

Appeal No. 2020AP2007

Cir. Ct. No. 2019CV324

**WISCONSIN COURT OF APPEALS
DISTRICT III**

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

PETITIONERS-RESPONDENTS,

v.

**STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW
COMMISSION,**

RESPONDENT-CO-APPELLANT,

**STATE OF WISCONSIN DEPARTMENT OF WORKFORCE
DEVELOPMENT,**

RESPONDENT-APPELLANT.

FILED

Dec. 7, 2021

Sheila T. Reiff
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Stark, P.J., Hruz and Gill, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2019-20),¹ this appeal is certified to the Wisconsin Supreme Court for its review and determination.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

ISSUE

The issue in this case is whether Catholic Charities Bureau, Inc. (CCB) and four of its sub-entities are “operated primarily for religious purposes” and are therefore exempt from Wisconsin’s Unemployment Compensation Act under the religious purposes exemption set forth in WIS. STAT. § 108.02(15)(h)2.² CCB argues that in answering this question, we should focus on whether CCB and its sub-entities are operated primarily for a religious motive or reason. Conversely, the Labor and Industry Review Commission (LIRC) and the Department of Workforce Development (DWD) contend that whether CCB and its sub-entities are operated primarily for religious purposes depends on whether their activities are primarily religious in character.³ The parties also dispute whether the religious purposes exemption is ambiguous, and, if so, how that ambiguity should be resolved.

To date, no Wisconsin Supreme Court decision or published court of appeals decision has addressed the interpretation of the religious purposes exemption in WIS. STAT. § 108.02(15)(h)2. Moreover, while courts in other jurisdictions have interpreted and applied identical religious purposes exemptions in their own unemployment insurance laws, there is no consensus among those courts as to the proper interpretation of the relevant statutory language. In

² CCB and the four sub-entities are all respondents in this appeal. However, for ease of reading, we refer to them collectively as “CCB” when discussing arguments made or actions taken in this lawsuit or in the underlying administrative proceedings.

³ The DWD filed a brief in this appeal, and the LIRC filed a letter indicating that it concurred with the arguments raised in the DWD’s brief and would not be submitting a separate brief. For ease of reading, we refer to the appellants in this matter as “the DWD” throughout the remainder of this certification.

addition, both CCB and the DWD argue that adopting the opposing party's interpretation of the religious purposes exemption will result in violations of the First Amendment.

The parties' arguments in this appeal raise novel legal questions regarding the interpretation of the religious purposes exemption and its constitutional implications. These questions are likely to arise in future cases, and their resolution is of crucial importance to religiously affiliated nonprofit organizations throughout the state, to employees of such organizations, and to the DWD, which must routinely apply the religious purposes exemption to determine whether such organizations are exempt from unemployment insurance coverage. Because of the novel legal issues presented and the statewide importance of those issues, we certify this appeal to the Wisconsin Supreme Court.

BACKGROUND

The facts of this case are essentially undisputed. Every Roman Catholic diocese in Wisconsin has a Catholic Charities entity, which functions as the diocese's social ministry arm. The stated mission of Catholic Charities is "to provide service to people in need, to advocate for justice in social structures and to call the entire church and other people of good will to do the same." During the administrative proceedings in this case, Archbishop Jerome ListECKI testified that this mission is "rooted in scripture," which "mandate[s]" the Catholic Church to "serve the poor." Archbishop ListECKI further explained that inherent in the church's teachings is a "demand" that Catholics respond in charity to those in need.

CCB is the Catholic Charities entity for the Diocese of Superior, Wisconsin. According to CCB's statement of philosophy, the "purpose" of CCB

is “to be an effective sign of the charity of Christ” by providing services that are “significant in quantity and quality” and are not duplicative of services already adequately provided by public or private organizations. CCB provides these services according to an “Ecumenical orientation,” such that “no distinctions are made by race, sex, or religion in reference to clients served, staff employed and board members appointed.”

CCB has various separately incorporated nonprofit sub-entities that operate sixty-three “programs of service,” which provide aid “to those facing the challenges of aging, the distress of a disability, the concerns of children with special needs, the stresses of families living in poverty and those in need of disaster relief.” Four of those sub-entities are at issue in this appeal: Barron County Developmental Services, Inc.; Black River Industries, Inc.; Diversified Services, Inc.; and Headwaters, Inc.

As a general matter, the four sub-entities involved in this appeal provide services to individuals with developmental and mental health disabilities, as well as individuals with limited income. These services primarily include providing job training, sheltered employment, and employment placement services. Other services provided by these sub-entities include mental health services, Head Start home visitation services for families with eligible children, and transportation services.

CCB, in turn, provides management services and consultation to its sub-entities, establishes and coordinates their missions, and approves their capital expenditures and investment policies. CCB’s executive director, who is not required to be a Catholic priest, oversees each sub-entity’s operations. Nonetheless, CCB’s internal organizational chart establishes that the bishop of the

Diocese of Superior oversees CCB in its entirety, including its sub-entities, and is ultimately “in charge of” CCB.

As noted above, CCB’s sub-entities provide services to all people in need, regardless of their religion, pursuant to the Catholic social teaching of “Solidarity,” which is a belief that “we are our brothers’ and sisters’ keepers, wherever they live. We are one human family.” Program participants are not required to attend any religious training or orientation to receive the services that CCB’s sub-entities provide. Neither CCB nor its sub-entities engage in devotional exercises with their employees or program participants, nor do they disseminate religious materials to those individuals.

CCB’s sub-entities are prohibited from engaging in activities that violate Catholic social teachings. New CCB employees are provided with CCB’s mission statement, statement of philosophy, and code of ethics, and they are informed that their employment “is an extension of Catholic Social Teachings and the Catechism of the Church.” However, employees of CCB and its sub-entities are not required to be members of the Catholic faith.

CCB became subject to Wisconsin’s Unemployment Compensation Act, WIS. STAT. ch. 108, in 1972, following CCB’s submission of an employer’s report stating that the nature of its operations was charitable, educational, and rehabilitative. CCB’s sub-entities report their employees under CCB’s unemployment insurance account. In 2015, a Douglas County Circuit Court judge ruled that Challenge Center, Inc.—a different CCB sub-entity that provides services to developmentally disabled individuals—was operated primarily for religious purposes and was therefore exempt from the Unemployment Compensation Act under the religious purposes exemption, WIS. STAT.

§ 108.02(15)(h)2. CCB and the four sub-entities at issue in this appeal then sought a determination from the DWD that they, too, were exempt from the Unemployment Compensation Act.

The DWD determined that CCB and the sub-entities did not qualify for the religious purposes exemption. CCB sought administrative review of that determination, and an administrative law judge reversed, concluding that CCB and the sub-entities qualified for the exemption because they were operated primarily for religious purposes. The DWD then appealed to the LIRC, which reversed the ALJ's decision. CCB sought judicial review, and the circuit court again reversed, concluding that CCB and the sub-entities were operated primarily for religious purposes and therefore qualified for the religious purposes exemption. The DWD now appeals.

DISCUSSION

When the Wisconsin Legislature enacted the Unemployment Compensation Act, it recognized that unemployment in Wisconsin is “an urgent public problem, gravely affecting the health, morals and welfare of the people of this state.” WIS. STAT. § 108.01(1). The legislature acknowledged that “[i]n good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners.” *Id.* As a result, the legislature concluded that “[e]ach employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers.” *Id.*

For purposes of the Unemployment Compensation Act, the term “[e]mploying unit” means “any person who employs one or more individuals.” WIS. STAT. § 108.02(14m). “Employment,” in turn, means “any service, including

service in interstate commerce, performed by an individual for pay.” Sec. 108.02(15)(a). The religious purposes exemption provides, however, that as applied to work for a nonprofit organization, “employment” does not include service “[i]n the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches.” Sec. 108.02(15)(h)2. In this case, it is undisputed that CCB and its sub-entities are nonprofit organizations and that they are operated, supervised, controlled, or principally supported by a church or convention or association of churches. The only issue is whether, based upon the undisputed facts, CCB and its sub-entities are operated primarily for religious purposes.

The parties fundamentally disagree as to the meaning of the phrase “operated primarily for religious purposes.” Citing an online dictionary and thesaurus, CCB asserts that the plain meaning of the term “purpose” is “the reason for which something exists or is done, made, used, etc.,” and synonyms include function, intent, objective, and reason. *Purpose*, <https://www.dictionary.com/browse/purpose> (last visited Nov. 9, 2021); *Purpose*, <https://www.thesaurus.com/browse/purpose> (last visited Nov. 9, 2021). CCB therefore contends that an organization is operated primarily for religious purposes when it is operated primarily “for a religious motive or reason.” CCB further contends that the undisputed facts of this case show that CCB and its sub-entities are operated primarily for a religious motive or reason—specifically, to comply with the Catholic Church’s scriptural mandate to serve the poor and respond in charity to those in need.

Conversely, the DWD asserts that an organization is operated primarily for religious purposes when its activities are primarily religious in

character. While the DWD does not assert that the plain meaning of the term “purpose” supports its interpretation, we note that in addition to the definition cited by CCB, “purpose” can also mean “something that one sets before himself [or herself] as an object to be attained” and “an object, effect, or result aimed at, intended, or attained.” *Purpose*, WEBSTER’S THIRD NEW INT’L DICTIONARY (unabr. 1993). These definitions arguably support the DWD’s interpretation by suggesting that an organization’s “purpose” is the object or result that it seeks to attain, rather than its motivation for seeking that result. Arguably, the object, intention, or goal that CCB and the sub-entities seek to attain is to provide non-religious charitable services to those in need. In other words, CCB’s goal is to perform activities that are charitable, but not religious.

As noted, however, the DWD does not rely on a plain meaning interpretation of the religious purposes exemption. Instead, citing a Seventh Circuit case, the DWD argues that the term “religious purposes” is a “term of art” in tax law that requires an examination of an organization’s activities, rather than its motivation. See *United States v. Dykema*, 666 F.2d 1096, 1100-01 (7th Cir. 1981).

The issue in *Dykema* was whether a particular organization was exempt from taxation under 26 U.S.C. § 501(c)(3) because it was operated exclusively for religious purposes. *Dykema*, 666 F.2d at 1099-1101. The Seventh Circuit stated that in order to make that determination, it was “necessary and proper” for the IRS “to survey all the activities of the organization, in order to determine whether what the organization in fact does is to carry out a religious mission or to engage in commercial business.” *Id.* at 1100. The court further clarified that such a survey could be made by “observation of the organization’s activities,” by “the testimony of other persons having knowledge of such

activities,” or by “examination of church bulletins, programs, or other publications, as well as by scrutiny of minutes, memoranda, or financial books and records relating to activities carried on by the organization.” *Id.* Based on *Dykema*, the DWD argues that we must determine whether CCB and its sub-entities are operated primarily for religious purposes based on their activities—i.e., by considering whether the sub-entities’ activities are primarily religious in character. The DWD further argues that the provision of secular charitable services does not qualify as religious activity.⁴

In its reply brief, the DWD also argues that the phrase “operated primarily for religious purposes” is ambiguous. In support of that proposition, the DWD notes that courts in other jurisdictions have interpreted identical statutory language in their own unemployment insurance laws in differing ways, with some focusing on an organization’s activities and others focusing on an organization’s motivation. Because the statute is ambiguous, the DWD asserts we should rely on legislative history to resolve the ambiguity. In particular, the DWD cites a report

⁴ The *Dykema* court stated that typical activities of an organization operated exclusively for religious purposes include:

- (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity in *partibus infidelium*; (b) pastoral counseling and comfort to members facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of individuals, such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and education in the doctrine and discipline of the church, as well as (in the case of mature and well developed churches) theological seminaries for the advanced study and the training of ministers.

United States v. Dykema, 666 F.2d 1096, 1100 (7th Cir. 1981).

of the House Ways and Means Committee (hereinafter, the House Report) pertaining to an amendment to the Federal Unemployment Tax Act, which added a religious purposes exemption to the federal act that is essentially identical to the exemption found in WIS. STAT. § 108.02(15)(h)2. *See* 26 U.S.C. § 3309(b)(1)(B); *see also St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 781 (1981) (noting that § 3309 was added to the federal act in 1970 and relying on the House Report to discern the legislative intent behind that amendment). The DWD asserts—and CCB does not dispute—that § 108.02(15)(h)2. was enacted to “conform Wisconsin’s unemployment law with [the] federal law in 26 U.S.C. § 3309(b)(1)(B).”

The House Report provides, in relevant part, that 26 U.S.C. § 3309(b)(1)

excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. *On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.*

H.R. Rep. No. 91-612, at 44 (1969) (emphasis added). The DWD argues this language shows that the religious purposes exemption was not intended to apply to

religiously affiliated organizations—like the ones at issue in this case—whose activities are primarily comprised of the provision of secular charitable services.

In response, CCB argues that we should not rely on the House Report because the religious purposes exemption is not ambiguous and plainly requires us to consider the religious character of an organization’s motivation, not its activities. CCB further argues that reliance on the House Report is inappropriate because some jurists have “called into question” the use of legislative history, and particularly committee reports, when interpreting statutes. The DWD notes, however, that Wisconsin courts routinely consult legislative history when interpreting ambiguous statutes. *See, e.g., Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶13, 293 Wis. 2d 123, 717 N.W.2d 258 (“[I]f the meaning of a statute is ambiguous after considering all intrinsic sources, we look to extrinsic sources such as legislative history to find legislative intent.”). The DWD also observes that the United States Supreme Court has relied on the House Report when interpreting 26 U.S.C. § 3309(b). *See St. Martin Evangelical Lutheran Church*, 451 U.S. at 781-83. In addition, the DWD notes that the Wisconsin Supreme Court has relied on congressional committee reports when interpreting other provisions of Wisconsin’s Unemployment Compensation Act. *See Leissring v. DILHR*, 115 Wis. 2d 475, 485-88, 340 N.W.2d 533 (1983).

Furthermore, the DWD observes that our supreme court has stated the Unemployment Compensation Act is “remedial in nature and should be liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status.” *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983), *superseded on other grounds by* WIS. STAT. § 108.02(15)(k)16., *as recognized in National Safety Assocs., Inc. v. LIRC*, 199 Wis. 2d 106, 119, 543

N.W.2d 584 (Ct. App. 1995). The supreme court has also stated that “[i]f a statute is liberally construed, ‘it follows that the exceptions must be narrowly construed.’” *McNeil v. Hansen*, 2007 WI 56, ¶10, 300 Wis. 2d 358, 731 N.W.2d 273 (citation omitted). The DWD therefore argues that we must narrowly construe the religious purposes exemption in order to effect the broad, remedial purpose of the Unemployment Compensation Act.

In response, CCB cites *Kendall v. Director of Division of Employment Security*, 473 N.E.2d 196 (Mass. 1985), in which the Supreme Judicial Court of Massachusetts stated: “Although tax exemptions are ‘normally ... given a strict construction with all doubts construed against the taxpayer ... the rule of strict construction is superseded in instances where there is a strong possibility that the statute in question infringes upon a party’s right to the free exercise of religion.’” *Id.* at 199 (quoting *Christian Sch. Ass’n of Greater Harrisburg v. Commonwealth Dep’t of Labor and Indus.*, 423 A.2d 1340, 1343 (Pa. Commw. Ct. 1980)). CCB therefore asserts that “[w]hen religious liberties are involved in the interpretation of such a statutory provision, the burden effectively reverses.” CCB does not, however, cite any Wisconsin law supporting the proposition that we should broadly construe the religious purposes exemption because of its potential effect on religious liberties.

Both CCB and the DWD cite cases from other jurisdictions in support of their respective interpretations of the religious purposes exemption. Those citations do not resolve the issue before us, however, because they merely show that some courts have concluded an organization is operated primarily for

religious purposes when its activities are primarily religious,⁵ while others have concluded that an organization is operated primarily for religious purposes when its primary motivation for operating is religious.⁶ Moreover, most of the cases from other jurisdictions that CCB and the DWD rely upon do not address the constitutional implications of the opposing interpretations of the religious purposes exemption—a topic that both CCB and the DWD have raised in this appeal.

⁵ See, e.g., *DeSantis v. Board of Rev.*, 372 A.2d 1362, 1364 (N.J. Super. Ct. App. Div. 1977) (concluding a Catholic social service agency was not operated primarily for religious purposes because its provision of “nondenominational community service” for senior citizens was “eleemosynary and not religious”); *Concordia Ass’n v. Ward*, 532 N.E.2d 411, 413-14 (Ill. Ct. App. 1988) (concluding a cemetery association formed by several Lutheran churches was not operated primarily for religious purposes because “[b]urial of the dead is a matter of public concern” and “[t]he functions performed by [the cemetery association] are no different than those performed in a secular cemetery”); *Terwilliger v. St. Vincent Infirmary Med. Ctr.*, 804 S.W.2d 696, 699 (Ark. 1991) (concluding a Catholic hospital was not operated primarily for religious purposes because although the hospital’s motivation may have been religious in nature, the evidence showed that it was operated primarily for the purpose of providing health care); *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 7-8 (Colo. 1994) (concluding an organization that provided administrative support and accreditation for religiously affiliated counseling centers was not operated primarily for religious purposes because “[a]n organization that provides essentially secular services falls outside of the scope of” the religious purposes exemption); *Cathedral Arts Project, Inc. v. Department of Econ. Opportunity*, 95 So. 3d 970, 973 (Fla. Ct. App. 2012) (concluding a church-affiliated organization was not operated primarily for religious purposes because although its motivation may have been religious, its primary purpose in operating—i.e., to give art instruction to underprivileged children—was not religious).

⁶ See, e.g., *Department of Emp. v. Champion Bake-N-Serve, Inc.*, 592 P.2d 1370, 1371-72 (Idaho 1979) (concluding a bakery operated by a Seventh Day Adventists school was operated primarily for religious purposes, at least with respect to the students who were required to work at the bakery as a condition of their education at the school, because the “tenets of the Seventh Day Adventists religion stress the value of labor, and work experience is conceived to be an integral part of the students’ religious training”); *Kendall v. Director of Div. of Emp. Sec.*, 473 N.E.2d 196, 199-200 (Mass. 1985) (concluding a religiously affiliated educational facility for the developmentally disabled was operated primarily for religious purposes, even though it provided services to all, regardless of religion, and even though it did not require participation in religious classes or church services); see also *Cathedral Arts Project*, 95 So.3d at 975-77 (Swanson, J., dissenting) (concluding an organization is operated primarily for religious purposes when its primary motivation is religious, regardless of the nature of its activities).

Specifically, both CCB and the DWD argue that the other party’s interpretation of the religious purposes exemption will result in violations of the First Amendment. The DWD argues that any interpretation of the religious purposes exemption that “requires the state to interpret religious doctrine and examine religious leaders as to their religious motivations risks excessive unconstitutional entanglement of the state and church,” which would violate the First Amendment’s Establishment Clause.⁷ In support, the DWD relies on *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 207, 533 N.W.2d 780 (1995), in which our supreme court concluded that a plaintiff’s claims alleging the negligent hiring, training, supervision, and retention of a priest were barred by the First Amendment. The *Pritzlaff* court reasoned that the First Amendment “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,” which would risk excessive entanglement between the state and the Catholic Church. *Id.* at 326, 330.

The DWD further cites *Coulee Catholic Schools v. LIRC*, 2009 WI 88, ¶¶1-3, 320 Wis. 2d 275, 768 N.W.2d 868, which held that the Free Exercise Clause of the First Amendment to the United States Constitution and article I,

⁷ The First Amendment provides, in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. “The first portion of this provision contains what is called the ‘Establishment Clause,’ and the second portion is called the ‘Free Exercise Clause.’” *Coulee Cath. Schs. v. LIRC*, 2009 WI 88, ¶35, 320 Wis. 2d 275, 768 N.W.2d 868. “[A] statute does not violate the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion.” *Jackson v. Benson*, 218 Wis. 2d 835, 856, 578 N.W.2d 602 (1998) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

section 18 of the Wisconsin Constitution precluded a teacher who had been laid off from a Catholic school from bringing an age discrimination claim against her former employer.⁸ The court explained that the state may not “interfere with the hiring or firing decisions of religious organizations with a religious mission with respect to employees who are important and closely linked to that mission.” *Coulee Cath. Schs.*, 320 Wis. 2d 275, ¶67. A court must therefore first determine whether the organization in question “has a fundamentally religious mission” in both statement and practice. *Id.*, ¶48. That determination is fact-specific, as

[i]t may be, for example, that one religiously-affiliated organization committed to feeding the homeless has only a nominal tie to religion, while another religiously-affiliated organization committed to feeding the homeless has a religiously infused mission involving teaching, evangelism, and worship. Similarly, one religious school may have some affiliation with a church but not attempt to ground the teaching and life of the school in the religious faith, while another similarly situated school may be committed to life and learning grounded in a religious worldview.

Id.

The DWD also relies on *Dykema*, in which the Seventh Circuit stated: “Objective criteria for examination of an organization’s activities thus enable the IRS to make the determination required by the statute”—i.e., whether the organization was operated exclusively for religious purposes—“without entering into any subjective inquiry with respect to religious truth which would be

⁸ Although the employee in *Coulee Catholic Schools* argued that the employer’s challenge to her age discrimination claim should be analyzed under the Establishment Clause, the supreme court concluded the employer’s challenge instead implicated the Free Exercise Clause. *Coulee Cath. Schs.*, 320 Wis. 2d 275, ¶¶36-37. Nonetheless, the court acknowledged that the employer’s challenge did, to some extent, implicate the idea of “excessive entanglement with religion.” *Id.*, ¶37.

forbidden by the First Amendment.” *Dykema*, 666 F.2d at 1100. Based on *Dykema*, *Pritzlaff*, and *Coulee Catholic Schools*, the DWD argues that the only way for a court to avoid excessive entanglement when determining whether an organization is operated primarily for religious purposes under WIS. STAT. § 108.02(15)(h)2. is to focus on the organization’s activities, which allows the court to conduct a neutral review based on objective criteria.

CCB, in turn, argues that the DWD’s interpretation of the religious purposes exemption would violate the First Amendment because “[a] determination by the state that CCB is not ‘religiously purposed enough,’ represents a constitutionally impermissible Free Exercise violation.” In essence, CCB argues that the DWD’s interpretation favors those religious entities that engage in proselytizing and provide services only to members of their own religion, which would impermissibly burden the sub-entities’ and CCB’s free exercise of the Catholic tenet of “solidarity”—i.e., “[b]eing ecumenical in social ministry.”

CCB also asserts that the DWD’s interpretation of the religious purposes exemption would result in an Establishment Clause violation because “[b]y allowing exemption to those religions which view ‘proselytizing’ and discriminating against non-adherents in the provision of services as part of their mission, [the DWD] is favoring those religions over Catholicism.” CCB contends the “easiest way” for the DWD to “‘entangle’ itself in religion is to promote one practice (proselytizing, etc.) over another (ecumenical delivery of charity).”

CONCLUSION

The Wisconsin Supreme Court “has been designated by the constitution and the legislature as a law-declaring court.” *State v. Grawien*, 123

Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985). Although the court of appeals also serves a law-declaring function, “such pronouncements should not occur in cases of great moment.” *Id.* We believe that this is such a case. The proper interpretation of the religious purposes exemption is highly important to countless religiously affiliated nonprofit organizations throughout the state, which need to know whether they are exempt from the Unemployment Compensation Act. The resolution of this issue is also important to such organizations’ employees, as the exemption determination will affect their eligibility for unemployment benefits. The DWD also has a significant interest in the interpretation of the religious purposes exemption, as it is charged with applying the exemption on a day-to-day basis. Furthermore, the term “religious purposes” appears in various other Wisconsin statutes, and a decision by the supreme court interpreting that term in WIS. STAT. § 108.02(15)(h)2. could provide guidance in interpreting those other statutory provisions.

As noted above, there is no binding Wisconsin case law regarding the interpretation of the religious purposes exemption, and courts in other jurisdictions are divided as to the proper interpretation. Moreover, CCB and the DWD have raised significant questions regarding: whether the religious purposes exemption is ambiguous; whether we should rely on legislative history when interpreting the exemption; whether the exemption should be interpreted narrowly (due to the remedial purpose of the Unemployment Compensation Act) or broadly (due to the risk that the exemption may infringe on religious liberties); and whether either of the parties’ proposed interpretations of the exemption will violate the First Amendment.

Given the dearth of binding case law addressing these questions and the importance of the legal issues presented, we believe this is a case in which it

would be appropriate for the supreme court, rather than the court of appeals, to render a decision. A decision by the supreme court “will help develop, clarify or harmonize the law,” WIS. STAT. RULE 809.62(1r)(c), thereby providing much needed guidance to religiously affiliated nonprofit organizations throughout Wisconsin, as well as to their employees, the DWD, and Wisconsin attorneys and lower courts.

