No. 2020AP2007

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,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,
Respondent-Co-Appellant,

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,
Respondent-Appellant.

Request for Review of a Published Decision by the Court of Appeals, District III, on Appeal from the Douglas County Circuit Court, the Hon. Kelly J. Thimm Presiding, Case No. 2019CV324

PETITION FOR REVIEW

Kyle H. Torvinen
(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

*Not admitted to the D.C. Bar; admitted to the N.Y. Bar; supervised by licensed D.C. Bar members.

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INTRODUCTION

The court of appeals' published decision stands church-state relations on their head. At the heart of its decision is the astonishing conclusion that the Catholic Charities Bureau of the Diocese of Superior—one of Wisconsin's largest religious charitable organizations—does not qualify for the religious exemption from the State's unemployment compensation system because it is not "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h). To reach that remarkable conclusion, the court of appeals relied on two equally remarkable—and false—premises of law.

First, the court of appeals decided that the purposes of the Diocese of Superior are irrelevant to determining whether CCB is operated for "religious purposes," as described in Section 108.02(15)(h). But CCB and its sub-entities are entirely creatures of the Diocese, and of the broader Catholic Church. As the court of appeals acknowledged, the government does not dispute, and CCB's name indicates, the Diocese specifically formed CCB to carry out its mandated social ministry in northern Wisconsin, and the bishop of the Diocese has complete control over CCB's ministry. CCB's purposes and the Diocese's are thus one and the same. The court of appeals' conclusion to the contrary is plain error and flies in the face of common sense and the typical treatment of parent-subsidiary relationships in Wisconsin.

Second, the court of appeals held that the word "operated" in the statutory phrase "operated primarily for religious purposes" means "actions" or "activities" rather than the more obvious mean-

ing of "managed" or "used." The court of appeals' attempt to shoehorn the word chosen by the Legislature into a subsidiary meaning found on Dictionary.com is untenable when read *in pari materia* with the other provisions of Section 108.02(15)(h).

Those errors of law, which run directly counter to the text, structure, and context of Section 108.02(15)(h), are reason enough for this Court's review. But the court of appeals' published decision does not just contort Wisconsin law. Uncorrected, it will also put a Wisconsin statute at odds with the First Amendment to the United States Constitution and Article I, Section 18 of the Wisconsin Constitution.

The decision below runs afoul of both constitutional provisions in three ways. First, it violates the church autonomy doctrine, which preserves a sphere of control over internal church affairs to religious bodies. Here, the court of appeals effectively severed CCB from the Diocese of Superior for purposes of Section 108.02(15)(h). That constitutes gross interference with the ability of the Church in this State to structure itself freely in accordance with its beliefs about religious polity.

Second, the decision violates the Free Exercise Clause by penalizing CCB for serving non-Catholics and for avoiding proselytism when engaging in ministry. The undisputed belief that the Church ought to help all who are in need is core to Catholic social teaching. Yet the lower court held that because of these beliefs, CCB could not invoke Section 108.02(15)(h). That burdens CCB's religious exercise in violation of the Free Exercise Clause.

Third, the decision violates the Establishment Clause by entangling church and state. By forcing Wisconsin executive branch officials and Wisconsin courts to finely parse all the activities of religious bodies in the State and decide whether those activities are "inherently" or "primarily" religious, the court of appeals has thrust those officials and courts into a constitutional thicket. That is the opposite of church-state separation.

* * *

Because the court of appeals' decision was published, only this Court (or the United States Supreme Court) can repair what the decision below has broken. This Court should therefore grant review to put Wisconsin law back onto a sounder footing and eliminate the conflict with the First Amendment.

ISSUES PRESENTED FOR REVIEW

1. Whether Wisconsin's unemployment insurance law, which exempts "an organization operated primarily for religious purposes," exempts Petitioners.

The circuit court answered yes.

The court of appeals answered no.

2. Whether the court of appeals' interpretation of the religious exemption to Wisconsin's unemployment insurance law violates the First Amendment to the United States Constitution and Article I, Section 18 of the Wisconsin Constitution.

The circuit court did not address this issue because it found Petitioners exempt.

The court of appeals answered no.

CRITERIA FOR REVIEW

Each issue presented independently warrants this Court's review of the court of appeals' published decision.

First, the religious purposes exemption in Wisconsin Statute § 108.02(15)(h)2 has never been addressed by a Wisconsin appellate court before this case. App.045. This "question presented is a novel one, the resolution of which will have statewide impact," and so a decision by this Court "will help develop . . . the law." Wis. Stat. § 809.62(1r)(c). Interpretation of the religious purposes exemption "is a question of law," *id.*, § 809.62(1r)(c)3, and, as the court of appeals explained in its certification to this Court, a decision from this Court "could provide guidance in interpreting [similar] statutory provisions." App.060.

Second, the court of appeals' published decision intrudes on the internal decision-making of the Diocese of Superior in violation of the church autonomy doctrine, discriminates based on religious beliefs in violation of the Free Exercise Clause, and entangles the government and courts in religious questions in violation of the Establishment Clause. It violates Article I, Section 18 of the Wisconsin Constitution for the same reasons. *See infra* Section II. This case thus presents "real and significant question[s] of federal [and] state constitutional law," and the decision below "is in conflict with controlling opinions of the United States Supreme Court[.]" Wis. Stat. § 809.62(1r)(a), (d).

STATEMENT OF THE CASE

A. Wisconsin's unemployment compensation system and the religious purposes exemption.

Enacted in 1932, the Wisconsin Unemployment Compensation Act was the first unemployment insurance law in the United States, providing temporary benefits to eligible unemployed workers.[1] Wis. Stat. §§ 108.01 *et seq.* The program is jointly financed through state and federal taxes of covered employers. Wisconsin law requires covered employers to contribute to an account with the State's unemployment reserve fund. *Id.* § 108.18. Benefits paid to a former employee are generally charged to the employer's reserve fund account. *Id.* § 108.03(a).

In 1972, the Legislature exempted certain religious nonprofits from this law. 1971 Wis. Laws 53. As amended, Wisconsin law exempts services performed for certain organizations from the definition of covered "employment":

> (h) "Employment" as applied to work for a nonprofit organization, except as such organization duly elects otherwise with the department's approval, does not include service:
>
> > 1. In the employ of a church or convention or association of churches;
> >
> > 2. In the employ of *an organization operated primarily for religious purposes* and operated, supervised, controlled, or principally supported by a church or convention or association of churches;

Id. § 108.02(15)(h)(1)-(2) (emphasis added).

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[1] *See generally* E.E. Muntz, *An Analysis of the Wisconsin Unemployment Compensation Act*, 22 Am. Econ. Rev. 414 (1932).

It is undisputed that Petitioners are "operated, supervised, controlled, or principally supported by a church." App.112, 149. The only dispute is whether they are "operated primarily for religious purposes." App.017.

B. The Catholic Church in Wisconsin and its religious ministries.

The Catholic Church organizes itself geographically by diocese. Archbishops and bishops oversee all Catholic parishes, schools, hospitals, and social ministries within their respective dioceses. *See* R.99:15-16; R.100:30-31.

Catholic teaching "demand[s]" that Catholics "respond . . . in charity to those in need." R.99:19-20. The Catechism of the Catholic Church and the Compendium of the Social Doctrine of the Church are the "foundational," "authoritative" sources of Catholic doctrine and teaching. R.99:19-21. These texts provide the "Ten Principles of Catholic Social Teaching," which include human dignity, participation, subsidiarity, preferential protection for the poor and vulnerable, and common good. App.085, 148, 179. These principles "guide and direct the action[s] of the church." R.99:22.

To carry out this mandate, each diocese operates a nonprofit social ministry arm—typically called "Catholic Charities." App.110, 143. Catholic Charities' mission generally "is to provide service to people in need, to advocate for justice in social structures, and to call the entire church and other people of goodwill to do the same." R.57:1, 5.

Petitioner Catholic Charities Bureau is the social ministry arm for the Diocese of Superior. App.177. Its mission is "[t]o carry on the redeeming work of our Lord by reflecting gospel values and the

moral teaching of the church." App.182, 206. CCB carries out this mission by "providing services to the poor and disadvantaged as an expression of the social ministry of the Catholic Church." App.183, 208. Its stated purpose is "to be an effective sign of the charity of Christ" by providing services without making distinctions "by race, sex, or religion in reference to clients served, staff employed and board members appointed." App.183, 208. CCB pledges that it "will in its activities and actions reflect gospel values and will be consistent with its mission and the mission of the Diocese of Superior." App.184-185, 207.

CCB operates dozens of programs in service to the elderly, the disabled, the poor, and those in need of disaster relief. App.178. Petitioners Headwaters, Barron County Developmental Services, Diversified Services, and Black River Industries are CCB sub-entities that provide services primarily to developmentally disabled individuals. R.65:17-18, 57-58; R.100:187-188, 256-257.

The bishop of the Diocese of Superior has plenary control over CCB and its sub-entities: "the entire organization begins and ends with [him]." R.100:55, 62, 130. He serves as president of CCB and appoints its "membership," which consists of leading diocesan clergy and the executive director. App.198-199. The bishop also appoints the boards of directors of CCB and its sub-entities. App.201, 203.

CCB's membership oversees CCB and its sub-entities to ensure fulfillment of CCB's mission in compliance with Catholic social teaching. App.199. Each sub-entity signs CCB's *Guiding Principles of Corporate Affiliation*, which gives CCB responsibility over

many of the sub-entity's major operating decisions. App.203-204. CCB and its sub-entities are directed to comply fully with Catholic social teaching in providing services. App.204; R.100:130-131. And all new "key staff and director-level positions" receive a manual entitled *The Social Ministry of Catholic Charities Bureau of the Diocese of Superior*, which they must review during orientation. R.100:74, 135-136.

The Diocese of Superior, CCB, and CCB's sub-entities are federally tax-exempt under 26 U.S.C. § 501(c)(3) pursuant to a "group ruling" by the IRS that the organizations operate "exclusively for religious . . . purposes." App.186-194.

C. CCB's attempts to participate in a Church-run unemployment assistance program.

After the religious organizations exemption was enacted in 1972, the State's labor agency determined that CCB and its sub-entities had to continue participating in the State's unemployment insurance program. App.236-242. But for the Catholic Church, "[t]he obligation to provide unemployment benefits . . . spring[s] from the fundamental principle of the moral order in this sphere." App.211 (quoting St. Pope John Paul II, *Laborem Exercens* (1981)).

Accordingly, in 1986, the Wisconsin bishops created the Church Unemployment Pay Program "to assist parishes, schools and other church employers in meeting their social justice responsibilities by providing church-funded unemployment coverage," in accordance with Catholic teaching. App.211. The Church's program provides the same level of benefits to unemployed individuals as the State's system while being "more efficient." R.100:125; App.214.

CCB and its sub-entities would be eligible for the Church's program if released from the State's. R.100:50. Were CCB to switch from the State's program to the Church's program, it would save funds that could be redirected to CCB's religious mission.

In 2001, the Department of Workforce Development (DWD) determined that Challenge Center—another CCB sub-entity—was "a church-related entity" and qualified for the religious purposes exemption. App.244. Challenge Center then paid into the Church-run unemployment program. App.244.

In light of this determination, in 2003, CCB requested to withdraw from the State's program, citing the religious purposes exemption and its intent to join the Church's program. App.215. DWD denied the request, and the Labor and Industry Review Commission (LIRC) affirmed. App.216-224.

In 2013, DWD "changed its earlier determination and concluded [Challenge Center] was not operated for a religious purpose." App.244. "This change in its position by DWD occurred without any change in the law or without any change in the way [Challenge Center] conducted its business." App.244. LIRC upheld DWD's new determination. App.244.

A circuit court (Glonek, J.) reversed LIRC's decision, holding that Challenge Center qualified for the religious purposes exemption. App.243-251. After considering "why the organization is operating," the court held that Challenge Center's purpose is primarily religious because it is "organized by the Bishop for a traditional Catholic purpose," "as demanded by the Catechism and [Catholic]

Social Doctrine," to provide not-for-profit services to disadvantaged people. App.249-250. DWD and LIRC did not appeal. *See* App.075.

D. The proceedings below.

In 2016, Petitioners sought a determination from DWD that, like Challenge Center, they qualify for the religious exemption. App.233-235. DWD, however, concluded that CCB and its sub-entities are not operated primarily for religious purposes and therefore are not exempt from the State's program. App.166-175. CCB appealed. After a two-day hearing, the ALJ (Galvin, J.) reversed, holding that CCB and its sub-entities qualify for the religious purposes exemption. App.134-165.

DWD petitioned LIRC for review. LIRC reversed, holding that the religious purposes exemption turns on an organization's "activities, not the religious motivation behind them or the organization's founding principles." App.100, 108, 116, 124, 133. And because CCB and its sub-entities "provide[] essentially secular services and engage[] in activities that are not religious per se," LIRC concluded that they do not qualify. App.099, 108, 116, 124, 132.

CCB sought review in circuit court. The court (Thimm, J.) reversed LIRC's decision, holding that under the "plain language" and "plain meaning" of the statute, "the test is really why the organizations are operating, not what they are operating." App.088-089. And since CCB and its sub-entities operate out "of th[e] religious motive of the Catholic Church . . . of serving the underserved," their primary purposes are religious. App.087.

DWD and LIRC appealed. In December 2021, the court of appeals (Stark, P.J., Hruz and Gill, JJ.), certified the case to this Court, citing the "novel legal questions regarding the interpretation of the religious purposes exemption and its constitutional implications." App.046. The court of appeals explained that resolution of the questions presented "is of crucial importance to religiously affiliated nonprofit organizations throughout the state, to employees of such organizations, and to the DWD, which must routinely apply the religious purposes exemption to determine whether such organizations are exempt from unemployment insurance coverage." App.046; App.060 (describing the case as one "of great moment"). This Court refused certification. R.123:1. The court of appeals then reinstated LIRC's decision. App.008.

The court of appeals held that "under a plain language reading of the statute," to qualify for the religious purposes exemption, "the organization must not only have a religious motivation, but the services provided—its activities—must also be primarily religious in nature." App.025. It therefore concluded that although CCB and its sub-entities "have a professed religious motivation . . . to fulfill the Catechism of the Catholic Church," their "activities . . . are the provision of charitable social services that are neither inherently or primarily religious activities." App.039-040. The court pointed to the fact that the organizations do not, *inter alia*, "operate to inculcate the Catholic faith," "teach[] the Catholic religion," "evangeliz[e]," "disseminate any religious material to [social service] participants," or "require their employees, participants, or board members to be of the Catholic faith." App.040-041. The court

viewed CCB and its sub-entities' "motives and activities separate from those of the church" simply because they "are structured as separate corporations." App.042.

The court of appeals further held that "the First Amendment is not implicated in this case," rejecting Petitioners' constitutional arguments. App.008, 034-035.

ARGUMENT

I. The court of appeals' novel interpretation of the religious purposes exemption is wrong and will have negative impacts statewide.

Without this Court's intervention, the published decision below will become binding statewide. But that decision is deeply flawed, setting forth an interpretation of the religious purposes exemption that ignores the statute's plain text and structure. What's more, this mistaken interpretation will have significant and harmful effects across Wisconsin. This Court should correct this erroneous decision.

A. The court of appeals' interpretation ignores the religious purposes exemption's plain text and structure.

In interpreting the religious purposes exemption, the court of appeals made two prominent errors. First, it held that the only "purpose" reviewing bodies can consider is the purpose evident from the mission and activities of separately incorporated nonprofit subsidiary organizations, thus ignoring the (here, undisputed) primary religious purpose of the church that directs and controls them. App.019-020.

Second, the court of appeals held that the religious purposes exemption requires reviewing bodies to look not only at the nonprofit organization's purpose or motive but also at the "activities of

the organization" and to determine whether those activities are "inherently or primarily religious." App.039-041. This inquiry forces reviewing bodies to engage in an extra-textual (and deeply entangling, *infra* Section II.C) assessment of, *inter alia*, whether the organizations "operate in a worship-filled environment," with a "faith-centered approach," and "with a focus on the inculcation of the[ir] faith and worldview." App.042.

Both holdings ignore the plain text and structure of the exemption and cannot be squared with a common-sense reading of the statute.

1. The relevant "purpose" is the parent church's.

The court of appeals' first error was to look only at the purpose of CCB and CCB's sub-entities instead of taking into consideration the *admittedly* religious purpose for which the Diocese of Superior operates these ministries. App.019-020.

"[S]tatutory interpretation begins with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. Specifically, "[s]tatutory language is given its common, ordinary, and accepted meaning[.]" *Id.* at ¶ 45. And "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* at ¶ 46. "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Pulera v. Town of Richmond*, 2017 WI 61, ¶¶ 12-17, 375 Wis. 2d 676, 896 N.W.2d 342.

Here, the plain text and structure of the exemption confirm that the relevant "purpose" reviewing bodies must consider is that of the church operating or controlling the nonprofit organizations.

Looking to the text, the exemption covers organizations that satisfy two requirements: they must be (1) "operated primarily for religious purposes" and (2) "operated, supervised, controlled, or principally supported by a church or convention or association of churches." Wis. Stat. § 108.02(15)(h)2. To understand *whose purpose* controls (the sub-entity or the parent church), the key word is "operated." The court of appeals interpreted "operated" as synonymous with "an action or activity." App.018. But this ignores basic canons of construction, the rules of grammar, and common sense. Read in context, "operated" is best understood as "managed" or "used." So understood, the remaining analysis is straightforward, as definitions of the remaining terms are undisputed. *See* App.018 (defining the remaining terms).

a. "Operated" as used in the religious purposes exemption means "managed" or "used."

To define "operated," courts must begin with the text of the exemption. "Operated" is used twice, to introduce the exemption's two requirements (primarily religious purposes and control by a church); the term must therefore have the same meaning in both places. *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶ 29, 299 Wis. 2d 1, 727 N.W.2d 311 ("[W]e attribute the same definition to a word both times it is used in the same statute or administrative rule."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170-73 (2012) (presumption of consistent usage). Courts can also infer the meaning of this term from the

other words the Legislature chose to use alongside it. Here, "operated" is used alongside "supervised, controlled, or principally supported by[,]" Wis. Stat. § 108.02(15)(h)2, and therefore must have a similar meaning, *Benson v. City of Madison*, 2017 WI 65, ¶ 31, 376 Wis. 2d 35, 897 N.W.2d 16 ("[A]n unclear statutory term should be understood in the same sense as the words immediately surrounding or coupled with it.").

With this statutory context in mind, courts can also look to the dictionary. To start, "operated" is used in the statute as a transitive verb (with "organization" as its object). This further narrows its meaning. *Contra* App.018 (citing only *intransitive* definitions of the word "operate"). Of the available dictionary definitions, "operated" as used here can only be understood to mean "managed" or "used." App.018; *see also Operate*, The Random House College Dictionary (1st ed. 1973) ("to manage or use"); *Landis v. Physicians Ins. Co. of Wis.*, 2001 WI 86, ¶ 36, 245 Wis. 2d 1, 628 N.W.2d 893 (dictionary definitions from time of enactment control). Even the Internet dictionary the court of appeals consulted lists this definition first among the transitive verb definitions. *See Operate (used with object)*, Dictionary.com, https://www.dictionary.com/browse/operate [https://perma.cc/Y4GP-YEXM] ("to manage or use"). This interpretation makes sense for both of the term's uses in the exemption, is consistent with the meaning of the words used alongside it, and fits the dictionary definition of "operate" when used as a transitive verb.

The court of appeals reached its alternative definition of "operated" ("an action or activity") by an entirely different analysis, one

that ignores and contravenes the text, context, and structure of the exemption. App.023-024. The error is evident from several factors: (1) "action" cannot be substituted for both uses of the term "operated" in the exemption, (2) "action" is not comparable in meaning to the other terms used alongside "operated" in the exemption, (3) "action" ignores the fact that "operated" is used as a transitive (not intransitive) verb in the statute, (4) the "action" definition isn't even supported by the definitions cited in the opinion below, and (5) the court of appeals' definition turns a verb ("operated") into a noun ("action"). *See* App.018 (defining "operate" as "to work, perform, or function").

Put simply, the only possible meaning of the term "operated" in the exemption is "managed" or "used." The court of appeals' alternative interpretation cannot be squared with text, structure, or common sense.

b. The relevant "purpose" is that of the parent church operating the nonprofit ministry.

With "operated" now correctly defined, the question remains: *whose* purpose is relevant to determining whether the sub-entity is "operated for a primarily religious purpose." Here too, the exemption's parallel structure (using "operated" to introduce both of the exemption's requirements) provides the answer. The text of the "controlled . . . by" requirement explicitly explains *who* is doing the operating: the "church." Wis. Stat. § 108.02(15)(h)2 ("operated . . . by a church"). Thus, when determining *why* the sub-entity

is being operated (the exemption's other requirement), the relevant purpose, motive, or objective[2] is that of the *operator*—which the exemption's "controlled . . . by" requirement indicates is the "church." *Id.*

To support its alternative interpretation, the court of appeals offered two explanations. Neither withstands scrutiny. First, it said that because the exemption covers employees of an organization "operated primarily for religious purposes," the "employees who fall under [the religious purposes exemption] are to be focused on separately in the statutory scheme," and therefore "the focus must be on the organizations" and their purpose, not the church's purpose. App.019. No one disagrees the exemption covers employees of the sub-entities. But *which* employees are covered says nothing about *whose* religious purpose is at issue. The key phrase "operated primarily for religious purposes" describes the sub-entity, not the employees. It is a *non sequitur* to leap from the premise that the exemption covers employees of the sub-entities to the conclusion that it is their purpose that controls the primary purpose analysis.

The court of appeals' second explanation fares no better. The court recognized that the exemption includes two requirements that must be satisfied. App.019-020. It then concluded that the second requirement would render the first "unnecessary" if the relevant purpose were that of the parent church. App.020. Here too, no one disputes that both requirements must be satisfied. But this

[2] App.018, 023-024 (defining purpose); c*f. Purpose*, Black's Law Dictionary (5th ed. 1979) ("That which one sets before him to accomplish; an end, intention, or aim, object, plan, project.").

again says nothing about the meaning of the exemption. A plain reading confirms the two requirements serve distinct purposes. The first asks *why* the organization is operated ("primarily for religious purposes"?); the second asks *who* operates the organization ("a church or convention or association of churches"?). Wis. Stat. § 108.02(15)(h)2. The first—regardless of how it is interpreted—does not render the second "unnecessary." App.020.

The plain text, context, and structure of the religious purposes exemption tell us that the "operator" (*i.e.*, the one who "operated" the organizations) is the parent church. Therefore, it is the church's purpose in operating the sub-entities that controls. This is confirmed by the only possible contextual meaning of the term "operated" (akin to "managed" or "used"). And it means that the religious purposes exemption covers CCB and its sub-entities, as it is undisputed that the Diocese of Superior's purpose in operating CCB and its sub-entities is primarily religious. App.034-035 ("[N]either 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.").

2. The parent church's undisputed purpose, not the sub-entity's activities, determines whether the exemption applies.

Despite recognizing that CCB and its sub-entities' purpose is primarily religious, App.039-040, the court of appeals held that they were not "operated primarily for a religious purpose," App.040-042. Why? Because, according to the court of appeals, "the reviewing body must consider both the *activities* of the organization as well as the organization's professed *motive* or purpose."

App.024-025. And here, the court concluded that "the activities of CCB and its sub-entities are the provision of charitable social services that are neither inherently or primarily religious activities." App.040-041. This despite also concluding that "the Catholic Church's tenet of solidarity compels it to engage in charitable acts." App.043.

In essence, the court of appeals grafted onto the religious purposes exemption a novel atextual requirement: that the *activities* of the church-controlled entity (not just its purpose) must be "inherently or primarily religious activities." App.040-041. To deploy this new requirement, the court looked at the specific charitable services each nonprofit provides—including "work training programs, life skills training, [and] in-home support services"—and concluded that "[w]hile these activities fulfill the Catechism of the Catholic Church to respond in charity to those in need, the activities themselves are not *primarily* religious." App.041.

The problems here are legion. To start with the text, the exemption makes *no mention* of any limitations or requirements regarding the types of "activities" a covered organization can perform. The text is straightforward: the organization must be "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h)2. What's more, it is undisputed that the requirement of a primarily religious purpose says nothing about the types of permitted "activities." *See* App.024 ("qualification for the exemption is based on the organization's reason for acting or its motivation"); App.039-041 (distinguishing between motive and activities). Instead, the court of appeals injected this new requirement into the term "operated."

Ignoring the text's plain meaning, several canons of construction, and basic rules of grammar, the court concluded that because "both words [('purpose' and 'operated')] appear in the statute," "[t]he only reasonable interpretation of the statute's language is that the reviewing body must consider both the *activities* of the organization as well as the organization's professed *motive* or purpose." App.024-025.

In other words, the court conjured up a requirement that the "activities" of exempt organizations be inherently or primarily religious solely from the exemption's use of the verb "operated." App.024-025. But, as explained above, "operated" in this context is best understood to mean "managed" or "used." It is not, as the court assumed, a synonym for "an action or activity." *Supra* 20-22. *Contra* App.023-025. The court's interpretation also contradicts basic rules of grammar. "Operated" is used as a transitive verb, with "organizations" as its direct object. But the court's interpretation requires turning "operated" into a noun (hence defining it to mean "an action or activity").

In essence, the court of appeals rewrote the exemption. A church-controlled entity now qualifies only if both its purpose *and* its activities are *inherently* religious. This new requirement cannot be justified by the exemption's text.

Likely recognizing its weak textual grounding, the court immediately turned to out-of-state court decisions and irrelevant legislative history. The court first looked to "courts in other jurisdictions," which, it concluded, "have interpreted the religious purposes exemption in different ways." App.021-022, 028-030. It then

looked to a federal House Ways and Means Committee report, citing a one-sentence hypothetical as evidence of the correct interpretation of Wisconsin law. App.032-033.

But neither supports the court's interpretation. First, extrinsic evidence is of little value when the text is clear, and regardless, it cannot contradict the statute's plain text, structure, and context. *See United States v. Franklin*, 2019 WI 64, ¶ 12, 387 Wis. 2d 259, 928 N.W.2d 545 ("Where the statutory language is unambiguous, we generally do not consult extrinsic sources of interpretation like legislative history.").

Second, as the court of appeals acknowledged, the extrinsic evidence is hopelessly muddled: there is a "distinct lack of consensus" among other jurisdictions regarding their interpretation of this or similar language. App.014-015. Thus, any attempt to decipher meaning from other courts' interpretations will be, at best, inconclusive. Third, all the extrinsic evidence regarding interpretation of statutory language comes from sources *outside* Wisconsin.[3] Yet this Court has repeatedly confirmed that "it matters not how courts of other states have construed their unemployment acts even though they are duplicates of or based upon our own." *Moorman Mfg. Co. v. Indus. Comm'n*, 241 Wis. 200, 207, 5 N.W.2d 743 (1942); *Bernhardt v. LIRC*, 207 Wis. 2d 292, 302, 558 N.W.2d 874 (Ct. App. 1996) ("[W]e need not look to the decisions of other jurisdictions (or the [NLRB]) in construing our own unemployment

[3] The only Wisconsin decision cited, *Coulee Catholic Schools v. LIRC*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, concerned the ministerial exception, not Wisconsin's unemployment statutes. As the court of appeals acknowledged, "*Coulee* is factually and legally distinguishable." App.031-032.

compensation act."); *Princess House, Inc. v. Dep't of Indus., Lab. & Hum. Rels.*, 111 Wis. 2d 46, 72 n.5, 330 N.W.2d 169 (1983) (rejecting analogy to "federal compensation law").

Were the court of appeals' erroneous interpretation not obvious on its face, the way the court applied it confirms its many flaws. The court of appeals repeatedly acknowledged that the motivations behind the nonprofit organizations' actions were primarily religious, but nevertheless determined that the "activities"—viewed in isolation, App.024—were not themselves "inherently or primarily religious" because they consisted of helping those in need, App.040-041.

This analysis fundamentally misunderstands what makes CCB's ministry "religious." It is not about how closely tied the physical action is to a form of religious worship, or even whether the ministry serves only coreligionists. App.041-043. Whether caring for the poor or comforting the afflicted is "religious" cannot be determined without looking at that action in the context in which it is performed. *Cf.* 1 *Corinthians* 13:3 (RSV-CE) ("If I give away all I have, and if I deliver my body to be burned, but have not love, I gain nothing."). In the same way, this Court recognized in *James v. Heinrich* that forcing religious schools to close during COVID "did not merely burden academic schooling; it burdened the exercise of religious practices." 2021 WI 58, ¶ 43, 397 Wis. 2d 517, 960 N.W.2d 350 ("the exercise of religion often involves not only belief and profession but the performance of physical acts" (cleaned up)). A secular court cannot hope to accurately determine, for every religious tradition in Wisconsin, which of that religion's activities are

"inherently religious." And even attempting this standardless inquiry would enmesh Wisconsin courts in answering impossible theological questions. *Infra* Section II.C.

The court of appeals was wrong to interpret the religious purposes exemption to require an activity-by-activity analysis of "inherent[]" religiosity, especially when the better textual interpretation avoids these constitutional pitfalls. *See Kenosha Cnty. DHS v. Jodie W.*, 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 716 N.W.2d 845 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.").

B. This case presents important questions of law.

This Court's intervention is desperately needed. If left uncorrected, the court of appeals' erroneous and atextual interpretation of the religious purposes exemption will dictate how all Wisconsin courts, LIRC, DWD, and religious employers statewide apply and understand the religious exemption. As explained above, this will turn application of this straightforward exemption into an exercise in formalism, *supra* 22-24, while also requiring secular courts to engage in a standardless, entangling, and case-by-case inquiry to determine whether each *activity* a religious ministry engages in is "inherently" or "primarily" religious, *supra* 24-27.

This case also presents the ideal vehicle to address these issues. As the court of appeals explained in its certification to this Court, the questions presented here are "novel legal questions." App.046. This Court has never interpreted the religious purposes exemption, App.045, and there are no disputed facts, App.008. This case is also likely to have a significant impact statewide and raises legal

issues likely to recur in future litigation. App.046. As the court of appeals explained, the correct interpretation of the exemption is "of crucial importance to religiously affiliated nonprofit organizations throughout the state, to employees of such organizations, and to the DWD, which must routinely apply the religious purposes exemption to determine whether such organizations are exempt from unemployment insurance coverage." App.046. And "a decision by the supreme court interpreting that term in Wis. Stat. § 108.02(15)(h)2 could provide guidance in interpreting . . . other statutory provisions" with similar language. App.060.

This case therefore easily satisfies the criteria for this Court's review. Wis. Stat. § 809.62(1r).

II. The court of appeals' decision violates the United States and Wisconsin Constitutions.

The court of appeals' startling decision that CCB and its subentities are not operated primarily for religious purposes also runs headlong into the strictures of the First Amendment. It does so by violating the church autonomy doctrine, the Free Exercise Clause, and the Establishment Clause. Each of these three violations separately renders the court of appeals' decision constitutionally infirm. Unless this Court intervenes, the law of Wisconsin will be left at odds with decisions of the United States Supreme Court and decisions of courts in other states. Only this Court (or the United States Supreme Court) can bring the law of Wisconsin back into alignment with the rest of the country.[4]

[4] This Court has confirmed that "the Wisconsin Constitution provides much broader protections for religious liberty than the First Amendment." *James*,

A. The court of appeals' decision violates the First Amendment principle of church autonomy.

The United States Constitution guarantees religious bodies "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." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). The United States Supreme Court has described this sphere of protection for church polity as "the general principle of church autonomy" or "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). These questions of "internal government" include the control of church property, the appointment and authority of bishops, and the hiring and firing of parochial school teachers, among other issues. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Kedroff*, 344 U.S. 94; *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Our Lady*, 140 S. Ct. at 2066.

The principle not surprisingly also extends to efforts by civil governments to divide up religious bodies according to secular lights. *Kedroff* is instructive on this point. There, in an effort to

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2021 WI 58, ¶ 36, 397 Wis. 2d 517, 960 N.W.2d 350 (cleaned up). Therefore, a "holding that the statute involved violates the First Amendment is a holding that, in these particulars, it also violated Art. 1, sec. 18, Wisconsin Constitution." *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 332-33, 198 N.W.2d 650 (1972) ("While words used may differ, both the federal and state constitutional provisions relating to freedom of religion are intended and operate to serve the same dual purpose . . . .").

combat Communist control, the New York Legislature attempted to separate certain Russian Orthodox churches "from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod" and transfer control to a different Russian Orthodox denomination based in the United States. *Kedroff*, 344 U.S. at 107. The United States Supreme Court roundly rejected this governmental effort to cut off sub-entities from the larger church body they belonged to. *Id.* at 116. Importantly, in a follow-up case, the Supreme Court extended the principle of *Kedroff* to *judicial* interference with internal government of churches. *See Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) ("[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize").

The decision below violates these principles. Everyone agrees that CCB is part and parcel of the Catholic Church and, specifically, the Diocese of Superior. Everyone agrees that CCB is controlled by the Diocese of Superior. And the court of appeals acknowledged that CCB exists for the purpose of implementing the ministry of the Diocese. App.039-040. Yet the court of appeals expressly disregarded CCB's relationship with the Diocese in deciding whether it is "operated primarily for religious purposes." That disregard ignores—and grossly interferes with—the internal church government of the Catholic Church. It also wrongly penalizes the Catholic Church for the way it organizes its church polity to further its ministry. By interfering with the Church's internal

government, the court of appeals' decision adversely "affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. Those violations of church autonomy are reason enough to grant review of the decision below.

B. The court of appeals' decision violates the Free Exercise Clause.

The court of appeals' decision also violates the Free Exercise Clause by subjecting CCB to differential and worse treatment—denial of the exemption—based on its Catholic beliefs and practices.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). That principle specifically extends to differential treatment among religions: thus, "a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service." *Id.* at 533 (citing *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953)); *see also Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (government officials denied Jehovah's Witnesses use of public park while allowing other religious organizations access). This free exercise inquiry looks not just to the "[f]acial neutrality" of a statute or regulation but also to "the effect of a law in its real operation." *Lukumi*, 508 U.S. at 535-36.

The court of appeals' decision violates this bedrock principle of neutrality among religions in several different ways. First, the approach used by the court of appeals discriminates against religious entities with a more complex polity. The Diocese of Superior has created and operates CCB as a separately incorporated ministry that carries out Christ's command to help the needy. It is undisputed that if CCB were not separately incorporated, the exemption would apply. App.041-042. Thus the decision below effectively penalizes the Catholic Church for organizing itself as a group of separate corporate bodies, unlike other religious groups that may include a variety of ministries as part of a single incorporated or unincorporated body. That penalty on the Church's polity violates the Free Exercise Clause's rule of neutrality.

The United States Supreme Court has taken the exact opposite tack in a recent case that concerned the Archdiocese of Philadelphia and its separately incorporated social services agency, Catholic Social Services. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). There, the Supreme Court treated CSS and the Archdiocese as effectively the same entity. *See id.* at 1874-76. That makes the court of appeals' decision to cut off CCB from the Diocese of Superior all the more baffling.

The court of appeals also violated the rule of neutrality among religions by targeting certain Catholic practices for special disfavor. For example, it held that CCB's activities were not primarily religious because:

- "CCB and its sub-entities do not operate to inculcate the Catholic faith"

- "they are not engaged in teaching the Catholic religion, evangelizing, or participating in religious rituals or worship services with the social service participants"
- "they do not require their employees, participants, or board members to be of the Catholic faith"
- "participants are not required to attend any religious training, orientation, or services"
- "they do not disseminate any religious material to participants"
- "[n]or do CCB and its sub-entities provide program participants with an 'education in the doctrine and discipline of the church.'"

App.040-041.

By identifying these characteristics of CCB's ministry as factors favoring denial of an otherwise-available exemption, the court of appeals did not treat CCB with religious neutrality. The court of appeals' rule thus favors religious groups that require those they serve to adhere to the faith of that group or be subject to proselytization. Yet Catholic doctrine teaches that limiting assistance solely to fellow Catholics or conditioning assistance on proselytism is wrong. *See* Catechism of the Catholic Church § 2463 ("How can we not recognize Lazarus, the hungry beggar in the parable (*cf.* Lk 17:19-31), in the multitude of human beings without bread, a roof or a place to stay?"); Pope Benedict XVI, *Caritas in Veritate* ¶ 27 (2009) ("*Feed the hungry* . . . is an ethical imperative for the universal Church, as she responds to the teachings of her Founder, the Lord Jesus, concerning solidarity and the sharing of goods.");

cf. Pope Francis Criticises Proselytization, Swarajya (Dec. 25, 2019) ("'Never, never bring the gospel by proselytizing,' Francis said. 'If someone says they are a disciple of Jesus and comes to you with proselytism, they are not a disciple of Jesus.'") And of course Wisconsin has no legitimate interest, much less a compelling one, in favoring anti-ecumenical religions over ecumenical ones. The Free Exercise Clause therefore poses another reason to grant review.

C. The court of appeals' decision violates the Establishment Clause.

One of the most familiar rules pertaining to church-state relations is the rule against entangling church and state. A corollary of this rule is the principle that secular courts must avoid deciding, or entanglement in, religious questions. Indeed, the First Amendment forbids "judicial entanglement in religious issues." *Our Lady*, 140 S. Ct. at 2069; *see also id.* at 2070 (Thomas, J., concurring) (noting that the Supreme Court "goes to great lengths to avoid governmental 'entanglement' with religion"). Moreover, the need to avoid entanglement also requires civil courts to "refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.); *see Wis. Conf. Bd. of Trs. of United Methodist Church, Inc. v. Culver*, 2001 WI 55, ¶ 20, 243 Wis. 2d 394, 627 N.W.2d 469, ("[T]he foremost limitation imposed by the First Amendment is that we refrain from resolving doctrinal disputes.").

The court of appeals' decision runs afoul of these fundamental Establishment Clause principles. First, the court of appeals' ap-

proach requires Wisconsin courts (and government officials) to conduct an intrusive inquiry into the operations of religious organizations that seek the religious purposes exemption. *See, e.g.*, App.040-041. That kind of thoroughgoing inquisition into the beliefs, practices, and operations of a religious body will always entangle church and state. *See L.L.N. v. Clauder*, 209 Wis. 2d 674, ¶ 20, 563 N.W.2d 434 (1997) ("It is well-settled that excessive governmental entanglement with religion will occur if a court is required to interpret church law, policies, or practices.").

Second, the court of appeals' mode of analysis—examining whether individual activities of religious nonprofits are "inherently" or "primarily" religious in nature—is a recipe for entanglement. For example, the court of appeals decided that "the work that CCB and its sub-entities engage in is primarily charitable aid to individuals with developmental and mental health disabilities" and that "while these activities fulfill the Catechism of the Catholic Church to respond in charity to those in need, the activities themselves are not *primarily* religious in nature." App.041. To make this determination, the court of appeals made itself the arbiter of which of a church's activities are "primarily" or "inherently" imbued with religious significance. App.041-042. And to do this, the court of appeals created out of whole cloth a set of criteria for second guessing the determination of the church that the activities it performed were in fact primarily religious in nature.

But when it comes to the activities of religious organizations, there are no simple lines to be drawn between "inherently religious" activities and those that are secular in nature, because the

entire institution is imbued with religious purpose. In *Hosanna-Tabor*, the Supreme Court specifically rejected this idea in the context of deciding who is a "minister" under the First Amendment, holding that "[t]he issue before us . . . is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed." *Hosanna-Tabor*, 565 U.S. at 193-94. What is true of ministers is also true of religious organizations—there is no neat division between the religious and the secular.

What makes the court of appeals' analytical approach even more entangling is that it also requires courts to second-guess churches' motivations. Indeed, the court *admitted* that it was rejecting CCB's view of the religious significance of its actions, recognizing that if it looked at CCB's purpose for engaging in these actions, it would likely have come to a different conclusion. App.038-040. That kind of second-guessing led the court to unsupportable—and constitutionally dangerous—conclusions: "While the Catholic Church's tenet of solidarity compels it to engage in charitable acts, the religious motives of CCB and its sub-entities appear to be incidental to their primarily charitable functions." App.043.

The consequences of this entangling approach would be devastating for church-state relations in Wisconsin. Unless this Court intervenes, Wisconsin executive branch officials and Wisconsin courts will have to undertake intrusive inquiries into the practices

of many different admittedly religious groups and then decide whether a series of specific activities carried out by these religious groups are all "inherently" or "primarily" religious. That would impermissibly entangle church and state in Wisconsin for years to come.

CONCLUSION

The petition for review should be granted.

Respectfully submitted,

Kyle H. Torvinen
(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

*Not admitted to the D.C. Bar; admitted to the N.Y. Bar; supervised by licensed D.C. Bar members.

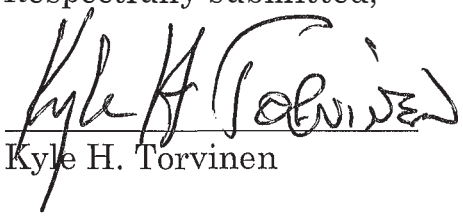
Dated this 12th day of January, 2023.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.62(4) and 809.19(8) (b), (bm), and (c) for a petition produced with a proportional serif font. The length of this petition is 7,923 words.

Dated this 12th day of January, 2023.

Respectfully submitted,



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This electronic petition is identical in content and format to the printed form of the petition filed as of this date.

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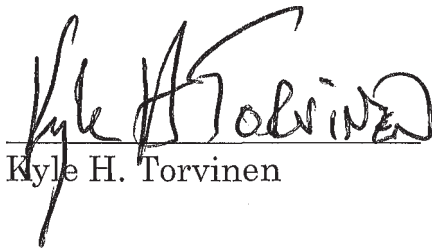

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I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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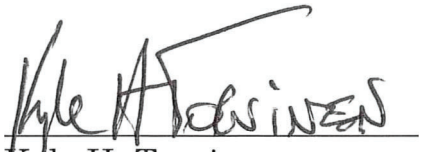


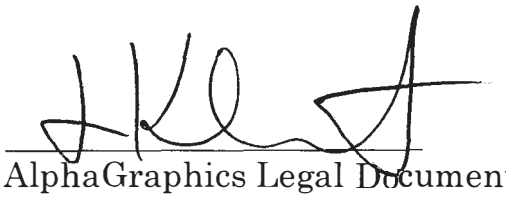
Kyle H. Torvinen

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 12, 2023, I filed with the Court by hand delivery and served copies of the Petition and Appendix upon counsel for Defendants-Appellants-Respondents by first class mail:

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

Christine Galinat
P.O. Box 8942
Madison, WI 53708
Counsel for State of Wisconsin Department of Workforce Development



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