UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

St. Augustine School and
Joseph and Amy Forro,

Plaintiffs,

v. Case No. 16-CV-575

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

Defendants.

BRIEF IN SUPPORT OF PLAINTIFFS, ST. AUGUSTINE SCHOOL AND JOSEPH AND AMY FORRO'S, MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Wisconsin law requires local school districts to provide transportation for students to both religious and secular private schools. While state law says that private schools operated by a single entity may not have overlapping attendance areas, the Wisconsin Supreme Court long ago made clear that the state may not employ a religious test in determining whether private schools are "affiliated" or commonly "sponsored." In other words, the State cannot decide that schools following the same "religion" may not have overlapping attendance areas. What matters is who controls the schools in question. This is so, the Wisconsin Supreme Court has said, both as a matter of statutory interpretation and constitutional principle.

The Defendants here blatantly ignored state law and applied a religious test to determine that the Plaintiff St. Augustine School 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 any Archdiocesan school. They have done this

even though it is undisputed that St. Augustine is legally and operationally independent of the Archdiocese and its schools, and from any other organ of the Roman Catholic Church. Indeed, they have done it even though St. Augustine claims to have religious differences with the Archdiocesan schools. In doing so, the Defendants deliberately violated state law and deprived the Plaintiffs of their constitutional rights.

BACKGROUND

Wis. Stat. §121.54(2)(b)1 governs the transportation of students to private schools. 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 and lives within the *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 statute appears to adopt a religious test and to provide that a determination must be made as to whether two different schools are part of the same religious denomination. However, in *Vanko v. Kahl*, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971), the Wisconsin Supreme Court held that it does not. Such a religious test, the Supreme Court said, would result in "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. The Court held that, taken as a whole, the statute should be construed to not authorize or permit "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. Although the Court noted that such a construction would save the statute from constitutional invalidity, it based its decision on statutory interpretation, relying on the statute's command of uniform treatment between public and private schools. *Id.* Thus, under *Vanko*, private schools, regardless of their religious denomination, are prohibited from having overlapping attendance areas only if they are affiliated or operated by a single sponsoring group. Thus, school districts and Superintendent Evers are directed to ignore the question of "religious denomination" and focus solely on the question of legal affiliation.

Nor can a religious test re-enter the analysis as a way of deciding that two legally independent and separately managed schools are "affiliated." In *Holy Trinity Community School v. Kahl*, 82 Wis. 2d 139, 262 N.W.2d 210 (1978), the Wisconsin Supreme Court considered a subsequent appeal by Holy Trinity School, which was one of the schools involved in *Vanko.* As a result of the *Vanko* decision, in order to obtain a larger attendance area, Holy Trinity closed as an archdiocesan school but then immediately reopened as an independent school 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 concluded that Holy Trinity was still a Catholic school and, thus, still affiliated with the Archdiocese. *Id.* at 155. But the Wisconsin Supreme Court strongly disagreed 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 the Catholic Archdiocese because it was separately incorporated and managed.

The Wisconsin Supreme Court emphatically 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 adherence." *Id.* The State must not apply a religious test and determine, for example, "who or what is Catholic." *Id.* at 150. 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 affiliation between the schools based upon the corporate documents, the State's inquiry must end. *Id.* at 150-153.

Holy Trinity's rejection of the concept of "religious" as opposed to legal affiliation is consistent with *Vanko's* determination that religious and secular schools be treated the same. There is no warrant in the statute to examine independently operated and owned secular schools and determine whether there is something about them – say they are both Montessori or military schools or use a similar progressive curriculum – that makes them "affiliated." Restricting the inquiry to legal independence and separate control serves this statutory end of uniformity. Going beyond it, as the Defendants did here, treats religious schools differently by asking whether they are sufficiently "like" some other religious schools – a question not asked of secular schools.

The interpretation of Section 121.51 adopted in *Vanko* and *Holy Trinity* has been followed by public school districts and private schools throughout the State for forty years. But,

in this case, the Friess Lake School District and Superintendent Evers (collectively the "Defendants") chose to disregard the Wisconsin Supreme Court's interpretation, and instead interpreted Section 121.51 in a manner that violated the constitutional religious liberty rights of St. Augustine School and Joseph and Amy Forro (collectively the "Plaintiffs"). Moreover, the Defendants did so intentionally. Even though the Plaintiffs made the Defendants aware of the Wisconsin Supreme Court's conclusive interpretation of the statute, the Defendants ignored that precedent.

The Plaintiffs brought this action in the Circuit Court for Washington County alleging violation of both state law and the deprivation of their civil rights under color of law in violation of 42 U.S.C. §1983. The Defendants removed the matter to this court. The Attorney General of the State of Wisconsin then withdrew from representation of the Defendant Evers who is now represented by counsel within the state Department of Public Instruction.

FACTUAL BACKGROUND

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

St. Augustine School ("St. Augustine") is a private elementary and high school located at 1810 Highway CC, Hartford, Wisconsin. (Zignego Decl. ¶ 2; PFF ¶1[1].) St. Augustine is an independent religious school that teaches and operates in a manner that it believes is consistent with the long-standing traditions of the Catholic faith. (*Id.* at ¶ 3; PFF ¶5.) It is operated 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; PFF ¶6.)[2] 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.

[1] References to "PFF" are to the Plaintiffs Proposed Finding of Fact filed herewith.
[2] Copies of the Articles of Incorporation and By-Laws are attached to the Zignego Declaration filed herewith as Exhibits A and C.

(*Id.* at ¶ 7; PFF ¶10.) Nor is it affiliated with any other school, Catholic or otherwise. (*Id.*) 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. (*Id.* ¶10; PFF ¶12.) 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.*; PFF ¶13)

St. Gabriel School ("St. Gabriel") is a private school in Hubertus, Wisconsin. (Cepelka Decl. ¶ 2; PFF ¶14.) It is operated under the authority of the Archdiocese of Milwaukee (the "Archdiocese"). (*Id.* at ¶ 2.) 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; PFF ¶15.) 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.* ¶ 6; PFF ¶16).

St. Augustine's curricula and values are determined solely by its own board of directors, administration, and staff. (Zignego Decl. ¶ 9; PFF ¶17.) 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; PFF ¶18.) 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; PFF ¶19.) St. Augustine is not listed in the Kennedy Directory of Catholic schools. (Cepelka Decl. ¶ 6; PFF ¶20.).

The Plaintiffs, Joseph and Amy Forro (the "Forros"), live at 3799 Turnwood Dr., Richfield, Wisconsin. (Forro Decl. ¶ 2; PFF ¶2.) The Forros have three children who attend St. Augustine School. (*Id.* at ¶ 3; PFF ¶21.) The Forro children live more than 2 miles from St. Augustine (*Id.* at ¶ 4; PFF ¶22) and live within the attendance area of St. Augustine (Zignego Decl. ¶ 13; PFF ¶22). St. Augustine is within the boundaries of Friess Lake. (*Id.* at ¶ 14; PFF ¶23.) 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. (Forro Decl. ¶ 5; PFF ¶24.) 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.* at ¶ 5; PFF ¶25.)

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 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 these children live and that such transportation be on a reasonably uniform basis with 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, 162 N.W.2d 5 (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 statute, there are several ways that a public school district can 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. (Forro Decl. ¶ 7; PFF ¶27.) If Friess Lake provided a parent contract to the Forros, Friess Lake has said that the cost to the district would be $1,500 per school year. (Zignego Decl. ¶ 22; Ex. G; PFF ¶28.)

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

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 School. (Zignego Decl. ¶ 15, Ex. D; PFF ¶31.) Friess Lake denied the request on April 29, 2015 (*Id*. at ¶ 20, Ex. H; PFF ¶33) and reaffirmed that denial on September 22, 2015. (*Id.* at ¶18, Ex. F; PFF ¶33.)

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. (Zignego Decl. ¶ 14; PFF ¶30.) St. Augustine's attendance area includes the entire geographic area that makes up the Friess Lake School District. (*Id*.) On April 29, 2015, St. Augustine was informed by Friess Lake that the "Friess Lake School District Board of Education did not approve [St. Augustine's] stated attendance area" because St. Augustine's attendance area overlaps with the attendance area of St. Gabriel. (Zignego Decl. ¶ 20, Ex. H; PFF ¶33.) Friess Lake takes the position that St. Gabriel and St. Augustine School are affiliated because they both say that they are Catholic schools. (Zignego Decl. ¶ 21; Ex. F; PFF ¶36.) As a result, Friess Lake refused to approve St. Augustine's attendance area and refused to provide transportation to the Forro children. (*Id*.)

In rejecting the request for transportation, Friess Lake expressly applied a religious test. Even though examination of St. Augustine's "corporate charter and by-laws" revealed its independence, 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, 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 affiliation, Friess Lake did precisely that. In fact, although religious differences between St. Augustine and the Archdiocese ought to be irrelevant, Friess Lake even judged and rejected St. Augustine's claim that "there is a distinction between St. Augustine and St. Gabriel's regarding adherence to Catholic principles …." (Zignego Dec. Ex. F; PFF ¶37.) Catholic in any way is Catholic in every way, and in the same way as far as Friess Lake is concerned, and it arrogates to itself the prerogative to judge who is "Catholic enough" to be considered the same.

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. (Zignego Decl. ¶ 23; PFF ¶42.) 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, Ex. J; PFF ¶45.)

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 statement 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.

(Zignego Decl. ¶ 28, Ex. J at page 7; PFF ¶47.) The Decision contains no facts concerning St. Gabriel, no facts concerning the ownership or management of St. Augustine or its constituent corporate documents, no facts concerning any corporate or other secular affiliation between St. Gabriel and St. Augustine, and no facts establishing that St. Gabriel and St. Augustine are **affiliated or operated by a single sponsoring group**. (Zignego Decl. ¶ 28, Ex. J; PFF ¶46.) Rather, the Decision announces a state policy that schools that the State determines are the same religious denomination may not have overlapping attendance areas.

SUMMARY JUDGMENT STANDARD

Summary judgment is required "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as

to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The mere existence of some factual dispute does not defeat a summary judgment motion; "the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis deleted). For a dispute to be genuine, the evidence must be such that a "reasonable jury could return a verdict for the nonmoving party." *Id.* For the fact to be material, it must relate to a disputed matter that "might affect the outcome of the suit." *Id.* There are no genuine issues of material fact herein.

ARGUMENT

I. THE PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR STATE LAW DECLARATORY JUDGMENT CLAIM UNDER WIS. STAT. §§121.51 AND 121.54.

As noted earlier, the Defendants are clearly wrong under state law. The Wisconsin Supreme Court has definitively interpreted the language of the statute to mean that there is no religious test and that overlapping attendance areas are only prohibited for "private schools **affiliated or operated by a single sponsoring group**, whether such school operating agency or corporation is secular or religious." *Vanko*, 52 Wis. 2d at 215, (emphasis added). School districts and the Superintendent must ignore the question of "religious denomination" and focus on the question of legal affiliation.

In *Holy Trinity*, the Wisconsin Supreme Court has also definitively interpreted the concept of "affiliation" to preclude any religious test or inquiry into which denomination a school is affiliated with. It has said that, in determining affiliation, authorities 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. If those documents do not demonstrate an affiliation, the State's inquiry must end.

This Court is obligated to accept and follow the Wisconsin Supreme Court's interpretation of a Wisconsin statute as binding. *Guaranty Bank v. Chubb Corp*., 538 F.3d 587, 590 (7th Cir. 2008) ("We are bound by the Wisconsin Supreme Court's interpretation of Wisconsin law, whether we think it right or wrong."); *Shanahan v. WITI-TV, Inc*., 565 F. Supp. 219, 222 (E.D. Wis. 1982) ("This Court is bound to apply Wisconsin's state law as determined by the legislature and the Wisconsin Supreme Court.") The Defendants may not re-litigate *Vanko* and *Holy Trinity* in federal court.[3] These decisions are dispositive as to how to read Wis. Stat. §121.51 and dispositive as to the limits of the Defendants' decision-making under the statute.

Under *Vanko*, St. Augustine School and St. Gabriel are prohibited from having overlapping attendance areas only if they were affiliated or operated by a single sponsoring group. The undisputed facts show they are not:

- St. Gabriel is an Archdiocesan school under the authority of the Archbishop of Milwaukee. (Cepelka Dec. ¶ 2; PFF ¶¶14-15)

- 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. (Zignego Decl. ¶ 3-4, 7; PFF ¶¶5, 6, 10-11.)

- St. Augustine was originally created as an interdenominational Christian School (Articles of Incorporation Article III) (Zignego Decl. Ex. 5; PFF ¶7.)

- It changed its name to St. Augustine School in 1994 (Amendment to Article I of Articles of Incorporation) (Zignego Decl. ¶ 5, Ex. B; PFF ¶8.)

- 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. (Zignego Decl. ¶ 6, Ex. C; PFF ¶9.)

[3] If the Defendants wanted to re-litigate *Vanko* and *Holy Trinity*, they should not have removed this case from state court. If the case had stayed in state court, the Defendants could have asserted that *Vanko* and *Holy Trinity* were wrongly decided and argued that position through the state court system up to the Wisconsin Supreme Court. The Defendants chose not to go that route.

- There is no over-lapping ownership, management, staff, or employees between St Augustine and St. Gabriel (or between St. Augustine and any other school) (Zignego Decl. ¶ 8; PFF ¶11.)

- The curricula and policies of St. Augustine are determined solely by St. Augustine and not by the Archdiocese or any other third party. (Zignego Decl. ¶ 9; PFF ¶17.)

- 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. (Zignego Decl. ¶ 10; PFF ¶18.)

- St. Augustine is not listed in the Kennedy Directory which is a national directory of every school operated by any Catholic Archdiocese anywhere in the country. (Cepelka Decl. ¶ 6; PFF ¶20.)

The Defendants, however, have announced a new policy that concludes that St. Gabriel and St. Augustine are affiliated simply because they both say that they are, in some way, "Catholic" schools – one because it is part of the Archdiocesan system of schools and the other because it says that it adheres to traditional Roman Catholic principles in a way that the Archdiocesan schools do not. In other words, the Defendants evaluated the religious nature of St. Augustine and decided that it is "like" that of St. Gabriel. But the Defendants are not permitted to engage in a determination of whether St. Augustine – or St. Gabriel – is "Catholic."

It is an effort to "monitor religious schools to determine to what denomination they owe allegiance and with what denomination they are affiliated," and is forbidden by *Holy Trinity* 82 Wis.2d at 149, and, as we shall see, federal cases interpreting the religion clauses. It represents a judgment that, when St. Augustine and St. Gabriel use the term "Catholic," they mean the same thing such that they should be considered religiously two of a kind – even as St. Augustine asserts this is not so. The State has no business even asking this question, much less resolving it. It does not matter if St. Augustine and St. Gabriel both are Catholic or both say that they are

Catholic, the only question that matters is whether or not they are operated by a single sponsoring group.

Under state law, the Defendants were supposed to review the corporate documents of St. Augustine and determine if it was affiliated with St. Gabriel in a legal and secular sense. They went well beyond that and violated the Plaintiffs' rights under Wisconsin law by creating a new (and unconstitutional policy). If this Court retains jurisdiction over the state law claim, it must hold for the Plaintiffs on that claim.[4] But, as we shall see, the fact that the Defendants ignored clearly established state law also bears on the Plaintiffs' federal claim.

II. THE DEFENDANTS VIOLATED 42 U.S.C §1983

Not only did the Defendants violate the Plaintiffs' rights under state law, they also 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 the free exercise of their religious beliefs.[5] Based upon the undisputed facts, the constitutional violations by the Defendants support summary judgment for the Plaintiffs on their claim under 42 U.S.C. §1983.

42 U.S.C. §1983 provides that "[e]very person 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."

[4] If this Court were to ignore the federal question or find that it is not substantial, it ought to remand the remaining state law claims.

[5] The same conduct by the Defendants also violates the Plaintiffs Equal Protection rights but that claim is largely redundant to the First Amendment claims.

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 Seventh Circuit has established the elements of a §1983 claim are as follows:

A. the plaintiff held a constitutionally protected right;
B. the plaintiff was deprived of that right in violation of the Constitution;
C. the defendants intentionally caused the deprivation; and
D. the defendants acted under color of state law.

Schertz v. Waupaca County, 875 F.2d 578, 581 (7th Cir. 1989). These four elements are met in the present case.

A. The Plaintiffs have constitutionally protected rights.

1. The Plaintiffs have a right to be free of religious discrimination, including discrimination because they are religious, under both the Free Exercise and Establishment Clauses of the First Amendment.[6]

St. Augustine and the Forro family have several constitutional rights at issue here. First they have the right to Free Exercise of Religion, including the right to form and attend a private school that aligns with their religious beliefs. *Pierce v. Society of the Sisters*, 268 U.S. 510, 534-

[6] The United States Supreme Court has held that the First Amendment applies to the States through the Fourteenth Amendment. *See Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940).

35 (1925) (holding that the State could not prohibit parents from sending their children to qualified private or parochial schools).

Furthermore, they have the right not to be discriminated against because they exercise that right. It is a fundamental principle of constitutional law that the state may not deny a public benefit simply because the beneficiary is engaged in religious exercise. *See McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 170 (2003).

The Plaintiffs also have a right under the Establishment Clause not to be denied government benefits based upon a religious test that the State does not apply to non-religious persons or entities. The government may not favor non-religion over religion. In *Everson v. Bd. of Ed. of Ewing Twp*., 330 U.S. 1, 16 (1947), in which the U.S. Supreme Court approved a public program to provide busing transportation to parents whose children attended private schools including religious schools, the Supreme Court said that "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."

Courts have consistently concluded that when the State offers a neutral and non-religious subsidy or provides a neutral and non-religious benefit, that benefit or subsidy cannot be subsequently denied simply because the recipient evinces a specific religious affiliation or is a religious organization. For example in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 846 (1995), the Supreme Court reversed the judgment of the Fourth Circuit dismissing the complaint and upheld the plaintiff's suit under 42 U.S.C. §1983 where the University of Virginia denied a benefit to a student club with an explicitly Christian orientation

and message. The University used the Student Activities Fund to defray the printing costs of various university clubs but denied that benefit to a religious club. The University argued (and the Court of Appeals agreed) that denying the benefit to the religious club was necessary to avoid an Establishment Clause violation. But the Supreme Court rejected the argument and ruled against the University, reminding everyone that government benefits are available to all and cannot be denied because of the recipient's religious convictions or religious speech. 515 U.S. 819 at 842-844. [7]

Rosenberger was further extended in *Good News Club v. Milford Central School*, 533 U.S. 98, 111-12 (2001), in which the Supreme Court held that after-school use of a public school building could not be denied to a Christian club if the building space had been similarly made available to other, secular clubs. *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) (O'Connor, J., concurring) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.").

In this case, the Plaintiffs (because they are religious) are being subjected to an extra layer of scrutiny and denied a benefit to which they would otherwise be entitled. The Defendants would not examine the nature of a secular school to determine whether it is philosophically or

[7] *See also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14 (1993) (upholding the provision of a sign language interpreter to a deaf student attending Catholic school); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 487 (1986) (upholding claim by a blind student for funds pursuant to a state vocational assistance grant to finance pastoral studies at a Christian college).

otherwise aligned with some other independent school such that they should be considered to be affiliated and they may not do so for religious schools.[8]

2. The Plaintiffs have a right under the Free Exercise and Establishment Clauses of the First Amendment not to have the state excessively entangled in their religious practices.

The United States Supreme Court's on-again, off-again test for Establishment Clause violations in *Lemon v. Kurtzman* 403 U.S. 602, 613-14 (1971) prohibits, among other things, "excessive entanglement" between the state and religion. Although the Supreme Court does not always deploy *Lemon*[9], the Court has consistently held that the state may not "evaluate" religious claims, make religious decisions or otherwise insert itself into religious conduct and practices. See, e.g.,*Lyng 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). Doing so makes the State a religious actor in violation of the Establishment Clause.

[8] This is not a case where the "play in the joints" between the Free Exercise and Establishment Clause suggests that the State may deny funding to core religious practices, see, e.g., *Locke v. Davey*, 540 U.S. 712, 725 (2004) (state may deny scholarships for devotional theology). As *Everson,* demonstrated, transportation funding is not like that and, in any event, Wisconsin, by amending its Constitution and passing a mandate for uniform funding for transportation, claims no such interest.

[9] *Compare*, e.g., *Van Orden v. Perry*, 545 U.S. 677, 685 (2005) (declining to apply *Lemon* in finding Ten Commandments display in Texas unconstitutional) with *McCreary v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (applying *Lemon* to find Ten Commandments display in Kentucky unconstitutional).

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. The Defendants cannot conclude St. Augustine is "Catholic" in the same way as the schools of the Archdiocese without making a judgment as to what being "Catholic" is.

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 a "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. *See also*, *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (Tenth Circuit struck down a Colorado scholarship program that subsidized tuition at private schools provided that the private institution was not "pervasively sectarian," on the grounds that it, entailed "intrusive governmental judgments regarding matters of religious belief and practice.")

This is, of course, exactly what the Wisconsin Supreme Court was saying in *Holy Trinity*, 82 Wis. 2d at 149, when the Court criticized the Superintendent of Public Schools for believing

that it was his obligation "to monitor religious schools to determine to what denominations they owe allegiance and with what denomination they are affiliated." The Court called such an inquiry "repugnant to the Constitution. *Id.* at 153.

B. The Plaintiffs have been deprived of constitutionally protected rights.

Under the Defendants' policy, St. Augustine was denied the attendance area that it is entitled to under §121.51. There is no dispute that its attendance area would have been approved as requested if it were a secular private school located precisely where St. Augustine is located. 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 …." No one would have asked if its curriculum or philosophy or core beliefs were "sufficiently like" some other school such that they should be considered affiliated even though they were independently owned and operated. Its statement of its religious faith is what caused it to be treated differently than a non-religious school in the exact same circumstance.

Without regard to what its religious beliefs are and whether or not they are Catholic, it was the existence of religious beliefs that caused it to be treated differently. If the school leaders and the school's families were non-believers, then the school would have had its attendance area approved. It was only because they said they had religious beliefs that the Defendants *trolled*[10] through the internet to determine those religious beliefs and then, based on that determination, denied the Plaintiffs' public benefits in a way that could never be applied to a non-religious school or parents.

[10] *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) stated that "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from *trolling* through a person's or institution's religious beliefs." (emphasis added)

Under the Defendants' policy, the Forros were denied funding for transportation because they exercised their right to have their children attend a religious school. 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. The Plaintiffs First (and Fourteenth) Amendment rights were violated because Friess Lake and Superintendent Evers applied to them a test of affiliation which is not and cannot be applied to private schools that are not religious.

C. *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.") (Zignego Decl. Ex. D; PPF ¶32.)

- 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." (*Id.* Ex. E; PPF ¶38.)

- 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." (Zignego Decl. Ex. F; PPF ¶39.) 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. (Zignego Decl. Ex. G; PPF ¶40.)

- 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. (Zignego Decl. Ex. I; PPF ¶43.)

- In its January, 2016 letter, St. Augustine again explained the lack of affiliation between itself and St. Gabriel's. (*Id.* ; PPF ¶43.)

In response to the above, in his March 10, 2016 Decision the Superintendent acknowledged receipt of all of these materials (Zignego Decl. Ex. J), but his Decision contains no facts concerning St. Gabriel whatsoever, no facts concerning the ownership, management, or corporate documents of St. Augustine, no facts concerning any corporate or other affiliation between St. Gabriel and St. Augustine, and no facts establishing that St. Gabriel and St. Augustine are affiliated or operated by a single sponsoring group.

Instead, in determining that St. Augustine was affiliated with St. Gabriel, the decision by Superintendent Evers states as follows:

> 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.

(Zignego Decl. Ex. J; Decision at page 7; PPF ¶47).

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." (Zignego Decl. Ex. I; PPF ¶43.) Nevertheless, the Superintendent approved a policy allowing for a religious test.

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.

The Wisconsin Supreme Court had already decided that the Defendants could not do what they did – they could not look past the corporate documents and the lack of a legal affiliation and instead make an inquiry into the Plaintiffs' religious beliefs. The Defendants ignored the law and instead made such an inquiry, which led to an intentional denial by the Defendants of St. Augustine's and the Forros' right to Free Exercise of their Religion and right to be free from excessive entanglement by the State in their religion.

Moreover, it has been almost 70 years since the U.S. Supreme Court's decision in *Everson,* 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 and the very specific instructions of the Wisconsin Supreme Court as to how to interpret Wis. Stat. §121.51 so as not to violate the First Amendment, the Defendants did not limit their affiliation inquiry to legal and non-secular matters such as the articles of incorporation and by-laws of St. Augustine, but instead analyzed the religious faith and beliefs of St. Augustine. 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.

D. 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, at best, is merely permitted by the literal language of Wis. Stat. §121.51, not commanded by it. (Of course, the Wisconsin Supreme Court has already foreclosed that policy because it is 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. 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.

(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.*)

In his letter dated November 10, 2015, he 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 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.

(Zignego Decl. Ex. G; PPF ¶41.) These letters express Friess Lake's policy of refusing overlapping attendance zones to religious schools that claim a similar denomination, 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.

RELIEF SOUGHT

In their state law claim, the Plaintiffs seek a declaration that their rights were violated and an injunction preventing the Defendants from imposing a religious test under Wis. Stat. §121.51.[11]

Under Section 1983, the Plaintiffs request a declaration, an injunction, costs and attorney's fees, (and damages from Friess Lake) all as permitted under 42 U.S.C. §1988. The Forros request damages in the amount of $1,500 from Friess Lake for the 2015-2016 school year[12] and an additional $1,500 for the 2016-2017 school year. In addition, the Plaintiffs are also entitled to a declaration that their rights have been violated and an injunction preventing the Defendants (and their successors) from applying a religious test under Wis. Stat. §121.54. *See*

[11] Alternatively, if for any reason the Court believes that declaratory and injunctive relief is not appropriate the Plaintiffs seek certiorari review of the decisions or such other review as the Court deems appropriate under the circumstances.

[12] The $1,500 amount comes from the November 10, 2015 letter from John Engstrom (District Administrator for Friess Lake) to Mr. Zignego and Ms. Jenkins (Zignego Decl. ¶22; Ex. G). In that letter, Mr. Engstrom states that the cost of a parent contract for the Forros would be $1,500.

Adams v. Attorney Registration and Disciplinary Com'n of Illinois, 801 F.2d 968, 975 (7th Cir. 1986) (affirming district court's award of declaration and injunction in §1983 suit); *Aurora Ed. Ass'n East v. Board of Ed. of Aurora Public School District No. 131*, 490 F.2d 431, 435 (7th Cir. 1973) (affirming plaintiff's right to a declaratory and injunctive relief in a §1983 case, even if defendant unilaterally discontinues the practice from which plaintiff seeks relief).

If the Court grants relief to the Plaintiffs on their §1983 claim, the Plaintiffs further request that the Court declare that the Plaintiffs are entitled to an award of attorneys' fees and that the Court set a schedule for submission and review of such fees.

Submitted this 19th day of December, 2016.

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