SUPREME COURT OF WISCONSIN
Appeal No. 2020-AP-2007
Circuit Court Case No. 2019 CV 324

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 CIRCUIT COURT OF DANE COUNTY HONORABLE KELLY J. THIMM, PRESIDING

BRIEF OF NON-PARTIES THE MINNESOTA-WISCONSIN BAPTIST CONVENTION, LUTHERAN CHURCH—MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, AMERICAN ISLAMIC CONGRESS, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, THE ETHICS AND RELIGIOUS LIBERTY COMMISSION & ISLAM AND RELIGIOUS FREEDOM ACTION TEAM AS *AMICI CURIAE*

Gene C. Schaerr*
James C. Phillips*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 361-1061
gschaerr@schaerr-jaffe.com

Matthew M. Fernholz
CRAMER, MULTHAUF & HAMMES, LLP
1601 E. Racine Ave., Ste. 200
P.O. Box 558
Waukesha, WI 53187
(262) 542-4278
mmf@cmhlaw.com

*Application to appear *pro hac vice* forthcoming
Counsel for Amici Curiae

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INTRODUCTION

As World War II raged, placing patriotism at a premium, the U.S. Supreme Court rejected a state requirement that children recite the Pledge of Allegiance. The Court observed: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in … religion." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet that is what the Wisconsin Labor and Industry Review Commission and the court of appeals attempted to do here, though by more subtle means.

They did so through an implausible interpretation of a Wisconsin law exempting from the state unemployment insurance program any "organization operated primarily for religious purposes," if that organization is "operated, supervised, controlled, or principally supported by a church or convention or association of churches." Wis. Stat. § 108.02(15)(h)2. The Commission and the appeals court determined that the Catholic Charities Bureau (and its sub-entities) are not "operated primarily for religious purposes." Petitioner's Appendix ("App.") at 17. The Commission found that these religious organizations "provide[] essentially secular services and engage[] in

activities that are not religious per se." App. 99,108,116,124,132. The appeals court agreed, noting that the Bureau did not seek to spread the Catholic faith through its activities nor require that the people it serves be Catholic. App. 39-42. Yet Catholicism does not allow the faithful to serve only members of the faith or to proselytize nonmembers when serving them. Petitioner's Brief at 15 ("Pet.Br.").

The appeals court also relied on its determination that the Bureau and its sub-entities' "motives and activities [are] separate from those of the church" since they "are structured as separate corporations." App. 42. Yet the Bureau was created by the Diocese of Superior to be its social ministry arm to carry out the Catholic religious mandate to serve the poor and disadvantaged, App. 177,183, and is under continual control by the Diocese, Pet. Br. 16-17.

By imposing the state's view of what it means to be religious, based on organizational structure and the who and how of charitable service, the Commission and the appeals court are prescribing a single form of religious orthodoxy in the context of the state unemployment law. That violates the U.S. Constitution's Establishment and Free Exercise Clauses, together with the well-recognized "church autonomy doctrine" that is grounded in both Clauses.

ARGUMENT

I. A Ruling Against the Catholic Charities Bureau Would Undermine Religious Organizations' Ability to Carry Out their Religious Missions and Live their Faith.

Faulting the Catholic Charities Bureau for not being sufficiently religious because its activities serve the poor of *all* faiths puts the religious missions of many faiths in jeopardy. Most faiths believe that their religion requires them to do things for religious reasons that may not seem overtly religious. And few limit religious charity to those of their own faith. Likewise, many faiths avoid mixing charity with proselytizing.

Yet the Commission and the court of appeals adopted a cramped notion of being religious—one not found in many of Wisconsin's religions. Christianity is one example: The New Testament, defines "[p]ure" and "undefiled" "religion" to include "visit[ing] the fatherless and widows in their affliction." James 1:27 (KJV). Yes, secular social workers can also visit orphans and widows and assist them in their needs, but for Christians, this is the very essence of religion and is done out of religious faith.

Judaism too has long required almsgiving and charitable behavior toward the less fortunate, promising blessings to those who

do.[1] As has Islam—its fourth pillar is giving alms to the poor.[2] In fact, nearly all of the world's major religions, most of which are to be found in Wisconsin, have similar beliefs.[3] These faiths do not require the faithful to help only their own, but rather require the faithful to treat all as their brothers or sisters, regardless of belief. And how much better is the world because religions generally do *not* believe that the less fortunate are unworthy of help if they believe differently than the helper.

To carry out this religious mission of caring for the less fortunate of any faith, or none at all, the Diocese created an entity—the Catholic Charities Bureau. The Diocese could have created a Catholic Missionary Bureau to facilitate proselytizing, or a Catholic Printing Bureau to publish Catholic religious materials. That the Diocese created a separate arm that it controls to assist it in fulfilling

[1] *See, e.g.,* Isaiah 1:17 (NIV) ("Learn to do right; seek justice. Defend the oppressed. Take up the cause of the fatherless; plead the case of the widow.").

[2] *See* Quran 2:274 ("Those who give, out of their own possessions, by night and by day, in private and in public will have their reward with their Lord."); *id*. 3:92 ("You will never attain righteousness until you spend in charity from that what you love.").

[3] For example, in Sikhism and Hinduism, *Seva* or *Sewa* refers to "selfless service" and this involves "reaching out to serve and uplift all of humanity as an expression or devotion to the Creator." "Seva," SikhiWiki.org. In Buddhism, *Dāna* involves giving, such as food, clothing, medicine, and money, and can lead to one of the "perfections." *See generally* DANA: THE PRACTICE OF GIVING (ed. Bhikkhu Bodhi, 1995).

a specific religious mission does not make the activities of that arm any less religious. That would make no more sense than arguing that, because the Department of Justice exercises only a portion of the President's executive power, it cannot be considered as exercising "executive" functions at all. So too here: Whether the Diocese undertakes these religious activities itself or creates and supervises another entity to do so does not change the nature and purpose of the activity.

Moreover, by punishing the Catholic Church for choosing this organizational form to carry out this specific charitable religious mission, the Commission and the court of appeals threaten the ability of *all* religious organizations in Wisconsin to fulfill the mandates of their faith in the way they see as most beneficial. After all, specialization is common in our society. Why shouldn't religious organizations be able to practice their faith through the organizational structure they see as best suited to the religious task at hand? The state certainly does so, as the existence of the two main state actors in this case—the Commission and the court of appeals—attest.

If the court of appeals' decision is affirmed, religious organizations in Wisconsin will have to eschew creating, delegating

to, and supervising subject-specific entities to carry out their religious missions, and instead try to do everything themselves as a diocese or similar ecclesiastical body. That undermines their ability to fulfill all the mandates of their faith to the best of their ability, forcing upon them second- or third-best organizational structures. Religious organizations would also be forced, under the court of appeals' reasoning, to minister only to those who share their faith or to those they seek to proselytize. Such a stingy notion of religion does no one any good—not the faithful whose religion requires that they serve based on need rather than creed, and not the needy who are looking for a hand up without the strings of conversion attached.

II. The First Amendment Protects All Forms of Religious Polity and All the Means By Which the Religious Carry Out Their Faith.

This practical point dovetails with an important constitutional point: The First Amendment's protections do not ebb and flow based on the organizational form of a religious polity. *See Crowder v. Southern Baptist Convention*, 828 F.2d 718, 726-27 (11th Cir. 1987) (applying the First Amendment's church autonomy doctrine and rejecting the "argument that [because] the [Southern Baptist Convention] has a congregational, rather than a hierarchical, form of church governance," the doctrine does not apply). *See also Burgess v.*

Rock Creek Baptist Church, 734 F. Supp. 30, 35 n.2 (D.D.C. 1990) ("[T]he Court can discern no justification for refusing to apply the First Amendment analysis and reasoning of Supreme Court and lower federal court case law involving hierarchical churches to this case" where the defendant "is a congregational church"). In fact, numerous valid forms of religious polity exist, and government recognizing some but not others amounts to religious discrimination in violation of the First Amendment.

A. There Exist Numerous Valid Forms of Religious Polity.

Nearly as varied as doctrine among religious organizations are the organizational forms they take. For instance, some employ a more congregational structure, such as most Jewish, Muslim, Buddhist, Hindu, and Sikh congregations. Others form a more hierarchical structure, such the Catholic Church and The Church of Jesus Christ of Latter-day Saints. Of course, many religious organizations (e.g., Presbyterians) are not purely one or the other, existing on a continuum. Furthermore, within these organizational forms, religious organizations will employ a plethora of sub-entities to conduct their religious missions, as the Diocese of Superior did here.

But, according to the Commission and the court of appeals, a polity that allows such delegation of religious functions means that the religious organization forfeits its constitutional rights: If the Pope himself gives a meal to a homeless person, that is religious, but if the *Catholic* Charities Bureau does so under the Pope's command, that is not. Likewise, if a Catholic organization serves Catholics, that is religious, but if it serves non-Catholics, that is not. And if one simultaneously performs *two* religious activities—serving the poor not of one's faith while proselytizing them—that is religious. But if one does only one of those faith-mandated activities at a time, that is not religious.

Such distinctions make little constitutional sense. And they do not make religious sense for millions of Americans of varied faiths.[4]

[4] In the context of the Religious Land Use and Institutionalized Persons Act (RLUIPA), a court earlier this month faced the argument that a faith-based organization's "food distribution activities are part of its religious exercise." *Micahs Way v. City of Santa Ana*, Case No. 8:23-cv-00183-DOC-KES, at 6 (C.D. Cal. June 8, 2023) (Order Denying Motion to Dismiss). The government entity in that case opposing that argument contended that such activities are "purely administrative and … not religious in nature." *Id.* The court found such an argument not persuasive because the religious organization "points both to scripture and a general religious duty to perform food distribution as evidence that the activity is religious exercise." *Id.* at 6-7.

B. To Recognize One Organizational Form or Manner of Practicing One's Religion as Worthy of Constitutional Protection Over Others Would Violate the First Amendment

A decision – like that of the Commission and the court of appeals below – recognizing some organizational forms or manners of practicing religion over others violates the Establishment Clause, the Free Exercise Clause, and the "church autonomy doctrine" that the U.S. Supreme Court has held to be grounded in both Clauses.

Establishment. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The U.S. Supreme Court faced such a scenario in *Larson* with a statute that made "explicit and deliberate distinctions between different religious organizations." *Id*. at 246 n. 23. Specifically, the Minnesota statute only required religious organizations to register and report when they solicited more than fifty percent of their funds from nonmembers of the faith. *Id*. at 230. The Court found such a distinction "discriminates against such organizations in violation of the Establishment Clause." *Id*.

That unconstitutional statute is sibling to the situation here. The Commission and court of appeals violated the Establishment

Clause by preferring religious denominations that carry out their religious mission directly rather than through sub-entities that the denomination creates and controls. And these state actors violated the clause by preferring religious polities that choose to serve only members of their faith rather than the broader community or that also seek to convert nonmembers they serve. But those are choices of church polity that religious organizations are free to make according to the dictates of their theology, without fault or favor from the state. To allow Wisconsin to play favorites among denominations is the very stuff of which church establishments are made. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion,* 44 Wm. & Mary L. Rev. 2105, 2135-36, 2160-2167, 2176-78 (2003) (noting that established churches in England and in the American colonies during the founding era required certain religious tenets of all faiths, coerced conformity of practice and belief, and limited certain public benefits and opportunities to those in approved churches).

Free Exercise. Closely related to the Establishment Clause violation is a violation of the Free Exercise Clause. "This constitutional prohibition of denominational preferences is

inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245. As explained in Federalist No. 51, "Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise … its beliefs." *Id*. Yet "such equality would be impossible in an atmosphere of official denominational preference." *Id*.

For the state actors in this case to officially prefer denominations that are organized a certain way, serve only their own people, or serve them in a certain way (while proselytizing), discriminates against those who do not conform. In other words, Wisconsin is telling the Catholic Church and all religious organizations in the state that they must exercise their distinct faiths in government-approved ways to qualify for the unemployment law exemption. This pressures the church to conform its faith to the law.

The Commission argues that the statute is neutral and generally applicable. Response Brief at 35. But facial neutrality is not enough. The Commission and court of appeals have discriminated against the Catholic Charities Bureau based on religion and created a system of individualized exemptions by importing a standardless

conception of what counts as a valid religious purpose. Under the Free Exercise Clause, a law with those features must satisfy strict scrutiny. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

In sum, "the exclusion of [the Catholic Charities Bureau] from a public benefit for which it is otherwise qualified, solely because [of its organizational structure and breadth and style of service], is odious to our Constitution …, and cannot stand." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017).

Church Autonomy. The decisions at issue here also violate the "church autonomy doctrine" recognized by the U.S. Supreme Court. As the Court put it in a recent case, "[t]he First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (internal quotation marks omitted). That protection provides "a spirit of freedom for religious organizations, an independence from secular control or manipulation," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 186 (2012).

This constitutional protection flows from both the Free Exercise and Establishment Clauses. *See Our Lady*, 140 S. Ct. at 2060. Both clauses are implicated because "[s]tate interference in that sphere [of ecclesiastical decision-making] would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id.*

Here, allowing the Commission, aided by the court of appeals, to penalize the Catholic Church in Wisconsin because of the organizational form it chooses to carry out its religious missions, as well as how and to whom that religious mission can be conducted, violates the church autonomy doctrine. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341–42 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to … run their own institutions") (internal quotation marks omitted). In short, the Commission and the appeals court committed the "error of [an indirect] intrusion into a religious thicket," trampling the First Amendment "power (of religious bodies) to decide for themselves, free from state interference, matters of

church government as well as those of faith and doctrine." *Serbian East Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 719, 721-22 (1976) (internal quotation marks omitted).

That unconstitutional intrusion is no less harmful when it comes in the form of withholding an otherwise available exemption as compared to a more direct invasion. The Constitution forbids either form of incursion.[5]

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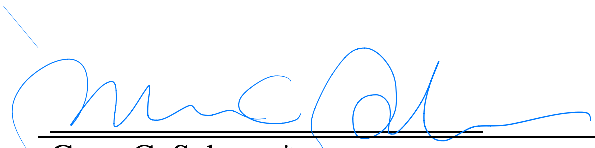
[5] The court of appeals also found the Catholic Charities Bureau activity did not have a religious purpose because the Bureau did not "require their employees, … or board members to be of the Catholic faith." App. 41. In a related context, the U.S. Supreme Court rejected a co-religionist requirement for a religious schoolteacher to be considered a minister under the First Amendment's ministerial exception—"insisting on this as a necessary condition would create a host of problems." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2068 (2020). That's because "determining whether a person is a 'co-religionist' will not always be easy," and "[d]eciding such questions would risk judicial entanglement in religious issues." *Id*. at 2068-69. So too here. How exactly would the Commission or a court determine whether the Catholic Church is serving someone who is sufficiently Catholic, or is sufficiently proselytizing to non-Catholics? That would require theological determinations wholly beyond the competence of a judge or bureaucrat, which is why that is forbidden territory for state actors under the First Amendment.

CONCLUSION

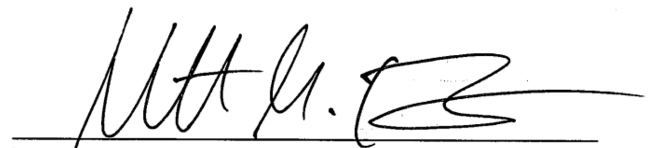
In rejecting the Bureau's application for an exemption, the Commission and the court of appeals have violated the established constitutional rule that "no official, high or petty, can prescribe what shall be orthodox in … religion." *Barnette*, 319 U.S. at 642. For that and the other reasons explained above, *amici* respectfully submit that court of appeals' decision should be reversed, and the circuit court's decision affirmed.

Dated this 21st day of June, 2023.

Respectfully submitted,



Gene C. Schaerr*
James C. Phillips*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 361-1061
gschaerr@schaerr-jaffe.com



Matthew M. Fernholz
CRAMER, MULTHAUF & HAMMES, LLP
1601 E. RACINE AVE., STE. 200
P.O. Box 558
Waukesha, WI 53187
(262) 542-4278
mmf@cmhlaw.com

Counsel for Amicus Curiae,
Minnesota-Wisconsin Baptist Convention, Lutheran Church—Missouri Synod, National Association of Evangelicals, American Islamic Congress, The Church of Jesus Christ of Latter-day Saints, General Council on Finance and Administration of the United Methodist Church, Ethics and Religious Liberty Commission, and Islam and Religious Freedom Action Team

*Application to appear *pro hac vice* forthcoming

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

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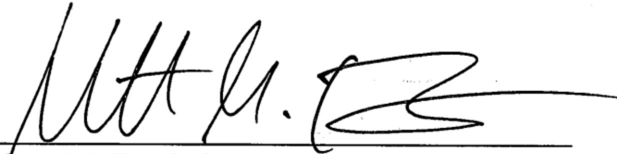

Matthew M. Fernholz
(State Bar No. 1065765)

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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BY

Matthew M. Fernholz
(State Bar No. 1065765