

FILED

07-14-2023

CLERK OF WISCONSIN

SUPREME COURT

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, District III,
reversing the Douglas County Circuit Court,
Hon. Kelly J. Thimm Presiding, Case No. 2019CV000324

NON-PARTY BRIEF OF WISCONSIN CATHOLIC CONFERENCE IN SUPPORT OF PETITIONERS-RESPONDENTS-PETITIONERS

David Earleywine
State Bar No. 1119314
WISCONSIN CATHOLIC
CONFERENCE
106 East Doty Street, Suite 300
Madison, Wisconsin 53703
Telephone: (608) 257-0004
david@wisconsincatholic.org

Bradley G. Hubbard*
Elizabeth A. Kiernan*
Zachary Faircloth*
Jason J. Muehlhoff*[†]
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
Telephone: (214) 698-3100
Facsimile: (214) 571-2900
bhubbard@gibsondunn.com

ATTORNEYS FOR NON-PARTY
WISCONSIN CATHOLIC CONFERENCE

* Admitted *pro hac vice*.

[†] Admitted only to the D.C. Bar; supervised by licensed Texas Bar members.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	3
Interest of Non-Party <i>Amicus Curiae</i>	5
Introduction.....	6
Background	7
I. The Structure of the Catholic Church.....	7
II. Catholic Charity Is Both Fundamental to the Faith and Inherently Religious.	8
III. The Wisconsin Catholic Conference, the Church Unemployment Pay Program, and the Catholic Charities Bureau All Further the Church's Charitable Work.....	11
Argument.....	13
The Court of Appeals' Decision Impermissibly Interferes with Church Autonomy and Entangles Judges in Assessing Religiosity.....	13
Conclusion	17
Certificates	18

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021)</i>	15
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012)</i>	16
<i>Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952)</i>	13
<i>L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997)</i>	15
<i>New York v. Cathedral Acad., 434 U.S. 125 (1977)</i>	15
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020)</i>	15
Statutes & Other Authorities	
Archbishop of Milwaukee Jerome E. Listecki et al., <i>A Letter to Wisconsin Catholics on Faithful Citizenship</i> (Aug. 2022)	12
<i>The Bible</i> (NRSV-CE)	7, 8
<i>Catechism of the Catholic Church</i> (2d ed. 1992)	5, 7, 8, 10, 16
Catholic Charities Bureau, Diocese of Superior, <i>A Growing Legacy: 2021 Annual Report</i>	12
<i>Codex Iuris Canonici</i> (Code of Canon Law) (1983)	7, 8, 10
Congregation for Bishops, <i>Directory for the Pastoral Ministry of Bishops</i> (2004)	10
CUPP, <i>CUPP Policy Handbook</i> (Oct. 1, 2022)	5, 11
Pope Benedict XVI, <i>Deus Caritas Est</i> (2005)	8, 9, 10, 11, 12, 16
Pope Francis, <i>Angelus</i> (Aug. 23, 2020)	9

TABLE OF AUTHORITIES
(cont'd)

	<u>Page(s)</u>
Pope John Paul II, <i>Address to the Members of Catholic Charities USA</i> (Sept. 13, 1987)	9, 10
Pope John Paul II, <i>Laborem Exercens</i> (1981).....	11
Pope Paul VI, <i>Lumen Gentium: Dogmatic Constitution of the</i> <i>Church</i> (1964).....	8
Wis. Stat. § 108.02	6
Wisconsin Catholic Conference, <i>The Catholic Presence in Wisconsin</i>	5, 7

INTEREST OF NON-PARTY *AMICUS CURIAE*

The Wisconsin Catholic Conference was founded by the Bishops of Wisconsin in 1969 to fulfill the vision of the Second Vatican Council, which called upon the Church to be more involved in the world. *See Catechism of the Catholic Church* ¶ 1915 (2d ed. 1992), <https://t.ly/aPH0>.

Led by the Bishops, the Conference—with teachings of the Church at its foundation—serves to promote dignity, preserve justice, and advance the common good by offering a specifically Catholic contribution to public policy debates. The Conference responds to issues facing the Church’s five dioceses, their Catholic Charities organizations, and the more than 1,700 priests and deacons that minister in over 700 parishes, 275 Catholic schools, and 30 hospitals across Wisconsin. Wisconsin Catholic Conference, *The Catholic Presence in Wisconsin*, <https://t.ly/c5jTl>.

The Conference’s significant interest in this case and the proper interpretation of the Unemployment Compensation Act stems from its mission as the Church’s public policy voice in Wisconsin and its role as the “informational clearinghouse” for the Church Unemployment Pay Program (CUPP). CUPP, *CUPP Policy Handbook 2* (Oct. 1, 2022), <https://t.ly/DVPS>.

The Conference submits this brief to explain how the decision below interferes with the Church’s internal affairs, impedes its sincere religious mission to serve *all people* in a non-judgmental, non-proselytizing fashion, and requires courts to become arbiters of religiosity.

INTRODUCTION

Diminishing the import of two millennia of Catholic teaching and interfering with how the Diocese of Superior organizes and structures its charitable activities, the appellate court reduced the question of “religious purpose” to an examination of corporate structure. Notwithstanding that charity is a fundamental principle of Catholicism, that the Bishop leads the Catholic Charities Bureau, and that the Bureau functions as the diocese’s charitable-ministry arm, the appellate court nevertheless ruled that the Bureau was not operated for a primarily religious purpose.

That conclusion not only ignores the *overwhelming* evidence of the Catholic Church’s direction and control over the Bureau and its charities but also finds no support in the statutory text. Indeed, the plain language exempts entities that are “operated, supervised, controlled, or principally supported by a church,” so long as they are “operated primarily for religious purposes.” Wis. Stat. § 108.02(15)(h)(2).

This Court should thus reverse and render judgment for the Bureau and its charities. The government—including the judiciary—has long been barred from interfering with church autonomy or imposing its own views of religiosity on religious organizations, and it is likely why the appellate court foresaw its decision would have “constitutional implications” and be “of crucial importance to religiously affiliated nonprofit organizations throughout the state, to employees of such organizations, and to the [State].” App.046.

BACKGROUND

I. The Structure of the Catholic Church.

Core to the Catholic faith is the understanding of what it means to be “the Church.” The Church was instituted by Christ himself during his earthly ministry when he said to one of the Apostles: “And I tell you, you are Peter, and on this rock I will build my church.” *Matthew* 16:18 (NRSV-CE). Guided by the Holy Spirit, Catholics have built His Church for two millennia to fulfill the mission to “profess[] the faith” and “liv[e] it in fraternal sharing.” *Catechism* ¶ 3.

There is only *one* Catholic Church. *E.g.*, *Catechism* ¶ 881; *Codex Iuris Canonici* (*Code of Canon Law*), 1983 CIC c.368, <https://t.ly/abL3> (“Particular churches, in which and from which the one and only Catholic Church exists.”). The Church is led by the Pope, who is the direct successor of Peter. 1983 CIC c.330–35 (the Pope “possesses power over the universal Church” and “all particular churches and groups of them”).

The Church is divided into dioceses. A diocese “is a portion of the people of God” that is “defined territorially” and “constitutes a particular church in which the one, holy, catholic, and apostolic Church of Christ is truly present and operative.” 1983 CIC c.369–70. Wisconsin has five dioceses that serve 1.1 million Catholics. Wisconsin Catholic Conference, *The Catholic Presence in Wisconsin*, <https://t.ly/c5jTl>.

Each diocese is “entrusted to a bishop for him to shepherd.” 1983 CIC c.369. Bishops, who are successors to the Apostles, are appointed by the Pope to be “teachers of doctrine, priests of sacred

worship, and ministers of governance.” 1983 CIC c.375 § 1, c.377. A bishop derives from the Pope the legislative, executive, and judicial power over his diocese and represents the diocese in all its juridic affairs. 1983 CIC c.391 § 1, c.393. While exercising “pastoral office over the portion of the People of God assigned to them,” a bishop is also called to care “especially [for] the poor.” *Catechism* ¶ 886. In this way, the diocesan bishops “are the visible source and foundation of unity in their own particular Churches.” *Id.* (quoting Pope Paul VI, *Lumen Gentium: Dogmatic Constitution of the Church* ¶ 23 (1964), <https://t.ly/JtB3>).

II. Catholic Charity Is Both Fundamental to the Faith and Inherently Religious.

Foundational to Catholicism is the duty to spread Christian love through charity—providing care for the most vulnerable without seeking to impose one’s faith on others. Christ’s command to his followers was to practice charity: “Just as I have loved you, you also should love one another.” *John* 13:34. He taught them that their acts of charity were so essential that they would be judged by how they served the hungry and the thirsty, welcomed the stranger, clothed the naked, and visited the ill and the incarcerated. *Matthew* 25:34–46.

Simply put, the Church “cannot neglect the service of charity any more than she can neglect the Sacraments and the Word.” Pope Benedict XVI, *Deus Caritas Est* ¶ 22 (2005), <https://t.ly/Bxvi>. Indeed, without charity, a person can “gain nothing.” *Catechism* ¶ 1826 (quoting 1 *Corinthians* 13:1–4).

This command to care for the most vulnerable is at the core of everything the Catholic Church does. It is inherently religious in that it expresses the love that binds Catholics to Christ, to each other, and to all those they encounter. It cannot, therefore, be likened to some secular social service. As Pope Francis has explained, “Charity is always the high road of the journey of faith, of the perfection of faith.” Pope Francis, *Angelus* (Aug. 23, 2020), <https://t.ly/K3y6>. “Christian charity is not simple philanthropy”—it “is looking at others through the very eyes of Jesus” while, at the same time, “seeing Jesus in the face of the poor.” *Id.* Indeed, “Catholic Charities and related organizations exist essentially to spread Christian love.” Pope John Paul II, *Address to the Members of Catholic Charities USA* ¶ 8 (Sept. 13, 1987), <https://t.ly/rTMCW>.

Another feature that makes Catholic charity distinctive is that it spreads Christian love while remaining free from proselytization. As Pope Benedict explained, charity “is an action of the Church as such” and “has been an essential part of her mission from the very beginning,” but it “cannot be used as a means of engaging in . . . proselytism.” Pope Benedict XVI, *Deus Caritas Est* ¶¶ 31(c), 32.

Accordingly, those “who practise charity in the Church’s name will never seek to impose the Church’s faith upon others,” because a “Christian knows when it is time to speak of God and when it is better to say nothing and to let love alone speak.” *Id.* ¶ 31(c). And it is “the responsibility of the Church’s charitable organizations,” like the Conference, the Bureau, and its charities, “to reinforce this awareness in their members, so that by their

activity—as well as their words, their silence, their example—they may be credible witnesses to Christ.” *Id.*

In response to this high calling to practice charity, the early Church recognized that it “need[ed] to be organized if it [was] to be an ordered service to the community.” *Id.* ¶ 20. The Apostles “put[] this fundamental ecclesial principal into practice” by establishing “*diaconia*”: the “ministry of charity exercised in a communitarian, orderly way.” *Id.* ¶ 21. Over five centuries, the *diaconia* “evolved into a corporation,” entrusted by civil authorities to store public grain and feed the citizenry. *Id.* ¶ 23; see Pope John Paul II, *Address to the Members of Catholic Charities USA* ¶ 3 (discussing how Catholic charities “go back to before the Declaration of Independence”). Today, the Pope appoints bishops to serve as the Apostles’ successors as “president of the assembly and minister of charity in the Church,” continuing the mission of the *diaconia*. Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops* (2004) ¶¶ 193–98, <https://t.ly/YQon>; see 1983 CIC c.331, c.368–73; *Catechism* ¶¶ 880–81.

The charity of the *diaconia* was and is unique: “[T]he social service which they were meant to provide was absolutely concrete, yet at the same time it was also a spiritual service.” Pope Benedict XVI, *Deus Caritas Est* ¶ 21. This is because charity “does not simply offer people material help, but refreshment and care for their souls, something which often is even more necessary than material support.” *Id.* ¶ 28. As Pope Benedict emphasized, those “who work for the Church’s charitable organizations must be distinguished by the fact that they do not merely meet the needs

of the moment, but they dedicate themselves to others with heartfelt concern, enabling [others] to experience the richness of their humanity.” *Id.* ¶ 31(a). These spiritual commitments ensure that Catholic charities are not “just another form of social assistance” or “welfare activity.” *Id.* ¶¶ 25(a), 31.

III. The Wisconsin Catholic Conference, the Church Unemployment Pay Program, and the Catholic Charities Bureau All Further the Church’s Charitable Work.

To further the Church’s charitable work, the Bishops of Wisconsin, through the Wisconsin Catholic Conference, founded the Church Unemployment Pay Program (CUPP) for lay employees in the Archdiocese of Milwaukee and the Dioceses of La Crosse, Madison, and Superior. *CUPP Policy Handbook 2* (Oct. 1, 2022), <https://t.ly/DVPS>; see Pope John Paul II, *Laborem Exercens* (1981), <https://t.ly/Bx8o> (“The obligation to provide unemployment benefits . . . is a duty springing from the fundamental principle of the moral order in this sphere . . . the right to life and subsistence.”).

CUPP is “housed under the umbrella” of the Conference, which serves as CUPP’s “informational clearinghouse.” *CUPP Policy Handbook 2*. The Conference’s executive director chairs CUPP’s interdiocesan board of directors, which comprises one member from each participating diocese, appointed by the bishop of that diocese. *Id.* CUPP’s board “determines general policies and criteria for the Program and serves as the final-level appeal body for the benefit claims process.” *Id.*

Importantly, the Bishops of Wisconsin maintain ultimate juridical power and direct the Conference in administering CUPP

and sharing the Church's principles of Catholic social teaching. This is so that the members of the Catholic Church within Wisconsin can more faithfully answer the Lord's call "to be good and faithful servants who serve the hungry and the thirsty, welcome the stranger, clothe the naked, and visit the ill and the incarcerated." See Archbishop of Milwaukee Jerome E. Listecki et al., *A Letter to Wisconsin Catholics on Faithful Citizenship* (Aug. 2022), <https://t.ly/FEpN>.

The bishops also maintain ultimate juridical power over the Catholic Charities in their dioceses. The Catholic Charities Bureau, for example, is under the pastoral leadership of the Bishop of the Diocese of Superior. App.198. Under his leadership, the Bureau "works to be an effective sign of the charity of Christ" by operating 127 programs in 59 communities and serving all—especially the "disadvantaged and vulnerable." Catholic Charities Bureau, Diocese of Superior, *A Growing Legacy: 2021 Annual Report*, <https://t.ly/BPDE>; see Pope Benedict XVI, *Deus Caritas Est* ¶ 33 ("every Catholic charitable organization want[s] to work with the Church and therefore with the Bishop, so that the love of God can spread throughout their world").

When adding a charity to the Bureau's purview, the Bureau makes clear that the agreement between it and the charity "confirms the importance of the role Catholic Charities Bureau, Inc. and [the charity] have in fulfilling the social ministry of the Diocese of Superior." App.204. The charity also affirms that it "will not engage in activities that violate Catholic Social Teachings." App.204; see also App.199 (the Bureau "serves as an

arm of the Church’s social ministry” and operates “in compliance with the Principles of Catholic Social Teaching”); R.100:55, 62, 130; R.57:1, 5.

That is not an empty affirmation—the Bureau takes significant steps to maintain this unique Catholic charitable ministry:

- It explains to each charity that a “clear understanding of the corporate relationship between Catholic Charities Bureau, Inc. and [the charity] is necessary to effectively encourage teamwork and to *mutually implement our shared mission*.”
- It retains the ability to hire and fire directors.
- It provides management services.
- And it “[e]stablish[es] and coordinate[s]” the charity’s mission.

App.203 (emphasis added).

In short, each of the Bureau’s charities—including those at issue here—act under, at the direction of, and to further the charitable ministry of the Catholic Church. *See* R.99:15–16; R.100:30–31.

ARGUMENT

The Court of Appeals’ Decision Impermissibly Interferes with Church Autonomy and Entangles Judges in Assessing Religiosity.

It is a foundational premise of our constitutional system that religious organizations enjoy the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

The court of appeals' decision flouts this basic principle, results in impermissible judicial oversight of religious teaching and structure, and introduces great uncertainty for any group that sincerely believes it operates "for a religious purpose."

In concluding that the charities at issue do not operate for a "religious purpose," the court of appeals made two fundamental errors: (1) it divorced the Church from its charities, based exclusively on corporate form, App.036–037, 041–042; and (2) it appointed itself the arbiter of religiosity—charged with determining what does and does not qualify as "inherently religious." App.024, 033, 040, 042. These errors ignore centuries of Church organization and teaching that charity—separate from proselytism—is a foundation of the Church and a manifestation of God's love for us.

The Catholic Church's organization and structure—from the Pope to the bishops to the Bureau to its Wisconsin-based charities—are designed and directed intentionally to accord with the Church's teachings. That is why the Bishop of the Diocese of Superior has plenary control over the Bureau and its charities: "the entire organization begins and ends with [him]." R.100:55, 62, 130.

The court of appeals, however, treated the Church's decision about how to organize and structure itself as incidental to its mission, stressing that "corporate form does make a difference." App.042. But that rationale ignores the bedrock constitutional principle of church autonomy.

Religious entities, like the Church, are entitled to “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); *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 975 (7th Cir. 2021) (same) (en banc). That includes, as relevant here, the power to decide how to organize itself and its ministry—including matters of corporate form—free from state interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 186 (2012) (church autonomy affords “an 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”) (quoting *Kedroff*, 344 U.S. at 116).

Further, the court of appeals’ decision tasks Wisconsin agencies and courts with deciding which activities are “inherently or primarily religious.” See App.039–043. But the “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). That is why it has long been held that courts are not equipped to draw and enforce such an illusory distinction. See *L.L.N. v. Clauder*, 563 N.W.2d 434, 440 (Wis. 1997) (“excessive governmental entanglement with religion will occur if a court is required to interpret church law, policies, or practices”).

The court of appeals' cramped view of religious purpose as it relates to the charities here bears these concerns out. In attempting to describe "inherently or primarily religious activity," the court imposed its own definition of religion, observing that such activity must involve actions such as "participating in religious rituals or worship" or "evangelizing." App.040–041. Applying its own idiosyncratic definition of religion, the court of appeals ruled that the charities' activities were inherently secular even though the Church has long viewed charity as inherently religious and essential to its mission both a form of "participation in the divine nature" of God and "the source and the goal of [virtuous] Christian practice." *Catechism* ¶¶ 1812, 1827; *see also supra* pp. 08–11.

The court of appeals thus flipped the Church's view of charity on its head—viewing the charities' activities as simply "social services." App.040–041; *contra* Pope Benedict XVI, *Deus Caritas Est* ¶ 31 ("[I]t is very important that the Church's charitable activity maintains all of its splendour and does not become just another form of social assistance."); *id.* ¶ 25 ("charity is not a kind of welfare activity"). In doing so, it presents the Church and its charities with a Hobson's choice: To obtain the statutory benefit to which She is entitled, the Church must *either* structure Her charitable work by government dictate *or* use charity as primarily a means to proselytize.

At base, the court of appeals' decision must be reversed because it requires what the First Amendment prohibits: "government interference with an internal church decision that

affects the faith and mission of the church itself.” *Hosanna-Tabor*, 565 U.S. at 190.

CONCLUSION

The Conference respectfully asks the Court to reverse the court of appeals and enter judgment for the Bureau and its charities.

Dated: July 14, 2023

Respectfully submitted,

Electronically signed by

David Earleywine

David Earleywine

State Bar No. 1119314

Wisconsin Catholic Conference

106 East Doty Street, Suite 300

Madison, Wisconsin 53703

Telephone: (608) 257-0004

david@wisconsincatholic.org

Electronically signed by

Bradley G. Hubbard

Bradley G. Hubbard*

Elizabeth A. Kiernan*

Zachary Faircloth*

Jason J. Muehlhoff[†]

GIBSON, DUNN & CRUTCHER LLP

2001 Ross Avenue, Suite 2100

Dallas, Texas 75201

Telephone: (214) 698-3100

Facsimile: (214) 571-2900

bhubbard@gibsondunn.com

ekiernan@gibsondunn.com

zfaircloth@gibsondunn.com

jmuehlhoff@gibsondunn.com

*Attorneys for Non-Party
Wisconsin Catholic Conference*

* Admitted *pro hac vice*.

[†] Admitted only to the D.C. Bar; supervised by licensed Texas Bar members.

CERTIFICATES

A. Certification as to Form and Length. I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief, not including the caption, tables of contents and authorities, signature blocks, and certification, is 2,982 words. It is produced with a minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, and a maximum of 60 characters per line of body text.

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

Dated: July 14, 2023

Respectfully submitted,

Electronically signed by

David Earleywine

David Earleywine

State Bar No. 1119314

Wisconsin Catholic Conference

106 East Doty Street, Suite 300

Madison, Wisconsin 53703

Telephone: (608) 257-0004

david@wisconsincatholic.org

Electronically signed by

Bradley G. Hubbard

Bradley G. Hubbard*

GIBSON, DUNN & CRUTCHER LLP

2001 Ross Avenue, Suite 2100

Dallas, Texas 75201

Telephone: (214) 698-3100

Facsimile: (214) 571-2900

bhubbard@gibsondunn.com

*Attorneys for Non-Party
Wisconsin Catholic Conference*

* Admitted *pro hac vice*.