UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Appeal No. 17-2333

St. Augustine School and
Joseph and Amy Forro,

Plaintiffs-Appellants,

v.

Tony Evers, in his official capacity,
as Superintendent of Public Instruction and
Friess Lake School District,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Eastern District of Wisconsin
Honorable Lynn Adelman, Case No. 16-C-0575

BRIEF OF PLAINTIFFS-APPELLANTS ST. AUGUSTINE SCHOOL AND JOSEPH AND AMY FORRO

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RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case.

St. Augustine School, Inc. and Joseph and Amy Forro

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Wisconsin Institute for Law & Liberty appeared for the Plaintiffs in this case in the district court and appears for the Plaintiffs-Appellants in this Court.

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and

St. Augustine School, Inc. is a Wisconsin non-stock not-for-profit corporation and has no parent corporation.

(ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable.

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JURISDICTIONAL STATEMENT

The action was originally filed in state court and removed by the Defendants-Appellees pursuant to 28 U.S.C. §1441. The district court had jurisdiction as this is a civil action arising under the laws of the United States pursuant to 28 U.S.C. §1331. The Plaintiffs-Appellants asserted causes of action arising under the U.S. Constitution (Equal Protection, Free Exercise and Establishment Clauses) and under 42 U.S.C. §1983. The Plaintiffs also asserted a state law claim under Wis. Stat. §§121.51-121.55. The district court had supplemental jurisdiction of the Plaintiffs-Appellants' state law claim pursuant to 28 U.S.C. §1367. The district court decided and denied Plaintiffs-Appellants' federal claims on the merits and declined to exercise its jurisdiction of the Plaintiffs-Appellants' state law claim and remanded that claim to state court pursuant to 28 U.S.C. §1367(c). There are no claims left for disposition in the district court.

This appeal is taken from the final decision of the U.S. District Court for the Eastern District of Wisconsin on June 6, 2017, by the Honorable Lynn Adelman. Judgment was entered the same day, June 6, 2017. The Notice of Appeal was filed with the District Court on June 28, 2017. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUE

Did the Defendants-Appellees violate the Plaintiffs-Appellants' Constitutional rights when they denied St. Augustine School's requested attendance area based upon their investigation of St. Augustine School's religious beliefs and subsequent determination that St. Augustine school was "Catholic" and thus "affiliated" with the Milwaukee Catholic Archdiocese and by denying transportation benefits to the Forros because their children attended St. Augustine School?

STATEMENT OF THE CASE

Parties and Procedural Background

The Plaintiffs-Appellants (the Plaintiffs) are St. Augustine School ("St. Augustine") and Joseph and Amy Forro (the "Forros"). St. Augustine is an independent religious school that teaches in the tradition of the Catholic faith. (Dkt. #26 at ¶3.) It is operated and under the control of its own board of directors and under the terms of its own articles of incorporation and by-laws. (*Id.* at ¶4) The Forros have three children who attend St. Augustine School. (Dkt. #24 at ¶ 3.)

The Defendants-Appellees (the "Defendants") are Tony Evers in his official capacity as Superintendent of Public Instruction for the State of Wisconsin ("Superintendent Evers") and the Friess Lake School District ("Friess Lake"). (Dkt. #1 at ¶¶ 4-5.) The Plaintiffs assert that the Defendants violated their rights under the First and Fourteenth Amendments by denying them a public benefit because of their religious beliefs; and that in the process of doing so the Defendants improperly probed into the Plaintiffs' religious beliefs in a way that violated the Establishment Clause. (Dkt. #1 at ¶59.) The Plaintiffs also assert that the Defendants violated Wisconsin state law. (Dkt. #1 at ¶71.)

The parties filed cross-motions for summary judgment which were decided by the district court on June 6, 2017 (Dkt. #41.) The district court granted summary judgment to the Defendants on the Plaintiffs' federal claims and remanded the Plaintiffs' state law claim to state court. (*Id.*) Judgment was entered that same day. (Dkt. # 42.) The Plaintiffs filed a Notice of Appeal on June 28, 2017. (Dkt. #43.)

St. Augustine School is completely independent of the Archdiocese of Milwaukee.

St. Augustine is an independent religious elementary and high school located at 1810 Highway CC, Hartford, Wisconsin. (Dkt. #26 at ¶¶ 2-3.) 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.) Incorporated under the name "Neosho Country Christian School, Inc."[1] its articles of incorporation clearly state that it is an interdenominational Christian school for the education of students in the primary and secondary grades. (Dkt. # 26-1 at Art. III.) It is not operated by any religious order of the Catholic Church and is not affiliated with the Catholic Archdiocese of Milwaukee in any way. (Dkt. #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 the Board of Directors. (Dkt. #26-3 at Section 2.) Neither its Articles nor 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 ecclesiastical authority of the Archbishop or otherwise affiliated with or subject to the control of any organ of the Roman Catholic Church. (Dkt. #26 at ¶10.) Although no religious tests may be employed here, 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. (*Id.*) In other words, St. Augustine considers itself religiously distinct from schools operated by the Archdiocese. (*Id.*)

St. Gabriel School ("St. Gabriel") is a private school in Hubertus, Wisconsin. (Dkt. #25 at ¶2.) It is operated under the authority of the 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.

[1] The name was subsequently changed to St. Augustine School, Inc. (Dkt. #26 ¶4; Dkt. #26-2.)

(*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. (Dkt. #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. (Dkt. #25 at ¶ 6.)

The Forros live at 3799 Turnwood Dr., Richfield, Wisconsin. (Dkt. #24 at ¶2.) The Forros have three children who attend St. Augustine. (*Id.* at ¶ 3.) The Forro children live more than 2 miles from St. Augustine (*Id.* at ¶ 4) and live within the attendance area of St. Augustine. (Dkt. #26 at ¶ 13.). St. Augustine is within the boundaries of Friess Lake. (*Id.* at ¶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. (Dkt. #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.*)

Wisconsin law requires the provision of uniform transportation to students in public and private schools.

Prior to 1967, children who attended private schools in Wisconsin were not entitled to

public transportation to their schools. Because this created health and safety concerns, the people amended the Wisconsin Constitution in 1967 to provide that "Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning." *See* Wisconsin Constitution, Art. I, sec. 23. This amendment eliminates any state constitutional concern regarding the State legislature's decision to provide transportation for children attending religious schools.

The amendment to the Constitution was promptly followed by legislation that required that such transportation be provided by the school districts in which the children live and that such transportation be on a reasonably uniform basis with the transportation services that the districts provide for their own public school students. This enabling legislation was created by chapters 68 and 313, Laws of 1967. These facts are all set forth in *Cartwright v. Sharpe*, 40 Wis. 2d 494, 501 (1968) where the Wisconsin Supreme Court noted that: "[w]hat the constitutional amendment and the enabling legislation accomplished was to provide that the same consideration of safety and welfare should apply to public and private students alike." *Id.* at 506. The enabling legislation has been amended from time to time and is currently contained in Wis. Stat. §§121.54 and 121.55.

Under the statutes, there are several ways that a public school district may provide transportation to children attending private schools. *See* Wis. Stat. §121.55. The public school district may: (1) transport them directly in a bus owned by the school district; (2) contract with a third party to transport them: or (3) have the parents transport the children and reimburse the parents through what is referred to as a parent contract. *Id.* The Forros would accept any method of transportation permissible under the statute, but understand that, in this particular

instance, the form of transportation that would have been provided by Friess Lake would have been a parent contract. (Dkt. #24 at ¶7; Dkt. #34-7.) If Friess Lake provided a parent contract to the Forros, Friess Lake has said it would have resulted in payments of $1,500 per school year to the Forros. (Dkt. # 26 at ¶22; Dkt #34-7.)

The Defendants denied transportation for the Forro children to St. Augustine.

Under Wisconsin law, each private school is entitled to an attendance area for transportation purposes. Wis. Stat. §121.51(1). St. Augustine's attendance area is as follows: The northern boundary is Hwy 33. The southern boundary is Good Hope Road. The western boundary is Hwy P, and the eastern boundary is Division Road. (Dkt. #26 at ¶14.) St. Augustine's attendance area includes the entire geographic area that makes up the Friess Lake School District. (*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. (Dkt. #26 at ¶15; Dkt. 26-4.) In making that request, it advised Friess Lake that it was not affiliated with the Archdiocesan Catholic school, St Gabriel, or the Archdiocese itself. (Dkt. #26 at ¶16.) It told the school district 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. (Dkt. #26 at ¶20, Dkt. #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. (Dkt. #26 at ¶21; Dkt. 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.*)

On May 20, 2015, St. Augustine wrote again to Friess Lake, providing its Articles of Incorporation and By-Laws that, as noted above, provide for its independent ownership and operation and further clarified that there had never been any management control or governance affiliation between St. Augustine and either St. Gabriel or the Archdiocese. (Dkt. #26. at ¶17; Dkt. #26-5) By letter dated September 22, 2015, Friess Lake reaffirmed its denial and told St. Augustine that notwithstanding the lack of any legal, operational, or other ties between the schools, Friess Lake still said St Augustine was "affiliated" with St. Gabriel because both were theologically Catholic. (Dkt. #26 at ¶18; Dkt. 26-6.) Although it had no business even considering such a religious question, it refused to accept St. Augustine's explanation that it was wrong, stating that "[y]our belief that there is a distinction between St. Augustine and St. Gabriel's regarding adherence to Catholic principles is your fight, not ours." (*Id.*) In subsequent correspondence, Friess Lake reiterated that it understood the absence of any secular form of connection between the schools but reiterated that it thought there was a religious one, saying that transportation was denied because St. Augustine chose to "use the Roman Catholic moniker." (Dkt. #26 at ¶19; Dkt. #26-7.)

In rejecting the request for transportation, Friess Lake expressly applied a religious test. Friess Lake decided that because St. Augustine says on its website that it is "Catholic," it is affiliated with other schools, like those of the Archdiocese of Milwaukee, who also say that they are "Catholic." Although it had no business asking St. Augustine about its religious character or evaluating the school's religious beliefs, Friess Lake did precisely that. Friess Lake even judged and rejected St. Augustine's claim that "there is a distinction between St. Augustine and St. Gabriel regarding adherence to Catholic principles …." (Dkt. #26 at ¶18; Dkt. #26-6.)

Pursuant to Wis. Stat. §121.51, if there is a dispute between a school district and a private school regarding an attendance area, the dispute can be referred to the Superintendent of Public Instruction. The dispute between St. Augustine and Friess Lake regarding St. Augustine's attendance area was submitted to Superintendent Evers in December, 2015. (Dkt. #26 at ¶23.) On March 10, 2016, Superintendent Evers, through his designee, Michael Thompson, Deputy Superintendent of Public Instruction, issued a decision upholding Friess Lake's determination that St. Gabriel and St. Augustine School were affiliated because St. Augustine said that it accepted Catholic religious tradition. (*Id*. at ¶ 26, Dkt. #26-10; App. 126-133.)

In determining that St. Augustine was affiliated with St. Gabriel, the decision by Superintendent Evers also applied a religious test:

> 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.

(App. 132.) This analysis contains and considers no facts concerning St. Gabriel, no facts concerning the ownership or management of St. Augustine or its constituent corporate documents, and no facts concerning any corporate or other secular affiliation between St. Gabriel and St. Augustine. It suggests no connection between the schools at all other than that both claim to draw from the Roman Catholic tradition. It ignores St. Augustine's explanation that it nevertheless practices its religion differently than St. Gabriel. Because it bases its finding of affiliation only on theological "affiliation," the decision implicitly and necessarily makes a religious judgment rejecting that claim. In other words, the Decision announces a State policy

that religious schools that the Superintendent decides profess the "same" religion may not have overlapping attendance areas regardless of their lack of legal or other secular affiliation.

SUMMARY OF ARGUMENT

Wis. Stat. §121.54(2)(b)1 governs the transportation of students to private schools in the State of Wisconsin. Under that statute, school districts must provide transportation to school children within their boundaries who attend private school if the child lives more than 2 miles from school, lives within the approved attendance area of the private school, and the private school is either within the boundaries of the school district or within 5 miles of the district's boundaries.

Importantly, for purposes of this case, Wis. Stat. §121.51(1) defines "attendance area" as follows:

> 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 added.)

On its face, the highlighted section of the statute appears – or at least could be read – to create an exception based on a religious test, and would require state officials to determine whether two different schools are theologically similar such that they should be considered part of the same religious denomination. But in *Vanko v. Kahl*, 52 Wis. 2d 206, 215 (1971), the Wisconsin Supreme Court held that the statute cannot be read in that way. If it were, the result would be "an apparent constitutional infirmity" because a classification based on religious

affiliation would not be "germane or reasonably related to the purpose of the statute." 52 Wis. 2d at 214. Instead, the Court held that the statute should be construed to forbid "overlapping attendance 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. Thus, under *Vanko*, private schools, regardless of their religious denomination, are prohibited from having overlapping attendance areas only if they are affiliated with or operated by a single sponsoring group.

The test for "affiliation," however, cannot be a religious one. In *Holy Trinity Community School v. Kahl*, 82 Wis. 2d 139 (1978) the Wisconsin Supreme Court considered a subsequent lawsuit brought against the Superintendent by Holy Trinity School, one of the original plaintiffs in *Vanko.* Holy Trinity was one of the many Catholic schools operated by the Archdiocese of Milwaukee, and thus even after the *Vanko* decision it would have been limited in claiming an attendance area that overlapped with other Archdiocesan schools. Holy Trinity, however, wanted a larger attendance area, so it closed as an archdiocesan school but then immediately reopened with its own articles of incorporation and by-laws. It employed many of the same employees, served many of the same students, and leased the school building from the Catholic parish for one dollar per year. 82 Wis. 2d at 146. Based upon the religious composition of the instructional staff and students, the Superintendent of Public Instruction (Superintendent Evers' predecessor) concluded that Holy Trinity was still a Catholic school and, thus, still affiliated with the Archdiocese. *Id.* at 155. But the Wisconsin Supreme Court rejected that conclusion and held that despite its previous history as an archdiocesan school and the makeup of its staff and students, Holy Trinity was nevertheless independent of and not affiliated with the Catholic Archdiocese because it was separately incorporated and managed.

The Wisconsin Supreme Court rejected the notion that the State could "monitor religious schools to determine to what denomination they owe allegiance and with what denomination they are affiliated." *Id* at 149. This, the Court held, would "meddle in what is forbidden by the Constitution the determination of matters of faith and religious allegiance." *Id.* at 150. The State, it said, may not and must not apply a religious test to determine, for example, "who or what is Catholic." *Id.* The Court said applying such a test would be "repugnant to the Constitution." *Id.* at 153. Instead, the government must limit its review of the factors that may constitute "affiliation" to those that are purely legal and secular – specifically, a review of the applicable constituent documents such as the articles of incorporation and by-laws of the school. If there is no legal affiliation between the schools based upon the corporate documents, the State's inquiry must end. *Id.* at 150-53.

But, in this case, Friess Lake and Superintendent Evers imposed the same religious test rejected in *Vanko* and *Holy Trinity*. The Defendants decided that St. Augustine is "Catholic" in the same way that the schools of the Archdiocese of Milwaukee are "Catholic." According to the Defendants, therefore, St. Augustine may not have an overlapping attendance area with St. Gabriel School – the local Archdiocesan school. The Defendants did this even though it is undisputed that St. Augustine has no legal or operational connection to the Archdiocese and its schools, or to any other organ of the Roman Catholic Church. Indeed, they did it even though St. Augustine claims to have religious differences with the Archdiocesan schools. In doing so, the Defendants deprived the Plaintiffs of their constitutional rights.

Moreover, the Defendants acted intentionally. The Plaintiffs specifically made the Defendants aware of the Wisconsin Supreme Court's conclusive interpretation of the statute, and made the Defendants aware of the lack of any legal or institutional affiliation between St.

Augustine and the Archdiocese. But the Defendants did not care. They deemed St. Augustine School and St. Gabriel School to both be "Catholic" and denied St. Augustine an attendance area that overlapped with that of St. Gabriel (which meant that no students who lived within the Friess Lake district, including the Forros' children, would receive transportation to St. Augustine).

ARGUMENT

I. THE DISTRICT COURT COMMITTED ERROR WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS DISMISSING THE PLAINTIFFS' CLAIM UNDER 42 U.S.C §1983

A. The District Court's Decision.

The district court acknowledged in its decision that the Plaintiffs met all of the statutory requirements for transportation regarding location and distance. (App. at 101-102.) The only issue was whether St. Augustine could have an overlapping attendance area with St. Gabriel, the local Archdiocesan school. (App. at 102-103.) The district court acknowledged that St. Gabriel is affiliated with the Milwaukee Catholic Archdiocese and that St. Augustine "is not affiliated with the Archdiocese" (App. at 102) and that St. Augustine considered itself "religiously distinct from schools operated by the Archdiocese."[2] (*Id.*) The district court laid out the facts showing no legal or secular affiliation between St. Augustine and the Archdiocese at page 4 of its decision. (App. at 104.)

[2] The district court correctly noted that St. Augustine has not "extensively described how it differs from a diocesan school" from a religious standpoint. (App. at 102.) But, of course, St. Augustine had no obligation to do so, because that involves a religious test. The district court nevertheless conducted its own investigation – outside the record – of what those differences might be, concluding that St. Augustine "appears" to have "slightly" different religious beliefs and "at least slightly different" religious practices. (App. at 102-103.) The district court did not explain how it came to characterize these differences as "slight." To the extent that this is a "finding of fact," it is not based on anything in the record.

The district court appears to have missed the point on two issues of fact, but neither of them present a material issue of disputed fact. First, the district court misreads the articles of incorporation. The articles of incorporation are in the record as Dkt. # 26-1. They state that the school was originally named Neosho Country Christian School and that it is an "interdenominational Christian school." The district court recites this fact at page 5 of its decision but the district court then says that there is no similar statement for St. Augustine or otherwise indicates whether St. Augustine is affiliated with a religious denomination. That is a misreading of the articles. The record reflects that the change from "Neosho Country Christian School, Inc." to "St. Augustine School, Inc." was simply a name change made in 1994. (Dkt. 26-2.) The articles of incorporation which describe the school as an interdenominational Christian school *are* the articles of incorporation for. St. Augustine. So that when the district court says that the corporate documents do not indicate whether St. Augustine is affiliated with a particular religious denomination (App. at 5) that is simply not true.

The second factual issue is related to the first. The district court also discussed whether the Defendants had received the copy of St. Augustine's articles of incorporation that St. Augustine sent to Friess Lake on May 20, 2015. (App. at 105.) In St. Augustine's letter to Friess Lake of that date (Dkt. #26-5), St. Augustine said as follows:

> We provided the articles of incorporation and bylaws of Saint Augustine School, Inc. to show you that the school was organized and is governed independently of any denomination. The school is organized under chapter 181 of the Wisconsin Statutes. Both the articles of incorporation and the bylaws (also included with this letter for your convenience) show that the corporation was not organized by, is not controlled by, and is not governed by any religious denomination.

In their summary judgment materials the Defendants said that they never received a copy of the articles of incorporation. (Dkt. #33 at ¶15; Dkt. #34 at ¶14.) However, Friess Lake admits receiving the May 20, 2015 letter (Dkt. # 34, ¶ 14) and did not ever tell St. Augustine that

it had not received the articles of incorporation which the letter plainly says were included. Moreover, it appears from the Superintendent's written decision that the State had a copy of the articles of incorporation and that the Superintendent reviewed them. (Dkt. # 26-10 at p.2, fn. 2.)[3] Nor does anyone dispute that St. Augustine's description of what is contained in its articles of incorporation as set forth in its May 20, 2015 letter is accurate. Finally, given the pronounced importance of the articles of incorporation as set forth in *Holy Trinity*, if they were missing, the Defendants never explain why they failed to request them. The obvious answer, of course, is that the Defendants did not care to consider whatever information was contained in the articles of incorporation.[4] They knew from St. Augustine's May 20, 2015 letter that such information would hurt and not help them in the decision to deny St. Augustine its attendance area.

After setting forth the facts, the district court discussed but did not decide the Plaintiffs' state law claim. (App. at 108-117.) The district court instead declined to exercise supplemental jurisdiction and remanded the state law claim back to the state court.[5] The Plaintiffs disagree with much of the district court's discussion of their state law claim. For example, the district court's discussion of state law misreads both *Vanko* and *Holy Trinity,* but the Plaintiffs will only discuss the details of that disagreement below to the extent that it impacts the Plaintiffs' federal law claims.

However, this must be said about the district court's state law analysis – if it is a correct reading of Wisconsin law then the law, itself, is unconstitutional. If the statute permits the

[3] The articles of incorporation which were on file with the State are records of the State of Wisconsin and would have been available to the Superintendent at any time.

[4] The only thing that the Plaintiffs admitted below is that the Defendants did not "consider" the articles of incorporation. (Dkt. #36 at ¶22.)

[5] The district court's decision to decline to exercise its supplemental jurisdiction of the state law claims is not before this Court. Neither side is arguing that the district court abused its discretion in declining jurisdiction and there is nothing unusual about this case that would mandate a different result. *Burritt v. Ditlefsen*, 807 F.3d 239, 252 (7th Cir. 2015).

review and consideration of a school's religious beliefs and religious statements as evidence of its "affiliation" under Wis. Stat. §121.51(1) then the statute is unconstitutional. The Wisconsin Supreme Court, however, expressly disavowed such a reading in *Vanko* and *Holy Trinity*. But whether the Defendants violated the Plaintiffs' constitutional rights based upon a correct or incorrect reading of state law is immaterial to the Plaintiffs' federal law claims. The Plaintiffs' rights were violated by the Defendants (as state actors setting state policy) in either instance.

The district court discussed the merits of the Plaintiffs' federal law claims at pages 17 through 24 of its decision. The district court dismissed the Plaintiffs' Free Exercise claim based on its conclusion that the Defendants had not applied a religious test. Rather, it said that the Defendants' determination that both St. Augustine and St. Gabriel were "Catholic" was based only on secular considerations. The district court dismissed the Plaintiffs' Establishment Clause claim on the bases that this was a single instance of entanglement act by the Defendants and that such a lone instance does not constitute *unconstitutional* entanglement in Plaintiffs' religious affairs. Even if that were not the case, the district court concluded that the Defendants' conduct did not constitute *excessive* entanglement because all they did was look at St. Augustine's website, and based upon that review determined that St. Augustine was "Catholic." According to the district court "[t]hese actions did not involve any participation in, supervision of, or intrusive inquiry into religious affairs." (App. at 122.)

B. The District Court Committed Legal Error in Dismissing the Plaintiffs' Federal Law Claims.

The Defendants violated the Plaintiffs' First Amendment rights not to be denied a public benefit because of the free exercise of their religious beliefs and not to have the government

excessively entangled in their religious beliefs.[6]

1. The Defendants violated the Plaintiffs' rights under the Free Exercise Clause by denying them public benefits based upon their religious beliefs.

Less than two months ago the U.S. Supreme Court said that the Free Exercise Clause protects religious observers against unequal treatment, and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their religious status. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021(2017). The Supreme Court specifically noted 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. *Id* at 2019.[7]

Trinity Lutheran is consistent with a long line of cases holding that a party cannot be denied a religiously neutral benefit that would otherwise be available because of his or her religious belief or practice. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (public school that allows student groups to use school facilities cannot deny that same benefits to a religious student group); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (public university cannot deny printing subsidies available to student groups based on religious viewpoint of a particular student organization); *McDaniel v. Paty*, 435 U.S. 618 (1978) (state cannot withhold right to hold public office to clergy); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (state cannot withhold unemployment benefits based upon a person's religious belief prohibiting her from working on Sundays); *See also Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (state may not deny use of facilities to a student group because it is religious); *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 715 (1994)

[6] The same conduct by the Defendants also violates the Plaintiffs Equal Protection rights but that claim is largely redundant to the First Amendment claims.
[7] The Defendants do not assert any such state interest in this case.

(O'Connor, J., concurring) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.").

These cases establish that no one can be forced to choose between an otherwise available government benefit and the free exercise of their religion. *Trinity Lutheran*, 137 S. Ct. at 2021-2022. To deny a public benefit because a potential recipient is religious, unconstitutionally punishes the free exercise of religion. *Id.* at 2022. Government may not deny benefits because a recipient is religious, nor can it deny those benefits based on what those beliefs are.

There is no doubt that the Plaintiffs were denied transportation because they were operating a school that they claim is "traditionally" Catholic yet religiously distinct from the Catholic Archdiocese. Had St. Augustine claimed to be an independent secular school the Defendants would not have denied them transportation based upon an attendance area that overlaps with St. Gabriel. Had St. Augustine not used "the Roman Catholic moniker," or chosen a different religious perspective that did not draw upon the Catholic tradition, they would not have been denied transportation based on an attendance area that overlaps with St. Gabriel. Had the Forros decided that their religious beliefs were such that their children could attend St. Gabriel and did not need to enroll in an independent school with different religious practices, they would not have been denied transportation. The denial of benefits was a direct result of the Plaintiffs' exercise of religion. It was because of their particular religious identity.

But the district court concluded that denying the Plaintiffs this benefit based upon their theological statements and religious practices was acceptable. It concluded that the Defendants' decision that "Catholics" get only one attendance area and the Plaintiffs are in the "Catholic" club was somehow not about religion. The district court said that this was not a religious test because the Defendants could have applied a similar standard to a private secular school, but that

cannot be the case as a matter of law. There is no legal equivalence to believing oneself to be "Catholic" that could be applied to a secular school.

If St. Augustine School was instead the secular Augustine Academy and St. Gabriel was instead the secular Gabriel Elementary and High School, there is no belief system that would be the legal equivalent of "Catholic" and that would allow the Defendants to conclude under the Wisconsin Statutes that they are affiliated for purposes of §121.51(1). Could the Defendants conclude that two military-style schools that have no legal affiliation of any type are "affiliated" and cannot have over-lapping attendance areas? What about two independent schools that are both French language immersion schools? Such an approach would be untenable under the statute because almost all schools will be alike in some ways but not in others. Nowhere in the statute does it say that educational or philosophical similarities are material to the determination of a school's attendance area.

There are at least four substantial legal problems with the district court's conclusion. First, if the Defendants were simply engaged in the secular enterprise of identifying the "sponsoring group" of St. Augustine, what is that group? It is not the Archdiocese of Milwaukee. It is undisputed that St. Augustine has nothing to do with the Archdiocese. (Dkt. #26 at ¶7.) It is not the Roman Catholic Church or any religious order or organization connected with or operated by the church. It is undisputed that St. Augustine was not affiliated with or operated by any religious order or other arm of the church. (*Id.*) There is no evidence that St. Augustine was a member of any association of Catholic schools and it was not listed in the Official Catholic Directory of Schools (known as the Kennedy Directory). (Dkt. #25 at ¶6.)

"Catholic" is not a secular standard. It is a matter of professed *religious* belief. It is not an indicia of membership but of creed, albeit one that may mean very different things to different

people. There is a sponsoring group that is Catholic (the Archdiocese), but St. Augustine is not a part of that group. Neither the Defendants nor the district court identified any such group to which St. Augustine belonged. They spoke only of religious belief.

Second, the district court suggested that "affiliation" with a sponsoring group might mean something other than a legal affiliation. The district court says that hypothetically the Defendants might prevent two Montessori schools from having over-lapping attendance areas, (App. at 119) but the district court offered no legal support for that conclusion and points to no basis in the statute for such a result. There is nothing in the statute that says that a hypothetical Augustine Montessori School which is legally independent of a hypothetical Gabriel Montessori School (with separate articles of incorporation, separate boards of directors, separate faculty and no other legal or secular affiliation) could be denied over-lapping attendance areas based upon the fact that they both believe in the concept of Montessori education.

There is nothing about believing in a Montessori education philosophy or principles that would allow the Defendants to deny two independent Montessori schools over-lapping attendance areas under the statute. It can surely be said that Montessori schools, military schools, or language immersion schools are alike in some ways. But neither their approach to pedagogy nor their similar curriculum would be sufficient to rule that they are affiliated even though they are legally independent. An entity's educational beliefs have nothing to do with "affiliation" under the statute. The district court certainly provided no legal basis for this novel idea and there is nothing at all in the statute that would support its viability.

Third, even if similar practices or beliefs *could* be the basis for "affiliation" under state law (which the Plaintiffs dispute), that is not what the Defendants did here. 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. *In fact, they pointedly refused to accept St. Augustine's claim that its beliefs and practices were not the same as St Gabriel's and that it was not "part of" the Roman Catholic Archdiocese.* The Defendants looked at a name – Catholic – what Friess Lake called a "moniker" – and nothing else.

Fourth, what the Defendants did here is apply a religious test. Even if state law might permit a finding of affiliation based on some common secular practices or memberships that is not what the Defendants did. 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. (Dkt. #26 at ¶10.)

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. (*Id.*) 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. (Dkt. #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.*) But the Defendants rejected those statements by the Plaintiffs and concluded that St. Augustine and the Forros are in fact affiliated with the Archdiocese.

This was the ultimate religious test by the Defendants. The Defendants made a religious judgment – even if it was one rooted in ignorance or carelessness and formed without any serious inquiry – about religion. St. Augustine and St. Gabriel may disagree about what being

"Catholic" means. One may think that it is "Catholic" and the other is not. It was not up to the State to resolve this dispute by saying one is right and the other wrong or that both are right. By resolving the dispute it is making a religious judgment.

Even if the district court was correct about Montessori schools and they could be lumped together because they both use the same term to describe themselves or follow some common practices, the district court overlooked a crucial legal distinction. Montessori is not a religion and Montessori schools do not have the First Amendment protection that religious schools have under the Free Exercise and Establishment clauses. To use the recent example of *Trinity Lutheran*, Missouri could have denied schools the right to participate in the tire recycling program on any number of bases – enrollment, median income of students' families, annual revenue, history of playground injuries, etc. – but it could not deny participation based upon religious belief or exercise.

And that is precisely what the Defendants did here. Because the Plaintiffs decided that their religious beliefs required them to start a school separate from the Archdiocesan schools, they have been denied an otherwise available benefit. The Defendants decided that there can be only one use of the "Roman Catholic moniker" and that anyone who claims to be in the Roman Catholic tradition must get together and operate a common school or be denied transportation benefits that would otherwise be available. Of course, St. Augustine's religious differences with St. Gabriel and the Archdiocese are not Friess Lake's "fight." But it cannot deny otherwise available benefits because the Plaintiffs' free exercise of their religion compels them to have that fight. To do is to impair free exercise. It is to treat the Plaintiffs differently because of what they believe and what those beliefs compel them to do.

The district court seems to have believed that *Vanko* permits the state to determine who is

in the same religious denomination and that it need not restrict itself to secular criteria such as legal affiliation. (App. at 110-111.) In *Vanko*, the Wisconsin Supreme Court hypothesized two schools – one school operated by Franciscans and another school by Jesuits. It suggested that perhaps two such schools could not have overlapping attendance areas under the statute. 52 Wis. 2d at 215-216. The Franciscans and Jesuits are – or at least in its *Vanko* hypothetical the Court assumed that they are – agencies of, or organizationally connected to, the officially constituted Catholic Church and subject to its authority. These secular facts of legal and organizational association might support a conclusion of "affiliation." But nothing in *Vanko* permits the state to determine that two schools are affiliated by asking whether they espouse the "same" religion, which is all that the Defendants and the district court asked in this case.

In fact, the Wisconsin Supreme Court, itself, said in *Holy Trinity* that the *Vanko* hypothetical was *dicta*, 82 Wis. 2d at 145, and held that two schools that both looked "Catholic" were not affiliated for purposes of the statute. Holy Trinity was a former archdiocesan school that closed its doors and then immediately reopened as an independent Catholic school with its own articles of incorporation for the purpose of gaining a larger attendance area under the statue. It employed many of the same employees (including five Catholic nuns), served many of the same students, and leased the school building from the Catholic parish for one dollar per year. 82 Wis. 2d at 146. It moved its Catholic religious instruction to a "released time program", but only the Catholic religion was taught in that program. Approximately 75 percent of the students attended the Catholic released time program and 80 percent of the students attending the school were children of the members of the Holy Trinity Catholic Parish. *Id.* at 146-47. It was abundantly clear that Holy Trinity School, its staff and its students, could be characterized as "Catholic" if such a characterization by the State was constitutionally permissible, but the

Wisconsin Supreme Court concluded that such a characterization was not constitutionally permissible, and that the only thing that mattered was Holy Trinity's lack of legal ties to the Catholic Archdiocese.

Compare those facts to the facts of this case. It is undisputed here that St. Augustine is not under the authority of any religious order of the Catholic Church (neither Franciscan, nor Jesuit, nor any other). Rather:

- St. Augustine is an independent school and not under the authority of the Archbishop or any religious order of the Catholic Church but rather under the authority of its own Board of Directors. (Dkt. #26 at ¶¶ 3-4, 7.)

- Its articles of incorporation say that it is an interdenominational Christian school. (Dkt. #26-1)

- Its By-Laws make it clear that "all powers of the corporation" belong to the Board of Directors (By-laws Section 2) and that the Board may take "all lawful acts" with respect to the conduct of the corporation. (Dkt. #26 at ¶ 6; Dkt. #26-3.)

- There is no over-lapping ownership, management, staff or employees between St Augustine and St. Gabriel (or between St. Augustine and any other school) (Dkt. #26 at ¶ 8.)

- The curricula and policies of St. Augustine are determined solely by St. Augustine and not by the Archdiocese or any other third party. (Dkt. #26 at ¶9.)

- St. Augustine does not recognize and does not need to comply with either the Archdiocesan religious curriculum for high school students as set by the U.S. Conference of Catholic Bishops, or the Grade Specific Catholic Education Curriculum for elementary schools required for schools sponsored by the Archdiocese. (Dkt. #26 at ¶10.)

The only way for the Defendants to have concluded that St. Augustine is affiliated with a "religious denomination" under §121.51 is to consider and evaluate its religious beliefs. But that is the absolute wrong (and unconstitutional) thing for the State to do. The permissible thing to do is to determine whether a religious denomination is the "sponsoring group." But that must be a legal and secular test, not a religious one. When the question about religious beliefs is asked

and the availability of benefits turns on the answer, free exercise is impaired. Persons are necessarily discriminated against – they are denied benefits – because of what they believe.

If the Defendants and the district court were right – if the state is free 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 – then it would be free to lump the Lutherans of the Missouri Synod in with those in the Evangelical Lutheran Church in America. Anglican Catholics could be thrown in with the Roman Catholics as could those adhering to Orthodox and Reform Judaism or Shia and Sunni Islam. After all, each of them use the "Lutheran," "Catholic," "Jewish" and "Muslim" monikers. The decision of each of these religious groups to identify and exercise their religion separately would be exercised only at the expense of losing a benefit they would otherwise receive. That is unconstitutional. If the State wants to tie different entities to a single denomination, it must do so by finding secular connections – legal control, common ownership, etc. – not religious affinity. The district court never explains how merely claiming to be in the "catholic *tradition*" places St. Augustine in the same school system as St. Gabriel and other archdiocesan schools.

However cavalier their analysis, the Defendants decided, "who or what is Catholic." That is "repugnant to the Constitution." *See Holy Trinity,* 82 Wis. 2d at 153. What could be more compelling than the words the Superintendent used in determining that St. Augustine was not entitled to its lawful attendance area:

> 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.

(Dkt. #26-10 at page 7.)

If this is not a decision that was made based upon the Plaintiffs' religion, it would be hard to see what is. This analysis contains no facts concerning any legal or other secular affiliation between St. Gabriel and St. Augustine or asserting how St. Gabriel and St. Augustine are operated by a single sponsoring group; rather it imposes a religious test, pure and simple, and the district court committed error by allowing it to stand.

2. The Defendants violated the Plaintiffs' rights under the Establishment Clause to be free from excessive entanglement by the State into their religious beliefs.

The district court rejected the Plaintiffs' Establishment Clause claim for two reasons. The first was based on its conclusion that this was only a one time inquiry to one religious school and that such a singular occurrence cannot result in a finding of excessive entanglement. (App. at 121.) The district court cited a single case – *Nelson v. Miller*, 570 F. 3d 868 (7th Cir. 2009) – to support that conclusion.

But that is not a fair reading of *Nelson*, nor does it take into consideration the other decisions in this area or the undisputed facts of this case. *Nelson* was a prisoner case in which a Roman Catholic convict requested and was denied meatless meals on Fridays. The prisoner prevailed on his Free Exercise claim. He also advanced an Establishment Clause argument based on a letter from the prison chaplain asking him to provide documentation to support his religious belief that he was entitled to meatless meals as penance for his sins. This Court held

that the single letter from the chaplain was not sufficient to support an Establishment Clause claim based on excessive entanglement. The Court said that "[e]ntanglement is a question of kind and degree." [citations omitted] and that "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Nelson* 570 F.3d at 881. The Court specifically concluded that the chaplain's one-time correspondence had little effect on the plaintiff and did not advance or inhibit religion. *Id.* at 881-882.

But this does not mean that a single episode of entanglement that causes harm to a litigant gets a free pass. Moreover, the Plaintiffs are not the first ones to challenge the Defendants' policy (see *Holy Trinity*). But even if this were the first violation by the Defendants, there is no rule that the first constitutional violation is "on the house." Whether viewed as a distinct violation of the free exercise clause or excessive entanglement under the Establishment Clause, the government is precluded from taking action based on an assessment of someone's religious beliefs and practices. *See, e.g.,Lyng v. Nw. 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"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (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) (refusing to "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).

This Court recognized that in *Nelson*. It said that the chaplain's letter in Nelson was inappropriate and improperly entangled the chaplain in a religious matter:

> [W]e do note that [the chaplain's] May 2, 2002 letter, in which [the chaplain] cited several Bible passages purportedly contradicting [the Plaintiff's] beliefs regarding penance, improperly entangled him in matters of religious interpretation. It simply is not appropriate for a prison official to argue with a

prisoner regarding the objective truth of a prisoner's religious belief.

Nelson 570 F.3d at 881.

Moreover, one hallmark delineating *excessive* entanglement is coercion. *Tanford v. Brand*, 104 F.3d 982, 985 (7th Cir. 1997). State conduct that is not coercive is less likely to be found unconstitutional. That distinguishes this case from the chaplain's letter in *Nelson*. This Court concluded that the chaplain's letter did not advance or inhibit religion. *Nelson* 570 F.3d at 881-882. Here there is a financial penalty for the Plaintiffs exercising their religion. As the Supreme Court pointed out in *Trinity Lutheran*, that is coercion and constitutes a constitutional violation. 137 S. Ct. at 2021-2022.

Further, the actions of the Defendants in this case did not involve a onetime act by a single employee (like in *Nelson*), but were instead the official interpretation and application of the statute by Superintendent Evers and Friess Lake. Here, the Defendants announced and applied official policy interpretations of a state statute.

For example, Friess Lake School District Administrator John Engstrom stated in his April 29, 2015 letter to St. Augustine that the school district had made the following determination:

> **It is our interpretation** that we do not have to transport to another Catholic school that overlaps the attendance area of a Catholic school for which transportation is already being provided. **We also interpret the phrase** "…or operated by the same sponsoring group, agency, corporation, or governing administrative authority" to mean that we do NOT transport to your school merely because you have a different governing body.

(Dkt. #26-8.)

In the April 29th letter, Mr. Engstrom made it clear that he was speaking on behalf of the district and that this was the policy decision of the Friess Lake School Board. ("The Friess Lake School District Board of Education did not approve your stated attendance area.") (*Id.*)

In his letter dated November 10, 2015, Mr. Engstrom explains that the district obtained

legal counsel on its decision and reiterates the district's commitment to a specific policy regarding the transportation of private school students:

> **Our interpretation** is that by bussing (sic) students to St. Gabriel School, we are in compliance with applicable rules pertaining to the transportation of private school students. We have sought the legal counsel of WASB, and were advised that **our interpretation** was correct. . . . We believe that **we are correctly interpreting** the applicable state statues [sic]. . . . **We do not believe** that we are required to transport children to another Roman Catholic School.

(Dkt. #26-7.) These letters express Friess Lake's official policy of refusing overlapping attendance zones to religious schools that identify with a similar religious heritage, even if they are legally separate organizations and share no common ownership or management.

The same is true for Superintendent Evers. On March 10, 2016, Superintendent Evers, through his designee, Michael Thompson, Deputy Superintendent of Public Instruction, issued a written decision upholding Friess Lake's determination that St. Gabriel and St. Augustine School were affiliated because St. Augustine said that it accepted Catholic religious tradition. (Dkt. #26-10.) This was not some type of one-time occurrence by a single state employee, but rather a statement of the official policy of both Friess Lake and Superintendent Evers in implementing their statutory authority.

The analogy would be if the prison in the *Nelson* case announced and applied a policy that all inmates must provide documentation of their religious beliefs which prison staff would analyze for religious accuracy before the prison would act on any request to accommodate such beliefs. If the letter in *Nelson* had established a policy rather than being a one-time incident, there is little doubt that this Court would have found an Establishment Clause violation as well as the Free Exercise violation that it did find.

The impropriety of what the Defendants did here is illustrated in *New York v. Cathedral Academy*, 434 U.S. 125 (1977). In that case, the State of New York allowed for payments to

nonpublic schools as reimbursement for the cost of recordkeeping and testing services required by state law. But in administering the program, the State attempted to deny the payments to religious schools unless those schools could establish that the funds were not being used for religious purposes. The State argued it was doing so to avoid an Establishment Clause violation, but the Supreme Court held that such a process was, itself, an Establishment Clause violation. The Supreme Court held that:

> detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments….The 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.

Id. at 132–33. Yet, here, we have that very litigation. The Defendants are deciding the contours of a religious denomination. They are not limiting themselves to a determination of secular affiliation, but asking who is theologically affiliated. That inquiry is not excused by the fact that the Defendants did not look very hard.

The district court concluded that the Defendants did not *excessively* entangle themselves in the Plaintiffs' religious affairs because they did not conduct an extensive inquiry. (App. at 122). But entanglement is based on what the government does, not just on how hard it works at it. To be sure, the scope of an inquiry might be relevant to a claim of excessive entanglement, but the sine qua non of the violation is that government is intruding into religious affairs. Imagine that the government announced that it would henceforth determine religious affiliation based on a review of school websites and concluded that "there really is no difference" between an Episcopalian and a Lutheran school such that they should be considered part of a single Protestant denomination and, therefore, "affiliated" for purposes of §121.54(2)(b)1. Wouldn't that excessively entangle the government in religious matters? Assume that a state anti-

discrimination agency decided that it would evaluate whether a school was part of a church's ministry solely on publicly available materials and determined, based in its examination of a church website that a Baptist congregation's operation of a school was not "really" part of its ministry and, therefore, not eligible for the ministerial exception that the Religion Clauses require. Wouldn't that excessively entangle the government in religious matters? See, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190–91 (2012) (teacher at an Evangelical Lutheran School is covered by the ministerial exception in the Religion Clauses).

These type of decisions – like the decision of the Defendants in this case – may not take much time or effort, but that does not mean that they don't involve excessive entanglement by the state in matters of religion. The district court said if the Defendants had engaged in what it called an "extensive inquiry" as was done by the Superintendent in *Holy Trinity* then that would have been a violation. But it is impossible to say that what the Superintendent did in *Holy Trinity* is somehow more egregious than what he and Friess Lake did here. There were certainly a lot of facts in the record in *Holy Trinity* regarding Holy Trinity School, but it is not clear from the decision that the Superintendent was the source of those facts. There are, of course, also a lot of facts in the record in this case about St. Augustine. Moreover, it is not clear that the Superintendent in *Holy Trinity* did any independent investigation of the school in that case, while both he and Friess Lake did so here. In addition, in *Holy Trinity*, the facts that the Superintendent looked at were objective things like the teaching staff, the student population, the source (and landlord) of the school building, etc. He did not look at the religious beliefs of Holy Trinity School as set forth in its publications. Here, the Superintendent did not focus on objective facts about St. Augustine but instead focused solely on its statements of its religious

beliefs. If anything, what the Superintendent did by focusing on St. Augustine's religious beliefs is worse than what he did in *Holy Trinity.*

That investigation is precisely the type of entanglement that the Wisconsin Supreme Court in *Holy Trinity* properly sought to avoid:

> The problem is basically whether this court, for the purpose of determining a school-attendance area, may inquire, and determine, whether the school is affiliated with the Roman Catholic denomination or whether, under the strictures imposed upon government by the First Amendment to the Constitution of the United States, we are required to refrain from making that inquiry and determination.

Holy Trinity, 82 Wis. 2d at 144.

The question answered itself. Determining whether a person or school is affiliated with a particular religious denomination is excessive entanglement. The district court should have but did not ask itself the same question – how could the district court decide if the Defendants' determination that both St. Augustine and St. Gabriel were "Catholic" was correct without, itself, engaging in an improper religious test? But instead of asking itself that question, the district court conducted its own investigation as to St. Augustine's religious beliefs. (App. at 103.)

Moreover, the district court, when it did its own investigation, like the Defendants, ignored the information contained in St. Augustine's articles of incorporation. The articles of incorporation are in the record as Dkt. # 26-1. They state that the Neosho Country Christian School (which later changed its name to St. Augustine School, Inc.) is an "interdenominational Christian school." The record reflects that the change from "Neosho Country Christian School" to "St. Augustine School, Inc." was simply a name change made in 1994 and nothing else. (Dkt. 26-2.) The Zignego affidavit (Dkt. #26) – and the May 20, 2015 letter from St. Augustine to Friess Lake (Dkt. #26-5) – clearly identify the articles for Neosho County Christian School, Inc. as the articles for the current corporation and encloses amendments changing the name. So that when the district court says that the corporate documents reflect that Neosho Country Christian

School was an interdenominational Christian school but do not indicate whether St. Augustine is affiliated with a particular religious denomination (App. at 105) that is simply not accurate.

By disregarding the undisputed facts regarding the lack of any legal or secular affiliation between St. Augustine and St. Gabriel, by failing to limit themselves to the articles of incorporation and by-laws, by conducting an investigation into the religious beliefs of St. Augustine, and by administering the statute in a way that made the Plaintiffs' religious beliefs relevant the Defendants excessively entangled themselves in the Plaintiffs' religious beliefs and violated their rights under the Establishment Clause.

II. THE DISTRICT COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT TO THE PLAINTIFFS.

In addition to reversing the decision of the district court granting summary judgment to the Defendants, this Court should affirmatively grant summary judgment to the Plaintiffs. 42 U.S.C. §1983 provides that "[e]very person[8] who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This Court has established the elements of a §1983 claim as follows: (1) the plaintiff held a constitutionally protected right; (2) the plaintiff was deprived of that right in violation of

[8] The Defendants can be sued for constitutional deprivations in violation of §1983. State officials in their official capacities, such as Defendant Evers, when sued for declaratory and injunctive relief are considered "persons" under §1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, n. 10 (1989) (citing *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14 (1985) & *Ex Parte Young*, 209 U.S. 123, 159-60 (1908)). Municipal entities, such as Defendant Friess Lake, are also "persons" under §1983 and can be sued for monetary, declaratory, and injunctive relief when an official district action is responsible for the constitutional deprivation. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690-91 (1978).

the Constitution; (3) the defendants intentionally caused the deprivation; and (4) the defendants acted under color of state law. *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989). The Plaintiffs presented undisputed evidence to the district court that supported each element of their claim.

A. The Plaintiffs held and have been deprived of constitutionally protected rights.

1. The Defendants violated the Plaintiffs' Free Exercise rights.

As more fully explained above, under the Defendants' policy, St. Augustine was denied the attendance area that it is entitled to under §121.51. St. Augustine would have had its attendance area approved as requested if it had not said on its website that it is "an independent and private traditional Roman Catholic School …." Its statement of its religious faith is what caused it to be denied an attendance area. Had its beliefs not been rooted in the Roman Catholic tradition or if it were a secular school, its attendance area would have been approved.

Under the Defendants' policy, the Forros were denied funding for transportation for their children because they exercised their right to have their children attend a religious school and the nature of the religious school that they chose. The Forros would have received transportation for their children (or been reimbursed under a parent contract) if they sent their children to a non-religious private school that was located precisely where St. Augustine is located. If they had sent their children to a religious school that did not claim to be rooted in the Roman Catholic tradition or if they had made the different religious choice to send their children to the Archdiocesan school, they would have received transportation. The Plaintiffs First (and Fourteenth) Amendment rights were violated because Friess Lake and Superintendent Evers based a denial of a public benefit on the Plaintiffs' religious beliefs.

2. The Defendants violated the Plaintiffs' right not to have the State excessively entangled in their religious affairs.

The Defendants' conduct that violated the Plaintiffs' rights under the Establishment Clause is discussed at length at pages 25-31, *supra* and will not be repeated here. In summary, the Defendants investigated the Plaintiffs' religious beliefs for the purpose of applying a religious test to St. Augustine's requested attendance area and the Forros request for transportation benefits. They involved themselves in determining who and what are Catholic. Their investigation and decision-making process resulted in excessive entanglement in the religious affairs of the Plaintiffs.

B. *The Defendants intentionally caused the deprivation*.

The Plaintiffs made both Friess Lake and Superintendent Evers aware of the Wisconsin Supreme Court's interpretation of Section 121.51. Further, they put forward facts demonstrating that St. Augustine is not affiliated with St. Gabriel:

- On April 27, 2015, St. Augustine advised Friess Lake that St. Augustine was not affiliated with St. Gabriel or the Archdiocese ("Our governing body is our Board of Directors and we receive no funding from nor communicate with the Diocese on matters of education….Saint Gabriel Catholic School and Saint Augustine School, Inc. have two different governing bodies, the former has Archdiocese oversight, and the latter has an independent board of directors.") (Dkt. #26-4.)

- On May 20, 2015, St. Augustine provided its Articles of Incorporation and Bylaws to Friess Lake, provided the citation to *Holy Trinity*, and further clarified that there has never been "any management, control or governance affiliation between St. Augustine School, Inc. and St. Gabriel's or between St. Augustine School, Inc. and the Archdiocese of Milwaukee." (Dkt. #26-5.)

- On September 22, 2015, Friess Lake responded, ignoring *Holy Trinity* and St. Augustine's Articles of Incorporation and Bylaws, stating, "Your belief that there is a distinction between St. Augustine and St. Gabriel's regarding adherence to Catholic principles. That is your fight, not ours." (Dkt. #26-6.) Friess Lake stated that because they both called themselves Catholic they could not have overlapping attendance areas. (*Id.*)

- On November 10, 2015, Friess Lake sent a letter to St. Augustine acknowledging that St. Augustine and St. Gabriel were "incorporated under a different charter," but stating that because they both "use the Roman Catholic moniker" they could not have overlapping attendance areas. (Dkt. #26-7.)

- In early January, 2016, St. Augustine sent a letter to Superintendent Evers' legal counsel (and copying Friess Lake) again citing *Holy Trinity* and stating that [Friess Lake's] kind of reasoning – that it can properly determine that St. Augustine School is Roman Catholic – results in excessive entanglement of state authority in religious affairs and is meddling in what is forbidden by the Constitution, the determination of matters of faith and religious allegiance. (Dkt. #26-9.)

- In its January, 2016 letter, St. Augustine again explained the lack of affiliation between itself and St. Gabriel. (*Id*.)

In response to the above, in his March 10, 2016 decision the Superintendent acknowledged receipt of all of these materials (Dkt. #26-10), but his analysis turned on St. Augustine's statements of its religious beliefs on its website and not on facts concerning the ownership, management, or corporate documents of St. Augustine or St. Gabriel, or facts concerning any corporate or other affiliation between St. Gabriel and St. Augustine, or facts establishing that St. Gabriel and St. Augustine are affiliated or operated by a single sponsoring group.

Based upon the undisputed facts, the Defendants were specifically informed about the law and knew there was no legal affiliation between St. Augustine and St. Gabriel. They knew, because St. Augustine told them, that their kind of reasoning "results in excessive entanglement of state authority in religious affairs and is meddling in what is forbidden by the Constitution, the determination of matters of faith and religious allegiance." (Dkt. #26-9.)

Knowledge of the law and the failure to follow the law is proof of intent. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (holding that a public official's violation of clearly established statutory or constitutional rights is sufficient to establish intent). *See also Anderson v. Creighton*, 483 U.S. 635, 649, n. 2 (1987) (government officials can be expected to have basic knowledge of constitutional rights (even in the absence of those rights being brought to their

attention)); *Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988) (public officials are charged with knowledge "if the appropriate legal standard is, by objective standards, clearly established at the time the official undertook the activity at issue"). Moreover, Superintendent Evers' predecessor was the Defendant in both *Vanko* and *Holy Trinity*. Thus, it would be preposterous to argue that the decision by the Defendants was an innocent mistake based upon lack of knowledge.

Moreover, it has been almost 70 years since the U.S. Supreme Court's decision in *Everson v. Bd. of Ed. of Ewing Twp*., 330 U.S. 1 (1947), in which the Supreme Court approved a public program to provide busing transportation to parents whose children attended private schools including religious schools, and in which the Supreme Court held that the State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." 330 U.S. at 16.

Here, despite the teachings of the U.S Supreme Court regarding the First Amendment, the Defendants did not limit their affiliation inquiry to legal and secular matters such as the articles of incorporation and by-laws of St. Augustine, but instead entangled themselves in the Plaintiffs' religious beliefs and analyzed their religious faith. They applied a religious test and denied public benefits on the basis of religious beliefs. That is an intentional violation of the Plaintiffs' constitutional rights. *Harlow*, 457 U.S. 800 at 818.

C. The Defendants acted under color of state law.

"'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'" *Schreiber v. Joint School Dist. No. 1, Gibraltar*, Wis., 335 F. Supp. 745, 747 (E.D. Wis. 1972)

(quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). Both Friess Lake and Superintendent Evers took official government action, misusing powers granted to them by statute, and thus acting under color of state law.

Friess Lake may argue that it cannot be held liable under §1983 because it was merely following state statutes regarding "religious denomination" and, as a result, it should not be liable for the violation. Any such argument should be rejected for two reasons. First, Friess Lake was not following state law, it was violating state law. Friess Lake was on notice that the language regarding "religious denomination" was read out of the statute by the Wisconsin Supreme Court and Friess Lake disregarded the law as set forth by the Wisconsin Supreme Court. Friess Lake cannot reasonably say it relied on the language regarding "religious denomination" when the undisputed facts show that it was informed by the Plaintiffs regarding the proper interpretation of the statute by the Wisconsin Supreme Court.

Second, even if Friess Lake could reasonably claim that it relied on the language in the statute, it would still be liable because it was not merely following state law, but was enforcing its own policy of determining whether two schools can share an attendance zone. Under federal law, a municipality that makes a discretionary decision under the authorization of a state statute is liable under §1983. *Snyder v. King*, 745 F.3d 242, 247 (7th Cir. 2014). The question is whether the statute provides room for discretion or whether it must simply be obeyed as written. Choosing a particular action that is permitted by state law is a "deliberate choice [by the municipality] to follow a course of action . . . made from among various alternatives." *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986).

Under the state statute at issue here, school districts are given discretion to approve or reject attendance zones submitted by private schools, Wis. Stat. §121.51(1); they are not

commanded to accept what they are presented. For example, the statute is silent as to how to divide the district's geographic area between two or more schools affiliated or operated by a single sponsoring group. Districts and private schools have to work that out themselves.

Here, Friess Lake adopted an attendance zone policy that constitutes an unconstitutional method of implementing §121.51. By choosing an unconstitutional method of following §121.51, Friess Lake has adopted its own policy, making it liable under §1983. *See N.N. ex rel. S.S. v. Madison Metro. Sch. Dist.*, 670 F. Supp. 2d 927, 937 (W.D. Wis. 2009).

That Friess Lake had, in fact, adopted its own policy is clear from its correspondence to St. Augustine (cited at page 27, *supra*.). As a reminder, Friess Lake School District Administrator John Engstrom stated in his April 29, 2015, letter to St. Augustine that the school district had made the following determination:

> **It is our interpretation** that we do not have to transport to another Catholic school that overlaps the attendance area of a Catholic school for which transportation is already being provided. **We also interpret the phrase** "…or operated by the same sponsoring group, agency, corporation, or governing administrative authority" to mean that we do NOT transport to your school merely because you have a different governing body.

(Zignego Decl. Ex. H; PPF ¶35.)

In the April 29th letter, Mr. Engstrom made it clear that he was speaking on behalf of the district and that this is the policy decision of the Friess Lake School Board. ("The Friess Lake School District Board of Education did not approve your stated attendance area.") (*Id.*) These letters express Friess Lake's policy of refusing overlapping attendance zones to religious schools that claim similar religious beliefs, even if they are legally separate organizations and share no common ownership or management.

Friess Lake School District and Superintendent Evers are both entities of the State performing acts clearly within the scope of their official duties. Friess Lake's obligation to

recognize St. Augustine's attendance area and to provide transportation for the Forros comes directly from the Wisconsin statutes. Likewise Superintendent Evers' responsibility regarding attendance areas comes straight from the Wisconsin statutes. Friess Lake and Superintendent Evers only had and have power to act in this matter because of state law – the quintessential example of acting under color of law.

CONCLUSION

The Plaintiffs request that this Court reverse the decision of the district court and grant summary judgment in their favor. Upon granting summary judgment to the Plaintiffs, the Plaintiffs request that this Court remand the case to the district court for a determination of damages and attorneys' fees and issuance of an injunction preventing the Defendants (and their successors) from applying a religious test under Wis. Stat. §§121.51 and 121.54 all as permitted under 42 U.S.C. §1988.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Cir. Rule 32 because it contains 12,735 words.

2. This brief complies with the typeface requirements of Cir. Rule 32 because it has been prepared in a proportionally spaced typeface using **Microsoft Word 2007** in **12 point Times New Roman and with 11 point Times New Roman for the footnotes**.

Dated this 4th day of August, 2017.

/S/ RICHARD M. ESENBERG

CERTIFICATE OF SERVICE

I certify that on August 4, 2017, I electronically filed the foregoing Brief with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for the following participants in the cases, who are registered CM/ECF users:

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APPENDIX
APPELLANTS' COURT OF APPEALS BRIEF
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CIRCUIT RULE 30(d) CERTIFICATION

I certify that this appendix contains all of the materials required by Circuit Rule 30 (a) and (b).

/s/ RICHARD M. ESENBERG

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

[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.*

§ 121.51(1), "affiliated with the same religious 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

[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.

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 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

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 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

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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 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.

[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

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 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.

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own standards and criteria for its accredited member schools. https://en.wikipedia.org/wiki/American_Montessori_Society (last viewed June 6, 2017).

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 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

[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.

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 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**.

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[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.

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

ZIGNEGO EX. J

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]

[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.

RELEVANT FACTS

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 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.

[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.

- 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:

- 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]

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

- 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

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 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"

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

program in the school. *Id.* 144. The *Kahl* court found all these facts sufficient to 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 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

[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.

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

[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.

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

Dated this 10th day of March, 2016

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