FILED
04-12-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2020AP2007
Circuit Court Case No. 2019CV324
Case Classification Code No. 30607

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.

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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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.

[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."

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.

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's

[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).

unemployment 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.

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).

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-based

services, 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).

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 Tri-County 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 provide

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). 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 an

employer's 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:

> "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.

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.

[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.

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,

[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).

made 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 locate

[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).

credible 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.

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[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.

§ 108.09(7)(c)6., a 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 Wis.

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[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.

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,

[26] *Tetra Tech,* 2018 WI 75, ¶ 84.

religious 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 liberally

[27] *State v. Matasek*, 2014 WI 27, ¶ 13, 353 Wis. 2d 601, 846 N.W.2d 811.

construed 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 the

[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)).

employee's 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 non-profits 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.

[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.

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 cancel

[33] *Crown Castle USA*, *Inc. v. Orion Const. Group*, *LLC*, 2012 WI 29, ¶ 37, 339 Wis. 2d 252, 811 N.W.2d 332.

its 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 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

[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).

organization's] actual 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. Its

[38] *Id.*
[39] 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

interpretation 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 the

Wisconsin 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 be

[40] *Coulee Catholic Schools*, 2009 WI 88, ¶ 45.

> committed 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 Catholic

[41] *Id.,* ¶ 48.
[42] *Id.,* ¶ 49.
[43] *Id.,* ¶ 67.
[44] *Id.,* ¶ 73.

faith 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 religious

leaders. 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 be

[45] Wis. Stat. § 108.02(15)(h)1.
[46] Wis. Stat. § 108.02(15)(h)3.

interpreted 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 except

[47] W*agner v. Milwaukee Cty. Election Comm'n,* 2003 WI 103, ¶ 33, 263 Wis. 2d 709, 666 N.W.2d 816.

for 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 the

[48] *Cathedral Arts Project, Inc. v. Dept. of Economic Opportunity,* 95 So. 3d 970, 974 (Fla. 1st DCA 2012).

language 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 be

[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.

interpreted 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 and

[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).

retention 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]

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[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).

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.

[57] *Jones v. Wolf*, 443 U.S. 595, 602, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

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 is

[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, 83-88).
[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.

religious 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]

[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).

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 Report**s** 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).

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[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).

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 clearly

[68] H.R. Rep. No. 91-612, p. 44 (1969) (emphasis added) (A-App. 223-224) 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.

distinguishes 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 appropriately

relied 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 the

[70] *Terwilliger v. St. Vincent Infirmary Medical Center*, 304 Ark. 626, 804 S.W.2d 696 (1991).
[71] *Terwilliger,* 304 Ark. at 629.

infirmary 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 interpreting

[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,

the 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,

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interpretations of unemployment compensation acts to interpret Wisconsin's unemployment compensation act." *Bernhardt v. LIRC,* 207 Wis. 2d at 302.

literary, 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 of

[76] *U.S. v. Dykema,* 666 F.2d at 1101.
[77] *U.S. v. Dykema*, 666 F.2d at 1100.

minutes, 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]

[78] *Id.*
[79] *Id.*
[80] *Id.*

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.

[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).

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-

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 each

[83] *Coulee Catholic Schools, supra.*
[84] *See U.S. v. Dykema,* 666 F.2d at 1100.

employer 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.

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.

Dated: April 12, 2021

Respectfully submitted,

Electronically signed by:

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CERTIFICATIONS REQUIRED
BY RULES OF APPELLATE PROCEDURE
Wis. Stat. §§ 809.19(8)(d) and 809.19(12)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The number of words in the Statement of the Case, Argument and Conclusion portions of this brief, including footnotes, is: 8,771.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

Dated: April 12, 2021

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CERTIFICATION REQUIRED BY INTERIM RULE FOR WISCONSIN'S APPELLATE ELECTRONIC FILING PROJECT ORDER No. 19-02

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated: April 12, 2021

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CERTIFICATION OF MAILING

I, Christine L. Galinat, certify that I am, and at all times during this service was, not less than 18 years of age and not a party to the matter concerning which service was made. I further certify that service of the Brief of Respondent-Appellant Department of Workforce Development, was made on April 12, 2021, by electronic service on all parties.

Under penalty of perjury, I declare the foregoing is true and correct.

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