FILED
07-12-2023
CLERK OF WISCONSIN
SUPREME COURT

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-PETITIONERS

V.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,
RESPONDENT-CO-APPELLANT

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT
RESPONDENT-APPELLANT

NONPARTY BRIEF OF MARANATHA BAPTIST UNIVERSITY, MARANATHA BAPTIST ACADEMY, CONCORDIA UNIVERSITY WISCONSIN, THE WISCONSIN FAMILY COUNCIL, AND THE WISCONSIN ASSOCIATION OF CHRISTIAN SCHOOLS

DANIEL R. SUHR
(STATE BAR # 1065568)
N46W5455 Spring Court
Cedarburg, WI 53012
danielsuhr@gmail.com

CALEB R. GERBITZ
(STATE BAR # 1122558)
JAMES M. SOSNOSKI
(STATE BAR # 1118862)
111 E. Kilbourn Ave., 19th Floor
Milwaukee, WI 53202
(414) 273-1300 (telephone)
(414) 273-5840 (fax)
crg@mtfn.com
sjm@mtfn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 5

INTRODUCTION 7

I. AN ORGANIZATION IS "OPERATED PRIMARILY FOR RELIGIOUS PURPOSES" IF ITS OWN MOTIVATION FOR OPERATING IS PRIMARILY RELIGIOUS. 7

II. THE COURT MUST EMPLOY NEUTRAL PRINCIPLES TO DETERMINE WHETHER AN ORGANIZATION IS OPERATED PRIMARILY FOR RELIGIOUS PURPOSES. 10

A. Neutral principles avoid constitutional problems. 12

B. A neutral principles test works for hierarchical and congregational faith groups alike. 15

C. A neutral principles test works for minority and non-traditional religious communities. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Bruss v. Przybylo,
895 N.E.2d 1102 (Ill. App. Ct. 2008) 16
Carroll College, Inc. v. NLRB,
558 F.3d 568 (D.C. Cir. 2009). 11
Cath. Charities Bureau v. LIRC,
2023 WI App 12, 406 Wis. 2d 586, 987 N.W.2d 778 ..... 9, 12
Holy Trinity Comm. Sch., Inc. v. Kahl,
82 Wis. 2d 139, 262 N.W.2d 210 (1978) 11, 14
Jackson v. Benson,
218 Wis. 2d 835, 578 N.W. 2d 602 (1998) 8
Jones v. Wolf,
443 U.S. 595 (1979) 11
Kelly v. Methodist Hosp. of S. Cal.,
22 Cal.4th 1108 (Cal. 2000) 14
Our Lady of Guadalupe Sch. v. Morrissey-Berru,
140 S. Ct. 2049 (2020) 14
St. Augustine School v. Taylor,
2021 WI 70, 398 Wis. 2d 92, 961 N.W.2d 635 ..... passim
State v. Miller,
202 Wis. 2d 56, 549 N.W.2d 235 (1996) 16
United States v. Dykema,
666 F.2d 1096 (7th Cir. 1981) 9
Verdecchia v. Unemployment Comp. Bd. of Rev.,
657 A.2d 1341 (Pa. Commw. Ct. 1995) 8
Walz v. Tax Comm.,
397 U.S. 664 (1970) 8
Wis. Conf. Bd. of Trs. Of the United Methodist Church v. Culver,
2001 WI 55, 243 Wis. 2d 494, 627 N.W.2d 469 11

Statutes

Wis. Stat. § 108.02(15)(h)2. ..... passim

Other Authorities

Conference Report on H.R. 2015, Balanced Budget Act of 1997, 143 Cong. Rec. H6029-01 (1997) 9
Unemployment Insurance Program Letter No. 28-87, U.S. Dept. of Labor (June 10, 1987) 9
W. Cole Durham & Robert Smith, *Articles of Incorporation—Protecting Religious Polity*, 1 Religious Organizations and the Law § 10:11 (2022) 16

STATEMENT OF INTEREST

Amici are faith-based non-profit organizations that serve their faith communities and their broader communities through social services, primarily education. To embody their religious missions, they prefer or require employees to share their faith or to live in line with their community covenants. They embrace the American heritage of religious liberty as a blessing that allows them to fully live out their identity and purpose.

Amici are therefore generally interested in a robust defense of religious liberty in Wisconsin, including for faith-based employers. But they hold a particular interest in this case because, unlike Petitioners, they come from faith traditions that are not hierarchical like the Catholic Church. In other words, their different faith communities are not organized on a top-down, integrated model. Instead, they operate independent, autonomous, or affiliated models where each entity enjoys freedom to pursue its own purpose.

Amici urge this Court to interpret Wis. Stat. § 108.02(15)(h)2. to cover all religiously affiliated nonprofits which profess a sincerely held religious belief that their activities are primarily motivated by religious faith. This interpretation comports with § 108.02(15)(h)2.'s plain meaning and with the First Amendment.

The following is a listing of each Amicus which joins this brief, along with a brief statement of their specific interest in this case:

Maranatha Baptist University is a non-profit, private educational institution in Watertown, Wisconsin, serving its independent Baptist constituency. Maranatha currently qualifies for § 108.02(15)(h)2.'s exemption, a status the Court of Appeals' decision could affect.

Maranatha Baptist Academy is a non-profit high school in Watertown, Wisconsin, serving its independent Baptist constituency. Maranatha currently qualifies for § 108.02(15)(h)2.'s exemption, a status the Court of Appeals' decision could affect.

Concordia University Wisconsin is a higher education community in Mequon, Wisconsin, committed to helping students develop in mind, body, and spirit for service to Christ in the Church and the world. Concordia is affiliated with The Lutheran Church – Missouri Synod. Its status under § 108.02(15)(h)2. could be affected by the Court of Appeals' decision.

Wisconsin Association of Christian Schools was founded in 1977 to promote Christian education in Wisconsin. It has seventeen member schools, several of which may be impacted be the Court of Appeals' interpretation of § 108.02(15)(h)2. in this case.

Wisconsin Family Council is a 501(c)(3) nonprofit organization with a church network connecting pastors and other ministry leaders from a variety of faith backgrounds to policy issues. Many of the churches and their connected ministries in its constituency are covered by the § 108.02(15)(h)2.'s exemption, a status the court of appeals' decision could affect.

INTRODUCTION

Amici ask the Court to reject the Court of Appeals' test and instead adopt a test that uses neutral principles to determine whether that organization is primarily operated for religious purposes. Amici advance three arguments in support. First, Amici agree with Petitioners that the plain text of Wis. Stat. § 108.02(15)(h)2.'s permits only an inquiry an organization's motivations for operating, not the nature of its activities. Second, Amici agree with DWD that it is an organization's ***own*** religious purposes which are relevant under § 108.02(15)(h)2., not that of their affiliated church body. Third, Amici fear that the Court of Appeals' test—which requires a government determination of what qualifies as "religious purpose" (versus a secular purpose)—violates this Court's recent directive against excessive entanglement, as stated in *St. Augustine School v. Taylor*, 2021 WI 70, 398 Wis. 2d 92, 961 N.W.2d 635. They believe neutral principles answers the question presented while maintaining compatibility with precedent and constitutional principles.

ARGUMENT

I. AN ORGANIZATION IS "OPERATED PRIMARILY FOR RELIGIOUS PURPOSES" IF ITS OWN MOTIVATION FOR OPERATING IS PRIMARILY RELIGIOUS.

Section 108.02(15)(h)2. exempts from unemployment insurance taxes those who are employed by "an organization ***operated primarily for religious purposes*** and operated, supervised, controlled, or principally supported by a church or convention or association of churches." (Emphasis added.) Here, the Court is asked to determine when an organization is "operated primarily for religious purposes."

To begin, Amici disagree with DWD's position that § 108.02(15)(h)2.'s exemption should be strictly construed. (Resp. Br. 17.) This is the generally applicable standard of construction, but not here. "[T]hat rule of strict construction is superseded in instances where there is a strong possibility that the statute in question infringes upon a party's right to the free exercise of religion." *Verdecchia v. Unemployment Comp. Bd. of Rev.*, 657 A.2d 1341, 1345 (Pa. Commw. Ct. 1995) (cleaned up) (declining to strictly construe a Pennsylvania statute substantially identical to § 108.02(15)(h)2.). This principle fits with the determination of this Court and the U.S. Supreme Court to show a "benevolent neutrality" toward religious liberty, to allow some "play in the joints" to avoid entangling church and state. *Jackson v. Benson*, 218 Wis. 2d 835, 861 n.8, 578 N.W. 2d 602 (1998) (quoting *Walz v. Tax Comm.*, 397 U.S. 664, 668–69 (1970)).

Turning to the statute's text, it plainly describes when § 108.02(15)(h)2.'s exemption applies. An organization is "operated primarily for religious purposes" when its primary "purpose"—i.e., motivation—is religious in nature. The statute does not ask whether the organization's "activities" meet certain indicia of religious activity, such as holding traditional worship services or evangelizing. Indeed, many religious organizations perform functions which may at first appear secular but are in fact part and parcel of that organization's exercise of its religious faith. Faith-based schools are a prime (and uncontroversial) example.

The Court of Appeals' interpretation of § 108.02(15)(h)2. is deeply concerning to Amici because it creates the possibility that religious schools may lose the exempt status they have long enjoyed if their curriculum is

deemed not sufficiently "religious" by a government official. Although their instruction often focuses primarily on secular subjects, religiously affiliated schools are exempt under § 108.02(15)(h)2. because the ***motivation*** behind their existence is religious, regardless of what subjects are actually taught in the classroom.[1] It is uncontroversial that religiously affiliated schools are often "operated primarily for religious purposes."[2]

The Court of Appeals' test casts doubt on that rule. Rather than look at an organization's motives for operating, it instead adopted a test that analyzes whether an organization's ***activities***—regardless of their motivations—are unlike other religious activities like traditional worship services and evangelizing. *Cath. Charities Bureau v. LIRC*, 2023 WI App 12, ¶40, 406 Wis. 2d 586, 987 N.W.2d 778. In doing so, the Court of Appeals adopted a definition of religious activities from the Seventh Circuit's outdated decision in *United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981). This Court has said many times, "It is a cardinal maxim of statutory construction that courts should not add words to a statute to give it a certain meaning." *State v. Hinkle*, 2019 WI 96, ¶24, 389 Wis. 2d 1, 935 N.W.2d 271. Yet this is precisely what the Court of Appeals has done in this instance, amending the "religious purpose" requirement to read "an organization operated primarily for religious

---

[1] The federal government has long counted religious schools as being operated primarily for religious purposes. *See, e.g.*, Unemployment Insurance Program Letter No. 28-87, U.S. Dept. of Labor (June 10, 1987) ("The second category of services exempt from the required coverage are those performed in the employ ***of religious schools and other entities*** . . . ." (emphasis added)).

[2] *See also Conference Report on H.R. 2015, Balanced Budget Act of 1997*, 143 Cong. Rec. H6029-01, at 797 (1997) (noting that the federal version of § 108.02(15)(h)2. covers "employment in an elementary or secondary school operated primarily for religious purposes").

purposes *and undertaking primarily religious activities*." The statute has no justification for an analysis of the organization's "activities," and the Court of Appeals erred by writing one in where it did not exist.

DWD responds with its own plain meaning argument: that the "operated primarily for religious purposes" is redundant unless it has a robust "activities" component. But that is not so. A church convention or association of churches could sponsor any number of non-profit organizations that lack a religious purpose. It could start a nonprofit benefits fund to provide retirement security or health insurance to church employees. It could sponsor a non-sectarian social service ministry, like a community food bank. It could also use a nonprofit entity to hold property, generate unrelated business income, or make investments, like the Diocese of Madison's Holy Name Heights apartment complex (in the renovated diocesan seminary building). Holding property and generating investment income may be nonprofit purposes, but they are not religious purposes, and so would not qualify under the statute.

II. THE COURT MUST EMPLOY NEUTRAL PRINCIPLES TO DETERMINE WHETHER AN ORGANIZATION IS OPERATED PRIMARILY FOR RELIGIOUS PURPOSES.

The Court of Appeals' test suffers from a deeper flaw—one of a constitutional dimension. By adopting *Dykema*'s definition of what qualifies as "religious," the Court of Appeals directed courts to undertake the fraught inquiry of what activities are "religious" rather than secular. Neutral principles should govern this inquiry, as required by *St. Augustine*, 398 Wis. 2d 92. Applying neutral principles, a court must accept an organization's sincerely held religious belief that its purposes are religious. If a religious school sincerely believes it performs a religious function, then it does. It is not the

place of a court to second guess whether, under a particular belief system, education is a religious or secular endeavor.

This Court typically employs neutral principles when dealing with religious organizations. *See Wis. Conf. Bd. of Trs. Of the United Methodist Church v. Culver*, 2001 WI 55, ¶21, 243 Wis. 2d 494, 627 N.W.2d 469; *Holy Trinity Comm. Sch., Inc. v. Kahl*, 82 Wis. 2d 139, 262 N.W.2d 210 (1978); *St. Augustine*, 398 Wis. 2d 92, ¶44. "Neutral principles of law" means answering the factual question presented—Is this organization operated primarily for religious purposes?—by resorting to the types of resources that courts read all the time: "the language of the deeds, the terms of the local church charters . . . and the provisions in the constitution of the general church concerning the ownership and control of church property." *Culver*, 243 Wis. 2d 494, ¶21 (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)).

In most instances, a look at these governing documents should be sufficient to answer the question of whether an organization has a primarily religious purpose. However, there may be some instances where DWD reasonably questions whether an organization's primary purpose is in fact the "operating" purpose today. In such instance, neutral principles permit an evaluation of contemporaneous documents, such as "professions that are published on its public website," *St. Augustine*, 398 Wis. 2d 92, ¶48, or documents like a school's "course catalogue, mission statement, [or] student bulletin," *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009).

Beyond comporting with precedent, employing neutral principles is preferable to the Court of Appeals' test for three reasons.

A. Neutral principles avoid constitutional problems.

First, neutral principles avoid the constitutional problems created by the Court of Appeals' test. This Court correctly said in *St. Augustine*, "Excessive entanglement occurs 'if a court is required to interpret church law, policies, or practices.' Thus, the First Amendment prohibits such an inquiry.'" 398 Wis. 2d 92, ¶43. Indeed, multiple times in *St. Augustine* the Court made clear it was unconstitutional for government officials to undertake "investigation and surveillance of a school's religious practices." *Id.*, ¶47; *id.*, ¶49 ("As long as the Superintendent considers the school's professions and not its practices, the Superintendent remains on the correct side of the line.").

The Court of Appeals' test requires exactly such an investigation and surveillance as to an organization's practices. Rather than looking at the face of corporate documents, DWD will have to investigate whether the organization undertakes "corporate worship services" with "sacraments" and "liturgical rituals," "preaching ministry," "evangelical outreach to the unchurched," "missionary activity," "pastoral counseling," "customary church ceremonies," and "education in the doctrine and discipline of the church." *Cath. Charities Bureau*, 406 Wis. 2d 586, ¶39. How is such an evaluation anything other than "an investigation or surveillance with respect to the [non-profit's] religious . . . practices"? *St. Augustine*, 398 Wis. 2d 92, ¶5. DWD will necessarily have to investigate the non-profit's practices before determining its exemption eligibility, an intensive inquiry *St. Augustine* rightly rejects.

The Court of Appeals' test directs DWD to compile a list of the organization's activities and then adjudicate whether those activities are

"religious," based on how similar those activities are to the ones listed in the Seventh Circuit's *Dykema* decision. A compare-and-contrast test like this is an invitation to inconsistent exercises of individual discretion, as DWD officials weigh how much religious activity is enough to count as religiously motivated, or how many of the Court of Appeals' boxes must be checked. It also fails to appreciate that different religious cultures may have different conceptions of what is religious and what is not, or what activities are required by their faith.

Beyond an investigation of the church's activities, the Court of Appeals also requires a determination as to the church's doctrines and beliefs. Does a DWD official believe that education or health care is required by an organization's faith (or the faith of its sponsoring church), or are its charitable undertakings just a nice thing it does? Employing neutral principles—as the Court's precedents require—allows DWD and courts to avoid the messy business of deciding whether a faith's beliefs include charity or education or social services as an essential component of their doctrine. No church should have to provide a list of Bible verses about visiting the imprisoned or feeding the widow before qualifying for an exemption (not that such a ministry would qualify under the *Dykema* test anyway). Neutral principles allow the non-profit to answer that question for itself. If its professions of faith, such as in governing documents, assert that the organization is operated for a religious purpose, that is sufficient.

To Amici's particular interest, education, particularly in secular subjects, may at first appear to be a secular endeavor, but for many, the choice to attend or send their children to faith-based schools, even for secular

subjects, is a deeply religious one. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020) (demonstrating "the close connection that religious institutions draw between their central purpose and educating the young in the faith."). Likewise, for many religions, community service and charity are central components of living out one's faith. *See Kelly v. Methodist Hosp. of S. Cal.*, 22 Cal.4th 1108, 1122 (Cal. 2000) ("Health care is a social service that historically has been associated with religious groups, and plaintiff does not dispute that Hospital's founders were motivated by a sincerely held belief that healing the sick serves to advance the religious principles of the Methodist faith."). It is unsurprising, therefore, that many churches affiliate with and support organizations whose primary purpose is to live out a spiritual obligation to serve their communities and provide what they believe to be religious services like education and charity.

What Amici are advocating is nothing more than what this Court already said in *St. Augustine*, adopting a previous holding from *Holy Trinity*: "We are obliged to accept the professions of the school and to accord them validity without further inquiry." 398 Wis. 2d 92, ¶47 (quoting *Holy Trinity*, 82 Wis. 2d at 150). As for schools, so also for other non-profits. The state should accept the public profession of a religious purpose without further inquiry. It is no more "for the government to decide 'who or what is Catholic'" than for the government to decide whether serving the poor is an integral part of the Catholic faith. *Id.*, ¶35.

B. A neutral principles test works for hierarchical and congregational faith groups alike.

Second, to the particular interest of Amici, neutral principles ensure all Wisconsin faith communities have equal access to the statutory exemption. Petitioners devote considerable attention in their initial brief to an argument that whether § 108.02(15)(h)2. applies depends on the religious purposes of the organization's parent church, not the religious purposes of the organization itself. (Pet. Br. 30–31.) This test might protect an organization attached to a hierarchical denomination like the Catholic church, but it doesn't work for a non-hierarchical faith tradition like those of Amici. This would lead to inconsistent application of § 108.02(15)(h)2. to different faith-based organizations with similar religious purposes.

Consider, for example, Amicus Maranatha Baptist University. Maranatha qualifies for the exemption because it is "principally supported by a church or convention or association of churches" *See* § 108.02(15)(h)2. Although Maranatha is affiliated with a faith community, it exercises independent control over its operations and objectives. Put simply, Maranatha operates itself. Thus, any analysis of whether Maranatha is "operated primarily for religious purposes" must turn on whether Maranatha operates ***itself*** primarily for religious purposes.

This arrangement is not uncommon among religious denominations outside the Catholic tradition. The law has long recognized a distinction between hierarchical and congregational church bodies, with hierarchical churches being controlled by their denominations and congregational church bodies being controlled independently. W. Cole Durham & Robert Smith, *Articles of Incorporation—Protecting Religious Polity,* 1 Religious

Organizations and the Law § 10:11 (2022). And the First Amendment requires that its protections apply to both hierarchical and congregational churches alike. *Bruss v. Przybylo*, 895 N.E.2d 1102, 1123 (Ill. App. Ct. 2008) ("[A] congregational church, whatever its formality, enjoys equal protection under the first amendment with a hierarchical church.").[3]

Adopting the neutral test Amici advance addresses Petitioners' concerns, but without improperly excluding non-hierarchical faiths such as those in the Jewish, Protestant, and Muslim traditions. Applying neutral principles respects hierarchical churches' internal governance—they can command their subsidiaries to incorporate certain language in their corporate documents, or courts can consider "provisions in the constitution of the general church concerning the ownership and control" of affiliated entities. Meanwhile, neutral principles also respect non-hierarchical churches' internal arrangements by directing a court to the exempt organization's own documents, which it determines for itself without outside influence.

C. A neutral principles test works for minority and non-traditional religious communities.

Finally, neutral principles are most flexible in their protection of minority and non-traditional religious communities. "[T]he diverse citizenry of Wisconsin" holds a wide variety of "religious beliefs," a tradition of tolerance this Court has always respected. *State v. Miller*, 202 Wis. 2d 56, 65, 549 N.W.2d 235 (1996). Yet a test that is written solely for hierarchical

[3] Moreover, as in the case of *St. Augustine* and *Holy Trinity*, even ministries that identify as Catholic may nevertheless operate independently from the hierarchy. *St. Augustine*, 398 Wis. 2d 92, ¶¶50, 83.

churches ignores the many minority faiths that prefer a localized model, such as Jewish and Muslim communities. And it may be even less useful for unique and nontraditional faiths, which may have extremely small numbers of adherents and lack the traditional corporate structures that larger and more established church bodies often employ.

Even more problematic is the Court of Appeals' test, which is written with a particular cultural vision of what constitutes "religious" activities, reflecting a more-or-less exclusively traditional mainstream Christian vision for what counts as "religious." But not all non-traditional religions may exercise their faith in the same visible ways, while others may manifest their faith through a call to a particular type of charity or service. The Court of Appeals' test presumes that religious activities look like preaching and evangelism.

Adopting a complex, compare-and-contrast test administered by government officials invites an easier pass for traditional religions doing traditional religious things and a harder road for new, nontraditional, and minority religious that appear unfamiliar to the official at first glance. A neutral principles approach lets the organization define its mission and motivation for itself, without the imposition of an external or majoritarian cultural framework.

A nonprofit organization that (1) professes a sincerely held religious belief that community service a charity are religious activities and (2) is primarily operated to do that work, qualifies for § 108.02(15)(h)2.'s exemption. To answer whether an organization meets those two prongs, *St. Augustine* does not permit a more searching inquiry than a resort to neutral

principles, *i.e.*, an objective evaluation of whether the organization sincerely believes that its primary purpose is religious, as evidenced by its governing public documents.

CONCLUSION

For the forgoing reasons, Amici respectfully urge the Court to adopt an interpretation of § 108.02(15)(h)2. that does not leave behind the religiously motivated nonprofits the exemption was written to cover. Amici also ask that the Court clarify that an organization's ***own*** religious motivations are relevant when analyzing whether a nonprofit is "operated primarily for religious purposes."

Dated: July 11, 2023

Respectfully submitted,

Electronically Signed by Daniel R. Suhr

DANIEL R. SUHR
(STATE BAR # 1065568)
N46W5455 Spring Court
Cedarburg, WI 53012
danielsuhr@gmail.com

CALEB R. GERBITZ
(STATE BAR # 1122558)
JAMES M. SOSNOSKI
(STATE BAR # 1118862)
111 East Kilbourn Avenue
19th Floor
Milwaukee, WI 53202
(414) 273-1300 (telephone)
(414) 273-5840 (fax)
crg@mtfn.com
sjm@mtfn.com

Counsel for Amici Curiae
Maranatha Baptist University, Maranatha Baptist Academy, Concordia University Wisconsin, the Wisconsin Family Council, and the Wisconsin Association of Christian Schools.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2997 words.

Dated: July 11, 2023

Electronically Signed by Daniel R. Suhr
DANIEL R. SUHR