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

REPLY 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

Catholic Charities Bureau of the Diocese of Superior has long ministered to "the least of these" in Jesus' name. That means caring for the poor, the widowed, the orphaned, the dispossessed—all in accordance with the Catholic Church's mission to care for others as part of God's plan for humanity. That is why, after all, it is a *Catholic* Charities Bureau.

But to hear LIRC tell it, "Catholic Charities Bureau" is a misnomer—really it should be "Secular Charities Bureau." Indeed, any charitable deed "that is not exclusively a religious activity" is a "secular social service[]" because "[g]overnment agencies and nonprofits with no religious affiliation also provide direct social services to individuals in need." Resp.44.

That view is absurd. Religious groups that help the needy do not suddenly become secular once a nonreligious entity starts helping the needy too. LIRC's position is simply the one that aggrandizes its role the most.

The absurdity of LIRC's position is echoed throughout its brief. At every turn, LIRC's brief distorts this Court's approach to statutory interpretation, Wisconsin unemployment insurance law, and First Amendment doctrine—which does not countenance the idea that what has been universally considered religious for millennia is suddenly "secular" on the say-so of a state agency. LIRC's writ runs nowhere near that far.

On the statutory text, LIRC offers no coherent theory for how the phrase "operated primarily for religious purposes" can transmute into a test that looks solely at the activities an organization

performs. LIRC relies on this test and its own assessment of what qualifies as "religious" to conclude that CCB is not religious enough.

If that sounds troubling, it is. LIRC's interpretation of the religious purposes exemption would prevent CCB and the Diocese of Superior from following Catholic teaching and would entangle LIRC and the Wisconsin courts in religious questions. The better approach is to follow the plain text of the statute and look to whether the church operating the organization is doing so for primarily religious reasons. That straightforward inquiry follows the best of our traditions—allowing LIRC and Wisconsin courts to assess the sincerity of a religious group's beliefs but not complex questions of faith and doctrine.

ARGUMENT

I. Catholic Charities Bureau and its sub-entities are "operated primarily for religious purposes."

In response to CCB's statutory interpretation argument, LIRC offers a grab bag of disconnected assertions. Instead of directly engaging the text, LIRC raises policy arguments, Resp.17-19, points to irrelevant (and often contradictory) out-of-state sources, Resp.25-28, and ultimately argues that the text is "ambiguous"—all while attempting to shoehorn "activities" into the definition of both "operated" and "purposes," Resp.25-26. The plain text of the exemption contains one simple test. And, when applied here, the outcome of that test is also simple: CCB is operated primarily for religious purposes.

A. A plain-text interpretation of the exemption confirms that Catholic Charities Bureau and its sub-entities are operated primarily for religious purposes.

As CCB previously explained, the meaning of the religious purposes exemption is plain from its text, structure, and context. Br.22-23. The exemption covers an organization that is managed or used (*i.e.*, "operated") primarily to advance the religious mission, end, or goal (*i.e.*, "purpose") of the church that is operating, supervising, controlling, or principally supporting the organization.

On this point, the record is unequivocal: "neither 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." App.034 (emphasis added); *cf.* Resp.23 (reluctantly conceding "[t]he Diocese's reason or motive for creating the employers to serve as a social ministry arm of the church may have a religious connection").

Rather than dispute the Diocese's religious purpose, LIRC contorts the statute in two ways.

"Operated." LIRC argues that "operated" means "actions and activity" and then suggests courts should consider *only* an organization's activities to determine whether it has a religious purpose. Resp.20. CCB has already explained why this transmutation of a verb into a noun contradicts the statute's plain text. Br.24-30.

LIRC's only response is its belief that "operated" is used intransitively. Resp.20. LIRC is wrong. LIRC seems to think the direct object should be "primarily for religious purposes." Resp.20-21. Yet the direct object of "operated" is "organization." It is the *organization* (direct object) that is *operated* (transitive verb) primarily for

religious purposes (prepositional phrase). This is elementary grammatical construction—the direct object goes *before* the verb in passive sentences. Bryan A. Garner, *Garner's Modern English Usage* 676 (4th ed. 2016) ("the passive subverts the normal word order for an English sentence" as "you back into the sentence" by putting the object before the verb).

Even treating "operated" as *in*transitive doesn't help LIRC. Either way, "operated" is used as a verb. But LIRC and the court of appeals both defined it as a noun. App.024; Resp.20. Not even the intransitive definitions of operated support this reading. *See, e.g.*, *Operate* (intransitive), Random House College Dictionary 931 (1st ed. 1973) ("to work, perform, or function, as a machine does"). No reasonable definition of "operated" supports LIRC's focus on the "actions" or "activities" of CCB.

"Primarily for religious purposes." LIRC makes two "purposes" arguments: (1) "purposes" *also* means "action" or "activity" and (2) only the purposes of the organization—not the church operating it—matter. Resp.21-25.

First, LIRC halfheartedly disputes, Resp.21, the court of appeals' definition of "purposes": "the reasons for which something exists or is done, made, used, etc." or "an intended or desired result; end; aim; goal." App.018; *see* Br.30 (agreeing). This definition, the court of appeals explained, "suggest[s] that motive should be considered such that we should ask why the organization acts." App.024. This Court has reached the same conclusion elsewhere. *See, e.g.*, *Brown County v. Brown Cnty. Taxpayers Ass'n*, 2022 WI 13, ¶ 38, 400 Wis. 2d 781, 971 N.W.2d 491 ("common definition" of

"purpose" is "the reason why something is done or used" or "the aim or intention of something").

LIRC tries to obscure this plain meaning by looking to non-contemporaneous and discredited dictionaries,[1] secondary definitions, and business-specific definitions. Resp.21. And even LIRC's cherry-picked definitions falter. None suggests a singular focus on the actions or activities an organization engages in—divorced from the aim, end, goal, or reason for doing so.

Unable to conjure up a definition that *does not* focus on the reason, motive, goal, or aim, LIRC asserts without citation that CCB's "*business activity*, objectives, goals and ends are the provision of *secular social services*." Resp.21 (emphasis added). Yet as the court of appeals concluded, "neither 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." App.035.

Second, LIRC disputes *whose* purposes should be considered. As CCB explained, the relevant religious "purposes" are those of the church. Br.30-31. In response, LIRC wrongly invokes the "next preceding antecedent" rule. Resp.23. This rule applies where a qualifying clause follows a list of *multiple* potential antecedents. *See In re Marriage of Meister*, 2016 WI 22, ¶ 30, 367 Wis. 2d 447, 876 N.W.2d 746 (explaining application). The rule is not triggered here because there is only *one* antecedent. The "organization" undoubtedly must be "operated primarily for religious purposes." But that does not explain *whose* purposes to consider.

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[1] *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 n.3 (1994) (Scalia, J.) (criticizing Webster's Third).

LIRC also says that because an organization may be "principally supported" by a church (instead of "operated" by it), the organization's purposes control. Resp.23. But this terminology is explained by the variety of religious polities in Wisconsin, which could include associations of churches supervising multiple tiers of subsidiary organizations. That's not relevant here, however, as the "controlled by a church" prong is not in dispute, Br.13, and the entity "operating" CCB and its sub-entities *is* the Diocese.

LIRC next recycles its argument that the religious purposes exemption would be "surplusage" under CCB's approach. Resp.23-24. Yet churches often set up secular subsidiaries to manage financial investments or real property, or to engage in other unrelated business. *See, e.g.*, IRS, *Tax Guide for Churches & Religious Organizations* 19, https://perma.cc/24SY-FH2E.

And regardless, CCB would prevail even if *its* purposes were dispositive. *E.g.*, App.110 (LIRC: "[t]he purpose of CCB 'is to be an effective sign of the charity of Christ'"); App.148 (DWD: CCB's "mission is derived from the Catholic Church's catechism and doctrine"); Resp.30 (conceding "court did acknowledge a religious motivation of CCB's work and to a lesser degree in the sub-entities' own work").

B. LIRC's policy arguments miss the mark.

LIRC next pivots to extratextual sources, citing a congressional committee report, Resp.25-26, and two court decisions, Resp.27-30. But "Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI

58, ¶¶ 50-51, 271 Wis. 2d 633, 681 N.W.2d 110. And LIRC identifies no ambiguity in the text—suggesting neither two reasonable interpretations nor that a "well-informed persons should have become confused." *Id.* ¶ 47. Instead, LIRC argues that CCB's interpretation is "unreasonable." Resp.14. Without genuine ambiguity, extrinsic evidence cannot be considered.

Were this Court nevertheless to consider extrinsic evidence—and it should not—LIRC's evidence is paltry. LIRC points to several federal sources that supposedly support its focus on "activities" instead of motivation. Resp.25-28. Yet under federal law, "the purpose towards which an organization's activities are directed, and not the nature of the activities themselves, is ultimately dispositive." *B.S.W. Grp., Inc. v. Comm'r*, 70 T.C. 352, 356-57 (1978). And *Living Faith* and *Dykema*, Resp.21, stand for the proposition that an organization's activities can *serve as evidence* of purpose—in those cases, whether an entity was a "commercial business" or religious. *Living Faith, Inc. v. C.I.R.*, 950 F.2d 365, 372 (7th Cir. 1991); *United States v. Dykema*, 666 F.2d 1096, 1100 (7th Cir. 1981). But it is still the purpose (*i.e.*, the reason for acting) that ultimately matters.

LIRC then suggests Wisconsin could lose federal funding if CCB is exempted. Resp.25. Tellingly, however, LIRC never claims that exempting CCB would violate federal law. Indeed, numerous

states interpret the statutory language the way CCB does, App.022-23 n.10—yet those states have not lost federal funding.[2]

LIRC next points to *Coulee*, but there the plaintiff's religious purpose was undisputed, so this Court never analyzed the issue. *Coulee Catholic Schs. v. LIRC*, 2009 WI 88, ¶ 71, 320 Wis. 2d 275, 768 N.W.2d 868. Even the dicta quoted by LIRC, Resp.29, do not support LIRC's exclusive focus on the activities of the organization. Instead, *Coulee* gave examples of ways hypothetical organizations manifest a religious mission by distinguishing between "a nominal tie to religion" and a "religiously infused mission." *Coulee*, 2009 WI 88, ¶ 48. *Coulee* does not endorse LIRC's activities-only test for assessing purpose.

II. LIRC's interpretation of the religious purposes exemption is unconstitutional.

CCB explained that LIRC's interpretation violates the United States and Wisconsin Constitutions by infringing on church autonomy, lacking religious neutrality, and entangling Church and State. Br.39-52. LIRC's responses fail.

Church Autonomy. LIRC claims the church autonomy doctrine covers only church property disputes and employment decisions. Resp.33-34. Not so. Such questions are merely "component[s]" of church autonomy. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060-61 (2020). The church autonomy doctrine is regularly applied to tort and contract claims. *See,*

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[2] LIRC also highlights alleged minor coverage differences in the Church's unemployment plan, but ultimately concedes that "the CUPP program is 'immaterial.'" Resp.18-19. Given that concession, CCB does not address the point further.

e.g., *In re Diocese of Lubbock*, 624 S.W.3d 506 (Tex. 2021) (defamation tort); *Lee v. Sixth Mt. Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018) (contract).

The doctrine ensures religious institutions maintain "power to decide for themselves, free from state interference, matters of church government." *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952). That includes "internal management decisions that are essential to the institution's central mission." *Our Lady*, 140 S. Ct. at 2060; *see also Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 721 (1976) (organization of diocese is an "issue at the core of ecclesiastical affairs"); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872) (questions of "fundamental organization of [a] religious denomination" are beyond civil courts).

Here, the corporate organization of the Diocese, CCB, and the sub-entities is structured in accordance with Church teaching. The Church instructs bishops to "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, *Apostolorum Successores* § 195 (2004).

LIRC concedes its determination would change if CCB and its sub-entities were not separately incorporated. Resp.34. And the court of appeals concluded "corporate form does make a difference," considering CCB and its sub-entities "independent of the church's overarching doctrine and purpose." App.042. CCB is thus penalized for following Catholic teaching about church governance.

LIRC claims "[t]he Diocese and the employers remain free to determine their corporate structure" while participating in the State's program. Resp.34. Yet pressuring CCB to assume a different corporate form to qualify for the exemption is equally unconstitutional. *See Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449, 462 (2017) ("condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties" (cleaned up)).

Free Exercise. In its opening brief, CCB argued that LIRC's proposed interpretation and activities-based approach is not neutral because it (1) favors religions with less complex polities and (2) penalizes CCB for following its Catholic beliefs in how it serves the needy. Br.43-47.

LIRC ignores the first point. On the second, LIRC acknowledges it "may not exclude members of the community from an otherwise generally available public benefit because of their religious exercise." Resp.37. Yet LIRC has done just that, determining that CCB doesn't qualify for the exemption because it follows Catholic teaching in serving non-Catholics and not proselytizing. Resp.11-13, 30-32; App.093-94, 98-100; *cf.* Br.14-16 (Catholic teaching). CCB now must choose between following its beliefs and qualifying for the exemption. "Governmental imposition of such a choice" is not neutral and substantially burdens religious exercise. *Thomas v. Review Bd.*, 450 U.S. 707, 716-18 (1981).

Moreover, LIRC admits "[a] statute is invalid if it clearly grants denominational preferences." Resp.37. It claims the religious purposes exemption "makes no explicit and deliberate distinctions between different religious organizations." Resp.37. But neutrality "extends beyond facial discrimination" to "the effect of a law in its real operation." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993). And in its real operation, LIRC's rule favors religious groups with less complex polities that, *inter alia*, proselytize and serve only their own. Br.44-47.

Because LIRC's interpretation is not neutral, LIRC must show that it "serve[s] a compelling interest and [is] narrowly tailored to that end." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426 (2022). LIRC cannot show either.

LIRC claims "a compelling interest in providing broad unemployment insurance access to workers." Resp.39. But Wisconsin unemployment insurance law is vastly underinclusive, exempting myriad forms of "employment." Wis. Stat. § 108.02(15)(f)-(kt) (listing over 40 different exemptions from coverage). A governmental interest is not compelling "when [a law] leaves appreciable damage to that supposedly vital interest" unaddressed. *Lukumi*, 508 U.S. at 547. LIRC's rule fails narrow tailoring for the same reason: a law that is "underinclusive in substantial respects" demonstrates an "absence of narrow tailoring" that "suffices to establish [its] invalidity." *Id.* at 546; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 172 (2015) (underinclusiveness doomed narrow tailoring).

Establishment. The Establishment Clause forbids excessive government entanglement with religion. *L.L.N. v. Clauder*, 209

Wis. 2d 674, 686, 563 N.W.2d 434 (1997). This occurs when "a court is required to interpret church law, policies, or practices." *Id.* at 687. Often the "character of an activity is not self-evident" and so "determining whether an activity is religious or secular requires a searching case-by-case analysis," which "results in considerable ongoing government entanglement in religious affairs." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring).

LIRC whistles past the entanglement graveyard, describing its approach as a "neutral review of the employers' activities." Resp.41. Far from it. LIRC determined that, despite being "religiously motivated and manifestations of religious belief," CCB and its sub-entities' activities are "not intrinsically, necessarily, or uniquely religious in nature," *i.e.*, "not religious per se." App.099; *see also* App.041 (court of appeals' similar reasoning). In reaching this conclusion, LIRC analyzed, *inter alia*: (1) CCB and its sub-entities' funding streams, (2) their IRS Form 990s, (3) their organizational structure and history, (4) whether they proselytize or "inculcate the Catholic faith," (4) whether employees must be Catholic, and (5) the religious beliefs of those they serve. Resp.11-13, 30-32; App.093-95, 098-100. LIRC even describes its assessment as "supported by substantial, credible evidence." Resp.32. If that isn't entangling, what is?

The Constitution prohibits "intrusive inquiry into religious belief." *Amos*, 483 U.S. at 339. And it bars the government from deciding which actions are "inherently" or "primarily" religious in light of a religious institution's mission. *See Carson v. Makin*, 142

S. Ct. 1987, 2001 (2022) (noting "concerns about state entanglement with religion and denominational favoritism" inherent in "scrutinizing whether and how a religious [entity] pursues its … mission").

LIRC's rule would force Wisconsin officials and courts to conduct endless inquiries into whether religious organizations' activities are sufficiently religious. But the very "prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). In contrast, CCB and its sub-entities' approach avoids entanglement.

CONCLUSION

The Court should reverse the court of appeals' judgment and render judgment for CCB and its sub-entities.

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 16th day of June, 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 reply brief produced with a proportional serif font. The length of this brief is 2,993 words.

Dated this 16th day of June, 2023.

Electronically signed by:
Kyle H. Torvinen

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 16, 2023, I electronically filed with the Court the above reply brief. I also served a true and correct copy via email upon:

Jeffrey Shampo
P.O. Box 8126
Madison, WI 53708
Counsel for State of Wisconsin Labor and Industry Review Commission
jeffrey.shampo1@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