No. 21-886

In The
Supreme Court of the United States

ISMET ISLAMI,

Petitioner,

v.

KEMPER INDEPENDENCE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE

Respondent Kemper Independence Insurance Company is a wholly-owned subsidiary of Trinity Universal Insurance Company. Trinity Universal Insurance Company is, in turn, a wholly-owned subsidiary of the Kemper Corporation.

T. Rowe Price Group, Inc. owns 10% or more of outstanding stock in the Kemper Corporation.

No other corporation owns 10% or more of outstanding stock in the Kemper Corporation.

RELATED CASES

Pursuant to Rule 15.2, Kemper hereby notifies the Court that Petitioner Ismet Islami (to whom Kemper will refer as "Ismet" because her husband, Ydbi Islami, is also relevant to this case) correctly and fully identified all cases falling within the parameters of Rule 14.1(b)(iii).

Throughout this response brief, Kemper will refer to the Wisconsin Court of Appeals' decision, reported at *Kemper Indep. Ins. Co. v. Islami*, 2020 WI App. 38, 392 Wis. 2d 866, 946 N.W.2d 231, as *Islami I*, and the Wisconsin Supreme Court's decision, reported at *Kemper Indep. Ins. Co. v. Islami*, 2021 WI 53, 397 Wis. 2d 394, 959 N.W.2d 912, as *Islami II*.

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JURISDICTIONAL STATEMENT

Kemper does not dispute that (1) Petitioner's December 13, 2021 petition for certiorari is timely under Rule 13, as modified by orders of March 19, 2020, April 15, 2020, and July 19, 2021, relating to the COVID-19 pandemic; and (2) this Court has jurisdiction over the Wisconsin Supreme Court judgment pursuant to 28 U.S.C. § 1257(a).

Kemper does dispute that this case truly presents a federal issue under 28 U.S.C. § 1257(a) because this case presents exclusively issues of state law. Relatedly, Kemper does dispute that this case fulfills the criteria of Rule 10 for this Court's review.

COUNTERSTATEMENT OF THE CASE

Due to the stipulation filed on the eve of trial—resulting in summary judgment on stipulated facts—Kemper does not disagree with the facts Ismet alleges, though Ismet leaves out some facts. The factual recitations in the state court decisions are more complete and evenhanded: *Islami I*, 946 N.W.2d, ¶¶ 3-6; *Islami II*, 959 N.W.2d 912, ¶¶ 4-12.

REASONS FOR DENYING THE PETITION

I. ISMET DID NOT PRESERVE CONSTITUTIONAL ARGUMENTS.

The statement that "[t]his is a liberty based 'due process' case," (Pet. at i,) is false, and would surely come as a surprise to Waukesha County Circuit Court Judge William Domina; the three Wisconsin Court of Appeals judges who heard this case; and all seven justices of the Wisconsin Supreme Court. Ismet's characterization of this case would come as a surprise because Ismet did not raise, and the lower courts did not answer, *any* federal constitutional issue during any part of this case.

Only in a motion for reconsideration to the Wisconsin Supreme Court, filed on June 28, 2021—after that court's June 8, 2021 Decision—did Ismet assert that this case raised constitutional issues. Ismet never used the words "due process," "liberty," or "constitution" in any of her submissions to the court of appeals or supreme court, including her briefing to both courts and her petition for review to the Wisconsin Supreme Court. Naturally, of course, neither the circuit court, court of appeals, nor supreme court addressed the constitutional issues Ismet raises here. The terms "due process," "liberty, and "constitution" do not appear in the circuit court's oral ruling, the court of appeals' decision, or the supreme court's decision (all of which Ismet includes in her appendix). Only her motion for reconsideration to the Wisconsin Supreme Court, after

she lost and the case was finally over, did she reference these doctrines.

The Court has long "refused to consider petitioners' claims that were not raised or addressed below," particularly where the petitioner seeks review of a state court judgment. *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153, 169 (1992); *accord Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346, 348 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162, 22 L. Ed. 2d 398, 400 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."). This Court typically looks only to the state court of last resort to determine if the issue was properly raised. *See Kentucky v. Stincer*, 482 U.S. 730, 734 n.5, 107 S. Ct. 2658, 2661, 96 L. Ed. 2d 631, 640 (1987). Application of the rule is proper in this case because Wisconsin law would have deemed Ismet to have forfeited[1] the constitutional issues since she did not raise them in her petition for review to the Wisconsin Supreme Court, even if she had raised the constitutional issues in the circuit court or court of appeals. *State v. Sholar*, 2018 WI 53, ¶ 49, 381 Wis. 2d 560, 912 N.W.2d 89 ("The forfeiture rule has also been applied when a party asserts new issues before

[1] Wisconsin courts use the term "forfeiture" to describe a party's failure to raise and preserve an issue in a lower court, reserving the term "waiver" for intentional relinquishments of a known right. *E.g.*, *State v. Sanders*, 2018 WI 51, ¶ 24 & n.13, 381 Wis. 2d 522, 912 N.W.2d 16.

this court that were not raised in a petition for review . . . ").

Nor can Ismet claim surprise at the Wisconsin Supreme Court's decision and reasoning. That court essentially accepted Kemper's arguments, and largely mirrored the court of appeals' analysis. As Kemper analyzes in Section II.A.1. below, the Wisconsin Court of Appeals did not go quite as far as the supreme court in its analysis of Wisconsin family law; however, Kemper consistently argued the family law issue in the way that the supreme court held. Ismet cannot claim that the Wisconsin Supreme Court's decision and reasoning surprised her.

Ismet's forfeiture (or waiver) of the constitutional issues below renders review inappropriate under Rule 10 because the case does not otherwise include any issues of federal law. *See also* 28 U.S.C. § 1257(a).

II. THIS CASE PRESENTS SOLELY ISSUES OF STATE LAW.

The Wisconsin Supreme Court decided three issues in reaching its conclusion in this case: whether Ydbi is Ismet's "spouse" under the Insurance Contract and Wisconsin family law; whether Ismet, as an innocent insured, was entitled to recover insurance benefits under the terms of the Insurance Contract and Wisconsin law; and whether Wis. Stat. § 631.95(2)(f), which prohibits insurers from denying coverage for intentional acts that are part of "an act, or pattern, of abuse or domestic abuse," applies to Ismet. *Islami II*, 959

N.W.2d 912, ¶ 3. Ismet focuses on the first in her Petition for Certiorari, though Kemper addresses all three.

These are all issues of state law over which this Court has no supervisory authority under 28 U.S.C. § 1257(a). *See Int'l Longshoremen's Assoc. v. Davis*, 476 U.S. 380, 387, 106 S. Ct. 1904, 1910, 90 L. Ed. 2d 389, 398 (1986) ("[W]e have no authority to review state determinations of purely state law."). This is hardly a surprise given that Congress has specifically left most insurance regulation to the states. *See SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 460, 89 S. Ct. 564, 568, 21 L. Ed. 2d 668, 676 (1969) (noting that "interpretation[] and enforcement" of insurance contract are "the core of the 'business of insurance'" under the McCarron-Ferguson Act, 15 U.S.C. § 1012).

Even if Ismet's allegation that the Wisconsin Supreme Court's reading of Wisconsin family law violates her right to due process has merit, the Wisconsin Supreme Court identified an alternative rationale for its decision on that issue. *Islami II*, ¶¶ 16-17. Consequently, a conclusion that the Wisconsin Supreme Court's reading of Wisconsin family law violates due process does not require reversal of the judgment, rendering review inappropriate. *Davis*, 476 U.S. at 387 ("Nor do we review federal issues that can have no effect on the state court's judgment."); *Murdock v. Memphis*, 87 U.S. 590, 630, 22 L. Ed. 429, 442 (1874) (noting that this Court's exercise of appellate jurisdiction over state courts "has been based upon the fundamental principle that this jurisdiction was limited to the correction of errors relating solely to Federal law").

A. Whether Ydbi is Ismet's "Spouse" Under the Insurance Contract is Solely a Question of State Law.

In order for the Insurance Contract's Concealment or Fraud provision to preclude coverage, Ydbi must be an insured under the Insurance Contract. The Wisconsin Supreme Court identified two alternative grounds to reach the conclusion that he is. First, Ydbi was specifically referenced as an insured in portions of the Insurance Contract and consistently represented himself as such. *Islami II*, 959 N.W.2d 912, ¶¶ 16-17. Second, Ydbi is Ismet's "spouse" under Wisconsin family law, which means he is within the Insurance Contract's definition of an "insured." *Id.*, ¶ 15. Ismet's petition focuses on the second ground, alleging that the Wisconsin Supreme Court's interpretation of Wisconsin family law violates her right to due process.

Ismet's due process claim fails for many reasons. Her entire premise that the Wisconsin Supreme Court "eviscerated" the Wisconsin Marital Property Act is flawed because that law does not determine whether a person is another's "spouse." Even if she were correct in her criticisms of the Wisconsin Supreme Court's decision, the decision nonetheless does not violate her right to due process.

But first, she ignores that the Wisconsin Supreme Court's resolution of whether Ydbi is Ismet's spouse under Wisconsin family law is not dispositive of the issue or case. Thus, even if this Court were to accept certiorari and find that the Wisconsin Supreme Court's

reading of Wisconsin family law violated Ismet's right to due process, the ultimate result in this case would not change.

1. The Insurance Contract Independently Deems Ydbi an Insured Regardless of his Status as Ismet's Spouse.

Though Ydbi is not listed as a named insured in the homeowners portion of the Insurance Contract, the Wisconsin Supreme Court found ample evidence in the Insurance Contract itself to determine that Ydbi is an "insured" as a matter of law. *Islami II*, 959 N.W.2d 912, ¶¶ 16-17. Perhaps most strikingly, the automobile portion of the Insurance Contract lists Ydbi as a named "Operator" who is "married"; Ismet is similarly listed as "married." *Id.*, ¶ 16. Furthermore, both Ismet and Ydbi represented themselves to be "insureds" during the claims process. *Id.*, ¶ 17. Based on these considerations, the Wisconsin Supreme Court concluded that Ydbi was Ismet's spouse based on the Insurance Contract alone before ever analyzing Wisconsin family law.

The Wisconsin Court of Appeals was even more explicit in this reasoning, after briefly reviewing the relevant provisions of Wisconsin family law: "Ultimately, however, we do not base our decision on this fine point of Wisconsin family law. Rather, like the trial court, we view this as a matter of contract interpretation . . . " *Islami I*, 946 N.W.2d 231, ¶ 12. The Wisconsin Supreme Court's decision to include analysis of family law issues in its opinion appears to be based more on

its role as the primary court for law development in the state rather than a true need to resolve the question for this case. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682 (rejecting the doctrine of dicta in the supreme court opinions); *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246, 255-56 (1997) ("[T]he [Wisconsin] supreme court's primary function is that of law defining and law development.").

Consequently, even if this Court were to find the Wisconsin Supreme Court's interpretation of Wisconsin family law to violate Ismet's due process rights, the judgment nonetheless survives on the interpretation of the Insurance Contract based upon state law. *See Islami I*, 946 N.W.2d 231, ¶ 12. This renders review by this Court inappropriate. *Davis*, 476 U.S. at 387.

2. The Wisconsin Supreme Court Did Not Eviscerate the Wisconsin Marital Property Act.

Ismet alleges that the Wisconsin Marital Property Act—chapter 766 of the Wisconsin Statutes—declares that her marriage to Ydbi terminated when she obtained the judgment of legal separation. (Pet. at 14, 20.) Consequently, she believes, Ydbi was not her "spouse" at the time of the fire, so he was not an insured under the Insurance Contract, and his misrepresentations to Kemper do not preclude coverage for her. (*See id.*)

The Wisconsin Supreme Court (and all lower courts, importantly) disagreed, reasoning that Wisconsin's

legislation on Actions Concerning the Family—chapter 767 of the Wisconsin Statutes—controlled the question. *Islami II*, 959 N.W.2d 912, ¶ 20; *see also Islami I*, 946 N.W.2d 231, ¶ 11. Ismet alleges that applying chapter 767, rather than chapter 766, is such a flagrant misreading of the relevant statutes that her right to due process has been denied by the Wisconsin court system.

The entire premise surrounding Ismet's petition crumbles upon realizing that the Wisconsin Supreme Court interpreted chapters 766 and 767 consistently with both the plain language of the statutes and longstanding Wisconsin precedent. Ismet primarily relies on Wis. Stat. § 766.01(7), which defines "dissolution" as, in relevant part, "termination of a marriage by a decree of dissolution, divorce, annulment or declaration of invalidity or entry of a decree of legal separation or separate maintenance." Ismet jumps on this definition to mean that a marriage subject to a decree (or judgment) of legal separation is dissolved for all purposes. (Pet. at 20.)

In so doing, however, Ismet glosses over the fact that § 766.01 contains important limiting language: "In this chapter." Wis. Stat. § 766.01. Thus, by its plain terms, § 766.01(7) applies only to chapter 766; it does not pretend to define "dissolution" in other contexts.

Conversely, Wis. Stat. § 767.001(1f) defines "divorce" as "dissolution of the marriage relationship." The section does not otherwise define dissolution or legal separation, but it does make clear that divorce and

legal separation are separate concepts. § 767.001(1)(c)-(d) (stating that divorce and legal separation are separate actions that fall within the catchall phrase "action affecting the family").

The substance of chapter 767 demonstrates that legal separation and divorce are separate concepts. For example, a circuit court (state trial court) may grant a divorce only upon finding the marriage is "irretrievably broken," but may grant a legal separation upon a finding that the marriage is "broken." Wis. Stat. § 767.35(1)(b). A legal separation may be revoked on motion showing that the parties have reconciled, while a divorce can be revoked only with remarriage. § 767.35(4), (7). If a legal separation dissolved a marriage in the same way as a divorce, one would expect that the legal separation and divorce could be "undone" in the same way.

More strikingly, parties to a legal separation have the absolute right to convert the legal separation to a divorce upon motion of either. § 767.35(5) ("By stipulation of both parties, or upon motion of either party . . . the court *shall* convert the judgment to a judgment of divorce." (emphasis added)). This provision would be entirely unnecessary if Ismet were correct that a legal separation terminated a marriage in the same way as a divorce.

Finally, parties to a divorce may legally marry someone else once six months have passed from the judgment of divorce. Wis. Stat. § 765.03(2). No such right exists for persons subject to a judgment of legal

separation; they must convert their judgment to a divorce before marrying someone else. *See* Wis. Stat. § 767.35(5).

Wisconsin courts, and federal courts applying Wisconsin law, have long read these provisions to mean that persons subject to a legal separation are still formally married, unlike persons who are divorced; just as the Wisconsin Supreme Court and Kemper do here. The *Islami II* court cited to *Herbst v. Hansen*, 46 Wis. 2d 697, 706, 176 N.W.2d 380 (1970), for the proposition that "there are . . . rights and obligations *remaining in the marriage* after a legal separation." *Islami II*, 959 N.W.2d 912, ¶ 18 (emphasis and alterations by *Islami* court). The court then cited to *Kuhlman v. Kuhlman*, 146 Wis. 2d 588, 592, 432 N.W.2d 295 (Ct. App. 1988), for the proposition that chapter 766 "provides rules which govern the ownership as well as management and control of property owned by married persons *during their marriage* . . . [and] at death." *Islami II*, 959 N.W.2d 912, ¶ 20 (emphasis and alterations by *Islami* court).

Other decisions of Wisconsin state appellate courts and local federal courts confirm that chapter 766 is essentially a creditor's right statute, *see, e.g.*, *Sokaogon Gaming Enter. Corp. v. Curda-Derickson*, 2003 WI App 167, ¶¶ 10-11 & n.4, 266 Wis. 2d 453, 668 N.W.2d 736, and chapter 767 governs divorce and legal separation. *E.g.*, *Abitz v. Abitz*, 155 Wis. 2d 161, 176, 455 N.W.2d 609, 615 (1990) ("The Marital Property Act is designed to govern property ownership during the course of an on-going marriage and property division

only upon the death of a spouse. The Marital Property Act was not intended to alter divorce law."); *Long v. Long*, 196 Wis. 2d 691, 697, 539 N.W.2d 462, 465 (Ct. App. 1995); *see also In re Landsinger*, 490 B.R. 827, 830 (Bankr. W.D. Wis. 2012); *In re Czerneski*, 330 B.R. 240, 244 (Bankr. E.D. Wis. 2005) ("The Marital Property Act, on the other hand, has nothing to do with the division of property on dissolution of a marriage. It is concerned only with the spouses' ownership of property during the marriage and at their death." (quoting *Kuhlman*, 432 N.W.2d at 296)).

Rejecting Ismet's reading of chapter 766 does not "eviscerate" the chapter; it simply limits that chapter to its plain terms. The Wisconsin Supreme Court held that persons subject to a legal separation are, as a general proposition, spouses under Wisconsin law; the court said nothing about specific statutory provisions that differ from this general proposition, including chapter 766. *Islami II*, 959 N.W.2d 912, ¶ 20. Thus, Ismet misreads the decision when she asserts that persons subject to a legal separation will no longer benefit from chapter 766. (Pet. at 22-24.) Chapter 766 specifically holds, in a provision applicable to that chapter and that chapter alone, that legal separation is a form of dissolution under the Marital Property Act. Wis. Stat. § 766.01(7).

At no point has anyone, including the Wisconsin Supreme Court, questioned the efficacy of Ismet's judgment of legal separation to vest title to the house in her name alone and otherwise assign assets and debts. *See Islami II*, 959 N.W.2d 912, ¶ 4. Nor are the various

provisions in chapter 766 to which she cites, (Pet. at 22-23,) affected by the decision because the definition of "dissolution" in § 766.01(7) applies, by its own terms, to those provisions.

Suffice to say, *Islami II* did not break new ground or declare new law; it simply applied long-standing principles of Wisconsin family law to the facts of this insurance coverage case. This Court's review is therefore inappropriate and unnecessary.

3. Ismet has No Constitutional Right to Terminate Her Marriage Through Something Other than Divorce.

Even if we assume, *arguendo*, that the Wisconsin Supreme Court misread Wisconsin law, said misreading does not rise to the level of a constitutional violation. Ismet raises two constitutional provisions: first, the Fourteenth Amendment's prohibition on "depriv[ing] any person of life, liberty, or property[] without due process of law," U.S. Const. amend. XIV, § 1 (Pet. at 18-25); second, the First Amendment's guarantee against government action "prohibiting the free exercise" of religion, U.S. Const. amend. I (Pet. at 25-32).

Underlying both of Ismet's constitutional claims is an assumption that she has a constitutional right to terminate her marriage through a proceeding other than divorce. (*E.g.*, Pet. at i.) She fails, however, to show that she has a fundamental right to a divorce, or the

substantive equivalent of a divorce under either constitutional provision that she raises.

a. Due Process

This Court has repeatedly declared that issues of marriage from inception to dissolution are within the unique province of the states. *E.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404, 95 S. Ct. 553, 560, 42 L. Ed. 2d 532, 543 (1975) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved" (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734, 24 L. Ed. 565, 573 (1877))).

When this Court has become involved in divorce, the issue is typically procedural rather than substantive in nature. Perhaps this Court's greatest foray into divorce came in *Boddie v. Connecticut*, 401 U.S. 371, 380-81, 91 S. Ct. 780, 787, 28 L. Ed. 2d 113, 121 (1971). That case concerned a Connecticut law that required payment of fees as a precondition to filing a divorce action. *Id.* at 372. The Court declared the law unconstitutional as violating the due process clause of the Fourteenth Amendment. *Id.* at 380-81. The Court's analysis focused on the lack of any alternative means to terminate a marriage under Connecticut law: the alternatives were continued marriage or a divorce action. *Id.* Thus, when the courthouse doors were shut to those unable to pay the fees, those indigent persons lacked any legal mechanism to terminate their marriages.

This case presents a much different issue. The State of Wisconsin did not and is not preventing Ismet from terminating her marriage; she could (and still can) obtain a divorce at any time. *See* Wis. Stat. § 767.65(5). Rather, the State of Wisconsin is preventing Ismet from terminating her marriage *de facto* without utilizing the procedures to terminate her marriage *de juris*. This presents even a further step: not only does Ismet believe that she has a federal constitutional right to terminate her marriage, she believes she has the right to terminate her marriage through something called a legal separation rather than a divorce. In essence, she asserts a constitutional right to a divorce by another name.

Ismet has not identified, nor can Kemper find, any constitutional right to dissolve a marriage, whether by divorce or a procedure given some other title. *Cf. Williams v. North Carolina (Williams I)*, 317 U.S. 287, 301, 63 S. Ct. 207, 214, 87 L. Ed. 279, 287 (1942) (acknowledging that states may adopt rules for divorce that are more or less strict than others). Thus, Wisconsin could, if it so desired, eliminate any right to a divorce or legal separation altogether. *See id.*; *cf. also Williams v. North Carolina (Williams II)*, 325 U.S. 226, 274, 65 S. Ct. 1092, 1116, 89 L. Ed. 1577, 1605-06 (1945) (Black, J., dissenting) ("Implicit in the majority . . . is the assumption that divorces are an unmitigated evil, and that the law can and should force unwilling persons to live with each other. Others approach the problem as one which can best be met by moral, ethical and

religious teachings. Which viewpoint is correct is not our concern.").

Wisconsin is well within its bounds to offer divorce and legal separation as distinct alternatives, each with benefits and detriments. This situation is therefore unlike *Boddie* where the parties were forced to stay married until they could afford the filing fees: Ismet has full access to the courts to obtain a judgment of divorce or a judgment of legal separation, she simply wishes to obtain a divorce without violating her religious beliefs against divorce.

b. Free Exercise

Ismet's free exercise claim essentially alleges that Wisconsin infringes on her free exercise of religion by failing to provide a procedure to terminate her marriage in full that is called something other than "divorce." (*See* Pet. at 25-32.) The availability of a legal separation is insufficient in her mind because it does not fully terminate her marriage (as a divorce does). (*See id.*)

Ismet's position fails because requiring Ismet to obtain a divorce in order to terminate her marriage does not infringe on her right to free exercise. She largely cites general First Amendment authority when discussing her claim. (Pet. at 27.) The closest she comes to citing specific authority on the issue is her citation to *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013). This decision, however, is wholly inapposite here. *Korte* deals with federal law, so the Religious

Freedom Restoration Act, 42 U.S.C. § 2000bb-1 ("RFRA"), applies, rather than the First Amendment. *Korte*, 735 F.3d at 672. The First Amendment, rather than RFRA, applies to this state law case. *City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S. Ct. 2157, 2172, 138 L. Ed. 2d 624, 649 (1997) (holding RFRA unconstitutional as applied to states); *cf. also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695-96, 134 S. Ct. 2751, 2761-62, 189 L. Ed. 2d 675, 689 (2014) (reaffirming that RFRA applies to federal law only).

> Conversely, under the First Amendment,
>
> > government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.

Bowen v. Roy, 476 U.S. 693, 706, 106 S. Ct. 2147, 2155-56, 90 L. Ed. 2d 735, 749 (1986). Thus, for example, in *Bowen*, this Court held that a federal statute requiring welfare recipients provide a Social Security number did not violate the Free Exercise Clause despite religious objections to Social Security numbers.[2] 476 U.S. at 712. The Court reasoned that Congress could constitutionally force the choice between receipt of welfare benefits and following religious beliefs. *Id.*; *accord*

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[2] This case was decided under the First Amendment because Congress had not yet passed RFRA.

Bob Jones Univ. v. United States, 461 U.S. 574, 604, 103 S. Ct. 2017, 2035, 76 L. Ed. 2d 157, 181 (1983) (upholding tax rule denying tax-exempt status to religious schools that discriminate on the basis of race on the theory that forcing the schools to choose tax-exempt status or religious beliefs did not violate the First Amendment); *Prince v. Massachusetts*, 321 U.S. 158, 171, 64 S. Ct. 438, 444, 88 L. Ed. 645, 655 (1944) (upholding law that prevented Jehovah's Witness children "from doing there what no other children may do").

This case is similar to the above examples. Wisconsin law allows Ismet the choice to remain "fully" married to Ydbi, to partially disentangle the marriage relationship through a legal separation, or fully sever the marriage relationship through a divorce. Wisconsin law does not permit Ismet what she apparently wants: a judgment with the legal effect of a divorce but a different title. However, Wisconsin law also does not force Ismet to obtain a divorce against her religious beliefs.

Instead, Wisconsin law required Ismet to make a choice once she decided she no longer wanted to remain "fully" married to Ydbi: obtain a legal separation that largely disentangled the marriage relationship but left her formally married to Ydbi, in compliance with her religious beliefs; or obtain a divorce that fully severs her marriage relationship but violates her religious beliefs. As shown above, this is a constitutionally

permissible choice that all people of all religions face.[3] Like the religious college that wanted to prohibit interracial marriage *and* receive tax deductions in *Bob Jones Univ.*, or the religious family that wanted to receive government benefits *without* complying with the Social Security requirement in *Bowen*, Ismet faces a choice between a certain government benefit and her religious beliefs, but she is not forced to violate her religious beliefs. Like the Jehovah's Witness children in *Prince*, Wisconsin can prohibit Ismet from obtaining a benefit (a full divorce by another name) that no one else may get. 321 U.S. at 171.

Ismet's Free Exercise claim is without merit, which confirms that this is a state law case presenting state law issues. The Court should deny further review.

* * *

Ironically, Ismet's position is the one that limits the choices of Wisconsin citizens. She seeks to turn legal separation into divorce by another name, which means persons who wish to divide property and transfer debts while remaining married would be unable to do so unless the Wisconsin legislature added yet a

[3] We assume for the purposes of this discussion that Ismet truly wanted to terminate her marriage with Ydbi and that she obtained the legal separation for religious reasons. As the court of appeals identified, the record contains evidence—direct in the form of Examination Under Oath ("EUO") testimony, circumstantial in the form of Ismet's decision to let Ydbi continue to live with her in the house that she solely owned—that the legal separation was actually a financial planning device. *Islami I*, 946 N.W.2d 231, ¶ 3 n.3.

third option to those wishing to affect the legalities of their marital relationships.

Thus, if Ismet has no constitutional right to terminate her marriage at all, then she has no right to terminate her marriage through something called a legal separation rather than a divorce.[4] Consequently, the sole federal issue she raises is specious such that the Court should deny review.

B. The Proper Interpretation of the Insurance Contract's Concealment or Fraud Provision is Solely a Matter of State Law.

After concluding that Ydbi was an insured under the Insurance Contract, the Wisconsin Supreme Court then moved to the second issue it considered: whether the Insurance Contract's Concealment or Fraud provision precludes coverage for Ismet based on Ydbi's misrepresentations during the claims process. *See Islami II*, 959 N.W.2d 912, ¶¶ 21-30. That provision states:

> 2. Concealment or Fraud.
>
> a. Under Section I—Property Coverages, with respect to all "insureds" covered under this policy, we provide coverage to no "insureds" for loss under Section I—Property Coverages if,

[4] Ismet does, of course, have a constitutional right to have Wisconsin's marriage and dissolution laws applied equally to her as anyone else under *Boddie*, 401 U.S. at 380-81, but the Court did so here.

> whether before or after a loss, an "insured" has:
>
> 1) Concealed or misrepresented any fact upon which we rely, and that concealment or misrepresentation is material and made with intent to deceive; or
>
> 2) Concealed or misrepresented any fact and the fact misrepresented contributes to the loss.

Islami II, 959 N.W.2d 912, ¶ 6; *see also Islami I*, 946 N.W.2d 231, ¶ 5.

The Wisconsin Supreme Court concluded that the plain language of the provision precluded coverage for Ismet due to Ydbi's misrepresentations because the provision specifically brings "all 'insureds' " under its purview and provides coverage to "no 'insureds' " in the event of a violation. *Islami II*, 959 N.W.2d 912, ¶¶ 23-24. This conclusion was consistent with Wisconsin law distinguishing between "joint" and "several" obligations in an insurance contract. *Compare, e.g.*, *State Farm Fire & Cas. Ins. Co. v. Walker*, 459 N.W.2d 605, 610, 157 Wis. 2d 459, 471 (Ct. App. 1990) (finding concealment or fraud clause to unambiguously create joint obligations) *with Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 487-88, 326 N.W.2d 727, 740 (1982) (finding concealment or fraud clause to be ambiguous and thus create several obligations).

Ismet also argued that the Concealment or Fraud provision contradicts the Intentional Loss exclusion

because the latter provision specifically protects innocent insureds:

> 1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . . .
>
> 1h. Intentional Loss.
>
> Intentional Loss means any loss arising out of any act an "insured" commits or conspires to commit with the intent to cause a loss.
>
> This exclusion only applies to an "insured" who commits or conspires to commit an act with the intent to cause a loss.

Islami II, 959 N.W.2d 912, ¶ 7. The Intentional Loss Exclusion therefore does not exclude coverage for Ismet. The Wisconsin Supreme Court reasoned that the Intentional Loss Exclusion does not render the Concealment or Fraud provision ambiguous because each serves a separate purpose. *Id.*, ¶ 26. The Insurance Contract essentially puts into practice the aphorism that "the cover-up is worse than the crime." *See Skin Pathology Assocs. v. Morgan Stanley & Co.*, 27 F. Supp. 3d 371, 378 (S.D.N.Y. 2014). The Wisconsin Supreme Court was correct to apply the Insurance Contract language as written.

More to the point, though, Ismet does not develop any argument that the Wisconsin Supreme Court's conclusion on this issue violates her right to due process, or any other federal statutory or constitutional right that would render review permissible under 28 U.S.C. § 1257(a) or advisable under Rule 10. (*See* Pet. at 6, 8, 12 (referencing the Concealment or Fraud provision without developing constitutional argument).) Interpretation of an insurance contract between private parties does not present a federal issue. *See Erie Ins. Grp. v. Sear Corp.*, 102 F.3d 889, 892 (7th Cir. 1996) ("Interpretation of terms in an insurance policy is a question of state contract law."). Thus, whether the Wisconsin Supreme Court was right or wrong in its reading of the Concealment or Fraud provision, it does not present a question warranting this Court's review.

C. Whether Ismet Presented Sufficient Facts to Trigger Wis. Stat. § 631.195(2)(f) is Solely a Matter of State Law.

Having determined that Ydbi is an insured and his misrepresentations preclude coverage for Ismet under the terms of the Insurance Contract, the Wisconsin Supreme Court was left with a final question: whether Wis. Stat. § 631.95(2)(f) prohibits Kemper from denying coverage to Ismet. Section 631.95(2)(f) states:

> (2) GENERAL PROHIBITIONS. Except as provided in sub. (3), an insurer may not do any of the following:

> (f) Under property insurance coverage that excludes coverage for loss or damage to property resulting from intentional acts, deny payment to an insured for a claim based on property loss or damage resulting from an act, or pattern, of abuse or domestic abuse if that insured did not cooperate in or contribute to the creation of the loss or damage and if the person who committed the act or acts that caused the loss or damage is criminally prosecuted for the act or acts. Payment to the innocent insured may be limited in accordance with his or her ownership interest in the property or reduced by payments to a mortgagee or other holder of a secured interest.

The court of appeals and supreme court decisions in this case are the only appellate decisions citing to this section.

The Wisconsin Supreme Court agreed with Kemper that the record contains no evidence whatsoever that Ydbi had ever abused Ismet prior to the fire—a proposition that Ismet did not seriously contest. *Islami II*, 959 N.W.2d 912, ¶ 34. Instead, Ismet posited that the fire itself was an act of domestic abuse. The court rejected this swiftly, reasoning that Ismet's absence from the country precluded any inference that Ydbi intended the arson to harm or intimidate Ismet. *Id.*

This issue drew three dissenting justices. *Islami II*, 949 N.W.2d 912, ¶¶ 37-67 (Karofsky, J., dissenting). The dissent challenged the conclusion that the record was devoid of evidence that the arson was an act of domestic abuse, arguing that a factfinder should be able to make that determination. *Id.*, ¶ 58 (Karofsky, J., dissenting). Like the majority opinion, though, the dissent addresses the issue through the lens of state law; nowhere does the dissent analyze any constitutional issues. *See id.*, ¶¶ 37-67 (Karofsky, J., dissenting).

Whether the majority or dissent is correct on this issue, it presents a question of how to interpret a state statute, which does not warrant this Court's review. *See Pernell v. Southall Realty*, 416 U.S. 363, 368, 94 S. Ct. 1723, 1726, 40 L. Ed. 2d 198, 205 (1974) ("[W]e are barred from reconsidering a state court's interpretation of a state statute."); *accord Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 1886, 44 L. Ed. 2d 508, 515 (1975) ("This Court, however, repeatedly has held that state courts are the ultimate expositors of state law . . . "). Ismet has not developed any argument that this issue presents federal or constitutional issue, having not even mentioned Wis. Stat. § 631.95, domestic, or abuse in her petition.

CONCLUSION

This case presents issues of state law only. The Wisconsin Supreme Court resolved those issues. This case presents *no* issues of federal law, as demonstrated

by Ismet's need to manufacture and raise said issues only after the Wisconsin Supreme Court decision in this case. Consequently, this case does not present any federal issues under 28 U.S.C. § 1257(a) and certainly no issues satisfying Rule 10. For these reasons, the Court should deny review.

Respectfully submitted, January 14, 2022

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