

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CATHOLIC CHARITIES BUREAU, INC.,)
ET AL.,)
 Petitioners,)
 v.) No. 24-154
WISCONSIN LABOR & INDUSTRY REVIEW)
COMMISSION, ET AL.,)
 Respondents.)

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WISCONSIN LABOR & INDUSTRY REVIEW)

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Washington, D.C.

Monday, March 31, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 24-154, Catholic Charities Bureau versus the Wisconsin Labor & Industry Review Commission.

Mr. Rassbach.

ORAL ARGUMENT OF ERIC C. RASSBACH
ON BEHALF OF THE PETITIONERS

MR. RASSBACH: Mr. Chief Justice, and may it please the Court:

This case is not complicated. The Wisconsin Supreme Court got it wrong when it interpreted a state-law religious exemption to favor what it called "typical" religious activity and when it held that helping the poor can't be religious, because secular people help the poor too. To resolve this case this Court need do nothing more than say that the Constitution doesn't allow courts to do that.

That conclusion breaks no new doctrinal ground, and most courts have no difficulty applying religious exemptions constitutionally. The problem here is that Wisconsin draws distinctions along theological

1 lines, something that this Court has repeatedly
2 forbidden.

3 Wisconsin compares its rule to the
4 ministerial exception. But Wisconsin's rule
5 would be equally unconstitutional in a
6 ministerial exception context. No court would
7 hold that clergy who preach on Saturday are not
8 ministers because preaching on Sunday is more
9 typical. Nor would any court hold that a
10 religious leader who helps the poor isn't a
11 minister because secular leaders help the poor
12 too. By that measure, Mother Teresa might not
13 qualify.

14 In short, there is nothing wrong with
15 the statutory text here or with how most
16 legislatures and courts deal with religious
17 accommodations. The problem is how the
18 Wisconsin Supreme Court applied the religious
19 purposes exemption.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Can a state impose
22 any limits on the exemptions?

23 MR. RASSBACH: Absolutely --

24 JUSTICE THOMAS: For religious
25 organizations?

1 MR. RASSBACH: Absolutely, Your Honor.
2 We're asking only here that -- that they not be
3 -- discriminate along theological lines. So
4 we're not saying that, you know, if you have a
5 religious motivation, you get a -- a religious
6 exemption no matter what the issue is.

7 What we're saying is once you have an
8 exemption in place, that then you have to -- the
9 Constitution requires you to apply it
10 evenhandedly.

11 JUSTICE THOMAS: Well, wouldn't that
12 be problematic if various religious groups set
13 themselves up differently? Some incorporate,
14 some don't, some are -- I mean, you make a point
15 that you are required canonically to not -- to
16 have a different organization from the Diocese
17 itself.

18 Some organization or religious
19 organizations may not have that requirement. So
20 can it -- can the state make any distinctions
21 between different organizations, religious
22 organizations?

23 MR. RASSBACH: I -- I think -- I think
24 that they can. I do think that there are
25 constitutional guardrails to that. I don't

1 think this case presents those, because this is
2 a case about an existing religious exemption and
3 whether that is applied evenhandedly or
4 selectively.

5 And in our view, the -- both the
6 Larson case and the Lukumi case say that
7 selective enforcement or application of a
8 religious exemption is a problem. Larson, in
9 particular, says that --

10 JUSTICE KAGAN: Well, maybe the same
11 kind of question that Justice Thomas raised, but
12 even within this given religious exemption, are
13 you saying that there can be absolutely no
14 distinctions; in other words, that any group
15 that comes in and says we are a religious group
16 doing religious activities for religious
17 purposes qualifies, sort of no matter what, that
18 there's no looking behind that at all?

19 MR. RASSBACH: No, I -- I think, for
20 example, the -- this particular exemption is
21 also -- there's a separate requirement, which
22 isn't disputed among the parties, about whether
23 Catholic Charities is controlled by a church.
24 So that's sort of another condition precedent to
25 getting this exemption.

1 And we don't see a problem with --
2 with that particular kind of limitation. So I
3 -- I think -- I want to be very clear, we're not
4 here to say, you know, limitless exemptions.
5 What we're saying is that, once you have --

6 JUSTICE KAGAN: Totally. But I think
7 what Justice Thomas's questions, my questions
8 are just -- you know, is there a line someplace
9 even if you fall on a side of the line that you
10 want to fall on?

11 MR. RASSBACH: Right. I think once
12 you're inside the exemption, there's obviously a
13 -- a requirement that it be sincere. And I
14 think also there's a requirement that it be,
15 say, religious not philosophical. But other
16 than that, I do think that there has to -- you
17 know, at that point, you probably do need to
18 start treating the different groups equally.

19 CHIEF JUSTICE ROBERTS: What if you
20 have a religion that thinks it's a sin to eat --
21 eat meat, and they -- to promote eating of
22 non-meat dinners they open a restaurant, but
23 it's only vegetables and, you know, non-meat?
24 Could -- do they have a claim to be exempt from
25 state taxes, food taxes, everything else,

1 because that's a --

2 MR. RASSBACH: Well --

3 CHIEF JUSTICE ROBERTS: So, assuming
4 it's a sincerely held belief and it's important
5 to them, and you're going to be taxing them --
6 you're going to be taxing the exercise of their
7 beliefs?

8 MR. RASSBACH: So I think it depends
9 on whether the statute that's, you know,
10 imposing the tax says, you know, this applies to
11 meat-eating people or not to meat-eating people.
12 That -- that's what we have to --

13 CHIEF JUSTICE ROBERTS: It just
14 applies -- applies across the board. And they
15 claim an exemption from it because this is a
16 part of their religious exercise.

17 MR. RASSBACH: I -- I don't think
18 that's -- I -- I don't think that that would be
19 -- they would necessarily have a claim there
20 because it's not something where the religious
21 organization is being discriminated against
22 along theological lines. That is, there's a --
23 a rule across the board.

24 Now, I do think -- with respect to the
25 claims that we've may in this particular case.

1 Now, of course, let's say it's like Lukumi,
2 where very similar issues came up with respect
3 to ritual slaughter by Santeria priests, and the
4 Court found no, you don't actually get to make
5 these kinds -- you know, you don't get to
6 gerrymander it so that only certain groups are
7 not allowed to, you know, do animal slaughter.

8 In -- and in Lukumi, of course, there
9 was both secular, allow -- allowed slaughter but
10 also religious. So there was a carveout for
11 kosher slaughter, as well as slaughter for other
12 reasons in Lukumi. So that's -- that's what
13 we're talking about with the -- the selectivity
14 in this -- in this case.

15 JUSTICE JACKSON: So can I just be
16 clear on your argument? Because I'm just
17 wanting to understand it.

18 It sounds like you are saying that to
19 the extent the state has chosen to exempt
20 religious groups, the line that they are drawing
21 divides Catholic Charities, which don't perform
22 certain, quote/unquote, "typical" religious
23 activities with respect to their charity and
24 other kinds of religions which may evangelize,
25 proselytize, or whatever. Is that -- so it's

1 the discrimination between Catholic Charities
2 and charities run by other kinds of churches
3 that you are focused on?

4 MR. RASSBACH: That's right. Because
5 this is just within a religious exemption that
6 already exists. And they are disfavoring
7 Catholic Charities because they serve
8 non-Catholics because they hire non-Catholics
9 and because they have -- they don't proselytize.

10 JUSTICE JACKSON: Yeah. So let me
11 just ask you -- I mean, I -- I totally see that,
12 and I do think that it -- it raises at least the
13 neutrality problem that you're talking about.

14 I'm wondering if the exemption was
15 actually designed to work that way and whether
16 Wisconsin may be at least -- I mean, obviously,
17 they have the right to say whatever they want
18 about their state statute, but to the extent
19 that they're following the federal law, I wonder
20 whether "for religious purposes" isn't really
21 about the motivation, that instead it is about
22 the kinds of activities that the organization
23 undertakes.

24 And so when we look, for example, at
25 the legislative history of the federal

1 provision, they're very clear in terms of making
2 the line be between a college devoted to
3 preparing students for the minister -- ministry
4 novitiate, which I understand is sort of a place
5 for people, nuns and the like, to decide whether
6 or not they are meant for the faith, or a
7 house -- quote, "a house of study training
8 candidates to become members of religious
9 orders." They put that on one side of the line,
10 Congress does. And then it says, on the other
11 hand, "a church-related, separately incorporated
12 charitable organization, such as an orphanage or
13 home for the aged, would not be considered."

14 So it seems to me that the line, at
15 least in the federal statute, is not between
16 charitable organizations that proselytize versus
17 charitable organizations that don't. Instead,
18 it's all charitable organizations on one side
19 that are run by the church and organizations run
20 by the church that are like training programs
21 for priests, that are like religious in that
22 way.

23 Now, for you that would be a little
24 unfortunate because it would take you outside of
25 the exemption, but I'm just trying to understand

1 whether "for religious purposes" is really about
2 the motivation or are they trying to get at
3 those organizations that are inculcating or
4 training religious doctrine.

5 MR. RASSBACH: So I -- I think that
6 "operated primarily for religious purposes," the
7 best reading of that is to say, you know, are --
8 are you the -- you know, is it the meat-free
9 restaurant that's just sort of run out of the
10 temple basement or is it sort of a separate
11 business.

12 So there is a separate part of the
13 Internal Revenue Code, Section 513 of the
14 Revenue -- Internal Revenue Code that talks
15 about unrelated business income. And there's a
16 carveout for all charitable organizations, if
17 they have a sort of separate thing.

18 I think that the "operated primarily
19 for religious purposes" means that you're not
20 operated -- you know, you're not operated
21 outside of that. You're not operated as a sort
22 of for-profit business that is owned by a
23 church, which -- of which there are many around
24 the country.

25 Those entities don't get the

1 exemption, even if they are controlled by a
2 church. Because, remember, there is also that
3 other condition that it be controlled -- that
4 the entities that enjoy this exemption are
5 controlled by a church.

6 JUSTICE SOTOMAYOR: Could you --

7 MR. RASSBACH: If I could also --

8 JUSTICE SOTOMAYOR: -- focus --

9 MR. RASSBACH: Oh.

10 JUSTICE SOTOMAYOR: -- on Justice
11 Jackson's question? Is there a difference in
12 your mind -- and Justice Jackson, you can
13 correct me.

14 Is there a difference in your mind
15 between this law and the IRS law that she
16 identified?

17 MR. RASSBACH: Sure.

18 JUSTICE SOTOMAYOR: And -- and what is
19 that difference? I think that's what she was
20 getting at. She thinks the two laws might be
21 the same. You -- are you seeing a difference?
22 And, if you are, how do you articulate it?

23 MR. RASSBACH: Well, I think that the
24 way -- so I -- the -- the laws that she is
25 talking about is the FUTA, which the -- we would

1 say that that language is not -- the text is not
2 really problematic there, but the way that the
3 Wisconsin Supreme Court interpreted it here --

4 JUSTICE SOTOMAYOR: That -- that --

5 MR. RASSBACH: -- to have that list --

6 JUSTICE SOTOMAYOR: That tells me --
7 yes, I see that language.

8 MR. RASSBACH: Right.

9 JUSTICE SOTOMAYOR: She was talking
10 about the laws in the IRS --

11 JUSTICE JACKSON: No, no.

12 JUSTICE SOTOMAYOR: -- that say --

13 JUSTICE JACKSON: I was -- I was
14 talking about the FUT --

15 JUSTICE SOTOMAYOR: Oh, I'm sorry.

16 JUSTICE JACKSON: Yes. But -- but --
17 but what I'm really kind of focused on is the
18 example in the legislative history that puts
19 church-run charitable organizations like an
20 orphanage or a home for the aged -- aged outside
21 of the exemption.

22 MR. RASSBACH: I -- I --

23 JUSTICE JACKSON: And that troubles me
24 because it seems as though you're saying that
25 should be in, and it shouldn't be distinguished

1 between orphanages that proselytize versus
2 orphanages that don't. And I guess I'm just
3 wondering whether any orphan -- orphanages are
4 in --

5 MR. RASSBACH: I see.

6 JUSTICE JACKSON: -- given the way
7 this statute is written.

8 MR. RASSBACH: Yeah, I -- I don't -- I
9 don't think that that's the -- the -- the right
10 reading of it. I mean, to the extent that, you
11 know, legislative history does control the way
12 that you interpret the text, I -- I would say
13 that you would really need to have a sort of
14 constitutional avoidance approach to it.

15 I don't think that Larson, for
16 example, says that you need to have a broad
17 reading of statutory religious exemptions. And
18 so I think you would need to have --
19 constitutionally, read FUTA to be pretty broad
20 and cover things like orphanages -- you know,
21 let's say Catholic Charities owned an orphanage.
22 They don't, but they also --

23 JUSTICE JACKSON: You're saying the --

24 JUSTICE BARRETT: Counsel --

25 JUSTICE JACKSON: -- Constitution

1 requires an exception here?

2 MR. RASSBACH: No. I -- I'm saying
3 that where -- where it's excluding -- where it's
4 excluding it on -- on the basis of, you know,
5 religious exercise or theological lines, then
6 that would be a problem.

7 Here -- there, I think the -- the
8 difference is that you're trying to alleviate --
9 most of these exemptions are trying to alleviate
10 burdens on -- on religious exercise.

11 And this Court has repeatedly said in
12 cases like Amos and Cutter that that does not
13 constitute discrimination.

14 JUSTICE BARRETT: Counsel, can I ask
15 you a question about the church autonomy
16 doctrine. So it seems to me that there's a
17 difference between telling a church what to do
18 or interfering in its internal affairs and
19 incentivizing the church to do certain things.

20 Do you see a distinction between those
21 things?

22 MR. RASSBACH: Well, I think -- I
23 think that there is a distinction between the
24 two things, but I think this Court has said, for
25 example, in the Kedroff case that it's -- it's

1 control or manipulation.

2 So that -- that the incentivization
3 part of it, I think, would also be covered. To
4 the extent that, you know, the power to tax is
5 the power to destroy or -- or things like that,
6 I think it really matters what the incentives
7 are.

8 JUSTICE BARRETT: Okay. Well, you
9 know, you talk about the organizational choices
10 that the Catholic Church has made in treating
11 Catholic Charities as a distinct corporation, a
12 distinct entity from the diocese itself, while a
13 nonprofit corporation is distinct from a
14 for-profit corporation.

15 And the Chief Justice asked you about
16 a restaurant, you know, that's an outreach that
17 serves vegetables.

18 Well, what about a profit --
19 for-profit versus a not-for-profit? What if a
20 church believes that raising money, either for
21 the benefit of members or to give away or
22 whatever, is essential to its religious mission
23 and wants to be a for-profit organization?
24 Would it violate the church autonomy doctrine
25 for an exemption to be offered only to

1 non-profits?

2 MR. RASSBACH: I -- I think that's --
3 I don't think so, Your Honor. I think that -- I
4 think that the -- the difference here is that
5 we've got different parts of the same church
6 body that are either exempt or not exempt. So
7 we have a sort of patchwork, where the parent,
8 so to speak, the Diocese of Superior, is exempt,
9 then one of the sub-entities of Catholic
10 Charities, which is sort of two layers down, is
11 also exempt --

12 JUSTICE BARRETT: But for purposes of
13 the church autonomy doctrine, I guess you were
14 focused on the organizational structure of the
15 Catholic Church and the diocese and its
16 outreaches. And I'm wondering why your theory
17 of the church autonomy doctrine and how it
18 applies here would not extend pretty broadly.

19 MR. RASSBACH: I -- I think you can --
20 you can limit it to situations where, you know,
21 it's -- it's part of the -- the long-term
22 governance, and there's a sort of discrimination
23 among different kinds of governance. This is
24 sort of explicated in the --

25 JUSTICE BARRETT: But what about my

1 for-profit, nonprofit example?

2 MR. RASSBACH: I -- I guess I just
3 don't -- maybe I'm misunderstanding the
4 question, but I'm not -- I'm not seeing how that
5 is the same as the -- the church governance
6 itself and how the different organizations are
7 set up.

8 JUSTICE BARRETT: Okay. Let me ask
9 you another question.

10 One of the problems here is figuring
11 out what the line is, you know, if -- if a
12 legislature wants to, like Justice Jackson is
13 saying, exempt certain kinds of religious
14 activities, but not others. And you point out
15 that it's excessive entanglement, in your view,
16 to try to distinguish between -- to get involved
17 in the enterprise of figuring out what you're up
18 to.

19 What about the ministerial exemption
20 itself? It requires that kind of distinct --
21 distinguishing. I mean, is it excessive
22 entanglement for a court to figure out who is a
23 minister?

24 MR. RASSBACH: No -- no, not at all.
25 I -- I think the -- the difference is the way

1 that the Wisconsin Supreme Court decided this
2 case and said, you know, we're -- if you're a
3 minister -- sorry, if you're -- if you're doing
4 something in -- in one -- with one kind of
5 theological set of presuppositions, you get
6 better treatment, you're favored, and if you're
7 not, then you are disfavored.

8 And I think if you have something
9 that's across the board, you're just looking at
10 is this religious, is this not religious, that's
11 the kind of thing that courts decide every day.
12 They decide all -- all the time whether
13 particular activity is religious or a particular
14 person is acting on religious bounds.

15 So I -- I want to be very clear, we're
16 not saying there's any problem with trying to
17 decide if something's religious or not. What
18 we're saying is that there are limits on -- on
19 what you can do within that -- that question.
20 And one of the things that you can't do is
21 discriminate along theological lines.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas, anything further?

25 Justice Alito?

1 JUSTICE ALITO: When you say that
2 Catholic Charities does not proselytize, are you
3 using that term in the ordinary sense or are you
4 using it as a term of art?

5 MR. RASSBACH: I -- I would say it's
6 used as a term of art for the Catholic Church,
7 that you don't proselytize.

8 JUSTICE ALITO: And what does it mean?
9 What -- what does that term of art mean?

10 MR. RASSBACH: Well, what it -- what
11 it means in the Catholic Church is that you're,
12 for example, saying here's your food, but if you
13 -- if you want the food, you have to come to
14 mass, or I need you to come pray with me or
15 something like that, or you need to convert at
16 the sort of most extreme end of that.

17 JUSTICE ALITO: It doesn't mean that
18 you can't -- Catholic Charities can't
19 evangelize; is that right?

20 MR. RASSBACH: That's right. In
21 Catholic teaching there is a distinction between
22 evangelization and proselytization.
23 Evangelization is okay, proselytization is not
24 okay.

25 JUSTICE ALITO: And what is the

1 difference?

2 MR. RASSBACH: The -- the difference
3 is the -- the sort of almost coercive effect or
4 the -- sort of, you know, using it to influence
5 people and kind of take advantage of them,
6 exploit them.

7 And -- and that's proselytization.
8 Evangelization is really the idea of sharing
9 one's faith, sharing the Catholic faith with
10 someone else to -- to help them understand what
11 someone believes.

12 JUSTICE ALITO: Does it -- does it
13 mean that Catholic Charities could not say to
14 participants in its services, if you would like
15 to pray, here's an opportunity? If you would
16 like to go to mass, here's an opportunity? If
17 you would like some religious reading, here is
18 something that we have available?

19 MR. RASSBACH: So within the Catholic
20 church, that's not a problem. Now, I think the
21 record in this case --

22 JUSTICE ALITO: Okay. Well, I'm --
23 I'm not -- I don't want to get into a
24 theological discussion.

25 MR. RASSBACH: Sure.

1 JUSTICE ALITO: But I'm asking these
2 questions because if you're making a religious
3 discrimination claim, you've got to have a
4 comparator. So what's your best comparator,
5 with this in mind?

6 MR. RASSBACH: With -- comparator to
7 -- sorry. I'm --

8 JUSTICE ALITO: You're saying here
9 that the -- the Wisconsin Supreme Court is
10 discriminating against Catholic Charities. It
11 would treat other religious charities
12 differently, right?

13 MR. RASSBACH: Yes. Sorry.

14 JUSTICE ALITO: Okay. So what is your
15 best comparator of a religious charity that
16 would be treated favorably by the Wisconsin
17 Supreme Court?

18 MR. RASSBACH: Well, let's say you had
19 a -- a -- you know, I don't want to pick on any
20 particular denomination, but let's say you had a
21 -- a Baptist church that said, you know, we're
22 going to, you know, give you food but we would
23 like -- you know, before that, we would like you
24 to attend this church service. Or, you know,
25 said, well -- another group might say we're only

1 going to serve our particular group.

2 Now, I think it's really important
3 that -- that it has to go both ways; that is, I
4 don't think that Wisconsin should discriminate
5 against people that -- that do proselytize
6 either. The point is that they made the
7 distinction along that theological line that has
8 -- that has nothing to do with it. So that --
9 that, to me, is the -- the difference.

10 JUSTICE ALITO: And the decision to
11 organize Catholic Charities as a nonprofit
12 corporation was done for religious reasons and
13 not for practical reasons?

14 MR. RASSBACH: Well, I -- I guess I
15 would say that the two kind of coincide. That
16 is, how can you be a more effective mission?
17 And, definitely, you can be a more effective
18 mission if you're both incorporated and are
19 organized as a nonprofit.

20 But there's not a teaching of the
21 Catholic Church that says that you must or
22 always and everywhere organize as a nonprofit.

23 JUSTICE ALITO: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: Two questions.
2 One, the government asked us to reverse not on a
3 constitutional ground but on the Wisconsin
4 church's -- the Wisconsin court's
5 misinterpretation of its own statute. Do you
6 have a position on that?

7 And then, number two, it seems to me
8 that all your arguments, both on autonomy and
9 entanglement, all come down to the
10 discrimination claim, but if Larson and City of
11 Hialeah -- that doesn't end the inquiry, meaning
12 you might -- if a state discriminates, it might
13 be entitled to, and you have to apply strict
14 scrutiny. In both -- in those two cases, we
15 affirmed because there was evidence of invidious
16 discrimination.

17 There's no evidence of that here. So
18 what do we do? Vacate and remand?

19 MR. RASSBACH: Okay. So --

20 JUSTICE SOTOMAYOR: And if we find
21 that there's discrimination and -- and -- what
22 guidance do we give? So answer the first and
23 then the second.

24 MR. RASSBACH: Sure. Yes. And I
25 apologize if I -- I -- I -- I hope I get all the

1 subparts there.

2 I -- on the Solicitor General's
3 argument, I think, you know, we -- we obviously
4 will take a win on any basis. We're -- we're
5 not going to reject that. But it doesn't seem
6 apparent from the face of the opinion below that
7 they were feeling bound by -- by the federal law
8 in this case. And that really is the standard
9 under Three Affiliated Tribes and the other
10 ones.

11 I guess the second issue that we see
12 is that this could just result in sort of a
13 do-over, where it goes back down to the
14 Wisconsin Supreme Court, Wisconsin Supreme Court
15 says, okay, you know, we're eliminating all
16 mention of the federal law; we're just
17 interpreting Wisconsin law here. And, you know,
18 we're back here in a couple of years.

19 Obviously, my clients wouldn't like,
20 that but also I don't think that's --

21 JUSTICE SOTOMAYOR: Why don't you go
22 on to the second question.

23 MR. RASSBACH: Okay. Then the second
24 question, I would say, is just that the -- on
25 strict scrutiny, I think it's just very hard for

1 -- I -- I don't think you -- you have to remand
2 for that. I don't think that they put on much
3 of a strict scrutiny case. The only interest
4 that they put forward below was whether it --
5 you know, broad access to getting unemployment
6 compensation -- unemployment benefits.

7 And there's so many different
8 exceptions to that, just like in Lukumi, just
9 like in Larson. And I think that there's also
10 no risk to the fisc of the -- of the -- of
11 Wisconsin because only 0.6 percent, as was put
12 in one of the bottom-side amicus briefs, of
13 workers are with religious organizations. So
14 it's just they don't have the interest and they
15 don't -- they're very under-inclusive and have
16 lots of exemptions and that defeats strict
17 scrutiny.

18 JUSTICE SOTOMAYOR: I agree with you,
19 but what do we do -- it is a compelling state
20 interest not to be entangled in church, in a
21 church. So that itself is a compelling state
22 interest.

23 Do -- do we say it fails strict
24 scrutiny, not on the interest prong but on the
25 narrow tailoring prong? Is that -- you said

1 there's so many exceptions, et cetera.

2 MR. RASSBACH: Right. I think --

3 JUSTICE SOTOMAYOR: So it sounds more
4 like a narrow tailoring.

5 MR. RASSBACH: I -- I think you could
6 definitely do it on -- on that basis, and this
7 Court has done that in many religion cases where
8 it said we're just going to skip over the
9 compelling interest part and just get straight
10 to the narrow tailoring.

11 JUSTICE SOTOMAYOR: Okay.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: Mr. Rassbach, I had
14 understood your autonomy argument as different
15 from your discrimination argument. In other
16 words, that your autonomy argument is
17 essentially that the way this statute, as
18 understood by the Wisconsin Supreme Court, works
19 is it puts pressure on the church to organize at
20 is charitable activities at the diocese level,
21 rather than the way it's done now, because at
22 the diocese level they surely would be entitled
23 to the exemption.

24 So it's not the most obvious thing
25 that stands out about what the Wisconsin court

1 has done here, you know, and I'm just wondering
2 why you led with that argument, I mean, why you
3 think it's your strongest one or why you -- you
4 know, I -- I-- I take it if you lead with it,
5 that's the one you most want us to rule on.

6 Maybe I'm wrong about that. If -- if
7 I'm right, why?

8 MR. RASSBACH: So I -- I don't -- I
9 don't think that we wrote the brief saying that
10 all three -- that their -- their ranking it that
11 way. So I -- I definitely -- I think all three
12 arguments are valid. You can rule on one. You
13 can rule on two. I'd be very surprised if you
14 ruled on all three, but -- but I -- we were not
15 meaning to rank them by the order that we put
16 them in the brief.

17 JUSTICE KAGAN: Okay. Why do you
18 think that, you know, that would be a good
19 choice?

20 MR. RASSBACH: Well, I think, you
21 know, in some ways, the church autonomy argument
22 would be sort of a very simple thing, to just
23 say, look, your -- your -- you know, this is a
24 single church body and they're all controlled by
25 a single bishop. It's -- it doesn't make any

1 sense to try to force them to reorganize. And
2 it's sort of senseless to say that, you know,
3 both the sort of top organization and one of
4 the, you know, two ranks down, subentities is --
5 are exempt while excluding everybody else.

6 So that -- you know, it -- it would be
7 a kind of very simple decision and I think one
8 that you could limit to this particular context.
9 But I -- but that's really, you know, what we
10 would be -- what the argument would be with
11 respect to church autonomy.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 JUSTICE GORSUCH: Mr. Rassbach, I
16 guess I have a similar question to Justice
17 Kagan. I would have thought the simplest
18 argument of the three you chose was the
19 discrimination argument. On the face of the
20 decision below, the court distinguished between
21 religions that proselytize and those that don't
22 and between those who serve co-religionists and
23 those who serve others as well.

24 Why isn't that the simplest basis on
25 which to rule?

1 MR. RASSBACH: Oh, sorry if I misspoke
2 when I was having the colloquy with Justice
3 Kagan. What -- what I meant to say it's a
4 relatively simple kind of decision, but I don't
5 think it's the simplest. I do think the
6 simplest is probably the discrimination
7 argument. And, you know, the Court can just
8 hold that the Wisconsin Supreme Court's
9 interpretation of the -- of the religious
10 exemption violated Larson and Lukumi by
11 discriminating along religious lines. And I --
12 I think that would be enough to decide the case.

13 JUSTICE GORSUCH: That would break no
14 new ground in our case law.

15 MR. RASSBACH: Correct.

16 JUSTICE GORSUCH: And then when it
17 comes to the compelling interest, what spelling
18 interest might a state have in distinguishing
19 between religions on that ground?

20 MR. RASSBACH: I do think it would be
21 difficult. I think this Court had a footnote in
22 Trinity Lutheran -- I -- I may be getting that
23 wrong -- that referred to McDaniel against Paty,
24 an earlier case that talked about the fact that
25 there may not be a strict scrutiny defense to

1 sort of a -- a pure discrimination among
2 religions.

3 JUSTICE GORSUCH: Right. And -- and
4 -- and is it further complicated by the fact --
5 an effort to survive a compelling interest
6 complicated by the fact that the Catholic
7 Charities apparently has an unemployment benefit
8 system that is comparable to the state's?

9 MR. RASSBACH: The -- that's exactly
10 right. I -- I -- you know, we think actually,
11 for the workers at Catholic Charities, it'll be
12 better for them to be on the church plan.
13 Certainly, they'd get their benefits much more
14 quickly from the church than they do from the
15 state, if -- when they ask for unemployment
16 benefits.

17 But also it enables us to show
18 solidarity with our other dioceses in the state.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: I wasn't quite
23 sure of your answer to Justice Jackson. If
24 Catholic Charities ran a -- an orphanage or home
25 for the aged, what -- what result?

1 MR. RASSBACH: I -- I think it would
2 be treated like their current ministries, like a
3 housing ministry or -- or other things.

4 So I -- I think that that language in
5 the legislative history, to the extent that it
6 then got transposed into Wisconsin law and was
7 seen to say, you know, orphanages are out, I
8 think that -- that would be -- that would be a
9 problem, because there's nothing in the law
10 itself that says that -- you know, the text of
11 the law that says that you can't have an
12 orphanage.

13 JUSTICE KAVANAUGH: So the -- to the
14 extent that reflected an understanding at the
15 time, that understanding is -- is simply
16 inconsistent with the statutory language, is
17 that the answer?

18 MR. RASSBACH: Yeah, I think the
19 answer is just that statutorily I think that
20 would be very hard to do. And I think, as I was
21 trying to make out earlier, that there is a
22 constitutional avoidance problem there too.

23 If you have -- if you create these
24 sets of approved religious -- you know,
25 judicially approved religious activities, that's

1 a real problem.

2 You know, this Court has identified
3 them in cases like Hosanna-Tabor or Our Lady of
4 Guadalupe. But it -- it was very clear not to
5 say that that's -- that's a closed set, it's an
6 open set, and that other kinds of activities or
7 things might be -- might be in there.

8 Obviously, you know, ministerial
9 exception's a little bit different because it's
10 talking about these important religious
11 functions within the -- the body. But -- but
12 religious -- you know, the -- the set should not
13 be closed by the judges. The judges should not
14 close it.

15 JUSTICE KAVANAUGH: And I think your
16 answer is getting at another question I have, is
17 the other side relies on the phrase
18 "distinctively religious activities." And I
19 just want to make sure you can respond to the
20 use of that phrase.

21 MR. RASSBACH: Yeah, I just -- I -- I
22 think it's, you know, six of one, half dozen of
23 the other.

24 You know, if you look at the opinion
25 below, they consistently talk about, you know,

1 it's wholly secular endeavor, it's not religious
2 in nature, it's secular in nature. And then
3 they rely repeatedly on the list from the Dykema
4 case from the Seventh Circuit in the '80s.

5 And, you know, they're -- they've come
6 up with a little list, and they're saying that
7 this is the closed list. And we're outside the
8 list. Whatever -- you know, they -- they say
9 it's just an illustrative -- illustrative list
10 in the opinion, but we're still out.

11 You know, we're -- what we're doing
12 clearly is not on the list. Whatever other
13 things might go on the Wisconsin Supreme Court's
14 list, we're not on that list. You know, helping
15 the poor, helping the elderly is not on the
16 list.

17 JUSTICE KAVANAUGH: And the limit on
18 that, to go to the other side, is what, again?
19 Sincerity is one limit --

20 MR. RASSBACH: I -- I would say --

21 JUSTICE KAVANAUGH: -- but what else?
22 Is there any other limit to the Chief Justice's
23 --

24 MR. RASSBACH: I would say that's
25 probably the main limit, is it sincere.

1 JUSTICE KAVANAUGH: Is it the only
2 limit?

3 MR. RASSBACH: Well, I would say also
4 religiosity, but in the sense of religion versus
5 philosophy.

6 So this is the thing that actually
7 comes up in the Yoder case, where the Court
8 makes a big distinction between what the Amish
9 were doing and what Henry David Thoreau was
10 doing. And it said, well, you know, there is
11 special solicitude under the First Amendment for
12 religion, and the Amish get that, but Thoreau
13 doesn't, even though he felt very strongly about
14 his opinions.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: I want to pick up on
19 Justice Kavanaugh's question. So you agree that
20 there has to be some way of separating out
21 religiosity from non-religiosity?

22 MR. RASSBACH: That's right.

23 JUSTICE BARRETT: Okay. And is your
24 answer to Justice Kavanaugh that if we
25 articulated a test for that, it's sincerity of

1 belief primarily, and then this Thoreau
2 distinction between religiosity and someone who
3 simply says this is just a philosophy?

4 MR. RASSBACH: Sure. And I think you
5 can kind of put a little bit more meat on the
6 bones there by thinking about, you know, what --
7 what is religion. I don't think you have to
8 answer the question --

9 JUSTICE BARRETT: It's kind of a big
10 question, right?

11 MR. RASSBACH: It's a -- it is a big
12 question. It's -- and it's a fascinating one.

13 I think if you go back even to the
14 Virginia Declaration of Rights, you know, it
15 says "the duty which we owe to our creator and
16 the means of discharging it."

17 And then Judge -- just -- Professor
18 McConnell, you know, sort of extended that a
19 little bit more broadly to just this idea of
20 transcendent binding truth. Because the problem
21 that comes up in these issues for the religion
22 and the law and why it is important what
23 religion is for the law, is conflicting
24 obligations.

25 So if you go to Madison's Memorial and

1 Remonstrance, you see there's this conflicting
2 between the obligations of the -- of God and the
3 obligations of the -- the -- the government.
4 And, you know, Madison says, you know, you have
5 to -- you have to navigate that.

6 So I think that -- I think you have to
7 be able to see that things are religious or not
8 because you look at whether there's a -- a
9 transcendent truth added.

10 JUSTICE BARRETT: Well, does all
11 religion have to have a transcendent truth? And
12 it's not always about a clash of obligations,
13 right? I mean, because here there's not a clash
14 between what Wisconsin is demanding and what
15 Catholic Charities is giving.

16 Wisconsin's not requiring Catholic
17 Charities to do anything. So it's not like a
18 conscience exemption kind of case.

19 This isn't like the Catholic hospital
20 being told that it has to provide abortions.
21 This is -- this is distinct. This is a benefits
22 case.

23 So I -- I guess -- let's see. Let me
24 just backtrack from the philosophical question.

25 MR. RASSBACH: Sure. Sure.

1 JUSTICE BARRETT: Can you give me,
2 like, what would an opinion say? I mean, we're
3 not going to talk about philosophy in an
4 opinion, right? So if we had to articulate a
5 test to distinguish religion from non-religion,
6 can you concisely tell me what the test would
7 say?

8 MR. RASSBACH: I -- I think I would --
9 I would say that it's -- it's a -- it's -- you
10 know, it's a duty that is owed and the means of
11 discharging it.

12 Here, we do have a duty that we owe as
13 Catholic Charities. We -- we are -- are
14 obligated --

15 JUSTICE BARRETT: And that's a uniform
16 test. Not just for Catholic Charities, but a
17 uniform test.

18 MR. RASSBACH: I think you can really
19 apply it across a lot of different situations.

20 Now, what a lot of people have --
21 scholars and others have commentated is that
22 99 percent of the time it's going to relate to
23 what you think God or gods is telling you to do.
24 There are some non-theistic religions, forms of
25 Zen Buddhism. But -- but the overall thing is

1 that there is something transcendent or
2 supernatural that you are feeling obligated by.

3 JUSTICE BARRETT: Okay.

4 MR. RASSBACH: And that's the
5 distinction.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: Can I just give you
10 a hypothetical, so I can -- I'm trying to
11 understand your constitutional point.

12 So suppose we have this federal
13 exemption from the unemployment scheme -- and
14 I'm just reading the text of the exemption --
15 "in the employ" -- this is -- you don't get --
16 you don't have to pay the -- the tax if you are
17 "in the employ of an organization operated
18 primarily for religious purposes and operated,
19 supervised, controlled, or principally supported
20 by a church," et cetera. That's the -- the text
21 of the statute.

22 Suppose the Wisconsin legislature
23 said, you know, we really don't want to get into
24 the business of trying to figure out who is
25 religious versus theory versus whatever. We

1 think that that's problematic from our
2 perspective.

3 So what we want to do -- this is the
4 legislature -- is define "in the employ of an
5 organization operated primarily for religious
6 purposes," we're going to say an organization
7 that is operated for primarily religious
8 purposes is a college devoted to preparing
9 students for the ministry, a novitiate, a house
10 of study training candidates to become members
11 of religious orders.

12 That's what we mean when we say --
13 when -- when the statute says, you know, "for
14 religious purposes."

15 So no orphanages, no soup kitchens, no
16 any of that. Whether you proselytize or not, we
17 don't care. We're not getting into that. We
18 just have a very, very narrow exemption for
19 certain kinds of religious organizations as
20 we've defined them.

21 Is that constitutional or not?

22 MR. RASSBACH: I think two -- two
23 parts to that. One is it does depend a little
24 bit on -- on the history before. So if -- like,
25 let's say this went back and the Wisconsin

1 legislature changed it, then you would be in a
2 situation where --

3 JUSTICE JACKSON: No, I understand.
4 But even -- even our current exemption, I
5 understand for years that Catholic Charities
6 didn't seek this exemption. So this is like a
7 new thing.

8 So now the legislature is saying,
9 okay, what we'd like to do is only give this
10 exemption to the novitiate, the ministry,
11 college, that's it. No restaurants run by vegan
12 -- vegan ministers, none of that.

13 MR. RASSBACH: Yeah, I --

14 JUSTICE JACKSON: Can they do that
15 consistent with the Constitution?

16 MR. RASSBACH: I think -- I think that
17 would probably go too far. I think that some --
18 if -- if it's designed to alleviate a specific
19 burden, sure. If it's just designed to --

20 JUSTICE JACKSON: It's designed to
21 keep the legislature and the state from, kind of
22 like the ministerial exemption, adjudicating
23 unemployment tax claims with respect to those
24 kinds of institutions.

25 Because if we get into it with those

1 kinds of institutions, we might have the same
2 kinds of problems that the Supreme Court has
3 identified for the ministerial exception. But
4 we don't get into those problems if we're
5 talking about unemployment for a restaurant
6 owned by a -- you know, a vegan minister,
7 like -- so we just want to focus in on those
8 kinds of institutions.

9 Can they do that?

10 MR. RASSBACH: I -- I just don't think
11 that you can decide -- I -- I -- I just -- I
12 don't buy the premise that you would say, first
13 of all, that it would be less entangling. I
14 would see that as much more entangling, because
15 then you would have about 15 cases about what's
16 a novitiate, is this thing --

17 JUSTICE JACKSON: I understand.

18 MR. RASSBACH: -- closer to a
19 novitiate, et cetera.

20 JUSTICE JACKSON: Okay.

21 MR. RASSBACH: So I think that would
22 be very entangling rather than de-entangling.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Gannon.

2 ORAL ARGUMENT OF CURTIS E. GANNON

3 FOR THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONERS

5 MR. GANNON: Mr. Chief Justice and may
6 it please the Court:

7 Wisconsin has opted into the
8 cooperative framework of the Federal
9 Unemployment Tax Act and has enacted the federal
10 statutes exemption for religious employers,
11 which applies to certain church-controlled
12 organizations that are, quote, "operated
13 primarily for religious purposes."

14 Petitioner serves as the social
15 ministry arm of a diocese of the Catholic
16 Church. They correctly told the Wisconsin
17 Supreme Court that they qualify for the
18 exemption under the statute. That court erred
19 in its reading of the statutory text, and
20 because it explains that the Wisconsin statute
21 conforms with the federal one, this Court should
22 correct its mistake. That would avoid serious
23 constitutional questions, just as this Court did
24 when it construed FUTA's religious employer
25 exception in St. Martin in 1981.

1 If the Court reaches the
2 constitutional question, it should reject the
3 Wisconsin Supreme Court's analysis, which
4 second-guesses the religious nature of sincerely
5 held expressions of faith and, worse, risks
6 discrimination among various faiths by singling
7 out certain activities that are deemed
8 inherently secular.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: You seem to prefer
11 the statutory argument. What would be the
12 problem with deciding this on a constitutional
13 basis?

14 MR. GANNON: Well, I think that we --
15 we do agree that the statute would be
16 unconstitutional as applied. I would prefer not
17 to have what I think is the sensible reading of
18 a federal statute be declared unconstitutional
19 by this Court. We think the better reading of
20 the statute is the one that the Wisconsin
21 Supreme Court rejected, and we think that
22 there's no doubt here, there's no -- there
23 hasn't been any debate here of that.

24 If it were construed our way, nobody
25 is alleging that that would be unconstitutional.

1 And so I -- I would prefer that sort of saving
2 construction that would avoid the need for the
3 Court even to say that, assuming the Wisconsin
4 Supreme Court were correct about construing this
5 verbatim language that comes straight from a
6 federal statute, that you're going to grant
7 them, you're going to spot them their
8 interpretation, which we think is
9 counterintuitive, and -- and then go on to
10 decide constitutional questions.

11 We don't -- we don't think that the
12 constitutional decision would need to be
13 incredibly complicated. Multiple particular
14 grounds have already been discussed today.

15 JUSTICE THOMAS: But what would --

16 MR. GANNON: Some are easier than
17 others.

18 JUSTICE THOMAS: What would happen if
19 the Wisconsin Supreme Court stood by its reading
20 of its statute?

21 MR. GANNON: If it stood by its
22 reading of the statute, it would have to back
23 away from the parts of its opinion where it said
24 the Wisconsin legislature was intending to
25 conform the statute with the federal statute.

1 And so -- and it would also perhaps be
2 dismissing the suggestion from this Court that
3 that actually raises serious constitutional
4 questions. It would have to sort of double-down
5 on --

6 JUSTICE THOMAS: So, in other words,
7 we'd be where we are now?

8 MR. GANNON: You could be where you
9 are now, but I do think that the Wisconsin
10 Supreme Court deserves to know that it was
11 incorrect about the fact that it thought that it
12 was conforming the state law with the federal
13 law. And that's exactly what this Court said in
14 St. Martin, when it -- a very similar question
15 was presented about whether schools were covered
16 by this exemption --

17 JUSTICE KAGAN: Well, I appreciate,
18 Mr. -- Mr. Gannon, you're supposed to, as
19 Solicitor General, sort of protect federal
20 statutes. And, you know, if you think this one
21 is okay, I get the point, but is there nothing
22 in addition to that?

23 I mean, are you worried about certain
24 kinds of constitutional questions, about the
25 difficulty that they might raise? If you think

1 they're easy, your argument to do it on a
2 statutory basis becomes less forceful. So -- so
3 are they easy? Are they hard? What -- what --

4 MR. GANNON: You know, frankly, I
5 think the bottom line is easy. I think, like,
6 deciding what the ultimate limit on any of these
7 particular theories here could get complicated.
8 And so I do think that there are serious
9 constitutional questions about each of the
10 arguments that have been raised.

11 JUSTICE KAGAN: Which is your -- which
12 is your preference of those arguments?

13 MR. GANNON: I mean --

14 JUSTICE KAGAN: Which do you think is
15 the easiest, the simplest, the least likely to
16 lead to complications?

17 MR. GANNON: I -- I mean, I think that
18 probably the discrimination argument is the --
19 is -- is -- but also, I mean, frankly, I think
20 that the second-guessing what counts as
21 inherently religious is just something that
22 courts shouldn't be in the business of doing.

23 And so that's a problem for a court to
24 be defining what is inherently religious, what
25 types of activities are inherently religious.

1 And we think that it flies in the face of the
2 statute. The statute clearly says you should be
3 looking at what is the primary purpose of this
4 organization. And we think that certain
5 activities -- it makes all the difference why
6 you are doing them. That determines whether
7 they are being done for religious purposes or
8 not.

9 As this Court has said you can grow a
10 beard or refrain from eating certain foods or
11 drink tea for a different reason. It makes all
12 the difference about whether it's religious or
13 not. And one of the things --

14 JUSTICE KAGAN: How would you answer
15 Justice Barrett's question? You know -- you
16 know, if we go this -- this route, you know,
17 what counts as religious? I mean, nobody likes
18 -- no judges like to say I'm sorry, you're not
19 sincere here.

20 MR. GANNON: That's --

21 JUSTICE KAGAN: So sincerity is, you
22 know, a pretty high bar.

23 MR. GANNON: Yeah. And that is -- we
24 think that there hasn't been any doubt here.
25 And, first of all, I think that the statutory

1 reading, I think, does -- makes that a much
2 easier argument because nobody is disputing here
3 the court below. And my -- I understand my
4 friend on the other side do not disagree that
5 Catholic Charities Bureau is motivated by a
6 religious purpose.

7 The question is just whether that is
8 so outweighed by the nature of their activities
9 here that they can't be considered to be their
10 principal purpose, that they -- that's not why
11 they're being operated, why these -- why these
12 activities are being carried out. And --

13 JUSTICE KAGAN: Yeah. I guess I was
14 asking you a little bit less about this case and
15 a little bit more about, like, the test we would
16 have to formulate or the principles that we
17 would have to use in -- in -- in deciding this
18 case.

19 MR. GANNON: Yeah. And I think that
20 the things that we think you would be looking to
21 is the sincerity and principality of the -- of
22 the religious beliefs. And so somebody asserts
23 that this -- that -- that our beliefs are
24 religious, and this Court has repeatedly says
25 -- that it's -- it is okay to determine whether

1 those are sincerely held. You're right, courts
2 don't want to say that's not sincerely held.
3 But sometimes they have to get into that.

4 And this Court looked at that in
5 Ramirez, the case about the -- the prisoner on
6 death row who wanted to be able to have a -- a
7 -- a pastor in the execution chamber being able
8 to lay hands on him. And the Court recognized
9 that -- that you -- it was okay to analyze
10 whether that was a sincere religious belief.
11 And -- and we think that the test here, the
12 statutory test that we would apply, is similar
13 to the one that the IRS has applied in the
14 501(c)(3) context.

15 And so I think that the Wisconsin
16 Supreme Court was correct to recognize that
17 analogy, but we think that it misapplied those
18 cases that it was drawing from in --

19 JUSTICE KAVANAUGH: I --

20 MR. GANNON: -- the 501(c)(3) context.

21 JUSTICE KAVANAUGH: -- think you just
22 said just sincerity and principality of the
23 religious belief?

24 MR. GANNON: What -- we -- the -- in
25 here, that's because it has to be operated --

1 JUSTICE KAVANAUGH: What's the --
2 that's second? Explain what you mean, because
3 that sounds a little --

4 MR. GANNON: Well, here that's -- that
5 comes straight from the statute because they're
6 operated primarily for religious purposes. The
7 question is whether this is the -- the principal
8 reason, the fundamental reason, the first of all
9 reasons for why the -- the organization is being
10 operated.

11 And so here we -- we get that from the
12 statutory test. A lot of religious exemptions
13 in statutes are -- are defined in those terms.
14 And that is what is happening in the 501(c)(3)
15 cases where the IRS has been looking into
16 whether you are principally motivated by
17 religious purposes or you're running -- one of
18 the cases that's discussed is actually a
19 vegetarian restaurant, to go back to the Chief
20 Justice's hypo.

21 And the -- and the -- the Court
22 concluded there that from the entire
23 situation --

24 JUSTICE KAVANAUGH: If it's -- if it's
25 --

1 MR. GANNON: -- and all of the --

2 JUSTICE KAVANAUGH: Sorry to
3 interrupt. But if it's sincerely motivated in
4 part by religious belief, that's going to be a
5 tough -- a really tough inquiry, right?

6 MR. GANNON: Yeah, but that question
7 is -- is whether the operations are -- whether
8 they are primarily for religious purposes. And
9 so there the ultimate decision was that there
10 was too much commercial flavor.

11 And so all of these are non-profits.
12 That's one answer to your question, Mr. Chief
13 Justice, is that the fact that you just opened a
14 restaurant and say this is consistent with our
15 religious beliefs, if you are making a lot of
16 money as a restaurant, you're not going to --

17 JUSTICE GORSUCH: Mr. Gannon --

18 MR. GANNON: -- qualify as a nonprofit
19 organization and get --

20 JUSTICE GORSUCH: -- on the -- on the
21 discrimination grounds, why would we have to get
22 into any of that? There's no dispute that
23 Catholic Charities exists primarily for
24 religious purposes. There's no dispute about
25 the sincerity of their religious belief.

1 And the only question is whether it's
2 treating different religions differently because
3 some proselytize when they provide services and
4 others don't. Wouldn't -- wouldn't it just be
5 that simple?

6 MR. GANNON: I agree with all of that.
7 I --I think that the biggest problem with it is
8 that it grants what we think is a wrong reading
9 of the --

10 JUSTICE GORSUCH: You say we --

11 MR. GANNON: -- verbatim text of a
12 federal statute.

13 JUSTICE GORSUCH: You say we can get
14 there under the statute as well, but that -- but
15 it doesn't seem to me we have to engage with any
16 of these other difficult questions. I mean, I
17 had on a circuit court a difficult question
18 about sincerity, whether somebody sincerely
19 believed that marijuana was a God or whether he
20 was a drug trafficker.

21 (Laughter.)

22 MR. GANNON: And -- you know, I --

23 JUSTICE GORSUCH: And, you know, that
24 one turned out to be easy to decide, but --

25 MR. GANNON: Well, and I was going to

1 say, Justice Gorsuch, that, you know, that's --
2 that's part of the inquiry in -- in looking into
3 sincerity, is --

4 JUSTICE GORSUCH: But -- but it's not
5 at issue here. No one disputes --

6 MR. GANNON: That's -- that's correct
7 because --

8 JUSTICE GORSUCH: -- that Catholic
9 Charities was primarily created for religious
10 purposes, and no one disputes the sincerity of
11 their religious beliefs. It's just not -- not
12 on the table, right?

13 MR. GANNON: That -- that is correct,
14 but we also think that there shouldn't be a
15 dispute that it is operated primarily for
16 religious purposes because what the Court should
17 not be doing is looking at particular activities
18 and defining them as inherently secular or
19 inherently religious.

20 JUSTICE GORSUCH: The -- that's the
21 discrimination problem.

22 MR. GANNON: Yes. That is a similar
23 problem even for purposes of -- of construing
24 the statute.

25 JUSTICE GORSUCH: Got you.

1 JUSTICE BARRETT: Mr. -- Mr. Gannon,
2 can I return you to the construing the statute
3 problem? I guess -- I understand that you're
4 worried that because the federal statute is
5 worded exactly in the same way, that a
6 constitutional holding here might call that into
7 question. But why is -- may I finish, Chief?

8 CHIEF JUSTICE ROBERTS: Sure.

9 JUSTICE BARRETT: But why would that
10 be so? Couldn't we say in an opinion -- I mean,
11 because it's -- it's hard for me to say,
12 frankly, in the Wisconsin Supreme Court's
13 opinion that it thought its reading was
14 compelled by the federal statute. It kind of
15 looked to it, you know, it -- it observed that
16 there was similarities, but it -- it's hard for
17 me to see how it wasn't interpreting its own
18 statute.

19 So just -- just grant me that.

20 MR. GANNON: I --

21 JUSTICE BARRETT: If we did that, why
22 would it necessarily call the federal statute
23 into question? Because couldn't we just say
24 Wisconsin has interpreted its statute this way,
25 drop a footnote, you know, the Solicitor General

1 of the United States has represented that the
2 federal government statute is interpreted
3 differently?

4 MR. GANNON: I -- I think you could do
5 that. The Wisconsin Supreme Court thought that
6 the Wisconsin legislature was conforming to the
7 federal law because everyone wants --

8 JUSTICE BARRETT: No, no, no.

9 MR. GANNON: -- to be part of the same
10 scheme.

11 JUSTICE BARRETT: Spot me -- spot --
12 spot me that I disagree.

13 MR. GANNON: And --

14 JUSTICE BARRETT: And if I did, why
15 would it necessarily call the constitutionality
16 of the federal statute into question --

17 MR. GANNON: Well --

18 JUSTICE BARRETT: -- assuming that we
19 held that there was a problem with this one?

20 MR. GANNON: I -- I think if you made
21 that type of reservation, then we would -- we
22 would surely insist that you had not decided
23 that the federal statute was unconstitutional if
24 it -- if -- because it wouldn't need to be
25 construed that way. I agree with that.

1 JUSTICE BARRETT: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 You want us to focus on -- on the
5 federal statute. How -- how would the -- the
6 statute apply to things like
7 religiously-operated hospitals, a Catholic
8 hospital, Presbyterian hospital?

9 MR. GANNON: It's -- it's -- it's the
10 same analysis, where -- where you would be
11 asking whether the organization -- whether its
12 operations are -- are primarily for religious
13 reasons.

14 And so you would be asking -- and
15 the -- the hypothetical about orphanages that's
16 in the legislative history, we think, is not
17 clearly carved out of the federal statute,
18 because there's a debate about whether that is
19 actually controlled by the church.

20 So if -- if you are talking about a --
21 a hospital that is actually controlled and
22 supervised by a church and it is -- it is doing
23 its activities principally for religious
24 reasons, then we think that it would be able to
25 qualify.

1 CHIEF JUSTICE ROBERTS: And -- and
2 would it be a sufficient religious reason to say
3 that the principles of the church require care
4 for the sick?

5 MR. GANNON: I -- I -- I think that --
6 that --

7 CHIEF JUSTICE ROBERTS: As in -- well,
8 as in this case, where the -- the position of
9 the church is that caring for the poor was part
10 of their religious mission.

11 MR. GANNON: The -- that that is the
12 purpose of the activities, is in service of
13 those religious goals, and that is the principal
14 reason for what -- for which they are operated,
15 yes.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 Justice Thomas?

18 JUSTICE THOMAS: But wouldn't that be
19 a bit more complicated if it -- it's one thing
20 if the church -- if the diocese controlled the
21 hospital, right? It's another thing if it's set
22 up as an entirely different organization run,
23 again, by religious people, say nuns, but it's
24 its own -- its own entity and it doesn't report
25 directly to the chancery.

1 MR. GANNON: Yes. And -- and
2 that's what -- that's what I said was in the
3 legislative history that Justice Jackson was
4 bringing up under the statute, potentially the
5 distinction for the orphanages that are
6 discussed in the committee report, is if they
7 are not actually directly controlled and
8 operated by the church, then that would be the
9 reason why they fell out.

10 And Justice Jackson was -- was
11 referring to that -- that phrase which talked
12 about church-related charitable organizations,
13 but that doesn't necessarily mean that they are
14 in the sense of the text of the statute
15 supervised, controlled, or principally supported
16 by the church that's in -- at issue.

17 JUSTICE THOMAS: So how is that
18 different from Catholic Charities here?

19 MR. GANNON: The -- the difference
20 here is that there's no dispute that they are
21 supervised, controlled, or -- and they're not
22 directly -- or -- or operated. The first three
23 verbs directly apply here.

24 Everybody understands that the
25 Catholic Charities Bureau supervises the

1 subentities that are at issue here, that they --
2 that the bishop is -- is -- is two levels up,
3 that he appoints the membership, and that the
4 principles the -- that the -- control Catholic
5 Charities Bureau subentities are -- that their
6 employees follow Catholic social teaching, that
7 they are providing services for poor and
8 disadvantaged to be an effective sign of the
9 charity of cross -- of Christ.

10 All of that is part of the religious
11 purposes that flow all the way down to the
12 subentities.

13 CHIEF JUSTICE ROBERTS: Justice Alito?
14 Justice Sotomayor?
15 Justice Kagan?
16 Justice Gorsuch, anything further?

17 JUSTICE GORSUCH: You'd have us
18 reverse, correct, not just vacate and remand?

19 MR. GANNON: I -- I think -- yes.
20 If -- if you wanted to do it on the statutory
21 ground, I think that you would tell the
22 Wisconsin Supreme Court that it was wrong to
23 think that it was conforming the state statute
24 to the federal statute.

25 It would then be free to make a

1 different decision on statutory construction on
2 remand. If you agree with us on the -- and
3 you -- you could call that a reverse and remand
4 for further proceedings, consistent with your
5 opinion.

6 JUSTICE GORSUCH: That's the boomerang
7 problem Justice Thomas talked about.

8 MR. GANNON: That --

9 JUSTICE GORSUCH: How about on the
10 constitutional side?

11 MR. GANNON: On the constitutional
12 side, then reverse, yes.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: I think your
17 answer to the Chief Justice on the hospital
18 question, I think you answered it, I might be
19 wrong, by just saying if, if it were operated
20 primarily for religious purposes, then it would
21 qualify.

22 But that's the -- I think the hypo was
23 assume that the hospital is operated for
24 religious purposes.

25 MR. GANNON: Yeah. And -- and --

1 JUSTICE KAVANAUGH: And you said:
2 Well, if it is, then it would qualify. Well --

3 MR. GANNON: Yeah. I -- and I was --
4 I was -- I was trying to say that the --
5 there -- there are two different categories of
6 analysis that I have seen that -- that seem to
7 read on that.

8 And one is the -- the committee report
9 issue that Justice Jackson was talking about,
10 where I was trying to draw a distinction between
11 church-related and church-controlled supervised,
12 et cetera, as reflected in the text of the
13 statute.

14 And you -- you asked my friend whether
15 the committee report really just isn't
16 consistent with the text of the statute. And I
17 think that the committee report is ambiguous in
18 that regard. And we wouldn't read it as saying
19 that something like an orphanage would be
20 categorically incapable of -- of being covered
21 by the exemption.

22 And then --

23 JUSTICE KAVANAUGH: Assume we're past
24 that point.

25 MR. GANNON: And then -- then the --

1 the other cases that I've seen, I -- I've just
2 -- I'm -- I'm not aware of what the IRS has done
3 with respect to hospitals in -- in the nonprofit
4 context, and applying the same type of analysis
5 that we have here.

6 And so I -- I think that -- that in a
7 case like this, it -- it looks to me like it's
8 easy to apply, but I -- but I'm -- I'm not sure
9 of that.

10 JUSTICE KAVANAUGH: When you say "a
11 case like this," a case involving these -- these
12 sort of -- the services that are actually
13 provided here?

14 MR. GANNON: Yes, with the type of --
15 with the type of agreement about what the
16 religious purposes are that are underlying this.
17 And as I said, we think that --

18 JUSTICE KAVANAUGH: Then -- then
19 you're in a world -- and we don't have to get
20 into this, as Justice Gorsuch rightly says, but
21 then we're in a world where we're distinguishing
22 the services that are provided, which I thought
23 is something we --

24 MR. GANNON: Well, I think there's a
25 lot else in the context of, you know, what else

1 the hospital is doing, who it's competing with,
2 how it provides the services.

3 If it is actually, you know, in -- in
4 competition with commercial hospitals, then --
5 then that is one of the things that was
6 considered in the -- the Living Faith Seventh
7 Circuit decision about the vegetarian
8 restaurant, to say that there is an aspect of
9 commercialness to the activity that -- that ends
10 up overwhelming the fundamentally religious
11 purpose here.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: No.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: So I guess -- I
19 guess I thought this case was about the meaning
20 of "primarily for religious purposes" and was
21 not about the other part of the exemption which
22 relates to the operation and control of a
23 church.

24 And so that's why I looked at the
25 committee report, which is very clear that it

1 was suggesting that the orphanage, separately
2 incorporated, would not be considered to be
3 primarily for religious purposes. It does not
4 say it would not be considered to be operated
5 and controlled by a church, which was your
6 answer.

7 But setting that aside, can I just
8 focus you for a second on -- I just have a
9 couple quick points on the statute and your
10 reading.

11 You -- you say that we should read the
12 statute as "purpose" being religious motivation.
13 As far as I can tell, "purpose" doesn't always
14 mean that. So, I mean, "purpose" can mean
15 any -- many things. It doesn't necessarily mean
16 motive, not necessarily -- certainly not
17 unambiguously so. It could mean the ends to be
18 accomplished. It could be fulfilling a
19 particular need.

20 You know, my pen serves a purpose; it
21 allows me to write notes. And that has nothing
22 to do with motivation.

23 And so I guess I'm wondering whether
24 the ambiguity in what the statute means when it
25 says "for religious purposes" doesn't invite us

1 to consider what Congress was actually trying to
2 do when it was drawing this exemption.

3 MR. GANNON: Well, I -- I certainly
4 don't disagree that a purpose includes
5 something -- you know, the -- the end to which
6 something is -- is -- is directed.

7 And if you look at the dictionary
8 definitions that we quote on page 15 of our
9 brief, we include a definition for "purpose"
10 that is like that.

11 JUSTICE JACKSON: Right, but your --

12 MR. GANNON: And I think it dovetails
13 well with the definitions for "operation," which
14 ask what -- what is -- we are carrying out a
15 principle or an undertaking to an end.

16 And so the end is the purpose. And
17 the end here, according to Catholic Charities
18 Bureau, is to be an effective sign of the
19 charity of Christ, by --

20 JUSTICE JACKSON: No, I understand. I
21 understand that that is a version of "purpose"
22 that is relating to their motivation, which is
23 to be an effective sign of the charity of
24 Christ.

25 But there's another idea of purpose

1 that would be: What is this organization's
2 activities about? What -- what is -- what are
3 they offering? And I guess my -- my concern is
4 that that view of "purpose" seems to make more
5 sense of the exemption in this case.

6 I mean, if the entities, if the two
7 hospitals, the Catholic hospital and the secular
8 hospital are performing the same services, I
9 don't understand why one would be exempt just
10 because they have religious motivation versus
11 the other. I don't know what -- what the
12 statute is doing to make that kind of
13 distinction.

14 MR. GANNON: And -- and this gets back
15 to -- I think, to the beard-growing,
16 tea-drinking example that I was talking about,
17 to say that -- that we don't think courts should
18 be in the business of saying that a particular
19 activity is inherently religious.

20 JUSTICE JACKSON: No, no, no. I -- it
21 doesn't at all.

22 MR. GANNON: Because --

23 JUSTICE JACKSON: No, what I'm saying
24 is if you are right that the -- the line that's
25 being drawn here is about motivation, I don't

1 understand how the exemption works. There must
2 be some rational reason why Congress would want
3 to exempt the exact same kinds of services being
4 provided just because they are being provided by
5 somebody who's religiously motivated versus, you
6 know, the restaurant that -- you know, we have
7 two identical vegan restaurants. One is being
8 run by people who say this is a tenet of our
9 faith and we're doing it in order to -- to be a
10 ministry for our religion. And the other is run
11 by a person who has so no motivation. What
12 would one, rationally, be under the employment
13 exemption and the other one doesn't?

14 MR. GANNON: If you --

15 JUSTICE JACKSON: If you -- if you
16 instead think of purpose as not motivation, if
17 you think of it as the actual services that are
18 being provided and the distinction is in that,
19 then Wisconsin says the reason why we're
20 exempting novitiates is because if we don't,
21 we're going to get entangled in religion as we
22 try to adjudicate those kinds of claims.

23 That -- it -- it only makes sense if
24 purpose is, like, focused on the activities,
25 rather than the motivation.

1 MR. GANNON: Yeah. And -- and I think
2 that the fact that it is a religious exemption
3 means that it makes sense to focus on what is
4 the motivation for the acts that you're doing --

5 JUSTICE JACKSON: Even though we have
6 another prong that says it's church-related and
7 that seems to care of this is being motivated
8 because a church is doing it.

9 MR. GANNON: But this is in addition
10 to that. It not only has to be supervised--
11 operated, supervised, or controlled by the
12 church, but it has to be done for -- primarily
13 for religious purposes. And my friend --

14 JUSTICE JACKSON: I -- I understand.
15 Thank you.

16 MR. GANNON: -- mentioned the --

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Roth.

20 ORAL ARGUMENT OF COLIN T. ROTH
21 ON BEHALF OF THE RESPONDENTS

22 MR. ROTH: Mr. Chief Justice, and may
23 it please the Court:

24 This religious accommodation solves a
25 particular problem posed by the unemployment

1 insurance system. When determining benefit
2 eligibility, the state must often resolve
3 disputes over whether an employee was discharged
4 for misconduct. If so, no benefits. Now
5 consider churches and their affiliates whose
6 employees express an inculcate religious
7 doctrine through worship, proselytization, and
8 religious education. For those employers,
9 misconduct disputes could often force the state
10 to decide whether employees complied with
11 religious doctrine.

12 So Wisconsin gives those kinds of
13 employers a wide berth by prophylactically
14 exempting them. But because exemption means
15 employees lose state unemployment insurance
16 coverage altogether, exemption is limited to the
17 employers most likely to draw the state into
18 doctrinal disputes.

19 So Wisconsin's search for worship,
20 proselytization, and religious education, much
21 like the ministerial exception, thus does not
22 decide what is religious in the abstract, nor
23 does it discriminate among denominations.
24 Instead, these activities are what reasonably
25 limit the exemption to the employers most likely

1 to pose entanglement problems.

2 Petitioners' motive-only test has no
3 such limits. It would leave potentially over 1
4 million employees nationwide without
5 unemployment coverage, like nurses and janitors
6 at religiously affiliated hospitals, even though
7 the state can virtually always determine their
8 benefit eligibility without confronting
9 religious doctrine.

10 And Petitioners' view that the First
11 Amendment requires a motive-only test would
12 radically expand similar exemptions like
13 501(c)(3), Title VII, Section 702, and property
14 tax exemptions, all of which examine what
15 organizations do, not simply their motives for
16 acting.

17 Petitioners' theory ultimately leads
18 to an all-or-nothing rule, exempt all religious
19 groups or none. Such a rule could incentivize
20 legislatures to cut back on religious
21 accommodations altogether.

22 I welcome your questions.

23 JUSTICE THOMAS: If Catholic Charities
24 reported directly to the bishop without being a
25 separate corporate entity, would -- would you be

1 here?

2 MR. ROTH: If they're incorporated as
3 part of the church, they would qualify for the
4 church exemption.

5 JUSTICE THOMAS: What's the
6 difference? If -- if -- if the function is
7 exactly the same, but it's a separate entity,
8 what's the difference? Religiously?

9 MR. ROTH: Well, the functions
10 obviously are the same. What we are recognizing
11 here is that sometimes the state makes
12 accommodations, especially for churches, because
13 we want to give churches a very wide berth. I
14 think that's entirely appropriate for states and
15 legislatures to do. That's -- Internal Revenue
16 Code, in many places, churches receive special
17 exemptions. And so, yes, in certain
18 circumstances, you will have differential
19 results based on how a religious organization --

20 JUSTICE KAGAN: But if that's true, it
21 puts a lot of pressure on a church's
22 organizational choices, you know? And why isn't
23 that in real tension with our church autonomy
24 cases?

25 MR. ROTH: Well, I think the church

1 autonomy doctrine until this point has been very
2 narrow. As we argue in our brief, it's limited
3 to instances of state compulsion. You see
4 Kedroff and Serbia, and that was about the state
5 telling the church who should run it, how it
6 should be organized, through a state statute or
7 judicial review of an ecclesiastical judicial
8 body's decision. That's compulsion.

9 None of this Court's cases -- and then
10 I'd also point to Our Lady and Hosanna-Tabor,
11 where Title VII remedies could include
12 reinstatement of the terminated employee. So
13 that's the state telling the organization what
14 it must do.

15 JUSTICE KAGAN: Yeah, I get the idea
16 that, like, there's compulsion and there's an
17 incentive structure. But the incentive
18 structure can be set up so that it becomes, you
19 know, an extremely pressured choice, which
20 basically -- you know, basically, even, although
21 not facially, forces the religious organization
22 into a certain choice.

23 MR. ROTH: Understood, Your Honor. I
24 think we're nowhere here that here. As we point
25 out in our brief -- and this is precisely

1 because Catholic Charities relies so heavily on
2 their backup CUPP private system. Because
3 they're a reimbursable employer for the state,
4 we think that the -- the fiscal impact they face
5 here is essentially net neutral. Either they're
6 paying for benefits through the state system in
7 a one-to-one reimbursable ratio, or they're
8 going to pay for the benefits through their
9 private system.

10 JUSTICE GORSUCH: Well, but doesn't
11 that cut the other way too? Because one of the
12 arguments your friends make on the other side is
13 the benefits that individuals receive will be
14 just as good or better than what the state
15 provides.

16 So that kind of goes to the compelling
17 interest. What compelling interest does -- does
18 Wisconsin have in insisting on, effectively,
19 Catholic Charities to be incorporated
20 differently than it is?

21 MR. ROTH: Well, I would note that the
22 compelling interest analysis only comes in when
23 we get to --

24 JUSTICE GORSUCH: I'm well aware of
25 that, and I know you are too counsel, but --

1 MR. ROTH: Right.

2 JUSTICE GORSUCH: But what -- what
3 interest does the state have in --

4 MR. ROTH: Well what --

5 JUSTICE GORSUCH: -- in effectively
6 saying you should be incorporated together with
7 the church rather than not?

8 MR. ROTH: Absolutely. So the -- the
9 first one is --

10 JUSTICE GORSUCH: I'm struggling.

11 MR. ROTH: -- of course, is the state
12 has a strong compelling interest in as broad
13 insurance -- unemployment insurance coverage as
14 possible. Now, it's true Catholic Charities has
15 a private backup system, but there's nothing in
16 their argument --

17 JUSTICE GORSUCH: And -- and you agree
18 that it's --

19 MR. ROTH: -- that would require them
20 --

21 JUSTICE GORSUCH: -- just as good as
22 what you -- you'd have in Wisconsin.

23 MR. ROTH: I -- I would -- I would
24 disagree with that, respectfully, Your Honor. I
25 think the most important point is that it's

1 essentially a self-insurance program.

2 JUSTICE GORSUCH: Right.

3 MR. ROTH: And so, when you have
4 layoffs, you know, self-insurance is a risk in
5 that situation --

6 JUSTICE GORSUCH: Well, all
7 self-insurance -- governments are at risk too,
8 but okay. Anything other than that?

9 MR. ROTH: There's also no due process
10 protections. And so, obviously, if the employee
11 is denied coverage in the private system,
12 there's no judicial review, which you have in
13 the -- in the state system.

14 JUSTICE GORSUCH: Okay.

15 JUSTICE KAVANAUGH: You said in your
16 opening that we should look at what the
17 organizations do --

18 MR. ROTH: Mm-hmm.

19 JUSTICE KAVANAUGH: -- and not why
20 they do it.

21 MR. ROTH: Correct.

22 JUSTICE KAVANAUGH: But how do you
23 square that with the language of the statute,
24 "operated primarily for religious purposes" --

25 MR. ROTH: Right.

1 JUSTICE KAVANAUGH: -- which seems to
2 go to the why they do it, not what they do.

3 MR. ROTH: So just with the brief
4 premise that we don't think this is a Michigan
5 v. Long situation where the state court's
6 interpretation is properly before this Court,
7 "operated primarily for religious purposes" is a
8 term of art. It's borrowed from the tax law
9 context. This is not something that Wisconsin
10 pulled out of the ether. This is a term that's
11 long been used in 501(c)(3). And we think under
12 501(c)(3) case law, it's long been understood
13 that "operated" looks at activity.

14 So 501(c)(3) has an organizational
15 test and an operational test. And the
16 operational test is always used to check what
17 the organizational purpose is. And so we think
18 the only way that operational test has any
19 effect is if you're looking at the activities.

20 And I'd point to the Living Faith case
21 because this goes to the Chief's question. I
22 see no way in which Living Faith came out the
23 way it did, which it denied the exemption to the
24 Seventh-Day Adventist restaurant, if a religious
25 motive is enough, because the Seventh-Day

1 Adventist and Living Faith said, for us,
2 promoting health is an element of the gospel.
3 Health leads to salvation. I think that's
4 practically indistinguishable from what Catholic
5 Charities is saying here. And Living Faith said
6 no, I'm sorry, the commercial -- simply because
7 you have a -- a religious motivation for the
8 non-exempt purpose --

9 JUSTICE KAVANAUGH: Well --

10 MR. ROTH: -- does not render you
11 eligible for the exemption.

12 JUSTICE KAVANAUGH: I think there --

13 CHIEF JUSTICE ROBERTS: I'm sorry, go
14 ahead.

15 JUSTICE KAVANAUGH: Go ahead.

16 CHIEF JUSTICE ROBERTS: What is the
17 simplest thing that the Catholic Charities would
18 have to do to qualify for the religious
19 exemption in Wisconsin?

20 MR. ROTH: I think --

21 CHIEF JUSTICE ROBERTS: Would they --
22 should they have one sign in the dining hall
23 saying: This meal provided by Catholic
24 Charities. If you want to find out about the
25 church, here's a brochure?

1 MR. ROTH: No, Your Honor. I think
2 what we're looking for is precisely what this
3 Court looks for in -- in adjudicating the
4 ministerial exception. We're looking for
5 activities that express and inculcate religious
6 doctrine: worship, proselytization, religious
7 education.

8 And it's precisely because it's those
9 activities that create the entangling problem in
10 the state --

11 JUSTICE GORSUCH: What -- what is --
12 what is proselytization?

13 MR. ROTH: "Proselytization" would
14 mean when the -- if Catholic Charities, when
15 it's delivering services, says, you know, please
16 repent, essentially. You know --

17 JUSTICE GORSUCH: Repent. They have
18 to say "repent"?

19 MR. ROTH: Anything like, you know,
20 please join our religion. We would like you to
21 become Catholic if you're going to receive this
22 service.

23 JUSTICE GORSUCH: So --

24 MR. ROTH: Because when -- I'm sorry,
25 Your Honor.

1 JUSTICE GORSUCH: So -- so they --
2 they have to say -- I just want to know what the
3 test is. So repent your sins. You get the
4 exemption. Not requiring you to repent your
5 sins, you -- you don't -- I guess you don't get
6 the exception.

7 MR. ROTH: No, the --

8 JUSTICE GORSUCH: Or -- or what was
9 the other one? What was your other test for
10 proselytization? Join their church? You
11 become -- you know, become a member, as opposed
12 to we welcome you to attend our services if you
13 want, here is some information about them?

14 What's the line there? Because
15 they -- they say they do. They say you're
16 always welcome. I mean, the Catholic church,
17 we'd love to have you, but we're not -- we're
18 not saying you have to -- to show up.

19 So is mandatory church attendance
20 versus optional church attendance, that's the
21 line?

22 MR. ROTH: No, Your Honor. I think
23 what -- what we're looking for is -- is
24 analogous to what this Court looks for in
25 applying the ministerial exception. What it

1 wants to know when it -- when it seeks to --

2 JUSTICE GORSUCH: No, I'm asking you
3 how to apply your exception. Because the
4 Wisconsin Supreme Court says proselytization is
5 really important. And it says, oh, also, if you
6 serve non-co-religionists, that's a problem.

7 So I guess you only serve those who
8 are co-religionists. That's one solution, I
9 guess, for the church. Don't help anybody else
10 in need. And the other is to proselytize. And
11 I'm just trying to get my hands around what that
12 means --

13 MR. ROTH: So I will say --

14 JUSTICE GORSUCH: -- in Wisconsin.

15 MR. ROTH: -- the -- the serving of
16 co-religionists is a marginal factor at best.

17 JUSTICE GORSUCH: It's a marginal
18 factor?

19 MR. ROTH: If this Court wants to
20 discard it, we have no problem with that.

21 JUSTICE GORSUCH: Well, it's in the --
22 it's in the Court's opinion.

23 MR. ROTH: I understand.

24 JUSTICE GORSUCH: So you're running
25 away from the Court's opinion. So this all

1 comes down to proselytization. How much is
2 enough?

3 MR. ROTH: No, Your Honor. What it
4 comes down to is whether the employees of the
5 organization are expressing and inculcating
6 religious doctrine.

7 JUSTICE GORSUCH: Okay.

8 JUSTICE KAGAN: Do you think that
9 Wisconsin could pass a statute that says we'll
10 give a religious tax exemption to religious
11 groups that proselytize, but to no others?

12 MR. ROTH: I don't think so, Your
13 Honor. Because I think that would not be
14 serving any particular purpose. And we have to
15 keep in mind --

16 JUSTICE KAGAN: I don't understand why
17 it's not the exact same thing. I mean, the way
18 the statute has been interpreted by the
19 Wisconsin courts, it's basically saying we're
20 giving a tax exemption to religious organize --
21 to religious organizations that proselytize, but
22 not to religious organizations that don't.

23 MR. ROTH: So I would like to step
24 back for a moment to the principle that
25 accommodations are meant to solve particular

1 problems. And we think the world is -- is
2 roughly divided into two groups. It's religious
3 organizations that -- that are --

4 JUSTICE KAGAN: I mean, some
5 religious -- I'm just -- Mr. Roth, some
6 religious organizations proselytize.

7 MR. ROTH: That's right.

8 JUSTICE KAGAN: And some religious
9 organizations are allergic to proselytizing.
10 And -- and for the Wisconsin -- I posed the hypo
11 where it was a Wisconsin legislature. This is,
12 instead, the Wisconsin court.

13 But, instead, saying: The tax
14 exemption goes to religious people who think of
15 proselytizing as part and parcel of their
16 religion, and not to the religious people who
17 think: We don't proselytize, even when we do
18 all these charitable works. It's actually not
19 what we do. And that's part of our religion.

20 MR. ROTH: So what Your Honor is
21 driving at, I -- I think, is essentially this is
22 an arbitrary distinction between religions that
23 proselytize and those that don't. And there is
24 no reason --

25 JUSTICE KAGAN: And the those that

1 don't, sometimes it's a religious principle not
2 to.

3 MR. ROTH: But I -- I would dispute
4 that premise that this is not an arbitrary
5 distinction. I think it -- it serves a
6 functional purpose when employees are expressing
7 and inculcating religious doctrine. We have to
8 step back.

9 The unemployment insurance system's
10 going to turn on misconduct disputes. And if
11 you're out there expressing and inculcating
12 religious doctrine through those three things
13 that I mentioned, it's going to be very
14 difficult for the state to resolve an
15 unemployment dispute.

16 JUSTICE KAGAN: Counsel --

17 JUSTICE GORSUCH: Well, but, no, you
18 gave that away, though, when you said all they
19 have to do is turn this into the Catholic
20 Church, Inc., and -- and -- and it all goes
21 away.

22 So you could adjudicate those
23 disputes, but you -- and you would say it would
24 be very important for -- for you to do so
25 because they don't involve proselytizing, but

1 the minute it goes into the Catholic Church,
2 Inc., rather than a separate incorporation.

3 So I'm not sure that argument works,
4 counsel.

5 MR. ROTH: So -- so -- well, Your
6 Honor, the legislature here, yes, has -- has
7 created this exemption to function on an
8 organizational level, rather than an individual
9 level like the ministerial exemption does.

10 But I think that's for a prophylactic
11 reason. We don't want to have to go through
12 sort of one by one, activity to activity to look
13 at it. So, yes, Your Honor, there is an element
14 of over-inclusivity when someone's inside the
15 church, we're going to let them out.

16 But, again, I think that's -- that's a
17 virtue. States should be very careful about
18 churches, and stay away from them. And so
19 that's what we've done here.

20 CHIEF JUSTICE ROBERTS: I -- it seems
21 to me -- and you've -- it's repeatedly in your
22 brief and in your opening and in all these
23 answers. You want a test that is the easiest
24 one for you to apply.

25 You're saying this will make it easy

1 for us. And it -- well, it -- it is easy here.
2 And that's why you say I don't want to get into
3 the particular doctrine. We want -- we don't
4 want to be dragged into trying to consider a
5 number of nuances or whatever, whether this
6 qualifies or not.

7 You want the test to be whatever is
8 easiest for you.

9 MR. ROTH: I don't think that's quite
10 right, Your Honor. I want the test to be the
11 one that accurately identifies the kinds of
12 organizations that are going to cause those
13 entangling problems.

14 I happen to think that it's a
15 relatively easy-to-administer test if it focuses
16 on those big three things. I think that's
17 exactly what the ministerial exception looks
18 for. It looks for those same three things to
19 identify the employees whose employment
20 decisions we want to stay out of in the
21 antidiscrimination context.

22 JUSTICE JACKSON: But it does it --

23 MR. ROTH: So it's not just --

24 JUSTICE BARRETT: Counsel, is it
25 possible --

1 JUSTICE JACKSON: -- at the level of
2 employees --

3 JUSTICE BARRETT: Go ahead.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett.

6 JUSTICE BARRETT: Counsel, if -- if
7 proselytization or evangelization or whatever we
8 want to call it is a necessary component in
9 Wisconsin's view -- I mean, as I understand it,
10 Judaism does not have that as part of its
11 religion. So does that mean that Judaism is
12 completely disqualified from --

13 MR. ROTH: No --

14 JUSTICE BARRETT: -- getting the
15 exemption --

16 MR. ROTH: Absolutely not --

17 JUSTICE BARRETT: -- if they're
18 running these sorts of organizations?

19 MR. ROTH: My apologies, Your Honor.

20 If I was not clear, these are or's;
21 these are not and's. So proselytization is
22 absolutely not a required component to receive
23 this accommodation. These are or's.

24 If your -- if your organization
25 involves -- again, engages, I think, in any of

1 these three things: worship, proselytization,
2 religious education, you're going to be doing
3 the kinds of things the State needs to stay away
4 from, whether it's in the antidiscrimination
5 context or whether it's in the unemployment
6 context.

7 So to Justice Gorsuch's question, if
8 they don't proselytize, that's fine. They may
9 still get this accommodation, if they do other
10 kinds of things --

11 JUSTICE BARRETT: Like --

12 MR. ROTH: -- that are going to create
13 these entangling forces --

14 JUSTICE BARRETT: Like -- like serve
15 co-religionists? I'm just trying to figure out
16 what. I mean, let's -- let's say that, you
17 know, you -- you want to serve people that
18 aren't co-religionists. You're still defining
19 it in a way that will inevitably exclude certain
20 religions.

21 MR. ROTH: Sure. So the -- the
22 co-religionist piece of the decision, I -- I'm
23 not going to stand and die on that hill. If
24 this Court wants to say that's not a proper
25 consideration, I think it's still sufficient to

1 affirm the decision below.

2 The core of the state supreme court's
3 decision was a motive alone is not enough to
4 qualify for this exemption.

5 Catholic Charities here relied
6 entirely on their motive. We think that
7 affirming that core of the decision suffices to
8 deny them the --

9 JUSTICE GORSUCH: I -- I think it has
10 to come down to proselytization for you.
11 Because worship, you know, you're not force --
12 you either -- some faiths will force you to sit
13 through the worship before they give you the
14 soup. Other -- others just give you the soup
15 and invite you to worship.

16 But -- so, again, you're -- that's
17 proselytization, in another way of looking at --

18 MR. ROTH: If --

19 JUSTICE GORSUCH: -- it; isn't that
20 right?

21 MR. ROTH: If I may, Your Honor?

22 JUSTICE GORSUCH: Are you going to
23 go -- is Wisconsin going to go around and -- and
24 this soup kitchen, you know, you have to go --
25 you have to go to the service before you get

1 your soup, they're good to go. But that one,
2 they just invite you to the service after the
3 soup, and they're bad.

4 I mean, is it really that's the -- I
5 would have thought this would entangle the state
6 in -- in religion a whole lot more than a
7 non-discrimination rule between religions.

8 MR. ROTH: So I would like to revisit
9 just very briefly, because I think it's directly
10 responsive to Your Honor's question. It's a
11 hypothetical we gave in our brief. I think it
12 illustrates this point.

13 Ministerial exception. Imagine
14 Catholic Charities on one hand, and we'll call
15 it evangelical charities on the other. The
16 evangelical charities worships, proselytizes,
17 educates its service recipients. It's -- it's
18 chock full of employees who have received the
19 ministerial exception precisely because they
20 perform those functions of expressing and
21 inculcating doctrine that the state needs to
22 stay away from.

23 Catholic Charities, however, is not
24 going to have employees who receive the
25 ministerial exception. So we -- we have the

1 same exact disparate --

2 JUSTICE GORSUCH: Really, there are no
3 nuns and priests and deacons at the soup
4 kitchen?

5 MR. ROTH: I -- I'm not saying that at
6 all, Your Honor. But if they are not -- when
7 they -- when they are deliberate --

8 JUSTICE GORSUCH: The bishop, you
9 know, is overseeing it? I mean, come on.

10 MR. ROTH: It's -- right. Your Honor,
11 it's not about who -- who the employees are.
12 It's about --

13 JUSTICE GORSUCH: Okay --

14 JUSTICE BARRETT: You said they were.

15 JUSTICE GORSUCH: Yeah, you just --

16 MR. ROTH: It's about what they do.

17 JUSTICE BARRETT: You said ministerial
18 exception, it was about who they are.

19 MR. ROTH: Well, sure, yeah, but -- I
20 apologize. What I meant is it's not their
21 status as a minister, a deacon, or a bishop. It
22 is about what -- what they do.

23 And so if the minister or the deacon
24 or the bishop at the soup kitchen is -- is --
25 is -- when he delivers the soup, is doing the

1 thing --

2 JUSTICE BARRETT: So the nun doesn't
3 get the ministerial exception --

4 MR. ROTH: Excuse me?

5 JUSTICE BARRETT: -- and neither does
6 the priest?

7 MR. ROTH: Sorry?

8 JUSTICE BARRETT: The nun and the
9 priest don't get the ministerial exception?

10 MR. ROTH: I -- so they -- I -- I
11 suppose they would, because in other contexts
12 they would be there to express and inculcate
13 religious doctrine.

14 But if in the context of -- of this,
15 if they're employed by Catholic Charities, in
16 the course of their employment with Catholic
17 Charities, they're not there to express and
18 inculcate the faith. While, you know, it --
19 when they're --

20 JUSTICE BARRETT: So you're not
21 entangled if you have to go in and interview the
22 -- the nun and the priest who go in and do a
23 shift at the soup kitchen that Catholic
24 Charities is running to see what they're doing
25 or if you have to listen -- I mean, are they

1 playing, like, hymns on the radio or, like,
2 Christian rock at the evangelical soup kitchen
3 on the radio? You know, is that -- is that
4 proselytization or not because you're forced to
5 sit there and listen to it?

6 MR. ROTH: Your Honor, I -- I -- I
7 understand the -- the thrust of the question. I
8 mean, I don't think it's any more entangling
9 than the kinds of questions courts have to
10 answer all the time when applying the
11 ministerial exception.

12 JUSTICE JACKSON: Well, Mr. Roth, why
13 don't you just apply the ministerial -- I mean,
14 this goes back to the -- to the Chief Justice's
15 question. It just seems as though Wisconsin
16 says we're going to set up this system that is
17 operating in a discriminatory fashion based on
18 whether or not you proselytize, to avoid having
19 to address the ministerial question if it should
20 arise in these situations.

21 But, I mean, if -- if it's creating a
22 constitutionally problematic, discriminatory
23 front-end issue, why don't you just deal with it
24 as the ministerial exception in the back end?

25 MR. ROTH: Well --

1 JUSTICE JACKSON: It's not as easy,
2 says the Chief Justice --

3 MR. ROTH: Mm-hmm.

4 JUSTICE JACKSON: -- but so be it.

5 MR. ROTH: Well, I -- of course
6 disputing the premise that this is, you know,
7 setting a discriminatory exemption, I think the
8 -- the point is this is a prophylactic, and the
9 -- the legislature has said rather than force
10 these kinds of organizations in individual cases
11 to assert something analogous to the ministerial
12 exception, which -- you -- you know, it can --
13 it can be challenging to predict who's -- who's
14 going to have to -- who's going to get this, we
15 want us to get these people out on the front
16 end.

17 I think that's very similar to what
18 Congress did when it expanded Section 702.
19 Pre-1972, it only applied to religious
20 activities, but then Congress said, well, that's
21 going to require religious organizations to sort
22 of predict on a one-by-one basis who's going to
23 get this 702 exemption, so we're going to expand
24 it to religious organizations as a whole.

25 And Amos said that is entirely

1 appropriate. It's good to have these
2 prophylactic measures to give space to the
3 organizations that do these things, rather than
4 force them, sort of on a one-by-one basis, to
5 have to adjudicate these sort of ministerial
6 exception-type defenses, which are affirmative
7 defenses in these -- you know, for instance, in
8 a Title VII case. And --

9 JUSTICE KAVANAUGH: I think your
10 overarching argument, again, is that we
11 shouldn't look at the motives; we should look at
12 what they do.

13 And the other side says, no, you have
14 to, by the statutory language and -- and the
15 constitutional principles look at why they're
16 doing the activity. And they say the limit on
17 that is to present -- prevent some of the absurd
18 hypotheticals or -- or extended hypotheticals is
19 sincerity, and sincerity will weed out the cases
20 that you're worried about.

21 What is your response to why
22 sincerity -- you should look at beliefs, look at
23 purpose, motive, but sincerity will weed out the
24 marginal cases?

25 MR. ROTH: Well, sincerity -- I -- so

1 I took two hypotheticals given to the other side
2 as examples of the edge cases that maybe we
3 don't want to be exempting here. One was the --
4 the hospital and one was the vegan restaurant.

5 I think in both those cases, you're
6 not going to weed those out on sincerity
7 grounds. The -- there's testimony in the record
8 here -- this is record 99 of the lower court
9 record. The archbishop of Milwaukee testified
10 that he oversees multiple Catholic hospitals in
11 the Milwaukee area. And so, that's clearly --
12 they're clearly operated for a religious motive.
13 We would never dispute the sincerity of that
14 religious motive. They're going to be out.
15 Seventh-Day Adventists similarly. It -- maybe
16 it's commercial activity they're engaging in --

17 JUSTICE KAVANAUGH: And they're going
18 to be out, why? Just explain that.

19 MR. ROTH: They're going to be out
20 because when they run their vegan restaurants,
21 what -- again, what a --

22 JUSTICE KAVANAUGH: Is that a
23 hospital -- I think you were on the hospital
24 one.

25 MR. ROTH: Oh, the hospital?

1 JUSTICE KAVANAUGH: Yeah.

2 MR. ROTH: Well, they're -- they're
3 out because what the hospital is saying if it's
4 supervised by the bishop, which is all this
5 statute requires, the bishop will say the reason
6 we run these hospitals is to serve -- I mean,
7 Christ healed the sick, and we're doing the
8 same. And so how can you tell us that that's
9 not a religious purpose?

10 They'll be out, even though
11 99.9 percent of what goes on at that hospital is
12 healthcare.

13 JUSTICE KAVANAUGH: And what's your
14 response to that? That they should be in?

15 MR. ROTH: That -- well, we think
16 they're properly --

17 JUSTICE KAVANAUGH: I mean, I'm just
18 trying to get at the analysis --

19 MR. ROTH: We think -- right.

20 JUSTICE KAVANAUGH: -- you would use
21 on the other side of that argument.

22 MR. ROTH: Well, my analysis would be
23 you're looking at the activities, and as Seventh
24 Circuit said in Dykema, we want to look at
25 whether the kinds of things that Catholic

1 hospital is doing is going to entangle the state
2 in unemployment benefit disputes.

3 And I think the answer is clearly no.
4 So -- and I can -- I would like to illustrate --
5 just two very briefly hypothetical --
6 hypotheticals to illustrate this sort of
7 entanglement point. I'll just stick with one,
8 actually.

9 So the nurse at the hospital. She's
10 not charged with inculcating religious doctrine.
11 She is fired for malpractice. There's a
12 misconduct dispute. The state can very easily
13 resolve whether she engaged in misconduct
14 without answering doctrinal questions, but if
15 they're right, she's out of the system
16 altogether and she loses benefits.

17 JUSTICE ALITO: Mr. --

18 MR. ROTH: And that's -- that's a
19 needless loss of benefits.

20 JUSTICE ALITO: I mean, Mr. Roth,
21 let's suppose we affirm and then Catholic
22 Charities comes to the state and says, okay,
23 fine, we don't like the decision, but what -- we
24 want to comply. Tell us the minimum change we
25 need to make in order to comply.

1 What's your answer?

2 MR. ROTH: I think if when they
3 deliver, say, the soup to the -- the recipient,
4 they say: Recipient, you know, we're both going
5 to say the Lord's prayer, that could be one
6 thing. I mean, when they're engaging in --

7 JUSTICE ALITO: That would be
8 sufficient?

9 MR. ROTH: I think --

10 JUSTICE ALITO: You don't get the --
11 you don't get the soup unless you pray first?

12 MR. ROTH: And, again, I think it's
13 because that type of job function is tethered to
14 religious doctrine. And so that's exactly what
15 creates the problem. If there's a -- if there's
16 a termination decision, if -- if the soup
17 kitchen person says the Lord's prayer, say, the
18 wrong way, he omits a line, and he's terminated
19 for that, however unlikely that may be, but if
20 it were -- come -- to come to pass, the state
21 agency would now have to decide did he omit too
22 much of the Lord's prayer, did he say it the
23 wrong way?

24 JUSTICE KAGAN: But it might be --

25 MR. ROTH: We want --

1 JUSTICE KAGAN: -- a matter of
2 religious doctrine that we don't require people
3 to say the Lord's prayer with us before we give
4 them soup. I mean, what's -- what's --

5 MR. ROTH: That --

6 JUSTICE KAGAN: -- what's -- what's
7 problematic about this -- I mean, there are lots
8 of hard questions in this area. Vegan
9 restaurants, hospitals, lots of hard questions.
10 But I thought it was pretty fundamental that we
11 don't treat some religions better than other
12 religions. And we certainly don't do it based
13 on the content of the religious doctrine that
14 those religions preach.

15 And if you -- this opinion sets up two
16 things. One is the co-religionist service.
17 You've run away from that. And the other is the
18 proselytization. Some religions proselytize.
19 Other religions don't. Why are we treating some
20 religions better than others based on that
21 element of religious doctrine?

22 MR. ROTH: Because -- precisely
23 because I think when an employee has to
24 proselytize, that's what creates the problem.

25 I'd draw just a brief comparison --

1 JUSTICE KAGAN: The problem must be --
2 you must be able to address this problem, which
3 is -- you know, entanglement is an issue. You
4 -- if -- if I say to you, you know -- you have
5 to figure out a way to do this that does not
6 discriminate among religions based on the
7 content of their doctrines.

8 MR. ROTH: So I would draw an analogy.

9 JUSTICE KAGAN: The reason why we're
10 so worried about entanglement is because it gets
11 us enmeshed in the content of religious
12 doctrine. But your way of doing it, you know,
13 basically puts the state on the side of some
14 religions with some doctrine versus other
15 religions with a different doctrine.

16 MR. ROTH: Sure. So, Your Honor, I
17 would draw -- I think a very apt analogy on this
18 point are the FICA and ACA exemptions. The --
19 these are very valuable exemptions to the FICA
20 taxes and the ACA individual mandate that are
21 exemptions for those who have a religious
22 objection to participating in public insurance.

23 Not all denominations have that
24 religious objection. And so it does fall in
25 denominational lines who gets the FICA

1 exception. This is a very valuable exemption.
2 Only certain denominations that have these kinds
3 of objections to public insurance are going to
4 receive this.

5 JUSTICE GORSUCH: Yes, but all can.
6 And here the difference is all cannot. Right?

7 MR. ROTH: Well --

8 JUSTICE GORSUCH: There are going to
9 be some exemptions that as a matter of --
10 Catholic Charities does more soup kitchens than
11 -- than some -- some other faiths. It's true.
12 It -- it's true. It's true. So they're going
13 to get -- more likely to get the exemption.

14 But I think what Justice Kagan is
15 getting at is, isn't it a fundamental premise of
16 our First Amendment that the state shouldn't be
17 picking and choosing between religions, between
18 certain evangelical sects, and Judaism and
19 Catholicism in -- on the other, for example?
20 And doesn't it entangle the state tremendously
21 when it has to go into a soup kitchen, send an
22 inspector in, to see how much prayer is going
23 on?

24 MR. ROTH: On the discrimination
25 point, the -- my -- my fundamental premise is

1 there are certain circumstances in which
2 Religion A faces a problem based on its
3 doctrinal content or its practices that Religion
4 B may not face. And so when the state
5 legislature -- Congress or state legislatures
6 set out to exempt Religious Group A but not
7 Religious Group B, precisely because B does not
8 face the problem, that cannot be discriminatory.

9 We're in a world, then, where there's
10 no line-drawing available to legislatures to
11 accommodate specific problems that only specific
12 religious groups face, because the principle is
13 if that ever falls on denominational lines, it's
14 unconstitutional.

15 And, Justice Gorsuch, I -- I -- I
16 actually dispute the premise of your question,
17 that it's just -- it's easy for a religious
18 group to adopt a new principle to obtain the ACA
19 or FICA exemption.

20 JUSTICE GORSUCH: Well, all they have
21 to do is reincorporate, according to you.

22 MR. ROTH: No. On -- on the FICA and
23 ACA example, the -- the premise would have to be
24 the denomination that is left out -- very
25 valuable exemption, all it has to do is adopt a

1 new tenet of religious doctrine that I don't
2 like to participate in public insurance, and it
3 gets the exemption. But that's obviously not so
4 simple.

5 We don't go around telling religions
6 you should adopt new tenets in order to get, you
7 know, a -- a -- a new benefit. And so I really
8 think it's -- it's basically the same dynamic
9 that we face here. It's certain groups face the
10 problem. Certain groups have conscientious
11 objections; other groups don't. That may fall
12 on denominational lines, but that's something we
13 have also done.

14 I would encourage you to go back to
15 the history on this. Professor McConnell, his
16 canonical article on the Free Exercise Clause,
17 recognizes that at the founding of this country,
18 we had multiple targeted religious
19 accommodations for oath-taking, for religious
20 assessments, for -- for conscription, and those
21 often were limited to religious groups known to
22 be opposed to those things, especially the oath
23 taking and the Quakers.

24 JUSTICE BARRETT: Counsel, can I shift
25 you to what I hope will be an easier question

1 for you?

2 MR. ROTH: Please.

3 JUSTICE BARRETT: Do you want to
4 address your disagreement with the Solicitor
5 General about whether the Wisconsin Supreme
6 Court's decision tracked the interpretation of
7 the federal statute?

8 MR. ROTH: So you want me to address
9 the Michigan v. Long question or --

10 JUSTICE BARRETT: Well -- well, yeah,
11 Michigan. You say we should not --

12 MR. ROTH: Sure.

13 JUSTICE BARRETT: -- decide it on that
14 basis. So, you know, you're distancing yourself
15 from the position taken by the federal
16 government.

17 Can you talk about that?

18 MR. ROTH: Right. So on Michigan v.
19 Long question, I -- I think it's a very simple
20 distinction. So in St. Martin, what was going
21 on is the South Dakota state court thought it
22 was required to bring its coverage up above the
23 floor that set -- FUTA sets. So FUTA sets a
24 floor. If you fall below it, you don't qualify
25 for the federal state tax sharing.

1 So South Dakota thought it had --
2 we're trying to get up to this floor, so we can
3 get the credits. So that's why the -- the --
4 the South Dakota court said: I'm required to do
5 what I'm doing by FUTA. That is not what is
6 happening here.

7 The state court did not think it was
8 required to meet -- meet a floor. And so that's
9 why Michigan v. Long doesn't apply. There's a
10 sufficient independent state grounds. This is
11 an optional exemption. I think the -- the
12 Solicitor General recognizes that. States don't
13 have to have this.

14 I believe the state of Oregon does not
15 have any part of this exemption at all for
16 churches or religious purpose organizations.

17 And so precisely because it's an
18 optional exemption, Wisconsin go -- can go above
19 the floor of FUTA. It's not a compelled
20 reading. And so Michigan v. Long doesn't apply.

21 I see my red light's on, but I am
22 happy to continue if you like.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Rebuttal, Mr. Rassbach?

1 JUSTICE THOMAS: Chief --

2 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.
3 You're -- you're -- yes, yes.

4 (Laughter.)

5 MR. ROTH: I -- I'm happy to stand up
6 or sit down, you know, Chief, whatever you want
7 me to do.

8 CHIEF JUSTICE ROBERTS: Well, I didn't
9 have anymore, so I figured -- Justice Thomas?

10 JUSTICE THOMAS: What would we do, you
11 seem to focus on the proselytizing aspect of the
12 exemption that you could get the exemption if
13 you proselytize, but, you know, it leads me to
14 wonder why you don't have the same attitude
15 towards someone who posts outside, we believe
16 deeply in the corporal works of mercy.

17 What is -- why would you have -- why
18 is there a difference from your standpoint from
19 -- in -- in one and not the other proselytizing
20 --

21 MR. ROTH: Right.

22 JUSTICE THOMAS: -- over the corporal
23 works of mercy?

24 MR. ROTH: Right. And it's because
25 the Catholic Charities employees, when they

1 perform the corporal works of mercy, which I
2 want to be unequivocal, the -- the state
3 recognizes -- recognizes that charity is an
4 essential aspect of the Catholic religion.

5 We are not disputing that. But when
6 the employee is simply performing the corporal
7 work of mercy without expressing and inculcating
8 religious doctrine, this is the point. This is
9 an an anti-entanglement statute. And so if
10 they're not expressing and inculcating religious
11 doctrine, they are not going to create the
12 entangling problems.

13 And so that's why we say they should
14 still be covered because we're not going to face
15 the misconduct disputes that are very difficult
16 for the state agency to resolve.

17 JUSTICE THOMAS: So what do you mean
18 by an "anti-entanglement statute"?

19 MR. ROTH: It's an anti-entanglement
20 statute precisely because when the state has to
21 resolve misconduct disputes over benefit
22 eligibility, we don't want our -- our
23 hardworking public servants to have to answer
24 questions of religious doctrine.

25 I want to return to my Lord's prayer

1 example, whether they, you know, said it
2 correctly. We want to keep them out of that
3 type of decision-making. And that's why that
4 kind of activity triggers this exemption.

5 JUSTICE THOMAS: Where does this
6 standalone entanglement issue come from?

7 MR. ROTH: Well, it's -- it's -- it's
8 what's driving this statute, Your Honor. It's
9 what's -- it's what's led to the types of
10 activities the state heard --

11 JUSTICE THOMAS: I know. But when I
12 think of entanglement, I think of the, hopefully
13 defunct, Lemon test. Where does it come from as
14 a --

15 MR. ROTH: Oh.

16 JUSTICE THOMAS: -- standalone
17 consideration?

18 MR. ROTH: Well, I think Lemon built
19 in -- entanglement predated Lemon. I believe
20 Walz is one of the first cases where it really
21 was discussed as a factor in First Amendment
22 doctrine, trying to avoid --

23 JUSTICE THOMAS: An Establishment
24 Clause context?

25 MR. ROTH: That's right.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

2 JUSTICE ALITO: Are you aware that
3 this entanglement problem has arisen in the
4 states that follow federal law?

5 MR. ROTH: And by "follow federal law"
6 you mean?

7 JUSTICE ALITO: Interpret the federal
8 and have statutes similar to the federal
9 statutes, similar to your statutes.

10 MR. ROTH: Well --

11 JUSTICE ALITO: So they have a -- have
12 they had a lot of entanglement problems?

13 MR. ROTH: So we're talking about
14 states who would take a motive-only approach?

15 JUSTICE ALITO: Yeah.

16 MR. ROTH: Well, they would be
17 exempting much more broadly so I think no, they
18 would not have the enforcement entanglement that
19 we're concerned about here because -- precisely
20 because many more organizations are exempted.

21 JUSTICE ALITO: So you don't actually
22 have any -- you -- you think there would be an
23 entanglement problem if you -- if the Wisconsin
24 Supreme Court interpreted Wisconsin law the way
25 the Solicitor General tells us federal law

1 should be interpreted, but you have no examples
2 of actual entanglement cases coming up?

3 MR. ROTH: Well, no, Your Honor. I do
4 think that if the Wisconsin statute were
5 interpreted as the Solicitor General requests
6 and it was simply a motive-only test, there is
7 less entanglement absolutely, but we think that
8 goes far beyond the anti-entanglement -- the --
9 the purpose of this statute, which is to get the
10 state out of entangling employment benefits
11 disputes.

12 You're going to exempt the hospitals
13 with all the nurses, all the janitors who aren't
14 going to pose these problems, so it's just -- it
15 simply takes us far beyond what it's meant to
16 do.

17 JUSTICE ALITO: All right. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: How much problem
21 is there in Oregon that doesn't give this
22 exemption at all?

23 MR. ROTH: I'm not aware, Your Honor.
24 I'm not aware. It's a relatively recent --

25 JUSTICE SOTOMAYOR: Isn't it because

1 if you have as an as-applied challenge to the
2 janitor being fired, if the janitor is not
3 exempt, the state is not going to fight it if it
4 doesn't have a religious reason for firing him
5 or her, correct?

6 MR. ROTH: Well, that's true, but if
7 there is a religious reason -- you know, a -- a
8 doctrinal issue --

9 JUSTICE SOTOMAYOR: But it's not going
10 to be more most people. The proselytizing is
11 usually not -- if the proselytizing causes a
12 problem, then the state is not going to get
13 involved, correct?

14 MR. ROTH: Well, I -- that's the
15 million dollar question. I mean, that's what
16 this exemption is meant to do.

17 JUSTICE SOTOMAYOR: I know you don't
18 like this question, but accept it. If we find
19 that your refusal is -- and it constitutes
20 denominational discrimination because the motive
21 is being judged -- the motive is being judged on
22 religious grounds, do you survive strict
23 scrutiny?

24 MR. ROTH: I think so, Your Honor.

25 JUSTICE SOTOMAYOR: How?

1 MR. ROTH: I do think this --

2 JUSTICE SOTOMAYOR: We found
3 denominational discrimination on the 50 percent
4 rule in Larson. This seems very similar to
5 that. And next we applied strict scrutiny.

6 So how are you different? I know
7 there was invidious discrimination, but I don't
8 -- I for one don't think that was the reason.
9 How do you survive?

10 MR. ROTH: Well, Larson, when we
11 looked at the 50 percent rule, I think what this
12 Court said is that's essentially inexplicable
13 for any other reason than an intent to
14 disadvantage up and coming new religions.

15 And we think that's nothing like the
16 rule -- the line the state court has drawn here.
17 We think it's an effective line that has divided
18 the world into groups most likely to pose
19 entangling problems and those that are not.

20 And so unlike Larson, our line does
21 something secular, something positive from the
22 -- the religion clause perspective, avoiding
23 entanglement. That's what differentiates us
24 from Larson.

25 JUSTICE SOTOMAYOR: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?
3 Justice Kavanaugh?
4 Justice Barrett?
5 Justice Jackson? Okay. Thank you,
6 counsel.

7 Rebuttal, Mr. Rassbach?

8 REBUTTAL ARGUMENT OF ERIC C. RASSBACH
9 ON BEHALF OF THE PETITIONERS

10 MR. RASSBACH: Thank you, Mr. Chief
11 Justice. A couple of quick points:

12 First, I think my friend's argument
13 showed that Wisconsin can't defend the decision
14 below, which said -- and I quote -- that the
15 subentities, if they quote, "partook in
16 activities such as those cited by the Dykema
17 court" -- that's at Petitioners' Appendix 46A --
18 that they -- "they would have been in a better
19 position than they are now." So they are
20 running away from that.

21 And you heard that in the -- in the
22 argument earlier. Their new interest in
23 anti-entanglement is itself incredibly
24 entangling, as I think the Court's questioning
25 amply demonstrated.

1 The reality is what they want to do is
2 make what -- what the Larson court called at
3 footnote 23, "explicit and deliberate
4 distinctions between religious groups," and
5 that's just not allowed by the -- the -- the
6 Constitution.

7 You know, I'd also say that a lot of
8 the -- the -- my friend's argument was a little
9 confused because it really focused a lot on
10 individuals versus institutions. This is --
11 this is about an institutional plaintiff. It's
12 not about different individuals that are coming
13 forward with -- you know, the -- the nurse or
14 the nun, et cetera. This -- this is about you
15 get the exemption as an institution, not
16 individual by individual.

17 You know, I'd say that the -- the
18 easiest way, I think, to decide this case is on
19 the Larson and Lukumi's ground of -- of ensuring
20 that different -- states do not discriminate
21 along theological lines.

22 You know, in -- in the end, this is a
23 religiously pluralistic society. And that calls
24 for a generous approach to religious exemptions,
25 not a stingy one. And, you know, Catholic

1 Charities is an integral part of the Catholic
2 Church. It's carrying out the mission of the
3 Catholic Church when it helps all people. And
4 penalizing them for helping all people without
5 proselytization cannot be reconciled with the
6 pluralism of American society or the religion
7 clauses.

8 We respectfully request that the Court
9 reverse.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 The case is submitted.

13 (Whereupon, at 11:45 a.m., the case
14 was submitted.)

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