STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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

Petitioners-Respondents,

v. Appeal No. 2020AP2007

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMISSION,

Respondent-Co-Appellant,

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondent-Appellant.

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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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.

[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."

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.

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 66-68). Contrary to the promise of "individualized assessment," Petitioner-Respondents 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

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

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

[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).

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] 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.

("Catechism"). The Catechism is "mandatory authority" for Catholics. (R.99 at 19-22). 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).

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 41:13-42:4). 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 55:21-60:7). 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.

(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

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

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 76:12-77:21).

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

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

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 142:19-143:17). 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).

[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.)

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

[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."

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.

[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.

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*.

[9] *Brandt v. LIRC*, 160 Wis.2d 353, 359, 466 N.W.2d 673, 675 (Ct. App. 1991)

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, ¶19, 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

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

> 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.

[10] The actual CCB Decision is cited throughout, when the language of each decision is identical.

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.

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.

> …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

[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.

> 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

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.

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.

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."

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

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

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

[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.

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

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

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,

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 I.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,

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

[14] William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 Ind.L.J. 699 (1991).

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." *Wallace v.*

[15] In re: Sinclair, 870 F2d 1340, 1343 (7th Cir. 1989).

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,

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,

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

[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.

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 Bake-N-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 after-school 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

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

[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.

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 non-religious 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." *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

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

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.

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.

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CERTIFICATION OF FORM AND LENGTH
PURSUANT TO WIS. STAT. §809.19(8)(B) AND (C)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,926 words.

Dated this 2nd day of June 2021.

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CERTIFICATION REGARDING ELECTRONIC FILING PURSUANT TO WIS. STAT. § 809.19(12)(f)

I hereby certify that:

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.

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CERTIFICATION OF MAILING

I, Kyle H. Torvinen, 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 Petitioner-Respondents Catholic Charities Bureau, Inc., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc., was made on June 2, 2021, by electronic service on all parties.

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

Dated this 2nd day of June 2021.

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