No. 18-____

In The

Supreme Court of the United States

ST. AUGUSTINE SCHOOL, *ET AL.*,
Petitioners,

v.

CAROLYN STANFORD TAYLOR, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF PUBLIC INSTRUCTION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Richard M. Esenberg
Counsel of Record
Anthony F. LoCoco
Wisconsin Institute for Law & Liberty
1139 E. Knapp Street
Milwaukee, WI 53202
(414) 727-9455
rick@will-law.org
Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the Free Exercise Clause prohibits the government from requiring a religious adherent to choose between following his or her faith tradition as he or she sees fit and the receipt of otherwise-available government benefits.

2. Whether the Religion Clauses prohibit the government from rejecting a private party's assertion that it is not affiliated with a specific organized religious group, where the sole basis for the government's decision is the religious label the party has assigned to itself.

PARTIES TO THE PROCEEDING

Petitioners are St. Augustine School, Inc. and Joseph and Amy Forro. Respondents are Carolyn Stanford Taylor, in her official capacity as Superintendent of Public Instruction,[*] and Friess Lake School District.[**]

CORPORATE DISCLOSURE STATEMENT

St. Augustine School, Inc. is a Wisconsin non-stock not-for-profit corporation. It has no parent corporation and no publicly-held company owns 10% or more of its stock.

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[*] Carolyn Stanford Taylor succeeded Tony Evers in office during the pendency of this action and has accordingly been substituted as a party. *See* Fed. R. Civ. P. 25(d).

[**] In 2018 Friess Lake School District and another school district (Richfield School District) were consolidated into Holy Hill Area School District. That consolidation has no effect on this dispute.

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JURISDICTION

The Seventh Circuit issued its opinion and entered final judgment on October 11, 2018. It issued its order denying Petitioners' petition for rehearing and rehearing en banc on December 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

Wisconsin Stats. §§ 121.51, 121.54, and 121.55, the Wisconsin transportation aid statutes most relevant

to this case, are reproduced in the Appendix at App. 82a-94a.

INTRODUCTION

The Petitioners were denied otherwise-available transportation aid because of their religious beliefs and practice. They believe that following in the Roman Catholic tradition requires them to establish their own school, religiously and operationally distinct from those operated by the Archdiocese of Milwaukee, the local arm of the Roman Catholic Church. Because they have made this religious choice to disaffiliate with the "established" Roman Catholic denomination, the State of Wisconsin will not provide transportation to their children. It says that transportation aid will only be provided if they send their children to the school recognized by the State as "Catholic," because Petitioners believe they are operating within the Catholic tradition.

The Seventh Circuit found no constitutional problem with excluding Petitioners based on their religious beliefs. It said that this Court's decisions in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012 (2017) and *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) permit Wisconsin to "foist[] a choice on religious families and schools." App. 9a-13a. Parents need to "decide whether to elect the school that qualifies for benefits, or to forgo the benefits and select a school that better reflects their

preferred ritual, doctrine, or approach." *Id.* at 10a. And if St. Augustine wished to obtain benefits, the court explained, it simply needed "to choose between identifying as Catholic and securing transit funding for its students." *Id.* "[I]f St. Augustine professed to be anything but Catholic," the court reiterated, "we would not have this case." *Id.* at 12a n.4.

Here is what happened.

Wisconsin provides transportation aid to qualifying private school students, with one significant restriction: private schools affiliated with the same sponsoring group or religious denomination may not have overlapping attendance areas.

Petitioner St. Augustine School, an interdenominational Christian school, sought transportation aid for the children of Petitioners Joseph and Amy Forro, but its application was rejected by Friess Lake School District ("Friess Lake"). The sole reason given by Friess Lake was that St. Augustine publicly refers to itself as a "Catholic" or "Roman Catholic" school and that its requested attendance area overlaps with the attendance area of a school of the Roman Catholic Archdiocese of Milwaukee. Friess Lake concluded that pursuant to the restriction referenced above, St. Augustine was ineligible for transportation. After an appeal to the Superintendent of Public Instruction ("SPI"), the SPI agreed with Friess Lake.

The problem with this conclusion is that it is undisputed that there is no legal, operational, or other secular connection between St. Augustine and the Roman Catholic Church as represented by the local Archdiocese of Milwaukee. In addition, St. Augustine considers itself to be within the Catholic tradition, but religiously distinct from the schools of the Archdiocese.

But the Seventh Circuit told St. Augustine that it cannot call itself a Catholic school if it wants to obtain State benefits. App. 10a. It said that St. Augustine's families can receive transportation aid only by attending the recognized "Catholic" school – even though the families believe that school does not fully and faithfully follow that tradition. *Id.* According to the Seventh Circuit, St. Augustine and its families must "*choose between identifying as Catholic and securing transit funding for [St. Augustine's] students*." *Id.* (emphasis added). According to the Seventh Circuit, it was not a violation of the Free Exercise Clause for the State to put St. Augustine to that choice. *Id.* at 2a, 9a-13a. Nor, according to the Seventh Circuit, was it a violation of the Establishment Clause for the State to determine, over St. Augustine's objection, that St. Augustine and the Archdiocesan school were affiliated with the same religious denomination when neither St. Augustine nor the Archdiocese actually believe that to be the case. *See id.* at 2a, 13a-18a.

This case presents important questions of federal law. The relevant issues are threefold.

First, this Court should clarify that the rule of *Trinity Lutheran Church of Columbia, Inc. v. Comer* – namely, that the government cannot make "disavow[al] [of] religious character" the price of participation in a generally-available government benefit program, *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2022 – also applies when the law requires a religious entity to describe its mission in a manner approved by the state or to affiliate with whatever institution is recognized by the state as the approved representative of its religious tradition in order to obtain government benefits. It should make clear that, contrary to the Seventh Circuit's assumption, *Trinity Lutheran* does not simply forbid the exclusion of all religious entities from a generally-available program, but requires strict scrutiny of any rule that makes access to public benefits turn on an applicant's particular religious beliefs or practices.

Second, this Court should revisit its rule in *Employment Div. v. Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring in the judgment)).

This case shows the inadequacy of the *Smith* rule and the need to revise it. If *Smith*'s protection of neutral rules of general applicability permits the state to categorize religious adherents based on their beliefs in the same way as it might categorize secular institutions and then allocate benefits based on that categorization, then *Smith* does not adequately protect free exercise.

Third, this Court should explain that its cases protecting the autonomy of religious organizations to define their own missions free of government intrusion, particularly *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), prohibit government officials from determining who is affiliated with which religious denomination, unless those officials are applying secular principles that do not interfere with the internal, faith-related decisions of those organizations.

STATEMENT OF THE CASE

Wisconsin's Transportation Aid Laws

Under Wisconsin law, qualifying private school students are entitled to transportation to and from school in the form of transportation services or transportation funding. *See generally* Wis. Stat. §§ 121.54(2)(b), 121.55. To qualify for transportation to a particular private school, the student must reside a minimum distance from the school and within that

school's "attendance area," *see* Wis. Stat. § 121.54(2)(b). The school's "attendance area" is "the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located." Wis. Stat. § 121.51(1).

Although private schools are largely unconstrained when drawing attendance areas, Wis. Stat. § 121.51(1) provides that "[t]he attendance areas of private schools affiliated with the same religious denomination shall not overlap."[1]

Concerned with saving the constitutionality of a requirement that seemingly applied only to religious schools, the Wisconsin Supreme Court in 1971 construed the prohibition on overlapping attendance areas to apply "to all private schools affiliated or operated by a single sponsoring group, whether . . . secular or religious." *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971). The Court reasoned that such a restriction was "inherent in the whole concept of 'attendance areas.'" *Id.* The Wisconsin Supreme Court interpreted the statute's reference to "religious denomination" to simply clarify the scope of this general, unstated restriction when applied specifically to religious private schools. *Id.* at 215-16.

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[1] This rule is subject to an exception involving single-sex schools not relevant here. *See* Wis. Stat. § 121.51(1).

In a subsequent case, the Wisconsin Supreme Court further clarified that in applying the prohibition on overlapping attendance areas to religious schools, government officials could not "meddle into what is forbidden by the Constitution[:] the determination of matters of faith and religious allegiance." *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 82 Wis. 2d 139, 150, 262 N.W.2d 210 (1978). In *Holy Trinity* the Wisconsin Supreme Court confronted a case in which an Archdiocesan Catholic school, burdened by the restriction on overlapping attendance areas, closed its doors and then immediately reopened as a religious but non-denominational private school. *Id.* at 145-46. Because of similarities between the prior Archdiocesan school and the new non-denominational school, the State Superintendent concluded that the school remained "affiliated with the Catholic denomination and that it need not be controlled by the archdiocese in which it is located for it to be affiliated with the Roman Catholic Church." *Id.* at 147.

The Wisconsin Supreme Court disagreed, concluding that under the First Amendment "where a religious school demonstrates by a corporate charter and bylaws that it is independent and unaffiliated . . . in the absence of fraud or collusion the inquiry stops there." *Id.* at 157-58. To probe deeper, the Court added, "is to involve the state in religious affairs and to make it the adjudicator of faith." *Id.* at 158.

Factual Background

St. Augustine School is an independent religious elementary and high school located in Hartford, Wisconsin, within the boundaries of Friess Lake School District. R. 26 at ¶¶2-3, 14. It is operated by and under the control of its own board of directors under the terms of its own articles of incorporation and by-laws. *Id.* at ¶4. Originally incorporated under the name "Neosho Country Christian School, Inc.,"[2] its articles of incorporation stated at all times relevant to this dispute that it is an interdenominational Christian school for the education of students in the primary and secondary grades. R. 26-1 at Art. III.

St. Augustine is not operated by any religious order of the Catholic Church and is not affiliated with the Catholic Archdiocese of Milwaukee in any way. R. 26 at ¶7. Nor is it affiliated with any other school, Catholic or otherwise. *Id.* In fact, its by-laws clearly state that all powers of the corporation belong to its board of directors. R. 26-3 at Section 2. Neither its articles nor its by-laws reveal any legal, operational, or other connection with any other sponsoring entity, and do not make – or commit – the corporation to be subordinate or associated with such an entity, including the Roman Catholic Church or its Milwaukee Archdiocese. It is not subject to the

[2] The name was subsequently changed to St. Augustine School, Inc. R. 26 at ¶4; R. 26-2.

ecclesiastical authority of the Archbishop or otherwise affiliated with or subject to the control of any organ of the Roman Catholic Church. R. 26 at ¶¶4, 7, 10.

St. Augustine sometimes describes itself as a "Catholic" or "Roman Catholic" school, including on its website. App. 15a. To the extent that it is relevant (and it should not be), St. Augustine believes that it operates more fully within the Catholic tradition than Archdiocesan schools and considers itself to be more faithfully following in that tradition. R. 26 at ¶10. In other words, St. Augustine considers itself religiously distinct from schools operated by the Archdiocese. *Id.*

St. Gabriel School is a private school in Hubertus, Wisconsin. R. 25 at ¶2. It is operated under the authority of the Roman Catholic Archdiocese of Milwaukee (the "Archdiocese"). *Id.* It is under the ecclesiastic authority of the Archbishop and must comply with the Grade Specific Catholic Education Curriculum for elementary schools sponsored by the Archdiocese. *Id.* at ¶¶2, 4. St. Gabriel is listed in the Official Catholic Directory, known as the Kennedy Directory, which is an official directory that lists all schools sponsored by any Archdiocese in the United States. *Id.* at ¶6.

St. Augustine's curricula and values are determined solely by its own board of directors, administration, and staff. R. 26 at ¶9. St. Augustine does not follow

the Archdiocesan religious curriculum for high school students set by the U.S. Conference of Catholic Bishops for schools sponsored by the Archdiocese. *Id.* at ¶10. Nor does it recognize or comply with the Grade Specific Catholic Education Curriculum for elementary schools sponsored by the Archdiocese. *Id.* The employees of the school, including the teachers, are selected by the administrators of the school, who are in turn selected by the Board of Directors. *Id.* at ¶11. St. Augustine is not listed in the Kennedy Directory of Catholic schools. R. 25 at ¶6.

Joseph and Amy Forro have three children who attend St. Augustine. R. 26 at ¶13. The Forro children live within the attendance area of St. Augustine, which includes the entire geographic area that makes up the Friess Lake School District. *Id.* at ¶¶13-14. The Forros chose to send their children to St. Augustine specifically because of its traditional religious values which the Forros believe to be different from those of an Archdiocesan school. R. 24 at ¶5. The Forros did not and do not consider it a choice between two equivalent "Catholic" schools – St. Augustine or St. Gabriel – but instead a choice between a school that implements their religious values (St. Augustine) and other schools, public and private (including those operated by the Archdiocese), that do not. *Id.*

On April 27, 2015, St. Augustine made a request pursuant to Wis. Stat. § 121.54 to Friess Lake for

transportation for the Forro children to and from St. Augustine. R. 26 at ¶15; R. 26-4. In making that request, it advised Friess Lake that it was an "independent" Catholic school that was not affiliated with the Archdiocesan Catholic school, St Gabriel, or the Archdiocese itself. R. 26 at ¶16; R. 26-4 at 1. It told Friess Lake that it received no funding from and did not communicate with the Archdiocese. *Id.*

Nevertheless, Friess Lake denied the request on April 29, 2015 because St. Augustine's attendance area overlapped with the attendance area of St. Gabriel. R. 26 at ¶20, R. 26-8. Notwithstanding that the evidence showed no legal, operational, or other secular connection between the schools, Friess Lake took the position that St. Gabriel and St. Augustine School are affiliated because they both say that they are "Catholic" schools. R. 26 at ¶21; R. 26-6. As a result, Friess Lake refused to approve St. Augustine's attendance area and refused to provide transportation to the Forro children. *Id.* In subsequent correspondence, Friess Lake informed St. Augustine: "Your belief that there is a distinction between St. Augustine and St. Gabriel's regarding adherence to Catholic principles is your fight, not ours. You both call yourself Catholic schools." R. 26-6 at 1.

The dispute between St. Augustine and Friess Lake regarding St. Augustine's attendance area was submitted to the SPI in December, 2015. R. 26 at ¶23. On March 10, 2016, the SPI issued a decision

upholding Friess Lake's determination that St. Gabriel and St. Augustine School were both "affiliated with the Roman Catholic denomination." App. 78a-79a. The decision relied principally on statements on St. Augustine's website referring to itself as "Catholic" or "Roman Catholic." *Id.* at 77a-78a.[3]

Procedural Background

St. Augustine and Joseph and Amy Forro ("Petitioners") sued the SPI and Friess Lake ("Respondents") in April of 2016 in state court. App. 44a. Petitioners alleged violations of the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause, requesting relief pursuant to 42 U.S. § 1983, and also asserted a state law claim. *See id.*

Respondents removed the suit to federal court pursuant to 28 U.S.C. § 1441. *See id.* On June 6,

[3] Although there was some dispute below about whether the SPI actually considered St. Augustine's original articles of incorporation, the Seventh Circuit concluded that the records failed to establish that the SPI did so. App. 7a-9a. St. Augustine does not challenge that determination on this appeal, which is largely immaterial to its constitutional claims. *See, e.g.*, App. 29a & n.14 (Ripple, J., dissenting (citing materials other than the articles of incorporation and explaining that "[t]he materials submitted to the Superintendent made the Superintendent well aware that St. Augustine is legally independent from St. Gabriel and the Archdiocese.")

2017, on cross-motions for summary judgment, the United States District Court for the Eastern District of Wisconsin ruled in Respondents' favor on the federal claims. *Id.* at 66a-67a.[4]

St. Augustine appealed the rulings on the Free Exercise and Establishment Clause claims, and a divided panel of the United States Court of Appeals for the Seventh Circuit affirmed on October 11, 2018. *Id.* at 1a-2a.

In rejecting Petitioners' free exercise claim that the State was impermissibly denying them public benefits based upon their religious beliefs, the court concluded that the rule of law from *Employment Division v. Smith* – namely, that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" – "resolve[d] the present case." *Id.* at 9a-10a (quoting *Smith*, 494 U.S. at 879).

More specifically, the court held that the prohibition on overlapping attendance areas in Wis. Stat. §

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[4] The district court had jurisdiction over the federal claims pursuant to 28 U.S.C. §1331 as this is a civil action arising under the Constitution and laws of the United States. The court declined to exercise supplemental jurisdiction over the state law claim and remanded that claim to state court pursuant to 28 U.S.C. § 1367(c). App. 66a. The state law claim is not at issue here.

121.51 as authoritatively construed by the Wisconsin Supreme Court was "religiously neutral and generally applicable." *Id.* at 9a. Pursuant to that prohibition, St. Augustine was permissibly denied transit benefits because "another school – St. Gabriel – shared its institutional affiliation and served the same catchment zone." *Id.* at 9a-10a. Shared affiliation was determined based on the fact that both schools called themselves "Catholic." *Id.* at 11a-12a.

The court similarly dismissed St. Augustine's claim that the SPI had violated the Establishment Clause by determining what the word "Catholic" means. *Id.* at 2a, 13a. The court concluded that the SPI did not engage in "an impermissible inquiry into the religious character of St. Augustine." *Id.* at 13a. Instead, it merely "read and credited St. Augustine's statements on its website and busing request form that it was a Catholic – specifically a Roman Catholic – school." *Id.* at 15a. The fact that St. Augustine repeatedly protested that it is religiously distinct from schools operated by the Archdiocese did not matter according to the Court because St. Augustine had "assign[ed] the label 'Catholic'" to itself. *Id.*

Judge Ripple dissented, criticizing the Court's decision as an "exercise in label reading." *Id.* at 34a (Ripple, J., dissenting). More specifically, he condemned the Court's conclusion that "if two schools employ the same label – 'Catholic' – to

describe themselves, they are 'affiliated.'" *Id.* at 28a. In Judge Ripple's view, in determining whether two schools are affiliated "the Constitution requires the state to rely on the same neutral principles it would apply to a non-religious school," namely "St. Augustine's independent corporate structure," and "[t]he materials submitted to the Superintendent made the Superintendent well aware that St. Augustine is legally independent from St. Gabriel and the Archdiocese." *Id.* at 28a-29a.

The Court's approach, Judge Ripple added, pressured parents "to bend to the school board's determination that what [the parents] believe to be an important religious difference between [St. Gabriel and St. Augustine] does not exist or is inconsequential" and burdened "the right of each individual to define personal religious beliefs not according to institutional norms but according to *personal* religious commitments." *Id.* at 29a-32a.

Judge Ripple noted that the Court's resolution had implications for other faiths. It would allow the State to determine that the Evangelical Lutheran Church in America and the Lutheran Church-Missouri Synod were the same religious denomination because they both call themselves Lutherans, or that Reform Judaism and Orthodox Judaism are the same denomination, or that Sunni and Shi'a Islam are the same denomination. *Id.* at 32a-33a. He argued that the decision "raise[d] haunting concerns about the future health of the

Religion Clauses in this circuit" and was "difficult to square" both with this Court's recent decision in *Trinity Lutheran*, 137 S.Ct. 2012, and "with the basic tenet of the Supreme Court's Religion Clauses jurisprudence that the Constitution protects not only the 'freedom to believe' but 'the freedom to act.'" *Id.* at 33a-34a (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940)).

Petitioners timely filed a petition for rehearing en banc, which the Seventh Circuit denied on December 7, 2018. App. 80a-81a. Petitioners then timely filed this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Conclusion that the Government May Require a Religious Adherent to Choose Between Following His or Her Faith Tradition as He or She Sees Fit and the Receipt of Otherwise-Available Government Benefits Conflicts with Relevant Decisions of this Court

This Court recently confirmed that the government cannot make "disavow[al] [of] religious character" the price of participation in a generally-available government benefit program. *Trinity Lutheran*, 137 S. Ct. at 2022. Yet the Seventh Circuit ratified just such a scheme in this case, explaining forthrightly that St. Augustine needed to "choose between

identifying as Catholic and securing transit funding for its students." App. 10a.

The Seventh Circuit found *Trinity Lutheran* distinguishable because the rules of Wisconsin's transportation program apply to religious and non-religious private schools alike rather than targeting religious entities as did the program in *Trinity Lutheran*. App. 10a-13a. But the Seventh Circuit failed to heed this Court's admonition that a general ban on religious organizations is not the only kind of religious penalty: "[a] law . . . may not discriminate against '*some or all* religious beliefs.'" *Trinity Lutheran*, 137 S. Ct. at 2021 (emphasis added) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)). Wisconsin's program penalizes an entire category of religious adherent. Judge Ripple saw it as discrimination against those who "define personal religious beliefs not according to institutional norms but according to *personal* religious commitments," thereby coercing them into describing their beliefs in a manner directed by the State. App. 29a, 31a-32a (Ripple, J., dissenting). One might also say that it penalizes those who believe that they must break away from an established or "recognized" religious institution or organization to more fully follow their faith. It says that religious adherents must conform or lose benefits.

A law that forbids overlapping attendance areas between schools that have some secular connection –

common management or organizational affiliation – would be something that applies to religious and nonreligious schools alike. A scheme that requires those who lay claim to a particular religious tradition – be it Christianity, Islam, Judaism, or even Catholicism – to forgo benefits if the state concludes that they are sufficiently like an "established" religious group treats people differently because of their particular religious beliefs. This Court should take this case as a follow-up to *Trinity Lutheran* to explain that this type of penalty is just as impermissible as the unqualified exclusion in that case.

A. This Court Should Clarify that the Rule of *Trinity Lutheran v. Comer* Applies Even When a Law Penalizes Only Certain Forms of Religious Expression

The Free Exercise Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. Less than two years ago, this Court confirmed that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion)).

Trinity Lutheran involved a state program, run by an agency, which "offer[ed] reimbursement grants to qualifying nonprofit organizations that purchase[d] playground surfaces made from recycled tires." *Id.* at 2017-18. Trinity Lutheran Church applied for one of these grants but was turned away because the state had a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* This Court concluded that the policy violated the Free Exercise Clause. *Id.* at 2024-25. Explaining that "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions,'" *id.* at 2022 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)), this Court observed that the state policy penalized Trinity Lutheran's free exercise of religion by "put[ting] [the church] to a choice . . . participate in an otherwise available benefit program or remain a religious institution." *Id.* at 2021-22.

The clear lesson of *Trinity Lutheran* is that the government cannot make "disavow[al] [of] religious character" the price of participation in a generally-available government benefit program. *Id.* at 2022. Yet the Respondents' policy in this case, ratified by the Seventh Circuit, works in precisely this manner. Despite the utter lack of legal, operational, or other secular ties between St. Augustine and the Roman Catholic Archdiocese, the court literally – and repeatedly – said in its opinion that all St. Augustine

needed to do to obtain transportation was to stop professing that it is a Catholic school, *i.e.,* disavow its religious character or identity. *See* App. 10a ("St. Augustine had to choose between identifying as Catholic and securing transit funding for its students."); *id.* at 12a n.4 ("[I]f St. Augustine professed to be anything but Catholic . . . we would not have this case."); *id.* at 16a ("St. Augustine is free to change its affiliation . . . .").

The defendants in *Trinity Lutheran* could have made the same argument. All that Trinity Lutheran had to do was stop professing that it was religious and it could have received the benefits it was seeking. But that type of "indirect coercion" by the government is precisely what this Court found to be unconstitutional. *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Lyng*, 485 U.S. at 450). The same kind of indirect coercion is at work where the State, in effect, forbids St. Augustine from describing its religious character in the way that it sees fit.

The Seventh Circuit distinguished *Trinity Lutheran* because the Missouri program at issue in that case brazenly excluded all religious entities from participation whereas Wisconsin's transportation aid rules apply to religious and non-religious private schools alike. App. 10a-13a.

But this Court made clear in *Trinity Lutheran* that "[a] law . . . may not discriminate against '*some or all* religious beliefs.'" *Trinity Lutheran*, 137 S. Ct. at

2021 (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532). *Trinity Lutheran* was a case involving discrimination against "all" religious beliefs; this is a case involving discrimination against one type of religious expression. In particular, the State is coercing parents and religious schools: (1) into outwardly describing their personal religious beliefs using only state-approved language; (2) into disregarding what are, to them, "important religious difference[s]" between schools; and (3) into "defin[ing] personal religious beliefs . . . according to institutional norms" instead of "according to personal religious commitments." App. 29a, 31a-32a (Ripple, J., dissenting).

Descriptions matter. They are not merely labels but reflect real religious beliefs. In describing itself as "Catholic," St. Augustine is not merely branding itself or seeking a particular market segment. It and its families are making a theological claim and exercising their religion. In breaking from the Archdiocese, they are not simply seeking to create another school or choose a different set of leaders. They are making a theological claim and exercising their religion. This is the kind of burden based on belief that *Trinity Lutheran* has forbidden. That Wisconsin does not discriminate against all religions but only burdens those adherents who claim to be independent and distinct from state-recognized denominations makes its practice no less offensive to the Free Exercise Clause.

B. This Is an Important Question of Federal Law

The sheer breadth of Missouri's exclusionary rule in *Trinity Lutheran* made the case ideal for the enunciation of foundational principles of law. But religious discrimination is rarely as blatant as it was in that case. This case allows the Court to illustrate how *Trinity Lutheran*'s rule applies in a scenario involving a state program that discriminates against only certain religious entities and individuals, and only because those entities and individuals choose to act in a certain way.

II. This Case Presents the Court with the Opportunity to Restore the Guarantees of the Free Exercise Clause to their Full Scope by Overruling *Employment Division v. Smith*

In *Employment Division v. Smith* this Court concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Division v. Smith*, 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 n. 3 (Stevens, J., concurring in judgment)).

If the Seventh Circuit was right that the rule of *Smith* "resolves the present case," App. 10a – that it authorizes the state to force religious entities and

individuals to choose between otherwise-available benefits and the free exercise of religion – then this case serves as a prime example as to why it is time for this Court to overrule *Smith*.

The Seventh Circuit thought *Smith* applicable because under Wisconsin's rule no schools with a single sponsoring entity can have overlapping attendance areas. App. 10a-13a. But it interpreted *Smith* to allow Wisconsin to "assign" schools to religious denominations based on their professed beliefs. For Wisconsin, anyone who uses the "moniker" "Catholic," R. 26-7, is to be lumped together and their claim to be religiously distinct is to be ignored.

This highlights the problem with *Smith*. It assumes that religious exercise is limited to belief and has nothing to do with action. St. Augustine and the Forros are free to believe what they want about the Roman Catholic tradition, but if they act on it and break away to start a new school, they forfeit benefits. For the Seventh Circuit, penalizing them in this way is justified because Wisconsin would similarly penalize those who started a "second" Montessori school or French International school. App. 11a-12a. Even were that true, persons who start a Montessori school or French International school are not practicing their religion. If, as the Seventh Circuit concluded, the religious character of the Petitioners' choice can be ignored, then *Smith* provides inadequate protection to free exercise.

Just this year, four justices of this Court noted that the Court in *Smith* had "drastically cut back on the protection provided by the Free Exercise Clause," but added that the parties in the case before them had not asked the Court to "revisit" the decision. *Kennedy v. Bremerton Sch. Dist.*, No. 18-12, 2019 WL 272131, at *3 (U.S. Jan. 22, 2019) (statement of Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., respecting the denial of certiorari). If *Smith* compels a finding against Petitioners in this case, Petitioners ask the Court to revisit – and overrule – *Smith*.

A. *Smith* Does Not Adequately Protect Those Rights Provided by the Free Exercise Clause

In *Smith* this Court was asked to determine whether Oregon could apply its criminal ban on the use of the hallucinogenic drug peyote to two individuals who had taken the drug for religious purposes and were then denied unemployment compensation for that "misconduct." *Smith*, 494 U.S. at 874.

Relying primarily on the Court's own precedent in the field and on concerns about the difficulties of applying a contrary rule, this Court concluded that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878-90. But there are

at least three significant problems with the Court's holding.

First, the decision failed to adequately address the text of the Free Exercise Clause and its original meaning. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 574-75 (Souter, J., concurring in part and concurring in the judgment) (arguing that *Smith* failed to "consider the original meaning of the Free Exercise Clause" and noting the "curious absence of history from our free-exercise decisions").

There is abundant historical evidence supporting an interpretation of the Free Exercise Clause that would excuse religious objectors from compliance with generally-applicable laws in the absence of a sufficient state interest. For example, provisions in early state constitutions and colonial charters, which would have influenced the Framers, explicitly or implicitly provided for such exemptions. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1117-18 (1990) [hereinafter *Free Exercise Revisionism*]; *City of Boerne v. Flores*, 521 U.S. 507, 551-57 (1997) (O'Connor J., dissenting). And exemptions were in fact granted by early legislatures who, "in the period before judicial review . . . had the sole responsibility for upholding constitutional norms." *Free Exercise Revisionism*, *supra*, at 1118-19 (discussing exemptions "from military conscription and from oath requirements").

A number of the Framers themselves expressed support for religious accommodations. *Flores*, 521 U.S. at 560-64 (O'Connor, J., dissenting). For instance, "James Madison, principal author and floor leader of the First Amendment, advocated free exercise exemptions, at least in some contexts." *Free Exercise Revisionism*, *supra*, at 1119; *see also Flores*, 521 U.S. at 555-57 (O'Connor, J., dissenting).

While the full historical case cannot be made here, the problem with *Smith* is that the Court in that case failed to discuss any of the relevant history. *See generally Free Exercise Revisionism*, *supra*, at 1116-20 (1990); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990); *Flores*, 521 U.S. at 548-64 (O'Connor J., dissenting).

The second major flaw with the *Smith* decision is the Court's statement that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878–79. But the Court's precedent suggests precisely the opposite. In *Wisconsin v. Yoder*, for example, the Court unambiguously concluded:

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct

> protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*. . . . A regulation *neutral on its face* may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (emphases added) (concluding that Amish religious objectors were exempt from compulsory school attendance law).

The *Smith* Court distinguished *Yoder* and cases like it by variously characterizing them as involving constitutional rights in addition to the right of free exercise, *Smith*, 494 U.S. at 881-82, or as limited to the unemployment compensation context, *id.* at 882-83, or as only "purport[ing] to apply" a more stringent level of review but "always [finding] the test satisfied," *id.* at 883, or as declining to apply a heightened standard of review at all, *id.* at 883-84.

But these explanations are at odds with the often unqualified language used in the Court's prior case law. *See, e.g.*, *Yoder*, 406 U.S. at 220; *Lee*, 455 U.S. at 257 (explaining, in case in which religious objector sought exemption from Social Security taxes, "Not all burdens on religion are unconstitutional. The

state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (citations omitted)); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 565, 571 (Souter, J., concurring in part and concurring in the judgment) (characterizing case law of the Court as "hard to read as not foreclosing the *Smith* rule" and concluding that "whatever *Smith*'s virtues, they do not include a comfortable fit with settled law").

Third, the *Smith* Court's fears that implementation of the test from *Sherbert v. Verner*, 374 U.S. 398 (1963) – according to which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest," *Smith*, 494 U.S. at 883 – would produce undesirable effects are simply unfounded.

The *Smith* Court cautioned that "[a]ny society adopting such a system would be courting anarchy," but experience both before and after *Smith* disproves that statement. *Id.* at 888. Before *Smith*, courts had "been quite capable of applying [the Court's] free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment). And following *Smith*, nearly half the states and the federal government have enacted Religious Freedom Restoration Acts ("RFRA") which restore some form of heightened scrutiny to religious liberty claims. *See, e.g.*, Lucien

J. Dhooge, *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretive Case Law*, 27 Wm. & Mary Bill Rts. J. 153, 153, 164 n.47 (2018). This is to say nothing of those jurisdictions that apply heightened standards of review based on state constitutional provisions. *See generally, e.g.*, Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. St. Thomas J.L. & Pub. Pol'y 103 (2013) (surveying states). No catastrophe has resulted.

Further, the balancing required under the *Sherbert* test is the same type of private-right-versus-government-interest balancing that the Court applies in other constitutional contexts, including speech, *see e.g.*, *Reed v. Town of Gilbert*, ___ U.S. ___ 135 S. Ct. 2218, 2226 (2015), substantive due process, *see, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), and equal protection, *see, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). *See Free Exercise Revisionism*, *supra*, at 1144. Courts throughout the country have applied the test without significant problem.

B. The Conditions for Overturning Precedent Are Met Here

Stare decisis considerations do not counsel against overturning *Smith*. As an initial matter, this Court recently wrote that:

> [t]he doctrine [of *stare decisis*] "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."

Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, ___ U.S. ___, 138 S. Ct. 2448, 2478 (2018) (citation omitted) (first quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997), then quoting *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in the judgment)).

A number of the factors governing whether to overrule a case indicate that the Court need not continue with the *Smith* rule. First, the reasoning in *Smith* was faulty in several respects. *Janus*, 138 S. Ct. at 2479 ("important factor" is "the quality of [the precedent's] reasoning"). Second, "experience has pointed up the precedent's shortcomings," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009), with the "anarchy" the Court in part premised its decision upon simply never materializing in those many

areas of the country providing more robust First Amendment protections. And not least of *Smith*'s "shortcomings" is the undeniable fact that "[t]he decision has harmed religious liberty." *Flores*, 521 U.S. at 547 (O'Connor, J., dissenting) (setting forth concrete examples). Third, *Smith* is not "consisten[t] with other related decisions," *Janus*, 138 S. Ct. at 2478, namely the long line of cases preceding it such as *Yoder* that applied the very protections the *Smith* Court disavowed.

Finally, "[n]o serious reliance interests are at stake." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010). The Nation is currently a patchwork of jurisdictions with inconsistent standards in this area of the law, some applying the *Smith* rule and some applying heightened standards provided for by RFRA laws or state constitutions. Further, from the day *Smith* was decided to the present day, numerous members of this Court have expressed or suggested doubts about *Smith*. *See, e.g.*, *Kennedy*, 2019 WL 272131, at *3 (statement of Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., respecting the denial of certiorari) (noting *Smith* "drastically cut back on the protection provided by the Free Exercise Clause," but adding that the parties in the case had not asked the Court to "revisit" the decision); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, ___ U.S. ___, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) ("*Smith* remains controversial in many quarters."); *Flores*, 521 U.S. at 548 (O'Connor, J., joined by

Breyer, J., dissenting) ("I believe that we should reexamine our holding in *Smith* . . . ."); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 559 (Souter, J., concurring in part and concurring in the judgment) ("I have doubts about whether the *Smith* rule merits adherence."); *id.* at 578 (Blackmun, J., concurring in the judgment) ("I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle."). *Smith*'s viability, in other words, has long been in question.

III. The Seventh Circuit's Conclusion that the Government May Reject a Private Party's Assertion That It Is Not Affiliated with a Religious Group, Where the Sole Basis for the Government's Decision Is the Religious Label the Party Has Assigned to Itself, Conflicts with Relevant Decisions of this Court

St. Augustine argued below that the Respondents violated the Establishment Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, by assuming the authority to decide (over St. Augustine's objection) that St. Gabriel and St. Augustine are affiliated with the same religious denomination. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971) (a statute

producing an "excessive entanglement between government and religion" is unconstitutional).

The Seventh Circuit rejected this argument. In its view, "[t]he defendants did not independently assign the label 'Catholic' to St. Augustine. St. Augustine did," specifically "on its website and busing request form." App. 15a. All the Respondents did was "credit[]" St. Augustine's statements, and "[t]aking a party's repeated chosen label at face value hardly constitutes a deep-dive into the nuances of religious affiliation." *Id.*

This reliance on labels alone – to the exclusion of what a religious organization says those labels mean – makes the government the judge of what the word "Catholic" means, in violation of this Court's case law on the Religion Clauses. That it did so superficially by saying that all who use a particular term must be lumped together even if they say they are not religiously together at all does not make it less so. Just as egregiously, the Seventh Circuit's apparent conclusion that a valid and neutral law of general applicability overrides even an internal, faith-related decision of a religious organization conflicts with decisions of this Court involving the Religion Clauses such as *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).[5]

[5] Below, Petitioners framed this argument as one under the Establishment Clause rather than under both Religion

The Seventh Circuit assumed that failing to lump St. Augustine together with the Archdiocesan schools would require some more detailed examination of its religious beliefs. *See* App. 15a, 17a-18a. It would not. Wisconsin – and the courts – are not permitted to examine St. Augustine's beliefs. It must accept them and proceed on the basis that it is religiously distinct. It may only consider whether there are secular connections between the schools.

A. This Court's Case Law Prohibits Courts from Defining Denominational Affiliation

The Seventh Circuit agreed with the Respondents that the government could constitutionally determine "that St. Augustine and St. Gabriel professed affiliation with the same Roman Catholic Church" *solely* on the basis of the fact that St. Augustine refers to itself as a "Catholic" or "Roman Catholic" school. App. 14a-16a. But as the evidence in the record discussed above shows, St. Augustine is not affiliated with the institutional Roman Catholic Church and in fact has a different view of the

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Clauses. Further, Petitioners did not specifically raise the argument pertaining to *Hosanna-Tabor* below, which relies on both Religion Clauses. But they have unequivocally asserted from the beginning of this case that Respondents' actions violated the Free Exercise and Establishment Clause, and therefore are not barred from making these arguments. *See, e.g.*, *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992).

Catholic tradition than the local Archdiocesan schools do.

The Seventh Circuit's conclusion that the government can determine whether an individual – or a school – is affiliated with a particular religious denomination by the name they use for themselves without listening to what they say about what they *mean* by that name thus arrogates to the government the authority to define the word "Catholic." As the dissent pointed out below, the associated guarantees of free exercise and non-establishment are made of sterner stuff:

> Labels work very well for identifying commodities in a supermarket, but they are ill fitted for protecting the religious liberty of an *individual* American. . . . A cornerstone of our Religion Clauses jurisprudence is the right of each individual to define personal religious beliefs not according to institutional norms but according to *personal* religious commitments. The congruity of personal beliefs with those of a known religious organization is beside the point.

App. 29a (Ripple, J., dissenting) (citation omitted).

This Court's test for Establishment Clause violations set forth in *Lemon v. Kurtzman* prohibits, among

other things, "excessive entanglement" between the state and religion. *Lemon*, 403 U.S. at 613-14. Deciding whether two schools are sufficiently religiously alike – particularly when they say they are not – such that they ought to be considered affiliated, violates this rule against excessive entanglement. There is no way to make such a judgment without evaluating competing religious claims even if that evaluation consists of cavalierly dismissing them. The Respondents cannot conclude St. Augustine is "Catholic" in the same way as the schools of the Archdiocese without making a judgment as to what being "Catholic" is. *See, e.g.*, *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) ("prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment").

Further, this Court has consistently held that the state may not "evaluate" religious claims, make religious decisions, or otherwise insert itself into religious conduct and practices. *See, e.g.*, *Lyng*, 485 U.S. at 458 (stating that interpreting the propriety of certain religious beliefs puts the Court "in a role that [it was] never intended to play"); *Lee*, 455 U.S. at 257 (refusing to assess the "proper interpretation of the Amish faith"); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (explaining that courts may not "engage in the forbidden process of interpreting . . . church doctrine"); *United States v. Ballard*, 322 U.S.

78, 87 (1944) (avoiding the "forbidden domain" of evaluating religious doctrine). That is exactly what the Seventh Circuit authorized when it allowed the SPI to conclude that St. Augustine and St. Gabriel were affiliated with the same religious denomination based solely on the labels they assigned to themselves. Doing so based on an assumption that "Catholic" means the same thing by all who use it is a religious decision.

The Seventh Circuit voiced legitimate concern that it not "pervert the Establishment Clause to declare internal doctrinal differences a matter of state concern." App. 18a. But that is precisely what it did by allowing the state to decide that St. Augustine and the Archdiocese were religiously affiliated even though they say they are not. The Seventh Circuit could have avoided offending the Establishment Clause by applying "the same neutral principles it would apply to a non-religious school" to determine affiliation, *Id.* at 28a (Ripple, J., dissenting) such as common ownership, overlapping management, common employees, legal control, and so on. Limiting the inquiry to secular facts would treat religious and non-religious schools alike.

B. The Seventh Circuit's Application of *Smith* Contravenes Decisions of this Court Protecting the Autonomy of Religious Organizations, Particularly *Hosanna-Tabor*

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), this Court confirmed that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor*, 565 U.S. at 181.

In its decision, this Court catalogued prior decisions supporting the more general proposition that "the Religion Clauses guarantee religious organizations autonomy in matters of internal governance." *Id.* at 196-97 (Thomas, J., concurring); *see also id.* at 190 ("The present case . . . concerns government interference with an internal church decision that affects the faith and mission of the church itself."); *id.* at 185-88 (discussing precedents).

These cases established the rule that "religious organizations" have a right to a degree of "independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government *as well as those of faith and doctrine*." *Id.* at 186 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (describing *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872))) (emphasis added).

It is hard to envision a more fundamental statement of faith and doctrine than the theological title a religious organization assigns to itself, and its own interpretation of what that title signifies. In this

case, the Respondents violated St. Augustine's right of autonomy in two ways. First, they interfered with St. Augustine's right to define its own faith freely by forcing St. Augustine to choose between receiving state aid and using the religious name St. Augustine prefers. Second, the Respondents took it upon themselves to define the word "Catholic" – a religious duty inappropriate for a state actor. Yet the Seventh Circuit's decision ratifies both of these violations.

As set forth in detail above, the Seventh Circuit premised much of its decision on *Smith*'s rule that religious objectors must comply with valid and neutral laws of general applicability. App. 9a-13a. Wisconsin's rule, the Seventh Circuit said, "bars two self-identified Catholic schools from receiving transit subsidies, but it also bars funding two Montessori schools, two International Baccalaureate® schools, or two French International schools." *Id.* at 12a.

But the exact same argument was made and rejected in *Hosanna-Tabor*: the government pointed out that the employment discrimination laws at issue in that case applied to religious and non-religious organizations alike and contended that under *Smith* this was enough. *Hosanna-Tabor*, 565 U.S. at 189-90. This Court disagreed:

> It is true that the [Americans with Disabilities Act's] prohibition on retaliation, like Oregon's prohibition on

> peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.

Id. at 190. So too here. Unlike a secular school describing itself as "Montessori" or "French International," when a religious school decides to describe itself using a word like "Catholic," it is making "an internal church decision that affects the faith and mission of the church itself." *Id.* The government has no business interfering with that decision. The rule of *Smith* should not apply here and, if it does, that is a reason it should be overruled.

C. This Is an Important Question of Federal Law

This Court should address this issue because the Seventh Circuit's decision dangerously expands the scope of *Smith*'s rule to encompass even the internal faith decisions of religious organizations. This is an affront to both Religion Clauses. Religious organizations, not the state, should have the right to describe the organizations' religious beliefs and

explain what the theological words they choose mean.

Further, as suggested by the dissent below, the Seventh Circuit's decision has important implications for our diverse religious society. *See* App. 32a-33a (Ripple, J., dissenting). Today a court has decided "who or what is Catholic." *Holy Trinity*, 82 Wis. 2d at 150. Tomorrow courts will decide who or what is Lutheran, or Christian, or Jewish, or Muslim. *See* App. 32a-33a (Ripple, J., dissenting).

CONCLUSION

Petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

Richard M. Esenberg
Counsel of Record
Anthony F. LoCoco
Wisconsin Institute for Law & Liberty
1139 E. Knapp Street
Milwaukee, WI 53202
(414) 727-9455
rick@will-law.org
Counsel for Petitioners
March 6, 2019

APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-2333
ST. AUGUSTINE SCHOOL, *et al.*,

Plaintiffs-Appellants,

v.

TONY EVERS, in his official capacity, as Superintendent of Public Instruction, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 2:16-cv-00575 — Lynn Adelman, *Judge*.

ARGUED NOVEMBER 29, 2017 — DECIDED OCTOBER 11, 2018

Before WOOD, *Chief Judge*, and RIPPLE and KANNE, *Circuit Judges*.

WOOD, *Chief Judge*. St. Augustine School, along with Joseph and Amy Forro, sued Wisconsin's Superintendent of Public Instruction and Friess Lake School District for refusing to provide school transportation (or equivalent cash benefits) to the Forros' children. The school and family assert that the state denied them this benefit in violation of the Establishment and Free Exercise Clauses of the First Amendment.

The district court granted summary judgment for the defendants, and we now affirm. Contrary to the plaintiffs' assertions, the record does not establish that the Superintendent or the school district furnished or withheld public benefits on the basis of non-neutral religious criteria. Nor does the evidence support the claim that public officials impermissibly determined the school's affiliation on the basis of theology, ecclesiology, or ritual. Instead, it shows that public officials applied a secular statute that limits benefits to a single school affiliated with *any* sponsoring group—and, when St. Augustine declared itself to be Catholic, they took the school at its word.[1]

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[1] The dissent characterizes the Superintendent's actions as an "extensive" examination of the school's theological affiliation. *Post* at 5 n.8. As we explain below, however, that is not at all what happened. All the Superintendent did was to look at the school's own description of itself as "Catholic" and take its word

I

Wisconsin law requires school districts to bus private-school students,[2] WIS. STAT. § 121.54, but that obligation extends only to one private school "affiliated with the same religious denomination" within each geographic attendance area, WIS. STAT. § 121.51. In an effort to avoid an unconstitutional interpretation of this limitation, the Wisconsin Supreme Court has construed section 121.51 to reach any two private schools "affiliated or operated by a single *sponsoring group*, whether ... secular or religious." *State ex rel. Vanko v. Kahl*, 52 Wis.2d 206, 215 (1971) (emphasis added). According to that court, the statute's reference to *denominational* affiliation is not meant to introduce a religious criterion, but rather to establish that the test of affiliation is not limited to "operation by a single agency or set of trustees or religious order." *Id.* at 215. For example, the court explained, schools operated by the Franciscan Order and Jesuit Order would "be considered, along with diocesan schools, as

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for it. He did not delve into corporate niceties, educational materials, or anything else that would inappropriately have entangled him with matters of religion. Nor did the Superintendent ever assume, one way or the other, anything about the school's affiliation with the archdiocese of Milwaukee or any other subdivision of the Catholic Church, or the similarity (or differences) in the beliefs held by each one.

[2] Districts may discharge this obligation by making a direct payment to pupils' parents. WIS. STAT. § 121.55(1)(b).

part of the Catholic school system ... because all are 'affiliated with the same religious denomination.'" *Id.* at 215–16. At the same time, officials may not determine the affiliation of a religious school by monitoring and evaluating its practices or personnel. *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 82 Wis.2d 139, 154–58 (1978). Instead, public officials "are obliged to accept the *professions* of the school and to accord them validity without further inquiry." *Id.* at 155 (emphasis added).

This case arose when St. Augustine applied for transportation for its students, including the Forros' children. Invoking section 121.51, the Friess Lake School District denied its request, and Wisconsin's Superintendent of Public Instruction, Tony Evers, upheld that decision. At the relevant time, St. Augustine described itself as a Catholic school. In its request for busing, the school told the district that it was "an independent, private Catholic school." In the section of its website entitled "About Us," St. Augustine stated that it is "an independent and private traditional Roman Catholic School" that "loves and praises all the traditional practices of the Catholic Faith" and "recognizes its spiritual custodial duty of establishing an authentic Catholic environment."[3]

[3] Although not pertinent here (because it was not a factor on which the Superintendent relied), we note that St. Augustine's employment application asks applicants about their "Catholic Background," including their "views as a Catholic teacher on why you wish to teach in a small, private school teaching in the

The problem was that there was already a Catholic school within the same catchment zone—St. Gabriel School, which was operated by the Archdiocese of Milwaukee. Relying on each school's self-classification, the school district and Superintendent determined that both schools were affiliated with the same sponsoring group, as *Vanko* used that term. (They may have thought that if the Franciscans and Jesuits were considered as "the same" for purposes of Wisconsin law, then so were St. Augustine and St. Gabriel.) Because St. Gabriel had already qualified for busing, the district and Superintendent disclaimed any obligation under section 121.51 to provide transportation services or their monetary equivalent to St. Augustine's students.

St. Augustine and the Forros sued the school district and Superintendent in state court for violations of their federal civil rights under 42 U.S.C. § 1983 and for violations of the state busing statute; the defendants removed the case to federal court. St. Augustine asserts that its students are entitled to publicly subsidized transportation and that, in rejecting their application, the state impermissibly probed into its religious beliefs. It maintains that even though it identifies itself as Catholic (specifying Roman Catholic in at least one place), it was

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Catholic tradition" and "what [they] expect from a truly Catholic educational institution."

nonetheless distinct from the diocesan schools in its curriculum and religious practices. The district court remanded the state claims to the state court and granted summary judgment in favor of the defendants on the federal claims. St. Augustine and the Forros appeal from that judgment.

II

Because this case comes to us following summary judgment, we have assessed the plaintiffs' claims and evidence *de novo*, *Spierer v. Rossman*, 798 F.3d 502, 507 (7th Cir. 2015), mindful that summary judgment is appropriate in the absence of a "genuine dispute as to any material fact" if "the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–52 (1986). For the plaintiffs to move ahead on their section 1983 claim, the record must contain evidence that would permit a trier of fact to find that "(1) they held a constitutionally protected right; (2) they were deprived of this right in violation of the Constitution; (3) the defendants intentionally caused this deprivation; and (4) the defendants acted under color of law." *Donald v. Polk Cnty.*, 836 F.2d 376, 379 (7th Cir. 1988).

Plaintiffs argue that the application of section 121.51 deprived them of their First Amendment rights in two ways. First, they assert that the defendants violated the Free Exercise Clause by

depriving St. Augustine (and the parents of its students) of a public benefit on account of their religion. As we explain in more detail below, this theory fails because, as construed by the Wisconsin Supreme Court, section 121.51 is a facially neutral and generally applicable law that deprives *all* private schools—religious and secular alike—of receiving a subsidy already claimed by another school affiliated with the same group or organization. Second, plaintiffs suggest that the defendants' application of section 121.51 violated the Establishment Clause by entangling the state actors with religious doctrine and belief when they categorized St. Augustine as Catholic. This allegation lacks support in the record, which shows that it was St. Augustine—not the state—that chose to define itself as Catholic. Ironically, it is St. Augustine's approach, not the state's, that would require officials to look beyond outward expressions of affiliation to engage in potentially impermissible inquiries into the ecclesiological boundaries of religions and denominations. The district court thus properly dismissed this suit.

A

As a preliminary matter, plaintiffs incorrectly assert that a factual dispute precludes summary judgment. They believe that the record could establish that the defendants consulted St. Augustine's original articles of incorporation, which declared the institution a nondenominational

Christian school, before they rejected its busing application. Had the defendants known of the articles' language, the argument goes, an impermissible inquiry into the school's religious doctrine or practice must have prompted its classification as Catholic. But plaintiffs have failed to carry their burden of producing evidence to support their assertion that the defendants looked at the document. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). Without any evidence that they did so, a secondary dispute over whether St. Augustine submitted the original articles of incorporation to the state is immaterial.

Although plaintiffs suggest that a footnote in the Superintendent's decision proves that he, at least, pulled and reviewed the articles on his own, they misconstrue that note. The footnote states that St. Augustine "did not provide the complete Articles of Incorporation," which "according to the online records of the Wisconsin Department of Financial Institution" have remained in effect since their 1981 filing. This statement does not establish that the Superintendent ever saw the articles—it indicates only that he saw records of their filing. (And, while we do not base our opinion on this fact, we note that the website in question produces only a docket-style list of filings without links to their contents. *Corporate Records, Saint Augustine School, Inc.*, WIS. DEP'T OF FIN. INSTITUTIONS, https://www.wdfi.org/apps/CorpSearch/Details.aspx?entityID=6N08664&hash=474157237&

searchFunctionID=9f86b932-7cef-4bc9-a6a5-7222036a7830& type=Simple& q=saint+augustine+school (last visited Oct. 11, 2018).) Therefore, even if it were relevant to a First Amendment analysis, plaintiffs have put forward no evidence to suggest that the defendants knew about and ignored the commitment to interdenominational Christianity professed in St. Augustine's bylaws. Because plaintiffs had no constitutional right under the First (or any) Amendment to have the defendants consult St. Augustine's articles of incorporation, their assertions that the school submitted the articles of incorporation cannot create a factual dispute sufficient to preclude summary judgment.

B

We now turn to the heart of this case: the constitutional claims. We conclude that the defendants did not violate the Free Exercise Clause when they denied St. Augustine's busing application pursuant to the religiously neutral and generally applicable grounds provided in section 121.51. Since *Employment Division v. Smith*, the Supreme Court has consistently held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)

(Stevens, J., concurring)). That rule resolves the present case. The defendants refused to bus pupils to St. Augustine because another school—St. Gabriel—shared its institutional affiliation and served the same catchment zone. That the schools' shared affiliation happened to follow denominational lines in this case does not entitle plaintiffs to an exemption from a restriction placed on all private schools that have a common sponsoring group, as Wisconsin law defines it.

Plaintiffs' argument to the contrary rests on a misunderstanding of section 121.51. They repeatedly complain that the defendants denied St. Augustine (and its families) a public benefit because of St. Augustine's religious beliefs or practices. We do not doubt that section 121.51 foists a choice on religious families and schools. It requires parents to decide whether to elect the school that qualifies for benefits, or to forgo the benefits and select a school that better reflects their preferred ritual, doctrine, or approach. Here, the Forros could send their children to a school that more precisely reflects their religious values only if they declined transportation benefits.

For its part, St. Augustine had to choose between identifying as Catholic and securing transit funding for its students. Were we presented with nothing but the text of section 121.51, which would appear to operate only with respect to religious schools, plaintiffs might have a strong case. To the extent that the statute "denies a generally available

benefit solely on account of religious identity," it would "impose[ ] a penalty on the free exercise of religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017). Strict scrutiny would then apply, see *id.* at 2024, a burden that the defendants in this case do not attempt to meet.

Yet the Wisconsin Supreme Court took that problem off the table when it authoritatively construed the statute to avoid any such constitutional problem. See *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004). As the state supreme court reads the statute, section 121.51 imposes a neutral and generally applicable limitation on transportation funding. Its ban on busing services in overlapping attendance areas applies "to *all* private schools affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious." *State ex rel. Vanko*, 52 Wis.2d at 215 (emphasis added). The state supreme court interpreted the statutory language singling out "private schools affiliated with the same religious denomination" as serving only to establish affiliation with a denomination as the operative limitation "rather than operation by a single agency or set of trustees or religious order." *Id.* at 465. In determining affiliation with a religious denomination, the state generally must accept the school's own profession of affiliation or non-affiliation. *Holy Trinity Cmty. Sch., Inc.*, 82 Wis.2d

at 155–58.

Thus, section 121.51 bars two self-identified Catholic schools from receiving transit subsidies, but it also bars funding two Montessori schools, two International Baccalaureate® schools, or two French International schools. As in the case of St. Augustine, the bar would apply even though the same corporate parent did not own or control both institutions and thus the articles of incorporation would reflect two entities. The reason why St. Augustine cannot demand services within its desired attendance zone is not because it is a Catholic school; it is because—by its own choice—it professes to be affiliated with a group that already has a school in that zone.[4] By the same token, Wisconsin is not denying the Forros a transit subsidy because they are Catholic or because they seek to send their children to Catholic school. It funds transportation for all of the Catholic families who send their children to St. Gabriel. The problem for St. Augustine is not that it is Catholic; it is that it is second in line.

Because section 121.51 does not deny benefits *on the basis of* their religion, neither St. Augustine School nor the Forros can obtain relief under the Free Exercise Clause. See *Smith*, 494 U.S. at 879.

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[4] We know from *Holy Trinity* that if St. Augustine professed to be anything but Catholic, that statement too would have to be taken at face value, and we would not have this case.

Section 121.51 imposes a neutral and generally applicable restriction on transit funding. The defendants thus did not violate the Free Exercise Clause when they relied on section 121.51 to deny St. Augustine's busing application.

C

Plaintiffs also assert that, as applied in this case, section 121.51 violates the Establishment Clause. We agree with them that the state may neither define nor police religious orthodoxy. But they have not shown that the state did any such thing. Contrary to the dissent's assertions, the record contains no evidence of an impermissible inquiry into the religious character of St. Augustine, let alone a comparison of the respective doctrines and practices of St. Augustine, St. Gabriel, and other Catholic institutions.

Had the defendants applied a religious test to establish denominational affiliation, we can assume that they would have violated *Lemon*'s prohibition of entanglement between government and religion. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). A long line of cases prohibits secular courts from delineating religious creeds or assessing compliance with them. *E.g.*, *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969) (prohibiting courts from judging adherence to denomination's traditional doctrines). In fact, the

state may not even monitor a religious school to identify which aspects of its curriculum and courses contain religious content generally. *New York v. Cathedral Acad.*, 434 U.S. 125, 132–33 (1977) (disapproving of a scheme that required state to identify "any religious content in various classroom materials" as part of a reimbursement process, *id.* at 133); *Lemon*, 403 U.S. at 619 (invalidating Rhode Island salary supplements for parochial teachers' *secular* teaching because "comprehensive, discriminating, and continuing state surveillance w[ould] inevitably be required to ensure that" teachers' religious beliefs did not infect their teaching). Thus, had the defendants determined that St. Augustine was Catholic on the basis of an affinity between its teachings or practices and those sanctioned by chosen dioceses, orders, or prelates, we would have found the defendants' inquiry to be unconstitutional.

Plaintiffs assert that such a forbidden probe lay behind the denial of St. Augustine's busing application. They argue that the defendants "based their finding of affiliation on the conclusion that St. Augustine and St. Gabriel were *theologically* connected even though St. Augustine said that it was 'religiously distinct' from the schools of the Archdiocese." The current system, St. Augustine argues, impermissibly permits the state "to decide who is and is not in the same religious denomination based on something other than legal and secular connections, and to ignore the claims of religious

adherents about whether they are and are not religiously distinct."

The problem with St. Augustine's argument is that the school district and state superintendent did *not* consider St. Augustine's theology or its religious practices. They did not, to use plaintiffs' words, "ignore the claims of religious adherents about whether they are [or] are not religiously distinct" from another denomination. The defendants did not independently assign the label "Catholic" to St. Augustine. St. Augustine did. The defendants read and credited St. Augustine's statements on its website and busing request form that it was a Catholic—specifically a Roman Catholic—school. Defendants properly avoided wading into any discussion about whether each school faithfully operates within the Catholic tradition because each one calls itself a Catholic School. The dissent claims that the state superintendent "examined extensively the theological statements on the School's website and determined that it evinces an affiliation with the Catholic Church." But it cites a portion of the Superintendent's decision that does no more than quote verbatim the school's own description of itself as a "Roman Catholic School" providing an education to "the children of our Catholic community" while "lov[ing] and prais[ing] all the traditional practices of the Catholic faith." R. 26-10, at 7. Taking a party's repeated chosen label at face value hardly constitutes a deep-dive into the nuances of religious affiliation.

Plaintiffs contend that section 121.51 also required the defendants to consider statements in the school's articles of incorporation and bylaws, which purportedly would have shown that the school's leadership disclaimed affiliation with the Catholic Church. But why does the Constitution compel exclusive reliance on that evidence, as opposed to the school's express statement on its application for benefits? We know of no such rule. Of course, as *Holy Trinity* illustrates, St. Augustine is free to change its affiliation, and the state must also respect such a change. See 82 Wis.2d at 146. But at least in our case, all evidence viewed by the school district and superintendent indicated that St. Augustine and St. Gabriel professed affiliation with the same Roman Catholic Church.

We see no evidence to support plaintiffs' and the dissent's hypothesized parade of horribles. Under the current system, they contend that the state could redefine denominational boundaries and "lump the Lutherans of the Missouri Synods in with those in the Evangelical Lutheran Church in America" while "Anglican Catholics could be thrown in with the Roman Catholics" because "each of them use the 'Lutheran,' [and] Catholic,' ... monikers." That is just to say, however, that there can be a question about which entity is the "group" to which section 121.51 refers. We assume that the Missouri Synods would be entitled to argue that they are a different group from the Evangelicals, that the

Orthodox Jews are entitled to argue that they are a different group from Reformed Jews, and that Shi'a Muslims can urge that they are different from Sunnis. We are content to save those cases for another day. In the present case, both St. Augustine and St. Gabriel self-designated as Roman Catholic, and that is enough. If we were presented with a state's refusal to recognize a denomination or a public official's attempt to serve as an arbiter of a religious schism, we would have a different case. We agree with our dissenting colleague that labels may not fully capture the plurality of religious beliefs in America. But for Wisconsin's statute to pose any meaningful limitation on the state's provision of busing, school districts must be able to rely on self-adopted labels.

Ironically, it is St. Augustine and the Forros—not the state—that are asking us to undertake an unconstitutional analysis of religious belief. They contend that St. Augustine is distinct because it "practices its religion differently than St. Gabriel." They argue that "even if similar practices or beliefs *could* be the basis for 'affiliation,'" the denial of St. Augustine's busing application cannot stand because the defendants "explicitly did not look at or compare St. Augustine's beliefs and practices with St. Gabriel's to determine whether they were sufficiently comparable such that they could be considered 'affiliated' or sponsored by some group.'" Yet considering whether a difference in belief constitutes a difference in denomination is precisely

what *Presbyterian Church* forbids.[5] 393 U.S. 440. The entire point of the approach endorsed by the Wisconsin Supreme Court and followed by the defendants is to take matters of doctrine and belief out of the secular determination of institutional affiliation. We will not pervert the Establishment Clause to declare internal doctrinal differences a matter of state concern. Nor are we prepared to say, in conflict with the Wisconsin Supreme Court, that the state's only choice is to assume that each and every school is unique and thus all children must receive transportation benefits.

Before concluding, we add a word about why we think it both unnecessary and inappropriate to abstain *sua sponte* from deciding the issues before us pursuant to the doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The Wisconsin Supreme Court has already resolved the critical questions of state law in *Vanko* and *Holy Trinity Church*. It has told state authorities how to apply the test of affiliation with a single sponsoring group, and it has stressed that the responsible state

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[5] It is hardly unusual for churches within the same denomination to display some differences. One Lutheran church might have a pastor who emphasizes public service, while another might have a minister who emphasizes self-reflection and atonement. One might approach the Bible from a strict-construction viewpoint, while another may take a more metaphorical view. Differences in theological approaches do not necessarily create different sponsoring groups, no matter how genuinely each congregation feels about its choices.

officials must accept a religious organization's self-characterization. It has also disapproved the factor on which our dissenting colleague relies so heavily—ownership or control by a single entity. *Pullman* does not require a federal court to stay its hand simply because a state legislature or court might surprise us by reversing course. See *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973) (rejecting *Pullman* abstention where alternative interpretation of state law was "foreclosed by the decision of the" state high court).

The *Pullman* doctrine aims to avoid an unnecessary adjudication of the constitutionality of a state statute. Its purpose is not served unless there is "some risk that the statute will be found unconstitutional unless narrowed." *Mazanec v. N. Judson-San Pierre Sch. Corp.*, 763 F.2d 845, 847 (7th Cir. 1985). As it comes to us, this was not a close case. St. Augustine complains that its religious exercise was burdened by a neutral and generally applicable law. It roots an Establishment Clause violation in the *failure* of the district and state officials to contrast its religious dogma and practices with those of the Roman Catholic diocese. And that is what inevitably would be required: two schools could be incorporated under the same entity and nonetheless differ just as much as St. Augustine and St. Gabriel do. This is not one of those cases in which we must side-step our obligation to resolve a case that is properly before us.

III

The district court properly granted summary judgment for the defendants. St. Augustine and the Forros have not shown a violation of their First Amendment rights. As applied here, section 121.51 neither impinged on plaintiffs' religious liberties nor impermissibly engaged the state in matters of religious doctrine. We therefore AFFIRM the judgment of the district court.

RIPPLE, *Circuit Judge*, dissenting. The people of Wisconsin have recognized in their state constitution the importance of ensuring that every Wisconsin schoolchild receives safe and secure transportation to the school chosen by his parents, whether that school be a state-operated school, a secular private school, or a religiously oriented private school.[1] As the Wisconsin Supreme Court has noted, by enacting this state constitutional provision and its implementing legislation,[2] Wisconsin has

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[1] *See* Wis. Const. art. I, § 23.

[2] Wisconsin Statutes section 121.54(2)(b) requires the school board of each district operating high school grades to provide transportation "for each pupil residing in the school district who attends any elementary ... or high school grade at a private school located 2 miles or more from the pupil's residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district." This transportation obligation can be fulfilled in a variety of ways. *See* Wis. Stat. § 121.55. This school district's choice of the way in which it would fulfill such an obligation is not at issue in this case.

recognized that "the same consideration of safety and welfare should apply to public and private students alike." *Cartwright v. Sharpe*, 162 N.W.2d 5, 11 (Wis. 1968).[3] Wisconsin's choice accords with the Supreme Court's recognition of the important liberty interest of parents to choose the educational environment of their children. *See Pierce v. Soc'y of Sisters,* 268 U.S. 510, 534–35 (1925).

In implementing the State's commitment, conscientious government administrators necessarily face practical problems. Limited funding is one of them. The Wisconsin legislature attempted a partial solution to this perennial problem by mandating that each private school is entitled to bus transportation within an established "attendance area"[4] and by also providing that, except in the case of single-sex schools, "[t]he attendance areas of private schools *affiliated* with the same religious denomination shall not overlap."[5] The statute, however, does not define what it means for a school to be "affiliated" with a denomination. There is no evidence in this record that this affiliation provision is anything other than a good-faith attempt to implement the transportation program in a sensible, fiscally

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[3] We need not decide today whether the Constitution of the United States requires such evenhanded treatment of public and non-public school students. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017).

[4] Wis. Stat. § 121.51(1).

[5] *Id.* (emphasis added). The single-sex school exception is not implicated in this case.

responsible manner. Nevertheless, the provision's ambiguity has caused significant disagreement, resulting in two decisions by the Wisconsin Supreme Court. Before focusing on the present case, therefore, I pause to examine these two cases of the Wisconsin Supreme Court. Both interpreted the statute in the crosslight of Religion Clause concerns and shed considerable light on the path that we ought to follow in the case before us.

In *State ex rel. Vanko v. Kahl*, 188 N.W.2d 460, 464 (Wis. 1971), the Supreme Court of Wisconsin focused directly on the language that, on its face, forbids providing transportation services to children of religiously operated private schools "affiliated with the same religious denomination" as another school already receiving transportation in the same attendance area. The statute contained no similar limitation for non-religious private schools, and the Wisconsin court recognized that this difference in treatment placed an additional burden on children attending a religiously affiliated private school—a burden that was not shared by children attending a non-religious private school. The court therefore construed this provision to apply equally to children in both religiously affiliated private schools and non-religiously affiliated schools. Although not invoking squarely the rule that courts should construe a statute to avoid doubts about its constitutionality, the Wisconsin high court frankly recognized that disparity in the treatment of children attending religious schools would create "an

apparent constitutional infirmity." *Id.* The statute's reference to religiously affiliated schools, noted the court, was simply to ensure that schools conducted by religious orders were considered affiliated with a religious group, even if these schools were not legally owned by the sponsoring religion. *Id.*[6] As construed by the court in *Vanko*, therefore, the statute forbade overlapping attendance zones only when a private school was "affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious." *Id.* at 465.

Vanko made clear that all private schools, not just religious private schools, were subject to the overlapping attendance area limitation. It had no occasion to come to grips with just how a school district should determine the "affiliation" of a religious private school with a "sponsoring group." In *Holy Trinity Community School, Inc. v. Kahl*, 262 N.W.2d 210 (Wis. 1978), the Wisconsin Supreme Court addressed this question. In that case, a school of the Catholic Archdiocese of Milwaukee, desiring a larger attendance area that would overlap with other diocesan schools, closed and then immediately reopened under new articles of incorporation and bylaws that did not identify it as a Catholic school and that stated that it had no formal religious

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[6] The court later referred to this last explanation as dicta. *See Holy Trinity Cmty. Sch., Inc. v. Kahl*, 262 N.W.2d 210, 212 (Wis. 1978).

affiliation. It continued to employ many of the same teachers, to enroll many of the same students, and to lease, for a dollar a year, its building from the Catholic parish in which it was located. It conducted its religious instruction in a "released-time" program. *Id.* at 211.

The State Superintendent of Instruction concluded, on these facts, that the school remained affiliated with the Catholic Church and refused to provide transportation. The Wisconsin Supreme Court did not think that the Superintendent's determination was sustainable. Relying principally on the decisions of the United States Supreme Court in *New York v. Cathedral Academy*, 434 U.S. 125 (1977), *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court held that the Superintendent should not make such a detailed inquiry into the school's religious practices to determine whether it was *affiliated* with another religious body. In the court's view, such an inquiry would have the primary effect of aiding religion or would result in an excessive entanglement of the government in religious affairs. The Superintendent must accept, said the court, the facial validity of the charter and bylaws of the school. *Id.* at 216.[7]

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[7] The majority maintains that the Wisconsin Supreme Court said in *Holy Trinity* that a court "generally must accept the school's own profession of affiliation or non-affiliation." Majority Op. at 10. Its citation to 82 Wis.2d at 155–58 apparently refers to the Wisconsin court's discussion of the

In *Vanko* and *Holy Trinity,* the Wisconsin Supreme Court adopted the salutary practice of employing "neutral principles of law," *Jones v. Wolf,* 443 U.S. 595, 600 (1979), in order to avoid slipping into the constitutionally impermissible quagmire of defining religious doctrine and practice. *Cf. Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–09 (1976).

Here, the State Superintendent failed to follow these Wisconsin decisions. The articles of incorporation state that "[t]he purposes for which the Corporation is organized are to create, establish, maintain, and operate an interdenominational Christian school for the instruction for children in the primary and secondary grades."[8] Rather than grounding his decision in the articles of incorporation and by-laws as he was required to do under state law, he decided to undertake an independent investigation and rested his decision on

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judicial obligation not to pierce the articles of incorporation or the bylaws. There, the Supreme Court of Wisconsin observers: "we hold only, where a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination, that in the absence of fraud or collusion the inquiry stops there. To make the further inquiry, as attempted by the Superintendent of Public Instruction, is to involve the state in religious affairs and to make it the adjudicator of faith." *Holy Trinity*, 82 Wis.2d at 157–58.

[8] R.26-1 at 1.

statements he found on St. Augustine's website.[9]

Faced with a clear failure of the State Superintendent to follow the decisions of the Supreme Court of Wisconsin, the district court undertook a close examination of *Vanko* and *Holy Trinity*. It began its analysis by admitting frankly that, given the holdings in those two cases, the Wisconsin Supreme Court might well "build on these cases" and interpret the statute to require the State Superintendent to approve St. Augustine's proposed area "even though it overlaps with the attendance area of St. Gabriel, and even though both schools describe themselves as Roman Catholic schools."[10] However, the district court then examined the website of St. Augustine School and, noticing that the school described itself as "Catholic," the court then decided that the holdings of the Wisconsin Supreme Court permitted an examination beyond the legal documents of incorporation into the "school's religious denomination."[11] The court

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[9] *See* R.26-10 at 7.

[10] R.41 at 16.

[11] *Id.* at 13. The district court noted that *Vanko* had described the required nexus as "affiliated or operated by a single sponsoring group." *Id.* It read *Holy Trinity* as not limiting the inquiry to the private school's constituent documents if those documents do not affirmatively disclose that the school has a particular affiliation. *Id* at 15. That interpretation is belied by the *Holy Trinity* court's reliance on *Bradfield v. Roberts*, 175 U.S. 291, 297 (1899), in which the operative document did not disclose the religious affiliation of the institution. *See id.* at 297–98 ("Nothing is said about religion or about the religious

apparently never considered abstaining until the parties could obtain a more precise definition of the word "affiliated" than the one offered in *Holy Trinity*.[12] Rather, it took the School's use of the term "Catholic" as, in effect, an admission of affiliation with the schools of the Archdiocese.[13]

My colleagues follow the lead of the district

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faith of the incorporators of this institution in the act of incorporation.... Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into.").

[12] Notably, the defendants had removed this case from the state court where the plaintiffs had commenced the action. The state court no doubt would have followed the Wisconsin precedent discussed in the text and concluded that the Superintendent was not permitted to ignore St. Augustine's claim of legal independence.

The defendants' removal of this case to federal court simply has allowed them to avoid answering to the Wisconsin Supreme Court for their failure to follow *Trinity Lutheran*, 137 S.Ct. at 2024. Had they obeyed the holding of that case, they would have treated religious and non-religious schools evenhandedly and, in the process, avoided any need to address a constitutional question.

[13] Earlier in its opinion, the district court had surmised that St. Augustine might be "Traditionalist Catholic." R.41 at 3. It then said that it mentioned this point "only to provide some background information on how St. Augustine differs from a diocesan school." *Id.*

court. The panel's opinion culls out of the School's self-description on its website the word "Catholic." In their view, if two schools employ the same label—"Catholic"—to describe themselves, they are "affiliated."

In my view, there are several problems with this approach. The first is one of elemental fairness. The term "Catholic" appears in the school website in the broader context of a wide-ranging description of St. Augustine School, a text that sets forth the educational philosophy of the institution and the theological principles that animate that educational philosophy. Taking the single term "Catholic" out of this context and employing it as an outcome-determinative label obviously raises a basic question of fairness, especially when we clearly are forbidden to evaluate the remainder of the context to determine whether the theological principles set forth there are indeed embraced by the Roman Catholic Church, which operates St. Gabriel in the same district.

I recognize, as do my colleagues, that permitting the state to derive denominational affiliation through an examination and judgment of theological doctrine would pose different constitutional concerns. I suggest, instead, that the Constitution requires the state to rely on the same neutral principles it would apply to a non-religious school. It should accept, as the Wisconsin courts certainly would, St. Augustine's independent

corporate structure as proof that it is not "affiliated" with St. Gabriel. The materials submitted to the Superintendent made the Superintendent well aware that St. Augustine is legally independent from St. Gabriel and the Archdiocese.[14]

Secondly, the court's selective use of the term "Catholic" rests on the assumption that, for purposes of our Free Exercise analysis, a single term, even when culled from its context, can describe accurately the religious values and aspirations of an individual or a group of individuals. Labels work very well for identifying commodities in a supermarket, but they are ill fitted for protecting the religious liberty of an *individual* American. Our constitution recognizes "the right of every person to freely choose *his own course*" with respect to "religious training, teaching and observance." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) (emphasis added). A cornerstone of our Religion Clauses jurisprudence is the right of each individual to define personal religious beliefs not according to institutional norms but according to *personal* religious commitments. *See Kaufman v.*

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[14] *See, e.g.*, R.26-9 (St. Augustine's request for Superintendent to review the school district's denial of transportation benefits, emphasizing St. Augustine's independence from the Archdiocese and separately chartered corporate structure); R.33-6 at 3–4 (school district's submission to Superintendent, recognizing that St. Augustine is "incorporat[ed] under a different charter" and has a "differing organizational structure[]" from an Archdiocesan school).

McCaughtry, 419 F.3d 678, 681 (7th Cir. 2005). The congruity of personal beliefs with those of a known religious organization is beside the point. Personal beliefs may have some overlap with an institutional religion; or they may be heretical or overly zealous variations of institutional beliefs. *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012). They may even evince lax adherence to a known religion. *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988). But if an individual sincerely holds those beliefs, the Religion Clauses protect them. *Grayson*, 666 F.3d at 454 ("Religious belief must be sincere to be protected by the First Amendment, but it does not have to be orthodox.").[15]

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[15] We have held that the government may inquire into the sincerity of a person's beliefs, *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012), and that it can be appropriate to examine, in a measured and non-intrusive manner, the congruity of a person's beliefs to those of the religion that he professes in an effort to ascertain the sincerity of his beliefs, *Nelson v. Miller*, 570 F.3d 868, 880–82 (7th Cir. 2009). *But see Koger v. Bryan*, 523 F.3d 789, 799–800 (7th Cir. 2008). Similarly, civil government need not tolerate sham or fraudulent conduct designed to avoid legitimate and evenhandedly applied civil obligations. *See, e.g.*, *Welsh v. United States*, 398 U.S. 333, 339–40 (1970) noting that it is necessary to consider whether an individual's beliefs are, in fact, "religious" in nature before granting that individual conscientious objector status under the Selective Service Act); *United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]e hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity [and]a prime consideration to the validity of every claim for exemption as a conscientious objector."). But,

Given our national commitment to freedom of *personal* conscience, it is not surprising that our history, even before the founding of the Republic, is filled with dissident individuals and groups who have disagreed with larger bodies and yet insisted that *they*, not the larger group, have remained faithful to the principles of the original group. As the Supreme Court noted in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715 (1981), "[i]ntra-faith differences ... are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." The "guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.... [I]t is not within the judicial function and judicial competence to inquire whether [one person or another] correctly perceive[s] the commands of their common faith." *Id.* at 715–16.

Today's holding permits a local school board to deny children an important safety protection because their parents have concluded, based on their religious beliefs, that St. Augustine School embodies their personal faith commitment and that the Archdiocesan School does not. The court permits the local school board to exert significant pressure on

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in the end, it is the sincerity of their beliefs, not their orthodoxy, that is the touchstone for constitutional protection. These are well-settled principles.

those parents to bend to the school board's determination that what they believe to be an important religious difference between the two schools does not exist or is inconsequential. It also rejects the Supreme Court's explicit statement that, when the state conditions receipt of an important benefit program upon acceptance of such a government determination, it places "substantial pressure" on the individual to modify his behavior and "a burden upon religion exists." *Id.* at 718. "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.*; *see also Abington Twp.*, 374 U.S. at 221.

Today's decision therefore raises very concrete concerns beyond our achieving substantive justice for the parties before us. What will the court now do when individuals identifying themselves as Anglican Catholics, Polish Catholics, or Orthodox Catholics seek to raise their children according to their own faith traditions? Barred from making any theological inquiry, will the court again rely on labels? What will it do when individuals identifying as Missouri Synod Lutherans seek to establish a facility separate from those identifying as Evangelical Lutherans? Will Methodists and United Methodists experience the same problem? As the ecumenical movement grows and individuals simply identify as "Christian," how will the court deal with the differences that still remain? Will the court recognize the right of those who identify as Orthodox Jews to nurture their faith

in schools separate from Reformed or Liberal Jews? Other analogous situations surely will arise as society continues to grow more and more pluralistic in its religious beliefs. Today, the court simply puts these very pragmatic but important questions off for another day; it ignores that its label methodology is simply unworkable in these situations. The majority opinion "assume[s] that the Missouri Synods would be entitled to argue that they are a different group from the Evangelicals, that the Orthodox Jews are entitled to argue that they are a different group from Reformed Jews, and that Shi'a Muslims can urge that they are different from Sunnis."[16] Why, then, is St. Augustine foreclosed from arguing that it is governed by a separate entity than that which governs St. Gabriel's?

Today's decision raises more than pragmatic problems. It raises haunting concerns about the future health of the Religion Clauses in this circuit. It is indeed difficult to square today's decision with the Supreme Court's recent reaffirmation that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017). It is equally difficult to square this decision with the basic tenet of the Supreme Court's Religion Clauses jurisprudence that the Constitution protects not only the "freedom to believe" but "the freedom to

[16] Majority Op. 14.

act." *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). Today's exercise in label reading is not consistent with our careful protection of the *individual* liberty to adhere to, and act on, one's *personal* religious beliefs. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

ST. AUGUSTINE SCHOOL and
JOSEPH and AMY FARRO,
Plaintiffs,

v. Case No. 16-C-0575

TONY EVERS, in his official capacity
as Superintendent of Public Instruction,
and FRIESS LAKE SCHOOL DISTRICT,
Defendants.

DECISION AND ORDER

I. BACKGROUND

Wisconsin law requires the school board of a school district to provide each student residing in the district with transportation to and from his or her school if the student resides two miles or more from the school. Wis. Stat. § 121.54(2). The school board must provide transportation even to students who attend a private school (including a religious private

school), but only "if such private school is a school within whose attendance area the pupil resides" and the school is located either within the school district or within five miles of the district's boundaries *Id.* § 121.54(2)(b)1. The "attendance area" is the geographic area designated by the private school as the area from which it draws its students, but the school board of the district must also approve the attendance area. *Id.* § 121.51(1). If the private school and the school board cannot agree on the attendance area, the state superintendent of public instruction must, upon the request of the private school and the school board, make a final determination of the attendance area. *Id.* As is relevant to this case, the law provides that "[t]he attendance areas of private schools affiliated with the same religious denomination shall not overlap." *Id.*

Joseph and Amy Forro send their three children to St. Augustine School, which is a private religious school. The Forros live within the Friess Lake School District and more than two miles from St. Augustine. St. Augustine is located within five miles of the Friess Lake School District's boundaries. In March 2015, to enable the Forros to receive transportation aid as provided by Wisconsin law, a representative from St. Augustine called the district and requested that it approve the school's attendance area under Wis. Stat. § 121.51(1). The district and the school then exchanged a number of communications. Throughout these communications, the district maintained that it could not approve St.

Augustine's attendance area because that area overlapped with the attendance area of St. Gabriel, a private school in the district for which the district already provided transportation and that was affiliated with the same religious denomination as St. Augustine, which the district described as "Roman Catholic." *See, e.g.,* Decl. of Tim Zignego Ex. G.

St. Gabriel is a Roman Catholic school that is affiliated with the Archdiocese of Milwaukee. Although St. Augustine is a Roman Catholic school, it is not affiliated with the Archdiocese. Moreover, the school appears to have at least slightly different religious beliefs, and to follow at least slightly different religious practices, than would a school that is affiliated with the Archdiocese. St. Augustine has not in its briefs and affidavits extensively described how it differs from a diocesan school, but it states that it believes that it "operates more fully within the Catholic tradition than Archdiocesan schools" and that it is "religiously distinct from schools operated by the Archdiocese." Zignego Decl. ¶ 10. From my review of the excerpts from St. Augustine's website that appear in the record, I have drawn the conclusion that St. Augustine is what might be described as "Traditionalist Catholic," which is a branch of Catholicism whose members believe that there should be a restoration of many or all of the customs, traditions, and practices of the Roman Catholic Church before the Second Vatican Council. *See*

https://en.wikipedia.org/wiki/Traditionalist_Catholic (last viewed June 6, 2017). For example, St. Augustine states on its website that it follows certain traditional Catholic practices, such as the reception of communion directly on the tongue while kneeling and the celebration of Mass in Latin. ECF No. 33-6 at p. 5 of 10. These are generally considered "traditionalist" practices that the Roman Catholic Church does not necessarily follow today. However, my conclusion that St. Augustine is Traditionalist Catholic may not be accurate, and my analysis of the legal issues in this case do not depend on this conclusion. I mention the possibility that St. Augustine is Traditionalist Catholic only to provide some background information about how St. Augustine differs from a diocesan school.

After the Friess Lake School District initially denied St. Augustine's proposed attendance area, St. Augustine asked it to reconsider its decision, pointing out that St. Gabriel is a Roman Catholic school affiliated with the Archdiocese of Milwaukee, while St. Augustine is independent of the Archdiocese. *See, e.g., id.*. Ex. D. St. Augustine might also have attempted to explain to the district that it practices Catholicism differently than diocesan schools, but no such communication appears in the record. However, the administrator of the district wrote in a letter to the school that the school's "belief that there is a distinction between St. Augustine and St. Gabriel's regarding adherence to Catholic principles is your fight, not ours." Zignego

Decl. Ex. F. This statement implies that St. Augustine said something to the administrator about its practicing Catholicism differently than St. Gabriel. In any event, the district continued to refuse to approve St. Augustine's attendance area because it overlapped with St. Gabriel's attendance area, and because both schools called themselves Catholic schools.

Because St. Augustine and the district could not agree on an attendance area, they submitted their dispute to the state superintendent of public instruction for a final determination under Wis. Stat. § 121.51(1). In its letter to the superintendent, St. Augustine argued, as it did to the district, that its attendance area could overlap with St. Gabriel's because St. Gabriel was a Roman Catholic school affiliated with the Archdiocese of Milwaukee, while St. Augustine was independent of the Archdiocese. *See* Aff. of Laura M. Varriale Ex. D. St. Augustine argued, in part, as follows:

> St. Augustine School, Inc., is a Wisconsin non-stock corporation, incorporated in 1981 as Neosho Country Christian School, Inc. The name was changed in 1994 to the current name. Neither St. Augustine School, Inc., nor the school operated by the corporation, has ever been affiliated by control, membership, or funding with the Archdiocese of Milwaukee. No

> representative of the Archdiocese or a parish church of the Archdiocese has ever been a director or officer of St. Augustine School, Inc. No employees of St. Augustine School have ever been hired or compensated by the Archdiocese or a parish church of the Archdiocese. None of the religious instructors at St. Augustine School have ever been employed, assigned, or compensated for their work at St. Augustine School by the Archdiocese or a parish church of the Archdiocese. Students currently enrolled at St. Augustine school come from families who are members of five different churches, including some churches independent of the Archdiocese of Milwaukee.

Id.

St. Augustine provided the superintendent with a copy of its bylaws, and also an amendment to its articles of incorporation showing that it was previously known as Neosho Country Christian School, Inc. *Id.* Although St. Augustine seems to have intended to also provide the superintendent with a copy of the school's full articles of incorporation, *see* Pls. Resp. to Defs. Prop. Finding of Fact ¶ 22, the superintendent claims that it never received a copy, *see* Varriale Aff. ¶ 14. The Friess

Lake School District also denies ever receiving a copy of the articles of incorporation. Decl. of Denise Howe ¶ 15. The plaintiffs admit that neither the superintendent nor the district saw St. Augustine's articles of incorporation. Pls. Resp. to Defs. Prop. Finding of Fact ¶ 22.[1] The articles of incorporation describe Neosho Country Christian School as "an interdenominational Christian school." Zignego Decl. Ex. A, art. III. However, the bylaws and amendment to the articles of incorporation do not contain any similar statement or otherwise indicate whether St. Augustine is affiliated with a religious denomination.

In its submission to the superintendent, the school district argued that St. Augustine and St. Gabriel could not have overlapping attendance areas because they both described themselves as Catholic schools and therefore were, for purposes of § 121.51(1), "affiliated with the same religious

[1] Technically, the plaintiffs admit only that the defendants did not "consider" the articles of incorporation. Pls. Resp. to Defs. Prop. Finding of Fact ¶ 22. This is not necessarily the same thing as admitting that the defendants did not "see" the articles of incorporation. That is, the defendants might have seen the articles of incorporation and made a conscious decision not to consider them. However, from the context of the plaintiffs' response, I conclude that the plaintiffs do not contend that the defendants saw the articles and intentionally disregarded them. Rather, they seem to admit that, due to an inadvertent error, the articles of incorporation never made their way to the relevant decisionmakers at the district and the department of public instruction. *See id.*

denomination," even if they were each "incorporated under a different charter." Varriale Aff. Ex. F. The district provided the superintendent with print-outs from St. Augustine's website, which describe the school as "an independent and private traditional Roman Catholic School." *Id.* at p. 2 of 4.

On March 10, 2016, the superintendent, through his designee, issued a written decision on the dispute over St. Augustine's attendance area. Varriale Aff. Ex. G. The superintendent began by citing Wis. Stat. § 121.51(1), emphasizing the language stating that "[t]he attendance areas of private schools affiliated with the same religious denomination shall not overlap." *Id.* at 4. He then described the parties' arguments as follows:

> The District contends both [St. Augustine] and St. Gabriel's are affiliated with the Roman Catholic denomination and that their attendance areas overlap. [St. Augustine] argues the District may not look beyond the School's corporate status, its name change amendment, and its bylaws to reach the District's conclusion that the School is a religious school affiliated with the Roman Catholic denomination. To do otherwise, the School contends, results in a constitutionally impermissible entanglement of state authority in religious affairs.

Id. at 4–5. After discussing relevant legal authority, the superintendent noted that St. Augustine's bylaws and the amendment to its articles of incorporation revealed nothing about its religious affiliations. (Again, it is undisputed that the superintendent did not see the articles of incorporation describing St. Augustine, under its old name, as an "interdenominational Christian school.") The superintendent reasoned that because St. Augustine had submitted no organizational documents that disclosed its religious affiliations, he could consider the print-outs from St. Augustine's website—in which it described itself as a "traditional Roman Catholic School"—without excessively entangling himself in a religious matter. *Id.* at 6–7. Based on the print-outs, the superintendent concluded that St. Augustine was "a religious school affiliated with the Roman Catholic denomination" for purposes of § 121.51(1). *Id.* at 7. The superintendent thus agreed with the school district's determination that St. Augustine and St. Gabriel could not have overlapping attendance areas. *Id.* at 7–8.

Because neither the school district nor the superintendent approved St. Augustine's attendance area, the Forros did not receive state transportation aid during either the 2015–16 school year or the 2016–17 school year. The parties agree that, had the Friess Lake School District provided this aid to the Forros, the cost to the district would have been

$1,500 per school year. Defs. Resp. to Pls. Prop. Finding of Fact ¶ 28.

In April 2016, the Forros and St. Augustine commenced this action in state court against the Friess Lake School District and the state superintendent of public instruction. The defendants removed the action to this court. The plaintiffs allege that the district's and the superintendent's decisions to deny it an overlapping attendance area with St. Gabriel were erroneous applications of Wis. Stat. § 121.51(1) and also violated the Religion Clauses of the United States Constitution (that is, the Free Exercise and Establishment Clauses of the First Amendment) and the Equal Protection Clause. The plaintiffs seek relief against the district and the superintendent under 42 U.S.C. § 1983 and state law.

The superintendent has filed a motion to be dismissed from this case on various grounds, and the superintendent and the district have filed a joint motion for summary judgment. The plaintiffs have filed their own motion for summary judgment. For relief, the plaintiffs seek: (1) a judicial finding (either in the form of a declaratory judgment or judicial review of the superintendent's administrative decision under state law) that the superintendent's decision to reject St. Augustine's proposed attendance area was erroneous as a matter of state law; (2) a declaratory judgment against both the district and the superintendent stating that the

defendants violated the plaintiffs' federal constitutional rights; (3) an injunction against the district and the superintendent preventing them from denying transportation aid to the Forro children to attend St. Augustine; (4) damages against Friess Lake School District in the amount of $1,500 for each of the two school years in which the Forros were already denied transportation aid; and (5) costs and attorneys' fees under 42 U.S.C. § 1988.

II. DISCUSSION

The motions under consideration are the superintendent's motion to dismiss the complaint against it, and the parties' cross-motions for summary judgment. However, I discuss only the parties' motions for summary judgment because they are dispositive. Summary judgment is required where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, I take evidence in the light most favorable to the non-moving party and must grant the motion if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

Before proceeding further, I note that the central issue in this case is one of state law: did the school district and the superintendent properly interpret and apply the definition of "attendance area" that appears in Wis. Stat. § 121.51(1)? This

issue arises in the form of the plaintiffs' request for judicial review of the superintendent's final decision to deny St. Augustine its proposed attendance area under Wis. Stat. § 121.51(1). *See* Compl. ¶¶ 71–73. I may exercise jurisdiction over this state-law claim pursuant to the supplemental-jurisdiction statute because that claim is part of the "same case or controversy" as the plaintiffs' claim for violation of their rights under the Constitution. *See* 28 U.S.C. § 1367(a). However, the supplemental-jurisdiction statute provides that a district court may decline to exercise supplemental jurisdiction over a state-law claim if it "raises a novel or complex issue of State law." 28 U.S.C. § 1367(c)(1). As explained in more detail below, the plaintiffs' state-law claim does raise a novel issue of state law, in that the existing Wisconsin cases do not clearly answer the question of whether the defendants correctly implemented the attendance-area definition of § 121.51(1). Thus, I will relinquish supplemental jurisdiction over the plaintiffs' claim for judicial review of the superintendent's decision and remand that claim to state court. Still, I must decide the plaintiffs' federal claim, which they bring under 42 U.S.C. § 1983. But, as will be made clear in the discussion that follows, this federal claim is closely related to the plaintiffs' state-law claim. For this reason, I will begin by discussing the relevant state cases, which are *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206 (1971) and *Holy Trinity Community School, Inc. v. Kahl*, 82 Wis. 2d 139 (1978).

In *Vanko*, several individuals and private religious schools in Racine County alleged that the "same religious denomination" sentence in § 121.51(1)'s definition of "attendance area" was unconstitutional.[2] The plaintiffs argued that because this prohibition against overlapping attendance areas applied only to affiliated religious schools, and not also to private nonreligious schools that were affiliated with each other, the law discriminated against religious schools in violation of the First Amendment. *Id.* at 213–14. The Wisconsin Supreme Court allowed that, if the statute indeed meant that only affiliated religious schools were prohibited from having overlapping attendance areas, then the statute would present "an apparent constitutional infirmity." *Id.* at 214. However, the court determined that the statute did not mean that only affiliated religious schools were prohibited from having overlapping attendance areas. Instead, the court determined, the statute prohibited "overlapping in attendance area boundary lines as to *all* private schools affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious." *Id.* at 215 (emphasis in original). The court found that this more general restriction against overlapping was "inherent in the whole concept of 'attendance areas.'" *Id.* Thus, reasoned the court, the statute treated

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[2] At the time *Vanko* was decided, the attendance-area definition was codified at Wis. Stat. § 121.51(4). 52 Wis. 2d at 208–09.

religious and nonreligious private schools the same and did not present a constitutional problem.

The *Vanko* court recognized that its interpretation of the statute seemed to reduce the "same religious denomination" sentence in § 121.51 to "mere surplusage." *Id.* However, the court determined that this sentence still added something to the statute, which was "to make 'affiliated with the same religious denomination' the test of affiliation in a single school system rather than operation by a single agency or set of trustees or religious order within a particular religious denomination." *Id.* The court gave the following example:

> [The sentence] means that, if the Franciscan Order of the Roman Catholic church operates a school in the northern part of the Racine district, and the Jesuit Order operates a school in the southern part of the district, they are to be considered, along with diocesan schools, as part of the Catholic school system of Racine because all are "affiliated with the same religious denomination."

Id. at 215–16. In this part of its opinion, the court concluded that the statute defines a religious denomination as the "sponsoring group" for purposes of determining the attendance areas of religious

schools. In other words, all schools affiliated with the same religious denomination are affiliated with the same sponsoring group.

In the second Wisconsin Supreme Court case at issue, *Holy Trinity Community School*, the court considered the method by which state officials could determine whether a private school is affiliated with a particular religious denomination. That case involved the Holy Trinity School, which was one of the plaintiffs in *Vanko*. Before *Vanko* was decided, the Holy Trinity School was known as the Holy Trinity Catholic School and was a parochial school affiliated with the Roman Catholic Church. *Holy Trinity*, 82 Wis. 2d at 145–46. The school's students were spread over a wide area of the Racine school district, and after *Vanko* upheld the prohibition against overlapping attendance areas, the Holy Trinity School stood to lose a large number of students to the Catholic schools that were closer to their homes. *Id.* at 145. To avoid this problem, the Holy Trinity Catholic School ceased operations and immediately reincorporated and reopened as the Holy Trinity Community School. *Id.* at 146. The reincorporated school had "no legal ties to the Roman Catholic church" and its bylaws provided that "the school shall have no affiliation with any religious denomination." *Id.* In making these changes to its organizational structure and bylaws, the school hoped to disaffiliate from the Catholic denomination and be entitled to its own attendance area, which could overlap with any of the other

Catholic schools in the Racine district. However, when the school applied for its own attendance area, the state superintendent found that the school was still "affiliated" with the Roman Catholic denomination. *Id.* at 147. The superintendent made this finding by looking behind the school's organizational documents—which stated that the school was "independent of any denomination," *id.* at 153—and examining various practices of the school—such as its hiring nuns and adopting a "released time" program through which 75% of the school's students received Roman Catholic religious instruction—that suggested it was still a Roman Catholic school. *Id.* at 146–49.

The state supreme court found that the superintendent's determining the "denominational allegiance" of the school though "inspection and surveillance of the school" resulted in "excessive entanglement of state authority in religious affairs." *Id.* at 149–50. The court held that the superintendent should have taken at face value the language in the school's articles of incorporation and bylaws that disclaimed affiliation with any religious denomination. *Id.* at 149–55. The court stated that "[b]y avoiding the making of [the superintendent's detailed inquiry] and by accepting the Holy Trinity Community School on the basis of its articles of incorporation as what it purports to be—a school independent of any denomination—the unconstitutionality in the administration of the

statute can be avoided." *Id.* at 153. The court summarized its holding as follows:

> In respect to the case before us, we hold only, where a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination, that in absence of fraud or collusion the inquiry stops there. To make further inquiry, as attempted by the Superintendent of Public Instruction, is to involve the state in religious affairs and to make it the adjudicator of faith. To so proceed results in the excessive entanglement of the secular state with religious institutions and is forbidden by the Constitution of the United States.

Id. at 157–58.

The plaintiffs interpret *Vanko* and *Holy Trinity* to mean that, in approving private-school attendance areas, "[s]chool districts and the Superintendent must ignore the question of 'religious denomination' and focus on the question of legal affiliation." Pl. Br. at 11, ECF No. 23. The plaintiffs further argue that, under these cases, the state authorities, in determining affiliation, "must limit their review of the factors that may constitute 'affiliation' to those that are purely legal and

secular—i.e., a review of the applicable constituent documents such as the articles of incorporation and by-laws of the school." *Id.* The plaintiffs contend that "[i]f those documents do not demonstrate an affiliation, the State's inquiry must end." *Id.*

The plaintiffs' interpretation of *Vanko* and *Holy Trinity* is not entirely accurate. First, these cases do not establish that state decisionmakers must entirely ignore a school's religious denomination when approving an attendance area under § 121.51(1). Although the court in *Vanko* interpreted the statute to prohibit overlapping attendance areas for private schools "affiliated or operated by a single sponsoring group," the court further determined that, with respect to religious private schools, "sponsoring group" means the religious denomination with which the school is affiliated. 52 Wis. 2d at 215–16 (stating that relevant sentence of § 121.51(1) makes "affiliated with the same religious denomination" the "test of affiliation" for religious private schools).[3] Thus,

[3] The plaintiffs contend that this part of *Vanko* is dicta. Reply Br. at 4. And indeed it is dicta in the sense that the *Vanko* case did not require the court to apply the "same religious denomination" sentence to the facts of the case before it. But this part of the opinion represents a key part of the court's reasoning for interpreting the statute to prohibit overlapping attendance areas for both religious and nonreligious private schools, in that the court was demonstrating that its interpretation of the statute did not reduce the sentence to mere surplusage. In any event, even if this part of the opinion is dicta and nonbinding, the important point is that no binding

under *Vanko*, state decisionmakers must still determine whether the "group" that "sponsors" the private school is religious, and, if it is, whether it is "affiliated" with a "denomination" that already operates a school with an overlapping attendance area.

Second, *Vanko* does not hold that every private school is necessarily entitled to an attendance area that overlaps with any other private school so long as both schools are organized as legal entities that are not affiliated with each other in the corporate-law sense. Rather, the test that the court adopted in *Vanko* was that schools "affiliated or operated by a single sponsoring group" cannot have overlapping attendance areas. *Id.* at 215. The court did not precisely define what constitutes a "single sponsoring group." Instead, it left the term undefined and only vaguely described it as meaning things like "a school operating agency or corporation" or a "religious denomination." *Id.* at 215–16. Certainly *Vanko* does not hold that every independent legal entity is its own "sponsoring group." It is possible that, in using the term "sponsoring group," the court had in mind a broader meaning that would include a collection of legal entities that are all united by some underlying

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part of the opinion states or implies that state decisionmakers must "ignore the question of religious denomination" when determining the affiliation of a religious private school. Pl. Br. at 11.

similarity, even if they are not all "affiliated" in the corporate-law sense. For example, all schools that are members of the American Montessori Society,[4] but that are organized as independent, unaffiliated corporations, might qualify as schools "affiliated or operated by a single sponsoring group." *Vanko*, 52 Wis. 2d at 215. Thus, *Vanko* does not establish that a private school is necessarily entitled to an overlapping attendance area with any other private school with which it is not legally affiliated.

Third, *Holy Trinity* does not hold that if a private school's constituent documents, such as its articles of incorporation and bylaws, do not demonstrate an affiliation with a religious denomination, then the state decisionmakers cannot look further to determine whether the school is affiliated with that denomination. What *Holy Trinity* holds is that if the constituent documents *affirmatively demonstrate* that the school is *not* affiliated with a particular denomination, then the decisionmakers are bound by the documents and

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[4] Montessori is an educational approach "characterized by an emphasis on independence, freedom within limits, and respect for a child's natural psychological, physical, and social development." https://en.wikipedia.org/wiki/Montessori_education (viewed June 6, 2017). The American Montessori Society advocates for the Montessori method in public and private schools throughout the United States, and publishes its own standards and criteria for its accredited member schools. https://en.wikipedia.org/wiki/American_Montessori_Society (last viewed June 6, 2017).

cannot, based on their own investigation, conclude that the relevant statements in the documents are false. *See, e.g.,* 82 Wis. 2d at 144 (noting that bylaws specifically disavowed affiliation with any religious denomination), 146 (same), 150 (noting that school's organizational documents made prima facie showing that school was not affiliated with a religious denomination), 157–58 (holding that "where a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination," the inquiry stops there). The case does not contain any discussion of what the decisionmakers can or cannot do where, as here, the constituent documents submitted to the decisionmakers do not indicate one way or the other whether the school is affiliated with a religious denomination, yet it is clear that the school is a religious school.

To be sure, *Holy Trinity* implies that under no circumstances could the state decisionmakers conduct their own extensive inquiry into the school's religious beliefs and practices and determine that it is affiliated with a particular religious denomination. *Id.* at 149–50. But that is not what the school district and the superintendent did in this case. They did not surveil St. Augustine and catalogue its religious beliefs and practices to determine that it was affiliated with Roman Catholicism. Rather, they accepted St. Augustine's statement on its own website that it was a Roman Catholic school. Essentially, what the defendants did in this case was

use the school's statement of religious affiliation on its website to fill in for the absence of a statement of affiliation or non-affiliation in the constituent documents that the school submitted to them. *Holy Trinity* does not hold that this was improper as a matter of state law.

My conclusion that *Vanko* and *Holy Trinity* are not dispositive does not resolve the plaintiffs' claim under state law. It is possible that the Wisconsin Supreme Court would build on these cases and interpret § 121.51(1) to require the superintendent to approve St. Augustine's proposed attendance area even though it overlaps with the attendance area of St. Gabriel, and even though both schools describe themselves as Roman Catholic schools. For example, the Wisconsin Supreme Court might agree with the plaintiffs and decide that § 121.51(1) should be construed in a way that allows religious schools to have overlapping attendance areas so long as they are not legally affiliated with each other, even if they both describe themselves as belonging to the same religious denomination.[5] Given this possibility, I conclude that the plaintiffs' state-law claim for judicial review of the superintendent's decision to deny St. Augustine its proposed attendance area "raises a novel or complex

[5] The Wisconsin Supreme Court could also disagree with my conclusion that *Vanko* and *Holy Trinity* have not already interpreted § 121.51(1) as the plaintiffs believe it should be interpreted.

issue of State law," and that therefore I should decline to exercise supplemental jurisdiction over it. *See* 28 U.S.C. § 1367(c)(1).

This leaves the plaintiffs' federal claim, which is that, regardless of how the Wisconsin courts ultimately interpret § 121.51(1), the defendants violated the plaintiffs' rights by denying the Forros transportation aid to attend St. Augustine for the 2015–16 and 2016–17 school years. However, it is somewhat difficult to identify the precise contours of the plaintiffs' federal legal theories. In their brief, the plaintiffs contend that they have "several constitutional rights at issue" in this case. Pl. Br. at 15. The plaintiffs then identify several rights, including (1) a right to form and attend a private school that aligns with their religious beliefs, *id.*; (2) a right not to be discriminated against because they engage in religious exercise, *id.* at 16; (3) a right not to be denied government benefits based on a test that the government does not apply to nonreligious entities, *id.* at 16–17; and (4) a right "not to have the state excessively entangled in their religious practices," *id.* at 18–20. However, in a section of their brief entitled "[t]he Plaintiffs have been deprived of constitutionally protected rights," the plaintiffs contend that they were deprived of only the third right on their list: the right to receive government benefits on the same terms as nonreligious entities. *Id.* at 20–21. In this section, they argue that St. Augustine's "attendance area would have been approved as requested if it were a

secular private school located precisely where St. Augustine is located." *Id.* at 20. Based on this part of their brief, I understand the plaintiffs to be arguing that the defendants' actions violated their rights under the Religion Clauses and the Equal Protection Clause by applying a test to St. Augustine that they would not have applied to a similarly situated nonreligious private school. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (noting that it is "a principle at the heart of the Establishment Clause" that "government should not prefer one religion to another, or religion to irreligion"); *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872–73 (7th Cir. 2014) (recognizing that the First Amendment and the Equal Protection Clause require a state to administer its laws neutrally as between different religions and as between religion and equivalent secular organizations).

The plaintiffs' "neutrality" argument is based on the premise that the defendants would have approved St. Augustine's attendance area if it were a nonreligious private school, rather than a religious private school. I will assume for purposes of this opinion that if St. Augustine were a nonreligious private school that was not affiliated with any "sponsoring group" that already operated a private school within the proposed attendance area, then the defendants would have approved its attendance area. But as discussed above, in *Vanko*, the Wisconsin Supreme Court inserted the "single

sponsoring group" concept into § 121.51(1) to avoid the concern that the statute treated religious schools differently than secular schools. Thus, for purposes of adjudicating the plaintiffs' neutrality claim, the relevant comparator is not just any nonreligious private school, but a nonreligious private school that could be thought to be affiliated with a "sponsoring group" that already operates a school within the proposed attendance area.

The plaintiffs have pointed to no evidence in the summary-judgment record from which a reasonable trier of fact could conclude that either the Friess Lake School District or the state superintendent would, in violation of § 121.51(1) and *Vanko*, grant secular private schools that are affiliated with or operated by the same sponsoring group overlapping attendance areas. And the defendants in their brief state that it is their understanding that "it would be well within the bounds of [state law] for a district to refuse overlapping attendance areas to two Montessori schools, even if they were incorporated as two separate legal entities." Def. Br. at 16. Although a party's statement in its brief is not evidence, the important point is that the defendants do not concede that they have treated or would treat secular private schools differently than they have treated St. Augustine, and the plaintiffs have not met their burden to produce evidence from which a reasonable trier of fact could conclude that the defendants either have treated or would treat such

secular schools differently. They have not, for example, pointed to deposition testimony suggesting that the defendants would treat secular schools differently, and they have not submitted evidence suggesting that either defendant has granted secular private schools affiliated with the same secular sponsoring group, such as Montessori schools, overlapping attendance areas. Thus, the defendants are entitled to summary judgment on the plaintiffs' claim that the defendants violated the First Amendment and the Equal Protection Clause by applying a test to St. Augustine that they would not have applied to a similarly situated secular private school.

Having decided the plaintiff's "neutrality" claim, I believe I have decided the plaintiffs' only federal claim. However, at places in their briefs, the plaintiffs contend that the defendants' interpretation of § 121.51(1) caused them to "evaluat[e] competing religious claims" in a way that led to "excessive entanglement." Reply. Br. at 12. They argue that the defendants impermissibly made a religious judgment that both St. Augustine and St. Gabriel practice the same religion and therefore are affiliated with the same religious denomination. "Excessive entanglement" is a concept that derives from the Supreme Court's Establishment Clause jurisprudence; it is one of the prongs of the so-called "*Lemon* test" of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under this prong of the test, a statute will be deemed unconstitutional if it "fosters an excessive

government entanglement with religion." *Id.* at 613 (internal quotation marks omitted). In light of the plaintiffs' references to excessive entanglement, a question arises as to whether they are alleging that the defendants committed a constitutional violation by excessively entangling themselves in a religious matter. I do not believe that they are, but in case I am mistaken, I will also address whether the plaintiffs are entitled to damages under § 1983 based on an excessive-entanglement theory.

An initial issue is that the *Lemon* test and its entanglement prong are not designed to apply to a single decision made by state actors under a broader statutory scheme. Rather, the *Lemon* test is used to evaluate whether the entire statutory scheme or a broader governmental policy or practice is unconstitutional. For example, in *Lemon* itself, the Court found two state statutes unconstitutional because ongoing administration of the statutes would have led to excessive entanglement between church and state. *See Lemon*, 403 U.S. at 614–25. Other cases evaluate whether an ongoing governmental policy or practice, even if not embodied in a statute, results in excessive entanglement. *See Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 842, 849 (7th Cir. 2012) (en banc) (evaluating whether school district's "practice" of holding "high school graduations and related ceremonies" at a church violated the *Lemon* test). The plaintiffs have not cited, and I have not found, a case holding that a governmental actor's single

decision under a broader statutory scheme can be deemed unconstitutional on the ground that it involved excessive entanglement. Rather, it is usually the entire statutory scheme or governmental policy that is evaluated for excessive entanglement. Where such entanglement is found, the entire statute or practice is deemed unconstitutional and invalidated.

Thus, in the present case, if the defendants' interpretation of § 121.51(1) were correct as a matter of state law (which is something that the state courts must decide), and their ongoing administration of the statute with respect to religious private schools resulted in excessive entanglement, then a question would arise as to whether the Wisconsin law that grants transportation aid to students of private schools is unconstitutional as a whole. Alternatively, perhaps only the "same religious denomination" sentence of § 121.51(1) would be unconstitutional, and it could be severed from the statute. But the defendants' single and potentially erroneous application of the statute to one religious school could not result in a finding of excessive entanglement. *Cf. Nelson v. Miller*, 570 F.3d 868, 881–82 (7th Cir. 2009) (finding that state actor's "one time" act of entanglement did not result in *excessive* entanglement). Accordingly, the defendants' single alleged act of entanglement could not have resulted in a violation of § 1983.

In case I am mistaken about whether a single act of entanglement could give rise to liability under § 1983, I also conclude that the defendants in this case did not excessively entangle themselves in a religious matter. "The general rule is that, to constitute excessive entanglement, the government action must involve 'intrusive government participation in, supervision of, or inquiry into religious affairs.'" *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 995 (quoting *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir.2000)). Here, I will assume that, had the district or the superintendent made the kind of extensive inquiry into St. Augustine's religious affiliations that the superintendent made in *Holy Trinity*, then the defendants would have excessively entangled themselves in the plaintiffs' religious affairs. However, as I have explained, the defendants did not make that kind of inquiry into St. Augustine's religious beliefs and practices. Rather, because St. Augustine was obviously a religious school and did not submit any articles of incorporation or bylaws that identified or disclaimed its affiliation with a religious denomination, the defendants looked elsewhere to determine what St. Augustine "purport[ed] to be," as required by *Holy Trinity*. 82 Wis. 2d at 153. The defendants then turned to the statement on St. Augustine's website describing it as a "Roman Catholic School," and they accepted this statement at face value and concluded that St. Augustine was affiliated with the Roman Catholic denomination. These actions did not involve any

participation in, supervision of, or intrusive inquiry into religious affairs.

The plaintiffs contend that the defendants' reliance on St. Augustine's describing itself as a Roman Catholic school involved the application of a "religious test." Although the plaintiffs do not precisely explain what they mean by "religious test," I understand them to be arguing that the defendants improperly concluded that all Roman Catholics have the same religious beliefs and follow the same religious practices and therefore all follow the same "religion." But this is not an accurate description of what the defendants did. What they did, instead, was conclude that, *for purposes of § 121.51(1)*, Roman Catholicism is a single "religious denomination," even if there are branches within the denomination that have different religious beliefs or follow different religious practices. The term "religious denomination," as used in the statute, is not a religious test. It does not require the state to evaluate the truth or falsity of any particular religious belief or to determine the sincerity of any person's religious beliefs. It is simply a secular term that is used for administering the statute. Thus, the state could determine that two schools that call themselves Roman Catholic are affiliated with the same religious denomination—as that term is used in the statute—even if the schools and their attendees would not consider themselves to have the same religious beliefs or to be following the same religious practices. Making this determination does

not excessively entangle the state in a religious matter. It is no different than the state's concluding that two Montessori schools are affiliated with the same sponsoring group because they each use the label "Montessori," even though each school may practice the Montessori method a bit differently.

To be sure, one can envision difficulties with the state's routinely making judgments about whether two schools that describe themselves in a similar way are affiliated with the same religious denomination. The problem here is in defining what the statute means by "religious denomination." For example, in the present case, St. Augustine did not describe itself as just a "Roman Catholic school," but as a "*traditional* Roman Catholic school." What criteria should the state employ when determining whether two schools that describe themselves similarly, but not identically, are affiliated with the same religious denomination, as that term is used in the statute?[6] Perhaps creating and applying such criteria to the attendance areas of multiple private religious schools would lead to excessive entanglement or other constitutional problems in the

[6] Notably, this problem could arise even if the superintendent considered nothing other than a school's description of itself in its articles of incorporation, in accordance with *Holy Trinity*. For example, what if St. Augustine's articles of incorporation described the school as a "traditional Roman Catholic school"? In this example, the state would have to make a judgment about whether Roman Catholicism and "traditional" Roman Catholicism are each part of the same denomination.

long run. Similar problems could arise in the secular context: what happens if two private Montessori schools describe themselves slightly differently? To avoid these problems, the state may wish to interpret § 121.51(1) as the plaintiffs have—that is, to make the test of affiliation always turn on the school's corporate organization rather than on its affiliation with a religious denomination or a secular sponsoring group. But as I have explained, I do not read the existing state cases to have already interpreted § 121.51(1) in this way. And because the proper interpretations of "religious denomination" and "sponsoring group" present novel questions of state law, I will decline to exercise supplemental jurisdiction over the plaintiffs' state-law claim.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that the defendants' motion for summary judgment is **GRANTED IN PART**, that is, insofar as it pertains to the plaintiffs' federal claims.

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that the plaintiffs' state-law claim for judicial review of the superintendent's final decision under Wis. Stat. § 121.51(1) is **REMANDED** to state court pursuant to 28 U.S.C. § 1367(c).

IT IS FURTHER ORDERED that the superintendent's motion to dismiss is **DENIED** as **MOOT**.

Dated at Milwaukee, Wisconsin, this 6th day of June, 2017.

/s/ Lynn Adelman
LYNN ADELMAN
United States District Judge

APPENDIX C

STATE OF WISCONSIN
BEFORE
THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter the Transportation of Students from the Friess Lake School District to St. Augustine School, Inc.

Decision

To: Tim Zignego
Chairman of the Board
St. Augustine School, Inc.
1810 Highway CC
Hartford, WI 53027

John Engstrom
District Administrator
Friess Lake School District
1750 State Road 164
Hubertus, WI 53033

INTRODUCTION

Pursuant to Wis. Stat. § 121.51(1), St. Augustine School, Inc. ("School") and the Friess Lake School District ("District") requested the State Superintendent of Public Instruction ("State Superintendent") to determine whether the District must provide transportation to three of the School's students. The District denied the School's request for transportation. The parties have submitted various materials to the State Superintendent to assist him in making his determination. The State Superintendent has reviewed these materials, other public information, and the law to reach his determination.[1]

RELEVANT FACTS

[1] By letter dated December 21, 2015, Janet Jenkins, Chief Legal Counsel, sent a letter to the School and the District stating, among other things, that the parties could provide any additional information the parties wished to submit. By December 21, both the School and the District already had submitted their positions and the reasons therefor. The parties had also submitted other documentation. The deadline for submitting additional information, as set forth in the December 21 letter, was January 8, 2016. The District provided some supplementary information. On or about January 11, 2016, the School contacted Chief Legal Counsel for the DPI via email and stated the School had not seen the December 21 letter until then because the School was closed for the holidays. The School did not state it had additional information to provide and the State Superintendent believes it has all the information it needs to reach its decision.

The District is a Wisconsin public school district within the meaning of Wis. Stat. § 115.01(3). The School is a private school within the meaning of Wis. Stat. § 115.001(3r) and is organized as a Wisconsin non-stock corporation under the provisions of Wis. Stat., ch. 181. The School is governed by a Board of Directors selected pursuant to the School's bylaws. The School has submitted to the State Superintendent a copy of its bylaws as well as an amendment to its Articles of Incorporation. The amendment only changed the name of the School from Neosho Country Christian School, Inc. to St. Augustine School, Inc. This amendment was dated May 25, 1994 and filed with the Wisconsin Secretary of State on June 14, 1994.[2] The District has also provided information to the State Superintendent in letter form.

In a letter from the School to the District dated April 27, 2015, the School requested the District to provide transportation for three students, all siblings, via a parent transportation contract. A parent transportation contract is one method school districts can use to provide transportation. Under a parent compensation contract, a school district pays

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[2] The School did not provide the complete Articles of Incorporation filed by its predecessor, Neosho Country Christian School, Inc. which, according to the online records of the Wisconsin Department of Financial Institution, were filed in 1981. These Articles are still in effect except for the amendment to change the name.

parents to transport children to school (Wis. Stat. § 121.55(b)).

The District responded to the School's request by letter dated April 29. It denied the School's request to provide transportation for the requested students. The reasons for the District's denial that are important to a determination of this matter are:

- The School is affiliated with the Roman Catholic denomination.
- The District already provides transportation for students attending St. Gabriel Catholic School, another Roman Catholic School within the District's attendance area.
- St. Gabriel' s attendance area includes the entirety of the District's attendance area and therefore, the attendance areas of the School and St. Gabriel School overlap.[3]

The School responded to the District's letter by letter dated May 20, 2015 claiming the District must provide transportation to the School's students because:

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[3] The School does not dispute the District's allegations that it already provides transportation to students of St. Gabriel School, a Roman Catholic School whose attendance area is co-extensive with the attendance area of the District.

- The School's Articles of Incorporation and bylaws show the School is organized as an independent Wis. Stat., ch. 181 corporation and is governed independently of any denomination.
- St. Gabriel Catholic School and the Archdiocese of Milwaukee have not managed, controlled or had any governance affiliation with the School.
- It is unconstitutional for the District to determine denominational affiliation by examining doctrine or other religious differences between schools.
- The School is an independent, private school and as such, the law permits no inquiry beyond the School's name change amendment and bylaws to determine whether the School and St. Gabriel Catholic School are private schools affiliated with the same religious denomination.[4]
- The question of whether St. Gabriel and the School are private schools affiliated with the same religious denomination is not a factor to be considered in applying Wis. Stat. § 121.51(1).

QUESTIONS PRESENTED

[4] Additional facts will be added to the Discussions section of this Decision and Order where appropriate.

1. Under the facts of this case, did the District improperly inquire into the School's religious affiliation beyond a review of the School's name change amendment to its Articles of Incorporation and bylaws?

2. Did the District properly determine that the School was affiliated with the Roman Catholic religious denomination thus permitting the the District to deny transportation to the the School's students?

DISCUSSION

Wisconsin Statutes § 121.51(1) lies at the heart of dispute between the School and the District. That statute states:

> (1) "Attendance area" is the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. **The attendance areas of private schools affiliated with the same religious denomination shall**

> **not overlap** unless one school limits its enrollment to pupils of the same sex and the other school limits its enrollment to pupils of the opposite sex or admits pupils of both sexes. (emphasis supplied).

The dispute herein revolves around the portion of Wis. Stat., § 121.51(1) emphasized in the above-quoted statute.

The District contends both the School and St. Gabriel's are affiliated with the Roman Catholic denomination and that their attendance areas overlap. The School argues the District may not look beyond the School's corporate status, its name change amendment, and its bylaws to reach the District's conclusion that the School is a religious school affiliated with the Roman Catholic denomination. To do otherwise, the School contends, results in a constitutionally impermissible entanglement of state authority in religious affairs.

In support of its argument, the School relies exclusively upon the decision in *Holy Trinity Community School, Inc. v. Kahl,* 82 Wis.2d 139, 262 N.W.2d 210 (1978) *("Kahl").*[5] The School's reliance is

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[5] In *Kahl,* the Court reviewed the decision of the Racine County Circuit Court which affirmed the decision of State Superintendent, William C. Kahl, who upheld the decision of the Racine County Unified School District denying Holy

misplaced. The Supreme Court in *Kahl* did not rule it is always impermissible for a school district to look beyond the School's corporate status, Articles of Incorporation and bylaws to determine whether a school is a private religious school affiliated with a particular religious denomination. As the Supreme Court noted in *Kahl,* "**Under the facts peculiar to this case**, the attempt of the Superintendent of Public Instruction to administer the law results in excessive entanglement of state authority in religious affairs." (emphasis supplied), *Id.* 149-150. The facts in the instant case are very different from the facts in *Kahl* and lead to a different conclusion.

In *Kahl,* the court found that the bylaws of Holy Trinity, also a Wis. Stat., ch. 181 independent corporation, provided ample evidence the school was: (1) a private religious school, and (2) not affiliated with any religious denomination. Among the evidence supporting the court's conclusion were provisions in Holy Trinity's bylaws stating the corporation, i.e., the
school, was to be maintained in the Judeo-Christian tradition. Moreover, the language of Article 4 of Holy Trinity's bylaws specifically disavowed any religious affiliation and encouraged students to practice the religion of their choice for which Holy Trinity provided a "released time" program in the school. *Id.* 144. The *Kahl* court found all these facts sufficient to

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Trinity's request for transportation from the Racine County Unified School District to Holy Trinity.

determine Holy Trinity was a religious school not affiliated with any religious denomination.

There are no equivalent statements in the School's bylaws. Rather, the bylaws only contain provisions frequently found in the bylaws of many non-religious public and private corporations organized and operating under Wis. Stat., chs. 180 and 181. The School's bylaws relate only to such items as the composition and powers of the corporation's board of directors and the officers of the corporation, meetings of the board of directors, indemnity and liability of the corporation, its directors and officers, and a few other provisions of the same ilk. Nothing in the School's bylaws even hints that the School is a private religious school or a private, religious non-denominational school. Similarly, there is nothing in the School's name change amendment to its Articles of Incorporation that reveals anything about the School's nature, i.e., religious or non-religious, or its affiliation with a religious denomination.[6]

In the absence of such evidence, the District must look beyond the School's name change amendment and bylaws to determine how Wis. Stat. § 121.51(1) applies to the School's request for

[6] The State Superintendent recognizes that the use of a saint's name is often used by religious schools, but that fact, alone, is not sufficient to show that the School is a religious School or that the School is affiliated or not affiliated with any religious denomination.

transportation of its students. If the District cannot do this, the District cannot meet its legal obligation to comply with Wis. Stat., § 121.51(1). Therefore, under the specific facts of this case, the District has the authority to look beyond the name change amendment and bylaws to determine how to apply Wis. Stat., § 121.51(1), as long as the manner in which it does so does not create an "excessive entanglement of state authority in religious affairs. *Id.* 149-150.

The District contends the School's public website provides sufficient information from which to determine that the School is a private religious school affiliated with the Roman Catholic denomination. Reviewing a public website that is created and maintained by or on behalf of the School, and accepting the School's description of itself as set forth in that website, does not create an excessive entanglement of state authority in religious affairs. This is so because a public website, by its very nature, invites, and even wants persons to review it. Under this circumstance, the District's review of the website and acceptance of the School's description of itself as set forth therein simply does not create any entanglement, let alone an excessive entanglement of state authority in religious affairs.

The School's website provides ample evidence the School is a religious school affiliated with the Roman Catholic denomination. The "About Us" portion of the website states the School is, " ... an

independent and private traditional Roman Catholic School ... [that is] an incorporation of dedicated families, who believing that all good things are of God, have joined together to provide the children of our Catholic community with an exceptional classical education ... " The website also contains the statement, "SAS loves and praises all the traditional practices of the Catholic faith ... " These statements are but two of a number of statements in the website pages from which any reasonable person would conclude the School is a religious school affiliated with the Roman Catholic denomination.[7]. A copy of the first three pages of the website are attached to this Decision.

CONCLUSION

St. Augustine School, Inc. is a private, religious school affiliated with the Roman Catholic denomination. The District already provides transportation to students attending St. Gabriel School, another private, religious school affiliated with the Roman Catholic denomination, the attendance area of which is co-extensive with the attendance area of the District. Therefore, the attendance area of the School overlaps the attendance area of St. Gabriel. Pursuant to Wis. Stat.§ 121.51(1), the Friess Lake School District is

[7] The School, in its submission to the State Superintendent did not mention the existence of its website or discuss how the website did or did not affect the decision to be made herein.

not required to provide transportation to students attending St. Augustine School, Inc.

Dated this 10th day of March, 2016

/s/ Michael J. Thompson
Michael J. Thompson, Ph.D.
Deputy State Superintendent

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 7, 2018

Before

DIANE P. WOOD, *Chief Judge*

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 17-2333

ST. AUGUSTINE SCHOOL, *et al.*,
Plaintiffs-Appellants,

v.

TONY EVERS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:16-cv-00575-LA

Lynn Adelman,
Judge.

ORDER

Plaintiffs-appellants filed a petition for rehearing and rehearing *en banc* on October 25, 2018, and on November 21, 2018, defendants-appellees filed an answer to the petition. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing is therefore DENIED.

APPENDIX E

SUBCHAPTER IV

TRANSPORTATION AID

121.51 Definitions. In this subchapter:

(1) "Attendance area" is the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. The attendance areas of private schools affiliated with the same religious denomination shall not overlap unless one school limits its enrollment to pupils of the same sex and the other school limits its enrollment to pupils of the opposite sex or admits pupils of both sexes.

(3) "School board" has the meaning designated in s. 115.001(7) and includes any governmental agency transporting children to and from public schools.

(4) "School bus" has the meaning designated in s. 340.01 (56).

History: 1975 c. 120; 1983 a. 189 ss. 185, 329 (17); 1983 a. 512; 1989 a. 31; 1995 a. 27 s. 9145 (1); 1997 a. 27.

121.54 Transportation by school districts. (1) CITY OPTION. (a) Subsections (2) and (6) and s. 121.57 do not apply to pupils who reside in a school district that contains all or part of a city unless the school they attend is located outside the city but within the boundaries of the school district.

(b) If a school district elects under sub. (2) (c) to provide transportation for the pupils under par. (a), state aid shall be paid in accordance with s. 121.58, and there shall be reasonable uniformity in the transportation furnished to the pupils, whether they attend public or private schools.

(c) Paragraph (a) does not apply to pupils who reside in a school district that contains all or part of a 1st, 2nd or 3rd class city with a population exceeding 40,000 unless transportation for the pupils is available through a common carrier of passengers operating under s. 85.20 or ch. 194.

(2) GENERAL TRANSPORTATION. (a) Except as provided in sub. (1), every school board shall provide transportation to and from public school for all pupils who reside in the school district 2 miles or more from the nearest public school they are entitled to attend.

(am) In lieu of transporting a pupil who is eligible for transportation under par. (a) to and from his or her residence, a school district may transport the pupil to or from, or both, a before– and

after–school child care program under s. 120.125, a child care program under s. 120.13 (14), or any other child care program, family child care home, or child care provider.

(b) 1. Except as provided in sub. (1) or otherwise provided in this subsection, the school board of each district operating high school grades shall provide transportation to and from the school a pupil attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a private school located 2 miles or more from the pupil's residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.

2. In lieu of transporting students under subd. 1. and paying for transportation under sub. (8) (b), an underlying elementary school district of a union high school district may elect, by resolution adopted at its annual or special meeting, to transport elementary school children who reside within the underlying district and qualify for transportation under subd. 1., in vehicles owned, operated or contracted for by the district. Once adopted, such a resolution may be repealed only upon one year's notice to the board of the union high school district of which the underlying district is a part. An elementary school district shall notify the union high school district of any action under this paragraph no later than June 15 preceding the school year in

which the elementary school district's action takes effect.

3. Annually by April 1, each private school shall submit its proposed attendance area for the ensuing school year to the school board of each school district having territory within the proposed attendance area. If a proposal is not submitted by April 1, the existing attendance area shall remain in effect for the ensuing school year.

4. No later than May 15 in each year, each private school shall notify each school board of the names, grade levels and locations of all pupils, if any, eligible to have transportation provided by such school board under this paragraph and planning to attend such private school during the forthcoming school term. The school board may extend the notification deadline.

(c) An annual or special meeting of a common or union high school district, or the school board of a unified school district, may elect to provide transportation for pupils who are not required to be transported under this section, including pupils attending public school under s. 118.145 (4) or 118.53. Transportation may be provided for all or some of the pupils who reside in the school district to and from the public school they are entitled to attend or the private school, within or outside the school district, within whose attendance area they reside. If transportation is provided for less than all such pupils there shall be reasonable uniformity in the minimum distance that pupils attending public and private schools will be transported. Except for

elementary school districts electing to furnish transportation under par. (b) 2., this paragraph does not permit a school district operating only elementary grades to provide transportation for pupils attending private schools.

(d) A school board may provide transportation for teachers to and from public school, subject to the same controls and limitations as apply to the transportation of pupils.

(e) Notwithstanding par. (a), if a pupil is living outside the school district in which he or she is enrolled because the pupil's parents or guardians have joint legal custody, as defined in s. 767.001 (1s), of the pupil, upon the request of the pupil's parent or guardian the school district shall transport the pupil to and from an agreed−upon location within the school district.

(3) TRANSPORTATION FOR CHILDREN WITH DISABILITIES. Every school board shall provide transportation for children with disabilities, as defined in s. 115.76 (5), to any public or private elementary or high school, to the school operated by the Wisconsin Center for the Blind and Visually Impaired or the school operated by the Wisconsin Educational Services Program for the Deaf and Hard of Hearing or to any special education program for children with disabilities sponsored by a state tax−supported institution of higher education, including a technical college, regardless of distance, if the request for such transportation is approved by the state superintendent. Approval shall be based on whether or not the child can walk to school with

safety and comfort. Section 121.53 shall apply to transportation provided under this subsection.

(4) SUMMER CLASS TRANSPORTATION. A school board may provide transportation for pupils residing in the school district and attending summer classes. If the school board provides transportation for less than all pupils, there shall be reasonable uniformity in the minimum and maximum distances pupils are transported.

(5) TRANSPORTATION TO TECHNICAL COLLEGES. The school board of a district operating high school grades may provide for the transportation or board and lodging of residents of the school district attending technical colleges outside the school district who are not high school graduates, are less than 20 years of age and attend such colleges full time. The school board of such a district may also provide transportation for residents of the district participating in vocational education programs organized cooperatively between school districts under s. 66.0301. The school district shall be paid state aid for such transportation or board and lodging in accordance with s. 121.58. This subsection does not apply if the distance between a pupil's home and the technical college along the usually traveled public highway is more than 15 miles, unless the pupil resides on an approved bus route or board and lodging are provided.

(6) TRANSPORTATION IN SPECIAL CASES. The school board of a district operating high school grades which, under s. 121.78 (2) (a), must permit a pupil to attend high school outside the school district

shall provide transportation for such pupil if the pupil resides 2 or more miles from the high school that the pupil attends.

(7) TRANSPORTATION FOR EXTRACURRICULAR ACTIVITIES. (a) A school board may provide transportation for pupils attending public or private schools, their parents or guardians, authorized chaperones, school officers, faculty and employees and school doctors, dentists and nurses in connection with any extracurricular activity of the public or private school, such as a school athletic contest, school game, after school practice, late activity, school outing or school field trip or any other similar trip when:

1. A school bus or motor bus or a motor vehicle under s. 121.555 (1) (a) is used and such transportation is under the immediate supervision of a competent adult.

2. A school operated by the school district or the private school has an actual interest in the safety and welfare of the children transported to the activity;

4. The school principal or other person with comparable authority authorizes such use.

(b) 1. If transportation is provided to pupils and other persons in connection with any extracurricular activity of a public school under par. (a), the school board may make a charge for such transportation, to be paid by the persons transported, sufficient to reimburse it for the cost of providing the transportation. If transportation is provided to pupils and other persons in connection

with any extracurricular activity of a private school under par. (a), the school board shall make a charge for such transportation, to be paid by the private school or the persons transported, sufficient to reimburse it for the cost of providing the transportation.

2. The school board may contract under s. 121.52 (2) (b) for transportation authorized under par. (a) for pupils attending public schools. The school board may authorize a charge for the transportation, to be paid by the persons transported, sufficient to make reimbursement for the cost of providing the transportation.

(8) PAYMENT OF TRANSPORTATION COSTS. (a) The cost of providing transportation for pupils under subs. (1) to (6) and s. 121.57 shall be paid by the school district in which they reside, and no part of such cost may be charged to the pupils or their parents or guardians.

(b) At the end of the school term, every union high school district shall submit to each of its underlying school districts operating only elementary grades a certified statement of the actual cost for the school year, less the amount to be paid for such pupils for that school year under s. 121.58 (2), of transporting the private school pupils residing in the underlying school district under sub. (2) (b). On or before June 30 in each year each underlying school district shall reimburse the union high school district for the net cost of transporting its resident private school pupils as so reported in the statement.

(9) TRANSPORTATION IN AREAS OF UNUSUAL HAZARDS. (a) In school districts in which unusual hazards exist for pupils in walking to and from the school where they are enrolled, the school board shall develop a plan which shall show by map and explanation the nature of the unusual hazards to pupil travel and propose a plan of transportation if such transportation is necessary, which will provide proper safeguards for the school attendance of such pupils. Copies of the plan shall be filed with the sheriff of the county in which the principal office of the school district is located. The sheriff shall review the plan and may make suggestions for revision deemed appropriate. The sheriff shall investigate the site and plan and make a determination as to whether unusual hazards exist which cannot be corrected by local government and shall report the findings in writing to the state superintendent and the school board concerned. Within 60, but not less than 30, days from the day on which the state superintendent receives the sheriff's report, the state superintendent shall determine whether unusual hazards to pupil travel exist and whether the plan provides proper safeguards for such pupils. If the state superintendent makes findings which support the plan and the determination that unusual hazards exist which seriously jeopardize the safety of the pupils in their travel to and from school, the school board shall put the plan into effect and state aid shall be paid under s. 121.58 (2) (c) for any transportation of pupils under this subsection. Any city, village or town may

reimburse, in whole or in part, a school district for costs incurred in providing transportation under this subsection for pupils who reside in the city, village or town.

(am) Any person aggrieved by the failure of a school board to file a plan with the sheriff as provided in par. (a) may notify the school board in writing that an area of unusual hazard exists. The school board shall reply to the aggrieved person in writing within 30 days of receipt of the aggrieved person's notice. The school board shall send a copy of the board's reply to the sheriff of the county in which the principal office of the school district is located and to the state superintendent. Upon receipt of the school board's reply, the aggrieved person may request a hearing before the state superintendent for a determination as to whether an area of unusual hazard exists. If the state superintendent determines that an area of unusual hazard exists, the state superintendent shall direct the school board to proceed as provided in par. (a).

(b) Within 30 days after the sheriff's report is received by the state superintendent, any aggrieved person may request a hearing before the state superintendent on the determination by the sheriff and on the plan. After such hearing, the state superintendent shall proceed as provided in par. (a).

(c) The state superintendent and the department of transportation shall establish a definition of "unusual hazards" and "area of unusual hazards" for the implementation of this subsection. Such definition shall be promulgated, as a rule, by

the state superintendent. Cross–reference: See also ch. PI 7, Wis. adm. code.

(10) ATTENDANCE IN NONRESIDENT SCHOOL DISTRICT. Subject to s. 118.51 (14) (a) 2., a school board may elect to provide transportation, including transportation to and from summer classes, for nonresident pupils who are attending public school in the school district under s. 118.51 or 121.84 (4), or its resident pupils who are attending public school in another school district under s. 118.51 or 121.84 (4), or both, except that a school board may not provide transportation under this subsection for a nonresident pupil to or from a location within the boundaries of the school district in which the pupil resides unless the school board of that school district approves.

History: 1971 c. 162; 1973 c. 89, 107, 333; 1975 c. 60, 392, 421; 1977 c. 227, 252, 418; 1981 c. 20 s. 2202 (51) (e); 1983 a. 27, 175; 1985 a. 29 s. 3202 (43); 1985 a. 218, 225, 240; 1993 a. 399, 492; 1995 a. 27 s. 9145 (1); 1995 a. 439; 1997 a. 27, 113, 164; 1999 a. 9, 117; 1999 a. 150 s. 672; 2001 a. 57; 2005 a. 68, 224; 2009 a. 185; 2013 a. 20.

121.55 Methods of providing transportation. (1) School boards may provide transportation by any of the following methods:

(a) By contract with a common carrier, a taxi company or other parties.

(b) By contract with the parent or guardian of the pupil to be transported. If the school board and

the parent or guardian cannot agree upon the amount of compensation, the department shall determine the amount of compensation to be designated in the contract.

(c) By contract with another school board, board of control of a cooperative educational service agency or the proper officials of any private school or private school association.

(d) By contract between 2 or more school boards and an individual or a common carrier.

(e) By the purchase and operation of a motor vehicle.

(3) (a) If the estimated cost of transporting a pupil under s. 121.54 (2) (b) 1. is more than 1.5 times the school district's average cost per pupil for bus transportation in the previous year, exclusive of transportation for kindergarten pupils during the noon hour and for pupils with disabilities, the school board may fulfill its obligation to transport a pupil under s. 121.54 (2) (b) 1. by offering to contract with the parent or guardian of the pupil. Except as provided in pars. (b) and (c), the contract shall provide for an annual payment for each pupil of not less than $5 times the distance in miles between the pupil's residence and the private school he or she attends, or the school district's average cost per pupil for bus transportation in the previous year exclusive of transportation for kindergarten pupils during the noon hour and for pupils with disabilities, whichever is greater.

(b) Except as provided in par. (c), if 2 or more pupils reside in the same household and attend the

same private school, the contract under par. (a) may, at the discretion of the school board of the school district operating under ch. 119, provide for a total annual payment for all such pupils of not less than $5 times the distance in miles between the pupils' residence and the private school they attend, or the school district's average cost per pupil for bus transportation in the previous year exclusive of transportation for kindergarten pupils during the noon hour and for pupils with disabilities, whichever is greater.

(c) The payment under this subsection shall not exceed the actual cost nor may the aids paid under s. 121.58 (2) (a) for the pupil exceed the cost thereof. A school board which intends to offer a contract under par. (a) shall notify the parent or guardian of the private school pupil of its intention at least 30 days before the commencement of the school term of the public school district.

History: 1979 c. 34, 221; 1981 c. 263; 1983 a. 264; 1997 a. 164; 2009 a. 28.