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STATE OF WISCONSIN
SUPREME COURT

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.

**NON-PARTY BRIEF ON BEHALF OF THE FREEDOM FROM
RELIGION FOUNDATION AS AMICUS CURIAE IN SUPPORT OF
RESPONDENTS**

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- Ethical and Religious Directives for Catholic Health Care Services*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (2018), <https://bit.ly/2TfWnZw>. 16
- Guy Boulton, *Ascension Wisconsin begins another round of layoffs*, MILWAUKEE JOURNAL SENTINEL (Mar. 2, 2018),
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The Freedom From Religion Foundation submits this non-party brief in support of Respondents.

INTEREST OF AMICUS CURIAE

Amicus curiae Freedom From Religion Foundation (FFRF) is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded in Madison, Wisconsin in 1978 as a 501(c)(3) nonprofit, FFRF has over 41,000 members, including members in every state and the District of Columbia. FFRF has more than 1,700 members in Wisconsin. Its purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF ends hundreds of state-church entanglements each year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. FFRF, whose motto is “Freedom depends on freethinkers,” works to uphold the values of the Enlightenment. As a secular organization that promotes freedom of conscience for those who do not practice religion, FFRF offers a unique viewpoint on erosion of civil rights and preferential treatment of religious organizations by the government.

ARGUMENT

I. The employers' First Amendment claims fail.

This case involves five nonprofit organizations that provide secular services (“the employers”). They seek to remove protections from their workers by exempting themselves from Wisconsin’s unemployment program. The employers claim that all that is required for an exemption is a religious motivation for their work. The First Amendment claims advanced by the employers have been considered and rejected in numerous prior cases by the Supreme Court and Seventh Circuit, and by this Court in the analogous context of property tax exemptions. Moreover, even if the employers’ claims were correct, the remedy they seek is inappropriate.

A. The First Amendment safeguards from government involvement in sacred matters, not from fact-based inquiries into an organization’s activities.

One of the core rationales underlying the First Amendment is preventing “a fusion of government and religious functions.” *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126–27 (1982) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 222 (1963)). The First Amendment prohibition on excessive entanglement in part seeks to safeguard religious organizations from “being limited by ... governmental intrusion into *sacred matters*.” See *Aguilar v. Felton*, 473 U.S. 402, 410 (1985) (emphasis added); cf. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (declining to decide “not a

church property dispute, but a religious dispute” because it would create substantial danger of entangling the state in “essentially religious controversies”). The “sacred matters” contemplated by the Supreme Court simply do not encompass fact-based, non-sacred regulatory inquiries, like those contemplated under Wis. Stat. § 108.02(15)(h)(2).

Government review of a religious organization’s activities for the purposes of taxation or other regulatory concerns does not constitute excessive entanglement. For instance, in *Troy and Susan Alamo Foundation v. Secretary of Labor*, the Supreme Court considered whether the Fair Labor Standards Act (FLSA)—which required religious organizations to keep and disclose records “of ... persons employed ... [along with] their wages, [and] hours”—constituted excessive entanglement. 471 U.S. 290, 305 (1985). Such requirements, the Court found, “do not pose an intolerable risk of government entanglement with religion” *Id.* The Establishment Clause, it continued, “does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations ... and the recordkeeping requirements of the [FLSA], while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs.” *Id.*

Likewise, the Seventh Circuit considered the constitutionality of federal employment tax provisions compelling church and other nonprofit participation, holding that “there is no basis under either the Free Exercise Clause or the Establishment Clause for the argument that neutral, generally applicable,

minimally intrusive tax laws (like the ones at issue here) cannot be applied to religious organizations.” *U.S. v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000). The tax payment and withholding obligations imposed by federal laws, as well as the enforcement proceedings that could result from non-compliance, do not “require a constitutionally impermissible amount of government involvement in church affairs.” *Id.* at 630. When a statute requires only “generally applicable administrative and record keeping requirements,” it may be “imposed on religious organizations without violating the Establishment Clause.” *Id.* at 631; *see also Jimmy Swaggart Ministries v. Bd. of Equalization of Ca.*, 493 U.S. 378, 394–97 (1990) (state sales and use tax); *Hernandez v. C.I.R.*, 490 U.S. 680, 695–98 (1994) (federal income tax); *S. Ridge Baptist Church v. Industrial Comm’n of Ohio*, 911 F.2d 1203, 1210 (6th Cir. 1990) (workers’ compensation program); *Bethel Baptist Church v. U.S.*, 822 F.2d 1334, 1340–41 (3rd Cir. 1987) (social security tax). Even “substantial administrative burdens ... do not rise to a constitutionally significant level.” *Jimmy Swaggart Ministries*, 493 U.S. at 392–97; *see also Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 764–65 (1976) (finding no excessive entanglement where State conducted audits to ensure state grants to religious colleges were not used to teach religion).

If a religious organization claims a special unemployment exemption, a fact-based inquiry into its operations is constitutionally permissible. Under Wis. Stat. § 108.02(15)(h), that would entail a simple showing that an organization is performing religious functions. The Supreme Court itself has engaged in a fact-

based review of the functions and employment status of employees when determining whether they qualify as “ministers.” *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2067 (2020) (noting that *Hosanna-Tabor* did not establish a rigid test, but instead, “called on courts to take all relevant circumstances into account”); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012). A similarly minimal review of the secular activities of a nonprofit claiming an exemption from the Wisconsin unemployment program does not threaten to excessively entangle religion and government. None of the statutory requirements touch, let alone intrude, “into *sacred matters*.” *See Aguilar*, 473 U.S. at 410 (emphasis added).

B. Review of the activities of religiously-affiliated organizations is common in a related area of law, property tax exemptions.

Wisconsin property tax exemptions provide a helpful framework for the review of an exemption request by a religious organization. In both circumstances a facial review of the actual activities of an organization seeking an exemption is both appropriate and constitutionally permissible.

In order to qualify for a property tax exemption in Wisconsin, religious or nonprofit organizations must: 1) own the property, and 2) use it exclusively for exempt purposes. It is not enough for a church to simply own a property, it must be “used exclusively” by the church. *See Wis. Stat. § 70.11(4)(a)*. As the Wisconsin Supreme Court has made clear, “The use made of property determines whether it is subject to taxation or whether it is entitled to tax exemption.” *State v.*

City of Madison, 55 Wis. 2d 427, 433, 198 N.W.2d 615 (1972) (citing *Men's Halls Stores, Inc. v. Dane Cnty.*, 269 Wis. 84, 89, 69 N.W.2d 213 (1955); *Frank Lloyd Wright Found. v. Wy.*, 267 Wis. 599, 605, 66 N.W.2d 642 (1954)).

Wisconsin courts have had little difficulty in ensuring that the property tax exemption statute is being appropriately applied to churches. In one of the original tax exemption cases in Wisconsin, the State Supreme Court determined that a vacant lot owned by a church was not tax exempt because it was not used for the legitimate purposes of the church and was not necessary for the convenience of church buildings. *See Green Bay & M. Canal Co. v. Outagamie Cnty.*, 76 Wis. 587, 45 N.W. 536 (1890). Similarly, a chapel and convent were not exempt from taxation once they were no longer used for their original purpose. *See Dominican Nuns v. La Crosse*, 142 Wis. 2d 577 (1987). In a more recent challenge, church property that included religious icons but lacked buildings was determined to be taxable. *St. Raphael's Congregation v. City of Madison*, 2017 WI App 85, 379 Wis. 2d 368, 906 N.W.2d 184.

The property tax statute requires assessors, and ultimately courts, to review the use of religious property to ensure that it is actually being used for exempt purposes. This regulatory process dates back to at least the late 1800's and has never been held to violate the First Amendment or rights of Wisconsin churches. A similar review of an organization's activities under the unemployment exemption statute is both appropriate and constitutionally permissible.

C. Even if the unemployment exemption statute were flawed, the employers are not entitled to the remedy they seek.

Even if the employers were correct that Wis. Stat. § 108.02(15)(h)(2) poses an issue of impermissible entanglement, they are wrong on the appropriate remedy. The most appropriate remedy for an unconstitutional statute is to strike down the statute, not to judicially rewrite the statute in favor of the specific entities seeking a special benefit. Here, the employers seek coverage under an exemption that they claim creates excessive entanglement. If the employers are correct, then in order to avoid excessive entanglement the Court must nullify Wis. Stat. § 108.02(15)(h)(2).

The U.S. Supreme Court has held that a constitutionally underinclusive scheme may be remedied either by expansion or contraction. A court “may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.” *Heckler v. Mathews*, 465 U.S. 728, 738–39 (1984) (quoting *Welsh v. U.S.*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)). Nullifying a statute is the appropriate course of action in the context of special exemptions, as broadening an exemption to all religiously-affiliated groups would create the problem of unconstitutional religious preference. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (finding a Texas statute that offered religious publications an exclusive tax benefit to be unconstitutional under the Establishment Clause of the First Amendment).

II. Consideration of the Diocese’s purposes instead of the employers’ purposes would allow any religiously-affiliated organization—including hospitals and universities—to exempt itself from the unemployment insurance program.

This Court’s decision will reach far beyond the five employers involved in this case. The decision will dictate whether employees at religiously-affiliated hospitals and some colleges throughout Wisconsin will maintain their unemployment benefits. The employers offer no argument that would distinguish themselves from Wisconsin’s numerous other religiously-affiliated nonprofit organizations, because there is no principled way to distinguish them. Creating an exemption for the employers would thus have a profound, detrimental impact on Wisconsin’s unemployment insurance program.

A. If accepted, the employers’ argument would cause thousands of healthcare and educational workers to lose the protections afforded by the unemployment program.

Religiously-affiliated hospitals account for about twenty percent of hospital beds in the U.S.,¹ but in Wisconsin specifically, more than forty percent of hospital beds are at religiously-affiliated, mostly Catholic-run hospitals.² Nearly 22% of postsecondary education institutions report having some religious

¹ *Research on Religious Healthcare Insts.*, UNIV. OF CA. SAN FRANCISCO, www.ansirh.org/research/ongoing/research-religious-healthcare-institutions.

² Tess Solomon *et. al.*, *Bigger and Bigger: The Growth of Catholic Health Systems*, COMMUNITY CATALYST 5, 29 (2020), www.communitycatalyst.org/wp-content/uploads/2022/11/2020-Cath-Hosp-Report-2020-31.pdf.

affiliation, and they serve over 1.8 million students nationwide.³ In Wisconsin, over 15% of non-farm workers (over 465,000 employees) are employed in the education or health services sectors.⁴ If the employers receive an exemption to Wisconsin's unemployment insurance program, that same exemption would become equally available to the numerous religiously-affiliated hospitals and colleges operated within the State. These institutions include Ascension Wisconsin (the State's second-largest health system, which has undergone several rounds of layoffs since reportedly employing more than 21,000 people in 2016)⁵, Marquette University (which recently reduced its more than 2,900 employees by roughly 10%),⁶ and SSM Health Hospital System (with more than 2,000 employees in Madison, plus six additional locations in Ripon, Fond du Lac, Waupun, Baraboo, Janesville, and Monroe)⁷. All of these employees would be at risk of losing their unemployment benefits overnight, if this Court accepts the employers' argument.

³ *Digest of Education Statistics*, NAT'L CENTER FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d21/tables/dt21_303.90.asp (showing 862 out of 3,928 postsecondary institutions reporting a religious affiliation, as of fall 2020).

⁴ *State and Metro Area Employment, Hours, & Earnings*, U.S. BUREAU OF LABOR STATISTICS, www.bls.gov/sae/tables/state-news-release/home.htm (click link to Table 3) (showing preliminary May 2023 results: of Wisconsin's 2.9955 million employees, 465.2 thousand are in education and health services).

⁵ Guy Boulton, *Ascension Wisconsin begins another round of layoffs*, MILWAUKEE JOURNAL SENTINEL (Mar. 2, 2018), www.jsonline.com/story/money/business/health-care/2018/03/02/ascension-wisconsin-begins-another-round-layoffs/390256002/.

⁶ Devi Shastri, *Marquette will furlough 250 employees as it estimates a \$15 million shortfall so far from coronavirus*, MILWAUKEE JOURNAL SENTINEL (Apr. 8, 2020), www.jsonline.com/story/news/education/2020/04/08/coronavirus-milwaukee-marquette-university-furloughs-250-employees-cites-15-million-shortfall/2969884001/.

⁷ SSM Health, *2022-2024 Cmty. Health Needs Implementation Strategy* at 6, www.ssmhealth.com/SSMHealth/media/Documents/about/chna/wisconsin/ssm-health-st-mary-madison-chip-2022-2024.pdf (claiming 2,197 employees in Madison); *see also* www.ssmhealth.com/locations/wisconsin (listing SSM Wisconsin locations).

In this case, the employers perform completely secular functions, receive government funding, and do not require employees or program participants to be Catholic (or religious at all). The employers argue that nevertheless they should be exempt because the Diocese formed each of these nonprofit organizations with some ultimately religious purpose in mind. *See* Pet.’s Br. at 30–31 (arguing that it is the “parent” entity’s purpose that is relevant, rather than the organization’s own purpose). They further claim that the employers’ purpose is necessarily religious because they exist to fulfill the “charitable mission of the Catholic Church in the Diocese of Superior,” Petr’s Br. at 22, and because the Catholic Charities Bureau and its sub-entities “are entirely creatures of the Diocese—and of the broader Catholic Church.” Pet.’s Br. at 9–10. But while it may be true that the Diocese created the employers in order to satisfy its religious mission, there is nothing religious about the operations of the employers themselves. The only sense in which the employers are “religious” is indirectly, through their parent entity’s affiliation with the Catholic Church. None of these features distinguish the employers from Wisconsin’s numerous other religiously-affiliated nonprofits.

Under the employers’ argument, any religiously-affiliated organization that can draw a connection between its operation and the religious mission of its parent entity would become exempt. Such connections would be trivially easy to make for Wisconsin’s religiously-affiliated hospitals and colleges. Catholic-affiliated hospitals, for instance, exist under the premise that providing healthcare services also advances the religious mission of the Catholic Church. The Catholic Health

Association of the United States describes Catholic health care as “a ministry of the church continuing Jesus’ mission of love and healing,”⁸ while the United States Conference of Catholic Bishops directs that any “Catholic institutional health care service [must] ... be animated by the Gospel of Jesus Christ and guided by the moral tradition of the Church.”⁹ As for religiously-affiliated universities, Marquette, as an example, proclaims that it maintains a “strong partnership” with the Milwaukee Archdiocese and that the mission of the university “overlaps” with that of the Church.¹⁰

The employers in this case have not identified any legal or factual basis for distinguishing their own situation from that of Wisconsin’s numerous other religiously-affiliated nonprofit organizations. Because there are no grounds for limiting the legal arguments advanced by the employers to their own organizations, adopting the employers’ interpretation would immediately put thousands of Wisconsin employees at risk of losing protections under the State’s unemployment program. This would be a disastrous result that, as argued below, would undermine the Wisconsin legislature’s public policy reasons for implementing the unemployment program in the first place.

⁸ *A Shared Statement of Identity*, CATHOLIC HEALTH ASS’N OF THE UNITED STATES 8, www.chausa.org/mission/a-shared-statement-of-identity (“As the church’s ministry of health care, we commit to . . . [s]erve as a Ministry of the Church[.]”).

⁹ *Ethical and Religious Directives for Catholic Health Care Services*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (2018), <https://bit.ly/2TfWnZw>.

¹⁰ *Milwaukee’s Catholic Roots – The history of Milwaukee, Marquette and the Catholic Church are intertwined*, MARQUETTE UNIV. (Apr. 16, 2019), <https://stories.marquette.edu/milwaukeees-catholic-roots-4d1c5b372a6b>.

B. The employers' interpretation runs counter to the State's well-established public policy goals.

Wisconsin's unemployment program is intended to offset the "heavy social cost" associated with unemployment, which "tends partially to paralyze the economic life of the entire state." Wis. Stat. Ann. § 108.01(1). The unemployment insurance statute has been interpreted to "embody a strong public policy in favor of compensating the unemployed." *Operton v. Lab. & Indus. Rev. Comm'n*, 2017 WI 46, ¶ 31, 375 Wis. 2d 1, 17, 894 N.W.2d 426, 433. Therefore, exceptions to unemployment should be granted only in instances where the employer clearly falls within the exceptions outlined by the legislature in Wis. Stat. Ann. § 108.02(15)(h). A blanket rule which allows each religiously-affiliated organization to determine its own status would cast too broad a net, creating a presumption that all religiously-affiliated organizations are exempt. The employers' argument would thus contradict the legislature's articulated policy of strictly limited exemptions.

The employers' interpretation runs counter to Wisconsin's public policy interests in ensuring that unemployed workers receive compensation. The Wisconsin legislature recognized that unemployment is "an urgent public problem, gravely affecting the health, morals and welfare of the people of this state." Wis. Stat. Ann. § 108.01(1). Granting an exemption to the employers and other religiously-affiliated organizations would limit the State's ability to control for the economic risk of widespread unemployment. This could have disastrous effects

not just on the workers who lose their unemployment benefits, but also on the rest of the economy. As the State found, “[t]he decreased and irregular purchasing power of wage earners in turn vitally affects the livelihood of farmers, merchants and manufacturers....” *See id.* The State thus implemented an unemployment insurance program to more fairly distribute the economic burdens resulting from unemployment, as well as decrease those burdens “as far as possible.” Wis. Stat. Ann. § 108.01(2).

Under the employers’ argument, all an organization would have to do to receive an exemption to the State’s unemployment program would be to draw a connection between its operation and the religious mission of its parent entity. As demonstrated above, Wisconsin’s major religiously-affiliated nonprofits can easily make that showing. *See* Sec. II.A., *supra*. The employers’ theory would allow these major players in Wisconsin’s job market to exempt themselves if they so choose, despite the fact that they employ exclusively or primarily secular workers and perform identical functions as their nonreligious counterparts. This result would have devastating effects on the State’s articulated public policy reasons for adopting its unemployment program and would leave thousands of Wisconsin employees without unemployment protection.

CONCLUSION

A fact-based inquiry into the employers’ activities is both appropriate and constitutional. Such inquiry reveals that the employers do not qualify for the exemption to Wisconsin’s unemployment insurance program and adopting the

employers' expansive interpretation of that exemption would undermine the State's public policy reasons for implementing the program, while immediately jeopardizing the unemployment protections of thousands of employees at other religiously-affiliated nonprofit organizations operating within the State. For these reasons, this Court should affirm the decision of the court of appeals.

Dated: June 21, 2023

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,978 words.

Dated: June 21, 2023

Electronically signed by:

Samuel Troxell Grover

CERTIFICATE OF SERVICE

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

Dated: June 21, 2023

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