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 OF *AMICI CURIAE* EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, DIOCESE OF COLORADO SPRINGS, CHERRY HILLS COMMUNITY CHURCH, CHRISTIAN CARE MINISTRY, CROSS CATHOLIC OUTREACH, ECO: A COVENANT ORDER OF EVANGELICAL PRESBYTERIANS, GRACE TO YOU, TYNDALE HOUSE MINISTRIES, CALVARY CHAPEL FORT LAUDERDALE, THE FULLER FOUNDATION, SERVANT FOUNDATION dba THE SIGNATRY, THE CROWELL TRUST, THE CHRISTIAN COMMUNITY FOUNDATION, INC. dba WATERSTONE, AND COMMUNITY BIBLE STUDY IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici constitute a diverse group of religious organizations. Collectively, they conduct many different types of activities including social services, community development, education, health care, family services, recreation, financial services, congregational care, foreign missions and publishing of works on theology and Christian living.

Amici conduct their activities in furtherance of their respective Christian missions and in a manner that distinctly expresses and exercises their religious beliefs. However, *amici* hold differing views on the extent to which their religious beliefs should be expressed overtly in their activities.

Many federal, state and local laws include religious exemptions that apply to organizations that are "operated primarily for religious purposes" (or to activities that further religious purposes). *Amici* rely on these exemptions to conduct their activities in a manner consistent with their particular religious beliefs.

Permitting government officials to deny such exemptions based on their determination that the organization's activities are not sufficiently religious (or are not "typical religious activities"), would significantly

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

impair the right of religious organizations like *amici* to conduct their activities in accordance with their beliefs. Granting government officials such authority would also undermine this country's defining commitment to religious liberty.

As a result, amici are respectfully submitting this brief arguing that Constitutional principles of religious deference and neutrality prohibit government officials from denying religious exemptions based on their assessment of the degree of religiosity of an organization's activities.

A list of *amici* along with a short description of each organization appears in the Appendix.

SUMMARY OF ARGUMENT

This case asks whether government officials can deny a statutory tax exemption to an otherwise qualifying religious organization based solely on the officials' determination that the organization's activities either are not "typical" activities of a religious organization or are too similar to activities conducted by secular organizations.

Wisconsin law exempts from its unemployment insurance tax organizations that are operated, supervised, controlled, or principally supported by a church and that are "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h). Federal law provides an identical exemption from federal unemployment tax. 26 U.S.C. § 3309(b). Because Catholic Charities Bureau, Inc. and four sub-entities (collectively referred to hereinafter as "CCB") serve persons with disabilities in accordance with

and in furtherance of Catholic doctrine, CCB asserts that it qualifies for this religious exemption.

In evaluating CCB's qualification, the Wisconsin Supreme Court imputed to this religious exemption a requirement that an organization's activities must be "primarily religious in nature." *Catholic Charities Bureau, Inc. v. State of Wisconsin Labor and Industry Review Commission*, 3 N.W.3d 666, 682 (March 14, 2024). The court explained that this requirement should be applied by determining whether the organization's activities are "typical" activities of religious organizations and are not too similar to activities performed by secular organizations. *Id.* at 681-82. By way of illustration, the court cited a list of typical religious activities that included (among others) worship services, the administration of sacraments, the observance of liturgical rituals, preaching, missionary activity in partibus infidelium, and theological seminaries (in the case of mature and well-developed churches). *Id*. at 681. The court noted that this list was neither exhaustive nor necessary, and that the listed activities may be different for different faiths. *Id.* Accordingly, the court did not adopt a "rigid formula" for its "primarily religious in nature" requirement. *Id.*

The court concluded that CCB does not satisfy this "primarily religious in nature" requirement because, in the court's view, CCB's activities are not typical of those of a religious organization and are performed by secular organizations. *Id.* at 684. The court based this conclusion on the fact that CCB serves and employs people without regard to their religion, and on its findings that CCB through its activities neither imbues participants with the Catholic faith nor supplies religious materials

to participants or employees. *Id.* at 682-83. The court also found that CCB's activities are secular in nature because they are similar to activities conducted by secular organizations. *Id.* at 683-84.

Establishment Clause

Wisconsin's "primarily religious in nature" test, which requires government officials to measure the degree of inherent religiosity in an organization's activities, violates the Establishment Clause. Cases applying this clause have established that government officials have no competence or authority to make religious determinations based on a litmus test of typical religious content. And using such a test invariably favors orthodox religious activities over less conventional religious activities. Put differently, a religiosity test which requires government officials to determine whether an activity (or purpose) is sufficiently religious sets government officials adrift in a sea of subjective religious determinations which they have no constitutional competence or authority to navigate. Such a test will inevitably produce arbitrary and discriminatory results.

Wisconsin's test requires government officials to identify within a particular faith what qualifies as worship services, sacraments, religious materials, and missionary or other activities that imbue nonbelievers with the faith. Moreover, this identification is based not on a rigid formula but rather on an illustrative list of "typical" religious activities that may differ among differing faiths, apparently based on the government official's determination of activities that are typically religious within a particular faith.

The test also imposes an implicit orthodoxy that runs contrary to the religious beliefs of many religious organizations. For instance, the Bible teaches that "[p]ure and genuine religion in the sight of God the Father means caring for orphans and widows in their distress and refusing to let the world corrupt you." James 1:27 (New Living Translation). This characterization of pure and genuine religion does not require the passing out of religious materials or proselytizing; instead, it contemplates that merely providing care can be a means of imbuing recipients with religious faith. But Wisconsin's test rejects this Biblical teaching and instead applies a contrary belief that providing such care is not "primarily religious in nature" unless it is carried out in a manner that a United States government official in the 21st century would recognize as religious.

Amazingly, the Wisconsin Supreme Court characterized its "primarily religious in nature" test as "objective." *Catholic Charities*, 3 N.W.3d at 684. In any case, because the test makes government officials the arbiters of religious doctrine and favors certain forms of religious beliefs and exercise over others, it violates the Establishment Clause.

Free Exercise Clause

Incorporating Wisconsin's "primarily religious in nature" test into the unemployment insurance tax religious exemption also both triggers and fails strict scrutiny under the Free Exercise Clause. The law triggers strict scrutiny because it is not neutral with respect to religion and it imposes a substantial burden on CCB's religious exercise by requiring CCB to predict which

of its activities a government official will consider to be sufficiently religious. In addition, the overall religious exemption exists to alleviate the burden imposed by the unemployment insurance tax.

The law fails strict scrutiny because Wisconsin has no compelling interest in requiring CCB to pay the unemployment insurance tax while exempting both (i) organizations conducting the exact same activities but with more overtly (or "typically") religious content and (ii) churches engaged in activities identical to those of CCB. Given these exemptions, Wisconsin cannot establish that it has a compelling interest in requiring CCB to pay the unemployment insurance tax, or that applying the religious exemption to CCB imposes meaningful harm on its interest.

Permissible and Meaningful Limitations

Finally, applying the religious statutory exemption's "operated primarily for religious purposes" requirement without reference to the degree of religiosity of an organization's activities imposes meaningful limitations on the scope of the exemption. Under this Court's precedents, government officials may review an organization's activities and statements to determine whether the organization has made false or materially inconsistent representations regarding its religious beliefs or purposes or regarding how its activities further its purposes. But to the extent the religious character of activities are relevant to such an inquiry, such character must be based solely on whether the activities further the organization's religious purposes and not on the court's subjective measure of their religiosity. Put differently, the inquiry must turn not on

a court's view of whether the activities are sufficiently religious, but rather on whether the organization's representations regarding its activities and religious purposes are *bona fide*.

ARGUMENT

Religious liberty in this country reflects, among other things, the twin propositions that (1) duty to God transcends duty to society and (2) true religious faith cannot be coerced. James Madison captured these propositions in his *Memorial and Remonstrance Against Religious Assessments*:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Reprinted in Everson v. Board of Education of Ewing, 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.).

Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, which in its preamble asserts that any attempt by the government to influence the mind through coercion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power

to do. . . ." Va. Code Ann. § 57-1 (West 2003). Because individuals possess an inalienable right and duty to worship God as they deem best, government can have no authority over religious exercise as such. Put differently, civil government is not the highest authority in human affairs.

Building on these propositions, this Court has articulated standards of religious deference and neutrality under both the Establishment Clause and the Free Exercise Clause. Wisconsin's "primarily religious in nature" test violates these standards.

1. Wisconsin's "primarily religious in nature" test violates the Establishment Clause requirement of religious deference.

a. The Establishment Clause prohibits government officials from measuring the degree of inherent religiosity of activities.

This Court has repeatedly held that government officials have no constitutional competence or authority to interpret or apply religious beliefs, or to determine based on their own standards the religious significance of various activities. In *New York v. Cathedral Academy*, for example, this Court struck down a statute which required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities." 434 U.S. 125, 132 (1977). This Court noted that the requirement would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at

the same time requiring the state "to undertake a search for religious meaning in every classroom examination offered in support of a claim." *Id.* at 132-33. This Court also noted that 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 against religious establishment." *Id.* at 133.

Ten years later, this Court upheld a statutory religious exemption that applied to all activities of a religious organization, not just its *religious activities*. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). This Court noted that "Congress' purpose in extending the exemption was to minimize governmental 'interfer[ence] with the decision-making process in religions.'" *Id*. at 336. Further, this Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.*

Not only do government officials lack competence to distinguish between religious and secular activities, but they also lack competence to distinguish different types of religious activities. In *Widmar v. Vincent*, this Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting "religious worship." 454 U.S. 263, 269 n.6 (1981). This Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* Indeed, "[m]erely

to draw the distinction would require the [State]—and ultimately the Courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*; *see also id.* at 272 n.11 (noting the difficulty of determining which words and activities constitute religious worship due to the many and various beliefs that constitute religion).

These same principles apply to the religious character of an organization. The Court of Appeals for the D.C. Circuit struck down a "substantial religious character" test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In evaluating a religious school, for instance, the test required the NLRB to consider "such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Id.* (quotation omitted). The court held that the "very process of inquiry" into the "'religious mission' of the University," as well as "the Board's conclusions have implicated [] First Amendment concerns. . . ." *Id.* at 1341 (*citing NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979)). The court concluded that the test was fatally flawed because it "boil[ed] down to '[I]s [an institution] sufficiently religious?'" *Id.* at 1343.

A court cannot avoid the constitutional quagmire by comparing the activities of a religious organization to those of secular organizations, as this type of comparison

has been rejected by this Court and others as irrelevant to the inquiry. The Third Circuit in *Leboon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217 (3d Cir. 2007), rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. The court held that "[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant." *Id.* at 230.

The D.C. Circuit in *University of Great Falls* also rejected this type of comparison, affirming that a litany of "secular" characteristics of the University:

> says nothing about the religious nature of the University. Neither does the University's employment of non-Catholic faculty and admission of non-Catholic students disqualify it from its claimed religious character. *Religion may have as much to do with why one takes an action as it does with what action one takes.* That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious. . . . If the University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty.

278 F.3d at 1346 (emphasis added).

More recently, this Court unanimously held that a teacher qualified as a minister even though her primary duties consisted of teaching secular subjects. In rejecting the federal government's argument that the religious exemption at issue in the case should be limited to employees engaged in "exclusively religious functions," the Court observed, "Indeed, we are unsure whether any such employees exist. The 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." *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694, 708-09 (2012). Similarly, this Court has held that a for-profit corporation may exercise religion through commercial activities. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). In *Hobby Lobby*, this Court held that the company exercises religion because its "statement of purpose proclaims that the company is committed to . . . Honoring the Lord in all we do by operating . . . in a manner consistent with Biblical principles." *Id.* at 2771.

As recognized in these cases, the extent of distinctly religious content in a particular activity is not a reliable indicator of the activity's religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division, Department of Human Resources*

of Oregon v. Smith, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The purpose, not the content, is what matters. *See Widmar*, 454 U.S. at 271 n.9 (explaining that the distinction between religious and nonreligious speech is based on the purpose of such speech).

b. Wisconsin's reliance on Colorado law is unfounded.

The Wisconsin Supreme Court cited Colorado as another jurisdiction that applies the unemployment insurance religious exemption only to organizations that engage in sufficiently religious activities. *Catholic Charities*, 3 N.W.3d at 678 n.10. In 1994, the Colorado Supreme Court did hold that the statutory exemption from unemployment insurance for organizations "operated primarily for religious purposes," C.R.S. § 8-70-140(1), did not apply to organizations engaged in "essentially secular services," even if such services were conducted in furtherance of an organization's religious purposes. *Samaritan Institute v. Prince-Walker*, 883 P.2d 3 (Colo. 1994). The court further held that pastoral counseling services provided by a religious organization were not religious activities because they didn't include sufficient distinctly religious content. The court stated that the motivation for such services, to build upon a person's faith, was not relevant. As a result, the court concluded that because the services were "essentially secular," the organization was not "operated primarily for religious purposes." *Id.* at 8.

But subsequent Colorado cases applying religious tax exemptions have expressly avoided such religiosity

inquiries. Indeed, even prior to *Samaritan Institute*, the Colorado Supreme Court had begun to recognize the Constitutional difficulties in assessing the inherent religiosity (or lack thereof) in various activities. A long line of Colorado cases had already held that the state's property tax exemption for "religious worship" should be broadly construed in deference to the bona fide representations of religious organizations. *See*, *e.g.*, *McGlone v. First Baptist Church of Denver*, 97 Colo. 427, 430-31 (1935) (holding that property tax exemptions for religious worship are subject to a "liberal rule of construction").

In 1989, the court applied this liberal rule of construction to affirm that a camp property owned and operated by Young Life was used exclusively for "religious worship." *Maurer v. Young Life*, 779 P.2d 1317 (Colo. 1989). The court noted that "not all of the activities that take place at Young Life camps . . . are inherently religious, [however] they are used by Young Life as effective vehicles for presenting the gospel during the day and for building relationships so that campers will be more receptive to the gospel as it is presented during the course of Young Life's program." *Id.* at 1331. The court cited the testimony of Young Life's president that:

> To us, skiing, horseback riding, swimming, opportunities to be with young people in a setting and in an activity that is wholesome is all a part of the expression of God in worship. There is no ["]we are now doing something secular, we are now doing something spiritual.["]

Id. at 1328.

Based on these findings, the court held that religious worship may encompass "secular" activities conducted in furtherance of religious purposes. In so doing, the court observed that "[a]voiding a narrow construction of property tax exemptions based upon religious use also serves the important purpose of avoiding any detailed governmental inquiry into or resultant endorsement of religion that would be prohibited by the establishment clause of the first amendment of the United States Constitution." *Id.* at 1333 n.21.

In 2009, the Colorado Supreme Court considered whether the operation by a Catholic organization of a continuing care retirement center constituted a "religious activity" for purposes of a city sales tax exemption. *Catholic Health Initiatives Colorado v. City of Pueblo*, 207 P.3d 812, 823 (Colo. 2009). The court found the trial court's reasoning, distinguishing between "religious functions" such as a chapel and "secular functions" such as refrigerators, "to be representative of an order that would violate the Establishment Clause." *Id.* (*citing Amos*, 483 U.S. at 336). Further, the court discussed *Young Life* "as an example of courts adopting a broad view of religious activity in an attempt to avoid entanglement. . . ." *Id.* at 819 n.5.

In 2015, the Colorado Court of Appeals declined to apply the "essentially secular services" test to the same statutory exemption at issue in *Samaritan Institute* and in this case. *A Child's Touch v. Industrial Claim Appeals Office*, 411 P.3d 990 (Colo. App. 2015). Instead, the court agreed that a religious school was operated primarily for religious purposes even though its curriculum was

primarily secular. The court quoted with approval from an Illinois case involving a religious school, which stated:

> [t]he Department's conclusion was based on a finding that [the school's] "curriculum is primarily secular in nature." Well, of course it is. Just like the curricula in every other parochial school in the state. But the primary purpose of the school is to teach those secular subjects in a faith-based environment.

Id. at 994 n.2 (*quoting Unity Christian School of Fulton, Illinois v. Rowell*, 6 N.E.3d 845, 852-53 (Ill. App. Ct. 2014)).

Most recently, the Colorado Court of Appeals in 2016 held that two YMCA camp and conference centers that offer to the public a wide range of recreational activities in a Christian environment are used solely for religious purposes under the statutory religious property tax exemption. *Grand County Board of Commissioners v. Colorado Property Tax Administrator*, 401 P.3d 561 (Colo. App. 2016), *cert. denied*, 2016 Colo. LEXIS 1233 (Colo. 2016). The court rejected an argument that government officials should evaluate the "religiousness" of each activity, noting that "[i]t is not our place to undertake an examination of Christian doctrine to determine whether hiking is 'overtly Christian' enough to count as a religious activity." *Id.* at 567.

c. Wisconsin's test requires subjective measuring of religiosity and imposes a state orthodoxy regarding such religiosity.

While Colorado courts now refuse to evaluate the "religiousness" of activities (even hiking) to determine whether they are religious activities, the Wisconsin Supreme Court has no such reticence. In determining that CCB's activities are not "primarily religious in nature," the court measured the degree of religiosity of CCB's activities and imposed a state orthodoxy regarding such religiosity in violation of this Court's precedents requiring religious deference.

The court's analysis of CCB's activities proceeded in two steps. The first step was to compare CCB's activities to a list of what the court described as "typical activities of an organization operated for religious purposes" and "hallmarks of a religious purpose." *Catholic Charities*, 3 N.W.3d at 681-83. These activities included worship services, religious outreach, ceremony, and religious education. *Id.* The court noted that CCB's activities reflected none of these so-called hallmarks, a fact which the court weighed in favor of a determination that CCB's activities are not primarily religious in nature. *Id.* at 682.

The court went on to find that CCB does not attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees. *Id.* Again, the court noted that these activities would be "strong indicators" that the activities of CCB are primarily religious in nature. *Id.* Lastly, the court points out that CCB employment and programming is open to all regardless of religion. *Id.* at 683.

The second step of the court's analysis involved comparing the activities of CCB to those of secular organizations. The court found that there are secular organizations that also provide job training, placement, coaching, and services related to daily living to individuals with disabilities. *Id.* Similarly, the court found that background support and management services provided by CCB for such services can be provided by secular organizations. *Id.* Therefore, the court concluded CCB's activities are primarily charitable and secular, not religious. *Id.* at 683-84.

The court's test boils down to whether the activities of an organization are sufficiently religious, an inquiry which government officials are prohibited from performing. This test also improperly requires courts to perform a detailed review of an organizations activities and policies in a search for religious meaning. *Cathedral Academy*, 434 U.S. at 132-33. Far from the objective and neutral analysis the court thinks it is applying, the court's analysis and conclusion are instead entirely based on the court's own views about what constitutes religion. Its list of typical religious activities begs the question—typical to what religion? While worship services and proselytization may be typical to religions the judges of the Wisconsin Supreme Court have encountered, they are not typical of all religions. Indeed, if every judge made determinations about what constitutes a religious organization based on his or her own experiences about what is typical, the law would be applied in an entirely inconsistent and arbitrary manner. This case is a prime example of why this Court and others have concluded that government officials are not equipped to make determinations about the religious nature of organizations and their activities.

The court believes it avoids any constitutional issues because it does not explicitly evaluate Catholic doctrine. *Catholic Charities*, 3 N.W.3d at 687. However, to accomplish this, the court completely jettisons CCB's sincere beliefs about the religious nature of its activities. This analysis turns the purpose of the Religions Clauses completely on its head. Instead of deferring to the religious beliefs of CCB about its activities, the court ignores these beliefs and substitutes its own evaluation of the nature of the activities in a void. Ergo, the religious views of the court are elevated and those of CCB and other religions organizations are entirely dismissed. This approach is antithetical to the Religion Clauses and clearly violates this Court's precedents.

The court also fails to recognize the implicit judgment of Catholic doctrine underlying its analysis. A determination that certain activities that CCB considers to be core to carrying out its religious mission are not religious in nature is a determination about the nature of CCB's beliefs about those activities. And the message is that those beliefs are not true, valid, or worthy of protection as religious beliefs. Therefore, by the court's own interpretation of the limits imposed by the Religion Clauses, its analysis does not meet the mark.

Finally, a religious exemption limited to activities that a court perceives to be sufficiently religious creates incentives for organizations to include more distinctly religious content in their activities. To satisfy Wisconsin's "primarily religious in nature" test, CCB would be well advised to add distinctly religious duties such as prayer and Bible teaching to its activities. Doing so would strengthen the argument that CCB qualifies under Wisconsin's

test, even though its activities would, ironically, be less faithful to CCB's religious tradition. Such a result flies in the face of the religious deference requirement under the Establishment Clause and trivializes CCB's religious exercise.

2. Wisconsin's "primarily religious in nature" test results in religious favoritism in violation of the Establishment Clause.

This Court and other courts have found that, when government officials seek to determine the religious content in activities or policies, they effectively create an implicit state-defined orthodoxy regarding religious activities. Distinctions based on a court's view of the relative religious significance of various activities inevitably favor expressly religious or conventional methods of accomplishing a religious mission over other more ecumenical or unorthodox methods. Such favoritism is prohibited by the Establishment Clause.

In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court struck down a city ordinance permitting churches and similar religious bodies to conduct *worship services* in its parks but prohibiting *religious meetings*. The ordinance resulted in the arrest of a Jehovah's Witness as he addressed a peaceful religious meeting. This Court held that the distinction required by the ordinance between *worship* and an *address on religion* was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic,

> more unorthodox, less formal than some. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, *is merely an indirect way of preferring one religion over another.*

Id. at 69-70 (emphasis added). This Court added that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *Id.* at 70.

In *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the Tenth Circuit held that a Colorado statutory distinction between "pervasively sectarian" and other religious schools violated Constitutional principles of religious deference and neutrality. With respect to the pervasively sectarian criteria, the court noted that the "First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes." *Id.* at 1263. The court also observed that "[b]y giving scholarship money to students who attend sectarian—but not 'pervasively' sectarian—universities, Colorado necessarily and explicitly discriminates among religious institutions, extending scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by governmental officials." *Id.* at 1258.

Similarly, in *University of Great Falls*, the D.C. Circuit observed that:

> To limit the . . . exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board in its brief, is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause—not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.

278 F.3d at 1346. *See also Hosanna-Tabor*, 132 S.Ct. at 711 (Thomas, J., concurring) ("[j]udicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'Mainstream' or unpalatable to some.").

Wisconsin's "primarily religious in nature" test explicitly favors certain religious practices and organizations over others. By relying on a list of "typical" religious activities, *Catholic Charities*, 3 N.W.3d at 681-83, the court elevated these practices to a favored position. Going forward, religious organizations which conduct these activities are much more likely to qualify for the unemployment tax exemption than those that do not. By implication, CCB's "more unorthodox" activities are relegated to a less favorable position. *Fowler*, 345 U.S. at 69-70. Extending the religious exemption to churches and organizations that provide "typical" religious services but not to organizations like CCB that are not considered religious enough is unconstitutional religious favoritism. *Colorado Christian University*, 534 F.3d at 1257-60.

Moreover, in order to determine whether an activity is one of the typical activities listed by the court, government officials must define these terms, an endeavor which requires answering an inherently religious question. How can a government official define a worship service, a religious ceremony, religious outreach, and religious education without invoking religious doctrine? As this Court recognized in *Fowler*, determining what constitutes a worship service inevitably results in favoritism.

The test also favors organizations with less complex corporate structures over those with structures that are more complex. While the status of CCB as an organization that is operated, supervised, controlled, or principally supported by the Catholic Church is relevant to determining which statutory exemption applies, it is not relevant to determining whether CCB is operated primarily for religious purposes. Yet, in its analysis of CCB's activities, the court makes a point to highlight that CCB is organized as a separate corporation from the church. *Catholic Charities*, 3 N.W.3d at 682. It also points out that one of the CCB subsidiaries only became affiliated with CCB in 2014. *Id.* at 683. If all of the CCB entities are operated for religious purposes, then whether they operate as one corporate entity or as one hundred corporate entities is irrelevant in the determination of whether or not their activities are religious. But by making this distinction between subsidiaries and parent entities, the court again creates favored and unfavored religious organizations.

3. Incorporating Wisconsin's "primarily religious in nature" test into the unemployment insurance tax religious exemption both triggers and fails strict scrutiny under the Free Exercise Clause.

In applying the Free Exercise Clause, the Court has adopted a general rule that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. However, "[a] law *failing to satisfy these requirements* must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32 (emphasis added). If Wisconsin's "primarily religious in nature" test is grafted onto the unemployment insurance religious exemption, then the law would trigger and fail strict scrutiny.

a. The law triggers strict scrutiny because it burdens the religious exercise of CCB and is not neutral with respect to religion.

The Wisconsin Supreme Court erroneously rejected CCB's free exercise arguments because CCB failed, in the court's view, to demonstrate that the Wisconsin statute imposes a constitutionally significant burden on its religious practice. *Catholic Charities*, 3 N.W.3d at 691-92. The court's conclusion failed to recognize both the burden imposed by its own "primarily religious in nature" test and the nature of the unemployment insurance tax burden which the religious exemption alleviates.

First, as this Court noted in *Amos*, requiring an organization "to predict which of its activities a secular court will consider religious" imposes a significant burden and "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." 483 U.S. at 336. This is exactly what the Wisconsin court's religiosity test does—it requires religious organizations like CCB to predict whether its activities will be considered religious enough by a secular court in order to determine whether it is required to remit unemployment taxes.

Second, the Wisconsin Supreme Court's conclusion that CCB's religious exercise was not substantially burdened erroneously relies on this Court's precedents in *Jimmy Swaggert Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), and *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989), for the broad proposition that the decrease in the money available for religious or charitable activities that comes with paying a generally applicable tax is not a constitutionally significant burden. *Catholic Charities*, 3 N.W.3d at 691-92. But these cases do not stand for the proposition that such a decrease in money can *never* be a constitutionally significant burden. The *Jimmy Swaggert* court specifically noted that "it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices" but that "we face no such situation in this case." 493 U.S. at 392. Additionally, the *Jimmy Swaggert* case involved a sales and use tax of 6% on in-state sales of tangible personal property, and the *Hernandez* case involved a charitable deduction from the personal income taxes of individual members of a

religious denomination. These tax burdens are a far cr' from the substantial liability imposed by the Wisconsin unemployment tax.

Third, the very existence of the religious exemption suggests that the unemployment insurance tax could substantially burden an organization's religious exercise. Alleviating this burden is likely a primary reason for the exemption. *See Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 673-74 (1970) ("We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions."); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding RLUIPA's institutionalized-persons provision does not violate the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise).

In addition to significantly burdening CCB's religious exercise, Wisconsin's "primarily religious in nature" test is not neutral with respect to religion, as established in Section 2 above. As a result, the test is subject to strict scrutiny.

Wisconsin's test also triggers strict scrutiny because it imposes an unconstitutional condition on the religious exemption. This Court has held that "the Free Exercise Clause guard[s] against the government's imposition of 'special disabilities on the basis of religious views or religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460-61 (2017) (*quoting Smith*, 494 U.S. at 877). The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or

discourage[s] the exercise of First Amendment rights." *Id.* at 463 (*quoting Sherbert v. Verner*, 374 U.S. 398, 405 (1963)). Therefore, when the government "requires [a religious organization] to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified . . . such a condition imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny." *Id.* at 460-61 (*quoting Lukumi*, 508 U. S. at 546). Here, the test requires CCB to renounce its faith-based standards for its activities in order to qualify for the exemption from unemployment tax.

Finally, the assessment of the "religiosity" of distinct activities also constitutes a form of individualized exceptions that trigger strict scrutiny under *Smith*. 494 U.S. at 884.

b. Wisconsin cannot establish that the law as applied to CCB is narrowly tailored to a compelling governmental interest.

Because the Wisconsin unemployment insurance tax law as interpreted and applied in this case is not religiously neutral, it is subject to strict scrutiny. And this Court has emphasized that the strict scrutiny test must be rigorous:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and

> must be narrowly tailored in pursuit of those interests.

Lukumi, 508 U.S. at 546 (citations omitted).

Strict scrutiny requires both an examination of the interests furthered by the religious exemption as interpreted by the court and the impact on such interests from exempting CCB. Those seeking to apply statutes to religious exercise will generally argue that any applicable legislative interest is compelling, and that declining to apply the law to the person whose free exercise it burdens will materially impair such interest. But it is important to note that these two parts of the test push against each other, such that it is difficult to maintain that a law is narrowly tailored to a broadly stated interest. Accordingly, this Court has held that the test "requires us to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the [law] in th[is] case[]." *Hobby Lobby*, 134 S.Ct. at 2779 (citation omitted); *see also id.* at 2780.

Finally, the government cannot satisfy its strict scrutiny burden with mere speculation, but instead must present evidence to support its assertions. *Larson v. Valente*, 456 U.S. 228, 249 (1982).

Often, courts will assume that the government's stated interest is compelling, even while noting reasons to doubt the government's position. *See Hobby Lobby*, 134 S.Ct. at 2779-80. In this case, even assuming the tax furthers a compelling interest, Wisconsin has not established that

applying the exemption to CCB would materially harm such interest. Indeed, the State cannot do so given that the religious exemption applies to churches that may conduct the exact same activities in the same manner as CCB. The religious exemption also applies to organizations identical to CCB in every respect, including their activities, if they include sufficient religious content in such activities. If the exemption of such churches and similar organizations does not materially impair the state's interest, then neither would exempting CCB. Therefore, Wisconsin's "primarily religious in nature" test fails strict scrutiny.

4. The requirement that an organization's activities must further sincerely held religious purposes imposes a meaningful limitation on the scope of the religious exemption.

The problem with the religious exemption in the Wisconsin unemployment insurance tax law is not how it is worded in the statute ("operated primarily for religious purposes"), but rather how the Wisconsin Supreme Court interpreted it (activities must be "primarily religious in nature," meaning that they are "typical" religious activities).

The question for religious exemption purposes should not be whether an activity is "sufficiently religious" as measured by a government official's assessment of the religious significance of the activity. The question instead should be whether the organization's representations regarding how its activities further its religious purposes are *bona fide*.

The Wisconsin Supreme Court incorrectly concluded that if it determined whether an organization was "operated primarily for religious purposes" without considering the religious nature of the organization's activities, the organization's "actual operations would not enter the calculus." *Catholic Charities*, 3 N.W.3d at 679. But although the First Amendment limits governmental inquiry regarding religious matters, it does not preclude government officials from determining whether an organization is making false statements regarding its activities and religious beliefs and purposes.

In *United States v. Ballard*, 322 U.S. 78 (1944), this Court held that although courts cannot inquire into whether an individual's asserted religious beliefs are true, they can inquire into whether the individual honestly and in good faith actually holds such beliefs. Similarly, in *Hobby Lobby*, this Court noted that, under the applicable exemption, "a corporation's pre-textual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." 134 S.Ct. at 2751, 2774 n.28. This Court also observed that Congress was confident of the ability of the federal courts to weed out insincere claims. *Id.* at 2774.

Accordingly, government officials can examine an organization's activities, but only for the limited purpose of verifying that its representations regarding its activities are *bona fide* and that its religious beliefs are sincerely held.[2] For example, the court in *University of Great*

2. To the extent specific activities are relevant to a *bona fide* inquiry, it should be clear that the religious character of an activity turns on the religious purpose for which it is performed. *See, e.g.*, *Widmar*, 454 U.S. at 271 n.9 (explaining that the distinction

Falls held that the religious character of an organization may be confirmed if the organization holds itself out to the public as a religious organization. 278 F.3d at 1344. Similarly, government officials could inquire into whether an organization has consistently asserted a *bona fide* role for its activities in furthering its religious purposes, or whether it is opportunistically making such assertions merely to claim the exemption.

CONCLUSION

For the reasons set forth above, *amici* respectfully request this Court to hold that inquiries by government officials into the degree of religiosity of activities or purposes violates the First Amendment. On this basis, the decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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between religious and nonreligious speech is based on the purpose of such speech).

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APPENDIX — DESCRIPTION OF *AMICI*

Evangelical Council for Financial Accountability ("ECFA") provides accreditation to leading Christian nonprofit organizations that faithfully demonstrate compliance with established standards for financial accountability, fundraising and board governance. ECFA has over 2,700 accredited member organizations that collectively represent over $38 billion in annual revenue.

Diocese of Colorado Springs covers ten counties in central Colorado. The Diocese serves more than 190,000 Catholics in 39 parishes and missions. The Diocese also provides education for more than 5,000 students.

Cherry Hills Community Church ("CHCC") is a vibrant church of everyday people who come together in many ways – in exploring and learning about faith, in raising kids and strengthening marriages, and in discovering the fullness of life God desires for each of us. CHCC also operates a Christian school providing education for students from preschool through middle school.

Christian Care Ministry ("CCM") is a nonprofit organization that helps Christians share their lives, faith, talents and resources. Among other programs, CCM operates Medi-Share, which is a health care sharing ministry with nearly 400,000 members who share each other's eligible medical bills and, most importantly, encourage and lift one another up in prayer.

Cross Catholic Outreach partners with bishops, priests, and religious and lay workers to provide food, water, housing, education, orphan support, medical care, microenterprise and disaster relief—and the love of the Lord Jesus Christ—to the poorest of the poor in more than 30 countries around the world.

ECO: A Covenant Order of Evangelical Presbyterians ("ECO") is a church denomination with over 390 member churches nationwide. ECO seeks to build flourishing churches that make disciples of Jesus Christ.

Grace to You is a California-based nonprofit organization that is dedicated to teaching Biblical truth with clarity. Since 1969, it has used radio, television, video, print, and the internet to share the teachings of Pastor John MacArthur all over the world.

Tyndale House Ministries operates a publishing ministry that was founded in 1962 by Dr. Kenneth N. Taylor as a means of publishing The Living Bible. Tyndale publishes Christian fiction, nonfiction, children's books, and other resources, including Bibles in the New Living Translation (NLT).

Calvary Chapel Fort Lauderdale is a multi-site, non-denominational Christian church located in South Florida. Its mission is to make disciples by connecting people to God, people, and outreach.

The Fuller Foundation is an independent Christian philanthropic services organization that provides financial support for Fuller Theological Seminary through annual and endowment fundraising, gift planning, capital campaign management, and funding for restricted purposes.

Servant Foundation (dba The Signatry) is a Christian ministry seeking to build the kingdom of God by inspiring world-changing generosity. Since 2000, The Signatry's donors have recommended grants to over 13,000 nonprofits, working to bring the hope of the gospel to all.

The Crowell Trust (the "Trust") supports the teaching and active extension of the doctrines of Evangelical Christianity through approved grants to qualified organizations. Since its founding in 1927 by Henry Parsons Crowell and Susan Coleman Crowell, the Trust continues to fulfill its ministry purposes through the issuance of grants to qualified Evangelical organizations.

The Christian Community Foundation, Inc. (dba Waterstone) is a Christian community foundation formed in 1980. The mission of Waterstone is to educate and encourage donors to achieve Christ-centered objectives by providing excellence in innovative, personalized charitable giving solutions.

Community Bible Study facilitates in-depth Bible studies nationwide for all age groups and stages of life.