

FILED
01-26-2023
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

No. 2020AP2007

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.

RESPONSE TO PETITION FOR REVIEW
OF THE STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT

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January 26, 2023

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STATEMENT OF FACTS

Each of the five nonprofit corporations (the “employers”) in this case has been subject to the Wisconsin unemployment insurance law. Catholic Charities Bureau (“CCB”) has been subject since January 1, 1972. (R. 67:17) The employers have been reporting their employees’ wages under a group account entitled “Catholic Charities.” The employers elected reimbursement financing.¹ (R. 99:34) Each employer is a separately incorporated, nonprofit corporation. (R. 100:114)

Barron County Developmental Services Inc. (“BCDS”) provides sheltered employment and job development services to developmentally disabled individuals. (R. 65:17-18 and R. 100:108) BCDS provides its services under contracts with the Wisconsin Department of Workforce Development, Division of Vocational Rehabilitation (“DVR”) and contracts with private entities for subcontracted work. (R. 65:12 and 100:235-239) In December 2014, the board of directors for Barron County Developmental Disabilities Services requested to become an affiliate of CCB and became BCDS. (R. 65:10-11 and R. 100:233) That organization had no previous religious affiliation. (R. 100:233-234) The type of services and programing provided by BCDS did not change after it affiliated with CCB. (R. 100:236-237)

Black River Industries Inc. (“BRI”) works with DVR and Taylor County to provide in-home services, community-based services, and facility-based services to individuals with developmental and mental health disabilities. (R. 100:252-253, 272 and 278-279) BRI also provides job training at a food service production facility, a document shredding program, and a mailing services program. (R. 100:283-285)

Diversified Services Inc. (“DSI”) provides work opportunities to individuals with developmental disabilities. (R. 65:57-58 and R. 100:220-221, 240-241) Most

¹ 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.

of DSI's funding comes from DVR, private contracts, and Wisconsin's Family Care system. (R. 100:227-228 and 246)

Headwaters Inc. provides various support services for individuals with disabilities under contracts with DVR and work-related contracts. (R. 100:184, 200 and 208-209) Long-term care service funding agencies refer individuals to Headwaters. (R. 100:185)

CCB has separately incorporated sub-entities that operate 63 different programs providing 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) CCB also 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)

The employers are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code under a group exemption that 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. 57:22-30 and R. 100:56) Separate exemptions are not issued to individual entities covered by the group exemption. (R. 57:22) The IRS has not determined whether each employer is operated primarily for religious purposes.

The employers have described their missions to the Internal Revenue Service in their Forms 990² as:

- Serving developmentally disabled citizens of Oneida, Forest and Vilas counties, Wisconsin. Headwaters Inc. (R. 64:2)

² The Form 990 is entitled "Return of Organization Exempt From Income Tax."

- Community rehabilitation program providing services to individuals with developmental disabilities. Barron County Developmental Services Inc. (R. 65:18)
- Providing employment opportunities to individuals with disabilities. Diversified Services Center Inc. (R. 65:58)
- In partnership with the community, to provide people with disabilities opportunities to achieve their highest level of independence. Black River Industries (R. 66:20)
- To alleviate human suffering by sponsoring direct service programs for the poor, the disadvantaged, the disabled, the elderly, and children with special needs. Catholic Charities Bureau Inc. (R. 61:52)

Participants receiving services from the employers are not required to attend any religious training or orientation. (R. 100:92, 234, 288) The employers do not provide any religious doctrine or engage in any religious activities as part of the daily programs for participants. (R. 55:4) The employees and participants are not required to have any religious affiliation. (R. 100:92, 187-188, 233, 287)

ARGUMENT

Nonprofit organizations³ are subject to Wisconsin's unemployment insurance laws if they meet the criteria contained in Wis. Stat. § 108.02(13)(b). The unemployment statutes contain a limited exemption for certain religious employers:

“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 “Nonprofits” are defined for unemployment insurance purposes as organizations exempt from taxation under 26 U.S.C. § 501(c)(3). Wis. Stat. § 108.02(19).

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.

Wis. Stat. § 108.02(15)(h).

At issue in this case is whether the employers are operated for religious purposes, as that term is used in Wis. Stat. § 108.02(15)(h)2. The court of appeals correctly affirmed the Labor and Industry Review Commission's decision that the employers are not operated primarily for religious purposes and thus remain covered by Wisconsin's unemployment insurance laws. *Catholic Charities Bureau, Inc., v. LIRC*, 2023 WI App 2. This Court should deny the petition for review because the court of appeals correctly interpreted the statute, and because the petition does not present a real and significant issue of constitutional law.

I. The court of appeals adhered to this Court's precedents in analyzing the statute and its decision will not cause "significant and harmful effects across Wisconsin."

The employers request that this Court "correct" the court of appeals' decision while ignoring that the court of appeals followed this Court's long-standing precedent. The employers' claim that the decision will have "significant and harmful effects across Wisconsin" is simply not supported by the record. Petition at 18. The dearth of appellate decisions illustrates the limited application and controversy of the "religious purposes" exemption, which was enacted over 50 years ago. The court of appeals maintained the long-established status quo for the employers and their employees. There was no showing by the employers that the status quo has caused any significant or harmful effects.

A. The court of appeals correctly interpreted the exemption narrowly to further the legislative objective of broad coverage for unemployment benefits.

The legislature enacted Wis. Stat. § 108.01 as a guide to the interpretation and application of Wis. Stat. ch. 108. *Slocum Straw Works v. Industrial Commission*, 232 Wis. 71, 286 N.W. 593, 596 (1939). Wisconsin Stat. § 108.01

recognizes that unemployment is an urgent public problem, gravely affecting the health, morals and welfare of the people. Unemployment also tends to partially paralyze the economic life of the entire state. “Each employing unit in Wisconsin should pay at least a part of this social cost” Wis. Stat. § 108.01(1).

To further this legislative command, this Court has consistently held that the unemployment insurance laws should be interpreted liberally in favor of coverage and had repeatedly upheld the broad presumptive coverage of the unemployment insurance laws. “Wisconsin’s unemployment compensation statutes embody a strong public policy in favor of compensating the unemployed.” *Operton v. LIRC*, 2017 WI 46, ¶ 31, 375 Wis. 2d 1, 894 N.W.2d 426. “Consistent with this policy, Wis. Stat. ch. 108 is ‘liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status.’” *Id.* at ¶ 32 (quoting *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983)). “If a statute is liberally construed, ‘it follows that the exceptions must be narrowly construed.’” *McNeil v. Hansen*, 2007 WI 56, ¶ 10, 300 Wis. 2d 358, 731 N.W.2d 273 (citation omitted). “[T]he burden of proving entitlement to the [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.’” *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)).

The court of appeals narrowly interpreted the religious purposes exemption consistent with the legislative and judicial directives that the unemployment insurance laws be interpreted to provide broad coverage. *Catholic Charities*, 2023 WI App 2, ¶¶ 36 & 37, App. 025-027.⁴ This broad coverage protects

⁴ References to “App.” are the pages in the Petitioner’s Appendix.

employees' benefit rights acquired during the course of their employment. *See Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636, 640-41 (1941).

B. The court of appeals adhered to the rules of statutory construction.

In addition to following this Court's long-standing interpretation of the unemployment laws, the court of appeals also followed well-established rules of statutory construction.

This Court has instructed that statutes are to be "read where possible to give reasonable effect to every word in order to avoid surplusage." *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. The employers contend that the analysis should focus on the Diocese's purposes instead of the employers' purposes when determining the "religious purposes" aspect of the statute. But the employers do not explain how their interpretation gives effect to every word of the statute. As pointed out by the court of appeals, such an interpretation would render the "religious purposes" exemption language "unnecessary." *Catholic Charities*, 2023 WI App 2, ¶ 27, App. 020. The court of appeals' decision gives full effect to the language of the exemption to ensure that the statute is not rendered surplusage. The decision also held that an organization's operations should be considered so that the phrase "operated primarily" is not rendered unnecessary. *Catholic Charities*, 2023 WI App 2, ¶ 35, App. 025.

Another 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 language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶ 46. In determining that the relevant "purpose" under the exemption is the employer's purpose and not the Diocese's purpose, the court of appeals properly considered the statutory context. Importantly, the religious purpose exemption applies to service in the employ of the nonprofit organization, not service in the employ of the church. The court of appeals noted that "[e]ach of the subdivisions of § 108.02(15)(h) apply to

an individual's 'service' in a different context: § 108.02(15)(h)1. addresses church employees, § 108.02(15)(h)2. addresses employees of 'an organization operated primarily for religious purposes,' and § 108.02(15)(h)3. addresses ministers and members of a religious order." *Catholic Charities*, 2023 WI App 2, ¶ 26, App. 019. Therefore, considering the context of the surrounding subdivisions, the court of appeals correctly concluded that employees who fall under subd. 2. are viewed separately in the statutory scheme from employees of a church. Because the exemption under subd. 2. applies specifically to the employees of the employers, the court of appeals properly concluded that the focus must be on the actions of the employers and correctly found that they were not operated "primarily for religious purposes."

Finally, the court of appeals properly relied, in part, on the dictionary definitions of the statutory terms for guidance in determining the scope of the exemption. *Catholic Charities*, 2023 WI App 2, ¶ 24, App. 018. The meaning of statutory terms may be ascertained by reference to the dictionary definition. *Kalal*, 2004 WI 58, ¶ 53.

C. The court of appeals correctly relied on a federal Committee report.

The employers imply that the court of appeals relied on decisions from other states to reach its decision. Petition at 26. In fact, while the court of appeals noted the divergent decisions from other states, it did not follow any of the decisions. *Catholic Charities*, 2023 WI App 2, ¶ 17, App. 015.

Wisconsin Stat. § 108.02(15)(h)2. is adopted verbatim from the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3309(b)(1). Wisconsin enacted its law to maintain conformity with federal unemployment tax requirements. The court of appeals appropriately relied on a federal committee report to inform its decision quoting:

[This paragraph] excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is

operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

H.R. Rep. No. 91-612, at 44 (1969). *Catholic Charities*, 2023 WI App 2, ¶ 46, App. 033. The United States Supreme Court cited the very portion of the report relied on by the court of appeals as indicative of the legislative history of the intended breadth of the exemption under 26 U.S.C. § 3309. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 781, 101 S. Ct. 2142, 68 L. Ed. 2d 612 (1981). The court of appeals' reliance on the federal Committee report is supported by this Court's holding that federal reports regarding FUTA amendments are appropriately relied on to interpret parallel Wisconsin statutes. *Leissring v. DILHR*, 115 Wis. 2d 475, 485-89, 340 N.W.2d 533 (1983).

D. The court of appeals, relying on decisions from this Court and the Seventh Circuit Court of Appeals, correctly determined that the employers' activities must be considered for purposes of the exemption.

The employers assert that an analysis of their activities is not required by the statute. In contrast to the employers' interpretation, which would render the statute superfluous, the court of appeals, in analyzing the employers' activities, gave meaning to the exemption consistent with *Coulee Catholic Schools v. LIRC*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868 (2009) and *United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981), *cert. denied*, 456 U.S. 983, 102 S. Ct. 2257, 72 L. Ed. 2d 861 (1982). *Catholic Charities*, 2023 WI App 2, ¶ 41 & 44, App. 030-032.

In *Coulee*, to determine whether an organization had a religious mission, this Court required that the motive or mission be clear "in both statement and practice." *Coulee*, 2009 WI 88, ¶ 48. *Coulee's* analysis of an organization's religious mission

considered the organization's mission and activities to determine if the organizations had a religious mission it substantially practiced. In support of its holding, this Court stated:

The actual practice of Ostlund's school substantially affirms that CCS gives life to the words of its mission. Teachers made efforts to integrate Catholic values into various aspects of the curricula. This included integrating theological and moral principles into each subject, as well as use of religious examples and symbols that would not be found in a public school. Students were taught the Catholic faith in a daily religion class, and celebrated Mass weekly. The students also prayed at points throughout the day and celebrated religious holidays. Teachers were required to teach, support, and exemplify Catholic doctrine and morality, and they were to help foster spiritual growth among their students.

Coulee, 2009 WI 88, ¶ 74. *Coulee's* discussion of the school's practices or activities supports the court of appeals' holding that "[s]tated differently, practice means the organization's *activities*." *Catholic Charities*, 2023 WI App 2, ¶ 44, App. 032. "Accordingly, *Coulee* is instructive as to the type of analysis that can inform the meaning of the religious purposes exemption and lends support to an interpretation that considers both an organization's motives and activities." *Id.*

The court of appeals also relied on *Dykema*, a Seventh Circuit decision analyzing whether an entity is operated for "religious purposes" under another provision of the federal tax code. The court of appeals held that "the *Dykema* court's decision endorses an interpretation of the religious purposes exemption that considers both motives and activities. The court expressly held that under a similar inquiry in the federal tax code, 'it is necessary and proper for the IRS to survey all the *activities* of the organization, in order to determine whether what the organization in fact does is to carry out a religious *mission*.'" *Catholic Charities*, 2023 WI App 2, ¶ 41, App. 030.

E. The existence of a separate Catholic unemployment system is irrelevant for interpreting the statute.

The employers argue that they could provide the same level of unemployment benefits as the State. Petition at 14. The court of appeals correctly rejected this argument because whether an organization could provide private unemployment payments to its employees is not a factor under the religious purposes exemption. The exemption “cannot be interpreted one way for Catholic entities and another way for entities affiliated with different faiths.” *Catholic Charities*, 2023 WI App 2, ¶ 39, App. 028.

Furthermore, the record does not support the employers’ assertion that the church-provided benefits are equivalent to benefits provided by the state or additional federal benefits, like Extended Benefits⁵ or Disaster Unemployment Assistance.⁶

F. This Court should reject the employers’ request to “correct” the court of appeals’ decision.

The court of appeals’ decision is not a “deeply flawed” one that needs to be “corrected” by this Court. The court of appeals interpreted the religious purposes exemption consistent with this Court’s unemployment insurance and statutory construction precedents. The court of appeals’ interpretation is also supported by *Coulee*, the federal legislative history and federal appellate decisions interpreting similar language in the federal tax code. Accordingly, this Court should reject the employers’ Petition for Review because there is no need to “correct” the court of appeals’ decision.

⁵ Wis. Stat. § 108.141 and 26 U.S.C. § 3304(a)(11).

⁶ Wis. Stat. § 108.145 and 42 U.S.C. § 5177.

II. The employers do not present a real and significant question of constitutional law.

The employers raise three first amendment challenges to the court of appeals' decision. Each of these challenges overreaches the bounds of First Amendment protections. The court of appeals' decision does not interfere with the Diocese's internal governance or restrict its ability to fulfill its religious mission. The statute, as interpreted by the court of appeals, does not burden the Diocese's sincerely held religious beliefs. The decision does not deny the employers a generally available benefit. A neutral review of the employers' activities will not result in an unconstitutional entanglement in religious affairs. The court of appeals simply requires that a law of general application, unemployment insurance, be applied to the employers.

A. The court of appeals' decision does not intrude on internal church governance.

The employers assert that the court of appeals' decision grossly interferes with internal church autonomy. Petition at 32. The employers' reliance on cases citing impermissible state or court interference with internal church governance is misplaced.

The court of appeals held that it is the organization's purpose, not the Diocese's purpose that should be considered in analyzing the statute. *Catholic Charities*, 2023 WI App 2, ¶ 27, App. 020. The court's analysis acknowledges that the employers are separately incorporated but does not effectuate a severance of the employers from the Diocese and does not interfere with the Diocese's autonomy. In contrast, in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952), the challenged statute transferred the control of the Russian Orthodox churches of New York to the governing authority of the Russian Church in America and thus, actually interfered with the governing structure of the church.

In this case, the court of appeals did not determine who had possession or control of church property in contrast to the issues presented in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871), *Serbian Eastern Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976) and *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 80 S. Ct. 1037, 4 L. Ed. 2d 1140 (1960). The Diocese and the employers remain free to determine their corporate structure. The employers' relationship with the Diocese is unchanged by the court's decision and the application of the statute.

In support of its internal church autonomy argument, the employers also rely on cases regarding the "ministerial exception" to employment discrimination laws. The ministerial exception protects religious institutions' "autonomy with respect to internal management decisions that are essential to the institution's central mission" and preserves a church's independent authority to remove a minister without interference by secular authorities. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060, 207 L. Ed. 2d 870 (2020). See also *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012). The Supreme Court emphasized that religious institutions' ability to decide "matters of church government" "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.

Requiring unemployment insurance coverage for laid off workers is simply not comparable to a court infringing on a church's authority to select its ministers and religious educators. The court of appeals' decision does not interfere with the Diocese's autonomy in selecting individuals who play key religious roles.

B. The court of appeals' decision does not violate the Free Exercise Clause.

The Free Exercise Clause inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden. *Hernandez v.*

Commissioner, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989). A party carries the burden of proving a free exercise violation by showing that a government entity has burdened a sincere religious practice pursuant to a policy that is not “neutral” or “generally applicable.” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22, 213 L. Ed. 2d 755 (2022).

The cases relied upon by the employers involve prohibitions imposed on certain religious activities. For example, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), the Supreme Court struck down ordinances that had been enacted because of their suppression of Santeria religious practice. *Fowler v. Rhode Island*, 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953) involved a Jehovah’s Witness minister who was prohibited from speaking in a public park when other religions’ church services could be held in the park.

In contrast, the court of appeals’ decision does not prohibit the Diocese or the employers from engaging in any activity. Furthermore, the employers have not made a showing that they have a belief against the payment of unemployment insurance or a belief against the provision of unemployment benefits to unemployed individuals. In fact, the employers have participated for many years in the state unemployment insurance program. The employers did not offer any evidence that their provision of unemployment insurance coverage affected or impaired any religious practice.

Although the decision requires that the employers pay for their employees’ unemployment benefits, any burden from the payment of a “generally applicable” sales and use tax is not “constitutionally significant.” *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 391, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990) and *Hernandez*, 490 U.S. at 699. “General laws related to building licensing, taxes, social security, and the like are normally acceptable.” *Coulee*, 2009 WI 88, ¶ 65.

The employers assert that an “otherwise-available” exemption was denied because of Catholic religious doctrine. Petition at 35. The state may not exclude members of the community from an otherwise generally available public benefit because of their religious exercise. *Carson v. Makin*, 142 S. Ct. 1987, 1998, 213 L. Ed. 2d 286 (2022). A denial of free exercise may occur if the exercise of a religious activity will result in the deprivation of a benefit or right that is otherwise available to a secular person or organization -- such as when religious schools cannot participate in voucher programs available to secular schools simply because they are religious schools.

In contrast, almost all employers are required to pay unemployment insurance taxes to fund their employees’ benefits and exemptions are not a generally available public benefit. The court’s interpretation of Wis. Stat. § 108.02(15)(h)2. does not prohibit “religious conduct while permitting secular conduct that undermines” the same governmental interest. *Kennedy*, 142 S. Ct. 2407, 2422. Instead, because the employers provide a charitable or social service with no overt religious activity, they are treated the same as secular nonprofit entities that provide the same services: they both must pay the unemployment insurance tax on employees of the organizations offering the services. The unemployment insurance tax law remains a law of general or neutral application despite the fact that it permits exemptions for religious activities. *See Listecky v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 744 (7th Cir. 2015).

The employers assert that the court’s decision favors religious groups who engage in overt religious activity in providing their services. Petition at 35. A statute is invalid if it clearly grants denominational preferences. *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. (1982). In *Larson*, the Supreme Court held that a Minnesota statute treating religious organizations differently based upon the percentage of contributions the organizations received from their members violated the Establishment Clause because the legislative history demonstrated that the statute was drafted to target particular religious denominations. There is no

evidence that the unemployment exemption was drafted to target specific religions. Unlike the Minnesota law, the unemployment exemption is not directed at a particular religion. In fact, under Massachusetts' comparable unemployment exemption, 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." *Ursuline Academy, Inc. v. Director of the Div. of Employment Sec.*, 383 Mass. 882, 883, 420 N.E.2d 326 (1981).

The employers assert that *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021) supports their argument that the court of appeals' decision penalizes religious entities with a more complex polity. In *Fulton*, the City would not allow Catholic Social Services ("CSS") to participate in its foster care system unless the CSS acted in a manner inconsistent with its beliefs by certifying same-sex couples as foster parents. The employers contend that the U.S. Supreme Court "treated CSS and the Archdiocese as effectively the same entity." Petition at 34. But *Fulton* is distinguishable from this case because first, the relationship between the Archdiocese and CSS was irrelevant to the Supreme Court's analysis.

Second, *Fulton* held that the City's refusal to contract with CSS because CSS would not certify same-sex couples as foster parents was contrary to the First Amendment's Free Exercise Clause. Here, the employers have failed to show that providing unemployment benefits to their employees is inconsistent with their religious beliefs. Section 108.02(15)(h)2. is a law of general applicability, so the employers have failed to show that the court of appeals' decision violates the Free Exercise Clause.

C. The court of appeals' decision does not violate the Establishment Clause.

Relying upon *L.L.N. v. Clauder*, 209 Wis. 2d 674, 563 N.W.2d 434 (1997), the employers assert that the court of appeals' decision results in impermissible entanglement because it will require the courts and the government to conduct an intrusive inquiry into the operation of religious organizations. Petition at 37.

However, *Clauder* considered whether the First Amendment prohibited a claim against a diocese for the negligent supervision of a priest. This Court held that, because the claim could not be resolved on neutral principles but would require the court to interpret church law, policies and practices, such a claim was constitutionally impermissible. “Excessive entanglement occurs ‘if a court is required to interpret church law, policies, or practices.’” *St. Augustine Sch. v. Taylor*, 2021 Wis. 70, ¶ 43, 398 Wis. 2d 92, 961 N.W.2d 635.

Under the court of appeals’ decision, Wis. Stat. § 108.02(15)(h)2. does not require an interpretation of church law but rather an objective review of an entity’s activities. Consistent with *Dykema*, 666 F.2d 1100-01, the court of appeals conducted a neutral review of the employers’ activities. *Catholic Charities*, 2023 WI App 2, ¶¶ 59-61, App. 040-041. A review of a religious entity’s activities is not only constitutionally permitted but is integral to the required *Coulee* two-step test to determine whether a ministerial exception exists. *Coulee* held that the first step requires a fact-sensitive inquiry to determine whether the organization in both statement and practice has a fundamentally religious mission. *Coulee*, 2009 WI 88, ¶ 48. In conducting this inquiry, this Court considered the actual practice of the school to determine that it had a religious mission. *Coulee*, 2009 WI 88, ¶ 74.

Coulee held that a second step in the analysis is a fact-specific inquiry into how important or closely linked the employee’s work is to the fundamental mission of the organization. *Coulee* directs that:

Relevant evidence as to the employee’s importance to the religious mission of the organization will include objective employment indicators such as hiring criteria, the job application, the employment contract, actual job duties, performance evaluations, and the understanding or characterization of a position by the organization. Teaching, evangelizing, church governance, supervision of a religious order, and overseeing, leading, or participating in religious rituals, worship, and/or worship services will serve as important factors, rather than the only evidence we measure or consider as under the quantitative approach. These quintessentially religious tasks will evince a close link and importance to an organization’s religious mission.

Coulee, 2009 WI 88, ¶ 49. Similar to *Coulee*, the United States Supreme Court conducts a fact-based inquiry into “what an employee does” for analyzing the

ministerial exception and considers whether the employee performs “vital religious duties.” *See Our Lady of Guadalupe School*, 140 S. Ct. at 2064 and 2066. *See also Hosanna-Tabor Evangelical Lutheran Church & School*, 565 U.S. at 192, in which the Supreme Court concluded that one reason a teacher was covered by the ministerial exception was the “important religious functions” the teacher performed for the Church.

These cases demonstrate that it does not offend the constitution to conduct a neutral, fact-based inquiry into whether an entity operates for a religious mission or religious purposes, or if employees perform religious duties. The court of appeals’ analysis of the employers’ activities is consistent with the fact-based inquiries undertaken in *Coulee, Our Lady of Guadalupe Sch.* and *Hosanna-Tabor Evangelical Lutheran Church & School*.

D. The employers’ arguments fail to show any actual First Amendment implications due to the application of the unemployment insurance laws.

The employers have not established that this case presents a real and significant constitutional question. Each of their constitutional arguments is based on an overreach of First Amendment jurisprudence. Neither the court of appeals’ decision nor the statute infringes on Church autonomy or the free exercise of the Church’s religious practices. Finally, the proper application of the statute, which requires an examination of the employers’ activities, does not require an examination of Church doctrine, and does not result in excessive entanglement.

CONCLUSION

The employers request that this Court grant their petition for review to “correct” perceived “errors” in the court of appeals’ decision. However, the court of appeals properly relied on this Court’s well-established precedent for interpreting statutes, and specifically statutes protecting employees’ rights to obtain unemployment insurance benefits. The five nonprofit employers do not engage in religious activities, so they are not exempt from the unemployment insurance law.

The employers' coverage in the unemployment insurance system does not infringe on any rights protected by the First Amendment. The employers' First Amendment arguments are without merit and were properly rejected by the court of appeals. The employers' decades-long participation in the state unemployment insurance system has not resulted in any unconstitutional impairment.

Accordingly, this Court should deny the Petition for Review.

Dated: January 26, 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of the response is 5,524 words.

Dated: January 26, 2023.

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