No. 24-154

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES BUREAU INC., ET AL.,

PETITIONERS,

V.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, ET AL.,

RESPONDENTS.

On a Writ of Certiorari to the Wisconsin Supreme Court

BRIEF OF MARANATHA BAPTIST UNIVERSITY, MARANATHA BAPTIST ACADEMY, WISCONSIN ASSOCIATION OF CHRISTIAN SCHOOLS, AND WISCONSIN FAMILY COUNCIL AS AMICI IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a state violate the First Amendment's Religion Clauses by denying a religious organization an otherwise-available tax exemption because the organization does not meet the state's criteria for religious behavior?

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INTEREST OF THE AMICI CURIAE[1]

Amici are faith-based ministries or coalitions of faith-based ministries in Wisconsin. They also filed as amici at the state Supreme Court. App. 2a, 84a n.40.

Maranatha Baptist University is a non-profit, private educational institution in Watertown, Wisconsin, on a mission to develop leaders for ministry in the local church and the world, "To the Praise of His Glory."

Maranatha Baptist Academy is a non-profit high school in Watertown, Wisconsin, serving students and families who share its independent Baptist heritage.

The *Wisconsin Association of Christian Schools* was founded in 1977 to promote Christian education in Wisconsin. It has seventeen member schools serving students grades kindergarten through twelve.

The *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 these churches and their connected ministries engage in education, care for the pregnant, impoverished, and sick, and provide other social services.

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[1] No other counsel authored any part of this brief, and no other person or entity prepared or funded it. *R. 37.*

SUMMARY OF ARGUMENT & INTRODUCTION

The "purpose plus activities" test set forth by the Wisconsin Supreme Court is an invitation for bureaucrats at the Wisconsin Department of Workforce Development (or those in any other state) to reach arbitrary and necessarily inconsistent results as to the unemployment insurance exemption of religious ministries.

This will create a quagmire that is unconstitutional in itself. First off, the First Amendment prohibits government policies that invite bureaucrats to exercise discretionary review of religious organizations' exemptions. *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). The Wisconsin Supreme Court's holding will empower agency bureaucrats to determine on an individual basis whether a religious ministry's undertakings are sufficiently "typical" of other religious activities to qualify for the unemployment insurance exemption.

Many religious ministries will fail that test, as the Catholic Charities subsidiaries did here. That will then invite a second round of First Amendment problems down the road, once all these religious ministries are forced into the unemployment insurance (UI) system. Discharged employees are entitled to UI benefits unless they are fired for "misconduct," which Wisconsin defines as "conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees." Wis. Stat. § 108.04(5). Administrative

law judges will now determine whether a subsidiary of Catholic Charities has justifiably discharged an employee for "misconduct" when the employee makes a belief statement or engages in personal conduct that conflicts with the ministry's statement of faith or standards of conduct.

ARGUMENT

When this Court found other grounds to resolve the case in *California v. Grace Brethren Church*, it included a footnote explaining an alternative holding from the lower court that is worth quoting in full:

> The [district] court held alternatively that if the Secretary of Labor's interpretation of § 3309(b) were correct (i.e., Category I and II schools were not exempt from coverage [by the unemployment insurance system]), then that provision violated the First Amendment because it caused excessive governmental entanglement with religion by requiring "[intrusive] monitoring of the activities of employees of religious schools in order to determine whether or not those employees are exempt from unemployment insurance . . . taxes" and by requiring "[involvement] of state officials in the resolution of questions of religious doctrine in the course of determining the benefit eligibility of discharged employees of religious schools."

457 U.S. 393, 402 n.12 (1982) (quoting the district court orders).

The district court's observation is spot on. These Amici, Wisconsin-based faith-based social service ministries, are the ones who will live with this Court's decision. They are the ones who will be subject to intrusive monitoring and the whims of bureaucrats as to whether their discharged employees engaged in "misconduct," not to mention the additional taxation.

I. The "purpose plus activities" test is an invitation to bureaucratic arbitrariness.

The record below discloses the first problem that will arise when judges, administrative law judges, and agency examiners apply a multi-part, amorphous "purpose plus activities" test to ministries seeking a UI exemption: they will come to different conclusions about different ministries on a somewhat random or arbitrary basis. A multi-factor, "totality of the circumstances" test "results in an 'I know it when I see it test,' which is no test at all." *Bell Supply Co., LLC v. United States*, 348 F. Supp. 3d 1281, 1295 (Ct. Int'l Trade 2018). *See* App. 27a ("We do not adopt a rigid formula for deciding whether an organization is operated primarily for religious purposes."). Of course, an amorphous, flexible, non-"rigid" test will inevitably lead to inconsistent results, and many ministries will be forced to litigate an appeal to the Wisconsin Supreme Court for a thumb up or down.

That is what has happened to Catholic Charities. A state trial court determined that one sub-entity of Catholic Charities was operated primarily for religious purposes. App. 10a (describing holding of *Challenge Ctr., Inc. v. LIRC*, Douglas County Case No.

2014CV384 (George L. Glonek, Judge), itself App. 497a). Challenge Center, Inc. is also a CCB sub-entity that "provid[es] services to developmentally disabled individuals." App. 132a.

By contrast, a state agency bureaucrat denied the exemption to four other sub-entities providing similar services in a similar way. App. 11a. An administrative law judge reversed that determination, and then a reviewing administrative law commission reversed the ALJ. *Id*. A state trial court then reversed the commission, siding with the ALJ, before the state court of appeals and ultimately supreme court sided with the commission. *Id*.

These inconsistent decisions and litigation roller-coaster prove the ultimate point: an open-ended "purpose and activities" test will invite inconsistency. The rule of law is a law of rules: this ain't that. *See* Antonin Scalia*, The Rule of Law as a Law of Rules,* 56 U. Chi. L. Rev. 1175 (1989).

This Court has rejected any test "if it 'invites' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). *See id*. at 535 (law "incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner."). That is the inevitable result of the Wisconsin Supreme Court's test: every religious ministry will be subject to a bureaucrat's assessment of the nature of the ministry's conduct, including whether that conduct is sufficiently "religious." *Fulton*

does not permit an "I know it when I see it" test for what looks and acts like a "religious" organization.

This Court's standard is different. A law should rely on simple, neutral principles that are easily ascertainable to the naked eye. *Jones v. Wolf*, 443 U.S. 595, 603 (1979). Just as in *Jones* a court can evaluate a church's constitution to determine who owns or inherits its property, so too a Workforce Development examiner can evaluate a non-profit organization's constitution or ownership to determine whether it has a religious purpose motivating its work. The alternative is "intrusive monitoring of the activities of employees of religious" organizations "in order to determine whether or not" the activities are sufficiently religious in nature to get and keep an organization's UI exemption. *Grace Brethren Chur*ch, 457 U.S. at 402 n.12 (quoting district court order).

II. Forcing religious ministries into the unemployment insurance system is an invitation for further First Amendment conflict.

Courts may not "intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 736–37 (2020). *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U. S. 171 (2012).

In *Our Lady of Guadalupe*, this Court held the First Amendment barred courts from considering whether Ms. Morrissey-Berru was the victim of age

discrimination because she was employed in a ministerial position. She claimed "the school had demoted her and had failed to renew her contract so that it could replace her with a younger teacher. The school maintains that it based its decisions on classroom performance." *Id*. at 742. Neither argued that she was removed because of her failure to live by or believe in the school's religious tenets. But even though the school's religious beliefs were not central to the dispute, the court nevertheless could not intervene because she held a ministerial role.

If courts cannot hear and decide such a dispute because of First Amendment principles, how can an administrative law judge at the Department of Workforce Development pass on whether a ministry's employee was discharged for misconduct? App. 85a n.40 (Grassl Bradley, J., dissenting) (pointing out the incongruity between the ministerial exception test and the UI exemption test: "why [should] Catholic colleges and schools receive such radically different treatment under the test it employs in this case"?)

What if an employee is terminated because his or her religious beliefs no longer align with the ministry's statement of faith, *see Garrick v. Moody Bible Inst*., 95 F.4th 1104, 1107 (7th Cir. 2024), or if they engage in personal conduct that conflicts with the ministry's statement of faith, *see Demkovich v. St. Andrew the Apostle Par*., 3 F.4th 968, 973 (7th Cir. 2021) (en banc)?[2]

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[2] *See* App. 8a ("CCB's code of ethics, which is 'displayed prominently in the program office of all affiliate agencies,' likewise sets forth the expectation that 'Catholic Charities will in its activities

And if an ALJ cannot lawfully pass on such a case, is it fair that ministries like Catholic Charities must pay UI taxes, but then many, most, or even all of their employees cannot receive UI benefits because the ALJ cannot constitutionally determine whether their discharge was for cause because they hold a ministerial position?

The answer cannot be, "No one at these subsidiaries of Catholic Charities Bureau will qualify for a ministerial exemption because the employer wasn't enough of a ministry to qualify for an exemption in the first place." Indeed, spotlighting that inquiry just highlights the problems with the typicality test.

A faith-based high school like amicus Maranatha Baptist Academy might not be recognized as "religious" to receive the exemption, *see* Pet. 22 (discussing holding of *Empl. Sec. Admin. v. Baltimore Lutheran High Sch. Ass'n*, 436 A.2d 481 (Md. 1981)), yet its teachers and principals (*i.e.*, most of its workforce) could still qualify as ministers under *Our Lady of Guadalupe* and *Hosanna-Tabor*. Teachers could qualify as ministers if they lead prayers and attend chapel services with their students, even if the school does not qualify for a UI exemption because prayer and chapel account for one hour a week, and the other 39 hours a week are secular curriculum like science and math. The same result could pertain for a hospital chaplain, *see* Pet. 21 (discussing *Terwilliger v. St. Vincent Infirmary Med. Ctr.*, 804 S.W.2d 696, 699 (Ark.

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and actions reflect gospel values and will be consistent with its mission and the mission of the Diocese of Superior.'").

1991)), or a counselor, *see* Pet. 21–22 (discussing *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 7 (Colo. 1994)).

The district court was right in *Grace Brethren Church*: involving "state officials in the resolution of questions of religious doctrine in the course of determining the benefit eligibility of discharged employees of religious schools" will be a continual constitutional headache. 457 U.S. at 402 n.12. The answer is not to live through that nightmare, but to recognize the reality to which it points: if a number of ministry employees qualify for the ministerial exception under employment law, it makes sense that they are employed by a ministry that is actually religious, and therefore should qualify for a religious exemption from UI taxes.

CONCLUSION

As faith-based providers of ministry-based services in Wisconsin, Amici are the ones who will live with this Court's decision. They and their members will have to justify to a bureaucrat in Madison whether their school, hospital, pregnancy resource center, or food bank gives out enough Gospel tracts, sufficiently stridently recommends attendance at chapel services, or prays with and not just for their program participants.

The Court should not permit this infringement on the First Amendment rights of the Petitioners or Amici. The decision below should be reversed.

Respectfully submitted,

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