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No. 2020AP2007

In the Supreme Court of Wisconsin

CATHOLIC CHARITIES BUREAU, INC., BARRON COUNTY DEVELOPMENTAL SERVICES, INC., DIVERSIFIED SERVICES, INC., BLACK RIVER INDUSTRIES, INC., AND HEADWATERS, INC.
Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, AND
Respondent Co-Appellant,

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT
Respondent-Appellant.

Request for Review of a Published Decision by
The Court of Appeals, District III, on Appeals from the
Douglas County Circuit Court, the Hon. Kelly J. Thimm
Presiding, Case NO. 2019CV324

NON-PARTY BRIEF OF CATHOLIC CONERENCES OF ILLINOIS, IOWA, MICHIGAN, AND MINNESOTA IN SUPPORT OF PETITION FOR REVIEW

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INTEREST OF AMICI CURIAE

Amici curiae are the state Catholic conferences representing the Roman Catholic dioceses throughout Illinois, Iowa, Michigan, and Minnesota in matters of public policy. They write to aid the Court in understanding the importance of the issues presented and why this Court should grant the Petition for Review. In short, they believe that the court of appeals' ruling distorts the fundamentally religious nature of Catholic charitable work, improperly narrows clear and reasonable statutory exemptions for religious organizations, and imperils foundational freedoms from interference with internal organization and from religious discrimination under the First Amendment.

The Catholic Conference of Illinois serves as the public-policy voice of the bishops in Illinois' 6 Catholic dioceses, consisting of approximately 949 parishes, 18 missions, 46 Catholic hospitals, 21 healthcare centers, 11 colleges and universities, 424 schools, and 527 Catholic cemeteries. It interacts with all elements of government to promote and defend the interests of the Church.

The Iowa Catholic Conference is the official public-policy voice of the Catholic bishops in Iowa across its 4 dioceses, including 450 parish-based ministries, 111 schools, 16 hospitals, 12 clinics, 13 social-service centers, and Catholic Charities organizations in each diocese. The Conference advocates the common good and promotes public policies respecting the life and dignity of every human person.

The Michigan Catholic Conference speaks for the Catholic Church in Michigan on public policy, representing 7 dioceses, 621 parishes, 202 schools, 21 Catholic hospitals, 6 healthcare centers, 5 orphanages, 14 daycare centers, 40 specialized homes, and 83 social-service centers. The

Conference promotes a social order that respects human life and dignity and serves the common good through public-policy advocacy.

The Minnesota Catholic Conference is the public-policy voice of the state's Catholic bishops and the six dioceses that the bishops lead. The Conference of bishops and its staff support legislation that serves human dignity and the common good, educates Catholics and the public about the ethical and moral framework to be applied to public-policy choices, and mobilizes the Catholic community in the public arena.[1]

BACKGROUND

I. Care for those in need is a fundamentally *religious* obligation for Catholic bishops and their dioceses.

For the Catholic Church, the service of charity is just as deeply a part of its religious mission as liturgical worship or spreading the faith. Rooted in the words of Jesus himself that "whatever you did for one of these least brothers of mine, you did for me," *see* Matthew 25:40 (New American Bible), and witnessed in the practice and teaching of the earliest Christians, "the exercise of charity" is "one of [the Church's] essential activities, along with the administration of the sacraments and the proclamation of the word." Benedict XVI, *Deus Caritas Est*, ¶¶ 22, 23 (2005). "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to her as the ministry of the sacraments and preaching of the Gospel," such that "[t]he Church cannot neglect the service of charity any more than she can neglect the sacraments

[1] No party's counsel authored this brief in whole or in part. No person, except *amici curiae*, their members, or their counsel, monetarily contributed to the brief's preparation.

and the Word." *Id.* ¶ 22. "These duties presuppose each other and are inseparable." *Id.* ¶ 25.

The Catholic Church's charitable service is thus "an indispensable expression of her very being" and an essential part of her nature and ministry, "not a kind of welfare activity which could equally well be left to others." *Id.* Further, the Church never regards itself as "a humanitarian agency and charitable service one of its 'logistical departments.'" *Address of Pope Francis to Participants in the Meeting Sponsored by Caritas Internationalis* (May 28, 2019).[2] Rather, "charity . . . is the experiential encounter with Christ; it is the wish to live with the heart of God who does not ask us to have generic love, affection, solidarity, etc., toward the poor, but to encounter him in them (cf. Mt 25:31–46), with the manner of poverty." *Id.*

Moreover, the Church's ministry of charity is neither conditioned on membership in the Catholic Church nor "used as a means of engaging in what is nowadays considered proselytism." *Deus Caritas Est* ¶ 31. "Those who practice charity in the Church's name will never seek to impose the Church's faith upon others." *Id.* In the words of Pope Francis:

> This is not about proselytism, as I said, so that others become "one of us". No, this is not Christian. It is about loving so that they might be happy children of God. . . . For without this love that suffers and takes risks, our life does not work.

Pope Francis, General Audience (Jan. 18, 2023).[3]

While the Church exhorts all the faithful to charitable works, it specially charges its bishops to carry out the service of charity in each particular diocese. *Deus Caritas Est* ¶ 32. "To facilitate aid for the needy

[2] http://bit.ly/3Dcl7IZ.
[3] http://bit.ly/3JbQHdG.

in the most effective manner, the Bishop should promote a diocesan branch of Caritas, Catholic Charities, or other similar organizations which, under his guidance, animate the spirit of fraternal charity throughout the diocese." Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops (Apostolorum Successores)*, ¶ 195 (Feb. 22, 2004).[4] Thus, Catholic Charities' purpose is fundamentally religious: "In every situation, diocesan Caritas or Catholic Charities should participate in all authentically humanitarian initiatives, so as to testify that the Church is close to those in need and in solidarity with them." *Id.* And, "[w]ithout ever misusing works of charity for purposes of proselytism, the Bishop and the diocesan community exercise charity in order to bear witness to the Gospel, to inspire people to listen to the Word of God and to convert hearts." *Id.* ¶ 196.

Catholic Charities therefore functions as an integral component of the Church's religious ministry, regardless of its legal structure under state law or, for that matter, its organization under the Church's canon law. Many dioceses organize their Catholic Charities as separately incorporated legal entities under civil law (even while in some cases treating them as part of the diocese under canon law). Other Catholic Charities are housed directly within the diocesan entity, and their employees are diocesan employees like other ministers. Such distinctions under state law, however, do not affect the practical reality that Catholic Charities is the principal charitable arm of the diocesan bishop, an integral

[4] https://bit.ly/3wtK8eV.

part of the Church through which the local Church exercises its fundamentally *religious* ministry of charity, ultimately answerable to that bishop.

In sum, the Catholic Church holds that charity is as integral to its nature as liturgical worship and spreading the faith. Moreover, the Church practices charity as a fundamentally religious activity in which it both encounters Christ in those served and bears witness to the Gospel. For these reasons—not simply as a humanitarian act or means to proselytize or impose the faith on others—the Church instructs bishops to perform charitable works through Catholic Charities or similar charitable organizations under their guidance.

ARGUMENT

I. The court of appeals' distinction between religious entities is wholly foreign to the purpose or structure of the unemployment statute's exemption.

Wisconsin law gives statutory language its "common, ordinary, and accepted meaning," avoiding "absurd or unreasonable results." *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Further, "[t]he statutory language is examined within the context in which it is used. An interpretation that fulfills the purpose of the statute is favored over one that undermines the purpose." *Klemm v. Am. Transmission Co., LLC*, 2011 WI 37, ¶ 18, 333 Wis. 2d 580, 798 N.W.2d 223. Here, the court of appeals' interpretation of Wis. Stat. § 108.02 contorted unambiguous language and unreasonably distinguished the activities and motivations of a "church" employee from

the exact same activities and motivations in an employee of a separately incorporated entity entirely controlled by that church.

First, the court of appeals failed to consider the context of the statutory exemption from Wisconsin's unemployment system. Instead of fairly reading the language of the exemption in context and favoring a reading that fulfills the purposes *of the exemption*, the court of appeals applied an overriding principle that "exceptions must be narrowly construed" and that the unemployment statute should be "liberally construed to effect unemployment compensation coverage." Opinion ¶¶ 36, 37. But this ignores that the statutory exemption was enacted within a broader statutory context in which it serves its own purposes.

Beyond generally noting that the exemption was enacted to "conform Wisconsin's unemployment law with" federal unemployment law, the court of appeals did not consider the purpose of the religious exemption to unemployment coverage. As a federal court of appeals has noted, however, "[e]fficient administration of the unemployment compensation system is particularly enhanced through the exemptions for religion because it eliminates the need for the government to review employment decisions made on the basis of religious rationales." *Rojas v. Fitch*, 127 F.3d 184, 188 (1st Cir.1997), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). There are similar benefits to broadening the religious exemption from churches to other closely related religious organizations. For example, what constitutes a "church" or "convention of churches" is not defined in the statute, and it may often be difficult to distinguish a "church" from another nonprofit entity operated by a church for religious purposes—especially where, as here, both entities are under the ultimate direction of the same religious leaders.

Similarly, an exemption that focuses on *who operates* the nonprofit organization and *why* it does so avoids the fundamentally religious question of *what constitutes religious activity*—the very trap into which the court of appeals stumbled here.

Second, the court of appeals' interpretation of the religious exemption leads to absurd and unreasonable results by drawing distinctions between materially similar employment based on an arbitrary criterion (whether an employer is a "church" or a nonprofit entity "operated, supervised, controlled, or principally supported by a church") that has nothing to do with the underlying purpose or structure of the exemption. Consider two hypothetical employers: the first is a diocese that provides social services through an unincorporated "Caritas" division of the diocese; the second provides identical services through a separately incorporated nonprofit Catholic Charities for the diocese. They employ two otherwise similarly situated individuals: both are ultimately subject to the direction of the bishop, both are employed full-time in providing social services to disabled individuals but not otherwise engaged in teaching or inculcating the Catholic faith or participating in religious worship, neither are Catholic, and both may be fired from their jobs if they publicly dissent from the teachings of the Catholic Church regarding social justice. As the court of appeals recognized, under its interpretation of the statute, the first employer is likely exempt from unemployment, but the latter is not. *See* Op. ¶ 61.

Why should this be the case? The court of appeals' only answer was: "[t]he corporate form does make a difference. . . ." *Id.* Yet that reasoning begs the question. None of the conceivable purposes of the religious exemptions turn on the particular corporate form through which a

church elects to engage in its ministry. There is no plausible reason the Wisconsin legislature would have intended this bizarre result for two employers with employees engaged in the same activities, for the same religious purposes, pursuant to the same religious doctrine, under the ultimate direction of the same religious leaders. Thus, this Court should prefer the CCB's reading of the statutory text, which "fulfills the purpose" of the religious exemption and avoids "absurd or unreasonable results."

II. The court of appeals' interpretation of the statute raises serious constitutional questions under the First Amendment.

The court of appeals' "religious activities" test would also raise serious doubts about the constitutionality of the unemployment statute under the First Amendment. "Where there is serious doubt of constitutionality," this Court "must look to see whether there is a construction of the statute which is reasonably possible which will avoid the constitutional question." *Baird v. La Follette*, 72 Wis.2d 1, 5, 239 N.W.2d 536 (1976); *accord Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). And this holds true for questions under the Religion Clauses as much as any other constitutional provisions. *See NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 507 (1979) ("[W]e decline to construe the [NLRA] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."). Here the court of appeals' interpretation would raise the very serious constitutional questions that the religious exemptions were designed to avoid in the first place.

First, allowing the LIRC and DWD to decide what is and is not a "religious activity," and thus whether a particular nonprofit organization is operated for a "religious purpose" would force the state to interfere with the internal structure and governance of churches and subsidiary entities, contrary to longstanding First Amendment doctrine prohibiting such intrusion on church autonomy. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). In other words, "the freedom of a religious organization to select its ministers," must also include the freedom of the Church to choose whether to pursue its ministries through subsidiary organizations or through its own employees. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012); *see also Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713 (1976) ("[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, *internal organization*, or ecclesiastical rule, custom, or law." (emphasis added)).

Here, the Church itself considers the charitable ministries undertaken through Catholic Charities an essential part of the nature and mission of the Church, on par with administration of the sacraments and proclamation of the Gospel. How it structures its operations to engage in this ministry—perhaps to reflect other fundamental principles such as subsidiarity and participation[5]—is a question of the Church's internal

[5] Such organizational decisions are themselves protected religious exercise, to the extent they are shaped by religious doctrine and canon law. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (holding that "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within" the definition of "religious exercise").

organization. There is no obvious or legitimate reason why the Wisconsin legislature (or Congress) would want to constrain which lawful activities the Church pursues as part of its religious purpose, either directly or through subsidiary organizations. To the contrary, by expanding the religious exemption to enable churches to pursue their "religious purposes" through other organizations that they direct through a variety of means, the unemployment statute carefully avoids drawing difficult distinctions about what is and is not part of a church, what is a "religious purpose," or a "religious activity," and who gets to answer to those questions. Whether a ministry or activity is part of the Church is a question for the Church, not for LIRC, DWD, or the courts. As the Supreme Court has repeatedly observed, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)). *See also, e.g.*, *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981).

Second, the court of appeals' "religious activities" test, by its own terms engages in "precisely the sort of official denominational preference that the Framers of the First Amendment forbade." *See Larson v. Valente*, 456 U.S. 228, 255 (1982). Just as the Minnesota statute in *Larson* violated the Establishment Clause by imposing requirements only on religious organizations that solicit the majority of their funds from nonmembers because its "principal effect" was to impose requirements "on some religious organizations but not on others," *id.* at 253, the court of appeals' interpretation of Wisconsin unemployment statute imposes unemployment coverage requirements on some religious organizations

but not on others. It does so by explicitly privileging certain "religious activities" (those "operated with a focus on the inculcation of [a religious] faith and worldview" or "in a worship-filled environment or with a faith-centered approach to fulfilling their mission") over others (those "primarily charitable functions" with "incidental" religious motives), and thus discriminates in favor of churches and charitable religious organizations that limit their charitable works to co-religionists or treat charitable service "primarily" as a means of engaging in proselytism. That result cannot be reconciled with the United States Constitution's command that the state may not "prefe[r] some religious groups over" others. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).[6]

CONCLUSION

The court of appeals' ruling distorts the fundamentally religious nature of Catholic charitable work, improperly narrows clear and reasonable statutory exemptions for religious organizations, trespasses on the Church's constitutionally guaranteed autonomy to define its own religious activities and organize its ministries in the manner it chooses, and discriminates against the Church by treating charitable religious activity less favorably than other religious activities that conform to the court of appeals' own notions of the proper domain of religion. For these reasons, the Catholic Conferences respectfully urge the Court to grant appellants' petition for review.

[6] For the same reason, the court of appeals' interpretation would violate the Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs . . . .").

Dated this 26th day of January, 2023.

Respectfully submitted,

Electronically signed by
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat § 809.19(8)(b), and (c) for a petition produced with a proportional serif font. The length of this brief is 3,000 words.

Dated: January 26, 2023

Electronically signed by
Robert S. Driscoll

CERTIFICATE OF SERVICE

I hereby certify that this brief (and this Certification) has been served on all opposing parties through the Court's electronic filing system pursuant the Clerk's designation of the above-captioned case as part of the Supreme Court's e-Filing Pilot Program.

Dated: January 26, 2023

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