No. 24-154

In the Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC., ET AL.,
Petitioners,

v.

WISCONSIN LABOR & INDUSTRY REVIEW COMMISSION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF *AMICI CURIAE* THE STATE OF OHIO AND 18 OTHER STATES IN SUPPORT OF THE PETITIONERS

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STATEMENT OF AMICI INTEREST

Since time immemorial, a diverse array of faiths has preached and practiced charity. Religious institutions have contributed to the common good through these acts of service, each in its own way. The Amici States have been the beneficiaries of religious institutions' good will, and the citizens of Amici States have enjoyed robust First Amendment protections that allow their free participation in public life through charity. The Amici States have an interest in preserving the First Amendment's protections for religious works, including the charity that has long been a hallmark of religious involvement in society.

SUMMARY OF ARGUMENT

I.A. For millennia, charity has been intertwined with religion. That was true long before colonists arrived in New England. It was true at the Founding and the ratification of the Bill of Rights. It remains true to this day. But the Wisconsin Supreme Court's definition of charity as inherently "secular," Pet.App.28a–33a, flies in the face of centuries of religious practices and teachings on charitable works across a variety of faiths. It also ignores the original public meaning of religious exercise.

I.B. More fundamentally, the Wisconsin Supreme Court erred by arrogating the power to define religious practice for Wisconsinites in the first instance. This Court has long understood that the Constitution forbids government intrusion into religion, and few maneuvers are so intrusive as the government taking it upon itself to define religious practice. *See Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940). The result is both doctrinally offensive and practically harmful; the reasoning underlying the Wisconsin Supreme Court's

opinion has no logical stopping point. If any religious activity, no matter how deeply rooted in doctrine and practice, becomes secular the moment the nonreligious adopt it, then no religious exercise is safe from government regulation.

II. Wisconsin's new rule is even worse in the broader legal context. Wisconsin recognizes that religious groups have a place in public service, and it defines boundaries on what religious groups can do when collaborating with government to provide social benefits. But now, heeding those boundaries means forsaking the kinds of activities that Wisconsin deems "religious." So, in effect, working with government on social goods requires shedding a religious identity.

III. Wisconsin's winnowing technique of defining away religious claims is unnecessary, just like other winnowing techniques. The strict scrutiny that exists to protect fundamental rights is the right scrutiny for religious claims, and it needs no help from courts defining away religious claims before they see the light of merits review.

ARGUMENT

I. The First Amendment as originally understood protects religious acts of charity without the government defining religious practice.

A wealth of historical evidence shows that charitable work has long been a core religious teaching and practice across many faiths—a truism understood by the Founders at the ratification of the First Amendment. And the First Amendment prohibits government from defining away religious groups' ancient role in charity by deeming their acts secular. The

Wisconsin Supreme Court's decision to determine what constitutes religious practice—and exclude acts of charity—is a governmental intrusion that violates both the First Amendment's establishment and free-exercise safeguards as originally understood. The Amici States focus here on the Free Exercise Clause.

A. The original public meaning of religion in the First Amendment encompasses charitable works.

The First Amendment protects "the free exercise" of religion. U.S. Const. amend. I; *Carson v. Makin*, 596 U.S. 767, 778 (2022). The Fourteenth Amendment's adoption in the wake of the Civil War made that protection applicable not just against congressional action, but as a defense against encroachment by States. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022) (citing *Cantwell*, 310 U.S. at 303).

To understand the scope of the First Amendment's protection, courts have looked to the original public meaning of the term "religion." *See, e.g.*, *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 480–82 (2020). Even a short stroll through the historical record demonstrates that religion includes charitable work.

Charity's roots run deep in religious soil—soil that predates civilization itself. "Out of little knots of worshippers, in Egypt, the Fertile Crescent, India, or China, there grew up simple cultures"; thus, the "American culture of our era is rooted, strange although the fact may seem to many, in tiny gatherings of worshippers." Russell Kirk, *The Politics of Prudence* 200 (1st ed. 1993). Indeed, "[t]hroughout history, virtually all societies have relied to some extent on the generosity of religious and faith-based

organizations." Brian C. Ryckman, *Indoctrinating the Gulf Coast: The Federal Response to Hurricanes Katrina and Rita and the Establishment Clause of the First Amendment*, 9 U. Pa. J. Const. L. 929, 929 (2007). Charity arguably owes its inception to religion, and the services and methods American culture now considers ubiquitous in modern charity—from soup kitchens to free clinics, from donating to fundraising—trace their origins to ancient faiths.

Charity's ancient religious roots.

Judaism holds claim to the earliest example of social welfare, which was a fundamental component of Jewish teachings and practices dating to at least 1,200 BC. *Tzedkah*, or "a combination of charity and justice," is at "the heart of Jewish social welfare," informed by the belief that the poor have a right to community support. *Religious Organizations in Community Service: A Social Work Perspective* 4 (Terry Tirrito & Toni Cascio eds., 2003). Torah is filled with exhortations to care for both foreigners and the poor within Jewish society. Every three years, Jews were instructed to "bring forth all the tithe of thine increase" and "lay it up within thy gates" so that "the stranger, and the fatherless, and the widow, which are within thy gates, shall come, and shall eat and be satisfied." Deuteronomy 14:28–29 (KJV); *see also* Leviticus 23:22; Leviticus 25:35–37; Exodus 22:21–23. Jewish law also required that fields not be stripped bare during harvest so that the needy could glean the remainder for their provision. Deuteronomy 24:19–21; *see also* Ruth 2:2–14. During Roman rule, Jews developed a system of community tithing (*kuppah*), with funds dispersed based on need. *Religious Organizations in Community Service* at 8. Those Jewish communities also implemented the *tamhui*, ancestor of

the modern soup kitchen, to provide the transient poor with two meals daily. *Id.*

The early Christian church similarly embodied an ethos of care for others premised on love for all mankind. Fittingly, early Christians referred to this as *caritas*—Latin for "charity." David P. King, *Religion, Charity, and Philanthropy in America*, Oxford Research Encyclopedias: Religion at 5 (Feb. 26, 2018). The New Testament teachings of Christ model charity for believers, perhaps none so succinctly as the great commandment to "love thy neighbor as thyself." Matthew 22:38–40 (KJV); *see also* Galatians 5:14. Scripture teaches radical charity towards all, treating the poor with the dignity of Christ himself: "Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me." Matthew 25:34–40 (KJV); *see also* James 1:27.

Christian practice of those tenets developed over the first three centuries A.D., with charitable obligations taught "in the earliest writings of the Church Fathers," James William Brodman, *Charity & Religion in Medieval Europe* 11–13 (2009) (collecting sources from the first century onward); *Religious Organizations in Community Service* at 9–11. The Christian church described in Acts was communal and shared worldly goods with each other: none claimed "that ought of the things which he possessed was his own; but they had all things in common." Acts 4:32 (KJV). Early Christians contributed regularly to a community fund (*arca*) used to aid widows, orphans, sick and disabled, and imprisoned Christians. *Religious Organizations in Community Service* at 9–11. They also buried the impoverished who could not afford funeral costs. *Id.* During Roman rule, Christian bishops implemented Christ's teachings on hospitality by

designating guest rooms in their home as *hospitalium*—rooms for use of the poor and sick, whom they tended. *See, e.g.*, Michele Augusto Riva and Ciancarlo Cesana, *The charity and the care: the origin and the evolution of hospitals*, 24 Europ. J. Internal Med. 1, 2 (2013) (quoting 1 Timothy 3:2). And by the fourth century, St. Basil founded the earliest model of the hospital and clinic—a public institution dedicated to healing that included convalescent homes and hospices for travelers and the poor. *Id.*

Islam emerged in the seventh century and, like the Judeo-Christian traditions, taught charity as a core precept. The Qur'an instructs Muslims to "practice regular charity." Qur'an 2:43 (Y. Ali, transl.); *see also id.* at 3:92; 9:60; 51:15–19. The Five Pillars of Islam guide daily life for Muslims, and the fifth pillar (*zakat*, or "purification") is the worship of Allah through obligatory giving to the needy. *Religious Organizations in Community Service* at 15. In historic Islamic society, government officials collected these mandatory alms and distributed them to the poor, debtors, slaves, and travelers. *Id.* at 16. The *waaf*, an ancient Muslim social welfare institution, dispersed contributions from voluntary almsgiving (*sadaqa*). *Id.* at 15, 17; Minlib Dallh, *Accumulate but Distribute: Islamic Emphasis on the Establishment of Waqf (Pious Endowment)*, 2 Relig. & Development 21, 24 (2023). "By the middle ages, *waaf* funds were used for a variety of establishments … including public soup kitchens, schools, hospices, orphanages, and hospitals." *Religious Organizations in Community Service* at 17.

Charity is by no means unique to the Abrahamic faiths. *See, e.g.*, Chris Berlin, *Charity in Buddhism*, Harvard Divinity News Archive (Nov. 26, 2018), https://perma.cc/RE3T-HJBU; *id.*, Harpreet Singh,

The Sikh Perspective on Acts of Charity. But a comprehensive account is impractical here, and the Amici States focus on the religions that most heavily influenced the practice of charity in Europe and colonial America.

Charity in medieval Europe.

After the fall of Rome, Christianity dominated Europe and led to the rise of institutions designed to alleviate social ills and provide relief to the poor. *See* King at 5; Brodman at 5–6; Riva and Cesana at 2. As the medieval church moved towards greater structure and centrality for its charitable endeavors, religious organizations and charitable orders emerged—for example, the Antonines, Brothers of the Holy Spirit, and Trinitarians. Brodman at 5–6; Riva and Cesana at 2. The Middle Ages saw the progenitor of the modern hospital become ubiquitous throughout European towns. Brodman at 5, 45–88; Riva and Cesana at 2. The early hospital had a largely ecclesiastical foundation; many began from the initiative of "bishops, cathedral chapels, monasteries and religious orders, and pious laypeople." Brodman at 5. Indeed, for centuries the medieval monastery "was almost the only institution in Europe whose chief task was to care for the sick." Riva and Cesana at 2 (quotation omitted). In similar vein, monasteries and religious laity were responsible for the rise of almshouses, hospices sheltering pilgrims and travelers, and leper houses throughout the continent. Brodman at 41–44, 89–91, 126–36. By the thirteenth century, charitable religious orders arose dedicated to caring for "victims of particular diseases, pregnant women," and war prisoners. *Id.* at 6.

While medieval charity exhibited some "intermingling of secular and religious initiatives," the

"fundamental impulse was ecclesiastical." *Id.* at 5. Many of the voluntary lay organizations engaged in charitable works, such as fraternities and guilds, were religiously affiliated. *Id.* at 6–7.

At the close of the Middle Ages, social welfare became increasingly a partnership between public and ecclesiastical sectors, especially in England. There, the "main burden for the poor rested on the shoulders of the [C]hurch" of England, which was established as the official state church. Howard Jacob Karger & David Stoesz, *American Social Welfare Policy: A Pluralist Approach* 39 (2006). That ultimately led to a greater public role in social welfare. *Id.* The 1601 Elizabethan Poor Laws established governmental responsibility to provide poor relief, but church parishes bore primary responsibility for administering that public aid—a statutory model initially adopted in several American colonies, in tandem with private charity. King at 6.

Charity in the New World.

The religious history of charity spanned the Atlantic and continued in the New World with the Puritans, Quakers, and other settlers. Colonial charity's religious character took early form on board the *Arbella*, a ship embarking from England with Puritan settlers to Massachusetts in 1630. Matthew S. Holland, *Bonds of Affection: Civic Charity and the Making of America—Winthrop, Jefferson, and Lincoln* 21 (2007). There, John Winthrop, governor of the Massachusetts Bay Company, delivered what became arguably the "most famous text in 17th century America," entitled *A Model of Christian Charity*. *Id.* at 2, 21; Perry

Miller, *The Shaping of American Character*, 28 New Engl. Q. 435, 443 (1955).

Winthrop exhorted the colonists that the scriptural "command[] to love his neighbor as himself" is the ground on which "stands all the precepts of the moral law" and requires that "every man afford his help to another in every want or distress." John Winthrop, *A Model of Christian Charity* (1630), in *Collections of the Massachusetts Historical Society* 34–35 (1838), https://perma.cc/RFL9-43D8 (spelling modernized). Anticipating the struggles ahead, he instructed that a "community of perils calls for extraordinary liberality." *Id.* at 35, 38–40. And he framed charity as a religious imperative: "For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us," such that we must not "shame the faces" of God's servants. *Id.* at 47. The *Model* speech was not mere sentiment. On Winthrop's watch, "considerable care was rendered to the poor" in the Massachusetts colony. Holland at 42. Both Winthrop and his address resonated throughout the early colonies, influencing Founders and creating an enduring impact on American political consciousness. *Id.* at 2, 21, 63–65, 70–71.

Winthrop was not the only voice on charity, either. Cotton Mather, a Puritan minister and prolific American writer, articulated a clear religious impetus for charity in 1710 in his *Essays to Do Good*. It is only the "glorious work of grace on the soul," Mather explained, that turns a sinner into one "zealous of good works." Cotton Mather, *Essays to Do Good* 17–18 (publ. American Tract Society, 1840), https://perma.cc/9HWP-LZ2F. The "moral law (which prescribes good works)" must then "be the rule of [every Christian's] life." *Id.* at 19. Mather detailed "good works" across every

aspect of human relations and offered specific instructions: "be concerned that the orphans and widows may be well provided for," care for those enduring "painful poverty" or "languishing with sickness," and "do not suffer" any "poor children" to remain "destitute of education." *Id.* at 48–51. And Mather practiced what he preached, with one source describing his charitable gifts as "sufficient to make him a one-man relief and aid society." Robert H. Bremner, *American Philanthropy* 13 (2d ed., 1988). He also was an early pioneer of associational charities. *Id.*

The connection between religion and charity was not unique to the Puritans. William Penn, a preeminent Quaker statesman and founder of Pennsylvania, likewise believed that "religious faith was one of the few forces" that could "truly move a people from selfishness to altruism." Arlin M. Adams & Charles J. Emmerich, *William Penn and the American Heritage of Religious Liberty*, 8 J. L. & Relig. 57, 58, 70 (1990). In one of his expositions on charity, he opined that "Pure Religion and undefiled before God the Father, is this, to visit the Fatherless and the Widows in their Affliction." William Penn, *Some Fruits of Solitude* 153 (1693) (publ. H. M. Caldwell Co., 1903), https://www.loc.gov/item/03020370/. And he found it a "severe Rebuke upon us, that God makes us so many Allowances, and we make so few to our Neighbor: as if Charity had nothing to do with Religion." *Id.* at 172–73.

From the outset, then, charity in colonial America was bound up with religious teaching and religious luminaries. This was also true in practice. "In the early colonies, social welfare was rudimentary at best, and entirely entrusted to the church: The vestry was charged with caring for the poor, the aged and infirm,

the sick and insane, and for orphans and other homeless children." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2170 (2003) (quotation omitted). Western Christian traditions of individual charity migrated with settlers to North America, and religious motivations were prevalent in both individual and associational charity in the 1700s. King at 5.

That became increasingly true with the advent of the Great Awakening in the mid-1700s, an event that stirred both religious fervor and "popularized philanthropy as a mass movement." *Id.* at 7; Bremner at 19–20. The mid-1700s also saw charitable aid to disaster relief. *See* Ryckman at 931. In 1760, private efforts throughout the colonies—including by churches—collected "impressive sums" for victims of the Boston fire. Bremner at 25. And during "the greatest relief crisis in the colonial period," when the closing of the Boston harbor following the Boston Tea Party threatened the city with "economic ruin," colonists gave food, clothing, and livestock "even more generously than before." *Id.* New England looked to the religious at this time of need, soliciting aid from Pennsylvania and New Jersey Quakers. *See id.*

Charity at the Founding.

From European and early colonial experience, the Founders understood charity as integral, if not exclusive, to religion. Consider for example some of the most famously philanthropic Framers and constitutional signatories, Benjamin Franklin and Dr. Benjamin Rush.

Benjamin Franklin's myriad contributions to public-welfare efforts are well-known and need little

recitation here. *See, e.g.*, *id.* at 14–18. It is noteworthy, however, that Franklin was keenly aware of charity's religious roots, as the teachings of Cotton Mather and William Penn greatly influenced him. For example, he wrote at one point to Mather's son, Samuel Mather, that his father's *Essays to Do Good* "gave me such a Turn of Thinking to have an Influence on my Conduct thro' Life … and if I have been, as you seem to think, a useful Citizen, the Publick owes the Advantage of it to that Book." *Letter from Benjamin Franklin to Samuel Mather* (May 12, 1784), https://perma.cc/P99P-MPP6.

Dr. Benjamin Rush, another notable Founder, was one of the "most accomplished American physicians and medical teachers of his generation"—and one of the most philanthropic. Alyn Brodsky, *Benjamin Rush: Patriot and Physician* 5 (2004); Bremner at 30–32. Rush founded the country's first free medical clinic, the Philadelphia Dispensary, and advocated for the abolition of slavery, improved education for women, and humane treatment for the mentally ill. Brodsky at 5–6; Bremner at 33; Nathan G. Goodman, *Benjamin Rush: Physician and Citizen 1746-1813* 158–59 (1934). Rush's charitable practices emanated from his deeply religious convictions. *See* Bremner at 34; Goodman at 13, 79–80, 131, 158–59, 308–09; Brodsky at 19–21. Nothing has greater effect on the "[a]melioration of our world," he once suggested, than the "faithful imitation of the example of our Savior and a general obedience to the plain and humble precepts of the Gospel." *Letters of Benjamin Rush* 441 (ed. L.H. Butterfield) (University of Virginia Press, Rotunda 2022) (Sept. 28, 1787 letter to John Coakley Lettsom).

Founding-era documents likewise memorialize the connection between religion and charity. The Virginia Declaration of Rights, drafted by George Mason in 1776, offers "revealing commentary on the political status of Christian charity at the dawn of American independence." Holland at 93. The concluding paragraph, on "Religion, or the duty which we owe to our Creator, and the manner of discharging it," articulates a "mutual duty of all to practice Christian forbearance, love, and charity, towards each other." Virginia Decl. of Rights, §16, https://perma.cc/R8R9-ZAMR (spelling modernized). This line survived substantial edits to the clause by James Madison and received the approval of the entire Virginia Assembly, suggesting that "the notion of some kind of public duty to Christian love was more than just an idiosyncratic aspiration of a single thinker" but rather endorsed by "one of the most notable assemblies of the early republic." Holland at 94.

This view continued in the years immediately following the Founding and ratification. For example, as Washington exited the presidency, he exhorted Americans that "without a 'brotherly affection and love for another,' without robust practices of 'charity' and other characteristics of the 'Divine Author of our blessed religion,' America can 'never hope to be a happy nation.'" Holland at 131 (quoting George Washington's 1796 *Farewell Address*). And "[r]eligion and social welfare in nineteenth-century America" continued to be "inextricably linked": "Almost all forms of relief emanated from church groups." Karger & Stoesz at 44.

In short, charity and religion have long been linked. When the First Amendment steps up to

protect religious conduct, acts of charity are easily in the core of that protection as originally understood.

B. The power to define religion is the power to destroy it.

This Court has long looked to the religious history of charity to inform the Court's guidance on the government's role in regulating charitable practices. It makes good sense that the Court would look at history, rather than theory alone, for its understanding of the limits of government authority over religion. In its earliest cases, the Court recognized that government power over institutions poses a threat to their existence. *McCulloch v. Maryland* famously declared that the "power to tax involves the power to destroy." 17 U.S. 316, 431 (1819). Such logic informs the Court's recognition that the definition of religious practice "is not to turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Rev. Bd. of Ind. Emp't. Sec. Div.*, 450 U.S. 707, 714 (1981). Here, those principles apply in full force, as the power to define what practices of religious people are sufficiently "religious" is arguably more destructive than even the power to tax.

The Court recognized that concern more than a century after *McCulloch* when it decided *Cantwell v. Connecticut*. *Cantwell* involved a First Amendment challenge to a Connecticut law barring solicitation. 310 U.S. at 301–02. While the law contained a religious exception, it permitted religious practitioners to seek charitable contributions only if they first obtained a state license. *Id.* at 305. The licensing officer had the power "to determine whether the cause is a religious one" based on his "judgment." *Id.* If he determined the cause was not "religion," then

solicitation for it "be[came] a crime." *Id.* The Court rebuffed that statutory scheme, with language echoing *McCulloch*: "Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment." *Id.*

The Wisconsin Supreme Court's decision illustrates the peril of a contrary approach—regardless of whether government "judgment" on "whether the [practice] is religious" is made by the state executive or judiciary. *Id.* Here, the Wisconsin Supreme Court declared that charity, unlike "[t]ypical" religious practices like worship and proselytizing, Pet.App.29a–31a, is inherently "secular." But charitable work has religious roots at least as longstanding and widespread as any secular ones—and religion arguably may claim precedence. *See* I.A. At minimum, this renders charity a practice that can be *either* religious or secular. It cannot be the rule that any activity—no matter how deeply rooted in centuries of religious teaching and practice—becomes secular the moment a nonreligious section of society adopts it. That presumption preferences secular people and organizations over religious ones and is anathema to the First Amendment.

Even the "paradigmatic" religious practices identified by the Wisconsin Supreme Court—evangelism and worship—could become secular under Wisconsin's test. "[S]preading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism." *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943). Yet countless secular organizations also distribute written materials espousing their views and mission. Planned Parenthood, for instance, "distributed" in 2012 several "briefing sheets, talking points, and a wide variety of other advocacy

materials" to spread "awareness" of its views on "reproductive health." *Services*, Planned Parenthood (Jan. 2014), https://perma.cc/Y9XQ-MC5K. But Planned Parenthood's distribution of literature spreading its beliefs does not mean that door-to-door evangelism by a Jehovah's Witness is now a "secular" activity.

Worship provides an even clearer example. The Wisconsin Supreme Court treated worship services as religious beyond doubt. But even church services now have secular iterations. There is an increasing rise of so-called "secular churches" that gather for nonreligious worship services. Jacqui Frost, *Inside the "secular churches" that fill a need for some nonreligious Americans*, CBS News (Jan. 11, 2024), https://perma.cc/8WL9-4JW3. They "mimic" and "directly borrow[] from religious organizations" by "using the language and structure of 'church.'" *Id.* For example, they may engage in "shared testimonies, collective singing, silent meditation"—"all activities you might find at a Christian church service on a Sunday morning in the United States." *Id.* But atheist co-opting of a most classically spiritual activity—worship—surely does not transform worship by religious people into an inherently secular practice.

In sum, secular organizations can and do participate in secular versions of many core religious practices. Likewise, many sacred religious items have corresponding secular uses. Few would dispute the religious nature of communion wine, candles lit during Hanukkah, or Islamic prayer rugs. Yet wine, candles, and rugs are ubiquitous in secular life. That duality does not erase the religious nature of these items when used by people of faith for religious purposes. Acts of charity are just the same.

II. The decision below creates a legal double bind for religious charities.

Taking the decision below in the broader legal context reveals a double bind for religious organizations. The setup takes three steps. First, the State partners with religious organizations to achieve social goods. Second, the State attaches requirements and limitations when it partners with religious organizations. And finally, those requirements and limitations conflict with the Wisconsin Supreme Court's new guidelines for establishing religiosity. When taken together, these conflicting signals leave religious organizations in a hopeless bind. And at worst, they signal that religious institutions are not free to engage in social services in the same way as secular organizations.

Start with the basics. Religious groups frequently seek to create the same social goods as the government, much to society's benefit. Alexis de Tocqueville wrote over 180 years ago that America benefits from such social institutions in numerous ways. *See* 1 Alexis de Tocqueville, *Democracy in America*, 230–33 (Henry Reeve trans., 1835), https://perma.cc/34KE-NW2T. Among them, our country can thrive without a bloated government because social institutions meet so many needs for which people might otherwise turn to the government. *Id.* In short, everyone benefits when social institutions, including religious groups, work together to improve the collective lot of the people.

Wisconsin agrees. The Badger State fosters relationships with religious organizations to assist with "the prevention of delinquency and crime" and "the rehabilitation of offenders." Wis. Stat. §301.065(1). It also works with religious groups to provide services

for children and families, including childcare for families in poverty, emergency assistance after fires or natural disasters, services for homeless and runaway youth, shelter and counseling for victims of domestic violence, treatment of drug and alcohol abuse, and literacy training. Wis. Stat. §§49.114, 49.257, 49.137, 49.138, 49.1385, 49.165, 49.167, 49.169. And it enlists the help of religious organizations in providing social services, including counseling people with epilepsy, distributing food to the needy, educating the public about Alzheimer's, and providing respite for those who take care of individuals with special needs. Wis. Stat. §§46.027, 46.57, 46.75, 46.856, 46.986.

Working alongside the State comes with strings attached. For each of the three areas of collaboration outlined above, Wisconsin also sets out conditions: a "religious organization may not discriminate" or deny services "on the basis of religion, a religious belief or nonbelief, or a refusal to actively participate in a religious practice." Wis. Stat. §301.065(6); *see also* §§46.027(6), 49.114(6). They also may not use government funds "for sectarian worship, instruction, or proselytization." Wis. Stat. §301.065(9); *see also* §§46.027(9), 49.114(9). These limitations are supposed to "allow the department to contract with, or award grants to, religious organizations … on the same basis as any other nongovernmental provider" while not "impairing the religious character of such organizations" and also preserving "religious freedom of [the program's] beneficiaries." Wis. Stat. §301.065(1); *see also* §§46.027(1), 49.114(1).

Putting these laws together with the Wisconsin Supreme Court's new rule creates a hopeless bind. Religious institutions that want to remain an active part of family and social services will have to continue

meeting the State's requirements of accepting all-comers and segregating their worship and proselytization activities away from their social services. But those acts—serving all comers and forgoing proselytization or worship—are exactly what the Wisconsin Supreme Court pointed to as markers of a secular organization. Pet.App.29a–31a. In other words, an organization that qualifies as religious will presumptively not be able to meet the government's requirements for collaboration, and an organization that can collaborate with the government presumptively is not religious.

To be sure, some organizations may manage to span the gap. Churches might be able to reorganize their ministry arms to ensure that none are left out in the cold. And organizations that might struggle to meet Wisconsin's religiosity test could combine to create a more-religious organization to shield their status while still maintaining their government-sanctioned programs.

But not every organization will be able to do so, and none of them should have to. The government cannot require religious groups to disavow their religious nature in order to participate in broadly available government programs. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017). Even if nonprofit lawyers can find a way around the obstacles, and even if every religious group would manage to thread the needle, the religiosity test still sends a message disfavoring religion in the public sphere. This anti-religious double-bind violates the First Amendment's guarantee of free religious exercise.

III. Winnowing out religious claims before merits review is unnecessary.

While the Wisconsin Supreme Court's opinion misinterpreted the First Amendment, it did so because of fear. At the heart of its opinion is worry that religious claims will overwhelm the system if unchecked. Simply put, if courts cannot employ strict religiosity tests or other winnowing doctrines, how will courts protect the legal system, and public order more broadly, from being overrun with religious claims?

To address the quandary, courts sometimes regrettably adopt judge-made winnowing techniques before ever reaching the merits of the claim. One such technique featured in *Employment Division v. Smith*: religious claims against a "neutral law of general applicability" receive no heightened scrutiny. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). In other words, to avoid weighing secular and religious imperatives, *Smith* denies that a burden on religion is really a burden. Wisconsin's technique is similar. Religious claims that fail to meet the court's standard receive no recognition. In other words, Wisconsin denies that a religious claim is really religious.

Judicial winnowing techniques distort religious liberty law. *Smith*'s failures have led many to question its continued viability. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 544–65 (1997) (O'Connor, J., dissenting); *Fulton v. City of Philadelphia*, 593 U.S. 522, 543–44 (2021) (Barrett, J., concurring); *id.* at 545–618, (Alito, J., concurring); *id.* at 618–627 (Gorsuch, J., concurring). Perhaps this is why there are only "four states in which the state high courts followed *Smith* for purposes of interpreting their state

constitutions' free exercise clause." W. Cole Durham and Robert Smith, *State standards of free exercise review under state RFRAs and state high court decisions*, 1 Religious Organizations and the Law §3:28, Westlaw (database updated Dec. 2023).

Wisconsin's approach likewise distorted the core principles that protect religion from encroachment by the government. *See above* at I.B.; Br. for Pet. at 24–50.

And for all the damage, winnowing out religious claims is not necessary for preserving the rule of law. The experience of the States as laboratories of democracy have been proving as much in the decades since *Smith*.

Ohio is a case study for robust religious-liberty protections. Ohio's Constitution prohibits "interference with the rights of conscience." Ohio Const. art. I, §7. Per Ohio Supreme Court precedent, this provision is a "ban on any interference" with religious practice, rather than a prohibition on laws targeting religion. *Humphrey v. Lane*, 89 Ohio St. 3d 62, 67 (2000). Even "tangential effects" on religious practice are "potentially unconstitutional" under the three-step test. *Id.* First, a plaintiff states a "prima facie free exercise claim" when he shows "that his religious beliefs are truly held and that the governmental enactment has a coercive affect against him in the practice of his religion." *Id.* at 68. Second, "the burden shifts to the state to prove that the regulation furthers a compelling state interest." *Id.* at 69. Finally, "the state must prove that its regulation is the least restrictive means available of furthering that state interest." *Id.*

Despite taking religious claims on their face and applying strict scrutiny to all alike, Ohio's streets are

not flooded with parades of horribles. This spring marks twenty-five years since Ohio's landmark case establishing strict scrutiny for all religious claims, and Ohio has never been forced to back away to a lower standard to manage the flow of religious claims. *Humphrey*, 89 Ohio St. 3d at 62.

The same goes for religious exemptions. For example, Ohio administers a tax exemption for "church camping" property, which includes only property owned by groups formed "for religious purposes." Ohio Rev. Code §5709.07(A)(3), (D)(1). But not every campground in Ohio has sought exemptions and overrun the system. Ohio exempts "religious" groups from licensing requirements for embalming, but there is no corpse crisis. Ohio Rev. Code §4717.12(B). It permits low-alcohol beverages for minors if "given for established religious purposes," but this provision has not caused widespread underaged drinking. Ohio Rev. Code §4301.631(F), (H). And Ohio exempts religious incense from its ban on public smoking, but the ban has not been rendered useless by claims of religious fumigation. Ohio Rev. Code §3794.01(A).

The States could go on. Twenty-four States have enacted Religious Freedom Restoration Acts. 1 Religious Organizations and the Law §3:28. Eleven other state supreme courts have taken an approach similar to Ohio's. *Id.* And the sky has fallen in none of them.

All this shows that the States are proof of the viability of confident pluralism: societal flourishing and respect for religious liberty do not compete but reinforce one another. The government need not weed out religious claims before even reaching the merits by denying the religiosity of religiously motivated acts or the burden of a neutral law on them.

* * *

Religious organizations have long engaged in charity, and the First Amendment has protected their ability to do so. The government may not erase that heritage by defining away religion's relationship to charity. Doing so not only violates the First Amendment, it also creates a Catch-22 for religious organizations who want to continue partnering with government without shedding their religious identity. And in the end, the damage to the religious institutions does nothing to advance First Amendment principles.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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FEBRUARY 2025

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