

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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11
12 Washington, D.C.
13 Monday, March 31, 2025

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15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 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.

11 And then it says, on the other hand, a
12 church-related, separately incorporated
13 charitable organization, such as an orphanage or
14 home for the aged, would not be considered.

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

24 Now, for you that would be a little
25 unfortunate because it would take you outside of

1 the exemption, but I'm just trying to understand
2 whether "for religious purposes" is really about
3 the motivation or are they trying to get at
4 those organizations that are inculcating or
5 training religious doctrine.

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

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

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

1 Those entities don't get the
2 exemption, even if they are controlled by a
3 church. Because, remember, there is also that
4 other condition that it be controlled -- that
5 the entities that enjoy this exemption are
6 controlled by a church.

7 JUSTICE SOTOMAYOR: Could you --

8 MR. RASSBACH: If I could also --

9 JUSTICE SOTOMAYOR: - focus --

10 MR. RASSBACH: Oh.

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

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

18 MR. RASSBACH: Sure.

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

24 MR. RASSBACH: Well, I think that the
25 way -- so I -- the -- the laws that she is

1 talking about is the FUTA, which the -- we would
2 say that that language is not -- the text is not
3 really problematic there, but the way that the
4 Wisconsin Supreme Court interpreted it here --

5 JUSTICE SOTOMAYOR: That' -- that --

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

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

9 MR. RASSBACH: Right.

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

12 JUSTICE JACKSON: No, no.

13 JUSTICE SOTOMAYOR: -- that say --

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

16 JUSTICE SOTOMAYOR: Oh, I'm sorry.

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

23 MR. RASSBACH: I --

24 JUSTICE JACKSON: And that troubles me
25 because it seems as though you're saying that

1 should be in, and it shouldn't be distinguished
2 between orphanages that proselytize versus
3 orphanages that don't. And I guess I'm just
4 wondering whether any orphan -- orphanages are
5 in --

6 MR. RASSBACH: I see.

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

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

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

24 JUSTICE JACKSON: You're saying the --

25 JUSTICE BARRETT: Counsel --

1 JUSTICE JACKSON: -- Constitution
2 requires an exception here?

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

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

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

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

21 Do you see a distinction between those
22 things?

23 MR. RASSBACH: Well, I think -- I
24 think that there is a distinction between the
25 two things, but I think this Court has said, for

1 example, in the Kedroff case that it's -- it's
2 control or manipulation.

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

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

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

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

1 for an exemption to be offered only to
2 non-profits?

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

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

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

1 JUSTICE BARRETT: But what about my
2 for-profit, nonprofit example?

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

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

11 One of the problems here is figuring
12 out what the line is, you know, if a legislature
13 wants to, like Justice Jackson is saying, exempt
14 certain kinds of religious activities, but not
15 others.

16 And you point out that it's excessive
17 entanglement, in your view, to try to
18 distinguish between -- to get involved in the
19 enterprise of figuring out what you're up to.

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

25 MR. RASSBACH: No, not at all. I -- I

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas, anything further?

1 Justice Alito?

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

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

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

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

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

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

1 JUSTICE ALITO: And what is the
2 difference?

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

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

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

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

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

1 MR. RASSBACH: Sure.

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

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

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

14 MR. RASSBACH: Yes. Sorry.

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

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

1 said, well -- another group might say we're only
2 going to serve our particular group.

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

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

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

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

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

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

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

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

20 MR. RASSBACH: Okay. So --

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

25 MR. RASSBACH: Sure. Yes. And I

1 apologize if I -- I -- I hope I get all the
2 subparts there.

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

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

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

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

24 MR. RASSBACH: Okay. Then the second
25 question, I would say, is just that the -- on

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

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

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

24 Do -- do we say it fails strict
25 scrutiny, not on the interest prong but on the

1 narrow tailoring prong? Is that -- you said
2 there's so many exceptions, et cetera.

3 MR. RASSBACH: Right. I think --

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

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

12 JUSTICE SOTOMAYOR: Okay.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

25 So it's not the most obvious thing

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

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

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

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

21 MR. RASSBACH: Well, I think, you
22 know, in some ways, the church autonomy argument
23 would be sort of a very simple thing, to just
24 say, look, your -- your -- you know, this is a
25 single church body and they're all controlled by

1 a single bishop. It's -- it doesn't make any
2 sense to try to force them to reorganize. And
3 it's sort of senseless to say that, you know,
4 both the sort of top organization and one of
5 the, you know, two ranks down, subentities is --
6 are exempt while excluding everybody else.

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

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

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

25 Why isn't that the simplest basis on

1 which to rule?

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

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

16 MR. RASSBACH: Correct.

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

21 MR. RASSBACH: I do think it would be
22 difficult. I think this Court had a footnote in
23 Trinity Lutheran -- I -- I may be getting that
24 wrong -- that referred to McDaniel against Paty,
25 an earlier case that talked about the fact that

1 there may not be a strict scrutiny defense to
2 sort of a -- a pure discrimination among
3 religions.

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

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

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

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: I wasn't quite
24 sure of your answer to Justice Jackson. If
25 Catholic Charities ran a -- an orphanage or home

1 for the aged, what -- what result?

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

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

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

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

24 If you have -- if you create these
25 sets of approved religious -- you know,

1 judicially approved religious activities, that's
2 a real problem.

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

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

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

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

25 You know, if you look at the opinion

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

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

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

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

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

22 JUSTICE KAVANAUGH: -- but what else?
23 Is there any other limit to the --

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

1 JUSTICE KAVANAUGH: Is that 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 -- Justice -- 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 government. And, you
4 know, Madison says, you know, you have to -- you
5 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 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 pastor
7 in the execution chamber being able to lay hands
8 on him. And the Court recognized that -- that
9 you -- it was okay to analyze whether that was a
10 sincere religious belief. And -- and we think
11 that the test here, the statutory test that we
12 would apply, is similar to the one that the IRS
13 has applied in the 501(c)(3) context.

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

18 JUSTICE KAVANAUGH: I --

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

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

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

25 JUSTICE KAVANAUGH: What's the --

1 that's second? Explain what you mean, because
2 that sounds a little --

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

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

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

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

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

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

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

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

16 JUSTICE GORSUCH: Mr. Gannon --

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

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

25 And the only question is whether it's

1 treating different religions differently because
2 some proselytize when they provide services and
3 others don't. Wouldn't -- wouldn't it just be
4 that simple?

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

9 JUSTICE GORSUCH: You say we --

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

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

20 (Laughter.)

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

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

24 MR. GANNON: Well, and I was going to
25 say, Justice Gorsuch, that, you know, that's --

1 that's part of the inquiry -- in looking into
2 sincerity, is --

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

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

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

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

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

21 MR. GANNON: That's a similar problem
22 even for purposes of -- of construing the
23 statute.

24 JUSTICE GORSUCH: Got you.

25 JUSTICE BARRETT: Mr. -- Mr. Gannon,

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

7 CHIEF JUSTICE ROBERTS: Sure.

8 JUSTICE BARRETT: But why would that
9 be so? Couldn't we say in an opinion -- I mean,
10 because it's -- it's hard for me to say,
11 frankly, in the Wisconsin Supreme Court's
12 opinion that it thought its reading was
13 compelled by the federal statute. It kind of
14 looked to it, you know, it -- it observed that
15 there was similarities, but it -- it's hard nor
16 me to see how it wasn't interpreting its own
17 statute.

18 So just -- just grant me that.

19 MR. GANNON: I --

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

1 federal government statute is interpreted
2 differently?

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

7 JUSTICE BARRETT: No, no, no.

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

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

12 MR. GANNON: And --

13 JUSTICE BARRETT: And if I did, why
14 would it necessarily call the constitutionality
15 of the federal statute into question, assuming
16 that we held that there was a problem with this
17 one?

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

24 JUSTICE BARRETT: Okay. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

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

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

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

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

24 CHIEF JUSTICE ROBERTS: And -- and
25 would it be a sufficient religious reason to say

1 that the principles of the church require care
2 for the sick?

3 MR. GANNON: I -- I think that --
4 that --

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

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

14 CHIEF JUSTICE ROBERTS: Thank you.
15 Justice Thomas?

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

24 MR. GANNON: Yes. And -- and
25 that's what -- that's what I said was in the

1 legislative history that Justice Jackson was
2 bringing up under the statute, potentially the
3 distinction for the orphanages that are
4 discussed in the committee report, is if they
5 are not actually directly controlled and
6 operated by the church, then that would be the
7 reason why they fell out.

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

15 JUSTICE THOMAS: So how is that
16 different from Catholic Charities here?

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

22 Everybody understands that the
23 Catholic Charities Bureau supervises the
24 subentities that are at issue here, that they --
25 that the bishop is -- is -- is two levels up,

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

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

11 CHIEF JUSTICE ROBERTS: Justice Alito?

12 Justice Sotomayor?

13 Justice Kagan?

14 Justice Gorsuch, anything further?

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

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

23 It would then be free to make a
24 different decision on statutory construction on
25 remand. If you agree with us on the -- and

1 you -- you could call that a reverse and remand
2 for further proceedings, consistent with your
3 opinion.

4 JUSTICE GORSUCH: That's the boomerang
5 problem Justice Thomas talked about.

6 MR. GANNON: That --

7 JUSTICE GORSUCH: How about on the
8 constitutional side?

9 MR. GANNON: On the constitutional
10 side, then reverse, yes.

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

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

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

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

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

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

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

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

20 And then --

21 JUSTICE KAVANAUGH: Assume we're past
22 that point.

23 MR. GANNON: And then -- then the --
24 the other cases that I've seen, I've just --
25 I'm -- I'm not aware of what the IRS has done

1 with respect to hospitals in -- in the nonprofit
2 context, and applying the same type of analysis
3 that we have here.

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

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

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

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

21 MR. GANNON: Well, I think there's a
22 lot else in the context of, you know, what else
23 the hospital is doing, who it's competing with,
24 how it provides the services.

25 If it is actually, you know, in -- in

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

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: No.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

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

21 And so that's why I looked at the
22 committee report, which is very clear that it
23 was suggesting that the orphanage, separately
24 incorporated, would not be considered to be
25 primarily for religious purposes. It does not

1 say it would not be considered to be operated
2 and controlled by a church, which was your
3 answer.

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

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

17 You know, my pen serves a purpose; it
18 allows me to write notes. And that has nothing
19 to do with motivation.

20 And so I guess I'm wondering whether
21 the ambiguity in what the statute means when it
22 says "for religious purposes" doesn't invite us
23 to consider what Congress was actually trying to
24 do when it was drawing this exemption.

25 MR. GANNON: Well, I -- I certainly

1 don't disagree that a purpose includes
2 something -- you know, the -- the end to which
3 something is -- is -- is directed.

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

8 JUSTICE JACKSON: Right, but your --

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

13 And so the end is the purpose. And
14 the end here, according to Catholic Charities
15 Bureau, is to be an effective sign of the
16 charity of Christ.

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

22 But there's another idea of purpose
23 that would be: What is this organization's
24 activities about? What -- what is -- what are
25 they offering? And I guess my -- my concern is

1 that that view of "purpose" seems to make more
2 sense of the exemption in this case.

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

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

17 JUSTICE JACKSON: No, no, no. I -- it
18 doesn't at all.

19 MR. GANNON: Because --

20 JUSTICE JACKSON: No, what I'm saying
21 is if you are right that the -- the line that's
22 being drawn here is about motivation, I don't
23 understand how the exemption works. There must
24 be some rational reason why Congress would want
25 to exempt the exact same kinds of services being

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

11 MR. GANNON: If you --

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

20 That -- it -- it only makes sense if
21 purpose is, like, focused on the activities,
22 rather than the motivation.

23 MR. GANNON: Yeah. And -- and I think
24 that the fact that it is a religious exemption
25 means that it makes sense to focus on what is

1 the motivation for the acts that you're doing --

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

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

11 JUSTICE JACKSON: I -- I understand.
12 Thank you.

13 MR. GANNON: -- mentioned the --

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Roth.

17 ORAL ARGUMENT OF COLIN T. ROTH

18 ON BEHALF OF THE RESPONDENTS

19 MR. ROTH: Mr. Chief Justice, and may
20 it please the Court:

21 This religious accommodation solves a
22 particular problem posed by the unemployment
23 insurance system. When determining benefit
24 eligibility, the state must often resolve
25 disputes over whether an employee was discharged

1 for misconduct. If so, no benefits. Now
2 consider churches and their affiliates whose
3 employees express an inculcate religious
4 doctrine through worship, proselytization, and
5 religious education. For those employers,
6 misconduct disputes could often force the state
7 to decide whether employees complied with
8 religious doctrine.

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

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

24 Petitioners' motive-only test has no
25 such limits. It would leave potentially over 1

1 million employees nationwide without
2 unemployment coverage, like nurses and janitors
3 at religiously affiliated hospitals, even though
4 the state can virtually always determine their
5 benefit eligibility without confronting
6 religious doctrine.

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

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

19 I welcome your questions.

20 JUSTICE THOMAS: If Catholic Charities
21 reported directly to the bishop without being a
22 separate corporate entity, would -- would you be
23 here?

24 MR. ROTH: If they're incorporated as
25 part of the church, they would qualify for the

1 church exemption.

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

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

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

22 MR. ROTH: Well, I think the church
23 autonomy doctrine until this point has been very
24 narrow. As we argue in our brief, it's limited
25 to instances of state compulsion. You see

1 Kedroff and Serbia, and that was about the state
2 telling the church who should run it, how it
3 should be organized, through a state statute or
4 judicial review of an ecclesiastical judicial
5 body's decision. That's compulsion.

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

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

20 MR. ROTH: Understood, Your Honor. I
21 think we're nowhere here that here. As we point
22 out in our brief -- and this is precisely
23 because Catholic Charities relies so heavily on
24 their backup CUPP private system. Because
25 they're a reimbursable employer for the state,

1 we think that the -- the fiscal impact they face
2 here is essentially net neutral. Either they're
3 paying for benefits through the state system in
4 a one-to-one reimbursable ratio, or they're
5 going to pay for the benefits through their
6 private system.

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

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

18 MR. ROTH: Well, I would note that the
19 compelling interest analysis only comes in when
20 we get to --

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

23 MR. ROTH: Right.

24 JUSTICE GORSUCH: But what -- what
25 interest does the state have in --

1 MR. ROTH: Well what --

2 JUSTICE GORSUCH: -- in effectively
3 saying you should be incorporated together with
4 the church rather than not?

5 MR. ROTH: Absolutely. So the -- the
6 first one is --

7 JUSTICE GORSUCH: I'm struggling.

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

14 JUSTICE GORSUCH: And -- and you agree
15 that it's --

16 MR. ROTH: -- that would require them
17 --

18 JUSTICE GORSUCH: -- just as good as
19 what you -- you'd have in Wisconsin.

20 MR. ROTH: I -- I would -- I would
21 disagree with that, respectfully, Your Honor. I
22 think the most important point is that it's
23 essentially a self-insurance program.

24 JUSTICE GORSUCH: Right.

25 MR. ROTH: And so, when you have

1 layoffs, you know, self-insurance is a risk in
2 that situation --

3 JUSTICE GORSUCH: Well, all
4 self-insurance -- governments are at risk too,
5 but okay. Anything other than that?

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

11 JUSTICE GORSUCH: Okay.

12 JUSTICE KAVANAUGH: You said in your
13 opening that we should look at what the
14 organizations do --

15 MR. ROTH: Mm-hmm.

16 JUSTICE KAVANAUGH: -- and not why
17 they do it.

18 MR. ROTH: Correct.

19 JUSTICE KAVANAUGH: But how do you
20 square that with the language of the statute,
21 "operated primarily for religious purposes" --

22 MR. ROTH: Right.

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

25 MR. ROTH: So just with the brief

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

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

17 And I'd point to the Living Faith case
18 because this goes to the Chief's question. I
19 see no way in which Living Faith came out the
20 way it did, which it denied the exemption to the
21 Seventh-Day Adventist restaurant, if a religious
22 motive is enough, because the Seventh-Day
23 Adventist and Living Faith said, for us,
24 promoting health is an element of the gospel.
25 Health leads to salvation. I think that's

1 practically indistinguishable from what Catholic
2 Charities is saying here. And Living Faith said
3 no, I'm sorry, the commercial -- simply because
4 you have a -- a religious motivation for the
5 non-exempt purpose --

6 JUSTICE KAVANAUGH: Well --

7 MR. ROTH: -- does not render you
8 eligible for the exemption.

9 JUSTICE KAVANAUGH: I think there --

10 CHIEF JUSTICE ROBERTS: I'm sorry, go
11 ahead.

12 JUSTICE KAVANAUGH: Go ahead.

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

17 MR. ROTH: I think --

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

23 MR. ROTH: No, Your Honor. I think
24 what we're looking for is precisely what this
25 Court looks for in -- in adjudicating the

1 ministerial exception. We're looking for
2 activities that express and inculcate religious
3 doctrine: worship, proselytization, religious
4 education.

5 And it's precisely because it's those
6 activities that create the entangling problem in
7 the state --

8 JUSTICE GORSUCH: What is -- what is
9 proselytization?

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

14 JUSTICE GORSUCH: Repent. They have
15 to say "repent"?

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

20 JUSTICE GORSUCH: So --

21 MR. ROTH: Because when -- I'm sorry,
22 Your Honor.

23 JUSTICE GORSUCH: So -- so they --
24 they have to say -- I just want to know what the
25 test is. So repent your sins. You get the

1 exemption. Not requiring you to repent your
2 sins, you don't -- I guess you don't get the
3 exception.

4 MR. ROTH: No, the --

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

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

16 So is mandatory church attendance
17 versus optional church attendance, that's the
18 line?

19 MR. ROTH: No, Your Honor. I think
20 what -- what we're looking for is -- is
21 analogous to what this Court looks for in
22 applying the ministerial exception. What it
23 wants to know when it -- when it seeks to --

24 JUSTICE GORSUCH: No, I'm asking you
25 how to apply your exception. Because the

1 Wisconsin Supreme Court says proselytization is
2 really important. And it says, oh, also, if you
3 serve non-co-religionists, that's a problem.

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

10 MR. ROTH: So I will say --

11 JUSTICE GORSUCH: -- in Wisconsin.

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

14 JUSTICE GORSUCH: It's a marginal
15 factor?

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

18 JUSTICE GORSUCH: Well, it's in the --
19 it's in the Court's opinion.

20 MR. ROTH: I understand.

21 JUSTICE GORSUCH: So you're running
22 away from the Court's opinion. So this all
23 comes down to proselytization. How much is
24 enough?

25 MR. ROTH: No, Your Honor. What it

1 comes down to is whether the employees of the
2 organization are expressing and inculcating
3 religious doctrine.

4 JUSTICE GORSUCH: Okay.

5 JUSTICE KAGAN: Do you think that
6 Wisconsin could pass a statute that says: We'll
7 give a religious tax exemption to religious
8 groups that proselytize, but to no others?

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

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

20 MR. ROTH: So I would like to step
21 back for a moment to the principle that
22 accommodations are meant to solve particular
23 problems. And we think the world is -- is
24 roughly divided into two groups. It's religious
25 organizations that -- that are --

1 JUSTICE KAGAN: I mean, some
2 religious -- I'm just -- Mr. Roth, some
3 religious organizations proselytize.

4 MR. ROTH: That's right.

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

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

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

22 JUSTICE KAGAN: And the those that
23 don't, sometimes it's a religious principle not
24 to.

25 MR. ROTH: But I -- I would dispute

1 that premise that this is not an arbitrary
2 distinction. I think it -- it serves a
3 functional purpose when employees are expressing
4 and inculcating religious doctrine. We have to
5 step back.

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

13 JUSTICE KAGAN: That's not --

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

19 So you could adjudicate those
20 disputes, but you -- and you would say it would
21 be very important for -- for you to do so
22 because they don't involve proselytizing, but
23 the minute it goes into the Catholic Church,
24 Inc., rather than a separate incorporation.

25 So I'm not sure that argument works,

1 counsel.

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

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

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

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

22 You're saying this will make it easy
23 for us. And, well, it -- it is easy here. And
24 that's why you say I don't want to get into the
25 particular doctrine. We want -- we don't want

1 to be dragged into trying to consider a number
2 of nuances or whatever, whether this qualifies
3 or not.

4 You want the test to be whatever is
5 easiest for you.

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

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

19 So it's not just --

20 JUSTICE JACKSON: But it does it --

21 JUSTICE BARRETT: Counsel, is it
22 possible --

23 JUSTICE JACKSON: -- at the level of
24 employees --

25 JUSTICE BARRETT: Go ahead.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

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

11 MR. ROTH: Absolutely not --

12 JUSTICE BARRETT: -- if they're
13 running these sorts of organizations?

14 MR. ROTH: My apologies, Your Honor.

15 If I was not clear, these are or's;
16 these are not and's. So proselytization is
17 absolutely not a required component to receive
18 this accommodation. These are or's.

19 If your -- if your organization
20 involves -- again, engages, I think, in any of
21 these three things, worship, proselytization,
22 religious education, you're going to be doing
23 the kinds of things the State needs to stay away
24 from, whether it's in the antidiscrimination
25 context or whether it's in the unemployment

1 context.

2 So to Justice Gorsuch's question, if
3 they don't proselytize, that's fine. They may
4 still get this accommodation, if they do other
5 kinds of things --

6 JUSTICE BARRETT: Like --

7 MR. ROTH: -- that are going to create
8 these entangling forces --

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

16 MR. ROTH: Sure. So the
17 co-religionist piece of the decision, I -- I'm
18 not going to stand and die on that hill. If
19 this Court wants to say that's not a proper
20 consideration, I think it's still sufficient to
21 affirm the decision below.

22 The core of the State Supreme Court's
23 decision was a motive alone is not enough to
24 qualify for this exemption.

25 Catholic Charities here relied

1 entirely on their motive. We think that
2 affirming that core of the decision suffices to
3 deny them the --

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

11 But -- so, again, you're -- that's
12 proselytization, in another way of looking at
13 it; isn't that right?

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

15 JUSTICE GORSUCH: Are you going to
16 go -- is Wisconsin going to go around and -- and
17 this soup kitchen, you know, you have to go --
18 you have to go to the service before you get
19 your soup, they're good to go. But that one,
20 they just invite you to the service after the
21 soup, and they're bad.

22 I mean, is it really that's the -- I
23 would have thought this would entangle the state
24 in -- in religion a whole lot more than a
25 non-discrimination rule between religions.

1 MR. ROTH: So I would like to revisit
2 just very briefly, because I think it's directly
3 responsive to Your Honor's question. It's a
4 hypothetical we gave in our brief. I think it
5 illustrates this point.

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

16 Catholic Charities, however, is not
17 going to have employees who receive the
18 ministerial exception. So we have the same
19 exact disparate --

20 JUSTICE GORSUCH: Really, there are no
21 nuns and priests and deacons at the soup
22 kitchen?

23 MR. ROTH: I -- I'm not saying that at
24 all, Your Honor. But if they are not -- when
25 they -- when they are --

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

3 MR. ROTH: It's -- right. Your Honor,
4 it's not about who -- who the employees are.
5 It's about --

6 JUSTICE GORSUCH: Okay --

7 JUSTICE BARRETT: You said they were.

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

9 JUSTICE BARRETT: You said ministerial
10 exception, it was about who they are.

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

15 And so if the minister or the deacon
16 or the bishop at the soup kitchen is -- is --
17 is -- when he delivers the soup, is doing the
18 thing --

19 JUSTICE BARRETT: So the nun doesn't
20 get the ministerial exception, and neither does
21 the priest?

22 MR. ROTH: Excuse me? Sorry?

23 JUSTICE BARRETT: The nun and the
24 priest don't get the ministerial exception?

25 MR. ROTH: I -- so they -- I -- I

1 suppose they would, because in other contexts
2 they would be there to express and inculcate
3 religious doctrine.

4 But if in the context of -- of this,
5 if they're employed by Catholic Charities, in
6 the course of their employment with Catholic
7 Charities, they're not there to express and
8 inculcate the faith. While, you know, it --

9 JUSTICE BARRETT: So you're not
10 entangled if you have to go in and interview the
11 -- the nun and the priest who go in and do a
12 shift at the soup kitchen that Catholic
13 Charities is running to see what they're doing
14 or if you have to listen -- I mean, are they
15 playing, like, hymns on the radio or, like,
16 Christian rock at the evangelical soup kitchen
17 on the radio? You know, is that -- is that
18 proselytization or not because you're forced
19 there to sit and listen to it?

20 MR. ROTH: Your Honor, I -- I -- I
21 understand the -- the thrust of the question. I
22 mean, I don't think it's any more entangling
23 than the kinds of questions courts have to
24 answer all the time when applying the
25 ministerial exception.

1 JUSTICE JACKSON: Well, Mr. Roth, why
2 don't you just apply the ministerial -- I mean,
3 this goes back to the -- to the Chief Justice's
4 question. It just seems as though Wisconsin
5 says we're going to set up this system that is
6 operating in a discriminatory fashion based on
7 whether or not you proselytize, to avoid having
8 to address the ministerial question if it should
9 arise in these situations.

10 But, I mean, if it's creating a
11 constitutionally problematic, discriminatory
12 front and issue, why don't you just deal with it
13 as the ministerial exception in the back end?

14 MR. ROTH: Well --

15 JUSTICE JACKSON: It's not as easy,
16 says the Chief Justice --

17 MR. ROTH: Mm-hmm.

18 JUSTICE JACKSON: -- but so be it.

19 MR. ROTH: Well, I -- of course
20 disputing the premise that this is, you know,
21 setting a discriminatory exemption, I think the
22 point is this is a prophylactic, and the -- the
23 legislature has said rather than force these
24 kinds of organizations in individual cases to
25 assert something analogous to the ministerial

1 exception, which -- you know, it can -- it can
2 be challenging to predict who's -- who's going
3 to have to -- who's going to get this, we want
4 us to get these people out on the front end.

5 I think that's very similar to what
6 Congress did when it expanded Section 702.
7 Pre-1972, it only applied to religious
8 activities, but then Congress said, well, that's
9 going to require religious organizations to sort
10 of predict on a one-by-one basis who's going to
11 get this 702 exemption, so we're going to expand
12 it to religious organizations as a whole.

13 And Amos said that is entirely
14 appropriate. It's good to have these
15 prophylactic measures to give space to the
16 organizations that do these things, rather than
17 force them, sort of on a one-by-one basis, to
18 have to adjudicate these sort of ministerial
19 exception-type defenses, which are affirmative
20 defenses in these -- you know, for instance, in
21 a Title VII case.

22 JUSTICE KAVANAUGH: I think your
23 overarching argument, again, is that we
24 shouldn't look at the motives; we should look at
25 what they do.

1 And the other side says, no, you have
2 to, by the statutory language and -- and the
3 constitutional principles look at why they're
4 doing the activity. And they say the limit on
5 that is -- to present -- prevent some of the
6 absurd hypotheticals or -- or extended
7 hypotheticals is sincerity, and sincerity will
8 weed out the cases that you're worried about.

9 What is your response to why
10 sincerity -- you should look at beliefs, look at
11 purpose, motive, but sincerity will weed out the
12 marginal cases?

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

18 I think in both those cases, you're
19 not going to weed those out on sincerity
20 grounds. The -- there's testimony in the record
21 here -- this is record 99 of the lower court
22 record. The archbishop of Milwaukee testified
23 that he oversees multiple Catholic hospitals in
24 the Milwaukee area. And that's clearly --
25 they're clearly operated for a religious motive.

1 We would never dispute the sincerity of that
2 religious motive. They're going to be out.
3 Seventh-Day Adventists similarly. It -- maybe
4 it's commercial activity they're engaging in --

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

7 MR. ROTH: They're going to be out
8 because when they run their vegan restaurants,
9 what -- again, what a --

10 JUSTICE KAVANAUGH: Is that a
11 hospital -- I think you were on the hospital
12 one.

13 MR. ROTH: Oh, the hospital? Well,
14 they're -- they're out because what the hospital
15 is saying if it's supervised by the bishop,
16 which is all this statute requires, the bishop
17 will say the reason we run these hospitals is to
18 serve -- I mean, Christ healed the sick, and
19 we're doing the same. And so how can you tell
20 us that that's not a religious purpose?

21 They'll be out, even though
22 99.9 percent of what goes on at that hospital is
23 healthcare.

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

1 MR. ROTH: That -- well, we think
2 they're properly --

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

5 MR. ROTH: We think -- right.

6 JUSTICE KAVANAUGH: -- you would use
7 on the other side of that argument.

8 MR. ROTH: Well, my analysis would be
9 you're looking at the activities, and as Seventh
10 Circuit said in Dykema, we want to look at
11 whether the kinds of things that Catholic
12 hospital is doing is going to entangle the state
13 in unemployment benefit disputes.

14 And I think the answer is clearly no.
15 So -- and I can -- I would like to illustrate --
16 just two very briefly hypotheticals to
17 illustrate this sort of entanglement point.
18 I'll just stick with one, actually.

19 So the nurse at the hospital. She's
20 not charged with inculcating religious doctrine.
21 She is fired for malpractice. There's a
22 misconduct dispute. The state can very easily
23 resolve whether she engaged in misconduct
24 without answering doctrinal questions, but if
25 they're right, she's out of the system

1 altogether and she loses benefits.

2 JUSTICE ALITO: Mr. --

3 MR. ROTH: And that's -- that's a
4 needless loss of benefits.

5 JUSTICE ALITO: I mean, Mr. Roth,
6 let's suppose we affirm and then Catholic
7 Charities comes to the state and says: Okay,
8 fine, we don't like the decision, but what -- we
9 want to comply. Tell us the minimum change we
10 need to make in order to comply.

11 What's your answer?

12 MR. ROTH: I think if when they
13 deliver, say, the soup to the -- the recipient,
14 they say: Recipient, you know, we're both going
15 to say the Lord's prayer, that could be one
16 thing. I mean, when they're engaging in --

17 JUSTICE ALITO: That would be
18 sufficient?

19 MR. ROTH: I think --

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

22 MR. ROTH: And, again, I think it's
23 because that type of job function is tethered to
24 religious doctrine. And so that's exactly what
25 creates the problem. If there's a -- if there's

1 a termination decision, if -- if the soup
2 kitchen person says the Lord's prayer, say, the
3 wrong way, he omits a line, and he's terminated
4 for that, however unlikely that may be, but if
5 it were -- come -- to come to pass, the state
6 agency would now have to decide did he omit too
7 much of the Lord's prayer, did he say it the
8 wrong way? We want to --

9 JUSTICE KAGAN: But it might be a
10 matter of religious doctrine that we don't
11 require people to say the Lord's prayer with us
12 before we give them soup. I mean, what's --
13 what's -- what's -- what's problematic about
14 this -- I mean, there are lots of hard questions
15 in this area. Vegan restaurants --

16 MR. ROTH: Mm-hmm.

17 JUSTICE KAGAN: -- hospitals, lots of
18 hard questions. But I thought it was pretty
19 fundamental that we don't treat some religions
20 better than other religions. And we certainly
21 don't do it based on the content of the
22 religious doctrine that those religions preach.

23 And if you --

24 MR. ROTH: Mm-hmm.

25 JUSTICE KAGAN: This opinion sets up

1 two things. One is the co-religionist service.

2 MR. ROTH: Mm-hmm.

3 JUSTICE KAGAN: You've run away from
4 that. And the other is the proselytization.
5 Some religions proselytize. Other religions
6 don't.

7 MR. ROTH: Mm-hmm.

8 JUSTICE KAGAN: Why are we treating
9 some religions better than others based on that
10 element of religious doctrine?

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

14 I'd draw just a brief comparison --

15 JUSTICE KAGAN: The problem must be --
16 you must be able to address this problem, which
17 is -- you know, entanglement is an issue.

18 MR. ROTH: Mm-hmm.

19 JUSTICE KAGAN: You -- if -- if I say
20 to you, you know -- you have to figure out a way
21 to do this that does not discriminate among
22 religions based on the content of their
23 doctrines.

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

25 JUSTICE KAGAN: The reason why we're

1 so worried about entanglement is because it gets
2 us enmeshed in the content of religious
3 doctrine. But your way of doing it, you know,
4 basically puts the state on the side of some
5 religions with some doctrine versus other
6 religions with a different doctrine.

7 MR. ROTH: Sure. So, Your Honor, I
8 would draw -- I think a very apt analogy on this
9 point are the FICA and ACA exemptions. The --
10 these are very valuable exemptions to the FICA
11 taxes and the ACA individual mandate that are
12 exemptions for those who have a religious
13 objection to participating in public insurance.

14 Not all denominations have that
15 religious objection. And so it does fall in
16 denominational lines who gets the FICA
17 exception. This is a very valuable exemption.
18 Only certain denominations that have these kinds
19 of objections to public insurance are going to
20 receive this.

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

23 MR. ROTH: Well --

24 JUSTICE GORSUCH: There are going to
25 be some exemptions that as a matter of --

1 Catholic Charities does more soup kitchens than
2 -- than some -- some other faiths. It's true.
3 It -- it's true. That's true. So they're going
4 to get -- more likely to get the exemption.

5 But I think what Justice Kagan is
6 getting at is, isn't it a fundamental premise of
7 our First Amendment that the state shouldn't be
8 picking and choosing between religions, between
9 certain evangelical sects, and Judaism and
10 Catholicism on the other, for example? And
11 doesn't it entangle the state tremendously when
12 it has to go into a soup kitchen, send an
13 inspector in, to see how much prayer is going
14 on?

15 MR. ROTH: On the discrimination
16 point, the -- my -- my fundamental premise is
17 there are certain circumstances in which
18 Religion A faces a problem based on its
19 doctrinal content or its practices that Religion
20 B may not face. And so when the state
21 legislature -- Congress or state legislatures
22 set out to exempt Religious Group A but not
23 Religious Group B, precisely because B does not
24 face the problem, that cannot be discriminatory.

25 We're in a world, then, where there's

1 no line-drawing available to legislatures to
2 accommodate specific problems that only specific
3 religious groups face, because the principle is
4 if that ever falls on denominational lines, it's
5 unconstitutional.

6 And, Justice Gorsuch, I -- I -- I
7 actually dispute the premise of your question,
8 that it's just -- it's easy for a religious
9 group to adopt a new principle to obtain the ACA
10 or FICA exemption.

11 JUSTICE GORSUCH: Well, all they have
12 to do is re- -- reincorporate, according to you.

13 MR. ROTH: No. On -- on the FICA and
14 ACA example, the -- the premise would have to be
15 the denomination that is left out -- very
16 valuable exemption, all it has to do is adopt a
17 new tenet of religious doctrine that I don't
18 like to participate in public insurance, and it
19 gets the exemption. But that's obviously not so
20 simple.

21 We don't go around telling religions
22 you should adopt new tenets in order to get, you
23 know, a -- a new benefit. And so I really think
24 it's -- it's basically the same dynamic that we
25 face here. It's certain groups face the

1 problem. Certain groups have conscientious
2 objections; other groups don't. That may fall
3 on denominational, but that's something we have
4 also done.

5 I would encourage you to go back to
6 the history on this. Professor McConnell,
7 canonical article on the Free Exercise Clause,
8 recognizes that at the founding of this country,
9 we had multiple targeted religious
10 accommodations for oath-taking, for religious
11 assessments, for -- for conscription, and those
12 often were limited to religious groups known to
13 be opposed to those things, especially the oath
14 taking and the Quakers.

15 JUSTICE BARRETT: Counsel, can I shift
16 you to what I hope will be an easier question
17 for you?

18 MR. ROTH: Yes.

19 JUSTICE BARRETT: Do you want to
20 address your disagreement with the Solicitor
21 General about whether the Wisconsin Supreme
22 Court's decision tracked the interpretation of
23 the federal statute?

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

1 JUSTICE BARRETT: Well -- well, yeah,
2 Michigan. You say we should not --

3 MR. ROTH: Sure.

4 JUSTICE BARRETT: -- decide it on that
5 basis. So, you know, you're distancing yourself
6 from the position taken by the federal
7 government.

8 Can you talk about that?

9 MR. ROTH: Right. So on Michigan v.
10 Long question, I think it's a very simple
11 distinction. So in St. Martin, what was going
12 on is the South Dakota state court thought it
13 was required to bring its coverage up above the
14 floor that FUTA sets. So FUTA sets a floor. If
15 you fall below it, you don't qualify for the
16 federal state tax sharing.

17 So South Dakota thought it had --
18 we're trying to get up to this floor, so we can
19 get the credits. So that's why the -- the --
20 the South Dakota court said: I'm required to do
21 what I'm doing by FUTA. That is not what is
22 happening here.

23 The state court did not think it was
24 required to meet -- meet a floor. And so that's
25 why Michigan v. Long doesn't apply. There's a

1 sufficient independent state grounds. This is
2 an optional exemption. I think the -- the
3 solicitor general recognizes that. States don't
4 have to have this.

5 I believe the state of Oregon does not
6 have any part of this exemption at all for
7 churches or religious purpose organizations.

8 And so precisely because it's an
9 optional exemption, Wisconsin can go above the
10 floor of FUTA. It's not a compelled reading.
11 And so Michigan v. Long doesn't apply.

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

14 CHIEF JUSTICE ROBERTS: Well -- thank
15 you, counsel.

16 Rebuttal, Mr. Rassbach? Oh, I'm
17 sorry. Yes, yes.

18 (Laughter.)

19 MR. ROTH: I'm happy to sit up or
20 stand more, Chief, whatever you want me to do.

21 CHIEF JUSTICE ROBERTS: I didn't have
22 anymore, so I figured -- Justice Thomas?

23 JUSTICE THOMAS: What would we do, you
24 seem to focus on the proselytizing aspect of the
25 exemption that you could get the exemption if

1 you proselytize, but, you know, it leads me to
2 wonder why you don't have the same attitude
3 towards someone who posts outside, we believe
4 deeply in the corporal works of mercy.

5 What is -- why would you have -- why
6 is there a difference from your standpoint from
7 -- in -- in one and not the other proselytizing
8 over the corporal works of mercy?

9 MR. ROTH: Right. Right. And it's
10 because the Catholic Charities employees, when
11 they perform the corporal works of mercy, which
12 I want to be unequivocal, the state recognizes
13 -- recognizes that charity is an essential
14 aspect of the Catholic religion.

15 We are not disputing that. But when
16 the employee is simply performing the corporal
17 work of mercy without expressing and inculcating
18 religious doctrine, this is the point. This is
19 an an anti-entanglement statute. And so if they
20 are not expressing and inculcating religious
21 doctrine, they are not going to create the
22 entangling problems.

23 And so that's why we say they should
24 still be covered because we're not going to face
25 the misconduct disputes that are very difficult

1 for the state agency to resolve.

2 JUSTICE THOMAS: So what do you mean
3 by an anti-entanglement statute?

4 MR. ROTH: It's an anti-entanglement
5 statute precisely because when the state has to
6 resolve misconduct disputes over benefit
7 eligibility, we don't want our -- our
8 hardworking public servants to have to answer
9 questions of religious doctrine.

10 I want to return to my Lord's prayer
11 example, whether they, you know, said it
12 correctly. We want to keep them out of that
13 type of decision-making. And that's why that
14 kind of activity triggers this exemption.

15 JUSTICE THOMAS: Where does this
16 standalone entanglement issue come from?

17 MR. ROTH: Well, it's -- it's -- it's
18 what's driving this statute, Your Honor. It's
19 what's -- it's what's led to the types of
20 activities the state heard --

21 JUSTICE THOMAS: I know. But when I
22 think of entanglement, I think of the hopefully
23 defunct Lemon test. Where does it come from as
24 a --

25 MR. ROTH: Oh.

1 JUSTICE THOMAS: -- standalone
2 consideration?

3 MR. ROTH: Well, I think Lemon built
4 in -- entanglement predated Lemon. I believe
5 Walz is one of the first cases where it really
6 was discussed as a factor in First Amendment
7 doctrine, trying to avoid --

8 JUSTICE THOMAS: In Establishment
9 Clause context?

10 MR. ROTH: That's right.

11 CHIEF JUSTICE ROBERTS: Justice Alito?

12 JUSTICE ALITO: Are you aware that
13 this entanglement problem has arisen in the
14 states that follow federal law?

15 MR. ROTH: And by "follow federal law"
16 you mean --

17 JUSTICE ALITO: Interpret the federal
18 and have statutes similar to the federal
19 statutes, similar to your statutes.

20 MR. ROTH: Well --

21 JUSTICE ALITO: They have -- have they
22 had a lot of entanglement problems?

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

25 JUSTICE ALITO: Yeah.

1 MR. ROTH: Well, they would be
2 exempting much more broadly so I think no, they
3 would not have the enforcement entanglement that
4 we're concerned about here because -- precisely
5 because many more organizations are exempted.

6 JUSTICE ALITO: So you don't actually
7 have any -- you think there would be an
8 entanglement problem if you -- if the Wisconsin
9 Supreme Court interpreted Wisconsin law the way
10 the Solicitor General tells us federal law
11 should be interpreted, but you have no examples
12 of actual entanglement cases coming up?

13 MR. ROTH: Well, no, Your Honor. I do
14 think that if the Wisconsin statute were
15 interpreted as the Solicitor General requests
16 and it was simply a motive-only test, there is
17 less entanglement absolutely, but we think that
18 goes far beyond the anti-entanglement -- the --
19 the purpose of this statute, which is to get the
20 state out of entangling employment benefits
21 disputes.

22 You're going to exempt the hospitals
23 with all the nurses, all the janitors who aren't
24 going to pose these problems, so it's just -- it
25 simply takes us far beyond what it's meant to

1 do.

2 JUSTICE ALITO: All right. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

5 JUSTICE SOTOMAYOR: How much problem
6 is there in Oregon that doesn't give this
7 exemption at all?

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

10 JUSTICE SOTOMAYOR: Isn't it because
11 if you have as an as-applied challenge to the
12 janitor being fired, if the janitor is not
13 exempt, the state is not going to fight it if it
14 doesn't have a religious reason for firing him
15 or her, correct?

16 MR. ROTH: Well, that's true, but if
17 there is a religious reason -- you know, a -- a
18 doctrinal issue --

19 JUSTICE SOTOMAYOR: But it's not going
20 to be more most people. The proselytizing is
21 usually not -- if the proselytizing causes a
22 problem, then the state is not going to get
23 involved, correct?

24 MR. ROTH: Well, I -- that's the
25 million dollar question. I mean, that's what

1 this exemption is meant to do.

2 JUSTICE SOTOMAYOR: I know you don't
3 like this question, but accept it. If we find
4 that your refusal is -- and it constitutes
5 denominational discrimination because the motive
6 is being judged -- the motive is being judged on
7 religious grounds, do you survive strict
8 scrutiny?

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

10 JUSTICE SOTOMAYOR: How?

11 MR. ROTH: I do think this --

12 JUSTICE SOTOMAYOR: We found
13 denominational discrimination on the 50 percent
14 rule in Larson. This seems very similar to
15 that. And next we applied strict scrutiny.

16 So how are you different? I know
17 there was invidious discrimination, but I don't
18 -- I for one don't think that was the reason.
19 How do you survive?

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

25 And we think that's nothing like the

1 rule -- the line the state court has drawn here.
2 We think it's an effective line that has divided
3 the world into groups most likely to pose
4 entangling problems and those that are not.

5 And so unlike Larson, our line does
6 something secular, something positive from the
7 -- the religion clause perspective, avoiding
8 entanglement. That's what differentiates us
9 from Larson.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 Justice Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 Justice Jackson? Okay. Thank you,
16 counsel.

17 Rebuttal, Mr. Rassbach?

18 REBUTTAL ARGUMENT OF ERIC C. RASSBACH

19 ON BEHALF OF THE PETITIONERS

20 MR. RASSBACH: Thank you, Mr. Chief
21 Justice. A couple of quick points.

22 First, I think my friend's argument
23 showed that Wisconsin can't defend the decision
24 below, which said -- and I quote -- that the
25 subentities, if they quote, "partook in

1 activities such as those cited by the Dykema
2 court" -- that's at Petitioners' Appendix 46A --
3 that they -- "they would have been in a better
4 position than they are now." So they are
5 running away from that.

6 And you heard that in the -- in the
7 argument earlier. Their new interest in
8 anti-entanglement is itself incredibly
9 entangling, as I think the Court's questioning
10 amply demonstrated.

11 The reality is what they want to do is
12 make what -- what the Larson court called at
13 footnote 23, "explicit and deliberate
14 distinctions between religious groups," and
15 that's just not allowed by the -- the -- the
16 Constitution.

17 You know, I'd also say that a lot of
18 the -- my friend's argument was a little
19 confused because it really focused a lot on
20 individuals versus institutions. This is --
21 this is about an institutional plaintiff. It's
22 not about different individuals that are coming
23 forward with -- you know, the -- the nurse or
24 the nun, et cetera. This -- this is about you
25 get the exemption as an institution, not

1 individual by individual.

2 You know, I'd say that the -- the
3 easiest way, I think, to decide this case is on
4 the Larson and Lukumi's ground of -- of ensuring
5 that different -- states do not discriminate
6 along theological lines.

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

18 We respectfully request that the Court
19 reverse.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

23 (Whereupon, at 11:45 a.m., the case
24 was submitted.)

25

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