UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ST. AUGUSTINE SCHOOL,
JOSEPH and AMY FORRO,

Plaintiffs,

Case No. 16-cv-575-LA

v.

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

Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case arises out of a denial of Plaintiffs' request for transportation benefits pursuant to Wis. Stat. § 121.54(2)(b) by Defendant, Friess Lake School District (the "District"), and the subsequent confirmation of that decision by the Superintendent of Public Instruction, Anthony Evers (the "Superintendent"). Plaintiffs St. Augustine School ("St. Augustine") and Joseph and Amy Forro (the "Forros") allege that the District and the Superintendent's decisions to deny St. Augustine's proposed attendance area, and consequently, the Forros' request for transportation benefits, were contrary to Wis. Stat. §§ 121.51 and 121.54 and the interpreting case law. Further, they allege that the decision-making procedure employed by the District and the Superintendent constitutes excessive entanglement in violation of the Establishment Clause and that the subsequent denial of benefits resulted in a violation of their First Amendment right to freely exercise their religion and Fourteenth Amendment right to equal protection of the laws.

Plaintiffs moved for summary judgment on these grounds; however, Defendants maintain that the decision to deny St. Augustine's request for approval of its attendance area (which formed the basis of the denial of the Forros' request for transportation benefits) was consistent with Wisconsin law; that the information taken into consideration in arriving at that decision did not result in excessive entanglement between the government and religion; and that Plaintiffs' free exercise and equal protection rights were not infringed. As such, in addition to their joint opposition to Plaintiffs' Motion for Summary Judgment, Defendants jointly move for summary judgment pursuant to Fed. R. Civ. P. 56(c).

APPLICABLE STATE STATUTES

Two Wisconsin statutes are at issue in this case. Wis. Stat. § 121.51(1) provides 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.

(2013-14).

The pertinent portions of Wis. Stat. § 121.54(2)(b) provides as follows:

> 1. Except as provided in sub. (1) or otherwise provided in this subsection, the school board of each district operating high school grades shall provide transportation to and from the school a pupil attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a private school located 2 miles or more from the pupil's residence, if such private school

> is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.
>
> . . .
>
> 3. Annually by April 1, each private school shall submit its proposed attendance area for the ensuing school year to the school board of each school district having territory within the proposed attendance area. If a proposal is not submitted by April 1, the existing attendance area shall remain in effect for the ensuing school year.
>
> 4. No later than May 15 in each year, each private school shall notify each school board of the names, grade levels and locations of all pupils, if any, eligible to have transportation provided by such school board under this paragraph and planning to attend such private school during the forthcoming school term. The school board may extend the notification deadline.

Plaintiffs allege the District and Superintendent's application and enforcement of these two statutory sections was unlawful and resulted in a violation of their respective constitutional rights.

FACTUAL BACKGROUND

See, Defendants' Proposed Findings of Fact.

ARGUMENT

Summary judgment is appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). With cross summary judgment motions, the court should construe all facts and inferences therefrom "in favor of the party against whom the motion under consideration is made." *In re United Air Lines, Inc.*, 453 F. 3d 463, 468 (7th Cir. 2006) (internal citations omitted).

When a plaintiff has failed to establish a factual basis for an essential element of his or her claim, there "can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the [claim] necessarily renders all other facts immaterial." *Id.* at 323 (internal quotations omitted). "By its very terms, [the summary judgment] standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis original). In order to determine whether a fact is *material* in a particular case, the courts must look to the substantive law governing the claims and defenses asserted. *Id.* at 248. Therefore, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

In order to prevail on their § 1983 claims, Plaintiffs must establish that: (1) they held a constitutionally protected right; (2) they were deprived of that right in violation of the Constitution; (3) Defendants intentionally caused the deprivation; and (4) Defendants acted under the color of state law. *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989). Thus, an essential element of Plaintiffs' claims is that Defendants' actions violated the First and Fourteenth Amendments and the substantive case law interpreting these Amendments. If they cannot make this showing, then they cannot prove an essential element of their claim and Defendants are entitled to summary judgment. As set out in detail below, the undisputed material facts of this case show that Defendants acted reasonably, acted consistent with applicable Wisconsin statutes, and in accordance with the United States Constitution. Therefore,

Defendants' actions did not violate Wisconsin law or Plaintiffs' constitutional rights, and their claims fail as a matter of law.

I. DEFENDANTS COMPLIED WITH WISCONSIN LAW.

A. Defendants complied with their obligations under applicable Wisconsin statutes.

Wis. Stat. 121.54(2)(b) requires the school board of each district operating high school grades to provide transportation "for each pupil residing in the school district who attends any elementary . . . or high school grade at a private school located 2 miles or more from the pupil's residence, if such private school is a school **within whose attendance area the pupil resides** and is situated within the school district." (Emphasis added.)

As stated above, the statutory definition of "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.**" Wis. Stat. 121.51(1) (emphasis added). That is, without approval from the school board of the district *or*, in the event of a disagreement, a final determination from the Superintendent approving the proposed attendance area, a private school does not have an attendance area from which the district is required to bus the private school's pupils.

The District and the Superintendent complied with their respective duties to (1) review the proposed attendance area submitted by St. Augustine and (2) make a final determination of the attendance area at the request of the private school and the school board. Plaintiffs' disapproval of both the outcome of the decision-making processes and the methodology by

which the District and the Superintendent arrived at their respective decisions does not equate to a violation of Wisconsin law.

The District received a letter from St. Augustine dated March 31, 2015 with its proposed "designated enrollment area." (Declaration of Denise Howe ¶9, Ex. C; Defs.' PFF ¶9; Zignego Decl. Ex. H; Pls' PFF ¶33.) Based upon the understanding that St. Augustine is a Catholic school, the proposed attendance area was not approved because it overlapped with the approved attendance area for St. Gabriel, another Catholic school within the geographic area of the District. (Howe Decl. ¶9, Ex. C; Defs.' PFF ¶12; Zignego Decl. Ex. H; Defs.' PFF ¶33.)

Subsequently, Plaintiffs requested the Superintendent resolve the disagreement regarding the proposed attendance area of St. Augustine. (Affidavit of Laura Varriale ¶10, Ex. D; Defs.' PFF ¶18.) The Superintendent made a determination upholding the District's rejection of the proposed attendance area. (Varriale Aff. ¶13, Ex. G; Defs.' PFF ¶21; Zignego Decl. Ex. J.) Therefore, no transportation benefits were provided to the Forros. Unless Plaintiffs prevail on their claims that Defendants' considerations in reaching these conclusions were unconstitutional, there is no basis for a determination that Defendants violated state law. As more fully addressed below, Plaintiffs' constitutional claims fail as a matter law. Therefore, Defendants' conduct complied with Wisconsin law.

B. *Vanko* and *Holy Trinity* did not supersede the language of § 121.51(1).

Plaintiffs claim that the rulings in *Vanko* and *Holy Trinity* superseded the statutory language regarding private schools affiliated by religious denomination and replaced it in its entirety with a test exclusively based on legal or secular affiliation. (Pls.' Br. at 3-5, 11-14.) Plaintiffs' position is untenable and not supported by these decisions.

1. *State ex rel. Vanko v. Kahl*

The *Vanko* case addressed "an attack upon the constitutionality" of §§ 121.51(1) and 121.54(2)(b) and its definition of attendance area. 52 Wis. 2d 206, 210, 188 N.W.2d 460, 462 (1971). The plaintiffs in the *Vanko* case argued that the portion of § 121.51(1) that provides, "The attendance areas of private schools affiliated with the same religious denomination shall not overlap," precluded overlapping attendance areas only as to religiously affiliated schools and, by default, authorized overlapping attendance areas for private, non-religious schools. *Id.* at 213-14. The court acknowledged that this construction would create a "constitutional infirmity" by placing a restriction upon children attending religious schools that was not placed upon those attending private, secular schools. *Id.* at 214.

In looking at the stated purpose of the statutes regarding school transportation, however, the Wisconsin Supreme Court noted that the "intent, effect and result [of the statute] is to establish an area or proximity basis as the general rule for determining which schools pupils are to be assigned to, public, private or parochial." *Id.* at 215. The court construed the statute "as not authorizing or permitting overlapping in attendance area boundary lines as to *all* private schools affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious." *Id.*

With regard to the statutory language at issue – the language Plaintiffs argue was superseded by the immediately preceding construction given to the statute by the court – the court went on to state:

> Given this interpretation, unless the sentence: "The attendance areas of private schools affiliated with the same religious denomination shall not overlap," is to be deemed mere surplusage, what does it add? It adds no special restrictive ban on overlapping. Such restriction is inherent in the whole concept of "attendance areas." **What the sentence adds it to make "affiliated with the**

> **same religious denomination" the test of affiliation in single school system rather than operation by a single agency or set of trustees or religious order within a particular religious denomination**.

Id. at 215 (emphasis added). As to the constitutional ramifications of this, the court noted that it did "not conclude that the public policy represented by such definition of affiliation in a single system is the best public policy. We do not need even need to find it to be good public policy. We need only to find that the definition provided in the statue is in the field of public policy, *not reaching constitutional dimensions or invading constitutional assurances*." *Id.* at 216 (emphasis added).

That is, in *Vanko*, the Wisconsin Supreme Court did *not*, as Plaintiffs argue, replace the statutory language regarding religious affiliation with a new and separate test that looks only to legal and secular matters and requiring school boards or the superintendent to ignore any references to religious affiliation. The Court instead added to the statutory language through interpretation. That is made clear by the illustration provided by the court:

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

Id. at 215-216 (emphasis added). Here, in keeping with *Vanko*, Defendants considered an avowed Roman Catholic school along with the diocesan school of St. Gabriel to be part of the Catholic school system of the Friess Lake school district.

2. *Holy Trinity Community School, Inc. v. Kahl*

In *Holy Trinity*, the Wisconsin Supreme Court was asked to reconcile the interpretation of the statute set forth in the *Vanko* case in light of a school that separated itself from the Roman

Catholic Church and changed the operations of its school such that it had *no affiliation* with any religious denomination in order to avoid the prohibition on overlapping attendance areas. 82 Wis. 2d 139, 145-46, 262 N.W.2d 210, 212 (1978). The school discontinued its teaching of the "usual and formal" Catholic religious tradition. *Id.* at 146. Children were released from classes for one-half hour each day to attend religious instruction of their parents' choice; though all of the students attended classes with a Catholic priest, other religions were invited to participate in the released-time program. *Id.* at 147. Only 75% of the students attended the Catholic released-time classes. *Id.* In making a determination regarding the school's attendance area, the Superintendent considered how many Catholic nuns were still employed at the school, how many pupils were members of the Holy Trinity congregation, and information regarding ownership of the real property where the school was located to conclude that the school was still affiliated with the Catholic denomination. *Id.*

The court noted that "the Superintendent would have us pierce the corporate veil to look at the facts and, from those facts, determine that, *despite the protestation of the corporation*, it nevertheless is Roman Catholic and is affiliated with that denomination." *Id.* at 148 (emphasis added). In *Holy Trinity*, the state was "in effect, insisting that it, on the basis of *inspection and surveillance* of the school, may determine the denominational allegiance of the institution." *Id.* (Emphasis added.) The court observed that the Superintendent "envisages his duty as necessitating continued examination and surveillance of the religious composition of both the instructional staff and the students of the Community School" and that he "conceives it to be his obligation to monitor religious schools to determine to what denomination they owe allegiance and with what denomination they are affiliated." *Id.* at 150.

Holy Trinity addressed the permissibility of the Superintendent's extensive "examination and surveillance" of the school prior to disallowing the proposed attendance area. The court stated:

> **Under the facts peculiar to this case**, the attempt of the Superintendent of Public Instruction to administer the law results in excessive entanglement of state authority in religious affairs. **For this court or for the Superintendent of Public Instruction to determine, in the light of the *prima facie* showing of the articles of incorporation to the contrary**, that this school corporation is or is not affiliated with the Catholic denomination is to meddle into what is forbidden by the Constitution -- the determination of matters of faith and religious allegiance.

Id. at 149-50 (emphasis added).

Contrary to Plaintiffs' contentions, *Holy Trinity* does not stand for the premise that "the government must limit its review of the factors that may constitute 'affiliation' to those that are purely legal and secular." (Pls.' Br. at 4.) Rather, the court stated:

> [W]hen the method of administering this aid requires a state imposed classification dependent upon religious allegiance or affiliation, **and** the administrator of the program concludes that **surveillance of the institution receiving the aid is necessary to determine the nature of the school's religious program**, the entanglement of the state in matters of religion becomes excessive.

Holy Trinity, 82 Wis. 2d at 153 (emphasis added). The court further clarified its decision that in the context of the facts particular to the case:

> We would conclude that the detailed inquiry which the State Superintendent of Public Instruction has made is equally repugnant to the Constitution. By avoiding the making of that inquiry and by accepting the Holy Trinity Community School on the basis of its articles of incorporation as what it purports to be -- a school independent of any denomination -- the unconstitutionality in the administration of the statute can be avoided.

Id. at 153.

> We accord the same facial validity to the charter and bylaws of the Holy Trinity Community School. **It purports to be a school**

> **fostering religion generally, but expressly disavows affiliation with any church denomination.** We believe that, to inquire further, impinges on the religious right of citizens **to make their own declaration in respect to their religious affiliation.**

Id. at 154 (emphasis added).

The court in *Holy Trinity* did not limit itself to inquiries into matters that were purely legal and secular in making its ruling. It concluded that "[u]nder the facts of this case, we hold that the Holy Trinity Community School is a private school, independent of any religious denomination; and, accordingly, as a matter of law is entitled to a district-wide attendance area." *Id.* at 155. In accepting the premise that the school was non-denominational, the court, by default, determined that the school was not Catholic. In fact, the court's ultimate conclusion was as follows:

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

Id. at 157-58 (emphasis added).

There is simply no basis in *Holy Trinity* to conclude, as Plaintiffs argue, that the District and the Superintendent were required by Wisconsin law to "ignore the question of 'religious denomination' and focus solely on the question of legal affiliation." (Pls.' Br. at 3.) That contention is not found anywhere in the court's decision or any reasonable reading thereof.

Defendants were given St. Augustine's Amendment to the Articles of Incorporation and By-Laws to review. (Howe Decl. ¶11; Varriale Aff. ¶10, Ex. D; Defs.' PFF ¶¶14 and 16.) Neither mentioned any religious affiliation despite the fact that by its very name, St. Augustine

presents itself as a religious school. Defendants also considered the publically available information on St. Augustine's website, as well as the information contained in its various letters, that it was a Roman Catholic school. (Zignego Decl. Ex. J; Pls.' PFF ¶45; Varriale Aff. ¶12, Ex. F; Defs.' PFF ¶18.) Consideration of these self-proclaimed characterizations is consistent with *Holy Trinity*.

II. PLAINTIFFS' FIRST AMENDMENT CLAIM UNDER THE FREE EXERCISE CLAUSE FAILS AS A MATTER OF LAW.

The Forros loosely allege Defendants violated their First Amendment rights because the denial of transportation benefits prevented them from freely exercising their religion. The First Amendment specifically provides as follows:

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

U.S. Const. Amend. I.

Defendants understand Plaintiffs' position to be that Defendants' decisions resulted in the limitation of their right to freely exercise their religion because they were denied an economic benefit available to other families whose children attend a different Catholic school within the District.

This position is legally untenable for a number of reasons. The Forros have made no factual showing regarding what their sincerely held religious beliefs are or how the lack of reimbursement for transportation costs incurred in driving their children to St. Augustine burdens their free exercise of those religious beliefs. They allege only that they personally feel St. Augustine embodies "traditional religious values" that they believe are "different" than those of St. Gabriel and that they do not see the schools as "two equivalent Catholic schools." (Forro

Decl. ¶5.) They assert that St. Augustine implements their religious values while other schools do not. (*Id.*)

Without facts supporting their argument that the District's or Superintendent's decisions substantially burdened the Forros by compelling them to do something prohibited by their religion or requiring them to refrain from believing in or doing something compelled by their religion, there can be no Free Exercise claim. *See generally*, *Frazee v. Ill. Dept. of Employment Sec.*, 489 U.S. 829 (1989). While the plaintiff does not have the burden of showing affiliation with a particular religious sect, Free Exercise claims must be based in "a given belief that is sincere and meaningful." *United States v. Seeger*, 380 U.S. 163 (1965); *see also*, *Frazee*, 489 U.S. 829. The logical prerequisite to this analysis is a factual showing that the Forros have a sincerely held religious belief and that education of their children at St. Augustine is part and parcel to that set of religious beliefs. Without such a factual showing, the claim fails as a matter of law.

Nonetheless, even if the Forros had alleged additional facts, the applicable Free Exercise case law does not support Plaintiffs' claims under the circumstances of the case at bar. The parties do not dispute that the Wisconsin statutes at issue are valid. The United States Supreme Court has recognized that a valid state statute may well place an economic burden upon individuals who wish to follow particular religious convictions. *See*, *Braunfeld v. Brown*, 366 U.S. 599 (1961).

In *Braunfeld*, Chief Justice Warren acknowledged that a Pennsylvania law regarding permissible hours of business operations, as far as members of the Orthodox Jewish faith were concerned, "operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605. The Court concluded, however, that "[fully] recognizing that the alternatives open to

appellants and others similarly situated . . . may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful." *Id.* at 605-06. The *Braunfeld* decision makes clear that the economic effect of a statute is not an appropriate test for determining whether a constitutional violation has occurred. The Court specifically noted that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference" and that "it cannot be expected, much less required, that legislators enact no law . . . that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions." *Id.* at 606.

Relying in part on the reasoning of *Braunfeld*, the Western District of Missouri held that refusing to provide state transportation benefits to private school children does not rise to the level of burdening the free exercise of religion. *See*, *Leutkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973). In *Leutkemeyer*, the plaintiffs argued that transportation of public school children without extending the same benefit to parochial school children forced "them to forego the exercise of their right to freely exercise their religion in order to secure a public benefit, and penalizes the free exercise of religion in violation of the First Amendment to the Constitution." *Id.* at 377-78. The Western District of Missouri's decision was summarily affirmed on appeal to the United States Supreme Court. 419 U.S. 888 (1974).

Defendants recognize the distinction in that the *Leutkemeyer* case addressed the permissibility of the Missouri state constitutional prohibition on expenditure of public education funds for any purpose other than public education, including any indirect aid to parochial schools by providing transportation to parochial school pupils. Nonetheless, the legal basis for the decision in *Leutkemeyer* regarding the Free Exercise clause applies under the circumstances of

this case. Plaintiffs cannot show that their right to freely exercise their religion was violated because the cost of sending their children to a religious school increased due to not receiving transportation benefits. Therefore, Plaintiffs' claims, even if properly factually supported with additional information regarding their religious practices, must fail.

III. PLAINTIFFS' EQUAL PROTECTION CLAIM FAILS AS A MATTER OF LAW.

Contrary to Plaintiffs' arguments, Defendants do not seek to re-litigate the Wisconsin Supreme Court's decisions in *Vanko* or *Holy Trinity*. While Defendants dispute Plaintiffs' broad interpretation of these cases (as argued above) and deny that their conduct violated the U.S. Constitution, Defendants do *not* contend that the case law is inapplicable to the circumstances of this case.

Plaintiffs summarily contend that Defendants applied a standard of religious affiliation that was outside the parameters set forth in *Vanko* and *Holy Trinity* because it was solely based on religion. They argue that this violates the Equal Protection clause because it is a test that could not be applied to institutions that are affiliated on the basis of a philosophy that is not rooted in religion. (Pls.' Br. at 7, 14.)

Defendants' actions and decisions complied with *Vanko* and *Holy Trinity*. Without belaboring the analysis already set forth above, Defendants point to the following language from *Vanko*, which upheld religious affiliation as a determining factor in whether attendance areas can overlap:

> Given this interpretation, unless the sentence: "The attendance areas of private schools affiliated with the same religious denomination shall not overlap," is to be deemed mere surplusage, what does it add? It adds no special restrictive ban on overlapping. Such restriction is inherent in the whole concept of "attendance areas." **What the sentence adds it to make "affiliated with the same religious denomination" the test of affiliation in single school system rather than operation by a single agency or set of**

> **trustees or religious order within a particular religious denomination.**

Id. at 215 (emphasis added).

Further, as noted above, the ruling in *Holy Trinity* did not create a new test, limiting the District and Superintendent to consider only legal and secular factors when determining affiliation. The court in *Holy Trinity* limited the scope of its inquiry in instances when an organization's incorporating documents expressly disavowed an affiliation with any particular religious denomination simply because the superintendent did not accept the facial validity of the incorporating documents. *See*, *supra*.

Plaintiffs have not shown that the District or the Superintendent applied the statute disparately to any other private institution. Further, their argument that the District or the Superintendent could not do so is without factual or logical support. (*See*, Pls.' Br. at 4, 17-18, and 21.) Based on the construction of the applicable statutes established by the Wisconsin Supreme Court, it would be well within the bounds of the law for a district to refuse overlapping attendance areas to two Montessori schools, even if they were incorporated as two separate legal entities. Consistent with the language in *Vanko* regarding schools operated by Catholic orders being affiliated with diocesan schools, and just as St. Augustine and St. Gabriel are affiliated based on religious denomination, two institutions publicly professing their adherence to Montessori philosophies would be affiliated by the single group of "Montessori."

IV. PLAINTIFFS' ESTABLISHMENT LAW CLAIM FAILS AS A MATTER OF LAW.

Under the *Lemon* Test, which arises out of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to survive a constitutional challenge regarding the Establishment Clause, a statute must: (1) have a secular legislative purpose; (2) the principal or primary effect of the statute must not advance or

inhibit religious practice; and (3) the statute must not result in "excessive government entanglement" with religious affairs. Plaintiffs allege the District's and the Superintendent's application of the statutorily prescribed "attendance area" affiliation test violates the third prong of this test. (Pls.' Br. at 3, 23-24.)

Plaintiffs argue that because the District and the Superintendent were required to "ignore the question of 'religious denomination' and focus solely on the question of legal affiliation," Defendants' conduct in reviewing publicly accessible website information published by St. Augustine constitutes "excessive entanglement" in violation of the Establishment Clause. (*Id*.) They maintain that "the State must not apply a religious test" and that "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 governing the school's board of directors. If there is no affiliation between the schools based upon the corporate documents, the State's inquiry must end." (Pls.' Br. at 4.) As set forth above, this is not what the *Vanko* and *Holy Trinity* decisions stand for. *See*, *supra*.

First, the Articles of Incorporation attached as Exhibit A to the Zignego declaration were never provided to the District or the Superintendent as part of their request for approval of the school's attendance area. (Howe Decl. ¶15; Varriale Aff. ¶14; Defs.' PFF ¶22.) The only materials provided were those reflecting the school's name change and the By-Laws governing the school's board of directors, both of which are silent as to the school's affiliations. (Howe Decl. ¶¶10-11, 15, Ex. D; Varriale Aff. ¶¶10, 14, Ex. D; Defs.' PFF ¶¶13, 22.)

Plaintiffs' position is that *any* analysis that includes the school's own statements regarding Catholicism outside of the bylaws and/or articles of incorporation constitute excessive

entanglement for purposes of the Establishment Clause. The case law is clear, however, that judicial inquiry under the Establishment Clause "necessarily 'calls for line-drawing; no fixed, per se rule can be framed'." *Cohen v. City of Des Plaines*, 8 F.3d 484, 489 (7th Cir. 1993) (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).) That is, the historical factual circumstances that were used to analyze constitutional questions regarding a school district's actions in one case cannot serve as the black letter rule for what a school may or may not be constitutionally permitted to consider in making the same determination five decades later under wholly different factual circumstances.

The United States Supreme Court has underscored that "under the Establishment Clause, detail is key" and that "Establishment Clause jurisprudence remains a delicate and fact-sensitive one." *McCreary County of Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 867 (2005); *Lee v. Weisman*, 505 U.S. 577, 597 (1992). The Wisconsin Supreme Court's ruling in *Holy Trinity* was equally specific:

> **Under the facts peculiar to this case**, the attempt of the Superintendent of Public Instruction to administer the law results in excessive entanglement of state authority in religious affairs. **For this court or for the Superintendent of Public Instruction to determine, in the light of the *prima facie* showing of the articles of incorporation to the contrary, that this school corporation is or is not affiliated with the Catholic denomination** is to meddle into what is forbidden by the Constitution -- the determination of matters of faith and religious allegiance.

82 Wis. 2d 139, 149-50, 262 N.W.2d 210 (1978) (emphasis added). This language is key in two respects: (1) it underscores the fact-sensitive nature of this line of case law; and (2) it does not purport, as Plaintiffs argue, to preclude a school district or the superintendent from determining if two institutions are affiliated on the basis of religion for attendance area purposes. Rather, the court seeks to limit the scope of the inquiry and the facts that may be considered in reaching a

conclusion regarding affiliation with a religious denomination when the school's incorporating documents specifically state that the school is non-denominational.

The ruling in *Holy Trinity* is twofold:

> "[W]hen the method of administering this aid requires a state imposed classification dependent upon religious allegiance or affiliation, **and** the administrator of the program concludes that **surveillance of the institution receiving the aid is necessary to determine the nature of the school's religious program**, the entanglement of the state in matters of religion becomes excessive.

Id. at 151-52 (emphasis added). That is, contrary to Plaintiffs' argument, the Wisconsin Supreme Court did not preclude state imposed classifications that were dependent upon religious allegiance or affiliation. Rather, it precluded surveillance of the institution as the mechanism by which to make that determination.

In the context of the conduct of the superintendent in the *Holy Trinity* case, the court stated that, "to make the inquiry and to determine that the school is or is not affiliated with the Catholic denomination is to make an impermissible inquisition into religious matters." *Id.* at 154-55 (emphasis added). However, the very next sentence goes on to state: "We are obliged to accept the professions of the school and to accord them validity without further inquiry." *Id.* at 155. The "professions of the school" to which the court is referring included the school's statements in its articles of incorporation in which it stated it was a non-denominational Christian school – that is, statements that clarified the school's religious affiliation.

In this instance, the documentation provided by St. Augustine regarding its name change and its By-Laws did not address in any way its sponsorship, affiliations, or religious denomination. When looking at the facts specific to this case, the name change amendment and the By-Laws provided by St. Augustine cannot reasonably be expected to limit the District or Superintendent's inquiry when both must uphold their statutory obligations to not allow

overlapping attendance areas. Further, unlike the Holy Trinity Community School, St. Augustine does not *disavow* affiliation with a particular religious denomination, but rather, openly proclaims its affiliation with the Roman Catholic denomination.

In its letters, St. Augustine identifies itself as an "independent, private Catholic school." (Zignego Decl. Ex. D; Pls.' PFF ¶¶5, 31.) It prides itself on its adherence to Catholic tradition, claiming that it "operates more fully within the Catholic tradition than Archdiocesan schools." (Zignego Decl. ¶10; Pls.' PFF ¶12.) Based on this distinction, Plaintiffs would have Defendants and this Court look in a dozen different directions to recognize it as "more fully" Catholic in order to permit it an overlapping attendance area with St. Gabriel Catholic School.

The District's April 29, 2015 letter to St. Augustine makes it clear that the District had a pre-existing understanding that St. Augustine was a Catholic school at the time it was initially contacted regarding transportation for St. Augustine students. (Howe Decl. ¶¶5-6, 9, Ex. C; Defs.' PFF ¶12; Zignego Decl. Ex. H; Pls.' PFF ¶33.) In light of that knowledge, the "legal and secular" documents to which St. Augustine would limit the District and Superintendent's review do nothing to assist in making a determination regarding whether the school's attendance area may legally be permitted to overlap with St. Gabriel's.

Defendants appreciate that at the time of the *Holy Trinity* decision, the Internet and websites were not contemplated by the court in its decision. Nonetheless, Defendants maintain that a limited inquiry into "the professions of the school" on its own publicly accessible website and its various declarations made to Defendants were well within the bounds of constitutionality.

When comparing publicly available information on the Internet published by the school itself to the ongoing auditing-type activities of the superintendent in *Holy Trinity*, Plaintiffs arguments regarding excessive entanglement fail. Taking the statements of the schools that they

are both Catholic institutions at face value does not rise to the level of "surveillance" undertaken by the superintendent in *Holy Trinity*. Rather, it is exactly the form of restraint prescribed by the court in *Holy Trinity*. Where a religious school demonstrates by the public statements made on its own website that is a "religious school that teaches and operates in a manner that it believes is consistent with the long-standing traditions of the Catholic faith," the inquiry should properly stop there. (Zignego Decl. ¶3, Pls.' PFF ¶5.)

The level of inquiry and scrutiny Plaintiffs would have Defendants and this Court take to distinguish between the two brands of Catholicism, namely contacting the Archdiocese, looking in the "Kennedy Book," requesting the other school's incorporating documents, etc. falls squarely within the category of activities deemed excessive entanglement in the *Holy Trinity* case.

V. BECAUSE PLAINTIFFS' CONSTITUTIONAL CLAIMS FAIL, THEY CANNOT RECOVER UNDER 42. U.S.C. § 1983.

In order to prove a claim under 42 U.S.C. § 1983, Plaintiffs must establish: (1) that Defendants have deprived them of a right secured by the "Constitution and laws" of the United States; and (2) that Defendants deprived them of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." *See*, *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 150 (1970). As addressed in detail in Part IV, Plaintiff St. Augustine cannot demonstrate that Defendants' reliance on St. Augustine's statements and its public website creates excessive government entanglement. Therefore St. Augustine's Establishment Clause claim must fail.

The Forros allege a First Amendment violation under the Free Exercise clause. As discussed in Part II, they fail to establish essential facts to support such a claim, and even if they had alleged the requisite facts the law does not support the premise that denial of transportation

benefits to private school pupils infringes the right to freely exercise one's religion. Neither Plaintiff established an Equal Protection clause claim, as discussed in Part III. Plaintiffs presented no facts and no supporting law demonstrating that treating both St. Augustine and St. Gabriel as Catholic schools treats them any differently than similarly situated private or public schools. The case law to which they point to support this proposition stands for the complete opposite with regard to Catholic schools. *See, supra*.

Absent a showing of a constitutional deprivation, a suit under 42 U.S.C. § 1983 cannot proceed. Plaintiffs have failed to meet the first element of their claim. Therefore the Court should deny Plaintiffs' motion and grant summary judgment in favor of Defendants.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court deny Plaintiffs' Motion for Summary Judgment and grant judgment in Defendants' favor, dismissing Plaintiffs' Complaint on its merits, with prejudice, and with costs.

Dated this 31st day of December, 2016.

/s/ Kristin Renee Pierre
Lori M. Lubinsky
State Bar No. 1027575
Kristin Renee Pierre
State Bar No. 1085499
Attorneys for Defendant,
Friess Lake School District
AXLEY BRYNELSON, LLP
2 East Mifflin Street, Suite 200
Madison, WI 53703
Telephone: (608) 257-5661
Facsimile: (608) 257-5444
E-mail: kpierre@axley.com

/s/ Laura M. Varriale
Laura M. Varriale
State Bar No. 1035902
Attorneys for Defendant,
Anthony Evers, State Superintendent
Wisconsin Department of Public Instruction
125 S. Webster Street
P.O. Box 7841
Madison WI 53707-7841
Telephone: (608) 266-9353
E-mail: laura.varriale@dpi.wi.gov