

No. 2020AP2007

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**In the Supreme Court of Wisconsin**

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CATHOLIC CHARITIES BUREAU, INC., BARRON COUNTY DEVELOPMENTAL  
SERVICES INC., DIVERSIFIED SERVICES, INC., BLACK RIVER INDUSTRIES, INC.,  
AND HEADWATERS, INC.,  
PETITIONERS-RESPONDENTS-PETITIONERS

v.

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

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT  
RESPONDENT-APPELLANT

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

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## STATEMENT OF INTEREST

Maranatha Baptist University was established in 1968 in Watertown, Wisconsin, to be “To the Praise of His Glory” (taken from Ephesians 1:12). This motto reflects Maranatha’s deeply held conviction that the primary purpose of every Christian is to glorify God through one’s chosen occupation and church membership, and by serving others in God-honoring ways. Maranatha is a non-profit institution governed by an independent board of trustees and is not part of any denominational hierarchy or structure. Faculty members, though diverse in academic backgrounds, share a common core of biblical values and consider themselves conservative, independent Baptists.

Originally founded as Maranatha Baptist Bible College, the name was changed to Maranatha Baptist University in 2013 to reflect the broad range of academic and career preparation programs offered while maintaining its founding purpose. Maranatha operates a small high school, Maranatha Baptist Academy, Inc., and offers 33 bachelor’s degree programs and seven graduate degrees across seven academic units.

Maranatha’s mission is “to develop leaders for ministry in the local church and the world,” in the belief that all graduates will be effectively equipped to serve God with competence in a church and in their chosen vocation. To ensure continuity and faithfulness to the mission, Maranatha makes its doctrinal position and behavior expectations plain to all prospective students, staff, and faculty. Integrated and robust systems are designed to prepare leaders (from all walks of life) to serve in the local church and the world. This integrated system of transmitting biblical values assists students to choose, prize, and act on their faith both during and after their college years.

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

The Wisconsin Association of Christian Schools (“WACS”) was founded in 1977 to promote Christian education in Wisconsin. It seeks to foster, maintain, and improve the moral, spiritual, and academic standards of the Christian schools by working together to disseminate information vital to schools and parents, to encourage excellence in Christian education, and to coordinate activities among member schools. WACS recognizes the right and responsibility of parents to educate their children in all areas of life—spiritual, academic, social, physical. It has seventeen member schools, several of which may be impacted by the court of appeals’ decision.

The Wisconsin Family Council (“WFC”) actively preserves God’s plan for marriage, family, life, and religious freedom in the public arena of Wisconsin while educating and equipping individual Christians and church leaders to do the same in their communities. WFC is a 501(c)(3) not-for-profit organization and is supported solely by the gifts and contributions of concerned citizens and churches. WFC’s church network connects pastors and other ministry leaders from a variety of faith backgrounds to policy issues. WFC partners with over 700 churches and ministries statewide, including WACS, many of which are affected by the tax exemption at issue in this case.

Amici (hereafter the “Maranatha Amici”) represent religious organizations that come from faith traditions that are less hierarchical than the

Catholic church. Due to this distinction, amici argue that a religiously affiliated organization's *own* primary religious purposes may inform whether that organization is "operated primarily for religious purposes." Because this argument varies from petitioners' position, the Maranatha Amici have also filed a motion for oral argument time to address their unique argument.

### ARGUMENT

Maranatha Amici advance three arguments to support the petition to review the court of appeals decision in this case. First, under the court of appeals' decision, many religiously motivated and religiously affiliated nonprofits could lose the benefit the unemployment insurance tax exemption Wis. Stat. § 108.02(15)(h)2. has afforded them for decades. That amounts to a "statewide impact" warranting this court's review. *See* Wis. Stat. § 809.62(1r)(c).

Second, the Court should take this case to scrutinize the court of appeals' interpretation of § 108.02(15)(h)2. The decision superimposes a judicial conception of what it means for a nonprofit to be "operated primarily for religious purposes," holding that only activities that square with a court's pre-conceived notions of traditional religious practices count as serving a primarily religious purpose. The Court should grant review to clarify whether organizations primarily serving religious purposes other than traditional worship and evangelism nonetheless may be "operated primarily for a religious purpose."

Third, Maranatha Amici ask that, in addition to the petitioners' arguments, the Court consider when a religiously affiliated nonprofit's *own* religious purposes may establish that it is "operated primarily for religious

purposes.” Maranatha Amici are organizations that are religiously motivated or affiliated, but which are not subject to the same style of supervision and control as are nonprofits affiliated with the Catholic Church. Such “independent affiliates” nevertheless qualify for § 108.02(15)(h)2.’s exemption.

**I. THIS CASE WARRANTS THE COURT’S ATTENTION BECAUSE OF ITS SIGNIFICANT IMPACT ON WISCONSIN’S RELIGIOUS SCHOOLS.**

Religiously motivated nonprofit organizations are the cornerstones of communities across Wisconsin. Called to service by their faith, they educate the young, walk with the aged, clothe the poor, heal the sick, welcome the refugee, house the homeless, visit widows and prisoners, and hold the hands of the dying. Whether through volunteers or professionals, they are the hands and feet of the body of believers in the world. They undertake these activities in response to the commands of their faith: “For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.” Matthew 25:35–36. None of those activities look like evangelism, theological education, or worship, yet all are undertaken with a primarily religious purpose, in response to a religious calling or conviction. The religiously motivated nonprofit organizations who serve in these ways are important to Wisconsin, and this issue is important to them.

“Religious education is vital to many faiths practiced in the United States.”<sup>1</sup> “In the Catholic tradition, religious education is ‘intimately bound up with the whole of the Church’s life.’”<sup>2</sup> “Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation. . . . Religious education is a matter of central importance in Judaism . . . [and] . . . is also important in Islam.”<sup>3</sup> There is a “rich diversity of religious education in this country,” and a “close connection that religious institutions draw between their central purpose and educating the young in the faith.”<sup>4</sup>

This rich diversity finds expression in Wisconsin. The Wisconsin Council of Religious and Independent Schools counts among its members nearly 600 schools spread across the Catholic, Lutheran, Seventh-Day Adventist, and evangelical Christian traditions.<sup>5</sup> The Wisconsin Association of Christian Schools, amicus here, has seventeen members from Baptist and evangelical backgrounds.<sup>6</sup> Wisconsin is also home to Jewish preschools, K-8 schools, and a high school,<sup>7</sup> and to four Islamic schools.<sup>8</sup> These hundreds of

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<sup>1</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064–66 (2020).

<sup>2</sup> *Id.* (quoting *Catechism of the Catholic Church* 8 (2d ed. 2016)).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 888.

<sup>5</sup> <https://www.wcris.org/about-wcris/wcris-members/>.

<sup>6</sup> <https://www.wacschools.org/members.html>.

<sup>7</sup> [https://www.milwaukeejewish.org/business-directory/wpbdp\\_category/education/](https://www.milwaukeejewish.org/business-directory/wpbdp_category/education/).

<sup>8</sup> <https://www.privateschoolreview.com/wisconsin/islamic-religious-affiliation>.

religiously motivated schools collectively educate over 100,000 children in Wisconsin, including many who are vulnerable and low-income.

Though the court of appeals' opinion suggests that some schools may qualify for the exemption (because they "inculcate the faith" among the children of believers), many religiously motivated schools may not if they serve a significant number of non-co-religionists.<sup>9</sup> One could easily imagine a case involving a Lutheran school that participates in the Milwaukee Parental Choice Program where the Department argues the school does not "operate to" "evangelize" Lutheranism on its "participants," does not require its "participants . . . to be of the [Lutheran] faith" (indeed, where a majority of them self-identify with faiths other than Lutheranism), and its "funding comes almost entirely from government [vouchers] or private [donors], not from the [Lutheran church]."<sup>10</sup>

Religiously motivated colleges and universities, no less than K-12 schools, also play an important role in shaping the faith and character of young people. Nothing about the importance of religious education in any of the faith traditions mentioned above said that its importance ends with high school graduation. Indeed, the doctrine interpreting the First Amendment "does not distinguish colleges from primary and secondary schools."<sup>11</sup>

Amicus Maranatha Baptist University, for instance, sees itself as first and foremost a community of students and faculty living together to glory of

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<sup>9</sup> *Cath. Charities Bureau, Inc. v. LIRC*, No. 2020AP2007, unpublished slip op., ¶59 (Ct. App. Dec. 13, 2022).

<sup>10</sup> *Id.*

<sup>11</sup> *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 401 (1st Cir. 1985) (op. of Breyer, J.).

God, even as they come together to study the liberal and fine arts. In addition to Maranatha, Wisconsin is home to over a dozen other faith-based colleges and universities. These other institutions are generally open to students of all faith or no faith, and they offer far more secular subjects than religious ones.

These religiously motivated schools must wonder whether they qualify for the exemption under the court of appeals' test. Would Maranatha have to separate its seminary off from the rest of the university, because the court's opinion suggests only "theological seminaries for the advanced study and the training of ministers" qualify for the exemption?<sup>12</sup>

Religiously motivated nonprofit organizations undertake numerous other religiously motivated purposes beyond schools, like running nursing homes and foster care agencies.<sup>13</sup> Indeed, the Wisconsin Department of Health Services' list of licensed nursing homes as of January 11, 2023, shows over forty nursing homes identified with religious faiths,<sup>14</sup> and the Wisconsin Department of Children & Families lists at least seven religiously motivated child placement agencies.<sup>15</sup> Religiously motivated ministries also offer homeless shelters, crisis pregnancy support, mental health counseling, prison visitation and mentorship, and refugee and immigrant settlement services. Again, given the constituencies they serve, the staff they hire, and their

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<sup>12</sup> *Cath. Charities Bureau*, No. 2020AP2007, ¶40 (quoting another source).

<sup>13</sup> See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2375 (2020) (nursing homes); *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1874 (2021) (foster care agencies).

<sup>14</sup> <https://www.dhs.wisconsin.gov/guide/nhdir.pdf>.

<sup>15</sup> <https://dcf.wisconsin.gov/files/cwlicensing/pdf/cpa.pdf>.

funding streams, it is difficult to see almost any of these organizations meeting the court of appeals' test.

These organizations' "primary purpose" is to serve as the hands and feet of their faith in their communities. In living out their faith, their activities may look secular at a glance. But just as it was wrong to "minimize or privatize religion by calling a faith-centered social studies class, for example, 'secular' because it does not involve worship and prayer,"<sup>16</sup> so too it is wrong to say a faith-centered homeless shelter or hospital is not operated for religious purposes.

Many of these ministries may choose to participate in the State's unemployment insurance programs. But for those directly impacted by the court of appeals' decision, it will be deeply disconcerting to be told by the government that their ministry is not "operated primarily for religious purposes" because it provides social services rather than distributes Bible tracts. That would be news to thousands of pastors, commissioned ministers, teachers, nuns, and nurses who show up to work at these ministries every day as part of a faith-filled vocation to love the least of these. The unexpected imposition of unemployment insurance tax on these nonprofits, many of which operate on narrow financial margins and often rely on the benevolence of believers, poses a significant financial burden. The potentially wide-ranging effect of the court of appeals' decision warrants this Court's review.

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<sup>16</sup> *Coulee Cath. Sch. v. LIRC*, 2009 WI 88, ¶46, 320 Wis. 2d 275, 768 N.W.2d 868.

## II. THE COURT OF APPEALS' INTERPRETATION OF WIS. STAT. § 108.02(15)(h)2. WARRANTS THIS COURT'S SCRUTINY.

The practical consequences of the court of appeals' decision are enough to warrant review. But the statutory and religious freedom questions it addressed are equally deserving of the Court's attention. Maranatha Amici outline four flaws in the court of appeals' reasoning which they urge the court to consider more deeply by granting review of the petition.

First, Wis. Stat. § 108.02(15)(h)2.'s text—"operated primarily for religious purposes"—quite clearly calls for an inquiry into the primary motivation for nonprofit's operation and not into the nature of its operations. Yet the court of appeals interpreted the statute to also compel an inquiry into whether a claimed religious operation looks enough like the court's own mental image of what counts as religious activities, like evangelism or worship. That interpretation was contrary to the statute's text.<sup>17</sup>

Second, the court of appeals interpretation of § 108.02(15)(h)2. violates the First Amendment and Article I, Section 18 of the Wisconsin Constitution because it directs courts to inquire into the validity of religious beliefs. The state may inquire into whether a person's religious beliefs are sincerely held without running afoul of religious liberty, but it cannot inquire into the validity of those beliefs.<sup>18</sup> The petitioners and Maranatha Amici sincerely believe that

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<sup>17</sup> See Unemployment Insurance Program Letter No. 28-87, U.S. Dept. of Labor (June 10, 1987) ("The second category of services exempt from the required coverage are those performed in the employ *of religious schools and other entities* which, although separately incorporated from a church, are operated, supervised, controlled or principles supported by a church or convention or association of churches . . . ." (emphasis added)).

<sup>18</sup> See *Coulee Cath.*, 320 Wis. 2d 275, ¶61; *Holt v. Hobbs*, 574 U.S. 352, 360–61 (2015).

charity is a fundamental tenant of living out their faith. Accepting that belief, it is not a court's place to question whether a ministry's operations look sufficiently religious.<sup>19</sup> Similarly, Maranatha Amici represent educational institutions that sincerely believe that education in a religious setting is a fundamental tenant of living out their faith. Accepting that belief, it is not the place of a court to question whether education is a qualifying religious activity.

The court of appeals' interpretation also interferes with the constitutionally guaranteed autonomy of religious organizations. Under the Wisconsin Constitution, "individuals also have the right to . . . form . . . faith-based organizations committed to achieving their faith-based ends," and the "Wisconsin Constitution uses the strongest possible language in the protection of this right."<sup>20</sup> This includes the right of believers of non-hierarchical faiths to organize themselves into separate organizations to serve separate ministry purposes, and the right of believers in hierarchical faiths to organize their ministries into separate sub-entities led by specifically qualified or appointed managers.

Third, the court of appeals' test misapplies the concept of surplusage. The court's test attempts to avoid reading the statutory language "operated primarily for religious purposes" as surplusage but in doing so excludes a wide swath of religiously motivated organizations that properly fall within the statute. It is true that some religiously affiliated entities are primarily secular.

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<sup>19</sup> See *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶¶47-49, 398 Wis. 2d 92, 961 N.W.2d 635.

<sup>20</sup> *Coulee Cath.*, 320 Wis. 2d 275, ¶¶58-59.

Churches and associations of churches may operate affiliated or controlled entities for purely secular purposes, usually as investments to generate income, which would not qualify as being “operated primarily for religious purposes.” Many donors, for instance, may choose to give stock to a ministry for tax purposes. Some donors give a specific kind of stock: ownership interests in closely held companies. Sometimes donors give the entire ownership in a closely held company to a ministry. The ministry may choose to then sell the closely held company, or choose to keep the closely held company, perhaps because the market timing is not optimal to get the best price, or perhaps because the ministry wants a long-term income stream rather than a short-term cash windfall.

While the court of appeals’ test avoids the problem of surplusage, it is incorrect and unworkable. Instead, Maranatha Amici propose the following test, which gives meaning to the full text of the statute: A religiously affiliated nonprofit is not operated primarily for a religious purpose if it is operated primarily for purposes that are not part of its sincerely held religious beliefs, but rather are primarily operated for purposes the entity views as secular. Maranatha Amici propose that a useful indicator when implementing this test is whether the affiliated organization’s income is tax-exempt or taxed, such as unrelated business income tax.<sup>21</sup> If a religiously affiliated organization is subject to income tax, it makes sense that it’s also subject to unemployment

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<sup>21</sup> See *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 89–90, 591 N.W.2d 583 (1999) (explaining that the unrelated business income tax rules apply to an exempt organization’s nonexempt business endeavors).

insurance tax. If it is exempt from income tax as a ministry, it should be exempt from unemployment insurance tax as well.

Fourth, the religious organizations exemption in the unemployment insurance statute safeguards important, constitutionally protected religious liberties. When an ex-employee applies for unemployment insurance, one of the first questions is whether the employee was “terminated by an employing unit for misconduct by the employee connected with the employee’s work.” Wis. Stat. § 108.04(5).<sup>22</sup> Whether an employer was justified in firing an employee for “misconduct” is thus frequently a topic of litigation. An administrative law judge at the Department of Workforce Development has no business determining whether a ministry employee’s violation of an employer’s statement of faith constitutes “misconduct.” As this Court said when declining to recognize a tort for negligent hiring or retention of a minister, “the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices.”<sup>23</sup> The ALJs and

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<sup>22</sup> “Misconduct” is defined in the statute to include:

one or more actions or conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, . . ., or to show an intentional and substantial disregard of an employer’s interests, or of an employee’s duties and obligations to his or her employer.”

Wis. Stat. § 108.04(5).

<sup>23</sup> *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis.2d 302, 326, 533 N.W.2d 780 (1995).

courts of this state are equally unqualified to determine what constitutes “misconduct” by a ministry employee sufficient to justify termination, because such a determination would often require interpretation of church canons and internal church policies and practices. The unemployment-insurance exemption protects important religious liberties, and adopting a narrow construction of the exemption in this case will only lead to future litigation asserting a constitutional defense to “misconduct” inquiries.

The court of appeals’ decision incorrectly interpreted § 108.02(15)(h)2. and in the process created constitutional problems warranting this Court’s review.

### **III. THE COURT SHOULD CONSIDER WHEN A NONPROFIT’S *OWN* PRIMARY RELIGIOUS PURPOSE SUFFICES TO SATISFY THE STATUTE.**

Amici do not take issue with the petitioners’ view that the primary religious purpose of a parent church is relevant to determining whether a particular entity is “operated primarily for a religious purpose.” However, amici urge the Court to also allow the organization’s own religious purpose to suffice.

Many religious nonprofit organizations, especially those affiliated with Protestant denominations, operate under a less hierarchical model than does the Catholic Church.<sup>24</sup> The petitioners have explained that their corporate structure is such that the Diocese of Superior exercises essentially complete control over its affiliated non-profits. But that practice is not ubiquitous across religious cultures. For example, amicus Maranatha Baptist University is a

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<sup>24</sup> Amici explain this difference at greater length in their motion for supplemental argument time.

religiously supported university, but it operates independently, without oversight by a single church or organized association of churches. The relationship is not that of parent-and-child religious entities, but more like siblings within the same faith family. Section 108.02(15)(h)2. contemplates both types of arrangements by covering organizations that are “operated, supervised, controlled, or principally supported by a church or convention or association of churches.” In the Maranatha Amici’s view, especially for nonprofits with autonomy from their affiliated church, it is necessary for a court to consider the nonprofit’s own primarily religious purpose.

### **CONCLUSION**

Because this case will have significant statewide ramifications for thousands of religiously motivated organizations who pursue faith-based ends beyond solely theological education and evangelism, review by this Court is necessary.

Dated: January 26, 2023

Respectfully submitted,



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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,841 words.

Dated: January 26, 2023



DANIEL R. SUHR

**CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f). Because this case is covered by the electronic filing pilot program, no printed copies have been provided to the Court. Paper copies will be provided to opposing counsel who have opted for paper service per the rule.

Dated: January 26, 2023



DANIEL R. SUHR