INN OF COURT FIRST AMENDMENT PROGRAM TIMED AGENDA DEC 10, 2024

Catholic Charities cases (6:30-7:00 PM)

- 6:30 Introduction
- 6:35: CCB position
- 6:45: WI position
- 6:50: Questions and discussion

Library case (7:00-7:30 PM)

- 7:00 Introduction
- 7:05 Factual background
- 7:10 Little's position
- 7:15 Llano County's position
- 7:20 Questions and discussion

Apache case (7:30-8:00 PM)

- 7:30 Introduction and facts
- 7:36 Apache position
- 7:43 Government position
- 7:50 Questions & Discussion

Team members

Beryl Abrams
Evan Brustein
Brian Choi
Tom Brown
Richard Dolan
Rozalind Fink
Aegis Frumento
Erik Groothuis
Michael Patrick
Ali Rawaf
Robert Smith

TEAM BIOS

Beryl Abrams

Beryl Abrams was Associate General Counsel for Columbia University from 1981 through mid-2018. She had lead responsibility on a broad range of matters, including overseeing all copyright and trademark matters for the University, serving as legal counsel to the University's Standing Committee on the Conduct of Research, and performing a leadership role in the University's international operations, overseeing the establishment of offices and projects in Africa and Central Asia. While at Columbia, she was a Lecturer in Law at Columbia Law School, teaching seminars in Intellectual Property.

Ms. Abrams's earlier legal career included four years as an associate at Paul Weiss and two years as an associate at Hogan & Hartson (now Hogan Lovells).

In recent years, Ms. Abrams has done pro bono work representing unaccompanied minors in immigration proceedings, through Kids in Need of Defense. She also works with formerly incarcerated individuals through the Fortune Society.

She is a graduate of University of Pennsylvania and Columbia Law School, where she was an editor of the Law Review.

Evan Brustein

Evan Brustein is the founder of Brustein Law PLLC, where he represents individuals who have had their civil rights violated by their employers, the police, or other institutions. Prior to entering private practice, Evan served as Senior Counsel in the New York City
Law Department's Special Federal Litigation Division, where he defended Section 1983 cases in the Southern and Eastern
Districts of New York. The New York City Bar Association awarded Evan the Municipal Affairs Award for outstanding achievement for his work representing the City of New York. Evan has also been honored by the New York City Law Department with the Division Chief Awards for both the Special Federal Litigation Division and the Family Court Division. In his spare time, Evan coaches his son's travel baseball team.

Brian Choi

Brian S. Choi is a partner at Kasowitz Benson Torres, where his practice focuses on complex commercial litigation and white collar defense and investigations. He has represented companies, boards of directors, and individuals under investigation by the United States Department of Justice, the Securities Exchange Commission, and other regulatory enforcement agencies. He also has significant experience representing clients in a broad spectrum of commercial litigation matters in federal and state courts, including securities fraud, antitrust and breach of contract cases. Brian has been recognized on Benchmark Litigation's 40 & Under Hot List. Prior to joining the firm, Brian clerked for the Honorable William H. Pauley III in the Southern District of New York. Brian is a 2011 cum laude graduate of Duke University School of Law, and he received his B.A. with distinction from University of Michigan in 2008.

Tom Brown

Tom Brown, Morea, Schwartz, Bradham, Friedman & Brown LLP

Tom has over 30 years of complex commercial, financial, employment and trust and estate litigation experience. He has handled a broad range of commercial, financial and employment cases, involving allegations of fraud, breach of fiduciary duty, breach of contract, breach of employment covenants, theft of trade secrets, discrimination and more. Tom has also represented executors, trustees and beneficiaries in numerous will contests and trust disputes.

Tom has successfully litigated many cases to verdict before juries, judges and arbitrators. He has also argued and won numerous appeals in both state and federal courts. He has handled all aspects of pre-trial strategy and discovery, including taking and defending depositions throughout the United States and abroad. Tom regularly advises corporations and individuals on litigation, litigation avoidance strategy and employment contractual matters.

Tom received his law degree from Cornell University (magna cum laude) in 1994, where he was an editor of the law review and a member of the Order of the Coif. He graduated from Colgate University (cum laude) in 1988 with a bachelor's degree in history. Tom has been named as a "New York Super Lawyer" every year since 2009 and is recognized as an AV (Preeminent) peer rated attorney by Martindale-Hubbell.

Richard Dolan

Richard is a co-founder of Schlam Stone & Dolan LLP and the co-head of its civil litigation department and practices complex commercial litigation. In a forty-year career, he has tried almost 100 jury and non-jury cases. Richard has also handled trials, arbitrations, and appeals involving antitrust, securities, telecommunications, bankruptcy, sports, and entertainment law. His clients include Fortune 500 corporations, family businesses, real estate consortiums and partnerships, and electronics manufacturers. Clients frequently seek his advice on strategically negotiating threatened transactional disputes.

Richard advises clients on corporate governance issues and on negotiating and drafting agreements in a wide variety of commercial contexts, including contracts and other business documents. He is currently defending the NYC Police Benevolent Association and enjoys taking on cases that other firms or lawyers reject as politically unpopular.

Before founding Schlam Stone & Dolan, Richard served as an Assistant United States Attorney, Civil Division, for the Eastern District of New York, and prosecuted matters relating to airplane crashes, government contract claims, antitrust actions, medical malpractice, environmental violations, and federal forfeiture. During his four years with the government, he litigated more than 25 cases before the Second Circuit Court of Appeals, including successfully arguing in defense of the constitutionality of numerous federal statutes and regulations.

Richard has been selected to the New York Metro Area list of Super Lawyers® in Business Litigation, Appellate, and Antitrust Litigation. Among his publications, he has co-authored the New York Law Journal's monthly Eastern District Roundup column since 1990.

Rozalind Fink

Rosalind Fink is a founding member and past president of our Inn.

She has practiced employment law since 1994, first with Brill & Meisel and then, after it dissolved in 2021, as a solo practitioner.

.Prior to joining Brill & Meisel, Ms. Fink was the Director of Columbia University's Office of Equal Opportunity and Affirmative Action, and was responsible for ensuring that the University was in compliance with all federal, state and local EO/AA laws and regulations. As part of this work, she developed and implemented Columbia's sexual harassment policies and programs. She also counseled many faculty, staff and students on harassment and discrimination issues.

While at Columbia, she was also an adjunct associate professor at Barnard College, teaching a colloquium for Political Science majors on Civil Rights and Liberties.

Ms. Fink's earlier legal career includes two years as an associate at Proskauer Rose and several years at the New York State Department of Law (the Attorney General's office), rising to a position as head of the Constitutional Litigation Group before she left to join Columbia.

Aegis Frumento

Aegis J. Frumento co-heads the Financial Markets Practice Group of Stern Tannenbaum & Bell in New York City, where he focuses on representing starting to mid-sized financial firms and individual investment professionals in transactions, regulatory enforcement and litigation/arbitration advocacy. Aegis has over 40-years' experience litigating and arbitrating complex corporate, commercial and securities disputes, including jury and non-jury trials in state and federal trial courts, SEC investigations and administrative hearings, FINRA investigations and enforcement proceedings, and FINRA, AAA, JAMS, FedArb and other arbitrations. His counseling work focuses on assisting start-ups in the financial and fintech sectors, private equity funds, investment advisers and their principals to ensure their business structures, compliance programs, operations, and disclosures are properly documented and effectuated. Aegis believes the two sides of his practice inform each other, and make him more sensitive as an advocate to the business realities behind a dispute, and as a counselor to the real litigation and regulatory risks his business clients face.

Aegis holds degrees from Harvard College and New York University Law School. Before joining Stern Tannenbaum in 2012, Aegis had been a partner and practice head at Duane Morris LLP, the managing partner of the financial industry boutique Singer Frumento LLP, and a Managing Director of Citigroup and Morgan Stanley. He is licensed to practice law in New York, and also admitted to the US District Courts in New York, the US Courts of Appeal for the 2d and 3d Circuits, and the US Supreme Court. He is a member of the SIFMA Legal and Compliance Division, a Fellow of the American Bar Foundation, a member of the New York American Inn of Court and the American Bar Association, a delegate to the House of Delegates of the New York State Bar Association, the immediate past chairperson of the New York City Bar Association's standing Committee on Professional Responsibility and a current member of its Ethics Committee. He is rated AV Preeminent by Martindale-Hubble and is a New York Metro Area SuperLawyer.

Aegis has written extensively on legal and securities matters over the years, and frequently appears on panels. His articles have been published in *The Business Lawyer*, *The Journal of Investment Compliance*, and *The Securities Arbitration Commentator*, among other publications, including over 100 weekly opinion pieces under the banner *InSecurities* in the securities industry blog *BrokeandBroker.com* (2018-2022). In what little time he has left, he enjoys retreating to his woodshop to build something that (unlike many legal arguments) he can be sure will work.

Aegis can be reached at afrumento@sterntannebaum.com.

Erik Groothuis

Erik Groothuis, a member of the Firm's management committee, has spent over 25 years litigating complex commercial disputes in New York City. He is widely recognized for his tenacious advocacy, strong writing and oral advocacy, and unflappable judgment. His matters have been covered by the New York Times, New York Daily News, and New York Post. He focuses on three main areas:

- Financial services litigation
- Real estate litigation
- Professional liability (legal and accounting malpractice) litigation

Erik also regularly represents clients in business divorce, breach of contract, corporate governance, defamation, insurance, investor and securities fraud, cryptocurrency disputes, and business-torts litigation, as well as related appeals. He often litigates at home in the Commercial Divisions of New York's state courts and the United States District Courts for the Eastern and Southern Districts of New York, but has represented clients in courts throughout the United States, as well as in FINRA and AAA arbitrations. Erik has been retained on behalf of both plaintiffs and defendants in legal malpractice litigation.

Clients depend on Erik's counsel to resolve their issues and get on with their lives and businesses. Known for his ability to generate superior work product, Erik is tenacious, efficient, and always mindful of the client's bottom line.

Erik also negotiates employment and severance agreements and other commercial contracts such as licensing, purchase and sale, and services agreements.

In 2022, Erik was appointed to the American Arbitration Association's roster of neutrals and maintains an active practice serving as an arbitrator in commercial cases. He is certified as a Small Claims Court arbitrator in New York County and is a Mediator trained by the International Institute for Conflict Prevention and Resolution.

Michael Patrick

Member of the Inn of Court since 2010. Retired in 2016, doing pro bono, mentoring, and not-for-profit since. Former Partner at Fragomen, Del Rey, Bernsen & Loewy (1990-2016)(corporate immigration), including serving on the Executive Committee and as General Counsel. Partner and Co-Founder at Campbell, Patrick & Chin (1986-1990)(civil litigation, immigration and general practice). Special Assistant US Attorney, SDNY, including Chief, Immigration Unit

(1981-1986). Assistant Corporation Counsel, NYC Law Department (Torts Division, Special Trials Unit)(1978-1981).

Ali Rawaf

Ali Rawaf is a litigation law clerk at Romano Law PLLC, where he focuses on commercial litigation and media law, drawing on more than a decade of experience in media and journalism. Before joining Romano Law, Ali served as a legal fellow in the New York State Attorney General's Office, a judicial extern for the Honorable Stewart Aaron of the U.S. District Court for the Southern District of New York, and a summer associate at a civil rights litigation boutique in New York City. Prior to his legal career, Ali was an investigative journalist and producer for CBS News' 60 Minutes, reporting on major domestic and international stories. His work earned him industry recognition, including an Emmy, a DuPont, and an Edward R. Murrow Award.

Robert Smith

Bob Smith retired from the practice of law in 2024 after a 56-year career, during which he was a commercial litigator at the Paul Weiss firm, an Associate Judge of the New York State Court of Appeals, and, most recently, Senior Counsel at Friedman Kaplan Seiler Adelman & Robbins. His experience as a lawyer included many trials and many appellate arguments, including two in the United States Supreme Court. As a judge, he was the author of important and sometimes controversial opinions on subjects including the state budget process, freedom of religion, capital punishment and gay marriage.

406 Wis.2d 586, 2023 WI App 12
Court of Appeals of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc. and Headwaters, Inc., Petitioners-Respondents, †
v.
State of Wisconsin LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant, State of Wisconsin Department of Workforce Development, Respondent-Appellant.

Case No.: 2020AP2007
|
Oral Argument: August 3, 2022
|
Opinion Filed: February 14, 2023

Synopsis

Background: Nonprofit corporation that was Roman Catholic diocese's social-ministry arm and nonprofit corporations that were that corporation's sub-entities sought judicial review of Labor and Industry Review Commission's (LIRC) determination that they were not organizations operated primarily for religious purposes and that the Unemployment Compensation Act's religious-purposes exemption therefore did not apply to them. The Circuit Court, Douglas County, Kelly J. Thimm, J., reversed. The Department of Workforce Development (DWD) appealed. The Court of Appeals, 2021 WL 9782350, certified question to the Supreme Court, which denied certification.

[Holding:] In a case that presented issues of apparent first impression, the Court of Appeals, Stark, P.J., held that the corporations were not organizations operated primarily for religious purposes.

Reversed.

Procedural Posture(s): Motion for Reconsideration; On Appeal; Review of Administrative Decision.

West Headnotes (25)

[1] Taxation Statutory Provisions

Wisconsin's unemployment compensation statutes embody strong public policy in favor of compensating unemployed. Wis. Stats § 108.01.

[2] Taxation Proceedings

On appeal from circuit court's reversal of Labor and Industry Review Commission's (LIRC) determination that nonprofit corporations were not operated primarily for religious purposes and that Unemployment Compensation Act's religious-purposes exemption therefore did not apply to them, court of appeals would review LIRC's decision, rather than decision of circuit court. Wis. Stats § 108.02(15)(h)(2).

1 Case that cites this headnote

[3] Taxation Proceedings

Labor and Industry Review Commission (LIRC) acts outside its power, as would warrant setting aside order of LIRC, when it incorrectly interprets statute. Wis. Stats § 108.09(7)(c)(6)(a).

1 Case that cites this headnote

[4] Taxation Proceedings

Appellate court will uphold Labor and Industry Review Commission's (LIRC) findings of fact in unemployment-compensation matter if they are supported by credible and substantial evidence. Wis. Stats § 108.09(7).

[5] Taxation Proceedings

Whether employer has proven that it is exempt from coverage under unemployment system involves application of facts to particular legal standard, which is conclusion of law that appellate court reviews independently. Wis. Stats §§ 108.02(15)(h), 108.09(7).

[6] **Statutes** Construction based on multiple factors

Courts give statutory language its common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meanings.

[7] **Statutes** Context

Statutes Similar or Related Statutes

Statutes Unintended or unreasonable results; absurdity

Courts interpret statutory language in context in which it is used, not in isolation but as part of whole, in relation to language of surrounding or closely related statutes, and reasonably, to avoid absurd or unreasonable results.

[8] **Statutes** What constitutes ambiguity; how determined

Statutes Plain language; plain, ordinary, common, or literal meaning

If analysis of statutory language yields plain, clear statutory meaning, then there is no ambiguity, and statute is applied according to that ascertainment of its meaning; however, if statute is capable of being understood by reasonably well-informed persons in two or more senses, then statute is "ambiguous."

[9] **Taxation** Employments subject to tax in general

When determining applicability of Unemployment Compensation Act's exemption for organizations operated primarily for religious purposes and operated, supervised, controlled, or principally supported by church or convention or association of churches, reviewing body considers purpose of nonprofit organization, not church's purpose in operating organization. Wis. Stats § 108.02(15)(h)(2).

[10] **Statutes** Construing together; harmony

In order to give meaning to every word in statute, all words need to be read together.

[11] **Statutes** What constitutes ambiguity; how determined

It is not enough that there is disagreement about statutory meaning; test for ambiguity examines language of statute to determine whether well-informed persons should have become confused, that is, whether statutory language reasonably gives rise to different meanings.

[12] **Statutes** What constitutes ambiguity; how determined

Statutes Application of statute to subject matter or facts

Otherwise unambiguous statutory provision is not rendered "ambiguous" solely because it is difficult to apply provision to facts of particular case.

[13] **Taxation** Charitable, educational, literary, or scientific

When determining applicability of Unemployment Compensation Act's exemption for organizations operated primarily for religious purposes and operated, supervised, controlled, or principally supported by church or convention or association of churches, reviewing body must consider both activities of organization as well as organization's professed motive or purpose; neither consideration alone is sufficient under statute. Wis. Stats § 108.02(15)(h)(2).

[14] **Statutes** Statute as a Whole; Relation of Parts to Whole and to One Another

Statutes are to be read where possible to give reasonable effect to every word.

[15] **Taxation** Charitable, educational, literary, or scientific

In order for Unemployment Compensation Act's exemption for organizations operated primarily for religious purposes and operated, supervised, controlled, or principally supported by church or convention or association of churches to apply, organization must not only have religious motivation, but services provided—its activities—must also be primarily religious in nature. Wis. Stats § 108.02(15)(h)(2).

[16] **Taxation** Construction

Unemployment insurance statutes are remedial in nature; therefore, they must be liberally construed to provide benefits coverage, and exceptions must be interpreted narrowly. Wis. Stats § 108.01 et seq.

[17] **Statutes** Exceptions, Limitations, and Conditions

General rule of statutory construction is that exceptions within statute should be strictly, and reasonably, construed and extend only as far as their language fairly warrants.

[18] **Statutes** Exceptions, Limitations, and Conditions

If statute is liberally construed, exceptions must be narrowly construed.

[19] **Taxation** Presumptions and burden of proof

Burden of proving entitlement to tax exemption is on one seeking exemption.

[20] **Taxation** Presumptions and burden of proof

To be entitled to tax exemption, taxpayer must bring himself or herself within exact terms of exemption statute.

[21] **Taxation** Employments subject to tax in general

Whether organization provides private unemployment insurance to its employees is not factor under Unemployment Compensation Act's religious-purposes exemption. Wis. Stats § 108.02(15)(h)(2).

[22] **Constitutional Law** Labor and Employment

Taxation Charitable, educational, literary, or scientific

Interpreting Unemployment Compensation Act's exemption for organizations operated primarily for religious purposes and operated, supervised, controlled, or principally supported by church or convention or association of churches to require reviewing body to consider both activities of organization as well as organization's professed motive or purpose did not infringe on First Amendment's guarantee of free exercise of religion. U.S. Const. Amend. 1; Wis. Stats § 108.02(15)(h)(2).

[23] **Constitutional Law** Entanglement

Excessive state entanglement in church matters, as would violate First Amendment, occurs if court is required to interpret church law, policies, or practices. U.S. Const. Amend. 1.

[24] **Taxation** Charitable, educational, literary, or scientific

Nonprofit corporation that was Roman Catholic diocese's social-ministry arm and nonprofit corporations that were sub-entities of that corporation were not organizations operated primarily for religious purposes, and therefore Unemployment Compensation Act's religious-purposes exemption did not apply to them; although nonprofit corporation that was diocese's social-ministry arm professed religious motivation, corporations were not actually run

by church, and they primarily administered charitable social services in form of providing work-training programs, life-skills training, in-home support services, transportation services, subsidized housing, and supportive living arrangements. Wis. Stats § 108.02(15)(h)(2).

[25] **Taxation** Charitable, educational, literary, or scientific

Fact that church operates, supervises, controls, or supports organization in charity with religious motivation does not, by itself, mean that organization is operated primarily for religious purposes and that it therefore qualifies for Unemployment Compensation Act's religious-purposes exemption. Wis. Stats § 108.02(15)(h)(2).

****781** APPEAL from an order of the circuit court for Douglas County, Cir. Ct. No. 2019CV324: KELLY J. THIMM, Judge. *Reversed*.

Attorneys and Law Firms

On behalf of the respondent-appellant, the cause was submitted on the briefs of Christine L. Galinat of Department of Workforce Development. There was oral argument by Jeffrey J. Shampo of Department of Labor and Industry Review Commission.

On behalf of the petitioners-respondents, the cause was submitted on the brief of and oral argument by Kyle Torvinen of Torvinen, Jones, Routh & Saunders, S.C., Superior.

Before Stark, P.J., Hruz and Gill, JJ.

Opinion

STARK, P.J.

***592** ¶1 This unemployment insurance case requires us to determine the proper interpretation of the religious purposes exemption under WIS. STAT. § 108.02(15)(h)2. (2019-20). [1] The petitioner-respondents are the Catholic Charities Bureau, Inc. (CCB) as well as four of its sub-entities: Barron County Developmental Services, Inc.; Diversified Services, Inc.; Black River Industries, Inc.; and Headwaters, Inc. [2] CCB asserts that it is exempt from Wisconsin's Unemployment Compensation Act under § 108.02(15)(h)2. because it is "operated primarily for religious purposes." In considering whether it is exempt under the statute, CCB argues that the proper consideration is whether it is operated primarily for a religious *motive* or *reason*.

¶2 Conversely, the Department of Workforce Development (DWD) and the Labor and Industry Review Commission (LIRC) [3] contend that whether CCB is operated primarily for religious purposes depends on whether its *activities* are primarily religious in character. The parties also dispute whether the religious purposes exemption is ambiguous and, if so, how that ***593** ambiguity ****782** should be resolved. Finally, both CCB and DWD argue, albeit for different reasons, that adopting the opposing party's interpretation of the religious purposes exemption will violate the First Amendment to the United States Constitution.

¶3 For the reasons that follow, we conclude that the reviewing body must consider the nonprofit organization's motives *and* activities to determine whether that organization is "operated primarily for religious purposes" under WIS. STAT. § 108.02(15)(h)2., such that the religious purposes exemption to unemployment taxation applies. We further determine that the First Amendment is not implicated in this case. Given the facts here, we conclude that LIRC correctly determined that CCB and its sub-entities are not organizations operated primarily for religious purposes; thus, employees of the organizations do not perform their services under excluded employment as that is defined under § 108.02(15)(h)2. We therefore reverse the circuit court's order and reinstate LIRC's decision. [4]

BACKGROUND

¶4 The facts of this case are undisputed. Every Roman Catholic diocese in Wisconsin has a Catholic Charities entity that functions as the diocese's social ministry arm. Catholic Charities' stated mission is "to provide service to people in need, to advocate for justice in social structures and to call the entire church and other people of good will to do the same." During the administrative proceedings in this case, Archbishop ***594** Jerome Listecki testified that this mission is "rooted in scripture," which "mandate[s]" that the Catholic Church "serve the poor." According to Archbishop Listecki,

inherent in the church's teachings is a "demand" that Catholics respond in charity to those in need.

¶5 CCB is the Catholic Charities entity for the Diocese of Superior, Wisconsin. CCB's statement of philosophy provides that the "purpose" of CCB is "to be an effective sign of the charity of Christ" by providing services that are "significant in quantity and quality" and are not duplicative of services already adequately provided by public or private organizations. CCB provides these services according to an "Ecumenical orientation," such that "no distinctions are made by race, sex, or religion in reference to clients served, staff employed and board members appointed."

¶6 Under CCB's umbrella, numerous separately incorporated nonprofit sub-entities operate sixty-three "programs of service," which provide aid "to those facing the challenges of aging, the distress of a disability, the concerns of children with special needs, the stresses of families living in poverty and those in need of disaster relief." As noted above, four of those sub-entities are at issue in this appeal.

¶7 Barron County Developmental Services, Inc. (BCDS) is a "[c]ommunity rehabilitation program providing services to individuals with developmental disabilities" that focuses "on the development of vocational and social skills that allow a person to reach their highest potential within the community." BCDS contracts with DWD's Division of Vocational Rehabilitation (DVR) to perform job placement, job coaching, and other employment services to assist individuals with disabilities to obtain employment in the community. ***595** BCDS is funded "primarily" through government funding via DVR, but it also receives some ****783** funding from private companies. It receives no funding from the Diocese of Superior. BCDS was formerly known as Barron County Developmental Disabilities Services, but in December 2014, its board of directors "requested to become an affiliate agency" of CCB and its name was changed. Prior to becoming a sub-entity of CCB, BCDS had no religious affiliation. The type of services and programming provided by the organization did not change after it became affiliated with CCB.

¶8 Black River Industries, Inc. (BRI) provides "in-home services, community-based services, and facility-based services" to individuals with developmental disabilities, mental health disabilities, and limited incomes. To serve those in need, BRI works with DVR to provide participants with job training skills; it provides transportation services to disabled adults and seniors; it has a contract with Taylor County to provide mental health services; and it has a food service production facility, a paper shredding program, and a mailing services program to serve the community and provide job training. "[M]uch" of BRI's funding comes from government organizations, including "county services, Department of Health Services, Long-Term Care Division[,] as well as" DVR. BRI receives no funding from the Diocese of Superior.

¶9 Diversified Services, Inc. (DSI) provides services to individuals with developmental disabilities. To do so, DSI offers "meaningful employment opportunities" to these individuals and also hires individuals without disabilities to do production work. Most of DSI's funding comes from Family Care, a Medicaid long-term care program, and from private contracts. DSI receives no funding from the Diocese of Superior.

***596** ¶10 Headwaters, Inc., provides "various support services for individuals with disabilities," including "training services related to activities of daily living," employment-related training services, and job placement. In addition, Headwaters has work-related contracts for individuals to learn work skills while earning a paycheck; provides Head Start home visitation services to eligible families with children; and provided birth-to-three services before Tri-County Human Services assumed providing those services. The majority of Headwaters' funding comes from government grants, and it too receives no funding from the Diocese of Superior.

¶11 CCB's role is to provide management services and consultation to its sub-entities, establish and coordinate the sub-entities' missions, and approve capital expenditures and investment policies. CCB's executive director, who is not required to be a Catholic priest, oversees each sub-entity's operations. Nonetheless, CCB's internal organizational chart establishes that the bishop of the Diocese of Superior oversees CCB in its entirety, including its sub-entities, and is ultimately "in charge of" CCB. New CCB employees are provided with CCB's mission statement, statement of philosophy, and code of ethics, and they are informed that their employment "is an extension of Catholic Social Teachings and the Catechism of the Church." Employees of CCB and its sub-entities are not required to be members of the Catholic faith, but they are prohibited from engaging in activities that violate Catholic social teachings.

¶12 As noted above, CCB's sub-entities provide services to all people in need, regardless of their religion, pursuant to the Catholic social teaching of "Solidarity," which is a belief that "we are our brothers' ***597** and sisters' keepers, wherever they live. We are one human family." Program participants are not required to attend any religious training or orientation to receive ****784** the services that CCB's sub-entities provide. Neither CCB nor its sub-entities engage in devotional exercises with their employees or program participants nor do they disseminate religious materials to those individuals, except for providing new hires with the CCB mission statement and code of ethics and philosophy. Neither CCB nor its sub-entities "try to inculcate the Catholic faith with program participants."

¶13 CCB became subject to Wisconsin's Unemployment Compensation Act, WIS. STAT. ch. 108, in 1972, following CCB's submission of an employer's report stating that the nature of its operations was charitable, educational, and rehabilitative.[5] CCB's sub-entities report their employees under CCB's unemployment insurance account. In 2015, a Douglas County Circuit Court judge ruled that Challenge Center, Inc.—another CCB sub-entity providing services to developmentally disabled individuals—was operated primarily for religious purposes and was therefore exempt from the Unemployment Compensation Act under the religious purposes exemption, WIS. STAT. § 108.02(15)(h)2. CCB and the four sub-entities at ***598** issue in this appeal then sought a determination from DWD that they, too, were exempt.

¶14 DWD determined that CCB and the sub-entities did not qualify for the religious purposes exemption. CCB sought administrative review of that determination, and an administrative law judge (ALJ) reversed, concluding that CCB and the sub-entities qualified for the exemption because they were operated primarily for religious purposes. DWD appealed to LIRC, which reversed the ALJ's decision. CCB then sought judicial review, and the circuit court again reversed, agreeing with the ALJ that CCB and the sub-entities qualified for the exemption. DWD appeals.

DISCUSSION

[1] ¶15 "Wisconsin's unemployment compensation statutes embody a strong public policy in favor of compensating the unemployed." *Operton v. LIRC*, 2017 WI 46, ¶31, 375 Wis. 2d 1, 894 N.W.2d 426. When the Wisconsin Legislature enacted the Unemployment Compensation Act, it recognized that unemployment in Wisconsin is "an urgent public problem, gravely affecting the health, morals and welfare of the people of this state. The burdens resulting from irregular employment and reduced annual earnings fall directly on the unemployed worker and his or her family." WIS. STAT. § 108.01(1). The legislature acknowledged that "[i]n good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners." *Id.* As a result, the legislature concluded that "[e]ach employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its ***599** own unemployed workers." *Id.* "Consistent with this policy, WIS. STAT. ch. 108 is 'liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status.' " *Operton*, 375 Wis. 2d 1, ¶32, 894 N.W.2d 426 (quoting *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983)).

I. WISCONSIN STAT. § 108.02(15)(h)

¶16 Nevertheless, Wisconsin's unemployment insurance law exempts some services ****785** from the "employment" services that are covered by WIS. STAT. ch. 108.[6] The issue in this case, then, is whether CCB and its sub-entities qualify under one of those exemptions. WISCONSIN STAT. § 108.02(15)(h) sets forth the statutory formula for the type of exemption that CCB argues is applicable here. That statute provides:

> (h) "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.

***600** Sec. 108.02(15)(h). Here, the parties' dispute is focused on subd. 2., the religious purposes exemption,

which has two requirements: (1) the nonprofit organization is "operated primarily for religious purposes"; and (2) the nonprofit organization is "operated, supervised, controlled, or principally supported by a church or convention or association of churches."[7] Sec. 108.02(15)(h)2. There is no dispute that CCB and its sub-entities are nonprofit organizations and that they are "operated, supervised, controlled, or principally supported by a church." Thus, the only issue before us is whether CCB and its sub-entities are "operated primarily for religious purposes" and are therefore exempt from paying unemployment tax on behalf of their employees. *See id.*

¶17 To date, no Wisconsin Supreme Court decision or published court of appeals decision has addressed the interpretation of the religious purposes exemption in WIS. STAT. § 108.02(15)(h)2. Our statute, however, is essentially identical to the exemption found in the Federal Unemployment Tax Act (FUTA). *See* 26 U.S.C. § 3309(b)(1)(B). DWD asserts—and CCB does not dispute—that § 108.02(15)(h)2. was enacted to "conform Wisconsin's unemployment law with [the] federal law in 26 U.S.C. § 3309(b)(1)(B)." *See* 1971 Wis. Laws, ch. 53, § 6. Other states have also included religious purposes exemptions in their unemployment insurance laws; however, there is a distinct lack of consensus as to the proper interpretation of the relevant statutory language among these different jurisdictions. ***601** [8] Our task, then, is to determine the statute's meaning based on its language and relevant legal authority.

II. Standard of Review

[2] **[3]** ¶18 On appeal, we review LIRC's decision, rather than the decision of the circuit court. *Operton*, 375 Wis. 2d 1, ¶18, 894 N.W.2d 426. Our scope and standard of judicial review of LIRC's decisions concerning unemployment insurance are established ****786** in WIS. STAT. § 108.09(7). We may confirm or set aside LIRC's order, but its decision may be set aside only upon one or more of the following grounds: (1) LIRC acted without or in excess of its powers; (2) the order or award was procured by fraud; and (3) LIRC's findings of fact do not support the order. Sec. 108.09(7)(c)6. An agency acts outside its power, contrary to § 108.09(7)(c)6.a., when it incorrectly interprets a statute. *See DWD v. LIRC*, 2018 WI 77, ¶12, 382 Wis. 2d 611, 914 N.W.2d 625.

[4] **[5]** ¶19 We will uphold LIRC's findings of fact if they are supported by credible and substantial evidence. *Operton*, 375 Wis. 2d 1, ¶18, 894 N.W.2d 426. Whether an employer has proven that it is exempt from coverage under Wisconsin's unemployment system involves the application of facts to a particular legal standard, which is a conclusion of law that we review independently. *See Nottelson v. DILHR*, 94 Wis. 2d 106, 116, 287 N.W.2d 763 (1980). Because the facts of this case are undisputed, the only issue on appeal is the proper interpretation of WIS. STAT. § 108.02(15)(h)2. We are not ***602** bound by LIRC's interpretation of a statute. *Operton*, 375 Wis. 2d 1, ¶19, 894 N.W.2d 426.[9] Therefore, we review LIRC's legal conclusions de novo. *Mueller v. LIRC*, 2019 WI App 50, ¶17, 388 Wis. 2d 602, 933 N.W.2d 645.

III. Statutory Interpretation

¶20 DWD and CCB have framed this case as a disagreement over whether WIS. STAT. § 108.02(15)(h)2. requires a reviewing body to consider either the activities or the motivations of either the nonprofit organization or the church. In particular, DWD faults the circuit court for defining "purposes" as the "reason something is done" and for holding that it is the religious motivation of the Diocese of Superior in operating CCB and its sub-entities that determines whether the organizations are operated for religious purposes. Instead, DWD argues that the term "religious purposes" requires an examination of an organization's activities, rather than its motivation, and that the "purpose" we are to examine is that of the nonprofit organization, not the church. Here, DWD asserts, CCB and its sub-entities are engaged in purely secular activities.

***603** ¶21 In contrast, CCB argues that an organization is operated primarily for religious purposes when it is operated primarily "for a religious motive or reason." Thus, motivation is the important consideration, specifically the church's motive in operating, supervising, controlling, or principally supporting the organizations. According to CCB, CCB and its sub-entities are operated primarily for a religious motive or reason—specifically, to comply with the Catholic Church's scriptural and doctrinal mandate to serve the poor and respond in charity to those in need.

[6] **[7]** **[8]** ¶22 We begin, as we must, with the language of the statute. *See* ****787** *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We give statutory language its common, ordinary, and accepted meaning, except that technical or

specially defined words or phrases are given their technical or special definitional meanings. *Id.* We interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶46. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.* (citation omitted). If, however, the statute "is capable of being understood by reasonably well-informed persons in two or more senses," then the statute is ambiguous. *Id.*, ¶47.

¶23 We first consider each word used in the phrase "operated primarily for religious purposes." Operate means "to work, perform, or function," "to act effectively; produce an effect; exert force or influence," or "to perform some process of work or treatment." ***604** *Operate*, https://www.dictionary.com/browse/operate (last visited Dec. 2, 2022). The term "operate" therefore connotes an action or activity. Primarily means "essentially; mostly; chiefly; principally" or "in the first instance; at first; originally." *Primarily*, https://www.dictionary.com/browse/primarily (last visited Dec. 2, 2022). The statute's use of the term "primarily" suggests that there may be other purposes for which an organization operates, and it need not be operated exclusively for religious purposes. Religious means "of, relating to, or concerned with religion." *Religious*, https://www.dictionary.com/browse/religious (last visited Dec. 2, 2022). And purpose means "the reasons for which something exists or is done, made, used, etc." or "an intended or desired result; end; aim; goal." *Purpose*, https://www.dictionary.com/browse/purpose (last visited Dec. 2, 2022). Purpose can also mean "something that one sets before himself [or herself] as an object to be attained" and "an object, effect, or result aimed at, intended, or attained." *Purpose*, WEBSTER'S THIRD NEW INT'L DICTIONARY (unabr. 1993). While these terms generally have a plain meaning interpretation, they are not necessarily dispositive of the meaning of the statute as a whole. Instead, they provide guidance in determining the statute's overall meaning.

a. The Nonprofit Organization's Purpose Controls

[9] ¶24 The first question we must address to determine the statute's meaning is which entity's purpose the reviewing body is to consider: the purpose of the nonprofit organization or the purpose of the church in operating, supervising, controlling, or principally supporting the nonprofit organization. In other words, are we to consider "the reasons for which something ***605** exists or is done" from the perspective of the nonprofit organization or from the perspective of the church? As noted, the parties disagree on this point. We conclude that the statute is not ambiguous as to this question and that the plain language of WIS. STAT. § 108.02(15)(h)2. demonstrates that the reviewing body is to consider the purpose of the nonprofit organization, not the church's purpose in operating the organization.

¶25 First and foremost, the religious purposes exemption applies to "service ... [i]n the employ" of the nonprofit organization, not service in the employ of the church. WIS. STAT. § 108.02(15)(h)2. As noted, we must consider the statutory language in the context in which it is used. *See Kalal*, 271 Wis. 2d 633, ¶46, 681 N.W.2d 110. Each of the subdivisions of § 108.02(15)(h) apply to an individual's ****788** "service" in a different context: § 108.02(15)(h)1. addresses church employees, § 108.02(15)(h)2. addresses employees of "an organization operated primarily for religious purposes," and § 108.02(15)(h)3. addresses ministers and members of a religious order. Therefore, considering the context of the surrounding subdivisions, we conclude that employees who fall under subd. 2. are to be focused on separately in the statutory scheme from employees of a church. *Compare* § 108.02(15)(h)1. *with* § 108.02(15)(h)2. The exemption under subd. 2. applies specifically to employees of the organizations, so the focus must be on the organizations.

[10] ¶26 Second, under the rules of statutory interpretation, an interpretation that focuses on the church's purpose could render the religious purposes exemption language unnecessary. In order to give meaning to every word in the statute, all words need to ***606** be read together. *See, e.g.*, *Kalal*, 271 Wis. 2d 633, ¶46, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." (citations omitted)); *State v. Martin*, 162 Wis. 2d 883, 894, 470 N.W.2d 900 (1991) ("A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect." (citation omitted)). WISCONSIN STAT. § 108.02(15)(h)2. has two parts. The first part of subd. 2. addresses "religious purposes," and the second part, which is not at issue in this appeal, provides that the employment must be "for a nonprofit organization" that is "operated, supervised, controlled, or principally supported by a church." Sec. 108.02(15)(h)2.

These distinct requirements are separated by a conjunction —"and"—meaning that *both* elements are required. Thus, the analysis of whether a nonprofit organization is "operated primarily for religious purposes" would need to be conducted only where the organization is also "operated, supervised, controlled, or principally supported by a church." Whatever "religious purposes" the church may have in operating these organizations, for purposes of the unemployment taxation law, the fact that both elements are required means we should focus on the organization, not the "parent" church.

b. Both the Motives and the Activities of the Nonprofit Organization Determine Whether It Is Operated for a Religious Purpose

¶27 The second question we must address is how the reviewing body is to determine whether a nonprofit organization has a religious purpose and whether the organization is being operated primarily for that religious purpose. As noted above, DWD argues that it is the *activities* of the nonprofit that dictate the analysis, while CCB claims that "an enterprise ***607** must be created or exist 'chiefly/mostly for a religious *motive* or reason' " in order for it to be operated primarily for a religious purpose. (Emphasis added.) For the reasons that follow, we conclude that the reviewing body must consider both the organization's activities as well as the motivation behind those activities to determine whether the religious purposes exemption applies.

¶28 We again look first to the plain language of the statute to determine whether the reviewing body must consider the nonprofit organization's motives or its activities. The phrase "religious purposes" is not defined in the statutory scheme, and DWD argues in its reply brief that the language is ambiguous, such that it is not clear from the statute's language how a reviewing body is to determine when a nonprofit organization has a religious purpose. In support of its position, DWD observes ****789** that courts in other jurisdictions have interpreted the religious purposes exemption in different ways, with some courts focusing on an organization's activities, others focusing on its motivations, and some considering both. [10]

***609** **[11]** **[12]** ¶29 As previously discussed, a statute is ambiguous if it is capable of ****790** being understood by reasonably well-informed persons in two or more senses. *Kalal*, 271 Wis. 2d 633, ¶47, 681 N.W.2d 110. However, "[i]t is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute 'to determine whether well-informed persons *should have* become confused, that is, whether the statutory ... language reasonably gives rise to different meanings.' " *Id.* (emphasis added; citation omitted). "An otherwise unambiguous provision is not rendered ambiguous solely because it is difficult to apply the provision to the facts of a particular case." *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, ¶20, 311 Wis. 2d 492, 753 N.W.2d 448.

¶30 Looking at the language of the statute, we disagree that the phrase "operated primarily for religious purposes" is ambiguous. Instead, we conclude that phrase is reasonably susceptible to only one ***610** interpretation based on the plain language of the statute and when viewed in the context of the statutory scheme. *See Kalal*, 271 Wis. 2d 633, ¶¶45-46, 681 N.W.2d 110. That interpretation requires the reviewing body to consider both the nonprofit organization's motivations and its activities to determine whether the organization qualifies under the religious purposes exemption.

¶31 We first return to the text and structure of the statute to determine its meaning "so that it may be given its full, proper, and intended effect." *See id.*, ¶44. Here, we note the use of both the words "operated" and "purposes" within the same statutory provision. As recognized above, the word "operated" connotes an action or activity—to act, to work, to perform—meaning *what* the nonprofit organization does and *how* it does it. "Purpose," in contrast, has been defined to mean "the reasons for which something exists or is done," *Purpose*, https://www.dictionary.com/browse/purpose (last visited Dec. 2, 2022), suggesting that motive should be considered such that we should ask *why* the organization acts. While the appearance of both words in the statute might suggest ambiguity, we conclude that those words reveal the intended effect of the religious purposes exemption.

¶32 In that way, DWD and CCB are not necessarily wrong in their respective plain language analyses. The problem is that each party focuses on different words and fails to read the statute as a whole. For example, if we focus on the word "purposes," as CCB does, we may conclude that qualification for the exemption is based on the organization's reason for acting or its motivation, without considering whether the work performed or the services provided are inherently "religious." If, however, we focus on the word ***611** "operated," as DWD appears to do, we may conclude that the focus of the exemption is on the actions of the organization,

meaning its activities and the work it is performing, without allowing any consideration of whether the work is part of a central mission of a religion. Both words appear in the statute and therefore both must be given meaning.

[13] **[14]** **[15]** ¶33 The only reasonable interpretation of the statute's language is that the reviewing body must consider both the *activities* of the organization as well as the organization's professed *motive* or purpose. Neither consideration alone is sufficient under the statute. If the reviewing body considered only the activities of the nonprofit organization, it would essentially render the word "purposes" superfluous because the organization's reason for acting, or motivation, would not be a consideration. Given the mandate that statutes are to be "read where possible to give reasonable effect to every word," *see* *Kalal*, 271 Wis. 2d 633, ¶46, 681 N.W.2d 110, this ****791** interpretation would be unreasonable. Therefore, under a plain language reading of the statute, for an employee's services to be exempt from unemployment tax the organization must not only have a religious motivation, but the services provided—its activities—must also be primarily religious in nature.

¶34 There are other reasons why an organization's motivation cannot be the sole determination. Here, again we highlight the use of the term "operated," this time as it is used in conjunction with "primarily." Had the legislature intended that the reviewing body focus on only the motives of the organization to determine a religious purpose, there would be no need to include the phrase "operated primarily." ***612** Instead, those words could have been removed from the statute to provide that an employee's services are exempt from taxation if they are "in the employ of an organization with religious purposes." To give effect to the phrase "operated primarily," rather than render the phrase unnecessary within the statutory scheme, the only reasonable reading of the statute is that the reviewing body should also look to the organization's operations—its activities, meaning the particular services individuals receive—and determine if they are primarily religious in nature.

[16] **[17]** **[18]** **[19]** **[20]** ¶35 This reading of the religious purposes exemption—considering both the motivations and the activities of the nonprofit organization—is also in line with the rules of statutory interpretation. As DWD argues, the unemployment insurance law is remedial in nature; therefore, the statutes must be "liberally construed" to provide benefits coverage, and exceptions to the law must be interpreted narrowly. *See* *Princess House*, 111 Wis. 2d at 62, 330 N.W.2d 169; *see also* *Wisconsin Cheese Serv., Inc. v. DILHR*, 108 Wis. 2d 482, 489, 322 N.W.2d 495 (Ct. App. 1982) ("In order to foster a reduction of both the individual and social consequences of unemployment, courts have construed the statutes broadly."). "A general rule of statutory construction is that exceptions within a statute 'should be strictly, and reasonably, construed and extend only as far as their language fairly warrants.' If a statute is liberally construed, 'it follows that the exceptions must be narrowly construed.' " *McNeil v. Hansen*, 2007 WI 56, ¶10, 300 Wis. 2d 358, 731 N.W.2d 273 (citations omitted); *see also* *Dominican Nuns v. La Crosse*, 142 Wis. 2d 577, 579, 419 N.W.2d 270 (Ct. App. 1987) ("Taxation is the rule, and exemption the exception. As ***613** a result, '[s]tatutes exempting property from taxation are to be strictly construed and all doubts are resolved in favor of its taxability.' " (alteration in original; citation omitted)). "[T]he burden of proving entitlement to [a tax] exemption is on the one seeking the exemption. 'To be entitled to tax exemption the taxpayer must bring himself [or herself] within the exact terms of the exemption statute.' " *Wauwatosa Ave. United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, ¶7, 321 Wis. 2d 796, 776 N.W.2d 280 (citation omitted).

¶36 Here, DWD argues, and we agree, that a narrow interpretation is appropriate because it protects an employee's eligibility for benefits. As noted above, WIS. STAT. ch. 108 is "liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." *Princess House*, 111 Wis. 2d at 62, 330 N.W.2d 169. The more broadly the religious purposes exemption is read, the more employers are exempt and the larger impact the exemption will have on unemployment compensation coverage for employees of those organizations as well as all employees who are impacted by the reserve fund being depleted. *See* ****792** WIS. STAT. §§ 108.02(4)(a) (benefits are dependent on employee's base period, which is impacted if employer is exempt), 108.18(1) (requiring employer to pay contributions to the unemployment reserve fund based on yearly payroll). Construing the statute broadly ignores the stated public policy purposes of the unemployment insurance compensation program. *See* WIS. STAT. § 108.01.

¶37 For this reason, LIRC's decision rejected an approach that considered only an organization's motivations because it would cast too broad a net. As DWD explained, if the reviewing body looked only at motives, ***614** "it would allow the organization to determine its own status without

regard to its actual function." This analysis could allow any nonprofit organization affiliated with a church to exempt itself from unemployment insurance by professing a religious motive without being required to provide support for that motive. *See Living Faith, Inc. v. Commissioner*, 950 F.2d 365, 372 (7th Cir. 1991) (noting, in an income tax exemption case, that "[w]hile we agree with Living Faith that an organization's good faith assertion of an exempt purpose is relevant to the analysis of tax-exempt status, we cannot accept the view that such an assertion be dispositive" and further observing that "[p]ut simply, saying one's purpose is exclusively religious doesn't necessarily make it so"). Allowing an organization to possibly create its own exemption would effectively render the "operated primarily for religious purposes" language unnecessary and without effect under the law. Such a broad reading of the statute is contrary to the requirement that we must construe the religious purposes exemption narrowly to guarantee that the exemption is applied only when necessary. An interpretation that considers the activities of each individual organization seeking the exemption in addition to its professed motives accomplishes that directive.

[21] ¶38 CCB's response is that "[a]ll Catholic entities (and many other religious entities) operate their own unemployment system(s). The church provides equivalent benefits to CCB employees, more efficiently at lesser cost." CCB therefore claims, quoting the circuit court, that "CCB employees are all 'covered.' " This argument is a nonstarter. Whether an organization provides private unemployment insurance to its employees is not a factor under the religious purposes ***615** exemption. CCB has not identified any language in the statute altering the analysis if an employer provides additional or other coverage, and, as DWD argues, considering the availability of such coverage in the analysis would impermissibly add words to the statute. *See State v. Simmelink*, 2014 WI App 102, ¶11, 357 Wis. 2d 430, 855 N.W.2d 437 (a court "should not read into [a] statute language that the legislature did not put in" (citation omitted)). Further, as DWD observes, the religious purposes exemption "cannot be interpreted one way for Catholic entities and another way for entities affiliated with different faiths." Thus, we decline to rewrite the religious purposes exemption to consider the availability of private unemployment insurance; that fact is therefore immaterial to the statute's interpretation or application.

¶39 Instead, DWD directs our attention to the Seventh Circuit Court of Appeals' decision in *United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981), which we find instructive. The question before the Seventh Circuit in that case was whether a church was an exempt organization under 26 U.S.C. § 501(c)(3), which grants tax exempt status to "[c]orporations ... organized and operated exclusively for religious ... purposes."[11] ****793** *Dykema*, 666 F.2d at 1099. In considering ***616** the "term 'religious purposes,' " the court stated that it is "simply a term of art in tax law." *Id.* at 1101. According to the court, the IRS's role is "to determine whether [the organization's] actual activities conform to the requirements which Congress has established as entitling them to tax exempt status." *Id.* The Seventh Circuit explained:

> In connection with this inquiry, it is necessary and proper for the IRS to survey all the activities of the organization, in order to determine whether what the organization in fact does is to carry out a religious mission or to engage in commercial business. Such a survey could be made by observation of the organization's activities or by the testimony of other persons having knowledge of such activities, as well as by examination of church bulletins, programs, or other publications, as well as by scrutiny of minutes, memoranda, or financial books and records relating to activities carried on by the organization.
>
> Typical activities of an organization operated for religious purposes would include (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity in partibus infidelium; (b) pastoral counseling and comfort to members ***617** facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of individuals, such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and education in the doctrine and discipline of the church, as well as (in the case of mature and well developed churches) theological seminaries for the advanced study and the training of ministers.

Id. at 1100. The court also concluded that an objective inquiry into the activities of an organization would not run afoul of the First Amendment, but that entering into a subjective inquiry with respect to the truth of the organization's religious beliefs would "be forbidden." *Id.*

¶40 In summary, the *Dykema* court's decision endorses an interpretation of the religious purposes exemption that considers both motives and activities. The court expressly held that under a similar inquiry in the federal tax code,

"it is necessary and proper for the IRS to survey all the *activities* of the organization, in order to determine whether what the organization in fact does is to carry out a religious *mission*." *See id.* (emphasis added); *see also Living Faith*, 950 F.2d at 372 ("Put simply, saying one's purpose is exclusively religious doesn't necessarily make it so. This [c]ourt and others have consistently held that an ****794** organization's purposes may be inferred from its manner of operations."). Thus, a review considering both the organization's activities and its motivations would comport with the *Dykema* court's analysis, which we conclude is sound.

¶41 DWD also cites our supreme court's decision in *Coulee Catholic Schools v. LIRC*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, which LIRC relied on ***618** in reaching its decision. There, our supreme court held that the Free Exercise Clause of the First Amendment to the United States Constitution and article I, section 18 of the Wisconsin Constitution precluded a teacher who had been laid off from a Catholic school from bringing an age discrimination claim against her former employer under the Wisconsin Fair Employment Act. *Coulee*, 320 Wis. 2d 275, ¶¶1-3, 768 N.W.2d 868. The court explained that the state may not "interfere with the hiring or firing decisions of religious organizations with a religious mission with respect to employees who are important and closely linked to that mission"—a principle that is colloquially called the ministerial exception. *Id.*, ¶¶39, 67.

¶42 In order to determine whether the ministerial exception is applicable, our supreme court explained that courts must conduct a two-part test. *Id.*, ¶¶45, 48. The first part of the test asks whether the organization "has a fundamentally religious mission" "in both statement and practice." *Id.*, ¶48. In other words, "does the organization exist primarily to worship and spread the faith?" *Id.* That determination is fact-specific, as

> [i]t may be, for example, that one religiously-affiliated organization committed to feeding the homeless has only a nominal tie to religion, while another religiously-affiliated organization committed to feeding the homeless has a religiously infused mission involving teaching, evangelism, and worship. Similarly, one religious school may have some affiliation with a church but not attempt to ground the teaching and life of the school in the religious faith, while another similarly situated school may be committed to life and learning grounded in a religious worldview.

Id. The second part of the ministerial exception test ***619** then asks how close an employee's work is to the organization's fundamental mission. *Id.*, ¶49. After applying this test, the *Coulee* court determined that the employer in that case—a school committed to the inculcation of the Catholic faith—had a fundamentally religious mission and that the teacher's position was closely linked to that mission, and it thereafter dismissed her claim. *Id.*, ¶¶72-80.

¶43 The analysis conducted in *Coulee* provides guidance in understanding the religious purposes exemption here. While we acknowledge that *Coulee* is factually and legally distinguishable, we cite the decision as a tool to help further understand the language in WIS. STAT. § 108.02(15)(h)2. In *Coulee*, to determine an organization's mission, our supreme court considered not only the motives of the organization or its stated purpose, but it also required that the motive or mission be clear "in both statement and *practice*." *Id.*, ¶48 (emphasis added). "Practice" means the "actual performance or application." *Practice*, https://www.merriam-webster.com/dictionary/practice (last visited Dec. 2, 2022). Stated differently, practice means the organization's *activities*. Accordingly, *Coulee* is instructive as to the type of analysis that can inform the meaning of the religious purposes exemption and lends support to an interpretation that considers both an organization's motives and activities.

¶44 Finally, DWD cites a report of the House Ways and Means Committee (the ****795** House Report) pertaining to an amendment to FUTA. DWD claims that the House Report on the bill to amend FUTA informs the interpretation of the Wisconsin statute because WIS. STAT. § 108.02(15)(h)2. was enacted to conform ***620** Wisconsin law to 26 U.S.C. § 3309(b)(1)(B). [12] *See Leissring v. DILHR*, 115 Wis. 2d 475, 485-88, 340 N.W.2d 533 (1983) (relying on congressional committee reports on bills amending FUTA when interpreting Wisconsin laws enacted to conform with FUTA).

¶45 The House Report explains the federal religious exemption in 26 U.S.C. § 3309(b)(1)(B). It provides, in relevant part, that § 3309(b)(1)(B)

> excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). 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. A college devoted primarily to preparing students for the ministry would ***621** be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. 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.

H.R. Rep. No. 91-612, at 44 (1969). DWD argues, and we agree, that the House Report demonstrates that the religious purposes exemption was not intended to apply to religiously affiliated organizations whose activities are primarily comprised of the provision of what are otherwise viewed as not inherently religious, charitable services, despite the asserted "religious in orientation" or "church related" nature of the organization. Instead, the House Report is clear that the focus of the religious purposes exemption is on the type of religious activities engaged in by the organization even where the religious motive of the organization is clear.

c. The First Amendment Is Not Implicated

¶46 CCB, however, rejects an interpretation of the religious purposes exemption focusing on activities rather than only motives, arguing that it violates the First Amendment because "[a] determination by the state that CCB is not 'religiously purposed enough,' represents a constitutionally impermissible Free Exercise violation." ****796** (Formatting altered.) In essence, CCB argues that considering activities favors those religious entities that engage in proselytizing and provide services only to members of their own religion, which would impermissibly burden CCB's free exercise of the Catholic tenet of "solidarity"—i.e., "[b]eing ecumenical in social ministry." As CCB stated during oral argument, we should look at the religious purposes exemption ***622** under First Amendment standards, beginning with the requirement that the organization hold a sincerely held religious belief. *See Coulee*, 320 Wis. 2d 275, ¶62, 768 N.W.2d 868; *see also Kennedy v. Bremerton Sch. Dist.*, —— U.S. ——, 142 S. Ct. 2407, 2421-22, 213 L.Ed.2d 755 (2022).

[22] ¶47 We disagree that the First Amendment is implicated in this case. The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." [13] U.S. CONST. amend. I. First, we note that the parties do not argue that the statute itself violates the First Amendment, meaning that CCB does not assert a facial constitutional challenge. Second, neither ***623** DWD nor this court dispute that the Catholic Church holds a sincerely held religious belief as its reason for operating CCB and its sub-entities. As we addressed previously, however, we do not look to the church to determine "religious purposes" under the statute; we look to the employing organizations themselves.

¶48 Third, and finally, CCB does not develop a proper First Amendment argument aside from its statements at oral argument that it has a sincerely held religious belief and that it is being denied a benefit as a result of that belief. Our review demonstrates, however, that the religious purposes exemption is not a generally available benefit that is being denied to CCB; CCB is simply being treated like every other employer in the state, including other nonprofit organizations operated by a church. To the extent that CCB is arguing that it is *not* being treated the same as other nonprofit organizations operated by churches that condition the availability of their services on adherence to, or instruction in, religious doctrine, that result is what the statute provides, and, as noted, CCB does not assert a facial challenge.

¶49 Further, neither the statute itself nor any purported interpretation of the statute seeks to penalize, infringe, or prohibit any conduct of the organizations based on religious

motivations, practice, or beliefs. *See* ****797** *Tony & Susan Alamo Found. v. Secretary of Lab.*, 471 U.S. 290, 303, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985) ("It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights."); *see also Coulee*, 320 Wis. 2d 275, ¶65, 768 N.W.2d 868 ("We do not ***624** mean to suggest that anything interfering with a religious organization is totally prohibited. General laws related to building licensing, taxes, social security, and the like are normally acceptable."). We see no free exercise concern.

[23] ¶50 DWD also raises its own First Amendment argument, asserting that the religious purposes exemption must be interpreted to avoid excessive state entanglement with church matters. According to DWD, any interpretation of the religious purposes exemption that "requires the state to interpret religious doctrine and examine religious leaders as to their religious motivations risks excessive unconstitutional entanglement of the state and church," which would violate the First Amendment's Establishment Clause. Indeed, "[e]xcessive entanglement occurs 'if a court is required to interpret church law, policies, or practices.' " *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶43, 398 Wis. 2d 92, 961 N.W.2d 635 (citation omitted).

¶51 DWD argues that its interpretation of the phrase "operated primarily for religious purposes" avoids this concern because it "focuses on an organization's activities and does not require the state or the court to examine or interpret church canons or internal church policies." DWD asserts that "[i]n contrast[,] an interpretation focusing on a religious entity's religious motivation requires an examination of church doctrine and an inquiry into the motivations of the church's religious leaders." *See Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 326, 533 N.W.2d 780 (1995) ("[T]he First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic ***625** priest since such a determination would require interpretation of church canons and internal church policies and practices.").

¶52 Conversely, CCB argues that DWD's interpretation of the religious purposes exemption would result in an Establishment Clause violation because "[b]y allowing exemption to those religions which view 'proselytizing' and discriminating against non-adherents in the provision of services as part of their mission, [DWD] is favoring those religions over Catholicism." CCB contends the "easiest way" for a reviewing body to " 'entangle' itself in religion is to promote one practice (proselytizing, etc.) over another (ecumenical delivery of charity)."

¶53 We conclude that an interpretation considering both the motivations and the activities of the organization appropriately balances an employee's ability to receive unemployment benefits with a religious organization's right to be free from state interferences, thereby avoiding excessive entanglement concerns. For support, we again turn to *Dykema*, where the court observed that an analysis considering the activities of an organization was constitutionally appropriate:

> Objective criteria for examination of an organization's activities thus 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. Ballard*, 322 U.S. 78, 86-88 [64 S.Ct. 882, 88 L.Ed. 1148] (1944). Likewise there is no "establishment of religion" involved in determining that ****798** entitlement to tax exemption has been demonstrated vel non. As well said by Chief Justice Burger in *Walz v. Tax Commission*, 397 U.S. 664, 675 [90 S.Ct. 1409, 25 L.Ed.2d 697] (1970): "There is no genuine ***626** nexus between tax exemption and establishment of religion." Indeed, it should be emphasized that no real questions regarding "religion" as referred to in the First Amendment are involved in the case at bar at all; the word "religious" concerns us merely in its statutory meaning as a description of a type of organization which Congress chose to exempt from taxation, believing that such relief from the tax burden would be beneficial and desirable in the public interest.

Dykema, 666 F.2d at 1100-01 (footnotes omitted); *see also Wisconsin Evangelical Lutheran Synod v. Prairie Du Chien*, 125 Wis. 2d 541, 553-54, 373 N.W.2d 78 (Ct. App. 1985) ("[T]here is no 'establishment of religion' involved in determining that a church or religious organization is entitled to a tax exemption," and "a determination denying a tax exemption is similarly not a violation of the religion clauses of the federal constitution." (citation omitted)). Thus, the way for a reviewing body to avoid excessive entanglement under the religious purposes exemption is to conduct a neutral review based on objective criteria.

¶54 Based on the foregoing, we conclude that the only reasonable interpretation of the phrase "operated for religious purposes" requires the reviewing body to consider the motivations as well as the activities of the nonprofit organization to determine whether the religious purposes exemption applies. This interpretation is consistent with the plain language of the statute, case law, and extrinsic sources, and it does not run afoul of constitutional considerations. Further, focusing on the stated motivations and the organization's activities allows the reviewing body to conduct an objective, neutral review that is "highly fact-sensitive" ***627** without examining religious doctrine or tenets. *See Coulee*, 320 Wis. 2d 275, ¶48, 768 N.W.2d 868; *Dykema*, 666 F.2d at 1100.

d. CCB and Its Sub-entities at Issue in this Case Are Not Operated Primarily for Religious Purposes

[24] ¶55 Having determined the proper interpretation of the religious purposes exemption, our final responsibility is to apply the statutory language to the facts of this case. In doing so, we conclude that CCB and its sub-entities failed to meet their burden to establish that they are exempt from Wisconsin's unemployment insurance program and that LIRC properly determined that each of the employers was "operated primarily to administer [or provide] social service programs" that are not "primarily for religious purposes." We reiterate that there are no factual disputes in this case, and CCB does not challenge LIRC's factual findings. Furthermore, we conclude that the evidence in the record supports LIRC's determination that CCB and its sub-entities at issue in this case are not operated primarily for religious purposes.

¶56 Our first consideration is whether the nonprofit organizations have a professed religious motivation. In other words, do the nonprofit organizations themselves assert that their reason for existing or acting is motivated by a religious purpose? This first step is not demanding, however, as it based on the organization's own words and statements, including its mission statement. If the organization states that it has a religious motive, then the reviewing body must accept that assertion and move on to the next consideration, which is whether the activities of the nonprofit organization are primarily religious.

***628** ****799** ¶57 As to the first consideration, we conclude that the nonprofit organizations in this case have a professed religious motivation. We acknowledge that the professed reason that CCB and its sub-entities administer these social service programs is for a religious purpose: to fulfill the Catechism of the Catholic Church. CCB itself is the organization, as the diocese's social ministry arm, with the most clearly professed religiously purposed motivation: "The mission of Catholic Charities is to provide service to people in need, to advocate for justice in social structures, and to call the entire church and other people of good will to do the same." We note, however, that when we look to the motivations of the individual sub-entities of CCB, not the mission of CCB or the church, the religious purpose is less evident. As is clear from the mission statements, as well as from the Form 990 that each organization filed with the IRS, the sub-entities' missions are to provide charitable services to everyone without any reference to religion.[14] While we conclude that the sub-entities do not appear to have an independent ***629** professed religious motivation, we acknowledge that there is a professed religious motivation for CCB overseeing and supporting these sub-entities and, in turn but to a lesser degree, in those sub-entities' own work.

¶58 As to the second consideration—whether the activities of the organizations are primarily religious—we agree with LIRC that the activities of CCB and its sub-entities are the provision of charitable social services that are neither inherently or primarily religious activities. CCB and its sub-entities do not operate to inculcate the Catholic faith; they are not engaged in teaching the Catholic religion, evangelizing, or participating in religious rituals or worship services with the social service participants; they do not require their employees, participants, or board members to be of the Catholic faith; participants are not required to attend any religious training, orientation, or services; their funding comes almost entirely from government contracts or private companies, not from the Diocese of Superior; and they do not disseminate any religious material to participants. Nor do CCB and its sub-entities provide program participants with an "education in the doctrine and discipline of the church." *See Dykema*, 666 F.2d at 1100.

¶59 Instead, the work that CCB and its sub-entities engage in is primarily charitable aid to individuals with developmental and mental health disabilities. As noted previously, the employers provide work training programs, life skills training, in-home support services, transportation services, subsidized housing, and supportive living arrangements. While these activities fulfill the Catechism of the Catholic ***630** Church to respond in charity to those in need, the activities themselves are not *primarily* religious in nature.

This fact is demonstrated most significantly by one of CCB's sub-entities, BCDS. LIRC found ****800** that BCDS—which was not brought under the CCB umbrella until 2014—had "no previous religious affiliation" and that "[t]he type of services and programming provided by the organization did not change" following its affiliation with CCB. The fact that the manner in which BCDS carried out its mission did not change after it became an affiliate of CCB supports our conclusion that BCDS' purpose and operations are not primarily religious.

¶60 Regarding CCB itself, as noted above, we acknowledge the clear religious motivation of CCB in supporting and operating its sub-entities. However, the actual activities in which CCB engages involve providing administrative support for its sub-entities which we have determined do not engage in primarily religious activities. CCB is not separately and directly involved in religiously oriented activities. We are cognizant that the result in this case would likely be different if CCB and its sub-entities were actually run by the church, such that the organizations' employees were employees of the church. *See* WIS. STAT. § 108.02(15)(h)1. Instead, CCB and its sub-entities are structured as separate corporations—and CCB makes no claims to the contrary—so we must view their motives and activities separate from those of the church. The corporate form does make a difference, especially with respect to the statutory scheme we must apply in this case. When considered independent of the church's overarching doctrine and purposes, ***631** CCB and its sub-entities are clearly operated to provide services in a manner that is neither inherently nor primarily religious.

¶61 We agree with LIRC's conclusion that the employers here are "akin to 'the religiously-affiliated organization committed to feeding the homeless that has only a nominal tie to religion' recognized by the *Coulee* court." Like the school in *Coulee*, CCB and its sub-entities are affiliated with the Catholic Church and under the control of the bishop; as LIRC recognized, however, unlike the school in *Coulee*, "CCB and its sub-entities are not operated with a focus on the inculcation of the Catholic faith and worldview and do not operate in a worship-filled environment or with a faith-centered approach to fulfilling their mission." Any such spreading of Catholic faith accomplished by the organizations providing such services—while genuine in deriving from and adhering to the Catholic Church's mission—is only indirect and not primarily the service that they provide to individuals. We further observe parallels between CCB and its sub-entities and the example in the House Report of "a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) [that] would not be considered under [the religious purposes exemption] to be operated primarily for religious purposes." *See* H.R. Rep. No. 91-612, at 44.

[25] ¶62 We recognize that CCB and its sub-entities perform important and vital work in our communities. Nevertheless, the fact that a church operates, supervises, controls, or supports an organization in charity with a religious motivation does not, by itself, mean that the organization is operated primarily for religious ***632** purposes. While the Catholic Church's tenet of solidarity compels it to engage in charitable acts, the religious motives of CCB and its sub-entities appear to be incidental to their primarily charitable functions. Thus, CCB and its sub-entities have not demonstrated through their activities a primarily religious purpose. Accordingly, we affirm LIRC's decision and reverse the circuit court's order reversing that decision.

By the Court.—Order reversed.

All Citations

406 Wis.2d 586, 2023 WI App 12, 987 N.W.2d 778

Footnotes

† Petition for Review Filed.

1 All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

2 For ease of reading, we will refer to CCB and its sub-entities collectively as CCB when referring to their arguments made on appeal, unless referring to the sub-entities individually. Otherwise, we refer to them as CCB and its sub-entities.

3 DWD filed a brief in this appeal, and LIRC filed a letter indicating that it concurred with the arguments raised in DWD's brief and would not be submitting a separate brief. For ease of reading, we will therefore refer to the appellants as DWD throughout, unless referring to LIRC's decision.

4 This opinion was first released on December 13, 2022. Subsequently, on our own motion, we withdrew our prior opinion on February 9, 2023, which was within the deadline provided under WIS. STAT. RULE 809.24(3).

5 CCB and its sub-entities are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code under a group exemption. The group exemption includes "the agencies and instrumentalities and the educational, charitable, and religious institutions operated by the Roman Catholic Church in the United States, its territories, and possessions" that are subordinate to the United States Conference of Catholic Bishops.

6 For purposes of the Unemployment Compensation Act, the term "[e]mployment" means "any service, including service in interstate commerce, performed by an individual for pay." WIS. STAT. § 108.02(15)(a).

7 For ease of reading, we will refer to the controlling entity as "a church" throughout this decision rather than as "a church or convention or association of churches." *See* WIS. STAT. § 108.02(15)(h)2.

8 For this reason, we certified the question in this case to our supreme court, but it denied certification. We subsequently held oral argument in this case on August 3, 2022, in Superior, Wisconsin.

9 Relying on *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶108, 382 Wis. 2d 496, 914 N.W.2d 21, and *Mueller v. LIRC*, 2019 WI App 50, ¶17, 388 Wis. 2d 602, 933 N.W.2d 645, the previous version of this decision suggested that while we no longer defer to administrative agency decisions on questions of law, we may still afford "due weight" to those decisions as a matter of persuasion. Although the parties did not address this question on appeal, on our own motion for reconsideration, we questioned whether "due weight" is appropriately afforded to proceedings under WIS. STAT. ch. 108, rather than only to general administrative proceedings under WIS. STAT. ch. 227. We need not and do not resolve this issue, however, as our conclusions remain the same whether or not we give "due weight" to LIRC's interpretation of WIS. STAT. § 108.02(15)(h)2.

10 *Compare* *Concordia Ass'n v. Ward*, 177 Ill.App.3d 438, 126 Ill.Dec. 726, 532 N.E.2d 411, 413-14 (1988) (concluding cemetery formed by several Lutheran churches not operated primarily for religious purposes because "[b]urial of the dead is a matter of public concern" and "[t]he functions performed by [the cemetery] are no different than those performed in a secular cemetery"); *Terwilliger v. St. Vincent Infirmary Med. Ctr.*, 304 Ark. 626, 804 S.W.2d 696, 699 (1991) (concluding Catholic hospital not operated primarily for religious purposes because although the hospital's motivation may have been religious in nature, evidence showed it was operated primarily for purpose of providing health care); *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 7-8 (Colo. 1994) (concluding organization providing administrative support and accreditation for religiously affiliated counseling centers not operated primarily for religious purposes because "[a]n organization that provides essentially secular services falls outside of the scope of" the religious purposes exemption); *DeSantis v. Board of Rev.*, 149 N.J.Super. 35, 372 A.2d 1362, 1364 (N.J. Super. Ct. App. Div. 1977) (concluding Catholic social service agency not operated primarily for religious purposes because provision of "nondenominational community service" for senior citizens was "eleemosynary and not religious"); *Cathedral Arts Project, Inc. v. Department of Econ. Opportunity*, 95 So. 3d 970, 973 (Fla. Dist. Ct. App. 2012) (concluding church-affiliated organization not operated primarily for religious purposes because although motivation may have been religious, primary purpose in operating—i.e., giving art instruction to underprivileged children—was not religious); *St. Augustine's Ctr. for Am. Indians, Inc. v. Department of Lab.*, 114 Ill.App.3d 621, 70

Ill.Dec. 372, 449 N.E.2d 246, 249 (1983) (concluding organization providing aide to Native Americans in Chicago not operated primarily for religious purposes, considering the organization's activities and not its motivation); *Imani Christian Acad. v. Unemployment Comp. Bd. of Rev.*, 42 A.3d 1171, 1175 (Pa. Commw. Ct. 2012) (holding Christian school not operated primarily for religious purposes because no evidence as to the extent of religious underpinnings that pervade curriculum), *with Department of Emp. v. Champion Bake-N-Serve, Inc.*, 100 Idaho 53, 592 P.2d 1370, 1371-73 (1979) (holding commercial bakery operated by Seventh Day Adventists exempt because students perform work under tenets of religion stressing value of labor and work); *Schwartz v. Unemployment Ins. Comm'n*, 2006 ME 41, ¶¶1-3, 11, 13, 895 A.2d 965 (finding that nondenominational charitable work did not prevent the organization from being operated primarily for religious purposes where mission was to demonstrate "God's love and compassion to marginalized people in the area [it] serve[s]" (alterations in original)); *Kendall v. Director of Div. of Emp. Sec.*, 393 Mass. 731, 473 N.E.2d 196, 198-99 (1985) ("The fact that the religious motives of the [Catholic] sisters ... also serve the public good by providing for the education and training of the mentally [handicapped] is hardly reason to deny the Center a religious exemption."); *Peace Lutheran Church v. Unemployment Appeals Comm'n*, 906 So. 2d 1197 (Fla. Dist. Ct. App. 2005) (concluding child care organization operated by the church, located on the church property, and subsidized by the church exempt because its services and church outreach were religious purposes); *see also By the Hand Club for Kids, NFP, Inc. v. Department of Emp. Sec.*, 2020 IL App (1st) 181768, ¶¶21, 39, 51-54, 453 Ill.Dec. 900, 188 N.E.3d 1196 (noting that courts "generally have been 'quite cautious in attempting to define, for tax [and unemployment insurance] purposes, what is or is not a "religious" activity or organization—for obvious policy and constitutional reasons' " and concluding that a court will instead consider "all the facts and circumstances of a particular case in order to decide whether an organization is engaged in primarily religious activities" (alteration in original; citations omitted)); *Community Lutheran Sch. v. Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 287, 291-92 (Iowa 1982) (finding that religious schools separately incorporated from church were operated primarily for religious purposes, but considering both the school's activities and statement of purpose).

11 As noted previously, CCB and its sub-entities are exempt from federal income tax under 26 U.S.C. § 501(c)(3) under a group exemption. *See supra* note 5. CCB therefore argues in its briefing and at oral argument that "[f]ederal law has already decided the issue" in this case as "[p]ursuant to that interpretation by [the] IRS, each CCB entity in this case has been continuously determined by the IRS to be operating 'exclusively' for a religious purpose." (Formatting altered.)

We agree with DWD that CCB's assertion is not supported by the record. The IRS did not determine that CCB and its sub-entities are operated exclusively for religious purposes. According to the record, the organizations are covered under a group exemption, "[s]ubordinate organizations under a group exemption do not receive individual exemption letters," and the exemption applies to educational and charitable institutions, not just religious organizations. *See* 26 U.S.C. § 501(c)(3) ("Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes ...."). Thus, the IRS group ruling did not determine that the employers in this case are operated exclusively for religious purposes.

12 CCB challenges DWD's reliance on the House Report, arguing that these types of reports "have been repeatedly called into question" because "[l]egislative history is a 'rival text' created by a group other than the voting legislature, which has no authority." Thus, CCB argues that it is improper to rely upon any extrinsic source. However, courts may consider an extrinsic source if that source confirms the plain reading of the text, so long as the extrinsic source is not treated as authoritative on the meaning of the text. *United Am., LLC v. DOT*, 2021 WI 44, ¶18, 397 Wis. 2d 42, 959 N.W.2d 317; *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶51, 271 Wis. 2d 633, 681 N.W.2d 110. Further, DWD argues that the House Report is a reliable extrinsic source because it was relied on by the United States Supreme Court to discern legislative

intent as to 26 U.S.C. § 3309. *See* *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 781, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981). Accordingly, we see no reason to ignore the House Report.

13 "The first portion of this provision contains what is called the 'Establishment Clause,' and the second portion is called the 'Free Exercise Clause.' " *Coulee Cath. Schs. v. LIRC*, 2009 WI 88, ¶35, 320 Wis. 2d 275, 768 N.W.2d 868. The First Amendment has been held applicable to the states under the terms of the Fourteenth Amendment. *Kennedy v. Bremerton Sch. Dist.*, —— U.S. ——, 142 S. Ct. 2407, 2421, 213 L.Ed.2d 755 (2022) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)).

Our state constitution also provides for religious freedom under article I, section 18 of the Wisconsin Constitution, known as the Freedom of Conscience Clauses. *Coulee*, 320 Wis. 2d 275, ¶¶56, 58, 768 N.W.2d 868. Our supreme court "has stated that Article I, Section 18 serves the same dual purposes as the Establishment Clause and Free Exercise Clause of the U.S. Constitution." *Id.*, ¶60. The rights provided by the Wisconsin Constitution, however, "are far more specific" and "contain[ ] extremely strong language, providing expansive protections for religious liberty." *Id.* Although CCB asserted during oral argument that the Wisconsin Constitution offers more protection than the First Amendment, this argument was undeveloped. Accordingly, we will not address this argument further. *See* *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

14 For example, Headwaters' mission statement is as follows: "We believe all people deserve the right to achieve their fullest potential. Therefore, we exist for the purpose of providing individualized services that are designed to maximize each person's daily living and vocational skills in order to be integrated into the community to the fullest extent possible." Similarly, BCDS's stated mission "is to provide person-centered services to adults based on the needs of each individual so that they are able to live their lives to the fullest." BRI states that its mission is to "[i]n partnership with the community, provide people with disabilities opportunities to achieve the highest level of independence." Finally, DSI's mission is "[t]o provide a prevocational and vocational program by using real work situations, such as subcontract and other production oriented work, to develop appropriate work behaviors, to maximize earnings and to increase an individual's potential for community employment. To provide employment opportunities for adults with disabilities."

411 Wis.2d 1, 2024 WI 13

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc. and Headwaters, Inc., Petitioners-Respondents-Petitioners,
v.
State of Wisconsin LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant, State of Wisconsin Department of Workforce Development, Respondent-Appellant.

No. 2020AP2007
|
Oral Argument: September 11, 2023
|
Opinion Filed: March 14, 2024

Synopsis

Background: Nonprofit corporation that was Roman Catholic diocese's social-ministry arm and nonprofit corporations that were that corporation's sub-entities sought judicial review of Labor and Industry Review Commission's (LIRC) determination that they were not organizations operated primarily for religious purposes and that the Unemployment Compensation Act's religious-purposes exemption therefore did not apply to them. The Circuit Court, Douglas County, Kelly J. Thimm, J., reversed. The Department of Workforce Development (DWD) appealed. The Court of Appeals, 2021 WL 9782350, certified question to the Supreme Court, which denied certification. The Court of Appeals, 406 Wis.2d 586, 987 N.W.2d 778, then reversed. Nonprofit corporation and sub-entities petitioned for review.

Holdings: The Supreme Court, Ann Walsh Bradley, J., held that:

[1] corporations were not operated primarily for religious purposes;

[2] determination that corporations were not operated primarily for religious purposes did not constitute as-applied violation of Establishment Clause of First Amendment;

[3] that determination did not constitute as-applied violation of church-autonomy principle under Establishment and Free Exercise Clauses of First Amendment; and

[4] that determination did not constitute as-applied violation of Free Exercise Clause of First Amendment.

Decision of the Court of Appeals affirmed.

Rebecca Grassl Bradley, J., dissented and filed opinion, which Annette Kingsland Ziegler, C.J., joined in part.

Brian Hagedorn, J., dissented and filed opinion.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

West Headnotes (31)

[1] Taxation Proceedings

In appeal from Labor and Industry Review Commission's (LIRC) determination in unemployment-insurance matter, supreme court reviews LIRC's decision rather than that of circuit court.

1 Case that cites this headnote

[2] Taxation Proceedings

Labor and Industry Review Commission (LIRC) acts outside of its power when it incorrectly interprets statute, as would warrant appellate court setting aside order of LIRC in unemployment-insurance matter. Wis. Stats § 108.09(7)(c)6.

1 Case that cites this headnote

[3] Taxation Weight and sufficiency

In unemployment-insurance matter, supreme court will uphold Labor and Industry Review Commission's (LIRC) findings of fact as long as there is substantial and credible evidence to support them. Wis. Stats § 108.09(7)(c)6.

1 Case that cites this headnote

[4] **Taxation** Proceedings

In unemployment-insurance matter, supreme court reviews Labor and Industry Review Commission's (LIRC) legal conclusions, i.e., questions of law, independently of decisions rendered by circuit court, court of appeals, and LIRC. Wis. Stats § 108.09(7)(c)6.

[5] **Appeal and Error** Statutory or legislative law

Statutory interpretation presents question of law that supreme court reviews independently.

[6] **Constitutional Law** Questions of law or fact

The application of constitutional principles presents a question of law.

[7] **Taxation** Construction

Unemployment-compensation statutes are liberally construed to effect unemployment-compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status. Wis. Stats § 108.01 et seq.

[8] **Taxation** Charitable, educational, literary, or scientific

When reviewing Labor and Industry Review Commission's (LIRC) determination of whether nonprofit organization is operated primarily for religious purposes, as required for it to qualify for religious-purposes exemption to Unemployment Compensation Act, reviewing body examines purpose of nonprofit organization, and not that of church. Wis. Stats § 108.02(15)(h)2.

[9] **Statutes** Statute as a Whole; Relation of Parts to Whole and to One Another

In examining meaning of statute, court must give reasonable effect to every word.

[10] **Statutes** Statute as a Whole; Relation of Parts to Whole and to One Another

Court reads statute as whole when interpreting it.

[11] **Taxation** Charitable, educational, literary, or scientific

Both nonprofit organization's activities and motivations must be considered when determining if organization is operated primarily for religious purposes, as required for it to qualify for religious-purposes exemption to Unemployment Compensation Act. Wis. Stats § 108.02(15)(h)2.

[12] **Statutes** Liberal or strict construction

Statutes Exceptions, Limitations, and Conditions

If statute is liberally construed, then exceptions must be narrowly construed.

[13] **Taxation** Presumptions and burden of proof

Roman Catholic diocese's nonprofit corporations bore burden of establishing that they qualified for religious-purposes exemption from Unemployment Compensation Act. Wis. Stats § 108.02(15)(h)2.

[14] **Taxation** Charitable, educational, literary, or scientific

Nonprofit corporation that was Roman Catholic diocese's social-ministry arm and nonprofit corporations that were corporation's sub-

entities were not operated primarily for religious purposes, and thus they were not entitled to religious-purposes exemption under Unemployment Compensation Act; although corporations professed to have religious motivation, their activities, which included job training, job placement, and provision of services to those with developmental or mental-health issues, were primarily charitable and secular. Wis. Stats § 108.02(15)(h)2.

[15] **Constitutional Law** Establishment of Religion

Establishment Clause of First Amendment protects against sponsorship, financial support, and active involvement of sovereign in religious activity; in other words, it operates to prohibit government from enacting laws that aid one religion, aid all religions, or prefer one religion over another. U.S. Const. Amend. 1.

[16] **Constitutional Law** Entanglement

Establishment Clause of First Amendment prohibits excessive entanglement of state in religious matters, which is principle known as "entanglement doctrine." U.S. Const. Amend. 1.

[17] **Constitutional Law** Neutrality

Constitutional Law Entanglement

"Excessive entanglement" occurs if court is required to interpret church law, policies, or practices; such inquiry is prohibited by First Amendment's Establishment Clause, but court may hear action if it involves consideration of neutral principles of law. U.S. Const. Amend. 1.

[18] **Constitutional Law** Beliefs protected; inquiry into beliefs

Free Exercise Clause of First Amendment assures right to harbor religious beliefs by protecting ability of those who hold religious beliefs of all kinds to live out their faiths in daily life. U.S. Const. Amend. 1.

[19] **Constitutional Law** Matters of faith and doctrine

Constitutional Law Internal affairs, governance, or administration; autonomy or polity

Free Exercise Clause of First Amendment protects religious organizations' right to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. U.S. Const. Amend. 1.

[20] **Constitutional Law** Internal affairs, governance, or administration; autonomy or polity

Both Free Exercise Clause and Establishment Clause of First Amendment inform doctrine known as "church autonomy principle," which is perhaps best understood as marking boundary between two separate polities, secular and religious, and acknowledging prerogatives of each in its own sphere; principle respects authority of churches to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions free from governmental interference, i.e., it protects religious institutions from secular control or manipulation. U.S. Const. Amend. 1.

[21] **Constitutional Law** Invalidity as applied

As-applied challenge to statute's constitutionality requires assessment of merits of challenge by considering facts of particular case in front of court.

[22] **Constitutional Law** Invalidity as applied

For as-applied challenge to statute's constitutionality to succeed, challenger must demonstrate that challenger's constitutional rights were actually violated; if such violation occurred, operation of statute is void as to facts presented for challenger.

[23] **Constitutional Law** Presumptions and Construction as to Constitutionality

Constitutional Law Proof beyond a reasonable doubt

Courts presume that statute is constitutional, and party raising as-applied challenge to statute's constitutionality must prove that challenged statute has been applied in unconstitutional manner beyond reasonable doubt.

1 Case that cites this headnote

[24] **Constitutional Law** Establishment of Religion

Establishment Clause of First Amendment does not treat religion as "third rail" that courts cannot touch; rather, it ensures that inevitable degree of involvement does not cross into evaluation of religious dogma. U.S. Const. Amend. 1.

[25] **Constitutional Law** Establishment of Religion

Under Establishment Clause of First Amendment, truth or falsity of religious belief is not proper matter for courts to decide, but courts still must answer delicate questions to avoid allowing every person to make his own standards on matters of conduct in which society as whole has important interests; key is for any inquiry court undertakes to remain on right side of line and not involve examination into religious beliefs, practices, or dogma of organization. U.S. Const. Amend. 1.

[26] **Constitutional Law** Labor and Employment

Taxation Charitable, educational, literary, or scientific

Determination that nonprofit corporation that was Roman Catholic diocese's social-ministry arm and nonprofit corporations that were corporation's sub-entities were not operated primarily for religious purposes and thus were not entitled to religious-purposes exemption under Unemployment Compensation Act did not constitute as-applied violation of Establishment Clause of First Amendment; despite argument that examination of corporations' motivations and activities, as required to determine applicability of religious-purposes exemption, was unconstitutional entanglement with religion, such inquiry was inherent in any statutory scheme that offered tax exemption to religious entities. U.S. Const. Amend. 1; Wis. Stats § 108.02(15)(h)2.

[27] **Constitutional Law** Labor and Employment

Taxation Charitable, educational, literary, or scientific

Determination that nonprofit corporation that was Roman Catholic diocese's social-ministry arm and nonprofit corporations that were corporation's sub-entities were not operated primarily for religious purposes and thus were not entitled to religious-purposes exemption under Unemployment Compensation Act did not constitute as-applied violation of church-autonomy principle under Establishment and Free Exercise Clauses of First Amendment, which principle respected authority of churches to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions free from governmental interference; Act's religious-purposes exemption neither regulated internal church governance nor mandated any activity. U.S. Const. Amend. 1; Wis. Stats § 108.02(15)(h)2.

[28] **Constitutional Law** Free Exercise of Religion

Party making free-exercise challenge must demonstrate that challenged law burdens their religious exercise in constitutionally significant way. U.S. Const. Amend. 1.

[29] **Constitutional Law** Free Exercise of Religion

Free Exercise Clause of First Amendment does not require exemption from governmental

program unless, at minimum, inclusion in program actually burdens claimant's freedom to exercise religious rights; if such burden is shown, then analysis proceed to second step, where party may carry its burden of proving free-exercise violation by showing that governmental entity has burdened sincere religious practice pursuant to policy that is not neutral or generally applicable. U.S. Const. Amend. 1.

[30] **Constitutional Law** Taxation

To extent that imposition of generally applicable tax merely decreases amount of money party has to spend on its religious activities, any such burden is not constitutionally significant under Free Exercise Clause of First Amendment. U.S. Const. Amend. 1.

[31] **Constitutional Law** Labor and Employment

Taxation Validity

Determination that nonprofit corporation that was Roman Catholic diocese's social-ministry arm and nonprofit corporations that were corporation's sub-entities were not operated primarily for religious purposes and thus were not entitled to religious-purposes exemption under Unemployment Compensation Act did not constitute as-applied violation of Free Exercise Clause of First Amendment; despite argument that determination favored religious groups that required those they served to adhere to groups' faith, corporations did not identify how payment of unemployment tax prevented them from fulfilling any religious function or engaging in any religious activities. U.S. Const. Amend. 1; Wis. Stats § 108.02(15)(h)2.

****670** Appeal from Circuit Court, Douglas County, Kelly J. Thimm, Judge (L.C. No. 2019CV324)

Attorneys and Law Firms

For the petitioners-respondents-petitioners, there were briefs filed by Kyle H. Torvinen, and Torvinen, Jones & Saunders, S.C., Superior; Eric C. Rassbach (pro hac vice), Nicholas R. Reaves (pro hac vice), Daniel M. Vitagliano (pro hac vice), and The Becket Fund for Religious Liberty, Washington, D.C. There was an oral argument by Eric Rassbach.

For the respondent-appellant and respondent-co-appellant, there was a brief filed by Christine L. Galinat, and Department of Workforce Development, Madison; Jeffrey J. Shampo, and Labor and Industry Review Commission, Madison. There was an oral argument by Jeffrey J. Shampo.

An amicus curiae brief was filed by Daniel R. Suhr, and Hughes & Suhr LLC, Chicago, IL; Caleb R. Gerbitz, James M. Sosnoski, and Meissner Tierney Fisher & Nichols SC, Milwaukee, on behalf of Maranatha Baptist University, Maranatha Baptist Academy, Concordia University Wisconsin, the Wisconsin Family Counsel, and the Wisconsin Association of Christian Schools.

An amicus curiae brief was filed by Robert S. Driscoll, and Reinhart Boerner Van Deuren SC, Milwaukee; Stephen M. Judge (pro hac vice), Tiernan Kane (pro hac vice), and South Bank Legal, South Bend, IN, on behalf of Catholic Conferences of Illinois, Iowa, Michigan, and Minnesota.

An amicus curiae brief was filed by Gene C. Schaerr (pro hac vice), James C. Phillips (pro hac vice), and Schaerr Jaffee LLP, Washington, D.C.; Matthew M. Fernholz, and Cramer, Multhauf & Hammes, LLP, Waukesha, on behalf of Minnesota-Wisconsin Baptist Convention, Lutheran Church - Missouri Synod, National Association of Evangelicals, American Islamic Congress, The Church of Jesus Christ of Latter-day Saints, General Council on Finance and Administration of the United Methodist Church, The Ethics and Religious Liberty Commission, and Islam and Religious Freedom Action Team.

An amicus curiae brief was filed by Timothy Feldhausen, Tiffany Woelfel, and Amundsen Davis LLC, Green Bay; Sarah M. Harris (pro hac vice), Mark S. Storslee (pro hac vice), Rohit P. Asirvatham (pro hac vice), and Williams & Connolly LLP, Washington, D.C., on behalf of Professors Douglas Laycock & Thomas C. Berg.

An amicus curiae brief was filed by Levi W. Swank, Benjamin Hayes, and Goodwin Procter LLP, D.C.; Dina Ljekperic, and

Goodwin Procter LLP, New York, NY; David W. Simon, Gregory N. Heinen, and Foley & Lardner LLP, Milwaukee, on behalf of International Society for Krishna Consciousness and The Sikh Coalition.

An amicus curiae brief was filed by Jon P. Axelrod, J. Wesley Webendorfer, and DeWitt LLP, Madison; Howard Slugh (pro hac vice), and The Jewish Coalition for Religious Liberty, Washington, D.C., on behalf of Jewish Coalition for Religious Liberty.

An amicus curiae brief was filed by Samuel Troxell Grover, Patrick C. Elliott, Madison, on behalf of Freedom From Religion Foundation.

An amicus curiae brief was filed by David Earleywine, and Wisconsin Catholic Conference, Madison; Bradley G. Hubbard (pro hac vice), Elizabeth A. Kiernan (pro hac vice), Zachary Faircloth (pro hac vice), Jason J. Muehlhoff (pro hac vice), and Gibson, Dunn & Crutcher LLP, Dallas, TX, on behalf of Wisconsin Catholic Conference.

An amicus curiae brief was filed by Jonathan Judge, and ArentFox Schiff LLP, Chicago, IL, on behalf of Catholic Charities USA.

An amicus curiae brief was filed by Ryan J. Walsh, John D. Tripoli, and Eimer Stahl LLP, Madison, on behalf of Wisconsin State Legislature.

ANN WALSH BRADLEY, J., delivered the majority opinion of the Court, in which DALLET, KAROFSKY, and PROTASIEWICZ, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ZIEGLER, C.J., joined with respect to ¶¶110-61 and 163-98. HAGEDORN, J., filed a dissenting opinion.

Opinion

ANN WALSH BRADLEY, J.

***11** ****671** ¶1 The petitioners, Catholic Charities Bureau, Inc. (CCB) and four of its sub-entities, seek an exemption from having to pay unemployment tax to cover their employees. They assert that they are exempt from coverage under Wisconsin's Unemployment Compensation Act because they are operated primarily for religious purposes.

¶2 Accordingly, CCB together with the four sub-entities (Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc.) seek review of a court of appeals decision reinstating a decision of the Labor and Industry Review Commission (LIRC) concluding that CCB and the four sub-entities were not "operated primarily for religious purposes" and thus not exempt from making contributions to the state unemployment insurance system. [1] The petitioners specifically contend that they are exempt from unemployment insurance contributions pursuant to Wis. Stat. § 108.02(15)(h)2. (2019-20), [2] which exempts from the definition of "employment" covered by the Act those "[i]n the employ of an organization operated primarily for religious purposes ***12** and operated, supervised, controlled, or principally supported by a church or convention or association of churches." [3]

¶3 They assert that they are "operated primarily for religious purposes" because the Diocese of Superior's motivation is primarily religious, i.e., their charitable works are carried out to operationalize Catholic principles. The petitioners further argue that a contrary interpretation would run afoul of the First Amendment to the United States Constitution and that as a result it also would violate Article I, Section 18 of the Wisconsin Constitution. [4]

****672** ¶4 On the other hand, LIRC advances that it is the organization's actual activities, and not its motivations, that are paramount in the analysis. Under this formulation, LIRC contends the petitioners do not fulfill the religious purposes exemption because their activities are secular. Such an analysis, in LIRC's view, ***13** does not violate the First Amendment or Article I, Section 18 of the Wisconsin Constitution.

¶5 We determine that in our inquiry into whether an organization is "operated primarily for religious purposes" within the meaning of Wis. Stat. § 108.02(15)(h)2., we must examine both the motivations and the activities of the organization. Applying this analysis to the facts before us, we conclude that the petitioners are not operated primarily for religious purposes within the meaning of § 108.02(15)(h)2. We further conclude that the application of § 108.02(15)(h)2. as applied to the petitioners does not violate the First Amendment because the petitioners have failed to demonstrate that the statute as applied to them is unconstitutional beyond a reasonable doubt.

¶6 Accordingly, we affirm the decision of the court of appeals.

I

¶7 Each Roman Catholic diocese in Wisconsin has a social ministry arm, referred to as Catholic Charities. As a whole, Catholic Charities' mission "is to provide service to people in need, to advocate for justice in social structures and to call the entire church and other people of good will to do the same."

¶8 The Catholic Charities entity at issue in this case is that of the Diocese of Superior, which we refer to as CCB. Its statement of philosophy indicates that it has "since 1917 been providing services to the poor and disadvantaged as an expression of the social ministry of the Catholic Church in the Diocese of Superior" and that its "purpose ... is to be an effective sign of the charity of Christ." In its provision of services, CCB assures that "no distinctions are made by race, sex, or ***14** religion in reference to clients served, staff employed and board members appointed." CCB aims to provide services that are "significant in quantity and quality" and not duplicative of services provided by other agencies.

¶9 Occupying the top position in CCB's organizational chart is the bishop of the Diocese of Superior, who exercises control over CCB and its sub-entities. The bishop serves as CCB's president and appoints its membership, whose function is to "provide[ ] essential oversight to ensure the fulfillment of the mission of Catholic Charities Bureau in compliance with the Principles of Catholic social teaching." CCB's code of ethics, which is "displayed prominently in the program office of all affiliate agencies," likewise sets forth the expectation that "Catholic Charities will in its activities and actions reflect gospel values and will be consistent with its mission and the mission of the Diocese of Superior."

¶10 Under the umbrella of CCB, there are numerous separately incorporated sub-entities. These sub-entities operate "63 programs of service ... to those facing the challenges of aging, the distress of a disability, the concerns of children with special needs, the stresses of families living in poverty and those in need of disaster relief."

****673** ¶11 Four sub-entities are involved in this case. The first is Barron County Developmental Services, Inc. (BCDS). BCDS contracts with the Department of Vocational Rehabilitation to provide job placement, job coaching, and an "array of services to assist individuals with disabilities [to] get employment in the community." Prior to December of 2014, BCDS was not affiliated with the Diocese of Superior, and in fact had no religious affiliation at all. At that time, BCDS ***15** reached out and requested to become an affiliate agency of the Diocese. It receives no funding from the Diocese.

¶12 The second sub-entity at issue is Black River Industries, Inc. (BRI). It provides services to people with developmental or mental health disabilities, as well as those with a limited income. These services include home-based, community-based, and facility-based job training and daily living services. Among BRI's offerings are a food services program, a document shredding program, and a mailing services program. BRI's funding comes largely from county and state government. It does not receive funding directly from the Diocese.

¶13 Diversified Services, Inc. (DSI) is the third sub-entity implicated in this appeal. It provides work opportunities to individuals with developmental disabilities. Additionally, DSI hires individuals without disabilities for production work. It is not funded by the Diocese, instead receiving its funding from Family Care, a Medicaid long-term care program, [5] and private contracts.

¶14 Finally, the fourth sub-entity involved is Headwaters, Inc., which provides "various support services for individuals with disabilities," "training services related to activities of daily living," "employment related training services" and additional employment-related support. It also provides Head Start home visitation services, and at one time offered birth-to-three services before a different entity took over that aspect of its operations. Like the other ***16** sub-entities, Headwaters is funded primarily through government contracts and does not receive funding from the Diocese.

¶15 These four sub-entities are overseen by CCB, which, among other things, provides management services and consultation; establishes and coordinates the missions of the sub-entities; and approves all capital expenditures, certain sales of real property, and investment policies of the sub-entities. In turn, the sub-entities themselves set organizational goals and make plans to accomplish those goals, employ staff, set program policies, enter into contracts, raise funds, and assure regulatory compliance.

¶16 Additionally, CCB's executive director supervises the operations of each of the sub-entities. However, neither those employed by nor those receiving services from CCB or the sub-entities are required to be of any particular religious faith. Individuals participating in the programs do not receive any

religious training or orientation, and CCB and the sub-entities do not try to "inculcate the Catholic faith with program participants."

¶17 In 1972, the Department of Industry, Labor and Human Relations made a determination that CCB was subject to the unemployment compensation law after CCB submitted a form that self-reported the nature of its operations as "charitable," "educational," and "rehabilitative," not "religious."[6] CCB has been making unemployment contributions since that time.

***17** ****674** ¶18 In 2015, the Douglas County Circuit Court determined that a sub-entity of CCB not involved in the present case was "operated primarily for religious purposes" and thus exempt from contributing to the state unemployment system.[7] The following year, CCB and the sub-entities sought a similar determination that they qualified for the exemption, bringing their claim first to the Department of Workforce Development (DWD).

¶19 DWD denied the petitioners' request to withdraw from the state system. It stated: "It has been determined these organizations are supervised and controlled by the Roman Catholic Church, but it has not been established they are operated primarily for religious purposes." CCB and the sub-entities appealed DWD's determination, and an administrative law judge (ALJ) reversed. Consequently, DWD petitioned LIRC for review, and LIRC reversed the ALJ, concluding consistent with the original DWD decision that the petitioners are not operated primarily for religious purposes. It observed that "while services may be religiously motivated and manifestations of religious belief, a separate legal entity that provides essentially secular services and engages in activities that are not religious per se ... falls outside the scope of Wis. Stat. § 108.02(15)(h)2.," regardless of any affiliation the entity may have with a religious organization.

¶20 Subsequently, CCB and the sub-entities sought judicial review in the circuit court and the pendulum swung again, as the circuit court reversed LIRC's decision. DWD and LIRC appealed, and the ***18** court of appeals reversed, reinstating LIRC's decision that CCB and the sub-entities did not establish a religious purpose.[8] Cath. Charities Bureau, Inc. v. LIRC, 2023 WI App 12, 406 Wis. 2d 586, 987 N.W.2d 778. The court of appeals concluded that "for an employee's services to be exempt from unemployment tax the organization must not only have a religious motivation, but the services provided—its activities—must also be primarily religious in nature." Id., ¶33. Such an analysis, in the court of appeals' view, does not violate either the federal or state constitution because "focusing on the stated motivations and the organization's activities allows the reviewing body to conduct an objective, neutral review that is 'highly fact-sensitive' without examining religious doctrine or tenets." Id., ¶54.

¶21 Applying this understanding, the court of appeals determined that "CCB and its sub-entities failed to meet their burden to establish that they are exempt from Wisconsin's unemployment insurance program and that LIRC properly determined that each of the employers was 'operated primarily to administer [or provide] social service programs' that are not 'primarily for religious purposes.' " Id., ¶55. CCB and the sub-entities petitioned for this court's review.

II

[1] **[2]** ¶22 In an appeal from a LIRC determination, we review LIRC's decision rather than that of the circuit court. ***19** ****675** Masri v. LIRC, 2014 WI 81, ¶20, 356 Wis. 2d 405, 850 N.W.2d 298. Our review is limited by statute. See Wis. Stat. § 108.09(7)(c)6. We may either confirm the commission's order or set it aside on one of three grounds: (1) if the commission acted without or in excess of its powers; (2) if the order was procured by fraud; or (3) if the commission's findings of fact do not support the order. Id. LIRC acts outside of its power when it incorrectly interprets a statute. DWD v. LIRC, 2018 WI 77, ¶12, 382 Wis. 2d 611, 914 N.W.2d 625.

[3] **[4]** ¶23 We will uphold LIRC's findings of fact as long as there is substantial and credible evidence to support them. Friendly Vill. Nursing and Rehab, LLC v. DWD, 2022 WI 4, ¶13, 400 Wis. 2d 277, 969 N.W.2d 245. We review LIRC's legal conclusions, i.e., questions of law, independently of the decisions rendered by the circuit court, the court of appeals, and the commission. Id.; Tetra Tech EC, Inc. v. DOR, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21.

[5] ¶24 In our review, we are called upon to interpret Wisconsin statutes. Statutory interpretation presents a question of law that we review independently of the determinations of the circuit court, the court of appeals, and the commission. Greenwald Fam. Ltd. P'ship v. Village of Mukwonago, 2023 WI 53, ¶14, 408 Wis. 2d 143, 991 N.W.2d 356; Tetra Tech EC, Inc., 382 Wis. 2d 496, ¶84, 914 N.W.2d 21.

[6] ¶25 Additionally, our review is informed by constitutional principles. The application of constitutional principles likewise presents a question of law. St. Augustine Sch. v. Taylor, 2021 WI 70, ¶24, 398 Wis. 2d 92, 961 N.W.2d 635.

***20** III

¶26 We begin with a short summary of Wisconsin's unemployment insurance scheme and then address the competing interpretations of "operated primarily for religious purposes" within the meaning of Wis. Stat. § 108.02(15)(h)2. In examining this question, we address first whether we must look to the purpose of the church in operating the organization or the purpose of the nonprofit organization itself in our analysis. We address second whether the organization's motivations, activities, or both, drive the analysis of whether a purpose is "religious" within the meaning of § 108.02(15)(h)2. Next, we apply our interpretation of the statute to the facts before us. Finally, we examine the petitioners' assertion that such interpretation violates the First Amendment.

A

¶27 The Wisconsin legislature passed the first unemployment compensation law in the nation in 1932. [9] Then, as now, the law evinces a strong public policy in favor of compensating the unemployed. Operton v. LIRC, 2017 WI 46, ¶31, 375 Wis. 2d 1, 894 N.W.2d 426.

[7] ¶28 At a macro level, "[t]he system generally provides for collecting limited funds from a large number of employers, particularly during periods of stable employment, then paying out benefits during ***21** periods of high unemployment from the funds that have been accumulated." Maynard G. Sautter, Employment in Wisconsin § 12-1 (Matthew Bender 2023). The statutes were enacted "to avoid the risk or hazards that will befall those who, because of employment, are dependent upon others for their livelihood." ****676** Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 69, 330 N.W.2d 169 (1983). "Consistent with this policy, Wis. Stat. ch. 108 is 'liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status.' " Operton, 375 Wis. 2d 1, ¶32, 894 N.W.2d 426 (quoting Princess House, 111 Wis. 2d at 62, 330 N.W.2d 169).

¶29 The legislature has recognized the social cost of unemployment and the need to share the burden presented by unemployment. See Wis. Stat. § 108.01(1). "In good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners. Each employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers." Id.

¶30 "Generally, any service for pay for a public, private, or nonprofit employer is employment [covered by ch. 108], but the service must be provided in Wisconsin or be provided for an employer with operations in Wisconsin." Peter L. Albrecht et al., Wisconsin Employment Law § 12.3 (8th ed. 2023). However, some services are statutorily exempt from the "employment" services addressed by the unemployment compensation law. E.g., Wis. Cheese Serv., Inc. v. DILHR, 108 Wis. 2d 482, 486, 322 N.W.2d 495 (Ct. App. 1982) (examining whether an individual is exempt from the unemployment system as an independent contractor); see Sautter, Employment in Wisconsin § 12-3. It is one ***22** of those exemptions, which we will refer to as the "religious purposes" exemption, that is at issue in the present case.

¶31 The religious purposes exemption is set forth as part of Wis. Stat. § 108.02(15)(h), which provides in full:

> "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.

¶32 Specifically, CCB and the sub-entities seek exemption pursuant to subd. 2, which contains two conditions that both must be fulfilled in order for the exemption to apply. First, the subject organization must be "operated primarily

for religious purposes." Second, the organization must be "operated, supervised, controlled, or principally supported by a church or convention or association of churches." It is undisputed that the second condition is satisfied, as CCB and the sub-entities are without question "operated, supervised, controlled, or principally supported" by the Diocese of Superior. Our inquiry thus focuses on the first condition only: "operated primarily for religious purposes."

***23** ¶33 In addressing the issue presented, we must answer the threshold question of whose purposes we must examine in our analysis—those of the Diocese or those of CCB and the sub-entities. To resolve this inquiry, we look first to the language of Wis. Stat. § 108.02(15)(h)2. Sw. Airlines Co. v. DOR, 2021 WI 54, ¶22, 397 Wis. 2d 431, 960 N.W.2d 384 (citing State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110).

¶34 Like the court of appeals, our review of the plain language of ****677** Wis. Stat. § 108.02(15)(h)2. leads us to conclude that "the reviewing body is to consider the purpose of the nonprofit organization, not the church's purpose in operating the organization." Cath. Charities Bureau, 406 Wis. 2d 586, ¶24, 987 N.W.2d 778. There are several textual cues in this language that guide us to our conclusion. We look first to the sentence structure of Wis. Stat. § 108.02(15)(h)2. This structure indicates that the religious purposes exemption applies to "service ... [i]n the employ" of an "organization," as opposed to service in the employ of a church. The way the sentence is structured, the phrase "operated primarily for religious purposes" modifies the word "organization," not the word "church."

¶35 Such an understanding is confirmed by a look to the surrounding provisions. See Belding v. Demoulin, 2014 WI 8, ¶15, 352 Wis. 2d 359, 843 N.W.2d 373. The subdivision directly before the religious purposes exemption, Wis. Stat. § 108.02(15)(h)1., exempts from the definition of "employment" for unemployment compensation purposes service "[i]n the employ of a church." The subdivision directly after, § 108.02(15)(h)3., exempts service "[b]y a duly ordained, commissioned or licensed minister of a church." Those employed by a church are thus addressed ***24** in subdivisions 1. and 3., indicating, as the court of appeals concluded, that "employees who fall under subd. 2. are to be focused on separately in the statutory scheme from employees of a church." Cath. Charities Bureau, 406 Wis. 2d 586, ¶25, 987 N.W.2d 778.

¶36 Thus, a focus on the church's purpose rather than the organization's purpose would render a significant portion of Wis. Stat. § 108.02(15)(h)2. surplusage. See State v. Martin, 162 Wis. 2d 883, 894, 470 N.W.2d 900 (1991) ("A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect."). To explain, Wis. Stat. § 108.02(15)(h)2. contains two provisions that both must be fulfilled. In order to be exempt, a nonprofit organization must be "operated primarily for religious purposes" and "operated, supervised, controlled, or principally supported by a church." § 108.02(15)(h)2.

[8] ¶37 If we looked to the church's purpose in operating the organization only, then any religiously affiliated organization would always be exempt. A church's purpose is religious by nature, and this focus is reflected in all of its work, including any sub-entities it oversees. If the tax-exempt status of a nonprofit organization operating under the umbrella of a church is predicated on the religious purposes of the church, an organization operated or controlled by a church always will automatically satisfy the first condition. In other words, the second condition of Wis. Stat. § 108.02(15)(h)2. would subsume the first. This would cause the first requirement of the statute to be surplusage, a reading we cannot endorse. We therefore will examine the purpose of the nonprofit organization, ***25** and not that of the church, in determining whether a nonprofit organization is "operated primarily for religious purposes."

B

¶38 Having determined that we look to the purpose of CCB and the sub-entities, and not that of the Catholic Church in operating CCB and the sub-entities, we turn next to another methodological disagreement between the parties. CCB and the sub-entities contend that in our inquiry into whether an organization is "operated primarily for religious purposes" we must look primarily to the organization's motivations, while LIRC advances that the organization's ****678** activities are paramount. [10]

¶39 Specifically, CCB and the sub-entities argue that the court of appeals incorrectly limited the religious purposes exemption to church-controlled entities with both purposes and activities that are religious. ***26** They assert that the court of appeals' analysis fails to follow the statutory

language because the statute refers only to a religious "purpose" and not religious "activities."

¶40 LIRC responds that looking at only an organization's motivation would allow the organization to determine its own status without consideration of its actual function. It advances that such an interpretation would run afoul of the maxim that tax exemptions are to be narrowly construed. In LIRC's view, the court of appeals correctly concluded that the term "operated," which appears in the statute, "connotes an action or activity." See Cath. Charities Bureau, 406 Wis. 2d 586, ¶31, 987 N.W.2d 778.

¶41 Again, we begin our analysis with the language of the statute, and in particular the language at the center of this case: "operated primarily for religious purposes." The court of appeals commenced its analysis by examining the key words "operated" and "purposes," and we do likewise.

¶42 An oft-cited dictionary defines "operate" as "to work, perform, or function, as a machine does." Operate, https://www.dictionary.com/browse/operate (last visited Feb. 27, 2024), see also Operate, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/operate (last visited Feb. 27, 2024) (defining "operate" as "to perform a function"). As the court of appeals concluded, this definition suggests an action being taken—in the context of the statute at issue meaning "what the nonprofit organization does and how it does it." Cath. Charities Bureau, 406 Wis. 2d 586, ¶31, 987 N.W.2d 778.

¶43 This same dictionary defines "purpose" as "the reason for which something exists or is done, made, used, etc." Purpose, https://www.dictionary.com/browse/purpose ***27** (last visited Feb. 27, 2024). The use of "reason" in this definition implies "motivation," or as the court of appeals put it, "why the organization acts." Cath. Charities Bureau, 406 Wis. 2d 586, ¶31, 987 N.W.2d 778.

[9] **[10]** ¶44 In examining the meaning of the statute, we must give reasonable effect to every word. State v. Rector, 2023 WI 41, ¶19, 407 Wis. 2d 321, 990 N.W.2d 213. We read the statute as a whole. Belding, 352 Wis. 2d 359, ¶15, 843 N.W.2d 373. Accordingly, both "operated" and "purposes" must be given full effect. In order to illustrate how to do this, we consider first the consequences if our analysis considered motivations only or activities only ****679** in determining whether an organization is operated primarily for religious purposes.

¶45 Considering purposes, i.e., motivations, alone would give short shrift to the word "operated." In this scenario, an organization could be exempt based purely on its stated reason for doing what it does, but its actual "operations" would not enter the calculus. Conversely, if we were to consider activities only, then "purposes" would be rendered surplusage. A singular focus on the "operations" of the organization at the expense of the "purpose" would lead us to excise from the analysis the connection between the organization's activities and its religious mission that the statute requires.

[11] ¶46 Reading the statute as a whole, the text and structure of Wis. Stat. § 108.02(15)(h)2. indicate that both activities and motivations must be considered in a determination of whether an organization is "operated primarily for religious purposes." Such an interpretation is consistent with the unemployment compensation law's legislatively-recognized purpose. ***28** See Wis. Stat. § 108.01; Princess House, 111 Wis. 2d at 61, 330 N.W.2d 169 (explaining that in determining liability under the Unemployment Compensation Act, "the act itself should be put in perspective, and the underlying purpose of the act should be given paramount consideration"). The unemployment compensation law addresses an "urgent public problem" and does so by sharing "fairly" the economic burdens of unemployment. Wis. Stat. § 108.01(1)-(2).

[12] ¶47 In light of this, we have stated that the unemployment compensation law is "remedial in nature and should be liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." Princess House, 111 Wis. 2d at 62, 330 N.W.2d 169. [11] As a corollary to this principle, it follows that if a statute is liberally construed, then exceptions must be ***29** narrowly construed. McNeil v. Hansen, 2007 WI 56, ¶10, 300 Wis. 2d 358, 731 N.W.2d 273.

¶48 Correctly demonstrating a narrow construction of the exception, the court of appeals here concluded that looking at an organization's motivations in a vacuum "would cast too broad a net." Cath. Charities Bureau, 406 Wis. 2d 586, ¶37, 987 N.W.2d 778. Sole reliance on self-professed motivation would essentially render an organization's mere assertion of a religious motive dispositive. [12] See ****680** Living Faith, Inc. v. Comm'r of Internal Revenue, 950 F.2d 365, 372 (7th Cir. 1991) ("While we agree with Living Faith that an organization's good faith assertion of an exempt purpose

is relevant to the analysis of tax-exempt status, we cannot accept the view that such an assertion be dispositive. Put simply, saying one's purpose is exclusively religious doesn't necessarily make it so.").

¶49 Although the motivations of an organization certainly figure into the analysis, allowing self-definition to drive the exemption would open the exemption to a broad spectrum of organizations based entirely on a single assertion of a religious motivation. [13] This would run counter to the direction that we ***30** construe the exemption narrowly. Considering the organization's activities in addition to its motivations is in line with the directive that we follow a narrow construction.

¶50 Our decision in Coulee Catholic Schools v. LIRC, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, additionally buttresses our conclusion. In that case, the court addressed an issue of whether a teacher's position in a religious school is "ministerial" such that the First Amendment bars suit under the Wisconsin Fair Employment Act. [14]

¶51 In examining this question, the court applied the two-part "primary duties" test. "The first step is an inquiry into whether the organization in both statement and practice has a fundamentally religious mission." Id., ¶48. Second, the court inquires "into ***31** how important or closely linked the employee's work is to the fundamental mission of that organization." Id., ¶49.

¶52 Although the legal issue and context were different in Coulee, we agree with the court of appeals that it "provides guidance in understanding the religious purposes exemption here." Cath. Charities Bureau, 406 Wis. 2d 586, ¶43, 987 N.W.2d 778. To explain, the first step of the primary duties test involves an inquiry into an organization's mission. In analyzing such a question, the Coulee court examined both the "statement" and "practice" of the organization. Coulee Cath. Schs., 320 Wis. 2d 275, ¶48, 768 N.W.2d 868. See also Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. ——, 140 S. Ct. 2049, 2067-69, 207 L.Ed.2d 870 (2020). In other words, it analyzed both the professions ****681** and actions of the organization to determine the organization's "mission."

¶53 The "mission" inquiry in Coulee is analogous to the "purpose" analysis we conduct in the present case. Indeed, mission and purpose are even listed as synonyms by a popular thesaurus. Mission, https://www.thesaurus.com/browse/mission (last visited Feb. 27, 2024). The concepts are thus related, and the Coulee court's analysis of two factors, professions and operations, in its "mission" inquiry supports our examination of similar dual considerations in the "purpose" question in the present case. See also Our Lady of Guadalupe Sch., 140 S. Ct. at 2067-69.

¶54 Further, the Seventh Circuit's decision in United States v. Dykema, 666 F.2d 1096 (7th Cir. 1981), lends support to the assertion that the organization's activities have a role to play in determining the organization's "purpose." In Dykema, which involved a determination of a pastor's tax liability, the Seventh Circuit observed that "religious purposes" is a "term of ***32** art in tax law" and that the IRS, in order to determine whether such a purpose is present, must examine whether an organization's "actual activities conform to the requirements which Congress has established as entitling them to tax exempt status." Id. at 1101 (emphasis added).

¶55 The Dykema court also emphasized that its inquiry into religious purpose is based on "objective criteria," which "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." Id. at 1100. It further charted "[t]ypical activities of an organization operated for religious purposes" as including:

> (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity in partibus infidelium; (b) pastoral counseling and comfort to members facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of individuals, such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and education in the doctrine and discipline of the church, as well as (in the case of mature and well developed churches) theological

> seminaries for the advanced study and the training of ministers.

Id. We reproduce this list not to create any requirement for an organization to be determined to have a religious purpose, but merely as an illustration. The Dykema court's listed hallmarks of a religious purpose ***33** are by no means exhaustive or necessary conditions and the listed activities may be different for different faiths.

¶56 We do not adopt a rigid formula for deciding whether an organization is operated primarily for religious purposes. See Hosanna–Tabor Evangelical Lutheran Church and Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 190, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). Instead, we agree with the Dykema court that an examination of an organization's activities lends itself to an objective inquiry that does not lead us into a First Amendment quagmire, as will be discussed further below. [15]

****682** ¶57 We therefore conclude that in determining whether an organization is "operated primarily for religious purposes" within the meaning of Wis. Stat. § 108.02(15)(h)2., we must examine both the motivations and the activities of the organization.

***34** C

[13] ¶58 We turn next to apply our statutory interpretation to the facts before us. The burden to establish an exemption is on CCB and the sub-entities. See Princess House, 111 Wis. 2d at 66, 330 N.W.2d 169; Sw. Airlines, 397 Wis. 2d 431, ¶24, 960 N.W.2d 384 (explaining that "[t]he burden is on the party seeking the exemption to prove its entitlement" and "taxation is the rule and exemption is the exception").

[14] ¶59 CCB and the sub-entities profess to have a religious motivation. Specifically, they state that their services "are based on gospel values and the principles of the Catholic Social Teachings." Indeed, it is part of CCB's mission to "carry on the redeeming work of our Lord by reflecting gospel values and the moral teaching of the church." We accept these statements at face value, and LIRC does not argue that these assertions of religious motivation are insincere, fraudulent, or otherwise not credible. Cf. Holy Trinity Cmty. Sch., Inc. v. Kahl, 82 Wis. 2d 139, 155, 262 N.W.2d 210 (1978) (indicating that the court is "obliged to accept the professions of the school" as to its affiliation and "to accord them validity without further inquiry" but the court may "look behind such decisions where there is evidence of fraud or collusion").

¶60 However, accepting an organization's motivations does not end the inquiry as we must also examine its activities. We look for guidance from prior cases to further the analysis. In Dykema, the court's examination of activities focused on whether an organization participated in worship services, religious outreach, ceremony, or religious education. ***35** Dykema, 666 F.2d at 1100. Here, such criteria weigh in favor of a determination that CCB's and the sub-entities' activities are not "primarily" religious in nature. The record demonstrates that CCB and the sub-entities, which are organized as separate corporations apart from the church itself, neither attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees. Although not required, these would be strong indications that the activities are primarily religious in nature.

¶61 Our own precedent, albeit in another First Amendment context, further bolsters this conclusion. In Coulee Catholic Schools, 320 Wis. 2d 275, ¶48, 768 N.W.2d 868, we distinguished "one religiously-affiliated organization committed to feeding the homeless [that] has only a nominal tie to religion" from "another religiously-affiliated organization committed to feeding the homeless [that] has a religiously infused mission involving teaching, evangelism, and worship" for purposes of the ministerial ****683** exception. CCB and the sub-entities fit into the former category. Both employment with the organizations and services offered by the organizations are open to all participants regardless of religion.

¶62 CCB's and the sub-entities' activities are primarily charitable and secular. The sub-entities provide services to individuals with developmental and mental health disabilities. These activities include job training, placement, and coaching, as well as services related to activities of daily living. CCB provides background support and management services for these activities—a wholly secular endeavor. See supra, ¶¶10-15.

¶63 Such services can be provided by organizations of either religious or secular motivations, and the ***36** services provided would not differ in any sense. This is illustrated by a historical look at one of CCB's sub-entities, BCDS. As noted by the court of appeals, BCDS was not under the CCB

umbrella until 2014, before which it had no affiliation with any religious organization. See Cath. Charities Bureau, 406 Wis. 2d 586, ¶59, 987 N.W.2d 778. Yet the services provided before and after BCDS's partnership with CCB commenced were exactly the same. We agree with the court of appeals that "[t]he fact that the manner in which BCDS carried out its mission did not change after it became an affiliate of CCB supports our conclusion that BCDS' purpose and operations are not primarily religious." Id.

¶64 The other three sub-entities at issue offer services comparable to those offered by BCDS. In other words, they offer services that would be the same regardless of the motivation of the provider, a strong indication that the sub-entities do not "operate primarily for religious purposes."

¶65 This result is further supported with a look to federal law. We observe that Wisconsin's religious purposes exemption contains verbatim language to a provision of federal law, with which Wisconsin's law was enacted to conform. See 26 U.S.C. § 3309(b)(1)(B); 1971 S.B. 330 (noting that the proposed changes to Wisconsin law "will bring Wisconsin's law in line with the 1970 amendments to the federal unemployment tax act" and that "[a]ny less coverage would cost federal tax credits"). A report of the House Ways and Means Committee on that federal law indicates that, identical to Wisconsin's law, it:

> excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation ***37** unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches).

H.R. Rep. No. 91-612, at 44 (1969). Importantly, the House Report continues and provides examples of employment that would and would not be entitled to the exemption:

> 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. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. 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.

Id. (emphasis added).

¶66 Comparing the services offered by CCB and the sub-entities here to the listed ****684** examples, the "orphanage" or "home for the aged" is analogous. The services provided by a religiously run orphanage and a secular one do not differ in any meaningful sense. The same is true of a "home for the aged." And the same principle applies to the developmental services provided by the sub-entities at the center of this case.

¶67 Although CCB and the sub-entities assert a religious motivation behind their work, the statutory language indicates that this is not enough to receive the exemption. An objective examination of the actual activities of CCB and the sub-entities reveals that ***38** their activities are secular in nature. We therefore conclude that CCB and the sub-entities are not operated primarily for religious purposes within the meaning of Wis. Stat. § 108.02(15)(h)2.

IV

¶68 Finally, we examine the petitioners' assertion that the above statutory interpretation violates the First Amendment. [16] Specifically, they advance that such analysis and conclusion creates a conflict with the First Amendment to the United States Constitution by violating both the Establishment Clause and Free Exercise Clause.

¶69 Together referred to as the Religion Clauses, the Establishment and Free Exercise clauses provide in their entirety: "Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof ...." U.S. Const. amend. I.

[15] ¶70 The Establishment Clause protects against three main evils: sponsorship, financial support, and active involvement of the sovereign in religious activity. Jackson v. Benson, 218 Wis. 2d 835, 856, 578 N.W.2d 602 (1998) (citing Walz v. Tax Comm'n, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)). In other words, it operates to prohibit the government from enacting laws that "aid one religion, aid all religions, or prefer one religion ***39** over another." Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 216, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (quoting Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947)).

[16] **[17]** ¶71 It further prohibits the excessive entanglement of the state in religious matters, a principle known as the entanglement doctrine. St. Augustine Sch., 398 Wis. 2d 92, ¶42, 961 N.W.2d 635. Excessive entanglement occurs "if a court is required to interpret church law, policies, or practices." L.L.N. v. Clauder, 209 Wis. 2d 674, 687, 563 N.W.2d 434 (1997). Such an inquiry is prohibited by the First Amendment. Id. However, "a court may hear an action if it will involve the consideration of neutral principles of law." Id.

[18] **[19]** ¶72 On the other hand, the Free Exercise Clause assures "the right to harbor religious beliefs" by "protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 524, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022). It protects religious organizations' right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Coulee Cath. Schs., 320 Wis. 2d 275, ¶37, 768 N.W.2d 868 (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952)).

****685** **[20]** ¶73 Both Religion Clauses inform a doctrine known as the church autonomy principle, which "is perhaps best understood as marking a boundary between two separate polities, the secular and the religious, and acknowledging the prerogatives of each in its own sphere." ***40** Korte v. Sebelius, 735 F.3d 654, 677 (7th Cir. 2013). "The church-autonomy doctrine respects the authority of churches to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions free from governmental interference." Id. (quoted source omitted). In other words, it protects religious institutions from "secular control or manipulation." Kedroff, 344 U.S. at 116, 73 S.Ct. 143.

¶74 The Religion Clauses are inherently in tension with each other. We acknowledged this complicated interplay in State v. Yoder, 49 Wis. 2d 430, 444, 182 N.W.2d 539 (1971) aff'd Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Indeed, the Religion Clauses are "not the most precisely drawn portions of the Constitution." Walz, 397 U.S. at 668, 90 S.Ct. 1409. Both clauses are "cast in absolute terms," id., and therefore have the tendency to "overlap, can conflict, and cannot always be squared on any strict theory of neutrality." Yoder, 49 Wis. 2d at 444, 182 N.W.2d 539.

¶75 The United States Supreme Court has also acknowledged these tensions, instructing that "[a]dherence to the policy of neutrality" is paramount to prevent "the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." Walz, 397 U.S. at 669-70, 90 S.Ct. 1409. At the same time, it emphasizes that strict adherence is not always feasible:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established ***41** religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669, 90 S.Ct. 1409.

¶76 A religious institution's First Amendment rights are not unlimited. Just as there are limitations on First Amendment free speech, i.e., the proverbial prohibition of yelling "fire" in a crowded theater, [17] so too are there limitations here. The challenge is to balance the competing interests. We are assisted in achieving this balance by a review of precedent, and by a review of how other jurisdictions have navigated the challenge.

[21] **[22]** **[23]** ¶77 An as-applied challenge, such as that brought by CCB and the sub-entities, requires an assessment of the merits of the challenge by considering the facts of the particular case in front of the court. [18] ****686** ***42** State v. Hamdan, 2003 WI 113, ¶43, 264 Wis. 2d 433, 665 N.W.2d 785. For an as-applied challenge to succeed, the challenger must demonstrate that the challenger's constitutional rights were actually violated. State v. Roundtree, 2021 WI 1, ¶18, 395 Wis. 2d 94, 952 N.W.2d 765. If such a violation occurred, the operation of the law is void as to the facts presented for the party asserting the claim. Id. We presume that the statute is constitutional, and the party raising a constitutional challenge must prove that the challenged statute has been applied in an unconstitutional manner beyond a reasonable doubt. Id.; State v. Christen, 2021 WI 39, ¶32, 396 Wis. 2d 705, 958 N.W.2d 746; State v. Wood, 2010 WI 17, ¶15, 323 Wis. 2d 321, 780 N.W.2d 63.

¶78 With this standard in mind, we turn now to the petitioners' constitutional claims to determine whether CCB and the sub-entities have made the requisite showing that Wis. Stat. § 108.02(15)(h)2. has been unconstitutionally applied to them beyond a reasonable doubt. CCB and the sub-entities claim that LIRC's statutory interpretation leads to a violation of the Establishment Clause and the Free Exercise Clause in three ways: (1) by causing an excessive state entanglement with religion, (2) by violating the church autonomy principle, and (3) by discriminating "against religious entities with a more complex polity" and "penalizing CCB for its Catholic beliefs regarding how it must serve those most in need." We address each argument in turn.

***43** A

¶79 CCB and the sub-entities assert initially that LIRC's interpretation of the statutory exemption violates the Establishment Clause by occasioning an excessive state entanglement with religion. Specifically, they argue that examination of an organization's activities "requires Wisconsin courts (and government officials) to conduct an intrusive inquiry into the operations of religious organizations that seek the religious purposes exemption."

¶80 However, the protection provided by the Establishment Clause is not a blanket protection against any type of governmental inquiry into a religious organization. There are certain instances that require some investigation, including determining tax liability or the applicability of a tax exemption. See Walz, 397 U.S. at 675-76, 90 S.Ct. 1409. In fact, investigations into tax-exempt status are consistent with a long-standing tradition of treating religious organizations equally under the law. See id. at 680, 90 S.Ct. 1409. Indeed, both taxation of churches and exemption "occasion[ ] some degree of involvement with religion." Id. at 674, 90 S.Ct. 1409.

[24] ¶81 The Establishment Clause does not treat religion as a third rail that courts cannot touch. Rather, it ensures that the inevitable "degree of involvement" in such a determination does not cross into an evaluation of religious dogma. The Supreme Court, in fact, has "upheld government benefits and tax exemptions that go to religious organizations, even though those policies have the effect of advancing or endorsing religion," ****687** Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 139 S. Ct. 2067, 2092, 204 L.Ed.2d 452 (2019) (Kavanaugh, J., concurring).

***44** ¶82 Although such an inquiry necessarily links the government with religious organizations, "some degree of involvement" does not offend the First Amendment. Walz, 397 U.S. at 674, 90 S.Ct. 1409; see also id. at 697 90 S.Ct. 1, 90 S.Ct. 1409409 (Harlan, J., concurring). An inquiry evaluating "the scope of charitable activities in proportion to doctrinal pursuits may be difficult," but such difficulty "does not render it undue interference with religion" as long as it "does not entail judicial inquiry into dogma and belief." Id. at 697 n.1, 90 S.Ct. 1409 (Harlan, J., concurring).

[25] ¶83 The truth or falsity of a religious belief is not a proper matter for us, or any other court to decide, but courts still must answer "delicate question[s]" to avoid "allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." Yoder, 406 U.S. at 215-16, 92 S.Ct. 1526. The key is for any inquiry a court undertakes to remain on the right side of the line and not involve an examination into the religious beliefs, practices, or dogma of an organization. Cf. St. Augustine Sch., 398 Wis. 2d 92, ¶¶47-49, 961 N.W.2d 635. For example, in St.

Augustine School, we observed that an examination of "a school's professions that are published on its public website or set forth in filings with the state does not necessarily require any investigation or surveillance into the practices of the school." Id., ¶48. Consideration of "professions" without any surveillance of whether an organization's practices are consistent with a particular religious dogma ensures that the inquiry remains on the right side of the line. Id., ¶49.

¶84 Such is our challenge here. We begin the inquiry by again looking at the statute at issue. As set forth above, the language of Wis. Stat. § 108.02(15)(h)2. dictates that we examine both the ***45** organization's motivations and activities to determine whether the organization is "operated primarily for religious purposes" and thus is entitled to exemption from unemployment tax.

¶85 Examining both the motivations and activities of the organization requires minimal judicial inquiry into religion, as there is no examination of whether CCB's or the sub-entities' activities are consistent or inconsistent with Catholic doctrine. A court need only determine what the nature of the motivations and activities of the organizations are—not whether they are "Catholic" enough to qualify for the exemption.

¶86 Again, this inquiry requires "some degree of involvement" with religion. See Walz, 397 U.S. at 674, 90 S.Ct. 1409. But rather than necessarily creating a constitutional problem, such an inquiry is inherent in any statutory scheme that offers tax exemption to religious entities. Id.; see id. at 675, 90 S.Ct. 1409 ("There is no genuine nexus between tax exemption and establishment of religion."). The review we endorse in this case is a neutral and secular inquiry based on objective criteria, examining the activities and motivations of a religious organization. See St. Augustine Sch., 398 Wis. 2d 92, ¶5, 961 N.W.2d 635 (concluding that a "neutral and secular inquiry" into a religious organization is constitutional); Dykema, 666 F.2d at 1100 (applying "objective criteria" to an investigation into a religious organization's activities.)

¶87 Our conclusion is consistent with those of other courts that have examined similarly "delicate" questions. For example, in Dykema, the Seventh Circuit examined an organization's actual activities, just as we do here. Id. ("Objective criteria for examination of an organization's activities ****688** ... enable the IRS to ***46** 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."). Our examination of the motivations and actual activities of an organization here is akin to our consideration of a school's corporate documents, professions with regard to self-identification and affiliation, and website to which we gave a constitutional seal of approval in St. Augustine School. 398 Wis. 2d 92, ¶5, 961 N.W.2d 635. This "neutral and secular" inquiry does not intrude on questions of religious dogma. See id.

¶88 Further, a look to history strongly supports our consideration of an organization's activities, to which CCB and the sub-entities object. As detailed below, this history establishes two essential principles for our purposes here. First, that an inquiry into "purpose" that examines an organization's actual activities has long been established in statutory enactments and the common law, and second, that courts have embraced, rather than shunned, a judicial inquiry into an organization's actual activities in order to make a determination of "purpose" to inform whether the organization qualifies for exemption. Our decision here is thus consistent with court's historical treatment of similar questions.

¶89 Religious tax exemption has been traced from ancient times through the British common law. See John W. Whitehead, Tax Exemption and Churches: A Historical and Constitutional Analysis, 22 Cumb. L. Rev. 521, 524-36 (1992). British common law, and certain colonial legislatures, widely granted property tax exemptions to church property. John Witte, Jr., Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?, 64 S. Cal. L. Rev. 363, 372-74 (1991). The law of equity, on ***47** the other hand, also accorded tax exemption to church properties, but only to those which were devoted to "charitable uses." Id. at 375. Thus, there has historically been some examination of a property's actual use, not just reliance on an organization's religious character. In other words, courts have long placed import on what a religious organization does, and not just on what it says.

¶90 As these exemptions evolved, statutory language likewise focused on an organization's "purpose." Indeed, from the earliest statutory enactments regarding tax exemption for religious entities, an examination of an organization's activities has been part and parcel of the inquiry.

¶91 For instance, the Wilson-Gorman Tariff Act of 1894, one of the earliest tax statutes that referenced an exemption for religious purposes, provided a tax exemption to a flat income tax. It stated:

> "[N]othing herein contained shall apply to ... corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary associations." Though the law was declared unconstitutional by the Supreme Court in 1895, the exemption language contained in the act would provide the cornerstone for tax legislation involving charitable organizations for the next century.

Paul Arnsberger, et al., A History of the Tax-Exempt Sector: An SOI Perspective, IRS Stat. of Income Bull. 105, 106-07 (Winter 2008), www.irs.gov/pub/irs-soi/tehistory.pdf. Similarly, a subsequent enactment, the Revenue Act of 1909, granted exemption to "any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, ***48** no part of the net income of which inures to the benefit of any private stockholder or individual." Id. at 107 (emphasis added).

****689** ¶92 The ubiquity of religious tax exemptions and the analytical consequences of such exemptions have been recognized by the United States Supreme Court. Specifically, the Walz Court observed that "Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies," noting several examples from the early 1800's. Walz, 397 U.S. at 677, 90 S.Ct. 1409. As stated above, however, the Walz court also emphasized that "some degree of involvement" with religion is a necessary consequence of offering tax exemption to religious entities. Id. at 674, 90 S.Ct. 1409.

¶93 Tax exemptions for entities with a religious "purpose" being well-established in historical enactments, it is paramount that there be a mechanism for determining if an organization qualifies. See Ecclesiastical Order of Ism of Am, Inc. v. Chasin, 653 F. Supp. 1200, 1205 (E.D. Mich. 1986) ("Without [an examination of religious activities], it would be difficult to see how any church could qualify as a tax exempt organization 'for religious purposes.' "). Such an endeavor inherently requires judicial inquiry and has on many occasions throughout the history of both federal and state law resulted in denial of tax exemption where religion is claimed as the basis of the exemption. [19]

***49** **[26]** ¶94 For the above reasons, we conclude that CCB and the sub-entities have failed to demonstrate beyond a reasonable doubt an unconstitutional entanglement with religion. The motivations and activities framework dictated by the language of Wis. Stat. § 108.02(15)(h)2. does not require the court to stray from a neutral and secular inquiry to an impermissible examination of religious dogma.

B

¶95 CCB and the sub-entities contend next that LIRC's interpretation violates the church autonomy principle. Namely, they argue that the church autonomy principle is violated because LIRC's interpretation penalizes the choice CCB made to structure itself and its sub-entities as corporations separate from the church itself. CCB and the sub-entities advance that the church autonomy principle is violated by "divid[ing] up religious bodies according to secular principles." They point to Kedroff, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120, to assert that the government is thereby "interfering with the Church's internal governance," which adversely affects the faith and mission of the church itself.

¶96 Kedroff illustrates the type of ecclesiastical governance matters protected by the church autonomy principle. At issue in Kedroff was an inter-church ***50** controversy over the right to use a Russian Orthodox cathedral in New York City. Id. at 96-97, 73 S.Ct. 143. The controversy arose between the North American Russian Orthodox churches, which claimed the right to use the cathedral belonged to an archbishop elected by them, and the Supreme Court Authority, which claimed the right ****690** belonged instead to an archbishop appointed by the patriarch in Moscow. Id. New York's highest court ruled in favor of the North American churches, based on a state law requiring every Russian Orthodox church in New York to recognize the determination of the governing body of the North American churches as authoritative. Id. at 99 n.3, 73 S.Ct. 143.

¶97 The Kedroff Court concluded that the state statute at issue was unconstitutional because it allowed the "power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment" by "displac[ing] one church administrator with another ... [thereby] pass[ing] the control of matters strictly ecclesiastical from one church authority to another." Id. at 119, 73 S.Ct. 143. The right to

acquire the cathedral was determined to be "strictly a matter of ecclesiastical government." Id. at 115, 73 S.Ct. 143.

¶98 In contrast to the New York statute at issue in Kedroff, Wis. Stat. § 108.02(15)(h)2. neither regulates internal church governance nor mandates any activity. Section 108.02(15)(h)2. defines what employment is for the purposes of unemployment insurance without reference to any religious principles or any attempt to control internal church operations. Put simply, it does not concern matters that are "strictly" or even remotely "ecclesiastical," which belong to the church alone. See id.

¶99 CCB and the sub-entities claim that viewing their motives and activities separate from those of ***51** the church penalizes their "choice to be 'structured as separate corporations'—a religious decision grounded in church polity and internal governance." On the contrary, the claim that in order to receive the exemption the church is now required to structure itself as a single entity rather than separately incorporated subsidiaries is unpersuasive. The statute at issue dictates that it is the motivation and activities of the nonprofit that determine its tax-exempt status, not its corporate structure.

[27] ¶100 It is not difficult to imagine a non-profit organization structured as a separate sub-entity of a church that is "operated primarily for religious purposes," that is, with both motivations and activities that are religious. For example, if one of the religiously-motivated sub-entities in this case partook in activities such as those cited by the Dykema court as indicative of a religious purpose, see supra, ¶55, it would have a stronger argument that, despite being incorporated separately from a religious institution, it is nevertheless "operated primarily for religious purposes" within the meaning of Wis. Stat. § 108.02(15)(h)2.[20] Thus, CCB and the sub-entities have failed to demonstrate that the church autonomy principle has been violated beyond a reasonable doubt ***52** because the statute does not interfere with its internal governance or any ecclesiastical matters.

C

¶101 Next, CCB and the sub-entities claim that LIRC's proposed interpretation ****691** as applied to them abandons "[the] bedrock principle of neutrality among religions" and violates the Free Exercise Clause in at least two ways. First, CCB and the sub-entities advance that it violates the principle of neutrality because "it discriminates against religious entities with a more complex polity." In other words, CCB and the sub-entities contend that the Catholic Church is penalized under LIRC's interpretation for "organizing itself as a group of separate corporate bodies—in contrast to other religious entities that include a variety of ministries as part of a single incorporated or unincorporated body."

¶102 Second, CCB and the sub-entities claim that LIRC's interpretation is not neutral because it penalizes them "for [their] Catholic beliefs regarding how [they] must serve those most in need." They point to LIRC's and the court of appeals' decisions as "identifying [certain[21]] characteristics of CCB's ministry as factors favoring denial of an otherwise-available exemption." ***53** Such an interpretation, in the petitioners' view, "flies in the face of Catholic beliefs about care for the poor" and "favors religious groups that require those they serve to adhere to the faith of that group or be subject to proselytization."

[28] **[29]** ¶103 As a threshold matter, a party making a free exercise challenge must demonstrate that the challenged law burdens their religious exercise in a constitutionally significant way. "[T]he Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985); see also Sch. Dist. of Abington Twp., 374 U.S. at 223, 83 S.Ct. 1560 ("[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."). If such a burden has been shown, then the analysis proceeds to the second step, where a party may carry its burden of proving a free exercise violation by showing that a governmental entity has burdened a sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." Bremerton, 507 U.S. at 525, 113 S.Ct. 1562.

¶104 Importantly for our Free Exercise analysis, LIRC asserts that CCB and the sub-entities have not shown that "the unemployment insurance system burdens their religious beliefs." In LIRC's view, "[i]nclusion in the unemployment program is not a constitutionally significant burden." LIRC's argument continues: "The commission's interpretation does not prohibit the Diocese or the employers from engaging in any activity. The employers have participated in the State unemployment insurance program for many ***54** years and

do not contend that their participation was a significant or substantial burden on their religious practices or beliefs."

[30] ¶105 A look to United States Supreme Court precedent illustrates that LIRC's position is correct. "[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant." ****692** Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 391, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990). "[T]he very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief." Id. at 394, 110 S.Ct. 688; see Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699-700, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (concluding that the burden imposed by a provision of the Internal Revenue Code governing charitable deduction was "no different from that imposed by any public tax or fee" and that even a "substantial burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.' ") (quoted source omitted); accord Coulee Cath. Schs., 320 Wis. 2d 275, ¶65, 768 N.W.2d 868 ("General laws related to building licensing, taxes, social security, and the like are normally acceptable.").

¶106 Such is the nature of the unemployment tax at issue here. CCB and the sub-entities have not identified how the payment of unemployment tax prevents them from fulfilling any religious function or engaging in any religious activities. As the United States Supreme Court said, the decrease in the money available for religious or charitable activities that comes with paying a generally applicable tax is not a constitutionally significant burden. ***55** Jimmy Swaggart Ministries, 493 U.S. at 391, 110 S.Ct. 688. CCB and the sub-entities thus cannot surmount the threshold inquiry to demonstrate a Free Exercise violation. Because CCB and the sub-entities have failed to demonstrate that the statute imposes a constitutionally significant burden on their religious practice, we need not address the petitioners' argument that the statute violates principles of neutrality.

[31] ¶107 Accordingly, we conclude that CCB and the sub-entities have therefore not met their burden under their Free Exercise claim to show that the law as-applied to them is unconstitutional beyond a reasonable doubt. [22]

V

¶108 In sum, we determine that in our inquiry into whether an organization is "operated primarily for religious purposes" within the meaning of Wis. Stat. § 108.02(15)(h)2., we must examine both the motivations and the activities of the organization. Applying this analysis to the facts before us, we conclude that the petitioners are not operated primarily for religious purposes within the meaning of § 108.02(15)(h)2. We further conclude that the application of § 108.02(15)(h)2. as applied to the petitioners does not violate the First Amendment because the petitioners ***56** have failed to demonstrate that the statute as applied to them is unconstitutional beyond a reasonable doubt.

¶109 Accordingly, we affirm the decision of the court of appeals.

By the Court.—The decision of the court of appeals is affirmed.

¶110 REBECCA GRASSL BRADLEY, J. (dissenting).

> "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."

Matthew 22:21 (King James).

¶111 The State of Wisconsin gives a tax exemption to any nonprofit organization ****693** "operated primarily for religious purposes and operated ... by a church ...." Wis. Stat. § 108.02(15)(h)2. Catholic Charities Bureau, Inc. and four of its sub-entities (collectively, "Catholic Charities") are operated primarily for a religious purpose—fulfillment of the command of Jesus Christ himself to serve others—and operated by the Roman Catholic Diocese of Superior, Wisconsin. The majority rewrites the statute to deprive Catholic Charities of the tax exemption, rendering unto the state that which the law says belongs to the church.

¶112 Impermissibly entangling the government in church doctrine, the majority astonishingly declares Catholic Charities are not "operated primarily for religious purposes" because their activities are not "religious in nature." Majority op., ¶60. The statute, however, requires only that a nonprofit be operated primarily for a religious reason. "The statute is neutral as to the type of service an organization provides; it ***57** speaks only in terms of the purpose of the organization." Cathedral Arts Project, Inc. v. Dep't of Econ. Opportunity, 95 So. 3d 970, 975 (Fla. Dist. Ct. App. 2012) (Swanson, J., dissenting in part, and dissenting from the judgment).

¶113 The majority's misinterpretation of the exemption renders the statute in violation of the First Amendment of the United States Constitution as well as the Wisconsin Constitution. By focusing on whether a nonprofit primarily engages in activities that are "religious in nature," the majority transforms a broad exemption into a denominational preference for Protestant religions and a discriminatory exclusion of Catholicism, Judaism, Islam, Sikhism, Hinduism, Buddhism, Hare Krishna, and the Church of Latter Day Saints, among others. The First Amendment forbids the government from such religious discrimination and commands neutrality among religions in the provision or denial of a government benefit.

¶114 The majority's misinterpretation also excessively entangles the government in spiritual affairs, requiring courts to determine what religious practices are sufficiently religious under the majority's unconstitutional test. The majority says secular entities provide charitable services, so such activities aren't religious at all, even when performed by Catholic Charities. The majority's determination directly contradicts Catholic Charities' faith:

> The [Catholic] Church's deepest nature is expressed in her three-fold responsibility: of proclaiming the word of God (kerygma-martyria), celebrating the sacraments (leitourgia), and exercising the ministry of charity (diakonia). These duties presuppose each other and are inseparable. For the Church, charity is not a kind of welfare activity which could equally well be left to ***58** others, but is a part of her nature, an indispensable expression of her very being.

Pope Benedict XVI, Deus Caritas Est, ¶25 (2005). [1] Courts should be uncomfortable judging matters of faith. Not only does the constitution forbid the exercise, but courts are susceptible to mischaracterizing deeply religious activities, which for some faith traditions include dancing, Bhakti-yoga, and sharing a meal, as amicus curiae, International Society for Krishna Consciousness and the Sikh Coalition, informs this court. The majority instead looks through a seemingly Protestant lens to deem works of charity worthy of the exemption only if accompanied by proselytizing—a combination ****694** forbidden by Catholicism, Judaism, and many other religions. [2]

¶115 The majority mangles Wis. Stat. § 108.02(15)(h)2. to reflect its policy preferences, supplanting the law actually enacted by the people's representatives in the legislature. The majority's activism renders the exemption unconstitutional. I dissent. [3]

***59** I. BACKGROUND

¶116 Every Roman Catholic diocese in Wisconsin has a Catholic Charities entity, which is its social ministry arm. Catholic Charities Bureau, Inc. (CCB) is the Catholic Charities entity for the Diocese of Superior, Wisconsin. The purpose of CCB "is to be an effective sign of the charity of Christ" by providing services according to an "[e]cumenical orientation," meaning the organization makes no distinction on the basis of race, sex, or religion regarding those served, employed, or who serve on its board. CCB has separately ***60** incorporated sub-entities, four of which are parties in this dispute. The bishop of the Diocese of Superior oversees CCB's programs and services and is in charge of Catholic Charities. It is uncontested that Catholic Charities are operated for a religious reason.

¶117 In 2016, Catholic Charities asked to withdraw from the Wisconsin unemployment tax system. The Department of Workforce Development (DWD) denied the request. Catholic Charities appealed, and an administrative law judge reversed DWD's decision. The Labor and Industry Review Commission (LIRC) reversed the administrative law judge's decision.

¶118 LIRC determined Catholic Charities are not "operated primarily for religious purposes" under Wis. Stat. § 108.02(15)(h)2. LIRC decided "[t]he activities, not the religious motivation behind them or the organization's founding principles, determine whether an exemption from participation in the unemployment ****695** insurance program is warranted." Although "[Catholic Charities'] services may be religiously motivated and manifestations of religious belief," LIRC decided Catholic Charities' activities are not "religious per se." LIRC determined "the provision of help to the poor and disabled" is "essentially secular," and therefore denied Catholic Charities the exemption. The circuit

court reversed LIRC's decision. The court of appeals then reversed the circuit court.

¶119 The court of appeals decided Catholic Charities do not operate primarily for religious purposes—holding that Catholic Charities' activities are not sufficiently "viewed as ... inherently religious." Cath. Charities Bureau, Inc. v. LIRC, 2023 WI App 12, ¶45, 406 Wis. 2d 586, 987 N.W.2d 778. The court of appeals held that to receive the exemption under Wis. Stat. § 108.02(15)(h)2., Catholic Charities ***61** must have a religious motivation and engage primarily in activities "religious in nature." Id., ¶34. According to the court of appeals, "a religious motivation does not, by itself, mean that the organization is operated primarily for religious purposes." Id., ¶62. It is "the type of religious activities engaged in by the organization" that determines its eligibility for the exemption. Id., ¶45. The court of appeals acknowledged Catholic Charities have a religious motivation for conducting their charitable activities. Id., ¶¶56-57. Nevertheless, the court of appeals decided Catholic Charities' charitable activities "are neither inherently or primarily religious activities":

> CCB and its sub-entities do not operate to inculcate the Catholic faith; they are not engaged in teaching the Catholic religion, evangelizing, or participating in religious rituals or worship services with the social service participants; they do not require their employees, participants, or board members to be of the Catholic faith; participants are not required to attend any religious training, orientation, or services; their funding comes almost entirely from government contracts or private companies, not from the Diocese of Superior; and they do not disseminate any religious material to participants. Nor do CCB and its sub-entities provide program participants with an "education in the doctrine and discipline of the church."

Id., ¶58 (quoting United States v. Dykema, 666 F.2d 1096, 1100 (7th Cir. 1981)). "While [Catholic Charities'] activities fulfill the Catechism of the Catholic Church to respond in charity to those in need, the activities themselves are not primarily religious in nature." Id., ¶59. The court of appeals held any "spreading of [the] Catholic faith accomplished" by Catholic Charities' activities is only "indirect." ***62** Id., ¶61. The court of appeals concluded that although "the Catholic Church's tenet of solidarity compels it to engage in charitable acts, the religious motives of CCB and its sub-entities appear to be incidental to their primarily charitable functions." Id., ¶62.

II. STATUTORY INTERPRETATION

¶120 The Wisconsin Unemployment Compensation Act provides temporary benefits to eligible unemployed workers. Employers contribute to a government account via a tax. In 1972, the state exempted certain religious nonprofits from paying the tax. See ch. 53, Laws of 1971. Currently, the law says, " 'Employment' as applied to work for a nonprofit organization ... does not include service ... [i]n 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[.]" Wis. Stat. § 108.02(15)(h)2.

¶121 To receive an exemption under Wis. Stat. § 108.02(15)(h)2., a nonprofit must meet two requirements: (1) the organization ****696** must be "operated primarily for religious purposes" and (2) the organization must be "operated, supervised, controlled, or principally supported by a church or convention or association of churches[.]"[4] The parties agree Catholic Charities are "operated, supervised, controlled, or principally supported by a church." The parties dispute whether Catholic Charities are "operated primarily for religious purposes." An examination of the statute's language unencumbered by the majority's policy agenda shows Catholic Charities are operated for religious purposes and entitled to the exemption.

***63** ¶122 The goal of statutory interpretation is to ascertain a law's objective meaning. State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶47, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting Bruno v. Milwaukee Cnty., 2003 WI 28, ¶25, 260 Wis. 2d 633, 660 N.W.2d 656); see Friends of Black River Forest v. Kohler Co., 2022 WI 52, ¶39, 402 Wis. 2d 587, 977 N.W.2d 342 (stating the Kalal framework involves "ascertaining statutory meaning," not what the legislature or "statute 'intended' "). Courts are supposed to focus on the text of the statute to derive "the fair meaning [from] the text itself." Brey v. State Farm Mut. Auto. Ins. Co., 2022 WI 7, ¶11, 400 Wis. 2d 417, 970 N.W.2d 1 (citing Kalal, 271 Wis. 2d 633, ¶¶46, 52, 681 N.W.2d 110); Friends of Black River Forest, 402 Wis. 2d 587, ¶28 n.13, 977 N.W.2d 342 (In a "textually driven analysis ... the language of the cited statutes drives the inquiry ...."). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." Kalal, 271 Wis. 2d 633, ¶45, 681 N.W.2d 110 (citations omitted); see

also Wis. Stat. § 990.01(1). If a statute's meaning is plain, the interpretive process ends. Kalal, 271 Wis. 2d 633, ¶45, 681 N.W.2d 110 (citations omitted).

¶123 To determine the meaning of a statute, this court consults the text, context, and structure of the statute. Brey, 400 Wis. 2d 417, ¶11, 970 N.W.2d 1 (citing Milwaukee Dist. Council 48 v. Milwaukee Cnty., 2019 WI 24, ¶11, 385 Wis. 2d 748, 924 N.W.2d 153). Canons of construction, dictionaries, and the rules of grammar "serve as 'helpful, neutral guides' " to determine a statute's meaning. James v. Heinrich, 2021 WI 58, ¶23 n.12, 397 Wis. 2d 517, 960 N.W.2d 350 (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 61 (2012)); ***64** State v. Sample, 215 Wis. 2d 487, 499, 573 N.W.2d 187 (1998) (first citing Wis. Stat. § 990.01(1); and then citing Swatek v. Cnty. of Dane, 192 Wis. 2d 47, 61, 531 N.W.2d 45 (1995)) ("For purposes of statutory interpretation or construction, the common and approved usage of words may be established by consulting dictionary definitions."); Scalia & Garner, supra, at 140 ("Words are to be given the meaning that proper grammar and usage would assign them."); Neil M. Gorsuch, A Republic, If You Can Keep It 132 (2019) (noting the rules of grammar "play no favorites" in statutory interpretation). Application of the traditional tools of statutory interpretation inexorably leads to the unremarkable conclusion that a nonprofit is "operated primarily for religious purposes" if it is managed primarily for religious reasons. Ascertaining the meaning of the religious exemption's first requirement ("operated primarily for religious purposes") requires a proper understanding of two words—"operated" and "purposes."

****697** A. Operated

¶124 LIRC argues the word "operated" means "to work, perform, or function." According to LIRC, the word "operate" "connotes" activity. The majority agrees. Majority op., ¶42. Catholic Charities argue the word means "managed" or "used." A textual analysis reveals the word "operated," as used in Wis. Stat. § 108.02(15)(h)2., means "managed." Basic grammar verifies the correctness of this interpretation.

¶125 "Although drafters, like all other writers and speakers, sometimes perpetrate linguistic blunders, they are presumed to be grammatical in their compositions. They are not presumed to be unlettered." Scalia & Garner, supra, at 140 (footnotes omitted). ***65** Courts are supposed to prefer interpretations in accord with the rules of grammar over non-grammatical readings. See Indianhead Motors v. Brooks, 2006 WI App 266, ¶9, 297 Wis. 2d 821, 726 N.W.2d 352 (rejecting an interpretation that "defie[d] the rules of grammar"). The word "operated" appears twice in Wis. Stat. § 108.02(15)(h)2. Each time, "operated" is a transitive verb, [5] taking the word "organization" as its direct object. "Operated" should be interpreted in its transitive sense. See State ex rel. DNR v. Wis. Ct. of Appeals, Dist. IV, 2018 WI 25, ¶29, 380 Wis. 2d 354, 909 N.W.2d 114. "Managed" is a common definition of "operated" when used as a transitive verb. E.g., Operate, The Random House Dictionary of the English Language 1009 (1st unabridged ed. 1966) (defining "operate" in the transitive sense as "[t]o manage or use"; "[t]o put or keep ... working or in operation"; and "[t]o bring about out, effect, or produce, as by action or the exertion of force or influence"). Other textual clues confirm "operated" means "managed."

***66** ¶126 The whole text of Wis. Stat. § 108.02(15)(h)2. must be considered when interpreting the word "operated." "Statutory interpretation centers on the 'ascertainment of meaning,' not the recitation of words in isolation." Brey, 400 Wis. 2d 417, ¶13, 970 N.W.2d 1 (citation omitted). "Context is a primary determinant of meaning." Scalia & Garner, supra, at 167, 385 Wis. 2d 748, 924 N.W.2d 153; see Clarke v. Wis. Elections Comm'n, 2023 WI 79, ¶198, 410 Wis. 2d 1, 998 N.W.2d 370 (Rebecca Grassl Bradley, J., dissenting) (citing Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158, 62 L.Ed. 372 (1918)). The word "operated" is used twice in § 108.02(15)(h)2.: "operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches[.]" (Emphasis added.) "[A]bsent textual or structural clues to the contrary[,]" we presume a word used multiple times in a statute bears the same meaning throughout. DNR, 380 Wis. 2d 354, ¶30, 909 N.W.2d 114 (citations omitted); DaimlerChrysler v. LIRC, 2007 WI 15, ¶29, 299 Wis. 2d 1, 727 N.W.2d 311 (quoting Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 663, 539 N.W.2d 98 (1995)) ("It is a basic rule of construction that we attribute the same definition to a word both times it is ****698** used in the same statute or administrative rule."). The text and structure of § 108.02(15)(h)2. confirm the word "operated" bears the same meaning in both uses. Section 108.02(15)(h)2. uses the word "operated" twice within the same sentence, providing strong evidence the word means the same thing in both instances. Miss. ex rel. Hood v. AU Optronics Corp., 571 U.S. 161, 171, 134 S.Ct. 736, 187 L.Ed.2d 654 (2014) (quoting Brown

v. Gardner, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994)) ("[T]he 'presumption that a given term is used to mean the same thing throughout a statute' is 'at its most vigorous when a term is repeated within a given sentence.' "). ***67** Additionally, the word "operated" is a transitive verb in both uses, sharing the same direct object: "organization." It is not credible that the word "operated," which is used twice in the same sentence, sharing the same direct object, means something different in each use. See United States v. Cooper Corp., 312 U.S. 600, 606, 61 S.Ct. 742, 85 L.Ed. 1071 (1941) ("It is hardly credible that Congress used the term 'person' in different senses in the same sentence.").

¶127 In its second appearance in Wis. Stat. § 108.02(15)(h)2., the word "operated" is followed by the verbs "supervised, controlled, [and] principally supported." It is a basic principle of statutory interpretation that the meaning of words should be understood "by reference to their relationship with other associated words or phrases." State v. Popenhagen, 2008 WI 55, ¶46 n.25, 309 Wis. 2d 601, 749 N.W.2d 611. When words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar. The [associated-words canon] especially holds that 'words grouped in a list should be given related meanings.' " Scalia & Garner, supra, 215 Wis. 2d 487, 499, 573 N.W.2d at 195 (citing Third Nat'l Bank in Nashville v. Impac Ltd., Inc., 432 U.S. 312, 322, 97 S.Ct. 2307, 53 L.Ed.2d 368 (1977)). "Managed" is a definition of "operated" that works for both uses of the word "operated" in the statute, and "managed" has a related meaning to "supervised, controlled, [and] principally supported." § 108.02(15)(h)2. The majority's proffered interpretation of "operated"—"to work, perform, or function, as a machine does[,]" majority op., ¶42 (quoted source omitted)—is utterly unlike "supervised, controlled, [and] principally supported." § 108.02(15)(h)2. Because "operated" means "managed" ***68** in its second appearance, it most likely means "managed" in its first appearance as well.

¶128 The text, its context, and the canons of construction all support the conclusion that "operated" means "managed" in Wis. Stat. § 108.02(15)(h)2. The definition of "operated" advanced by LIRC and adopted by the majority simply does not work. Both define "operated" to mean "to work, perform, or function ...." Majority op., ¶42 (citations omitted). Both treat "operated" as a synonym for the word "activity"—an interpretation unsupported by the statutory text. Treating "operated" as a stand in for the noun "activity" either assigns "operated" two different senses in the same sentence, or gives "operated" a meaning oddly dissimilar to the words surrounding it in its second use. See § 108.02(15)(h)2. (requiring the nonprofit to be "operated, supervised, controlled, or principally supported by a church or convention or association of churches"). Additionally, defining "operated" to mean "activity" transmogrifies a verb, "operated," into a noun, "activity." The majority's interpretation of "operated" violates the "fundamental rule of textual interpretation ... that neither a word nor a sentence may be given a meaning that it cannot bear." Scalia & Garner, supra, at 31, 139 S. Ct. 2067, 2092.

****699** B. Purposes

¶129 The majority correctly concludes the word "purposes" means the reasons for which something is done. Majority op., ¶43 (quoting Purpose, https://www.dictionary.com/browse/purpose (last visited Feb. 27, 2024)); purpose, The Random House Dictionary of the English Language 1167 (1st unabridged ed. 1966) (defining "purpose" as "the reason for which something exists or is done, made, used, etc."); ***69** see also Brown Cnty. v. Brown Cnty. Taxpayers Ass'n, 2022 WI 13, ¶38, 400 Wis. 2d 781, 971 N.W.2d 491 (internal quotation marks omitted) (quoting Purpose, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/purpose (last visited Feb. 14, 2022)) (the "common definition" of "purpose" is "the reason why something is done or used" or "the aim or intention of something"). To be "primarily operated for religious purposes," the nonprofit must be managed primarily for a religious reason.

¶130 LIRC resists this common-sense understanding of "purposes," insisting "purposes" means "[t]he employers' business activity, objectives, goals and ends." LIRC argues this court should not consider the reasons why a nonprofit is operated. LIRC cites a legal dictionary—purpose, Black's Law Dictionary 1493 (11th ed. 2019)—for its conclusion that "purposes" means "business activity." Because "purposes" is an ordinary term,[6] however, we should use ordinary dictionaries to ***70** aid our search for its meaning. See Sanders v. State of Wis. Claims Bd., 2023 WI 60, ¶14, 408 Wis. 2d 370, 992 N.W.2d 126 (lead opinion) (internal citations omitted) ("To determine common and approved usage, we consult dictionaries. To determine the meaning of legal terms of art, we consult legal dictionaries."); see majority op., ¶43 (quoted source omitted). Unless a word or phrase is a legal term of art or statutorily defined, words and phrases are given

their "common, ordinary, and accepted meaning." Kalal, 271 Wis. 2d 633, ¶45, 681 N.W.2d 110. "Business activity" is anything but the ordinary meaning of "religious purposes." LIRC's assertion that "purposes" means "objectives, goals and ends" does not logically lead to considering only Catholic Charities' activities, much less whether those activities are inherently religious. An objective, goal, or end cannot ****700** be divorced from motives. "Purposes" means the reason something is done, the motivation underlying the action. As a matter of simple logic, "purposes" does not mean the action itself.

***71** C. Applying the Plain Meaning of Wis. Stat. § 108.02(15)(h)2.

¶131 As a matter of statutory construction, common usage of ordinary terms, and basic grammar, "operated primarily for religious purposes" means managed primarily for religious reasons. See, e.g., Czigler v. Adm'r, Ohio Bureau of Emp. Servs., 27 Ohio App.3d 272, 501 N.E.2d 56, 58 (1985). No one disputes that the only reason the Catholic Church operates Catholic Charities is religious. See majority op., ¶59; see also Cath. Charities Bureau, 406 Wis. 2d 586, ¶47, 987 N.W.2d 778 ("[N]either DWD nor this court dispute that the Catholic Church holds a sincerely held religious belief as its reason for operating CCB and its sub-entities."). It's no surprise the issue is uncontested—Catholic Charities' raison d'être is religious. A court must accept a religious entity's good faith representations that religious beliefs motivate an operation and the operation furthers a religious mission. Holy Trinity Cmty. Sch., Inc. v. Kahl, 82 Wis. 2d 139, 154-55, 262 N.W.2d 210 (1978); See United States v. Lee, 455 U.S. 252, 257, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (Brennan, J., concurring in the judgment) ("Determining that certain activities are in furtherance of an organization's religious mission ... is ... a means by which a religious community defines itself."); See also Kendall v. Dir. of Div. of Emp. Sec., 393 Mass. 731, 473 N.E.2d 196, 199 (1985); Hollis Hills Jewish Ctr. v. Comm'r of Lab., 92 A.D.2d 1039, 461 N.Y.S.2d 555, 556 (N.Y. App. Div. 1983) (stating that an employer's statement that its operation furthers a religious objective, "made in good faith, must be accepted by civil courts"). That should end the inquiry, and Catholic Charities should receive the tax exemption. Regardless of whose motivations ***72** are relevant—Catholic Charities' or the Diocese of Superior's—Catholic Charities are managed primarily for religious reasons.

D. Whose Purposes

¶132 Because it is undisputed that the only reason Catholic Charities are operated is religious (no matter whose purposes are relevant under Wis. Stat. § 108.02(15)(h)2.) the majority need not decide whose purposes are relevant. Nevertheless, the majority answers the question, botching the analysis. The answer should be obvious from the statutory text: The purposes of the entity that operates the nonprofit are the relevant purposes under the statute. When trying to figure out why a nonprofit exists, ask the manager, not those managed.

¶133 The majority comes to the opposite conclusion, deeming the nonprofit's subjective motivations relevant. Majority op., ¶34. The majority's rationale is unconvincing. As a preliminary matter, the majority relies on a false dichotomy. The majority asks whether—in all cases—the analysis focuses on the church's motivations or the nonprofit's motivations. See id., ¶33. Not all cases, however, will present those two options. The text of Wis. Stat. § 108.02(15)(h)2. indicates it is the operator's motivations that are relevant. A nonprofit could operate itself. Alternatively, a "church or convention or association of churches" could operate the nonprofit. § 108.02(15)(h)2. As a third option, a third party could operate the nonprofit. The statute's language contemplates that a nonprofit may be operated by a third party and the exemption will be available if the nonprofit is "operated primarily for religious ****701** purposes" and "supervised, controlled, or ***73** principally supported by a church or convention or association of churches[.]" § 108.02(15)(h)2.

¶134 With the majority's false dichotomy discredited, the majority's conclusion collapses. There is no surplusage under a textualist reading. When a church operates a nonprofit, focusing on the church's motivations for doing so will not lead to every religiously affiliated organization "automatically" receiving an exemption because "[a] church's purpose is religious by nature." See majority op., ¶37. When a nonprofit is self-operated or operated by a third party other than a church, the "operated primarily for religious purposes" requirement still has force.[7] The "operated primarily for religious purposes" requirement is not "pointless," Scalia & Garner, supra, at 176, if the relevant motives are that of the nonprofit's operator, which could be the nonprofit itself or a

third party other than a church. The surplusage canon applies only if an interpretation renders a word or phrase meaningless or redundant. See id. That is not the case under a fair reading of Wis. Stat. § 108.02(15)(h)2.

¶135 The majority also argues we should focus on the nonprofit's motivations because the exemption relates to the services of the employees of a nonprofit, not a church. Majority op., ¶34.[8] But whose services ***74** are exempt under the statute does not indicate whose purposes are relevant under Wis. Stat. § 108.02(15)(h)2. The majority's conclusion simply doesn't follow from its premises. The majority persists with its fallacious analysis, arguing the nonprofit's motivations are always the relevant motivations because "the phrase 'operated primarily for religious purposes' modifies the word 'organization,' not the word 'church' " in § 108.02(15)(h)2. Id. No one denies it is the nonprofit that must be operated primarily for religious purposes, not the church. But that doesn't mean the nonprofit's motivations control the application of the statute.

¶136 If (as the majority agrees) "purposes" means one's subjective reason for doing something, then in determining why a nonprofit is being operated, it is the operator's motives that matter. According to the majority, however, the court can determine the subjective reason why a nonprofit is operated without examining the motives of the entity operating the nonprofit. The majority's conclusion refutes itself. Apparently the majority would ask a car why it is being operated rather than asking the driver. If the majority's analysis seems ridiculous, that's because it is.

E. The Majority's Test

¶137 The majority affirms LIRC's denial of the exemption under Wis. Stat. § 108.02(15)(h)2. using a two-prong test: A nonprofit must (1) operate primarily for a religious reason and (2) primarily engage in activities that are "religious in nature." Majority op., ¶¶59-67. The majority's test, however, is unmoored ***75** from the text of ****702** § 108.02(15)(h)2. The majority insists its test is the only way to "give reasonable effect to every word" in the statute because considering purposes alone would "give short shrift to the word 'operated.' " Id., ¶¶44-45. But the majority's reformulation of the text relies on an unreasonable interpretation of § 108.02(15)(h)2., while impermissibly adding words to the statute.

¶138 The majority offends basic rules of grammar by transmuting "operated," a transitive verb, into a noun —"activity." It does not address what "operated" means in its second use in Wis. Stat. § 108.02(15)(h)2.; instead, the majority completely ignores the fact that the word is used twice, employing a divide-and-conquer method of statutory interpretation this court has rebuked many times. E.g., Brey, 400 Wis. 2d 417, ¶13, 970 N.W.2d 1 (citing Kalal, 271 Wis. 2d 633, ¶47, 681 N.W.2d 110); see also Scalia & Garner, supra, at 167; King v. Burwell, 576 U.S. 473, 500-01, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015) (Scalia, J., dissenting) ("[S]ound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters.").

¶139 The majority completely reimagines the statute. Compare the statute's actual language to the majority's remaking of it:

- Wisconsin Stat. § 108.02(15)(h)2.: " 'Employment' as applied to work for a nonprofit organization ... does not include service ... [i]n 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[.]"

- Majority's interpretation: " 'Employment' as applied to work for a nonprofit organization ... does not include service ... [i]n the employ of an ***76** organization ~~operated~~ that has primarily ~~for~~ religious purposes and primarily performs activities that are religious in nature, which is ~~and~~ operated, supervised, controlled, or principally supported by a church or convention or association of churches[.]"

The majority's interpretation violates the "cardinal maxim ... that courts should not add words to a statute to give it a certain meaning." State v. Hinkle, 2019 WI 96, ¶24, 389 Wis. 2d 1, 935 N.W.2d 271 (quoting State v. Fitzgerald, 2019 WI 69, ¶30, 387 Wis. 2d 384, 929 N.W.2d 165) (internal quotation marks omitted); State v. Neill, 2020 WI 15, ¶23, 390 Wis. 2d 248, 938 N.W.2d 521 (quoting Fond Du Lac Cnty. v. Town of Rosendale, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989)). Instead of reading words into the statute and rearranging the words to meet a desired result, we must " 'interpret the words the legislature actually enacted into law.' " Neill, 390 Wis. 2d 248, ¶23, 938 N.W.2d 521 (quoting Fitzgerald, 387 Wis. 2d 384, ¶30, 929 N.W.2d 165).

¶140 Troublingly, the majority's redefinition of "operated" to mean "activities" does not require a nonprofit to primarily engage in activities that are "religious in nature." The majority fails to identify the source of its "religious in nature" requirement; it simply declares it and moves on. The majority also fails to explain where—in the text—the majority derives the factors it uses to deny Catholic Charities the exemption.

¶141 With no support for its interpretation in the text of Wis. Stat. § 108.02(15)(h)2., the majority attempts to "buttress[ ] [its] conclusion" with this court's decision in Coulee Catholic Schools. Majority ***77** op., ¶50. But that decision concerned the ministerial exception under the ****703** First Amendment, not the statute at issue in this case. Coulee Cath. Schs. v. LIRC, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868. Because Coulee Catholic Schools has nothing to say about the meaning of § 108.02(15)(h)2., the case is irrelevant. The majority baldly asserts the decision " 'provides guidance in understanding the religious purposes exemption here[,]' " majority op., ¶52 (quoting Cath. Charities Bureau, 406 Wis. 2d 586, ¶43, 987 N.W.2d 778), but fails to explain how Coulee Catholic Schools sheds any light on the meaning of § 108.02(15)(h)2., a statute it never mentions.

¶142 The majority also mistakenly relies upon federal cases interpreting 26 U.S.C. § 501(c)(3), which exempts from taxation "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes ...." Cases interpreting and applying this exemption do not support the majority's conclusion that an exemption under Wis. Stat. § 108.02(15)(h)2. is available only if (1) a nonprofit's motivations are primarily religious and (2) the actual activities engaged in by the nonprofit are primarily "religious in nature." The majority relies on a case from the Seventh Circuit, United States v. Dykema. But the majority misunderstands Dykema and other federal cases interpreting 26 U.S.C. § 501(c)(3).

¶143 To the extent federal courts evaluate an organization's activities, they do not delve into whether the organization's activities are "religious in nature," as the majority does. Instead, some federal courts use activities as evidence of motive in cases interpreting and applying 26 U.S.C. § 501(c)(3). ***78** Dykema is not an exception. As the court in Dykema explained, "it is necessary and proper for the IRS to survey all the activities of the organization, in order to determine whether what the organization in fact does is to carry out a religious mission or to engage in commercial business." 666 F.2d at 1100 (emphasis added).

¶144 The Seventh Circuit later verified the limited role an organization's activities might play in the inquiry. As the Seventh Circuit explained in Living Faith v. Commissioner, in evaluating "whether [an organization] is 'operated exclusively' for exempt purposes within the meaning of § 501(c)(3)" "[the court] focus[es] on 'the purposes toward which an organization's activity are directed, and not the nature of the activities.' " 950 F.2d 365, 370 (7th Cir. 1991) (quoted source omitted). The activities and the "particular manner in which an organization's activities are conducted" are simply "evidence" used to "determin[e] whether an organization has a substantial nonexempt purpose" because "an organization's purposes may be inferred from its manner of operations." Id. at 372; accord Presbyterian & Reformed Publ'g. Co. v. Comm'r, 743 F.2d 148, 156 (3d Cir. 1984) (stating the "inquiry must remain that of determining the purpose to which the ... activity is directed"); B.S.W. Grp., Inc. v. Comm'r, 70 T.C. 352, 356-57 (1978) (citation omitted) ("[T]he purpose towards which an organization's activities are directed, and not the nature of the activities themselves, is ultimately dispositive of the organization's right to be classified as a section 501(c)(3) organization exempt from tax under section 501(a)."); Golden Rule Church Ass'n v. Comm'r, 41 T.C. 719, 728 (1964) (first citing Trinidad v. Sagrada Orden, 263 U.S. 578, 582, 44 S.Ct. 204, 68 L.Ed. 458 (1924); and then citing ***79** Unity Sch. of Christianity, 4 B.T.A. 61, 70 (1926)) ("The statute requires, in relevant part, that the committee be organized and operated exclusively for religious purposes. In this requirement, the statutory language treats as a touchstone, not the organization's ****704** activity, but rather the end for which that activity is undertaken."). Activities serve only as "useful indicia of the organization's purpose or purposes." Living Faith, 950 F.2d at 372.[9] Dykema's list of "[t]ypical activities"[10] in ***80** which an organization operated for religious purposes might engage is just that—a list of typical religious activities. 666 F.2d at 1100. Courts interpreting and applying 26 U.S.C. § 501(c)(3) have acknowledged that religious purposes might be unorthodox or resemble secular purposes. E.g., Golden Rule Church Ass'n, 41 T.C. 719 (holding a commercial enterprise was operated for religious purposes because it was created as an illustration of the applicability of a church's teachings in daily life); accord Dep't of Emp. v. Champion Bake-N-Serve, Inc., 100 Idaho 53, 592 P.2d 1370 (1979) (holding a bakery was "operated primarily for religious purposes" under state law because the students at issue worked at the

bakery as a part of their religious training); see Amos, 483 U.S. at 344, 107 S.Ct. 2862 (Brennan, J., concurring in the judgment) (noting "[c]hurches often regard the provision of [community services] as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster").

¶145 Federal cases interpreting 26 U.S.C. § 501(c)(3) do not support the majority's bifurcated purpose-activities test, under which courts must determine whether an activity is religious or secular in nature. At most, the federal cases support examining an organization's activities as evidence of motive. Because both LIRC and the majority concede that the ***81** reason Catholic Charities are operated is religious, federal precedent supplies no support for the majority's faulty conclusion.

¶146 It is unsurprising that no other court has adopted the majority's approach; it is incoherent. The majority's bifurcated ****705** purpose-activities test falls apart upon the faintest scrutiny. Most obviously, religious activities cannot be separated from religious purposes. It is the underlying religious motivation that makes an activity religious. See, e.g., Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715-16, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); Univ. of Great Falls v. N.L.R.B., 278 F.3d 1335, 1346 (D.C. Cir. 2002). For example, anyone—religious or irreligious—could use peyote, [11] kill animals, [12] grow a 1/2–inch beard, [13] or use Saturday as a day of rest. [14] One could read the Bible for secular or religious reasons. Cf. Locke v. Davey, 540 U.S. 712, 734-35, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) (Thomas, J., dissenting) (explaining that "the study of theology does not necessarily implicate religious devotion or faith" since it may be done "from a secular perspective as well as from a religious one"). One could erect a cross to promote a Christian message or honor fallen soldiers. See Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 139 S. Ct. 2067, 2082, 204 L.Ed.2d 452 (2019). Such activities are religious activities only if motivated by religious beliefs. See Holt v. Hobbs, 574 U.S. 352, 360-61, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015); ***82** Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 n.28, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014); Wisconsin v. Yoder, 406 U.S. 205, 216, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."). Unable to divorce religious activities from religious motivations, the majority's activities prong swallows the majority's purposes prong. The only activities that are "religious in nature," according to the majority, are activities that presuppose a religious purpose —e.g., proselytizing and teaching one's religious doctrine. Majority op., ¶¶55, 60. The majority's purposes prong is superfluous.

¶147 The majority's activities prong doesn't simply ask whether an activity is religious, it asks whether it is "religious in nature." But no activities are inherently religious; religious motivation makes an activity religious. The majority actually inquires whether Catholic Charities' activities are stereotypically religious. Nothing in the text of Wis. Stat. § 108.02(15)(h)2., however, prompts the court to determine what religious activities are sufficiently stereotypical. The majority never explains what an inherently religious activity is, leaving it up to courts to make determinations of religiosity on an ad hoc basis. What is inherently religious will simply reflect what an individual judge subjectively regards as religious enough. The statute does not demand this exercise, and more importantly the constitution bars such an inquiry. Infra, ¶¶163-97.

¶148 Further highlighting the deficiencies of the majority's test, the majority fails to explain why the factors it furnishes make an activity more or less "religious in nature." For example, why does offering a ***83** service to those of a different faith tradition make the activity less "religious in ****706** nature"? See majority op., ¶61. Doesn't this factor conflict with the majority's statements that religious outreach and evangelism are "religious in nature"? Id., ¶60. The majority asserts that activities resembling secular ones are less "religious in nature." Id., ¶¶63-64, 66. But the overlap between secular and religious conduct does not make the religious conduct any less religious. As the Court of Appeals for the District of Columbia Circuit explained, "[t]hat a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious." Univ. of Great Falls, 278 F.3d at 1346.

¶149 Incoherency aside, the majority's primarily-religious-in-nature-activities requirement is highly susceptible to manipulation. "[T]he definition of a particular program can always be manipulated" such that the inquiry may be " 'reduced to a simple semantic exercise.' " See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 215, 133 S.Ct. 2321, 186 L.Ed.2d 398 (2013) (quoting Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547, 121 S.Ct. 1043, 149

L.Ed.2d 63 (2001)). The activities of Catholic Charities can be characterized as the provision of charitable social services. They can also be characterized as "providing services to the poor and disadvantaged as an expression of the social ministry of the Catholic Church in the Diocese of Superior" and acting as "an effective sign of the charity of Christ." A religious activity can be described narrowly, making it sound more secular, or described broadly, making it sound more religious. Baking sounds secular while religious training sounds religious; both characterizations could fit the activities at issue in a case. See ***84** Champion Bake-N-Serve, Inc., 100 Idaho 53, 592 P.2d 1370. Whether one is entitled to the exemption under Wis. Stat. § 108.02(15)(h)2. cannot turn on word games.

¶150 The court makes meager effort to explain why it considers activities like proselytizing and teaching religious doctrine more religious than religiously motivated charitable services. Many religions consider charity a central religious practice. As one amicus—the Jewish Coalition for Religious Liberty ("the Jewish Coalition")—explains, it believes each of the commandments in the Torah is a divine obligation. [15] One of the obligations is charity, which the Jewish Coalition explains is sometimes connected to religious rituals and sometimes not; regardless, both equally express the Jewish commandments. [16]

¶151 The majority's conclusion that Catholic Charities' activities are not religious because their activities are charitable is unsupportable. In this case, there is no daylight between religious activities and charitable activities. See St. Augustine's Ctr. for Am. Indians, Inc. v. Dep't of Lab., 114 Ill.App.3d 621, 70 Ill.Dec. 372, 449 N.E.2d 246, 249 (1983) (quoting St. Vincent DePaul Shop v. Garnes, No. 74AP-76, 1974 WL 184313, *3 (Ohio Ct. App. Sept. 17, 1974) (unpublished opinion)) (alterations in original) ("[T]he terms 'charitable' and 'religious' are not mutually exclusive and ... 'the fact that an organization is charitable does not preclude it from being religious.' "). In their briefs, Catholic Charities explain that charity is a religious activity for Catholics, in which Catholic Charities engages as the Diocese of Superior's social ministry arm. According to Catholic Charities, "[c]harity is 'the greatest' of the Catholic ***85** Church's theological virtues .... Charity ... is a 'constitutive element of the Church's mission and an indispensable ****707** expression of her very being.' " Consistent with Catholic doctrine—as documented in the briefs—"[t]he Catholic Church 'claims works of charity as its own inalienable duty and right.' " Catholic Charities explains that according to the Catholic faith, charity is a religious duty they must fulfill in an impartial manner, without proselytizing. As Catholic Charities inform us, " 'the Church's missionary spirit is not about proselytizing, but the testimony of a life that illuminates the path, which brings hope and love.' " Catholic Charities "carr[y] on [the Diocese of Superior's] good work by providing programs and services that are based on gospel values and principles of the Catholic Social Teachings." The purpose of Catholic Charities "is to be an effective sign of the charity of Christ[.]" Multiple amici similarly confirm that charity is a religious activity in each of their respective faith traditions. As one court observed, "the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions." W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C., 862 F. Supp. 538, 544 (D.D.C. 1994).

> For example, one of the five Pillars of Islam—the fundamental ritual requirements of worship, including ritual prayer—requires Muslims of sufficient means to give alms to the poor and other classes of recipients. Also, Hindus belonging to the Brahmin, Ksatriya, and Vaisya castes are required to fulfill five daily obligations of worship, one of which is making offerings to guests, symbolized by giving food to a priest or giving food or aid to the poor. The concept finds its place in Judaism in the form of tendering to the poor clothing for the naked, food for the hungry, and benevolence to the needy.

***86** Id. (internal citations omitted). Reflecting this understanding, an Illinois court [17] recently reversed a state agency determination that an organization was not primarily operated for religious purposes, holding the agency "erred by recharacterizing [the provision of meals, homework help, and literacy improvement] as secular activities" when the organization "characterized [those activities] as religious exercises" of the organization. By The Hand Club for Kids, NFP, Inc. v. Dep't of Emp. Sec., 453 Ill.Dec. 900, 188 N.E.3d 1196, ¶52 (Ill. Ct. App. 2020). The same is true in this case. Catholic Charities' charitable activities are a part of their religious exercise, which means those activities are religious.

This court belittles Catholic Charities' faith—and many other faith traditions—by mischaracterizing their religiously motivated charitable activities as "secular in nature," majority op., ¶67—that is, not really religious at all.

¶152 Ultimately, the majority demolishes its own test, obliquely saying the activities the majority will consider inherently religious "may be different for different faiths." Id., ¶55. If what constitutes an inherently religious activity might be different for different faiths, the majority must explain why religiously motivated charity is not an inherently religious activity for Catholics. It never does.

¶153 The majority's erroneous interpretation and application of Wis. Stat. § 108.02(15)(h)2.—which produces the demeaning conclusion that the social ministry arm of the Diocese of Superior is inherently secular—would be baffling but for the majority's admissions ***87** of its results-oriented approach. According to the majority, a ****708** plain reading of the statute would be " 'too broad' " a policy, so the majority adopts a contorted construction instead. Id., ¶48 (quoting Cath. Charities Bureau, 406 Wis. 2d 586, ¶37, 987 N.W.2d 778). The majority anxiously speculates a plain reading might exempt Catholic colleges, schools, and (gasp) hospitals. Id., ¶48 n.12. [18] This court has neither the authority nor ***88** competency to decide how broad or narrow a policy should be. The legislature decided how broadly the exemption sweeps, and it is not for this court to second-guess that policy decision. Friends of Frame Park, U.A. v. City of Waukesha, 2022 WI 57, ¶96, 403 Wis. 2d 1, 976 N.W.2d 263 (Rebecca Grassl Bradley, J., concurring) ("The people of Wisconsin elect judges to interpret the law, not make it."); See also Scalia & Garner, supra, at 21, 403 Wis. 2d 1, 976 N.W.2d 263; Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 20 (1997) ("Congress can enact foolish statutes as well as wise ones, and it is not for courts to decide which is which and rewrite the former."). "Courts decide what the law is, not what it should be. In the course of executing this judicial function, we neither endorse nor condemn the legislature's policy choices." See Sanders, 408 Wis. 2d 370, ¶44, 992 N.W.2d 126. Judges have no authority to advance their favored policies by expanding or narrowing a statute's text beyond what the fair meaning of the statute contemplates.

¶154 To mask its policy-driven reasoning, the majority employs the shibboleth that remedial statutes are liberally construed and exemptions are narrowly construed—a long-discredited maxim that pawns judicial activism off as legitimate, textual interpretation. See CTS Corp. v. Waldburger, 573 U.S. 1, 12, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014) (stating the remedial statute canon is not "a substitute for a conclusion grounded in the statute's text and structure"). The majority's unabashed reliance on the remedial statute canon is troubling given the immense criticism the so-called canon has received. The majority makes clear it is aware of these criticisms, but uses the maxim anyway, without defending it. Majority op., ¶47 n.11. The majority should not employ the maxim so thoughtlessly, since it ***89** has been severely criticized and abandoned by many jurists espousing a wide range of judicial philosophies. ****709** E.g., Regions Bank v. Legal Outsource PA, 936 F.3d 1184, 1195 (11th Cir. 2019) (expressly refusing to apply the so-called remedial statute canon because of its "dubious value"); Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 135, 115 S.Ct. 1278, 131 L.Ed.2d 160 (1995) (calling the maxim the "last redoubt of losing causes"); Keen v. Helson, 930 F.3d 799, 805 (6th Cir. 2019) (describing the maxim as the least useful of the interpretive tools a judge might use); see also E. Bay Mun. Util. Dist. v. U.S. Dep't of Com., 142 F.3d 479, 484 (D.C. Cir. 1998) ("express[ing] ... general doubts about the canon"). Antonin Scalia once compared the canon's use to Chinese water torture, in which "one's intelligence [is] strapped down helplessly" as the maxim is repeated as a "ritual error[ ]." Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Rsrv. L. Rev. 581, 581 (1989) [hereinafter Assorted Canards].

¶155 Judges have discarded the remedial statute canon because it has three critical flaws. The first is the canon's "indeterminate coverage." Regions Bank, 936 F.3d at 1195. Jurists have been unable to agree on what constitutes a remedial statute. Scalia, Assorted Canards, supra, at 583-86; Ober United Travel Agency, Inc. v. U.S. Dep't of Lab., 135 F.3d 822, 825 (D.C. Cir. 1998) ("Although courts have often used the maxim[,] ... it is not at all apparent just what is and what is not remedial legislation."). This is unsurprising, considering "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem." CTS Corp., 573 U.S. at 12, 134 S.Ct. 2175; accord Scalia & Garner, supra, at 364 ("Is any statute not remedial? Does any statute not seek to ***90** remedy an unjust or inconvenient situation?"); Keen, 930 F. 3d at 805 (noting that the canon's "trigger—a 'remedial statute'—is hopelessly vague").

¶156 Second, what constitutes a "liberal" or "strict" construction is unanswerable. Scalia & Garner, supra, at 365.

As Antonin Scalia noted, the canon "lay[s] a judicial thumb" "of indeterminate weight" "on one or the other side of the scales" in statutory interpretation. Scalia, Assorted Canards, supra, at 582. "How 'liberal' is liberal, and how 'strict' is strict?" Id. No one can say.

¶157 Finally, the maxim is "premised on two mistaken ideas: (1) that statutes have a singular purpose and (2) that [the legislature] wants statutes to extend as far as possible in service of that purpose. Instead, statutes have many competing purposes, and [the legislature] balances these competing purposes by negotiating and crafting statutory text." Keen, 930 F.3d at 805 (citing Newport News, 514 U.S. at 135-36, 115 S.Ct. 1278); CTS Corp., 573 U.S. at 12, 134 S.Ct. 2175 (quoting Rodriguez v. United States, 480 U.S. 522, 525–26, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987) (per curiam)) ("[T]he Court has emphasized that 'no legislation pursues its purposes at all costs.' "); Encino Motorcars, LLC v. Navarro, 584 U.S. 79, 138 S. Ct. 1134, 1142, 200 L.Ed.2d 433 (2018) (citations omitted). As Richard Posner explained, the maxim is "unrealistic about legislative objectives" and "ignore[s] the role of compromise in the legislative process and, more fundamentally, the role of interest groups, whose clashes blunt the thrust of many legislative initiatives." Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 808-09 (1983). The maxim ignores that "limiting provisions ... are no less a reflection of the genuine 'purpose' of the statute than the operative provisions, and it is not the court's ***91** function to alter the legislative compromise." Scalia & Garner, ****710** supra, at 21. Those who employ the maxim rarely appreciate that "[t]oo much 'liberality' will undermine the statute as surely as too literal an interpretation would." In re Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987).

¶158 In fact, the remedial statute "canon" is not a canon at all. It is "an excuse" to reach a desired result. Keen, 930 F.3d at 805; Scalia, Assorted Canards, supra, at 586 (stating the maxim "is so wonderfully indeterminate" it can always be used to "reach[ ] the result the court wishes to achieve"). Its vagueness makes it "an open invitation" to ignore the statute's text and "engage in judicial improvisation" to reach the judge's preferred outcome. Scalia & Garner, supra, at 365-66. This court should abandon the maxim and return to deciding cases based upon the fair meaning of the text. Instead of reading the exemption strictly, "the court need only determine 'how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.' " United Am., LLC v. DOT, 2021 WI 44, ¶44, 397 Wis. 2d 42, 959 N.W.2d 317 (Rebecca Grassl Bradley, J., dissenting) (quoting Scalia & Garner, supra, at 33). The majority violates the rule that a "strict construction" cannot be "an unreasonable construction." Sw. Airlines Co. v. DOR, 2021 WI 54, ¶25, 397 Wis. 2d 431, 960 N.W.2d 384 (citing Covenant Healthcare Sys., Inc. v. City of Wauwatosa, 2011 WI 80, ¶32, 336 Wis. 2d 522, 800 N.W.2d 906); see also McNeil v. Hansen, 2007 WI 56, ¶10, 300 Wis. 2d 358, 731 N.W.2d 273 (quoting 82 C.J.S. Statutes § 371 (2006)) (stating exemptions to remedial statutes " 'should be strictly, and reasonably, construed and extend only as far as their language fairly warrants' "). To the extent the maxim delivers ***92** any value, it is not even applicable in this case because the statute is unambiguous. State of Wis. Dep't of Just. v. DWD, 2015 WI 114, ¶32, 365 Wis. 2d 694, 875 N.W.2d 545 (quoting Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 207, 132 S.Ct. 2181, 183 L.Ed.2d 186 (2012) (Roberts, J., dissenting)).

¶159 The majority compounds its errors by using legislative history to contradict (rather than confirm) the plain meaning of Wis. Stat. § 108.02(15)(h)2. Kalal, 271 Wis. 2d 633, ¶51, 681 N.W.2d 110; State v. Martin, 162 Wis. 2d 883, 897 n.5, 470 N.W.2d 900 (1991). Legislative history is not the law, and it cannot override the law's clear meaning. See State v. Grandberry, 2018 WI 29, ¶55, 380 Wis. 2d 541, 910 N.W.2d 214 (Kelly, J., concurring) ("[W]e give effect only to what the legislature does, not what it tried to do."). In this case, the majority does not even cite state legislative history; instead, it relies upon federal legislative history to contravene the plain meaning of a state law. In so doing, the majority makes another "law's history superior to the law itself[.]" Clean Wis., Inc. v. DNR, 2021 WI 71, ¶91, 398 Wis. 2d 386, 961 N.W.2d 346 (Rebecca Grassl Bradley, J., dissenting). Using long-discredited methodologies, the majority's interpretation discards the statutory text, ignores its plain meaning, and triggers constitutional quandaries.

III. THE MAJORITY'S INTERPRETATION VIOLATES THE FIRST AMENDMENT AND THE WISCONSIN CONSTITUTION

¶160 The majority's decision is an egregious example of legislating from the bench. It takes a simple statute and twists its language to narrow its sweep. In so doing, the majority engages in religious discrimination and entangles the state with religion in ***93** violation of the First Amendment. ****711** [19] Courts sometimes—though inappropriately—warp a statute's fair meaning to save it from

unconstitutionality. See St. Augustine Sch. v. Taylor, 2021 WI 70, ¶112, 398 Wis. 2d 92, 961 N.W.2d 635 (Rebecca Grassl Bradley, J., dissenting) (discussing a particularly egregious example). In this case, the majority bends over backwards to alter the statute's meaning and create a constitutional violation, turning the canon of constitutional avoidance on its head. State v. Stenklyft, 2005 WI 71, ¶8, 281 Wis. 2d 484, 697 N.W.2d 769 (quoting Panzer v. Doyle, 2004 WI 52, ¶65, 271 Wis. 2d 295, 680 N.W.2d 666); Jankowski v. Milwaukee Cnty., 104 Wis. 2d 431, 439, 312 N.W.2d 45 (1981) (quoting Niagara of Wis. Paper Corp. v. DNR, 84 Wis. 2d 32, 50, 268 N.W.2d 153 (1978)); Baird v. La Follette, 72 Wis. 2d 1, 5, 239 N.W.2d 536 (1976) ("Where there is serious doubt of constitutionality, we must look to see whether there is a construction of the statute which is reasonably possible which will avoid the constitutional question.").

¶161 The First Amendment declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. Const. amend. I. The Religion Clauses of the First Amendment apply to the states via the Fourteenth Amendment. Everson v. Bd. of Educ. of Ewing Twp., ***330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 194** 7; Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).[20] Catholic ****712** Charities claim an inquiry ***95** into whether their activities are "religious in nature" violates the First Amendment by discriminating against their religious practices and excessively entangling the government in religious affairs.

¶162 The majority improperly stacks the deck against Catholic Charities' claims under the Religion Clauses from the outset, requiring Catholic Charities to prove their First Amendment rights are violated "beyond a reasonable doubt." Majority op., ¶77. "The United States Supreme Court has abandoned the beyond-a-reasonable-doubt standard for assessing the constitutionality of statutory law[,]" and this court must follow the Court's pronouncements on issues of federal law. Winnebago Cnty. v. C.S., 2020 WI 33, ¶65, 391 Wis. 2d 35, 940 N.W.2d 875 (Rebecca Grassl Bradley, J., dissenting) (citing Edward C. Dawson, Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage, 16 U. Pa. J. Const. L. 97, 109 (2013)). "No United States Supreme Court case since 1984 has applied a strong presumption of constitutionality in challenges to federal statutes." Mayo v. Wis. Injured Patients & Fams. Comp. Fund, 2018 WI 78, ¶78, 383 Wis. 2d 1, 914 N.W.2d 678 (Rebecca Grassl Bradley, J., concurring) (citing Dawson, supra, at 109 n.43). Instead, the Court "will strike down statutes upon a 'plain showing' of their unconstitutionality, or when their unconstitutionality is 'clearly demonstrated.' " Id., ¶80. "This court continues to reflexively ***96** apply the rule without any acknowledgement of the United States Supreme Court's reformulation of the standard." Id. (citations omitted). Conforming to the standards articulated by the Court would end the absurdity of applying the beyond-a-reasonable-doubt standard. The majority does not hold Catholic Charities' First Amendment rights are not violated by its interpretation of Wis. Stat. § 108.02(15)(h)2.; instead, it merely holds Catholic Charities failed to prove their rights are violated "beyond a reasonable doubt." See C.S., 391 Wis. 2d 35, ¶67, 940 N.W.2d 875 (Rebecca Grassl Bradley, J., dissenting).

A. Religious Discrimination

¶163 The majority's interpretation of Wis. Stat. § 108.02(15)(h)2. violates the First Amendment's Free Exercise Clause and Establishment Clause by discriminating among religious faiths. The majority sidesteps the issue of religious discrimination by declaring Catholic Charities failed to show the law burdens their free exercise of religion. Majority op., ¶¶105-07. The majority, however, misapprehends Catholic Charities' alleged burden, causing it to erroneously conclude there is no burden on their free exercise at all. Contrary to the majority's assertions, Catholic Charities do not allege that paying the tax itself burdens their free exercise of religion. See Id.[21] Catholic Charities ***97** never argued the ****713** Free Exercise Clause guarantees them an exemption from paying the unemployment tax. Instead, Catholic Charities assert that discriminatorily denying them the exemption under § 108.02(15)(h)2. burdens their free exercise of religion.

¶164 Catholic Charities are correct.[22] The United States Supreme Court has long held that withholding a benefit or privilege based on religious status or activity may constitute a burden on the free exercise of religion. Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466, 137 S.Ct. 2012, 198 L.Ed.2d 551 (2017) (holding expressly requiring a religious institution to renounce its religious character in order to receive a public benefit imposes a penalty on the free exercise of religion); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 140 S. Ct. 2246, 2260, 207 L.Ed.2d 679 (2020) (quoted source omitted) (noting "precedents have 'repeatedly confirmed' the straightforward rule that ... [w]hen otherwise eligible recipients are disqualified from a public benefit 'solely

because of their religious character,' we must apply strict scrutiny"); Carson v. Makin, 596 U.S. 767, 786-88, 142 S.Ct. 1987, 213 L.Ed.2d 286 (2022) (holding religious status or activity cannot be the basis for denying a benefit or privilege); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). As the Supreme Court said long ago, ***98** "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." Sherbert, 374 U.S. at 404, 83 S.Ct. 1790 (citations omitted).

¶165 Supreme Court precedent has focused on the denial of a "generally available" benefit to those with a religious status or who engage in certain religious activities. Carson, 596 U.S. at 780, 142 S.Ct. 1987. For example, in Sherbert, an employer fired a member of the Seventh-day Adventist Church because she would not work on Saturdays, and the state later denied her otherwise generally available unemployment benefits because it determined her religious beliefs were not "good cause" to reject other employment. 374 U.S. at 400, 83 S.Ct. 1790. The Supreme Court held that denying her unemployment benefits because of her religious practices placed a burden on her free exercise of religion:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404, 83 S.Ct. 1790. As the court concluded, "to condition the availability of benefits upon this appellant's willingness ****714** to violate a cardinal principle of her religious faith ***99** effectively penalizes the free exercise of her constitutional liberties." Id. at 406, 83 S.Ct. 1790. [23]

¶166 In Trinity Lutheran, a state offered grants to nonprofits to help finance the purchase of rubber playground surfaces. 582 U.S. at 454, 137 S.Ct. 2012. The program awarded grants based on several religiously neutral criteria, such as the level of poverty in the surrounding area and the applicant's plan to promote recycling. Id. at 455, 137 S.Ct. 2012. However, the state denied Trinity Lutheran Church Child Learning Center a grant it was otherwise qualified to receive because of the state's policy to deny grants to any applicant owned or controlled by a church, sect, or religious entity. Id. at 455-56, 137 S.Ct. 2012. The Court held that denying Trinity Lutheran the otherwise available grant burdened Trinity Lutheran's free exercise of religion. The Court reasoned a denial based on religion penalizes religious exercise:

> [T]he Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church .... But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit ***100** in this way, ... the State has punished the free exercise of religion: "To condition the availability of benefits ... upon [a recipient's] willingness to ... surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties."

Id. at 462, 137 S.Ct. 2012 (some alterations in original) (quoting McDaniel v. Paty, 435 U.S. 618, 626, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (plurality opinion)). The Court acknowledged the state's policy did not constitute direct coercion over religious exercise. Id. at 463, 137 S.Ct. 2012. But withholding an otherwise available benefit based on religious status creates constitutionally intolerable indirect coercion over, and a penalty on, religious exercise. Id. (quoting Lyng, 485 U.S. at 450, 108 S.Ct. 1319) ("[T]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.' ").

¶167 In Carson, a state provided tuition assistance to parents who lived in school districts that were unable to operate a secondary school. 596 U.S. at 773, 142 S.Ct. 1987. Under the program, parents chose the school they wanted their child to attend and the state school administrative units paid the

school. Id. at 773-74, 142 S.Ct. 1987. In order for a private school to receive the payment, the school needed to meet basic requirements under the state compulsory education law, like offering a course on the history of the state. Id. at 774, 142 S.Ct. 1987. State law excluded "sectarian" schools from the tuition reimbursement program. Id. The petitioners wished to send their children to schools that were, but for the "nonsectarian" requirement, ****715** eligible to receive the tuition assistance. Id. at 776, 142 S.Ct. 1987.

¶168 The Court held the program's "nonsectarian" requirement violated the Free Exercise Clause because the law " 'effectively penalize[d] the free exercise' ***101** of religion" by conditioning the tuition assistance on the school's religious character. Id. at 780, 142 S.Ct. 1987. The state argued that lesser scrutiny should apply because it was not discriminating against religious status, but withheld state funds if the school engaged in certain religious activities. Id. at 786-87, 142 S.Ct. 1987. The Court rejected the status-activities distinction, noting that "[a]ny attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would ... raise serious concerns about state entanglement with religion and denominational favoritism." Id. at 787, 142 S.Ct. 1987 (citations omitted).

¶169 The exemption in this case is available only to religiously affiliated institutions. See Wis. Stat. § 108.02(15)(h)2. (requiring the nonprofit to be "operated, supervised, controlled, or principally supported by a church or convention or association of churches" in order to receive the tax exemption). Nonetheless, the principles underlying Sherbert, Trinity Lutheran, and Carson have equal force when the alleged discrimination occurs among religious institutions, rather than between religious and secular entities.

¶170 The Sherbert-Trinity Lutheran-Carson line of cases prohibit indirect coercion and penalties on religious exercise. E.g., Carson, 596 U.S. at 778, 142 S.Ct. 1987 (quoting Lyng, 485 U.S. at 450, 108 S.Ct. 1319); Thomas, 450 U.S. at 717-18, 101 S.Ct. 1425 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."). Failure to provide a benefit, which is otherwise available to any religiously affiliated entity, to a religious institution because of its religious status or ***102** religious activities "condition[s] the availability of [a] benefit[ ] upon [its] willingness to violate a cardinal principle of [its] religious faith[,] effectively penaliz[ing] the free exercise of [its] constitutional liberties." Sherbert, 374 U.S. at 406, 83 S.Ct. 1790. Even if a benefit is available only to religiously affiliated organizations, the denial of the benefit still pressures the entity to forego its religious practices, forcing the entity to "choose between following the precepts of [its] religion and forfeiting benefits." Id. at 404, 83 S.Ct. 1790. As in Sherbert, Trinity Lutheran, and Carson, such a choice burdens the free exercise of religion.

¶171 At their core, the Religion Clauses prohibit the government from discriminating among religions. "From the beginning, this nation's conception of religious liberty included, at a minimum, the equal treatment of all religious faiths without discrimination or preference." Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1257 (10th Cir. 2008). Historically, England privileged the Church of England and penalized non-established religions and practices. In the 16th century, Parliament enacted the Thirty-nine Articles of Faith, which determined the tenets of the Church of England and the liturgy for religious worship. Nathan S. Chapman & Michael W. McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience 12-13 (2023). Additionally, "[t]he Acts of Uniformity of 1549, 1559, and 1662 required all ministers to conform to these requirements, making ****716** the Church of England the sole institution for lawful public worship." Id. at 13. "There were also specific 'Penal Acts' suppressing the practice of faiths whose tenets were thought to be inimical to the regime." Id. at 14. The practice of establishing churches "of the old world [was] transplanted ***103** and ... thrive[d] in the soil of the new America." Everson, 330 U.S. at 9, 67 S.Ct. 504. In the American colonies religious dissenters were often penalized for their heterodox religious practices. For example, in Connecticut in the 1740s, religious dissenters were fined and imprisoned for preaching and meeting. Philip Hamburger, Separation of Church and State 90 (2002). In Virginia, laws "fin[ed] 'scismaticall persons' who refused to have their children baptized, prohibit[ed] the immigration of Quakers, and outlaw[ed] Quaker religious assemblies." Chapman & McConnell, supra, at 17.

¶172 "During the Revolution, American establishments lost their severity," and states tended to abandon direct penalties on non-established religions and religious practices while retaining privileges for the established religion and

religious practices of the state. Hamburger, supra, at 89–90. By the time the First Amendment was written, "at least ten of the twelve state constitutional free exercise provisions required equal religious treatment and prohibited denominational preferences." Colo. Christian Univ., 534 F.3d at 1257 (citing Arlin M. Adams & Charles J. Emmerich, A Heritage of Religious Liberty, 137 U. Pa. L. Rev. 1559, 1637–39 (1989)). One of the "essential legal elements of disestablishment" in the states was denominational equality. Chapman & McConnell, supra, at 57. The principle that the government cannot prefer one religion over another has "strong historical roots and is often considered one of the most fundamental guarantees of religious freedom." Jeremy Patrick-Justice, Strict Scrutiny for Denominational Preferences: Larson in Retrospect, 8 N.Y.C. L. Rev. 53, 54-55 (2005). The constitutional bar on religious discrimination among faiths emanates from both Religion ***104** Clauses. Larson v. Valente, 456 U.S. 228, 245, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982); Colo. Christian Univ., 534 F.3d at 1257.

¶173 The Supreme Court has unwaveringly affirmed the central principle that government cannot prefer one religion over another: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson 456 U.S. at 244, 102 S.Ct. 1673; Everson, 330 U.S. at 15, 67 S.Ct. 504 (stating that under the Establishment Clause, a state cannot "pass laws which ... prefer one religion over another."); Cutter v. Wilkinson, 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (stating religious exemptions must be "administered neutrally among different faiths"); Zorach v. Clauson, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952) ("The government must be neutral when it comes to competition between sects."); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 707, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) ("[I]t is clear that neutrality as among religions must be honored."); Epperson v. Arkansas, 393 U.S. 97, 103-04, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ("Government in our democracy ... must be neutral in matters of religious theory, doctrine, and practice. It may not ... aid, foster, or promote one religion or religious theory against another ...."); see also Dunn v. Ray, —— U.S. ——, 139 S. Ct. 661, 662, 203 L.Ed.2d 145 (2019) (Kagan, J., dissenting from grant of application to vacate stay) (describing denominational neutrality as "the Establishment Clause's core principle"). "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates ****717** against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (citations omitted); Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). State laws and practices "which happen to have a 'disparate impact' ***105** upon different religious organizations" resulting from secular criteria do not amount to a denominational preference or religious discrimination, but laws that do not merely incidentally discriminate against certain religions or religious practices receive strict scrutiny. Larson, 456 U.S. at 246 n.23, 102 S.Ct. 1673; Smith, 494 U.S. at 878, 110 S.Ct. 1595; Colo. Christian Univ., 534 F.3d at 1257.

¶174 The majority's primarily-religious-in-nature-activities test necessarily and explicitly discriminates among certain religious faiths and religious practices. As the majority construes Wis. Stat. § 108.02(15)(h)2., religious institutions that do not perform sufficiently religious acts to satisfy the court's subjective conceptions of religiosity will be denied the exemption. The government cannot "discriminate between 'types of institutions' on the basis of the nature of the religious practice these institutions are moved to engage in." Colo. Christian Univ., 534 F.3d at 1259.

¶175 While the application of secular criteria that leads to disparate treatment of religions is not religious discrimination, the relevant criteria under the majority's test are not secular. The majority denies the exemption to institutions if they do not primarily engage in activities the court deems "religious in nature"—a criterion that can only be described as religious. See Church of Lukumi, 508 U.S. at 533, 113 S.Ct. 2217 ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."). It includes only a small, and ill-defined, subset of religious activities. The majority employs factors that are similarly not secular. For example, the majority asks whether a nonprofit engages in worship services, religious ceremonies, serves ***106** only co-religionists, or imbues program participants with the nonprofit's faith. Such criteria certainly sound religious, not secular.

¶176 The majority declares Catholic Charities ineligible for the exemption because Catholic Charities do not participate in worship services, engage in religious outreach, perform religious ceremonies, provide religious education, "imbue program participants with the Catholic faith[,] [ ]or supply any religious materials to program participants or employees." Majority op., ¶60. Additionally, the majority denies the

exemption on the non-secular and discriminatory basis that Catholic Charities employ and serve non-Catholics. Id., ¶61. In the majority's view, Catholic Charities' religious practices resemble secular social services too much. Id., ¶¶63-64, 66. The majority's "test" compares the nonprofit's activities to an arbitrary list of stereotypical religious activities to determine whether the activities are sufficiently religious. Id., ¶100 (explaining that activities like those listed in Dykema are more likely to be "religious in nature" in the eyes of the court).

¶177 The majority's test overtly discriminates against Catholic Charities because they follow Catholic doctrine. As Catholic Charities explain, Catholic doctrine commands they engage in charity without limiting their assistance to fellow Catholics and bars them from proselytizing when conducting charitable acts. Under the Free Exercise Clause, the state cannot condition a benefit upon the abandonment of religious practices. The majority puts Catholic ****718** Charities to a choice: They may receive the tax exemption by violating their religious beliefs or they can conduct their operations in accordance with their faith and forgo the ***107** exemption. Conditioning a benefit in this manner burdens the free exercise of religion. Trinity Lutheran, 582 U.S. at 462, 137 S.Ct. 2012.

¶178 The majority's primarily-religious-in-nature-activities test poses a particular danger for minority faiths. The majority's conception of what constitutes activities that are "religious in nature" reflects a narrow view of what religious practice looks like. Many amici submitted briefs to this court explaining how a test like the majority's will discriminate against minority faiths.

¶179 The brief of the International Society for Krishna Consciousness and the Sikh Coalition ("the Coalition") is particularly illuminating. It notes that government officials are less likely to be familiar with minority faith traditions, and therefore may perceive minority religious practices as less "religious in nature" than the activities of majority religions.[24] The Coalition identifies many activities central to their faiths but likely to fail the majority's test, which compares a nonprofit's activities to a list of stereotypical (and largely Protestant) religious activities, because the list is derived from a "Western" understanding of religion.[25] For example, adherents of Hare Krishna have a religious practice called "Prasadam," during which adherents prepare food, offer it to their deity, and distribute it to the general population.[26] Sikhs have a religious practice of providing a community kitchen, "serving free meals and allowing people of all faiths to break bread together."[27] According to the ***108** Coalition, this practice is "foundation[al] to the Sikh way of life; it represents the principle of equality among all people regardless of religion ...."[28] The Coalition rightly worries that these religious practices will be characterized by courts as "secular in nature" under the majority's test.

¶180 State actors cannot treat one faith's religious practices as "religious in nature" and another's practices as "secular in nature." Cf. Fowler v. Rhode Island, 345 U.S. 67, 70, 73 S.Ct. 526, 97 L.Ed. 828 (1953) ("To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another."). The United States Supreme Court subjects such overt religious discrimination to strict scrutiny. See, e.g., Espinoza, 140 S. Ct. at 2278 (Gorsuch, J., concurring) (stating "any discrimination against religious exercise must meet the demands of strict scrutiny"). A government policy satisfies strict scrutiny only if it "advances 'interests of the highest order' and is narrowly tailored to achieve those interests." Fulton v. City of Philadelphia, 593 U.S. 522, 541, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021) (quoting Church of Lukumi, 508 U.S. at 546, 113 S.Ct. 2217). "That standard 'is not watered down'; it 'really means what it says.' " Tandon v. Newsom, 593 U.S. 61, 65, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam) (quoting Church of Lukumi, 508 U.S. at 546, 113 S.Ct. 2217). As scholars have noted, however, " '[i]t is difficult ****719** to imagine the circumstances under which the government would have a compelling need to prefer some religions over others.' " Richard F. Duncan, ***109** The Clearest Command of the Establishment Clause: Denominational Preferences, Religious Liberty, and Public Scholarships that Classify Religions, 55 S.D. L. Rev. 390, 392 (2010) (alteration in original) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure 14 (3d ed. 1999)); see also Church of Lukumi, 508 U.S. at 578-80, 113 S.Ct. 2217 (Blackmun, J., concurring in the judgment) (arguing a law that discriminates against religion automatically fails strict scrutiny because such a law in not narrowly tailored "by definition").

¶181 LIRC does not even suggest the state has a compelling interest in denying the exemption under Wis. Stat. § 108.02(15)(h)2. in a manner that discriminates among the various faiths. LIRC, like the majority, misunderstands Catholic Charities' asserted burden on the free exercise of their religion. LIRC believes the asserted burden is paying a

tax. In response to this misconception of Catholic Charities' claim, LIRC asserts the whole of Wis. Stat. ch. 108 is justified by the compelling interest in "providing broad unemployment insurance access to workers ...." LIRC then argues the law is narrowly tailored because "it is impossible to construct workable tax laws that account for the 'myriad of religious beliefs.' " LIRC's arguments miss the mark. Under strict scrutiny, LIRC needed to provide a compelling interest justifying the discrimination between religions. See Fulton, 593 U.S. at 541, 141 S.Ct. 1868; Colo. Christian Univ., 534 F.3d at 1269. LIRC failed to do so. This court cannot invent justifications for the state to save the statute from unconstitutionality. See Colo. Christian Univ., 534 F.3d at 1268 ("We cannot and will not uphold a statute that abridges an enumerated constitutional right on the basis of a factitious governmental interest ...."); Redeemed Christian Church of God (Victory Temple) Bowie v. Prince George's Cnty., 17 F.4th 497, 510-11 (4th Cir. 2021) (citation omitted) ("To ***110** survive strict scrutiny review, the government must show that pursuit of its compelling interest was the actual reason for its challenged action."); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543 n.8, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022) (quoting United States v. Virginia, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996)) (noting " 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented post hoc in response to litigation' "). In the absence of any compelling interest to justify the state's discrimination among religions, § 108.02(15)(h)2., as interpreted by the majority, cannot survive strict scrutiny.

¶182 This case illustrates the interconnection between the right to free exercise and the Constitution's bar on religious establishments. Citizens are inhibited from freely practicing their faiths when the government doles out benefits or imposes penalties on the basis of religious practice. As Justice Neil Gorsuch explained:

> The First Amendment protects religious uses and actions for good reason. What point is it to tell a person that he is free to be Muslim but he may be subject to discrimination for doing what his religion commands, attending Friday prayers, living his daily life in harmony with the teaching of his faith, and educating his children in its ways? What does it mean to tell an Orthodox Jew that she may have her religion but may be targeted for observing her religious calendar? Often, governments lack effective ways to control what lies in a person's heart or mind. But they can bring to ****720** bear enormous power over what people say and do. The right to be religious without the right to do religious things would hardly amount to a right at all.

Espinoza, 140 S. Ct. at 2277 (Gorsuch, J., concurring). The "free competition between religions" protected by ***111** the Establishment Clause requires "that every denomination ... be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference." Larson, 456 U.S. at 245, 102 S.Ct. 1673. The Religion Clauses "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" by "sponsor[ing] an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." Zorach, 343 U.S. at 313, 72 S.Ct. 679. "Free exercise thus can be guaranteed only when legislators —and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." Larson, 456 U.S. at 245, 102 S.Ct. 1673.

¶183 While the Free Exercise Clause does not require the state to provide a tax exemption to religious nonprofits, "[w]hat benefits the government decides to give, whether meager or munificent, it must give without discrimination against religious conduct." Espinoza, 140 S. Ct. at 2277 (Gorsuch, J., concurring). In our constitutional order, there are no second-class religions or religious practices. The Religion Clauses bar discrimination against religious status, beliefs, and practices: "Eliminating [religious] discrimination means eliminating all of it." See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023). The majority errs by inventing and operationalizing a test that discriminates against Catholic Charities' religious practices—and those of many faith traditions going forward.

¶184 The protection against religious preferences embodied in the First Amendment is even more explicit in the Wisconsin Constitution, which bars the ***112** state from giving "any

preference ... by law to any religious establishments or modes of worship."[29] Wis. Const. art. I, § 18; Coulee Cath. Schs., 320 Wis. 2d 275, ¶60, 768 N.W.2d 868 (explaining the Wisconsin Constitution "provid[es] expansive protections for religious liberty" beyond what the First Amendment provides). As this court proclaimed in Weiss, Article I, section 18 of the Wisconsin Constitution, sometimes called the No Preference Clause,[30] "probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union." State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton, 76 Wis. 177, 208, 44 N.W. 967 (1890) (Cassoday, J., concurring).[31]

**721 ¶185 The majority's interpretation of Wis. Stat. § 108.02(15)(h)2. blatantly violates the No Preference Clause. In Weiss, this court explained that the phrase "modes of worship" is capacious, embracing "any and every mode of worshiping the Almighty God." *113 Id. at 211-12, 44 N.W. 967. It includes " 'the performance of all those external acts, and the observance of those rites and ceremonies, in which men engage with the professed and sole view of honoring God.' " Id. at 212, 44 N.W. 967 (listing additional dictionary definitions). Because the statute, under the majority's interpretation, provides benefits for religiously affiliated nonprofits that engage in activities the court deems "religious in nature," it prefers some modes of worship over others. Catholic Charities explained that charitable works are a form of worship for Catholics, who may not proselytize while engaged in acts of charity. The majority denies the exemption to Catholic Charities because they did not engage in other modes of worship, like proselytizing. The majority's test prefers some types of worship (e.g., proselytizing) over others (e.g., religiously motivated charity).

¶186 Instead of addressing the Wisconsin Constitution's impact on this case, the majority dodges the issue, dismissing it in a footnote as "undeveloped." Majority op., ¶3 n.4. But that is not true. The Wisconsin Legislature, as amicus curiae, thoroughly explains in its brief why a test like the one employed by the majority violates the No Preference Clause. That clause "operate[s] as a perpetual bar to the state ... giving ... any preference by law to any religious sect or mode of worship." Weiss, 76 Wis. at 210-11, 44 N.W. 967. The majority's preference for some religious practices over others violates the Wisconsin Constitution.[32]

*114 B. Religious Entanglement

¶187 The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, and "prohibits the excessive entanglement of the state in religious matters." St. Augustine Sch., 398 Wis. 2d 92, ¶42, 961 N.W.2d 635 (citing L.L.N. v. Clauder, 209 Wis. 2d 674, 686, 563 N.W.2d 434 (1997)). The Establishment Clause precludes the state from making "intrusive judgments regarding contested questions of religious belief or practice." Colo. Christian Univ., 534 F.3d. at 1261. "[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion ... and any attempt by government to dictate or even to influence such matters ... constitute[s] one of the central attributes of an establishment of religion." Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. ——, 140 S. Ct. 2049, 2060, 207 L.Ed.2d 870 (2020) (internal citations and quotations marks omitted).

¶188 Civil courts may answer only factual and legal questions; they lack any authority or competency to answer theological questions. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445-47, 449-50, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969). As James Madison explained in his Memorial and Remonstrance, the idea that a "Civil Magistrate is a competent Judge of Religious **722 truth ... is an arrogant pretension" that has been "falsified" by history. James Madison, Memorial and Remonstrance Against Religious Assessments, reproduced in Everson, 330 U.S. at 67, 67 S.Ct. 504 (appendix to dissent of Rutledge, J.). The majority's opinion proves Madison's thesis. The majority's interpretation *115 of Wis. Stat. § 108.02(15)(h)2. not only encourages excessive entanglement with religion, it compels such entanglement.

¶189 The majority's requirement that a nonprofit's activities be primarily "religious in nature" forces courts to answer debatable theological questions courts have no authority to answer. The majority's test requires courts to decide what activities are sufficiently religious to qualify as "religious in nature." The First Amendment bars the government from ranking activities on a scale from least to most religious. See Thomas, 450 U.S. at 714, 101 S.Ct. 1425 ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task .... However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs

need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). "Courts are not arbiters of scriptural interpretation," and this court cannot choose which religiously motivated actions are, in their essence, religious. Id. at 716, 101 S.Ct. 1425. A court cannot decide whether an organization primarily conducts activities that are "religious in nature" without violating the First Amendment.

¶190 Determining whether an organization's activities are primarily "religious in nature" will lead to examining the activities performed by nonprofits, which will be forced to prove whether their religiously motivated activities are sufficiently religious. "What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing ***116** government entanglement in religious affairs." Amos, 483 U.S. at 343, 107 S.Ct. 2862 (Brennan, J., concurring in the judgment); Espinosa v. Rusk, 634 F.2d 477, 481 (10th Cir. 1980), aff'd, 456 U.S. 951, 102 S.Ct. 2025, 72 L.Ed.2d 477 (1982).

¶191 For example, religious schools will be forced to defend the religious nature of textbooks, class instruction, examinations, fieldtrips, employees, students, parents, and more. "[T]his sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments." New York v. Cathedral Acad., 434 U.S. 125, 132, 98 S.Ct. 340, 54 L.Ed.2d 346 (1977). "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment ...." Id. at 133, 98 S.Ct. 340; accord Presbyterian Church in U.S., 393 U.S. at 449, 89 S.Ct. 601 ("First Amendment values are plainly jeopardized when ... litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."). The intrusive inquiries the majority's test demands may recur. While a court initially may deem a nonprofit's activities primarily "religious in nature," the nonprofit may later lose its exempt status. See Walz v. Tax Comm'n, 397 U.S. 664, 673, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) ("Qualification for tax exemption is not perpetual or immutable[.]"). The majority gives the state license to monitor whether nonprofits fail to hit the proper ratio of activities that are ****723** "religious in nature" to "secular in nature." " '[P]ervasive monitoring' for 'the subtle or overt presence of religious matter' is a central danger against which [the Court has] held the Establishment Clause guards." See Hernandez v. Comm'r, 490 U.S. 680, 694, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (citations omitted). To force religious ***117** entities to repeatedly satisfy the state that their activities are "religious in nature" is anathema to the First Amendment.

¶192 The majority's primarily-religious-in-nature-activities test puts state officials and courts in the constitutionally tenuous position of second-guessing the religious significance and character of a nonprofit's actions. Catholic Charities strenuously maintain their charitable activities are religious and central to their faith. Nevertheless, this court rejects Catholic Charities' understanding of the religious significance of their own activities, insisting those activities are actually "secular in nature." The First Amendment forbids such second-guessing and recharacterization of Catholic Charities' activities. Lyng, 485 U.S. at 457-58, 108 S.Ct. 1319 ("[T]he dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play."); Thomas, 450 U.S. at 716, 101 S.Ct. 1425 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.").

¶193 The entanglement occasioned by the impermissible second-guessing of sincere religious claims is compounded by the majority's claim that what constitutes an activity that is "religious in nature" "may be different for different faiths." Majority op., ¶55. The majority has already made clear it will not take nonprofits at their word that their activities are "religious in nature." For what constitutes an activity that is "religious in nature" to change from religion to ***118** religion, the court must study the doctrines of the various faiths and decide for itself what religious practices are actually religious. The Constitution bars civil courts from such intrusions into spiritual affairs. Jones v. Wolf, 443 U.S. 595, 602, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) (stating civil courts are barred from "resolving ... disputes on the basis of religious doctrine and practice"). "Plainly, the First Amendment forbids civil courts from" "determin[ing] matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion." Presbyterian Church in U.S., 393 U.S. at 450, 89

S.Ct. 601. The majority opinion strikes at the heart of religious autonomy.

¶194 The majority denies Catholic Charities the exemption under Wis. Stat. § 108.02(15)(h)2. in part because they employ and serve those of other religions. This is not a lawful criterion. Courts are not allowed to determine who is and is not a co-religionist. "[W]ho or what is Catholic ... is an inquiry that the government cannot make." Holy Trinity, 82 Wis. 2d at 150-51, 262 N.W.2d 210. Deciding who is and is not a co-religionist is plagued with entanglement problems. Are those no longer practicing a faith co-religionists? Our Lady, 140 S. Ct. at 2069. Who decides? "Would the test depend on whether the person in question no longer considered himself or herself to be a member of a particular faith? Or would the test turn on whether the faith tradition in question still regarded the person as a member in some sense?" Id. "What characteristics, professions of faith, or doctrinal tenets render a [person] part of a particular denomination? ****724** The statute doesn't tell us, and it would be unconstitutional for any state actor, including a court, to resolve the question." St. Augustine Sch., 398 Wis. 2d 92, ¶138, 961 N.W.2d 635 (Rebecca Grassl Bradley, J., dissenting). Who constitutes a co-religionist is a ***119** religious, not legal, question. Colo. Christian Univ., 534 F.3d at 1264-65 (noting such a question "requires [the state] to wade into issues of religious contention").

¶195 Whether a nonprofit engages in religious education or "imbue[s] program participants with the Catholic faith" presents additional entanglement problems. Majority op., ¶60. The court must decide what constitutes religious education and evangelism—religious questions whose answers will vary from faith to faith. Does conducting charity as an illustration of the love of one's deity count? What about engaging in a commercial enterprise to illustrate one's faith applied to daily life? See Golden Rule Church Ass'n, 41 T.C. 719. "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act" educates others about his faith and acts as a form of proselytizing or evangelism? See Smith, 494 U.S. at 887, 110 S.Ct. 1595. Whether activities are " '[religious education]' or mere 'education' depends as much on the observer's point of view as on any objective evaluation of the educational activity." Colo. Christian Univ., 534 F.2d. at 1263. "The First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient" of a nonprofit. Id. Similar problems abound with the majority's declaration that activities involving worship services and religious ceremonies are more "religious in nature." See Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 633-34 (2d Cir. 2020) ("The government must normally refrain from making assumptions about what religious worship requires."). The majority's criteria invite the state and courts to make religious determinations and second-guess the sincere assertions of religiosity of those operating nonprofits.

***120** ¶196 The majority does not deny its inquiry entangles church and state, but simply asserts that the entanglement occasioned by its misreading of Wis. Stat. § 108.02(15)(h)2. is "inherent in any statutory scheme that offers tax exemption to religious entities" [33] —a preposterous claim in light of the majority's failure to properly interpret the statute, which simply requires the nonprofit's motivations be religious. [34] The majority believes its consideration of whether a nonprofit primarily performs activities "religious in nature" does not unduly entangle government and religion because its inquiry is a "neutral and secular inquiry based on objective criteria." Majority op., ¶86. But there is nothing neutral, secular, or objective about the majority's test for whether activities are "religious in nature." The majority's test asks whether the activities are similar—in some undefined and arbitrary way—to stereotypical religious activities listed in a Seventh Circuit decision, which made the list up from whole cloth. See id., ¶100 (stating that "if one of the religiously motivated sub-entities in this case partook in activities such as those cited by the Dykema court as indicative of a religious purpose" the court would be more likely to decide it is operated ****725** primarily for religious purposes). The test does not "rel[y] exclusively on objective, well-established concepts of ... law familiar to lawyers and judges." ***121** Jones, 443 U.S. at 603, 99 S.Ct. 3020. Instead, it relies upon each justice's subjective sense of what is genuinely religious and what is not.

¶197 While the majority does not ask "whether [Catholic Charities] are 'Catholic' enough to qualify for the exemption," majority op., ¶85, the majority improperly entangles itself with religion by asking whether Catholic Charities' concededly religious activities are sufficiently religious. The majority's protestation that its decision doesn't "intrude on questions of religious dogma" [35] is dystopian —"a manner of Orwellian newspeak by which 'religious' means something other than 'religious.' " St. Augustine Sch., 398 Wis. 2d 92, ¶141, 961 N.W.2d 635 (Rebecca Grassl Bradley, J., dissenting). The majority doesn't simply answer " 'delicate' questions," majority op., ¶87, it treads where the Constitution forbids the judiciary from intruding.

IV. CONCLUSION

¶198 The majority's decision constitutes a profound overreach of the judicial power. The majority radically transforms Wis. Stat. § 108.02(15)(h)2., which provides a tax exemption for nonprofits managed primarily for a religious reason "and operated, supervised, controlled, or principally supported by a church or convention or association of churches[.]" Finding the exemption too broad as a matter of policy, the majority excludes nonprofits it deems insufficiently religious. As newly interpreted, the statute violates the First Amendment and the Wisconsin Constitution. The majority's primarily-religious-in-nature-activities test embodies an unlawful preference for some religious practices and thereby discriminates against others. ***122** The test also requires courts to answer theological questions well beyond the judiciary's purview. The majority exercises the power of the legislature, rewriting § 108.02(15)(h)2., and proclaims itself the arbiter of what is and is not religious. Whatever authority the majority believes it possesses to assume these roles is not found in the Wisconsin Constitution. I respectfully dissent.

¶199 I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER joins ¶¶110-61 and ¶¶163-98 of this dissent.

BRIAN HAGEDORN, J. (dissenting).

¶200 Although I would not reach the constitutional questions and do not sign onto every point in the analysis, I agree with the construction of the statute in Justice Rebecca Grassl Bradley's thoughtful dissent. I also agree with the excellent discussion of the majority's misplaced reliance on the remedial statute canon. Justice Rebecca Grassl Bradley's dissent, ¶¶154-58. There is no particular reason to assume a statutory exemption in an area like religious freedom —a constitutionally protected category to which the law regularly gives wide latitude—should be construed narrowly. I respectfully dissent.

All Citations

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Footnotes

1 Cath. Charities Bureau, Inc. v. LIRC, 2023 WI App 12, 406 Wis. 2d 586, 987 N.W.2d 778 (reversing the order of the circuit court for Douglas County, Kelly J. Thimm, Judge).

2 All subsequent references to the Wisconsin Statutes are to the 2019-20 version unless otherwise indicated.

3 Both parties agree that the first half of the statute is not at issue, that is that CCB is "operated, supervised, controlled, or principally supported by a church or convention or association of churches."

4 Although CCB and its sub-entities allege a violation of the Wisconsin constitution, they did not develop an argument apart from their assertions under the United States Constitution. They assert in a footnote that if the statute violates the First Amendment, then it must also violate the Wisconsin Constitution. It is true that "[t]he Wisconsin Constitution, with its specific and expansive language, provides much broader protections for religious liberty than the First Amendment." Coulee Cath. Schs. v. LIRC, 2009 WI 88, ¶66, 320 Wis. 2d 275, 768 N.W.2d 868 (citing State v. Miller, 202 Wis. 2d 56, 64, 549 N.W.2d 235 (1996)). However, any argument that Wis. Stat. § 108.02(15)(h)2. violates the state constitution specifically is undeveloped. We generally do not address undeveloped arguments, and we will not do so here. Sw. Airlines Co. v. DOR, 2021 WI 54, ¶32 n.10, 397 Wis. 2d 431, 960 N.W.2d 384.

5 See Wis. Admin. Code ch. DHS 10.

6 CCB and the sub-entities are exempt from federal income tax pursuant to 26 U.S.C. § 501(c)(3), which provides exemption to, among other entities, those "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."

7 Challenge Ctr., Inc. v. LIRC, Douglas County Case No. 2014CV384 (George L. Glonek, Judge).

8 The court of appeals initially certified the appeal to this court, but we denied the certification. See Wis. Stat. § (Rule) 809.61; Cath. Charities Bureau, Inc. v. LIRC, No. 2020AP2007, unpublished certification, 2021 WL 9782350 (Wis. Ct. App. Dec. 7, 2021).

9 See Daniel Nelson, The Origins of Unemployment Insurance in Wisconsin, 51 Wis. Mag. Hist. 109, 109 (1967); Operton v. LIRC, 2017 WI 46, ¶57, 375 Wis. 2d 1, 894 N.W.2d 426 (Abrahamson, J., concurring).

10 Other jurisdictions have taken varying approaches to similar questions. For example, some jurisdictions have considered the activities of an organization in determining religious purpose. See, e.g., Samaritan Inst. v. Prince-Walker, 883 P.2d 3, 8 (Colo. 1994) (concluding that an organization does not "operate primarily for religious purposes" because the "services offered are essentially secular"); Cathedral Arts Project, Inc. v. Dep't of Econ. Opportunity, 95 So. 3d 970, 973 (Fla. Dist. Ct. App. 2012) (determining that although an organization's motivation may be religious, the organization's "primary purpose in operating ... is to give art instruction to underprivileged children" and it is therefore not entitled to the exemption). Conversely, other jurisdictions have granted a religious purpose exemption based on the motivations of the organization. See, e.g., Dep't of Emp. v. Champion Bake-N-Serve, Inc., 100 Idaho 53, 592 P.2d 1370, 1373 (1979) (concluding that a bakery operated by Seventh Day Adventist church was operated primarily for religious purposes despite a commercial aspect).

11 Although the United States Supreme Court has in the past applied a similar principle of liberal construction of remedial statutes, see Peyton v. Rowe, 391 U.S. 54, 65, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968), recent cases suggest a potential step back from this approach. See, e.g., Encino Motorcars, LLC v. Navarro, 584 U.S. 79, 138 S. Ct. 1134, 1142, 200 L.Ed.2d 433 (2018). Nevertheless, we follow (and do not overrule) the Wisconsin approach to our Unemployment Compensation Act and our precedent regarding the interpretation of remedial statutes under the Act. See Operton, 375 Wis. 2d 1, ¶32, 894 N.W.2d 426; Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983); see generally Miller v. Hanover Ins. Co., 2010 WI 75, ¶31, 326 Wis. 2d 640, 785 N.W.2d 493; Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 22, ¶21, 308 Wis. 2d 103, 746 N.W.2d 762 (explaining that "remedial statutes must be liberally construed to advance the remedy that the legislature intended to be afforded"). The statutory text confirms the original intent of the legislature to provide broad coverage for unemployed workers that is "shared ... fairly" among employers. See generally Wis. Stat. § 108.01.

12 The stopping point of the argument presented by CCB and the sub-entities is unclear. For example, at the administrative hearing in the present case, the Archbishop of Milwaukee testified that he is responsible for overseeing numerous grammar schools and high schools, 10 hospitals, and five colleges. Under the petitioners' argument, these entities' employees, numbering in the thousands, would seemingly lack coverage under the state unemployment system.

13 The argument advanced by the petitioners did not garner anywhere close to a majority vote when addressed by the United States Supreme Court. At oral argument, Justice Thomas's concurrences in both Hosanna–Tabor Evangelical Lutheran Church and Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 196-98, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012) (Thomas, J., concurring) and Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. ——, 140 S. Ct. 2049, 2069-70, 207 L.Ed.2d 870 (2020) (Thomas, J., concurring, joined by Gorsuch, J.), were invoked to support the idea that courts must wholly defer to an organization's good-

faith claims instead of examining the activities of the organization. However, this position was not supported by the majority in either case.

14 The "ministerial exception" recognizes "that the First Amendment protects houses of worship from state interference with the decision of who will teach and lead a congregation." Coulee Cath. Schs., 320 Wis. 2d 275, ¶39, 768 N.W.2d 868. Premised on the "idea that the 'introduction of government standards [in]to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state,' " the exception "recognizes that 'perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.' " Id. (quoting Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168-69 (4th Cir. 1985)).

15 Our examination of an organization's activities also finds support in a federal law utilizing the same language as the statute we examine here. See 26 U.S.C. § 3309(b)(1)(B). A report of the House Ways and Means Committee on that law sets forth an example of its application that focuses on an organization's activities:

> 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. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. 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.

H.R. Rep. No. 91-612, at 44 (1969). Congress thus envisioned that an examination of activities, and not merely motivations, would be undertaken given the language we examine in this case.

16 In full, the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

17 See Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

18 There are two major types of constitutional challenges: facial and as-applied. State v. Roundtree, 2021 WI 1, ¶17, 395 Wis. 2d 94, 952 N.W.2d 765. A party challenging a law as unconstitutional on its face must show that the law cannot be constitutionally enforced under any circumstances. Id. In contrast, in an as-applied challenge, the court assesses the merits of the challenge by considering the facts of the particular case before it. Id., ¶18. The parties' briefing was not particularly clear regarding which type of challenge CCB and the sub-entities bring here. Both LIRC and the court of appeals interpreted the petitioners' challenge to be an as-applied challenge, and we do the same. See Cath. Charities Bureau, 406 Wis. 2d 586, ¶47, 987 N.W.2d 778 ("[W]e note that the parties do not argue that the statute itself violates the First Amendment, meaning that CCB does not assert a facial constitutional challenge."). In any event, the standard for a facial challenge is more stringent, and if an as-applied challenge fails, then a facial challenge will also necessarily fail because the law can be constitutionally applied in at least one circumstance.

19 See, e.g., Gibbons v. District of Columbia, 116 U.S. 404, 407, 6 S.Ct. 427, 29 L.Ed. 680 (1886); All Saints Par. v. Inhabitants of Town of Brookline, 178 Mass. 404, 59 N.E. 1003, 1004 (1901); Trinity Church v. City of New York, 10 How. Pr. 138, 140-41 (N.Y. Sup. Ct. 1854); In re City of Pawtucket, 24 R.I. 86, 52 A. 679, 679 (1902); Frederick Cnty. Comm'rs v. Sisters of Charity of Saint Joseph, 48 Md. 34, 43 (Md. 1878); see also Waushara County v. Graf, 166 Wis. 2d 442, 462-63, 480 N.W.2d 16 (1992); Midtown Church of Christ, Inc. v. City of Racine, 83 Wis. 2d 72, 73-74, 264 N.W.2d 281 (1978); John W. Whitehead, Tax Exemption and

Churches: A Historical and Constitutional Analysis, 22 Cumb. L. Rev. 521, 545 n.184 (1992) (collecting cases both upholding and disallowing property tax exemptions for churches and other religious organizations).

20 See also Schwartz v. Unemployment Ins. Comm'n, 895 A.2d 965, 970 (Me. 2006) (concluding that a nonprofit organization which, in part, provides healthcare to island communities, is operated primarily for religious purposes because of its religious motivations and activities including bringing pastors to island communities, offering Christmas programs, and employing clergy members); Peace Lutheran Church v. State, Unemployment Appeals Comm'n, 906 So. 2d 1197, 1199-1200 (Fla. Dist. Ct. App. 2005) (determining that a child care center located at a church was operated primarily for religious purposes because it provided outreach for the church and its "religious purposes pervade all aspects of the school/day care center.").

21 LIRC and the court of appeals observe that CCB does not engage in any of the following activities: inculcating Catholic faith; teaching the Catholic religion; evangelizing or participating in religious rituals or worship services; requiring employees, participants or board members to be of Catholic faith; requiring attendance at religious training, orientation, or services; and disseminating religious materials.

22 To the extent that CCB and the sub-entities argue that Wis. Stat. § 108.02(15)(h)2. is facially unconstitutional, such a challenge also fails. For a facial challenge to be successful, it must be demonstrated that the law cannot be constitutionally enforced under any circumstances. Roundtree, 395 Wis. 2d 94, ¶17, 952 N.W.2d 765. Our conclusion that § 108.02(15)(h)2. can be constitutionally enforced under the present circumstances necessarily precludes such an argument.

1 https://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est.html.

2 Amicus Br. Professors Douglas Laycock & Thomas C. Berg, at 15-16 (internal citations omitted) ("Many evangelical Christians view conversion and overt worship as indispensable elements of their charitable activities. But Catholics and Jews view service itself as a distinct mode of worship that should remain separate from proselytizing.").

3 Continuing its telling trend, the majority refuses to address any arguments against its desired result. Clarke v. Wis. Elections Comm'n, 2023 WI 79, ¶206, 410 Wis. 2d 1, 998 N.W.2d 370 (Rebecca Grassl Bradley, J., dissenting) (noting the majority "pretend[ed] the respondents made an argument that [was] easier for the majority to dismiss" instead of addressing the parties' actual argument). This dissent details the majority's analytical blunders, which lead the majority to absurdly conclude Catholic Charities are purely secular. Justice Brian Hagedorn also dissents, questioning why the majority reads the exemption narrowly in the face of constitutionally protected religious freedom. If the majority sincerely stands behind its analysis, it should explain where the dissents go astray. As Justice Antonin Scalia put it,

> When I have been assigned the opinion for the Court in a divided case, nothing gives me as much assurance that I have written it well as the fact that I am able to respond satisfactorily (in my judgment) to all the onslaughts of the dissents or separate concurrences. The dissent or concurrence puts my opinion to the test, providing a direct confrontation of the best arguments on both sides of the disputed points. It's a cure for laziness, compelling me to make the most of my case.

Antonin Scalia, The Dissenting Opinion, 1994 J. Sup. Ct. Hist. 33, 41 (1994). Pitifully, the majority does not make the most of its case. Generally, when a party fails to respond to the legal arguments advanced in a case, the court considers the arguments conceded. United Coop. v. Frontier FS Coop., 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (citing Schlieper v. DNR, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994)). By refusing to offer a word of rebuttal in response to the dissents, the majority concedes its analysis lacks legal merit.

4 Cf. St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 782 n.12, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981).

5 In its brief, LIRC insists "operated" is an intransitive verb with no direct object. The majority agrees, citing internet dictionary definitions of "operate" in the intransitive sense. See majority op., ¶42. LIRC and the majority are wrong; "operated" is a transitive verb in Wis. Stat. § 108.02(15)(h)2. It is the "organization"—the direct object—that is "operated"—transitive verb—"primarily for religious purposes" and "operated"—transitive verb—"by a church or convention or association of churches[.]" § 108.02(15)(h)2. Section 108.02(15)(h)2. has a passive construction. See generally Bryan A. Garner, Garner's Modern English Usage 676 (4th ed. 2016). "[O]nly transitive verbs can appear in the passive voice." C. Edward Good, A Grammar Book for You and I ... Oops, Me! 33 (2002).

6 In its brief, LIRC tepidly argues the term "religious purposes" is a term of art in tax law, citing United States v. Dykema, 666 F.2d 1096 (7th Cir. 1981). The majority gestures at (but does not commit to) the same argument, likewise relying on Dykema. Majority op., ¶54. While Dykema deemed "religious purposes" a "term of art in tax law," 666 F.2d at 1101, it did not cite any authority to support its contention; it also failed to explain why it believed the phrase is a term of art. No cases support Dykema's assertion; only two parroted it. The only cases to treat "religious purposes" as a term of art are Dykema, 666 F.2d at 1101, Living Faith, Inc. v. Commissioner, 950 F.2d 365, 376 (7th Cir. 1991), which cited Dykema, and Catholic Charities Bureau, Inc. v. LIRC, 2023 WI App 12, ¶39, 406 Wis. 2d 586, 987 N.W.2d 778, the court of appeals decision in this case, which cited only Dykema. In reaching its conclusion, the Dykema court interpreted 26 U.S.C. § 501(c)(3), which exempts entities operated exclusively for "religious, charitable, scientific, testing for public safety, literary, or educational purposes." Federal regulations undermine Dykema's characterization of "religious purposes" as a term of art. Regulations define what "charitable," "educational," "testing for public safety," and "scientific" mean. 26 C.F.R. § 1.501(c)(3)-1(d)(2)-(5). Conspicuously absent is any definition of what "religious" means under the statute. Dykema's representation that "religious purposes" is a term of art in tax law is also severely undermined by divergent interpretations of "operated primarily for religious purposes" embraced by state courts. See majority op., ¶38 n.10 (collecting a sample of cases). Neither Dykema, LIRC, nor the majority have provided any basis for construing "religious purposes" as a term of art.

7 The majority's surplusage argument is additionally flawed because it relies on the false assumption that a church's purposes are by definition religious. Id., ¶37. While that sounds reasonable, it is not universally true. Nothing precludes a church from taking an action for a nonreligious reason. Similarly, it is not true that a school's motivations are by definition educational.

8 The majority similarly argues that "[t]hose employed by a church are ... addressed in subdivisions 1. and 3. [of Wis. Stat. § 108.02(15)(h)], indicating ... that 'employees who fall under subd. 2. are to be focused on separately in the statutory scheme from employees of a church.' " Id., ¶35 (quoting Cath. Charities Bureau, 406 Wis. 2d 586, ¶25, 987 N.W.2d 778).

9 See also 26 C.F.R. § 1.501(c)(3)-1(c)(1) (stating "[a]n organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose").

10 Dykema provided the following list:

> (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity in partibus infidelium; (b) pastoral counseling and comfort to members facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of

> individuals, such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and education in the doctrine and discipline of the church, as well as (in the case of mature and well developed churches) theological seminaries for the advanced study and the training of ministers.

Dykema, 666 F.2d at 1100.

It is unclear why the majority relies on Dykema's list as heavily as it does. Dykema did not cite any legal authority supporting its list of typical religious activities. See id. The court simply made it up. Moreover, Dykema's list is not used by other courts. The only published opinions having relied on its list are the court of appeals, below, and this court—in this very case. Moreover, Dykema's list was meant to serve only as a list of "[t]ypical activities" done for a religious purpose. Id. Nothing in Dykema suggests a nonprofit is "operated primarily for religious purposes" only if the organization engages primarily in activities that are "religious in nature," as the majority requires.

The majority also wrongly asserts that the Dykema court "examined an organization's actual activities." Majority op., ¶87. The Dykema court did no such thing. The court reversed a district court decision denying the enforcement of an IRS summons that called for 14 categories of records belonging to a church. 666 F.2d at 1098, 1104.

11 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

12 Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

13 Holt v. Hobbs, 574 U.S. 352, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015) (holding a prison's refusal to allow a Muslim to grow a 1/2-inch beard violated the Religious Land Use and Institutionalized Persons Act of 2000).

14 Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

15 Amicus Br. Jewish Coalition for Religious Liberty, at 7.

16 Id. at 7-8.

17 Illinois courts consider the activities of a nonprofit in cases under the Illinois equivalent of Wis. Stat. § 108.02(15)(h)2. E.g., Concordia Ass'n v. Ward, 177 Ill.App.3d 438, 126 Ill.Dec. 726, 532 N.E.2d 411 (1988).

18 The majority's footnote expressing indignation at the prospect that religious colleges, schools, and hospitals might be exempt under Catholic Charities' reading of the exemption appears to prejudge issues not before this court. Amicus curiae, Maranatha Baptist University, et al., comprises a collection of faith-based nonprofits that primarily provide education. Its brief notes that a number of its members currently qualify for the exemption under Wis. Stat. § 108.02(15)(h)2., but would likely lose that exemption if this court upholds the court of appeals. Amicus Br. Maranatha Baptist University, et al., at 5-6. Amicus argues "[t]he federal government has long counted religious schools as being operated primarily for religious purposes." Id. at 9 n.1 (citing Unemployment Insurance Program Letter No. 28-87, U.S. Dept. of Labor (June 10, 1987)) (" 'The second category of services exempt from the required coverage are those performed in the employ of religious schools and other entities ....' "). The majority simply ignores this argument.

Curiously, the majority's assumption that Catholic colleges and schools cannot qualify for the exemption exists in tension with the cases upon which it relies. The majority analogizes its test to cases applying the ministerial exception under the First Amendment. In each of the cases the majority cites, however, the religious school received the exception. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. ——, 140 S. Ct. 2049, 207 L.Ed.2d 870 (2020); Coulee Cath. Schs. v. LIRC, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868; see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 132 S.Ct. 694, 181

L.Ed.2d 650 (2012). The majority neglects to explain why Catholic colleges and schools receive such radically different treatment under the test it employs in this case.

19 Any constitutional issues arising from a plain-meaning interpretation of Wis. Stat. § 108.02(15)(h)2. are not before the court. Similarly, the constitutionality of the second prong of § 108.02(15)(h)2., requiring the nonprofit to be "operated, supervised, controlled, or principally supported by a church or convention or association of churches[,]" is not before the court. See, e.g., Christian Sch. Ass'n of Greater Harrisburg v. Commonwealth, Dep't of Lab. & Indus., 55 Pa.Cmwlth. 555, 423 A.2d 1340, 1346-47 (Pa. 1980).

20 Justice Clarence Thomas of the United States Supreme Court has questioned whether the Establishment Clause properly applies to states. Zelman v. Simmons-Harris, 536 U.S. 639, 678-79, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (Thomas, J., concurring); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45, 49-51, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (Thomas, J., concurring in the judgment); Van Orden v. Perry, 545 U.S. 677, 692-93, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (Thomas, J., concurring); Town of Greece v. Galloway, 572 U.S. 565, 604-07, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014) (Thomas, J., concurring in part and concurring in the judgment); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 139 S. Ct. 2067, 2095, 204 L.Ed.2d 452 (2019) (Thomas, J., concurring in the judgment); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 140 S. Ct. 2246, 2263-64, 207 L.Ed.2d 679 (2020) (Thomas, J., concurring). Justice Thomas has argued the Establishment Clause is a "federalism provision," Newdow, 542 U.S. at 45, 124 S.Ct. 2301 (Thomas, J., concurring in the judgment), which merely prohibits Congress "from establishing a national religion" and "interfer[ing] with state establishments." Id. at 50, 124 S.Ct. 2301. It does "not protect any individual right." Id. Under this theory, the Establishment Clause, "resists incorporation." Id. at 45, 124 S.Ct. 2301. "[A]n incorporated Establishment Clause would prohibit exactly what the text of the Clause seeks to protect: state establishments of religion." Am. Legion, 139 S. Ct. at 2095 (Thomas, J., concurring in the judgment) (citation omitted). Scholars have debated whether the Establishment Clause was meant to be incorporated through the Fourteenth Amendment. Compare Vincent Philip Muñoz, The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation, 8 J. Const. L. 585 (2006), and William K. Lietzau, Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation, 39 DePaul L. Rev. 1191 (1990), with Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. State L.J. 1085 (1995), and Nathan S. Chapman & Michael W. McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience 75-84 (2023). Regardless, the Court has held the Establishment Clause applies to the states, and we are duty bound to apply the Court's decisions interpreting and applying the Establishment Clause. State v. Jennings, 2002 WI 44, ¶¶18-19, 252 Wis. 2d 228, 647 N.W.2d 142; cf. Hutto v. Davis, 454 U.S. 370, 374, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

21 The majority exclusively relies upon cases in which the litigant argued the Free Exercise Clause required the state to provide an exemption from a generally applicable tax. Majority op., ¶105 (first citing Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 391, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990); and then citing Hernandez v. Comm'r, 490 U.S. 680, 699-700, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989)); see also United States v. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (rejecting that the Free Exercise Clause requires an exemption from paying social security taxes even if the payment of such taxes violates one's sincerely held religious beliefs).

22 The Free Exercise Clause would not, absent Wis. Stat. § 108.02(15)(h)2., require the state to exempt Catholic Charities from paying the tax. After it creates a religious exemption, however, the state cannot discriminate against certain religions or religious practices in applying the exemption. See Carson v. Makin, 596 U.S. 767, 785, 142 S.Ct. 1987, 213 L.Ed.2d 286 (2022); Golden Rule Church Ass'n v. Comm'r, 41 T.C. 719, 729 (1964).

23 See also Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (holding that failure to provide a Jehovah's Witness unemployment benefits because he quit his job due to his religious objections to making armaments burdened his free exercise); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) (holding that failure to provide a member of the Seventh-day Adventist Church unemployment benefits because she was fired after refusing to work from sundown on Friday to sundown on Saturday in accordance with her religious beliefs burdened her free exercise of religion).

24 Amicus Br. International Society for Krishna Consciousness and the Sikh Coalition, at 11.

25 Id. at 11-13.

26 Id. at 12-13.

27 Id. at 13.

28 Id.

29 Article I, section 18 of the Wisconsin Constitution provides in full:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

30 King v. Vill. of Waunakee, 185 Wis. 2d 25, 61, 517 N.W.2d 671 (1994) (Heffernan, C.J., dissenting).

31 While the discussion appears in the concurring opinion of Justice Cassoday, it was on a subject expressly reserved for his consideration, which makes it the opinion of the court. State ex rel. Reynolds v. Nusbaum, 17 Wis. 2d 148, 165 n.3, 115 N.W.2d 761 (1962).

32 Because the majority dodges the religious discrimination issues presented by its test, litigants likely will bring such claims in the future, forcing the majority to admit its error. “This decision might as well be written on the dissolving paper sold in magic shops.” Fulton v. City of Philadelphia, 593 U.S. 522, 551, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021) (Alito, J., concurring in the judgment).

33 Majority op., ¶86.

34 The majority claims that without an examination of a nonprofit's activities, it wouldn't be possible for a nonprofit to qualify for a tax exemption premised on a “religious purposes” requirement. See id., ¶93 (citing Ecclesiastical Order of Ism of Am, Inc. v. Chasin, 653 F. Supp. 1200, 1205 (E.D. Mich. 1986)). Of course, the court could simply accept Catholic Charities’ sincere claims that they operate for religious purposes.

35 Id., ¶87.

No. _____

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 PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Wisconsin exempts from its state unemployment tax system certain religious organizations that are "operated, supervised, controlled, or principally supported by a church or convention or association of churches" and that are also "operated primarily for religious purposes."

Petitioners are Catholic Charities of the Diocese of Superior and several sub-entities. Although all agree Catholic Charities is controlled by a church—the Diocese of Superior—the Wisconsin Supreme Court held that Catholic Charities is not "operated primarily for religious purposes" and thus does not qualify for the tax exemption. Specifically, the court held that Catholic Charities' activities are not "typical" religious activities because Catholic Charities serves and employs non-Catholics, Catholic Charities does not "attempt to imbue program participants with the Catholic faith," and its services to the poor and needy could also be provided by secular organizations.

The questions presented are:

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

2. In addressing federal constitutional challenges, may state courts require proof of unconstitutionality "beyond a reasonable doubt?"

CORPORATE DISCLOSURE STATEMENT

Catholic Charities Bureau, Inc. does not have a parent corporation and does not issue stock.

Catholic Charities Bureau, Inc. is the parent corporation of Barron County Developmental Services, Inc.; Diversified Services, Inc.; Black River Industries, Inc.; and Headwaters, Inc. None of these entities issue stock.

RELATED PROCEEDINGS

There are no directly related proceedings.

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INTRODUCTION

Forty years ago, this Court granted review in a pair of cases to determine whether the imposition of state unemployment taxes on certain religious bodies under the Federal Unemployment Tax Act and identical state statutes violated the First Amendment. See *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *California* v. *Grace Brethren Church*, 457 U.S. 393 (1982). Lower courts had divided over whether church schools were church-controlled organizations "operated primarily for religious purposes," 26 U.S.C. 3309(b)(1)(B), and thus exempt from unemployment tax, and—if not exempt—over whether FUTA and its cognate state statutes violated the First Amendment.

But neither case resolved the constitutional questions presented. In *St. Martin*, the Court unanimously held that church schools that were not separately incorporated counted as "churches" and were thus protected under the independent exemption for churches in 26 U.S.C. 3309(b)(1)(A). And in *Grace Brethren*, the Court held that the federal district court from which appeal had been taken lacked jurisdiction under the Tax Injunction Act, 28 U.S.C. 1341, so the case had to be dismissed. In both cases, the Court expressly declined to reach the First Amendment questions on which review had been granted. Congress later added a specific exemption that covered religious schools, but the status of other church-controlled but separately incorporated entities remains unaddressed to this day.

The split is thus unfinished business. And as the decision of the Wisconsin Supreme Court in this case shows, it is a split that is growing. The Wisconsin Su-

preme Court recognized the split and weighed in, concluding that Catholic Charities, the separately incorporated charitable arm of the Roman Catholic Diocese of Superior, was not "operated primarily for religious purposes." Acknowledging that Catholic Charities undertakes its charitable activities because of its sincerely held religious beliefs and to carry out the religious mission the bishop has given it, the court nevertheless held that Catholic Charities' activities have no religious purpose because those activities are not, in that court's view, "typical" for a religious organization. The Wisconsin Supreme Court thought it atypical of religion that Catholic Charities does not "attempt to imbue" those it helps with the Catholic faith, and that it hires employees "regardless of religion." And the court held that because Catholic Charities provides services that "can be provided by organizations of either religious or secular motivations," those services do not have a religious purpose. Put another way, it doesn't matter if Catholic Charities gives a cup of water in Jesus' name, because non-religious charities offer cups of water too.

That absurd result deepens a split between state courts that require religious entities to conform to stereotypes to qualify for the "religious purposes" exemption and those that do not. Four states look to the sincerity of the entity's religious beliefs to decide whether it qualifies for the religious purposes exemption, thus avoiding constitutional questions. Four other states, now including Wisconsin, instead determine "religious purpose" based on an assessment of whether a religious organization's charitable activities are "typical" of religion or "objective[ly]" religious. And that thrusts state governments into a thicket of First Amendment

questions under the Free Exercise Clause, the Establishment Clause, and the church autonomy doctrine, not least because it forces agencies and courts to second-guess the religious decisions of religious bodies.

And that split matters. Religious bodies like Petitioners are deeply affected, having to pay unemployment taxes that otherwise could be helping the needy. Moreover, because Petitioners are forced to pay into the state unemployment compensation program, they cannot participate in their church's own unemployment compensation system along with Wisconsin dioceses, including the Diocese of Superior itself. And because the Tax Injunction Act prevents lower federal courts from addressing the matter, only this Court can resolve the split and the underlying constitutional issues in any comprehensive way.

Finally, the decision below deepened a different existing split over the proper burden of proof applicable to federal constitutional claims. According to the Wisconsin Supreme Court, its state laws are presumptively constitutional unless a plaintiff can prove unconstitutionality "beyond a reasonable doubt." This heightened standard conflicts with the practices of all federal courts and most state courts—which analyze federal constitutional claims without such a burden—and is fundamentally at odds with this Court's constitutional jurisprudence. And because only a few state courts still adhere to this heightened standard for adjudicating federal constitutional claims, it too generally avoids federal review.

The Court should not allow these longstanding splits to fester any longer. It should grant review on both questions presented.

OPINIONS BELOW

The decision of the Supreme Court of Wisconsin (App.1a-124a) is reported at 3 N.W.3d 666.The decision of the Court of Appeals of Wisconsin (App.125a-168a) is reported at 987 N.W.2d 778. The decision of the Court of Appeals of Wisconsin certifying this appeal to the Supreme Court of Wisconsin (App.169a-188a) is not reported. The decision of the Douglas County Circuit Court (App.189a-211a) is not reported.

JURISDICTION

The Supreme Court of Wisconsin issued its opinion on March 14, 2024. App.1a. On May 30, 2024, Justice Barrett extended the time to file a petition for certiorari until August 11, 2024. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." U.S. Const. Amend. I.

The Federal Unemployment Tax Act states in relevant part that "[t]his section shall not apply to service performed (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, 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).

Wisconsin's Unemployment Insurance and Reserves laws state in relevant part that "'Employment' * * * does not include service: * * * 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." Wis. Stat. § 108.02(15)(h)(2).

STATEMENT OF THE CASE

A. The Federal Unemployment Tax Act and the religious purposes exemption

In 1935, Congress enacted the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301-3311, which "called for a cooperative federal-state program of benefits to unemployed workers." *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 775 (1981). As part of this cooperative system, employers pay the federal government a percentage of their employees' annual wages to fund job service programs, to support state unemployment agencies (in times of high unemployment), and to support a federally administered fund against which states may borrow to pay unemployment benefits. But these employers can claim a credit of up to 90% of this federal tax for "contributions" they have made to federally approved state unemployment compensation programs (which provide benefits directly to unemployed workers), thus reducing the amount of money they owe to the federal government and reducing their overall tax burden. *Id.* at 775 n.3; 26 U.S.C. 3302(a)(1).

Accordingly—and to ensure their programs remain federally approved—all states (including Wisconsin)

have "complementary" statutes which impose, at a minimum, the coverage mandated by FUTA. See *Wimberly* v. *Labor & Indus. Rels. Comm'n of Mo.*, 479 U.S. 511, 514 (1987) ("The Act establishes certain minimum federal standards that a State must satisfy in order for a State to participate in the program."); *Bleich* v. *Maimonides Sch.*, 849 N.E.2d 185, 188 (Mass. 2006) (similar). The Secretary of Labor reviews all state FUTA-implementation statutes, 26 U.S.C 3304(a), and certifies annually that state laws meet FUTA's requirements, 26 U.S.C. 3304(b).

FUTA exempts church-controlled religious organizations "operated primarily for religious purposes" from payment of the unemployment tax. 26 U.S.C. 3309(b)(1)(B). This exemption was enacted by Congress in 1970. *St. Martin*, 451 U.S. at 776. Since then, forty-seven states have adopted language identical, or nearly identical, to FUTA's language.[1]

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[1] Twenty-three states and the District of Columbia use language identical to Section 3309(b)(1)(B). See Conn. Gen. Stat. § 31-222(a)(1)(E)(i)(II); Del. Code tit. 19, § 3302(10)(D)(i)(II); D.C. Code § 51-101(2)(A)(iv)(I)(b); Ga. Code § 34-8-35(j)(1)(B); Idaho Code § 72-1316A(7)(b); Ind. Code § 22-4-8-2(j)(3)(A)(ii); Iowa Code § 96.1A(16)(a)(6)(a); Kan. Stat. § 44-703(i)(4)(I); Ky. Rev. Stat. § 341.055(19); La. Stat. § 23:1472(12)(F)(III)(a)(ii); Mass. Gen. Laws ch. 151A, § 6(r); Miss. Code § 71-5-11(I)(5)(a)(ii); Mo. Rev. Stat. § 288.034.9(1); Neb. Rev. Stat. § 48-604(6)(g)(i)(B); Nev. Rev. Stat. § 612.121(2)(a)(2); N.C. Gen. Stat. § 96-1(b)(12)(b)(2) (incorporating Section 3309(b) by reference); Ohio Rev. Code § 4141.01(B)(3)(h)(i); Okla. Stat. tit. 40 § 1-210(7)(a)(ii); N.D. Cent. Code § 52-01-01(17)(h)(1)(b); 43 Pa. Con. Stat. § 753(l)(4)(8)(a)(ii); S.D. Codified Laws § 61-1-36(1)(b); Va. Code § 60.2-213(B)(1)(ii); Wash. Rev. Code § 50.44.040(1)(b); W. Va. Code § 21A-1A-17(9)(A).

Twice before, this Court considered constitutional claims challenging the scope of the religious exemption but resolved both cases on alternative grounds. In *St. Martin*, this Court held that the religious school plaintiffs were exempt from South Dakota's unemployment tax under a different FUTA provision (Section 3309(b)(1)(A)), making it "unnecessary * * * to consider the First Amendment issues raised by petitioners." *St. Martin*, 451 U.S. at 788. And in *California* v. *Grace Brethren Church*, this Court resolved the case

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Sixteen states use identical language, including "operated primarily for religious purposes," but make small grammatical changes to other parts of the subsection. See Ala. Code § 25-4-10(b)(21)(a)(2); Alaska Stat. § 23.20.526(d)(9)(B); Ark. Code § 11-10-210(a)(4)(A)(ii); Cal. Unemp. Ins. Code § 634.5(a)(2); Fla. Stat. § 443.1216(4)(a)(2); Md. Labor & Empl. § 8-208(b)(2)(i); Me. Rev. Stat. tit. 26 § 1043(11)(F)(17)(a); Mich. Comp. Laws § 421.43(o)(*i*); N.M. Stat. § 51-1-42(F)(12)(a)(2); 28 R.I. Gen. Laws § 28-42-8(4)(i)(B); S.C. Code § 41-27-260(10)(a); Tenn. Code § 50-7-207(c)(5)(B); Tex. Lab. Code § 201.066(1)(C); Utah Code § 35A-4-205(1)(g)(i)(B); Vt. Stat. tit. 21, § 1301(6)(C)(vii)(I); Wis. Stat. § 108.02(15)(h)(2).

Seven states have made minor substantive changes to FUTA's language, for example to specify that schools are included, or that entities must be nonprofit. See Ariz. Rev. Stat. § 23-615(B)(1) (schools); Colo. Rev. Stat. § 8-70-140(1)(a) (schools); 820 Ill. Comp. Stat. § 405/211.3(A)(2) (schools); Minn. Stat. § 268.035 subd. 20(5) (nonprofit status); N.H. Rev. Stat. § 282-A:9, IV(p)(1) (schools); N.J. Stat. § 43:21-19(i)(1)(D)(i)(II) (schools); Wyo. Stat. § 27-3-105(b)(ii) (deleting second use of "operated").

Of the remaining four states, one utilized identical language, but has since repealed it. 2005 Or. Laws c. 218, § 1 (amending Or. Rev. Stat. § 657.072(1)(a)(B)). Three states employ religious exemptions that turn on ministerial status or function. Haw. Rev. Stat. § 383-7(a)(9)(A); Mont. Code § 39-51-204(2)(a); N.Y. Lab. Law § 563(2)(a)-(c).

on jurisdictional grounds, holding that the Tax Injunction Act prohibited the federal district court from enjoining the collection of state taxes. 457 U.S. 393, 417 (1982).

After this Court's decisions in *St. Martin* and *Grace Brethren*, Congress again amended FUTA to make clear that religious schools are exempt so long as they are "operated primarily for religious purposes,"—even if not "operated, supervised, controlled, or principally supported by a church or convention or association of churches." 26 U.S.C. 3309(b)(1)(C) (enacted 1997).

Wisconsin law generally requires nonprofits with four or more employees (and which meet other minimum qualifications) to pay into its state unemployment program. Wis. Stat. 108.02(13)(b). Through its (h)(2) exemption, the State provides a religious exemption identical to FUTA's Section 3309(b)(1)(B) save for the omission of two instances of "which is." Compare Wis. Stat. § 108.02(15)(h)(2) with 26 U.S.C. 3309(b)(1)(B).

B. Catholic Charities and its religious mission

Petitioner Catholic Charities Bureau is a Wisconsin nonprofit corporation and the social ministry arm of the Diocese of Superior, a diocese of the Roman Catholic Church. App.371a. Its mission is "[t]o carry on the redeeming work of our Lord by reflecting gospel values and the moral teaching of the church." App.382a, 428a. Catholic Charities carries out this mission by "providing services to the poor and disadvantaged as an expression of the social ministry of the Catholic Church." App.383a, 431a. Its purpose is "to be an effective sign of the charity of Christ" by providing services without making distinctions "by race, sex, or

religion in reference to clients served, staff employed and board members appointed." App.383a, 431a. This is a mandate of Catholic social teaching, and a primary tenet of the faith. App.373a-379a. Catholic Charities pledges that it "will in its activities and actions reflect gospel values and will be consistent with its mission and the mission of the Diocese of Superior." App.384a, 429a. Catholic Charities operates dozens of programs in service to the elderly, the disabled, the poor, and those in need of disaster relief. App.373a. In accordance with the Catholic social teaching of subsidiarity, Catholic Charities is separately incorporated from the Diocese of Superior and, like the Diocese, has 501(c)(3) status under the Roman Catholic Church's group tax exemption. App.386a-402a.

Petitioners Headwaters, Barron County Developmental Services, Diversified Services, and Black River Industries are Catholic Charities' sub-entities that provide services primarily to developmentally disabled individuals. App.128a-130a. They are each separately incorporated as Wisconsin nonprofit corporations, and each also enjoys 501(c)(3) status as part of the Roman Catholic Church. App.386a-402a.

The bishop of the Diocese of Superior has plenary control over Catholic Charities and its sub-entities: he "oversees CCB in its entirety, including its sub-entities." App.130a; App.7a-8a. He serves as president of Catholic Charities and "appoints its membership," which consists of leading diocesan clergy and the executive director. App.7a, 415a-417a. The bishop also appoints the boards of directors of Catholic Charities and its sub-entities. App.419a, 422a.

Catholic Charities' membership oversees the ministry and its sub-entities to ensure fulfillment of Catholic Charities' mission in compliance with Catholic social teaching. App.28a-29a, 416a-417a. Each sub-entity signs Catholic Charities' *Guiding Principles of Corporate Affiliation*, which gives Catholic Charities responsibility over many of the sub-entity's major operating decisions. App.422a-425a. Catholic Charities and its sub-entities are directed to comply fully with Catholic social teaching in providing services. App.8a, 425a. And all new key staff and director-level positions receive a manual entitled *The Social Ministry of Catholic Charities Bureau in the Diocese of Superior*, which they must review during orientation. App.371a-385a. In addition, every new employee receives a welcome letter with the Catholic Charities' mission statement, code of ethics, and statement of the ministry's philosophy toward service. App.131a; App207a; App.380a-383a, 469a-475a. All employees are instructed to abide by these documents. App.130a-131a; 207a.

Catholic Charities' ministry is also guided by the principles of its Catholic faith. Specifically, Catholic teaching "'demand[s] that Catholics respond in charity to those in need." App.128a, 58a; see also Pope Benedict XVI, *Deus Caritas Est* ¶ 32 (2005) ("[Charity] has been an essential part of [the Church's] mission from the very beginning."). Indeed, the Catholic Church "claims works of charity as its own inalienable duty and right." Pope Paul VI, *Apostolicam Actuositatem* ¶ 8 (1965).

Catholic teaching also confirms that the Church's charitable ministry "must embrace the entire human race." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 581

(2004). The Church therefore instructs that charity should be exercised "in an impartial manner towards" "members of other religions." Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops* "*Apostolorum Successores*" ¶ 208 (2004); *Apostolicam Actuositatem* ¶ 8 ("[C]haritable enterprises can and should reach out to all persons and all needs."). Charity, moreover, "cannot be used as a means of engaging in * * * proselytism." *Deus Caritas Est* ¶ 31; see also *Apostolorum Successores* ¶ 196 (instructing not to "misus[e] works of charity for purposes of proselytism"). As Pope Benedict XVI explained, "Those who practise charity in the Church's name will never seek to impose the Church's faith upon others." *Deus Caritas Est* ¶ 31.

C. Catholic Charities seeks to participate in the Wisconsin bishops' unemployment assistance program

For the Catholic Church, "[t]he obligation to provide unemployment benefits * * * spring[s] from the fundamental principle of the moral order in this sphere." App.433a (quoting St. Pope John Paul II, *Laborem Exercens* (1981)). Accordingly, in 1986, the Wisconsin bishops created the Church Unemployment Pay Program (CUPP) "to assist parishes, schools and other church employers in meeting their social justice responsibilities by providing church funded unemployment coverage" in accordance with Catholic teaching. App.433a. This program provides the same level of benefits to unemployed individuals as the State's system "more efficiently at lesser cost." App.149a, 448a, 478a. Participating in the CUPP instead of the state's program would allow Catholic Charities to direct additional resources towards helping the needy.

In 2016—after a different sub-entity of Catholic Charities (not a Petitioner here) was held to qualify for the (h)(2) exemption, App.497a-504a—Catholic Charities sought a similar determination from Respondent Department of Workforce Development (DWD). DWD, however, concluded that Catholic Charities and its sub-entities were not operated primarily for religious purposes.[2] App.351a-370a. Catholic Charities appealed. After a two-day hearing, the administrative law judge reversed. App.291a-350a.

DWD then petitioned Respondent Labor and Industry Review Commission (LIRC) for review. LIRC reversed, holding that the (h)(2) exemption turns on an organization's "activities, not the religious motivation behind them or the organization's founding principles." App.227a, 242a, 258a, 273a, 290a. And because Petitioners "provide[] essentially secular services and engage[] in activities that are not religious per se," LIRC concluded that they do not qualify. App.226a, 241a, 257a, 272a, 289a.

Catholic Charities sought review in Douglas County Circuit Court. The Circuit Court reversed LIRC's decision, holding that under the "plain language" and "plain meaning" of the statute, "the test is really why the organizations are operating, not what they are operating." App.209a-210a. And since Petitioners operate out "of th[e] religious motive of the Catholic Church * * * of serving the underserved," their primary purposes are religious. App.209a.

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[2] It is undisputed that Petitioners are "operated, supervised, controlled, or principally supported by a church." App.218a-219a, 297a. Petitioners thus qualify for the (h)(2) exemption if they are "operated primarily for religious purposes." App.5a.

DWD and LIRC appealed. The Court of Appeals initially certified the appeal to the Wisconsin Supreme Court, but that court refused the certification. App.169a, 11a n.8. After the refusal, the Court of Appeals reversed the Circuit Court's order and reinstated LIRC's decision. App.127a. The Court of Appeals held that "under a plain language reading of the statute," to qualify as operated primarily for religious purposes, "the organization must not only have a religious motivation, but the services provided—its activities—must also be primarily religious in nature." App.146a. It therefore concluded that although Catholic Charities and its sub-entities "have a professed religious motivation * * * to fulfill the Catechism of the Catholic Church," their "activities * * * are the provision of charitable social services that are neither inherently or primarily religious activities." App.163a-165a. The court of appeals further held that "the First Amendment is not implicated in this case," rejecting CCB's constitutional arguments. App.127a, 157a-159a. Catholic Charities petitioned the Supreme Court of Wisconsin for review.

On March 14, 2024, the Wisconsin Supreme Court held that whether an entity was "operated primarily for religious purposes" required an "objective inquiry" into the entity's "activities" to determine whether they were "'primarily' religious in nature." App.27a, 29a. As part of this inquiry, the court determined that certain "criteria"—"[a]lthough not required"—would be "strong indications that the activities are primarily religious in nature." App.29a. These "objective" criteria focused on "[t]ypical" forms of religious exercise: whether the entity proselytized, whether it "participated in worship services, religious outreach, cere-

mony, or religious education," and whether its employment and ministry are "open to all participants regardless of religion." App.26a; App.29a-30a.

Applying this test, the court found that Catholic Charities' "activities are primarily charitable and secular" because the organization does not "attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees," and because its services "are open to all participants regardless of religion." App.29a-30a.

The Court also rejected Catholic Charities' federal constitutional arguments, repeating seven times that Catholic Charities had to prove "beyond a reasonable doubt" that the Court's new interpretation of the (h)(2) exemption violated the federal constitution. App.7a, 37a, 44a, 47a, 50a, 51a. First, the court held that its interpretation did not entangle courts in religious questions because "[a] court need only determine what the nature of the motivations and activities of the organizations are." App.40a. The court acknowledged that its analysis "requires 'some degree of involvement' with religion," but concluded that this is "inherent" in any statutory exemption scheme. *Ibid*. (citation omitted).

Writing in dissent, Justice Rebecca Grassl Bradley (joined by Chief Justice Ziegler and in part by Justice Hagedorn) highlighted numerous errors in the majority's approach. App.51a-54a. The dissent pointed out that the majority's test puts courts in the "constitutionally tenuous position of second-guessing the religious significance and character of a nonprofit's actions." App.116a. And it explained that the court's approach "belittles Catholic Charities' faith—and many

other faith traditions—by mischaracterizing their religiously motivated charitable activities as 'secular in nature'—that is, not really religious at all." App.83a (citation omitted). Whether an activity is "religious in nature" was an inherently entangling question: "For what constitutes an activity that is 'religious in nature' to change from religion to religion, the court must study the doctrines of the various faiths and decide for itself what religious practices are actually religious. The Constitution bars civil courts from such intrusions into spiritual affairs." App.117a.

REASONS FOR GRANTING THE PETITION

I. The decision below deepens a 4-4 split over whether states can, consonant with the First Amendment, deny church organizations a tax exemption because they do not engage in "typical" religious activities.

The split this Court granted certiorari to review in *St. Martins* and *Grace Brethren* remains unresolved, and the decision below deepens the split. Four state supreme courts deciding whether an unemployment tax exemption is available to a church-controlled religious organization under FUTA have held that the church's sincere beliefs about whether its activities are undertaken to further its religious mission are dispositive. By contrast, four other state supreme courts—including now the Supreme Court of Wisconsin—have

engaged in a "searching case-by-case" analysis of a religious entity's activities, rejecting or ignoring any First Amendment arguments to the contrary.[3]

A. Four states, to avoid constitutional infringement, focus on whether an organization has sincere religious beliefs motivating its activities.

The highest courts of four states focus on whether an organization has sincere religious beliefs indicating that the purpose of its activities is rooted in religious motivation.

Idaho. The Idaho Supreme Court held that a bakery owned and operated by the Seventh-day Adventist Church was operated primarily for religious purposes despite its commercial and secular activities. In reaching this conclusion, the Court reversed the state commission's finding that the "commercial and competitive nature of the production and marketing of the food product produced" meant the bakery should "not [be] considered * * * a 'religious activity.'" *Department of Emp.* v. *Champion Bake-N-Serve, Inc.*, 592 P.2d 1370, 1372 (Idaho 1979). Instead, the court recognized that the reason the church operated the bakery was plainly religious: "The tenets of the Seventh Day Adventists religion stress the value of labor, and work experience is conceived to be an integral part of the students' religious training. Hence, as a part of their religious training, students at the academy are assigned to work at a bakery, a laundry, a cafeteria, the school or a farm." *Id.* at 1371. It was for this religious reason

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[3] Due to the Tax Injunction Act, 28 U.S.C. 1341, claims concerning these state tax exemptions are not heard in the lower federal courts.

that "the Seventh Day Adventists Corporation owns, operates and controls Champion Bake-N-Serve." *Ibid.* The court rejected the idea that "commercial aspects coexistent with the primary religious purpose" undermined those purposes. *Id.* at 1372. Relying on this statutory interpretation, the Idaho court did not reach any constitutional questions. *Id.* at 1373. Cf. *Nampa Christian Schs. Found., Inc.* v. *State of Idaho*, 719 P.2d 1178, 1180 (Idaho 1986) (concluding that religious school was operated primarily for religious purposes and thus not "address[ing] the constitutional issues raised by both parties").

Iowa. The Iowa Supreme Court similarly interpreted its identical religious exemption to "avoid constitutional issues," holding that a separately incorporated Lutheran secondary school was operated for primarily religious purposes. *Community Lutheran Sch.* v. *Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 289-291 (Iowa 1982). Employing what it called "unusual respect to decisions of the United States Supreme Court interpreting identical language in federal statutes," the court surveyed the caselaw, including *St. Martin* and *Grace Brethren*. *Id.* at 289. The court rejected the state unemployment agency's assertion that the "educational function" of the school was "dominant," instead concluding that the evidence showed the "purpose for creating and operating the parochial schools is to rear children in the Christian faith 'in all their schooling[.]'" *Id.* at 290-291. Because the court interpreted the religious exemption to focus on the reason for which the school operated, it did not need to reach the school's claim that "refusal to exempt them would constitute an unconstitutional denial of religious freedom under the first amendment to the United States Constitution." *Id.* at 289.

Maine. In *Schwartz* v. *Unemployment Insurance Commission*, a religious ministry provided "religious and secular services to the coastal communities" of Maine. 895 A.2d 965, 968 (Me. 2006). This included "telemedicine," an "after-school program," and "a used clothing shop and food pantry." *Id.* at 968-969. Interpreting a religious exemption that was substantively identical to FUTA and the Wisconsin statute, the court rejected the claim that these activities undermined the religious purpose of the ministry: "The fact that the Mission provides health care to islanders and an after-school program for students does not diminish its continuing religious purpose." *Id.* at 971. The court also explained that charitable work and even a charitable purpose are not inconsistent with a primarily religious purpose: "The fact that an organization has a charitable purpose and does charitable work does not require the conclusion that its purposes are not primarily religious." *Id.* at 970. Instead, based on "substantial evidence in the record," the court concluded that the motivation and reason for the ministry's charitable activity was primarily religious. *Ibid*. The court did not disturb the lower court's "expansive" reading of the exemption because the "right to free exercise of religion" was at stake. See *Schwartz* v. *Maine Unemployment Ins. Comm'n*, No. AP-2003-028, at 8 (Me. Super. Ct. Aug. 25, 2004) (quoting *Kendall* v. *Director of Div. of Emp. Sec.*, 473 N.E.2d 196, 199 (Mass. 1985)).

Massachusetts. In a case with facts closely resembling this one, the Supreme Judicial Court refused to parse the religious activities of a Catholic charity, concluding that courts must be "quite cautious in attempting to define, for tax [and unemployment insurance] purposes, what is or is not a 'religious' activity * * *

for obvious policy and constitutional reasons." *Kendall*, 473 N.E.2d at 199 (alterations in original). As here, the religious motivations of the charity were not disputed; instead, "[a]t oral argument the claimant * * * argued that this [religious] motivation is distinct from the Center's secular purpose, the education of the mentally retarded." *Id.* at 199. The court rejected this argument, "declin[ing] to impose such rigid criteria in defining religious pursuits." *Ibid.*[4]

Other courts. Numerous state intermediate appellate courts have also concluded that this religious exception focuses on sincerity of mission or motivation. For example, in a case distinguished below, App.83a, 143a-144a n.10, the Illinois Court of Appeals rejected the state's attempts to recharacterize and second-guess the nature of a religious charity's activities. See *By The Hand Club for Kids, NFP, Inc.* v. *Department of Emp. Sec.*, 188 N.E.3d 1196, 1198 (Ill. Ct. App. 2020). The court relied on the church-supervised after-school program's sincere assertion that its activities

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[4] In *Grace Lutheran Church* v. *North Dakota Employment Security Bureau*, the North Dakota Supreme Court relied on this Court's precedents to determine that "church schools" were categorically "operated primarily for religious purposes." 294 N.W.2d 767, 771 n.11 (N.D. 1980) (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)). Accordingly, the court did not separately analyze the church organization's activities.

Similarly, the Vermont Supreme Court, without taking a side, recognized the existence of the split and explained that these "issues have been litigated extensively in other jurisdictions with mixed results, especially with respect to whether similar organizations are operated primarily for religious purposes." *Mid Vt. Christian Sch.* v. *Department of Emp. & Training*, 885 A.2d 1210, 1213. (Vt. 2005).

were religious: "According to By The Hand, the activities of feeding hungry children, helping struggling readers, and occasionally caring for children's medical needs are no less religious activities than leading Bible studies, chapel services, scripture memorization, and prayers." *Id.* at 1214. The government therefore "erred by recharacterizing them as secular activities for purposes of the exemption from the unemployment compensation system." *Ibid.* This meant the court did not need to "reach the parties' constitutional arguments." *Ibid.*

Similarly, the Ohio Court of Appeals—interpreting an identical religious exemption—rejected the argument that a Jewish school was not operated "primarily for religious purposes" because "its curriculum of religious instruction was secondary to secular subjects taught at the school." *Czigler* v. *Administrator,* 501 N.E.2d 56, 57 (Ohio Ct. App. 1985). Instead, the court explained that the religious "exemption is determined by the purpose of the existence and operation of the school. If that purpose be primarily of a religious nature, the exemption applies without regard to the proportion of time devoted to religious instruction." *Ibid.* In other words, "[t]he test is not the activities but the purpose for which they are operated and conducted." *Id.* at 58. That decision "avoid[ed] potentially serious entanglement by the state in violation of the Establishment Clause of the First Amendment" and prevented courts from "entering into the quagmire of proportionality of interference in religious affairs" by foreclosing consideration of the "relative amount of religious activity or instruction" provided. *Id.* at 57-59.

B. By contrast, four states now hold that state agencies can review the activities of a religious organization to determine whether they are "typical" religious behavior without running afoul of the Constitution.

With the addition of Wisconsin, the highest courts of four states now find themselves on the opposite side of the split.

Arkansas. The Arkansas Supreme Court, in an opinion cited below, expressly rejected the test used by courts on the other side of the split, holding that a religious hospital operated by the Sisters of Charity was not operated primarily for religious purposes. See *Terwilliger* v. *St. Vincent Infirmary Med. Ctr.*, 804 S.W.2d 696, 699 (Ark. 1991) ("We disagree with the approach taken in the *Kendall* case."). Despite acknowledging that the religious hospital's "sole motivation may be religious in nature," the court held that Saint Vincent's was not operated primarily for religious purposes because the hospital "functioned as any other hospital in the area except in those areas prohibited by the Roman Catholic Church," *id.* at 697, 699, and "no proselytizing takes place, and no religious requirements are involved in hiring and staffing decisions except with reference to 18 employees associated with the chapel," *id.* at 699. In reaching its decision, the court relied on both *Lemon* and *Meek*. *Id.* at 698.

Colorado. In another decision cited below, the Colorado Supreme Court interpreted nearly identical statutory language to reject a religious organization's tax exemption. See *Samaritan Inst.* v. *Prince-Walker*, 883 P.2d 3, 7 (Colo. 1994). As the court explained, there was no dispute that the Samaritan Institute's

"goal * * * is to strengthen and build upon a person's faith," that its "mission statement is described in its by-laws as providing religious outlets 'for people under stress,'" and that it "perceives itself as 'an extension of the ministry of the various churches with which it is affiliated.'" *Id.* at 8. The court, however, concluded that "[t]he evidence indicates that the services provided by the Institute are essentially secular," because the "Institute does not evangelize or proselytize," and "a counselee is not required to participate in any religious discussion or activity." *Ibid.* Thus "[b]ecause the services offered are essentially secular, the Institute does not 'operate primarily for religious purposes.'" *Ibid.* The court did not address any constitutional issues.

Maryland. The Maryland Court of Appeals adopted a similar approach when a Lutheran high school sought to qualify for an identical religious exemption. See *Employment Sec. Admin.* v. *Baltimore Lutheran High Sch. Ass'n*, 436 A.2d 481 (Md. 1981). Instead of crediting the apparently undisputed testimony from the school's principal that the school's "primary purpose is religious," the court instead articulated twelve factors for courts to independently assess, including the "[e]xtent of encouragement of spiritual development," the [s]ource[] of financial support," the [c]omposition of student body," and the "[d]egree of academic freedom." *Id.* at 487-488. Applying these factors, the court scrutinized the school's funding streams, the number of credits devoted to "religious training," the "nature of the mandatory chapel services," and "whether the school subscribes to and follows principles of academic freedom." *Id.* at 488-489. Ultimately the court determined that even more evidence and "further proceedings" were necessary. *Id.* at

490. The court chose not to address the constitutional issues presented. *Id.* at 484 n.2.

Other courts. Some intermediate state appellate courts have also joined this side of the split. In *Cathedral Arts Project, Inc.* v. *Department of Econ. Opportunity*, a Florida court of appeals held that an arts ministry controlled by the Episcopal Cathedral of Jacksonville was not operated primarily for religious purposes, reasoning that "[w]hile Appellant's motivation may be religious in nature, its primary purpose in operating * * * is to give art instruction to underprivileged children.") 95 So.3d 970, 973 (Fla. Dist. Ct. App. 2012). The dissent noted that this outcome created a constitutional "Catch-22" for the ministry. *Id.* at 976 (Swanson, J., dissenting).

C. The decision below violates the First Amendment.

The decision below violates the First Amendment by favoring some religions over others, entangling courts in religious questions, and interfering with church autonomy.

1. The decision below favors some religions over others.

Wisconsin's rule expressly discriminates among religious groups, violating both Religion Clauses. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs[.]" *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). Thus "a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic

mass or Protestant church service." *Id.* at 533 (citing *Fowler* v. *Rhode Island*, 345 U.S. 67, 69-70 (1953)); see also *Niemotko* v. *Maryland*, 340 U.S. 268, 272-273 (1951) (Jehovah's Witnesses denied use of public park while other religious organizations were given access). This free exercise inquiry looks not just to the "[f]acial neutrality" of a statute or regulation but also to "the effect of a law in its real operation." *Lukumi*, 508 U.S. at 534-536. See also *Carson* v. *Makin*, 596 U.S. 767, 787 (2022) (citing *Larson* v. *Valente*, 456 U.S. 228, 244 (1982)) (in free exercise case, citing "serious concerns" about "denominational favoritism").[5]

Wisconsin's discrimination among religions also violates the Establishment Clause. See *Larson*, 456 U.S. at 253. There, by "impos[ing]" certain registration and reporting requirements "on some religious organizations but not on others" Minnesota ran afoul of the Establishment Clause. The mere "capacity" of the law "to burden or favor selected religious denominations" triggered scrutiny. *Id.* at 255.[6]

The decision below discriminates among religions in two ways. First, it penalizes Catholic Charities for its Catholic beliefs regarding how it must engage in its ministry. The court concluded that Catholic Charities' activities were not religious because:

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[5] Three Justices have indicated that the issue of denominational favoritism is certworthy. See *Roman Catholic Diocese of Albany* v. *Emami*, 142 S. Ct. 421 (2021); cf. *Roman Catholic Diocese of Albany* v. *Harris*, No. 24A90 (application granted July 26, 2024).

[6] *Larson* was not decided under *Lemon*. *Larson*, 456 U.S. at 252.

- "[Catholic Charities] and the sub-entities, * * * neither attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees."
- "Both employment with the organizations and services offered by the organizations are open to all participants regardless of religion."
- Catholic Charities and its sub-entities do not engage "in worship services, religious outreach, ceremony, or religious education."

App.29a-30a. Indeed, after assessing the "nature" of Catholic Charities' activities, the Wisconsin Supreme Court concluded they were "primarily charitable and secular," even though Catholic Charities views them as religious. App.29a-30a.[7]

By penalizing Catholic Charities for engaging in critical parts of its ministry (like serving those in need without proselytizing), Wisconsin did not treat Catholic Charities with religious neutrality. Instead, the state denied Catholic Charities an exemption precisely because its religious beliefs and exercise differed from what the Wisconsin Supreme Court thought were "typical" religious activities. App.26a; see also App.79a

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[7] Federal judges have also wrongly discounted religious motivation because secular charities provide similar services. See, *e.g., Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 764 (9th Cir. 2011) (Berzon, J., dissenting) ("vast majority of World Vision's work consists of humanitarian relief" rather than "explicitly Christian work" so it ought not qualify as "religious" under Title VII). But see *id.* at 741 (O'Scannlain, J., concurring) (World Vision "primarily religious" because its "humanitarian relief efforts flow from a profound sense of religious mission").

(Grassl Bradley, J., dissenting) ("The majority actually inquires whether Catholic Charities' activities are stereotypically religious."). That wrongly disfavors those religious traditions that ask believers to care for the poor without strings attached.

Second, Wisconsin's rule also violates the bedrock principle of neutrality among religions by discriminating against religious groups with more complex polities. The Diocese of Superior operates Petitioners as separately incorporated ministries that carry out Christ's command to help the needy. But if Catholic Charities were not separately incorporated, it would be exempt. App.166a ("the result in this case would likely be different if [Catholic Charities] and its subentities were actually run by the church"). Thus Wisconsin penalizes the Catholic Church for organizing itself as a group of separate corporate bodies in accordance with Catholic teaching on subsidiarity, while other religious entities that include a variety of ministries as part of a single body are unaffected. That penalty on the Church's religiously determined polity violates the Religion Clauses' rule against discrimination among religions. Cf. *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 528-531 (2021) (treating separately incorporated Catholic Social Services as part of Archdiocese). And that makes LIRC's determination to cut off Catholic Charities from the Diocese of Superior all the more baffling.[8]

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[8] Wisconsin cannot hope to meet strict scrutiny, as it has no legitimate, much less compelling, reason for discriminating against Catholic Charities. Although fully briefed by the parties, the Wisconsin Supreme Court did not address strict scrutiny.

2. The decision below entangles courts in religious questions.

This Court has repeatedly confirmed that the Religion Clauses forbid courts from entangling themselves in religious questions. See, *e.g.*, *Carson* v. *Makin*, 596 U.S. 767, 787 (2022) (citing *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 761 (2020)) ("serious concerns" under the First Amendment "about state entanglement with religion"); *Our Lady*, 591 U.S. at 761 (courts must avoid "judicial entanglement in religious issues"); *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee"); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 679 (1970) (examining "entanglement" within "historical frame of reference.")

And almost nothing could be more entangling than second-guessing a church's answers to religious questions—including what constitutes religious activity. As this Court explained in *Amos*, "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Corporation of Presiding Bishop* v. *Amos,* 483 U.S. 327, 336 (1987). Avoiding this inquiry "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335.

The decision below runs afoul of this fundamental principle by requiring Wisconsin agencies and courts to conduct an intrusive inquiry into the internal affairs of religious organizations seeking the (h)(2) ex-

emption. See, *e.g.*, App.165a-166a. That kind of detailed inquisition into the beliefs, practices, and operations of a religious body will always entangle Church and State.

Indeed, the court's mode of analysis—examining whether individual activities of religious nonprofits are "inherently" or "primarily" religious in nature—is a recipe for hopeless entanglement. The court decided that Petitioners' "activities are primarily charitable and secular," and that their ministry is a "wholly secular endeavor" despite Catholic Charities' uncontested belief that its charitable ministry "is part of [its] mission to 'carry on the redeeming work of our Lord by reflecting gospel values and the moral teaching of the church.'" App.29a-30a. To reach this result, the court made itself the arbiter of which of a church's actions are "primarily religious in nature," App.29a, and invented criteria for second-guessing a church's religious belief that what it did was filled with religious purpose. App.26a-27a (listing criteria). Cf. *Amos*, 483 U.S. at 343-344 (Brennan, J., and Marshall, J., concurring) ("A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity."); *Carson*, 596 U.S. at 787 ("scrutinizing whether and how a religious school pursues its educational mission" is off-limits).

The Wisconsin court thus went badly astray when it assumed simple lines could be drawn between "primarily religious" activities and secular ones where an entire institution is imbued with religious purpose. See *Amos*, 483 U.S. at 336. Indeed, the court's criteria, such as assessing whether a religious organization serves or employs only co-religionists or conducts

"worship services, religious outreach, ceremony, or religious education," App.29a, will inevitably thrust courts into a constitutional thicket. See *Our Lady*, 591 U.S. at 761.

Worse still, Wisconsin's approach also *requires* courts to second-guess churches' motivations. Indeed, the Wisconsin Court of Appeals admitted it was rejecting Catholic Charities' view of the religious significance of its actions, recognizing that if it looked at Catholic Charities' purpose for engaging in these actions, it would likely have come to a different conclusion. App.165a-166a; App.225a-227a. Forcing government agencies and courts to conduct an ongoing inquisition into church activities is the opposite of separation of church and state.

3. The decision below interferes with church autonomy.

The United States Constitution guarantees religious bodies "independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952). That "general principle of church autonomy," protects among other things churches' "autonomy with respect to internal management decisions." *Our Lady*, 591 U.S. at 746-747. In *Kedroff*, the New York Legislature attempted to separate certain Russian Orthodox churches it viewed as Communist-controlled "from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod" and transfer control to a U.S.-based Russian Orthodox denomination. *Kedroff*, 344 U.S. at 107. This Court rejected this governmental effort to divide sub-

entities from their larger church body. *Id.* at 116; see also *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 721 (1976) ("reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs"); *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (*Kedroff* also applies to judicial determinations).

Wisconsin's discriminatory rule violates the church autonomy doctrine for at least two reasons. First, Wisconsin's approach interferes with matters of church government and organization. By penalizing Petitioners because they are organized as separately incorporated bodies in accordance with the Catholic principle of subsidiarity, Wisconsin has put a gigantic thumb on the religious polity scale for all religious institutions.

Second, Wisconsin does not credit activities that could be "provided by organizations of either religious or secular motivations" as religious. App.30a. That mirrors the government's error in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, where it demanded that a minister's activities be "exclusively religious" to merit protection. 565 U.S. 171, 193 (2012). And just as "manag[ing] the congregation's finances" or "supervising purely secular personnel," did not make a minister's efforts nonreligious, *ibid.*, providing "background support and management services" is anything but a "wholly secular endeavor." App.30a.

* * *

Wisconsin's rule is both absurd and harmful. Absurd, because it can logically lead to the conclusion that the charitable arm of a Catholic diocese is not op-

erated for religious purposes. Harmful, because it discriminates against religious organizations that help people outside their group without proselytizing. Worse yet, the rule takes away resources that would otherwise be used to help the poor and the needy. The Court should intervene to resolve the split and remove this burden on the free exercise of religious institutions in states across the country.

II. The decision below also deepens a split among lower courts over whether federal constitutional violations must be proven "beyond a reasonable doubt."

The decision below also exacerbates an existing split among the lower courts over the burden of proof for federal constitutional claims.

A. Federal courts apply a "plain showing" or "clearly demonstrated" burden of proof to federal constitutional claims.

In most modern cases raising constitutional challenges to statutes, federal courts simply apply the relevant doctrinal standards without any reference to a burden of proving unconstitutionality. See, *e.g.*, *Carson*, 596 U.S. at 778-781; *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381-386 (1992). Where they articulate a specific standard, federal courts employ a "plain showing" or "clearly demonstrated" standard. *E.g.*, *United States* v. *Morrison*, 529 U.S. 598, 607 (2000); *Mississippi Comm'n on Env't Quality* v. *EPA*, 790 F.3d 138, 182-183 (D.C. Cir. 2015); *United States* v. *Brunner*, 726 F.3d 299, 303 (2d Cir. 2013).

For its part, this Court has used the phrase "beyond a reasonable doubt" or "beyond a rational doubt" only five times, and only twice as part of a holding. See

Legal Tender Cases, 79 U.S. 457, 531 (1870) (dicta); *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) (dicta); *Powell* v. *Pennsylvania*, 127 U.S. 678, 684 (1888) (holding); *Federal Housing Admin.* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958) (holding); *Stanton* v. *Stanton*, 421 U.S. 7, 10 (1975) (dicta).

The "beyond a reasonable doubt" standard has, of course, its roots in criminal law. See James Q. Whitman, The Origins of Reasonable Doubt 114-123 (2008) (discussing history of standard in the twelfth and thirteenth century). In the nineteenth century, jurists began to sporadically use the term outside the criminal context, though never as "a *rule* that the relevant courts actually applied." Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt"*, 74 Rutgers U. L. Rev. 1429, 1437 (2022).

Law Professor James Bradley Thayer advocated for broader adoption of the standard to limit perceived judicial activism. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 151 (1893) (advocating for broad adoption of "beyond a reasonable doubt" standard). Though some courts and scholars embraced it, Thayer's theory never garnered any purchase in this Court. See Spitzer, *Reasoning*, 74 Rutgers U. L. Rev. at 1438 ("The Supreme Court never seriously entertained 'unconstitutional beyond a reasonable doubt' as a working standard."). It last appeared as dictum, 50 years ago, in a quotation of the underlying state court opinion. *Stanton*, 421 U.S. at 11. The "unconstitutional beyond a reasonable doubt" standard is thus "dead" in federal courts. Richard A. Posner,

The Rise and Fall of Judicial Self-Restraint, 100 Cal. L. Rev. 519, 544, 553 (2012).

B. Some state courts continue to use "beyond a reasonable doubt" as a working standard for deciding federal constitutional claims.

Forty-nine states have used this standard in opinions since 1893, though its use has dwindled over time. See Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Review*, 57 S. Tex. L. Rev. 169, 179-182 nn.102-150 (2015) (collecting state cases); Spitzer, *Reasoning*, 74 Rutgers U. L. Rev. at 1440-1441 nn.70-73 (tracking state usage over last two decades). In most cases the phrase is "'simply a hortatory expression' when the justices are really saying that they respect the legislature's role." *Id.* at 1460 (citation omitted).

By contrast, at least five states, including Wisconsin, actively apply the "beyond a reasonable doubt" standard to dispose of federal constitutional claims.

Colorado. Colorado applies "the burden of proving [a statute] unconstitutional beyond a reasonable doubt" to allegations "that a statute infringes on first amendment freedoms." *People* v. *Ford*, 773 P.2d 1059, 1062 (Colo. 1989). See also *Evans* v. *Romer,* 854 P.2d 1270, 1284-1286 (Colo.), cert. denied, 510 U.S. 959 (1993) (employing "beyond a reasonable doubt" standard to decide federal Equal Protection claim).

Connecticut. Connecticut also employs the standard. For example, it used "beyond a reasonable doubt" to reject a Takings Clause claim regarding condemnation of property for economic development by private parties. *Kelo* v. *City of New London*, 843 A.2d 500, 536 (Conn. 2004), affirmed, 545 U.S. 469 (2005).

Hawaii. Similarly, the Supreme Court of Hawaii has applied the "beyond a reasonable doubt" burden of proof to eminent domain challenges. *Housing Fin. & Dev. Corp.* v. *Castle*, 898 P.2d 576, 602 (Haw. 1995).

Montana. Montana requires claimants to prove statutes unconstitutional "beyond a reasonable doubt." For instance, it applied the standard when analyzing whether a state tax transgressed equal protection and due process rights. *Powder River County* v. *State*, 60 P.3d 357, 373-377 (Mont. 2002).

Wisconsin. The Wisconsin Supreme Court has repeatedly applied the standard. See, *e.g.*, *In re Termination of Parental Rts.*, 694 N.W.2d 344, 350-355 (Wis. 2005) (federal Due Process challenge to termination of parental rights) *In re Mental Commitment of Christopher S.*, 878 N.W.2d 109, 120-126 (Wis. 2016) (federal Due Process challenge to commitment of inmate to mental health facility); *State* v. *Smith*, 780 N.W.2d 90, 95-105 (Wis. 2010) (federal Equal Protection and Due Process challenge to sex offender registration statute); *Society Ins.* v. *LIRC*, 786 N.W.2d 385, 402, 404 (Wis. 2010) (federal Due Process and Contract Clause challenge to retroactive application of workers' compensation statute). And here, the court reiterated the standard seven times, relying heavily on this burden of proof (over the dissent's objections) to reject Catholic Charities' constitutional claims. App.7a, 37a, 44a, 47a, 50a, 51a.

C. "Beyond a reasonable doubt" is the wrong standard for federal constitutional claims.

In criminal cases, "beyond a reasonable doubt" is "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358,

363 (1970). But it is entirely misplaced when it comes to constitutional guarantees because the Constitution provides "no textual support" for applying it outside the criminal context. *Island County* v. *State*, 955 P.2d 377, 384 (Wash. 1998) (Sanders, J., concurring). If anything, allowing state courts to give shorter shrift to enumerated federal constitutional rights contravenes the text of the Supremacy Clause.

What's worse, applying the standard threatens constitutional rights. The "beyond a reasonable doubt" standard is, by nature, a presumption, which means there will be "occasions" when the standard is "determinative." *Island County*, 955 P.2d at 388 (Sanders, J., concurring). As a result, a constitutional challenge might fail in a state courthouse in Milwaukee when the same challenge would prevail in the federal courthouse down the street.

Moreover, application of this standard to constitutional claims is inconsistent with modern judicial methodologies. "No originalist, or any other judge committed to a constitutional theory" can embrace the standard. Posner, *Rise and Fall*, 100 Cal. L. Rev. at 537. That is because such theories are premised on the notion that there are identifiable answers to constitutional questions. "[T]he Constitution, unlike evidentiary proof of a fact, does not operate on a continuum." *State* v. *Grevious*, 223 N.E.3d 323, 343 (Ohio 2022) (DeWine, J., concurring). Cf. *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2271 (2024) (deference inappropriate because statutes have meaning "necessarily discernible by a court deploying its full interpretive toolkit"). So "[w]hen a law contravenes the constitution, it is [a court's] duty to say so." *Mayo* v. *Wisconsin Injured Patients & Families Comp. Fund*, 914

N.W.2d 678, 702 (Wis. 2018) (Grassl Bradley, J., concurring).

It may be better that "ten guilty persons escape, than the one innocent suffer." 4 William Blackstone, *Commentaries* 352. But "[i]t is not better, that the Constitution should be violated ninety and nine times by the Legislature than, that the courts should erroneously hold one act of the Legislature unconstitutional." *Varner* v. *Martin*, 21 W. Va. 534, 542 (1883).

III. This case is an ideal vehicle.

This case presents an ideal vehicle for resolving the questions presented. The first question presented was fully and finally litigated through six layers of review, from the Department of Workforce Development to the Wisconsin Supreme Court. That leaves only the federal questions passed on below to be decided by this Court. Moreover, there is an ample record on which to predicate a decision.

With respect to the second question presented, although the Wisconsin Supreme Court was the first in this litigation to invoke the "beyond a reasonable doubt" standard, it relied on it heavily in reaching its judgment. That standard is therefore squarely before this Court.

And without this Court's intervention, the splits are unlikely to resolve themselves. In particular, this case is the cleanest vehicle for addressing the "religious purposes" split to arrive at the Court since *St. Martin* and *Grace Brethren* were decided. The Court should therefore take the opportunity to set this important area of law onto a firmer—and constitutionally sounder—footing.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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AUGUST 2024

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 Petition for Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Wisconsin's unemployment insurance statute, which exempts religious organizations based on the purpose and nature of their operations, complies with the First Amendment.

2. Whether state courts may require proof of unconstitutionality "beyond a reasonable doubt" in considering federal constitutional challenges.

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INTRODUCTION

This case involves an effort by Catholic Charities of the Diocese of Superior, Wisconsin, and four independently incorporated sub-entities of Catholic Charities to obtain a state statutory exemption from paying unemployment insurance contributions on the grounds that they are "operated primarily for religious purposes." They argue the First Amendment compels this result.

No split of authority among the states' supreme courts exists on that constitutional question, and the Wisconsin Supreme Court decision does not directly conflict with the decision of any federal circuit or state high court. All courts look to some degree at the operations of the group seeking an exemption; none simply grant the exemption solely based on the group's assertion that its activities are religiously motivated. On the merits, the Wisconsin Supreme Court correctly declined to hold that the First Amendment entitles Petitioners to this tax exemption.

Likewise, no split of authority exists regarding the presumption of constitutionality afforded to statutes when their validity is challenged. The variations Petitioners identify are rhetorical, not substantive. And even if a split existed, Petitioners did not raise this issue at any level below and therefore it was not sufficiently developed to warrant this Court's review.

The petition for certiorari should be denied.

STATEMENT OF THE CASE

Wisconsin established its unemployment compensation system in 1932, the first in the Nation. App. 14a. It enacted its law, codified today in Wis. Stat. ch. 108, to "avoid the risk or hazards that will befall those, who, because of employment, are dependent upon others for their livelihood." App. 14a. The law collects "limited funds from a large number of employers, particularly during periods of stable employment, then pay[s] out benefits during periods of high unemployment from the funds that have been accumulated." App. 14a.

Generally, any service performed for pay for a public, private, or nonprofit employer is covered by Chapter 108. App. 15a. But some services are statutorily exempt. Relevant here, Wisconsin law exempts paid service "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." Wis. Stat. § 108.02(15)(h)2. Petitioners seek that exemption here.

Catholic Charities states that it provides services to the poor and disadvantaged as an expression of the social ministry of the Catholic church in the Diocese of Superior and that its "purpose . . . is to be an effective sign of the charity of Christ." App. 7a. It also states that its religious mission requires it to offer services to all in need, not just those of the Catholic faith. App. 7a.

Catholic Charities offers various charitable services partly through four separately incorporated sub-entities, the other Petitioners in this case:

- 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." This company had no religious affiliation until it joined Catholic Charities in 2014. App. 8a.
- Black River Industries, Inc. provides job training and daily living services to people with developmental or mental health disabilities, as well as those with a limited income. App. 8a–9a.
- Diversified Services, Inc. provides work opportunities to individuals with developmental disabilities. App. 9a.
- Headwaters, Inc., provides services for people with disabilities including training related to activities of daily living and employment, and provides Head Start home visitation services. App. 9a.

People receiving services from these organizations receive no religious training or orientation, and none of them attempts to "inculcate the Catholic faith." App. 10a. Employees need not ascribe to any religious faith. App. 10a.

None of the sub-entities receives funding from the Diocese of Superior. Barron County Development Services, Inc. contracts with the Wisconsin Department of Workforce Development's Division of Vocational Rehabilitation to provide its services. App. 8a. Black River Industries, Inc.'s funding comes largely from county and state government. App. 8a–9a. Diversified Services, Inc. receives its funding from

Family Care, a Medicaid long-term care program, and private contracts. App. 9a. And Headwaters, Inc. is funded primarily through government contracts. App. 9a.

Catholic Charities has participated in Wisconsin's unemployment insurance program since 1972, when it submitted a form describing the nature of its operations as "charitable," "educational," and "rehabilitative," not "religious." App. 10a. The state agency then administering the uninsurance program determined that Catholic Charities was subject to the unemployment insurance law. App. 10a.

In 2015, a Wisconsin trial court determined that a sub-entity of Catholic Charities that is not part of this case was eligible for the religious purposes exception in Wis. Stat. § 108.02(15)(h)2. App. 10a. After that ruling, Catholic Charities and the four sub-entities sought a determination from the Wisconsin Department of Workforce Development, which administers the unemployment compensation system today, that they too are exempt. App. 10a–11a.

The Department denied Petitioners' request to withdraw from the program because it determined that they had not established that they are "operated primarily for religious purposes" within the meaning of Wis. Stat. § 108.02(15)(h)2. App. 11a. An administrative law judge reversed that decision, but the final agency decisionmaker, the Labor and Industry Review Commission, affirmed the Department's determination. 11a. On judicial review, the trial court for Douglas County reversed in Petitioners' favor, but the court of appeals and Wisconsin Supreme Court affirmed the Labor and

Industry Review Commission's decision. App. 11a–12a.

The Wisconsin Supreme Court affirmed the court of appeals' interpretation of Wisconsin law. It held that the Commission had correctly interpreted Wis. Stat. § 108.02(15)(h)2., including by reasoning that "both activities and motivations must be considered in a determination of whether an organization is 'operated primarily for religious purposes.'" App. 21a–22a. In other words, the statute required an "objective examination of [Petitioners'] actual activities" to determine whether those activities are "secular in nature" such that Petitioners are "not operated primarily for religious purposes." App. 32a–33a.

Applying that statutory construction to the organizations, the court concluded that Petitioners did not qualify for the religious exemption for two main reasons: (1) they did not seek to imbue participants with the Catholic faith and provided participants with no religious materials (App. 29a); and (2) their activities were primarily charitable and secular (App. 30a), as illustrated by how the activities of one of the sub-entities, Barron County Development Services, Inc., had not changed after it affiliated with Catholic Charities (App. 30a–31a). The court noted how this result was consistent with congressional history of the parallel federal unemployment law, which indicated that "an orphanage or a home for the aged" would not qualify as being "operated primarily for religious purposes" simply by virtue of being "related" to a church. App. 30a.

The court also rejected Petitioners' arguments under the First Amendment, concluding that the statute violated neither the Establishment Clause, the church autonomy principle, nor the Free Exercise Clause.

As to the Establishment Clause, the court held that the statutorily required "neutral and secular inquiry" into Petitioners' "actual activities" (App. 40a–41a) does not improperly "cross into an evaluation of religious dogma" (App. 38a–39a). Rather, that objective analysis is consistent with the inquiry needed for any religious tax exemption laws, which have been recognized as valid throughout American history. App. 41a–44a. And the court held that the statute did not violate the church autonomy principle because it neither "regulate[d] internal church governance nor mandate[d] any activity." App. 45a–46a. Last, the law did not violate Petitioners' free exercise rights because imposing a generally applicable tax is not a constitutionally significant burden. App. 48a–50a.

Petitioners then filed a petition for writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

While Petitioners would like an exemption from paying unemployment insurance contributions, they have not satisfied this Court's criteria for certiorari. The state courts are not split on Petitioners' First Amendment challenges, and Wisconsin's Supreme Court correctly resolved those challenges, in any event. Likewise, there is no state court split on the burden for challenges to the validity of state statutes.

And even if there was, this case is a poor vehicle to resolve it because the issue was not raised below.

I. Certiorari should be denied on the first question presented.

This Court should deny the petition on Petitioners' first question: whether the "religious purpose" exemption in Wis. Stat. § 108.02(15)(h)2., as interpreted by the Wisconsin Supreme Court, violates the First Amendment.

Contrary to Petitioners' assertion, there is no split of authority among the state supreme courts on the First Amendment claims they present. The many state court cases they discuss consider only how to interpret and apply similar statutory exemptions, not whether those exemptions comply with the First Amendment. And Petitioners identify no federal circuit spilt. Without any disagreement among the state courts or lower federal courts, Petitioners' constitutional arguments have not percolated enough to merit certiorari.

In any event, the Wisconsin Supreme Court got it right. Courts routinely deny religious tax exemptions to entities that assert religious motivations without overly entangling themselves in religious matters. That effort does not violate the church autonomy principle because it does not regulate internal church governance or compel any activity. And the unemployment tax does not violate Petitioners' free exercise rights: it imposes no constitutionally significant burden on their religious exercise, and it is a general law that is neutral and nondiscriminatory on questions of religious belief.

A. No split of authority exists on the First Amendment questions Petitioner presents.

Petitioners identify no split on the question of whether states may constitutionally consider an employer's operations, not just its motivations, in deciding whether it is entitled to a religious exemption from a state's unemployment insurance tax system.

1. No high courts have addressed the First Amendment issues Petitioners raise here, let alone in a way that creates a split.

Petitioners cite seven other state high court cases, but those cases all involve state statutory interpretation issues, not First Amendment ones. The cases all confront similar interpretation questions because the states copied the language of a federal statute, the Federal Unemployment Tax Act (FUTA), which establishes a cooperative federal-state program of benefits to unemployed workers. *See St. Martin Evangelical Lutheran Church v. S. Dakota*, 451 U.S. 772, 775 & n.3 (1981); *Comm. Lutheran Sch. v. Iowa Dep't of Job Serv.,* 326 N.W.2d 286, 287 (Iowa 1982). FUTA—like state statutes copying it—allows qualified state unemployment programs to exclude non-profit employers from coverage as to services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (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 . . . .

26 U.S.C. § 3309(b).

Because many states have adopted that language, multiple state high court decisions discuss what it means and how to apply it as a matter of state law. That is the issue presented in the cases cited by Petitioners—not whether those state statutes complied with the First Amendment.

Begin with the four states that Petitioners highlight as supposedly "focus[ing] on whether an organization has sincere religious beliefs indicating that the purpose of its activities is rooted in religious motivation." Pet. 16. None of them issued a First Amendment holding.

Idaho. In *Department of Employment v. Champion Bake-N-Serve, Inc.*, 592 P.2d 1370, 1372 (Idaho 1979), Idaho's high court found only that an agency had "erred in its application of the Idaho unemployment security law." It said nothing about the First Amendment. And, as Petitioners candidly admit, *Nampa Christian Schools Foundation v. State of Idaho*, 719 P.2d 1178, 1183 (Idaho 1986) relied on "statutory interpretation" and "did not reach any constitutional questions." Pet. 17.

Iowa. Petitioners also concede that *Community Lutheran School v. Iowa Department of Job Service*, 326 N.W.2d 286 (Iowa 1982) "did not need to reach" any First Amendment questions. Pet. 17. But Petitioners' suggestion that the court construed the statute to "avoid constitutional issues" is inaccurate. Pet. 17. The court applied ordinary statutory interpretation principles and then, after doing so,

noted that it did not need to resolve any First Amendment questions because it had granted the employer an exemption as a matter of statutory interpretation. *Cmty. Lutheran*, 326 N.W.2d at 291–92.

Maine. In *Schwartz v. Unemployment Insurance Commission*, 895 A.2d 965, 970–71 (Me. 2006), Maine's high court never mentioned the First Amendment and instead examined whether "substantial evidence in the record" supported a finding of "primarily religious" purposes.

Massachusetts. Massachusetts' high court found that an organization "satisfie[d] the[ ] statutory requirements" of religious purpose. *Kendall v. Dir. of Div. of Emp. Sec.*, 473 N.E.2d 196, 198–200 (Mass. 1985). In passing, the court mentioned that the default of construing tax exemptions against the taxpayer does not apply when the "free exercise of religion" is at issue, *id.* at 199, but the court never further analyzed whether denying the exemption would have violated the First Amendment.

Then turn to the three states (excluding Wisconsin) that supposedly embody the "opposite side of the split." Pet. 21. Like the first four, none of these issued a First Amendment holding.

Arkansas. Arkansas' high court denied a religious purpose exemption to a Catholic-affiliated hospital based on the court's "interpretation of the statute in a manner separating motivation from purpose of operation." *Terwilliger v. St. Vincent Infirmary Med. Ctr.*, 804 S.W.2d 696, 699 (Ark. 1991). As Petitioners note, the case cited *Lemon v. Kurtzman,* 403 U.S. 602 (1971) and *Meek v.*

Pittenger, 421 U.S. 349 (1975) once in passing (Pet Br. 21), but it engaged in no First Amendment analysis whatsoever.

Colorado. Petitioners acknowledge that the Colorado high court in *Samaritan Institute v. Prince-Walker*, 883 P.2d 3 (Colo. 1994) "did not address any constitutional issues." Pet. 22. Instead, it addressed whether the lower court had "properly interpreted the phrase 'operated primarily for religious purposes'" and denied the exemption to a counseling center. *Samaritan Inst.*, 883 P.2d at 4.

Maryland. Again, Petitioners concede that Maryland's high court in *Employment Security Association v. Lutheran High School Association*, 436 A.2d 481 (Md. 1981) "chose not to address the constitutional issues presented." Pet. 23. Like the others, the court instead addressed what "factors may appropriately be taken into account" in the religious purposes analysis. *Lutheran High Sch. Ass'n*, 436 A.2d at 487.[1]

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[1] The intermediate state appellate court decisions Petitioners cite on both sides of the "split" likewise did not involve First Amendment holdings. *See By The Hand Club for Kids, NFP, Inc. v. Dep't of Emp. Sec.*, 188 N.E.3d 1196, 1198, 1214 (Ill. App. 2020) (evaluating whether religious afterschool program qualified for Illinois' exemption without "reach[ing] the parties' constitutional arguments"); *Cathedral Arts Project, Inc. v. Dep't of Econ. Opportunity*, 95 So.3d 970, 973 (Fla. App. 2012) (examining whether children's art program qualified for Florida's exemption); *Czigler v. Administrator*, 501 N.E.2d 56, 57 (Ohio App. 1985) (evaluating whether religious school qualified for Ohio's exemption and mentioning only

Because there is no split on a federal question, certiorari should be denied. This Court does not resolve questions of how states interpret their own laws. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.").

2. Even on the statutory interpretation question of how to construe and apply the "religious purpose" exemption, the split that Petitioners posit does not really exist.

Among the cases Petitioners describe as residing on their side of the ledger (Pet. 16–20), it is true that the courts held the entities were operated "primarily for a religious purpose" and thus entitled to the statutory exemption. But that is because the specific facts in those four cases justified this result, not because the courts applied a different test from the ones on Respondents' side of the ledger. More to the point, none of the cases on Petitioners' side looked at the entity's motivation alone—they all also looked to some degree at the entity's activities, just like Wisconsin's supreme court did here.

Idaho. In *Champion Bake-N-Serve, Inc.*, the Idaho court held that services provided by students at a religious college in a church-run bakery qualified for the exemption because it was part of their religious training; services provided by regular fulltime employees at the same bakery did not qualify.

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in passing "potentially serious entanglement by the state in violation of the Establishment Clause").

592 P.2d at 1371–72. And in *Nampa Christian Schools Foundation*, the Idaho Supreme Court held that the statutory language required the court to look at an organization's operations, not just its motivations. 719 P.2d at 1180.

Iowa. In *Community Lutheran School*, the court looked at the operations of the school, including the incorporation of Lutheran faith into "every aspect of all classes." 326 N.W. 2d at 291. The curriculum involved "[s]pecific religious instruction," "religious ceremonies [were] held throughout the day," and teachers had to be Lutherans. *Id.* The school was not engaged in otherwise secular activity motivated by a religious purpose.

Maine. In *Schwartz*, the court examined operational facts including how the entity "[brought] pastors to island communities to lead religious services and provide religious counseling," paid for minister salaries, and had otherwise "maintained its religious emphasis and function." 895 A.2d at 970.

Massachusetts. In *Kendall*, the court rejected a rule that would grant exemptions only to schools "devoted to religious instruction." 473 N.E.2d at 199. But the court noted how the school was "operated in accordance with church principles," provided "[c]lasses in religious education," and held "Saturday mass . . . for the school's resident students." *Id.* Petitioners repeatedly point to *Kendall*, but it did not rely on religious motivations alone.[2]

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[2] The intermediate state appellate cases Petitioners cite similarly considered operational facts, not just motivations. *By The Hand Club for Kids, NFP, Inc.*,

All told, none of those state cases hold that an organization's motivation alone is sufficient to qualify for the "operated primarily for religious purposes" exemption.

This analytical approach is consistent with the congressional history of FUTA, which many state courts have looked to in construing their statutes. *See Samaritan Inst.*, 883 P.2d at 7; *Terwilliger*, 304 S.W.2d at 698; *Sugar Plum Tree Nursery Sch. v. Iowa Dep't of Job Serv.*, 285 N.W.2d 23, 24–25 (Iowa 1979). That history provides examples of what the exception encompasses:

> A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

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188 N.E.3d at 1208–09 (afterschool program qualified for exemption based on executive director's religious goals; governing documents; control of key staff appointments and assets by the church; requirement that all staff adhere to a religious doctrinal statement and regularly attend church; a "pervasive Bible-based program content that includes evangelical study material"; and frequent prayer); *Czigler*, 501 N.E.2d at 58 (religious school qualified where students recognized Jewish holidays, studied Hebrew and religion, and were of the Jewish faith).

S.Rep.No.752, 91st Cong., 2d Sess. 48-49 (1970); H.R.Rep.No.612, 91st Cong., 1st Sess. 44 (1969)) (quoted in *St. Martin Evangelical Lutheran*, 451 U.S. at 781). Those examples—especially the "orphanage or home for the aged" charitable organizations that are merely "church related"—demonstrate how state courts are correctly taking the entity's operations into account.

Petitioners thus offer this Court no developed disagreement among state courts at all, much less one on a federal constitutional issue. As a result, the issue they present is not appropriate for this Court's consideration.

B. The decision below follows directly from this Court's precedents.

The Petition also does not warrant certiorari because the Wisconsin Supreme Court correctly applied this Court's precedents.

Petitioners assert that Wisconsin's statute violates the First Amendment in three ways: (1) by requiring Wisconsin courts to conduct an "intrusive inquiry into the operations of religious organizations"; (2) by violating the church autonomy principle, through "penalizing" its creation of charitable entities separate from the Church; and (3) by abandoning the principle of neutrality through denying an exemption to religious organizations that structure themselves differently. *See* Pet. 23–31. This Court's precedents do not support those claims.

1. The Wisconsin statute, interpreted to require an examination of "both the motives and the activities of the organization" seeking an exemption, does not

require excessive government entanglement with religion. App. 28a. In *Walz v. Tax Commission of the City of New York*, this Court recognized the unremarkable principle that granting exemptions from taxation "occasions some degree of involvement with religion." 397 U.S. 664, 674 (1970). As Justice Harlan explained in his concurrence, "evaluating the scope of charitable activities in proportion to doctrinal pursuits may be difficult," but that difficulty "does not render the interference undue so long as it "does not entail judicial inquiry into dogma and belief." *Id.* at 697 n.1 (Harlan, J., concurring).

The Wisconsin Supreme Court did not cross that line. Contrary to Petitioners' assertion, the Wisconsin Supreme Court never "second-guess[ed]" Catholic Charities' "belief that what it did was filled with religious purpose." Pet. 28. Rather, the Court "accept[ed] these [beliefs] at face value" and did not find Catholic Charities' asserted religious motivations to be "insincere, fraudulent, or otherwise not credible." App. 28a–29a. And it engaged in "no examination of whether CCB's or the sub-entities' activities are consistent or inconsistent with Catholic doctrine." App. 40a. Instead, the Court relied on the organization's "primarily charitable and secular" activities, and especially how the "services provided would not differ in any sense" whether provided by an organization with religious or secular motivations. App. 30a–31a. That does not represent an "inquisition" into religious beliefs (Pet. 28); it is exactly what Congress suggested should be done to determine whether a religious purpose is "primary." *See* H.R. Rep. No. 91-612, at 44 (1969).

2. The Wisconsin Supreme Court also followed this Court's precedents in determining that its interpretation of state law did not violate the church autonomy principle. This Court held in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 119 (1952), that states may not determine questions of religious governance. There, the state court had adjudicated a dispute between two branches of the Russian Orthodox church and ordered that New York churches recognize the governing body of one of those branches. *Id.* at 99 n.3. This Court held that the state violated autonomy principles by "displac[ing] one church administrator with another . . . [and] pass[ing] the control of matters strictly ecclesiastical from one church authority to another." *Id.* at 119.

This case is nothing like the decision invalidated in *Kedroff*. Wisconsin's unemployment insurance law neither requires nor prohibits any particular religious governance structure or leadership. Rather, it "defines what employment is for the purposes of unemployment insurance without reference to any religious principles or any attempt to control internal church operations." App. 45a–46a. That "does not concern matters that are 'strictly' or even remotely 'ecclesiastical,' which belong to the church alone." App. 45a–46a.

3. The Wisconsin Supreme Court also rightly found no violation of the neutrality principle under this Court's precedent. A free exercise challenge requires the claimant to show that his religious exercise was significantly burdened and that the law is not "neutral" or "generally applicable." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). The

state court here correctly held that Petitioners failed at the first step of showing a constitutionally significant burden.

A free exercise clause claimant must demonstrate that the challenged law burdens their freedom to exercise religion in a significant or substantial way: "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985).

The Wisconsin court held that Petitioners had failed to show that the unemployment insurance statute burdened their religious beliefs. App. 49a. The state law did not prohibit Petitioners from engaging in any religious activity and, despite participating for many years in the unemployment insurance program, they did not contend that it significantly or substantially burdened their religious practices or beliefs. App. 49a.

That holding is consistent with cases like *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 391 (1990), which held that the financial impacts of state taxation schemes on an entity's religious activities are not "constitutionally significant."

Such taxation regimes are unlike the laws in the cases Petitioners rely on here. Pet. 24. The ordinance in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), denied one denomination the ability to pray in a park but allowed

it for others; the criminal conviction for Bible talks in a public park in *Niemotko v. Maryland*, 340 U.S. 268, 272–73 (1951), similarly burdened that group's free exercise right; and the law in *Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982), forced a denomination to register and be regulated as a charity based on its donor base. Tax exemptions for groups that engage in religious activities, in contrast, do not force ineligible groups to do anything and do not burden their free exercise rights.

Here, Petitioners failed to show how "the payment of unemployment tax prevents them from fulfilling any religious function or engaging in any religious activities." App. 50a. That defeats their argument, whether under the Free Exercise or the Establishment Clause.

II. Certiorari should be denied on the second question presented.

Petitioners also ask the Court to resolve a supposed split regarding the burden to overcome the presumption of constitutionality afforded to legislative enactments when challenging the constitutionality of a statute.

This split is illusory, too. This Court and every state's highest court, save Alaska's, has articulated this presumption by saying that a challenger must show beyond a reasonable doubt that a statute is unconstitutional. Other formulations of the presumption have been used too—by the same courts, and even in the same cases—but these represent mere rhetorical variation, not substantive differences in the presumption. Petitioners have failed to point to a

single case where the choice of one formulation of the presumption over another made a difference in the outcome.

And even if a substantive, outcome-determinative split existed, this case presents a poor vehicle to resolve it. The courts below dedicated only one paragraph of discussion to the issue, in a dissent. This lack of development resulted from Petitioners' failure to raise the issue at any point before their petition for certiorari. The issue has therefore not been considered below in a way that tees it up for this Court's consideration.

A. No split of authority exists on the presumption-of-constitutionality question Petitioners present.

Petitioners tell the Court that the decision below reinforced a split that exists over the proper standard for the judicial review of statutes. Pet. 31. Petitioners point out that the Wisconsin Supreme Court, along with the high courts of several other states, sometimes says that a party challenging a statute on constitutional grounds must show its unconstitutionality "beyond a reasonable doubt." *Id.* at 33–34. Petitioners assert that this is a higher standard than that used by other state high courts and the federal courts, which require that unconstitutionality be "clearly" or "plain[ly]" demonstrated. *Id.* at 31–33.

There is no such split. Any difference Petitioners identify is merely a rhetorical one over how to refer to the presumption of constitutionality afforded statutes. This presumption is one courts, both federal

and state, have unanimously adopted when deciding constitutional challenges to statutes. *See* Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. Tex. L. Rev. 169, 172–82 (2015).

All courts (including this one), save Alaska's, have expressed the presumption of constitutionality by saying that a challenger must show beyond a reasonable doubt that a statute is unconstitutional. Green, *supra*, at 172, 179–82 (2015); *e.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525, 544 (1923) ("This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.").

And all courts have also expressed the presumption by saying the showing of unconstitutionality must be clear, plain, or manifest. Green, *supra*, at 176–178; *e.g.*, *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). Sometimes these formulations of the presumption—call them the clarity formulations—appear in the same case as the beyond-a-reasonable-doubt formulation. *See, e.g.*, *State v. Kahalewai*, 541 P.2d 1020, 1024 (Haw. 1975) (holding that the showing of unconstitutionality must be "clear and convincing" and "beyond all reasonable doubt"). In fact, seven states adopted the two formulations in the same case. Green, *supra*, at 185

(New York, Arkansas, Florida, Michigan, Rhode Island, Idaho, and Utah).

Some state courts, including Wisconsin's, prefer a particular formulation of the presumption. *E.g.*, App. 37a. Other state courts and the federal courts continue to use both the beyond-a-reasonable-doubt and clarity formulations. *Compare Dutra v. Trs. of Boston Univ.*, 96 F.4th 15 (1st Cir. 2024) ("A legislative enactment carries with it a presumption of constitutionality, and the challenging party must demonstrate beyond a reasonable doubt that there are no 'conceivable grounds' which could support its validity." (citations omitted)), *with United States v. Anderson*, 771 F.3d 1064 (8th Cir. 2014) ("'[A] general reticence to invalidate the acts of the Nation's elected leaders' and 'proper respect for a coordinate branch of the government' requires that a federal court strike down an Act of Congress only if 'the lack of constitutional authority to pass the act in question is clearly demonstrated.'" (citations omitted)). And still others use a mash-up of the two. *E.g. State v. Crawford*, 478 S.W.2d 314, 316 (Mo. 1972) ("A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly and undoubtedly violates some constitutional provision.")

In short, the clarity and beyond-a-reasonable-doubt formulations are just different ways of naming the same presumption—they are "alternative verbal formulations of the same rule." Green, *supra*, at 171, 184, 186 (referring to the two formulations as "synonymous" and "precedentially interchangeable"). Indeed, "[t]o be clearly and truly convinced is to lack any reasonable doubt." *Id.* at 188 (citation omitted).

Petitioners wrongly suggest that the beyond-a-reasonable-doubt formulation places a heavier burden on a party challenging a statute than the clarity formulations do. Pet. 35–36. Any difference is rhetorical. Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt"*, 74 Rutgers U. L. Rev. 1429, (2022) (noting that the beyond-a-reasonable-doubt formulation is a "rhetorical commitment to judicial deference" (alteration omitted) (citation omitted); *Island County v. State*, 955 P.2d 377, 384, 393 (Wash. 1998) (Talmadge, J., concurring) (referring to same as "simply a hortatory expression, a guide for our consideration, a reminder that the Legislature—not the Court—is the body the people of our state have chosen to make their laws").

The Wisconsin Supreme Court, among other state high courts, has said as much. In *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, the Wisconsin Supreme Court explained that "[i]n the context of a challenge to a statute's constitutionality, beyond a reasonable doubt expresses the force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute . . . can be set aside." 914 N.W.2d 678, 689 (Wis. 2018) (citation omitted); Spitzer, *supra*, at 1452 (interpreting this line in *Mayo* as "essentially converting the [beyond-a-reasonable-doubt] formulation into a rhetorical flourish meant to emphasize that the justices should have a high degree of confidence of unconstitutionality prior to invalidating a statute"). In other words, "beyond a reasonable doubt" in the judicial-review context is not the high burden of proof it represents in the criminal-

law context. *See In re Commitment of Alger*, 858 N.W.2d 346, 353–54 (Wis. 2015) (distinguishing "unconstitutional beyond a reasonable doubt" from "probably unconstitutional").

The substantive similarity between the clarity and beyond-a-reasonable-doubt formulations of the presumption accounts for why Petitioners cannot point to a single case in which a choice among them had any effect on the outcome. *Accord Island County*, 955 P.2d at 393 (Talmadge, J., concurring) ("I have not heard a judge say, and I have not read a case that says, 'I believe this statute is clearly and convincingly unconstitutional, but I am not persuaded it is unconstitutional beyond a reasonable doubt.'").

Contrary to Petitioners' claim that the beyond-a-reasonable-doubt formulation "threatens constitutional rights," (Pet. 35), the judicial and scholarly consensus is that the formulation is "not a presumption or doctrine that drives the outcome of cases." Spitzer, *supra*, at 1433. This case is in line with that consensus: both the Wisconsin Supreme Court and Wisconsin Court of Appeals held that their shared interpretation of Wis. Stat. § 108.02(15)(h)2 passed constitutional muster, but only the former used the beyond-a-reasonable-doubt formulation. *Compare* App. 50a, *with* App. 162a.

In sum, there is no split. Rather, different states have developed various formulations of the presumption of constitutionality. In practice, the superficial differences in the wording of various formulations are just that—disguises for a "very strong consensus" among courts on how to apply the

presumption of constitutionality. Green, *supra*, at 197.

B. Even if a split of authority existed, this case would be a poor vehicle for this Court to resolve it.

This Court typically will not address issues that were not raised below. *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."); *E.E.O.C. v. Fed. Labor Relations Auth.*, 476 U.S. 19, 24 (dismissing writ of certiorari as improvidently granted because issues were not raised below).

Petitioners concede that they failed to raise below their challenge to the beyond-a-reasonable-doubt formulation of the presumption of constitutionality. Pet. 36. As a result, there was but one paragraph of discussion, in a dissent, about the standard. App. 93a–94a. With so little development in the lower courts, and none by the parties, this case is not the one in which to resolve a split, if there were one, regarding the proper beyond-a-reasonable-doubt formulation.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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November 8, 2024

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 PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR PETITIONERS

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REPLY

The brief in opposition amply confirms that both questions presented should be granted. The Wisconsin Supreme Court deepened an existing split among lower courts over whether government violates the First Amendment when it decides that an admittedly religious charity is not religious enough to merit equal treatment under state FUTA-compliant tax exemption statutes. And the Wisconsin Supreme Court also extended a separate split over whether federal constitutional claims must be proven beyond a reasonable doubt. Both questions are of nationwide importance, and this case gives the Court the perfect vehicle to address them.

This Court should therefore intervene to vindicate the First Amendment. Wisconsin should not be allowed to deny Catholic Charities and religious organizations like it an exemption just because—as required by their faith—they serve all people.

ARGUMENT

I. Only this Court can resolve the split over the First Amendment's application to FUTA-compliant tax exemption statutes.

State supreme courts are split 4-4 over whether they can, consonant with the First Amendment, deny a religious organization a religious tax exemption because the organization does not engage in "typical" religious activities—like worship or proselytizing. Pet.15-23. Respondents don't dispute that the Wisconsin Supreme Court recharacterized Petitioners' religious exercise as primarily secular activity. Instead, they try to minimize the split by pointing to irrelevant facts and quibbling over the merits. Neither gambit

detracts from the need for this Court to resolve this important question of constitutional law.

A. Courts are hopelessly split over whether religious organizations can be denied a religious tax exemption because their behavior is not "typical" enough to qualify.

1. Respondents first say there is no split because some state supreme courts didn't directly address "First Amendment issues." BIO.8. Instead, Respondents claim, these courts were merely interpreting FUTA-compliant state laws. *Ibid.*

Respondents are wrong. As Petitioners explained, several cases in the split engaged in constitutional analysis or (for the courts that came out the right way) simply didn't need to reach any constitutional questions. Pet.18, 20, 21, 23. And, more importantly, a state court need not *analyze* the Constitution for its interpretation of state law to *violate* the Constitution. If Respondents were right, the simplest way for a court to certiorari-proof its opinion would be to ignore the Constitution altogether. That's obviously wrong. This Court has "an obligation to ensure that state court interpretations of [state] law do not evade federal law." *Moore* v. *Harper*, 600 U.S. 1, 34 (2023). And here, there is no question that the decisions on the wrong side of the split are *not* consistent with the demands of the First Amendment. Pet.23-30.

2. Respondents next suggest that all courts in the split are applying the *same* standard. BIO.12. That blinks reality: The split has been acknowledged repeatedly—including in *Terwilliger*, *Mid Vermont Christian School*, and again in the decision below.

Pet.19 n.4. (*Mid Vermont*); Pet.21 (*Terwilliger*); App.142a (this case).

Looking for keys under the streetlight, Respondents scour the opinions on the correct side of the split for evidence of any religious activity, on the theory that—rather than looking at religious motivation or mission—these courts instead balanced religious activities against secular activities and determined that the religious activities predominated. BIO.13. But that's not what they did, and Defendants' scattershot factual citations tell us nothing about the *legal standard* these courts applied.

Idaho. Respondents suggest that *Champion Bake-N-Serve* independently considered the bakery's activities because its analysis distinguished between full-time employees and students receiving "religious training" through their work at the bakery. BIO.12-13. Not so—the court concluded that the bakery's *motivation* for employing students was primarily religious (because it viewed their work as religiously motivated). *Department of Emp.* v. *Champion Bake-N-Serve, Inc.*, 592 P.2d 1370, 1371-1372 (1979). That's fully consistent with the separate conclusion that the bakery might have had a *different* motivation for employing *other* employees. *Ibid.* And, contra BIO.13, *Nampa Christian* similarly supports Petitioners. There, the court looked to the school's "intent and operations" merely as evidence "*reveal*[*ing*]" its "religious mission and purpose." *Nampa Christian Schs. Found., Inc.* v. *State*, 719 P.2d 1178, 1183 (Idaho 1986) (emphasis added).

Iowa. Respondents note that the religious school in *Community Lutheran* included religion in its curriculum and required its teachers to be Lutheran.

BIO.13. This tells us nothing about the legal standard the court applied. And even a cursory review of the opinion shows that the court applied the correct standard—expressly citing *Champion Bake-N-Serve*. See *Community Lutheran Sch.* v. *Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 291 (Iowa 1982).

Maine. The facts identified by Respondents in *Schwartz* v. *Unemployment Insurance Commission* similarly served as evidence of the organization's religious motivations—not as part of a supposed secular-versus-religious-activities balancing test. Indeed, after citing *Kendall*, the court explained that the Center's outwardly secular activities (like its after-school program) did not at all "diminish its continuing religious purpose." 895 A.2d 965, 970-971 (Me. 2006).

Massachusetts. Even odder, Respondents claim *Kendall* "did not rely on religious motivations alone." BIO.13. But, citing *Champion Bake-N-Serve*, the court treated religious "motive" and religious "purpose" as two variations on the same idea. *Kendall* v. *Director of Div. of Emp. Sec.*, 473 N.E.2d 196, 199 (Mass. 1985). Here too, the facts Respondents flag, BIO.13, did not independently drive the analysis; they supported the conclusion that the Center's ministry was religiously motivated. *Kendall*, 473 N.E.2d at 199.

In short, the fact that the religiously motivated entities in these cases unsurprisingly engaged in some

religious activities Wisconsin deems sufficiently "typical" tells us nothing about the legal standard the courts applied.[1]

3. Finally, respondents suggest that their approach is "consistent" with FUTA's legislative history. BIO.14. But, as an initial matter, this Court isn't being asked to interpret *congressional* intent at all. Instead, this Court has been presented with a decision definitively interpreting Wisconsin law. The question is whether that interpretation complies with the First Amendment. Because Congress lacks the authority to either definitively interpret Wisconsin law or the First Amendment, Congress' intent is beside the point. And, regardless, this Court in *St. Martin* (a case Respondents all but ignore), considered the same legislative history cited by Respondents and gave it minimal weight. See *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 782, 786-788 (1981); see *id.* at 790-791 (Stevens, J., concurring) ("there is special force to the rule that the plain statutory language should control").

B. The decision below violates the First Amendment.

The approach taken by the Wisconsin Supreme Court and defended by Respondents violates the First Amendment thrice over. Pet.23-31. Respondents claim their position is consistent with the Constitution. BIO.15-19. A fuller response can be saved for the merits, but Petitioners offer a few points here.

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[1] Respondents' attempts to distinguish the intermediate appellate court opinions fail for the same reason. Compare Pet.19-20 with BIO.13-14.

First, Respondents never dispute, and thus concede, that their test favors some religious beliefs over others. Pet.23-26. Instead, Respondents excuse the unequal treatment by arguing that the law doesn't burden Petitioners. BIO.17-19. But Respondents' argument is as outdated as their precedent. Unequal denial of a *benefit* is a textbook burden on Free Exercise rights. *E.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2017). And here there is a burden because Wisconsin is denying Petitioners an exemption.

Second, Respondents claim there is no excessive entanglement because Wisconsin "accepted" Petitioners' beliefs and only "relied on [Catholic Charities'] 'primarily charitable and secular' activities" to perform its analysis. BIO.16. But that begs the question. Determining whether various activities—like feeding the hungry—are inherently secular or religious *is* the excessive entanglement. Pet.27-29.

Third, Respondents argue that this case is "nothing like" *Kedroff* because it does not involve matters which "belong to the church alone." BIO.17. But the principle of church autonomy articulated in *Kedroff* ensures that secular authorities don't interfere with matters of church governance and organization. Pet.29-30. Here, Respondents never dispute that Wisconsin's rule favors certain types of church structures over others—or that only *exclusively* religious activity counts. *Ibid.*

II. Lower courts are split over whether federal constitutional claims must be proven "beyond a reasonable doubt."

Over a strong dissent, the Wisconsin Supreme Court emphasized—seven times—that it was applying

a "beyond a reasonable doubt" standard. App.7a, 37a, 44a, 47a, 50a, 51a; see also 93a-94a (Grassl Bradley, J., dissenting). That standard is both wrong and at odds with the approach taken by this Court and other federal courts. These courts, if they apply a burden of proving unconstitutionality at all, employ a much lower "plain showing" or "clearly demonstrated" standard. Pet.31.

1. Respondents agree that the Wisconsin Supreme Court applied the "beyond a reasonable doubt" standard. BIO.24. Yet, as they do not dispute, this Court long ago abandoned that standard. The most recent reference Respondents identify is over 100 years old. BIO.21 (citing *Adkins* v. *Children's Hosp. of D.C.*, 261 U.S. 525, 544 (1923)). And the only other federal court they cite picks up this standard from a *state* supreme court. BIO.22 (quoting *Dutra* v. *Trustees of Bos. Univ.*, 96 F.4th 15, 20 (1st Cir. 2024) (quoting *Leibovich* v. *Antonellis*, 574 N.E.2d 978, 984 (Mass. 1991))).

Respondents thus concede that different courts have adopted different formulations of the legal standard—they just claim that this variation is unimportant. BIO.20-21. But precision of language matters, especially when it comes to standards of proof. A narrow win under one standard can become a loss under a more stringent standard. *E.g., Hilburn* v. *Enerpipe Ltd.*, 442 P.3d 509, 527-528 (Kan. 2019) (Stegall, J., concurring in part) (difference between *de novo* and "beyond a reasonable doubt" standards outcome-determinative); *Island County* v. *State*, 955 P.2d 377, 388 (Wash. 1998) (Sanders, J., concurring) (similar discussion).

Furthermore, if Respondents' argument is that "beyond a reasonable doubt" doesn't *really* mean "beyond

a reasonable doubt," BIO.23-24 (standard is "not the high burden of proof it represents in the criminal-law context"), that concession alone is reason to grant review. Two different standards of proof traveling under the same name is a recipe for lower court confusion and inconsistent application of the civil rights laws.

Nor does Respondents' argument make sense of *this* case. Even if many states treat the standard as "hortatory," Wisconsin stands among the small group that applies the "beyond a reasonable doubt" in a way that is often dispositive of federal constitutional claims. The Wisconsin Supreme Court's opinion in this case serves as an exemplar. Pet.33-34. And, tellingly, Respondents do not engage with the opinion below or even cite the other Wisconsin cases applying the same standard. Compare BIO.22, 24 with Pet.34. Like the majority below, Respondents also do not substantively engage the dissenting opinion, which explained how the majority "stack[ed] the deck against Catholic Charities' claims under the Religion Clauses from the outset." App.93a. They instead cite *Mayo*, BIO.23, but fail to mention that the separate writing in *Mayo* identifies this exact split. See *Mayo* v. *Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 700 (Wis. 2018) (Grassl Bradley, J., concurring).

2. Respondents' fallback position is that this case is not the right vehicle for this Court to consider the issue because Petitioners failed to raise a challenge to the standard below. BIO.25. But before the Wisconsin Supreme Court used it, no other adjudicator through five levels of review had mentioned—much less applied—"beyond a reasonable doubt." See BIO.24 (acknowledging that the Wisconsin Court of Appeals did

not use the "beyond a reasonable doubt" standard). Petitioners are not charged with prescience about what erroneous standards a court might invoke; it suffices to mount a challenge to a wrongheaded standard at the first opportunity.

Respondents also say that the opinion below provides inadequate discussion for this Court to resolve the issue. BIO.20. But the opinion below is utterly typical of how state courts misuse the "beyond a reasonable doubt" standard to minimize federal constitutional rights. And many jurists—including the dissent here—have analyzed the issue in depth. See, *e.g.*, App.93a-94a; *Mayo*, 914 N.W.2d at 697-705 (Grassl Bradley, J., concurring); *State* v. *Grevious*, 223 N.E.3d 323, 343 (Ohio 2022) (DeWine, J., concurring in judgment); *Hilburn*, 442 P.3d at 526-531 (Stegall, J., concurring in part); *Island County*, 955 P.2d at 384 (Sanders, J., concurring). Where a split is already clear, this Court does not require the challenged decision to discuss it in treatise-level detail.

III. This case presents an excellent vehicle to address these questions of nationwide importance.

Both questions presented are of nationwide importance, and both can be squarely addressed in this appeal.

1. The first question presented concerns an issue of nationwide importance, demonstrated not least by the fact that 47 states have identical or near-identical statutory language. Pet.6 n.1. If the Wisconsin Supreme Court's decision is allowed to stand, religious organizations of all stripes in Wisconsin will be di-

rectly and negatively affected. And because the relevant statutory language is identical across so many jurisdictions, Wisconsin's rule promises to find traction in other states as well.

Moreover, because the religious entities affected often operate on shoestring budgets, adoption of the Wisconsin rule will have an outsize effect on the ability of these organizations to continue serving the needy. Indeed, as the many amici explain, minority religious groups, whose religious practices are often unfamiliar to nonadherents, will face "disproportionate[] disadvantage." ISKCON Br.4. See also Jewish Coalition Br.1-4, 6-15 ("the State's 'true religiosity' test systematically harms minority religions like Judaism"); LCMS Br.14-16 (describing effects of Wisconsin rule on variety of religions). In short, the First Amendment is of vital importance and the lower court's interpretation represents a grave threat to its application.

More broadly, whether government can properly classify specific *behaviors* as objectively religious or nonreligious, as opposed to *beliefs*, is an important and recurring one. See, *e.g., Thomas* v. *Review Bd.*, 450 U.S. 707, 718-719 (1981) (discussing termination of employment for "'personal' reasons" or for "religious reasons"); cf. *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972) ('Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."). Thus drinking wine can be a religious act based not on something inherent to the behavior, but on the web of belief that surrounds the act. Drinking a cup of wine at a Passover seder has profound importance because of the relevant context of belief; by contrast, drinking a cup of wine on an airplane flight would (normally)

have no religious significance. That broader and very important question is directly implicated by the Wisconsin Supreme Court's rule. Indeed, "Wisconsin's test is a blueprint for undermining religious exemptions across the board." Religious Scholars Br.15.

2. The second question presented is also of nationwide importance—by virtue of the importance of the burden of proof in deciding constitutional claims. Whether a federal constitutional claim must be proven beyond a reasonable doubt, by clear and convincing evidence, or some other standard is of utmost importance to the outcome of individual cases and entire areas of jurisprudence. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 325 (1993) (distinguishing clear-and-convincing standard from beyond-a-reasonable-doubt standard in the context of an Equal Protection challenge to mental illness commitment proceedings); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252-253 (1986) (discussing importance of following the proper standard of proof on summary judgment). And there is also good reason to end the disjunct caused by having different standards for federal claims in federal and state courts, not least to avoid incentives to forum-shop. Pet.35. This case presents an opportunity to remove this anomaly in the law.

3. This appeal is also an excellent vehicle for resolving both questions presented. It includes a robust record that will allow the Court to fully review both questions. And the Wisconsin Supreme Court directly addressed both questions presented, so there are no obstacles to reaching and resolving both.

Wisconsin's only anti-vehicle argument concerns the second question presented, and rests entirely on its mistaken premise that the Wisconsin Supreme

Court did not address the beyond-a-reasonable-doubt standard. BIO.25. But as noted above, the lower court made a point of invoking the standard and repeating it at every turn of the decision. And Wisconsin says nothing at all about the fact that this Court has already twice found the first question presented cert-worthy. Pet.7-8 (discussing *St. Martin* and *Grace Brethren*).

CONCLUSION

The petition should be granted.

Respectfully submitted.

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2023 WL 4976588 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant,
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
July 28, 2023.

On Appeal from the Court of Appeals Reversing the Douglas County
Circuit Court the Hon. Kelly J. Thimm, Presiding Case No. 2019CV000324

Brief of Non-Party Wisconsin State Legislature as Amicus Curiae Supporting Petitioners

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*6 ARGUMENT

I. THE PRINCIPLE THAT THE UNEMPLOYMENT-INSURANCE LAW IS TO BE LIBERALLY CONSTRUED MUST YIELD TO THE RULE OF CONSTITUTIONAL AVOIDANCE

The court of appeals held that the remedial-statute canon - the principle that such statutes are to be liberally construed - dooms Catholic Charities Bureau's textual arguments. Indeed, when turning to the "rules of statutory interpretation," the court cited this one first: "[T]he unemployment insurance law is remedial in nature; therefore, the statutes must be 'liberally construed' to provide benefits coverage, and exceptions to the law must be interpreted narrowly." App. 025-026 (citations omitted). It added that, "[i]f a [remedial] statute is liberally construed, 'it follows that the exceptions must be narrowly construed."' *Id.* at 026 (citing *McNeil v. Hansen*, 2007 WI 56, 110, 300 Wis. 2d 358, 731 N.W.2d 273). The State echoes this purposivist argument. *E.g.*, Resp. Br. 17-18.

Jurists differ over the wisdom of the remedial-statute canon, including its cousin canon requiring strict construction of exemptions. Textualists traditionally have regarded these notions as analytical makeweights, inconsistently applied and incapable of precise application. *See, e.g., Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995) ("[T]he Director retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 359-66 (2012); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 583-84 (1989-1990) ***7** ("[The remedial canon] is surely among the prime examples of lego-babble."); *Ober United Travel Agency, Inc. v. United States Dept. of Labor*, 135 F.3d 822, 825 (D.C. Cir. 1998); *In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987). Justice Elena Kagan, for example, has even suggested that all substantive canons "should" be "toss[ed]." [1] On the other hand, some jurists and scholars have treated the canon more favorably. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999) (Stevens, J., dissenting); *James v. Heinrich*, 2021 WI 58, 1 76, 397 Wis.2d 517, 960 N.W.2d 350 (Dallet, J., dissenting) (stating that some of Scalia and Garner's positions, such as their rejection of the remedial-statute canon, "are irreconcilable with this court's precedent"). No party asks this Court to discard these canons.

Whatever they think of the merits of the remedial-statute canon, courts tend to agree that it must yield to certain other interpretive rules - including clear-statement rules, such as the rule of constitutional avoidance. *See, e.g., Keen v. Helson*, 930 F.3d 799, 805 (6th Cir. 2019) ("'[L]ast' is where [this canon] belongs in the interpretive process. A court should only invoke the liberal construction canon after it has exhausted other ... tools of interpretation." (citation omitted)); *see also, e.g., Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1220 (9th Cir. 2012) (prioritizing "constitutional concerns" over the liberal ***8** reading canon); *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 294 (3d Cir. 2013) (holding liberal reading of remedial-statute canon cannot "trump [] textual clues to the contrary"); *Collette v. St. Luke's Roosevelt Hosp.*, 132 F.Supp.2d 256, 267 (S.D.N.Y. 2001) (declining to apply remedial-statute canon because "constitutional avoidance weighs heavily in favor" of a more "sensible" construction). [2] Put simply, a statute's meaning should not be stretched to *create* a constitutional problem. Rather, if a reasonable interpretation would avoid such a concern, that interpretation is preferred - regardless of whether it makes the statute more or less "remedial." So here, because Catholic Charities Bureau articulates a quite reasonable reading of the statute that would avoid any constitutional doubts, *see* Pet. Op. Br. 22-34, this Court ought to adopt it, regardless of which way the remedial-statute canon cuts.

Prioritizing constitutional avoidance over the remedial-statute canon makes especially good sense in this case, because it happens also to advance the statute's remedial purpose: "to foster a reduction of both the individual and social consequences of unemployment." App. 025-026 (citing *Wisconsin Cheese Serv., Inc. v. DILHR*, 108 Wis. 2d 482, 489, 322 N.W.2d 495 (Ct. App. 1982)). ***9** Reading the exemption not to include Catholic Charities Bureau - thereby causing it to be unconstitutional, *see* Pet. Op. Br. 42 - would serve only to impose on the charity needless costs and burdens that it could efficiently avoid by simply subscribing to the Church Unemployment Pay Program, redirecting their savings in costs to their core mission, which happens also to be the core mission of the statute. *Id.* at 18. *Both* seek to ameliorate the harsh consequences of unemployment on individuals and society. *Compare* Wis. Stat. § 108.01(1) (aiming to mitigate the "urgent public problem" and "social cost" of unemployment) *with* Pet. Op. Br. 18 (explaining that Catholic Charities Bureau aims to help with "social justice responsibilities by providing church-funded unemployment coverage"). "The mission of Catholic Charities is to serve all regardless of religious affiliation in their time of greatest need. Catholic Charities employs and serves individuals of all faiths." *Zubik v. Sebelius*, 911 F. Supp. 2d 314, 319 (W.D. Pa. 2012); *see also Brandt v. Burwell*, 43 F. Supp. 3d 462, 469 (W.D. Pa. 2014). In all, exempting Catholic Charities Bureau would further not only the State's interest in "alleviating 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, 339 (1987), but it would also further the very ends that the unemployment-insurance law seeks to advance - by freeing Catholic Charities Bureau and other like entities to care for the poor, feed the hungry, and support the jobless.

***10 II. THE WISCONSIN CONSTITUTION FORBIDS THE STATE FROM "EXPRESSING] A PREFERENCE" FOR OR AGAINST A "RELIGIOUS PRACTICE," INCLUDING BY TREATING WORSHIP-ORIENTED ACTIVITIES AS "PREDOMINANTLY RELIGIOUS" AND ALMSGIVING AS NOT**

Article I, section 18 of the Wisconsin Constitution guarantees "[t]he right of every person to worship Almighty God according to the dictates of conscience." To reinforce this promise, it also prohibits "any preference ... to any religious establishments or modes of worship." This latter proscription has been referred to as the "No Preference Clause." *King v. Vill. of Waunakee*, 185 Wis. 2d 25, 62, 517 N.W.2d 671 (1994) (Heffernan, C.J., and Abrahamson, J., dissenting). Enacted in 1848, the framers crafted these provisions to reflect eighteenth-century principles of religious liberty, attract religious immigrants to Wisconsin, and secure the most expansive protection of religious liberties in the nation. *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 44 N.W. 967, 977 (1890) (Cassoday, J., concurring).

This Court has long observed the same. In its 1890 decision in *Weiss*, this Court acknowledged that the framers of the Wisconsin Constitution intended Wisconsinites to have the most "complete" religious protection possible. 44 N.W. at 977 (1890) (Cassoday, J., concurring). As such, Article I, section 18 "probably furnishe[s] a more complete bar to any preference for, or discrimination *against*, any religious sect, organization, or society than any other state in the Union." *Id.* (emphasis added); *King*, 185 Wis. 2d at 65 (Heffernan, C.J., and Abrahamson, J., dissenting) (observing same). The people who wrote and ratified the No Preference

Clause did not ***11** authorize the government to stand in judgment of what does or does not constitute religious worship. Far from it. Because "our state constitution is not a grant, but a limitation, of powers," the No Preference Clause "operate[s] as a perpetual bar to the state, and each of the three departments of the state government, and every agency thereof, from the infringement, control, or interference with" the religious worship of every Wisconsin citizen, including "the giving of any preference by law to any ... mode of worship." *Weiss*, 44 N.W. at 978 (Cassoday, J., concurring). [3] The plain language of the No Preference Clause thus prohibits government agencies from thumbing the scale as to what qualifies as religious worship.

The meanings of the terms "worship" and "preference" in 1848 further support this interpretation. This Court has already unpacked what "worship" means. Citing four nineteenth century dictionary sources, *Weiss* states that "the word 'worship'" "includes any and every mode of worshiping Almighty God." 44 N.W. at 979. And relevant here, "'[w]orship consists in the performance of all those external acts ... in which men engage with the professed and sole view of honoring God.'" *Id.* As for "preference," Webster's dictionary at the time of Wisconsin's constitutional convention defined the term as: "n. 1. The act of preferring one thing before another; estimation of one thing above another; choice of one thing ***12** rather than another. 2. The state of being preferred." Noah Webster, An American Dictionary of the English Language 771 (1848). Government "preference" of "worship," according to the original understanding of those terms, not only "corrupts religion," it "makes the state despotic." *Weiss*, 44 N.W. at 981-82 (Orton, J., concurring). Conversely, "[t]he right to follow one's own chosen method of worshipping God is enhanced, not diminished, by a decision that ... government must not express a preference" for modes of worship. *King*, 185 Wis. 2d at 62 (Heffernan, C.J., and Abrahamson, J., dissenting).

The framers understood the import of vigorously safeguarding and encouraging religious liberty in a newly developed state. As detailed by Justice Cassoday in *Weiss*, and similarly observed by then-Chief Justice Heffernan in *King*, "history indicates that the framers wrote the Wisconsin constitution with an eye toward attracting settlers to Wisconsin by ensuring that the government would not dictate the form or content of religious practices." *King*, 185 Wis. 2d at 65 (Heffernan, C.J., and Abrahamson, J., dissenting); *Weiss*, 44 N.W. at 974 (Cassoday, J., concurring) ("[T]he convention framed the constitution with reference to attracting [immigrants] to Wisconsin."). Our framers enthusiastically intended to "establish liberal laws to encourage the emigrant hither and to secure and protect him when here." Milo M. Quaife, *The Convention of 1846* 237 (1919). "Many, perhaps most," of the sought-after immigrants came from countries that enforced a state religion and "suffered" "the horrors of sectarian intolerance" or the repercussions of rejecting a state-sanctioned faith. ***13** *Weiss*, 44 N.W. at 974 (Cassoday, J., concurring). For that reason, there was no greater "inducement" than to assure these immigrants "the guaranties of the right of conscience and of worship in their own way." *Id.* The enticement paid off and Wisconsin made good on its promise. As a result, Wisconsin became "composed of immigrants from almost every state in Europe" that "are honest, intelligent, wellinformed, and grateful for the religious ... liberties they enjoy here." Milo M. Quaife, *The Attainment of Statehood* 364 (1928).

This Court should assume that the religious-purposes exemption of Wis. Stat. § 108.02(15)(h)(2) does not run afoul of the Wisconsin Constitution. *See Am. Power & Light Co. v. Sec. & Exch. Comm'n*, 329 U.S. 90, 108 (1946) ("Wherever possible, statutes must be interpreted in accordance with constitutional principles."). And when this Court "interpret[s] the Wisconsin Constitution" it aims "to give effect to the intent of the framers and of the people who adopted it" by "focus[ing] on the language of the adopted text and historical evidence." *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 12, 402 Wis. 2d 539, 976 N.W.2d 821. Moreover, because Article I, section 18 provides "far more" "expansive protections for religious liberty" than the First Amendment, courts must "give effect to" its "more explicit guarantees." *Coulee Cath. Sch. v. Lab. & Indus. Rev. Comm'n, Dep't of Workforce Dev.*, 320 Wis. 2d 275, 311-12, 768 N.W.2d 868 (2009). In light of these principles of construction, Wis. Stat. § 108.02(15)(h)(2)'s religious-purposes exemption must be interpreted in accord with the No Preference Clause, and, consequently, the framer's intent of increasing religious liberty and prohibiting government preference for modes of worship.

***14** The Labor and Industry Review Commission's (LIRC) interpretation of Wis. Stat. § 108.02(15)(h)(2) fails to give due consideration to these well-settled principles of construction. In concluding that Catholic Charities Bureau primarily "provide[s] secular social services" and is therefore subject to Wisconsin's unemployment compensation system, Resp. Br. 19-25, LIRC, with the imprimatur of the State, heralds that some modes of worship are preferred over others. More specifically, when considering eligibility for § 108.02(15)(h)(2)'s exemption, certain types of worship purportedly qualify while others

do not. For example, despite conceding that Catholic Charities Bureau's almsgiving and social ministry work "may have a religious connection," LIRC did not deem this ministry sufficiently "religious" because it did not "teach[] the Catholic religion, evangeliz[e] [the Catholic faith], or participate] in religious rituals or worship services with program participants." Resp. Br. 23, 32.

LIRC's position ignores that religious worship "includes *any* and *every* mode of worshiping Almighty God," *Weiss*, 44 N.W. at 979 (Cassoday, J., concurring) (emphasis added), and "[t]he usual and necessary work connected with religious worship or reasonably incident thereto is work of charity," *Commonwealth v. SesquiCentennial*, 8 Pa. D. & C. 77, 85 (Com. Pl. 1926). *See also Saltonstall v. Sanders*, 93 Mass. 446, 455 (1865) (describing "almsgiving" and "assistance of the poor" as a "religious duty"). In doing so, LIRC grants a preferred status to "evangelizing" and "participating in religious rituals or worship services," Resp. Br. 32, while ***15** rejecting almsgiving and other social services as insufficiently religious. The religious character of charitable activities is not destroyed merely because secular organizations can perform the same activities. Nor does Article I, section 18 of the Wisconsin Constitution, or the historical evidence surrounding its enactment, support such a finding. Because "[t]he religious freedom of all citizens is threatened when the government expresses a preference for any one religious practice," *King*, 185 Wis. 2d at 66 (Heffernan, C.J., and Abrahamson, J., dissenting), the Legislature respectfully encourages this Court to construe Wis. Stat. § 108.02(15)(h)(2) in a way that maximizes the primordial rights of religious organizations to worship in accordance with their faith and limits the State's power to interfere with such worship.

CONCLUSION

The Legislature respectfully asks the Court to reverse the court of appeals and affirm the circuit court's decision.

***16** Dated: July 28, 2023.
Respectfully submitted,

<<signature>>

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Footnotes

1 Will Baude, *Should Courts Stop Using "Substantive" Canons of Construction?*, Volokh Conspiracy (Mar. 8, 2022, 6:23 PM), https://perma.cc/J8ZQ-62RL (quoting Justice Kagan's comments during oral argument).

2 The constitutional-avoidance, or constitutional-doubt canon, is best understood as a longstanding "clear statement" rule and not a "substantive" canon and therefore relevant to linguistic meaning, given that legislative bodies are assumed to enact laws in light of the canon. *See, e.g.*, Amy Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. Rev. 109, 169 (2010); Scalia & Garner, *supra.*, at 254 (describing avoidance as an "expected-meaning canon" because of its long-established role in jurisprudence).

3 Although the quoted statement in *Weiss* appears in the separate opinion of Justice Cassoday, "it is on a subject expressly reserved for his consideration in the court's opinion ... and thus represents the opinion of the court." *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 165 n.3, 115 N.W.2d 761 (1962).

2023 WL 4683567 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant,
State of Wisconsin Department of Workforce Development, Respondent-Appellant.

No. 2020AP002007.
July 14, 2023.

On Appeal from the Court of Appeals, District III, reversing the Douglas County Circuit Court, Hon. Kelly J. Thimm Presiding, Case No. 2019CV000324

Non-Party Brief of Wisconsin Catholic Conference in Support of Petitioners-Respondents-Petitioners

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*5 INTEREST OF NON-PARTY *AMICUS CURIAE*

The Wisconsin Catholic Conference was founded by the Bishops of Wisconsin in 1969 to fulfill the vision of the Second Vatican Council, which called upon the Church to be more involved in the world. *See Catechism of the Catholic Church* ¶ 1915 (2d ed. 1992), https://t.ly/aPH0.

Led by the Bishops, the Conference-with teachings of the Church at its foundation-serves to promote dignity, preserve justice, and advance the common good by offering a specifically Catholic contribution to public policy debates. The Conference responds to issues facing the Church's five dioceses, their Catholic Charities organizations, and the more than 1,700 priests and deacons that minister in over 700 parishes, 275 Catholic schools, and 30 hospitals across Wisconsin. Wisconsin Catholic Conference, *The Catholic Presence in Wisconsin*, https://t.ly/c5jTl.

The Conference's significant interest in this case and the proper interpretation of the Unemployment Compensation Act stems from its mission as the Church's public policy voice in Wisconsin and its role as the "informational clearinghouse" for the Church Unemployment Pay Program (CUPP). CUPP, *CUPP Policy Handbook* 2 (Oct. 1, 2022), https://t.ly/DVPS.

The Conference submits this brief to explain how the decision below interferes with the Church's internal affairs, impedes its sincere religious mission to serve *all people* in a non-judgmental, non-proselytizing fashion, and requires courts to become arbiters of religiosity.

*6 INTRODUCTION

Diminishing the import of two millennia of Catholic teaching and interfering with how the Diocese of Superior organizes and structures its charitable activities, the appellate court reduced the question of "religious purpose" to an examination of corporate structure. Notwithstanding that charity is a fundamental principle of Catholicism, that the Bishop leads the Catholic Charities Bureau, and that the Bureau functions as the diocese's charitable-ministry arm, the appellate court nevertheless ruled that the Bureau was not operated for a primarily religious purpose.

That conclusion not only ignores the *overwhelming* evidence of the Catholic Church's direction and control over the Bureau and its charities but also finds no support in the statutory text. Indeed, the plain language exempts entities that are "operated, supervised, controlled, or principally supported by a church," so long as they are "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h)(2).

This Court should thus reverse and render judgment for the Bureau and its charities. The government-including the judiciary-has long been barred from interfering with church autonomy or imposing its own views of religiosity on religious organizations, and it is likely why the appellate court foresaw its decision would have "constitutional implications" and be "of crucial importance to religiously affiliated nonprofit organizations throughout the state, to employees of such organizations, and to the [State]." App.046.

*7 BACKGROUND

I. The Structure of the Catholic Church.

Core to the Catholic faith is the understanding of what it means to be "the Church." The Church was instituted by Christ himself during his earthly ministry when he said to one of the Apostles: "And I tell you, you are Peter, and on this rock I will build my church." *Matthew* 16:18 (NRSV-CE). Guided by the Holy Spirit, Catholics have built His Church for two millennia to fulfill the mission to "profess[] the faith" and "liv[e] it in fraternal sharing." *Catechism* ¶ 3.

There is only *one* Catholic Church. *E.g., Catechism* ¶ 881; *Codex Iuris Canonici (Code of Canon Law)*, 1983 CIC c.368, https://t.ly/abL3 ("Particular churches, in which and from which the one and only Catholic Church exists."). The Church is led by the Pope, who is the direct successor of Peter. 1983 CIC c.330-35 (the Pope "possesses power over the universal Church" and "all particular churches and groups of them").

The Church is divided into dioceses. A diocese "is a portion of the people of God" that is "defined territorially" and "constitutes a particular church in which the one, holy, catholic, and apostolic Church of Christ is truly present and operative." 1983 CIC c.369-70. Wisconsin has five dioceses that serve 1.1 million Catholics. Wisconsin Catholic Conference, *The Catholic Presence in Wisconsin*, https://t.ly/c5jTl.

Each diocese is "entrusted to a bishop for him to shepherd." 1983 CIC c.369. Bishops, who are successors to the Apostles, are appointed by the Pope to be "teachers of doctrine, priests of sacred ***8** worship, and ministers of governance." 1983 CIC c.375 § 1, c.377. A bishop derives from the Pope the legislative, executive, and judicial power over his diocese and represents the diocese in all its juridic affairs. 1983 CIC c.391 § 1, c.393. While exercising "pastoral office over the portion of the People of God assigned to them," a bishop is also called to care "especially [for] the poor." *Catechism* ¶ 886. In this way, the diocesan bishops "are the visible source and foundation of unity in their own particular Churches." *Id.* (quoting Pope Paul VI, *Lumen Gentium: Dogmatic Constitution of the Church* ¶ 23 (1964), https://t.ly/JtB3).

II. Catholic Charity Is Both Fundamental to the Faith and Inherently Religious.

Foundational to Catholicism is the duty to spread Christian love through charity-providing care for the most vulnerable without seeking to impose one's faith on others. Christ's command to his followers was to practice charity: "Just as I have loved you, you also should love one another." *John* 13:34. He taught them that their acts of charity were so essential that they would be judged by how they served the hungry and the thirsty, welcomed the stranger, clothed the naked, and visited the ill and the incarcerated. *Matthew* 25:34-46.

Simply put, the Church "cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Pope Benedict XVI, *Deus Caritas Est* ¶ 22 (2005), https://t.ly/Bxvi. Indeed, without charity, a person can "gain nothing." *Catechism* ¶ 1826 (quoting 1 *Corinthians* 13:1-4).

***9** This command to care for the most vulnerable is at the core of everything the Catholic Church does. It is inherently religious in that it expresses the love that binds Catholics to Christ, to each other, and to all those they encounter. It cannot, therefore, be likened to some secular social service. As Pope Francis has explained, "Charity is always the high road of the journey of faith, of the perfection of faith." Pope Francis, *Angelus* (Aug. 23, 2020), https://t.ly/K3y6. "Christian charity is not simple philanthropy"-it "is looking at others through the very eyes of Jesus" while, at the same time, "seeing Jesus in the face of the poor." *Id.* Indeed, "Catholic Charities and related organizations exist essentially to spread Christian love." Pope John Paul II, *Address to the Members of Catholic Charities USA* ¶ 8 (Sept. 13, 1987), https://t.ly/rTMCW.

Another feature that makes Catholic charity distinctive is that it spreads Christian love while remaining free from proselytization. As Pope Benedict explained, charity "is an action of the Church as such" and "has been an essential part of her mission from the very beginning," but it "cannot be used as a means of engaging in ... proselytism." Pope Benedict XVI, *Deus Caritas Est* ¶¶ 31(c), 32.

Accordingly, those "who practise charity in the Church's name will never seek to impose the Church's faith upon others," because a "Christian knows when it is time to speak of God and when it is better to say nothing and to let love alone speak." *Id.* ¶ 31(c). And it is "the responsibility of the Church's charitable organizations," like the Conference, the Bureau, and its charities, "to reinforce this awareness in their members, so that by their ***10** activity-as well as their words, their silence, their example-they may be credible witnesses to Christ." *Id.*

In response to this high calling to practice charity, the early Church recognized that it "need[ed] to be organized if it [was] to be an ordered service to the community." *Id.* ¶ 20. The Apostles "put[] this fundamental ecclesial principal into practice" by establishing *"diaconia":* the "ministry of charity exercised in a communitarian, orderly way." *Id.* ¶ 21. Over five centuries, the *diaconia* "evolved into a corporation," entrusted by civil authorities to store public grain and feed the citizenry. *Id.* ¶ 23; *see* Pope John Paul II, *Address to the Members of Catholic Charities USA* ¶ 3 (discussing how Catholic charities "go back to before the Declaration of Independence"). Today, the Pope appoints bishops to serve as the Apostles' successors as "president of the assembly and minister of charity in the Church," continuing the mission of the *diaconia.* Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops* (2004) ¶¶ 193-98, https://t.ly/YQon; *see* 1983 CIC c.331, c.368-73; *Catechism* ¶¶ 880-81.

The charity of the *diaconia* was and is unique: "[T]he social service which they were meant to provide was absolutely concrete, yet at the same time it was also a spiritual service." Pope Benedict XVI, *Deus Caritas Est* ¶ 21. This is because charity "does not simply offer people material help, but refreshment and care for their souls, something which often is even more necessary than material support." *Id.* ¶ 28. As Pope Benedict emphasized, those "who work for the Church's charitable organizations must be distinguished by the fact that they do not merely meet the needs ***11** of the moment, but they dedicate themselves to others with heartfelt concern, enabling [others] to experience the richness of their humanity." *Id.* ¶ 31(a). These spiritual commitments ensure that Catholic charities are not "just another form of social assistance" or "welfare activity." *Id.* ¶¶ 25(a), 31.

III. The Wisconsin Catholic Conference, the Church Unemployment Pay Program, and the Catholic Charities Bureau All Further the Church's Charitable Work.

To further the Church's charitable work, the Bishops of Wisconsin, through the Wisconsin Catholic Conference, founded the Church Unemployment Pay Program (CUPP) for lay employees in the Archdiocese of Milwaukee and the Dioceses of La Crosse, Madison, and Superior. *CUPP Policy Handbook* 2 (Oct. 1, 2022), https://t.ly/DVPS; *see* Pope John Paul II, *Laborem Exercens* (1981), https://t.ly/Bx8***o*** ("The obligation to provide unemployment benefits ... is a duty springing from the fundamental principle of the moral order in this sphere ... the right to life and subsistence.").

CUPP is "housed under the umbrella" of the Conference, which serves as CUPP's "informational clearinghouse." *CUPP Policy Handbook* 2. The Conference's executive director chairs CUPP's interdiocesan board of directors, which comprises one member from each participating diocese, appointed by the bishop of that diocese. *Id.* CUPP's board "determines general policies and criteria for the Program and serves as the final-level appeal body for the benefit claims process." *Id.*

Importantly, the Bishops of Wisconsin maintain ultimate juridical power and direct the Conference in administering CUPP ***12** and sharing the Church's principles of Catholic social teaching. This is so that the members of the Catholic Church within Wisconsin can more faithfully answer the Lord's call "to be good and faithful servants who serve the hungry and the thirsty, welcome the stranger, clothe the naked, and visit the ill and the incarcerated." *See* Archbishop of Milwaukee Jerome E. Listecki et al., *A Letter to Wisconsin Catholics on Faithful Citizenship* (Aug. 2022), https://t.ly/FEpN.

The bishops also maintain ultimate juridical power over the Catholic Charities in their dioceses. The Catholic Charities Bureau, for example, is under the pastoral leadership of the Bishop of the Diocese of Superior. App.198. Under his leadership, the Bureau "works to be an effective sign of the charity of Christ" by operating 127 programs in 59 communities and serving all-especially the "disadvantaged and vulnerable." Catholic Charities Bureau, Diocese of Superior, *A Growing Legacy: 2021 Annual Report*, https://t.ly/BPDE; *see* Pope Benedict XVI, *Deus Caritas Est* ¶ 33 ("every Catholic charitable organization want[s] to work with the Church and therefore with the Bishop, so that the love of God can spread throughout their world").

When adding a charity to the Bureau's purview, the Bureau makes clear that the agreement between it and the charity "confirms the importance of the role Catholic Charities Bureau, Inc. and [the charity] have in fulfilling the social ministry of the Diocese of Superior." App.204. The charity also affirms that it "will not engage in activities that violate Catholic Social Teachings." App.204; *see also* App.199 (the Bureau "serves as an ***13** arm of the Church's social ministry" and operates "in compliance with the Principles of Catholic Social Teaching"); R.100:55, 62, 130; R.57:1, 5.

That is not an empty affirmation-the Bureau takes significant steps to maintain this unique Catholic charitable ministry:
• It explains to each charity that a "clear understanding of the corporate relationship between Catholic Charities Bureau, Inc. and [the charity] is necessary to effectively encourage teamwork and to *mutually implement our shared mission."*

• It retains the ability to hire and fire directors.

• It provides management services.

• And it "[e]stablish[es] and coordinate[s]" the charity's mission.

App.203 (emphasis added).

In short, each of the Bureau's charities-including those at issue here-act under, at the direction of, and to further the charitable ministry of the Catholic Church. *See* R.99:15-16; R. 100:30-31.

ARGUMENT

The Court of Appeals' Decision Impermissibly Interferes with Church Autonomy and Entangles Judges in Assessing Religiosity.

It is a foundational premise of our constitutional system that religious organizations enjoy the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). ***14** The court of appeals' decision flouts this

basic principle, results in impermissible judicial oversight of religious teaching and structure, and introduces great uncertainty for any group that sincerely believes it operates "for a religious purpose."

In concluding that the charities at issue do not operate for a "religious purpose," the court of appeals made two fundamental errors: (1) it divorced the Church from its charities, based exclusively on corporate form, App.036-037, 041-042; and (2) it appointed itself the arbiter of religiosity-charged with determining what does and does not qualify as "inherently religious." App.024, 033, 040, 042. These errors ignore centuries of Church organization and teaching that charity-separate from proselytism-is a foundation of the Church and a manifestation of God's love for us.

The Catholic Church's organization and structure-from the Pope to the bishops to the Bureau to its Wisconsin-based charities-are designed and directed intentionally to accord with the Church's teachings. That is why the Bishop of the Diocese of Superior has plenary control over the Bureau and its charities: "the entire organization begins and ends with [him]." R.100:55, 62, 130.

The court of appeals, however, treated the Church's decision about how to organize and structure itself as incidental to its mission, stressing that "corporate form does make a difference." App.042. But that rationale ignores the bedrock constitutional principle of church autonomy.

***15** Religious entities, like the Church, are entitled to "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020); *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 975 (7th Cir. 2021) (same) (en bane). That includes, as relevant here, the power to decide how to organize itself and its ministry-including matters of corporate form-free from state interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 186 (2012) (church autonomy affords "an independence from secular control or manipulation-in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine") (quoting *Kedroff*, 344 U.S. at 116).

Further, the court of appeals' decision tasks Wisconsin agencies and courts with deciding which activities are "inherently or primarily religious." *See* App.039-043. But the "prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). That is why it has long been held that courts are not equipped to draw and enforce such an illusory distinction. *See L.L.N. v. Clauder*, 563 N.W.2d 434, 440 (Wis. 1997) ("excessive governmental entanglement with religion will occur if a court is required to interpret church law, policies, or practices").

***16** The court of appeals' cramped view of religious purpose as it relates to the charities here bears these concerns out. In attempting to describe "inherently or primarily religious activity," the court imposed its own definition of religion, observing that such activity must involve actions such as "participating in religious rituals or worship" or "evangelizing." App.040-041. Applying its own idiosyncratic definition of religion, the court of appeals ruled that the charities' activities were inherently secular even though the Church has long viewed charity as inherently religious and essential to its mission both a form of "participation in the divine nature" of God and "the source and the goal of [virtuous] Christian practice." *Catechism* ¶¶ 1812, 1827; *see also supra* pp. 08-11.

The court of appeals thus flipped the Church's view of charity on its head-viewing the charities' activities as simply "social services." App.040-041; *contra* Pope Benedict XVI, *Deus Caritas Est* ¶ 31 ("[I]t is very important that the Church's charitable activity maintains all of its splendour and does not become just another form of social assistance."); *id.* ¶ 25 ("charity is not a kind of welfare activity"). In doing so, it presents the Church and its charities with a Hobson's choice: To obtain the statutory benefit to which She is entitled, the Church must *either* structure Her charitable work by government dictate *or* use charity as primarily a means to proselytize.

At base, the court of appeals' decision must be reversed because it requires what the First Amendment prohibits: "government interference with an internal church decision that ***17** affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190.

CONCLUSION

The Conference respectfully asks the Court to reverse the court of appeals and enter judgment for the Bureau and its charities.

Dated: July 14, 2023

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2023 WL 4684170 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc. and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
July 14, 2023.

Circuit Court Case No. 2019CV000324
On Appeal from the Court of Appeals Reversing the Douglas County Circuit Court, the Hon. Kelly J. Thimm, Presiding Case No. 2019CV000324

Non-Party Amicus Curiae Brief of Catholic Charities Usa in Support of Petitioners-Respondents-Petitioners

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Catholic Charities USA ("CCUSA") is a nonprofit national voluntary membership organization representing Catholic Charities member agencies throughout the United States and its territories, including the Petitioner-Respondent-Petitioner Catholic Charities Bureau, Inc.'s Diocese of Superior and its sub-entities. There are 176 Arch/Dioceses in the United States; 167 (95%) of these have a Catholic Charities agency that is a member of CCUSA.

The questions presented in this case are of substantial importance to CCUSA's members, who operate more than 3,500 service locations across 50 states, the District of Columbia, and five U.S. Territories. The diverse array of social services offered by Catholic Charities agencies helped more than 14 million people in need last year who are among the most vulnerable members of our society. These agencies help all people, regardless of their faith, who are struggling with poverty and other complex issues. The Wisconsin Supreme Court's determination of whether their operations are for "primarily religious purposes" is crucial to their ability to continue to serve persons living in poverty and in vulnerable populations.

Catholic Charities agencies perform the charitable work of the Catholic Church in America. They are the social services arm of the Catholic Church and are guided by Catholic Social Doctrine and bound by Catholic canon law. The work of Catholic Charities is inseparable from the Catholic faith; indeed, it is compelled by the Catholic faith and is the very essence of religious practices by Catholics in America. The Catholic Church believes that charity and promoting the gospel are inseparable. The Court of Appeals ruling to the contrary, in which the Court substituted its interpretation of ***6** the Catholic faith for that of the Church, is not only factually incorrect, it also imperils the work of the Church in Wisconsin and throughout the United States. CCUSA submits this non-party amicus curiae brief to educate the Court on both Catholic Social Doctrine and Catholic canon law as they pertain to the religious activities of Petitioner-Respondent-Petitioner Catholic Charities Bureau, Inc., its sub-entities, and all Catholic Charities agencies.

As the national office for Catholic Charities agencies, CCUSA is uniquely situated to speak to the religious purposes of its member agencies' activities and to educate the Court about the centrality of charitable works to the Catholic faith.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Wisconsin Court of Appeals, District III, reversed the order of the Circuit Court for Douglas County that found the Petitioners-Respondents-Petitioners ("Petitioners") met the requirements of the religious purpose exemption under Wis. Stat. § 108.02(15) (h) 2 (2019-20). In reversing the Circuit Court's decision, the Court of Appeals concluded that Petitioners "are not organizations operated primarily for religious purposes." Opinion at ¶ 3 (citing Wis. Stat. § 108.02(15)(h) 2). The Court of Appeals did not consider Catholic Social Doctrine, papal encyclicals, or Catholic canon law regarding the purpose and mission of Catholic Charities organizations; rather, the Court of Appeals substituted its own interpretation of the Catholic faith notwithstanding the well-established rule that judges are precluded from making decisions that require evaluating and determining the substance of religious doctrine. See, e.g., ***7** *County of Allegheny v. ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981).

The work of Petitioners is an integral part of the mission of the Catholic Church performed by an integrated organization of the Church. Their charitable work is at the heart of the Church's social doctrine, and it is impossible to separate the Church's works of charity from the evangelizing of the Catholic Church. Therefore, all such works are carried out for religious purposes. Catholic Charities agencies are the designated vehicles in Catholic dioceses for the Church's charitable works. The opinion of the Court of Appeals should be reversed.

ARGUMENT

I. *CHARITABLE WORKS ARE AT THE CORE OF THE CATHOLIC FAITH*

A. *Charitable Works Constitute Evangelizing*

The Court of Appeals conceded that Petitioners "have a professed religious motivation. We acknowledge that the professed reason that CCB and its sub-entities administer these social services programs is for a religion purpose: to fulfill the Catechism of the Church." Opinion at ¶ 57. However, the Court of Appeals then sought to separate the Church's charitable works from what it considers true "religious activities" and asserted the social service programs provided by Petitioners "are neither inherently nor primarily religious activities" based on the following findings:

CCB and its sub-entities do not operate to inculcate the Catholic faith; they are not engaged in teaching the Catholic religion, evangelizing, or participating in religious rituals or worship services with social service participants; they do not ***8** require their employees, participants, or board members to be of the Catholic faith; participants are not required to attend any religious training, orientation, or services; their funding comes almost entirely from government contracts or private companies, not from the Diocese of Superior; and they do not disseminate any religious material to participants. Nor do CCB and its sub-entities provide program participants with an "education in the doctrine and discipline of the church."

Opinion at ¶ 58.

The Court of Appeals' opinion as to what does or does not constitute "religious practices" of the Catholic Church is not determinative and violates the well-established rule that judges are precluded from making decisions that require evaluating and determining the substance of religious doctrine. See, e.g., *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981). Rather, the teachings of the Catholic Church and its centuries-old interpretation of what constitute the religious doctrine and required "religious purposes" of the Church must be given deference. Those teachings and purposes are clear: the core of the religious practices of the Catholic Church includes providing services to those living in poverty, in vulnerable communities, and in need without regard to a person's faith or other characteristics.

The opinion issued by the Court of Appeals demonstrated a troubling lack of understanding of the Catholic faith and the crucial role of Catholic Charities in the evangelization of the faith. Catholic Charities help all persons in need, regardless of a person's religious tradition or lack thereof, because the Catholic faith requires them to do so. They do not proselytize or force the Catholic faith on people who are suffering; they simply help ***9** them as Jesus Christ and the Church require them to do. [1] The Court of Appeals also demonstrated an extremely narrow and incorrect understanding of what "evangelizing" means in the Catholic Church. The Catholic Church believes that charity and evangelizing are inseparable: "Practicing charity is the best way to evangelize." Pope Frances ((C)Pontifex), Twitter (January 24, 2015, 4:24 AM), https://twitter.com/pontifex/status/558918164604399617?s=46&t=_wydb 7OtauxFk1LsgQ9Mxw.

The Court of Appeals failed to understand that in the Catholic Church, evangelizing is best done not by words, but by good acts that show the beauty and power of the Catholic faith.

B. *Charity Is an Indispensable Expression of the Church's Very Being*

The Court of Appeals failed to consider any of the great volumes of Catholic social teaching, including the Compendium of the Social Doctrine of the Church and papal teachings, on the topic of charitable activities as the core mission of the Catholic Church and essential to the Catholic religion. See, e.g., Pontifical Council for Justice and Peace, *Compendium of the Social* ***10** *Doctrine of the Church*, ¶¶ 66-67, 184, 208, 581 (2004). Catholic social doctrine is rooted in the teachings of Jesus Christ. In the Gospel of St. Matthew, Catholics are taught that serving others is a requirement of the faith:

> Whoever wants to be a leader among you must be your servant, and whoever wants to be first among you must become your slave. For even the Son of Man came not to be served but to serve others and to give his life as a ransom for many.

Matthew 20:25-28. In addition to serving others generally, helping persons in need is foundational to the Catholic faith: "For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in." *Id.* at 25:35.

In his papal encyclical *Deus Caritas Est* (God is Love), Pope Benedict XVI wrote:
Thus far, two essential facts have emerged from our reflections:

a) The Church's deepest nature is expressed in her three-fold responsibility: of proclaiming the word of God *(kerygma-martyria)*, celebrating the sacraments *(leitourgia)*, and exercising the ministry of charity *(diakonia)*. These duties presuppose each other and are inseparable. For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being.

b) The Church is God's family in the world. In this family no one ought to go without the necessities of life. Yet at the same time *caritas-agape* extends beyond the frontiers of the Church. The parable of the Good Samaritan remains as a standard which imposes universal love towards the needy whom we encounter "by chance" (cf. *Lk* 10:31), whoever they may be. Without in any way detracting from this commandment of universal love, the Church also has a specific responsibility: within the ecclesial family no member should suffer through being in need.

Pope Benedict XVI, *Deus Caritas Est*, ¶ 25 (2005) (citations omitted). In a subsequent encyclical, *Caritas in Veritate*, Pope Benedict XVI wrote:

> ***11** Charity is at the heart of the Church's social doctrine. Every responsibility and every commitment spelt out by that doctrine is derived from charity which, according to the teaching of Jesus, is the synthesis of the entire Law (cf. Mt 22:3640). It gives real substance to the personal relationship with God and with neighbour; it is the principle not only of micro-relationships (with friends, with family members or within small groups) but also of macro-relationships (social, economic and political ones). For the Church, instructed by the Gospel, charity is everything because, as Saint John teaches (cf. 1 Jn 4:8, 16) and as I recalled in my first, "God is love" (*Deus Caritas Est): everything has its origin in God's love, everything is shaped by it, everything is directed towards it*. Love is God's greatest gift to humanity, it is his promise and our hope.

Pope Benedict XVI, *Caritas in Veritate*, ¶ 2 (2009) (emphasis in the original).

The teachings of Pope Benedict establish that: (1) exercising the ministry of charity is an essential element of the Catholic Church's three-fold responsibility; (2) charity is "an indispensable expression of [the Church's] very being;" (3) the Church has a specific responsibility to help those who are suffering; and (4) charity is "at the heart of the Church's social doctrine." Therefore, it is impossible to separate the Church's works of charity from the essence of the Catholic Church. All such charitable works are carried out for religious purposes.

In addition to papal edicts, the Church has developed an entire body of religious law contained in the Code of Canon Law, which is the fundamental body of ecclesiastical laws for the Church and which further reflects the Catholic command for charity. "The Church engages not only in divine worship but also in apostolic and charitable works. These vary according to the conditions of time and place but along with word and sacrament are constitutive of the mission of the Church and are to be supported by all." Coriden, J. A., *et al., The Code of Canon Law: A Text and Commentary*, 156 (1985).

***12** Jesus taught the Corporal Works of Mercy, the "charitable actions by which we help our neighbors in their bodily needs." United States Conference of Bishops, *The Corporal Works of Mercy*, www.usccb.org/beliefs-and- *teachings/how-we-teach/new-evangelization/jubilee-of-mercy/the-corporal-works-of-mercy*. Among the Corporal Works of Mercy are the mandates from Jesus to feed the hungry, give drink to the thirsty, shelter the homeless, and support the poor. The Court of Appeals is correct that secular organizations also do these things; however, that does not change the fact that Catholic Charities members do them as a requirement of the Catholic faith and as an integral part of the Church's evangelization.

In short, the charitable works of the Catholic Church are fundamental to and inseparable from the core of the Catholic faith. Overseen by our Bishops, they are, in all respects, carried out for "religious purposes." Wis. Stat. § 108.02(15)(h)2. Charitable works in the Catholic tradition are not merely examples of faith; they are the essence of the faith.

II. *CATHOLIC CHARITIES ARE THE CHARITABLE ARM OF THE CATHOLIC CHURCH*

The Church's charitable organizations, on the other hand, constitute an opus proprium, a task agreeable to her, in which she does not cooperate collaterally, but acts as a subject with direct responsibility, doing what corresponds to her nature.

Deus Caritas Est, ¶ 29

The Church exercises its "direct responsibility" to do charitable work through an international network of charitable organizations under the umbrella name *Caritas Internationalis*. In the United States, these organizations are known as Catholic Charities. CCUSA is a member of *Caritas Internationalis* ("*Caritas* "), the pontifical charitable entity located in ***13** the Vatican and under the jurisdiction of the Holy See. *Caritas'* vision statement provides:
Caritas Internationalis is at the heart of the Church's mission.

Its member organizations link together in a confederation to serve the world's poor, vulnerable, dispossessed and marginalized. Caritas is inspired by Scripture, Catholic Social Teaching and by the experiences and hopes of people who are disadvantaged and living in poverty.

We work with people of all faiths and those who have none.

Caritas, Our Vision, www.caritas.org/who-we-are/vision.

The purpose of these organizations is not to attempt to compel people who are suffering to join the Catholic faith, as the Court of Appeals would require, but rather to serve people living in poverty, in vulnerable populations, and in need - terms the Church defines broadly. They provide help and hope to all suffering persons regardless of those persons' faith.

In a recent address to the General Assembly of *Caritas*, Pope Francis stated that

> [t]he identity of *Caritas Internationalis* depends directly on the mission it has received. What distinguishes it from other agencies working in the social sphere is its ecclesial vocation. And what specifies its service within the Church, compared to many other ecclesial associations and institutions devoted to charity, is its task of assisting and supporting the Bishops in their exercise of pastoral *caritas*

Address of His Holiness Pope Francis to the Participants in the General Assembly of *Caritas Internationalis*, Clementine Hall (May 11, 2023). In his ***14** *motu proprio*[2] *On the Service of Charity*, Pope Benedict XVI established and decreed:

In addition to observing the canonical legislation, the collective charitable initiatives to which this *Mo tu Proprio* refers are required to follow Catholic principles in their activity and they may not accept commitments which could in any way affect the observance of those principles.
... [Any] agency [of the Church] has the duty to inform the Bishops of other Dioceses where it operates and to respect the guidelines for the activities of the various charitable agencies present in those Dioceses.

It is the responsibility of the diocesan Bishop to ensure that in the activities and management of these agencies the norms of the Church's universal and particular law are respected, as well as the intentions of the faithful who made donations or bequests for these specific purposes [ ].

The Bishop is to encourage in every parish of his territory the creation of a local *Caritas* service or a similar body.

Pope Benedict XVI, *On the Service of Charity*, Articles 1, 3-4, 9 (2012) (citations omitted).

Each Catholic Charities agency is a separate legal entity under the auspices of the Catholic bishop in the diocese where the agency is located. The agencies serve as the charitable arm of the bishop and are integral to the work and service of the bishop to the people of his diocese. Suggesting otherwise, as the Court of Appeals opinion does, impermissibly substitutes the Court's interpretation of the Catholic faith for that of its Popes and Bishops.

As a matter of Church law, America's Bishops are responsible for creating a Catholic Charities (*Caritas)* agency in their diocese, requiring the agency to ***15** follow Catholic Social Doctrine and Church guidelines including those regarding charity, overseeing the activities of the agency, and "ensur[ing] that in the activities and management of these agencies, the norms of the Church's universal and particular law are respected." Catholic Charities agencies and their activities are inextricably tied to the Bishops' role and therefore are inherently and necessarily religious activities.

CONCLUSION

For the reasons stated, the decision of the Court of Appeal should be overturned.

Dated: July 14, 2023
Respectfully submitted,

Electronically Signed By

/s/ Jonathan Judge

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Footnotes

1 The Court of Appeals used as a basis for its decision denying the applicability of the "religious purposes" exemption the fact that Petitioners' funding "comes almost entirely from government contracts or private companies, not from the Diocese of Superior." Opinion at ¶ 58. Nationally, approximately 35-40% of Catholic Charities' funding comes from local, state, and federal government contracts. Government at all levels in the United States recognizes that Catholic Charities agencies are better suited than government to provide essential social services to people who are suffering and in need. If Petitioners followed the Court of Appeals' apparent criteria for the religious purposes exemption, such as requiring recipients of their social services to participate in religious training or disseminating religious materials to the people they serve (Opinion at ¶ 58), then they would violate state and federal laws regarding the use of government funds and would likely lose those funds. *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (plurality opinion).

2 A *motu proprio* is a legal document issued by a pope under his personal authority to the Roman Catholic Church. A *motu proprio* has the effect of a binding law in the Church.

2023 WL 4684162 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc. and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
July 13, 2023.

Circuit Court Case No. 2019 CV 324
On Appeal from the Court of Appeals Reversing the Circuit Court of Douglas County Honorable Kelly J. Thimm, Presiding

Brief of Non-Parties the Minnesota-Wisconsin Baptist Convention, Lutheran Church-Missouri Synod, National Association of Evangelicals, American Islamic Congress, the Church of Jesus Christ of Latter-Day Saints, General Council on Finance and Administration of the United Methodist Church, the Ethics and Religious Liberty Commission & Islam and Religious Freedom Action Team as Amici Curiae

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* Application to appear *pro hac vice* forthcoming

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*1 *INTRODUCTION*

As World War II raged, placing patriotism at a premium, the U.S. Supreme Court rejected a state requirement that children recite the Pledge of Allegiance. The Court observed: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in ... religion." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet that is what the Wisconsin Labor and Industry Review Commission and the court of appeals attempted to do here, though by more subtle means.

They did so through an implausible interpretation of a Wisconsin law exempting from the state unemployment insurance program any "organization operated primarily for religious purposes," if that organization is "operated, supervised, controlled, or principally supported by a church or convention or association of churches." Wis. Stat. § 108.02(15)(h)2. The Commission and the appeals court determined that the Catholic Charities Bureau (and its sub-entities) are not "operated primarily for religious purposes." Petitioner's Appendix ("App.") at 17. The Commission found that these religious organizations "provide[] essentially secular services and engage[] in ***2** activities that are not religious per se." App. 99,108,116,124,132. The appeals court agreed, noting that the Bureau did not seek to spread the Catholic faith through its activities nor require that the people it serves be Catholic. App. 39-42. Yet Catholicism does not allow the faithful to serve only members of the faith or to proselytize nonmembers when serving them. Petitioner's Brief at 15 ("Pet.Br.").

The appeals court also relied on its determination that the Bureau and its sub-entities' "motives and activities [are] separate from those of the church" since they "are structured as separate corporations." App. 42. Yet the Bureau was created by the Diocese of Superior to be its social ministry arm to carry out the Catholic religious mandate to serve the poor and disadvantaged, App. 177,183, and is under continual control by the Diocese, Pet. Br. 16-17.

By imposing the state's view of what it means to be religious, based on organizational structure and the who and how of charitable service, the Commission and the appeals court are prescribing a single form of religious orthodoxy in the context of the state unemployment law. That violates the U.S. Constitution's Establishment and Free Exercise Clauses, together with the well-recognized "church autonomy doctrine" that is grounded in both Clauses.

*3 ARGUMENT

I. A Ruling Against the Catholic Charities Bureau Would Undermine Religious Organizations' Ability to Carry Out their Religious Missions and Live their Faith.

Faulting the Catholic Charities Bureau for not being sufficiently religious because its activities serve the poor of *all* faiths puts the religious missions of many faiths in jeopardy. Most faiths believe that their religion requires them to do things for religious reasons that may not seem overtly religious. And few limit religious charity to those of their own faith. Likewise, many faiths avoid mixing charity with proselytizing.

Yet the Commission and the court of appeals adopted a cramped notion of being religious - one not found in many of Wisconsin's religions. Christianity is one example: The New Testament, defines "[p]ure" and "undefiled" "religion" to include "visit[ing] the fatherless and widows in their affliction." James 1:27 (KJV). Yes, secular social workers can also visit orphans and widows and assist them in their needs, but for Christians, this is the very essence of religion and is done out of religious faith.

Judaism too has long required almsgiving and charitable behavior toward the less fortunate, promising blessings to those who ***4** do. [1] As has Islam - its fourth pillar is giving alms to the poor. [2] In fact, nearly all of the world's major religions, most of which are to be found in Wisconsin, have similar beliefs. [3] These faiths do not require the faithful to help only their own, but rather require the faithful to treat all as their brothers or sisters, regardless of belief. And how much better is the world because religions generally do *not* believe that the less fortunate are unworthy of help if they believe differently than the helper.

To carry out this religious mission of caring for the less fortunate of any faith, or none at all, the Diocese created an entity - the Catholic Charities Bureau. The Diocese could have created a Catholic Missionary Bureau to facilitate proselytizing, or a Catholic Printing Bureau to publish Catholic religious materials. That the Diocese created a separate arm that it controls to assist it in fulfilling ***5** a specific religious mission does not make the activities of that arm any less religious. That would make no more sense than arguing that, because the Department of Justice exercises only a portion of the President's executive power, it cannot be considered as exercising "executive" functions at all. So too here: Whether the Diocese undertakes these religious activities itself or creates and supervises another entity to do so does not change the nature and purpose of the activity.

Moreover, by punishing the Catholic Church for choosing this organizational form to carry out this specific charitable religious mission, the Commission and the court of appeals threaten the ability of *all* religious organizations in Wisconsin to fulfill the mandates of their faith in the way they see as most beneficial. After all, specialization is common in our society. Why shouldn't religious organizations be able to practice their faith through the organizational structure they see as best suited to the religious task at hand? The state certainly does so, as the existence of the two main state actors in this case - the Commission and the court of appeals - attest.

If the court of appeals' decision is affirmed, religious organizations in Wisconsin will have to eschew creating, delegating ***6** to, and supervising subject-specific entities to carry out their religious missions, and instead try to do everything themselves as a diocese or similar ecclesiastical body. That undermines their ability to fulfill all the mandates of their faith to the best of their ability, forcing upon them second-or third-best organizational structures. Religious organizations would also be forced, under the court of appeals' reasoning, to minister only to those who share their faith or to those they seek to proselytize. Such a stingy notion of religion does no one any good - not the faithful whose religion requires that they serve based on need rather than creed, and not the needy who are looking for a hand up without the strings of conversion attached.

II. The First Amendment Protects All Forms of Religious Polity and All the Means By Which the Religious Carry Out Their Faith.

This practical point dovetails with an important constitutional point: The First Amendment's protections do not ebb and flow based on the organizational form of a religious polity. *See* *Crowder v. Southern Baptist Convention*, 828 F.2d 718, 726-27 (11th Cir. 1987) (applying the First Amendment's church autonomy doctrine and rejecting the "argument that [because] the [Southern

Baptist Convention] has a congregational, rather than a hierarchical, form of church governance," the doctrine does not apply). *See also* ***7** *Burgess* v. *Rock Creek Baptist Church*, 734 F. Supp. 30, 35 n.2 (D.D.C. 1990) ("[T]he Court can discern no justification for refusing to apply the First Amendment analysis and reasoning of Supreme Court and lower federal court case law involving hierarchical churches to this case" where the defendant "is a congregational church"). In fact, numerous valid forms of religious polity exist, and government recognizing some but not others amounts to religious discrimination in violation of the First Amendment.

A. There Exist Numerous Valid Forms of Religious Polity.

Nearly as varied as doctrine among religious organizations are the organizational forms they take. For instance, some employ a more congregational structure, such as most Jewish, Muslim, Buddhist, Hindu, and Sikh congregations. Others form a more hierarchical structure, such the Catholic Church and The Church of Jesus Christ of Latter-day Saints. Of course, many religious organizations (e.g., Presbyterians) are not purely one or the other, existing on a continuum. Furthermore, within these organizational forms, religious organizations will employ a plethora of sub-entities to conduct their religious missions, as the Diocese of Superior did here.

***8** But, according to the Commission and the court of appeals, a polity that allows such delegation of religious functions means that the religious organization forfeits its constitutional rights: If the Pope himself gives a meal to a homeless person, that is religious, but if the *Catholic* Charities Bureau does so under the Pope's command, that is not. Likewise, if a Catholic organization serves Catholics, that is religious, but if it serves non-Catholics, that is not. And if one simultaneously performs *two* religious activities - serving the poor not of one's faith while proselytizing them - that is religious. But if one does only one of those faith-mandated activities at a time, that is not religious.

Such distinctions make little constitutional sense. And they do not make religious sense for millions of Americans of varied faiths. [4]

***9** B. To Recognize One Organizational Form or Manner of Practicing One's Religion as Worthy of Constitutional Protection Over Others Would Violate the First Amendment

A decision - like that of the Commission and the court of appeals below - recognizing some organizational forms or manners of practicing religion over others violates the Establishment Clause, the Free Exercise Clause, and the "church autonomy doctrine" that the U.S. Supreme Court has held to be grounded in both Clauses.

Establishment. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The U.S. Supreme Court faced such a scenario in *Larson* with a statute that made "explicit and deliberate distinctions between different religious organizations." *Id.* at 246 n. 23. Specifically, the Minnesota statute only required religious organizations to register and report when they solicited more than fifty percent of their funds from nonmembers of the faith. *Id.* at 230. The Court found such a distinction "discriminates against such organizations in violation of the Establishment Clause." *Id.*

That unconstitutional statute is sibling to the situation here. The Commission and court of appeals violated the Establishment ***10** Clause by preferring religious denominations that carry out their religious mission directly rather than through sub-entities that the denomination creates and controls. And these state actors violated the clause by preferring religious polities that choose to serve only members of their faith rather than the broader community or that also seek to convert nonmembers they serve. But those are choices of church polity that religious organizations are free to make according to the dictates of their theology, without fault or favor from the state. To allow Wisconsin to play favorites among denominations is the very stuff of which church establishments are made. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2135-36, 2160-2167, 2176-78 (2003) (noting that established churches

in England and in the American colonies during the founding era required certain religious tenets of all faiths, coerced conformity of practice and belief, and limited certain public benefits and opportunities to those in approved churches).

Free Exercise. Closely related to the Establishment Clause violation is a violation of the Free Exercise Clause. "This constitutional prohibition of denominational preferences is ***11** inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245. As explained in Federalist No. 51, "Madison's vision - freedom for all religion being guaranteed by free competition between religions - naturally assumed that every denomination would be equally at liberty to exercise ... its beliefs." *Id.* Yet "such equality would be impossible in an atmosphere of official denominational preference." *Id.*

For the state actors in this case to officially prefer denominations that are organized a certain way, serve only their own people, or serve them in a certain way (while proselytizing), discriminates against those who do not conform. In other words, Wisconsin is telling the Catholic Church and all religious organizations in the state that they must exercise their distinct faiths in government-approved ways to qualify for the unemployment law exemption. This pressures the church to conform its faith to the law.

The Commission argues that the statute is neutral and generally applicable. Response Brief at 35. But facial neutrality is not enough. The Commission and court of appeals have discriminated against the Catholic Charities Bureau based on religion and created a system of individualized exemptions by importing a standardless ***12** conception of what counts as a valid religious purpose. Under the Free Exercise Clause, a law with those features must satisfy strict scrutiny. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

In sum, "the exclusion of [the Catholic Charities Bureau] from a public benefit for which it is otherwise qualified, solely because [of its organizational structure and breadth and style of service], is odious to our Constitution ..., and cannot stand." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017).

Church Autonomy. The decisions at issue here also violate the "church autonomy doctrine" recognized by the U.S. Supreme Court. As the Court put it in a recent case, "[t]he First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (internal quotation marks omitted). That protection provides "a spirit of freedom for religious organizations, an independence from secular control or manipulation," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 186 (2012).

***13** This constitutional protection flows from both the Free Exercise and Establishment Clauses. *See Our Lady*, 140 S. Ct. at 2060. Both clauses are implicated because "[s]tate interference in that sphere [of ecclesiastical decision-making] would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id.*

Here, allowing the Commission, aided by the court of appeals, to penalize the Catholic Church in Wisconsin because of the organizational form it chooses to carry out its religious missions, as well as how and to whom that religious mission can be conducted, violates the church autonomy doctrine. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341-42 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to ... run their own institutions") (internal quotation marks omitted). In short, the Commission and the appeals court committed the "error of [an indirect] intrusion into a religious thicket," trampling the First Amendment "power (of religious bodies) to decide for themselves, free from state interference, matters of ***14** church government as well as those of faith and doctrine." *Serbian East Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 719, 721-22 (1976) (internal quotation marks omitted).

That unconstitutional intrusion is no less harmful when it comes in the form of withholding an otherwise available exemption as compared to a more direct invasion. The Constitution forbids either form of incursion. [5]

*15 CONCLUSION

In rejecting the Bureau's application for an exemption, the Commission and the court of appeals have violated the established constitutional rule that "no official, high or petty, can prescribe what shall be orthodox in ... religion." *Barnette*, 319 U.S. at 642. For that and the other reasons explained above, *amici* respectfully submit that court of appeals' decision should be reversed, and the circuit court's decision affirmed.

Dated this 21st day of June, 2023.

<<signature>>

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*Application to appear *pro hac vice* forthcoming

Footnotes

1 *See, e.g.*, Isaiah 1:17 (NIV) ("Learn to do right; seek justice. Defend the oppressed. Take up the cause of the fatherless; plead the case of the widow.").

2 *See* Quran 2:274 ("Those who give, out of their own possessions, by night and by day, in private and in public will have their reward with their Lord."); *id.* 3:92 ("You will never attain righteousness until you spend in charity from that what you love.").

3 For example, in Sikhism and Hinduism, *Seva* or *Sewa* refers to "selfless service" and this involves "reaching out to serve and uplift all of humanity as an expression or devotion to the Creator." "Seva," SikhiWiki.org. In Buddhism, *Dana* involves giving, such as food, clothing, medicine, and money, and can lead to one of the "perfections." *See generally* DANA: THE PRACTICE OF GIVING (ed. Bhikkhu Bodhi, 1995).

4 In the context of the Religious Land Use and Institutionalized Persons Act (RLUIPA), a court earlier this month faced the argument that a faith-based organization's "food distribution activities are part of its religious exercise." *Micahs Way v. City of Santa Ana*, Case No. 8:23-cv-00183-DOC-KES, at 6 (C.D. Cal. June 8, 2023) (Order Denying Motion to Dismiss). The government entity in that case opposing that argument contended that such activities are "purely administrative and ... not religious in nature." *Id.* The court found such an argument not persuasive because the religious organization "points both to scripture and a general religious duty to perform food distribution as evidence that the activity is religious exercise." *Id.* at 6-7.

5 The court of appeals also found the Catholic Charities Bureau activity did not have a religious purpose because the Bureau did not "require their employees, ... or board members to be of the Catholic faith." App. 41. In a related context, the U.S. Supreme Court rejected a co-religionist requirement for a religious schoolteacher to be considered a minister under the First Amendment's ministerial exception - "insisting on this as a necessary condition would create a host of problems." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2068 (2020). That's because "determining whether a person is a 'coreligionist' will not always be easy," and "[d]eciding such questions would risk judicial entanglement in religious issues." *Id.* at 2068-69. So too here. How exactly would the Commission or a court determine whether the Catholic Church is serving someone who is sufficiently Catholic, or is sufficiently proselytizing to non-Catholics? That would require theological determinations wholly beyond the competence of a judge or bureaucrat, which is why that is forbidden territory for state actors under the First Amendment.

2023 WL 4684153 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
July 12, 2023.

Nonparty Brief of Maranatha Baptist University, Maranatha Baptist Academy, Concordia University Wisconsin, the Wisconsin Family Council, and the Wisconsin Association of Christian Schools

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*5 STATEMENT OF INTEREST

Amici are faith-based non-profit organizations that serve their faith communities and their broader communities through social services, primarily education. To embody their religious missions, they prefer or require employees to share their faith or to live in line with their community covenants. They embrace the American heritage of religious liberty as a blessing that allows them to fully live out their identity and purpose.

Amici are therefore generally interested in a robust defense of religious liberty in Wisconsin, including for faith-based employers. But they hold a particular interest in this case because, unlike Petitioners, they come from faith traditions that are not hierarchical like the Catholic Church. In other words, their different faith communities are not organized on a top-down, integrated model. Instead, they operate independent, autonomous, or affiliated models where each entity enjoys freedom to pursue its own purpose.

Amici urge this Court to interpret Wis. Stat. § 108.02(15)(h)2. to cover all religiously affiliated nonprofits which profess a sincerely held religious belief that their activities are primarily motivated by religious faith. This interpretation comports with § 108.02(15)(h)2.'s plain meaning and with the First Amendment.

The following is a listing of each Amicus which joins this brief, along with a brief statement of their specific interest in this case:

Maranatha Baptist University is a non-profit, private educational institution in Watertown, Wisconsin, serving its independent Baptist constituency. Maranatha currently qualifies for § 108.02(15)(h)2.'s exemption, a status the Court of Appeals' decision could affect.

***6** *Maranatha Baptist Academy* is a non-profit high school in Watertown, Wisconsin, serving its independent Baptist constituency. Maranatha currently qualifies for § 108.02(15)(h)2.'s exemption, a status the Court of Appeals' decision could affect.

Concordia University Wisconsin is a higher education community in Mequon, Wisconsin, committed to helping students develop in mind, body, and spirit for service to Christ in the Church and the world. Concordia is affiliated with The Lutheran Church - Missouri Synod. Its status under § 108.02(15)(h)2. could be affected by the Court of Appeals' decision.

Wisconsin Association of Christian Schools was founded in 1977 to promote Christian education in Wisconsin. It has seventeen member schools, several of which may be impacted be the Court of Appeals' interpretation of § 108.02(15)(h)2. in this case.

Wisconsin Family Council is a 501(c)(3) nonprofit organization with a church network connecting pastors and other ministry leaders from a variety of faith backgrounds to policy issues. Many of the churches and their connected ministries in its constituency are covered by the § 108.02(15)(h)2.'s exemption, a status the court of appeals' decision could affect.

*7 INTRODUCTION

Amici ask the Court to reject the Court of Appeals' test and instead adopt a test that uses neutral principles to determine whether that organization is primarily operated for religious purposes. Amici advance three arguments in support. First, Amici agree with Petitioners that the plain text of Wis. Stat. § 108.02(15)(h)2.'s permits only an inquiry an organization's motivations for

operating, not the nature of its activities. Second, Amici agree with DWD that it is an organization's *own* religious purposes which are relevant under § 108.02(15)(h)2., not that of their affiliated church body. Third, Amici fear that the Court of Appeals' test - which requires a government determination of what qualifies as "religious purpose" (versus a secular purpose) - violates this Court's recent directive against excessive entanglement, as stated in *St. Augustine School v. Taylor*, 2021 WI 70, 398 Wis. 2d 92, 961 N.W.2d 635. They believe neutral principles answers the question presented while maintaining compatibility with precedent and constitutional principles.

ARGUMENT

I. AN ORGANIZATION IS "OPERATED PRIMARILY FOR RELIGIOUS PURPOSES" IF ITS OWN MOTIVATION FOR OPERATING IS PRIMARILY RELIGIOUS.

Section 108.02(15)(h)2. exempts from unemployment insurance taxes those who are employed by "an organization *operated primarily for religious purposes* and operated, supervised, controlled, or principally supported by a church or convention or association of churches." (Emphasis added.) Here, the Court is asked to determine when an organization is "operated primarily for religious purposes."

***8** To begin, Amici disagree with DWD's position that § 108.02(15)(h)2.'s exemption should be strictly construed. (Resp. Br. 17.) This is the generally applicable standard of construction, but not here. "[T]hat rule of strict construction is superseded in instances where there is a strong possibility that the statute in question infringes upon a party's right to the free exercise of religion." *Verdecchia v. Unemployment Comp. Bd. of Rev.*, 657 A.2d 1341, 1345 (Pa. Commw. Ct. 1995) (cleaned up) (declining to strictly construe a Pennsylvania statute substantially identical to § 108.02(15)(h)2.). This principle fits with the determination of this Court and the U.S. Supreme Court to show a "benevolent neutrality" toward religious liberty, to allow some "play in the joints" to avoid entangling church and state. *Jackson v. Benson*, 218 Wis. 2d 835, 861 n.8, 578 N.W. 2d 602 (1998) (quoting *Walz v. Tax Comm.*, 397 U.S. 664, 668-69 (1970)).

Turning to the statute's text, it plainly describes when § 108.02(15)(h)2.'s exemption applies. An organization is "operated primarily for religious purposes" when its primary "purpose" - i.e., motivation - is religious in nature. The statute does not ask whether the organization's "activities" meet certain indicia of religious activity, such as holding traditional worship services or evangelizing. Indeed, many religious organizations perform functions which may at first appear secular but are in fact part and parcel of that organization's exercise of its religious faith. Faith-based schools are a prime (and uncontroversial) example.

The Court of Appeals' interpretation of § 108.02(15)(h)2. is deeply concerning to Amici because it creates the possibility that religious schools may lose the exempt status they have long enjoyed if their curriculum is ***9** deemed not sufficiently "religious" by a government official. Although their instruction often focuses primarily on secular subjects, religiously affiliated schools are exempt under § 108.02(15)(h)2. because the ***motivation*** behind their existence is religious, regardless of what subjects are actually taught in the classroom. [1] It is uncontroversial that religiously affiliated schools are often "operated primarily for religious purposes." [2]

The Court of Appeals' test casts doubt on that rule. Rather than look at an organization's motives for operating, it instead adopted a test that analyzes whether an organization's ***activities*** - regardless of their motivations - are unlike other religious activities like traditional worship services and evangelizing. *Cath. Charities Bureau v. LIRC*, 2023 WI App 12, ¶40, 406 Wis. 2d 586, 987 N.W.2d 778. In doing so, the Court of Appeals adopted a definition of religious activities from the Seventh Circuit's outdated decision in *United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981). This Court has said many times, "It is a cardinal maxim of statutory construction that courts should not add words to a statute to give it a certain meaning." *State v. Hinkle*, 2019 WI 96, ¶24, 389 Wis. 2d 1, 935 N.W.2d 271. Yet this is precisely what the Court of Appeals has done in this instance, amending the "religious purpose" requirement to read "an organization operated primarily for religious ***10** purposes *and undertaking*

primarily religious activities." The statute has no justification for an analysis of the organization's "activities," and the Court of Appeals erred by writing one in where it did not exist.

DWD responds with its own plain meaning argument: that the "operated primarily for religious purposes" is redundant unless it has a robust "activities" component. But that is not so. A church convention or association of churches could sponsor any number of non-profit organizations that lack a religious purpose. It could start a nonprofit benefits fund to provide retirement security or health insurance to church employees. It could sponsor a nonsectarian social service ministry, like a community food bank. It could also use a nonprofit entity to hold property, generate unrelated business income, or make investments, like the Diocese of Madison's Holy Name Heights apartment complex (in the renovated diocesan seminary building). Holding property and generating investment income may be nonprofit purposes, but they are not religious purposes, and so would not qualify under the statute.

II. THE COURT MUST EMPLOY NEUTRAL PRINCIPLES TO DETERMINE WHETHER AN ORGANIZATION IS OPERATED PRIMARILY FOR RELIGIOUS PURPOSES.

The Court of Appeals' test suffers from a deeper flaw - one of a constitutional dimension. By adopting *Dykema's* definition of what qualifies as "religious," the Court of Appeals directed courts to undertake the fraught inquiry of what activities are "religious" rather than secular. Neutral principles should govern this inquiry, as required by *St. Augustine*, 398 Wis. 2d 92. Applying neutral principles, a court must accept an organization's sincerely held religious belief that its purposes are religious. If a religious school sincerely believes it performs a religious function, then it does. It is not the ***11** place of a court to second guess whether, under a particular belief system, education is a religious or secular endeavor.

This Court typically employs neutral principles when dealing with religious organizations. *See Wis. Conf. Bd. of Trs. Of the United Methodist Church v. Culver*, 2001 WI 55, ¶21, 243 Wis. 2d 494, 627 N.W.2d 469; *Holy Trinity Comm. Sch., Inc. v. Kahl*, 82 Wis. 2d 139, 262 N.W.2d 210 (1978); *St. Augustine*, 398 Wis. 2d 92, ¶44. "Neutral principles of law" means answering the factual question presented - Is this organization operated primarily for religious purposes? - by resorting to the types of resources that courts read all the time: "the language of the deeds, the terms of the local church charters ... and the provisions in the constitution of the general church concerning the ownership and control of church property." *Culver*, 243 Wis. 2d 494, ¶21 (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)).

In most instances, a look at these governing documents should be sufficient to answer the question of whether an organization has a primarily religious purpose. However, there may be some instances where DWD reasonably questions whether an organization's primary purpose is in fact the "operating" purpose today. In such instance, neutral principles permit an evaluation of contemporaneous documents, such as "professions that are published on its public website," *St. Augustine*, 398 Wis. 2d 92, ¶48, or documents like a school's "course catalogue, mission statement, [or] student bulletin," *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009).

Beyond comporting with precedent, employing neutral principles is preferable to the Court of Appeals' test for three reasons.

*12 A. Neutral principles avoid constitutional problems.

First, neutral principles avoid the constitutional problems created by the Court of Appeals' test. This Court correctly said in *St. Augustine*, "Excessive entanglement occurs 'if a court is required to interpret church law, policies, or practices.' Thus, the First Amendment prohibits such an inquiry.'" 398 Wis. 2d 92, ¶43. Indeed, multiple times in *St. Augustine* the Court made clear it was unconstitutional for government officials to undertake "investigation and surveillance of a school's religious practices." *Id.*, ¶47; *id.*, ¶49 ("As long as the Superintendent considers the school's professions and not its practices, the Superintendent remains on the correct side of the line.").

The Court of Appeals' test requires exactly such an investigation and surveillance as to an organization's practices. Rather than looking at the face of corporate documents, DWD will have to investigate whether the organization undertakes "corporate worship services" with "sacraments" and "liturgical rituals," "preaching ministry," "evangelical outreach to the unchurched," "missionary activity," "pastoral counseling," "customary church ceremonies," and "education in the doctrine and discipline of the church." *Cath. Charities Bureau*, 406 Wis. 2d 586, ¶39. How is such an evaluation anything other than "an investigation or surveillance with respect to the [non-profit's] religious ... practices"? *St. Augustine*, 398 Wis. 2d 92, ¶5. DWD will necessarily have to investigate the non-profit's practices before determining its exemption eligibility, an intensive inquiry *St. Augustine* rightly rejects.

The Court of Appeals' test directs DWD to compile a list of the organization's activities and then adjudicate whether those activities are ***13** "religious," based on how similar those activities are to the ones listed in the Seventh Circuit's *Dykema* decision. A compare-and-contrast test like this is an invitation to inconsistent exercises of individual discretion, as DWD officials weigh how much religious activity is enough to count as religiously motivated, or how many of the Court of Appeals' boxes must be checked. It also fails to appreciate that different religious cultures may have different conceptions of what is religious and what is not, or what activities are required by their faith.

Beyond an investigation of the church's activities, the Court of Appeals also requires a determination as to the church's doctrines and beliefs. Does a DWD official believe that education or health care is required by an organization's faith (or the faith of its sponsoring church), or are its charitable undertakings just a nice thing it does? Employing neutral principles - as the Court's precedents require - allows DWD and courts to avoid the messy business of deciding whether a faith's beliefs include charity or education or social services as an essential component of their doctrine. No church should have to provide a list of Bible verses about visiting the imprisoned or feeding the widow before qualifying for an exemption (not that such a ministry would qualify under the *Dykema* test anyway). Neutral principles allow the nonprofit to answer that question for itself. If its professions of faith, such as in governing documents, assert that the organization is operated for a religious purpose, that is sufficient.

To Amici's particular interest, education, particularly in secular subjects, may at first appear to be a secular endeavor, but for many, the choice to attend or send their children to faith-based schools, even for secular ***14** subjects, is a deeply religious one. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020) (demonstrating "the close connection that religious institutions draw between their central purpose and educating the young in the faith."). Likewise, for many religions, community service and charity are central components of living out one's faith. *See Kelly v. Methodist Hosp. of S. Cal.*, 22 Cal.4th 1108, 1122 (Cal. 2000) ("Health care is a social service that historically has been associated with religious groups, and plaintiff does not dispute that Hospital's founders were motivated by a sincerely held belief that healing the sick serves to advance the religious principles of the Methodist faith."). It is unsurprising, therefore, that many churches affiliate with and support organizations whose primary purpose is to live out a spiritual obligation to serve their communities and provide what they believe to be religious services like education and charity.

What Amici are advocating is nothing more than what this Court already said in *St. Augustine*, adopting a previous holding from *Holy Trinity*: "We are obliged to accept the professions of the school and to accord them validity without further inquiry." 398 Wis. 2d 92, ¶47 (quoting *Holy Trinity*, 82 Wis. 2d at 150). As for schools, so also for other non-profits. The state should accept the public profession of a religious purpose without further inquiry. It is no more "for the government to decide 'who or what is Catholic"' than for the government to decide whether serving the poor is an integral part of the Catholic faith. Id., ¶35.

***15 B. A neutral principles test works for hierarchical and congregational faith groups alike.**

Second, to the particular interest of Amici, neutral principles ensure all Wisconsin faith communities have equal access to the statutory exemption. Petitioners devote considerable attention in their initial brief to an argument that whether § 108.02(15)(h)2. applies depends on the religious purposes of the organization's parent church, not the religious purposes of the organization itself. (Pet. Br. 30-31.) This test might protect an organization attached to a hierarchical denomination like the Catholic church,

but it doesn't work for a non-hierarchical faith tradition like those of Amici. This would lead to inconsistent application of § 108.02(15)(h)2. to different faith-based organizations with similar religious purposes.

Consider, for example, Amicus Maranatha Baptist University. Maranatha qualifies for the exemption because it is "principally supported by a church or convention or association of churches" *See* § 108.02(15)(h)2. Although Maranatha is affiliated with a faith community, it exercises independent control over its operations and objectives. Put simply, Maranatha operates itself. Thus, any analysis of whether Maranatha is "operated primarily for religious purposes" must turn on whether Maranatha operates ***itself*** primarily for religious purposes.

This arrangement is not uncommon among religious denominations outside the Catholic tradition. The law has long recognized a distinction between hierarchical and congregational church bodies, with hierarchical churches being controlled by their denominations and congregational church bodies being controlled independently. W. Cole Durham & Robert Smith, *Articles of Incorporation - Protecting Religious Polity*, 1 Religious ***16** Organizations and the Law § 10:11 (2022). And the First Amendment requires that its protections apply to both hierarchical and congregational churches alike. *Bruss v. Przybylo*, 895 N.E.2d 1102, 1123 (Ill. App. Ct. 2008) ("[A] congregational church, whatever its formality, enjoys equal protection under the first amendment with a hierarchical church."). [3]

Adopting the neutral test Amici advance addresses Petitioners' concerns, but without improperly excluding non-hierarchical faiths such as those in the Jewish, Protestant, and Muslim traditions. Applying neutral principles respects hierarchical churches' internal governance - they can command their subsidiaries to incorporate certain language in their corporate documents, or courts can consider "provisions in the constitution of the general church concerning the ownership and control" of affiliated entities. Meanwhile, neutral principles also respect non-hierarchical churches' internal arrangements by directing a court to the exempt organization's own documents, which it determines for itself without outside influence.

C. A neutral principles test works for minority and nontraditional religious communities.

Finally, neutral principles are most flexible in their protection of minority and non-traditional religious communities. "[T]he diverse citizenry of Wisconsin" holds a wide variety of "religious beliefs," a tradition of tolerance this Court has always respected. *State v. Miller*, 202 Wis. 2d 56, 65, 549 N.W.2d 235 (1996). Yet a test that is written solely for hierarchical ***17** churches ignores the many minority faiths that prefer a localized model, such as Jewish and Muslim communities. And it may be even less useful for unique and nontraditional faiths, which may have extremely small numbers of adherents and lack the traditional corporate structures that larger and more established church bodies often employ.

Even more problematic is the Court of Appeals' test, which is written with a particular cultural vision of what constitutes "religious" activities, reflecting a more-or-less exclusively traditional mainstream Christian vision for what counts as "religious." But not all non-traditional religions may exercise their faith in the same visible ways, while others may manifest their faith through a call to a particular type of charity or service. The Court of Appeals' test presumes that religious activities look like preaching and evangelism.

Adopting a complex, compare-and-contrast test administered by government officials invites an easier pass for traditional religions doing traditional religious things and a harder road for new, nontraditional, and minority religious that appear unfamiliar to the official at first glance. A neutral principles approach lets the organization define its mission and motivation for itself, without the imposition of an external or majoritarian cultural framework.

A nonprofit organization that (1) professes a sincerely held religious belief that community service a charity are religious activities and (2) is primarily operated to do that work, qualifies for § 108.02(15)(h)2.'s exemption. To answer whether an organization meets those two prongs, *St. Augustine* does not permit a more searching inquiry than a resort to neutral ***18** principles, *i.e.*, an objective evaluation of whether the organization sincerely believes that its primary purpose is religious, as evidenced by its governing public documents.

CONCLUSION

For the forgoing reasons, Amici respectfully urge the Court to adopt an interpretation of § 108.02(15)(h)2. that does not leave behind the religiously motivated nonprofits the exemption was written to cover. Amici also ask that the Court clarify that an organization's *own* religious motivations are relevant when analyzing whether a nonprofit is "operated primarily for religious purposes."

***19** Dated: July 11, 2023

Respectfully submitted,

Electronically Signed by Daniel R. Suhr

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Footnotes

1 The federal government has long counted religious schools as being operated primarily for religious purposes. *See, e.g.*, Unemployment Insurance Program Letter No. 28-87, U.S. Dept. of Labor (June 10, 1987) ("The second category of services exempt from the required coverage are those performed in the employ ***of religious schools and other entities*** ...." (emphasis added)).

2 *See also Conference Report on H.R. 2015, Balanced Budget Act of 1997*, 143 Cong. Rec. H6029-01, at 797 (1997) (noting that the federal version of § 108.02(15)(h)2. covers "employment in an elementary or secondary school operated primarily for religious purposes").

3 Moreover, as in the case of *St. Augustine* and *Holy Trinity*, even ministries that identify as Catholic may nevertheless operate independently from the hierarchy. *St. Augustine*, 398 Wis. 2d 92, ¶50, 83.

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2023 WL 4684138 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
June 21, 2023.

Non-Party Brief on behalf of the Freedom from Religion Foundation as Amicus Curiae in Support of Respondents

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***6** The Freedom From Religion Foundation submits this non-party brief in support of Respondents.

INTEREST OF *AMICUS CURIAE*

Amicus curiae Freedom From Religion Foundation (FFRF) is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded in Madison, Wisconsin in 1978 as a 501(c)(3) nonprofit, FFRF has over 41,000 members, including members in every state and the District of Columbia. FFRF has more than 1,700 members in Wisconsin. Its purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF ends hundreds of state-church entanglements each year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. FFRF, whose motto is "Freedom depends on freethinkers," works to uphold the values of the Enlightenment. As a secular organization that promotes freedom of conscience for those who do not practice religion, FFRF offers a unique viewpoint on erosion of civil rights and preferential treatment of religious organizations by the government.

*7 ARGUMENT

I. The employers' First Amendment claims fail.

This case involves five nonprofit organizations that provide secular services ("the employers"). They seek to remove protections from their workers by exempting themselves from Wisconsin's unemployment program. The employers claim that all that is required for an exemption is a religious motivation for their work. The First Amendment claims advanced by the employers have been considered and rejected in numerous prior cases by the Supreme Court and Seventh Circuit, and by this Court in the analogous context of property tax exemptions. Moreover, even if the employers' claims were correct, the remedy they seek is inappropriate.

A. The First Amendment safeguards from government involvement in sacred matters, not from fact-based inquiries into an organization's activities.

One of the core rationales underlying the First Amendment is preventing "a fusion of government and religious functions." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 222 (1963)). The First Amendment prohibition on excessive entanglement in part seeks to safeguard religious organizations from "being limited by ... governmental intrusion into *sacred matters*." *See Aguilar v. Felton*, 473 U.S. 402, 410 (1985) (emphasis added); *cf. Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (declining to decide "not a ***8** church property dispute, but a religious dispute" because it would create substantial danger of entangling the state in "essentially religious controversies"). The "sacred matters" contemplated by the Supreme Court simply do not encompass fact-based, non-sacred regulatory inquiries, like those contemplated under Wis. Stat. § 108.02(15)(h)(2).

Government review of a religious organization's activities for the purposes of taxation or other regulatory concerns does not constitute excessive entanglement. For instance, in *Troy and Susan Alamo Foundation v. Secretary of Labor*, the Supreme Court considered whether the Fair Labor Standards Act (FLSA) - which required religious organizations to keep and disclose records "of ... persons employed ... [along with] their wages, [and] hours" - constituted excessive entanglement. 471 U.S. 290, 305 (1985). Such requirements, the Court found, "do not pose an intolerable risk of government entanglement with religion" *Id.* The Establishment Clause, it continued, "does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations. and the recordkeeping requirements of the [FLSA], while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs." *Id.*

Likewise, the Seventh Circuit considered the constitutionality of federal employment tax provisions compelling church and other nonprofit participation, holding that "there is no basis under either the Free Exercise Clause or the Establishment Clause for the argument that neutral, generally applicable, ***9** minimally intrusive tax laws (like the ones at issue here) cannot be applied to religious organizations." *U.S. v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000). The tax payment and withholding obligations imposed by federal laws, as well as the enforcement proceedings that could result from noncompliance, do not "require a constitutionally impermissible amount of government involvement in church affairs." *Id.* at 630. When a statute requires only "generally applicable administrative and record keeping requirements," it may be "imposed on religious organizations without violating the Establishment Clause." *Id.* at 631; *see also Jimmy Swaggart Ministries v. Bd. of Equalization of Ca.*, 493 U.S. 378, 394-97 (1990) (state sales and use tax); *Hernandez v. C.I.R.*, 490 U.S. 680, 695-98 (1994) (federal income tax); *S. Ridge Baptist Church v. Industrial Comm'n of Ohio*, 911 F.2d 1203, 1210 (6th Cir. 1990) (workers' compensation program); *Bethel Baptist Church v. U.S.*, 822 F.2d 1334, 1340-41 (3rd Cir. 1987) (social security tax). Even "substantial administrative burdens ... do not rise to a constitutionally significant level." *Jimmy Swaggart Ministries*, 493 U.S. at 392-97; *see also Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 76465 (1976) (finding no excessive entanglement where State conducted audits to ensure state grants to religious colleges were not used to teach religion).

If a religious organization claims a special unemployment exemption, a fact-based inquiry into its operations is constitutionally permissible. Under Wis. Stat. § 108.02(15)(h), that would entail a simple showing that an organization is performing religious functions. The Supreme Court itself has engaged in a fact-based ***10** review of the functions and employment status of employees when determining whether they qualify as "ministers." *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2067 (2020) (noting that *Hosanna-Tabor* did not establish a rigid test, but instead, "called on courts to take all relevant circumstances into account"); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012). A similarly minimal review of the secular activities of a nonprofit claiming an exemption from the Wisconsin unemployment program does not threaten to excessively entangle religion and government. None of the statutory requirements touch, let alone intrude, "into *sacred matters*." *See Aguilar*, 473 U.S. at 410 (emphasis added).

B. Review of the activities of religiously-affiliated organizations is common in a related area of law, property tax exemptions.

Wisconsin property tax exemptions provide a helpful framework for the review of an exemption request by a religious organization. In both circumstances a facial review of the actual activities of an organization seeking an exemption is both appropriate and constitutionally permissible.

In order to qualify for a property tax exemption in Wisconsin, religious or nonprofit organizations must: 1) own the property, and 2) use it exclusively for exempt purposes. It is not enough for a church to simply own a property, it must be "used exclusively" by the church. *See* Wis. Stat. § 70.11(4)(a). As the Wisconsin Supreme Court has made clear, "The use made of property determines whether it is subject to taxation or whether it is entitled to tax exemption." ***11** *State* v. *City of Madison*, 55 Wis. 2d 427, 433, 198 N.W.2d 615 (1972) (citing *Men's Halls Stores, Inc. v. Dane Cnty.*, 269 Wis. 84, 89, 69 N.W.2d 213 (1955); *Frank Lloyd Wright Found. V. Wy*, 267 Wis. 599, 605, 66 N.W.2d 642 (1954)).

Wisconsin courts have had little difficulty in ensuring that the property tax exemption statute is being appropriately applied to churches. In one of the original tax exemption cases in Wisconsin, the State Supreme Court determined that a vacant lot owned by a church was not tax exempt because it was not used for the legitimate purposes of the church and was not necessary for the convenience of church buildings. *See Green Bay & M. Canal Co.* **V**. *Outagamie Cnty.*, 76 Wis. 587, 45 N.W. 536 (1890). Similarly, a chapel and convent were not exempt from taxation once they were no longer used for their original purpose. *See Dominican Nuns* **V**. *La Crosse*, 142 Wis. 2d 577 (1987). In a more recent challenge, church property that included religious icons but lacked buildings was determined to be taxable. *St. Raphael's Congregation v. City of Madison*, 2017 WI App 85, 379 Wis. 2d 368, 906 N.W.2d 184.

The property tax statute requires assessors, and ultimately courts, to review the use of religious property to ensure that it is actually being used for exempt purposes. This regulatory process dates back to at least the late 1800's and has never been held to violate the First Amendment or rights of Wisconsin churches. A similar review of an organization's activities under the unemployment exemption statute is both appropriate and constitutionally permissible.

***12 C. Even if the unemployment exemption statute were flawed, the employers are not entitled to the remedy they seek.**

Even if the employers were correct that Wis. Stat. § 108.02(15)(h)(2) poses an issue of impermissible entanglement, they are wrong on the appropriate remedy. The most appropriate remedy for an unconstitutional statute is to strike down the statute, not to judicially rewrite the statute in favor of the specific entities seeking a special benefit. Here, the employers seek coverage under an exemption that they claim creates excessive entanglement. If the employers are correct, then in order to avoid excessive entanglement the Court must nullify Wis. Stat. § 108.02(15)(h)(2).

The U.S. Supreme Court has held that a constitutionally underinclusive scheme may be remedied either by expansion or contraction. A court "may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Heckler v. Mathews*, 465 U.S. 728, 738-39 (1984) *(quoting Welsh v. U.S.*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)). Nullifying a statute is the appropriate course of action in the context of special exemptions, as broadening an exemption to all religiously-affiliated groups would create the problem of unconstitutional religious preference. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (finding a Texas statute that offered religious publications an exclusive tax benefit to be unconstitutional under the Establishment Clause of the First Amendment).

***13 II. Consideration of the Diocese's purposes instead of the employers' purposes would allow any religiously-affiliated organization - including hospitals and universities - to exempt itself from the unemployment insurance program.**

This Court's decision will reach far beyond the five employers involved in this case. The decision will dictate whether employees at religiously-affiliated hospitals and some colleges throughout Wisconsin will maintain their unemployment benefits. The employers offer no argument that would distinguish themselves from Wisconsin's numerous other religiously-affiliated nonprofit organizations, because there is no principled way to distinguish them. Creating an exemption for the employers would thus have a profound, detrimental impact on Wisconsin's unemployment insurance program.

A. If accepted, the employers' argument would cause thousands of healthcare and educational workers to lose the protections afforded by the unemployment program.

Religiously-affiliated hospitals account for about twenty percent of hospital beds in the U.S.,[1] but in Wisconsin specifically, more than forty percent of hospital beds are at religiously-affiliated, mostly Catholic-run hospitals.[2] Nearly 22% of

postsecondary education institutions report having some religious ***14** affiliation, and they serve over 1.8 million students nationwide.[3] In Wisconsin, over 15% of non-farm workers (over 465,000 employees) are employed in the education or health services sectors.[4] If the employers receive an exemption to Wisconsin's unemployment insurance program, that same exemption would become equally available to the numerous religiously-affiliated hospitals and colleges operated within the State. These institutions include Ascension Wisconsin (the State's second-largest health system, which has undergone several rounds of layoffs since reportedly employing more than 21,000 people in 2016),[5] Marquette University (which recently reduced its more than 2,900 employees by roughly 10%),[6] and SSM Health Hospital System (with more than 2,000 employees in Madison, plus six additional locations in Ripon, Fond du Lac, Waupun, Baraboo, Janesville, and Monroe).[7] All of these employees would be at risk of losing their unemployment benefits overnight, if this Court accepts the employers' argument.

***15** In this case, the employers perform completely secular functions, receive government funding, and do not require employees or program participants to be Catholic (or religious at all). The employers argue that nevertheless they should be exempt because the Diocese formed each of these nonprofit organizations with some ultimately religious purpose in mind. *See* Pet.'s Br. at 30-31 (arguing that it is the "parent" entity's purpose that is relevant, rather than the organization's own purpose). They further claim that the employers' purpose is necessarily religious because they exist to fulfill the "charitable mission of the Catholic Church in the Diocese of Superior," Petr's Br. at 22, and because the Catholic Charities Bureau and its sub-entities "are entirely creatures of the Diocese - and of the broader Catholic Church." Pet.'s Br. at 9-10. But while it may be true that the Diocese created the employers in order to satisfy its religious mission, there is nothing religious about the operations of the employers themselves. The only sense in which the employers are "religious" is indirectly, through their parent entity's affiliation with the Catholic Church. None of these features distinguish the employers from Wisconsin's numerous other religiously-affiliated nonprofits.

Under the employers' argument, any religiously-affiliated organization that can draw a connection between its operation and the religious mission of its parent entity would become exempt. Such connections would be trivially easy to make for Wisconsin's religiously-affiliated hospitals and colleges. Catholic-affiliated hospitals, for instance, exist under the premise that providing healthcare services also advances the religious mission of the Catholic Church. The Catholic Health ***16** Association of the United States describes Catholic health care as "a ministry of the church continuing Jesus' mission of love and healing,"[8] while the United States Conference of Catholic Bishops directs that any "Catholic institutional health care service [must] ... be animated by the Gospel of Jesus Christ and guided by the moral tradition of the Church."[9] As for religiously-affiliated universities, Marquette, as an example, proclaims that it maintains a "strong partnership" with the Milwaukee Archdiocese and that the mission of the university "overlaps" with that of the Church.[10]

The employers in this case have not identified any legal or factual basis for distinguishing their own situation from that of Wisconsin's numerous other religiously-affiliated nonprofit organizations. Because there are no grounds for limiting the legal arguments advanced by the employers to their own organizations, adopting the employers' interpretation would immediately put thousands of Wisconsin employees at risk of losing protections under the State's unemployment program. This would be a disastrous result that, as argued below, would undermine the Wisconsin legislature's public policy reasons for implementing the unemployment program in the first place.

***17 B. The employers' interpretation runs counter to the State's well-established public policy goals.**

Wisconsin's unemployment program is intended to offset the "heavy social cost" associated with unemployment, which "tends partially to paralyze the economic life of the entire state." Wis. Stat. Ann. § 108.01(1). The unemployment insurance statute has been interpreted to "embody a strong public policy in favor of compensating the unemployed." *Operton v. Lab. & Indus. Rev. Comm 'n*, 2017 WI 46, ¶ 31, 375 Wis. 2d 1, 17, 894 N.W.2d 426, 433. Therefore, exceptions to unemployment should be granted only in instances where the employer clearly falls within the exceptions outlined by the legislature in Wis. Stat. Ann. § 108.02(15)(h). A blanket rule which allows each religiously-affiliated organization to determine its own status would cast

too broad a net, creating a presumption that all religiously-affiliated organizations are exempt. The employers' argument would thus contradict the legislature's articulated policy of strictly limited exemptions.

The employers' interpretation runs counter to Wisconsin's public policy interests in ensuring that unemployed workers receive compensation.The Wisconsin legislature recognized that unemployment is "an urgent public problem, gravely affecting the health, morals and welfare of the people of this state." Wis. Stat. Ann. § 108.01(1). Granting an exemption to the employers and other religiously-affiliated organizations would limit the State's ability to control for the economic risk of widespread unemployment. This could have disastrous effects ***18** not just on the workers who lose their unemployment benefits, but also on the rest of the economy. As the State found, "[t]he decreased and irregular purchasing power of wage earners in turn vitally affects the livelihood of farmers, merchants and manufacturers ...." *See id.* The State thus implemented an unemployment insurance program to more fairly distribute the economic burdens resulting from unemployment, as well as decrease those burdens "as far as possible." Wis. Stat. Ann. § 108.01(2).

Under the employers' argument, all an organization would have to do to receive an exemption to the State's unemployment program would be to draw a connection between its operation and the religious mission of its parent entity. As demonstrated above, Wisconsin's major religiously-affiliated nonprofits can easily make that showing. *See* Sec. II.A., *supra*. The employers' theory would allow these major players in Wisconsin's job market to exempt themselves if they so choose, despite the fact that they employ exclusively or primarily secular workers and perform identical functions as their nonreligious counterparts. This result would have devastating effects on the State's articulated public policy reasons for adopting its unemployment program and would leave thousands of Wisconsin employees without unemployment protection.

CONCLUSION

A fact-based inquiry into the employers' activities is both appropriate and constitutional. Such inquiry reveals that the employers do not qualify for the exemption to Wisconsin's unemployment insurance program and adopting the ***19** employers' expansive interpretation of that exemption would undermine the State's public policy reasons for implementing the program, while immediately jeopardizing the unemployment protections of thousands of employees at other religiously-affiliated nonprofit organizations operating within the State. For these reasons, this Court should affirm the decision of the court of appeals.

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Footnotes

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4 *State and Metro Area Employment, Hours, & Earnings*, U.S. BUREAU OF LABOR STATISTICS, *www.bls.gov/sae/tables/state-news-release/home.htm* (click link to Table 3) (showing preliminary May 2023 results: of Wisconsin's 2.9955 million employees, 465.2 thousand are in education and health services).

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6 Devi Shastri, *Marquette will furlough 250 employees as it estimates a $15 million shortfall so far from coronavirus*, *MI*LWAUKEE JOURNAL SENTINEL (Apr. 8, 2020), www.jsonline.com/story/ *news/education/2020/04/08/coronavirus-milwaukee-marquette-university-furloughs-250-employees-cites-15-million-shortfall/2969884001/*.

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9 *Ethical and Religious Directives for Catholic Health Care Services*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (2018), https://bit.lv/2TfWnZw.

10 *Milwaukee's Catholic Roots - The history of Milwaukee, Marquette and the Catholic Church are intertwined*, MARQUETTE UNIV. (Apr. 16, 2019), https://stories.marquette.edu/milwaukees- *catholic-roots-4d1c5b372a6b*.

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2023 WL 4684145 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, and Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
June 21, 2023.

On Appeal from the Court of Appeals Reversing the Douglas County Circuit Court, the Hon. Kelly J. Thimm Presiding, Case No. 2019CV324

Non-Party Brief of Catholic Conferences of Illinois, Iowa, Michigan, and Minnesota in Support of Petitioners-Respondents-Petitioners

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*5 INTEREST OF AMICI CURIAE

Amici curiae are the state Catholic conferences representing the Roman Catholic dioceses throughout Illinois, Iowa, Michigan, and Minnesota in matters of public policy. They write to aid the Court in understanding the importance of the issues presented and why this Court should reverse the decision of the court of appeals and render judgment in favor of Catholic Charities Bureau and its sub-entities ("CCB"). In short, they believe that the court of appeals' ruling distorts the fundamentally religious nature of Catholic charitable work, improperly narrows important statutory exemptions for religious organizations, and imperils foundational freedoms from interference with internal organization and from religious discrimination under the First Amendment.

The Catholic Conference of Illinois serves as the public-policy voice of the bishops in Illinois' six Catholic dioceses, consisting of approximately 949 parishes, 18 missions, 46 Catholic hospitals, 21 healthcare centers, 11 colleges and universities, 424 schools, and 527 Catholic cemeteries. It interacts with all elements of government to promote and defend the interests of the Church.

The Iowa Catholic Conference is the official public-policy voice of the Catholic bishops in Iowa across its four dioceses, including 450 parish-based ministries, 111 schools, 16 hospitals, 12 clinics, 13 social-service centers, and Catholic Charities organizations in each diocese. The Conference advocates the common good and promotes public policies respecting the life and dignity of every human person.

Founded in 1963, the Michigan Catholic Conference serves as the official voice of the Catholic Church in Michigan on matters of public ***6** policy. The Conference promotes a social order that respects human life and dignity and serves the common good through public-policy advocacy including on behalf of over 50,000 students attending over 200 Catholic schools.

The Minnesota Catholic Conference is the public-policy voice of the state's Catholic bishops and the six dioceses that the bishops lead. The Conference of bishops and its staff support legislation that serves human dignity and the common good, educates Catholics and the public about the ethical and moral framework to be applied to public-policy choices, and mobilizes the Catholic community in the public arena. [1]

BACKGROUND

I. Care for those in need is a fundamentally *religious* obligation for Catholic bishops and their dioceses.

For the Catholic Church, the service of charity is as much a part of its religious mission as worship or spreading the faith. Rooted in the words of Jesus himself that "whatever you did for one of these least brothers of mine, you did for me," *see* Matthew 25:40 (New American Bible), and witnessed in the practice and teaching of the earliest Christians, "the exercise of charity" is "one of [the Church's] essential activities, along with the administration of the sacraments and the proclamation of the word." Benedict

XVI, *Deus Caritas Est*, ¶¶ 22, 23 (2005). "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, *is as essential to her as the ministry of the sacraments and preaching of the Gospel,"* such that "[t]he Church cannot neglect the service of charity any more than she can neglect the sacraments and the ***7** Word." *Id.* ¶ 22 (emphasis added). "These duties presuppose each other and are inseparable." *Id.* ¶ 25.

The Catholic Church's charitable service is thus "an indispensable expression of her very being" and an essential part of her nature and ministry, "not a kind of welfare activity which could equally well be left to others." *Id.* Further, the Church never regards itself as "a humanitarian agency and charitable service one of its 'logistical departments.'" *Address of Pope Francis to Participants in the Meeting Sponsored by Caritas Internationalis* (May 28, 2019).[2] Rather, "charity ... is the experiential encounter with Christ; it is the wish to live with the heart of God who does not ask us to have generic love, affection, solidarity, etc., toward the poor, but to encounter him in them (cf. Mt 25:31-46), with the manner of poverty." *Id.*

Moreover, the Church's ministry of charity is neither conditioned on membership in the Catholic Church nor "used as a means of engaging in what is nowadays considered proselytism." *Deus Caritas Est* ¶ 31. "Those who practice charity in the Church's name will never seek to impose the Church's faith upon others." *Id.* In the words of Pope Francis:

This is not about proselytism, as I said, so that others become "one of us". No, this is not Christian. It is about loving so that they might be happy children of God.... For without this love that suffers and takes risks, our life does not work.

Pope Francis, General Audience (Jan. 18, 2023).[3]

While the Church exhorts all the faithful to charitable works, it specially charges its bishops to carry out the service of charity in each particular diocese. *Deus Caritas Est* 1 32. "To facilitate aid for the needy ***8** in the most effective manner, the Bishop should promote a diocesan branch of Caritas, Catholic Charities, or other similar organizations which, under his guidance, animate the spirit of fraternal charity throughout the diocese." Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops*, ¶ 195 (Feb. 22, 2004).[4] Thus, Catholic Charities' purpose is essentially religious: "In every situation, diocesan Caritas or Catholic Charities should participate in all authentically humanitarian initiatives, so as to testify that the Church is close to those in need and in solidarity with them." *Id.* And, "[w]ithout ever misusing works of charity for purposes of proselytism, the Bishop and the diocesan community exercise charity in order to bear witness to the Gospel, to inspire people to listen to the Word of God and to convert hearts." *Id.* ¶ 196.

Catholic Charities therefore functions as an integral component of the Church's religious ministry, regardless of its legal structure under state law or, for that matter, its organization under the Church's canon law. Many dioceses organize their Catholic Charities as separately incorporated legal entities under civil law (even while in some cases treating them as part of the diocese under canon law). Other Catholic Charities are housed directly within the diocesan entity, and their employees are direct diocesan employees like other ministers. Such distinctions under state law, however, do not affect the practical reality that Catholic Charities is the principal charitable arm of the diocesan bishop, an integral part of the diocese through which the local Church exercises its fundamentally *religious* ministry of charity, answerable to that bishop.

***9** In sum, the Catholic Church holds that charity is as integral to its nature as liturgical worship and spreading the faith. Moreover, the Church practices charity as a fundamentally religious activity in which it both encounters Christ in those served and bears witness to the Gospel to the world. For these reasons - not simply as a humanitarian act or means to proselytize or

impose the faith on others - the Church instructs bishops to perform charitable works through Catholic Charities or similar charitable organizations under their guidance.

ARGUMENT

I. LIRC's and the court of appeals' distinction between religious entities is foreign to the purpose and structure of the unemployment statute's exemption.

Wisconsin law gives statutory language its "common, ordinary, and accepted meaning," avoiding "absurd or unreasonable results." *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Further, "[t]he statutory language is examined within the context in which it is used. An interpretation that fulfills the purpose of the statute is favored over one that undermines the purpose." *Klemm v. Am. Transmission Co., LLC*, 2011 WI 37, ¶ 18, 333 Wis. 2d 580, 798 N.W.2d 223. Here, LIRC's and the court of appeals' interpretation of Wis. Stat. § 108.02 contorts unambiguous language and unreasonably distinguishes the activities and motivations of a "church" from the exact same activities and motivations of a separately incorporated entity entirely controlled by that church.

First, LIRC's narrowing construction fails to consider the context of statutory religious exemptions to unemployment statutes: "Efficient ***10** 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), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). Decisions by church sub-entities operated by a church for religious purposes, however, are no less subject to this rationale than decisions by churches themselves. And there are other similar benefits to broadening the religious exemption from churches to other closely related religious organizations. For example, what constitutes a "church" or "convention of churches" is not defined in the statute, and it may often be difficult to distinguish a "church" from another nonprofit entity operated by a church for religious purposes - especially where, as here, both entities are under the ultimate direction of the same religious leaders. Similarly, an exemption that focuses on *who operates* the nonprofit organization and *why* it does so avoids the fundamentally religious question of *what constitutes religious activity* - the very trap into which the court of appeals stumbled here.

Second, LIRC's interpretation of the religious exemption leads to absurd results by drawing distinctions between materially similar employers based on an arbitrary criterion (whether an employer is a "church" or a nonprofit entity "operated, supervised, controlled, or principally supported by a church") that has nothing to do with the underlying purpose or structure of the exemption. Consider two hypothetical employers: the first is a diocese that provides social services through an unincorporated "Caritas" division of the diocese; the second provides identical ***11** services through a separately incorporated nonprofit Catholic Charities for the diocese. They employ two otherwise similar individuals: both are ultimately subject to the direction of the bishop, both are employed full-time in providing social services to disabled individuals but not otherwise engaged in teaching or inculcating the Catholic faith or participating in religious worship, neither are Catholic, and both may be fired from their jobs if they publicly dissent from the teachings of the Catholic Church regarding social justice. As the court of appeals recognized, under its interpretation of the statute, the first employer is likely exempt from unemployment, but the latter is not. *See* Op. ¶ 61.

Why should this be the case? The court of appeals' only answer was: "[t]he corporate form does make a difference...." *Id.* Yet that reasoning begs the question. None of the purposes of the religious exemptions turn on the particular corporate form through which a church elects to engage in its ministry, *see generally Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713 (1976) (rejecting searching "inquiry into church polity") - the DWD has no more competence to review religiously motivated employment decisions by CCB than decisions by the Diocese itself. There is no reason the Wisconsin legislature would have intended this result for two employers with employees engaged in the same activities, for the same religious purposes, pursuant to the same religious doctrine, under the ultimate direction of the same religious leaders. Thus,

this Court should prefer CCB's reading of the statutory text, which "fulfills the purpose" of the religious exemption and avoids "absurd or unreasonable results."

***12 II. LIRC's interpretation of the statute raises serious constitutional questions.**

LIRC's "religious activities" test would also raise serious doubts about the constitutionality of the unemployment statute under the First Amendment. "Where there is serious doubt of constitutionality," this Court "must look to see whether there is a construction of the statute which is reasonably possible which will avoid the constitutional question." *Baird v. La Follette*, 72 Wis.2d 1, 5, 239 N.W.2d 536 (1976); *accord Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). And this holds true for questions under the Religion Clauses as much as any other constitutional provisions. *See NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 507 (1979) ("[W]e decline to construe the [NLRA] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."). Here, LIRC's interpretation would raise the very serious constitutional questions that the religious exemptions were designed to avoid.

First, allowing the LIRC and DWD to decide what is and is not a "religious activity," and thus whether a nonprofit organization is operated for a "religious purpose," would force the state to interfere with the internal structure and governance of churches and subsidiary entities, contrary to longstanding First Amendment doctrine prohibiting such intrusion on church autonomy. *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). But "the freedom of a religious organization to select its ministers," must also include the freedom of the Church to choose whether to pursue its ministries through subsidiary organizations or through its own employees. *See* ***13** *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012); *see also Milivojevich*, 426 U.S. 696 at 713 ("[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, *internal organization*, or ecclesiastical rule, custom, or law." (emphasis added)).

Here, the Church itself considers the charitable ministries of Catholic Charities an essential part of the nature and mission of the Church, on par with administration of the sacraments and proclamation of the Gospel. How a diocese structures its operations to engage in this ministry - perhaps to reflect other fundamental principles such as subsidiarity and participation - is a question of the Church's internal organization and itself a form of protected religious exercise. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (holding that "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within" the definition of "religious exercise"). There is no legitimate reason why the Wisconsin legislature would want to constrain which lawful activities the Church pursues as part of its religious purpose, either directly or through subsidiary organizations.

To the contrary, by expanding the religious exemption to enable churches to pursue their "religious purposes" through subsidiary organizations, the unemployment statute carefully avoids drawing difficult distinctions about what is part of a church, what is a "religious activity," and who gets to answer to those questions. Whether a ministry is part of the Church is a question for the Church, not for LIRC, DWD, or the courts. As the United States Supreme Court has repeatedly observed, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." ***14** *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)).

Second, LIRC's "religious activities" test, by its own terms engages in "precisely the sort of official denominational preference that the Framers of the First Amendment forbade." *See Larson v. Valente*, 456 U.S. 228, 255 (1982). LIRC concedes that the statute "is invalid if it clearly grants denominational preferences," Resp. at 37, yet insists that Wisconsin's statute "makes no 'explicit and deliberate distinctions between different religious organizations.'" *Id.* (citation omitted). That is true only under *CCB's* interpretation of the law. Under *LIRC's* interpretation, the statute explicitly exempts some but not all religious organizations from the State's unemployment system. LIRC does not deny that CCB is operated by "a church" (the Diocese) to serve a religious mission and provides the services it provides for religious reasons. *See* Resp. at 23. Nevertheless, LIRC reads the statute to exclude such religious organizations from the exemption specifically extended to *other* religious organizations,

i.e., churches and charitable religious organizations that limit their charitable works to co-religionists or treat charitable service "primarily" as a means of engaging in proselytism. That is an illicit denominational preference, just as in *Larson* it was illicit to exclude certain religious organizations from an exemption granted to religious organizations receiving a set proportion of their funding from affiliated parties. [5]

***15** LIRC seeks to force this case under *Hernandez v. Commissioner*, but that will not work. The statutory provision in *Hernandez* did *not* distinguish between religious organizations as such. It applied to "a taxpayer" in general, religious or not, and gave preference to a taxpayer who transferred funds in exchange for nothing over a taxpayer who transferred funds in exchange for something. 490 U.S. at 685-86. By contrast, the statutory provision here applies specifically to religious organizations that are operated by a church for religious reasons - and it gives preference (in LIRC's interpretation) to some such organizations if they devote their religious ministry "primarily" to certain activities. Thus, unlike the statute in *Hernandez*, LIRC's interpretation of the statute here explicitly regulates, and distinguishes between, religious organizations.

At a minimum, therefore, LIRC's interpretation creates "serious doubt of constitutionality" as to Wisconsin's unemployment compensation scheme. *Baird*, 72 Wis.2d at 5. For this reason, too, the Court should adopt CCB's sounder interpretation of the statute.

CONCLUSION

LIRC's interpretation distorts the fundamentally religious nature of Catholic charitable work, improperly narrows clear statutory exemptions for religious organizations, trespasses on the Church's constitutionally guaranteed autonomy to organize its ministries in the manner it chooses, and discriminates against the Church by treating charitable religious activity less favorably than other religious activities that conform to LIRC's own notions of the proper domain of religion. For these reasons, the Catholic Conferences respectfully urge the Court to reverse the court of appeals' judgment.

***16** Dated this 21st day of June, 2023.
Respectfully submitted,

Electronically signed by

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Footnotes

1 No party's counsel authored this brief in whole or in part. No one except *amici curiae*, their members, or their counsel, monetarily contributed to the briefs preparation.

2 *http://bit.ly/3Dcl7IZ*.

3 *http://bit.ly/3JbQHdG*.

4 *https://bit.ly/3wtK8eV*.

5 For the same reasons, LIRC's interpretation would violate the Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs ....").

2023 WL 4686740 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant,
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
June 21, 2023.

On Appeal from the Court of Appeals Reversing the Douglas County Circuit Court The Hon. Kelly J. Thimm, Presiding Case No. 2019CV000324

Non-Party Brief of the International Society for Krishna Consciousness and the Sikh Coalition in Support of Petitioners

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*2 INTEREST OF NON-PARTY *AMICI CURIAE*

The International Society for Krishna Consciousness ("ISKCON"), otherwise known as the Hare Krishna movement, is a monotheistic, Gaudiya Vaishnava faith within the broad Hindu tradition. ISKCON has over seven hundred temples and rural communities, one hundred affiliated vegetarian restaurants, and ten million congregational members worldwide. Its affiliated Hare Krishna Food Relief programs distribute more than one million free meals daily across the globe. ISKCON members believe that all living beings have an eternal relationship with God, or Lord Krishna, and that the purpose of life is to awaken our dormant love of God. Thus, protecting religious freedom for all people is an essential principle for ISKCON.

The Sikh Coalition is a nonprofit organization that works to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life, and educate the broader community about Sikhism, including the Sikh practice of communal meals called langar. The Sikh Coalition's goal is working toward a world where Sikhs, and other religious minorities in America, may freely practice their faith without discrimination or government intrusion. To that end, the Sikh Coalition has submitted *amicus* briefs in courts across the country advocating for religious liberty. *See, e.g., Groff v. DeJoy*, No. 22-174 (U.S. Sept. 22, 2022); *Smith v. Ward*, No. 21-1405 (U.S. June 6, 2022).

Amici are concerned that the decision of the Court of Appeals impermissibly entangles government entities in religious ***3** organizations' affairs because it requires a reviewing body to decide whether religious organizations' activities are, on balance, "primarily religious" or "secular." That assessment necessarily involves a searching inquiry into religious organizations' beliefs, doctrines, and sacred texts - an exercise this Court has recognized impermissibly intrudes in religious affairs and entangles church and State.

Amici believe that courts and other government officials are ill-equipped to conduct this analysis, as exemplified by the exceedingly narrow conception of "religious" activity endorsed by the Court of Appeals here. The Court of Appeals held that certain activities of a nonprofit organization affiliated with the Catholic Church were "secular," rather than "primarily religious," because they do not involve, for example, "evangelizing," "participating in religious rituals or worship services," or "teaching the Catholic religion," and they are offered to all regardless of faith. App.040-041. Any "religious motives," the court concluded, were "incidental." App.043. If a court were to analyze the religious tenets of *amici* and those of other faiths through this myopic lens, activities central to their religious worship and devotion would likely be deemed secular, rather than religious, in the eyes of the State. That risk is particularly acute for *amici* and other non-Western and minority religions in the United States that are less familiar to courts and other government entities. *Amici* are filing this brief to provide the Court with their unique perspectives on this issue.

*4 INTRODUCTION

The Court of Appeals held that a reviewing body must look beyond an organization's religious motivation or purpose in determining whether the religious-purposes exemption in the Wisconsin Unemployment Compensation Act applies. The court required that "the reviewing body should also look to the organization's operations - its activities, meaning the particular services individuals receive - and determine if they are primarily religious in nature." App.025. The court then determined that the religious-purposes exemption did not apply to the Catholic Charities Bureau and its sub-entities (collectively, "CCB") because it deemed their charitable activities - though admittedly motivated by the principles of the Catholic faith - to be "secular," rather than "primarily religious." App.039-042.

The Court of Appeals committed two fundamental errors, which, if left uncorrected, will disproportionately disadvantage minority religious organizations. First, by requiring that a reviewing body perform a searching inquiry of a religious organization's activities to determine whether they are "primarily religious," the Court of Appeals' decision impermissibly entangles the State in religious affairs. Though the lower court asserted that it could avoid entanglement through "a neutral review based on objective criteria," App.038, no such "objective criteria" exist. Instead, determining which activities are "primarily religious" requires government officials to engage in study of a religion's sacred doctrines and rituals in an effort to discern what practices and beliefs are most central to that religion. This type of inquiry ***5** necessarily entangles church and state and makes a government official - rather than the religious organization itself - the arbiter of religious doctrine.

Second, the Court of Appeals also erred by imposing an exceedingly narrow view of the activity it considers "primarily religious" - one that could be read to favor Western religious practice and exclude activities and practices fundamental to non-Western, minority religions in particular, including those of the Hare Krishnas and Sikhs. The Court of Appeals held that the activities of CCB are not "primarily religious" because CCB does not, for example, engage in "evangelizing," "participating in religious rituals or worship services," or "teaching the Catholic religion," and provides services to all regardless of faith. App.040-041. That rationale, if applied to the Hare Krishnas or Sikhs, would mean that core religious practices - such as dancing and the sharing of sanctified food, prasada for the Hare Krishnas, or langar for the Sikhs - could be deemed "secular" rather than "religious." The Court of Appeals' decision illustrates perfectly the dangers to religious organizations posed by a test that requires government officials to decide what activities are "primarily religious." These dangers that are only amplified for organizations whose non-Western and minority religious beliefs and practices likely are foreign to U.S. courts and government agencies.

ARGUMENT

I. The Court of Appeals' decision impermissibly entangles Church and State.

Courts have historically gone "to great lengths to avoid government 'entanglement' with religion." *Our Lady of Guadalupe* ***6** *Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2070 (2020) (Thomas, J., concurring). The entanglement doctrine "prohibits excessive intermixture of government and religion in the shape of intensive governmental control and surveillance of the activities of religious organizations." *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 262 N.W.2d 210, 214 (Wis. 1978) (citation omitted). In so doing,

the doctrine "protects a religious group's right to shape its own faith and mission." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

The Court of Appeals' decision impermissibly entangles government officials in religious affairs. Because the religious character of an "activity is not self-evident," "determining whether an activity is religious or secular requires a searching case-by-case analysis[,]" which necessarily produces "considerable ongoing government entanglement in religious affairs." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343-344 (1987) (Brennan, J., concurring in the judgment). Fully understanding which practices and activities are dictated by a particular religion requires parsing sacred texts and understanding the history, tradition, and evolution of the religious faith. In the case of the Hare Krishnas, this exercise would, at a minimum, require study of Hindu religious texts, including the Bhagavad-Gita, the Srimad-Bhagavatam, and the Caitanya Caritamrita. Likewise, judging which activities are dictated by the Sikh faith would require the examination of their sacred scriptures, including the Guru Granth Sahib and the Dasm Granth, as well as a deep understanding of the cultural traditions ***7** impacting Sikh faith practices. But absent an understanding of how these sacred texts have been interpreted by religious adherents and leaders over time, and within the current cultural context, such efforts will inevitably produce an incomplete or misleading picture of what the Hare Krishna or Sikh faiths require. That is why asking courts "to make distinctions as to that which is religious and that which is secular … is necessarily a suspect effort." *Espinosa v. Rusk*, 634 F.2d 477, 481 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982).

The analysis mandated by the Court of Appeals is tantamount to "interpret[ing] church law, policies, or practices," which this Court has recognized impermissibly entangles the State in religious affairs. *See L.L.N. v. Clauder*, 563 N.W.2d 434, 440 (Wis. 1997). The Court of Appeals' decision also "involves [government] officials in the definition of what is religious" - the essence of entanglement. *See Rusk*, 634 F.2d at 481; *see also Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 633-634 (2d Cir. 2020) ("The government must normally refrain from making assumptions about what religious worship requires.").

The Court of Appeals dismissed any concern of entanglement on the theory that reviewing bodies can "conduct a neutral review based on objective criteria" to determine whether the religious-purposes exemption applies. App.038. But there are no "objective criteria" for determining which activities are primarily religious "without examining religious doctrine or tenets." *Cf.* App.038. That is true for Western religions (*e.g.*, the Catholic Church), but is all the more true if a court seeks to understand what religious ***8** worship requires for a Hare Krishna, Sikh, or any of the other non-Western, minority religions practiced in the United States. The only way for a reviewing body to decide whether a particular act or practice is a "primary" component of those faiths is to parse religious doctrines and tenets - the hallmark of government entanglement with religious affairs.

The entangling effect of the Court of Appeals' decision is further illustrated by the incentives it creates for religious organizations to alter their practices to avoid engaging in activities that would be viewed as secular. For example, to avoid the risk that a reviewing body would preclude it from invoking the religious-purposes exemption, a religious organization may limit its practice of providing charitable services regardless of the recipients' faith, or provide such services only in connection with proselytizing, or even not at all. The risk that religious organizations, "wary of [] judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments" is what the entanglement doctrine is designed to prevent. *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

II. The Court of Appeals adopted an exceedingly restrictive view of what activities are "primarily religious," which will disfavor minority religions.

The Court of Appeals compounded its error by adopting an exceedingly narrow view of what activities count as "primarily religious." The Court of Appeals held that CCB's activities are not "primarily religious" because CCB does not, for example, engage in ***9** "evangelizing," "participat[e] in religious rituals or worship services," or "teach[] the Catholic religion," and it provides services to all regardless of faith. App.040-041. That restrictive view of "religious" activity sets a dangerous precedent

that would exclude practices central to many non-Western, minority religious faiths. This Court should not permit the Court of Appeals' misguided view of religious activity to take root in the law of this State.

The United States Supreme Court has repeatedly recognized the dangers inherent in courts scrutinizing the nature, validity, or centrality of particular religious practices or beliefs. For that reason, courts have consistently declined to question whether a particular belief or practice is central to a particular religion - "[i]t is not," the Court has emphasized, "within the judicial ken to question the centrality of particular … practices to a faith." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (concluding that "what is a 'religious' belief or practice" does "not … turn upon a judicial perception of the particular belief or practice in question"). Following this principle, courts have consistently adopted a broad view of religious activity - one that turns largely on the motives and beliefs underlying the relevant conduct, not on some generally applicable "objective criteria."

For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court held that the Old Order Amish's practice of withdrawing their children from traditional school after Eighth Grade was religious activity protected by the Free Exercise Clause. The Court recognized that had the practice would not have been ***10** protected by the First Amendment had it been "based on purely secular considerations," but because it sprung from a "deep religious conviction," the Free Exercise Clause applied. *Id.* at 215-216. Similarly, in *Espinosa v. Rusk, supra*, the Tenth Circuit invalidated an ordinance requiring charitable organizations, including churches, to obtain a license before engaging in solicitation. 634 F.2d at 479. The ordinance exempted "religious" activities from the license requirement, but deemed "secular" numerous activities performed by the church - including "the feeding of the hungry or the offer of clothing and shelter to the poor." *Id.* at 481. The court rejected the city's narrow view that to be "religious," the activity must "be purely spiritual or evangelical[,]" and, in turn, admonished the city's "broad definition of secular" that subjected the church's charitable acts to regulation. *Id*.

The principle underlying these and other cases is clear - the scope of religious activity extends beyond the "purely spiritual," *Rusk*, 634 F.2d at 481, and government officials may not deem activity "secular" that is motivated by a sincerely held religious belief.

The Court of Appeals' disregarded that principle in finding that the CCB's activities were "secular" rather than "primarily religious." It acknowledged that the CCB engaged in a range of charitable services, including assisting those "facing the challenges of aging, the distress of a disability, the concerns of children with special needs, and the stresses of families living in poverty" (App.047; *see also* Opening Br. 16), and that CCB engaged ***11** in those activities because of a "professed religious motivation" (*see* App. 040), and to "fulfill the Catechism of the Catholic Church to respond in charity to those in need," (*see* App.041). Nonetheless, the Court of Appeals held that CCB was not engaged in "*primarily* religious activities" because it did not "operate to inculcate the Catholic faith," "engage[] in teaching the Catholic religion," "evangeliz[e]," or engage in "religious rituals or worship." App.040-041 (emphasis added). That is a severely constricted view of religious activity - one that confines religion to proselytizing or rituals performed in a Church, Temple, Synagogue, Gurdwara, or other place of worship on a holy day, and disregards other *equally* fundamental aspects of religious faith and practice, such as feeding the poor or caring for the sick and elderly. The Court of Appeals erred by analyzing these "activities" in a vacuum, stripping them of their motivation, purpose, and context, and in so doing deemed broad swathes of religiously motivated conduct to be primarily secular.

The Court of Appeals' "broad definition of secular," *Rusk*, 634 F.2d at 481, sets a dangerous precedent generally, but the perils of allowing government to define what activities are "inherently" religious or "primarily" religious are particularly acute for minority and non-Western religions, whose varied beliefs and practices are likely to be unfamiliar to government officials in the United States. As courts have candidly acknowledged, "lay courts familiar with Western religious traditions" - "characterized by sacramental rituals and structured theologies" - "are ill-equipped to evaluate the relative significance of particular rites of an alien ***12** faith." *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981). As a result, minority religions, including those represented by *amici*, are at risk of having practices central to their faiths being deemed "secular" by a reviewing body applying the so-called "objective criteria," App.038, used by the Court of Appeals.

The Hare Krishnas, for example, engage in many practices that are central to their faith that resemble actions (broadly defined) engaged in by non-adherents for non-religious purposes. For example, the requirements of practicing Bhakti-yoga include mandates against intoxication, following a vegetarian diet, and practicing cleanliness of the mind and body, as central tenets of the Hare Krishna religion. These physical requirements are "one step on [the] path of God realization" and help followers "connect to the Supreme by means of loving devotional service." [1] Under the lower court's theory, however, Bhakti-yoga could be considered primarily *secular* because it may not always involve proselytizing or religious instruction and - like feeding the poor or caring for the disabled - is also an activity performed by others for non-religious purposes.

The same is true of "Prasadam" - the Hare Krishna "practice of preparing food, offering it to the Deity, and distributing it to the general population." [2] This practice involves the widespread ***13** distribution of vegetarian food to millions worldwide, regardless of faith, and is distributed without proselytizing or direct religious instruction. [3] Yet, a court applying criteria used by the Court of Appeals would likely consider this activity to be no more religious than food stamps or a foodbank - "secular" charitable aid.

Practices central to Sikhs are equally at risk of being deemed secular under the Court of Appeals' rationale. Langar (or "open kitchen") is the Sikh practice of providing a community kitchen serving free meals and allowing people of all faiths to break bread together. [4] This practice is foundation to the Sikh way of life; it represents the principle of equality among all people regardless of religion, and expressing the Sikh ethics of sharing, community, inclusiveness, and the oneness of humankind. But despite the centrality of langar to Sikh practices, the meal is put at risk of being deemed "secular" under the Court of Appeals' criteria because it is served without religious instruction or proselytizing.

The Court of Appeals decision thus threatens to drain fundamental practices of minority religious faiths of their religious character - despite the clear religious dictates, motivations, and beliefs driving those activities. The decision sets a dangerous precedent, has no place in the law of this State, and is contrary to the principles of religious liberty embraced by the United States ***14** and Wisconsin Constitutions, and the religious-purposes exemption itself.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Dated: June 21, 2023

Footnotes

1 *Bhakti Yoga*, ISKCON, https://www.iskcon.org/beliefs/bhakti-yoga.php (accessed June 10, 2023).

2 *Wonderful Prasadam*, Krishna.com, https://food.krishna.com/article/wonderful-prasadam (accessed June 10, 2023).

3 *Food Relief Program*, ISKCON, https://www.iskcon.org/activities/food-relief-program.php (accessed June 10, 2023).

4 *Langar: The Communal Meal*, The Pluralism Project, https://pluralism.org/langar-the-communal-meal (accessed June 14, 2023).

2023 WL 4686747 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant,
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
June 21, 2023.

On Appeal from the Court of Appeals Reversing the Douglas County Circuit Court, the Hon. Kelly J. Thimm, Presiding Case No. 2019CV000324

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*5 STATEMENT OF INTEREST

Douglas Laycock and Thomas C. Berg are leading religious liberty scholars. Professor Laycock has authored six books and 60+ articles on religious liberty. He has argued five religious liberty cases before the U.S. Supreme Court, including *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). And the U.S. Supreme Court has cited his religious liberty scholarship eight times. Professor Berg has authored six books, including a leading casebook on religion and the Constitution, as well as dozens of articles and book chapters on religious liberty. The U.S. Supreme Court has twice cited his scholarship.

Amici are well acquainted with the U.S. Supreme Court's religious liberty jurisprudence and have an interest in the sound development of this body of law.

INTRODUCTION

The U.S. Constitution's Free Exercise and Establishment Clauses protect religious organizations' right to decide "matters of faith and doctrine and … closely linked matters of internal government" free of government interference. *Our Lady of Guadalupe Sch.*

v. Morrissey-Berru, 140 S. Ct. 2049, 2060-61 (2020) (citations omitted). The Constitution thus guards each faith's autonomy to decide how to conduct its work in accordance with its beliefs. Both Religion Clauses also prohibit the government from engaging in "denominational favoritism," *i.e.*, ***6** treating religions differently based on their beliefs, practices, or structure. *See Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022).

Those longstanding constitutional principles foreclose the court of appeals' interpretation of Wisconsin law. Wisconsin exempts nonprofits "operated … by a church" and "operated primarily for religious purposes" from paying into the state's unemployment compensation system. Wis. Stat. § 108.02(15)(h)2. At the Labor and Industry Review Commission's urging, the court of appeals interpreted that exemption to exclude petitioners - the charitable arm of the Catholic Diocese of Superior, whose activities include ministering to those in need "as an expression of the social ministry of the Catholic Church." App.183. Under the government's and court of appeals' view, petitioners are no different from secular groups for statutory purposes because petitioners do not limit aid or employment to Catholics, do not overtly proselytize or worship while serving others, and are structured as separate corporations. App.040-42.

This Court avoids interpretations that create "a constitutional conflict." *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶64, 357 Wis. 2d 469, 851 N.W.2d 262. But the court of appeals' reasoning would put Wisconsin crosswise with U.S. Supreme Court precedent. The whole point of the Supreme Court's church-autonomy cases is that religious groups, not courts, get to define what counts as acts of faith. And petitioners' decisions about who and how to serve reflect the Catholic Church's ***7** judgments about how to carry out the Church's religious mission. Catholic doctrine requires petitioners to serve all in need and forbids combining service with proselytizing.

Likewise, the court of appeals' interpretation would cause exactly the kind of discrimination among sects that the Constitution forbids. Under that interpretation, groups that restrict aid and employment to co-religionists are deemed to operate "primarily for religious purposes" and thus can claim the statutory exemption - but equally religiously motivated groups without such restrictions cannot. Groups that overtly proselytize or worship while serving others are exempt - but not other faiths. And religious groups that house their charitable arms within the church's aegis, rather than separately incorporating them, get better statutory treatment than other faiths. To avoid these constitutional problems, this Court should reject that interpretation and hold that petitioners satisfy the statutory exemption.

BACKGROUND

1. For Catholics, "[s]ocial ministry is an expression of the Gospel" and "a fundamental element of the mission of the Church." U.S. Conference of Catholic Bishops, *In All Things Charity* (Nov. 18, 1999), https://tinyurl.com/49afv29v. Indeed, "[c]harity is the greatest social commandment." Catechism of the Catholic Church ¶ 1889. This "mandate of charity" requires serving "all peoples" regardless of their particular faith. Pope ***8** Francis, *Apostolic Exhortation Evangelii Guadium* ¶ 181 (2013). And charitable efforts "cannot be used as a means of engaging in … proselytism." Pope Benedict XVI, *Deus Caritas Est* ¶ 31 (2005). Catholic charity "is about loving [others] so that they might be happy children of God"; "not about proselytism … so that others become 'one of us.'" Pope Francis, *General Audience* (Jan. 18, 2023).

By the early twentieth century, however, parishes and dioceses struggled to administer wide-ranging charitable works effectively while carrying out other religious missions. As "local pastors struggled to fulfill the temporal as well as spiritual needs of parishioners, bishops began to formalize the apostolate of charity by establishing diocesan Catholic Charities agencies." U.S. Conference of Catholic Bishops, *In All Things Charity* (Nov. 18, 1999), https://tinyurl.com/49afv29v. Indeed, the Vatican-level department that oversees the appointment of bishops and the establishment of particular churches has pronounced that "[t]o facilitate aid for the needy in the most effective manner, the Bishop should promote a diocesan branch … Catholic Charities, or other similar organization[] … under his guidance." Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops* (*Apostolorum Successores*) ¶ 195 (2004).

Petitioner Catholic Charities Bureau "provide[s] services to the poor and disadvantaged as an expression of the social ministry of the Catholic Church" and strives "in its activities and actions ***9** [to] reflect gospel values" and act "consistent with … the mission of the Diocese of Superior." App.183-85, 207-08. "[T]he entire organization begins and ends with" the bishop of the Diocese, who is the president of the Bureau and appoints the boards of directors of the Bureau and its sub-entities. R.100:130; App.201, 203. Consistent with Catholic teaching, the Bureau serves all without proselytizing. App.011; Petrs' Br. 16.

2. Wisconsin exempts nonprofits "operated … by a church" and "operated primarily for religious purposes" from paying into the state's unemployment compensation system. *See* Wis. Stat. § 108.02(15)(h)2. Adopting the Commission's interpretation of that provision, the court of appeals held that Catholic Charities Bureau and its sub-entities should be denied that exemption because they are not "operated primarily for religious purposes." According to the court of appeals, the statute exempts only organizations whose *activities* are primarily religious. App.025.

Under that interpretation, the court of appeals deemed petitioners' work insufficiently religious because petitioners "do not operate to inculcate the Catholic faith" or "evangeliz[e]"; do not limit their services to Catholics; do not engage "in religious rituals or worship services"; "do not require their employees" to be Catholic; receive significant funding "from government contracts or private companies"; and are "structured as separate corporations." App.040-42. The Commission (at 32) again urges that same reading.

***10 ARGUMENT**

This Court should reject the court of appeals' interpretation of Wisconsin's statutory exemption. That interpretation contravenes the First Amendment and U.S. Supreme Court jurisprudence by purporting to define what characteristics make a group's activities sufficiently "religious" and by picking characteristics that some faiths - but not others - embrace.

I. The Court of Appeals' Interpretation Tramples the Autonomy of Religious Institutions

The court of appeals' interpretation impermissibly injects courts into paramount matters of church governance, violating both Religion Clauses.

1. The U.S. Supreme Court has long held that religious organizations have the right to decide "matters of church government" and "faith and doctrine" for themselves "free from state interference." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185-86 (2012) (citations omitted); *Our Lady of Guadalupe*, 140 S. Ct. at 2060-61. The Supreme Court has recently referred to those protections as a right to "church autonomy." *Our Lady of Guadalupe*, 140 S. Ct. at 2060-61.

This right to church autonomy means that churches, not the government, decide how a church's "work will be conducted." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to* ***11** *Church Autonomy*, 81 Colum. L. Rev. 1373, 1398 (1981); *see Carson*, 142 S. Ct. at 2001. And churches, not the government, have "the right to choose from among … forms of church organization." Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253, 258 (2009). Requiring religious organizations to compromise on matters of doctrine or internal structure as a "condition on benefits or privileges inevitably deters or discourages the exercise of First Amendment rights." *See Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2256-57 (2020) (citations omitted).

Relatedly, the church autonomy doctrine prohibits government from deciding religious questions. "The determination of what is a 'religious' belief or practice is … [a] delicate task" and "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). Among other problems, forcing a religious organization to "predict which of its activities a secular court will consider religious … might affect the way [the] organization carrie[s] out … its religious mission." *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-*

day Saints v. Amos, 483 U.S. 327, 336 (1987). Both Religion Clauses prohibit that outcome. *Our Lady of Guadalupe*, 140 S. Ct. at 2060-61.

2. The court of appeals' interpretation violates those precepts by creating a de facto checklist of genuine religiosity.

***12** For instance, the court of appeals acknowledged that it denied the Bureau and its sub-entities the statutory exemption because of the church's decision about how best to structure itself: "[T]he result in this case would likely be different if CCB and its sub-entities" were not "structured as separate corporations." App.042. But the Church's decision about structure flows from its religious obligation to help those in need and from internal decisions about "the most effective manner" in which to fulfill that obligation. *See* Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops* (*Apostolorum Successores*) ¶ 195 (2004).

Likewise, the court of appeals' interpretation passes judgment on "matters of faith and doctrine" by conditioning the statutory exemption on a requirement that religious organizations engage in certain practices. *See Our Lady of Guadalupe*, 140 S. Ct. at 2060. For example, under the court of appeals' interpretation, a group is more likely to qualify as "religious" if its activities "focus on the inculcation of [its] faith and worldview." App.042. But a core tenet of the Catholic faith is that Catholics must "never seek to impose the Church's faith upon others" while serving. Pope Benedict XVI, *Deus Caritas Est* ¶ 31 (2005).

The court of appeals also considered service directed toward co-religionists to be more religious than service directed to outsiders. App.041. But Catholics are called to "provide services to all people in need, regardless of their religion." App.011. And ***13** many Muslims too believe their "duty to help [those] in difficulty" extends to all. *Service to Humanity*, Al-Islam.org, https://tinyurl.com/mcye9cee.

Further, when classifying groups as "religious," the court of appeals instructed that practices involving "rituals" or "worship" should count as more religious. App.041. But in myriad faiths, fasting, meditation, unshorn beards, and charitable giving carry deep religious significance in and of themselves, without accompanying conduct that is more explicitly devotional.

Similarly, the court of appeals saw organizations that "require their employees … to be of the … faith" as more religious. App.041. But "[j]ust as engaging in acts of service is a legitimate, familiar way of exercising religion, so is engaging in acts of service carried out by persons who do not believe all of the religion's tenets." Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 Notre Dame L. Rev. 1341, 1351 (2016). Thus, when courts apply the ministerial exception, "[t]here is no requirement that an organization exclude members of other faiths in order to be deemed religious." *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658 (7th Cir. 2018) (per curiam).

In sum, the court of appeals' box-ticking exercise invites courts to dictate how churches must structure themselves and lets courts disregard acts of faith that do not fit a predetermined mold - exactly the type of governmental interference the ***14** Constitution forbids. And allowing courts to become arbiters of religiosity would enmesh courts in questions of faith they are ill-suited to resolve, such as what acts even count as "worship" or "proselytizing," and who qualifies as a member of a given religion.

The Commission (at 43) claims that courts are free to make these calls because "the U.S. Supreme Court conducts a factbased inquiry into whether an employee performs 'vital religious duties' for analyzing the ministerial exception." But the ministerial exception caselaw holds the opposite: Courts ask whether an employee's activities are important in carrying out duties the *church* considers religiously important. Thus, the U.S. Supreme Court has cautioned that when undertaking these inquiries, "courts must take care to avoid resolving underlying controversies over religious doctrine." *Our Lady of Guadalupe*, 140 S. Ct. at 2063 n.10 (citations omitted).

II. The Court of Appeals' Interpretation Discriminates Among Faiths

The Religion Clauses also prohibit the government from preferring one religion over another. Denominational neutrality is both the "clearest command of the Establishment Clause" and "inextricably connected with … the Free Exercise Clause." *Larson v. Valente*, 456 U.S. 228, 244-45 (1982); *accord Carson*, 142 S. Ct. at 2001.

When an exemption extends generally to "religious" groups - or, as here, to entities with "religious" purposes - applying the exemption to exclude particular religious groups with ***15** certain attributes or practices is textbook denominational discrimination. The U.S. Supreme Court's ministerial-exception cases illustrate this principle. They hold that the First Amendment prohibits courts or legislatures from interfering with religious groups' employment decisions concerning their "ministerial" employees - employees who perform an important religious role. *Our Lady of Guadalupe*, 140 S. Ct. at 2055.

In determining who is a minister under the exception, the Court has warned against relying on one-size-fits-all indicators of religiosity that would risk "impermissible discrimination" amongst faiths. *Id.* at 2063-64. For instance, "attaching too much significance to [employees'] titles would risk privileging religious traditions with formal organizational structures over those that are less formal." *Id.* So would treating certain degrees or training as dispositive, given that "religious traditions may differ in the degree of formal religious training thought to be needed in order to teach." *Id.* at 2064.

Here, the court of appeals' crabbed reading of the exemption discriminates among faiths based on differences in their religious practices. For example, the court of appeals' view that an organization is more religious when it combines charitable work with formal worship or evangelizing discriminates against those whose beliefs require separating service from proselytizing. *See id.* at 2069-70; App.041. Many evangelical Christians view conversion and overt worship as indispensable elements of their ***16** charitable activities. *See* Berg, *Partly Acculturated Religious Activity*, at 1352 & n.48. But Catholics and Jews view service itself as a distinct mode of worship that should remain separate from proselytizing. [1] Thus, the D.C. Circuit refused to interpret an exemption for religious organizations to turn on whether the institution engaged in "hard-nosed proselytizing," lest the court create a constitutional problem by "prefer[ring] some religions" or "some approaches to indoctrinating religion" over others. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1345-46 (D.C. Cir. 2002).

The court of appeals' interpretation also invites discrimination by deeming groups that hire outside of the faith or provide aid to all to be less "religious." *See* App.041. As the Seventh Circuit has observed, courts should not use "inclusion as a weapon" against certain religious organizations. *See Grussgot*, 882 F.3d at 657-58; *accord Great Falls*, 278 F.3d at 1345-46. Some religious organizations require employees to share the organization's faith. [2] Others do not; Jewish preschools, for ***17** instance, employ non-Jews to teach religious doctrines. *See* Brief for Amici Curiae Stephen Wise Temple and Milwaukee Jewish Day School in Support of Petitioners at 8, *Our Lady of Guadalupe*, 140 S. Ct. 2049 (No. 19-267). Similarly, Sikhs and Hindus regularly engage in acts of service directed toward non-adherents. [3] The court of appeals' interpretation would treat those faiths differently. And it would effectively disadvantage minority faiths whenever they lack a constituency large enough to hire exclusively from their own faith.

The court of appeals' interpretation also discriminates against denominations that favor separately structured charitable arms. *See* App.042. Catholics and Episcopalians, for instance, have religious communities with complex polities that often carry out their charitable activities through separate legal instrumentalities. By contrast, many evangelical Christians and other groups maintain churches that tend to be more independent from one another, and thus eschew separate instrumentalities at the denominational level. [4] In both cases, those decisions are ***18** inseparable from theological judgments about each community's "temporal as well as spiritual needs." *See* U.S. Conference of Catholic Bishops, *In All Things Charity* (Nov. 18, 1999), https://tinyurl.com/49afv29v. Just as courts cannot "privileg[e] religious traditions with formal organizational structures over those that are less formal," courts cannot privilege informal structures over formal ones without offending the Religion Clauses. *See Our Lady of Guadalupe*, 140 S. Ct. at 2064.

The Commission (at 37) suggests that concerns about denominational discrimination are unfounded because the unemployment exemption was not "drafted to target specific religions." But differential treatment based on "how a religious [organization]

pursues its … mission" implicates "denominational favoritism," even without evidence of animus. *See Carson*, 142 S. Ct. at 2001; *Our Lady of Guadalupe*, 140 S. Ct. at 2063-64; *supra* pp. 14-15. Regardless of motives, courts must avoid reading general religious exemptions or benefits - such as those for organizations with "religious purposes" - to turn on attributes over which "religious traditions may differ." *See Our Lady of Guadalupe*, 140 S. Ct. at 2063-64.

*19 CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Footnotes

1 *Supra* pp. 7-8; *see, e.g.*, Allison Berry, *Why Doesn't Judaism Promote Conversion, Whereas Other Faiths Do?*, Jewish Boston (Jan. 14, 2014), https://tinyurl.com/kjcrtdv7.

2 *See, e.g.*, Association of Classical Christian Schools, *Statement of Faith*, https://tinyurl.com/4tz7ez5n ("We welcome members who hold to traditional, conservative Christian orthodoxy and our statement of faith.").

3 *See, e.g.*, Evan Simko-Bednarski, *U.S. Sikhs Travel Their Communities to Feed Hungry Americans*, CNN.com (July 9, 2020), https://tinyurl.com/rn988axf; Diana L. Eck, *The Religious Gift: Hindu, Buddhist, and Jain Perspectives on Dana*, 80 Soc. Rsch. 359, 359 (2013).

4 *See, e.g.*, App.183-85; Episcopal Charities, *About*, https://tinyurl.com/yucnerr2; Saddleback Church, *Peace Community Resource Center*, https://tinyurl.com/4s4d6rsz.

2023 WL 4686709 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant, State of Wisconsin Department of Workforce Development, Respondent-Appellant.

No. 2020AP002007.
June 20, 2023.

On Appeal from the Court of Appeals Reversing the Douglas County Circuit Court The Hon. Kelly J. Thimm, Presiding Case No. 2019CV000324

Non-Party Brief of the Jewish Coalition for Religious Liberty in Support of Petitioners- Respondents-Petitioners

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INTEREST OF AMICUS CURIAE

The Jewish Coalition for Religious Liberty ("Coalition") is a nonprofit organization - a group of lawyers, rabbis, and professionals who practice Judaism and defend religious liberty. Its members have written on the role of religion in public life. Representing members of the legal profession, and adherents of a minority religion, The Coalition has an interest in ensuring the flourishing of diverse religious viewpoints and practices. The Coalition advocates for people of faith who practice their faith in religious services, schools, and the public square. [1]

SUMMARY OF THE ARGUMENT

We endorse Petitioners' textual arguments but will not reiterate them. Instead, we aim to show how the misinterpretation of Wis. Stat. § 108.02(15)(h)(2) (the "Statute") offered by the Labor and Industry Review Commission ("LIRC") and the Court of Appeals would harm religious minorities, including Jews. This Court should give the word "operate" its ordinary meaning in order to avoid those harms.

The test articulated by LIRC and the Court of Appeals would require courts to judge the "true" religiosity of a religious organization's actions. Courts would have to scrutinize and pass judgment on Jewish doctrine in order to ***2** determine which Jewish observances have a sufficiently religious character to qualify for the statutory exemption. The First Amendment to the United States Constitution plainly prohibits that sort of intrusion into religious affairs.

Limiting the Statute's exception to organizations that engage in recognizable or stereotypical religious rituals would draw an arbitrary line and exclude religious organizations that are operated in an equally religious manner to those that would be included. This would inevitably favor large and popular religions, those whose practices are more easily recognized, over smaller minority faiths who may engage in practices that judges cannot immediately identify as religious. For example, in Judaism, many acts that appear secular to a non-adherent are imbued with religious significance. Judaism contains a system of commandments called "mitzvot" that govern even mundane seeming aspects of adherents' lives. The notion that acts such as teaching the faith or leading prayers are more religious than giving charity or ministering to the sick is alien to Judaism. Adopting LIRC's test would likely lead courts to deem important Jewish observances irreligious.

This Court should reject LIRC's interpretation of the statute which would render it unconstitutional and lead to results that disadvantage religious minorities.

*3 ARGUMENT

I. IN JUDAISM, THERE IS NO SHARP DISTINCTION BETWEEN RITUALISTIC ACTS SUCH AS PRAYER OR RELIGIOUS INSTRUCTION AND OTHER RELIGIOUS COMMANDMENTS SUCH AS GIVING CHARITY.

LIRC distinguished between those "quintessentially religious" acts such as "inculcation of the Catholic faith" and operating "in a worship-filled environment" which would qualify for the exception, and "acts that are not religious per se, such as the provision of help to the poor and disabled" which would not. App.115-16. Such a division is alien to Judaism and applying it would cause courts to arbitrarily distinguish between different, but equally authentic Jewish religious organizations.

In Judaism, all religious requirements flow from 613 mitzvot, or commandments that appear in the Torah. See Mendy Hecht, *The 613 Commandments (Mitzvot)*, CHABAD.ORG, https://tinyurl.com/y7he88c4. Each of these commandments is a divinely given religious obligation, and no commandment is more or less religious than any other. LIRC's test does not make sense to a Jewish reader.

The Torah contains a religious obligation to give charity. This obligation can sometimes be linked to an observable religious ritual that would presumably meet LIRC's test, like donating to charitable funds that ensure the poor have the provisions for the Passover Seder. *See Ma'ot Chitim –* ***4** "*Wheat Money*," CHABAD.ORG, https://tinyurl.com/5n6sw3zs. However, Judaism does not view that type of charity as any more religious than other forms of charity, like donating to food banks. Menachem Posner, *15 Facts About Tzedakah Every Jew Should Know*, CHABAD.ORG, https://tinyurl.com/ 56dk8j7.

To provide another example, Judaism contains a commandment to comfort the sick (*bikur cholim), See* Eliezer Wenger, *Bikur Cholim: Visiting the Sick*, CHABAD.ORG, https://tinyurl.com/4r2cc86b. Visiting a sick person to lead him in prayers is no more religious of an action than simply visiting to provide him solace. Under LIRC's test, organizations that fulfill the commandment of *bikur cholim* would not be exempt under the Statute.

God's commandments determine what actions hold religious value in Judaism, not an outward appearance of religiosity. Therefore, limiting the Statutory exemption to organizations engaged in what civil courts deem religious acts will arbitrarily exclude Jewish organizations whose purpose is to fulfill mitzvot that are not tied to religious rituals.

II. ANY TEST THAT REQUIRES COURTS TO DISTINGUISH BETWEEN ACTS THAT ARE SUFFICIENTLY RELIGIOUS AND THOSE THAT ARE NOT WOULD VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

As the Supreme Court has noted, "[i]t hardly requires restating that government has no role in deciding or even suggesting whether the religious ground" for a conscience- ***5** based objection "is legitimate or illegitimate." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). Courts may not determine what constitutes orthodox religious behavior. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that "no official, high or petty, can prescribe what shall be orthodox in … religion"). If the lower court's decision were to stand, Wisconsin courts would have to decide whether organizations that are admittedly acting with a religious purpose are also acting in a sufficiently religious manner to qualify for the Statutory exception. The court would have to make that determination for itself, even in cases where a religious organization testified that its actions were religious in nature. In fact, that is what occurred in this very case. That question is one which courts are constitutionally prohibited from answering. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (describing the question of whether an asserted religious belief is reasonable as one which courts "have no business addressing").

While a court cannot determine whether a sincere religious believer is properly practicing his faith, it may determine, at the outset, whether a purported believer is in fact sincere. That is the exact question, one of motivation, that the Statute actually requires courts to answer.

When a belief is shown to be fabricated or disingenuous, a court can declare a purported believer to be insincere. For example, in *United States v. Quaintance*, 608 F.3d 717, 718 (10th Cir. 2010) (Gorsuch, J), the Tenth Circuit held that two ***6** criminal defendants' religious beliefs were insincere when they sought to hastily induct a co-conspirator into the Church of Cognizance "which teaches that marijuana is a deity and sacrament." The court did not find that the defendant had misstated one of the articles of his faith, nor did it purport to explicate the true teachings of the Church of Cognizance. Rather, it simply found that there was tangible evidence that the defendant was lying about his adherence altogether.

Under the textual reading of the Statute, courts will determine whether organizations are sincerely motivated by a religious purpose rather than scrutinizing whether their actions are required by their faith. This Court should adopt that test both because it is a better reading of the statue and because it will avoid serious constitutional infirmities.

III. ALLOWING COURTS TO SUBSTITUTE THEIR JUDGMENT FOR THAT OF RELIGIOUS ADHERENTS REGARDING WHAT CONSTITUTES RELIGIOUS ACTS WILL HARM JEWISH WISCONSINITES.

Civil courts are not empowered nor qualified to decide religious questions. Indeed, judges consistently err while engaging in these types of inquiries. Such errors often redound to the detriment of religious minorities such as Jews.

For example, in one case concerning the reach of the Religious Freedom Restoration Act, a judge gave the example of a law requiring someone to "turn on the light bulb every day" as a statute that definitely would not impose a substantial burden on religion. Oral Argument at 1:00:40, E. *Tex. Baptist* ***7** *Univ. v. Burwell*, 793 F.3d 449 (5th Cir. Apr. 7, 2015), *vacated and remanded, sub nom. Zubik v. Burwell*, 578 U.S. 403 (2016). However, he was mistaken. That requirement would substantially burden Orthodox Jewish religious practices. On the Sabbath, Jews are forbidden from kindling flames, and Orthodox rabbis agree that this prohibition extends to turning on a light switch. *See Exodus* 35:3; *see also* Aryeh Citron, *Electricity on Shabbat*, CHABAD.ORG, https://tinyurl.com/ mrx4ynkk. The judge certainly did not intend to demean Judaism or suggest that Jewish practices should not qualify for protection. He was simply unaware of a practice that is central to the life of Orthodox Jews.

In another cautionary tale, the United States Court of Appeals for the Fourth Circuit effectively created a brand-new Jewish law requiring a quorum of men to study the bible. *See Ben-Levi v. Brown*, No. 5:12-CT-3193-F, 2014 WL 7239858 (E.D. N.C. Dec. 18, 2014), *aff'dfor reasons stated by district court*, No. 14-7908, 2015 WL 1951350 (4th Cir. May 1, 2015). The North Carolina Department of Public Safety had implemented a policy requiring the presence of a rabbi or a quorum of men before Jewish inmates were allowed to study the bible together. *See id.* That holding, although predicated on the view of one rabbi sent in an email to the chaplain, was clearly mistaken. Such a requirement is unheard of and was likely the result of miscommunication. The Talmud, Judaism's corpus of religious law and tradition, expressly contemplates bible study in groups of two. *See* Yehuda Shurpin, *What Is the Talmud? Definition and Comprehensive Guide*, CHABAD.ORG, ***8** https://tinyurl.com/ sphwmma2; see *also* Ilene Rosenblum, *Chavruta: Learning Torah in Pairs*, CHABAD.ORG, https://tinyurl.com/ypkan7nj. Torah study by individuals is permissible as well.

Indeed, the Court of Appeals decision in this case highlights the inevitability of such errors. The Court of Appeals maintained that it could objectively discern which actions were religious in nature. In doing so, it laid out a framework that could not possibly be applied to Jewish practices. For example, the Court of Appeals approvingly quoted the Seventh Circuit's list of religious activities that would qualify as operating exclusively for religious purposes:

> (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity in partibus infidelium; (b) pastoral counseling and comfort to members facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of individuals, such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and

> education in the doctrine and discipline of the church, as well as (in the case of mature and well-developed churches) theological seminaries for the advanced study and the training of ministers.

App.029 (citing *United States v. Dykema*, 666 F.2d 1096, 1100 (7th Cir. 1981).

That supposedly objective list of religious behaviors would bewilder observant Jewish readers. For example, Judaism does not command its adherents to proselytize - an action on the list - but it does command them to give charity - ***9** a behavior missing from the list. It would be tragic if a court were to tell a synagogue that its charity could qualify as religious, if it only acted more like a Christian group and engaged in proselytization.

Moreover, the prominence of clergy on the court's list of examples is also distinctly Christian and cannot "objectively" apply to Jewish practices which generally do not require the participation of rabbis. Under an analysis guided by these examples, a rabbi officiating at a funeral would be considered religious, whereas a *Chevra Kadisha*, a Jewish burial society that prepares a body for burial according to the strictures of Jewish law would not. *See* Menachem Posner, The *Chevra Kadisha*, CHABAD.ORG, https://tinyurl.com/599t9m6n. A rabbi officiating a wedding ceremony would be regarded as religious, but a *gmach*, or free loan society that often helps defray the costs of weddings, would not. *See Interest-Free Loans*, CHABAD.ORG, https://tinyurl.com/3yr2pmbn. The distinctions cited by the court, far from being objective, reflect a particular subjective religious tradition and cannot be evenhandedly applied to other faiths - such as Judaism.

These are just some examples of Jewish religious observances that would be deemed irreligious under the court of appeals' test which purports to "objectively" identify religious practices. We are confident that the Court of Appeals did not intend to articulate an objective test that could not be applied to Jews, but the fact that it did highlights why no such test can succeed.

***10 CONCLUSION**

Interpreting the term "operate" in the Statute according to its plain text as the Catholic Charities Bureau advocates, would prevent the unequal, arbitrary, and unconstitutional applications of the Statute that this brief highlights. This Court should conclude that whenever a religious organization acts in furtherance of religious tenets, it is operating with a religious purpose. If, however, this Court decides that the Statute does require civil courts to determine whether an organization's specific actions are religious, it should clarify that courts should defer to an organization's sincere beliefs regarding the religious nature of those actions.

Dated this 20th day of June, 2023.

Respectfully submitted,

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Footnotes

1 The Coalition wishes to thank Mendel Pinson, a student of Fordham University School of Law, for his assistance in preparing this brief.

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2023 WL 4149502 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
June 16, 2023.

On Appeal from the Court of Appeals Reversing the Douglas County Circuit Court
The Hon. Kelly J. Thimm, Presiding
Case No. 2019CV000324

Reply Brief of Petitioners-Respondents-Petitioners

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*5 INTRODUCTION

Catholic Charities Bureau of the Diocese of Superior has long ministered to "the least of these" in Jesus' name. That means caring for the poor, the widowed, the orphaned, the dispossessed - all in accordance with the Catholic Church's mission to care for others as part of God's plan for humanity. That is why, after all, it is a *Catholic* Charities Bureau.

But to hear LIRC tell it, "Catholic Charities Bureau" is a misnomer - really it should be "Secular Charities Bureau." Indeed, any charitable deed "that is not exclusively a religious activity" is a "secular social service[]" because "[g]overnment agencies and nonprofits with no religious affiliation also provide direct social services to individuals in need." Resp.44.

That view is absurd. Religious groups that help the needy do not suddenly become secular once a nonreligious entity starts helping the needy too. LIRC's position is simply the one that aggrandizes its role the most.

The absurdity of LIRC's position is echoed throughout its brief. At every turn, LIRC's brief distorts this Court's approach to statutory interpretation, Wisconsin unemployment insurance law, and First Amendment doctrine - which does not countenance the idea that what has been universally considered religious for millennia is suddenly "secular" on the say-so of a state agency. LIRC's writ runs nowhere near that far.

On the statutory text, LIRC offers no coherent theory for how the phrase "operated primarily for religious purposes" can transmute into a test that looks solely at the activities an organization ***6** performs. LIRC relies on this test and its own assessment of what qualifies as "religious" to conclude that CCB is not religious enough.

If that sounds troubling, it is. LIRC's interpretation of the religious purposes exemption would prevent CCB and the Diocese of Superior from following Catholic teaching and would entangle LIRC and the Wisconsin courts in religious questions. The better approach is to follow the plain text of the statute and look to whether the church operating the organization is doing so for primarily religious reasons. That straightforward inquiry follows the best of our traditions - allowing LIRC and Wisconsin courts to assess the sincerity of a religious group's beliefs but not complex questions of faith and doctrine.

ARGUMENT

I. Catholic Charities Bureau and its sub-entities are "operated primarily for religious purposes."

In response to CCB's statutory interpretation argument, LIRC offers a grab bag of disconnected assertions. Instead of directly engaging the text, LIRC raises policy arguments, Resp.17-19, points to irrelevant (and often contradictory) out-of-state sources, Resp.25-28, and ultimately argues that the text is "ambiguous" - all while attempting to shoehorn "activities" into the definition of both "operated" and "purposes," Resp.25-26. The plain text of the exemption contains one simple test. And, when applied here, the outcome of that test is also simple: CCB is operated primarily for religious purposes.

*7 A. A plain-text interpretation of the exemption confirms that Catholic Charities Bureau and its sub-entities are operated primarily for religious purposes.

As CCB previously explained, the meaning of the religious purposes exemption is plain from its text, structure, and context. Br.22-23. The exemption covers an organization that is managed or used (*i.e.*, "operated") primarily to advance the religious mission, end, or goal (*i.e.*, "purpose") of the church that is operating, supervising, controlling, or principally supporting the organization.

On this point, the record is unequivocal: "neither DWD nor this court dispute that the Catholic Church holds a *sincerely held religious belief as its reason for operating* CCB and its sub-entities." App.034 (emphasis added); *cf*. Resp.23 (reluctantly conceding "[t]he Diocese's reason or motive for creating the employers to serve as a social ministry arm of the church may have a religious connection").

Rather than dispute the Diocese's religious purpose, LIRC contorts the statute in two ways.

"Operated." LIRC argues that "operated" means "actions and activity" and then suggests courts should consider *only* an organization's activities to determine whether it has a religious purpose. Resp.20. CCB has already explained why this transmutation of a verb into a noun contradicts the statute's plain text. Br.24-30.

LIRC's only response is its belief that "operated" is used intransitively. Resp.20. LIRC is wrong. LIRC seems to think the direct object should be "primarily for religious purposes." Resp.20-21. Yet the direct object of "operated" is "organization." It is the *organization* (direct object) that is *operated* (transitive verb) primarily for ***8** religious purposes (prepositional phrase). This is elementary grammatical construction - the direct object goes *before* the verb in passive sentences. Bryan A. Garner, *Garner's Modern English Usage* 676 (4th ed. 2016) ("the passive subverts the normal word order for an English sentence" as "you back into the sentence" by putting the object before the verb).

Even treating "operated" as intransitive doesn't help LIRC. Either way, "operated" is used as a verb. But LIRC and the court of appeals both defined it as a noun. App.024; Resp.20. Not even the intransitive definitions of operated support this reading. *See, e.g., Operate* (intransitive), Random House College Dictionary 931 (1st ed. 1973) ("to work, perform, or function, as a machine does"). No reasonable definition of "operated" supports LIRC's focus on the "actions" or "activities" of CCB.

"Primarily for religious purposes." LIRC makes two "purposes" arguments: (1) "purposes" *also* means "action" or "activity" and (2) only the purposes of the organization - not the church operating it - matter. Resp.21-25.

First, LIRC halfheartedly disputes, Resp.21, the court of appeals' definition of "purposes": "the reasons for which something exists or is done, made, used, etc." or "an intended or desired result; end; aim; goal." App.018; *see* Br.30 (agreeing). This definition, the court of appeals explained, "suggest[s] that motive should be considered such that we should ask why the organization acts." App.024. This Court has reached the same conclusion elsewhere. *See, e.g., Brown County v. Brown Cnty. Taxpayers Ass'n*, 2022 WI 13, ¶ 38, 400 Wis. 2d 781, 971 N.W.2d 491 ("common definition" of ***9** "purpose" is "the reason why something is done or used" or "the aim or intention of something").

LIRC tries to obscure this plain meaning by looking to non-contemporaneous and discredited dictionaries,[1] secondary definitions, and business-specific definitions. Resp.21. And even LIRC's cherry-picked definitions falter. None suggests a singular focus on the actions or activities an organization engages in - divorced from the aim, end, goal, or reason for doing so.

Unable to conjure up a definition that *does not* focus on the reason, motive, goal, or aim, LIRC asserts without citation that CCB's *"business activity*, objectives, goals and ends are the provision of *secular social services."* Resp.21 (emphasis added). Yet as the court of appeals concluded, "neither DWD nor this court dispute that the Catholic Church holds a sincerely held religious belief as its reason for operating CCB and its sub-entities." App.035.

Second, LIRC disputes *whose* purposes should be considered. As CCB explained, the relevant religious "purposes" are those of the church. Br.30-31. In response, LIRC wrongly invokes the "next preceding antecedent" rule. Resp.23. This rule applies where a qualifying clause follows a list of *multiple* potential antecedents. *See In re Marriage of Meister*, 2016 WI 22, ¶ 30, 367 Wis. 2d 447, 876 N.W.2d 746 (explaining application). The rule is not triggered here because there is only *one* antecedent. The "organization" undoubtedly must be "operated primarily for religious purposes." But that does not explain *whose* purposes to consider.

***10** LIRC also says that because an organization may be "principally supported" by a church (instead of "operated" by it), the organization's purposes control. Resp.23. But this terminology is explained by the variety of religious polities in Wisconsin, which could include associations of churches supervising multiple tiers of subsidiary organizations. That's not relevant here, however, as the "controlled by a church" prong is not in dispute, Br.13, and the entity "operating" CCB and its sub-entities *is* the Diocese.

LIRC next recycles its argument that the religious purposes exemption would be "surplusage" under CCB's approach. Resp.23-24. Yet churches often set up secular subsidiaries to manage financial investments or real property, or to engage in other unrelated business. *See, e.g.*, IRS, *Tax Guide for Churches & Religious Organizations* 19, https://perma.cc/24SY-FH2E.

And regardless, CCB would prevail even if *its* purposes were dispositive. *E.g.*, App.110 (LIRC: "[t]he purpose of CCB 'is to be an effective sign of the charity of Christ"'); App.148 (DWD: CCB's "mission is derived from the Catholic Church's catechism and doctrine"); Resp.30 (conceding "court did acknowledge a religious motivation of CCB's work and to a lesser degree in the sub-entities' own work").

B. LIRC's policy arguments miss the mark.

LIRC next pivots to extratextual sources, citing a congressional committee report, Resp.25-26, and two court decisions, Resp.27-30. But "Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous." ***11** *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶¶ 50-51, 271 Wis. 2d 633, 681 N.W.2d 110. And LIRC identifies no ambiguity in the text - suggesting neither two reasonable interpretations nor that a "well-informed persons should have become confused." *Id.* ¶ 47. Instead, LIRC argues that CCB's interpretation is "unreasonable." Resp.14. Without genuine ambiguity, extrinsic evidence cannot be considered.

Were this Court nevertheless to consider extrinsic evidence - and it should not - LIRC's evidence is paltry. LIRC points to several federal sources that supposedly support its focus on "activities" instead of motivation. Resp.25-28. Yet under federal law, "the purpose towards which an organization's activities are directed, and not the nature of the activities themselves, is ultimately dispositive." *B.S.W. Grp., Inc. v. Commr*, 70 T.C. 352, 356-57 (1978). And *Living Faith* and *Dykema*, Resp.21, stand for the proposition that an organization's activities can *serve as evidence* of purpose - in those cases, whether an entity was a "commercial business" or religious. *Living Faith, Inc. v. C.I.R.*, 950 F.2d 365, 372 (7th Cir. 1991); *United States v. Dykema*, 666 F.2d 1096, 1100 (7th Cir. 1981). But it is still the purpose (*i.e.*, the reason for acting) that ultimately matters.

LIRC then suggests Wisconsin could lose federal funding if CCB is exempted. Resp.25. Tellingly, however, LIRC never claims that exempting CCB would violate federal law. Indeed, numerous ***12** states interpret the statutory language the way CCB does, App.022-23 n.10 - yet those states have not lost federal funding. [2]

LIRC next points to *Coulee*, but there the plaintiffs religious purpose was undisputed, so this Court never analyzed the issue. *Coulee Catholic Schs. v. LIRC*, 2009 WI 88, ¶ 71, 320 Wis. 2d 275, 768 N.W.2d 868. Even the dicta quoted by LIRC, Resp.29, do not support LIRC's exclusive focus on the activities of the organization. Instead, *Coulee* gave examples of ways hypothetical organizations manifest a religious mission by distinguishing between "a nominal tie to religion" and a "religiously infused mission." *Coulee*, 2009 WI 88, ¶ 48. *Coulee* does not endorse LIRC's activities-only test for assessing purpose.

II. LIRC's interpretation of the religious purposes exemption is unconstitutional.

CCB explained that LIRC's interpretation violates the United States and Wisconsin Constitutions by infringing on church autonomy, lacking religious neutrality, and entangling Church and State. Br.39-52. LIRC's responses fail.

Church Autonomy. LIRC claims the church autonomy doctrine covers only church property disputes and employment decisions. Resp. 33-34. Not so. Such questions are merely "component[s]" of church autonomy. *Our Lady of Guadalupe Sch. v. Mor-rissey-Berru*, 140 S. Ct. 2049, 2060-61 (2020). The church autonomy doctrine is regularly applied to tort and contract claims. *See*, ***13** *e.g., In re Diocese of Lubbock*, 624 S.W.3d 506 (Tex. 2021) (defamation tort); *Lee v. Sixth Mt. Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018) (contract).

The doctrine ensures religious institutions maintain "power to decide for themselves, free from state interference, matters of church government." *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952). That includes "internal management decisions that are essential to the institution's central mission." *Our Lady*, 140 S. Ct. at 2060; *see also Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 721 (1976) (organization of diocese is an "issue at the core of ecclesiastical affairs"); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872) (questions of "fundamental organization of [a] religious denomination" are beyond civil courts).

Here, the corporate organization of the Diocese, CCB, and the sub-entities is structured in accordance with Church teaching. The Church instructs bishops to "promote a diocesan branch of *Caritas*, Catholic Charities, or other similar organizations which, under his guidance, animate the spirit of fraternal charity throughout the diocese." Congregation for Bishops, *Apostolorum Successores* § 195 (2004).

LIRC concedes its determination would change if CCB and its sub-entities were not separately incorporated. Resp.34. And the court of appeals concluded "corporate form does make a difference," considering CCB and its sub-entities "independent of the church's overarching doctrine and purpose." App.042. CCB is thus penalized for following Catholic teaching about church governance.

***14** LIRC claims "[t]he Diocese and the employers remain free to determine their corporate structure" while participating in the State's program. Resp.34. Yet pressuring CCB to assume a different corporate form to qualify for the exemption is equally unconstitutional. *See Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449, 462 (2017) ("condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties" (cleaned up)).

Free Exercise. In its opening brief, CCB argued that LIRC's proposed interpretation and activities-based approach is not neutral because it (1) favors religions with less complex polities and (2) penalizes CCB for following its Catholic beliefs in how it serves the needy. Br.43-47.

LIRC ignores the first point. On the second, LIRC acknowledges it "may not exclude members of the community from an otherwise generally available public benefit because of their religious exercise." Resp.37. Yet LIRC has done just that, determining that CCB doesn't qualify for the exemption because it follows Catholic teaching in serving non-Catholics and not proselytizing. Resp.11-13, 3032; App.093-94, 98-100; *cf.* Br.14-16 (Catholic teaching). CCB now must choose between following its beliefs and qualifying for the exemption. "Governmental imposition of such a choice" is not neutral and substantially burdens religious exercise. *Thomas v. Review Bd.*, 450 U.S. 707, 716-18 (1981).

***15** Moreover, LIRC admits "[a] statute is invalid if it clearly grants denominational preferences." Resp.37. It claims the religious purposes exemption "makes no explicit and deliberate distinctions between different religious organizations." Resp.37. But neutrality "extends beyond facial discrimination" to "the effect of a law in its real operation." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993). And in its real operation, LIRC's rule favors religious groups with less complex polities that, *inter alia*, proselytize and serve only their own. Br.44-47.

Because LIRC's interpretation is not neutral, LIRC must show that it "serve[s] a compelling interest and [is] narrowly tailored to that end." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426 (2022). LIRC cannot show either.

LIRC claims "a compelling interest in providing broad unemployment insurance access to workers." Resp.39. But Wisconsin unemployment insurance law is vastly underinclusive, exempting myriad forms of "employment." Wis. Stat. § 108.02(15)(f)-(kt) (listing over 40 different exemptions from coverage). A governmental interest is not compelling "when [a law] leaves appreciable damage to that supposedly vital interest" unaddressed. *Lukumi*, 508 U.S. at 547. LIRC's rule fails narrow tailoring for the same reason: a law that is "underinclusive in substantial respects" demonstrates an "absence of narrow tailoring" that "suffices to establish [its] invalidity." *Id.* at 546; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 172 (2015) (underinclusiveness doomed narrow tailoring).

Establishment. The Establishment Clause forbids excessive government entanglement with religion. ***16** *L.L.N. v. Clauder*, 209 Wis. 2d 674, 686, 563 N.W.2d 434 (1997). This occurs when "a court is required to interpret church law, policies, or practices." *Id.* at 687. Often the "character of an activity is not self-evident" and so "determining whether an activity is religious or secular requires a searching case-by-case analysis," which "results in considerable ongoing government entanglement in religious affairs." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring).

LIRC whistles past the entanglement graveyard, describing its approach as a "neutral review of the employers' activities." Resp.41. Far from it. LIRC determined that, despite being "religiously motivated and manifestations of religious belief," CCB and its sub-entities' activities are "not intrinsically, necessarily, or uniquely religious in nature," *i.e.*, "not religious per se." App.099; *see also* App.041 (court of appeals' similar reasoning). In reaching this conclusion, LIRC analyzed, *inter alia*: (1) CCB and its sub-entities' funding streams, (2) their IRS Form 990s, (3) their organizational structure and history, (4) whether they proselytize or "inculcate the Catholic faith," (4) whether employees must be Catholic, and (5) the religious beliefs of those they serve. Resp.11-13, 3032; App.093-95, 098-100. LIRC even describes its assessment as "supported by substantial, credible evidence." Resp.32. If that isn't entangling, what is?

The Constitution prohibits "intrusive inquiry into religious belief." *Amos*, 483 U.S. at 339. And it bars the government from deciding which actions are "inherently" or "primarily" religious in light of a religious institution's mission. *See* ***17** *Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022) (noting "concerns about state entanglement with religion and denominational favoritism" inherent in "scrutinizing whether and how a religious [entity] pursues its ... mission").

LIRC's rule would force Wisconsin officials and courts to conduct endless inquiries into whether religious organizations' activities are sufficiently religious. But the very "prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). In contrast, CCB and its sub-entities' approach avoids entanglement.

CONCLUSION

The Court should reverse the court of appeals' judgment and render judgment for CCB and its sub-entities.

***18** Respectfully submitted,

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Dated this 16th day of June, 2023.

Footnotes

1 *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 n.3 (1994) (Scalia, J.) (criticizing Webster's Third).

2 LIRC also highlights alleged minor coverage differences in the Church's unemployment plan, but ultimately concedes that "the CUPP program is 'immaterial.'" Resp. 18-19. Given that concession, CCB does not address the point further.

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2023 WL 4055049 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
June 7, 2023.

On Appeal from the Court of Appeals, District 3 Reversing an Order of the Circuit Court for Douglas County, Honorable Kelly J. Thimm Circuit Court Case No. 2019cv000324

Response Brief of Respondent-Appellant State of Wisconsin Department of Workforce Development and Respondent-Co-Appellant State of Wisconsin Labor and Industry Review Commission

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*10 STATEMENT OF ISSUES

1. Services performed by employees for a nonprofit "organization operated primarily for religious purposes" are exempt from unemployment insurance coverage. Wis. Stat. § 108.02(15)(h)2. [1] The Labor and Industry Review Commission ("commission") and the court of appeals determined that the five nonprofit corporations in this case are not operated primarily for religious purposes because they provide secular social services and no religious programming. [2] Are the five nonprofit corporations operated primarily for religious purposes and therefore exempt from unemployment insurance coverage under Wis. Stat. § 108.02(15)(h)2.?

The circuit court answered: Yes.

The court of appeals answered: No. [3]

2. Do the court of appeals' and commission's decisions violate the First Amendment to the Constitution of the United States or Article I, section 18 of the Wisconsin Constitution?

The court of appeals answered: No.

STATEMENT OF FACTS

Each of the five nonprofit corporations (the "employers") in this case has been subject to the Wisconsin unemployment insurance laws. One employer, Catholic Charities Bureau ("CCB"), became subject in 1972, after it submitted a Department of Workforce Development ("department") form indicating that the nature of its operations was charitable, educational, and rehabilitative rather than religious. (R99:45 and R67:15-17) Two other employers, Black River Industries Inc. ("BRI") and Headwaters Inc. ("Headwaters") became subject in 1983. (R61:7 and 11) The employers have been reporting their employees' wages under a group ***11** account entitled "Catholic Charities" and elected reimbursement financing. [4] (R61:3-7, R67:5 and R99:34)

The employers provide secular social services, mostly funded through government grants and contracts. (R100:42 and 155) Barron County Developmental Services Inc. ("BCDS") provides sheltered employment to individuals with developmental disabilities. (R100:108) BCDS contracts with the Wisconsin Department of Workforce Development, Division of Vocational Rehabilitation ("DVR") to provide employment assessment and job development services to individuals with disabilities. (R100:235-236) BCDS also contracts with private companies to perform subcontracted work. (R65:12 and R100:238-239) BCDS is primarily funded by government grants and the contracts with private businesses. BCDS receives no funding from the Diocese of Superior ("Diocese"). (R100:239)

In December 2014, the board of directors for Barron County Developmental Disabilities Services requested to become an affiliate of CCB and became BCDS. (R100:233 and R65:10-11) The organization had no previous religious affiliation. (R100:233-234) The type of services and programing provided by the organization did not change after it affiliated with CCB. (R100:236-237)

BRI provides services to individuals with developmental disabilities, mental health disabilities, and individuals with a limited income. (R100:252-253) To provide these services, BRI: works with DVR to provide job training skills (R100:278-279); contracts with Taylor County to provide mental health services (R100:272); and operates a food service production facility, shredding program, and mailing services program to serve the community and provide job training. (R100:283-285) BRI receives no funding from the Diocese. (R100:273)

***12** Diversified Services Inc. ("DSI") provides services to individuals with developmental disabilities. (R100:220-221 and R65:57-58) DSI provides work opportunities for individuals with disabilities and also hires individuals without disabilities for production work. (R100:240-241) Most of DSI's funding comes from Family Care, a long-term care program, from DVR, and from private contracts. (R100:227-228, 246) DSI receives no funding from the Diocese. (R100:246)

Headwaters provides support services for individuals with disabilities. (R100:184) Individuals are referred to Headwaters from long-term care service funding agencies. (R100:185) Headwaters contracts with DVR to provide employment assessment and job development services for individuals. (R64:49 and R100:200-201) Headwaters has work-related contracts for individuals to learn work skills while earning a paycheck and teaches life skills to individuals with disabilities. (R64:48 and R100:206, 211)

Headwaters also provides Head Start home visitation services. (R100:209) Headwaters had provided birth-to-three services until Tri-County Human Services took over providing those services. (R100:205) Most of Headwaters' funding comes from government grants and it receives no funding from the Diocese. (R100:204 and R64:1)

CCB has separately incorporated sub-entities that operate 63 service programs. (R57:11) One sub-entity offers housing to seniors, individuals with disabilities, and individuals with mental illness. (R62:29-47, 55 and R100:173-174) Other sub-entities provide home health care services, daycare services for the elderly and for children. (R62:1-15 and R100:103-104, 106-107, 177-178) CCB's executive director, a layperson, oversees the operations of each of the sub-entities. (R100:65, 125) CCB also provides management services and consultation to its sub-entities, establishes, and coordinates their missions, and approves their capital expenditures and investment policies. (R57:39-40)

***13** The individuals participating in the employers' programs are not required to attend any religious training or orientation. (R100:92, 234, 288) Employees, board members and participants are not required to have any religious affiliation. (R97:17 and 100:92, 187-188, 219, 233, 287)

The employers are exempt from federal income tax under section 26 U.S.C. § 501(c)(3) of the Internal Revenue Code under a group exemption. (R100:56 and R57:22-30). The group exemption applies to "the agencies and instrumentalities and the **educational, charitable, and religious** institutions operated by the Roman Catholic Church in the United States" that are subordinate to the United States Conference of Catholic Bishops. (R57:22 emphasis added) The employers' brief crops the language of the IRS exemption, making it appear that the IRS had determined that each employer is operated exclusively for religious purposes. (Employers' brief 17) The IRS **does not** determine which organizations are included in a group exemption and organizations exempt under a group exemption **do not** receive their own IRS determination letter. (R57:25) The IRS **did not** determine that each of the employers is operated exclusively for religious purposes. *Catholic Charities*, ¶ 39, n.11.

APPLICABLE STATUTE

Wisconsin unemployment insurance law excludes from covered "employment" services performed for certain organizations. 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.

***14** The focus of the parties' dispute is the exemption under subdivision 2. The specific issue before this Court is whether the employers are operated primarily for religious purposes.

ARGUMENT

The employers provide **secular** social services to the public but insist that they should be exempt from unemployment insurance coverage based on a statute that only exempts nonprofits operated primarily for **religious** purposes. The employers' interpretation of the "operated primarily for religious purposes" clause is unreasonable because their interpretation does not give meaning to the entire statute, contradicts the legislative history, departs from the manner in which the word "purposes" is used in connection with religious activities in other statutes, and is inconsistent with this Court's decision in *Coulee Catholic Schools v. LIRC*. [5]

The commission correctly held that the employers' activities, rather than the religious motivation behind them, determine whether an exemption for participation in the unemployment insurance program is warranted. Finally, the Wisconsin and U.S. Constitutions permit laws of general application, like the unemployment insurance law, to be applied to employers affiliated with religious entities. [6] Accordingly, this Court should confirm the commission's decisions.

I. Scope and standard of review

This Court reviews the commission's decision rather than the decision of the court of appeals. *Heritage Mutual Ins. Co. v. Larsen*, 2001 WI 30, ¶ 25, n.13, 242 Wis. 2d 47, 624 N.W.2d 129. However, it may benefit from the lower court's analysis. *Id.*

A commission unemployment decision may only be set aside on limited grounds:
1. That the commission acted without or in excess of its powers.

2. That the order or award was procured by fraud.

3. That the findings of fact by the commission do not support the order.

***15** Wis. Stat. § 108.09(7)(c)6. Whether an employer has proven that it is exempt from coverage under the state unemployment system is a mixed question of law and fact. *Nottelson v. DILHR*, 94 Wis. 2d 106, 287 N.W.2d 763 (1980).

A. The commission's findings of fact and determinations as to the weight and credibility of evidence are conclusive upon reviewing courts.

Review of the commission's findings of fact is significantly limited. *Heritage Mutual*, 2001 WI 30, ¶ 24. Findings of fact made by the commission under chapter 108, the unemployment insurance law, are conclusive if supported by any credible evidence in the record.

Courts review the commission's findings on appeal, not those of the administrative law judge. *Anheuser Busch, Inc. v. Indus. Comm'n*, 29 Wis. 2d 685, 692, 139 N.W.2d 652 (1966). The question is not whether there is evidence to support a finding that was not made, but whether there was evidence to support a finding that was, in fact, made by the commission. *Brickson v. DILHR*, 40 Wis. 2d 694, 699, 162 N.W.2d 600 (1968).

Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact finder could base a decision. *Cornwell Personnel Assoc., Ltd. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). Substantial evidence, for purposes of review of an unemployment insurance decision, does not require a preponderance of the evidence. The test is whether reasonable minds could arrive at the same conclusion the commission reached. *Holy Name Sch. v. DILHR*, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982).

In determining whether substantial evidence supports a finding, the evidence is to be construed most favorably to the commission's findings. *Cornwell Personnel*, 175 Wis. 2d at 544. No court may substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. Wis. Stat. § 108.09(7)(f).

***16** The burden of showing that a commission decision is not supported by substantial and credible evidence is on the party seeking to have the decision set aside. *Xcel Energy Services, Inc. v. LIRC*, 2013 WI 64, ¶ 48, 349 Wis. 2d 234, 833 N.W.2d 665. A reviewing court, even though it has the complete record before it, has no authority to make its own findings of fact. *R.T. Madden, Inc. v. DILHR*, 43 Wis. 2d 528, 536-537, 169 N.W.2d 73 (1969). Here, the commission's factual findings are based on the actual, objective operations of the employers and are supported by substantial and credible evidence in the record. They are, therefore, conclusive on review.

B. The court applies a *de novo* standard of review to the commission's interpretation of law.

The determination of whether the facts, as found by the commission, fulfill a statutory standard is a question of law. *Bernhardt v. LIRC*, 207 Wis. 2d 292, 302-303, 558 N.W.2d 874 (Ct. App. 1996). The Wisconsin Supreme Court ended the practice of according deference to an administrative agency's interpretation of law. *See Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21.

The ultimate question of whether the employers are "operated primarily for religious purposes" and entitled to an exemption from Wisconsin's unemployment insurance program is dependent upon an interpretation of those terms as envisaged by the legislature and used in Wis. Stat. § 108.02(15)(h)2. Courts review *de novo* questions of statutory interpretation, *Tetra Tech*, 382 Wis. 2d 496, ¶ 84, but will give due weight to an agency's expertise, technical competence, and specialized knowledge where appropriate, *id.*, ¶ 3.

II. Under the exemption, the employers are not operated primarily for religious purposes because their activities are secular.

The employers operate for charitable, social services purposes. They rely primarily on government funding to provide programs for individuals with disabilities and individuals in need. They also contract with private companies to ***17** provide services as part of their job training programs. The employers do not require their employees, program participants, or board members to be of the Catholic faith. The employers do not provide the participants with religious materials, training or devotional services and do not try to inculcate the Catholic Faith. (R100:97-98)

The commission correctly determined that the employers are operated primarily for secular social services purposes, not religious purposes. This Court should confirm the commission's decisions.

A. The unemployment insurance law is remedial in nature, designed by the Legislature to provide unemployment benefit coverage to wage earners, and must be interpreted to further the law's purpose.

"Statutes are interpreted in view of the purpose of the statute." *State v. Matasek*, 2014 WI 27, ¶ 13, 353 Wis. 2d 601, 846 N.W.2d 811. Wisconsin's unemployment insurance law embodies a strong public policy in favor of compensating the unemployed. "In good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners." Wis. Stat. § 108.01(1). The purpose of the unemployment insurance law is to provide benefits to persons who have lost work through no fault of their own. "Hence, the statute is remedial in nature and should be liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983). This Court reaffirmed this construction of the unemployment law in *Operton v. LIRC*, 2017 WI 46, ¶ 32, 375 Wis. 2d 1, 894 N.W.2d 426.

In order to construe the statute broadly in favor of coverage, this Court must narrowly construe the exemption. *McNeil v. Hansen*, 2007 WI 56, ¶ 10, 300 Wis. 2d 358, 731 N.W.2d 273. The exemption should be construed "with the general purpose of ch. 108 in mind." ***18** *Leissring v. DILHR*, 115 Wis. 2d 475, 484, 340 N.W.2d 533 (1983) and "[T]he burden of proving entitlement to [a tax] exemption is on the one seeking the exemption. 'To be entitled to tax exemption the taxpayer must bring himself within the exact terms of the exemption statute.'" [7] *Wauwatosa Ave. United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, ¶ 7, 321 Wis. 2d 796, 776 N.W.2d 280 (citation omitted).

Here, a narrow interpretation of the exemption is warranted to protect employees' eligibility for unemployment benefits. Benefit eligibility is dependent on wages earned in non-exempt employment during the employee's base period. [8] When a worker's wages are excluded because an employer is exempt, the employee's eligibility for unemployment benefits may be jeopardized or greatly reduced due to insufficient base period wages. This defeats the purpose of the unemployment insurance law, which is to protect wage earners.

Furthermore, unemployment insurance is a joint federal-state program. Federally-funded benefits provide additional assistance in times of high unemployment, but employees who are ineligible for regular unemployment insurance benefits do not qualify, in most instances, for additional federal assistance. The additional federal assistance, like other unemployment insurance benefits, is not only essential for the welfare of unemployed workers, but also to the economic vitality of the state. "The decreased and irregular purchasing power of wage earners in turn vitally affects the livelihood of farmers, merchants and manufacturers, results in a decreased demand for their products, and thus tends partially to paralyze the economic life of the entire state." Wis. Stat. § 108.01(1).

The employers assert that the parties agree that the Catholic Church Unemployment Program ("CCUP") provides equivalent benefits to the State's system. (Employers' brief 18 and 47) This is false. First, the CCUP system is not integrated into the State system. Employees in the CCUP system would not ***19** receive credit from the State for wages earned in exempt employment, resulting in no, or reduced, benefits. Furthermore, while part-time employees who worked fewer than 20 hours a week or employees who are furloughed may be eligible for benefits under Wis. Stat. ch. 108 based on wages earned from nonexempt employers, such employees are not eligible for benefits from CCUP. (R60:2-4) The state program also provides additional benefits in time of high unemployment. [9]

This Courts' interpretation of the subdivision will be applicable to all religiously-affiliated organizations and thus the CCUP program is "immaterial." *See Catholic Charities*, ¶ 38. ("This argument is a nonstarter. Whether an organization provides private unemployment insurance to its employees is not a factor under the religious purposes.") Wisconsin Stat. § 108.02(15)(h)2. must

be interpreted narrowly to implement the remedial goals of chapter 108 so that employees of organizations such as the five employers receive unemployment benefits when they lose their jobs through no fault of their own.

B. The commission's decisions interpret the statute to fulfill the remedial goals of Wis. Stat. ch. 108.

1. The Court's focus must be on the employers' purposes, as shown by their activities.

The employers rewrite the exemption as applying to an organization "[managed or used] primarily for religious purposes [of a church.]" (Employers' brief 33) Their interpretation is contradicted by the language of the statute, adds words to the statute, would render the language at issue surplusage, and is inconsistent with the legislative history.

Statutory interpretation begins with the language of the statute. "Statutory language is given its common, ordinary and accepted meaning." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Context is also important. *Id.* ¶ 46.

***20** "Employment" is defined as any service performed by an individual for pay. Wis. Stat. § 108.02(15). Wisconsin Stat. § 108.02(15)(h) provides that employment, as applied to work for a nonprofit organization, does not include service performed in three separate instances. Under subdivision 1., employment does not include service performed for a church. Under subdivision 2., employment does not include service performed for entities meeting the two separate conditions in the subdivision. Under subdivision 3., employment does not include service performed as a minister. For each of these subdivisions, the noun phrase "employment as applied to work for a nonprofit organization" is the subject and "does not include" is the verbal phrase. "Service" combined with each of the three subdivisions are noun phrases that constitute the direct object.

The court of appeals defined "operate" as "to work, perform, or function," "to act effectively; produce an effect; exert force or influence," or "to perform some process of work or treatment." *Catholic Charities*, ¶ 23 (citing *Operate*, https://www.dictionary.com/browse/operate) The court thus held that the term "'operate' connotes an action or activity." *Id.* The actions and activity are the services performed by the employers' employees.

The employers incorrectly argue that "operate" is a transitive verb in the "religious purposes" clause and thus the court of appeals used the wrong definition. "Operate" may be used as either a transitive or intransitive verb. When used as an intransitive verb, "operate" does not take a direct object, "although [an intransitive verb] may be followed by a prepositional phrase serving an adverbial function." Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation*, p. 71 (2016). (Supp-App. 4) In the phrase "organization operated primarily for religious purposes," "operated" is an intransitive verb and "primarily for religious purposes," is a prepositional phrase. *See, e.g., Union Tank Line Co. v. Richardson*, 183 Cal. 409, 412, 191 P. 697 (1920), (holding that "operate" was used intransitively in the statutory phrase "taxes levied upon railroads ... including ***21** other car-loaning and other car companies **operating upon railroads** in this state ...." (emphasis added)).

The intransitive use of "operated" in the exemption is illustrated by substituting an adverb such as "legally" for the phrase "for religious purposes." However, if "operated" were used as a transitive verb, the sentence would need a direct object. To make "operated" a transitive verb as the employers contend, the sentence would need to be written as "the church operated the organization." But that is not what the statute says.

The next word, "primarily," means "essentially; mostly; chiefly; principally" or "in the first instance; at first; originally." *Catholic Charities*, ¶ 23 (citing *Primarily*, https://www.dictionary.com/browse/primarily). Primarily is followed by "purposes," which has several definitions. Because the employers are corporations, Black's Law Dictionary (11th ed. 2019) provides an appropriate definition of "purpose:" "[a]n objective, goal, or end; specif., the business activity that a corporation is chartered to engage in." The court of appeals stated that "[p]urpose" is also defined as "the reasons for which something exists or is done, made, used, etc." or "an intended or desired result; end; aim; goal." *Catholic Charities*, ¶ 23, citing *Purpose*, https://www.dictionary.com/browse/purpose. "Purpose can also mean 'something that one sets before himself [or herself] as an object

to be attained' and 'an object, effect, or result aimed at, intended, or attained."' *Id.*, citing *Purpose*, Webster's Third New Int'l Dictionary (unabr. 1993).

The key issue is the proper definition of "purposes." The employers' business activity, objectives, goals and ends are the provision of secular social services. The activities of the employers are properly considered to determine their purposes because the employers' "activities provide a useful indicia of the organization's purpose or purposes." *Living Faith, Inc. v. C.I.R.*, 950 F.2d 365, 372 (7th Cir. 1991). In this case, the employers operate to provide social services, ***22** and their activities accomplish, through their employees' services, the employers' social services objectives or purposes.

Focusing on the employers' activities to determine their purpose is consistent with statutes restricting the use of public monies that state: "Limitations on use of funds for certain *purposes*. No funds provided directly to religious organizations by the [governmental entity] may be expended for sectarian worship, instruction, or proselytization." Wis. Stat. §§ 46.027(9), 49.114(9), 59.54(27)(j) and 301.065(9) (emphasis added). These statutes define impermissible **purposes** as certain religious **activities**.

By considering the employers' activities, this Court can determine if the employers fall within the unemployment exemption. This Court conducted such an analysis to determine if a labor union's **activities** brought it within an exempt **purpose** under Wis. Stat. § 108.02(5)(g)(7) (1942-43) in *International Union v. Industrial Comm.*, 248 Wis. 364, 372, 21 N.W.2d 711 (1946). The statute at issue exempted "[e]mployment of any person by a corporation ... organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes ..." This Court considered the uses of the union's income, and because the bulk of it was spent to carry out its collective bargaining contract, the union did not fall within the exemption.

Here, because the employers' activities and use of its funds is to provide secular social services, the employers are not operated for religious purposes.

2. Consideration of the church's purpose instead of the employers' purposes would require rewriting the statute and impermissibly render the "purposes" clause surplusage.

The court of appeals considered the employers' purpose, not the church's, because the exemption only applies to the employers' employees. *Catholic Charities*, ¶ 25. The court of appeals' analysis is supported by the structure of subdivision 2. It is the nonprofit organizations' employees' services, not the church employees' services, which are "not included" as employment. ***23** Furthermore, a qualifying phrase refers to the next preceding antecedent unless the context or evident meaning require otherwise. *Fuller v. Spieker*, 265 Wis. 601, 605, 62 N.W.2d 713 (1954). When considering the qualifying phrase "operated primarily for religious purposes," the next preceding antecedent, the employing organization, should be considered and not the church.

The employers' argument, that the church's purpose must be considered, ignores that subdivision 2. specifically contemplates that a nonprofit may be principally supported by a church but not operated by the church. *See, e.g., MHS, Inc.*, UI Dec. Hearing No. 8852, S (LIRC July 12, 1991)(Supp-App. 7). To ensure the entire subdivision has meaning in all cases, this Court must focus on the activities of the nonprofit organizations in determining their purposes.

The employers are only able to achieve their desired result by inserting "of a church" after "purposes." (Employers' brief 33) However, the legislature did not write the statute that way; this Court rejects statutory interpretations that add words to the statute. *See, Bruno v. Milwaukee Cnty.*, 2003 WI 28, ¶ 16, 260 Wis. 2d 633, 660 N.W.2d 656.

The employers' argument on pages 9 and 31 of their brief, that it is undisputed the Diocese operates CCB for a religious purpose, is misleading. To make this argument, the employers define purpose as "reason." The Diocese's reason or motive for creating the employers to serve as a social ministry arm of the church may have a religious connection, but the ends to be accomplished by the individual employers through their employees' services - in other words, their "purposes" - is the provision of social

services. The employers also incorrectly assert that it is undisputed that the requirement of a primarily religious purpose says nothing about the types of permitted activities. (Employers' brief 35) However, the department and commission's position has been that the employers' activities must be religious to fall within the scope of the statute.

The court of appeals also held that, if the church's purpose were considered, it would render the "religious purposes" clause unnecessary. *Catholic* ***24** *Charities*, ¶ 26. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Kalal*, 271 Wis. 2d 633, ¶ 46. The employers respond that the religious purpose clause asks "why" the organization is operated. But this proves the court of appeals' point: Why would a religious organization set up a nonprofit affiliate except if motivated by its religious mission? Under the employer's interpretation, a religiously-affiliated nonprofit would always be exempt and the clause rendered surplusage.

Moreover, as demonstrated by the employers' brief at pages 14-15 and 37-38, answering the question of why the organization operated, that is looking for the motive, requires an interpretation of religious beliefs. Such an inquiry is constitutionally impermissible. "It is well-settled that excessive governmental entanglement with religion will occur if a court is required to interpret church law, policies, or practices." *L.L.N. v. Clauder*, 209 Wis. 2d 674, 687, 563 N.W.2d 434 (1997). However, in conducting a neutral and secular inquiry of whether schools are affiliated with the same religious denomination, "the professions of the school with regard to the school's self-identification and affiliation" may be considered. *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶ 5, 398 Wis. 2d 92, 961 N.W.2d 635. It is also permissible to consider whether an employer's actual practice shows a fundamentally religious mission for purposes of an exception to the Fair Employment Act. *Coulee*, 320 Wis. 2d 275,¶¶ 48, 72-75. Similarly, the commission's neutral and secular review based on the employers' professions of their activities does not require an interpretation of "church law, policies or practice."

Finally, the commission rejected an approach looking solely at an entity's motivation or reasons, because it would allow the organization to determine its own status without regard to its actual function. (R55:10) Such an approach would render the clause unnecessary and contrary to the requirement that the exemption be construed narrowly. *Catholic Charities*, ¶ 37. The Legislature could have written an exemption that excluded **all** nonprofit entities affiliated with ***25** a religious organization, by omitting the clause "operated primarily for religious purposes." Because it chose to include the limiting clause, this Court must interpret the statute to give it meaning.

C. Wisconsin unemployment laws must be interpreted consistent with the Federal Unemployment Tax Act.

Federal funding of Wisconsin's unemployment program is contingent on Wisconsin's law conforming to federal unemployment law and Wisconsin's administration of its program substantially complying with federal law. 20 C.F.R. §§ 601.2(d) and 601.5. *See also City of Milwaukee v. DILHR*, 106 Wis. 2d 254, 260, 316 N.W.2d 367 (1982).

Wisconsin Stat. § 108.02(15)(h)2. was enacted to conform Wisconsin's unemployment law to 26 U.S.C. § 3309(b)(1)(B) of the Federal Unemployment Tax Act ("FUTA"). 1971 Wis. Laws, ch. 53, § 6. *See* 1971 S.B. 330 and *Resurrection Cemetery and Mt. Olivet Cemetery, Inc. v. DILHR*, No. 149-083 (Wis. Cir. Ct. Dane Cty., June 9, 1976) (Supp-App. 13, 21-22 & 25). A Congressional Committee Report discusses the Legislature's intent of the federal religious exemption in 26 U.S.C. § 3309(b)(1)(B). "[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." *Garcia v. U.S.*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984) (citation omitted).

The court of appeals properly referred to the Report because a court may look to legislative history to confirm the plain meaning. *Teschendorf v. State Farm Ins. Co., 2006* WI 89, ¶ 14, 293 Wis. 2d 123, 717 N.W.2d 258. The "purpose in doing this is merely to contribute to an informed explanation that will firm up statutory meaning." *Id.* Furthermore, given the conflict among the other jurisdictions as noted in *Catholic Charities*, ¶ 28 n.10, this Court should determine that the statute is ambiguous and consult its legislative history.

This Court has relied on Congressional Committee Reports on bills amending FUTA when interpreting Wisconsin laws enacted to conform with ***26** FUTA. *Leissring*, 115 Wis. 2d at 485-488. [10] Because Wis. Stat. § 108.02(15)(h)2. was enacted to conform Wisconsin law to federal law, the Congressional Committee Report on the bill amending FUTA informs the interpretation of the Wisconsin statute. The Committee Report explains the intent of the federal exclusion:

This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). 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. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. 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**.

H.R. Rep. No. 91-612, p. 44 (1969) (emphasis added) (Supp-App. 39).

The U.S. Supreme Court cited this portion of the report as indicative of the intended coverage of the exemption under 26 U.S.C. § 3309. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 781, 101 S. Ct. 2142, 68 L. Ed. 2d 612 (1981). [11] The Committee Report distinguishes between employers engaged in religious activities, such as colleges preparing students for the ministry, which are considered to be operated primarily for religious purposes, from church-related charitable organizations, which are not engaged in religious activities, such as an orphanage or a home for the aged, and **not** considered to be operated primarily for religious purposes. Here, the employers are separately incorporated charitable organizations that provide secular social services, not religious instruction. Like an orphanage or home for the aged, they are **not** ***27** considered to be operated primarily for **religious** purposes. The commission's activity-focused inquiry is consistent with the Report.

D. The implementing regulations and federal court decisions reviewing "religious purposes" to determine tax exempt status under the federal tax code provide persuasive authority for examining the activities of the organization.

This Court has found federal cases interpreting statutes identical, or similar, to Wisconsin statutes to be persuasive authority for interpreting Wisconsin law. *See, e.g., Industrial Comm. v. Woodlawn Cemetery Ass'n*, 232 Wis. 527, 287 N.W. 750 (1939) and *Ladish Co. v. DOR*, 69 Wis. 2d 723, 733-34, 233 N.W.2d 354 (1975).

Because the Wisconsin exemption is based on a provision in the federal tax code, guidance for interpreting "operated primarily for religious purposes" is provided by cases applying 26 U.S.C. § 501(c)(3) of the tax code and its implementing regulations. Under the tax code, "[corporations ... organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." are exempt from federal taxation. The tax code regulations instruct that "an organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)." 26 C.F.R. § 1.501(c)(3)-1(c)(1). Under the regulations, organizations that are exempt for religious, charitable, scientific, testing for public safety, literary, or educational purposes are those organizations that are primarily engaged in religious, charitable, scientific, testing for public safety, literary, or educational activities.

The court of appeals properly relied on a Seventh Circuit decision in analyzing the religious purposes exemption. In *U.S. v. Dykema*, the Seventh Circuit instructs that the "term 'religious purposes' is simply a term of art in the tax law" and that the IRS determines whether an entity's "actual activities conform ***28** to the requirements" for being tax exempt. *U.S. v. Dykema, 666* F.2d 1096, 1101 (7th Cir. 1981). To determine if an organization's actual activities conform to the statutory requirements for exemption, "it is necessary and proper for the IRS to survey all the activities of the organization, in order to determine whether what the organization in fact does is to carry out a religious mission or to engage in commercial business." *Id.* at 1100. The

appropriate review "could be made by observation of the organization's activities or by the testimony of other persons having knowledge of such activities, as well as by examination of church bulletins, programs, or other publications, as well as by scrutiny of minutes, memoranda, or financial books and records relating to activities carried on by the organization." *Id.*

The Seventh Circuit also held that "[t]ypical activities of an organization operated for religious purposes would include:"

> (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity *in partibus infidelium*; (b) pastoral counseling and comfort to members facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of individuals, such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and education in the doctrine and discipline of the church, as well as (in the case of mature and well developed churches) theological seminaries for the advanced study and the training of ministers.

Id. The Seventh Circuit explained that examining "an organization's activities thus enable[s] 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." *Id.*

In a later decision, the Seventh Circuit reaffirmed the importance of examining an organization's activities to avoid any subjective inquiry. *Living Faith*, 950 F.2d at 376. Similarly, here, an examination of employers' activities is necessary to determine whether their activities conform to the exemption from Wisconsin's unemployment insurance law under Wis. Stat. § 108.02(15)(h)2.

***29 E. The commission and court of appeals appropriately relied on *Coulee* to determine if the employers are operated primarily for religious purposes.**

The court of appeals held that the analysis in *Coulee* "provides guidance in understanding the religious purposes exemption." *Catholic Charities*, ¶ 43. In *Coulee*, this Court analyzed whether a school association had a fundamentally religious mission to determine whether a teacher's discrimination claim was precluded by the Free Exercise clause in the U.S. Constitution under the "ministerial exception" to anti-discrimination laws. The "ministerial exception" protects a church's free exercise rights from governmental interference with a church's selection of those positions important to its spiritual and pastoral mission. *Coulee*, 320 Wis. 2d 275, ¶ 45.

To determine whether the teacher's position was ministerial, this Court conducted a two-step, functional analysis. First, a court must determine if the organization, in both statement and practice, has a fundamentally religious mission; "[t]hat is, does the organization exist primarily to worship and spread the faith?" *Id.* ¶ 48. This court explained that:

> It may be, for example, that one religiously-affiliated organization committed to feeding the homeless has only a nominal tie to religion, while another religiously-affiliated organization committed to feeding the homeless has a religiously infused mission involving teaching, evangelism, and worship. Similarly, one religious school may have some affiliation with a church but not attempt to ground the teaching and life of the school in the religious faith, while another similarly situated school may be committed to life and learning grounded in a religious worldview.

Id. The decision's distinguishing of organizations based on their activities parallels the analysis in the Federal Committee Report.

Under *Coulee*, if the organization has a fundamentally religious mission, "[t]he second step in the analysis is an inquiry into how important or closely linked the employee's work is to the fundamental mission of that organization." *Id.* ¶ 49. This inquiry considers several factors, including whether the individual ***30** performs quintessentially religious tasks, such as evangelizing, participating in religious rituals, worship, or worship services.

Coulee informs the interpretation of the unemployment exemption because determining whether an organization has a fundamentally religious mission is analogous to determining whether the organization is operated for primarily religious purposes. The exemption in Wis. Stat. § 108.02(15)(h) also excludes individuals employed by a church, [12] and ministers and members of a religious order. [13] *Coulee* illustrates how employees working for an employer engaged in quintessentially religious activities may be analogous to church employees and ministers.

The employers assert that *Coulee* is distinguishable but do not explain why those distinctions mean *Coulee's* functional analysis should not be considered for purposes of defining the religious purposes exemption. Focusing on an employer's activities, rather than the church's reasons or motivation, appropriately balances employees' ability to obtain unemployment benefits against religious organizations' need to be free from governmental interference in their selection of positions important to their spiritual and pastoral mission. Accordingly, *Coulee* provides guidance on whether an organization is operated primarily for religious purposes and supports the commission decisions.

F. The commission and court of appeals appropriately determined that the employers are not operated primarily for religious purposes.

Contrary to the employers' assertion at page 34 of its brief, the court of appeals did not recognize that CCB and its sub-entities' purposes are primarily religious. The court did acknowledge a religious *motivation* of CCB's work and to a lesser degree in the sub-entities' own work. *Catholic Charities*, ¶ 57.

The commission found that the employers were not operated primarily for religious purposes by considering whether the employers' activities conform to the ***31** requirements which the Legislature has established as entitling them to an exemption from the unemployment laws. The commission determined that the employers are akin "to the religiously-affiliated organization committed to feeding the homeless that has only a nominal tie to religion." (R55:8, 17, 24, 33 and 41)

The objectives, goals and ends which the employers seek to achieve through their employees' services as shown by their IRS Form 990s and websites, are the provision of social services and are described in the employers' mission statements to the Internal Revenue Service:

· Serving developmentally disabled citizens. (R64:2)

· Provide services to individuals with developmental disabilities. (R65:18)

· Provide employment activities to individuals with disabilities. (R65:58)

· In partnership with the community, to provide people with disabilities opportunities to achieve the highest level of independence. (R66:20)

· To alleviate human suffering by sponsoring direct service programs for the poor, the disadvantaged, the disabled, the elderly, and children with special needs. (R61:52)

BCDS was formerly an independent agency without any religious affiliation (R100:233-234) that later became affiliated with CCB. BCDS provides sheltered workshops for individual with disabilities. (R100:108 and 65:17-18) The organization operated the same way before and after its affiliation with CCB. (R61:1-2 and R100:236-37) The purposes of the organization's operations did not transform from secular to religious simply as a result of the business transfer.

BRI provides job training programs and services for individuals with disabilities and individuals with limited incomes. (R66:19-20 and R100:252-254, 275) DSI provides work opportunities for individuals with disabilities and supports them in community jobs. (R65:48-58 and R100:240-241) Headwaters primarily serves individuals with developmental disabilities and teaches them life and work skills. (R64:1-2 and R100:206, 211)

CCB provides administrative services to its affiliated agencies. CCB's social services include subsidized housing for income-eligible seniors, individuals ***32** with disabilities, and individuals with mental illness. (R62:29-47, 55 and R100:173-174) CCB also provides home healthcare services, and daycare services for the elderly and for children. (R62:1-15 and R100:103-107, 177-178)

"[T]he activities of CCB and its sub-entities are the provision of charitable social services that are neither inherently or primarily religious activities." *Catholic Charities*, ¶ 58. The employers do not operate to inculcate the Catholic faith. (R100:98) They are not engaged in teaching the Catholic religion, evangelizing, or participating in religious rituals or worship services with program participants. (R100:99-100) Their employees, participants, and board members are not required to be of the Catholic faith. (R100:92, 187, 219, 233 and 287-288) The commission's findings that the employers are operated primarily to administer social service programs (R55:21) and to provide social services is supported by substantial, credible evidence. (R55:5, 13, 29 and 38) Accordingly, the employers are not operated primarily for religious purposes.

The commission's functional approach, which considers the employers' activities, is consistent with the language of the statute, the Congressional Committee Report, *Coulee*, and persuasive Seventh Circuit decisions. It gives meaning to all parts of the statute and avoids any unconstitutional entanglement. The commission's decisions should be confirmed.

III. The denial of the unemployment tax exemption to the employers does not violate the U.S. or Wisconsin Constitutions.

The employers raise three First Amendment challenges to the commission's and court of appeals' decisions, each of which overreaches the bounds of First Amendment protections. They raise "as applied" challenges and thus must prove that the denial of the unemployment exemption is unconstitutional beyond a reasonable doubt. *State v. Smith*, 2010 WI 16, ¶¶ 8-9, 323 Wis. 2d 377, 780 N.W.2d 90 (citations omitted).

The commission's and court of appeals' decisions do not interfere with the Diocese's internal governance or restrict its ability to fulfill its religious mission.

***33** The statute, as interpreted and applied by the commission and court of appeals, does not burden the Diocese's sincerely held religious beliefs. The decisions do not deny the employers a generally available benefit. A neutral, objective review of the employers' activities will not result in an unconstitutional entanglement in religious affairs. The commission and court of appeals simply require that laws of general application, the unemployment insurance laws, be applied to the employers.

A. The commission's and court of appeals' decisions do not intrude on internal church governance.

The employers assert that the commission's interpretation interferes with church autonomy principles. (Employers' brief 40) However, while the commission and court of appeals recognized that the employers are separately incorporated legal entities, their decisions do not effectuate a severance of the employers from the Diocese and do not interfere with the Diocese's autonomy.

In contrast, in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952), the challenged statute transferred the control of the New York churches of the Russian Orthodox religion to the governing authorities of the Russian Church in America and thus actually interfered with the governing structure of the church. Here, neither the court of appeals nor the commission determined who had possession or control of church property in contrast to the issues presented in the cases cited on pages 41 and 42 of the employers' brief.

In support of its internal church autonomy argument, the employers also rely on cases regarding the "ministerial exception" to employment discrimination laws. The ministerial exception, also discussed in *Coulee*, protects religious institutions' "autonomy with respect to internal management decisions that are essential to the institution's central mission" and preserves a church's authority to remove a minister without interference by secular authorities. ***34** *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060, 207 L. Ed. 2d 870 (2020). The religious institutions' autonomy in deciding "matters of church government" "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060. Similarly, *Coulee* found that although Wis. Const. art. I, § 18 does not permit the application of the State's anti-discrimination laws to ministerial employees, general laws related to taxes and social security are normally acceptable. *Coulee*, 320 Wis. 2d 275, ¶ 65.

The employers incorrectly assert that everyone agrees that CCB is part and parcel of the Catholic Church. (Employers' brief 41) In fact, the employers are separately incorporated. Thus, under the statute, the employers' employees are not considered church employees. If the entities were not separately incorporated and the employees were church employees, the employees would be exempt under Wis. Stat. § 108.02(15)(h)1., which exempts church employees. The employers incorrectly assert that everyone agrees that the reason CCB and its sub-entities administer their social services programs is for a religious purpose. (Employers' brief 41-42) The department and the commission do not agree that the employers are operated for religious purposes because, under the unemployment law, the employers are operated for secular social services purposes.

Requiring unemployment insurance coverage for laid off workers is simply not comparable to a court infringing on a church's authority to select its ministers and religious educators. The Diocese and the employers remain free to determine their corporate structure and to determine who plays key roles in their respective organizations while participating in the unemployment program. Accordingly, the application of the unemployment insurance law is permissible under both the Wisconsin and the United States Constitutions.

***35 B. The commission's and court of appeals' decisions do not violate the Free Exercise Clause.**

1. Chapter 108 is a neutral law of general application that does not burden sincere religious beliefs.

"The Free Exercise Clause inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989). Neutral laws of general application that only incidentally burden religion are not subject to strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876, 210 L. Ed. 2d 137 (2021). A party may carry its burden of proving a free exercise violation by showing that a government entity has burdened a sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22, 213 L. Ed. 2d 755 (2022). A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*

Here, the employers' purported burden, the unemployment insurance laws, are neutral and generally applicable and do not target religious practices. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 880, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (The Social Security law is a "neutral, generally applicable regulatory law") *citing U.S. v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982). In contrast, the cases cited by the employers involve prohibitions imposed on specific religious activities. For example, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538-39, 113 S.

Ct. 2217, 124 L. Ed. 2d 472 (1993), the City prohibited, for public health reasons, the animal sacrifice practice of the Santeria religion. The Court found the City's ordinance was not neutral because it resulted in a "flat prohibition" on the targeted religious practice even when it did not threaten public ***36** health interests. *Id. Fowler v. Rhode Island*, 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953) involved a Jehovah's Witness minister who was prohibited from speaking in a public park when other religions' church services could be held in the park.

The commission's interpretation does not prohibit the Diocese or the employers from engaging in any activity. The employers have participated in the State unemployment insurance program for many years and do not contend that their participation was a significant or substantial burden on their religious practices or beliefs. "[T]he Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony and Susan Alamo Found. v. Sec'y Labor*, 471 U.S. 290, 303, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985).

The employers have not asserted that they have a sincere religious belief against the payment of unemployment insurance taxes or against the provision of unemployment benefits to unemployed workers. They assert that they would save funds if they were to switch to the church program. CCB's former Chief Financial Officer believed that their own program "was more efficient and dealt more directly with the people that were eligible." (R100:123) His testimony does not establish any cost savings.

Moreover, although the statute requires that the employers pay for their employees' unemployment benefits, any burden from the payment of a "generally applicable" sales and use tax is not "constitutionally significant." *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 391, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990). Similarly, it is doubtful that the denial of an income tax deduction constitutes a substantial burden. *Hernandez*, 490 U.S. at 699. To support their assertion that the commission is subjecting the employers to "worse treatment than other religious ministries," the employers would need to ***37** show a burden. Under the law, their inclusion in the unemployment program is not a constitutionally significant burden.

The employers assert that an "otherwise-available" exemption was denied because of Catholic religious doctrine. (Employers' brief 45-46) The state may not exclude members of the community from an otherwise generally available public benefit because of their religious exercise. *Carson v. Makin*, 142 S. Ct. 1987, 1998, 213 L. Ed. 2d 286 (2022). A free exercise violation occurs if a person or organization, due to their religious status, is deprived of a benefit or right that is otherwise available to a secular person or organization such as when religious schools cannot participate in voucher programs available to secular schools simply because they are religious schools. In contrast, almost all employers are required to pay unemployment insurance taxes to fund their employees' benefits and exemptions are not a generally available public benefit.

The commission and court of appeals' interpretation of Wis. Stat. § 108.02(15)(h)2. does not prohibit "religious conduct while permitting secular conduct that undermines" the same governmental interest. *Kennedy*, 142 S. Ct. at 2422. Instead, because the employers provide a charitable or social service with no overt religious activity, they are treated the same as secular nonprofit entities that provide the same services: they both must pay the unemployment insurance tax on employees of the organizations offering the services.

The employers assert that the court of appeals' decision favors religious groups who service only individuals of their faith or proselytize. (Employers' brief 46) A statute is invalid if it clearly grants denominational preferences. *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 33 (1982). Unlike the statute at issue in *Larson*, there is no evidence that the unemployment exemption was drafted to target specific religions and the law "makes no 'explicit and deliberate distinctions between different religious organizations.'" *Hernandez*, 490 U.S. at 695 (citation omitted).

***38** Moreover, in an as-applied challenge, courts assess the merits of the challenge on the facts of the particular case before it, "not hypothetical facts in other situations." *State v. Hamdan, 2003* WI 113, ¶ 43, 264 Wis. 2d 433, 665 N.W.2d 785; *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. Here, most of the employers' funding is from governmental entities.

Based on the restrictions for the use of public funds, it is highly doubtful that a religious group could use state and federal funding to proselytize and provide social services. (R100:96 and 155)

The employers contend that the U.S. Supreme Court "treated CSS and the Archdiocese as effectively the same entity" in *Fulton*. In *Fulton*, although the Court may have conflated the two, it did not do so under a statute that requires a church and any affiliated agencies to be considered separately like subdivisions (15)(h)1. and 2. require. *See Catholic Charities*, ¶ 60.

The employers have not shown that the unemployment insurance system burdens their religious beliefs. The unemployment insurance tax law remains a law of general or neutral application even though it permits exemptions for religious activities. *See Hernandez*, 490 U.S. at 700 and *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 744 (7th Cir. 2015). Accordingly, the application of the unemployment system to the employers does not violate the Free Exercise clause.

2. Chapter 108 is a neutral law of general applicability that withstands strict scrutiny.

The unemployment laws do not need to satisfy a strict scrutiny analysis because the employers have not shown that the unemployment laws have burdened a sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Kennedy*, 142 S. Ct. at 2422. Nevertheless, chapter 108 withstands a strict scrutiny analysis. In order to satisfy a strict scrutiny analysis, the government must demonstrate "its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.*

***39** The first step under a strict scrutiny analysis is determining whether there is a compelling state interest. *Id.* The compelling state interest is set forth in Wis. Stat. § 108.01, that recognizes that covering workers in the unemployment insurance program is important for both wage earners and the economic health of the state. "Each employing unit in Wisconsin should pay at least a portion of this social cost [of unemployment] of its own irregular operations by financing benefits for its own unemployed workers." Wis. Stat. § 108.01(1). The purpose of the act - compensation for loss of earnings by workers - must be given great - even controlling - effect, in determining who are employees under the act as it is the employees who are to receive the compensation provided for and an "employee" must work in an "employment" to be eligible for the benefits. *Princess House*, 111 Wis. 2d at 62. The broad public interest in maintaining a sound tax system is of such a high order, a religious belief in conflict with the payment of taxes affords no basis for resisting the Social Security tax. *U.S. v. Lee*, 455 U.S. at 260. Wisconsin has a compelling interest in providing broad unemployment insurance access to workers and satisfies this part of the strict scrutiny analysis.

The second step is determining whether the law is narrowly tailored and the least restrictive possible. The U.S. Supreme Court has upheld taxes imposed on religious organizations, even if the tax imposes a burden, because it is impossible to construct workable tax laws that account for the "myriad of religious beliefs."
The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. ... Religious beliefs can be accommodated, ... but there is a point at which accommodation would "radically restrict the operating latitude of the legislature."

U.S. v. Lee, 455 U.S. at 259 (citation omitted). Thus, in *Lee*, the imposition of the Social Security tax was constitutional although the tax was inconsistent with the plaintiff's sincerely held religious beliefs. *Id.* The Supreme Court similarly upheld taxes in *Hernandez* (income tax) and *Swaggart* (sales and use tax).

***40** The employers assert that under *Fulton*, the commission may not refuse to extend the statutory exemptions for church employees and ministers to "cases of religious hardship." (Employers' brief 47-48) In *Fulton*, without an exemption, the organization would have needed to act contrary to its religious beliefs to contract with the City. Here, the employers have not even contended that the unemployment tax burdens their sincerely held beliefs. Moreover, in *Fulton*, the denial of an exemption

resulted in harm to third parties: children requiring foster care. *Fulton*, 141 S. Ct. at 1886-87 (Alito, J. concurring). In contrast, here, the grant of an exemption results in harm to third parties: employees needing unemployment benefits.

The broad exemption the employers seek would defeat the purpose of the unemployment law to provide coverage to as many workers as possible. Under *Lee, Hernandez*, and *Swaggart*, the limited exemption provided to nonprofit corporations that are engaged in religious activities is constitutionally permissible under the First Amendment.

Based on its First Amendment arguments, the employers also assert a violation of Wis. Const. art. 1, § 18. (Employers' brief 39) Under the Wisconsin Constitution, the employers must prove that their sincerely held religious beliefs have been burdened by the application of the unemployment insurance laws, which they have not proven. *James v. Heinrich*, 2021 WI 58, 39, 43, 397 Wis. 2d 517, 960 N.W.2d 350 (County order closing schools burdened the exercise of religious practices by precluding religious expression and practice). Furthermore, this Court has held that laws related to "taxes, social security, and the like are normally acceptable." *Coulee*, 320 Wis. 2d 275, ¶ 65. Accordingly, the application of the unemployment laws to the employers is also permissible under the Wisconsin Constitution.

***41 C. The commission's and court of appeals' decisions do not violate the Establishment Clause.**

The employers assert that the commission's interpretation results in impermissible entanglement because it will require the courts and the government to conduct an intrusive inquiry into the beliefs, practices and operation of religious organizations. (Employers' brief 49) The neutral review of the employers' activities based on their statements does not constitute excessive entanglement.

"Excessive entanglement occurs 'if a court is required to interpret church law, policies, or practices.'" *St. Augustine Sch.*, 398 Wis. 2d 92, ¶ 43. This Court found that the First Amendment prohibited a claim against a diocese for the negligent supervision of a priest because the claim could not be resolved on neutral principles but would require the court to interpret church law, policies, and practices. *L.L.N.*, 209 Wis. 2d at 698. In contrast, a determination of whether an organization's activities entitle it to a tax exemption can be resolved on neutral principles and does not require a court to interpret church doctrine. "Qualification for tax exemption is not perpetual or immutable" and "some tax-exempt groups lose that status when their **activities** take them outside the classification." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (emphasis added).

Tax exemptions are matters of legislative grace. *Dominican Nuns v. La Crosse*, 142 Wis. 2d 577, 579, 419 N.W.2d 270 (Ct. App. 1987). The taxpayer has the burden of demonstrating entitlement thereto. *Wauwatosa Ave. United Methodist Church*, 321 Wis. 2d 796, ¶ 7. If an examination of an organization's religious activities were not permitted, "it is difficult to see how any church could qualify as a tax-exempt organization 'for religious purposes.'" *Dykema*, 666 F.2d at 1102.

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) does not immunize the employers from a determination of whether their activities entitle ***42** them to the unemployment exemption. *Amos*, consistent with the ministerial exception discussed above, upheld the religious exemption to federal anti-discrimination laws to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. A neutral review of the employers' activities does not constitute a significant interference with the Diocese's religious mission.

If such a review were constitutionally impermissible, the government would need to rely on the association or individual's assertion alone. In *Christian Echoes Nat. Ministry, Inc. v. U.S.*, 470 F.2d 849, 856 (10th Cir. 1972), the court rejected Christian Echoes' argument that, for purposes of section 501(c)(3), the First Amendment forbids the government and courts from deciding whether activities are political or religious because "we would be compelled to hold that Congress is constitutionally restrained from withholding the privilege of tax exemption whenever it enacts legislation relating to a nonprofit religious organization."

"Such conclusion is tantamount to the proposition that the First Amendment right of free exercise of religion, ipso facto, assures no restraints, no limitations and, in effect, protects those exercising the right to do so unfettered." *Id.*

Furthermore, as explained by *Agostini v. Felton*, 521 U.S. 203, 233, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997): "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." Examples provided by *Agostini* that did not raise constitutional concerns included: "*Bowen v. Kendrick*, 487 U.S., at 615-617, 108 S. Ct., at 2577-2579 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 764-765, 96 S. Ct. 2337, 2353-2354, 49 L.Ed.2d 179 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state ***43** grants to religious colleges are not used to teach religion)." *Agostini*, 521 U.S. at 233.

Under the commission's decisions, Wis. Stat. § 108.02(15)(h)2. does not require an interpretation of church law but rather an objective review of an entity's activities. *See Dykema*, 666 F.2d at 1100-01. Such a review is consistent with a court's review of an organization's activities for purposes of determining the ministerial exception. For example, *Coulee* espoused a fact-sensitive inquiry to determine if an employee performs quintessentially religious tasks evincing a close link to an organization's religious mission, by looking at activities as "[t]eaching, evangelizing, church governance, supervision of a religious order, and overseeing, leading, or participating in religious rituals, worship, and/or worship services." *Coulee*, 320 Wis. 2d 275, ¶ 49. Similarly, the U.S. Supreme Court conducts a fact-based inquiry into whether an employee performs "vital religious duties" for analyzing the ministerial exception. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064 and 2066. *See also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) (one reason a teacher was covered by the ministerial exception was the "important religious functions" the teacher performed for the Church).

Most Wisconsin employers must participate in the unemployment system. The First Amendment does not provide religiously affiliated organizations the ability to decide whether they will comply with chapter 108. The First Amendment does not "foreclose a court from analyzing a church's activities" to determine whether those activities fall within statutory terms. *U.S. v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983). In short, it does not offend the constitution to conduct a neutral, fact-based inquiry into whether an entity operates for religious purposes. The commission's analysis of the employers' activities is consistent with the fact-based inquiries undertaken in *Dykema, Coulee*, *Our Lady of Guadalupe Sch*. and *Hosanna-Tabor* and is not unconstitutional.

***44 D. The employers fail to show any actual First Amendment implications by the application of the unemployment insurance laws to them.**

Each of the employers' constitutional arguments is based on an overreach of First Amendment jurisprudence. The court of appeals' decision, the commission's decisions, and the statute do not violate church autonomy and do not burden the free exercise of any religious practice. Finally, applying the statute properly, with an examination of the employers' activities, does not result in excessive entanglement.

CONCLUSION

The ultimate issue before this Court is whether the employers met their burden to establish that, unlike most employers in the state, they are exempt from participating in the unemployment insurance program. As the employers claiming the exemption, the burden is on them to prove that they are entitled to it.

The uncontroverted facts show that the employers provide secular social services. The goal of each employer is to help those in need, but that is not exclusively a religious activity. Government agencies and nonprofits with no religious affiliation also provide direct social services to individuals in need. The employers are not operated primarily for religious purposes. The employers are

operated for secular social services purposes and, therefore, should remain covered by the Wisconsin Unemployment Insurance law.

The department and the commission request that this Court affirm the court of appeals' decision and confirm the commission's decisions.

Dated: June 7, 2023
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Footnotes

1 The nonprofit must also be "operated, supervised, controlled, or principally supported by a church or convention or association of churches."

2 The commission issued a separate decision to each employer. (R55:2-43) Separate appeals were taken to the five decisions and those appeals were consolidated before the circuit court.

3 *Catholic Charities Bureau, Inc. v. LIRC*, 2023 WI App 12, 406 Wis. 2d 586, 987 N.W.2d 778.

4 Nonprofit employers may finance their employees' unemployment benefits by electing to reimburse the department for benefits paid to their employees instead of paying quarterly unemployment insurance tax contributions. Wis. Stat. § 108.151.

5 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

6 *See Coulee*, 320 Wis. 2d 275, ¶ 65.

7 Unemployment taxes are excise taxes. *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 204, 121 S. Ct. 1433, 149 L. Ed. 2d 401 (2001).

8 A claimant's base period is generally the first four of the five most recently completed calendar quarters. Wis. Stat. § 108.02(4).

9 Wis. Stat. §§ 108.141 and 108.142.

10 This Court has referenced external sources interpreting FUTA to interpret Wisconsin statutes conforming with FUTA. *See DILHR v. LIRC*, 161 Wis. 2d 231, 247-48, 467 N.W.2d 545 (1991).

11 In *St. Martin*, the court considered whether church-affiliated schools that have no separate legal existence from a church are exempt from FUTA.

12 Wis. Stat. § 108.02(15)(h)1.

13 Wis. Stat. § 108.02(15)(h)3.

2023 WL 3684388 (Wis.) (Appellate Brief)
Supreme Court of Wisconsin.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
May 18, 2023.

On appeal from the Court of Appeals reversing the Douglas County Circuit Court The Hon. Kelly J. Thimm, presiding Case No. 2019CV000324

Opening Brief of Petitioners-Respondents-Petitioners

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*9 INTRODUCTION

Wisconsin law exempts from its unemployment compensation system all nonprofits "operated … by a church" and "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h)(2). Catholic Charities Bureau of the Diocese of Superior (CCB) - one of Wisconsin's largest religious charitable organizations - sought to claim this exemption so it could join the Wisconsin Catholic Church's own unemployment compensation system. It is undisputed that the bishop of the Diocese of Superior exercises

direct control over CCB and that the Diocese operates CCB for a religious purpose: to serve as the social ministry arm of the Catholic Church.

But all that was not enough for the Labor and Industry Review Commission (LIRC) or the court of appeals. Both held that CCB was *not* "operated primarily for religious purposes" under Wisconsin law and thus did not qualify for this religious exemption, leading to the absurd conclusion that the charitable arm of a Catholic diocese is not "religious enough" to qualify for the "religious purposes" exemption. Even worse, they faulted CCB for helping all those in need, rather than just helping Catholics.

To reach that remarkable conclusion, LIRC and the court of appeals relied on two equally remarkable - and false - premises of law.

First, they determined that the purposes of the Diocese in operating CCB are irrelevant to determining whether CCB is operated for "religious purposes," thus severing CCB and its sub-entities from the religious mission of the Diocese. But CCB and its sub-entities are entirely creatures of the Diocese - and of the broader ***10** Catholic Church. As the court of appeals acknowledged, LIRC does not dispute, and CCB's name indicates, the Diocese formed CCB specifically to carry out its religiously mandated social ministry. CCB's purposes and the Diocese's are thus one and the same. The court of appeals' conclusion to the contrary is plain error and flies in the face of both common sense and the typical treatment of parent-subsidiary relationships in Wisconsin.

Second, the court of appeals and LIRC held that the word "operated" in the statutory phrase "operated primarily for religious purposes" means "actions" or "activities," rather than the more obvious and contextual meaning of "managed" or "used." This attempt to shoehorn the word chosen by the Legislature into a subsidiary meaning found on Dictionary.com is untenable, particularly when read *in pari materia* with the other provisions of the statute.

Those errors of law run directly counter to the text, structure, and context of Section 108.02(15)(h). A straightforward reading of the text confirms this Court should look to the undisputed religious purposes *of the Diocese* - the entity operating CCB and its sub-entities - to determine if CCB is "operated primarily for religious purposes." This Court should also reject LIRC's attempt to scrutinize the individual "activities" or "actions" of religious nonprofits, rather than looking to the *reason why* the entities engage in those activities. As detailed below, a straightforward interpretation of the text confirms that courts should look only to the *religious purposes* - a term that undisputedly refers to the reasons for which ***11** the nonprofit is operated - when determining whether an organization satisfies the religious purposes prong of the exemption.

Adopting LIRC's contrary interpretation would not only distort Section 108.02(15)(h); it would also put the statute at odds with the First Amendment to the United States Constitution and Article I, Section 18 of the Wisconsin Constitution in three ways.

First, LIRC's interpretation violates the church autonomy doctrine, which reserves a sphere of control over internal church affairs to religious bodies. Here, the court of appeals effectively severed CCB from the Diocese of Superior and the broader Catholic Church for purposes of Section 108.02(15)(h). That grossly interferes with the ability of the Church in this State to structure itself freely in accordance with its beliefs about religious polity.

Second, LIRC's interpretation violates the Free Exercise Clause by penalizing CCB for serving non-Catholics and for not proselytizing when engaging in ministry. CCB's undisputed belief that the Church ought to help all who are in need without proselytizing is core to Catholic social teaching. Yet LIRC argued, and the court of appeals held, that these beliefs disqualified CCB from Section 108.02(15)(h)'s exemption. That burdens CCB's religious exercise in violation of the Free Exercise Clause.

Third, the decision violates the Establishment Clause by entangling Church and State. By forcing Wisconsin executive branch officials and Wisconsin courts to finely parse all the activities of religious bodies in the State and decide whether those activities are "inherently" or "primarily" religious, the court of appeals has ***12** thrust those officials and courts into a constitutional thicket. That is the opposite of church-state separation.

This Court can avoid this constitutional conundrum by following the plain language of Section 108.02(15)(h) and confirming that CCB and its sub-entities are exempt as nonprofit "organization[s] operated primarily for religious purposes."

ISSUES PRESENTED

1. Whether Wisconsin's unemployment insurance law, which exempts "an organization operated primarily for religious purposes," exempts Petitioners.

The circuit court answered yes.

The court of appeals answered no.

2. Whether the court of appeals' interpretation of the religious exemption to Wisconsin's unemployment insurance law violates the First Amendment to the United States Constitution and Article I, Section 18 of the Wisconsin Constitution.

The circuit court did not address this issue because it found Petitioners exempt.

The court of appeals answered no.

ORAL ARGUMENT AND PUBLICATION

By granting the petition for review, this Court has indicated the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Wisconsin's unemployment compensation system and the religious purposes exemption.

Enacted in 1932, the Wisconsin Unemployment Compensation Act was the first unemployment insurance law in the United ***13** States, providing temporary benefits to eligible unemployed workers. [1] Wis. Stat. §§ 108.01 *et seq.* The program is jointly financed through state and federal taxes on covered employers. Wisconsin law requires covered employers to contribute to an account with the State's unemployment reserve fund. *Id.* § 108.18. Benefits paid to a former employee are generally charged to the employer's reserve fund account. *Id.* § 108.03(1).

In 1972, the Legislature exempted certain religious nonprofits from this law. 1971 Wis. Act 53. As amended, Wisconsin law exempts services performed for certain organizations from the definition of covered "employment":

(h) "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; [or]

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[.]

Wis. Stat. § 108.02(15)(h)(1)-(2) (emphasis added).

It is undisputed that Catholic Charities Bureau and its sub-entities are "operated, supervised, controlled, or principally supported by a church." App.112, 149. The only dispute is whether they are "operated primarily for religious purposes." App.017.

***14 B. The Catholic Church and its religious ministries in Wisconsin.**

The Catholic Church organizes itself geographically by diocese. Archbishops and bishops oversee all Catholic parishes, schools, hospitals, and social ministries within their respective dioceses. *See* R.99:15-16; R.100:30-31.

Catholic teaching "demand[s]" that Catholics "respond … in charity to those in need." R.99:19-20. The Catechism of the Catholic Church and the Compendium of the Social Doctrine of the Church are the "foundational," "authoritative" sources of Catholic doctrine and teaching. R.99:19-21. These texts provide the "Ten Principles of Catholic Social Teaching," which include human dignity, participation, subsidiarity, preferential protection for the poor and vulnerable, and common good. App.085, 148, 179. These principles "guide and direct the action[s] of the church." R.99:22.

Charity is "*the greatest*" of the Catholic Church's theological virtues, above faith and hope. Catechism of the Catholic Church ¶ 1826 ("Charity is superior to all the virtues."). Charity is "the *new commandment*" of the Church, established by Jesus Christ. *Id.* ¶ 1823. Charity accordingly is "a constitutive element of the Church's mission and an indispensable expression of her very being." Pope Benedict XVI, *Apostolic Letter Issued 'Motu Proprio' on the Service of Charity* (Nov. 11, 2012); *see also* Pope Benedict XVI, *Deus Caritas Est* ¶ 32 (2005) ("[Charity] has been an essential part of [the Church's] mission from the very beginning."). The Catholic Church "claims works of charity as its own inalienable duty and right." Pope Paul VI, *Apostolicam Actuositatem* ¶ 8 (1965).

***15** The Church's mandate of charity "must embrace the entire human race." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 581 (2004). The Church therefore instructs that charity should be exercised "in an impartial manner towards" "members of other religions." Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops "Apos-tolorum Successores"* ¶ 208 (2004); *see also* Pope Francis, *Apostolic Exhortation Evangelii Gaudium* ¶ 181 (2013) ("[The Church's] mandate of charity encompasses all dimensions of existence, all individuals, all areas of community life, and all peoples."). For this reason, the Church's "charitable enterprises can and should reach out to all persons and all needs." *Apostolicam Actuositatem* ¶ 8.

Charity, moreover, "cannot be used as a means of engaging in … proselytism." *Deus Caritas Est* ¶ 31; *see also Apostolorum Successores* ¶ 196 (instructing not to "misus[e] works of charity for purposes of proselytism"). As Pope Benedict XVI explained, "Those who practise charity in the Church's name will never seek to impose the Church's faith upon others." *Deus Caritas Est* ¶ 31. And as Pope Francis has written, "The Church's missionary spirit is not about proselytizing, but the testimony of a life that illuminates the path, which brings hope and love." *Message of Pope Francis for World Mission Day 2013* ¶ 4 (2013).

To carry out the Church's mandate of charity, each diocese operates a nonprofit social ministry arm - typically called "Catholic Charities." App.110, 142; *see Apostolorum Successores* ¶ 195. Catholic Charities' mission generally "is to provide service to people in need, to advocate for justice in social structures, and to call the ***16** entire church and other people of goodwill to do the same." R.57:1, 5.

Petitioner Catholic Charities Bureau is the social ministry arm of the Diocese of Superior. App.177. Its mission is "[t]o carry on the redeeming work of our Lord by reflecting gospel values and the moral teaching of the church." App.182, 206. CCB carries out this mission by "providing services to the poor and disadvantaged as an expression of the social ministry of the Catholic Church." App.183, 208. Its purpose is "to be an effective sign of the charity of Christ" by providing services without making distinctions "by race, sex, or religion in reference to clients served, staff employed and board members appointed." App.183, 208. CCB pledges that it "will in its activities and actions reflect gospel values and will be consistent with its mission and the mission of the Diocese of Superior." App. 184-85, 207.

CCB operates dozens of programs in service to the elderly, the disabled, the poor, and those in need of disaster relief. App.178. Petitioners Headwaters, Barron County Developmental Services, Diversified Services, and Black River Industries are CCB sub-entities that provide services primarily to developmentally disabled individuals. R.65:17-18, 57-58; R.100:187-88, 256-57.

The bishop of the Diocese of Superior has plenary control over CCB and its sub-entities: "the entire organization begins and ends with [him]." R.100:55, 62, 130. He serves as president of CCB and appoints its "membership," which consists of leading diocesan ***17** clergy and the executive director. App. 198-99. The bishop also appoints the boards of directors of CCB and its sub-entities. App.201, 203.

CCB's membership oversees the ministry and its sub-entities to ensure fulfillment of CCB's mission in compliance with Catholic social teaching. App.199. Each sub-entity signs CCB's *Guiding Principles of Corporate Affiliation*, which gives CCB responsibility over many of the sub-entity's major operating decisions. App.203-04. CCB and its sub-entities are directed to comply fully with Catholic social teaching in providing services. App.204; R.100:130-31. And all new "key staff and director-level positions" receive a manual entitled *The Social Ministry of Catholic Charities Bureau of the Diocese of Superior*, which they must review during orientation. R.100:74, 135-36. In addition, every new employee receives a welcome letter with the Catholic Charities Bureau's mission statement, code of ethics, and statement of philosophy. R.100:79-80, 150; *see* App.205-08, 229-32. All employees are instructed to abide by these documents. R.100:80, 149.

The Diocese of Superior, CCB, and CCB's sub-entities are federally tax-exempt under 26 U.S.C. § 501(c)(3) pursuant to a "group ruling" by the IRS that the organizations operate "exclusively for religious … purposes." App. 186-94.

C. Catholic Charities Bureau's attempts to participate in a Church-run unemployment assistance program.

For the Catholic Church, "[t]he obligation to provide unemployment benefits … spring[s] from the fundamental principle of the moral order in this sphere." App.211 (quoting St. Pope John Paul ***18** II, *Laborem Exercens* (1981)). Accordingly, in 1986, the Wisconsin bishops created the Church Unemployment Pay Program "to assist parishes, schools and other church employers in meeting their social justice responsibilities by providing church-funded unemployment coverage," in accordance with Catholic teaching. App.211. The Church's program provides the same level of benefits to unemployed individuals as the State's system while being "more efficient." R.100:125; App.214.

CCB and its sub-entities would be eligible for the Church's program if released from the State's. R.100:50. Were CCB to switch from the State's program to the Church's program, it would save funds that could be redirected to CCB's religious mission.

In 2001, the Department of Workforce Development (DWD) determined that Challenge Center - one of CCB sub-entities not involved in this case - was "a church-related entity" and qualified for the religious purposes exemption. App.244. Challenge Center then paid into the Church-run unemployment program. App.244.

In light of this determination, in 2003, CCB requested to withdraw from the State's program, citing the religious purposes exemption and its intent to join the Church's program. App.215. DWD denied the request, and the Labor and Industry Review Commission (LIRC) affirmed. App.216-24.

In 2013, DWD "changed its earlier determination and concluded [Challenge Center] was not operated for a religious purpose." App.244. "This change in its position by DWD occurred with- ***19** out any change in the law or without any change in the way [Challenge Center] conducted its business." App.244. LIRC upheld DWD's new determination. App.244.

The circuit court (Glonek, J.) reversed LIRC's decision, holding that Challenge Center qualified for the religious purposes exemption. App.243-51. After considering "why the organization is operating," the court held that Challenge Center's purpose is primarily religious because it is "organized by the Bishop for a traditional Catholic purpose," "as demanded by the Catechism

and [Catholic] Social Doctrine," to provide not-for-profit services to disadvantaged people. App.249-50. DWD and LIRC did not appeal. *See* App.075.

D. The proceedings below.

In 2016, Petitioners sought a determination from DWD that, like Challenge Center, they qualify for the religious purposes exemption. App.233-35. DWD, however, concluded that Catholic Charities Bureau and its sub-entities are not operated primarily for religious purposes and therefore are not exempt from the State's program. App. 166-75. CCB appealed. After a two-day hearing, the administrative law judge (Galvin, J.) reversed, holding that CCB and its sub-entities qualify for the religious purposes exemption. App. 134-65.

DWD petitioned LIRC for review. LIRC reversed, holding that the religious purposes exemption turns on an organization's "activities, not the religious motivation behind them or the organization's founding principles." App.100, 108, 116, 124, 133. And be- ***20** cause CCB and its sub-entities "provide [] essentially secular services and engage[] in activities that are not religious per se," LIRC concluded that they do not qualify. App.099, 108, 116, 124, 132.

CCB sought review in circuit court. The court (Thimm, J.) then reversed LIRC's decision, holding that under the "plain language" and "plain meaning" of the statute, "the test is really why the organizations are operating, not what they are operating." App.088-89. And since CCB and its sub-entities operate out "of th[e] religious motive of the Catholic Church … of serving the underserved," their primary purposes are religious. App.087.

DWD and LIRC appealed. In December 2021, the court of appeals (Stark, P.J., Hruz and Gill, JJ.) certified the case to this Court. App.044. This Court refused certification. R.123:1. The court of appeals then reversed the circuit court's order and reinstated LIRC's decision. App.008.

The court of appeals held that "under a plain language reading of the statute," to qualify for the religious purposes exemption, "the organization must not only have a religious motivation, but the services provided - its activities - must also be primarily religious in nature." App.025. It therefore concluded that although CCB and its sub-entities "have a professed religious motivation … to fulfill the Catechism of the Catholic Church," their "activities … are the provision of charitable social services that are neither inherently or primarily religious activities." App.039-40. The court pointed to the fact that the organizations do not, *inter alia*, "operate to inculcate the Catholic faith," "teach[] the Catholic religion," "evange- ***21** liz[e]," "disseminate any religious material to [social service] participants," or "require their employees, participants, or board members to be of the Catholic faith." App.040-41. The court viewed CCB and its sub-entities' "motives and activities separate from those of the church" simply because they "are structured as separate corporations." App.042.

The court of appeals further held that "the First Amendment is not implicated in this case," rejecting CCB's constitutional arguments. App.008, 034-35. It reasoned that its interpretation of the religious purposes exemption does not "penalize, infringe, or prohibit any conduct of the organizations based on religious motivations, practice, or beliefs," eliminating any "free exercise concern." App.036. And its purported "neutral review based on objective criteria" "avoid[ed] excessive entanglement" under the Establishment Clause. App.038.

CCB petitioned this Court for review. The court of appeals then withdrew its decision, issued a revised one (leaving its statutory and constitutional analysis unchanged), and ordered it published. App.006. All parties agreed to stand on their previously filed papers. This Court then granted review.

STANDARD OF REVIEW

Statutory construction presents questions of law subject to de novo review by this Court, without deference to lower courts. *State ex rel. Collison v. City of Milwaukee Bd. of Rev.*, 2021 WI 48, ¶ 21, 397 Wis. 2d 246, 960 N.W.2d 1; *Hinrichs v. DOW*

Chem. Co., 2020 WI 2, ¶ 26, 389 Wis. 2d 669, 937 N.W.2d 37. Nor is this court "bound by an agency's interpretation of a statute." ***22** *Operton v. LIRC*, 2017 WI 46, ¶ 19, 375 Wis. 2d 1, 894 N.W.2d 426. LIRC has conceded that review is de novo, Opp. to Pet. 11, and regardless, this Court has rejected deference when it comes to questions of law. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21 ("We have also decided to end our practice of deferring to administrative agencies' conclusions of law."). Constitutional interpretation also "presents an issue of law that this court decides de novo." *State v. Johnson*, 2020 WI App 73, ¶ 22, 394 Wis. 2d 807, 951 N.W.2d 616; *State v. Williams*, 2012 WI 59, ¶ 10, 341 Wis. 2d 191, 814 N.W.2d 460.

ARGUMENT

I. The plain meaning, context, and structure of the unemployment insurance law confirm that Catholic Charities Bureau and its sub-entities are "operated primarily for religious purposes."

The plain meaning of the statutory phrase "an organization operated primarily for religious purposes" encompasses Catholic Charities Bureau and its sub-entities. Indeed, CCB is the epitome of an organization operated for religious purposes because the sole purpose of its existence is to advance the charitable mission of the Catholic Church in the Diocese of Superior.

This Court's rulings in a host of statutory interpretation cases require a common-sense, plain-meaning mode of analysis. An ordinary speech analysis leads to the conclusion that "organization operated primarily for religious purposes" means religious organizations that are "managed" or "used" to carry out the religious purposes of the church, synagogue, or mosque that controls them. That common sense is also reflected in the many Wisconsin statutes ***23** that employ the words "operated" and "purposes" to express the same concept.

In stark contrast, LIRC's interpretation, adopted by the court of appeals, does what the principles of statutory interpretation forbid: look at specific words in isolation from the whole of the statute, apply entirely uncommon and extraordinary meanings to the words of the exemption, and torture the rules of grammar to turn verbs into nouns and to render the sentence nonsensical.

A. The plain meanings of the terms "operated" and "religious purposes" support CCB's interpretation.

In Wisconsin, statutory interpretation "begins with the language of the statute." *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1 (quoting *Milwaukee Dist. Council 48 v. Milwaukee County*, 2019 WI 24, ¶ 11, 385 Wis. 2d 748, 924 N.W.2d 153). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 "If the meaning of the language is plain, our inquiry ordinarily ends." *Brey*, 2022 WI 7, ¶ 11. Moreover, "[a] statute's context and structure are critical to a proper plain-meaning analysis." *Id.*

Here the plain meaning of the text "operated primarily for religious purposes" encompasses a nonprofit organization carrying out a religious mission - whether its own, or its controlling religious parent's. When each part of the phrase is examined in context, the meaning is entirely unambiguous. As explained below, "operated" means "managed" or "used," and "religious purposes" refers to the ***24** religious purposes of the entity doing the managing - here, the Diocese of Superior.

1. "Operated" as used in the religious purposes exemption means "managed" or "used".

To define "operated," courts must begin with the text of Section 108.02(15)(h)(2). That text must be "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶ 45. These modes of textual analysis show that in the context of Section 108.02(15)(h), "operated" must mean "managed" or "used."

"Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Brey*, 2022 WI 7, ¶ 13 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)). Reading "operated" "as part of a whole" is particularly important with respect to Section 108.02(15)(h)(2) because the word "operated" is used twice in the provision, introducing the exemption's two requirements: (1) "operated primarily for religious purposes" and (2) "operated … by a church." The term therefore must have the same meaning in both places. *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶ 29, 299 Wis. 2d 1, 727 N.W.2d 311 ("[W]e attribute the same definition to a word both times it is used in the same statute or administrative rule."); *see also* Scalia & Garner at 170-73 (presumption of consistent usage).

***25** Courts can also infer the meaning of a term from the other words the legislature chose to use alongside it. Here, "operated" is used alongside "supervised, controlled, or principally supported by," Wis. Stat. § 108.02(15)(h) 2, and therefore must have a similar meaning, *Benson v. City of Madison*, 2017 WI 65, ¶ 31, 376 Wis. 2d 35, 897 N.W.2d 16 ("[A]n unclear statutory term should be understood in the same sense as the words immediately surrounding or coupled with it.").

Finally, to help understand a term's contextual meaning, courts can look to the grammatical structure of the sentence or phrase and the way the statutory term is used therein. *See, e.g., State ex rel. Dep't of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 29, 380 Wis. 2d 354, 909 N.W.2d 114 (determining that "select" is used in the statute as a transitive verb and looking to the relevant transitive verb definition in a contemporaneous dictionary); *John R. Davis Lumber Co. v. First Nat'l Bank of Milwaukee*, 87 Wis. 435, 58 N.W. 743, 744 (1894) (same). Here, both instances of the word "operated" confirm it is used as a transitive verb, *i.e.*, it is a verb that takes an object. Both instances of "operated" in Section 108.02(15)(h)(2) take "organization" as their object - the organization is the thing being operated. Thus, the *organization* must be *operated* both primarily for religious purposes and by a church. *See* Wis. Stat. § 108.02(15)(h)(2).

Taken together, the statutory context requires a definition of "operated" that (1) can be used in both provisions of the statute, (2) has a meaning consistent with "supervised, controlled, or principally supported by," and (3) functions as a transitive verb.

***26** With this statutory context in mind, courts then look to "common and accepted meaning, ascertainable by reference to the dictionary definition." *Kalal*, 2004 WI 58, ¶ 53. Here, dictionary definitions contemporaneous to the statute's enactment in 1972 show that "operated" can only be understood as "managed" or "used" - there is no ambiguity.

For example, there are several definitions of "operate" in the 1973 version of The Random House College Dictionary. The first definition that is a transitive verb - how "operated" is used in Section 108.02(15)(h)(2) - is "to manage or use." *Operate*, The Random House College Dictionary 931 (1st ed. 1973). The other transitive verb definitions are "to put or keep in operation" and "to bring about, effect, or produce, as by exertion of force or influence." *Id.* The first simply adds a durational component to the word "operate." The second cannot be read *in pari materia* with "supervised, controlled, or principally supported by" and cannot replace both instances of "operated" in the statute (and, regardless, it does not support LIRC's interpretation in the slightest). Other contemporaneous dictionaries use similar definitions. *See, e.g., Operate*, 1 Compact Edition of the Oxford English Dictionary 1995 (1971) ("To direct the working of; to manage, conduct, work (a railway, business, etc.)"); *Operate*, Webster's Dictionary 260 (1975) ("*v.t.* to cause to function"); *Operate*, Black's Law Dictionary (5th ed. 1979) ("To perform a function, or operation, or produce an effect."). [2]

***27** Accordingly, "to manage or use" is the best definition of "operated" in this statutory context. Because these dictionary definitions are contemporaneous with Section 108.02(15)(h)(2)'s enactment in 1972, their meaning is controlling. *See Landis v. Physicians Ins. Co. of Wis.*, 2001 WI 86, ¶ 36, 245 Wis. 2d 1, 628 N.W.2d 893 (dictionary definitions from time of enactment control).

The uniform verdict of the dictionary definitions is confirmed by the use of the word "operate" and its variants elsewhere in other Wisconsin statutes. For example, in the statute restricting unfair trade practices in the procurement of vegetable crops, "'Subsidiary' means a corporation or business entity that is owned, controlled or *operated* by a contractor." Wis. Stat. §

100.235(1)(f) (emphasis added). The subsidiary is managed or used to carry out the parent contractor's purposes - to procure vegetables. Here, CCB is the subsidiary of the Diocese and is thus "operated" by it.

Similarly, Wisconsin driving laws frequently speak in terms of an "operator" controlling a "vehicle." *See, e.g.*, Wis. Stat. § 340.01(41) ("'Operator' means a person who drives or is in actual physical control of a vehicle."). That usage is in full harmony with the idea conveyed in Section 108.02(15)(h)(2) - one entity controls another to carry out its purposes. Here, CCB is the car and the Diocese is the driver.

Given this consistent meaning across several Wisconsin statutes and the internal logic of Section 108.02(15)(h)(2) itself, the relevant "context and structure" point to the same definition that the plain meaning analysis did: CCB is controlled by, managed by, ***28** and used to carry out the specific religious mission of the Diocese. *Brey*, 2022 WI 7, ¶ 11.

2. LIRC's contrary interpretation of "operated" is unreasonable.

LIRC's contrary interpretation of the word "operated" - adopted by the court of appeals below - would lead to "absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶ 46. The court of appeals held that the word "operated" means "an action or activity." App.018. This interpretation is "absurd or unreasonable" for at least five reasons: (1) the court of appeals' definition turns a verb ("operated") into a noun ("action"); (2) "action" ignores the fact that "operated" is used as a transitive (not intransitive) verb in the statute; (3) "action" cannot be substituted for both uses of the term "operated" in Section 108.02(15)(h)(2); (4) "action" is not comparable in meaning to the other terms used alongside "operated" in the exemption; and (5) the "action" definition isn't even supported by the Dictionary.com definitions the court of appeals cited.

First, LIRC's interpretation contradicts basic rules of grammar by substituting one part of speech for another. In Section 108.02(15)(h)(2), as in normal English speech, "operated" is a verb. But the court of appeals defined "operated" as a noun ("an action or activity"). App.018. Neither LIRC nor the court of appeals has offered any reason - much less a plausible one - for this grammatical switcheroo. Nor is this a situation where the same word could plausibly be employed as either a noun or a verb. *See, e.g., Return of Prop. in State v. Perez*, 2001 WI 79, ¶ 22, 244 Wis. 2d 582, 628 N.W.2d 820 (distinguishing between "use" as noun and "use" as verb).

***29** Second, LIRC's interpretation also ignores the fact that "operated" is not just a verb but a *transitive* verb. The court of appeals never explained what happens to the leftover direct object "organization" when the transitive verb "operated" is changed into a noun. *Cf. Peace ex rel. Lerner v. Nw. Nat. Ins. Co.*, 228 Wis. 2d 106, 126, 596 N.W.2d 429 (1999) (discussing differences in meaning that depend on whether the verb is transitive or intransitive).

Third, substituting "action" for "operated" shows how LIRC's interpretation would render the statute nonsensical: "'Employment' … does not include service … In the employ of an organization [action] primarily for religious purposes and [action], supervised, controlled, or principally supported by a church or convention or association of churches." That interpretation twists Section 108.02(15)(h)(2) beyond comprehension. *See* Section I.B below.

Fourth, "action" is not comparable in meaning to the terms "immediately surrounding" it. *Benson*, 2017 WI 65, ¶ 31. Treating the verbs "supervised," "controlled," and "supported" as comparable to the nouns "action" or "activity" both repeats the part-of-speech error and mistakes a broader category ("action") for some of its components (various verbs).

Fifth, the definitions cited by the court of appeals don't even support its "action or activity" interpretation. The court of appeals cited three different meanings of "operate" from Dictionary.com: "to work, perform, or function"; "to act effectively; produce an effect; exert force or influence"; or "to perform some process of work or treatment." App.018 (citing *Operate*, Dictionary.com, https://perma.cc/Y4GP-YEXM). But none of these support treating ***30** the verb "operate" as a noun, and all of them are much less general than "action" or "activity." "[T]o act effectively" is different and narrower than "to act" and even more different

than "action or activity." "To work" or "perform a process of work or treatment" are even further afield. The court of appeals' interpretation, embraced by LIRC, is unconvincing.

3. The relevant "religious purposes" are those of the parent church operating the nonprofit organization.

With "operated" correctly defined as "managed" or "used," the next question in the interpretive analysis is the definition of "for religious purposes."

There is little disagreement among the parties or the court of appeals over the definition of "purposes" at the highest level of generality. A contemporary dictionary definition is "[t]hat which one sets before him to accomplish; an end, intention, or aim, object, plan, project." *Purpose*, Black's Law Dictionary (5th ed. 1979). The Dictionary.com definition offered by the court of appeals and embraced by LIRC is not significantly different. *See* App.024 ("the reasons for which something exists or is done" (citing *Purpose*, Dictionary.com, https://perma.cc/A4HH-2VUY)).

The key point of difference concerns *whose* purposes are referred to in the statute. LIRC and the court of appeals say it is solely the purposes of the subsidiary entity, not the parent. App.019-20. But this runs directly counter to the common-sense meaning and context of the words "religious purposes."

***31** As with the word "operated," the exemption's parallel structure (using "operated" to introduce both of the exemption's requirements) provides the answer to the question of "whose purposes?" The text of the "controlled … by" requirement explicitly explains *who* is doing the operating: the "church." Wis. Stat. § 108.02(15)(h)(2) ("operated … by a church"). Thus, when determining *why* the sub-entity is being operated (the exemption's other requirement), the relevant purpose, motive, or objective is that of the *operator* - which is the "church," as the exemption's "controlled … by" requirement confirms. *Id.*

The plain text, context, and structure of the religious purposes exemption show that the "operator" (*i.e.*, the one who "operated" the organizations) is the parent church. Therefore, the "religious purposes" referred to in Section 108.02(15)(h)(2) are the church's religious purposes. It is the purposes of the driver, not the car, that matter. *Cf.* Wis. Stat. § 340.01(3)(j) (putting into special exempt category "[v]ehicles *operated* by federal, state or local authorities for the *purpose* of bomb and explosive or incendiary ordnance disposal") (emphases added). This is confirmed by the only possible contextual meaning of the term "operated" (akin to "managed" or "used"). And it means that the religious purposes exemption covers CCB and its sub-entities, as it is undisputed that the Diocese of Superior's purpose in operating CCB and its sub-entities is primarily religious. App.034-35 ("[N]either DWD nor this court dispute that the Catholic Church holds a sincerely held religious belief as its reason for operating CCB and its sub-entities.").

*32 *4. LIRC's contrary interpretation of "religious purposes" is unreasonable.*

LIRC's strained interpretation of "religious purposes" is that those purposes belong solely to the subsidiary religious organization and not the mother church. App.019-20. LIRC has adopted the position of the court of appeals, which offered two explanations for its interpretation. Neither withstands scrutiny.

First, the court of appeals said that because the exemption covers employees of an organization "operated primarily for religious purposes," the "employees who fall under [the religious purposes exemption] are to be focused on separately in the statutory scheme," and therefore "the focus must be on the organizations" and their purposes, not the church's purposes. App.019. No one disagrees that the exemption, if applicable, would cover employees of CCB and its sub-entities. But *which* employees are covered says nothing about *whose* religious purposes are at issue. The phrase "organization operated primarily for religious purposes" describes CCB and its sub-entities, not their employees. Leaping from the premise that the exemption would cover employees of the subsidiaries to the conclusion that the subsidiaries' purposes control the primary purpose analysis is a *non sequitur.*

The court of appeals' second explanation fares no better. The court recognized that the exemption includes two requirements that must be satisfied: (1) "operated primarily for religious purposes," and (2) "operated … by a church." App.019-20. It then concluded that the second requirement would render the first "unnecessary" if the relevant purpose were that of the parent church. App.020. Here too, no one disputes that both requirements must ***33** be satisfied. But this again says nothing about the meaning of the exemption. A plain reading confirms the two requirements serve distinct purposes. The first asks *why* the organization is operated ("primarily for religious purposes"?); the second asks *who* operates the organization ("a church or convention or association of churches"?). Wis. Stat. § 108.02(15)(h)(2). The first - regardless of how it is interpreted - does not render the second "unnecessary." App.020.

5. Reading Section 108.02(15)(h)(2) as a whole confirms that CCB and its sub-entities are "operated primarily for religious purposes."

As demonstrated above, the terms "operated" and "religious purposes" both support a reading of Section 108.02(15)(h)(2) that includes Catholic Charities Bureau and its sub-entities as "organization[s] operated primarily for religious purposes." But "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole." *Kalal*, 2004 WI 58, ¶ 45. And that whole-statute reading confirms that CCB and its sub-entities qualify for the exemption.

In CCB's interpretation, the whole of Section 108.02(15)(h)(2) would read in context:
(h) "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:

…

2. In the employ of an organization [managed or used] primarily for religious purposes [of a church] and [managed or used], supervised, controlled, or principally supported by a church or convention or association of churches[.]

***34** By contrast, LIRC and the court of appeals would have it read:

2. In the employ of an organization [action or activity] primarily for religious purposes [of that organization alone] and [action or activity], supervised, controlled, or principally supported by a church or convention or association of churches[.]

One interpretation makes sense of the statute as a whole; the other renders it incomprehensible. Given this Court's frequent injunctions not to view terms in isolation but to examine them in light of the whole text, LIRC's interpretation is unsupportable.

B. The Court should reject the court of appeals' other errors.

The court of appeals made two other errors that this Court should expressly reject.

Inherently religious activities. First, despite recognizing that both CCB's and its sub-entities' purposes are primarily religious, App.039-40, the court of appeals held that they were not "operated primarily for a religious purpose," App.040-42. Why? Because, according to the court of appeals, "the reviewing body must consider both the *activities* of the organization as well as the organization's professed *motive* or purpose." App.024-25. And here, the court concluded that "the activities of CCB and its sub-entities are the provision of charitable social services that are neither inherently or primarily religious activities." App.040-41. This despite also concluding that "the Catholic Church's tenet of solidarity compels it to engage in charitable acts." App.043.

In essence, the court of appeals grafted onto the religious purposes exemption a novel atextual requirement: that the *activities* ***35** of the church-controlled entity (not just its purpose) must be "inherently or primarily religious activities." App.040-41. To deploy this new requirement, the court looked at the specific charitable services each nonprofit provides - including "work training programs, life skills training, [and] in-home support services" - and concluded that "[w]hile these activities fulfill the Catechism of the Catholic Church to respond in charity to those in need, the activities themselves are not *primarily* religious." App.041.

This Court should reject the court of appeals' "activities" analysis because it contradicts the text of the statute. It is undisputed that the requirement of a primarily religious purpose says nothing about the types of permitted "activities." *See* App.024 ("qualification for the exemption is based on the organization's reason for acting or its motivation"); App.039-41 (distinguishing between motive and activities). Instead, the court of appeals injected this new requirement into the term "operated." Ignoring the text's plain meaning, several canons of construction, and basic rules of grammar, the court concluded that because "both words [('purpose' and 'operated')] appear in the statute," "[t]he only reasonable interpretation of the statute's language is that the reviewing body must consider both the *activities* of the organization as well as the organization's professed *motive* or purpose." App.024-25.

In essence, the court of appeals rewrote the exemption. A church-controlled entity would qualify only if both its purpose *and* its activities are *inherently* religious. This novel requirement cannot be justified by the exemption's text.

36** ***Improper use of extrinsic sources. This Court should also reject the court of appeals' reliance on out-of-state court decisions and federal legislative history. The court of appeals invoked "courts in other jurisdictions," which, it concluded, "have interpreted the religious purposes exemption in different ways." App.021-22, 028-30. It also looked to a federal House Ways and Means Committee report, citing a one-sentence hypothetical as evidence of the correct interpretation of Wisconsin law. App.032-33. But neither supports the court's interpretation.

First, "[w]here statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Lovelien v. Austin Mut. Ins. Co.*, 2018 WI App 4, ¶ 15, 379 Wis. 2d 733, 906 N.W.2d 728. And regardless, it cannot contradict the statute's plain text, structure, and context. Here, the court of appeals expressly *rejected* LIRC's argument that the statute is ambiguous. App.024. That ought to have excluded extrinsic sources altogether, but the court of appeals inexplicably relied on them.

Second, as the court of appeals acknowledged, the extrinsic sources are hopelessly muddled: there is a "distinct lack of consensus" among other jurisdictions regarding their interpretation of this or similar language. App.014-15. Thus, any attempt to decipher meaning from other courts' interpretations will be, at best, inconclusive.

***37** Third, all the extrinsic evidence regarding interpretation of statutory language comes from sources *outside* Wisconsin.[3] Yet this Court has repeatedly confirmed that it does not matter "how courts of other states have construed their unemployment acts even though they are duplicates of or based upon our own." *Moorman Mfg. Co. v. Indus. Comm'n*, 241 Wis. 200, 207, 5 N.W.2d 743 (1942); *Bernhardt v. LIRC*, 207 Wis. 2d 292, 302, 558 N.W.2d 874 (Ct. App. 1996) ("[W]e need not look to the decisions of other jurisdictions (or the [NLRB]) in construing our own unemployment compensation act."); *Princess House, Inc. v. Dep't of Indus., Lab. & Hum. Rels.*, 111 Wis. 2d 46, 72 n.5, 330 N.W.2d 169 (1983) (rejecting analogy to "federal compensation law").

Were the court of appeals' erroneous interpretation not obvious on its face, the way the court applied it confirms its many flaws. The court of appeals repeatedly acknowledged that the motivations behind the nonprofit organizations' actions were primarily religious. But it nevertheless determined that the "activities" - viewed in isolation, App.024 - were not themselves "inherently or primarily religious" because they consisted of helping those in need, App.040-41.

This analysis fundamentally misunderstands what makes CCB's ministry "religious." It is not about how closely tied the physical action is to a form of religious worship, or even whether ***38** the ministry serves only co-religionists. App.041-43. Whether caring for the poor or comforting the afflicted is "religious" cannot be determined without looking at that action in the context in which it is performed. *Cf.* 1 *Corinthians* 13:3 (RSV-CE) ("If I give away all I have, and if I deliver my body to be burned, but have not love, I gain nothing."). A secular court cannot hope to accurately determine, for every religious tradition in Wisconsin, which of that religion's activities are "inherently religious." And even attempting this standardless inquiry would enmesh Wisconsin courts in answering impossible theological questions. *See* Section II.C below.

The court of appeals was wrong to interpret the religious purposes exemption to require an activity-by-activity analysis of "inherent[]" religiosity, especially when the better textual interpretation avoids these constitutional pitfalls. *See Kenosha Cnty. DHS v. Jodie W.*, 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 716 N.W.2d 845 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.").

...

CCB is an organization used by its mother church as the primary means of carrying out that church's religious mission to help those in need. Under the plain text, context, and structure of the statute, it is therefore an "organization operated primarily for religious purposes."

LIRC's proposed interpretation requires the courts to contort the plain text of the statute and invites a host of interpretive ambiguities that would vex the Wisconsin courts for years to come. ***39** Worse, it leads to the absurd conclusion that the charitable arm of a Catholic diocese is not "religious enough" to qualify for the "religious purposes" exemption.

The Court should adopt the common-sense interpretation of Section **108.02(15)(h)(2).**

II. LIRC's proposed interpretation of the religious purposes exemption would violate the United States and Wisconsin Constitutions.

LIRC's startling claim that the Catholic Charities Bureau and its sub-entities are not operated primarily for religious purposes also runs headlong into the First Amendment. It does so by violating the church autonomy doctrine, the Free Exercise Clause, and the Establishment Clause. Each of these three violations separately renders LIRC's position constitutionally infirm. Adopting LIRC's interpretation of the religious purposes exemption would set Wisconsin law at odds with longstanding United States Supreme Court precedent. [4]

*40 A. LIRC's proposed interpretation violates the First Amendment principle of church autonomy.

The United States Constitution guarantees religious bodies "independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). The United States Supreme Court has described this sphere of protection for church polity as "the general principle of church autonomy" or "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020). These questions of "internal government" include the control of church property, the appointment and authority of bishops, church polity, and the hiring and firing of parochial school teachers, among other issues. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Kedroff*, 344 U.S. 94; *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Our Lady*, 140 S. Ct. at 2066; *DeBruin v. St. Patrick Congregation*, 2012 WI 94, ¶ 18, 343 Wis. 2d 83, 816 N.W.2d 878; *Black v. St. Bernadette Congregation of Appleton*, 121 Wis. 2d 560, 565, 360 N.W.2d 550 (Ct. App. 1984) ("Matters of internal church government are at the core of ecclesiastical affairs[.]").

Not surprisingly, this doctrine also extends to efforts by civil governments to divide up religious bodies according to secular principles. *Kedroff* is instructive on this point. There, in an effort ***41** to combat Communist control, the New York Legislature attempted to separate certain Russian Orthodox churches "from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod" and transfer control to a different Russian Orthodox denomination based in the United States. *Kedroff*, 344 U.S. at 107. The United States Supreme Court roundly rejected this governmental effort to cut off sub-entities from the larger church body they belonged to. *Id.* at 116; *see also Serbian E. Orthodox Diocese*, 426 U.S. at 721 ("the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs"). Importantly, in a follow-up case, the Supreme Court extended the principle of *Kedroff* to *judicial* interference with the internal government of churches. *See Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) ("[I]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.").

LIRC's determination violates basic church autonomy principles. Everyone agrees that CCB is part and parcel of the Catholic Church and, specifically, the Diocese of Superior. App.008, App.093 (describing CCB as the social ministry arm of the Diocese). Everyone agrees that CCB is controlled by the Diocese of Superior. App.011 ("CCB's internal organizational chart establishes that the bishop of the Diocese of Superior oversees CCB in its entirety, including its sub-entities, and is ultimately 'in charge of CCB."); App.093. And everyone agrees that the "reason that CCB and its sub-entities administer these social service programs is for ***42** a religious purpose: to fulfill the Catechism of the Catholic Church." App.039-40; App.93 ("The purpose of the CCB 'is to be an effective sign of the charity of Christ[.]"').

Yet LIRC's proposed interpretation expressly disregards CCB's relationship with the Diocese in deciding whether CCB is "operated primarily for religious purposes." According to LIRC, "the relevant 'purpose' under the exemption is the employer's purpose and not the Diocese's purpose." Opp. to Pet. 12. Viewed in this light, CCB and its sub-entities are "akin to '[a] religiously-affiliated organization committed to feeding the homeless that has only a nominal tie to religion."' App.042. The court of appeals similarly sought to consider CCB's ministry "independent of the church's overarching doctrine and purposes." App.042. ("[W]e must view [CCB's and its sub-entities'] motives and activities separate from those of the church.").

This approach penalizes CCB and its sub-entities for the way the Diocese has organized its ministry. There is no dispute that if CCB and the Diocese were a single nonprofit corporation, it would be exempt. *See* App.042. But instead, their choice to be "structured as separate corporations" - a religious decision grounded in church polity and internal governance - is penalized. App.042. By interfering with the Church's internal governance, LIRC's proposed interpretation adversely "affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190; *see Serbian E. Orthodox Diocese*, 426 U.S. at 721 ("reorganization of the Diocese involves a matter of internal church government"). It is therefore unconstitutional.

***43 B. LIRC's proposed interpretation violates the Free Exercise Clause.**

LIRC's proposed interpretation also violates the Free Exercise Clause by subjecting CCB to worse treatment than other religious ministries based on its Catholic beliefs and practices.

1. LIRC's proposed interpretation is not neutral among religions.

Under the Free Exercise Clause, government actions that burden religious exercise must undergo strict scrutiny if they are not neutral or if they are not generally applicable. *See Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990); *Larson v. Valente*, 456 U.S. 228, 245 (1982) ("This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."). And discrimination among religions is not neutral: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs[.]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). That principle specifically extends to differential

treatment among religions: thus, "a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service." *Id.* at 533 (citing *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953)); *see also Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (government officials denied Jehovah's Witnesses use of public park while allowing other religious organizations access). This free exercise inquiry looks not just to the "[f]acial neutrality" of a statute or regulation ***44** but also to "the effect of a law in its real operation." *Lukumi*, 508 U.S. at 534-36.

LIRC's interpretation of Section 108.02(15)(h)(2) violates this bedrock principle of neutrality among religions in at least two different ways.

First, it discriminates against religious entities with a more complex polity. The Diocese of Superior has created and operates CCB as a separately incorporated ministry that carries out Christ's command to help the needy. But, as noted above, if CCB were not separately incorporated, it would be exempt. *See* App.041-42 ("the result in this case would likely be different if CCB and its sub-entities were actually run by the church"). Thus, by interpreting the religious purposes exemption to exclude CCB, LIRC is penalizing the Catholic Church for organizing itself as a group of separate corporate bodies - in contrast to other religious entities that include a variety of ministries as part of a single incorporated or unincorporated body. That penalty on the Church's polity violates the Free Exercise Clause's rule of neutrality.

In fact, the United States Supreme Court took the exact opposite tack in a recent case concerning the Archdiocese of Philadelphia and its separately incorporated social services agency, Catholic Social Services (CSS). *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). There, the Supreme Court treated CSS and the Archdiocese as effectively the same entity. *See id.* at 1874-76. That makes LIRC's determination to cut off CCB from the Diocese of Superior all the more baffling.

***45** *Second*, LIRC's proposed interpretation would violate the rule of neutrality among religions by penalizing CCB for its Catholic beliefs regarding how it must serve those most in need. For example, the court of appeals concluded that CCB's and its sub-entities' activities were not primarily religious (and instead were primarily charitable) because:

• "CCB and its sub-entities do not operate to inculcate the Catholic faith";

• "they are not engaged in teaching the Catholic religion, evangelizing, or participating in religious rituals or worship services with the social service participants";

• "they do not require their employees, participants, or board members to be of the Catholic faith";

• "participants are not required to attend any religious training, orientation, or services";

• "they do not disseminate any religious material to participants"; and

• "[n]or do CCB and its sub-entities provide program participants with an 'education in the doctrine and discipline of the church.'"

App.040-41; *see also* App.093-94 (LIRC relying on the same facts). Based on these facts, both the court of appeals and LIRC concluded that CCB did not "operate in a worship-filled environment or with a faith-centered approach to fulfilling their mission." App.042; App.098. And therefore "[a]ny such spreading of Catholic faith accomplished by the organizations providing such services - while genuine in deriving from and adhering to the Catholic Church's mission - is only indirect and not primarily the service that they provide to individuals." App.042.

By identifying these characteristics of CCB's ministry as factors favoring denial of an otherwise-available exemption, the court of ***46** appeals and LIRC did not treat CCB with religious neutrality. Catholic doctrine rejects limiting assistance solely to

fellow Catholics or conditioning assistance on proselytism. *See* Catechism of the Catholic Church ¶ 2463 ("How can we not recognize Lazarus, the hungry beggar in the parable (*cf.* Lk 17:19-31), in the multitude of human beings without bread, a roof or a place to stay?"); Pope Benedict XVI, *Caritas in Veritate* ¶ 27 (2009) ("*Feed the hungry* … is an ethical imperative for the universal Church, as she responds to the teachings of her Founder, the Lord Jesus, concerning solidarity and the sharing of goods."); *cf. Pope Francis Criticises Proselytization*, Swarajya (Dec. 25, 2019) ("'Never, never bring the gospel by proselytizing,' Francis said. 'If someone says they are a disciple of Jesus and comes to you with proselytism, they are not a disciple of Jesus.'").

But because CCB organized its religious ministry around Catholic teachings like the universal care for the poor, the court of appeals and LIRC concluded that it was not operated primarily for religious purposes. App.042-43; App.098-100. This not only flies in the face of Catholic beliefs about care for the poor; it also favors religious groups that require those they serve to adhere to the faith of that group or be subject to proselytization. Conditioning the religious purposes exemption on the way in which a religious ministry exercises its faith - and looking solely at the outward physical manifestations of CCB's charitable ministry, instead of the undisputed purpose for which the ministry is performed by the Church - disfavors those religious traditions that demand care for the poor without strings attached. In effect, LIRC's interpretation ***47** encourages discriminatory differential treatment, rather than evenhandedness.

2. LIRC cannot satisfy strict scrutiny.

Because LIRC's proposed interpretation is not neutral, it must withstand strict scrutiny. *Lukumi*, 508 U.S. at 532. But LIRC cannot hope to satisfy that demanding standard.

"A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881 (quoting *Lukumi*, 508 U.S. at 546).

Here, Wisconsin has no legitimate interest, much less a compelling one, in penalizing religious organizations that help those who are not co-religionists. The only legitimate interest LIRC could point to is its interest in ensuring that workers receive unemployment compensation. But all parties agree that the Church's unemployment compensation system provides equal benefits to workers while being "more efficient." R.100:125; App.214. So there is no harm to be cured.

Nor can LIRC's interest be called "compelling." "[A] law cannot be regarded as protecting an interest 'of the highest order' … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Yet here, the very rule LIRC seeks to enforce contains exemptions for churches, ordained ministers, and nonprofit religious organizations that LIRC deems religious enough to qualify for the religious purposes exemption. ***48** LIRC "may not refuse to extend" these exemptions to "cases of 'religious hardship' without compelling reason." *Fulton*, 141 S. Ct. at 1878. And as noted above, LIRC has no reason, much less a compelling one, to do so. LIRC therefore cannot satisfy strict scrutiny.

C. LIRC's proposed interpretation violates the Establishment Clause by entangling Church and State.

LIRC's proposed interpretation also violates the Establishment Clause. Among other things, that Clause forbids entangling Church and State. A corollary of this rule is the principle that secular courts must avoid deciding, or entanglement in, religious questions. Indeed, the First Amendment forbids "judicial entanglement in religious issues." *Our Lady*, 140 S. Ct. at 2069; *see also id.* at 2070 (Thomas, J., concurring) (noting that the Supreme Court "goes to great lengths to avoid governmental 'entanglement' with religion"); *DeBruin*, 2012 WI 94, ¶ 102 (Ann Walsh Bradley, J., dissenting) ("An 'excessive entanglement' in violation of the Establishment Clause can arise when the state is required to interpret and evaluate church doctrine."). Moreover, the prohibition on entanglement also requires civil courts to "refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.); *see Wis. Conf. Bd. of Trs. of United Methodist*

Church, Inc. v. Culver, 2001 WI 55, ¶ 20, 243 Wis. 2d 394, 627 N.W.2d 469, ("[T]he foremost limitation imposed by the First Amendment is that we refrain from resolving doctrinal disputes."); *L.L.N. v. Clauder*, 209 Wis. 2d 674, ¶ 20, 563 N.W.2d 434 (1997) ("It is well-settled that excessive governmental ***49** entanglement with religion will occur if a court is required to interpret church law, policies, or practices.").

LIRC's interpretation of the exemption runs afoul of these fundamental Establishment Clause principles. It requires Wisconsin courts (and government officials) to conduct an intrusive inquiry into the operations of religious organizations that seek the religious purposes exemption. *See, e.g.*, App.040-41. That kind of detailed inquisition into the beliefs, practices, and operations of a religious body will always entangle Church and State.

Indeed, the court of appeals' mode of analysis - examining whether individual activities of religious nonprofits are "inherently" or "primarily" religious in nature - is a recipe for hopeless entanglement. The court of appeals, for example, decided that "the work that CCB and its sub-entities engage in is primarily charitable aid to individuals with developmental and mental health disabilities," and that "while these activities fulfill the Catechism of the Catholic Church to respond in charity to those in need, the activities themselves are not *primarily* religious in nature." App.041. To make this determination, the court of appeals made itself the arbiter of which of a church's actions are "primarily" or "inherently" imbued with religious significance. App.041-42. And to do this, the court of appeals created out of whole cloth a set of criteria for second-guessing the determination of the church that the activities it performed were in fact primarily religious in nature. App.041-42; *see* Section II.B.1 above.

***50** But when it comes to the activities of religious organizations, there are no simple lines to be drawn between "inherently religious" activities and those that are secular in nature, because often the entire institution is imbued with religious purpose. In *Hosanna-Tabor*, the United States Supreme Court specifically rejected this idea in the context of deciding who is a "minister" under the First Amendment, holding that "[t]he issue before us … is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed." 565 U.S. at 193-94. This Court rejected the same argument in *Coulee*, explaining that the "primary duties test" (analyzing the percentage of time an employee spends performing "'religious' activities,") "redounds in an intrusiveness inconsistent with the free exercise of religion." *Coulee*, 2009 WI 88, ¶ 46.

What is true of ministers is also true of religious organizations - there is no neat division between religious and secular activities. But LIRC's proposed interpretation of the religious purposes exemption would require courts to do just that - analyze the specific activities of CCB and each of its sub-entities to determine whether each organization is more than fifty percent religious. App.041-42.

Indeed, the criteria laid out by the court of appeals are a recipe for entanglement. It raises questions that plainly fall outside the judicial ken, like determining who qualifies as a co-religionist: "Are Orthodox Jews and non-Orthodox Jews coreligionists? … Would ***51** Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?" *Our Lady*, 140 S. Ct. at 2068-69. Related questions abound: Does sharing the love of Christ by serving food to the hungry qualify as "teaching the Catholic religion"? App.040-41; *see, e.g., Matthew* 14:13-21. Does modeling the love of Christ by caring for the sick help to "inculcate the Catholic faith"? App.040; *see, e.g., Mark* 2:1-12. Making such determinations, as this Court and the United States Supreme Court have already held, impermissibly entangles courts and the government in religious questions. *Coulee*, 2009 WI 88, ¶ 46; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("a religious-secular distinction … results in considerable ongoing government entanglement in religious affairs").

What makes the court of appeals' analytical approach even more entangling is that it also requires courts to second-guess churches' motivations. Indeed, LIRC and the court of appeals *admitted* that they were rejecting CCB's view of the religious significance of its actions, recognizing that if they looked at CCB's purpose for engaging in these actions, it would likely have come to a different conclusion. App.038-40; App.099-100. That kind of second-guessing led the court of appeals to an unsupportable - and constitutionally dangerous - conclusion: "While the Catholic Church's tenet of solidarity compels it to

engage in charitable acts, the religious motives of CCB and its sub-entities appear to be incidental to their primarily charitable functions." App.043.

***52** The consequences of this entangling approach would be devastating for church-state relations in Wisconsin. Wisconsin executive branch officials and Wisconsin courts would have to undertake intrusive inquiries into the practices of many different admittedly religious groups and then decide whether a series of specific activities carried out by these religious groups are all "inherently" or "primarily" religious. That would impermissibly entangle Church and State in Wisconsin for years to come.

...

This Court can avoid all these constitutional pitfalls by adopting a straightforward, plain meaning of the religious purposes exemption, as explained above. By focusing on the purpose of the church or religious organization operating the ministry, this Court would respect the religious autonomy of the Catholic Church and its religious decision-making regarding how to structure its ministry, ensure neutral treatment of religious nonprofits regardless of their religious beliefs, and prevent excessive entanglement by courts and governments attempting to parse out which activities of a religious nonprofit are primarily religious.

CONCLUSION

Catholic Charities Bureau and its sub-entities respectfully ask this Court to reverse the court of appeals' February 14, 2023, Order and Final Judgment and render final judgment for them.

***53** Respectfully submitted,

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Dated this 18th day of May, 2023.

Footnotes

1 *See generally* E.E. Muntz, *An Analysis of the Wisconsin Unemployment Compensation Act*, 22 Am. Econ. Rev. 414 (1932).

2 Even the Internet dictionary the court of appeals consulted lists "manage or use" first among the transitive verb definitions. *See Operate (used with object)*, Dictionary.com, https://perma.cc/Y4GP-YEXM ("to manage or use").

3 The only Wisconsin decision cited, *Coulee Catholic Schs. v. LIRC*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, concerned the ministerial exception, not Wisconsin's unemployment statutes. As the court of appeals acknowledged, "*Coulee* is factually and legally distinguishable." App.031-32.

4 This Court has confirmed that "the Wisconsin Constitution provides much broader protections for religious liberty than the First Amendment." *James v. Heinrich*, 2021 WI 58, ¶ 36, 397 Wis. 2d 517, 960 N.W.2d 350 (cleaned up). Therefore, a "holding that the statute involved violates the First Amendment is a holding that, in these particulars, it also violated Art. 1, sec. 18, Wisconsin Constitution." *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 332-33, 198 N.W.2d 650 (1972) ("While words used may differ, both the federal and state constitutional provisions relating to freedom of religion are intended and operate to serve the same dual purpose[.]").

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2023 WL 1862514 (Wis.App. III Dist.) (Appellate Brief)
Court of Appeals of Wisconsin, District III.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services Inc., Diversified Services, Inc., Black River Industries, Inc., And Headwaters, Inc., Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR and Industry Review Commission, Respondent-Co-Appellant,
State of Wisconsin Department of Workforce Development, Respondent-Appellant.

No. 2020AP2007.
February 2, 2023.

Nonparty Brief of Maranatha Baptist University, Maranatha Baptist Academy, Concordia University Wisconsin, The Wisconsin Family Council, and the Wisconsin Association of Christian Schools

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*5 STATEMENT OF INTEREST

Maranatha Baptist University was established in 1968 in Watertown, Wisconsin, to be "To the Praise of His Glory" (taken from Ephesians 1:12). This motto reflects Maranatha's deeply held conviction that the primary purpose of every Christian is to glorify God through one's chosen occupation and church membership, and by serving others in God-honoring ways. Maranatha is a non-profit institution governed by an independent board of trustees and is not part of any denominational hierarchy or structure. Faculty members, though diverse in academic backgrounds, share a common core of biblical values and consider themselves conservative, independent Baptists.

Originally founded as Maranatha Baptist Bible College, the name was changed to Maranatha Baptist University in 2013 to reflect the broad range of academic and career preparation programs offered while maintaining its founding purpose. Maranatha operates a small high school, Maranatha Baptist Academy, Inc., and offers 33 bachelor's degree programs and seven graduate degrees across seven academic units.

Maranatha's mission is "to develop leaders for ministry in the local church and the world," in the belief that all graduates will be effectively equipped to serve God with competence in a church and in their chosen vocation. To ensure continuity and faithfulness to the mission, Maranatha makes its doctrinal position and behavior expectations plain to all prospective students, staff, and faculty. Integrated and robust systems are designed to prepare leaders (from all walks of life) to serve in the local church and the world. This integrated system of transmitting biblical values assists students to choose, prize, and act on their faith both during and after their college years.

*6 Concordia University Wisconsin is a higher education community in Mequon, Wisconsin, committed to helping students develop in mind, body, and spirit for service to Christ in the Church and the world. Concordia is affiliated with The Lutheran Church - Missouri Synod. Its status under Wis. Stat. § 108.02(15)(h)2. could be affected by the court of appeals' decision.

The Wisconsin Association of Christian Schools ("WACS") was founded in 1977 to promote Christian education in Wisconsin. It seeks to foster, maintain, and improve the moral, spiritual, and academic standards of the Christian schools by working together to disseminate information vital to schools and parents, to encourage excellence in Christian education, and to coordinate activities among member schools. WACS recognizes the right and responsibility of parents to educate their children in all areas of life-spiritual, academic, social, physical. It has seventeen member schools, several of which may be impacted by the court of appeals' decision.

The Wisconsin Family Council ("WFC") actively preserves God's plan for marriage, family, life, and religious freedom in the public arena of Wisconsin while educating and equipping individual Christians and church leaders to do the same in their communities. WFC is a 501(c)(3) not-for-profit organization and is supported solely by the gifts and contributions of concerned citizens and churches. WFC's church network connects pastors and other ministry leaders from a variety of faith backgrounds to policy issues. Many of the churches and ministries in WFC's constituency are covered by the tax exemption at issue in this case.

Amici (hereafter the "Maranatha Amici") represent religious organizations that come from faith traditions that are less hierarchical than the ***7** Catholic church. Due to this distinction, amici argue that a religiously affiliated organization's *own* primary religious purposes may inform whether that organization is "operated primarily for religious purposes." Because this argument varies from petitioners' position, the Maranatha Amici have also filed a motion for oral argument time to address their unique argument.

ARGUMENT

Maranatha Amici advance three arguments to support the petition to review the court of appeals decision in this case. First, under the court of appeals' decision, many religiously motivated and religiously affiliated nonprofits could lose the benefit the unemployment insurance tax exemption Wis. Stat. § 108.02(15)(h)2. has afforded them for decades. That amounts to a "statewide impact" warranting this court's review. *See* Wis. Stat. § 809.62(1r)(c).

Second, the Court should take this case to scrutinize the court of appeals' interpretation of § 108.02(15)(h)2. The decision superimposes a judicial conception of what it means for a nonprofit to be "operated primarily for religious purposes," holding that only activities that square with a court's pre-conceived notions of traditional religious practices count as serving a primarily religious purpose. The Court should grant review to clarify whether organizations primarily serving religious purposes other than traditional worship and evangelism nonetheless may be "operated primarily for a religious purpose."

Third, Maranatha Amici ask that, in addition to the petitioners' arguments, the Court consider when a religiously affiliated nonprofit's *own* religious purposes may establish that it is "operated primarily for religious ***8** purposes." Maranatha Amici are organizations that are religiously motivated or affiliated, but which are not subject to the same style of supervision and control as are nonprofits affiliated with the Catholic Church. Such "independent affiliates" nevertheless qualify for § 108.02(15)(h)2.'s exemption.

I. THIS CASE WARRANTS THE COURT'S ATTENTION BECAUSE OF ITS SIGNIFICANT IMPACT ON WISCONSIN'S RELIGIOUS SCHOOLS.

Religiously motivated nonprofit organizations are the cornerstones of communities across Wisconsin. Called to service by their faith, they educate the young, walk with the aged, clothe the poor, heal the sick, welcome the refugee, house the homeless, visit widows and prisoners, and hold the hands of the dying. Whether through volunteers or professionals, they are the hands and feet of the body of believers in the world. They undertake these activities in response to the commands of their faith: "For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me." Matthew 25:35-36. None of those activities look like evangelism, theological education, or worship, yet all are undertaken with a primarily religious purpose, in response to a religious calling or conviction. The religiously motivated nonprofit organizations who serve in these ways are important to Wisconsin, and this issue is important to them. ***9** "Religious education is vital to many faiths practiced in the United States." [1] "In the Catholic tradition, religious education is 'intimately bound up with the whole of the Church's life.'" [2] "Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation.... Religious education is a matter of central importance in Judaism ... [and] ... is also important in Islam.'" [3] There is a "rich diversity of religious education in this country," and a "close connection that religious institutions draw between their central purpose and educating the young in the faith." [4]

This rich diversity finds expression in Wisconsin. The Wisconsin Council of Religious and Independent Schools counts among its members nearly 600 schools spread across the Catholic, Lutheran, Seventh-Day Adventist, and evangelical Christian traditions. [5] The Wisconsin Association of Christian Schools, amicus here, has seventeen members from Baptist and evangelical backgrounds. [6] Wisconsin is also home to Jewish preschools, K-8 schools, and a high school, [7] and to four Islamic schools. [8]

These hundreds of ***10** religiously motivated schools collectively educate over 100,000 children in Wisconsin, including many who are vulnerable and low-income.

Though the court of appeals' opinion suggests that some schools may qualify for the exemption (because they "inculcate the faith" among the children of believers), many religiously motivated schools may not if they serve a significant number of non-co-religionists. [9] One could easily imagine a case involving a Lutheran school that participates in the Milwaukee Parental Choice Program where the Department argues the school does not "operate to" "evangelize" Lutheranism on its "participants," does not require its "participants ... to be of the [Lutheran] faith" (indeed, where a majority of them self-identify with faiths other than Lutheranism), and its "funding comes almost entirely from government [vouchers] or private [donors], not from the [Lutheran church]." [10]

Religiously motivated colleges and universities, no less than K-12 schools, also play an important role in shaping the faith and character of young people. Nothing about the importance of religious education in any of the faith traditions mentioned above said that its importance ends with high school graduation. Indeed, the doctrine interpreting the First Amendment "does not distinguish colleges from primary and secondary schools." [11]

Amicus Maranatha Baptist University, for instance, sees itself as first and foremost a community of students and faculty living together to glory of ***11** God, even as they come together to study the liberal and fine arts. In addition to Maranatha, Wisconsin is home to over a dozen other faith-based colleges and universities. These other institutions are generally open to students of all faith or no faith, and they offer far more secular subjects than religious ones.

These religiously motivated schools must wonder whether they qualify for the exemption under the court of appeals' test. Would Maranatha have to separate its seminary off from the rest of the university, because the court's opinion suggests only "theological seminaries for the advanced study and the training of ministers" qualify for the exemption? [12]

Religiously motivated nonprofit organizations undertake numerous other religiously motivated purposes beyond schools, like running nursing homes and foster care agencies. [13] Indeed, the Wisconsin Department of Health Services' list of licensed nursing homes as of January 11, 2023, shows over forty nursing homes identified with religious faiths, [14] and the Wisconsin Department of Children & Families lists at least seven religiously motivated child placement agencies. [15] Religiously motivated ministries also offer homeless shelters, crisis pregnancy support, mental health counseling, prison visitation and mentorship, and refugee and immigrant settlement services. Again, given the constituencies they serve, the staff they hire, and their ***12** funding streams, it is difficult to see almost any of these organizations meeting the court of appeals' test.

These organizations' "primary purpose" is to serve as the hands and feet of their faith in their communities. In living out their faith, their activities may look secular at a glance. But just as it was wrong to "minimize or privatize religion by calling a faith-centered social studies class, for example, 'secular' because it does not involve worship and prayer," [16] so too it is wrong to say a faith-centered homeless shelter or hospital is not operated for religious purposes.

Many of these ministries may choose to participate in the State's unemployment insurance programs. But for those directly impacted by the court of appeals' decision, it will be deeply disconcerting to be told by the government that their ministry is not "operated primarily for religious purposes" because it provides social services rather than distributes Bible tracts. That would be news to thousands of pastors, commissioned ministers, teachers, nuns, and nurses who show up to work at these ministries every day as part of a faith-filled vocation to love the least of these. The unexpected imposition of unemployment insurance tax on these nonprofits, many of which operate on narrow financial margins and often rely on the benevolence of believers, poses a significant financial burden. The potentially wideranging effect of the court of appeals' decision warrants this Court's review. ***13 II. THE COURT OF APPEALS' INTERPRETATION OF WIS. STAT. § 108.02(15)(H)2. WARRANTS THIS COURT'S SCRUTINY.**

The practical consequences of the court of appeals' decision are enough to warrant review. But the statutory and religious freedom questions it addressed are equally deserving of the Court's attention. Maranatha Amici outline four flaws in the court of appeals' reasoning which they urge the court to consider more deeply by granting review of the petition.

First, Wis. Stat. § 108.02(15)(h)2.'s text-"operated primarily for religious purposes"-quite clearly calls for an inquiry into the primary motivation for nonprofit's operation and not into the nature of its operations. Yet the court of appeals interpreted the statute to also compel an inquiry into whether a claimed religious operation looks enough like the court's own mental image of what counts as religious activities, like evangelism or worship. That interpretation was contrary to the statute's text. [17]

Second, the court of appeals interpretation of § 108.02(15)(h)2. violates the First Amendment and Article I, Section 18 of the Wisconsin Constitution because it directs courts to inquire into the validity of religious beliefs. The state may inquire into whether a person's religious beliefs are sincerely held without running afoul of religious liberty, but it cannot inquire into the validity of those beliefs. [18] The petitioners and Maranatha Amici sincerely believe that ***14** charity is a fundamental tenant of living out their faith. Accepting that belief, it is not a court's place to question whether a ministry's operations look sufficiently religious. [19] Similarly, Maranatha Amici represent educational institutions that sincerely believe that education in a religious setting is a fundamental tenant of living out their faith. Accepting that belief, it is not the place of a court to question whether education is a qualifying religious activity.

The court of appeals' interpretation also interferes with the constitutionally guaranteed autonomy of religious organizations. Under the Wisconsin Constitution, "individuals also have the right to ... form ... faith-based organizations committed to achieving their faith-based ends," and the "Wisconsin Constitution uses the strongest possible language in the protection of this right." [20] This includes the right of believers of non-hierarchical faiths to organize themselves into separate organizations to serve separate ministry purposes, and the right of believers in hierarchical faiths to organize their ministries into separate sub-entities led by specifically qualified or appointed managers.

Third, the court of appeals' test misapplies the concept of surplusage. The court's test attempts to avoid reading the statutory language "operated primarily for religious purposes" as surplusage but in doing so excludes a wide swath of religiously motivated organizations that properly fall within the statute. It is true that some religiously affiliated entities are primarily secular. ***15** Churches and associations of churches may operate affiliated or controlled entities for purely secular purposes, usually as investments to generate income, which would not qualify as being "operated primarily for religious purposes." Many donors, for instance, may choose to give stock to a ministry for tax purposes. Some donors give a specific kind of stock: ownership interests in closely held companies. Sometimes donors give the entire ownership in a closely held company to a ministry. The ministry may choose to then sell the closely held company, or choose to keep the closely held company, perhaps because the market timing is not optimal to get the best price, or perhaps because the ministry wants a long-term income stream rather than a short-term cash windfall.

While the court of appeals' test avoids the problem of surplusage, it is incorrect and unworkable. Instead, Maranatha Amici propose the following test, which gives meaning to the full text of the statute: A religiously affiliated nonprofit is not operated primarily for a religious purpose if it is operated primarily for purposes that are not part of its sincerely held religious beliefs, but rather are primarily operated for purposes the entity views as secular. Maranatha Amici propose that a useful indicator when implementing this test is whether the affiliated organization's income is tax-exempt or taxed, such as unrelated business income tax. [21] If a religiously affiliated organization is subject to income tax, it makes sense that it's also subject to unemployment ***16** insurance tax. If it is exempt from income tax as a ministry, it should be exempt from unemployment insurance tax as well.

Fourth, the religious organizations exemption in the unemployment insurance statute safeguards important, constitutionally protected religious liberties. When an ex-employee applies for unemployment insurance, one of the first questions is whether the employee was "terminated by an employing unit for misconduct by the employee connected with the employee's work."

Wis. Stat. § 108.04(5). [22] Whether an employer was justified in firing an employee for "misconduct" is thus frequently a topic of litigation. An administrative law judge at the Department of Workforce Development has no business determining whether a ministry employee's violation of an employer's statement of faith constitutes "misconduct." As this Court said when declining to recognize a tort for negligent hiring or retention of a minister, "the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." [23] The ALJs and ***17** courts of this state are equally unqualified to determine what constitutes "misconduct" by a ministry employee sufficient to justify termination, because such a determination would often require interpretation of church canons and internal church policies and practices. The unemployment-insurance exemption protects important religious liberties, and adopting a narrow construction of the exemption in this case will only lead to future litigation asserting a constitutional defense to "misconduct" inquiries.

The court of appeals' decision incorrectly interpreted § 108.02(15)(h)2. and in the process created constitutional problems warranting this Court's review.

III. THE COURT SHOULD CONSIDER WHEN A NONPROFIT'S *OWN* PRIMARY RELIGIOUS PURPOSE SUFFICES TO SATISFY THE STATUTE.

Amici do not take issue with the petitioners' view that the primary religious purpose of a parent church is relevant to determining whether a particular entity is "operated primarily for a religious purpose." However, amici urge the Court to also allow the organization's own religious purpose to suffice.

Many religious nonprofit organizations, especially those affiliated with Protestant denominations, operate under a less hierarchical model than does the Catholic Church. [24] The petitioners have explained that their corporate structure is such that the Diocese of Superior exercises essentially complete control over its affiliated non-profits. But that practice is not ubiquitous across religious cultures. For example, amicus Maranatha Baptist University is a ***18** religiously supported university, but it operates independently, without oversight by a single church or organized association of churches. The relationship is not that of parent-and-child religious entities, but more like siblings within the same faith family. Section 108.02(15)(h)2. contemplates both types of arrangements by covering organizations that are "operated, supervised, controlled, or principally supported by a church or convention or association of churches." In the Maranatha Amici's view, especially for nonprofits with autonomy from their affiliated church, it is necessary for a court to consider the nonprofit's own primarily religious purpose.

CONCLUSION

Because this case will have significant statewide ramifications for thousands of religiously motivated organizations who pursue faith-based ends beyond solely theological education and evangelism, review by this Court is necessary.

***19** Dated: January 26, 2023

Respectfully submitted,

<<signature>>

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Footnotes

1 *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064-66 (2020).

2 *Id.* (quoting *Catechism of the Catholic Church* 8 (2d ed. 2016)).

3 *Id.*

4 *Id.* at 888.

5 https://www.wcris.org/about-wcris/wcris-members/.

6 https://www.wacschools.org/members.html.

7 https://www.milwaukeej ewish.org/business-directory/wpbdpcategory/education/.

8 https://www.privateschoolreview. com/wisconsin/islamic-religious-affiliation.

9 *Cath. Charities Bureau, Inc. v. LIRC*, No. 2020AP2007, unpublished slip op., ¶59 (Ct. App. Dec. 13, 2022).

10 *Id.*

11 *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383,401 (1st Cir. 1985) (op. of Breyer, J.).

12 *Cath. Charities Bureau*, No. 2020AP2007, ¶40 (quoting another source).

13 *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2375 (2020) (nursing homes); *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1874 (2021) (foster care agencies).

14 https://www.dhs.wisconsin.gov/guide/nhdir.pdf.

15 https://dcf.wisconsin.gov/files/cwlicensing/pdf/cpa.pdf

16 *Coulee Cath. Sch. v. LIRC*, 2009 WI 88, ¶46, 320 Wis. 2d 275, 768 N.W.2d 868.

17 *See* Unemployment Insurance Program Letter No. 28-87, U.S. Dept. of Labor (June 10, 1987) ("The second category of services exempt from the required coverage are those performed in the employ *of religious schools and other entities* which, although separately incorporated from a church, are operated, supervised, controlled or principles supported by a church or convention or association of churches ...." (emphasis added)).

18 *See Coulee Cath.*, 320 Wis. 2d 275, ¶61; *Holt v. Hobbs*, 574 U.S. 352, 360-61 (2015).

19 *See St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶¶47-49, 398 Wis. 2d 92, 961 N.W.2d 635.

20 *Coulee Cath.*, 320 Wis. 2d 275, ¶¶58-59.

21 *See Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 89-90, 591 N.W.2d 583 (1999) (explaining that the unrelated business income tax rules apply to an exempt organization's nonexempt business endeavors).

22 "Misconduct" is defined in the statute to include:

> one or more actions or conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, ..., or to show an intentional and substantial disregard of an employer's interests, or of an employee's duties and obligations to his or her employer."
>
> Wis. Stat. § 108.04(5).

23 *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d302, 326, 533 N.W.2d 780 (1995).

24 Amici explain this difference at greater length in their motion for supplemental argument time.

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2023 WL 1862473 (Wis.App. III Dist.) (Appellate Brief)
Court of Appeals of Wisconsin, District III.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc. Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR and Industry Review Commission, and Respondent Co-Appellant; State of Wisconsin Department of Workforce Development Respondent-Appellant.

No. 2020AP2007.
February 1, 2023.

Request for Review of a Published Decision by The Court of Appeals, District III, on Appeals from the Douglas County Circuit Court, the Hon. Kelly J. Thimm Presiding, Case No. 2019CV324

Non-Party Brief of Catholic Conerences of Illinois, Iowa, Michigan, and Minnesota In Support of Petition for Review

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*5 INTEREST OF AMICI CURIAE

Amici curiae are the state Catholic conferences representing the Roman Catholic dioceses throughout Illinois, Iowa, Michigan, and Minnesota in matters of public policy. They write to aid the Court in understanding the importance of the issues presented and why this Court should grant the Petition for Review. In short, they believe that the court of appeals' ruling distorts the fundamentally religious nature of Catholic charitable work, improperly narrows clear and reasonable statutory exemptions for religious organizations, and imperils foundational freedoms from interference with internal organization and from religious discrimination under the First Amendment.

The Catholic Conference of Illinois serves as the public-policy voice of the bishops in Illinois' 6 Catholic dioceses, consisting of approximately 949 parishes, 18 missions, 46 Catholic hospitals, 21 healthcare centers, 11 colleges and universities, 424 schools, and 527 Catholic cemeteries. It interacts with all elements of government to promote and defend the interests of the Church.

The Iowa Catholic Conference is the official public-policy voice of the Catholic bishops in Iowa across its 4 dioceses, including 450 parishbased ministries, 111 schools, 16 hospitals, 12 clinics, 13 social-service centers, and Catholic Charities organizations in each diocese. The Conference advocates the common good and promotes public policies respecting the life and dignity of every human person.

The Michigan Catholic Conference speaks for the Catholic Church in Michigan on public policy, representing 7 dioceses, 621 parishes, 202 schools, 21 Catholic hospitals, 6 healthcare centers, 5 orphanages, 14 daycare centers, 40 specialized homes, and 83 social-service centers. The *6 Conference promotes a social order that respects human life and dignity and serves the common good through public-policy advocacy.

The Minnesota Catholic Conference is the public-policy voice of the state's Catholic bishops and the six dioceses that the bishops lead. The Conference of bishops and its staff support legislation that serves human dignity and the common good, educates Catholics and the public about the ethical and moral framework to be applied to public-policy choices, and mobilizes the Catholic community in the public arena. [1]

BACKGROUND

I. Care for those in need is a fundamentally *religious* obligation for Catholic bishops and their dioceses.

For the Catholic Church, the service of charity is just as deeply a part of its religious mission as liturgical worship or spreading the faith. Rooted in the words of Jesus himself that “whatever you did for one of these least brothers of mine, you did for me,”

see Matthew 25:40 (New American Bible), and witnessed in the practice and teaching of the earliest Christians, "the exercise of charity" is "one of [the Church's] essential activities, along with the administration of the sacraments and the proclamation of the word." Benedict XVI, *Deus Caritas Est*, ¶¶ 22, 23 (2005). "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to her as the ministry of the sacraments and preaching of the Gospel," such that "[t]he Church cannot neglect the service of charity any more than she can neglect the sacraments ***7** and the Word." *Id.* ¶ 22. "These duties presuppose each other and are inseparable." *Id.* ¶ 25.

The Catholic Church's charitable service is thus "an indispensable expression of her very being" and an essential part of her nature and ministry, "not a kind of welfare activity which could equally well be left to others." *Id.* Further, the Church never regards itself as "a humanitarian agency and charitable service one of its 'logistical departments.'" *Address of Pope Francis to Participants in the Meeting Sponsored by Caritas Internationalis* (May 28, 2019).[2] Rather, "charity ... is the experiential encounter with Christ; it is the wish to live with the heart of God who does not ask us to have generic love, affection, solidarity, etc., toward the poor, but to encounter him in them (cf. Mt 25:31-46), with the manner of poverty." *Id.*

Moreover, the Church's ministry of charity is neither conditioned on membership in the Catholic Church nor "used as a means of engaging in what is nowadays considered proselytism." *Deus Caritas Est* ¶ 31. "Those who practice charity in the Church's name will never seek to impose the Church's faith upon others." *Id.* In the words of Pope Francis:

> This is not about proselytism, as I said, so that others become "one of us". No, this is not Christian. It is about loving so that they might be happy children of God.... For without this love that suffers and takes risks, our life does not work.

Pope Francis, General Audience (Jan. 18, 2023).[3]

While the Church exhorts all the faithful to charitable works, it specially charges its bishops to carry out the service of charity in each particular diocese. *Deus Caritas Est* ¶ 32. "To facilitate aid for the needy ***8** in the most effective manner, the Bishop should promote a diocesan branch of Caritas, Catholic Charities, or other similar organizations which, under his guidance, animate the spirit of fraternal charity throughout the diocese." Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops (Apostolorum Successores)*, ¶ 195 (Feb. 22, 2004).[4] Thus, Catholic Charities' purpose is fundamentally religious: "In every situation, diocesan Caritas or Catholic Charities should participate in all authentically humanitarian initiatives, so as to testify that the Church is close to those in need and in solidarity with them." *Id.* And, "[w]ithout ever misusing works of charity for purposes of proselytism, the Bishop and the diocesan community exercise charity in order to bear witness to the Gospel, to inspire people to listen to the Word of God and to convert hearts." *Id.* ¶ 196.

Catholic Charities therefore functions as an integral component of the Church's religious ministry, regardless of its legal structure under state law or, for that matter, its organization under the Church's canon law. Many dioceses organize their Catholic Charities as separately incorporated legal entities under civil law (even while in some cases treating them as part of the diocese under canon law). Other Catholic Charities are housed directly within the diocesan entity, and their employees are diocesan employees like other ministers. Such distinctions under state law, however, do not affect the practical reality that Catholic Charities is the principal charitable arm of the diocesan bishop, an integral ***9** part of the Church through which the local Church exercises its fundamentally *religious* ministry of charity, ultimately answerable to that bishop.

In sum, the Catholic Church holds that charity is as integral to its nature as liturgical worship and spreading the faith. Moreover, the Church practices charity as a fundamentally religious activity in which it both encounters Christ in those served and bears witness to the Gospel. For these reasons-not simply as a humanitarian act or means to proselytize or impose the faith on others-

the Church instructs bishops to perform charitable works through Catholic Charities or similar charitable organizations under their guidance.

ARGUMENT

I. The court of appeals' distinction between religious entities is wholly foreign to the purpose or structure of the unem-ployment statute's exemption.

Wisconsin law gives statutory language its "common, ordinary, and accepted meaning," avoiding "absurd or unreasonable results." *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Further, "[t]he statutory language is examined within the context in which it is used. An interpretation that fulfills the purpose of the statute is favored over one that undermines the purpose." *Klemm v. Am. Transmission Co., LLC*, 2011 WI 37, ¶ 18, 333 Wis. 2d 580, 798 N.W.2d 223. Here, the court of appeals' interpretation of Wis. Stat. § 108.02 contorted unambiguous language and unreasonably dis-tinguished the activities and motivations of a "church" employee from ***10** the exact same activities and motivations in an employee of a separately incorporated entity entirely controlled by that church.

First, the court of appeals failed to consider the context of the statutory exemption from Wisconsin's unemployment system. Instead of fairly reading the language of the exemption in context and favoring a reading that fulfills the purposes *of the exemption*, the court of appeals applied an overriding principle that "exceptions must be narrowly construed" and that the unemployment statute should be "liberally construed to effect unemployment compensation coverage." Opinion ¶¶ 36, 37. But this ignores that the statutory exemption was enacted within a broader statutory context in which it serves its own purposes.

Beyond generally noting that the exemption was enacted to "conform Wisconsin's unemployment law with" federal unemployment law, the court of appeals did not consider the purpose of the religious exemption to unemployment coverage. As a federal court of appeals has noted, however, "[e]fficient 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), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). There are similar benefits to broadening the religious exemption from churches to other closely related religious organizations. For example, what constitutes a "church" or "convention of churches" is not defined in the statute, and it may often be difficult to distinguish a "church" from another nonprofit entity operated by a church for religious purposes-especially where, as here, both entities are under the ultimate direction of the same religious leaders. ***11** Similarly, an exemption that focuses on *who operates* the nonprofit organization and *why* it does so avoids the fundamentally religious question of *what constitutes religious activity-the* very trap into which the court of appeals stumbled here.

Second, the court of appeals' interpretation of the religious exemption leads to absurd and unreasonable results by drawing distinctions between materially similar employment based on an arbitrary criterion (whether an employer is a "church" or a nonprofit entity "operated, supervised, controlled, or principally supported by a church") that has nothing to do with the underlying purpose or structure of the exemption. Consider two hypothetical employers: the first is a diocese that provides social services through an unincorporated "Caritas" division of the diocese; the second provides identical services through a separately incorporated nonprofit Catholic Charities for the diocese. They employ two otherwise similarly situated individuals: both are ultimately subject to the direction of the bishop, both are employed full-time in providing social services to disabled individuals but not otherwise engaged in teaching or inculcating the Catholic faith or participating in religious worship, neither are Catholic, and both may be fired from their jobs if they publicly dissent from the teachings of the Catholic Church regarding social justice. As the court of appeals recognized, under its interpretation of the statute, the first employer is likely exempt from unemployment, but the latter is not. *See* Op. ¶ 61.

Why should this be the case? The court of appeals' only answer was: "[t]he corporate form does make a difference ...." *Id.* Yet that reasoning begs the question. None of the conceivable purposes of the religious exemptions turn on the particular corporate

form through which a ***12** church elects to engage in its ministry. There is no plausible reason the Wisconsin legislature would have intended this bizarre result for two employers with employees engaged in the same activities, for the same religious purposes, pursuant to the same religious doctrine, under the ultimate direction of the same religious leaders. Thus, this Court should prefer the CCB's reading of the statutory text, which "fulfills the purpose" of the religious exemption and avoids "absurd or unreasonable results."

II. The court of appeals' interpretation of the statute raises serious constitutional questions under the First Amendment.

The court of appeals' "religious activities" test would also raise serious doubts about the constitutionality of the unemployment statute under the First Amendment. "Where there is serious doubt of constitution-ality," this Court "must look to see whether there is a construction of the statute which is reasonably possible which will avoid the constitutional question." *Baird v. La Follette*, 72 Wis.2d 1, 5, 239 N.W.2d 536 (1976); *accord Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). And this holds true for questions under the Religion Clauses as much as any other constitutional provisions. *See NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 507 (1979) ("[W]e decline to construe the [NLRA] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."). Here the court of appeals' interpretation would raise the very serious constitutional questions that the religious exemptions were designed to avoid in the first place.

***13** First, allowing the LIRC and DWD to decide what is and is not a "religious activity," and thus whether a particular nonprofit organization is operated for a "religious purpose" would force the state to interfere with the internal structure and governance of churches and subsidiary entities, contrary to longstanding First Amendment doctrine prohibiting such intrusion on church autonomy. *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). In other words, "the freedom of a religious organization to select its ministers," must also include the freedom of the Church to choose whether to pursue its ministries through subsidiary organizations or through its own employees. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012); *see also Serbian E. Orthodox Diocese for U.S. & Can. v. Milivo-jevich*, 426 U.S. 696, 713 (1976) ("[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, *internal organization*, or ecclesiastical rule, custom, or law." (emphasis added)).

Here, the Church itself considers the charitable ministries undertaken through Catholic Charities an essential part of the nature and mission of the Church, on par with administration of the sacraments and proclamation of the Gospel. How it structures its operations to engage in this ministry-perhaps to reflect other fundamental principles such as subsidiarity and participation [5] -is a question of the Church's internal ***14** organization. There is no obvious or legitimate reason why the Wisconsin legislature (or Congress) would want to constrain which lawful activities the Church pursues as part of its religious purpose, either directly or through subsidiary organizations. To the contrary, by expanding the religious exemption to enable churches to pursue their "religious purposes" through other organizations that they direct through a variety of means, the unemployment statute carefully avoids drawing difficult distinctions about what is and is not part of a church, what is a "religious purpose," or a "religious activity," and who gets to answer to those questions. Whether a ministry or activity is part of the Church is a question for the Church, not for LIRC, DWD, or the courts. As the Supreme Court has repeatedly observed, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)). *See also, e.g., Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981).

Second, the court of appeals' "religious activities" test, by its own terms engages in "precisely the sort of official denominational preference that the Framers of the First Amendment forbade." *See Larson v. Valente*, 456 U.S. 228, 255 (1982). Just as the Minnesota statute in *Larson* violated the Establishment Clause by imposing requirements only on religious organizations that solicit the majority of their funds from nonmembers because its "principal effect" was to impose requirements "on some religious organizations but not on others," *id.* at 253, the court of appeals' interpretation of Wisconsin unemployment statute

imposes unemployment coverage requirements on some religious organizations ***15** but not on others. It does so by explicitly privileging certain "religious activities" (those "operated with a focus on the inculcation of [a religious] faith and worldview" or "in a worship-filled environment or with a faithcentered approach to fulfilling their mission") over others (those "primarily charitable functions" with "incidental" religious motives), and thus discriminates in favor of churches and charitable religious organizations that limit their charitable works to co-religionists or treat charitable service "primarily" as a means of engaging in proselytism. That result cannot be reconciled with the United States Constitution's command that the state may not "prefe[r] some religious groups over" others. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). [6]

CONCLUSION

The court of appeals' ruling distorts the fundamentally religious nature of Catholic charitable work, improperly narrows clear and reasonable statutory exemptions for religious organizations, trespasses on the Church's constitutionally guaranteed autonomy to define its own religious activities and organize its ministries in the manner it chooses, and discriminates against the Church by treating charitable religious activity less favorably than other religious activities that conform to the court of appeals' own notions of the proper domain of religion. For these reasons, the Catholic Conferences respectfully urge the Court to grant appellants' petition for review.

***16** Dated this 26th day of January, 2023.

Respectfully submitted,

Electronically signed by

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Footnotes

1 No party's counsel authored this brief in whole or in part. No person, except *amici curiae*, their members, or their counsel, monetarily contributed to the briefs preparation.

2 *http://bit.ly/3Dcl7IZ.*

3 *http://bit.ly/3JbQHdG.*

4 *https://bit.ly/3wtK8eV.*

5 Such organizational decisions are themselves protected religious exercise, to the extent they are shaped by religious doctrine and canon law. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (holding that "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within" the definition of "religious exercise").

6 For the same reason, the court of appeals' interpretation would violate the Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs ....").

2023 WL 1863246 (Wis.App. III Dist.) (Appellate Brief)
Court of Appeals of Wisconsin, District III.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents,

v.

STATE OF WISCONSIN LABOR and Industry Review Commission, Respondent- Co-Appellant;
State of Wisconsin Department of Workforce Development, Respondent-Appellant.

No. 2020AP2007.
January 26, 2023.

Request for Review of a Published Decision by the Court of Appeals, District III, On Appeal from the Douglas County Circuit Court, Hon. Kelly J. Thimm Presiding, Case No. 2019CV324

Non-Party Brief Of Wisconsin Catholic Conference in Support of Petition for Review

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*5 INTEREST OF NON-PARTY *AMICUS CURIAE*

The Wisconsin Catholic Conference was founded by the Bishops of Wisconsin in 1969 to fulfill the vision of the Second Vatican Council, which called upon the Church to be more involved in the world. *See Catechism of the Catholic Church* M 1915 (2d ed. 1992), https://t.ly/aPH0.

Led by the Bishops, the Conference-with teachings of the Church at its foundation-serves to promote dignity, preserve justice, and advance the common good by offering a specifically Catholic contribution to public policy debates. The Conference responds to issues facing the Church's five dioceses, their Catholic Charities organizations, and the more than 1,700 priests and deacons that minister in over 700 parishes, 275 Catholic schools, and 30 hospitals across Wisconsin. Wisconsin Catholic Conference, *The Catholic Presence in Wisconsin*, https://t.ly/c5jTl.

The Conference's significant interest in this case and the proper interpretation of the Unemployment Compensation Act stems from its mission as the Church's public policy voice in Wisconsin and its role as the "informational clearinghouse" for the Church Unemployment Pay Program (CUPP). CUPP, *CUPP Policy Handbook* 2 (Oct. 1, 2022), https://t.ly/DVPS.

The Conference submits this brief to explain how the decision below interferes with the Church's internal affairs, impedes its sincere religious mission to serve *all people* in a non-judgmental, non-proselytizing fashion, and requires courts to become arbiters of religiosity.

*6 INTRODUCTION

Diminishing the import of two millennia of Catholic teaching and interfering with how the Diocese of Superior organizes and structures its charitable activities, the appellate court reduced the question of "religious purpose" to an examination of corporate structure. Notwithstanding that charity is a fundamental principle of Catholicism, that the Bishop leads the Catholic Charities Bureau, and that the Bureau functions as the diocese's charitable-ministry arm, the appellate court nevertheless ruled that the Bureau was not operated for a primarily religious purpose.

That conclusion not only ignores the *overwhelming* evidence of the Catholic Church's direction and control over the Bureau and its charities but also finds no support in the statutory text. Indeed, the plain language exempts entities that are "operated, supervised, controlled, or principally supported by a church," so long as they are "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h)(2).

This Court should thus grant review. The government-including the judiciary-has long been barred from interfering with church autonomy or imposing its own views of religiosity on religious organizations, and it is likely why the appellate court foresaw its decision would have "constitutional implications" and be "of crucial importance to religiously affiliated nonprofit organizations throughout the state, to employees of such organizations, and to the [State]." App.046.

*7 BACKGROUND

I. The Structure of the Catholic Church.

Core to the Catholic faith is the understanding of what it means to be "the Church." The Church was instituted by Christ himself during his earthly ministry when he said to one of the Apostles, "[a]nd I tell you, you are Peter, and on this rock I will build my church." *Matthew* 16:18 (NRSV-CE). Guided by the Holy Spirit, Catholics have built His Church for two millennia to fulfill the mission to "profess[] the faith" and "liv[e] it in fraternal sharing." *Catechism of the Catholic Church* ¶ 3 (2d ed. 1992), https://t.ly/aPHO.

There is only *one* Catholic Church. *E.g., Catechism* ¶ 881; *Codex Iuris Canonici (Code of Canon Law*), 1983 CIC c.368, https://t.ly/abL3 ("Particular churches, in which and from which the one and only Catholic Church exists."). The Church is led by the Pope, who is the direct successor of Peter. 1983 CIC c.330-35 (the Pope "possesses power over the universal Church" and "all particular churches and groups of them").

The Church is divided into dioceses. A diocese "is a portion of the people of God" that is "defined territorially" and "constitutes a particular church in which the one, holy, catholic, and apostolic Church of Christ is truly present and operative." 1983 CIC c.369-70. Wisconsin has five dioceses that serve 1.1 million Catholics. Wisconsin Catholic Conference, *The Catholic Presence in Wisconsin*, https://t.ly/c5jTl.

Each diocese is "entrusted to a bishop for him to shepherd." 1983 CIC c.369. Bishops, who are successors to the Apostles, are ***8** appointed by the Pope to be "teachers of doctrine, priests of sacred worship, and ministers of governance." 1983 CIC c.375 § 1, c.377. A bishop derives from the Pope the legislative, executive, and judicial power over his diocese and represents the diocese in all its juridic affairs. 1983 CIC c.391 § 1, c.393. While exercising "pastoral office over the portion of the People of God assigned to them," a bishop is also called to care "especially [for] the poor." *Catechism* ¶ 886. In this way, the diocesan bishops "are the visible source and foundation of unity in their own particular Churches." *Id.* (quoting Pope Paul VI, *Lumen Gentium: Dogmatic Constitution of the Church* ¶ 23 (1964), https://t.ly/JtB3).

II. Catholic Charity Is Both Fundamental to the Faith and Inherently Religious.

Foundational to Catholicism is the duty to spread Christian love through charity-providing care for the most vulnerable without seeking to impose one's faith on others. Christ's command to his followers was to practice charity: "Just as I have loved you, you also should love one another." *John* 13:34. He taught them that their acts of charity were so essential that they would be judged by how they served the hungry and the thirsty, welcomed the stranger, clothed the naked, and visited the ill and the incarcerated. *Matthew* 25:34-46.

Simply put, the Church "cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Pope Benedict XVI, *Deus Caritas Est* ¶ 22 (2005), https://t.ly/Bxvi. Indeed, without charity, a person can "gain nothing." *Catechism* ¶ 1826 (quoting 1 *Corinthians* 13:1-4).

***9** This command to care for the most vulnerable is at the core of everything the Catholic Church does. It is inherently religious in that it expresses the love that binds Catholics to Christ, to each other, and to all those they encounter. It cannot, therefore, be likened to some secular social service. As Pope Francis has explained, "Charity is always the high road of the journey of faith, of the perfection of faith." Pope Francis, *Angelus* (Aug. 23, 2020), https://t.ly/K3y6. "Christian charity is not simple philanthropy"-it "is looking at others through the very eyes of Jesus" while, at the same time "seeing Jesus in the face of the poor." *Id.* Indeed, "Catholic Charities and related organizations exist essentially to spread Christian love." Pope John Paul II, *Address to the Members of Catholic Charities USA* ¶ 8 (Sept. 13, 1987), https://t.ly/rTMCW.

Another feature that makes Catholic charity distinctive is that it spreads Christian love while remaining free from proselytization. As Pope Benedict explained, charity "is an action of the Church as such" and "has been an essential part of her mission from the very beginning," but it "cannot be used as a means of engaging in ... proselytism." Pope Benedict XVI, *Deus Caritas Est* ¶¶ 31(c), 32.

Accordingly, those "who practise charity in the Church's name will never seek to impose the Church's faith upon others," because a "Christian knows when it is time to speak of God and when it is better to say nothing and to let love alone speak." *Id.* ¶ 31(c). And it is "the responsibility of the Church's charitable organizations," like the Conference, the Bureau, and its charities, "to reinforce this awareness in their members, so that by their ***10** activity-as well as their words, their silence, their example-they may be credible witnesses to Christ." *Id.*

In response to this high calling to practice charity, the early Church recognized that it "need[ed] to be organized if it [was] to be an ordered service to the community." *Id.* ¶ 20. The Apostles "put[] this fundamental ecclesial principal into practice," by establishing *"diaconia":* the "ministry of charity exercised in a communitarian, orderly way." *Id.* ¶ 21. Over five centuries, the *diaconia* "evolved into a corporation," entrusted by civil authorities to store public grain and feed the citizenry. *Id.* ¶ 23; *see* Pope John Paul II, *Address to the Members of Catholic Charities USA* ¶ 3 (discussing how Catholic charities "go back to before the Declaration of Independence"). Today, the Pope appoints bishops to serve as the Apostles' successors as "president of the assembly and minister of charity in the Church," continuing the mission of the *diaconia.* Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops* (2004) ¶¶ 193-98, https://t.ly/YQon; *see* 1983 CIC c.331, c.368-73; *Catechism* ¶¶ 880-81.

The charity of the *diaconia* was and is unique: "[T]he social service which they were meant to provide was absolutely concrete, yet at the same time it was also a spiritual service." Pope Benedict XVI, *Deus Caritas Est* ¶ 21. This is because charity "does not simply offer people material help, but refreshment and care for their souls, something which often is even more necessary than material support." *Id.* ¶ 28. As Pope Benedict emphasized, those "who work for the Church's charitable organizations must be distinguished by the fact that they do not merely meet the needs ***11** of the moment, but they dedicate themselves to others with heartfelt concern, enabling [others] to experience the richness of their humanity." *Id.* ¶ 31(a). These spiritual commitments ensures that Catholic charities are not "just another form of social assistance" or "welfare activity." *Id.* ¶¶ 25(a), 31.

III. The Wisconsin Catholic Conference, the Church Unemployment Pay Program, and the Catholic Charities Bureau All Further the Church's Charitable Work.

To further the Church's charitable work, the Bishops of Wisconsin, through the Wisconsin Catholic Conference, founded the Church Unemployment Pay Program (CUPP) for lay employees in the Archdiocese of Milwaukee and the Dioceses of La Crosse, Madison, and Superior. *CUPP Policy Handbook* 2 (Oct. 1, 2022), https://t.ly/DVPS; *see* Pope John Paul II, *Laborem Exercens* (1981), https://t.ly/Bx80 ("The obligation to provide unemployment benefits ... is a duty springing from the fundamental principle of the moral order in this sphere ... the right to life and subsistence.").

CUPP is "housed under the umbrella" of the Conference, which serves as CUPP's "informational clearinghouse." *CUPP Policy Handbook* 2. The Conference's executive director chairs CUPP's interdiocesan board of directors, which comprises one member

from each participating diocese, appointed by the bishop of that diocese. *Id.* CUPP's board "determines general policies and criteria for the Program and serves as the final-level appeal body for the benefit claims process." *Id.*

Importantly, the Bishops of Wisconsin maintain ultimate juridical power and direct the Conference in administering CUPP ***12** and sharing the Church's principles of Catholic social teaching. This is so that the members of the Catholic Church within Wisconsin can more faithfully answer the Lord's call "to be good and faithful servants who serve the hungry and the thirsty, welcome the stranger, clothe the naked, and visit the ill and the incarcerated." *See* Archbishop of Milwaukee Jerome E. Listecki et al., *A Letter to Wisconsin Catholics on Faithful Citizenship* (Aug. 2022), https://t.ly/FEpN.

The bishops also maintain ultimate juridical power over the Catholic Charities in their dioceses. The Catholic Charities Bureau, for example, is under the pastoral leadership of the Bishop of the Diocese of Superior. App.198. As part of the Church's extensive charitable network, the Bureau "serves as an arm of the Church's social ministry" and operates "in compliance with the Principles of Catholic Social Teaching." App.199; *see* R. 100:55, 62, 130; R.57:1, 5. Under the Bishop's leadership, the Bureau "works to be an effective sign of the charity of Christ" by operating 127 programs in 59 communities and serving all-especially the "disadvantaged and vulnerable." Catholic Charities Bureau, Diocese of Superior, *A Growing Legacy: 2021 Annual Report*, https://t.ly/2voI; *see* Pope Benedict XVI, *Deus Caritas Est* ¶ 33 ("every Catholic charitable organization want[s] to work with the Church and therefore with the Bishop, so that the love of God can spread throughout their world").

When adding a charity to the Bureau's purview, the Bureau makes clear that the agreement between it and the charity "confirms the importance of the role Catholic Charities Bureau, ***13** Inc. and [the charity] have in fulfilling the social ministry of the Diocese of Superior." App.204. The charity also affirms that it "will not engage in activities that violate Catholic Social Teachings." App.204.

That is not an empty affirmation-the Bureau takes significant steps to maintain this unique Catholic charitable ministry:
• It explains to each charity that a "clear understanding of the corporate relationship between Catholic Charities Bureau, Inc. and [the charity] is necessary to effectively encourage teamwork and to *mutually implement our shared mission."*

• It retains the ability to hire and fire directors.

• It provides management services.

• And it "[e]stablish[es] and coordinate[s]" the charity's mission.

App.203 (emphasis added).

In short, each of the Bureau's charities-including those at issue in this case-act under, at the direction of, and to further the charitable ministry of the Catholic Church. *See* R.99:15-16; R. 100:30-31.

ARGUMENT

The Decision Below Impermissibly Interferes with Church Autonomy and Entangles Judges in Assessing Religiosity.

It is a foundational premise of our constitutional system that religious organizations enjoy the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." ***14** *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). The decision below flouts this basic principle, results in impermissible judicial oversight of religious teaching and structure, and introduces great uncertainty for any group that sincerely believes it operates "for a religious purpose."

In concluding that the charities at issue do not operate for a "religious purpose," the court of appeals made two fundamental errors: (1) it divorced the Church from its charities, based exclusively on corporate form, App.036-037, 041-042; and (2) it appointed itself the arbiter of religiosity-charged with determining what does and does not qualify as "inherently religious." App.024, 033, 040, 042. These errors ignore centuries of Church organization and teaching that charity-separate from proselytism-is a foundation of the Church and a manifestation of God's love for us.

The Catholic Church's organization and structure-from the Pope to the bishops to the Bureau to its Wisconsin-based charities-are designed and directed intentionally to accord with the Church's teachings. That is why the Bishop of the Diocese of Superior has plenary control over the Bureau and its charities: "the entire organization begins and ends with [him]." R.100:55, 62, 130.

The appellate court, however, treats the Church's structure as happenstance or poor planning, stressing that "corporate form does make a difference." App.042. But that rationale ignores bedrock constitutional principles of church autonomy. Religious entities, like the Church, are entitled to "independence in matters ***15** of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020); *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 975 (7th Cir. 2021) (same). That includes, as here, independence from government coercion to assume a particular corporate form.

Further, were the appellate court's decision to stand, Wisconsin agencies and courts would be required to decide what activities are "inherently or primarily religious." *See* App.039-043. But the "prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). That is why it has long been held that courts are not equipped to draw and enforce such an illusory distinction. *See L.L.N. v. Clauder*, 563 N.W.2d 434, 440 (Wis. 1997) ("excessive governmental entanglement with religion will occur if a court is required to interpret church law, policies, or practices").

The appellate court's cramped view of religious purpose as it relates to the charities here bears these concerns out. In attempting to describe "inherently or primarily religious activity," the appellate court imposed its own definition of religion, observing that such activity would include "participating in religious rituals or worship" or "evangelizing." App.040-041. Yet it concluded that the charities' activities were inherently secular even though the Church has long viewed charity as both a form of ***16** "participation in the divine nature" of God and "the source and the goal of [virtuous] Christian practice." *Catechism* ¶¶ 1812, 1827.

The appellate court thus flipped the Church's view of charity on its head-viewing the charities' activities as simply "social services." App.040-041; *contra* Pope Benedict XVI, *Deus Caritas Est* ¶ 31 ("[I]t is very important that the Church's charitable activity maintains all of its splendour and does not become just another form of social assistance."); *id.* ¶ 25 ("charity is not a kind of welfare activity"). In doing so, it established a system in which the Church and its charities are presented a Hobson's choice: To obtain the statutory benefit to which She is entitled, the Church must *either* structure the Church's charitable work by government dictate *or* use charity as primarily a means to proselytize.

Fundamentally, the decision below requires what the First Amendment prohibits: "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012).

CONCLUSION

The Conference respectfully asks the Court to grant review.

***17** Dated: January 26, 2023

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2021 WL 3072480 (Wis.App. III Dist.) (Appellate Brief)
Court of Appeals of Wisconsin, District III.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP2007.
June 17, 2021.

Circuit Court Case No. 2019CV324
Case Classification Code No. 30607
Appeal from an Order of the Circuit Court for Douglas County, Honorable Kelly J. Thimm

Reply Brief of Respondent-Appellant State of Wisconsin Department of Workforce Development

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***1 ARGUMENT**

The employers' interpretation of the "operated for religious purposes" clause is not reasonable because their interpretation does not give meaning to every part of the statute, is contrary to the legislative history and is inconsistent with the Wisconsin Supreme Court's decision in *Coulee Catholic Schools v. LIRC*.[1] The First Amendment of the U.S. Constitution does not prevent general laws, like the unemployment insurance law, from being applied to employers affiliated with religious entities.[2] Accordingly, this Court should reverse the circuit court and confirm the commission's decisions.

I. The differing interpretations of the religious purposes exemption reached by other jurisdictions establish the exemption's ambiguity.

The employers err by failing to acknowledge the clause's ambiguity. "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses."[3] Both parties cite cases from other jurisdictions interpreting the religious purposes exemption and reaching different conclusions. These differing ***2** interpretations demonstrate that the religious purposes exemption is ambiguous.

If a statute is ambiguous, a court may consult extrinsic sources, such as legislative history.[4] Accordingly, the House Report,[5] relied upon by U.S. Supreme Court,[6] is appropriately considered by this Court when interpreting the exemption at issue. The

employers assert that congressional reports are unreliable,[7] but, in doing so, they ignore that the U.S. Supreme Court relied on the House Report and the Wisconsin Supreme Court has relied on Congressional Committee Reports on bills amending the Federal Unemployment Tax Act ("FUTA") when interpreting Wisconsin laws enacted to conform with FUTA.[8]

The employers also err by interpreting "purposes" in isolation. Interpreting purposes as "the reason something is done" still leaves the proper interpretation of the statute in doubt. Is the reason these employers operate to provide work ***3** training skills and other services to people with disabilities or is it to fulfill a religious mission?

Courts interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results."[9] The rest of the statute excludes from unemployment insurance coverage those who are employed directly by a church and those who are actively engaged in ministering religion.[10] The "religious purposes" clause must be interpreted in relation to the language surrounding it.

II. The employers have the burden to establish entitlement to the tax exemption.

Relying on a Massachusetts' case, the employers argue that the exemption should not be strictly construed and that they do not have the burden of establishing their entitlement to the exemption.[11] Their argument is inconsistent with Wisconsin precedent.

In addressing whether property owned and maintained by a religious order was exempt from property tax, the court ***4** held that "[t]axation is the rule, and exemption the exception. As a result, 'statutes exempting property from taxation are to be strictly construed and all doubts are resolved in favor of its taxability.[12]

In determining whether church-owned property housing a church custodian qualified for a tax exemption, the court held that "the burden of proving entitlement to [a tax] exemption is on the one seeking the exemption."[13] "[T]he modern rule is that the statute must be given a 'strict but reasonable' construction."[14] "Consequently, any doubt under the 'strict but reasonable' construction rule must be resolved against the party seeking the exemption."[15]

Wisconsin law requires that the employers establish that they fit within the "religious purposes" exemption; the burden is not on the state to prove that the exemption is inapplicable.

***5 II. Private unemployment benefits do not negate the public policy goals of Wisconsin unemployment insurance law.**

The employers assert that because "all Catholic entities" operate their own unemployment benefit system, public policy "is not a real-world concern."[16] However, the statute at issue applies to all religions. It cannot be interpreted one way for Catholic entities and another way for entities affiliated with different faiths.

Real-world public policy concerns include claimants having sufficient wages to qualify for unemployment benefits if laid off from work subsequent to their employment with the employers. Wages earned in excluded employment negatively affect claimants' eligibility for benefits. Real-word public policy concerns also include claimants having access to additional federal benefits in times of high unemployment, such as existed during the pandemic.[17] There is no factual basis or legal justification for disregarding the ***6** state's public policy concerns expressed in Wis. Stat. § 108.01(1).

III. The department's interpretation gives meaning to each part of the statute and the employers' interpretation does not.

The employers argue that the department's argument makes the term "primarily" surplusage. [18] An organization can be operated for both religious and secular purposes. For example, the Illinois Appellate Court concluded that a center providing religious services and guidance and also social services was operated primarily to provide secular assistance. [19] That case is notable because the employer was found **not** to have a religious purpose, even though it provided religious services and guidance - which the employers in this case **do not do**.

Contrary to the employers' assertion, the department does not argue that if a service could be operated by a secular organization, it could not be performed for religious purposes. As the Supreme Court explains in *Coulee*, the same service ***7** can be performed with a religious mission or without a religious mission. [20]

In response to the department's assertion that the employers' interpretation renders the religious purposes clause superfluous, the employers argue that the religious purposes clause would apply if a church engaged in lucrative, competitive, commercial activity. [21] Yet, the exemption applies only to nonprofit organizations described in section 501(c)(3) of the Internal Revenue Code. [22] Thus, the intent of the clause would not have been to disqualify commercial enterprises from the exemption, because such enterprises would already be disqualified.

V. The employers' discussion of *Coulee Catholic Schools* ignores the first step of the Wisconsin Supreme Court's analysis.

The employers argue that *Coulee* is inapplicable by ignoring the first step of the test articulated in *Coulee*. In *Coulee*, the Wisconsin Supreme Court held that "[t]he first step is an inquiry into whether the organization in both statement and practice has a fundamentally religious mission. That is, does the organization exist primarily to worship and ***8** spread the faith?" [23] The Court then looked at the activities of the organization to complete this analysis and determine if the organization was operated primarily for a religious mission.

If the organization is operated primarily for a religious mission, the Court considers the second step of whether the employee bringing the discrimination claim is closely linked to that mission. The employers' brief jumps straight to the second step of the analysis, intentionally bypassing the first step. [24]

The first step is integral to the analysis of whether an employee may bring a discrimination claim because *Coulee* protects a religious organization's ability to choose its leaders. *Coulee* balanced the state's strong interest in eradicating discrimination [25] with a religious organization's interest in choosing its leaders. The *Coulee* Court's balancing of these interests applies to other cases where the state's strong interest in protecting individuals, with unemployment insurance, for example, [26] must be balanced with a religious organization's First Amendment interests.

***9** *Coulee* employed a fact-based inquiry to balance the competing interests and demonstrates how the commission and courts should not delve into matters of doctrine and belief when determining "religious purposes." In contrast, the employers' methodology would require the department to take one of two approaches. The first approach would be to interpret a religious organization's doctrines and beliefs and examine whether an affiliated entity's activities are consistent with those religious beliefs. The other approach would be to determine that the operations of an entity affiliated with a religious organization are consistent with the religious organization's beliefs in every case, thus rendering the "religious purposes" clause superfluous. Neither of these approaches is consistent with controlling precedent.

The department may not examine religious beliefs, nor may it disregard a portion of the statute. The commission applied the statute correctly.

VI. Wisconsin's unemployment insurance law does not burden the employers' free exercise of religion.

The employers argue that the department is burdening its free exercise of religion.[27] *Fifth Avenue Presbyterian* ***10** *Church*[28] demonstrates when the government imposes a substantial burden on a church's First Amendment Free Exercise rights. There, the **city refused to allow the church** to provide an outdoor sanctuary for the homeless to sleep. The court found that the church was effectuating a sincerely held religious belief to minister to the homeless and that the city's actions in dispersing the homeless from the church's property was a substantial burden on that protected religious belief.

Here, unlike the city's action in *Fifth Avenue Presbyterian Church*, the commission's decision does not prohibit the employers from providing services. The U.S. Supreme Court stated that "the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights."[29]

***11** Similarly, the Wisconsin Supreme Court held, with respect to the Wisconsin Constitution's protection of religious liberty clause,[30] that:

We do not mean to suggest that anything interfering with a religious organization is totally prohibited. **General laws related to building licensing, taxes, social security, and the like are normally acceptable**.[31]

The department has not prohibited the employers from operating, nor has it instructed the employers to operate in a particular manner. Catholic Charities Bureau has been subject to Wisconsin Unemployment Insurance laws since 1972.[32] A number of related entities that provide housing for senior citizens and for people with disabilities, daycare and work training services have been subject for more than 20 years.[33] The employers have not shown that their coverage under the Wisconsin unemployment insurance law - a law that is neutral and of general applicability - has burdened their free exercise of religion or that providing unemployment insurance coverage to their employees is inconsistent with their sincerely held religious beliefs.

***12** The employers cite *Pritzlaff v. Archdiocese of Milwaukee*[34] to assert that the department is using the internal beliefs of the church against them and undertaking an evaluation of religious norms.[35] This is absurd. *Pritzlaff* involved claims against the Archdiocese of Milwaukee for the negligent hiring and retention and the negligent supervision and training of a priest accused of sexual misconduct. The Wisconsin Supreme Court rejected the claims due to concerns of excessive entanglement and because an evaluation of the claims "would require interpretation of church canons and internal church policies and practices."[36]

Pritzlaff does not hold that any examination of a religiously affiliated organization's operations is forbidden. Yet, that is what the employers' brief suggests. "[E]xamination of an organization's activities - even those of a religious organization - is not only permissible in the ***13** context of deciding an institution's tax-exempt status, but it is necessary."[37] The commission's examination of the employers' activities, and its decisions that the employers are not covered by the exemption, does not violate the employers' free exercise rights.[38]

VII. The religious purposes exemption is a facially neutral law that does not demonstrate a preference for any religion.

The employers assert that the department "tilts the playing field against Catholics,"[39] contrary to the Establishment Clause of the First Amendment's prohibition against denominational preference by the government.[40] In a case involving an

Establishment Clause challenge, the U.S. Supreme Court found a Minnesota law, which imposed reporting requirements on religious organizations that received more than half of their contributions from nonmembers, was unconstitutional, because "the history of ***14** [the law] demonstrates that the provision was drafted with the explicit intention of including particular religious denominations and excluding others." [41]

Unlike the Minnesota law, the unemployment exemption is not directed at a particular religion. In fact, schools operated to provide "education in the Catholic tradition" are covered by the exemption. [42]

VIII. The state and the courts should not interpret church doctrine.

Whether a law involves excessive entanglement in religion is one prong of the test set forth in *Lemon v. Kurtzman* [43] to determine whether a law violates the Establishment Clause of the First Amendment. The employers assert that the department's analysis of excessive entanglement is incomplete.

However, both the U.S. Supreme Court and the Wisconsin Supreme Court did not rely on the *Lemon* test to determine that excessive entanglement would arise from analyzing church doctrine. For example, *Pritzlaff* held that certain claims could not be maintained against a religious ***15** governing body due to concerns of excessive entanglement and that other claims required an inquiry into church laws, practices and policies. [44] The U.S. Supreme Court found that Georgia judicial precedent that "require[d] the civil courts to engage in the forbidden process of interpreting and weighing church doctrine" unconstitutional. [45]

A religious entity's **motivation** should not determine whether it qualifies for a religious exemption. An opposite conclusion would impermissibly require the department to examine religious doctrine and raise concerns of excessive entanglement.

IX. The IRS has not determined that the employers are operated exclusively for religious purposes.

The employers' argument that the IRS has determined they are operated exclusively for a religious purpose is contradicted by the record. [46] The IRS **did not** issue rulings that the employers are operated exclusively for religious purposes.

For federal income tax purposes, the employers are covered, as subordinate organizations, by a Group Exemption ***16** the IRS issued to the United States Conference of Catholic Bishops ("USCCB"). [47] The subordinate organizations do not need to be religious organizations to be covered by the USCCB Group Exemption. The USCCB Group Exemption covers USCCB's **educational, charitable and religious** subordinate organizations listed in the Official Catholic Directory. [48]

The USCCB explained to its subordinate organizations that the IRS **does not** determine which organizations are included in a group exemption and organizations exempt under a group exemption **do not** receive their own IRS determination letter. [49]

Contrary to the employers' argument, the IRS did not determine that the employers are operated exclusively for religious purposes because: (1) the IRS group exemption applies to educational and charitable institutions, not just religious institutions, and (2) the IRS does not issue determination letters to subordinate organizations. [50] The IRS Group Ruling did **not** require a finding that the employers here were operated exclusively for religious purposes.

*17 CONCLUSION

For the reasons cited in this brief and its initial brief, the department requests that this Court hold that the employers remain subject to Wisconsin Unemployment Insurance law and confirm the commission's decisions.

Dated: June 17, 2021
Respectfully submitted,

Electronically signed by:

Christine L. Galinat

<<signature>>

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Footnotes

1 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

2 *See* *Coulee Catholic Schools*, 2009 WI 88, ¶ 65.

3 *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 47, 271 Wis. 2d 633, 681 N.W.2d 110.

4 *Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶ 20, 379 Wis. 2d 471, 907 N.W.2d 68.

5 H R. Rep. No. 91-612, p. 44 (1969).

6 *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 781-82, 101 S. Ct. 2142, 68 L. Ed. 2d 612 (1981).

7 Employers' brief at 31-35.

8 *Leissring v. DILHR*, 115 Wis. 2d 475, 485-488, 340 N.W.2d 533 (1983).

9 *State ex rel. Kalal*, 2004 WI 58, ¶ 46.

10 Wis. Stat. §§ 108.02(15)(h)1. and 3.

11 Employers' brief at 18.

12 *Dominican Nuns v. City of La Crosse*, 142 Wis. 2d 577, 579, 419 N.W.2d 270 (Wis. App. 1987) (internal citations omitted).

13 *Wauwatosa Ave. United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, ¶ 7, 321 Wis. 2d 796, 776 N.W.2d 280 (internal citations omitted).

14 *Id.*

15 *Id.*

16 Employers' brief at 18.

17 **Federal Pandemic Emergency Unemployment Compensation** provides claimants with additional weeks of benefits. Section 2107 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020. **Federal Pandemic Unemployment Compensation** provides claimants with additional benefits each week. Section 2104 of the CARES Act.

18 Employers' brief at 20.

19 *St. Augustine's Center for American Indians, Inc. v. Dept. of Labor*, 114 Ill. App. 3d 621, 626, 70 Ill. Dec. 372, 449 N.E.2d 246 (1983).

20 *Coulee Catholic Schools*, 2009 WI 88, ¶ 48.

21 Employers' brief at 23.

22 Wis. Stat. § 108.02(19).

23 *Coulee Catholic Schools*, 2009 WI 88, ¶ 48.

24 Employers' brief at 21-22.

25 *Coulee*, 2009 WI 88, ¶ 40.

26 *See* Wis. Stat. § 108.01(1) and *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 63, 330 N.W.2d 169 (1983).

27 Employers' brief at 25-26.

28 *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570, 575 (2d Cir. 2002).

29 *Tony and Susan Alamo Found. v. Sec'y Labor*, 471 U.S. 290, 303, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985).

30 This clause is interpreted as providing greater protections than the Free Exercise Clause of the First Amendment. *Coulee Catholic Schools*, 2009 WI 88, ¶ 60.

31 *Coulee Catholic Schools*, 2009 WI 88, ¶ 65 (emphasis added).

32 R. 67:17.

33 R. 60:33 & 41-46 and R. 67:7 & 11.

34 194 Wis. 2d 302, 533 N.W.2d 780 (1995).

35 Employers' brief at 26-28.

36 *Pritzlaff*, 194 Wis. 2d at 326.

37 *See, e.g., United States v. Dykema*, 666 F.2d 1096, 1102 (7th Cir. 1981) *cert. denied*, 456 U.S. 983, 102 S. Ct. 2257, 72 L. Ed. 2d 861 (1982) (noting that the IRS had to be permitted to examine the religious activities of an organization because "[i]f such examination were not permitted, it is difficult to see how any church could qualify as a tax-exempt organization for 'religious purposes.'").

38 *See, e.g., Wis. Evangelical Lutheran Synod v. City of Prairie du Chien*, 125 Wis. 2d 541, 554, 373 N.W.2d 78 (Ct. App. 1985) ("We conclude that a determination denying a tax exemption is similarly not a violation of the religion clauses of the federal constitution.").

39 Employers' brief at 26.

40 *Larson v. Valente*, 456 U.S. 228, 246, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982).

41 *Larson*, 456 U.S. at 254.

42 *MHS, Inc.*, UI Dec. Hearing No. 8852 S (LIRC July 12, 1991) (A-App. 225)

43 *Lemon v. Kurtzman*, 403 U.S. 602, 619-20, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

44 *Pritzlaff*, 194 Wis. 2d at 330.

45 *Presbyterian Church v. Hull Church*, 393 U.S. 440, 451, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969).

46 Employers' brief at 40.

47 R. 57:24 and 32.

48 R. 57:22-23, emphasis added.

49 R. 57:25.

50 R. 57:22.

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2021 WL 3072475 (Wis.App. III Dist.) (Appellate Brief)
Court of Appeals of Wisconsin, District III.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMISSION, Respondent-Co-Appellant.
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP2007.
June 2, 2021.

On Appeal from the Circuit Court for Douglas County Circuit Court
Case No. 2019 CV 324 the Honorable Kelly J. Thimm Presiding

Brief of Petitioner-Respondents Catholic Charities Bureau, Inc., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc.

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CASES

*vii STATEMENT OF ISSUE

Services performed by employees of an "organization operated primarily for religious purposes" are exempt from unemployment insurance coverage. [1] The Labor and Industry Review Commission ("LIRC") determined that the five Catholic nonprofit religious corporations involved in this case were not operated for primarily religious purposes, because they provide social services pursuant to Catholic social teachings which demand ecumenical delivery of services, and the delivery of services is not contingent upon attendance at mass or mandatory receipt of what LIRC refers to as overtly "religious programming." LIRC was reversed by Douglas County Circuit Court Judge Kelly Thimm. The sole issue is whether as a matter of law these Catholic service entities, operated by the bishop and motivated exclusively by Catholic social teachings, are "operated primarily for religious purposes" and are therefore exempt from unemployment insurance coverage under Wis. Stat. § 108.02(15)(h)2.

The circuit court answered in the affirmative.

*VIII STATEMENT ON ORAL ARGUMENT

Oral argument is only necessary to the extent the court should have questions. The number of issues raised by respondent appellant and co-appellant, required brevity of address of each argument. At this court's discretion, to the extent the court should have questions on particular issues, oral argument would allow for further inquiry by the court into those issues.

STATEMENT ON PUBLICATION

The court's opinion should be published because it will establish the rule of law and decide a case of substantial and continuing public interest. Specifically, it will resolve the scope of the exemption for religious entities contained in Wis. Stat § 108.02(15)(h)2. And whether the focus of the phrase "operated primarily for religious purposes" refers to **what** is being operated or **why** it is being operated.

*1 STATEMENT OF THE CASE

I. Procedural History

Previously, a similarly-situated Catholic charity-based service provider, Challenge Center, Inc. ("Challenge Center"), received a decision (judicial review) by Douglas County Circuit Court Judge George Glonek ("Judge Glonek") dated November 18,

2016, determining that Challenge Center was operated "primarily for religious purposes," and thus exempting Challenge Center from state unemployment. (R.61, Ex.28;A-App.179-187)). The genesis of these consolidated cases, was in seeking a consistent ruling for these similar Catholic entities, Petitioner-Respondents herein.

To that end, each petitioned The State of Wisconsin Department of Workforce Development, Division of Unemployment Insurance ("DWD"), at DWD's suggestion, based upon *Challenge Center*. (R.67 at 1-3 (Ex.55);R.99 at 6668). Contrary to the promise of "individualized assessment," PetitionerRespondents had to wait for over a year without word from DWD. Id. When they finally insisted that some response be provided, DWD issued a blanket denial, without having requested any information or analyzed anything. Id. DWD simply declined the petition(s), without analysis. Appeal followed. A two-day hearing was held, and Administrative Law Judge Heidi Galvan ("ALJ Galvan"), ruled in favor of Petitioner-Respondents. (R.55 at 142-171 and R.56 at 1-47;A-App.173-208). ALJ Galvan incorporated Judge Glonek's decision by reference in each decision, because of its "almost identical" facts. (Id.;A-App. 176, 191, 196, 201, 206). DWD ***2** petitioned the Wisconsin Labor and Industry Review Commission ("LIRC"), and LIRC reversed Judge Galvan. (R.55 at 2-43;A-App.131-172).

The Petitioner-Respondents requested judicial review. (R. 1-5). Several of the cases were assigned to Judge Glonek, but LIRC and DWD substituted. (R.79). The cases were thus reassigned to Douglas County Circuit Court Judge Kelly J. Thimm ("Judge Thimm"), who reversed LIRC, after consolidation. (R.77 and 101;A-App.101-129). LIRC and DWD appealed to this Court.

II. Statement of Facts

A. Threshold Hierarchy Facts.

The head of the Roman Catholic Church (the "church") is the Pope. Appointed by the Pope (R.99 at 15), is Archbishop Jerome Listecki of the Archdiocese of Milwaukee, the Metropolitan with oversight of the four diocesan bishops in Wisconsin. (R.99 at 14-17;R.100 at 31). Under an archbishop, the church organizes itself into dioceses. In each diocese, the bishop is the top authority carrying out the church's mission. (R.100 at 32-33).

The Diocese of Superior (the "diocese") is co-commensurate with 16 counties of Wisconsin lead by Bishop James Powers ("bishop"). (R.58, Ex.15 at 2) (R.100 at 54-55). Any bishop, anywhere, is responsible for multiple ministries. (R.100 at 34-35). Bishop(s) in any diocese have a social ministry arm, a "Catholic Charities" entity. (R.56 at 3;R.55 at 20, Findings ¶1;R.100 at 32-34,46). In the Diocese of Superior, that entity is formally called "Catholic Charities Bureau, Inc. of the Diocese of Superior" (or "CCB"). CCB has several separately incorporated ***3** sub-entities within the diocese that provide services primarily to the developmentally disabled. (R.56 at 3). These entities assist CCB, in carrying out the bishop's mission based on Catholic social teachings. Those subsidiary Catholic entities include employers herein: Headwaters, Inc., Barron County Developmental Services, Inc., Diversified Services, Inc., Black Rivers Industries, Inc.,[2] and (in the prior contested case) Challenge Center, Inc.[3]

B. Case-specific facts.

The Unemployment Insurance Contribution Liability Decisions ("LIRC's Decisions") (R.55 at 2-43;A-App. 131-172) operated as primary factual findings for purposes of Judge Thimm's judicial review.[4] In keeping with the Statement of Issue and Procedural History herein-above, this case is undisputedly about LIRC's legal conclusion as to the meaning of the phrase "primarily for religious purposes," from which CCB sought review. Judge Thimm noted,

... There's no factual disputes. The facts are all there ... this wasn't some hotly contested factual case. So really what we're looking at is the law and. what the law says. And everybody agrees this isn't something where I'm giving any deference to

LIRC because this isn't a case, nor does the case law support deference when looking at the statute ...[T]his is clearly a de novo review. (R.101 at 20-21;A-App.122-123).

Those undisputed facts have been found in several contexts. For example, by ***4** ALJ Galvan in her Appeal Tribunal decisions (R.56 at 1-15;A-App.173-205), by Judge Thimm on judicial review (R.101 at 19-27;A-App.121-129), and though a separate case, relative to the identical parent CCB, by Judge Glonek in *Challenge Center* (R.61, Ex.28; A-App. 179-187), in addition to the LIRC Decisions.

ALJ Galvan (and Judge Glonek, in *Challenge Center)* were both cited with approval by Judge Thimm, who found their logic and legal rationale "highly persuasive." (R.101 at 24;A-App. 126). Each Judge heard undisputed testimony [5] that Catholic teachings require preferential treatment of the poor and vulnerable, including the developmentally disabled, among others. (R.57, Exs.3,4 informing Ex.2 at 13). Archbishop Listecki testified:

[The mission is] ... initially rooted in scripture...you want to go two thousand years ago...in our catholic belief, after the resurrection...of Jesus...there was an establishment of outreach...to those in need...all throughout the ages, there has been ... a mandate from Scripture to serve the poor ... with the rise of social encyclicals.the Church has formalized its concerns in every area ... social teaching that has embodied in the - Catholic Church and the Catechism of the Catholic Church. So in the teaching of the Church itself ... a demand that the Christian that lives a life must respond in - charity to those in need." (R.99 at 19-20)

Promulgated by the Pope, R.57, Ex.3 is the Catechism of the Catholic Church ***5** ("Catechism"). The Catechism is "mandatory authority" for Catholics. (R.99 at 1922). The pope has declared it to be "... a sure norm for teaching the faith ..." (R.57, Ex.3, Catechism, Fidei Depositum, at 5).

Within the Catechism, specific teachings address social ministry. (R.57, Ex.3, Catechism, contents, ix-x). The church's social ministry is focused in R.57, Ex.4, the Compendium of the Social Doctrine of the Church (the "Compendium"). It too, is "mandatory authority." (R.57, Ex.4, Compendium, Presentation by Cardinal Renato Raffaele Martino, ¶1; See also R.57, Ex.4 at 72¶163).

Archbishop Listecki testified that (R.57) Exs. 3 and 4 are **the** definitive teachings of the church, which "guide and direct the actions." (R.99 at 20-22; R.100 at 37). The Catechism and the Compendium "identify the Ten Principles of Catholic Social Teaching, which are respect for human life; human dignity; association; participation; preferential treatment for the poor and vulnerable; solidarity; stewardship; subsidiarity; human equality; and common good." (ALJ Galvan: R.56 at 3;A-App.174, referencing Exs.3,4 and Ex.2 at 13; Judge Thimm: R.101 at 22;A-App.124).

These teachings require action. In Wisconsin, as in every diocese, there is a Catholic Charities ("CC") entity. (R.100 at 33). Kim Vercauteren, Executive Director of the Wisconsin Catholic Conference, explained the relationship between the two. (R.100 at 33-34). CCs are

"... a visible presence of the Catholic Church.[S]o essentially they are.[the] social ministry arm. They're...out there showing God's presence in the world." (R.100 at 34).

***6** A CC is a subset of a diocese. Most CC offices are housed directly within diocesan offices. (R.100 at 34). Bishops consider CC directors much like other executives of their staff. (R.100 at 34-35). CCs are usually direct affiliates of and financially supported primarily by their diocese. (R.100 at 32:24-35:2 at 41:1342:4). There is a national organization of CCs (R.100 at 36). The national website is R. 57, Ex. 1 which incorporates the express teachings from the Compendium and the Catechism. (R.57, Exs.3,4;R.100 at 36-41).

Archbishop Listecki testified:

[A] part of the mandate of any bishop is...outreach in terms of social ministry...I would...tell you that all of the...bishops of Wisconsin, all have Catholic Charity...that is part of the - the mandate and mission of who they are. (R.99 at 16:15-16:20)

[I]t almost would be in congress (sic-incongruous) to say that the - - the Catholic [C]hurch ... exists in a particular diocese without outreach ... And the outreach ... is formalized ... through Catholic Charities. (R.99 at 18:20-18:24)

In the diocese, Bishop Powers carries out the diocese's social ministry through CCB entities. (R.100 at 54:25-55:5).

CCB is tax exempt by IRS. R.57, at 22-30,31-33 (Exs.5 and 6) establish that CCB entities are long-considered by taxing authorities, as entities of the church, listed in the official Catholic Directory, the "Kenedy manual." (R.100 at 55:2160:7). The diocese and CCB entities are together approved pursuant to a "group ruling" in favor of the United States Conference of Catholic Bishops. Id. To be included in the manual, an entity **must be** determined to be operated by the church. ***7** (Emphasis added). Id. Thus, CCB is already exempt, because CCB entities are, per the IRS, church entities. Id. (R.100 at 86:14-23).

An organizational chart establishes the hierarchy of CCB. (R.57 at 34, (Ex. 7)). Ex. 7 (and testimony) reflects that the bishop has complete control over all CCB entities. (R.100 at 54:20-24;61:15-19). All activities of all CCB entities "begin and end" with the bishop. (R.100 at 128:3-24). The bishop's control is so complete, that as ALJ Galvan noted (R.56 at 6;A-App.177), the bishop considered ceasing the operations of CCB, because the Affordable Care Act might have required the entities (as a receiver of federal funds) to provide a health plan that was contrary to church teachings. (R.57, Ex.2,4, Respect for Human Life). Both the bishop and archbishop weighed doing so. (R.100 at 61:20-62:15). Showdown was avoided when the issue was "reconsidered" and determined that CCB entities were religious organizations, and all were exempted by HHS. (R.100 at 62:16-23).

At CCB, bishop is advised by, and appoints "the membership" of which he is president. (R.100 at 63:14-65:11;66;128:3-24). The membership is religious, consisting of priests or fathers, with the exception of its executive director. (R.100 at 64-66). The membership provides oversight to CCB's mission in compliance with social teachings. (R.57, Ex.2 at 13;R.57, Ex.8 at 35;R.100 at 69:3-19).

The bishop appoints candidates to the Board of CCB. (R.100 at 71:7-72:3). The bishop has the authority to select, fire, remove (or do anything else) regarding directors of CCB. Id.

CCB's executive director may be removed at bishop's pleasure. (R.100 at ***8** 73:17-74:18). The bishop expects compliance with the church's social teachings as they extend to the services that CCB provides. (R.100 at 129:7-20; 130-31).

The bishop considers CCB and its subsidiaries to be the social ministry arm of the diocese. (R.100 at 129:14-20;R.57, Ex.2 at 11. Archbishop Listecki confirms that is true in all Wisconsin dioceses. (R.99 at 16-18).

The Guiding Principles of Governance for the Social Ministry of Catholic Charities Bureau in the Diocese of Superior are set out in R.57at 10-19 (Ex.2). (R.100 at 74:19-75:19). Upon employment with CCB, all key CCB employees (R.100 at 133-135) are provided a binder entitled "The Social Ministry of Catholic Charities Bureau of the Diocese of Superior." ("Social Ministry binder") (R.100 at 72:11-73:16). During an "extensive orientation" (R.100 at 73), each is required to go through the teachings of the Social Ministry, page by page. (R.100 at 133-135;260). The Social Ministry binder contains all of the Guiding Principles, among others.

All directors of sub-entities must also be approved by the bishop. (R.100 at 132). Sub-entity directors understand and are taught from "day one" that they must not violate social teachings. (R.100 at 146-149).

In meetings, the terminology of the teachings are used, and are "very" real world concerns to the bishop and directors. (R.100 at 131:5-25). Meetings begin with prayer (R.100 at 132), and the Mission Statement, Philosophy, and Code of Ethics (R.57,

Ex.2), which directly incorporate the teachings, are "touchstone" documents which "guide us in...how we operate." Id. In a 42-year career, CCB CFO ***9** Anderson testified all bishop(s) had been "consistent" in insisting upon compliance with social teachings. (R.100 at 69:3-19). The relationship between the diocese, its bishop and CCB (and sub-entities) is that "The [CCB] as the social ministry arm of the [d]iocese...carries on its good work by providing programs and services that are based on gospel values and the principles of the Catholic social teachings." (Emphasis added). (R.100 at 134:18-135:21;R.57, Ex.2 at 11,¶3).

The bishop further emphasizes in contract that all CCB entities must abide by the (social) teachings of the church, via R.57, at 39-40 (Ex.12). (R.100 at 76:1277:21).

Also in the Social Ministry binder, R.57, at 12 (in Ex.2), is a letter which establishes the expectation that CCB must perform "... daily work as a visible sign of the love of Christ for all people." The letter references the principles of Catholic social teachings and requirement of strict adherence to the church's teachings in the provision of service. (R.100 at 135:22-136:13).

The Ten Principles of Catholic Social Teaching are listed in R.57, at 13 (Ex.2). The terminology from these teachings spring directly from the Catechism (R.57, Ex.3), and the Compendium (R.57, Ex.4). (R.100 at 138-139; R.57, Exs.3,4). They provide guidance to the services which are provided daily through CCB. (R.100 at 137:11-139:8). The teachings are consulted in determining what services to deliver, and what level of service is delivered. *Id.* For example, R.57, Ex.2 at 13, No. 5 refers to the Principle of Preferential Protection for the Poor and Vulnerable, which is particularly relevant here, because that is what CCB provides. (R.100 at ***10** 139:9-20). CCB provides primarily services to the developmentally or mentally disabled. (R.100 at 184,220-221,252). Each sub-entity director testified of the need to understand and comply with social teachings, to meet the mission of the church. (R.100 at 193,223,260-261).

The Mission Statement of the diocese confirms that the basis for the existence of CCB is to "carry on the work of the Lord by reflecting gospel values and the moral teachings of the church." (R.100 at 141:3-142:11;R.57, Ex.2 at 15). CCB has operated programs meant to preferentially serve the vulnerable, orphans, the poor, and disadvantaged since Bishop Koudelka started CCB's precursor in Superior in 1917. (R.58, Ex.15 at 5-6;R.57, Ex.2 at 17, Statement of Philosophy).

The bishop also charges the need for compliance (with R.57 at 39-40 (Ex.12)) to each employee of the CCB entities. R. 57, at 41 (Ex. 13) is a letter for each new employee. It explains that "your employment is an extension of Catholic Social Teachings, and the Catechism of the Church" *Id.* Accompanying the letter are the Mission Statement, Statement of Philosophy, Code of Ethics R.57 at 42-44 (Ex.14), and R.58 and 59, Ex.15 (parts 1 and 2), the Century of Service booklet. (R.58 at 1-16;R.59 at 1-16). The Mission, Philosophy and Code are framed and publicly displayed at each place of employment. (R.100 at 78:3-79:8). New employees are told and taught that services must be delivered without regard to race, sex, or religion, to all people, not just Catholics (pursuant to the Catholic social teaching of Solidarity). (R.57, Ex.2 at 13;see also R.57, Ex.3, Catechism, index at ***11** 851 "Solidarity"). [6]

Accompanying the "new employee" letter, is an annual report. (R.58 at 1-16 and 59 at 1-16) (Ex.15, parts 1 and 2). It is created by the bishop of the Diocese of Superior (see R.58 at 2, Address from the Bishop), and the cover contains quotes from the pope, related to the teachings of the Catechism and the Compendium. (R.100 at 80:19-81:6;R.58,59).

Each sub-entity has a mission, philosophy, and code which closely follows that of Catholic Charities and the diocese, and "... Catholic social teachings are the foundation of everything that we do." (R.100 at 260:15-22).

At the sole consolidated evidentiary hearing, DWD did not cross examine or challenge the content of the preceding record. Rather, DWD focused primarily on the strategies identified in footnote 5, *supra*. (See also R.56, Findings at 3-4;A-App.176-177). This approach was also proffered before Judge Thimm, but directly rejected because of the teaching of "solidarity." (R.101 at 23-25;A-App.125-127).

Specifically, CCB entities **must** serve everyone regardless of religious orientation, race, sex, etc. (R.56 at 3,5-6;R.55 at 20, Findings ¶2;R.100 at 142:19143:17). Being ecumenical in social ministry **is** the teaching of "Solidarity." (R.100 at 138,143-144;R.57, Ex.2 at 13, No.6). Archbishop Listecki so confirmed. (R.99 at 24:16-25:9).

***12** We serve "... because we are Catholic, not because those we minister to are...it has more to do with what we believe as Catholics than who we're serving." (R.100 at 47:9-12). Thus, "favoritism" cannot be a practice. ALJ Galvan noted, to so discriminate "... in order to meet the requirements of the Department is an infringement on their freedom to practice their religion." (R.56 at 5;A-App.177). LIRC refused to even acknowledge, let alone address that concern.

C. The statute and issue in controversy.

Wis. Stat. § 108.02(15)(h) provides:
(h) "Employment" ... does not include service:

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; ...*Id.* (Emphasis added).

The second prong was stipulated throughout, so the sole issue is whether CCB entities are "operated primarily for religious purposes." (LIRC/DWD's Brief at 8-9;R.56 at 4,¶1;R.55 at 5). If so, they are exempt.

ARGUMENT

I. Scope and Standard of Review

A. LIRC/DWD's emphasis upon LIRC's "factual findings" are misplaced, because *de novo* review is required.

LIRC/DWD [7] proffers LIRC's "Findings of Fact" ("Findings") urging this ***13** Court give deference. (LIRC/DWD's Brief at 11, *et seq.)* However, LIRC's Findings were sufficient to support either side's competing statutory reading. See R.74, Findings 1-5, 7, 8, 9, 10, 11, 12, 15, 17, and 25 at 3-5. [8] This sometimes happens:

In reviewing administrative agencies' factual findings under similar provisions containing the "substantial evidence" standard, our supreme court has stated that "there may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept." *Robertson Transportation Co.* v. *PSC*, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (1968).

Whatever an agency determines, this Court must then perform *de novo* review. The question of how undisputed facts fit the legal standard, is a question of law.
The facts in this case are undisputed, so we address only questions of law. (internal cites omitted) "Whether the facts of a particular case fulfill a legal standard is a question of law we review de novo." *Tetra Tech EC, Inc.* v. *Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 565, 914 N.W.2d 21, 55.

Each court's ruling is a *de novo* statutory interpretation of one issue: LIRC's **legal** conclusion that each agency "... is not an organization operated primarily for religious purposes." (See R.74, Findings 27-31 at 5), as informed by Judge Thimm's reversal of that interpretation. (R.77, A-App.101-102). LIRC/DWD acknowledges *de novo* review is proper. (LIRC/DWD's Brief at 14).

This case thus represents a question of law informed by undisputed facts.

***14 II. The Catholic Employers Are Operated for "Primarily Religious Purposes" So LIRC's Decision Was Properly Reversed.**

A. The LIRC/DWD analysis defies known cannons of construction.

The biggest "tell" throughout this case, has been LIRC/DWD's acknowledgement that a plain reading of the statute must be performed, while refusing to perform that analysis relative to the term "purpose" or "religious purpose." (LIRC/DWD's Brief at 38;R.55 at 2-43, specifically at A-App.135-136,144,152,160,168-169). "...[the statute] ... is written in ordinary English and creates a simple framework. 'Operate' is an ordinary word ... in language and...means 'to perform a function' ...'Primarily' is also an ordinary word [which] means 'for the most part, chiefly.'" *Id.* Unfortunately, LIRC's reading then abruptly ends without analyzing "purpose" or "religious purpose."

LIRC/DWD mentions only in veiled terms, never by name, Judge Glonek's decision in *Challenge Center* (R.61, Ex.28;A-App.179-187), and Judge Thimm's decision herein (R.77;A-App.101-102), urging this Court to ignore each because they are not "binding." (LIRC/DWD's Brief at 1, fn.3). Yet reference to Circuit Court decisions is proper, [9] because: "many of them are **highly persuasive** and helpful for their reasoning." *Kuhn v. Allstate Insurance Company*, 181 Wis.2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993). What LIRC/DWD ignores about each Judges' analysis, is that each presents a *de novo* statutory interpretation of the exemption for "almost-identically"-situated Catholic entities, to the same conclusion. Notably, LIRC/DWD chose *not* to appeal *Challenge Center*.

***15** Both Circuit Judges properly approached the question of *de novo* statutory interpretation with a threshold "plain reading." (Glonek R.61, Ex.28 at 7 *et seq.; A-* App.185 *et seq*.; Thimm R.101 at 19-20;A-App.121-122). Such interpretation has rules. The first: "statutory and regulatory interpretation begin and end with the language of the relevant statutes and regulations if their meaning is plain." (quoted source omitted) *Papa* v. *Wisconsin Department of Health Services*, 2020 WI 66, 119, 946 N.W.2d 17.
"[S]tatutory interpretation 'begins with the language of the statute.'" (quoted source omitted). If the meaning of the language is plain, our inquiry ordinarily ends...If this inquiry "yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." (quoted source omitted). If the language is unambiguous, then we need not "consult extrinsic sources of interpretation, **such as legislative history**." (Emphasis added). *Milwaukee District Council 48* v. *Milwaukee County*, 2019 WI 24, ¶ 11, 835 Wis.2d 748, 758, 924 N.W.2d 153 (2019).

Wisconsin Courts do **not** consult legislative history unless the language is ambiguous:

> [T]he aim of all statutory interpretation...is to discern the intent of the legislature. In ascertaining the statues meaning, our first inquiry is to the plain language of the statute. If the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the Court to apply that intent ... and not look beyond the statutory language to ascertain its meaning. (quoted source omitted) *Wagner Mobile, Inc*. v. *City of Madison*, 190 Wis. 2d 585, 591, 527 N.W. 2d 301, 303 (Wis. 1995).

Wisconsin Courts must "give the language of an unambiguous statute its ordinary meaning." *State* v *Timmerman*, 198 Wis. 2d 309, 316, 542 N.W.2d 221, 224 (Wis. Ct. App. 1995). As a practical matter, this often means utilizing a ***16** dictionary. *Madison Teachers, Inc. v. Madison Metro. Dist.*, 197 Wis. 2d 731, 749, 541 N.W.2d 786, 793-794 (Wis. Ct. App. 1995).

We turn to the obvious question, which is whether the statute can be read plainly. Two ALJs and two Judges, now in two cases, have determined it can. If the statute can be read plainly, there is no need to resort to extrinsic sources. In fact, consultation of extrinsic sources is mutually inconsistent with plain reading.

Of the few words at play in the clause in question, all can be read plainly, whether separately or together. "Primarily," means "essentially; mostly; chiefly; principally." *Primarily*, https://www.dictionary.com/browse/primarily (last visited May 25, 2021). Judge Thimm: "the plain language of 'primarily' ... 'primarily' is 'chiefly.'" (R.101 at 26, A-App.128). LIRC agrees. (see Argument II, section A, *supra*). If something has a primary purpose, it is inherent that it could have more than one purpose. (R.55 at 124). ("The use of the word 'primarily' acknowledges that an organization can have more than one purpose."). (R.61, Ex.28 at 7;A-App.185).

"Purpose" is also not a complicated term. It has a common meaning. "Purpose" means "the reason for which something exists or is done, made, used, etc." *Purpose*, https://www.dictionary.com/browse/purpose (last visited May 25, 2021). Synonyms are "function, intent, objective, reason, etc." *Purpose*, https://www.thesaurus.com/browse/purpose (last visited May 25, 2021).

> ... the majority misinterprets the plain meaning of the first part of the statute...which specifically focuses only upon the "primary purpose" of the organization. Rather than focus on the "primary purpose" of the ***17** organization, the majority takes a non-textual approach in focusing solely upon the service delivered. The statute is neutral as to the type of service an organization provides: it speaks only in terms of the purpose of the organization. The legal question under the statute's language is "why" the organization provides the service, i.e. its purpose, and not "what" the organization provides ... *Cathedral Arts Project, Inc. v. Dept. of Economic Opportunity, 95 So.3d 970, 975 (Fla. 2012)*. (dissent Swanson, J.).

Substituting synonyms into the contested clause means, an enterprise must be created or exist "chiefly/mostly for a religious motive or reason" etc.

Oddly, DWD agreed below, and LIRC acknowledged in its decisions that it was **required** to perform a plain reading (R.55 at 23;A-App.152), [10] even while citing **exclusively** to extrinsic evidence. Now, not having ever completed a plain reading, LIRC/DWD asserts that LIRC "appropriately determined" that the employers were not operating for primarily religious purposes absent the exercise, (LIRC/DWD Brief at 44) and they urge this Court to look **exclusively** to extrinsic evidence, primarily the utterances of a committee member, in 1969. (LIRC/DWD's Brief at 36-41). These same tired arguments were urged upon Judge Glonek in *Challenge Center*, and ALJ Galvan and Judge Thimm herein. The arguments failed, because there is no proper resort to extrinsic sources, or tortured policy interpretation, when a statute reads plainly.

LIRC/DWD refuses, because plain reading makes an adverse result mandatory. The state cannot have its cake and eat it too. LIRC/DWD's "extrinsic aid"-based analysis - and thus its entire brief - totally misses the point.

***18 B. LIRC/DWD's resort to extrinsic evidence and policy arguments are particularly improper when it comes to an encumbrance on religion.**

LIRC/DWD argues that it is "important public policy" to provide workers' compensation. (LIRC/DWD's Brief at 16-21). Plain reading analysis defeats policy argument(s), but even if not, that is not a real-world concern.

All Catholic entities (and many other religious entities) operate their own unemployment system(s). The church provides equivalent benefits to CCB employees, more efficiently at lesser cost. CCB employees are all "covered," (R.60, Exs.16,17;R.100 at 49-50,82-84,123-124), as Judge Thimm noted. (R.101 at 23;A-App.125:15-21).

LIRC/DWD cites a **general** rule that exemptions should be strictly construed against the taxpayer. (LIRC/DWD's Brief at 16-18). Yet, LIRC/DWD refuses to consider the issue in the context of an encumbrance upon religion, as did ALJ Galvan, citing *Kendall v. Director of Division of Employment Security*, 473 NE 2d 196 (Mass 1985). (R.56 at 4;A-App.196). As the *Kendall* court noted, "the rule of strict construction **is superseded** in instances where there is a strong possibility that the statute in question infringes upon a party's right to the free exercise of religion." *Kendall*, 473 N.E.2d at199. When religious liberties are involved in the interpretation of such a statutory provision, the burden effectively reverses.

LIRC/DWD's own proposed interpretation is constitutionally impermissible, see section F, *infra*. In sum, LIRC/DWD's recitation both of the "policy need" for coverage and the rule of strict construction against CCB are defeated by plain reading, and alternatively, are factually and legally misplaced.

***19 C. LIRC/DWD's "either/or" fallacy makes the term "primarily" surplusage.**

LIRC/DWD's arguments suggest any "purpose" must be either religious or secular in nature, such that if a service could be performed by some non-existent-in-reality, secular organization, it cannot be operated "primarily for religious purposes." This analysis again ignores the meaning of the term "primarily," and makes it surplusage in the statute. As Judge Thimm noted,

> The argument - the defendants focus on the arguments that the activities of the organizations - that the organizations perform and not why the organizations are **primarily** operated is the key here. If we look at the dictionary ... it is the reason why something is being done. That's what - purpose. Motive? Why? It's being done because of this religious motive of the Catholic Church of being good stewards, of serving the underserved ...(Emphasis added). (R.101 at 24-25;A-App.126-127).

"Primarily" is not a complicated word. Yet, while offering analysis premised upon word(s) being ambiguous, LIRC/DWD offers no alternative interpretation or meaning, which even suggests ambiguity. If there is some larger legislative reason that demands a political fix to the statute, then that happens at the legislature, not at the court.

As Judge Thimm noted:
... I have reviewed Judge Glonek's decision. I've reviewed the decision of ALJ in this case and looked at them quite closely. And I find Judge Glonek's decision absolutely right on point ... this is a plain reading statute. I don't think that there's anything particularly complex about it. I don't think that there's anything that I have to read into it. I think it's very simple and I think this is a circumstance where...I don't think you have to look very far.

***20** ... I'm not the Legislature nor the super Legislature. I didn't make those decisions. The Legislature made those decisions. If they want to change it to something else other than what it is, they can certainly do it. They - they chose not to ...

But, as it stands, quite frankly, I'm gonna look at, in my opinion, is this primarily for a religious purpose? And I find that it is. (R.101 at 19-20;A-App.121-122).

The term "purpose" or "religious purpose" is not complicated, either. LIRC/DWD's analysis makes "primarily" surplusage, while ignoring the clear definition of "purpose."

D. [11] LIRC/DWD's reliance on *Coulee Catholic Schools v. LIRC, Department of Workforce Development*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868 is fundamentally flawed.

LIRC/DWD's reliance upon *Coulee* is misplaced. The determination of whether an organization is "operated primarily for religious purposes," and whether the ministerial exception applies in an employment discrimination case, are fundamentally different.

In *Coulee*, a teacher terminated from her position at a Catholic school alleged age discrimination. *Id.* at ¶1. Such claims are generally barred if the employee is acting as a "minister" of a particular religious employer, on constitutional grounds. *Id.* at ¶2,3.

The conclusions:

> We conclude that both the Free Exercise Clause of the First Amendment of United States Constitution and the Freedom of ***21** Conscience Clauses in Article I, Section 18 of the Wisconsin Constitution preclude employment discrimination claims ... for employees whose positions are important and closely linked to the religious mission of a religious organization. In the case at bar, Ostlund's school was committed to a religious mission - the inculcation of Catholic faith and worldview **- *and Ostlund's position was important and closely linked to that mission***. Therefore, Ostlund's age discrimination claim under the WFEA unconstitutionally impinges upon her employer's right to religious freedom. Accordingly, we reverse. (Emphasis added). *Id.* at ¶ 3.

Aside from being separate language, fields of law, and having a genesis in entirely different legislative and policy reasons, the shortcomings of the *Coulee* comparison are exposed by raw logic. Of course, a Catholic Church may have employees whose job it is to inculcate Catholic faith. A priest for example, or, as in *Coulee*, a teacher. All are "ministers."

Within the same organization, there may be a janitor or a landscaper whose job has nothing to do with "ministry." The law recognizes that religious entities **can** be sued for employment discrimination, when the ministerial exception does **not** apply. Of course (as the emphasis added to the citation above establishes) a competent Court's analysis **is going to be** dedicated to whether the so-called "minister" is actually performing activities that are "ministerial" and linked to the mission of the organization. However, that analysis has to do with the individual's job description, and has nothing to do with the statutory interpretation of whether an organization or an entity in its totality operates "primarily for a religious purpose."

LIRC/DWD again compares apples and oranges. The *Coulee* Court ***22** conducted a "functional analysis" of the position, which is the **only** analysis which can be employed to determine whether someone is performing as a "minister," qualifying for exemption. Notably, LIRC/DWD lost *Coulee*, which is presumably the genesis of their overly-aggressive desire to utilize its interpretation to pound a square peg in a round hole.

In *Coulee*, LIRC urged taking a "quantitative approach," where tribunals look at the amount of time spent on subjects. *Id.* at ¶44. The Supreme Court rejected that in favor of determining whether a position is "important to the spiritual and pastoral mission of the church." *Id.* at ¶45. The court found this a "more wholistic approach" in which the whole of the employee's underlying activity and motivation was relevant evidence as to the "importance...to the spiritual and pastoral mission of a house of worship or religious organization ..." *Id.* at 45. One can substitute "purpose" for "mission" and get the point.

Coulee can be cited in favor of CCB's position, because *Coulee* focused not on whether the activities "looked" secular, or comparison of the religious versus secular activities by time, or otherwise. Rather, what the court deemed relevant, was the importance of the employee's position (following the analogy, the role or the importance of the CCB organizations) to the larger

spiritual and pastoral mission of the church - its motivation. LIRC/DWD's error in *Coulee* is remarkably similar to the errant position asserted here.

***23 E. Judge Thimm's interpretation of the statute was logical and consistent.**

LIRC/DWD ironically argues that Judge Thimm's interpretation makes part of the statute "meaningless." Specifically, LIRC/DWD asserts that Judge Thimm gives meaning only to "operated by a church" and makes the term "religious purpose" surplusage. (LIRC/DWD's Appellate Brief at 28-29). Not so. Judge Thimm's analysis does not make either prong surplusage.

A reasonable legislature would want to link activity to a legitimate "church," rather than inviting tribunals to engage in the impossible and foolhardy mission of simply determining the "religious purpose" of any activity, when unconnected to any church. Connection to a church is thus a threshold determination. By the same token, with a church affiliation established, a legislature would want something that was religiously motivated - a religious purpose. For example, a church which engaged in lucrative, competitive, commercial activity that made the church wealthy, but had no religious motivation, would properly not qualify for exemption despite the church affiliation. Judge Thimm's plain reading honors and gives meaning to both clauses.

F. LIRC/DWD's interpretation would result in an unconstitutional outcome.

1. A determination by the state that CCB is not "religiously purposed enough," represents a constitutionally impermissible Free Exercise violation.

Below, LIRC/DWD extensively argued from *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (R.74 at 23, *et seq.)*. They have since abandoned the case, with nary a mention before this Court.

***24** A review is illustrative. In *Fifth Avenue*, the church viewed its outdoor space as a sleeping sanctuary, and homeless were welcome overnight. The city notified the church that it would not permit this, and removed the homeless. Fifth Avenue brought suit under 42 U.S.C. § 1983 and the First Amendment, among other causes. Id. at 572-573.

The *Fifth Avenue* Court analyzed the law:
Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny. (Internal cite omitted). To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests. (Internal cite omitted).

Because "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires," courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists. (Internal cite omitted). As such, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. (Internal cite omitted). An individual claiming violation of free exercise rights need only demonstrate that the beliefs professed are "sincerely held" and in the individual's "own scheme of things, religious." (Internal cite omitted).

Although the City concedes that the Church's provision of services to the homeless falls within the ambit of protected activity under the Free Exercise Clause, the City argues that allowing homeless persons to sleep outside is not a meaningful provision of "services" and does not constitute legitimate religious conduct. Presbyterian responds that its outdoor sanctuary forms an integral part of its religious mission and that the police's removal of the homeless interferes with the Church's ministry and homeless outreach program ... the Church's homeless liaison states that the Church is "commanded by scripture to care for the least, the lost, and the lonely of this world" and in ministering to the homeless, the Church is "giving the love of God.There is perhaps no higher act of worship for a Christian."

***25** *Id.* at 574-575.

Similar to *Fifth Avenue*, LIRC/DWD's actions are "government enforcement," because the state is using Catholicism's requirement that social ministry be provided without discrimination, against Catholics. "Directing" Catholic entities to compel "religious programing" upon charity recipients or not qualify, *burdens* the free exercise of the tenets of Catholic social ministry. *Fifth Avenue* demands such a practice be subjected to strict scrutiny. These state interests are not "of the highest order", nor are they "narrowly tailored."

Clearly "solidarity" in the presentation of service is a professed belief that is sincerely held. LIRC/DWD cannot argue, whether the belief in "solidarity" is meaningful to Catholics, even if LIRC/DWD finds that illogical.

Though it is unclear whether, like *Fifth Avenue*, LIRC/DWD concedes that the provision of services - there to the homeless, here to the disabled, etc. - fall within the gambit of protected Free Exercise activity, the *Fifth Avenue* Court's analysis is compelling.

The city argued that allowing homeless to sleep outside was not a provision of "religious services" and therefore was not religiously purposed. In other words, allowing sleeping on your property without proselytizing, etc. was not for a religious purpose. That is remarkably similar to LIRC/DWD's arguments here, that the provision of services to the disabled is not "religious enough" conduct because it does not possess the religious trappings that LIRC/DWD feels are required. Yet, the ***26** *Fifth Avenue* Court focused on whether the conduct was part of its religious mission (e.g.; its motivation) rather than whether ministers of Fifth Avenue proselytized, or insisted upon forcing "religious programming" on the homeless. Rather, the Court found that the *motivation* for the action defined whether it was providing religious services or not.

Little surprise the State abandoned its citations to *Fifth Avenue. Fifth Avenue* is inapposite to LIRC/DWD's position. As in that case, the free exercise of Catholic social teachings is excessively and substantially burdened by LIRC/DWD's enforcement schema.

Indeed, the United States Supreme Court has ruled that even a 100% totally commercial enterprise and for-profit corporation can have "sincerely held" religious convictions in relation to the Affordable Care Act. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 US 682, 134 S.Ct. 2751, 2769-2774 (2014). The reality here is that each entity does have sincerely held religious beliefs and motivations, including the non-discriminatory provision of social service that constitutes the very fabric of the social ministry of the church.

All CCs know this to be a mandatory, primary directive of the bishop. (R.57, Ex.12 at 39-40). LIRC acknowledges these entities collectively are the true social ministry arm of the church. (R.74 at 3, Findings 1,2). Yet, LIRC/DWD's attorneys have repeatedly argued that the fact there is no religious programming or affiliation requirement is dispositive. (LIRC/DWD Brief at 3-7,15-16).

This tilts the playing field against Catholics. Using the internal beliefs of the ***27** church in a differential manner against Catholic entities is a constitutionally impermissible entanglement under *Pritzlaff v. Archdiocese of Milwaukee, 194 Wis. 2d 302, 533 N.W.2d 780 (1995)*. In *Pritzlaff*, the Wisconsin Supreme Court concluded that Wisconsin courts cannot determine who may serve as a priest, since "such a determination would require interpretation of church canons and internal church policies and practices." *Pritzlaff*, 194 Wis.2d at 326. The court concluded the claims in *Pritzlaff* were barred. *Id.*

CCB consistently asserted that these actions undertaken by LIRC/DWD, are unconstitutional. Specifically, it burdens both Federal and Wisconsin constitutional doctrine, (Article I, Section 18 of Wisconsin Constitution) [12] including the Free Exercise Clause, and the Establishment Clause, citing to *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302 (1995). Oddly, LIRC and DWD have consistently chosen not to provide analysis under *Pritzlaff*, now also abandoning the analysis of *Fifth Avenue*.

Yet, CCB fulfills a niche which is only going to be fulfilled by CCB, in the first instance. [13] Any program could be snap-shotted and compared to a hypothetical non-religious counterpart, and determined to be "objectively" non-religious. That is

true wherever a service exists which, by its nature, could *possibly* be performed by a non-religious entity. Consider a private business or altruistically motivated but ***28** non-religious foundation, which allowed people experiencing homelessness on its grounds, similar to *Fifth Avenue*.

By DWD/LIRC's analysis, every church which did the same, would magically become not religiously-purposed. When being ecumenical in one's presentation of service is **itself** a deeply held religious belief, it does not magically become a "non-religious" purpose simply because of "snap-shotting," as *Fifth Avenue* identifies. Especially when it promotes preferential or discriminatory bias. This is precisely the sort of "qualitative evaluation of religious norms and religious selectivity" the Supreme Court refused to engage in in *Pritzlaff* and served as the rationale for avoiding entanglement. *Pritzlaff*, 194 Wis.2d at 326-327. Indeed, LIRC/DWD is telling Catholics what a "religious purpose" looks like: the state would effectively be the arbiter of what *is* Catholic religious purpose and what is not, favoring some religions over others and applying a "Catholic penalty."

For these reasons, LIRC/DWD's actions and attacks upon the ecumenical provision of service represents an unconstitutional exercise.

2. LIRC/DWD's course also constitutes a constitutionally impermissible Establishment Clause violation.

LIRC/DWD have acknowledged that Catholic entities have alleged an Establishment Clause violation throughout this and the *Challenge Center* case, but they do not address it anywhere. (R.74 at 23, fn.71).

The Establishment Clause prohibits a governmental entity from "favoring one religion over another." *Coulee*, 209 WI 88 ¶37. By allowing exemption to those ***29** religions which view "proselytizing" and discriminating against non-adherents in the provision of services as part of their mission, LIRC/DWD is favoring those religions over Catholicism. LIRC/DWD's schema not only *burdens* Catholicism contrary to the Free Exercise clause, but it also favors religions who choose to discriminate by favoring them with an exemption, thereby "establishing" such religion(s) over Catholicism, and treating them in a constitutionally differential manner. That is impermissible treatment under the Establishment Clause. LIRC/DWD's ongoing failure to address the issue does not relieve the constitutional analysis which should result in a ruling in favor of CCB.

Pritzlaff demands that Catholicism be treated at least evenhandedly to other religions: "any award...would have a chilling effect leading indirectly to state control over the future affairs of a religious denomination, a result violative of the text and history of the Establishment Clause." *Pritzlaff* at 329 (string citations omitted). That would be the effect here.

3. LIRC/DWD's interpretation is patently unconstitutional.

LIRC/DWD argues that CCB's analysis of "religious purpose" would cause "entanglement." (LIRC/DWD's Brief at 31 *et seq.)*. Not so, as addressed immediately above. Like *Fifth Avenue*, it only requires a determination that a belief is "sincerely held" and a plain reading of "primarily for religious purposes."

Constitutional infirmities only occur, when applying LIRC/DWD's rationale. LIRC/DWD's analysis promotes a non-textually apparent "reward" of exemption for those entities which have "religious programming, preferential ***30** treatment of members of their own religion, compelled religious training, orientation, or attendance at services, a focus on "devotional exercises," and "inculcation of the faith," that nowhere appear in the statute. (R.55 at 109-110).

LIRC/DWD's entanglement analysis is also short-sighted and incomplete. (LIRC/DWD's Brief at 31). Whether there is excessive government entanglement with religion, is actually only analyzing one prong (the third prong) of the Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1973), see *Jackson v. Benson*, 218 Wis. 2d 835, 873, 578 N.W.2d 602 (1998). As the *Jackson* Court adopted:

> Not all entanglements have the effect of advancing or inhibiting religion. The Court's prior holdings illustrate that total separation between church and state is not possible in an absolute sense. Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship. ... Some relationship between the state and religious organizations is inevitable ... but the entanglement must be 'excessive' before it runs afoul of the Establishment Clause." (internal citations omitted). *Jackson* at ¶49, 218 Wis. 2d at 874.

Even analyzing the application of entanglement doctrine alone, however, produces a similar conclusion. The easiest way for LIRC/DWD to "entangle" itself in religion is to promote one practice (proselytizing, etc.) over another (ecumenical delivery of charity).

Clearly, a Constitutionally permissible statutory analysis is whether a controlling entity is a church, and whether an activity engaged in by that church comports with its own "sincerely held" beliefs and stated purpose. It is LIRC/DWD's test which is unconstitutional. Establishment violations, ***31** entanglement, and other constitutional risk, will become reality only if LIRC/DWD's test is adopted.

G. The argument that Wisconsin statutes "must be interpreted" consistent with federal law is unfounded.

1. The federal sky is not falling: there is no evidence of federal punishment.

LIRC/DWD argues that a Wisconsin court interpretation will cause the federal government to "punish" the State of Wisconsin by forfeiting federal funding. (LIRC/DWD's Brief at 35). Nowhere is there any such indication.

In fact, LIRC itself noted "... courts have been cautious in attempting to define what is or is not a 'religious' purpose. There are no court decisions binding on the Commission that set forth an all-inclusive definition or specification of what constitutes a religious purpose under the unemployment insurance law." (R.55 at 22;A-App.151).

Further, multiple state supreme courts (R.99 at 109-114) have interpreted the statute in question in their respective states, decades ago, without any such "punishment." (See section H, *infra)*. Likewise for Judge Glonek, in *Challenge Center*. Again, LIRC/DWD manufactures risk that does not comport with real-world concerns, to present a false downside. The federal government recognizes and has already long recognized each of these entities as exempt. (See section 1.1, *infra)*.

2. LIRC's Decisions are inconsistent with the ALJ and Judicial Decisions, because LIRC improperly relied upon extrinsic sources.

LIRC/DWD has relied on one statement - a so-called "legislative history" - from a 1969 "committee report." (LIRC/DWD's Brief at 36-41). Legislative history, and particularly committee reports, have been repeatedly called into question, ***32** because the text which legislatures pass into law, is the text which the courts must use. The interpretive role of the courts is to read enactments as they are expressed through legislation. Legislative history is a "rival text" created by a group other than the voting legislature, which has no authority. [14]

Indeed, Supreme Court Justices have noted that the constitutional requirements of Article I are not even complied with when "legislative history" is used as a tool of construction, because it lacks concurrence by both houses and, without two house

approval, is a violation of bicameral legislation guaranteed by that amendment. Committee Reports ignore Presidential authority to execute or choose not to execute legislation. One legislator "speaking into" a committee report can create a "note" inconsistent with the intent of many, or possibly all legislators, and the President, in passing the legislation. "An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen ... are frail substitutes for bi-cameral votes upon the text of the law and its presentment to the President." *Thompson v Thompson*, 484 US 174, 191-92, 125 S.Ct. 2825 (1988) (Scalia, J, concurring). The only authoritative voice of Congress is the legislation it enacts.

One of the primary objections to legislative history and particularly Committee Reports is the ease with which staff or congressional members can manipulate content, even though they be in the minority. An "agendized" judge may later engage in judicial activism and ignore known principles of restraint. The grave ***33** concern is from susceptibility of committee reports to a "stacking of the deck" in order to promote a later favorable interpretation from an inclined judge. [15] Committee reports are often a "... loser's history" (if you can't get your proposal into the bill, at least write the legislative history to make it look like you prevailed). Id. Committee Reports are particularly criticized, though they are the most commonly-referenced type of legislative history.

Reliance on legislative history is further challenged, because it is an unreliable guide to intent. Committee reports have become "increasingly unreliable evidence of what the voting members of Congress actually had in mind" *Blanchard* v. *Begeron*, 489 US 87, 99, 109 S.Ct. 939 (1989) (Scalia, J, concurring). Committee reports are written by staff. These staff members are in close contact with lobbyists who can provide "advice" in the form of language to be added to the report, language which no legislature has seen. Kenneth R. Dortzbach, *The Legislative History of the Philosophies of Justice Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 Marq. L. Rev. 161, 163 (1996). "What a heady feeling it must be for a young staffer to know that his or her citation of obscure district court cases can transform them into the law of the land." *Blanchard* at 99. (Scalia, J, concurring).

As Judge Koziniski has stated, "[t]he propensity of judges to look past the statutory language is well known to legislatures. It creates strong incentives for manipulating legislative history to achieve, through the Court, results not achievable through the enactment process. The potential for abuse is great." ***34** *Wallace* v. *Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986). "Interest groups that fail to persuade a majority of the Congress to accept particular statutory language are often able to insert in the legislative history of the statute's statements favorable to their position, in the hopes that they can (later) persuade a Court to construe the statutory language in light of these statements." *Nat'l Small Shipments Traffic Conf., Inc., v. Civil Aeronautics Board*, 618 F.2d 819, 828 (D.C. 1980).

Another concern is legitimacy. In *Conroy* v. *Aniskoff*, Scalia, J. noted, "the greatest defect of legislative history is its *illegitimacy*. We are governed by laws, not by the intentions of legislators." *Conroy* v. *Aniskoff*, 507 US 511, 519, 113 S.Ct. 1352 (1993). What Committee Reports lack, is the law itself. Id.

In fact, the Supreme Court has pointed out that members of Congress have even been known to directly avoid the amendment process in favor of using legislative history instead. Scalia, J. pointed this out in *US* v. *Taylor* 487 US 326, 345-46, 108 S.Ct. 2413 (1988), where a floor debate contained the following: "... I have an amendment here in my hand which could be offered, but if we could make up some legislative history which would do the same thing, I am willing to do it." Id. at 345 *(quoting* 120 CONG. REC. 41795 (1974)).

LIRC/DWD's "extrinsic source" argument relies upon how perhaps one legislator (or lobbyist or staffer) hoped the statute might later be interpreted, in a committee report. For all of the reasons cited, that approach is suspect. It is even more suspect when LIRC/DWD admits a "plain reading" mandate elsewhere, but, in direct opposition to its own position(s), asserts a 1969 committee report should carry the day here after 50-plus years of contrary analysis by courts (See section H, ***35** infra). LIRC/DWD has to pick its poison. "Judges interpret laws rather than reconstruct legislator's intentions. Where the language of those

laws is clear, we are not free to replace it with an unenacted legislative intent." *I.N.S. v Cardoza-Fonseca*, 480 US 421, 452-53, 107 S.Ct. 1207 (1987).

Because there is a natural and plain reading of the statute, as has been stated by Judge Thimm, (and Judge Glonek in *Challenge Center* (R.55 at 148-156; A-App.179-187)), it is improper to rely upon any extrinsic source. The LIRC/DWD argument should be disregarded by this Court.

H. Other courts interpret "operated primarily for religious purposes" by employing a plain reading.

LIRC/DWD argues that this Court should follow cases which rely on the 1969 insert into the Committee Report. (LIRC/DWD's Brief at 36-40). There are more cases against Defendants' position than those to which Defendants cite. A sampling follows, though space prevents citation to each persuasive authority.

Department of Employment v. *Champion Bake-N-Serve, Inc.*, 100 Idaho 53, 592 P.2d 1370 (1979) held that a bakery was operated primarily for a religious purpose though there were mostly commercial aspects to the bakery. In *Champion*, the church ran a school which operated the bakery. *Id.* at 1372. Students were required to perform work as part of their education. *Id.* Tenets of the education stressed the value of the work experience. Thus, the school provided the bakery. *Id.* Students were paid minimum wages which were required to be used as a credit. *Id.* The baked goods were sold in interstate commerce. *Id.* An average of 1000 baked products, and 20,000 to 25,000 loaves of frozen dough were produced daily. *Id.* Yet, ***36** as here, the objective of the bakery was not primarily profit-seeking in the view of the Idaho Supreme Court, as the bakery seldom obtained profit, and often saw deficits. Id.

The sole issue in *Champion*, as in the present case, was whether the entity was operated "primarily for a religious purpose." *Id.* at 1372. The Idaho LIRC-equivalent felt that the substantial commercial and competitive nature of the production and marketing of the food product could not be considered "primarily for religious purposes." *Id.* The Idaho Supreme Court held that the agency erred in concluding "that the religious exemption was not applicable in the case at bar because there were commercial aspects coexistent with the primary religious purpose." (Emphasis added). *Id.* In the court's view, the word "primarily" contemplated the co-existence of other attributes in addition to the most prominent attribute. *Id.* [16] Hence, regardless of the commercial aspects, the "purpose" was to teach students a religiously-motivated value.

As in *Champion*, the present case involves religious purpose in the dignity that comes from work, to the human person, as several judges in this string have recognized. As Judge Glonek stated in *Challenge Center*, "this is done to establish dignity for these people as demanded by the Catechism and Social Doctrine." (R.55 at 154;A-App.185). Here, there are some aspects of not-for-profit commercial ***37** activity, but like the bakery, the associated business activities of Plaintiffs never have been, "primarily" for profit. Implicit in the court's ruling in *Champion BakeN-Serve, Inc*. is the principle that even traditionally secular activities (operating a bakery), can become religious if the "purpose" behind the activity derives from religious underpinnings. The word "primarily" contemplates subservient attributes of a particular activity, including commercial activities.

Schwartz v. *Unemployment Ins. Comm.*, 2006 ME 41, 895 A.2d 965 (2006) dealt with the Maine Sea Coast Missionary Society whose religious mission was to demonstrate "God's love and compassion to marginalized people in the area [it] serve[s]." *Schwartz*, 895 A.2d at 968. The Mission provided various services to Maine coastal communities, including the operation of a boat that would bring a nurse to care for those who couldn't afford it. *Id.* The program also had an afterschool program that did not teach religious doctrine, but emphasized character building, leadership and academic achievement. *Id.* at 968-969. The Mission also ran a used clothing shop and food pantry. *Id.* at 969. The agency in *Schwartz* argued, like here, that non-denominational charitable work to the public prevented the Mission from being "operated primarily for a religious purpose." *Id.* at 970. The Supreme Court of Maine rejected the argument: "the fact that an organization has a charitable purpose and does charitable work does not require the conclusion that its purposes are not primarily religious...the fact that the Mission provides health care to

islanders and an after-school program for students does not diminish its ***38** continuing religious purpose." (Emphasis added). *Id.* at 970-971. [17]

In *Kendall* (see *Kendall* at II.B., *supra)*, the identical clause was interpreted by the Massachusetts Supreme Court. Claimant argued that a center operated by Catholic sisters was open to developmentally disabled youth regardless of their religion, and that religious classes were not required, and therefore it was not operated primarily for religious purposes. *Id.* at 198. Claimant conceded that the motivation was religious, but argued that the motivation was apart from a secular "purpose" - education of the mentally retarded. *Id.* at 199. The court concluded, "We do not see a clear distinction between such motive and purpose. The fact that the religious motives of the sisters...also serve the public good by providing for the education and training of the mentally [handicapped] is hardly reason to deny the center a religious exemption." *Id.*

In *Cox* v. *Employment Division*, 47 Or.App. 641, 614 P.2d 633 (Oregon Ct. App. 1980), a Salvation Army thrift store truck driver was not entitled to unemployment insurance benefits as the Salvation Army was operated "primarily for religious purposes." Cox, 614 P.2d at 634. Thrift/consignment/'second hand' stores are operated both by religious organizations and the private, secular sector. This did not mean that there could be no "religious purpose" merely because the activity is also something done by non-religious organizations, nor because the ***39** organization does not "proselytize," or require adherence to a particular religion.

In *Peace Lutheran Church v. State Unemployment Appeals Comm'n.*, 906 So.2d 1197 (Fla. Dist. Ct. App. 4th Dist. 2005), the Florida District Court of Appeals dealt with an organization that engaged in child care on behalf of a church congregation. *Id.* at 1198. The Court held the organization not liable for unemployment insurance payments because it provided both child care services and church outreach, which it felt were religious purposes. *Id.* at 1199. Outreach and child care services, like the public outreach of the social ministry of CCB directed towards developmentally disabled people, is still a religious purpose even if it pertains to activities that *may* (though likely will not) be undertaken by nonreligious entities.

These cases demonstrate that social ministry, even in an overtly public realm, and in the performance of "secular-appearing" activities, are routinely determined to be operated primarily for a religious motive, a synonym for purpose. CCB is no different.

I. LIRC/DWD's contention that federal tax code analysis applies is wrong, but if it did, these facts would satisfy that test.

"Our Supreme Court has already rejected the argument that Wisconsin courts should look to other jurisdictions', federal or other state courts', interpretation of unemployment compensation acts to interpret Wisconsin's unemployment compensation act." ***40** *Bernhardt* v. *LIRC*, 207 Wis. 2d 292, 302, 558 N.W.2d 874 (Ct. App 1996). Thus, all of the cases and the statutes cited by LIRC/DWD's Brief (p. 41-44), are not of any precedential value.

1. Federal law has already decided the issue.

LIRC/DWD analyzes 26 U.S.C. § 501(c)(3), noting that the code applies to "corporations ... organized and operated exclusively (emphasis added) for religious ... purposes." (LIRC/DWD's Brief at 41). In so citing, LIRC/DWD is discussing US Code which requires "exclusivity" of religious purpose, whereas the statute in question here, requires interpretation of the word "primarily." As discussed, the term "primarily" means that there can be more than one purpose - a fact inconsistent with "exclusivity." Yet another apple-orange comparison by LIRC/DWD in order to avoid plain language.

As LIRC/DWD put it, however, even to determine "exclusivity," "it is necessary and proper for the IRS to survey all the activities of the organization in order to determine whether what the organization in fact does is to carry out a religious mission or to engage in common business." (LIRC/DWD's Brief at 42).

The analysis which precedes the qualification for 501(c)(3) religious tax status, requires the IRS to determine whether any such entity qualifies by being operated "exclusively" for religious purposes. Pursuant to that interpretation by IRS, **each CCB entity in this case has been continuously determined by the IRS to be operating "exclusively" for a religious purpose**. Were it otherwise, they would not qualify for ongoing 501(c)(3) status within the category in which they operate. Of record, each entity appears in the oft-called Kenedy Manual which identifies all ***41** 501(c)(3) qualifying Catholic entities. Each entity appears therein. (R.57, Ex.6). Accordingly, in order for the IRS to make or have made that determination, it already dispositively determined that CCB entities carried out a religious mission. That determination has never been challenged.

2. The facts satisfy a "functional analysis."

LIRC/DWD urges the Court employ the "functional analysis", language of *Coulee*, but in a way which is very similar to the losing "quantitative approach", they urged upon the Supreme Court in *Coulee*. Even where the above not so, to the extent that the Court should choose to do so (in the alternative) this Court should arrive at the same conclusion by different means.

The LIRC Decisions concede that each Roman Catholic diocese in Wisconsin (and actually throughout the Country) has a social ministry arm - a Catholic Charities. (Statement of Facts, 1, hereinafter "Statement," found in R.74 at 3-5). The very purpose of the entities is to be an "effective sign of the charity of Christ." Without distinction to race, sex, or religion in any context, but not duplicitous of other services adequately provided. (Statement 2). The bishop occupies the top spot of the diocese's organizational chart, and controls all of the entities with the advice of "the membership" made up by internal rule of primarily religious individuals. (Statement 3). It is the bishop of the diocese that oversees each program and its services. (Statement 10). The Mission Statement, Code of Ethics, and Statement of Philosophy are displayed in the entryway of every entity and included in employee handbooks. (Statements 12, 15). The Plaintiffs are exempt ***42** under a group exception applying to "agencies and instrumentalities operated by the Roman Catholic Church ... subordinate to the United States Conference of Catholic Bishops." (Statement 17).

The LIRC Decisions do not acknowledge the additional undisputed facts that the Annual Report begins with a quote from the pope (R.58, Ex.15), or that all meetings begin with prayer. (R.100 at 132:8-10).

The LIRC Decisions misleadingly state that "employees and participants are not given paperwork that references the Catechism or Social Teachings of the Catholic Church ..." (Statement 16). The Mission Statement, Code of Ethics, and Statement of Philosophy are included in employee handbooks and are derived directly from Catholic social teachings that spring directly from the Catechism and are drawn directly from the Compendium of the Social Doctrine of the Church. (R.57, Ex.2 versus R.57, Exs. 3 and 4;R.100 at 127:20-129:6).

Also notoriously absent from the Commission's record, is the undisputed fact that each organization is required to "sign off" that they will abide in every respect, scrupulously, by Catholic social teachings. (R.57, Ex.4).

Read together, not only is the motivation for the existence of these entities Catholic, but Catholic directives, leadership, teachings and tone are infused by mandate throughout each organization. In sum, CCB passes even LIRC/DWD's proposed test.

***43 CONCLUSION**

There is little doubt that LIRC and DWD want their inefficient program to ensnare as many employers as possible. But their motivation is irrelevant. Multiple judges in two prior cases properly performed a plain-reading analysis based upon simple words. LIRC and DWD concede that is the appropriate exercise, but refuse to perform the task. None of the other arguments matter, but if they did, in each argument LIRC and DWD's position is incorrect. For all of these reasons, the Court's *de novo* review should affirm Judge Thimm's interpretation and decision.

Dated this 2nd day of June 2021.
TORVINEN, JONES, ROUTH & SAUNDERS, S.C.

Electronically Signed by Kyle H. Torvinen

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Footnotes

1 Wis. Stat. § 108.02(15)(h)2. The nonprofit must also be "operated, supervised, controlled, or principally supported by a church or convention or association of churches."

2 CCB and all of the affiliate sub-entities were consolidated as employers for the purpose of hearing and thereafter because of the identity of mission, operations, and legal issues. (R.54).

3 For brevity, all Petitioner-Respondents collectively will be referred to under the name of the parent, "CCB," unless otherwise specifically identified.

4 The LIRC findings constituting facts versus legal conclusions are comingled. (R.55 at 3-5,12-13,20-21,28-29,36-38;A-App.132-134,141-142,149-150,157-158,165-167).

5 DWD admits it did not cross-examine any CCB direct testimony. ("They argue that the testimony.was not cross-examined and was wholly undisputed. That is true." (R.74 at 9)). To contest, DWD argues that "there is no program of religion within the services provided to the participants in the program, nor are there any religious duties required of any of the employees, and no prophalatizing (sic) occurs, and neither the participants nor the employees are required to be of any certain religion." (R.99 at 115-116) ... Program participants are not required to be Roman Catholic, were not required to attend religious training or orientation, (R.100 at 92:1-92:15), they did not engage in devotional exercises, or disseminate "religious materials" (R.100 at 97), push religious content, or inculcate Roman Catholic faith (R.100 at 98). On that basis, DWD/LIRC concludes that such enterprises could not be operated "primarily for religious purposes," regardless of motivation.

6 The Catechism teaches: "The equality of men rests essentially on their dignity as persons and the rights that flow from it: Every form of social or cultural discrimination in fundamental personal rights on the grounds of sex, race, color,

social conditions, language, or religion must be curbed and eradicated as incompatible with God's design." (R.57, Ex.3, labeled 470, upper left corner, paragraph 1935.)

7 LIRC and DWD joined in the filing of DWD's Brief. Their identical arguments, and the joint entities are referred to as "LIRC/DWD."

8 In their briefing below, LIRC/DWD consolidated the findings of the five separate LIRC Decisions (due to their similarity) into one reference. We adopt that recitation.

9 *Brandt v. LIRC*, 160 Wis.2d 353, 359, 466 N.W.2d 673, 675 (Ct. App. 1991)

10 The actual CCB Decision is cited throughout, when the language of each decision is identical.

11 LIRC/DWD's Brief contains a "B/C" duplicate heading in the table of contents (Brief, ii), but not in text, see Argument at 23 and 28, making the two inconsistent. This Brief, structured generally to respond to LIRC/DWD's submission, corresponds to the textual LIRC Argument B=CCB, Argument D, LIRC C=CCB E, etc.

12 The state constitutional claims are not excessively elaborated upon herein in the interests of brevity, because they are more stringent in favor of free exercise. If a practice does not pass federal Constitutional muster, as it must not here, it will presumptively violate that of Wisconsin.

13 "They are not duplicative of services already adequately provided by governmental or public agencies or other private agencies." R.55 at 20, Findings ¶2.

14 William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 Ind.L.J. 699 (1991).

15 In re: Sinclair, 870 F2d 1340, 1343 (7th Cir. 1989).

16 Judge Glonek in *Challenge Center* independently arrived at the same conclusion: "The use of the word "primarily" acknowledges that an organization can have more than one purpose." R.55 at 154;A-App.185.

17 Herein, LIRC relied on a 40+ year old tax paperwork submission where CCB checked a box indicating a charitable, educational and rehabilitative operation. The Commission seized upon this submission as proof that CCB did not consider itself "religious." (R.74, Defendants' Brief at 5, Finding 22). *Schwartz* specifically noted that "charitable" and "religious" are not inconsistent.

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2021 WL 1592275 (Wis.App. III Dist.) (Appellate Brief)
Court of Appeals of Wisconsin, District III.

CATHOLIC CHARITIES BUREAU, INC., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., Petitioners-Respondents,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent-Co-Appellant,
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent-Appellant.

No. 2020AP002007.
April 12, 2021.

Circuit Court Case No. 2019CV324
Case Classification Code No. 30607
Appeal from an Order of the Circuit Court for Douglas County, Honorable Kelly J. Thimm

Brief of Respondent-Appellant State of Wisconsin Department of Workforce Development

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*viii STATEMENT OF ISSUE

Services performed by employees for a nonprofit "organization operated primarily for religious purposes" are exempt from unemployment insurance coverage.[1] The Labor and Industry Review Commission determined that the five nonprofit corporations in this case are not operated primarily for religious purposes because they provide secular social services and no religious programming. Are the five nonprofit corporations operated primarily for religious purposes and therefore exempt from unemployment insurance coverage under Wis. Stat. § 108.02(15)(h)2.?

The circuit court answered: Yes.

*IX STATEMENT ON ORAL ARGUMENT

Oral argument is not necessary. The parties' briefs should fully present the issues on appeal and fully develop the legal theories on each side of the case.

STATEMENT ON PUBLICATION

The court's opinion should be published because it will enunciate a new rule of law and decide a case of substantial and continuing public interest: the scope of the exemption for nonprofit corporations contained in Wis. Stat. § 108.02(15)(h)2.

*1 STATEMENT OF THE CASE

I. Procedural History

Each of the five nonprofit corporations (the "employers") in this case has been subject to the Wisconsin unemployment insurance law. The employers have been reporting their employees' wages under a group account entitled "Catholic Charities." The group elected reimbursement financing.[2] (R. 99:34). Each entity in the group is a separately incorporated, nonprofit corporation. (R. 100:114).

Based on a decision of the Douglas County Circuit Court[3] in a case involving another nonprofit corporation, the employers requested to terminate their Wisconsin unemployment insurance coverage. The Wisconsin Department of Workforce Development, Division of Unemployment Insurance (the "department") determined that the employers were not operated primarily for religious purposes and, consequently, were not exempt from the state'sunemployment ***2** insurance law under Wis. Stat. § 108.02(15)(h)2. The employers appealed.

An appeal tribunal (administrative law judge) reversed the department's determinations, holding that the employers are operated primarily for religious purposes and, are therefore, exempt from unemployment insurance coverage. (R. 55:142-171 and R. 56:1-47) (A-App. 173-208).

The department petitioned for review by the Labor and Industry Review Commission (the "commission"). The commission issued five decisions reversing the appeal tribunal's decisions. (R. 55:2-43) (A-App. 131-172). The commission held that the employers were not operated primarily for religious purposes because they provide essentially secular services and engage in activities that are not religious.

Each of the employers filed an action for judicial review of the commission's decisions. The five actions were consolidated on appeal, and the circuit court reversed the commission's decisions. (R. 77 and 101) (A-App. 101-129).

The department and commission appealed the circuit court's decision.

***3 II. Statement of Facts**

Every Roman Catholic diocese in Wisconsin has a social ministry arm-a Catholic Charities entity. (R. 100:33). "The mission of Catholic Charities is to provide service to people in need, to advocate for justice in social structures and to call the entire church and other people of goodwill to do the same." (R. 57:1, 5).

In the Diocese of Superior, the social ministry arm is called the Catholic Charities Bureau ("CCB"). (R. 100:54-55 and R. 57:17). The purpose of the CCB "is to be an effective sign of the charity of Christ," by providing services that are significant in quantity and quality to everyone-no distinctions are made by race, sex, or religion in reference to clients served, staff employed, and board members appointed-and that are not duplicative of services already adequately provided by governmental or public agencies or other private agencies. (R. 57:17).

CCB has separately incorporated sub-entities that operate 63 programs of service to "those facing the challenges of aging, the distress of a disability, the concerns of children with special needs, the stresses of families living in poverty and those in need of disaster relief." (R. 57:11).

***4** Barron County Developmental Services Inc. ("BCDS") is a sub-entity of CCB that provides sheltered employment to developmentally disabled individuals. (R. 100:108 and R. 65:17-18). BCDS contracts with the Wisconsin Department of Workforce Development, Division of Vocational Rehabilitation ("DVR") to provide employment assessment and job development services to individuals with disabilities. (R. 100:235-236). BCDS also has contracts with both Parker Hannifin and Barron Electric Coop to perform subcontracted work. (R. 65:12 and R. 100:238-239). Most of BCDS's funding comes from the government and private businesses. BCDS receives no funding from the Diocese of Superior. (R. 100:238-239).

In December 2014, the board of directors for Barron County Developmental Disabilities Services requested to become an affiliate of CCB and became BCDS. (R. 100:233 and R. 65:10-11). The organization had no previous religious affiliation. (R. 100:233-234). The type of services and programing provided by the organization did not change. (R. 100:236-237).

Black River Industries Inc. ("BRI") is a sub-entity of CCB that provides in-home services, community-basedservices, ***5** and facility-based services to individuals with developmental disabilities and mental health disabilities and to individuals with a limited income. (R. 100:252-253). To provide these services, BRI: works with DVR to provide participants with job training skills (R. 100:278-279); has a contract with Taylor County to provide mental health services (R. 100:272); and has a food service production facility, a shredding program, and a mailing services program to serve the community and provide job training. (R. 100:283-285).

Diversified Services Inc. ("DSI") is a sub-entity of CCB that provides services to individuals with developmental disabilities. (R. 100:220-221 and R. 65:57-58). DSI provides work opportunities for individuals with disabilities and hires individuals without disabilities to do production work. (R. 100:240-241). Most of DSI's funding comes from Family Care, a long-term care program, from DVR, and from private contracts. (R. 100:227-228, 246). DSI receives no funding from the Diocese of Superior. (R. 100:246).

Headwaters Inc. is a sub-entity of CCB that provides various support services for individuals with disabilities. (R. 100:184). Individuals are referred to Headwaters from long-term care service funding agencies. (R. 100:185).

***6** Headwaters contracts with DVR to provide employment assessment and job development services for individuals. (R. 64:49 and R. 100:200-201). Headwaters also has work-related contracts for individuals to learn work skills while earning a paycheck. (R. 100:211). Headwaters has a day services program to teach individuals with disabilities life skills. (R. 64:48 and R. 100:206).

Headwaters also provides Head Start home visitation services to families with eligible children. (R. 100:209). Headwaters had provided birth-to-three service until TriCounty Human Services took over providing those services. (R. 100:205). Most of Headwaters' funding comes from government grants and contracts and it receives no funding from the Diocese of Superior. (R. 100:204 and R. 64:1-2).

CCB provides management services and consultation to its sub-entities, establishes, and coordinates their missions, and approves their capital expenditures and investment policies. (R. 57:39-40). A number of the affiliated agencies are operated by CCB Housing Management and offer housing to income-eligible seniors, individuals with disabilities, and individuals with mental illness. (R. 62:29-47, 55 and R. 100:173-174). Other agencies affiliated with CCB providehome ***7** health care services, day-care services for the elderly, and day-care services for children. (R. 62:1-15 and R. 100:103-104, 106-107, 177-178). CCB's executive director, a layperson, oversees the operations of each of the sub-entities. (R. 100:65, 125). The bishop of the Diocese of Superior oversees CCB's programs and services. (R. 57:34).

The program participants are not required to attend any religious training or orientation. (R. 100:92, 234, 288). Board members, employees, and participants of BCDS, DSI, BRI, and Headwaters are not required to have any religious affiliation. (R. 97:17 and 100:92, 187-188, 233, 287).

CCB and its sub-entities are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code under a group exemption. (R. 100:56 and R. 57:22-30). The group exemption applies to "the agencies and instrumentalities and the educational, charitable, and religious institutions operated by the Roman Catholic Church in the United States, its territories, and possessions" that are subordinate to the United States Conference of Catholic Bishops. (R. 57:22).

CCB became subject to the Wisconsin unemployment insurance law in 1972, following its submission of anemployer's ***8** report in which CCB indicated that the nature of its operations was charitable, educational, and rehabilitative. CCB did not indicate that the nature of its operation was religious. (R. 99:45 and R. 67:15-17).

Sub-entities of CCB report their employees under CCB's unemployment insurance account. (R. 60:29-46, R. 61:3-7 and R. 67:1-3). In 2003, CCB requested to withdraw from coverage under the unemployment insurance law. The department denied CCB's request and the department's determination was upheld by the commission. (R. 60:19-28).

In 2015, a circuit court judge held that a sub-entity of CCB, the Challenge Center, was entitled to an exemption from the requirements of the unemployment insurance law. (R. 61:8-16). CCB and the four sub-entities subsequently requested department determinations finding that they, too, are entitled to an exemption from mandated participation in the state's unemployment insurance program. (R. 67:1-3).

APPLICABLE STATUTE

Wisconsin unemployment insurance law excludes from covered "employment" services performed for certain organizations. Wisconsin Stat. § 108.02(15)(h) provides:

***9** "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.

The focus of the parties' dispute is subdivision 2., which contains a two-part test for determining whether an employer is exempt from unemployment insurance coverage. The parties agree that the employers are operated, supervised, controlled, or principally supported by a church. The only issue before the Court is whether the employers are operated primarily for religious purposes.

*10 ARGUMENT

I. Scope and Standard of Review

The scope and standard of judicial review of decisions of the Labor and Industry Review Commission concerning unemployment insurance are established in Wis. Stat. § 108.09(7). A commission decision may only be set aside on limited grounds:
1. That the commission acted without or in excess of its powers.

2. That the order or award was procured by fraud.

3. That the findings of fact by the commission do not support the order. [4]

Whether an employer has proven that it is exempt from coverage under the state unemployment system is a mixed question of law and fact. [5] Reviewing courts apply different standards to review the commission's findings of fact than they apply to review the commission's conclusions of law. [6] Both standards are discussed below.

*11 A. The commission's findings of fact and assessments as to the weight and credibility of evidence are conclusive upon reviewing courts.

Review of the commission's findings of facts is significantly limited. [7] Findings of fact made by the commission under Wis. Stat. ch. 108, the unemployment insurance law, are conclusive if supported by any credible evidence in the record. [8] A court may remand a case to the commission if its order depends on a material and controverted finding of fact not supported by substantial and credible evidence. [9] Otherwise, absent fraud, findings of fact made by the commission are conclusive. [10]

The findings which courts review on appeal are those of the commission, not those of the administrative law judge, and the court cannot ignore and "jump over" the findings of the commission to reach those of the administrative law judge which were set

aside. [11] The question is not whether there is evidence to support a finding that was not made, but whether there was evidence to support a finding that was, in fact,made ***12** by the commission. The courts thus need not consider whether there was credible evidence that would have supported a contrary inference or conclusion. [12]

Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact finder could base a decision. [13] Substantial evidence for purposes of review of an unemployment insurance decision does not require a preponderance of the evidence. The test is whether reasonable minds could arrive at the same conclusion the commission reached. [14]

In determining whether substantial evidence supports a finding, the evidence is to be construed most favorably to the commission's findings. [15] No court may substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. [16] A reviewing court's role is to search the record to locatecredible ***13** and substantial evidence, not to weigh the evidence opposed to it. [17]

The ultimate responsibility for findings of fact is upon the commission itself, not the hearing examiner. [18] A reviewing court is to review the findings of the commission, not those of the administrative law judge, [19] and the commission's findings need be only as to the ultimate facts. [20] There is no requirement that an administrative decision be entered with exacting specificity. [21]

The burden of showing that a commission decision is not supported by substantial and credible evidence is on the party seeking to have the decision set aside. [22] A reviewing court, even though it has the complete record before it, has no authority to make its own findings of fact. Under Wis. Stat. § 108.09(7)(c)6.,a ***14** reviewing court may only determine "[t]hat the findings of fact by the commission do not support the order." [23]

Here, the commission's factual findings are based on the actual, objective operations of the employers and are supported by substantial and credible evidence in the record.

They are, therefore, conclusive on review.

B. The court applies a *de novo* standard of review to the commission's interpretation of law.

The determination of whether the facts, as found by the commission, fulfill a statutory standard is a question of law. [24] The Wisconsin Supreme Court ended the practice of according deference to an administrative agency's interpretation of law in 2018. [25]

The ultimate question of whether the employers are "operated primarily for religious purposes" and entitled to an exemption from inclusion in Wisconsin's unemployment insurance program is dependent upon an interpretation of those terms as envisaged by the legislature and used in ***15** Wis.Stat. § 108.02(15)(h)2. Courts review *de novo* questions of statutory interpretation. [26]

II. The Employers Are Not Operated Primarily for Religious Purposes Because Their Business Activities Are Secular.

This Court should reverse the circuit court decision and confirm the commission's decisions because the employers operate for purely secular, not religious, purposes. The employers operate to provide social services primarily for individuals with disabilities. The employers provide work training programs, life skills training, in-home support services, transportation services, subsidized housing, and supportive living arrangements.

The employers work with DVR to provide job skills training and assessment services to individuals. The employers also contract with other governmental entities and private companies to provide their job training programs and other social services.

The employers do not require their employees, participants, or board members to be of the Catholic faith, and participants are not required to attend any religious training,religious ***16** orientation, or religious services as a condition of receiving the social services offered. (R. 100:92, 233).

The commission correctly determined that the employers are operated primarily for secular social services purposes, not religious purposes, and this Court should affirm the commission's decisions.

A. The unemployment insurance law is remedial in nature, designed by the legislature to provide unemployment benefit coverage to wage earners.

1. The law must be interpreted to provide benefit coverage and exceptions to the law must be interpreted narrowly to further the law's purpose.

"Statutes are interpreted in view of the purpose of the statute."[27] Wisconsin's unemployment insurance law embodies a strong public policy in favor of compensating the unemployed. "In good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners." Wis. Stat. § 108.01(1). The purpose of the unemployment insurance law is to provide benefits to persons who have lost work through no fault of their own. "Hence, the statute is remedial in nature and should be liberallyconstrued ***17** to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status."[28]

In order that the statute may be construed broadly for coverage, exemptions should be interpreted narrowly. "A general rule of statutory construction is that exceptions within a statute 'should be strictly, and reasonably, construed and extend only as far as their language fairly warrants.' ... If a statute is liberally construed, 'it follows that the exceptions must be narrowly construed.'"[29] "[T]he burden of proving entitlement to [a tax] exemption is on the one seeking the exemption. 'To be entitled to tax exemption the taxpayer must bring himself within the exact terms of the exemption statute.'"[30]

Here, a narrow interpretation is warranted because it protects an employee's eligibility for benefits. Benefit eligibility is dependent on wages earned during theemployee's ***18** base period.[31] When a worker's earned wages are excluded because an employer is exempt, the employee's eligibility for benefits may be jeopardized during a period of unemployment due to insufficient base period wages.

A narrow interpretation of the exemption is also warranted because if an employer is exempt from unemployment coverage, the employer is not required to pay taxes into the unemployment insurance reserve fund.[32] Even though the employers in this case have chosen reimbursement funding, which means they reimburse the fund for benefits paid to their employees who are out of work, some nonprofits choose to remain taxable and pay unemployment tax contributions based on their unemployment experience. The more nonprofits deemed exempt from unemployment insurance coverage, the less solvent the fund becomes.

*19 2. The circuit court erred in disregarding the public policy behind the unemployment insurance law.

The circuit court disregarded the public policy behind the unemployment insurance law as explicitly expressed by the Wisconsin legislature in Wis. Stat. § 108.01, because the Catholic Church maintains its own unemployment benefit program. (R. 101:23) (A-App. 125). However, the existence or non-existence of private unemployment benefits is immaterial to an analysis of the statute and cannot be the basis for determining whether an employer is subject to Wis. Stat. ch. 108.

First, the exclusion at issue applies only where the employer proves it is exempt-not just in close cases where there is "other" coverage. An interpretation that considers the availability of "other" coverage impermissibly adds words to the statute.[33] The proper interpretation of the statute applies to any religiously affiliated organization, including those which do not offer unemployment benefits. Furthermore, an employer covering its employees with an unemployment insurance program could always choose to modify or cancelits ***20** coverage. The presence of alternate coverage should not affect, in any way, the interpretation of the statutory provision at issue.

Second, employees of an exempt organization may find other employment, and later, lose that employment due to a lack of suitable work. If some or all of these employees' base period employment was for employers exempt from the unemployment insurance law, these employees may be ineligible for benefits or, if eligible, only for a greatly reduced amount of benefits. This defeats the purpose of the unemployment insurance law and its protections for wage earners.

Third, unemployment insurance is a joint federal-state program. Federally funded benefits provide additional assistance in times of high unemployment. Employees ineligible for regular unemployment insurance benefits do not qualify, in most instances, for additional federal assistance. The additional federal assistance, like other unemployment insurance benefits, is not only essential for the welfare of unemployed workers, but also to the economic vitality of the state. "The decreased and irregular purchasing power of wage earners in turn vitally affects the livelihood of farmers,merchants ***21** and manufacturers, results in a decreased demand for their products, and thus tends partially to paralyze the economic life of the entire state." Wis. Stat. § 108.01(1).

Wis. Stat. § 108.02(15)(h)2. must be interpreted narrowly in order to implement the remedial goals of Wis. Stat. ch. 108 to provide unemployment coverage to workers and protect the economic health of the state.

3. The commission's decisions rely on the language of the statute to fulfill the remedial goals of Wis. Stat. ch. 108.

Statutory interpretation begins with the language of the statute. "Statutory language is given its common, ordinary and accepted meaning."[34] "Operate" generally means "to perform a function."[35] "Primarily" generally means "for the most part: chiefly."[36]

The crux of the case is the interpretation of "religious purposes" in the context of the statute. The Seventh Circuit holds that "[t]he term 'religious purposes' is simply a term of art in tax law ...."[37] As used for determining exemptions from taxes, the term is used "to determine whether [an organization's]actual ***22** activities conform to the requirements which Congress has established as entitling them to tax exempt status."[38]

The circuit court held that because the definition of "purposes" is the "reason something is done," it is the religious motivation of the Diocese of Superior that determines whether the entities are operated for religious purposes. (R. 101:24) (A-App. 126). Simply replacing the word "purposes" with the term "reason something is done" does not answer the question of how to interpret the statute. The employers' actual activities are the provision of secular social services by their employees and the employers operate to provide these services. The employers are not operating to provide a religious education or other religious activities.

The commission followed the guidance of the Wisconsin Supreme Court's decision in *Coulee Catholic Schools v. LIRC*[39] to interpret the term "primarily operate for religious purposes." The commission's interpretation gives meaning to every portion of the statute and is consistent with the unemployment insurance law remedial goals. Itsinterpretation ***23** avoids any unconstitutional entanglement that would occur if the state examines religious motivation and church doctrine. In addition, the commission's reasoning is consistent with a Congressional committee report pertaining to the Federal Unemployment Tax Act ("FUTA") amendment with which the Wisconsin statute conforms. Accordingly, the Court should reverse the circuit court decision and affirm the commission's decisions.

B. The commission appropriately relied on *Coulee Catholic Schools* to determine if the employers are operated primarily for religious purposes.

1. In *Coulee Catholic Schools*, the Supreme Court examined an organization's activities to determine if it had a fundamental religious mission.

In the absence of Wisconsin precedent, the commission looked to *Coulee Catholic Schools* for guidance in determining whether the employers are operated primarily for religious purposes. In *Coulee Catholic Schools*, the Supreme Court analyzed whether the Coulee Catholic Schools association had a fundamentally religious mission to determine whether a teacher's discrimination claim was precluded by the free exercise clause in the U.S. Constitution. Granted, *Coulee Catholic Schools* is a case involving theWisconsin ***24** Fair Employment Act. Nonetheless, the Supreme Court's reasoning in that case is instructive here.

The free exercise clause prohibits the government from interfering with a church's selection of its leaders. In order to protect this right, courts have adopted a "ministerial exception" to anti-discrimination laws for those positions important to the spiritual and pastoral mission of the church. [40]

In order to determine whether the teacher's position was ministerial, the Supreme Court conducted a two-step functional analysis. The first step requires a court to determine if the organization, in both statement and practice, has a fundamentally religious mission; that is, does the organization exist primarily to worship and spread the faith?

The Supreme Court explained that:

> [i]t may be, for example, that one religiously-affiliated organization committed to feeding the homeless has only a nominal tie to religion, while another religiously-affiliated organization committed to feeding the homeless has a religiously infused mission involving teaching, evangelism, and worship. Similarly, one religious school may have some affiliation with a church but not attempt to ground the teaching and life of the school in the religious faith, while another similarly situated school may becommitted ***25** to life and learning grounded in a religious worldview. [41]

If the organization has a fundamentally religious mission, "[t]he second step in the analysis is an inquiry into how important or closely linked the employee's work is to the fundamental mission of that organization." [42] This inquiry considers a number of factors, including whether the individual performs quintessentially religious tasks, such as evangelizing, participating in religious rituals, worship, or worship services. The Supreme Court held that "the state may not interfere with the hiring or firing decisions of religious organizations with a religious mission with respect to employees who are important and closely linked to that mission." [43]

The Supreme Court determined that the school association had a religious mission to "be a worship-filled educational environment with a faith-centered approach to learning." [44] Because the teacher was closely linked to her school's religious mission of the inculcation of the Catholicfaith ***26** and world view, the teacher was covered by the ministerial exception.

2. *Coulee Catholic Schools* provides guidance for determining if an organization is operated primarily for religious purposes.

Coulee informs the interpretation of the unemployment exemption because determining whether an organization has a fundamentally religious mission is analogous to determining whether the organization is operated for primarily religious purposes. Both the unemployment insurance law and the fair employment law deal with the relationship between employers and their employees. The courts must balance the statutory rights of employees with a religious organization's constitutional rights. If an organization has a fundamentally religious mission, the state cannot interfere with the organization's determination as to its leaders. If the organization is simply affiliated with a religious organization, then providing employees with protection under the Wisconsin Fair Employment Act from discrimination does not impinge on a religion's ability to choose its leaders.

An organization that is operated primarily for religious purposes would similarly need to be protected from state interference with respect to its ability to choose its religiousleaders. ***27** Statutorily exempting such entities from unemployment coverage serves the same purpose as the ministerial exception. The other two unemployment insurance religious exemptions, those involving church employees [45] and ministers and members of a religious order, [46] highlight this point. If "operated primarily for religious purposes" is focused on an entity's activities, then an entity such as Coulee Catholic Schools, which is operated primarily for religious purposes to inculcate the Catholic faith, would be free from state interference in choosing its leaders.

Focusing on an employer's **activities**, rather than a religious organization's **motivation**, appropriately balances employees' ability to obtain unemployment benefits with a religious organization's need to be free from state interference. *Coulee* provides the guidance in ensuring that religious entities are protected from state interference in choosing their leaders and, at the same time, ensuring that employees' statutory rights are recognized and protected when possible. Because the unemployment statutes are to beinterpreted ***28** broadly to provide coverage, the statutory exemption must be interpreted narrowly to ensure that the exemption is applied only when necessary.

Accordingly, *Coulee* provides guidance on whether an organization is operated primarily for religious purposes and supports the commission's decisions regarding the employers.

C. A statute must be interpreted to give every part meaning, in the context of the surrounding text, and reasonably to avoid absurd results.

1. The circuit court's interpretation renders the statute meaningless.

Statutes should be interpreted so that no provision is rendered meaningless. [47] The circuit court's interpretation of Wis. Stat. § 108.02(15)(h)2. essentially nullifies the "operated primarily for religious purposes" clause. It is difficult to imagine that any religious organization would operate a nonprofit entity that was inconsistent with its faith, values, or mission. An interpretation focusing on a religious organization's motivation thus renders the religious purposes clause superfluous. Indeed, what would be the motivation of a religious organization to set up a nonprofit affiliate exceptfor ***29** a motivation consistent with the religious organization's tenets and overall mission to serve others?

If Congress and the Wisconsin Legislature had intended to exclude **all** nonprofit entities affiliated with a religious organization, the "operated primarily for religious purposes" language would not have been included. As the District Court of Appeal of Florida explained, "the Legislature, had it wished to exempt all religious outreach ministries from unemployment taxation, could have easily done so by expressly providing that any outreach ministry, any organization that is operated for religious purposes, or any organization having a religious motivation is exempt." [48]

The circuit court's interpretation would exempt **any** church-affiliated organization from coverage, not just those operated primarily for religious purposes.

2. The religious purposes exemption must be interpreted in the context of the other religious exemptions.

An important rule of statutory construction is that "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to thelanguage ***30** of surrounding or closely related statutes ..."[49] As discussed above, the religious exemption set forth in Wis. Stat. § 108.02(15)(h) also excludes individuals employed by a church,[50] and ministers and members of a religious order.[51] These two exemptions are dependent on the position the individuals hold with a religious entity. A focus on the operations of an entity keeps the focus on the positions that individuals hold in a religiously-affiliated organization.

Accordingly, teachers in a college preparing students for ministry would be excluded from unemployment insurance coverage, because the college is involved in the training of its religious leaders. On the other hand, employees of a religiously-affiliated organization that is not operated for religious purposes would be subject to coverage under the unemployment insurance laws because they are not involved with the organization's ministerial functions. By interpreting religious purposes to encompass organizations that provide or perform religious activities, the focus is on the individuals and the role they play in the organization. This allows subsection 2 of Wis. Stat. § 108.02(15)(h) to beinterpreted ***31** in a manner consistent with the language of subsections 1 and 3.

D. Wisconsin Stat. § 108.02(15)(h)2. must be interpreted to avoid excessive state entanglement with Church matters.

As illustrated by the appeal tribunal decisions, which analyzed whether the employer's motivations conformed to Catholic tenets and doctrine,[52] an evaluation of a religious entity's motivation requires an interpretation and analysis of religious doctrine. The employers' exhibits and testimony also show that an inquiry into the employers' motivation requires an interpretation of church doctrine and tenets. The circuit court relied upon such interpretations referencing both Catholic and Christian tenets in its decision, explaining that aid to the underserved is an exemplification of what it is to be Catholic and one of the tenets of Christianity in general. (R. 101:23) (A-App. 125).

The state, however, must avoid interpreting religious canons in order not to violate the First Amendment.[53] In *Pritzlaff v. Archdiocese of Milwaukee*, the Wisconsin Supreme Court rejected a claim for negligent hiring andretention ***32** of a priest because, "the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices."[54]

The commission's interpretation of "operated primarily for religious purposes" focuses on an organization's activities and does not require the state or the court to examine or interpret church canons or internal church policies. In contrast, an interpretation focusing on a religious entity's religious motivation requires an examination of church doctrine and an inquiry into the motivations of the church's religious leaders. Statutes should be interpreted in a manner that will not create a constitutional conflict.[55] "Given a choice of reasonable interpretations of a statute, [a] court must select the construction which results in constitutionality."[56]

***33** It is illogical that the legislature would require the state to investigate and interpret church doctrine and religious motivations when applying Wis. Stat. § 108.02(15)(h)2. because long-standing precedent requires that the government not examine or interpret religious doctrine. For example, in resolving church property disputes, the courts employ a "neutral principles of law" approach because the "First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."[57] By resolving property disputes using objective, well-established concepts of property law, the courts are not undertaking a consideration of doctrinal matters.

A determination regarding whether an employer is operated primarily for religious purposes must be made **without** examination of religious doctrine or tenets. A determination that requires the state to interpret religious doctrine and examine religious leaders as to their religious motivations risks excessive unconstitutional entanglement of the state and church.

***34** Here, the employers' operations are described in their Form 990 submissions to the IRS, [58] on their websites, [59] and by the testimony of their executive directors. These sources show that the employers are engaged in purely secular activities, such as job training services and supportive social services. In contrast, Messmer High School, [60] an entity that inculcates Catholic values through the provision of an education in the Catholic tradition with regular religious services, required weekly prayers and courses in Catholic theology, is engaged in religious activities. A school that "embarked on a religious mission to inculcate Catholic youth with the tenets of the Roman Catholic Church" was being "operated primarily for religious purposes." [61]

Statutory language should be interpreted reasonably to avoid absurd or unreasonable results. [62] A fact-based inquiry into an organization's activities avoids the unconstitutional entanglement presented by an inquiry examining whether a religious organization's motivation for operating an entity isreligious ***35** and consistent with the organization's religious tenets. The circuit court's decision assumes that the legislature enacted a law requiring the examination of religious organizations' motivation when determining whether the organizations qualify for a tax exemption. The circuit court's interpretation of the statute should be rejected because it risks excessive entanglement, which is an unreasonable result.

E. Wisconsin unemployment laws must be interpreted consistent with FUTA.

Wisconsin Stat. § 108.02(15)(h)2. was enacted to conform Wisconsin's unemployment law with federal law in 26 U.S.C. § 3309(b)(1)(B). [63] If Wisconsin's unemployment laws do not conform to, and substantially comply with, federal standards, private employers in the state may not claim a credit against their FUTA tax and the state forfeits federal funding for the unemployment insurance program. [64]

***36** A Congressional Committee Report, [65] which preceded the passage of the federal law, provides an interpretation for the federal religious exemption in 26 U.S.C. § 3309(b)(1)(B). "[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen [t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" [66]

The Wisconsin Supreme Court has relied on Congressional Committee Reports on bills amending FUTA when interpreting Wisconsin laws enacted to conform with FUTA. [67] Because Wis. Stat. § 108.02(15)(h)2. was enacted to conform Wisconsin law to federal law, the Congressional Committee Report on the bill to amend FUTA informs the interpretation of the Wisconsin statute. The commission properly relied on the Congressional Committee Report in reaching its decisions. (R. 55:9, 17-18, 25-26, 33-34, 42) (A-App. 138, 146-147, 154-155, 162-163 and 171).

***37** The Committee Report, which was presented to both houses of Congress during consideration of the federal law, clearly indicates that the federal exclusion is **not** intended to exempt the types of entities that are at issue in this case:

> This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). 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. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. 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**. [68]

The Committee Report was cited with approval by the U.S. Supreme Court in *St. Martin Evangelical Lutheran Church v. South Dakota*. [69] The Committee Report clearlydistinguishes ***38** between employers such as a college preparing students for the ministry as operated primarily for religious purposes from church-related charitable organizations such as an orphanage or a home for the aged, which are **not** operated primarily for religious purposes and **not exempt** from unemployment coverage. The Committee Report defines the limit of the exemptions and establishes that not all religiously affiliated entities are exempt.

Here, the circuit court found that the employers are excluded from coverage under Wisconsin unemployment law because they meet the requirements of Wis. Stat. § 108.02(15)(h)2. and, necessarily, 26 U.S.C. § 3309(b)(1)(B) due to the motivation of the Diocese of Superior in operating the employers. The circuit court's holding is contrary to the plain language of the statute and the Congressional Committee Report because the employers are separately incorporated charitable organizations, such as an orphanage or home for the aged, which are **not** considered to be operated primarily for *religious* purposes. The statute and the Committee Report focus not on the motivation for establishing the charitable organization but, rather, on the activities of the organization. The commission appropriatelyrelied ***39** on the Committee Report in analyzing the Wisconsin statute.

F. Other states have interpreted "operated primarily for religious purposes" to refer to the operation of the organization rather than the organization's motivation.

The Congressional Committee Report has been relied on by other states' courts in interpreting their state's religious exemption statutes. For example, the Arkansas Supreme Court interpreted its statute in a manner separating motivation from purpose of operation when considering an infirmary medical center. [70] The court quoted the Committee Report in *St. Martin* and held that it stated "[t]he proper focus of inquiry to determine the primary purpose of operation." [71] The court held that, because religion accounted for only a small amount of the infirmary's budget; no proselytizing took place; and no religious requirements were involved in most hiring and staffing decisions, the infirmary was subject to the state's unemployment law. The court agreed with the administrative decision that the primary function of theinfirmary ***40** was the commercial delivery of health care services as a hospital facility.

The Colorado Supreme Court also relied on the Committee Report to analyze the religious purposes exemption. [72] The Colorado court focused on the word "operated," stating that the activities of the organization determine whether it is exempt and "[a]n organization that provides essentially secular services falls outside of the scope of [the religious exemption]." [73] Citing to *St. Martin's* quote of the Committee Report, the court held that "[t]he activities of an organization, and not the motivation behind those activities, determine whether an exemption is warranted." [74]

The court found that, because the employer provided secular services without evangelizing or proselytizing and new employees were not given any religious purpose in their instructions, the employer was not operated primarily for religious purposes.

These cases, though not precedential for Wisconsin courts, [75] are highly persuasive and instructive for interpretingthe ***41** Wisconsin exemption and illustrate the importance of the Congressional Committee Report in interpreting the religious purposes exemption.

G. Federal courts reviewing "religious purposes" to determine tax exempt status under the federal tax code examine the activities of the organization.

Under 26 U.S.C. § 501(c)(3), "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes. ..." are exempt from federal taxation. Seventh Circuit decisions analyzing whether an organization is operated exclusively for religious purposes under the tax code are instructive because Wisconsin's unemployment exemption was enacted to conform to the federal exemption contained in the tax code at 26 U.S.C. § 3309(b)(1)(B). The list of the types of tax-exempt organizations in the tax code shows that "purposes" should be focused on the activities of an organization rather than a motivation. That is, organizations that are exempt for religious, charitable, scientific, testing for public safety,literary,, ***42** or educational purposes are those organizations that are engaged in religious, charitable, scientific, testing for public safety, literary, or educational activities.

In analyzing the religious purposes exemptions, the Seventh Circuit instructs that:

> The term "religious purposes" is simply a term of art in tax law, just like "collapsible corporation" or "Section 306 stock." In that connection it must be remembered that more than 20 other types of exempt organizations, besides those for religious purposes, are listed in 26 U.S.C. § 501(c). The IRS has the same monitoring function with respect to all these groups, namely to determine whether their actual activities conform to the requirements which Congress has established as entitling them to tax exempt status. [76]

To make such a determination "it is necessary and proper for the IRS to survey all the activities of the organization, in order to determine whether what the organization in fact does is to carry out a religious mission or to engage in commercial business." [77] The appropriate review "could be made by observation of the organization's activities or by the testimony of other persons having knowledge of such activities, as well as by examination of church bulletins, programs, or other publications, as well as by scrutiny ofminutes, ***43** memoranda, or financial books and records relating to activities carried on by the organization." [78]

The Seventh Circuit provided guidance on activities to be considered in the review:

> Typical activities of an organization operated for religious purposes would include (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity *in partibus infidelium*; (b) pastoral counseling and comfort to members facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of individuals, such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and education in the doctrine and discipline of the church, as well as (in the case of mature and well developed churches) theological seminaries for the advanced study and the training of ministers. [79]

The Seventh Circuit stressed the importance of conducting a neutral review based on objective criteria, explaining that:

> Objective criteria for examination of an organization's activities thus 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. [80]

***44** In a later decision, the Seventh Circuit reaffirmed the importance of examining an organization's activities to avoid any subjective inquiry. [81] Similarly, an examination of activities of the employers here is necessary to determine whether their activities conform to the exemption from Wisconsin's unemployment insurance law under Wis. Stat. § 108.02(15)(h)2. The commission undertook just such an inquiry, and its decisions should be affirmed.

H. The commission appropriately determined that the employers are not operated primarily for religious purposes.

A review of the record establishes that the employers are not operated primarily for religious purposes and are, therefore, not exempt from unemployment insurance coverage. The commission determined that the employers here are akin "to the religiously-affiliated organization committed to feeding the homeless that has only a nominal tie to religion." [82] The commission's conclusion that the employers are operated primarily for social services purposes is supported by the record.

***45** BCDS was formerly an independent agency without any religious affiliation (R. 100:233-234) that later became affiliated with the Catholic Charities Bureau. BCDS provides sheltered workshops for individual with disabilities. (R. 100:108 and 65:17-18). The organization operated the same way both before and after its affiliation with Catholic Charities. (R. 61:1-2 and R. 100:236-37). The purpose of the organization's operations did not transform from secular to religious simply as a result of the business transfer.

BRI provides job training programs, in-home services, and community and facility-based services for individuals with disabilities and individuals with a limited income. (R. 66:19-20 and R. 100:252-254, 275).

DSI provides work opportunities for individuals with disabilities and supports them in community jobs and learning how to navigate in the community. (R. 65:48-58 and R. 100:240-241).

Headwaters serves primarily individuals with developmental disabilities and teaches them life skills and work skills. (R. 64:1-2 and R. 100:206, 211).

CCB provides administrative services to its affiliated agencies. CCB provides subsidized housing to income- ***46** eligible seniors, individuals with disabilities, and individuals with mental illness. (R. 62:29-47, 55 and R. 100:173-174). CCB also provides home health care services, day-care services for the elderly, and day-care services for children. (R. 62:1-15 and R. 100:103-104, 106-107, 177-178).

The employers provide secular social services. Unlike the employer in *Coulee Catholic Schools*, the employers in this case do not operate to inculcate the Catholic faith. (R. 100:98). The employees are not engaged in teaching the Catholic religion, evangelizing, or participating in religious rituals or worship services with the social service participants. [83] The employers do not require their employees, participants, or board members to be of the Catholic faith, and participants are not required to attend any religious training, orientation, or services. (R. 100:92). The employers do not disseminate any religious material to participants. (R. 100:97). The employers are not providing program participants with an "education in the doctrine and discipline

of the church." [84] The stated and actual purpose of eachemployer ***47** is not to provide religious instruction or services, but rather to provide **secular** social services.

The commission rejected an approach looking solely to an entity's motivation, because it would allow the organization to determine its own status without regard to its actual function. Such an approach would narrow the coverage of the unemployment act, contrary to the requirement that the statute be liberally interpreted to provide broad coverage. The functional approach employed by the commission that looks at the organization's activities, as described by the Congressional Committee Report and employed by the Wisconsin Supreme Court in *Coulee Catholic Schools* and the Seventh Circuit, not only gives meaning to the statute but also avoids any constitutional entanglement concerns.

*48 CONCLUSION

The ultimate issue before the Court is whether the employers met their burden to establish that, unlike most employers in the state, they are exempt from the requirement to be part of the unemployment insurance program. As the employers claiming the exemption, the burden is on the employers to prove that they are entitled to it. The circuit court erred in finding that employers met their burden.

The uncontroverted facts show that the employers provide secular social services. The goal of each employer is to help those in need. Helping those in need is not exclusively a religious activity. Providing social services to those in need is performed by government agencies, some of which provide funds to the employers, and by organizations and individuals not affiliated with any religion. The employers are not operated primarily for religious purposes. The employers provide secular social services and, therefore, should remain covered by the Wisconsin Unemployment Insurance law.

The department requests that this Court reverse the circuit court decision and confirm the commission's decisions.

***49** Dated: April 12, 2021
Respectfully submitted,

Electronically signed by:

<<signature>>

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Footnotes

1 Wis. Stat. § 108.02(15)(h)2. The nonprofit must be also be "operated, supervised, controlled, or principally supported by a church or convention or association of churches."

2 Nonprofit employers may finance their employees' unemployment benefits by electing to reimburse the department for benefits paid to their employees instead of paying unemployment insurance tax contributions. Wis. Stat. § 108.151.

3 Circuit court decisions are not binding precedent or authority. *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993).

4 Wis. Stat. § 108.09(7)(c)6.

5 *Nottelson v. DILHR*, 94 Wis. 2d 106, 287 N.W.2d 763 (1980).

6 *Heritage Mut. Ins. Co. v. Larsen*, 2001 WI 30, ¶ 21, 242 Wis. 2d 47, 624 N.W.2d 129.

7 *Heritage Mut*, 2001 WI 30, ¶ 24.

8 *R.T. Madden, Inc. v. DILHR*, 43 Wis. 2d 528, 547, 169 N.W.2d 73 (1969).

9 Wis. Stat. § 108.09(7)(f).

10 Wis. Stat. § 108.09(7)(c)1.

11 *Anheuser Busch, Inc. v. Indus. Comm'n*, 29 Wis. 2d 685, 692, 139 N.W.2d 652 (1966).

12 *Brickson v. DILHR*, 40 Wis. 2d 694, 699, 162 N.W.2d 600 (1968).

13 *Cornwell Personnel Assoc., Ltd. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993).

14 *Holy Name Sch v. DILHR*, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982); *Farmers Mill of Athens, Inc. v. DILHR*, 97 Wis. 2d 576, 579, 294 N.W.2d 39 (Ct. App. 1980).

15 *Cornwell Personnel*, 175 Wis. 2d at 544.

16 *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (1989).

17 *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

18 *Falke v. Indus. Comm'n*, 17 Wis. 2d 289, 294-295, 116 N.W.2d 125 (1962); *Indianhead Truck Lines v. Indus. Comm'n*, 17 Wis. 2d 562, 567, 117 N.W.2d 679 (1962). Administrative law judges were formerly referred to as hearing examiners.

19 *Anheuser Busch, Inc., supra*.

20 *Van Pool v. Indus. Comm'n*, 267 Wis. 292, 294, 64 N.W.2d 813 (1954).

21 *Door Cty. Highway Dep't v. DILHR*, 137 Wis. 2d 280, 295, 404 N.W.2d 548 (Ct. App. 1987).

22 *Xcel Energy Services, Inc. v. LIRC*, 2013 WI 64, ¶ 48, 349 Wis. 2d 234, 833 N.W.2d 665.

23 *See R. T. Madden*, 43 Wis. 2d at 536-537.

24 *Bernhardt v. LIRC*, 207 Wis. 2d 292, 302-303, 558 N.W.2d 874 (Ct. App. 1996).

25 *See Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21.

26 *Tetra Tech*, 2018 WI 75, ¶ 84.

27 *State v. Matasek*, 2014 WI 27, ¶ 13, 353 Wis. 2d 601, 846 N.W.2d 811.

28 *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983).

29 *McNeil v. Hansen*, 2007 WI 56, ¶ 10, 300 Wis. 2d 358, 731 N.W.2d 273 (citation omitted).

30 *Wauwatosa Ave. United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, ¶ 7, 321 Wis. 2d 796, 776 N.W.2d 280 (quoting *Sisters of Saint Mary v. City of Madison*, 89 Wis. 2d 372, 379, 278 N.W.2d 814 (1979)).

31 A claimant's base period is the first four of the five most recently completed calendar quarters. Wis. Stat. § 108.02(4)(a). If a claimant does not qualify under that period, the base period is the four most recently completed calendar quarters. Wis. Stat. § 108.02(4)(b).

32 Wisconsin Stat. § 108.18(1) requires employers to pay quarterly tax contributions on reported wages based on the employers' experience.

33 *Crown Castle USA, Inc. v. Orion Const. Group, LLC*, 2012 WI 29, ¶ 37, 339 Wis. 2d 252, 811 N.W.2d 332.

34 *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

35 https:/www.merriam-webster.com/dictionary/operate.

36 https:/www.merriam-webster.com/dictionary/primarily.

37 *U.S. v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981), *cert. denied*, 456 U.S. 983, 102 S. Ct. 2257, 72 L.Ed.2d 861 (1982).

38 *Id.*

39 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

40 *Coulee Catholic Schools*, 2009 WI 88, ¶ 45.

41 *Id.*, ¶ 48.

42 *Id.*, ¶ 49.

43 *Id.*, ¶ 67.

44 *Id.*, ¶ 73.

45 Wis. Stat. § 108.02(15)(h)1.

46 Wis. Stat. § 108.02(15)(h)3.

47 *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶ 33, 263 Wis. 2d 709, 666 N.W.2d 816.

48 *Cathedral Arts Project, Inc. v. Dept. of Economic Opportunity*, 95 So. 3d 970, 974 (Fla. 1st DCA 2012).

49 *State ex rel. Kalal*, 2004 WI 58, ¶ 46.

50 Wis. Stat. § 108.02(15)(h)1.

51 Wis. Stat. § 108.02(15)(h)3.

52 *See* e.g. (R. 55:146-147) (A-App. 207-208).

53 *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 326, 533 N.W.2d 780 (1995).

54 *Pritzlaff*, 194 Wis. 2d at 326.

55 *Milwaukee Journal Sentinel v. DOA*, 2009 WI 79, ¶ 41, 319 Wis. 2d 439, 768 N.W.2d 700.

56 *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 526, 261 N.W.2d 434 (1978).

57 *Jones v. Wolf*, 443 U.S. 595, 602, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

58 (R. 61:51-52, R. 64:1-2, R. 65:17-18, 57-58 and R. 66:19-20, 44-45).

59 (R. 62:1-63, R. 64:43-58, R. 65:10-16, 48-56 and R. 66:54, 73-78, 8388).

60 *MHS, Inc.*, UI Dec. Hearing No. 8852 S (LIRC July 12, 1991) (A-App. 225-229).

61 *Ursuline Academy, Inc. v. Director of the Div. of Employment Sec.*, 383 Mass. 882, 420 N.E.2d 326 (1981).

62 *State ex rel. Kalal*, 2004 WI 58, ¶ 46.

63 1971 Wis. Laws, ch. 53, § 6. *See Resurrection Cemetery and Mt. Olivet Cemetery, Inc. v. DILHR*, No. 149-083 (Wis. Cir. Ct. Dane Cty. June 9, 1976) (A-App. 210).

64 *City of Milwaukee v. DILHR*, 106 Wis. 2d 254, 260, 316 N.W.2d 367 (1982).

65 The report of the House Ways and Means Committee on the Employment Security Amendments of 1970. H.R. Rep. No. 91-612, p. 44 (1969) (A-App. 223-224).

66 *Garcia v. U.S.*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984) (citation omitted).

67 *Leissring v. DILHR*, 115 Wis. 2d 475, 485-488, 340 N.W.2d 533 (1983).

68 H.R. Rep. No. 91-612, p. 44 (1969) (emphasis added) (A-App. 223224) or S. Rep. No. 91-752, pp. 48-49 (1970).

69 451 U.S. 772, 781, 101 S. Ct. 2142, 2147, 68 L. Ed. 2d 612 (1981). In *St. Martin*, the court considered whether church-affiliated schools that have no separate legal existence from a church are exempt from FUTA.

70 *Terwilliger v. St. Vincent Infirmary Medical Center*, 304 Ark. 626, 804 S.W.2d 696 (1991).

71 *Terwilliger*, 304 Ark. at 629.

72 *Samaritan Institute v. Prince-Walker*, 883 P.2d 3 (Colo. 1994).

73 *Id.* at 8.

74 *Id.* at 7.

75 "Our supreme court has already rejected the argument that Wisconsin courts should look to other jurisdictions', federal or other state courts, interpretations of unemployment compensation acts to interpret Wisconsin's unemployment compensation act." *Bernhardt v. LIRC*, 207 Wis. 2d at 302.

76 *U.S. v. Dykema*, 666 F.2d at 1101.

77 *U.S. v. Dykema*, 666 F.2d at 1100.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Living Faith, Inc. v. C.I.R.*, 950 F.2d 365, 376 (7th Cir. 1991).

82 (R. 55:8, 17, 24, 33 and 41) (A-App. 137, 146, 153, 162 and 170).

83 *Coulee Catholic Schools, supra*.

84 *See U.S. v. Dykema*, 666 F.2d at 1100.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LEILA GREEN LITTLE, et al., Plaintiffs, v. LLANO COUNTY, et al., Defendants.	§ § § § § § § § § §	1:22-CV-424-RP

ORDER

Before the Court are Defendants Llano County, et al.'s ("Defendants") Motion to Dismiss, (Dkt. 42), and Plaintiffs Leila Green Little, et al.'s ("Plaintiffs") Motion for a Preliminary Injunction, (Dkt. 22). Having considered the parties' briefs, the record, and the relevant law, the Court finds that the motion to dismiss, (Dkt. 42), should be partially granted, and the motion for preliminary injunction, (Dkt. 22), should be partially granted. The Court will dismiss only the claims relating to the cancellation of the OverDrive online book database. The Court will also (1) order Defendants to return all the books at issue to the Library System, (2) update the Library System's searchable catalog to reflect that these books are available for checkout, and (3) enjoin Defendants from removing any more books for the pendency of this action. The Court will deny all other relief requested.

I. BACKGROUND

Plaintiffs are patrons of the Llano County Library System who are suing members of the Llano County Commissioners Court ("Commissioners"), members of the Llano County Library Board ("board members") and Llano County Library System Director Amber Milum for violations of their constitutional rights. Plaintiffs contend that Defendants are infringing their First Amendment right to access and receive ideas by restricting access to certain books based on their messages and content. (Compl., Dkt. 1, at 27–29). They further allege that, because the removal and

restrictions happened without prior notice and without any opportunity for appeal, Defendants also violated their Fourteenth Amendment right to due process. (*Id.* at 29–30). Plaintiffs request an injunction that would, among other things, require Defendants to (1) return the books at issue to the catalog and to their original location in the physical shelves, and (2) reinstate access to Overdrive, the Library's former system for e-book access. (Mot. Prelim. Inj., Dkt. 22, at 2–3).

The Llano County Library System is comprised of three physical libraries: the Llano Library Main Branch, the Kingsland Library Branch, and the Lakeshore Library Branch. Until December 13, 2021, the Library also offered access to OverDrive, a digital e-book catalog that gave library patrons access to a curated collection of thousands of e-books and audiobooks. (Email, Dkt. 22-10, at 79). Today, after a period of unavailability, the Library offers access to e-books and audiobooks through a different service, Bibliotheca.

The Llano County Library System has used the "Continuous Review, Evaluation and Weeding" ("CREW") method to keep its collection up to date and make space for new acquisitions. (Hr'g Tr. Vol. 1 at 13:19-20, 18:12-15). The "CREW" method is an established weeding guide used by modern libraries. (*See* Milum Decl., Dkt. No. 49-1, at 2–2). To identify appropriate candidates for weeding, the CREW method suggests using the following factors, known collectively by the acronym "MUSTIE": Misleading; Ugly; Superseded; Trivial; Irrelevant; and Elsewhere. (*Id.*). The Library calls this process "weeding." (Hr'g Tr. Vol. 2 at 71:20-25).

In early July 2021, prior to their appointment to the New Library Board, Defendants Rochelle Wells, Rhonda Schneider, Gay Baskin, and Bonnie Wallace were part of a community group pushing for the removal of children's books that they deemed "inappropriate." (Call Log, Dkt. 59-1, at 72; Complaint Logs, Dkt. 59-1, at 77–89). For example, these Defendants objected to two series of children's picture books, the "Butt and Fart Books," which depict bodily functions in a humorous manner in cartoon format, because they believed these books were obscene and

promoted "grooming" behavior. (*E.g.,* Complaint Logs, Dkt. 59-1, at 79). Defendant Milum, the library system's director, shared the complaints with the Commissioners Court.[1] Although several commissioners and librarians stated that they saw no problem with the books, Defendants Moss and Cunningham contacted Milum to instruct her to remove the books from the shelves. (*Compare* Log, Dkt. 59-1, at 94 (describing commissioners saying they did not see a problem with the books) *and* Email, Dkt. 59-1, at 91 (same); *with* Cunningham Email, Dkt. 59-1, at 74–75 (instructing Milum to remove the books from the shelves); Mt'g Logs, Dkt. 59-1, at 76, 92 (noting the complaints and stating that Moss told Milum to "pick [her] battles.")).

By August 5, 2021, Milum informed Cunningham she would be deleting both sets of books from the catalog system. (Cunningham Email, Dkt. 59-1, at 74–75; *see also* List of Removed Books, Dkt. 22-10, at 60–61). In the following months, other books, such as *In the Night Kitchen* by Maurice Sendak and *It's Perfectly Normal*, by Robbie H. Harris, were removed because of similar complaints: that they encouraged "child grooming" and depicted cartoon nudity. (List of removed books, Dkt. 22-10, at 62–63). There was no recourse for Plaintiffs, or anyone else, to appeal these removals to the library system.

In Fall 2021, Wallace, Schneider, and Wells, as part of their community group, contacted Cunningham to complain about certain books that were in the children's sections or otherwise highly visible, labeling them "pornographic filth." (Wallace Email, Dkt. 22-10, at 68–69). On November 10, 2021, Wallace provided Cunningham with lists, including a list of "dozens" that could be found in the library. (*Id.*; *see also* Wallace List, Dkt. 22-10 at 75). The books labeled "pornographic" included books promoting acceptance of LGBTQ views. (*See, e.g.*, Wallace List, Dkt.

[1] The Commissioners Court is the municipal entity that controls the Llano County Library System. The Commissioners Court is led by Llano County Judge Ron Cunningham.

22-10[2]). Other books in Wallace's list of pornographic books about "critical race theory" and related racial themes. (*Id.*[3]). In other communications, Defendants refer to them as "CRT and LGBTQ" books. (Wells Emails, Dkt. 20-10, at 71–72 (discussing book removals and planning a list of "CRT and LGBTQ book[s]")). In the email, Wallace advocated for the books to be relocated to the adult section because "[i]t is the only way that [she] could think of to prohibit future censorship of books [she does] agree with." (Wallace Emails, Dkt. 22-10, at 68).

That same day, Cunningham and Moss ordered Milum, "[a]s action items to be done immediately," to pull books that contained "sexual activity or questionable nudity" from the shelves and from OverDrive, which at the time was the Library's online e-book database. (Cunningham Emails, Dkt. 22-10, at 67; 106). Milum informed Moss and Cunningham she would pull the books, as well as books found in Wallace's lists. (*Id.*, Hr'g Tr. Vol 1, at 104:6–104:9).

Milum then ordered the librarians to pull books from an edited version of Wallace's list from the shelves. (Baker Decl., Dkt. 22-1, at 2). On November 12, 2021, Defendants removed several books on the Bonnie Wallace Spreadsheet from the Llano Library Branch shelves, including, for example, *Caste: The Origins of Our Discontents*, *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group*, *Being Jazz: My Life as a (Transgender) Teen*, and *Spinning*. (List of removed books, Dkt. 22-10, at 60–65). In early December, the Commissioners and Milum also discussed options to implement filters or other restrictions for books in Wallace's list that were available through OverDrive. (OverDrive Emails, Dkt. 22-10, at 8–10). Although Plaintiffs do not identify which e-book titles were at issue in their complaint, Defendants were converned that at least two of the

[2] For example, Wallace's list included the following titles: (1) *All out: the no-longer-secret stories of queer teens throughout the ages* by Saundra Mitchell; (2) *Beyond Magenta: transgender teen speaks out,* by Susan Kuklin; and (3) *Some assembly required: the not-so-secret life of a transgender teen*, by Arin Andrews, among others.

[3] For example, Wallace's list included the following titles: (1) *Caste, the origins of our discontents*, by Isabel Wilkerson; (2) *How to be an antiracist*, by Ibram X. Kendi, and (3) *Separate is never equal* by Duncan Tonatiuh, among others.

books in Wallace's list, *Lawn Bow* by Jonathan Evison and *Gender Queer* by Maia Kobabe, were accessible to library patrons though OverDrive. (Wells Emails, Dkt. 22-9, at 5).

On December 13, 2021, the Commissioners Court voted to approve three days of library closures, from December 20, 2021 to December 23, 2021 to review the library catalog. (Macdougal Emails, Dkt. 20-10, at 79–80). These tasks included "labeling books and checking [the] shelves for "'inappropriate'" books." (*Id.*, at 79–80; Hr'g Tr. Vol 1, at 151:1–152:13). The Commissioners Court did not define "appropriateness," but Milum declared that during these days, the staff mainly pulled books that the other Defendants had identified as inappropriate. (Hr'g Tr. Vol. 1, at 83:5–84:7).

On December 13, 2021, the Commissioners Court also voted to suspend all access to OverDrive. (Email, Dkt. 22-10, at 79). After the start of this litigation, the Commissioners Court voted to enter into a contract with Bibliotheca, another e-book database system. On May 9, 2022, the County began to provide access to Bibliotheca. (Milum Decl., Dkt. 49-1). Bibliotheca provides access to some, but not all, of the books at issue. (*Id.* at 6–7).

On December 13, 2021, the Commissioners Court also voted to dissolve the existing library board and to create a new one, named the "Library Advisory Board." Wallace, Wells, Schneider, and other Llano County residents who advocated for book removals were appointed to the new board. This new Board then instituted a policy that all new books must be presented to and approved by the board before purchasing them. (Hr'g Tr. Vol. 1, at 51:5–20; 107:4–21; 111:3–20). The Commissioners Court stopped all new book purchases in November 2021, and no new acquisitions have been approved since this litigation began. (Cunningham Emails, Dkt. 22-10, at 106; Hr'g Tr. Vol. 1, at 50:21–51:8). On or around January 19, 2022, the Board asked Librarian Milum "that she not be present at all meeting [sic] and just on an as-needed basis." (Mt'g Minutes, Dkt. 22-10, at 52–53). In February 2022, Defendants banned staff librarians from attending New Library Board Meetings. (Librarians' Emails, Dkt. 22-1, at 6 ("Staff members are not to attend Advisory Board

Meetings. You may not use your vacation time to attend.")). A month later, the meetings were closed to the public. (News Article, Dkt. 22-10, at 130–132; Mt'g Minutes, Dkt. 22-10, at 52–53 (discussing the possibility of closing meetings to the public)).

Plaintiffs filed their complaint on April 25, 2022, (Dkt. 1), and filed their motion for preliminary injunction on May 9, 2022, (Dkt. 22). Defendants filed a motion to dismiss on June 8, 2022. (Dkt. 42). After the parties submitted their respective briefing, the Court held a hearing on the preliminary injunction on October 28 and October 31, 2023. (Order, Dkt. 69; Minute Entries, Dkts. 79, 80). The parties then submitted post-hearing briefing on the preliminary injunction. (Pls.' Post-Hearing Memorandum in Support, Dkt. 91; Defs.' Corrected Resp., Dkt. 101; Pls.' Reply, Dkt. 98; Defs.' Surreply, Dkt. 117).

II. LEGAL STANDARD

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Fed. R. Civ. P. 12(b)(1). Federal district courts are courts of limited jurisdiction and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in

the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

B. Rule 12(b)(6)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the [plaintiffs'] grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). "[A] motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*,

663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)).

C. Rule 65 Standard

A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The party seeking injunctive relief carries the burden of persuasion on all four requirements. *PCI Transp. Inc. v. W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

III. DISCUSSION

Plaintiffs seek an injunction ordering the return of the books at issue and other removed books to the library catalog and to their original location, to restore access to OverDrive, and to prevent further book removals. Defendants have filed a motion to dismiss, asserting that Plaintiffs lack standing for most of their claims, that Plaintiffs' claims regarding access to the OverDrive database are moot, and that, to the extent that Plaintiffs have standing for their claims, Plaintiffs have failed to state either a First Amendment or a Due Process claim. The Court will first address Defendants' motion to dismiss before turning to Plaintiffs' motion for preliminary injunction.

A. Defendants' Motion to Dismiss

Defendants' motion to dismiss proceeds in two parts. First, Defendants argue that Plaintiffs have not alleged "concrete plans" to access the books at issue, and therefore they have not alleged a cognizable injury. (Mot. Diss., Dkt. 42, at 3–5). Defendants further contend that Plaintiffs' claims regarding the OverDrive online system are moot because the library has closed that forum, and that

in any case, Plaintiffs claims are also moot because Plaintiffs can access the books through the library's new online database or by requesting them through the "in-house" checkout system. (Reply, Dkt. 54, at 8–9). Second, Defendants argue that Plaintiffs fail to state a claim for relief because the library engaged in government speech, and because there is no liberty interest implicated in book removal. (Mot. Diss., Dkt. 42, at 8–10).

The Court will first address whether Plaintiffs have standing to bring a claim against Defendants before turning to the sufficiency of their allegations for Rule 12(b)(6) purposes. The Court finds that Plaintiffs are suffering a continuing injury, and that most of their claims are not moot. However, the Court also finds that Plaintiffs' OverDrive related claims are moot because Defendant has replaced OverDrive with Bibliotheca, a comparable online database of books. With respect to the remaining claims, the Court finds that Plaintiffs have properly alleged First Amendment and Due Process violations. As to the First Amendment claims, the Court finds Plaintiffs have sufficiently alleged that Defendants' actions do not constitute government speech and that Defendants unlawfully removed books based on their viewpoint. As to the Due Process claims, the Court identifies a liberty interest in access to information protected by the Due Process Clause of the Fourteenth Amendment.

1. Standing

To have Article III standing, a plaintiff must "(1) have suffered an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that will likely be redressed by a favorable decision." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (citing *Lujan v. Def's. of Wildlife*, 504 U.S. 555, 560–61 (1992), *as revised* (Oct. 30, 2020)). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *Lujan*, 504 U.S. at 564. "[S]ome day's intentions—without any description of concrete plans or indeed even any specification of *when* the some day will be—do

not support a finding of the 'actual or imminent' injury." *Id.* However, an injury that "has already happened and is ongoing . . . fulfills the constitutional standing requirement" because it is not conjectural. *Inst. for Creation Rsch. Graduate Sch. v. Texas Higher Educ. Coordinating Bd.*, No. 1:09-cv-00382-SS, 2009 WL 10699959, at *2 (W.D. Tex. July 31, 2009) (holding that a municipal education board's denial of a license to grant degrees was an ongoing injury that fulfills constitutional standing requirements).

Plaintiffs have alleged sufficient facts to show they are suffering an actual, ongoing injury. Plaintiffs alleged that they are library users and members, that they wish to check out the removed library books, and that they have attempted and failed to check out the removed books from the library. (Compl, Dkt. 1, at 27). The removal of books initiated Plaintiffs' injuries, but the infringement on their right to access information is a "continuing, present adverse effect[]" that qualifies as an injury for Article III purposes. *Lujan*, 504 U.S. at 564; *cf. Sund v. City of Wichita Falls*, 12 F. Supp. 2d, 530, 553–54 (N.D. Tex. 2000) (finding irreparable injury where implementation of the city's resolution would have resulted in books promoting acceptance of LGBTQ families being "segregated" from the children's section to the adult section). In light of this ongoing effect, requiring Plaintiffs to engage in futile attempts to check out books that are unavailable or to attend the library board meetings that have been closed and stalled for months would be pointless. Accordingly, the Court finds that Plaintiffs have sufficiently pled an actual, ongoing injury for the purposes of standing.

2. Mootness

a. OverDrive-Related Claims

Defendants make two arguments regarding mootness. First, Defendants contend that Plaintiffs' OverDrive-related claims are moot because the contract cancellation amounts to a closing of the public forum. (Mot. Diss., Dkt. 42, at 5–7; Reply, Dkt. 54, at 8–9). Second, Defendants argue

that there is no ongoing injury because Plaintiffs may access the books through Llano County Library System's new online book database, Bibliotheca, or through the library's "in-house checkout" system. (Reply, Dkt. 54, at 8–9; Milum's Supp. Decl., Dkt. 53, at 1–2). Defendants claim their actions were genuine and not litigation posturing. (Mot. Diss., Dkt. 42).

Courts are skeptical of defendant induced mootness because of the risk of posturing—attempting to escape litigation while intending to engage in the same conduct once the case is dismissed. *Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018). In general, defendants cannot "evade sanction by predictable protestations of repentance and reform after a lawsuit is filed." *Ctr. For Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 425 (5th Cir. 2013) (citation omitted). But the Fifth Circuit has cautioned that skepticism is lessened for voluntary governmental cessation because "[g]overnment officials 'in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties.'" *Id.* at 910–11. "Without evidence of the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing." (*Id.* at 910).

As Defendants note, on May 9, 2022, the County began to provide access to Bibliotheca, a different online book database. (Reply, Dkt. 54, at 8). In their post-hearing briefing, Plaintiffs state that Bibliotheca provides access to some, but not all, of the books at issue. (*See* Pls.' Post-Hr'g Br., Dkt. 91, at 18 (citing Milum Decl., Dkt. 49-1, at 6–7)). However, Plaintiffs' complaint does not specify which books Defendants objected to. Without allegations regarding specific books, and given that some of the books at issue are available though Bibliotheca, the Court cannot find, based on the pleadings, that Bibliotheca does not sufficiently replace OverDrive database. Plaintiffs' injury appears to be the violation of their right to access information through the online book database OverDrive. However, the evidence shows that the County replaced OverDrive with a comparable online service. In light of Plaintiffs' current pleadings, the County's new contract with Bibliotheca

thus moots the OverDrive-related claims. Accordingly, the Court will dismiss Plaintiffs' OverDrive-related claims without prejudice.

b. Physical Books

However, the Court does not conclude that Plaintiffs' claims are moot as to the physical books. The physical books at issue in this case, although "available" for checkout are hidden from view and absent from the catalog. Their existence is not discernible to the public, nor is their availability. An injury exists because the library's "in-house checkout system" still places "a significant burden on Library Patrons' ability to gain access to those books." *Sund*, 12 F. Supp. 2d at 534.

Furthermore, Defendants' creation of an "in-house checkout system" comprises precisely the type of posturing the voluntary cessation exception is meant to prevent. Defendant Milum received the books in July, three months into this litigation and shortly after the parties had filed responses to their motions to dismiss and for preliminary injunction, respectively. (Milum Supp. Decl., Dkt. 53, at 1). But the books were not donated by a neutral benefactor with the intent of making them available to library patrons. Defendants' Counsel, Jonathan Mitchell, provided these books ostensibly anonymously. Upon questioning, Counsel repeatedly to avoid the disclosure of his donation by asserting attorney-client privilege. The Court concluded, however, that his actions, clearly designed his clients' litigation position, were not so privileged.

Furthermore, even if Counsel Mitchell's actions were not calculated to promote his clients' litigation position, the Library's protocols making access to the books virtually impossible do not deserve the type of solicitude the Fifth Circuit has instructed. Making books "available" in a back room, only upon specific request by a patron who has no way of knowing that the books even exist, is hardly a "formally announced change[] to official governmental policy" deserving less scrutiny. *Bunton*, 905 F.3d at 910.

The Court thus finds that the rest of Plaintiffs claims are not moot. Accordingly, the Court will dismiss Plaintiffs' OverDrive-related claims without prejudice but allow the remaining claims to proceed.

3. First Amendment Claim

Next, Defendants argue that Plaintiffs have not stated a First Amendment claim upon which relief can be granted. Defendants contend that First Amendment protections do not apply to the public library's content and collection decisions, because libraries are afforded broad discretion over these decisions. (Mot. Diss., Dkt. 42, at 9).[4]

The Supreme Court has recognized that public libraries should be afforded "broad discretion" in their collection selection process, in which library staff must necessarily consider books' content. *See U.S. v. Am. Library Assn., Inc.*, 539 U.S. 194, 205 (2003) (plurality). But this discretion is not absolute, and it applies only to materials' selection. In fact, the Fifth Circuit, adopting the Supreme Court's plurality in *Pico*, has recognized a "First Amendment right to receive information" which prevents libraries from "remov[ing] books from school library shelves 'simply because they dislike the ideas contained in these books.'" *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995) (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality)).

[4] Defendants also argue that Plaintiffs have not alleged that the library is a public forum, and that any First Amendment claim should fall based on that fact alone. (Reply, Dkt. 54, at 8–9). This argument is unavailing. The Fifth Circuit has recognized that there is a First Amendment right to access information, and that First Amendment protections apply to the removal of materials in public libraries. *See, e.g.*, *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995)). As the following paragraphs make clear, courts have almost uniformly held that public libraries are subject to First Amendment limitations, even as limited public forums. *See, e.g.*, *Sund v. City of Wichita Falls*, 12 F. Supp. 2d, 530, 534 (N.D. Tex. 2000) ("The Wichita Falls Public Library, like all other public libraries, is a limited public forum for purposes of First Amendment analysis."). *American Library*, which Defendants cite for the contrary proposition, simply states that "*Internet access* in public libraries is neither a 'traditional' nor a 'designated' public forum." *See U.S. v. Am. Library Assn., Inc.*, 539 U.S. 194, 205 (date) (emphasis added).

"The key inquiry in a book removal case" is whether the government's "substantial motivation" was to deny library users access to ideas with which [the government] disagreed." *Id.* at 190. Here, Plaintiffs have sufficiently pled that Defendants' conduct was substantially motivated by a desire to remove books promoting ideas with which disagreed. They plainly allege that Defendants removed, ordered the removal, or pursued the removal of the books at issue "because they disagree with their political viewpoints and dislike their subject matter." (Compl., Dkt. 1, at 3, 7–9).

Defendants do not argue otherwise. Instead, they contend that Plaintiffs have not stated a claim because the removal decisions were "government speech to which the First Amendment does not apply." (Mot. Diss., Dkt. 42, at 8–9). But as Plaintiffs' note, the cases Defendants cite mostly involve the initial selection, not removal, of materials. *See, e.g.*, *Am. Library*, 539 U.S. at 205 ("The principles underlying [the precedent] also apply to a public library's exercise of judgment in selecting the material it provides to its patrons."); *PETA v. Gittens*, 414 F.3d 23, at 28 (analogizing the discretion afforded to library's book collection decisions to the commission's art selection decisions). As the Fifth Circuit held in *Campbell*, removal decisions are subject to the First Amendment and are evaluated based on whether the governments' "substantial motivation in arriving at the removal decision" was discriminatory. *Campbell*, 64 F.3d at 190. Here, Plaintiff has clearly pled that Defendants had this motivation.

Defendants contend that *Campbell* and *Pico* do not apply to this context because those cases dealt with book removals from public school libraries, which may be subject to unique constitutional rules. (Reply, Dkt. 54, at 8). At the same time, Defendants urge us to follow *Chiras*, even though *Chiras* also involves book selection at a public school library. (*Id.* at 10 (citing *Chiras v, Miller*, 432 F.3d 606, 614 (5th Cir. 2005). In any case, the Court agrees that the precedent indicates public school libraries are a unique environment for constitutional analysis. *See Pico*, 457 U.S. at 868 (plurality) ("First Amendment rights accorded to students must be construed 'in light of the special

characteristics of the school environment'" (citation omitted)). *Campbell*, *Pico*, and *Chiras* suggest that school officials' discretion is particularly broad for book selection in public school libraries because of schools' unique inculcative function. *See also Sund*, 121 F. Supp. 2d at 548. However, the right to access to information first identified in *Pico* and subsequently adopted by the Fifth Circuit in *Cambpell* has "even greater force when applied to public libraries," since public libraries are "designed for freewheeling inquiry," and the type of discretion afforded to school boards is not implicated. *Id.* (omitting citations).

Defendants, like other government officials implicated in maintaining libraries, have broad discretion to select and acquire books for the library's collection. But the Fifth Circuit recognizes a First Amendment right to access to information in libraries, a right that applies to book removal decisions. Plaintiffs have clearly stated a claim that falls squarely within this right: that Defendants removed the books at issue to prevent access to viewpoints and content to which they objected.

4. Due Process Claim

Finally, Defendants argue that Plaintiffs have not alleged a due process claim because Plaintiffs do not have a protected property or liberty interest involved in library books. Defendants point to a single Second Circuit case, *Bicknell v. Vergennes Union High School*, 638 F.2d 438, 442 (2d Cir 1980). In *Bicknell,* plaintiffs challenged a school board's decision to remove two books based on their content. *Id.* at 440–41. The Second Circuit found that, even assuming that there was a deprivation of rights at play, such a deprivation did not entitle plaintiffs "to a hearing before that removal takes place." *Id.* at 442. According to the court, the rights involved were not particularized nor personal enough to require a hearing. *Id.*

But many courts have held that access to public library books is a protected liberty interest created by the First Amendment. *See Doyle v. Clark Cnty. Pub. Libr.*, No. 3:07-cv-00003-TMR-MRM, 2007 WL 2407051, at *5 (S.D. Ohio Aug. 20, 2007); *see also Miller v. Nw. Region Libr. Bd.*, 348 F. Supp.

2d 563, 570 (M.D. N.C. 2004) (denying defendants' motion to dismiss plaintiff's Fourteenth Amendment due process claim, holding that access to public library computers was a protected liberty interest); *Hunt v. Hillsborough County,* No. 8:07-cv-01168-JSM-TBM, 2008 WL 4371343, at *3 (M.D. Fla. 2008) ("Plaintiff had a fundamental right to access the Law Library and receive the information provided therein."); *Dolan v. Tavares*, No. 1:10-cv-10249-NMG, 2011 WL 10676937, at *13 (D. Mass. May 16, 2011) ("[P]laintiff has a liberty interest in being able to access the law library"); *cf. Neinast v. Bd. of Trs. of Columbus Metro. Libr.*, 346 F.3d 585, 592 (6th Cir. 2003) (referring to the First Amendment right to receive information in public library books as a "fundamental right"); *Armstrong v. Dist. of Columbia Pub. Libr.,* 154 F. Supp. 2d 67, 82 (D.D.C. 2001) (recognizing that "access to a public library [ ] is at the core of our First Amendment values"). And even if this Court were to follow the Second Circuit's rationale, *Bicknell* only states that the right involved could not sustain a hearing requirement. *Bicknell*, 638 F.2d at 442. The court's analysis does not foreclose the possibility that Plaintiffs could be entitled to some form of post-removal appellate or review process.

The Court follows our many sister courts in holding that there is a protected liberty interest in access to information in a public library. Accordingly, the Court finds that Plaintiff has sufficiently stated a due process claim.

B. Plaintiffs' Motion for Preliminary Injunction

Having addressed Defendants' motion to dismiss, the Court will now evaluate whether Plaintiffs are entitled to a preliminary injunction. Plaintiffs seek an injunction ordering Defendants to: (1) return the physical books at issue to their original locations and (2) update the Library Service's catalog to reflect that the books have been returned and are available for checkout, and enjoying Defendants from: (1) removing any books from the Llano County's physical shelves during the pendency of the action, and (2) closing future Library Board meetings to members of the public.

(Proposed Ord., Dkt. 22-12). Plaintiffs originally requested a preliminary injunction regarding access to OverDrive, but the Court will not address this relief because it has dismissed those claims. Furthermore, Plaintiffs request relief related to their Due Process claim but do not actually present any arguments on the issue. Accordingly, the Court will deny the motion as to their request for access to the library board meetings.

For the rest of the preliminary injunction, Plaintiffs must show (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012). Plaintiffs have carried their burden on each of these elements.

1. Likelihood of Success on the Merits

a. Viewpoint Discrimination

As the Court stated earlier, the First Amendment "protect[s] the right to receive information." *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000) (citing *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)). In a book removal case, "the key inquiry . . . is the school officials' substantial motivation in arriving at the removal decision." *Campbell*, 64 F.3d at 190.

Plaintiffs have made a clear showing that they are likely to succeed on their viewpoint discrimination claim. Although libraries are afforded great discretion for their selection and acquisition decisions, the First Amendment prohibits the removal of books from libraries based on either viewpoint or content discrimination. *See Pico*, 457 U.S. at 871. "Official censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination." *Robinson v. Hunt County*, 921 F.3d 440, 447 (5th Cir. 2019) (citing *Matal v.*

Tam, 137 S. Ct. 1744, 1763 (2017). In a book removal case, plaintiffs must show that an intent to deny library users access to viewpoints with which they disagreed was a "substantial factor" in making the removal decision. *Id.* at 188 n.21 (citing *Pico*, 457 U.S. at 872); *id.* at 190.

Here, the evidence shows Defendants targeted and removed books, including well-regarded, prize-winning books, based on complaints that the books were inappropriate. For example, between early and mid-July 2021, Wells and other citizens contacted Milum to complain about the appropriateness of the "Butt and Fart Books." (Call Log, Dkt. 59-1, at 72; Complaint Logs, Dkt. 59-1, at 77–89). By August 5, 2021, Commissioners Cunningham and Moss had contacted Milum to recommend removing them from the shelves. Milum then deleted these books from the catalog system. (Cunningham Email, Dkt. 59-1, at 74–75; Mt'g Logs, Dkt. 59-1, at 76, 92).

Similarly, between October 28, 2021, and December 22, 2021, a span of two months, Wallace and Wells had contacted Defendants Cunningham and Moss with a list of books they considered inappropriate, labeling them "pornographic filth" and "CRT and LGBTQ books" and advocating for their removal and relocation. (Wallace Emails, Dkt. 22-10, at 67–69; Wells Emails, Dkt. 22-10, at 71–72; Hr'g Tr. Vol 1, at 89:23–90:4; 97:2–100:2). Cunningham and Moss then instructed Milum, the library director, to pull out these books. (Wallace Emails, Dkt. 22-10, at 67; Wells Emails, Dkt. 22-10, at 71–72). Milum, in turn, removed some of the books and soon thereafter the library was closed for three days at the direction of the Commissioners Court, for the purpose of "checking [the] shelves for 'inappropriate' books." (Macdougall Emails, Dkt. 22-10, at 79–80; Hr'g Tr. Vol 1, at 151:1–152:13).

Admittedly, Wallace, Wells, and other complainants were members of the public, not library board members, at the time. (Hr'g Tr. Vol. 2, at 25:2–25:13). Furthermore, at least one Defendant admitted in his testimony that he did not have personal knowledge of the content of the books at issue. (Hr'g Tr. Vol. 1, at 170:23–172:1; 174:21–175:7). But by responding so quickly and uncritically,

Milum and the Commissioners may be seen to have adopted Wallace's and Wells's motivations. The Court finds that Plaintiffs have clearly shown that Defendants' decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells objected.

Defendants aver that any cataloguing and removal that occurred was simply part of the library system's routine weeding process, for which Milum was ultimately responsible. (Hr'g Tr. Vol. 1, at 82:8–82:16). Yet Milum testified that the books that she pulled were books that Wallace, Wells, or the Commissioners identified as "inappropriate." (Hr'g Tr. Vol. 1, at 83:5–84:7). The Commissioners, her superiors and final policymakers with power over the library system,[5] instructed her to review the books—and even to remove some of them—based on people's perception of their content or viewpoints. (Hr'g Tr. Vol. 1 at 68:15-18). The short amount of time between the complaints, commissioners' actions, and Millum's removal strongly suggests that the actions were in response to each other. . Plaintiffs have made a clear showing about what Defendants' substantial motivations may have been and how these may have led to the book removals.

Finally, Defendants argue, as they did in their motion to dismiss, that even if their actions amount to viewpoint discrimination, the library's weeding decisions are only subject to rational-basis review. Not so. The Fifth Circuit's precedent recognizing a right to access to information is not "nonsense." (Post-Hr'g Corr. Resp., Dkt. 100, at 25); *see also Campbbell*, 64 F.3d at 189–90 (finding that the "decision to remove [books] must withstand greater scrutiny within the context of the First Amendment than would a decision involving a curricular matter."). Defendants' attempts to convince the Court otherwise simply confirm what the Court already addressed in Defendants'

[5] Tex. Const. art. 5, § 18(b) ("[T]he County Commissioners Court . . . shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State[.]"); Tex. Loc. Gov't Code. § 323.006 ("The county library is under the general supervision of the commissioners court."); *see also Doe AW v. Burleson Cnty.*, No. 1:20-CV-00126-SH, 2022 WL 875912, at *4 (W.D. Tex. Mar. 24, 2022) (holding county commissioners court has final policymaking authority over all areas entrusted to them by the state constitution and statutes).

motion to dismiss: that "content discrimination is permissible and inevitable in library-book selection." (Post-Hr'g Corr. Resp., Dkt. 100, at 25). It does not follow from this proposition that such discrimination is equally permissible in removal decisions. To hold otherwise would be to entirely disregard *Campbell*.

b. Content Discrimination

Even if Plaintiffs had not shown a likelihood of success on their viewpoint discrimination claim, the Court finds that Plaintiffs clearly met their burden to show that these are content-based restrictions that are unlikely to pass constitutional muster. Content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). A restriction is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. But, as discussed above, multiple Defendants acknowledged during the hearing that each of the books in question were slated for review (and ultimately removal) precisely because certain patrons and county officials complained that their contents were objectionable.[6]

Although Defendants now argue that each of these books were subject to routine "weeding" from the library's catalogue based on content-neutral factors, Plaintiffs have offered sufficient evidence to suggest this post-hoc justification is pretextual. Whether or not the books in fact qualified for "weeding" under the library's existing policies,[7] there is no real question that the

[6] Hr'g Tr. Vol. 1 at 127:24-128:5; *see also* Ex. 52 at 1-2; Ex. 2A; Ex. 2; Hr'g Tr. Vol. 1 at 66:9-14 (Butt and Fart books); Hr'g Tr. Vol. 1 at 70:13-18, 71:9-15; Ex. 19 (*In the Night Kitchen*, and *It's Perfectly Normal*); Hr'g Tr. Vol. 1 at 82:3-10, 82:24-83:3, 84:12-21, 94:23-25 (LGBTQ and CRT books).

[7] The record contains competing testimony on this point. Milum stated in her declarations and testimony that she weeded the 17 disputed books because she believed that each of them met the library's criteria for weeding under the CREW and MUSTIE factors. *See* Milum Decl., Dkt. No. 49-1, at ¶¶ 8, 12–16; Hr'g Tr. Vol. 2 95:16–106:20. In contrast, Tina Castelan stated that Milum's decisions to weed some of disputed books violated the library's weeding policies. *See id.* at 6–9; Hr'g Tr. Vol. 1 at 33:15–45:18. It appears to be

targeted review was directly prompted by complaints from patrons and county officials over the contents of these titles. Defendants' contemporaneous communications, as well as testimony at the hearing, amply show this. For example, Ms. Wells testified at the hearing that "if there was any book that [in her opinion] was harmful to minors that was in the library, I would speak with the director, [Milum] to have it removed." (Hr'g Tr. Vol. 1 at 205:9-14). In turn, Milum acknowledged that "the reason that [the books] were selected to be weeded and reviewed to be weeded, as opposed to other books, w[as] because Ms. Wallace had them on her list" of objectionable books. (*Id.* at 82:24-83:3). And, notably, there is no evidence that any of the books were slated to be reviewed for weeding prior to the receipt of these complaints; to the contrary, many other books eligible for weeding based on the same factors appear to have remained on the shelves for many years.[8]

Defendants' insist that "[t]he notion that librarians cannot engage in 'content discrimination' when weeding books is absurd" because "[w]eeding inherently involves content discrimination." This is unavailing. In the context of weeding, the test the Fifth Circuit stated in *Campbell* provides flexibility for the type of content considerations Defendants warn about. In a book removal case, "the key inquiry . . . is the [library] officials' substantial motivation in arriving at the removal decision." *Campbell*, 64 F.3d at 190. Although some of the MUSTIE criteria consider content, overall, the library weeding process appears to be directed towards managing the size and quality of the library collection. That is, the Llano County Library System has discretion to weed books, using professional criteria, when its "substantial motivation" is to curate the collection and allow space for new volumes. As long as its motivation remains as such, the library system may cull and curate its collection as needed.

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undisputed that, given its subjective nature, reasonable minds may disagree over how to apply the CREW and MUSTIE criteria. *Id.* at 127:6-8.

[8] *Compare* Ex. 52 *with* Ex. 79A; *see also, e.g.*, Hr'g Tr. Vol. 2 at 127:21-25, 136:4-7.

Conversely, when the governments' "substantial motivation" appears to be a desire to prevent access to particular views, like in this case, Defendants' actions deserve greater First Amendment scrutiny. The Court finds that Plaintiffs made a clear showing that the "substantial motivation" for Defendants actions appears to be discrimination, as opposed to mere weeding.

Under the strict scrutiny analysis, the Defendants bear the burden of proving that the removals are narrowly tailored to serve a compelling interest. *Reed*, 135 S. Ct. at 2226; *Turner Broad. Sys.*, 512 U.S. at 664–65. Applying this standard, the Court finds it substantially likely that the removals do not further any substantial governmental interest—much less any compelling one. Indeed, the Defendants' briefing doesn't argue that their actions can survive heightened scrutiny, nor have they set forth any governmental interests that are served by the removals. On this record, the Court will not endeavor to guess what interests Defendants may eventually proffer. As content-based restrictions on Plaintiffs' right to receive information, Plaintiffs have clearly shown the removals are likely to be constitutionally infirm because they are not narrowly tailored to serve a compelling state interest.

2. Irreparable Harm

The "loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury." *Texans for Free Enter v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013). "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Opulent Life Church*, 697 F.3d at 295. Because Plaintiffs have clearly shown Defendants actions likely violate their First Amendment right to access to information, they have clearly shown they are suffering irreparable harm.

Attempting to deny this harm, Defendants contend that Plaintiffs can access every one of the books through either the InterLibrary Loan system, Bibliotheca, or the library system's in-house checkout system. None of these options mitigate the constitutional harm Plaintiffs are suffering. First,

the InterLibrary Loan system is not a replacement for access to books within the Llano County Library System. Patrons must pay for postage and wait for weeks for books to arrive. (Milum Decl., Dkt. No. 49-1, at 10; Hr'g Tr. Vol. 2 at 124:24-125:1). Furthermore, to allow the InterLibrary loan system to stand in for purported "access" to the books would absolve any government official from liability for unconstitutional book removals, no matter how egregiously unconstitutional their intent, as long as the official could find, *ex post facto*, a library or network from which it could secure a loan.

Likewise, access through Bibliotheca is not a replacement for access to the physical books at issue. E-books and physical books are tangibly different. Using Bibliotheca requires access to a compatible device, and most of the books are not available through Bibliotheca at all. (Milum Decl., Dkt. 49-1, at 6–7; Hr'g Tr. Vol. 2 at 47:2-4). Furthermore, as early as March 2022, Defendants were trying to remove books they had already purchased through Bibliotheca, due to concerns about their appropriateness. (Wallace Depo., Dkt. 59-1, at 114:4-10, 126:12-15; Bibliotheca Emails, Dkt. 59-1, at 104–107). Even if the Court were to find that access to these e-books is equivalent to access to the physical books, there is sufficient evidence to raise concerns that the books would not remain in place without an injunction.

The Court's reservations about Defendants' in-house checkout system are even greater. As noted above, the books that are supposedly "available" for checkout are absent from the library's catalog. They are, to the extent they exist, not accessible from the library shelves. A patron must, notwithstanding the fact that the books' existence is not reflected in the library catalog, know that the books can be requested. They must then make a special request for the book to be retrieved from behind the counter. This is, of course, an obvious and intentional efford by Defendants to make it difficult if not impossible to access the materials Plaintiffs seek. This ongoing infringement warrants an interim remedy precisely because the harm is ongoing and irreparable.

3. Balance of Equities and Public Interest

As to the last two factors, Defendants once again insist that the balance of equities and public interest cannot support an injunction because Plaintiffs have not, will not, and could not have suffered constitutional harm. This Court found otherwise. "[I]njunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter.*, 732 F.3d at 539 (quoting *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). As Plaintiffs request an injunction protecting their First Amendment Freedoms, and there is no evidence that the equities tilt in Defendants favor, the Court finds Plaintiffs have clearly shown these factors are in their favor.

4. Remedy

Although Plaintiffs have demonstrated they are entitled to a preliminary injunction, their evidence cannot sustain some of the remedies they seek. The evidence demonstrates that, without an injunction, Defendants will continue to make access to the subject books difficult or impossible. Defendants must therefore be prevented from removing the books, and the books at issue be made available for checkout through the Library System's catalogs. (Proposed Ord., Dkt. 22-12[9]).

However, Plaintiffs focused on book removals, not on relocations. Therefore, the Court cannot find that they are entitled to their request to return the physical books to their original locations. The Court will not invade the prerogative of the Library with regard to proper placement of books or restrictions on access.

Although Plaintiffs originally requested a preliminary injunction regarding access to OverDrive, the Court will not grant the relief because it has dismissed those claims. Finally, Plaintiffs requested relief related to their Due Process claim but did not actually present any arguments or evidence on the issue. Accordingly, the Court will deny the motion as to their request for access to the library board meetings.

[9] Librarian Milum testified at the hearing that the Library System does not plan to weed or add any books to the Library for the pendency of this litigation; therefore, an injunction preventing book removals is unlikely to be burdensome. (Hr'g Tr. Vol. 1, at 130:5–15).

IV. CONCLUSION

For the reasons given above, **IT IS ORDERED** that Defendants' motion to dismiss, (Dkt. 42), is **GRANTED. IN PART** and **DENIED IN PART.** Plaintiffs' OverDrive related claims are dismissed **WITHOUT PREJUDICE**. Defendants' motion is denied as to all other claims.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Preliminary Injunction, (Dkt. 22), is **PARTIALLY GRANTED**. **IT IS ORDERED THAT**:

1. Within twenty-four hours of the issuance of this Order, Defendants shall return all print books that were removed because of their viewpoint or content, including the following print books, to the Llano County Libraries:
    a. *Caste: The Origins of Our Discontent* by Isabel Wilkerson;
    b. *Called Themselves the K.K.K: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti;
    c. *Spinning* by Tillie Walden;
    d. *In the Night Kitchen* by Maurice Sendak;
    e. *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie Harris;
    f. *My Butt is So Noisy!*, *I Broke My Butt!*, and *I Need a New Butt!* by Dawn McMillan;
    g. *Larry the Farting Leprechaun*, *Gary the Goose and His Gas on the Loose*, *Freddie the Farting Snowman*, and *Harvey the Heart Has Too Many Farts* by Jane Bexley;
    h. *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings;
    i. *Shine* by Lauren Myracle;
    j. *Under the Moon: A Catwoman Tale* by Lauren Myracle;

k. *Gabi, a Girl in Pieces* by Isabel Quintero; and

l. *Freakboy* by Kristin Elizabeth Clark.

2. Immediately after returning the books to the Libraries as ordered in (1) above, Defendants shall update all Llano County Library Service's catalogs to reflect that these books are available for checkout.

3. Defendants are hereby enjoined from removing any books from the Llano County Library Service's catalog for any reason during the pendency of this action.

SIGNED on March 30, 2023.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 6, 2024
Lyle W. Cayce
Clerk

No. 23-50224

LEILA GREEN LITTLE; JEANNE PURYEAR; KATHY KENNEDY; REBECCA JONES; RICHARD DAY; CYNTHIA WARING; DIANE MOSTER,

Plaintiffs—Appellees,

versus

LLANO COUNTY; RON CUNNINGHAM, *in his official capacity as Llano County Judge*; JERRY DON MOSS, *in his official capacity as Llano County Commissioner*; PETER JONES, *in his official capacity as Llano County Commissioner*; MIKE SANDOVAL, *in his official capacity as Llano County Commissioner*; LINDA RASCHKE, *in her official capacity as Llano County Commissioner*; AMBER MILUM, *in her official capacity as Llano County Library System Director*; BONNIE WALLACE, *in her official capacity as Llano County Library Board Member*; ROCHELLE WELLS, *in her official capacity as Llano County Library Board Member*; RHODA SCHNEIDER, *in her official capacity as Llano County Library Board Member*; GAY BASKIN, *in her official capacity as Llano County Library Board Member*,

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:22-CV-424

Before WIENER, SOUTHWICK, and DUNCAN, *Circuit Judges*.

JACQUES L. WIENER, JR., *Circuit Judge*:

The dirtiest book in all the world is the expurgated book.[1]

Plaintiffs-Appellees, seven patrons of the Llano County library system ("Plaintiffs"), brought this suit against Defendants-Appellants Llano County, the members of the County's Commissioners Court, the County's library system director, and the library board (collectively, "Defendants"). Plaintiffs claim that Defendants violated their First Amendment right to access information and ideas by removing seventeen books based on their contents and messages. The district court granted Plaintiffs' request for a preliminary injunction, requiring Defendants to return "all print books that were removed because of their viewpoint or content" and enjoining Defendants from "removing any books . . . for any reason during the pendency of this action." Defendants appeal. For the reasons to follow, we MODIFY the language of the injunction to ensure its proper scope, but otherwise AFFIRM.

I. Facts

Libraries must continuously review their collection to ensure that it is up to date and to make room for new acquisitions. Like many libraries, the Llano County library system uses the "Continuous Review, Evaluation and Weeding" ("CREW") process. This is a standardized method of evaluating a library's collection and removing outdated or duplicated materials (also known as "weeding"), according to objective, neutral criteria. Llano County applies the "MUSTIE" factors in weeding books, as recommended by experts in the field, under which a book is evaluated for whether it is (1) "Misleading and/or factually inaccurate," (2) "Ugly (worn out beyond

[1] Walt Whitman (1888), *in* HORACE TRAUBEL, WITH WALT WHITMAN IN CAMDEN 124 (1906).

mending or rebinding)," (3) "Superseded by a new edition or a better source," (4) "Trivial (of no discernable literary or scientific merit)," (5) "Irrelevant to the needs and interests of the community," or (6) "Elsewhere (the material may be easily borrowed from another source)." Weeding decisions are made based on "some combination of these criteria – that is, an item will probably not be discarded based on meeting only one these criteria."

Llano County's public library system has three physical branches, respectively located in Llano, Kingsland, and Buchanan Dam. The library also offers access to e-books and audiobooks through a digital service called Bibliotheca. Amber Milum serves as the director of the library system. *See* TEX. LOCAL GOV'T CODE § 323.005(a) (providing for the appointment of a "county librarian"). The library is under the general supervision of the County's Commissioners Court, which is led by Judge Ron Cunningham. *See id.* § 323.006.

In August 2021, Llano resident Rochelle Wells, together with Eva Carter and Jo Ares, complained to Cunningham about "pornographic and overtly sexual books in the library's children's section." They were specifically concerned with several books about "butts and farts." Wells had been checking out those books continuously for months to prevent others from accessing them. As library director, Milum had initially ordered those books because she thought, based on her training, that they were age appropriate. Because of the complaints, Cunningham told Milum to remove the books from the shelves. Commissioner Jerry Don Moss also requested that Milum remove the books, telling her that the next step would be going to court, which would lead to bad publicity, and advising her to "pick her battles." She followed those instructions and removed the "butt and fart" books from both the library shelves and the catalog.

A few months later, in response to further complaints, Cunningham directed Milum to immediately pull all books from the shelves that "depict any type of sexual activity or questionable nudity." That direction came via a forwarded email that Cunningham had received from a constituent named Bonnie Wallace. Wallace had sent Cunningham a list of books in the Llano County library system that appeared on Texas Representative Matt Krause's list of objectionable material, referring to the books as "pornographic filth." After receiving that list ("the Wallace list") from Cunningham, Milum pulled the books from the shelves, allegedly to "weed" them based on the traditional MUSTIE factors. Milum testified that she would not have pulled the books had it not been for her receipt of the Wallace list. In fact, she had pulled no other books for review during that time period. By the end of 2021, seventeen books—all on the Wallace List—had been removed from the Llano County library system entirely.

Loosely grouped, those books are:

- Seven "butt and fart" books, with titles like *I Broke My Butt!* and *Larry the Farting Leprechaun*;
- Four young adult books touching on sexuality and homosexuality, such as *Gabi, a Girl in Pieces*;
- *Being Jazz: My Life as a (Transgender) Teen* and *Freakboy*, both centering on gender identity and dysphoria;
- *Caste* and *They Called Themselves the K.K.K.*, two books about the history of racism in the United States;
- Well-known picture book, *In the Night Kitchen* by Maurice Sendak, which contains cartoon drawings of a naked child; and
- *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health*.

In January 2022, the existing library board was dissolved and a new board was created. Cunningham appointed Wells and Wallace to the new board. The new board implemented several policy changes, including prohibiting Milum from attending their meetings and requiring her to seek approval before purchasing any new books.

Defendants' attorney donated copies of the seventeen books back to the library after the inception of this litigation. However, today the books are not on shelves nor in the catalog system. Instead, if a patron wishes to access them, he or she must approach the desk and ask the librarian for them. Their existence has not been advertised in any way: Without reading the briefs in this lawsuit, there is no way to know that the books are available. Defendants characterize this as an "in-house checkout system," which has been traditionally used to let people read reference books inside the library. However, unlike the seventeen at issue here, those books are available in the catalog.

II. Procedural History

Plaintiffs, seven patrons of the library, brought this suit, alleging that Defendants removed the seventeen books because they disagreed with the books' content, in violation of the First Amendment.[2] Plaintiffs sought a preliminary injunction requiring, among other things, that Defendants replace the seventeen books. In response, Defendants moved to dismiss Plaintiffs' suit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). After a two-day evidentiary hearing, the district court largely denied

[2] Plaintiffs also brought a due process claim under the Fourteenth Amendment. However, that claim is not at issue in this appeal because the district court did not rely on it in granting the preliminary injunction.

Defendants' motion to dismiss and granted Plaintiffs' motion for a preliminary injunction.

The district court first held that Plaintiffs had standing to bring the case, including assertion of a constitutional injury in the form of an inability to check out the contested books. The court rejected Defendants' argument that Plaintiffs' claims were mooted because they could access the books through Bibliotheca or the in-house checkout system.[3] The district court next held that Plaintiffs' complaint adequately pleaded a First Amendment claim upon which relief could be granted, noting that while public libraries have "broad discretion" to curate the content of their collections, this discretion is not absolute. *See United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 204 (2003) (plurality opinion) (hereinafter "*ALA*"). The court therefore adopted a standard from our 1995 decision *Campbell v. St. Tammany Parish School Board*, in which we held that libraries may not "remove books from school library shelves 'simply because they dislike the ideas contained in those books.'" 64 F.3d 184, 188 (5th Cir. 1995) (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion)). "The key inquiry in a book removal case," we wrote in *Campbell*, is whether the government's "substantial motivation" was to deny library users access to "objectionable ideas." *Id.* at 187, 190. The district court held that Plaintiffs had adequately pled that "Defendants' conduct was substantially motivated by a desire to remove books promoting ideas with which [they] disagreed."

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[3] Initially, Plaintiffs also brought a claim relating to OverDrive, the online book database that the library had used prior to Bibliotheca. The district court granted Defendants' motion to dismiss Plaintiffs' "OverDrive-related claims" because they were mooted by the County's new contract with Bibliotheca.

The trial court then considered Plaintiffs' application for a preliminary injunction. It held that Plaintiffs were likely to succeed on the merits of their claim, addressing both viewpoint and content discrimination. As to viewpoint discrimination, applying the standard from *Campbell*, the court found that Defendants' "likely motivat[ion]" in removing the books was "a desire to limit access to the viewpoints" with which they disagreed. It saw Defendants' claim that the removals were part of the library's routine weeding process as a post hoc and pretextual rationalization. The court also determined that Plaintiffs were likely to succeed on the merits of their First Amendment claim through a content discrimination analysis, as the removal decisions would not survive strict scrutiny.

Finding the remaining preliminary injunction factors to be satisfied, the district court ordered Defendants to "(1) return all print books that were removed because of their viewpoint or content," including the seventeen books at issue; (2) "update all Llano County Library Service's catalogs to reflect that these books are available for checkout"; and (3) refrain from "removing any books from the Llano County Library Service's catalog for any reason during the pendency of this action."

Defendants timely appealed the district court's injunction. They also moved to expedite the appeal and for an injunction pending appeal. A motions panel of our court agreed to expedite and carried the motion for an injunction with the case. When this panel was assigned the case, we granted an administrative stay of the district court proceedings pending our decision.

III. Standard of Review

"We review a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*." *Rest. Law Ctr. v. U.S. Dep't of Lab.*, 66 F.4th 593, 597 (5th Cir. 2023) (citation omitted). A factual finding is not clearly erroneous if it is "plausible in light

of the record viewed in its entirety . . . even though we may have weighed the evidence differently." *Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1116 (5th Cir. 2021) (citation omitted). To obtain the "extraordinary remedy" of a preliminary injunction, the movant must show "(1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest." *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 219 (5th Cir. 2010).

IV. Analysis

The crux of this appeal concerns the appropriate balance between a library's necessary discretion in making collection decisions and the rights of its patrons to access information and ideas. Although this is undoubtedly a hot-button issue at present, we answered the question in 1995 in *Campbell*, a directly applicable decision that circumscribes the boundaries of our analysis today. The district court, applying the correct standard, did not abuse its discretion in granting Plaintiffs' request for a preliminary injunction. We explain why below.

A. The First Amendment Limits Public Libraries' Discretion to Shape Their Collections

We first outline the relevant cases to trace the contours of the First Amendment as it applies to libraries and book removal. While the First Amendment may most famously shield freedom of speech, it also protects "the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This right is a "necessary predicate to the recipient's meaningful

exercise" of other rights protected by the First Amendment. *Pico*, 457 U.S. at 867 (plurality opinion).[4]

In *Pico*, the Supreme Court considered whether school officials acted in violation of the First Amendment when they removed what critics called "just plain filthy" books from public school library shelves. *Id.* at 857 (plurality opinion). A plurality of the Court observed that, because students do not "shed their constitutional rights . . . at the schoolhouse gate," school officials must discharge their discretionary functions "within the limits and constraints of the First Amendment." *Id.* at 865 (plurality opinion) (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969)). The Court held that while school boards have discretion to "determine the content of their school libraries," such discretion "may not be exercised in a narrowly partisan or political manner." *Id.* at 870 (plurality opinion). School officials "may not remove books from school library shelves simply because they dislike the ideas contained in those books." *Id.* at 872 (plurality opinion). If they do so with the intent to deny "access to ideas with which [they] disagree[], and if this intent [is] the decisive factor in [their] decision, then

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[4] The dissent asserts that *Stanley*'s "right to receive information and ideas" is only relevant in a private context. It is true that the only quasi-binding precedent to apply this right to public libraries is one of *Pico*'s several opinions. Note, however, that this court has applied *Stanley*'s rule in the context of prison libraries, *see Mann v. Smith*, 796 F.2d 79, 83 n.3 (5th Cir. 1986), and other circuits have applied it to public libraries, *see Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992). And regardless, the Supreme Court has applied *Stanley* in various other non-private contexts, rendering the dissent's concern about extending its holding inapt. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (attending criminal trials); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (receiving advertisements with prescription drug prices); *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (hearing a lecturer speak).

[they] have exercised their discretion in violation of the Constitution."[5] *Id.* at 871 (plurality opinion).[6]

We had an opportunity to apply this Supreme Court guidance in *Campbell*. There, school officials had removed the book *Voodoo & Hoodoo* from the school library after parents complained that the book was dangerous. 64 F.3d at 186–87. We affirmed the principle that the "key inquiry in a book removal case" is the remover's "substantial motivation in arriving at the removal decision." *Id.* at 190. The record, however, was not sufficiently developed at the summary judgment stage to determine whether "the single decisive motivation" behind the removal decision was to "deny students access to ideas with which the school officials disagreed." *Id.* at 188, 191. Thus, while the circumstances surrounding the removal of *Voodoo & Hoodoo* could not "help but raise questions regarding the constitutional validity of [the] decision," we remanded the case to the district court for further factual consideration. *Id.* at 191.

Also relevant to our analysis today is the Supreme Court's 2003 *American Library Association* decision. That case addressed a federal law granting public libraries money for internet access, provided that they install computer filters to block material harmful to children. 539 U.S. at 201. A

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[5] A "decisive factor" is a "'substantial factor' in the absence of which the opposite decision would have been reached." *Pico*, 457 U.S. at 871 n.22 (plurality opinion).

[6] Although *Pico* was a highly fractured opinion, the Supreme Court has clarified that "all members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). We have said that while "the constitutional analysis in the *Pico* plurality opinion does not constitute binding precedent, it may properly serve as guidance in determining whether the . . . removal decision was based on constitutional motives." *Campbell*, 64 F.3d 189. Our opinion in *Muir v. Alabama Educational Television Commission* does not compel an alternative result. *See id.* (citing *Muir*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (en banc)).

plurality of the Court rejected a facial First Amendment challenge to the law. *See id.* at 198–99 (plurality opinion). The yet again sharply divided Court (with a four-judge plurality, two concurrences, and three dissents) did so for different reasons. Justice Rehnquist, writing for the plurality, emphasized public libraries' "broad discretion" in shaping their collections, writing that it is the librarian's responsibility to "separate out the gold from the garbage." *Id.* at 204 (plurality opinion) (quoting W. KATZ, COLLECTION DEVELOPMENT: THE SELECTION OF MATERIALS FOR LIBRARIES 6 (1980)). Justice Kennedy focused not on libraries' discretion but instead on the fact that a librarian could quickly unblock material upon request, rendering any burden on patrons insignificant. *Id.* at 214–15 (Kennedy, J., concurring). Finally, Justice Breyer's concurrence was concerned with "fit": the relative burden that the law placed on library patrons versus the government's legitimate interests in protecting young library patrons from inappropriate material. *Id.* at 220 (Breyer, J., concurring). There were very few "common denominators" between these three opinions which would "provide a controlling rule that establishes or overrules precedent." *See Whole Woman's Health v. Paxton*, 972 F.3d 649, 652 (5th Cir. 2020) (internal quotation marks and citation omitted). To the extent that one exists, we see it as an agreement that libraries must consider content to some degree in selecting material. But we still hesitate to ascribe *ALA* with significant precedential power, such that it could have modified the clear rule that we announced in *Campbell*.

From these three cases, we glean the following rules. Librarians may consider books' contents in making curation decisions. *Id.* at 205 (plurality opinion). Their discretion, however, must be balanced against patrons' First Amendment rights. *Pico*, 457 U.S. at 865 (plurality opinion). One of these rights is "the right to receive information and ideas." *Stanley*, 394 U.S. at 564. This right is violated when an official who removes a book is

"substantially motivated" by the desire to deny "access to ideas with which [they] disagree[]." *Pico*, 457 U.S. at 871 (plurality opinion); *see also Campbell*, 64 F.3d at 191. To be sure, content is necessarily relevant in removal decisions. *ALA*, 539 U.S. at 205 (plurality opinion). But a book may not be removed for the sole—or a substantial— reason that the decisionmaker does not wish patrons to be able to access the book's viewpoint or message. *Campbell*, 64 F.3d at 191. Thus, a librarian who removes the 7th Edition of a Merriam-Webster dictionary in favor of the 8th Edition does not act unconstitutionally simply because he or she considers the books' content and prefers the new edition. They may remove the 7th Edition with the intent to eliminate superfluous editions to make room for new volumes, or merely because the content is superseded by the 8th Edition. Similarly, a book by a former Grand Wizard of the K.K.K., which hasn't been checked out in years and is discovered by a librarian during routine weeding, could be removed based on lack of interest and poor circulation history.

We agree with Defendants that public forum principles are "out of place in the context of this case." *ALA*, 539 U.S. at 205 (plurality opinion). In *ALA*, the plurality explained in dicta that forum analysis is inapplicable because "[a] public library does not acquire internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak." *Id.* at 206 (plurality opinion). But that is not what Plaintiffs argue here. They are not authors who seek to have their books included in the library's collection, but instead are patrons who seek to exercise their right to receive information.[7] This distinction is relevant to the applicability of forum

[7] This also distinguishes many of the cases cited by the dissent. *See, e.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 465 (2009) (plaintiff was organization seeking

principles. In *Chiras v. Miller*, a textbook author and a student brought suit against a state board of education that decided to select certain textbooks over others. 432 F.3d 606, 607 (5th Cir. 2005). A panel of our court relied on *ALA* and found that forum analysis did not apply. *Id.* at 615. We did so on consideration of whether there was a "forum to which Chiras [the textbook author] might assert a right of access under the First Amendment." *Id.* at 618. But, we wrote, "[t]he conclusion that no forum exists in this case does not necessarily preclude . . . Appellant Rodriguez's asserted right as a student to receive the information in Chiras' textbook from the school." *Id.*

The dissent—like Defendants—attempts to distinguish *Pico* and *Campbell* from *ALA* and the case at hand. Each of the reasons for doing so is without merit; all four cases are harmonizable. First, our colleague believes that *Campbell*'s focus on the "unique role of the school library" circumscribes its applicability. *See Campbell*, 64 F.3d at 188 (quoting *Pico*, 457 U.S. at 869 (plurality opinion)). It is beyond dispute that there are unique considerations involved in balancing the discretion necessary for collection curation against students' First Amendment rights. *See Pico*, 457 U.S. at 879 (Blackmun, J., concurring). But if the principles enshrined in *Pico* and *Campbell* apply in the education context, in which particular free speech principles are restricted because of school officials' need to control the curriculum and school environment, then they apply with even greater force outside of the education context, where no such limitations exist. *See Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 3d 530, 548 (N.D. Tex. 2000). In emphasizing that students do not "shed their constitutional rights . . . at the schoolhouse gate," the Court in *Pico* necessarily acknowledged that rights outside the school context are even more robust. *See Pico*, 457 U.S. at 865

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to create and donate monument to public park); *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 26 (D.C. Cir. 2005) (same).

(plurality opinion) (quoting *Tinker*, 393 U.S. at 506). The Court in *Pico* also expressly emphasized that its holding is limited to "*library* books, books that by their nature are optional rather than required reading," as opposed to curricular materials. *Id.* at 862 (plurality opinion). This rendered the unique constitutional concerns of the classroom immaterial to the case. *See id.* ("Our adjudication of the present case thus does not intrude into the classroom.").[8] As we noted in *Campbell*, "the high degree of deference accorded to educators' decisions regarding curricular matters diminishes when the challenged decision involves a noncurricular matter." 64 F.3d at 188. Our colleague's worry about "transplanting *Campbell* into the realm of public libraries" is therefore misplaced, as we are already bound by its reasoning in and out of the school context.

The dissent next insists that *ALA* prevents us from applying *Campbell*, as *Campbell*'s "substantial motivation" test is incompatible with *ALA*'s recognition of public libraries' "broad discretion" in collection curation. First, as we noted above, the badly fractured nature of *ALA*'s plurality opinion circumscribes its precedential effect. We are skeptical that five Justices would have agreed with the "broad discretion" language of the plurality. Further, "broad discretion" is not the same as "unlimited discretion." The Supreme Court recognized in *Pico* that officials do not have "absolute discretion to remove books from their school libraries." 457 U.S. at 869 (plurality opinion). The hypothetical posed by the dissent is inapt: If a librarian exercises his or her discretion in removing a book promoting Holocaust denial, as allegedly allowed by *ALA*, it does not necessarily follow

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[8] We discussed this distinction in *Chiras v. Miller*, in which we declined to apply *Pico* to a situation involving the selection of a textbook for use in the classroom, as *Pico* concerned "the removal of an *optional* book from the school library." 432 F.3d at 619 (emphasis added).

that "the book is being removed because the library dislikes the ideas in it," as forbidden by *Campbell*. Instead, the librarian might be removing the book based on other constitutional considerations, such as the accuracy of the content. Although a public library *does* have discretion to consider books' content in shaping its collection, when such discretion is exercised via unconstitutional motivations—*i.e.*, a desire to "prescribe what shall be orthodox,"—the protections of the First Amendment necessarily come into play. *Pico*, 457 U.S. at 872 (plurality opinion) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The dissent's second justification for rejecting *Campbell*, then, is also unpersuasive.

Finally, the dissent contends that, even if *Campbell* were to apply in the public library context, the district court's application of the case does not comport with its holding. Our colleague sees the district court's use of strict scrutiny for content-related decisions as being in conflict with *Campbell*'s suggestion that removing "pervasively vulgar" or "educational[ly] [un]suitable" books would not be unconstitutional. *See Campbell*, 64 F.3d at 188–89 (quoting *Pico*, 457 U.S. at 871 (plurality opinion)). The district court's opinion is somewhat imprecise on the difference between viewpoint and content discrimination and the role that *Campbell*'s substantial-motivation test plays in each analysis. But *Campbell*'s rule holds true regardless: if the remover's motivation is to deny access to ideas with which he or she disagrees, the remover violates the Constitution. *Id.* at 188. Even if this decision were subject to only the lowest level of scrutiny, the government has no legitimate interests furthered by removal. We therefore hold that if a government decisionmaker removes a book with the substantial motivation to prevent access to particular points of view, he or she violates the First Amendment, and no further analysis is required.

Before the district court, Defendants also asserted that their actions in selecting books for library shelves constituted government speech, to which

the Free Speech Clause does not apply. The district court disagreed, explaining that it was bound by *Campbell*'s application of the First Amendment to library collection decisions.[9] Defendants have not pressed this theory on appeal, although our dissenting colleague remains convinced.[10]

While "[t]he Free Speech Clause . . . does not regulate government speech," collection decisions are not such speech. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). Nowhere in *Campbell*, which is binding on us, did we suggest that a public official's decision to remove a book from a school library was government speech. *See* 64 F.3d at 190. The choice to do so is subject to the First Amendment's limitations. *See id.* at 188. The cases cited by our dissenting colleague, like *Forbes* and *Finley*, stand for the proposition that the government requires extensive discretion in "deciding

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[9] The district court also distinguished between cases cited by Defendants about the initial selection of materials versus those regarding book removal, holding that only the latter were relevant to the case at hand. We decline to expressly address the relevance of this distinction because *Campbell*'s clear application renders it unnecessary for the scope of our review today. We note that it is entirely possible that a book with a strong viewpoint, initially protected on selection, might later be constitutionally removed if, *inter alia*, it becomes damaged or is not checked out.

[10] Plaintiffs contend that Defendants have waived their government-speech argument by not raising it in their opening brief to this court. Generally, "a party waives any argument that it fails to brief on appeal." *United States v. Whitfield*, 590 F.3d 325, 346 (5th Cir. 2009). But this rule is not absolute; whether waiver applies "depends on the nature of the issue." *Stramaski v. Lawley*, 44 F.4th 318, 326 (5th Cir. 2022). Our dissenting colleague sees the question of government speech as inextricably bound up in the issue of how the First Amendment applies to a library's collection decisions, such that we cannot address one without the other. *See id.* (considering "the unasked question of whether the doctrine even applies"). Although we are not so confident in the inevitability of the government speech theory, we consider the question because of its import. *See id.* at 326 (explaining that the issues which we may consider are "not limited to the particular legal theories advanced by the parties"); *see also Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("[W]hat questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals.").

what private speech to make available to the public." *ALA*, 539 U.S. at 204 (plurality opinion) (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672–73 (1998) and *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 585 (1998)). We agree. But, again, this discretion is not so unfettered as to put these government actions entirely outside the ambit of the First Amendment. *See Pico*, 457 U.S. at 869 (plurality opinion) (rejecting absolute discretion). In each of these cases, the Court upheld the government's right to consider the content of private speech in deciding what to make available to the public. *See, e.g.*, *Finley*, 524 U.S. at 585 (allowing the NEA to consider a "wide variety" of funding criteria, including "the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value . . . ."). As discussed above, we agree that library personnel must necessarily consider content in curating a collection. However, the Court has nowhere held that the government may make these decisions based solely on the intent to deprive the public of access to ideas with which it disagrees. That would violate the First Amendment and entirely shield all collection decisions from challenge. *See Pico*, 457 U.S. at 871 (plurality opinion); *Campbell*, 64 F.3d at 190.[11]

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[11] The dissent cites numerous cases involving the selection of public monuments. The case at hand, however, is distinguishable based on the differences between a monument in a public park and a book on a public library shelf. In *Pleasant Grove City, Utah v. Summum*, for example, the Supreme Court held that a "City's decision to accept certain privately donated monuments . . . is best viewed as a form of government speech . . . [and as such] is not subject to the Free Speech Clause." 555 U.S. at 481. The Court considered the plaintiff's "legitimate concern" that the government-speech doctrine could be used as "a subterfuge for favoring certain private speakers over others based on viewpoint." *Id.* at 473. It held that there was nothing deceptive about the selection of monuments, however, because by placing a monument in a park the government "dramatically" endorses the monument's message, signaling that "the City intends the monument to speak on its own behalf." *Id.* The same cannot be said about library collection decisions, however, which are too numerous to keep track of and often occur behind closed doors. The Court was also

B. Defendants Likely Violated Plaintiffs' First Amendment Rights

Having laid out the foregoing principles, we conclude that resolution of this appeal requires a relatively straightforward application of *Campbell*, in which we considered direct testimony as well as circumstantial evidence in evaluating the defendants' substantial motivation. *See Campbell*, 64 F.3d at 190; *see also Pico*, 457 U.S. at 874 (plurality opinion). The seventeen books at issue here were removed after constituents complained that they were "pornographic filth" inappropriate for children. Specifically, Wallace and the other objectors were concerned about young readers accessing critical race theory, facts about sexuality, stories about gender dysphoria, and images that purportedly promote "grooming" behavior. Each of the books Milum removed were on the Wallace list. The removed books were not slated for review before the complaints were lodged, and no other books were weeded during that period. Moreover, Wallace and Wells were elevated to the newly reconstituted library board after their involvement in the complaints. "[T]he circumstances surrounding the . . . [removal] cannot help but raise questions regarding the constitutional validity of [the] decision." *Campbell*, 64 F.3d at 191; *see also Pico*, 457 U.S. at 875 (plurality opinion) (noting that the procedures used to remove the book seemed like "the antithesis of those procedures that might tend to allay suspicions regarding the [government's] motivation"). The district court, which had the opportunity to observe Milum's live testimony, found her explanations for her alleged reasons for removing the books to be contradictory and unconvincing. *See United States v. Gibbs*, 421 F.3d 352, 357 (5th Cir. 2005) (citation omitted) ("One of the

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persuaded that the government "made no effort to abridge the traditional free speech rights—the right to speak, distribute leaflets, etc.—that may be exercised . . . in [the park]." *Id.* at 474. Plaintiffs have no such recourse in the library, which is not a traditional public forum as is a park. *See Estiverne v. La. State Bar Ass'n*, 863 F.2d 371, 376 (1989).

most important principles in our judicial system is the deference given to the finder of fact who hears the live testimony of witnesses because of his opportunity to judge the credibility of those witnesses."). Each of these facts support the district court's reasonable conclusion that the books were removed because of the Defendants' complaints, and that Defendants' substantial motivation was to deny access to particular ideas. *See Pico*, 457 U.S. at 871 (plurality opinion).

The district court found that "[t]here is no real question that [Milum's] targeted review was directly prompted by complaints from patrons and county officials over the content of these titles." We agree with Defendants that the real issue here is not Milum's choice to review the books on the Wallace List, but instead is her decision to permanently remove the seventeen books. The evidence, however, demonstrates that the complaints did not merely cause Milum to pull the books for review; they were likely also the motivating factor in her decision to remove the seventeen books from the shelves permanently. Although Moss and Cunningham testified that they did not expressly direct Milum to permanently remove the books, it was not clear error for the district court to understand their communications as instructions to do just that. *See Anderson v. City of Bessamer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). The contemporaneous communications instructed that the books should be "pulled immediately," not specifying whether they should be pulled for review or forever. Further, the supervisory role of the Commissioners and the language used, such as "Please advise Commissioner Moss and I when this task has been completed," underscores the fact that Milum removed the books because she was told to do so. She did not even read the books before removing them. Although it is Milum's motivation that matters, we agree

with the district court that she likely "adopted" the motivations of the other Defendants.

Defendants aver that the books were removed through the library's routine weeding process and its application of the MUSTIE factors. A review of the evidence reveals that the district court did not clearly err in finding this reasoning to be unpersuasive. First, one of the main rationales behind the CREW process is to ensure that there is space for new books on the shelves. But the Llano County library suspended all new purchases in October of 2021, rendering this concern irrelevant. Second, Milum's alleged application of the MUSTIE factors was contradictory and inconsistent. For example, Milum testified that *Freakboy* was weeded because it was "irrelevant," given that it had not been checked out in five years, and "elsewhere" because it was available on interlibrary loan. But Milum herself testified that a book should not be weeded for "irrelevance" simply because it had not been checked out in a while. She also testified that a book is available "elsewhere" when it is "*easily* borrowed from another source," rather than simply available anywhere, yet she did not look to see where *Freakboy* was located. Further, Milum's reasoning for weeding *Freakboy* applies to hundreds of other books in the Llano County system, but those books remain on the shelves. As another example, Milum stated that *In the Night Kitchen* was removed because it was "ugly," as the library's copy had been damaged. However, the physical evidence at trial showed otherwise.

When these explanations are stripped away, it becomes clear that Milum likely weeded these books because she was told to by those who disagreed with their message. That is not a valid reason to remove a book under the MUSTIE criteria. It was not clear error for the district court to conclude that Defendants' alternative explanations for removal were pretextual.

We note that the removal of at least some of these books could be upheld if the right justifications had been found by the district court. As we recognized in *Campbell*, "an unconstitutional motivation would not be demonstrated if the . . . officials removed the books from the . . . libraries based on a belief that the books were 'pervasively vulgar' or on grounds of 'educational suitability.'" *Campbell*, 64 F.3d at 188–89 (quoting *Pico*, 457 U.S. at 871 (plurality opinion)). But that is not what seems to have happened here. For example, Milum testified that she initially ordered the "butt and fart" books because she thought based on her training that they were age appropriate, and her "opinion about the appropriateness of these books as the head librarian never changed."[12] Our holding in this case is controlled by the district court's supportable fact-finding that Defendants' removal decisions were likely motivated by a desire to limit access to ideas with which they disagreed.

The fact that Milum did not weed every book on the Wallace list does not negate the likelihood that Defendants' substantial motivation in removing the seventeen books was a desire to limit public access to the books' viewpoints. Nor is that finding undermined by Milum's decision to weed *Being Jazz* from the Llano branch while refusing to do so at the Kingsland branch where the book had been checked out more recently. A motivation is "substantial" when in its absence "the opposite decision would have been

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[12] While the "butt and fart" books may not on their face have a clear "idea" or "viewpoint," the record reveals that they were removed because Defendants did not want readers to have access to books with pictures of naked bodies. Defendants believe that these books promote "grooming" by depicting children displaying their naked bodies to "various individuals, some of whom are adults." I see access to these images—and what Defendants say that they allegedly promote—as a viewpoint sufficient to support an unconstitutional motivation under *Campbell*. Both of my colleagues disagree, however, so our holding does not require the return of those books. Nor does it require the return of *In the Night Kitchen* or *It's Perfectly Normal*, for the same reasons.

reached." *Pico*, 457 U.S. at 871 n.22 (plurality opinion). That Milum decided to weed only those books on the Wallace list that allegedly met a MUSTIE criteria does not necessarily mean that she would not have weeded the books without an unconstitutional motivation. It is possible that "something other than Bonnie Wallace's objections was behind Milum's decision to weed those books," and that her substantial motivation in removal was still unconstitutional.

We reversed the district court in *Campbell* because there was not sufficient evidence in the summary judgment record to support a finding "as a matter of law" that the book in question was removed "substantially based on an unconstitutional motivation." 64 F.3d at 190. There are two important differences between the procedural posture of that case and this one. First, we have here the benefit of a multi-day adversarial hearing, in which the district court had the opportunity to observe witnesses under cross-examination. *See Campbell*, 64 F.3d at 190 ("[P]ermitting cross-examination probing [the removers'] justifications for removing the Book[] will enable the finder of fact to determine . . . the true, decisive motivation."); 11A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2949 (3d ed. 2023) ("When the outcome of a Rule 65(a) application depends on resolving a factual conflict by assessing the credibility of opposing witnesses, it seems desirable to require that the determination be made on the basis of their demeanor during direct and cross-examination, rather than on the respective plausibility of their affidavits."). Second, we are not deciding as a matter of law that Defendants' substantial motivation was unconstitutional, as is true on summary judgment review. Instead, we are merely holding that Plaintiffs have a substantial likelihood of ultimately succeeding on the merits. Those merits are still to be litigated in the trial court. *See All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 242 (5th Cir. 2023), *cert. granted*, 144 S.Ct. 537 (Dec. 13, 2023) ("[W]e note

that 'substantial' does not mean 'certain.'"); *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) ("A plaintiff is not required to prove its entitlement to summary judgment in order to establish a substantial likelihood of success on the merits for preliminary injunction purposes." (internal quotation marks and citation omitted)).

C. Plaintiffs Met Their Burden in Showing Other Preliminary Injunction Factors

In addition to the likelihood of success on the merits of Plaintiffs' First Amendment claim, Defendants contend that the trial court erred in holding that the remaining factors required for a preliminary injunction were met. The parties talk past each other in arguing over the relevance of these issues within the context of standing. But these questions arise not in the district court's denial of Defendants' motion to dismiss—which Defendants do not appeal—but instead in the court's issuance of the preliminary injunction. As noted above, to obtain a preliminary injunction, Plaintiffs must show that (1) they are likely to succeed on the merits, (2) they will likely suffer irreparable harm in the absence of relief, (3) the balance of the equities tip in their favor, and (4) an injunction is in the public interest. *La Union Del Pueblo Entero*, 608 F.3d at 219.

Defendants insist that Plaintiffs are unable to meet the irreparable-harm prong required for preliminary injunctive relief because they are still able to read and checkout the seventeen contested books through the library's "in-house checkout system." Defendants claim that Plaintiffs have not shown "*any* harm (let alone an 'irreparable' harm) that they will suffer from obtaining the disputed books through the library's in-house checkout system" as opposed to using the usual process. The district court held that this difference did indeed create an irreparable harm. When we review that determination for clear error, we conclude that the district court did not so

err. *See Taylor-Travis*, 984 F.3d at 1116. We agree with Defendants that the injuries to other library patrons, who may not know about the availability of the contested books, is irrelevant for this analysis. *See Jones v. District of Columbia*, 177 F. Supp. 3d 542, 546 n.3 (D.D.C. 2016) ("[T]he irreparable harm prong of the injunctive relief calculus only concerns harm suffered by the party or parties seeking injunctive relief."). But Plaintiffs have shown that they themselves will be injured by being unable to anonymously peruse the books in the library without asking a librarian for access. This burden on accessing their right to receive information is a valid First Amendment injury. *See Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 754 (1996);[13] *see also Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 307 (1965) (holding that the government acted unconstitutionally when it imposed an "affirmative obligation" on plaintiffs to request access to communist literature, which would have a "deterrent effect"). And a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). We cannot say that the district court clearly erred in concluding that Plaintiffs will be irreparably harmed in the absence of an injunction.

Neither did the district court err in evaluating the balance of the equities or the public interest. First, Defendants assert that the balance of the equities tips in their favor, since complying with the injunction will impose a

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[13] Defendants attempt to distinguish this case on the basis that, unlike cable programming, libraries "have limited shelf space and *must* relegate some materials to alternative sources such as . . . an in-house checkout system." This is a red herring that harkens back to Defendants' argument about the role of content in collection decisions. It is true that libraries must make decisions based on space constraints, but it is their motivation in making those choices that matters for the First Amendment. It is unconstitutional for the government to choose certain books for an in-house checkout system above others, simply because they wish to prevent the public from accessing ideas with which they disagree.

large burden on them, and Plaintiffs have not suffered a constitutional injury. We have held otherwise. Second, as the district court pointed out, "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (citation omitted). The district court did not abuse its discretion in concluding that the remaining factors for a preliminary injunction were met.

D. The Preliminary Injunction is Overbroad

Finally, Defendants contend that the preliminary injunction ordered by the district court is overbroad. Plaintiffs requested an injunction requiring Defendants to return the seventeen contested books to the catalog and the shelves. Their proposed order required the return of "the following print books that were removed or concealed from the Llano County Libraries in 2021 or 2022 because of their viewpoint or content," and then listed the seventeen books. In contrast, the injunction issued by the district court ordered the return of "all print books that were removed because of their viewpoint or content, *including* the following print books," then listed the seventeen books by name. Defendants complain that Plaintiffs failed to show that they are injured by the removal of any library materials other than the seventeen complained-of books. We agree. Because an injunction may go no further than what is necessary "to ensure Plaintiffs' relief," the injunction issued by the district court is overbroad to the extent that it requires the return of any books beyond the seventeen discussed herein. *See Missouri v. Biden*, 83 F.4th 350, 395 (5th Cir. 2023).

The district court's order further enjoins Defendants from "removing *any* books from the Llano County Library Service's catalog for *any* reason during the pendency of this action." That language also goes too far. "[I]t is axiomatic that an injunction is overbroad if it enjoins a defendant from

engaging in legal conduct." *Id.* There are still entirely valid and constitutional reasons to remove books from the library's shelves, such as when a patron severely damages a book. The injunction, then, is not narrowly tailored to remedy the injury of which Plaintiffs complain. *See OCA-Greater Hous. v. Texas*, 867 F.3d 604, 616 (5th Cir. 2017) (citation omitted). We will therefore modify the district court's order to reflect the limited scope of the relief.

V. Conclusion

The dissent accuses us of becoming the "Library Police," citing a story by author Stephen King. But King, a well-known free speech activist, would surely be horrified to see how his words are being twisted in service of censorship. Per King: "As a nation, we've been through too many fights to preserve our rights of free thought to let them go just because some prude with a highlighter doesn't approve of them."[14] Defendants and their highlighters are the true library police.

Government actors may not remove books from a public library with the intent to deprive patrons of access to ideas with which they disagree. Because that is apparently what occurred in Llano County, Plaintiffs have demonstrated a likelihood of success on the merits of their First Amendment claim, as well as the remaining factors required for preliminary injunctive relief. The district court's order is AFFIRMED, except that we MODIFY the district court's injunction to state:

IT IS ORDERED THAT:

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[14] Stephen King, *The Book-Banners: Adventure in Censorship is Stranger Than Fiction*, THE BANGOR DAILY NEWS (Mar. 20, 1992), https://stephenking.com/works/essay/book-banners-adventure-in-censorship-is-stranger-than-fiction.html.

1. Within twenty-four hours of the issuance of the mandate, Defendants shall return the following books to the publicly visible and accessible shelves of the Llano County Libraries:

a. *Caste: The Origins of Our Discontent* by Isabel Wilkerson;

b. *Called Themselves the K.K.K: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti;

c. *Spinning* by Tillie Walden;

d. *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings;

e. *Shine* by Lauren Myracle;

f. *Under the Moon: A Catwoman Tale* by Lauren Myracle;

g. *Gabi, a Girl in Pieces* by Isabel Quintero; and

h. *Freakboy* by Kristin Elizabeth Clark.

2. Immediately after returning the books to the Libraries as ordered in 1. above, Defendants shall update all Llano County Library Service's catalogs to reflect that those books are available for checkout.

3. Defendants are hereby enjoined from removing any books from the Llano County Library Service's publicly visible and accessible shelves and/or searchable catalog without first providing Plaintiffs with documentation of (a) the individual who decided to remove or conceal the books, and (b) the reason or reasons for that removal or concealment.

Lastly, Defendants' motions to stay the district-court proceedings pending appeal and to stay the preliminary injunction pending appeal are DENIED AS MOOT.

LESLIE H. SOUTHWICK, *Circuit Judge*, concurring in part and concurring in the judgment in part:

This court has declared that officials may not "remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 188 (5th Cir. 1995) (quotation marks and citations omitted). While that case was in the context of a school library, the First Amendment standard it announced applies outside of schools as well. Judge Wiener's thorough and nuanced opinion accurately captures the state of current law when it identifies the standard from *Campbell* as the one to apply here. I concur in that opinion's explication of the law. I part company on some of the law's application.

I find that some of the removals here satisfy the *Campbell* standard. The district court found that all removals were unconstitutional, stating: "Plaintiffs have clearly shown that Defendants' decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells objected." I disagree, first, because not all of the books express an "idea" or "viewpoint" in the sense required by the caselaw. I am referring to the items we have needed to label for clarity as the "butt and fart books." Viewpoints and ideas are few in number in a book titled "Gary the Goose and His Gas on the Loose" — only juvenile, flatulent humor. Perhaps a librarian selected the book believing the juvenile content would encourage juveniles to read. Even if that is so, I do not find those books were removed on the basis of a dislike for the ideas within them when it has not been shown the books contain any *ideas* with which to disagree.

Second, at this stage of the case, I find the motivations behind some of the removals here are likely defensible and cannot satisfy the standard for

a preliminary injunction. The district court concluded that those responsible for removing the books had effectively adopted the motivations of those objecting to the books, *i.e.*, "by responding so quickly and uncritically, Milum and the Commissioners may be seen to have adopted Wallace's and Wells's motivations." Wallace and Wells objected to the butt and fart books on the basis that they (1) promoted "grooming" of minors[1] and (2) were sexually explicit. These objections do not convert the resulting removals into viewpoint-based decisions. No controlling law prevents a librarian from exercising what might be called traditional discretion to remove certain types of *content*. *Campbell* itself acknowledged the Supreme Court's guidance that school librarians may permissibly remove books on the belief that the books were "pervasively vulgar" or were not educationally suitable. *Campbell*, 64 F.3d at 188–89 (quoting and citing *Board. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870–72 (1982) (plurality opinion)).

Whatever the outer bounds of this traditional discretion might be, I would have no difficulty in allowing the removal of a book from the children's section on the basis that it encourages children to engage in sexual activity with adults or includes sexually explicit content. At this stage of the case, I find ordering the return of such books to be error.

For similar reasons, the removals of *In the Night Kitchen* by Maurice Sendak and *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie Harris are also likely permissible. While these books may express ideas, they were removed as part of the library's efforts to

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[11] To "groom" in the sense used here, according to the Merriam-Webster Dictionary, is "to build a trusting relationship with (a minor) in order to sexually exploit them especially for nonconsensual sexual activity." *Merriam-Webster Dictionary Online*, https://www.merriam-webster.com/dictionary/groom#:~:text=%3A%20to%20clean%20and%20maintain%20the,to%20make%20neat%20or%20attractive (last accessed May 30, 2024).

respond to objections that certain books promoted grooming and contained sexually explicit material that was not appropriate for children. Whether these two books or the butt and fart books actually promoted grooming or contained sexually explicit material is irrelevant. This court's governing law focuses on the subjective motivation of the remover, *see Campbell*, 64 F.3d at 191, and the district court reasonably concluded that the removers here had adopted the motivations of the objectors.

I conclude that the plaintiffs have not met their burden to show a likelihood of success on the merits of their constitutional challenges to the removal of the butt and fart books,[2] *In the Night Kitchen*, and *It's Perfectly Normal*. The plaintiffs are, therefore, not entitled to a preliminary injunction requiring the return of those books to the Llano County Libraries.

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[2] *My Butt is So Noisy!*, *I Broke My Butt!*, and *I Need a New Butt!* by Dawn McMillan, and *Larry the Farting Leprechaun*, *Gary the Goose and His Gas on the Loose*, *Freddie the Farting Snowman*, and *Harvey the Heart Has Too Many Farts* by Jane Bexley.

STUART KYLE DUNCAN, *Circuit Judge*, dissenting:

The commission hanging in my office says "Judge," not "Librarian." Imagine my surprise, then, to learn that my two esteemed colleagues have appointed themselves co-chairs of every public library board across the Fifth Circuit. In that new role, they have issued "rules" for when librarians can remove books from the shelves and when they cannot. While I do not doubt my colleagues' good intentions, these "rules" are a disaster. They lack any basis in law or common sense. And applying them will be a nightmare.

Look no further than today's decision. The two judges in the majority, while agreeing on the rules, cannot agree on how they apply to over *half* of the 17 books *in this case*. So, according to JUDGE WIENER, a library cannot remove *It's Perfectly Normal*, a sex-education book for 10-year-olds that has cartoons of people having sex and masturbating. Op. 27. But according to JUDGE SOUTHWICK, removing that book is "likely permissible," at least "[a]t this stage of the case," because it contains "sexually explicit material that [i]s not appropriate for children." Op. 2, 3 (Southwick, J., concurring in part and concurring in the judgment in part). Evidently, both judges would not allow a librarian to remove racist books—unless they have a "poor circulation history." Op. at 12. They differ, however, on how the rules apply to a series of children's books about flatulence. *Compare* Op. 21 n.11 *with* Op. 1, 3 (Southwick, J., concurring in part and concurring in the judgment in part). And so we have a genuine first in the Federal Reporter: federal judges debating whether the First Amendment lets a library remove a book called (I kid you not) *Larry the Farting Leprechaun*.

This journey into jurisprudential inanity should never have been launched. There is a simple answer to the question posed by this case: A public library's choice of some books for its collection, and its rejection of others, is government speech. I dissent.

What follows is what our opinion should have said.

Introduction

Suppose you are a public librarian. One day, you receive complaints about two books. The first is *It's Perfectly Normal*, a sex-education book for ages 10 and up. A mother argues that the book, which has explicit cartoons[1] of sexual activity, is inappropriate for children and should be removed. The second is *Little Black Sambo*, an old children's book. A mother argues that the book, whose cover features a racist caricature,[2] is inappropriate for children and should be removed. The librarian sees some sense in both complaints. But does the Constitution let her pull either book off the shelves?

The district court in this case said no. Agreeing with Plaintiffs, the court ruled that the Free Speech Clause bars a public library from removing any book based on disagreement with its contents. So, the court ordered the Llano County library to reshelve 17 books, including *It's Perfectly Normal*. County officials had removed those books, Plaintiffs alleged, after patrons complained about their treatment of sexual and racial themes. The officials now appeal, arguing the injunction was based on a mistaken view of how the Free Speech Clause constrains a library's collection decisions.

The majority now affirms the district court's Free Speech ruling. Op. 2. In doing so, the majority invents "rules" to discern when the Free Speech Clause bars libraries from removing books. *Id.* at 11. Here they are:

1. Libraries "may consider books' contents in making curation decisions." *Ibid.* (citing *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 204 (2003) [*ALA*] (plurality)).

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[1] Scroll to page 43, *infra*, to see some of them.

[2] Scroll to page 24, *infra*, to see it.

2. But patrons have the "right to receive information and ideas." *Ibid.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).
3. A library violates that right if its decision to remove a book is "'substantially motivated' by the desire to deny 'access to ideas with which [the library] disagree[s].'" *Id.* at 11–12 (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) [*Pico*] (plurality)).
4. But a library can remove books "based on . . . the accuracy of the[ir] content," *id.* at 15, or "based on a belief that the books [are] 'pervasively vulgar' or on grounds of 'educational suitability,'" *id.* at 21 (quoting *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 188–89 (5th Cir. 1995)).

Henceforth, these rules will govern each and every public librarian in this circuit, each and every time she takes a book out of circulation.[3] And who will apply these rules? Federal judges, naturally. You've heard of the Soup Nazi? Say hello to the Federal Library Police.

As I explain below, the majority's rules lack any grounding in the First Amendment or common sense. The underlying "right" the rules supposedly protect comes from a 50-year-old case recognizing the freedom to peruse obscene materials—not in a public library, but "in the privacy of a person's *own home*." *Id.* at 11 (quoting *Stanley*, 394 U.S. at 564) (emphasis added). The rules themselves are facially absurd: by the majority's own admission, a librarian can remove *The Autobiography of David Duke* only if it has a "poor circulation history." *Id.* at 12. Moreover, the rules will be a nightmare to apply. In this very case, the two judges in the majority cannot even agree on how they apply to crude children's books like *I Broke My Butt! Compare id.* at

[3] The majority "decline[s]" to say whether the rules *also* govern a librarian's "initial selection" of books, *id.* at 16 n.8. We will presumably find that out in litigation—coming soon to a federal court near you—over whether a library "unconstitutionally" chose not to acquire explicit sex-education books for 10-year-olds.

21 n.11, *with* Op. 1, 3 n.2 (Southwick, J., concurring in part and concurring in the judgment in part). So, we can look forward to years of litigation testing whether a librarian's "substantial motivation" for removing *Gary the Goose and His Gas on the Loose* was her "desire to deny access to certain ideas"(unconstitutional) or rather the belief that the book was "vulgar" or "educationally unsuitable" (constitutional).[4]

What a train wreck. It has never been the law that the Free Speech Clause bars a public library from selecting or removing books based on content or viewpoint. To the contrary, "[a] library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material." *ALA*, 539 U.S. at 208 (plurality). Plainly, that involves choosing some books, and rejecting others, because of what they say or how they say it. If a library could not do that, it would be a warehouse, not a library.

Imagine if a library had to feature books of *all* viewpoints. Alongside history books, it would have to shelve conspiracy theories. *See, e.g.*, RANDY WALSH, THE APOLLO MOON MISSIONS: HIDING A HOAX IN PLAIN SIGHT (2018). Alongside medical books, it would have to shelve quackeries. *See, e.g.*, L. RON HUBBARD, DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH (2007). Alongside books on Jewish history, it would have to shelve books denying the Holocaust. *See, e.g.*, ROBERT FAURISSON, THE DIARY OF ANNE FRANK—A FORGERY? (1985). How preposterous.[5] A public librarian can, without transgressing the

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[4] On a more serious note, the majority judges also split over "sexually explicit" children's books and books that may "promote[] grooming" of minors. *See* Op. 2–3 (Southwick, J., concurring in part and concurring in the judgment in part).

[5] The majority's response to the Holocaust-denial hypo is equally preposterous. A librarian can't remove the book because she "dislikes the ideas in it" but can remove the

Free Speech Clause, reject such books—precisely because she rejects their viewpoint. Just so, if a librarian finds such books on the shelves, she can remove them. *See ALA*, 539 U.S. at 204 ("The librarian's responsibility . . . is to separate out the gold from the garbage.") (plurality) (quoting W. KATZ, COLLECTION DEVELOPMENT: THE SELECTION OF MATERIALS FOR LIBRARIES 6 (1980)).

There is a simple answer to the question posed by this case: A public library's choice of some books for its collection, and its rejection of others, is government speech. "With respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude." *People for the Ethical Treatment of Animals v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005) [*PETA*]. This conclusion is supported by a long line of Supreme Court precedent, as well as authority from our sister circuits.[6] It means the Free Speech Clause does not constrain a public library's collection decisions. The Clause provides no coherent standard against which to judge a library's inescapably expressive decision about which books it deems "suitable and worthwhile" and which it does not. *ALA*, 539 U.S. at 208 (plurality).

In other words, the Constitution does not deputize federal judges as the Library Police.

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book if she questions the "accuracy" of Holocaust-denial. Op. 14–15. What's the difference? *See infra* note 17 (discussing this further).

[6] *See infra* Part III(B)(1)–(2) (discussing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *ALA*, 539 U.S. 194; *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Sutliffe v. Epping School District*, 584 F.3d 314 (1st Cit. 2009); *Ill. Dunesland Pres. Soc'y v. Ill. Dep't of Nat. Res.*, 584 F.3d 719 (7th Cir. 2009); *PETA*, 414 F.3d 23).

I. Background

A. Facts and Proceedings

Plaintiffs are seven patrons of the Llano County public library. Llano County lies about 80 miles northwest of Austin and has a population of just over 21,000. The county's public library system has three branches, located in Llano (the county seat), Kingsland, and Buchanan Dam. Amber Milum serves as the library system director. *See* Tex. Local Gov't Code § 323.005(a) (providing for appointment of a "county librarian"). The library is under the general supervision of the county commissioners court and County Judge Ron Cunningham. *See id.* § 323.006 (providing "[t]he county library is under the general supervision of the commissioners court" and "also under the supervision of the state librarian").

In April 2022, Plaintiffs sued Cunningham, Milum, the commissioners court, and the library board (collectively, "Defendants") in federal district court. They claimed Defendants violated their "First Amendment right to access and receive ideas by restricting access to certain books based on their messages and content." According to Plaintiffs, the books were targeted because Defendants objected to their treatment of sexual or racial themes. Plaintiffs argued this constituted "viewpoint discrimination" in violation of the First Amendment's Free Speech Clause.[7]

Following discovery, Defendants moved to dismiss based on standing, mootness and failure to state a claim. Plaintiffs moved for a preliminary injunction based on their First Amendment claims. In October 2022, the district court held a two-day hearing with testimony from seven witnesses.

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[7] Plaintiffs also alleged a Fourteenth Amendment due process claim. That claim is not at issue because the district court did not rely on it to grant a preliminary injunction.

The testimony focused on 17 books removed from the Llano branch. Seven of them—which the parties call the "Butt and Fart Books"—are a series of children's books with titles like: *I Broke My Butt!* and *Freddie the Farting Snowman*. Another book is the well-known children's story *In the Night Kitchen* by Maurice Sendak, which contains drawings of a naked toddler. Another is a sex-education book for pre-teens, *It's Perfectly Normal*, which has cartoon depictions of explicit sexual activity. Three are young-adult books touching on sexuality and homosexuality (*Spinning*, *Shine*, *Gabi: A Girl in Pieces*). Two portray gender dysphoric children and teenagers (*Being Jazz* and *Freakboy*). Two others discuss the history of racism in the United States (*Caste* and *They Called Themselves the K.K.K.*).[8]

Defendants generally testified that the books at issue were removed, not because of disagreement with their content, but as a result of a standard "weeding" method known as "Continuous Review, Evaluation, and Weeding" or "CREW." Under this approach, books are weeded according to the so-called "MUSTIE" factors: **M**isleading, **U**gly, **S**uperseded, **T**rivial, **I**rrelevant, and **E**lsewhere. So, a book might be weeded because it was inaccurate ("misleading"), damaged ("ugly"), outdated ("superseded"), silly ("trivial"), seldom checked out ("irrelevant"), or available at another branch ("elsewhere").

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[8] The full list of books is: *My Butt is So Noisy!*; *I Broke my Butt!*; *I Need a New Butt!*, all by Dawn McMillan; *Larry the Farting Leprechaun*; *Gary the Goose and His Gas on the Loose*; *Freddie the Farting Snowman*; *Harvey the Heart Has Too Many Farts*, all by Jane Bexley; *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie H. Harris and Michael Emberley; *In the Night Kitchen* by Maurice Sendak; *Caste: The Origins of Our Discontents* by Isabel Wilkerson; *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti; *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings; *Freakboy* by Kristin Elizabeth Clark; *Shine* by Lauren Myracle; *Gabi, a Girl in Pieces* by Isabel Quintero; *Spinning* by Tillie Walden; and *Under the Moon: a Catwoman Tale* by Lauren Myracle.

For their part, Plaintiffs portrayed this weeding rationale as pretextual. According to Plaintiffs, Milum actually removed the books under orders from Cunningham and the commissioners court (in particular, Commissioner Jerry Don Moss). Plaintiffs argued Cunningham and Moss were responding to complaints from the public—spearheaded by Rochelle Wells and Bonnie Wallace—about some books' treatment of sex and race. They also emphasized that, after dissolving the existing library board, the commissioners put Wells and Wallace on a new advisory board with input into the library's selections.

Testimony also addressed the library's decision to stop providing access to e-books and audiobooks through the "Overdrive" online database. Witnesses testified this was done because Overdrive's filters were unable to keep children from accessing books containing graphic depictions of sexual activity. The library removed Overdrive and replaced it with a database called "Bibliotheca." Some of the 17 removed books remain accessible through Bibliotheca, although the record does not make clear which ones.

Finally, witnesses described an "in-house checkout system" at the Llano branch which contained physical copies of the 17 removed books. Although patrons could check out the books through this system, the books were kept behind the counter and not listed in the catalog. The books had been donated to the library by an anonymous donor who turned out to be one of Defendants' lawyers.

B. District Court Decision

1. Motion to Dismiss

The district court granted Defendants' motion to dismiss in part and denied it in part. *See generally Little v. Llano County*, 1:22-CV-424-RP, 2023 WL 2731089 (W.D. Tex. Mar. 30, 2023). First, the court found that Plaintiffs had standing because they wanted to check out the 17 books but could not.

Next, the court found that creation of the in-house checkout system after the litigation began did not moot Plaintiffs' claims. The court did find, however, that Plaintiffs' claims related to Overdrive were moot because it had been replaced with Bibliotheca, a "comparable online service." The court therefore dismissed claims related to Overdrive without prejudice.

The court then turned to Plaintiffs' Free Speech claims with respect to the 17 books. It acknowledged that, in the 2003 *American Library Association* decision, a plurality of the Supreme Court recognized public libraries' "broad discretion" over the content of their collections. *See ALA*, 539 U.S. at 205 (plurality). But the district court believed that this discretion "applies only to materials' selection," not to their removal.

As to removals, the district court adopted a standard from our 1995 decision in *Campbell v. St. Tammany Parish School Board*. That case held that the First Amendment bars school officials from "removing books from school library shelves 'simply because they dislike the ideas contained in those books.'" *Campbell*, 64 F.3d at 188 (quoting *Pico*, 457 U.S. at 872 (plurality)). The district court also suggested that public libraries are "limited public forums" for First Amendment purposes. For that proposition, the court relied on a federal district court's 2000 decision in *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000).

Accordingly, the court denied Defendants' motion to dismiss. The court ruled Plaintiffs stated a valid First Amendment claim by pleading that "Defendants' conduct was substantially motivated by a desire to remove books promoting ideas with which [they] disagreed." The court also rejected Defendants' argument that the removal decisions were "government speech to which the First Amendment does not apply." The court believed that any precedents supporting this proposition, including *ALA*, "mostly involve the initial selection, not removal, of books." *See, e.g.*, *PETA*, 414 F.3d at 28

("With respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude.").

Finally, the court rejected Defendants' argument that First Amendment cases concerning school libraries, like *Campbell*, do not apply to disputes over the books available in public libraries. To the contrary, the court reasoned that the First Amendment right "to access to information" applied in *Campbell* should have "'even greater force when applied to public libraries,' since public libraries are 'designed for freewheeling inquiry.'"

2. Preliminary Injunction

The court then turned to Plaintiffs' motion for a preliminary injunction. The court's analysis started with this overarching Free Speech principle, carried over from its motion to dismiss ruling: "Although libraries are afforded great discretion for their selection and acquisition decisions, the First Amendment prohibits the removal of books from libraries based on either viewpoint or content discrimination." The court found Plaintiffs were substantially likely to succeed in showing that Defendants engaged in both viewpoint and content discrimination by removing the 17 books at issue.

As to viewpoint discrimination, the court found Defendants removed books "based on complaints that the books were inappropriate." For example, Defendants removed the Butt and Fart Books based on complaints about those books' "appropriateness." Other books were removed after Wallace and Wells emailed Cunningham and Moss lists of books generally identified as "pornographic filth" and "CRT and LGBTQ books."

The court rejected Defendants' argument that the removals were "simply part of the library system's routine weeding process." To the contrary, the court found Plaintiffs "clearly show[ed] that Defendants' decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells objected."

The court also found Plaintiffs were likely to succeed on their claim that Defendants removed books based on "content-based restrictions." "Content-based restrictions on speech," the court stated, "are presumptively unconstitutional and subject to strict scrutiny." *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

The court ruled that Plaintiffs clearly met that standard. It found "sufficient evidence to suggest" that Defendants' weeding explanation was "pretextual." "Whether or not the books in fact qualified for 'weeding' under the library's existing policies," the court stated, "there is no real question that the targeted review was directly prompted by complaints from patrons and county officials over the contents of these titles." Finally, the court found the book removals were unlikely to survive strict scrutiny—*i.e.*, they were "not narrowly tailored to serve a compelling state interest."

Finding the remaining factors met, the court entered a preliminary injunction: (1) requiring Defendants to "return all print books that were removed because of their viewpoint or content," including the 17 books discussed above; (2) requiring Defendants to "update" all library catalogs "to reflect that these books are available for checkout"; and (3) enjoining Defendants from "removing" any books from the catalogs "for any reason during the pendency of this action."

Defendants timely appealed. They also moved to expedite the appeal and for an injunction pending appeal. A motions panel of our court granted the motion to expedite.[9] Nearly a year later, the panel majority now affirms

[9] The motions panel carried the injunction motion with the appeal. When this panel was assigned to the case, it granted an administrative stay of the district court proceedings pending its decision.

the district court's First Amendment ruling, while narrowing the preliminary injunction to requiring the return of 8 of the 17 removed books and updating library catalogs accordingly. Op. 26–27. The majority does not order all of the books returned because the two judges in the majority do not agree how the Free Speech standard they adopt applies to the Butt and Fart Books and to two books with certain sexual content. *Compare id.* at 21 n.11 with Op. 1–3 (Southwick, J., concurring in part and concurring in the judgment in part).

II. Standard of Review

"We review a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*." *Rest. Law Ctr. v. U.S. Dep't of Labor*, 66 F.4th 593, 597 (5th Cir. 2023) (citation omitted). "When a district court applies incorrect legal principles, it abuses its discretion." *Planned Parenthood of Greater Tex. v. Kauffman*, 981 F.3d 347, 354 (5th Cir. 2020) (en banc) (citation omitted).

To obtain the "extraordinary remedy" of a preliminary injunction, the movant must show he is likely to prevail on the merits and also "demonstrate a substantial threat of irreparable injury if the injunction is not granted; the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and the injunction will not disserve the public interest." *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018) (citation omitted).

III. Discussion

Defendants marshal a phalanx of arguments for vacating the preliminary injunction. Only one need be addressed. The district court held that the Free Speech Clause[10] bans a public library from considering the

[10] "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend. I.

content or viewpoint of books when deciding whether to remove them. I agree with Defendants that this was legal error.

Below, I first (A) explain how the district court erred and how the panel majority deepens that error, and then (B) set out how the Free Speech Clause applies to a public library's choice of the materials in its collection.[11]

A. Public Libraries Have Broad Discretion to Shape Their Collections.

The district court began on the right foot by citing the Supreme Court's *ALA* decision.

ALA addressed a federal law giving public libraries money for internet access, provided they installed filters to block material harmful to children. The Court—in a four-justice plurality with two concurrences—rejected a facial First Amendment challenge to the law. *See* 539 U.S. at 198–99, 214 (plurality); *id.* at 215 (Kennedy, J., concurring in the judgment); *id.* at 216 (Breyer, J., concurring in the judgment).[12] *ALA* is pertinent because it drew on libraries' discretion to shape their collections, defined to include not only the internet but also books and other materials. *See, e.g.*, *id.* at 207 (plurality)

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[11] So, there is no need to address Defendants' other arguments, which are: (1) Plaintiffs' First Amendment right "to access and receive information" has not been violated because they can check out the 17 books through the in-house system; (2) for the same reason, Plaintiffs do not show irreparable harm; (3) even assuming the district court did not err on the First Amendment standard, it clearly erred in ruling Milum engaged in viewpoint or content discrimination; (4) the preliminary injunction is overbroad (although the majority finds it is, which is correct as far as it goes); (5) the balance of equities and public interest do not clearly favor preliminary injunctive relief.

[12] While not rejecting the plurality's analysis of the facial challenge, Justice Kennedy wrote separately that he would consider an as-applied challenge if an adult patron showed he was blocked from viewing "constitutionally protected Internet material." *Id.* at 215 (Kennedy, J., concurring in the judgment). Justice Breyer also concurred, but unlike the plurality he would have applied heightened scrutiny. *See id.* at 216 (Breyer, J., concurring in the judgment).

(describing internet as "a technological extension of the book stack") (citation omitted); *id.* at 217 (Breyer, J., concurring) (explaining "a library's 'collection'" is "broadly defined to include all the information the library makes available").

The key rationale lies in the plurality's statement, quoted by the district court, that public libraries have "broad discretion" over which materials they make available to the public. "Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them." *ALA*, 539 U.S. at 205 (plurality). The district court could have quoted many other passages saying the same thing.[13] The point is captured most vividly by this advice from a library manual, which the plurality quoted approvingly: "The librarian's responsibility . . . is to separate out the gold from the garbage." *Id.* at 204 (plurality) (quoting KATZ, *supra*, at 6).

ALA makes one thing clear: the Free Speech Clause allows public libraries to shape their collections based on the content and viewpoint of books. Indeed, the notion that the Clause *forbids* this is preposterous. How else are libraries supposed to choose the books on their shelves if not by "discriminating" according to content and viewpoint? "[S]eparat[ing] out the gold from the garbage" means—by definition—rejecting some books and

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[13] *See, e.g.*, 539 U.S. at 204 (plurality) ("To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons."); *ibid.* (explaining a library's "goal has never been to provide 'universal coverage,'" but rather "to provide materials 'that would be of the greatest direct benefit or interest to the community'") (citation omitted); *ibid.* (observing "libraries collect only those materials deemed to have 'requisite and appropriate quality'"); *id.* at 208 ("A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material[.]"); *id.* at 217 (Breyer, J., concurring in the judgment) (referring to "the discretion necessary to create, maintain, or select a library's 'collection'").

preferring others because of *what* they say and *how* they say it. *Ibid.* This is common sense, and *ALA* plainly supports it.

Imagine if a library had to keep just any book in circulation—no matter how out-of-date, inaccurate, biased, vulgar, lurid, or silly. It would be a warehouse, not a library. By definition, libraries curate what they offer. A library's "goal has never been to provide universal coverage," but rather to "collect only those materials deemed to have requisite and appropriate quality." *Id.* at 204 (plurality) (cleaned up).[14] Selecting materials for their "requisite and appropriate quality" means choosing some content and viewpoints while rejecting others. No one thinks the Constitution requires public libraries to shelve books promoting quackeries like phrenology, spontaneous generation, tobacco-smoke enemas, Holocaust denial, or the theory that the Apollo 11 moon landing was faked.[15] *See* Frederick A. Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 106 (1998) ("SCHAUER") (few people would "disagree . . . with the ability of a librarian to select books accepting that the Holocaust

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[14] *See also id.* at 217 (Breyer, J., concurring in the judgment) (rejecting strict scrutiny because it "would unreasonably interfere with the discretion necessary to create, maintain, or select a library's 'collection'").

[15] *See, e.g.*, LYDIA KANG, QUACKERY: A BRIEF HISTORY OF THE WORST WAYS TO CURE EVERYTHING (2017) (discussing 18th-century notion that "tobacco-smoke enemas" could revive drowning victims); HENRY HARRIS, THINGS COME TO LIFE: SPONTANEOUS GENERATION REVISITED (2002) (discussing "the theory that inanimate material can, under appropriate conditions, generate life forms by completely natural processes"); Audiey Kao, *Medical Quackery: The Pseudo-Science of Health and Well-Being*, 2 VIRTUAL MENTOR: A.M.A. J. ETHICS 30, 30 (Apr. 2000) (explaining that early-20th-century phrenology practitioners purported to examine a person's character by "measur[ing] the conformation of the skull" with a "psychograph"); DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1994) (discussing history of Holocaust denial).

happened to the exclusion of books denying its occurrence"). The First Amendment does not force public libraries to have a Flat Earth Section.

How, then, did the district court—and now the majority—reach the mind-boggling conclusion that the Free Speech Clause *bars* libraries from removing books based on content or viewpoint? By making a series of legal errors. First, the district court and the majority invented a right to "receive information and ideas" in a public library. Op. 11. But that supposed right comes from a case recognizing the right to possess obscene materials *in one's private home*. Second, the district court and the majority each drew on our court's *Campbell* decision to constrain a library's discretion. But *Campbell* applies in the unique realm of *school* libraries and extending it to public libraries runs headlong into the Supreme Court's subsequent *ALA* decision. Furthermore, the district court relied on *Campbell* to make a nonsensical distinction (which the majority does not accept) between a library's *acquiring* and *removing* books. Third, the district court wrongly applied forum analysis to a library's bookshelves—an analysis which, again, the majority apparently disavows. Finally, the majority aggravates the district court's errors by inventing "rules" for librarians that are self-contradictory and will prove impossible to apply.

1. The Stanley v. Georgia *right to privately possess obscenity does not extend to a public library.*

The majority stumbles out of the gate by grounding its holding on the supposed right of library patrons "to receive information and ideas." Op. 9, 11. The majority excavates this right from *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Op. 9. But even a casual perusal of *Stanley* shows why that decision does not translate to a public library.

Stanley recognized a person's right to view obscene books and films at home. As the Supreme Court put it: the petitioner was "asserting the

right . . . to satisfy his intellectual and emotional needs in the privacy of his own home." *Stanley*, 394 U.S. at 565. This is the context of the Court's recognizing a "right to receive information and ideas." *Id.* at 564; *see also ibid.* (observing the case involved "a prosecution for mere possession of printed or filmed matter *in the privacy of a person's own home*") (emphasis added); *ibid.* (noting the petitioner's "right to be free . . . from unwanted governmental intrusions into one's *privacy*") (emphasis added).

It is too obvious for words why *Stanley*'s right to privately peruse obscenity at home cannot extend to a public library. But I will say it anyway. The home is *private* while the public library is *public*. Mr. Stanley won the right to watch legally obscene films at his house (presumably with the shades drawn). *See id.* at 563 (recognizing Stanley's right to privately view materials whose distribution could be banned under *Roth v. United States*, 354 U.S. 476 (1957)); *see also Miller v. California*, 413 U.S. 15 (1973). He did not win the right to watch dirty movies in a reading room at the local county library. *Cf. United States v. Marchant*, 803 F.2d 174, 178 (5th Cir. 1986) (noting that "the attempt to extend *Stanley* 'overlooks the explicitly narrow and precisely delineated *privacy* right on which *Stanley* rests' ") (quoting *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 127 (1973)).

No precedent has ever extended *Stanley* to a public library. The closest anyone has come is Justice Brennan's separate opinion in *Pico*. *See Pico*, 457 U.S. at 867 (op. of Brennan, J., joined by Marshal and Stevens, JJ.). That opinion, which only two other Justices joined, would have extended the *Stanley* right to a school library. *Id.* at 856–57 (op. of Brennan, J.). But at least *five* other Justices rejected the idea. *See id.* at 883 (White, J., concurring in the judgment); *id.* at 885 (Burger, C.J., joined by Powell, Rehnquist, and O'Connor, JJ., dissenting). And our *Campbell* decision—discussed in detail below—identified Justice White's *Pico* concurrence as the narrowest ground for the judgment. *See Campbell*, 64 F.3d at 189 (stating that "Justice White's

concurrence in *Pico* represents the narrowest grounds for the result in that case"). Justice White's concurrence *rejected* Justice Brennan's "dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library." *Pico*, 457 U.S. at 883 (White, J., concurring in the judgment). So, our own precedent belies the notion that *Stanley* applies to a school library.

Finally, consider the absurdity of extending *Stanley*'s "right to receive information" to a public library. It suggests that a public library has a constitutional obligation to make sure patrons "receive" certain materials. *Cf. id.* at 888 (Burger, C.J., dissenting) (explaining *Stanley*'s "right to receive information and ideas' . . . does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government"). It also suggests that a public library must not only avoid removing certain books but must acquire those books as well. *See id.* at 916 (Rehnquist, J., dissenting) (explaining the "distinction between acquisition and removal makes little sense" because "[t]he failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf"). None of that makes any sense.

The majority's Free Speech misadventure should have stopped in its tracks here. *Stanley*'s right to peruse obscenity in private has no application to someone's desire to read books, obscene or not, in a public library.

2. Just as when they acquire books, public libraries can remove books based on content or viewpoint.

The district court and the majority, in different ways, both mistakenly drew on our *Campbell* decision. The district court found in *Campbell* a constitutional distinction between a library's *acquiring* and *removing* books that collapses under the slightest scrutiny. For its part, the majority tries to "harmonize" *Campbell* with *ALA* by using *Campbell* to artificially constrict

public libraries' discretion to shape book collections. Op. 13. But the cases are discordant. *Campbell* addresses the unique school library context and extending it to public libraries flies in the face of *ALA* and common sense.

Contrary to the district court's reasoning, the Free Speech Clause does not apply differently to a library's decision to acquire books as opposed to its decision to remove them. That bizarre dichotomy finds no support in *ALA*, again the most on-point decision. The opinions in that case discuss libraries' discretion in "decid[ing] what material to provide to their patrons," in "selecting . . . material," in "making collection decisions," and in "creat[ing], maintain[ing], or select[ing]" its materials. *See ALA*, 539 U.S. at 204, 205 (plurality op.); *id.* at 217 (Breyer, J., concurring in the judgment). None suggests that a library's discretion, at its apex when acquiring a book, somehow vanishes if a library retires the book because it is now inaccurate or biased or no longer of interest. That is good news, because the distinction between acquiring and removing books makes no sense.

To support the supposed distinction between acquisition and removal, the district court believed it was bound by our 1995 decision in *Campbell*. As noted, *Campbell* held that the First Amendment bars officials from "remov[ing] books from school library shelves simply because they dislike the ideas contained in these books." 64 F.3d at 188 (cleaned up) (citation omitted). The court found a fact dispute over why officials removed a book called *Voodoo & Hoodoo* from St. Tammany Parish school libraries and remanded for further inquiry. *Id.* at 190. Even assuming *Campbell* contains some distinction between acquiring and removing books, *Campbell* does not apply here for at least three reasons.

First, *Campbell* addressed the "unique role of the school library." *Id.* at 188 (quoting *Pico*, 457 U.S. at 868–69 (plurality)). It therefore had to balance "public school officials['] . . . broad discretion in the management of

school affairs" against "students' First Amendment rights." *Id* at 187–88. Those "competing considerations," *Campbell* stressed, lay "at the core of this First Amendment book removal case." *Id.* at 188; *see also id.* at 190 (noting "the special role of the school library as a place where students may freely and voluntarily explore diverse topics").

Campbell's competing considerations are absent here. A county library does not implicate the "unique" First Amendment concerns at play in a public school. *Id.* at 188; *see also ibid.* (observing a school library is "the principal locus" of students' "free[dom] to inquire, to study[,] and to evaluate") (quoting *Pico*, 457 U.S. at 868–69 (plurality)). While no doubt important to the local community, a county library is—to state the obvious—not part of a public school. *Cf. Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (discussing students' First Amendment rights "in light of the special characteristics of the school environment"). So, there is no basis for transplanting *Campbell* into the realm of public libraries.[16]

Second, even if one were inclined to extend *Campbell* to public libraries, *ALA* would stand in the way. *Campbell* prohibits removing a school library book if the "decisive factor" is "dislike [of] the ideas contained in th[e] book[]." 64 F.3d at 188 (quoting *Pico*, 457 U.S. at 870–72). By contrast, *ALA* recognizes public libraries' "broad discretion to decide what material to provide to their patrons." *ALA*, 539 U.S. at 204 (plurality); *see also id.* at

[16] The majority responds by saying that *Campbell* applies both "in and out of the school context." Op. 14. Not so. *Campbell* positively marinates in the school context. *See, e.g.*, *Campbell*, 64 F.3d at 188 ("School officials' legitimate exercise of control over pedagogical matters must be balanced, however, with the recognition that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'") (quoting *Tinker*, 393 U.S. at 506). To say that *Campbell* applies "out of the school context" is to rewrite the decision.

217 (Breyer, J., concurring in the judgment) (discussing "the discretion necessary to create, maintain, or select a library's 'collection'").

The two standards are incompatible. Suppose a public library discovers it offers a book promoting Holocaust denial and decides to remove it. *ALA* allows that. *See ALA*, 539 U.S. at 208 (plurality) ("A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material[.]"). Yet, there is no escaping that the book is being removed because the library "dislike[s] the ideas" in it. *Campbell*, 64 F.3d at 188.[17] So, *Campbell* would likely forbid what *ALA* allows. We cannot extend *Campbell* in such a way that it conflicts with an on-point Supreme Court decision, especially one issued long after *Campbell*.[18]

Third, even assuming *Campbell* applies to a public library, it would still conflict with the district court's First Amendment rationale. The district court applied strict scrutiny to a public library's removing a book based on *any* consideration of content. But *Campbell* itself would allow a school library to remove books "based on a belief that the books were 'pervasively vulgar'

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[17] The majority's response to this point is baffling. It claims a librarian does "not necessarily" remove the Holocaust-denial book because she "dislikes the ideas in it," but perhaps because she objects to "the accuracy of the content." Op. 14–15. What in heaven's name is the difference? And does the majority not see that just about *every* disagreement over a book's "ideas" can be re-imagined as a disagreement about a book's "accuracy"? And even if there is some metaphysical distinction between the two concepts, the majority is sentencing the judiciary to an eternity of hair-splitting litigation over whether a librarian's motives for removing a book are about "ideas" or "accuracy."

[18] This also answers the majority's view that First Amendment rights "outside the school are even more robust." Op. 13. *ALA* teaches that the opposite is true: because public libraries do not have to contend with the sometimes competing speech interests of students and administrators, they have "broad discretion" to curate their collections. In any event, as discussed, the majority's whole conception of library patrons' "rights" in this context is mistaken, based on an illogical extension of *Stanley*. *See supra* Part III(A)(1).

or on grounds of 'educational suitability.'" *Campbell*, 64 F.3d at 189 (quoting *Pico*, 457 U.S. at 870–72). In other words, because of objectionable *content* or *viewpoint*. So, even if *Campbell* applied here (which it could not under *ALA*), it would impose a First Amendment standard different from the district court's. That is yet another reason not to apply *Campbell* to a public library.[19]

Instead of addressing whether *Campbell* supports a constitutional distinction between acquiring and removing books, the majority hides in the tall weeds. In a footnote, it "decline[s] to expressly address" this question because *Campbell* only involved removal. Op. 16 n.8. Come *on*. If one's right to "receive information" is violated by a library's removing a book, then the obvious question is whether that right is also violated by a library's not acquiring the book in the first place. I suspect the reason the majority ducks this question is that answering it would nuke its position. Does anyone think patrons have a First Amendment right to make libraries *purchase* their preferred books? Of course not. But a library just as surely denies a patron's right to "receive information" by not purchasing a book in the first place as it does by pulling an existing book off the shelves.

The majority does embrace *Campbell*, however, for the proposition that public librarians' discretion must be limited when they remove books.

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[19] The majority concedes the district court's opinion was "somewhat imprecise" on this point, Op. 15, yet waves away any problem by stating: "But *Campbell*'s rule holds true regardless: if the remover's motivation is to deny access to ideas with which he or she disagrees, the remover violates the Constitution." *Ibid.* Six pages later, though, the majority reintroduces the same problem by conceding a librarian *can* remove books that are "pervasively vulgar" or "educationally unsuitable." *Id.* at 21. The majority has thus simultaneously missed my point and proved it: there is no discernible difference between (1) removing a book because of disagreement with its "ideas," and (2) removing a book because it is "vulgar" or "educationally unsuitable." Maybe there is a world where a librarian can, at the same time, agree with a book's ideas and yet believe the book is so crass or stupid that it should be pulled off the shelves. It is not our world, though.

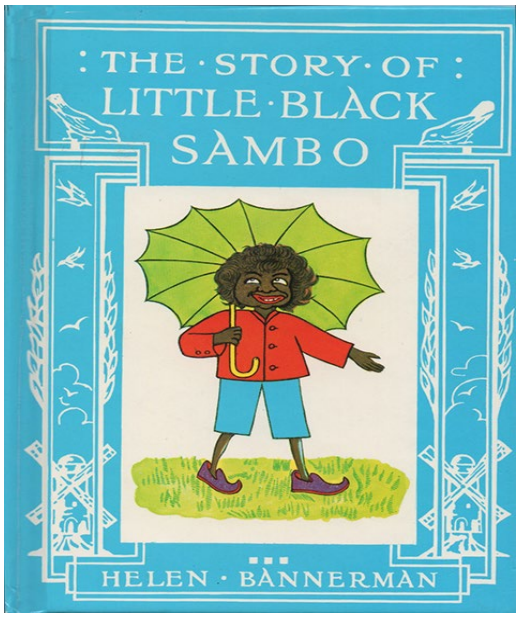
See Op. 11, 18. The majority is mistaken here, too. Perhaps *Campbell* gives some support to curtailing *school* librarians' discretion over book removals, given the sometimes competing interests of school officials and students. *See Campbell*, 64 F.3d at 188 (I express no opinion on whether *Campbell* was correctly decided). But that idea falls flat when applied to public librarians, who must have the freedom to remove books for various reasons inescapably related to the books' content and viewpoint.

Times change and library collections change along with them. Here is one mundane example. Not long ago, astronomy books taught that Pluto was a full-fledged planet. In 2006, Pluto was demoted to a "dwarf." *See* INT'L ASTRONOMICAL UNION, RESOLUTION B6, XXVI GENERAL ASSEMBLY (2006) ("Pluto is a 'dwarf planet' . . . and is recognized as the prototype of a new category of Trans-Neptunian Objects."). If a public library replaces books listing Pluto as the outermost planet with newer books listing Neptune, does it commit "content or viewpoint discrimination"? Yes, it does. Otherwise, it would commit library malpractice.

Two more examples. Suppose a public librarian discovers on the shelves the 1943 book *Sex Today in Wedded Life*, which offers this advice to married women:

> Don't bother your husband with petty troubles and complaints when he comes home from work. Be a good listener. Let him tell you his troubles; yours will seem trivial in comparison. Remember your most important job is to build up and maintain his ego (which gets bruised plenty in business). Morale is a woman's business.

EDWARD PODOLSKY, SEX TODAY IN WEDDED LIFE (1943). Today, some may find this viewpoint outdated. Or suppose a librarian discovers an old children's book displaying racist stereotypes—one infamous example is *Little Black Sambo* (1899):



Today, a librarian would surely prefer a book depicting race in a better light. According to Plaintiffs, though, the First Amendment forbids the librarian from removing either book based on disagreement with their "viewpoint" on sex or race. That cannot be the law (but it is now, thanks to the majority).

You may be thinking: surely Plaintiffs would not push this idea *that* far! You would be wrong. At oral argument, Plaintiffs made their position crystal clear. *See* O.A. Rec. at 24:00–27:20. Counsel was asked this hypothetical:

> Q: Let's say a new librarian comes in and discovers on the shelves a book by a former Grand Wizard of the Ku Klux Klan. The book explains why black people are an inferior race. So she removes it from the shelves. Is that viewpoint discrimination? And if so is that unconstitutional?
>
> A: In your hypothetical, Judge Duncan, *why* did she remove it from the shelves?
>
> Q: Because she found that idea offensive. That black people are inferior.

> A: If that was her substantial or . . . decisive motivation, then yes, your honor.
>
> Q: Really? *Really*?

O.A. Rec. 24:36–25:11. This position is absurd. Yet, incredibly, the majority *agrees* with it. We are told that a librarian can only remove "a book by a former Grand Wizard of the K.K.K. . . . *based on lack of interest and poor circulation history*." Op. 12 (emphasis added). So, if a library's patrons are keenly interested in the "viewpoint and message" of, say, *The Autobiography of David Duke*—and so they check the book out regularly—then a library cannot constitutionally remove it. Astounding.

In sum, a public library's "broad discretion" to shape its collection applies equally to removing books as to acquiring them. *ALA*, 539 U.S. at 205 (plurality). And barring public librarians from considering a book's viewpoint as a reason for putting it on the shelves, or for taking it off the shelves, is nonsensical. The district court erred in concluding otherwise and the majority reinforces that error today.

3. Forum analysis does not apply to a public library's book collection.

The district court also supported its decision by characterizing a library as a "limited public forum" in which viewpoint-based restrictions are verboten. On appeal, Plaintiffs defend the preliminary injunction on this basis, arguing that forum analysis applies to a library's book collection. The majority appears to disavow this rationale, *see* Op. 12, but because the district court and the Plaintiffs rely on it, I will explain why it is mistaken.

Forum analysis is used to assess when government can regulate private speech on property it owns or controls. *See generally Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 426–27 (5th Cir. 2020)

["*FFRF*"]. In traditional public fora—sidewalks, streets, and parks—the government has little leeway to regulate speech: content- or viewpoint-based restrictions are strictly scrutinized. *FFRF*, 955 F.3d at 426 (citing *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 758 (5th Cir. 2010)).[20] The government has more latitude in "limited" public fora, which are "places that the government has opened for public expression of particular kinds or by particular groups." *Ibid.* (citing *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) (per curiam)). There, restrictions are valid if they are "(1) reasonable in light of the purpose served by the forum and (2) do[] not discriminate against speech on the basis of viewpoint." *Id.* at 426–27; *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (government "may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects," where it "may impose restrictions on speech that are reasonable and viewpoint neutral") (citation omitted).

To support their argument, Plaintiffs point to three sister-circuit decisions that deem public libraries some kind of public forum. Those cases have no bearing on the question before us, however. They address whether public libraries may evict certain people from their premises—such as sex offenders, shoeless persons, or a vagrant who menaced library staff and whose "odor was so offensive that it prevented the [l]ibrary patrons from using certain areas of the [l]ibrary." *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1115 (10th Cir. 2012) (sex offenders); *Neinast v. Bd. of Tr. of the Columbus Metro. Libr.*, 346 F.3d 585, 589 (6th Cir. 2003) (shoeless man);

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[20] The same standard applies to "designated" public fora, which are "places that the government has designated for the same widespread use as traditional public forums." *Ibid.* (citation omitted). In either traditional or designated public fora, however, the government may impose reasonable restrictions on the time, place, and manner of private speech. *See, e.g.*, *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (citation omitted).

Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1247-48 (3rd Cir. 1992) (menacing, odiferous vagrant). Those courts answered that question by treating a library's premises as a First Amendment forum. *See, e.g.*, *Kreimer*, 958 F.3d at 1261 (concluding public library at issue "constitutes a limited public forum").

We need not decide whether this analysis by our sister circuits was correct. It is one thing to say that a public library's *premises* may constitute a public forum of some sort. For instance, a library might open one of its rooms to poetry readings by the public and thereby create a limited public forum. *See, e.g.*, *id.* at 1259–60 (concluding public library at issue "constitutes a limited public forum" because "the government intentionally opened the Library to the public for *expressive activity*"). But it is entirely another thing to extend this concept, as Plaintiffs would, to a library's *bookshelves*. Plaintiffs' cases do not support doing that. They address only whether a library can evict certain patrons. *See, e.g.*, *Neinast*, 346 F.3d at 592 (upholding no-shoes policy because it avoided "tort claims brought by library patrons who were injured because they were barefoot"). They say nothing about whether a library can exclude certain books from its shelves.

More to the point, it makes no sense to apply forum analysis to a library's book collection. Library shelves are not a community bulletin board: they are not "places" set aside "for public expression of particular kinds or by particular groups." *FFRF*, 955 F.3d at 426. If they were, libraries would have to remain "viewpoint neutral" in choosing books. *See Summum*, 555 U.S. at 470 (limited public fora's restrictions must be "viewpoint neutral"). That would be ridiculous. Libraries choose certain viewpoints (or range of viewpoints) on a given topic. But they may exclude others. A library can have books on Jewish history without including the Neo-Nazi take. *See, e.g.*, SCHAUER, *supra*, at 106 (explaining a librarian may choose books "accepting

that the Holocaust happened to the exclusion of books denying its occurrence"). Forum analysis has no place on a library's bookshelves.

If there were any doubt, *ALA* would dispel it. The plurality rejected the notion that a library's book collection is a public forum. "A public library does not acquire Internet terminals in order to create a public forum," the plurality explained, "any more than it collects books in order to provide a public forum for the authors of books to speak." *ALA*, 539 U.S. at 206 (plurality). We have followed *ALA* on this point. *See Chiras v. Miller*, 432 F.3d 606, 614 (5th Cir. 2005) (relying on *ALA* for proposition that neither forum analysis nor heightened scrutiny apply to libraries' collection decisions) (citing *ALA*, 539 U.S. at 205 (plurality)). A library places books on its shelves for an obvious purpose—"to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." *ALA*, 539 U.S. at 206 (plurality). That core function is at war with any notion that the library's book collection constitutes a public forum.

I said earlier that the majority "appears" to agree with these points. *See* Op. 12 ("We agree with Defendants that public forum principles are 'out of place in the context of this case.'") (citation omitted). I am not 100% sure, though. According to the majority, the notion that a library's shelves are a public forum "is not what Plaintiffs argue here." *Ibid.* Wrong. On page 42 of their brief, Plaintiffs argue (incorrectly) that "courts have almost uniformly held that public libraries are limited public fora to which heightened scrutiny applies, as the District Court found." Red Br. at 42. The majority gets around this by recasting Plaintiffs' argument: they are not "authors" who want their books on library shelves, "but instead are patrons who seek to exercise their right to receive information." Op. 12. So, we arrive again at the supposed right to receive information at a public library. *See supra* Part III(A)(1). Take away that made-up right, and all the plaintiffs have is their library-shelves-

are-a-public-forum argument. It is wrong, whether the majority wants to admit it or not.

In sum, First Amendment forum analysis does not apply to a public library's book collection. The district court erred by concluding otherwise.

4. The majority's "rules" are a jurisprudential disaster.

Finally, the majority is not content just to adopt the district court's rule that libraries cannot consider content or viewpoint when removing books. While wrong, that rule is at least straightforward. The majority has chosen to complexify the matter by inventing its own "rules." Here they are again:

1. Libraries "may consider books' contents in making curation decisions." Op. 11 (citing *ALA*, 539 U.S. at 204 (plurality)).
2. But patrons have the "right to receive information and ideas." *Ibid.* (quoting *Stanley*, 394 U.S. at 564).
3. A library violates that right if its decision to remove a book is "'substantially motivated' by the desire to deny 'access to ideas with which [the library] disagree[s].'" *Id.* at 11–12 (quoting *Pico*, 457 U.S. at 871 (plurality)).
4. But a library can remove books "based on . . . the accuracy of the[ir] content," *id.* at 15, or "based on a belief that the books [are] 'pervasively vulgar' or on grounds of 'educational suitability,'" *id.* at 21 (quoting *Campbell*, 64 F.3d at 188–89).

These rules are ill-conceived, self-contradictory, and impossible to apply.

First, like Frankenstein's Monster, the rules are stitched together from bits and parts of four cases—*ALA*, *Stanley*, *Pico*, and *Campbell*. As I've already explained, though, only one of those cases—*ALA*—is actually relevant because it alone addresses the subject at hand: a public library's discretion to shape its collection. *See supra* Part III. The other cases are inapposite. *Stanley* is about private viewing of obscenity, and *Pico / Campbell*

are about school libraries (and both pre-date *ALA*).[21] The bottom line, though, is that the majority's rules are the majority's creation. No binding precedent, either of the Supreme Court or our court, required their adoption.

Second, the rules contradict themselves. Suppose a librarian removes Henry Miller's 1934 book, *Tropic of Cancer*, based on complaints that the book is "debased and morally bankrupt" and uses "vivid, lurid, [and] salacious language." *See Besig v. United States*, 208 F.2d 142, 145 (9th Cir. 1953) (affirming finding that *Tropic of Cancer* was obscene).The book was a font of controversy in the 1950's and 60's because of its explicit treatment of sexual themes. *Time* referred to it as one of those books "sewer-written by dirty-fingered authors for dirty-minded readers." *Life* took a different view, predicting the book "will be defended by critics as an explosive corrosive Whitmanesque masterpiece (which it is) and attacked as an unbridled obscenity (which it is)." Then-Massachusetts Attorney General, Edward J. McCormack, Jr., was less nuanced: he found the book "repulsive," "an affront to human decency," and "brazenly animalistic."[22]

So, to return to our librarian: does removing *Tropic of Cancer* violate the First Amendment? Let's apply the majority's rules:

Question: Was the librarian's "substantial motive" in removing *Tropic of Cancer* her disagreement with the book's ideas?

Answer: Yes, so removing it violates the First Amendment.

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[21] *Pico* bears mention only because *Campbell* discussed it. *See Campbell*, 64 F.3d at 188–89. But *Campbell* itself noted that nothing in *Pico* is "binding precedent" with respect to the First Amendment. *Ibid*. As *Campbell* stated, the "narrowest" and hence controlling opinion in *Pico* is Justice White's concurrence—a concurrence that disavowed the First Amendment discussion in Justice Brennan's separate opinion. *See supra* Part III(A)(2).

[22] *See* Barney Rosset, *Profiles in Censorship: Henry Miller and the Tropic of Cancer*, in ROSSET: MY LIFE IN PUBLISHING AND HOW I FOUGHT CENSORSHIP (2017).

Question: Did the librarian remove *Tropic of Cancer* because she found it "pervasively vulgar"?

Answer: Yes, so removing it does not violate the First Amendment.

Raise your hand if you see the problem.

Or consider a more modern example. In 2018, the American Library Association stripped Laura Ingalls Wilder's name from its Lifetime Achievement Award because, according to some, her *Little House* books "reflect dated cultural attitudes toward Indigenous people and people of color."[23] Suppose, in response to the ALA's action, a Travis County librarian removes the *Little House* books. The librarian is sued. Let's apply the majority's rules. Was the librarian's "substantial motivation" for removing the books to deny access to Wilder's supposedly dated ideas? Or was her motive that the books were educationally unsuitable? The answer is "yes" and "yes," which of course is no answer at all.

Finally, the rules cannot be applied coherently. Look no further than this case. The two judges in the majority cannot agree on how their rules apply to over *half* of the books at issue. JUDGE WIENER is confident all 17 books must be restored to the shelves because the evidence shows the "substantial" motive for removing them was to "deny access" to disfavored ideas. *See* Op. 18–23; *see also id.* at 18 (claiming this is a "relatively straightforward application" of the rules). JUDGE SOUTHWICK is less sure. He believes the rules allow the Butt and Fart Books to be removed because he doubts they "contain any *ideas* with which to disagree." Op. 1 (Southwick, J., concurring in part and concurring in the judgment in part). Alternatively, he believes those books may be removed because a librarian might consider

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[23] *See* AMERICAN LIBRARY ASS'N PRESS RELEASE, *ALA, ALSC respond to Wilder Medal name change* (June 25, 2018), https://www.ala.org/news/press-releases/2018/06/ala-alsc-respond-wilder-medal-name-change.

them "pervasively vulgar" or "not educationally suitable." *Id.* at 2 (citation omitted). He also allows that a book may be removed on the ground that "it encourages children to engage in sexual activity with adults or includes sexually explicit content"—a rationale that, "[a]t this stage of the case," may include *In the Night Kitchen* (because it contains drawings of a naked toddler) and *It's Perfectly Normal* (because of the sexually explicit cartoons you can examine on page 43). *Ibid.*

So, by my count, that means the two judges in the majority—while ostensibly agreeing on the "rules"—disagree on whether those "rules" permit removal of nine of the 17 books at issue. To paraphrase Cormac McCarthy, "If the rules you followed led you to this, of what use were the rules?" Cormac McCarthy, NO COUNTRY FOR OLD MEN (2005).

Do I have to answer?

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Because the district court applied an incorrect legal standard, it abused its discretion in entering a preliminary injunction. *See Kauffman*, 981 F.3d at 354 (citation omitted). The court should have vacated the injunction and remanded for further proceedings.

B. The Free Speech Clause Does Not Constrain Public Libraries' Collection Decisions.

Because the case will continue on remand, the court should answer to the legal question posed here—namely, how the Free Speech Clause applies to a public library's choice of the books and other materials in its collection.[24]

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[24] *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc) (reversing and remanding for district court to consider racial discrimination claim "in light of the guidance we have provided in this opinion"); *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 482 (5th Cir. 2001) (in addition to reversing class certification, addressing legal issue on which district court erred "to guide the district court on remand").

The short answer is that those choices are government speech to which the Free Speech Clause does not apply. Below, I explain why that is the case, while responding to the majority's criticisms.

1. Supreme Court precedents: Forbes, Finley, ALA, *and* Summum

The library at issue is a public entity supervised by a local government body. *See* TEX. LOCAL GOV'T CODE §§ 323.001(a) (providing for "a free county library" created either by "the commissioners court" or "a majority of the voters"); 323.006 ("The county library is under the general supervision of the commissioners court."). It is supported by county funds. *Id.* § 323.002. It is administered by the county librarian "subject to the general rules adopted by the commissioners court." *Id.* § 323.005(c). Among other duties, the librarian "shall determine which books and library equipment will be purchased." *Ibid.*

How, if at all, does the Free Speech Clause constrain this library's discretion to shape its collection, whether through acquiring new books or removing books on the shelves? As discussed, Plaintiffs defend the position (adopted by the district court and largely affirmed by the majority) that a library's viewpoint- or content-based removal of books is unconstitutional. They also argue that, as a limited public forum, a library's removal of a book triggers heightened scrutiny. I have already explained why these arguments fail. For their part, Defendants argue that libraries' "weeding decisions" need only have a rational basis. As I explain below, both sides are incorrect about the Free Speech standard applicable here.

To answer this question, *ALA* is again a good starting place. The plurality characterized a public library's choice of books as "the government . . . deciding what private speech to make available to the public." 539 U.S. at 204 (plurality). To flesh out that idea, the plurality drew

on two areas where the government makes similar decisions regarding private speech: a public television station's "editorial judgments" over what private speech to air (*see Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998)), and a federal agency's decision to fund certain artistic works (*see Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)). In the plurality's view, these precedents charted the boundaries of a public library's discretion: "The principles underlying *Forbes* and *Finley* . . . apply to a public library's exercise of judgment in selecting the material it provides to its patrons." *ALA*, 539 U.S. at 205 (plurality).[25]

Those cases afforded the government wide discretion over its presentation of private speech. For instance, *Forbes* recognized that public broadcasters "are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." 523 U.S. at 673. That discretion generally excludes "claims of viewpoint discrimination" because "a broadcaster by its nature will facilitate the expression of some viewpoints instead of others." *Id.* at 673–74. Moreover, allowing judges to superintend such decisions "would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion." *Id.* at 674; *see also ALA*, 539 U.S. at 204 (plurality).[26]

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[25] In Defendants' view, *ALA* teaches that "rational-basis review applies to a public library's weeding decisions." I disagree. The statement Defendants quote for this point ("[G]enerally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review.") was itself merely quoting the district court decision in that case. *See ALA*, 539 U.S. at 202 (plurality) (quoting 201 F. Supp. 2d 401, 462 (E.D. Pa. 2002)). The *ALA* plurality, however, did not adopt that standard for testing a library's collection decisions.

[26] *Forbes* recognized a "narrow exception" to this general principle—namely, where a public broadcaster creates a "non-public forum" by hosting a candidate debate. *See id.* at 675 (explaining that "candidate debates present the narrow exception to the rule" that forum analysis does not apply to public broadcasting). That narrow exception has no

Finley is also deferential to government discretion. As the *ALA* plurality explained, *Finley* "upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in making funding decisions." *ALA*, 539 U.S. at 205 (plurality) (citing *Finley*, 524 U.S. 569). The criteria included "consideration [of] general standards of decency and respect for the diverse beliefs and values of the American public." *Finley*, 524 U.S. at 576 (quoting 20 U.S.C. § 954(d)(1)). The Free Speech Clause did not constrain the NEA's grant-making discretion, *Finley* reasoned, because judgments based on subjective considerations—including "esthetics" and "artistic worth"[27]—were "a consequence of the nature of arts funding." *Id.* at 585, 586; *see also ALA*, 539 U.S. at 205 (plurality). In that realm, "absolute neutrality is simply inconceivable." *ALA*, 539 U.S. at 205 (quoting *Finley*, 524 U.S. at 585); *see also Chiras*, 432 F.3d at 613–14 (taking a similar view of *Forbes*, *Finley*, and *ALA* in the context of a state board of education's discretion over curricula and textbooks).

Six years after *ALA*, the Supreme Court refined these principles in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). *Summum* rejected a Free Speech challenge to a city's accepting a privately-donated Ten Commandments monument for a public park. *Id.* at 464–65. Citing the *ALA* plurality, the Court held forum analysis did not apply: the city had not opened its property to private speakers but had only allowed installation of "a limited

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application here, however. As discussed, this case does not involve a public library's decision to open its premises to private speech, much less to candidate debate.

[27] As *Finley* explained, the NEA program incorporated a "wide variety" of funding criteria, including: "the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form." *Finley*, 524 U.S. at 585.

number of permanent monuments." *Id.* at 478 (citing *ALA*, 539 U.S. at 205 (plurality)). Accordingly, the city did not have to "maintain viewpoint neutrality" in choosing monuments. *Id.* at 479.

Moreover, *Summum* held the city's decision to select some monuments but reject others "constitute[s] government speech." *Id.* at 472. It did not matter that most of the monuments were privately donated. *Id.* at 464. The relevant expression was the *city*'s decision, guided by its own criteria, to allow only certain monuments on public property. *Id.* at 465. The city could "express its views," the Court explained, even "when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.* at 468 (citation omitted). This was an example of a government "speak[ing] for itself." *Id* at 467 (citation omitted). Indeed, the Court cited a concurring opinion in *Finley* for the proposition that "[i]t is the very business of government to favor and disfavor points of view." *Id* at 468. (quoting *Finley*, 524 U.S. at 598 (Scalia, J., concurring in judgment)).

In sum, *Summum* held that the Free Speech Clause did not constrain the city's choice of monuments in a public park. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Id.* at 467 (citing, *inter alia*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 533 (2005)). But, the Court added, "[t]his does not mean that there are no restraints on government speech." *Id.* at 468. The Court noted the Establishment Clause as one potential check, along with "law, regulation, or practice." *Ibid.* More fundamentally, the government expression was "ultimately 'accountable to the electorate and the political process.'" *Ibid.* (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Id.* at 468–69 (citation omitted).

2. Sister-Circuit precedents: Sutliffe, Illinois Dunesland, *and* PETA.

Rounding out this discussion, I note sister-circuit cases that treat the government's presentation of third-party speech as the government's own expression. For instance, in *Sutliffe v. Epping School District*, 584 F.3d 314 (1st Cir. 2009), a non-profit group sued a town for refusing to include the group's hyperlink on the town's website. Applying *Summum*, *Finley*, *Forbes*, and *ALA*, the First Circuit rejected the plaintiff's Free Speech challenge: "[T]he Town engaged in government speech by establishing a town website and then selecting which hyperlinks to place on its website." *Id.* at 331 (citing *Summum*, 129 S. Ct. at 1134; *ALA*, 539 U.S. at 204–05 (plurality); *Finley*, 524 U.S. at 585–86; *Forbes*, 523 U.S. at 674). Specifically, the court read *Summum* to teach that when government "uses its discretion to select between the speech of third parties for presentation" through government channels, "this in itself may constitute an expressive act by the government that is independent of the message of the third-party speech." *Id.* at 330 (citing *Summum*, 129 S. Ct. at 1133–36).[28]

Similarly, in *Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources*, 584 F.3d 719, 721 (7th Cir. 2009), a non-profit group sued a state agency for refusing to include the group's "scary two-page pamphlet" in state park display racks. The pamphlet warned about "asbestos contamination while at the beaches of Illinois Beach State Park." *Ibid.* Applying *Summum*, the Seventh Circuit rejected plaintiffs' Free Speech

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[28] Like *Summum*, the court acknowledged that "there may be limits to the government speech doctrine," such as "vot[ing] [officials] out of office, or limit[ing] the conduct of those officials by law, regulation, or practice." *Id.* at 331 & n.9 (citations and internal quotation marks omitted). The court added that "[t]he Establishment Clause is another restraint on government speech, and the Equal Protection Clause may be as well." *Ibid.* (citation omitted).

challenge by characterizing the agency's selection of materials in display racks as government expression "designed to attract people to the park." *Id.* at 724–25 (citing *Summum*, 129 S. Ct. at 1131). As the court explained:

> The [agency's] choice of materials conveys a message that is contradicted by the plaintiff's pamphlet. The message of the publications in the display racks is: come to the park and have a great time on the sandy beaches. The message of the plaintiff's pamphlet is: you think you're in a nice park but really you're in Chernobyl[.]

Id. at 725. The court also pointed out the absurdity of imposing viewpoint neutrality here: "Must every public display rack exhibit on demand pamphlets advocating nudism, warning that the world will end in 2012, . . . or proclaiming the unconstitutionality of the income tax, together with pamphlets expressing the opposing view on all these subjects?" *Ibid.*

The final instructive case is *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005). As part of a public art program called "Party Animals," the District of Columbia solicited designs for "sculptures of 100 donkeys and 100 elephants." *Id.* at 25. Winners chosen by the District[29] would have their designs displayed at prominent locales. *Id.* at 26. PETA submitted various elephant designs, including "one of a happy circus elephant, the other of a sad, shackled circus elephant with a trainer poking a sharp stick at him." *Id.* at 26. After the District "accepted the happy elephant, but rejected the sad one," PETA sued under the Free Speech Clause. *Ibid.* The district court

[29] The District's criteria sought "artwork that is dynamic and invites discovery," "original and creative," "durable," and "safe." *Id.* at 25–26. Not allowed, however, were "direct advertising," "social disrespect," "slogans," or "inappropriate images." *Ibid.*

granted a preliminary injunction requiring the District to display one of PETA's sad elephants. *Id.* at 27.[30] The D.C. Circuit reversed.

The court first concluded that the District itself was speaking by choosing some designs over others. *Id.* at 28 (citing *Forbes*, 523 U.S. at 674). The court carefully distinguished the District's speech from the artists' speech, using the analogy of public library books: "As to the message any elephant or donkey conveyed, this was no more the government's speech than are the thoughts contained in the books of a city's library." *Ibid.* Nonetheless, government speech was still present:

> With respect to the public library, *the government speaks through its selection of which books to put on the shelves and which books to exclude*. In the case before us, the Commission spoke when it determined which elephant and donkey models to include in the exhibition and which not to include.

Ibid (emphasis added).[31]

Next, the court held that "public forum principles 'are out of place in the context of this case.'" *Ibid.* (quoting *ALA*, 539 U.S. at 205 (plurality)). By choosing some designs and rejecting others, the District was not regulating private speech but was speaking for itself. The government, the court explained, "may run museums, libraries, television and radio stations, primary and secondary schools, and universities," and "[i]n all such

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[30] This version "depict[ed] a shackled elephant crying" with a "sign tacked to the elephant's side [that] read: 'The Circus is coming. See SHACKLES–BULL HOOKS–LONELINESS. All under the 'Big Top.'" *Id.* at 26.

[31] While *PETA* pre-dated *Summum*, the D.C. Circuit's analysis anticipated the Supreme Court's. *See id.* at 29 (explaining that "First Amendment constraints do not apply when [government] authorities engage in government speech by installing sculptures in the park. If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee").

activities, the government engages in the type of viewpoint discrimination that would be unconstitutional if it were acting as a regulator of private speech." *Id.* at 29 (citing SCHAUER, *supra*, at 104–05). Relying on *Forbes*, *Finley*, and *ALA*, the court underscored the government's wide discretion in such endeavors: "As a television broadcaster, the government must 'exercise journalistic discretion'; as an arts patron, the government must 'make esthetic judgments'; and as a librarian, the government must 'have broad discretion to decide what material to provide to [its] patrons.'" *Ibid.* (cleaned up) (quoting *Forbes*, 523 U.S. at 674; *Finley*, 524 U.S. at 586; *ALA*, 539 U.S. at 204 (plurality)). Accordingly, the Free Speech Clause did not restrict the District's "decisions about PETA's elephants" because the Clause "does not apply to the government as communicator." *Id.* at 30–31.

3. A public library's collection decisions are government speech.

These precedents point to one conclusion: a public library's selection of some books, and its rejection of others, constitutes government speech. Those choices are therefore not constrained by the Free Speech Clause. *See, e.g.*, *Summum*, 555 U.S. at 467 ("The Free Speech Clause . . . does not regulate government speech.") (citation omitted).

I emphasize, as have other courts, the distinction between government and private speech at work here. *See, e.g.*, *Summum*, 555 U.S. at 470–72; *PETA*, 414 F.3d at 28. The government expression in this case is not found in the words of the library books themselves. Of course not. "Those who check out a Tolstoy or Dickens novel would not suppose that they will be reading a government message." *PETA*, 414 F.3d at 28. Rather, the government speaks by choosing certain books over others for the library's collection. That selectivity is why we have libraries in the first place. "[T]heir goal has never been to provide universal coverage," but instead "to collect only those materials deemed to have requisite and appropriate quality."

ALA, 539 U.S. at 204 (plurality) (citation and internal quotation marks omitted). And the message sent by the library's choice is plain: *this* book is "suitable and worthwhile material," while *that* book is not. *Id.* at 208 (plurality). That message is the library's and is not subject to judicial scrutiny under the Free Speech Clause.[32]

Plaintiffs' rejoinder is that affording public libraries broad discretion over their collections will lead to something they call "book banning."[33] The

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[32] The majority's response to this entire line of argument is anemic. First, the majority says *Campbell* never "suggest[ed]" the officials' decision to remove *Voodoo & Hoodoo* was government speech. Op. 16. Likely that's because no one raised the point. In any event, *Campbell* didn't decide the issue and so it is open in this circuit (or at least it was). The majority's next response is entirely circular. It claims that government discretion in "deciding what private speech to make available to the public," while "extensive," is nonetheless subject to First Amendment constraints. *Id.* at 17. What might those constraints be? You guessed it: the government can't "inten[d] to deprive the public of access to ideas with which it disagrees." *Ibid.* In other words, government discretion is limited by the "right" the majority invented for this case. Finally, the majority tries to distinguish *Summum* based on the notion that, unlike the government's selection of public monuments, a library's collection decisions are "numerous" and "often occur behind closed doors." Op. 17–18 n.10. Those are distinctions without a difference. To the contrary, *Summum* is directly on point: just as the government expressed itself there by selecting some monuments over others, so library officials express themselves here by selecting some books over others. *See PETA*, 414 F.3d at 28 (explaining "[w]ith respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude").

[33] Plaintiffs also claim Defendants have "waived" the argument that the library's collection decision is government speech by not arguing the point here. I disagree and so does the majority. *See* Op. 16 n.9. Whether the Free Speech Clause constrains a library's collection decisions is plainly before us; whether those decisions constitute government expression is bound up with that question, regardless of how the parties phrase the issue. *See, e.g.*, *Stramaski v. Lawley*, 44 F.4th 318, 326 (5th Cir. 2022) ("[W]e may use our 'independent power to identify and apply the proper construction of governing law' to any 'issue or claim [that] is properly before the court, . . . not limited to the particular legal theories advanced by the parties.'") (quoting *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 99 (1991)). Regardless, the court could (and should) exercise its discretion to address government speech, even if it were somehow waived. *See Singleton v. Wulff*, 428 U.S. 106, 121 ("[W]hat questions may be taken up and resolved for the first time on appeal is one left

theme is woven throughout Plaintiffs' brief, which ritually dubs the 17 books at issue the "Banned Books." *See* Red Br. at 4, 13, 15, 17, 18, 20, 24, 28, 29, 31, 34, 42, 47, 49, 55, 56, 57. The brief's opening sentence asks: "Can government officials freely purge public libraries of any books containing ideas those officials want to prevent library patrons from accessing?" *Id.* at 1. It warns elsewhere that, without strict judicial oversight, "government officials could remove books for any reason no matter how partisan" and "the robust marketplace of ideas embodied in public libraries would disappear." *Id.* at 18. This is hyperbole, not argument.

First, Plaintiffs ignore public libraries' wide latitude to choose the books on their shelves. Our own precedent, quoting *ALA*, recognizes that "public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them." *Chiras*, 432 F.3d at 614 (quoting *ALA*, 539 U.S. at 205 (plurality)). Plaintiffs nonetheless insist that courts have the power to oversee those decisions in order to prevent "book banning." This raises an obvious question: what is the difference between a library's "banning" a book (something Plaintiffs claim is prohibited by the Free Speech Clause) and a library's discretionary decision not to include the book in its collection? Plaintiffs do not say.

To make this pivotal question more concrete, consider one of the supposedly "banned" books at issue: *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health*, by Robie H. Harris and Michael Emberley. Plaintiffs' brief describes *It's Perfectly Normal* as "an illustrated children's[34] health book that helps readers understand puberty and discusses

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primarily to the discretion of the courts of appeals[.]"). Our court could not properly address how the Free Speech Clause applies to the library's decision without addressing the intertwined issue of whether that decision was government speech.

[34] The book's cover states: "FOR AGE 10 AND UP."

ways to stay safe online." Red Br. at 7. Yet the book has stirred controversy[35] and evidence suggests it was removed from the library because of its sexually explicit cartoons. *Ibid.* Here are some that have drawn the most attention:

they want a baby. Most often, people have sexual intercourse because it feels good. People have sexual intercourse well into old age.

When a couple has sexual intercourse and does not want to make a baby, there are healthy ways, called birth control, that can help keep them from making a baby or from passing on an infection to one another.

Sometimes, a couple does not plan ahead or decide whether or not to have sexual intercourse. Planning ahead is most often the most effective way to keep a pregnancy from beginning.

People also call sexual intercourse "making love" or "lovemaking" because it's a way of expressing love. But sexual intercourse is only one way of expressing love.

Another kind of sexual intercourse happens when the sexual parts of two people who have female bodies touch or when the sexual parts of two people who have male bodies touch. This kind of touching can make the whole body feel good—feel sexy. Since male bodies have only sperm cells and no egg cells—and since female bodies have only egg

WHAT IS SEX? 9

[35] *See, e.g.*, Aymann Ismail, *Closed Book*, SLATE.COM (Sept. 11, 2023) (discussing controversy surrounding *It's Perfectly Normal*), *available at* https://slate.com/human-interest/2023/09/banned-books-list-its-perfectly-normal-facebook.html.

It's Perfectly Normal, at 9.

So, back to our question: did the library "ban" *It's Perfectly Normal*, as Plaintiffs contend? Or did the library instead exercise its "broad discretion" to decide the book was not "suitable and worthwhile" for 10-year-olds? *ALA*, 539 U.S. at 205, 208 (plurality). Again, Plaintiffs offer no way of distinguishing one from the other. This suggests their cryptic warning about "book banning" is nothing more than a rearguard attack on public libraries' discretion over their collections. *See, e.g.*, *id.* at 208 (plurality) ("A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material[.]").

Second, even *assuming* courts can police libraries' collection decisions, what standard would they apply? The only one proposed by Plaintiffs (and the district court) is to forbid "content or viewpoint discrimination." As shown, that is a non-starter. It would leave a librarian powerless to remove from the shelves all manner of bigoted screeds. It would perversely require librarians to "balance" legitimate scientific volumes with reams of quackery. It would literally bar a library from stopping a subscription to *Penthouse* magazine. *Cf. id.* at 208 (plurality) ("Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion."). In short, it is a standard in open war with the very concept of a library, whose mission is to assess materials *precisely* in terms of content and viewpoint and thereby "separate out the gold from the garbage." *Id.* at 204 (plurality) (quoting KATZ, *supra*, at 6).[36]

Defendants' counterproposal is that a library's collection decisions must be "rational." That is more modest than Plaintiffs' proposal, but no

[36] I have already explained why the majority's "rules" will prove impossible to apply coherently, *supra* Part III(A)(4), and need not repeat that here.

more helpful. After all, what constitutes an "irrational" collection decision? Featuring the romantic works of E.L. James? Classifying *The DaVinci Code* as "Literature"? The mind reels at judges concocting "standards" for adjudicating such insoluble subjectivities. It would be no different than judges opining on whether the NEA should fund the latest "re-imagining" of *Hamlet*.[37] Or whether a public television station should air old episodes of *The Joy of Painting* instead of the new season of *Call The Midwife*. Those are matters of esthetic, social, and moral judgment and no judge-made test can possibly say whether their resolution in any given case was "rational." *Cf. Forbes*, 523 U.S. at 674 ("Were the judiciary to require, and so to define and approve, pre-established criteria for access [to public broadcasting], it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion."). The same goes for a public library's decision about which books to feature and which books to exclude.

Third, bear in mind the limits of my view. I say only that the *Free Speech* Clause does not constrain a public library's collection decisions. That says nothing about other parts of the Constitution. *Cf. Summum*, 555 U.S. at 468–49 (suggesting other possible "restraints on government speech" besides Free Speech). I would hold only that that the Free Speech Clause provides no standard against which to judge a public library's inescapably expressive decision about which books it deems "suitable and worthwhile" and which it does not. *ALA*, 539 U.S. at 208 (plurality).

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[37] *See, e.g.*, Alamo Drafthouse Cinema, *You've Never Experienced the Bard Like This Before!* (Oct. 12, 2012) (discussing Rudolf Volz's *Hamlet In Rock*, in which "Hamlet is a whiny goth, Queen Gertrude wears a bright red penis-shaped crown, and the gravedigger is an incomprehensible three-eared space rabbit"), *available at* https://drafthouse.com/news/youve-never-experienced-the-bard-like-this-before.

Nor should we forget the most effective constraint on public officials' speech: the good sense of the citizens who elected them. "[The Llano County commissioners court] is ultimately 'accountable to the electorate and the political process for its [choice of library books].'" *Summum*, 555 U.S. at 468 (quoting *Southworth*, 529 U.S. at 235) (brackets added). Energized voters can bend public officials to their will, as this case amply shows. Plaintiffs' lamentations to the contrary, that does not amount to "book banning." It means that a local government heeded its citizens. True, the upshot is that Llano County's books may differ from the books in Travis or Harris County. But variety is a feature of our system, not a bug. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory[,] and try novel social and economic experiments without risk to the rest of the country.").

IV. Conclusion

Stephen King saw this coming. One of his scary stories once warned: "AVOID THE LIBRARY POLICE!"[38] Now, thanks to the majority, we are all the Library Police.

I dissent.

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[38] Stephen King, *The Library Policeman*, in Four After Midnight (1990).

No. 23-50224

In the United States Court of Appeals for the Fifth Circuit

Leila Green Little; Jeanne Puryear; Kathy Kennedy; Rebecca Jones; Richard Day; Cynthia Waring; Diane Moster,

Plaintiffs-Appellees,

v.

Llano County; Ron Cunningham, in his official capacity as Llano County Judge; Jerry Don Moss, in his official capacity as Llano County Commissioner; Peter Jones, in his official capacity as Llano County Commissioner; Mike Sandoval, in his official capacity as Llano County Commissioner; Linda Raschke, in her official capacity as Llano County Commissioner; Amber Milum, in her official capacity as Llano County Library System Director; Bonnie Wallace, in her official capacity as Llano County Library Board Member; Rochelle Wells, in her official capacity as Llano County Library Board Member; Rhoda Schneider, in her official capacty as Llano County Library Board Member; Gay Baskin, in her official capacity as Llano County Library Board Member,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas
Case No. 1:22-cv-424-RP

APPELLANTS' OPENING BRIEF

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Certificate of Interested Persons

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Statement Regarding Oral Argument

The defendants-appellants respectfully request oral argument, as the issues in this case are sufficiently important and complex to warrant oral-argument time.

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A public library must continually "weed" books from its shelves to make room for new arrivals and ensure that its collection remains up-to-date and responsive to the needs of the community. This is standard practice in the library profession, and even small libraries weed and permanently remove thousands of books each year from their shelves and catalogs. From February 1, 2021, to March 18, 2022, the Llano County Library System weeded nearly 8,000 books, which were sold or donated and removed from circulation. *See* Milum Decl. ¶ 6, ECF No. 14-4; ROA.3953 ("We weed all the time.").[1]

Librarians weed materials according to an acronym called "MUSTIE,"[2] which encourages librarians to weed materials that are Misleading, Ugly,[3] Superseded, Trivial, Irrelevant,[4] or available Elsewhere. The MUSTIE factors provide guidelines and not hard-and-fast rules.[5] It is permissible and sometimes prudent for a li-

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1. The Llano County Library System comprises three distinct library buildings: Llano Library, Kingsland Library, and Lakeshore Library. The disputed books in this case were all weeded from Llano Library.
2. ROA.3955-3957; ROA.2636-2638.
3. The "Ugly" factor is used to weed books that are damaged. ROA.2637.
4. A book is "irrelevant" if library patrons are not checking it out enough to warrant continuation in the library's collection. The frequency of checkouts needed to avoid weeding depends on the publication's Dewey decimal class. ROA.3890; ROA.2501-2502; ROA.2483.
5. ROA.3526-3527 n.7 ("It appears to be undisputed that, given its subjective nature, reasonable minds may disagree over how to apply the CREW and MUSTIE criteria."); ROA.3957 ("The CREW is mainly guidelines, so every librarian is going to go with their feelings, their training, their gut on their community of what is getting checked out, what isn't and why."); ROA.3891-3892 ("It's up to the librarian and the library system."); ROA.2603 ("[T]he final weeding decision is left to the professional judgment of the resident librari-

brarian to weed a book based on the presence of a single MUSTIE factor, such as books that are seriously damaged (Ugly), that have been replaced by a new edition in the library (Superseded), or that haven't been checked out in a long time (Irrelevant). ROA.2485-2486; ROA.2502. But when a book only barely meets a single MUSTIE factor, or if the issue with the book is a relatively minor one, a librarian will sometimes (but not always) look for the presence of an additional MUSTIE factor before deciding to weed the book. *See id.*

The plaintiffs disagree with the Llano County head librarian's decision to weed 17 of the thousands of books that she weeded in 2021, and they have falsely accused her of weeding those 17 books because she disapproves of their content. When the plaintiffs sued to compel the return of those 17 books to the shelves and catalog, the Llano Library accepted a donation of the 17 disputed books and made them available to the plaintiffs through its in-house checkout system. ROA.3463-3465. This arrangement accommodated the plaintiffs' stated desire to read and check out the 17 disputed books, but without empowering individual library patrons to commandeer the library's limited shelf space or override the library staff's weeding decisions. The plaintiffs refused to accept this arrangement and continued litigating, even though they could not show an ongoing violation of their First Amendment rights when each of the disputed books remained available for them to read and check out at Llano Library.

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an."); ROA.2587 ("[L]ibrarians are urged to **use professional judgment at all times**." (boldface in original)).

On March 30, 2023, the district court granted a preliminary injunction and ruled that the First Amendment prohibits a public library from engaging in "content discrimination" or "viewpoint discrimination" when weeding books. ROA.3523 ("[T]he First Amendment prohibits the removal of books from libraries based on either viewpoint or content discrimination."). Then it ordered the defendants to return to the shelves *every* single book that had *ever* been removed because of viewpoint or content, in addition to the 17 books that the plaintiffs had sued over, and enjoined the defendants from removing *any* book from the library catalog for *any* reason during the pendency of the litigation. ROA.3531-3532. This relief extends far beyond what the plaintiffs had requested,[6] and awards relief that the plaintiffs do not even have Article III standing to pursue. The defendants have appealed and respectfully ask this Court to reverse the preliminary injunction.

Statement Of Jurisdiction

The federal district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because the plaintiffs are alleging violations of their First Amendment rights. This Court's appellate jurisdiction rests on 28 U.S.C. § 1292(a)(1) because the defendants have appealed a preliminary injunction. The district court issued the injunction on March 30, 2023, ROA.3507-3532, and the defendants appealed later that day, ROA.3533.

6. ROA.1038-1040 (plaintiffs' proposed order).

Statement Of The Issues

1. Did the plaintiffs make a "clear showing" that the defendants are violating their "First Amendment rights to access and receive information" when each of the 17 books that the plaintiffs have sued over remains available for the plaintiffs to read and check out at Llano Library?

2. Did the plaintiffs make a "clear showing" that they will suffer irreparable harm absent a preliminary injunction when each of the 17 books that the plaintiffs have sued over would remain available for the plaintiffs to read and check out at Llano Library?

3. Did the district court err in holding that the First Amendment prohibits public librarians from engaging in "viewpoint discrimination" or "content discrimination" when weeding library materials?

4. Assuming for the sake of argument that the First Amendment prohibits public librarians from engaging in viewpoint- or content-based weeding decisions, did the plaintiffs make a "clear showing" that Amber Milum engaged in "viewpoint discrimination" or "content discrimination" when weeding the 17 disputed books?

5. Did the district court err by issuing a preliminary injunction that extends beyond the 17 books that the plaintiffs have sued over?

6. Did the plaintiffs make a "clear showing" that the balance of equities and the public interest support a preliminary injunction?

Statement Of The Case

I. Facts And Evidence

On April 25, 2022, seven patrons of Llano Library sued Llano County, Amber Milum (the library director), the county judge, every county commissioner, and several volunteer members of the Llano County library advisory board. ROA.39-69. The complaint alleged that the defendants were violating the plaintiffs' "First Amendment rights to access and receive information"[7] by weeding certain books from Llano Library, and it accused the defendants of engaging in "unconstitutional content-based and viewpoint-based discrimination" in weeding those books. ROA.67 (¶ 147).[8] On May 9, 2022, the plaintiffs moved for a preliminary injunction that would compel the return of 17 previously weeded books to the library shelves and catalog. ROA.187-212.[9]

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7. ROA.67 (¶ 148).
8. The complaint also asserted a due-process claim, but the district court did not grant preliminary relief on that claim and it is not an issue in the appeal.
9. The 17 books that the plaintiffs want returned to the shelves and catalog are: *Freakboy* by Kristin Elizabeth Clark; *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings; *Gabi, a Girl in Pieces* by Isabel Quintero; *Under the Moon: A Catwoman Tale* by Lauren Myracle; *Shine* by Lauren Myracle; *Spinning* by Tillie Walden; *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie Harris; *In the Night Kitchen* by Maurice Sendak; *My Butt is So Noisy!*, *I Broke My Butt!*, and *I Need a New Butt!* (aka the "butt books"), all by Dawn McMillan; *Larry the Farting Leprechaun*, *Gary the Goose and His Gas on the Loose*, *Freddie the Farting Snowman*, and *Harvey the Heart Had Too Many Farts* (aka the "fart books"), all by Jane Bexley; *They Called Themselves the K.K.K: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti; and *Caste: The Origins of Our Discontent* by Isabel Wilkerson. ROA.1039 (proposed order).

In response to the lawsuit, the Llano Library accepted a donation of the 17 disputed books and made them available for the plaintiffs to read and check out through the library's "in-house checkout" system.[10] The in-house checkout system contains books that are donated or loaned to Llano Library from staff members or other friends of the library. ROA.673. These in-house books are not placed on the shelves or in the catalog and do not have bar codes, but are nonetheless made available for library patrons to read and check out. ROA.3924-3925.

The donation and availability of the 17 disputed books through the in-house checkout system does not moot the plaintiffs' First Amendment claims, as the plaintiffs continue to suffer Article III injury from the fact that the 17 books are no longer on the library's shelves or included in the catalog. But it does eliminate any possible violation of the plaintiffs' "First Amendment rights to access and receive information,"[11] as each plaintiff is aware of the in-house checkout system and the availability of the disputed books,[12] and the plaintiffs have the same ability to check out the disputed books from Llano Library that they had before the books were weeded.

The plaintiffs refused to accept this arrangement and demanded a preliminary injunction that would return each of the 17 disputed books to the shelves and catalog—even though they could not show "irreparable harm" when the 17 books re-

10. ROA.3463-3465; ROA.673-674; ROA.2497; ROA.720-721.
11. ROA.67 (¶ 148).
12. ROA.3463-3465 (stipulation of undisputed facts).

mained available for them to read and check out at Llano Library.[13] The district court held a two-day hearing on the motion for preliminary injunction in October of 2022. The undisputed evidence and sworn testimony showed that:

- Amber Milum alone made the decision to "weed" each of the 17 disputed books.[14]

- None of the other defendants ordered, pressured, or even asked Ms. Milum to weed (*i.e.*, permanently remove) any book from Llano Library or the Llano County Library System.[15]

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13. The plaintiffs' district-court briefing did not explain how the defendants could be violating their "First Amendment right to access information" by making the 17 disputed books available through Llano Library's in-house checkout system rather than returning them to the shelves and catalog. ROA.1884-1914; ROA.2390-2407.

14. ROA.2499 ("I alone made the decisions to weed the 17 disputed books in this case. No other defendant in this case, including Bonnie Wallace, Rochelle Wells, Rhonda Schneider, Jerry Don Moss, or Ron Cunningham, has ever weeded a book from Llano library or directed me to weed or permanently remove a book from the library. Nor has any of these individuals pressured or attempted to pressure me to weed or permanently remove any book from the library system."); ROA.676 ("I was never instructed or pressured by the County Judge or any of the County Commissioners to weed or otherwise permanently remove any books from the Llano County libraries. I was also never instructed to remove any books from the libraries by the Llano County Advisory Board.").

15. *See* note 14, *supra*; *see also* ROA.4000-4001 ("Q. Were any of your ultimate decisions to weed any book from the library shelves influenced in any way by anyone on the commissioners' court? A. No. Q. Were they influenced by anyone on the library advisory board? A. No."); ROA.2492 (Moss) ("I never 'ordered' or 'directed' the removal of any book from the library and . . . I have no authority over Ms. Milum's decisionmaking").

- Ms. Milum's decisions to weed the 17 books had nothing to do with the content or viewpoints expressed in the books.[16] Ms. Milum did not even read any of the 17 disputed books before weeding them.[17]

- Ms. Milum weeded the 17 disputed books solely because she concluded, in her professional judgment, that the books satisfied the MUSTIE criteria for weeding, no less than the other 7,767 books that were weeded from the Llano County Library System between February 1, 2021, and March 18, 2022.[18]

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16. ROA.676 ("I did not consider the content of any of the books I weeded when I made the decision to weed them. I also did not consider any of the viewpoints expressed in any of the books I weeded. I weeded the books based on the objective criteria I always use in determining which books to weed."); ROA.677 ("No book was removed based on its content or viewpoint during this process."); ROA.2506-2507 ("I have never in my entire career weeded a book because of its viewpoints, and I have never considered the content of a book when making a weeding decision except to the extent that the MUSTIE factors might require me to consider whether a book should be considered 'misleading,' 'superseded,' 'trivial,' or 'irrelevant.' I have no hostility, antipathy, or opposition of any type to the presence of library books discussing critical race theory or LGBTQ issues, regardless of the viewpoints expressed in those books, and the Llano library system has many books on these topics. Nor do I have any hostility, antipathy, or opposition of any type to the presence of library books containing nudity, so long as the depictions are lawful (*i.e.*, no child pornography or obscenity) and intended to serve educational rather than pornographic purposes. I do not ever allow my personal views or beliefs to influence my weeding decisions because a library exists to serve the community, and our patrons have diverse beliefs and tastes and reading habits. For the plaintiffs to accuse me of weeding books because I disapprove of nudity, critical race theory, or LGBTQ content is false and defamatory.").
17. ROA.3974 ("Q. Have you read any of the books that we've been talking about? A. No."); ROA.2507 ("I did not read any of those books before weeding them, and I am not even aware of the 'viewpoints' or 'positions' (if any) that might be expressed in any of those books.").
18. ROA.4174-4187 (Milum explaining her reasons for weeding the disputed books); ROA.672, 675-676 (same); ROA.2500-2501 (Milum explaining her reasons for weeding *Under The Moon*); ROA.2501 (Milum explaining her reasons

- One of the books that Ms. Milum weeded from Llano Library was *Being Jazz: My Life as a (Transgender) Teen*, because it hadn't been checked out at Llano Library in more than four years.[19] Ms. Milum did not, however, weed the version of *Being Jazz* held at Kingsland Library because the Kingsland version had a better circulation record.[20]

- Jerry Don Moss, one of Llano County's Commissioners, expressed his opinion to Ms. Milum and library staff that the "butt" books and *It's Perfectly Normal* did not belong in the children's section of the library,[21] but he never instructed anyone to remove or weed any book.[22]

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for weeding the "butt" and "fart" books); ROA.2507 ("I did not consider any of the 17 books that I weeded to be pornographic or in any way inappropriate for a public library. I weeded those books solely based on my application of the CREW/MUSTIE factors.").

19. ROA.346 (showing last checkout was July 19, 2017).
20. ROA.3995 ("Q. Why did you decide to weed *Being Jazz: My Life As A Transgender Teen*? It was not getting checked out at the Llano library, but it was popular at Kingsland, so we had an extra copy. Q. Did you weed the book at Kingsland where it was popular? A. No.").
21. ROA.4243-4244 (Moss) ("I made sure and told her that I was not her supervisor . . . . I told her that I didn't think that those books should be in the children's section . . . . That was my personal opinion. Like I said, I wanted to make sure that she understood I wasn't her boss. I think she knew that. So it was just my opinion that it should not be in the children's section of the library."); ROA.2492 (Moss) ("I merely expressed my opinions that the 'butt' books and *It's Perfectly Normal* should not be shelved in the children's section of the library."); ROA.2498 (Milum) ("Commissioner Moss merely expressed his opinion to me regarding the butt books. He did not think those books should be in the children's section and he said that if it were him he would take them out of the system and for me to pick my battles.").
22. ROA.4244 (Moss) ("Q. How many times, if any, did you direct Amber Milum to remove a particular book from the Llano County Library System? A. I did not direct her to remove any books from the library."); ROA.2492 (Moss) ("I

- Ron Cunningham, the Llano County Judge, recommended that Ms. Milum *temporarily* pull the "butt" and "fart" books from the shelves to determine whether they should remain in the children's section of the library,[23] but he never asked or directed Ms. Milum to "weed" those books by permanently removing them from the shelves and catalog.[24]

- Judge Cunningham also asked Ms. Milum to *temporarily* pull from the shelves books that "depict any type of sexual activity or questionable nudity"[25] so that Ms. Milum could review whether those

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never 'ordered' or 'directed' the removal of any book from the library and . . . I have no authority over Ms. Milum's decisionmaking"); ROA.684 (Moss) ("I made clear to Ms. Milum that I was not her boss and could not tell her what to do . . . . I never directed or suggested that any books be removed from the library based on their content."); ROA.2295 (Milum) ("Commissioner Moss never ordered or directed me to weed or temporarily remove the butt books (or any other book)"); ROA.2296 (Milum) ("Commissioner Moss never ordered the weeding or even the temporary removal of any book in the Llano library.").

23. ROA.2499 (quoting e-mail from Judge Cunningham that says: "Amber, I am still receiving calls, letters and emails concerning the Farts and Butts books. I think it is best to remove these books from the shelves *for now*." (emphasis added)); *id.* (Milum) ("Judge Cunningham recommended only that I *temporarily* remove those books from the shelves."); ROA.2488 (Cunningham) ("My e-mail to Amber Milum . . . recommended only that Ms. Milum *temporarily* remove those books from the shelves to determine whether they should remain in the children's section of the library."); ROA.4009-4010 ("[M]y intent was to neutralize the situation until we could investigate it further.").
24. ROA.2499 (Milum) ("Judge Cunningham . . . . never directed me to weed those books, and my decision to weed those books was entirely my own."); ROA.2488 (Cunningham) ("I never directed Amber Milum or any other library employee to weed those books or any other book.").
25. ROA.349 (e-mail from Ron Cunningham to Amber Milum of November 10, 2021); ROA.682 ("I did in at least one email to Ms. Milum direct her to 'pull' books with 'sexual activity or questionable nudity,' it was the shared understanding of both myself and Ms. Milum that 'pull' in the context used meant to remove such books from the shelves for review prior to making a decision on

books should remain in the library's collection. All of those books remained in the catalog and remained available for checkout while Ms. Milum conducted her review.[26] Ms. Milum returned the vast majority of these temporarily pulled books to the shelves after conducting her review.

- Judge Cunningham also forwarded to Ms. Milum a spreadsheet prepared by Bonnie Wallace of books at Llano Library that Ms. Wallace found objectionable. Judge Cunningham did not look at the spreadsheet[27] and did not instruct Ms. Milum to do anything with Ms. Wallace's spreadsheet.[28] Ms. Milum did not know Ms. Wallace and had never heard of her when she received the spreadsheet from Judge Cunningham.[29]

- Judge Cunningham never instructed Ms. Milum to weed any book from the Llano County public library system.[30]

- 47 of the books on Ms. Wallace's spreadsheet were on the shelves at Llano Library. Ms. Milum decided to review these 47 books to see if they qualified for weeding under MUSTIE.[31] All of those

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whether to re-shelve the books in a different section of the library such as the adult section.").

26. ROA.3900 ("[W]hile they were on the cart in Amber's office, were they available to be checked out? A. Yes. We just had to ask for them.").
27. ROA.680 (Cunningham) ("I received an email from Bonnie Wallace that contained a list of books. I did not look at the list. I forwarded the email to Ms. Milum for her to consider. To this day I am unaware of the books that are on the list.").
28. ROA.675 ("I was not instructed to do anything with respect to the books on the list, but I decided to review them out of curiosity.").
29. ROA.675 ("I was not familiar with Bonnie Wallace at the time.").
30. ROA.682 (Cunningham) ("I have never instructed any library staff, including Ms. Milum, to remove any books from the Llano County library shelves. Nor have I removed any books. It is not within my duties as County Judge to either acquire or remove books from the libraries.").
31. ROA.675; ROA.3953 ("I pulled them to review them, not to weed them.").

books remained in the catalog and remained available for checkout while Ms. Milum conducted her review.[32]

- Ms. Milum concluded that only 6 of the 47 books on Ms. Wallace's spreadsheet should be weeded according to the MUSTIE criteria: *Freakboy*; *Shine*; *Caste: The Origins of our Discontents*; *Gabi, a Girl in Pieces*; and *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group*. ROA.675. Ms. Milum determined that the remaining 41 books did not meet the criteria for weeding and she returned those 41 books to the shelves. *See id.*

- Ms. Milum's decision to "weed" the 6 of the 47 books on Ms. Wallace's spreadsheet had nothing to do with the content or viewpoints expressed in those books, and Ms. Milum would have weeded those books even if no one in the community had ever complained about them.[33]

- Library-weeding manuals not only authorize but *require* librarians to engage in both "content discrimination" and "viewpoint discrimination" when weeding books.[34]

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32. *See* note 26, *supra*.
33. ROA.675 ("My decision to weed the six books had nothing to do with the viewpoints or content expressed in any of those books. I would have weeded each of those six books regardless of the viewpoints or content expressed in those books, and I would have done so even if no one in the community had ever complained about them."); ROA.2507 ("The plaintiffs' claim that I 'removed' those books 'because they were on the Wallace list' is misleading. . . . My decision to pull those books for review (*i.e.*, to *temporarily* remove the book) was because they appeared on the Wallace list, but my decision to weed the books (*i.e.*, to *permanently* remove them) was *solely* because I determined they met the criteria for weeding. The vast majority of books on Bonnie Wallace's list were returned to the shelves").
34. ROA.3191 (listing "poor *content*" as grounds for weeding, including "[m]aterial that contains biased, racist, or sexist terminology *or views*" (emphasis added)); ROA.3193 (instructing librarians to consider "current interest in the subject matter"); ROA.3205 ("[L]ook for books that contain stereotyping, including stereotypical images and views of people with disabilities and

Although the plaintiffs had alleged a vast conspiracy among the defendants to purge the Llano County Library System of all books containing nudity, LGBTQ content, or critical race theory, their case quickly fell apart when Milum insisted that she alone made the weeding decisions and the remaining defendants denied instructing or pressuring Milum to weed any materials from the library.[35] The plaintiffs do not claim that Ms. Milum (or the other defendants) are lying in their declarations and courtroom testimony, and none of the plaintiffs' witnesses or declarants claim to have personal knowledge of Ms. Milum's subjective state of mind. So the testimony on Ms. Milum's actual motivations for weeding the 17 books is unrebutted,[36] and it conclusively refutes the plaintiffs' accusation that Ms. Milum engaged in "content discrimination" or "viewpoint discrimination" in her weeding decisions. *See Board of Education v. Pico*, 457 U.S. 853, 871 (1982) (plurality op. of Bren-

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the elderly, or gender and racial biases."); ROA.3237 ("Weed biased or unbalanced and inflammatory items."); *id.* ("Weed career guides with gender, racial, or ethnic bias."); ROA.3240 ("Discard books that are MUSTIE or that reflect gender, family, ethnic, or racial bias."); *id.* ("Weed based on the quality of the retelling, especially if racial or ethnic bias is present."); ROA.3245 ("While information may not become dated, watch for cultural, racial, and gender biases."); ROA.3246 ("Discard books . . . that feature gender bias."); ROA.3247 ("Watch for gender and racial bias in sports and athletics."); ROA.3248 ("Watch for collections that feature gender or nationality bias and outdated interests and sensitivities."); ROA.3249 ("Watch for outdated interests and collections that feature gender or race bias."); ROA.3253 ("Weed books that reflect racial and gender bias."); ROA.3254 ("Do not retain books that have erroneous and dangerous information simply because the book is still in great shape.").

35. *See* notes 14–15 and accompanying text, *supra*.
36. *See* notes 16–18 and accompanying text, *supra*.

nan, J.) ("[W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions.").

The plaintiffs tried to salvage their case by relying on several pieces of documentary evidence. One piece of evidence comprised two e-mails sent by Judge Cunningham to Ms. Milum. The first of these e-mails, dated November 10, 2021, reads as follows:

> Amber,
>
> As we discussed in our meeting in my office at 9:45 AM on November 9, 2021 any and all books that depict any type of sexual activity or questionable nudity are to be pulled immediately.
>
> I am also requesting that any of these books that are available online be pulled as well. Please advise Commissioner Moss and I when this task has been completed.

ROA.349. But Cunningham and Milum both explained that this e-mail merely instructed Milum to *temporarily* pull those books so that Milum could *review* whether they should be weeded or moved from the children's section.[37] It was not an instruction to weed or permanently remove those books.[38]

The second e-mail from Cunningham to Milum read as follows:

> Amber, I am still receiving calls, letters and emails concerning the Farts and Butts books. I think it is best to remove these books from the shelves *for now*.

37. *See* note 25 and accompanying text, *supra*.
38. *See* note 30 and accompanying text, *supra*.

ROA.2488 (emphasis added). This, too, is not an instruction to weed the "butt" and "fart" books, but a mere request to *temporarily* remove them from the shelves to determine whether they should be weeded or moved from the children's section. Cunningham and Milum both testified to this effect.[39]

Finally, the plaintiffs invoked an e-mail that Rochelle Wells sent to members of the Llano community on November 11, 2021, which said:

> Commissioner Moss and Judge Cunningham have instructed Amber, the head librarian, to remove certain books, both physical books and ebooks (via the LIBBY app) . . . . Amber was told to get rid of Lawnboy and Gender Queer (physical and ebook). Commissioner Moss, we are very grateful for your help in this situation and all you have done to begin to remedy it!

ROA.354. But Cunningham and Moss both declared under oath that these statements in Wells's e-mail were false, and that they never "instructed" Milum to weed or "get rid of" *any* book in the Llano County public-library system.[40]

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39. *See* notes 23–24 and accompanying text, *supra*.

40. ROA.2489 (Cunningham) ("Ms. Wells was mistaken to assume in her e-mail of November 11, 2022, [sic] that I had 'directed' Ms. Milum to remove books. I merely asked Ms. Milum to *temporarily* pull certain books to *review* whether they should continue be housed in the library or stored in the children's section."); ROA.2493 (Moss) ("Ms. Wells's e-mail of November 11, 2021, is mistaken in saying that I 'instructed' and 'told' Ms. Milum to 'remove certain books.' I never instructed or told anyone at the library to weed or temporarily remove any book, either physical books or ebooks, and I never instructed Ms. Milum or anyone else to remove *Lawn Boy* or *Gender Queer*."); *see also id.* ("Ms. Wells was mistaken to assume in her e-mail of January 19, 2022, that I had 'made' Ms. Milum or Ms. Castelan remove *It's Perfectly Normal*. I did not 'make' anyone at the public library remove that book. I merely expressed my opinion . . . that *It's Perfectly Normal* should not be shelved in the children's section of the library.").

II. The District Court's Ruling

On March 30, 2023, the district court granted the plaintiffs' motion for preliminary injunction and ruled that the First Amendment prohibits a public library from engaging in "content discrimination" or "viewpoint discrimination" when weeding books. ROA.3523 ("[T]he First Amendment prohibits the removal of books from libraries based on either viewpoint or content discrimination.").[41]

The district court did not explain how the defendants could be "violating" the plaintiffs' First Amendment rights when each of the 17 disputed books remains available for the plaintiffs to read and check out at Llano Library. ROA.3507-3532. Instead, the district court observed that the donation of the disputed books and their availability through Llano Library's in-house checkout system did not "moot" the plaintiffs' First Amendment claims. ROA.3518. The district court was surely right to hold that the plaintiffs' First Amendment claims are not moot, and the defendants had conceded in the district court that the plaintiffs continue to suffer Article III injury (though a very minor one) from their inability to obtain or check out the disputed books from the library shelves as opposed to the in-house checkout system.[42] But it is not enough for the plaintiffs to establish an Article III case or

41. Later in its opinion, the district court stated that content-based weeding decisions at public libraries must survive "strict scrutiny," which backtracks slightly from the categorical condemnations that appear elsewhere in its opinion. ROA.3526 ("Content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny."); ROA.3528 (applying strict scrutiny to the plaintiffs' content-discrimination claim).
42. ROA.3153 ("Neither the case nor the motion is moot, and it would be wrong for the Court to hold that they are moot.").

controversy; they must also make a "clear showing"[43] that the defendants are infringing their "First Amendment rights to access and receive information and ideas"[44] before they can obtain a preliminary injunction. The district court did not attempt to explain how the plaintiffs are being deprived of their rights to "access and receive information and ideas" when each of them has the same access to the 17 disputed books that they had before the books were weeded.

Then the district court ruled that the plaintiffs were likely to succeed on their claims that the "defendants" had engaged in both "viewpoint discrimination" and "content discrimination." ROA.3523-3528. The district court did not identify the "viewpoints" that the defendants had discriminated against, nor did it identify the viewpoints expressed in any of the 17 disputed books. ROA.3523-3526. Instead, the district court ruled that the defendants had likely engaged in "viewpoint discrimination" because "the evidence shows" that they "targeted and removed books . . . based on complaints that the books were inappropriate,"[45] and they "may be seen to have adopted" the motivations of Bonnie Wallace and Rochelle Wells, who objected to the 17 books (among many others) and wanted them removed from the library. ROA.3525. The district court also ruled that the defendants had likely engaged in "content discrimination" because the decision to *review* the disputed books (and

43. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." (emphasis in original) (citation and internal quotation marks omitted)).
44. ROA.67.
45. ROA.3524.

others) for weeding was prompted by complaints from library patrons who found the books objectionable—even if the ultimate weeding decision was made without regard to content or viewpoint. ROA.3526-3527 ("[T]he targeted review was directly prompted by complaints from patrons and county officials over the contents of these titles.").

The district court then issued a preliminary injunction that went far beyond what the plaintiffs had requested and awards relief that the plaintiffs do not even have Article III standing to pursue. The plaintiffs had sought a preliminary injunction that would order the defendants to return to the library shelves only the 17 disputed books. ROA.1038-1040 (proposed order). The district court's order, however, demands the return of "*all* print books that were removed because of their viewpoint or content, *including*" the 17 books at issue in this litigation. ROA.3531 (emphasis added). The district court's order also enjoins the defendants from "removing *any* books from the Llano County Library Service's catalog for *any* reason during the pendency of this action." ROA.3532 (emphasis added). This, too, goes beyond what the plaintiffs asked for, as they had requested a more limited injunction that would prohibit removal of books absent documentation of "(a) the individual who decided to remove or conceal the book and (b) the reason or reasons for that removal or concealment." ROA.1040.

The defendants appealed and asked this Court to stay the preliminary injunction pending appeal, as well as expedite the appeal to the next available argument sitting. *See* Mot. for Stay, ECF No. 14. On May, 5, 2023, this Court granted the mo-

tion to expedite and ordered that the motion for stay pending appeal be carried with the case. *See* Order, ECF No. 58-2.

Summary Of Argument

The preliminary injunction should be vacated for many reasons. First, none of the plaintiffs are suffering any violation of their constitutional right "to access and receive information" because every one of the 17 disputed books remains available for them to check out and read through the Llano Library's in-house checkout system. ROA.3463-3465. Second, the plaintiffs cannot make a showing of irreparable harm when they can access each of the 17 disputed books at Llano Library without a preliminary injunction. *See id.* Third, the district court erred in holding that the First Amendment forbids "viewpoint discrimination" or "content discrimination" in public-library weeding decisions, as content and viewpoint considerations are both inevitable and permissible when weeding library materials, and a public library's shelf space is not a "public forum" that triggers rules against viewpoint discrimination or content discrimination.[46] Fourth, even if one were to assume that the Constitution prohibits content- or viewpoint-based weeding decisions at public libraries, the plaintiffs failed to make a "clear showing" that Amber Milum engaged

46. *See Chiras v. Miller*, 432 F.3d 606, 614 (5th Cir. 2005) ("'[J]ust as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.'" (quoting *United States v. American Library Ass'n Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion of Rehnquist, C.J.))); *id.* ("'Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.'" (quoting *American Library Ass'n*, 539 U.S. at 205 (plurality opinion of Rehnquist, C.J.))).

in viewpoint or content discrimination when weeding the 17 disputed books. Fifth, the district court's injunction is overbroad and awards relief that the plaintiffs did not request and do not have standing to pursue. Finally, the plaintiffs failed to make a "clear showing" that the balance of equities or the public interest supports a preliminary injunction.

Standard Of Review

An order granting a preliminary injunction is reviewed for abuse of discretion, but issues of law are reviewed de novo and findings of fact are reviewed under the clearly erroneous standard. *See Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013).

Argument

I. The District Court Erred In Granting A Preliminary Injunction

To obtain a preliminary injunction, the plaintiffs needed to make a "clear showing" of: (1) Likely success on the merits; (2) A likelihood that the plaintiffs will suffer irreparable harm absent preliminary relief; (3) That the balance of equities tips in the plaintiffs' favor; and (4) That a preliminary injunction is in the public interest. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). A preliminary injunction is "an extraordinary remedy," and it may not be granted unless the plaintiffs "*clearly carried* the burden of persuasion on *all four requirements*." *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012) (emphasis added) (citation and internal quotation marks omitted); *Voting for*

America, Inc. v. Steen, 732 F.3d 382, 386 (5th Cir. 2013) (same). The plaintiffs failed to make a "clear showing" on any of the four prongs.

A. The Plaintiffs Failed To Make A Clear Showing That The In-House Checkout System Violates Their First Amendment Right To Access And Receive Information

The plaintiffs' First Amendment claims cannot get off the ground when each of the 17 disputed books remains available for them to check out through Llano Library's in-house system. The district court's opinion does not explain how the defendants can be violating the plaintiffs' "right to access and receive information" when each plaintiff remains able to check out every one of the 17 disputed books at Llano Library. And the plaintiffs have not explained how the in-house checkout system violates their constitutional rights in any document that they have filed in this litigation.

The plaintiffs (and the district court) complained that *other* library patrons may not be aware of the in-house checkout option.[47] But the plaintiffs have no standing to assert the rights or interests of non-parties,[48] and the plaintiffs made no showing

47. ROA.3518 (observing that other library patrons have "no way of knowing that the books even exist"); ROA.1902 (complaining that "[t]he only way that a patron might know these books are available is because of the lawsuit." (internal quotation marks omitted)).

48. Neither 42 U.S.C. § 1983 nor the Declaratory Judgment Act allows the plaintiffs to sue over alleged violations of someone else's rights. *See Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986) (plaintiffs who invoke 42 U.S.C. § 1983 are "required to prove some violation of their *personal* rights." (emphasis added)); *id.* (citing rulings from other federal courts that prohibit litigants from asserting third-party rights under section 1983); *Garrett v. Clarke*, 147 F.3d 745, 746 (8th Cir. 1998) ("Garrett may not base his Section 1983 action on a viola-

that the in-house checkout system violates *their* First Amendment rights or burdens *them* in any way. Courts exist to resolve disputes between named litigants, not to act as "roving commissions"[49] empowered to pass judgment on the conduct of the Llano public-library system. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." (citation and internal quotation marks omitted)). So the plaintiffs needed to make a "clear showing" that the defendants are violating *the plaintiffs'* First Amendment rights by offering the disputed books through an in-house checkout system of which the plaintiffs are fully aware. ROA.3463-3465. Neither the plaintiffs nor the district court attempted to make this showing.

The district court correctly held that the defendants have not *mooted* the plaintiffs' claims by offering the disputed books through the in-house checkout system, as the plaintiffs remain "injured" by the continued absence of those books from the library shelves and catalog. ROA.3518-3519; *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) ("[A]n identi-

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tion of the rights of third parties."); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45.

49. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *see also id.* ("Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities."); *In re Gee*, 941 F.3d 153, 161 (5th Cir. 2019) ("'[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973)).

fiable trifle is enough for standing" (citation and internal quotation marks omitted)). But the district court's "voluntary cessation" analysis is irrelevant because the defendants have not mooted the plaintiffs' Article III injury and are not attempting to moot the case by returning the books to the shelves. Voluntary cessation is an *exception* to mootness, and that exception cannot be implicated when the defendants have done nothing that could eliminate an Article III case or controversy. The plaintiffs are still experiencing Article III injury (though a very minor one) from the fact that 17 books are in a slightly different location from before. The problem for the plaintiffs is that this injury does not remotely approach a violation of their constitutional rights. To obtain a preliminary injunction, the plaintiffs need to make a "clear showing" of *both* an Article III case or controversy *and* a violation of their First Amendment rights. And the plaintiffs cannot show that the defendants are depriving them of their "right to access and receive information" when every one of the 17 disputed books remains available for the plaintiffs to read and check out at Llano Library.

B. The Plaintiffs Failed To Make A "Clear Showing" Of "Irreparable Harm" When Each Of The 17 Disputed Books Remains Available For Them To Read And Check Out At Llano Library

The plaintiffs also failed to make a "clear showing" that they will suffer irreparable harm absent a preliminary injunction. *See Winter*, 555 U.S. at 20 ("A plaintiff seeking a preliminary injunction must establish . . . that *he is* likely to suffer irreparable harm in the absence of preliminary relief." (emphasis added)); *Jones v. District of Columbia*, 177 F. Supp. 3d 542, 546 n. 3 (D.D.C. 2016) ("[T]he irreparable harm

prong . . . only concerns harm suffered by the party or parties seeking injunctive relief . . . . [A]ny alleged harm to third parties is properly addressed under the public interest prong"). And they cannot possibly establish irreparable harm when each of the 17 disputed books remains available for them to read and check out through Llano Library's in-house checkout system.

The plaintiffs failed to identify *any* harm (let alone an "irreparable" harm) that they will suffer from obtaining the disputed books through the library's in-house checkout system. *See C.K.-W. by and through T.K. v. Wentzville R-IV School District*, 619 F. Supp. 3d 906, 919 (E.D. Mo. 2022) (removal of library books did not inflict irreparable harm because it "does not stop any student from reading or discussing the book"). All of the plaintiffs are aware of the in-house checkout system and heard testimony about the donation and availability of the 17 disputed books. ROA.3463-3465; ROA.4145-4149. And it is *easier* for the plaintiffs to obtain their desired book by asking for it at the reference desk rather than searching a catalog, traipsing among the shelves, and pawing through the books.

The district court's opinion also fails to explain how the *plaintiffs* will suffer irreparable harm from using the library's in-house checkout system. The district court observed that *other* library patrons might not be aware of the in-house collection. ROA.3529 ("A patron must, notwithstanding the fact that the books' existence is not reflected in the library catalog, know that the books can be requested."). But effects on non-parties are irrelevant to the irreparable-harm inquiry; only harms to the seven named plaintiffs may be considered. *See Winter*, 555 U.S. at 20; *Jones*, 177 F. Supp. 3d at 546 n.3. And the plaintiffs cannot suffer "irreparable harm" from a

library that offers them the 17 books through an in-house checkout system—especially when the plaintiffs presented no evidence or arguments showing how this arrangement imposes any inconveniences on them.

C. The District Court Erred In Holding That The First Amendment Forbids "Viewpoint Discrimination" Or "Content Discrimination" In Public-Library Weeding Decisions

The plaintiffs have insisted throughout this litigation that "viewpoint discrimination" is unconstitutional *per se* in a public library's weeding decisions, and that "content discrimination" in public-library weeding is either categorically forbidden or subject to strict scrutiny.[50] The district court adopted the plaintiffs' stance almost verbatim in its opinion and order. ROA.3523 ("[T]he First Amendment prohibits the removal of books from libraries based on either viewpoint or content discrimination."); ROA.3526 ("Content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny."); ROA.3531 (ordering the defendants to return "*all* print books that were removed because of their viewpoint or content, including" the 17 books that the plaintiffs sued over). But the notion that

50. ROA.1903 ("The First Amendment prohibits the removal of books from libraries based on either content or viewpoint discrimination."); ROA.1904 ("Plaintiffs need only show Defendants removed books from the Llano County Library System—or placed burdens on accessing books—based either on the viewpoints expressed or on their content without narrowly tailoring the burden to a compelling government interest."); ROA.1891 ("Plaintiffs are likely to prevail on the merits because viewpoint and content discrimination are repugnant to the First Amendment."); ROA.202 ("Defendants' content-based suppression of access to books in public libraries—which are limited public forums—likewise violates the First Amendment.").

the First Amendment prohibits "content discrimination" or "viewpoint discrimination" in public-library weeding decisions is indefensible.

The binding precedent of this Court recognizes that content discrimination is not only permissible but inevitable when public libraries make collection decisions. *See Chiras v. Miller*, 432 F.3d 606, 614 (5th Cir. 2005) ("'Public library staffs *necessarily consider content* in making collection decisions and enjoy broad discretion in making them.'" (emphasis added) (quoting *United States v. American Library Ass'n Inc.*, 539 U.S. 194, 205 (2003) (plurality op.))). The district court acknowledged this passage from *Chiras* but insisted that it applies only to the selection and not the removal of library materials. ROA.3519 ("[T]his discretion . . . applies only to materials' selection."). But neither *Chiras* nor the plurality opinion in *American Library* makes any distinction between "selection" and removal decisions. And the distinction makes no sense because the weeding process involves the "selection" of library materials no less than the initial purchase of books. In both situations, the librarian is "selecting" the publications that he or she deems worthy of the library's limited shelf space. And books that survive the weeding process are being "selected" for continued inclusion in the library's collection, just as the newly purchased library materials are "selected." In addition, public libraries must enjoy the same latitude in "selecting" new materials that they have in weeding books that no longer belong in their collection, because library shelf space is limited and existing materials must be removed to create room for the new arrivals. An outdated book that is no longer accurate should be weeded and replaced with a newer and more accurate source,

and both the decision to weed and the decision to "select" the replacement are equally content-based and equally within the discretion of the library.

The district court appeared to believe that *Board of Education v. Pico*, 457 U.S. 853 (1982), and *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995), prohibit content or viewpoint discrimination in a public library's weeding decisions. ROA.3523 (citing *Pico* to support its claim that "the First Amendment prohibits the removal of books from libraries based on either viewpoint or content discrimination."); ROA.3526 (holding that *Campbell* is incompatible with the defendants' claim that "'content discrimination is permissible and inevitable in library-book selection.'"). Neither *Pico* nor *Campbell* says anything of the sort. Justice Brennan's plurality opinion in *Pico*, which represents the most restrictive view of public-library decisionmaking ever taken by a Supreme Court justice,[51] acknowledges that content discrimination is permissible in library-book selection, and it allows libraries to remove books based on content that is "pervasively vulgar" or that lacks "educational suitability." *Pico*, 457 U.S. at 871 (plurality op.); *see also id.* at 869 (plurality op.) ("[L]ocal school boards have a substantial legitimate role to play in the determination of school library *content*." (emphasis added)); *id.* at 870 (plurality op.) ("Petitioners rightly possess significant discretion to determine the *content* of

51. *See Pico*, 457 U.S. at 885 (1982) (Burger, C.J., dissenting) (describing the Brennan plurality opinion as "a lavish expansion going beyond any prior holding under the First Amendment"); *C.K.-W. by and through T.K. v. Wentzville R-IV School District*, 619 F. Supp. 3d 906, 915 (E.D. Mo. 2022) (describing "Justice Brennan's approach" as "the most expansive view of the purported right at play").

their school libraries." (emphasis added)); *id.* at 880 (1982) (Blackmun, J., concurring in part and concurring in the judgment) (endorsing specific examples of content and viewpoint discrimination in library-book selection).[52] *Campbell* re-affirms the *Pico* plurality's allowance for content-based weeding. *See Campbell*, 64 F.3d at 188–89 ("The Court in its plurality opinion implicitly recognized . . . that an unconstitutional motivation would not be demonstrated if the school officials removed the books from the public school libraries based on a belief that the books were 'pervasively vulgar' or on grounds of 'educational suitability.'"). The *Pico* plurality opinion says only that school libraries may not weed books "in a narrowly partisan or political manner"[53]—a far cry from the near-total prohibition on viewpoint or content discrimination that the district court endorsed.

Chiras also establishes that a public library is *not* a "public forum" that triggers rules against viewpoint discrimination or content discrimination:

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52. *See Virgil v. School Board of Columbia County, Florida*, 862 F.2d 1517, 1521–22 (11th Cir. 1989) (acknowledging that under Justice Brennan's plurality opinion in *Pico*, the "removal of books from library would be permissible if decision were based on determination that books were 'pervasively vulgar' or not 'educational[ly] suitab[le]'"); *Serra v. U.S. General Services Administration*, 847 F.2d 1045, 1050 (2d Cir. 1988) ("Removal of books that were pervasively vulgar or educationally unsuitable would, even in the [*Pico*] plurality's view, be 'perfectly permissible.'" (citations omitted)); *C.K.-W. by and through T.K. v. Wentzville R-IV School District*, 619 F. Supp. 3d 906, 916 (E.D. Mo. 2022) ("[I]t is 'perfectly permissible' for a school to remove a book based upon the book's 'educational suitability.'" (quoting *Pico*, 457 U.S. at 871 (plurality op. of Brennan, J.))).

53. *See Pico*, 457 U.S. at 870 (plurality op.); *id.* at 872 ("[S]chool boards may not remove books from school library shelves simply because they dislike the ideas contained in those books").

> [J]ust as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.

Chiras, 432 F.3d at 614 (citation and internal quotation marks omitted). The district court ignored this passage from *Chiras* and held that library shelf space qualifies as a "limited public forum"—on the authority of a district-court opinion that predates *Chiras*. ROA.3519 n.4 (declaring that a public library is "'a limited public forum for purposes of First Amendment analysis.'" (quoting *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 534 (N.D. Tex. 2000))).[54] But *Chiras* is binding on the district court, and it precludes the use of "forum analysis" when litigants sue public libraries over their collection decisions. And if a public library does not qualify as a "forum," then there is no basis for imposing rules against content discrimination or viewpoint discrimination. Governments are *permitted* to engage in content and viewpoint discrimination when allocating government resources, and they do it all the time. *See Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt

54. The district court and the plaintiffs appear to be unaware that content discrimination is (for the most part) permissible in a "limited public forum," so long as the content discrimination is reasonable and viewpoint neutral. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009) ("In a [limited public] forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral."); *Christian Legal Society v. Martinez*, 561 U.S. 661, 679 (2010) (similar). Content discrimination is not subject to "strict scrutiny" in a limited public forum, as the district court and the plaintiffs apparently believe. ROA.202 (declaring "public libraries" to be "limited public forums"); ROA.205 (same).

democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism."); *National Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view"). Only when a government program establishes a "forum" of some sort do the rules against viewpoint discrimination or content discrimination kick in. *See, e.g.*, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829–30 (1995).

The more serious problem for the district court (and the plaintiffs) is that the weeding process *requires* public librarians to engage in content and viewpoint discrimination. Three of the six MUSTIE factors require librarians to weed materials that are "Misleading," "Superseded," Or "Trivial." All of that is "content discrimination," as books with content that a librarian deems misleading, superseded, or trivial are weeded to make room for books with content that is accurate, up-to-date, and more important. And all of that is constitutional. A public library that weeds the seventh edition of Hart & Wechsler to make room on its shelves for the eighth edition is not violating the First Amendment, even though it is engaging in "content discrimination" by preferring the newer content of the eighth edition over the more dated content of the seventh edition. A librarian who engages in content-blind weeding is committing library malpractice.

Library-weeding manuals recognize all of this, and they instruct librarians to engage in both "content discrimination" and "viewpoint discrimination" when weeding library materials. A library-weeding manual published by the Texas State

Library and Archives Commission tells librarians to weed books with "poor content," which includes each of following:

- **Outdated and obsolete information** (especially on subjects that change quickly or require absolute currency, such as computers, law, science, space, health and medicine, technology, travel)

- **Trivial subject matter**, including topics that are no longer of interest or that were dealt with superficially due to their popularity at a specific point in time, as well as titles related to outdated popular culture

- **Mediocre writing style**, especially material that was written quickly to meet popular interest that has passed

- **Inaccurate or false information**, including outdated information and sources that have been superseded by new titles or editions

- **Unused sets of books** (although you may keep specific volumes if they meet local needs and are used)

- **Repetitious series**, especially series that are no longer popular or that were published to meet a popular demand that no longer exists

- **Superseded editions** (in general, it is unnecessary to keep more than one previous edition, discarding as new editions are added)

- **Resources that are not on standard lists** or that were never reviewed in standard review sources

- **Material that contains biased, racist, or sexist terminology or views**

- **Unneeded duplicates**, especially if they are worn or tattered

- **Self-published or small press materials that are not circulating**, especially if they were added as gifts

ROA.3191 (boldface in original). In addition to this mandated content discrimination, the manual repeatedly instructs librarians to engage in viewpoint discrimination by weeding books with biased viewpoints:

- "[L]ook for books that contain stereotyping, including stereotypical images and views of people with disabilities and the elderly, or gender and racial biases."[55]
- "Weed biased or unbalanced and inflammatory items."[56]
- "Weed career guides with gender, racial, or ethnic bias."[57]
- "Discard books that are MUSTIE or that reflect gender, family, ethnic, or racial bias."[58]
- "Weed based on the quality of the retelling, especially if racial or ethnic bias is present."[59]
- "While information may not become dated, watch for cultural, racial, and gender biases."[60]
- "Discard books . . . that feature gender bias."[61]
- "Watch for gender and racial bias in sports and athletics."[62]

55. ROA.3205.
56. ROA.3237.
57. ROA.3237.
58. ROA.3240.
59. ROA.3240.
60. ROA.3245.
61. ROA.3246.
62. ROA.3247.

- "Watch for collections that feature gender or nationality bias and outdated interests and sensitivities."[63]
- "Watch for outdated interests and collections that feature gender or race bias."[64]
- "Weed books that reflect racial and gender bias."[65]
- "Do not retain books that have erroneous and dangerous information simply because the book is still in great shape."[66]

The plaintiffs also introduced into evidence a slideshow on weeding produced by Dawn Vogler at the Texas State Library and Archives Commission, which likewise instructs librarians to engage in content and viewpoint discrimination by weeding materials with "Trivial subject matter (outdated popular culture)," "Mediocre writing style," "Inaccurate or false information," and "bias, racist, sexist terminology or views." ROA.2486.

The plaintiffs have never come to grips with the fact that their proposed ban on "content discrimination" and "viewpoint discrimination" would make it impossible for public librarians to do their job. Libraries are supposed to establish standards for the materials in their collection, and they must ensure that their limited shelf space is reserved for quality publications. There is nothing wrong with content- or viewpoint-based weeding of library books that deny the Holocaust, promote crackpot conspiracy theories, or espouse obsolete and debunked scientific theories such as

63. ROA.3248.
64. ROA.3249.
65. ROA.3253.
66. ROA.3254.

spontaneous generation or scientific racism. Of course, the government could never ban or censor a publication on these grounds, nor could it discriminate against these views in a traditional public forum. But public libraries are different. They are not "forums" of any sort,[67] and they *must* impose content-based (and viewpoint-based) standards when deciding how to allocate their limited shelf space. *See American Library*, 539 U.S. at 204 (plurality op.); *Chiras*, 432 F.3d at 614. A public library cannot function if its librarians are prohibited from making content- or viewpoint-based weeding decisions, or if its librarians can be sued whenever a library patron suspects that a weeding decision was influenced by the content or viewpoints expressed in a book. *See* Milum Decl., ECF No. 14-4, at ¶¶ 7–8.

D. The Plaintiffs Failed To Make A "Clear Showing" That Amber Milum Engaged In Viewpoint Or Content Discrimination When Weeding The 17 Disputed Books

The preliminary injunction should be vacated for yet another reason: Even if one assumes that the First Amendment prohibits content- or viewpoint-based weeding decisions, the plaintiffs failed to make a "clear showing" that Amber Milum engaged in "viewpoint discrimination" or "content discrimination" when weeding the disputed books.

Milum insisted repeatedly and under oath that her decisions to weed the 17 disputed books were unrelated to their content or viewpoints,[68] and were based solely

67. *See Chiras*, 432 F.3d at 614 ("'[F]orum analysis and heightened judicial scrutiny . . . are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.'" (quoting *American Library*, 539 U.S. at 205 (plurality op. of Rehnquist, C.J.))).

68. *See* notes 16–17 and accompanying text, *supra*.

on her application of the MUSTIE factors that govern library-weeding decisions.[69] The district court did not claim that Milum was lying in her sworn testimony, and it did not find that Milum had misapplied the MUSTIE factors when weeding the 17 disputed books. ROA.3526-3527 & n.7. Indeed, the district court recognized the "subjective nature" of library weeding decisions and acknowledged that "reasonable minds may disagree over how to apply the CREW and MUSTIE criteria." ROA.3526-3527 n.7.

Instead, the district court held that the plaintiffs had made a "clear showing" of "viewpoint discrimination" because Milum weeded the disputed books shortly after Bonnie Wallace, Rochelle Wells, and other members of the community had complained about them. ROA.3524-3525 ("[B]y responding so quickly and uncritically, Milum and the Commissioners may be seen to have adopted Wallace's and Wells's motivations. The Court finds that Plaintiffs have clearly shown that Defendants' decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells objected."). There are many problems with the district court's argument.

The first problem is that Milum weeded only a small fraction of the books on Bonnie Wallace's spreadsheet, and Milum returned the vast majority of those books the library shelves after concluding that they did not meet the criteria for weeding. ROA.675. Of the 47 print books at Llano Library that Wallace found objectionable, Milum weeded only six of them and kept the remaining 41 in the library's collec-

69. *See* note 18 and accompanying text, *supra*.

tion. *See id*. So something other than Bonnie Wallace's objections was behind Milum's decision to weed those books, and Milum presented unrebutted testimony that she weeded only six of the 47 books on Wallace's list because she determined that those six books met the MUSTIE criteria for weeding, while the remaining 41 books that Wallace opposed did not qualify for weeding and were returned to the shelves.[70] It is false for the district court to say that Milum acted "uncritically" in response to Wallace's objections, and it is equally false for the district court to impute Wallace's or Wells's motivations to Milum.

The second problem is that Ms. Milum declined to weed *Being Jazz: My Life as a (Transgender) Teen* from Kingsland Library, where it had a respectable circulation record,[71] even though Milum weeded the version at Llano Library that wasn't getting checked out.[72] Milum's nuanced response to *Being Jazz* is incompatible with the district court's effort to paint her as an unthinking pawn of Bonnie Wallace and others who were motivated by the content or viewpoints expressed in the disputed books.

The third problem is that there is no evidence that Wallace, Wells, or any other community members objected to the "viewpoints" (as opposed to the content) of the 17 disputed books. Wallace described the books that she opposed as "pornographic filth,"[73] an objection that goes to the content of a book rather than its view-

70. *See* note 33 and accompanying text, *supra*.
71. *See* note 20 and accompanying text, *supra*.
72. ROA.346 (showing last checkout of the Llano Library version was July 19, 2017).
73. ROA.349-351.

points, and there is no evidence that Wallace (or anyone else) was even aware of the "viewpoints" expressed in any of the weeded books. There is no evidence in the record of what "viewpoints" were espoused in any of these books, and many of the titles seem too silly or frivolous to contain a "viewpoint."[74] Neither the district court nor the plaintiffs have even identified the "viewpoints" that Milum and the remaining defendants were supposedly "discriminating" against.

The district court also held that the plaintiffs had made a "clear showing" of "content discrimination" because Milum's decision to *review* the disputed books (and others) for weeding was prompted by complaints from library patrons who thought the books objectionable—even if her ultimate weeding decision was made without regard to the content of those books. ROA.3526-3527 ("The targeted review was directly prompted by complaints from patrons and county officials over the contents of these titles."). This argument also does not hold water. There is nothing unconstitutional about *reviewing* a category of books to determine *whether* they should be weeded—even if the books are chosen for review because of their content or in response to complaints from library patrons who object to their content. Weeding is a continual process and librarians are constantly checking books to see whether they should remain on the library shelves. ROA.3953 ("We weed all the time."). And librarians will inevitably engage in "content discrimination" when selecting a shelf or section of the library for a weeding evaluation, as library shelves and the Dewey Decimal system are organized according to the *content* of a publica-

74. The plaintiffs have yet to explain the "viewpoint" expressed in *Larry the Farting Leprechaun* and the other books in the "butt" and "fart" series.

tion. ROA.2483. To ban a librarian from even *considering* whether a book should be weeded simply because library patrons or community members find its content objectionable is to prevent librarians from doing their job. Library materials are always fair game for a weeding evaluation. And it is a non sequitur to say that a librarian who *considers* a book for weeding because of its content is actually *weeding* books because of their content or viewpoints.

The plaintiffs have fallen far short of a "clear showing" that Amber Milum weeded the 17 disputed books because she disapproved of their content or viewpoints. There were certainly members of the Llano community who disapproved of the content of those books. But only Milum made the decision to weed,[75] and the plaintiffs' evidence that Milum weeded the books because she disapproved of their content or viewpoints is nonexistent. Milum weeded the 17 books because she determined that they met the MUSTIE criteria for weeding, not because she disapproved of their content or viewpoints.[76]

E. The Preliminary Injunction Is Overbroad

The preliminary-injunction order goes far beyond what the plaintiffs requested and awards relief that the plaintiffs do not have Article III standing to pursue. The plaintiffs asked the district court to order the return of only the 17 disputed books. ROA.1038-1040 (proposed order). The district court's order, however, demands the return to the shelves of "*all* print books that were removed because of their viewpoint and content, *including*" the 17 books at issue in this litigation. ROA.3531

75. *See* notes 14–15 and accompanying text, *supra*.
76. *See* notes 16–18 and accompanying text, *supra*.

(emphasis added). The plaintiffs, however, made no showing (let alone a "clear showing") that they are suffering Article III injury from the removal of any library materials other than the 17 books that they have complained about. *See DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press" and "separately for each form of relief sought." (citation omitted)); *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) ("Because a preliminary injunction 'may only be awarded upon a clear showing that the plaintiff is entitled to such relief,' the plaintiffs must make a 'clear showing' that they have standing to maintain the preliminary injunction.").

The preliminary injunction also restrains the defendants from "removing *any* books from the Llano County Library Service's catalog for *any* reason during the pendency of this action." ROA.3532 (emphasis added). This, too, goes far beyond what the plaintiffs asked for, and the plaintiffs lack Article III standing to pursue relief of that scope because they cannot be injured by the removal of a book that they have no interest in reading. The plaintiffs had requested a more limited injunction that would prohibit removal of books absent documentation of "(a) the individual who decided to remove or conceal the book and (b) the reason or reasons for that removal or concealment." ROA.1040.

An injunction should extend no further than necessary to provide complete relief to the named plaintiffs. *See Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs"). The plaintiffs did not allege or show injury in fact from the removal of any book other than the 17 books that they

sued over. Even if this Court decides to vacate the injunction across the board, it should remind district courts that their injunctions should not extend beyond what is necessary to remedy the injuries shown by the plaintiffs. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 616 (5th Cir. 2017) ("[A]n injunction must be 'narrowly tailor[ed] . . . to remedy the specific action which gives rise to the order.'" (quoting *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004)); *see also Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 273–74 (5th Cir. 1984); *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *vacated on other grounds by Planned Parenthood Center for Choice v. Abbott*, 141 S. Ct. 1261 (2021).

F. The Plaintiffs Failed To Make A "Clear Showing" That The Balance Of Equities And The Public Interest Favors A Preliminary Injunction

Finally, the plaintiffs failed to make a clear showing that the balance of equities tips in their favor, and they failed to make a clear showing that the public interest supports the district court's preliminary injunction. Each of the plaintiffs remains able to check out each of the 17 disputed books from Llano Library without any need for a preliminary injunction, and the burdens that the injunction imposes on the defendants far outweigh the benefits to the named plaintiffs.

The categorical prohibition on weeding in the district court's preliminary injunction will prevent the Llano County Library System from removing patently obsolete books or materials that have been damaged beyond repair. *See* Milum Decl., ECF No. 14-4, at ¶ 9 ("An injunction of that scope makes it impossible to run a

functioning library."). The preliminary injunction also purports to compel the return of every book that has ever been weeded for its content or viewpoints, and there is no way for the defendants to determine the reasons behind every previous weeding decision—many of which were made by librarians who are no longer employed by the county. *See id.* at ¶ 10 ("It is impossible for me to determine the reasons behind every one of our *thousands* of previous weeding decisions."). Nor is it possible for the defendants to re-shelve previously weeded books that are no longer in the library's possession and may not even be in print. *See id.* ("There is no way for our library system to comply with the terms of this injunction.").

Yet all that the plaintiffs get from this injunction is the satisfaction of having 17 books that were already available for them at Llano Library on the library shelves and in the catalog. This does not in any way enhance the plaintiffs' ability to "access and receive information and ideas," as they already had access to the books at Llano Library before the district court's injunction. The balance of equities does not favor the plaintiffs here, and the plaintiffs certainly have not made a "clear showing" to the contrary.

Nor have the plaintiffs made a "clear showing" that the public interest supports a preliminary injunction. There is no evidence that anyone other than the seven plaintiffs objects to the weeding practices at Llano Library or has any desire to check out any of the 17 books that the plaintiffs have sued over. And the preliminary injunction exposes every public librarian to the threat of lawsuits if a library patron disapproves of a weeding decision. *See* Milum Decl., ECF No. 14-4, at ¶ 7 ("Judge Pitman's ruling makes it impossible for our library's employees and volunteers to

do their jobs without facing the risk of ruinous lawsuits or contempt citations whenever a library patron disagrees with a weeding decision."). Public libraries weed *thousands* of books every year, and the notion that a disgruntled library patron can file a 42 U.S.C. § 1983 lawsuit over any one of these weeding decisions will subject every public librarian to the risk of harassing or vindictive litigation. *See id.* ("Any library patron can find reasons to object to a decision to weed any of the thousands of books that are permanently removed from our library shelves each year.").

II. The Court Should Hold That Rational-Basis Applies To Public-Library Weeding Decisions

The district court's opinion and order would allow a public librarian to be sued under 42 U.S.C. § 1983 whenever a library patron disagrees with a weeding decision and alleges that the librarian considered the "content" or "viewpoints" of the weeded material—even through librarians are *instructed* to engage in content- and viewpoint-based weeding by library weeding manuals.[77] Any librarian could be forced to sit for a deposition, face the prospect of a ruinous fee award under 42 U.S.C. § 1988, and be subjected to harassing litigation for months and years. And any random library patron would be empowered to countermand the weeding decisions of professional librarians by running to federal court and holding a trial on whether to believe a librarian's stated reasons for her weeding decisions.

A regime of this sort should not be tolerated. The plaintiffs have already imposed more than $150,000 in litigation costs on Llano County in their attempt to

77. *See* note 34 and accompanying text, *supra*.

prove "content discrimination" and "viewpoint discrimination,"[78] even though *Chiras* makes clear that content discrimination is both permissible and inevitable in public-library weeding decisions. *See Chiras*, 432 F.3d at 614 ("'Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.'" (quoting *American Library*, 539 U.S. at 205 (plurality opinion of Rehnquist, C.J.))).

The Court should hold that rational-basis review applies to a public library's weeding decisions, consistent with *Chiras* and the plurality opinion in *American Library*. *See American Library Ass'n*, 539 U.S. at 202 (plurality opinion of Rehnquist, C.J.) ("[G]enerally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review." (citation and internal quotation marks omitted)); *Egli v. Chester County Library System*, 394 F. Supp. 3d 497, 504 (E.D. Pa. 2019) ("Libraries are not required to accommodate every book or proposed talk, but instead must determine based on their professional judgment which materials are deemed to have 'requisite and appropriate quality' to occupy the limited space available." (quoting *American Library Ass'n*, 539 U.S. at 204 (plurality opinion of Rehnquist, C.J.))); *Gay Guardian Newspaper v. Ohoopee Regional Library System*, 235 F. Supp. 2d 1362, 1371 (S.D. Ga. 2002) ("Librarians may ordinarily take some comfort in the fact that . . . their content selection/removal decisions need only have a rational basis."). It is the rational-basis test, and not the plaintiffs' made-up rule against "content discrimina-

78. *See* Cunningham Decl., ECF No. 65, Ex. 2, at ¶¶ 7–9.

tion" or "viewpoint discrimination," that governs a public library's weeding decisions.

Conclusion

The preliminary injunction should be vacated.

Respectfully submitted.

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Dated: May 16, 2023

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No. 23-50224

In the United States Court of Appeals for the Fifth Circuit

Leila Green Little; Jeanne Puryear; Kathy Kennedy; Rebecca Jones; Richard Day; Cynthia Waring; Diane Moster,

Plaintiffs-Appellees,

v.

Llano County; Ron Cunningham, in his official capacity as Llano County Judge; Jerry Don Moss, in his official capacity as Llano County Commissioner; Peter Jones, in his official capacity as Llano County Commissioner; Mike Sandoval, in his official capacity as Llano County Commissioner; Linda Raschke, in her official capacity as Llano County Commissioner; Amber Milum, in her official capacity as Llano County Library System Director; Bonnie Wallace, in her official capacity as Llano County Library Board Member; Rochelle Wells, in her official capacity as Llano County Library Board Member; Rhoda Schneider, in her official capacty as Llano County Library Board Member; Gay Baskin, in her official capacity as Llano County Library Board Member,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas
Case No. 1:22-cv-424-RP

APPELLANTS' REPLY BRIEF

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Reply To The Plaintiffs' Statement Of Facts

The plaintiffs' recitation of the facts is misleading and (in many places) demonstrably false. Throughout their brief, the plaintiffs deploy imprecise terminology (such as the word "remove") and tiresome hyperbole. Saying that the 17 disputed books have been "banned" or "censored" is histrionic when each of those books remains available through the library's in-house checkout system and (for most of the books) through additional means such as CloudLibrary (the library's online collection)[1] or InterLibrary Loan.[2] Books that have been weeded from the shelves yet remain available to library patrons through other means have not been "banned" or "censored"—any more than the thousands of books that the Llano library system weeds each year. *See ACLU of Florida, Inc. v. Miami-Dade County School Board*, 557 F.3d 1177, 1218 (11th Cir. 2009) ("Book banning takes place where a government or its officials forbid or prohibit others from having a book. . . . [R]emoving a book from [library] shelves is not book banning.").

The plaintiffs also deliberately conflate the decisions to temporarily pull the disputed books for review with the decisions to permanently "weed" those books and erase them from the library catalog. The plaintiffs' brief uses the verb "remove" interchangeably to encompass each of these actions. And it does so without

1. Four of the 17 books remain available to library patrons through CloudLibrary: *Caste*, *It's Perfectly Normal*, *Being Jazz*, and *Gabi*. ROA.673-674.
2. 13 of the 17 books remain available through interlibrary loan: *They Called Themselves the K.K.K.*, *Spinning*, *In the Night Kitchen*, each of the three "butt" books, each of the four "fart" books, *Shine*, *Gabi*, and *Freakboy*. ROA.673-674. In addition to this, a copy of *Being Jazz* remains in the Kingsland Library's collection. ROA.3995.

indicating whether "remove" is referring to the *temporary* "removal" of the hundreds of books that were placed on a cart for Ms. Milum to review—the vast majority of which were returned to the library shelves,[3] and all of which remained available for checkout while Ms. Milum conducted her review[4]—or the *permanent* "removal" that occurred when Ms. Milum decided to weed the 17 books in this lawsuit.

Here is an example of the plaintiffs' obfuscation: Their assertion that Judge Cunningham "instructed Milum to *remove* from the shelves '[a]ny books with photos of naked or sexual conduct'" and that Milum "obeyed his directive" and "removed" *In the Night Kitchen* "because it includes illustrations of a naked toddler." Appellees' Br. at 6–7 (emphasis added). If the word "remove" refers to the decision to *temporarily* pull the books to determine *whether* they should be weeded or moved to the adult section, then the statements are truthful. Milum did pull books containing nudity to determine whether they should be weeded or relocated, and she pulled them in response to Cunningham's directive. ROA.682; ROA.2506 (¶ 35); ROA.3953 ("I pulled them to review them, not to weed them."). But if the word "remove" refers to the decision to *permanently* remove, *i.e.*, weed the books, then the statements are false. Milum decided to weed *It's Perfectly Normal* and *In the Night Kitchen* because (in her judgment) they met the criteria for weeding, not because they contained nudity and not because Judge Cunningham (or anyone else)

3. ROA.675.
4. ROA.3900 ("[W]hile they were on the cart in Amber's office, were they available to be checked out? A. Yes. We just had to ask for them.").

told her to weed them.[5] The plaintiffs elide this distinction throughout their brief to create the impression that the reasons behind the *temporary* removal of the hundreds of books that were placed on a cart for review are the same reasons behind the *permanent* removal of the 17 books that got weeded.

Yet this distinction is crucially important because there is nothing unconstitutional about taking a library book off a shelf to *review* whether it should be weeded or relocated, especially when the book remains available for library patrons to check out during the review process.[6] Librarians are constantly pulling books off shelves to decide whether they should be weeded,[7] and the plaintiffs have not alleged Article III injury from the decisions to temporarily pull books for review. So the motivations behind the requests that Ms. Milum *examine* the books that were temporarily pulled are irrelevant. The plaintiffs are suing only over Ms. Milum's decisions to *weed* the 17 disputed books, which no longer appear in the library shelves or catalog. And the only relevant motivations are those behind the decisions to weed, *i.e.*, the

5. ROA.2506 (¶ 35) (Milum) ("The plaintiffs' claim that I 'removed *In The Night Kitchen* from the library system because it includes illustrations of a naked toddler' is false. . . . My decision to *pull* the book *for review* (*i.e.*, to *temporarily* remove the book) was because of the naked-toddler pictures, as Judge Cunningham had instructed me to pull from the shelves and review all books with nudity. But my decision to *weed* the book (*i.e.*, to 'remove the book from the library system') had nothing whatsoever to do with the content of the book or the pictures of the naked toddler, and I would have weeded *In The Night Kitchen* even if there had been no nudity or drawings of a naked toddler." (emphasis in original)).
6. *See* note 4, *supra*.
7. ROA.3953 ("We weed all the time.").

decisions to *permanently* remove the 17 disputed books from the library's shelves and delete them from the catalog.

I. Undisputed Facts

The plaintiffs do not dispute or deny any of the following facts:

- Amber Milum alone made the decision to "weed" each of the 17 disputed books. *See* Appellants' Br. at 7.

Nothing in the plaintiffs' brief contests or refutes this fact. Instead, the plaintiffs try to obscure this fact by playing word games with "remove," claiming that Milum was instructed by others to "remove" books when Milum was told only to *temporarily* pull certain books to review whether they *should* be weeded or relocated. *See, e.g.*, Appellees' Br. at 6 ("Defendants Cunningham and Moss directed Milum to *remove* the Butt and Fart Books." (emphasis added)).

- None of the other defendants ordered, pressured, or even asked Ms. Milum to weed (*i.e.*, permanently remove) any book from Llano Library or the Llano County Library System. *See* Appellants' Br. at 7.

The plaintiffs never claim that anyone ordered, pressured, or asked Milum to *weed* the books. They claim only that Milum was instructed to "remove" certain books, by which they mean that Milum was told to *temporarily* pull books to review whether they *should* be weeded or relocated.

- Ms. Milum's decisions to weed the 17 books had nothing to do with the content or viewpoints expressed in the books. Ms. Milum did not even read the 17 books before weeding them. *See* Appellants' Br. at 7.

The plaintiffs do not claim that Milum decided to *weed* the 17 disputed books because of their content or viewpoints, and they have no evidence that Milum en-

gaged in content or viewpoint discrimination when weeding the books. The plaintiffs rely on evidence that other individuals (such as Bonnie Wallace and Rochelle Wells) disliked the books, but none of those individuals weeded the books or did anything to influence Milum's weeding decisions.[8] The plaintiffs also do not deny that Milum never read the 17 disputed books.

- Ms. Milum weeded the 17 disputed books solely because she concluded, in her professional judgment, that the books satisfied the MUSTIE criteria for weeding. *See* Appellants' Br. at 8.

The plaintiffs do not deny that Milum sincerely believed that the 17 disputed books were appropriate candidates for weeding based on the MUSTIE criteria, and they do not claim and have no evidence to show that Milum is lying in her sworn testimony. The plaintiffs argue that Milum misapplied the MUSTIE criteria when weeding these 17 books,[9] but they do not claim that Milum *actually believed* that the books were improperly weeded, and they do not claim that she lied in her testimony or sworn declarations when explaining her reasons for weeding the disputed books.

- Milum weeded *Being Jazz* from Llano Library yet declined to weed the version held at Kingsland Library, where it had a better circulation record. *See* Appellants' Br. at 9.

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8. ROA.2499 ("I alone made the decisions to weed the 17 disputed books in this case. No other defendant in this case, including Bonnie Wallace, Rochelle Wells, Rhonda Schneider, Jerry Don Moss, or Ron Cunningham, has ever weeded a book from Llano library or directed me to weed or permanently remove a book from the library. Nor has any of these individuals pressured or attempted to pressure me to weed or permanently remove any book from the library system.").
9. *See* Appellees' Br. at 9–11.

The plaintiffs do not deny that Milum declined to weed the Kingsland copy of *Being Jazz*, where it had a better circulation record. They simply ignore this fact when accusing Milum of weeding the book because of its content and viewpoints.

- Ron Cunningham, the Llano County Judge, never asked or directed Ms. Milum to "weed" any book. *See* Appellants' Br. at 10 & n.24.

The plaintiffs never claim that Judge Cunningham ordered Milum to *weed* a book. They claim only that he ordered her to "remove" the butt and fart books and books containing nudity or sex, by which they mean he instructed her to *temporarily* pull those books to review whether they should be weeded or relocated.

- Ms. Milum pulled and reviewed the 47 books on Bonnie Wallace's spreadsheet but returned the vast majority of them to the shelves after determining that they did not meet the criteria for weeding. *See* Appellants' Br. at 12.

The plaintiffs do not deny that the vast majority of the books on Bonnie Wallace's list were *not* weeded and were returned to the shelves after Ms. Milum conducted her review.

- Library-weeding manuals not only authorize but *require* librarians to engage in both "content discrimination" and "viewpoint discrimination" when weeding books. *See* Appellants' Br. at 12–13 & n.34.

The plaintiffs do not deny that library-weeding manuals require both content discrimination and viewpoint discrimination in weeding decisions, and they do not question the authenticity of the excerpts that were quoted throughout our opening brief. *See* Appellants' Br. at 31–33.

II. The False And Misleading Statements In The Plaintiffs' Brief

Although the plaintiffs do not deny or contest the facts as described in the appellants' opening brief, their own brief is rife with misleading statements and (in many places) outright falsehoods.

A. The Misleading Statements In The Plaintiffs' Brief

Many statements in the plaintiffs' brief are literally true if read a certain way, yet are written with the intent to mislead the reader. Each of the following sentences, for example, uses the word "remove" to convey the impression that books were being *permanently* removed (*i.e.*, weeded), when they were only being *temporarily* pulled from the shelves to evaluate whether they *should* be weeded or relocated:

- "Defendants Cunningham and Moss directed Milum to remove the Butt and Fart Books." Appellees' Br. at 6.
- "[Milum] . . . agreed that 'Cunningham also directed [her] to remove the books.'" Appellees' Br. at 6 n.4.
- "Milum removed [*In the Night Kitchen*] because it includes illustrations of a naked toddler." Appellees' Br. at 6–7.
- "Cunningham instructed Milum to remove from the shelves '[a]ny books with photos of naked or sexual conduct regardless if they are animated or actual photos[.]'" Appellees' Br. at 6.
- "[T]he District Court . . . found that Defendants instructed Milum to remove the Banned Books." Appellees' Br. at 31.

In each of these sentences, the word "remove" refers only to the *temporary* pulling of a book for review rather than the *permanent* decision to weed. But a reader could easily be misled into thinking that Cunningham and Moss ordered Milum to weed

those books, or that Milum weeded (rather than reviewed) *In the Night Kitchen* because of the naked-toddler pictures.

Other statements in the plaintiffs' brief attempt to convey a causal relationship between events when none existed. Examples of this include:

- "In summer 2021, in response to directions from her Llano County superiors, Milum removed all seven titles from the Library System." Appellees' Br. at 5.
- "Milum's removal of the seven books resulted from complaints made by Defendants Wells and Schneider." Appellees' Br. at 5.
- "Milum followed her superiors' directives, taking the books from the shelves and deleting them from the Library System catalog." Appellees' Br. at 6.

Each of these sentences describes events that preceded Milum's decision to weed the butt and fart books, as Milum had been directed by Judge Cunningham to *temporarily* remove those books from those shelves before she decided to weed them. ROA.2488; ROA.2499. But Milum was not instructed by anyone to *weed* those books, and her decision to weed was not influenced in any way by Judge Cunningham or Commissioner Moss. ROA.2488; ROA.2499.

B. The False Statements In The Plaintiffs' Brief

In other places the plaintiffs' brief crosses the line into outright falsehoods.

- "[T]he 'Wallace List,' was 'the list of books that Bonnie Wallace thought were inappropriate and should be removed from the Llano County Library System.'" Appellees' Br. at 7.

It is untrue to say that Bonnie Wallace thought that the books on her list should be "removed from the Llano County Library System." Wallace's e-mail specifically

asked that the books on her list *not* be removed because she feared it would lead others to retaliate by removing library books that she supports. Instead, Wallace asked only that those books be relocated from the children's section to the adult section:

> [T]hese books (I have attached a list of dozens which are currently at our libraries) are in the CHILDREN'S section of the library and can be checked out by our children and grandchildren. ***I am not advocating for any books to be censored but to be RELOCATED to the ADULT section where a child would need to get their parent's approval to check out.*** It is the only way that I can think of to prohibit future censorship of books I do agree with, mainly the Bible, if more radicals come to town and want to use the fact that we censored these books against us.

ROA.350 (emphasis added).

The plaintiffs think they can tell this Court that Wallace wanted the books removed by quoting from a loaded question that one of their attorneys asked during the preliminary-injunction hearing. ROA.3959 ("Q. That's a book that was on Bonnie Wallace's list, yes? A. Yes. Q. The book of — the list of books that Bonnie Wallace thought were inappropriate and should be removed from the Llano County Library System, correct? A. Yes."). The premise of that question was false, yet the plaintiffs' brief quotes from that loaded question as if it were an established fact. An attorney cannot make a false statement of fact to a tribunal, and the plaintiffs cannot circumvent this rule by asking a loaded question in the district court and then quoting the false portion of that question in their appellate brief.

- "By the end of 2021, Defendants had removed the remaining Banned Books—all of which were on the Wallace List—from the Llano library, in addition to the Butt and Fart Books, *In the Night Kitchen*, and *It's Perfectly Normal*." Appellees' Br. at 8.

This statement is false because *Under the Moon* is not on the Wallace List, even though it is one of the "remaining" disputed books that the plaintiffs are suing over. ROA.357 (Wallace List).

- "Defendants admitted that the reason that these 'CRT and LGBTQ' books were 'selected for weeding' was because they were on the Wallace List." Appellees' Br. at 9.

Milum testified under oath that she pulled the books on Wallace's list only to *review* whether they *should* be weeded:

> Q. So the reason you pulled the books off the shelves to look at them for weeding was because they were on Ms. Wallace's list, correct?
>
> A. ***I pulled them to review them, not to weed them.***
>
> Q. Okay. You pulled them because they were on Ms. Wallace's list?
>
> A. Yes.

ROA.3953 (emphasis added). The reason that the books were *reviewed* was because they were on Wallace's list; the reason that they were "selected for weeding" was only because Milum concluded that they met the MUSTIE criteria. ROA.675; ROA.2507-2508.

- "Historically, the Library System would not consider a book for weeding unless it met two or three MUSTIE criteria." Appellees' Br. at 10.

This is another falsehood. Milum declared that "it is permissible and sometimes prudent for a librarian to weed a book based on the presence of a single MUSTIE factor, and the plaintiffs are wrong to assert that Llano Library 'historically' has weeded books only when two or three MUSTIE criteria are satisfied."

ROA.2502. The plaintiffs cite testimony from Tina Castelan, a former librarian who testified against Milum at the preliminary-injunction hearing, but here is what Castelan had to say:

> Q. Does any one MUSTIE factor mean that a book is weeded?
> A. No. It's *usually* a combination.
> Q. Is there a minimum number?
> A. So *my minimum number* was always two to three.

ROA.3891 (emphasis added). Castelan was not testifying about "historical" practices at the Llano library; she was describing her own personal application of the MUSTIE factors. She also hedged by saying that it's "usually" a combination of factors, a qualification that the plaintiffs omit when citing this testimony.

- "None of the removed books, however, qualified for weeding under the Library System's general weeding practices." Appellees' Br. at 9.

The plaintiffs know this statement is false, because on the next page they concede that *Freakboy* was properly weeded. *See* Appellees' Br. at 10 ("*All but one* of the 17 books at issue were weeded contrary to Library System policies and practices." (emphasis added)); ROA.3908-3909 (Castelan conceding that Milum was right to weed *Freakboy* because of its poor circulation record).

More importantly, Amber Milum testified repeatedly and in detail about how each of the disputed books qualified for weeding under the MUSTIE factors. ROA.672 (¶ 8); ROA.675-676 (¶¶ 12–16); ROA.4174-4185 (Milum explaining her reasons for weeding *Freakboy*, *Being Jazz*, *Gabi, A Girl In Pieces*, *They Called Themselves The KKK*, *Spinning*, *Shine*, *Caste: The Origins of Discontent*, *It's Perfectly Normal*, and *In The Night Kitchen*, and how each of those books met multiple criteria for

weeding under MUSTIE). Ms. Milum also explained her reasons for weeding the "butt" and "fart" books: (1) No one had asked for or inquired about the "butt" books that were continuously being checked out by Rochelle Wells and Rhonda Schneider;[10] (2) The actions of Wells and Schneider would render the "butt" and "fart" books inaccessible to other patrons;[11] and (3) The "butt" and "fart" books were trivial and "didn't really meet anyone's needs," and they remained available to patrons through interlibrary loans, so the books satisfied the "Trivial" and "Elsewhere" factors for weeding under the MUSTIE framework.[12]

The plaintiffs insist that the disputed books did *not* meet the library's criteria for weeding, but they base this claim on the testimony of a single witness, Tina Castelan, who claimed that Milum's decisions to weed some of the disputed books violated the library's weeding policies. ROA.3903-3915. Castelan's accusation is false and was soundly refuted by Ms. Milum's courtroom testimony and declarations. Every single book that Milum weeded met at least one of the MUSTIE factors, and nearly all of them satisfied two and possibly more of those factors. ROA.4174-4187. Castelan's testimony did not rebut any of this, as she opined only that the *circulation record* of those books was not, in her opinion, enough to support a decision to weed. ROA.3903-3915. But Castelan was never asked whether any

10. ROA.4185 ("[N]obody else asked for it.").
11. ROA.4185-4186.
12. ROA.4186 ("[I]t was just silly trivial books"); *id.* ("They were more trivial books, anyway."); ROA.4187 ("Q. . . . [H]ow many criterion total did these books qualify for? A. Trivial, irrelevant, it didn't really meet anyone's needs and elsewhere.").

other MUSTIE factors could support Milum's decision to weed those 16 books, such as the "Ugly," "Trivial," or "Elsewhere" criteria, and Castelan did not rebut Milum's reliance (or potential reliance) on those factors. Milum, for example, testified that the "butt" and "fart" books were appropriately weeded under the "Trivial" and "Elsewhere" categories,[13] and that the "Elsewhere" category supported her decision to weed the other disputed books.[14] Castelan never even addressed (let alone rebutted) this.

Castelan's testimony was mistaken in other respects. She claimed, for example, that *It's Perfectly Normal* was improperly weeded "because its last checkout was in 2018,"[15] but under the Llano library's CREW chart a book in that Dewey class becomes eligible for weeding three years since its last checkout. ROA.2503 (¶ 27); ROA.2483. Castelan also testified that *Gabi, a Girl in Pieces* was improperly weeded "because [its] last checkout was 2018 and we've had it since 2016." ROA.3914. But *Gabi* is a Young Adult book, which becomes eligible for weeding two years after its last circulation or three years after it was first acquired. ROA.2503 (¶ 28); ROA.2483; ROA.2661. *Gabi* qualified for weeding under either criterion. Castelan also claimed that *Being Jazz* was improperly weeded because the Llano libraries "only had one or two of the books that pertained to [its] subject." ROA.3912. That is untrue; there are no fewer than 10 other books on the subject of transgender

13. *See* note 12, *supra*.
14. ROA.4171-4187.
15. ROA.3907.

youth in the Llano library system, in addition to the copy of *Being Jazz* that remains in circulation at the Kingsland library. ROA.2503-2504 (¶ 29).

- "The District Court did not credit Milum's testimony." Appellees' Br. at 10.

Nothing in the district court's opinion rejects Milum's testimony or declares it false. On the contrary, the district court recognized the conflicting testimony between Milum and Castelan but refused to resolve the dispute, declaring that "given its subjective nature, reasonable minds may disagree over how to apply the CREW and MUSTIE criteria." ROA.3527 n.7. The district court also relied on Milum's testimony to support its conclusion that the plaintiffs had made a clear showing of viewpoint discrimination and content discrimination. ROA.3525; ROA.3527.

- "Milum . . . could not explain why hundreds of other books not checked out for decades were currently still on library shelves." Appellees' Br. at 10.

Milum explained this. She said that the Llano County library system is behind on weeding due to staffing constraints and other factors. ROA.2505 ("I have not yet had the opportunity to conduct a thorough weed of the library shelves since becoming system director, and we stopped weeding entirely in late 2021. The library system has been understaffed (and therefore under-weeded) for years, which is why there are so many books on the shelves that should be weeded but have not yet been.").

- "Milum admitted that there was no need to make space for new books in November 2021 because the Commissioners Court had suspended all new purchases a month before she removed the Wallace List books from the library." Appellees' Br. at 32–33.

This is a misrepresentation of Milum's testimony. Milum was asked whether the weeding in November of 2021 was done "to make room for new books," and she acknowledged that it was not. ROA.4200 ("Q. So when you did the weeding based on Ms. Wallace's list that was e-mailed to you by your boss, you weren't doing that to make room for new books because you weren't allowed to order new books, correct? A. Right."). Milum never said that there was no need to weed books at that time, and she declared that weeding is needed *regardless* of whether new books are coming in because: (1) Shelf space costs money; (2) The presence of unused books frustrates and distracts library employees and patrons who must sift through the unnecessary clutter; and (3) Weeding helps librarians identify holes in the library's collection and understand the community's desires and needs. ROA.2506.

* * *

The Court deserves an accurate recitation of the facts, and the adversarial process cannot function when a litigant misrepresents the factual record to this extent. We have hit on the most egregious misrepresentations in the plaintiffs' submission, but we cannot in a single brief unpack every one of the misstatements that permeate their filing. We encourage the Court to carefully compare the plaintiffs' factual claims with the primary sources before accepting or relying on any factual assertion in the plaintiffs' brief.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING A PRELIMINARY INJUNCTION

The preliminary injunction should be vacated for no fewer than six separate and independent reasons. *See* Appellants' Br. at 20–42. The plaintiffs have not refuted any of them.

A. The Plaintiffs Failed To Make A Clear Showing That The In-House Checkout System Violates Their First Amendment Right To Access And Receive Information

The plaintiffs cannot explain how the defendants are violating their First Amendment right to "access and receive information" when each of the 17 disputed books remains available for them to check out at Llano Library. They complain that the defendants have not informed *other* library patrons about the availability of these 17 books,[16] but the plaintiffs have no standing to assert the constitutional rights of non-parties—and it is undisputed that each of the named plaintiffs is aware that the 17 books are available. ROA.3463-3465. Courts exist to resolve disputes between named litigants, not to act as "roving commissions"[17] or "ombudsmen of the general welfare."[18] The plaintiffs must show that *their* constitutional rights are being violated by the in-house checkout system, and it is entirely irrelevant whether other library patrons know about the books.

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16. *See* Appellees' Br. at 12 ("Defendants did not inform library patrons about these hidden books.").
17. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *In re Gee*, 941 F.3d 153, 161 (5th Cir. 2019).
18. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982).

The First Amendment does not empower the plaintiffs to demand that public libraries house books in their preferred locations. The plaintiffs complain that they must ask a librarian and "personally request" a book from the in-house collection,[19] but they do not explain how that violates their First Amendment right to "access and receive information." Library patrons must often ask librarians for assistance, such as when books have been misplaced or are hard to find, or need to be obtained through interlibrary loan. None of that violates an individual's constitutional right to "access and receive information," and library patrons do not get to sue librarians for violating their First Amendment rights whenever they are unable to obtain their desired book without assistance. The plaintiffs also complain that they cannot anonymously read the books in the library,[20] but the First Amendment does not guarantee library patrons anonymity. Library patrons check out books in person with their library card, and they allow the library to keep records of the books that they have borrowed. The plaintiffs do not claim that they are too embarrassed to ask for the books, nor do they assert any other encumbrance (such as a speech impediment) that would prevent them from acquiring books through the in-house checkout system. The plaintiffs' citation of *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1989), is inapposite because libraries have limited shelf space and *must* relegate some materials to alternative sources such as interlibrary loan, e-books, or an in-house checkout system. It is untenable to say that library patrons suffer violations of their First Amendment right to "access and

19. *See* Appellees' Br. at 51.
20. *See* Appellees' Br. at 51.

receive information" whenever they must ask a librarian for assistance in obtaining a desired book rather than browsing the library shelves.[21]

In addition, Justice Kennedy's and Justice Breyer's concurrences in *United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003), make clear that "small" or non-significant burdens on a library patron's ability to obtain materials do not violate the First Amendment. *See id.* at 215 (Kennedy, J., concurring in the judgment) (upholding restriction after concluding that the plaintiffs failed to "show that the ability of adult library users to have access to the material is burdened in any significant degree"); *id.* at 220 (Breyer, J., concurring in the judgment) (upholding restriction given the "comparatively small burden that the Act imposes upon the library patron"). Here, it is hard to see how there is *any* "burden" imposed on the plaintiffs, as the in-house checkout option spares them the inconvenience of having to search for the disputed books on the library shelves. And any "burden" that the

21. The plaintiffs rely on district-court rulings in *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530 (N.D. Tex. 2000), and *Counts v. Cedarville School District*, 295 F. Supp. 2d 996 (W.D. Ark. 2003), but each of those decisions is wrong and should be disowned by this Court. *Sund* holds a public library is a "limited public forum," a stance that cannot be sustained after *Chiras v. Miller*, 432 F.3d 606, 614 (5th Cir. 2005) ("'[J]ust as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.'" (quoting *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion of Rehnquist, C.J.))). *Counts* complains that it is "stigmatizing" for schoolchildren to obtain parental permission before checking out Harry Potter books, but there is no constitutional right to be free from stigma, and there is nothing problematic with a school district, which is acting in loco parentis, requiring parental consent before allowing children to check out library books.

plaintiffs might theorize will be far less of a burden than that imposed by the Children's Internet Protection Act (CIPA), the statute at issue in *American Library Ass'n*, which required adult users to ask a librarian to unblock filtered materials before access would be allowed.

The plaintiffs falsely claim that the defendants are contesting their "standing," and they accuse us of attempting to "moot" their First Amendment claims. *See* Appellees' Br. at 47. Yet we have made absolutely clear to this Court (and to the district court)[22] that the in-house checkout system does *not* moot the plaintiffs' First Amendment claims, and it does not undermine the continued existence of an Article III case or controversy. *See* Appellants' Br. at 22. The plaintiffs continue to suffer Article III injury from the absence of the 17 disputed books from the library shelves and catalog. The problem for the plaintiffs is that this injury does not amount to a violation of their First Amendment rights, because each of the plaintiffs can access and check out the 17 books from the library's in-house collection.

The voluntary-cessation doctrine is irrelevant because the defendants did not restore the 17 books to the shelves and catalog, as the plaintiffs are demanding, nor have they eliminated the plaintiffs' Article III injury. The "challenged practice"[23] in this case was the decision to *weed* the 17 books, and the defendants have not halted that challenged practice or reversed their weeding decisions in response to the law-

22. ROA.3153.

23. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.").

suit. But even if the voluntary-cessation doctrine applied, that would *at most* justify an injunction that prohibits the defendants from removing the 17 disputed books from the in-house checkout system—not an injunction that compels their return to the shelves and catalog. The plaintiffs' First Amendment right to access and receive information will be protected so long as the 17 disputed books remain available for them to check out at Llano Library, and an injunction should be no more burdensome than necessary to ensure the protection of that constitutional right. *See Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979). If the plaintiffs fear that the defendants might "return to their old ways"[24] by removing the 17 books from the in-house checkout system, then they should seek an injunction that prevents the removal of those books from the library. The First Amendment does not give them (or anyone else) the right to dictate the location of library books or the precise mechanism by which they are made available to library patrons.

Finally, the plaintiffs launch ad hominem attacks on defendants' counsel and suggest that it was somehow improper to arrange for the provision of the 17 books through the in-house checkout system. *See* Appellees' Br. at 49 & nn.20–22; ROA.3518. But the identity of the donor has no relevance to whether the in-house checkout system violates the plaintiffs' First Amendment right to access and re-

24. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave (t)he defendant . . . free to return to his old ways.").

ceive information,[25] and it has no bearing on the mootness inquiry because the book donation does not eliminate the plaintiffs' Article III injury. *See* Appellants' Br. at 22–23. The plaintiffs are suing the defendants and accusing them of violating their First Amendment right to "access and receive information." When the defendants respond by alleviating or eliminating the alleged constitutional burden, the plaintiffs should be thanking the defendants rather than accusing them of bad faith. The in-house checkout system is a win-win: It allows the seven plaintiffs to access and check out the 17 books at Llano Library, and it does so without allocating scarce library shelf space toward books that no longer warrant inclusion in the library's collection—and without empowering individual library patrons to commandeer or override the weeding decisions and professional judgments of the library staff. If the plaintiffs want to enjoin this arrangement, then they need to show how it violates their constitutional rights.

B. The Plaintiffs Failed To Make A "Clear Showing" Of "Irreparable Harm" When Each Of The 17 Disputed Books Remains Available For Them To Read And Check Out At Llano Library

The plaintiffs do not even attempt to explain how they would suffer "irreparable harm" absent a preliminary injunction when each of them can check out and read the 17 disputed books at Llano Library. Their brief ignores the issue, even though they must make a "clear showing" of irreparable harm to sustain the pre-

25. The defendants objected on relevance grounds when the plaintiffs asked Amber Milum to disclose the donor of the books. ROA.3986. The district court should have sustained the objection.

liminary injunction. *See Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990). The plaintiffs have forfeited any argument for irreparable harm by failing to brief the issue. *See Roe v. Cypress-Fairbanks Independent School District*, 53 F.4th 334, 343 n.5 (5th Cir. 2022).

The plaintiffs introduced no evidence or testimony showing how they would be "irreparably harmed" by obtaining the 17 disputed books from the in-house checkout system rather than the library shelves. *See C.K.-W. by and through T.K. v. Wentzville R-IV School District*, 619 F. Supp. 3d 906, 919 (E.D. Mo. 2022) (removal of books from school library did not inflict irreparable harm because it "does not stop any student from reading or discussing the book"). None of them testified or submitted declarations claiming that they would be "harmed" by asking a librarian for the books, and their brief does not explain how a harm of this sort would be "irreparable."

C. The District Court Erred In Holding That The First Amendment Forbids "Viewpoint Discrimination" Or "Content Discrimination" In Public-Library Weeding Decisions

The plaintiffs' brief doubles down on their claim a public library is a "limited public forum," where viewpoint discrimination is categorically prohibited and content discrimination is subject to strict scrutiny. *See* Appellees' Br. at 19 ("The First Amendment Prohibits Removal of Library Books Based on Viewpoint or Content-Based Discrimination"); *id.* at 42; ROA.1903. The district court adopted this rationale across the board. ROA.3519 n.4; ROA.3523-3528. The Court should reject all of this.

First. No decision of this Court or the Supreme Court has held that a public library is a "limited public forum," and *Chiras* says that "forum analysis . . . [is] incompatible with the discretion that public libraries must have to fulfill their traditional missions." *Chiras*, 432 F.3d at 614 (citation and internal quotation marks omitted). The plaintiffs try to get around *Chiras* by claiming that *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995), "held that the First Amendment prohibits viewpoint discrimination in book removal decisions at public school libraries," and that *Chiras* cannot be read to preclude "forum analysis" without overruling *Campbell*. Appellees' Br. at 43. That is a misrepresentation of *Campbell*. The opinion in *Campbell* never says that libraries are "public forums," or that "viewpoint discrimination" or "content discrimination" is prohibited in library-weeding decisions. *Campbell* even acknowledges that library books may be weeded if they are "pervasively vulgar" or lack "educational suitability," which recognizes the propriety of both content and viewpoint discrimination. *See Campbell*, 64 F.3d at 188–89. *Campbell* comes nowhere close to a categorical prohibition on viewpoint discrimination or content discrimination in library-weeding decisions, and it never even suggests that a public library qualifies as a "limited public forum."

Second. Public libraries are *supposed* to engage in "content discrimination" and "viewpoint discrimination" when weeding books, and library-weeding manuals not only authorize but compel librarians to engage in content- and viewpoint-based weeding. *See* Appellants' Br. at 30–34. The plaintiffs ignored this problem in the

district court,[26] but their brief in this Court concedes (for the first time) that the First Amendment allows public librarians "to use the MUSTIE standards they have traditionally used to weed books." Appellees' Br. at 46. But now the plaintiffs are asserting two mutually exclusive propositions:

1. The First Amendment categorically bans viewpoint discrimination in public-library weeding decisions and subjects content discrimination to strict scrutiny;[27] and

2. The First Amendment allows public librarians "to use the MUSTIE standards they have traditionally used to weed books."[28]

One or the other must be false, because the MUSTIE standards *require* librarians to engage in both viewpoint discrimination and content discrimination when weeding books. *See* Appellants' Br. at 30–34. If the plaintiffs repudiate (2), then their argument becomes untenable. But they cannot repudiate (1) without pulling the rug from under the district court's opinion, which insists that viewpoint-based weeding is categorically forbidden and content-based weeding is subject to strict scrutiny.

Third. Even if a public library were a limited public forum (and it isn't), the First Amendment *permits* content discrimination in a limited public forum—so long as the content discrimination is "reasonable" and "viewpoint neutral." *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009); *Christian Legal Society v. Martinez*, 561 U.S. 661, 679 (2010). Once again, the plaintiffs are asserting two mutually incompatible claims, and they will need to jettison either:

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26. ROA.2390-2406.
27. *See* Appellees' Br. at 19–24.
28. *Id.* at 46.

1. Their claim that public libraries are "limited public forums"; or

2. Their insistence that content-based weeding decisions are subject to strict scrutiny.

The plaintiffs claim in a footnote that strict scrutiny applies to content discrimination in a limited public forum,[29] but they are wrong. There is language that can be found in older cases (such as *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)), implying that content discrimination is subject to strict scrutiny in a limited public forum, but the Supreme Court and the lower federal courts now recognize that content discrimination in a limited public forum need only be "reasonable" and "viewpoint neutral." *See Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 519 (6th Cir. 2019) ("In a limited public forum, the government can impose reasonable restrictions based on speech content, but it cannot engage in viewpoint discrimination."); *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 502 (9th Cir. 2015) ("In a limited public forum, however, what's forbidden is viewpoint discrimination, not content discrimination."); *Barrett v. Walker County School District*, 872 F.3d 1209, 1225 (11th Cir. 2017) ("[C]ontent-based discrimination . . . is permitted in a limited public forum if it is viewpoint neutral and reasonable in light of the forum's purpose." (footnote omitted)).

As a fallback, the plaintiffs say this Court should affirm the district court even if it erred by imposing a no-content-discrimination rule, because they claim that the evidence of "viewpoint discrimination" can sustain the preliminary injunction by itself. *See* Appellees' Br. at 46 n.19. But there are two problems with this request.

29. Appellees' Br. at 46 n.19.

First, a public library is *not* a limited public forum because *Chiras* precludes the use of "forum analysis," and because libraries are *supposed* to establish minimum standards for their collections by weeding books with biased, outdated, or discredited viewpoints. *See* Appellants' Br. at 30–34. Second, the plaintiffs' evidence of "viewpoint discrimination" is non-existent. There is no evidence in the record of the "viewpoints" expressed in any of the weeded books, and neither the plaintiffs nor the district court could even identify the "viewpoints" that Milum was "discriminating" against. *See id.* at 36–37. Nudity is not a "viewpoint," and neither is flatulence.

Finally, the plaintiffs' brief misrepresents our argument at every turn. We have never argued that the government can "remove any books it disagrees with,"[30] nor are we asking the Court to "overrule *Campbell*" and "ignore *Pico*."[31] Our claim is only that there is no *categorical* prohibition on content or viewpoint discrimination in public-library weeding decisions. Library-weeding decisions remain subject to rational-basis review, and book removals that serve no purpose other than to deny students (or library patrons) access to ideas would fail rational-basis scrutiny. *See, e.g.*, *Campbell*, 64 F.3d at 188. So would book removals undertaken by "a Democratic school board" that "ordered the removal of all books written by or in favor of Republicans." *Board of Education v. Pico*, 457 U.S. 853, at 870–71 (1982) (plurality op.). But that is a far cry from the district court's categorical prohibition on content- or viewpoint-based weeding. And Ms. Milum clearly was not seeking to suppress ac-

30. Appellees' Br. at 19.
31. Appellees' Br. at 35.

cess to ideas because she continued to allow Llano Library patrons to obtain the weeded books through CloudLibrary and interlibrary loan, as well as the in-house checkout system.

D. The Plaintiffs Failed To Make A "Clear Showing" That Amber Milum Engaged In Viewpoint Or Content Discrimination When Weeding The 17 Disputed Books

Amber Milum is the *only* defendant who has authority to weed books from Llano Library,[32] and the decisions to weed the 17 disputed books were made by Ms. Milum alone.[33] Neither the plaintiffs nor the district court has denied these facts. The plaintiffs' preoccupation with the motivations of Bonnie Wallace and Rochelle Wells—and their attempts to use the statements and actions of Wallace and Wells to impute motivations to "the defendants" as a collective whole—is a sideshow. *See* Appellees' Br. at 5, 7–8, 26–28. Bonnie Wallace, Rochelle Wells, Rhonda Schneider, and Jerry Don Moss did not weed or temporarily remove a single book from Llano Library,[34] and they have no authority to move a library book or instruct anyone to do so.[35] Ron Cunningham instructed Amber Milum to temporarily pull books from the

32. ROA.4190 ("Q. Does Bonnie Wallace or Rochelle Wells have any authority to remove or weed a book from the Llano County libraries? A. No. Q. Does Bonnie Wallace, or Rochelle Wells, or any member of the library advisory board have authority to direct you to weed or remove a book? A. No."); ROA.4191-4192 ("Q. Does Jerry Don Moss have any authority or ability to remove or weed a book from the Llano County Library System? A. No. Q. Does Jerry Don Moss have the authority to direct you to weed or remove a book? A. No.").
33. *See* Appellants' Br. at 7 nn.14–15.
34. *See* Appellants' Br. at 7 nn.14–15 and accompanying text.
35. *See* note 32, *supra*.

library shelves for review,[36] but he never instructed Ms. Milum (or anyone else) to permanently weed a book.[37] The plaintiffs' brief repeatedly and falsely states that "Defendants" (plural) "removed" the disputed books — apparently in an effort to make Bonnie Wallace's and Rochelle Wells's subjective motivations relevant to this case. There is only one defendant who "removed," *i.e.*, weeded the books from the Llano library. And only the motivations of *that* defendant will determine whether the books were removed for content- or viewpoint-based reasons.

The plaintiffs claim that the district court's factual determinations must be reviewed deferentially,[38] but they do not identify a finding regarding Amber Milum's subjective motivations for weeding the 17 books. The district court's discussion of Milum's thought process was circumspect and mealy-mouthed. The Court, for example, wrote that "Milum and the Commissioners *may be seen to have adopted* Wallace's and Wells's motivations,"[39] and that "Plaintiffs have made a clear showing about what Defendants' substantial motivations *may have been* and how these *may have led* to the book removals."[40] These are not findings of fact, but expressions of possibility. Statements about what "may be seen" or what "may have been" are not findings of anything. The closest thing to a finding is this statement: "The Court finds that Plaintiffs have clearly shown that Defendants' decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells ob-

36. *See* Appellants' Br. at 10–11 nn.25–26 and accompanying text.
37. *See* Appellants' Br. at 11 n.30 and accompanying text.
38. *See* Appellees' Br. at 31–34.
39. ROA.3525 (emphasis added).
40. ROA.3525 (emphasis added).

jected." ROA.3525. To the extent that finding encompasses the motivations of Amber Milum, it is clearly erroneous for the reasons in our opening brief: (1) Milum weeded only a small fraction of the 47 print books on Bonnie Wallace's list; (2) Milum declined to weed the copy of *Being Jazz* in the Kingsland Library, where it has a better circulation record; and (3) There is no evidence that anyone objected to the "viewpoints" (as opposed to the content) of the 17 disputed books. *See* Appellants' Br. at 35–36. There is also no evidence that Milum is hostile to books containing nudity, critical race theory, or LGBTQ issues, and Milum specifically denies that she harbors any opposition to these types of books. ROA.2507 (¶ 36). Neither the plaintiffs nor the district court claims that Milum is lying, so they cannot make a "clear showing" that she weeded the 17 books because she disapproved of their content or viewpoints.

E. The Preliminary Injunction Is Overbroad

The plaintiffs do not attempt to defend an injunction that orders the return of anything beyond the 17 books that the plaintiffs are suing over. Instead, the plaintiffs deny that the preliminary injunction extends beyond those 17 books. *See* Appellees' Br. at 57. Yet the text of the injunction clearly states that the defendants must return to shelves "*all* print books that were removed because of their viewpoint or content, *including*" the 17 books at issue in this litigation. ROA.3531 (emphasis added). Because the plaintiffs are unwilling to defend an injunction of this scope, they should have no objection to a ruling that vacates the portion of the injunction ex-

tending beyond the 17 disputed books.[41] The plaintiffs (thankfully) have not attempted to enforce the injunction as written, but the defendants should not have to rely on their continued forbearance.

The plaintiffs also make no effort to defend the categorial prohibition on removing books from the library catalog "for any reason" during the pendency of this action. ROA.3532. The Court should vacate that portion of the injunction as well.

Finally, if any portion of the injunction is affirmed, it should be limited to Amber Milum, who is the only defendant with authority to restore books to the library shelves and catalog. The remaining defendants cannot be held responsible for the return of library books when they have no ability or authority to place books on the library shelves or restore them to the library's catalog.

Conclusion

The preliminary injunction should be vacated and the case remanded.

Respectfully submitted.

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41. The Court could accomplish this by striking the phrase "all print books that were removed because of their viewpoint or content, including," as well as the comma between "books" and "to." ROA.3531.

Certificate Of Service

I certify that on June 2, 2023, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Fifth Circuit and served through CM/ECF upon:

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Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

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In the United States Court of Appeals for the Fifth Circuit

LEILA GREEN LITTLE; JEANNE PURYEAR; KATHY KENNEDY; REBECCA JONES; RICHARD DAY; CYNTHIA WARING; DIANE MOSTER,

Plaintiffs-Appellees,

v.

LLANO COUNTY; RON CUNNINGHAM, IN HIS OFFICIAL CAPACITY AS LLANO COUNTY JUDGE; JERRY DON MOSS, IN HIS OFFICIAL CAPACITY AS LLANO COUNTY COMMISSIONER; PETER JONES, IN HIS OFFICIAL CAPACITY AS LLANO COUNTY COMMISSIONER; MIKE SANDOVAL, IN HIS OFFICIAL CAPACITY AS LLANO COUNTY COMMISSIONER; LINDA RASCHKE, IN HER OFFICIAL CAPACITY AS LLANO COUNTY COMMISSIONER; AMBER MILUM, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY SYSTEM DIRECTOR; BONNIE WALLACE, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY BOARD MEMBER; ROCHELLE WELLS, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY BOARD MEMBER; RHODA SCHNEIDER, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY BOARD MEMBER; GAY BASKIN, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY BOARD MEMBER,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas, Austin Division
1:22-cv-00424-RP

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees respectfully submit that oral argument will be helpful to the Court and is appropriate. This is an interlocutory appeal from a grant of Plaintiffs' motion for preliminary injunction. After holding a two-day evidentiary hearing and receiving post-hearing briefing from the parties, the District Court made factual findings in Plaintiffs' favor on all four preliminary injunction factors, including that Defendants likely engaged in viewpoint and content-based discrimination in removing books they personally disliked from the local public library. In granting the requested relief, the District Court relied on an extensive factual record below. Oral argument will assist the Court in understanding the factual basis supporting the District Court's sound exercise of its discretion to grant the preliminary injunction.

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INTRODUCTION

Can government officials freely purge public libraries of any books containing ideas those officials want to prevent library patrons from accessing? The Court has already answered that question unequivocally in the negative. In C*ampbell v. St. Tammany Parish School Board*, the Court stated that library patrons "have a First Amendment right to receive information" that is violated when government officials remove library books "substantially based on an unconstitutional motivation"—namely, the desire to deny "access to ideas with which the [] officials disagree." 64 F.3d 184, 188, 190 (5th Cir. 1995). The *Campbell* court held that the factual question "at the heart of this First Amendment case" is "the true, decisive motivation behind" the removing officials' decision. *Id.* at 190. Where an official's motivation for removal of library books is improper, no further inquiry is required and the official's action violates the First Amendment. *Id.* at 190-91.

Here, Llano County officials removed books—including award-winning books about race, history, and politics—from public libraries because they found the books' viewpoints and contents "objectionable." ROA.3525-26. The District Court found that "Defendants' decisions were likely motivated by a desire to limit access" to the ideas in those books. ROA.3525-26. Consequently, the court concluded that "the 'substantial motivation' for Defendants' actions appears to be

discrimination," ROA.3528, and that Plaintiffs were suffering irreparable harm from the "ongoing infringement" of their constitutional rights. ROA.3529.

To resolve this appeal, the Court need only apply its own, binding precedent—directly on point in this book removal case—to the District Court's factual finding that Llano County officials acted with an impermissible motivation. Defendants' attempts to obfuscate the decision before the Court misrepresent the record below, ignore the District Court's extensive factual findings, and misapply the law.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court clearly err in finding that Defendants removed 17 books from the public library because of their viewpoint and content, when the books did not meet the library's own criteria for "weeding" books, Defendants' internal communications referred to the books as "pornographic filth," and Defendants offered demonstrably false testimony and pretextual explanations to justify their removal?

2. Did the District Court act within its discretion when it issued a preliminary injunction restoring the status quo by preventing Defendants from hiding the 17 books from library patrons until the merits of the case are decided?

3. Can Defendants moot the need for an injunction by having their lawyer buy the 17 books in question and place them in a non-public room in the

library, where their presence is not listed in the library catalogue, is not advertised to patrons, and is not communicated by the library through the channels normally employed to tell library patrons that books are available?

STATEMENT OF THE CASE

A. The Action Below

Plaintiffs-Appellees Leila Green Little, Jeanne Puryear, Kathy Kennedy, Rebecca Jones, Richard Day, Cynthia Waring, and Diane Moster ("Plaintiffs") are patrons of Llano County public libraries. ROA.3507.

Defendants-Appellants are Llano County, Texas and the individuals who ordered and effected the removal of the books at issue in this lawsuit from the County's main public library. Defendant Ron Cunningham serves as County Judge and Defendants Jerry Don Moss, Peter Jones, Mike Sandoval, and Linda Raschke serve as County Commissioners. ROA.237. Defendant Amber Milum is the Llano County Library System Director. ROA.237. Defendants Bonnie Wallace, Rochelle Wells, Gay Baskin, and Rhonda Schneider advocated for the book removal and were subsequently appointed by the Commissioners Court to sit on the County's Library Advisory Board. ROA.237.

Plaintiffs filed this action alleging that Llano County, its County Commissioners, Library Advisory Board members, and Library System Director, acting under color of state law, violated Plaintiffs' First Amendment and Due

Process rights by removing popular, critically acclaimed books from the Llano library simply because those books express views and contain content that do not align with the personal and political views of Llano County officials. ROA.65 (First Amendment), ROA.67 (Due Process). Plaintiffs moved for a preliminary injunction to restore those books to the Llano library while their claims are tried.

B. Evidence Presented at the Preliminary Injunction Motion Hearing

In support of the motion for a preliminary injunction, Plaintiffs presented evidence that Defendants removed 17 books from the Llano library (the "Banned Books")[1] because they disliked the authors' viewpoints and the books' contents. ROA.3523. Plaintiffs also presented evidence that Library Director Milum was not merely "weeding" the books using standard library procedures. The District Court credited this evidence based on the facts below:

[1] The 17 Banned Books include *My Butt Is So Noisy!*, *I Broke My Butt!*, and *I Need a New Butt!* by Dawn McMillan (the "Butt Books"); *Larry the Farting Leprechaun*, *Gary the Goose and His Gas on the Loose*, *Freddie the Farting Snowman*, and *Harvey the Heart Had Too Many Farts* by Jane Bexley (the "Fart Books"); *In the Night Kitchen* by Maurice Sendak; *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie Harris; *Caste: The Origins of Our Discontent* by Isabel Wilkerson; *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti; *Spinning* by Tillie Walden; *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings; *Shine* and *Under the Moon: A Catwoman Tale* by Lauren Myracle; *Gabi, a Girl in Pieces* by Isabel Quintero; and *Freakboy* by Kristin Elizabeth Clark.

1. Defendants Remove Children's Books that Make Jokes about Bodily Functions from the Public Library

Library System Director Milum personally selected for inclusion in the children's section of the Llano library a number of children's books that make light of flatulence (referenced below as the "Butt and Fart Books"). She chose the books based on her training and experience. In summer 2021, in response to directions from her Llano County superiors, Milum removed all seven titles from the Library System. *See* ROA.1660-61, 3936-37, 3997-98, 4042.

Milum's removal of the seven books resulted from complaints made by Defendants Wells and Schneider.[2] *See, e.g.*, ROA.3894:20-22, 3934:1-2, 4047:9-4048:14, 1660-61. Before Milum removed the books, Wells and Schneider repeatedly checked them out to keep them off the shelves and make them inaccessible to other library patrons. ROA.3894:20-24, 4084:23-4085:10, 4185:23-4186:3. Then Wells, who "believe[s] the Fart Books don't belong in our library," asked Milum and Llano County officials Judge Cunningham and Commissioner Moss to remove the Butt and Fart Books from the Library System. ROA.4048:10-4055:1.

[2] At the time of these complaints, both Wells and Schneider were local residents. Each was placed on the Llano County Library Advisory Board, replacing longtime board members who were ousted with no contemporaneous explanation. ROA.237.

In response to Wells' requests, Defendants Cunningham and Moss directed Milum to remove the Butt and Fart Books. ROA.1498, 3937:1-3, 4042:7-11, 3997:24-3998:5. Milum followed her superiors' directives, taking the books from the shelves[3] and deleting them from the Library System catalog. ROA.3509, *see* ROA.1660-61, 3934:18-21, 3936:9-25, 4042:7-11, 3997:24-3998:5.[4]

2. Defendants Target Books Containing Nudity

After the Butt and Fart Books were removed, Cunningham instructed Milum to remove from the shelves "[a]ny books with photos of naked or sexual conduct regardless if they are animated or actual photos[.]" ROA.1667, 3509, 3939:1-17, 4218. Milum obeyed his directive, closing the library for three days as librarians followed Cunningham's instructions: hundreds of books, including books about potty training and getting dressed, disappeared. ROA.3899:21-3900:20, 3979:8-14.

One casualty of this purge was Maurice Sendak's classic, Caldecott Award-winning book *In the Night Kitchen*, which Milum removed because it includes

[3] Five of the books were newly ordered by Milum and had not yet been added to the library shelves before Milum disposed of them in response to these directives. ROA.3903-05.

[4] At the preliminary injunction evidentiary hearing ("Evidentiary Hearing"), Milum attempted to deny that she removed the Butt and Fart Books at least in part because she was so directed by Moss, but after reviewing her contemporaneous notes of the meeting—"an accurate reflection of the conversation"—she agreed she had been so instructed. ROA.3936:5-12, 1409. She also agreed that "Cunningham also directed [her] to remove the books." ROA.3937:1-3.

illustrations of a naked toddler. ROA.3940:13-19, 3941:9-15, 3963:5-8. Defendants also removed *It's Perfectly Normal* by Robie Harris, an illustrated children's health book that helps readers understand puberty and discusses ways to stay safe on the internet. ROA.3898:10-24, 3899:13-20, 3945:3-11, 4219:5-10. Wells thanked Moss for "making [Milum] remove [*It's Perfectly Normal*] because of its 'disgusting' photos." ROA.1540-41.

3. Defendants Target Books about Race, Gender, and Sexuality that Defendant Wallace Identified

On October 25, 2021, Texas State Representative Matt Krause published a 16-page list of allegedly "objectionable" books about race, politics, sexuality, and gender identity (the "Krause List"). ROA.1505-23. Wells and her associates agreed by email to review a "couple of pages each" of the "16 pages of [Krause List] books" to see if any of the titles were available in the Library System. ROA.1525-26. The resulting table of Krause List titles available in the Library System, referred to below as the "Wallace List," was "the list of books that Bonnie Wallace thought were inappropriate and should be removed from the Llano County Library System."[5] ROA.3509-10, 3942:13-21, 3951:6-9, 3959:15-25.[6] Milum's "boss"

[5] The books on the Wallace List included *Caste*; *They Called Themselves the K.K.K.*; *Spinning*; *Being Jazz*; *Shine*; *Gabi, a Girl in Pieces*; and *Freakboy*. ROA.1527.

[6] Subsequently, in an email thread including Moss, Wells reported that Moss and Cunningham had "instructed [Milum] to … remove certain books," including *Lawn Boy*, *Gender Queer*, and "the Butt Book," and she thanked Moss "for [his]

Cunningham sent her the Wallace List on November 10, 2021, forwarding an email describing the books on the list as "pornographic filth." ROA.1502-04, 3509-10, 3960:1-9, 3966:21-3967:6. Milum testified: "When I received [the Wallace List], we went and pulled all of those books." ROA.3510, 3952:8-9.

On October 28, 2021, Milum emailed Cunningham about the book *How to Be an Antiracist* by Ibram X. Kendi, which she referred to as the "[c]ritical race theory book," and which Milum noted she and Cunningham had previously discussed. ROA.1524, 3948:2-21. Milum explained that she "wanted to let [Cunningham] know before it came up in any of [his] meetings" that, although the book was still in the system, it was now hidden behind the front desk and was "no longer on the shelf." ROA.1524.

By the end of 2021, Defendants had removed the remaining Banned Books—all of which were on the Wallace List—from the Llano library, in addition to the Butt and Fart Books, *In the Night Kitchen*, and *It's Perfectly Normal*. ROA.3510, 3933:23-3934:2, 3945:3-5, 3951:6-3954:25, 3962:23-3963:3.

help in this situation and all [he had] done to remedy it!" ROA.1525-26, 4088:10-19. Wells then reported that the work of ascertaining which of the "CRT and LGBTQ book[s]" were in the Library System had been completed. Their next steps were to "research the content of the ones [they had] found," along with related other titles and to send a list "of the ones that are found to be inappropriate, along with a summary, to Commissioner Moss." ROA.1525-26.

Defendants admitted that the reason that these "CRT and LGBTQ" books were "selected for weeding" was because they were on the Wallace List. ROA.3510, 3952:3-10, 3952:24-3953:3, 3954, 3964. Milum also admitted that no books other than those on the Wallace List were selected for "weeding" at that time. ROA.3954:2-7.

4. Defendants Do Not Follow Routine Weeding Procedure in Removing the 17 Books

After this litigation was initiated, Defendants asserted that Milum had removed the 17 Banned Books from circulation as a matter of routine curation of the library's inventory pursuant to library policies (a process called "weeding"), rather than in response to directives from her superiors. None of the removed books, however, qualified for weeding under the Library System's general weeding practices.

The Llano Library System uses the Texas Library Association's "CREW" method to determine which books to weed from the library catalog.[7] ROA.1543-1610, 3883:12-15, 3888:6-15. The CREW method uses an acronym, MUSTIE, to indicate when an item should be removed from the collection. ROA.1544. MUSTIE stands for: "**M**isleading and/or factually inaccurate," "**U**gly (worn out beyond mending or rebinding)," "**S**uperseded by a new edition or a better source,"

[7] CREW stands for "Continuous Review, Evaluation and Weeding." ROA.1544.

"**T**rivial (of no discernable literary or scientific merit), "**I**rrelevant to the needs and interests of the community," and "**E**lsewhere (the material may be easily borrowed from another source)." ROA.1544. Weeding decisions "are based on some combination of these criteria—that is, an item will probably not be discarded based on meeting only one of [the MUSTIE] criteria." ROA.1544. Historically, the Library System would not consider a book for weeding unless it met two or three MUSTIE criteria. ROA.3891:17-21, 4204:2-5.

All but one of the 17 books at issue were weeded contrary to Library System policies and practices. ROA.3903:15-3904:3, 3905:7-3908:16, 3910:1-3911:8, 3911:16-3912:19, 3913:12-3914:14, 3915:5-18. None of the Banned Books met more than one MUSTIE criterion, and most of them met none. ROA.1660-65, 3912:14-19, 3913:20-25.

The 17 books were treated differently than other books in the library. The District Court did not credit Milum's testimony to the contrary, which was inconsistent, contradictory, and implausible. ROA.4176:3-11, 4178:6-13, 4180:22-4181:5, 4181:18-25, 4183:5-15, 4184:2-8, 4184:17-24. Milum asserted that the CREW Manual permits the removal of books that have not circulated in "3-5 years," ROA.1586, for example, but could not explain why hundreds of other books not checked out for decades were currently still on library shelves. ROA.3527, *compare* ROA.1660-65, *with* ROA.1779-90, *see also, e.g.*,

ROA.4206:21-25, 4215:4-7. Milum also explained that the Commissioners Court had indefinitely suspended all new purchases a month prior to her November removal of the Wallace List books. ROA.4199:25-4200:5.

When asked to explain the removal of *Caste*, which had been checked out multiple times during the ten months it was in the Library System, Milum suggested that "it was possibly put in a different stack when we were looking through all these other books because it was new." ROA.3961:6-9. Milum did not explain how that kind of error would have resulted in *Caste's* permanent removal from the digital catalogue or why Milum did not return the book to the Library System upon realizing her mistake.

Milum testified that she weeded *In the Night Kitchen* because it "was old and worn" and therefore **U**gly. ROA.3963:24-25. But the weeded copy of *In the Night Kitchen* was introduced into evidence at the Evidentiary Hearing and was "in excellent condition" and lacked "any tears or stains or any damage." ROA.1821-69, 4120:11-4121:7.

5. Defendants Attempt to Moot the Case by Having Their Lawyer Buy and Donate Copies of the Banned Books

In July 2022, three months after this action was filed and shortly before Defendants' opposition to the preliminary injunction motion was due, ROA.648, Defendants' lawyer Jonathan Mitchell "anonymously" donated new copies of

certain Banned Books to Defendants.[8] ROA.4161. Defendants kept the donated books in a non-public room at the Llano library, to be produced for check-out only on a patron's direct request. ROA.3924:12-3925:5, 3926:15-3927:1, 4155:10-18. Defendants called this hidden library the "in-house checkout program." ROA.720-21, 3986:7-9, 3987:1-9, 4261:10-13.

Defendants did not inform library patrons about these hidden books. ROA.3989. They were not listed in the Library System catalog or advertised on any library bulletin board or on physical signs, and no announcement of their renewed availability appeared in the library newsletter or on social media. ROA.3924:23-3925:3, 3925:19-24, 3925:25-3926:2, 3984:16-3985:1, 3985:2-4, 3986:3-6, 3988:8-3989:16, 4123.[9] The books' appearance was distinct because they did not have a barcode, spine label, or genre label. ROA.3925:6-13. Plaintiffs only learned these hidden books were "available" because "of the lawsuit." ROA.3926:6-11, 3991:19-25, 4121:12-18.

[8] Mr. Mitchell attempted to suppress testimony that he had donated the books after this action was filed by asserting that his donation of the books was "privileged." The District Court rejected this theory, and Defendants were forced to reveal that Mr. Mitchell was the donor. ROA.4161.

[9]The Library System's standard practice is to publicize all newly acquired titles in its newsletter. ROA.3985:12-14.

C. Procedural History

Plaintiffs filed their Complaint in April 2022. ROA.39-69. They filed the motion for preliminary injunction in May 2022, and it was fully briefed by July 2022. ROA.187, 805, 981, 998. In June 2022, Defendants moved to dismiss. ROA.609, 686, 723.

On October 28 and 31, the District Court held the Evidentiary Hearing on the preliminary injunction motion. ROA.25-26. The parties called seven witnesses and introduced thirty-two documents for nine hours of testimony. ROA.25-26, 1009. The parties then submitted post-hearing briefing on the requested injunction. ROA.1884, 2448, 2390 3149.

D. The District Court's Decision

On March 30, 2023, the District Court issued a 26-page order denying Defendants' motion to dismiss and granting Plaintiffs' motion for a preliminary injunction. ROA.3507-32.

In denying the motion to dismiss, the District Court held Defendants' book removal "infringe[s] on [Plaintiffs'] right to access information" and constitutes a "continuing, present adverse effect" for Article III purposes. ROA.3516. It found that Defendants did not moot Plaintiffs' lawsuit by creating an "in-house checkout system" in which the Banned Books were "hidden from view and absent from the catalog." ROA.3518. The District Court called this "precisely the type of posturing

the voluntary cessation exception [to mootness claims] is meant to prevent."[10] ROA.3518.

The District Court also held that Plaintiffs have a "First Amendment right to receive information" that prohibited Defendants from removing books "simply because they dislike the ideas contained in [them]." ROA.3519 (quoting *Campbell*, 64 F.3d at 189) (internal quotations omitted). The "key inquiry," the court held, "is whether the governments' 'substantial motivation' was to deny library users access to ideas with which [it] disagreed." ROA.3520 (quoting *Campbell*, 64 F.3d at 190). The Court also held that *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) and *Chiras v. Miller,* 432 F.3d 606 (5th Cir. 2005)—the primary cases Defendants rely on—discuss "the initial selection, not removal, of materials," and so do not supplant this Court's binding precedent in *Campbell*.[11] ROA.3520.

The District Court also made extensive factual findings. After reviewing many rounds of briefing, countless declarations and exhibits, and several days of testimony, it found that Defendants had "targeted and removed books, including well-regarded, prize-winning books, based on complaints that the books were

[10] The District Court did dismiss, without prejudice, Plaintiffs' claims related to Defendants' elimination of the Library System online book database, called "OverDrive." ROA.3517-18. That was because, in May 2022, Defendants switched to a new online book database—Bibliotheca. ROA.3517.

[11] As Defendants note in their Opening Brief ("OB"), the Complaint also asserted a due process claim that is not at issue in this appeal. OB5.

inappropriate." ROA.3524. It also found that Defendants' removal decisions were content-based and subject to heightened scrutiny—a standard Defendants' "post-hoc … pretextual" justification did not meet. ROA.3526. Based on the evidence, the court found that there was "no real question" that Defendants' conduct amounted to content discrimination, and that it was "substantially likely" that the removals "d[id] not further any substantial governmental interest—much less any compelling one." ROA.3526-28. The court further held that the "loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury," and that Defendants' hidden "in-house checkout system" failed to mitigate that harm. ROA.3528-29 (citing *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013)). The balance of equities favored Plaintiffs for the same reasons. ROA.3529-30.

The District Court additionally found that Mr. Mitchell had donated the Banned Books to advance his clients' litigation position, not as "a neutral benefactor with the intent of making them available to library patrons." ROA.3518. It found that the system was "an obvious and intentional effor[t] by Defendants to make it difficult if not impossible to access the materials Plaintiffs seek." ROA.3529.

To remedy these First Amendment violations, the District Court ordered that "the books at issue be made available for checkout through the Library System's catalogs" during the pendency of this case. ROA.3530.

SUMMARY OF THE ARGUMENT

In *Campbell v. St. Tammany Parish School Board*, this Court held that government officials violate the First Amendment right to receive information when their "substantial motivation" in removing library books is a desire to deny access to the ideas in those books. 64 F.3d at 188-91. The District Court below found that Llano County officials acted with precisely such a motivation in this case. ROA.3525-29. That should be the end of the Court's inquiry.

Defendants' arguments to the contrary are inapposite. First, Defendants portray this as a case about routine "weeding" decisions. OB1-2, 7-15, 34-38, 42-44. But the District Court rejected this justification as a pretext after an evidentiary hearing, finding that "Plaintiffs have offered sufficient evidence to suggest this post-hoc justification is pretextual," and noting that contemporaneous evidence provided no support for the "weeding" defense. ROA.3526-27. Defendants cannot show that the District Court's finding was clear error. Rather, Defendants simply urge this Court to ignore the District Court's credibility determinations in favor of their own. ROA.3526-28.

Second, Defendants suggest that this Court should ignore its own controlling precedent in *Campbell* and instead apply out-of-context language and dicta from cases regarding government decisions about what textbooks belong in schools or what internet sites should be made available in libraries. OB25-34. Defendants provide no reason for the Court to set aside binding precedent directly dealing with library book removals and instead apply dicta from cases with little or no contextual relevance. Nor is Defendants' prediction of a deluge of challenges to mundane library operations persuasive; no such deluge has materialized in the twenty-eight years since *Campbell* was decided and it is unlikely to appear now.[12]

Finally, Defendants argue that Plaintiffs' First Amendment injury vanished when, months after litigation began, Defendants established a hidden library which secretly contained the Banned Books. OB20-24. Once again, Defendants ignore the requirement that they show clear error, this time in the District Court's finding that the hidden library did not "mitigate the constitutional harm Plaintiffs are suffering." ROA.3518, 3528-29. Moreover, the voluntary cessation doctrine readily disposes of Defendants' "standing" argument, which is actually one of mootness. As the District Court held, litigation counsel's creation of a partial

[12] Nor have North Texas libraries been paralyzed since the decision in *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530 (N.D. Tex. 2000), which blocked a book removal on virtually identical legal grounds to those cited by the District Court here.

hidden library for the Plaintiffs alone was litigation posturing and did not moot Plaintiffs' First Amendment claim. ROA.3518, 3529.

Ultimately, this case simply requires a straightforward application of binding precedent to the District Court's well-supported factual findings. Fidelity to the Court's already-established rule ensures that library staff remain free to operate according to professional standards without interference by elected officials. Under the alternative suggested by Defendants, where government officials could remove books for any reason no matter how partisan, the robust marketplace of ideas embodied in public libraries would disappear. This Court should decline Defendants' invitation to authorize such a result.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

The District Court correctly determined that Plaintiffs are likely to succeed on the merits. *Campbell* precludes the government from selectively removing books it disagrees with, and the extensive evidentiary record shows that Defendants impermissibly targeted and removed 17 books based on their viewpoint and content.

In their Opening Brief, Defendants do not contend that the District Court's factual findings that they removed the Banned Books based on their viewpoint and content and subsequently offered a pretextual explanation for that removal were

clearly erroneous. They simply recite evidence that they believe is favorable to them, which almost exclusively consists of their own litigation testimony. This fails to carry their burden on appeal.

Defendants' legal argument fares no better. They argue that the government can remove any books it disagrees with, OB29, but also acknowledge, inconsistently, that libraries cannot remove books "in a narrowly partisan or political manner," OB28, which the District Court found Defendants did here. And the case Defendants rely on most extensively—*Chiras*—is all but irrelevant here: It specifically distinguishes itself from *Campbell* both because it involves selection rather than removal of books, and because it concerns the role of textbooks in schools, where, unlike public libraries, the government has broad discretion to direct educational policy.

A. The First Amendment Prohibits Removal of Library Books Based on Viewpoint or Content-Based Discrimination

The First Amendment limits the government's discretion to remove books from public libraries in two ways. First, it prohibits viewpoint discrimination—when the government censors speech because its "subjective judgment" is that the ideas it expresses are "offensive or inappropriate." *Robinson v. Hunt County*, 921 F.3d 440, 447 (5th Cir. 2019). That this "egregious form of content discrimination" violates the First Amendment is "axiomatic." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) ("When the government targets not

subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

Second, even where government censorship does not amount to viewpoint discrimination, it is still "presumptively unconstitutional" if it is "content-based" and not "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). A restriction is "content-based" if it "target[s] speech based on its communicative content," whether that content is "the topic discussed or the idea or message expressed." *Id*. A restriction that is "content based on its face"—as "Defendants acknowledged" their censorship was here, ROA.3526—"is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165.

Here, the District Court found that Defendants violated both standards: Their "substantial motivations" in removing the Banned Books were to suppress views they found "inappropriate," ROA.3523, 3525, and their "content-based restrictions" on those books did not satisfy heightened constitutional review, ROA.3526-28. Defendants cannot show that either finding was a clear error because the evidence supporting both findings is overwhelming.

1. *Campbell* Prohibits Viewpoint Based Discrimination in Library Book Removal

Both the Supreme Court and this Court have held that the First Amendment's prohibition on viewpoint discrimination extends to book removal in public school libraries. In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, a public school board obtained a list of books it found "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," and directed that they be removed from school libraries. 457 U.S. 853 (1982). In a plurality opinion, the Supreme Court recognized the well-established principle that "[t]he Constitution protects the right to receive information and ideas," and held that the government violates that right when it removes books "to deny … access to ideas with which [it] disagree[s]."[13] *Id.* at 871. "If there is any fixed star in our constitutional constellation," the Supreme Court observed, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Id.* at 870.

A decade later, this Court applied *Pico* in *Campbell*, which also involved book removal in public school libraries. In *Campbell*, a local school board, at a parent's urging, ordered the removal of a book that traced the development of

[13] Defendants do not challenge the existence of a "right to receive information," which in any case is well established. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas.").

African tribal religion. 64 F.3d at 185. Following *Pico*, *Campbell* held that the First Amendment limits the discretion of government officials to remove books from public school libraries. *Id.* at 189. The "key inquiry," it held, is "the school officials' substantial motivation in arriving at the removal decision." *Id.* at 190. If a book is removed to "deny students access to ideas with which … school officials disagree[], and this intent was the decisive factor in the removal decision," then the removal is unconstitutional. *Id.* at 188 (emphasis omitted).[14]

Applying this standard, the District Court held that Defendants violate the First Amendment "right to receive information" when they "remov[e] books" simply because "'they dislike the ideas contained in [them].'" ROA.3519 (quoting *Campbell*, 64 F.3d at 189), ROA.3523 (quoting *Sund*, 121 F. Supp. 2d at 547). The "'key inquiry in a book removal case,'" the court recognized, "is whether the

[14] Other courts—both inside and outside the Fifth Circuit—have applied this standard in book removal contexts. *See, e.g.*, *Sund* 121 F. Supp. 2d at 533-34 (granting preliminary injunction where pro-LGBTQ books were moved from children's section to adult section of library); *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1001 (W.D. Ark. 2003) (granting summary judgment where school moved *Harry Potter* books from shelves to location behind the staff counter); *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875 (D. Kan. 1995) ("If the decisive factor behind the removal of Annie on My Mind was the school board members' personal disapproval of the ideas contained in the book, then under *Pico* the removal was unconstitutional."); *Delcarpio v. St. Tammany Par.*, No. 2:93-cv-00531-PEC, 1993 WL 432360, at *1 (E.D. La. Oct. 20, 1993) (denying summary judgment due to "a genuine issue of fact as to whether the motives or intent of the majority of those School Board members voting to remove the book were constitutionally invalid" under *Pico*).

government's 'substantial motivation' was to deny library users access to ideas with which [it] disagreed.'" ROA.3520 (quoting *Campbell*, 64 F.3d at 190).[15]

As discussed below, the court found that Plaintiffs made "a clear showing" that Defendants' "substantial motivations" in removing the Banned Books were to suppress views they found "inappropriate." ROA.3523, 3525 (quoting *Robinson*, 921 F.3d at 447). The evidence supporting that finding is overwhelming.

2. Content-Based Discrimination is Unconstitutional Unless it is Narrowly Tailored to Achieve a Compelling Government Interest

A limited public forum is created when the government has voluntarily "opened for use by the public…a place for expressive activity." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). Once Llano County voluntarily opened the Library System for residents to use, it became "bound by the same standards [that] apply in a traditional public forum." *Id.* at 46. Applying these principles, the District Court found that, even aside from *Campbell*, Defendants' book removal decisions "clearly" constituted "content-based

[15] Defendants do not argue here, as they did below, that *Pico* and *Campbell* are distinguishable because they dealt with school rather than public libraries. *See* ROA.616. And for good reason. *Chiras*—the primary case Defendants rely on—concerns book selection at a public-school library. More importantly, as the District Court also recognized, the reasoning in *Pico* and *Campbell* has "even greater force when applied to public libraries" because First Amendment protections on school campuses are limited by the broad discretion school officials have to fulfill their "unique inculcative function." ROA.3521 (quoting *Sund*, 121 F. Supp. 2d at 548).

restrictions" on protected speech and therefore were subject to heightened constitutional scrutiny. ROA.3526-27; *see Reed*, 576 U.S. at 163 ("Content-based laws…are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

Again, overwhelming evidence supports this finding. And Defendants cannot point to any evidence demonstrating that their actions were narrowly tailored to serve a compelling state interest—indeed, they do not even try.

B. The District Court's Factual Finding that Defendants' Removal of the Disputed Books Was Based on Viewpoint and Content Discrimination Was Not Clear Error

After reviewing the substantial witness testimony, documentary evidence, and legal argument below, the District Court found that "Defendants' decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells objected," including views on LGBTQ and racial equity. ROA.3525. It further found that "there is no real question that [Milum's] targeted review [of the Banned Books] was directly prompted by complaints from patrons and county officials over the content of these titles." ROA.3527.

Defendants disregard the District Court's detailed findings, and selectively cite out-of-context record excerpts and Defendants' declarations (including materials that Defendants did not place before the District Court) to claim that

"undisputed evidence" supports their version of the facts. OB7-12. But Defendants bear the burden of showing on the full record that the District Court's findings of fact were clearly erroneous. *See Hopwood v. State of Texas*, 236 F.3d 256, 272-73 (5th Cir. 2000) ("To be clearly erroneous, a decision … must be dead wrong.") That bar is high—this Court's review of factual determinations "is deferential," *Bluefield Water Association, Inc. v. City of Starkville, Miss.*, 577 F.3d 250, 253 (5th Cir. 2009), and such deference "is even greater" for any "determinations of credibility" that are necessary to resolve conflicting testimony. *Kristensen v. United States*, 993 F.3d 363, 367 (5th Cir. 2021). Indeed, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

Defendants have not met their burden to show that the District Court clearly erred in finding that "Defendants' contemporaneous communications, as well as testimony at the hearing, amply show," ROA.3527, that "Defendants targeted and removed books, including well-regarded, prize-winning books, based on complaints that the books were inappropriate." ROA.3524. On the contrary, the District Court's findings were supported by overwhelming evidence.

First, the District Court found that, "[a]lthough several commissioners and librarians stated that they saw no problem with the [Butt and Fart] books,

Defendants Moss and Cunningham contacted Milum to instruct her to remove the books from the shelves." ROA.3509 (comparing Log, ROA.911 (describing commissioners saying they did not see a problem with the books) and Email, ROA.908 (same), with Cunningham Email, ROA.891-92 (instructing Milum to remove the books from the shelves), Mt'g Logs, ROA.893, 909 (noting complaints and stating that Moss told Milum to "pick [her] battles.")).

Second, as to the LGBTQ and racial equity books, the District Court found that, "[i]n Fall 2021, Wallace, Schneider, and Wells, as part of their community group, contacted Cunningham to complain about certain books that were in the children's sections or otherwise highly visible, labeling them 'pornographic filth.'" ROA.3509 (citing Wallace Email, ROA.350-51). It found that, "[o]n November 10, 2021, Wallace provided Cunningham with lists, including a list of 'dozens' that could be found in the library." ROA.3509 (citing Wallace Email, ROA.350-51, 357) "The books labeled 'pornographic' included books promoting acceptance of LGBTQ views," ROA.3509 (citing *e.g.*, Wallace List, ROA.357), and "books about 'critical race theory' and related racial themes," ROA.3510 (citing ROA.357), or as "Defendants refer to them, 'CRT and LGBTQ' books" ROA.3510 (citing Wells Emails, ROA.353-54 (planning a list of "CRT and LGBTQ book[s]" to remove)). "In the email, Wallace advocated for the books to be relocated to the adult section because '[i]t is the only way that [she] could think of to prohibit

future censorship of books [she does] agree with.'" ROA.3510 (alternations in original) (citing Wallace Email, ROA.350-51). "Milum then ordered the librarians to pull books from an edited version of Wallace's list from the shelves." ROA.3510 (citing Baker Decl., ROA.216). "On November 12, 2021, Defendants removed several books on the Bonnie Wallace Spreadsheet from the Llano Library Branch shelves, including, for example, *Caste: The Origins of Our Discontents*, *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group*, *Being Jazz: My Life as a (Transgender) Teen*, and *Spinning*." ROA.3510 (citing ROA.342-347).

Third, regarding *In the Night Kitchen* and *It's Perfectly Normal*, "Cunningham and Moss ordered Milum, '[a]s action items to be done immediately,' to pull books that contained 'sexual activity or questionable nudity' from the shelves … ." ROA.3510 (citing Cunningham Emails, ROA.349, 388). "Milum informed Moss and Cunningham she would pull the books, as well as books found in Wallace's lists." ROA.3510 (citing ROA.349, 388, 3974:6-9).

The District Court further found compelling that Milum "testified that the books she pulled were books that Wallace, Wells, or the Commissioners [Cunningham and Moss] identified as 'inappropriate.'" ROA.3525. It also credited Wells's testimony that "if there was any book that [in her opinion] was harmful to minors that was in the library, I would speak with the director, [Milum] to have it

removed." ROA.3527, 4075:9-14. If Milum disagreed with her assessment—as with the Butt and Fart Books—Wells would speak to County officials Moss and/or Cunningham to have them removed. ROA.4075:15-76:12. Milum and Wells were not alone. Defendants openly described the types of books whose content or viewpoints they found offensive or inappropriate and therefore removed from the library. *See, e.g.*, ROA.3899:2-9, 4067:8-10, 1540-41.

As the District Court found, "[t]he short amount of time between the complaints, commissioners' actions, and Mil[um]'s removal strongly suggests that the actions were in response to each other." ROA.3525.

Defendants do not challenge the evidence showing that Cunningham and Moss instructed Milum to pull the Banned Books from circulation. *See* OB9-10. Instead, they ask the Court to interpret Judge Cunningham and Commissioner Moss's instructions as mere suggestions—even though both individuals had supervisory authority over Milum. *See* ROA.669 (Milum Decl.) ("I report to the Llano County Judge."), ROA.3929 (Milum testimony affirming Moss as her employer); ROA.679 (Cunningham Decl.) ("Milum[] reports to me and the Llano County Commissioners.").

Defendants' own statements are thus more than sufficient to support the District Court's factual determinations that Cunningham and Moss's contemporaneous communications to Milum—including express requests to

remove books and implicit orders that "[she] should take them out of the system," ROA.3936:9-12, *see* ROA.3509—constituted instructions. There is no clear error here.

C. Defendants Do Not Present Compelling Arguments for Either Overturning *Campbell* or Rejecting the District Court's Factual Findings

Defendants attempt to frame their content and viewpoint discrimination as merely constitutionally permissible weeding. OB25-34. But the District Court rejected Defendants' narrative as a "pretextual" and "post-hoc justification" for their discriminatory conduct. ROA.3526. The court identified extensive direct and circumstantial evidence refuting Defendants' claim, and Defendants point to no clear error in its findings.

Faced with this powerful factual record, Defendants pivot to assert that the District Court created a categorical rule prohibiting librarians from making any decisions about what goes onto library shelves. The court did no such thing.

Following *Pico* and *Campbell*, the District Court only held (1) that government officials cannot "remov[e] books from school library shelves 'simply because they dislike the ideas contained in [them]," and (2) that, because Defendants "substantial motivation" in removing the Banned Books "was to deny library users access to ideas with which [they] disagreed," Plaintiffs were likely to succeed on their First Amendment claim. ROA.3519-20 (citations omitted).

Defendants attempt to undermine this decision by arguing that *Pico* and *Campbell* have been implicitly overruled by *Chiras*. But *Chiras* acknowledges that *Pico* (and, thereby, *Campbell*) involves the removal, not the selection, of library books. More to the point, *Chiras*—a case holding that the government has discretion to select textbooks in public schools—is irrelevant to the issue in this case, because this dispute does not implicate the government's interest in determining school curriculum.

Defendants' arguments are also divorced from the facts of this case. Even the authorities Defendants cite would not permit them to do what they did here—i.e., target specific books for negative treatment based on their message. *See Chiras*, 432 F.3d at 620 (acknowledging that, under *Pico*, book removals "motivated by 'narrowly partisan or political' considerations" are unconstitutional). Whatever validity Defendants' arguments about forum analysis and content-based decision-making may have in theory, they are entirely divorced from the facts of this case and the District Court's finding that Defendants "remov[ed] books from … library shelves 'simply because they dislike the ideas contained in [them]." *Campbell*, 64 F.3d at 188. In light of the District Court's factual findings, Plaintiffs are likely to prevail, even under Defendants' legal construct.

1. Defendants Fail to Show that the District Court's Findings of Discrimination and Pretext Were Clearly Erroneous

Defendants spend many pages constructing an alternate narrative in which Milum weeded the Banned Books pursuant to normal library policy on her own initiative. OB7-12. But the District Court rejected this story for reasons that are obvious from the record.

Citing extensive evidence, the District Court found Defendants' claim of routine weeding to be a "pretextual" and "post-hoc justification" for their discriminatory conduct. ROA.3526. It found that Defendants instructed Milum to remove the Banned Books, and that their motivation for doing so, and her motivation for so doing, bypassed permissible "cull[ing] and curat[ing]," ROA.3527, and crossed into prohibited viewpoint and content-based discrimination. ROA.3523-28 ("[E]ach of the books in question were slated for review (and ultimately removal) precisely because certain patrons and county officials complained that their contents were objectionable.").

This Court's question on review, then, is not whether Plaintiffs made "a 'clear showing' that Amber Milum engaged in 'viewpoint discrimination' or 'content discrimination' when weeding the disputed books," OB34, but whether Defendants have shown the District Court clearly erred in finding that they "targeted and removed books, including well-regarded, prize-winning books, based on complaints that the books were inappropriate." ROA.3524. The expansive

record evidence set forth *supra* § I.B shows that the District Court did not err, and Defendants' post-hoc declarations and testimony—on which they exclusively rely—provides no credible evidence to the contrary.

First, Milum's testimony was riddled with contradictory and implausible statements. ROA.4176:3-11, 4178:4-13, 4180:22-4181:5, 4181:18-25, 4183:5-15, 4184:2-8, 4184:17-24. She offered no explanation for the fact that hundreds of books which had not been checked out for ***decades*** remained in the Library System, while the books at issue—all of which had been checked out much more recently—were "weeded" shortly after being referred to as pornographic filth by Wallace. ROA.3527, *compare* ROA.1660-65, *with* ROA.1779-90, *see also, e.g.*, ROA.4206:21-25, 4215:4-7. Nor did Milum explain why *Caste*, which she testified "was possibly" weeded by mistake, ROA.3961:6-9, remained absent from the library catalogue until the District Court ordered her to replace it.

The District Court also considered physical evidence that flatly contradicted Milum's testimony that she weeded *In the Night Kitchen* because it "was old and worn" and therefore **U**gly, ROA.3963:24-25. The weeded copy of *In the Night Kitchen* was introduced into evidence at the Evidentiary Hearing and found to be "in excellent condition" and lacking "any tears or stains or any damage." ROA.1821-69, 4120:11-21:7. And Milum admitted that there was no need to make space for new books in November 2021 because the Commissioners Court had

suspended all new purchases a month before she removed the Wallace List books from the library. ROA.4199:25-200:10.

The District Court also credited Milum's live admission that "the books that she pulled were books that Wallace, Wells, or the Commissioners identified as 'inappropriate'" ROA.3525, over her prepared declarations to the contrary. The District Court was entitled to credit this live testimony, subject to cross-examination, over the declarations written by Milum's lawyer who was, himself, a participant in the underlying book banning. *See* 11A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2949 (3d ed. 2023) ("When the outcome of a Rule 65(a) application depends on resolving a factual conflict by assessing the credibility of opposing witnesses, it seems desirable to require that the determination be made on the basis of their demeanor during direct and cross-examination, rather than on the respective plausibility of their affidavits."). As the District Court witnessed Milum's testimony in person, its determination here is afforded significant deference. *Galena Oaks Corp. v. Scofield*, 218 F.2d 217, 219 (5th Cir. 1954) ("The burden [on appellants to show clear error] is especially strong when the trial court has had the opportunity, not possessed by the appellate court, to see and hear the witnesses, to observe their demeanor on the stand, and thereby the better to judge of their credibility.").

Last, the District Court underscored the additional direct and circumstantial evidence showing Defendants' personal dislike of the Banned Books, including that the Banned Books did not meet the standards for weeding but were removed anyway.[16] ROA.3524-27.

The District Court did not err in crediting the Defendants' contemporaneous records and live cross-examination testimony over their proffered evidence. Both below and on appeal, Defendants present only their own prepared litigation testimony to support their pretextual explanation. OB7-15 nn.14-33, 35-40 (citing only sworn declarations and hearing testimony on direct questioning from Defendants Milum, Cunningham, and Moss to support Defendants' alternate narrative of the events at issue). This does not meet their burden of demonstrating clear error. The District Court had ample evidence to support its conclusions, find Defendants' factual allegations not credible, and find that Milum acted to enforce Defendants' unconstitutional discrimination against books they personally disliked.

[16] Milum even testified that she found the Butt and Fart Books that the Commissioners ordered removed to be appropriate for the Llano Library, based on positive reviews, and "thought they would be funny." She never changed her mind that "they were appropriate for the [targeted] age range." *See* ROA.3929:24-30:23, 3934:3-8.

2. Defendants Arguments Are Inconsistent With Fifth Circuit Precedent and Do Not Establish That Viewpoint or Content Discrimination Is Permissible in Library Book Removal Decisions

Defendants next urge the Court to ignore *Pico*, overrule *Campbell*, and manufacture novel exceptions to traditional First Amendment principles. OB25-34. Their arguments and the cases they cite offer no support for such extreme outcomes.

a. Defendants' Attacks on *Pico* and *Campbell* Are Meritless

Defendants argue that *Pico* and *Campbell* do not "prohibit content or viewpoint discrimination in a public library's weeding decisions" because (1) *Pico* "acknowledges" that "content discrimination is permissible in library book selection," OB27, and (2) *Pico* and *Campbell* both "allow[] libraries to remove books based on content that is 'pervasively vulgar' or that lacks 'educational suitability.'" OB27 (quoting *Pico*, 457 U.S. at 871), 27-28 (quoting *Campbell*, 64 F.3d at 188-89). Not so.

Defendants' first argument is a non sequitur twice over. As discussed *infra* § I.C.2.b.1, even if the government is constitutionally permitted to discriminate against unpopular viewpoints when acquiring books, it does not follow that it can do the same when removing them. Even setting that aside, that a local school board has "significant discretion to determine" which books to place on its library

shelves, as *Pico* observed, OB27 (quoting *Pico*, 457 U.S. at 870), does not mean that it has "*unfettered* discretion" to discriminate against *viewpoints* it dislikes. *Pico*, 457 U.S. at 869. Indeed, *Pico*'s purpose in highlighting the school board's discretion is to explain how the First Amendment *limits* it: "[R]emoval decision[s]" that are intended to "deny … access to ideas with which [the school board] disagree[s]" are a "violation of the Constitution." *Id.* at 871. Allowing viewpoint discrimination, as Defendants urge here, would permit a "Democratic school board, motivated by party affiliation" to "order[] the removal of all books written by or in favor of Republicans," or "an all-white school board, motivated by racial animus" to "remove all books authored by blacks or advocating racial equality and integration." *Id.* at 870-71. "[F]ew would doubt" that this regime would "violate[] the constitutional rights" of library patrons. *Id.*

Defendants' second argument fares no better. School officials can limit books that are "pervasively vulgar" or lack "educational suitability" in school libraries because they have "legitimate … control over pedagogical matters." *Campbell*, 64 F.3d at 188. It does not follow—and no cases hold—that the government has the same broad discretion in *public* libraries, which, unlike schools, are "designed for freewheeling inquiry." *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting). And even the Constitution's tailored limitations on students' First

Amendment rights does not mean that school officials may eradicate *any* books they disagree with. *Pico*, 457 U.S. at 869.

In any case, courts have held that protecting minors from obscenity and ensuring educational suitability are compelling government interests, so the two *Pico* exceptions offer nothing to support Defendants' position that heightened scrutiny should not apply to content-based library removal decisions. *See, e.g.*, *Reno v. A.C.L.U.*, 521 U.S. 844, 875 (1997) ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful material."); *Murray v. W. Baton Rouge Par. Sch. Bd.*, 472 F.2d 438, 442 n.2 (5th Cir. 1973) ("The interest of the state in maintaining an educational system is a compelling one.").[17] Nor are those exceptions applicable with the same force in public libraries because "the Government may not 'reduc[e] the adult population … to … only what is fit for children.'" *Reno*, 521 U.S. at 875 (citation omitted).

Finally, Defendants themselves do not dispute that even "school libraries may not weed books 'in a narrowly partisan or political manner.'" OB28 (quoting *Pico*, 457 U.S. at 870); *see also Chiras*, 432 F.3d at 620 (observing that even "Justice Rehnquist was willing to 'cheerfully concede' this principle in his [*Pico*] dissent"). That alone resolves this case, for—as the District Court found after

[17] Defendants have never argued that the Banned Books were removed because they met the legal definition of obscenity.

extensive review of the facts—that is precisely what Defendants did here. *See supra* § I.B.

b. The Cases Defendants Rely on Do Not Establish That Viewpoint or Content Discrimination Is Permissible

Since *Pico* and *Campbell* prohibit state officials from removing library books simply because those books contain views they disagree with, Defendants urge the Court to apply *American Library* and *Chiras*—two cases that have nothing to do with library book removal—to this case. Defendants' attempt to extend *Chiras*—which provides broad discretion to school boards when purchasing school textbooks—to public library book removals is flatly inconsistent with the First Amendment.

(1) The First Amendment treats the selection and the removal of library books differently

In *Chiras*, this Court held that "the selection of textbooks by the state for use in public school classrooms" is not subject to "viewpoint neutrality requirement[s]" because it constitutes "government speech." 432 F.3d at 620. Defendants do not argue that public library removal decisions constitute government speech.[18] Yet, they claim that *Chiras* nonetheless undermines the District Court's holding because it quotes, in dicta, *American Library*'s

[18] The District Court rejected this argument. ROA.3520. Defendants have not made it on appeal and have therefore waived it. *United States v. Whitfield*, 590 F.3d 325, 346 (5th Cir. 2009) ("As a general rule, a party waives any argument that it fails to brief on appeal.").

observations that "[p]ublic library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them." *Chiras*, 432 F.3d at 614 (quoting 539 U.S. at 205). Citing dicta does not make it law.

Pico and *Campbell*—cases that deal squarely with First Amendment restrictions on library book removals—provide the relevant precedent. ROA.3520. *American Library* and *Chiras*, which "involve the initial selection, not removal, of materials," do not. ROA.3520 (quoting *American Library*, 539 U.S. at 205 (discussing "a public library's exercise of judgment in *selecting* the material it provides to its patrons") (emphasis added); *Chiras*, 432 F.3d at 620 (discussing "the *selection* of textbooks by the state for use in public school classrooms") (emphasis added)).

Defendants cannot refute this. They claim that "neither *Chiras* nor the plurality opinion in *American Library* makes any distinction between 'selection' and removal decisions." OB26. But that is incorrect. *Chiras* did not apply *Pico* precisely "because *Pico* addressed *the removal of an optional book* from the school library, *not the selection of a textbook* for use in the classroom." *Chiras*, 432 F.3d at 619 (emphasis added). And the fact that the *American Library* plurality does not discuss removal is meaningless. That case concerned a restriction requiring libraries to install blocking software on federally funded internet stations. 539 U.S. at 204-05 (2003) (plurality op.). The Court had no reason to discuss the application

of its rule to peripheral issues like book removal, which, in any case, it had already addressed in *Pico*.

Even though *Chiras* recognizes *Pico*'s (and thus, by extension, *Campbell*'s) application in the book removal context, Defendants insist, citing no authority, that *Chiras* somehow supplants those cases because "any distinction between 'selection' and removal decisions," in their eyes, "makes no sense." OB26. But Defendants are wrong. First, even if there were no distinction between selection and removal, *Chiras* would still be irrelevant here, for the rule *Chiras* established—that "the section of [public school] textbooks" is not subject to "viewpoint neutrality requirement[s]" because it "is government speech"—has no bearing at all on book collections in public libraries. 432 F.3d at 620. Second, as Justice Souter explained in *American Library*, "[t]he difference between choices to keep out and choices to throw out [a library book] is … enormous." 539 U.S. at 242 (Souter, J., dissenting).

Acquisition decisions are "poor candidates for effective judicial review" because of their "sheer volume." *Id.* at 241-42. Removal decisions, by contrast, "tend to be few," so "courts can examine them without facing a deluge." *Id.* at 242. Acquisition decisions are also challenging to review because of the number of "legitimate considerations that may go into [them]." *Id.* at 241. But when a library considers removing a book, it already made the decision to acquire it, so "the

variety of possible reasons that might legitimately support an initial rejection are no longer in play." *Id.* at 242.

This Court reiterated this principle in an analogous context just last year. In *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022), the Court considered the validity of a Texas law that would prohibit social media platforms from removing user content they dislike. The social media companies argued that their editorial discretion to select what content may be made available also permitted them to remove content after it had already been posted. The Court disagreed, stating that there is no authority "even remotely suggesting that *ex post* censorship constitutes editorial discretion akin to *ex ante* selection." *Id.* at 465 (emphasis in original).

In the end, the most important difference between selection and removal is also the most salient here: Courts "can smell a rat … when a library removes books from its shelves for reasons having nothing to do with wear and tear, obsolescence, or lack of demand." 539 U.S. at 241 (Souter, J., dissenting). Because these decisions "so often obviously correlate[] with content," they "tend to show up for just what they are"—unconstitutional viewpoint discrimination. *Id.* at 242.

(2) Public Libraries Are a Public Forum Subject to Heightened Scrutiny

Defendants challenge the District Court's finding that libraries are limited public fora to which heightened scrutiny applies, OB29 n.54, and urge the Court to apply a "[r]ational-[b]asis" standard under which, they say, viewpoint and content-

based discrimination is permitted, OB42-43. The Court should decline the invitation to upend well established First Amendment jurisprudence.

As an initial matter, Defendants do not provide a single case to support their claim that rational-basis review permits viewpoint discrimination. That is because it does not. *See Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (explaining that, even on the lowest level of scrutiny, the government may not "suppress the speaker's activity due to disagreement with the speaker's view"). Thus, Defendants conduct here—which the District Court found clearly targeted the views in the Banned Books—would be unconstitutional even under the standard they suggest.

Additionally, "courts have almost uniformly held" that public libraries are limited public fora to which heightened scrutiny applies, as the District Court found. ROA.3519; *see, e.g.*, *Doe v. City of Albuquerque*, 667 F.3d 1111, 1128 (10th Cir. 2012) ("reaffirm[ing]" that libraries are "a type of designated public forum"); *Neinast v. Bd. of Trs. of Columbus Metro. Libr.*, 346 F.3d 585, 591 (6th Cir. 2003) ("For the purposes of First Amendment analysis, the Library is a limited public forum."); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1259 (3d Cir. 1992) ("[T]he Library constitutes a limited public forum, a type of designated public fora.").

Defendants' arguments to the contrary are meritless. First, Defendants assert that dicta from *American Library*'s plurality opinion, which *Chiras* cites in dicta of its own, is "binding on the district court" and "precludes the use of 'forum analysis' when litigants sue public libraries over their collection decisions." OB28-29. Defendants extrapolate from this that "rules against viewpoint discrimination or content discrimination" in public library removal decisions evaporate. OB28.

This chain of reasoning breaks at every link. Most obviously, as the District Court explained, ROA.3525, *Campbell* settled this issue when it held that the First Amendment prohibits viewpoint discrimination in book removal decisions at public school libraries. 64 F.3d at 191. For reasons already discussed *supra* note 15, that decision applies with greater force in non-school public libraries. Defendants' argument therefore cannot be right, for it implies that *Chiras* overruled *Campbell*, violating "this circuit's rule of orderliness, which prohibits one panel from overruling another panel absent intervening *en banc* or Supreme Court decisions" on point. *United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017).

In any case, Defendant's claim that the *American Library* dicta *Chiras* quotes was "binding on the district court" is simply false. OB29. When the *American Library* plurality discussed "the discretion that public libraries must have to fulfill their traditional missions," it was, as explained above, talking about "a

public library's exercise of judgment in *selecting* the material it provides to its patrons." 539 U.S. at 205 (emphasis added). That is why the plurality did not grapple with *Pico*, which considered only the removal context. *Chiras* then cited the *American Library* passage when explaining why textbook selection is government speech—a question that has nothing to do with public libraries or book removal. 432 F.3d at 614. The passage *Chiras* quotes is, in short, about as far from "binding precedent" as a line of text can be.

Second, Defendants say that governments engage in content and viewpoint discrimination "all the time" when "allocating government resources." OB29. But the cases they cite—*Walker v. Texas Division, Sons of Confederate Veterans, Inc*., 576 U.S. 200 (2015); *Rust v. Sullivan*, 500 U.S. 173 (1991); and *National Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998)—hardly support such a sweeping principle.

Indeed, the Supreme Court recently rejected this very argument. In *Matal v. Tam*, the Federal Trademark Office refused to register the trademark "THE SLANTS" to an electronic music group. 582 U.S. 218, 228-29 (2017). The trademark office concluded that the name was offensive and that registration would therefore violate 15 U.S.C. § 1052(a), which prohibits trademarks that "disparage … or bring … into contemp[t] or disrepute" any "persons, living or dead." *Id.* at 223. Arguing for the constitutionality of the disparagement clause, the government,

like Defendants here, maintained that the case should be analogized to *Walker*, *Rust*, *Finley*, and other cases where the Supreme Court "has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint." *Id.* at 239.

The Court rejected those comparisons. It recognized that the trademark office, much like a public library, provides "valuable non-monetary benefits that are directly traceable to the resources devoted by the federal government[.]" *Id.* at 240-41. It held, however, that because *Rust* (which concerned funds provided to private parties for family planning services) and *Finley* (which concerned cash grants to artists) "involved cash subsidies or their equivalent," they were "not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with [other, non-monetary] services." *Id*. And while *Walker* (which concerned specialty license plates) did not involve cash payments, it held that specialty license plates constitute government speech, which was not true in the trademark context. *Id.* at 238.

For the same reasons, these cases do not support Defendants' claim here. Public libraries are not "*permitted* to engage in content and viewpoint

discrimination" in book removal decisions simply because they "allocat[e] government resources" to run the library, as Defendants claim. OB29.[19]

c. Standard Library "Weeding" Does Not Inevitably Lead to First Amendment Violations

Finally, Defendants argue that it is impossible to weed books without engaging in both content and viewpoint discrimination, and warn the Court that, if it affirms, library patrons will be forever condemned to reading outdated editions of their favorite encyclopedias. But things are not so bleak. As the District Court explained, under the *Campbell* standard, "the Llano County Library System has discretion to weed books, using professional criteria, when its 'substantial motivation' is to curate the collection and allow space for new volumes." ROA.3527. So Defendants are free to use the MUSTIE standards they have traditionally used to weed books. What they cannot do is what they did here: remove books simply because they dislike their viewpoints and "desire to prevent access to [them]." ROA.3528.

[19] Defendants also argue, in a footnote, that "content discrimination is (for the most part) permissible in a 'limited public forum,' so long as the content discrimination is reasonable and viewpoint neutral." OB29 n.54. Not so. *See Krishna*, 505 U.S. at 678 (explaining that regulation governing a "designated public forum, whether of a limit or unlimited character" must be "narrowly drawn to achieve a compelling state interest"). But the Court need not reach this question, for the District Court's finding that Defendants engaged in viewpoint discrimination was not clearly erroneous.

The sky will not fall if the Court applies *Campbell*. Libraries will continue to make space for new books—as they have for the twenty-eight years since *Campbell* was decided—using the constitutional principles they have applied for decades, and even centuries.

II. PLAINTIFFS HAVE ASSERTED AN ONGOING FIRST AMENDMENT INJURY

Defendants argue on appeal is that by creating a hidden library of Banned Books after this case was filed, they eliminated Plaintiffs' "standing." OB2–3, 6, 16–17, 19, §§ I.A. & I.B. But this argument is actually one of mootness. *See*, *e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) ("The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings."). And it is barred by the rule that a defendant's voluntary cessation of wrongful conduct during litigation does not moot a plaintiff's injury unless defendants can satisfy the "heavy burden" of proving "the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

By any name, Defendants' argument fails. First, the hidden library was unequivocally a product of litigation strategy and cannot prevent a preliminary injunction against the underlying removal of the banned books. ROA.3518. Second, Defendants' central premise—that Plaintiffs are not suffering ongoing

injury sufficient to support a preliminary injunction—is foreclosed by District Court's factual finding that such injury exists despite the hidden library. ROA.3518, 3528-29.

A. Defendants Cannot Recast Their Mootness Claims as a Standing Argument to Avoid the Voluntary Cessation Doctrine

Defendants cannot avoid review by strategically ceasing the challenged action once litigation is initiated—this is precisely the reason the voluntary cessation doctrine exists. "If that is all it took to moot a case, 'a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends.'" *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190; *see Knox v. SEIU*, 567 U.S. 298, 307 (2012) ("[M]aneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."). Defendants cannot "evade sanction by predictable protestations of repentance and reform after a lawsuit is filed[.]" *Ctr.*

for Biological Diversity, Inc. v. BPArn. Prod. Co., 704 F.3d 413, 425 (5th Cir. 2013) (citation omitted).[20]

The District Court correctly found that Defendants' hidden library of banned books was mere litigation "posturing" rather than proof "the controversy is actually extinguished." ROA.3518; *Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018). Significantly, the donor of the banned books to the hidden library was Defendants' attorney, who subsequently attempted to use attorney-client privilege to conceal his improper efforts[21] to alter the facts of the case to suit his litigation strategy.[22] ROA.3518. The District Court correctly characterized the argument as one based in mootness before rejecting it. ROA.3518, 3529.

Regardless of whether Defendants call their argument "standing" or mootness, accepting such a position would allow Defendants to engage in broad violations of constitutional rights and then avoid judicial review—not by engaging

[20] Such a result would be consistent with a strategy of hamstringing judicial review. *See* Jeannie Suk Gersen, *The Conservative Who Wants to Bring Down the Supreme Court*, THE NEW YORKER (Jan. 5, 2023), https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court. It would not be consistent, however, with the bedrock principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).

[21] *See* Tex. Disciplinary R. Prof. Conduct 1.08 (prohibiting lawyers from "providing financial assistance to a client in connection with pending or contemplated litigation" except for advancing court costs, expenses, medical and living expenses).

[22] It remains unclear how counsel has reconciled his status as fact witness with his continued representation. *See* Tex. Disciplinary R. Prof. Conduct 3.08.

in sincere efforts to remedy the violations, but by foisting a partial, inadequate "remedy" on specific plaintiffs alone. Each subsequent plaintiff would be stripped of standing upon receipt of the unsolicited "remedy" and the underlying violations would go unaddressed. A loophole of that magnitude serves neither litigants nor the judicial system and the Court should decline the invitation to authorize it. *See Knox*, 567 U.S. 298, 307 (2012) ("[M]aneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.").

B. Defendants Have Not Proven that the District Court's Findings of Ongoing Injury Were Clearly Erroneous

The District Court also found that Defendants' hidden library did not cure Plaintiffs' First Amendment injury. ROA.3529.[23] Contrary to Defendants' assertions, OB21–22, 24, the District Court valuated the injury to Plaintiffs, not the general public, and found that the existence of the hidden library "still places 'a

[23] Plaintiffs' injury should have been assessed as though the hidden library did not exist at all. *See, e.g.*, *Speech First, Inc. v. Fenves*, 979 F.3d 319, 327, 333–34 (5th Cir. 2020), *as revised* (Oct. 30, 2020) (holding voluntary cessation prevented changes to university policy from rendering claim moot and evaluating injury caused by original policy); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) (holding defendant's complete "voluntary cessation of its allegedly violative religious practices does not preclude a finding of irreparable injury"); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality *of the practice*.") (emphasis added).

significant burden on Library Patrons' ability to gain access to those books.'" ROA.3518 (quoting *Sund*, 121 F. Supp. 2d at 534).

Defendants do not attempt to demonstrate that this finding was clear error, and the record contains ample support for it.[24] As the District Court found, to access a book from the hidden library, Plaintiffs must "make a special request for the book to be retrieved from behind the counter." ROA.3529. Plaintiffs are thus required to personally request books that Llano County's leaders have denounced as "disgusting" and "pornographic filth." ROA.1502-04, 1540-41, 3926:23-3927:1, 3524-25. The hidden library also removes Plaintiffs' ability to access the books anonymously and read them in the library. The District Court correctly found that this constitutes an ongoing injury. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) (holding right of free speech includes anonymity, whether "motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible"); *see also Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 283 n.14 (3d Cir.

[24] Defendants treat the question of whether the hidden library continues to injure Plaintiffs as one for *de novo* determination. OB21, 22, 24. That is not the standard. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 471 (5th Cir. 2017) (applying clear error standard to irreparable harm determination), *overruled on other grounds by Planned Parenthood of Greater Tex. Family Planning & Healthcare Servs., Inc. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020); *Plains Cotton Coop. Ass'n of Lubbock, Tex. v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1261 (5th Cir. 1987) (same).

2011) ("There is no 'de minimis' defense to a First Amendment violation."); *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988) (same).

Nor are Defendants correct in their argument that any type of access to the disputed books—regardless of the form of that access—negates constitutional injury. "The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000); *see also Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011) ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.").

In *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, the Supreme Court found that a similar burden on First Amendment rights constituted an injury. 518 U.S. 727, 753 (1989). There, a statute required cable providers to segregate "patently offensive" material on a separate, blocked channel subscribers could only access by making a request to their cable provider. *Id.* at 734, 753. The Court concluded that the plaintiffs sustained a First Amendment injury in part because viewers could not make decisions minute-to-minute while channel surfing (just as Plaintiffs are no longer free to choose the disputed books while browsing the library catalog). *Id.* at 754.[25]

[25] Courts in library book removal cases have done likewise, even where the relocation was less burdensome than the one associated with Defendants' hidden library. In *Sund*, a city moved two children's books portraying LGBTQ

The same result should obtain here, where Llano Library System patrons—including Plaintiffs—cannot make decisions regarding the disputed books while browsing the shelves or anonymously remove them to read inside the library.

III. THE DISTRICT COURT PROPERLY FOUND THAT THE EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF PLAINTIFFS

The District Court was soundly within its discretion to find that "Plaintiffs have clearly shown these [two] factors are in their favor." ROA.3530. Defendants provided neither evidence nor argument to the District Court as to why the balance of the equities or the public interest was on their side. *See* ROA.981, 2448, 3149. Their only argument as to both was that "Plaintiffs have not, will not, and could not have suffered constitutional harm." ROA.3530. But the District Court rejected this argument for the reasons set forth *supra* § II, and properly ruled that both factors weighed towards Plaintiffs.

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relationships from the children's section to the adult section. 121 F. Supp. 2d at 533–34. The court found that this still violated library patrons' First Amendment rights because, even though the books remained on publicly accessible shelves, they would not be found by those browsing the children's section or looking for them there. *Id.* at 549–51, 554. Similarly, the library in *Counts v. Cedarville School District* relocated *Harry Potter* books to a "highly visible" location, that was nonetheless inaccessible to students, and required parental permission to access them. 295 F. Supp. 2d 996, 1001 (W.D. Ark. 2003). The Court held that the "stigmatizing effect" of having to get permission and the fact that patrons could not simply access the books on the shelves constituted an impermissible burden. *Id.* at 1002, 1005.

Defendants now argue that the District Court committed error based on a declaration that Milum first submitted to this Court *after* the issuance of the preliminary injunction. OB40-41 (citing ECF No. 14 at 36). This evidence is not properly before this Court and does not constitute grounds for reversal in any event.

A. Defendants Have Not Shown that the District Erred in Finding that the Balance of the Equities Favors Plaintiffs

Had Milum submitted her declaration below, the District would have been within its discretion to reject her statements as misleading and inaccurate. For example, Milum now claims that the Injunction's bar on weeding during the litigation "makes it impossible to run a functioning library." OB40. But at the Evidentiary Hearing, Milum testified to the District Court that she would not be weeding "any book … in the Llano County system between now and the conclusion of this litigation." ROA.4196:8-13. Cunningham and the Commissioners further nullified the need for weeding when they decreed that the Llano County Library System will order no new books pending resolution of this case. ROA.4087:3-11, 4227:9-16.

Defendants also cite Milum's overbroad interpretation of the Injunction as a basis to attack the District Court's determination on the equities below. OB41. This argument is also unavailing. Not only do Defendants mischaracterize the scope of the Injunction, *see infra* § IV, the effect of the Injunction as ordered is not relevant

to the District Court's ex-ante weighing of the equities as presented by the parties. On that issue, Defendants have proffered no evidence or argument to disturb the District Court's determination.

Nor can they. No Defendant would face any cognizable equitable harm if the 17 Banned Books remain available in the Library System online catalog until this litigation concludes. And Defendants' alleged ex-post injury from the Injunction—that Milum must "determine the reasons behind every one of our thousands of previous weeding decisions," OB41—is purely speculative. Defendants have made no effort to comply with this interpretation of the Injunction or sought clarification or reconsideration below. *See generally* ROA.33-38. To date, they have only listed the 17 identified books in the Library System catalog, as the Injunction ordered them to do.[26]

Accordingly, Defendants have failed to show that the District Court's balance of the equities was an abuse of discretion.

B. Defendants Have Not Shown that the District Court Erred by Finding that the Public Interest Weighs in Favor of Plaintiffs

As the District Court found, Plaintiffs' request was in the public interest because "injunctions protecting First Amendment freedoms are always in the public interest." ROA.3530 (quoting *Texans for Free Enter.*, 732 F.3d at 539).

[26] A search of the Library System's online catalog for "What's New" in the last two months shows that only the 17 Banned Books, plus a copy of the 1969 reference book "Antique Firearms," have been added to the catalog since the Injunction. *See* https://llano.biblionix.com/catalog/.

Defendants did not provide any contrary evidence below. To the extent any of Defendants' new arguments are considered, they lack merit.

Defendants first posit that Plaintiffs had an obligation to show that other library patrons were interested in checking out the Banned Books. OB24. This theory misunderstands the public interest implicated in First Amendment actions. The entire public benefits from the courts' consistent protection of individuals' First Amendment freedoms. *Cf. G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1984) ("It is always in the public interest to prevent the violation of a party's constitutional rights."). No further showing is necessary. *See Texans for Free Enter.*, 732 F.3d at 539.

Conversely, the public interest is unaffected by Milum's claimed personal fear of running afoul of the Injunction, which she could resolve at any time by seeking clarification below. Nor is it adversely affected by the Injunction itself.

Defendants also extrapolate that the Injunction "exposes every public librarian to the threat of lawsuits if a library patron disapproves of a weeding decision." OB41. But the suit and the Injunction address only the removal of books motivated by government censorship, not routine weeding, as proven by Defendants' own testimony. Milum affirmed that the Llano County System weeded "8,143 books/DVDs" in the fifteen months before this litigation. ROA.671. Plaintiffs brought suit only with respect to 17 of those books, and only

in response to evidence that local government officials were targeting those books for removal based on their personal animus. And it is no blow to the public interest that library patrons might be inspired to enforce their First Amendment rights against wrongful conduct. To the contrary, that is a public good.

IV. THE INJUNCTION IS PROPER IN SCOPE

For purposes of this appeal, Defendants misinterpret the Injunction as requiring them to restore the "books that were removed because of their viewpoint or content," ROA.3531, since the creation of the Llano library. OB38. Their interpretation is grounded neither in the District Court's order nor in the facts of this case. In describing the needed remedy, the District Court instructed that "the books *at issue* be made available for checkout through the Library System's catalogs." ROA.3530 (emphasis added). This corresponds with Plaintiffs' limited request to restore the 17 Banned Books, ROA.1039-40, and is well within the District Court's discretion to fashion narrowly tailored injunctive relief. ROA.187.

Defendants' conduct also belies their purported concerns with the Injunction. After the Injunction issued, Defendants restored the 17 Banned Books to the Llano Library catalog and have maintained compliance since then.[27] They have alleged no additional effort to comply with the "entire history" requirement

[27] *See* Llano County Library System Catalog, https://llano.biblionix.com/catalog/, in which the Banned Books now appear.

they now read into the order. Quite the opposite. Milum has averred to this Court, and Plaintiffs agree, that to do so would be "impossible." Milum Decl., ECF No. 14 at 36. As Defendants' efforts show, Defendants and Plaintiffs share the same view regarding the practical effect and scope of the Injunction. It is not overbroad.

CONCLUSION

For the reasons set forth above, the Court should affirm the Injunction as a proper exercise of the District Court's broad discretion.

Dated: May 26, 2023

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2023, I electronically submitted the foregoing to the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit using the Court's ECF system, which sent a Notice of Electronic Filing to the following attorneys of record:

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POLITICS

"Discard [Library] Books ... That Reflect Gender, Family, Ethnic, or Racial Bias"

Professional librarian sources seem split on viewpoint-based book removals: some firmly call for viewpoint neutrality, while others say that books should be evaluated for "biased viewpoints."

EUGENE VOLOKH | 9.19.2024 8:01 AM

[1.] Next week, the entire en banc Fifth Circuit will be hearing *Little v. Llano County*, a case involving allegations of viewpoint-based book removals in a public library. As I've noted before, the Supreme Court has never resolved whether such removals are unconstitutional. *Pico v. Bd. of Ed.* (1982), which considered the matter as to public school libraries, split 4-4 on the subject, with the ninth Justice, Justice White, expressly declining to resolve the substantive question. (The *Pico* Justices generally agreed that schools could remove some material as age-inappropriate because of its vulgar or sexual content; the debate was about viewpoint-based removals.)

U.S. v. American Library Ass'n (2003), which dealt with the related question of Internet filtering in public libraries generally, was also a splintered decision, and didn't resolve the broader question, either. A 1995 Fifth Circuit panel decision had generally precluded such viewpoint-based removals, but the Fifth Circuit en banc court will need to consider whether that decision should stand: Rehearing by the full en banc court is the normal way that federal appellate courts reconsider whether three-judge panel decisions should be overruled.

I'm not sure what the answer here should be. I tentatively think a *public school* is entitled to decide which viewpoints to promote through its own library: School authorities can decide that their library will be a place where they provide books they recommend as particularly interesting/useful/enlightening/etc., essentially as supplements to the school curriculum (over which the school has broad authority). The process of selecting library books is part of the government's own judgment about what views it wishes to promote. And the ability to reconsider selection decisions—including in response to pressure from the public, which is to say from the ultimate governors of the public schools—should go with the ability to make those decisions in the first place. To be sure, some such decisions may be foolish or narrow-minded, but they're not unconstitutional.

But this doesn't necessarily resolve the question of how librarians should administer non-school public libraries, which aren't the adjunct to any sort of school curriculum. Libraries are much more about giving more options to readers, rather than about teaching particular skills and attitudes to students. The case for viewpoint neutrality is therefore stronger there—though not, I think, open and shut. (Note also that even the challengers in this case leave open the possibility that courts shouldn't scrutinize book *acquisition* decisions to decide whether they are viewpoint-based, but only book *removal* decisions. See Appellees' En Banc Brief at 43-44 & n.13, 50.)

In any case, that's the big picture; here, I want to talk about a particular twist in the dispute, which can be particularly well seen in a friend-of-the-court brief filed by the Freedom to Read Foundation, the Texas Library Association, and American Library Association. The passage, and the sources it cites, refer to the necessity to remove books on *some* criteria—this is

called "weeding," and some sources suggest that each year a public library would generally weed out 5% of its stock—and discuss which criteria are proper:

> There are various methods for weeding library collections. One is the "CREW" method, which stands for "Continuous Review, Evaluation, and Weeding." CREW contains six general guidelines under the acronym "MUSTIE":
>
> *Misleading:* factually inaccurate
>
> *Ugly:* beyond mending or rebinding
>
> *Superseded* by a new edition or by a much better book on the subject
>
> *Trivial:* of no discernible literary or scientific merit
>
> *Irrelevant* to the needs and interests of the library's community
>
> *Elsewhere:* the material is easily obtainable from another library.[26]
>
> When weeding, the goal is "to maintain a collection that is free from outdated, obsolete, shabby, or no longer useful items."[27]
>
> Weeding is not the removal of books that, in the view of government officials, contain "inappropriate" ideas or viewpoints. Professional librarian practice is crystal-clear: "While weeding is essential to the collection development process, it should not be used as ***a deselection tool for controversial materials***."[28]
>
> [26] Lester Asheim, *Not Censorship But Selection*, Am. Libr. Ass'n, www.ala.org/advocacy/intfreedom/NotCensorshipButSelection (last visited Sept. 10, 2024); see also Rebecca Vnuk, The Weeding Handbook: A Shelf-By-Shelf Guide 6 (2d ed. 2022) (describing MUSTIE method).
>
> [27] Jeanette Larson, *CREW: A Weeding Manual for Modern Libraries* at 11, Tex. State Libr. & Archives Comm'n (2012), at 11, https://www.tsl/texas.gov/sites/default/files/public/tslac/ld/ld/pubs/crew/crewmethod12.pdf (last visited Sept. 10, 2024).
>
> [28] Collection Maintenance, supra note 23 (emphasis added) [Collection Maintenance & Weeding, Am. Libr. Ass'n, https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/weeding (last visited Sept. 10, 2024).

But here's the twist: As the government defendants earlier briefing makes clear, both *The Weeding Handbook* (note 26) and *A Weeding Manual* (note 27) expressly contemplate "removal of books that, in the view of government officials, contain 'inappropriate' ideas or viewpoints." Here are some passages from *A Weeding Manual* (emphasis added):

> For all items, consider the following problem categories and related issues:
>
> Poor Content: … Material that contains **biased, racist, or sexist terminology or views …**
>
> Juvenile Fiction … Consider discarding older fiction especially when it has not circulated in the past two or three years. Also look for books that contain **stereotyping**, including stereotypical images and views of people with disabilities and the elderly, or **gender and racial biases**.
>
> 323 (Immigration & Citizenship) … Weed **biased** or unbalanced and **inflammatory** items.
>
> 330 (Economics) … Weed career guides with **gender, racial, or ethnic bias**.
>
> 390 (Customs, Etiquette & Folklore) … Discard books that lack clear color pictures. Holiday-specific books may only circulate once or twice a year. Discard books that are MUSTIE or that reflect **gender, family, ethnic, or racial bias.**
>
> 398 (Folklore) … Weed based on the quality of the retelling, especially if **racial or ethnic bias** is present.
>
> 709 (Art History) … While information may not become dated, watch for **cultural, racial, and gender biases**.
>
> 740 (Drawing & Decorative Arts) … Discard books on crafts that are no longer popular (macramé) or that **feature gender bias**.
>
> 793-796 (Games and Sports) … Watch for **gender and racial bias** in sports and athletics.
>
> 800 (Literature) … Watch for collections that feature **gender or nationality bias and outdated** interests and **sensitivities**.
>
> E (Easy Readers/Picture Books) … Weed books that reflect **racial and gender bias**.
>
> JF (Juvenile Fiction) … Evaluate closely for outdated styles, artwork, and mores, or **biased viewpoints**.

Some of these criteria, to be sure, may be defended on various grounds, including that books that contain what to appear outdated viewpoints are just not going to be as useful or interesting to new generations of readers. But that still involves viewpoint-based decisionmaking (as opposed to using viewpoint-neutral criteria such as whether the book has in fact been checked out in the last few years).

The Weeding Handbook, published by the American Library Association itself, likewise calls for some viewpoint-based removal decisions:

> It is … imperative to view materials through the lens of **diversity and inclusion**. Outdated or misrepresentational material needs to be removed on a regular basis. The Washington Office of Superintendent of Public Instruction has a very thorough tool for screening for **biased content** available online, … *Washington Model Resource: Screening for Biased Content in Instructional Materials*. [That tool is focused on classroom materials, but the *Weeding Handbook* is suggesting that it be adapted to library materials as well. -EV]
>
> Carefully evaluate books on Black history, women's issues, and gender for language and **bias**…. Are materials free of **stereotypes** and assumptions?
>
> [Quoting one librarian favorably:] "Removing the Dr. Seuss books that are purposefully no longer published due to their **racist** content is absolutely acceptable because it's an act of basic collection maintenance. It is our professional duty to make those carefully chosen decisions to ensure our collections are up-to-date and suitable for the communities we serve…. **Librarians who claim to be antiracist need to remove these books**…."
>
> Libraries would do well to remember the first 'M' in MUSTIE: *Misleading*. CREW goes even further to define that "material that contains **biased, racist, or sexist terminology or views**" should be weeded.
>
> [Quoting another librarian favorably:] "… This … highlights a new and much needed discussion in weeding principles: the weeding out of harmful materials with **racist cultural stereotypes**." "My philosophy is indeed to *let it go* when it comes to **racially offensive material**."

And this seems to represent broader attitudes among many librarians. A 2021 School Library Journal report notes, without criticism, that 47.3% of public library respondents (and 65.1% of school library respondents) included in "criteria for weeding" "inappropriate content (e.g., racist, biased, etc.). The California Department of Education *Weeding the School*

Library publication (to be sure, it's focused on school libraries) expressly noted that "Books containing racial, cultural or sexual stereotyping" should be weeded as "misleading."

To be sure, there are other documents from the ALA that seem to take a much more pro-viewpoint-neutrality view, e.g., this statement (originally adopted in 1973) from "Evaluating Library Collections: An Interpretation of the Library Bill of Rights":

> The collection-development process is not to be used as a means to remove materials … because the materials may be viewed as controversial or objectionable. Doing so violates the principles of intellectual freedom and is in opposition to the *Library Bill of Rights*.
>
> Some resources may contain views, opinions, and concepts that were popular or widely held at one time but are now considered outdated, offensive, or harmful. Content creators may also come to be considered offensive or controversial. These resources should be subject to evaluation in accordance with collection-development and collection-maintenance policies. The evaluation criteria and process may vary depending on the type of library. While weeding is essential to the collection-development process, the controversial nature of an item or its creator should not be the sole reason to remove any item from a library's collection. Rather than removing these resources, libraries should consider ways to educate users and create context for how those views, opinions, and concepts have changed over time.
>
> Failure to select resources merely because they may be potentially controversial is censorship, as is withdrawing resources for the same reason.
>
> The American Library Association opposes censorship from any source, including library workers, faculty, administration, trustees, and elected officials. Libraries have a profound responsibility to encourage and support intellectual freedom by making it possible for the user to choose freely from a variety of offerings.

And when I talked to librarians about this earlier this year, many of them also endorsed the viewpoint-neutrality approach. I also asked Deborah Caldwell-Stone, Director of the ALA Office for Intellectual Freedom / Freedom to Read Foundation, and she reaffirmed the viewpoint-neutrality position of the FFRF and ALA amicus brief, as well as of the Evaluating Library Collections statement quoting above. She added, "Citing to examples of weeding resources that are published by others or books that represent the view of a particular author should not be seen as an endorsement of every statement contained in those resources."

But I think it's hard to say, as the ALA Brief does, that there's a "crystal-clear" "[p]rofessional librarian practice" of viewpoint neutrality. Rather, it appears that there is a pretty major split among librarians and among those who discuss library weeding policy: Some view the weeding of certain views as legitimate and indeed recommend such weeding, while others insist on viewpoint-neutral criteria.

Who is right and who is wrong is a complicated question. But the debate shouldn't be seen, I think, as being between some solid professional norm of viewpoint-neutrality and conservative political departures from such a norm.

NEXT: **Today in Supreme Court History: September 19, 1907**

EUGENE VOLOKH is the Thomas M. Siebel Senior Fellow at the Hoover Institution at Stanford, and the Gary T. Schwartz Distinguished Professor of Law Emeritus and Distinguished Research Professor at UCLA School of Law. Naturally, his posts here (like the opinions of the other bloggers) are his own, and not endorsed by any institution.

POLITICS

Removal of Books With "Lascivious Content" from School Libraries Likely Constitutionally Permissible

Federal Court Blocks Arkansas Law That Limits “Harmful to Minors” Books in Libraries and Bookstores, and Also

Does the First Amendment Bar Public Schools from Removing School Library Books Based on Their Viewpoints?

Oklahoma Bill Would Effectively Let Any Parent Veto Any Public School Library Book

Viewpoint-Based Removal of Books from Public Library Violated First Amendments, Holds District Court

No. 23-50224

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LEILA GREEN LITTLE, JEANNE PURYEAR, KATHY KENNEDY, REBECCA JONES, RICHARD DAY, CYNTHIA WARING, AND DIANE MOSTER,

Plaintiffs-Appellees,

v.

LLANO COUNTY, RON CUNNINGHAM, IN HIS OFFICIAL CAPACITY AS LLANO COUNTY JUDGE, JERRY DON MOSS, IN HIS OFFICIAL CAPACITY AS LLANO COUNTY COMMISSIONER, PETER JONES, IN HIS OFFICIAL CAPACITY AS LLANO COUNTY COMMISSIONER, MIKE SANDOVAL, IN HIS OFFICIAL CAPACITY AS LLANO COUNTY COMMISSIONER, LINDA RASCHKE, IN HER OFFICIAL CAPACITY AS LLANO COUNTY COMMISSIONER, AMBER MILUM, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY SYSTEM DIRECTOR, BONNIE WALLACE, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY BOARD MEMBER, ROCHELLE WELLS, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY BOARD MEMBER, RHODA SCHNEIDER, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY BOARD MEMBER AND GAY BASKIN, IN HER OFFICIAL CAPACITY AS LLANO COUNTY LIBRARY BOARD MEMBER,

Defendants-Appellants.

Appeal from the United States District Court,
For the Western Division of Texas, Austin Division
1:22-cv-00424-RP

BRIEF OF AMICI CURIAE FREEDOM TO READ FOUNDATION, TEXAS LIBRARY ASSOCIATION, AND AMERICAN LIBRARY ASSOCIATION IN SUPPORT OF APPELLEES EN BANC

(Counsel Listed Inside Cover)

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Case No. 23-50224, *Leila Green Little, et al. v. Llano County, et al.*

Pursuant to 5TH CIR. RULES 28.2.1 and 29.2, I hereby certify that I am aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation. I certify that the Freedom to Read Foundation (FTRF) is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code; and that FTRF, as a not-for-profit organization, has no parent corporation or stock, and therefore no publicly owned corporation owns ten percent or more of its stock. I certify that the Texas Library Association (TLA) is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code; and that TLA, as a not-for-profit organization, has no parent corporation or stock, and therefore no publicly owned corporation owns ten percent or more of its stock. Finally, I certify that the American Library Association (ALA) is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code; and that ALA, as a not-for-profit organization, has no parent corporation or stock, and therefore no publicly owned corporation owns ten percent or more of its stock. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

s/ Thomas F. Allen, Jr.
Thomas F. Allen, Jr.

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STATEMENT OF INTEREST OF AMICI CURIAE

The Freedom to Read Foundation (FTRF) is a nonprofit organization established to foster libraries as institutions that fulfill the promise of the First Amendment; support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, including a broad array of authors and viewpoints; establish legal precedent for the freedom to read of all citizens; and protect the public against efforts to suppress or censor speech.

The Texas Library Association (TLA) was established in 1902 and currently has a membership of more than 5,000 academic, public, school, and special librarians. TLA supports and advocates for Texas librarians and strives for excellence in libraries and librarianship. The association's core values include intellectual freedom, literacy, and lifelong learning, access to information, and ethical responsibility and integrity.

The American Library Association (ALA) is a nonprofit, educational organization representing libraries and librarians throughout the United States. ALA's membership includes over 5,000 organizational members and more than 44,000 individual members. Members are in public libraries, academic libraries, special libraries, and school library media centers throughout the United States. Founded in 1876, ALA is committed to the preservation of the library as a resource indispensable to the intellectual, cultural, and educational welfare of the nation.

FTRF, ALA, and TLA believe that the defining tenet of the library profession is the commitment to providing free and equal access to information at the library. Censoring books from public libraries violates this shared value and thus these Amici have a strong interest in the outcome of this case.[1]

Appellants and Appellees do not oppose the filing of this amici curiae brief.

STATEMENT OF CONTRIBUTIONS

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, FTRF, ALA, and TLA state that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person (other than the Amici Curiae, their members, or their counsel) contributed money that was intended to fund preparing or submitting this brief.

[1] FTRF, ALA, and TLA filed an amici curiae brief at the panel stage of this appeal. This brief is adapted from their panel-stage brief.

INTRODUCTION

At the heart of this dispute is the institution of the American public library—that quiet, "ubiquitous fixture[] in American cities and towns" where members of the public may browse, read, and think according to their own interests.[2] Guided by highly trained professional librarians, public libraries have one goal: to provide books and other materials "for the interest, information, and enlightenment of all people of the community the library serves" by selecting materials "presenting all points of view on current or historical issues."[3] Essential to this mission is the promise that library materials will not be "proscribed or excluded because of partisan or doctrinal disapproval."[4]

Appellants and their supporting amici curiae, the Attorneys General of several states, see little value in that promise. In their view, the public library should not be the traditional locus of "freewheeling inquiry,"[5] but a decidedly less free place, where government officials may censor any book based solely on its content or perceived viewpoint. Appellants and the Attorneys General ask this Court *en banc*

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[2] *Fayetteville Pub. Library v. Crawford Cnty., Ark.*, 684 F. Supp. 3d 879, 890 (W.D. Ark. 2023).

[3] LIBRARY BILL OF RIGHTS, AM. LIBR. ASS'N, §§ I & II, https://www.ala.org/advocacy/intfreedom/librarybill (last visited Sept. 10, 2024).

[4] *Id.* § II.

[5] *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting).

to overrule decades of precedent, break entirely new doctrinal ground, and foment at least one circuit split.

Under either their "government-speech" theory or their contraction of the First Amendment itself, Appellants and the Attorneys General seek a new—and deeply troubling—rule: that the First Amendment has no role in the American public library. They would transform libraries into vehicles for imposing the government's view about "what shall be orthodox in politics, nationalism, religion, or other matters of public opinion."[6] This benighted vision, and the legal arguments offered in support, contradict the centuries-old role of libraries in America, professional library practice, and decades of First Amendment jurisprudence.

ARGUMENT

I. Public libraries are havens of free inquiry, where patrons may choose classic or controversial books as they see fit.

Underlying the differing positions of the parties and panel members are competing notions of what a public library is or ought to be. Amici—national and Texas-based library organizations—therefore offer the following background about the historical role of libraries and their place in American civic life.

[6] *Id.* at 872 (plurality op.).

A. At the nation's founding, libraries were envisioned as citadels of American democracy.

The American public library predates the nation itself. In 1731, Benjamin Franklin—"the ultimate bibliophile"—was a founder of the country's first lending library, the Library Company of Philadelphia.[7] Franklin hoped that by having equal access to books, Americans would be "better instructed and more intelligent."[8]

"By the latter part of the 1800s, most major metropolitan cities in the country had a public library."[9] The American Library Association (ALA) was founded in 1876 and accredits library academic programs in the United States.[10] Today, over 17,000 public library outlets exist around the country.[11]

The civic role of public libraries has evolved along with their numbers. Having witnessed pyres of burned books kindling the rise of early twentieth-century totalitarian regimes, American librarians embraced a "basic position in opposition to

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[7] Carrie Mcbride, *Ben Franklin: The Ultimate Bibliophile*, NEW YORK PUBLIC LIBRARY BLOG (Jan. 17, 2020), https://www.nypl.org/blog/2020/01/17/ben-franklin-library-lover; *See generally Fayetteville Pub. Library*, 684 F. Supp. 3d at 889-90 (discussing history of American public libraries).

[8] Jared Gibbs, *"For Tomorrow Will Worry About Itself": Ivan Illich's Deschooling Society and the Rediscovery of Hope*, 34 W. NEW ENG. L. REV. 381, 394 (2012) (citation omitted)).

[9] *Fayetteville Pub. Library*, 684 F. Supp. 3d at 889.

[10] *See Accreditation Frequently Asked Questions*, AM. LIBR. ASS'N, https://www.ala.org/educationcareers/accreditedprograms/faq (last visited Sept. 10, 2024).

[11] NAT'L CTR. FOR EDUC. STATS., DIGEST OF EDUC. STATS., Table 701.60, Number of public libraries (for FY 2019-20) n.1, https://nces.ed.gov/programs/digest/d22/tables/dt22_701.60.asp (last visited Sept. 10, 2024).

censorship."[12] In 1939, the ALA adopted its "Library Bill of Rights," which confirms the essential role of public libraries: to serve as "forums for information and ideas" that are available to "all people of the community."[13] Under the Bill of Rights, libraries "should provide materials and information presenting all points of view on current and historical issues" with no prohibition on materials "because of partisan or doctrinal disapproval."[14]

Public libraries are therefore not places to "coerce the taste of others,"[15] but rather serve as "a mighty resource in the free marketplace of ideas."[16]

B. Professional librarians are guided by well-established ethical canons and standards that favor no party, subject, or viewpoint.

Professional librarians must satisfy rigorous academic requirements. In Texas, for example, a professional librarian in a public library must hold a specialized degree in librarianship from an ALA-accredited institution.[17] The ALA accredits 68 programs at 64 institutions in the United States, Canada, and Puerto

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[12] *See United States v. Am. Libr. Ass'n, Inc.* ("*ALA*"), 539 U.S. 194, 238-39 (2003) (Souter, J., dissenting) (citation omitted).

[13] LIBRARY BILL OF RIGHTS § 1, *supra* note 3.

[14] *Id.*

[15] Krug & Harvey, *ALA and Intellectual Freedom: A Historical Overview*, INTELLECTUAL FREEDOM MANUAL xi, xv (Am. Libr. Ass'n 1974), *quoted in ALA*, 539 U.S. at 239 (Souter, J., dissenting).

[16] *Minarcini v. Strongville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976).

[17] *See* 13 TEX. ADMIN. CODE § 1.84.

Rico.[18] Accreditation "assures that…programs meet appropriate standards of quality and integrity."[19]

As part of their training, librarians agree to adhere to the ALA's Code of Ethics, which "guide[s] the work of librarians" with a focus on "the values of intellectual freedom that define the profession of librarianship."[20] Chief among these ethical obligations is the librarian's duty not to limit access to information based on viewpoint. Librarians agree that they will:

- "uphold the principles of intellectual freedom and resist all efforts to censor library resources";
- "distinguish between [their] personal convictions and professional duties"; and
- "not allow [] personal beliefs to interfere" with providing access to library information.[21]

In short, librarians must not suppress books just because they are controversial or outside the mainstream.

C. "Weeding" library collections is an objective process, not the targeting of disfavored or controversial books.

This case involves one aspect of the librarian's work: the periodic "weeding" of library collections. Appellants have attempted to characterize their efforts to

[18] *Accreditation Frequently Asked Questions*, *supra* note 10.

[19] *Id.*

[20] CODE OF ETHICS, AM. LIBR. ASS'N, https://www.ala.org/tools/ethics (last visited Sept. 10, 2024).

[21] *Id.* ¶¶ 2, 7.

remove or hide certain books from Llano Public Library branches as part of the standard "weeding" process. The district court correctly recognized this as a "pretextual" "post-hoc justification" for the suppression of books because of their ideas or perceived message.[22]

Weeding is the periodic refreshing of public library collections by removing and replacing damaged or outdated books.[23] This process is guided by "objective criteria," which librarians apply based on their training and ethical obligations of viewpoint neutrality.[24]

There are various methods for weeding library collections. One is the "CREW" method, which stands for "Continuous Review, Evaluation, and Weeding."[25] CREW contains six general guidelines under the acronym "MUSTIE":

> ***M****isleading:* factually inaccurate
>
> ***U****gly:* beyond mending or rebinding
>
> ***S****uperseded* by a new edition or by a much better book on the subject
>
> ***T****rivial:* of no discernible literary or scientific merit
>
> ***I****rrelevant* to the needs and interests of the library's community

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[22] ROA.3526-27.

[23] *See Collection Maintenance & Weeding*, AM. LIBR. ASS'N, https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/weeding (last visited Sept. 10, 2024).

[24] CODE OF ETHICS, *supra* note 20.

[25] ROA.3508.

Elsewhere: the material is easily obtainable from another library.[26]

When weeding, the goal is "to maintain a collection that is free from outdated, obsolete, shabby, or no longer useful items."[27]

Weeding is not the removal of books that, in the view of government officials, contain "inappropriate" ideas or viewpoints. Professional librarian practice is crystal-clear: "While weeding is essential to the collection development process, it should not be used as ***a deselection tool for controversial materials***."[28]

Unfortunately, that is what happened in Llano County. Based on a robust evidentiary record, the district court found that "well-regarded, prize-winning books" on topics like LGBTQ identity and race relations, along with children's "potty humor" books, were "targeted and removed" "based on complaints" by community members.[29] The complaints asserted that the books were "inappropriate" or "pornographic filth" because—among other things—they depicted cartoon nudity, discussed sexuality, or allegedly promoted "CRT" views.[30]

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[26] Lester Asheim, *Not Censorship But Selection*, AM. LIBR. ASS'N, www.ala.org/advocacy/intfreedom/NotCensorshipButSelection (last visited Sept. 10, 2024); *see also* REBECCA VNUK, THE WEEDING HANDBOOK: A SHELF-BY-SHELF GUIDE 6 (2d ed. 2022) (describing MUSTIE method).

[27] Jeanette Larson, *CREW: A Weeding Manual for Modern Libraries* at 11, TEX. STATE LIBR. & ARCHIVES COMM'N (2012), at 11, https://www.tsl/texas.gov/sites/default/files/public/tslac/ld/ld/pubs/crew/crewmethod12.pdf (last visited Sept. 10, 2024).

[28] *Collection Maintenance*, *supra* note 23 (emphasis added).

[29] ROA.3524; ROA.3529.

[30] ROA.3524; ROA.3529.

The removal of these books bears no relation to professional library practice or "weeding." What happened in Llano County was not a function of limited shelf space or the other MUSTIE factors. Rather, it was a response to complaints by community members about the substance of the books themselves—the proverbial "heckler's veto," which has no place in the American public library.[31]

D. Parents, not librarians or public officials, have the right and responsibility to control what their children read.

Another misconception about library practice lurks below the surface of this dispute. Appellants purported to act out of concern that children visiting Llano's public library branches might be exposed to books that are "inappropriate" or worse.[32] But lost in Appellants' defense of these actions is an unspoken assumption: that children roam libraries alone and unguided. That is not the case.

First, public libraries operate on the common-sense premise that parents and guardians will help shepherd their children's learning experiences. In its "Access to Library Resources and Services for Minors," the ALA states: "The mission, goals, and objectives of libraries cannot authorize libraries and their governing bodies to assume, abrogate, or overrule ***the rights and responsibilities of parents and***

[31] *See Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 549 (N.D. Tex. 2000).

[32] ROA.1526.

guardians."[33] Indeed, "only parents and guardians have the right and the responsibility to determine" their child's library access.[34]

Second, public libraries do not act *in loco parentis*. Many libraries have policies about minors in the library.[35] In Texas, libraries often require parental supervision of young children (e.g., under ages 8 or 10).[36] Children's educational programs at the library require parental consent and involvement.[37]

So parents can and do take an active role in selecting the best book for their children. The panel dissent wondered what should happen when a parent encounters a book she doesn't want her child to see.[38] If the parent demands that the book be removed from the library—so that ***no child*** can see it—does the librarian accede to

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[33] *Access to Library Resources and Services for Minors: An Interpretation of the Library Bill of Rights*, AM. LIBR. ASS'N, https://www.ala.org/advocacy/intfreedom/librarybill/interpretations/minors (emphasis added) (last visited Sept. 10, 2024).

[34] *Id.*

[35] *See Top 10 Library Policies Every Small Community Library Should Have*, TEX. STATE LIBR. & ARCHIVES, https://www.tsl.texas.gov/ldn/plm/governance/policies (last visited Sept. 10, 2024).

[36] *See, e.g.*, POTTSBORO LIBRARY POLICIES, https://pottsborolibrary.com/about/polices/ (requiring children 10 and younger to be accompanied by parent, legal guardian, or adult over 18) (last visited Sept. 10, 2024);

BURLESON LIBRARY, SAFE CHILD POLICY, https://www.burlesontx.com/1331/Safe-Child-Policy ("Children nine and under may not be left unattended in any part of the library.") (last visited Sept. 10, 2024).

[37] *See, e.g.*, BEDFORD PUBLIC LIBRARY CHILDREN'S AND UNATTENDED GUIDELINE, https://bedfordlibrary.org/wp-content/uploads/sites/66/2021/07/ChildrensAreaUnattendedPolicy_Jun2021.pdf (last visited Sept. 10, 2024).

[38] Panel Op. at 2-3 (Duncan, J., dissenting).

that demand? No. The solution is obvious, yet bears repeating: "if a parent wishes to prevent her child from reading a particular book, that parent can and should accompany the child to the Library" and choose another book.[39] But neither the dissent's hypothetical parent—nor a local public official—may make that choice ***for another parent***, who may want the same book for their child.[40]

II. The First Amendment right to receive information must be upheld.

To facilitate their rejection of the traditional model of public libraries, Appellants ask this Court to stake out a sweeping and novel position: that there is no First Amendment right to receive information. This extreme idea defies decades of precedent from the Supreme Court and this Court.

A. The right to receive information is essential to the First Amendment.

The panel dissent contends that the right to receive information arose from a "50-year-old case [*Stanley v. Georgia*] recognizing the freedom to peruse obscene materials—not in a public library, but 'in the privacy of a person's ***own home***.'"[41] But the provenance of this right is much older and broader.

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[39] *Sund*, 121 F. Supp. 2d at 551.

[40] *See id.*

[41] Panel Op. at 33 (Duncan, J., dissenting) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (emphasis in original)).

The right to receive information traces its origins to James Madison, architect of the First Amendment, who explained: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[42] True to Madison's insight, the Supreme Court has recognized the constitutional right to access information in multiple contexts, including the right to access advertisements, mail, literature, radio, the internet, political materials—and books in libraries.

Beginning with *Martin v. Struthers* in 1943, the Supreme Court stated that the First Amendment protects both "the right to distribute literature" and "the right to receive it."[43] There, the Court held that a law banning the distribution of door-to-door advertisements was unconstitutional. Later, in *Procunier v. Martinez*, the Court ruled that censoring the mail of inmates infringes the rights of the non-inmates to receive that correspondence.[44] More recently, in *Packingham v. North Carolina*, the Court held that a law prohibiting sex offenders from using social media was unconstitutionally overbroad because "[a] fundamental principle of the First

[42] Letter from James Madison to W.T. Barry (Aug. 4, 1822), LIBRARY OF CONGRESS, https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text (last visited Sept. 10, 2024) (*quoted in Pico*, 457 U.S. at 867-68 (plurality op.)).

[43] 319 U.S. 141, 143 (1943).

[44] 416 U.S. 396, 408-09 (1974).

Amendment is that all persons have access to places where they can speak ***and listen*** ….”[45]

These opinions are not outliers or limited to unique circumstances. Time and again, the Supreme Court has enforced the First Amendment “right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.”[46] The First Amendment’s Free Speech Clause protects “not only the right to utter or to print, but [also] the right to distribute, the right to receive, the right to read and the freedom of inquiry, freedom of thought, and freedom to teach ....”[47] Thus, “the right to receive information and ideas”[48] is not limited to one’s own home. To the contrary, it is “a necessary predicate to the ***recipient’s*** meaningful exercise of his own [constitutional] rights of speech, press, and political freedom”[49] and “is fundamental to our free society.”[50] And where—as here—“the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.”[51]

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[45] 582 U.S. 98, 104 (2017) (emphasis added).

[46] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

[47] *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (internal citations omitted).

[48] *Stanley*, 394 U.S. at 564.

[49] *Pico*, 457 U.S. at 867 (plurality op.) (emphasis in original).

[50] *Stanley*, 394 U.S. at 564.

[51] *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975). *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (“the government may not reduce the adult population to reading

B. *Pico* has guided courts and libraries for decades.

Following this tradition, a plurality of the Supreme Court in *Board of Education v. Pico* held that students have the right to receive information and ideas in the form of books on the shelves in public school libraries.[52] In the years since *Pico* was decided, this right of library patrons has been embraced by federal courts, including this Court, and applied with even greater force in the context of public libraries (as Appellants acknowledge).

In *Campbell v. St. Tammany Parish School Board*, this Court considered the removal of the book *Voodoo Hoodoo* from a school library.[53] After noting there was no clear majority in *Pico*, the Court focused on Justice White's opinion because it concurred on the narrowest grounds.[54] The Court concluded that Justice White had not rejected the plurality's assessment of the constitutional limitations on removing books from school library shelves, but had merely ruled that the procedural posture of the case did not require addressing those constitutional questions.[55] Following

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only what is fit for children") (cleaned up); *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc.*, 425 U.S. 748, 756-57 (1976) (collecting cases protecting rights to receive information); *Marsh v. Ala.*, 326 U.S. 501, 505 (1946) ("the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire ….").

[52] 457 U.S. at 867-69 (plurality op.).

[53] 64 F.3d 184, 185 (5th Cir. 1995).

[54] *Id.* at 189.

[55] *Id.*

Pico, this Court expressed grave concern that *Voodoo Hoodoo* may have been removed to "strangle the free mind at its source" and explained that "the key inquiry in a book removal case is the school officials' substantial motivation in arriving at the removal decision."[56]

Appellants and the panel dissent suggest that *Pico* and, by extension, *Campbell*, have little value because of *Pico*'s fractured ruling. But that division occurred because *Pico* involved a school library, not a public library. As the Third Circuit noted, the "dissenters in *Pico* made no contention that the First Amendment did not encompass the right to receive information and ideas, but merely argued that the students could not freely exercise this right in the public school setting in light of the countervailing duties of the School Board."[57] Dissenting in *Pico*, Justice Rehnquist highlighted the source of contention: "***Unlike…public libraries***, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored,

[56] *Id.* at 190 (citing *Pico*, 457 U.S. at 870-72). Other circuits have followed suit. *See, e.g.*, *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992) (acknowledging First Amendment right to receive information in public libraries, but holding that library rules for patron conduct were not facially invalid); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) (citing *Pico* for the "well-established rule that the right to receive information is an inherent corollary of the rights of free speech and press …."); *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1204 (11th Cir. 2009) (applying the "*Pico* standard" to question of school board's motivation in removing library book).

[57] *Kreimer*, 958 F.2d at 1254-55.

to the teaching of basic skills and ideas."[58] He "cheerfully concede[d]" that "if a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans," such an order would violate the First Amendment.[59] Thus, a "majority of justices in *Pico* agreed that the state's censorship power could not be exercised 'in a narrowly partisan or political manner'—***even in a school library setting***."[60]

Appellants elide this distinction and invite this Court to go where the *Pico* dissenters did not: to rule that the right to receive information does not exist even in a public library and that government officials may select and remove books based on viewpoint or with partisan motives. This *en banc* Court should not accept that invitation.

C. The panel majority correctly aligned *Pico* and *Campbell* with *American Library Association*.

The panel majority correctly aligned the common denominators from *Pico*, as established in *Campbell*, with *United States v. American Library Association, Inc.* (*ALA*), on which Appellants rely.[61] In *ALA*, a plurality of the Supreme Court held that the Children's Internet Protection Act did not violate the First Amendment when

[58] *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting) (emphasis added).

[59] *Id.* at 907.

[60] *Fayetteville Pub. Libr.*, 684 F. Supp. 3d at 909 (citation omitted) (emphasis in original).

[61] 539 U.S. 194 (2003).

it required libraries, as a condition of receiving federal funds, to install software that would block minors from viewing on libraries' internet terminals visual depictions of obscenity, child pornography, and other types of speech that are not constitutionally protected.[62]

Writing for the plurality, Justice Rehnquist stated that public libraries have broad discretion in shaping their collections and the librarian's role is to "separate out the gold from the garbage."[63] Just as government officials may consider content in selecting winners of an art funding program, the plurality stated, librarians must consider content in making collection decisions "to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.[64]

But *ALA* does not mean that librarians may suppress disfavored books based on viewpoint. From *Pico*, *Campbell*, and *ALA*, the panel majority here correctly distilled six rules to guide its analysis:

1. "Librarians may consider books' contents in making curation decisions."

2. "Their discretion, however, must be balanced against patrons' First Amendment rights."

3. "One of these rights is 'the right to receive information and ideas."

[62] *Id.* at 214.

[63] *Id.* at 204 (citation omitted).

[64] *Id.* at 206.

4. "This right is violated when an official who removes a book is 'substantially motivated' by the desire to deny 'access to ideas with which [they] disagree[ ].'"

5. "To be sure, content is necessarily relevant in removal decisions."

6. "But a book may not be removed for the sole—or a substantial—reason that the decisionmaker does not wish patrons to be able to access the book's viewpoint or message."[65]

These rules synthesize the *Pico* and *ALA* pluralities, together with this Court's opinion in *Campbell*. As discussed, none of the dissenting or concurring opinions in *Pico* disputed that a right to receive information exists in public libraries.[66] Again, even Justice Rehnquist "cheerfully conceded" that a library could not make its selection or removal decisions based on partisan motives.[67] And this Court has already decided that books may not be removed for the sole or substantial reason that the decisionmaker disagrees with the book's viewpoint or message.[68]

D. Appellants' criticisms of *Campbell* are unfounded.

There is nothing unworkable or unsound about this framework. Appellants and the panel dissent contend that *Campbell* is hopelessly unworkable because it

[65] *See* Panel Op. at 11-12 (majority op.).

[66] *Kreimer*, 958 F.2d at 1254-55.

[67] *Pico*, 457 U.S. at 907 (Rehnquist, J., dissenting).

[68] *See Campbell*, 64 F.3d at 190 (citing *Pico*, 457 U.S. at 870-72). *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005), on which Appellants have relied, concerned the selection of school textbooks, not the removal of public library books, and thus is inapplicable.

requires analysis of subjective motives.[69] But analyzing someone's subjective state of mind is not new to the First Amendment.[70] Appellants' proposed alternative—to give government officials unchecked authority to purge books based on content or viewpoint[71]—is no answer.

Appellants also feign bewilderment about "how to distinguish" between content-based curation decisions and impermissible discrimination.[72] Librarians are trained to strike this balance. While librarians consider the content of books (among other criteria) when they select or weed books, that is an objective inquiry.[73] And, as discussed, "weeding" of library collections involves weighing other objective criteria like factual obsolescence and wear and tear.[74] Librarians do not curate collections based on their own viewpoint, but select material that appeals to the community, guided by objective criteria.

Appellants seize on the different approaches by the majority opinion and concurrence to the "butt and fart" books, as proof that *Pico* and *Campbell* should be

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[69] Appellants' Supp. Br. at 20-21; Panel Op. at 18-23.

[70] *See New York Times v. Sullivan*, 376 U.S. 254, 279-280 (public officials must demonstrate actual malice to recover for defamation); *St. Amant v. Thomas*, 390 U.S. 727, 731 (actual malice requires evidence the defendant "entertained serious doubts as to the truth of his publication").

[71] Appellants' Supp. Br. at 22-23.

[72] *Id.* at 22.

[73] CODE OF ETHICS, *supra* note 20.

[74] *See* Asheim, *supra* note 28.

jettisoned.[75] This argument misses the point. The protections of the First Amendment encompass books that both inform and entertain: "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right."[76] Nor does it matter whether *Larry the Farting Leprechaun* has an easily identified viewpoint or message. "[A] narrow, succinctly articulable message is not a condition of constitutional protection…."[77] And the First Amendment proscribes discrimination based on content.[78] So, while reasonable minds may differ as to whether any "viewpoint" emerges from the absurdist adventures of *The Cat in the Hat*, none would dispute that this classic work merits First Amendment protection.[79]

Librarians do not remove silly books because they do not find them funny or children's books because they do not discern a clear moral to the story. Librarians have been trained to include in their collections a wide variety of books that entertain because, among other things, these materials encourage patrons to visit the library

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[75] Appellants' Supp. Br. at 19-20.

[76] *Winters v. New York*, 333 U.S. 507, 510 (1948). *See also Mahanoy Area Sch. Dist. v. B.L. by and through Levy*, 594 U.S. 180, 193 (2021) (the First Amendment protects both "the superfluous" and "the necessary").

[77] *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 569 (1995).

[78] *See, e.g., Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163-64 (2015). In the public library setting, where a book has allegedly been suppressed based on "content," that conduct is reviewed under strict scrutiny. *See id.*

[79] Along with making young readers laugh, *Larry* et al. can be interpreted as promoting body acceptance and positivity. Thus, these books have at least as discernable a "viewpoint" as their literary forebearer, Chaucer's famously scatological "The Miller's Tale." *See* GEOFFREY CHAUCER, THE CANTERBURY TALES, *The Miller's Tale*, https://chaucer.fas.harvard.edu/pages/millers-prologue-and-tale.

and—of particular importance for young people—to read.[80] While the humor of *Larry* may not be for everyone, the First Amendment applies anyway, even if some grown-ups don't get the joke.

III. Under the guise of "government speech," Appellants and the Attorneys General would give government officials carte blanche to target any controversial book they don't like.

While they seek to eliminate the First Amendment right to receive information, Appellants, along with the Attorneys General, also urge "a huge and dangerous extension" of an exception to the First Amendment—the "government-speech" doctrine.[81] Appellants and the Attorneys General ask this Court to rule that the curation of a library collection is merely "government speech" and thus immune from any First Amendment scrutiny.

Such a ruling would give government officials carte blanche to target any library book for any reason—including the suppression of controversial or unpopular ideas—and is anathema to traditional library practice. Amici will not repeat the thorough discussion of the government-speech issue by Appellees but offer the following additional comments.

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[80] A well-known example of this phenomenon is the *Harry Potter* book series. *See* Wynne Davis, *How Harry Potter Has Brought Magic to Classrooms For More Than 20 Years*, NAT'L PUBLIC RADIO (Dec. 31, 2018), https://www.npr.org/2018/12/31/678860349/how-harry-potter-has-brought-magic-to-classrooms-for-more-than-20-years (last visited Sept. 10, 2024).

[81] *Matal v. Tam*, 582 U.S. 218, 239 (2017).

First, Amici are unaware of another court holding that the curation of a public library collection amounts to "government speech." This is unsurprising: courts must exercise "great caution before extending" the "government-speech" doctrine into new contexts because it is "susceptible to dangerous misuse," including (as happened here) the "silenc[ing] or muffl[ing] of disfavored viewpoints."[82]

If this Court rules that curating a public library collection is government speech, it will create a circuit-split with the Eighth Circuit. In *GLBT Youth in Iowa Schools Task Force v. Reynolds*, the Eighth Circuit held that the government-speech doctrine does not extend to "the placement and removal of books in public school libraries."[83] The court explained that unlike a public monument, curating a library collection does not have "the effect of conveying a government message."[84] If placing a broad variety of books on the library shelves "constitutes government speech, the State 'is babbling prodigiously and incoherently.'"[85] That description applies with even greater force to a public library serving children and adults. Other courts have likewise concluded that government does not "speak" through public library collections.[86]

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[82] *Id.* at 235.

[83] Nos. 24-1075 & 24-1082, 2024 WL 3736785, at *2 (8th Cir. Aug. 9, 2024).

[84] *Id.* at *3.

[85] *Id.* (quoting *Matal*, 582 U.S. at 236).

[86] *See PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, No. 3:23cv10385-TKW-ZCB, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024) ("the Court simply fails to see how any reasonable person

In contrast, the Attorneys General cite dicta from a nearly twenty-year-old D.C. Circuit opinion, but that case concerned the selection of sculptures for display by a government arts commission, not the removal of books from a public library.[87] This older dicta also would not survive under the Supreme Court's 2022 opinion in *Shurtleff v. City of Boston*, which held that Boston's selection of flags to fly in front of city hall was ***not*** government speech.[88]

Second, Appellants' reliance on *Moody v. Netchoice, LLC* is misplaced. In *Moody*, the Supreme Court held that a private social media platforms' aggregation of third-party conduct constitutes protected "expression" under the First Amendment.[89] But *Moody* is not a government-speech case and does not even mention the word "library." Appellants simply posit that a library collection is just like a social media platform. But they do not explain what "particular expressive quality" is "unique" to a library collection.[90] Nor could they: library collections historically contain diverse viewpoints of interest to an entire community.

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would view the contents of the school library (or any library for that matter) as the government's endorsement of the views expressed in the books on the library's shelves"); *Fayetteville Pub. Libr.*, 684 F. Supp. 3d at 908-10.

[87] *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 28-31 (D.C. Cir. 2005).

[88] 596 U.S. 243, 252 (2022).

[89] 144 S. Ct. 2383, 2401-02 (2024).

[90] Appellants Supp. Br. at 17-18.

Third, the Attorneys General fare no better. They assert that a library collection conveys the governmental "message" that the selected "materials are of the 'requisite and appropriate quality' and will 'be of the greatest direct benefit or interest to the community.'"[91] If the "message" is the "quality" of the books and their unspecified "benefit or interest to the community," that message is so vague it could mean anything (or nothing). And, as Appellees note, such a malleable "message" could transform virtually any regulation into "government speech," the very scenario the Supreme Court has warned against.

The Supreme Court's government-speech cases look at the ***content*** of the speech—for example, what state-issued specialty license plates say[92] or what "message" a monument conveys—to determine whether that message will be perceived as the government itself "speaking."[93] The government message is not, as the Attorneys General would have it, that the license plates are sturdy and highly reflective at night or that the monument will survive bad weather for years. In the context of libraries, patrons understand that the books provide a diverse collection of messages by the authors of the books.

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[91] Amici Brief of States at 7 (quoting *ALA*, 539 U.S. at 204); *see also id.* at 9-10 (the "presence and position" of the books "'convey[s] important messages about government' and its views on their social and literary value").

[92] *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 213 (2015).

[93] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470-71 (2009).

This novel government-speech theory misconceives the nature of libraries themselves. As one court has recently observed: "[b]y virtue of its mission to provide the citizenry with access to a wide array of information, viewpoints, and content, the public library is decidedly not the state's creature[.]"[94] It is, instead, "the people's."[95]

IV. Appellants' "in-house checkout system" is a transparent ploy to moot the lawsuit and remove controversial titles from library shelves.

Finally, Amici note that Appellants' so-called "in-house checkout system," though couched in neutral-sounding terms, is simply another form of impermissible censorship.

Under this "in-house" system, a librarian (acting in concert with government officials) may select certain books for elimination from the library's circulating collection—based substantially on those individuals' views about the book—and then consign those books to a form of *damnatio memoriae*.[96] The books are removed from the shelves, scrubbed from the library catalogue, and confined behind a desk, hidden from view.[97] Patrons who are aware of the books' hidden presence—through litigation or maybe just the grapevine—must seek out a librarian, explain which

[94] *Fayetteville Pub. Library*, 684 F. Supp. 3d at 891.

[95] *Id.*

[96] ROA.3524; ROA.3528-29.

[97] ROA.3518.

book they want, and request special access to the book. But patrons "browsing" the shelves "will never find [these] books."[98] According to Appellants, because Appellees themselves know about these hidden books and may still check them out, their First Amendment claims "cannot get off the ground."[99]

For over 50 years, the American Librarian Association and library professionals have denounced charades like this, which limit, rather than promote, patrons' access to a broad range of materials and amount to "censorship, albeit [in] a subtle form."[100] Like their bowdlerized distortion of "weeding," Appellants' system impedes Appellees' and other patrons' ability to access books.

The "in-house checkout system" bears no resemblance to a traditional "reserve system," which is sometimes employed by academic libraries containing rare or archival materials to prevent their degradation or theft, not because the materials are controversial.[101] Nor is there any suggestion that this system was motivated by concerns about preserving fragile or rare books. And Appellants'

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[98] *Sund*, 121 F. Supp. 2d at 550 ("forced removal of children's books to the adult section of the Library…places a significant burden on Library patrons' ability to gain access to those books").

[99] Appellants' Supp. Br. at 26. Appellees have ably explained why this system cannot insulate Appellants' conduct from First Amendment scrutiny. Appellees' Supp. Br. at 52-56.

[100] *ALA*, 539 U.S. at 239 (Souter, J., dissenting) (citation omitted).

[101] *See, e.g.*, Reserve Instructions and Policies, TEX. STATE UNIV., RESERVE SERVS., https://www.library.txst.edu/services/borrow-renew/reserve.html (last visited Sept. 10, 2024) (university reserve system allows faculty to set aside designated materials "for students in a specific course" that are secured through "adhesive barcodes and security tags" and with strictly limited loan windows).

invocation of InterLibrary Loans—which facilitate the distribution of materials temporarily between institutions—is misplaced.[102]

Appellants' "system" also contradicts historical library organizational systems, i.e., that books and other materials should be located in the sections logically affiliated with their topics. For example, children's books appear in the children's section while biographies and history appear in another section.[103] These placement decisions are made according to objective systems, such as information provided by publishers and Library of Congress categorizations, at the time the library acquires the book.[104] They are ***not*** made to satisfy the demands of a public official or the "heckler's veto" of a complaining patron.[105]

CONCLUSION

Amici conclude where they began: public libraries are "designed for freewheeling inquiry."[106] Amici recognize that some books at issue in this case might be controversial or even offensive to some library patrons. But that is the

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[102] *See Interlibrary Loans*, AM. LIBR. ASS'N, https://libguides.ala.org/Interlibraryloans (last visited Sept. 10, 2024). Equally misplaced is Appellants' speculation that operating an "in-house collection" will subject librarians to ruinous civil rights litigation. Appellants' Supp. Br. at 28-29. Were that the case, Amici would expect to see lengthy string cites of such cases; Appellants provide none.

[103] CAROL ALABASTER, DEVELOPING AN OUTSTANDING CORE COLLECTION 88, 100, 138-57 (2d ed. 2010).

[104] *See id.*

[105] *Sund*, 121 F. Supp. 2d at 549.

[106] *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting).

point of a library, after all: to "provide materials and information presenting all points of view on current and historical issues."[107] Patrons—including parents of children—may choose whether to read a given book. But government officials may not make that choice for them, based on the officials' own views about the merits or substance of the book. The First Amendment—which includes library patrons' "right to read and freedom of thought"—demands nothing less.

The district court's preliminary injunction should be AFFIRMED.

[107] LIBRARY BILL OF RIGHTS, *supra* note 13 (preamble).

Dated: September 10, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of FED. R. APP. P. 29(a)(5) and 32(a)(7)(b) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 6,453 words.

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2024, I electronically submitted the foregoing document to the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit using the Court's ECF system, which sent a Notice of Electronic Filing to the following attorneys of record:

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No. 23-50224

United States Court of Appeals
For the
Fifth Circuit

LEILA GREEN LITTLE, et al.,

Plaintiffs-Appellees,

– v. –

LLANO COUNTY, et al.,

Defendants–Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
CASE NO. 1:22-CV-424-RP

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND ACLU OF TEXAS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATION OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae American Civil Liberties Union and ACLU of Texas state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

Pursuant to Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
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ACLU Foundation of Texas, Inc.	Amicus curiae
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Dated: September 10, 2024

By: */s/ Vera Eidelman*
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STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization. The ACLU Foundation of Texas, Inc. ("ACLU of Texas") is a state affiliate of the ACLU. Both organizations are dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws, including freedom of speech. The ACLU was counsel in both *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982) and *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003). As organizations committed to protecting the rights to freedom of speech and freedom from government censorship, the ACLU and ACLU of Texas have a strong interest in the proper resolution of this case.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

INTRODUCTION

Public libraries exist to provide the public with free access to books, information, and ideas. They offer people a universe of materials to explore, and enable patrons to make up their own minds about which are worthwhile. In many ways, they are the physical embodiment of the First Amendment principle that, "[f]rom the multitude of competing offerings the public," not the government, "will pick and choose." *Hannegan v. Esquire, Inc*., 327 U.S. 146, 158 (1946).

As the panel dissent emphasized, notwithstanding—indeed, due to—the core function of public libraries, librarians necessarily have broad discretion to choose what books to offer. *Little v. Llano Cnty.*, 103 F.4th 1140, 1167 (5th Cir. 2024) (Duncan, J., dissenting). Otherwise, public libraries would be little more than warehouses. *Id*. Librarians must decide what books are worthy of inclusion, and they can base those decisions on a book's artistry, its eloquence, its entertainment value, and even its placement on bestseller lists, among other things. Of course, many of those judgments will be subjective (though informed by a librarian's expertise and training) and they may well turn on the content, and the ideas, of a book.

At the same time, some reasons for removing library books are plainly impermissible, particularly given the role, nature, history, and tradition of public libraries. A Democratic governor could not order the removal of all library books

advocating "Republican" ideals, nor could a predominantly Jewish city council ban all copies of the New Testament to impose a single religious view.

This is clear not only from common sense, but also from First Amendment doctrine. The First Amendment prohibits government officials from prescribing what is orthodox, including via public library shelves. Defendants argue that, "[a]s a matter of first principles," the act of removing books from public libraries "should be treated as government speech," Def. Suppl. Br. at 16, as did the panel dissent. *Pico* forecloses this argument, because eight justices in that case agreed that *some* reasons for removal would violate the First Amendment. And, even if *Pico* were not controlling on this point, immunizing book removals from First Amendment scrutiny would contradict scores of other Supreme Court cases.

Cases that establish and apply First Amendment limitations on (1) the removal of books from school libraries, (2) government programs that necessarily pick and choose among private speech, and (3) nonpublic forums all hold that government officials cannot engage in "invidious viewpoint discrimination" that seeks to "drive certain ideas or viewpoints from the marketplace." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (marks and citation omitted). Government actors may not "discriminate invidiously . . . in such a way as to aim at the suppression of dangerous ideas." *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 548 (1983) (tax exemptions) (marks and citation omitted). Nor may they silence ideas in

an effort to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Pico*, 457 U.S. at 872 (plurality op.) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

The Supreme Court has made clear that even when a government program necessarily involves making value judgments between instances of private speech—for example, National Endowment for the Arts grants, or a public-broadcast station's plan for a political debate—officials may not use their curatorial authority to silence unorthodox views. That rule is not new, and courts have successfully administered it in school libraries, public libraries, and other public programs for decades. To require anything less in public libraries now would ignore controlling caselaw, and wholly distort their nature, function, and tradition.

This Court should affirm the court below and hold that government officials cannot remove books from public library shelves in an effort to prescribe what shall be orthodox in matters of opinion.

ARGUMENT

I. BOOK REMOVALS ARE SUBJECT TO FIRST AMENDMENT SCRUTINY.

A. *First Amendment scrutiny applies to government efforts to remove books from public library shelves.*

In *Pico*, the Supreme Court's only case about book removals, a majority of justices agreed on one thing: government officials' decision to remove books from library shelves will violate the First Amendment if the facts are egregious enough.

The three-justice plurality concluded that "the First Amendment rights of students may be directly and sharply implicated by the removal of books[.]" 457 U.S. at 866 (plurality op.). Justice Blackmun agreed that the Supreme Court's cases "command" a First Amendment limitation on *why* government officials may remove a library book. *Id.* at 878–79 (Blackmun, J., concurring). Justice White agreed that the case should be remanded for further fact-finding about the school board's specific reasons in the case—an exercise that would have been pointless if no facts could have established a violation of the First Amendment. *Id.* at 883–84. And Justice Rehnquist, joined by Chief Justice Burger and Justice Powell in dissent, "cheerfully concede[d]" that "[o]ur Constitution does not permit the official suppression of *ideas*," including in libraries. *Id.* at 907 (Rehnquist, J., dissenting (quoting plurality op.)) (emphasis in original).[2] Thus, eight of the justices in *Pico* agreed that library book removals can violate the First Amendment.

It is not hard to understand why. As the plurality stated, and Justices Blackmun and Rehnquist echoed, of course "a Democratic school board, motivated by party affiliation" could not "order[] the removal of all books written by or in favor of Republicans," nor could an "an all-white school board, motivated by racial animus, decide to remove all books authored by blacks or advocating racial equality

[2] Though they doubted that the "extreme examples" of partisan or political disapproval posited by the plurality would "arise in the real world," these justices agreed that the scenarios would violate the Constitution if they ever did. *Id.*

and integration." *Id*. at 870–71 (plurality op.); *see also id*. at 878 (Blackmun, J, concurring), *id.* at 907 (Rehnquist, J., dissenting).

Equally, county and library officials, motivated by their own atheism, could not decide to remove all books suggesting that God exists, nor could religious board members remove all *Harry Potter* books because they disagree with "witchcraft" as a viable religion. *Counts v. Cedarville Sch. Dist*., 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003). Officials could not choose to remove all books advocating for a higher minimum wage, broader gun rights, or cheaper public transportation because they believe those are the wrong political views. Nor could officials remove a "novel depicting a fictional romantic relationship between two teenage girls," *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 867 (D. Kan. 1995), because they believed the book "promoted or glorified" a "lifestyle" they viewed as sinful and abnormal. *Id*. at 871.

As discussed further below, government officials have considerable discretion to decide what books to remove from public libraries—but that discretion is not boundless. To the contrary, as these examples illustrate, the First Amendment has a role to play in assessing the removal of books from public library shelves. Indeed, no court faced with removal of books from public libraries has held that *no* First Amendment scrutiny applies. *See GLBT Youth in Iowa Sch. Task Force v. Reynolds*, No. 24-1075, 2024 WL 3736785, at *2–3 (8th Cir. Aug. 9, 2024) (rejecting argument

that "the placement and removal of books in public school libraries" constitutes government speech); *Sund v. City of Wichita Falls, Tex*., 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) (holding that book removals from public library shelves must undergo First Amendment scrutiny, which applies with "even greater force" than in the school library context).[3]

B. *ALA, Finley, and Forbes are not to the contrary.*

Notwithstanding the fact that *Pico* "cannot be overruled by the en banc court," Def. Suppl. Br. at 23, the panel dissent argued that a library's book removal choices "are government speech to which the Free Speech Clause does not apply." *Little*, 103 F.4th at 1177 (Duncan, J., dissenting). To make that argument, the dissent primarily relied on *United States v. American Library Association, Inc*., 539 U.S. 194 (2003), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998)—three cases that are not about government speech, and that do apply First Amendment scrutiny.

[3] Every appellate court to consider restrictions on access to the ideas contained in public libraries has held that they must withstand First Amendment scrutiny. *See Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1251 (3d Cir. 1992); *Neinast v. Bd. of Trs. of the Columbus Metro. Libr.*, 346 F.3d 585, 591 (6th Cir.2003); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1128 (10th Cir. 2012).While these cases consider restrictions on physical access to public library buildings, if First Amendment scrutiny did not attach to restrictions on libraries' provision of information—including, in large part, through the books on their shelves—it would not attach to restrictions on building access either.

The dissent was right to point to these cases for the proposition that, in the context of certain government programs—including Internet access in public libraries, arts funding, and political debates on public-broadcast television—the government has broad, even content-based, discretion to choose what speech to include. But it overlooked the fact that, in each of those cases, the Supreme Court held that private speech was at issue—and that the First Amendment applied.[4]

In *United States v. American Library Association* ("*ALA*"), the Court considered the constitutionality of a program that gave "federal assistance to [public libraries] to provide Internet access" as long as they installed "software to block images that constitute obscenity," "child pornography" or material that is "harmful

[4] The dissent also relied on *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). *Summum* is a government speech case, and it follows the proper approach for determining when government speech is at issue. *See id.* at 470–472 (considering history, public perception, and extent of government control). As Plaintiffs argue, not one of those factors supports the argument that the government is speaking when it removes books from public library shelves. Pl. Suppl. Br. at 21–36. Nor does *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024) change the result. While the First Amendment protects curation by private actors, it typically prohibits "curation" by the government. *See id.* at 2407 (directing this Court to revisit its decision regarding government regulation of private curation because, though "[s]tates (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views . . . the way the First Amendment achieves that goal is by preventing *the government* from tilting public debate in a preferred direction." (cleaned up and citation omitted)).

to minors." 539 U.S. at 199 (plurality op.).[5] The restriction was content-, not viewpoint-based.

To determine whether the federal law imposed an unconstitutional condition, the plurality began by "examin[ing] the role of libraries in our society." *Id.* at 203 (plurality op.). It explained that a public library's role is to "decid[e] what *private speech* to make available to the public," *id.* at 204 (emphasis added), and it cited *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985), a nonpublic forum case, with approval in upholding the federal law. *ALA*, 539 U.S. at 206 (plurality op.). *See* Section II.C *infra*. While noting that "[p]ublic library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them," *id.* at 205 (plurality op.), nowhere did the plurality conclude that that discretion is boundless. Instead, it emphasized the ways in which the restrictions at issue were consistent with the nature, history, and purpose of libraries' collection decisions more broadly, and—narrowly echoed by Justice Kennedy in his concurrence—highlighted the ease with which a patron could unblock any improperly blocked site, something that would not matter if blocking raised no First Amendment concerns to begin with. *Id.* at 208–09 (plurality op.); *see also id.* at 214 (Kennedy, J., concurring).

[5] The law at issue, 47 U.S.C.A. § 254(h)(7)(G), defined "harmful to minors" consistent with the requirements of *Ginsberg v. New York*, 390 U.S. 629 (1968) and *Miller v. California*, 413 U.S. 15 (1973).

The plurality also concluded that "[t]he principles underlying *Forbes* and *Finley* . . . apply to a public library's exercise of judgment in selecting the material it provides to its patrons," *id.* at 205. As discussed below, *see* Section II.B *infra,* those "principles" include First Amendment scrutiny and a prohibition on invidious viewpoint discrimination aimed at suppressing dangerous ideas.

Like *ALA*, *Finley* is not a case about government speech, and it is a case that applies First Amendment scrutiny. In that case, the Supreme Court considered a facial challenge to a federal law that required the National Endowment for the Arts to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" when considering grant applications. *Finley,* 524 U.S. at 572 (cleaned up, citation omitted). The Court recognized that the NEA "may decide to fund particular projects for a wide variety of reasons," from technical proficiency to creativity to contemporary relevance, and that "[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding." *Id.* at 585. It upheld the law on its face.

At the same time, the Court was careful to explain that "the denial of a grant . . . [because] of invidious viewpoint discrimination" would present a different scenario. *Id.* at 586–87. Far from immunizing the NEA's decision-making from First Amendment scrutiny, the Court made clear that, "even in the provision of subsidies,

the Government may not 'aim at the suppression of dangerous ideas,'" *id.* at 587 (quoting *Regan*, 461 U.S. at 550), and that "a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace,'" *id.* (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

Finally, in *Forbes*, the Court held that a state-owned public television broadcaster could exclude an independent candidate from its election debate as long as the exclusion decision was "a reasonable, viewpoint-neutral exercise of journalistic discretion," 523 U.S. at 669—squarely applying the First Amendment scrutiny that governs nonpublic forums. *See* Section II.C, *infra.* Recognizing that, "in many cases it is not feasible for the broadcaster to allow unlimited access to a candidate debate," the Court nevertheless held that "the requirement of neutrality remains; a broadcaster cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate's views." *Id.* at 676.

Thus, while the government may have "broad discretion to make content-based judgments in deciding what private speech to make available to the public" in public libraries, *see ALA*, 539 U.S. at 204–05 (plurality op.) (discussing *Forbes* and *Finley*), it does not have complete immunity from First Amendment scrutiny.

II. GOVERNMENT OFFICIALS CANNOT REMOVE LIBRARY BOOKS TO PRESCRIBE WHAT SHALL BE ORTHODOX IN MATTERS OF OPINION.

Supreme Court cases make clear not only that the First Amendment applies, but also what it requires. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds," including through "telling a man . . . what books he may read[.]" *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). In the context of public libraries, this First Amendment principle demands that government officials cannot remove books in order to "prescrib[e] what shall be orthodox in . . . matters of opinion." *Pico*, 457 U.S. at 872 (plurality op.) (quoting *Barnette*, 319 U.S at 642.

Every doctrinal path available to the Court—the First Amendment standards that govern (1) the removal of books from school libraries, (2) limitations on government programs that pick and choose among private speech, and (3) nonpublic forums—all lead to the same result: government officials cannot remove books "[to aim] at the suppression of dangerous ideas," *Regan*, 461 U.S. at 550 (citation omitted), "to drive certain ideas or viewpoints from the marketplace," *Finley*, 524

U.S. at 587 (marks and citation omitted), or to instill a pall of orthodoxy in matters of opinion, *Barnette*, 319 U.S. at 642.

A. *Pursuant to the school library cases, removals that seek to impose a pall of orthodoxy in matters of opinion violate the First Amendment.*

Whatever they make of *Pico*, courts assessing the removal of books from a school library essentially boil the First Amendment question down to "whether the . . . [removal] decision . . . was motivated by . . . a desire to promote political orthodoxy and by opposition to the viewpoint of the book." *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1227 (11th Cir. 2009). That is the *Pico* plurality's rule: government actors "may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,'" 457 U.S. at 872 (quoting *Barnette*, 319 U.S. at 642). It is also Justice Blackmun's rule: "school officials may not remove books [from school libraries] for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved." *Pico*, 457 U.S. at 879 (Blackmun, J., concurring). It is the rule courts arrived at before *Pico*. *See, e.g.*, *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 at 581–82 (6th Cir. 1976) (school board could not remove books from library because members found the content "objectionable," because it

"occasioned their displeasure or disapproval," or "solely [due] to the[ir] social or political tastes"). And it is the rule that has been applied since, including by this Court. *See, e.g.*, *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995). Abandoning it now would be a dangerous—and lonely—road.

Perhaps for this reason, the panel dissent suggested that, rather than abandon *Pico* entirely, this Court could limit it to school libraries. But, as Defendants concede, "one would think that a public-school library should have more latitude than a county library to remove books[.]" Defs. Suppl. Br. at 19. *See also Sund*, 121 F. Supp. at 548 ("The principles set forth in *Pico*—a school library case—have even greater force when applied to public libraries."). Indeed, far from grounding its rule in the First Amendment protections enjoyed by schoolchildren, the *Pico* plurality began by recognizing the First Amendment rights that attach to public libraries, and protect Americans, in general. "A school library, *no less than any other public library*, is 'a place dedicated to quiet, to knowledge, and to beauty.'" 457 U.S. at 868 (plurality op.) (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (emphasis added)). And "just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Id.* at 868 (plurality op.).

Even Justice Rehnquist, who disagreed with the plurality's rule for school libraries, expressly distinguished "public libraries," which are "designed for freewheeling inquiry." *Id.* at 915 (Rehnquist, J., dissenting). *See also id.* at 914 (criticizing plurality for "turn[ing] to language about *public* libraries"); *id.* at 915 (specifically noting that, though the books had been removed from the school library, they could still "be borrowed from a public library").

Thus, following the school library cases, this Court should hold that government officials cannot purge public library shelves to push political dogma.

B. *Removing books to aim at the suppression of dangerous ideas or to drive an idea from the marketplace is equally unconstitutional under the government subsidy or government program cases.*

Alternatively, the Court could view library book removals as a restriction on a government program in which officials have "broad discretion to make content-based judgments in deciding what private speech to make available to the public." *See ALA*, 539 U.S. at 204–05; *see also* Section I.B *supra.* In that context, too, government officials cannot violate two key First Amendment rules.

First, "[t]he First Amendment forb[ids] the Government" from using or controlling a government program, medium, or institution "in ways which distort its usual functioning." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 543 (2001). Even where "content-based considerations . . . may be taken into account" because of "the nature" of the program, those considerations must be tied to that specific

nature. *Finley*, 524 U.S. at 585. *See also Forbes*, 523 U.S. at 674 (emphasizing the "nature" of public broadcasting in explaining what First Amendment restrictions apply to it).[6]

Second, "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" *Finley*, 524 U.S. at 587 (quoting *Regan*, 461

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[6] *Forbes* concludes that "a broadcaster by its nature will facilitate the expression of some viewpoints instead of others," making a rule against viewpoint discrimination generally inapplicable to the medium—but it holds that publicly broadcast "candidate debates" *are* subject to that rule because of two special characteristics, *id.* at 674–75, which they happen to share with public libraries. First, in a candidate debate, "the implicit representation of the broadcaster [i]s that the views expressed [a]re those of the candidates, not its own." *Id.* So, too, for the books on public library shelves; it would be "far-fetched to suggest that the content" of public library books "is government speech," for the government would be "babbling prodigiously and incoherently." *Matal v. Tam*, 582 U.S. 218, 236 (2017) (refusing to hold that trademarks are government for this reason). Second, debates offer the "opportunity [for candidates] to make their views known so the electorate may intelligently evaluate [them]," a process that "is integral to our system of government." *Forbes*, 523 U.S. at 675. Offering speech people the opportunity to evaluate the political, religious, moral, and artistic ideas available in library books is equally "integral to our system of government."

Even if the Court is not convinced that a public library is akin to a political debate on public broadcast TV, it has already made clear that, by its "nature," a public library is distinct from general public broadcast "in a number of important ways," making *Forbes'* conclusion that viewpoint discrimination is typically part of the nature of the program inapplicable. *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1046 (5th Cir. 1982) (en banc). "A library constantly and simultaneously proffers a myriad of written materials," while a public broadcaster must choose one view to broadcast at any given time. *Id.* In addition, the "right to cancel a program is . . . far more integral a part of the operation of a television station than the decision to remove a book from a school library" since the library has already had "the opportunity to review a book before acquiring it." *Id*.

U.S. at 550) (alteration in original). It cannot "effectively preclude or punish the expression of particular views," or engage in "invidious" viewpoint-based discrimination "calculated to drive certain ideas from the marketplace," *Id.* at 583, 587 (marks and citation omitted).

Blessing book removals that seek to drive certain ideas out of society would violate each of these restrictions.

By "nature," public libraries are "designed for freewheeling inquiry," not "for the selective conveyance of ideas." *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting) (distinguishing public libraries from school libraries). They "pursue the worthy missions of facilitating learning and cultural enrichment" and "they seek to provide a wide array of information[.]" *ALA*, 539 U.S. at 203–04 (plurality op.). Throughout our country's history, libraries have provided "a mighty resource in the free marketplace of ideas," *Minarcini*, 541 F.2d at 582, and have acted as "the quintessential locus of the receipt of information." *Kreimer*, 958 F.2d at 1255. They made "free access to knowledge . . . possible for all Americans, regardless of geography or wealth." *Fayetteville Pub. Lib. v. Crawford Cnty., Arkansas*, 684 F. Supp. 3d 879, 890 (W.D. Ark. 2023).[7]

[7] As one scholar notes, "American democracy has never known a time without a public library. In 1731, Benjamin Franklin incorporated the Library Company of Philadelphia after persuading fellow members of his Junto debate society to 'pool their resources and purchase a collection of books' that would have been too costly

The "usual functioning," *Velazquez*, 531 U.S. at 543, of public libraries is "to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." *ALA*, 539 U.S. at 206 (plurality op.). Custodians of our collective wisdom, public librarians safeguard the narratives, insights, and information that fuel our First Amendment freedoms. As "hallowed place[s]" "dedicated to . . . knowledge," *Brown*, 383 U.S. at 142, their "mission [is] to provide the citizenry with access to a wide array of information, viewpoints, and content[.]" *Fayetteville*, 684 F. Supp. 3d at 891.

"The librarian curates the collection of reading materials for an entire community, and in doing so, he or she reinforces the bedrock principles on which this country was founded." *Id.* Those bedrock principles include "our system of government['s] . . . accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another." *Hannegan*, 327 U.S. at 157. The whole point of the First Amendment is that people, not the government, get to "pick and choose." *Id.* at 158.

This Court, sitting *en banc*, has already recognized that there are "few legitimate reasons why a book, once acquired, should be removed from a

for any single individual to amass on his own." Amy K. Garmer, *Public Libraries in the Community*, 13 I/S: J.L. & POL'Y FOR INFO. SOC'Y 1, 3–4 (2016).

library." *Muir*, 688 F.2d at 1046 (en banc) (citation omitted). "[A]bsent space limitations," "[t]he maintenance of one volume on a library shelf does not . . . preempt another." *Id.*[8] "[T]he decision to remove a book from a . . . library" is thus not an "integral . . . part of the [library's] operation." *Id.*

Allowing invidiously viewpoint-based removals that are aimed at "the suppression of dangerous ideas" would not only violate the First Amendment in its own right, but would also run particularly contrary to the nature, history, and tradition of public libraries. It would distort these institutions—expressly *not* designed "for the selective conveyance of ideas," *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting)—into just that. Permitting ideological purges would mutate public libraries from bastions of knowledge into megaphones for state-sanctioned thought and purveyors of literary blacklists.

C. *Removing books from public libraries to impose political orthodoxy in ideas would also violate the First Amendment under nonpublic forum doctrine.*

Alternatively, this Court may assess the book removals as a restriction on a nonpublic forum. Indeed, in *ALA*, though the plurality concluded that "*public* forum principles" were "out of place in the context of . . . Internet access in public

[8] Plaintiffs argue that concerns about shelf space could not have motivated the removals at issue since the County had already suspended buying new books during the time period in question. Pl. Suppl. Br. at 7.

libraries," because such access "is neither a 'traditional' nor a 'designated' public forum," the Court did not reject the application of nonpublic forum principles. 539 U.S. at 205 (plurality op.) (emphasis added). To the contrary, the plurality cited to *Cornelius*, a nonpublic forum case, when explaining the "reasons [why a library] offers . . . resources," *id*. at 206, and described public libraries as "deciding what private speech to make available to the public," *id.* at 204, offering a strong case for the application of nonpublic forum doctrine.

Moreover, subjecting library book removals to nonpublic forum scrutiny makes sense on its own terms. "Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums." *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 11–12 (2018). "Public property that is not by tradition or designation open for public communication is governed by nonpublic forum standards." *Chiu v. Plano Indep. Sch. Dist*., 260 F.3d 330, 347 (5th Cir. 2001); *see also Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983) (same).

Public libraries, including public library shelves, are public property. And they bear the indicia of "selective access" that typically "indicate[ ] the property is a nonpublic forum." *Forbes*, 523 U.S. at 679. "[J]ust as the Government in *Cornelius* made agency-by-agency determinations as to which of the eligible agencies would participate in the [charity drive]," *id.* at 680, and the government in *Forbes* "made

candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate," *id.* at 680, libraries make book-by-book decisions about which of the eligible books will appear on library shelves.

This "distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." *Forbes*, 523 U.S. at 680. And "it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers." *Id.*

The library shelf's "status as a nonpublic forum" does not "give [officials] unfettered power to exclude any [book] it wished." *Id.* at 682. "A nonpublic forum . . . is not a private forum, and because it is a government-sponsored medium of communication, it is still subject to First Amendment constraints." *Chiu*, 260 F.3d at 347. Specifically, any restriction in a nonpublic forum must be "reasonable in light of the purpose of the forum," *id.* at 356, and cannot be an effort "to suppress a particular viewpoint," *id*.

Under this line of doctrine, a book can be properly excluded from a library—a nonpublic forum designed to inform and educate the public—"because [it] had generated no appreciable public interest." *See Forbes*, 523 U.S. at 682. But, much

like a candidate improperly excluded from a political debate on public broadcast television, a book could not be removed because its "views were unpopular or out of the mainstream," due to "political pressure," or "in an attempted manipulation" of the government program or the broader marketplace of ideas. *Id.* at 683. Those justifications would be both unreasonable in light of the purposes of public libraries and impermissibly, invidiously viewpoint-based.

* * *

Thus, whether the Court chooses to rely on cases about removals of books from school libraries, invidious discrimination in programs that pick and choose among private speech, or nonpublic fora, it is unconstitutional for government officials to remove books in order to prescribe what shall be orthodox. This has been the rule for decades, and it has allowed public libraries and ideas to flourish. The First Amendment provides a backstop to such overreach in public libraries, no less than it does in other arenas.

CONCLUSION

For these reasons, this Court should affirm the court below and hold that government actors cannot remove books from public library shelves to prescribe what shall be orthodox in matters of opinion, to aim at the suppression of dangerous ideas, or to drive an idea from the marketplace.

Dated: September 10, 2024

Respectfully submitted,

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Dated: September 10, 2024

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COMMENT

BOOKS FOR ME BUT NOT FOR THEE: HOW MODERN BOOK BANNING IN PUBLIC LIBRARIES WILL BROADLY DISENFRANCHISE FIRST AMENDMENT LIBERTIES*

ABSTRACT

Public libraries have long been a prominent institution of education and democracy throughout the country. Despite this, libraries across the United States have seen a sharp increase in censorship attempts through book banning. Many may impulsively believe that book banning is an issue that takes place, and therefore only has consequences, along partisan lines. However, this form of censorship has drastic and negative implications that transcend political values and predominantly harm the most vulnerable citizens in the nation. This Comment examines these profound impacts on individuals and communities across various social, political, and economic spectra. It does this not only by surveying the historical and legal framework that surrounds censorship, but also by analyzing the current Fifth Circuit case *Little v. Llano County*. It then provides insight into how a pro-censorship decision would likely undermine the First and Fourteenth Amendments, the rights and values of various minorities and religious groups, and democracy itself. It concludes that unconstitutional censorship creates a vicious cycle that ultimately undermines our societal, educational, and democratic institutions as a whole.

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I. INTRODUCTION

"The public library is the last bastion of true democracy that we have in this country."[1] Spoken by Jeffrey Wright, star of the 2018 film *The Public*, these words ring true from the hills of Hollywood to the most rural counties in the country. Growing up in Llano County, the public library became my first introduction to true freedom. At nine years old, I was first allowed to venture into the streets of my hometown alone to attend our local public library's summer reading program. This physical freedom was nothing compared to the ability to peruse the thousands of books on the shelves that inspired my love of learning. This newfound passion carried me through twelve years in my small-town school district, four years at an incredible public university, and all the way up to writing this Comment as a first-generation law student.[2]

Our public libraries play a vital role as bastions of democracy for millions of Americans.[3] They act as educational hubs that serve those across this nation's diverse social, economic, religious, and political spectrum.[4] Public libraries function as true equalizers and offer resources that bridge this country's many societal gaps.[5] Despite these benefits, this democratic institution is under fire. In the last half a decade, public libraries across the country have seen a sharp increase in book-banning attempts.[6] In fact, the American Library Association (ALA) has reported over 1,200 challenges to remove books from public libraries in 2022, a number nearly

1. THE PUBLIC (Hammerstone Studios 2018).

2. In order to provide full context for this piece, I would like to disclose that the public library system has not only had a major impact on myself, but on multiple generations of my family. My mom has been a children's librarian in Kingsland, Texas since 2011. My grandma has been a Llano Library patron since moving to Llano in 2002, and during that time has held the positions of Treasurer and President for the Friends of the Llano Library. She is also one of the seven plaintiffs in the *Little v. Llano County* case that inspired this Comment.

3. *See* Carsyn Fessenden, *The Library, Democracy, and You*, URB. LIBRS. COUNCIL, https://www.urbanlibraries.org/blog/the-library-democracy-and-you [https://perma.cc/4R7P-4JU4] (last visited Feb. 3, 2024).

4. *See* John B. Horrigan, *Who Uses Libraries and What They Do at Their Libraries*, PEW RSCH. CTR. (Sept. 15, 2015), https://www.pewresearch.org/internet/2015/09/15/who-uses-libraries-and-what-they-do-at-their-libraries/ [https://perma.cc/UXB3-GPV6].

5. *See* Scott Carlson, *Libraries Are the Great Equalizers*, CHRON. HIGHER EDUC., https://www.chronicle.com/article/libraries-are-the-great-equalizers [https://perma.cc/6UBF-373B] (last visited Feb. 3, 2024).

6. *See* Tracie D. Hall, *Attacks on Libraries Are Attacks on Democracy*, TIME (Sept. 20, 2023, 10:27 AM), https://time.com/collection/time100-voices/6315724/banned-books-library-access/ [https://perma.cc/CTT7-EP76].

doubling the 729 reported challenges in 2021.[7] While book banning poses a major issue across the United States, Texas leads the nation in book-banning attempts as of August of 2023.[8]

This Comment explores the issue of modern-day book banning through the lenses of both the First and Fourteenth Amendments. It concludes that state removal of books from public libraries is not only unconstitutional but has severe negative implications for various protected classes across the social and political spectrum.

Part II begins with a brief summary of the modern trend toward book banning. This summary initially discusses book-banning efforts generally throughout the twentieth century and then highlights the resurgence of censorship attempts appearing since 2020. Next, this part closely examines the current Fifth Circuit case *Little v. Llano County* as a case study to represent the larger national trend. It first recounts the factual and procedural backgrounds of the case, then the legal arguments made by both the plaintiffs and the defendants.

Part III surveys the existing First Amendment case law that is pertinent to this issue, while comparing and distinguishing the relevant elements of *Little*. This analysis will begin with the seminal First Amendment book-banning case *Board of Education v. Pico*. It will compare and contrast both the relevant facts and legal issues with *Little*. This includes how control of "optional reading" is greatly distinguishable from control of "curriculum and classroom," how state action is treated as it intertwines with the creation of an advisory board of private citizens, and the protection of the rights of minors to meaningfully exercise their rights of free speech and expression, which includes the constitutional right to receive information and ideas in a variety of contexts. This part next explains the context of *Miller v. California* in First Amendment analysis and applies the *Miller* test to the facts of *Little*.

Part IV explores the possibility for a potential claim of unconstitutionality under the Fourteenth Amendment's Equal Protection Clause. It first discusses the current understanding of Fourteenth Amendment law and the history of protected classes. Then, it explains how, under the existing framework, the success of an equal protection claim is unclear. Finally, it sets up a suggestion

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7. Raymond Garcia, *American Library Association Reports Record Number of Demands to Censor Library Books and Materials in 2022*, AM. LIBR. ASS'N (Mar. 22, 2023), https://www.ala.org/news/press-releases/2023/03/record-book-bans-2022 [https://perma.cc/3LA9-8RF3].

8. *Censorship by the Numbers*, AM. LIBR. ASS'N, https://www.ala.org/bbooks/censorship-numbers [https://perma.cc/4NYA-EW94] (last visited Oct. 20, 2024).

for the potential expansion of the constitutional "protected class framework" to protect against age discrimination or socioeconomic discrimination. This is further explored in Part V's discussion on the negative implications that successful book banning may have on minors and the socioeconomically disadvantaged.

Part V discusses the negative implications that a decision in favor of book banning would have on various classes. This includes the "traditional," social suspect classes of race, gender, and sexual orientation that are currently facing most book-banning attempts. However, it also discusses the negative effects that successful book banning could easily have on religious minorities who also enjoy suspect-class status. Finally, this part explores the greater societal effects that book banning has on children and the socioeconomically disadvantaged: two groups, which, while not enjoying a protected legal status, still have lowered political influence and will likely face disproportionate harm from successful book banning.

This Comment concludes that state-sponsored censorship in the form of book banning in public libraries is not only an infringement on First Amendment liberties across political lines but has profound and negative consequences past its First Amendment implications.

II. MODERN BOOK BANNING

Book banning has experienced a resurgence in the last half-decade.[9] Modern book banning reflects the overarching trend of censorship efforts for written works over the history of the United States.[10] This history reveals a common thread of promoting a greater sense of morality, whether in religious, social, or cultural sense.[11] Contemporary book banning has been revived and

9. *Id.*

10. Rebecca Boone, *Experts Say Attacks on Free Speech Are Rising Across the U.S.*, PBS (Mar. 15, 2023, 5:13 PM), https://www.pbs.org/newshour/politics/experts-say-attacks-on-free-speech-are-rising-across-the-us [https://perma.cc/9V3R-ZQDT]. Despite this Comment's focus on the trend of censorship in written media, it is also important to note the broader trend toward censorship in the United States as a whole. Both the congressional ban on the social media application TikTok and the silencing, and even arrests, of pro-Palestinian student protestors at universities across the country exemplify this trend. *Fighting Campus Censorship: The ACLU Defends Pro-Palestinian Voices in Florida*, ACLU (Dec. 29, 2023), https://www.aclu.org/news/free-speech/fighting-campus-censorship-the-aclu-defends-pro-palestinian-voices-in-florida [https://perma.cc/558F-RMX9]; *see* Caitlin Yilek, *Why U.S. Officials Want to Ban TikTok*, CBS NEWS, https://www.cbsnews.com/news/tiktok-ban-congress-reasons-why/ [https://perma.cc/G8EJ-D3MU] (last updated Apr. 24, 2024, 5:17 PM).

11. Jennifer Elaine Steele, *A History of Censorship in the United States*, J. INTELL. FREEDOM & PRIV., Spring/Summer 2020, at 6, 8–9, https://journals.ala.org/index.php/jifp/article/view/7208/10293 [https://perma.cc/LQ2R-AZZK].

reinvigorated, in great part, by religious groups and the conservative right in a manner that closely reflects the emergence of the larger "culture wars" political movement that has since followed the 2016 election.[12] However, in response to book-banning attempts from the right, several states have seen movements coming from the left to remove religious literature, including the Bible, from public and school libraries.[13] This part covers the history of censorship throughout the United States and how it has led to contemporary book-banning movements. Then, it discusses the current Fifth Circuit Court of Appeals case *Little v. Llano County* as a specific instance of modern book banning. This includes the factual background that led to the lawsuit, and the legal issues and arguments undertaken by each side.

A. A Brief History of American Book Banning

Historical relevance for book banning in the United States began as a religious backlash to the introduction of a more secular counter-culture in colonial America with "anti-Puritanical" works like Thomas Morton's *New English Canaan*.[14] Morton and his

12. Eesha Pendharkar, *Who's Behind the Escalating Push to Ban Books? A New Report Has Answers*, EDUCATIONWEEK, https://www.edweek.org/leadership/whos-behind-the-escalating-push-to-ban-books-a-new-report-has-answers/2022/09 [https://perma.cc/G4XW-CVMF] (last updated Sept. 28, 2022); Jonathan Allen & Hannah Beier, *How Christian Groups Helped Parents Pull Books from Some Pennsylvania School Libraries*, REUTERS (June 24, 2023, 4:26 PM), https://www.reuters.com/world/us/how-christian-groups-helped-parents-pull-books-some-pennsylvania-school-2023-06-24/ [https://perma.cc/2R2F-4PRX]; *see also* Eric W. Dolan, *Study Provides Insight into How Culture War Issues Contributed to Trump's Rise to Power*, PSYPOST (Mar. 20, 2023), https://www.psypost.org/study-provides-insight-into-how-culture-war-issues-contributed-to-trumps-rise-to-power/ [https://perma.cc/4YMF-L6FC].

13. Kelsey Dallas, *The Bible Was Removed from Libraries in This Texas School District*, DESERETNEWS (Aug. 18, 2022, 4:00 PM), https://www.deseret.com/faith/2022/8/18/23311833/why-bible-was-removed-from-libraries-texas-school-district [https://perma.cc/8ETG-AM2V]; Sam Metz, *Utah District Bans Bible in Elementary and Middle Schools 'Due to Vulgarity or Violence,'* AP NEWS (June 2, 2023, 5:26 PM), https://apnews.com/article/book-ban-school-library-bible-fc025c8ccf30e955aaf0b0ee1899608a [https://perma.cc/4PEA-LV8F]; Jenny Brundin, *After a Colorado Springs School District Banned Several Books, One Parent Is Requesting They Pull the Bible, Too*, CPR NEWS (June 29, 2023, 1:05 PM), https://www.cpr.org/2023/06/29/colorado-springs-school-district-book-bans-bible/ [https://perma.cc/5SVS-VNL9]; Alaijah Brown, *'Nontheistic' Nonprofit Calls for Bible Ban in Leon Schools, Citing Moms for Liberty Efforts*, TALLAHASSEE DEMOCRAT, https://www.tallahassee.com/story/news/local/2023/07/18/leon-schools-told-to-ban-bible-after-banning-books-for-moms-for-liberty/70420067007/ [https://perma.cc/CZA3-MTAE] (last updated July 18, 2023, 2:51 PM).

14. Matthew Taub, *America's First Banned Book Really Ticked Off the Plymouth Puritans*, ATLAS OBSCURA (Nov. 1, 2019), https://www.atlasobscura.com/articles/americas-first-banned-book [https://perma.cc/HNS9-UF6U]. While this was one of the earliest instances of religious book banning in the colonial United States, religious groups like the Puritans had been banning books, either by law or by fire, since the seventeenth century.

works were seen as a threat to the greater religious values held by the Puritans and their pious way of life.[15] He consistently criticized the strict and suppressive policies of the colony and strove to integrate indigenous groups and their culture into the lives and culture of the Puritans.[16] However, because the colony's leadership disagreed with these ideas, they refused to print Morton's work and likely destroyed any copies that had slipped past their printers.[17] Morton arguably received a light sentence for his works and ideology, merely being exiled, imprisoned, and then exiled again.[18] The prominence and power of religious leaders in the colonies, paired with the lack of any formal constitutional rights, meant that not only could authors of controversial books or pamphlets have their works burned or banned, but that the authors themselves could be banned as heretics.[19]

By the 1850s, religious controversies were temporarily replaced by concerns over abolition, leading to the Confederacy's prohibition of Stowe's *Uncle Tom's Cabin* in multiple states for expressing sentiments against slavery.[20] However, after the Civil War abolished slavery, the Comstock Act, which criminalized the possession or mailing of "obscene" or "immoral" texts, highlighted a new era of book banning for moral and religious motivations.[21] This Act was drafted, in part, by Evangelical activist Anthony Comstock and enforced for the better part of a century.[22] It gave government officials extensive discretion to search, seize, and

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This included the requirement to obtain a license from a Puritan-regulated authority to print or sell books, and several orders to burn books deemed heretical or offensive. *Religious Book Bans: The History of Book Bans (Part 2)*, CARE HARDER, https://www.careharder.com/blog/history-of-religious-book-bans [https://perma.cc/CFH2-LXNW] (last visited Feb. 4, 2024).

15. Chris Klimek, *A Brief History of Banned Books in America*, SMITHSONIAN MAG. (Oct. 5, 2023), https://www.smithsonianmag.com/history/a-brief-history-of-banned-books-in-america-180983011/ [https://perma.cc/8T8K-KZB2].

16. *Id.*

17. *Id.*

18. *See* Mindy Johnston, *Thomas Morton*, BRITANNICA, https://www.britannica.com/biography/Thomas-Morton [https://perma.cc/GU4D-9RPG] (last visited Feb. 4, 2024).

19. Erin Blakemore, *The History of Book Bans—and Their Changing Targets—in the U.S.*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states [https://perma.cc/V8GU-MT4Z] (last updated Sept. 20, 2024).

20. Amy Brady, *The History (and Present) of Banning Books in America*, LITERARY HUB (Sept. 22, 2016), https://lithub.com/the-history-and-present-of-banning-books-in-america/ [https://perma.cc/WA96-VGTK].

21. Blakemore, *supra* note 19.

22. Jonathan Friedman & Amy Werbel, *The Comstock Law at 150: A Highly Relevant Cautionary Tale for Today*, HILL (Mar. 3, 2023, 2:00 PM), https://thehill.com/opinion/education/3882873-the-comstock-law-at-150-a-highly-relevant-cautionary-tale-for-today/ [https://perma.cc/5AF5-32MV].

destroy citizen's private mail and other published materials, as well as "to fine and imprison writers and booksellers [for creating or distributing illicit works], as well as anyone found in possession of material deemed illicit."[23] This resulted in the burning of millions of published works and the arrest of over 3,000 individuals for writing or possessing works covering then controversial topics like sexuality, abortion, equality of the sexes, separation of church and state, and atheism.[24]

Because we are no longer arresting authors and burning their works, it might seem reasonable to assume that book banning in our more socially relaxed contemporary democratic society would be negligible and mostly inconsequential. In the years leading up to 2020, the average American would have likely perceived the removal of books from schools, bookstores, and public libraries as an insignificant issue.[25] However, book banning has been a prevalent issue throughout the twentieth and twenty-first centuries and is seeing a great resurgence in the 2020s.[26]

B. Little v. Llano County*: A Case Study for Modern Book Banning*

While there have been efforts to remove books throughout the country, this recent resurgence in banning attempts can be seen clearly in the case *Little v. Llano County*.[27] *Little* is currently pending in the Fifth Circuit Court of Appeals.[28] This case, which initially seemed to only affect the small population of roughly 20,000 people[29] in the central-Texas county, has gained national

23. *Id.*

24. *Id.* Notably, the censorship and imprisonment under the Comstock Act took place despite the country having a strong Constitution meant to protect fundamental rights to free speech and expression, and against forcing religious values, and unreasonable searches and seizures by the federal government. *See* U.S. CONST. amends. I, IV.

25. *See generally Voter Perceptions of Book Bans in the United States — September 2022*, EVERY LIBR. INST. (Sept. 2022), https://www.everylibraryinstitute.org/bookbanpoll [https://perma.cc/TJ28-CNAM] (reporting survey statistics on differences in belief regarding whether books should be banned based on factors including 2020 presidential election vote); *Banned in the USA: The Mounting Pressure to Censor*, PEN AM. (Sept. 1, 2023), https://pen.org/report/book-bans-pressure-to-censor/ [https://perma.cc/NQH7-6H5C].

26. Brady, *supra* note 20.

27. *See* Klimek, *supra* note 15.

28. Andrew Albanese, *On Appeal, Llano County Seeks Book Ban Ruling that Would Upend Public Libraries*, PUBLISHERS WKLY. (Sept. 25, 2024), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/96015-on-appeal-llano-county-seeks-book-ban-ruling-that-would-upend-public-libraries.html [https://perma.cc/CXK4-PXZE].

29. *Quick Facts: Llano County, Texas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/llanocountytexas [https://perma.cc/BL5R-K848] (last visited Oct. 20, 2024) (population estimates as of July 1, 2023).

attention over the last two years.[30] It is a case that provides specific insight into the overall trend toward book banning and may have broad implications for First Amendment rights across the country, which is greatly concerning to civil rights groups, attorneys, publishers, and library patrons across the country.[31] The following section will recount the factual and procedural background in order to highlight an example of a typical contemporary book-banning case.

1. Factual and Procedural Background. In 2021, Republican State Representative Matt Krause compiled a list of 850 books that contained materials that he believed "might make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex."[32] This list, paired with Krause's request for schools to report whether their libraries contained the books on the list, created concern within Texas's educational system, as many saw this as an attempt to target books that could inform students on controversial but important issues like critical race theory and LBGTQ+ identity.[33] Krause's list caught the attention of various activist groups who proceeded to reach out to public and school librarians across the state, demanding to know if the libraries were putting "pornography" on their shelves that could poison the minds of their children.[34]

Shortly after the release of Krause's list, several residents of Llano County were inspired to create an activist group to demand the removal of seventeen books that they deemed inappropriate from the Llano County Library System, which includes Llano Library, Kingsland Library, and Lakeshore Library.[35] In response to these

30. David Montgomery & Alexandra Alter, *Texas County Keeps Public Libraries Open Amid Book Ban Controversy*, N.Y. TIMES, https://www.nytimes.com/2023/04/13/books/book-bans-libraries-texas-llano.html [https://perma.cc/KJV5-U9N9] (last updated Apr. 13, 2023, 7:55 PM).

31. Alejandro Serrano, *Llano County Libraries Case Has Lawyers and Publishers Worried About Existing Legal Precedents*, TEX. TRIB. (June 19, 2023, 5:00 AM), https://www.texastribune.org/2023/06/19/llano-county-books-legal/ [https://perma.cc/3H4S-F63U].

32. Bill Chappell, *A Texas Lawmaker Is Targeting 850 Books That He Says Could Make Students Feel Uneasy*, NPR (Oct. 28, 2021, 1:00 PM), https://www.npr.org/2021/10/28/1050013664/texas-lawmaker-matt-krause-launches-inquiry-into-850-books [https://perma.cc/LH8N-G83Q].

33. *Id.*

34. *See* Micheal Powell, *In Texas, a Battle Over What Can Be Taught, and What Books Can Be Read*, N.Y. TIMES, https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html [https://perma.cc/F3VN-GRUR] (last updated June 22, 2023).

35. Plaintiffs' Rule 65 Motion for Preliminary Injunction at 2, 5–6, Little v. Llano Cnty., No. 1:22-cv-00424-RP, 2023 WL 2731089 (W.D. Tex. May 9, 2022); TER Staff, *Texas County Must Reinstate 8 Books to Its Libraries According to an Appeals Court*, EDUCATOR'S

demands, Llano County closed its three libraries in December of 2021 to "inventory" all of the books in their library catalog.[36] After inventory procedures, the library's director decided to remove the seventeen books from the shelves.[37] These books included those covering topics like LGBTQ+ issues, including Jazz Jennings's *Being Jazz: My Life as a (Transgender) Teen* and Jonathan Evison's *Lawn Boy*, as well as racial issues like Susan Campbell Bartoletti's *They Called Themselves the KKK: The Birth of an American Terrorist Group*.[38] Another group of targeted books were children's picture books deemed to have "pornographic nudity" including Maurice Sendak's *In the Night Kitchen* and *I Need a New Butt!* by Dawn McMillan.[39] Coinciding with the removal of these print books, the library terminated its patrons' access to a previously accessible electronic book (e-book) software, where over 17,000 e-books had previously been accessible.[40]

In January of 2022, shortly after the removal of the print books and the termination of the e-book software, the county library system decided to replace the existing library board with a new "library advisory board."[41] This new board was mostly composed of the same activist group members who had initially proposed the book removals, and its purpose was to facilitate the filtering and approval of new books into the library system.[42] Then, the advisory

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ROOM (June 8, 2024), https://theeducatorsroom.com/texas-county-must-reinstate-8-books-to-its-libraries-according-to-an-appeals-court/ [https://perma.cc/RW34-MHUU].

36. Plaintiffs' Rule 65 Motion for Preliminary Injunction, *supra* note 35, at 7.

37. Little v. Llano Cnty., 103 F.4th 1140, 1144 (5th Cir. 2024).

38. Brooke Park, *Residents Sue Llano County Officials, Library Director, Board Members to End Book Bans*, TEX. TRIB. (Apr. 25, 2022, 11:00 AM), https://www.texastribune.org/2022/04/25/texas-public-library-bookbans-lawsuit-llano/ [https://perma.cc/XW6K-HJPA]; Montgomery & Alter, *supra* note 30; Asher Price, *Legal Costs in Texas Book Ban Fight Continue to Rise*, AXIOS AUSTIN (June 23, 2023), https://www.axios.com/local/austin/2023/06/23/legal-cost-texas-book-ban [https://perma.cc/CC9C-7TTX].

39. *Little*, 103 F.4th at 1144–45. Dawn McMillan's *I Need a New Butt!* has come under fire for being "inappropriate" for small children because it refers to "butts in various colors, shapes and sizes," including the main character's own, which is, unfortunately, "crack[ed]." Victoria Bekiempis, *Mississippi Teacher Fired for Reading* I Need a New Butt! *to Children*, GUARDIAN (Mar. 13, 2022, 1:00 AM) https://www.theguardian.com/us-news/2022/mar/12/i-need-a-new-butt-teacher-fired-mississippi [https://perma.cc/7TBD-SSA2]. Maurice Sendak's *In the Night Kitchen*'s controversy stems from the belief that the main character, a young boy, was meant to desensitize children to nudity, because he falls out of his pajamas at the beginning of the book. Angela Maycock, *Timeline Entry for 1985:* In the Night Kitchen, AM. LIBR. ASS'N: INTELL. FREEDOM BLOG (Sept. 4, 2012), https://www.oif.ala.org/timeline-entry-for-1985-in-the-night-kitchen/ [https://perma.cc/MDA8-FLAL].

40. Plaintiffs' Rule 65 Motion for Preliminary Injunction, *supra* note 35 at 7–8.

41. *Id.* at 8.

42. *Id.*

board closed its meetings to the public.[43] Following opposition to the deviation from standard-library procedure by some of the librarians, including the then-head-librarian of the Kingsland branch, several employees were let go for insubordination.[44]

In March 2022, in response to the removal of the books from the library and the cancellation of the e-book software, a group of seven patrons of the Llano County Library System filed a suit against Llano County, its judge, commissioner, and the members of the new library advisory board.[45]

On June 6th, 2024, the Fifth Circuit released a set of opinions partially affirming and partially modifying the U.S. District Court for the Western District of Texas's decision to grant plaintiffs' request for a temporary injunction.[46] This 2–1 decision consisted of three separate opinions authored by Judges Weiner, Southwick, and Duncan.[47] The majority ultimately decided that eight of the seventeen books in question must be returned "to the publicly visible and accessible shelves of the Llano County Libraries."[48] The decision prompted multiple requests by judges and the defendants' counsel that the case be reheard en banc with additional oral arguments, and it is scheduled to take place in the latter half of September 2024.[49] Ultimately, while many of the books in question will (for now) remain on Llano County Library shelves, the en banc hearings and the likelihood of further post-injunction hearings leave the fate of the

43. *Id.* at 9.

44. *See, e.g.*, Nabil Remadna, *Llano County Librarian Loses Job After Not Removing Books*, KXAN, https://www.kxan.com/news/local/hill-country/llano-county-librarian-loses-job-after-not-removing-books/ [https://perma.cc/A2JZ-8Y4R] (last updated Mar. 18, 2022, 2:25 PM). The "insubordination" that led to former head-librarian Suzette Baker's termination on March 9, 2022, included not hiding a book on critical race theory behind the library's circulation desk and vocally protesting decisions like a ban on ordering new books or accepting donations. Brooke Park, *Texas Librarians Face Harassment as They Navigate Book Bans*, KERANEWS (May 17, 2022, 9:43 AM), https://www.keranews.org/education/2022-05-17/texas-librarians-face-harassment-as-they-navigate-book-bans [https://perma.cc/HZ8J-SDVC]. Baker has since filed her own civil suit "against Llano County, its judge and commissioners, the library system's director, and four members of the county's Library Advisory Board." Suzanne Freeman, *Fired Kingsland Librarian Files Civil Suit Against Llano County*, DAILY TRIB. (Mar. 5, 2024), https://www.dailytrib.com/2024/03/05/fired-kingsland-librarian-files-civil-suit-against-llano-county/ [https://perma.cc/99T9-3FHM].

45. Serrano, *supra* note 31; Park, *supra* note 38.

46. Little v. Llano Cnty., 103 F.4th 1140, 1157 (5th Cir. 2024); Ed Whelan, *Federal Judges as 'Library Police,'* NAT. REV. (June 10, 2024, 11:32 AM), https://www.nationalreview.com/bench-memos/federal-judges-as-library-police/ [https://perma.cc/8GD3-W2NM].

47. Whelan, *supra* note 46.

48. *Little*, 103 F.4th at 1157.

49. E-mail from Leila Green Little, lalubean@gmail.com, to undisclosed-recipients (July 6, 2024, 1:05 PM) (on file with author). The editing process for this Comment was completed before the hearings occurred.

books and the ultimate question of the legality of their removal under the First or Fourteenth Amendments deeply uncertain.[50]

2. Legal Arguments. A large part of both the plaintiffs' and defendants' cases rely on the First Amendment.[51] This includes a debate over the amount of discretion that public libraries hold over their content and collection decisions and thus, what constitutes "content and collection" decisions.[52] Both sides also grapple with the distinction between public libraries and school libraries, which has only partially been described by the court, and currently leaves a lot of flexibility in interpretation.[53] Further, the plaintiffs raise the issues of whether the defendants had reason for removal beyond disagreeing with the subject matter.[54]

The defendants claim that First Amendment protections are not applicable to public libraries, because the Supreme Court has recognized that public libraries should be given broad discretion over decisions regarding the library's content and collection.[55] They interpret this to mean that government officials, including the public figures in this case, have more constitutional authority to restrict speech and access to information under the First Amendment than usual.[56] Therefore, they can remove the books, which they contend are part of the collection of content available through the library to the public.[57]

However, the plaintiffs disagree with the scope of this discretion on multiple fronts.[58] They contend that "this discretion is not absolute, and it applies only to materials' selection."[59] Firstly, they believe that previous interpretations in this area require that this discretion cannot be exercised merely because someone

50. *Little v. Llano County (23-50224)*, COURTLISTENER, https://www.courtlistener.com/docket/67132921/little-v-llano-county/ [https://perma.cc/E3WA-8EHW] (last visited Feb. 4, 2024).

51. Little v. Llano Cnty., No. 1:22-CV-424-RP, 2023 WL 2731089, at *5, *7 (W.D. Tex. Mar. 30, 2023), *aff'd as modified*, 103 F.4th 1140 (5th Cir. 2024), *reh'g en banc granted*, *vacated*, 106 F.4th 426 (5th Cir. 2024).

52. *Id.* at *7.

53. *Id.* at *7–9.

54. *Id.* at *5, *8.

55. *Id.* at *8–9; *see, e.g.*, United States v. Am. Libr. Ass'n, 539 U.S. 194, 200, 204 (2003) (plurality opinion) (stating, in a case regarding the Child Internet Protection Act's limitation on library funding to libraries who install software intended to block pornography on library computers, that "[t]o fulfill their traditional missions [of facilitating learning and cultural enrichment], public libraries must have broad discretion to decide what material to provide to their patrons").

56. *Little*, 2023 WL 2731089, at *8–9.

57. *Id.* at *8.

58. *Id.*

59. *Id.*

"simply . . . dislike[s] the ideas contained in these books."[60] Thus, defendants, like the members of the activist group, cannot request the removal of the books in question because they believe that they are profane or contrary to their religious values.[61] Furthermore, defendant state actors like the County or their librarians also cannot remove the books based on their own values, the values of the citizens that they represent, or the patrons that they serve.[62]

Further, the plaintiffs distinguish between the discretion to remove books that had already been accepted into the library through standard procedure and the discretion to choose what enters the library during "their collection selection process."[63] Libraries are required to follow a standard procedure for purchasing, replacing, and weeding books from their collections, commonly with the Continuous Review, Evaluation, and Weeding (CREW) method.[64] This procedure is enforced in all ALA-accredited libraries, and requires that certain guidelines are followed before books are removed from a library.[65] This criterion does not include whether the books are offensive to library staff or patrons.[66] Therefore, once a book is accepted into library circulation, it becomes very difficult to remove, especially for popular books or books in smaller libraries

60. *Id.*

61. *Id.* at *10.

62. *Id.* at *10–11.

63. *Id.* at *8.

64. *Selection Criteria*, AM. LIBR. ASS'N, https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/criteria [https://perma.cc/MMX5-4EC9] (last updated Jan. 2018). While the ALA provides more flexibility to libraries and their individual librarians in the selection process, entities such as the Texas State Library and Archives Commission have made removing, and even replacing books from the library incredibly restrictive. *See id.* The ALA allows for libraries to create their own selection criteria for *adding* books into their library system. Specifically, the ALA states:

> Selection policies should include specific criteria to guide professionals in purchasing items." *Id.* "The criteria should be relevant to the library's objectives: excellence (artistic, literary, visual, etc.), appropriateness to level of user, authoritative and varying perspectives on controversial issues, accessibility, and ability to stimulate further intellectual and social development." *Id.* "Librarians should consider authenticity, public demand, general interest, content, and circumstances of use." *Id.* "For libraries serving minors, librarians should consider age, social and emotional development, intellectual level, interest level, and reading level.

Id. In contrast, the CREW method creates heavy restrictions on when librarians may remove books. *See* JEANETTE LARSON, CREW: A WEEDING MANUAL FOR MODERN LIBRARIES 17 (2012). For example, juvenile fiction should not be weeded (removed) from the library's collection unless it has not circulated in 2–3 years. *Id.* at 33. Nonfiction is typically not removed unless it is extremely outdated or there is another book in the system that adequately fills the information gap that would be created without the book. *Id.* at 34–35.

65. *See Selection Criteria*, *supra* note 64.

66. *Id.*

with less available resources.[67] This reasoning clashes with the argument that the broad discretion enjoyed by libraries extends to the weeding of books, and strengthens the idea that this broad discretion is limited to the acquisition of new resources and content for the library's collection. Because of this, the plaintiffs contend that the non-CREW-compliant weeding of the seventeen "inappropriate" books was intended to "prevent access to viewpoints and content to which they objected" and therefore, was beyond the scope of what the court's understanding of discretion allowed.[68]

III. HISTORICAL FIRST AMENDMENT CASE LAW AND ITS IMPLICATIONS ON *LITTLE*

Throughout their arguments, both parties in *Little* refer to significant case law that supports the arguments discussed in Section II.B.[69] While Fourteenth Amendment concerns are raised in *Little*, the issues at the heart of the case directly relate to the First Amendment.[70] Constitutional law cases spanning back from the mid-twentieth century can help inform parties and observers on potential holdings on these issues from the Fifth Circuit, and potentially the Supreme Court.[71] This part surveys some of the relevant case-law precedent that will almost certainly be discussed in book-banning litigation at large. It begins with arguably the most pertinent case on book banning in libraries: *Board of Education v. Pico*. It will first provide an overview of the facts and legal issues that helped determine the case outcome, as many of these issues are also salient to *Little*. Then, it will discuss how a modern court may or may not interpret the issues in *Little* in light of the various issues in *Pico*. This part will discuss book banning through the lens of obscenity and the *Miller* test and it will begin with a broad overview of the *Miller* test as it is described in *Miller v. California*. Then, it will apply the three prongs of the *Miller* test to the books in question in *Little*.

67. *Id.*

68. *Little*, 2023 WL 2731089, at *9–10.

69. *Id.* at *8–9.

70. *Id.* at *1, *7–9.

71. *See generally Precedent*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/precedent [https://perma.cc/469N-QHME] (last updated Mar. 2024) (defining "precedent").

A. Board of Education v. Pico *as the Seminal Library Case*

Board of Education v. Pico stands as one of the most significant Supreme Court cases that addresses whether public school officials possess the authority to remove books from school libraries.[72] In February of 1976, officials from the Island Trees School District made the controversial decision to remove eleven books from their high school and junior high libraries at the suggestion of some of their students' parents.[73] The officials were "unofficially direct[ed]" by these parents who had recently attended a conference about New York's education legislation.[74] Their reasoning behind removal came from a perceived sense of moral obligation, as they believed that the books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[75]

Shortly afterward, the Island Trees School Board established a book review committee comprised of their own school staff and parents of Island Tree students.[76] The committee was tasked with reading the listed books and determining whether they should remain removed from the libraries based on their "good taste, relevance, and appropriateness to age and grade level."[77] After committee deliberation, the school board decided to return only two of the books back to its library shelves.[78] In response to the removal, Island Trees students brought claims that the removals denied them their First Amendment rights.[79]

Specifically, the students alleged that the school board had "ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational

72. Bd. of Educ. v. Pico, 457 U.S. 853, 855–56 (1982) (plurality opinion).

73. *Id.* at 856–57.

74. *See id.* (explaining that this conference was sponsored by the politically conservative organization: Parents of New York United (PONYU)). The PONYU conference distributed a list of "objectionable" books to its attendees. *Id.* at 856. All eleven of the books removed from the school district's libraries were included on this list. *Id.*

75. *Id.* at 857 (alteration in original) (quoting Bd. of Educ. v. Pico, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

76. *Id.* at 857.

77. *Id.* (internal quotation marks omitted).

78. *See id.* at 858 (demonstrating that the committee ultimately decided to recommend that five of the eleven books be returned to the libraries). The committee recommended that two books be removed. *Id.* Three of the remaining books had no clear designation by the committee, and the last book was recommended to be available to students only with approval by their parents. *Id.* Ultimately, the School Board ignored these suggestions by the committee. *Id.*

79. *Id.* at 858–59.

value."[80] They believed that the school board was acting out of an "impermissible desire to suppress ideas" rather than "a justifiable desire to remove books containing vulgarities and sexual explicitness."[81] Therefore, they did not have a legitimate interest that was strong enough to override the students' abilities to access those books in their school library.[82] The Supreme Court ultimately agreed with the students.[83]

Notably, Justice Brennan began the majority's legal reasoning with a disclaimer.[84] Brennan stated, "[w]e emphasize at the outset the limited nature of the substantive question presented by the case before us. Our precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and the classroom."[85] This is significant because the majority bolsters a large part of their opinion on their perceived difference between the required reading that comes with the "curriculum and classroom" and optional readings.[86] They note that the parents, in this case, do not seek for the Court "to impose limitations upon their school Board's discretion to prescribe the curricula of [their] schools" but rather "*library* books, books that by their nature are optional rather than required reading."[87]

The Court reasons that, typically, local school boards have broad authority, when acting as state and local authorities, to make decisions on how they choose to direct their students.[88] This usually means that federal courts will allow a great amount of discretion to school boards before they intervene in each school's daily operations.[89] This is significant because public libraries' purpose for existing is materially different from school libraries.[90]

80. *Id.*

81. *Id.* at 861, 871–72.

82. *Id.* at 860.

83. *Id.* at 866.

84. *Id.* at 861.

85. *Id.*

86. *Id.* at 861–62.

87. *Id.* at 862 (emphasis in original). Justice Brennan himself italicized the word "library" in the opinion. I find this notable, as he uses italics frequently throughout this paragraph of the opinion. Later in this paragraph, Justice Brennan also compares the "*acquisition*" of books to their "*removal*." *Id.* ("Respondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by the school authorities, or without objection from them.").

88. *Id.* at 863–64.

89. *Id.* at 864.

90. *See* MD. Ashikuzzaman, *The Difference Between Public Libraries and School Libraries*, LIS EDUC. NETWORK, https://www.lisedunetwork.com/the-difference-between-public-libraries-and-school-libraries/ [https://perma.cc/956A-53VP] (last updated Dec. 17, 2023).

While it is true that public libraries do provide educational materials, and even educational programming for patrons, this does not make them schools: especially when considering removing materials from the libraries.[91] In fact, the main comparison that the majority makes between school libraries and public libraries helps to support the notion of protected access to information in both. The Court states that "[a] school library, no less than any other public library, is 'a place dedicated to quiet, to knowledge and to beauty.'"[92] Thus, "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[93] In this way, free speech is not limited just to the ability to express ideas, but also to access information that informs one's ability to express those ideas.[94]

A court following this rationale in *Pico* should have a difficult time favoring the removal of the seventeen-questioned books in *Little*. With even a quick glance, there are clearly many similarities between *Pico* and *Little*. First, in both cases, the direction to remove the books from the shelves came primarily from parents with children who lived in the community.[95] Second, the parental groups in both cases have religious and moral motivations that inspired them to request the removal of the books.[96] Third, a short time after the requests were made in both cases, the governmental entity allowed for the creation of a group comprised of interested parties that would review controversial literature and advise the governmental entities on whether they should retain or remove the content from their library.[97] The key difference here, at least for the defendants, is the distinction between school libraries and public libraries.

However, this distinction should be irrelevant. The Court goes through great effort to distinguish a government entity's control of optional reading and its control over curriculum and classroom.[98] In fact, the decision in *Pico* essentially hinges on this distinction. Justice Brennan makes it very clear that school administration, as agents of

91. *Id.*

92. *Pico*, 457 U.S. at 868 (quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966) (opinion of Fortas, J.)).

93. *Id.* (quoting Kevishian v. Bd. of Regents, 385 U.S. 589 (1967)).

94. *Id.* at 868–69.

95. *See id.* at 856, 891; Plaintiffs' Rule 65 Motion for Preliminary Injunction, *supra* note 35, at 6.

96. *Pico*, 457 U.S. at 857; Plaintiffs' Rule 65 Motion for Preliminary Injunction, *supra* note 35, at 6.

97. *Pico*, 457 U.S. at 857; Plaintiffs' Rule 65 Motion for Preliminary Injunction, *supra* note 35, at 3, 8.

98. *Pico*, 457 U.S. at 862.

the government, have the authority to control what material is taught to their students to advance their interest in education.[99] However, the optional readings that students choose to do in their free time are *not* linked to this interest.[100] The public library is optional. It is a place for students, and every other member of the public to choose to enter and choose which books, if any, they would like to check out and read. The public library does not give assigned reading homework. While libraries surely advance the compelling interest of educating the masses, they provide a broad array of options so that individuals may choose how they would like to be educated.[101] Thus, government entities like librarians or commissioners do not have an interest that overrides the strong First Amendment liberties of their patrons.[102]

B. Miller *and the Obscenity Test*

While not necessarily involved with materials in libraries, the *Miller* test still provides an important framework for determining whether the state can regulate certain speech without violating the First Amendment. In 1957, the Supreme Court decided in *Roth v. United States* that obscenity does not fall under the umbrella of constitutionally protected speech or press provided by the First Amendment.[103] However, once the Court deemed obscene materials unprotected, it was clear that they needed a more solid standard to explain what "obscenity" meant. While the "prurient interest" standard created in *Roth* could provide some instruction, the obscenity litigation that soon began to flood the Court clearly displayed that confusion still remained.[104] The legal world finally got its answer in the 1972 case *Miller v. California*.

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99. *Id.* at 864.

100. *Id.* at 869.

101. *See* Ashikuzzaman, *supra* note 90.

102. I am hesitant to label the exact level of scrutiny that the Court uses to decide *Pico* (especially because they did not label it themselves). However, I believe they are utilizing strict scrutiny here. It is clear they used a traditional balancing test by weighing the interests of the school board to regulate student activity with the consistent and fundamental safeguards enjoyed by the students to exercise their First Amendment rights. *Pico*, 457 U.S. at 866. The Court categorizes these rights as "'basic constitutional values' [that] are 'directly and sharply implicated'" in the conflict between the students and school officials. *Id.* at 866. This seems to hint at the traditional strict scrutiny that courts apply in free speech cases. *See* David L. Hudson Jr., *Strict Scrutiny*, FREE SPEECH CTR., https://firstamendment.mtsu.edu/article/strict-scrutiny/ [https://perma.cc/Z5ND-PY54] (last updated July 2, 2024).

103. Roth v. United States, 354 U.S. 476, 485 (1957).

104. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). Nearly a decade after *Roth*, the best the Court could provide was a plurality opinion with no agreed-upon rationale. While iconic, Justice Stewart's "I know it when I see it," did little to provide guidance in a pre-*Miller* world. *See id.* at 196–97 (Stewart, J., concurring).

Miller involved a mass mailing campaign that advertised "adult" materials.[105] In order to determine whether the pamphlets were considered obscene, the Court created the three-pronged "*Miller* test." For a work to be considered obscene under this test, it must satisfy all three prongs of the test. The first prong, established in *Roth*, asks whether "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[106] The second prong asks "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[107] Finally, the third prong of the test asks "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[108]

The reason *Miller* is raised here is to evaluate whether the books in *Little* are considered obscene by current legal standards. If they do meet the muster for obscenity, then there is a chance that they could be regulated by the state, regardless of the discretion discussion in Section III.A, because obscenity simply does not enjoy protection under the First Amendment. As discussed in Section II.B, there were several books identified by defendants as inappropriate for children.[109] These included those covering LGBTQ+ issues: *Being Jazz: My Life as a (Transgender) Teen* and *Lawn Boy*, as well as the children's picture books with "pornographic nudity": *In the Night Kitchen* and *I Need a New Butt*. *Lawn Boy* notably contains descriptions of nudity and genitalia alongside their LGBTQ+ themes.[110] *In the Night Kitchen* and *I Need a New Butt* both contain partial nudity in their illustrations.[111]

105. Miller v. California, 413 U.S. 15, 16 (1973).

106. *Id.* at 24.

107. *Id.*

108. *Id.*

109. *See supra* Section II.B.

110. The full extent of the sexual nature is largely up for debate. *See* Rachel Ulatowski, *Why Conservatives Are Manufacturing Controversy Over this Coming-of-Age Novel*, MARY SUE (Sept. 6, 2023, 10:35 AM), https://www.themarysue.com/lawn-boy-book-controversy-explained/ [https://perma.cc/YC84-4LE3] (explaining the controversial passages in question are "not graphically portrayed at all and merely allude[] to 'innocent experimentation' between two boys of the same age"). *But see* Monica Chen, *"Lawn Boy" IS Pedophilic. Here's Why. (Explicit)*, SPRING MAG. (Jan. 28, 2022), https://thespringmagazine.com/2022/01/28/lawn-boy-is-pedophilic-heres-why-explicit/ [https://perma.cc/R8QY-ZHCV] (detailing how various "disturbing passages" included in the novel are "pedophilic, exploitative and abusive . . . beyond the swear words and the sexual passages").

111. *See supra* note 39.

However, depictions of nudity and genitalia do not, in and of themselves, constitute obscenity. When analyzing obscenity, the court still falls back on the aforementioned *Miller* test. The first issue is whether these books, taken as a whole, appeal to the prurient interest. This is clearly up for debate given that there are groups on both sides who are willing to argue about these books' offensiveness or lack thereof. The second prong evaluates the relevant state obscenity statute.[112] In Texas, obscenity includes, among other things, descriptions of "the male or female genitals in a state of sexual stimulation or arousal."[113] By this definition, it seems like a book like *Lawn Boy* might not pass muster. However, obscenity in Texas is conjunctive and also requires the same third prong as the *Miller* test to fail in order for the work to be considered obscene.[114] The third prong stands for the prospect that even if the first two prongs are satisfied, a work is still not considered obscene if it has serious literary, artistic, political, or scientific value.[115] There is a strong argument that books like *Lawn Boy* contain serious literary, artistic, and political value. In such a tense political climate, books like *Lawn Boy* explore topics like race, class, and sexuality, and the experience of being a kid struggling to fit in a world with constant pressure to belong.[116] The opportunity to explore these themes is a valuable literary contribution to a student (or anyone else) who may not have other outlets to learn these lessons.

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112. Texas's relevant obscenity statute defines obscene material in a similar way to the *Miller* standard. The second prong, however, provides a little more guidance:

> (1) "Obscene" means material or a performance that . . .
>
> . . . .
>
> (B) depicts or describes:
>
> (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or
>
> (ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs.

TEX. PENAL CODE § 43.21.

113. *Id.*

114. *Id.*

115. *See* Miller v. California, 413 U.S. 15, 24 (1973).

116. *See* Sarah Mack, Lawn Boy*, Gender Queer Shouldn't Be Banned, They Should Be Celebrated*, FOREST SCOUT (Dec. 3, 2021), https://theforestscout.com/34659/in-our-opinion/to-ban-or-not-to-ban-a-students-perspective/ [https://perma.cc/AP5F-5PR5].

IV. THE POTENTIAL FOR A CHALLENGE UNDER THE FOURTEENTH AMENDMENT

First Amendment violations are not the only constitutional issues that arise from censoring books. This part highlights the pitfalls that may also come with trying to combat book banning from the traditional understanding of the Fourteenth Amendment's Equal Protection Clause. It begins by explaining the current framework of the Fourteenth Amendment and demonstrating instances of case law that create the recognition of various groups as "protected classes." This includes classifications based on race, gender, and sexual orientation, as well as religion. However, by highlighting the ability of the Court to recognize new protected classes over time, this part will examine the merit behind arguments for the inclusion of additional protected classes. The discussed classes will include protection based on age and protection based on socioeconomic status. Finally, this part will examine how courts may react to book-banning attempts through the existing and potentially enhanced Fourteenth Amendment Equal Protection framework.

A. A Challenge Under Equal Protection as It Currently Exists

As it currently stands, the Court recognizes a right to equal protection of fundamental rights under the law.[117] These rights stem from the Fourteenth Amendment of the Constitution, but also act to protect other rights provided in the Bill of Rights.[118] Fundamentally, the Equal Protection Clause seeks to prohibit government entities from treating various groups differently.[119] However, equal protection under the law doesn't apply to everyone de facto.[120] Rather, it requires that those seeking its protection belong to a particular protected class. These suspect classes are groups that are discriminated against based upon arbitrary classifications, including race, ethnicity, or national origin.[121]

Further, just because an individual belongs to any of these particular protected classes does not necessarily mean that they will receive the same level of protection from government

117. *Equal Protection*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/equal_protection [https://perma.cc/2AM6-EJQ6] (last updated Nov. 4, 2022).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Suspect Classification*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/suspect_classification [https://perma.cc/M485-A22U] (last updated June 2024).

discrimination.[122] The Supreme Court has provided various levels of scrutiny that apply to different groups.[123] Strict scrutiny is the highest level, and it is applied to laws that classify individuals based on suspect categories such as race or ethnicity. It requires the government to prove that they are following the most narrowly tailored policy possible to serve a compelling state interest.[124] Intermediate scrutiny applies to laws involving gender or legitimacy, and it requires that the government shows that the classification serves an important governmental interest. It provides slightly less protection than its strict scrutiny counterpart as the policy in question should be narrowly tailored, but does not necessarily have to be the solution with the narrowest possible means.[125] Rational basis scrutiny, the lowest level of protection, applies to all other classifications and merely requires that the government demonstrate that the policy in question has a rational connection to a policy that serves a legitimate state interest.[126]

Here, the most clearly affected traditional suspect classes are arguably groups who would find representation in the challenged books. This includes racial minorities and members of the LGBTQ+ community. Racial groups would likely have the strongest initial claim given that courts have traditionally afforded them strict scrutiny protection. Similarly to *Pico*'s First Amendment censorship analysis previously discussed in Section III.A, the government has a high bar to clear when they want to enforce a policy that selectively targets books about one race, but not another. The Court in *Pico* seems to agree that promoting education can potentially be a compelling interest.[127] However, as discussed earlier, the Court seems to cede this more to compulsory and primarily educational facilities like schools, rather than optional and additionally social- and community-oriented facilities like the public library.[128] With this in mind, it seems unlikely that defendants in *Little* would be able to overcome strict scrutiny protection and remove books focused on racial content like *They Call Themselves the KKK* without showing a lack of narrow tailoring in the policy.

122. *Id.*

123. *Id.*

124. *Strict Scrutiny*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [https://perma.cc/W96K-FTY6] (last updated Sept. 2024).

125. *Intermediate Scrutiny*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [https://perma.cc/5LDG-AMZ2] (last visited June 2023).

126. *Rational Basis Test*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test [https://perma.cc/G8PP-TNC8] (last updated Mar. 2024).

127. Bd. of Educ. v. Pico, 457 U.S. 853, 861, 864 (1982).

128. *Id.* at 861–62.

The argument for Fourteenth Amendment protections for LGBTQ+ identifying individuals is less compelling. Recent case law, including the 2015 case *Obergefell v. Hodges* has decided that the Fourteenth Amendment and its protections, at least in some instances, extend to same-sex couples.[129] However, because of this recency, the scope of these protections is still unknown. *Obergefell* says that it is unconstitutional to deny marital rights to same-sex couples, but a large part of its reasoning is dependent on an analysis of the significance of the institution of marriage.[130] Further, the Court's analysis consistently references "same-sex couples," which doesn't necessarily extend to the rights of LGBTQ+ individuals at large.[131] While the Court has ruled that some instances of discrimination against transgender individuals are impermissible, this analysis is typically framed under Title VII of the Civil Rights Act, rather than under the Equal Protection Clause.[132]

Even under the most expansive scenario, these protections seem limited, as the Court has only afforded rational basis scrutiny to LGBTQ+ individuals, meaning that sexual orientation is not considered a suspect class.[133] As discussed prior, even strict scrutiny protection would likely not provide Fourteenth Amendment protections to suspect classes when it comes to book banning. Therefore, it seems highly unlikely that the Court, as it interprets precedent today, would provide any sort of relief.

B. A Potential for Expanded Equal Protection Classifications

A related issue follows the preceding rationale: the expansion of protected-class status to groups who have not traditionally been afforded protection under the current Fourteenth Amendment framework. While, at first glance, this may seem impracticable, it is important to remember the history and context of the Fourteenth Amendment. Initially created in a set of three post-Civil War Reconstruction Era Amendments, alongside the Thirteenth and Fifteenth Amendments, the Fourteenth Amendment and its counterparts sought to promote equal rights

129. Obergefell v. Hodges, 576 U.S. 644, 675, 680–81 (2015).

130. *Id.* at 656–57.

131. *Id.* at 665.

132. Bostock v. Clayton Cnty., 590 U.S. 644, 653–54 (2020).

133. *See* Jennifer R. Covais, *Baby, We Were Born This Way: The Case for Making Sexual Orientation a Suspect Classification Under the Equal Protection Clause of the Fourteenth Amendment*, 38 TOURO L. REV. 283, 286 (2022).

and protections to newly freed slaves.[134] While the text of the Amendment provides that the government shall not "deny to *any* person within [the United States'] jurisdiction the equal protection of the laws," it has been historically understood to be limited to applying the law to various groups differently.[135]

As I will discuss in Section V.C, book banning is an issue that disproportionately affects groups that are not legally recognized as a suspect class, namely children and the socioeconomically disadvantaged. While these are not groups that are traditionally considered to warrant Fourteenth Amendment protection, and indeed may benefit more from legislative efforts, the lens of book banning provides an opportunity to consider expanding the scope of the Fourteenth Amendment. For over a century, legal scholars have considered and critiqued the socioeconomic implications of the Supreme Court's application of the Fourteenth Amendment.[136] While case law like *Griffin v. Illinois* and *Douglas v. California* does acknowledge that the law should equally protect those of all socioeconomic backgrounds, this precedent is largely limited to criminal proceedings rather than social legislation.[137] In fact, Justice Harlan believed that the appropriate question was one of due process, rather than equal protection.[138] In his view, a generally applicable economic burden by the State was completely acceptable, and it was an overstep by the Court to utilize the Equal Protection Clause to justify their decision.[139] In many ways, this is understandable. Providing suspect class status based on socioeconomic standing is both troubling because of the potential for individuals to fluctuate in and out of various economic classes, and because it could easily hinder a state from enacting any policy that would have a negative financial impact on a class that would be hard to pinpoint any given time (taxation, employment, and investment, just to name a few). And on the flip side, opening the door to protection based on socioeconomic classification could

134. Eric Foner, *The Reconstruction Amendments: Official Documents as Social History*, GILDER LEHRMAN INST. AM. HIST., https://www.gilderlehrman.org/history-resources/essays/reconstruction-amendments-official-documents-social-history [https://perma.cc/W57N-BRJB] (last visited Apr. 25, 2024).

135. U.S. CONST. amend. XIV (emphasis added).

136. *See* Robert E. Cushman, *Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 741 (1922).

137. *Overview of Wealth-Based Distinctions and Equal Protection*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-8-12-1/ALDE_00000838/ [https://perma.cc/YN6D-QSU8] (last visited May 21, 2024).

138. *Id.*

139. *Id.*

create a flood of questions on the extent of protections that those who are economically advantaged were entitled to receive.

However, I believe these concerns are less warranted when considering how various communities, especially those who are disproportionately disadvantaged, can access public resources, including institutions like a public library and the resources found within them. By not providing protection to those who are more likely to depend on these resources, courts entrench these disadvantages that bleed into the more financially oriented policies.

Further, an expansion of the Fourteenth Amendment would likely benefit the same religious groups attempting to further these bans. Currently, the Supreme Court does afford strict-scrutiny protection based on religion.[140] However, this protection is derived from the First Amendment's religion clauses, rather than the Fourteenth Amendment's Due Process or Equal Protection clauses.[141] Although many would argue that the First Amendment protections offer a strong shield against religious discrimination, the scope of these protections is still unclear. Case law like *Groff v. DeJoy* seems to suggest that the current Court is willing to expand the rights of religious individuals.[142] However, this analysis, much like the aforementioned *Bostock*, was largely dependent on Title VII, rather than the First Amendment.[143] Furthermore, case law like *Employment Division v. Smith* suggests that religious liberties have their limitations, even under a First Amendment framework.[144] Given these limitations, the potential for an expanded scope of the Fourteenth Amendment may seem like a promising solution.

V. NEGATIVE IMPACTS FOLLOWING A DECISION IN FAVOR OF LLANO COUNTY

This part will discuss the policy implications of courts favoring a First Amendment framework that encourages book banning. This Part will somewhat focus on the negative impacts that censorship will have on racial minorities and those who identify as LGBTQ+. However, it will also discuss the effect that

140. *See* Hudson, *supra* note 102.

141. *First Amendment and Religion*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion# [https://perma.cc/V5HV-Z6L7] (last visited May 21, 2024).

142. Groff v. DeJoy, 600 U.S. 447, 468, 473 (2023).

143. *Id.* at 473.

144. Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990).

newly emerging "retaliatory" book-banning attempts could have on the conservative and religious groups who initially instigated the resurgence in book banning. Through this, this part will demonstrate that when courts support book banning against one protected class, they support book banning against all protected classes, which creates an atmosphere that dangerously suppresses speech for all, and harms democratic institutions as a whole. Finally, this part will address the issue of the groups who will be most negatively impacted by book-banning attempts: children and the socioeconomically disadvantaged. It illustrates that these groups are further disadvantaged by book-banning efforts in counties like Llano that are already disadvantaged by a lowered ability to access information.[145]

A. General Impact

In a recent interview with the National Coalition Against Censorship (NCAC), Steven Pico, the named defendant in *Pico*, stated that he believed "censorship was not simply a right-wing vs. left-wing issue," but rather "offensive to the vast majority of Americans, offensive to Americans from the right, offensive to Americans from the center, and offensive to Americans from the left."[146] Following *Pico*'s logic, book banning should not be a partisan issue, especially because of its broad range of short-term and long-term negative effects on society at large.[147] These effects are not only limited to librarians and library patrons, but also students, parents, teachers, and authors of all social and political backgrounds.[148] American Civil Liberties Union (ACLU) staff attorney Vera Eidelman argues that societies that accept book banning undermine free-thinking, as well as the basic principle of

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145. *Llano County, TX*, DATAUSA, https://datausa.io/profile/geo/llano-county-tx# [https://perma.cc/2QLY-5EN4] (last visited Oct 23, 2024).

146. Debra Lau Whelan, *NCAC Talks to the Man Behind* Pico v. Board of Ed, NAT'L COAL. AGAINST CENSORSHIP (July 9, 2013), https://ncac.org/news/blog/ncac-talks-to-the-man-behind-pico-v-board-of-ed [https://perma.cc/AX5Q-GQV4]. When asked who tends to ban books, Pico stated:

> Many diverse groups and individuals . . . advocate some form of censorship. That does not anger me so much as it scares me. I've encountered feminists who advocate censorship and religious groups advocating censorship, and African-Americans who raise objections to *The Adventures of Huckleberry Finn* and *Gone with the Wind*. This is a very complex issue.

Id.

147. Elizabeth Yuko, *What Is Book Banning, and How Does It Affect Society?*, READER'S DIG., https://www.rd.com/article/book-banning/ [https://perma.cc/39L7-QC42] (last updated Sept. 23, 2024).

148. *Id.*

freedom and the notion of democratic representation.[149] When viewpoints that are available in public spaces like libraries are limited, then individuals who primarily utilize those spaces will be limited in what viewpoints they are allowed to consume, and therefore, to believe.[150] Limiting the availability of certain ideas and values hinders the marketplace of ideas, thereby hindering the ability for people to make informed democratic decisions.[151]

In this way, book banning undermines the very essence of democratic institutions because it stifles freedom of expression and access to diverse perspectives.[152] It restricts individuals' right to seek and impart knowledge, which is essential for informed citizenship.[153] Censoring ideas deemed controversial or offensive by some inhibits open discourse and hinders the exchange of differing viewpoints that is crucial for a thriving democratic society.[154] Additionally, book banning fosters ignorance and narrow-mindedness, thereby depriving communities of opportunities for critical thinking and intellectual growth.[155] Ultimately, book banning cultivates a culture of censorship and conformity, eroding the essence of democracy built upon the foundational principles of free speech, tolerance, and the pursuit of truth.

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149. *Id.* (quoting Eidelman, "[a] society in which book banning is acceptable is no longer a free society . . . [i]t is instead one in which the government tells the people what books to read—and therefore what ideas to encounter and, ultimately, what to think. It weakens education and prevents people from learning to think for themselves").

150. *See* Ella Creamer, *'Eating Away at Democracy': Book Bans in US Public Schools Rise by a Third in a Year*, GUARDIAN (Sept. 22, 2023, 10:37 AM), https://www.theguardian.com/books/2023/sep/22/democracy-book-bans-us-public-schools-rise [https://perma.cc/QGS6-FPCZ].

151. The theory of the marketplace of ideas requires a variety of ideas to compete with each other in order for superior ideas to rise above all the others, much like how superior products beat out inferior products in a free market economy. Thus, by limiting ideas to only those sanctioned by the government, the marketplace is hindered. *See* David Schultz, *Marketplace of Ideas*, FREE SPEECH CTR., https://firstamendment.mtsu.edu/article/marketplace-of-ideas/ [https://perma.cc/L5D6-2DSZ] (last updated July 9, 2024) ("The marketplace of ideas refers to the belief that the test of the truth or acceptance of ideas depends on their competition with one another and not on the opinion of a censor, whether one provided by the government or by some other authority."). *Id.*

152. *See* Yuko, *supra* note 147.

153. Ashley Rogers Berner, *An Informed Citizenry*, DEMOCRACY PROJECT (Oct. 30, 2020), https://hub.jhu.edu/2020/10/30/democracy-project-ashley-rogers-berner/ [https://perma.cc/SYV2-NW8M].

154. New York Times Editorial Board, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html [https://perma.cc/7REM-K9K7].

155. NCAC Staff, *Censorship Protects Ignorance Not Innocence*, NAT'L COAL. AGAINST CENSORSHIP (Sept. 1, 2000), https://ncac.org/censorship-news-articles/censorship-protects-ignorance-not-innocence [https://perma.cc/P6LC-LMPG].

B. Impact on Existing Suspect Classes

Just because censorship has a negative impact on society doesn't mean that there is not a heightened impact on individual social groups. These groups include racial minorities, members of the LGBTQ+ community, and perhaps surprisingly, members of the same religious communities who are advocating for book banning in cases like *Little*.[156]

Firstly, book banning often disproportionately affects racial minorities.[157] It creates negative effects by exacerbating existing inequality and silencing already marginalized voices. Books by and about minorities are often targeted because they challenge dominant narratives and portray diverse experiences.[158] This censorship not only restricts access to literature that reflects the realities and struggles of minority communities but also perpetuates stereotypes and erases their contributions to literature and history. By denying individuals the opportunity to engage with these narratives, book banning reinforces systemic oppression and undermines efforts for social justice and equality.[159] Moreover, it sends a message that the perspectives and stories of minorities are not valued or worthy of being heard. This exclusion from the literary landscape further marginalizes minority communities, hindering their ability to assert their identities and advocate for change.[160] Ultimately, book banning serves to entrench racial inequality and deny minorities the agency to tell their own stories and challenge dominant narratives.

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156. *See Book Bans: An Act of Policy Violence Promoting Anti-Blackness*, CRISIS (May 15, 2023), https://naacp.org/articles/book-bans-act-policy-violence-promoting-anti-blackness [https://perma.cc/Y28N-ZLNS]; Elizabeth Wolfe, *Book Bans Are Harming LGBTQ People, Advocates Say. This Online Library Is Fighting Back.*, CNN (Dec. 16, 2023, 1:00 PM), https://www.cnn.com/2023/12/16/us/queer-liberation-library-combats-lgbtq-book-bans-reaj/index.html [https://perma.cc/NQD5-KUJY]; Feng Gang, *Religious Books Banned and Destroyed by the State*, BITTER WINTER (Dec. 23, 2018), https://bitterwinter.org/religious-books-banned-and-destroyed-by-the-state/ [https://perma.cc/Y9VD-NHWT].

157. Sigy George, *Silenced Voices: Ripples of Book Ban*, INFO. MATTERS (Oct. 12, 2023), https://informationmatters.org/2023/10/silenced-voices-ripples-of-book-ban/ [https://perma.cc/G9AE-LTWM].

158. Ishena Robinson, *Anti-CRT Mania and Book Bans Are the Latest Tactics to Halt Racial Justice*, LEGAL DEF. FUND, https://www.naacpldf.org/critical-race-theory-banned-books/ [https://perma.cc/P8VH-2FKS] (last visited Feb. 1, 2024).

159. *Id.*

160. *See* George, *supra* note 157.

Furthermore, book banning poses a significant threat to the LGBTQ+ community by limiting access to literature that represents their identities, struggles, and triumphs.[161] Many books featuring LGBTQ+ characters or themes are frequently targeted for censorship, thereby perpetuating stigma and erasing queer voices from public discourse.[162] By denying individuals the opportunity to explore diverse perspectives and experiences, book banning fosters ignorance and intolerance, which impedes the acceptance and understanding of LGBTQ+ people.[163] It also sends a harmful message to LGBTQ+ individuals that their stories are deemed inappropriate or unworthy of acknowledgment, further marginalizing them in society.[164] Additionally, censorship of LGBTQ+ literature can have detrimental effects on mental health, especially for youth who may rely on such literature as a source of validation and support.[165] Ultimately, book banning contributes to the erasure of LGBTQ+ identities and narratives, undermining efforts for inclusivity, acceptance, and equality.

Somewhat ironically, many of the groups seeking to ban books that broaden representation for racial minorities or the LGBTQ+ community would also likely be harmed by increased censorship. Book banning also poses a threat to religious groups, including the large influx of evangelical Christian groups who are inciting so many book-banning efforts.[166] Many of the same "inappropriate" issues and themes that are targeted in these cases are also present in religious texts and literature: violence, sex and sexuality, and subversion of existing governmental powers.[167] Even outside of

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161. Samantha Laine Perfas, *Who's Getting Hurt Most by Soaring LGBTQ Book Bans? Librarians Say Kids.*, HARV. GAZETTE (June 28, 2023), https://news.harvard.edu/gazette/story/2023/06/lgbtq-book-challenges-are-on-the-rise-heres-why/ [https://perma.cc/N85Q-JG2A].

162. Wolfe, *supra* note 156.

163. *See* Aubree Miller, *Book Bans 'Promote Ignorance' Locally, Nationally*, COLLEGIAN (Dec. 1, 2023), https://collegian.com/articles/news/2023/12/category-news-the-impact-of-book-bans-locally-and-nationally/ [https://perma.cc/LN6A-MY6B].

164. *See id.*

165. Rebecca Bauer, *Book Bans and Mental Health*, PRIDE & LESS PREJUDICE, https://www.prideandlessprejudice.org/blog/book-bans-and-mental-health [https://perma.cc/QEY6-DH3H] (last visited Feb. 1, 2024).

166. Paul Brandeis Raushenbush, *Book Bans Are a Religious Freedom Issue*, UNITE AGAINST BOOK BANS, https://uniteagainstbookbans.org/book-bans-are-a-religious-freedom-issue/ [https://perma.cc/Y6S5-3NUB] (last visited Jan. 28, 2024); Eesha Pendharkar, *Why the Bible Is Getting Pulled Off School Bookshelves*, EDUCATIONWEEK (Dec. 15, 2022) https://www.edweek.org/teaching-learning/why-the-bible-is-getting-pulled-off-school-bookshelves/2022/12 [https://perma.cc/U93G-5429].

167. Pendharkar, *supra* note 166. *See Yes. Jesus Was Subversive. Here Are 10 Overlooked Examples.*, CRAIGGREENFIELD (Apr. 18, 2016), https://www.craiggreenfield.com/blog/2016/4/18/yes-jesus-was-subversive [https://perma.cc/S5KZ-FBBG].

these contexts, religious books like the Bible can come under fire simply because of their religious nature.[168] This may come from a belief that separation of church and state should logically result in religious texts being unavailable in state-sponsored facilities, or from a more retaliatory belief that it is only fair for these books to be removed to mirror the removals of other books.[169] Either way, setting a legal precedent that books can be removed despite being unable to overcome an actual strict scrutiny standard could easily result in the removal of books for various groups of people regardless of their religion, race, sexuality, or political ideology.

C. Impact on Children and the Socioeconomically Disadvantaged

Not only are the identities discussed in the prior section disproportionally harmed by lowering representation, but politically underrepresented groups like children and the socioeconomically disadvantaged face disproportionate consequences.[170] Children already have limited political rights due to their legal status as minors.[171] They lack the ability to vote, run for office, or otherwise participate fully in political processes. This minor status hampers their ability to influence policies and decisions that directly affect their lives and future.[172] Despite this direct impact by governmental actions, children rarely have a significant role in influencing these outcomes. This exclusion from political participation further undermines democratic institutions for children that are already being eroded by issues like book banning. On top of this, people with a low socioeconomic status also often have less effective political

168. *Id.*

169. *Id.*; Olivia Summers, *WHAT? School Tells Little Christian Boy that His Christian Reading Material and Talking About the Bible Is BANNED from School Property Because of "Separation of Church and State,"* ACLJ (Dec. 13, 2022), https://aclj.org/religious-liberty/what-school-tells-little-christian-boy-that-his-christian-reading-material-and-talking-about-the-bible-is-banned-from-school-property-because-of-separation-of-church-and-state [https://perma.cc/9GY9-NM58].

170. *See* John Wall & Anandini Dar, *Children's Political Representation: The Right to Make a Difference*, 19 INT'L. J. CHILD.'S RTS. 595, 606 (2011); Mary O'Hara, *Poverty and Class: The Latest Themes to Enter the US Banned-Books Debate*, GUARDIAN (Oct. 21, 2014, 9:00 AM), https://www.theguardian.com/society/2014/oct/21/us-adds-poverty-to-dangerous-reading-lists [https://perma.cc/5NP8-CRGA]; George, *supra* note 157.

171. Jade Yeban, *What Are the Legal Rights of Children?*, FINDLAW (May 29, 2023), https://www.findlaw.com/family/emancipation-of-minors/what-are-the-legal-rights-of-children.html [https://perma.cc/NZ7S-3QNG].

172. *See id.*

rights.[173] This is largely because of systemic barriers that are intensified by economic hardships. This includes, but is not limited to, lack of resources or time to engage in civil or political systems. It may also result from feeling powerless or disenfranchised, which can lower political engagement.[174]

Children of lower socioeconomic backgrounds are extremely at risk, in great part because of education-related challenges.[175] Many students from lower-income families, or who live in lower-income communities, already attend schools in underfunded school districts.[176] Here, they likely have high student-to-teacher ratios, as well as limited or outdated facilities and materials. Furthermore, an economically unstable home life often leads to decreased attendance and inadequate healthcare or nutrition.[177] All these factors can compound to make a student's education less effective.

However, public libraries can be effective in filling gaps in the educational system. Firstly, libraries provide access to a wide range of free educational resources, including books, digital materials, and databases, which enables students to pursue further education regardless of their financial circumstances.[178] Additionally, libraries often offer programs and services tailored to the needs of underserved communities, such as homework help, literacy programs, and computer skills workshops, helping to

173. Jennifer Shore, *How Social Policy Impacts Inequalities in Political Efficacy*, SOCIO. COMPASS, Mar. 2020, at 3, https://compass.onlinelibrary.wiley.com/doi/10.1111/soc4.12784 [https://perma.cc/V69N-E3WB].

174. PEW RSCH. CTR., THE POLITICS OF FINANCIAL INSECURITY 1, 2–3 (2015), https://www.pewresearch.org/politics/2015/01/08/the-politics-of-financial-insecurity-a-democratic-tilt-undercut-by-low-participation/ [https://perma.cc/CZ4S-4V32]; Shore, *supra* note 173, at 3–4.

175. *Education and Socioeconomic Status*, AM. PSYCH. ASS'N (2017), https://www.apa.org/pi/ses/resources/publications/education [https://perma.cc/H6Q6-Z2LP].

176. This is an incredibly important and widespread issue, especially in the state of Texas. As of early 2024, the majority of schools in Harris County ISD were underfunded, with spending gaps ranging from $800 to over $12,000 per student across the district. This is resulting in lower test scores and achievement rankings, which disparately affect Black and Hispanic students. Sarah Grunau, *Report: Nearly Every Harris County School District Is Underfunded*, HOUS. PUB. MEDIA (Feb. 7, 2024, 2:42 PM), https://www.houstonpublicmedia.org/articles/education/2024/02/07/476839/report-nearly-every-harris-county-school-district-is-underfunded/ [https://perma.cc/UWP2-8Y4K].

177. Yuan-Ting Lo et al., *Health and Nutrition Economics: Diet Costs Are Associated with Diet Quality*, 18 ASIA PAC. J. CLINICAL NUTRITION 598, 600–01 (2009), https://pubmed.ncbi.nlm.nih.gov/19965354/ [https://perma.cc/5DG5-6KV9]; Markus Klein et al., *Mapping Inequalities in School Attendance: The Relationship Between Dimensions of Socioeconomic Status and Forms of School Absence*, CHILD. & YOUTH SERVS. REV., Nov. 2020, at 1, 6.

178. Brittaney Wilmore, *Beyond Books: How Libraries Across Southeast Texas Serve as Critical Spaces*, ABC 13 (Aug. 22, 2023), https://abc13.com/free-library-resources-houston-american-association-rosenberg-galveston-county-libraries/13667743/ [https://perma.cc/FG36-8UP6].

bridge educational disparities.[179] For instance, their summer reading programs encourage students to read regularly, and help increase their reading skills before starting and while attending school.[180] Book banning limits the resources that are available to students, and may also make them feel ostracized, thereby discouraging them to attend the library at all.

VI. CONCLUSION

This examination of modern-day book banning through the lenses of the First and Fourteenth Amendments reveals concerns from both constitutional and societal perspectives. *Little* reflects a dangerous trend toward censorship that will likely have far-reaching consequences for education, expression, and fundamental principles of democracy. If the Fifth Circuit chooses to condone the censorship in the Llano County Library System, they risk lighting matches in the hands of people searching for books to burn across the country.

Caroline Puryear

179. *Id.*

180. Bonnie Terry, *6 Benefits of Summer Reading Programs*, SCHOLAR WITHIN (June 5, 2024), https://scholarwithin.com/6-benefits-of-summer-reading-programs [https://perma.cc/3CVX-K6GN].

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Are "Book Bans" Unconstitutional? Reflections on Public School Libraries and the Limits of Law

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Abstract. Since 2021, the number of demands that public school libraries remove materials from their shelves based on content has accelerated almost too quickly to track. Book removal incidents are more prevalent today than at any time since data became available, doubling between 2021 and 2022. Such "book bans" (as opponents characterize them) or "targeted book removals" (as the courts call them) arise in the context of intense political and cultural divisions and, in turn, exacerbate those conflicts. Indeed, national organizations as well as politicians at every level have played a role in the contemporary attack on library materials, which disproportionately targets books about or by LGBTQ+ people and racial and ethnic minorities. Targeted book removals have led to a spate of litigation, most of it still working its way through the judicial system.

While it might seem a simple proposition that removing books from school libraries based on their content always violates the First Amendment, the governing law is far more complex. Public schools exist in a special constitutional zone in which students and others have a limited right to free expression. Libraries play a special role within that zone, it is argued, as a place devoted to free inquiry, where students have asserted a right to receive information.

This Essay delves into the granular distinctions among settings, decisionmakers, and materials in public schools before analyzing the current constitutional status of targeted book removals. When courts consider legal challenges to book removals, they face a number of complexities, including (1) the fragility and diminished stature of the sole Supreme Court case addressing library book removals, which is the basis of students' right to receive information; (2) limited (or no) guidance from appellate courts; and (3) the need to assess the standing of a variety of plaintiffs (including students, teachers, and librarians

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as well as authors and publishers) in relation to a range of distinct constitutional claims that receive different levels of judicial review. Meanwhile, competing visions of parental rights add to the stakes.

The Essay reveals the jurisprudential obstacles to successfully challenging targeted book removals in court. It argues, however, that—with the right plaintiffs—a range of constitutional arguments offer a path to keeping controversial library books available to public school students in every jurisdiction.

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Introduction[1]

"Book bans are unconstitutional censorship," the ACLU of Texas asserted in an Instagram post.[2] The plain text of the Free Speech Clause of the First Amendment might suggest that is the case. If only the law were so simple.

This Essay examines proliferating campaigns to remove books from public school libraries amid heightened cultural and political divisions and the spate of lawsuits filed since 2022 challenging those removals.[3] I analyze the extent to which current constitutional doctrine prohibits book removals that serve an ideological or partisan agenda. As I will show, the legal analysis is often far more complex—and more discouraging to those who value freedom of expression—than the ACLU's post claims. The doctrine is inchoate and confusing. Little appellate guidance exists for trial courts considering challenges to library book removals. The outcome in any particular lawsuit asserting that a book removal is unconstitutional depends in large part on factors such as which of the limited precedents the court follows, the context of the removal itself, the motivation for the removal, and the identity of the challenger.

An advocate for robust student speech rights would hope to find that contemporary constitutional doctrine offers a clear path to challenging the decimation of school library shelves. But the record of the past few decades—and especially of the last two years—has not been encouraging. The acceleration of successful attacks on school library books takes place in the shadow of a pattern of public schools regularly silencing and punishing constitutionally protected student speech. As I showed in *Lessons in Censorship: How Schools and Courts Subvert Students' First Amendment Rights*, schools convey to students by their policies and disciplinary actions that the First Amendment is a false promise,[4] a "mere platitude[],"[5] and not a principle that extends to them now or when they become adults. Schools that strip students of the right

1. The legal landscape and the facts discussed in this Essay are developing rapidly. Materials cited are current as of April 2024.

2. ACLU of Texas (@aclutx), INSTAGRAM (July 31, 2023), https://perma.cc/XYN9-RK8G; *see also* Asher Lehrer-Small, *The ACLU's Fight Against Classroom Censorship, State by State*, THE 74 (updated Sept. 16, 2022), https://perma.cc/CVH4-VN7K (reporting an ACLU attorney's statement that the organization is filing lawsuits to challenge laws banning a variety of books and curricula "on race and gender").

3. *E.g.*, Complaint at 4-6, H.A. *ex rel.* Adams v. Matanuska-Susitna Borough Sch. Dist., No. 23-cv-00265 (D. Alaska Nov. 17, 2023), https://perma.cc/H3MC-NX2F (alleging that a school district violated students' rights by removing fifty-six books). Most of the lawsuits discussed in this essay remain in preliminary stages. None have been resolved as of April 2024.

4. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 6 (2015).

5. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

to speak or to question received wisdom and popular ideology teach the wrong lessons about the very meaning of democracy and citizenship. The same concerns animate my reflections on school library book removals—which teach students that ideas we disagree with should be buried. These are hardly the lessons in liberty school officials should model for their students, whether through their responses to the students' own speech or by removing controversial materials from libraries.

Part I of this Essay lays out the scope of contemporary attacks on books through state and local regulation and the explosion of book removal incidents, and explains why courts reject the notion of "book bans" in school, preferring the term "targeted book removals." Part II places the targeted removal problem in the context of First Amendment jurisprudence governing curricular decisions, the autonomy of teachers to provide supplementary materials, and the function of school libraries. Part III analyzes the appellate jurisprudence governing targeted book removals, including *Board of Education v. Pico*,[6] the only Supreme Court case that addresses the issue, and the limited guidance provided by the Courts of Appeals. It then sets out and analyzes the unique doctrine governing the speech rights of public school students. Part IV returns to the contemporary landscape, considering the role of elected school boards and explaining how targeted removals became national politics, including through the "parents' rights" movement. It then analyzes the standing of various potential plaintiffs in cases challenging targeted removals. Finally, Part V analyzes the First and Fourteenth Amendment claims available to plaintiffs who challenge targeted removals and describes the class of plaintiffs best positioned to succeed under each claim.

I. Contemporary Developments

Legal disputes over book removals occur in the context of political friction and debate on the issue. In a 2023 video announcing that he would seek reelection, President Biden called "MAGA extremist[]" book banners a threat to democracy.[7] Congressional committees led by both political parties have held hearings on book bans,[8] which have predictably reached diametrically opposed

6. 457 U.S. 853 (1982).

7. Joe Biden, *Joe Biden Launches His Campaign for President: Let's Finish the Job*, at 00:30-00:50, YOUTUBE (Apr. 25, 2023), https://perma.cc/BFQ8-7TM8 (to locate, select "View the live page"); Manuela López Restrepo, *Book Bans Are Getting Everyone's Attention—Including Biden's. Here's Why*, NPR (Apr. 25, 2023, 5:32 PM ET), https://perma.cc/NJ7H-DREW.

8. *Protecting Kids: Combating Graphic, Explicit Content in School Libraries: Hearing Before the Subcomm. on Early Childhood, Elementary, & Secondary Educ. of the H. Comm. on Educ. & the Workforce*, 118th Cong. (2023) (Republican majority); *Free Speech Under Attack: Book Bans and Academic Censorship: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm.*
footnote continued on next page

conclusions. Democrats asserted that the challenges to library books stemmed from "moral panic" and violated the First Amendment.[9] In stark contrast, Republicans characterized targeted removals as mere "content moderation" aimed at "pornographic" materials that threatened children's "innocence."[10] The Republican-run Committee majority deemed the books so dangerous that its summary of the hearing included a "Disclaimer" warning: "The following hearing recap contains direct quotations from children's books . . . . [N]o children should read beyond this point."[11]

A. State and Local Regulation

State and local officials are weighing in, too—mostly on the side of shrinking the marketplace of ideas. Between January 2021 and September 2023, state and local officials "enacted or adopted over 200 . . . laws limiting K-12 curricula."[12] Those laws affect more than 22 million children, almost half of the country's public school students.[13]

Legislation in many states, including Florida and Texas, bars schools and individual teachers from addressing or accurately teaching topics that could

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on Oversight & Reform, 117th Cong. (2022), https://perma.cc/YYP2-KVGY [hereinafter *Free Speech Under Attack*] (Democratic majority).

9. *See Free Speech Under Attack*, *supra* note 8, at 3-4 (statement of Rep. Jamie Raskin, Chairman, Subcomm. on C.R. & C.L.). As a law professor, Representative Raskin authored a book about constitutional law issues affecting students, such as freedom of speech: JAMIE B. RASKIN, WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS (1st ed. 2000).

10. *See Hearing Recap: Explicit Children's Books Edition*, COMM. ON EDUC. & THE WORKFORCE (Oct. 19, 2023), https://perma.cc/S5ZU-J386.

11. *Id.* (capitalization altered).

12. JONATHAN FEINGOLD & JOSHUA WEISHART, NAT'L EDUC. POL'Y CTR., HOW DISCRIMINATORY CENSORSHIP LAWS IMPERIL PUBLIC EDUCATION 9 (2023), https://perma.cc/D8LH-68U8; *see also* TAIFHA ALEXANDER, LATOYA BALDWIN CLARK, KYLE REINHARD & NOAH ZATZ, UCLA SCH. OF L. CRITICAL RACE STUD., CRT FORWARD: TRACKING THE ATTACK ON CRITICAL RACE THEORY 6 (2023), https://perma.cc/4R79-QC8M.

    As this Essay went to press, new laws affecting school library collections went into effect in three states: Utah (barring "pornographic or indecent material" without reference to its artistic or other merit); South Carolina (imposing a statewide form for complaints about books containing sexual content, requiring districts to list all materials available, but preserving some district control over how to handle complaints); Tennessee (codifying the definition of suitability for children and providing under certain circumstances for review by a state commission, whose decision to remove material would apply statewide). Elizabeth A. Harris, *More States Are Passing Book Banning Rules. Here's What They Say.*, N.Y. TIMES (updated Aug. 7, 2024), https://perma.cc/HV2Y-M2XG.

13. FEINGOLD & WEISHART, *supra* note 12, at 9 (quoting ALEXANDER ET AL., *supra* note 12, at 4).

stir controversy, including race, the history of slavery, gender identity, and gender equity.[14] Some statutes also prohibit the use or discussion of materials containing any sexual content, including scientific information about sex.[15] Definitions of forbidden books are sometimes so broad that they encompass standard dictionaries, which define terms like sexual intercourse.[16] Attacks on books in public school libraries reflect the same concerns and deny students access to those topics at school.[17]

Authorities including local elected school board members and school administrators have increasingly adopted regulations and used their executive

14. *See id.* at 3, 10-12 (discussing "discriminatory censorship laws"); *Book Ban Data*, AM. LIBR. ASS'N, https://perma.cc/E5EG-NVT5 (archived May 12, 2024) ("Titles representing the voices and lived experiences of LGBTQIA+ and BIPOC individuals made up 47 percent of those targeted in censorship attempts."); Press Release, Am. Libr. Ass'n, American Library Association Reports Record Number of Unique Book Titles Challenged in 2023 (Mar. 14, 2024), https://perma.cc/MXU2-U6M6 (reporting an increase in the number of challenges to library books with a dramatic increase in incidents involving public libraries).

    Those who oppose books or curricular offerings pertaining to race, slavery, and topics regarded as "divisive" commonly label the lessons as "critical race theory." *See* Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), https://perma.cc/H9HA-EALY (finding that 41% of books targeted for removal are about LGBTQ+ persons or themes, 40% involve major characters who are persons of color, and 21% directly concern race and racism); FEINGOLD & WEISHART, *supra* note 12, at 7 (noting that the Florida social studies curriculum "suggested enslaved people benefitted from slavery" and used "self-described right-wing" materials from PragerU—a conservative organization). Representatives of PragerU have admitted that the organization seeks to "indoctrinate kids." *Id.* (quoting Valerie Strauss, *Florida Says It Doesn't Want Indoctrination in Schools—But Look at the Materials It Just Approved*, WASH. POST (Aug. 10, 2023, 9:03 AM EDT), https://perma.cc/8LVE-8HTU).

15. Friedman & Johnson, *supra* note 14 (discussing state efforts to restrict educators' coverage of topics and viewpoints deemed "divisive" through legislation, policy, and executive orders). Some statutes appropriately exempt subjects like art history, science, and sex education from such restrictions. *E.g.*, MO. REV. STAT. § 573.550(1) (2024).

16. In response to a new state law, a school district in Florida removed more than 1,600 titles from its libraries because they mentioned "sexual conduct"; the books removed included several children's dictionaries, such as *Webster's Dictionary and Thesaurus for Children* and *Merriam-Webster's Elementary Dictionary*. Justine McDaniel & Hannah Natanson, *Florida Law Led School District to Pull 1,600 Books—Including Dictionaries*, WASH. POST (Jan. 11, 2024, 9:02 PM EST), https://perma.cc/6MSP-FEAY. The district considered other reference books for removal, including the *World Book Encyclopedia of People and Places* and the *World Almanac and Book of Facts*, but it is unclear whether those titles were ever removed from classroom or library collections. *Id.* The district may have returned the dictionaries to the shelves following adverse publicity related to litigation filed by PEN America. *See id.* For further discussion on the litigation, see notes 189-97 and the accompanying text below.

17. *See infra* note 198 and accompanying text.

powers to limit educators' discretion.[18] Officeholders also use their platforms less formally to diminish the range of materials available to students. For instance, Texas state representative Matt Krause proposed banning approximately 850 books, leading some school districts to pull books from shelves in classrooms and libraries in a frenzy.[19]

B. Incidence of Book Removals and Terminology

Since 2021, the pace at which books have been targeted for removal from libraries and classrooms has accelerated almost too quickly to track.[20] PEN America reported 3,362 documented "book bans" affecting at least 1,557 titles during the 2022-2023 school year—an increase of 33% over the record high reported the previous year.[21] The American Library Association (ALA) similarly sounded alarms about an unparalleled number of challenges to books in public school libraries.[22] In 2022, the ALA documented 1,269 demands to censor library books, nearly double the number of challenges from the previous year and the largest number in the twenty years the organization has tracked such incidents.[23] Both PEN America and the ALA advise that the

18. *See* Jeremy C. Young & Jonathan Friedman, *America's Censored Classrooms*, PEN AM. (Aug. 17, 2022), https://perma.cc/5CKL-NW3D (tracking and summarizing proposed state "gag orders" that restrict what K-12, college, and university educators are allowed to cover and finding a 250% increase from 2021 to 2022).

19. *See* Cassandra Pollock & Brian Lopez, *Texas Lawmaker Keeping Mum on Inquiry into What Books Students Can Access as School Districts Grapple with how to Respond*, TEX. TRIB. (updated Oct. 29, 2021, 8:00 PM CT), https://perma.cc/2K3N-5LT5; Michael Powell, *In Texas, a Battle Over What Can Be Taught, and What Books Can Be Read*, N.Y. TIMES (updated June 22, 2023), https://perma.cc/99KY-NVSY.

20. At least fifty organized groups, many with multiple sub-chapters, coordinate campaigns to challenge books in school libraries or curricula. Most were established in or after 2021. Friedman & Johnson, *supra* note 14.

21. Kasey Meehan, Tasslyn Magnusson, Sabrina Baêta & Jonathan Friedman, *Banned in the USA: Mounting Pressure to Censor*, PEN AM., https://perma.cc/5QR8-3NNQ (archived May 12, 2024) [hereinafter Meehan et al., *Mounting Pressure*]; *see also* Kasey Meehan, Sabrina Baêta, Madison Markham & Tasslyn Magnusson, *Banned in the USA: Narrating the Crisis*, PEN AM. (Apr. 16, 2024), https://perma.cc/NP4V-S4MN (reporting that over 4,000 books were banned during the fall of 2023, which exceeded the total number of banned books in the entire previous school year).

22. *See Book Ban Data*, *supra* note 14; Letter from Deborah Caldwell-Stone, Dir., Off. for Intell. Freedom, Am. Libr. Ass'n, to Rep. Jamie Raskin, Chairman, Subcomm. on C.R. & C.L., House Comm. on Oversight & Reform, & Rep. Nancy Mace, Ranking Member, Subcomm. on C.R. & C.L., House Comm. on Oversight & Reform 1 (Apr. 5, 2022), https://perma.cc/CYY6-F5GJ (noting that the ALA is "alarmed by an increasing trend of censorship campaigns directed at libraries," including school libraries).

23. Press Release, Am. Libr. Ass'n, American Library Association Reports Record Number of Demands to Censor Library Books and Materials in 2022 (Mar. 22, 2023), https://perma.cc/K832-KW5X.

number of incidents is likely higher than their reports indicate due to underreporting by librarians and limited local news coverage.[24]

Politicians, organizations like PEN America and the ALA, plaintiffs seeking restoration of library books, journalists, and civil libertarians label these incidents "censorship," "book bans," and the like,[25] but I shall use the term "targeted removal." A targeted removal occurs when officials single out one or more volumes for review and removal based on complaints about their content or viewpoint. Regardless of what terminology is used, demands to remove books from the library's existing collection trigger First Amendment alarms because the objections always stem from the books' content or viewpoint. Restrictions on speech based on either its content (that is, its subject matter) or viewpoint (the position a speaker takes with respect to a subject) are presumptively unconstitutional.[26] First Amendment concerns may also be triggered when the process for reviewing or removing the material disregards established neutral procedures.[27]

The term "ban" is particularly provocative in First Amendment parlance because it signals a constrained marketplace of ideas. In schools, a ban could transform students into "closed-circuit recipients of only that which the State chooses to communicate," an outcome once deemed impermissible by the Supreme Court.[28] A ban signals a total prohibition—that is, classic "censorship"—while "targeted removal," though also content-based, indicates a more limited incursion on the ideas in circulation.

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24. *See Book Ban Data*, *supra* note 14 (characterizing the report as only a "snapshot" of censorship because many incidents are not reported or covered in the press); Friedman & Johnson, *supra* note 14 (footnote omitted) ("[T]here are likely additional bans that have not been reported.").

25. *See, e.g.*, Michelle Goldberg, Opinion, *If You Care About Book Bans, You Should Be Following This Lawsuit*, N.Y. TIMES (May 19, 2023), https://perma.cc/4DRG-3SKF; ACLU of Texas, *supra* note 2; Meehan et al., *Mounting Pressure*, *supra* note 21; Friedman & Johnson, *supra* note 14.

26. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (recognizing that all content-based laws are subject to strict scrutiny regardless of motive); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (explaining that regulation of speech based on the speaker's viewpoint or opinion is an "egregious form of content discrimination" and presumptively unconstitutional).

27. *See, e.g.*, Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 874 (1982) (plurality opinon) (explaining that if a school board removed books under an "established, regular, and facially unbiased procedure[] for the review of controversial materials," the board's "substantive motivations" to remove books would "not be decisive").

28. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

In 2009, the Eleventh Circuit critiqued the use of "overwrought rhetoric" and declared that the term "book ban" is only appropriate in limited circumstances, such as when "a government or its officials forbid or prohibit others from having a book."[29] That "pejorative label" is inapplicable, the court concluded, where a school "simply" removes a book from library shelves—so long as the book remains available in other settings, including public libraries or the general marketplace.[30]

Recent lower court decisions agree about the correct legal terminology. Denying a preliminary injunction against a school library, a federal district court in Missouri unequivocally stated that "this case does not involve banning books."[31] There is no book ban, the court explained, where no one is prohibited from "reading, owning, possessing, or discussing any book."[32] The court emphasized that students remained free to acquire the books anywhere, to lend them to each other, to bring their own copies to school and, during free time, to discuss them and even urge peers to read them.[33] Beyond that, the accessibility of books on the internet reinforces the notion that targeted removals rarely amount to an enforceable ban.

Targeted book removals occur in a broader context of decisions about what materials students are exposed to in official school curricula and classrooms, to which we now turn.

II. The Legal Basics of Choosing Educational Materials

Before analyzing the constitutional status of targeted book removals, we must distinguish books that are in a school's library collection from materials that have never been available to students at that school. The constitutional

29. ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1218 (11th Cir. 2009); *see also Pico*, 457 U.S. at 886 (Burger, C.J., dissenting) (pointing out that, even if books are removed, students remain "free to read the books in question, which are available at the public library and bookstores; they are free to discuss them in the classroom").

30. *Miami-Dade Cnty. Sch. Bd.*, 557 F.3d at 1217-19. The Eleventh Circuit emphasized that none of the seven separate opinions issued in *Pico* used the term "ban"—not even once—but instead collectively characterized the issue as book "'removal' or a derivative of that [term]." *Id.* at 1220. According to the Eleventh Circuit, the seven *Pico* opinions used removal and variations thereon a total of 107 times. *Id.*

31. C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 909 (E.D. Mo. 2022).

32. *Id.*

33. *Id. But see* Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 999-1000, 999 n.2 (W.D. Ark. 2003) (citing Reno v. ACLU, 521 U.S. 844, 880 (1997)) (holding that a student's ability to access books at home does not mitigate the infringement of her First Amendment rights where her school puts the books in a restricted section that requires parental consent for access).

status of targeted removals initially turns on whether and in what context the school once made the materials available to students: in the curriculum, in supplemental classroom materials or lectures, or in the school library. And courts may need to consider who decided to deny students access to these books at school and under what circumstances that decision was made.

Materials may be inaccessible for a variety of distinguishable reasons, including: (1) authorities never acquired them or approved of their use ("never selected"); (2) authorities barred teachers from offering the materials for use in the classroom as supplements to curricular assignments or as part of an in-class library ("expressly unauthorized"); or (3) the materials once were available in the school library but have been permanently or temporarily removed ("targeted removals").[34]

A. Curricular Choices

When authorities omit topics or materials, their vast discretion over curricular choices almost always protects them from legal challenges.[35] Discretionary curricular choices include what subjects are required or permitted, which instructional materials are used to teach those subjects, and which viewpoint a course should promote.[36] From the earliest litigation concerning state regulation of curriculum—*Meyer v. Nebraska*[37]—until today, no teachers,

34. "Targeted removals" may include books that remain in the library collection but are no longer in general circulation. Materials that were once on open shelves may be unavailable to students below a certain grade level or may require parental consent.

35. *See* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 869-70 (1982) (plurality opinion) (observing that school boards "might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values," but that this duty does not extend "beyond the compulsory environment of the classroom"). Although curricular choices (both to add and remove topics and materials) and targeted removals call for distinct constitutional analyses, a statute might classify a work that appears in both settings as unsuitable, or a district might remove library materials from the curriculum's required or optional reading. *See, e.g.*, GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *1 (S.D. Iowa Dec. 29, 2023) (explaining that the state's restrictions apply to curricular and library materials in a specified range of school grades), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024). When a case alleges targeted removals in both settings, courts should analyze the curriculum and the library separately.

36. 4 JAMES A. RAPP, EDUCATION LAW § 11.02[2](d)(i) (LexisNexis 2023).

37. 262 U.S. 390, 399-402 (1923) (overturning a school's ban on teaching certain foreign languages as a violation of parents' and teachers' substantive due process rights but noting that the no party challenged "the State's power to prescribe a curriculum for institutions which it supports"); *see also* Amended Complaint at 18 n.3, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213 (N.D. Fla. Jan. 12, 2024), ECF No. 27, https://perma.cc/Z6BX-FMYM ("Plaintiffs' claims in this action do not involve, rely on, or challenge any action taken by Defendants with respect to any classroom curricular materials, whether optional or required . . . ."). But lawsuits based

footnote continued on next page

parents, or students have challenged the state's power to choose subjects of study or classroom materials based solely on students' expressive rights.

Two sets of considerations bolster the state's discretion to control curricular decisions. Judicial prudence has led courts to defer to school officials' comprehensive authority and to refrain from "interven[ing] in the resolution of conflicts which arise in the daily operation of school systems."[38] Equally important from a doctrinal perspective, a school's curricular decisions are government speech to which the First Amendment does not apply.[39] In order to communicate at all, the government must necessarily differentiate among possible messages and ways to communicate those messages.[40] These considerations give the state virtually free rein to decide what subject matter public schools cover, how school curricula will define and treat the subjects, and what textbooks teachers will use.

B. Supplementary Classroom Materials and Teachers' Voices

Despite the state's broad authority over education, many teachers introduce other ideas in classrooms and offer supplementary materials that complement the mandated curricular materials. Supplementary materials are often selected precisely to expose students to different ways of thinking about a given subject, including conflicting viewpoints or alternative evidence.[41] Offering students these additional materials, whether required or optional, encourages engaged classroom discussions and promotes critical thinking.[42]

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on other constitutional guarantees may succeed. For example, in *González v. Douglas*, the court held that a statute barring ethnic studies courses was motivated by racial animus and violated the Fourteenth Amendment as applied to Mexican American studies in a district subject to a desegregation order. 269 F. Supp. 3d 948, 950, 972-73 (D. Ariz. 2017). The court further found that barring the subject violated students' First Amendment right to receive information. *Id.* at 973. In rare cases, a challenge to curricular requirements that violate the Establishment Clause may succeed—but these challenges are based on religious freedom grounds, rather than solely on students' expressive rights. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (overturning a ban on teaching evolution); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (overturning a requirement that schools that teach evolution also teach Bible-based creationism).

38. *Epperson*, 393 U.S. at 104. But courts must ensure that such authority is exercised "consistent with fundamental constitutional safeguards." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

39. *See* ROSS, *supra* note 4, at 111. Government speech is discussed below at notes 81-90, 197-98, and the accompanying text.

40. *See* ROSS, *supra* note 4, at 111-12; Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207-08 (2015) (explaining that, in general, the government may promote a specific position and that it needs the ability to communicate its views in order to accomplish its functions).

41. *See* ROSS, *supra* note 4, at 110-12.

42. *See id.* at 112.

Students may find the marketplace of ideas in their classes limited when laws and school officials label teachers' supplementary materials "expressly unauthorized."[43] Pervasive state regulation limits teachers' ability to introduce facts, interpretations, or materials that differ from the curricular message, and K-12 educators lack constitutional protection if they share material that competes with the viewpoint of the district or school.[44]

C. School Libraries

This brings us to decisions about what materials a school library acquires and the circumstances that can lead it to remove a book from circulation. Much turns on the school library's function and whether the district (or the reviewing court) views the library as an extension of the school's curriculum or a place for free-ranging student inquiry. Justice Brennan's plurality opinion in *Board of Education v. Pico*—the Supreme Court's only school library case—strongly endorsed the latter view.[45] The opinion underscored that "*library* books . . . by their nature are optional rather than required reading."[46] It is, Justice Brennan posited, "especially appropriate" that the First Amendment rights of students be respected given the "special characteristics of the school *library*," including its role as "the principal locus" of free inquiry.[47] The school library gives students "an opportunity at self-education and individual enrichment," in contrast to the "compulsory environment of the classroom."[48]

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43. *See supra* text accompanying note 34.

44. *See* ROSS, *supra* note 4, at 112-16; *see, e.g.*, Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479-80 (7th Cir. 2007) (explaining that because the school system "hires" a teacher's speech, which the teacher "sells to her employer in exchange for a salary," K-12 educators cannot "cover topics, or advocate viewpoints, that depart from the [school's] curriculum"); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 334 (6th Cir. 2010) (holding that the First Amendment does not apply to teachers' curricular speech, including the choice of assigned reading). School districts vary in their level of tolerance for supplementary materials, including the teacher's own classroom speech. It may also matter whether the students are required to use the supplementary materials or are merely free to peruse them—in other words, whether the supplements resemble curricular or library materials.

45. 457 U.S. 853, 862 (1982) (plurality opinion).

46. *Id. Pico* is discussed further in Part III.A below.

47. *Id.* at 868-69.

48. *Id.* at 869. A more authoritarian view of the school's function treats the library as an extension of its "inculcative" curriculum and has no qualms with limiting its collection to materials supporting the school's messages. *Id.* at 915 (Rehnquist, J., dissenting) (asserting that, aligning with primary and secondary school curricula, "elementary and secondary school libraries are not designed for freewheeling inquiry").

Regardless of the school library's function, acquisitions of books—like curricular decisions—typically do not generate legal challenges.[49] As far as I know, litigation has only been filed to challenge removals from the shelves or restrictions on who can access the materials. However, hypothetical situations could plausibly raise constitutional questions about library acquisitions. What if the school library *only* acquires books by Republicans, or Democrats, or White authors, or Black authors, or if it *never* acquires books by Jewish or Palestinian authors, Black authors, or LGBTQ+ authors?[50]

The relatively granular distinctions set out in this Part only hint at the importance of the contextual and legal complexities that impede litigants who seek to overturn so-called book bans. But, as the next Part demonstrates, the appellate courts have provided little guidance on how to address those complexities.

III. The Limited Jurisprudential Guidance for Reviewing Targeted Book Removals

Litigants, attorneys, and district court judges who are engaged with cases involving targeted book removals will find sparse guidance in appellate decisions. The applicable precedents are few, most are dated, and some confuse rather than clarify.

A. Legal Doctrine Affecting Targeted Book Removals

In 1943, long before the Supreme Court's 1982 decision in *Pico*—its first and only case about targeted book removals—the Court held in *West Virginia State Board of Education v. Barnette* that students have First Amendment rights in

49. *But see* Chiras v. Miller, 432 F.3d 606, 607, 611-15 (5th Cir. 2005) (holding that a textbook author has no right to a court order requiring a state board of education to approve his book for state funding). Although a few book removal cases plausibly involve a demand that a school library acquire specific materials, that issue is not the central question in those cases. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1207 (11th Cir. 2009) (noting that a parent has no right to demand that the school district remove a book and replace it with a book reflecting a different viewpoint).

50. *See Pico*, 457 U.S. at 870-71 (plurality opinion) (venturing that "few would doubt" that a decision by members of the other major party to remove all books by Republicans or Democrats or "an all-white school board, motivated by racial animus, decid[ing] to remove all books authored by blacks" would violate the constitutional rights of students, but declining to restrict "the discretion of a local school board to choose books to *add* to the libraries of their schools"); *see also* GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *18 (S.D. Iowa Dec. 29, 2023) ("The *removal* of books from a school library is different for First Amendment purposes than the *acquisition* of books."), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

public schools.[51] In 1969, the Court reiterated in *Tinker v. Des Moines Independent Community School District* that public school students have First Amendment rights, including the right to express their own views.[52] Those rights, however, are not coextensive with rights outside of school. The *Tinker* Court crafted a unique standard for evaluating claims that schools violated student speech rights in light of the "special characteristics of the school environment" and its civic mission.[53]

Barnette and *Tinker* comprised the universe of Supreme Court student speech rights cases when the Court took up the library book removal problem in 1982. In *Pico*, a group of high school and junior high school students challenged the local board of education's removal of nine books from their school libraries.[54] The removals occurred after three board members attended a meeting of a politically conservative parents' organization that distributed a list of "objectionable" books.[55] The board later described these books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[56]

Alleging a violation of their First Amendment rights, students sued in federal court seeking an injunction ordering the district to return the books to the shelves and to lift a prohibition on using the materials in the curriculum. The district court granted summary judgment to the defendant school board after accepting what the court regarded as the parties' "substantial[] agree[ment]" that the board acted on "its conservative educational philosophy," which informed its view that the books were, among other things, "vulgar, immoral, and in bad taste," rendering them "educationally unsuitable."[57] A divided Second Circuit panel reversed and remanded for trial and the Supreme Court granted certiorari.[58]

A splintered Supreme Court issued five opinions. Justice Brennan's plurality opinion announced the judgment of the Court and was joined in full

51. 319 U.S. 624, 637 (1943) (holding that schoolchildren can enforce their First Amendment rights against boards of education, which are constrained by "the limits of the Bill of Rights" via the Fourteenth Amendment).

52. 393 U.S. 503, 506 (1969); *see also Pico*, 457 U.S. at 864-66 (plurality opinion) (discussing *Barnette* and *Tinker*).

53. *Tinker*, 393 U.S. at 506.

54. *Pico*, 457 U.S. at 856-59 (plurality opinion).

55. *Id.* at 856-57.

56. *Id.* at 857 (alteration in original) (quoting Pico *ex rel.* Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)). There was no allegation that the materials met the legal definition of obscenity as applied to minors. *See infra* notes 205-07 and accompanying text.

57. *Pico*, 457 U.S. at 859 (quoting *Pico*, 474 F. Supp. at 391-92).

58. *Id.* at 860-61 (summarizing the case's procedural posture).

by two other Justices and in part by Justice Blackmun.[59] Justice White's concurrence gave a portion of the plurality opinion a fifth vote on the narrowest of grounds: He concluded that the Court had granted certiorari improvidently and the case should be remanded for development of the facts about the board's motivation for removing the books.[60]

Responding to the broad strokes of the constitutional analysis in Justice Brennan's plurality opinion, Chief Justice Burger's dissent emphasized that "there is no binding holding of the Court on the critical constitutional issue presented."[61]

The four dissenting Justices did not agree that the Constitution limited a school board's discretion to remove library books.[62] They did, however, agree with the plurality on one point: "[A]s a matter of *educational policy* students should have wide access to information and ideas."[63] But the dissenters deferred to the discretion of elected school boards which, they said, are uniquely accountable to local communities through elections.[64]

Justice Brennan posited that the right to receive information implicit in the Speech Clause limits school boards' discretion to cull library shelves.[65] The right to receive information, Justice Brennan explained, flows from the speaker's right to share his ideas, from the willing recipient's need for information in order to enjoy "meaningful exercise of his own" expressive rights, and, in the case of students, from the need to prepare for meaningful citizenship.[66]

The plurality of four Justices proposed a new standard: "[S]chool boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[67] But a removal would not offend the Constitution "if it were

59. *Id.* at 855.

60. *Id.* at 883 (White, J., concurring).

61. *Id.* at 885-86, 886 n.2 (Burger, C.J., dissenting).

62. Each conservative member of the Court—Chief Justice Burger, Justice Powell, Justice Rehnquist, and Justice O'Connor—wrote a dissenting opinion. *See id.* at 885 (Burger, C.J., dissenting); *id.* at 893 (Powell, J., dissenting); *id.* at 904 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting). All of the dissenters also signed the Chief Justice's opinion, *id.* at 885 (Burger, C.J., dissenting), which garnered more votes than Justice Brennan's three-person plurality opinion locating the students' constitutional claim in the right to receive information. *Id.* at 867-68 (plurality opinion); *see infra* notes 65-66 and accompanying text.

63. *Id.* at 891 (Burger, C.J., dissenting).

64. *Id.*

65. *See id.* at 867-69 (plurality opinion).

66. *Id.* at 867-68. Justice Blackmun did not join this part of the analysis. *See id.* at 855.

67. *Id.* at 872 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

demonstrated that the removal decision was based solely upon the 'educational suitability' of the books in question."[68]

Educational suitability is a flexible concept. The plurality did not define it beyond noting that "pervasive[] vulgar[ity]" could render a book unsuitable.[69] Other valid considerations may include the age of students, the accessibility of the language, and, in the case of nonfiction, the accuracy of the information.[70]

But, the *Pico* plurality emphasized, a school board's discretion to remove books "may not be exercised in a narrowly partisan or political manner."[71] This standard requires a court to scrutinize the motive underlying a targeted book removal.[72] Based on decades of doctrine that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," Justice Brennan explained that an intent to impose a "pall of orthodoxy over the classroom" would render book removals constitutionally suspect.[73] Accordingly, a school that removed books primarily in order to prevent students from being exposed to disfavored ideas would likely violate the students' right to access information.

68. *Id.* at 871 (quoting Transcript of Oral Argument at 53, *Pico*, 457 U.S. 853 (No. 80-2043)).

69. *Id.* All parties in all of the cases discussed throughout this Essay concede that the disputed materials do not satisfy the legal definition of obscenity. Nor do the targeted materials meet the more easily satisfied definition of variable obscenity applicable to minors, which is discussed below in notes 202-06 and the accompanying text.

70. *See, e.g.*, *id.* at 873-74 (noting that these factors "appear on their face to be permissible"); ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009) (explaining that students have no right to access nonfiction library books containing "factual inaccuracies," whether by omission or commission).

71. *Pico*, 457 U.S. at 870 (plurality opinion).

72. *See id.* at 872-75 (discussing the evidence of motive and finding a need for additional fact-finding at trial). Many of the opinions cited in this Essay address motions that did not require factual hearings; later proceedings may develop a factual record that reveals the school district's motives. *See, e.g.*, L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 2192234, at *1 (W.D. Mo. Feb. 23, 2023) (denying a motion for preliminary injunction without a hearing); C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 912, 920 (E.D. Mo. 2022) (same).

73. *Pico*, 457 U.S. at 870 (plurality opinion) (first quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); and then quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); *see also id.* at 871 n.22 (referencing the *Mt. Healthy City School District Board of Education v. Doyle* test for identifying unconstitutional deprivations where the exercise of First Amendment rights was an impermissible "substantial factor"); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (applying the "substantial factor" test in a school employment decision); *Pico*, 457 U.S. at 879 & n.2 (Blackmun, J., concurring) (arguing that the state may not "single out an idea for disapproval and then deny access to it").

B. *Pico*'s Precarious Precedential Value

Until the early 2000s, lower courts regularly cited and applied the *Pico* plurality's approach to targeted library book removals.[74] Several twenty-first century courts, however, have vehemently criticized lower courts' reliance on the plurality's reasoning and test.[75] In *ACLU of Florida, Inc. v. Miami-Dade County School Board*—the only federal appellate decision that has squarely considered targeted book removals in school libraries since *Pico*[76]—the Eleventh Circuit proclaimed: "*Pico* is a non-decision so far as precedent is concerned. It establishes no standard."[77] Despite that conclusion, the court still considered whether the plaintiffs could prevail under *Pico*, rather than accepting the school board's argument for a more deferential standard.[78]

74. *See, e.g.*, Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 188-91 (5th Cir. 1995) (relying on *Pico* to remand for an inquiry into whether the school board's removal of a book was "substantially based on an unconstitutional motivation"); Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 874-75, 877 (D. Kan. 1995) (relying on *Pico* to enjoin a book removal); Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 1004-05 (W.D. Ark. 2003) (drawing from *Pico* to grant summary judgment to plaintiffs who challenged a school district's restriction of access to certain books in its library); *see also* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1024-25, 1027 n.5 (9th Cir. 1998) (relying on *Pico* to rule on a school's curricular decisions). Some courts still apply the *Pico* test. *See* González v. Douglas, 269 F. Supp. 3d 948, 950, 972-73 (D. Ariz. 2017) (applying *Pico* to the removal of ethnic studies from the school's curriculum).

75. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1200 (11th Cir. 2009) ("*Pico* is of no precedential value as to the application of the First Amendment to these issues." (quoting Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (Former 5th Cir. 1982) (en banc)); *see also* GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *14 (S.D. Iowa Dec. 29, 2023) (explaining that the "splintered" decision in *Pico* "provides some guidance" about whether a school board's decision to remove books from the school library would be unconstitutional, but that it would be "difficult to apply . . . without additional guidance"), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

76. 557 F.3d 1177. Another appellate court has issued an opinion since *Pico* in a controversy arising at least in part from targeted book removal, but the book removal was not the central question in the appeal, and the court did not rule on it. Book People, Inc. v. Wong, 91 F.4th 318, 339-41 (5th Cir. 2024) (holding that the rights of book sellers were likely violated when the state compelled them to speak by rating books as a condition to sell books in schools); *see also* Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243, 1246 (10th Cir. 1998) (noting that the district court ruled for the plaintiffs on book removal but that the appeal was limited to attorneys' fees).

77. *Miami-Dade Cnty. Sch. Bd.*, 557 F.3d at 1200; *see also* Parnell v. Sch. Bd. of Lake Cnty., No. 23-cv-00414, 2024 WL 2703762, at *7 (N.D. Fla. Apr. 25, 2024) ("[T]he issue of how and to what extent the First Amendment limits [school officials' substantial discretion over school library content] is surprisingly unsettled").

78. *Miami-Dade Cnty. Sch. Bd.*, 557 F.3d at 1202-03, 1206-07, 1230 (vacating the district court's preliminary injunction and concluding that, even under *Pico*, factual inaccuracies in a non-fiction book about Cuba constituted a "legitimate pedagogical reason[]" for removal despite significant community debate).

Seven of the twelve circuit courts with general jurisdiction have *never* rendered an opinion on targeted removals of library books.[79] Another four circuits have not heard a case involving the targeted removal of school library books since *Pico* was decided.[80] And many aspects of First Amendment doctrine have changed since 1982, including the introduction and interpretation of the concept of government speech[81] and a series of Supreme Court decisions narrowing public school students' speech rights.[82]

79. These are the First, Third, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits.

80. These are the Second, Sixth, Seventh, and Eighth Circuits. *See* Pico *ex rel.* Pico v. Bd. of Educ., 638 F.2d 404 (2d Cir. 1980), *rev'd*, 457 U.S. 853 (1982); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577 (6th Cir. 1976); Zykan *ex rel.* Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300 (7th Cir. 1980); Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771 (8th Cir. 1982). The Eighth Circuit's decision in *Pratt v. Independent School District No. 831* was issued on January 13, 1982—roughly six months before the Supreme Court decided *Pico*. 670 F.2d 771. But the *Pratt* court cited frequently to the various Second Circuit opinions in *Pico*. *See, e.g.*, *id.* at 775 nn.4-5 (discussing *Pico*, 638 F.2d 404). Appellate decisions issued before *Pico* remain good law because the Court has not rendered a clear holding, but those appellate decisions obviously did not engage with the analysis in the *Pico* opinions. To the extent that the circuit courts have adopted different approaches, the applicable law may differ depending on where the plaintiffs live. Potential litigants who object to targeted removals may find the availability of library materials is limited by both local political currents and regional jurisprudence.

81. Defendants in school library cases often claim that they have unlimited discretion to remove books that do not support the school's preferred messages because, they assert, the contents of library shelves are government speech. *See, e.g.*, GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *18-19 (S.D. Iowa Dec. 29, 2023) (discussing and rejecting the state's claim that a statute requiring book removals is a form of government speech), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024); Parnell v. Sch. Bd. of Lake Cnty., No. 23-cv-00414, 2024 WL 2703762, at *7-9 (N.D. Fla. Apr. 25, 2024) (declining to resolve the defendants' claim that school library curation is government speech and noting that the Supreme Court "has not articulated a precise test" (quoting Mech v. Sch. Bd. of Palm Beach Cnty., 806 F.3d 1070, 1074 (2015))); PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024) (describing the inquiry into "whether something is government speech" as "fact-intensive and generally not amenable to resolution at the motion to dismiss stage," but noting that no "reasonable person" would consider the selection of library books in this case to be the government's endorsement of the views contained in those books); Chiras v. Miller, 432 F.3d 606, 614-15, 618-20 (5th Cir. 2005) (finding that a school's selection of textbooks is government speech promoting the state's chosen message); *see also Book People*, 91 F.4th at 338 (holding that there is no government speech where the state requires private actors to rate school materials according to government guidelines). States might also argue that a school board's decision to remove material is the flip side of the decision to acquire it and is in that sense a form of government speech.

82. *See infra* notes 102-11 and accompanying text (discussing these cases and the relationship some courts have considered between government speech and school-sponsored speech under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 281 (1988)).

The Eighth Circuit, which issued an opinion in a targeted removal case shortly before the Supreme Court announced the result in *Pico*,[83] heard arguments in a library book removal case this term.[84] In the meantime, its earlier decision—*Pratt v. Independent School District No. 831*—governs in the Circuit.[85] *Pratt*, like the plurality opinion in *Pico*,[86] found that the right to receive information provided the basis for the students' First Amendment claim.[87] *Pratt* requires a school board defending against a challenge to a targeted library book removal to "establish that a substantial and reasonable governmental interest exists for interfering with the students' right to receive information."[88]

Pratt's "substantial and reasonable" interest test[89] provides students less protection than *Pico*'s requirement that courts examine a school's actual motive in removing a book.[90] It is easier for schools to hide behind pretextual substantial and reasonable interests when the legal standard does not require a court to examine actual motives.

C. The Unique Jurisprudence Governing Student Speech Rights

Students are frequently among the plaintiffs in litigation challenging targeted book removals, and the level of judicial scrutiny that the state's actions receive is tied to their status as students. The expressive rights of public school students in school are not coextensive with the rights they might have outside of school or with the expressive rights adults possess.[91] In contrast to the adult or organizational plaintiffs in targeted book removal cases, student plaintiffs are not entitled to strict scrutiny when courts analyze their First Amendment claims.[92] Instead, courts analyze students' freedom of expression claims under a distinct student speech doctrine.

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83. *See supra* note 80.

84. For the district court's decision, see *L.H. v. Independence School District*, No. 22-cv-00801, 2023 WL 3132003 (W.D. Mo. Apr. 27, 2023) (dismissing the case for lack of standing), *argued*, No. 23-02326 (8th Cir. Apr. 9, 2024).

85. 670 F.2d 771; *see also GLBT Youth*, 2023 WL 9052113, at *18 (referring to *Pratt* as "binding Eighth Circuit precedent" that "the Court cannot ignore" absent a higher court's determination "that it is no longer good law").

86. *See supra* notes 65-66 and accompanying text (noting that only three Justices signed onto that part of the opinion).

87. *Pratt*, 670 F.2d at 777, 779.

88. *Id.* at 777.

89. *See supra* notes 71-73 and accompanying text.

90. *Pratt*, 670 F.2d at 776-77.

91. *See* Morse v. Frederick, 551 U.S. 393, 404-06 (2007).

92. *See* ROSS, *supra* note 4, at 33. Courts considering constitutional claims involving individual rights typically apply strict scrutiny, the most demanding of three levels of judicial scrutiny, which places a heavy burden on the government. To survive strict

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My analysis in *Lessons in Censorship* demonstrated that the taxonomy of student speech categories—each subject to different rules created by the Supreme Court—has confused school officials and lower courts alike.[93] As a district court judge in Iowa lamented in 2023, it is unclear what standard of scrutiny applies in targeted book removal cases "because the Supreme Court has never settled on a single, governing standard for First Amendment challenges in school settings."[94]

1. *Tinker* and student speakers

In a string of cases that followed the 1969 *Tinker* decision, the Supreme Court crafted what Justice Brennan presciently charged in 1988 would become a "taxonomy" of student speech rights in public schools, each with its own set of tests.[95] These cases govern what students themselves are allowed to say or write while under the school's supervision; whereas *Pico* only applies to book removals that implicate students' right to receive information from other speakers.[96]

In *Tinker*, the Court held that the Speech Clause gives students rights even in school, but that the "special characteristics of the school environment" merited a unique constitutional standard of review.[97] The test the Court crafted in *Tinker* protects student expressive rights so long as the expression does not violate two rules: It must not "materially and substantially interfere[] with the requirements of appropriate discipline in the operation of the school,"[98] and it must not collide "with the rights of other students to be secure

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scrutiny in a case involving free expression, the Government must demonstrate a compelling interest in regulating content, that the regulation will address the harm the government has identified, and that it is narrowly crafted so that it does not affect more speech than necessary. *See, e.g.*, United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).

93. *See* ROSS, *supra* note 4, at 3-4.

94. GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *15 (S.D. Iowa Dec. 29, 2023), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

95. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 281 (1988) (Brennan, J., dissenting).

96. The Supreme Court has not provided a clear answer regarding a school's authority over student speech that occurs off campus, or what legal standard would apply if the circumstances permitted the school to discipline a student's off-campus expression. *See Morse*, 551 U.S. at 401 (finding that school discipline extends to supervised class trips during school hours but noting that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents"); Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021) (reserving for a future case the task of defining the parameters of off-campus speech that might be subject to school authority).

97. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

98. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

and to be let alone."[99] *Tinker* aimed to establish an equilibrium between rights and a level of order that would permit schools to fulfill their unique role in training the next generation of citizens.[100] That test governed the entire universe of student speech rights until the late 1980s.

One might ask whether—if *Tinker* still offered the only school speech doctrine—it could be applied to library book removals. Hypothetically, we can imagine a school with a high suicide rate and a pattern in which suicides appeared to inspire peers to harm themselves. In that situation, a school might silence a student who sang the Hemlock Society's praises. Similarly, publications by the Hemlock Society or science texts about asphyxiation or poisons might be deemed to pose a well-founded fear of material disruption. If the young people who committed suicide and provided a model for their peers to follow had read some of these guides, the school could reasonably anticipate that copycat suicides would sufficiently disrupt its educational mission that the materials should be sequestered. Even if *Tinker* could be applied and would uphold censoring materials that promote suicide, it is hard to imagine that it would support a wide range of targeted book removals.[101]

But *Tinker* is not the only option in the judicial decision tree today. When students assert that a school has violated their right to express themselves, a court must first determine what category of speech is involved in order to determine what standard applies. *Tinker*'s progeny include four additional Supreme Court decisions about student speech, some of which might arguably provide standards for analyzing students' right to receive information in targeted removal cases.

2. School-sponsored speech

Hazelwood School District v. Kuhlmeier, decided in 1988, arose when a high school principal excised two full pages from the student newspaper to censor two articles: one on teenage pregnancy in the school and another on the effects of parental divorce on students at the school.[102] The student newspaper at Hazelwood was part of the for-credit, graded curriculum under close faculty supervision.[103]

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99. *Id.* at 508.

100. *See id.* at 511-12.

101. *See* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 878 n.1 (1982) (Blackmun, J., concurring in part and concurring in the judgment) (contrasting book removals with *Tinker* material disruption by contending that "library books on a shelf intrude not at all with the daily operation of a school").

102. 484 U.S. 260, 262-63 (1988).

103. *Id.* at 268.

The Court created a new category of student speech—"school-sponsored" speech—and a new highly deferential standard for evaluating censorship of that speech. *Hazelwood* defined school-sponsored speech broadly to include all student expression in activities with an educational goal under faculty supervision.[104] School sponsorship reached far beyond the control of student publications within the curriculum to govern almost every form of expression in extracurricular activities. The *Hazelwood* majority awarded school authorities almost unlimited discretion to censor school-sponsored student expression "so long as their actions are reasonably related to legitimate pedagogical concerns."[105]

One limitation could have proven significant—to be able to restrict speech, such speech must appear to "bear the imprimatur of the school."[106] Indeed, Justice Alito has described *Hazelwood* as reaching what a "reasonable observer" would regard as "the school's own speech."[107] But this is not how courts have interpreted *Hazelwood*. Instead, many lower courts have allowed schools to constrain speech that undermined the school's preferred messages so blatantly that no reasonable observer would attribute it to the school.[108]

School authorities frequently—though largely unsuccessfully—argue that *Hazelwood*'s deferential standard governs targeted book removals because library books appear to bear the school's imprimatur.[109]

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104. *Id.* at 270-73.

105. *Id.* at 273 (footnote omitted).

106. *Id.* at 271.

107. Morse v. Frederick, 551 U.S. 393, 422-23 (2007) (Alito, J., concurring); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (describing school-sponsored speech covered by *Hazelwood* as speech that "a reasonable observer would view as the school's own").

108. *See, e.g.*, Henery *ex rel.* Henery v. City of St. Charles, 200 F.3d 1128, 1133 (8th Cir. 1999) (holding that a student who distributed condoms while campaigning for class president as "The Safe Choice" was engaged in school-sponsored speech); Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) (finding school-sponsored speech subject to discipline where a student made fun of an assistant principal and accused him of "play[ing] tricks" with students' minds in a campaign speech); *see also* ROSS, *supra* note 4, at 51 (asserting that mistaken perceptions of school sponsorship suffice and need not be based on knowledge of the facts or context).

109. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1201-02 (11th Cir. 2009) (explaining that *Hazelwood* may not be on point because "this is not a school newspaper situation, and the speech at issue does not form part of a course of study in a school's curriculum"). But *Hazelwood* is not limited to activities that are commonly understood to be part of a school's curriculum. *See* ROSS, *supra* note 4, at 279-80 (discussing the legal distinctions between curricular-related clubs—which include scuba diving and frisbee, where *Hazelwood* governs student expression—and non-curricular-related clubs including student-initiated religious groups protected by federal law); *Hazelwood*, 484 U.S. at 270-271, 273 (defining school-sponsored speech as activities that are "part of the school curriculum, whether or not they occur in a

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Hazelwood only applies to speech by students. The Court did not address school libraries.[110]

However, reasonable observers should not presume that the ideas available in a high school library designed to expose students to competing views or to facilitate research bear the school's imprimatur. The library might well contain various versions of the Bible and texts holy to non-Judeo-Christian religions. It might house the writing of Karl Marx or Adolf Hitler without conveying that those materials bear the school's imprimatur. On the contrary, such books might be assumed to undermine the school's likely message that capitalism is better than socialism and democracy better than fascism.[111]

Tinker, *Hazelwood*, and their progeny only govern speech by students. Student speech doctrine does not reach the other classes of plaintiffs who have standing to challenge targeted removals.

IV. The Contemporary Landscape: Who Decides?

The lack of clear legal doctrine governing the removal of books in schools and school libraries deprives the key players in these disputes (including judges) of sufficient guidance, leaving much of the escalating conflict to be fought in the political arena. Although the vast majority of demands for targeted book removals come from the political right,[112] both sides in the culture wars have attacked educational materials that conflict with their ideals. The political right regularly targets books about race, sex, and gender identity (as discussed above). Demands for book removals from the left commonly aim to serve the goals of diversity and equity.[113] Progressive targets include books

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traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills").

110. Nonetheless, some school districts claim that *Hazelwood*'s deferential standard applies to targeted removals. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 439 F. Supp. 2d 1242, 1277-79 (S.D. Fla. 2006) (holding that the removal of books from the library is not curricular where the books are not assigned or optional reading for any class, project, or "regular scheduled course of study"), *vacated and remanded on other grounds*, 557 F.3d 1177 (11th Cir. 2009).

111. *See Hazelwood*, 484 U.S. at 279-80 (Brennan, J., dissenting) (arguing that student speech that "express[es] a message that conflicts with the school's" without interfering with instruction should be protected, as when a student in political science class says that socialism is better than capitalism).

112. *See, e.g.*, Odette Yousef, *Moms for Liberty Among Conservative Groups Named 'Extremist' by Civil Rights Watchdog*, NPR (June 7, 2023, 2:54 PM ET), https://perma.cc/BWP9-AENK (explaining that the Southern Poverty Law Center named Moms for Liberty and other "so-called 'parental rights' groups" as extremist, citing their anti-vaccination stances and efforts to ban books and to restrict the discussion of race and LGBTQ+ issues in schools).

113. Challenges based on offensive views of minorities in books are not a new phenomenon. *See, e.g.*, Rosenberg v. Bd. of Educ. of N.Y., 92 N.Y.S.2d 344, 345-46 (Sup.

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that include racial or ethnic stereotypes, as well as those deemed harmful to LGBTQ+ identities or gender fluidity presented in books that conservatives target for removal.[114]

A. Democracy in a Microcosm: Elected School Boards

The simplest answer to the question "Who decides?" after someone targets a book for removal is the elected members of the school board. In reality, of course, the answer is not simple.

Constitutional jurisprudence has long relied on the idea that a local school board is attuned to its community's values and is subject to reprimand at election time.[115] This construction underlies the *Pico* dissents. As Chief Justice Burger explained, "local control of education involves democracy in a microcosm."[116] Parents and voters are assumed to communicate their views to the board and to "influence, if not control" their children's educations by electing school board members who are closely accountable to their constituency,[117] at least in theory.

But in recent years, book removal activists have disrupted school board meetings.[118] Opponents of book removals sometimes confront activists there,

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Ct. 1949) (dismissing a petition seeking removal the of *Oliver Twist* and *The Merchant of Venice* from public school libraries and curricula because of their "derogatory" portrayals of Jewish people).

114. *See* Kiara Alfonseca, *How Conservative and Liberal Book Bans Differ amid Rise in Literary Restrictions*, ABC NEWS (Jan. 12, 2023, 2:08 AM), https://perma.cc/7X4P-53ME (reporting that liberal efforts to restrict books are far fewer in number than right wing challenges, more likely to be local than national, aim to combat racism or promote progressive ideals, and tend to target curricular assignments of books like *Adventures of Huckleberry Finn*); Elizabeth Williamson, *'My Heart Sank': In Maine, a Challenge to a Book, and to a Town's Self-Image*, N.Y. TIMES (Feb. 3, 2024), https://perma.cc/Z6KU-NG3M (reporting on a liberal effort to remove a book that critics view as harmful to transgender people); Amended Complaint, *supra* note 37, at 77-78 (alleging an Equal Protection violation based on the school board's "disproportionate[] targeting of "books authored by non-white and/or LGBTQ authors, and/or books that explore themes relating to race, gender, or sexual orientation").

115. *See, e.g.*, Little v. Llano County, 103 F.4th 1140, 1185 (5th Cir. 2024) (Duncan, J., dissenting) (asserting that the "most effective constraint" on public library officials and local governments remains accountability in local elections), *reh'g en banc granted, vacated*, 106 F.4th 426 (5th Cir. 2024).

116. Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting).

117. *Id.* at 891-92; *see also id.* at 894 (Powell, J., dissenting) ("School boards are uniquely local and democratic institutions . . . responsible . . . to the parents and citizens of school districts.").

118. *See, e.g.*, Hannah Natanson, *She Challenges One School Book a Week. She Says She'll Never Stop.*, WASH. POST (updated Sept. 28, 2023, 2:24 PM EDT), https://perma.cc/V9G5-Z9UF.

making school board meetings increasingly visible and contentious.[119] These developments have arguably transformed the context in which school boards consider book removals.

It remains to be seen whether courts will take judicial notice of how organized national groups and vocal outsiders have influenced local educational decisions in the last few years. Today's fact patterns differ radically from those of the past, which may or may not amount to constitutional facts pertinent to the context of First Amendment claims.

The typical book removal case litigated before and in the decades following *Pico* did not arise on facts resembling those in *Pico*. When parents challenged library books, they typically targeted one book at a time.[120] And in general, most incidents of school censorship—whether they arose in the form of targeting educational materials for removal, demanding the school cancel a student production, or singling out a student's views expressed on clothing or in writing—came in response to a complaint by a single vociferous parent in the district.[121]

In contrast, the widespread contemporary attacks on library books arise from facts that more closely resemble those in *Pico*, amplified many times over. First, outside organizations prompt the incident: In *Pico*, a minor state-based conservative group advocated for the removal, and today, nationwide organizations pursue coordinated plans.[122] Second, in both cases the school district relies on a list of challenged books prepared by outsiders: The school

119. *See, e.g.*, Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (updated June 22, 2023), https://perma.cc/DY5M-X5LJ; *see also* Nicole Carr & Lucas Waldron, *How School Board Meetings Became Flashpoints for Anger and Chaos Across the County*, PROPUBLICA (July 19, 2023), https://perma.cc/9ADC-2MAY; Tom Schuba & Nader Issa, *Proud Boys Join Effort to Ban 'Gender Queer' Book from School Library—Rattling Students in Suburban Chicago*, CHI. SUN-TIMES (Nov. 21, 2021, 5:52 PM PDT), https://perma.cc/M4K3-Y8SE.

120. *E.g.*, Right to Read Def. Comm. of Chelsea v. Sch. Comm. of Chelsea, 454 F. Supp. 703, 704-05 (D. Mass. 1978) (describing the removal of a book after one parent complained about one selection in an anthology); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979) (describing the cancellation of a library's magazine subscription and the removal of existing issues after one board member voiced personal objections to the content). In other instances they targeted only a few books, compared to recent complaints that draw on long lists of objectionable books. *See supra* note 19 and accompanying text.

121. *See* ROSS, *supra* note 4, at 100, 157-58, 201-02, 297 (discussing patterns, incidents, and cases pertaining to these challenges).

122. *Compare Pico*, 457 U.S. at 856-57 (Parents of New York United), *with* Khaleda Rahman, *Moms for Liberty Banned Book List—The Novels They Want Taken Out of Schools*, NEWSWEEK (Nov. 3, 2022, 10:16 AM EDT), https://perma.cc/8QUS-KNCH (Moms for Liberty).

district in *Pico* removed a total of nine books, while Moms for Liberty and similar contemporary groups target long lists of titles.[123]

Individual complainants continue to demand targeted book removals, but they aren't the stereotyped outraged parent of yore. In Florida, known as a hotbed of targeted removals,[124] just two people—a father and a teacher in two different counties—filed more than half of the 1,100 complaints about books that the state's public schools received between July 2022 and August 2023.[125]

The pattern is not limited to Florida. The *Washington Post* found that only eleven people originated 60% of all the school book challenges nationally in the 2021-2022 school year.[126] These individuals stand in stark contrast to the citizens who the *Pico* dissenters envisioned—parents operating independently of larger organizations, engaging in dialogue with elected school board members or challenging those members at election time. As discussed above, however, national movements impact local school boards and elections today.

B. Politics or Litigation?

As a matter of constitutional law, it is not enough to merely tell those who disagree with a censorious school board that they should "vote the rascals out." Citizens should not have to rely on the ballot box, as the dissenters in *Pico* recommended,[127] to vindicate the liberty that the Speech Clause guarantees. In *Barnette*, Justice Jackson reminded us that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the

123. *Compare Pico*, 457 U.S. at 857-58 (challenges to numerous titles, leading the board to remove nine), *with* Rahman, *supra* note 122 (challenge to more than 150 books, leading the board to remove five titles). *See also* Hannah Natanson, *Objection to Sexual, LGBT Content Propels Spike in Book Challenges*, WASH. POST (updated June 9, 2023, 6:15 PM EDT), https://perma.cc/6CF8-7K9S (discussing individuals who targeted "dozens—sometimes close to 100—books"). Recent challenges have also come from members of state and local governments. *See, e.g.*, *supra* note 19 and accompanying text (discussing a challenge to 850 titles).

124. *See* Meehan et al., *Mounting Pressure*, *supra* note 21 (noting that Florida was responsible for over forty percent of book removals in the 2022-2023 school year).

125. Ian Hodgson, *Florida Schools Got Hundreds of Book Complaints—Mostly from Two People*, TAMPA BAY TIMES, https://perma.cc/5XQH-NDND (updated Aug. 26, 2023) ("[A] tiny minority of activists across the state can overwhelm school districts while shaping the national conversation over what belongs on school library shelves."). The majority of Florida's sixty-seven school districts did not receive a single request to remove a library book, though some districts pruned their collections in response to new state directives. *Id.*

126. Natanson, *supra* note 123.

127. *See* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting).

courts."[128] Relying on that guidance in 2023, a federal judge in Pennsylvania opined, "The suggestion that parents must engage in politics to protect their constitutional rights is contrary to law."[129]

Justice Jackson correctly asserted that courts exist in part to vindicate individual rights. Potential plaintiffs who oppose targeted book removals may choose to fight on multiple complementary fronts: by litigating, by loudly objecting at their children's school, and by challenging the school board in meetings or at the next election. In fact, as attacks on books have escalated, many communities replaced the conservatives on their school boards in the fall of 2023.[130]

Concerned citizens who oppose targeted bans can also lobby for new laws that would protect books from targeted attacks.[131] States could codify the *Pico* plurality's standard by barring removals based on partisan, political, or discriminatory motives.[132] Narrower measures might include limiting who can challenge books to only the parents of children enrolled in the district's public schools, as well as restricting the number of complaints one parent can file at a time.[133] Jurisdictions so inclined could also give more authority to

128. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

129. Tatel v. Mt. Lebanon Sch. Dist., 675 F. Supp. 3d 551, 568-69 (W.D. Pa. 2023) (denying a motion to reconsider the dismissal of a suit alleging a substantive due process violation when the school did not permit parents to opt out of instruction on gender dysphoria).

130. *See* Matt Barnum & Scott Calvert, *Conservatives Lose Steam in School Board Races as Liberals Mobilize*, WALL ST. J. (Nov. 10, 2023, 8:38 AM ET), https://perma.cc/U8AL-RMJC. This shift was in response to successful conservative campaigns in previous years. *See id.*

131. A handful of states have adopted or are considering laws that would constrain targeted removals and/or protect librarians from liability or harassment. *See* Hannah Natanson & Anumita Kaur, *Red States Threaten Librarians with Prison—As Blue States Work to Protect Them*, WASH. POST (Apr. 16, 2024, 9:00 AM EDT), https://perma.cc/VNT7-9PA9 (collecting pending and enacted legislation designed to protect library books or to make it easier to successfully challenge targeted removals).

132. *See id.* (discussing A.B. 1825, 2023-2024 Leg., Reg. Sess. (Cal. 2024), https://perma.cc/E6UU-G4JE); *see also* 75 ILL. COMP. STAT. 10/3 (2024) ("[M]aterials should not be proscribed or removed because of partisan or doctrinal disapproval . . . .").

133. In an apparent response to negative publicity and a lawsuit opposing a flood of targeted challenges to library books in the wake of a 2023 policy, Florida enacted legislation it claims will stem the tide. *See* Andrew Atterbury, *DeSantis Signs Law Limiting Florida Book Challenges*, POLITICO (Apr. 16, 2024, 2:30 PM EDT), https://perma.cc/CF98-9EC6; Act of April 16, 2024, § 15, 2024 Fla. Laws. ch. 2024-101 (to be codified at FLA. STAT. § 1006.28(2)(a) (2024)) ("A resident of the county who is not the parent or guardian of a student with access to school district materials may not object to more than one material per month."). For discussion of the lawsuit, see below at notes 189-98 and accompanying text.

professional librarians instead of elected school board members and require librarians to adhere to the ALA's code.[134]

Judges should not abandon plaintiffs who seek to enforce their First Amendment rights to the vagaries of politics, whether local or national. Judicial enforcement of civil liberties is especially crucial in the face of escalating, well-organized attacks, described in the next Subpart.

C. Parents' Rights

Concerted political attacks on public schools that promote critical thinking and support pluralism did not spring from nothing overnight. They are deeply rooted in right-wing politics, particularly in the parental rights movement led by Michael Farris, whom the *Washington Post* describes as "a conservative Christian lawyer who is the most influential leader of the modern home-schooling movement."[135] Farris spearheaded the right-wing politicization of parental rights. He then nurtured and developed an organized movement to achieve targeted book removals.[136] By considering Farris's role in the parental rights movement, we can better understand the seemingly rapid rise of ideological campaigns to constrict the materials available to students.

Before he targeted books, Farris drafted, and Republicans in Congress pursued, a series of bills and a proposed constitutional amendment enshrining parental rights as "fundamental."[137] The Supreme Court has long recognized

134. *See Professional Ethics*, AM. LIBR. ASS'N, https://perma.cc/T7AM-65DC (archived May 12, 2024) ("In a political system grounded in an informed citizenry, we are members of a profession explicitly committed to intellectual freedom and the freedom of access to information. We have a special obligation to ensure the free flow of information and ideas to present and future generations."). In 2023, Illinois incorporated the ALA's Bill of Rights into its statutory code. *See* 75 ILL. COMP. STAT. 10/3 (2024).

135. Emma Brown & Peter Jamison, *The Christian Home-Schooler Who Made 'Parental Rights' a GOP Rallying Cry*, WASH. POST (Aug. 29, 2023, 7:00 AM EDT), https://perma.cc/7NJW-73L9.

136. *Id.* (discussing Farris's career and his July 2021 teleconference with right-wing mega-donors outlining his plans for legal attacks on teaching about gender identity and race). Farris founded the Home School Legal Defense Association in 1983, and in 2007 he created Parentalrights.org. *Id.* Additionally, from 2017 to 2022, he was the president and chief executive of Alliance Defending Freedom, a leading Christian legal group that initiated many consequential state and federal lawsuits. *Id.*

137. *See, e.g.*, *Proposing an Amendment to the Constitution of the United States Relating to Parental Rights: Hearing on H.J. Res. 110 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. (2012), https://perma.cc/VQ5C-ZGU8; *Proposing an Amendment to the Constitution of the United States Relating to Parental Rights: Hearing on H.J. Res. 50 Before the Subcomm. on the Const. & Civ. Just. of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Proposing an Amendment 2014*], https://perma.cc/DHK2-TFY2. I testified in opposition to the proposal at the 2014 hearing. *See Proposing an Amendment 2014*, *supra* at 22 (testimony of Catherine J. Ross, Professor of Law, George Washington University Law School). None of Farris's proposals were reported out of committee.

that parents have the right to "make decisions concerning the care, custody, and control of their children" as one of the fundamental substantive due process rights implicit in the constitutional order.[138] According to Farris, parental rights are not just fundamental as the term is used in constitutional doctrine; they are, he declared, "right[s] which come[] from God."[139] To the extent that organized efforts to remove books from school libraries reflect Farris's influence, his views on parental rights illuminate the book removal movement's goals.

By 2014, Farris claimed that there was an urgent need for a parental rights amendment to protect parents from government incursions into what he sees as their sacred rights.[140] He argued that "threats to parental rights" required express constitutional language recognizing that the right was "fundamental" in order to guarantee that intrusions on those rights would be subject to strict scrutiny in court.[141]

The Amendment's language threatened a major rebalancing between the existing rights of parents and the state's *parens patriae* powers.[142] That realignment could have exposed children to real risks of neglect and abuse,

138. Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion). My own congressional testimony analyzes the Supreme Court's parental rights jurisprudence. *See Proposing an Amendment 2014*, *supra* note 137, at 22-36 (statement of Catherine J. Ross).

139. *Parental Rights and Responsibilities Act of 1995: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 104th Cong. 154 (1995) (statement of Michael P. Farris, President, Home School Legal Defense Association), https://perma.cc/F9FA-D7KH; *see also* Brown & Jamison, *supra* note 135. Fundamental rights include those expressly mentioned in the Constitution, as well as important liberty interests implicit in the constitutional scheme, such as the right of parents to the care, custody, and control of their children. Most fundamental rights are so crucial that the state generally cannot limit them unless it can satisfy strict scrutiny by showing that the state has a compelling interest and that the regulation is necessary and narrowly crafted to achieve the state's goal. *See supra* note 92.

140. *Proposing an Amendment 2014*, *supra* note 137, at 16-17 (statement of Michael P. Farris, Chairman, Home School Legal Defense Association, and Chancellor, Patrick Henry College) (describing a "crisis" in which "we are rapidly . . . becom[ing] a nation where the government comes first and parents come second").

141. *Id.* at 12, 15-16, 21. My testimony refuted this argument, pointing out that the amendment was not necessary because courts generally respect parental rights. *See id.* at 24-36 (statement of Catherine J. Ross); *see also id.* at 19 (statement of Michael P. Farris) (noting the "clash" between his views and my own).

142. Common law *parens patriae* doctrine refers to the state's role in protecting those who cannot care for themselves, including children. It limits parents' rights to raise their children as they see fit by allowing the state to intervene on the child's behalf to protect them from neglect or abuse and to ensure that they receive an adequate education. *See* Naomi Cahn & Catherine J. Ross, *Parens Patriae*, *in* THE CHILD: AN ENCYCLOPEDIC COMPANION 705, 705-06 (Richard A. Shweder et al., eds., 2009).

through the denial of vaccines and medical treatment as well as the inhibition of other state regulations designed to protect children.[143]

Farris's rebalancing would have reached the daily operation of public schools as well. The proposed amendment would have given parents "the right to make reasonable choices within public schools for [their] child."[144] That seemingly innocuous language would have transformed public education by allowing each parent to tailor the curriculum for their own child, primarily by allowing parents to opt out of topics and materials that were part of the school's required curriculum. Current constitutional doctrine does not support a right to such exemptions.[145]

Different parents are likely to have different objections based on their values. Two adults parenting the same child may not even agree with each other. Allowing parental objections would make the curriculum a smorgasbord in which parents take only the components they like, with each course, each unit of each course, and each assignment subject to carve-outs based on diverse values and beliefs. "Chaos would result, significantly undermining the quality of education [for all students] . . . ."[146] Despite protestations that "reasonable" choices would only affect each parent's own child, schools facing challenges under the amendment would likely take the easy way out and offer a pared down curriculum to all.[147]

Parents who succeed in getting books removed make those titles unavailable to *everyone's* children—not just their own. The result is the opposite of a smorgasbord: varieties of herrings, smoked fish, and salads that one person does not like would be pulled off the serving table, limiting what is available for all to sample. The restricted offering may be analogized to the First Amendment heckler: The heckler's veto doctrine requires authorities to

143. *See Proposing an Amendment 2014*, *supra* note 137, at 73-74 (statement of First Focus Campaign for Children); *id.* at 57-58 (statement of Catherine J. Ross).

144. *Id.* at 4 (reproducing the proposed amendment); *see id.* at 49 (statement of Catherine J. Ross) (discussing the implications of the "reasonable choices" language given that "every parent has different views about what is appropriate and what is not appropriate for their children").

145. *See, e.g.*, Leebaert *ex rel.* Leebaert v. Harrington, 193 F. Supp. 2d 491, 501-02 (D. Conn. 2002) ("[P]arents of public school students do not have a constitutional veto over decisions of school officials concerning the contents of required courses."); Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987) (concluding that there is no religious exercise right to an exemption from required reading that exposes the student to ideas offending parental beliefs).

146. *Proposing an Amendment 2014*, *supra* note 137, at 34 (statement of Catherine J. Ross).

147. *See id.* at 48-49 (explaining that on its face the "reasonableness" language would not affect what every child learns, but that parents could object to each assignment in each subject, including art history because it may involve viewing naked bodies and American history because it "doesn't put us in a good light").

remove the hecklers rather than silence the speaker whose words provoke the crowd.[148] Similarly, it would seem consistent with the normative values inherent in the Speech Clause that parents should not be able to prevent other people's children from accessing information.

Self-identified parental rights activists certainly do not speak for parents of every stripe when they target books for removal. Survey data from 2022 reveals that "large majorities" (71%) of parents regardless of political affiliation "oppose efforts to remove books from school libraries because some people find them offensive or inappropriate."[149] Only 19% of parents agree with the statement that "[w]e need to protect young people from books they might find upsetting or that reflect ideologies and lifestyles that are out of the mainstream."[150] And nearly three-quarters of parents (72%) distinguish between the rules they set for their own children and the right of "other parents [to decide] what books are available to their children."[151]

Some school districts strive for a middle ground when parents challenge library materials by moving targeted materials to a section that requires parental consent.[152] This approach arguably avoids pitting one set of parents

148. *See* Terminiello v. Chicago, 337 U.S. 1, 4-6 (1949) (stating that free speech is protected though it "invite[s] dispute" and "even stirs people to anger"); *see also* Meinecke v. City of Seattle, 99 F.4th 514, 524-26 (9th Cir. 2024) (discussing and applying the rule that "wrongful acts on the part of hecklers" cannot justify silencing the speaker (quoting Santa Monica Nativity Scenes Comm. v. Santa Monica, 784 F.3d 1286, 1292-93 (9th Cir. 2015))). *But see* L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 2192234, at *5 (W.D. Mo. Feb. 23, 2023) (quoting C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 918 (E.D. Mo. 2022)) (rejecting the plaintiff's claim that a book removal resembles a heckler's veto because the removal was not motivated by a fear of a violent response). Some book removal episodes raise the specter of violence, such as when the targeted challenge is accompanied by a community book burning. *See, e.g.*, Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 867-68 (D. Kan. 1995) (noting news reports that protesters demanding removal "burned copies of *Annie on My Mind* on the steps of the Kansas City School District offices").

149. Am. Libr. Ass'n, Voters Oppose Book Bans in Libraries 1 (n.d.), https://perma.cc/MB7T-DNTS (finding that 75% of Democrats, 58% of independents, and 70% Republicans oppose removals on this ground).

150. *Id.* at 4.

151. *See id.*

152. *See, e.g.*, Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 858 (plurality opinion) (recounting that a committee appointed by the school board recommended that one challenged book be returned to the school library subject to parental approval); Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 997-98 (W.D. Ark. 2003) (challenging placement of books on a reserve shelf requiring parental consent); Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 190-91 (5th Cir. 1995) (observing that the school board removed *Voodoo & Hoodoo* from all school libraries without even considering the committee's recommendations that the book be made available to eighth graders with parental consent); *see also* GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *19 (S.D. Iowa Dec. 29, 2023) (explaining that students lacked any way to access the

footnote continued on next page

against another by retaining the challenged books in the collection while accommodating parents who do not want their own children exposed to literature that offends them.

However, shelving subject to parental consent has many limitations. From the censorious parents' point of view, the risk remains that their children will simply ask friends to show them the books or that the book will seem even more enticing because it is forbidden.[153] From the students' vantage point, some students in conservative settings may not want to ask for a book that some adults have labelled pornographic or subversive[154] (just as students may not want to ask to be excused from prayer or Bible reading). As a practical matter, a significant proportion of parental consent forms—whether they pertain to permission to access library books, class trips, or allowing the nurse to dispense aspirin—never make it back to school, not necessarily because parents want to withhold consent but often because parents are too busy to respond.[155]

The parents who target books for removal may succeed through political action but they lack any constitutional right to achieve their goals if their children attend public schools. For example, parents have no constitutional basis for demanding that their children be exempted from sex education class.[156] Similarly, parents have no legal ground for insisting that their

challenged books, which were not even available on restricted shelves subject to parental consent), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

153. The desires of parents and children are sometimes at odds. A teenage student may wish to access a restricted library book but cannot obtain her parent's consent. *See* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 224-25 (1999) (arguing that, notwithstanding the objections of parents, the state should provide information to mature minors who need the information in order to meaningfully exercise other constitutional rights, such as rights involving personal autonomy, sexuality, contraception and abortion). A teenager in this position may even be eighteen years old—a legal adult.

154. *See Counts*, 295 F. Supp. 2d at 999 (finding that requiring parental consent stigmatizes books and the students who choose to read books identified as "bad").

155. *See, e.g.*, Holly Given, Amanda Neitzel, Ahmed F. Shakarchi & Megan E. Collins, *School-level Factors and Consent Form Return Rate in a School-based Vision Program*, 8 HEALTH & BEHAV. POL'Y REV. 148, 152 (2021), https://perma.cc/QU3Z-VUPF (finding a return rate of 57.8% for forms consenting to participation in a free vision program). In one Florida district, only 3% of parents declined to consent to their children's use of challenged materials, but 40% failed to return the forms. Dana Goldstein, *In Florida, New School Laws Have an Unintended Consequence: Bureaucracy*, N.Y. TIMES (Jan. 10, 2024), https://perma.cc/DXT9-7SU6. In another county where the district would not allow students to check out any books without parental consent, about 25% of parents did not return the forms. *Id.*

156. Leebaert *ex rel.* Leebaert v. Harrington, 193 F. Supp. 2d 491, 493-94 (D. Conn. 2002; *see also* Parker v. Hurley, 514 F.3d 87, 107 (1st Cir. 2008) (holding that parents have no constitutional right to opt out of a required curriculum that exposes their children to material they find objectionable because of their religious beliefs).

children be allowed to choose an unauthorized ("never selected" or "expressly unauthorized") book as the topic for a book report[157] or be permitted to perform a potentially explosive experiment in the chemistry lab.

As Justice Alito has observed, "The theory must be that by enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights."[158] Applying *in loco parentis* doctrine[159] to the public schools, Justice Alito "inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform."[160]

Parents who seek to constrict a school's educational program for their own child confront a high bar in court even before the merits are reached.[161] Judges may find that the parent lacks standing because, among other things, they have not suffered a "concrete, imminent, and actual injury," or that their alleged injuries are unlikely to be redressed.[162] In contrast, courts are likely to find that parents who *challenge* targeted removals have standing and cognizable claims, as discussed in the next Part.

V. Standing and Standards of Review

Litigation stemming from targeted removals is almost always brought by plaintiffs who challenge (1) a decision to temporarily or permanently remove a library book; (2) a decision to require parental permission to access a book; or

157. Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 156 (6th Cir. 1995) (explaining that teachers have broad authority to set parameters for assignments and students must confine their work to the requirements); *see also supra* note 34 and accompanying text.

158. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2051 (2021) (Alito, J., concurring).

159. *See id.* at 2045 (majority opinion) ("[S]chools at times stand *in loco parentis*, *i.e.*, in the place of parents.").

160. *Id.* at 2052 (Alito, J., concurring).

161. *See, e.g.*, Mahmoud v. McKnight, 688 F.Supp.3d 265, 274, 305-07 (D. Md. 2023) (denying preliminary injunctive relief to Muslim parents who sought a right to opt out of story books with LGBTQ+ characters and applying rational basis review to their parental rights claims), *aff'd*, 102 F.4th 191 (4th Cir. 2024).

162. *See, e.g.*, L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 3132003, at *1-4, *4 n.2 (W.D. Mo. Apr. 27, 2023) (dismissing a lawsuit challenging a book removal policy for lack of standing), *argued*, No. 23-02326 (8th Cir. Apr. 9, 2024); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 78 F.4th 622, 626 (4th Cir. 2023) (finding no parental standing where the plaintiffs challenged aspects of the school board's guidelines that "permit school officials to develop gender support plans and then withhold information about a child's gender support plan from their parents" because the plaintiffs failed to allege that their children have gender support plans, identify as transgender, or struggle with their gender identity), *cert. denied sub nom.* Parents 1 v. Montgomery Cnty. Bd., No. 23-601, 2024 WL 2262333 (U.S. May 20, 2024).

(3) laws that lead those decisions. The plaintiffs are drawn from a broad spectrum of parties whose interests are affected, including students, parents, teachers, librarians, publishers, and authors. Those plaintiffs confront several threshold issues, including showing that they have legal standing[163] and establishing the correct legal standard for evaluating their claims in the absence of clear guidance from appellate courts.[164]

In 2023, a federal district held that librarians, teachers (and their statewide union), as well as certain students (whose parents sued on their behalf), all had standing to challenge a recently enacted law: Iowa Senate File 496.[165] Senate File 496 bars "promotion" of alternative gender identity or "sexual orientation" to students below the seventh grade as well as the use of materials in any grade deemed not to be "age-appropriate" as defined by the legislature.[166]

The court parsed the basis for each group's standing, beginning with what it termed the "educator plaintiffs," a group that included middle school teachers, a librarian, and the teachers' union.[167] One educator plaintiff, a seventh-grade teacher who was found to have standing, sometimes made books about gender identity available to sixth graders, which could be considered "promotion" under the statute.[168] Teachers and librarians at every grade level had standing to challenge the portion of the statute that required them to remove materials deemed "not 'age-appropriate.'"[169] Senate File 496 placed librarians at particular risk because they were responsible for deciding what was age appropriate under a statute that provided little guidance.[170] This may explain why, even before the statute became effective, educators and officials had removed more than 500 distinct titles from schools in the state.[171] The

163. The "irreducible constitutional minimum of standing" requires the plaintiff to show (1) an "injury in fact" that is (2) "fairly . . . trace[able] to the challenged action of the defendant" and (3) that a decision for the plaintiff will likely redress that injury. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (alteration in original) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41-42 (1976)) (explaining that in order to satisfy these requirements, plaintiffs must identify the precise legal right they are asserting).

164. GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *12 (S.D. Iowa Dec. 29, 2023) ("[E]xisting Supreme Court and Eighth Circuit precedent provide helpful guidance in some ways but very little clarity in others."), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

165. *Id.* at *2, *8, *10-12.

166. Act of May 26, 2023, §§ 1-4, 16, 2023 Iowa Acts. ch. 91 (codified at IOWA CODE §§ 256.11, 279.80 (2024)); *see GLBT Youth*, 2023 WL 9052113, at *2-3 (explaining that the law applies to school curricula, classrooms, and libraries).

167. *GLBT Youth*, 2023 WL 9052113, at *8-9.

168. *Id.* at *8.

169. *Id.* at *9.

170. *Id.*

171. *See id.* at *3. The vagueness of such book removal laws is discussed in Part VI.B below.

union too had standing because each of its members would have standing to sue individually, and the organization's interests of "providing support for teachers and other licensed education professionals" were at stake.[172]

The publishers and authors could not be held liable under the statute because they were not licensed or employed by the state, but they nonetheless had standing because Senate File 496 "prohibit[ed] them from reaching their intended audience" and could diminish their profits.[173] The stigma that would likely follow book removals provided an independent ground for standing: The public could mistakenly view their work as "pornography" given the statute's aims.[174]

Students who are in the grades affected by the removals also have standing because the "age-appropriate" restrictions "directly limit the books and materials [they] can obtain from the school library."[175] Their parents routinely represent them in court as next friends,[176] or parents may serve as a representative for their minor child without joining the child as a party.[177]

The plaintiffs' identities—as students, librarians, publishers, and so forth—are inextricably linked to the precise basis for their constitutional claims, discussed below, and the resulting standard of review.[178] Generally applicable

172. *GLBT Youth*, 2023 WL 9052113, at *8.

173. *Id.* at *9-10.

174. *See id.*

175. *Id.* at *10. Other courts have imposed more stringent requirements on students who assert standing. *See, e.g.*, Parnell v. Sch. Bd. of Lake Cnty., No. 23-cv-00414, 2024 WL 2703762, at *3 (N.D. Fla. Apr. 25, 2024) (finding that a student who sought to check out a removed book and would presumably borrow it if it became available satisfies the injury-in-fact standing requirements because she alleged more than a "some day intention" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992))); ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1196-97 (11th Cir. 2009) (holding that plaintiffs who "have not stated with sufficient specificity their plans for accessing the books" lack standing to challenge the school library's removal of a book).

176. *See, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *10.

177. *See* L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 2192234, at *3 (W.D. Mo. Feb. 23, 2023) (explaining that "guardians of the real parties in interest" may bring suit "without joining their children" (citing FED. R. CIV. P. 17(a)(1)(C))). I am not aware of any targeted book removal cases in which a parent or guardian asserts independent standing without pointing to a child whose interest the adult is pursuing. In a related context—a challenge to a school's Pledge of Allegiance ceremony—the Court found on state law grounds that a father with joint custody of (but limited legal authority over) a minor child lacked prudential standing. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18 (2004), *overruled in other part by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Chief Justice Rehnquist, concurring in the judgment, argued that the father's "daughter is not the source" of his standing and that the father should have standing because of his "*relationship*" to his daughter and his interest in exposing her to his values. *Id.* at 23-24 (Rehnquist, C.J., concurring in the judgment).

178. *See GLBT Youth*, 2023 WL 9052113, at *14-15 (explaining that "to determine the appropriate standard for the overbreadth challenge, it is necessary to evaluate whose

footnote continued on next page

First Amendment doctrine applies to claims by plaintiffs who are outside the scope of the school's authority—for instance, authors, publishers, or public interest groups.[179] But that is not the case for plaintiffs who are subject to the school's authority.[180]

VI. Constitutional Claims

Despite substantial doctrinal hurdles, at least six potential constitutional claims remain viable to plaintiffs who are within the scope of a school's authority and challenge targeted book removals. The strongest constitutional claim for students in targeted book removal cases remains the First Amendment right to receive information.[181] Other plaintiffs, as well as students, may have Speech Clause claims based on overbreadth and vagueness as well as prior restraint. Fourteenth Amendment claims based on procedural due process and equal protection also hold some promise.

A. The Right to Receive Information

Students and their parents who challenge targeted removals continue to rely primarily on the right to receive information.[182] To the extent that lower courts seek guidance from *Pico*, they recognize that students have a constitutional right to receive information so long as they allege that the decision to remove materials from a school library was motivated by "ideological, religious, or other" animus toward the ideas in the targeted materials.[183]

First Amendment rights are at issue, and what those rights are," and distinguishing the different standards of review applicable to publishers and authors from those applicable to students).

179. *See id.* at *14 (finding it "straightforward" to determine that publishers and authors have the right to not be limited in reaching their "intended audience based on the content of their speech," and to not be "stigmatize[d]" by the implication that their books are "pornographic or otherwise unsuitable for the target audience").

180. *See id.* at *13, *15.

181. *See* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 866-69 (1982) (plurality opinion); *GLBT Youth*, 2023 WL 9052113, at *13 (determining that student plaintiffs "have a First Amendment right to receive information in school libraries"); *see also* Virgil v. Sch. Bd. of Columbia Cnty., 677 F. Supp. 1547, 1550 (M.D. Fla. 1988) (citing *Pico* for the holding that improper book removals violate students' right to receive information).

182. *See, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *13 (granting in part a motion for preliminary injunction and agreeing with the student plaintiffs that they "have the First Amendment right to receive information in school libraries free from suppression based on viewpoint, ideology, or other reasons amounting to the suppression of ideas"); C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 911 (E.D. Mo. 2022); Amended Complaint, *supra* note 37, at 76 (quoting *Pico*, 457 U.S. at 867-68, 870-71).

183. *See GLBT Youth*, 2023 WL 9052113, at*13-14.

Students may not be the ideal plaintiffs in book removal cases even though they suffer the most direct harm because of: (1) the diminished status of the *Pico* plurality's opinion;[184] (2) the resulting apparent fragility of the right to receive information in school libraries;[185] and (3) the application of a standard of review to student's expressive claims in school that is less protective than strict scrutiny.[186] As discussed below, other kinds of plaintiffs may have stronger legal arguments.

On the other hand, student plaintiffs need not rely too heavily on the *Pico* plurality opinion because the right to receive information remains part of First Amendment jurisprudence outside of the school library context.[187] Plaintiffs' chances of prevailing in pending cases likely depend on those cases' specific facts and context as well as on the judge's view of *Pico's* continued

184. *See supra* Part III.B.

185. Justice Brennan's plurality opinion in *Pico* rested on students' right to receive information in public school libraries; it was the first time that right was applied to students. When lower courts assert that *Pico* lacks precedential value, they undermine students' right to receive information in targeted book removal cases. Since 1999, courts have paid limited attention to the right to receive information beyond cases involving public school libraries. *See infra* note 187.

However, in a case decided in June 2024 (after the cut-off date signaled in note 1 above) the Fifth Circuit applied the right to receive information and the standards established in *Pico* and *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995), to the removal of books from the children's section of a public library. Little v. Llano Cnty., 103 F.4th 1140, 1149-51 (5th Cir. 2024) (holding that the First Amendment is violated when book removal results from the "substantial motivation to prevent access to particular points of view" and noting that the principle applies "with even greater force" outside the education context), *reh'g en banc granted, vacated*, 106 F.4th 426 (5th Cir. 2024).

186. *See supra* notes 97-99 and accompanying text.

187. *See* Parnell v. Sch. Bd. of Lake Cnty., No. 23-cv-00414, 2024 WL 2703762, at *9-10, *10 n.12 (N.D. Fla. Apr. 25, 2024) (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969); and Martin v. City of Struthers, 319 U.S. 141, 143-44 (1943)) (rejecting the government's argument that there is no constitutional right to receive information); Ross, *supra* note 153, at 227-33 (analyzing the right to receive information and discussing leading cases outside of the school library context before and after *Pico*). Since 1999, only a handful of cases have mentioned the rights of listeners in any context. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."). In contrast, academic literature has paid increasing attention to the right to receive information. *See, e.g.*, Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 906-09 (2017); RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 500-06 (2019); Caroline Lester, Note, *Say Gay: Why H.B. 1557 Is an Unconstitutional Infringement on Minors' First Amendment Right to Receive Information*, 25 GEO. J. GENDER & L. 141, 173 (2023); *see also* Dana R. Wagner, Note, *The First Amendment and the Right to Hear*, 108 YALE L.J. 669, 673-76 (1998).

relevance and the independent vitality of a right to receive information in school libraries.[188]

In 2023, PEN America, authors, publishers, and parents filed a wide-ranging lawsuit against the Escambia County School Board that rested in large part on the right to receive information.[189] In January 2024, a federal district court in Florida denied the school board's motion to dismiss the First Amendment claims.[190]

The amended complaint alleged that the school district removed 10 books from school libraries and restricted another 155 while it reviewed them for potential removal.[191] Two developments prompted the board's actions. First, one teacher in the district submitted numerous "Request[s] for Reconsideration of Educational Media" based on national lists of objectionable books.[192] Second, the plaintiffs alleged that the district misinterpreted Florida's Parental Rights in Education Act (known as the "Don't Say Gay" bill) to require the school to restrict access to books that so much as "recognize the *existence* of same-sex relationships or transgender persons."[193] On its face, and as the state confirmed in a different case, the Act "regulates only 'classroom instruction,' not the availability of library books."[194] The amended complaint further alleged that the push to remove books singled out works by or about persons of color, by LGBTQ+ authors, or about certain topics, and that the district removed books without following its standard procedures.[195] The basis for pleading additional counts is discussed in the Subparts that follow.

Florida—which is not a defendant in the case—filed an amicus brief supporting the school board's motion to dismiss, asserting that no First Amendment rights attached to school libraries.[196] The state argued that the

188. *See, e.g.*, C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 913-17, 920 (E.D. Mo. 2022) (calling the right to receive information in schools "amorphous," applying *Pico* after saying it is not binding, and denying relief to a student plaintiff where the district followed neutral procedures that provided mechanisms for review).

189. *See* Amended Complaint, *supra* note 37, at 4.

190. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024).

191. Amended Complaint, *supra* note 37, at 31, 36.

192. Amended Complaint, *supra* note 37, at 21-23.

193. *Id.* at 29-30.

194. *Id.* at 29-30 (quoting State Defendants' Second Motion to Dismiss and Incorporated Memorandum of Law at 8, Cousins v. Sch. Bd. of Orange Cnty., 687 F. Supp. 3d 1251 (M.D. Fla. 2023), 2022 WL 19348689, ECF No. 112).

195. *See id.* at 19-21, 45-47.

196. Brief of the State of Florida as Amicus Curiae in Support of Defendant's Motion to Dismiss at 2-3, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213 (N.D. Fla. Jan. 12, 2024), ECF No. 31-1, https://perma.cc/SXN4-7NHS.

contents of school libraries (like the curriculum) are government speech, meaning that the government "can freely select the views that it wants to express, including choosing not to speak and speaking through the removal of speech that the government disapproves."[197]

If courts were to treat library books as government speech that could be silenced or modified with changes in leadership, any distinction between school libraries and the curricular arena would be obliterated. The range of topics and viewpoints in the library could be severely restricted so that its function would no longer extend to intellectual exploration or reading for pleasure.[198]

B. Vagueness and Overbreadth

The First Amendment's analytical mainstays of vagueness and overbreadth provide potentially powerful arguments against poorly drafted regulations. Government regulation of speech may be void for vagueness even absent an independent Speech Clause claim if the law does not provide "adequate notice of proscribed behavior" that is subject to penalty.[199] If a

197. *Id.* at 3 (quoting Gundy v. City of Jacksonville, 50 F.4th 60, 71 (11th Cir. 2022) (internal quotation marks omitted)). The state correctly noted that *Pico* predates the Supreme Court's creation of government speech doctrine, *id.* at 9, which first appears in *Rust v. Sullivan*, 500 U.S. 173, 197-200 (1991).

198. Of course, the Constitution does not require schools to provide libraries at all. As a result, many schools may lack this important resource. *See, e.g.*, Hannah Dellinger, *Plans to Put Libraries in Most Michigan Schools Get Support from Educators and Parents*, CHALKBEAT DETROIT (Apr. 17, 2024, 9:17 AM PDT), https://perma.cc/9VX6-MEN2 (writing that although the exact number is "not clear," many Michigan schools have no library, and less than 10% of school libraries are staffed with full-time professional librarians).

199. GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *19 (S.D. Iowa Dec. 29, 2023) (quoting Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 (8th Cir. 1997)), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024). The risk of criminal liability for an individual's expression enhances the vagueness claims under the Fifth Amendment. *See* Smith v. Goguen, 415 U.S. 566, 574 (1974) (holding that the "statutory language [criminalizing 'contemptuous treatment' of the flag] fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not," requiring closer scrutiny because of the potential to encroach on expression). Librarians in at least seven states are exposed to criminal liability for failing to remove material that could harm minors. Hannah Natanson, *School Librarians Face a New Penalty in the Banned Books Wars: Prison*, WASH. POST (May 18, 2023, 6:00 AM EDT), https://perma.cc/S93A-BUYY. It does not appear that any librarians have been charged under these laws. *See* Natanson & Kaur, *supra* note 131. Organizations representing librarians in Missouri have challenged a statute that would subject their members to up to one year in prison if they provide "explicit sexual" materials to students, no matter when or where they did so—including sharing materials with their own children. Petition for Injunctive and Declaratory Relief at 1-2, 8, Mo. Ass'n of Sch. Librs. v. Baker, No. 2316-cv-05732 (Mo. Cir. Ct. Jackson Cnty. filed Feb. 16, 2023), https://perma.cc/GD82-R9VH (challenging MO. REV. STAT. § 573.550 (2023)).

regulation inhibiting speech restricts substantially more speech than is constitutionally permissible, it is unconstitutional because of overbreadth.[200] Vagueness and overbreadth often overlap in targeted removal cases.

A number of the statutes and regulations that have led to mass targeted removals in the last few years were aimed at depictions of, reference to, or information about sex and sexuality, thus reaching far more protected speech than is necessary to achieve the asserted state interest in protecting students.[201] For example, in Iowa an "expansive definition of 'age-appropriate'" required "the wholesale removal of every book containing a description or visual depiction of a 'sex act,' regardless of context."[202] Despite the Iowa State Board of Education's attempt to flesh out the meaning of "age-appropriate," the educators who were responsible for carrying out the statute's commands remained confused, and school districts reached different conclusions about what materials needed to be removed from the library.[203] Similarly, in Texas, where the statute challenged in court requires removal of "sexually explicit" and "sexually relevant" materials, the state's Penal Code defines "sexual conduct" in a way that "seemingly encompasses any sexual-related topic."[204]

All parties in book removal cases concede that the targeted material is not obscene even under the variable obscenity standards that apply to minors.[205] If these materials met the legal definition of obscenity, they would already be illegal for minors to access—whether in school or in the community. The policies at issue often define expressly unauthorized or unsuitable material in terms that completely disregard their context or whether the material "taken as a whole" has "serious literary, artistic, political or scientific value."[206] Such

200. *See* Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987); *see also* United States v. Stevens, 559 U.S. 460, 483-84 (2010) (Alito, J., dissenting) ("[T]he overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others.").

201. *See, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *15.

202. *Id.* at *19.

203. *See id.* at *3.

204. *See* Book People, Inc. v. Wong, 692 F. Supp. 3d 660, 672 & n.1 (W.D. Tex. 2023), *aff'd in part, vacated in part, remanded*, 91 F.4th 318 (5th Cir. 2024).

205. Ginsberg v. New York, 390 U.S. 629, 631-35 (1968) (upholding a statute barring the sale of materials that are obscene for a person under the age of seventeen even though the materials would not be obscene for adults); *see, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *16 (noting the plaintiffs' concession that "school districts have greater freedom to remove books from school libraries and curricula than just those that meet the adult obscenity standard").

206. Miller v. California, 413 U.S. 15, 23-25 (1973) (establishing the current test for obscenity); *see, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *17 (concluding that the "obscenity-light" standard from *Ginsberg* and its progeny must be considered in assessing whether book restrictions in schools comply with the First Amendment).

overbroad policies have led to patently absurd results, such as targeted removals of dictionaries.[207]

Even policies that seem at first glance to be content-neutral may not be easy to apply. For example, a school district in Missouri allows librarians to remove books that (1) are in disrepair, (2) contain unreliable information, or (3) are inappropriate because they "exceed[] age sensitivity."[208] The first basis seems relatively straightforward, but the second—a determination of what is regarded as "unreliable"—might depend on a librarian's viewpoint. Does the librarian think climate change is real? Does he believe Joe Biden was elected President in 2020? And the third basis—a determination of what "exceed[s] age sensitivity"[209] (closely akin to educational suitability)—may correlate with personal values, such as whether the adult worries more about a child's exposure to sex than to depictions of violence or the death of a parent (as in children's classics like *Bambi*).

That said, challenged books sometimes clearly fall within the intended and permissible statutory definitions. One district court judge observed, "[I]t is quite easy to see why a librarian would conclude the three books at issue should be removed based on age sensitivity given each has lascivious content."[210] Describing the books that the plaintiffs sought to restore to the school library collection, the judge quoted explicit descriptions of "multiple sexual encounters" such as, "Dougie was on his knees in front of Delaney . . . [h]is tongue was out, licking the tip of Delaney's penis."[211] Professional librarians, the judge mused, might rule either way on whether these books were suitable for older students, but he found that the plaintiffs' "sweeping and, frankly, disconcerting request" to immediately restore the removed books to the shelves could hypothetically expose third graders to their content.[212] Surely many parents would share these concerns. We should not assume that all targeted books deserve a vigorous defense.

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207. *See supra* note 16 and accompanying text; *GLBT Youth*, 2023 WL 9052113, at *20 (observing that the *Merriam-Webster Online Dictionary* is likely prohibited under the state's law because it defines sexual intercourse).

208. *See* C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 910 (E.D. Mo. 2022) (alteration in original).

209. *Id.*

210. *Id.* at 916.

211. *Id.* at 916-17 (quoting KIESE LAYMON, HEAVY: AN AMERICAN MEMOIR 25 (2018)) (noting that the court cannot conclude absent "actual evidence" that the librarians' conclusion that the books were vulgar and "not age appropriate" was pretextual).

212. *Id.* at 917.

C. Prior Restraint

Where the government attempts to restrain speech that has not yet occurred, it generally relies on injunctions (based on the dangers posed by publication)[213] or licensing requirements (which must not be based on content or viewpoint).[214]

Several courts have considered pleadings based on prior restraint at early stages of book removal litigation—yielding mixed results. In *C.K.-W. v. Wentzville R-IV School District*, the district judge rejected the plaintiffs' argument that book removals prevented communication before it occurred.[215] Even if a targeted book removal met the definition of prior restraint, he posited, *Hazelwood* (which permitted censorship of a school newspaper) indicates that "prior restraints on speech are not always unconstitutional in a public school setting."[216]

Students' diminished First Amendment rights undermine their claims of prior restraint, but other kinds of plaintiffs on other facts may succeed. A district court in Texas issued a preliminary injunction when book vendors challenged a statute that imposed a rating system to identify books that school districts would not be allowed to purchase.[217] The statute also required vendors to issue a recall for all existing copies of those books.[218] The court determined that the statute amounted to "classic" prior restraint, which "bears a heavy presumption against its constitutional validity."[219]

That presumption was reinforced by the lack of procedural protections for the vendors.[220] At a minimum, the "settled rule" requires "at least the[se] three safeguards": (1) the burden must be on the censor to institute judicial proceedings to prove the material is unprotected; (2) a prior restraint pending judicial review can be only "for a specified brief period" to preserve the status quo; and (3) the judicial resolution must be prompt.[221] The Texas regulatory

213. *See, e.g.*, Alexander v. United States, 509 U.S. 544, 550 (1993).

214. *See, e.g.*, Freedman v Maryland, 380 U.S. 51, 56-59 (1965) (explaining that a licensing system must provide procedural safeguards, including access to prompt judicial review).

215. 619 F. Supp. 3d at 918 (explaining that there is no prior restraint where no one is forbidden from speaking).

216. *Id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268-69 (1988)); *see also supra* Part III.C.2 (discussing *Hazelwood*).

217. Book People, Inc. v. Wong, 692 F. Supp. 3d 660, 671-72 (W.D. Tex. 2023), *aff'd in part, vacated in part, remanded*, 91 F.4th 318 (5th Cir. 2024).

218. Act of June 6, 2023, § 3, 2023 Tex. Sess. Law Serv. ch. 808 (West) (codified at TEX. EDUC. CODE ANN. § 35.002 (2023)).

219. *Book People, Inc.*, 692 F. Supp. at 698-99.

220. *See id.* at 701.

221. *Id.* at 699 (quoting Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 559-60 (1975)).

scheme lacked all of those safeguards. It required the vendors themselves to rate the books but allowed the state to overturn the rating in order to place a given book in the forbidden group without providing any process to challenge the reclassification.[222] The state bore no burden at all.

Again, the identity of the party seeking to assert that its First Amendment rights have been violated proves critical. For example, in the Texas case discussed immediately above, the administrative scheme prevented authors, publishers, and vendors from communicating with their intended audience. Accordingly, publishers, authors, and vendors may succeed with claims on which students and parents cannot prevail.[223]

D. Procedural Due Process

Plaintiffs are not entitled to procedural protections unless they first establish that the state deprived them of a "life, liberty, or property" interest.[224] Plaintiffs in school library book removal cases would need to convince a court that the book removal deprived them of a constitutional right before they could seek vindication under the Fourteenth Amendment's Due Process Clause.[225]

Claims that book removals constitute a deprivation of due process can arise in two ways: They may be tied to allegations of prior restraint, or they may allege that a school district circumvented its own policies when it reviewed and removed targeted books.

As discussed in the preceding Subpart, resolution of prior restraint disputes must be rapid and conclude within a definite time frame.[226] That may be impossible in library book removal cases because serious reviews are so

222. *See id.* at 674-75, 701.

223. On August 29, 2024 (after the cut-off date signaled in note 1 above), six of the nation's largest publishers, joined by authors and students, sued officials of the Florida State Board of Education and others alleging, among other things, that the Florida statute requiring school libraries to remove books that describe sexual conduct violates the publishers' and authors' First Amendment rights by interfering with their ability to make their constitutionally protected works available to readers. Complaint at 1-6, Penguin Random House LLC v. Gibson, No. 24-cv-01573 (M.D. Fla. filed Aug. 29, 2024), ECF No. 1, https://perma.cc/KFX3-FU5P.

224. *See* L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 2192234, at *6 (W.D. Mo. Feb. 23, 2023) (explaining that the plaintiffs failed to show that the district's automatic book removal deprived them of "some 'life, liberty, or property' interest," so they cannot claim a violation of procedural due process (quoting Krentz v. Robertson Fire Prot. Dist., 228 F.3d 897, 902 (8th Cir. 2000)).

225. *See id.* at *2, *6 (concluding that the automatic removal of a book from the school library's shelves does not deprive students and parents of a liberty or property interest).

226. Freedman v. Maryland, 380 U.S. 51, 59 (1965).

labor intensive.[227] Where a district has removed hundreds of volumes for targeted review, the process may not be completed during the school year, or even before a student plaintiff graduates.

Another set of due process claims arises when districts disregard their own established procedures, a concern noted in *Pico*.[228] In every reported case on this issue, the school district had clear policies governing library book removals.[229] The policies may begin with who can complain and where, often providing a form for complaints.[230] They then indicate where the books should be kept and whether they can circulate during the review process.[231] Typically, a committee is appointed to review the challenged material; it includes a range of interested parties such as parents, teachers, and community members, as well as librarians.[232] The committee's determination is not dispositive—it is subject to

227. *See, e.g.*, *Book People, Inc.*, 692 F. Supp. 3d at 675 (citing Shannon Ryan, *More Than $30K of Taxpayers' Money, 220 Hours Spent on Single Spring Branch ISD Book Ban, Docs Show*, ABC13 (Mar. 28, 2023), https://perma.cc/A2AV-6NHC).

228. Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 857-58 (1982) (plurality opinion) (explaining that board members initially reviewed the books on their own instead of following the written policy which required appointing a committee). *But see* Amended Complaint, *supra* note 37, at 24-26 (noting that before the statute was revised, the board implemented an immediate removal policy which the plaintiffs argued "short-circuit[ed]" procedures to "cater to the political objections" of those advocating for removal); *id.* at 17 (observing that the person targeting library books "borrowed heavily from . . . a national campaign to remove books from public school libraries" that address "themes related to race and/or LGBTQ identity").

229. *See, e.g.*, Complaint at 4-8, *L.H.*, No. 22-cv-00801, 2023 WL 2192234, ECF No. 1, https://perma.cc/U82A-UWYZ (describing the school district's policies regarding "the selection, retention, and reconsideration of materials" in school libraries and attaching those policies as exhibits); Amended Complaint Exhibit 1, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213 (N.D. Fla. Jan. 12, 2024), ECF No. 27 at 83 [hereinafter *Escambia* Policy], https://perma.cc/Z6BX-FMYM.

230. *See, e.g.*, Complaint Exhibit 1 at 3, *L.H.*, No. 22-cv-00801, 2023 WL 2192234, ECF No. 1-2, https://perma.cc/3C5Q-DMT6 ("Students or parents/guardians who find materials in the library objectionable in any manner may make a formal complaint by obtaining from the Superintendent's office Form 6241—Review of Instructional Materials."); *Escambia* Policy, *supra* note 229, at 12 ("Any parent/guardian or resident of the county of the school district may raise objections to resources used in the educational program . . . .").

231. *See, e.g.*, Complaint Exhibit 4 at 1, *L.H.*, No. 22-cv-00801, 2023 WL 2192234, ECF No. 1-5 [hereinafter *Independence* Policy], https://perma.cc/G23K-YWAD ("Media being questioned will be removed from use, pending committee study and final action by the Board of Education, unless the material questioned is a basic text."); *Escambia* Policy, *supra* note 229, at 12 (restricting access to material challenged as "pornographic" but maintaining "[a]ll other challenged material . . . in circulation during the pendency of the review process").

232. *See, e.g.*, *Independence* Policy, *supra* note 231, at 1 ("The committee shall consist of the administrator of the building involved, three teachers [including a librarian], a member of the Board of Education, and four lay persons [two of which must be parents]."); *Escambia* Policy, *supra* note 229, at 13 ("The District Materials Review Committee shall

footnote continued on next page

review and reversal by the elected board of education, and perhaps by intermediaries (like administrators) prior to that point.[233]

Some districts immediately remove all challenged materials from circulation without any screening pending formal review.[234] That approach provides a defense against accusations that the district is discriminating based on content or viewpoint, at least at the initial stages. However, it cedes enormous power to the censorious, who can achieve removal of material to which they object for a period that may last through the school year or longer by merely filling out a form.[235]

One recurrent question arises: Is there a presumption of procedural irregularity if the school board or a higher official reverses a committee's recommendation? Litigants often frame their disagreement with a librarian's or committee's conclusions about a targeted volume as indicative of procedural irregularities.[236] But where successive levels of review or paths for appeal exist, they are arguably designed to allow reconsideration.[237]

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be comprised of five or more members to include community members, school administrators, teachers, parents/guardians, and media specialists [librarians] . . . .").

233. *See, e.g.*, *Independence* Policy, *supra* note 231, at 2 ("The Superintendent shall . . . report the recommendations of the Review Committee to the Board of Education. The decision of the Board will be final."); *Escambia* Policy, *supra* note 229, at 13 (allowing the superintendent to remove a book "without review by the District Materials Review Committee or the Board" if there is sufficient evidence that it is "pornographic"); *id.* at 14-15 (outlining procedures to appeal the decisions of the review committee to the school board).

234. Florida law requires schools to remove books describing or depicting "sexual conduct" from classrooms or school libraries within five days of a challenge and to keep those books unavailable until the challenge is fully resolved. FLA. STAT. § 1006.28(b) (2023); *see also Escambia* Policy, *supra* note 229, at 12.

235. For example a school board in Beaufort County, South Carolina, pulled ninety-seven books for review in October 2022 and did not complete its review until December 2023. Scott Pelley, Aliza Chasan, Henry Schuster & Sarah Turcotte, *See the Full List of 97 Books Parents Tried to Ban from Beaufort, South Carolina School Library Shelves*, CBS NEWS (Mar. 3, 2024, 7:00 PM EST), https://perma.cc/P7FR-JK9Q. Of the ninety-seven books reviewed, only five—*Beautiful* by Amy Reed, *Forever for a Year* by B.T. Gottfried, *It Ends With Us* by Colleen Hoover, *Nineteen Minutes* by Jodi Picoult, and *The Haters* by Jesse Andrews—were permanently removed from circulation. *See School Library Materials Reconsideration Information*, BEAUFORT CNTY. SCH. DIST., https://perma.cc/3NV7-ZSXL (archived July 5, 2024). Many of the others were only available to grades 9-12. *See id.*

236. *See, e.g.*, Amended Complaint, *supra* note 37, at 31-38.

237. *See* ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1184 (11th Cir. 2009) (describing the levels of review and appeal in the school district); *see also* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 894 n.1 (1982) (Powell, J., dissenting) ("[T]he board . . . simply did not agree with the recommendations of a committee it had appointed. Would the plurality require—as a constitutional matter—that the board delegate unreviewable authority to such a committee?").

The best way to assess whether overturning a recommendation about keeping or removing a book has legal significance is to examine the decisionmaker's motive—just as the *Pico* plurality instructed. That may be difficult, but it is not impossible. Defendant school officials and school board members often unwittingly reveal a great deal about their thought processes.

It is hard to predict whether and to what extent courts will (or should) attribute the motives of organized book removal activists to local decisionmakers. As a matter of common sense, it is tempting to do so. In litigation, plaintiffs would need evidence that the decisionmakers (presumably the members of the school board) were influenced by the outside pressure and either (1) capitulated to it or (2) adopted premises the outsiders promulgated and that violated expressive rights. Massive organized political pressure from outside the community should at a minimum suggest the need to scrutinize whether partisan goals overwhelmed educational considerations.

E. Equal Protection.

Dating back to *Pico*, a large proportion of materials targeted for removal was authored by or about people of color.[238] This pattern has been well documented in contemporary book removal incidents.[239] Justice Brennan did not delve into equal protection in *Pico* but used its premises as an example of school board actions that would be "narrowly partisan or political" and therefore unlawful.[240] "[F]ew would doubt," he wrote, that students' rights would be violated "if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration."[241]

Reliance on equal protection doctrine in targeted removal cases is in the most nascent stages. Equal protection violations might be found under federal law or under the Fourteenth Amendment and applied to bias aimed at gender-

238. *See, e.g.*, *Pico*, 457 U.S. at 856 n.3 (plurality opinion) (listing the books that were removed).

239. *See, e.g.*, *Book Ban Data*, *supra* note 14 ("Titles representing the voices and lived experiences of LGBTQIA+ and BIPOC individuals made up 47% of those targeted in censorship attempts."); FEINGOLD & WEISHART, *supra* note 12, at 7 (asserting that an organized and "well-funded . . . assault on inclusive classrooms and curricula" in Florida was intended to "thwart the anti-racist aspirations that animated 2020's global uprising for racial justice").

240. *Pico*, 457 U.S. at 870-71 (plurality opinion).

241. *Id.* at 871. The hypothetical of removing "all books authored by blacks" implicitly conflates authors' personal characteristics (identity) with their viewpoints or life experience—as frequently happens. We should not assume, however, that all persons of color, or all LGBTQ+ persons, or all women, or for that matter, all men share similar experiences or will express the same views on any number of topics.

nonconformity.[242] Efforts to counteract targeted book removals that aim to suppress racial groups or gender-nonconformity may be more successful within federal agencies than in courtrooms, as I shall explain.

The complaint in PEN America's lawsuit against the Escambia County School District asserted, among other things, a Fourteenth Amendment Equal Protection Clause violation, alleging that the county targeted books "disproportionately authored by non-white and/LGBTQ authors, and/or books that explore themes relating to race, gender, or sexual orientation," acting with "clear intent" to exclude speech and "discriminatory animus."[243] In January 2024 the district court dismissed the equal protection count, while allowing the First Amendment claims to proceed to trial.[244]

Despite that setback in court, the promise of equal protection claims in targeted removal cases is apparent in a recent enforcement action by the Department of Education's Office for Civil Rights. In May 2023, the Office settled its investigation into school library book removals in Forsyth County, Georgia.[245] Following a familiar pattern, the school district had removed the books after some parents complained that the library housed "sexually explicit" books and books with LGBTQ+ content.[246] The removals garnered attention.[247] Catherine E. Lhamon, Assistant Secretary for Civil Rights, explained, "[T]here was a lot of discussion in the school community about which books would be removed, and it looked like the books being removed were by and about LGBTQI+ people, and by and about people of color. . . .

242. *See, e.g.*, Education Amendments of 1972, tit. IX, Pub. L. No. 92-318, 86 Stat. 235, 373-75 (codified as amended at 28 U.S.C. §§ 1681-1689); Brief Overview of Key Provisions of the Department of Education's 2024 Title IX Final Rule 1 (n.d.), https://perma.cc/M2JN-SPKX (explaining that under 34 C.F.R. § 106.10 (2024), "sex discrimination includes discrimination based on sex stereotypes, sex characteristics . . . sexual orientation, and gender identity," while under 34 C.F.R. § 106.2 (2024), "sex-based harassment includes harassment on these bases"); *see also* Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020) (extending Title VII employment discrimination protections to sexual orientation).

243. Amended Complaint, *supra* note 37, at 77-78.

244. *See* PEN Am. Ctr., Inc. v Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213, at *2-3 (N.D. Fla. Jan. 12, 2024).

245. *See* Press Release, U.S. Dep't of Educ., U.S. Department of Education's Office for Civil Rights Resolves Investigation of the Removal of Library Books in Forsyth County Schools in Georgia (May 19, 2023), https://perma.cc/Z5LN-MQQY; Resolution Agreement: Forsyth County Schools: Complaint No. 04-22-1281 (2023), https://perma.cc/6898-ZEQY.

246. Press Release, *supra* note 245; *see also* Elizabeth A. Harris & Alexandra Alter, *Book Removals May Have Violated Students' Rights, Education Department Says*, N.Y. TIMES (May 22, 2023), https://perma.cc/C8CC-WS9U.

247. *See, e.g.*, Lauren Hunter, *8 Book Titles Removed from Forsyth County School Shelves*, ACCESSWDUN (Feb. 10, 2022, 4:00 PM), https://perma.cc/DBN4-QGGF.

Students heard that message and felt unsafe in response."[248] From the limited public information available,[249] it appears that students filed a complaint with Department of Education under Title IX of the Educations Amendments of 1972 and Title VI of the Civil Rights Act of 1964, alleging that the removals from the library created a hostile environment.[250] The district submitted to federal oversight moving forward, although it claimed that it had only removed "sexually explicit" material and denied "remov[ing] any book based on the sex, gender, gender identity, sexual orientation, race, national origin or color of the book's author or characters."[251] This result suggests that regulatory oversight may provide another avenue for responding to targeted removals, depending on the administration in power.

Conclusion

Everything that is wrong is not illegal. The mass targeted book removals we are witnessing today as part of politically-driven culture wars seem patently wrong when viewed in light of the values embedded in the First Amendment. And yet, contemporary constitutional doctrine does not offer an obvious remedy. Targeted book removals may violate constitutional norms—they may even smack of authoritarianism—but they may not prove to be unconstitutional.

Choosing the best plaintiff—the one with the strongest constitutional claim—may be critical to impact litigation in targeted removal cases, as it is in other areas of public interest law. Contrary to initial instincts about who is harmed when school libraries remove books, the best plaintiff may not be a student. Preliminary opinions in pending cases suggest that sometimes the best plaintiff may instead be an author or publisher.

Numerous potential routes for challenging targeted book removals exist, but they may bring even the best-positioned litigants through rocky territory. Given the surge in challenges to library books, I anticipate that more appellate courts will weigh in soon. Perhaps they will clarify the doctrine. We can only hope that judicial guidance—whenever it comes—will provide a clear constitutional path to keeping books available to students no matter where they live.

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248. Harris & Alter, *supra* note 246.

249. The only public materials are the resolution agreement, a press release, and a letter. *See sources cited supra* note 245; Letter from Jana L. Erickson, Program Manager, U.S. Dep't of Educ., Off. for C.R., to Jeff Bearden, Superintendent, Forsyth County Schools (May 19, 2023), https://perma.cc/KC98-QB5R.

250. *See* Letter, *supra* note 249, at 1.

251. *See* Resolution Agreement, *supra* note 246, at 1. The settlement agreement included reporting requirements and a requirement that the district administer a "school climate survey." *Id.* at 2-3.

No. _____

In the Supreme Court of the United States

APACHE STRONGHOLD,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For centuries, Western Apaches have centered their worship on a small sacred site in Arizona called *Chí'chil Biłdagoteel*, or Oak Flat. Oak Flat is the Apaches' direct corridor to the Creator and the locus of sacred ceremonies that cannot take place elsewhere. The government has long protected Apache rituals there. But because copper was discovered beneath Oak Flat, the government decided to transfer the site to Respondent Resolution Copper for a mine that will undisputedly destroy Oak Flat—swallowing it in a massive crater and ending sacred Apache rituals forever.

Petitioner challenged this decision under the Religious Freedom Restoration Act and the Free Exercise Clause. In a fractured en banc ruling cobbled together from two separate 6-5 majorities, the Ninth Circuit rejected both claims. Although the court acknowledged that destroying Oak Flat would "literally prevent" the Apaches from engaging in religious exercise, it nevertheless concluded that doing so would not "substantially burden" their religious exercise under RFRA, relying on this Court's pre-RFRA decision in *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). And while the majority acknowledged that singling out Oak Flat for destruction is "plainly not 'generally applicable,'" it rejected the free-exercise claim "for the same reasons"—no substantial burden.

The question presented is:

Whether the government "substantially burdens" religious exercise under RFRA, or must satisfy heightened scrutiny under the Free Exercise Clause, when it singles out a sacred site for complete physical destruction, ending specific religious rituals forever.

PARTIES TO THE PROCEEDINGS

Petitioner Apache Stronghold, an Arizona non-profit corporation, was plaintiff in the U.S. District Court for the District of Arizona and appellant in the U.S. Court of Appeals for the Ninth Circuit.

Respondents the United States of America, Sonny Perdue, Thomas J. Vilsack, Vicki Christensen, Randy Moore, Neil Bosworth, and Tim Torres were defendants in the U.S. District Court for the District of Arizona and appellees in the U.S. Court of Appeals for the Ninth Circuit. Defendants-appellees Sonny Perdue and Vicki Christensen were terminated as parties on June 24, 2022.

Respondent Resolution Copper Mining, LLC, intervened as a defendant in the District Court on May 29, 2023, and as an appellee in the Court of Appeals on June 30, 2023.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Apache Stronghold represents that it does not have any parent entities and does not issue stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Apache Stronghold* v. *United States of America*, No. 21-15295, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 1, 2024.
- *Apache Stronghold* v. *United States of America*, No. 2:21-cv-00050-SPL, U.S. District Court for the District of Arizona. Preliminary injunction denied February 12, 2021.

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PETITION FOR CERTIORARI

For centuries, Western Apaches have worshipped at a sacred site in Arizona called *Chí'chil Biłdagoteel*, or Oak Flat, which is the site of religious ceremonies that cannot take place elsewhere. The government has long protected religious exercise at Oak Flat. But it recently agreed to transfer Oak Flat to Respondent Resolution Copper for a mine that will admittedly obliterate the site. As a result, many sacred Apache rituals will be ended, not just temporarily but forever.

Six judges below—one at the emergency stage and five en banc—concluded that the government's action is an "obvious substantial burden" warranting strict scrutiny under the Religious Freedom Restoration Act. But a splintered 6-5 en banc majority nevertheless found no substantial burden. The majority didn't dispute that the government's actions "will categorically prevent the Apaches from participating in any worship at Oak Flat because their religious site will be obliterated." Nor did it dispute that categorically preventing religious exercise is a substantial burden under RFRA's ordinary meaning.

Instead, it held that the ordinary meaning of "substantial burden" does not apply in cases involving "the Government's management of its own land and internal affairs." In such cases, the court said, the phrase "substantial burden" in RFRA "subsumes" *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)—a pre-RFRA decision that never used the phrase "substantial burden." According to the court, *Lyng* holds that a disposition of government real property does not burden religious exercise if it does not (1) "coerce," (2) "discriminate," (3) "penalize," or (4) deny "equal" rights. So in the Ninth Circuit's view,

the government is free to destroy Oak Flat and permanently extinguish age-old Apache religious exercises without even triggering strict scrutiny under RFRA.

This remarkable result openly conflicts with RFRA's text, which expressly applies to "all Federal law" and "the use * * * of real property for the purpose of religious exercise"—with no carveout for government property. It also defies this Court's precedent, which has repeatedly rejected the proposition that RFRA's meaning is "tied" to "pre-*Smith* free-exercise cases" like *Lyng*. Indeed, this Court has consistently treated *Lyng* as part of the legal framework RFRA was designed to displace, not the secret key to RFRA's hidden, unwritten meaning. And in any event, the decision below wildly overreads *Lyng*, which said "a different set of constitutional questions" would arise if the government prohibited religious adherents from "visiting" a sacred site—much less destroyed it.

Not surprisingly, the decision below conflicts with decisions of the Fourth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits. These circuits have long recognized that the government substantially burdens religious exercise not only by penalizing it but also by preventing it from occurring. Particularly when the government controls "the temporal and geographic environment" required for religious exercise—as in the military, in prison, or on federal land—individuals may be "unable to engage in the practice of their faiths" without "the use of government facilities." *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 226 n.10 (1963). In such cases, government action that "prevents" religious exercise "easily" qualifies as a substantial burden. *Yellowbear* v. *Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.).

The decision below also widens a circuit split over the correct legal standard for applying the Free Exercise Clause. The majority conceded that singling out Oak Flat for destruction is "plainly not 'generally applicable'" under *Employment Division* v. *Smith*—which would ordinarily trigger strict scrutiny. But the court declined to apply strict scrutiny based on its finding of no "substantial burden." This conflicts with decisions from the Second, Third, and Sixth Circuits, which hold that "there is no justification for requiring a plaintiff to make a threshold showing of substantial burden" when government actions "are not neutral and generally applicable."

These questions are vitally important for people of all faiths. The decision below poses an obvious and existential threat to Native Americans, gutting RFRA's protections in the circuit that governs by far the most Native Americans and the most federal land. More broadly, the decision provides a roadmap for eviscerating RFRA in any context that can be deemed part of the government's "internal affairs"—a concept that could cover almost anything the government does.

This Court has repeatedly held that RFRA provides "very broad protection for religious liberty." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). The decision below rejects that command in defiance of RFRA's plain text, this Court's precedent, and decisions of other circuits. And it threatens the permanent eradication of Western Apache religious identity. Certiorari is warranted.

OPINIONS BELOW

The Ninth Circuit's en banc opinion (App.1a) is published at 101 F.4th 1036. The Ninth Circuit's panel opinion (App.518a) is published at 38 F.4th 742. The Ninth Circuit's unpublished order denying an injunction pending appeal (App.604a) is accessible at 2021 WL 12295173. The district court's order (App.622a) is published at 519 F. Supp. 3d 591.

JURISDICTION

The Ninth Circuit entered judgment on March 1, 2024. App.263a. It denied full-court rehearing and issued an amended en banc opinion on May 14, 2024. App.1a. Justice Kagan extended the deadline for filing a petition for a writ of certiorari to September 11, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the First Amendment to the United States Constitution, U.S. Const. amend. I, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1 *et seq.*, and the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003, 128 Stat. 3732-3741, is reproduced at App.658a-679a.

STATEMENT OF THE CASE

I. Statutory Background

RFRA arose out of a back-and-forth between this Court and Congress over the scope of protection for religious exercise.

In cases like *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court interpreted the Free Exercise Clause to require strict scrutiny of government actions burdening religious exercise. This was known as "the *Sherbert* test." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014).

In the 1980s, the Court decided a series of cases declining to apply the *Sherbert* test in various contexts—including challenges to military dress regulations, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), the government's use of Social Security numbers in its programs, *Bowen* v. *Roy*, 476 U.S. 693 (1986), restrictions on worship in prison, *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), and road construction on federal land, *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

These cases culminated in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which declined to apply the *Sherbert* test to free-exercise claims brought by two Native Americans who were fired and denied unemployment compensation for consuming peyote in violation of Oregon law. *Id.* at 874-875. Relying on *Goldman*, *Bowen*, *O'Lone*, and *Lyng*, the Court held that "the First Amendment has not been offended" if a burden on religious exercise is merely the "incidental effect" of a "neutral, generally applicable law." *Id.* at 878-879, 881.

Congress responded by enacting RFRA to provide "very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at 693. RFRA goes "far beyond what this Court has held is constitutionally required"—not only going beyond *Smith*, but also going "beyond what was required by our pre-*Smith* decisions." *Id.* at 706 & n.18.

RFRA thus provides that the federal government "shall not substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a)-(b). RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. 2000bb-3(a). It also defines the "exercise of religion" to include "[t]he use * * * of real property" for religious exercise. 42 U.S.C. 2000bb-2(4), 2000cc-5(7)(B).

II. Factual Background

1. Since long before European contact, Western Apaches and other tribes have performed religious ceremonies at Oak Flat—a 6.7-square-mile sacred site east of Superior, Arizona. The site includes old-growth oak groves, sacred springs, burial locations, and a singular concentration of archaeological sites testifying to its persistent use for the past 1,500 years.

2 E.R. 235

2 E.R. 251

For Apaches, Oak Flat is a unique dwelling place of spiritual beings called Ga'an, who are "guardians" and "messengers" between the Creator and people in the physical world. App.981a-984a, 1000a-1001a. The Ga'an are "our creators, our saints, our saviors, our holy spirits"—"the very foundation of [Apache] religion." App.871a.

As the dwelling place of the Ga'an, Oak Flat is a direct corridor to the Creator and is "uniquely endowed with holiness and medicine." App.1170a. Neither "the powers resident there, nor [Apache] religious activities that pray to and through these powers can be 'relocated.'" *Ibid.*

Accordingly, Oak Flat is the site of religious ceremonies that cannot take place elsewhere. App.977a-978a. These include specific sweat lodge ceremonies for boys entering manhood, Holy Grounds Ceremonies for blessing and healing, place-specific prayers and songs, and the gathering of sacred medicine plants, animals, and minerals essential to those ceremonies. App.1170a-1171a; see App.997a-998a, 1026a.

One example is the Sunrise Ceremony, a multi-day celebration marking an Apache girl's entry into womanhood. App.979a-982a. To prepare, the girl gathers plants from Oak Flat that contain "the spirit of Chi'chil Biłdagoteel." App.976a. As she gathers, she speaks to the spirit of Oak Flat, expressing gratitude for its resources. *Ibid.* Her godmother dresses her in "the essential tools of * * * becoming a woman," and tribal members surround her with singing, dancing, and prayer. App.980a-983a.

App.1034a.

During the night, the Ga'an enter Apache men called crown dancers. App.982a-984a. The Ga'an bless the girl, who joins their dance. *Ibid.*

App.1045a.

On the final day, one of the Ga'an dancers paints the girl with white clay taken from the ground at Oak Flat, "mold[ing] her into the woman she is going to be." App.981a. When her godmother wipes the clay from her eyes, "she's a new woman" forever "imprint[ed]" with the spirit of Oak Flat. App.982a, 977a.

App.1036a.

2. The United States first gained an interest in Oak Flat in 1848, when Mexico ceded its claim to the area in the Treaty of Guadalupe Hidalgo. In 1852, the United States signed the Treaty of Santa Fe with six Apache chiefs. In it, the United States promised to settle the Apaches' territorial boundaries—which included Oak Flat, according to the earliest map of the area, App.1015a—and "pass and execute" laws "conducive to the[ir] prosperity and happiness." App.1055a.

Shortly after the 1852 Treaty, settlers and miners entered the area over Apache opposition, and U.S. soldiers and civilians repeatedly massacred Apaches.[1] App.858a. In 1862, U.S. Army General James Carleton "ordered Apache men to be killed wherever found." Welch at 7.

When miners discovered gold and silver nearby, General Carleton ordered the "utter extermination" of Apaches or "removal to a Reservation" to protect "all those who go to the country in search of precious metals." Welch at 8. In 1872, the General Mining Act authorized mining on "public" land. Ch. 152, 17 Stat. 91. By 1874, the government had forced 4,000 Apaches onto the San Carlos Reservation—nicknamed "Hell's 40 Acres" because it was a barren wasteland. App.1032a. The government prohibited traditional Native American religious practices on pain of imprisonment and forcibly removed hundreds of Apache children from their families, sending them to boarding

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[1] John R. Welch, *Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874*, SAGE Open (2017) (hereinafter "Welch").

schools aimed at rooting out their "savagism" and converting them to Christianity.[2]

3. As federal policy toward Native Americans evolved, the government acknowledged the spiritual and cultural significance of Oak Flat. In 1955, President Eisenhower reserved part of Oak Flat for "public purposes" to protect it from "mining." 20 Fed. Reg. 7,319, 7,336-7,337 (Oct. 1, 1955). President Nixon renewed the protection. 36 Fed. Reg. 18,997, 19,029 (Sept. 25, 1971). And the National Park Service placed Oak Flat in the National Register of Historic Places, recognizing "that *Chí'chil Biłdagoteel* is an important feature of the Western Apache landscape as a sacred site, as a source of supernatural power, and as a staple in their traditional lifeway."[3]

4. In 1995, a large copper deposit was discovered 4,500 to 7,000 feet beneath Oak Flat. App.687a. Hoping to obtain the deposit, two large multinational mining companies, Rio Tinto and BHP, formed a joint venture called Resolution Copper. *Ibid.* From 2005 to 2013, congressional supporters of Resolution Copper introduced at least twelve standalone bills to transfer Oak Flat to the company. App.19a n.1. Each failed.

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[2] Hiram Price, *Rules Governing the Court of Indian Offenses*, Department of the Interior, Office of Indian Affairs (Mar. 30, 1883); Welch at 14; David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928*, at 6 (1995).

[3] *Chí'chil Biłdagoteel Historic District, Traditional Cultural Property, National Register of Historic Places Registration Form, NPS Form 10-900*, at 8, National Park Service (Jan. 2016), https://perma.cc/4Y38-XQQE.

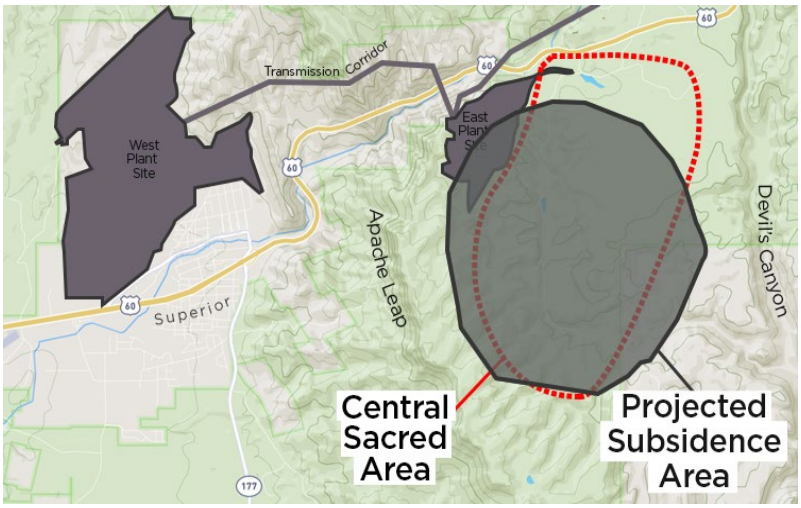
Lacking the votes for a standalone bill, Senators McCain and Flake in 2014 attached the land-transfer bill to the must-pass National Defense Authorization Act, authorizing transfer of a 2,422-acre parcel including Oak Flat to Resolution Copper in exchange for about 5,344 acres scattered elsewhere. Pub. L. No. 113-291, § 3003(b)(2), § 3003(b)(4), § 3003(c)(1) and § 3003(d)(1), 128 Stat. 3732-3736. The bill revokes the presidential orders protecting Oak Flat from mining and directs the Secretary of Agriculture to prepare an environmental impact statement (EIS) for the proposed mine. Pub. L. No. 113-291, § 3003(i)(1)(A), § 3003(a) and § 3003(c)(9)(B), 128 Stat. 3732. Within 60 days of publishing the EIS, it requires the Secretary to "convey all right, title, and interest" in Oak Flat to Resolution Copper. Pub. L. No. 113-291, § 3003(c)(10), 128 Stat. 3736-3737.

5. The Secretary published the EIS on January 15, 2021. As the EIS confirms, the mine would destroy Oak Flat. To mine the ore, Resolution Copper will use a technique called panel caving, which involves tunneling beneath the ore, fracturing it with explosives, and removing it from below. App.710a. This method has lower operating costs than other feasible techniques, but is far more destructive of Oak Flat's surface. App.928a-936a.

Once the ore is removed, approximately 1.37 billion tons of waste ("tailings") will need to be stored "in perpetuity." App.461a, 726a. That will "permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, potentially including human burials." App.461a. And Oak Flat itself will collapse (or "subside") into a crater nearly 2 miles across and 1,100 feet deep, destroying it forever. App.611a.

The EIS acknowledges that the entire "*Chí'chil Bildagoteel* Historic District" will be "directly and permanently damaged." App.698-699a. Nothing can "replace or replicate the tribal resources and traditional cultural properties that would be destroyed." App.912a. Among other things, the mine would completely destroy the sites used for Sunrise, Holy Grounds, and sweat lodge ceremonies (App.977a, 997a-999a, 1025a, 1034a); old-growth oak groves and other sacred medicinal plants (App.754a-755a, 877a); sacred springs (App.746a, 841a, 1043a-1044a, 1177a); and burial grounds and ancient religious and cultural artifacts, including centuries-old petroglyphs (App.746a, 1043a-1044a, 886a, 893a-894a).

The following map shows the planned crater in relation to the area of Oak Flat used for religious ceremonies:



3/18/21 Pet. C.A. Br. 21; *cf.* App.727a.

These effects would be "immediate, permanent, and large in scale." App.912a. "It is undisputed that this subsidence will destroy the Apaches' historical

place of worship, preventing them from ever again engaging in religious exercise at their sacred site." App.199a (Murguia, C.J., en banc dissent); see also App.974a-976a, 1026a, 1046a-1047a.

III. Proceedings Below

1. Petitioner Apache Stronghold is an Arizona nonprofit founded by Dr. Wendsler Nosie, former Chairman of the San Carlos Apache Tribe and direct descendant of Western Apache prisoners of war. Dr. Nosie founded Apache Stronghold to unite Western Apaches with other Native and non-Native allies to preserve indigenous sacred sites. App.979a-981a, 1033a, 1135a. After the Forest Service announced imminent publication of the EIS, Apache Stronghold filed this lawsuit seeking to enjoin the transfer and destruction of Oak Flat under RFRA, the Free Exercise Clause, and the 1852 Treaty of Santa Fe. Compl., D. Ct. Doc. 1 (Jan. 12, 2021). The Forest Service published the EIS three days later, triggering the 60-day clock to complete the land transfer. App.624a.

After the district court denied a preliminary injunction and stay pending appeal, Apache Stronghold sought an emergency injunction from the Ninth Circuit. Six hours before its response was due, the government rescinded the EIS and paused the transfer, stating that it needed "additional time" to "fully understand concerns raised by Tribes."[4] The government then argued the injunction should be denied because the harm was no longer "imminent." See App.608a.

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[4] *Resolution Copper Project & Land Exchange Environmental Impact Statement: Project Update*, U.S. Department of Agriculture (Mar. 1, 2021), https://perma.cc/RD6A-EQZZ.

By a 2-1 vote, a motions panel denied emergency relief, agreeing that immediate relief was no longer necessary. App.604a-605a. Judge Bumatay dissented, concluding that "Apache Stronghold has established a strong likelihood of success on the merits." App.609a. He noted that "a substantial burden exists" under RFRA when "the government 'prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief.'" App.610a (quoting *Yellowbear* v. *Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.)). Since Apache Stronghold had shown that "certain religious ceremonies * * * *must* take place" at Oak Flat, and that the transfer and destruction of Oak Flat would "render[] their core religious practices impossible," there was an "obvious substantial burden." App.606a, 611a, 613a.

2. On plenary review, a divided panel rejected Apache Stronghold's claims. The majority didn't dispute that destroying Oak Flat would impose a "substantial burden" under the "plain meaning" of those words. See App.548a. But it deemed itself bound to reject RFRA's plain meaning under *Navajo Nation* v. *U.S. Forest Service*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc), which held that "substantial burden" is a "term of art" that applies "in two—and only two—circumstances": when the government "denies a benefit" or "imposes a penalty" based on religious exercise. App.541a, 543a, 553a n.10.

Judge Berzon dissented, calling the majority's analysis "illogical," "incoheren[t]," "disingenuous," and "absurd." App.580a, 585a, 598a. She reasoned that the government can substantially burden religious exercise not only by denying benefits or imposing penalties, but also by preventing religious exercise entirely.

App.584a-585a. The latter imposes an even "*greater* burden on religious exercise." App.586a, 594a-595a. She thus had "no doubt that the complete destruction of Oak Flat would be a 'substantial burden' on the Apaches' religious exercise." App.600a.

3. The court granted rehearing en banc.[5] On rehearing, the Ninth Circuit splintered into two different 6-5 majorities, issuing seven opinions spanning 246 pages.

One majority, in opinions authored by Chief Judge Murguia and Judge Nelson, overruled *Navajo Nation* and its two-category definition of "substantial burden," concluding that government actions "[p]reventing access to religious exercise" constitute a "substantial burden" under RFRA's "plain meaning." App.209a-210a (Murguia, C.J.); App.118a-119a (Nelson, J.) ("ordinary meaning"); App.3a (per curiam).

A different majority, however, in opinions authored by Judges Collins and Nelson, held that the plain meaning of "substantial burden" does not control in cases involving "the Government's management of its own land and internal affairs." App.35a. In such cases, government action does not trigger RFRA scrutiny unless it (1) "'coerce[s] individuals into acting contrary to their religious beliefs,'" (2) "'discriminate[s]' against" religious adherents, (3) "'penalize[s]' them," or (4) "den[ies] them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" App.40a. The court therefore concluded that RFRA

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[5] After en banc argument, Resolution Copper intervened "for the limited purpose of participating in potential future litigation before the Supreme Court." App.209a n.6.

provides no protection against government land-management decisions that physically destroy a sacred site and "literally prevent" religious exercise. App.34a, 50a-52a.

The majority reached that startling conclusion by positing that RFRA "subsumes" this Court's pre-RFRA decision in *Lyng*, which involved a Free Exercise Clause challenge to the government's decision to pave part of a road through a national forest sacred to tribes. App.27a-28a, 52a-53a. Although the tribes in *Lyng* retained access to the area, and "[n]o sites where specific rituals t[ook] place were to be disturbed," they maintained that the road would "diminish the sacredness of the area" and render their rituals spiritually "ineffectual." 485 U.S. at 454, 448, 450. This Court declined to apply strict scrutiny, reasoning that the road had only "incidental effects" on religious exercise, did not "discriminate" based on religion, and did not "prohibit[] the Indian respondents from visiting" the area. *Id.* at 450, 453.

Although *Lyng* never used the phrase "substantial burden," the Ninth Circuit reasoned that "[w]hen Congress copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise." App.53a. Applying that logic, it held that destroying Oak Flat doesn't substantially burden the Apaches' religious exercise. App.58a. And it rejected the free-exercise claim "for the same reasons." *Ibid.*

In an opinion authored by Chief Judge Murguia, five dissenters explained that this majority "tragically

err[ed]" by deviating from "RFRA's plain text," the decisions of "[s]everal other circuits," and "the Supreme Court's" precedent. App.261a, 232a n.13, 242a.

As they explained, the "plain meaning" of "substantial burden" easily encompasses government actions that "prevent" religious exercise—as this Court and other circuits have long recognized. App.233a-235a. And far from carving out government actions involving "real property," RFRA applies to "all *Federal law*" and expressly defines religious exercise to include the "use" of "real property." App.252a-253a.

The dissenters explained that the majority's expansion of *Lyng* was mistaken for three reasons. First, *Lyng* was a free-exercise case, not a RFRA case, and this Court has expressly rejected tying RFRA's "coverage" "to the specific holdings of our pre-*Smith* free-exercise cases." App.219a (quoting *Hobby Lobby*, 573 U.S. at 714). Second, even assuming RFRA's coverage could be tied to pre-*Smith* cases, "*Lyng* did not analyze whether there was a substantial burden" on religious exercise, or even use that phrase. App.237a. Instead, *Lyng* rested on the principle that strict scrutiny is "inapplicable to neutral and generally applicable laws"—the very principle "rejected in RFRA." App.246a. Third, *Lyng* was factually inapposite because the plaintiffs there "continued to have full access to their sacred sites to engage in religious exercise," whereas here, "[i]t is undisputed" that the mine "will prevent the Western Apaches from visiting Oak Flat for eternity," resulting in "the utter erasure of a religious practice." App.237a, 240a-241a.

REASONS FOR GRANTING THE PETITION

I. The decision below defies RFRA's plain text and decisions of this Court and six circuits.

The decision below holds that the government can completely destroy a sacred site and end age-old religious rituals forever—without imposing a "substantial burden" on religious exercise under RFRA. That decision contravenes "any ordinary understanding of the English language," App.197a, conflicts with this Court's cases, and creates a 6-1 circuit split.

A. Destroying a sacred site and permanently terminating religious practices is a "substantial burden" under RFRA's ordinary meaning.

1. RFRA doesn't define what it means to "substantially burden" a person's exercise of religion. When a statutory term is undefined, the "usual" course is to apply "that term's 'ordinary, contemporary, common meaning.'" *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 433-434 (2019). RFRA is no exception. For example, when interpreting "appropriate relief" in RFRA, this Court held that, "[w]ithout a statutory definition, we turn to the phrase's plain meaning." *Tanzin* v. *Tanvir*, 592 U.S. 43, 48 (2020) (citing dictionary definitions).

Here, the plain meaning yields an obvious result: destroying a unique sacred site necessary for specific religious ceremonies "substantially burdens" religious exercise. A "burden" is "'[s]omething oppressive'" or something that "'imposes either a restrictive or onerous load' on an activity." App.214a (Murguia, C.J.) (quoting *Burden*, Black's Law Dictionary (6th ed.

1990); citing Webster's Third New International Dictionary 298 (1986)). And "substantial" means "[o]f ample or considerable amount, quantity, or dimensions." *Ibid.* (quoting *Substantial*, Oxford English Dictionary 66-67 (2d ed. 1989)). So the government "substantially burdens" an exercise of religion when it "oppresses" or "restricts" it to a "considerable amount." *Ibid.*

One way the government substantially burdens religious exercise is by making religious exercise more costly: for example, by imposing penalties for engaging in it. See *Hobby Lobby*, 573 U.S. at 720. But another way the government substantially burdens religious exercise is by wholly preventing it from taking place: for example, by barring clergy from the execution chamber, see *Ramirez* v. *Collier*, 595 U.S. 411, 419 (2022), or "destr[oying] * * * religious property," *Tanzin*, 592 U.S. at 51.

Not only this Court but six circuits have so held. *Infra* Part I.C. For example, in *Haight* v. *Thompson*, the Sixth Circuit concluded that when the government "*barred* access" to resources needed for the plaintiff's religious exercise, it "necessarily place[d] a substantial burden on it." 763 F.3d 554, 564-565 (6th Cir. 2014) (Sutton, J.). Likewise, in *Yellowbear* v. *Lampert*, then-Judge Gorsuch observed that "it doesn't take much work to see" that when "access to a sweat lodge" is the relevant religious exercise, "refus[ing] *any* access" "easily" constitutes a substantial burden. 741 F.3d at 56.

2. RFRA's "overall statutory scheme," *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264, 275 (2023), confirms that RFRA applies with full force to government actions preventing religious exercise on "government real property." App.40a (Collins, J.).

First, RFRA applies to "all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. 2000bb-3(a). That sweeping language plainly encompasses the government's management of real property. Indeed, one of the key examples presented to Congress to support the need for RFRA involved the government's management of real property: "veterans' cemeteries had refused to allow burial on weekends even when that was required by the deceased's religion." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 562 n.26 (2021) (Alito, J., concurring in judgment).

Second, if any doubt remained, Congress removed it by amending the definition of "exercise of religion" in RFRA to expressly include "[t]he use * * * of real property for the purpose of religious exercise." 42 U.S.C. 2000bb-2(4), 2000cc-5(7)(B). It would be hard for Congress to make any clearer that RFRA applies to government property.

Third, while the Ninth Circuit interpreted *Lyng* to require a showing that the government's management of property would "discriminate" or "deny" "equal" treatment (App.32a), RFRA applies regardless of whether government action is "'neutral' toward religion" or stems from a "rule of general applicability." 42 U.S.C. 2000bb(a)(2), 2000bb-1(a). Indeed, the core purpose of RFRA was to "counter" *Smith* on this score. *Tanzin*, 592 U.S. at 45. Thus, RFRA does not require "discrimination"; it "concentrate[s] on a law's effects." *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997).

So RFRA's plain terms dictate that it applies to government property; that religious exercise includes the use of such property; and that whether the govern-

ment "discriminates" in managing its property is irrelevant. That makes the substantial-burden analysis here straightforward. Swallowing Oak Flat in a crater will "literally prevent" Apaches from ever again engaging in religious exercise at that sacred site. App.34a (Collins, J.). That is an "obvious substantial burden." App.606a (Bumatay, J., motions panel dissent).

B. The Ninth Circuit's contrary reading defies this Court's precedent.

The Ninth Circuit reached a contrary conclusion only by ignoring RFRA's plain text and distorting this Court's precedent. According to the controlling majority, RFRA "subsumes" *Lyng* in cases involving "the Government's management of its own land and internal affairs," which means the government imposes a "substantial burden" only if it "coerce[s]," "'discriminate[s]' against," or "'penalize[s]'" religious exercise, or "den[ies]" religious adherents "'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" App.32a, 35a-36a, 52a-55a. That reasoning is wrong at every turn.

1. The majority's reasoning hinged largely on *Williams* v. *Taylor*, 529 U.S. 362 (2000) ("*Terry Williams*")—a fractured habeas decision that has never been cited by any court in any other RFRA case ever. According to the majority, *Terry Williams* compels the conclusion that RFRA should be assumed to have "adopted" the "meaning given" to "substantial burden" in "the body of law discussed in" *Smith*. App.47a-49a.

Even one of the judges who joined that majority opinion expressed "reservations" about that claim. App.155a (Nelson, J.). With good reason. *Terry Williams* addressed a statute that adopted a "certain

term" with a settled meaning derived from "specific statements" in prior cases. 529 U.S. at 411-412. But *Lyng*, by contrast, "does not even use 'substantial burden' or any analogous framing of the phrase." App.150a (Nelson, J.). Nor was "substantial burden" defined (or even contested) in *Smith*. In fact, the phrase appears in only two pre-*Smith* cases—and never with any meaningful elaboration. Michael A. Helfand, *Substantial Burdens as Civil Penalties*, 108 Iowa L. Rev. 2189, 2192 & n.14 (2023) (citing *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989); *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 384-385 (1990) (quoting *Hernandez*)). Thus, "substantial burden" had no settled meaning for Congress to adopt.

Moreover, this Court has repeatedly *rejected* the proposition that RFRA's terms should be interpreted to "subsume" the perceived constraints of pre-*Smith* caselaw. For example, in *Hobby Lobby*, the government made two arguments mirroring the Ninth Circuit's analysis here. First, the government argued that a for-profit business couldn't bring a RFRA claim because RFRA "codif[ied]"—*i.e.*, subsumed—"this Court's pre-*Smith* Free Exercise Clause precedents," none of which "held that a for-profit corporation has free-exercise rights." 573 U.S. at 713. This Court rejected that argument as "absurd." *Id.* at 715. As it explained, far from "t[ying] RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases," "[b]y enacting RFRA, Congress went *far beyond* what this Court has held is constitutionally required." *Id.* at 706, 714-716 (emphasis added).

Second, the government invoked another pre-*Smith* free-exercise case, *United States* v. *Lee*, 455 U.S.

252 (1982), to argue that certain burdens—those imposed on "commercial activity"—are not cognizable under RFRA. *Hobby Lobby*, 573 U.S. at 735 n.43. The Court rejected this argument, too. As it explained, "*Lee* was a free exercise, not a RFRA, case." *Ibid.* And if *Lee* held something "squarely inconsistent with the plain meaning of RFRA," that plain meaning, not the pre-*Smith* caselaw, controls. *Ibid.*

This Court likewise rejected efforts to use pre-*Smith* caselaw to limit "substantial burden" in *Holt*. *Holt* involved RLUIPA, RFRA's "sister statute," which applies RFRA's "same standard" to prisons. *Holt* v. *Hobbs,* 574 U.S. 352, 356, 358 (2015). There, the lower court held that a prison's prohibition on beards didn't substantially burden a Muslim prisoner's religious exercise since the prison allowed numerous *other* religious items and observances. In support, the lower court relied on the pre-*Smith* free-exercise decisions in *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), and *Turner* v. *Safley*, 482 U.S. 78 (1987), which made "the availability of alternative means of practicing religion" a "relevant consideration." *Holt*, 574 U.S. at 361.

Again, far from agreeing that "substantial burden" in RLUIPA subsumed these cases, this Court unanimously reversed, explaining that the lower court had "improperly imported a strand of reasoning from cases involving prisoners' First Amendment rights." *Holt*, 574 U.S. at 361.

2. Even assuming *Lyng* could limit the plain meaning of "substantial burden," the Ninth Circuit erred by treating *Lyng* as a substantial-burden case, when this Court has consistently treated it as a neutral-and-generally-applicable-law case. Besides never using the

phrase "substantial burden," *Lyng* identified the "crucial word" for its analysis as the constitutional term "'prohibit,'" 485 U.S. at 450-451—which is not the term in RFRA. Moreover, *Lyng* described the effect on religious exercise there as "incidental," and contrasted the government's action with laws that "discriminate against religions." *Id.* at 445-450, 453. This is the classic language of general applicability later adopted in *Smith*—then rejected in RFRA.

Next, *Smith* "drew support for the neutral and generally applicable standard from * * * *Lyng*." *Fulton*, 593 U.S. at 536. Specifically, in rejecting "the *Sherbert* test," *Smith* cited *Lyng* as an example of a case that "abstained from applying the *Sherbert* test" "at all"—not one that applied the test but found no cognizable burden on religious exercise. 494 U.S. at 883-884. Indeed, *Smith* expressly *rejected* the attempt (echoed by the court below) to portray *Lyng* as a unique application of *Sherbert* to "internal affairs," finding no "reason in principle or practicality why" a different rule should apply to "management of public lands." 494 U.S. at 885 n.2; compare App.35a (Collins, J.) (applying a different rule to "the Government's management of its own land and internal affairs").

Since then, this Court has explicitly said *Lyng* was a case about neutrality and general applicability—not about what constitutes a cognizable burden on religious exercise. In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, this Court explained that "[i]n recent years," the Court has "rejected free exercise challenges" where "the laws in question have been neutral and generally applicable." 582 U.S. 449, 460 (2017). The Court then gave two "example[s]" of cases involving neutral and generally applicable laws: *Lyng* and

Smith. *Ibid.* And it expressly described *Smith* as having been decided "[a]long the same lines as our decision in *Lyng*." *Ibid.*

The en banc majority had no good answer for this. In fact, it initially ignored *Trinity Lutheran* entirely, insisting that "the [Supreme] Court has not said, and could not have said, that *Lyng* was *itself* a case involving a neutral and generally applicable law." App.296a (original opinion). When Petitioner pointed out that *Trinity Lutheran* says exactly that, the majority just amended its opinion to dismiss *Trinity Lutheran*'s understanding of *Lyng* as "dicta." App.11a-12a (amendment); App.38a-39a (amended opinion).

3. In all events, even assuming *Lyng* had some bearing on the phrase "substantial burden," it does not remotely support the proposition that the government imposes no cognizable burden when it completely destroys a sacred site, terminates access, and ends religious practices forever. Rather, *Lyng* emphasized that the road was "removed as far as possible from [religious] sites," and "[n]o sites where specific rituals take place were to be disturbed." 485 U.S. at 443, 454. Thus, the plaintiffs weren't restricted from "visiting" the area or continuing their religious practices; they claimed that the road would "create distractions" rendering their practices spiritually "ineffectual." *Id.* at 448, 450, 452-453.

That is a far cry from this case—which explains why the en banc majority's "retelling of *Lyng*" "omits [these] crucial facts." App.237a (Murguia, C.J.). Here it is undisputed that the site of specific rituals will be completely obliterated. Apache practices will be rendered not just spiritually "ineffectual" but physically impossible. Thus, unlike in *Lyng*, courts need not

"measur[e] the effects of a governmental action on a religious objector's spiritual development" to evaluate the claim here. 485 U.S. at 451; see also *id.* at 448 (analogizing to *Bowen*, where plaintiffs claimed the government's use of their daughter's Social Security number would "rob [her] spirit"). They need only recognize what the government has itself conceded: that "access to Oak Flat and the subsidence zone will" first be "curtailed once it is no longer safe," and "irreversibly los[t]" once Oak Flat is destroyed. App.205a (Murguia, C.J.).

C. The decision below conflicts with the decisions of six other circuits.

The Ninth Circuit's ruling not only defies this Court's precedent but conflicts with six other circuits' decisions interpreting "substantial burden."

Contrary to the decision below, the Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits recognize that a substantial burden plainly exists "where the government completely prevents a person from engaging in religious exercise." App.232a n.13, 236a (Murguia, C.J.); see *supra* at 22; *Haight*, 763 F.3d at 564-565 (Sutton, J.) ("barring access" to a practice is "necessarily" a substantial burden); *Yellowbear*, 741 F.3d at 56 (Gorsuch, J.) (preventing access to a prison sweat lodge "easily" qualifies as a substantial burden); *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 555-556 (4th Cir. 2013) ("preventing a religious organization from building a church" can be a substantial burden even if it does not "force the organization to violate its religious beliefs"); *West* v. *Radtke*, 48 F.4th 836, 845 n.3 (7th Cir. 2022) ("a substantial burden may arise" not only "when a

prison threatens an inmate with some negative consequence" but also "when a prison declines to provide an inmate access to something that will allow him to exercise his religion"); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996) (recovering tithing monies from debtors' church was a substantial burden because it "would effectively prevent the debtors from tithing"); *Thai Meditation Ass'n of Ala., Inc.* v. *City of Mobile*, 980 F.3d 821, 830-831 (11th Cir. 2020) (land-use regulation that "completely prevents" religious exercise "clearly satisfies the substantial-burden standard"). As Chief Judge Sutton aptly put it: "The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Haight*, 763 F.3d at 564-565.

The Tenth Circuit's standard has already produced a conflicting result in an indistinguishable case involving government property. In *Comanche Nation* v. *United States*, Native Americans challenged the Army's plan to build a warehouse on federal land in Oklahoma near Medicine Bluffs, a sacred site. No. 5:08-cv-849, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008). They argued that the warehouse would substantially burden their religious exercise because it would occupy "the precise location" where they stood for worship. *Id.* at *7, *17. The government "urge[d] the Court to adopt a definition [of 'substantial burden'] applied by the Ninth Circuit" in *Navajo Nation*. *Id.* at *3 n.5. But the court refused, stating "[t]he Tenth Circuit has not adopted that definition." *Ibid.* Instead, applying Tenth Circuit precedent, the court issued a preliminary injunction under RFRA, holding that permitting construction that would prevent Native American religious exercise on federal land "amply demon-

strates" a "substantial burden." *Id.* at *17; see also *Perez* v. *City of San Antonio*, No. 5:23-cv-977, 2023 WL 6629823, at *1, 11 (W.D. Tex. Oct. 11, 2023) ("fencing off" Native American sacred site "substantially burdened Plaintiffs' religious exercise" under state RFRA).

The Ninth Circuit attempted to distinguish some of the contrary circuit rulings (like *Haight* and *Yellowbear*) on the ground that they involved RLUIPA, which applies only to prisons and land-use regulations—"contexts" where the "crucial element" of "coerci[on]" is "already baked in." App.54a-55a. Thus, according to the majority, the "dictionary definitions of 'substantial' and 'burden' will adequately flesh out the concept of 'substantial burden'" under RLUIPA, but not RFRA. *Ibid.* But "RFRA and RLUIPA are 'sister statute[s]'" that "apply the same test"—which is why "the Supreme Court and virtually all the lower courts have recognized that 'substantial burden' holds the same definitional meaning in RFRA and RLUIPA." App.119a, 135a-136a (Nelson, J.) (quoting *Holt*). Indeed, RFRA *itself* applies to federal prisons—yet gives not the slightest textual suggestion that "substantial burden" has a different meaning in prison.

In any event, comparison to the prison and land-use contexts only *supports* a finding of substantial burden here. Unlike in most of "private life," there are some contexts in which the "government controls access to religious locations and resources"—with examples including prison and land use, but also the military and sacred sites on federal land. App.583a-584a (Berzon, J., panel dissent); see Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1301, 1333-

1343 (2021). In these contexts, "[b]y simply preventing access to religious locations and resources, the government may directly prevent religious exercise." App.585a; see also *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 226 n.10 (1963) ("military personnel would be unable to engage in the practice of their faiths" without religious services conducted "with the use of government facilities"); *Katcoff* v. *Marsh*, 755 F.2d 223, 234-235 (2d Cir. 1985) (military chaplaincy required by Free Exercise Clause). That is what is occurring here. And that is a substantial burden in six other circuits.

II. The decision below deepens a 5-3 circuit split over the meaning of the Free Exercise Clause.

1. The decision below also deepens a circuit split over the Free Exercise Clause. The majority acknowledged that the decision to authorize the transfer and destruction of Oak Flat is "plainly not 'generally applicable.'" App.36a-37a, 37a n.4. Nevertheless, the court refused to apply strict scrutiny, holding that the Apaches' RFRA and free-exercise claims "fail[] for the same reasons," App.58a—*i.e.*, the supposed lack of a "substantial burden."

That reasoning deepens an acknowledged split. The First, Fourth, Eighth, Tenth, and D.C. Circuits, like the court below, hold that regardless of whether the government's action is not "neutral and generally applicable," free-exercise claimants must still make a "threshold showing" of "substantial burden." *Firewalker-Fields* v. *Lee*, 58 F.4th 104, 114 n.2 (4th Cir. 2023); see also *Roman Catholic Bishop of Springfield* v. *City of Springfield*, 724 F.3d 78, 98, 101 (1st Cir. 2013) (rejecting free-exercise claim for lack of "sub-

stantial burden" even though "we do not view the Ordinance as a 'neutral law of general applicability'"); *Mbonyunkiza* v. *Beasley*, 956 F.3d 1048, 1053-1054 (8th Cir. 2020) ("like other courts, we have made the [free-exercise] standard more restrictive" by requiring a "substantial burden"); *Williams* v. *Hansen*, 5 F.4th 1129, 1133 (10th Cir. 2021) ("To state a valid constitutional claim, a prisoner must allege facts showing that officials substantially burdened a sincerely held religious belief."); *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("threshold showing" of substantial burden required "before the First Amendment is implicated").

But the Second, Third, and Sixth Circuits hold the opposite—that "there is no justification for requiring a plaintiff to make a threshold showing of substantial burden" when government action is "not neutral and generally applicable." *Kravitz* v. *Purcell*, 87 F.4th 111, 124-126, 126 n.11 (2d Cir. 2023) ("We disagree with those circuits that continue to apply the substantial burden test."); see *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002) ("there is no substantial burden requirement when government discriminates against religious conduct"); *Hartmann* v. *Stone*, 68 F.3d 973, 978, 979 n.4 (6th Cir. 1995) ("[Plaintiffs] need not demonstrate a substantial burden" when "regulations are not neutral and generally applicable").

These latter circuits are correct. This Court's decisions show that where a challenged law is not neutral and generally applicable, no "substantial burden" is needed. Rather, a claimant can "prov[e] a free exercise violation" "by showing that a government entity has *burdened*"—not substantially burdened—"his 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) (emphasis added); see *Kravitz*, 87 F.4th at 124 (collecting this Court's post-*Smith* decisions).

Moreover, while the Ninth Circuit purported to locate its imposition of a substantial-burden-understood-as-coercion requirement in the First Amendment's term "prohibiting," App.34a-35a, that effort flouts the original meaning of the term. As Justice Alito has explained, the "'normal and ordinary' meaning" of "prohibit," in 1791 as today, is "*either* '[t]o forbid' *or* 'to hinder.'" *Fulton*, 593 U.S. at 564-566, 565 n.30 (Alito, J., concurring in judgment) (emphases added). And regardless of whether the government is "forbidding" Apache religious practices, it is certainly "hindering" them, by destroying the irreplaceable location at which they must take place.

2. If the Ninth Circuit is right about *Lyng*—and *Lyng* means the Free Exercise Clause isn't implicated when the government knowingly singles out a sacred site for complete physical destruction and ends longstanding religious practices forever—this Court should revisit *Lyng*. As an example of *Smith avant la lettre*, *Lyng* is subject to criticism on the same grounds *Smith* is. And *Smith* has been criticized as contrary to the Constitution's text, structure, original public meaning, and longstanding precedent. *Fulton*, 593 U.S. at 543 (Barrett, J., joined by Kavanaugh, J., concurring); *id.* at 555-594 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in judgment).

Making matters worse, the Ninth Circuit's reading of *Lyng* interprets the Free Exercise Clause even more narrowly than *Smith* did—holding that strict scrutiny

applies only when governmental action is *both* not neutral or generally applicable (*Smith*'s rule) *and* meets some additional requirement of "coercion" (the allegedly *Lyng*-derived addition). Thus, to the extent *Lyng* adds yet another atextual and ahistorical requirement to the Free Exercise Clause, *Lyng* likewise "lacks in originalist or textualist support," and "it is time for the Supreme Court to revisit *Lyng*." App.156a-157a (Nelson, J.).

III. This case is vitally important for people of all faiths.

The question presented is exceptionally important—not only for Apaches and other Native Americans, but for all people of faith.

1. The transfer and destruction of Oak Flat would end Western Apache religious existence as we know it. Oak Flat is "'crucial' to Western Apache religious life"—a "direct corridor" to the Creator and the site of religious practices that "must occur at Oak Flat and cannot take place anywhere else." App.17a-18a (Collins, J.). The mining crater, nearly two miles wide and over 1,000 feet deep, would completely engulf the irreplaceable locus of age-old sacred rituals. Once Oak Flat is gone, "religious practices at Oak Flat [that] date back at least a millennium" are gone forever, App.17a—and with them, the bedrock of Western Apache religious identity.

Yet the destruction of Oak Flat is far from the only issue at stake. The decision below guts RFRA for *all* Native Americans throughout the Ninth Circuit,

which encompasses 74% of all federal land[6] and almost a third of the nation's Native American population[7]—far more than any other circuit. Thus, the circuit with the most power over Native American lives and liberty has given the federal government carte blanche to destroy any sacred site on federal land for any reason—without even undergoing RFRA review.

What's more, the court's aggressive expansion of *Lyng* doesn't just harm Native Americans; it undermines religious liberty for all faiths. One need look no farther than the government's actions in the wake of the decision below. Two days after the decision, the National Park Service denied permission for the Knights of Columbus to hold an annual Memorial Day Mass within Virginia's Poplar Grove National Cemetery—a tradition they had maintained without objection for over 60 years. When the Knights sued, the Park Service invoked the decision below, arguing that "RFRA's understanding of what counts as substantially burdening a person's exercise of religion must be understood as subsuming, rather than abrogating, the holding of *Lyng*"—and thus, the Knights suffered "no burden" under RFRA. Gov't Br. at 20-21, *Knights of Columbus* v. *National Park Serv.* 3:24-cv-363, ECF No. 21 (E.D. Va. May 22, 2024).

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[6] See Carol Hardy Vincent et al., *Federal Land Ownership: Overview and Data*, Cong. Rsch. Serv., R42346, 7-8 (Feb. 21, 2020), https://perma.cc/67BD-PP7C; *Our Mission* Infographic, Bureau of Land Management (May 2016), https://perma.cc/SFG9-WJXY.

[7] Eight of the sixteen states with the highest concentration of Native Americans are in the Ninth Circuit. *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, U.S. Census Bureau (Aug. 12, 2021), https://perma.cc/JX6W-EENT.

That same reasoning would let the government shut down almost any religious exercise on federal land. Many churches are situated on federal land—some 70 within national parks alone, not to mention Ebenezer Baptist Church (where Martin Luther King, Jr., preached) and historic missions dotted throughout the west. Barclay & Steele, 134 Harv. L. Rev. at 1341. Many host active religious communities and ongoing religious worship. Yet under the decision below, the federal government could shut down and destroy them all—for any reason or no reason at all.

And it's not just federal land; other circuits have used the same expansive reading of *Lyng* to undermine religious exercise in many contexts. Four circuits have stretched *Lyng* to find no burden when the government required religious groups to facilitate distribution of contraception and abortion-causing drugs. *Geneva Coll.* v. *HHS*, 778 F.3d 422, 435-436 (3d Cir. 2015); *Little Sisters of the Poor* v. *Burwell*, 794 F.3d 1151, 1193 (10th Cir. 2015); *Priests For Life* v. *HHS*, 772 F.3d 229, 246 (D.C. Cir. 2014); *East Tex. Baptist Univ.* v. *Burwell*, 793 F.3d 449, 458 (5th Cir. 2015); all vacated *sub nom Zubik* v. *Burwell*, 578 U.S. 403 (2016). Two circuits have extended *Lyng* to find no burden when public schools require young children to attend religiously objectionable, sexually themed lessons with no parental notice or consent. *Mahmoud* v. *McKnight*, 102 F.4th 191, 204-205, 210 (4th Cir. 2024); *Parker* v. *Hurley*, 514 F.3d 87, 103-106 (1st Cir. 2008). Other courts have expanded *Lyng* to find no burden when public schools give young students condoms without parental notice or consent, *Curtis* v. *School Committee of Falmouth*, 652 N.E.2d 580, 589 (Mass. 1995), or when public health clinics give a minor the morning-after pill without informing her parents or

letting her know it could cause an abortion, *Anspach ex rel. Anspach* v. *Philadelphia*, 503 F.3d 256, 272-273 (3d Cir. 2007). All these actions were deemed the government's "internal affairs." *Ibid.*

2. The Ninth Circuit didn't deny the sweeping implications of its ruling. Instead, it professed concerns that recognizing a substantial burden here would grant Apaches a "religious servitude" that would "divest the Government of its right to use what is, after all, *its* land," App.32a, 40a (Collins, J.), or "entitle a wide variety of religions to government handouts," App.193a (VanDyke, J.). But these are the same sort of policy arguments "made forcefully by the Court in *Smith*"—and rejected by Congress in RFRA. *Hobby Lobby*, 573 U.S. at 735. Moreover, they have nothing to do with the question of whether permanently ending Apache religious exercises "substantially burdens" those exercises. Rather, they "slip[ ] * * * into the substantial burden analysis" the very different question of how to balance "competing claims on federal land"—the question to be resolved on strict scrutiny. App.598a-599a (Berzon, J., panel dissent).

Strict scrutiny, as "Congress determined," "'is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.'" *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (quoting 42 U.S.C. 2000bb(a)(5)). It has proven workable in RFRA and RLUIPA cases for over 30 years, in every context from prisons to drug laws to military bases. See App.599a-600a (Berzon, J., panel dissent). And it's the statutorily prescribed mechanism for addressing the real question at the heart of this case: whether the government has a compelling interest in exploiting this

particular copper deposit, and whether destroying Oak Flat is the only way to do so.

Meanwhile, it's the Ninth Circuit's opinion that produces untenable results. Under that opinion, if the government posts "No Trespassing" signs at Oak Flat and imposes modest "penalties" for trespassing (App.31a), Apaches suffer a substantial burden—even though they can pay fines and still worship there. But if the government blasts Oak Flat into oblivion, Apaches suffer no burden at all. Likewise, if the government prevents a prisoner from using a sweat lodge in prison, he suffers a substantial burden—even though "those convicted of crime in our society lawfully forfeit a great many civil liberties." *Yellowbear*, 741 F.3d at 52. But if the government prevents law-abiding Apaches from using a sweat lodge at Oak Flat, they suffer no burden at all. Indeed, if a mine at Oak Flat would kill endangered fish, the project could not proceed, because "the balance has been struck in favor of affording endangered species the highest of priorities." *TVA* v. *Hill*, 437 U.S. 153, 156, 194 (1978). But if a mine would terminate Apache rituals forever, the government need offer no justification at all. All of this is backwards.

More broadly, if policy concerns about protecting the government's "internal affairs" can override RFRA's ordinary meaning, that is a recipe for judicial repeal of RFRA. Government officials routinely plead the same policy concerns in other contexts—that RFRA will make it impossible to manage prisons (*Holt*, *Ramirez*), enforce drug laws (*O Centro*), maintain military discipline (*Singh* v. *Berger*, 56 F.4th 88, 97-99 (D.C. Cir. 2022)), or deliver contraception (*Hobby Lobby*). Those concerns have never justified ignoring

RFRA's text before, and land use is no different. But by making an unprincipled exception for federal land, the court below has created a roadmap for evading RFRA in anything that can be deemed part of the government's "internal affairs"—which would encompass "most government action and indeed swallow RFRA whole." App.246a n.18 (Murguia, C.J.).

* * *

RFRA promises "very broad protection for religious liberty" for all faiths across all federal law. *Hobby Lobby*, 573 U.S. at 693. The decision below breaks that promise, in derogation of RFRA's text, this Court's precedent, and decisions from other circuits. Left standing, it will end Apache religious existence as we know it—without the government ever even having to justify that extraordinary result under RFRA. Only this Court can prevent that tragedy and ensure RFRA is applied evenhandedly to all faiths according to its text.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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SEPTEMBER 2024

ADDENDUM

Table of Relevant Excerpts of
U.S. Department of Agriculture, U.S. Forest Service,
Resolution Copper Project and Land Exchange Environmental Impact Statement (January 15, 2021)

App. Cite	EIS Cite	Excerpt
App.698a-699a	1-EIS-ES-28	"The NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP would be directly and permanently damaged by the subsidence area at the Oak Flat Federal Parcel."
App.701a-702a	1-EIS-ES-29	"Oak Flat is a sacred place to the Western Apache, Yavapai, O'odham, Hopi, and Zuni. It is a place where rituals are performed, and resources are gathered; its loss would be an indescribable hardship to those peoples .... Development of the Resolution Copper Mine would directly and permanently damage the NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP. One or more Emory oak groves at Oak Flat, used by tribal members for acorn collecting, likely would be lost. Other unspecified mineral or plant collecting locations and culturally important landscapes are also likely to be affected .... Dewatering likely would impact between 18 and 20 GDEs, mostly sacred springs .... Burials are likely to be

		impacted. The numbers and locations of burials would not be known until such sites are detected as a result of project-related activities."
App.707a	1-EIS-9	"The land surface overlying the copper deposit is located in an area that has a long history of use by Native Americans, including the Apache, O'odham, Puebloan, and Yavapai people."
App.710a	1-EIS-10	"As the ore moves downward and is removed, the land surface above the ore body also moves downward or 'subsides.' Analysts expect a 'subsidence' zone to develop near the East Plant Site; there is potential for downward movement to a depth between 800 and 1,115 feet. Resolution Copper projects the subsidence area to be up to 1.8 miles wide at the surface."
App.712a	1-EIS-31	"[T]ailings storage facilities are permanent and remain part of the landscape in perpetuity."
App.718a	1-EIS-40	"Construction and operation of the mine would pro-

		foundly and permanently alter the NRHP-listed *Chí'chil Bił dagoteel* .... In addition, development of the proposed tailings storage facility at any of the four proposed or alternative locations would permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, potentially including human burials."
App.722a	1-EIS-42	"Construction and operation of the Resolution Copper Mine would, as a result of anticipated geological subsidence at the East Plant Site, permanently alter the topography and scenic character of the Oak Flat area."
App.726a	1-EIS-58	"Approximately 1.37 billion tons of tailings would be created during the mining process and would be permanently stored at the tailings storage facility."
App.734a	1-EIS-84	"Reclamation activities would not occur within the subsidence area. There would be a berm and/or fence constructed around the perimeter of the continuous subsidence area."

App.745a	1-EIS-149	"All public access … would be eliminated on 7,490 acres."
App.745a	1-EIS-154	"The NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP would be directly and permanently damaged."
App.746a	1-EIS-156	"Development of the Resolution Copper Mine would directly and permanently damage the NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP .... Dewatering or direct disturbance would impact between 18 and 20 groundwater dependent ecosystems, mostly sacred springs .... Burials are likely to be impacted; the numbers and locations of burials would not be known until such sites are detected as a result of mine-related activities. Under this or any action alternative, one or more Emory oak groves at Oak Flat, used by tribal members for acorn collecting, would likely be lost. Other unspecified mineral- and/or plant-collecting locations would also likely be affected; historically, medicinal and other plants are frequently

		gathered near springs and seeps, so drawdown of water at these locations may also adversely affect plant availability."
App.750a-751a	1-EIS-185-86	"The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources from the proposed mine and block caving .... If the land exchange does not occur, not only would mineral exploration not take place within the 760-acre Oak Flat Withdrawal Area, but subsidence caused by block caving would not be allowed to impact the Withdrawal Area."
App.761a	1-EIS-314	"The land exchange would have significant effects on transportation and access .... [P]ublic access would be lost to the parcel itself, as well as passage through the parcel to other destinations, including Apache Leap and Devil's Canyon."

App.783a	2-EIS-423	"Mine dewatering at the East Plant Site under all action alternatives would result in the same irretrievable commitment of 160,000 acre-feet of water from the combined deep groundwater system and Apache Leap Tuff aquifer over the life of the mine .... [E]ven if the water sources are replaced, the impact on the sense of nature and place for these natural riparian systems would be irreversible. In addition, the GDEs directly disturbed by the subsidence area or tailings alternatives represent irreversible impacts."
App.798a	2-EIS-558	"With respect to surface water flows from the project area, all action alternatives would result in both irreversible and irretrievable commitment of surface water resources."
App.800a	2-EIS-575	"The entire subsidence area would be fenced for public safety."
App.802a	2-EIS-600	"The direct loss of productivity of thousands of acres of various habitat from the project components would result

		in both irreversible and irretrievable commitment of the resources."
App.806a-807a	2-EIS-620	"The land exchange would have significant effects on recreation .... Additional recreational activities that would be lost include camping at the Oak Flat Campground, picnicking, and nature viewing. The campground currently provides approximately 20 campsites and a large stand of native oak trees."
App.814a	2-EIS-716	"[O]nce the land exchange occurs, Resolution Copper could use hazardous materials on this land without approval."

App.816a-817a	2-EIS-766-67	"For all action alternatives, there would be an irretrievable loss of scenic quality from increased activity and traffic during the construction and operation phases of the mine .... There would be an irretrievable, regional, long-term loss of night-sky viewing during project construction and operations because night-sky brightening, light pollution, and sky glow caused by mine lighting would diminish nighttime viewing conditions in the direction of the mine."
App.823a-824a	2-EIS-774	"In consultation with SHPO, ACHP, tribes, and other consulting parties, the Forest Service determined that the project will have an adverse effect on historic properties. However, because of the complexity of the project, all of the effects would not be known prior to implementation of the project."
App.825a-826a	2-EIS-776	"The project area is within the traditional territories of the Western Apache, the Yavapai, and the Akimel O'odham or Upper Pima. The histories of the Western

		Apache—a group that includes ancestors of the White Mountain, San Carlos, Cibecue, and Tonto Apache—tell of migrations into Arizona where they encountered the last inhabitants of villages along the Gila and San Pedro Rivers .... In the 1870s, the Apache were forced onto reservations .... However, not all Apache stayed on the reservations, and some continued to use the vicinity of the project area into the twentieth century."
App.830a-831a	2-EIS-780	"The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources. If the land exchange occurs, 31 NRHP-eligible archaeological sites and one TCP within the selected lands would be adversely affected .... [H]istoric properties leaving Federal management is considered an adverse effect, regardless of the plans for the land, meaning that, under NEPA, the land

		exchange would have an adverse effect on cultural resources."
App.837a-838a	2-EIS-787	"[E]ven if recorded and documented, loss of these cultural sites contributes to the overall impact to the cultural heritage of the areas .... While the footprint of these projects is used as a proxy for impacts to cultural resources, effects on cultural resources extend beyond destruction by physical disturbance."
App.840a-841a	2-EIS-789-90	"Cultural resources and historic properties would be directly and permanently impacted. These impacts cannot be avoided within the areas of surface disturbance, nor can they be fully mitigated .... Physical and visual impacts on archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources caused by construction of the mine would be immediate, permanent, and large in scale. Mitigation measures cannot replace or replicate the historic properties that

		would be destroyed by project construction. The landscape, which is imbued with specific cultural attributions by each of the consulting tribes, would also be permanently affected .... The direct impacts on cultural resources and historic properties from construction of the mine and associated facilities constitute an irreversible commitment of resources. Archaeological sites cannot be reconstructed once disturbed, nor can they be fully mitigated. Sacred springs would be eradicated by subsidence or tailings storage facility construction and affected by groundwater drawdown. Changes that permanently affect the ability of tribal members to use known TCPs for cultural and religious purposes are also an irreversible commitment of resources."
App.846a, 848a	3-EIS-820	"No tribe supports the desecration/destruction of ancestral sites. Places where ancestors have lived are considered alive and sacred. It

		is a tribal cultural imperative that these places should not be disturbed or destroyed for resource extraction or for financial gain. Continued access to the land and all its resources is necessary and should be accommodated for present and future generations .... The Resolution Copper Project and Land Exchange has a very high potential to directly, adversely, and permanently affect numerous cultural artifacts, sacred seeps and springs, traditional ceremonial areas, resource-gathering localities, burial locations, and other places of spiritual value to tribal members."
App.848a-849a	3-EIS-821	"We received numerous comments from tribal members about the sacredness and importance of Oak Flat to them, their lives, their culture, and their children. Many expressed their sadness and anger that their sacred place would be destroyed and that they would lose access to their oak

		groves and ceremonial grounds."
App.851a-852a	3-EIS-824	"Direct impacts on resources of traditional cultural significance (archaeological sites; burial locations; spiritual areas, landforms, viewsheds, and named locations in the cultural landscape; water sources; food, materials, mineral, and medicinal plant gathering localities; or other significant traditionally important places) would consist of damage, loss, or disturbance …. [T]he land exchange will have an adverse impact on resources significant to the tribes."
App.855a-856a	3-EIS-826	"In 2015, the Tonto National Forest, in partnership with the San Carlos Apache Tribe, composed a nomination for Oak Flat, the area originally known as *Chí'chil Biłdagoteel*, to be listed in the NRHP as a TCP .... Places like springs, ancestral (archaeological) sites, plants, animals, and mineral resource locations are sacred and should not be disturbed or disrupted. The Oak Flat

		Federal Parcel slated to be transferred to Resolution Copper was once part of the traditional territories of the Western Apache, the Yavapai, the O'odham, and the Puebloan tribes of Hopi and Zuni. They lived on and used the resources of these lands until the lands were taken by force 150 years ago."
App.858a-860a	3-EIS 827-28	"After the signing of the Treaty of Guadalupe in 1848 … Euro-American settlers began arriving in Western Apache lands in search of mineral wealth and ranching lands …. Several massacres of Apache by soldiers and civilians occurred from the 1850s through the 1870s, including the reported events at Apache Leap. In the 1870s, the Apache were forced off their lands and onto reservations …. All these communities lost large portions of their homelands, including Oak Flat, and today live on lands that do not encompass places sacred to their cultures …. Knowing these places is vital to understanding Apache history

		and, therefore, identity. For the Western Apache, 'the people's sense of place, their sense of the tribal past, and their vibrant sense of themselves are inseparably intertwined' (Basso 1996:35). The Apache landscape is imbued with diyah, or power. Diyah resides in natural phenomenon like lightning, in things like water or plants, and in places like mountains. Gáán, or holy beings, live in important natural places and protect and guide the Apache people. They come to ceremonies to impart well-being to Apache, to heal, and to help the people stay on the correct path."
App.864a	3-EIS-833	"[T]he tribal monitors recorded 594 special interest areas in the direct analysis area. Of the 594, 523 are described as cultural resources, 66 as natural resources, and 5 as both cultural and natural resources. The cultural resources generally correspond to prehistoric archaeological sites and were categorized by the tribal monitors as cultural

		areas, settlement areas, resource gathering areas, resource processing areas, agricultural areas, and other."
App.869a	3-EIS-837	"Oak Flat is a sacred place to the Western Apache, Yavapai, O'odham, Hopi, and Zuni. It is a place where rituals are performed, and resources are gathered; its loss would be an indescribable hardship to those peoples. The following is the testimony of tribal members describing the spiritual significance of Oak Flat and what its loss would mean to their culture, especially Apache culture, in their own words."
App.870a	3-EIS-838	"For as long as may be recalled, our People have come together here. We gather the acorns and plants that these lands provide, which we use for ceremonies, medicinal purposes, and for other cultural reasons …. These are holy, sacred, and consecrated lands which remain central to our identity as Apache People." [Congressional testimony of Dr. Wendsler Nosie]

App.873a-875a	3-EIS-839-840	"*Chí'chil Bił dagoteel* (also known as Oak Flat) is a Holy and Sacred site .... where we pray, collect water and medicinal plants for ceremonies, gather acorns and other foods, and honor those that are buried here .... Emory oak groves at Oak Flat used by tribal members for acorn collecting are among the many living resources that will be lost along with more than a dozen other traditional plant medicine and food sources .... The impacts that will occur to Oak Flat will undeniably prohibit the Apache people from practicing our ceremonies at our Holy site .... Our connections to the Oak Flat area are central to who we are as Apache people. Numerous people speak of buried family members .... The destruction to our lands and our sacred sites has occurred consistently over the past century in direct violation of treaty promises and the trust obligation owed to Indian tribes .... [T]he

		United States incurred obligations to protect our lands from harm, and to respect our religion and way of life. Despite these obligations, the U.S. Government has consistently failed to uphold these promises or too often fails to act to protect our rights associated with such places like *Chí'chil Biłdagoteel*." [Congressional testimony of Dr. Wendsler Nosie]
App.875a-877a	3-EIS-840	"Throughout our history, Oak Flat continues as a vital part of the Apache religion, traditions, and culture. In Apache, our word for the area of Oak Flat is *Chí'chil Biłdagoteel* (a "Flat with Acorn Trees"). Oak Flat is a holy and sacred site, and a traditional cultural property with deep religious, cultural, archaeological, historical and environmental significance to Apaches, Yavapais, and other tribes. At least eight Apache Clans and two Western Apache Bands have documented history in the area …. A number of Apache religious ceremonies will be held at Oak Flat this Spring,

		just as similar ceremonies and other religions and traditional practices have been held for a long as long as Apaches can recall. We do so because Oak Flat is a place filled with power, a place Apaches go: for prayer and ceremony, for healing and ceremonial items, or for peace and personal cleansing …. In the Oak Flat area, there are hundreds of traditional Apache species of plants, birds, insects, and many other living things in the Oak Flat area that are crucial to Apache religion and culture …. Only the species within the Oak Flat area are imbued with the unique power of this area." [Congressional testimony of Terry Rambler]
App.878a	3-EIS-841	"In the late 1800s, the U.S. Army forcibly removed Apaches from our lands, including the Oak Flat area, to the San Carlos Apache Reservation. We were made prisoners of war there until the early 1900s. Our people lived, prayed, and died in the Oak Flat area …. Since

		time immemorial, Apache religious ceremonies and traditional practices have been held at Oak Flat. Article 11 of the Apache Treaty of 1852, requires the United States to "so legislate and act to secure the permanent prosperity and happiness" of the Apache people. Clearly, H.R. 687 fails to live up to this promise." [Congressional testimony of Terry Rambler]
App.883a-885a	3-EIS-843	"How can we practice our ceremonies at Oak Flat when it is destroyed? How will the future Apache girls and boys know what it is to be Apache, to know our home when it is gone? .... *Chí'chil Biłdagoteel* … is a place where we pray, collect water and medicinal plants for ceremonies, gather acorns and other foods, and honor those that are buried here. We have never lost our relationship to *Chí'chil Biłdagoteel*." [Congressional testimony of Naelyn Pike]
App.887a-888a	3-EIS-844	"My nine year old daughter dreams about having her

		Apache Sunrise dance ceremony at Oak Flat. The Apaches see Oak Flat differently—it is a church, a place for worship and the practice of our traditional religion. It is the center of our most sincerely held, religious beliefs, where diyf'(sacred power) can be called upon via prayers …. At least eight Apache clans have direct ties to this location. Tribal members continue to visit Oak Flat for prayer and a wide range of traditional needs and practices .... I pray my son will have the opportunity to sweat at Oak Flat for the first time, when he becomes a young man. We have gone to many Apache spiritual ceremonies (Sunrise dances and Holy ground ceremonies) at Oak Flat." [DEIS comment of Terry Rambler]
App.890a-891a	3-EIS-845	"My family, my ancestors come from Oak Flat. I grew up there, praying, picking the medicine, picking the acorn, going to the springs, gaining the teachings of my role as an Apache woman so I can pass it down to my

		daughters …. My daughter, Nizhoni, held her Ceremony at Oak Flat in October 2014 .... All the elements of the wind, fire, water, and land go into the Ceremony for my daughter. Everything Usen (Creator, God) has created has a significant role in the Ceremony [during] the 4 days that she prays, dances, connects with all the elements, connected to our ancestors, connected to the Holy Spirit. On the 3rd day of the Ceremony she is painted white with the white clay that is provided from Mother Earth, and that paint blesses all living beings, followed by the next day, the last day of the ceremony, she has to wash the paint off and give it back to the earth …. The exact springs she went to wash her paint off is being affected by Resolution Copper Mine already by dewatering the springs. You are already tampering with her life." [DEIS comment of Vanessa Nosie]

App.893a-894a	3-EIS-846	"For at least a half millennium through to the present day, members of our Tribe have utilized the Oak Flat area for traditional religious ceremonies, such as the Sunrise Dance …. It is a place where Apache Holy Ground rituals occur, where we commune with and sing to our Creator God, and celebrate our holy spirits, including our mountain spirits, the Ga'an. It is a place filled with rock paintings and petroglyphs, what some may describe as the footprints and the very spirit of our ancestors, hallmarks akin to the art found in gothic cathedrals and temples, like the Western Wall in Jerusalem, St. Peter's Basilica in Vatican City, or Angor Wat in Cambodia. This is why I call Oak Flat the Sistine Chapel of Apache religion." [DEIS comment of Terry Rambler]
App.895a-896a	3-EIS-847	"I just recently had my coming of age ceremony at Oak Flat and being there meant a lot to me to have my ceremony in a place where all

		my ancestors used to be. If the Resolution Copper mine continues with destroying Oak Flat, then I will never have a sacred place to come back to or to show my kids where our ancestors gathered." [DEIS comment of Gouyen Brown-Lopez] "Oak Flat is so important to me because I have a very strong connection with the land. Oak Flat gives me connection with my family and my past ancestors." [DEIS comment of Waya Brown] "Oak Flat is also a place where our members still conduct traditional harvesting of plants important to our diet, such as acorns from Emory oaks, and healing plant-based medicines for a wide range of ailments …. The numerous natural elements, that come from these Holy Sites, are used as tools to conduct Religious Ceremonies, spiritual sweats, and Sunrise Ceremonies." [DEIS comment of Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold]

App.899a	3-EIS-848	"Distinctive features of the TCP include an Emory oak stand that Apache and Yavapai use to harvest acorn, and a nearby campground, constructed by the Civilian Conservation Corps, that provides a convenient place for family gatherings. All of these resources would be adversely affected by leaving Federal management. In particular, as described above, the loss of the ceremonial area and acorn-collecting area in Oak Flat would be a substantial threat to the perpetuation of cultural traditions of the Apache and Yavapai tribes, because healthy groves are few and access is usually restricted unless the grove is on Federal land."
App.909a, 912a	3-EIS-854-55	"Maintaining access to Oak Flat Campground …. represents only a small portion of Oak Flat, and would not reduce the impact on tribal cultural heritage caused by the destruction of the broader landscape due to the subsidence area …. Significant tribal properties and

		uses would be directly and permanently impacted. These impacts cannot be avoided within the areas of direct impact, nor can they be fully mitigated."
App.912a-913a	3-EIS-856	"Physical and visual impacts on TCPs, special interest areas, and plant and mineral resources caused by construction of the mine would be immediate, permanent, and large in scale. Mitigation measures cannot replace or replicate the tribal resources and traditional cultural properties that would be destroyed by project construction and operation .... Traditional cultural properties cannot be reconstructed once disturbed, nor can they be fully mitigated. Sacred springs would be eradicated by subsidence or construction of the tailings storage facility, and affected by groundwater drawdown .... For uses such as gathering traditional materials from areas that would be within the subsidence area or the tailings storage facil-

		ity, the project would constitute an irreversible loss of resources."
App.916a	3-EIS-871	"Native American communities would be disproportionately affected by the land exchange …. Loss of the culturally important area of Oak Flat would be a substantial threat to the perpetuation of cultural traditions of the Apache and Yavapai tribes."
App.919a	3-EIS-875	"[D]isturbance of the sites would result in a disproportionate impact on the tribes, given their historical connection to the land. Additionally, the potential impacts on archaeological and cultural sites … are directly related to the tribes' concerns and the potential impacts on cultural identity and religious practices. Given the known presence of ancestral villages, human remains, sacred sites, and traditional resource-collecting areas that have the potential to be permanently affected, it is unlikely that compliance

		and/or mitigation would substantially relieve the disproportionality of the impacts on the consulting tribes."
App.931a	4-EIS-F-3	"While there are other underground stoping techniques that could physically be applied to the Resolution copper deposit, each of the alternative underground mining methods assessed was found to have higher operational costs than panel caving."
App.933a	4-EIS-F-4	"The Forest Service recognizes and acknowledges scoping comments that suggest the use of mining techniques other than panel caving could substantially reduce impacts on surface resources, both by reducing or eliminating subsidence and by allowing the potential of backfilling tailings underground."

Appendix

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APACHE STRONGHOLD, a 501(c)(3) nonprofit organization, *Plaintiff-Appellant*, v. UNITED STATES OF AMERICA; THOMAS J. VILSACK, Secretary, U.S. Department of Agriculture (USDA); RANDY MOORE, Chief, USDA Forest Service; NEIL BOSWORTH, Supervisor, USDA Forest Service, Tonto National Forest; TOM TORRES, Acting Supervisor, USDA Forest Service, Tonto National Forest, *Defendants-Appellees*, RESOLUTION COPPER MINING, LLC, *Intervenor*.	No.21-15295 D.C. No. 2:21-cv-00050-SPL ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Argued and Submitted En Banc March 21, 2023
Pasadena, California

Filed March 1, 2024
Amended May 14, 2024

Before: Mary H. Murguia, Chief Judge, and Ronald M. Gould, Marsha S. Berzon, Carlos T. Bea, Mark J. Bennett, Ryan D. Nelson, Daniel P. Collins, Kenneth K. Lee, Danielle J. Forrest, Lawrence VanDyke and Salvador Mendoza, Jr., Circuit Judges.

Order;
Per Curiam Opinion; Opinion by Judge Collins;
Partial Concurrence and Partial Dissent by Judge Bea;
Concurrence by Judge R. Nelson;
Concurrence by Judge VanDyke;
Dissent by Chief Judge Murguia;
Dissent by Judge Lee

SUMMARY*

Religious Freedom Restoration Act / Free Exercise Clause

The en banc court filed (1) an order denying a petition for rehearing en banc before the full court and amending Judge Collins's opinion, and (2) Judge Collins's amended opinion in a case in which the en banc court affirmed the district court's order denying Apache Stronghold's motion for a preliminary injunction against the federal government's transfer of Oak Flat—federally owned land within the Tonto National Forest—to a private company, Resolution Copper.

Oak Flat is a site of great spiritual value to the Western Apache Indians and also sits atop the world's third-largest deposit of copper ore. To take advantage of that deposit, Congress by statute—the Land Transfer Act—directed the federal government to transfer the land to Resolution Copper, which would then mine the ore.

Apache Stronghold, an organization that represents the interests of certain members of the San Carlos Apache Tribe, sued the government, seeking an injunction against the land transfer on the ground that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and an 1852 treaty between the United States and the Apaches.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The per curiam opinion provides an overview of the votes of the en banc court:

- A majority of the en banc court (Chief Judge Murguia, and Judges Gould, Berzon, R. Nelson, Lee and Mendoza) concluded that (1) the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), and RFRA are interpreted uniformly; and (2) preventing access to religious exercise is an example of substantial burden. A majority of the en banc court therefore overruled the narrow definition of substantial burden under RFRA in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc).

- A different majority of the en banc court (Judges Bea, Bennett, R. Nelson, Collins, Forrest, and VanDyke) concluded that (1) RFRA subsumed, rather than overrode, the outer limits that *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), placed on what counts as a governmental imposition of a substantial burden on religious exercise; and (2) under *Lyng*, a disposition of government real property does not impose a substantial burden on religious exercise when it has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, does not "penalize" them, and does not deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." Apache Stronghold's claims under the Free Exercise Clause and RFRA failed under these *Lyng*-based standards and the claims based on the 1852 treaty failed for separate reasons.

In his amended opinion for the court, Judge Collins, joined by Judges Bea, Bennett, R. Nelson, Forrest, and VanDyke, held that Apache Stronghold was unlikely to succeed on the merits on any of its three claims before the court, and consequently was not entitled to preliminary injunctive relief.

- Apache Stronghold's claim that the transfer of Oak Flat to Resolution Copper would violate the Free Exercise Clause failed under the Supreme Court's controlling decision in *Lyng* because the project challenged here is indistinguishable from that in *Lyng*. As in *Lyng*, the government's actions with respect to "publicly owned land" would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their religious beliefs," but it would have no "tendency to coerce" them "into acting contrary to their religious beliefs." Also, as in *Lyng*, the challenged transfer of Oak Flat for mining operations did not discriminate against Apache Stronghold's members, did not penalize them, or deny them an "equal share of the rights, benefits, and privileges enjoyed by other citizens."

- Apache Stronghold's claim that the transfer of Oak Flat to Resolution Cooper would violate RFRA failed for the same reasons because what counts as "substantially burden[ing] a person's exercise of religion" must be understood as subsuming, rather than abrogating, the holding of *Lyng*.

- Apache Stronghold's claim that the 1852 Treaty of Sante Fe created an enforceable trust obligation that would be violated by the transfer of Oak Flat failed

> because the government's statutory obligation to transfer Oak Flat abrogated any contrary treaty obligation.

Concurring in part and dissenting in part, Judge Bea, joined by Judge Forrest except for footnote 1 and by Judge Bennett with respect to Part II, dissented from paragraph one of the per curiam opinion's purported overruling of *Navajo Nation* because a majority of the panel already affirmed the district court, under the different rationale in Judge Collins's majority opinion, the district court's finding that the transfer of Oak Flat will impose no substantial burden under RFRA. He concurred in full with Judge Collins's majority opinion, and wrote separately to provide additional reasons in support of the conclusion that Apache Stronghold cannot obtain relief under RFRA.

Concurring, Judge R. Nelson stated that en banc review was warranted to correct the faulty legal test (not outcome) in *Navajo Nation.* He explained that since *Navajo Nation* was decided, it has become clear that "substantial burden" means more in RLUIPA than the narrow definition *Navajo Nation* gave it under RFRA, and a majority of the en banc court now rejects the narrow construction of "substantial burden" in *Navajo Nation*. While the dissent raises a plausible textual interpretation of "substantial burden" under RFRA, Judge R. Nelson ultimately disagrees with it. Because RFRA does not overrule the Supreme Court's binding precedent in *Lyng*, Apache Stronghold has no viable RFRA claim.

Concurring, Judge VanDyke agreed with the majority that this decision is controlled by *Lyng*, and wrote separately to elaborate on why the alleged "burden" in this case is not cognizable under RFRA and to explain why reinterpreting

RFRA to impose affirmative obligations on the government to guarantee its own property for religious use would inevitably result in religious discrimination.

Dissenting, Chief Judge Murguia, joined by Judges Gould, Berzon, and Mendoza, and by Judge Lee as to all but Part II.H, wrote that the utter destruction of Oak Flat, a site sacred to the Western Apaches since time immemorial, is a "substantial burden" on the Apaches' sincere religious exercise under RFRA. *Navajo Nation* wrongly defined "substantial burden" as a narrow term of art and foreclosed relief. In light of the plain meaning of "substantial burden," RFRA prohibits government action that "oppresses" or "restricts" "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," to a "considerable amount," unless the government can demonstrate that imposition of the burden is in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. Chief Judge Murguia would hold that Apache Stronghold has shown that it is likely to succeed on the merits of its RFRA claim, and would remand for the district court to determine whether the Land Transfer Act is justified by a compelling interest pursued through the least restrictive means. Finally, Chief Judge Murguia rejected the government's eleventh-hour argument that RFRA does not apply to the Land Transfer Act.

Dissenting, Judge Lee joined all of Chief Judge Murguia's dissent except for Section II.H because the government waived the argument that RFRA cannot apply to the Land Transfer Act.

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ORDER

The slip opinion filed on March 1, 2024 is amended as follows:

1) On page 33, after "(quoting *Lyng*, 485 U.S. at 451).", delete the remainder of the paragraph through and including "neutral and generally applicable." Immediately after that shortened paragraph, add the following new paragraph:

But the Court has not said, and could not have said, that the *holding* of *Lyng* rested on the view that *Lyng* was itself a case involving a neutral and generally applicable law. As we have set forth, *Lyng* rested on a holding about the scope of the term "prohibiting" under the Free Exercise Clause and never mentioned or endorsed a *Smith*-style rule. At most, the Court has suggested in dicta that *Lyng* fits a pattern of cases in which the Court had upheld laws that were "neutral and generally applicable without regard to religion" in the sense that they did not "'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460 (2017) (quoting *Lyng*, 485 U.S. at 449). But *Trinity Lutheran* did not have before it the more focused question whether, in light of the parcel-specific rigging of the statutory framework in *Lyng*, the underlying statute at issue in *Lyng* could be properly deemed to qualify as "neutral and generally applicable" under the details of *Smith*'s framework. As we have explained, *Lyng* involved a situation in which, *after* religious objections had been raised to the G-O road and the road's construction had been enjoined, Congress proceeded to adopt an explicit statutory gerrymander for the precise parcel at issue. *See supra* at 27–28. That manifestly would *not* fit the Court's current understanding of a

> case involving a neutral and generally applicable law. *See*, *e.g.*, *Church of the Lukumi*, 508 U.S. at 542 (emphasizing that "categories of selection" in legislative drafting "are of paramount concern when a law has the incidental effect of burdening religious practice"). In all events, even if the law in *Lyng* were deemed, in hindsight, to be neutral and generally applicable within the meaning of *Smith*, the fact remains that the holding of *Lyng* did not rest on any such premise, but instead on the view that the challenged actions there lacked the sort of features that would qualify as "prohibiting" the free exercise of religion.

2) On page 43, in the sentence that begins "Consequently," add "pre-*Smith*" immediately before "framework for applying".

An amended version of the opinion, reflecting these changes, accompanies this order. The per curiam opinion, the concurrences, and the dissents are unchanged. The full court has been advised of the petition for rehearing en banc before the full court filed on April 15, 2024 (Dkt. No. 184), and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35; Ninth Circuit General Order 5.8. Accordingly, the petition for rehearing en banc before the full court is DENIED. No further petitions for rehearing will be entertained.

OPINION

PER CURIAM:

A majority of the en banc court (Chief Judge MURGUIA and Judges GOULD, BERZON, R. NELSON, LEE, and MENDOZA) concludes that (1) the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, et seq., and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, et seq., are interpreted uniformly; and (2) preventing access to religious exercise is an example of substantial burden. A majority of the en banc court therefore overrules *Navajo Nation v. U.S. Forest Service* to the extent that it defined a "substantial burden" under RFRA as "imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." 535 F.3d 1058 (9th Cir. 2008) (emphasis added).

A different majority (Judges BEA, BENNETT, R. NELSON, COLLINS, FORREST, and VANDYKE) concludes that (1) RFRA subsumes, rather than overrides, the outer limits that the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), places on what counts as a governmental imposition of a substantial burden on religious exercise; and (2) under *Lyng*, a disposition of government real property does not impose a substantial burden on religious exercise when it has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, does not "penalize" them, and does not deny them "an equal share of the rights, benefits, and

privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449–50, 453. The same majority holds that Apache Stronghold's claims under the Free Exercise Clause and RFRA fail under these *Lyng*-based standards and that the claims based on the 1852 Treaty fail for separate reasons.

We therefore AFFIRM the district court's order denying the motion for a preliminary injunction.

COLLINS, Circuit Judge, delivered the following opinion for the court, in which BEA, BENNETT, R. NELSON, FORREST, and VANDYKE, Circuit Judges, join:

Oak Flat, an area located on federally owned land within Tonto National Forest, is a site of great spiritual value to the Western Apache Indians, who believe that it is indispensable to their religious worship. But Oak Flat also sits atop the world's third-largest deposit of copper ore. To take advantage of that deposit, Congress by statute directed the federal Government to transfer the land to a private company, Resolution Copper, which would then mine the ore. Apache Stronghold, an organization that represents the interests of certain members of the San Carlos Apache Tribe, sued the Government, seeking an injunction against the land transfer on the ground that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and an 1852 treaty between the United States and the Apaches. The district court denied Apache Stronghold's request for a preliminary injunction on the ground that Apache Stronghold had not shown a likelihood of success on the merits. *See Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 598 (D. Ariz. 2021). We affirm.

I

A

Apache Stronghold is an Arizona nonprofit corporation "based in the Western Apache lands of the San Carlos Apache Tribe." It describes itself as "connecting Apaches and other Native and non-Native allies from all over the world." Its declared mission is "to battle continued colonization, defend Holy sites and freedom of religion, and

. . . build[] a better community through neighborhood programs and civic engagement." The San Carlos Apache Tribe of the San Carlos Reservation is a federally recognized Indian tribe located on the San Carlos Reservation, roughly 100 miles east of Phoenix.

Apache Stronghold's members engage in traditional Western Apache religious practices. Among the locations that are central to their religion is a place called "Chí'chil Biłdagoteel," which in English means "Emory Oak Extends on a Level." That accounts for the site's more common name, which is "Oak Flat." According to Apache Stronghold's expert witness, Western Apache religious practices at Oak Flat date back at least a millennium. The Western Apache believe that Oak Flat is a "sacred place" that serves as a "direct corridor" to "speak to [their] creator." Specifically, they believe that Oak Flat is the site where one of the "Ga'an"—spirit messengers between the Western Apache and their Creator—"has made its imprint, its spirit." The Western Apache believe that the Ga'an, and the Western Apaches' interaction with the Ga'an, constitute "a crucial part" of their "personal being," and that Oak Flat thus provides them "a unique way . . . to communicate" with their Creator.

Members of the tribe report that they "cannot have this spiritual connection with the land anywhere else on Earth." Oak Flat is "the only area" with these unique features, making it "crucial" to Western Apache religious life. As one example, members of the tribe stated that certain Western Apache religious practices must occur at Oak Flat and cannot take place anywhere else. And even among those religious practices that need not necessarily occur at Oak Flat, some trace their origins to practices that were first begun there. One such practice is the "Sunrise Ceremony,"

a rite of passage for Western Apache girls to recognize "the gift of life and the bearing of children to the female." The Western Apache believe that "the place the ceremony takes place is the life thread forever connecting the place and the girls who have their ceremony there." One member testified that "the most important part about" the Sunrise Ceremony "is that everything that we are able to use for the ceremony comes from Chí'chil Biłdagoteel, Oak Flat." Accordingly, in Western Apache religious belief, harms to Oak Flat work a corresponding spiritual harm to those who performed their Sunrise Ceremonies there, damaging their "life and their connection to their rebirth."

B

In addition to being a sacred site for the Western Apache, Oak Flat is also a place of considerable economic significance. Located near the "Copper Triangle," Oak Flat sits atop the third-largest known copper deposit in the world. Roughly 4,500 to 7,000 feet beneath Oak Flat is an ore deposit containing approximately two billion tons of "copper resource." The U.S. Forest Service estimates that, if mined, this deposit could yield around "40 billion pounds of copper." For that reason, there has long been considerable interest among mining companies in gaining access to the Oak Flat deposit.

Believing the copper beneath Oak Flat to be a significant asset, various members of Arizona's congressional delegation drafted legislation to compel the Government to transfer Oak Flat and its surroundings to Resolution Copper, a private mining company. Such legislation was introduced

in each Congress from 2005 through 2014.[1] Although these bills were the subject of numerous hearings and other congressional action over the years,[2] these legislative efforts

[1] *See*, *e.g.*, *Southeast Arizona Land Exchange and Conservation Act of 2005*, H.R. 2618, 109th Cong. (2005); *Southeast Arizona Land Exchange and Conservation Act of 2005*, S. 1122, 109th Cong. (2005); *Southeast Arizona Land Exchange and Conservation Act of 2006*, H.R. 6373, 109th Cong. (2006); *Southeast Arizona Land Exchange and Conservation Act of 2006*, S. 2466, 109th Cong. (2006); *Southeast Arizona Land Exchange and Conservation Act of 2007*, H.R. 3301, 110th Cong. (2007); *Southeast Arizona Land Exchange and Conservation Act of 2007*, S. 1862, 110th Cong. (2007); *Southeast Arizona Land Exchange and Conservation Act of 2008*, S. 3157, 110th Cong. (2008); *Southeast Arizona Land Exchange and Conservation Act of 2009*, H.R. 2509, 111th Cong. (2009); *Southeast Arizona Land Exchange and Conservation Act of 2009*, S. 409, 111th Cong. (2009); *Southeast Arizona Land Exchange and Conservation Act of 2011*, H.R. 1904, 112th Cong. (2011); *Southeast Arizona Land Exchange and Conservation Act of 2013*, H.R. 687, 113th Cong. (2013); *Southeast Arizona Land Exchange and Conservation Act of 2013*, S. 339, 113th Cong. (2013).

[2] A House subcommittee held a hearing on H.R. 3301 in the 110th Congress, but no further action was taken on that bill. *See H.R. 3301, Southeast Arizona Land Exchange and Conservation Act of 2007: Hearing Before the Subcomm. on Nat'l Parks, Forests, & Pub. Lands of the H. Comm. on Nat. Res.*, SERIAL NO. 110-52 (Nov. 1, 2007). In the 111th Congress, a Senate subcommittee held a hearing on S. 409 on June 17, 2009, and that bill was subsequently reported on March 2, 2010 to the Senate floor, where no further action was taken. *See Public Lands and Forests Bills: Hearing Before the Subcomm. on Pub. Lands & Forests of the S. Comm. on Energy & Nat. Res.*, S. HRG. NO. 111-65 (June 17, 2009); S. REP. NO. 111-129 (March 2, 2010). In the 112th Congress, H.R. 1904 was considered at a June 14, 2011 House subcommittee hearing, reported out of committee on October 14, 2011, and passed by the full House on October 26, 2011. *See H.R. 473, et al.: Hearing Before the Subcomm. on Nat'l Parks, Forests, & Pub. Lands of the H. Comm. on Nat. Res.*, SERIAL NO. 112-40 (June 14, 2011); H.R. REP. NO. 112-246 (Oct. 14, 2011); 157 CONG. REC. H7090–110 (Oct. 26, 2011). A Senate committee then held a hearing on H.R. 1904 on Feb.

did not bear fruit until late 2014, when Congress passed, and the President signed, the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("NDAA"). *See* Pub. L. No. 113-291, 128 Stat. 3292 (2014). Included as § 3003 of the NDAA was a version of the previously oft-proposed "Southeast Arizona Land Exchange and Conservation Act."[3] *Id.* § 3003, 128 Stat. at 3732–41 (classified to § 539p of the unenacted title 16 of the United States Code).

Section 3003's declared purpose is "to authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States." 16 U.S.C. § 539p(a). To that end, it directs that "if Resolution Copper offers to convey to the United States all right, title, and interest of Resolution Copper" in certain "non-Federal land," then "the Secretary [of Agriculture] is authorized and directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land." *Id.*

9, 2012. *See Resolution Copper: Hearing Before the S. Comm. on Energy & Nat. Res.*, S. HRG. NO. 112-486 (Feb. 9, 2012). In 2013, both House and Senate subcommittees held further hearings in the 113th Congress on the respective versions of the legislation, and the House bill was reported to the House floor on July 22, 2013. *See Oversight Hearing Titled "America's Mineral Resources: Creating Mining and Manufacturing Jobs and Securing America": Hearing on H.R. 1063, et al., Before the Subcomm. on Energy & Mineral Res. of the H. Comm. on Nat. Res.*, SERIAL NO. 113-7 (March 21, 2013); *Current Public Lands, Forests, and Mining Bills: Hearing Before the Subcomm. on Pub. Lands, Forests, & Mining of the S. Comm. on Energy & Nat. Res.*, S. HRG. NO. 113-342 (November 20, 2013); H.R. REP. NO. 113-167 (July 22, 2013).

[3] Apache Stronghold derides § 3003 as a "midnight" rider attached to a "must-pass" bill, but that characterization ignores the extensive hearings and congressional consideration given to the land transfer proposal over the previous seven years. *See supra* note 2.

§ 539p(c)(1). The referenced "Federal land" consists of "approximately 2,422 acres of land located in Pinal County, Arizona," including Oak Flat and the surrounding area. *Id.* § 539p(b)(2); *see* U.S. Forest Service, Resolution Copper Project & Land Exchange, Map of Land Exchange Parcels, (2015), https://www.resolutionmineeis.us/documents/usfs-resolution-land-exchange-parcels-2016 [https://perma.cc/JEC7-GUC4].

The land exchange is subject to certain conditions. For example, title to the land the Government would receive from Resolution Copper must be in a form that is acceptable to the Secretaries of Agriculture and the Interior, and must conform to the Department of Justice's "title approval standards." 16 U.S.C. § 539p(c)(2)(A), (B). The federal and non-federal land must be independently appraised, *id.* § 539p(c)(4), and the value of the exchanged land equalized as set forth in the statute, *id.* § 539p(c)(5). Other provisions of § 3003 provide direction concerning ancillary matters related to the exchange. *E.g.*, *id.* § 539p(i).

In recognition of the Western Apaches' religious beliefs, Congress incorporated an accommodation provision into § 3003. That provision directs the Secretary of Agriculture to "engage in government-to-government consultation with affected Indian tribes" to address concerns "related to the land exchange." 16 U.S.C. § 539p(c)(3)(A). Further, the statute obligates the Secretary to work with Resolution Copper to address those concerns and to mitigate any possible "adverse effects on the affected Indian tribes." *Id.* § 539p(c)(3)(B). The statute also requires Resolution Copper to keep Oak Flat accessible to the public for as long as safely possible, *id.* § 539p(i)(3), and Congress explicitly set aside another religiously significant area, Apache Leap,

in order to "preserve [its] natural character" and "allow for traditional uses of the area." *Id.* § 539p(g)(2).

Lastly, Congress expressly stated that the land exchange would generally be governed by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. Thus, § 3003 requires that an environmental impact statement ("EIS") be prepared under NEPA prior to the Secretary executing the land exchange. 16 U.S.C. § 539p(c)(9)(B). Congress supplemented the ordinary NEPA requirements for such statements and required that the EIS for the land transfer also "assess the effects of the mining" on "cultural and archaeological resources" in the area and "identify measures . . . to minimize potential adverse impacts on those resources." *Id.* § 539p(c)(9)(C). The EIS was then to form "the basis for all decisions under Federal law related to the proposed mine," such as "the granting of any permits, rights-of-way," and construction approvals. *Id.* § 539p(c)(9)(B).

The statute commands that the land transfer take place "[n]ot later than 60 days after" the publication of the EIS. 16 U.S.C. § 539p(c)(10). Nowhere in § 3003 does Congress confer on the Government discretion to halt the transfer. The statute mandates that the Government secure an appraisal of the land, *id.* § 539p(c)(4)(A); that it prepare the EIS, *id.* § 539p(c)(9)(B); and that it then transfer the land, *id.* § 539p(c)(10). Although Resolution Copper could theoretically prevent the transfer by refusing "to convey to the United States all right, title, and interest . . . in and to the non-Federal land," *id.* § 539p(c)(1), no corresponding authority exists for the Government.

Once the land transfer takes place, Resolution Copper plans to extract the ore by using "panel caving," a technique that entails digging a "network of shafts and tunnels below

the ore body." Resolution Copper will then detonate explosives to fracture the ore, which will "move[] downward" as a result. That, in turn, will cause the ground above to begin to collapse inward. Over the next 41 years, Resolution Copper will remove progressively more ore from below Oak Flat, causing the surface geography to become increasingly distorted. The resulting subsidence will create a large surface crater, which the Forest Service estimates will span approximately 1.8 miles in diameter and involve a depression between 800 and 1,115 feet deep.

This collapse will not occur immediately upon transfer of the land. Even once Resolution Copper begins construction on the mine, it will be as much as six years before the mining facilities will be operational. And during that time, Resolution Copper is required by the terms of § 3003 to keep Oak Flat accessible to "members of the public, including Indian tribes, to the maximum extent practicable, consistent with health and safety requirements." 16 U.S.C. § 539p(i)(3). Even so, the Government conceded at argument that "the access will end before subsidence occurs, because it wouldn't be safe to have people accessing the land when it could subside." Once the mine is operational, the Forest Service estimates that it will produce ore for at least 40 years before closure and reclamation activities commence to decommission the mine.

C

On January 4, 2021, the Forest Service announced that the EIS for the land transfer would be published in 11 days, on January 15. That publication would trigger the 60-day window for the federal Government to transfer title to the land. 16 U.S.C. § 539p(c)(10). Seeking to halt the transfer, Apache Stronghold sued the federal Government and its

relevant officials on January 12, requesting declaratory relief, "a permanent injunction prohibiting" the "Land Exchange Mandate," and ancillary fees and costs. Three days later, on January 15, the Government released the EIS as planned.

Apache Stronghold asserted several different claims in support of its prayer for relief. First, it alleged that the Government provided too little advance notice of the publication of the EIS, thereby infringing Apache Stronghold's members' rights under the Due Process Clause and under the Petition Clause of the First Amendment. Next, Apache Stronghold alleged that the land transfer would violate its members' rights under the 1852 Treaty of Sante Fe. As this treaty-based claim has been described by Apache Stronghold in this court, the 1852 treaty assertedly imposed fiduciary trust obligations on the Government to "protect the traditional uses of ancestral lands," even if the Government "has formal title to the land." The transfer would allegedly violate the treaty—and this corresponding federal trust obligation—because it would "allow total destruction" of the property and prevent the Western Apache from conducting their traditional religious practices.

Apache Stronghold also argued that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment and under RFRA. With respect to its Free Exercise Clause claim, Apache Stronghold argued that § 3003 was not a neutral law of general applicability and was therefore subject to strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). And, according to Apache Stronghold, the transfer was neither in support of a compelling governmental interest nor narrowly tailored to accomplish such an interest. As to RFRA, Apache Stronghold argued that the land

exchange "chills, burdens, inhibits, and destroys" the religious exercise of its members, thus substantially burdening their exercise of religion in violation of RFRA. As with the Free Exercise Clause claim, Apache Stronghold's RFRA claim asserted that the transfer was not narrowly tailored to accomplish a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(b). Lastly, Apache Stronghold alleged that the federal Government intentionally discriminated against its members on account of their religion in violation of the Free Exercise Clause.

Two days after filing suit, Apache Stronghold moved for a temporary restraining order ("TRO") and preliminary injunction. Specifically, Apache Stronghold sought an order "preventing Defendants from publishing a Final Environmental Impact Statement . . . and from conveying the parcel(s) of land containing Oak Flat."

On January 14, 2021, the district court denied Apache Stronghold's motion for a TRO. After conducting an evidentiary hearing on February 3, the district court denied the preliminary injunction motion on February 12. Because the district court concluded that Apache Stronghold had not demonstrated "a likelihood of success on, or serious questions going to, the merits" of its claims, the district court did not consider the remaining preliminary injunction factors. *See Apache Stronghold*, 519 F. Supp. 3d at 598, 611. Apache Stronghold timely appealed.

On March 1, 2021, during the pendency of this appeal, the Government withdrew its EIS for the land transfer and mine. It explained that "additional time is necessary to fully understand concerns raised by Tribes" and to "ensure[] the agency's compliance with federal law." To date, the Government has provided the court no concrete estimate of

when the EIS will be issued, except to pledge that it is not awaiting the decision in this case and to state that it will provide the court and Apache Stronghold at least 60 days' notice prior to issuing the EIS.

II

We have jurisdiction under 28 U.S.C. § 1292(a)(1). We review the district court's refusal to issue a preliminary injunction for abuse of discretion. *See AK Futures LLC v. Boyd Street Distro, LLC*, 35 F.4th 682, 688 (9th Cir. 2022). We review the district court's "underlying legal conclusions *de novo*" and its "factual findings for clear error." *Id*.

To show that it is entitled to a preliminary injunction, Apache Stronghold "must establish [1] that [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The first factor—likelihood of success on the merits—is "the most important," and "when a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [factors]." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (citations and internal quotation marks omitted). In this court, Apache Stronghold only challenges the district court's likelihood-of-success determination with respect to its claims under the Free Exercise Clause, RFRA, and the 1852 treaty. Because, as we shall explain, Apache Stronghold has no likelihood of success on any of those three claims, we have no occasion to address the remaining *Winter* factors.

III

Apache Stronghold asserts that the transfer of Oak Flat from the Government to Resolution Copper would "violate the Free Exercise Clause." This claim fails under the Supreme Court's controlling decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

A

The dispute in *Lyng* arose from the Government's long-running effort to build a road connecting the northwest California towns of Gasquet and Orleans (the "G-O road"). 485 U.S. at 442. One of the final components of that project involved the construction of "a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest," a section that had "historically been used for religious purposes by Yurok, Karok, and Tolowa Indians." *Id.* As part of its preparation of a final environmental impact statement concerning the completion of the road through Chimney Rock, the Forest Service "commissioned a study of the American Indian cultural and religious sites in the area." *Id.* That study recommended against completion of the road, because "any of the available routes 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.'" *Id.* (citation omitted). The Forest Service nonetheless decided to proceed with the construction of the road. *Id.* at 443. "At about the same time, the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest." *Id.*

The Forest Service's actions were promptly challenged in a federal lawsuit brought by "an Indian organization,

individual Indians," the State of California, and others. *Lyng*, 485 U.S. at 443. The district court permanently enjoined both the timber management plan and the construction of the remaining section of the road, holding that these actions would infringe the rights of tribal members under the Free Exercise Clause as well as violate other provisions of federal law. *Id*. at 443–44. While the case was pending on appeal in this court, Congress intervened by enacting the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (1984). *See Lyng*, 485 U.S. at 444. That statute designated much of the land governed by the Forest Service's timber management plan as protected wilderness, thereby barring "commercial activities such as timber harvesting." *Id*. However, the Act specifically "exempt[ed] a narrow strip of land, coinciding with the Forest Service's proposed route for the remaining segment of the G-O road, from the wilderness designation." *Id*. This was done precisely "to enable the completion of the Gasquet-Orleans Road project if the responsible authorities so decide." *Id*. (quoting S. REP. NO. 98-582, at 29 (1984)). A panel of this court subsequently vacated the district court's injunction to the extent that it had been mooted by the wilderness designations in the California Wilderness Act, but otherwise largely affirmed the district court. *See Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 698 (9th Cir. 1986); *see also Lyng*, 485 U.S. at 444–45.

The Supreme Court reversed. In addressing the Free Exercise Clause issue, which was a necessary component of the relief granted by the district court, the Court began by acknowledging that "[i]t is undisputed that the Indian [plaintiffs'] beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the

practice of their religion." *Lyng*, 485 U.S. at 447. As the Court explained, it was undisputed that the "projects at issue in this case could have devastating effects on traditional Indian religious practices," and the Court therefore accepted the premise that "the G-O road will virtually destroy the Indians' ability to practice their religion." *Id.* at 451 (simplified); *see also id.* (acknowledging that the threat to the Indian plaintiffs' "religious practices is extremely grave"). Despite these acknowledged severe impacts, the Court nonetheless held that the Government was *not* required to demonstrate a "compelling need" or otherwise to satisfy strict scrutiny. *Id.* at 447. That was true, the Court held, because the plaintiffs would not "be coerced by the Government's action into violating their religious beliefs," nor would that action "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449.

The Court held that the case was, in that respect, comparable to *Bowen v. Roy*, 476 U.S. 693 (1986), in which the Court rejected a Free Exercise challenge to a federal statute "that required the States to use Social Security numbers in administering certain welfare programs." *Lyng*, 485 U.S. at 448–49. The plaintiffs in *Roy* contended that the governmental assignment of a "numerical identifier" would seriously impede their ability to practice their religion by "rob[bing] the spirit of their daughter and prevent[ing] her from attaining greater spiritual power." *Id.* at 448 (simplified) (quoting *Roy*, 476 U.S. at 696). Although the result would be a significant interference with the *Roy* plaintiffs' religious beliefs, the *Roy* Court held that the challenged governmental action—the state and federal governments' "internal" use of a Social Security number—nonetheless did not implicate the Free Exercise Clause. *Id.*

As the Court explained, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id*. (quoting *Roy*, 476 U.S. at 699). "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id*. (quoting *Roy*, 476 U.S. at 700).

The *Lyng* Court acknowledged that "[i]t is true that this Court has repeatedly held that *indirect* coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." 485 U.S. at 450 (emphasis added). Such indirect coercion or penalties would include a denial of program benefits "based solely" on the claimant's religious beliefs and practices, as well as any other denial of "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id*. at 449–50. But the Court held that the Free Exercise Clause's protection against government conduct "prohibiting" the free exercise of religion, *see* U.S. CONST. amend. I, does not protect against the "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id*. at 450; *see also id*. at 451 (noting that the "crucial word in the constitutional text is 'prohibit'").

In light of these principles, the Court concluded, the claim in *Lyng* could not "meaningfully be distinguished" from that in *Roy*. *Lyng*, 485 U.S. at 449. Although the resulting effects on the religious practices of the Indian plaintiffs would "virtually destroy" their "ability to practice their religion," those religious impacts nonetheless did not

implicate the Free Exercise Clause because the governmental actions that caused them had "no tendency to coerce individuals into acting contrary to their religious beliefs." *Id*. at 450–51. Nor was this a situation in which the Government had "discriminate[d]" against the plaintiffs, as might be the case if Congress had passed "a law prohibiting the Indian [plaintiffs] from visiting the Chimney Rock area." *Id*. at 453. According to the Court, the Indian plaintiffs sought, not "an equal share of the rights, benefits, and privileges enjoyed by other citizens," but rather a "religious servitude" that would "divest the Government of its right to use what is, after all, *its* land." *Id*. at 449, 452–53.

The project challenged here is indistinguishable from that in *Lyng*. Here, just as in *Lyng*, the Government's actions with respect to "publicly owned land" would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," but it would have "no tendency to coerce" them "into acting contrary to their religious beliefs." 485 U.S. at 449–50. And just as with the land use decisions at issue in *Lyng*, the challenged transfer of Oak Flat for mining operations does not "discriminate" against Apache Stronghold's members, "penalize" them, or deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id*. at 449, 453. Under *Lyng*, Apache Stronghold seeks, not freedom from governmental action "prohibiting the free exercise" of religion, *see* U.S. CONST. amend. I, but rather a "religious servitude" that would uniquely confer on tribal members "*de facto* beneficial ownership of [a] rather spacious tract[] of public property." *Lyng*, 485 U.S. at 452–53. Under *Lyng*, Apache Stronghold's Free Exercise Clause claim must be rejected.

B

Apache Stronghold's various arguments for distinguishing *Lyng* are all without merit.

First, Apache Stronghold argues that *Lyng* is distinguishable because, in that case, the virtual destruction of the "Indians' ability to practice their religion" was accomplished *without* actually destroying any "sites where specific rituals take place." 485 U.S. at 451, 454. According to Apache Stronghold, *Lyng*'s holding is limited to cases involving only interference with "subjective" spiritual experiences and therefore does not apply to a case, such as this one, involving "physical destruction of a sacred site." Although the dissent does not directly address the merits of Apache Stronghold's Free Exercise Clause claim, *see* Dissent at 197, the dissent's discussion of *Lyng* (undertaken in the context of analyzing RFRA) seeks to distinguish the case on the comparable ground that the project at issue there would not have precluded *physical access* to the relevant sacred sites, *see* Dissent at 220–26. These efforts to distinguish *Lyng* are refuted by *Lyng* itself.

In *Lyng*, the State of California argued that *Roy* was distinguishable on the ground that it involved only interference with the plaintiffs' "religious tenets from a *subjective* point of view," whereas *Lyng* involved a "proposed road [that] will '*physically destroy* the environmental conditions and the privacy without which the religious practices cannot be conducted.'" 485 U.S. at 449 (simplified) (emphasis added). The Court rejected this proffered subjective/physical distinction, expressly holding that there was no permissible basis to "say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional

analysis than the other." *Id.* at 449–50. This holding requires rejection of Apache Stronghold's analogous proffered distinction between interference with subjective experiences and physical destruction of the means of conducting spiritual exercises.

The dissent contends that "*Lyng* did not specifically address government action that *prevented* religious exercise," and that it therefore does not apply to a case, such as this one, in which the Government's actions will physically destroy the site and thereby literally prevent its future use for religious purposes. *See* Dissent at 228–29 (emphasis added). This effort to distinguish *Lyng* also fails, because, once again, it ultimately relies on too expansive a notion of what counts as "prohibiting" the free exercise of religion. We readily agree that "prevent" can often be synonymous with "prohibit," *see Prohibit*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1813 (1981 ed.) ("WEBSTER'S THIRD") ("to prevent from doing or accomplishing something"), and in that sense it is true that "prevent[ing] the plaintiff from participating in an activity motivated by a sincerely held religious belief" qualifies as prohibiting free exercise. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (citing, *inter alia*, *Lyng*, 485 U.S. at 450); *see also Graham v. Comm'r*, 822 F.2d 844, 850–51 (9th Cir. 1987). But "prevent" also can have the broader sense of "frustrate," "keep from happening," or "hinder," which is how the dissent uses the term here. *See Prevent*, WEBSTER'S THIRD, *supra*, at 1798. *Lyng* squarely rejected *that* broader notion of "prohibiting the free exercise" of religion:

> The dissent begins by asserting that the "constitutional guarantee we interpret today

> . . . is directed against any form of government action that *frustrates or inhibits* religious practice." The Constitution, however, says no such thing. Rather, it states: "Congress shall make no law . . . *prohibiting* the free exercise [of religion]."

485 U.S. at 456 (emphasis altered) (citations omitted).

Thus, contrary to what the dissent posits, it is not enough under *Lyng* to show that the Government's management of its own land and internal affairs will have the practical consequence of "preventing" a religious exercise. Indeed, *Lyng* explicitly rejected that broader notion of "prohibiting" religious exercise, concluding that it was foreclosed by *Roy*:

> . . . *Bowen v. Roy* rejected a First Amendment challenge to Government activities that the religious objectors sincerely believed would "'rob the spirit' of [their] daughter and *prevent* her from attaining greater spiritual power." The dissent now offers to distinguish that case by saying that the Government was acting there "in a purely internal manner," whereas land-use decisions "are likely to have substantial external effects." Whatever the source or meaning of the dissent's distinction, it has no basis in *Roy*. Robbing the spirit of a child, and *preventing* her from attaining greater spiritual power, is both a "substantial external effect" and one that is remarkably similar to the injury claimed by [the plaintiffs] in the case before us today. The dissent's reading of *Roy*

> would effectively overrule that decision, without providing any compelling justification for doing so.

Lyng, 485 U.S. at 456 (emphasis added) (citations and further quotation marks omitted).

Second, Apache Stronghold argues that *Lyng* is distinguishable because it involved application of a neutral and generally applicable law, inasmuch as "the road in *Lyng* was carried out pursuant to the California Wilderness Act of 1984." By contrast, according to Apache Stronghold, this case involves legislative action directed at "one 'particular property,'" which is the antithesis of a "generally applicable" law. The dissent also endorses this ground for distinguishing *Lyng*, arguing that *Lyng* merely stands for the "proposition that the compelling interest test is 'inapplicable' to 'across-the-board' neutral laws." *See* Dissent at 229 (citation omitted). Once again, *Lyng* itself refutes this ground for attempting to distinguish that decision.

As *Lyng* itself makes clear, the California Wilderness Act was *not* a neutral and generally appliable law in the sense that Apache Stronghold posits, because it contained an express exemption for the "narrow strip of land" that exactly "coincid[ed] with the Forest Service's proposed route for the remaining segment of the G-O road." 485 U.S. at 444. Thus, contrary to what Apache Stronghold claims, the relevant provisions of the statute at issue in *Lyng* likewise involved legislative action directed at "one 'particular property.'" Indeed, it was precisely this feature of the challenged actions in *Lyng* that the plaintiffs there sought to invoke as a ground for distinguishing *Roy*: whereas *Roy* involved the "mechanical" application of a general program requirement

for the welfare program at issue, *Lyng* involved "a case-by-case substantive determination as to how a particular unit of land will be managed." 485 U.S. at 449. In rejecting this effort to distinguish *Roy*, the *Lyng* Court did not dispute that such a distinction existed as a factual matter between the two cases. Instead, the Court held that the distinction simply provided no grounds for distinguishing *Roy*. *Id*. at 449–50. That was true, the Court explained, because the central ingredient of a Free Exercise Claim—some "tendency to coerce individuals into acting contrary to their religious beliefs"—was absent in both cases. *Id*. at 450.[4]

The dissent claims that, even if the *Lyng* decision did not view itself as resting on a rule about neutral and generally applicable laws, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and other post-*Smith* decisions have read it that way. *See*

[4] The dissent nonetheless insists that the Forest Service's plan and the special legislative carve-out in *Lyng*—both of which were tailored for the specific property at issue—were "generally applicable" because "there was no indication" that they were "made *because of*, rather than in disregard of," the religious interest in that particular property. *See* Dissent at 232–33 (emphasis added). This contention fails, because it mixes up the distinct issues of whether a particular law is "neutral" and whether it is "generally applicable." Even if the plan and legislation at issue in *Lyng* were "neutral" in the limited sense that it was not their "object . . . to infringe upon or restrict practices *because* of their religious motivation," *Church of the Lukumi*, 508 U.S. at 533 (emphasis added), they were plainly not "generally applicable" as that phrase is currently understood, given that they were directed at one particular property. *See*, *e.g.*, *International Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) ("In this case, while the zoning scheme itself may be facially neutral and generally applicable, the *individualized assessment* that the City made to determine that the Church's rezoning and CUP request should be denied is not." (emphasis added)).

Dissent at 229–31. That is not correct. All that the Court has stated is that *Smith* and its progeny "*drew support* for [*Smith*'s] neutral and generally applicable standard from cases involving internal government affairs," such as *Lyng*. *Fulton v. City of Philadelphia*, 593 U.S. 522, 536 (2021) (emphasis added). Thus, in *Smith*, the Court stated that its core holding—*i.e.*, that strict scrutiny does not apply to neutral laws of general applicability—was supported by *Lyng*'s broader observation that the boundaries of the Free Exercise Clause "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." 494 U.S. at 885 (quoting *Lyng*, 485 U.S. at 451).

But the Court has not said, and could not have said, that the *holding* of *Lyng* rested on the view that *Lyng* was itself a case involving a neutral and generally applicable law. As we have set forth, *Lyng* rested on a holding about the scope of the term "prohibiting" under the Free Exercise Clause and never mentioned or endorsed a *Smith*-style rule. At most, the Court has suggested in dicta that *Lyng* fits a pattern of cases in which the Court had upheld laws that were "neutral and generally applicable without regard to religion" in the sense that they did not "'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460 (2017) (quoting *Lyng*, 485 U.S. at 449). But *Trinity Lutheran* did not have before it the more focused question whether, in light of the parcel-specific rigging of the statutory framework in *Lyng*, the underlying statute at issue in *Lyng* could be properly deemed to qualify as "neutral and generally applicable" under the details of *Smith*'s framework. As we have explained, *Lyng* involved a

situation in which, *after* religious objections had been raised to the G-O road and the road's construction had been enjoined, Congress proceeded to adopt an explicit statutory gerrymander for the precise parcel at issue. *See supra* at 27–28. That manifestly would *not* fit the Court's current understanding of a case involving a neutral and generally applicable law. *See*, *e.g.*, *Church of the Lukumi*, 508 U.S. at 542 (emphasizing that "categories of selection" in legislative drafting "are of paramount concern when a law has the incidental effect of burdening religious practice"). In all events, even if the law in *Lyng* were deemed, in hindsight, to be neutral and generally applicable within the meaning of *Smith*, the fact remains that the holding of *Lyng* did not rest on any such premise, but instead on the view that the challenged actions there lacked the sort of features that would qualify as "prohibiting" the free exercise of religion.

The dissent also points to *Lyng*'s observation that, because the "Constitution does not permit government to *discriminate* against religions that treat particular physical sites as sacred," a "law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions." 485 U.S. at 453 (emphasis added); *see also* Dissent at 225. According to the dissent, "the Land Transfer Act is *exactly* that kind of 'prohibitory' law." *See* Dissent at 225. That contention is refuted by the fact that, under the statute, any post-transfer prohibitions that Resolution Copper may impose on public access to Oak Flat would be nondiscriminatory. *See* 16 U.S.C. § 539p(i)(3) (stating that, "[a]s a condition of conveyance," Resolution Copper must "provide access to the surface of the Oak Flat Campground to members of the public, including Indian tribes, to the maximum extent practicable . . . until such time as the operation of the mine precludes continued public

access for safety reasons"). To the extent that the dissent instead reads *Lyng* as endorsing the broader notion that the Free Exercise Clause would be violated by a *nondiscriminatory* law that will ultimately have the effect of precluding public access to a particular parcel of land, that view cannot be squared with *Lyng*'s explicit rejection of such a broad concept of "prohibiting." Indeed, under the dissent's expansive view, any transfer of Government land *without* a condition guaranteeing access to a sacred site on that parcel would amount to a prohibition on free exercise. *Lyng*, however, explicitly rejects the view that the Free Exercise Clause requires any such "religious servitude" on Government land, which would confer "*de facto* beneficial ownership of some rather spacious tracts of public property." 485 U.S. at 452–53.

In sum, *Lyng* stands for the proposition that a disposition of government real property is not subject to strict scrutiny when it has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, does not "penalize" them, and does not deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449–50, 453. In such circumstances, the essential ingredient of "prohibiting" the free exercise of religion is absent, and the Free Exercise Clause is not violated. And because *Lyng*'s application of that rule in the context of that case cannot meaningfully be distinguished in this case, Apache Stronghold has no likelihood of success on its Free Exercise claim.

IV

Apache Stronghold also contends that the sale of Oak Flat to Resolution Copper would violate its members' rights

under RFRA. Congress enacted RFRA in 1993 "in direct response" to *Smith*'s narrow construction of the Free Exercise Clause, *see City of Boerne v. Flores*, 521 U.S. 507, 512 (1997), and Congress did so precisely "in order to provide greater protection for religious exercise than is available" under the Free Exercise Clause as construed in *Smith*, *see Holt v. Hobbs*, 574 U.S. 352, 357 (2015). The question here is whether the broader protection afforded by RFRA has the practical effect of displacing, by statute, the pre-*Smith* decision in *Lyng*. The answer to that question is no.

A

In order to understand what RFRA enacts, it is important to begin with the decision that RFRA sought to supersede, namely, *Employment Division v. Smith*.

Smith involved a denial of unemployment benefits to two Oregon workers who "were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both [were] members." 494 U.S. at 874. The claimants appealed that denial of benefits to the Oregon Court of Appeals, which held that the denial violated the Free Exercise Clause. *Id.* On the State's further appeal, the Oregon Supreme Court agreed. *Id.* at 875. The U.S. Supreme Court granted certiorari, but it initially held only that, "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." *Employment Div., Dep't of Human Res. of Oregon v. Smith*,

485 U.S. 660, 670 (1988). The Court therefore remanded the case to the Oregon Supreme Court to address "whether [the plaintiffs'] sacramental use of peyote was in fact proscribed by Oregon's controlled substance law." *Smith*, 494 U.S. at 875. On remand, the Oregon Supreme Court answered that question in the affirmative and otherwise "reaffirmed its previous ruling" in the plaintiffs' favor. *Id.* at 876. The U.S. Supreme Court again granted review. *Id.* Thus, although *Smith* had started out as an unemployment compensation case, it returned to the Supreme Court as squarely presenting the question of whether Oregon's *criminal prohibition* on all use of peyote violated the Free Exercise Clause. *Id.* Accordingly, unlike *Lyng*, *Smith* presented no threshold question as to whether the challenged Oregon law actually "prohibit[ed]" the claimants' religious exercise. *See* U.S. CONST. amend I.

A sharply divided Court held that there was no violation of the Free Exercise Clause. Justice Scalia's majority opinion for five Justices acknowledged what it described as "the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)," under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883. The Court noted that it had applied the *Sherbert* test in three cases to "invalidate[] state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Id.* The Court also observed that, in several other decisions, the Court "purported to apply the *Sherbert* test in contexts other than that," but that it had "always found the test satisfied." *Id.* Citing specifically to (among other decisions) *Roy* and *Lyng*, the Court further noted that, "[i]n recent years [the Court]

ha[s] abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." *Id*. The Court then held that, "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a *generally applicable* criminal law." *Id*. at 884 (emphasis added). Reviewing its caselaw more broadly, the Court held that its decisions had "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879 (citation omitted). Citing *Lyng*, the Court held that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id*. at 885 (quoting *Lyng*, 485 U.S. at 451).

The Court's holding that the *Sherbert* test does not apply to neutral and generally applicable prohibitions drew the sharp disagreement of four Justices, in a separate opinion written by Justice O'Connor.[5] According to Justice O'Connor, the Court's caselaw has "respected both the First Amendment's express textual mandate and the

[5] Because Justice O'Connor ultimately concurred in the judgment even under the *Sherbert* test, her separate opinion was technically styled as a concurrence in the judgment. *See Smith*, 494 U.S. at 891–907. The other three Justices who joined Justice O'Connor's criticism of the majority's abandonment of the *Sherbert* test did not agree that the Oregon law survived that test, and they therefore only partially joined her concurrence and also filed a separate dissent. *See id*. at 907–21 (Blackmun, J., dissenting).

governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment). Citing the unemployment compensation case of *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), Justice O'Connor elaborated on her understanding of what it meant for government to impose a substantial burden on religious exercise:

> [T]he essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As [the Court] explained in *Thomas*:
>
> > "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to

> violate his beliefs, a burden upon religion exists." 450 U.S., at 717–718.

Smith, 494 U.S. at 897 (O'Connor, J., concurring in the judgment). Thus, Justice O'Connor concluded, "[t]he *Sherbert* compelling interest test applies" to both "cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct." *Id*. at 898. In either type of case, Justice O'Connor concluded, it did not matter whether the law was a "neutral" or "generally applicable" one. *Id*. at 898–900. The Court's precedents, she explained, reflected a "consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Id*. at 892.

B

Congress promptly sought to supersede, by statute, *Smith*'s holding that "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause." *Holt*, 574 U.S. at 356–57. As stated expressly in § 2 of RFRA, Congress's primary purpose in enacting the Act was to "restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). That stated purpose was based on RFRA's express finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id*. § 2000bb(a)(1).

Section 3(a) of RFRA establishes the general rule that "[g]overnment shall not substantially burden a person's

exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). In its current form, that prohibition extends to any "branch, department, agency, instrumentality, [or] official (or other person acting under color of law) of the United States" or of the District of Columbia, the Commonwealth of Puerto Rico, or the United States' territories and possessions. *Id.* § 2000bb-2(1), (2). The sole exception to this general rule is contained in § 3(b), which states:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000bb-1(b). The net effect is that the government may substantially burden a person's exercise of religion if and only if the government's action can survive "strict scrutiny." *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430 (2006).

Congress also made clear its intent that RFRA operate as a framework statute, "displacing the normal operation of other federal laws." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 682 (2020). Specifically, § 6 of RFRA provides that the Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" the date of RFRA's enactment. 42 U.S.C.

§ 2000bb-3(a). Congress further provided that "[f]ederal statutory law adopted after [RFRA's enactment] is subject to [RFRA] unless such law explicitly excludes such application by reference to [RFRA]." *Id*. § 2000bb-3(b).

RFRA does not define what it means to "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a), (b). But "Congress legislates against the backdrop of existing law," *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013), and the meaning of that phrase is clearly elucidated by considering the body of law discussed in the "separate opinions" in *Smith*, which "concerned the very issue addressed" by Congress in § 3 of RFRA. *Williams v. Taylor* (*Terry Williams*), 529 U.S. 362, 411 (2000).[6]

As *Terry Williams* explained, in the unusual situation in which the "broader debate and the specific statements" of the Justices in a particular decision "concern[] precisely the issue" that Congress later addresses in a statute that borrows the Justices' terminology, Congress should be understood to have "adopt[ed]" the relevant "meaning given a certain term in that decision." 529 U.S. at 411–12. Thus, in construing the standards of review applicable in deciding habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), *Terry Williams* turned to "[t]he separate opinions" in *Wright v. West*, 505 U.S. 277 (1992), which concerned that "very issue." 529 U.S. at 411. As *Terry Williams* recounted, the respective opinions of Justice

[6] We refer to this case as "*Terry Williams*" because, in an extraordinary coincidence, the Supreme Court on the very same day decided another case named "*Williams v. Taylor*" (in which the petitioner was Michael Williams). *See* 529 U.S. 420 (2000); *see also Shinn v. Martinez Ramirez*, 596 U.S. 366, 381 (2022) (similarly referring to the other case as "*Michael Williams*").

Thomas and Justice O'Connor in *Wright* vigorously debated whether habeas review should be deferential, with Justice O'Connor concluding that a federal court should review de novo whether the state court's resolution of the federal issue was "correct," and Justice Thomas concluding that a federal court should "simply" inquire as to whether the state decision was "reasonable." *Id*. at 410–11. In addressing the issue of the appropriate standards of review in AEDPA's amendments to the habeas statute, *see* 28 U.S.C. § 2254, "Congress specifically used the word 'unreasonable,'" thereby confirming that it had effectively adopted Justice Thomas's position and rejected Justice O'Connor's. *See Terry Williams*, 529 U.S. at 411.

RFRA presents exactly the sort of distinctive situation in which the principles discussed in *Terry Williams* are applicable. *Terry Williams* invoked those principles with respect to AEDPA even though the Court conceded that there was "no indication in § 2254(d)(1) itself that Congress was '*directly* influenced' by Justice Thomas' opinion in *Wright*." 529 U.S. at 411 (emphasis added). As the Court explained, "Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt either a rule or a meaning given a certain term in that decision." *Id*. But where, as with RFRA, Congress *does* specifically "mention a prior decision of this Court by name in a statute's text," *id*., the inference is all the more inescapable that, when Congress borrows the Justices' same phrasing, it does so against the backdrop of how those terms were understood in the relevant opinions accompanying that decision. Here, RFRA was enacted against the backdrop of the vigorous debate between Justice Scalia and Justice O'Connor in *Smith*; both of their opinions used variations of the phrase "substantially burden" in describing the pre-*Smith*

framework for evaluating Free Exercise Clause claims[7]; RFRA's text states that its purpose is to supersede, by statute, the decision in "Employment Division v. Smith, 494 U.S. 872 (1990)," *see* 42 U.S.C. § 2000bb(a)(4); and, in superseding *Smith*, RFRA uses the phrase "substantially burden," *id.* § 2000b-1(a), (b). The inference is overwhelming that Congress thereby "adopt[ed]" the "meaning given [that] certain term in that decision." *Terry Williams*, 529 U.S. at 411. Consequently, RFRA unmistakably sought to enshrine, by statute, the basic principles reflected in the pre-*Smith* framework for applying the Free Exercise Clause that is described in those opinions, and that framework clearly includes *Lyng*.

Thus, for example, Justice O'Connor's separate opinion in *Smith* confirms that the "substantial burden" rule established in the Court's caselaw is consistent with, and does not abrogate, the Court's decision in *Lyng* (which she wrote). As Justice O'Connor explained in her separate opinion in *Smith*, *Lyng* did *not* "signal" a "retreat from [the Court's] consistent adherence to the compelling interest test" in evaluating governmental action prohibiting the free exercise of religion; instead, it reflected the underlying limits in the governmental conduct *reached* by the Free Exercise Clause. *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment). She argued that, like *Roy*, *Lyng* involved the

[7] *See Smith*, 494 U.S. at 883 ("Under the *Sherbert* test, governmental actions that *substantially burden* a religious practice must be justified by a compelling governmental interest." (emphasis added)); *id.* at 894 (O'Connor, J., concurring in the judgment) (stating that, under the Court's existing caselaw, the government is required "to justify any *substantial burden* on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest" (emphasis added)).

Government's "conduct [of] its own internal affairs" in a way that did not implicate the Free Exercise Clause's rule about "what the government cannot *do* to the individual." *Id.* (emphasis added) (citation omitted). That view is consistent with *Lyng*, which—as we have exhaustively explained earlier—rests on the premise that the Government's actions there, although substantially destructive of the Indians' religious interests, did not involve "*prohibiting* the free exercise" of religion within the meaning of the Free Exercise Clause. *See supra* at 28–31.

Moreover, Justice O'Connor's *Smith* concurrence contained a detailed explication of what counts as a cognizable burden under the Court's then-existing caselaw, and it closely dovetails with *Lyng*. As she explained, such burdens may be "imposed directly through laws that *prohibit or compel* specific practices"; they may be imposed "indirectly through laws that, in effect, make *abandonment* of one's own religion or conformity to the religious beliefs of others the *price* of an equal place in the civil community"; or they may involve benefit conditions that "put[] *substantial pressure* on an adherent to modify his behavior and to violate his beliefs." *Smith*, 494 U.S. at 897 (O'Connor, J., concurring in the judgment) (emphasis added) (citation omitted).

Likewise, nothing in Justice Scalia's majority opinion in *Smith* suggested that the Court thought that *Lyng* was inconsistent with the substantial burden test. Instead, in the course of arguing for a broader jettisoning of *Sherbert*'s compelling interest test, the *Smith* majority simply cited *Lyng* as an instance in which that strict scrutiny test had not been applied. *See Smith*, 494 U.S. at 883. As noted earlier, the *Smith* majority also argued that its broader position drew support from *Lyng*'s general observation that the limitations

imposed by the Free Exercise Clause "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development," *id*. at 885 (quoting *Lyng*, 485 U.S. at 451), but that likewise reflects no criticism of *Lyng*'s holding about the scope of "prohibiting" under the Free Exercise Clause.

Indeed, the only debate that Justice Scalia and Justice O'Connor had concerning *Lyng* related to the majority's use of this latter comment to bolster its broader rule about neutral laws of general applicability. Justice O'Connor objected that the majority took that comment out of *Lyng*'s specific context, which involved only the Government's conduct of its "internal affairs" and therefore did not implicate the Free Exercise Clause's rule about "what the government cannot do to the individual." *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment) (citation omitted). The Court responded that there was no basis for limiting the cited principle in the way that Justice O'Connor posited. *Lyng*'s observation should apply more broadly, the Court explained, because "it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng*, *supra*, or its administration of welfare programs, *Roy*, *supra*." *Id*. at 885 n.2. This debate about whether and how to *extend* an observation made in *Lyng* reflects no criticism of *Lyng*'s ultimate holding.

Accordingly, both Justice O'Connor's concurrence and the majority opinion in *Smith* strongly confirm that, under the then-existing framework of Free Exercise Clause jurisprudence, the proposition that the government must justify, by strict scrutiny, any "substantial burden" on religious exercise is one that subsumes, rather than

overrides, *Lyng*'s holding about the scope of government action that is reached by the constitutional phrase "prohibiting the free exercise thereof." U.S. CONST. amend. I. As a decision about the scope of the term "prohibiting," *Lyng* defines the outer bounds of what counts as a *cognizable* substantial burden imposed by the government. That is plainly how Justice O'Connor viewed *Lyng* in *Smith*, and the *Smith* majority did not disagree. When Congress copied the "substantial burden" phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise. *See Terry Williams*, 529 U.S. at 411–12; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012) ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, . . . they are to be understood according to that construction.").

C

The dissent's exclusive reliance on its composite understanding of the dictionary definitions of "substantial" and "burden," *see* Dissent at 201, contravenes the interpretive principles discussed in *Terry Williams*, as well as the crucial context supplied by *Smith* and *Lyng*. As a result, the dissent's construction of the phrase elides the crucial ingredient that *Lyng* reflects, which is that the phrase "substantial burden" must ultimately be bounded by what counts as within the domain of the phrase "*prohibiting* the free exercise thereof." U.S. CONST. amend. I (emphasis added).

It is no answer to say, as the dissent does, that we have applied that dictionary definition in construing the meaning

of the identical term "substantial burden" as used in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *See* Dissent at 208–10. The dissent overlooks the fact that RLUIPA expressly applies only to "substantial burdens" in two specific contexts—namely, "impos[ing] or implement[ing] a land use regulation," 42 U.S.C. § 2000cc(a)(1), and restrictions on "a person residing in or confined to an institution" affiliated with a government, *id*. § 2000cc-1(a). *See id*. § 1997; *see also Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005). Because both of these specific contexts inherently involve coercive restrictions, they do *not* raise a similar *Lyng*-type issue about the bounds of what counts as "prohibiting" religious exercise. In RLUIPA's two specific contexts, where that crucial element is already baked in, the dictionary definitions of "substantial" and "burden" will adequately flesh out the concept of "substantial burden" *against* that backdrop. The same is true under RFRA, once it is recognized that RFRA preserves *Lyng*'s understanding of what counts as "prohibiting" the free exercise of religion. But the same is *not* true if, with respect to RFRA, the critical context supplied by *Smith* and *Lyng* is overlooked. That would yield a very *different* concept of "substantial burden" under RFRA, one that (unlike RLUIPA) is shorn of any requirement to show that the governmental action has a "tendency to coerce individuals into acting contrary to their religious beliefs," "discriminate[s]" against religious adherents, "penalize[s]" them, or denies them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449–50, 453. Nothing in RFRA indicates that Congress intended to eliminate this crucial element or to abrogate *Lyng*.

The dissent's contrary conclusion that RFRA *does* supersede *Lyng* rests on the premise that *Lyng* was based on a *Smith*-style holding about neutral and generally applicable rules. *See* Dissent at 229–33. For the reasons that we have already explained, that premise is patently incorrect. The law at issue in *Lyng* was manifestly *not* generally applicable, and nothing in *Lyng* rests upon, or endorses, the broad rule later adopted in *Smith*. *See supra* at 28–29, 35–37. Indeed, the most that the *Smith* majority claimed was that one particular statement in *Lyng* should be *extended* in a way that would support differential treatment of neutral laws of general applicability. *See Smith*, 494 U.S. at 885.

The dissent is also wrong in asserting that a 2000 amendment to RFRA—enacted as part of RLUIPA—demonstrates Congress's intent that RFRA *not* be tied to the constitutional understanding of what counts as "prohibiting" the free exercise of religion. *See* Dissent at 205–06. Prior to RLUIPA, RFRA defined the specific term "exercise of religion" to "mean[] the exercise of religion under the First Amendment to the Constitution." *See* Pub. L. No. 103-141 § 5(4), 107 Stat. 1488, 1489 (1993). However, a circuit split developed as to whether, as a result, RFRA's protections were limited to only those practices that are "central" to, or "mandated" by, a person's faith. *Compare Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (adopting those limitations) *with Mack v. O'Leary*, 80 F.3d 1175, 1178–79 (7th Cir. 1996) (noting the circuit split and rejecting *Bryant*), *vacated on other grounds*, 522 U.S. 801 (1997). Congress, of course, cannot statutorily change the scope of the Free Exercise Clause as construed by the courts, but it could effectively abrogate decisions such as *Bryant* by decoupling RFRA's definition of "exercise of religion" from the Free Exercise Clause and then giving it a broader meaning for purposes of

RFRA. That is exactly what Congress did in RLUIPA. In § 7(a)(3) of RLUIPA, Congress rewrote the definition of "exercise of religion" in RFRA to mean "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc-5]." *See* Pub. L. No. 106-274, § 7(a)(3), 114 Stat. 803, 806 (2000). Section 8 of RLUIPA, in turn, defines "religious exercise" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and further provides that the "use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise." *See* 42 U.S.C. § 2000cc-5(7)(A)–(B). But in thus decoupling the definition of what *activities* count as the "exercise of religion" from the Free Exercise Clause," Congress did not alter the phrase "substantial burden," nor did it suggest that *that* phrase should be understood as somehow being decoupled from any notion of what counts as "prohibiting" the free exercise of religion under pre-*Smith* caselaw.[8]

The dissent further errs in contending that our construction of "substantial burden" here disregards the Supreme Court's rejection of the view that "RFRA merely restored th[e] Court's pre-*Smith* decisions in ossified form." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 715–16

[8] To the extent that the dissent insinuates that the amended RFRA's borrowing of RLUIPA's definition of religious exercise has the effect of abrogating *Lyng*, *see* Dissent at 205–06, that is quite wrong. The dissent has not cited any authority—and we are aware of none—that would support the extraordinary proposition that RFRA and RLUIPA purport to grant freestanding rights to obtain otherwise unavailable access to the real property of *others* for religious use. Put simply, neither statute purports to grant persons a "religious servitude" over the property of others. *Lyng*, 485 U.S. at 452.

(2014); *see also* Dissent at 206. The proposition the Court rejected in *Hobby Lobby* was that RFRA protected only the particular collection of practices that happened to have been "specifically addressed in [the Court's] pre-*Smith* decisions," much like AEDPA requires a showing of "'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id*. at 714 (quoting 28 U.S.C. § 2254(d)(1)). That "absurd" view, the Court explained, would mean that "resident noncitizen[s]" would not be protected by RFRA, given that there was no "pre-*Smith* case in which th[e] Court entertained a free-exercise claim brought by a resident noncitizen." *Id*. at 715–16. *Hobby Lobby* thus does not stand for the quite different—and erroneous—proposition that RFRA is somehow exempt from the settled rule that "Congress legislates against the backdrop of existing law." *McQuiggin*, 569 U.S. at 398 n.3. Indeed, even the dissent concedes that RFRA must be construed in light of "the Supreme Court's pre-*Smith* Free Exercise jurisprudence." *See* Dissent at 210–11; *see also id*. at 215 (noting that we have previously "relied on pre-*Smith* Free Exercise Clause cases to define substantial burden").

* * *

Accordingly, RFRA's understanding of what counts as "substantially burden[ing] a person's exercise of religion" must be understood as subsuming, rather than abrogating, the holding of *Lyng*. That holding therefore governs Apache Stronghold's RFRA claim as well, and that claim therefore fails for the same reasons discussed earlier. *See supra* at 31.

V

Finally, Apache Stronghold also argues that an 1852 treaty of "perpetual peace and amity" between the "Apache Nation of Indians" and the United States, *see* TREATY WITH

THE APACHES, July 1, 1852, art. 2, 10 Stat. 979 (1853), created an enforceable trust obligation that would be violated by the transfer of Oak Flat. That trust obligation, Apache Stronghold argues, stems from Article 9 of the treaty, which provides, in relevant part, that

> Relying confidently upon the justice and the liberality of the [federal] government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's [*sic*] that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Id., art. 9; *see also id*., art. 11 (stating that "the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians"). Specifically, Apache Stronghold argues that the Government's treaty obligation to "pass and execute . . . such laws as may be deemed conducive to the prosperity and happiness'" of the Apaches should be "construed to obligate the United States to preserve traditional Apache religious practices on their historic homeland." Thus construed, Apache Stronghold contends, the Government's obligations under the treaty override any power or obligation to transfer Oak Flat under § 3003. This contention fails. Even assuming *arguendo* that Apache Stronghold's interpretation of the Government's treaty obligations is correct, the Government's statutory obligation to transfer Oak Flat under

§ 3003 clearly abrogates any contrary treaty obligation, not the other way around.[9]

"Congress has the power to abrogate Indians' treaty rights," but Congress generally must "clearly express its intent to do so." *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993). To the extent that Apache Stronghold is correct in contending that the Government has a treaty-based trust obligation to *retain* Oak Flat for the benefit of the tribe and its members, § 3003 clearly and manifestly abrogates any such obligation. Section 3003 was passed to accomplish a single goal: to "authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States." 16 U.S.C. § 539p(a). The entirety of the statute is built around that ultimate objective. There are various preparatory requirements, like consultations and report generation, *e.g.*, *id.* § 539p(c)(3), (c)(4), (c)(6)(A), (c)(9), and post-transfer rules about land disposition and

[9] Although Apache Stronghold has adequately shown that its members face an imminent threatened injury in fact that is fairly traceable to the alleged treaty violation, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014), the district court concluded that allowing its members to assert what it deemed to be the *tribe's* treaty rights violated the "prudential requirement that a plaintiff 'cannot rest his claim to relief on the legal rights or interests of third parties.'" *Apache Stronghold*, 519 F. Supp. 3d at 598 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Because the parties' dispute over this "prudential" requirement does not involve our subject matter jurisdiction, we are not required to resolve it before addressing the merits of the treaty issue. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (finding that the relevant plaintiffs had Article III standing and then rejecting a claim on the merits after assuming *arguendo* that "prudential, *jus tertii* standing" was met); *cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–28 (2014) (clarifying that "'prudential standing' is a misnomer" and must be distinguished from the jurisdictional requirements of Article III (citation omitted)).

management, *id*. § 539p(d)(2), (e), (g), (h), but they all lead up to the transfer of Oak Flat. Indeed, § 3003 unambiguously states that, upon completion of the preparatory steps, "if Resolution Copper offers to convey to the United States all right, title, and interest of Resolution Copper in and to the non-Federal land, *the Secretary is* authorized and *directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land*." *Id*. § 539p(c)(1) (emphasis added). Section 3003's clear direction that, after consultation with the tribe, the transfer *shall* occur simply cannot co-exist with Apache Stronghold's claim that the treaty requires that it shall *not* occur. Section 3003 plainly abrogates any tribal treaty rights that would otherwise preclude the transfer. *See Bourland*, 508 U.S. at 687.

VI

For the foregoing reasons, Apache Stronghold is unlikely to succeed on the merits of any of the three claims before this court. It consequently cannot show that it is entitled to preliminary injunctive relief, and we need not consider the remaining *Winter* factors. *See Garcia*, 786 F.3d at 740. The district court's order denying Apache Stronghold's motion for a preliminary injunction is therefore affirmed.

AFFIRMED.

BEA, Circuit Judge, dissenting in part and concurring in part, with whom Circuit Judge FORREST joins except for footnote one; Circuit Judge BENNETT joins with respect to Part II:

I.

I dissent from paragraph one of the per curiam opinion, which announces that the term "substantial burden" as used in RFRA and RLUIPA "are interpreted uniformly," declares that *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), is overruled as a result of this interpretation of uniformity between RFRA and RLUIPA, and volunteers, in place of that 15-year precedent, a new test for when a government action imposes a "substantial burden" under RFRA that broadly asks whether the government conduct "prevent[s] access to religious exercise." We also did not apply this test to arrive at the ultimate decision of this Court, and this test does not address any "issue [that is] germane to the *eventual resolution* of th[is] case." *United States v. Johnson*, 256 F.3d 895, 914–16 (9th Cir. 2001) (separate opinion of Kozinski, J., Trott, T.G. Nelson, Silverman, JJ.) (emphasis added). That is because a majority of this panel has already *affirmed*, under the *completely different* rationale in Judge Collins's majority opinion, the district court's finding that the transfer of Oak Flat will impose no substantial burden under RFRA.[1]

[1] The statements in paragraph one of the per curiam can be characterized only as dicta that address "question[s] . . . not essential to the decision" reached in this case. *Judicial Dictum*, Black's Law Dictionary (11th ed. 2019); *see* Bryan A. Garner et al., *The Law of Judicial Precedent* 46–47 (1st ed. 2016). Our decision today—the *only* decision that resolves this controversy—is that the transfer of Oak Flat will impose no "substantial burden" on Apache Stronghold's religious exercise under RFRA. To state the obvious, it is unnecessary to overrule *Navajo Nation* to reach that outcome because *Navajo Nation* directly supports our holding. *See, e.g.*, *infra* Part II.C.

Nor do I think the separate majority's pronouncements in paragraph one of the per curiam opinion deserve binding weight in future cases even

II.

I concur in full with Judge Collins's majority opinion. I agree that RFRA's term "substantial burden" does not include the governmental action at issue here "because the plaintiffs would not 'be coerced by the Government's action into violating their religious beliefs,' nor would that action 'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" And I agree that Congress "adopted the limits that *Lyng* places on what counts as a governmental imposition of a substantial burden on religious exercise" when Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq. ("RFRA"). Further, I agree that RFRA and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, et seq. ("RLUIPA"), are applied in contexts so distinguishable from one another as to

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under our "well-reasoned" dicta rule. *See Johnson*, 256 F.3d at 914–16 (separate opinion of Kozinski, J., Trott, T.G. Nelson, Silverman, JJ.), *adopted as the law of the circuit in Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003). No majority of this panel has filed a separate opinion setting forth the rationale behind paragraph one of the per curiam opinion. Neither Chief Judge Murguia's dissent nor Judge R. Nelson's concurrence reflect the rationale *of this Court* that would support overruling *Navajo Nation*. We have, in other words, two sentences of dicta in the opening of a majority per curiam opinion—which purport to effect a seismic shift in our RFRA jurisprudence—but no guiding rationale that explains this sea change in our law. This cannot be the scenario that *Johnson*'s "well-reasoned" dicta rule was meant for. When we held in *Johnson* that a panel's ruling on an issue, though "[un]necessary in . . . a strict logical sense," can become the law of this circuit so long as the panel "decide[s] [it] after careful analysis," the "analysis" we had in mind was the analysis "in a published opinion" *of the court*, *id.* at 914; *see id.* at 909 n.1, not the separate rationales of a fractured majority expressed in different writings.

make RLUIPA cases entirely unhelpful when interpreting RFRA.

I write separately to provide additional reasons in support of the conclusion that Apache Stronghold cannot obtain relief under RFRA. First, I will discuss the further textual and contextual evidence that the term "substantial burden," as used in RFRA, has the same limited meaning it had in federal court cases decided prior to RFRA's enactment. Second, I will discuss how RFRA and RLUIPA, in addition to having distinguishable applications, also have distinguishable texts, such that RLUIPA cases ought not to be used to interpret RFRA for this additional reason. Third, I will discuss the serious practical problems that would arise with the test proposed by Chief Judge Murguia in her lead dissent. Last, I will discuss how, even were RFRA to provide the Apache a viable claim for relief, RFRA's application in this case would nonetheless be abrogated by Congress's express direction in the Land Exchange Act that the land exchange be consummated.

FACTUAL BACKGROUND

Congress passed the Land Exchange Act in 2015. The Land Exchange Act authorizes and directs the exchange of land between the United States Government and two foreign mining companies (known collectively as "Resolution Copper"). 16 U.S.C. § 539p. The 2,422-acre parcel of Arizona land that Congress has expressly authorized and directed the Secretary of the Interior to convey to Resolution Copper is located within the Tonto National Forest and includes a sacred Apache ceremonial ground called Chí'chil Biłdagoteel—known in English as "Oak Flat."

On January 12, 2021, Apache Stronghold, a nonprofit organization with members who belong to Western Apache

tribes, filed suit seeking to prevent the land exchange and ensure that its members would forever have a right to access Oak Flat. Two days later, Apache Stronghold filed a Motion for Temporary Restraining Order and Preliminary Injunction. The district court held a hearing on the motion on February 3, 2021, and denied it nine days later. The district court found "that the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries." *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 603 (D. Ariz. 2021). The district court also found that the Apache believed that "Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood." *Id.* at 604. This finding is undisputed.

Apache Stronghold appealed, and on June 24, 2022, a three-judge panel of this court affirmed the denial of the preliminary injunction. *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022). The panel opinion relied on our en banc decision in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1069–70 (9th Cir. 2008) (en banc), to decide the RFRA claim. 38 F.4th at 753.

On November 17, 2022, upon a vote of a majority of the non-recused active judges, the court sua sponte ordered that this case be reheard en banc.

LEGAL BACKGROUND

A. Pre-RFRA Jurisprudence

Before the 1993 enactment of RFRA, in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court had laid out a strict scrutiny test for certain governmental actions that interfered

with the constitutional right of free exercise of religion as set forth in the First Amendment. Under that strict scrutiny test, the government cannot impose a substantial burden on the exercise of a religious adherent's sincerely held religious beliefs unless that burden is outweighed by a compelling governmental interest. *Sherbert*, 374 U.S. at 403–06.[2]

In *Sherbert*, the plaintiff was fired from her job for refusing to work on Saturday, the Sabbath day of her faith. The Court held that the state's denial of unemployment benefits to the plaintiff substantially burdened her religious exercise by forcing her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

In *Yoder*, members of the Old Order Amish religion appealed their convictions under a law that required them to send their children to school until the age of sixteen—a violation of the tenets of the Amish religion, which prohibit the schooling of children beyond the eighth grade. The Court held that the state's schooling mandate, as applied to three Amish children who had completed the eighth grade but who had not yet reached the age of sixteen, caused a substantial burden because it "affirmatively compel[led] [the Amish], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218.

The Supreme Court's analysis of burdens in *Sherbert* and *Yoder* represented a fundamental inquiry: whether the

[2] When we assess claims that the government has infringed on the free exercise of religion, we use the terms "strict scrutiny" and "the compelling interest test" to refer to the same test. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77, 1881 (2021).

governmental action *coerces* the individual religious adherent to violate or abandon his sincere religious beliefs. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) ("[T]he forfeiture of unemployment benefits for choosing [to engage in religious conduct] brings unlawful coercion to bear on the employee's choice." (citing *Sherbert*, 374 U.S. at 404)); *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (plurality) ("Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs."); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 249 (1968) ("[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion."); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963) ("[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.").

The Supreme Court specifically addressed the application of *Sherbert*'s and *Yoder*'s tests to the Government's excavation and reconfiguration of the government's own land in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). In *Lyng*, the United States Forest Service wanted to build a road through an area "significant as an integral and indispens[a]ble part of Indian religious conceptualization and practice." *Id.* at 442. The road was to be built on Forest Service land, generally available to the public—Indians included. A study by the Forest Service found that the construction of the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.* The Indians filed suit, seeking to enjoin the construction of the road.

The Supreme Court held that the construction of the road did not burden the Indians' religious practices in a way that would require the government to meet the compelling interest test—not because the religious practices were unaffected, but because the construction of the road did not "coerce[]" the Indians "into violating their religious beliefs," as in *Yoder*, nor "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens," as in *Sherbert*. *Id.* at 449. In other words, it was irrelevant that "the Indians' spiritual practices would become ineffectual" or made "more difficult" because there was "no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450. Thus, the burden suffered by the Indians was qualitatively different than the burden required to be proven to obtain relief under *Sherbert* and *Yoder*. Even accepting that the road-building project "could have devastating effects on traditional Indian religious practices" or even "virtually destroy the Indians' ability to practice their religion," *id.* at 451, the project did not put the Indians to the choice between violating or abandoning their religious tenets and losing vested benefits or incurring a governmental penalty. Because there was no personal coercion, the new road did not substantially burden the Indians' constitutional right to the free exercise of their religion. *Id.* at 447.[3]

[3] In dicta, the Supreme Court in *Lyng* mentioned that "a law prohibiting the Indian respondents from visiting the [sacred] area would raise a different set of constitutional questions." *Id.* at 453. The Supreme Court gave no indication as to what "different . . . constitutional questions" would be raised under such circumstances, what analysis the Court would use to answer those questions, or what answers the Court would reach. We do not give any weight to "an unconsidered statement" found in Supreme Court dicta, *Valladolid v. Pac. Operations Offshore, LLP*,

The lead dissent argues, however, that *Smith* interpreted "*Lyng* [as] stand[ing] for the proposition that the compelling interest test is 'inapplicable' to 'across-the-board' neutral laws" because *Smith* quoted from *Lyng* when it established that rule. We addressed and rejected this same argument fifteen years ago. *See Navajo Nation*, 535 F.3d at 1072–73. The fact that *Smith* divined some support for its rule from the *Lyng*'s language does not mean that *Lyng* was the case that established the rule that "neutral, generally applicable laws" are exempt from the *Sherbert* and *Yoder* test.[4] That case was *Smith*. And Congress cited *Smith*, not *Lyng*, as the case that "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." *See* 42 U.S.C. § 2000bb(a)(4).[5]

Smith, if anything, construed *Lyng* as one of several examples where the Court declined to apply the compelling interest test because the government action in that case was not coercive, making the burden it imposed on religious practice not "substantial[]" within the meaning of *Sherbert*. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872,

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604 F.3d 1126, 1131–32 (9th Cir. 2010), *aff'd*, 565 U.S. 207 (2012), and this language in *Lyng* does not establish that the term "substantial burden" has any greater or different meaning than used in the remainder of the opinion in *Lyng* and in other pre-RFRA cases.

[4] I agree in full with Judge Collins's explanation as to *why* the law at issue in *Lyng* was not neutral or generally applicable. Simply put, an Act of Congress that deals with a specific stretch of road in Northern California is not, by definition, a "neutral law of general application."

[5] RFRA also explicitly endorsed "the compelling interest test as set forth *in prior Federal court rulings*"—that is, the test used in federal court rulings prior to *Smith*. 42 U.S.C. § 2000bb(a)(5) (emphasis added). *Lyng* was handed down two years prior to *Smith*. Thus, *Lyng* was one of the "prior Federal court rulings" which Congress explicitly wanted to restore.

883 (1990) (citing *Sherbert*, 374 U.S. at 402–03). *Smith* explained that the government action in *Sherbert* "substantially burden[ed] . . . religious practice" because it coerced a religious adherent into violating her beliefs by "condition[ing] the availability of [unemployment] benefits upon [her] willingness to work under conditions forbidden by h[er] religion." *Smith*, 494 U.S. at 883 (citing *Sherbert*, 374 U.S. at 402–03). But the Court had "never invalidated any governmental action on the basis of the *Sherbert* test" outside the unemployment benefit context because none of the challenged state actions in those cases were coercive. *Smith*, 494 U.S. at 883. Whether it was the "military dress regulations [in *Goldman v. Weinberger*] that forbade the wearing of yarmulkes," the state "prison's refusal [in *O'Lone v. Estate of Shabazz*] to excuse inmates from work requirements to attend worship services," the federal statute in *Bown v. Roy* "that required [Social Security] benefit applicants . . . to [obtain and] provide their Social Security numbers," or the "devastating effects on . . . religious practices" caused by the "Government's logging and road construction activities on [sacred] lands" in *Lyng*—these activities, at most, interfered with religious exercise *as an incident* to the operation of governmental affairs. *Smith*, 494 U.S. at 883–84 (internal citations and quotations omitted). They did not entice religious adherents into violating the tenets of their faith in exchange for government benefits, as the government had done in *Sherbert*. *See id.*

Pre-RFRA cases applying (or refusing to apply) *Sherbert*'s compelling interest test only confirm what *Smith* later observed: that coercion is the *sine qua non* for what constitutes a "substantial[] burden" under *Sherbert*. *Id.* at 883. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), a religious adherent

was fired for refusing to participate in the production of armaments, and the state denied him unemployment benefits. Although *Thomas* was a relatively easy application of *Sherbert*, the Supreme Court took the occasion to reiterate that only personal coercion qualifies as a substantial burden under the Free Exercise Clause: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.* at 717–18. The Supreme Court held that a substantial burden was placed on the religious adherent and granted relief under the Free Exercise Clause. *Id.* at 720.

In *Bowen v. Roy*, 476 U.S. 693 (1986)—one of the examples that *Smith* identified as not involving a substantial burden, *see Smith*, 494 U.S. at 883—an Indian religious adherent challenged the Government's internal use of a Social Security number to identify the religious adherent's daughter, *Bowen*, 476 U.S. at 699. The religious adherent testified that the Government's use of a Social Security number would "rob" his daughter of "her spirit." *Id.* at 697. The Supreme Court explained how the use of the Social Security number was not a substantial burden by drawing a distinction between burdens that coerce the religious adherent to violate or abandon his sincere religious beliefs and those that do not:

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government

> may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices . . . .

Id. at 699–700. In other words, "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700. The Supreme Court concluded that the use of the Social Security number did not create a substantial burden, even though it might "rob" the "spirit" of the adherent's daughter, because "in no sense d[id] it affirmatively compel [the adherents], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they f[ound] objectionable for religious reasons." *Id.* at 703. The Supreme Court thus denied relief under the Free Exercise Clause. *Id.* at 712.

Only a few years before RFRA, the Supreme Court decided *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), in which the Court held that a generally applicable tax does not impose a "constitutionally significant burden on [the religious adherent's] religious practices or beliefs." *Id.* at 392. In explaining why the tax did not impose a substantial burden, the Supreme Court reasoned that "in no sense has the State 'conditioned receipt of an important benefit upon conduct proscribed by a religious faith, or denied such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* at 391–92 (alterations adopted) (quoting *Hobbie*, 480 U.S. at 141).

In sum, pre-RFRA jurisprudence set forth very clear guidelines as to what *type* of burden is "substantial" enough to require the government to demonstrate a compelling interest: government action that coerces a religious adherent to violate or abandon the tenets of his religion—by threatening, for example, the denial of a governmental benefit to which the person is otherwise entitled or the imposition of a penalty based on the religious adherent's choice to act in accordance with the protected tenets of his religion. Whether one might think the phrase "substantial burden" admits a broader definition, the Supreme Court did not. It was with this clear jurisprudential history that RFRA adopted "substantial burden" as a statutory term. [6]

The lead dissent disagrees, arguing that "pre-RFRA precedents did not limit the kinds of burdens protected under the Free Exercise Clause to the types of burdens challenged in *Sherbert* (the choice between sincere religious exercise and receiving government benefits) and in *Yoder* (the threat of civil or criminal sanctions)." Instead, the dissent argues that "the Supreme Court's pre-*Smith* jurisprudence recognizes at least one other category of government action that violates the Free Exercise Clause: *preventing a religious*

[6] The Supreme Court's jurisprudence prior to *Smith* used the term "burden" or "undu[e] burden," and did not specifically use the term "substantial burden"—though our own pre-*Smith* jurisprudence certainly did. *See Callahan v. Woods*, 736 F.2d 1269, 1273 (9th Cir. 1984). The use of the term "substantial burden" did not appear in Supreme Court case law until *Smith* itself. *See* 485 U.S. at 883. Nonetheless, *Smith*'s use of the term "substantial burden," as well as our own use of that term in pre-*Smith* jurisprudence, invoked the entire line of cases, beginning with *Sherbert* and *Yoder*, in which the Court had identified the kinds of burdens on religious adherents which the government must justify with a compelling interest.

adherent from engaging in religious exercise." The dissent cites two cases to support this theory.

First, the dissent cites *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam). In *Cruz*, Texas state prison officials barred a Buddhist prisoner from using a prison chapel, which was available to prisoners who were members of other religious sects. *Id.* at 319. Prison officials had also facilitated distribution of religious materials of non-Buddhist faiths. *Id.* at 319–20. But when the prisoner shared Buddhist religious material with other prisoners, prison officials retaliated by placing the prisoner in solitary confinement and on a diet of bread and water for two weeks, without access to newspapers, magazines, or other sources of news. *Id.* at 319. Further, the prison officials prohibited the prisoner from corresponding with his religious advisor, even though prison officials facilitated correspondence with religious advisors for prisoners of other faiths. *Id.*

The Buddhist prisoner sued the prison officials under 42 U.S.C. § 1983 for violating his rights to the free exercise of his religion under the First and Fourteenth Amendments. The district court denied relief under the theory that a prisoner's exercise of religion should be left "to the sound discretion of prison administrators," and held that "disciplinary and security reasons . . . may prevent the 'equality' of exercise of religious practices in prison," and thus ruled that prisoners do not enjoy a right to the free exercise of religion under the First and Fourteenth Amendments. *Id.* at 321. The Fifth Circuit affirmed.

The Supreme Court reversed in a five-page, per curiam opinion. The Court held that prisoners enjoy the right to the free exercise of religion and held that the allegations in the prisoner's complaint were sufficient to state a claim under

the First and Fourteenth Amendments. *Id.* at 322. When the Court analyzed the prisoner's complaint, the Court did not discuss which of the prison officials' actions—the denial of access to the chapel, a religious advisor, and news sources, or the placement of the prisoner in solitary confinement and on a diet of bread and water for two weeks—constituted a qualifying burden for First Amendment purposes. The Court never held that the denial of access to the prison chapel was a sufficient burden on its own or that the burdens discussed in *Sherbert* and *Yoder* were merely two examples of a broader inquiry. The Court never even cited *Sherbert* or *Yoder*.

It was unnecessary for the Court to conduct a detailed analysis of the burden on the religious adherent in *Cruz*: the religious adherent's complaint easily stated enough facts to allege a plausible Free Exercise Clause violation under *Sherbert* or *Yoder*. The religious adherent in *Cruz* alleged that prison officials denied access to governmental benefits that were generally available to similarly situated prisoners of other religions. The denial of those benefits plainly qualified as a cognizable burden under *Sherbert*, 374 U.S. at 404.[7] Further, he alleged that the prison officials placed the prisoner in solitary confinement and on a diet of bread and water for two weeks as punishment for his distribution of religious materials. Those penalties easily qualified as burdens under *Yoder*, 406 U.S. at 218. Nowhere in the Court's decision is there any mention of a First Amendment right to access and use governmental property for exercise of a religious rite.

[7] Moreover, these denials likely qualified as violations of the Equal Protection Clause of the Fourteenth Amendment, which the prisoner had also invoked as a basis for relief. *See Cruz*, 405 U.S. at 320 n.1.

Second, the dissent cites *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). In *O'Lone*, prison officials in a New Jersey state prison forced some Muslim prisoners to work outside the prison during workdays, which included Friday afternoons, the Muslim holy day. *Id.* at 345–47. The Muslim prisoners filed suit to challenge the prison regulation because the regulations prevented the prisoners from attending a religious service, which their faith commanded them to perform on Friday afternoons. *Id.* at 345. The Supreme Court analyzed the claim not with *Sherbert* and *Yoder*'s compelling interest framework, but with a "reasonableness" test that the Court had used at that time for Free Exercise claims arising in the prison context. *Id.* at 349. The Court held that the prison regulations were reasonable. *Id.* at 351–53.

O'Lone is clearly inapplicable. The Court barely mentioned that the Muslim plaintiffs were barred from attending their religious event and never analyzed whether that bar constituted a qualifying burden under the First Amendment. There was no discussion whether the bar might have constituted or been backed by the denial of a vested governmental benefit or the imposition of a penalty. The Court, of course, did not need to address the issue whether the burden was a qualifying burden because the Court ruled against the prisoners on the grounds that the prison regulations were "reasonable." Even had the court provided some guidance on whether the denial of access to a religious site was a qualifying burden in *O'Lone*, it would have been inapplicable in the present case because RFRA adopted *Sherbert* and *Yoder*'s compelling interest framework, not the now-abandoned "reasonableness" framework in use in prisoner cases at the time of *O'Lone*.

The mere fact that the governmental actions in *Cruz* and *O'Lone* had caused, as one of their effects, what one could describe as the prevention or denial of access to a location for sincere religious exercise, does not mean that the Supreme Court recognized that such an effect constitutes a "substantial burden" for purposes of the *Sherbert* test. That simply was not a finding in either case.

B. *Smith*, RFRA, and RLUIPA

In 1990, the Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, two individuals were fired from their jobs at a private drug rehabilitation organization because they ingested peyote at a ceremony of the Native American Church. *Id*. at 874. An Oregon agency denied both individuals unemployment compensation because the agency determined that the individuals had been discharged for work-related misconduct. *Id*. Oregon courts reversed, holding that *Sherbert* and *Yoder* prohibited the denial of unemployment benefits to the religious adherent on the basis of his participation in religious conduct. *Id*. at 874–76. The Supreme Court, however, disagreed, holding that *Sherbert* and *Yoder*'s substantial burden test does not prevent a state from enacting and enforcing "neutral, generally applicable laws" such as Oregon's criminal law prohibition against the use of peyote. *Id*. at 878–82.

Congress responded to *Smith* in 1993 by enacting RFRA. Congress disagreed with *Smith*'s exempting "neutral, generally applicable laws" from the reach of *Sherbert* and *Yoder*, saying that *Smith* had "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress required that "the

compelling interest test as set forth in prior Federal court rulings" apply no matter whether the challenged law was one of neutral, general applicability. 42 U.S.C. § 2000bb(a)(5). RFRA then pointedly and specifically cited two Supreme Court cases; RFRA explained that Congress's intent was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1).

Against this backdrop, Congress provided the following statutory language: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a), (b)(1)–(2).

In 1997, the Supreme Court curtailed the scope of RFRA. In *City of Boerne v. Flores*, the Supreme Court held that RFRA was unconstitutional as applied to the actions and laws of state governments because Congress had exceeded the authority delegated to it in the Fourteenth Amendment to the Constitution. 521 U.S. 507 (1997). When Congress passed RFRA, Congress invoked its authority under the Fourteenth Amendment to extend the reach of RFRA to regulate state actions and lawmaking. *Id.* at 516; *see also* U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). In *City of Boerne*, the Supreme Court held that Congress's reliance on the Fourteenth Amendment as a basis for regulating state actions and lawmaking was misplaced because the Fourteenth Amendment permits Congress to enforce only existing constitutional rights, not

to define new constitutional rights. *Id*. at 536. And because the Supreme Court had held in *Smith* that the Free Exercise Clause of the First Amendment did not provide any right to be exempt from a neutral law of general applicability, the rights protected in RFRA went beyond the rights protected under the First Amendment and therefore exceeded Congress's power to regulate the state and local actions under the Fourteenth Amendment. *Id.* at 534–35.

In 2000, in response to *City of Boerne*, Congress passed a new, different, and narrower statute: RLUIPA. RLUIPA's application and text differs from RFRA's in many important and decisive ways, discussed further below. Most significantly, RLUIPA makes no mention of *Sherbert* or *Yoder* or any other case and does not purport to restore any test "set forth in prior federal court rulings."

C. *Navajo Nation*

In 2008, we took *Navajo Nation v. United States Forest Service* en banc to resolve disagreement over what kinds of burdens qualify as "substantial burdens" on the exercise of religion under RFRA. 535 F.3d 1058 (9th Cir. 2008) (en banc). In *Navajo Nation*, a coalition of Indian tribes and environmentalist organizations filed a lawsuit seeking to prohibit the United States Forest Service from approving planned upgrades to a ski resort located on federal property. *Id.* at 1062. The Indian plaintiffs, who considered the whole mountain at issue to be a sacred place in their religion, contended that the planned use of artificial snow made from recycled wastewater containing microscopic amounts of human fecal matter would spiritually contaminate the entire mountain. *Id.* at 1062–63. The Indian plaintiffs claimed that the use of recycled wastewater would cause:

> (1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated—physically, spiritually, or both—for sacramental use; and (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination.

Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1039 (9th Cir. 2007) (vacated panel opinion). The panel opinion held that the planned use of recycled wastewater would create a substantial burden on the Indians' religious practices, and the panel granted relief under RFRA. *See id.* at 1042–43.

In reversing the panel decision, our en banc decision noted that RFRA used "substantial burden" as "a term of art chosen by Congress to be defined by reference to Supreme Court precedent." *Navajo Nation*, 535 F.3d at 1063. While RFRA did not include a definition of "substantial burden" among its several definitions, *see* 42 U.S.C. § 2000bb-2, the en banc panel reasoned that "[w]here a statute does not expressly define a term of settled meaning, 'courts interpreting the statute must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term.'" *Id.* at 1074 (alterations adopted) (quoting *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

The en banc panel therefore applied the *Sherbert* and *Yoder* framework and concluded that the planned use of

recycled wastewater to make artificial snow did not coerce the religious adherents to violate the tenets of their religion and therefore did not qualify as a "substantial burden." *Id.* at 1078. Despite the fact that the use of recycled wastewater might destroy "an entire way of life," the en banc panel concluded that a substantial burden was not present because the use of recycled wastewater did "not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*," nor did it "coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*." *Id.* at 1070.

Since our decision in *Navajo Nation*, a majority of circuits have followed suit, defining the term "substantial burden" as including only government actions which coerce individual religious adherents to violate or abandon their sincere religious beliefs.[8]

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[8] *See Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 818 (Nov. 9, 2020); *Newdow v. Peterson*, 753 F.3d 105, 109 (2d Cir. 2014) (per curiam); *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 356 (3d Cir. 2017); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 100 (4th Cir. 2013); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 350 (5th Cir. 2022); *New Doe Child #1 v. United States*, 901 F.3d 1015, 1026 (8th Cir. 2018); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008).

Four circuits have used a definition of "substantial burden" that includes both governmental actions that coerce religious adherents to violate or abandon their sincere religious beliefs and governmental actions that prevent the religious adherent from participating in religiously motivated conduct. *See Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *Lovelace v. Lee*, 472 F.3d 174, 187–88 (4th Cir. 2006); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004). The dissent cites to these circuits as support for its proposed test. But these four circuits failed to provide any

DISCUSSION

A. The Textual and Contextual Evidence Compels the Conclusion That Congress Intended "Substantial Burden" to Be Defined by Its Case-Based, Technical Definition, Rather Than Its Dictionary Definition.

"Words are to be understood in their ordinary, everyday meanings—*unless the context indicates that they bear a technical sense*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (emphasis added). When a statute addresses a subject already addressed in jurisprudence, "ordinary *legal* meaning is to be expected, which often differs from common meaning." *Id.* at 73 (emphasis added). "If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)) (alteration adopted); *see also Twitter, Inc., v. Taamneh*, 143 S. Ct. 1206, 1218 (2023); *Sekhar v. United States*, 570 U.S. 729, 733 (2013).

"If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's

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statutory, textual, or historical reason for expanding the definition of "substantial burden." "An authority derives its persuasive power from its ability to convince others to go along with it." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 509 (9th Cir. 2018) (quoting Bryan A. Garner, et al., *The Law of Judicial Precedent* 170 (2016)), *rev'd in part and vacated in part on other grounds*, 140 S. Ct. 1891 (2020); *see also* Chad Flanders, Toward A Theory of Persuasive Authority, 62 Okla. L. Rev. 55, 65 (2009) ("[T]he force of persuasive authority is the unforced force of the better argument."). Decisions from other circuits made without any analysis are not valuable as persuasive authorities.

court of last resort, . . . they are to be understood according to that construction." Scalia & Garner at 322. Of course, "[t]he clearest application" of this canon occurs when the legislature codifies a test previously expressed in judicial cases. *Id.*; *see also United States v. Hansen*, 143 S. Ct. 1932, 1942 (2023) ("[W]hen Congress 'borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.'" (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))).[9]

When the full context is considered—the discussion in pre-*Smith* jurisprudence of which governmental actions generate cognizable burdens, the agreement between the majority and concurrence in *Smith* that only those governmental actions that coerce the religious adherent to violate or abandon his religious tenets are cognizable burdens, the use of the term "substantial burden" by both the majority and concurrence in *Smith* to describe such burdens, the fact that RFRA cited to *Smith*, and the fact that RFRA adopted the term "substantial burden" without modification and without noting any disapproval of the limited scope given to that term by the majority and concurrence in *Smith*—it is clear that Congress employed the term "substantial burden" in RFRA not for its dictionary

[9] The lead dissent cites *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020), to support the proposition that dictionary definitions should be used to define RFRA's terms. In *Tanzin*, the Supreme Court used a dictionary to define the term "appropriate relief" under RFRA because no party argued that the term had taken on a technical meaning. The fact that one term in a statute does or does not have a technical meaning has no effect on the interpretation of other terms in the statute.

definition but for the technical definition given to that term by *Smith* and prior federal court rulings.

This view is confirmed by two pieces of textual evidence in the body of RFRA itself: RFRA's statement of purpose and RFRA's dual citation to *Sherbert* and *Yoder*.

1. *RFRA states that its purpose is to "restore" the free exercise of religion test "as set forth in prior federal court rulings."*

When Congress expressly states a purpose for a statute,[10] that statement of purpose "is 'an appropriate guide' to the 'meaning of the statute's operative provisions.'" *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (quoting Scalia & Garner at 218) (alteration adopted). "Purpose sheds light . . . on deciding which of various textually permissible meanings should be adopted." Scalia & Garner at 57.

Congress's expressed desire to "restore" the free exercise of religion test "as set forth in prior federal court rulings" is a strong indication that Congress meant to have the term "substantial burden" in RFRA mean the same thing the term had meant "in prior federal court rulings." 42 U.S.C. § 2000bb(a)(5).

The lead dissent argues that this analysis prioritizes RFRA's statement of purpose over RFRA's operative language. Not so. As the dissent acknowledges, "RFRA does not define 'substantial burden.'" Thus, there is no such "operative language" in the statute to be overridden and the

[10] My discussion here references Congress's statements of purpose explicitly laid out in the text of 42 U.S.C. § 2000bb, not any purpose which might be divined from the legislative history of the statute, such as the records of the Congressional committee reports or debates.

statement of purpose is "an appropriate guide" to clarify the undefined term. *Gundy*, 139 S. Ct. at 2127.

2. *RFRA directly cites and incorporates* Sherbert *and* Yoder *as setting forth Congress's desired test.*

RFRA's direct citation to *Sherbert* and *Yoder*—and lack of citation to any other pre-*Smith* case—cannot be overstated for purposes of properly interpreting RFRA. Congress rarely chooses to cite and incorporate directly *a* judicial case into the body of a statute. When it does so, courts interpreting that statute always give the case citation and its incorporation dispositive or at least highly persuasive effect.[11]

[11] *See Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1191–94 (9th Cir. 2018) (giving dispositive weight to 12 U.S.C. § 25b's citation to *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996)); *Cantero v. Bank of Am., N.A.*, 49 F.4th 121 (2d Cir. 2022) (same); *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197 (11th Cir. 2011) (same); *United States v. Alabama*, 691 F.3d 1269, 1297 (11th Cir. 2012) (giving dispositive weight to 8 U.S.C. § 1643's citation to *Plyler v. Doe*, 457 U.S. 202 (1982)); *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 405 (6th Cir. 2001) (giving dispositive weight to 15 U.S.C. § 6701's citation to *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996)); *Nat'l Treasury Emps. Union v. United States*, 950 F.2d 1562, 1568 (Fed. Cir. 1991) (giving dispositive weight to 19 U.S.C. § 1451's citation to *United States v. Myers*, 320 U.S. 561, 566 (1944)); *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284, 287 (9th Cir. 1987) (using *Arizona v. California*, 376 U.S. 340 (1964), to define the Government's duties under 43 U.S.C. § 1524 because § 1524 cites *Arizona*); *United States v. Bell*, 761 F.3d 900, 913 n.6 (8th Cir. 2014) (holding that 22 U.S.C. § 7101's citation to and *rejection* of the narrow scope of *United States v. Kozminski*, 487 U.S. 931 (1988), means that the scope of § 7101 must at least include the scope of *Kozminski*); *United States v. Calimlim*, 538 F.3d 706, 714 (7th Cir. 2008) (same); *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) (same), *cert. granted, judgment vacated on other grounds*, 545 U.S. 1101 (2005); *see*

But even more impressive is that in *no* statute other than RFRA has Congress *ever* cited more than one case in setting a single statutory test. Bearing in mind the canon of statutory interpretation against surplusage—which teaches us that neither citation "should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence," Scalia & Garner at 174—we must ask why Congress saw the need to cite *both Sherbert and Yoder*.

Sherbert and *Yoder* both held that no government action can burden an individual's free exercise of religion without using means narrowly tailored to a compelling governmental interest. *See Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 213–15. If that was all the law that Congress wanted to "restore," 42 U.S.C. § 2000bb(b)(1), then citation to *either Sherbert* or *Yoder* would have been adequate. Yet Congress, legislating in response to *Smith*, nonetheless felt the need to cite *both Sherbert and Yoder*.

The material difference between *Sherbert* and *Yoder* was in the *kind* of coercive burden the Supreme Court recognized as substantial in each case. In *Sherbert*, the Court recognized that the denial of governmental benefits to which the claimant was otherwise entitled because of her choice to engage in religiously motivated conduct can be a substantial burden; in *Yoder*, the Supreme Court recognized that the imposition of a governmental penalty because of the religious adherent's participation in religiously motivated conduct can have the same coercive effect. *Sherbert*, 374 U.S. at 403–04; *Yoder*, 406 U.S. at 218. Because Congress

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also Taamneh, 143 S. Ct. at 1218 (using *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), to define aiding and abetting under 18 U.S.C. § 2333 because Congress cited *Halberstam* in the findings section of the Justice Against Sponsors of Terrorism Act, which amended § 2333).

cited both *Sherbert* and *Yoder*, those two cases and the two types of coercion they recognized provide the lens through which courts interpret RFRA's "substantial burden."[12]

We must then ask why Congress cited *only Sherbert* and *Yoder*. The canon of statutory interpretation *expressio unius est exclusio alterius* teaches us that "[t]he expression of one thing implies the exclusion of others." Scalia & Garner at 107. Thus, by citing *only Sherbert* and *Yoder*, Congress did more than merely endorse the two types of coercive burdens recognized in those cases as determinative of the scope of the term "substantial burden." Congress could have just as easily cited *Cruz* or *O'Lone* as additional examples of cases where the burden at issue was "substantial," but it did not. Congress therefore implied that any other kinds of burdens on religious exercise are excluded from the meaning of "substantial burden" in RFRA. *See United States v. Giordano*, 416 U.S. 505, 514 (1974) (a statute's listing of

[12] The dissent and Judge R. Nelson argue that RFRA's statement of purpose referred to the "compelling interest" portion of *Sherbert* and *Yoder*, but not the definition of "substantial burden." The definition of "substantial burden" used in pre-RFRA jurisprudence was a core predicate part of the test that RFRA, in its own words, sought to "restore." 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)."); *see also Tanzin*, 592 U.S. at 45 ("RFRA sought to . . . restore the pre-*Smith* 'compelling interest test' . . . ."") (quoting 42 U.S.C. § 2000bb(1)–(2)). *Smith* itself defined the test as follows: "Under the *Sherbert* test, governmental actions *that substantially burden* a religious practice must be justified by a compelling governmental interest." 494 U.S. at 883 (emphasis added). It is impossible to "restore" the compelling interest test without restoring the original definition of its essential predicate, the "substantial burden."

two individuals authorized to enforce the statute implied that others were not authorized to enforce the statute).

Nor does RFRA's choice of words suggest that Congress cited *Sherbert* and *Yoder* as mere *examples* of the pre-*Smith* test. We should not read into a statute a phrase that "Congress knows exactly how to adopt . . . when it wishes," but which Congress has not adopted in the statute at issue. *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1942 (2022); *see also Astrue v. Ratliff*, 560 U.S. 586, 595 (2010). There are several phrases Congress has, and could have again, employed to communicate that *Sherbert* and *Yoder* should be treated as mere examples of substantial burdens. *See, e.g.*, 8 U.S.C. § 1368 ("for example"); 15 U.S.C. § 769 ("to include"); 34 U.S.C. § 12621 ("such as"). But Congress used none of these phrases. The lead dissent offers no rationale nor cites any authority for its suggestion that *Yoder* and *Sherbert* were mere "examples" of substantial burdens.

These canons of statutory interpretation reinforce the conclusion that RFRA codified only a limited definition of "substantial burden": "substantial burden" means personal coercion, limited to the threatened denial of a vested benefit or the threatened imposition of a penalty because of the religious adherent's participation in protected religious conduct, as set forth in *Sherbert* and *Yoder*.

3. Hobby Lobby *did not remove or alter the technical definition of "substantial burden" adopted by Congress.*

The lead dissent cites *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706, 714–15 (2014), for the proposition that RFRA "goes 'far beyond what is constitutionally required' under the Free Exercise Clause" and thus "*Navajo Nation* made too much of the fact that RFRA explicitly

mentions *Sherbert* and *Yoder* by name in explaining the statute's purpose."

The dissent's citation to *Hobby Lobby* is an unfortunate example of "snippet analysis": the use of selected words in a case as the basis for an argument, without mention of the case's actual issues, reasoning, and holding, or to what those words actually referred to in that case. *See Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. . . . [T]heir possible bearing on all other cases is seldom completely investigated." (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (Marshall, C.J.))).

The *Hobby Lobby* decision lends no support to the dissent's proposed expansion of the definition of "substantial burden." At issue in *Hobby Lobby* was a governmental mandate that required employers to provide insurance coverage to employees for certain forms of contraception. *Id.* at 689–90. The government threatened penalties against the employers if they did not comply with the mandate. The employers sued to enjoin the imposition of such penalties, invoking RFRA. The question presented to the Supreme Court was whether corporations, such as Hobby Lobby, enjoy protection under RFRA even though pre-RFRA jurisprudence had been applied only to protect the right to free exercise of religion of natural persons. The Supreme Court held that RFRA applies to a broad category of plaintiffs, including plaintiffs who do not necessarily "f[a]ll within a category of plaintiffs one of whom had brought a free-exercise claim that [the Supreme] Court entertained in the years before *Smith*." *Id.* at 716. The

Supreme Court therefore held that certain corporations may bring suit under RFRA.

Hobby Lobby emphasized that RFRA is not limited to the factual incidences of pre-RFRA jurisprudence as to *who* can sue the federal government under RFRA. But neither *Hobby Lobby* nor RFRA went "far beyond" pre-RFRA First Amendment cases as to *what* could be sued on: what constituted an actionable "substantial burden." *Hobby Lobby* never rejected the *test* used by pre-RFRA jurisprudence, including the portion of the test at issue here: the definition of "substantial burden." Nothing about *Hobby Lobby* can be read to suggest that "substantial burden" is anything but a term of art or that it extends past the definitions provided in *Sherbert* and *Yoder*. To the contrary, *Hobby Lobby* held that a substantial burden was present in that case *by using* the pre-RFRA test. *See id.* at 726 (holding that regulation at issue created a "substantial burden" under RFRA because the governmental action threatened penalties against religiously adherent employers who refused to provide contraceptive care as part of their heath provision plans, and therefore involved "coercion"). Thus, the snippet of *Hobby Lobby*'s language quoted by the dissent dealt with the expansion of the list of *who* could sue under RFRA. It did not expand the list of what constitutes a "substantial burden," or which government actions can be halted. As to *what* constituted a "substantial burden," *Hobby Lobby* simply followed *Yoder* and pre-RFRA Supreme Court decisions.[13]

[13] The dissent also cites 42 U.S.C. § 2000bb-3(c). Section 2000bb-3, enacted as part of RFRA, is entitled "Applicability." Subsection (c) says: "Nothing in [RFRA] shall be construed to authorize any government to burden any religious belief." 42 U.S.C. § 2000bb-3(c). This statutory

B. The Textual Differences Between RFRA and RLUIPA Make RLUIPA Cases Inapposite in the RFRA Context.

Rather than utilize straightforward methods of statutory interpretation based on the language of RFRA, as explained above, the lead dissent gets to its proposed definition of "substantial burden" by way of a different statute: RLUIPA. The dissent argues that the term "substantial burden" "has the same meaning under both RFRA and RLUIPA." And because, "under RLUIPA," "denying access to or preventing religious exercise qualifies as a substantial burden," the lead dissent's conclusion then follows: "transferring Oak Flat to Resolution Copper will amount to a substantial burden under RFRA."

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language is unhelpful for two reasons. First, this kind of statutory language merely acts as a failsafe provision, included to prevent any unintended consequences of the operative language of the statute. Here, the language ensures that RFRA's terms are not somehow construed to *expand* the government's ability to burden religion. The language is unhelpful for determining what the rest of the statute in fact prohibits. We have reached the same conclusion when interpreting similar language in other statutes. *See Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994); *Cath. Soc. Servs., Inc. v. Thornburgh*, 956 F.2d 914, 923 (9th Cir. 1992), *vacated on other grounds sub nom. Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43 (1993).

But second, even if the statute said what the dissent claims—that the government "may not burden any religious belief"—that language would nevertheless be unhelpful because we would still be required to determine what kinds of government actions qualify as "burdens" and whether the term "burden" is used in a technical sense. Nothing about this statutory language states or implies that RFRA's use of the term "substantial burden" is anything but a reference to a term of art or that Congress intended to expand the kinds of burdens that qualify under RFRA beyond those identified in *Sherbert* and *Yoder*.

This reasoning is erroneous for two reasons. First, as explained by the majority, RFRA and RLUIPA apply in contexts so distinguishable as to make any discussion of burdens in RLUIPA cases entirely unhelpful when interpreting RFRA. But second, RLUIPA cases are unhelpful for interpreting RFRA because the text of RLUIPA, especially its land use provision, uses language that implies a broader test.

What the dissent refers to as "RLUIPA" in fact encompasses two different statutory provisions. RLUIPA's first operative provision governs state land-use and zoning regulations. 42 U.S.C. § 2000cc(a)(1). Its second operative provision governs state regulation of institutionalized persons. 42 U.S.C. § 2000cc-1(a). No party argues that RLUIPA applies to this case. The Land Exchange Act is not a state land-use law. The members of Apache Stronghold are not institutionalized persons. Yet, Apache Stronghold and the dissent argue that somehow the similarities between RFRA and the two provisions of RLUIPA should make all RLUIPA precedent binding when we interpret RFRA.

RLUIPA's two operative provisions are somewhat similar to RFRA, but they are not identical. The dissent argues that RFRA and RLUIPA are "distinguished only in that they apply to different categories of governmental actions."[14] However, several other distinctions must be

[14] The dissent cites *Hobby Lobby* for this proposition. The Court in *Hobby Lobby* remarked in a passing comment that RLUIPA "imposes the same general test as RFRA but on a more limited category of governmental actions." 573 U.S. at 695. Remember: *Hobby Lobby* was exclusively a federal law action; no state, state land-use regulation, or state prisoner was involved; hence, RLUIPA was inapplicable. The Court never analyzed the differences between RFRA and RLUIPA and never held that RFRA and RLUIPA are distinguished *only* in that they

drawn between RFRA and RLUIPA, especially RLUIPA's land-use provision. First, RFRA cites and incorporates *Sherbert* and *Yoder*, but no provision in RLUIPA mentions either case, nor indeed any case. Second, RFRA restores a test "set forth in prior Federal court rulings," but no provision in RLUIPA invokes any "prior Federal court rulings" as a framework for its test. Third, RFRA must be construed using normal tools of statutory interpretation, including the presumption that Congress intended to incorporate the settled meaning of a term of art, but RLUIPA must "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by" its terms. 42 U.S.C. § 2000cc-3(g).

For RLUIPA's land-use provision in particular, the distinctions from the text of RFRA are dramatic: RFRA requires the government to provide a compelling interest to justify substantial burdens on any *person*'s religious exercise, but RLUIPA's land-use provision requires a compelling interest to justify substantial burdens on the religious exercise of any *person, religious assembly, or religious institution*. *See* 42 U.S.C. § 2000cc(a)(1). And RLUIPA's land-use provision contains multiple commands specifically seeking to eliminate "land use regulations" that substantially burden "[t]he use, building, or conversion of real property" for religious purposes, but RFRA contains no

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apply to different categories of governmental actions. In any event, that *Hobby Lobby* stated in the abstract that RLUIPA and RFRA "impose[] the same general test" (i.e., that the Government may not "substantially burden" a person's "religious exercise" unless it is "in furtherance of a compelling government interest" and does so by the "least restrictive means") is hardly a full-throated endorsement of the notion that the *discrete* test for determining when Government action imposes "substantial burden" is the same between the statutes.

analogous language. *See* 42 U.S.C. § 2000cc(b)(1), (b)(2), (b)(3).

Even accepting that the institutionalized-persons portion of RLUIPA imposes the same standard as RFRA in some ways, *see Holt v. Hobbs*, 574 U.S. 352, 358 (2015), that comparison does not require any change to our interpretation of RFRA. Under RLUIPA's institutionalized persons provision, the Supreme Court has assessed the question whether the government action has created a "substantial burden" by assessing whether the government action coerces the religious adherent to violate or abandon his sincere religious beliefs. *E.g.*, *id.* at 361 ("If petitioner contravenes [the prison grooming] policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise.").[15] Thus, the fact that the Supreme Court has implied a connection between RFRA and RLUIPA's institutionalized-persons provision serves only to reaffirm the result we reached in *Navajo Nation*.

RLUIPA's land-use provision, however, clearly requires a different standard. *See Navajo Nation*, 535 F.3d at 1077. *Sherbert*'s and *Yoder*'s personal coercion test cannot provide the full test for "substantial burden" under RLUIPA's land-

[15] The dissent cites *Ramirez v. Collier*, 142 S. Ct. 1264 (2022), for the proposition that a prison official's denial of an inmate's access to the inmate's pastor during the inmate's execution is a substantial burden. The Supreme Court made no such holding in *Ramirez*. The Supreme Court merely noted that there was no dispute on the "substantial burden" prong and moved on with the analysis. The Supreme Court never discussed whether a threat of governmental sanctions might have backed the prison official's decision or whether the denial of affirmative approval for the minister's presence might count as the denial of a vested governmental benefit.

use provision because the land-use provision does not protect merely persons, nor does it protect merely the "exercise of religion" as that term is understood in Free Exercise Clause jurisprudence. Instead, the land-use portion of RLUIPA targets a far broader kind of burden: regulations that have any substantial effect on a religious assembly's or institution's use, building, or conversion of real property owned by that religious assembly or institution.

When addressing claims under the land-use provision of RLUIPA, we have thus naturally taken a broader view of the phrase "substantial burden"—though we have honored the presumption of consistent usage by analogizing the burden of the land-use regulations to the burden of personal coercion set forth in *Sherbert* and *Yoder*. *See, e.g.*, *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (comparing the burden of the land-use regulation to the laws struck down by the Supreme Court under the Free Exercise Clause as having a "tendency to coerce individuals into acting contrary to their religious beliefs").

The Supreme Court has never held that RFRA and the land-use provision of RLUIPA must be interpreted using the same standard, nor has the Supreme Court ever cited a RLUIPA land-use case as setting the standard for a claim brought under RFRA. Passing comments by the Supreme Court which might suggest some connection between RFRA and the institutionalized-persons portion of RLUIPA do not mean that the Supreme Court meant to overrule its clear pre-RFRA jurisprudence. Nor do such comments suggest the Supreme Court intended to establish a legal rule that yoked the definition of "substantial burden" under RFRA to the analysis conducted under the textually distinguishable land-use portion of RLUIPA.

Application of normal tools of statutory interpretation to RFRA—the statute actually before us—provides a clear result: the term "substantial burden" is a term of art and is limited to those burdens identified in *Sherbert* and *Yoder*.[16] When the law provides such a clear result under RFRA, it is unnecessary to divine what the Supreme Court might do under RLUIPA.

William of Ockham's razor teaches that when one is faced with two competing ideas, the simplest explanation is generally the best. *See United States v. Newhoff*, 627 F.3d 1163, 1166 (9th Cir. 2010). "Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023) (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). The dissent's circuitous route through RLUIPA to define a term for which RFRA already provides a clear definition is unnecessary and contrary to these principles of statutory interpretation.

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[16] Judge R. Nelson argues that "substantial burden" is not a term of art because pre-RFRA cases used it "not as [a phrase with a precise] definition" but as a shorthand way for describing a "legal framework" or test. But terms of art often *are* words that describe legal tests and standards. *See, e.g.*, *United States v. Callahan Walker Const. Co.*, 317 U.S. 56, 60–61 (1942) ("[T]he phrase 'fair and equitable' had become a term of art, [and] Congress used it in the sense in which it had been used by the courts in reorganization cases, and that whether a plan *met the test of* fairness and equity long established by judicial decision was . . . a question to be answered . . . by the court as a matter of law."); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1300 (9th Cir. 1982) ("[']Substitutability in production,[']while a more technical term of art, is another way of describing the analysis required by the first *Tampa Electric* test.")

C. The Lead Dissent Understates the Sea Change That Its Proposed Definition of "Substantial Burden" Would Cause.

For the entire history of our nation's Free Exercise jurisprudence, we have focused our analysis on "what the government cannot do to the individual, not . . . what the individual can exact from the government." *Lyng*, 485 U.S. at 451 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)). Yet the lead dissent would violate this simple principle by holding that RFRA empowers any individual to exact what is in effect a government easement that entitles his access and use of that land, so long as that is what his sincere beliefs require. In so holding, my colleagues purport to overrule the very type of claim that the Supreme Court unambiguously rejected in *Lyng*. *Id.* at 452 (rejecting that the First Amendment's Free Exercise Clause entitled the religious adherent to a "religious servitude" on federal land).[17]

If the dissent's reading of RFRA were accepted, such easements would be granted to sincere religious adherents for access to and use of vast expanses of federal land[18]—

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[17] Easements are a subset of servitudes. *See Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 105 (2014).

[18] *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1066 n.7 (9th Cir. 2008) (en banc) ("In the Coconino National Forest alone, there are approximately a dozen mountains recognized as sacred by American Indian tribes. The district court found the tribes hold other landscapes to be sacred as well, such as canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes, rock formations, shrines, gathering areas, pilgrimage routes, and prehistoric sites. Within the Southwestern Region forest lands alone, there are between 40,000 and 50,000 prehistoric sites. The district court also found the Navajo and the

perhaps even *all* federal land. *See Lyng*, 485 U.S. at 475 (Brennan, J., dissenting) ("Because of their perceptions of and relationship with the natural world, Native Americans consider *all land* sacred." (emphasis added)). Even sensitive federal facilities such as military installations could be encumbered by such easements.

To obtain such an easement of access and use, the only determinative issue would be whether the religious adherent sincerely believes that such access to federal land is important to him for his religious exercise. Binding precedent forbids us from evaluating whether the religious adherent's professed need to access federal land is true to his religion's tenets. *Id.* at 449–50 (majority op.). Equally out of bounds is whether the access to federal land is necessary or central to the religion. *See Hobby Lobby*, 573 U.S. at 696. Were the religious adherent to say that access—at all times of the day and on all days of the year—was necessary for his religion, it would not be "for us to say that the line he drew was an unreasonable one." *Thomas*, 450 U.S. at 715.

So there is no limiting principle to the dissent's proposal of defining "substantial burden" to include all government

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Hualapai Plaintiffs consider the entire Colorado River to be sacred. New sacred areas are continuously being recognized by the Plaintiffs.").
One religious adherent has testified that the "entire state of Washington and Oregon" is "very sacred" to him. Excerpts of Record at 716, *Slockish v. U.S. Dep't of Transp.*, 2021 WL 5507413 (9th Cir. Nov. 24, 2021) (No. 21-35220), ECF No. 18-5. Another has claimed as sacred an area "extending 100 miles to the east and 100 miles to the west of the Colorado River from Spirit Mountain [in Nevada] in the north to the Gulf of California in the south"—some 40,000 square miles. Excerpts of Record at 27, *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, 603 F. App'x 651 (9th Cir. 2015) (No. 13-56799), ECF No. 12-3.

actions "prevent[ing] or den[ying] access to sincere religious exercise."[19] The result of each case would turn on the sole issue of the litigant's religious sincerity. And when assessing that sincerity, the district court would not be permitted to ask whether the religious adherent's profession of faith is "acceptable, logical, consistent, or comprehensible to others." *Thomas*, 450 U.S. at 714. In addition, if the religious adherent only recently began to profess his beliefs, that would be generally irrelevant because, after all, it is possible that his beliefs were simply "late in crystallizing." *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (quoting *Ehlert v. United States*, 402 U.S. 99, 103 (1971)); *see also Hobbie*, 480 U.S. at 144 ("The timing of [the plaintiff]'s conversion is immaterial."). With so many traditional indicators of testing sincerity off the table, a district court might be required to grant a religious easement to nearly any religious adherents who brought a land-based RFRA claim. It is difficult to conceive of a sincerely held claim that would be rejected. Even our appellate review of the district court's sincerity determination would be limited because we would be required to affirm unless the sincerity determination was wholly "without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

This low bar the dissent would set to obtain such religious easements contrasts sharply with the burden that the government would be required to meet to forestall or extinguish the easement: the compelling interest test. This

[19] The Supreme Court cautions us not to adopt a test that has "no real limiting principle." *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206 n.11 (2020); *see also Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021); *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013).

test requires the government "to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest." *City of Boerne*, 521 U.S. at 509. Our relatively brief review of plaintiffs' claims under the dissent's proposed test would be followed by a searching and detailed inquiry of the government's motivations and methods. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). And, of course, it would not be enough for the government merely to assert a broad interest in the security of a particular piece of land: the government must justify the application of its exclusionary policies to each individual religious adherent who seeks access. *See Hobby Lobby*, 573 U.S. at 726. Courts would be required to "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431. The government would be forced to face "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 509, just to keep trespassers, albeit *devout* trespassers, off its land and out of its installations and buildings.

The dissent's proposed expansion of the definition of "substantial burden" is also not limited to this new easement right. The dissent argues that "substantial burden" is not a term of art, and should be defined as any "government action that 'oppresses' or 'restricts' 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief,' to a 'considerable amount,'" without any objective criteria or limiting principle as to what constitutes either "substantial" in "substantial burden" or "considerable" in "considerable amount." Where *Sherbert* and *Yoder* provide two clear qualitative burdens that meet the definition of "substantial burden," the dissent would insert more—and argues that *Sherbert*'s and *Yoder*'s

qualitative burdens are merely illustrative "examples" of burdens that would meet its objectively standardless, *quantitative* definition of "substantial burden" (i.e., "considerable amount"). No part of the dissent's test would prevent a panel in a future case from recognizing an additional "example," or would prevent a panel from simply turning to the dissent's dictionary definition of "substantial burden" and ignoring the "examples" altogether.

In future cases, we would be asked to determine whether religious exercises are "oppresse[d] or restrict[ed] . . . to a considerable *amount*," and we would thus be forced to conduct a quantitative, rather than qualitative, analysis. In other words, we would have to assess *how much* the government action interferes with the religious practice—i.e., an examination of the *effects* of the government action—rather than *in what way* the government action interferes with the religious practice—i.e., an examination of the *kind* of government action at issue. This quantitative approach would be inconsistent with Supreme Court precedent, as explained above, but it also would be very difficult for a court to administer.

So long as "substantial burden" is defined by reference to the character of the governmental action, rather than the particular effect it has on the claimant, the test is not difficult to administer: we simply ask whether the government action involves coercion in the form of denying the religious adherent a vested benefit or imposing a penalty on the religious adherent because of his participation in religiously motivated conduct. But for a court to determine whether a religious practice has been "oppresse[d] or restrict[ed] . . . to a considerable amount," the court would be required to assess the importance of the particular religious practice to the religious adherent and to the religious adherent's

religion, and assess the extent to which the practice is impaired by the relevant governmental action—inquiries that not only stray far from our expertise but also enter areas into which the Supreme Court has repeatedly told us courts cannot venture.[20] *See Lyng*, 485 U.S. at 449–50 ("This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy*, and accordingly cannot weigh the adverse effects on the appellees in *Roy* and compare them with the adverse effects on the Indian respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other." (citation omitted)); *id.* at 451 ("Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."); *Hobbie*, 480 U.S. at 144 n.9 (citing *United States v. Ballard*, 322 U.S. 78, 87 (1944)) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."); *Thomas*, 450 U.S. at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *see also Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014)

[20] A "substantial burden" on economic activity, for example, can be measured in dollars and cents. *See, e.g.*, *Groff v. DeJoy*, 143 S. Ct. 2279, 2294 (2023). But our precedent has yet to recognize a spiritual "currency" or other quantitative way to measure a governmental action's impact on religion.

(Gorsuch, J.) ("[W]e also lack any license to decide the relative value of a particular exercise to a religion. That job would risk in the attempt not only many mistakes—given our lack of any comparative expertise when it comes to religious teachings, perhaps especially the teachings of less familiar religions—but also favoritism for religions found to possess a greater number of 'central' and 'compelled' tenets.").

To convince the reader that its proposed test is "narrow," the dissent attempts to distinguish between the facts of this case and the facts of *Navajo Nation* and *Lyng* on the grounds that the Indians in *Navajo Nation* and *Lyng* suffered only "subjective" burdens, whereas the Indians here will suffer an objective burden through the loss of access to the land. However, the government actions in both *Navajo Nation* and *Lyng* undoubtedly meet the dissent's proposed test. In both cases, the Government "prevent[ed] [the religious adherents] from engaging in sincere religious exercise." In *Lyng*, the excavation and construction of the road caused "the Indians' spiritual practices [to] become ineffectual." 485 U.S. at 450. In *Navajo Nation*, the use of recycled wastewater caused "the inability to perform" certain religious ceremonies and destroyed "an entire way of life." 479 F.3d at 1039.

The ability to perform a ceremony gutted of all religious meaning cannot be equated to the ability to perform the full religious ceremony. Access to an area stripped of spiritual significance—the mountain in *Navajo Nation*, the land near the road in *Lyng*—is not the same as access to an extant shrine for the religious adherent who wishes to use the land as a shrine.[21] The "sincere religious exercises" in *Navajo*

[21] For instance, at the corner of Fillmore and Fell Streets in San Francisco, California, stands a building once known as Sacred Heart

Nation and *Lyng* were not only "prevent[ed] or denie[d]," they were completely destroyed, even if the lands themselves were not destroyed.

In any event, the dissent's discussion of what might count as the "prevent[ion] or deni[al of] access to sincere religious exercise" is frankly irrelevant in light of the fact that such prevention or denial of access would be merely one "example" of a substantial burden under the dissent's proposed test. The real question under the dissent's proposed test would be whether the governmental action "oppresses or restricts" the religious exercise "to a considerable amount." Under that test, the government actions in *Navajo Nation* and *Lyng* would easily qualify as "substantial burdens"—results that would directly contradict our precedent and the Supreme Court's precedent, respectively.

The dissent, in sum, favors the plaintiffs in this case over the plaintiffs in *Lyng* and *Navajo Nation* simply because the plaintiffs in this case will lose an aspect of their religious practice that one can see and hear, whereas the plaintiffs in *Lyng* and *Navajo Nation* lost an intangible aspect of their religious practices. In short, the dissent would distinguish and prioritize the tangible aspects of religious activity over the intangible. This distinction finds no support in our precedent. *Cf. Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) ("[T]he Federal Government . . . can[not]

Catholic Church. Today, the building has been de-consecrated and converted into a roller-skate discotheque. *See* Amanda Font, *Wanna Try Roller-Skating in San Francisco? Better Head to Church*, KQED (Sept. 22, 2022), https://www.kqed.org/news/11924576/wanna-try-roller-skating-in-san-francisco-better-head-to-church. Can a Catholic register as a parishioner at this roller disco—or expect to observe the Stations of the Cross therein during Holy Week?

pass laws which aid one religion . . . or prefer one religion over another.").

D. Even Were Apache Stronghold's Claim Cognizable Under RFRA, the Land Exchange Act Mandates That the Land Exchange Occur.[22]

Most claims under RFRA challenge a regulatory or discretionary decision of a federal agency. However, the claim in this case seeks to stop a federal action mandated by an Act of Congress. The Land Exchange Act states that the Secretary of Agriculture is "authorized and *directed* to convey" more than two thousand acres of land, including Oak Flat, to Resolution Copper if three main conditions are met. 16 U.S.C. § 539p(c)(1) (emphasis added).

The three conditions are simple: (1) the Secretary must "engage in government-to-government consultation with affected Indian tribes concerning issues of concern to the affected Indian tribes related to the land exchange," and then "consult with Resolution Copper and seek to find mutually acceptable measures to (i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper under this section," 16 U.S.C. § 539p(c)(3); (2) the Secretary must ensure that the land exchanged is of equal

[22] Judge Lee contends that the Government forfeited this argument when it failed to raise it below. However, "in adjudicating a claim or issue pending before us, we have the authority to identify and apply the correct legal standard, whether argued by the parties or not." *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013). When a statute is invoked by the parties, we can inquire, even *sua sponte*, whether the statute has been expressly or impliedly repealed. *See generally U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993).

value, 16 U.S.C. § 539p(c)(5); and (3) the Secretary must ensure that the land exchange complies with the National Environmental Policy Act of 1969, 16 U.S.C. § 539p(c)(9).

Congress knew the adverse effects that the Land Exchange Act would have upon the Indian tribes with respect to the planned excavation of the Oak Flat area. Wendsler Nosie, Sr., Chairman of the San Carlos Apache Tribe and leader of Apache Stronghold, testified before the House Natural Resources Committee, Subcommittee on National Parks, Forests, and Public Lands, in a hearing on the Land Exchange Act. Nosie testified that "[t]he lands to be acquired and mined . . . are sacred and holy places." *Southeast Arizona Land Exchange and Conservation Act of 2007: Hearing on H.R. 3301 before the H. Comm. on Nat. Res., Subcomm. on Nat'l. Parks, Forests, and Pub. Lands.*, 110th Cong. 18 (2007). Nosie explained that Apache Leap is "sacred and consecrated ground for our People" because "seventy-five of our People sacrificed their lives at Apache Leap during the winter of 1870 to protect their land, their principles, and their freedom." *Id.* at 19. He testified that "Oak Flat and nearby Devils Canyon are also holy, sacred, and consecrated grounds" that should not be transferred. *Id.* at 21–22.

Ultimately, Congress struck a compromise. The Land Exchange Act directed the Forest Service to transfer the Oak Flat parcel to Resolution Copper, 16 U.S.C. § 539p(c)(10), but also required Resolution Copper to surrender all rights it held to mine under Apache Leap, 16 U.S.C. § 539p(g)(3). The Act directs the Forest Service to preserve Apache Leap "for traditional uses of the area by Native American people." 16 U.S.C. § 539p(g)(1), (2)(B).

The question is whether Congress's careful compromise in the Land Exchange Act can be undone by Apache Stronghold's invocation of a prior Act of Congress—namely, RFRA. The dissent argues that "[i]f Congress meant to exempt the Land Transfer Act from RFRA, Congress could and would have done so explicitly." The dissent therefore argues that "RFRA applies to the Land Transfer Act." But one Congress cannot prohibit a future Congress from using one of the most commonplace tools of lawmaking—the implied repeal. *See Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). And while a statute's anti-implied-repeal provision should be given some interpretive weight, the dissent's proposed test would turn RFRA's anti-implied-repeal provision into an impenetrable fortress—in direct contradiction to multiple Supreme Court cases.

1. *RFRA's Anti-Implied-Repeal Provision*

RFRA states that "[f]ederal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). The Land Exchange Act, in turn, is silent on the applicability of RFRA.

Such statutory language purporting to restrict the ability of later Congresses to repeal an act of an earlier Congress by implication cannot bar all implied repeals. *See Great N. Ry. Co.*, 208 U.S. at 465 ("As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.").

In *Dorsey v. United States*, 567 U.S. 260 (2012), for example, the Supreme Court invalidated a statute which

purported to authorize criminal prosecutions under any later-repealed criminal statute that was in force at the time of the crime unless the repealing statute "expressly provide[d]" that such prosecutions would be barred.[23] The Court held:

> statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. And Congress remains free to express any such intention either expressly *or by implication* as it chooses.

Id. at 274 (emphasis added) (citations omitted). Thus, a statutory provision that requires future Congresses to use express language to exempt an enactment from the earlier statute's terms is not constitutional.

However, that is not to say that the anti-implied-repeal language has no effect whatsoever. In *Dorsey*, the Court said that the anti-implied-repeal provision created "an important background principle of interpretation" and that the provision required courts, before finding an implied repeal in the face of an anti-implied-repeal provision, "to assure themselves that ordinary interpretive considerations point clearly in that direction." *Id.* at 274–75; *see also Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (giving significant

[23] *See* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.").

weight to an anti-implied-repeal provision). The Supreme Court "has described the necessary indicia of congressional intent by the terms 'necessary implication,' 'clear implication,' and 'fair implication,' phrases it has used interchangeably." *Dorsey*, 567 U.S. at 274. And in two cases, the Supreme Court has given some weight to RFRA's anti-implied-repeal provision. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020); *Hobby Lobby*, 573 U.S. at 719 n.30.[24]

But the dissent's proposed method of interpreting anti-implied-repeal provisions is incompatible with the Supreme Court's method. The Supreme Court has held that one Congress cannot force a future Congress "to employ magical passwords in order to effectuate an exemption" from a statute. *Marcello*, 349 U.S. at 310. Yet the dissent argues that the Land Exchange Act should be required to employ one of two passwords to avoid the reach of RFRA: either an explicit reference to RFRA or "some variation of a 'notwithstanding any other law' provision." The Supreme Court has held that implied repeals must remain available to future Congresses. *See Dorsey*, 567 U.S. at 274; *Great N. Ry. Co.*, 208 U.S. at 465. But the dissent argues that an implied repeal, as traditionally understood, is impossible because the Land Exchange Act must include an "explicit[]"

[24] Of course, even without an anti-implied-repeal provision, a party seeking to prove implied repeal carries a weighty burden. "The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). "An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas*, 296 U.S. at 503).

exemption to avoid the reach of RFRA. The dissent's approach affords far too much power to RFRA's anti-implied-repeal provision.

2. *Whether the Land Exchange Act Can Be Reconciled with RFRA*

The irreconcilability question must be read in the context of the relief sought by Apache Stronghold. As is relevant to Apache Stronghold's RFRA claim, Apache Stronghold's complaint sought a declaration that *the land exchange* between the United States and Resolution Copper "violate[s] the Religious Freedom Restoration Act." The complaint prayed that the district court "[i]ssue a permanent injunction *prohibiting* [*the land exchange*]." Apache Stronghold's motion for a temporary restraining order and preliminary injunction filed in the district court sought "to preserve the status quo by preventing Defendants from publishing a Final Environmental Impact Statement ('FEIS') on the 'Southeast Arizona Land Exchange and Resolution Copper Mine Project' *and from conveying the parcel(s) of land containing Oak Flat*." Similarly, Apache Stronghold's motion for injunction pending appeal sought an injunction against "*the transfer* and destruction *of Oak Flat*."

The Land Exchange Act grants some authority to the Secretary to "minimize the adverse effects on the affected Indian tribes" and to ensure that the land exchange complies with the National Environmental Policy Act of 1969. 16 U.S.C. § 539p(c)(3)(B)(ii), (c)(9). But the plain text of the Land Exchange Act requires that the land exchange, including the exchange of Oak Flat, *must* occur if the preconditions are met. In fact, Apache Stronghold's complaint refers to the land exchange as "The Land Exchange *Mandate*" and recognizes that "Section 3003 of

the [Land Exchange Act] *mandates* that the [land exchange] *shall be done*."

Apache Stronghold claims that the Government should be enjoined from transferring the land to Resolution Copper pursuant to RFRA. But that is the one thing that the Land Exchange Act clearly requires. If RFRA did provide a legal basis for Apache Stronghold's claim, RFRA would be in "irreconcilable conflict" with the Land Exchange Act. *See Branch*, 538 U.S. at 273.

That is not to say that all potential RFRA claims would be irreconcilable with the Land Exchange Act. Instead of seeking to block the entire land exchange, a plaintiff might, for example, claim that the conditions imposed upon Resolution Copper in the FEIS should be modified to provide greater accommodation for the religious practices of the Indians.

But that is not the claim advanced by Apache Stronghold, and adopted by the dissent, in this case.[25] The claim here is that the land exchange should be stopped altogether. And that relief is directly in conflict with the Land Exchange Act. *See* 16 U.S.C. § 539p(c)(1). Because the RFRA claim advanced by Apache Stronghold is irreconcilable with the terms of the Land Exchange Act, the Land Exchange Act necessarily requires that the claim be rejected. *See Dorsey*, 567 U.S. at 274.

CONCLUSION

Pre-RFRA jurisprudence demonstrates that only governmental actions which coerce religious adherents to

[25] Indeed, such a claim would likely fail on ripeness grounds because the terms of the final FEIS are not yet known.

violate or abandon their religious tenets can constitute "substantial burdens" on the free exercise of religion. *See Hobbie*, 480 U.S. at 144; *Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 249; *Schempp*, 374 U.S. at 223; *Lyng*, 485 U.S. at 450; *Bowen*, 476 U.S. at 703. For coercion to affect a religious adherent personally, the coercion must involve either the denial of a vested benefit to the religious adherent or the imposition of a penalty on the religious adherent because of the religious adherent's participation in religiously motivated conduct. *See Hobbie*, 480 U.S. at 144; *Lyng*, 485 U.S. at 449; *Bowen*, 476 U.S. at 703; *Thomas*, 450 U.S. at 717–18; *Jimmy Swaggart*, 493 U.S. at 391–92.

RFRA incorporated this settled definition of the term, and RFRA made this incorporation explicit when it stated that its purpose was to "restore" the free exercise of religion test "as set forth in prior federal court rulings," and when it directly cited *Sherbert* and *Yoder*. The text of the statute and pre-RFRA jurisprudence command that the definition of "substantial burden" be limited to those burdens recognized in *Sherbert* and *Yoder*.

Our en banc decision in *Navajo Nation* correctly interpreted RFRA, and our limited definition of "substantial burden" has served as a workable test for fifteen years.[26]

The proposed copper mine would not force the Apache to choose between violating or abandoning their sincere religious beliefs and receiving a governmental penalty or

[26] Principles of *stare decisis* caution us not to overrule our precedent lightly. *See United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) (en banc). These principles have a heightened effect in matters of statutory interpretation because the losing parties in such cases can seek relief in the halls of Congress. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

losing a governmental benefit. Without any such coercion, there is no substantial burden. Thus, the Apache's claim under RFRA must fail.

Moreover, even were the Apache's claim cognizable under RFRA, the language of the Land Exchange Act is clearly irreconcilable with the Apache's claim for relief under RFRA. In such cases of direct conflict, the later statute—the Land Exchange Act—must be given effect over the earlier statute—RFRA.

For these reasons, in addition to those expressed in Judge Collins's majority opinion, I agree that the judgment of the district court must be affirmed, and I dissent from the per curium's purported overruling of *Navajo Nation*.

R. NELSON, Circuit Judge, concurring:

In my view, en banc review was warranted to correct our faulty legal test (not the outcome) in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc). Generally, we adopt the same definition of a term—like "substantial burden" here—when that term is used in similar statutes. For that reason, RFRA and RLUIPA apply the same legal definition of "substantial burden." Since *Navajo Nation* was decided, it has become clear that "substantial burden" means more in RLUIPA than the narrow definition we gave it under RFRA. Today, a majority of the panel rejects the narrow construction of "substantial burden" in *Navajo Nation*. *See* Per Curiam at 14–15; Murguia Dissent at 185, 207 n.8. Six judges adopt a new test to define "substantial burden" going forward for both RFRA and RLUIPA. *See* Per Curiam at 14–15. A government act imposes a "substantial burden" on religious exercise if it (1)

"requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief," (2) "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief," or (3) "places considerable pressure on the plaintiff to violate a sincerely held religious belief." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014); *see also Bryant v. Gomez,* 46 F.3d 948, 949 (9th Cir. 1995) (per curiam) (citing *Graham v. C.I.R.*, 822 F.2d 844, 850–51 (9th Cir. 1987)) (holding that the "substantial burden" test is met when a religious adherent proves that a government action "prevent[ed] him or her from engaging in conduct or having a religious experience which the faith mandates"); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000); *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996); *see also* Per Curiam at 14–15.

Even Judge Collins's majority, which I join, adopts a new test without relying on *Navajo Nation*. As explained more fully in section V, the strained interpretation of "substantial burden" announced in *Navajo Nation* is not sustainable. In the last 15 years, the Supreme Court and virtually all the lower courts have recognized that "substantial burden" holds the same definitional meaning in RFRA and RLUIPA. While the terms may apply in different contexts that arise under the statutes, the definitions are the same.

But the question remains—can RFRA be used to protect a religious practice exercised on government property? This case raises the prevent prong of RFRA's "substantial burden" definition announced by our court today. As Chief Judge Murguia's dissent notes, the ordinary meaning of "substantial burden" suggests that in selling the land, the government is preventing the Apache's participation by

restricting their access to the land. *See* Murguia Dissent at 200–201. That much is true. But that conclusion conflicts with the Supreme Court's direction in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Under *Lyng*, a "substantial burden" analysis does not apply to the internal affairs of the government. I therefore reach a different conclusion from the same beginning premise as the dissenters.

Preventing access to religious exercise generally constitutes a substantial burden on religion. But the parameters of "substantial burden" are not unconstrained. We cannot ignore RFRA's statutory context. The Supreme Court has distinguished the boundaries of cognizable burdens under the Free Exercise Clause. Through decades of case law, the Court formulated a test that examined whether there was a cognizable, substantial burden on religious exercise justified by a compelling government interest. In RFRA, Congress then applied the Court's terminology, essentially codifying both the test and those parameters. Neither the Court nor Congress has defined "substantial burden." But in *Lyng*, the Court held that the government's use and alienation of its own land is not a substantial burden. And the Court repeated that principle even more broadly: "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 448 (citing *Bowen v. Roy*, 476 U.S. 693, 699 (1986)) (internal citation omitted).

This case thus turns on whether Congress's codification of "substantial burden" in RFRA overruled *Lyng*'s application of substantial burden under the First Amendment. I am reluctant to conclude that a Supreme

Court opinion is implicitly reversed by Congress when Congress specifically adopts a term used in the Court's prior opinions. I therefore conclude that Congress through RFRA did not reverse the Supreme Court's holding in *Lyng*. As such, I join Judge Collins's majority to affirm the district court's denial of injunctive relief.

I

The National Defense Authorization Act for Fiscal Year 2015 (NDAA) includes a section known as the Southeast Arizona Land Exchange and Conservation Act (Land Exchange). The Land Exchange requires the conveyance of federal land, including a parcel known as Oak Flat, to Resolution Copper, a foreign mining company. *See* 16 U.S.C. § 539p. Resolution Copper intends to construct a large copper mine on Oak Flat. Once the transfer is complete, Oak Flat, as it is now known, by all accounts will eventually be destroyed by the mining activity. The planned mining technique will leave a two-mile-wide crater hundreds of feet deep and will affect about eleven square miles. The mining will thus permanently alter Oak Flat beyond recognition, destroying the Apache's "cultural landscapes" and barring all access to that land for religious or other purposes. Additionally, spiritually significant objects, like Emory Oak, that play a key role in Apache ceremonies will be destroyed.

Congress acknowledged the impact that the Land Exchange would have on the Apache's religious practice. It included several provisions in the NDAA to balance this concern. The Land Exchange requires the Secretary to engage in "government-to-government consultation with affected Indian tribes concerning issues of concern to the affected Indian tribes related to the land exchange." *Id.*

§ 539p(c)(3)(A). Additionally, after consulting the tribes, the Secretary shall consult Resolution Cooper to "address the concerns of the affected Indian tribes" and "minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper." *Id.* § 539p(c)(3)(B).

Noticeably, despite the undisputedly significant impact that would befall Apache religious practice, Congress did not exempt the Land Exchange from RFRA. *See* Murguia Dissent § II.H. Perhaps Congress declined to do so because it believed that under preexisting Supreme Court precedent, including *Lyng*, no substantial burden was implicated and RFRA did not apply. This case thus requires us to answer whether RFRA imposes additional strictures on the land transfer.

II

The Constitution provides Congress with plenary power over Indian affairs. *See United States v. Lara*, 541 U.S. 193, 200–01 (2004); U.S. Const. art. I, § 8. Congress addressed religious liberty for Native Americans in the American Indian Religious Freedom Act of 1978 (AIRFA), declaring that it

> shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of

> sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996.

In accordance with AIFRA, President Clinton signed Executive Order No. 13007, 61 Fed. Reg. 26,771 (1996). Like the Land Exchange, it requires agencies to, as practicable, "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." *Id.* § 1. But that same Order meant "only to improve the internal management of the executive branch" and did not "create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person." *Id.* § 4.

AIFRA does not confer "so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights" and is merely a policy statement. *Lyng*, 485 U.S. at 455. This paradox fuels the criticism that "despite its assertion of sweeping plenary power over Indian affairs, the federal government has done little of consequence to protect the ability of tribes to access and preserve sacred sites." Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1297 (2021).

We would be daft to ignore that, historically, the relationship between the American government and native tribes has not been a pristine example of intergovernmental relations. *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("[I]t's equally clear that Congress has since broken more than a few of its promises to the Tribe[s].").

Although this reality is regrettable, we are bound to enforce only those statutory rights prescribed by Congress.

Apache Stronghold asserts that Congress has protected native access to government land for religious practices in RFRA, and that the statute prevents the government from transferring Oak Flat to Resolution Copper. I do not agree. We apply the law as Congress wrote it and as the Supreme Court has interpreted it. Examination of the Supreme Court's pre-RFRA jurisprudence illuminates why RFRA does not provide Apache Stronghold the right it seeks.

III

A

RFRA does not appear in our legal system from the ether. It is a legislative response to the culmination of decades of caselaw interpreting the Free Exercise Clause. So I begin with the Free Exercise Clause.

Religious liberty and the concept of free exercise are grounded in the bedrock of our founding and the structure of our system of government. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). At the founding, various state constitutions recognized a right to free exercise of religious beliefs. Even before ratification of the First Amendment in 1791, many state constitutions reflected the sentiment that "all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences." N.C. Const. art. XIX (Dec. 18, 1776), *reprinted in* 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2787,

2788 (Francis Newton Thorpe ed., 1909); *see also* Nathan S. Chapman, *Disentangling Conscience and Religion*, Ill. L. Rev. 1457, 1466 n.44 (2013) (listing state constitutional provisions). In Virginia, for instance, Thomas Jefferson drafted a 1779 bill establishing religious freedom that no one "shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion . . . ." *A Bill for Establishing Religious Freedom* (June 12, 1779), *reprinted in* 5 Founders' Constitution.

Virginia's view was echoed on the national level, too. Of the newly established American government, George Washington said: "All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." *Letter to The Hebrew Congregation in Newport, Rhode Island* (Aug. 18, 1790), The Papers of George Washington, Presidential Series, vol. 6, 1 July 1790–30 Nov. 1790, ed. Mark A. Mastromarino. Charlottesville: University Press of Virginia, 1996, pp. 284–86. Washington echoed this same sentiment to other religious groups: "[t]he liberty enjoyed by the People of these States, of worshipping Almighty God agreeable to their Consciences, is not only among the choicest of their Blessings, but also of their Rights." *From George Washington to the Society of Quakers* (Oct. 13, 1789), The Papers of George Washington, Presidential Series, vol. 4, 8 Sept. 1789–15 Jan. 1790, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 265–69. Washington conveyed this same sentiment to various religious groups, including Roman

Catholics, Presbyterians, the Moravian Society for Gospel, and others. *See George Washington to Religious Organizations*, https://www.mountvernon.org/george-washington/religion/george-washington-to-religious-organizations/. From the founding, free exercise of religion was intended to apply to all faiths. Native American religious practice is no exception. Their religious practice is honored and respected the same as any other religious practice or belief. [1] But their right to practice religion, like

[1] The criticism that accommodating the Native American religious practices here "would inevitably require the government to discriminate between competing religious claimants," VanDyke Concurrence at 167, is misguided. I disagree with my dissenting colleagues' conclusion in this case because Apache Stronghold's RFRA claim does not raise a cognizable substantial burden under *Lyng*. The dissenters are not wrong, however, because under their view "only *some* religions would benefit from the precedent created by such a decision." *Id.* Almost any recognition of a substantial burden on religious practice would be subject to the same criticism. Our court has issued opinions more hostile to religion than any other court in the country. *See, e.g.*, *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 76 F.4th 962, 968 (9th Cir. 2023); *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004 (9th Cir. 2021), *reversed* 597 U.S. 507 (2022); *Tandom v. Newsom*, 992 F.3d 916 (9th Cir. 2021), *disapproved* 593 U.S. 61 (2021); *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), and *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 Fed. Appx. 460 (9th Cir. 2019), *reversed* 140 S. Ct. 2049 (2020); *Freedom from Religion Found., Inc. v. Chino Valley Uni. Sch. Dist. Bd. of Educ.*, 896 F.3d 1132 (9th Cir. 2018). But if courts were to deny religious claims based on how the decision may benefit one religion over another, we would pit religious interests against each other and undermine religious liberty far more than any position previously taken by our court. Would we deny a Muslim from growing a reasonable beard in prison because other religious prisoners would not get the same benefit? Or would we deny allowing a church to build a 100-foot spire because other religions do not have a similar religious belief? Or would we deny a religious school a voucher because some other religions do not operate schools? Such considerations by the

all religious practice protected by the Free Exercise Clause and our legal system, must track the law.

Even the Founders recognized that religious exercise in a pluralistic society was bound to conflict with government structure. From the beginning, the Founders attempted to reconcile these competing views by distinguishing the freedom to believe from the freedom to act. As to religious freedom, Jefferson said that "the legislative powers of government reach actions only, and not opinions." *The Works*, vol. 8 (Correspondence 1793-1798). G. P. Putnam's Sons, 1905. Jefferson was not alone. Oliver Ellsworth, a member of the Constitutional Convention and later Chief Justice of the United States, wrote: "But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion." Connecticut Courant, Dec. 17, 1787, *reprinted in* 1 Stokes, Church and State in the United States, 535. The question is, what are those cases?

B

The First Amendment right to free exercise of religion is not absolute. The Supreme Court has long formulated a legal framework balancing the interests of religious free exercise against the competing demands of government. For example, the government cannot restrict an individual's religious opinion but may restrict individual religious action when the government has a sufficient interest. *See Reynolds v. United States*, 98 U.S. 145, 166 (1878) (While government laws "cannot interfere with mere religious belief and opinions, they may with practices.").

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courts would be grossly inconsistent with religious liberty. *Cf.* VanDyke Concurrence II.B.iii & II.C.

The right to belief is distinct from the right to act and the latter is not free from government restrictions. *See Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (citing *Cantwell v. State of Connecticut*, 310 U.S. 296, 303–04, 306 (1940)) ("[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."). Abraham Braunfeld, an Orthodox Jew, owned a retail store, but state law prohibited him from opening on Sunday, and his faith, from working on Saturday. *See id.* at 601. He challenged the law as a violation of the religious liberty clauses, claiming economic concerns required his store to be open six days a week. *See id.* at 602.

Braunfeld reflects the early development of the "substantial burden/compelling interest" test that would later be expanded by the Supreme Court and codified by Congress in RFRA. The Court noted: "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Id.* at 606.

The Supreme Court later clarified the government interest analysis. In *Sherbert v. Verner*, a Seventh-day Adventist was terminated from her job and rejected alternative employment because she would not work on Saturday, her Sabbath. 374 U.S. 398, 399 (1963). South Carolina law barred her unemployment benefits because she declined an alternate suitable employment offer. *See id.* at 401.

The Court held that South Carolina's law was unconstitutional because the burden on Sherbert's exercise

acted as a fine imposed against her worship and was not justified by a compelling state interest. *See id.* at 403 ("[A]ny incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))). The Court first examined whether Sherbert's claim fell within the class of cognizable Free Exercise claims. *See id.* at 402–03. Because it was cognizable, the Court then examined whether Sherbert suffered a burden to her religious practice and whether a compelling state interest justified that "substantial infringement on [Sherbert's] First Amendment right." *Id.* at 403–06.

A decade later, the Court reiterated that in some cases the government can regulate "religiously grounded conduct." *Wisconsin v. Yoder*, 406 U.S. 205, 220–21 (1972). The Court did not use the phrase "substantial burden" but invoked the same theory: Wisconsin could not require religious parents to send their children to school until age 16 because "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.* at 215, 220.

The Court returned to the idea of a "substantial burden" another decade later. *See Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981). It held that, while compulsion regarding religious exercise could be incidental, "the infringement upon free exercise is nonetheless substantial." *Id.* at 718. Because Thomas quit his job due to his religious convictions against producing military weapons, the denial of unemployment benefits was an unconstitutional burden. *See id.* But the Court also stated that "[t]he mere fact that the petitioner's religious practice is

burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Id*. (citing *Yoder*, 406 U.S. at 215). The Court's citation to *Yoder* confirms that the substantial burden/compelling interest framework was consistent even in cases that did not mention it by name.

The Court continued to make clear that its balancing framework did not guarantee relief for all religious burdens, even if those incognizable burdens were substantial in the ordinary sense. *See United States v. Lee*, 455 U.S. 252, 257 (1982) ("The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry."). The Court held that "[n]ot all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* (internal citations omitted). The Court did not analyze how substantial the burden of the tax law was on Amish beliefs when it analyzed whether the burden was cognizable. *See id.* at 257. The Court instead couched its holding on the government's "very high" interest in managing the social security system. *Id*. at 259. And the government's compelling interest in preserving the social security program outweighed the burden on religious exercise. *See id.* at 261.

The Court followed up in *Bowen v. Roy*, in which Native American parents challenged the constitutionality of requiring a social security number for their child to receive federal food stamps and related benefits. 476 U.S. 693 (1986). The parents believed that a social security number would "rob the spirit." *Id.* at 696. In rejecting the religious

challenge, the Court echoed that "[n]ot all burdens on religion are unconstitutional." *Id.* at 702.

The Court again noted that the First Amendment does not "require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* at 699 (emphasis omitted). Instead, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* The Court in *Bowen* did not analyze whether there was a "substantial burden" on any religious practice; it determined that the claim itself was not cognizable. *Id.* at 700 ("Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.").

Two years later, the Court decided *Lyng*, the most factually relevant case here. In *Lyng*, Native American tribes challenged the construction of a road connecting two towns. 485 U.S. at 442–43. The proposed six-mile paved road would affect sacred area used for religious purposes and rituals by Yurok, Karok, and Tolowa Indians. *See id.* A study commissioned by the U.S. Forest Service concluded that constructing the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.*

The Court declined to interpret the Free Exercise Clause as permitting a significant burden on religious practice to weigh as equally, or even overrule, the government's use of its land. *See id.* at 452. Indeed, it echoed that the

Constitution "does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours." *Id.* at 452.

Lyng's analytical framework was not new. The Court started by assessing whether the harms alleged were cognizable under the First Amendment, holding that "[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, its land." *Id.* at 452–53.

And the Court acknowledged that the burden on religion was substantial because "the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices." *Id.* at 451. No doubt a "devastating" impact that would foreclose religious practice is substantial in the ordinary sense. *See* Substantial, BLACK'S LAW DICTIONARY (6th ed. 1990) ("Of real worth and importance; of considerable value; valuable."). But, like in several prior cases, the Court determined that even the potential foreclosure of the religious practice did not render the tribes' religious claim cognizable under the First Amendment. *See Lyng*, 485 U.S. at 451–53. *Lyng* held that the Free Exercise Clause does not encompass claims relating to government management of its land. *See id.* And the Court stated *Lyng*'s holding even more broadly: The "Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 448 (citing *Bowen*, 476 U.S. at 693) (internal citation omitted).

Cases following *Lyng* but pre-*Smith* invoked the Court's preexisting framework, but notably use the phrase

"substantial burden." This represents no new test but articulates the test the Court had formulated all along: "Our cases have established that '[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384–85 (1990) (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). Within this framework, the Court separated cognizable substantial burdens from the incognizable. In so doing, it was not applying a uniform or literal dictionary construction of "substantial." It was defining the applicable constitutional framework.

In the pre-*Smith* cases, the Supreme Court used different variations to articulate the "substantial burden" standard. *See Lee*, 455 U.S. at 257 ("The state may justify a limitation on religious liberty" with "an overriding governmental interest."); *Thomas*, 450 U.S. at 717–18 ("[T]he infringement . . . is nonetheless substantial."); *Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Sherbert*, 374 U.S. at 406 (assessing whether a compelling state interest justified a "substantial infringement of appellant's First Amendment right"). But there is no indication these were different tests; they are consistent applications of the same legal standard over several decades.

Employment Division v. Smith, 494 U.S. 872 (1990), is no exception. The Court again made clear that the Free Exercise Clause recognizes only certain cognizable substantial burdens. And "[u]nder the *Sherbert* test,

governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Id*. at 883 (citing *Sherbert*, 374 U.S. at 402–03; *Hernandez*, 490 U.S. at 699). Although Justice Scalia's majority opinion held that the *Sherbert* test does not apply to neutral, generally appliable laws, it did not overrule *Lyng*. *Smith*, 494 U.S. at 883; *see also* Collins Maj. at 49–50. Therefore, *Lyng* is within the very pre-*Smith* framework reinvigorated by RFRA.

IV

RFRA was a direct rejection of *Smith*'s holding that all generally applicable laws that incidentally burden religious practice present no First Amendment claim. *See Holt v. Hobbs*, 574 U.S. 352, 356–57 (2015). RFRA codified the compelling interest test as set forth by *Yoder* and *Sherbert*. *See id.* As discussed above, under RFRA, a government's "substantial burden" on the exercise of religious practice must be justified by a compelling interest narrowly tailored to accomplish that interest. 42 U.S.C. § 2000bb-1(b). RFRA's text reflects the Supreme Court's pre-*Smith* jurisprudence: "[G]overnments should not substantially burden religious exercise without compelling justification," and "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb-(a)(3), (5). Additionally, RFRA's purpose was "to restore the compelling interest test." *Id*. § (b)(1). RFRA expressly draws this restored test from the Court's free exercise caselaw, discussed above.

Like the several cases to predate it, RFRA does not define "substantial burden," except "as set forth in prior Federal court rulings." *Id*. § (a)(5). But RFRA's religious

protections are plainly robust. RFRA applies to all federal law, statutory or otherwise, whether adopted before or after RFRA's enactment. *Id.* § 2000bb-3(a).

Shortly after RFRA was passed, the Court held that it only applied to the Federal Government. *See City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). Congress then doubled down on its codified protections for religious exercise. *See* The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq. RLUIPA amended RFRA's definition of free exercise, both broadening it to include the use of real property for religious purposes and ensuring that RFRA and RLUIPA share the same definition. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014). RLUIPA echoes the same command as RFRA that no government shall impose a "substantial burden" on religious exercise unless the government demonstrates that such an imposition "is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[2] *Id.* § 2000cc(a)(1).

As the court today holds, RFRA and RLUIPA apply the same test—that is clear from the text of both statutes and

[2] Chief Judge Murguia contends that RLUIPA's amendment to RFRA's definition of "substantial burden" signals that *Lyng* does not apply to this case. *See* Murguia Dissent at 205–06. Even though the Supreme Court has noted that RLUIPA removed mention of the First Amendment and the Court has questioned "why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases," *Hobby Lobby*, 573 U.S. at 714, this is not the same as finding pre-*Smith* constructions of "substantial burden" inapplicable to its meaning. *See* Murguia Dissent at 205–06. While pre-*Smith* cases do not define "substantial burden," this does not foreclose a holding that certain categories of cases do not apply to the "substantial burden" analysis.

from the Supreme Court's discussion of them.[3] *See* Per Curiam at 14; Murguia Dissent at 207 n.8. RFRA and RLUIPA are "sister statute[s]" enacted "in order to provide very broad protection for religious liberty," and RLUIPA protects religious accommodations "pursuant to the same standard as set forth in RFRA." *Holt*, 574 U.S. at 356, 358 (internal citations omitted). Although I agree with Chief Judge Murguia that RFRA and RLUIPA are interpreted uniformly, I cannot join her in assigning "substantial burden" its dictionary definition meaning. *See* Murguia Dissent at 200–201. "[W]e do not follow statutory canons of construction with their focus on 'textual precision' when interpreting judicial opinions." *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766, 770 (9th Cir. 2023) (quoting *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000)); *see also Parker v. Cnty. of Riverside*, 78 F.4th 1109 (9th Cir. 2023) (R. Nelson, J., concurring). Although "substantial burden" is in RFRA, Congress adopted "substantial burden" in RFRA from "prior Federal Court rulings," 42 U.S.C. § 2000bb-(a)(5). Thus, we do not use the ordinary meaning of "substantial burden," but the context given in those prior judicial opinions.

Interpreting "substantial burden" in RFRA and RLUIPA consistently also follows rules of construction. Our notion of "*in pari materia*," stemming from the related-statutes canon states that statutes concerning the same topic are to be

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[3] The Supreme Court in *Hobby Lobby* also disavowed differing constructions of another phrase used in both statutes. "[T]he phrase 'exercise of religion,' as it appears in RLUIPA, must be interpreted broadly, and RFRA states that the same phrase, as used in RFRA, means 'religious exercis[e] as defined in [RLUIPA].' . . . It necessarily follows that the 'exercise of religion' under RFRA must be given the same broad meaning that applies under RLUIPA." 573 U.S. at 695 at n.5.

interpreted together, as though they were one law. *See Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). To conclude otherwise would depart from the presumption of consistent usage—which has special force where, as here, there is a recognized "connection" between "the cited statute" and "the statute under consideration." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 172–73. Because RFRA and RLUIPA both restrict governments' ability to impose "substantial burdens" on religion, there is no reason to define the same term differently. *See id.*

Although RFRA and RLUIPA share the same definition, neither defines "substantial burden." And the need to discern that definition is central to this appeal.

V

Before *Navajo Nation*, our court consistently invoked pre-*Smith* Free Exercise Clause cases and held that a "substantial burden" under RFRA includes preventing an individual from engaging in religious practice. *See, e.g., Goehring*, 94 F.3d at 1299 (quoting *Graham*, 822 F.2d at 850–51) ("substantial burden" test met when government "prevent[ed] him or her from engaging in conduct or having a religious experience which the faith mandates"); *Bryant*, 46 F.3d at 949 (citing *Graham*, 822 F.2d. at 850–51); *see also Worldwide Church of God*, 227 F.3d at 1121; *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996).

We then held that a substantial burden under RFRA "is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a

governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1070 (emphasis added). A majority of the panel reverses this narrow holding of *Navajo Nation* today—specifically the limitation to "only" the specific circumstances of *Sherbert* and *Yoder*. *See* Per Curiam at 14; Murguia Dissent at 207 n.8. Not only has the Supreme Court foreclosed the definition applied in *Navajo Nation*, but almost every circuit has declined to adopt such a narrow construction of "substantial burden." "Substantial burden" is not limited to the burdens that were at issue in *Sherbert* and *Yoder*. *See* Per Curiam at 14; Murguia Dissent at 207. While I conclude that *Navajo Nation* was wrong for some overlapping and differing reasons than Chief Judge Murguia in her dissent, a majority of the panel rejects that test, thus controlling this question in future cases in this court.

A

The Supreme Court disavowed the narrow definition applied by the majority in *Navajo Nation* and asserted by Judge Bea here. *See* Bea Dissent at 91–93. The Supreme Court said: "Even if RFRA simply restored the status quo ante, there is no reason to believe . . . that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Burwell*, 573 U.S. at 706 n.18.

The Supreme Court, however, has left lower courts to tackle the underlying definitional question; it has never defined a "substantial burden" in post-*Smith* cases, either. In *Burwell*, the Court had "little trouble concluding" that the contraceptive mandate, which permitted millions of dollars in fines, constituted a substantial burden on the exercise of petitioner's religious beliefs. *Id.* at 719–20, 726. And in

Holt, the Court found that a prison grooming policy constituted a substantial burden because petitioner was required to shave his beard in serious violation of his religious beliefs or face discipline. *See* 574 U.S. at 361–62.

Here, both *Burwell* and *Holt* involved instances of coercion akin to *Yoder*. *See* Bea Dissent at 86–87. While true, the Court did not limit its definition of substantial burden to *Yoder* or to any additional pre-*Smith* cases. *Burwell*, 573 U.S. at 706 n.18.

Most of our sister circuits have heeded the Supreme Court's words. Many have analyzed "substantial burden" in the presence of coercion like in *Sherbert* and *Yoder*. Still, none have expressly limited the definition of substantial burden only to that universe. *Contra* Bea Dissent at 78 n.8. And aside from whether "substantial burden" under RFRA is the same as under RLUIPA, many of our sister circuits have rejected the notion that a substantial burden must fall only under *Sherbert* or *Yoder*, and no other scenario.

To begin with, the Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have treated RFRA and RLUIPA as analogous statutes and define "substantial burden" the same.[4] This underscores that RFRA and

[4] *See, e.g.*, *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 n.103 (3d Cir. 2016) (citing *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007)) ("although *Klem* examined the definition of 'substantial burden' in the context of RLUIPA, the two statutes [RFRA and RLUIPA] are analogous for purposes of the substantial burden test"); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 350 (5th Cir. 2022) (citing *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004), a RLUIPA case, to define "substantial burden" in a RFRA case); *New Doe Child #1 v. Cong. of United States*, 891 F.3d 578, 588, (6th Cir. 2018) (citing *Haight v. Thompson*, 763 F.3d 554, 565–66 (6th Cir. 2018), a RLUIPA case, to define "substantial burden" in a RFRA case); *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th

RLUIPA share the same definition of "substantial burden" and that *Navajo Nation* should be overruled on that issue.

It is not correct, *see* Bea Dissent at 78, that the majority of circuits have followed *Navajo Nation* and these circuits limit "substantial burden" to *Sherbert* and *Yoder*. Without question, all courts apply the coercion and benefit tests identified in *Navajo Nation*. But no other court expressly limits RFRA to only those scenarios. The D.C. Circuit, for example, held that a substantial burden exists when the government leverages

> "substantial pressure on an adherent to modify his behavior and to violate his beliefs," as in *Sherbert*, where the denial of unemployment benefits to a Sabbatarian who could not find suitable non-Saturday employment forced her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her

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Cir. 2013) (citing *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), a RLUIPA case, to define "substantial burden" in a RFRA case); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013), *aff'd sub nom. Hobby Lobby*, 573 U.S. 682 (describing RLUIPA as "a statute that adopts RFRA's 'substantial burden' standard"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1237 (11th Cir. 2004) ("RLUIPA revives RFRA's substantial burden test"); *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004) ("several factors cause us to conclude that Congress intended that the language of the act [RLUIPA] is to be applied just as it was under RFRA"). None of these cases reference *Sherbert* or *Yoder*, let alone limit the definition of "substantial burden" to them.

> religion in order to accept work, on the other hand."

Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008) (first quoting *Thomas*, 450 U.S. at 718; and *Sherbert*, 374 U.S. at 404). The First Circuit applied a similar definition and cited *Navajo Nation* favorably. *See Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020) ("[C]ase law counsels that a substantial burden on one's exercise of religion exists '[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'") (citing *Navajo Nation*, 535 F.3d at 1069–70). And while the Second Circuit recognizes *Sherbert* and *Yoder* as examples of substantial burden, it does not limit the definition to only those cases. *See Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

Indeed, several other circuits adopt a test inconsistent with *Navajo Nation* but consistent with our approach today. The Eighth Circuit, for example, has held that a "substantial burden"

> must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable

> opportunity to engage in those activities that are fundamental to a person's religion.

United States v. Ali, 682 F.3d 705, 709–10 (8th Cir. 2012) (citing *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008)). There is no way to square the Eighth Circuit's definition of "substantial burden" with *Navajo Nation*.

The Seventh Circuit has also held that RFRA and RLUIPA adopt the same meaning of "substantial burden": "[A] law, regulation, or other governmental command substantially burdens religious exercise if it 'bears direct, primary, and fundamental responsibility for rendering a religious exercise . . . effectively impracticable.'" *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th Cir. 2013). The Seventh Circuit definition of "substantial burden" is more expansive than just *Sherbert* and *Yoder*.

The Tenth Circuit has similarly held that a government act imposes a "substantial burden" on religious exercise if it: (1) "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010); *Yellowbear*, 741 F.3d at 55. This is plainly contrary to our prior holding in *Navajo Nation*. And it is the legal test the majority adopts today to govern future RFRA cases.

A survey of the caselaw from our sister circuits is clear. Our definition of substantial burden as articulated in *Navajo Nation* has not been adopted by any court since it was announced 15 years ago. "Substantial burden" is not limited

only to coercion or denial of a government benefit as articulated under *Sherbert* and *Yoder*. The narrow interpretation of "substantial burden" from *Navajo Nation* misses a crucial nuance: what satisfies a condition does not automatically set its parameters in stone. The Supreme Court's opinions in *Holt* and *Burwell*, and the holdings by virtually all other circuits, supports our holding today. *Navajo Nation*'s express limitation on the RFRA definition of "substantial burden" is properly overruled and no longer good law.

B

The majority's holding overruling *Navajo Nation*'s legal test of "substantial burden" is a fully binding holding of the court. Judge Bea claims that the first paragraph of the per curiam opinion is dicta and not well-reasoned. *See* Bea Dissent at 59 n.1. He is wrong on both counts.

First, the holding is not dicta. To the contrary, when we "confront[] an issue germane to the eventual resolution of the case, and resolve[] it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (quoting *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004)). Judge Bea quotes that language (Bea Dissent at 59 n.1), but conveniently omits the relevant phrase: "regardless of whether doing so is necessary in some strict logical sense." He does not get to dictate what reasoning is necessary to the ultimate conclusion in the case; nor does that matter under *McAdory*. I voted to take this case en banc to correct the wrong legal test of "substantial burden" in *Navajo Nation*. The issue was central to the

parties' arguments and fully briefed before the district court, the three-judge panel, and the en banc panel.

Judge Bea would resolve this case on narrower grounds. But had a majority of the panel been willing to uphold the legal test for "substantial burden" in *Navajo Nation*, this case could have been resolved on those narrower grounds. That position, however, failed to garner a majority; it failed to garner even a plurality. And rejecting the prior *Navajo Nation* legal test was important to the legal analysis of a majority of the judges on the panel in deciding this case. Indeed, without a majority of the court rejecting *Navajo Nation*'s legal test, this case could have been resolved simply by applying *Navajo Nation* as the panel opinion did, rather than on the narrower basis adopted in Judge Collins's majority opinion. To be clear, Judge Collins's opinion would not have garnered a majority vote of the panel had *Navajo Nation* not been overruled. So it was important to address that question.

Moreover, defining "substantial burden" in a case that asks precisely whether the government imposed a substantial burden can hardly be viewed as so tangential to the case to be dicta in any meaningful sense. Nor can a majority's rejection of a primary argument raised by the parties before resolving the case on other grounds be considered dicta. It is clearly "germane" under our precedent. We do that every day in our opinions. Judge Bea's expansive view of dicta would have far-reaching consequences for potentially hundreds of our opinions if future panels were allowed to parse what issues were germane to support a particular result–and reject all other reasoning as dicta.

Second, the holding is well reasoned. I explain why *Navajo Nation* applied the wrong legal definition of

"substantial burden." *See supra* § V.A. And Chief Judge Murguia explains why *Navajo Nation* was wrong, joined by four other judges. *See* Murguia Dissent § II.A-C. True, some of the reasoning differs. But much of it overlaps. For example, I agree with Chief Judge Murguia's reasoning that RFRA and RLUIPA both apply the same legal test. *See* Murguia Dissent § II.A (197–99); *see also id.* at 209 (quoting *Holt*, 574 U.S. at 356–57, and citing *Gonzales v. O Centro Espírita Beneficente Uniaõ do Vegetal*, 546 U.S. 418, 436 (2006); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019)). I also agree with her reasoning that *Navajo Nation* adopted a narrow reading of 'substantial burden.' *See id.* at 206–07. And my analysis that no other circuit has adopted the "substantial burden" test in *Navajo Nation* largely tracks with her similar reasoning. *See id.* § II.C (209–10).

Judge Bea's contention that the first paragraph of the per curiam opinion is not well reasoned ignores the dozens of pages of reasoning provided in my concurrence and Chief Judge Murguia's opinion. "Only 'statements made in passing, without analysis, are not binding precedent.'" *City of Los Angeles v. Barr*, 941 F.3d 931, 943 n.15 (9th Cir. 2019) (quoting *In re Magnacom Wireless, LLC*, 503 F.3d 984, 993–94 (9th Cir. 2007)). The first paragraph of the per curiam opinion was neither made in passing nor without analysis. If anything, the holdings in the first paragraph of the per curiam opinion are "too well reasoned." No reasonable reader (though perhaps aided by a strong dose of caffeine) can walk away after reading the various opinions without a plain understanding of how forcefully a majority of this panel believes that *Navajo Nation*'s legal definition of "substantial burden" was wrongly decided and must be overruled to resolve this case; and the reasoning behind that

conclusion. Judge Bea is free to dissent from that view. But he cannot bind future panels. No future panel of this court (except a future en banc panel) may adopt Judge Bea's dissenting view.

VI

Even in overruling this aspect of *Navajo Nation*, our inquiry is not complete. We still must decide this case. We unanimously hold that Apache Stronghold has no First Amendment claim under *Lyng*. *See* Collins Maj. at 40; Murguia Dissent at 221–29. Apache Stronghold's claim under RFRA, however, is much closer. The question remains—what constitutes a substantial burden and has that standard been met here? I agree with Judge Collins's majority opinion that the burden here does not satisfy the "substantial burden" applied under RFRA.

Two main theories emerge from the majority and concurrences. The majority holds that because Congress "copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise." Collins Maj. at 46. I agree, but for additional reasons. I disagree, however, with the separate theory that "substantial burden" is a term of art with a specific definition.[5] *See* Bea Dissent at 93.

[5] "Terms of art are words having specific, precise meanings in a given specialty." Terms of Art, GERNER'S DICTIONARY OF LEGAL USAGE (3d ed. 2011); *see also* Term of Art, BLACK'S LAW DICTIONARY (11th ed. 2019) (same). Judge Bea attacks this position, noting that "legal tests and standards" can "often" be a "term of art." Bea Dissent at 93 n.16. His sole example, however, is the term "fair and equitable" which the Supreme Court described as a term of art 80 years ago. But "fair and equitable" had become a term of art because of the precise and consistent

While RFRA relies on the prior Supreme Court analytical framework of "substantial burden," that term was never defined as a term of art.

A

It is a longstanding principle that "[w]hen a statutory term is obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citations and internal quotation marks omitted). The question is what "old soil" regarding "substantial burden" was grafted into RFRA. As explained above, "substantial burden" was not defined by the Supreme Court before the adoption of RFRA. "Substantial burden" or related phrasing was used by the Court not as a definition that could be transplanted, but as a legal framework to apply the Free Exercise Clause. And a legal framework differs from a precise definition.

Judge Bea asserts that we must look only to pre-RFRA cases to define "substantial burden," because the term was taken by Congress, without modification, from the Supreme Court's pre-RFRA First Amendment jurisprudence; because RFRA states that its goal is to restore the test used by pre-RFRA federal court rulings; and because RFRA directly cites two Supreme Court decisions—*Sherbert* and *Yoder*—as

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definition attached to it over time. If 200 plus pages in six separate opinions in this case prove anything, it is that the definition of "substantial burden" has not been defined with the precision necessary to be a well-defined term of art. The Supreme Court had not defined "substantial burden" prior to Congress adopting RFRA. And other federal courts had not adopted a consistent definition of the term either. Our definition of "substantial burden" today, *see* Per Curiam at 14–15, is consistent with the definition adopted by other federal courts and may well constitute a term of art going forward.

determinative of the scope of the term "substantial burden." *See* Bea Dissent at 80–87. But even taking these three assertions to their logical conclusions, this does not cabin "substantial burden" to *Sherbert* and *Yoder*.

1

As outlined above, "substantial burden" was used in several pre-*Smith* and pre-RFRA cases and referenced a prior analytical approach. *See supra* § III.B; *Jimmy Swaggart Ministries*, 493 U.S. at 384–85; *Hernandez*, 490 U.S. at 699. Congress adopted "substantial burden" from those "prior Federal court rulings." 42 U.S.C. § 2000bb-(a)(5). None of those cases define "substantial burden." But Congress, in adopting RFRA, expressly incorporated the contours and limitations of the "substantial burden" framework into RFRA.

This aligns with how the Supreme Court described its own Free Exercise Clause jurisprudence. For example, the Court in *Sherbert* held that the government may not compel affirmation of a belief or penalize groups for holding certain views. 374 U.S. at 402. Same with *Bowen*: Free Exercise violation arises when "compulsion of certain activity with religious significance was involved." 476 U.S. at 704. These holdings describe categories of claims protected by the First Amendment, but do not define "substantial burden" itself. There is again no definition of "substantial burden." Thus, the legal context here reveals no technical definition or term of art.

2

Judge Bea next asserts that there is no evidence that Congress intended to expand or alter the definition of

"substantial burden" in pre-RFRA cases.[6] *See* Bea Dissent at 87. But this again assumes, incorrectly, that there ever was a precise definition. True, RFRA's use of "substantial burden" strongly supports the conclusion that Congress was satisfied with that portion of the test as set forth in prior federal court rulings. But that does not mean that the terms were defined as a term of art. *Cf.* Bea Dissent at 93.

Indeed, our sister circuits do not speak of "substantial burden" as a term of art. *See, e.g.*, *Mack*, 839 F.3d at 286; *U.S. Navy Seals 1-26*, 27 F.4th at 336; *New Doe Child #1*, 891 F.3d at 578; *Korte*, 735 F.3d at 654; *Hobby Lobby*, 723 F.3d at 1114; *Midrash*, 366 F.3d at 1214; *Murphy*, 372 F.3d at 979. And for good reason: There is no definition by which they could do so. So while *Lyng* forecloses Apache Stronghold's RFRA claim here, *see* Collins Maj. at 40, that is not because *Lyng* is part of any "old soil" that was used to define "substantial burden," Bea Dissent at 79. Indeed, *Lyng* does not even use "substantial burden" or any analogous framing of the phrase. *Lyng* therefore cannot be read as establishing a precise definition of "substantial burden" "carried over into the soil" of RFRA. *Taggart*, 139 S. Ct. at 1801 (emphasis added).

3

Judge Bea's approach, which purports to be one grounded in the statute's text, also violates fundamental principles of textualism. *See* Bea Dissent at 79–93. His application of the soil theory disregards a textual analysis of half of RFRA's statutory language. The words of a

[6] The Supreme Court seems to reject that premise: "[T]here is no reason to believe . . . that [RFRA] was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Burwell*, 573 U.S. at 706 n.18.

governing text are of paramount concern. We must analyze those words in their full context and not focus exclusively on particular provisions. *See* Textualism, BLACK'S LAW DICTIONARY (11th ed. 2019).

Here, Judge Bea stresses that RFRA directly cites *Sherbert* and *Yoder*. *See* Bea Dissent at 82–85. But this only addresses half of the relevant textual inquiry. Section 2000bb states that a purpose of RFRA is "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." The rest of § 2000bb, however, reads "*and* to guarantee its application in all cases where free exercise of religion is substantially burdened; *and* (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id*. § 2000bb(1)–(2) (emphasis added).

Congress explicitly codified the test formulated in *Sherbert* and *Yoder*. But it did far more than that. It also extended RFRA's reach to include any other substantial burdens (consistent with the Supreme Court's application) on religious practice. Congress employs not one but two uses of "and." *Id.* And Judge Bea ignores them both. We cannot ignore statutory language like that. If Judge Bea were correct, Congress would not need to have included language guaranteeing RFRA's application in *all* cases in which there is a substantial burden. This is true even considering that Congress referenced *Sherbert* and *Yoder* to the exclusion of other cases, *see* Bea Dissent at 84–85, and that Congress declined to use phrases like "for example" to indicate that *Sherbert* and *Yoder* were mere examples of substantial burdens, *id*. at 85. The entire text of the subsection does not start and end with *Sherbert* and *Yoder*—it extends further to all substantial burdens. We cannot read Congress's words

out of existence. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) ("We are 'reluctant to treat statutory terms as surplusage in any setting' . . . .").

Not only should we not read the statutory text out of existence, we also ought not read words *into* RFRA that are not there. That certain members of Congress made statements about RFRA's scope as Congress debated its enactment does not provide any reliable evidence of RFRA's meaning. *See* VanDyke Concurrence at 160–61. "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). The use of such legislative history has been properly criticized as being "neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States . . . ." *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring); *see also Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137, 1146 (9th Cir. 2022) (R. Nelson, J., concurring). And that remains true even though one of the comments came from Senator Hatch who sponsored and championed RFRA. Particularly when legislative history supports our textual interpretation of a statute, we must even more vigilantly guard against encroaching on fundamental statutory principles of construction.[7] Therefore, our assessment of

[7] Whether RFRA's sponsor or a slew of law professors agree with our reading of prior federal law has no bearing here where the statutory text makes clear that RFRA did not overrule *Lyng*. Had these commentators instead suggested that RFRA overruled *Lyng*, that would have similarly been irrelevant. Relying on those subjective views undermines the long-standing understanding that, "It is emphatically the province and duty of

substantial burden and of any implication of pre-RFRA cases, namely *Lyng*, must come from analysis grounded in the text. And because "substantial burden" is not a term of art with a specific definition, the soil theory is inapplicable.

B

I ultimately agree with Judge Collins's majority opinion, which relies on a more compelling theory in this case than the soil theory. *See Medina Tovar v. Zuchowski*, 982 F.3d 631, 644 (9th Cir. 2020) (en banc) (Callahan, J., dissenting) ("In the battle of competing aphorisms I think that 'context matters' prevails over the interpretive canon 'bringing the old soil with it.'"). Judge Collins essentially invokes a different understanding of the Canon of Prior Construction. *See* Collins Maj. at 46–47 (citing *Williams v. Taylor (Terry Williams)*, 529 U.S. 362 (2000)). This familiar canon is one of context: "If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 322.

But construction is different than definition. *Compare* Construction, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The act or process of interpreting or explaining the meaning of a writing") *with* Definition, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The meaning of a term as explicitly stated in a drafted document such as a contract, a corporate bylaw, an ordinance, or a statute"). Here, the

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the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Supreme Court has not defined "substantial burden." Even so, the Court has construed the term. We apply that context to this case. *Lyng* is an authoritative construction that the substantial burden test codified in RFRA is inapplicable to certain challenges, including one in which the government manages its own land. True, the *Smith* majority rejected that the application of the *Sherbert* test strictly turned on "the government's conduct of 'its own internal affairs.'" 494 U.S. at 885 n.2 (citing *Lyng*, 485 U.S. at 439). But this was to justify *Smith*'s rule of general applicability, which was expressly overruled in RFRA. RFRA, however, does not address, nor overrule *Lyng*.

This said, I do not read RFRA as enshrining just Justice O'Connor's view in her *Smith* concurrence. *Cf.* Collins Maj. at 50–51. Justice O'Connor's articulation of *Sherbert*'s compelling interest test in her *Smith* concurrence was not her mere opinion, nor was it "her" test—it was the test established by decades of judicial precedent. Thus, in overruling *Smith*, Congress codified this preexisting framework in RFRA. And it follows that because RFRA's stated purpose was to reject *Smith*, § 2000bb(a), and its effect was to codify the compelling interest test, *id.* § 2000bb(b)(1), RFRA therefore reinstated the legal framework's parameters as well. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (citing *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013)) ("Congress legislates against the backdrop of existing law."). RFRA thus adopted the term "substantial burden" from the Court's prior construction of the *Sherbert* framework. It is therefore not just *Smith* (or Justice O'Connor's concurrence), but the entirety of the Court's pre-RFRA jurisprudence, that provides the contours of substantial burden.

I also have some reservations about Judge Collins's broad categorization of the Supreme Court's opinion in *Terry Williams*. That theory allows us to infer the meaning of a word or phrase when "'broader debate and the specific statements' of the Justices in a particular decision concern 'precisely the issue' that Congress later addresses in a statute that borrows the Justices' terminology." Collins Maj. at 46 (quoting *Terry Williams*, 529 U.S. at 411–12). There is good reason to be cautious of an overapplication of this theory. The Supreme Court has not relied on it in the 23 years since *Terry Williams*—and we never have previously. Part of why *Terry Williams* has not been relied on more may be the Supreme Court's own limitation: "It is not unusual for Congress to codify earlier precedent in the habeas context." 529 U.S. at 380 n.11. That same principle has not been established in the First Amendment context to date.

Given these concerns, this theory should be used sparingly. But it is an appropriate application when considering a unique context like habeas in *Terry Williams* and an equally unique statute like RFRA where Congress explicitly adopted a term from multiple cases to codify that legal framework into law. *See Smith*, 494 U.S. at 883 ("Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a 'compelling governmental interest.'"). Thus, despite the lack of explicit definition, the body of case law from which "substantial burden" springs forecloses Apache Stronghold's RFRA claim here. A contrary conclusion would wrongfully ignore the textualist roots of "substantial burden."

The ultimate question is whether RFRA overrules *Lyng*. As explained above, the stronger case is that *Lyng* remained

part of the "substantial burden" analysis.[8] The Supreme Court has been clear: "'If a precedent of this Court has direct application in a case,' . . . a lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2038 (2023) (citing *Rodriguez de Quijas v. Shearson / Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). "This is true even if the lower court thinks the precedent is in tension with 'some other line of decisions.'" *Id.*

A commendable critique of *Lyng* might be that its holding lacks in originalist or textualist support. As *Smith* has been deeply criticized for its lack of original or textual grounding, the same may be said about *Lyng*, which *Smith* cites repeatedly. *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1888 (2021) (Alito, J., concurring) (*Smith* "can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption."). Justice Alito concludes that "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*." *Id.* at 1896. Under that definition, perhaps it is time for the Supreme Court to revisit *Lyng*. But that is a task for a different Court on a different day.

[8] It has been argued that because RFRA applies to all federal government action, 42 U.S.C. § 2000bb-3, it thus overrules *Lyng*. But RFRA also instructs courts to look to "prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5). *Lyng* is such a prior federal court ruling.

At any rate, *Lyng* remains the law. There, the Supreme Court held that the government action at issue was not a substantial burden because the First Amendment "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 485 U.S. at 448. And because the land transfer here concerns the government's management and alienation of its own land, which is no doubt part of its internal affairs, *Lyng* directly applies to any statutory application of "substantial burden" under RFRA as well. With no compelling evidence to support a finding that *Lyng* was overruled when Congress enacted RFRA, for the same reasons that Apache Stronghold's claim fails under the First Amendment, it fails under RFRA too.

VII

RFRA is a unique statute. While the dissent raises a plausible textual interpretation of "substantial burden," I ultimately disagree. In adopting RFRA, Congress used a specific term—"substantial burden"—which should reasonably be read to reject *Smith* but incorporate prior Supreme Court construction of that term. While we lack a precise definition, we are given guideposts. And *Lyng* is one of those.

The phrase "substantial burden" does not exist in a vacuum. Rather, decades of Supreme Court precedent establish that only certain forms of substantial burdens are cognizable as that term is used to apply the Free Exercise Clause. And when the government seeks to manage its internal affairs and operate on its own land, no such cognizable burden exists under RFRA. Congress then codified this standard and its associated boundaries in

RFRA. Because RFRA does not overrule the Supreme Court's binding precedent in *Lyng*, Apache Stronghold has no viable RFRA claim here.

VANDYKE, Circuit Judge, concurring:

I agree with the majority that our decision in this case is controlled by *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). I write separately to elaborate on why the alleged "burden" in this case is not cognizable under the Religious Freedom Restoration Act (RFRA) and to explain why reinterpreting RFRA to impose affirmative obligations on the government to guarantee its own property for religious use would inevitably result in religious discrimination. Occupying the background of the majority opinion is a reality central to the resolution of this case: there is no textual, historical, or precedential support for the notion that a government's refusal to use its own property to enable or subsidize religious practice is a cognizable burden under either the Free Exercise Clause or RFRA. Even assuming it's theoretically possible to reconceptualize Uncle Sam's parsimony as a "burden" on religious exercise, such stinginess in the allocation of the government's own property isn't the sort of burden our religious freedom guarantees were ever meant to address. And because the government action here did not constitute a cognizable burden, any reliance on the substantiality of the impact of the government's decision on the plaintiffs in this case is misguided.

I.

Enacted in response to one of the most criticized Supreme Court decisions in history,[1] RFRA was a laudable attempt to broadly restore religious liberty. But like any rights-endorsing statute, no matter its scope, RFRA has its limits. A cognizable RFRA claim arises only when (1) the government (2) substantially (3) burdens (4) religious exercise. 42 U.S.C. § 2000bb-1(a). Apache Stronghold claims that the government will burden the Apaches' religious exercise—specifically, their use of Oak Flat to worship and conduct ceremonies—by transferring ownership of the government's property to Resolution Copper.

Because it is undisputed that the Apaches' desire to use Oak Flat to worship and conduct ceremonies qualifies as religious exercise, the only issue before our court is whether the transfer is an instance of the government burdening the Apaches' religious exercise as that action has long been understood under RFRA and the Free Exercise Clause. After considering the logic underlying RFRA, and then reviewing the proper Free Exercise Clause and RFRA frameworks, it becomes apparent that the government does not burden religious exercise by refusing to ensure the government's own property remains available to enable it.

[1] *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

A. A commonsense reading of RFRA does not suggest the government burdens religion by refusing to use its property to enable religious activity.

Notwithstanding the volume of ink spilt today by our en banc court across multiple opinions, it's safe to say that we all agree on at least one thing: RFRA provides a claim for some—but not *all*—burdens that a person may experience in relation to his or her religious exercise. For starters, the burden must have been imposed by a particular entity—namely, the government. And related to that, when the government acts (or fails to act), not all of its actions (or inactions) that may have some incidental effect on an individual's religious exercise are deemed to "burden" that person's religious exercise within the meaning of our guarantees of religious freedom.[2]

This is confirmed by both common sense and the ordinary meaning of the verb "burden," as a few illustrations will show. Imagine, for example, that a Muslim believes he must complete a religious pilgrimage to Mecca during his lifetime. But he lacks the money to do so. If his sister has enough money to pay for the trip but refuses to give it to him, no one would seriously claim that the sister "burdened" her brother's religious exercise by refusing to give him her money to enable his exercise. Sure, there is a sense in which the brother faces a burden on his religious exercise: he doesn't have something he needs to enable it. But few if any

[2] Indeed, Apache Stronghold's able counsel acknowledged at oral argument that not every government action that might be characterized as a "burden" is cognizable under RFRA, including when the government refuses to sell its land to a private party to build a church on the property.

would say his sister caused that burden by refusing to give him her money.

If our example were changed slightly so that the brother asked the government instead of his sister for the money, the result would be unchanged. Characterizing the government's unwillingness to give its resources to our disadvantaged Muslim friend as a government-imposed burden on his religious exercise would be no less strange than in our first example.

That is the key to this case. Much has been said about the substantiality of the burden the Apaches will experience when the government's Oak Flat property is traded and eventually destroyed. It is certainly true that the effect is substantial. But its substantiality is irrelevant in this case. Even assuming one could counterintuitively characterize the government's unwillingness to give someone its property as a "burden," such a burden is not the type of government-imposed burden that is cognizable under RFRA or the Free Exercise Clause. Few people today would characterize the government withholding its own property as the government imposing a burden. And there is no reason to think that such a peculiar conception of a government-imposed burden had any more purchase at the time of the nation's founding, at the time of the Fourteenth Amendment's ratification, or at the time of RFRA's enactment. In short, Apache Stronghold's RFRA claim fails because the government's use of its own property simply does not impose on the Apaches' religious exercise the type of "burden" that either RFRA or the Free Exercise Clause contemplate.

B. Under the Free Exercise Clause, the government does not burden religious exercise by managing its own property.

The Free Exercise Clause comes into play when the government "prohibit[s]" the "free exercise" of religion, U.S. Const. amend. I, which courts have long interpreted as doing something that burdens such free exercise. Because this constitutional right "is written in terms of what the government cannot do to the individual, *not* in terms of what the individual can exact from the government," the Supreme Court has recognized that government actions involving the government's use of its own resources do not impose a First Amendment burden on a person's religious exercise, even when such government actions may indirectly—and possibly even substantially—affect religious exercise. *Lyng*, 485 U.S. at 450–51 (emphasis added) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Since well before *Smith*, it has been commonly understood that the government does not impose a burden when it merely refuses to subsidize a religious exercise. *See, e.g.*, *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 549 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."); *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them.").

The understanding that a refusal to subsidize does not burden religious exercise is obviously not limited to just the government's money. A Catholic priest can no more demand that the government provide him with communion

wine than he can demand that the government provide him with money to buy that wine. An elder of the Church of Jesus Christ of Latter-day Saints can't insist that the government give him either a bicycle or the cash to buy one. Nor can a pastor require that the government provide him a church on government land so that he can better serve his flock. As in our initial Mecca example, the government has not "burdened" anyone's religious exercise in any of these examples by withholding its own resources.

Of course, every level of government in our nation distributes a variety of government benefits to a variety of recipients. And when the government does that, it cannot do so in a way that *discriminates* against or between religions. In *Sherbert*, for example, a state government provided unemployment benefits to workers who required Sunday off to practice their faith, but not to those whose religion required them to take Saturday off. 374 U.S. at 399–400, 406. The Supreme Court correctly concluded that the Free Exercise Clause disallows such discrimination between or against religions in the provision of government benefits. *Id.* at 404. The Court explained that such differential treatment of religious adherents in the allocation of government benefits imposes the type of "burden" on religious liberty that the Free Exercise Clause was meant to protect against. *Id.* Indeed, it "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* This is because "to condition the availability of benefits upon [a religious observer's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406. Thus, *Sherbert* and its progeny make clear that once the government chooses to provide government benefits, it cannot do so in a

discriminatory fashion that effectively coerces potential recipients into abandoning their constitutional right to freely exercise their religion.

But of course, nowhere did *Sherbert* (or any case since) conclude that the government had to provide unemployment benefits to anyone in the first instance; it simply concluded that if the government chose to do so, it couldn't religiously discriminate. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017) ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution … and cannot stand."). I'm not aware of any case applying *Sherbert*'s anti-discrimination principle that holds the government must either start providing or continue providing some government benefit—again, those cases simply stand for the reasonable proposition that *if* the government is doling out benefits, it must not discriminate against religion in the process of doing so.

Unsurprisingly, the Supreme Court has also made clear that the Free Exercise Clause protects against the government burdening religious exercise by directly imposing requirements on people that are at odds with their religious beliefs. The Supreme Court addressed this situation in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Wisconsin had attempted to make school attendance mandatory until the age of 16. *Id.* at 207. This compulsory-attendance law was "undeniably at odds with fundamental tenets of [Amish] religious beliefs" and presented the Amish with a classic dilemma: exercising their religious beliefs would lead to criminal sanctions, but compliance with the law would violate their beliefs. *Id.* at 218. *Yoder* and many cases since then stand for the straightforward proposition

that, when the government says, "you must do X," and your religion says, "you must *not* do X," then the government's demand has burdened your religious exercise.

Both the *Yoder* type of burden and *Sherbert* type of burden, while different, converge under a single concept: government coercion. *Yoder* involved the most direct form of coercion: violate your religious scruples or be punished. *Sherbert*'s coercion is less direct but not necessarily less coercive: violate your religious scruples or be denied an otherwise available government benefit. Both the *Yoder* and *Sherbert* types of government coercion are conceptually quite different from a theoretical third type: the government simply refusing to give someone its property so that he can use it to exercise his religion.[3] This third type of government action is different in kind from the first two. In no way is the government coercively inducing or requiring people to

[3] It is important to distinguish between a *Sherbert*-type burden and this third potential type of claim. Both involve the government withholding its property, but in *Sherbert* the government is already giving its property to some religious adherents, while discriminatorily withholding its property from others of a different religion. Thus, in a *Sherbert* case, the baseline condition is, so to speak, that the government is already providing its property to some (but not all) religious adherents. In contrast, the baseline condition in a case like this one is that the government is not giving its property to anyone, and the religious claimants nonetheless insist that the government must uniquely provide them with government property to enable their religious exercise. Apache Stronghold has not tried to make a *Sherbert*-type religious discrimination claim in this case, presumably because the government isn't discriminatorily "giving" its land to anyone but is instead trading the government-owned Oak Flat for other land owned by the mining company. In other words, the government is effectively selling Oak Flat to the mining company, and Apache Stronghold hasn't claimed any discriminatory action on the part of the government in, say, rejecting an equivalent competing offer from Apache Stronghold.

violate their religious beliefs. Instead, any coercion works in the opposite direction: people are demanding that the courts make the government enable or subsidize their religious beliefs by uniquely providing them with government property.

While an able lawyer can certainly characterize this third type of claim as a "burden," it has been well understood since before *Smith* that the Free Exercise Clause does not cover any such government decisions, regardless of the label. This is most unmistakably demonstrated by *Lyng*. There, the federal government had permitted the building of a road and the harvesting of timber on publicly owned land. *Lyng*, 485 U.S. at 441–42. Some Native American tribes argued that this would burden their religious practice on the government's land. *Id.* at 447. But as the Court explained, the project did not burden religious exercise within the meaning of the Free Exercise Clause. *Id.* at 452. Notwithstanding that the claimed effects from the road-building project could be "severe" and "virtually destroy the … Indians' ability to practice their religion," those effects did not give rise to a cognizable burden. *Id.* at 447, 450–51.

The reason the Indian tribes lacked a Free Exercise Clause claim in *Lyng* was because, despite the "devastating" incidental effect that the government's management of its own land would have on their religious exercise, *id.* at 451, the tribes would not "be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity by denying [them] … benefits," *id.* at 449. As *Lyng* made clear, the "Free Exercise Clause affords an individual protection from certain forms of governmental *compulsion*; it does not afford an individual a right to dictate the conduct of the

Government's internal" affairs, particularly the government's management of its own property. *Id.* at 448 (emphasis added) (quoting *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986)).

Nothing since *Lyng* has cast into question the straightforward understanding that the Free Exercise Clause does not require the government to let you use its property—including its real property—to exercise your religion. Our court, sitting en banc fifteen years ago, reviewed these same cases and reached the same conclusion. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068–73 (9th Cir. 2008) (en banc).[4] Regardless of how you label it, the government's nondiscriminatory use of its own property has never been understood to impose a constitutionally cognizable burden on someone's religious freedom—even when such governmental decisions incidentally have "devastating" and "severe adverse effects on the practice of [a] religion." *Lyng*, 485 U.S. at 447, 451.

C. RFRA adopted the ordinary meaning of "burden" as that term had been uniformly understood in Free Exercise Clause cases.

Echoing decades of Free Exercise precedent, RFRA prohibits the government from burdening a person's religious exercise. 42 U.S.C. § 2000bb-1(a). As is typical in many statutes, RFRA defined some but not all terms that determine whether a person has a cognizable RFRA claim. For example, RFRA tells us that a person's "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.*

[4] Our court reached the right result in *Navajo Nation*, although I might quibble with some of its rationale.

at §§ 2000bb-2(4), 2000cc-5(7)(A). Since this is a clear departure from how religious exercise had been understood under the First Amendment,[5] it made sense for Congress to provide that definition. But tellingly, RFRA does not define what it means for the government to "burden" religious exercise. The obvious reason for that, given the context of RFRA's enactment and its clear textual departures from the First Amendment in other regards, is that RFRA meant "burden" in the way it had been commonly understood in the Free Exercise Clause context. Indeed, the Supreme Court has acknowledged as much. *See Tanzin v. Tanvir*, 592 U.S. 43, 46–48 (2020) (citing Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 323 (2012)).

In pre-RFRA First Amendment caselaw, it was well understood that the government burdens religious exercise when it acts in a coercive manner, and that the government's decisions about how it uses its own property are not coercive unless they discriminate (as in *Sherbert*). During and immediately after RFRA's enactment, everyone understood that RFRA carried forward this ordinary understanding of what it means to burden religious exercise. Post-RFRA caselaw only further confirmed that RFRA adopted the ordinary meaning of how the government may impose a

[5] Prior to being amended by the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. (RLUIPA), RFRA defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." Under this standard, courts had required the burdened religious exercise to be "central to" or "compelled by" the religion. *See, e.g.*, *Graham v. C.I.R.*, 822 F.2d 844, 850–51 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 345 (1987); *see also Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997).

burden—and specifically, as relevant to this case, that the government's use of its own property burdens religious exercise only when it is allocated in a discriminatory manner. Here, there is no claim that the government has used its resources in a discriminatory manner, and the government therefore has not burdened the Apaches' religious exercise within the meaning of RFRA.

i. The ordinary understanding of RFRA does not support the claim that the government burdens religious exercise by using its own resources in a nondiscriminatory manner.

If RFRA's plain text doesn't make it obvious enough that RFRA did not depart from the ordinary meaning of "burden" under the Free Exercise Clause, the discussion surrounding the passage of RFRA further confirms that the government does not burden religious exercise by using its own resources in a nondiscriminatory manner.

When Congress enacted RFRA, it was well understood that a burden is imposed by the government's use of its own resources *only* when the use of such resources discriminates against or between religions. Readily accessible examples of this widespread understanding are provided by congressional statements explicitly maintaining that RFRA "does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." S. Rep. 103–111, at 9 (1993); *see also* 139 Cong. Rec. 26193 (1993) (remarks of Sen. Hatch) (explaining that *Lyng* and *Bowen* are unaffected by RFRA).[6] Leading religious liberty

[6] Judge R. Nelson mildly chastises me for engaging in supposed faint-hearted textualism by citing the congressional record. I agree with both

scholars shared a similar understanding of RFRA's effect, observing immediately after its enactment that, under RFRA, a "cognizable burden" does not exist when the government uses its resources in a nondiscriminatory manner that has only an indirect effect on religion. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 228–30 (1994) (footnotes omitted).[7] No burden exists

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him and Justice Scalia, whom he quotes, that "[e]ven if the members of each house wish to do so, they cannot assign responsibility or making law—or the details of law—to one of their number, or to one of their committees." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 386 (2012). But as should be sufficiently clear from context, I am not citing to the views of specific legislators for the purpose of conclusively determining what RFRA means. Nor am I (as charged) preferencing legislative history just because it happens to support my understanding of RFRA. Instead, I cite such statements as further evidence of my point—with which I believe Judge Nelson agrees—that at the time of RFRA's enactment, *nobody* would have understood the government's decision about what to do with its own land to be a cognizable burden under RFRA. Individual legislators are no more able to authoritatively speculate about how a law will apply in a certain case than anyone else. That goes for legal academics, too—who I also cite. "The interpretation of the laws is," after all, "the proper and peculiar province of the courts," not Congress or the academy or anyone else. Alexander Hamilton, Federalist No. 78. My point is only to demonstrate the unanimity of understanding about what did and did not constitute a burden on religious exercise at the time of RFRA's passage, which matters here because RFRA's text indicates that it should be understood by reference to the state of Free Exercise jurisprudence before *Smith*.

[7] *See also* Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers*, 24 N.M. L. Rev. 331, 345 (1994) (noting that pre-RFRA courts declined to extend First Amendment protection to "challenges to government control of non-Indian land" and later explaining that, "[s]ince RFRA mandates that strict scrutiny be used only if a burden is first found, Indian free exercise

because citizens simply "may not demand that the Government join in their chosen religious practices" by providing the resources for such practices. *Id.* (quoting *Lyng*, 485 U.S. at 448). Everyone understood that, under RFRA, the government retains its right to use its resources according to its own preferences.[8] It does not have the

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claims will likely be resolved in the very same manner as before"); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont. L. Rev. 171, 202 (1995) (explaining that the "developing case law" on "substantial burden" under RFRA suggests that "religious exercise is burdened only by the combination of legal coercion and religious duty"); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39, 73 & n.172 (1995) (noting that although "RFRA repudiates *Smith*, … it appears to leave the internal operations cases," such as *Lyng* and *Bowen*, "unaffected").

[8] I of course agree with Judge Nelson that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But I respectfully disagree with his insistence that the uncontradicted view of a "slew of law professors" and legislators "has no bearing" on the proper interpretation of RFRA. I presume that Judge Nelson and I agree that it is the original *public* meaning of the text that controls our analysis, not some hidden or idiosyncratic meaning devised by judges. *See Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) ("[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."). Part of the endeavor of surmising the original public meaning is understanding what the *public* would have originally understood the legislative enactment to mean, including the part of the public that was elected to Congress. If, for example, every law professor, every Congressman, and every other literate person in the United States were on record opining that a particular statute meant "X," I would hope good originalists could count that as some useful evidence that its original public meaning was indeed "X," not "Y." *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1757 (Alito, J., concurring) ("As I will

obligation to enable religious practice by donating its own property.

ii. Cases interpreting RLUIPA are not inconsistent with this well-established understanding of RFRA.

Understandably seeking to distance themselves from the settled understanding that the government does not burden religious exercise through the mere use of its resources in a nondiscriminatory manner, Apache Stronghold and the dissent focus heavily on caselaw interpreting a different statute, RLUIPA, to argue that the government will burden the Apaches' religious exercise because the Apaches won't be able to access Oak Flat once it is physically destroyed. In doing so, they improperly divorce the RLUIPA cases from the comprehensive and individualized coercive context inherent in *every single* RLUIPA case, implicitly endorsing that the Apaches are effectively prisoners in this country and therefore indistinguishable from the actual prisoners who bring claims under RLUIPA. Applying that obviously controversial assumption—and making no attempt to show that this assumption was widely shared when RFRA was enacted in 1993—the dissent relies heavily on what has been

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show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. … And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law."). That is all I mean by referencing legislative statements above—it is part of my proof that *everyone* who knew anything about RFRA when it was enacted understood it as not requiring holy handouts of the government's own property.

deemed a substantial burden on religious exercise in the prison context.

I agree with the dissent that the *substantiality* of a burden can be measured the same way under both RLUIPA and RFRA. But whether a burden is cognizable in the first instance has always been a context-dependent inquiry. And what constitutes a cognizable burden in the prison context—surely the most comprehensively coercive setting in America today—obviously may be very different from what constitutes a "burden" under RFRA. That is why, for example, a Jewish prisoner has a right under RLUIPA to require the government to provide him with kosher meals, whereas a Jewish man outside of prison has no right to insist that the government deliver him free kosher food.[9]

The dissent's need to resort to RLUIPA prison cases to justify its preferred outcome in this case is very telling. In

[9] The other category of cases addressed by RLUIPA—land-use regulations, or "zoning"—is equally comprehensively coercive. Every zoning case involves the government telling someone what he can or can't do with his own land. So when the government tells someone he can't build a church on his own land, for example, that is just as coercive as forbidding someone from buying communion wine with his own money. As such, RLUIPA land-use cases, like cases in the prison context, usually don't involve hard questions about whether the government's regulation actually causes a burden on religious exercise. The coercive burden is obvious, inevitably making the litigated question whether the burden is *substantial*. *See, e.g.*, *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 988–92 (9th Cir. 2006) (discussing whether the regulation was "oppressive to a significantly great extent" (cleaned up)); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) (citing *Guru Nanak*, 456 F.3d at 987) ("[O]ur practice is to examine the particular burden imposed by the implementation of the relevant zoning code on the claimant's religious exercise and determine, on the facts of each case, whether that burden is 'substantial.'").

prisons, the "government exerts a degree of control *unparalleled* in civilian society." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (emphasis added). It controls every aspect of an inmate's life and renders him fully dependent on the government by stripping him of his ability to provide for his own needs. *Brown v. Plata*, 563 U.S. 493, 510 (2011). It is certainly true that in RLUIPA cases, courts have concluded that the government must provide resources to prisoners for their religious exercise. But that's for the same reason they require the government to provide prisoners with basic sustenance like food and clothing, *id.*, or medical care, *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), or protection from other inmates, *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)—because the government has coercively "stripped them of virtually every means of" providing for themselves, *id.* In a very real sense, the prisoner depends on the grace of the government for all his needs and in all his activities. This degree of direct and immediate coercion is, again, "*unparalleled in civilian society*." *Cutter*, 544 U.S. at 720 (emphasis added).

As a result, in the vast majority of RLUIPA cases there is no need to explicitly analyze whether the government's action burdens religious exercise—it's a given. The only question is substantiality. And that may also be true for *some* RFRA cases. But it is not true for all of them, and certainly not this one. This case presents the opposite situation encountered in most RLUIPA cases. The substantiality of the effect on the Apaches' religious exercise is obvious; it is the legal cognizability of any burden that is at issue. Thus, the dissent's extensive reliance on inapt RLUIPA cases analyzing the substantiality of an undisputed burden is badly misplaced.

Ultimately, the dissent cannot rely on RLUIPA prison cases without also showing that the Apaches are identically situated vis-à-vis the government as the prisoners in those cases. The dissent makes no attempt to do so, and more importantly makes no attempt to show that this was the common understanding when RFRA was enacted. Absent such a showing, the only justification for the dissent's extensive reliance on inapt RLUIPA jurisprudence to defend its result in this case is an implicit recognition that it can't find justification in RFRA and the Free Exercise Clause. As discussed, all the RFRA and Free Exercise Clause cases support the common understanding that, unless you're the government's prisoner (literally, not metaphorically), the government's nondiscriminatory use of its own property is not the type of action that gives rise to a cognizable burden on religious exercise.

D. The government's swap of Oak Flat for other property does not burden the Apaches' religious exercise under RFRA.

This case is not meaningfully different from *Lyng* or *Navajo Nation*. In all three cases, the government wanted to do something with its own land. In all three cases, what the government planned to do would substantially affect how the tribes wanted to use the government's land for their own religious exercise. In *Lyng* and *Navajo Nation*, courts rejected the First Amendment and RFRA claims because, notwithstanding the "devastating effects" on religious exercise resulting from the government's planned use of its land, the Free Exercise Clause and RFRA simply do not recognize such burdens resulting from the government's nondiscriminatory use of its own property. This case is no different, but the dissent would have this court reach the opposite result. In doing so, it would for the first time

characterize something as a "burden" under RFRA that has never before been considered a cognizable burden. To do so would be an obvious rewriting of statutory law—a job for Congress, not the courts.

II.

Reconceiving the government's nondiscriminatory use of its own property as a cognizable burden under RFRA would not only require a judicial rewrite of the statute; it would turn the statute on its head, requiring instead of reducing religious discrimination. Because the government's resources are not infinite, the expansion of RFRA advocated by Apache Stronghold and the dissent would inevitably require the government to discriminate between competing religious claimants. While no doubt some such claims—including those made by Apache Stronghold in this case—would be sympathetic, there is no way to resolve this case in the Apaches' favor without endorsing a rule that would one day soon force the government to pick religious winners and losers. So even if this court did require the government to effectively hand over Oak Flat as a religious offering to the Apaches, only *some* religions would benefit from the precedent created by such a decision.[10]

[10] In Part I of this opinion, I have endeavored to explain why I think the dissent's proposed interpretation of RFRA is wrong as a legal matter. And now, in Part II, I explain why that view is also wrongheaded. Judge Nelson misunderstands this approach, confusing the *reasons* I agree with the majority's interpretation of RFRA (Part I) with the *warnings* I make about religious discrimination that would inevitably result if the dissent's rewrite of RFRA was adopted (Part II). But to be clear, I agree with Judge Nelson that "[t]he dissenters are not wrong … because under their view 'only *some* religions would benefit from the precedent created by such a decision.'" The *reason* the dissenters are *wrong* is because they

Eventually, lines limiting the court-enforced distribution of the government's largesse would need to be drawn. And because, as explained above, the dissent's novel approach has no basis in the text or original understanding of RFRA, any judicially created distinctions limiting the extent of the resulting religious entitlement would similarly lack any statutory justification. Worse, such distinctions would necessarily discriminate between religions, offering government property to some and not others and turning RFRA into a tragic parody of itself. One need look no further than the dissent itself to see early indications of the kind of discriminatory distinctions that might flow from this atextual understanding of RFRA.

A. The dissent would establish a discriminatory preference in favor or older religions and against newer ones.

Not far into the dissent, the reader encounters the first such distinction: religious practices with a lengthy historical pedigree apparently deserve more protection than newly established ones. Parroting Apache Stronghold's repeated emphasis that the Apaches have worshipped at Oak Flat "since time immemorial," the dissent heavily implies the Apaches should be treated preferentially because their religious exercise is a long-established practice.[11]

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advance a view of RFRA that has no basis in its original public meaning. My point here is that in addition to being the legally wrong interpretation, the dissenters' judicial revision of RFRA would also undermine the equal protection of religion that RFRA was enacted to protect.

[11] The dissent is not alone in emphasizing the ancient nature of the Apaches' religious practice. Both the panel and motion-stage dissents

The trouble with emphasizing the lengthy history of the Apaches' religious practice at Oak Flat is that it is entirely irrelevant to our analysis under RFRA and the Free Exercise Clause. Our religious liberty protections "apply to all citizens alike," *Lyng*, 485 U.S. at 452, and with equal force to a religion founded yesterday as to one with roots deep in prehistory. How long a person has practiced a religion, or how old that religion is, should be "immaterial to our determination that … free exercise rights have been burdened; the salient inquiry under" both RFRA and the Free Exercise Clause "is the burden involved." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987). It is bad enough that Apache Stronghold's counsel made this discriminatory argument. Our court has thankfully refused to make things worse by imbuing it with the force of law.[12]

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did so also. *See, e.g.*, *Apache Stronghold v. United States*, 38 F.4th 742, 774 (9th Cir. 2022) (Berzon, J., dissenting).

[12] It's not hard to see how invidious this argument is when you consider a sincere religious observer whose *newer* religion requires the ceremonial use of Oak Flat, just like the Apaches. The government's action of trading Oak Flat for other land would have *exactly* the same effect on both the observer of a newer religion and an Apache: neither would be able to use Oak Flat for religious ceremonies. But accepting the dissent's implicit premise that the "time-immemorial" nature of the Apaches' religious practice at Oak Flat is legally significant could lead to a different result in each of the two cases: the transfer of Oak Flat *would* burden the Apaches' religious exercise, but the same transfer might *not* burden a similarly situated practitioner of the newer religion simply because the person (or, more precisely, the person's predecessors) had not used the land before or for long enough. And what about a religion of intermediate age—say, a hundred years or so? How long is "long enough" to warrant protection under RFRA? By introducing the age of a religion and the length of religious practice as variables relevant to the analysis, the dissent offers an arbitrary and

Of course, the suggestion that long-established religious practices should receive favorable treatment under RFRA is made only lightly. The dissent stops short of a full-throated defense of such a rule. Instead, it contents itself to repeatedly emphasize the longstanding nature of the Apaches' religious practice and leaves the legal significance of that fact to implication. Making the argument explicitly would lay its blatantly discriminatory character bare, but subtle though it may be, the dissent unmistakably lays the groundwork for a discriminatory limiting principle that (need it be said?) could never be supported under either the Free Exercise Clause or RFRA.

B. The dissent's interpretation of RFRA also discriminates by providing more protection against burdens accompanied by significant physical or environmental impacts.

Both the dissent and Apache Stronghold also take care to emphasize the extent of the physical destruction associated with the transfer of Oak Flat. The import of such argument is clear: as with age, the dissent and the Apaches would also establish a discriminatory preference in favor of protecting burdens on religious exercise with a significant physical or environmental component when compared to burdens associated with less physical manifestations. But doing so would be double error, both because such a rule wrongly implies that a practitioner's religious harm under RFRA claim is somehow predicated on the physical attributes of the intrusion, and because it invites courts to measure the comparative significance of religious harms in physical terms, a behavior strictly prohibited in our jurisprudence.

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discriminatory distinction between observers of newer religions and long-established ones—a distinction that has no basis in RFRA.

Ultimately, this distinction too is contrary to both the text of RFRA and the background precedent that informed its understanding, and if adopted, it would likewise perpetuate religious discrimination.

i. Attempting to distinguish *Lyng* and *Navajo Nation* by focusing on the extent of the physical impact reads a discriminatory preference for land-based religious practices into RFRA.

The biggest hurdle faced by the dissent and the Apaches is that this case is strikingly similar to both the Supreme Court's decision in *Lyng* and our court's en banc decision in *Navajo Nation*. To get around these cases, which doom its claims, Apache Stronghold attempts to distinguish them by emphasizing the physical differences between the government's actions in those cases and this one. *Navajo Nation* and *Lyng* are different, they contend, because "neither … involved physical destruction of a sacred site." The dissent employs similar logic, distinguishing *Lyng* on the basis that the transfer will result in the "utter destruction" of Oak Flat, which "will prevent the Western Apaches from visiting Oak Flat for eternity." Not only does this argument fail to provide a suitable basis to distinguish *Lyng* and *Navajo Nation*, but it also introduces another arbitrary and discriminatory limitation on the scope of RFRA's protection.

In *Navajo Nation*, the government allowed a mountain sacred to multiple Indian tribes to be showered daily with 1.5 million gallons of poopy water that, according to those tribes, would desecrate the mountain, render it impure, and destroy their ability to perform certain religious ceremonies. 535 F.3d at 1062–63; *id.* at 1081 (Fletcher, J., dissenting).

So both *Navajo Nation* and this case present precisely the same impact on religious exercise from government land-use decisions: elimination of the ability to perform religious ceremonies. The dissent here, however, distinguishes *Navajo Nation* by asserting that "nothing 'with religious significance … would be *physically* affected'" by the government's decision to spray recycled wastewater containing human waste onto a sacred mountain (emphasis added). But that downplays the spiritual significance of the government's action in *Navajo Nation* and ignores the court's later reasoning in the same opinion that "[e]ven were we to assume … that the government action in this case w[ould] 'virtually destroy the … Indians' ability to practice their religion,'" the result would not have changed. *Navajo Nation*, 535 F.3d at 1072 (quoting *Lyng*, 485 U.S. at 451).

The dissent similarly distinguishes and downplays the government's land-use decisions in *Lyng*—notwithstanding their "severe" and "devastating effects on traditional Indian religious practices"—by highlighting the limited *physical* effects of the government's actions in *Lyng*. In the face of *Lyng* and *Navajo Nation*, it nevertheless continues to rely on the extent of the physical impact that will result from the government's decision to transfer Oak Flat.

There is little doubt that the government's decision to transfer Oak Flat will have consequences for the physical environment in and around that area, but as much as some may wish otherwise, this is not an environmental case. This is a case about religious injury, and the measure of that injury is the harm to religious exercise. *That* harm is precisely the same here as it was in *Lyng* and *Navajo Nation*: the complete inability of Native Americans to conduct certain religious ceremonies because of government decisions about how it uses government land.

The desire to distinguish *Lyng and Navajo Nation* by emphasizing the physical impact of the challenged government decision is certainly understandable from an environmentalist's perspective, but doing so would result in an unfortunate perversion of RFRA. The view advocated by Apache Stronghold and endorsed by the dissent threatens to turn RFRA into a statute that arbitrarily gives greater protection to burdens on religious exercise that are more physical in nature, while downplaying equally significant burdens on other forms of religious exercise simply because they don't similarly affect the physical environment. Such an approach privileges forms of religious exercise that preserve the physical environment at the expense of other religious exercise that might arguably lack similar positive environmental externalities. Again, it is understandable why this might be an attractive rewrite of RFRA for some modern judges—one could say that environmentalism is the favored religion du jour[13]—it just has no basis whatsoever in RFRA's text or original meaning.

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[13] *See* Joel Garreau, *Environmentalism as Religion*, The New Atlantis, Summer 2010, at 61 ("For some individuals and societies, the role of religion seems increasingly to be filled by environmentalism."); Freeman Dyson, *The Question of Global Warming*, The New York Review of Books (June 12, 2008), https://www.nybooks.com/articles/2008/06/12/the-question-of-global-warming/ ("There is a worldwide secular religion which we may call environmentalism …. Environmentalism has replaced socialism as the leading secular religion."); Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 Case W. Res. L. Rev. 51, 51 (2004) ("Environmentalism is a type of modern religion.… Indeed, many leading environmentalists have characterized their own efforts in religious terms."); Andrew Sullivan, *Green Faith*, The Atlantic (March 28, 2007), https://www.theatlantic.com/daily-dish/archive/2007/03/green-faith/229789/; Andrew P. Morriss &

ii. A rule that distinguishes religious harms by their physical measurability finds no support in either the text of RFRA or the body of caselaw supporting it.

The physical impact of the government's actions has no basis in the text of RFRA, and it is just as foreign to the pre-*Smith* understanding of the Free Exercise Clause that informed RFRA. But it is not simply the case that the dissent's approach finds no support in RFRA's text or caselaw; it has already been affirmatively rejected. Focusing on the physical destruction of Oak Flat resurrects an argument that the Supreme Court rejected outright in *Lyng*.

In *Lyng*, the government sought to build a road that would result in the physical destruction of wilderness conditions necessary for the plaintiffs' religious exercise, including "privacy, silence, and an undisturbed natural setting." 485 U.S. at 442. The Court recognized that "too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible," meaning the "projects at issue … could have devastating effects on traditional Indian religious practices." *Id.* at 451. The Court nevertheless explained that the incidental religious effect of such government action on native tribal religious activity—"devastating" though it might be—could not "meaningfully be distinguished from the use of a Social Security number" in *Bowen v. Roy*, in which a religious practitioner sincerely believed that merely issuing a Social Security number (which had the slightest of physical components) to a child would rob the child of her spirit. *Id.* at 449, 456. "In both cases, the challenged

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Benjamin D. Cramer, *Disestablishing Environmentalism*, 39 Env't L. 309, 323–42 (2009).

Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." *Id.* at 449. Thus, notwithstanding the significantly different *physical* effects of the government action in each case, the *religious* harms suffered were indistinguishable for purposes of determining whether a burden existed. *Id.* at 449–50. The presence or absence of the burden on religious exercise turns not on the degree of any physical impact from the government's activity, as urged by Apache Stronghold and the dissent, but on the asserted harm to religious exercise, as explained in *Lyng* and *Bowen*.

iii. Analyzing burdens on religious exercise with reference to their associated physical impacts is inherently discriminatory.

Text and caselaw aside, it is also inequitable to let the physical consequences of a government action determine whether religious exercise has been burdened because religions differ in what might burden their exercise. Some religions place more emphasis on the material world, while others are more spiritually directed. Some center their devotion on historic rites held in set-apart, holy places, while others are not as ceremonially or geographically constrained. And of course, many faiths incorporate degrees of some or all of these defining characteristics into their religious practice. The dissent's misguided emphasis on the environmental consequences of the government's action preferences some of these religious aspects over others, and if it were afforded legal significance, it would ensure that RFRA would be applied discriminatorily going forward. Religions that experience a substantial burden to their exercise due to government action that also has a substantial physical manifestation would be treated favorably.

Inversely, religions affected by government actions with less physical impact would be sent to the back of the bus. But our religious liberty protections were designed to extend to *all* religions, not just to those that may suffer a tangibly "objective" and "measurable" burden (whatever that might mean) evaluated in physical terms. A test that relies on the physical effects of government action could significantly reduce protection for religions that do not rely on tangible relics, material artifacts, or other paraphernalia. Such a test would threaten to overtly discriminate against and overwhelmingly under-protect religions less tied to the material world.

C. The dissent encourages discrimination by creating a baseless distinction between the government's real property and its other property.

The dissent relatedly appears to infer that there's something legally special about the religious use of government-owned *real* property that makes it materially distinguishable from other forms of government resources. But again, this distinction bears no connection to anything in RFRA itself, and it too would invite future discrimination between religious groups.

As a legal matter, limiting the dissent's preferred rule that the government must give out its resources for religious exercise to religions that use particular real property in the government's control is clearly disconnected from RFRA's text. The practice of essentially every religion is resource constrained, and nothing in the statutory text supports distinguishing between the types of resources that religious observers need to conduct their religious exercises. Some need land, some need vehicles, some need cash (or Venmo).

Regardless of what they need in a particular instance to exercise their religion, one commonality among religious observers is that they are often limited in what religious activities they can engage in based on the resources they have available to them. And if the government owns the resources they need, they face the exact same problem—regardless of whether it's land or legal tender, the government's refusal to contribute its stuff is hindering their religious exercise.

Grafting onto RFRA a special rule favoring religions that happen to require land would clearly discriminate against other religions. What makes real property special, particularly under RFRA? Is needing specific real property to conduct a ceremony different under RFRA from needing a bike to proselytize? Or needing a sweat lodge made from certain trees under government control? There is no logical or textual basis in RFRA for the dissent's suggestion that land is somehow special. While certain tracts of government-owned land are religiously special for many Native Americans, other government property may be (or become) religiously special for other religions. Under the dissent's approach, the latter would be treated worse than the former without any textual basis for the difference in treatment.

The dissent tries to limit the discriminatory impact of the rule it offers by limiting it to circumstances where the government has unique control over access to religious resources. But that's no limitation at all. The government has unique control over *all* its resources. Every dollar bill in circulation was at one point owned and "uniquely controlled" by the government—after all, the government alone prints legal tender. So if a religious observer sincerely believes he needs a government resource to exercise his

religion, including cash, the dissent's "unique control" principle offers no practical limitation on what resources the government may need to give the religious observer. Arbitrarily carving out government favors for a religion that requires specific *real* property would invite discrimination against religions with different property needs.[14]

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[14] So to recap: I not only think it would badly misinterpret RFRA to revise it the way the dissent does (Part I above), but I also think it would be a bad idea that would necessarily force the government to discriminatorily pick religious winners and losers in the distribution of its largesse (this Part II). Judge Nelson does not dispute my prediction that it would result in discrimination, but instead disputes my premise that such discrimination would be odious to the promise of religious liberty contained in both RFRA and the Constitution's religion clauses.

That surprises me. Since long before *Smith* was decided, it has been a bedrock principle of American religious liberty law that the government "cannot prefer one religion over another." *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). With that time-honored principle in mind, I'm not sure what Judge Nelson is suggesting in his three hypotheticals. I would think it is beyond dispute that the government cannot discriminate by allowing a devout Muslim prisoner to grow a beard for religious reasons while disallowing the same or a similar religious exception for devout Jewish or Native American prisoners. *See, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005); *Sprouse v. Ryan*, 346 F. Supp. 3d 1347 (D. Ariz. 2017). Is Judge Nelson seriously contending we could require a religious zoning exemption for a Catholic cathedral to build a 100-foot steeple, yet deny a mosque across the street the same exemption to build a 100-foot minaret? And does anyone seriously believe that a school-choice program that gave voucher money to Catholic schools but not Lutheran schools would pass constitutional muster?

It has taken too long for the Supreme Court to recognize that discrimination against religion vis-à-vis supposedly "secular" counterparts is constitutionally problematic. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712 (2004). But there has always been widespread acceptance that discrimination *between* religions is repugnant to the Constitution.

D. The dissent further encourages discrimination by reading a reparations theory into RFRA.

Ultimately, none of the distinctions either explicitly or implicitly relied on by the dissent to rationalize its rewrite of RFRA have any basis in its text or original meaning. So what might better explain the result the dissent would prefer this court to reach? It appears that, buttressed by the argument of academics who appeared as amici in this case, what the dissent is really advocating for is what might best be called a reparations version of RFRA. *See* Stephanie H. Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294 (2021).

Under this "reconceptualized" and "alternative" theory of RFRA, Native Americans have a special historical and religious need for government-owned land because that land once belonged to them. As the academics explain, because the ancestors of Native Americans were mistreated and their land was taken, RFRA (and other laws) should be re-read to give current tribal members "unique" access to federal land. *Id.* at 1297–1303. Whatever the merits of these academic arguments, this court rightly declined to rewrite RFRA in service to them. If Native Americans are going to get unique protection of their religious exercise, they need to obtain it from Congress, not ask the courts to pretend they already got it from Congress.

i. Amici's reparations theory of RFRA has no basis in RFRA.

For starters, the academic argument motivating the dissent's approach has no basis in the text or original meaning of RFRA, nor does it pretend to. The scholars pushing their theory openly acknowledge that courts have historically interpreted RFRA and the Free Exercise Clause

to the contrary, *id.* at 1297, and that their approach requires courts to "recontextualize the way in which the law … view[s] coercion"—and thus what constitutes a burden—under RFRA, *id.* at 1302. Boiled down, theirs is a reparations theory of religious liberty for Native Americans, and Native Americans alone. Obviously, the reader will search RFRA in vain for any intergenerational theory of reparations, for Native Americans or otherwise. There is simply nothing in the text to that effect, and unsurprisingly, *nobody* at the time of RFRA's enactment thought it was providing some type of reparations benefit.

To overcome RFRA's obvious textual silence, these scholars try to draw an analogy from religious accommodations in inherently coercive contexts—namely, prisons. If this sounds familiar, that's because it's the same analogy suggested by the dissent, which asserts that the transfer of Oak Flat "prevents the Apaches from practicing their religious beliefs … just as would an outright ban or religious worship … in prison." They correctly observe that the reason religious inmates are entitled to receive government property in prison to practice their religions under RLUIPA is because of the inherently coercive environment of prison. *Id.* at 1333. Just as prisons are under exclusive government control, the argument goes, many sites sacred to Native Americans are under exclusive government control, and therefore the government should more proactively give its property to indigenous persons to offset the coercion suffered by their ancestors when the government took their land in the first place. *Id.* at 1339–43.

It's an interesting academic theory, and not one entirely devoid of moral force. But as already noted, nothing shows that Congress was attempting to do *anything* reparations-related when it passed RFRA. Even assuming the coercive

removal of Native Americans from their lands can be analogized in some way to the coercion experienced by prison inmates, direct and immediate coercion is entirely different from ancestral coercion. The religious liberty of an inmate is directly and immediately implicated by the extreme version of coercion the government has imposed *on that inmate*. In contrast, the "reconceptualized" version of coercion relied on by the scholars' attempted rewrite of RFRA is the governmental coercion of the *ancestors* of present-day Native Americans. This reparations-based theory is not entirely different from saying the Fourth Amendment should be applied specially to modern-day African Americans because of the lingering effects of slavery. Again, regardless of whether the theory has any merit, the idea that RFRA meant this when it was enacted in 1993 is entirely unfounded. RFRA was enacted to protect religious freedoms from current and future interference, not to turn back the clock and hunt for past burdens for which future religious devotees might be remunerated.

ii. To avoid discrimination, a reparations theory of RFRA would entitle a wide variety of religions to government handouts.

But that isn't the only problem with a reparations theory of RFRA. Even assuming that religious reparations for ancestral coercion were somehow legitimate, what is the limiting principle? Should every religious person who can plausibly claim ancestral discrimination be entitled to religious reparations? RFRA is supposed to be generally applicable to protect all religions, so surely if reparations for government-sanctioned ancestral coercion of Native Americans are available under RFRA, they should also be available to others. Native Americans are not the only recipients of past government-imposed or government-

allowed mistreatment arguably affecting their modern-day religious exercise. Indeed, if the dissent's reparations theory of RFRA were ever adopted, one could expect swaths of religious claimants to line up for government benefits, each carrying the historical pedigree of discrimination against their respective religious tradition in tow.

Baptists in colonial Virginia were horsewhipped and their ministers were imprisoned when the Church of England enjoyed a monopoly there.[15] Catholics were deprived of their political and civil rights at various times in all thirteen colonies,[16] antebellum mobs burned down their churches and occasionally massacred them,[17] and efforts to ratify a constitutional amendment designed to clamp down on their parochial schools—the "Blaine Amendment of 1870"—gained widespread traction after the Civil War.[18] Mormons

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[15] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421–23 (1990).

[16] Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 42 (1985).

[17] *E.g.*, Sydney E. Ahlstrom, *A Religious History of the American People* 561 (2d ed. 2004) (describing anti-Catholic riots in Boston), 563 (describing riots in Philadelphia and New York), 1090 (In the United States, "Catholics were subjected to disabilities, intolerance, and violence from the earliest times."); Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* 451 (2005); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L.J. 1085, 1118–20 (1995) (describing a massacre of Catholics in Kentucky).

[18] *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) ("The Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have similarly shameful pedigree.")); *see* Richard White, *The Republic for Which It Stands: The United States During*

were violently expelled from Missouri in 1838,[19] denied the right to vote in Idaho in the 1880s,[20] and had their settlements in Utah undercut by the federal government in favor of Native Americans.[21] The first Jews to arrive in the colonies were nearly expelled because of their religion,[22] Ulysses S. Grant's notorious "General Orders No. 11" expelled Jews from defeated Confederate territories,[23] and "anti-Semitism began to grow virulent as soon as the Jewish immigration rate started to rise during the 1880s."[24] And of course, one could surely argue that some African Americans today continue to experience the lingering effects of slavery and segregation as resource constraints on the uninhibited exercise of their religion.[25] Black churches were

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Reconstruction and the Gilded Age, 1865–1896, at 317–21, *in* 7 Oxford Hist. of the United States (David M. Kennedy ed. 2017). *See generally* John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 301–05 (2001).

[19] *See, e.g.*, Marie H. Nelson, *Anti-Mormon Mob Violence and the Rhetoric of Law and Order in Early Mormon History*, 21 Legal Stud. F. 353, 358–73 (1997).

[20] *Davis v. Beason*, 133 U.S. 333, 345–48 (1890), *overruled by Romer v. Evans*, 517 U.S. 620, 634 (1996).

[21] *See Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 772–73 (1993).

[22] Eli Faber, *America's Earliest Jewish Settlers, 1654–1820*, at 25, *in* The Columbia Hist. of Jews and Judaism in Am. (Marc Lee Raphael ed. 2008).

[23] *See, e.g.*, Eric Muller, *All the Themes but One*, 66 U. Chi. L. Rev. 1395, 1420–24 (1999).

[24] Ahlstrom, *supra*, at 973–74, 1090.

[25] *See, e.g.*, *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 759–60 (7th Cir. 2006); *Cato v. United States*, 70 F.3d 1103, 1105–06, 1109–11 (9th Cir. 1995); *see also* Margaret Russell, *Cleansing*

sporadically suppressed by Southern states before the Civil War,[26] Bull Connor arrested congregants by the busload as they left the safety of the sanctuary to march for equal rights in the streets,[27] and some of the church buildings they left behind were bombed in their absence.[28]

History is replete with examples of the mistreatment of groups of people by other groups, and this nation's history is unfortunately not exempt. Given this reality, it's unclear why the reparations theory of RFRA offered by the dissent would stop with Native Americans and not extend to Baptists, Catholics, Mormons, Jews, and descendants of slaves, to name but a few possible groups.

Regardless of the philosophical arguments for and against reparations, RFRA was not designed to create reparations for *any* aggrieved religious group. There is zero legal or textual basis for reading such a program into RFRA. If reparations are ever to come from any source, it must be from Congress, not the courts. And until Congress enacts religious reparations for Native Americans, courts should

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Moments and Retrospective Justice, 101 Mich. L. Rev. 1225, 1240 (2003).

[26] Steven Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* 45 (2003).

[27] Taylor Branch, *Pillar of Fire: America During the King Years 1963–65* 77 (1998).

[28] *Id.* at 137–38; *see also Church Fires in the Southeast: Hearing Before the H. Comm. on the Judiciary*, 104th Cong. 9–13 (1996) (statement of Donald L. Payne, Representative in Congress from the State of New Jersey, summarizing church burning incidents under criminal investigation in 1995–1996 in the Southeast states). *See generally* S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 Calif. L. Rev. 471 (2008).

studiously avoid inventing such remedies under the auspices of RFRA, a statute designed to protect religious liberty for *all*. RFRA does not play favorites, and neither should we. For these reasons, I wholeheartedly agree with the majority's refusal to rewrite RFRA to include an affirmative mandate to discriminate.

MURGUIA, Chief Judge, dissenting, with whom GOULD, BERZON, and MENDOZA, Circuit Judges, join, and LEE, Circuit Judge, joins as to all but Part II.H:

We are asked to decide whether the utter destruction of *Chí'chil Biłdagoteel*, a site sacred to the Western Apaches since time immemorial, is a "substantial burden" on the Apaches' sincere religious exercise under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to bb-4. Under any ordinary understanding of the English language, the answer must be yes. This conclusion comports with the First Amendment's protection against government conduct prohibiting the free exercise of religion, because the destruction of the Apaches' sacred site will prevent worshipers from ever again exercising their religion. *See* U.S. Const. amend. I.

Our decision in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), wrongly defined "substantial burden" as a narrow term of art and foreclosed any relief. Although a majority of this en banc court rejects *Navajo Nation*'s reasoning, *see* Nelson Op. at 130; Collins Op. at 51–52 (no mention of *Navajo Nation* while recognizing that in certain instances "substantial burden" under RFRA can be read by its plain meaning), a different majority concludes that the Apaches' RFRA claim

fails under *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Relying on *Lyng*, Judge Collins' majority opinion ("the majority") holds that the destruction of a sacred site cannot be described as a substantial burden no matter how devastating the impact on religious exercise, erroneously concluding that preventing a religious practice is neither prohibitory nor coercive. In so doing, the majority misreads RFRA, Supreme Court precedent, and our own case law. And rather than using the rare opportunity of sitting en banc to provide clarity, the majority leaves litigants in the dark as to what "substantial burden" means. I respectfully dissent.

I. Background

In a rider to a must-pass defense spending bill, Congress directed the Secretary of Agriculture to transfer 2,422 acres of federal land to Resolution Copper Mining, a foreign-owned limited liability company, to build an underground copper mine. The copper ore is located beneath *Chí'chil Biłdagoteel*, also known as Oak Flat, a sacred place where Western Apache people have worshiped and conducted ceremonies since time immemorial.[1] Once the land transfer occurs, Resolution Copper will mine the ore through a panel caving process, causing the land to subside and eventually creating a crater nearly two miles wide and a thousand feet deep. It is undisputed that this subsidence will destroy the Apaches' historical place of worship, preventing them from ever again engaging in religious exercise at their sacred site.

[1] Western Apache generally refers to the Apaches living in modern day Arizona, including ancestors of the White Mountain, San Carlos, Cibecue, and Tonto Apache.

The land transfer, however, is subject to RFRA. Congress enacted RFRA to protect the right to engage in religious practice without substantial government interference, which "the framers of the Constitution" understood "as an unalienable right." 42 U.S.C. § 2000bb(a)(1). Thus, under RFRA, the federal government must provide a "compelling" justification pursued by the least restrictive means for any action that "substantially burden[s]" sincere religious exercise. *Id.* § 2000bb-1(b). Apache Stronghold, an Arizona nonprofit organization founded by a former Chairman of the San Carlos Apache Tribe to preserve Indigenous sacred sites, sued to enjoin the land transfer, arguing that, among other things, it violates RFRA. The district court, relying on our decision in *Navajo Nation*, declined to preliminarily enjoin the transfer, concluding that the destruction of Oak Flat did not amount to a substantial burden on the Apaches' religious exercise. The district court therefore did not determine whether the government had provided sufficient justification for the land transfer.

Because the land transfer will prevent Apache worshippers from engaging in sincere religious exercise at their sacred site, I would hold that Apache Stronghold is likely to succeed in establishing that the government has imposed a "substantial burden" on the Apaches' religious exercise. Such a holding stems from the Supreme Court's jurisprudence before and after the enactment of RFRA, as well as our own case law, which have long recognized that preventing people from engaging in religious exercise impermissibly burdens that exercise. And such a decision reflects the government's unique control of access to Oak Flat, a degree of control that is rare outside the prison and land-use context. I would therefore reverse the district

court's order concluding that there is no substantial burden, vacate the rest of the order, and remand to the district court to determine whether the government can demonstrate that the substantial burden posed by the land transfer is justified under subsection 2000bb-1(b).

A. Oak Flat and the Land Transfer

The Western Apache believe that their ancestral landscape is imbued with *diyah*, or spiritual power. This is especially true for *Chí'chil Biłdagoteel*, which means "Emory Oak Extends on a Level" or "Flat with Acorn Trees" or more simply "Oak Flat," a 6.7-square-mile sacred site located primarily in the Tonto National Forest. Oak Flat is situated between *Ga'an Bikoh* (Devil's Canyon), a canyon east of Oak Flat, and *Dibecho Nadil* (Apache Leap), the edge of a plateau west of Oak Flat.

Oak Flat, Devil's Canyon, and Apache Leap comprise a hallowed area where the Apaches believe that the *Ga'an*—the "guardians" and "messengers" between *Usen*, the Creator, and people in the physical world—dwell. *Usen* created the *Ga'an* as "the buffer between heaven and earth" and created specific "blessed places" for the *Ga'an* to reside. The *Ga'an* are "the very foundation of [Apache] religion," and they protect and guide the Apache people. The Apaches describe the *Ga'an* as their "creators, [their] saints, [their] saviors, [and their] holy spirits."

Through *Usen* and the *Ga'an*, the Apaches believe that everything has life, including air, water, plants, animals, and *Nahagosan*—Mother Earth herself. The Apaches strive to remain "intertwined with the earth, with the mother" so they can "communicate with what [is] spiritual, from the wind to the trees to the earth to what [is] underneath." Because of the importance of remaining connected to the land, the

Apaches view Oak Flat as a "direct corridor" to their Creator's spirit and as the place where the *Ga'an* "live and breathe." Oak Flat is thus "uniquely endowed with holiness and medicine," and neither "the powers resident there, nor [the Apaches'] religious activities . . . can be 'relocated.'"

The *Ga'an* come "to ceremonies to impart well-being to" the Apaches "to heal, and to help the people stay on the correct path." Oak Flat thus serves as a sacred ceremonial ground, and these ceremonies cannot take place "anywhere else." For instance, young Apache women have a coming-of-age ceremony, known as a "Sunrise Ceremony," in which each young woman will "connect her soul and her spirit to the mountain, to Oak Flat." Similarly, "young boys that are coming into manhood" have a sweat lodge ceremony at Oak Flat. There, the Apaches also conduct a Holy Grounds Ceremony, which is a "blessing and a healing ceremony . . . for people who are sick, have ailments[,] or seek guidance." The Apaches gather "sacred medicine plants, animals, and minerals essential to [these] ceremonies" from Oak Flat, and they use "the sacred spring waters that flow[] from the earth with healing powers" that are not present elsewhere. "Because the land embodies the spirit of the Creator," if the land is desecrated, then the "spirit is no longer there. And so without that spirit of *Chí'chil Biłdagoteel*, [Oak Flat] is like a dead carcass." *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 604 (D. Ariz. 2021).

The Apaches have held Oak Flat sacred since long before the United States government and its people ventured west of the Rio Grande. The Apaches, however, were dispossessed from their ancestral land during the nineteenth century, when miners and settlers moved west and clashed repeatedly with the local Apaches. To make peace, various Apache leaders signed the Treaty of Santa Fe in 1852,

wherein the United States government promised the Apaches that it would "designate, settle, and adjust their territorial boundaries" and "pass and execute" laws "conducive to the prosperity and happiness of" their people. Despite the treaty, conflict continued as more settlers, miners, and United States soldiers entered the Apaches' ancestral land, resulting in several massacres of the Apaches by soldiers and civilians. By the late 1870s, the United States government forcibly removed the Apaches from their ancestral homelands and onto reservations, so that today, the Apaches no longer live on lands encompassing their sacred places. Nonetheless, the Apaches "remain connected to their spirituality" and "the earth," and they continue to come to Oak Flat to worship, conduct ceremonies, sing and pray, and gather sacred plants. *Apache Stronghold*, 519 F. Supp. 3d at 603–04.

In the twentieth century, the United States government took steps to protect Oak Flat from mining activity. In 1955, President Eisenhower reserved 760 acres of Oak Flat for "public purposes" to protect it from mineral exploration or other mining-related activities. 20 Fed. Reg. 7319, 7336–37 (Oct. 1, 1955). President Nixon renewed that protection in 1971. 36 Fed. Reg. 18,997, 19,029 (Sept. 25, 1971). That approach changed in 1995, after miners discovered a large copper deposit 7,000 feet beneath Oak Flat. The following decades saw several congressional attempts to transfer Oak Flat to Resolution Copper. Those efforts reached fruition in 2014, when Congress passed the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014) ("NDAA"). The NDAA included a rider that stripped Oak Flat's mining protections and "authorized and directed" the Secretary of Agriculture to convey 2,422 acres of federal land, including Oak Flat, to Resolution Copper in exchange

for 5,344 acres of Arizona land currently owned by the company. *See id.* § 3003, 128 Stat. 3292 (codified at 16 U.S.C. § 539p) (the "Land Transfer Act").[2] Congress's stated purpose for authorizing the exchange is to "carry out mineral exploration activities under" Oak Flat. 16 U.S.C. § 539p(c)(6)(A)(i).

Under the Land Transfer Act, the Secretary of Agriculture must prepare an environmental impact statement ("EIS") before the land transfer may take place. *See id.* § 539p(c)(9)(B).[3] This EIS will "be used as the basis for all" federal government decisions "significantly affecting the quality of the human environment," including permitting necessary for any development of the transferred land. *Id.* The EIS must "assess the effects of the mining and related activities on the Federal land conveyed to Resolution Copper under [the Land Transfer Act] on the cultural and archeological resources that may be located on [that] land" and "identify measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources." *Id.* § 539p(c)(9)(C). Within sixty days of the Final EIS's publication, and regardless of its contents, "the Secretary shall convey" the land to Resolution Copper. *Id.* § 539p(c)(10).

In January 2021, the Forest Service, a division of the Department of Agriculture, issued an EIS, which has since

[2] The 2,422-acre tract is known as the "Oak Flat Federal Parcel," and includes the 760-acre section of land originally protected by President Eisenhower in 1955 (known as the "Oak Flat Withdrawal Area") as well as additional National Forest Service lands near Oak Flat. The copper deposit sits primarily beneath the Oak Flat Withdrawal Area.

[3] The Land Transfer Act is subject to several other conditions not at issue here. *See, e.g.*, 16 U.S.C. § 539p(c)(2)(A), (B).

been withdrawn. In that EIS, the Forest Service concluded that the land transfer would remove Oak Flat from the Forest Service's jurisdiction, making the Forest Service unable to "regulate" the mining activity under applicable environmental laws. The Forest Service found that the mine would be "one of the largest" and "deepest" "copper mines in the United States," with an estimated 1,970 billion metric tons of copper situated 4,500 to 7,000 feet beneath Oak Flat. Resolution Copper will use an underground mining technique known as panel caving that carves a network of tunnels below the ore. As the ore is removed, the land above the ore "moves downward or 'subsides.'" This "subsidence zone" or crater will reach between 800 and 1,115 feet deep and nearly two miles wide. The crater would start to appear within six years of active mining. The crater and related mining activity will have a lasting impact on the land of approximately eleven square miles. The Forest Service "assessed alternative mining techniques in an effort to prevent subsidence, but alternative methods were considered unreasonable."

As a result of the crater, the Forest Service determined that "access to Oak Flat and the subsidence zone will be curtailed once it is no longer safe for visitors." The Forest Service therefore concluded that the mine would cause "immediate, permanent, and large in scale" destruction of "archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources."[4] Oak Flat would "be permanently affected," and tribal members would

[4] Removing the ore will also create roughly one-and-a-half billion tons of waste that will need to be stored "in perpetuity" at a site close to Oak Flat. The Forest Service determined that development of the storage facility will "permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, potentially including human burials."

irreversibly lose access to the area for "religious purposes," thus resulting in "an indescribable hardship to [Indigenous] peoples." "[T]he impacts of the Resolution Copper [mine] . . . are substantial and irreversible due to the changes that would occur at Oak Flat." The Forest Service also found that there are no mitigation measures that could "replace or replicate the historic properties that would be destroyed by project construction. . . . Archaeological sites cannot be reconstructed once disturbed, nor can they be fully mitigated."

In March 2021, the Department of Agriculture ordered the Forest Service to rescind the EIS. The Department explained that the government needed "additional time" to "fully understand concerns raised by Tribes and the public" and to "ensure the agency's compliance with federal law." While counsel for the government informed the en banc panel at oral argument in March 2023 that the environmental analysis would be completed and the EIS republished by the summer, the Forest Service has not yet issued a revised Final EIS.

B. Procedural History

Apache Stronghold filed this action several days before the government issued the now-withdrawn EIS.[5] As

[5] Besides this case, there are two other pending cases seeking to prevent the land transfer. In January 2021, the San Carlos Apache Tribe sued the Forest Service to stop the land transfer under RFRA, the Free Exercise Clause, and the 1852 Treaty of Santa Fe, and moved to vacate the now withdrawn EIS as deficient under the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), the Land Transfer Act, and the National Historic Preservation Act. *See San Carlos Apache Tribe v. U.S. Forest Serv.*, No. 21-cv-0068 (D. Ariz.). Also in January 2021, a coalition of environmental and tribal groups sued the Forest Service to enjoin the land transfer and vacate the EIS as deficient

relevant on appeal, Apache Stronghold alleges that the Land Transfer Act violates RFRA, the First Amendment's Free Exercise Clause, and trust duties created by the 1852 Treaty of Santa Fe. Two days after filing its complaint, Apache Stronghold filed a motion for a temporary restraining order and for a preliminary injunction to prevent the government from transferring the land to Resolution Copper. The district court denied the temporary restraining order, reasoning that Apache Stronghold could not show immediate and irreparable injury. *Apache Stronghold*, 519 F. Supp. 3d at 597.

The district court then held a hearing and took evidence before denying Apache Stronghold's motion for a preliminary injunction. *Id.* at 611. The district court found that Apache Stronghold was unlikely to succeed on the merits of its RFRA, Free Exercise Clause, and breach of trust claims. *See id.* at 598–609. As to the RFRA claim, the district court concluded that although the "Government's mining plans on Oak [Flat] will have a devastating effect on

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under the APA, NEPA, the Land Transfer Act, the Forest Service Organic Act, the Federal Land Policy and Management Act, and other statutory grounds. *See Ariz. Mining Reform Coal. v. U.S. Forest Serv.*, No. 2:21-cv-0122-DLR (D. Ariz.). Resolution Copper intervened in both cases, and the Defendants moved to consolidate all three cases. The district court in this case denied that motion, concluding that "there is minimal overlap in controlling questions of law between the pending cases" given the different legal theories advanced by the three plaintiffs.

The parties agreed to stay both cases after the Forest Service withdrew its original EIS. *See San Carlos Apache Tribe*, No. 21-cv-0068 (D. Ariz. Mar. 15, 2021); *Ariz. Mining Reform Coal.*, No. 21-cv-0122 (D. Ariz. Mar. 15, 2021). Those cases remain stayed, and the parties have filed regular joint status reports. The government has stated that it will give the defendants sixty days' notice prior to filing an updated Final EIS. As of now, that notice has not been given.

the Apache people's religious practices," there was no "substantial burden" under this circuit's limited definition of that term. *Id.* at 605–08 (citing *Navajo Nation*, 535 F.3d at 1063–72). The district court therefore did not determine whether the government could establish a compelling interest to justify its actions, nor did the district court analyze the other preliminary injunction factors under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). *See Apache Stronghold*, 519 F. Supp. 3d at 611. Apache Stronghold appealed, and moved for an injunction pending appeal.

After the district court denied Apache Stronghold's preliminary injunction motion, the Forest Service withdrew the Final EIS. The three-judge motions panel that considered Apache Stronghold's motion for an injunction pending appeal therefore concluded that Apache Stronghold had failed to show that it needed immediate relief to "avoid irreparable harm," because the Forest Service expected to take "months" to complete its revised environmental review and the land transfer would not occur until then. *Apache Stronghold v. United States*, No. 21-15295, 2021 U.S. App. LEXIS 6562, at *2 (9th Cir. March 5, 2021) ("Injunction Order"). Accordingly, the divided motions panel denied Apache Stronghold's motion. *Id.* In dissent, Judge Bumatay stated that he would have granted the motion and held that the land transfer violated RFRA because "the complete destruction of the land . . . . is an obvious substantial burden on [the Apaches'] religious exercise, and one that the Government has not attempted to justify." *Id.* at *5 (Bumatay, J., dissenting).

On the merits, a divided three-judge panel affirmed the district court's order. *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022). We granted rehearing en banc.

Apache Stronghold v. United States, 56 F.4th 636 (9th Cir. 2022).[6]

II. Discussion

In *Winter*, the Supreme Court emphasized that injunctive relief, whether temporary or permanent, is an "extraordinary remedy never awarded as of right." 555 U.S. at 24. A party seeking a preliminary injunction must show that: (1) it is "likely to succeed on the merits"; (2) it is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [its] favor"; and (4) "an injunction is in the public interest." *Id.* at 20. "Where, as here, the government opposes a preliminary injunction, the third and fourth factors merge into one inquiry." *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021).

The district court concluded that Apache Stronghold could not establish a likelihood of success on any of its three claims, so it denied the motion for a preliminary injunction. *See Apache Stronghold*, 519 F. Supp. 3d at 598–609. Because I conclude that *Navajo Nation*'s reasoning is incorrect and because I would hold that preventing a person from engaging in sincere religious exercise is a substantial burden under RFRA, I would reverse and remand. I would therefore consider neither the other two claims nor the remaining *Winter* factors. Finally, I conclude that RFRA applies to the Land Transfer Act. Because a majority of judges have voted to affirm, I respectfully dissent.

[6] After oral argument, Resolution Copper intervened in this case before the district court, as well as before this court, for the limited purpose of participating in potential future litigation before the Supreme Court.

A. RFRA and the Religious Land Use and Institutionalized Persons Act

In RFRA, Congress crafted a statutory right to the free exercise of religion broader than the corresponding constitutional right delineated by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court held that the First Amendment tolerates neutral, generally applicable laws even when those laws burden or prohibit religious acts. *Id.* at 885–90. The Supreme Court explained that so long as the government's burden on religious exercise, even if substantial, was not the "object of" a law, "the First Amendment has not been offended" and the government need not demonstrate a narrowly tailored, compelling governmental interest to justify it. *Id.* at 878–79; *see also id.* at 886 n.3 ("[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.").

In response, in 1993, Congress enacted RFRA. Congress disagreed with the Supreme Court's decision in *Smith* to "virtually eliminate[] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Instead, Congress found that "the framers of the Constitution[] recogniz[ed the] free exercise of religion as an unalienable right," and that governments, therefore, "should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(1), (3). Congress further determined that "the compelling interest test"—*i.e.*, strict scrutiny—"is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5); *see Gonzales v. O Centro*

Espírita Beneficente Uniaõ do Vegetal, 546 U.S. 418, 430 (2006). Congress then stated that RFRA's two "purposes" were (1) "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened," and (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). RFRA therefore goes "far beyond what . . . is constitutionally required" under the Free Exercise Clause, and thus "provide[s] very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014); *see Ramirez v. Collier*, 595 U.S. 411, 424 (2022).

Four years later, however, the Supreme Court struck down the portion of RFRA regulating state and local governments, concluding that Congress had exceeded its power under § 5 of the Fourteenth Amendment to regulate states. *City of Boerne v. Flores*, 521 U.S. 507, 511, 536 (1997). To repair RFRA's constitutional defect, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 803, 42 U.S.C. §§ 2000cc to cc-5, "which applies to the States and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). Recognizing their history and overlapping purposes, the Supreme Court has characterized RLUIPA and RFRA as "sister statute[s]" that "impose[] the same general test," distinguished only in that they apply to different "categor[ies] of governmental actions." *Hobby Lobby*, 573 U.S. at 695, 730. In contrast to RFRA's more general application to all federal government action, including federal prisons and federal land-use regulations by the

District of Columbia or U.S. territories, *see* 42 U.S.C. §§ 2000bb-1, 2000bb-3, RLUIPA governs only state land-use regulations, *see id.* § 2000cc, and religious exercise by institutionalized persons, typically in the state prison context, *see id.* § 2000cc-1. RLUIPA otherwise generally "mirrors RFRA." *Holt*, 574 U.S. at 357–58; *compare* 42 U.S.C. § 2000cc-1(a) (providing that a "substantial burden" in the state prison context must be justified by a compelling governmental interest pursued through the least restrictive means); *with id.* § 2000bb-1(b) (same test for federal government action).

B. Defining "Substantial Burden"

i. Plain Meaning

With that background in mind, I turn to Apache Stronghold's claim that the government will violate RFRA by transferring Oak Flat to Resolution Copper, which will result in the destruction of the Apaches' place of worship. Under RFRA, the federal government may not "substantially burden a person's exercise of religion . . . except as provided in subsection (b)." 42 U.S.C. § 2000bb-1(a). Subsection (b) provides that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). Thus, to proceed with its RFRA claim, Apache Stronghold must show that (i) its sincere religious exercise is (ii) subject to a substantial burden imposed by the government. If Apache Stronghold makes that showing, the government must then justify that burden by demonstrating that (iii) it has a compelling interest that (iv) it is pursuing through the least restrictive means.

As to the Apaches' religious exercise, the district court found, and the government does not dispute, that the Apaches have a sincere religious belief in worshipping and conducting ceremonies at Oak Flat. *See Apache Stronghold*, 519 F. Supp. 3d at 603; *see also* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (defining the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief").[7] Because the government concedes that "it is undisputed that RFRA applies to federal land-management statutes and their implementation," on appeal, we must determine whether the transfer and resulting destruction of Oak Flat constitutes a substantial burden on the Apaches' religious exercise.

To define "substantial burden," I begin with RFRA's text. *Tanzin v. Tanvir*, 592 U.S. 43, 46 (2020); *Williams v. Taylor*, 529 U.S. 420, 431 (2000). Because RFRA does not define "substantial burden," I "turn to the phrase's plain meaning at the time of enactment." *Tanzin*, 592 U.S. at 48; *see also FCC v. AT & T Inc.*, 562 U.S. 397, 403 (2011). Indeed, when grappling with RFRA's undefined terms, the Supreme Court has done just that. *Tanzin*, 592 U.S. at 45–49 (looking to RFRA's plain meaning, using dictionaries, to conclude that "appropriate relief" encompasses claims for money damages against government officials in their individual capacities).

[7] RFRA appropriately does not permit courts to judge the significance or "centrality" of a particular belief or practice, given that courts are not the proper arbiters of religious doctrine. *See* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Courts can only inquire into the sincerity of the professed religiosity. *See Hobby Lobby*, 573 U.S. at 696, 717 n.28; *cf. Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005).

At the time of RFRA's passage, a "burden" was defined as "[s]omething oppressive" or "anything that imposes either a restrictive or onerous load" on an activity. *Burden*, *Black's Law Dictionary* (6th ed. 1990); Webster's Third New International Dictionary 298 (1986) (defining burden as "something that weighs down [or] oppresses"). A burden is "substantial" if it is "[o]f ample or considerable amount, quantity, or dimensions." *Substantial*, *Oxford English Dictionary* 66–67 (2d ed. 1989). And "substantial" does not mean complete or total. *Substantial*, *Black's Law Dictionary* (6th ed. 1990) (defining "substantial" as something "considerable"; not "nominal"). In light of the plain meaning of substantial burden, therefore, RFRA prohibits government action that "oppresses" or "restricts" "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," to a "considerable amount," unless the government can demonstrate that imposition of the burden is in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. *Accord* Injunction Order, 2021 U.S. App. LEXIS 6562, at *8–9 (Bumatay, J., dissenting).

ii. *Navajo Nation*'s Flawed Reasoning

Our decision in *Navajo Nation*, relied upon by the district court, rejected a plain meaning reading of "substantial burden." There, Native American tribes and their members sought to enjoin the use of artificial snow, made from recycled wastewater, on a public mountain sacred to their religion. *Navajo Nation*, 535 F.3d at 1062–63. This court concluded that using artificial snow was not a substantial burden under RFRA, because "the sole effect of the artificial snow is on the Plaintiffs' *subjective* spiritual experience." *Id.* at 1063, 1070 (emphasis added). Aside from holding that

subjective interference with religious exercise is not a substantial burden under RFRA, *Navajo Nation* also concluded that because Congress "incorporated" *Sherbert* and *Yoder* into RFRA, the only two categories of burden that could constitute a "substantial burden" are the specific types of burdens at issue in those cases. 535 F.3d at 1069–70; *see also id.* at 1063. *Navajo Nation* therefore held:

> Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.

Id. at 1069–70. This is erroneous for six reasons.

First, *Navajo Nation* made too much of the fact that RFRA explicitly mentions *Sherbert* and *Yoder* by name in explaining the statute's purpose. *See* 535 F.3d at 1074–75. Reading "substantial burden" by its plain language is fully consistent with RFRA's statements of purpose. Congress explained that RFRA's two "purposes" are (1) "to restore the compelling interest test as set forth in *Sherbert* and *Yoder*[,] *and* to guarantee its application in *all* cases where free exercise of religion is substantially burdened," *and* (2) "to provide a claim or defense to persons whose religious

exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b) (emphasis added) (citations omitted). Section 2000bb(b) thus links *Sherbert* and *Yoder* to the "compelling interest test," *not* to the "substantial burden" inquiry. *See* 42 U.S.C. § 2000bb(b) (not mentioning *Sherbert* or *Yoder* in RFRA's second purpose). Consonant with the statute's purposes, the Supreme Court has recognized that "RFRA expressly adopted the *compelling interest* test 'as set forth in *Sherbert* and *Yoder*.'" *Gonzales*, 546 U.S. at 431 (quoting 42 U.S.C. § 2000bb(b)(1) (emphasis added) (citations omitted)). "In each of those cases, [the] Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Id.*

In other words, when enacting RFRA, Congress was focused on governments' *justifications* for burdens on religious exercise created by generally applicable laws—the requirement present in *Sherbert* and *Yoder* that *Smith* eliminated—not the definition of substantial burden. Justice O'Connor, concurring only in the judgment in *Smith*, made this point when she critiqued the *Smith* majority for dropping the "*Sherbert* compelling interest test" and argued that "[r]ecent cases have instead affirmed that [*compelling interest*] *test* as a fundamental part of our First Amendment doctrine. The cases cited by the [majority] signal no retreat from our consistent adherence to the *compelling interest test*." *Smith*, 494 U.S. at 898, 900 (O'Connor, J., concurring in the judgment) (emphasis added) (cleaned up). Justice O'Connor notably did not describe the test as the "*Sherbert* substantial burden test," because her disagreement with the *Smith* majority was not with the meaning of substantial burden but with the *level of scrutiny*. And the *Smith* majority

never defined substantial burden because it concluded the *Sherbert* test was entirely "inapplicable" in cases challenging neutral, generally applicable laws. *See id.* at 884–85.

Second, neither *Sherbert* nor *Yoder* contains the term "substantial burden." It would therefore be surprising for Congress to invoke an interpretation of a purported term of art by referencing two cases, neither of which uses the term. *See Sherbert*, 374 U.S. at 406 ("substantial infringement"); *Yoder*, 406 U.S. at 220 ("unduly burdens"). *Navajo Nation*'s argument that "substantial burden" is a term of art from the Supreme Court's pre-RFRA First Amendment jurisprudence makes little sense given that neither case includes that term. 535 F.3d at 1074. Indeed, the Supreme Court did not commonly or consistently use the term "substantial burden."

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, for example, decided just months before Congress enacted RFRA, the Court explained that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," without using the term "substantial burden." 508 U.S. 520, 546 (1993). If "substantial burden" truly was a term of art, then one would expect consistent usage. *See Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2445 (2021) ("Ordinarily . . . this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption.").

In looking to the term's plain meaning, I do not ignore the significance of RFRA mentioning *Sherbert* and *Yoder* by name. But rather than implausibly reading "substantial burden" as a term of art shackled to *Sherbert* and *Yoder*, I rely on those cases—along with other "Federal court

rulings," 42 U.S.C. § 2000bb(a)(5)—to properly situate "substantial burden" within RFRA. *See infra* § II(D). And it would unreasonably contort the English language to read "substantial burden" to exclude the utter destruction of sacred sites. "Because common sense rebels" at the majority's interpretation of RFRA, "we should not adopt that interpretation unless the statutory language compels us to conclude that Congress intended such a startling result." *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1341 (9th Cir. 2000) (Canby, J., dissenting).

Third, *Navajo Nation* (and the majority here) proceeds as if RFRA's coverage is identical to that of the Free Exercise Clause, frozen in time at the moment of the statute's enactment. But Congress amended RFRA in 2000 and repealed RFRA's previous definition of the "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." Pub. L. No. 103-141, § 5 (1993). As the Supreme Court explained: "[t]hat amendment deleted the prior reference to the First Amendment," and it is unclear "why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases." *Hobby Lobby*, 573 U.S. at 714. Congress also broadened the definition of "religious exercise" in two ways: it eliminated any requirement that a religious exercise be "compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc-5(7)(A), and it specified that "religious exercise" includes "[t]he use, building, or conversion of real property for the purpose of religious exercise," 42 U.S.C. § 2000cc-5(7)(B). The term "substantial burden" must therefore be construed in light of Congress's express direction that RFRA applies to the use of property for religious purposes. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439,

455 (1993) (explaining that statutory construction "is a holistic endeavor," so "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law" (quotation marks omitted) (cleaned up)). That Congress amended RFRA to expressly include religious use of property reinforces my conclusion that the denial of religious exercise at a sacred site is a substantial burden on religious exercise, contrary to the holding of *Navajo Nation*.

Fourth, considering this amendment to RFRA, and after *Navajo Nation*, the Supreme Court has rejected the notion that RFRA "merely restored [its] pre-*Smith* decisions in ossified form." *Hobby Lobby*, 573 U.S. at 715–16. Instead, the Court explained that "the amendment of RFRA through RLUIPA surely dispels any doubt" that Congress did not intend "to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases." *Id*. at 714; *see also id.* at 706 n.18 (explaining that there is "no reason to believe" that RFRA "was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases"). I therefore rely on pre-*Smith* cases for guidance only.

Fifth, and relatedly, as discussed in the next section, *Navajo Nation*'s choice to confine "substantial burden" to a term of art cannot stand in the face of the Supreme Court's directive that RFRA and RLUIPA impose "the same standard." *Holt*, 574 U.S. at 356–58 (quoting *Gonzales*, 546 U.S. at 436); *see also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019) (noting that courts do not "ordinarily imbue statutory terms with a specialized . . . meaning when Congress has not itself invoked" one).

Finally, instead of just answering the question before it, *Navajo Nation*'s decision to define substantial burden as a

narrow term of art swept too broadly. *Cf. City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) ("A broad holding . . . might have implications for future cases that cannot be predicted."). This case asks whether the utter destruction of a sacred site is a substantial burden. That is a fundamentally different question than the one *Navajo Nation* considered, because there, plaintiffs still had "*virtually unlimited access* to the mountain" to "continue to pray, conduct their religious ceremonies, and collect plants for religious use." *Navajo Nation*, 535 F.3d at 1063 (emphasis added); *see id.* (noting that nothing "with religious significance, or religious ceremonies . . . would be physically affected"). Because the *Navajo Nation* majority went to great lengths to emphasize that "no places of worship [were] made inaccessible," *id.*, *Navajo Nation* should not have adopted a rule that extends to cases where places of worship will be obliterated. And by adopting such a broad holding, it erred.

Accordingly, I would revise *Navajo Nation*'s definition of "substantial burden" to the extent that it defined that phrase as a term of art limited to the kinds of burdens at issue in *Sherbert* and *Yoder*. Rather, as discussed *infra* § II(D), the kinds of burdens challenged in *Sherbert* and *Yoder* are examples *sufficiently* demonstrating a substantial burden, not those *necessary* to do so.[8]

C. RFRA and RLUIPA Are Interpreted Uniformly

RLUIPA, RFRA's sister statute, supports my conclusion to define substantial burden by its plain meaning. RLUIPA's

[8] As reflected in the first paragraph of the per curiam opinion, a majority of this court has overruled *Navajo Nation*'s narrow test for a "substantial burden" under RFRA. I echo Judge Nelson's clear refutation of any suggestion to the contrary. *See* Nelson Op. at 135–38.

"substantial burden" test largely mirrors RFRA's test, and like RFRA, it does not define "substantial burden." *See* 42 U.S.C. §§ 2000cc, 2000cc-1, 2000cc-5(4)(A). So, as we did in *San Jose Christian College v. City of Morgan Hill*, I look to RLUIPA's plain meaning to interpret "a 'substantial burden' on 'religious exercise'" in the land-use context as "a significantly great restriction or onus upon such exercise." 360 F.3d 1024, 1034 (9th Cir. 2004); *id.* ("When a statute does not define a term, a court should construe that term in accordance with its ordinary, contemporary, common meaning." (quotation marks omitted)). Since then, we have relied on this plain meaning definition of substantial burden in other RLUIPA cases. *See, e.g.*, *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 988–89 (9th Cir. 2006); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011).[9]

That "substantial burden" has the same meaning under both RFRA and RLUIPA is a logical application of statutory construction for several reasons. First, it is significant that these two Title 42 statutes use the same "substantial burden" and "compelling interest" language. *See United States v. Nishiie*, 996 F.3d 1013, 1026 (9th Cir. 2021) ("When Congress uses the same language in two statutes having similar purposes," this Court starts with the "presum[ption]

[9] Dictionaries contemporaneous with the enactments of RFRA and RLUIPA define "substantial" synonymously as either a "considerable" or a "significant" amount. To the extent there is any semantic difference, I conclude that the meaning of "substantial" is the same under both statutes, particularly given that RLUIPA was meant to restore part of RFRA's original reach. *See Holt*, 574 U.S. at 357–58 (RLUIPA "mirrors RFRA"); *Gonzales*, 546 U.S. at 436 (RLUIPA allows incarcerated people "to seek religious accommodations pursuant to the same standard as set forth in RFRA.").

that Congress intended that text to have the same meaning in both statutes." (quotation marks omitted) (cleaned up)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 172–73 (2012) (presumption of consistent usage). The term "religious exercise" also has an identical definition in the two statutes. *See* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). The two sister statutes differ only in what categories of government action they control: RFRA applies to all federal action, including federal prisons and land-use restrictions, whereas RLUIPA governs state government land-use regulations and state prisons. Diverging definitions for identical terms in the two statutes would allow federal prisons to burden religious rights more heavily than state prisons, or vice versa, which is implausible given the statutes' history and purpose. *See Gonzales*, 546 U.S. at 436; *Holt*, 574 U.S. at 356–58 (explaining that the two statutes impose "the same standard"); *Cutter*, 544 U.S. at 716–17 ("To secure redress for [incarcerated persons] who encountered undue barriers to their religious observances, Congress carried over from RFRA [to RLUIPA] the 'compelling governmental interest'/'least restrictive means' standard."); *see also Austin v. U.S. Navy Seals 1–26*, 142 S. Ct. 1301, 1307 (2022) (Alito, J., dissenting) (explaining that RLUIPA "essentially requires prisons to comply with the RFRA standard").

Second, the Supreme Court has cross-referenced the two statutes for support. *See, e.g.*, *Holt*, 574 U.S. at 356–57 (a RLUIPA case invoking RFRA cases); *Hobby Lobby*, 573 U.S. at 695, 729 n.37 (a RFRA case invoking RLUIPA cases).

Third, at least seven other circuits agree with my conclusion that the two statutes' "substantial burden" standards are one and the same. *See, e.g.*, *Mack v. Warden*

Loretto FCI, 839 F.3d 286, 304 n.103 (3d Cir. 2016) ("[T]he two statutes are analogous for purposes of the substantial burden test."); *Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003) (RLUIPA "reinstate[d] RFRA's protection against government burdens" and "mirror[s]" its provisions); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 n.64 (5th Cir. 2010) ("same 'substantial burden' question"); *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th Cir. 2013) ("same understanding"); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) ("same definition"); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 n.13 (10th Cir. 2013) ("interpreted uniformly"), *aff'd sub nom. Hobby Lobby*, 573 U.S. 682; *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1144 n.23 (11th Cir. 2016) ("same substantial burden analysis"); *see also Sabir v. Williams*, 52 F.4th 51, 60 & n.5 (2d Cir. 2022) (applying RLUIPA's substantial burden precedent to a RFRA claim); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 587 (6th Cir. 2018) (relying on *Holt*, a RLUIPA case, to define substantial burden in a RFRA case), *aff'd sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

The great weight of authority thus buttresses my conclusion that RFRA and RLUIPA employ the same substantial burden test defined by its plain meaning.

D. Preventing a Person from Engaging in Religious Exercise Is an Example of a Substantial Burden

I next consider which government actions amount to a substantial burden on religious exercise. Keeping in mind that RFRA did not "merely restore[the Supreme] Court's pre-*Smith* decisions in ossified form," *Hobby Lobby*, 573 U.S. at 715, the Supreme Court's pre-*Smith* Free Exercise

jurisprudence, as well as our own case law, provide at least three clear examples of a substantial burden on religious exercise: where the government (1) forces a religious adherent to choose between sincere religious exercise and receiving government benefits; (2) threatens a religious adherent with civil or criminal sanctions for engaging in sincere religious exercise; or (3) prevents a person from engaging in sincere religious exercise.

i. Pre-*Smith* Free Exercise Jurisprudence

I begin with *Sherbert* and *Yoder*, the two pre-*Smith* cases that RFRA mentions by name. *See* 42 U.S.C. § 2000bb(b)(1). In *Sherbert*, a state employer fired a Seventh-day Adventist because she refused to work on Saturdays, her faith's day of rest. 374 U.S. at 399. The state denied the plaintiff's claim for unemployment compensation benefits, finding that she had failed to accept work without good cause. *Id.* at 399–401. The Supreme Court held that the state's denial of unemployment compensation to the plaintiff because she was exercising her faith imposed a "substantial infringement" under the Free Exercise Clause. *Id.* at 403–04, 406. Such a condition unconstitutionally forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. Having determined that there was a "substantial infringement" on religious exercise, the Court then "consider[ed] whether some compelling state interest enforced in the eligibility provisions of the [state] statute justifie[d] the substantial infringement of [her] First Amendment right," and held that the state's concern about protecting against "fraudulent [unemployment] claims" was insufficiently compelling. *Id.* at 406–09.

In *Yoder*, a state prosecuted members of the Amish faith for violating a state law that required children to attend school until the age of sixteen. 406 U.S. at 207–08. The defendants sincerely believed that their children's attendance in high school was "contrary to the Amish religion and way of life." *Id*. at 209. The Supreme Court reversed the convictions, holding that the application of the compulsory school-attendance law to the defendants "unduly burden[ed]" their exercise of religion in violation of the Free Exercise Clause. *Id*. at 207, 220. According to the Court, the state law "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id*. at 218. As to the state's interest underlying its truancy law, the Court explained that a general interest in compulsory education was insufficiently compelling. *Id*. at 221.

But pre-RFRA precedents did not limit the kinds of burdens protected under the Free Exercise Clause to the types of burdens challenged in *Sherbert* (the choice between sincere religious exercise and receiving government benefits) and in *Yoder* (the threat of civil or criminal sanctions). Beyond these two cases, the Supreme Court's pre-*Smith* jurisprudence recognizes at least one other category of government action that violates the Free Exercise Clause: preventing a religious adherent from engaging in religious exercise. In *Cruz v. Beto*, for example, a prison denied a Buddhist access to the prison chapel and prohibited him from corresponding with his religious advisor. 405 U.S. 319, 322 (1972) (per curiam). The Court reversed the dismissal of the complaint and held that, taking the allegations as true, the prison had violated the Free Exercise Clause. *Id.*

And in *O'Lone v. Estate of Shabazz*, prison officials "prevented Muslims . . . from attending Jumu'ah," an Islamic congregational service held on Friday afternoons. 482 U.S. 342, 347 (1987). The plaintiffs sued, "alleging that the prison policies unconstitutionally denied them their Free Exercise rights under the First Amendment." *Id.* The Supreme Court recognized that preventing Muslims from engaging in religious exercise gave rise to a cognizable Free Exercise Clause claim. But, at the time, before RFRA and RLUIPA, prison officials were only required to show that a policy that burdened religious exercise was "reasonable." *Id.* at 350. So the Court concluded that preventing Muslims from attending religious services was "justified by concerns of institutional order and security." *Id.*; *see id.* at 351–52 (concluding that, although there were "no alternative means of attending Jumu'ah," the prison policy of preventing religious exercise was reasonable because "alternative means of exercising the [First Amendment] right" remained open as the plaintiffs were "not deprived of all forms of religious exercise" such as daily prayer).

In dissent, Justice Brennan agreed that preventing an adherent from engaging in religious practices was sufficient to demonstrate a Free Exercise claim, but disagreed with the majority's reasonableness standard:

> The prison in this case has completely prevented respondent inmates from attending the central religious service of their Muslim faith. I would therefore hold prison officials to the standard articulated in *Abdul Wali*, [which requires the government to demonstrate a compelling interest] and would find their proffered justifications wanting.

> The State has neither demonstrated that the restriction is necessary to further an important objective nor proved that less extreme measures may not serve its purpose.

Id. at 359 (Brennan, J., dissenting). RFRA and RLUIPA later essentially codified Justice Brennan's dissent, eliminating the reasonableness test for evaluating prison policies and instead requiring federal and state prison policies that substantially burden religious exercise to be justified by a compelling interest furthered by the least restrictive means. *See* 42 U.S.C. § 2000cc-1(a); *id.* § 2000bb-1(b).[10]

RFRA also instructs that courts look to "prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5). Like the Supreme Court, our own cases prior to *Smith* recognized that preventing a person from engaging in religious exercise implicates the Free Exercise Clause. For instance, in *Graham v. Commissioner of Internal Revenue*, we required a religious adherent, there a taxpayer, to show that the

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[10] Other pre-*Smith* examples falling outside the *Sherbert*/*Yoder* framework are Free Exercise Clause challenges to government autopsies. *See Tanzin*, 592 U.S. at 51 (noting that autopsies are among the cases in which RFRA grants effective relief) (citing *Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990) (autopsy of son that violated Hmong beliefs), *opinion withdrawn in light of Smith*, 750 F. Supp. 558 (D.R.I. 1990)); *see also City of Boerne*, 521 U.S. at 547 (O'Connor, J., concurring in part) (discussing *Yang* as an example of why *Smith* was wrongly decided in the context of RFRA); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1893 & n.26 (2021) (Alito, J., concurring in judgment) (discussing the import of *Yang* in the lead up to Congress enacting RFRA and stating that "*Smith*'s impact was quickly felt, and Congress was inundated with reports of the decision's consequences" (citing 139 Cong. Rec. 9681 (1993))).

government action "burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion *or by preventing* him or her from engaging in conduct or having a religious experience." 822 F.2d 844, 850–51 (9th Cir. 1987) (emphasis added), *aff'd sub nom. Hernandez v. Comm'r*, 490 U.S. 680 (1989).

The same is true in other cases. *See, e.g.*, *McElyea v. Babbitt*, 833 F.2d 196, 197–99 (9th Cir. 1987) (citing *O'Lone* and recognizing a Free Exercise Clause claim where a prison had no weekly Jewish services and the plaintiff alleged that prison officials "prevented him from practicing his religion"); *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987) (assuming that denial of access to a sweat lodge was a viable Free Exercise Clause claim, but upholding the prison policy under the *O'Lone*, pre-RFRA, reasonableness test); *cf. Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir. 1997) (holding, in a Free Exercise Clause case decided post-*City of Boerne* and pre-RLUIPA, that "[i]n order to establish a free exercise violation, [a plaintiff] must show the defendants burdened the practice of his religion, by preventing him from engaging in [religious exercise], without [proper] justification" (footnote omitted)).

ii. This Circuit's Precedents Recognize Preventing Religious Exercise Is a Substantial Burden

Given this legal backdrop, it is unsurprising that in our first RFRA case in 1995, we relied on pre-*Smith* Free Exercise Clause cases to define substantial burden to include preventing a person from engaging in religious exercise. In *Bryant v. Gomez*, we held that to show a "substantial burden" under RFRA,

> the religious adherent has the obligation to prove that a governmental action burdens the adherent's practice of his or her religion by preventing him or her from engaging in conduct or having a religious experience . . . . This interference must be more than an inconvenience.

46 F.3d 948, 949 (9th Cir. 1995) (per curiam) (cleaned up) (quoting *Graham*, 822 F.2d at 850–51).[11]

The majority makes no effort to explain why we should not adhere to *Bryant*'s formulation of substantial burden. Nor does it distinguish our subsequent pre-*Navajo Nation* RFRA cases in which we consistently invoked the concept of preventing a person from engaging in religious conduct as a substantial burden in various contexts, including ones outside of the two RLUIPA contexts. For example, in a case considering a university's mandatory student registration fee that, in part, covered abortion services, we "look[ed] to our

[11] In *Bryant*, we rejected the plaintiff's RFRA claim because "full Pentecostal services" were not "mandated by his faith." 46 F.3d at 949 (stating that religious exercise must be one that "the faith mandates" or "a tenet or belief that is central to religious doctrine"). However, as discussed *supra* § II(B)(ii), in 2000, Congress expanded the statutory protection for religious exercise by amending RFRA and RLUIPA's definition of "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). So to the extent that *Bryant* and other cases discussed below applied a narrower definition of "religious exercise" that required it to be central to or mandated by a person's faith, Congress has abrogated them. Similarly, RFRA and RLUIPA's definition of "exercise of religion" is broader than *O'Lone* and *Freeman*'s definition under the Free Exercise Clause. Otherwise, *Bryant*'s discussion of substantial burden remains good law.

decisions prior to *Smith*," including a Free Exercise Clause challenge by a taxpayer, to define substantial burden to include "preventing [a person] from engaging in conduct or having a religious experience." *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996) (quoting *Graham*, 822 F.2d. at 850–51, and discussing *Bryant*); *see also Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (citing *Bryant*'s substantial burden standard in a copyright case and concluding that the unauthorized use of intellectual property of religious texts was not a substantial burden under RFRA); *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (citing *Bryant*'s standard and finding no substantial burden because an incarcerated person was not "prevented" from "engaging in any [religious] practices" when the prison confiscated a religious text not central to his practice).[12]

Similarly, before and since *Navajo Nation*, we have routinely recognized that preventing religious exercise qualifies as a substantial burden under RLUIPA, which applies the "same standard" as RFRA, *Holt*, 574 U.S. at 356–57. *See Johnson v. Baker*, 23 F.4th 1209, 1215–16 (9th Cir. 2022) (recognizing that prohibiting plaintiff from possessing scented prayer oil in his cell substantially burdened his religious exercise); *Foursquare Gospel*, 673 F.3d at 1061, 1066–70 (recognizing that preventing the plaintiff from building a place of worship could constitute a substantial burden); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th

[12] The Seventh, Eighth, and Tenth Circuits have followed *Bryant*'s interpretation of a substantial burden under RFRA. *See Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (expressly drawing on *Bryant*); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (citing *Bryant*).

Cir. 2008) ("We have little difficulty in concluding that an outright ban on a particular religious exercise"—*i.e.*, a "policy of prohibiting [a person] from attending group religious worship services"—"is a substantial burden on that religious exercise."); *Guru Nanak Sikh Soc'y of Yuba City*, 456 F.3d at 981–82 (holding that a county "imposed a substantial burden" on a Sikh organization's "religious exercise" by denying applications from the group for a conditional use permit to build a temple); *cf. United States v. Antoine*, 318 F.3d 919, 923–24 (9th Cir. 2003) (assuming that "raz[ing]" a "house of worship" to build a freeway would be a substantial burden).[13]

[13] Several other circuits also recognize that denying access to or preventing religious exercise qualifies as a substantial burden under RLUIPA. *See Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *Lovelace v. Lee*, 472 F.3d 174, 187–88 (4th Cir. 2006); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004); *cf. C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). Notably, the Tenth Circuit referenced this circuit's definition of a substantial burden when defining it to include preventing religious exercise. *See Werner*, 49 F.3d at 1480 (citing *Bryant*); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1313 (10th Cir. 2010) (citing *Werner*).

And in a recent RLUIPA case, the Supreme Court stayed the execution of an incarcerated person who requested that "his long-time pastor be allowed to pray with him and lay hands on him while he is being executed." *Ramirez*, 595 U.S. at 416; *see id.* at 426, 433 (holding that the state's refusal to permit audible prayer or religious touch, denying him access to his religious rites, "substantially burdens his exercise of religion," because "he will be unable to engage in protected religious exercise in the final moments of his life").

E. The Land Transfer Act Substantially Burdens the Exercise of Religion

The foregoing firmly establishes that where the government prevents a person from engaging in religious exercise, the government has substantially burdened the exercise of religion. The plain meaning of RFRA clearly reaches such instances. The Free Exercise Clause cases prior to *Smith* so recognized. *O'Lone*, 482 U.S. at 347–52; *Graham*, 822 F.2d at 850–51. We held as much in our first RFRA case. *See Bryant*, 46 F.3d at 949. And, as Judge Bumatay pointed out in his dissent from the order declining to enjoin the land transfer pending appeal, this understanding is consistent with RLUIPA. *See* Injunction Order, 2021 U.S. App. LEXIS 6562, at *9 (Bumatay, J., dissenting) ("[A]s then-Judge Gorsuch wrote [in a RLUIPA case], a substantial burden exists when the government 'prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief.'" (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014))).

I now turn to whether Apache Stronghold is likely to succeed in showing that the transfer and eventual destruction of Oak Flat constitutes a substantial burden on the Western Apaches' religious exercise. The district court heard extensive testimony about the impact of the land transfer and mine. The district court found:

> Because the land embodies the spirit of the Creator, "without any of that, specifically those plants, because they have that same spirit, that same spirit at Oak Flat, that spirit is no longer there. And so without that spirit of *Chí'chil Biłdagoteel*, it is like a dead carcass." If the mining activity continues,

> Naelyn Pike testified, "then we are dead inside. We can't call ourselves Apaches." Quite literally, in the eyes of many Western Apache people, Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood. . . . [T]he land in this case will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship.

Apache Stronghold, 519 F. Supp. 3d at 604, 606 (citations omitted).

As discussed *supra* § I(A), the Forest Service, in its now-withdrawn EIS, similarly documented the extensive, irreversible, and devastating impact of the mine's construction, and how the mining activity would prevent Apache worshipers from engaging in religious exercise at their religious sites. The crater will start to appear within six years of active mining, and the Forest Service concluded that the mining activity will cause "immediate" and "permanent" destruction of "archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources." In addition, once the government publishes its Final EIS, regardless of its contents, "the Secretary *shall* convey" the land to Resolution Copper within sixty days. 16 U.S.C. § 539p(c)(10) (emphasis added). So once the land transfer occurs, Oak Flat will be private property no longer subject to RFRA and other federal protections.

In other words, the land transfer will result in a crater that will subsume Oak Flat. The impact of the mining activity on sacred sites will be immediate and irreversible. All that will

be left is a massive hole and rubble, making the site unsuitable for religious exercise. Religious worship will be impossible, and the Apaches will be prevented from ever again worshipping at Oak Flat. As I have concluded, where the government prevents a religious adherent from engaging in religious exercise, the government has restricted the exercise of religion to a considerable amount. I would therefore hold that Apache Stronghold is likely to succeed in establishing that transferring Oak Flat to Resolution Copper will amount to a substantial burden under RFRA. *See* 42 U.S.C. § 2000bb-1(a). Because the district court did not determine whether the government could justify that burden by demonstrating a compelling interest pursued through the least restrictive means, I would remand for the district court to make that determination in the first instance. *See id.* § 2000bb-1(b).

F. *Lyng* Is Consistent with My Analysis

i. *Lyng* and Prohibitions on Free Exercise

The majority concludes that the destruction of a sacred site cannot be a substantial burden but cites no authority squarely supporting that proposition. Indeed, the majority fails to cite even one case foreclosing a RFRA claim where the government completely prevents a person from engaging in religious exercise. Confusingly, the majority agrees with me that then-Judge Gorsuch correctly held in *Yellowbear* "that 'prevent[ing] the plaintiff from participating in an activity motivated by a sincerely held religious belief' qualifies as prohibiting free exercise." Collins Op. at 33 (quoting *Yellowbear*, 741 F.3d at 55). And the majority concedes that it is undisputed that the Land Transfer Act will categorically prevent the Apaches from participating in any worship at Oak Flat because their religious site will be

obliterated. *See* Collins Op. at 23. If the majority agrees with *Yellowbear*'s formulation—which mirrors the one I have laid out above in § II(D) (explaining that preventing religious exercise is an example of a substantial burden)—and agrees that the Apaches will be prevented from worshiping at Oak Flat, Apache Stronghold's claim cannot fail. *See* Injunction Order, 2021 U.S. App. LEXIS 6562, at *9–10 (Bumatay, J., dissenting) (relying on *Yellowbear* to conclude that the destruction of Oak Flat is a substantial burden). And yet, the majority says that it does.

Rather than acknowledge this inconsistency, the majority relies entirely on a pre-RFRA Free Exercise Clause case: *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). But *Lyng* cannot bear the weight the majority places on it.

The Supreme Court in *Lyng* did not analyze whether there was a substantial burden under the Free Exercise Clause. The case is therefore not inconsistent with my RFRA analysis and cannot foreclose Apache Stronghold's statutory claim, which rests on the "substantial burden" concept.

In its retelling of *Lyng*, the majority omits crucial facts. The *Lyng* plaintiffs challenged the federal government's proposal to permit timber harvesting and build a road through part of a national forest that "ha[d] traditionally been used for religious purposes by members of three American Indian tribes." 485 U.S. at 441–42. The proposed road "avoided archeological sites and was removed as far as possible from the sites used by [tribes] for specific spiritual activities." *Id.* at 443. Unlike here—a fact that the majority entirely disregards—"[n]o sites where specific rituals t[ook] place were to be disturbed." *Id.* at 454. The *Lyng* plaintiffs

continued to have full access to their sacred sites to engage in religious exercise, and there were "one-half mile protective zones around all the religious sites," insulating them from any logging activity. *See id.* at 441–43. However, because the road and logging activity would generally disturb the "privacy," "silence," "spiritual development," and the subjective enjoyment of those sacred sites, the plaintiffs brought a Free Exercise Clause challenge. *Id.* at 442, 444, 454 (citing the record to note that "successful use of the area is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting" (cleaned up)); *see id.* at 462 (Brennan, J., dissenting) (quoting the record to highlight that "silence, the aesthetic perspective, and the physical attributes, are an extension of the sacredness of [each] particular site").

Assuming that the noise and general disturbance from logging would "have severe adverse effects" on the individuals' subjective religious experience, the Supreme Court held that the government's actions did not trigger the compelling interest test under the Free Exercise Clause. *Id.* at 447, 450–51. Relying on *Bowen v. Roy*, 476 U.S. 693 (1986), the Court concluded that the *Lyng* plaintiffs' subjective spiritual harm from the loss of silence and privacy was "incidental" to the government's "internal" affairs. *Lyng*, 485 U.S. at 448, 451. In *Roy*, the Supreme Court had rejected a religious objection to the use of Social Security numbers as a numerical identifier that, according to the plaintiffs' religious beliefs, would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." 476 U.S. at 696. The *Roy* Court held that the "Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that

comport with the religious beliefs of particular citizens." *Id.* at 699.

Applying *Roy*, the *Lyng* Court explained that the plaintiffs' allegations of spiritual harm "cannot meaningfully be distinguished from the use of a Social Security number in *Roy*":

> Similarly, in this case, it is said that disruption of the natural environment caused by the . . . road will diminish the sacredness of the area in question and create distractions that will interfere with "training and ongoing religious experience of individuals using [sites within] the area for personal medicine and growth . . . and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power."

485 U.S. at 448–49 (quoting the record). The Court construed the harm in both cases as "subjective" and so refused to decide whether the spiritual harm in *Roy* was "significantly greater" than the *Lyng* plaintiffs' harm. *Id.* at 449.[14]

[14] In rejecting the plaintiffs' challenge, the Supreme Court did not minimize the impact that the road building and logging activity would have on the plaintiffs' "personal spiritual development." *Lyng*, 485 U.S. at 451. The Court, however, did not wish to weigh the magnitude of the subjective spiritual harm. *Id.* at 449, 451. So it explained that the noise and invasion of privacy caused by roadbuilding and logging had only an "*incidental*" constitutional effect under the Free Exercise Clause because the government was not "outright prohibit[ing]" religious exercise,

Lyng emphasized that the "crucial word in the constitutional text [of the Free Exercise Clause] is '*prohibit*': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Id.* at 451 (emphasis added) (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)). The Court therefore concluded its analysis by reiterating that "[t]he Constitution does not permit [the] government to discriminate against religions that treat particular physical sites as sacred, and a law *prohibiting the Indian respondents from visiting the [sacred] area would raise a different set of constitutional questions*." *Id.* at 453 (emphasis added).

The majority argues that, as in *Lyng*, the land transfer here is not "a situation in which the Government ha[s] 'discriminate[d]' against the plaintiffs, as might be the case if Congress had passed 'a law prohibiting the Indian [plaintiffs] from visiting the [sacred] area.'" Collins Op. at 31 (quoting *Lyng*, 485 U.S. at 453). The majority is mistaken on two fronts. First, the Land Transfer Act is *exactly* that kind of "prohibitory" law. It is undisputed and indisputable that once implemented, the Act will prevent the Western Apaches from visiting Oak Flat for eternity. The majority concedes this point, but then goes on to argue that where government action only "frustrates or inhibits" religious exercise, the government does not violate RFRA.

"indirect[ly] coerc[ing]" an individual to act contrary to their religious belief, or "penal[izing]" religious practice. *Id.* at 450–51 (citing U.S. Const. amend. I; *Sherbert*, 374 U.S. at 404).

This discussion also highlights that Free Exercise Clause claims are not limited to the circumstances presented in *Sherbert* and *Yoder* but include the broader concept of "prohibitions." *Id.* at 450; U.S. Const. amend. I.

But Apache Stronghold does not argue that the destruction of Oak Flat merely "frustrates" their ability to worship there; they argue—and the district court found—that worship there will be "impossible," and their spiritual practice will be eviscerated. *See Apache Stronghold*, 519 F. Supp. 3d at 604 ("Quite literally, in the eyes of many Western Apache people, Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood."); *id.* at 606 ("[T]he land in this case will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship."). So, contrary to the majority, this case does not ask us to determine at what point "frustrating" religious exercise qualifies as a substantial burden;[15] instead, we are confronted only with the utter erasure of a religious practice. In other words, the burden here is categorical and thus undisputedly "synonymous with 'prohibit.'" Collins Op. at 33.

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[15] *See, e.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (plurality opinion) (no infringement where a law merely "operates so as to make the practice of [the individual's] religious beliefs more expensive"); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306 (6th Cir. 1983) (similar); *Goehring*, 94 F.3d at 1299; *Worldwide Church of God*, 227 F.3d at 1121; *United States v. Friday*, 525 F.3d 938, 947 (10th Cir. 2008) ("We are skeptical that the bare requirement of obtaining a permit can be regarded as a 'substantial burden' under RFRA."); *see also Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (no infringement where government action "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed"); *Abdulhaseeb*, 600 F.3d at 1316 ("[W]e do not intend to imply that every infringement on a religious exercise will constitute a substantial burden.").

Second, that the Land Transfer Act does not specially "discriminate" against the Western Apaches by name—*i.e.*, that the Act is neutral and generally applicable to all who would visit Oak Flat—is irrelevant because, when enacting RFRA, Congress eliminated *Smith*'s neutrality test. *See* 42 U.S.C. § 2000bb(a)(2) ("Congress finds that . . . laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."). *All that matters under RFRA*, as opposed to the Free Exercise Clause, is whether the government has "substantially burden[ed]" sincere religious exercise. *Id.* § 2000bb-1(a). The majority thus misunderstands Congress's purpose in enshrining a broad right to religious liberty by eliminating *Smith*'s neutrality requirement.

The majority argues that such a reading of RFRA is too "broad." But a clear-cut conclusion that making religious exercise impossible is a "substantial burden" can hardly be called broad, especially when it adheres closely to both RFRA's text and the Supreme Court's precedent. The majority also contends that claims like Apache Stronghold's would subject the government to "religious servitude." Yet the majority proceeds as if, once a religious adherent has satisfied the substantial burden test, the outcome is a foregone conclusion. However, Congress explicitly identified the compelling interest test as "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

At this stage, Apache Stronghold has only proven that there is a substantial burden. On remand, the government could demonstrate that transferring Oak Flat is justified by a compelling interest pursued through the least restrictive

means.[16] *See Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *see also Gonzales*, 546 U.S. at 430, 436 (rejecting the government's "slippery slope" argument under RFRA, and noting that *Sherbert* did so under the Free Exercise Clause); *cf. Cutter*, 544 U.S. at 722 (stating that the Supreme Court had "no cause to believe" that the compelling interest test "would not be applied in an appropriately balanced way"). So although *Lyng* did not specifically address government action that prevented religious exercise, contrary to the

[16] The compelling interest test has not proven fatal to the government. *See* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, Cato Sup. Ct. Rev. at 44–45 & n.66 (2020–21) (noting that "the compelling-interest standard has not come close to producing the 'anarchy' of which *Smith* warned" and finding that "free-exercise claims, including RFRA claims, were the least likely to invalidate the government action" (citing Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 857–58, 861 (2006))).

And if the majority were correct that my reading of RFRA would subject the government to "religious servitude," then we would necessarily have seen that concern play out in circuits that have long employed a broader reading of "substantial burden." Neither the government nor the majority provide evidence that other circuits are inundated with such claims, and I have found no evidence hinting at that possibility. *Cf. Yellowbear*, 741 F.3d at 62 (Gorsuch, J.) (rejecting slippery slope argument). In addition, before *Smith*, the government was not yoked to religious deference—as the majority and the government fears it would be—even though the Supreme Court had read the Free Exercise Clause to cover claims about preventing religious exercise.

majority's assertions, *Lyng*'s discussion of "discrimination" by "prohibiting" access to a sacred site confirms that the Land Transfer Act creates a substantial burden.

ii. *Lyng*'s Post-RFRA Limits

Moreover, to the degree *Lyng*'s Free Exercise ruling is in any tension with my understanding of RFRA, those aspects of *Lyng* were not carried forward into RFRA. *Smith* makes that much evident, as it treats *Lyng* as declining to apply the compelling interest test to a neutral law of general applicability, and RFRA displaced that standard for governmental decisions governed by RFRA.

Smith held that *Lyng* "declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities 'could have devastating effects on traditional Indian religious practices.'" *Smith*, 494 U.S. at 883 (quoting *Lyng*, 485 U.S. at 451). Per *Smith*, *Lyng* stood for the proposition that the compelling interest test is "inapplicable" to "across-the-board" neutral laws. *Smith*, 494 U.S. at 884–85. In declining to apply the compelling interest test, *Smith* relied on *Lyng* for the point that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Smith*, 494 U.S. at 885 (quoting *Lyng*, 485 U.S. at 451). *Smith* then concluded that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." *Id.* at 886 n.3.

In so holding, *Smith* emphatically rejected Justice O'Connor's concurrence suggesting that *Lyng* created an exception for Free Exercise challenges to the government's conduct of its internal affairs. 494 U.S. at 885 n.2.[17]

The *Smith* majority first acknowledged that "Justice O'Connor seeks to distinguish *Lyng* and *Roy* on the ground that those cases involved the government's conduct of 'its own internal affairs.'" *Id.* (citations omitted). *Smith* then considered Justice O'Connor's position that challenges to the government's conduct of its internal affairs are "different because, as Justice Douglas said in *Sherbert*, 'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Id.* (internal quotation marks and citation omitted). "But," said the *Smith* majority in refuting the internal affairs proposition, "that quote obviously envisioned that what 'the government cannot do to the individual' includes not just the prohibition of an individual's freedom of action through criminal laws but also the running of its programs . . . in such fashion as to harm the individual's religious interests." *Id.* "Moreover," *Smith* continued, "*it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, Lyng, supra*." *Id.* (emphasis added).[18]

[17] Judge Nelson's concurring opinion so recognizes.

[18] As the *Smith* majority alluded to, it is hard to see how an exception permitting the government to substantially burden religious exercise when "manag[ing] its internal affairs," Nelson Op. at 148, would not encompass most government action and indeed swallow RFRA whole.

Smith treated *Lyng* as reflecting not any special exception for challenges to the government's internal affairs, but as concerning the type of neutral and generally applicable laws not subject to the compelling interest test under *Smith*. *Id.* at 884–85 (citing *Lyng,* 485 U.S. at 451). *Smith*'s understanding of *Lyng* remains controlling. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) ("*Smith* . . . drew support for the neutral and generally applicable standard from cases involving internal government affairs." (citing *Lyng*, 485 U.S. at 439)).

Accordingly, *Lyng* was not about measuring the extent of burdens sufficient to trigger the compelling interest test. Nor was *Lyng*, as the majority and concurring opinions posit, a case concerning the borders of the Free Exercise Clause or a special carve-out category of government actions that were not covered by *Smith*. Instead, *Lyng* reflected the principle, further developed in *Smith* and rejected in RFRA, that the compelling interest test was categorically inapplicable to neutral and generally applicable laws. *See Smith*, 494 U.S. at 884–85; *Fulton*, 141 S. Ct. at 1878.

Smith's controlling interpretation of *Lyng* thus makes clear that (1) *Lyng* turned on the categorical inapplicability of the compelling interest test to the Free Exercise challenge in that case; and (2) the reason the compelling interest test was inapplicable in *Lyng* was that "the test [is] inapplicable to such challenges" to generally applicable laws. *Smith*, 494 U.S. at 885. RFRA's rejection of *Smith*'s rule—that the compelling interest test is inapplicable to neutral and generally applicable laws—means that *Lyng* likewise does not control in RFRA cases.

The majority's flawed response to this point is that *Lyng* did not involve a neutral or generally applicable law. Collins

Op. at 35–36. But that proposition is wrong. Indeed, elsewhere in its opinion, the majority asserts, accurately, that *Lyng* did not involve "a situation in which the Government had 'discriminate[d]' against the plaintiffs, as might be the case if Congress had passed 'a law prohibiting the Indian [plaintiffs] from visiting the [sacred] area.'" Collins Op. at 31 (quoting *Lyng*, 485 U.S. at 453). A law that "does not 'discriminate' against religious adherents," like the policy in *Lyng*, is a neutral one for purposes of Free Exercise doctrine. *See Church of the Lukumi Babalu Aye,* 508 U.S. at 533 (explaining that a "law is not neutral" if "the object of a law is to infringe upon or restrict practices because of their religious motivation" (citing *Smith*, 494 U.S. at 878–89)). The plan to build the road at issue in *Lyng* was indisputably neutral in this sense, as it would affect equally all who preferred leaving the wilderness untouched—environmentalists, for example, or ranchers.

Nor is the majority correct that the policy challenged in *Lyng* was not generally applicable. In *Lyng*, the Forest Service proposed building a road connecting two towns and permitting timber harvesting in the same area; the road would be open to all, and there was no suggestion that the purpose of the Forest Service's plan was to discriminate against Native American tribes. Indeed, the Forest Service took steps to mitigate the impact on tribes by "select[ing] a route that avoided archeological sites and was removed as far as possible from the sites used by [tribes] for specific spiritual activities." *Lyng*, 485 U.S. at 443. While the litigation in *Lyng* was pending in the court of appeals, Congress enacted the California Wilderness Act, which designated portions of the forest as a protected wilderness area but excluded the proposed route. *Id.* at 444. While the choice of the route in the Act was made with knowledge of

the tribes' religious interest in it, there was no indication that it was made because of, rather than in disregard of, that interest, and the impact of the choice remained generally applicable and neutral.[19]

In short, the plan to construct a road and harvest timber in *Lyng* was generally applicable and "'neutral' toward religion" in the sense that its purpose was not to "interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). Therefore *Lyng*, a Free Exercise Clause case that rejected the compelling interest test for neutral laws of general applicability, does not answer the question of whether, under RFRA, preventing a person from engaging in religious exercise by denying them access to a sacred site is a substantial burden.

iii. *Terry Williams* Is Inapplicable Here

There is another, related problem with the majority's treatment of *Lyng*. Relying on *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("*Terry Williams*"), the majority erroneously proceeds as if Congress must be understood to have adopted the term "substantial burden" as interpreted in Justice O'Connor's concurrence in *Smith*, and so excepted cases similar to *Lyng* from that concept.

Terry Williams explained that "Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt either a rule or a meaning given a

[19] Moreover, even if the majority were correct as to the impact of the California Wilderness Act, that would be beside the point. *Lyng* involved a challenge to the Forest Service's plan to construct the road and harvest timber, not to the California Wilderness Act. *See Lyng*, 485 U.S. at 448; Collins Op. at 28 (acknowledging that the California Wilderness Act was not enacted until the litigation in *Lyng* "was pending on appeal in this court").

certain term in that decision." 529 U.S. at 411. Where "[t]he separate opinions" in a prior Supreme Court case "concerned the very issue addressed" in a subsequently enacted statute, the prior case can "confirm what [the statutory] language already makes clear." *Id.* at 411–12. But the majority opinion's premises for applying *Terry Williams* here are flawed.

First, the majority here is wrong that *Smith* "concerned the very issue" of what constitutes a cognizable substantial burden. The majority opinion asserts that "in superseding *Smith*, RFRA uses the phrase 'substantially burden,' *id.* § 2000b-1(a), (b)," so "[t]he inference is overwhelming that Congress thereby 'adopt[ed]' the 'meaning given [that] certain term in that decision.'" Collins Op. at 48 (quoting *Terry Williams*, 529 U.S. at 411). From that premise, the majority concludes that "[w]hen Congress copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* places on what counts as a governmental imposition of a substantial burden on religious exercise."

But as Judge Nelson's concurring opinion appears to acknowledge, neither *Lyng* nor the *Smith* majority interpreted the term "substantial burden." Nelson Op. at 140. *Lyng* simply refused to apply the compelling interest test. *See* 485 U.S. at 450–51 (explaining that *Sherbert* and *Yoder* "cannot imply that incidental effects of government programs," without outright prohibition, coercion, or penalty, "require government to bring forward a compelling justification"); *see also Smith*, 494 U.S. at 883. Thus, Judge Nelson writes that *Lyng* is not

> part of any "old soil" that was used to define "substantial burden," Bea Dissent at 79.

> Indeed, *Lyng* does not even use "substantial burden" or any analogous framing of the phrase. *Lyng* therefore cannot be read as establishing a precise definition of "substantial burden" "carried over into the soil" of RFRA.

Nelson Op. at 141 (citation omitted).

Likewise, *Smith* was about categorically excepting neutral and generally applicable laws from the compelling interest test, rather than about defining the term "substantial burden." *See* 494 U.S. at 884–85; *see also supra* § II(F)(ii) (discussing Justice O'Connor's *Smith* concurrence and explaining that the *Smith* majority did not apply the compelling interest test). Although Justice O'Connor's concurring opinion took the position that the denial of unemployment benefits based on religious drug use constituted a substantial burden, she did not rely on *Lyng* in her discussion of that term. *See Smith*, 494 U.S. at 897–98 (O'Connor, J., concurring in the judgment). Moreover, the *Smith* majority never reached the question of what types of burdens would be required to satisfy the first step of the *Sherbert* test. Instead, it concluded that the test was entirely "inapplicable" in cases challenging neutral, generally applicable laws. *See Smith*, 494 U.S. at 884–85. So there was no "vigorous debate" in *Smith* on the meaning of the term substantial burden, contrary to the majority's representation.

Furthermore, *Terry Williams* involved a situation in which Congress did "not mention a prior decision of this Court by name in a statute's text." 529 U.S. at 411. That is not the circumstance here. Instead, RFRA explicitly identified which portion of *Smith* Congress sought to

address. Congress declared that "in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4) (citation omitted). Congress's view, by contrast, was that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2). Consequently, although the majority opinion points to RFRA's citation to *Smith* as reinforcing its holding, the appropriate conclusion is the opposite: Congress was specific about the aspect of *Smith* that it intended to address—the rule that neutral and generally applicable laws are not subject to the compelling interest test. Congress could not have, by expressly citing *Smith* in the course of negating its exception for neutral and generally applicable laws, intended to incorporate the "meaning given a certain term," *Terry Williams,* 529 U.S. at 411, when that term simply was not at issue in *Smith*.

The upshot is that RFRA's text does not support the majority's conclusion that Congress intended a special exception for certain types of government actions. Rather, RFRA is explicit that:

- Religious exercise includes the use of real property for the purpose of religious exercise. 42 U.S.C. § 2000bb-2(4); *Id.* § 2000cc-5(7)(B).
- Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion" *except when* the compelling interest test is satisfied.

Id. § 2000bb-1(a), (b). No other exceptions are provided.

- Government "includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." *Id.* § 2000bb-2(1).
- RFRA "applies to all *Federal law*, and the implementation of that law, whether statutory or otherwise." *Id.* § 2000bb-3(a) (emphasis added)
- "Nothing in" RFRA "shall be construed to authorize any government to burden any religious belief." *Id.* § 2000bb-3(c). Here, Congress used the term "burden" rather than "substantial burden."
- "[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5).

Given these congressional directives, unlike in *Terry Williams*, this is not a case in which reference to *Smith* can "confirm what" RFRA's statutory "language already makes clear." *Terry Williams*, 529 U.S. at 411–12. Rather, for the reasons I have surveyed, what RFRA's language makes clear is that there is a "substantial burden" when individuals are prevented from practicing their religion by governmental action; if *Lyng* indicates otherwise (which I do not believe), that implication of *Lyng* does not survive RFRA.

G. This En Banc Panel Fails to Clarify Our Law

"As an en banc court, we have a responsibility to bring clarity to our law." *Garfias-Rodriguez v. Holder*, 702 F.3d

504, 532 (9th Cir. 2012) (en banc) (Kozinski, C.J., concurring in part). Notably, although the divided three-judge panel rejected Apache Stronghold's RFRA claim largely under *Navajo Nation*, the majority makes no mention of that case. Instead, litigants are forced to piece together from a composite of opinions that a majority of judges on this en banc panel rejects *Navajo Nation*'s reasoning.

Furthermore, the majority opinion creates confusion as to how to define "substantial burden." Although RFRA's text simply provides that the federal government may not "substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), the majority skips the test entirely and asks only whether litigants bring a "cognizable" claim. As I have discussed, *see supra* § II(E), preventing religious adherents from worshipping at a sacred site is inherently prohibitory. For the majority, only once a litigant has shown that the government action is cognizably "prohibitory" can a court ask whether there is a "substantial burden." At that point, the majority finds it "adequate[]" to apply a dictionary definition of "substantial burden" in the context of zoning and confinement under *both* RFRA and RLUIPA, but not in other RFRA contexts. Collins Op. at 52. But this answer is not helpful. Under the majority's approach, dictionaries can supply the meaning of substantial burden in RFRA cases about zoning and confinement, but dictionaries appear to be irrelevant when a person challenges a different type of government action—as Apache Stronghold does here. Either the meaning of "substantial burden" is the same under RFRA and RLUIPA, or the definition under RFRA is case-dependent. It cannot be both.

And the majority provides no authority for this sort of distinction. Nor could it. If the meaning of "substantial burden" turned on the type of case, several Supreme Court

Free Exercise Clause cases would have lacked any discussion of substantial burden or compelling interest. *See, e.g.*, *Hernandez*, 490 U.S. at 684–85, 699 (discussing substantial burden and concluding the government had a compelling justification in a Free Exercise Clause challenge to the Internal Revenue Service's refusal to recognize payments made by Scientologists to churches as tax-deductible charitable contributions).

The majority's shapeshifting definition of substantial burden also finds no support in RFRA's and RLUIPA's text. RLUIPA's land-use provision states that "[n]o government shall *impose or implement a land use regulation* in a manner that imposes a substantial burden on the religious exercise of a person." 42 U.S.C. § 2000cc(a)(1) (emphasis added). And the institutionalized persons provision likewise states that "[n]o government shall *impose* a substantial burden on the religious exercise of a person residing in or confined to an institution." *Id.* § 2000cc-1(a) (emphasis added). The majority argues that RLUIPA incorporates or "bake[s] in" the Free Exercise Clause's "prohibition" requirement. But RLUIPA's text does not use the word "prohibit," so it is hard to see how RLUIPA incorporates the Free Exercise Clause in a way that RFRA does not. *Compare id.*, *with* § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion.").

Nor does the majority meaningfully distinguish the coercion inherent in land-use cases from the coercion here. For instance, the majority contends that in the land-use context, the Free Exercise Clause's "prohibition" requirement is inherent. Collins Op. at 52. But if a city precludes the building of a church on a parcel zoned for single-family dwellings, the city is not conditioning a benefit on forgoing religious exercise nor is it penalizing religious

exercise. So how is the city's zoning law "inherently . . . coercive" in a way that the Land Transfer Act and the destruction of Oak Flat is not? The majority offers little guidance to litigants wondering what governmental actions are sufficiently "coercive" to allow for a substantial burden analysis.

Indeed, contrary to what the majority says, Apache Stronghold's RFRA claim "inherently involve[s] coercive restrictions." Collins Op. at 52. As Judge Berzon noted in her panel dissent, Native American sacred sites—like the contexts of land-use and confinement—are unique in that "the government controls access to religious locations and resources." *Apache Stronghold*, 38 F.4th at 776 (Berzon, J., dissenting) (citing Stephanie Hall Barclay and Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1301 (2021)). In each of these contexts the government has control over religious sites and resources, and religious adherents must "practice their religion in contexts in which voluntary choice is *not* the baseline." *Id.* As with the Western Apaches here, Native American religions are typically land-based, so many traditional Native American religious sites are located exclusively on federal land. Therefore, unlike most non-incarcerated Americans, Native Americans are "at the mercy of government permission to access sacred sites." *Id.* (quoting Barclay & Steele, *supra*, at 1301); *see also* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, Cato Sup. Ct. Rev. at 33, 58 (2020–21) (arguing that the government "took control over the tribes' ability to practice their traditions fully—in somewhat the same way that prisons control [incarcerated persons'] ability to practice their faith"). The Land Transfer Act thus prevents the Apaches from practicing their religion

at Oak Flat, substantially burdening their religious exercise, just as would an outright ban of religious worship, meetings, or diet in prison, or a zoning law precluding a religious group from building a mosque, church, or synagogue. In other words, the government's control over access to Oak Flat is coercive, and few other religious adherents are situated similarly to the Apache such that they need the government's permission to worship.

H. RFRA Applies to the Land Transfer Act

For the first time in its Brief in Opposition to Rehearing En Banc, the government urges this court to affirm on the alternative ground that, under the legislative anti-entrenchment principle, RFRA cannot apply to the Land Transfer Act. Because the government did not raise that argument before the district court, and did not develop it on appeal, I would normally consider such eleventh-hour arguments waived. *See Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423, 425 (9th Cir. 1962). However, the issue is purely legal, and the government could and likely would raise the argument to the district court on remand. *See Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 888 n.4 (9th Cir. 2002). So for the sake of judicial efficiency, I address it now.

RFRA applies to "all Federal" statutes enacted after RFRA's adoption "unless such [later-enacted] law explicitly excludes such application by reference." 42 U.S.C. § 2000bb-3(b). The government argues that § 2000bb-3(b) holds no force whatsoever and instead maintains the Land Transfer Act supersedes RFRA because "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). Generally, under the legislative anti-

entrenchment doctrine, a prior Congressional enactment "may be repealed, amended, or disregarded by the legislature which enacted it, and is not binding upon any subsequent legislature." *United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996) (cleaned up).

The Supreme Court has held, however, that "RFRA operates as a kind of super statute" because it applies to all federal statutes and thus "displac[es] the normal operation of other federal laws." *Bostock*, 140 S. Ct. at 1754. In two RFRA cases, the Supreme Court accordingly determined that RFRA was controlling even though it conflicted with later-enacted federal law. *See Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (applying RFRA to the Affordable Care Act ("ACA"), a later-enacted statute, because the "ACA does not explicitly exempt RFRA"); *Hobby Lobby*, 573 U.S. at 719 n.30 (rejecting an implied repeal argument for the same reason). And as the Seventh and Eleventh Circuits have recognized, RFRA is consistent with the anti-entrenchment principle because "the statute does not apply to a subsequently enacted law if it 'explicitly excludes such application by reference to'" RFRA. *Korte*, 735 F.3d at 672–73 (cleaned up) (quoting 42 U.S.C. § 2000bb-3(b)); *accord Cheffer v. Reno*, 55 F.3d 1517, 1522 n.10 (11th Cir. 1995). In other words, because a majority of Congress can preclude the application of RFRA to any subsequently-enacted statute, Congress "remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey v. United States*, 567 U.S. 260, 274 (2012).[20] RFRA does not therefore limit

[20] Neither Judge Bea's concurrence nor the government explain why we should depart from *Korte* and *Cheffer* and create a circuit split. *See*

the authority of future Congresses and so does not violate the anti-entrenchment principle. *See Little Sisters of the Poor*, 140 S. Ct. at 2383 (RFRA "permits Congress to exclude statutes from RFRA's protections." (citing 42 U.S.C. § 2000bb-3(b))).

I note that RFRA's express exemption provision is no different from the one contained in the Administrative Procedure Act ("APA"), which the Supreme Court considered in *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). The question in *Marcello* was whether the Immigration and Nationality Act ("INA") satisfied the APA's requirement that any exemptions from its procedures be "express[]," such that the APA was inapplicable to deportation proceedings. 349 U.S. at 305–10. The INA section at issue provided that "[t]he procedure (herein prescribed) shall be the *sole and exclusive procedure* for determining the deportability of an alien under this section." *Marcello*, 349 U.S. at 309 (emphasis added) (quotation marks omitted). The Supreme Court explained that this textual provision was a "clear and categorical direction" that the INA "was meant to exclude the application of the" APA. *Id.*

In other words, the Supreme Court held that the INA did not need to explicitly mention the APA or use a "magical password[]" to supersede the APA's express repeal provision. *Id.* at 309–10. The INA's express inclusion of a "notwithstanding" clause—*i.e.*, "notwithstanding the provisions of any other law"—was sufficient. *Id.* Consistent with *Marcello*, we have recognized the inclusion of a "notwithstanding" clause as "a method—akin to an express

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Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co., 346 F.3d 1190, 1192 (9th Cir. 2003) ("[W]e decline to create a circuit split unless there is a compelling reason to do so.").

reference to the superseded statute—by which Congress can demonstrate that it intended to partially repeal an [earlier] Act." *United States v. Novak*, 476 F.3d 1041, 1052 (9th Cir. 2007) (en banc) (cleaned up).

In short, for a statute to exempt itself from RFRA, a simple majority of Congress need only exempt that later-enacted statute from RFRA under 42 U.S.C. § 2000bb-3(b), either by referencing RFRA specifically *or* by including some variation of a "notwithstanding any other law" provision under *Marcello*. *See Lujan-Armendariz v. I.N.S.*, 222 F.3d 728, 747 (9th Cir. 2000), *overruled on other grounds by Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). Such a requirement does not require a "magical password" to supersede RFRA, nor does it violate the legislative anti-entrenchment principle. *Marcello*, 349 U.S. at 309–10; *see Korte*, 735 F.3d at 672–73.

Here, the Land Transfer Act cannot escape RFRA's reach. It neither explicitly exempts itself from RFRA, nor does it contain a "notwithstanding any other law" provision of any kind. *See* 16 U.S.C. § 539p. At the same time, had Congress wanted to exempt the Land Transfer Act from RFRA, it knew how to do so. The Land Transfer Act includes a specific exemption from another statute—the Federal Land Policy and Management Act of 1976—reinforcing that Congress could have, but did not, enact a similar exemption from RFRA. *See* 16 U.S.C. § 539p(c)(5)(B)(ii) ("The Secretary may accept a payment in excess of 25 percent of the total value of the land or interests conveyed, *notwithstanding section 206(b) of the Federal Land Policy and Management Act of 1976* (43 U.S.C. 1716(b))." (emphasis added)). If Congress meant to exempt the Land Transfer Act from RFRA, Congress could and

would have done so explicitly. Accordingly, RFRA applies to the Land Transfer Act.

III. Conclusion

The majority tragically errs in rejecting Apache Stronghold's RFRA claim solely under *Lyng*. *Lyng* does not answer the question here, where we are faced with government action that will result in a massive hole obliterating Oak Flat and categorically preventing the Western Apaches from ever again communing with *Usen* and the *Ga'an*, the very foundation of the Apache religion. The effect will be immediate and irreversible. Under RFRA, preventing religious adherents from engaging in sincere religious exercise undeniably constitutes a "substantial[] burden." 42 U.S.C. § 2000bb-1(a). RFRA's plain text encompasses such claims, and the Supreme Court's and our jurisprudence have long so recognized.

I would therefore hold that, at this stage, Apache Stronghold has shown that it is likely to succeed on the merits of its RFRA claim, and I would remand for the district court to determine whether the Land Transfer Act is justified by a compelling interest pursued through the least restrictive means. 42 U.S.C. § 2000bb-1(b). Because the majority holds the opposite, I respectfully dissent.

LEE, Circuit Judge, dissenting:

Chief Judge Murguia's excellent dissent lays out why *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), incorrectly defined "substantial burden" as a narrow term of art. Simply put, the complete obliteration of the land—which the Western

Apache consider sacred and where they have worshipped and conducted ceremonies for at least a millennium—obviously imposes a substantial burden on the Apache's religious exercise.

I join Chief Judge Murguia's dissent except for Section II.H. I do not believe we should address the merits of the government's last-minute argument that the Religious Freedom Restoration Act cannot apply to the Land Transfer Act. The government did not bother raising this difficult question before the district court or on appeal. Rather, the government advanced this argument for the first time in its brief opposing rehearing en banc, and now asks the en banc panel to rule in its favor on this newly developed argument. The government infrequently shows any grace when people miss deadlines or do not follow its rules. *Cf. Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."). I would not show any leniency to the government and would consider this argument waived.

George Washington to Religious Organizations

George Washington considered religious freedom to be very important, as did many of his countrymen.

Prior to the Revolution, many groups had been victims of religious persecution to varying degrees, in both Europe and the American colonies. Shortly after his inauguration as president, religious communities began writing to Washington, to ask how the government he was leading would treat them. In letter after letter, Washington wrote back that the only being to whom Americans owed an explanation of their religious beliefs was God.

Below are the surviving letters Washington wrote to religious groups during his presidency.

From George Washington to the German Lutherans of Philadelphia

APRIL-MAY 1789

"...give us cause to hope for the accomplishment of all our reasonable desires"

READ THE LETTER

From George Washington to the Bishops of the Methodist Episcopal Church

29 MAY 1789

"the sincerity of my desires to contribute whatever may be in my power towards the preservation of the civil and religious liberties of the American People."

READ THE LETTER

From George Washington to the United Baptist Churches of Virginia

MAY 1789

"If I could have entertained the slightest apprehension that the Constitution framed in the Convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical Society, certainly I would never have placed my signature to it..."

READ THE LETTER

From George Washington to the General Assembly of the Presbyterian Church

30 MAY- 5 JUNE 1789

"While all men within our territories are protected in worshipping the Deity according to the dictates of their consciences..."

LEARN MORE

From George Washington to the German Reformed Congregations

JUNE 1789

"May your devotions before the Throne of Grace be prevalent in calling down the blessings of Heaven upon yourselves and your country."

READ THE LETTER

From George Washington to the Moravian Society for Propagating the Gospel

15 AUGUST 1789

"...to be assured of my patronage in your laudable undertakings."

READ THE LETTER

Religion
Religious Freedom
George Washington to Religious Organizations
Religion in Washington's Life
Churchwarden and Vestryman
Religious Practices of the Washington Family
8 Facts about George Washington and Religion
Quiz

Youth
French & Indian War
Revolutionary War
Constitution
First President
Martha Washington
Slavery
Native Americans
Religion
Family

العربية

From George Washington to the Society of Quakers,

13 OCTOBER 1789

"*The liberty enjoyed by the People of these States, of worshipping Almighty God agreable to their Consciences, is not only among the choicest of their Blessings, but also of their Rights...*"

READ THE LETTER

From George Washington to the Congregational Ministers of New Haven,

17 OCTOBER 1789

"*...it will be my earnest endeavor (as far as human frailty can resolve) to inculcate the belief and practice of opinions...*"

READ THE LETTER

From George Washington to the Presbyterian Ministers of Massachusetts and New Hampshire

2 NOVEMBER 1789

"*To this consideration we ought to ascribe the absence of any regulation, respecting religion, from the Magna-Charta of our country.*"

READ THE LETTER

From George Washington to the Synod of the Dutch Reformed Church in North America

19 NOVEMBER 1789

"*...and I readily join with you that 'while just government protects all in their religious rights, true religion affords to government its surest support.'*"

READ THE LETTER

From George Washington to Roman Catholics in America

C.15 MARCH 1790

"*...all those who conduct themselves as worthy members of the community, are equally entitled to the protection of civil government.*"

READ THE LETTER

From George Washington to the Society of Free Quakers

C.8 APRIL 1790

"*... it will be my earnest endeavor, in discharging the duties confided to me with faithful impartiality, to realise the hope of common protection which you expect from the measures of that government.*"

READ THE LETTER

العربية

From George Washington to the Savannah, Ga., Hebrew Congregation

14 JUNE 1790

"*... make the inhabitants of every denomination participate in the temporal and spiritual blessings of that people whose God is Jehovah.*"

READ THE LETTER

From George Washington to the Convention of the Universal Church

9 AUGUST 1790

"*...however different are the sentiments of citizens on religious doctrines, they generally concur in one thing, for their political professions and practices are almost universally friendly to the order and happiness of our civil institutions...*"

READ THE LETTER

From George Washington to the Hebrew Congregation in Newport, Rhode Island

18 AUGUST 1790

"*For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens...*"

READ THE LETTER

From George Washington to the Hebrew Congregations of Philadelphia, New York, Charleston, and Richmond

13 DECEMBER 1790

> *The liberality of sentiment toward each other which marks every political and religious denomination of men in this Country, stands unparalleled in the history of Nations.*

READ THE LETTER

From George Washington to the Congregational Church of Midway, Georgia

13 MAY 1791

> *Your sentiments on the happy influence of our equal government impress me with the most sensible satisfaction...*

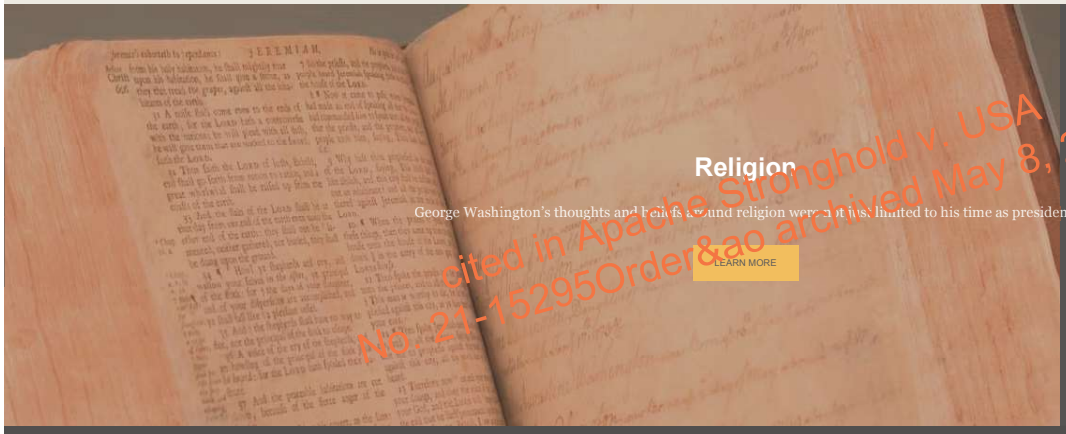
READ THE LETTER

From George Washington to the Members of the New Jerusalem Church of Baltimore

27 JANUARY 1793

> *...in this land the light of truth and reason have triumphed over the power of bigotry and superstition, and that every person may here worship God according to the dictates of his own heart.*

READ THE LETTER



Religion

George Washington's thoughts and beliefs around religion were not just limited to his time as president.

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Wanna Try Roller-Skating in San Francisco? Better Head to Church

Bay Curious

Amanda Font

Sep 22, 2022

Skaters get warmed up at the beginning of a skate session at the Church of 8 Wheels in San Francisco on Sept. 20, 2022. *(Beth LaBerge/KQED)*

Read the transcript of this episode of Bay Curious.

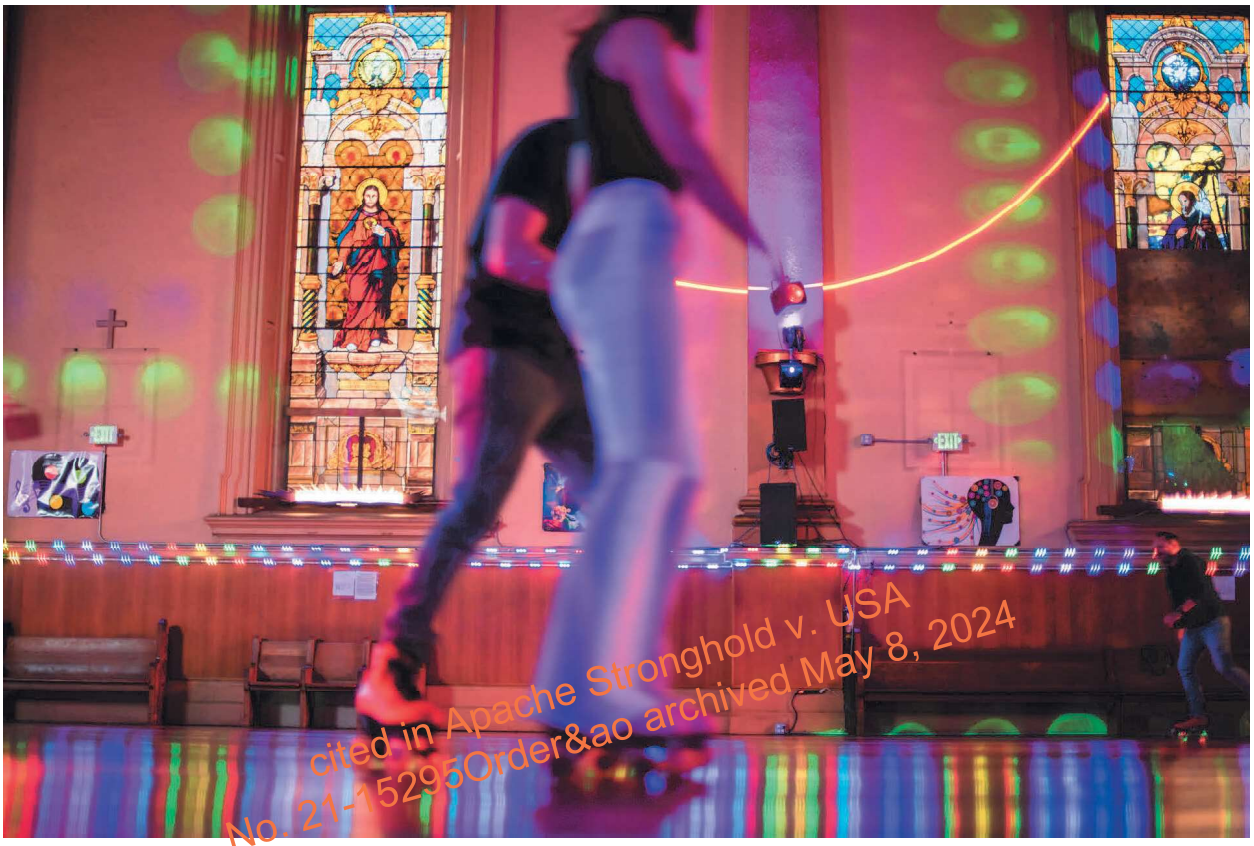
The Bay Area is filled with unique things to do — you could find a porcelain treasure on a beach covered in 70-year-old ceramics, visit a herd of bison in Golden Gate Park or, as Bay Curious listener Katie Talda discovered, go to a roller disco in an old Catholic church.

Katie and friends recently visited the Church of 8 Wheels, San Francisco's only indoor skating rink. She said it's not what she expected to find based on the outside of the building.

"It's a huge open space and you expect to walk in and, I don't know, go see an opera," she said. "But instead there's people rolling around in circles. Then you get all the fun music playing and lots of cool lighting."

BAY CURIOUS Bay Curious is a podcast that answers your questions about the Bay Area. Subscribe on Apple Podcasts, NPR One or your favorite podcast platform.

The novelty of this experience left her wondering: When did the building go from being an active church to a roller-skating rink?



Skaters make their way around the rink while classic disco and soul plays at the Church of 8 Wheels in San Francisco on Sept. 20, 2022. *(Beth LaBerge/KQED)*

The Godfather of Skate

The Church of 8 Wheels roller disco is run by David G. Miles Jr., a legend in the Bay Area's skate scene. To many he's known as "The Godfather of Skate." As Miles says, "Skating is my entire life." Miles grew up in Kansas City, Missouri, and learned to skate as a kid, taught by his older sisters. He says his family went to the roller rink often: "We went roller-skating like, you know, people go to the movies," he said.

But it was moving to San Francisco that really set him on the path to becoming a roller-skating devotee. Miles arrived in the late '70s, when skating had exploded all over the city, especially in Golden Gate Park. According to the park's own estimates, in the summer of 1979, anywhere between 15,000 and 20,000 skaters would show up to cruise along JFK Drive on Sundays. Miles quickly became part of the scene.

The boom in skating also caused contention with city residents, who pushed for a total ban on skating in San Francisco. Miles joined the Golden Gate Park Skate Patrol, a skating ambassador group formed to keep skaters in the park safe and in designated areas. They skated all the way from San Francisco to Sacramento to make their case to the state of California that cities should be allowed to regulate, but not outright ban, roller-skating. They won.

By the late ’80s, Miles was making a living exclusively with skate lessons and events. In 2000, he attended Burning Man for the first time — it would become a regular occurrence for him. He’s part of the camp that builds the Black Rock Roller Disco, which they run 24 hours a day the whole week of Burning Man. There is clearly Burning Man influence in Miles’ skating outfits, too, and in the space that would become the Church of 8 Wheels.

David Miles skates back to his DJ booth at the Church of 8 Wheels in San Francisco on Sept. 20, 2022. *(Beth LaBerge/KQED)*

From church to roller disco

The building that now houses the roller rink, at 554 Fillmore Street, is part of what was formerly the Sacred Heart Catholic Church complex, consisting of the church, the rectory, the convent and a school. The church was designed by architect Thomas John Welsh, who designed many other Catholic churches and schools in the Bay Area. Built in 1897, it survived the 1906 earthquake and the 1989 Loma Prieta earthquake.

Sacred Heart Catholic Church, on the corner of Fell and Fillmore streets in San Francisco, 1939. *(Courtesy of San Francisco History Center, San Francisco Public Library)*

In 2004, the Archdiocese of San Francisco announced the church would be closed, due to the high cost of seismic repairs. The property was sold to a private buyer. The building has since been designated a historic landmark in the National Register of Historic Places.

Bay Curious

Sign up for KQED's Bay Curious Newsletter and stay informed on a range of topics, from news about arts and culture to science and technologies.

Thanks for signing up for the newsletter.

Miles says the roller disco in the church started out as a one-night party. In 2013, a friend of his suggested he get in contact with the owner of the empty church to see if they could host a skate night there. The owner agreed, on the condition that Miles help clean up the inside of the building first. They hosted the party, and it was a success. Miles says he even had a rope light up in the shape of an 8, perhaps anticipating the future Church of 8 Wheels.

Following the success of the first party, the skating night became a weekly event. Now they're up to four nights a week, and Miles said recently they've made their agreement in the space more permanent.

"So we're basically here forever," he said, "It's better than [winning] the lottery. It's so fun. People call it a job, but it's not a job. I would never stop doing this."

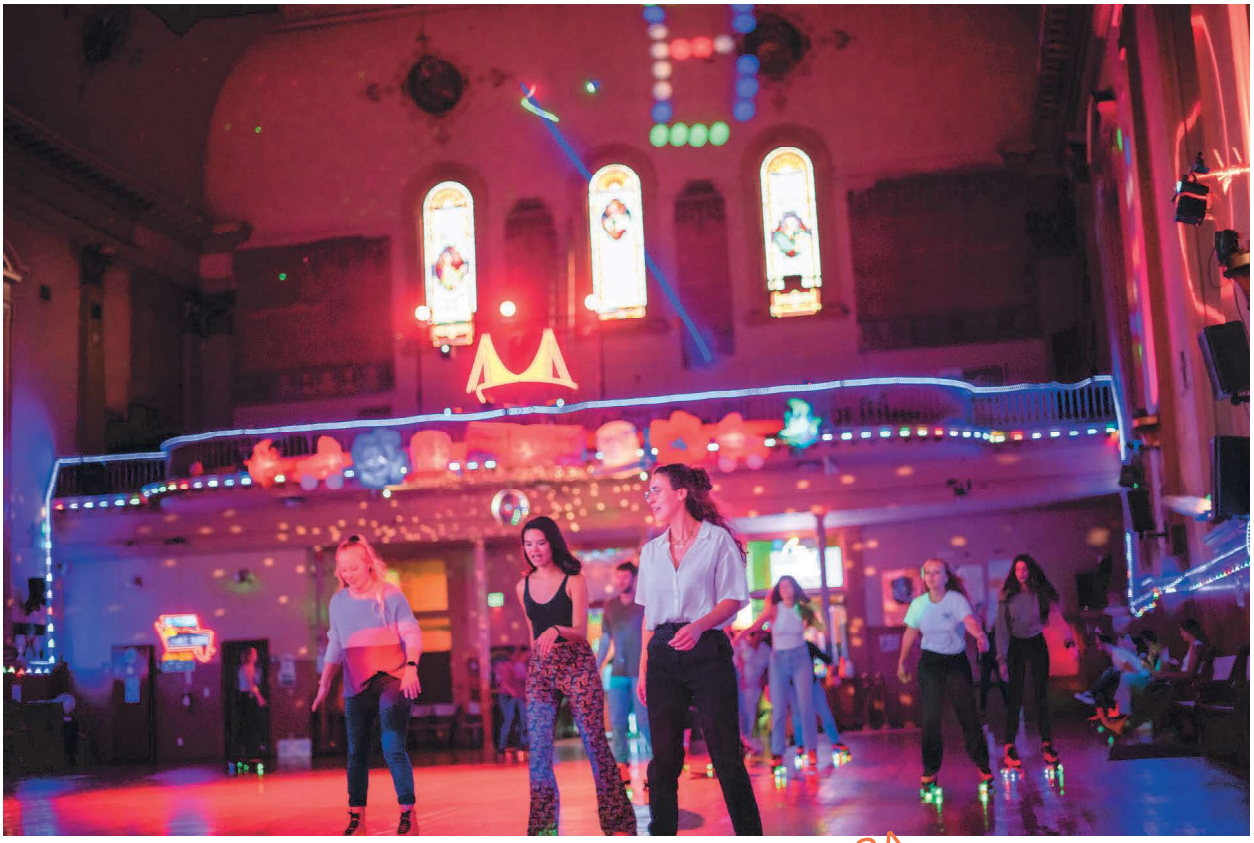
David Miles announces that skaters will change direction at the Church of 8 Wheels in San Francisco on Sept. 20, 20
(Beth LaBerge/KQED)

Over the years they've made more improvements to the building, refinishing the floor into a smooth surface for skating, and installing a ton of disco lights and a professional sound system. Where the church's main altar once stood, now there's a DJ booth. The Godfather of Skate is usually there playing a collection of disco and soul hits while wearing one of his signature colorful top hats.

Miles also continues to champion skating everywhere in the city. Outside of the church, Miles and his fellow skaters are often found at the now-permanent "Skatin' Place" in Golden Gate Park.

"What you have at [Golden Gate Park] is like my masterpiece outdoor roller rink," said Miles. "I've nurtured it from 1984 all the way up to now. [The city] just improved it. They enlarged it 7,000 more square feet. And to top that off, they did a mural — 93 feet long — that commemorates roller-skating in the park forever."

Quite the change of heart from the city's stance in the 1970s — in part thanks to the Godfather of Skate.



Skaters make their way around the rink while classic disco and soul plays at the Church of 8 Wheels in San Francisco on Sept. 20, 2022.

The New York Review of Books

The Question of Global Warming

Freeman Dyson
June 12, 2008 issue

Reviewed:

A Question of Balance: Weighing the Options on Global Warming Policies
by William Nordhaus
Yale University Press, 234 pp., $28.00

Global Warming: Looking Beyond Kyoto
edited by Ernesto Zedillo
Yale Center for the Study of Globalization/Brookings Institution Press, 237 pp., $26.95 (paper)

I begin this review with a prologue, describing the measurements that transformed global warming from a vague theoretical speculation into a precise observational science.

There is a famous graph showing the fraction of carbon dioxide in the atmosphere as it varies month by month and year by year (see the graph). It gives us our firmest and most accurate evidence of effects of human activities on our global environment. The graph is generally known as the Keeling graph because it summarizes the lifework of Charles David Keeling, a professor at the Scripps Institution of Oceanography in La Jolla, California. Keeling measured the carbon dioxide abundance in the atmosphere for forty-seven years, from 1958 until his death in 2005. He designed and built the instruments that made accurate measurements possible. He began making his measurements near the summit of the dormant volcano Mauna Loa on the big island of Hawaii.

Concentration of Carbon Dioxide in the Atmosphere

Freeman Dyson

Freeman Dyson is Professor of Physics Emeritus at the Institute for Advanced Study in Princeton. (January 2020)

* See Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2007). ↩

DAILY DISH

Green Faith

By The Daily Dish

MARCH 28, 2007

Is environmentalism becoming a form of religion? This is a meme sometimes found on the anti-enviro right, and in some extreme cases, they have a point. There is something fundamentalist about those who think of the earth as somehow an entity to be obeyed rather than a place to be simply lived in. The totalism of some animal rights activists has the smack of rigid orthodoxy. We all know how green the roots of the Nazi party were.

But this is an extreme fringe. For the vast majority of people who care about the

environment, the impulse is usually to preserve something we love. At its root, this is a *conservative* impulse. In America, in particular, love of the land has long been a part of patriotism. And where religious faith appears, it isn't necessarily a paean to Gaia. "America, The Beautiful" is an environmentalist hymn. America's greatest poets, Walt Whitman and Emily Dickinson, are intoxicated with the natural beauty of this continent. Part of their intoxication is their sense of the divine saturating the natural. Read Thoreau or Emerson and the same American interaction with nature is palpable. Americans, after all, forged a relationship with wilderness more recently than any Europeans. And there is, therefore, a deeply patriotic form of green thought in America that has been overly neglected by environmentalists and that can and should be reclaimed by political leaders, especially on the right.

There is also, it seems to me, an authentically religious approach to the environment that is completely orthodox and defensible. Christians believe that we have dominion over the earth, and that dominion carries with it a responsibility not just to the creatures we control but to the earth and sea and sky we inhabit. This has been on my mind this week watching the ravishing new series, Planet Earth on Discovery HD Theater. It's a collaboration with the BBC and took five years to make. They use innovative camera techniques - floating a self-stabilizing camera from a balloon to glide across the tree-tops of rain forests or diving equipment to capture the diversity and beauty of the ocean depths. And they photograph everything in high definition. It's lung-filling in its capacity to provoke wonder. If you want to know why this planet is worth conserving, watch it.

Mercifully, the narration (impeccably done by Sigourney Weaver) doesn't get too preachy. Nor does it spare us the brutality of the wild. But the impact of seeing the planet in this detail is enough to drive anyone to environmentalism. I don't believe in a neurotic resistance to all climatic and environmental change. But I do believe in responsible guardianship. The possibility that our carelessness and selfishness in carbon production could rid the world of whole species or transform rich flora into deserts, or drown delicate eco-systems, is a terrible one. And the urge to conserve, to pass the world on unharmed to the next generation is not a radical or necessarily

atheist impulse. It's also a conservative and Christian one. How we lost sight of that is a mystery to me. But technology may help us both see the danger more clearly, and give us new sources of energy to avoid it.

2006-2011 archives for The Daily Dish, featuring Andrew Sullivan

No. 24-291

In the Supreme Court of the United States

APACHE STRONGHOLD, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In 2014, Congress "authorized and directed" the Secretary of Agriculture to convey specific federal lands in Pinal County, Arizona, to respondent Resolution Copper Mining, LLC, as part of a land exchange. 16 U.S.C. 539p(c)(1). The federal lands to be conveyed to Resolution Copper include an area known as Oak Flat, which some Native Americans consider sacred and use for religious purposes. The statute contemplates that Resolution Copper will engage in mining that will eventually cause the surface of Oak Flat to subside, "preclud[ing] public access for safety reasons." 16 U.S.C. 539p(i)(3). Petitioner brought this action seeking to enjoin the transfer, asserting that it violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, and the Free Exercise Clause of the First Amendment. The question presented is:

Whether the court of appeals correctly determined that the land exchange does not violate RFRA or the First Amendment because the federal government's conveyance of its own property to a third party does not impose any cognizable burden on petitioner's exercise of religion.

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In the Supreme Court of the United States

No. 24-291

APACHE STRONGHOLD, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The amended opinion of the en banc court of appeals (Pet. App. 1a-262a) is reported at 101 F.4th 1036. The initial, superseded opinion of the en banc court (Pet. App. 263a-517a) is reported at 95 F.4th 608. A prior panel opinion (Pet. App. 518a-603a) is reported at 38 F.4th 742. An earlier order by a motions panel (Pet. App. 604a-621a) is not published in the Federal Reporter but is available at 2021 WL 12295173. The opinion of the district court (Pet. App. 622a-652a) is reported at 519 F. Supp. 3d 591.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2024. On August 1, 2024, Justice Kagan extended the time within which to file a petition for a writ

of certiorari to and including September 11, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

1. This case concerns the transfer of approximately 2422 acres of federal land in Pinal County, Arizona, to respondent Resolution Copper Mining, LLC, for the development of a copper mine. Pet. App. 16a, 21a. The land to be transferred is located in the Tonto National Forest, *id.* at 16a, which is managed by the Secretary of Agriculture acting through the U.S. Forest Service.

In 1955, 760 acres in the Tonto National Forest were reserved for public use—and made unavailable for mineral extraction—to form the Oak Flat Picnic and Camp Ground. 20 Fed. Reg. 7336, 7337 (Oct. 1, 1955). Forty years later, the "third-largest known copper deposit in the world" was discovered thousands of feet beneath the Forest. Pet. App. 18a; see *id.* at 687a. Resolution Copper holds unpatented mining claims on part of that deposit, which is estimated to contain nearly two billion tons of copper resource. *Id.* at 688a. Although much of the deposit is open to mining under federal law, it also "extends underneath [the] adjacent 760-acre" Oak Flat area. *Ibid.* As a result, Resolution Copper has been unable to "conduct[] mineral exploration or other mining-related activities" on the deposit. *Ibid.*

To address that problem, Resolution Copper "pursued a land exchange [with the federal government] for more than 10 years." Pet. App. 688a. Between 2005 and 2014, multiple bills were introduced in Congress to "compel the Government to transfer Oak Flat and its surroundings to Resolution Copper" in exchange for other lands elsewhere. *Id.* at 19a. During the legislative process, Congress heard from both supporters and

opponents of the proposed land exchange. As particularly relevant here, the then-Chairman of the San Carlos Apache Tribe testified that the federal lands that Resolution Copper sought to acquire contained sites that he considered "sacred and holy places" for the Apache, including "Oak Flat" and another site known as "Apache Leap." *H.R. 3301, Southeast Arizona Land Exchange and Conservation Act of 2007: Hearing before the Subcomm. on National Parks, Forests and Public Lands of the House Comm. on Natural Resources*, 110th Cong., 1st Sess. 18 (2007) (2007 Hearings); cf. Gov't C.A. Br. 6-7 (citing additional testimony).

In 2014, Congress enacted a statute authorizing and directing a version of the land exchange that Resolution Copper had sought. See Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003, 128 Stat. 3732-3741 (16 U.S.C. 539p) (Land Exchange Act). The Land Exchange Act requires the Secretary to transfer 2422 acres of federal land in the Tonto National Forest to Resolution Copper if the mining company offers to convey to the United States other lands satisfying the criteria set forth in the Act. 16 U.S.C. 539p(c)(1) and (5)(A). The federal lands to be conveyed to Resolution Copper include the Oak Flat area that had previously been withdrawn from mineral entry. See 16 U.S.C. 539p(b)(6) and (c)(6)(C); Pet. App. 21a.

As a condition of the land exchange, Congress required Resolution Copper to "agree to provide access to the surface of the Oak Flat Campground to members of the public, including Indian tribes, to the maximum extent practicable." 16 U.S.C. 539p(i)(3). Congress also required the Secretary to engage in government-to-government consultations with affected Indian tribes

and to consult with Resolution Copper to "seek to find mutually acceptable measures" to address tribal concerns and to "minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper." 16 U.S.C. 539p(c)(3)(A) and (B). But the Land Exchange Act contemplates that Resolution Copper's mining activities will ultimately result in surface subsidence that will "preclude[] continued public access [to Oak Flat] for safety reasons." 16 U.S.C. 539p(i)(3); see Pet. App. 23a (explaining that Resolution Copper plans to engage in underground mining activities that, over several decades, will "caus[e] the surface geography to become increasingly distorted," eventually resulting in "a large surface crater").

Although Congress chose to direct a conveyance of Oak Flat that will result in the area being rendered unsafe and inaccessible to tribes and the public, Congress also acted to protect the separate site known as Apache Leap. Congress did not include Apache Leap in the federal lands to be exchanged with Resolution Copper; instead, Congress required Resolution Copper to surrender all rights it held to mine under Apache Leap. 16 U.S.C. 539p(g)(3). Congress also directed the Secretary to establish a special management area for Apache Leap for the purpose of, among other things, "allow[ing] for traditional uses of the area by Native American people." 16 U.S.C. 539p(g)(2)(B).

2. On January 4, 2021, the Forest Service announced that it was planning to publish a final environmental impact statement for the land exchange with Resolution Copper (and for the associated copper mining project) on January 15. Pet. App. 24a. An environmental impact statement is a document prepared under the National

Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, to study the environmental effects of proposed federal actions. See 42 U.S.C. 4332(2)(C). The Land Exchange Act requires the publication of such a statement as a precondition to the conveyance of federal lands to Resolution Copper. 16 U.S.C. 539p(c)(9).

On January 12, 2021, petitioner brought this action in the United States District Court for the District of Arizona, seeking to halt the transfer of Oak Flat in order to protect the "religious freedom rights * * * of the Western Apache Peoples." Compl. ¶ 1; see Pet. App. 24a. Petitioner is not itself an Indian tribe, nor was it established by a tribe or under tribal law. Petitioner instead describes itself as a "nonprofit community organization of individuals" that seeks to protect "Holy sites." Compl. ¶ 24. The gravamen of the complaint is that Oak Flat is a "sacred and actively utilized religious place" and that transferring title to the area to Resolution Copper will violate the free-exercise rights of petitioner and its members because Oak Flat will ultimately be "annihilate[d]" through subsidence. Compl. ¶ 9. The complaint includes claims under both the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* See Compl. ¶¶ 58-86.

The district court denied petitioner's motion for a preliminary injunction. Pet. App. 622a-652a. As relevant here, the court found that petitioner was unlikely to succeed on its free-exercise or RFRA claims. *Id.* at 636a-645a. The court stated that the evidence in the preliminary-injunction record "shows that the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries." *Id.* at 636a. But with respect to the First Amendment, the court found the

Land Exchange Act to be a "'valid and neutral law of general applicability,'" which "merely authorizes the exchange of land" between the federal government and Resolution Copper. *Id.* at 639a (quoting *Employment Div.* v. *Smith*, 494 U.S. 872, 879 (1990)). The court also found that the land exchange would not "substantially burden" petitioner's exercise of religion within the meaning of RFRA. 42 U.S.C. 2000bb-1(a); see Pet. App. 639a-645a.

3. Petitioner appealed and sought an emergency injunction from the court of appeals. While that litigation was ongoing, the government withdrew the final environmental impact statement in order to engage in further consultations with affected Indian tribes. See Gov't C.A. Opp. to Emergency Mot. for Inj. Pending Appeal 1, 4-5. The government informed the court of appeals that the conveyance that petitioner sought to enjoin would not occur until a new final environmental impact statement was published. Pet. App. 604a. The government also committed to providing at least 30 days' notice to petitioner before publication. *Ibid.*[1]

After those developments, the court of appeals denied petitioner's motion for emergency relief without prejudice. Pet. App. 604a-605a. Judge Bumatay dissented; he would have granted an injunction pending appeal. *Id.* at 605a-621a.

4. In June 2022, a panel of the court of appeals affirmed the district court's denial of a preliminary injunction, over the dissent of Judge Berzon. Pet. App. 518a-603a. The court then granted rehearing en banc

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[1] The district court later ordered the government to provide at least 60 days' notice to petitioner and the public. D. Ct. Order 2 (May 12, 2021).

and again affirmed, issuing a per curiam order and several separate opinions. *Id.* at 1a-262a.[2]

a. RFRA forbids the government from "substantially burden[ing] a person's exercise of religion" unless "application of the burden to the person" furthers a "compelling governmental interest" and is "the least restrictive means of furthering that" interest. 42 U.S.C. 2000bb-1(a) and (b). At the panel stage, the majority viewed petitioner's likelihood of success under RFRA as turning on "what constitutes a substantial burden." Pet. App. 535a. The majority understood a prior en banc decision to establish that "the government imposes a substantial burden on religion" for RFRA purposes in only two circumstances: (1) "'when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit'" or (2) "when individuals are 'coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.'" *Id.* at 537a-538a (quoting *Navajo Nation* v. *United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), cert. denied, 556 U.S. 1281 (2009)). And the majority concluded that the government's transfer of Oak Flat to Resolution Copper did not violate RFRA because it would not result in either circumstance. *Id.* at 543a-544a. The majority also agreed with the district court that petitioner's constitutional claim failed because the Land Exchange Act is a "valid and neutral law of general applicability." *Id.* at 571a (citation omitted); see *id.* at 571a-574a.

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[2] The en banc court issued an initial opinion on March 1, 2024. Pet. App. 263a-517a. Petitioner requested that the full en banc court rehear the matter. *Id.* at 13a. The court denied that request on May 14, 2024, and simultaneously released an amended en banc opinion, see *id.* at 11a-13a (noting changes).

b. At the en banc stage, the court of appeals issued a per curiam order affirming the denial of a preliminary injunction and explaining that the 11-judge en banc court had produced two majority holdings explained in different opinions. Pet. App. 14a-15a.

In the lead opinion—authored by Judge Collins, and joined by Judges Bea, Bennett, Nelson, Forrest, and VanDyke, see Pet. App. 16a—a majority of the en banc court held that petitioner's free-exercise claim is foreclosed by this Court's decision in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and that *Lyng*'s constitutional holding is incorporated into the concept of a "substantial[] burden" codified in RFRA, 42 U.S.C. 2000bb-1(a), therefore foreclosing petitioner's RFRA claim as well. See Pet. App. 27a, 41a.

In *Lyng*, a group of Indian and environmental plaintiffs challenged the Forest Service's decision to construct a road and allow logging on federal lands in an area within a national forest that had "historically been used for religious purposes." *Lyng*, 485 U.S. at 442. This Court acknowledged that the proposed project would have "severe adverse effects on the practice of [the plaintiffs'] religion." *Id.* at 447. But the Court nonetheless rejected the plaintiffs' free-exercise claim, explaining that the First Amendment does not confer any right to a "religious servitude" on public lands, *id.* at 452, and that the government's management of its own property did not impose a cognizable burden on the plaintiffs' exercise of their religion, see *id.* at 451-453.

In this case, the lead opinion explained that the land transfer required by the Land Exchange Act is "indistinguishable" from the government action in *Lyng*. Pet. App. 32a. As in *Lyng*, the transfer would have "no tendency to coerce" any persons "into acting contrary to

their religious beliefs." *Ibid.* (quoting *Lyng*, 485 U.S. at 450). Nor would the transfer "'discriminate' against [petitioner's] members, 'penalize' them, or deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Ibid.* (quoting *Lyng*, 485 U.S. at 449, 453). In light of *Lyng*, the lead opinion concluded that petitioner's constitutional claim amounts to an unfounded request for "a 'religious servitude' that would uniquely confer on tribal members '*de facto* beneficial ownership'" of the federal lands at issue. *Ibid.* (quoting *Lyng*, 485 U.S. at 452-453).

With respect to RFRA, the lead opinion further held that *Lyng* continues to inform "what counts as a *cognizable* substantial burden" on religious exercise for purposes of that statute. Pet. App. 53a. In particular, the lead opinion viewed RFRA's reference to a "substantial burden" as a term of art that incorporated this Court's pre-*Smith* case law. *Id.* at 58a. And the lead opinion thus concluded that "RFRA's understanding of what counts as 'substantially burdening a person's exercise of religion' must be understood as subsuming, rather than abrogating, the holding of *Lyng*." *Ibid.* (brackets omitted).

Chief Judge Murguia authored the lead dissent, which four other judges joined in full or part. Pet. App. 197a; see *id.* at 197a-261a. In her view, the prior en banc decision in *Navajo Nation* did not reflect a proper interpretation of RFRA. *Id.* at 197a-198a. In particular, she concluded that government action may constitute a "substantial burden" on the free exercise of religion for purposes of RFRA not only in the two circumstances described in *Navajo Nation*, 535 F.3d at 1070, but also in other instances—including "cases where places of worship will be obliterated" as a result of the government's action. Pet. App. 221a. Applying those principles here,

Chief Judge Murguia would have held that petitioner is likely to succeed in showing that the land transfer imposes a substantial burden under RFRA because it will ultimately result in the destruction, through subsidence, of Oak Flat. See *id.* at 261a.

Judge Ryan Nelson joined the lead opinion and also issued a separate concurrence. Pet. App. 16a, 118a-158a. In his concurrence, Judge Nelson stated that he agreed with the dissenting judges that *Navajo Nation* had adopted an unduly narrow interpretation of RFRA, albeit for "some overlapping and differing reasons" than those expressed by Chief Judge Murguia. *Id.* at 139a. But Judge Nelson also explained that he agreed with the lead opinion that affirmance was warranted because *Lyng* continues to inform the best reading of RFRA. See *id.* at 154a-156a. As reflected in the en banc court's per curiam order, the effect of Judge Nelson agreeing in part with the dissenters was to "overrule[] *Navajo Nation* * * * to the extent that it defined a 'substantial burden' under RFRA" as imposed only in the two circumstances described in *Navajo Nation*. *Id.* at 14a.

Judge Bea concurred in part and dissented in part. Pet. App. 62a-117a. He agreed in full with the lead opinion and dissented only from that portion of the per curiam order overruling *Navajo Nation*. *Id.* at 62a-63a. In a portion of his opinion also joined by Judges Forrest and Bennett, see *id.* at 62a, Judge Bea further emphasized that the land transfer at issue here is specifically "mandated by an Act of Congress" that post-dates RFRA. *Id.* at 108a. Accordingly, he explained, to the extent that RFRA could be construed to prohibit a transfer specifically mandated by Congress, the later-in-time

Land Exchange Act would be controlling. See *id.* at 110a-115a.

Judge VanDyke concurred. Pet. App. 159a-197a. He agreed with the lead opinion and separately observed that "reinterpreting RFRA to impose affirmative obligations on the government to guarantee its own property for religious use would inevitably result in religious discrimination." *Id.* at 159a; see *id.* at 177a-181a.

Judge Lee dissented to state his view that the government had forfeited the argument that RFRA cannot prohibit a land transfer specifically mandated by the later-in-time Land Exchange Act. Pet. App. 262a.[3]

ARGUMENT

Petitioner renews its contention (Pet. 21-32) that transferring Oak Flat to Resolution Copper would violate RFRA and the Free Exercise Clause because the exchange will allow Resolution Copper to engage in mining that will eventually cause Oak Flat to subside, preventing the use of the land for religious practices. The United States respects and does not in any way seek to diminish the importance of those practices. Indeed, the federal government has long had a policy of "accommodat[ing] access to and ceremonial use of Indian sacred sites" on federal land and "avoid[ing] adversely affecting the physical integrity of such sacred sites," to the extent practicable and as permitted by law. Exec. Order No. 13,007, § 1(a), 61 Fed. Reg. 26,771, 26,771 (May 29, 1996).

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[3] After the en banc court heard oral argument, Resolution Copper moved to intervene as a defendant-appellee in the proceedings, and the court granted that motion before issuing its judgment. See C.A. Order 1 (June 30, 2023); see also Mot. of Resolution Copper Mining, LLC to Intervene 1-4 (June 16, 2023).

Here, however, Congress has specifically mandated that Oak Flat be transferred so that the area can be used for mining. The en banc court of appeals correctly rejected petitioner's contention that the required transfer violates RFRA or the Free Exercise Clause, and the court's decision does not conflict with any decision of this Court or another court of appeals. To the contrary, this Court rejected a materially identical constitutional claim in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), which formed part of the legal backdrop that Congress incorporated into RFRA. And petitioner does not cite any decision by any court of appeals holding that the federal government's use or disposition of its own land violates RFRA or the Free Exercise Clause.

Even if the Court were otherwise inclined to consider the law governing claims that the use of federal land interferes with religious exercise, this highly unusual case would be a poor vehicle in which to do it. Unlike a typical RFRA claimant, petitioner does not seek a religious exemption from a generally applicable federal law or policy. Instead, petitioner seeks to use RFRA to nullify a subsequent statute in which Congress mandated that this specific parcel of land be transferred to a third party. Even if petitioner were correct that the transfer would otherwise violate RFRA, the later-enacted and more specific Land Exchange Act would control in the event of such a conflict. The resolution of the RFRA question presented would thus have no effect on the ultimate outcome of this case.

A. The Decision Below Is Correct

As the court of appeals explained, *Lyng* and this Court's other relevant precedents establish that the government does not impose a cognizable burden on

religious exercise when it uses or disposes of its own property—even when members of the public seek to use that property for religious purposes. In restoring this Court's pre-*Smith* approach to religious-liberty claims, RFRA did not upset that settled understanding. To the contrary, RFRA is best read to "subsume[], rather than override[]," *Lyng*'s holding. Pet. App. 53a.

1. For several decades, in a line of cases including *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court permitted religious adherents to invoke the Free Exercise Clause to seek religious exemptions from neutral, generally applicable laws. "[T]hose decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

This Court's decisions applying the *Sherbert-Yoder* test rejected claims that the government's management of its own programs or property could impose a substantial burden on the exercise of religion. In *Bowen* v. *Roy*, 476 U.S. 693 (1986), two applicants for welfare benefits challenged a federal statute requiring welfare agencies to use Social Security numbers to identify claimants, contending that using a number to identify their two-year-old daughter would "'rob [her] spirit'" and "prevent her from attaining greater spiritual power." *Id.* at 696. This Court did not question the sincerity or the weight of the parents' religious beliefs, but it held that the claimed injury was not a cognizable burden because the Free Exercise Clause "does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700.

The Court later reaffirmed that principle in the specific context presented here—the government's management of federal lands. In *Lyng*, the Court considered a challenge brought by an Indian organization and other plaintiffs to government plans to permit timber harvesting in, and construction of a road through, the Chimney Rock area, a portion of a national forest traditionally used for religious practice by members of three Indian tribes. 485 U.S. at 442-443. The plaintiffs asserted that the Chimney Rock area was an "indispensible part of Indian religious conceptualization and practice," and that the project "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the[ir] belief systems and lifeway." *Id.* at 442 (citations omitted).

The Court acknowledged that the challenged project would have "devastating effects on traditional Indian religious practices." *Lyng*, 485 U.S. at 451. But it held that those harms did not constitute a cognizable burden under the Free Exercise Clause because, as in *Roy*, the affected persons would not "be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity." *Id.* at 449. Noting that a "broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs," the Court explained that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires" in matters such as the administration of public lands. *Id.* at 452. The religious beliefs asserted in *Lyng*, the Court emphasized, could allow adherents to "seek to exclude all human

activity but their own from sacred areas of the public lands." *Id.* at 452-453. The Court declined to adopt an understanding of the right to the free exercise of religion that would grant religious adherents such "*de facto* beneficial ownership" of federal lands. *Id.* at 453.

2. This Court ultimately rejected the *Sherbert-Yoder* approach as a matter of constitutional law in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *Smith* held that the Free Exercise Clause does not require religious exemptions to neutral laws of general applicability, even if those laws substantially burden religiously motivated conduct. *Id.* at 876-890. Congress responded to the Court's decision by enacting RFRA, which "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Under RFRA, the government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "application of the burden to the person" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b).

RFRA expressly provides that it is intended to "restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*]." 42 U.S.C. 2000bb(b)(1). And its legislative history confirms that Members of Congress intended for courts to "look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993) (Senate Report); see H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same). In particular, legislators recognized that, in light of *Roy* and *Lyng*, "pre-*Smith* case law makes it clear that strict scrutiny does not apply to

government actions involving only management of internal Government affairs or the use of the Government's own property or resources." Senate Report 9; see, *e.g.*, 139 Cong. Rec. 26,193 (1993) (Sen. Hatch) (observing that *Lyng* held that "the way in which Government manages its affairs and uses its own property does not constitute a burden on religious exercise" and reaffirming that "RFRA does not affect *Lyng*"); *id.* at 26,415-26,416 (Sen. Grassley) (same). Even those who strongly supported greater protection for "native American worship at sacred sites on federal land" recognized that, in light of "the Supreme Court's ruling in *Lyng*," RFRA "did not address" that issue. *Id.* at 26,416 (Sen. Inouye).[4]

RFRA originally "applied to both the Federal Government and the States." *Hobby Lobby*, 573 U.S. at 695. After this Court held that Congress had exceeded its authority in seeking to subject States to RFRA liability, see *City of Boerne* v. *Flores*, 521 U.S. 507, 533-534 (1997), Congress responded by enacting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* RLUIPA "imposes the same general test as RFRA but on a more limited category of governmental actions," including certain restrictions on land use. *Hobby Lobby*, 573 U.S. at 695; see *Holt* v. *Hobbs*, 574 U.S. 352, 357-358 (2015). In particular, RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person," unless the government can satisfy the

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[4] Senator Inouye instead sought to protect sacred sites on federal land through separate legislation, which failed to pass. See 139 Cong. Reg. at 26,416 (Sen. Inouye) (discussing the Native American Free Exercise of Religion Act of 1993, S. 1021, 103d Cong. (1993)).

same compelling-interest test applicable under RFRA. 42 U.S.C. 2000cc(a)(1). But RLUIPA is not directed at state and local governments' management of their own land; to the contrary, the statute specifically requires that the claimant have an "ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. 2000cc-5(5) (defining "land use regulation").

3. The court of appeals correctly held that the principle adopted by this Court in *Lyng* and carried forward by Congress in RFRA forecloses petitioner's claim. See Pet. App. 41a-58a. Like the plaintiffs in *Lyng*, petitioner challenges a government action that will effectively preclude the use of certain federal land for religious exercise, but that government action does not "coerce[]," "penalize," or otherwise prohibit petitioner's religious practices. *Lyng*, 485 U.S. at 449. As in *Lyng*, petitioner effectively seeks a "religious servitude," *id.* at 452, that would preclude the transfer of Oak Flat or any other use of the land that would interfere with tribal religious exercise. If that theory were valid, similar RFRA claims could burden "some rather spacious tracts" of federal lands. *Id.* at 453. And that is not merely a theoretical concern: "One religious adherent has testified that the 'entire state of Washington and Oregon' is 'very sacred' to him," and another "has claimed as sacred" an area spanning "some 40,000 square miles" around the Colorado River. Pet. App. 100a n.18. As this Court held in *Lyng*, the right to the free exercise of religion "simply does not provide a principle that could justify upholding" such a claim to control the use of public land. 485 U.S. at 452.

Petitioner asserts (Pet. 21-22) that the court of appeals failed to give effect to the plain meaning of the term "substantial[] burden" in RFRA, 42 U.S.C. 2000bb-1(a). In petitioner's view (Pet. 22), that term may encompass "preventing [religious exercise] from taking place," just as it may encompass penalizing religious exercise or making religious exercise more costly or difficult. But a majority of the en banc court agreed with petitioner on that point as a general matter, and the court formally overruled the circuit precedent that the panel had read to require a more narrow understanding of RFRA. See Pet. App. 14a (per curiam order); see also *id.* at 119a (R. Nelson, J., concurring) (stating that "[p]reventing access to religious exercise generally constitutes a substantial burden"); *id.* at 225a (Murguia, C.J., dissenting) (stating that "prevent[ing] a person from engaging in sincere religious exercise" may constitute a substantial burden). The decision below thus clears the way for a future RFRA plaintiff to argue in an appropriate case in the Ninth Circuit that the government has substantially burdened the plaintiff's religious exercise by preventing access to a place of worship.

The particular place at issue in this case, however, is located on federal lands. And in that specific context, the court of appeals properly looked to this Court's decision in *Lyng* to inform the distinct question of "what counts as a *cognizable* substantial burden" under RFRA. Pet. App. 53a. Congress did not define the term "substantial burden" in RFRA or its sister statute, RLUIPA. But Congress was seeking to "restore" the approach reflected in this Court's pre-*Smith* decisions in *Sherbert* and *Yoder*, 42 U.S.C. 2000bb(b)(1), and looking to the corpus of pre-RFRA precedent applying those decisions is therefore appropriate to understand the concepts

that Congress incorporated into RFRA. Those pre-*Smith* decisions formed the "legal 'backdrop against which Congress enacted' RFRA," *Tanzin* v. *Tanvir*, 592 U.S. 43, 48 (2020) (citation omitted), as expressly reflected in the statutory text, see 42 U.S.C. 2000bb(a)(5) (referring to the "compelling interest test as set forth in prior Federal court rulings").

In referring to actions that "substantially burden" the exercise of religion, 42 U.S.C. 2000bb-1(a), moreover, Congress borrowed a phrase that this Court had used to summarize the *Sherbert-Yoder* test in *Smith* itself, as well as in pre-*Smith* decisions. See *Smith*, 494 U.S. at 883 ("Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."); see also, *e.g.*, *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989). This Court's subsequent decisions have likewise described the pre-*Smith* test as asking "whether the challenged action imposed a *substantial burden* on the practice of religion." *Hobby Lobby*, 573 U.S. at 693 (emphasis added); accord *Holt*, 574 U.S. at 357. Where, as here, a statutory term "is obviously transplanted from another legal source," it "brings the old soil with it." *Taggart* v. *Lorenzen*, 587 U.S. 554, 560 (2019) (citation omitted). Thus, as the court of appeals recognized, "[w]hen Congress copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise." Pet. App. 53a.

To be sure, this Court in *Lyng* did not use the phrase "substantial burden." Cf. Pet. 25. But the Court described the plaintiffs' claim in that case as a contention "that the burden on their religious practices is heavy

enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need." *Lyng*, 485 U.S. at 447. The Court "disagree[d]," *ibid.*, holding that burdens on religious exercise that result from the federal government's management of its own land are not cognizable under the Free Exercise Clause. See *id.* at 452-453; see also *id.* at 458-459 (Brennan, J., dissenting) (acknowledging "the Court's determination that federal land-use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause").

More broadly, the concept of a "burden" on religious exercise was well-developed in this Court's pre-RFRA precedent. In *Sherbert*, for example, the Court began with the question whether the challenged disqualification from unemployment benefits "imposes any burden on the free exercise of [the challenger's] religion." 374 U.S. at 403; see also, *e.g.*, *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981) (same). Accordingly, even if the phrase "substantially burden" in Section 2000bb-1(a) was not itself a term of art, cf. Pet. 25, the concept of a cognizable "burden" certainly was. And in adding the qualifier "substantially," Congress plainly did not *expand* the burdens this Court's pre-*Smith* decisions had recognized as cognizable. Just the opposite: Senators Hatch and Kennedy sponsored the amendment inserting "substantially" and emphasized that the amendment was "intended to make it clear that the pre-*Smith* law is applied under RFRA in determining whether" a cognizable burden exists. 139 Cong. Reg. at 26,180 (Sen. Kennedy); see *ibid.* (Sen. Hatch).

Petitioner suggests (Pet. 23) that reading RFRA to preserve the reasoning of *Lyng* would conflict with

those portions of the statute making clear that the "use * * * of real property" can be a form of religious exercise. 42 U.S.C. 2000cc-5(7)(B) (RLUIPA); see 42 U.S.C. 2000bb-2(4) (incorporating that definition into RFRA). But that statutory language is fully consistent with both *Lyng* and the decision below. In *Lyng*, this Court accepted that using specific property for religious purposes can be a form of religious exercise. See, *e.g.*, 485 U.S. at 451 (explaining the plaintiffs' sincere belief that "rituals would not be efficacious if conducted at other sites"). The court of appeals likewise did not gainsay that accessing a particular site for ceremonial purposes may qualify as religious exercise. The court merely recognized that RFRA does not itself "grant freestanding rights to obtain otherwise unavailable access" to federal property, such as federal buildings generally closed to the public or federal lands that the government seeks to transfer to a third party. Pet. App. 57a n.8.

4. Petitioner briefly asserts (Pet. 28-29) that *Lyng* is distinguishable because the challenged project at issue there did not physically prevent the plaintiffs from visiting the relevant sacred sites. But as the court of appeals explained, "[t]hese efforts to distinguish *Lyng* are refuted by *Lyng* itself." Pet. App. 33a. "In *Lyng*, the State of California argued that *Roy* was distinguishable on the ground that it involved only interference with the plaintiffs' 'religious tenets from a *subjective* point of view,'" whereas the challenged action in *Lyng* would "'*physically destroy* the environmental conditions and the privacy without which the religious practices cannot be conducted.'" *Ibid.* (quoting *Lyng*, 485 U.S. at 449). This Court squarely rejected any such "subjective/physical distinction," *ibid.*, explaining that courts have no principled basis to "say that one form of incidental interference

with an individual's spiritual activities should be subjected to a different constitutional analysis than the other," *Lyng*, 485 U.S. at 450. That principle likewise forecloses petitioner's proposed "distinction between interference with subjective experiences and physical destruction of the means of conducting spiritual exercises." Pet. App. 34a.

B. Petitioner's RFRA Claim Does Not Warrant Review

The court of appeals' rejection of petitioner's RFRA claim does not conflict with any decision of this Court or another court of appeals, nor does it otherwise warrant this Court's review.

1. Petitioner principally asserts (Pet. 24-29) that the decision below "defies this Court's precedent." Pet. 24 (emphasis omitted); see Pet. 24-29. In fact, the court of appeals explained that its conclusion followed directly from faithful adherence to this Court's decisions, most obviously *Lyng*. See, *e.g.*, Pet. App. 27a-32a, 42a-46a. And petitioner does not cite any decision of this Court holding—or even suggesting—that the government's disposition of its own land can impose a substantial burden cognizable under RFRA. Instead, petitioner overreads statements in this Court's post-RFRA decisions addressing very different issues.

For example, petitioner asserts (Pet. 25) that the decision below is inconsistent with this Court's observation in *Hobby Lobby* that Congress did not seek to "tie RFRA coverage tightly to the specific holdings of [the Court's] pre-*Smith* free-exercise cases," 573 U.S. at 714. But the Court there was addressing whether for-profit corporations are "person[s]" who can exercise religion within the meaning of RFRA. *Id.* at 705 (citation omitted). The Court's conclusion that for-profit corporations can assert RFRA claims, even in the absence of

any pre-*Smith* case law squarely on point, "does not stand for the quite different—and erroneous—proposition that RFRA is somehow exempt from the settled rule that 'Congress legislates against the backdrop of existing law.'" Pet. App. 57a (citation omitted).

Petitioner likewise errs in relying (Pet. 26) on *Holt*, where this Court observed that a lower court considering a prisoner's RLUIPA claim had "improperly imported a strand of reasoning" from two pre-RLUIPA precedents, 574 U.S. at 361. The lower court's error in that case consisted of improperly taking into account whether a prisoner had "alternative means of practicing [his] religion"—a question that was relevant before RFRA and RLUIPA, but that Congress had foreclosed by adopting the substantial-burden test. *Ibid.* Here, in contrast, the court of appeals relied on a pre-*Smith* requirement—the existence of a cognizable "burden" on the exercise of religion—that Congress explicitly incorporated into RFRA's text.

Hobby Lobby and *Holt* underscore that RFRA and RLUIPA can obligate the government to provide religious accommodations in some circumstances where the Free Exercise Clause itself would not. But neither supports petitioner's view that Congress repudiated *Lyng*—an assertion that would have come as a shock to RFRA's key supporters, who gave express assurances that the statute would do no such thing. See pp. 15-16, *supra*.

2. Petitioner contends that the decision below conflicts with the decisions of six other courts of appeals, which petitioner describes as having recognized that a "substantial burden plainly exists 'where the government completely prevents a person from engaging in religious exercise.'" Pet. 29 (citation omitted); see Pet. 29-32. Petitioner invoked a similar purported circuit conflict

in seeking en banc review below. See Pet. C.A. Br. in Support of Reh'g En Banc 8-9. But a majority of the en banc court *agreed* with petitioner that Ninth Circuit precedent should be overruled to the extent that it had suggested that preventing religious exercise could not constitute a substantial burden. Pet. App. 14a. The en banc court instead rejected petitioner's claim based on the narrower ground that, consistent with *Lyng*, "a disposition of government real property does not impose a substantial burden on religious exercise when it has 'no tendency to coerce individuals into acting contrary to their religious beliefs,' does not 'discriminate' against religious beliefs, does not 'penalize' them, and does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Id.* at 14a-15a (quoting *Lyng*, 485 U.S. at 449-450, 453).

Petitioner does not identify any decision by any court of appeals that conflicts with that holding, which concerns only RFRA's application to the federal government's use or disposition of its own land. To the contrary, petitioner cites only a single district-court decision endorsing a RFRA claim comparable to the one it asserts here. See Pet. 30 (citing *Comanche Nation* v. *United States*, No. 08-cv-849, 2008 WL 4426621, at *17 (W.D. Okla. Sept. 23, 2008)). The court in that case did not address *Lyng*, and its preliminary, unpublished, and non-precedential decision does not create any conflict warranting this Court's review. See Sup. Ct. R. 10.

By contrast, the appellate decisions that petitioner invokes (Pet. 29-30) largely addressed RLUIPA claims arising in circumstances far afield from the government's use of its own land. See *Thai Meditation Ass'n of Ala., Inc.* v. *City of Mobile*, 980 F.3d 821, 825 (11th Cir. 2020) (RLUIPA challenge to zoning); *Bethel World*

Outreach Ministries v. *Montgomery Cnty. Council*, 706 F.3d 548, 552 (4th Cir. 2013) (same); *West* v. *Radtke*, 48 F.4th 836, 840 (7th Cir. 2022) (RLUIPA challenge to prison policies); *Haight* v. *Thompson*, 763 F.3d 554, 558-559 (6th Cir. 2014) (same); *Yellowbear* v. *Lampert*, 741 F.3d 48, 51-52 (10th Cir. 2014) (Gorsuch, J.) (same).

RFRA and RLUIPA are sister statutes and should be "interpreted uniformly" to the extent they overlap. Pet. App. 14a. But the two statutes apply in different contexts. RLUIPA creates two causes of action: one to challenge "land use regulation[s]" as substantial burdens on religious exercise, 42 U.S.C. 2000cc(a)(1), and the other to challenge substantial burdens on the religious exercise of "person[s] residing in or confined to an institution," 42 U.S.C. 2000cc-1(a)(1). The land-use cases are no help to petitioner because RLUIPA is limited to circumstances in which the claimant has an ownership interest in the lands at issue. See p. 17, *supra*. RLUIPA does not support any claim to control how *someone else's* property is used, let alone property of the federal government. And the court of appeals specifically distinguished cases involving both private land use and prisons because those contexts "inherently involve coercive restrictions" and thus "do *not* raise a similar *Lyng*-type issue about the bounds of what counts as 'prohibiting' religious exercise." Pet. App. 54a.

Only one of the appellate decisions that petitioner cites (Pet. 30) in asserting a circuit conflict actually addressed RFRA. In that case, the Eighth Circuit stated that it would "assume" that a bankruptcy trustee's recovery in bankruptcy of the debtors' tithe would impose a substantial burden on the debtors' religious exercise because it "would effectively prevent" them from tithing. *Christians* v. *Crystal Evangelical Free Church*

(*In re Young*), 82 F.3d 1407, 1418 (1996), vacated, 521 U.S. 1114 (1997). Petitioner does not attempt to explain how that decision conflicts with the decision below, and it plainly does not.

C. Petitioner's Constitutional Claim Does Not Warrant Review

Petitioner briefly contends (Pet. 32-34) that the decision below "deepens" an existing disagreement in the courts of appeals about whether a plaintiff asserting a violation of the Free Exercise Clause must show a "substantial burden" or merely a "burden" on the plaintiff's religious exercise when the plaintiff challenges a law that is *not* neutral and generally applicable. This case does not implicate any such division, even on the counterfactual assumption that the Land Exchange Act is not neutral or generally applicable.[5] The court of appeals rejected petitioner's free-exercise claim because that claim is squarely foreclosed by *Lyng*. See Pet. App. 31a-32a. The court thus had no occasion to pass on the free-exercise question that petitioner asks this Court to resolve, and this Court should not grant certiorari to do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (observing that this Court generally sits as "a court of review, not of first view").

Petitioner also suggests in passing (Pet. 34) that the Court should grant certiorari to overrule *Lyng*. But

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[5] In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017), this Court identified its prior decision in *Lyng* as one of a number of decisions rejecting free-exercise challenges to "neutral and generally applicable" laws, *id.* at 460. The court of appeals questioned that characterization of *Lyng* but concluded that, in any event, the Land Exchange Act and the law at issue in *Lyng* are materially indistinguishable and thus both pass muster under the Free Exercise Clause. Pet. App. 36a-37a & n.4, 41a.

petitioner has not offered anything like the sort of "special justification" that this Court demands before overruling a precedent. *Gamble* v. *United States*, 587 U.S. 678, 691 (2019) (citation omitted). Instead, petitioner argues only (Pet. 34) that a *different* precedent—*Smith*—"has been criticized" as inconsistent with the Constitution's text, original understanding, and pre-*Smith* precedent. And although petitioner asserts without explanation (*ibid.*) that "*Lyng* is subject to criticism on the same grounds," that is not so. Justice O'Connor, for example, strongly disagreed with the Court's holding in *Smith* but explained that *Lyng* presented a very different issue because "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment) (citation omitted); see Pet. App. 50a-52a. And petitioner does not offer any basis in text, history, or precedent to conclude that the government must satisfy strict scrutiny whenever it seeks to use its own land in a manner that would prevent or interfere with a citizen's religious exercise.

D. This Case Would Be A Poor Vehicle For Considering The Questions Petitioner Seeks To Raise Even If Those Questions Otherwise Warranted Review

Even if this Court were inclined to consider how RFRA and the Free Exercise Clause apply to the use of federal land, this unusual case would be a poor vehicle in which to do so for at least two reasons.

First, petitioner's RFRA claim is atypical in important respects. In the paradigmatic RFRA case, the claimant seeks a religious exemption "from a rule of general applicability." 42 U.S.C. 2000bb-1(a); see, *e.g.*,

Hobby Lobby, 573 U.S. at 726-727 (religious exemption from mandate to provide contraceptive coverage); *O Centro*, 546 U.S. at 434-437 (religious exemption from federal drug laws for religious use of controlled substance). Here, by contrast, petitioner does not seek a religious exemption for itself or its members from the Land Exchange Act's requirement to transfer Oak Flat to Resolution Copper. Petitioner instead "seek[s] to prevent the land exchange" entirely. Pet. App. 623a; see *id.* at 24a. Moreover, it is not the transfer itself that would prevent petitioner from accessing Oak Flat for religious exercise, but rather subsequent mining activities by a private party. Those complexities would make this case an unsuitable vehicle for addressing broad questions about RFRA's application to more typical decisions about the use of federal lands.

Second, the RFRA question that petitioner seeks to present is academic to the proper resolution of this case. As Judge Bea explained below, "the plain text of the Land Exchange Act requires that the land exchange, including the exchange of Oak Flat, *must* occur if the preconditions are met." Pet. App. 114a (Bea, J., concurring in part and dissenting in part); see 16 U.S.C. 539p(c)(1) ("the Secretary is authorized *and directed* to convey" the specific lands to Resolution Copper) (emphasis added). If petitioner were correct that RFRA forbids the government from transferring Oak Flat to Resolution Copper, then the result would be an "irreconcilable" conflict between RFRA and the Land Exchange Act—one statute prohibiting what the other specifically commands. Pet. App. 114a (Bea, J., concurring in part and dissenting in part). And in the event of such a conflict, the later and more specific statute must be given effect. See, *e.g.*, *National Ass'n of Home Builders* v.

Defenders of Wildlife, 551 U.S. 644, 662-663 (2007); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936).

The later-enacted Land Exchange Act would be controlling over RFRA in those circumstances notwithstanding the rule of construction in 42 U.S.C. 2000bb-3. See Pet. App. 110a-113a (Bea, J., concurring in part and dissenting in part). That provision states that RFRA applies to any federal law enacted after the date on which RFRA was enacted "unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. 2000bb-3(b). But such express-statement requirements are "ineffective." *Lockhart* v. *United States*, 546 U.S. 142, 147-150 (2005) (Scalia, J., concurring) (citing Section 2000bb-3(b) as an example). "That is because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey* v. *United States*, 567 U.S. 260, 274 (2012). And, critically, a future Congress "remains free to express" its intention to amend or partially repeal prior law "either expressly or by implication as it chooses." *Ibid.*

The rule of construction in Section 2000bb-3(b) does underscore that RFRA applies broadly. This Court has thus described RFRA as "a kind of super statute, displacing the normal operation of other federal laws." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 682 (2020). And in the mine run of RFRA cases, no irreconcilable conflict will arise between RFRA and any later-enacted statute because the government will generally be able to carry both into effect by granting the particular claimant a religious exemption or accommodation while continuing to apply the later-enacted statute to others.

Providing exceptions or accommodations to a particular person is generally "how [RFRA] works," as explained above. *O Centro*, 546 U.S. at 434; see *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657, 681 (2020). But again, this case presents the anomalous situation in which a RFRA plaintiff does not seek an exemption from a law that would continue to operate as to others, but instead seeks to invoke RFRA to block a land transfer that Congress specifically required.

Here, moreover, Congress mandated the transfer of Oak Flat with full awareness that some Native Americans consider the area to be sacred. Indeed, the Land Exchange Act reflects a legislative compromise between economic development and concerns about protecting sacred sites: Congress did *not* transfer to Resolution Copper another area, Apache Leap, that had been identified as sacred in committee hearings, and instead mandated that the area be withdrawn from mining and managed "to allow for traditional uses of the area by Native American people." 16 U.S.C. 539p(g)(2)(B); see pp. 3-4, *supra*. The clear implication of those legislative choices is that Congress itself already determined that the transfer of Oak Flat "shall" occur despite sincerely held religious objections. 16 U.S.C. 539p(c)(10). RFRA's general prohibition cannot be invoked to thwart that specific and unambiguous directive from a later Congress.[6]

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[6] In his dissenting opinion, Judge Lee stated that the government had "waived" this argument below by raising it for the first time in opposing rehearing en banc. Pet. App. 262a. In fact, the government made the same argument in its brief at the panel stage. See Gov't C.A. Br. 16 n.3. And even if the government had forfeited the argument for purposes of this preliminary-injunction appeal, the government would still be entitled to raise it when the district court

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2024

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addresses the merits—meaning that the resolution of the RFRA question presented in the petition would still have no effect on the ultimate outcome of this case.

No. 24-291

In the Supreme Court of the United States

APACHE STRONGHOLD,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

Respondents don't dispute the exceptional importance of this case for Western Apaches, Native Americans, and all Americans who worship on federal land. Nor do they dispute that forever abolishing Apache rituals is a "substantial burden" under RFRA's ordinary meaning. Instead, offering legislative history and policy arguments, they claim that "substantial burden" must have a specialized meaning that incorporates *Lyng* in the "specific context" of "government real property."

That claim defies RFRA's text, which applies uniformly to "all Federal law" including laws governing "real property," and never mentions *Lyng*. It flouts this Court's cases, which hold that RFRA's coverage is not tied to the "holdings of our pre-*Smith* free-exercise cases." It misconstrues *Lyng*, which is part of the *Smith* framework that RFRA displaces, and didn't involve demolishing a site. And it conflicts with six circuits, which hold that preventing religious exercise is a substantial burden.

Alternatively, Respondents try to manufacture vehicle problems, claiming RFRA can't apply to later-enacted statutes. But RFRA commands the opposite, and this Court has twice followed that command without hesitation. Nor is there any "irreconcilable conflict" between the statutes here; they can be read harmoniously to authorize the land transfer *if* RFRA is satisfied.

The stakes here are clear: The Ninth Circuit has blown an unprincipled, atextual, and conspicuously Native American-shaped hole in RFRA. Absent this Court's review, the government will extinguish age-old

Apache rituals without meaningful judicial review. Native Americans will be stripped of RFRA's protection in the circuit where it is needed most. And the Nation will renege on its promise of religious liberty for all. The Court should grant certiorari.

ARGUMENT

I. The RFRA question warrants review.

1. Respondents don't dispute the simple textual proposition at the heart of this case: destroying Oak Flat would "substantially burden" religious exercise under RFRA's ordinary meaning. Pet.21-24. Instead, they claim "substantial burden" has a special meaning that "restore[s]" *Lyng* in the "specific context" of "federal lands." U.S.17-19.

That argument is foreclosed by RFRA's plain text. Far from carving out laws regulating federal lands, U.S.16, RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. 2000bb-3(a). Far from expressing any intent to "restore" *Lyng*, U.S.18-19, RFRA says that it seeks to "restore" only "the compelling interest test," "as set forth in" "*Sherbert*" and "*Yoder*." 42 U.S.C. 2000bb(b)(1) (emphases added). And far from asking whether claimants have been discriminated against or denied equal benefits, U.S.24, RFRA applies "even if" the challenged "burden results from a rule of general applicability." 42 U.S.C. 2000bb-1(a).

With no textual support, Respondents resort to legislative history. U.S.15-16; Res.16-17. But Respondents can't "alter [a statute's] plain terms on the strength only of arguments from legislative history." *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427,

436 (2019). Even the decision below eschewed this maneuver, Pet.App.16a-61a (no mention), flagging its "illegitimacy," Pet.App.152a-153a (Nelson, J.). And the history here, as usual, has "something for everyone." Scalia & Garner, *Reading Law* 377 (2012). While Respondents elevate the Senate Report, U.S.15-16, Res.16-17, they bury the House Report, which says RFRA is *not* limited to coercion, penalties, or denial of equal rights—language taken verbatim from *Lyng*—and instead tracks "Justice Brennan's *Lyng* dissent." Sikh.Br.5-6.

Respondents also ignore that RFRA was amended *after* this legislative history, further contradicting their theory. In 2000, Congress expanded the definition of "exercise of religion" to include the "use * * * of real property." P.L.106-274, §7(a)(3). It also deleted RFRA's reference to "the First Amendment," *ibid.*—which this Court has described as an "obvious effort to effect a complete separation from First Amendment case law" and "dispel" the notion that Congress wanted "to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases." *Hobby Lobby*, 573 U.S. at 696, 714.

Alternatively, Respondents claim "Congress explicitly incorporated into RFRA's text" a "requirement" of a "*cognizable* substantial burden." U.S.18, 23; Res.15-16. But "cognizable" appears nowhere in the statute. And far from saying some substantial burdens aren't "cognizable," RFRA says the opposite: strict scrutiny applies "*in all cases* where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1) (emphasis added).

2. Respondents' term-of-art theory is not just wrong, 85.Religious.Orgs.Br.18-24, but also conflicts

with this Court's precedents. First, this Court twice rejected similar efforts to read pre-*Smith* free-exercise limits into the statutory substantial-burden inquiry. Pet.25-26 (*Hobby Lobby*, *Holt*). Respondents suggest these holdings relate only to strict scrutiny. Res.18. Not so. See *Holt*, 574 U.S. at 361 (lower court "improperly imported" First Amendment cases in finding no "substantial[] burden"); *Hobby Lobby*, 573 U.S. at 735 n.43 (rejecting claim of "free hand" to "substantially burden" religion in commercial cases).

Second, even assuming "substantial burden" incorporates "the corpus of pre-RFRA precedent applying" *Sherbert* and *Yoder*, U.S.18-19, *Lyng* isn't part of that corpus, Pet.26-28. Rather, *Smith* holds that *Lyng* "abstained from applying the *Sherbert* test." 494 U.S. at 883-884. And *Trinity Lutheran* identifies *Lyng* as declining to apply strict scrutiny because "the law[] in question [was] neutral and generally applicable." 582 U.S. at 460. In other words, *Lyng* embodies the *Smith* framework that RFRA rejects. Respondents have no good answer for this; indeed, the government concedes the Ninth Circuit "questioned" (read: rejected) *Trinity Lutheran*'s understanding of *Lyng*. U.S.26 n.5.

Third, even construing *Lyng* as a substantial-burden case, it doesn't mean that the government's use of "its own property" *ipso facto* imposes no substantial burden. Cf. U.S.12-13. Rather, *Lyng*'s crucial facts included that "[n]o sites where specific rituals take place were to be disturbed," and plaintiffs retained "use of the area." 485 U.S. at 453-454. Thus, the *Lyng* plaintiffs—unlike here—weren't denied the ability to access or use the site for religious exercises. Pet.28-29.

Respondents find no "principled basis" for this distinction. U.S.21. But it's the same distinction drawn in

the government's own Executive Order 13,007, which mandates accommodation of "access to" and "use of" sacred sites on federal land. U.S.11 (quoting order). And the basis for this distinction is obvious: Courts can't second-guess whether "spiritual practices would become ineffectual," *Lyng*, 485 U.S. at 450, or whether government action would "rob [a person's] spirit," *Bowen* v. *Roy*, 476 U.S. 693, 696 (1986). But they can assess whether government action hinders specific acts of religious exercise, like accessing and using a sacred site. RFI.Br.6-8.

3. The Ninth Circuit's RFRA ruling also conflicts with six circuits. Pet.29-32. Respondents don't dispute that the Ninth Circuit *formerly* split with these circuits, since *Navajo Nation* "limited 'substantial burdens' under RFRA to two categories" not including prevention of religious exercise. Res.24-25. But Respondents claim the decision below mended the split by overruling *Navajo Nation* and holding that prevention counts except in one context: cases involving "government real property." U.S.23-24.

But no decision on the other side of the split contemplates categorical exceptions from the ordinary meaning of substantial burden. And several (*Haight*, *West*, *Yellowbear*) involve government property: prisons. Thus, the decision below only renders the Ninth Circuit's rule more obviously gerrymandered to exclude Native American sacred-site claims.

Respondents acknowledge that *Comanche Nation* supports Petitioner, but say no circuit has "endors[ed]" a "comparable" RFRA sacred-site claim. U.S.24. But Respondents identify no other circuit *rejecting* such a claim either. That's because there have been only five circuit decisions in thirty-one years addressing RFRA

sacred-site claims on federal land—all from the Ninth Circuit.[1] This confirms both that Respondents' floodgates concerns are exaggerated, cf. U.S.17, Res.22, and that this Court's review is urgently needed, given the Ninth Circuit's disproportionate power over Native American lives and liberty and its *de facto* control over this entire genre of cases. Pet.35-36.

Respondents note that several of Petitioner's cases "addressed RLUIPA." U.S.24-25. But they concede, as they must, that "substantial burden" in both statutes "should be 'interpreted uniformly.'" U.S.25. They also note that RLUIPA land-use claims require claimants to have an "ownership interest" in real property. *Ibid.*; 42 U.S.C. 2000cc-5(5). But this only supports Petitioner—since both RFRA and RLUIPA apply to the "use * * * of real property," but RFRA noticeably *omits* the "ownership" requirement.

Next, Respondents claim Petitioner "never explains how" the decision below conflicts with *In re Young*, 82 F.3d 1407 (8th Cir. 1996), *reinstated*, 141 F.3d 854. Res.24. But *Young* holds that government action that "would effectively prevent" religious exercise is a substantial burden. 82 F.3d at 1418. The decision below holds that government action that would "literally prevent" religious exercise is not. Pet.App.34a. That's a conflict.

Lastly, unable to refute the common thread running through prison, military, and sacred-site cases, Pet.31-32, Resolution resorts to pejoratives. Res.25

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[1] This case, *Navajo Nation*, *Snoqualmie Indian Tribe* v. *FERC*, 545 F.3d 1207 (9th Cir. 2008); *Slockish* v. *Dep't of Transp.*, 2021 WL 5507413 (9th Cir. 2021); and *Fallon Paiute-Shoshone Tribe* v. *Dep't of Interior*, 2022 WL 3031583 (9th Cir. 2022).

("extraordinary," "reparations"). But the point is simple: When the government brings religious resources "under federal control"—whether in prison, the military, or federal land—religious observers "can't voluntarily practice their faith unless the government" accommodates them. Chaplains.Br.14-15; RFI.Br.12-13. Given this change in "baseline," denial of "access" can burden religious exercise. *Lozano* v. *Collier*, 98 F.4th 614, 628-629 (5th Cir. 2024) (Oldham, J., concurring) (citing Barclay & Steele).

II. The free-exercise question warrants review.

On free exercise, Respondents don't deny that circuits are split over whether plaintiffs must show a "substantial burden" when a law is not "neutral and generally applicable." Pet.32. Instead, they say the split isn't presented here because the Ninth Circuit found no "*cognizable*" burden. U.S.26, Res.26. But the three circuits on the right side of this split draw no such distinction. Pet.33.[2]

To the extent *Lyng* really does create a federal-land-use exception to the Free Exercise Clause, it "lacks in originalist or textualist support" and should be "revisit[ed]." Pet.App.156a-157a (Nelson, J.). The government says Petitioner offered no "special justification" for doing so. U.S.27. But the justification is

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[2] Resolution cites three free-exercise cases from other circuits—none holding the government escapes heightened scrutiny when destroying and terminating religious practices at a sacred site. Res.26-27 (*Prater*, *Taylor*, and *Lockhart*). The one circuit to address such a case, by contrast, *rejected* the argument that there is no "cognizable free exercise claim" absent a "property interest in [federal land]." *Badoni* v. *Higginson*, 638 F.2d 172, 176-177, 177 n.4 (10th Cir. 1980).

"straightforward": "the ordinary meaning of 'prohibiting the free exercise of religion'" is "forbidding or hindering unrestrained religious practices or worship." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 567 (2021) (Alito, J., concurring). Here, it's undisputed that religious worship at Oak Flat would be not just hindered but obliterated.

III. The issues are vitally important.

Respondents don't dispute the exceptional importance of the issues or that destroying Oak Flat would forever end essential Apache rituals. Pet.35-36; 52.Tribes.Br.2. Nor do they dispute that the decision below threatens religious exercise of *all faiths* who worship on federal land—churches in national parks, Masses in national cemeteries, prayer gatherings on the National Mall, and more. Pet.26-28; Knights.Br.8-13; Sikh.Br.18-19.

Instead, Respondents press a policy argument, claiming that applying RFRA as written would "upend federal land management." Res.21-22; U.S.17. But this is the same "courting anarchy" concern that animated *Smith*. 494 U.S. at 888. Congress repudiated it in RFRA.

Rightly so, as that concern is greatly exaggerated. Any RFRA claim that thwarts a compelling governmental interest will fail. States.Br.12. That's what strict scrutiny means. And even before getting to strict scrutiny, RFRA plaintiffs must satisfy the threshold requirements of showing a "substantial" "burden" on "sincere" "religious" "exercise." RFI.Br.5. These are meaningful limits that have long enabled courts to

"sift the wheat of religious liberty from the chaff of unwarranted exemption claims." RFI.Br.6. Respondents ignore them.

Indeed, Respondents don't even attempt to explain why RFRA works across all federal law *except* "federal lands." U.S.18. Why can the government comply with RFRA in managing sensitive properties like prisons and military bases, Pet.39-40, but not parks and forests? And why can the government manage parks and forests subject to a host of restrictive laws—like NEPA, FLPMA, NHPA, NAGPRA, CERCLA, ESA, CWA, and CAA—but not RFRA? Particularly telling is the government's boast that it has "long" complied with Executive Order 13,007 (U.S.11), which requires the government to protect the use of sacred sites on "Federal lands" unless "clearly inconsistent with essential agency functions." 61 Fed. Reg. 26,771 (May 24, 1996). What makes the clearly-inconsistent-with-essential-agency-functions test workable, but RFRA's compelling-governmental-interest test not?

Even Respondents' unprincipled carve-out for federal lands is riddled with additional unprincipled carve-outs for "penaliz[ing]" and "discriminat[ion]." U.S.24. Why does it substantially burden religious exercise to penalize the use of Oak Flat as trespassing, Pet.39, or to discriminate in favor of secular uses there, but not to terminate religious uses entirely? Respondents don't even try to make this make sense—much less ground these carve-outs in RFRA's text.

Instead, Resolution touts the "potential" of its mine to create jobs and support "the clean-energy transition," citing the self-serving, extra-record affidavit of

its president. Res.35. But these are classic strict-scrutiny arguments having nothing to do with the substantial-burden inquiry. They can be tested on remand.

IV. This case is an ideal vehicle.

Unable to contest importance, Respondents invent supposed vehicle issues. None exist.

1. The government says Petitioner's RFRA claim is "atypical," because it would purportedly "nullify" a "statute," rather than grant an "exemption." U.S.12, 27-28. But what Respondents call the "Land Exchange Act" is just one of 649 sections in the National Defense Authorization Act for Fiscal Year 2015, P.L.113-291. Whatever happens with the land transfer, 648 sections of that statute will remain in effect.

Nor would a successful RFRA claim necessarily stop the transfer. If the RFRA ruling rested on the availability of less-restrictive alternatives—like the government's admission that alternative mining techniques "could physically and technically be applied" while reducing "impacts on [Oak Flat's] surface" (Pet.App.928a-936a)—the transfer might proceed conditioned on those alternatives. PCUSA.Br.15-18.

Even if the transfer were stopped, that is hardly atypical. When a law targets religion or lacks general applicability, courts often hold it "void" and enjoin its implementation. *Church of Lukumi* v. *City of Hialeah*, 508 U.S. 520, 547 (1993); see *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978); 42 U.S.C. 2000bb-1(c) ("appropriate relief").

2. Next, Respondents claim the land exchange was a carefully considered congressional "directive" that RFRA cannot "thwart." U.S.4, 30. In fact, it was a last-

minute rider to a 698-page, must-pass defense bill, added without vote or debate because Congress rejected all eleven standalone bills proposing it.[3]

More importantly, Congress carefully considered RFRA, and RFRA specifically provides that it applies to later-enacted laws "unless such law explicitly excludes such application by reference to this chapter," 42 U.S.C. 2000bb-3(b)—which all agree the transfer provision doesn't do. Respondents offer a "last-minute argument" (Pet.App.262a) that RFRA's express-reference provision is unconstitutional, because "one Congress cannot bind a later Congress." U.S.29. But this Court has twice applied the provision to later-enacted statutes without suggesting any such infirmity. *Hobby Lobby*, 573 U.S. at 719 n.30; *Little Sisters of the Poor* v. *Pennsylvania*, 591 U.S. 657, 681 (2020). Rightly so, as RFRA's express-reference provision leaves Congress free to exempt later-enacted laws from RFRA by a simple majority. Senator.Lee.Br.18; Pet.App.258a. In fact, members of Congress have introduced sixty-five bills in the last six years proposing to do just that.

Regardless, the transfer provision can't impliedly repeal RFRA either, because the statutes are readily "harmonized." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 510-511 (2018). RFRA doesn't "render [the land transfer] meaningless," *Traynor* v. *Turnage*, 485 U.S. 535, 548 (1988)—it permits it to occur *if* strict scrutiny is satisfied. This is precisely how RFRA is designed to

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[3] Resolution also touts the land exchange as a benevolent "opportunity" for the government to "acquire and protect Apache Leap." Res.34, I, 22. But the government already owns over 80% of Apache Leap. Pet.App.803a; 1-EIS-ES-8. And calling this "protection" is like destroying the Western Wall and telling Jews they should be thankful they can still visit King David's Tomb.

work: as a "super statute" that guarantees strict scrutiny before "other federal laws" substantially burden religious exercise. *Bostock* v. *Clayton County*, 590 U.S. 644, 682 (2020).

3. Resolution (but not the government) feigns "confusion about what land is even at issue," complaining about three overlapping areas labeled "Oak Flat." Res.28-31. But there is no confusion. The first two are created and defined by the government: (1) the 4,309-acre (6.7-square-mile) "Chí'chil Biłdagoteel Historic District Traditional Cultural Property" in the National Register of Historic Places, NPS Form at 10-12 (cited in Pet.13 n.3); and (2) within that, the 2,422 acres designated by statute for conveyance to Resolution, P.L.113-291, §3003(b)(2).

Because traditional religious practices don't necessarily track government boundaries, and to aid the Court, Petitioner delineated the specific "area of Oak Flat used for religious ceremonies." Pet.15 (Central Sacred Area). This includes the "sites used for Sunrise, Holy Grounds, and sweat lodge ceremonies," "old-growth oak groves," "sacred springs," and "centuries-old petroglyphs." Pet.15; see also SCAT.Br.5-10. The government has never disputed that this area is used for "rituals that can only take place there," SCAT.Br.19, 6, 10-12, and will be destroyed.[4]

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[4] Resolution complains (Res.30) about a photograph of Devil's Canyon, which Apaches call Ga'an Canyon, and which forms Oak Flat's eastern boundary. It is included for context and labeled in the record as Ga'an Canyon. 2.E.R.251. Resolution also questions the doctrine of associational standing (Res.27) but doesn't dispute that it is controlling law and Petitioner satisfies it.

Alternatively, Resolution suggests the project's impacts won't be "immediate." Res.32. But Judge Bumatay correctly dismissed this argument as "absurd[]," Pet.App.616a, not least because the EIS itself repeatedly describes the impacts as "immediate, permanent, and large in scale." Pet.App.912a. The transfer would immediately "strip" Apaches of "legal protections," "effectively exclud[ing]" them from Oak Flat. Pet.App.606a, 615a. Resolution "would undoubtedly" begin "preparatory activities that are likely to degrade" the site and "cause irreparable damage." Pet.App.615a-616a. And Ninth Circuit precedent makes seeking "reversal of the transfer futile." Pet.App.616a-617a. Thus, "further percolation," Res.28, means destruction.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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