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

BRIEF OF NON-PARTY WISCONSIN STATE LEGISLATURE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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I. THE PRINCIPLE THAT THE UNEMPLOYMENT-INSURANCE LAW IS TO BE LIBERALLY CONSTRUED MUST YIELD TO THE RULE OF CONSTITUTIONAL AVOIDANCE

The court of appeals held that the remedial-statute canon—the principle that such statutes are to be liberally construed—dooms Catholic Charities Bureau's textual arguments. Indeed, when turning to the "rules of statutory interpretation," the court cited this one first: "[T]he unemployment insurance law is remedial in nature; therefore, the statutes must be 'liberally construed' to provide benefits coverage, and exceptions to the law must be interpreted narrowly." App. 025–026 (citations omitted). It added that, "[i]f a [remedial] statute is liberally construed, 'it follows that the exceptions must be narrowly construed.'" *Id.* at 026 (citing *McNeil v. Hansen*, 2007 WI 56, ¶10, 300 Wis. 2d 358, 731 N.W.2d 273). The State echoes this purposivist argument. *E.g.*, Resp. Br. 17–18.

Jurists differ over the wisdom of the remedial-statute canon, including its cousin canon requiring strict construction of exemptions. Textualists traditionally have regarded these notions as analytical makeweights, inconsistently applied and incapable of precise application. *See, e.g.*, *Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135–36 (1995) ("[T]he Director retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 359–66 (2012); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev.

581, 583–84 (1989–1990) ("[The remedial canon] is surely among the prime examples of lego-babble."); *Ober United Travel Agency, Inc. v. United States Dept. of Labor*, 135 F.3d 822, 825 (D.C. Cir. 1998); *In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987). Justice Elena Kagan, for example, has even suggested that all substantive canons "should" be "toss[ed]."[1] On the other hand, some jurists and scholars have treated the canon more favorably. *See, e.g.*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999) (Stevens, J., dissenting); *James v. Heinrich*, 2021 WI 58, ¶ 76, 397 Wis.2d 517, 960 N.W.2d 350 (Dallet, J., dissenting) (stating that some of Scalia and Garner's positions, such as their rejection of the remedial-statute canon, "are irreconcilable with this court's precedent"). No party asks this Court to discard these canons.

Whatever they think of the merits of the remedial-statute canon, courts tend to agree that it must yield to certain other interpretive rules—including clear-statement rules, such as the rule of constitutional avoidance. *See, e.g.*, *Keen v. Helson*, 930 F.3d 799, 805 (6th Cir. 2019) ("'[L]ast' is where [this canon] belongs in the interpretive process. A court should only invoke the liberal construction canon after it has exhausted other . . . tools of interpretation." (citation omitted)); *see also, e.g.*, *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1220 (9th Cir. 2012) (prioritizing "constitutional concerns" over the liberal

[1] Will Baude, *Should Courts Stop Using "Substantive" Canons of Construction?*, Volokh Conspiracy (Mar. 8, 2022, 6:23 PM), https://perma.cc/J8ZQ-62RL (quoting Justice Kagan's comments during oral argument).

reading canon); *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 294 (3d Cir. 2013) (holding liberal reading of remedial-statute canon cannot "trump [ ] textual clues to the contrary"); *Collette v. St. Luke's Roosevelt Hosp.*, 132 F.Supp.2d 256, 267 (S.D.N.Y. 2001) (declining to apply remedial-statute canon because "constitutional avoidance weighs heavily in favor" of a more "sensible" construction).[2] Put simply, a statute's meaning should not be stretched to *create* a constitutional problem. Rather, if a reasonable interpretation would avoid such a concern, that interpretation is preferred—regardless of whether it makes the statute more or less "remedial." So here, because Catholic Charities Bureau articulates a quite reasonable reading of the statute that would avoid any constitutional doubts, *see* Pet. Op. Br. 22–34, this Court ought to adopt it, regardless of which way the remedial-statute canon cuts.

Prioritizing constitutional avoidance over the remedial-statute canon makes especially good sense in this case, because it happens also to advance the statute's remedial purpose: "to foster a reduction of both the individual and social consequences of unemployment." App. 025–026 (citing *Wisconsin Cheese Serv., Inc. v. DILHR*, 108 Wis. 2d 482, 489, 322 N.W.2d 495 (Ct. App. 1982)).

[2] The constitutional-avoidance, or constitutional-doubt canon, is best understood as a longstanding "clear statement" rule and not a "substantive" canon and therefore relevant to linguistic meaning, given that legislative bodies are assumed to enact laws in light of the canon. *See, e.g.*, Amy Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. Rev. 109, 169 (2010); Scalia & Garner, *supra.*, at 254 (describing avoidance as an "expected-meaning canon" because of its long-established role in jurisprudence).

Reading the exemption not to include Catholic Charities Bureau—thereby causing it to be unconstitutional, *see* Pet. Op. Br. 42—would serve only to impose on the charity needless costs and burdens that it could efficiently avoid by simply subscribing to the Church Unemployment Pay Program, redirecting their savings in costs to their core mission, which happens also to be the core mission of the statute. *Id.* at 18. *Both* seek to ameliorate the harsh consequences of unemployment on individuals and society. *Compare* Wis. Stat. § 108.01(1) (aiming to mitigate the "urgent public problem" and "social cost" of unemployment) *with* Pet. Op. Br. 18 (explaining that Catholic Charities Bureau aims to help with "social justice responsibilities by providing church-funded unemployment coverage"). "The mission of Catholic Charities is to serve all regardless of religious affiliation in their time of greatest need. Catholic Charities employs and serves individuals of all faiths." *Zubik v. Sebelius*, 911 F. Supp. 2d 314, 319 (W.D. Pa. 2012); *see also Brandt v. Burwell*, 43 F. Supp. 3d 462, 469 (W.D. Pa. 2014). In all, exempting Catholic Charities Bureau would further not only the State's interest in "alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions," *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987), but it would also further the very ends that the unemployment-insurance law seeks to advance—by freeing Catholic Charities Bureau and other like entities to care for the poor, feed the hungry, and support the jobless.

II. THE WISCONSIN CONSTITUTION FORBIDS THE STATE FROM "EXPRESS[ING] A PREFERENCE" FOR OR AGAINST A "RELIGIOUS PRACTICE," INCLUDING BY TREATING WORSHIP-ORIENTED ACTIVITIES AS "PREDOMINANTLY RELIGIOUS" AND ALMSGIVING AS NOT

Article I, section 18 of the Wisconsin Constitution guarantees "[t]he right of every person to worship Almighty God according to the dictates of conscience." To reinforce this promise, it also prohibits "any preference . . . to any religious establishments or modes of worship." This latter proscription has been referred to as the "No Preference Clause." *King v. Vill. of Waunakee*, 185 Wis. 2d 25, 62, 517 N.W.2d 671 (1994) (Heffernan, C.J., and Abrahamson, J., dissenting). Enacted in 1848, the framers crafted these provisions to reflect eighteenth-century principles of religious liberty, attract religious immigrants to Wisconsin, and secure the most expansive protection of religious liberties in the nation. *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 44 N.W. 967, 977 (1890) (Cassoday, J., concurring).

This Court has long observed the same. In its 1890 decision in *Weiss*, this Court acknowledged that the framers of the Wisconsin Constitution intended Wisconsinites to have the most "complete" religious protection possible. 44 N.W. at 977 (1890) (Cassoday, J., concurring). As such, Article I, section 18 "probably furnishe[s] a more complete bar to any preference for, or discrimination *against*, any religious sect, organization, or society than any other state in the Union." *Id.* (emphasis added); *King*, 185 Wis. 2d at 65 (Heffernan, C.J., and Abrahamson, J., dissenting) (observing same). The people who wrote and ratified the No Preference Clause did not

authorize the government to stand in judgment of what does or does not constitute religious worship. Far from it. Because "our state constitution is not a grant, but a limitation, of powers," the No Preference Clause "operate[s] as a perpetual bar to the state, and each of the three departments of the state government, and every agency thereof, from the infringement, control, or interference with" the religious worship of every Wisconsin citizen, including "the giving of any preference by law to any . . . mode of worship." *Weiss*, 44 N.W. at 978 (Cassoday, J., concurring).[3] The plain language of the No Preference Clause thus prohibits government agencies from thumbing the scale as to what qualifies as religious worship.

The meanings of the terms "worship" and "preference" in 1848 further support this interpretation. This Court has already unpacked what "worship" means. Citing four nineteenth century dictionary sources, *Weiss* states that "the word 'worship'" "includes any and every mode of worshiping Almighty God." 44 N.W. at 979. And relevant here, "'[w]orship consists in the performance of all those external acts . . . in which men engage with the professed and sole view of honoring God.'" *Id.* As for "preference," Webster's dictionary at the time of Wisconsin's constitutional convention defined the term as: "n. 1. The act of preferring one thing before another; estimation of one thing above another; choice of one thing

[3] Although the quoted statement in *Weiss* appears in the separate opinion of Justice Cassoday, "it is on a subject expressly reserved for his consideration in the court's opinion . . . and thus represents the opinion of the court." *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 165 n.3, 115 N.W.2d 761 (1962).

rather than another. 2. The state of being preferred." Noah Webster, An American Dictionary of the English Language 771 (1848). Government "preference" of "worship," according to the original understanding of those terms, not only "corrupts religion," it "makes the state despotic." *Weiss*, 44 N.W. at 981–82 (Orton, J., concurring). Conversely, "[t]he right to follow one's own chosen method of worshipping God is enhanced, not diminished, by a decision that . . . government must not express a preference" for modes of worship. *King*, 185 Wis. 2d at 62 (Heffernan, C.J., and Abrahamson, J., dissenting).

The framers understood the import of vigorously safeguarding and encouraging religious liberty in a newly developed state. As detailed by Justice Cassoday in *Weiss*, and similarly observed by then–Chief Justice Heffernan in *King*, "history indicates that the framers wrote the Wisconsin constitution with an eye toward attracting settlers to Wisconsin by ensuring that the government would not dictate the form or content of religious practices." *King*, 185 Wis. 2d at 65 (Heffernan, C.J., and Abrahamson, J., dissenting); *Weiss*, 44 N.W. at 974 (Cassoday, J., concurring) ("[T]he convention framed the constitution with reference to attracting [immigrants] to Wisconsin."). Our framers enthusiastically intended to "establish liberal laws to encourage the emigrant hither and to secure and protect him when here." Milo M. Quaife, *The Convention of 1846* 237 (1919). "Many, perhaps most," of the sought-after immigrants came from countries that enforced a state religion and "suffered" "the horrors of sectarian intolerance" or the repercussions of rejecting a state-sanctioned faith. *Weiss*, 44 N.W.

at 974 (Cassoday, J., concurring). For that reason, there was no greater "inducement" than to assure these immigrants "the guaranties of the right of conscience and of worship in their own way." *Id*. The enticement paid off and Wisconsin made good on its promise. As a result, Wisconsin became "composed of immigrants from almost every state in Europe" that "are honest, intelligent, well-informed, and grateful for the religious … liberties they enjoy here." Milo M. Quaife, *The Attainment of Statehood* 364 (1928).

This Court should assume that the religious-purposes exemption of Wis. Stat. § 108.02(15)(h)(2) does not run afoul of the Wisconsin Constitution. *See Am. Power & Light Co. v. Sec. & Exch. Comm'n*, 329 U.S. 90, 108 (1946) ("Wherever possible, statutes must be interpreted in accordance with constitutional principles."). And when this Court "interpret[s] the Wisconsin Constitution" it aims "to give effect to the intent of the framers and of the people who adopted it" by "focus[ing] on the language of the adopted text and historical evidence." *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 12, 402 Wis. 2d 539, 976 N.W.2d 821. Moreover, because Article I, section 18 provides "far more" "expansive protections for religious liberty" than the First Amendment, courts must "give effect to" its "more explicit guarantees." *Coulee Cath. Sch. v. Lab. & Indus. Rev. Comm'n, Dep't of Workforce Dev.*, 320 Wis. 2d 275, 311–12, 768 N.W.2d 868 (2009). In light of these principles of construction, Wis. Stat. § 108.02(15)(h)(2)'s religious-purposes exemption must be interpreted in accord with the No Preference Clause, and, consequently, the framer's intent of increasing religious liberty and prohibiting government preference for modes of worship.

The Labor and Industry Review Commission's (LIRC) interpretation of Wis. Stat. § 108.02(15)(h)(2) fails to give due consideration to these well-settled principles of construction. In concluding that Catholic Charities Bureau primarily "provide[s] secular social services" and is therefore subject to Wisconsin's unemployment compensation system, Resp. Br. 19–25, LIRC, with the imprimatur of the State, heralds that some modes of worship are preferred over others. More specifically, when considering eligibility for § 108.02(15)(h)(2)'s exemption, certain types of worship purportedly qualify while others do not. For example, despite conceding that Catholic Charities Bureau's almsgiving and social ministry work "may have a religious connection," LIRC did not deem this ministry sufficiently "religious" because it did not "teach[] the Catholic religion, evangeliz[e] [the Catholic faith], or participat[e] in religious rituals or worship services with program participants." Resp. Br. 23, 32.

LIRC's position ignores that religious worship "includes *any* and *every* mode of worshiping Almighty God," *Weiss*, 44 N.W. at 979 (Cassoday, J., concurring) (emphasis added), and "[t]he usual and necessary work connected with religious worship or reasonably incident thereto is work of charity," *Commonwealth v. Sesqui-Centennial*, 8 Pa. D. & C. 77, 85 (Com. Pl. 1926). *See also Saltonstall v. Sanders*, 93 Mass. 446, 455 (1865) (describing "almsgiving" and "assistance of the poor" as a "religious duty"). In doing so, LIRC grants a preferred status to "evangelizing" and "participating in religious rituals or worship services," Resp. Br. 32, while

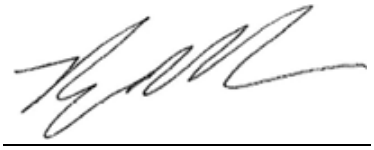
rejecting almsgiving and other social services as insufficiently religious. The religious character of charitable activities is not destroyed merely because secular organizations can perform the same activities. Nor does Article I, section 18 of the Wisconsin Constitution, or the historical evidence surrounding its enactment, support such a finding. Because "[t]he religious freedom of all citizens is threatened when the government expresses a preference for any one religious practice," *King*, 185 Wis. 2d at 66 (Heffernan, C.J., and Abrahamson, J., dissenting), the Legislature respectfully encourages this Court to construe Wis. Stat. § 108.02(15)(h)(2) in a way that maximizes the primordial rights of religious organizations to worship in accordance with their faith and limits the State's power to interfere with such worship.

CONCLUSION

The Legislature respectfully asks the Court to reverse the court of appeals and affirm the circuit court's decision.

Dated: July 28, 2023.

Respectfully submitted,



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WIS. STAT. § 809.19(8g) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 2,663 words.

Dated: July 28, 2023

Ryan J. Walsh

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, I caused true and correct paper copies of the forgoing brief to be delivered to counsel of record, addressed as follows:

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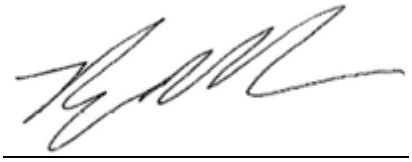

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