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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

NON-PARTY BRIEF OF THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS AND THE SIKH COALITION IN SUPPORT OF PETITIONERS

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INTEREST OF NON-PARTY *AMICI CURIAE*

The International Society for Krishna Consciousness ("ISKCON"), otherwise known as the Hare Krishna movement, is a monotheistic, Gaudiya Vaishnava faith within the broad Hindu tradition. ISKCON has over seven hundred temples and rural communities, one hundred affiliated vegetarian restaurants, and ten million congregational members worldwide. Its affiliated Hare Krishna Food Relief programs distribute more than one million free meals daily across the globe. ISKCON members believe that all living beings have an eternal relationship with God, or Lord Krishna, and that the purpose of life is to awaken our dormant love of God. Thus, protecting religious freedom for all people is an essential principle for ISKCON.

The Sikh Coalition is a nonprofit organization that works to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life, and educate the broader community about Sikhism, including the Sikh practice of communal meals called langar. The Sikh Coalition's goal is working toward a world where Sikhs, and other religious minorities in America, may freely practice their faith without discrimination or government intrusion. To that end, the Sikh Coalition has submitted *amicus* briefs in courts across the country advocating for religious liberty. *See, e.g.*, *Groff v. DeJoy*, No. 22-174 (U.S. Sept. 22, 2022); *Smith v. Ward*, No. 21-1405 (U.S. June 6, 2022).

Amici are concerned that the decision of the Court of Appeals impermissibly entangles government entities in religious

organizations' affairs because it requires a reviewing body to decide whether religious organizations' activities are, on balance, "primarily religious" or "secular." That assessment necessarily involves a searching inquiry into religious organizations' beliefs, doctrines, and sacred texts—an exercise this Court has recognized impermissibly intrudes in religious affairs and entangles church and State.

Amici believe that courts and other government officials are ill-equipped to conduct this analysis, as exemplified by the exceedingly narrow conception of "religious" activity endorsed by the Court of Appeals here. The Court of Appeals held that certain activities of a nonprofit organization affiliated with the Catholic Church were "secular," rather than "primarily religious," because they do not involve, for example, "evangelizing," "participating in religious rituals or worship services," or "teaching the Catholic religion," and they are offered to all regardless of faith. App.040-041. Any "religious motives," the court concluded, were "incidental." App.043. If a court were to analyze the religious tenets of *amici* and those of other faiths through this myopic lens, activities central to their religious worship and devotion would likely be deemed secular, rather than religious, in the eyes of the State. That risk is particularly acute for *amici* and other non-Western and minority religions in the United States that are less familiar to courts and other government entities. *Amici* are filing this brief to provide the Court with their unique perspectives on this issue.

INTRODUCTION

The Court of Appeals held that a reviewing body must look beyond an organization's religious motivation or purpose in determining whether the religious-purposes exemption in the Wisconsin Unemployment Compensation Act applies. The court required that "the reviewing body should also look to the organization's operations—its activities, meaning the particular services individuals receive—and determine if they are primarily religious in nature." App.025. The court then determined that the religious-purposes exemption did not apply to the Catholic Charities Bureau and its sub-entities (collectively, "CCB") because it deemed their charitable activities—though admittedly motivated by the principles of the Catholic faith—to be "secular," rather than "primarily religious." App.039-042.

The Court of Appeals committed two fundamental errors, which, if left uncorrected, will disproportionately disadvantage minority religious organizations. First, by requiring that a reviewing body perform a searching inquiry of a religious organization's activities to determine whether they are "primarily religious," the Court of Appeals' decision impermissibly entangles the State in religious affairs. Though the lower court asserted that it could avoid entanglement through "a neutral review based on objective criteria," App.038, no such "objective criteria" exist. Instead, determining which activities are "primarily religious" requires government officials to engage in study of a religion's sacred doctrines and rituals in an effort to discern what practices and beliefs are most central to that religion. This type of inquiry

necessarily entangles church and state and makes a government official—rather than the religious organization itself—the arbiter of religious doctrine.

Second, the Court of Appeals also erred by imposing an exceedingly narrow view of the activity it considers "primarily religious"—one that could be read to favor Western religious practice and exclude activities and practices fundamental to non-Western, minority religions in particular, including those of the Hare Krishnas and Sikhs. The Court of Appeals held that the activities of CCB are not "primarily religious" because CCB does not, for example, engage in "evangelizing," "participating in religious rituals or worship services," or "teaching the Catholic religion," and provides services to all regardless of faith. App.040-041. That rationale, if applied to the Hare Krishnas or Sikhs, would mean that core religious practices—such as dancing and the sharing of sanctified food, prasada for the Hare Krishnas, or langar for the Sikhs—could be deemed "secular" rather than "religious." The Court of Appeals' decision illustrates perfectly the dangers to religious organizations posed by a test that requires government officials to decide what activities are "primarily religious." These dangers that are only amplified for organizations whose non-Western and minority religious beliefs and practices likely are foreign to U.S. courts and government agencies.

ARGUMENT

I. The Court of Appeals' decision impermissibly entangles Church and State.

Courts have historically gone "to great lengths to avoid government 'entanglement' with religion." *Our Lady of Guadalupe*

Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2070 (2020) (Thomas, J., concurring). The entanglement doctrine "prohibits excessive intermixture of government and religion in the shape of intensive governmental control and surveillance of the activities of religious organizations." *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 262 N.W.2d 210, 214 (Wis. 1978) (citation omitted). In so doing, the doctrine "protects a religious group's right to shape its own faith and mission." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

The Court of Appeals' decision impermissibly entangles government officials in religious affairs. Because the religious character of an "activity is not self-evident," "determining whether an activity is religious or secular requires a searching case-by-case analysis[,]" which necessarily produces "considerable ongoing government entanglement in religious affairs." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343-344 (1987) (Brennan, J., concurring in the judgment). Fully understanding which practices and activities are dictated by a particular religion requires parsing sacred texts and understanding the history, tradition, and evolution of the religious faith. In the case of the Hare Krishnas, this exercise would, at a minimum, require study of Hindu religious texts, including the Bhagavad-Gita, the Srimad-Bhagavatam, and the Caitanya Caritamrita. Likewise, judging which activities are dictated by the Sikh faith would require the examination of their sacred scriptures, including the Guru Granth Sahib and the Dasm Granth, as well as a deep understanding of the cultural traditions

impacting Sikh faith practices. But absent an understanding of how these sacred texts have been interpreted by religious adherents and leaders over time, and within the current cultural context, such efforts will inevitably produce an incomplete or misleading picture of what the Hare Krishna or Sikh faiths require. That is why asking courts "to make distinctions as to that which is religious and that which is secular . . . is necessarily a suspect effort." *Espinosa v. Rusk*, 634 F.2d 477, 481 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982).

The analysis mandated by the Court of Appeals is tantamount to "interpret[ing] church law, policies, or practices," which this Court has recognized impermissibly entangles the State in religious affairs. *See L.L.N. v. Clauder*, 563 N.W.2d 434, 440 (Wis. 1997). The Court of Appeals' decision also "involves [government] officials in the definition of what is religious"—the essence of entanglement. *See Rusk*, 634 F.2d at 481; *see also Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 633-634 (2d Cir. 2020) ("The government must normally refrain from making assumptions about what religious worship requires.").

The Court of Appeals dismissed any concern of entanglement on the theory that reviewing bodies can "conduct a neutral review based on objective criteria" to determine whether the religious-purposes exemption applies. App.038. But there are no "objective criteria" for determining which activities are primarily religious "without examining religious doctrine or tenets." *Cf.* App.038. That is true for Western religions (*e.g.*, the Catholic Church), but is all the more true if a court seeks to understand what religious

worship requires for a Hare Krishna, Sikh, or any of the other non-Western, minority religions practiced in the United States. The only way for a reviewing body to decide whether a particular act or practice is a "primary" component of those faiths is to parse religious doctrines and tenets—the hallmark of government entanglement with religious affairs.

The entangling effect of the Court of Appeals' decision is further illustrated by the incentives it creates for religious organizations to alter their practices to avoid engaging in activities that would be viewed as secular. For example, to avoid the risk that a reviewing body would preclude it from invoking the religious-purposes exemption, a religious organization may limit its practice of providing charitable services regardless of the recipients' faith, or provide such services only in connection with proselytizing, or even not at all. The risk that religious organizations, "wary of [] judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments" is what the entanglement doctrine is designed to prevent. *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

II. The Court of Appeals adopted an exceedingly restrictive view of what activities are "primarily religious," which will disfavor minority religions.

The Court of Appeals compounded its error by adopting an exceedingly narrow view of what activities count as "primarily religious." The Court of Appeals held that CCB's activities are not "primarily religious" because CCB does not, for example, engage in

"evangelizing," "participat[e] in religious rituals or worship services," or "teach[] the Catholic religion," and it provides services to all regardless of faith. App.040-041. That restrictive view of "religious" activity sets a dangerous precedent that would exclude practices central to many non-Western, minority religious faiths. This Court should not permit the Court of Appeals' misguided view of religious activity to take root in the law of this State.

The United States Supreme Court has repeatedly recognized the dangers inherent in courts scrutinizing the nature, validity, or centrality of particular religious practices or beliefs. For that reason, courts have consistently declined to question whether a particular belief or practice is central to a particular religion—"[i]t is not," the Court has emphasized, "within the judicial ken to question the centrality of particular … practices to a faith." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (concluding that "what is a 'religious' belief or practice" does "not … turn upon a judicial perception of the particular belief or practice in question"). Following this principle, courts have consistently adopted a broad view of religious activity—one that turns largely on the motives and beliefs underlying the relevant conduct, not on some generally applicable "objective criteria."

For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court held that the Old Order Amish's practice of withdrawing their children from traditional school after Eighth Grade was religious activity protected by the Free Exercise Clause. The Court recognized that had the practice would not have been

protected by the First Amendment had it been "based on purely secular considerations," but because it sprung from a "deep religious conviction," the Free Exercise Clause applied. *Id*. at 215-216. Similarly, in *Espinosa v. Rusk*, *supra*, the Tenth Circuit invalidated an ordinance requiring charitable organizations, including churches, to obtain a license before engaging in solicitation. 634 F.2d at 479. The ordinance exempted "religious" activities from the license requirement, but deemed "secular" numerous activities performed by the church—including "the feeding of the hungry or the offer of clothing and shelter to the poor." *Id*. at 481. The court rejected the city's narrow view that to be "religious," the activity must "be purely spiritual or evangelical[,]" and, in turn, admonished the city's "broad definition of secular" that subjected the church's charitable acts to regulation. *Id*.

The principle underlying these and other cases is clear—the scope of religious activity extends beyond the "purely spiritual," *Rusk*, 634 F.2d at 481, and government officials may not deem activity "secular" that is motivated by a sincerely held religious belief.

The Court of Appeals' disregarded that principle in finding that the CCB's activities were "secular" rather than "primarily religious." It acknowledged that the CCB engaged in a range of charitable services, including assisting those "facing the challenges of aging, the distress of a disability, the concerns of children with special needs, and the stresses of families living in poverty" (App.047; *see also* Opening Br. 16), and that CCB engaged

in those activities because of a "professed religious motivation" (*see* App. 040), and to "fulfill the Catechism of the Catholic Church to respond in charity to those in need," (*see* App.041). Nonetheless, the Court of Appeals held that CCB was not engaged in "*primarily* religious activities" because it did not "operate to inculcate the Catholic faith," "engage[] in teaching the Catholic religion," "evangeliz[e]," or engage in "religious rituals or worship." App.040-041 (emphasis added). That is a severely constricted view of religious activity—one that confines religion to proselytizing or rituals performed in a Church, Temple, Synagogue, Gurdwara, or other place of worship on a holy day, and disregards other *equally* fundamental aspects of religious faith and practice, such as feeding the poor or caring for the sick and elderly. The Court of Appeals erred by analyzing these "activities" in a vacuum, stripping them of their motivation, purpose, and context, and in so doing deemed broad swathes of religiously motivated conduct to be primarily secular.

The Court of Appeals' "broad definition of secular," *Rusk*, 634 F.2d at 481, sets a dangerous precedent generally, but the perils of allowing government to define what activities are "inherently" religious or "primarily" religious are particularly acute for minority and non-Western religions, whose varied beliefs and practices are likely to be unfamiliar to government officials in the United States. As courts have candidly acknowledged, "lay courts familiar with Western religious traditions"—"characterized by sacramental rituals and structured theologies"—"are ill-equipped to evaluate the relative significance of particular rites of an alien

faith." *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981). As a result, minority religions, including those represented by *amici*, are at risk of having practices central to their faiths being deemed "secular" by a reviewing body applying the so-called "objective criteria," App.038, used by the Court of Appeals.

The Hare Krishnas, for example, engage in many practices that are central to their faith that resemble actions (broadly defined) engaged in by non-adherents for non-religious purposes. For example, the requirements of practicing Bhakti-yoga include mandates against intoxication, following a vegetarian diet, and practicing cleanliness of the mind and body, as central tenets of the Hare Krishna religion. These physical requirements are "one step on [the] path of God realization" and help followers "connect to the Supreme by means of loving devotional service."[1] Under the lower court's theory, however, Bhakti-yoga could be considered primarily *secular* because it may not always involve proselytizing or religious instruction and—like feeding the poor or caring for the disabled—is also an activity performed by others for non-religious purposes.

The same is true of "Prasadam"—the Hare Krishna "practice of preparing food, offering it to the Deity, and distributing it to the general population."[2] This practice involves the widespread

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[1] *Bhakti Yoga*, ISKCON, https://www.iskcon.org/beliefs/bhakti-yoga.php (accessed June 10, 2023).

[2] *Wonderful Prasadam*, Krishna.com, https://food.krishna.com/article/wonderful-prasadam (accessed June 10, 2023).

distribution of vegetarian food to millions worldwide, regardless of faith, and is distributed without proselytizing or direct religious instruction.[3] Yet, a court applying criteria used by the Court of Appeals would likely consider this activity to be no more religious than food stamps or a foodbank—"secular" charitable aid.

Practices central to Sikhs are equally at risk of being deemed secular under the Court of Appeals' rationale. Langar (or "open kitchen") is the Sikh practice of providing a community kitchen serving free meals and allowing people of all faiths to break bread together.[4] This practice is foundation to the Sikh way of life; it represents the principle of equality among all people regardless of religion, and expressing the Sikh ethics of sharing, community, inclusiveness, and the oneness of humankind. But despite the centrality of langar to Sikh practices, the meal is put at risk of being deemed "secular" under the Court of Appeals' criteria because it is served without religious instruction or proselytizing.

The Court of Appeals decision thus threatens to drain fundamental practices of minority religious faiths of their religious character—despite the clear religious dictates, motivations, and beliefs driving those activities. The decision sets a dangerous precedent, has no place in the law of this State, and is contrary to the principles of religious liberty embraced by the United States

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[3] *Food Relief Program*, ISKCON, https://www.iskcon.org/activities/food-relief-program.php (accessed June 10, 2023).

[4] *Langar: The Communal Meal*, The Pluralism Project, https://pluralism.org/langar-the-communal-meal (accessed June 14, 2023).

and Wisconsin Constitutions, and the religious-purposes exemption itself.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATES

A. Certification as to Form and Length. I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,957 words.

B. Certificate of Service. I certify that on June 21, 2023, I electronically filed with the Court the above *amici curiae* brief. I also served a true and correct copy of this *amici curiae* brief via email upon:

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