No. 18-1151

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

REPLY BRIEF FOR PETITIONERS

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

CORPORATE DISCLOSURE STATEMENT

No amendments to Petitioners' earlier corporate disclosure statement are necessary. *See* Pet. ii.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES

ARGUMENT

Contrary to the attempts of Respondents to convince the Court otherwise, the operation of the Wisconsin transportation benefit program is not in dispute. As the decision below acknowledged, it is undisputed that under Wisconsin law, two private schools affiliated with the same sponsoring group or religious denomination may not have overlapping attendance areas in order for each to qualify for transportation benefits. *See* App. 18a (declining abstention in this case under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) because "[t]he Wisconsin Supreme Court has already resolved the critical questions of state law").

The material facts of this case are also not in dispute. District's BIO 16 (agreeing). As the decision below acknowledged, it is undisputed that there are no legal, operational, or other *secular* connections between St. Augustine on the one hand and the Roman Catholic Archdiocese of Wisconsin and its schools on the other. The panel majority repeatedly said that the reason St. Augustine and its families could be denied transportation is because they claim to be Catholic. *See, e.g.*, App. 10a ("St. Augustine had to choose between identifying as Catholic and securing transit funding for its students."); *id.* at 15a ("Taking a party's repeated chosen label at face value hardly constitutes a deep-dive into the nuances of religious affiliation."). No other reason was offered.

And, although no federal court should adjudicate its theological claims, it is also undisputed that St. Augustine views itself as *religiously* distinct from those schools operated by the Archdiocese. R. 26 at ¶10.

The only question before this Court is whether Respondents may, consistent with the Religion Clauses of the First Amendment, deny St. Augustine and its students transportation benefits *simply* because St. Augustine refers to itself as "Catholic" while possessing an attendance area that overlaps with a legally- and religiously-distinct Archdiocesan school.

The Seventh Circuit, over a dissent, answered that question in the affirmative. In their petition, Petitioners showed how that answer violates decisions of this Court, particularly cases like *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012 (2017), *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012). Petitioners also showed why that answer requires reconsideration of this Court's decision in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). And they showed how that answer implicates exceedingly important questions of federal law.

Respondents fail to refute any of these arguments. Instead, they use their briefs to try to paint this

dispute as "fact-bound" and state-specific. *See, e.g.*, SPI's BIO 20. It is not. This Court should decline Respondents' invitation to disregard their violation of Petitioners' First Amendment rights.

I. The Seventh Circuit's Decision Conflicts with Relevant Decisions of this Court

The Seventh Circuit's decision below is inconsistent with governing Supreme Court case law interpreting the guarantees of the Religion Clauses in two principal respects. First, the decision impermissibly authorizes government entities to force religious adherents to choose between following their faith tradition and receiving otherwise-available government benefits.

Second, the decision impermissibly allows the government to reject a religious group's assertion that it is not affiliated with another religious group based solely on the religious label the party has assigned to itself.

Respondents fail to rebut these arguments.

A. The Seventh Circuit's Decision Conflicts with *Trinity Lutheran v. Comer*

As Petitioners explained in their petition, this Court's decision in *Trinity Lutheran* makes clear that, absent "a state interest 'of the highest order,'" the state may not require a religious group to "renounce its religious

character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012, 2024 (2017) (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

Yet in this case, Respondents and the Seventh Circuit repeatedly put St. Augustine to that choice. *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 . . . .").

Respondents' response to this logic is superficial. They simply point to the obvious fact that the state program at issue in *Trinity Lutheran* categorically barred all churches from participation whereas the state program at issue in this case only bars religious groups from participation under certain circumstances. SPI's BIO 12-14; District's BIO 9-10. This is an irrelevant distinction for two reasons.

First, it makes no difference at all to the religious adherent whether he or she is being asked to renounce *all* religious faiths (as in *Trinity Lutheran* where only secular entities were eligible for benefits) or simply the one he or she follows (as in this case). The constitutional injury is the same; free exercise of religion is being impeded.

Second, *Trinity Lutheran* itself reiterated that "[a] law . . . may not discriminate against "some or all religious beliefs." *Trinity Lutheran*, 137 S. Ct. at 2021 (quoting and discussing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)). In other words, *Trinity Lutheran* acknowledges that *categorical* religious bans are not the only type prohibited under the First Amendment.

Petitioners do not contest on this appeal that Wisconsin's rule functions as a "second-in-line" rule: in theory, if St. Augustine had applied for transportation benefits before St. Gabriel had, then St. Augustine might have become the state-approved "Catholic" school to receive transportation aid and St. Gabriel would have had to decide between calling itself "Catholic" and receiving such benefits. But Respondents are unable to demonstrate why this affects the constitutional analysis. Although in theory any given religious group is eligible to obtain state aid under Wisconsin's program, in practice the rule adversely affects religious adherents in a dispute with others about religious doctrine (Orthodox versus Reform Jews, Sunni versus Shi'a Muslims, and Missouri Synod versus Evangelical Lutherans). In those cases, the "second in line" must disavow their religious identity in order to obtain state aid. That is not permissible under *Trinity Lutheran*.

B. The Seventh Circuit's Decision Conflicts with Cases of this Court Prohibiting Courts from Defining Denominational Affiliation

Respondents violated both Religion Clauses by taking it upon themselves to define the word "Catholic." The Seventh Circuit ratified this decision.

Logically, there are only two grounds on which Respondents could have based their conclusion that St. Gabriel and St. Augustine were affiliated with the same sponsoring group or religious denomination. First, it might have relied on evidence of secular affiliation: common ownership, overlapping management, common employees, legal control, and so on. Second, it might have relied on evidence of religious affiliation: shared faith or religious doctrine.

As stated above, it is undisputed that secular ties between St. Augustine and St. Gabriel do not, in fact, exist and St. Augustine had repeatedly set forth the facts on that matter to Respondents. *See* R. 26-4; 26-5; 26-6; 26-7; 26-8 (correspondence between St. Augustine and Friess Lake School District); R. 26-9 (St. Augustine's submission to the Wisconsin Department of Public Instruction); R. 33-6 (Friess Lake School District's submission to the Wisconsin Department of Public Instruction).

Consequently, Respondents must have based their decision on religious affiliation. And the record confirms this conclusion. As the Seventh Circuit

explained (with its approval), the SPI made its decision based solely on the *religious* label that St. Augustine assigned to itself – "Catholic." App. 15a. This necessarily means that the government defined the word "Catholic" by concluding that St. Gabriel and St. Augustine mean the same thing when they use that term. The Seventh Circuit described Respondent's actions as "[t]aking [St. Augustine's] repeated chosen label at face value." App. 15a. What is the "face value" of the word "Catholic"? And why should the government get to answer that question, where the term in question is one of *religious* significance?

This Court's cases flatly prohibit this kind of religious decision-making by the government. *See, e.g.*, *Lemon*, 403 U.S. at 613-14 ("excessive entanglement" between the state and religion is impermissible); *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"); Pet. 36-38 (listing additional cases).

Respondents attempt to rebut this argument by asserting, falsely, that Petitioners want the government to "parse out doctrinal distinctions between religious groups." District's BIO 13; *see also* SPI's BIO 16 (suggesting that St. Augustine wants the government "to inquire as to what the School 'means' by the name it gives itself"). Respondents are conflating legal and religious inquiries. Petitioners'

view is and has been that Respondents may *not* engage in any religious inquiry. They must accept Petitioners' claim to be religiously distinct from the Archdiocese of Milwaukee. Instead, in applying Wisconsin law, Respondents must rely on "neutral principles" applicable to religious and non-religious schools alike. App. 28a (Ripple, J., dissenting).

C. The Seventh Circuit's Decision Conflicts with *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*

In *Hosanna-Tabor*, this Court reaffirmed that religious groups 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." *Hosanna-Tabor*, 565 U.S. 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))). Both of the above transgressions committed by Respondents – forcing St. Augustine to choose between receiving state aid and using its preferred religious title and taking it upon themselves to define the word "Catholic" – violate this guarantee of religious autonomy. Although the Seventh Circuit's decision was based in large part on *Employment Division v. Smith*, App. 9a-13a, this Court also clarified in *Hosanna-Tabor* that *Smith*'s rule does not allow the state to override "an internal church decision that

affects the faith and mission of the church itself," *Hosanna-Tabor*, 565 U.S. at 190 – in this case, the selection of a religious title by a religious organization.

The SPI argues that this Court should not consider this argument, which was not raised below. SPI's BIO 17. But the SPI misapprehends the relevant rule. This Court has unambiguously explained that "[o]nce a federal *claim* is properly presented, a party can make any *argument* in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (emphases added) (assertions that ordinance effected both physical and regulatory taking were two separate arguments, not two separate claims; the claim was that a taking had occurred). Petitioners have advanced *claims* that Respondents violated the Religion Clauses throughout this litigation, so they are not barred from making the additional *argument* in support of these claims that Respondent's actions violate the doctrine espoused in *Hosanna-Tabor*. *See also, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) (because party had asserted First Amendment claim below, it could argue as part of that claim that a certain case should be overruled); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (because party had asserted First Amendment claim below, it could argue as part of that claim that the defendant was a government entity).

On the merits, Respondents do little more to address this argument than to restate their previous responses to Petitioners' other Free Exercise and Establishment Clause arguments. But even were Respondents to prevail on those arguments, they are insufficient to answer the *Hosanna-Tabor* question for two reasons.

First, Respondents premise their Free Exercise defense on *Employment Division v. Smith*, *see, e.g.*, SPI's BIO 11, but *Hosanna-Tabor* makes clear that *Smith's* rule applies to "government regulation of only outward physical acts," not "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. Respondents have no real answer to that rule of law.

The SPI does appear to half-heartedly dispute the proposition that St. Augustine's decision to call itself "Catholic" is an "internal . . . decision [of the religious organization] that affects the faith and mission of the [organization] itself." *See* SPI's BIO 19. Petitioners would have thought that proposition to be self-evident. But to witness the government telling a religious organization that it is wrong when the organization insists that one of its actions is infused with religious meaning is to understand the offensiveness of the government's conduct in this case. *Cf., e.g.*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988) (stating that interpreting the propriety of certain religious

beliefs puts the Court "in a role that [it was] never intended to play").

Similarly, Respondents' earlier Establishment Clause arguments do not address the new considerations that *Hosanna-Tabor* brings to the fore: the special protection granted internal church decisions. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 196 (noting the "importan[ce]" of "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission").

Consequently, this Court should assess whether Respondents' actions preventing Petitioners from freely defining their creed complies with *Hosanna-Tabor*.

II. This Court Should Reexamine Its Decision in *Employment Division v. Smith*

Petitioners have argued that, assuming the Seventh Circuit was correct that *Employment Division v. Smith* resolves Petitioners' Free Exercise Claim, *see* App. 10a, this Court should reexamine that case as some of its members have suggested the Court might do on many occasions. *See* Pet. 32.

Respondents really provide only two substantive rejoinders to this request. First, they argue that this case is not the "proper vehicle" for such review. SPI's BIO 21. They are wrong, but that question is addressed in the following section. Second, the SPI

asserts that Petitioners have failed to demonstrate that *stare decisis* is inappropriate here; in the SPI's words, "the bottom line is that [Petitioners] simply disagree with *Smith's* holding." *Id.*

Petitioners will not restate the arguments they provided in their petition, but they did far more than voice disagreement with *Smith*'s holding: Petitioners discussed the analytical flaws of *Smith*, including its failure to analyze the original meaning of the Free Exercise Clause, *Smith*'s inconsistency with prior case law, the unfounded nature of *Smith*'s concerns regarding the practical effects of a contrary holding, and the lack of reliance interests at stake. Pet. 25-33. There is only so much space in a petition for writ of certiorari.

Finally, the SPI suggests that "[t]his is not a case concerning whether Petitioners should be 'excused' from compliance with generally-applicable laws." SPI's BIO 21. But that is just not true. The Seventh Circuit concluded that Wisconsin's transportation program "imposes a neutral and generally applicable limitation on transportation funding." App. 11a. Under its decision, this neutral rule requires all who disagree on what some religious tradition means – be it Catholicism, Lutheranism, Judaism, or Islam – to resolve those religious differences or lose their benefits. In Petitioners view, this limitation impermissibly burdens their free-exercise rights by forcing them to choose between receiving otherwise-

available benefits and the free exercise of their religion and they should therefore be excused from it.

For almost 30 years, *Smith* has seriously weakened the constitutional guarantees of religious freedom in this country. It is time for this Court to right the ship.

III. This Case Raises Important Questions of Federal Law

Petitioners will also not restate their discussion of the importance of the federal issues in this case to the prevention of religious discrimination and the preservation of religious autonomy. *See, e.g.*, Pet. 23, 41-42.

But in an effort to avert this Court's review of this case, Respondents adopt the tactic of attempting to portray this case as a bad "vehicle" for this Court's analysis of the federal issues. They suggest that "[t]his case is based on narrow facts, and pertains to a Wisconsin statute whose interpretation has yet to be fully developed in the Wisconsin courts." SPI's BIO 22. Petitioners will briefly respond to these assertions.

First, this Court need go no further than the Seventh Circuit's decision below for confirmation that "[t]he Wisconsin Supreme Court has already resolved the critical questions of state law" in this case. App. 18a. The twin Wisconsin Supreme Court cases establishing that the funding limitation at issue

applies to private and public schools alike, *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 188 N.W.2d 460 (1971) and straightforwardly elaborating on the law's application, *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 82 Wis. 2d 139, 262 N.W.2d 210 (1978) have been in place since the 1970s. There is no assertion by Petitioners on this appeal that any Wisconsin case law needs further interpretation. The single question is whether the longstanding state program at issue in this case is being applied in a manner consistent with the First Amendment. This case is no more state-law-specific than was *Trinity Lutheran*, which also involved a state aid program. *See Trinity Lutheran*, 137 S. Ct. at 2017. Hence the Seventh Circuit expressly declined to abstain from ruling on the federal issues in this case. App. 18a-19a.

Second, this case is not based on "narrow facts." As discussed, it is undisputed that St. Augustine is legally and religiously distinct from St. Gabriel and the Milwaukee Archdiocese. Petitioners ask this Court to decide whether, for purposes of a state-administered benefit program, the government may conclude that two distinct religious organizations are nevertheless affiliated. It is not difficult to imagine the numerous similar circumstances under which this issue could arise.

CONCLUSION

For the foregoing reasons, 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
June 7, 2019