

# Are You Religious Enough?



By Paul Engel

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- Do Catholic Charities act primarily for religious purposes?
- Did the Wisconsin Supreme Court violate the First Amendment when they said no?
- Should a religious charity act like minister to be eligible for a tax exemption?

The State of Wisconsin exempts religious organizations from their unemployment tax system. Even though everyone agrees that Catholic Charities is controlled by a church, the Wisconsin Supreme Court held that Catholic Charities is not “operated primarily for religious purposes,” and therefore does not qualify for the exemption. Catholic Charities appealed to the Supreme Court to ask if that decision violated the First Amendment.

## Background

To understand the primary issue in this case, we have to back up a little bit. In 1939, Congress passed the Federal Unemployment Tax Act (FUTA), which required employers to pay a tax on employee wages into an unemployment fund. The fact that this law is a blatant violation of the Constitution is not the issue though. Wisconsin, like many states, passed their own unemployment laws, many very similar to the federal law. This law includes an exception for religious entities operated primarily for religious purposes. Why did the state include this exemption? I think it is best described in the argument

by Colin T. Roth, attorney for the Wisconsin Labor & Industry Review Commission:

This religious accommodation solves a particular problem posed by the unemployment insurance system. When determining benefit eligibility, the state must often resolve disputes over whether an employee was discharged for misconduct. If so, no benefits. Now consider churches and their affiliates whose employees express an inculcate religious doctrine through worship, proselytization, and religious education. For those employers, misconduct disputes could often force the state to decide whether employees complied with religious doctrine.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

The question before the court is, when the Wisconsin Supreme Court claimed that Catholic Charities did not qualify for the exemption, did they violate the First Amendment?

Eric C. Rassbach on Behalf of the Petitioners

As always, oral arguments start with the attorney representing those who asked the court to review the case, the petitioners.

1. 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.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

While there is a lot of legalese in this case, I think this

paragraph summarizes Catholic Charities' complaint. The Wisconsin Supreme Court decided that Catholic Charities wasn't religious enough. From the petition to the Supreme Court I found:

The court concluded that Catholic Charities' activities were not religious because:

- “[Catholic Charities] and the sub-entities, \* \* \* neither attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees.”
- “Both employment with the organizations and services offered by the organizations are open to all participants regardless of religion.”
- Catholic Charities and its sub-entities do not engage “in worship services, religious outreach, ceremony, or religious education.”

Indeed, after assessing the “nature” of Catholic Charities' activities, the Wisconsin Supreme Court concluded they were “primarily charitable and secular, ” even though Catholic Charities views them as religious.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al. – Petition for a Writ of Certiorari](#)

During oral arguments there was some discussion about the fact that Catholic Charities is independently incorporated, but is overseen by a Bishop of the Roman Catholic Diocese. But the question that kept coming up is how do you define “religious activities”? More on that later.

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 lines, something that this Court has repeatedly forbidden.

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

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

The state tried very hard to equate the unemployment tax exemption to what is known as the "ministerial exception." This legal practice exempts ministers from certain taxes, but only if they perform certain ministerial duties. That also will be discussed later.

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

I welcome the Court's questions.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

One of the frequently referred to hypothetical situations was brought up by Chief Justice Roberts.

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

1. RASSBACH: Well –

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

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

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

1. RASSBACH: I – I don't think that's – I – I don't think that that would be – they would necessarily have a claim there because it's not something where the religious organization is being discriminated against along theological lines. That is, there's a – a rule across the board.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

I found this hypothetical fairly disingenuous. First off, while there are a few, I am not aware of many restaurants that function for charitable purposes, much less religious ones. If we take Justice Robert's hypothetical at face value, the question becomes what is the religious purpose? Let's ignore the vegan question and focus on what the law requires: A religious purpose. If a restaurant is opened for the express purpose of a religious duty like feeding the poor, helping the homeless, or spreading a religious message, then I think it should qualify for the exemption. Yes, there are restaurants that the feed the poor or homeless without a religious duty, which gets into another question the court dealt with. In fact Justice Jackson got right to this point.

JUSTICE JACKSON: So can I just be clear on your argument?

Because I'm just wanting to understand it.

It sounds like you are saying that to the extent the state has chosen to exempt religious groups, the line that they are drawing divides Catholic Charities, which don't perform certain, quote/unquote, "typical" religious activities with respect to their charity and other kinds of religions which may evangelize, proselytize, or whatever. Is that – so it's the discrimination between Catholic Charities and charities run by other kinds of churches that you are focused on?

1. RASSBACH: That's right. Because this is just within a religious exemption that already exists. And they are disfavoring Catholic Charities because they serve non-Catholics because they hire non-Catholics and because they have – they don't proselytize.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

According to the Wisconsin Supreme Court, the only "religious purposes" they recognize for this exemption is promoting your religion. Several of the justices will delve deeper into this when they question Colin T. Roth, attorney for the Wisconsin Labor & Industry Review Commission.

Now, let's look at the argument from the United States in support of Catholic Charities.

Curtis E. Gannon For The United States, Supporting The Petitioners

Mr. Gannon, Deputy Solicitor General argued as amicus curiae, or "friend of the court".

1. GANNON: Mr. Chief Justice and may it please the Court:

Wisconsin has opted into the cooperative framework of the Federal Unemployment Tax Act and has enacted the federal statutes exemption for religious employers, which applies to

certain church-controlled organizations that are, quote, “operated primarily for religious purposes.”

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

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

I welcome the Court’s questions.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

In short, the Department of Justice under the current administration thinks the Wisconsin Supreme Court got it wrong. First, because the Wisconsin state matches the federal one, and previous courts have found what Catholic Charities does is primarily for religious purposes. Second, even if the court doesn’t find on the statutory grounds, the Wisconsin Supreme Court erred by second-guessing Catholic Charities religious purpose.

Justice Gorsuch brought up the idea of proselytization back into the discussion.

JUSTICE GORSUCH: – on the – on the discrimination grounds, why would we have to get into any of that? There’s no dispute that

Catholic Charities exists primarily for religious purposes. There's no dispute about the sincerity of their religious belief.

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

1. GANNON: I agree with all of that. I –I think that the biggest problem with it is that it grants what we think is a wrong reading of the –

JUSTICE GORSUCH: You say we –

1. GANNON: – verbatim text of a federal statute.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

This idea that Catholic Charities does not proselytize, or attempt to convert someone to their faith, seems to be a big hang-up for the Wisconsin Supreme Court. This discriminates against different organizations based on how they exercise their religious beliefs.

1. GANNON: That – that is correct, but we also think that there shouldn't be a dispute that it is operated primarily for religious purposes because what the Court should not be doing is looking at particular activities and defining them as inherently secular or inherently religious.

JUSTICE GORSUCH: The – that's the discrimination problem.

1. GANNON: Yes. That is a similar problem even for purposes of – of construing the statute.

JUSTICE GORSUCH: Got you.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor &](#)



## [Industry Review Commission, et al.](#)

Interesting, that the Wisconsin Supreme Court, in an attempt to avoid entangling itself in religious issues, entangles itself by defining what is and is not a religious purpose. Justice Jackson attempted to define purpose not based on why something is done, but by what is done.

But there's another idea of purpose that would be: What is this organization's activities about? What – what is – what are they offering? And I guess my – my concern is that that view of “purpose” seems to make more sense of the exemption in this case.

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

## [Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

It seems Justice Jackson has an issue with the definition of the word “purpose.” She equates “purpose” with what is being done and what services are being provided, not why they are provided. Merriam-Webster defines purpose as:

something set up as an object or end to be [attained](#)

## [Purpose – Merriam-Webster Online Dictionary](#)

To use Justice Jackson's example, a hospital could treat patients simply for the financial gain or because their religious doctrine tells them to heal the sick. One is a religious purpose, the other is not. But there appears to be more to Justice Jackson's confusion.

JUSTICE JACKSON: No, what I'm saying is if you are right that

the – the line that's being drawn here is about motivation, I don't understand how the exemption works. There must be some rational reason why Congress would want to exempt the exact same kinds of services being provided just because they are being provided by somebody who's religiously motivated versus, you know, the restaurant that – you know, we have two identical vegan restaurants. One is being run by people who say this is a tenet of our faith and we're doing it in order to – to be a ministry for our religion. And the other is run by a person who has so no motivation. What would one, rationally, be under the employment exemption and the other one doesn't?

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

How about the First Amendment's requirement that Congress not make a law that prohibits the free-exercise of one's religion?

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

That – it – it only makes sense if purpose is, like, focused on the activities, rather than the motivation.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

Actually, Justice Jackson's statement, "it only makes sense of purpose is motivation not as service" doesn't make sense. Does a doctor perform an appendectomy for the fee he collects, or is he motivated by a religious duty to heal the sick? Does he waive his fee for tax purposes or because his religion tells him to help the poor? No Justice Jackson, the service is not the purpose, the motivation behind the service is.

## Colin T. Roth on Behalf of the Respondents

Now that we've been through the arguments for Catholic Charities, it's time for arguments for Wisconsin Labor & Industry Review Commission, or more accurately, how the Wisconsin Supreme Court decided this case. Arguments are presented by Colin T. Roth.

1. ROTH: Mr. Chief Justice, and may it please the Court:

This religious accommodation solves a particular problem posed by the unemployment insurance system. When determining benefit eligibility, the state must often resolve disputes over whether an employee was discharged for misconduct. If so, no benefits. Now consider churches and their affiliates whose employees express an inculcate religious doctrine through worship, proselytization, and religious education. For those employers, misconduct disputes could often force the state to decide whether employees complied with religious doctrine.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

As I've already pointed out, the reason for the exemption is to disentangle government from questions of religious doctrine.

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

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

So the main concern of the State of Wisconsin, the "compelling government interest" in denying the exemption to Catholic Charities, is their employees won't be eligible for state

unemployment insurance.

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

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

In their attempt to keep the state out of doctrinal disputes, the State of Wisconsin places itself in the middle of a doctrinal dispute. Specifically, is the only religious purposes someone is exempt for limited to worship, proselytization, and religious education? In effect, the State of Wisconsin limits religious purpose to those activities regularly associated with the conduct of a minister.

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

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

Mr. Roth is incorrect. Petitioner's test would only leave this theoretical 1 million employees with state provided unemployment coverage. Catholic Charities actually has its own unemployment insurance which covers these employees.

The State of Wisconsin also seems to ignore the fact that employment is a voluntary act. If someone perceives working for a religiously motivated organization above participating in a compulsory unemployment insurance program, isn't that

their choice? Especially when you consider all of the other non-tangible benefits a religious person may gain from working for such an employer.

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

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

I welcome your questions.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

"Petitioners' theory ultimately leads to an all-or-nothing rule, exempt all religious groups or none." Isn't that the point? Should the State of Wisconsin discriminate for one religious group and against another? Isn't that a violation of the Fourteenth Amendment?

No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

[U.S. Constitution, Amendment XIV](#)

While the arguments before the court have focused on the First Amendment (erroneously I believe), the real problem is the Fourteenth Amendment's Equal Protection Clause. The State of Wisconsin is applying the phrase "religious purpose" differently based on how an organization exercises their religion.

Chief Justice Roberts asked Mr. Roth question that I think points to the problem.

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

1. ROTH: I think –

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

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

And it's precisely because it's those activities that create the entangling problem in the state –

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

Except the state's view of their entangling problem is so narrow and myopic, they cannot see beyond their desire to have as many workers as possible in their unemployment insurance system.

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

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

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

The question before the court is: Was the state supreme court wrong when they found that Catholic Charities was not

religious enough for the exemption on their motive alone? Put another way, does your religious purpose end at worship, conversion, and education?

Justice Kavanaugh asked Mr. Roth why sincerity of one's belief or why they engage in these activities shouldn't be considered.

1. ROTH: Well, sincerity – I – so I took two hypotheticals given to the other side as examples of the edge cases that maybe we don't want to be exempting here. One was the – the hospital and one was the vegan restaurant.

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

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

1. ROTH: They're going to be out because when they run their vegan restaurants, what – again, what a –

JUSTICE KAVANAUGH: Is that a hospital – I think you were on the hospital one.

1. ROTH: Oh, the hospital?

JUSTICE KAVANAUGH: Yeah.

1. ROTH: Well, they're – they're out because what the hospital is saying if it's supervised by the bishop, which is all this statute requires, the bishop will say the reason we run these hospitals is to serve – I mean,

Christ healed the sick, and we're doing the same. And so how can you tell us that that's not a religious purpose?

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

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

I think Mr. Roth blew up his argument right here. He states that, because a Bishop oversees Catholic Hospitals, they must have a religious purpose. What happened to worship, conversion, and education? In other words, because they are overseen by a Bishop, they have religious motives. What about another hospital that has the exact same motives, but their denomination does not have bishops?

Rebuttal Argument Of Eric C. Rassbach on Behalf of the Petitioners

As always, the attorney for the petitioners has the chance to rebut the other's arguments.

You know, in – in the end, this is a religiously pluralistic society. And that calls for a generous approach to religious exemptions, not a stingy one. And, you know, Catholic Charities is an integral part of the Catholic Church. It's carrying out the mission of the Catholic Church when it helps all people. And penalizing them for helping all people without proselytization cannot be reconciled with the pluralism of American society or the religion clauses.

We respectfully request that the Court reverse.

[Catholic Charities Bureau, Inc., et al., v. Wisconsin Labor & Industry Review Commission, et al.](#)

I think that's a pretty sufficient summation of Catholic Charities' position.



## Conclusion

It seems quite obvious that the State of Wisconsin's desire to have as many employees in their unemployment insurance system as possible is driving them to narrow the religious purpose exemption. They are so focused on the ministerial aspects of religious purpose, they ignored all the other possibilities.

Many years ago, it came to my attention that a missionary group our church supported had their website hacked, and was taken down by the group. Since I both had the skill and resources, I offered to build and host a website for them until they could get their system up and running again. Did I do that to proselytize? Was my purpose to educate? No. I simply saw a religious organization that needed help that I was in a position to provide. Was that a religious purpose?

Mr. Roth kept coming back to the idea was to minimize religious entanglement, to keep the state out of doctrinal debates. He seemed to forget that doctrinal debates may include more than simply worship, conversion, or education. What about the doctrinal debates around abortion, end of life care, helping the poor, etc? Is the state allowed to put a fence around certain activities and label them "religious purposes" without considering why the people engage in those activities?

Could it be that a nurse prefers working at a hospital run by Catholic Charities because she knows they will not ask her to perform procedures that would violate her religious beliefs? Can disaster relief, affordable housing, and providing food not be done for religious purposes, simply because secular organizations do so as well? There are atheist churches, that I assume also educate and proselytize. I'm sure it would surprise these anti-religious people that their organization functions for religious purposes.

As I pointed out, while the parties and judges in this case

are examining a First Amendment violation, this cannot be one, simply for the reason that the law in question was not made by Congress.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

#### [U.S. Constitution – Amendment I](#)

This violation of the Equal Protection Clause of the Fourteenth Amendment and Article I, Section 18 of the Wisconsin Constitution should not be allowed to stand.

or any preference be given by law to any religious establishments or modes of worship;

#### [Wisconsin Constitution](#) – Article I, Section 18

Beyond that, the fact that the Wisconsin Supreme Court ignored the very Constitution that created them should be of great concern to each and every citizen of that state. I hope they work to rectify this situation quickly.

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