**No. 2020AP002007**

# 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,
*Respondent-Co-Appellant*,

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,
*Respondent-Appellant.*

On appeal from the Court of Appeals
reversing the Douglas County Circuit Court
The Hon. Kelly J. Thimm, presiding
Case No. 2019CV000324

## OPENING BRIEF OF PETITIONERS-RESPONDENTS-PETITIONERS

Kyle H. Torvinen
(WI Bar No. 1022069)
Torvinen, Jones & Saunders, S.C.
823 Belknap Street
Suite 222
Superior, WI 54880
(715) 394-7751
*ktorvinen@superiorlawoffices.com*

Eric C. Rassbach (*pro hac vice*)
Nicholas R. Reaves (*pro hac vice*)
Daniel M. Vitagliano* (*pro hac vice*)
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
*erassbach@becketlaw.org*

*Attorneys for Petitioners-Respondents-Petitioners*

* Admitted only in New York. Supervised by a member of the DC Bar.

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## INTRODUCTION

Wisconsin law exempts from its unemployment compensation system all nonprofits "operated . . . by a church" and "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h)(2). Catholic Charities Bureau of the Diocese of Superior (CCB)—one of Wisconsin's largest religious charitable organizations—sought to claim this exemption so it could join the Wisconsin Catholic Church's own unemployment compensation system. It is undisputed that the bishop of the Diocese of Superior exercises direct control over CCB and that the Diocese operates CCB for a religious purpose: to serve as the social ministry arm of the Catholic Church.

But all that was not enough for the Labor and Industry Review Commission (LIRC) or the court of appeals. Both held that CCB was *not* "operated primarily for religious purposes" under Wisconsin law and thus did not qualify for this religious exemption, leading to the absurd conclusion that the charitable arm of a Catholic diocese is not "religious enough" to qualify for the "religious purposes" exemption. Even worse, they faulted CCB for helping all those in need, rather than just helping Catholics.

To reach that remarkable conclusion, LIRC and the court of appeals relied on two equally remarkable—and false—premises of law.

First, they determined that the purposes of the Diocese in operating CCB are irrelevant to determining whether CCB is operated for "religious purposes," thus severing CCB and its sub-entities from the religious mission of the Diocese. But CCB and its sub-entities are entirely creatures of the Diocese—and of the broader

Catholic Church. As the court of appeals acknowledged, LIRC does not dispute, and CCB's name indicates, the Diocese formed CCB specifically to carry out its religiously mandated social ministry. CCB's purposes and the Diocese's are thus one and the same. The court of appeals' conclusion to the contrary is plain error and flies in the face of both common sense and the typical treatment of parent-subsidiary relationships in Wisconsin.

Second, the court of appeals and LIRC held that the word "operated" in the statutory phrase "operated primarily for religious purposes" means "actions" or "activities," rather than the more obvious and contextual meaning of "managed" or "used." This attempt to shoehorn the word chosen by the Legislature into a subsidiary meaning found on Dictionary.com is untenable, particularly when read *in pari materia* with the other provisions of the statute.

Those errors of law run directly counter to the text, structure, and context of Section 108.02(15)(h). A straightforward reading of the text confirms this Court should look to the undisputed religious purposes *of the Diocese*—the entity operating CCB and its sub-entities—to determine if CCB is "operated primarily for religious purposes." This Court should also reject LIRC's attempt to scrutinize the individual "activities" or "actions" of religious nonprofits, rather than looking to the *reason why* the entities engage in those activities. As detailed below, a straightforward interpretation of the text confirms that courts should look only to the *religious purposes*—a term that undisputedly refers to the reasons for which

the nonprofit is operated—when determining whether an organization satisfies the religious purposes prong of the exemption.

Adopting LIRC's contrary interpretation would not only distort Section 108.02(15)(h); it would also put the statute at odds with the First Amendment to the United States Constitution and Article I, Section 18 of the Wisconsin Constitution in three ways.

First, LIRC's interpretation violates the church autonomy doctrine, which reserves a sphere of control over internal church affairs to religious bodies. Here, the court of appeals effectively severed CCB from the Diocese of Superior and the broader Catholic Church for purposes of Section 108.02(15)(h). That grossly interferes with the ability of the Church in this State to structure itself freely in accordance with its beliefs about religious polity.

Second, LIRC's interpretation violates the Free Exercise Clause by penalizing CCB for serving non-Catholics and for not proselytizing when engaging in ministry. CCB's undisputed belief that the Church ought to help all who are in need without proselytizing is core to Catholic social teaching. Yet LIRC argued, and the court of appeals held, that these beliefs disqualified CCB from Section 108.02(15)(h)'s exemption. That burdens CCB's religious exercise in violation of the Free Exercise Clause.

Third, the decision violates the Establishment Clause by entangling Church and State. By forcing Wisconsin executive branch officials and Wisconsin courts to finely parse all the activities of religious bodies in the State and decide whether those activities are "inherently" or "primarily" religious, the court of appeals has

thrust those officials and courts into a constitutional thicket. That is the opposite of church-state separation.

This Court can avoid this constitutional conundrum by following the plain language of Section 108.02(15)(h) and confirming that CCB and its sub-entities are exempt as nonprofit "organization[s] operated primarily for religious purposes."

## ISSUES PRESENTED

1. Whether Wisconsin's unemployment insurance law, which exempts "an organization operated primarily for religious purposes," exempts Petitioners.

The circuit court answered yes.

The court of appeals answered no.

2. Whether the court of appeals' interpretation of the religious exemption to Wisconsin's unemployment insurance law violates the First Amendment to the United States Constitution and Article I, Section 18 of the Wisconsin Constitution.

The circuit court did not address this issue because it found Petitioners exempt.

The court of appeals answered no.

## ORAL ARGUMENT AND PUBLICATION

By granting the petition for review, this Court has indicated the case is appropriate for oral argument and publication.

## STATEMENT OF THE CASE

### A. Wisconsin's unemployment compensation system and the religious purposes exemption.

Enacted in 1932, the Wisconsin Unemployment Compensation Act was the first unemployment insurance law in the United

States, providing temporary benefits to eligible unemployed workers.[1] Wis. Stat. §§ 108.01 *et seq*. The program is jointly financed through state and federal taxes on covered employers. Wisconsin law requires covered employers to contribute to an account with the State's unemployment reserve fund. *Id.* § 108.18. Benefits paid to a former employee are generally charged to the employer's reserve fund account. *Id.* § 108.03(1).

In 1972, the Legislature exempted certain religious nonprofits from this law. 1971 Wis. Act 53. As amended, Wisconsin law exempts services performed for certain organizations from the definition of covered "employment":

> (h) "Employment" as applied to work for a nonprofit organization, except as such organization duly elects otherwise with the department's approval, does not include service:
>
> > 1. In the employ of a church or convention or association of churches; [or]
> >
> > 2. In the employ of *an organization operated primarily for religious purposes* and operated, supervised, controlled, or principally supported by a church or convention or association of churches[.]

Wis. Stat. § 108.02(15)(h)(1)-(2) (emphasis added).

It is undisputed that Catholic Charities Bureau and its sub-entities are "operated, supervised, controlled, or principally supported by a church." App.112, 149. The only dispute is whether they are "operated primarily for religious purposes." App.017.

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[1] *See generally* E.E. Muntz, *An Analysis of the Wisconsin Unemployment Compensation Act*, 22 Am. Econ. Rev. 414 (1932).

### B. The Catholic Church and its religious ministries in Wisconsin.

The Catholic Church organizes itself geographically by diocese. Archbishops and bishops oversee all Catholic parishes, schools, hospitals, and social ministries within their respective dioceses. *See* R.99:15-16; R.100:30-31.

Catholic teaching "demand[s]" that Catholics "respond . . . in charity to those in need." R.99:19-20. The Catechism of the Catholic Church and the Compendium of the Social Doctrine of the Church are the "foundational," "authoritative" sources of Catholic doctrine and teaching. R.99:19-21. These texts provide the "Ten Principles of Catholic Social Teaching," which include human dignity, participation, subsidiarity, preferential protection for the poor and vulnerable, and common good. App.085, 148, 179. These principles "guide and direct the action[s] of the church." R.99:22.

Charity is "*the greatest*" of the Catholic Church's theological virtues, above faith and hope. Catechism of the Catholic Church ¶ 1826 ("Charity is superior to all the virtues."). Charity is "the *new commandment*" of the Church, established by Jesus Christ. *Id.* ¶ 1823. Charity accordingly is "a constitutive element of the Church's mission and an indispensable expression of her very being." Pope Benedict XVI, *Apostolic Letter Issued 'Motu Proprio' on the Service of Charity* (Nov. 11, 2012); *see also* Pope Benedict XVI, *Deus Caritas Est* ¶ 32 (2005) ("[Charity] has been an essential part of [the Church's] mission from the very beginning."). The Catholic Church "claims works of charity as its own inalienable duty and right." Pope Paul VI, *Apostolicam Actuositatem* ¶ 8 (1965).

The Church's mandate of charity "must embrace the entire human race." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 581 (2004). The Church therefore instructs that charity should be exercised "in an impartial manner towards" "members of other religions." Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops "Apostolorum Successores"* ¶ 208 (2004); *see also* Pope Francis, *Apostolic Exhortation Evangelii Gaudium* ¶ 181 (2013) ("[The Church's] mandate of charity encompasses all dimensions of existence, all individuals, all areas of community life, and all peoples."). For this reason, the Church's "charitable enterprises can and should reach out to all persons and all needs." *Apostolicam Actuositatem* ¶ 8.

Charity, moreover, "cannot be used as a means of engaging in . . . proselytism." *Deus Caritas Est* ¶ 31; *see also Apostolorum Successores* ¶ 196 (instructing not to "misus[e] works of charity for purposes of proselytism"). As Pope Benedict XVI explained, "Those who practise charity in the Church's name will never seek to impose the Church's faith upon others." *Deus Caritas Est* ¶ 31. And as Pope Francis has written, "The Church's missionary spirit is not about proselytizing, but the testimony of a life that illuminates the path, which brings hope and love." *Message of Pope Francis for World Mission Day 2013* ¶ 4 (2013).

To carry out the Church's mandate of charity, each diocese operates a nonprofit social ministry arm—typically called "Catholic Charities." App.110, 142; *see Apostolorum Successores* ¶ 195. Catholic Charities' mission generally "is to provide service to people in need, to advocate for justice in social structures, and to call the

entire church and other people of goodwill to do the same." R.57:1, 5.

Petitioner Catholic Charities Bureau is the social ministry arm of the Diocese of Superior. App.177. Its mission is "[t]o carry on the redeeming work of our Lord by reflecting gospel values and the moral teaching of the church." App.182, 206. CCB carries out this mission by "providing services to the poor and disadvantaged as an expression of the social ministry of the Catholic Church." App.183, 208. Its purpose is "to be an effective sign of the charity of Christ" by providing services without making distinctions "by race, sex, or religion in reference to clients served, staff employed and board members appointed." App.183, 208. CCB pledges that it "will in its activities and actions reflect gospel values and will be consistent with its mission and the mission of the Diocese of Superior." App.184-85, 207.

CCB operates dozens of programs in service to the elderly, the disabled, the poor, and those in need of disaster relief. App.178. Petitioners Headwaters, Barron County Developmental Services, Diversified Services, and Black River Industries are CCB sub-entities that provide services primarily to developmentally disabled individuals. R.65:17-18, 57-58; R.100:187-88, 256-57.

The bishop of the Diocese of Superior has plenary control over CCB and its sub-entities: "the entire organization begins and ends with [him]." R.100:55, 62, 130. He serves as president of CCB and appoints its "membership," which consists of leading diocesan

clergy and the executive director. App.198-99. The bishop also appoints the boards of directors of CCB and its sub-entities. App.201, 203.

CCB's membership oversees the ministry and its sub-entities to ensure fulfillment of CCB's mission in compliance with Catholic social teaching. App.199. Each sub-entity signs CCB's *Guiding Principles of Corporate Affiliation*, which gives CCB responsibility over many of the sub-entity's major operating decisions. App.203-04. CCB and its sub-entities are directed to comply fully with Catholic social teaching in providing services. App.204; R.100:130-31. And all new "key staff and director-level positions" receive a manual entitled *The Social Ministry of Catholic Charities Bureau of the Diocese of Superior*, which they must review during orientation. R.100:74, 135-36. In addition, every new employee receives a welcome letter with the Catholic Charities Bureau's mission statement, code of ethics, and statement of philosophy. R.100:79-80, 150; *see* App.205-08, 229-32. All employees are instructed to abide by these documents. R.100:80, 149.

The Diocese of Superior, CCB, and CCB's sub-entities are federally tax-exempt under 26 U.S.C. § 501(c)(3) pursuant to a "group ruling" by the IRS that the organizations operate "exclusively for religious . . . purposes." App.186-94.

### C. Catholic Charities Bureau's attempts to participate in a Church-run unemployment assistance program.

For the Catholic Church, "[t]he obligation to provide unemployment benefits . . . spring[s] from the fundamental principle of the moral order in this sphere." App.211 (quoting St. Pope John Paul

II, *Laborem Exercens* (1981)). Accordingly, in 1986, the Wisconsin bishops created the Church Unemployment Pay Program "to assist parishes, schools and other church employers in meeting their social justice responsibilities by providing church-funded unemployment coverage," in accordance with Catholic teaching. App.211. The Church's program provides the same level of benefits to unemployed individuals as the State's system while being "more efficient." R.100:125; App.214.

CCB and its sub-entities would be eligible for the Church's program if released from the State's. R.100:50. Were CCB to switch from the State's program to the Church's program, it would save funds that could be redirected to CCB's religious mission.

In 2001, the Department of Workforce Development (DWD) determined that Challenge Center—one of CCB sub-entities not involved in this case—was "a church-related entity" and qualified for the religious purposes exemption. App.244. Challenge Center then paid into the Church-run unemployment program. App.244.

In light of this determination, in 2003, CCB requested to withdraw from the State's program, citing the religious purposes exemption and its intent to join the Church's program. App.215. DWD denied the request, and the Labor and Industry Review Commission (LIRC) affirmed. App.216-24.

In 2013, DWD "changed its earlier determination and concluded [Challenge Center] was not operated for a religious purpose." App.244. "This change in its position by DWD occurred with-

out any change in the law or without any change in the way [Challenge Center] conducted its business." App.244. LIRC upheld DWD's new determination. App.244.

The circuit court (Glonek, J.) reversed LIRC's decision, holding that Challenge Center qualified for the religious purposes exemption. App.243-51. After considering "why the organization is operating," the court held that Challenge Center's purpose is primarily religious because it is "organized by the Bishop for a traditional Catholic purpose," "as demanded by the Catechism and [Catholic] Social Doctrine," to provide not-for-profit services to disadvantaged people. App.249-50. DWD and LIRC did not appeal. *See* App.075.

**D. The proceedings below.**

In 2016, Petitioners sought a determination from DWD that, like Challenge Center, they qualify for the religious purposes exemption. App.233-35. DWD, however, concluded that Catholic Charities Bureau and its sub-entities are not operated primarily for religious purposes and therefore are not exempt from the State's program. App.166-75. CCB appealed. After a two-day hearing, the administrative law judge (Galvin, J.) reversed, holding that CCB and its sub-entities qualify for the religious purposes exemption. App.134-65.

DWD petitioned LIRC for review. LIRC reversed, holding that the religious purposes exemption turns on an organization's "activities, not the religious motivation behind them or the organization's founding principles." App.100, 108, 116, 124, 133. And be-

cause CCB and its sub-entities "provide[] essentially secular services and engage[] in activities that are not religious per se," LIRC concluded that they do not qualify. App.099, 108, 116, 124, 132.

CCB sought review in circuit court. The court (Thimm, J.) then reversed LIRC's decision, holding that under the "plain language" and "plain meaning" of the statute, "the test is really why the organizations are operating, not what they are operating." App.088-89. And since CCB and its sub-entities operate out "of th[e] religious motive of the Catholic Church . . . of serving the underserved," their primary purposes are religious. App.087.

DWD and LIRC appealed. In December 2021, the court of appeals (Stark, P.J., Hruz and Gill, JJ.) certified the case to this Court. App.044. This Court refused certification. R.123:1. The court of appeals then reversed the circuit court's order and reinstated LIRC's decision. App.008.

The court of appeals held that "under a plain language reading of the statute," to qualify for the religious purposes exemption, "the organization must not only have a religious motivation, but the services provided—its activities—must also be primarily religious in nature." App.025. It therefore concluded that although CCB and its sub-entities "have a professed religious motivation . . . to fulfill the Catechism of the Catholic Church," their "activities . . . are the provision of charitable social services that are neither inherently or primarily religious activities." App.039-40. The court pointed to the fact that the organizations do not, *inter alia*, "operate to inculcate the Catholic faith," "teach[] the Catholic religion," "evange-

liz[e]," "disseminate any religious material to [social service] participants," or "require their employees, participants, or board members to be of the Catholic faith." App.040-41. The court viewed CCB and its sub-entities' "motives and activities separate from those of the church" simply because they "are structured as separate corporations." App.042.

The court of appeals further held that "the First Amendment is not implicated in this case," rejecting CCB's constitutional arguments. App.008, 034-35. It reasoned that its interpretation of the religious purposes exemption does not "penalize, infringe, or prohibit any conduct of the organizations based on religious motivations, practice, or beliefs," eliminating any "free exercise concern." App.036. And its purported "neutral review based on objective criteria" "avoid[ed] excessive entanglement" under the Establishment Clause. App.038.

CCB petitioned this Court for review. The court of appeals then withdrew its decision, issued a revised one (leaving its statutory and constitutional analysis unchanged), and ordered it published. App.006. All parties agreed to stand on their previously filed papers. This Court then granted review.

## STANDARD OF REVIEW

Statutory construction presents questions of law subject to de novo review by this Court, without deference to lower courts. *State ex rel. Collison v. City of Milwaukee Bd. of Rev.*, 2021 WI 48, ¶ 21, 397 Wis. 2d 246, 960 N.W.2d 1; *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 26, 389 Wis. 2d 669, 937 N.W.2d 37. Nor is this court "bound by an agency's interpretation of a statute." *Operton v.*

*LIRC*, 2017 WI 46, ¶ 19, 375 Wis. 2d 1, 894 N.W.2d 426. LIRC has conceded that review is de novo, Opp. to Pet. 11, and regardless, this Court has rejected deference when it comes to questions of law. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21 ("We have also decided to end our practice of deferring to administrative agencies' conclusions of law."). Constitutional interpretation also "presents an issue of law that this court decides de novo." *State v. Johnson*, 2020 WI App 73, ¶ 22, 394 Wis. 2d 807, 951 N.W.2d 616; *State v. Williams*, 2012 WI 59, ¶ 10, 341 Wis. 2d 191, 814 N.W.2d 460.

## ARGUMENT

### I. The plain meaning, context, and structure of the unemployment insurance law confirm that Catholic Charities Bureau and its sub-entities are "operated primarily for religious purposes."

The plain meaning of the statutory phrase "an organization operated primarily for religious purposes" encompasses Catholic Charities Bureau and its sub-entities. Indeed, CCB is the epitome of an organization operated for religious purposes because the sole purpose of its existence is to advance the charitable mission of the Catholic Church in the Diocese of Superior.

This Court's rulings in a host of statutory interpretation cases require a common-sense, plain-meaning mode of analysis. An ordinary speech analysis leads to the conclusion that "organization operated primarily for religious purposes" means religious organizations that are "managed" or "used" to carry out the religious purposes of the church, synagogue, or mosque that controls them. That common sense is also reflected in the many Wisconsin statutes

that employ the words "operated" and "purposes" to express the same concept.

In stark contrast, LIRC's interpretation, adopted by the court of appeals, does what the principles of statutory interpretation forbid: look at specific words in isolation from the whole of the statute, apply entirely uncommon and extraordinary meanings to the words of the exemption, and torture the rules of grammar to turn verbs into nouns and to render the sentence nonsensical.

### A. The plain meanings of the terms "operated" and "religious purposes" support CCB's interpretation.

In Wisconsin, statutory interpretation "begins with the language of the statute." *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1 (quoting *Milwaukee Dist. Council 48 v. Milwaukee County*, 2019 WI 24, ¶ 11, 385 Wis. 2d 748, 924 N.W.2d 153). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 "If the meaning of the language is plain, our inquiry ordinarily ends." *Brey*, 2022 WI 7, ¶ 11. Moreover, "[a] statute's context and structure are critical to a proper plain-meaning analysis." *Id.*

Here the plain meaning of the text "operated primarily for religious purposes" encompasses a nonprofit organization carrying out a religious mission—whether its own, or its controlling religious parent's. When each part of the phrase is examined in context, the meaning is entirely unambiguous. As explained below, "operated" means "managed" or "used," and "religious purposes" refers to the

religious purposes of the entity doing the managing—here, the Diocese of Superior.

### *1. "Operated" as used in the religious purposes exemption means "managed" or "used."*

To define "operated," courts must begin with the text of Section 108.02(15)(h)(2). That text must be "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal,* 2004 WI 58, ¶ 45. These modes of textual analysis show that in the context of Section 108.02(15)(h), "operated" must mean "managed" or "used."

"Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Brey*, 2022 WI 7, ¶ 13 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)). Reading "operated" "as part of a whole" is particularly important with respect to Section 108.02(15)(h)(2) because the word "operated" is used twice in the provision, introducing the exemption's two requirements: (1) "operated primarily for religious purposes" and (2) "operated . . . by a church." The term therefore must have the same meaning in both places. *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶ 29, 299 Wis. 2d 1, 727 N.W.2d 311 ("[W]e attribute the same definition to a word both times it is used in the same statute or administrative rule."); *see also* Scalia & Garner at 170-73 (presumption of consistent usage).

Courts can also infer the meaning of a term from the other words the legislature chose to use alongside it. Here, "operated" is used alongside "supervised, controlled, or principally supported by," Wis. Stat. § 108.02(15)(h)2, and therefore must have a similar meaning, *Benson v. City of Madison*, 2017 WI 65, ¶ 31, 376 Wis. 2d 35, 897 N.W.2d 16 ("[A]n unclear statutory term should be understood in the same sense as the words immediately surrounding or coupled with it.").

Finally, to help understand a term's contextual meaning, courts can look to the grammatical structure of the sentence or phrase and the way the statutory term is used therein. *See, e.g.*, *State ex rel. Dep't of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 29, 380 Wis. 2d 354, 909 N.W.2d 114 (determining that "select" is used in the statute as a transitive verb and looking to the relevant transitive verb definition in a contemporaneous dictionary); *John R. Davis Lumber Co. v. First Nat'l Bank of Milwaukee*, 87 Wis. 435, 58 N.W. 743, 744 (1894) (same). Here, both instances of the word "operated" confirm it is used as a transitive verb, *i.e.*, it is a verb that takes an object. Both instances of "operated" in Section 108.02(15)(h)(2) take "organization" as their object—the organization is the thing being operated. Thus, the *organization* must be *operated* both primarily for religious purposes and by a church. *See* Wis. Stat. § 108.02(15)(h)(2).

Taken together, the statutory context requires a definition of "operated" that (1) can be used in both provisions of the statute, (2) has a meaning consistent with "supervised, controlled, or principally supported by," and (3) functions as a transitive verb.

With this statutory context in mind, courts then look to "common and accepted meaning, ascertainable by reference to the dictionary definition." *Kalal,* 2004 WI 58, ¶ 53. Here, dictionary definitions contemporaneous to the statute's enactment in 1972 show that "operated" can only be understood as "managed" or "used"—there is no ambiguity.

For example, there are several definitions of "operate" in the 1973 version of The Random House College Dictionary. The first definition that is a transitive verb—how "operated" is used in Section 108.02(15)(h)(2)—is "to manage or use." *Operate*, The Random House College Dictionary 931 (1st ed. 1973). The other transitive verb definitions are "to put or keep in operation" and "to bring about, effect, or produce, as by exertion of force or influence." *Id.* The first simply adds a durational component to the word "operate." The second cannot be read *in pari materia* with "supervised, controlled, or principally supported by" and cannot replace both instances of "operated" in the statute (and, regardless, it does not support LIRC's interpretation in the slightest). Other contemporaneous dictionaries use similar definitions. *See, e.g.*, *Operate,* 1 Compact Edition of the Oxford English Dictionary 1995 (1971) ("To direct the working of; to manage, conduct, work (a railway, business, etc.)"); *Operate,* Webster's Dictionary 260 (1975) ("*v.t.* to cause to function"); *Operate*, Black's Law Dictionary (5th ed. 1979) ("To perform a function, or operation, or produce an effect.").[2]

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[2] Even the Internet dictionary the court of appeals consulted lists "manage or use" first among the transitive verb definitions. *See Operate (used with object)*, Dictionary.com, https://perma.cc/Y4GP-YEXM ("to manage or use").

Accordingly, "to manage or use" is the best definition of "operated" in this statutory context. Because these dictionary definitions are contemporaneous with Section 108.02(15)(h)(2)'s enactment in 1972, their meaning is controlling. *See Landis v. Physicians Ins. Co. of Wis.*, 2001 WI 86, ¶ 36, 245 Wis. 2d 1, 628 N.W.2d 893 (dictionary definitions from time of enactment control).

The uniform verdict of the dictionary definitions is confirmed by the use of the word "operate" and its variants elsewhere in other Wisconsin statutes. For example, in the statute restricting unfair trade practices in the procurement of vegetable crops, "'Subsidiary' means a corporation or business entity that is owned, controlled or *operated* by a contractor." Wis. Stat. § 100.235(1)(f) (emphasis added). The subsidiary is managed or used to carry out the parent contractor's purposes—to procure vegetables. Here, CCB is the subsidiary of the Diocese and is thus "operated" by it.

Similarly, Wisconsin driving laws frequently speak in terms of an "operator" controlling a "vehicle." *See, e.g.*, Wis. Stat. § 340.01(41) ("'Operator' means a person who drives or is in actual physical control of a vehicle."). That usage is in full harmony with the idea conveyed in Section 108.02(15)(h)(2)—one entity controls another to carry out its purposes. Here, CCB is the car and the Diocese is the driver.

Given this consistent meaning across several Wisconsin statutes and the internal logic of Section 108.02(15)(h)(2) itself, the relevant "context and structure" point to the same definition that the plain meaning analysis did: CCB is controlled by, managed by,

and used to carry out the specific religious mission of the Diocese. *Brey*, 2022 WI 7, ¶ 11.

#### *2. LIRC's contrary interpretation of "operated" is unreasonable.*

LIRC's contrary interpretation of the word "operated"—adopted by the court of appeals below—would lead to "absurd or unreasonable results." *Kalal,* 2004 WI 58, ¶ 46. The court of appeals held that the word "operated" means "an action or activity." App.018. This interpretation is "absurd or unreasonable" for at least five reasons: (1) the court of appeals' definition turns a verb ("operated") into a noun ("action"); (2) "action" ignores the fact that "operated" is used as a transitive (not intransitive) verb in the statute; (3) "action" cannot be substituted for both uses of the term "operated" in Section 108.02(15)(h)(2); (4) "action" is not comparable in meaning to the other terms used alongside "operated" in the exemption; and (5) the "action" definition isn't even supported by the Dictionary.com definitions the court of appeals cited.

First, LIRC's interpretation contradicts basic rules of grammar by substituting one part of speech for another. In Section 108.02(15)(h)(2), as in normal English speech, "operated" is a verb. But the court of appeals defined "operated" as a noun ("an action or activity"). App.018. Neither LIRC nor the court of appeals has offered any reason—much less a plausible one—for this grammatical switcheroo. Nor is this a situation where the same word could plausibly be employed as either a noun or a verb. *See, e.g.*, *Return of Prop. in State v. Perez*, 2001 WI 79, ¶ 22, 244 Wis. 2d 582, 628 N.W.2d 820 (distinguishing between "use" as noun and "use" as verb).

Second, LIRC's interpretation also ignores the fact that "operated" is not just a verb but a *transitive* verb. The court of appeals never explained what happens to the leftover direct object "organization" when the transitive verb "operated" is changed into a noun. *Cf. Peace ex rel. Lerner v. Nw. Nat. Ins. Co.*, 228 Wis. 2d 106, 126, 596 N.W.2d 429 (1999) (discussing differences in meaning that depend on whether the verb is transitive or intransitive).

Third, substituting "action" for "operated" shows how LIRC's interpretation would render the statute nonsensical: "'Employment' . . . does not include service . . . In the employ of an organization [action] primarily for religious purposes and [action], supervised, controlled, or principally supported by a church or convention or association of churches." That interpretation twists Section 108.02(15)(h)(2) beyond comprehension. *See* Section I.B below.

Fourth, "action" is not comparable in meaning to the terms "immediately surrounding" it. *Benson*, 2017 WI 65, ¶ 31. Treating the verbs "supervised," "controlled," and "supported" as comparable to the nouns "action" or "activity" both repeats the part-of-speech error and mistakes a broader category ("action") for some of its components (various verbs).

Fifth, the definitions cited by the court of appeals don't even support its "action or activity" interpretation. The court of appeals cited three different meanings of "operate" from Dictionary.com: "to work, perform, or function"; "to act effectively; produce an effect; exert force or influence"; or "to perform some process of work or treatment." App.018 (citing *Operate*, Dictionary.com, https://perma.cc/Y4GP-YEXM). But none of these support treating

the verb "operate" as a noun, and all of them are much less general than "action" or "activity." "[T]o act effectively" is different and narrower than "to act" and even more different than "action or activity." "To work" or "perform a process of work or treatment" are even further afield. The court of appeals' interpretation, embraced by LIRC, is unconvincing.

### *3. The relevant "religious purposes" are those of the parent church operating the nonprofit organization.*

With "operated" correctly defined as "managed" or "used," the next question in the interpretive analysis is the definition of "for religious purposes."

There is little disagreement among the parties or the court of appeals over the definition of "purposes" at the highest level of generality. A contemporary dictionary definition is "[t]hat which one sets before him to accomplish; an end, intention, or aim, object, plan, project." *Purpose*, Black's Law Dictionary (5th ed. 1979). The Dictionary.com definition offered by the court of appeals and embraced by LIRC is not significantly different. *See* App.024 ("the reasons for which something exists or is done" (citing *Purpose*, Dictionary.com, https://perma.cc/A4HH-2VUY)).

The key point of difference concerns *whose* purposes are referred to in the statute. LIRC and the court of appeals say it is solely the purposes of the subsidiary entity, not the parent. App.019-20. But this runs directly counter to the common-sense meaning and context of the words "religious purposes."

As with the word "operated," the exemption's parallel structure (using "operated" to introduce both of the exemption's requirements) provides the answer to the question of "whose purposes?" The text of the "controlled . . . by" requirement explicitly explains *who* is doing the operating: the "church." Wis. Stat. § 108.02(15)(h)(2) ("operated . . . by a church"). Thus, when determining *why* the sub-entity is being operated (the exemption's other requirement), the relevant purpose, motive, or objective is that of the *operator*—which is the "church," as the exemption's "controlled . . . by" requirement confirms. *Id.*

The plain text, context, and structure of the religious purposes exemption show that the "operator" (*i.e.*, the one who "operated" the organizations) is the parent church. Therefore, the "religious purposes" referred to in Section 108.02(15)(h)(2) are the church's religious purposes. It is the purposes of the driver, not the car, that matter. *Cf.* Wis. Stat. § 340.01(3)(j) (putting into special exempt category "[v]ehicles *operated* by federal, state or local authorities for the *purpose* of bomb and explosive or incendiary ordnance disposal") (emphases added). This is confirmed by the only possible contextual meaning of the term "operated" (akin to "managed" or "used"). And it means that the religious purposes exemption covers CCB and its sub-entities, as it is undisputed that the Diocese of Superior's purpose in operating CCB and its sub-entities is primarily religious. App.034-35 ("[N]either DWD nor this court dispute that the Catholic Church holds a sincerely held religious belief as its reason for operating CCB and its sub-entities.").

#### *4. LIRC's contrary interpretation of "religious purposes" is unreasonable.*

LIRC's strained interpretation of "religious purposes" is that those purposes belong solely to the subsidiary religious organization and not the mother church. App.019-20. LIRC has adopted the position of the court of appeals, which offered two explanations for its interpretation. Neither withstands scrutiny.

First, the court of appeals said that because the exemption covers employees of an organization "operated primarily for religious purposes," the "employees who fall under [the religious purposes exemption] are to be focused on separately in the statutory scheme," and therefore "the focus must be on the organizations" and their purposes, not the church's purposes. App.019. No one disagrees that the exemption, if applicable, would cover employees of CCB and its sub-entities. But *which* employees are covered says nothing about *whose* religious purposes are at issue. The phrase "organization operated primarily for religious purposes" describes CCB and its sub-entities, not their employees. Leaping from the premise that the exemption would cover employees of the subsidiaries to the conclusion that the subsidiaries' purposes control the primary purpose analysis is a *non sequitur*.

The court of appeals' second explanation fares no better. The court recognized that the exemption includes two requirements that must be satisfied: (1) "operated primarily for religious purposes," and (2) "operated . . . by a church." App.019-20. It then concluded that the second requirement would render the first "unnecessary" if the relevant purpose were that of the parent church. App.020. Here too, no one disputes that both requirements must

be satisfied. But this again says nothing about the meaning of the exemption. A plain reading confirms the two requirements serve distinct purposes. The first asks *why* the organization is operated ("primarily for religious purposes"?); the second asks *who* operates the organization ("a church or convention or association of churches"?). Wis. Stat. § 108.02(15)(h)(2). The first—regardless of how it is interpreted—does not render the second "unnecessary." App.020.

#### *5. Reading Section 108.02(15)(h)(2) as a whole confirms that CCB and its sub-entities are "operated primarily for religious purposes."*

As demonstrated above, the terms "operated" and "religious purposes" both support a reading of Section 108.02(15)(h)(2) that includes Catholic Charities Bureau and its sub-entities as "organization[s] operated primarily for religious purposes." But "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole." *Kalal*, 2004 WI 58, ¶ 45. And that whole-statute reading confirms that CCB and its sub-entities qualify for the exemption.

In CCB's interpretation, the whole of Section 108.02(15)(h)(2) would read in context:

> (h) "Employment" as applied to work for a nonprofit organization, except as such organization duly elects otherwise with the department's approval, does not include service:
>
> . . .
>
> 2. In the employ of an organization [managed or used] primarily for religious purposes [of a church] and [managed or used], supervised, controlled, or principally supported by a church or convention or association of churches[.]

By contrast, LIRC and the court of appeals would have it read:

> 2. In the employ of an organization [action or activity] primarily for religious purposes [of that organization alone] and [action or activity], supervised, controlled, or principally supported by a church or convention or association of churches[.]

One interpretation makes sense of the statute as a whole; the other renders it incomprehensible. Given this Court's frequent injunctions not to view terms in isolation but to examine them in light of the whole text, LIRC's interpretation is unsupportable.

### B. The Court should reject the court of appeals' other errors.

The court of appeals made two other errors that this Court should expressly reject.

***Inherently religious activities.*** First, despite recognizing that both CCB's and its sub-entities' purposes are primarily religious, App.039-40, the court of appeals held that they were not "operated primarily for a religious purpose," App.040-42. Why? Because, according to the court of appeals, "the reviewing body must consider both the *activities* of the organization as well as the organization's professed *motive* or purpose." App.024-25. And here, the court concluded that "the activities of CCB and its sub-entities are the provision of charitable social services that are neither inherently or primarily religious activities." App.040-41. This despite also concluding that "the Catholic Church's tenet of solidarity compels it to engage in charitable acts." App.043.

In essence, the court of appeals grafted onto the religious purposes exemption a novel atextual requirement: that the *activities*

of the church-controlled entity (not just its purpose) must be "inherently or primarily religious activities." App.040-41. To deploy this new requirement, the court looked at the specific charitable services each nonprofit provides—including "work training programs, life skills training, [and] in-home support services"—and concluded that "[w]hile these activities fulfill the Catechism of the Catholic Church to respond in charity to those in need, the activities themselves are not *primarily* religious." App.041.

This Court should reject the court of appeals' "activities" analysis because it contradicts the text of the statute. It is undisputed that the requirement of a primarily religious purpose says nothing about the types of permitted "activities." *See* App.024 ("qualification for the exemption is based on the organization's reason for acting or its motivation"); App.039-41 (distinguishing between motive and activities). Instead, the court of appeals injected this new requirement into the term "operated." Ignoring the text's plain meaning, several canons of construction, and basic rules of grammar, the court concluded that because "both words [('purpose' and 'operated')] appear in the statute," "[t]he only reasonable interpretation of the statute's language is that the reviewing body must consider both the *activities* of the organization as well as the organization's professed *motive* or purpose." App.024-25.

In essence, the court of appeals rewrote the exemption. A church-controlled entity would qualify only if both its purpose *and* its activities are *inherently* religious. This novel requirement cannot be justified by the exemption's text.

***Improper use of extrinsic sources.*** This Court should also reject the court of appeals' reliance on out-of-state court decisions and federal legislative history. The court of appeals invoked "courts in other jurisdictions," which, it concluded, "have interpreted the religious purposes exemption in different ways." App.021-22, 028-30. It also looked to a federal House Ways and Means Committee report, citing a one-sentence hypothetical as evidence of the correct interpretation of Wisconsin law. App.032-33. But neither supports the court's interpretation.

*First*, "[w]here statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Lovelien v. Austin Mut. Ins. Co.*, 2018 WI App 4, ¶ 15, 379 Wis. 2d 733, 906 N.W.2d 728. And regardless, it cannot contradict the statute's plain text, structure, and context. Here, the court of appeals expressly *rejected* LIRC's argument that the statute is ambiguous. App.024. That ought to have excluded extrinsic sources altogether, but the court of appeals inexplicably relied on them.

*Second*, as the court of appeals acknowledged, the extrinsic sources are hopelessly muddled: there is a "distinct lack of consensus" among other jurisdictions regarding their interpretation of this or similar language. App.014-15. Thus, any attempt to decipher meaning from other courts' interpretations will be, at best, inconclusive.

Third, all the extrinsic evidence regarding interpretation of statutory language comes from sources *outside* Wisconsin.[3] Yet this Court has repeatedly confirmed that it does not matter "how courts of other states have construed their unemployment acts even though they are duplicates of or based upon our own." *Moorman Mfg. Co. v. Indus. Comm'n*, 241 Wis. 200, 207, 5 N.W.2d 743 (1942); *Bernhardt v. LIRC*, 207 Wis. 2d 292, 302, 558 N.W.2d 874 (Ct. App. 1996) ("[W]e need not look to the decisions of other jurisdictions (or the [NLRB]) in construing our own unemployment compensation act."); *Princess House, Inc. v. Dep't of Indus., Lab. & Hum. Rels.*, 111 Wis. 2d 46, 72 n.5, 330 N.W.2d 169 (1983) (rejecting analogy to "federal compensation law").

Were the court of appeals' erroneous interpretation not obvious on its face, the way the court applied it confirms its many flaws. The court of appeals repeatedly acknowledged that the motivations behind the nonprofit organizations' actions were primarily religious. But it nevertheless determined that the "activities"—viewed in isolation, App.024—were not themselves "inherently or primarily religious" because they consisted of helping those in need, App.040-41.

This analysis fundamentally misunderstands what makes CCB's ministry "religious." It is not about how closely tied the physical action is to a form of religious worship, or even whether

[3] The only Wisconsin decision cited, *Coulee Catholic Schs. v. LIRC*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, concerned the ministerial exception, not Wisconsin's unemployment statutes. As the court of appeals acknowledged, "*Coulee* is factually and legally distinguishable." App.031-32.

the ministry serves only co-religionists. App.041-43. Whether caring for the poor or comforting the afflicted is "religious" cannot be determined without looking at that action in the context in which it is performed. *Cf.* 1 *Corinthians* 13:3 (RSV-CE) ("If I give away all I have, and if I deliver my body to be burned, but have not love, I gain nothing."). A secular court cannot hope to accurately determine, for every religious tradition in Wisconsin, which of that religion's activities are "inherently religious." And even attempting this standardless inquiry would enmesh Wisconsin courts in answering impossible theological questions. *See* Section II.C below.

The court of appeals was wrong to interpret the religious purposes exemption to require an activity-by-activity analysis of "inherent[]" religiosity, especially when the better textual interpretation avoids these constitutional pitfalls. *See Kenosha Cnty. DHS v. Jodie W.*, 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 716 N.W.2d 845 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.").

* * *

CCB is an organization used by its mother church as the primary means of carrying out that church's religious mission to help those in need. Under the plain text, context, and structure of the statute, it is therefore an "organization operated primarily for religious purposes."

LIRC's proposed interpretation requires the courts to contort the plain text of the statute and invites a host of interpretive ambiguities that would vex the Wisconsin courts for years to come.

Worse, it leads to the absurd conclusion that the charitable arm of a Catholic diocese is not "religious enough" to qualify for the "religious purposes" exemption.

The Court should adopt the common-sense interpretation of Section 108.02(15)(h)(2).

## II. LIRC's proposed interpretation of the religious purposes exemption would violate the United States and Wisconsin Constitutions.

LIRC's startling claim that the Catholic Charities Bureau and its sub-entities are not operated primarily for religious purposes also runs headlong into the First Amendment. It does so by violating the church autonomy doctrine, the Free Exercise Clause, and the Establishment Clause. Each of these three violations separately renders LIRC's position constitutionally infirm. Adopting LIRC's interpretation of the religious purposes exemption would set Wisconsin law at odds with longstanding United States Supreme Court precedent.[4]

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[4] This Court has confirmed that "the Wisconsin Constitution provides much broader protections for religious liberty than the First Amendment." *James v. Heinrich*, 2021 WI 58, ¶ 36, 397 Wis. 2d 517, 960 N.W.2d 350 (cleaned up). Therefore, a "holding that the statute involved violates the First Amendment is a holding that, in these particulars, it also violated Art. 1, sec. 18, Wisconsin Constitution." *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 332-33, 198 N.W.2d 650 (1972) ("While words used may differ, both the federal and state constitutional provisions relating to freedom of religion are intended and operate to serve the same dual purpose[.]").

### A. LIRC's proposed interpretation violates the First Amendment principle of church autonomy.

The United States Constitution guarantees religious bodies "independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). The United States Supreme Court has described this sphere of protection for church polity as "the general principle of church autonomy" or "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020). These questions of "internal government" include the control of church property, the appointment and authority of bishops, church polity, and the hiring and firing of parochial school teachers, among other issues. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Kedroff*, 344 U.S. 94; *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Our Lady*, 140 S. Ct. at 2066; *DeBruin v. St. Patrick Congregation*, 2012 WI 94, ¶ 18, 343 Wis. 2d 83, 816 N.W.2d 878; *Black v. St. Bernadette Congregation of Appleton*, 121 Wis. 2d 560, 565, 360 N.W.2d 550 (Ct. App. 1984) ("Matters of internal church government are at the core of ecclesiastical affairs[.]").

Not surprisingly, this doctrine also extends to efforts by civil governments to divide up religious bodies according to secular principles. *Kedroff* is instructive on this point. There, in an effort

to combat Communist control, the New York Legislature attempted to separate certain Russian Orthodox churches "from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod" and transfer control to a different Russian Orthodox denomination based in the United States. *Kedroff*, 344 U.S. at 107. The United States Supreme Court roundly rejected this governmental effort to cut off sub-entities from the larger church body they belonged to. *Id.* at 116; *see also Serbian E. Orthodox Diocese*, 426 U.S. at 721 ("the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs"). Importantly, in a follow-up case, the Supreme Court extended the principle of *Kedroff* to *judicial* interference with the internal government of churches. *See Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) ("[I]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.").

LIRC's determination violates basic church autonomy principles. Everyone agrees that CCB is part and parcel of the Catholic Church and, specifically, the Diocese of Superior. App.008, App.093 (describing CCB as the social ministry arm of the Diocese). Everyone agrees that CCB is controlled by the Diocese of Superior. App.011 ("CCB's internal organizational chart establishes that the bishop of the Diocese of Superior oversees CCB in its entirety, including its sub-entities, and is ultimately 'in charge of' CCB."); App.093. And everyone agrees that the "reason that CCB and its sub-entities administer these social service programs is for

a religious purpose: to fulfill the Catechism of the Catholic Church." App.039-40; App.93 ("The purpose of the CCB 'is to be an effective sign of the charity of Christ[.]'").

Yet LIRC's proposed interpretation expressly disregards CCB's relationship with the Diocese in deciding whether CCB is "operated primarily for religious purposes." According to LIRC, "the relevant 'purpose' under the exemption is the employer's purpose and not the Diocese's purpose." Opp. to Pet. 12. Viewed in this light, CCB and its sub-entities are "akin to '[a] religiously-affiliated organization committed to feeding the homeless that has only a nominal tie to religion.'" App.042. The court of appeals similarly sought to consider CCB's ministry "independent of the church's overarching doctrine and purposes." App.042. ("[W]e must view [CCB's and its sub-entities'] motives and activities separate from those of the church.").

This approach penalizes CCB and its sub-entities for the way the Diocese has organized its ministry. There is no dispute that if CCB and the Diocese were a single nonprofit corporation, it would be exempt. *See* App.042. But instead, their choice to be "structured as separate corporations"—a religious decision grounded in church polity and internal governance—is penalized. App.042. By interfering with the Church's internal governance, LIRC's proposed interpretation adversely "affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190; *see Serbian E. Orthodox Diocese*, 426 U.S. at 721 ("reorganization of the Diocese involves a matter of internal church government"). It is therefore unconstitutional.

### B. LIRC's proposed interpretation violates the Free Exercise Clause.

LIRC's proposed interpretation also violates the Free Exercise Clause by subjecting CCB to worse treatment than other religious ministries based on its Catholic beliefs and practices.

#### *1. LIRC's proposed interpretation is not neutral among religions.*

Under the Free Exercise Clause, government actions that burden religious exercise must undergo strict scrutiny if they are not neutral or if they are not generally applicable. *See Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990); *Larson v. Valente*, 456 U.S. 228, 245 (1982) ("This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."). And discrimination among religions is not neutral: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs[.]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). That principle specifically extends to differential treatment among religions: thus, "a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service." *Id.* at 533 (citing *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953)); *see also Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (government officials denied Jehovah's Witnesses use of public park while allowing other religious organizations access). This free exercise inquiry looks not just to the "[f]acial neutrality" of a statute or regulation

but also to "the effect of a law in its real operation." *Lukumi*, 508 U.S. at 534-36.

LIRC's interpretation of Section 108.02(15)(h)(2) violates this bedrock principle of neutrality among religions in at least two different ways.

*First*, it discriminates against religious entities with a more complex polity. The Diocese of Superior has created and operates CCB as a separately incorporated ministry that carries out Christ's command to help the needy. But, as noted above, if CCB were not separately incorporated, it would be exempt. *See* App.041-42 ("the result in this case would likely be different if CCB and its sub-entities were actually run by the church"). Thus, by interpreting the religious purposes exemption to exclude CCB, LIRC is penalizing the Catholic Church for organizing itself as a group of separate corporate bodies—in contrast to other religious entities that include a variety of ministries as part of a single incorporated or unincorporated body. That penalty on the Church's polity violates the Free Exercise Clause's rule of neutrality.

In fact, the United States Supreme Court took the exact opposite tack in a recent case concerning the Archdiocese of Philadelphia and its separately incorporated social services agency, Catholic Social Services (CSS). *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). There, the Supreme Court treated CSS and the Archdiocese as effectively the same entity. *See id.* at 1874-76. That makes LIRC's determination to cut off CCB from the Diocese of Superior all the more baffling.

*Second*, LIRC's proposed interpretation would violate the rule of neutrality among religions by penalizing CCB for its Catholic beliefs regarding how it must serve those most in need. For example, the court of appeals concluded that CCB's and its sub-entities' activities were not primarily religious (and instead were primarily charitable) because:

- "CCB and its sub-entities do not operate to inculcate the Catholic faith";
- "they are not engaged in teaching the Catholic religion, evangelizing, or participating in religious rituals or worship services with the social service participants";
- "they do not require their employees, participants, or board members to be of the Catholic faith";
- "participants are not required to attend any religious training, orientation, or services";
- "they do not disseminate any religious material to participants"; and
- "[n]or do CCB and its sub-entities provide program participants with an 'education in the doctrine and discipline of the church.'"

App.040-41; *see also* App.093-94 (LIRC relying on the same facts). Based on these facts, both the court of appeals and LIRC concluded that CCB did not "operate in a worship-filled environment or with a faith-centered approach to fulfilling their mission." App.042; App.098. And therefore "[a]ny such spreading of Catholic faith accomplished by the organizations providing such services—while genuine in deriving from and adhering to the Catholic Church's mission—is only indirect and not primarily the service that they provide to individuals." App.042.

By identifying these characteristics of CCB's ministry as factors favoring denial of an otherwise-available exemption, the court of

appeals and LIRC did not treat CCB with religious neutrality. Catholic doctrine rejects limiting assistance solely to fellow Catholics or conditioning assistance on proselytism. *See* Catechism of the Catholic Church ¶ 2463 ("How can we not recognize Lazarus, the hungry beggar in the parable (*cf.* Lk 17:19-31), in the multitude of human beings without bread, a roof or a place to stay?"); Pope Benedict XVI, *Caritas in Veritate* ¶ 27 (2009) ("*Feed the hungry* . . . is an ethical imperative for the universal Church, as she responds to the teachings of her Founder, the Lord Jesus, concerning solidarity and the sharing of goods."); *cf. Pope Francis Criticises Proselytization*, Swarajya (Dec. 25, 2019) ("'Never, never bring the gospel by proselytizing,' Francis said. 'If someone says they are a disciple of Jesus and comes to you with proselytism, they are not a disciple of Jesus.'").

But because CCB organized its religious ministry around Catholic teachings like the universal care for the poor, the court of appeals and LIRC concluded that it was not operated primarily for religious purposes. App.042-43; App.098-100. This not only flies in the face of Catholic beliefs about care for the poor; it also favors religious groups that require those they serve to adhere to the faith of that group or be subject to proselytization. Conditioning the religious purposes exemption on the way in which a religious ministry exercises its faith—and looking solely at the outward physical manifestations of CCB's charitable ministry, instead of the undisputed purpose for which the ministry is performed by the Church—disfavors those religious traditions that demand care for the poor without strings attached. In effect, LIRC's interpretation

encourages discriminatory differential treatment, rather than even-handedness.

***2. LIRC cannot satisfy strict scrutiny.***

Because LIRC's proposed interpretation is not neutral, it must withstand strict scrutiny. *Lukumi*, 508 U.S. at 532. But LIRC cannot hope to satisfy that demanding standard.

"A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881 (quoting *Lukumi*, 508 U.S. at 546).

Here, Wisconsin has no legitimate interest, much less a compelling one, in penalizing religious organizations that help those who are not co-religionists. The only legitimate interest LIRC could point to is its interest in ensuring that workers receive unemployment compensation. But all parties agree that the Church's unemployment compensation system provides equal benefits to workers while being "more efficient." R.100:125; App.214. So there is no harm to be cured.

Nor can LIRC's interest be called "compelling." "[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Yet here, the very rule LIRC seeks to enforce contains exemptions for churches, ordained ministers, and nonprofit religious organizations that LIRC deems religious enough to qualify for the religious purposes exemption.

LIRC "may not refuse to extend" these exemptions to "cases of 'religious hardship' without compelling reason." *Fulton*, 141 S. Ct. at 1878. And as noted above, LIRC has no reason, much less a compelling one, to do so. LIRC therefore cannot satisfy strict scrutiny.

### C. LIRC's proposed interpretation violates the Establishment Clause by entangling Church and State.

LIRC's proposed interpretation also violates the Establishment Clause. Among other things, that Clause forbids entangling Church and State. A corollary of this rule is the principle that secular courts must avoid deciding, or entanglement in, religious questions. Indeed, the First Amendment forbids "judicial entanglement in religious issues." *Our Lady*, 140 S. Ct. at 2069; *see also id.* at 2070 (Thomas, J., concurring) (noting that the Supreme Court "goes to great lengths to avoid governmental 'entanglement' with religion"); *DeBruin*, 2012 WI 94, ¶ 102 (Ann Walsh Bradley, J., dissenting) ("An 'excessive entanglement' in violation of the Establishment Clause can arise when the state is required to interpret and evaluate church doctrine."). Moreover, the prohibition on entanglement also requires civil courts to "refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.); *see Wis. Conf. Bd. of Trs. of United Methodist Church, Inc. v. Culver*, 2001 WI 55, ¶ 20, 243 Wis. 2d 394, 627 N.W.2d 469, ("[T]he foremost limitation imposed by the First Amendment is that we refrain from resolving doctrinal disputes."); *L.L.N. v. Clauder*, 209 Wis. 2d 674, ¶ 20, 563 N.W.2d 434 (1997) ("It is well-settled that excessive governmental

entanglement with religion will occur if a court is required to interpret church law, policies, or practices.").

LIRC's interpretation of the exemption runs afoul of these fundamental Establishment Clause principles. It requires Wisconsin courts (and government officials) to conduct an intrusive inquiry into the operations of religious organizations that seek the religious purposes exemption. *See, e.g.*, App.040-41. That kind of detailed inquisition into the beliefs, practices, and operations of a religious body will always entangle Church and State.

Indeed, the court of appeals' mode of analysis—examining whether individual activities of religious nonprofits are "inherently" or "primarily" religious in nature—is a recipe for hopeless entanglement. The court of appeals, for example, decided that "the work that CCB and its sub-entities engage in is primarily charitable aid to individuals with developmental and mental health disabilities," and that "while these activities fulfill the Catechism of the Catholic Church to respond in charity to those in need, the activities themselves are not *primarily* religious in nature." App.041. To make this determination, the court of appeals made itself the arbiter of which of a church's actions are "primarily" or "inherently" imbued with religious significance. App.041-42. And to do this, the court of appeals created out of whole cloth a set of criteria for second-guessing the determination of the church that the activities it performed were in fact primarily religious in nature. App.041-42; *see* Section II.B.1 above.

But when it comes to the activities of religious organizations, there are no simple lines to be drawn between "inherently religious" activities and those that are secular in nature, because often the entire institution is imbued with religious purpose. In *Hosanna-Tabor*, the United States Supreme Court specifically rejected this idea in the context of deciding who is a "minister" under the First Amendment, holding that "[t]he issue before us . . . is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed." 565 U.S. at 193-94. This Court rejected the same argument in *Coulee*, explaining that the "primary duties test" (analyzing the percentage of time an employee spends performing "'religious' activities,") "redounds in an intrusiveness inconsistent with the free exercise of religion." *Coulee*, 2009 WI 88, ¶ 46.

What is true of ministers is also true of religious organizations—there is no neat division between religious and secular activities. But LIRC's proposed interpretation of the religious purposes exemption would require courts to do just that—analyze the specific activities of CCB and each of its sub-entities to determine whether each organization is more than fifty percent religious. App.041-42.

Indeed, the criteria laid out by the court of appeals are a recipe for entanglement. It raises questions that plainly fall outside the judicial ken, like determining who qualifies as a co-religionist: "Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would

Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?" *Our Lady*, 140 S. Ct. at 2068-69. Related questions abound: Does sharing the love of Christ by serving food to the hungry qualify as "teaching the Catholic religion"? App.040-41; *see, e.g.*, *Matthew* 14:13-21. Does modeling the love of Christ by caring for the sick help to "inculcate the Catholic faith"? App.040; *see, e.g.*, *Mark* 2:1-12. Making such determinations, as this Court and the United States Supreme Court have already held, impermissibly entangles courts and the government in religious questions. *Coulee*, 2009 WI 88, ¶ 46; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("a religious-secular distinction . . . results in considerable ongoing government entanglement in religious affairs").

What makes the court of appeals' analytical approach even more entangling is that it also requires courts to second-guess churches' motivations. Indeed, LIRC and the court of appeals *admitted* that they were rejecting CCB's view of the religious significance of its actions, recognizing that if they looked at CCB's purpose for engaging in these actions, it would likely have come to a different conclusion. App.038-40; App.099-100. That kind of second-guessing led the court of appeals to an unsupportable—and constitutionally dangerous—conclusion: "While the Catholic Church's tenet of solidarity compels it to engage in charitable acts, the religious motives of CCB and its sub-entities appear to be incidental to their primarily charitable functions." App.043.

The consequences of this entangling approach would be devastating for church-state relations in Wisconsin. Wisconsin executive branch officials and Wisconsin courts would have to undertake intrusive inquiries into the practices of many different admittedly religious groups and then decide whether a series of specific activities carried out by these religious groups are all "inherently" or "primarily" religious. That would impermissibly entangle Church and State in Wisconsin for years to come.

* * *

This Court can avoid all these constitutional pitfalls by adopting a straightforward, plain meaning of the religious purposes exemption, as explained above. By focusing on the purpose of the church or religious organization operating the ministry, this Court would respect the religious autonomy of the Catholic Church and its religious decision-making regarding how to structure its ministry, ensure neutral treatment of religious nonprofits regardless of their religious beliefs, and prevent excessive entanglement by courts and governments attempting to parse out which activities of a religious nonprofit are primarily religious.

## CONCLUSION

Catholic Charities Bureau and its sub-entities respectfully ask this Court to reverse the court of appeals' February 14, 2023, Order and Final Judgment and render final judgment for them.

Respectfully submitted,

Electronically signed by:

*Kyle H. Torvinen*
Kyle H. Torvinen
(WI Bar No. 1022069)
Torvinen, Jones
& Saunders, S.C.
823 Belknap Street, Suite 222
Superior, WI 54880
(715) 394-7751
*ktorvinen@superiorlawoffices.com*

Eric C. Rassbach (*pro hac vice*)
Nicholas R. Reaves (*pro hac vice*)
Daniel M. Vitagliano* (*pro hac vice*)
The Becket Fund for
Religious Liberty
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
*erassbach@becketlaw.org*

*Attorneys for Petitioners-Respondents-Petitioners*

*Admitted only in New York. Supervised by a member of the DC Bar.

Dated this 18th day of May, 2023.

## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,848 words.

Dated this 18th day of May, 2023.

Electronically signed by:
*Kyle H. Torvinen*

## CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of May, 2023.

Electronically signed by:
*Kyle H. Torvinen*

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 18, 2023, I electronically filed with the Court the above opening brief and associated appendix. I also served a true and correct copy of both via email upon:

Jeffrey Shampo
P.O. Box 8126
Madison, WI 53708
*Counsel for State of Wisconsin Labor and Industry Review Commission*
jeffrey.shampo@wisconsin.gov

Christine Galinat
P.O. Box 8942
Madison, WI 53708
*Counsel for State of Wisconsin Department of Workforce Development*
christine.galinat@dwd.wi.gov

Electronically signed by:
*Kyle H. Torvinen*