No. __-____

In The

Supreme Court of the United States

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

v.

JILL UNDERLY, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF PUBLIC INSTRUCTION, *ET AL.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether summary reversal is warranted where the Seventh Circuit did not consider this case in light of *Espinoza v. Montana Dep't of Revenue*, 591 U.S. ___, 140 S. Ct. 2246 (2020) as ordered by this Court on July 2, 2020.

2. Whether summary reversal is warranted where the Seventh Circuit concluded that an overlapping state remedy rendered unnecessary resolution of the Petitioners' federal constitutional claims under 42 U.S.C. § 1983 in compliance with this Court's mandate.

3. Whether summary reversal is warranted where the Seventh Circuit declined to hold that the Petitioners' First Amendment rights were violated, despite agreeing that the Respondents withheld from the Petitioners otherwise-available public benefits "for reasons that can be tied to [the Petitioners'] religious preference" and following a "doctrinal determination" by the government. App. 4a, 14a.

PARTIES TO THE PROCEEDING

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

CORPORATE DISCLOSURE STATEMENT

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

DIRECTLY RELATED PROCEEDINGS

- *St. Augustine School v. Evers*, No. 2016cv225; Washington County Circuit Court; no judgment entered;

- *St. Augustine School v. Evers*, No. 16-C-0575, U.S. District Court for the Eastern District of Wisconsin; judgment entered June 6, 2017;

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

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

- *St Augustine School v. Evers*, No. 17-2333, U.S. Court of Appeals for the Seventh Circuit; judgment entered Oct. 11, 2018;
- *St. Augustine School v. Taylor*, No. 18-1151, Supreme Court of the United States; judgment entered August 3, 2020;
- *St. Augustine School v. Taylor*, No. 2021AP265-CQ, Supreme Court of Wisconsin; no judgment entered;
- *St Augustine School v. Underly*, No. 17-2333, U.S. Court of Appeals for the Seventh Circuit; judgment entered December 20, 2021.

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OPINIONS AND ORDERS BELOW

The decision of the Wisconsin Superintendent of Public Instruction is unreported but is reproduced at App. 191a-202a. The opinion and order of the United States District Court for the Eastern District of Wisconsin is reported at 276 F. Supp. 3d 890. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the District Court's judgment is reported at 906 F.3d 591. The Seventh Circuit's order denying Petitioners' petition for rehearing and rehearing en banc is unreported but is reproduced at App. 205a-206a. This Court's order granting the Petitioners' petition for writ of certiorari, vacating the judgment of the Seventh Circuit, and remanding for further proceedings is reported at 141 S. Ct. 186.

The Seventh Circuit's order certifying a question of state law to the Supreme Court of Wisconsin is unreported but is available at 2021 WL 2774246 and is reproduced at App. 111a-121a. The Supreme Court of Wisconsin's order accepting certification is unreported but is reproduced at App. 105a. The Supreme Court of Wisconsin's opinion answering the certified question and remanding the cause to the Seventh Circuit is reported at 2021 WI 70, 398 Wis. 2d 92, 961 N.W.2d 635. The Seventh Circuit's decision reversing the judgment of the district court and remanding for further proceedings is reported at 21 F.4th 446. The Seventh Circuit's order denying Petitioners' petition for rehearing is unreported but is

available at 2022 WL 170868 and is reproduced at App. 203a-204a.

JURISDICTION

The Seventh Circuit issued its opinion and entered final judgment on December 20, 2021. App. 1a. The Petitioners timely filed a petition for rehearing on January 3, 2022. R. 82[1]; Fed. R. App. P. 40(a)(1). The Seventh Circuit issued its order denying Petitioners' petition for rehearing on January 19, 2022. App. 203a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

Wisconsin Stats. §§ 121.51, 121.54, and 121.55, the Wisconsin transportation aid statutes most relevant to this case, are reproduced in the Appendix at App. 207a-219a.

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[1] "R." refers to the Seventh Circuit's docket; "Dkt." refers to the District Court's docket.

INTRODUCTION

This case, involving Wisconsin's private school transportation aid program, is before this Court for a second time. In 2020 this Court examined the Seventh Circuit's alarming conclusion that the State of Wisconsin could, consistent with the First Amendment, force Petitioner St. Augustine School "to choose between identifying as Catholic and securing transit funding for its students." App. 133a. This Court vacated the Seventh Circuit's judgment and ordered it to consider this case in light of *Espinoza v. Montana Dept. of Revenue*, 591 U.S. ___, 140 S.Ct. 2246 (2020), which this Court had since decided. App. 122a-123a.

But the Seventh Circuit did not do so. Instead, ignoring this Court's mandate and the substantial constitutional question it identified, it *sua sponte* certified to the Supreme Court of Wisconsin the question of whether the Respondents were violating *state* law, on its own unbriefed (and, as will be shown, incorrect) theory that if state law were being violated there would be no need to consider *Espinoza*. App.115a.

After the Supreme Court of Wisconsin confirmed that state law had to be applied consistent with the First Amendment and, therefore, that religion could not be considered in the provision of transportation aid, *see, e.g.*, App. 21a, 41a, the Seventh Circuit continued to ignore the mandate and the crucial question of

Espinoza's applicability, instead concluding that the Respondents had violated state law because their denial of benefits "was not justified by neutral and secular considerations, but instead necessarily and exclusively rested on a doctrinal determination . . . ." App. 4a. The Respondents, the Seventh Circuit agreed, had "with[held] state benefits for reasons that can be tied to the religious preference of the" Petitioners. App. 14a.

While one might conclude, in light of *Espinoza*, that this was tantamount to a finding that the Respondents had violated the First Amendment, and even though the only claims at issue in the case are federal constitutional claims, the Seventh Circuit inexplicably concluded it was not "necessary to reach any constitutional issues in this case" and thus not necessary to consider the Petitioners' claims in light of *Espinoza* as this Court had ordered. App. 12a. Having not resolved any of the claims presented, the Seventh Circuit remanded the case to the District Court for a determination of remedy, in its words, "if any." App. 15a.

The Seventh Circuit committed summarily reversible error in three different ways.

First, it is well-settled that when this Court issues its mandate in a case a federal appellate court must execute it as written. It cannot "vary [this Court's decree], or examine it for any other purpose than execution; or give any other or further relief; or review

it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). This Court ordered the Seventh Circuit to consider the Petitioners' claims in light of *Espinoza*. App. 123a. That is a clear directive. But the Seventh Circuit did not do so. Instead, it concocted its own theory of the case and purported to resolve the case on those new grounds. This "refus[al] to give effect to [this Court's] mandate . . . may be controlled by this court . . . upon a new appeal." *Baltimore & O.R. Co. v. United States*, 279 U.S. 781, 785 (1929).[2]

Second, as the Petitioners pointed out at the first available opportunity below, *see* R. 70:16, the Seventh Circuit's novel view of this case—that a finding that the Respondents violated state law renders resolution of the Petitioners' federal § 1983 claims unnecessary—contravenes established case law of this Court that "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Zinermon v. Burch*, 494 U.S. 113, 124 (1990). That is, even assuming that a state law claim were properly presented here (it is not), "[i]t is no answer that the State has a law which

[2] Mandamus is an alternate means of enforcing compliance with this Court's mandate, *Baltimore & O.R. Co.*, 279 U.S. at 785, but here a writ of certiorari is a perfectly adequate remedy. *See, e.g.*, *Ex parte Fahey*, 332 U.S. 258, 260 (1947) (mandamus against judges proper "only where appeal is a clearly inadequate remedy").

if enforced would give relief. *The federal remedy is supplementary to the state remedy*." *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (emphasis added). To dispose of this case, the Seventh Circuit *must* answer the question of whether the Respondents violated the Petitioners' First Amendment rights.

Third, and perhaps most importantly, the Seventh Circuit's conclusions, quoted above, that the Respondents denied the Petitioners otherwise-available benefits *because of their religious preference* and *based on religious considerations* remove all doubt that the Respondents violated the First Amendment. Yet in its original decision, the Seventh Circuit said otherwise, holding that states can ration benefits by religious affiliation. In its second decision, it went out of its way to avoid saying they cannot. This Court can rectify this omission by finally concluding this six-year-long case by summary disposition. *See* Supreme Court Rule 16.1.

Alternately, this Court should order plenary review of the Petitioners' First Amendment claims. This case involves important federal questions relating to the government's authority to deny otherwise-available public benefits to religious adherents, and the Seventh Circuit's refusal to condemn the Respondents' actions as contrary to the First Amendment conflicts with relevant decisions of this Court. *Cf.* Supreme Court Rule 10(c).

STATEMENT OF THE CASE

Wisconsin's Transportation Aid Laws

Under Wisconsin law, qualifying private school students are entitled to transportation to and from school in the form of transportation services or transportation funding. *See generally* App. 209a, 218a. To qualify for transportation to a particular private school, the student must reside a minimum distance from the school and within that school's "attendance area." *See* 209a. The school's "attendance area" is "the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located." App. 207a.

Although private schools are largely unconstrained when drawing attendance areas, the statutes provide that "[t]he attendance areas of private schools affiliated with the same religious denomination shall not overlap." App. 207a.[3]

Confronted with a question over the constitutionality of a requirement that seemingly applied only to religious schools, the Wisconsin Supreme Court in 1971 construed the prohibition on overlapping attendance areas to apply "to all private schools

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[3] This rule is subject to an exception involving single-sex schools not relevant here. *See* 207a.

affiliated or operated by a *single sponsoring group*, whether . . . secular or religious." *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971) (emphasis added).

In a subsequent case, the Wisconsin Supreme Court further clarified that in applying the prohibition on overlapping attendance areas to religious schools, government officials could not "meddle into what is forbidden by the Constitution[:] the determination of matters of faith and religious allegiance." *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 82 Wis. 2d 139, 150, 262 N.W.2d 210 (1978).

Thus, as interpreted by the Supreme Court of Wisconsin, the statutory restriction against overlapping attendance areas operates as a straightforward means of limiting transportation benefits to one school per area per sponsoring group. The Petitioners have no quarrel with this framework; indeed, they are entitled to benefits under this framework.

This case arises instead because of the illegal actions the Respondents took in determining the threshold question of affiliation as applied to Petitioner St. Augustine School. They took it upon themselves to determine St. Augustine's religious affiliation, going so far as to reject the school's own professions about its own religious identity, despite the lack of any dispute that those professions were sincere.

Factual Background

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

St. Augustine is not operated by any religious order of the Catholic Church and is not affiliated with the Catholic Archdiocese of Milwaukee in any way. 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 its board of directors. Dkt. 26-3 at Section 2. Neither its articles nor its by-laws reveal any legal, operational, or other connection with any other sponsoring entity, and do not make—or commit—the corporation to be subordinate or associated with such an entity, including the Roman Catholic Church or its Milwaukee Archdiocese. It is not subject to the

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

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

St. Augustine sometimes describes itself as a "Catholic" or "Roman Catholic" school, including on its website. *See, e.g.*, App. 5a. To the extent that it is relevant (and it should not be), St. Augustine believes that it operates more fully within the Catholic tradition than Archdiocesan schools and considers itself to be more faithfully following in that tradition. *See* Dkt. 26 at ¶10. In other words, St. Augustine considers itself to be religiously distinct from schools operated by the Archdiocese. *Id.*

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

St. Augustine's curricula and values are determined solely by its own board of directors, administration, and staff. 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 need to 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.

In summary, it is *undisputed* that there is no legal, operational, or other secular connection between St. Augustine and the Roman Catholic Church as represented by the local Archdiocese of Milwaukee. Further, it is *undisputed* that St. Augustine considers itself to be religiously distinct from the schools of the Archdiocese.

Petitioners Joseph and Amy Forro are the parents of three children who attended St. Augustine at all times relevant to this dispute. Dkt. 26 at ¶13. During those years the Forro children lived within the attendance area of St. Augustine, which includes the entire geographic area that makes up the Friess Lake School District. *Id.* at ¶¶13-14. The Forros chose to send their children to St. Augustine specifically because of its traditional religious values which the Forros believe to be different from those of an Archdiocesan school. Dkt. 24 at ¶5. The Forros did not consider it a choice between two equivalent

"Catholic" schools—St. Augustine or St. Gabriel—but instead a choice between a school that implemented their religious values (St. Augustine) and other schools, public and private (including those operated by the Archdiocese), that did not. *Id.*

On April 27, 2015, St. Augustine made a request pursuant to Wis. Stat. § 121.54 to Friess Lake for transportation for the Forro children to and from St. Augustine. Dkt. 26 at ¶15; Dkt. 26-4. In making that request, it advised Friess Lake that it was an "independent" Catholic school that was not affiliated with the Archdiocesan Catholic school, St. Gabriel, or the Archdiocese itself. Dkt. 26 at ¶16; Dkt. 26-4 at 1-2. It told Friess Lake that it received no funding from and did not communicate with the Archdiocese. *Id.*

Nevertheless, Friess Lake denied the request on April 29, 2015 because St. Augustine's attendance area overlapped with the attendance area of St. Gabriel. 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 are affiliated because they both say that they are "Catholic" schools. Dkt. 26 at ¶21; Dkt. 26-6 at 1. As a result, Friess Lake refused to approve St. Augustine's attendance area and refused to provide transportation to the Forro children. Dkt. 26-6. In subsequent correspondence, Friess Lake informed St. Augustine: "Your belief that there is a distinction between St. Augustine and St. Gabriel's regarding

adherence to Catholic principles is your fight, not ours. You both call yourself Catholic schools." Dkt. 26-6 at 1.

Consistent with state law, *see* App. 207a, the dispute between St. Augustine and Friess Lake regarding St. Augustine's attendance area was submitted to the Wisconsin Superintendent of Public Instruction ("Superintendent") in December, 2015. Dkt. 26 at ¶23. On March 10, 2016, the Superintendent issued a decision upholding Friess Lake's determination that St. Gabriel and St. Augustine were both "affiliated with the Roman Catholic denomination." App. 201a. The decision relied principally on statements on St. Augustine's website referring to itself as "Catholic" or "Roman Catholic." App. 200a-201a.[5]

Procedural Background

St. Augustine and Joseph and Amy Forro ("Petitioners") sued the Superintendent and Friess

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[5] Although there was some dispute below about whether the Superintendent actually considered St. Augustine's original articles of incorporation, the Seventh Circuit earlier concluded that the record failed to establish that the Superintendent did so. App. 130a-132a. The Petitioners do not challenge that determination on this appeal, which is largely immaterial to its constitutional claims. *See, e.g.*, App. 152a & n.14 (Ripple, J., dissenting) (explaining that "[t]he materials submitted to the Superintendent made the Superintendent well aware that St. Augustine is legally independent from St. Gabriel and the Archdiocese.")

Lake ("Respondents") in April of 2016 in state court. App. 167a. The Petitioners alleged violations of the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause, requesting relief pursuant to 42 U.S.C. § 1983, and also asserted a state law claim. *See id.*

The Respondents removed the suit to federal court pursuant to 28 U.S.C. § 1441. *See id.* On June 6, 2017, on cross-motions for summary judgment, the United States District Court for the Eastern District of Wisconsin ruled in Respondents' favor on the federal claims and remanded the state claim to state court. *Id.* at 190a.[6]

The Petitioners appealed the rulings on the Free Exercise and Establishment Clause claims. *See* App. 125a. With respect to the former, they argued that the Respondents were forcing them to choose between use of their chosen religious label ("Catholic") and receipt of an otherwise-available government benefit; with respect to the latter, they argued that the Respondents had improperly assumed the quasi-ecclesiastical role of determining that when St. Gabriel and St. Augustine each used the label

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[6] The district court had jurisdiction over the federal claims pursuant to 28 U.S.C. § 1331 as this is a civil action arising under the Constitution and laws of the United States. The court declined to exercise supplemental jurisdiction over the state law claim and remanded that claim to state court pursuant to 28 U.S.C. § 1367(c). App. 190a. The state law claim is not at issue here.

"Catholic," they meant the same thing. *See, e.g.*, App. 129a-130a. A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed on October 11, 2018. App. 125a. It acknowledged that under its holding "St. Augustine had to choose between identifying as Catholic and securing transit funding for its students" and "the Forros could send their children to a school that more precisely reflects their religious values only if they declined transportation benefits," but ratified this state of affairs because Wisconsin's transportation program was a "valid and neutral law of general applicability." App. 132a-133a (quoting *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990)). The court likewise concluded that the Superintendent did not engage in "an impermissible inquiry into the religious character of St. Augustine" but instead merely "read and credited St. Augustine's statements on its website and busing request form that it was a Catholic—specifically a Roman Catholic—school." App. 136a, 138a.

Judge Ripple dissented, criticizing the Court's decision as an "exercise in label reading." App. 157a (Ripple, J., dissenting). He noted, among other things, that the Court's resolution had implications for other faiths. It would allow the State to determine that the Evangelical Lutheran Church in America and the Lutheran Church-Missouri Synod were the same religious denomination because they both call themselves Lutherans, or that Reform Judaism and Orthodox Judaism are the same denomination, or

that Sunni and Shi'a Islam are the same denomination. *Id.* at 155a-156a. He noted that the panel decision raised "haunting concerns about the future health of the Religion Clauses in this circuit," calling into question the Constitution's "careful protection of the *individual* liberty to adhere to, and act on, one's *personal* religious beliefs." App. 157a.

Petitioners timely filed a petition for rehearing en banc, which the Seventh Circuit denied on December 7, 2018. App. 205a-206a. Petitioners then timely filed a petition for writ of certiorari with this Court. *See* App. 122a-123a.

On July 2, 2020, the Supreme Court granted the Petitioners' petition, vacated the Seventh Circuit's judgment, and remanded the case to that court for further consideration in light of *Espinoza v. Montana Dep't of Revenue*, 591 U.S. ___, 140 S. Ct. 2246 (2020). *Id.*

Back before the Seventh Circuit, the parties briefed the effect of *Espinoza* on this case. *See, e.g.*, App. 114a. Petitioners argued, among other things, that *Espinoza*'s injunction against conditioning benefits on an organization's religious character did not permit an evaluation of those beliefs or an allocation of benefits "among" religions. *See* R. 61:10-19. However, the Seventh Circuit did not issue an opinion discussing the case in light of *Espinoza*. Instead, on February 16, 2021, the Seventh Circuit *sua sponte*

certified to the Wisconsin Supreme Court the following question:

> For purposes of determining whether two or more schools are "private schools affiliated with the same religious denomination" for purposes of Wis. Stat. 121.51, must the state superintendent rely exclusively on neutral criteria such as ownership, control, and articles of incorporation, or may the superintendent also take into account the school's self-identification in sources such as its website or filings with the state[?]

App. 121a. In the Seventh Circuit's view, if "state law requires the authorities to use neutral criteria such as corporate structure, then there is no need for us to say anything further about the Religion Clauses of the U.S. Constitution" (and thus *Espinoza*) because "[t]here is no such relationship between the two schools, and the St. Augustine families will get their benefits." App. 114a-115a.

Following briefing and oral argument before it, *see* App. 107a, 109a, the Wisconsin Supreme Court answered the certified question in an opinion issued on July 2, 2021. App. 16a-104a. It explained:

> We conclude that, in determining whether schools are "affiliated with the

> same religious denomination" pursuant to Wis. Stat. § 121.51, the Superintendent is not limited to consideration of a school's corporate documents exclusively. In conducting a neutral and secular inquiry, the Superintendent may also consider the professions of the school with regard to the school's self-identification and affiliation, but the Superintendent may not conduct any investigation or surveillance with respect to the school's religious beliefs, practices, or teachings.

App. 21a. It made clear that its decision was driven by the First Amendment. *See* App. 41a.

The Wisconsin Supreme Court expressly declined to apply its holding to the facts of this case. App. 20a-21a. But it observed that while the Superintendent could consider a school's "professions" in conducting an affiliation inquiry, "[h]ere St. Augustine professes that *while it is Roman Catholic, it is independent of and unaffiliated with the Archdiocese*." App. 42a (emphasis added).

The parties thereafter filed statements before the Seventh Circuit. R. 70, 75-76. In its statement, the Petitioners explained that although the Wisconsin Supreme Court's decision plainly disclosed a violation of state law, the only claims currently pending in this case were the § 1983 claims for violations of the First Amendment and the Seventh Circuit was still

required to resolve them under this Court's mandate. R. 70:2; *see also* R. 70:14-16.

On December 20, 2021, the Seventh Circuit issued an opinion reversing the District Court's judgment. App. 1a-15a. The Seventh Circuit concluded that "the Superintendent's decision in the case before us was not justified by neutral and secular considerations, but instead necessarily and exclusively rested on a doctrinal determination that both St. Augustine and St. Gabriel's were part of a single sponsoring group—the Roman Catholic church—because their religious beliefs, practices, or teachings were similar enough." App 4a-5a. Further, the Court explained that the Superintendent had "with[held] state benefits for reasons that can be tied to the religious preference of the disfavored group," namely St. Augustine. App. 14a.

Although these statements were tantamount to a holding that the First Amendment was violated, the Court for inexplicable reasons said that it did "not find it necessary to reach any constitutional issues in this case." App. 12a. It thus did not apply *Espinoza* to the facts of this case. It instead explained that it was "enough to decide whether the Superintendent properly applied Wisconsin law" and decided that he had not done so. App. 12a-15a. The Seventh Circuit then ordered the District Court to "determine the amount of monetary damages (if any) to which the Forros or St. Augustine might be entitled, or what

type of injunctive relief (if any) for any plaintiff is proper." App. 15a.

The Petitioners filed a petition for rehearing and/or for clarification. R. 82. They noted that the Seventh Circuit's decision did not comply with this Court's mandate. *Id.* at 8-9. They explained again that there was no state law claim at issue in the case—the only state law claim having been remanded to state court in 2017—and again pointed out that even if such a claim were in issue, under Supreme Court case law "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Id.* (quoting *Zinermon*, 494 U.S. at 124). Thus, the Petitioners argued, there *must* be resolution of St. Augustine's constitutional claims in this case. *Id.* at 4.

The Petitioners also asked that the Seventh Circuit at least provide clarification on how the District Court was to resolve its direction to determine an appropriate remedy given that no claim had been resolved to which such a remedy—compensatory damages, for example—could attach. *Id.* at 10-11. Clarification would "save the parties and the District Court the need to litigate the question." *Id.* at 11.

The Seventh Circuit denied the petition without comment. App. 203a-204a.

This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Disobeyed this Court's Mandate

This Court should summarily reverse the Seventh Circuit's decision in order to enforce compliance with its mandate, which that court disregarded.

It is "indisputable" that "a lower court is bound to respect the mandate of an appellate tribunal." *F.C.C. v. Pottsville Broad. Co.*, 309 U.S. 134, 140 (1940). When this Court resolves a case and remands it to an inferior court, that court should "scrupulously and fully" execute this Court's mandate. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 325 (1961). The inferior court "cannot vary [this Court's decree], or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *Sanford Fork & Tool Co.*, 160 U.S. at 255.

That rule was not followed here. In 2018 the Seventh Circuit ruled that the Respondents had not violated the Petitioners' First Amendment rights, making clear that it believed that the state could allocate benefits among religions and deny them to persons who, although claiming otherwise, have been found or assumed to be part of some other religious group that has already received its "share." App. 125a. In 2020

this Court vacated the Seventh Circuit's judgment and "remanded" "the case . . . for further consideration in light of *Espinoza*." App. 123a. But not only did the Seventh Circuit not analyze the case under *Espinoza*, it chose not to resolve St. Augustine's First Amendment claims at all. App. 12a. Instead, it came up with its own, alternate theory for resolving the case under state law requiring a lengthy detour to the Supreme Court of Wisconsin.

Where a lower court "mistakes or misconstrues the decree of this court, and does not give full effect to the mandate," resort may be had to this Court via a new appeal. *Sanford Fork & Tool Co.*, 160 U.S. at 255. This Court's decision in *Yates v. Aiken*, 484 U.S. 211 (1988) provides a helpful example.

Yates focused on the actions of the South Carolina Supreme Court after this Court vacated its judgment and remanded the case for further consideration in light of one of its decisions, *Francis v. Franklin,* 471 U.S. 307 (1985), which cast doubt on jury instructions used to obtain the petitioner's conviction. *Yates*, 484 U.S. at 212-13. On remand, the state supreme court briefly acknowledged that the jury instruction "suffered from the same infirmities . . . addressed in *Francis*" and present in one of its own intervening decisions, *State v. Elmore*, 279 S.C. 417 (1983). *Id.* at 233. But it then upheld the conviction as consistent with state law, declining to apply *Elmore* retroactively without ever considering whether *Francis* had retroactive effect. *Id.* at 212-214.

On appeal, this Court granted certiorari for a second time because it was "concerned that the South Carolina Supreme Court had not fully complied with our mandate." *Id.* at 214. It explained that its earlier order remanding the case "was predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question" and that its mandate "contemplated that the state court would consider whether, as a matter of federal law, petitioner's conviction could stand in the light of *Francis*"; the South Carolina Supreme Court's discussion of whether to apply a state precedent retroactively was thus not "responsive to [the Court's] mandate." *Id.* at 214-15. The Court then examined *Francis*' application to the case itself "[s]ince the state court did not" do so and unanimously reversed. *Id.* at 215, 218.

This case is identical to *Yates* in all relevant respects. As in *Yates*, this Court ordered consideration of one of its cases because of the substantial federal question presented—here, the Petitioners are asserting federal Free Exercise arguments similar to those that were made in *Espinoza*. But as the South Carolina Supreme Court did in *Yates*, the Seventh Circuit declined to consider the federal claims as instructed and instead purported to resolve the case under state law. And, as in *Yates*, this non-compliance is reversible.

Yates is not an isolated example of this Court ensuring full execution of its orders. *See, e.g.*, *Stanton v. Stanton*, 429 U.S. 501 (1977) (per curiam) (vacating judgment and remanding because lower court, in failing to "consider the issue presented to it" by this Court, did "not comply with [the Court's] mandate); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136, 142-43 (1967) (reversing where proceedings on remand sought "the opposite of what our prior opinion and mandate commanded"; parties could not negotiate around this Court's order); *Gen. Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) (per curiam) (granting relief where lower court "refused or failed to comply with the judgment of this Court").

This is not surprising; the "hierarchical structure of our judicial system," *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 733 (6th Cir. 2019) (Sutton, J., concurring), depends for its function on obedience by inferior courts to the orders of superior courts. That obedience was lacking here. While this Court is not merely an error-correcting court, it has a strong interest in ensuring that its mandates be followed. This Court should reverse[7] the

[7] Alternately, this Court could vacate and remand, but for reasons discussed below, *see infra* Part III, reversal is the better route.

Seventh Circuit's decision lest other inferior courts begin treating this Court's orders as optional.[8]

II. The Seventh Circuit's Conclusion that a Potential, Overlapping State Remedy Rendered Unnecessary Resolution of the Petitioners' Federal Constitutional Claims under 42 U.S.C. § 1983 in Compliance with this Court's Mandate Conflicts with Relevant Decisions of this Court

The Seventh Circuit's justification for ignoring this Court's instruction remains unclear. Although it

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[8] The closest the Seventh Circuit ever got to a discussion of *Espinoza* in its legal analysis was a single "*see*" citation to the case following its statement that as a matter of state law the Wisconsin Supreme Court requires the Wisconsin Superintendent to apply the State's transportation aid program consistently with the First Amendment. App. 14a. But the Court never commented on whether the Respondents had failed to do so and violated the First Amendment as interpreted in *Espinoza*—indeed, it never discussed the case at all. The Seventh Circuit cannot insulate its decision from scrutiny for compliance with the mandate with this type of *pro forma* reference. *See Yates*, 484 U.S. at 214 (state court did not comply with mandate requiring it to consider effect of Supreme Court decision although its opinion mentioned the case).

The Seventh Circuit also briefly discussed *Espinoza* in its certification order. App. 115a-17a. But this was merely by way of concluding that it need not consider *Espinoza* in the first place if the Respondents were found to have violated state law; the Court never actually determined *Espinoza*'s effect on the case.

reached the Petitioners' federal constitutional claims when it ruled *against* the Petitioners in 2018, *see* App. 125a, following this Court's order it concluded it was not "necessary to reach any constitutional issues" because it could instead "decide whether the Superintendent properly applied *Wisconsin* law." App. 12a. The Seventh Circuit concluded she did not and remanded for a determination of remedy "if any." App. 12a-15a.

As the Petitioners pointed out to the Seventh Circuit at the first opportunity and again following its decision, this approach violates well-established case law of this Court providing that state remedies do not supplant 42 U.S.C. § 1983. *See, e.g.*, R. 70:16; R. 82:8. In other words, even assuming the Seventh Circuit had the authority to resolve this case on grounds other than those identified by this Court, answering a state law question cannot moot the federal law questions that are asserted under § 1983.

This Court addressed this issue in detail over 60 years ago in the seminal decision of *Monroe v. Pape*. This Court was confronted with the argument that a petitioner could not sue under § 1983 for violation of the Fourth Amendment's bar on unreasonable searches and seizures (as made applicable by the Fourteenth Amendment) because the challenged conduct likewise violated Illinois law and under that law "a simple remedy" offering "full redress" was available in Illinois state court. *Monroe*, 365 U.S. at 168-172. This Court rejected the theory: "It is no

answer that the State has a law which if enforced would give relief. *The federal remedy is supplementary to the state remedy*, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.

This Court has since reaffirmed the view, notably in *Zinermon v. Burch* where this Court observed that *Monroe* "rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law." 494 U.S. at 124. The *Zinermon* Court bluntly summarized the controlling rule: "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Id.* at 124.

The *Zinermon* Court also specifically referenced the type of situation presented here: "[I]n many cases there is 'no quarrel with the state laws on the books'; instead, the problem is the way those laws are or are not implemented by state officials." *Id.* at 125 (quoting *Monroe*, 365 U.S. at 478). That is precisely the Petitioners' position.

The Seventh Circuit itself has not indicated a misunderstanding of this rule in the past. *See, e.g.*, *Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993) ("[I]t is not appropriate for a federal court, hearing a case under § 1983, to upbraid state officials for a

supposed error of state law. . . . Constitutional adjudication tests the *power* of a state to act in a particular way; whether the state indeed wishes to act in that way is a question of its domestic law." (citation omitted)).

Yet here the Seventh Circuit went out of its way—even requiring the parties to brief and argue the question of the Respondents' compliance with state law before the Supreme Court of Wisconsin—to rule on state grounds irrelevant to a determination of the Petitioners' First Amendment rights. That is reversible error.

It is worth noting that the Seventh Circuit's decision does not even have the benefit of bringing this six-year-long litigation to a close. To the contrary, it has thrown the proceedings into confusion; the Seventh Circuit has ordered the District Court to make a determination on remedy despite the fact that the only claims in this case—the federal § 1983 claims—have not been decided. App. 15a.[9]

Consequently, the parties are now rebriefing before the District Court the same summary judgment

[9] Although the Petitioners asserted a state law claim in their original complaint, the District Court remanded that claim to state court under 28 U.S.C. § 1367(c) approximately five years ago (June 6, 2017). App. 190a. That decision was not appealed by either party and the claim is no longer at issue. Even if it were still at issue, as discussed, such a claim would be entirely supplementary to the § 1983 claim.

motions they filed in 2016, and the Petitioners are again requesting resolution of their First Amendment claims. Dkt. 57, 59. If these First Amendment claims are not resolved, the Petitioners will not receive the remedies to which they are entitled under § 1983, such as recovery of the denied benefits.

The Seventh Circuit's conclusion that a state-law violation rendered unnecessary a decision on Petitioners' constitutional claims (a conclusion which itself supported the Seventh Circuit's refusal to execute this Court's mandate) rests on a fundamental misapplication of this Court's case law interpreting § 1983. This Court should reverse.

III. The Seventh Circuit's Acknowledgment that the Respondents Denied the Petitioners Otherwise-Available Public Benefits for Reasons Tied to the Religious Preference of the Petitioners and Following the Government's Doctrinal Determination Warrants Summary Disposition on the Merits

Although this Court could simply vacate the Seventh Circuit's judgment again and remand for further proceedings, a better course than risking the need for a *third* certiorari petition to correct what the Petitioners continue to believe is a patent violation of the First Amendment would be summary reversal on the merits. This approach is appropriate here because the relevant "law is settled and stable, the facts are not in dispute, and the decision below is

clearly in error." *Pavan v. Smith*, ___ U.S. ___, 137 S. Ct. 2075, 2079 (2017) (Gorusch, J., dissenting) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (2017) (Marshall, J., dissenting)).

Specifically: (1) The Seventh Circuit's determination that the Respondents "with[held] state benefits for reasons that can be tied to the religious preference of" the Petitioners, App. 14a, compels a holding that the Respondents violated the Free Exercise Clause, *see, e.g.*, *Espinoza*, 140 S. Ct. at 2255;

(2) The Seventh Circuit's determination that the Respondents' denial of benefits "necessarily and exclusively rested on a doctrinal determination that both St. Augustine and St. Gabriel's were part of a single sponsoring group—the Roman Catholic church—because their religious beliefs, practices, or teachings were similar enough," App. 4a-5a, compels a holding that the Respondents violated the Establishment Clause, *see, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971); and

(3) These two statements from the Seventh Circuit's decision jointly or separately compel a holding that the Respondents violated both Religion Clauses under this Court's cases protecting the autonomy of religious organizations in matters of faith and doctrine, *see, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, ___ U.S. ___, 140 S. Ct. 2049, 2060 (2020) ("*OLG*").

These conclusions are inescapable under the Seventh Circuit's opinion.[10] This Court can and should say so now rather than vacating and remanding for a second time.

But if this is not true, then, as discussed in Part IV, *infra*, the Seventh Circuit's prior determination that a state may deny benefits by allocating them to religious groups and deciding who falls within which group is worthy of review by this Court, as its previous decision to grant, vacate and remand demonstrates.

A. The Respondents Violated the Free Exercise Clause by Forcing St. Augustine to Choose Between Following its Faith Tradition and the Receipt of Otherwise-Available Government Benefits

The first issue by which to decide this case is the one for which this Court vacated and remanded the Seventh Circuit's 2018 decision: whether the Respondents violated the Supreme Court's ruling that under the Free Exercise Clause the government may not "bar[] religious schools from public benefits solely because of the religious character of the schools" and may not " bar[] parents who wish to send

[10] In fact, the Wisconsin Supreme Court's decision, on which the Seventh Circuit relied, was itself premised on the First Amendment. *See* App. 39a-41a.

their children to a religious school from those same benefits, again solely because of the religious character of the school." *Espinoza*, 140 S. Ct. at 2255. The Respondents did violate it.

Espinoza involved a Montana scholarship program that provided tuition assistance to parents enrolling their children in private schools, including religious schools. *Espinoza*, 140 S. Ct. at 2251. After the Montana Supreme Court struck down the program on the basis of a state constitutional provision "which prohibits any aid to a school controlled by a 'church, sect, or denomination,'" *id.* (quoting Mont. Const. art. X, § 6(1)), three mothers with children who attended a private religious school asked this Court to rule that the application of that so-called "no-aid provision" violated the Free Exercise Clause, *id.* at 2251-52.

This Court agreed that it did, building on the propositions from its earlier case, *Trinity Lutheran*, that "[t]he Free Exercise Clause . . . 'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status'" and that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'" *Id.* at 2254-55 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___, 137 S. Ct. 2012, 2021 (2017)).

Montana's Constitution, the *Espinoza* Court explained, violated these principles by compelling schools to "divorce [themselves] from any religious control or affiliation" before they could become "eligible for government aid." *Id.* at 2256. Similarly, it "put[] families to a choice between sending their children to a religious school or receiving such benefits." *Id.* at 2257. This result forced a dilemma on religious adherents which triggered strict scrutiny, a standard Montana could not meet. *Id.* at 2260-61.

The same is true here. Under the Respondents' policy, St. Augustine could only obtain benefits by refraining from saying it is Catholic (because the Respondents determined that "Catholic" means the same thing to everyone all the time). *See id.* at 2256 (state could not apply a rule whereby "[t]o be eligible for government aid . . . , a school must divorce itself from any religious control or affiliation"). Likewise, families had to choose between obtaining benefits and sending their children to a school that aligns with their religious beliefs. *See id.* at 2257 (state could not "put[] families to a choice between sending their children to a religious school or receiving . . . benefits"). In fact, in its most recent decision, the Seventh Circuit *agreed* that the Respondents "*withh[eld] state benefits for reasons that can be tied to the religious preference of the disfavored group*" (here St. Augustine). App. 14a (emphasis added). That is flatly inconsistent with *Espinoza*.

The *only* significant difference between *Espinoza* and this case is that Montana's policy required schools to disclaim *any* religious identity, whereas the Respondents' requires schools to disclaim *particular* religious identities. *This is not a material difference*. It is wholly irrelevant for constitutional purposes whether the government tells a citizen "you may not call yourself religious if you want benefits" or "you may not call yourself a Catholic if you want benefits." The relevant question under the First Amendment is whether, through "indirect coercion," *Espinoza*, 140 S. Ct. at 2256 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022), the government is penalizing a citizen for exercising his or her religion. *Espinoza* itself contains passages emphasizing this point, *see id.* at 2255 ("a 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' (quoting *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947)) (emphasis removed)); *id.* (a state may not tell a church "that it cannot subscribe to a *certain view* of the Gospel" (quoting *Trinity Lutheran*, 137 S. Ct. at 2022) (emphasis added)), as does *Trinity Lutheran*, *see Trinity Lutheran*, 137 S. Ct. at 2021 (state "may not discriminate against '*some or all* religious beliefs'" (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)) (emphasis added)). The Respondents' policy works in precisely this manner, requiring St. Augustine to disavow the religious title

it has given to itself if it wants to become eligible for state aid, simply because an unaffiliated group lays claim to the same religious title. *Espinoza* prohibits such a rule and requires reversal.

B. The Respondents Violated the Establishment Clause by Defining St. Augustine's Denominational Affiliation

Alternately, this Court should dispose of this case by concluding that the Respondents violated the Establishment Clause by making the religious determination that both St. Augustine and St. Gabriel mean the same thing by use of the term "Catholic."

This Court's test for Establishment Clause violations set forth in in *Lemon v. Kurtzman* prohibits, among other things, "excessive entanglement" between the state and religion. *Lemon*, 403 U.S. at 613-14. Deciding whether two schools are sufficiently religiously alike—particularly when they say they are not—such that they ought to be considered affiliated, violates this rule against excessive entanglement. There is no way to make such a judgment without evaluating competing religious claims even if that evaluation consists of cavalierly dismissing them. The Respondents could not conclude St. Augustine is "Catholic" in the same way as the schools of the Archdiocese without making a judgment as to what being "Catholic" is. *See, e.g.*, *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) ("prospect of

church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment"). Placing dispositive significance on the use of a term—in this instance "Catholic"—is not an admirable avoidance of state evaluation of religious distinctions, but the state imposition of them by its insistence that the labels must mean the same thing.

Similarly, this Court has consistently held that the state may not evaluate religious claims, make religious decisions, or otherwise insert itself into disputes over religious conduct and practices. *See, e.g.*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457-58 (1988); *United States v. Lee,* 455 U.S. 252, 257 (1982); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969); *United States v. Ballard*, 322 U.S. 78, 87 (1944); *see also* App. 136a ("A long line of cases prohibits secular courts from delineating religious creeds or assessing compliance with them.").

Yet that is precisely what the Respondents did here when they told St. Augustine, over its objection, that when it and St. Gabriel used the term "Catholic" they meant the same thing. Here, the Friess Lake School District told St. Augustine that its claim to be religiously distinct from the Archdiocese of Milwaukee was "your fight, not ours," Dkt. 26-6 at 1, then proceeded to declare a winner by concluding that

all who say "Catholic" are the same. The Seventh Circuit's recent decision confirms that this is what occurred. As that Court explained—citing *Lemon*, 403 U.S. at 613:

> "[A]s a matter of state law [the Superintendent] may not delve into "the school's religious beliefs, practices, or teachings," because the latter inquiry would transgress the First Amendment prohibition against excessive entanglement with religious matters. . . . [T]he Superintendent's decision in the case before us was not justified by neutral and secular considerations, but instead necessarily and exclusively rested on a doctrinal determination that both St. Augustine and St. Gabriel's were part of a single sponsoring group—the Roman Catholic church—because their religious beliefs, practices, or teachings were similar enough.

App. 4a (citation omitted) (quoting App. 21a). Indeed, in the decision accompanying its earlier (now-vacated) judgment, the Seventh Circuit agreed that "[h]ad the defendants applied a religious test to establish denominational affiliation, we can assume that they would have violated *Lemon*'s prohibition of entanglement between government and religion." App. 136a. Four years after making that observation,

the Seventh Circuit has now confirmed that such a "religious test to establish denominational affiliation" was applied. The Respondents violated the Establishment Clause.

C. The Respondents Violated the Religion Clauses by Interfering with the Ability of St. Augustine to Define its Own Faith and Doctrine

Finally, this Court has developed a line of cases, resting on both Religion Clauses, protecting the autonomy of religious organizations. The Respondents' actions contravene the rule of these cases.

Specifically, this Court has declared that "religious organizations" have a right to a degree of "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government *as well as those of faith and doctrine*." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (describing *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872))) (emphasis added). Accordingly, "[s]tate *interference* in [the] sphere" of "matters '"of faith and doctrine"' . . . would obviously violate the free exercise of religion, and *any* attempt by government to dictate *or even to influence* such

matters would constitute one of the central attributes of an establishment of religion." *OLG*, 140 S. Ct. at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186) (emphases added)).

It is hard to envision a more fundamental statement of faith and doctrine than the theological title a religious organization assigns to itself and its own interpretation of what that title signifies. Yet the Respondents interfered with the Petitioners' ability to exercise this autonomy by forcing St. Augustine to choose between receiving state aid and using the religious name St. Augustine prefers—"Catholic"—and by taking it upon themselves to define, in the words of the Seventh Circuit's vacated opinion, the "face value" of religious labels such as the word "Catholic"—a religious duty inappropriate for a state actor. App. 138a. "The First Amendment outlaws such intrusion." *OLG*, 140 S. Ct. at 2060.

OLG is illuminating specifically on the issue of how religious labels should be assessed by civil courts. In discussing application of the ministerial exception, this Court warned lower courts that "impermissible discrimination" inheres in attaching dispositive consequence to religious labels, and "risk[s] privileging religious traditions with formal organizational structures over those that are less formal." *Id.* at 2064. That is what occurred here.

By failing to respect St. Augustine's right of autonomy in the areas of faith, doctrine, and religious mission,

and take it at its word when it says it is not religiously affiliated with the schools of the Milwaukee Archdiocese, the Respondents violated the First Amendment.[11]

IV. Alternately, Plenary Review of the Petitioners' First Amendment Claims is Justified in Order to Correct the Seventh Circuit's Improper Disposition of Multiple Important Federal Questions Relating to the Government's Authority to Deny Otherwise-Available Public Benefits to Religious Adherents

If this Court is disinclined to resolve this case on a summary basis, it should accept the case for full briefing and argument. As the above discussion shows, this case involves multiple important questions of federal law relating to the government's authority to deny otherwise-available public benefits to religious adherents. And in contravention of this Court's decisions, the Seventh Circuit has refused to condemn, as inconsistent with the First Amendment, the Respondents' decisions to force the Petitioners to choose between exercising their religion and receiving government aid, to tell the Petitioners they

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[11] Importantly, this doctrine is an exception to the *Smith* rule on which the Seventh Circuit relied in 2018. *Hosanna-Tabor*, 565 U.S. at 190 (*Smith* applies to "government regulation of only outward physical acts," not "government interference with an internal church decision that affects the faith and mission of the church itself").

misunderstand their own creed, and to interfere in fundamental matters of faith and doctrine.

The Respondents' actions in this case were "odious to our Constitution." *Trinity Lutheran*, 137 S. Ct. at 2025. This Court should not allow them to "stand." *Id.*

CONCLUSION

Petitioners respectfully request that this Court grant the Petitioners' petition for writ of certiorari and either summarily reverse the decision below or schedule the case for plenary review.

Respectfully submitted,

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