No. 24-154

In the Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC., ET AL.,

Petitioners,

v.

WISCONSIN LABOR & INDUSTRY REVIEW COMMISSION, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CAMPUS CRUSADE FOR CHRIST, INC., THE NATIONAL ASSOCIATION OF EVANGELICALS, AND REJOYCE IN JESUS MINISTRIES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a state violate the First Amendment's Religion Clauses by denying a religious organization an otherwise available tax exemption because the organization does not meet the state's criteria for religious behavior?

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INTERESTS OF *AMICI CURIAE*[1]

Christian Legal Society, **Campus Crusade for Christ, Inc.**, and **ReJOYce in Jesus Ministries** are religious organizations that employ staff members and have associated religious organizations on campuses across the nation. The **National Association of Evangelicals** is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. Amici believe that basic religious freedom and common sense require that a religious organization be permitted to maintain leadership and employment requirements in agreement with its religious message and mission. The reasoning underlying the decision below parallels the erroneous logic of *Christian Legal Soc'y v. Martinez,* 561 U.S. 661 (2010), and threatens to harm amici's ability to have belief-based standards for employees and student leaders, which amici deem necessary to be an authentically religious organization. This reasoning can be and has been used to deny benefits to religious student organizations because of their religious beliefs and leadership requirements. Indeed, religious organizations with leadership standards for their respective campus ministries, including amici, have been denied campus access as a direct result of the ruling in the *Martinez* case. Unless this Court corrects the narrow view of religious organizations' free exercise rights, religious student organizations will continue to be harmed,

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[1] No party or party's counsel authored this brief, in whole or in part. No person or entity (other than *amici*, their members, or their counsel) made any monetary contribution toward the preparation or submission of this brief.

preventing them from maintaining their mission through selection of their leaders.

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court has held that Catholic Charities Bureau ("Catholic Charities" or "CCB"), the social-service ministry of the Roman Catholic Diocese of Superior, is not an organization "operated primarily for religious purposes." As a result, the court denied Catholic Charities and its sub-entities (collectively "Petitioners") eligibility for the religious organizations exemption from the state's unemployment tax system. The court reached the remarkable conclusion that Petitioners are not "primarily religious" on the ground that they did not meet various criteria that the court set for determining what is religious behavior. By denying an otherwise available exemption on the basis of these criteria, the state courts violated the First Amendment's Religion Clauses.

I. This case implicates principles of church autonomy that apply not just to churches or houses of worship but to all religious organizations. The church autonomy doctrine extends to a wide range of religious organizations, including student religious groups at public educational institutions.

The decision below intrudes on a religious organization's internal governance. The Wisconsin legislature exempted nonprofit religious organizations from the unemployment tax statute. Yet here, the state courts severely constricted the exemption's scope based on a set of reasons that are constitutionally impermissible and erroneous. A state

interferes with religious freedom and religious autonomy under the First Amendment when it sets improper conditions on the availability of the exemption it offers.

The state courts here made a sharp, determinative distinction between (a) churches, and organizations formally integrated into them, and (b) separately organized but religiously related institutions. Separate incorporation from a church may play some permissible role in defining exemptions from regulation. But here the state supreme court denied exemption entirely to a class of religious nonprofits based on restrictive and discriminatory criteria for whether their activities are "typically" or "primarily" religious. The court's ruling imposes a clear penalty on Petitioners' internal governance decision to incorporate separately from the diocese.

II. The state court decision also violates the Religion Clauses by denying exemption for activities—service to persons outside the faith—that the court deemed are not "typically" religious.

A. Wisconsin's rule expressly discriminates among types of religious groups, violating both the Establishment and Free Exercise Clauses. The decision below penalizes Petitioners for choosing to serve people outside the faith without seeking to convert them. The state court's rule triggers strict scrutiny, and the rule fails that scrutiny. There can be no good reason—let alone a compelling one—for discriminating against an organization in *employment* regulation and taxation because of its choice of whom it will *serve* and how.

B. Excluding organizations from exemption because their activities are not "typically" religious also impermissibly embroils courts in religious questions. Notwithstanding Petitioners' clear religious character, the state court set narrow criteria for what activities it deemed sufficiently religious.

C. Excluding service to others from "typically religious" activities also flies in the face of our nation's history and traditions. History from before the founding to the present confirms that social service to others is a core—that is, "primary"—aspect of many religious faiths, including Catholicism. And service to others remains a primary activity of various faiths today.

III. This Court should overrule statements in *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 697 n.27 (2010), whose erroneous logic is reflected in the decision below.

A. The state court erred by concluding Petitioners' activity was not "primarily religious" because their services "can be provided by organizations of either religious or secular motivations." As numerous decisions hold, an activity can be religious exercise because of its religious motivations even though other persons or entities do it for nonreligious reasons.

B. The erroneous reasoning of the state court below unfortunately has parallels in decisions of this Court that hold or suggest that the free exercise of religion does not protect religiously motivated conduct against laws that are religion neutral and generally applicable. For example, *Martinez* denied student religious organizations protection under the Free Exercise Clause for activity falling under a general

policy applicable to all organizations, religious and nonreligious. 561 U.S. at 697 n.27. *Martinez*'s standard is one of "formal equality" or "formal neutrality": government need not give religious exercise any more protection than it gives any nonreligious activity.

C. *Martinez*'s free exercise standard has been undercut by this Court's subsequent decisions recognizing church autonomy and, particularly, the "ministerial exception." Those decisions explicitly reject limiting religious organizations' autonomy to situations involving general expressive association rights—that is, they reject limiting it to situations where nonreligious organizations could invoke the same principles.

D. The erroneous logic of "formal equality" or "formal neutrality" is also apparent in the decision below, with its statement that Petitioners are ineligible for the exemption because their services can also be provided by organizations with secular motivations.

E. *Martinez* contributes to uncertainty and cost in enforcing the free exercise rights of student religious organizations. To escape *Martinez*, a religious organization must show that a policy is discriminatory or selectively enforced, which requires extensive discovery. Student religious organizations have limited resources, and deregistration distracts student leaders and members from their coursework and causes them to fear harm to their grades, honors, or graduate school or job references.

F. Accordingly, this Court should not only reverse the decision of the Wisconsin Supreme Court, but also

overrule the Free Exercise Clause holding (footnote 27) of *Martinez*.

ARGUMENT

I. This Case Implicates Principles of Church Autonomy That Apply to all Religious Organizations, not Just Churches or Houses of Worship.

The constitutional doctrine of church autonomy guarantees religious organizations "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 747 (2020). As this Court has long emphasized, the First Amendment "'radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (ellipsis in original) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

The church autonomy doctrine applies not only to churches and congregations, but also to other religious organizations. *Hosanna-Tabor*, 565 U.S. 171; *Our Lady*, 591 U.S. 732; *see id.* at 746 ("courts are bound to stay out of employment disputes involving those holding certain important positions with churches *and other religious institutions*") (emphasis added).

The lower courts have likewise applied the ministerial exception, and thus the general autonomy principle, to a wide variety of non-church religious

organizations. *See, e.g.*, *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.,* 363 F.3d 299 (4th Cir. 2004) (Jewish nursing home); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) (Methodist-affiliated hospital); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018) (Orthodox Jewish day school serving a wide range of students); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (religious university). "'[I]n order to invoke the exception, an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization.'" *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (quoting *Hollins*, 474 F.3d at 225).

In particular, church autonomy applies to student religious organizations at public educational institutions. Such organizations clearly have religious purposes and mission. As the Sixth Circuit has said, "It is undisputed that InterVarsity Christian Fellowship [IVCF] is a Christian organization, whose purpose is to advance the understanding and practice of Christianity in colleges and universities." *Conlon*, 777 F.3d at 833-34; *id.* at 834 (noting that IVCF "clearly" had a religious nature, "with not only its Christian name, but its mission of Christian ministry and teaching"). *See also InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 807 (E.D. Mich. 2021) ("As a matter of law, Plaintiffs have a clear and obvious religious mission.") (cleaned up).

Moreover, as with a church or other religious organization, the internal governance autonomy of student religious organizations extends to choosing

their leaders and setting standards of belief and conduct for them. That includes their minister employees. See *Conlon*, 777 F.3d at 835 (applying ministerial exception to bar claim by staff spiritual director because of "the important religious functions [she] performed," including "assist[ing] others to cultivate 'intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines'") (brackets added, quotation omitted).

But the exception is not limited to employment; it covers any choice of leaders, including student leaders of campus religious organizations. "Plaintiffs' [student] Christian leaders are highly religious positions that serve a leading role in advancing Plaintiffs' faith and mission on Wayne State's campus and, as a matter of law, Christian leaders are ministers under the First Amendment." *Wayne State*, 534 F. Supp. 3d at 810.

This Court should confirm that the constitutional principles of church autonomy apply to a broad range of religiously affiliated entities (including these amici). All these entities have a religious freedom need for "independence in matters of internal government" as well as "matters of faith and doctrine." *Our Lady*, 591 U.S. at 747. And government can intrude on that independence through a variety of means.

The present case likewise involves state intrusion on a religious organization's autonomy and governance. The issue here is not whether Wisconsin was required to exempt nonprofit religious organizations from the unemployment tax statute. The legislature enacted an exemption. But the Wisconsin Supreme Court severely constricted the

exemption's scope based on a set of constitutionally impermissible reasons. A state interferes with religious freedom and religious autonomy when it sets improper conditions on the availability of the exemption it offers.

Here the state courts made a sharp, determinative distinction between (a) churches, and organizations formally integrated into them, and (b) separately organized, religious nonprofit institutions. The Wisconsin Supreme Court adopted radically different approaches for persons "employed by a church" as against persons employed by a religious nonprofit organization. App. 17a-18a. And the state court of appeals stated explicitly that "the result in this case would likely be different if CCB and its sub-entities were actually run by the church, such that the organizations' employees were employees of the church." App. 166a. (Such formal integration would have apparently imputed the church's "overarching doctrine and purposes" to CCB, apparently making its activities "primarily religious" under the exemption. App. 17a-18a, 166a.) "Instead," the state court of appeals said, "CCB and its sub-entities are structured as separate corporations," and "the corporate form does make a difference." *Id.* Because they were separately incorporated from the diocese, Catholic Charities and its sub-entities had to satisfy the court's test for whether their own activities were "primarily religious"—and that test, as amici will discuss, was unconstitutionally narrow and discriminatory.

The court's decision "interferes with matters of church government and organization" (Pet. 30), violating the church autonomy doctrine. Petitioners' separate incorporation from the Diocese of Superior

was a decision about religious polity, made "[i]n accordance with the Catholic social teaching of subsidiarity." *Id.* at 9.

Separate incorporation from a church may play some permissible role in defining exemptions from regulation. Churches, for example, are exempt from filing federal tax returns and other forms that other tax-exempt nonprofits, including religious nonprofits, must file. 26 U.S.C. § 6033(a)(1), (a)(3)(A). But in that situation, the non-church nonprofits are still broadly exempt from taxes under 26 U.S.C. § 501(c)(3) and similar provisions.

By contrast, here the lower court denied exemption entirely to a class of religious nonprofits based on restrictive and discriminatory criteria for whether their activities are "typically" or "primarily" religious. Because those criteria are so restrictive, a church-related organization's decision to incorporate separately has a huge effect in excluding it from exemption. The court's ruling clearly penalizes Petitioners' internal governance decision to incorporate separately from the diocese.

In the next two parts, amici explain why the state court's criteria for denying Petitioners' exemption violated the Religion Clauses. The court held that Petitioners' activity was not "typically" or "primarily" religious because they serve others without engaging in explicit religious teaching or attempts at conversion. Part II explains why that holding impermissibly discriminates among religions and embroils courts in religious questions. The court also held that Petitioners' activity was not sufficiently religious because secular organizations also provide

the same services. Part III explains why that holding disregards basic principles of church autonomy.

II. The Decision Below Violates the Establishment and Free Exercise Clauses by Excluding a Religious Organization from Exemption Using Criteria the Court May Not Validly Employ.

The Wisconsin Supreme Court held that Petitioners, as organizations separately incorporated from the diocese, were ineligible for exemption because their activities were not "primarily religious" (App. 29a) or "typical" religious activities (*id.* at 26a (quotation omitted)). The court said Petitioners' activity was not sufficiently religious because they:

- "neither attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees";
- do not engage "in worship services, religious outreach, ceremony, or religious education"; and
- offer services, as well as employment, "to all participants regardless of religion."

App. 29a-30a.

The court's imposition of these criteria for what constitutes "religious purposes" violated bedrock principles of the Religion Clauses. Government has some discretion to determine the scope of a statutory exemption. "[B]ut categories of selection are of paramount concern" when a law burdens religious practice." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542 (1993). The decision below

conflicts with two fundamental constitutional principles, as well as with our nation's history and traditions.

A. Excluding organizations from exemption because they serve others discriminates among religions, for no good reason, let alone a compelling one.

First, "Wisconsin's rule expressly discriminates among religious groups, violating both Religion Clauses." Pet. 23. *See, e.g.*, *Lukumi*, 508 U.S. at 532-33 (applying strict scrutiny where "the law at issue discriminates against some or all religious beliefs"); *Larson v. Valente*, 456 U.S. 228, 246-47, 244 (1982) (applying strict scrutiny to a law that preferred some denominations over others and thereby violated "the clearest command of the Establishment Clause"). Amici agree that the state courts discriminated among religions "[b]y penalizing Catholic Charities for engaging in critical parts of its ministry (like serving those in need without proselytizing)"—a religious practice that "differed from what the Wisconsin Supreme Court thought were 'typical' religious activities." Pet. 25.

Notably, *Larson* held that the state had made "explicit and deliberate distinctions between different religious organizations," 456 U.S. at 246-47 n.23, in the same context this case involves: a statutory provision exempting certain religious organizations from state regulation, in that case registration and reporting requirements for organizations engaged in charitable solicitation. The state exempted "only those religious organizations that received more than half of their total contributions from members or affiliated organizations." *Id.* at 231-32 (citation omitted). Even

more clearly here, the state courts made "explicit and deliberate distinctions" between organizations based on the court's conception of what activities count as "primarily" or "typically" religious.

The state courts' error here is one this Court recently warned of in *Our Lady*. The Court there refused to read narrowly the definition of "minister," under the ministerial exception, to require a formal religious title. The Court reasoned that such a narrow reading "would risk privileging religious traditions with formal organizational structures over those that are less formal." *Our Lady*, 591 U.S. at 753. Likewise, here, the state court's artificial limitation of the unemployment tax exemption "wrongly disfavors those religious traditions that ask believers to care for the poor without strings attached." Pet. 26.

The judicial error here is also the exact error that prompted this Court to summarily invalidate a law in *Rusk v. Espinosa*, 456 U.S. 951 (1982), *aff'g Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980). This Court summarily affirmed a decision that enjoined a charitable solicitation ordinance requiring the government to decide what activities were "spiritual" and what were "secular." The Tenth Circuit had explained that one of the ordinance's First Amendment infirmities was its "broad definition of secular," under which every activity that a religious group undertook was considered secular unless it was "purely spiritual or evangelical." *Espinosa v. Rusk*, 634 F.2d at 481. The court of appeals noted that defining "spiritual" activity narrowly "so as to subject [religiously motivated] activity to regulation" was "necessarily a suspect effort" and that government could not define it so that "the charitable activity of

the church having to do with the feeding of the hungry or the offer of clothing and shelter to the poor was deemed to be subject to regulation." *Id.*

Some faiths and their social ministries make the specific choice "to serve and employ individuals in the broader society and still maintain [their] distinctive religious standards." Thomas C. Berg, *Partly Acculturated Religious Activities: A Case for Accommodating Religious Nonprofits*, 91 Notre Dame L. Rev. 1341, 1348 (2016). The fact that such organizations are partly "acculturated" in that "they provide services of secular value from which people of all beliefs may benefit" does not mean that they are any less "religious" or that they should entirely lose their claim to accommodation. *Id.* at 1345.

Finally, denying exemption to organizations that serve others without strings is discriminatory because, among other things, denying exemption based on whom the organization *serves* (and how it serves) does not relate to the purposes of the unemployment statute, which deals with *employees*. In *Lukumi*, this Court held that ordinances against animal sacrifice discriminated against Santeria worshipers and therefore triggered strict scrutiny. One significant reason for that holding was that the ordinances were both overinclusive and underinclusive for their asserted purposes of preserving public health and preventing cruelty to animals. *Lukumi*, 508 U.S. at 538-39, 543-44. Thus, the ordinances triggered strict scrutiny and, for similar reasons, failed such scrutiny. *Id.* at 546-47.

Likewise, in a case such as this, "[t]o regulate organizations based on their service activities [is] utterly disconnected from the [statute's] employee-

protection goals." Berg, *supra*, at 1350-51. An organization poses no more threat to employees' security because it chooses to serve all people, rather than just its own adherents, and to forego, rather than engage in, explicit religious teaching. Thus, the decision below simply penalizes Petitioners for making that religious choice. It triggers strict scrutiny and fails that scrutiny. There can be no good reason—let alone a compelling one—for discriminating against an organization in *employment* regulation because of its choice of whom it will *serve* and how.

B. Excluding organizations from exemption because their activities are not "typically" religious impermissibly embroils courts in religious questions.

Notwithstanding Petitioners' clear religious character, the state court set criteria for what activities it deemed sufficiently religious based in part on what it deemed "typically" religious. As Petitioners explain,

> The court decided that Petitioners' "activities are primarily charitable and secular," and that their ministry is a "wholly secular endeavor" despite Catholic Charities' uncontested belief that its charitable ministry "is part of [its] mission to 'carry on the redeeming work of our Lord by reflecting gospel values and the moral teaching of the church.'"

Pet. 28 (quoting App. 29a-30a). The court's determination violates numerous decisions of this Court. For example, in *Our Lady* the Court recently held that the ministerial exception should not be denied for positions that employed non-adherents of

the faith, reasoning that deciding who counted as a non-adherent "would risk judicial entanglement in religious issues." 591 U.S. at 761. And several decades ago the Court said: "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee." *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977).

Judicial second guessing whether a religious organization's activities are "typically religious" is impermissible whether the court's conclusions in a given case are accurate or erroneous. But erroneous conclusions help show why courts should not undertake such inquiries. Here the state court made at least one serious error in characterizing the religious interest of Catholic social-service organizations like Petitioners.

The Wisconsin court held that excluding Petitioners from the exemption imposed no "constitutionally significant burden" on their religious activities. App. 49a-50a. The only burden on Petitioners, the court claimed, was a "decrease in the money available for religious or charitable activities that comes with paying a generally applicable tax," which is insufficient under *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990). However, *Swaggart* reaffirmed the rule that a state significantly burdens religious exercise if it "'condition[s] receipt of an important benefit upon conduct proscribed by a religious faith, or . . . denie[s] such a benefit because of conduct mandated by religious belief.'" *Id.* at 391-92 (quoting, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987)). And here the Wisconsin court ignored that its

ruling denies exemption to Petitioners because of conduct mandated by their religious beliefs.

The court denied Petitioners the exemption because, in serving people in need, they did not "attempt to imbue [them] with the Catholic faith" or otherwise engage in explicit religious teaching. App. 29a-30a. But Petitioners followed that practice because, under Catholic teaching, "'[c]haritable enterprises can and should reach out to all persons and all needs,'" not just to Catholics. Pet. 11 (quoting Pope Paul VI, *Apostolicam Actuositatem* ¶ 8 (1965)). And under that teaching, charity "'cannot be used as a means of engaging in . . . proselytism.'" Pet. 11 (quoting Pope Benedict XVI, *Deus Caritas Est* ¶ 31 (2005) (ellipsis added)); *see also* Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops "Apostolorum Successores"* ¶ 196 (2004) (instructing Catholics not to "misus[e] works of charity for purposes of proselytism").

In other words, the court "denie[d Petitioners] a benefit"—an otherwise available exemption—precisely "because of conduct mandated by religious belief." *Swaggart*, 493 U.S. at 391-92. The court's ruling thereby "'put[s] substantial pressure on [Petitioners] to modify [their] behavior and to violate [their] beliefs.'" *Id.* at 392 (quotation omitted).

The court's failure to recognize and understand the effect of Petitioners' religious beliefs is telling for the issues of entanglement. It provides a clear example of why courts should not take an organization with clear religious motivations and second-guess whether its activities are "typically" or "primarily" religious.

C. Excluding service to others from "religious" activities is invalid in light of history and tradition.

In interpreting the Religion Clauses and other religious freedom provisions, the Court gives attention to our nation's history and longstanding traditions. For example, *Hosanna-Tabor*, 565 U.S. at 182-86, traced the history of disputes over selection of religious leaders—in England, the colonies, the founding period, and afterward—to conclude that "the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices." *Id.* at 184.

Likewise, *Ramirez v. Collier*, 595 U.S. 411 (2022), held that a death-sentenced prisoner had a right to have his pastor pray audibly and touch him in the chamber during the execution by virtue of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. In analyzing whether the government had a compelling interest in excluding the pastor, the Court began by noting that "there is a rich history of clerical prayer at the time of a prisoner's execution, dating back well before the founding of our Nation" to English practice, and "continu[ing] throughout our Nation's history." *Ramirez*, 595 U.S. at 427-28. The Court then rebuffed the state's assertion that "[de]spite this long history," it had sufficient interests in denying the inmate's claim for clerical prayer. *Id.* at 428, 429-30. *See also, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) ("[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'") (quotation omitted).

History and tradition, from "before the founding" to the present (*Ramirez*), likewise confirm that social service to others is a core—that is, a "primary"—aspect of religious faith. Catholic teaching "'demand[s] that Catholics respond in charity to those in need.'" Pet. 10 (quoting App. 128a, 58a). So do the teachings of America's other major faiths. "The foundations of the three main religions—Christianity, Islam, and Judaism—are each bedded down on doctrines that require their members to do good for others mainly by caring for the ill or destitute and giving to those otherwise in need." Kerry O'Halloran, *Charity and Religion*, *in International Encyclopedia of Civil Society* 109, 109 (Helmut K. Anheier ed., 2010). The prime place of service and charity across religions shows in the fact that "[r]eligiously motivated and religiously based organizations have historically played a vital role in one area of public service after another." Steven V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* 8 (1996) (citing sources).

History likewise confirms that charitable and service work can claim protection under church autonomy principles. In a well-known example, President Thomas Jefferson wrote a letter in 1804 to the Ursuline Sisters of New Orleans, who operated a school for orphaned girls. Jefferson assured them that the Louisiana Purchase would not undermine their legal rights: "[T]he principles of the Constitution . . . are a sure guaranty that [your property] will be preserved to you sacred and inviolate, and that your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority." Anson Phelps Stokes, *Church and State in the United States* 478 (1950).

Indeed, religious organizations' service and charitable work typically predate governments' entry into that field. "Religiously motivated service . . . responded to the needs of communities before state or federal governments assumed this responsibility or before the evolution of the social work profession. Indeed, until the close of the nineteenth century, religious groups were virtually the nation's sole provider of social services." Nieli Langer, Sectarian Organizations Serving Civic Purposes, in *Religious Organizations in Community Services: A Social Work Perspective* 137, 137–38 (Terry Tirrito & Toni Cascio eds. 2003). "From before the Republic's founding . . . and through much of the nineteenth century, social welfare was dominated by voluntary, faith-based agencies." Carl H. Esbeck, *Regulation of Religious Organizations via Governmental Financial Assistance*, *in Religious Organizations in the United States: A Study of Identity, Liberty, and Law* 349, 351 & n.2 (James A. Serritella *et al.* eds., 2006) (citing sources). "Typically, religiously motivated persons have been the first into areas of societal need. Secular agencies and government have followed." Monsma, *supra*, at 8.

To take just one example well known to this Court, "[t]he Catholic Church has served the needy children of Philadelphia for over two centuries." *Fulton v. City of Philadelphia*, 593 U.S 522, 528 (2021); *see also id.* at 542 ("[Catholic Social Services] has 'long been a point of light in the City's foster-care system.'") (quoting Brief for City Respondents at 1, *Fulton*, 593 U.S. 522).

Service to others has not just been a primary activity of various faiths in the past; it remains so

today. *See, e.g.*, Brief for The Lutheran Church—Missouri Synod et al. as Amici Curiae on Pet. for Cert. 14-15 & nn.3-5, *Catholic Charities Bureau v. Wisconsin Labor & Industry Review Comm'n*, No. 24-154 (2024). That fact too is relevant. This Court has considered religious organizations' statements and practices to shed light on what activities fall within the scope of constitutionally protected autonomy. For example, *Our Lady*, in deciding that a religious school teacher fit within the ministerial exception, surveyed schools of various faiths to show "the close connection that religious institutions draw between their central purpose and educating the young in the faith." 591 U.S. at 754-56. Here, current practice likewise shows the "close connection" that religions draw between their faith and serving others regardless of faith, and the "primarily religious" nature of such service.

III. This Court Should Overrule the Free Exercise Clause Holding in *Christian Legal Society v. Martinez*, Whose Erroneous Logic Parallels the Decision Below.

A. The decision below erroneously excludes an organization's religiously motivated activity from protection just because nonreligious organizations also do it.

The Wisconsin Supreme Court gave another reason for concluding that Petitioners' activities are "primarily charitable and secular" rather than "primarily religious." App. 30a. The court reasoned that various services—"job training, placement, and coaching, as well as services related to activities of daily living"—"can be provided by organizations of

either religious or secular motivations, and the services provided would not differ in any sense." *Id.* In other words, the court said an activity is not "primarily religious" when a religious person or entity does it—even as a religious exercise—if a nonreligious person or entity can also do it.

As the dissent below observed, this reasoning is "incoherent" and "falls apart upon the faintest scrutiny." App. 78a. In a vast number of cases, the reason an activity is "religious" is because it is done from a religious motivation, not because it appears different on its face from the activity as done by a nonreligious person. A devout Muslim's wearing of a beard, based on the commands of the Quran, is no less "religious" because other persons wear beards for fashion or medical reasons. *Cf. Holt v. Hobbs*, 574 U.S. 352 (2015); *Fraternal Order of Police v. Newark*, 170 F.3d 359 (3d Cir. 1999). The examples could be multiplied. "[A]nyone— religious or irreligious—could use peyote, kill animals, grow a ½-inch beard, or use Saturday as a day of rest. One could read the Bible for secular or religious reasons." App. 78a (dissenting opinion). "Such activities are religious activities only if motivated by religious beliefs." *Id.*

This proposition holds true for religious institutions as well as individuals. This Court has explicitly rejected the notion that an organization's activities must be uniquely religious to qualify for religious autonomy protection. In *Hosanna-Tabor*, the government argued "that any ministerial exception 'should be limited to those employees who perform *exclusively* religious functions.'" 565 U.S. at 193 (quotation omitted; emphasis added). The Court unanimously rejected that view, noting that "[t]he

heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities." *Id.*

B. This Court in *Martinez* likewise denied student religious organizations free exercise protection for activity falling under a general policy applicable to nonreligious organizations.

Unfortunately, the state court's misguided reasoning has some parallels in decisions of this Court that hold or suggest that the Free Exercise Clause does not protect religiously motivated conduct against laws that are religion neutral and generally applicable. *See, e.g.*, *Emp't Div. v. Smith*, 494 U.S. 872 (1990); *Martinez*, 561 U.S. at 697 n.27.

Most relevant here, *Martinez* held, by a 5-4 vote, that a Christian Legal Society ("CLS") group could be denied status as a recognized student organization, imposing significant burdens on its operation at the law school, on the ground that it required its leaders and voting members to affirm a statement of Christian faith and commit to standards of behavior drawn from biblical teaching. In the posture of the case, the Court assumed that the law school had an "all comers policy" that required all "'registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.'" *Id.* at 675 (citation omitted; emphasis added by the Court). In short, the Court treated the policy as barring every student group from requiring that its leaders commit to its ideological

views. *See id.* ("'Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.'").

Having characterized the policy in that fashion, the majority found that it drew "no distinction between groups based on their message or perspective" and thus did not violate the Free Speech Clause. *Id.* at 694-95 (calling the policy "textbook viewpoint neutral"). For different reasons, the Court also rejected CLS's argument that the policy violated its expressive associational rights. *Id.* at 680-83. We disagree with those holdings but do not revisit them here.

But *Martinez* also held the law school had not violated CLS's free exercise rights, and that holding is quite relevant here. CLS argued that penalizing it for setting requirements of belief for its leaders unconstitutionally burdened its ability to exercise its faith. The Court dismissed that claim in a footnote, stating that "the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct." *Id.* at 697 n.27 (citing *Smith*, 494 U.S. at 878-82). The majority asserted that "[i]n seeking an exemption from Hastings' across-the-board all-comers policy, CLS . . . seeks preferential, not equal, treatment" and thus could not rely on the Free Exercise Clause. *Id.*

In other words, *Martinez* adopted the "formal neutrality" or "formal equality" reading of the Free Exercise Clause, under which government need not accord religious organizations any more freedom than any other nonreligious organization. *See, e.g.*, Douglas

Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

C. *Martinez*'s "formal equality" standard for free exercise has been substantially undercut by this Court's subsequent church autonomy decisions.

Martinez's free exercise holding has been thoroughly undercut with respect to religious organizations' right to make governance decisions "affect[ing] the faith and mission of the [organization] itself." *Hosanna-Tabor*, 565 U.S. at 190; *accord Our Lady*, 591 U.S. at 747, 749-50. In *Hosanna-Tabor*, the Court unanimously embraced the ministerial exception even though the nondiscrimination law there was "a valid and neutral law of general applicability." 565 U.S. at 190. The Court explicitly distinguished *Smith*, holding that it applied only to "government regulation of only outward physical acts," and not to "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* (citing *Smith*, 494 U.S. at 877).

Moreover, *Hosanna-Tabor* explicitly rejected an attempt to limit religious organizations' autonomy to situations where nonreligious organizations could invoke the same principles. The EEOC had claimed that religious organizations' leadership decisions could be protected under general principles of expressive association and thus there was "no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves." 565 U.S. at 189. The Court called that argument "untenable" and "hard to square with the text of the

First Amendment itself, which gives special solicitude to the rights of religious organizations." *Id.* ("We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.").

D. The erroneous "formal equality" logic apparent in *Martinez* is also apparent in the decision below.

The Wisconsin Supreme Court's decision in this case reflects the attitude toward free exercise that appeared in *Martinez* but that this Court has since rejected. The Wisconsin court ruled that the social-services arm of a Catholic diocese is not "operated primarily for religious purposes"—that its activities are primarily "secular." App. 30a. A major reason the court gave for that improbable conclusion was that the services CCB provides "can be provided by organizations of either religious or secular motivations." *Id.* The court declared CCB ineligible for the statutory religious exemption because it engaged (for religious reasons) in activities in which nonreligious persons and entities can also engage. As in *Martinez*, the court below denied religious freedom protection on the ground that claimants with religious motivations should receive no more protection than claimants with nonreligious motivations receive.

In *Martinez*, the logic of formally equal treatment between religious and nonreligious entities was the basis for rejecting a constitutional (First Amendment) claim of religious freedom. Here, the logic led the Wisconsin court to interpret a statutory religious freedom exemption narrowly. But the logic in both cases is the same, and for both cases it has been undercut by decisions like *Hosanna-Tabor*.

The logic of formally equal treatment is equally misplaced for interpreting a statutory exemption as it is for interpreting the Constitution. The Wisconsin legislature unquestionably gave distinctive protection to religious organizations through this exemption; the logic of formally equal treatment simply disregards the nature of a statute that exempts religious organizations. As the legislature observed in its brief supporting the grant of review here: "The whole point of the statute is to protect nonprofits engaging in charitable work for religious purposes. The theory below—that charity is never religious because it is sometimes secular—is nonsense." Brief for Wisconsin State Legislature as Amici Curiae on Pet. for Cert. 13, *Catholic Charities Bureau v. Wisconsin Labor & Industry Review Comm'n*, No. 24-154 (2024).

In *Martinez*, the state law school infringed on a student religious organization's autonomy by penalizing it for limiting its leadership and voting membership to persons who shared its religious beliefs and standards of conduct. Here, the state court has infringed on Petitioners' autonomy by penalizing them for providing care and services to persons who *do not* share their beliefs. Either way, the state has interfered with decisions "that are essential to the institution's central mission." *Our Lady*, 591 U.S. at 746; *see also Hosanna-Tabor*, 565 U.S. at 186-87.

E. *Martinez* contributes to uncertainty over the free exercise rights of student religious organizations.

As noted in Part I, several courts have correctly recognized that internal autonomy protections apply to student religious organizations at public educational institutions. *Supra*, pp. 6-8. Both the

Sixth Circuit and a federal district court have applied the ministerial exception to leaders in the context of student religious organizations. *Id.* In particular, the district court held that student religious groups could assert the ministerial exception as a claim under 42 U.S.C. § 1983, not solely as an affirmative defense to a lawsuit. *Wayne State*, 534 F. Supp. 3d at 806-07. Citing and following *Our Lady* and *Hosanna-Tabor*, the district court concluded:

> These two foundational Supreme Court precedents cannot be fairly read to first recognize a religious organization's absolute right to appoint its ministers while at the same time prohibiting the organization any means by which it may seek to terminate, redress, or remedy even the most blatant of government restrictions and incursions into such ministerial business.

Id. at 803; *see also id.* at 812 ("The First Amendment categorically prohibits government attempts to influence or impose unwanted ministers on religious groups. . . . No religious group can constitutionally be made an outsider, excluded from equal access to public or university life, simply because it insists on religious leaders who believe in its cause."). *Accord* Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definition to Church Autonomy Doctrine*, 108 Marq. L. Rev. (forthcoming 2025), at *7 n.24, available at https://ssrn.com/abstract=5099688 ("[C]hurch autonomy is not just an affirmative defense but can be brought as a plaintiff's primary cause of action.") (citing authorities).

But other courts have ruled the other way, in erroneous reliance on *Martinez*'s discredited and superseded footnote. A federal district court held that neither the ministerial exception nor church autonomy protected a student religious group that was required to certify its future compliance with the university's nondiscrimination policy to avoid the disabilities of being unrecognized. *Business Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 904 (S.D. Ia. 2019) ("*BLinC*"), *aff'd in part, rev'd in part on other grounds*, 991 F.3d 969 (8th Cir. 2021). The court ruled against the university under free speech and free exercise—but only because the university had applied its policy selectively to different groups, committing both viewpoint discrimination and anti-religious discrimination. *Id.* at 898-903. The court made clear it would have applied *Martinez*, and rejected the free exercise claim, had the university not "unevenly applied the Human Rights Policy." *Id.* at 902 n.12.[2]

Although *Martinez* has been significantly undercut, its remaining viability continues to harm student religious groups, including these amici. Many university administrators do not understand the nuances of the *Martinez* decision and interpret it to give them complete discretion to exclude religious groups because of their religious beliefs, including religious leadership requirements.

Martinez has harmed student organizations in secondary schools as well. In 2019, a California school district abruptly revoked the recognition of a Fellowship of Christian Athletes (FCA) student

[2] The Eighth Circuit did not review the district court's rejection of the religious organization's ministerial exception and autonomy claims. *BLinC,* 991 F.3d at 979.

chapter that had met in district high schools for almost two decades. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 673 (9th Cir. 2023) (en banc) ("*FCA*"). Administrators revoked the group's recognition because it required its leaders to agree with its religious beliefs. *Id.* at 675. Administrators saw no problem with recognizing the Satanic Temple Club while denying FCA recognition. *Id.* at 676. FCA students then faced almost a year of harassment from faculty, administrators, and other students before filing a federal lawsuit. *Id.* at 674-77. Despite all this, the district court denied FCA injunctive relief in reliance on, among other things, *Martinez*. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Ed.*, 2022 WL 1786574 (N.D. Cal. 2022), at *7 ("'the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct'") (quoting *Martinez*, 561 U.S. at 697 n.27). Ultimately the en banc Ninth Circuit—relying heavily on this Court's free exercise jurisprudence since *Martinez*—held that the students were likely to succeed on their free exercise claims. *FCA*, 82 F.4th at 672, 685-96.

To escape *Martinez*'s vise, a religious organization must show a policy is discriminatory or selectively enforced, which requires extensive discovery. In one such case, "factual development . . . entailed review of 6,000 pages of documents along with the 23,000 documents produced in a related case" as well as depositions, motions, and summary judgment briefing. *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 2021 WL 12096987, at *2 (S.D. Ia. 2021). In the related case, "over 23,000 pages of

documents were exchanged during litigation and eight depositions were taken" along with "two motions for preliminary injunction, cross-motions for summary judgment, and an appeal." Order, *BLinC v. Univ. of Iowa*, 3:17-cv-00080 (S.D. Ia. Nov. 10, 2021), ECF No. 147, at 3. Some administrators will inaccurately claim to have an all comers policy when they do not, or in the course of litigation, will attempt to adopt such a policy. *See, e.g.*, *FCA*, 82 F.4th at 678, 693.

The student organizations in question have severely limited resources. Negotiating with university administrators for equal rights to meet can consume a full academic year; litigation can take years. During its lengthy conflict with the University of Iowa, "Intervarsity struggled with recruiting members, organizing activities, and spent money and other resources in fighting its deregistration." *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 862 (8th Cir. 2021). Deregistration—threatened or executed—distracts student leaders and members from their coursework and causes them to fear harm to their grades, honors, or graduate school or job references.[3] Because it is expensive and time-consuming for students to pursue judicial relief, they are seriously discouraged from doing so, particularly when they are unlikely to see the fruits of litigation during their limited time at the school.

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[3] Testimony concerning such effects on students and groups appears in *Hearing on First Amendment Protections on Public College and University Campuses Before the Subcomm. on the Const. & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 48-75 (2015), available at https://bit.ly/39Dg1EL.

Moreover, the complications that *Martinez* adds make it difficult to deter officials from unconstitutional behavior by means of damages awards. Courts have found officials entitled to qualified immunity from the religious organization's free exercise claim because the law on that claim was complex rather than "clearly established." In *BLinC*, the Eighth Circuit quoted footnote 27 of *Martinez* in holding that no cases "make clear that BLinC would have a free-exercise claim—as opposed to a free-speech claim—against the University defendants for selectively enforcing its nondiscrimination policy against BLinC in a limited public forum." 991 F.3d at 987 (citing *Martinez*, 561 U.S. at 697 n.27). Thus, the court denied damages to BLinC on its free exercise claim. Likewise, the district court in *BLinC* denied free exercise damages, saying: "Defendants could be forgiven for focusing on *Martinez* [and other decisions that] left unresolved how a selective application of the policies in question would impact the respective plaintiffs' constitutional rights (both free speech and free exercise)." 360 F. Supp. 3d at 908 ("[T]he Court cannot say the constitutional issues were established 'beyond debate.'"). This Court would clarify the law substantially, thereby reducing conflict and recurring litigation, if it were to disavow *Martinez*'s footnote 27—giving a clear indication that student organizations have autonomy in choosing their leaders.

F. This Court should overrule *Martinez*'s free exercise holding.

Martinez's footnote 27 continues to leave the implication—now fundamentally mistaken—that "formal neutrality" rather than the autonomy doctrine

governs the leadership decisions of student religious organizations. For that and the other reasons above, this Court should disavow footnote 27. Amici ask only that the Court disavow the free exercise holding (footnote 27) because of its relationship to the free exercise rights of religious organizations implicated in this case.[4]

By disavowing *Martinez* to this extent, the Court would equalize the governance rights of student religious organizations with those of other religious organizations and protect them from exclusion from public educational institutions. It would also signal to courts around the nation, in cases like the present one, that distinctive protection of religious organizations' autonomy is a constitutional norm—not an improper "preference." An organization is no less "religious"—and does not lose entitlement to distinctive religious freedom protections—when its faith leads it to provide services that other organizations happen to provide for nonreligious reasons.

[4] *Martinez*'s holdings on free speech and expressive association are also fundamentally erroneous; this Court should consider overruling them in a case raising those issues.

CONCLUSION

This Court should reverse the judgment of the Wisconsin Supreme Court and also overrule the free exercise holding (footnote 27) of *Martinez*.

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