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

NON-PARTY BRIEF OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS-RESPONDENTS-PETITIONERS

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The Jewish Coalition for Religious Liberty ("Coalition") is a nonprofit organization—a group of lawyers, rabbis, and professionals who practice Judaism and defend religious liberty. Its members have written on the role of religion in public life. Representing members of the legal profession, and adherents of a minority religion, The Coalition has an interest in ensuring the flourishing of diverse religious viewpoints and practices. The Coalition advocates for people of faith who practice their faith in religious services, schools, and the public square.[1]

SUMMARY OF THE ARGUMENT

We endorse Petitioners' textual arguments but will not reiterate them. Instead, we aim to show how the misinterpretation of Wis. Stat. § 108.02(15)(h)(2) (the "Statute") offered by the Labor and Industry Review Commission ("LIRC") and the Court of Appeals would harm religious minorities, including Jews. This Court should give the word "operate" its ordinary meaning in order to avoid those harms.

The test articulated by LIRC and the Court of Appeals would require courts to judge the "true" religiosity of a religious organization's actions. Courts would have to scrutinize and pass judgment on Jewish doctrine in order to

[1] The Coalition wishes to thank Mendel Pinson, a student of Fordham University School of Law, for his assistance in preparing this brief.

determine which Jewish observances have a sufficiently religious character to qualify for the statutory exemption. The First Amendment to the United States Constitution plainly prohibits that sort of intrusion into religious affairs.

Limiting the Statute's exception to organizations that engage in recognizable or stereotypical religious rituals would draw an arbitrary line and exclude religious organizations that are operated in an equally religious manner to those that would be included. This would inevitably favor large and popular religions, those whose practices are more easily recognized, over smaller minority faiths who may engage in practices that judges cannot immediately identify as religious. For example, in Judaism, many acts that appear secular to a non-adherent are imbued with religious significance. Judaism contains a system of commandments called "*mitzvot*" that govern even mundane seeming aspects of adherents' lives. The notion that acts such as teaching the faith or leading prayers are more religious than giving charity or ministering to the sick is alien to Judaism. Adopting LIRC's test would likely lead courts to deem important Jewish observances irreligious.

This Court should reject LIRC's interpretation of the statute which would render it unconstitutional and lead to results that disadvantage religious minorities.

ARGUMENT

I. IN JUDAISM, THERE IS NO SHARP DISTINCTION BETWEEN RITUALISTIC ACTS SUCH AS PRAYER OR RELIGIOUS INSTRUCTION AND OTHER RELIGIOUS COMMANDMENTS SUCH AS GIVING CHARITY.

LIRC distinguished between those "quintessentially religious" acts such as "inculcation of the Catholic faith" and operating "in a worship-filled environment" which would qualify for the exception, and "acts that are not religious per se, such as the provision of help to the poor and disabled" which would not. App.115-16. Such a division is alien to Judaism and applying it would cause courts to arbitrarily distinguish between different, but equally authentic Jewish religious organizations.

In Judaism, all religious requirements flow from 613 mitzvot, or commandments that appear in the Torah. *See* Mendy Hecht, *The 613 Commandments (Mitzvot)*, CHABAD.ORG, https://tinyurl.com/y7he88c4. Each of these commandments is a divinely given religious obligation, and no commandment is more or less religious than any other. LIRC's test does not make sense to a Jewish reader.

The Torah contains a religious obligation to give charity. This obligation can sometimes be linked to an observable religious ritual that would presumably meet LIRC's test, like donating to charitable funds that ensure the poor have the provisions for the Passover Seder. *See Ma'ot Chitim* –

"Wheat Money," CHABAD.ORG, https://tinyurl.com/5n6sw3zs. However, Judaism does not view that type of charity as any more religious than other forms of charity, like donating to food banks. Menachem Posner, *15 Facts About Tzedakah Every Jew Should Know*, CHABAD.ORG, https://tinyurl.com/56dk8j7.

To provide another example, Judaism contains a commandment to comfort the sick (*bikur cholim*), *See* Eliezer Wenger, *Bikur Cholim: Visiting the Sick*, CHABAD.ORG, https://tinyurl.com/4r2cc86b. Visiting a sick person to lead him in prayers is no more religious of an action than simply visiting to provide him solace. Under LIRC's test, organizations that fulfill the commandment of *bikur cholim* would not be exempt under the Statute.

God's commandments determine what actions hold religious value in Judaism, not an outward appearance of religiosity. Therefore, limiting the Statutory exemption to organizations engaged in what civil courts deem religious acts will arbitrarily exclude Jewish organizations whose purpose is to fulfill *mitzvot* that are not tied to religious rituals.

II. ANY TEST THAT REQUIRES COURTS TO DISTINGUISH BETWEEN ACTS THAT ARE SUFFICIENTLY RELIGIOUS AND THOSE THAT ARE NOT WOULD VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

As the Supreme Court has noted, "[i]t hardly requires restating that government has no role in deciding or even suggesting whether the religious ground" for a conscience-

based objection "is legitimate or illegitimate." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). Courts may not determine what constitutes orthodox religious behavior. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that "no official, high or petty, can prescribe what shall be orthodox in … religion"). If the lower court's decision were to stand, Wisconsin courts would have to decide whether organizations that are admittedly acting with a religious purpose are also acting in a sufficiently religious manner to qualify for the Statutory exception. The court would have to make that determination for itself, even in cases where a religious organization testified that its actions were religious in nature. In fact, that is what occurred in this very case. That question is one which courts are constitutionally prohibited from answering. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (describing the question of whether an asserted religious belief is reasonable as one which courts "have no business addressing").

While a court cannot determine whether a sincere religious believer is properly practicing his faith, it may determine, at the outset, whether a purported believer is in fact sincere. That is the exact question, one of motivation, that the Statute actually requires courts to answer.

When a belief is shown to be fabricated or disingenuous, a court can declare a purported believer to be insincere. For example, in *United States v. Quaintance*, 608 F.3d 717, 718 (10th Cir. 2010) (Gorsuch, J), the Tenth Circuit held that two

criminal defendants' religious beliefs were insincere when they sought to hastily induct a co-conspirator into the Church of Cognizance **"**which teaches that marijuana is a deity and sacrament.**"** The court did not find that the defendant had misstated one of the articles of his faith, nor did it purport to explicate the true teachings of the Church of Cognizance. Rather, it simply found that there was tangible evidence that the defendant was lying about his adherence altogether.

Under the textual reading of the Statute, courts will determine whether organizations are sincerely motivated by a religious purpose rather than scrutinizing whether their actions are required by their faith. This Court should adopt that test both because it is a better reading of the statue and because it will avoid serious constitutional infirmities.

III. ALLOWING COURTS TO SUBSTITUTE THEIR JUDGMENT FOR THAT OF RELIGIOUS ADHERENTS REGARDING WHAT CONSTITUTES RELIGIOUS ACTS WILL HARM JEWISH WISCONSINITES.

Civil courts are not empowered nor qualified to decide religious questions. Indeed, judges consistently err while engaging in these types of inquiries. Such errors often redound to the detriment of religious minorities such as Jews.

For example, in one case concerning the reach of the Religious Freedom Restoration Act, a judge gave the example of a law requiring someone to "turn on the light bulb every day" as a statute that definitely would not impose a substantial burden on religion. Oral Argument at 1:00:40, *E. Tex. Baptist*

Univ. v. Burwell, 793 F.3d 449 (5th Cir. Apr. 7, 2015), *vacated and remanded, sub nom*. *Zubik v. Burwell*, 578 U.S. 403 (2016). However, he was mistaken. That requirement would substantially burden Orthodox Jewish religious practices. On the Sabbath, Jews are forbidden from kindling flames, and Orthodox rabbis agree that this prohibition extends to turning on a light switch. *See Exodus* 35:3; *see also* Aryeh Citron, *Electricity on Shabbat*, CHABAD.ORG, https://tinyurl.com/mrx4ynkk. The judge certainly did not intend to demean Judaism or suggest that Jewish practices should not qualify for protection. He was simply unaware of a practice that is central to the life of Orthodox Jews.

In another cautionary tale, the United States Court of Appeals for the Fourth Circuit effectively created a brand-new Jewish law requiring a quorum of men to study the bible. *See Ben-Levi v. Brown*, No. 5:12-CT-3193-F, 2014 WL 7239858 (E.D. N.C. Dec. 18, 2014), *aff'd for reasons stated by district court*, No. 14-7908, 2015 WL 1951350 (4th Cir. May 1, 2015). The North Carolina Department of Public Safety had implemented a policy requiring the presence of a rabbi or a quorum of men before Jewish inmates were allowed to study the bible together. *See id.* That holding, although predicated on the view of one rabbi sent in an email to the chaplain, was clearly mistaken. Such a requirement is unheard of and was likely the result of miscommunication. The Talmud, Judaism's corpus of religious law and tradition, expressly contemplates bible study in groups of two. *See* Yehuda Shurpin, *What Is the Talmud? Definition and Comprehensive Guide*, CHABAD.ORG,

https://tinyurl.com/ sphwmma2; *see also* Ilene Rosenblum, *Chavruta: Learning Torah in Pairs*, CHABAD.ORG, https://tinyurl.com/ypkan7nj. Torah study by individuals is permissible as well.

Indeed, the Court of Appeals decision in this case highlights the inevitability of such errors. The Court of Appeals maintained that it could objectively discern which actions were religious in nature. In doing so, it laid out a framework that could not possibly be applied to Jewish practices. For example, the Court of Appeals approvingly quoted the Seventh Circuit's list of religious activities that would qualify as operating exclusively for religious purposes:

> (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity in partibus infidelium; (b) pastoral counseling and comfort to members facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of individuals, such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and education in the doctrine and discipline of the church, as well as (in the case of mature and well-developed churches) theological seminaries for the advanced study and the training of ministers.

App.029 (citing *United States v. Dykema*, 666 F.2d 1096, 1100 (7th Cir. 1981).

That supposedly objective list of religious behaviors would bewilder observant Jewish readers. For example, Judaism does not command its adherents to proselytize—an action on the list—but it does command them to give charity—

a behavior missing from the list. It would be tragic if a court were to tell a synagogue that its charity could qualify as religious, if it only acted more like a Christian group and engaged in proselytization.

Moreover, the prominence of clergy on the court's list of examples is also distinctly Christian and cannot "objectively" apply to Jewish practices which generally do not require the participation of rabbis. Under an analysis guided by these examples, a rabbi officiating at a funeral would be considered religious, whereas a *Chevra Kadisha*, a Jewish burial society that prepares a body for burial according to the strictures of Jewish law would not. *See* Menachem Posner, *The Chevra Kadisha*, CHABAD.ORG, https://tinyurl.com/599t9m6n. A rabbi officiating a wedding ceremony would be regarded as religious, but a *gmach*, or free loan society that often helps defray the costs of weddings, would not. *See Interest-Free Loans*, CHABAD.ORG, https://tinyurl.com/3yr2pmbn. The distinctions cited by the court, far from being objective, reflect a particular subjective religious tradition and cannot be evenhandedly applied to other faiths—such as Judaism.

These are just some examples of Jewish religious observances that would be deemed irreligious under the court of appeals' test which purports to "objectively" identify religious practices. We are confident that the Court of Appeals did not intend to articulate an objective test that could not be applied to Jews, but the fact that it did highlights why no such test can succeed.

CONCLUSION

Interpreting the term "operate" in the Statute according to its plain text as the Catholic Charities Bureau advocates, would prevent the unequal, arbitrary, and unconstitutional applications of the Statute that this brief highlights. This Court should conclude that whenever a religious organization acts in furtherance of religious tenets, it is operating with a religious purpose. If, however, this Court decides that the Statute does require civil courts to determine whether an organization's specific actions are religious, it should clarify that courts should defer to an organization's sincere beliefs regarding the religious nature of those actions.

Dated this 20th day of June, 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with proportional serif font. The number of words in this brief, including footnotes, is 2,184 words.

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CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on June 20, 2023, I electronically filed this brief using the Wisconsin Appellate Court Electronic Filing System, which accomplishes electronic notice and service for all parties.

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