No. 24-154

In the Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC., BARRON COUNTY DEVELOPMENTAL SERVICES, INC., DIVERSIFIED SERVICES, INC., BLACK RIVER INDUSTRIES, INC., AND HEADWATERS, INC.,

Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION AND STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Legislatures may free employers from state scrutiny of employment decisions that present entangling questions of religious doctrine and faith. When organizations perform distinctively religious functions like worship, ritual, teaching the faith, or spreading a religious message, their employment decisions will often raise such questions.

To avoid this religious thicket, Wisconsin exempts from its unemployment system not just churches and ministers, but also religiously affiliated nonprofits that are "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h)2. This statutory language covers employers that perform distinctively religious functions, since those activities may often give rise to entangling disputes over unemployment benefit eligibility.

Does the First Amendment allow Wisconsin to tether this religious accommodation to its disentangling purpose by asking whether employers engage in distinctively religious activities like worship, ritual, teaching the faith, or spreading a religious message?

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INTRODUCTION

Wisconsin long ago created an unemployment insurance program to solve an "urgent public problem" that "vitally affects" the "economic life of the entire state." Wis. Stat. § 108.01(1). Coverage is broad and generally includes nonprofit employers. But disputes over benefit eligibility can present entangling questions when religious employers decide to discharge employees based on matters of religious faith and doctrine.

To "stay out of" such employment decisions, *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 746 (2020), Wisconsin chose to create a targeted religious accommodation for certain employers. It exempts from the state unemployment system churches, ministers, and other religiously affiliated organizations that are "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h)2. This statutory language tailors the accommodation to the religious employers who present entangling unemployment questions and thereby ensures that employees do not needlessly lose coverage.

Petitioners are five charitable nonprofits, four of which deliver services primarily to people with disabilities, and one, Catholic Charities, that provides administrative services to the rest. None engages in distinctively religious activities. None asserts a religious objection to contributing to unemployment insurance. And, despite participating in Wisconsin's system for decades, none identifies unemployment disputes that have involved religious questions. But Petitioners now seek to opt out, arguing that Catholic

Charities' religious motivation means the First Amendment entitles them all to an exemption.

The First Amendment does not oblige Wisconsin to cleave this religious accommodation from its disentangling purpose. Religious motivations alone do not necessarily create entangling employment disputes, and so Wisconsin permissibly requires more. Specifically, it asks whether an organization primarily engages in distinctively religious activities like "worship services, religious outreach, ceremony, or religious education," Pet.App.29a, much like how the ministerial exemption asks whether an employee "conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of [the] faith," *Our Lady*, 591 U.S. at 754 (cleaned up). Neither exemption requires deciding "what is and is not religious" or what is "[t]ypical" of religions. Pet.Br.38, 40 (alteration in original). Rather, they both search for certain "objective functions" to ensure the accommodations serve their "fundamental purpose": keeping the state out of entangling assessments of religious questions. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012) (Alito, J., concurring); *Our Lady*, 591 U.S. at 758.

If the First Amendment did not allow religious accommodations to be tailored to particular religious groups on a nondenominational basis, legislatures (and courts) would have to choose between exempting all religious groups or none at all. Such a rule would threaten the entire project of fitting religious accommodations to the problems they seek to solve.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The religion clauses of the First Amendment to the United States Constitution provide:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ….

Wisconsin Stat. § 108.02(15)(h) provides:

> "Employment" as applied to work for a nonprofit organization, except as such organization duly elects otherwise with the department's approval, does not include service:
>
> 1. In the employ of a church or convention or association of churches;
>
> 2. In the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches; or
>
> 3. By a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order.

STATEMENT OF THE CASE

I. Wisconsin's unemployment system protects employees, including those of non-profits, while exempting certain religious employers.

In 1932, during the depths of the Great Depression, Wisconsin enacted the first unemployment compensation law in the Nation. Pet.App.14a. The State recognized that unemployment represents "an urgent public problem, gravely affecting the health, morals and welfare of [its] people." Wis. Stat. § 108.01(1). Unemployment's burden falls not just on unemployed workers themselves, but also the State's economy as a whole: unemployed workers face "irregular employment and reduced annual earnings," which in turn causes "farmers, merchants and manufacturers" to face a "decreased demand for their products" that can "paralyze the economic life of the entire state." *Id.*

Wisconsin spreads this social cost partly by requiring employers to "financ[e] benefits for [their] own unemployed workers." *Id.* Most employers make risk-adjusted quarterly contributions to the State's unemployment fund. Wis. Stat. §§ 108.17–.18. But non-profit employers have an alternative to this requirement: they may instead choose to reimburse the State for benefits paid to their own, laid-off employees. Wis. Stat. § 108.151; *cf.* 26 U.S.C. § 3309(a)(2).

Generally, all work for pay is covered by Wisconsin's system. Pet.App.15a. For covered employees, a layoff generally entitles them to compensation unless they engaged in "misconduct." Wis. Stat. § 108.04(5). When an employee applies for benefits, her employer may object to the claim. Wis. Stat. § 108.09(1). Disputes about whether the employee did, indeed, engage in misconduct are resolved by the Wisconsin Department of Workforce Development, then the Labor and Industry Review Commission, followed by judicial review in state court. Wis. Stat. § 108.09(2r), (4), (6)–(7).

Narrow categories of employers are exempted from the State's unemployment system, meaning their employees receive no state benefits. For instance, employers of seasonal employees and those with fewer than four employees are exempted. Wis. Stat. § 108.02(13)(b), (15)(k)19. And relevant here, Wisconsin exempts service:

> 1. In the employ of a church or convention or association of churches;
>
> 2. In the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches; or
>
> 3. By a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order.

Wis. Stat. § 108.02(15)(h)1.–3.

Wisconsin's reimbursement option for non-profits and its religious exemptions track the Federal Unemployment Tax Act (FUTA), first enacted in 1939, which establishes a cooperative federal-state program to provide benefits to unemployed workers. *See* 26 U.S.C. §§ 3301–3311; *California v. Grace Brethren Church*, 457 U.S. 393, 396 (1982).

Before 1970, the exemptions under state and federal law were broader. Both exempted all service in the employ of 26 U.S.C. § 501(c)(3) nonprofit organizations, including religious nonprofits. *See* Wis. Stat. § 108.02(5)(g)7. (1969–70); 26 U.S.C. § 3306(c)(8) (1964).

Then, in 1970, Congress expanded coverage to most nonprofits, recognizing "the need of their employees for protection against wage loss resulting from unemployment." S. Rep. No. 91-752, at 14 (1970). Congress amended FUTA to require that, to qualify for the federal-state cost-sharing system, States had to provide coverage to most employees of non-profit organizations. *See Grace Brethren Church*, 457 U.S. at 397; 26 U.S.C. § 3309(a).[1] But Congress allowed States to exempt certain nonprofit employers whose employees provide service:

> (1) in the employ of (A) a church or convention or association of churches, (B) an organization which is operated primarily for religious purposes and which is operated,

[1] Congress simultaneously required states to offer these newly covered nonprofits the "reimbursable employer" option described above. 26 U.S.C. § 3309(a)(2).

> supervised, controlled, or principally supported by a church or convention or association of churches, or (C) an elementary or secondary school which is operated primarily for religious purposes ….

26 U.S.C. § 3309(b)(1).

Both the Senate and House reports explained how the exemption worked, distinguishing churches from religiously affiliated employers that perform the same sorts of social services that non-exempt *secular* employers perform:

> Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered.… On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

S. Rep. No. 91-752, at 48–49; *see also* H.R. Rep. No. 91-612, at 44 (1969).

II. Catholic Charities provides management services to independent affiliates that provide social services to the needy.

Petitioners are Catholic Charities Bureau, Inc. and four nonprofit social services organizations. All

are separately incorporated from each other and from the Diocese of Superior. R.100:114–16.[2]

Catholic Charities itself does not provide direct services to individuals. Rather, under affiliation agreements, it provides "oversight services" for its affiliated entities (including the four other Petitioners here) in the form of "payroll processing," "assur[ing] … sound business practices," "resource development," and "administration of employee benefit plans." Pet.App.422a–25a; J.A.104.

The four affiliated organizations' "[p]rimary activity," as described in Catholic Charities' tax filings, is to provide social services to people with disabilities, J.A.86–95:

- Barron County Developmental Services, Inc., provides job placement, job coaching, and an "array of services to assist individuals with disabilities [to] get employment in the community." Pet.App.8a; J.A.141–44, 152–53. It had no religious connections until it affiliated with Catholic Charities in 2014. J.A.206.
- Black River Industries, Inc., provides job training and daily living services to people with developmental or mental health disabilities and those with a limited income. J.A.181–83.

[2] All cites in "R." format refer to documents and pages within index item 12 ("circuit court record") of the record below, identified by a footer that appears at the bottom of every page.

- Diversified Services, Inc., provides work opportunities to individuals with developmental disabilities. J.A.157–61, 164.
- Headwaters, Inc., provides services for people with disabilities, including training related to daily living and employment, and Head Start home visitation services. J.A.113–40.

The affiliated organizations incorporate no worship, religious training, or religious teaching into their services. Likewise, Petitioners' employees need not ascribe to the tenets of any religious faith. J.A.198–200, 236–38, 257–59; R.100:186–88.

Federal, state, and local government funding supports much of Petitioners' operations. J.A.186, 203, 209, 221–22; R.100:99–100, 271–72. That federal funding may not be spent on "explicitly religious activities," and federally funded operations must be "neutral in their treatment of religion." J.A.197–98. None of the affiliated organizations receives funding from the Diocese of Superior. J.A.222, 241, 244, 248.

Petitioners have long participated in Wisconsin's unemployment system. Catholic Charities has participated since 1971; its initial registration report described the "nature of its operations" as "charitable," "educational," and "rehabilitative," not "religious." Pet.App.490a–91a. Three of the four affiliates have participated since the 1980s, and the other since at least 2015. R.60:38–39; 67:5–8, 11–12. All participate as reimbursable employers, meaning they contribute only the cost of the state benefits

paid to their own laid-off employees, not quarterly risk-adjusted payments. R.61:3–7; 67:5.

III. Petitioners seek an exemption from Wisconsin's unemployment system, and the Wisconsin Supreme Court concludes they are not entitled to one.

For many decades, Petitioners did not claim that they were exempt, even when their activities were religiously motivated. In 2016, however, Petitioners sought a determination from the Wisconsin Department of Workforce Development that employment with each organization was exempt from coverage under Wis. Stat. § 108.02(15)(h)2. The Department found that they were not "operated primarily for religious purposes" and thus denied Petitioners' requests. Pet.App.351a–69a. The Wisconsin Labor and Industry Review Commission affirmed the Department's initial determination. Pet.App.212a–75a.

After back-and-forth lower court decisions, Pet.App.125a–68a, 189a-211a, the Wisconsin Supreme Court agreed that Petitioners were not entitled to the exemption, Pet.App.1a–122a.

The court first held that, in evaluating "religious purpose," it is the "purpose" of the specific employer seeking the exemption that matters, not that of an affiliated religious organization. Pet.App.16a–19a.

The court next held that, in determining whether each employer operates "primarily for religious purposes," the State must consider the organization's "activities and motivations." Pet.App.21a–22a.

The court accepted at "face value" Petitioners' assertion that their work is religiously motivated, Pet.App.28a–29a, but it declined to find that this alone qualified them for the exemption. In doing so, the court analyzed the exemption's language, the analogous ministerial exemption, FUTA's legislative history, and case law interpreting similar language in Section 501(c)(3). Pet.App.19a–28a.

The court concluded that Petitioners' activities mirrored those of any secular nonprofit providing similar services: Petitioners' religious motivation did not cause the services provided to "differ in any sense." Pet.App.30a–31a. For instance, Petitioner Barron County Developmental Services had operated identically both before and after its affiliation with Catholic Charities in 2014. Pet.App.30a.

Because Petitioners had relied solely on motivations, the court did not need to "exhaustive[ly]" list all relevant factors or specify any "necessary conditions." Pet.App.26a–27a. Distinctively religious activities that could qualify an employer for an exemption include "worship services, religious outreach, ceremony, or religious education," but that list could be "different for different faiths." Pet.App.26a–27a, 29a. Although the court mentioned that Petitioners did not "attempt to imbue program participants with the Catholic faith," it emphasized that this was "not required" to obtain the exemption; rather, it explained that the presence of such activity would be one "strong indication[ ]" of religious purpose. Pet.App.29a.

The court then rejected Petitioners' First Amendment argument. It noted that "'some degree of involvement' with religion" is inevitable with any "statutory scheme that offers tax exemption to religious entities." Pet.App.40a (citation omitted). It concluded that, because Wisconsin's exemption does not ask whether Petitioners' "activities are consistent or inconsistent with Catholic doctrine," it is not excessively entangling. Pet.App.40a. Indeed, an inquiry into "the scope of charitable activities in proportion to doctrinal pursuits" is permissible so long as it "does not entail judicial inquiry into dogma and belief." Pet.App.39a (citation omitted). The Court also found no violation of the church autonomy principle because the exemption neither "regulate[d] internal church governance nor mandate[d] any activity." Pet.App.45a–46a. Last, it found no actionable discrimination because Petitioners did not assert that participating in state unemployment insurance burdened their religious practices or beliefs. Pet.App.49a–50a.

SUMMARY OF THE ARGUMENT

The Wisconsin Supreme Court rightly rejected Petitioners' First Amendment challenges.

I. Wisconsin's unemployment exemption does not excessively entangle the state with religion. To the contrary, the exemption aims to avoid entangling the state in employment disputes that turn on religious faith and doctrine. Wisconsin thus must draw lines that identify which organizations present these entangling concerns. Because a religious-motive-only

test would do a poor job, Wisconsin instead searches for distinctively religious activities like worship, ritual, teaching the faith, or spreading a religious message—all of which can pose entangling unemployment questions when discharging an employee who engages in them. The ministerial exemption permissibly asks whether an employee engages in these same activities, and so Wisconsin's analogous test does not cause excessive entanglement.

II. Denying Petitioners the exemption does not discriminate against them in a way the Religion Clauses forbid. The Establishment Clause allows Wisconsin to tailor this accommodation to the religious organizations—unlike Petitioners—whose employment decisions might well present entangling religious questions. And doing so does not trigger strict scrutiny under the Free Exercise clause: Petitioners have no religious objection to participating in the unemployment system; they do not show that Wisconsin targeted their faith; and they cannot claim that the exemption favors secular organizations over religious ones. But even if the exemption triggers heightened scrutiny, it is properly tailored to accommodate only those organizations that present entangling unemployment questions. Wisconsin's substantial interest in broad unemployment coverage justifies limiting the exemption accordingly.

III. Denying Petitioners the exemption does not violate the narrow church autonomy principles embodied in the Court's precedents. The Court has rejected only state compulsion that operates on

certain matters of faith and mission: selecting church leaders and ministers and resolving ecclesiastical disputes over church property. What Petitioners face—at most, minor and incidental economic incentives on their corporate affiliation choices—lies far afield from that kind of compulsion.

IV. Contrary to the United States' position, the Wisconsin court's interpretation of the state statute is not properly before this Court. But that court properly interpreted the exemption. Its reading was consistent with the statute's plain language, context, and purpose, FUTA's legislative history, cases interpreting similar language in Section 501(c)(3), and state cases applying similar statutes.

ARGUMENT

I. Examining whether Petitioners engage in distinctively religious activities does not excessively entangle the state with religion.

Petitioners argue that Wisconsin's one-time search for distinctively religious activities excessively entangles the state in religious matters. Pet.Br.33.

But the First Amendment does not bar "all entanglements," especially not in the religious accommodation context, where "[i]nteraction between church and state is inevitable." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). In tailoring religious accommodations, legislatures and courts must draw lines. Any resulting "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause," *id.* (citation omitted), which typically entails

"official and continuing surveillance" of religious organizations, *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 675 (1970).

Wisconsin's exemption complies with these principles. It requires a one-time examination, not continuing surveillance, of Petitioners' activities to tailor the accommodation to its disentangling purpose: keeping the state out of employment decisions that turn on distinctively religious conduct.

A. Line-drawing is inevitable in crafting religious accommodations, including those that seek to avoid state assessment of religious questions.

Religious accommodations come in two main flavors: those that (like RFRA) lift burdens on particular religious beliefs or practices, and those that (like this exemption) exempt a class of religious actors to avoid interfering with church autonomy in matters of faith and doctrine.

The second type typically draws lines to identify which religious actors face autonomy problems that deserve accommodation (and, by implication, which do not). This Court recognized as much when crafting the ministerial exemption, which does not cover all employees within covered organizations, but rather only those who perform "vital religious duties" that are "essential to the institution's central mission." *Our Lady*, 591 U.S. at 746, 756. So long as such line-drawing does not require ongoing, case-by-case surveillance, it is not excessively entangling.

1. Accommodations may lift burdens on particular religious beliefs or avoid interference with religious faith and doctrine.

One kind of religious accommodation lifts a substantial burden on a religious practice or belief imposed by otherwise-neutral government action. That may take the form of a statutory exemption from a specific program, like the FICA exemption for "member[s] of a recognized religious sect" whose "established tenets or teachings" entail a "conscientious[ ] oppos[ition]" to receiving the "benefits of any private or public insurance." 26 U.S.C. § 1402(g)(1); *see also* 26 U.S.C. §§ 1402(e)(1) (similar exemption for "Christian Science practitioner[s]"), 3127(b). Or it may take the form of a RFRA-type statute, which allows claimants to seek individualized exemptions from any government activity that substantially burdens their religious belief or practice. *See, e.g.*, 42 U.S.C. § 2000cc-1. Such exemptions require no line-drawing; the particular belief or practice that merits accommodation must simply be identified.

Other accommodations, like this one, do not focus on whether the law burdens a specific exercise of religion. Rather, they establish an institution- or employee-based exemption in order to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). For instance, the Title VII

exemption for "religious organizations" discussed in *Amos* sought to "minimiz[e] governmental 'interfer[ence] with the decision-making process in religions" by allowing them to make employment decisions for religious reasons. *Id.* at 336 (citation omitted). These kinds of accommodation often must "mark boundaries," *Walz*, 397 U.S. at 670, among various religiously motivated entities to tailor the exemption to those whose religious mission would be impacted by the government action at issue.

2. To accommodate religious autonomy in the employment context, the ministerial exemption recognizes the need for functional, activity-focused tests.

The ministerial exemption illustrates the functional line-drawing required by religious accommodations that protect religious autonomy in matters of faith and doctrine.

In fashioning an exemption for employment discrimination laws in *Hosanna-Tabor* and *Our Lady*, this Court faced its own line-drawing project. It recognized that the state is "bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady*, 591 U.S. at 746. But Congress had provided no such statutory accommodation. So, the Court had to step in and fill the void, a project that required tailoring the exemption to the "certain important positions" that deserve it. *Id.*

The Court arrived at a flexible, activity-focused test: "[w]hat matters, at bottom, is what an employee does." *Id.* at 753. When they "inculcat[e]" the faith—as do those who "conduct[ ] worship services or important religious ceremonies or rituals, or serve[ ] as a messenger or teacher of [religious] faith," *id.* at 753–54 (cleaned up)—they likely qualify. *See also Hosanna-Tabor*, 565 U.S. at 192 (covered activities include religious teaching, worship, and ritual). These distinctively religious activities—"religious leadership, worship, ritual, and expression"—are "objective functions" important to "any religious group, regardless of its beliefs." *Id.* at 200 (Alito, J., concurring).

But this list is not exhaustive: "a variety of factors may be important," and some relevant to one case may not "necessarily [be] important" "in all other cases." *Our Lady*, 591 U.S. at 751–52. Ultimately, the test seeks "to determine whether each particular position implicate[s] the fundamental purpose of the exception." *Id.* at 758.

Critically, the Court declined to defer altogether to the organization's assertion that a position should be exempted, as advocated by Justice Thomas's concurrence in *Our Lady*. Rather, the *Our Lady* majority treated the organization's own view of its employee's role as "important," but not determinative. *Id.* at 757. This rightly recognizes how autonomy-preserving accommodations like these differ from belief-protecting ones. When a particular religious belief or practice is burdened, courts defer to sincere claims that claimants hold that belief. But when an accommodation seeks to avoid interference

with a religious employer's autonomy in matters of faith and doctrine, courts (and, by extension, legislatures) can identify objective factors tailored to that goal.[3]

3. Entanglement concerns primarily arise from ongoing, activity-by-activity government surveillance.

The ministerial exemption recognizes that occasional searches for distinctively religious activities permissibly tether certain accommodations to their "fundamental purpose." *Our Lady*, 591 U.S. at 756, 758. But excessive entanglement can sometimes result when the government must instead engage in "continuing surveillance" of an organization's activities. *Walz*, 397 U.S. at 675. The entanglement cases on which Petitioners primarily rely fall into this category. Pet.Br.33–37.

For example, in *New York v. Cathedral Academy*, 434 U.S. 125, 132 (1977), a religious school sought to qualify for state aid through a detailed "review … [of] all expenditures for which reimbursement [was] claimed, including all teacher-prepared tests, in order to assure that state funds [were] not given for sectarian activities." The Court frowned upon "this

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[3] Petitioners also invoke *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), but that case just tracks the ministerial exemption. Pet.Br.35–36. It similarly recognized that subjecting religious schools to NLRB jurisdiction would have created entangling disputes over whether "their challenged actions were mandated by their religious creeds." *Catholic Bishop*, 440 U.S. at 502. That has little to do with the line-drawing questions presented here.

sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities" because it would have amounted to a "search for religious meaning in every classroom examination." *Id.* at 132–33. Similarly, in *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981), the Court required a university to allow religious student groups equal access to an open forum, partly because trying to exclude religious speech from the forum would create a "continuing need to monitor group meetings to ensure compliance with the rule."

Amos is consistent. In rejecting an Establishment Clause challenge to Title VII's exemption for religious organizations, the Court found a "secular legislative purpose" (then required by *Lemon v. Kurtzman*, 403 U.S. 602 (1971)) for the exemption's 1972 amendment. *Amos*, 483 U.S. at 335 (citation omitted). Before the amendment, Title VII exempted an employer's individual "religious activities"; after, Title VII more broadly exempted "religious employers." *Id.* at 335–36. The Court treated that change as permissible, not required. *See id.* at 336 ("assum[ing]" the prior version was "adequate"). And the potential problem presented by the pre-1972 version was the need for religious employers to predict, on a case-by-case basis, which specific activities qualified for the liability exemption—the type of ongoing, activity-by-activity review of which *Widmar* and *Cathedral Academy* disapproved.

And *Mitchell v. Helms*, 530 U.S. 793 (2000), was even more forgiving. To be sure, the plurality opinion rejected the concept of "pervasively sectarian" schools on the basis that it required "trolling through a

person's or institution's religious beliefs." *Id.* at 828. But *Mitchell* still upheld aid to a religious school where the aid could be used only for "secular, neutral, and nonideological" purposes and thus did not contain "impermissible content." *Id.* at 831 (citation omitted). Indeed, the Court credited "monitoring programs" that ensured aid complied with these limitations, *id.* at 832–34, without identifying any entanglement concerns.

B. Tailoring Wisconsin's employment-related religious accommodation to its disentangling purpose is not excessively entangling.

The Wisconsin exemption, like the ministerial exemption, recognizes that the state sometimes ought to avoid employment disputes involving religion, here in the unemployment context. In both settings, the First Amendment permits a functional, one-time analysis of whether each "particular [actor] implicate[s] the fundamental purpose of the exception." *Our Lady*, 591 U.S. at 758.

1. The exemption avoids state interference with unemployment decisions touching on religious faith and doctrine.

The exemption aims to "avoid excessive entanglement" and "preserve[ ] the autonomy and freedom" of certain religious organizations. *Walz*, 397 U.S. at 670, 672. Specifically, it avoids entangling the state with unemployment eligibility decisions

that implicate questions about an employee's distinctively religious activity. Wisconsin Stat. § 108.02(15)(h) shows as much in how it exempts not just churches but also ministers, a specific job involving religious functions that would present employment disputes the state should "stay out of." *Our Lady*, 591 U.S. at 746. The First Circuit recognized this disentangling function:

> Efficient administration of the unemployment compensation system is particularly enhanced through the exemptions for religion because it eliminates the need for the government to review employment decisions made on the basis of religious rationales.

Rojas v. Fitch, 127 F.3d 184, 188 (1st Cir. 1997); *see also* Br. for the Fed. Resp't in Opp'n, *Rojas v. Fitch*, No. 97-1550, 1998 WL 34103612, *7–8 (May 20, 1998) (explaining same rationale).

To tailor the accommodation to employers that face this problem, the exemption draws a line between those whose employment decisions would present difficult entangling questions and those whose decisions would not.

Two hypotheticals illustrate the distinction.

Imagine a Catholic diocese that discharges a priest who persists in celebrating the traditional Tridentine Mass (often called the "Latin Mass") without the permission of the diocesan bishop and after repeatedly being asked to stop. *See generally* U.S. Catholic, *Can my parish celebrate the Latin Mass?* (Apr. 15, 2024), https://perma.cc/T573-4NN3.

If the diocese participated in the state unemployment system, and the priest sought unemployment benefits, the state workforce agency would need to resolve whether he was terminated for "misconduct." Wis. Stat. § 108.04(5). But it could do so only by studying Church-issued documents, such as those from the Second Vatican Council and official communications from the Pope.

Then imagine a religiously affiliated hospital, operating no differently than a secular hospital, that terminates a nurse for excessive absenteeism. If the nurse sought unemployment benefits, the workforce agency could resolve any dispute over misconduct without becoming entangled in questions of religious doctrine.

Wisconsin's exemption tracks that distinction. Churches will regularly present hard questions, and so their employees and ministers are categorically exempt. Wis. Stat. § 108.02(15)(h)1., 3. But separate, church-affiliated organizations might not. So, they qualify only if they are "operated primarily for a religious purpose," Wis. Stat. § 108.02(15)(h)2., which covers those that primarily perform distinctively religious functions such as religious education or worship. This differential treatment flows from the basic insight that some kinds of religious organizations are more likely to present entangling problems than others.

The accommodation's disentangling purpose is underscored by how Wisconsin does not exempt religious organizations from all employment-related laws. For instance, religious employers—like all

others—must provide worker's compensation coverage. *See generally* Wis. Stat. § 102.07 (defining "[e]mployee" under worker's compensation statutes). Unlike unemployment benefit claims, which sometimes require resolving religious disputes over misconduct, workers compensation injury disputes raise no entanglement concerns.

2. Wisconsin's functional test, like the ministerial exemption's, permissibly tailors the exemption to its purpose.

a. In determining eligibility for the exemption, Wisconsin performs an analysis analogous to this Court's evaluation of a claimed ministerial exemption. Indeed, the Wisconsin Supreme Court expressly linked its test to the ministerial exemption. Pet.App.24a–26a.

Like the ministerial exemption, Wisconsin's exemption considers "what … [the organization] does" by evaluating a "variety of factors," the necessity or sufficiency of which may vary from case to case, depending on the organization and religion at issue. *Compare Our Lady*, 591 U.S. at 751, 753, *with* Pet.App.26a–27a. If an organization primarily engages in distinctively religious activity—namely, "worship services, religious outreach, ceremony, or religious education," Pet.App.29a—it will likely qualify for the exemption. Wisconsin's search for those "objective functions," *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring), parallels how the ministerial exemption generally covers those who "conduct[ ] worship services or important religious

ceremonies or rituals, or serve[ ] as a messenger or teacher of its faith." *Our Lady*, 591 U.S. at 754 (cleaned up); *see also Hosanna-Tabor*, 565 U.S. at 192 (examining similar activities).

By searching for this kind of distinctively religious activity, both this exemption and the ministerial exemption try to identify the kinds of "employment disputes" that the state ought to "stay out of." *Our Lady*, 591 U.S. at 746. In both situations, the exemptions are thereby tailored to ensure that exempting each "particular position [or organization] implicate[s] the fundamental purpose of the exception." *Id.* at 758. This inquiry is not excessively entangling in applying either exemption.

b. Petitioners cannot distinguish away the ministerial exemption. Pet.Br.37. To be sure, *Our Lady* declined to hinge the exemption on either "second-guessing" a church's credentialing views or imposing a "co-religionist" requirement. 591 U.S. at 759, 761. But the case nevertheless applied a functional analysis that treated the schools' own views as "important" but not determinative. *Id.* at 757. Petitioners' preferred approach—more-or-less complete deference—did not prevail.

Moreover, Petitioners' appeal to minority religions ignores how this same sort of issue arose in *Hosanna-Tabor*. Pet.Br.40. Not all denominations have ordained ministers, and so courts must instead "focus on the [employee's] function" to ensure other religions receive the exemption's protection. *Hosanna-Tabor*, 565 U.S. at 198, 202 (Alito, J., concurring); *see also Our Lady*, 591 U.S. at 752–53.

But the important underlying functions are performed by "any religious group, regardless of its beliefs." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

The same is true here. If an organization affiliated with a minority religion engages in distinctively religious activity of the kind that would pose entangling unemployment questions, it will receive an exemption. To be sure, any religion—large or small—needs to identify the activities in question. But they will invariably involve the "objective functions" that "any religious group" performs, *id.*, and so the state can sensitively evaluate such claims made by all religions.

c. Wisconsin's search for distinctively religious activities like "worship services, religious outreach, ceremony, or religious education," Pet.App.29a, (or something similar) also parallels a search this Court, the federal government, and Petitioners themselves have long performed in the context of direct government aid to faith-based organizations.

Laws allowing faith-based organizations to receive state funds, but not for distinctively religious purposes, are ubiquitous. Consider, for example, the "Charitable Choice" provisions of 1996's welfare reform legislation. *See* Ira C. Lupu, Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1, 6–7 (2005). Generally, such provisions allow faith-based organizations to receive government contracts and grants for certain welfare-related services, but only if they do not use

government funds for "sectarian worship, instruction, or proselytization," 42 U.S.C. § 604a(j).

President George W. Bush's Faith-Based and Community Initiative expanded this project, but it still did not allow participating organizations to use funding for "inherently religious activities, such as worship, religious instruction, and proselytization." Exec. Order No. 13,279, 67 Fed. Reg. 77,141, 77,142 (2002). The Obama Administration clarified that this restriction covers "explicitly religious" activities rather than "inherently religious" ones, reasoning that while "some might consider the provision of a hot meal to a needy person an 'inherently religious' act when it is undertaken from a sense of religious motivation or obligation," that has "no overt religious content" that would prevent government funding. President's Advisory Council on Faith-Based and Neighborhood Partnerships, *Report of Recommendations to the President* (Mar. 2010), at 129–30, https://perma.cc/7M6B-RYY8; *see also* 81 Fed. Reg. 19,355, 19,358–59 (2016).

These limitations still exist today. *See, e.g.*, 2 C.F.R. § 3474.15(d)(1) (Dep't of Educ. aid cannot be used to fund "explicitly religious activities, such as worship, religious instruction, or proselytization"). The Trump Administration's recent executive order on this topic modified other aspects of the faith-based initiative, but not this one. *See* Exec. Order No. 14,205, 90 Fed. Reg. 9,499 (2025).

These direct aid limitations reflect this Court's precedents, which have prohibited direct government aid to religious organizations that is used for

"specifically religious activities." *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 613 (1988) (approving aid that funded "facially neutral projects" that were "not themselves 'specifically religious activities'"). Whether or not the Establishment Clause indeed requires such limits, such cases have drawn very similar lines to the ones Wisconsin has drawn here.

Petitioners administer this very same limitation when receiving federal aid. Catholic Charities receives most of its funding from government contracts and grants, including grants that cannot be used for "explicitly religious activities." J.A.198; 24 C.F.R. § 5.109(e) (HUD regulations). The affiliated Petitioners receive federal grant money with the same kinds of restrictions. *See* 7 C.F.R. § 16.4(b) (Dep't of Agric. regulations); 45 C.F.R. § 87.3(d) (HHS regulations). Catholic Charities USA likewise recognizes that its affiliates must abide by these "permitted use" restrictions to keep receiving government funds. C.C.USA.Br.9–10 n.5.

Because it has not been excessively entangling for Petitioners and other state aid recipients to apply the limitations derived from cases like *Kendrick*, it cannot be excessively entangling for Wisconsin to consider whether Petitioners engage in those same activities here.

3. The exemption's line-drawing requires no ongoing, activity-by-activity surveillance.

Wisconsin's exemption does not require a "continuing day-to-day relationship" between church

and state, *Walz*, 397 U.S. at 674, and so Petitioners' reliance on *Cathedral Academy*, *Widmar*, and *Amos* does not help them. Pet.Br.33–34, 36–37. The exemption's one-time eligibility decision is nothing like the case-by-case, "detailed inquiry into the subtle implications of in-class examinations" in *Cathedral Academy*, 434 U.S. at 132, "continu[ally] … monitor[ing]" meetings to determine whether speech contains religious content as in *Widmar*, 454 U.S. at 272 n.11, or ongoing activity-by-activity liability predictions of the kind that drove the congressional amendment of Title VII discussed in *Amos*, 483 U.S. at 336.

C. Petitioners misconstrue Wisconsin's test, appeal to inapposite sincerity principles, and advance a test that would raise its own constitutional problems.

Petitioners' entanglement theory rests on a false premise: that Wisconsin's exemption hinges on "[t]ypical" religious activities and decides "what is religious." Pet.Br.38, 40 (alteration in original) (citation omitted). In reality, Wisconsin's test is consistent with the Court's ministerial exemption and direct government aid cases. Petitioners also rely on cases regarding burdens placed on particular religious beliefs, but they have never identified a religious belief that collides with Wisconsin's unemployment system. And their test invites constitutional problems. By untethering the exemption from its purpose, their approach raises Establishment Clause concerns that might encourage

legislatures to narrow or eliminate such accommodations altogether.

1. Petitioners misconstrue Wisconsin's test.

Petitioners' selective reading of the Wisconsin court's decision does not reflect its true holding. The court used the word "[t]ypical" only once, teeing up a list of activities—"worship," "pastoral counseling," "church ceremon[y]," and "education" in "doctrine"—which it described as merely "illustrati[ve], not "require[d]," of an organization that might merit exemption. Pet.App.26a–27a (first alteration in original) (citation omitted). And the court expressly did not treat this as an exclusive list, even noting that such activities vary among religions. Pet.App.26a–27a. This analysis cannot be unconstitutional because it searches for practically the same distinctively religious functions that the ministerial exemption and direct aid cases do. *See Hosanna-Tabor*, 565 U.S. at 192; *Our Lady*, 591 U.S. at 754; *Kendrick*, 487 U.S. at 613.[4]

Similarly, the Wisconsin court never said that Petitioners' decision to serve non-Catholics without proselytizing disqualified them. Rather, it emphasized that these factors were "not required," simply noting how—if present—they "would be strong

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[4] *Cf.* Reply Br. for Pet'rs, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, Nos. 19-267, 19-348, 2020 WL 1810070, *4–7 (Apr. 3, 2020) (denying that searching for these functions "would force courts to decide religious questions," because it is no "great mystery what religious functions are objectively important").

indications" of an employer's exempt status. Pet.App.29a. Petitioners were ultimately denied the exemption because they identified no distinctively religious activities whatsoever, not just a lack of proselytization.

Nor did the court undertake to decide "which activities can be religious and which ones can't." Pet.Br.38. The court "accept[ed]" that Petitioners' religious motivation drove their charitable work. Pet.App.28a–29a. It simply held that religiously motivated work, standing alone, does not suffice. That was entirely proper, given how an employer whose operations are "religious" solely due to its motivation likely presents no entangling unemployment questions—as was true during Petitioners' decades of participation in Wisconsin's system. As the court rightly observed, such an organization's activities outwardly mimic those of a comparable secular employer, Pet.App.30a, which is a "relevant" consideration, *Hosanna-Tabor*, 565 U.S. at 193. In neither case will employment decisions rest on entangling religious questions.

By looking for distinctively religious activities (like worship services, religious outreach, ceremony, or religious education), the Wisconsin court simply aligned the exemption with its basic disentangling purpose.

2. Cases addressing the sincerity of religious belief are inapt here.

Because, like the ministerial exemption, Wisconsin's exemption turns on distinctively religious

activity indicative of entangling employment questions—not religious belief per se—Petitioners' sincere religious beliefs are beside the point. Pet.Br.40–42.

Petitioners' reliance on the sincerity principle conflates the two kinds of accommodations discussed above. Accommodations like RFRA and 26 U.S.C. § 1402(g) aim to lift burdens on specific religious exercise. To evaluate claims for those accommodations, a sincere assertion of religious belief triggers protection. Pet.Br.36–37 (citing *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981); *Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953)); Pet.Br.41–42 (citing cases like *Holt v. Hobbs*, 574 U.S. 352, 369 (2015)).

The exemption here is unlike those accommodations: it does not seek to alleviate burdens on specific religious beliefs or practices. Rather, it seeks to preserve the religious autonomy of organizations likely to present entangling unemployment questions. An employer's sincere religious belief does not mean an organization's decision to discharge an employee poses such questions. Catholic Charities is a perfect example—it sincerely believes that its Catholic faith requires it to do charity, but it identifies no resulting religious problems with participating in the unemployment system. So, Catholic Charities' sincere belief does not determine Petitioners' eligibility for the accommodation.

3. A motive-only test would raise Establishment Clause concerns.

Petitioners' motive-only test also would raise Establishment Clause concerns that Wisconsin's tailored approach avoids.

Where "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion," such an exemption ordinarily need not "come[ ] packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. But when an exemption is arbitrarily denied to those who "do not practice … any [religion] at all," potential Establishment Clause problems arise. *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 87 (2019) (Gorsuch, J., concurring) (citing *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 7–8 (1989) (plurality op.)); *see also Walz*, 397 U.S. at 673 (religious property tax exemption upheld partly because it was accompanied by a "broad class" of secular exemptions).

Consider again a religiously affiliated hospital that makes employment decisions without reference to religious questions. Even though that hospital would not face the entanglement problem that drives this accommodation, Petitioners' test would presumably exempt it. But a comparable secular hospital would not receive the exemption, even though its employment decisions rest on the very same nonreligious factors. This disparate result raises concerns, as it denies the secular hospital an exemption precisely because it "do[es] not practice … any [religion] at all." *Am. Legion*, 588 U.S. at 87 (Gorsuch, J., concurring).

Even if that differential treatment did not violate the Establishment Clause, crimping legislatures' ability to tether religious accommodations to their purpose might make them far more reluctant to enact accommodations in the first place. Simply put, "[l]egislatures may not be willing to exempt the Catholic parish from some requirement if it means having to exempt the Catholic hospital …." Lund Br. 15.

II. Denying Petitioners an exemption does not unconstitutionally discriminate against them.

Petitioners also assert that Wisconsin's exemption unconstitutionally "discriminates among religions." Pet.Br.43. But the Establishment Clause permits legislatures to limit religious accommodations to the groups that face a religious liberty problem. Here, the exemption is permissibly tailored to religious employers whose participation in the unemployment system would pose entangling questions of religious faith and doctrine.

This targeted accommodation does not trigger strict Free Exercise scrutiny, either. Subjecting Petitioners to the unemployment system does not burden their exercise of religious faith, target them as a disfavored religion, or amount to preferential treatment for secular groups over religious ones. And while heightened scrutiny should not apply, Wisconsin's substantial interests would satisfy it anyway.

At bottom, Petitioners' discrimination theory threatens the entire project of crafting targeted religious accommodations and thus itself poses a serious threat to religious liberty.

A. The Establishment Clause permits legislatures to enact targeted exemptions like this one.

1. Religious accommodations historically have been tailored to certain religious entities but not others.

Petitioners rest their Establishment Clause challenge on the general principles that the government may not "prefer one religion over another" and "must be neutral" among religions. Pet.Br.43 (citing *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). But "the same constitutional principle may operate very differently in different contexts," and so "different categories of Establishment Clause cases … may call for different approaches." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring).

Religious accommodations are such a context. Accommodations that seek to alleviate interference with religious practice are "an accepted part of our political and cultural heritage." *Id.* at 723 (Kennedy, J., concurring) (citation omitted). But most accommodations "seek[ ] to solve a problem that applies to members of only one or a few religions," *id.* at 747 (Scalia, J., dissenting), given how

state-imposed burdens may not necessarily fall evenly on all religions.

For instance, seventeenth-century Quakers in New York received accommodations to testify by affirmation rather than oath, *id.* at 723 (Kennedy, J., concurring), an accommodation reflected in the federal constitution, *id.* at 744 (Scalia, J., dissenting). More recently, a miliary draft exemption was extended only to those with religious objections to *all* war (not just to specific wars). *See Gillette v. United States*, 401 U.S. 437 (1971). Such targeted accommodations do not automatically require courts to "either nullify the [accommodation] or somehow extend [it] … to cover all religions." *Id.* at 451.

That does not mean such accommodations are insulated from review. But "a claimant alleging 'gerrymander' must be able to show the absence of a neutral, secular basis for the lines government has drawn." *Id.* at 452. When an accommodation's line serves "considerations of a pragmatic nature" having "nothing to do with a design to foster or favor any sect, religion, or cluster of religions," the Establishment Clause is not offended. *Id.* at 452–53.

There is similarly no cause for concern if religious groups are left out of the accommodation because they do not face the "same burden on [their] religious practice" the accommodation is meant to address. *Kiryas Joel*, 512 U.S. at 727 (Kennedy, J., concurring). Ordinarily, a legislature's choice "to accommodate the burdens unique to one religious group … raise[s] no constitutional problems." *Id.* at 728 (Kennedy, J., concurring).

2. Wisconsin's exemption complies with those principles.

The exemption's purpose—avoiding interference with employment decisions that may turn on faith and doctrine—is a "secular" and "pragmatic" consideration that does not raise concerns about favoring particular religions. *Gillette*, 401 U.S. at 452–53. And the accommodation seeks to "solve a problem" that Petitioners do not even claim to face. *Kiryas Joel*, 512 U.S. at 747 (Scalia, J., dissenting).

Petitioners object that they were left out because they provide their services in an ecumenical, non-proselytizing manner. Pet.Br.46–47. But that mischaracterizes why they were denied this accommodation: it was not because they do not proselytize or serve only Catholics, but because they identified no distinctively religious activity that would create difficulty in resolving unemployment disputes. That reflects a sensibly tailored accommodation, not invidious discrimination.

B. This Court has not recognized a Free Exercise claim in this context.

Petitioners' Free Exercise theory fails for the same basic reasons as above. Since tailoring Wisconsin's exemption to religious groups who face entangling religious questions complies with the Establishment Clause, leaving out groups that don't face these problems cannot violate the Free Exercise Clause. *See Gillette*, 401 U.S. at 448–60 (rejecting Establishment Clause and Free Exercise claims for same reasons).

Moreover, Petitioners' Free Exercise discrimination theory extends well beyond this Court's precedents. Free Exercise protects claimants against substantial burdens on the exercise of their faith, but Petitioners never assert that participating in Wisconsin's unemployment system burdens their religious practice. Petitioners cite cases that bar targeting specific faiths or advantaging secular groups over religious ones, but this exemption presents neither scenario.

1. Under *Smith* or any other test, a Free Exercise claim requires a substantial burden on the claimant's practice of her religious faith.

a. Whether viewed under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), *Sherbert v. Verner*, 374 U.S. 398 (1963), or any test, meritorious Free Exercise claims feature a common core: a substantial burden on the claimant's exercise of her religious practice. "[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222–23 (1963).

A government program that directly restricts certain religious practices creates one type of cognizable burden. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524–28 (1993), members of the Santeria faith faced fines and imprisonment if they engaged in a religious ritual.

Likewise, *Niemotko v. Maryland*, 340 U.S. 268, 272–73 (1951), involved Jehovah's Witnesses who were denied the opportunity to preach in a public park. And in *United States v. Lee*, 455 U.S. 252, 254 (1982), a member of the Old Order Amish objected on religious grounds to paying FICA and FUTA taxes to support public insurance benefits for his employees.

A burden may also arise when a believer can enjoy a generally available benefit only by forgoing her religious practice or beliefs. So, in *Sherbert*, a Seventh-day Adventist could either accept work on Saturday, violating her religion, or follow her religious beliefs and lose both her job and unemployment benefits. 374 U.S. at 404. And in *Fulton v. City of Philadelphia*, 593 U.S. 522, 530 (2021), a Catholic adoption agency could either forgo participation in the city's adoption program or participate but endorse family relationships that violated its faith.

In contrast, paying a tax does not, by itself, impose a cognizable Free Exercise burden. In *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 391 (1990), appellants did not object to the sales and use tax on religious grounds, and the Court made clear that the burden of paying a generally applicable tax "is not constitutionally significant." *See also Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (appellant did not object on religious grounds to paying the tax at issue).

b. Petitioners do not identify any cognizable Free Exercise burden. They differ from the claimants in *Church of Lukumi*, *Niemotko*, and *Lee* because they

never argue that reimbursing the state unemployment system for the benefits paid to their laid-off employees would violate their religious faith.

And Petitioners also differ from the claimants in *Sherbert* and *Fulton*. This accommodation is not equivalent to a generally available benefit, precisely because it is targeted at specific religious groups who present entangling unemployment questions. Because a legislature's choice "to accommodate the burdens unique to one religious group … raise[s] no constitutional problems," *Kiryas Joel*, 512 at 728 (Kennedy, J., concurring), it cannot be a cognizable "burden" for Petitioners to be denied a targeted accommodation that solves a problem they do not even purport to face.

Petitioners are thus left only with their benefit reimbursement obligation. That does not even amount to a "tax"—Petitioners merely reimburse the State for any unemployment benefits their employees have received. But even if Petitioners did pay a tax, it would be insufficient under *Jimmy Swaggert* and *Hernandez*.[5]

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[5] Determining eligibility for this statutory accommodation also does not trigger strict scrutiny under *Fulton*'s individualized exemption rule. There, a city refused to extend exemptions from contracting requirements to cases of religious hardship. *Fulton*, 593 U.S. at 535. This case is the opposite—Wisconsin has extended statutory exemptions specifically to religious employers with an accommodation need.

2. Cases involving intentional targeting of disfavored groups, or favoring of secular over religious groups, have no relevance to Petitioners' claims here.

Lacking any substantial burden on their religious practice, Petitioners focus on alleged differential treatment. In their view, the mere difference in eligibility between organizations that engage in distinctively religious activity and those that do not triggers strict scrutiny.

The Court has never applied strict scrutiny simply based on a disparate treatment of that kind—one that results from countless targeted religious accommodations. Rather, strict scrutiny is triggered only where the state intentionally discriminates against a disfavored denomination or treats religious organizations worse than secular ones. Neither scenario is present here.

a. When the state intentionally discriminates against a disfavored religious denomination by imposing unique burdens or prohibitions on its religious practice, such targeting survives constitutional review only if it satisfies strict scrutiny.

In *Church of Lukumi*, the central "object of the [challenged] ordinances" that barred certain forms of animal slaughter was "suppression … of the Santeria worship service." 508 U.S. at 534. Copious evidence revealed "improper targeting of Santeria sacrifice," and such "a law targeting religious beliefs as such is never permissible." *Id.* at 533, 538.

Similarly, in *Larson v. Valente*, 456 U.S. 228, 255 (1982), the Court highlighted a state legislature's "express design" to single out Unification Church members for statutory registration requirements that were not imposed on other organizations. The Court pointed to evidence that the legislature passed the law to discriminate against this disfavored religious group while consciously ensuring that a Catholic Archdiocese would remain unaffected. *Id.* at 254; *see also Niemotko*, 340 U.S. at 272–73 (invalid preaching bar arose from city's "dislike for or disagreement with" Jehovah's Witnesses).

This Court has declined to broaden *Larson* or *Church of Lukumi* beyond their facts. *See Lynch v. Donnelly*, 465 U.S. 668, 687 n.13 (1984) (noting that *Larson* applies only to government acts that are "patently discriminatory on [their] face"); *Locke v. Davey*, 540 U.S. 712, 720 (2004) (declining to "extend the *Lukumi* line of cases well beyond not only their facts but their reasoning").

b. Petitioners also point to cases treating religion worse than comparable secular activity, like *Carson v. Makin*, 596 U.S. 767 (2022), *Tandon v. Newsom*, 593 U.S. 61 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020). Pet.Br.43–45. There, unequal treatment between religious and secular groups triggered strict scrutiny. *Carson*, 596 U.S. at 780–81; *Tandon*, 593 U.S. at 62; *Cuomo*, 592 U.S. at 18.

c. Wisconsin's exemption implicates neither line of cases. Petitioners have never identified any evidence that this exemption was intentionally

crafted to leave out certain groups for invidious reasons, unlike in *Church of Lukumi* and *Larson*. And it presents the opposite scenario from the secular-favoring treatment in *Carson*, *Tandon*, and *Cuomo*: Wisconsin offers organizations that operate for religious purposes an exemption that comparable secular organizations cannot obtain.[6]

3. Strict scrutiny does not apply here, but Wisconsin would satisfy a heightened scrutiny standard.

a. Petitioners fail to show that any of the three situations where the Court has applied strict scrutiny—state action substantially burdening a claimant's religious practice, intentionally targeting religious exercise with regulation, or favoring secular organizations over religious ones—exists here. Furthermore, the narrow tailoring required by strict scrutiny is ill suited for religious exemption statutes, which prospectively seek to *avoid* conflicts with religion through generally worded, forward-looking laws. It is not easy to draw perfect lines in this context, and legislatures should not be required to do so or else face strict scrutiny.

b. But Wisconsin's exemption would satisfy a heightened scrutiny standard if this Court imposed

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[6] *Carson*, 596 U.S. at 780, like *Sherbert* and *Fulton*, also involved the denial of a generally available benefit—there, public funding—due to a school's religious nature. Again, this case differs fundamentally because it does not involve a generally available benefit but rather a tailored religious accommodation.

one. It is narrowly tailored to avoid entangling the state with employment decisions touching on religious faith and doctrine.

And its interests are compelling. In *Lee* and *Hernandez*, the Court observed that the government's interest in operating its Social Security and tax systems was a "broad public interest" that justified even substantial burdens. *Lee*, 455 U.S. at 260; *Hernandez*, 490 U.S. at 700. Here, Wisconsin's century-long commitment to ensuring unemployment coverage for its citizens, along with Congress's 1970 decision to expand FUTA to include employees of non-profit organizations, demonstrates a compelling public interest that justifies tailoring the exemption to employers who actually present entangling unemployment questions.

Wisconsin's interest is even stronger here than in *Lee* and *Hernandez* because an exemption causes concrete harm: the "heavy social cost" of depriving the unemployed of benefits. Wis. Stat. § 108.01(1). This is not a tax exemption that simply leaves less money in state coffers to spread around. Rather, this unemployment insurance exemption leaves real people out in the cold, stripped of this longstanding social safety net.[7] Petitioners have never identified any religious burdens from participating in this system, and so Wisconsin's compelling public interest

[7] Petitioners may have a backup private system (which lacks any due process right to judicial review), but there is no statutory requirement that other exempted employers create backups too.

in addressing the "urgent public problem" of unemployment should prevail. *Id.*

C. Petitioners' theory threatens the validity of countless accommodations, including the ministerial exemption itself.

In Petitioners' apparent view, the Religion Clauses bar any accommodation that covers something less than all religiously oriented groups, because such accommodations improperly discriminate against left-out groups. But such accommodations "necessarily have boundaries," and so Petitioners' theory presents a "mortal threat to thousands of specific religious exemptions crafted by legislatures" nationwide. Br. of Baptist Joint Comm. for Religious Liberty, *Zubik v. Burwell*, Nos. 14-1418, *et al.*, 2016 WL 692850, *28–38 (Feb. 17, 2016).

To begin, it is unclear how even the ministerial exemption could withstand Petitioners' discrimination theory. Consider a charitable religious organization whose employees engage in prayer, ritual, and religious teaching with service recipients—those employees would likely qualify for the ministerial exemption. *Cf. Our Lady*, 591 U.S. at 750–51. But Petitioners' employees would not qualify, precisely because they do not (and, as Petitioners say, cannot) engage in those activities. So, one organization is largely freed from antidiscrimination law while Petitioners are not. If Petitioners are right, the differential result caused by the ministerial exemption—itself constitutionally

compelled—would apparently be unconstitutional. That cannot be correct.

Many other religious accommodations cover something less than all religious organizations. FICA exempts only "Christian Science practitioner[s]" and "member[s] of … recognized religious sect[s]" who object to social insurance programs. 26 U.S.C. §§ 1402(g)(1), 1402(e)(1), 3127(b). The Internal Revenue Code specially protects "churches" and the "exclusively religious activities" of "religious order[s]." 26 U.S.C. §§ 508(c)(1)(A) (no tax-exempt status filing requirement), 6033(a)(3)(A)(iii) (no annual informational return requirement); 26 U.S.C. § 7611 (audit protections). ERISA exempts plans "established and maintained . . . by a church or by a convention or association of churches." 29 U.S.C. § 1002(33)(A).

Other examples abound. *See, e.g.*, 26 U.S.C. §§ 1402(c)(4), 3121(b)(8)(A) (excluding from FICA taxes "service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order"); 26 U.S.C. § 5000A(d)(2)(A)(i)(II) (excluding from Affordable Care Act's insurance mandate a member of a "sect … who relies solely on a religious method of healing"); 26 U.S.C. § 5000A(d)(2)(B)(ii)(II) (excluding from ACA insurance mandate members of organization which "share[s] a common set of ethical or religious beliefs and share[s] medical expenses among members in accordance with those beliefs"); 26 U.S.C. § 107 (taxable income of "minister[s] of the

gospel" does not include value of their parsonage benefit).

If targeted accommodations like these were invalid, legislatures again would be put in a difficult position. They would have to exempt either everyone or no one, and Justice Kennedy observed that "[i]t would take a court bolder than this one to predict ... that extension, not invalidation, would be the probable choice." *Kiryas Joel*, 512 U.S. at 727 (Kennedy, J., concurring) (quoting *Olsen v. Drug Enf't Admin.*, 878 F.2d 1458, 1464 (D.C. Cir. 1989)); *see also* Br. of Baptist Joint Comm., 2016 WL 692850, *34 (noting "political pressure to repeal thousands of narrow religious exemptions already enacted, lest they be expanded to become universal exemptions").

III. Denying Petitioners an exemption does not offend church autonomy principles.

Petitioners also argue that denying them the exemption violates church autonomy principles. Pet.Br.24. But the denial merely means they must reimburse Wisconsin's unemployment system for benefits paid (if any) to their own laid-off employees. Petitioners identify no autonomy problems arising from those reimbursements. Rather, they point to a marginal and incidental economic incentive that may affect their corporate structuring choices. But the Court's autonomy decisions narrowly shield religious organizations from compulsion regarding church governance and leadership, not minor and incidental economic incentives on corporate structure.

A. Church autonomy principles bar direct state compulsion on internal church matters of faith and mission.

This Court's church autonomy precedents teach that the state may not intervene to control church decisions that directly affect their faith and mission. This can be broken down into a two-part test: (1) whether the state controls a church's decision, and (2) whether that decision is "essential to the institution's central mission." *Our Lady*, 591 U.S. at 746. Church autonomy is implicated only if the answer to both questions is "yes."

1. The doctrine protects churches against government compulsion, not minor and incidental economic incentives.

To satisfy the first predicate of a church autonomy claim, the state must act with legally binding effect to override a church decision.

Begin with *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952). There, New York sought a "transfer by statute of control over churches" from one set of governing church authorities to another. *Id.* at 110. The "state interference" was direct compulsion that "[b]y fiat ... displac[ed] one church administrator with another." *Id.* at 116, 119.

Such compulsion was also at stake in *Serbian Eastern Orthodox Diocese for United States & Canada v. Milivojevich*, 426 U.S. 696 (1976). The lower court

had held that a "[church] reorganization was invalid" and "reinstate[d]" a church leader, contrary to the decisions of a church's own judicial body. *Id.* at 708. This Court rejected that "judicial interference" as an "impermissible rejection of the decisions of the highest ecclesiastical tribunals" of the church. *Id.* at 698, 708.

Similar concerns drove *Hosanna-Tabor* and *Our Lady*. There, the Court considered whether employees in church leadership positions could sue under employment discrimination statutes. Because such claims could ultimately "[r]equir[e] a church to accept or retain an unwanted minister, or punish[ ] a church for failing to do so," *Hosanna-Tabor*, 565 U.S. at 188, those remedies could "[a]ccord[ ] the state the power to determine which individuals will minister to the faithful," *id.* at 188–89.

All these cases addressed government compulsion of a church decision, not incidental economic incentives that a regulation might create.

2. The doctrine protects only decisions affecting faith and doctrine.

A church autonomy claim requires not just compulsion, but compulsion affecting "matters of church government" or "those of faith and doctrine." *Kedroff*, 344 U.S. at 116. This principle protects "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady*, 591 U.S. at 746. Petitioners try to extend this principle to cover all matters of "church

polity" Pet.Br.29 (citation omitted), but that stretches the precedents beyond their breaking point.

In *Kedroff*, the invalid statute "transfer[red] the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church ... to the governing authorities of the Russian Church in America." 344 U.S. at 107. Likewise, in *Serbian*, the lower court judgment usurped the Serbian Orthodox Church's "sole power to appoint and remove [its] Bishops." 426 U.S. at 715. Few matters are more central to a church's mission than who controls it.

And in the ministerial exemption cases, applying antidiscrimination laws to certain employees would compromise "a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 565 U.S. at 188.

These cases do not bar state influence on all decisions religious organizations might make, like whether to deliver services directly or through affiliated nonprofit organizations. Questions about who qualifies as the Serbian Orthodox Church's bishop or who serves as a religious organization's minister reside a world apart from choices about whether to separately incorporate related entities.

Moreover, Petitioners' attempt to invalidate any state action touching on organizational form sits in tension with *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981). There, the Court treated as unproblematic the FUTA exemptions for different types of schools, which distinguish schools with "no legal identity separate

from a church" from "separately incorporated church school[s]." *Id.* at 782 n.12. If that distinction between forms of church polity posed a serious constitutional problem, *St. Martin* presumably would have flagged it.

B. Denying Petitioners an exemption violates neither church autonomy principle.

1. Denying the exemption does not compel Petitioners to restructure or violate their faith.

Petitioners' ineligibility for an exemption does not compel them to restructure or violate their faith. To be sure, it means they must reimburse the State for benefits (if any) provided to their laid-off employees, but Petitioners never say this threatens their autonomy. Petitioners instead assert that denying them the exemption "forc[es] the Diocese to fully merge Catholic Charities and the Diocese" and thus "restructures the polity of the Catholic Church." Pet.Br.29.

That is simply untrue. Petitioners have lacked the exemption for decades yet remained separately incorporated. At most, Petitioners face a marginal economic incentive to restructure their operations—for if they merged with the Diocese, they could obtain the blanket church exemption under Wis. Stat. § 108.02(15)(h)1. That is not legal compulsion of the kind faced in *Kedroff* or *Hosanna-Tabor*.

To the extent Petitioners also argue the denial compels them to proselytize or serve only Catholics, Pet.Br.31, that is untrue for the same reasons. Petitioners have lacked this exemption for decades without adopting proselytizing or non-ecumenical service delivery.

And any financial incentive here cannot be large. Petitioners do not pay a tax. As nonprofit employers, they reimburse the state an amount equal to the benefits, if any, paid to their laid-off employees. And since Petitioners, if exempted, propose to provide comparable benefits through the Church's private CUPP system, it is unclear whether an exemption would save them any money.[8] Regardless, marginal cost savings is nowhere near a legal compulsion to restructure or begin proselytizing. Petitioners' autonomy claim fails for that reason alone.

2. Denying the exemption does not interfere with Petitioners' decisions about religious faith and mission.

Leaving aside how a minor economic incentive is not compulsion, any incentive here does not affect an "internal management decision[ ] that [is] essential to [Petitioners'] … central mission." *Our Lady*, 591 U.S. at 746.

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[8] No record evidence demonstrates as much; Petitioners cite only a quote from their own brief below, a letter from their lawyer, and general statement of benefits. Pet.Br.12 (citing Pet.App.149a, 448a, 478a).

Any marginal effect on the "Diocese's decision to incorporate separate bodies" to deliver charitable services, Pet.Br.29, does not alter the "faith and mission of the church." *Hosanna-Tabor*, 565 U.S. at 190. Religious groups may structure their operations through related yet separately incorporated entities for many secular reasons, like limiting each one's liability. Such organizational decisions differ greatly from a religious school's choices about who will "educat[e] young people in their faith, inculcat[e] its teachings, and train[ ] them to live their faith," *Our Lady*, 591 U.S. at 753–54, or a church's decision about who leads it, as in *Kedroff* and *Serbian*.

The Catholic principle of subsidiarity does not change the result. The principle generally means that one should not "assign to a greater and higher association what lesser and subordinate organizations can do." Pet.Br.7–8 (citing Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 186 (2004)).

But Petitioners do not assert that subsidiarity requires Catholic Charities to incorporate separately from the Diocese, let alone to affiliate with separately incorporated nonprofits. Rather, they say only that these structural choices are "allow[ed]" by, in "accord with," and "rooted in" the subsidiarity principle. *Id.* at 7–8, 29. Whether the Diocese, Catholic Charities, and the affiliates incorporate separately or merge together, nothing stops them from delivering services at the "lowest common level" using "individuals from the local community," in accordance with subsidiarity principles. J.A.208.

Separately, Petitioners say the denial affects their decisions about "whom to hire, whom to serve, and whether to proselytize." Pet.Br.31. But just as it is not invidious discrimination to deny an accommodation to religious groups that do not face the identified problem, any resulting incentives placed on left-out groups cannot be unconstitutional as a matter of church autonomy, either. *See supra* Arg.II.B.–C.

C. Petitioners' expansive view of church autonomy principles has no stopping point.

It is difficult to discern the stopping point of Petitioners' church autonomy theory. Their approach would apparently bar, per se, not just state compulsion on matters of faith and mission, but also marginal and incidental economic incentives on peripheral matters like the "great diversity" of church organizational choices. *St. Martin*, 451 U.S. at 782 n.12.

Petitioners concede that laws can sometimes "make distinctions among differently structured religious entities." Pet.Br.31. But their proposed line—"recognizing and accommodating" different polities versus "penalizing" them—does not meaningfully cabin their theory, given how "penalizing," in their view, includes marginal economic incentives. Pet.Br.32.[9]

[9] Petitioners illuminate no meaningful boundary by questioning the lines drawn by an earlier version of the exemption to the ACA's contraceptive mandate. *See* 76 Fed. Reg. 46,621, 46,623 (2011). Groups there pleaded ordinary RFRA claims based on their religious objections to the mandate. *See Zubik v. Burwell*, 578 U.S. 403 (2016). They needed no "restructuring incentive" theory like Petitioners' here.

Where would such a rule end? A "flurry" of federal laws distinguishes among forms of religious organizations in granting exemptions. Lund Br. 7–10; *supra* Arg. II.C. Invariably, some religious organizations will find themselves on the "wrong" side of the line; they could always argue that the resulting incentive to modify their structure invalidates the line altogether. If that sufficed, all these exemptions would fall.

IV. The Wisconsin Supreme Court's interpretation of the state statute is not properly before this Court, but it was correct.

The Wisconsin Supreme Court interpreted a state, not a federal, statute. The United States nevertheless asks this Court to review that interpretation under *Michigan v. Long*, 463 U.S. 1032 (1983), based on the Wisconsin court's citation to two federal sources: congressional history underlying the FUTA exception and federal cases applying Section 501(c)(3). U.S.Br.13–14.

Leaving aside that the Court did not grant certiorari on this question and Petitioners have not argued it, the Wisconsin Supreme Court's interpretation of Wisconsin law did not rely on federal law, and so its statutory interpretation is beyond this Court's review. In any event, the Wisconsin court's interpretation is correct.

A. The Wisconsin Supreme Court's statutory interpretation is not properly before this Court.

The Wisconsin Supreme Court's interpretation of state law does not trigger *Michigan* because its holding did not rely on federal law. Rather, its analysis rested almost wholly on state law. Pet.App.16a–33a.

To be sure, FUTA "allows," but does not require, U.S.Br.4, states to exempt employers "operated primarily for religious purposes," if they are also "operated, supervised, controlled, or principally supported by a church or convention or association of churches." 26 U.S.C. § 3309(b)(1)(B). Wisconsin chose to adopt identical language in Wis. Stat. § 108.02(15)(h)2. That was an option, not a mandate, and so the Wisconsin court merely saw FUTA as "support[ing]" its interpretation of state law. Pet.App.31a. Similarly, the Wisconsin court cited cases applying Section 501(c)(3) as supportive, not determinative. Pet.App.23a.

That distinguishes this case from *St. Martin*, on which the United States relies. U.S.Br.10. There, the South Dakota Supreme Court saw its task as interpreting Congress's deletion of a prior FUTA exemption. *See Matter of Nw. Lutheran Acad.*, 290 N.W.2d 845, 847 (S.D. 1980) (construing change as "a mandatory condition precedent to certification by the [U.S.] Secretary of Labor"). Because the South Dakota court's holding "depended entirely on its understanding of the meaning of FUTA and the First Amendment," *St. Martin*, 451 U.S. at 780 n.9, this

Court reviewed that holding. And even so, *St. Martin* recognized that its ruling was essentially advisory—South Dakota "remain[ed] free to construe [its] own law differently," and it simply "deserve[d] to be made aware of the proper and, here, significant interpretation of the intertwined federal law." *Id.*

Unlike the South Dakota court in *St. Martin*, the Wisconsin Supreme Court did not rely primarily on federal law, and so this Court should not review this state law interpretation.

B. The Wisconsin Supreme Court correctly interpreted the exemption statute.

The Wisconsin Supreme Court's reading comports with the provision's plain language and purpose, the congressional history of the FUTA exemption, federal cases construing similar language in Section 501(c)(3), and other state courts' reading of identically worded statutes. The United States' reading is mistaken.

1. The Wisconsin Supreme Court correctly interpreted the statute.

The court correctly rejected both premises on which Petitioners sought an exemption: (1) the religious purposes for which the Catholic Diocese of Superior operated should be ascribed to each of them; and (2) an employer's motivation, standing alone, meant that each employer "operated primarily for religious purposes." Pet.App.5a.

The court first held that the relevant purposes are those of each employer. Pet.App.17a–19a. The statute's plain language exempts certain service "[i]n the employ of an organization" that meets specified criteria, Wis. Stat. § 108.02(15)(h)1.–2., and so it is each employer's service that a court must examine.

The court then held that, in determining whether an employer operates "primarily for religious purposes," the State must consider the organization's "activities and motivations." Pet.App.21a–22a. That conclusion was also correct.

First, the court's interpretation accords with the statute's plain language. The provision requires that the organization be "operated ... by a church," which already embeds a religious motive requirement. Wis. Stat. § 108.02(15)(h)2. The provision's separate prong requiring that the employer "operate[ ] primarily for religious purposes," *id.*, must be given independent effect; it cannot double as another motive requirement. *See Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698–99 (2022) (statutes construed "so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant") (citation omitted). Taken together, these separate prongs address both the organization's motivation and its operational functions.

Second, the court's reading coheres with the exemption's context and purpose. Unemployment insurance exemptions generally "address administrability concerns," and this particular one "eliminat[es] the need for the government to review employment decisions made on the basis of religious

rationales." *Rojas*, 127 F.3d at 188. An employer's distinctively religious activities present that concern, not its religious motives alone.

Third, FUTA's legislative history supports the court's reading. The congressional reports about the parallel federal language distinguished between religious orientation and religious operation: even if "religious in orientation," "a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes." H.R. Rep. No. 91-612, at 44; *see also* S. Rep. No. 91-752, at 48–49.

Fourth, examining activities rather than just motives tracks the test under Section 501(c)(3), which asks whether an organization is "organized and operated exclusively for" exempt purposes, like religion, charity, or education. 26 U.S.C. § 501(c)(3).

The Seventh Circuit has explained that, in making a Section 501(c)(3) determination, "it is necessary and proper for the IRS to survey all the activities of the organization." *United States v. Dykema*, 666 F.2d 1096, 1100 (7th Cir. 1981). *Dykema* discussed activities such as worship, pastoral counseling and comfort to members, ceremonies relating to life events like birth, marriage, and burial, and education about the doctrine of the faith. *Id.*

And in *Living Faith, Inc. v. C.I.R.*, 950 F.2d 365, 372 (7th Cir. 1991), the court agreed that although "an organization's good faith assertion of an exempt purpose is relevant," it "[could not] accept the view

that such an assertion be dispositive." The court examined "various objective indicia" regarding the organization's "activities and manner of operations." *Id.* (collecting cases); *see also Dumaine Farms v. C.I.R.*, 73 T.C. 650, 664–68 (1980) (examining applicant's planned activities because "tax exemption is based not on good intentions, but on actual charitable, scientific, or educational activities").

The IRS's manual concurs, explaining that it considers an organization's activities to determine whether it operates for exempt purposes:

> For purposes of the operational test, ["exclusively," "primarily," "substantial" and "insubstantial"] apply to the review of the purposes, activities, time and resources of exempt organizations to determine if they are operating for Section 501(c)(3) purposes. There is no express formula or measurement in the IRC for the operational test. Rather, all facts and circumstances pertaining to the operational test should be considered when making these determinations.

IRS Publication 5859, *Exempt Organizations Technical Guide* (rev. Feb. 1, 2024), at 19, https://perma.cc/4YXK-9X3T.

Fifth, the Wisconsin court's interpretation also accords with the decisions of virtually all other states that have examined parallel statutory language. Those courts all examined an employing organization's activities, not just its motives, in evaluating eligibility for comparable exemptions. *See Schwartz v. Unemployment Ins. Comm'n*, 895 A.2d 965, 970–71 (Me. 2006) (organization

providing ministry to coastal communities exempt); *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 7 (Colo. 1994) ("The activities of an organization, and not the motivation behind those activities, determine whether an exemption is warranted."); *Terwilliger v. St. Vincent Infirmary Med. Ctr.*, 804 S.W.2d 696, 698–99 (Ark. 1991) (hospital not exempt); *Nampa Christian Schs. Found. Inc. v. State, Dep't of Emp.*, 719 P.2d 1178, 1183 (Idaho 1986) (reviewing "intent and operations"); *Cmty. Lutheran Sch. v. Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 291 (Iowa 1982) (granting exemption to school due partly to "religious instruction" and "religious ceremonies"); *Emp. Sec. Admin. v. Balt. Lutheran High Sch. Ass'n*, 436 A.2d 481, 487 (Md. 1981) (considering factors like the "[e]xtent of religious exercises" and "prayer"). Even *Kendall v. Director of Division of Employment Security*, 473 N.E.2d 196, 199 (Mass. 1985), a case on which Petitioners rely, Pet.Br.42, observed how the exempted school provided "[c]lasses in religious education," and held "Saturday mass ... for the school's resident students."

2. The United States' interpretation is mistaken.

The United States fails to rebut the Wisconsin Supreme Court's reading of the exemption.

The United States discusses the syntax of "operated" without convincingly explaining why it matters, U.S.Br.15, and it never reconciles its reading with the statutory context and purpose. A motive-only test would exempt organizations that pose no

entangling religious questions when resolving unemployment eligibility.

As for the FUTA legislative history, the United States urges the Court to ignore it because Wisconsin's statute is supposedly unambiguous. U.S.Br.24–25. But the plain language, bolstered by history and context, is unambiguous in the other direction. At worst, the statute is ambiguous, which allows examination of this history. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 674 (2020) (legislative history can be used to "clear up ambiguity"); *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110 (Wisconsin courts can "confirm" statutory interpretations by examining legislative history).

And the United States' position that Section 501(c)(3) reflects a motive-only test would revolutionize that provision. U.S.Br.17–19. None of its cited cases treated an organization's asserted motive as determinative. In addition to *Living Faith* and *Dumaine Farms*, *Golden Rule Church Association v. C.I.R.*, 41 T.C. 719, 729 (1964), explained that "we must always be guided by the character of the organization and its activities." Likewise, *Golden Rule* rejected the proposition that "we must accept all claims that activities are religious simply because those claims are sincere." *Id.* at 730 n.10; *see also Presbyterian & Reformed Publ'g Co. v. C.I.R.*, 743 F.2d 148, 150 (3d Cir. 1984) (group entitled to exemption where "actual activities consist[ed] of publishing a religious paper" (citation omitted)).

CONCLUSION

The judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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February 26, 2025