No. 24-154

In the Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC., et al.,
Petitioners,

v.

WISCONSIN LABOR & INDUSTRY REVIEW COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DANIEL MACH
HEATHER L. WEAVER
American Civil Liberties Union Foundation
915 15th St. NW, Ste. 600
Washington, DC 20008
(202) 675-2330

CECILLIA D. WANG
American Civil Liberties Union Foundation
425 California St., Ste. 700
San Francisco, CA 94104
(415) 343-0775

ALEX J. LUCHENITSER*
**Counsel of Record*
JESS ZALPH
Americans United for Separation of Church and State
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org

Counsel for amici curiae

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MISCELLANEOUS

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious, civil-rights, and civil-liberties organizations that share a commitment to the free exercise of religion and the separation of religion and government. *Amici* believe that government may properly exempt religious institutions or activities from legal requirements in certain circumstances to lift burdens on religious exercise and avoid governmental interference with religion. But *amici* oppose transformation of this principle into a rule that would permit any entity or person asserting a religious motive to claim a religious exemption that goes beyond a statute's express exemptions. Far from supporting the free exercise of religion, such a rule would inflict widespread harm on religious freedom and on people whom religious institutions employ and serve.

The *amici* are:

- Americans United for Separation of Church and State;
- American Civil Liberties Union;
- ACLU of Wisconsin;
- Bend the Arc: A Jewish Partnership for Justice;
- Interfaith Alliance;

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

- National Council of Jewish Women;
- Reconstructionist Rabbinical Association; and
- Sadhana: Coalition of Progressive Hindus.

INTRODUCTION AND SUMMARY OF ARGUMENT

Though not required to do so, Wisconsin has chosen to exempt many religious entities from its unemployment-tax laws. The relevant tax statute does not apply to (1) churches, (2) organizations operated primarily for religious purposes that are closely affiliated with churches, and (3) individuals exercising ministerial functions. See Wis. Stat. § 108.02(15)(h) (2024). The Wisconsin Supreme Court did not violate the First Amendment's Religion Clauses when it concluded that, to qualify for an exemption under the second category, an organization must be engaged in distinctively religious activities.

Throughout American history, legislatures and courts have drawn similar lines in determining the appropriate scope and nature of religious exemptions. Property-tax laws, including those predating the founding of our nation, have routinely distinguished between religious and nonreligious uses of church property. And since the Founding, courts have interpreted similar distinctions in statutes that regulate appropriations, property ownership, tariffs, and conveyances, examining objective factors to draw distinctions between religious and nonreligious organizations, as well as between religious and nonreligious activities.

Moreover, such distinctions remain at the heart of myriad contemporary statutory schemes. Today, courts use objective factors to distinguish between religious and nonreligious organizations and activities when interpreting laws relating to taxes, property, discrimination, healthcare, and religion itself.

Contrary to Petitioners' arguments, the First Amendment's no-preference, entanglement, and church-autonomy doctrines do not prohibit states from offering limited, categorical religious exemptions or from distinguishing between religious and nonreligious entities and activities in assessing the applicability of exemptions, as Wisconsin has done here. In suggesting that governments and courts may ask *only* whether an entity has a sincere religious motive for its conduct, Petitioners seek to twist the First Amendment beyond recognition.

If Petitioners prevail, the net effect will likely be *fewer* religious exemptions, as some legislatures will respond by repealing existing exemptions or declining to approve new ones. In short, Petitioners' position would harm religious freedom in the name of protecting it. This Court should reject Petitioners' invitation to do so.

ARGUMENT

If adopted by this Court, Petitioners' legal theories would upend countless statutory schemes and centuries of historical practice and court rulings distinguishing between religious and nonreligious organizations and activities. Petitioners have offered no valid justification for such a radical departure from history, tradition, and precedent.

I. There is a long history and tradition, dating back to the Founding, of legislatures and courts distinguishing between religious and nonreligious organizations and activities.

Statutory exemptions—and courts interpreting them—have for centuries distinguished organizations and activities that are religious from ones that are not. In many contexts, these exemptions have

traditionally extended only to religious activities of religious organizations.

At the time of the Founding, property-tax exemptions for churches were widespread, but they were not "automatic and unrestricted." John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. Cal. L. Rev. 363, 371 (1991). Common law governed taxation of church property in both England and the colonies; church property devoted to "religious uses" was generally exempted, but property held for "nonreligious uses" was taxable. *Id.* at 372-373. "[T]he common law limited closely the scope" of exemptions to religious uses to prevent the church from "grow[ing] ostentatious and opulent at the expense of the state and society." *Id.* at 375.

Early state constitutions incorporated the Colonial-era exemptions. Witte, 64 S. Cal. L. Rev. at 380. And though the precise nature of the exemptions for churches changed as states added their own versions of the Establishment Clause to their constitutions (*id.* at 381-383), the previously widespread tax exemptions for church property used for religious activities were reaffirmed in the second half of the nineteenth century (*id.* at 386). And now, through constitutional and statutory provisions, "[a]ll of the 50 States provide for tax exemption of places of worship." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 676 (1970).

The proper scope of religious property-tax exemptions was contested before nineteenth-century courts, and these courts routinely looked to objective factors to determine whether particular property was used for religious activities. For example, in *Trinity Church* v. *City of New York*, 10 How. Pr. 138, 138-139 (N.Y. Sup. Ct. 1854), a New York court considered whether

a church-owned property fell under the state's property-tax exemption for "building[s] of public worship." It held that a cemetery with a burial chapel was subject to taxation because "[a] building for public worship is an edifice devoted primarily, if not exclusively, to church services generally." *Id.* at 139; see also *Gibbons* v. *District of Columbia*, 116 U.S. 404, 406-407 (1886) (distinguishing, in property-tax context, between bona fide "church buildings" and land owned by religious organizations for business purposes); *All Saints Parish* v. *Town of Brookline*, 59 N.E. 1003, 1003-1004 (Mass. 1901) ("houses of religious worship" are exempt from property taxes, but this does not include surrounding land not necessary for church building's use); *In re City of Pawtucket*, 52 A. 679, 679 (R.I. 1902) (per curiam) (holding that building used partly as chapel for religious worship and partly as residence for teachers of religious school was not used "exclusively for religious or educational purposes" because it was devoted "both to secular and exempted uses").

Implementation of laws not pertaining to taxation also sometimes turned on whether property was used for religious activities. For instance, the Dawes Act authorized the President to divide and distribute land held by Native American tribes. The Act exempted, to a degree, public lands held by a "religious society" for "religious or educational work." Dawes Act, ch. 119, § 5, 24 Stat. 390 (1887). And the Act did not "change or alter any [property] claim of such society for religious or educational purposes." *Ibid.* Another federal statute provided that "it shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate * * * of a greater value than fifty thousand dollars." Morrill Anti-Bigamy Act, ch. 126, § 3, 12 Stat. 501 (1862). The

Edmunds-Tucker Act of 1887 limited the scope of the territory forfeiture required under this law, explaining that "no building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith, or burial ground shall be forfeited." Edmunds-Tucker Act of 1887, ch. 397, § 13, 24 Stat. 637; see also *Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 6-7, 9 (1890) (discussing these laws); Act of Apr. 6, 1791, ch. 1547, § 4, 14 Pa. Stat. 52-53 (Pennsylvania statute limiting value of property that can be held for religious or charitable purposes).

In *Gilmer* v. *Stone*, this Court distinguished between types of religious practice in considering an Illinois corporate law regulating the acquisition of land by "[a]ny corporation that may be formed for religious purposes." 120 U.S. 586, 593 (1887) (quoting 32 Ill. Rev. Stat. § 42 (1874)). The Court specifically addressed what it means to be "formed for religious purposes" and held that, at least in the context of that statute, "religious purposes" meant "religious worship" and not "organizations commonly called benevolent or missionary societies." *Id.* at 594. The Court explained that "[t]he reasons of public policy which restrict societies formed for the purpose of religious worship in their ownership of real estate do not apply at all, or, if at all, only with diminished force, to corporations which have no ecclesiastical control of those engaged in religious worship." *Ibid.*

Frequently, states regulated conveyances to religious organizations based on whether the properties were devoted to religious uses. For example, a 1702 Connecticut statute provided that all estates granted "for the maintenance of the ministry of the Gospel"

shall forever be used for that purpose and be exempt from the payment of taxes. See *Seymour* v. *Hartford*, 21 Conn. 481, 484 & n.a (1852). A 1776 Maryland constitutional clause provided that conveyances of land for religious use generally required legislative approval. See Md. Const. of 1776, Declaration of Rights, art. XXXIV. An Illinois law exempted from taxation property transferred by gift or bequest for the use of any "religious * * * purpose." Act of May 10, 1901, § 2½, 1901 Ill. Laws 269. See also Ga. Code § 2-6-2-2419 (Irwin's 1873) (limiting bequests to religious entities in certain circumstances); Miss. Code § 35-10-55 (1857) (prohibiting bequests of property to religious entities); *Magill* v. *Brown*, 16 F. Cas. 408, 412, 429 (C.C.E.D. Pa. 1833) (describing Pennsylvania constitutional protections for "bodies united for * * * religious * * * purposes" and providing examples of purposes that were "pious and charitable" such that the bodies could receive property by devise or bequest).

Statutory exemptions that require an examination of the religious nature of an entity or activity have long been widespread outside the property context as well. Take Congress's 1897 appropriations act for the District of Columbia, which prohibited the federal government from, through appropriations, "aiding" "any church or religious denomination, or any institution * * * under sectarian or ecclesiastical control." Act of Mar. 3, 1897, ch. 387, § 1, 29 Stat. 683. In *Roberts* v. *Bradfield*, the D.C. Court of Appeals interpreted this provision to allow a contract between the government and a hospital run by "a monastic order or sisterhood of the Roman Catholic Church" for treating contagious diseases. 12 App. D.C. 453, 455, 471 (1898). The "actual services" provided by the hospital were not religious and represented a "legitimate government use or purpose." *Id.* at 471-472. This Court

affirmed, noting that Catholic control over the hospital did not "make a religious corporation out of a purely secular one as constituted by the law of its being." *Bradfield* v. *Roberts*, 175 U.S. 291, 298 (1899).

In 1861, the Morrill Tariff Act exempted books imported for the use of organizations incorporated for religious purposes. Morrill Tariff Act, ch. 68, § 23, 12 Stat. 193 (1861). Subsequent tariff statutes similarly exempted a variety of products when used by organizations established solely for religious purposes. See, *e.g.*, Tariff Act of 1897, ch. 11, ¶ 503, 30 Stat. 196 (exempting various literary resources for use of societies or institutions "incorporated or established solely for religious * * * purposes"); *id.*, ¶¶ 638, 649, 30 Stat. 200-201 (exempting philosophic and scientific tools, regalia, and sculptures used by organizations established solely for religious purposes).

II. Modern statutes and judicial opinions routinely distinguish between religious and nonreligious organizations and activities.

Modern statutes and courts have continued our country's longstanding tradition of distinguishing between religious and nonreligious entities and activities to assess whether religious exemptions apply. Numerous federal and state statutes include exemptions that are limited to organizations that have a religious nature or purpose. When construing these statutes, courts typically conduct an objective analysis of the organization's nature, often focusing on whether an organization's activities are religious or not. And courts conduct similar analyses when construing other protections for religious organizations.

A. Religious purposes.

Certain tax exemptions are limited to organizations operated for religious "purposes." Courts routinely conduct objective examinations of organizations that seek such exemptions, typically placing primacy on the nature of an organization's activities.

Wisconsin's unemployment-tax law is not unique. Its religious-purposes exemption is nearly identical to the exemption set forth in the Federal Unemployment Tax Act (FUTA) (26 U.S.C. 3301 *et seq.*). Indeed, the Wisconsin statute was modeled on FUTA. Pet. App. 31a. FUTA exempts work performed 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, 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, which is described in section 501(c)(3), and which is exempt from tax under section 501(a).

26 U.S.C. 3309(b)(1).

In enacting FUTA, Congress contemplated that "religious purposes" would be assessed by an objective consideration of an organization's activities. The House Committee Report prepared with the legislation noted that not every organization "religious in orientation" would qualify. H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969). "The services of the janitor of a church," "[a] college devoted primarily to preparing students for the ministry," and "a novitiate or a house of study training candidates to become members of religious orders" would be exempt from the

unemployment tax, but "services of a janitor for a separately incorporated college" would not be. *Ibid.* And, crucially, "a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered * * * to be operated primarily for religious purposes." *Ibid.*

Like Wisconsin, most states have enacted unemployment-tax statutes similar to FUTA. Pet. 6 & n.1. To determine whether an entity qualifies for the religious-purposes exemption in these statutes, courts regularly consider "all the facts and circumstances of a particular case in order to decide whether an organization is engaged in primarily religious activities." *By The Hand Club for Kids, NFP, Inc.* v. *Department of Empl. Sec.*, 188 N.E.3d 1196, 1202 (Ill. App. 2020); see, *e.g.*, *id.* at 1204-1205 (noting that afterschool program's primary goal was to teach religion, prayer was incorporated into all aspects of program, and its activities included mandatory Bible study); *Simon* v. *Board of Rev.*, No. A-1972-15T4, 2017 WL 6398900, at *3 (N.J. Super. App. Div. Dec. 14, 2017) (treating fact that school was "for Jewish students only" as "evidential, but not conclusive," that its purpose was primarily religious; and considering course offerings and the school's statements of goals); *Schwartz* v. *Unemployment Ins. Comm'n*, 895 A.2d 965, 970 (Me. 2006) (looking particularly at prominent role of ministers and clergy leading religious services, among other aspects of charitable organization's activities, to conclude that organization's purposes were primarily religious).

The "religious purposes" framework operates in other federal tax statutes as well. Under the Internal Revenue Code, an organization is exempt from paying income tax if it is "organized and operated exclusively

for religious * * * purposes." 26 U.S.C. 501(c)(3). Courts have interpreted "exclusively for religious * * * purposes" to mean that the organization is not operated for any "substantial" "nonexempt purpose." See, *e.g.*, *Living Faith, Inc.* v. *Commissioner*, 950 F.2d 365, 370 (7th Cir. 1991). This inherently requires an inquiry into the activities an organization undertakes. See *ibid.*

"Objective criteria for examination of an organization's activities * * * enable the IRS to make the determination required by the statute without entering into any subjective inquiry with respect to religious truth which would be forbidden by the First Amendment." *United States* v. *Dykema*, 666 F.2d 1096, 1100 (7th Cir. 1981). For instance, in *Living Faith*, the court assessed whether a religious restaurant operator was an exempt organization operated for religious purposes or whether its commercial activity represented a substantial nonexempt purpose. 950 F.2d at 371-372. The court considered not only the operator's "'good faith' religious belief" and "good works" but also the "particular manner in which [its] activities are conducted, the commercial hue of those activities, competition with commercial firms, and the existence and amount of annual or accumulated profits." *Ibid.* (also collecting cases that examine an organization's "manner of operations" to determine the organization's purpose); see also *Dykema*, 666 F.2d at 1100 (explaining that evidence of an organization serving religious purposes can include "worship services," "preaching ministry and evangelical outreach," "pastoral counseling and comfort to members," "performance by the clergy of customary church ceremonies," and "a system of * * * education in the doctrine and discipline of the church").

B. Religious organizations.

Some statutes limit their protections or exclusions to religious organizations. The inquiries in which courts engage when determining whether an entity is a religious one are similar to those they employ when determining whether an organization is operated for religious purposes.

Title VII of the Civil Rights Act of 1964 prohibits various kinds of discrimination, including religious discrimination, in employment practices such as hiring, firing, and promotion. 42 U.S.C. 2000e-2. The statute contains an exemption for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. 2000e-1(a). Although Title VII does not define "a religious corporation, association, educational institution, or society," the EEOC has endorsed the use of a fact-intensive, case-by-case approach in assessing whether an entity qualifies for the exemption. EEOC, EEOC-CVG-2021-3, *Compliance Manual Section 12: Religious Discrimination* (2021), https://bit.ly/4i1jfVh. And to that end, courts have considered various objective characteristics of an organization in determining whether the entity qualifies as "religious" for purposes of Title VII.

Many courts examine, in totality, both the religious and secular activities carried out by an organization. See, *e.g.*, *LeBoon* v. *Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) ("All significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious." (quoting

EEOC v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988))); *Garcia* v. *Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019) (court must weigh "all significant religious and secular characteristics" (quoting *Townley*, 859 F.2d at 618)); *Hall* v. *Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) ("the court must look at all the facts," and "[i]t is appropriate to consider and weigh the religious and secular characteristics of the institution"). In *LeBoon*, the court summarized the factors that have typically been considered:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

503 F.3d at 226; see also *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (explaining that an organization is exempt if "it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious

purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts").

Some courts focus on whether there are sufficient indicia of religious operations, particularly the integration of religious matters into the organization's regular activities. See, *e.g.*, *Garcia*, 918 F.3d at 1003 (concluding that Salvation Army is a religious organization because it "holds regular religious services" and its "mission is to preach the gospel of Jesus Christ"); *Kennedy* v. *St. Joseph's Ministries, Inc.*, 657 F.3d 189, 190 (4th Cir. 2011) (identifying organization as religious because it held regular prayer and communion, displayed crucifixes, and operated as "a family of faith * * * in the Catholic tradition"); *Killinger* v. *Samford Univ.*, 113 F.3d 196, 199-200 (11th Cir. 1997) (concluding that organization was religious because of theological mission in its charter, religious sources of funding, exclusively Baptist trustees, and history of religious exemptions from the IRS); *EEOC* v. *Mississippi Coll.*, 626 F.2d 477, 479 (5th Cir. 1980) (finding school exempt because, among other factors, Bible study and chapel attendance were mandatory, ninety-five percent of faculty and eighty-eight percent of students were Baptist, and school employed "director of Christian activities").

Other statutes also exempt organizations only if they are "religious." For example, under 26 U.S.C. 170(b)(1)(A)(i), charitable contributions to churches are tax-exempt. Courts have regularly considered objective factors under an "associational test" to determine whether an organization is a church for the purposes of this statute. See, *e.g.*, *Foundation of Hum. Understanding* v. *United States*, 614 F.3d 1383, 1389 (Fed. Cir. 2010) ("[C]ourts have held that in order to

be considered a church under [the statute] a religious organization must create, as part of its religious activities, the opportunity for members to develop a fellowship by worshipping together."); *American Guidance Found., Inc.* v. *United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) ("At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship."). Applying this requirement ensures that the exemption is not abused. In one case, for example, the Federal Circuit determined that an organization was not a church for purposes of the statute because it did not have regular services at any location, did not have a regular congregation, and did not "establish a community of worship." *Foundation of Hum. Understanding*, 614 F.3d at 1390.

Further, many states exempt "religious employers" from certain health-insurance mandates. In New York, for instance, the state's regulations do not require religious employers to cover abortion in their health plans. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o)(2) (2023). The regulations set forth a four-part definition of "religious employer." *Id.* § 52.2(y). Factors include whether the purpose of the entity is the "inculcation of religious values" and whether the organization primarily employs and serves people who share the faith of the organization. *Ibid.*

In addition, houses of worship continue to be exempt from property taxes, with the exemptions often limited to property that is used for religious purposes. See, *e.g.*, *Lac Courte Oreilles Band of Lake Super. Chippewa Indians of Wis.* v. *Evers*, 46 F.4th 552, 570 (7th Cir. 2022) ("This, too, is a categorical rule based on the identity of the owner (a religious organization) and the use to which the property is put (religious uses or housing for certain religious leaders). If a

church sells its minister's quarters to a secular bookstore, the land becomes taxable."). Thus, state property-tax laws typically require determinations not only of whether an entity is a house of worship but also whether a subject property is used for religious or secular activities.

C. Constitutional clauses and religious-freedom statutes.

Courts similarly distinguish between religious and nonreligious organizations and activities when interpreting constitutional protections for religious organizations, as well as related religious-freedom statutes.

One example is the "ministerial exception" doctrine, which shields religious entities from antidiscrimination laws when it comes to employment decisions pertaining to ministerial employees. See *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 746 (2020). Determining whether an employee qualifies as a "minister" requires courts to examine the secular and religious duties of the employee through a fact-intensive analysis, taking into account "all relevant circumstances" and assessing whether an employee "performed vital religious duties." *Morrissey-Berru*, 591 U.S. at 756, 758.

This Court has identified four primary considerations for this analysis: the employee's job title, the employee's religious or secular training, the employee's job responsibilities, and how the employee is held out to others. See *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 190-192 (2012). Courts examine evidence—not simply the employer's say-so—to decide whether an employee actually performed or was tasked with performing religious

duties. See *Morrissey-Berru*, 591 U.S. at 756-757; *Behrend* v. *San Francisco Zen Ctr., Inc.*, 108 F.4th 765, 769-770 (9th Cir. 2024); *Fitzgerald* v. *Roncalli High Sch., Inc.*, 73 F.4th 529, 531 (7th Cir. 2023). "What matters, at bottom, is what an employee does." *Morrissey-Berru*, 591 U.S. at 753.

Cases involving disputes between religious entities likewise require courts to objectively make similar distinctions. This Court has held that it is entirely proper for judges to resolve such disputes if they are capable of being adjudicated on the basis of "neutral principles of law" and the judges can avoid wading into questions of "religious doctrine." See, *e.g.*, *Jones* v. *Wolf*, 443 U.S. 595, 602-604 (1979). Accordingly, to determine whether adjudication of a particular dispute is permissible, courts must distinguish between religious and nonreligious disputes and questions. Compare *Maryland & Va. Eldership of Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (upholding decision in church-property case because "the Maryland court's resolution of the dispute involved no inquiry into religious doctrine"), with *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (holding that court could not properly decide church-property dispute that would have required court to "make its own interpretation of the meaning of church doctrines" and determine "the importance of those doctrines to the religion").

More broadly, courts must consider whether a practice constitutes religious exercise when adjudicating whether the practice is protected by the Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), or the Religious Land Use and Institutionalized Persons Act (RLUIPA).

The Free Exercise Clause prohibits government from burdening a person's "sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (quoting *Employment Div.* v. *Smith*, 494 U.S. 872, 879-881 (1990)). Governmental policies that are not neutral and generally applicable and therefore trigger strict scrutiny include those that "prohibit[ ] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 534 (2021). Strict scrutiny also applies when government discriminates against organizations "based on the[ir] religious character." *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 484 (2020).

To apply these tests, courts must be able to determine what a "sincere religious practice," "religious conduct," or "religious character" is. And to answer these kinds of questions, courts look at objective factors to assess whether a belief system is indeed a religion. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972) (concluding that Amish objections to public high-school education were "religious," not "philosophical and personal," in part because "the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community"); *Africa* v. *Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) ("First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.").

The federal RFRA and similar state statutes also apply strict scrutiny to laws that substantially burden religious exercise. See 42 U.S.C. 2000bb *et seq.*; see also, *e.g.*, 71 Pa. Cons. Stat. §§ 2401 *et seq.* (2025); Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 *et seq.* (2023). While courts are prohibited from examining "the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds" (*Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989)), they must determine whether the conduct at issue is indeed religious exercise and whether it is substantially burdened by the government's conduct (see, *e.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709-726 (2014)). And in doing so, courts do not simply defer to claimants' assertions. See, *e.g.*, *Davis* v. *Wigen*, 82 F.4th 204, 212 (3d Cir. 2023); *Perrier-Bilbo* v. *United States*, 954 F.3d 413, 431-432 (1st Cir. 2020); *Doe* v. *Congress of the U.S.*, 891 F.3d 578, 589-591 (6th Cir. 2018).

RLUIPA grants protections similar to RFRA's to people confined in nonfederal institutions and further provides that land-use regulations "that impose[] a substantial burden on the religious exercise of a person, including a religious assembly or institution" are subject to strict scrutiny. See 42 U.S.C. 2000cc *et seq.* Here, as with RFRA, courts must determine what constitutes "religious exercise." See, *e.g.*, 146 Cong. Rec. S7774, S7776 (2000) (statement by Senate cosponsors of RLUIPA that when religious institutions use property in ways comparable to secular institutions, this activity is not necessarily "religious exercise"); *Westchester Day Sch.* v. *Village of Mamaroneck*, 504 F.3d 338, 347 (2d Cir. 2007) (RLUIPA does not immunize "all conceivable improvements proposed by religious schools," and "if a religious school wishes to build a gymnasium to be used exclusively for sporting

activities, that kind of expansion would not constitute religious exercise"); *California-Nevada Annual Conf. of the Methodist Church* v. *City & County of San Francisco*, 74 F. Supp. 3d 1144, 1154 (N.D. Cal. 2014) (commercial endeavors, even those "undertaken * * * in order to fund" an organization's "religious mission, do not constitute 'religious exercise' protected by RLUIPA"); *Rector Church Wardens* v. *City of Phila. Hist. Comm'n*, 215 A.3d 1038, 1045 (Pa. Commw. Ct. 2019) (activity may qualify as religious exercise if it is "administered" by spiritual leader or if associated organization holds religious services).

III. Adoption of Petitioners' arguments would destabilize a settled balance and undermine religious freedom, including the availability of religious exemptions.

Ignoring our country's long history and tradition of distinguishing between religious and nonreligious organizations and activities in connection with religious exemptions, Petitioners argue that such line-drawing—whether by statutes or courts—somehow violates the Religion Clauses' no-preference, entanglement, and church-autonomy doctrines. Not only are Petitioners wrong, but accepting their arguments would lead to a perverse result: Any time a statute (or constitutional-law principle) affords a religious exemption, any entity or person who sincerely asserts a religious motive for their conduct would be entitled to the exemption.

Petitioners' view would destabilize the existing balance between protecting religious freedom and enabling legislatures to pass laws of general applicability. If anyone may assert a religious exemption without meeting statutory requirements and limitations, legislatures will be forced to make an untenable choice

between providing for unlimited religious exemptions on demand or offering no religious exemption at all. The likely outcome is that many legislatures will choose not to enact any new religious exemptions, and some might repeal existing religious exemptions.

The Constitution does not call for these extreme results. And Petitioners offer no compelling reason to upend the history, tradition, and precedent that heavily weigh against their arguments.

A. Religious preference.

Both the Establishment Clause and the Free Exercise Clause prohibit the government from discriminating among religions. *Everson* v. *Board of Educ.*, 330 U.S. 1, 15 (1947) (Establishment Clause means that the government cannot pass laws that "prefer one religion over another"); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) (under Free Exercise Clause, laws cannot "discriminate[] against some or all religious beliefs"). Relying principally on *Larson* v. *Valente*, 456 U.S. 228 (1982), and *Lukumi*, 508 U.S. 520, Petitioners argue that the Wisconsin Supreme Court's interpretation of its unemployment-tax law unconstitutionally discriminates against religious organizations that choose to separately incorporate their social-service entities and not to inject religion into their service delivery. Pet. Br. 43-48. But this contention amounts to a disparate-impact argument that does not state a violation of the Religion Clauses.

Unlike this case, *Larson* and *Lukumi* both featured record evidence that the legislature was acting with the intent to disfavor or target particular religions. In *Larson*, this Court held that a law that imposed registration and reporting requirements only on

religious organizations that "solicit more than fifty per cent of their funds from nonmembers" violated the Establishment Clause by discriminating among religious denominations. 456 U.S. at 230. The Court explained that the provision preferenced "well-established churches," which are not typically reliant on financial support from nonmembers, over newer denominations that might be. *Id.* at 246 n.23. Further, the Court noted that the proposed justifications for the selective rule were unsupportable. *Id.* at 248-251. And the Court emphasized that the legislative history of the rule "demonstrates that the provision was drafted with the explicit intention of including particular religious denominations and excluding others." *Id.* at 254.

In *Lukumi*, this Court held that laws that target a particular religion for disfavor violate the Free Exercise Clause. *Lukumi* involved a set of ordinances ostensibly concerned with animal welfare; though facially neutral, these laws, in intent and practice, targeted the Santeria ritual of animal sacrifice. 508 U.S. at 525-527. Through vast carveouts that belied the notion that the ordinances were meant to apply generally, they permitted the killing of animals in many circumstances, including ones that undermined the ordinances' stated purposes of protecting against improper disposal of remains and preventing animal cruelty. *Id.* at 535-538. Further, the ordinances could have accomplished those ends with more precision by, for example, regulating the manner of animal disposal or preventing specific practices that cause suffering. *Id.* at 538-539. Taken together, the regulations "singled out" a particular religion "for discriminatory treatment," thus accomplishing a non-neutral "religious gerrymander." *Id.* at 535, 538 (quoting *Walz*, 397 U.S. at 696).

Larson and *Lukumi* make clear that even if laws do not facially distinguish between denominations, they will be subject to strict scrutiny if they are engineered with the intent to target or to otherwise discriminate against particular disfavored religions. But nothing in *Larson* or *Lukumi* suggests that strict scrutiny is triggered merely because neutral criteria happen to impact different religious groups in different ways.

Neither the Wisconsin statute nor the Wisconsin Supreme Court's decision implicate *Larson*'s and *Lukumi*'s prohibition against targeting particular faiths for disfavor. There is no evidence of improper intent here. Nor is there facial discrimination along religious lines. There is certainly no "religious gerrymander" that targets any specific religious denomination; any number of religiously affiliated entities—including many affiliated with denominations represented by some of the religious *amici*—provide charitable services without engaging in proselytization or otherwise infusing religious activity into their delivery of services.

Petitioners' position is that they are entitled to strict scrutiny merely because the neutral lines drawn by the Wisconsin statute and the Wisconsin Supreme Court have a disparate impact on religious organizations that choose to separately incorporate their social-service entities and not to inject religion into their service delivery. See Pet. Br. 46-48. But neither *Larson*, nor *Lukumi*, nor any other decision by this Court holds that such a disparate impact is sufficient to trigger heightened scrutiny under the First Amendment's Religion Clauses.

And for good reason. Acceptance of Petitioners' arguments on this issue would prevent legislatures and

courts from limiting statutory religious exemptions in any manner. Any lines that legislatures or courts draw would inevitably have a disparate impact that benefits some religions over others. In essence, Petitioners are simply objecting to this Court's rule that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." See *Lukumi*, 508 U.S. at 531; accord *Smith*, 494 U.S. at 878.

B. Entanglement.

One of the aims of the First Amendment's Religion Clauses is to prevent "state entanglement with religion." See, *e.g.*, *Carson ex rel. O.C.* v. *Makin*, 596 U.S. 767, 787 (2022). This principle prohibits courts from deciding questions of religious doctrine, including determining the validity of litigants' interpretations of their faith or questioning the centrality of particular practices to a faith. See *Hernandez*, 490 U.S. at 699; *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). Contrary to Petitioners' assertions (Pet. Br. 33-42), Wisconsin has not run afoul of these principles here.

As explained in Parts I and II above, throughout our country's history, statutes and courts have distinguished religious organizations and activities from nonreligious ones. This Court explained in *Yoder* that, "[a]lthough a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." 406 U.S. at 215-216 (footnote omitted). Thus courts may adjudicate disputes touching on religion by

applying neutral principles of law—for example, courts may "examine certain religious documents" so long as they "take special care to scrutinize the document[s] in purely secular terms." *Jones*, 443 U.S. at 604. In the tax context, this means that tax exemptions for religious organizations have been held constitutional, even though determining which specific organizations are entitled to be exempted "occasions some degree of involvement with religion." See *Walz*, 397 U.S. at 674.

Consistent with this precedent, the Wisconsin Supreme Court examined objective factors—focusing on Petitioners' activities—to determine whether Petitioners are entitled to the tax exemption they seek. See Pet. App. 26a-33a. The court did not attempt to assess the centrality of any Catholic belief or practice, determine the validity of Petitioners' interpretation of the Catholic faith, or answer questions about what the Catholic faith considers religious or about any other aspects of Catholic doctrine. Indeed, beyond pointing out that their activities are religiously motivated and guided, Petitioners present no evidence that their activities are religious in nature. Wherever the constitutional line delineating permissible from impermissible inquiries concerning religion may fall, the Wisconsin Supreme Court did not cross the line when it concluded that Petitioners did not satisfy the requirements for the religious exemption they sought merely by showing that their activities arise out of and are delivered consistently with their religious beliefs.

Petitioners' view of the law is that the only permissible inquiry relating to religion is whether an organization (or person) has a sincere religious motive for their conduct. See Pet. Br. 41-42. But like their erroneous no-preference argument, this contention

would effectively expand every religious exemption that exists anywhere in the law to cover any entity (or person) that sincerely asserts a religious motivation for the activity at issue.

C. Church autonomy.

"[T]he general principle of church autonomy" gives religious denominations the right to decide for themselves "matters of faith and doctrine" and "closely linked matters of internal government." *Morrissey-Berru*, 591 U.S. at 747; accord *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Petitioners argue that the Wisconsin Supreme Court's interpretation of the unemployment-tax statute violates the church-autonomy doctrine by creating incentives to no longer incorporate Petitioners as entities separate from the Catholic Church and to inject proselytization and other religious elements into their delivery of services. Pet. Br. 29-31.

But this Court has never suggested that the church-autonomy principle is violated by a neutral law that incidentally happens to give a religious organization an incentive to structure itself differently or alter its operations. And the Court should not do so now. Like Petitioners' other arguments, this legal theory seeks a breathtaking change in the law that would make it effectively impossible for legislatures to cabin any religious exemption: Every conceivable limit (even Petitioners' own religious-motive test) would give some religious organization an incentive to change its structure, operations, or beliefs so that it can qualify for an exemption. Indeed, under Petitioners' logic, the Court's own ministerial-exception jurisprudence would violate the church-autonomy doctrine by giving religious organizations an incentive to

assign religious duties to employees to increase the likelihood that they will be covered by the exception. See *Morrisey-Berru*, 591 U.S. at 753. More generally, all laws that do not precisely align with religious organizations' practices or beliefs can be said to give religious organizations incentives to change those practices or beliefs. Petitioners' version of the church-autonomy doctrine thus contradicts this Court's admonition that the doctrine "does not mean that religious institutions enjoy a general immunity from secular laws." See *id.* at 746.

What is more, Petitioners' church-autonomy argument essentially rehashes their failed contention that Wisconsin has created a religious preference through an exemption scheme that disparately impacts religiously affiliated social-service providers that are separately incorporated and do not include religious elements in their service delivery. As the religious-preference argument lacks merit, it cannot be successfully resurrected by dressing it up in the clothing of church autonomy.

Finally, Petitioners gain nothing through their argument (Pet. Br. 30) that the Wisconsin Supreme Court gave insufficient weight to the Diocese of Superior's motives for supporting them. This contention appears to be an attempt to repackage Petitioners' failed entanglement arguments. Far from questioning Petitioners' or the Diocese's beliefs, the Wisconsin Supreme Court accepted their averments that Petitioners' activities are religiously motivated. Pet. App. 28a-29a. By concluding that this motivation was insufficient to qualify Petitioners for a tax exemption, the Wisconsin Supreme Court did not somehow disapprove of the underlying religious beliefs or attempt to alter them.

CONCLUSION

Petitioners are asking this Court to overturn a centuries-old tradition of legislatures limiting the scope of religious exemptions, and of courts construing the exemptions by considering objective and nonreligious factors to distinguishing between religious and secular activities and organizations. In that tradition's place, Petitioners would have this Court adopt a legal regime that would effectively expand *all* religious exemptions that exist in every area of law to *all* entities and individuals who claim a religious motive for their conduct. That result would harm not only people employed and served by religious organizations (by depriving them of legal protections that legislatures intended them to have) but also religious organizations themselves (by giving legislatures an incentive to repeal religious exemptions or not enact them in the first place). The judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted.

DANIEL MACH
HEATHER L. WEAVER
American Civil Liberties Union Foundation
915 15th Street NW
Suite 600
Washington, DC 20005
(202) 675-2330
dmach@aclu.org
hweaver@aclu.org

CECILLIA D. WANG
American Civil Liberties Union Foundation
425 California Street
Suite 700
San Francisco, CA 94104
(415) 343-0775
cwang@aclu.org

ALEX J. LUCHENITSER*
**Counsel of Record*
JESS ZALPH
Americans United for Separation of Church and State
1310 L Street NW
Suite 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org
zalph@au.org

Counsel for Amici Curiae

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