No. 17-2333

In the United States Court of Appeals for the Seventh Circuit

ST. AUGUSTINE SCHOOL, INC., ET AL

Plaintiffs-Appellants,

v.

ANTHONY EVERS, *IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF PUBLIC INSTRUCTION*, ET AL,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
CASE NO. 2:16-CV-00575-LA
THE HONORABLE JUDGE LYNN ADELMAN

CORRECTED JOINT RESPONSE BRIEF OF DEFENDANTS-APPELLEES ANTHONY EVERS AND FRIESS LAKE SCHOOL DISTRICT

Wisconsin Department of
Public Instruction
Attorney for Defendant-Appellee,
Anthony Evers, Superintendent of
Public Instruction
Laura M. Varriale
125 S. Webster Street
Madison, WI 53707
(608) 266-9353

Axley Brynelson, LLP
Attorneys for Defendant-Appellee,
Friess Lake School District
Lori M. Lubinsky
Kristin Renee Pierre
2 E. Mifflin Street, Suite 200
Madison, WI 53703
(608) 257-5661

RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Case No. 17-2333

Short Caption: St. Augustine School, Inc., et al v. Evers, et al

The full name of every party that the attorney represents in this case:

Anthony Evers, in his official capacity as Superintendent of Public Instruction

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

If the party or amicus is a corporation:

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

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

Attorney's Signature: /s/ *Laura M. Varriale*

Date: September 15, 2017

Attorney's Printed Name: Laura M. Varriale

Address: 125 S. Webster Street, Madison, Wisconsin 53707

RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Case No. 17-2333

Short Caption: St. Augustine School, Inc., et al v. Evers, et al

The full name of every party that the attorney represents in this case: Friess Lake School District

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

If the party or amicus is a corporation:

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

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

Attorney's Signature: /s/*Lori M. Lubinsky*

Date: September 15, 2017

Attorney's Printed Name: Lori M. Lubinsky

Address: 2 E. Mifflin Street, Suite 200, Madison, WI 53703

RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Case No. 17-2333

Short Caption: St. Augustine School, Inc., et al v. Evers, et al

The full name of every party that the attorney represents in this case: Friess Lake School District

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

If the party or amicus is a corporation:

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

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

Attorney's Signature: /s/*Kristin Renee Pierre*

Date: September 15, 2017

Attorney's Printed Name: Kristin Renee Pierre

Address: 2 E. Mifflin Street, Suite 200, Madison, WI 53703

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal

State

JURISDICTIONAL STATEMENT

The Plaintiffs-Appellants' (Plaintiffs) jurisdictional statement is incomplete.

As the Plaintiffs state, this action was originally filed in state court and removed by the Defendant-Appellees (Defendants) pursuant to 28 U.S.C. § 1441. The district court had jurisdiction over this civil action pursuant to 28 U.S.C. § 1131. The Plaintiffs asserted causes of action arising under the U.S. Constitution and 42 U.S.C. § 1983, along with a state law claim under Wis. Stat. §§ 121.51-121.55. The district court did have supplemental jurisdiction over the state law claim pursuant to 28 U.S.C. § 1367.

The district court decided and denied the Plaintiffs' federal claims on the merits by granting the Defendants' motion for summary judgment and denying the Plaintiffs' motion for summary judgment. The district court declined to exercise its supplemental jurisdiction over the state law claim and remanded it to state court pursuant to 28 U.S.C. § 1367(c).

Defendant Anthony Evers also filed a motion to dismiss him as a defendant. The district court denied that motion to dismiss as moot. There are no claims left at this time for disposition in the district court. However, should this Court decide to overturn the district court's decision, the case

should be remanded to district court to consider Defendant Evers' motion to dismiss as it would no longer be moot.

As the Plaintiffs further state, this appeal is taken from the final decision of the Honorable Judge Lynn Adelman for the U.S. District Court for the Eastern District of Wisconsin, dated June 6, 2017, and entered that same day. The Notice of Appeal was filed by the Plaintiffs with the district court on June 28, 2017. The Defendants agree this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the district court err when it held that the Defendants did not violate the Plaintiffs' constitutional rights when the Defendants determined that St. Augustine's requested attendance area could not be approved because it overlapped with the attendance area of a private school affiliated with the same religious denomination, contrary to Wis. Stat. § 121.51(1)?

STATEMENT OF THE CASE

I. Introduction

This case arose from allegations by the Plaintiffs, St. Augustine School, Inc. (St. Augustine) and Joseph and Amy Forro (Forros) that the Defendants, Anthony Evers, the Superintendent of Public Instruction for the State of Wisconsin (Superintendent), in his official capacity, and the Friess Lake

School District (Friess Lake) violated the Plaintiffs' First and Fourteenth Amendment rights. (Dkt. 1-2.) Based on the applicable state statutes, Friess Lake denied St. Augustine an attendance area contiguous with another Catholic school, and, as a result, the Forros were not eligible for school transportation benefits for transporting their three children to St. Augustine. (Dkt. 34, Declaration of Denise Howe, ¶9, Ex. C.) St. Augustine and Friess Lake jointly requested the Superintendent make a final determination as to an attendance area. (Dkt. 33, Affidavit of Laura M. Varriale, ¶¶9-10, Exs. C and D.) The Superintendent upheld Friess Lake's denial after reviewing materials submitted by the parties. (Dkt. 33, ¶¶9-13, Ex. G; App. 126-133.) The district court held the Defendants did not violate the Plaintiffs' constitutional rights. (Dkt. 41.) This appeal followed.

II. Statement of Facts

Plaintiff St. Augustine, on behalf of Plaintiffs Forros, applied to Defendant Friess Lake for transportation benefits under Wis. Stat. § 121.54. (Dkt. 34, ¶7, Ex. A.) St. Augustine also requested Friess Lake approve its requested attendance area. (Dkt. 26, Declaration of Tim Zignego, ¶¶15-16, Ex. D; Dkt. 34 ¶8, Ex. B.) In that request, St. Augustine identifies itself as "an independent, private Catholic school." (Dkt. 26, ¶3, Ex. D; Dkt. 34, Ex. B.) St. Augustine did not submit its original Articles of Incorporation for

consideration as part of its request.[1] (Dkt. 33, ¶14; Dkt. 34, ¶15.) Friess Lake denied St. Augustine an attendance area based on St. Augustine's statement that it was a Catholic school in both its letters and on its website because Friess Lake already had an approved attendance area for a Catholic school, St. Gabriel, that overlapped with St. Augustine's proposed attendance area. (Dkt. 34, ¶9, Ex. C.) Friess Lake based its decision upon the applicable Wisconsin statutes and the two Wisconsin Supreme Court cases that interpret those statutes. (Dkt. 34, ¶9, Ex. C.)

Because St. Augustine and Friess Lake could not agree on an attendance area, they jointly requested that, pursuant to Wis. Stat. § 121.51(1), the Superintendent make a final determination of the attendance area. (Dkt. 33, ¶¶9-10.) The Superintendent, through his designees, reviewed the materials submitted by both parties, the statutes, and the two applicable cases and determined that the attendance areas of St. Augustine and St. Gabriel could

[1] The original Articles of Incorporation for the previously named Neosho Country Christian School, Inc. identified the school as an "interdenominational Christian school." The Plaintiffs first presented these documents during the district court case as Dkt. 26, Ex. A, and, therefore, the documents were not considered by Friess Lake or the Superintendent when making the appealed decisions. Instead of attaching the Articles of Incorporation where St. Augustine refers to them as attachments to various letters submitted during the initial request for attendance area and subsequent review by the Superintendent (e.g. Dkt. 33, Ex. D as SAS Corporate Filings; Dkt. 34, Ex. D), what St. Augustine actually attached was the Amendment to the Articles, which merely changed the name of the school and does not refer to religion. The Amendment to the Articles is Exhibit B to the Declaration of Tim Zignego, Dkt. 26.

not overlap as they were affiliated with the same religious denomination, Catholicism. (Dkt. 33, ¶13, Ex. G; App. 126-133.) Both Defendants interpreted the two applicable cases as clarifying, but not removing, the statutory prohibition. (*Id*.)

III. Procedural History

The Plaintiffs brought suit in state court alleging the Defendants' decisions were contrary to the state statutes and the decision-making process violated the Plaintiffs' First and Fourteenth Amendment rights. (Dkt. 1, Exs. 1 and 2.) The Plaintiffs alleged the decision not to grant St. Augustine its proposed attendance area violated the Forros' right to freely exercise their religion. (Dkt. 1, Ex. 2.) The Plaintiffs further alleged that the Defendants excessively entangled themselves in the Plaintiffs' religion when the Defendants accepted and relied upon St. Augustine's assertion that it was a Catholic school. (Dkt. 1, Ex. 2.) The Defendants removed the case to federal court. (Dkt. 1.)

The parties filed cross-motions for summary judgment. (Dkt. 21 and 30.) Additionally, the Superintendent filed a motion to dismiss. (Dkt. 19.) The district court granted the Defendants' summary judgment motion holding that the Defendants did not violate the Plaintiffs' constitutional rights. (Dkt. 41.) The district court denied the Superintendent's motion to dismiss as

moot. (Dkt. 41.) The district court further remanded the state law claims to the Wisconsin Circuit Court. (Dkt. 41)

STANDARD OF REVIEW

The Plaintiffs' brief is incomplete in that they failed to set forth the applicable standard of review in this matter.

The appellate court exercises plenary review over a district court's grant of summary judgment and must evaluate the factual record in the light most favorable to the nonmoving parties. *Johnson v. City of Fort Wayne*, 91 F.3d 922, 930 (7th Cir. 1996) (internal citations omitted). Further, the appellate court must resolve all inferences in favor of the nonmoving parties. *Id.* Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 930-31; Fed. R. Civ. P. 56(a).

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 in 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.*

To prevail on their § 1983 claims, the Plaintiffs must establish that: (1) they held a constitutionally protected right; (2) they were deprived of that right in violation of the Constitution; (3) the Defendants intentionally caused the deprivation; and (4) the Defendants acted under the color of state law. *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989). Thus, the Plaintiffs must demonstrate that the Defendants' actions violated the First and Fourteenth Amendments and the substantive case law interpreting these Amendments. If the Plaintiffs cannot make this showing, the Defendants are entitled to summary judgment, and the district court's decision granting the Defendants' summary judgment motion should be affirmed.

SUMMARY OF THE ARGUMENT

The Defendants' review of St. Augustine's requested attendance area properly applied the Wisconsin pupil transportation statutes in conformance with the two Wisconsin Supreme Court cases interpreting the constitutionality of these statutes.

Wisconsin law requires public school districts to transport private school students who meet certain criteria to their private school. *See*, Wis. Stat. § 121.54(2)(b). Pursuant to Wis. Stat. § 121.54(2)(b)1., the obligation of a school district to provide transportation benefits to any given pupil who elects to attend a private school is directly tied to the student living within the approved attendance area of a given private school.

Attendance area is defined in Wis. Stat. § 121.51(1) 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.

This definition prohibits a school board and the Superintendent from approving overlapping attendance areas for private schools affiliated with the same religious denomination, absent the circumstances specifically articulated in the definition.

Two Wisconsin Supreme Court cases interpret the definition of attendance area: *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 188 N.W.2d 460 (Wis. 1971) and *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 82 Wis. 2d 139, 262 N.W.2d 210 (Wis. 1978).

Vanko clarified that the statutory definition of attendance area prohibits schools owned or operated by the same sponsoring group from having overlapping attendance areas, regardless of whether they are public or private, parochial or otherwise. 52 Wis. 2d at 215-16. As noted by the district court, *Vanko* maintained that state decision makers must determine whether the group sponsoring a private school is religious, and, if so, whether it is "affiliated" with a "denomination" that already operates a school with an overlapping attendance area. *Id.* (*See also*, Dkt. 41, 13-14.)

Holy Trinity involved a state superintendent impermissibly entangling himself in a "continued examination and surveillance of the religious composition of both the instructional staff and the students" of a school that affirmatively and legally professed it was nondenominational. 82 Wis. 2d at

149. *Holy Trinity* does not hold that a school district and the Superintendent are strictly limited to considering only a private school's articles of incorporation and bylaws to determine affiliation. (Dkt. 41, 15.) Rather, *Holy Trinity* holds that when a private school's governing documents affirmatively demonstrate that the school is not affiliated with any denomination, the school board and the Superintendent may not, based on their own detailed inquiry and surveillance, conclude that the statements in these documents are false. 82 Wis. 2d at 144, 146, 150, 157-58; (Dkt. 41.)

In light of these decisions, the Defendants properly complied with their obligations under Wisconsin law within the constitutional parameters identified by *Vanko* and *Holy Trinity*. St. Augustine explicitly identified itself as "an independent, private Catholic school" when it requested Friess Lake to approve its proposed attendance area. (Dkt. 26, ¶3, Ex. D; Dkt. 34, Ex. B.) Friess Lake and the Superintendent appropriately accepted this self-identification, as well as St. Augustine's statement displayed publicly on its website that it was affiliated with the Catholic denomination. (*See*, Dkt. 33, Ex. F.) Contrary to the Plaintiffs' argument, neither the Wisconsin common law nor the bounds of constitutionality limited the Defendants to consider only what the Plaintiffs term purely "legal and secular" documents to determine whether the sponsoring group of two private schools is the same

religious denomination for purposes of enforcing these Wisconsin statutes. (Dkt. 41.)

The Defendants' actions and the resulting decision to deny St. Augustine's proposed attendance area, thus denying the Forros' transportation benefits, did not infringe upon the Forros' right to freely exercise their religion or equal protection under the law, nor did the decision-making process excessively entangle Friess Lake or the Superintendent in religious matters. As such, the district court's decision granting the Defendants' motion for summary judgment should be affirmed.

ARGUMENT

I. The Defendants complied with Wisconsin law.

A. The Defendants complied with their obligations under the 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."

In turn, the 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." Wis. Stat. § 121.51(1) (emphasis added). "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). 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 transport the private school's pupils.

Friess Lake 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. The Plaintiffs' disapproval of the outcome and methodology of this decision-making processes does not equate to a violation of Wisconsin law.

The decision-making process is not disputed. The District received a letter from St. Augustine dated March 31, 2015, with its proposed

"designated enrollment area." (Dkt. 34, ¶9, Ex. C; Dkt. 26, Ex. H.) Friess Lake knew St. Augustine to be a Catholic school. St. Augustine sent two additional letters on April 27, 2015, requesting a parent transportation contract for the Forros and again requesting an attendance area. (Dkt. 34, ¶¶7-8, Ex. A and B; Dkt. 26, Ex. D.) In one of those letters, St. Augustine affirmatively identifies itself as "an independent, private Catholic school." (Dkt. 34, Ex. B; Dkt. 26, Ex. D.) Friess Lake also consulted St. Augustine's website, which plainly states it is a Catholic school in the opening paragraph of the "About Us" section, directly above where it posted a photo of the Vatican flag. (Dkt. 33, Ex. F.) Based upon the understanding that St. Augustine is a Catholic school, the proposed attendance area was not approved because it overlapped with the existing approved attendance area for St. Gabriel, another Catholic school within the District. (Dkt. 34, ¶9, Ex. C; Dkt. 26, Ex. H.)

Subsequently, the Plaintiffs requested the Superintendent resolve the disagreement regarding the proposed attendance area of St. Augustine. (Dkt. 33, ¶10, Ex. D.) Friess Lake joined in that request. The Superintendent made a determination upholding the District's rejection of the proposed attendance area. (Dkt. 33, ¶13, Ex. G; App. 126-133; Dkt. 26, Ex. J.) Therefore, no transportation benefits were provided to the Forros.

The Plaintiffs' arguments are a house of cards. Unless the Plaintiffs prevail on their claims that the Defendants' considerations in reaching these conclusions regarding St. Augustine's affiliation were unconstitutional, there is no basis for a determination that the Defendants violated state law. As more fully addressed below, because the Plaintiffs cannot do so, their constitutional claims also fail as a matter law.

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

The 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. 9-11.) The Plaintiffs' further argue that any other interpretation of the statutes and the case law renders the statute unconstitutional in that it violates the First and Fourteenth Amendments. (Pls.' Br. 13-15.) The Plaintiffs' position is untenable and not supported by these decisions.

1. The Defendants followed *State ex rel. Vanko v. Kahl* and Wis. Stat. § 121.51(1) by not permitting overlapping attendance areas for schools of the same denomination.

The *Vanko* case squarely addressed "an attack upon the constitutionality" of Wis. Stat. §§ 121.51(1) and 121.54(2)(b) and the definition of attendance area. 52 Wis. 2d at 210. The plaintiffs in the *Vanko*

case argued that the portion of Wis. Stat. § 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 particular construction of the statute 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.

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 (emphasis added). 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 the 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 **is to make "affiliated with the same religious denomination" the test of affiliation in a single school system** rather than operation by a single agency or set of trustees or religious order within a particular religious denomination.

Id. at 215 (emphasis added). As to potential constitutional ramifications, the court held 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.

In other words, in *Vanko*, the Wisconsin Supreme Court did *not*, as the Plaintiffs argue, replace the statutory language regarding religious affiliation. Nor did the Wisconsin Supreme Court create a new and separate test that requires school districts and the Superintendent to look only to legal and secular matters while excluding any references to religious affiliation. Instead, the court only clarified the statutory language by adding the concept of affiliated operators or sponsoring groups. 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 215-16 (emphasis added).

The *Vanko* opinion was confirmed by the Wisconsin Supreme Court's decision in *Holy Trinity Cmty. School, Inc. v. Kahl*, 82 Wis. 2d 139, 262 N.W.2d 210 (Wis. 1978), discussed *infra*. When discussing *Vanko*, the *Holy Trinity* court stated:

> We held that the effect of the statute was to prohibit overlapping attendance districts in respect to public schools, private nonreligious schools operated under the same system, and religious schools affiliated or operated by a single sponsoring group **or denomination**.

Id. at 215 (emphasis added). It goes on to discuss the *Vanko* dicta cited above as support for its conclusion that a school's affiliation with a religious denomination had not been removed from the attendance area analysis. *Id*. at 215.

Here, in keeping with *Vanko*, the Defendants properly determined that St. Augustine, a self-avowed Catholic school, and the diocesan school of St. Gabriel, were both schools within the Friess Lake school district affiliated

with the Catholic denomination and therefore could not have overlapping attendance areas. (Dkt. 34, Ex. C; Dkt. 33, Ex. G; App. 126-133.)

2. The Defendants complied with *Holy Trinity Community School, Inc. v. Kahl* by basing their decisions on St. Augustine's own description of its religious affiliation.

In *Holy Trinity*, the Wisconsin Supreme Court was asked to revisit the interpretation of the statute set forth in the *Vanko* in light of new circumstances for one of the former plaintiffs. 82 Wis. 2d at 262. *Holy Trinity* involved a private school that, in light of the ruling in *Vanko* and in order to avoid the prohibition on overlapping attendance areas, changed the operations of its school such that it had no affiliation with any particular religious denomination. *Id.* The previous iteration of the school, Holy Trinity School, ceased to exist. *Id.* at 146. The school reincorporated itself as the Holy Trinity Community School, a non-denominational private school. *Id.* It was no longer operated by the Holy Trinity Congregation, and it discontinued its teaching of the "usual and formal" Catholic religious tradition. *Id.* Most significantly, its bylaws explicitly *precluded* the school from having any affiliation with any religious denomination. *Id.* (Emphasis added.)

Nevertheless, in making a determination regarding the school's proposed attendance area, the state superintendent considered the religious

affiliation of the staff members, 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. *Id.* at 147. Based on this information, the state superintendent concluded 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). 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 state 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.

In light of these facts, the *Holy Trinity* court addressed the permissibility of the state superintendent's extensive "examination and surveillance" of the school prior to granting the proposed attendance area:

> **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 the Plaintiffs' contentions and as found by the district court, *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. 11.) Rather, the *Holy Trinity* court clarified that the state could not conduct surveillance to determine religious affiliation where a *prima facie* case was made by the school itself:

> [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 as the Plaintiffs allege. 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 the Plaintiffs argue, that the District and the Superintendent were required by Wisconsin law to focus solely on the question of legal, operational, or some other secular connection between the schools. (Pls.' Br. 3, 6-7.) That conclusion is not found anywhere in the court's decision or any reasonable reading thereof.

Even if that were true, St. Augustine's own request for an attendance area, which presumably would be considered a "legal and secular"

document, stated the school was a Catholic school. (Dkt. 34, Ex. B; Dkt. 26, Ex. D.) St. Augustine characterizes itself as a Catholic school through publicly available information on its website, another secular document. (Dkt. 26, Ex. J; Dkt. 33, ¶12, Ex. F.) Neither St. Augustine's Amendment to the Articles of Incorporation nor its By-Laws mentioned any religious affiliation or indicated St. Augustine was unaffiliated with the Catholic denomination. (Dkt. 34, ¶11; Dkt. 33, ¶10, Ex. D.) Consistent with *Vanko* and *Holy Trinity*, the Defendants properly considered these self-published descriptions and affirmative statements regarding religious affiliation in considering St. Augustine's attendance area request.

II. The Plaintiffs' Free Exercise Clause claim fails as a matter of law as the Forros are not being forced to choose between practicing their religion and obtaining a public benefit.

The Forros allege the 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.

The Plaintiffs argue that the Defendants' decisions resulted in the limitation of their right to freely exercise their religion by denying the Forros an economic benefit available to other families whose children attend a different Catholic school within the Friess Lake School District.

This position is legally untenable. In order to advance a Free Exercise Claim, the Plaintiffs must show facts that demonstrate the Defendants' decisions substantially burdened the Forros by compelling them to do something prohibited by their religion or by requiring them to refrain from believing in or doing something compelled by their religion. *See generally*, *Frazee v. Ill. Dept. of Employment Sec.*, 489 U.S. 829 (1989). While a 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.

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 have made no

factual showing to show that obtaining the transportation benefits available to transport their children to St. Gabriel burdens their free exercise of religion. They allege only that they personally feel St. Augustine embodies "traditional religious values" that they consider to be "different" than those of St. Gabriel and that they do not see the schools as "two equivalent Catholic schools." (Dkt. 24, Declaration of Joesph Forro, ¶5.) They assert that St. Augustine implements their religious values while other schools do not. (*Id.*) Without the necessary factual showing, the claim fails as a matter of law.

Even if the Forros had alleged sufficient facts, the applicable Free Exercise case law does not support the Plaintiffs' claims under the circumstances of the case at bar. The parties do not dispute the validity of the Wisconsin statutes at issue, and 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 applied to members of the Orthodox Jewish faith, "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*, *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973). In *Luetkemeyer*, 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).

Under *Braunfeld* and *Luetkemeyer*, the Forros 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, even if the Forros had sufficiently factually demonstrated their sincerely held religious beliefs, the Plaintiffs' claims must fail.

The Plaintiffs cite the recently decided *Trinity Lutheran Church of Columbia, Inc. v. Comer* in support of their Free Exercise claim. 137 S. Ct. 2012 (2017). This case is readily distinguishable, however, from the facts and circumstances of the case at bar. First and foremost, the Missouri Department of Natural Resources had in place a system for the distribution of state grant funds that expressly prohibited funds from being awarded to *any* entity owned or controlled by a religious organization, regardless of whether they met the other qualifications for the program. *Id.* at 2017. That is, despite the fact that Trinity Lutheran Church ranked fifth among the forty-four applicants in terms of the qualifying criteria for grant eligibility, and the State awarded fourteen organizations grants that year, Trinity

Lutheran Church was automatically disqualified solely because it was a religious institution. *Id.* at 2018. In the case at bar, the Defendants had no such scheme in place. In fact, Friess Lake provides transportation benefits to children who attend St. Gabriel, another Catholic school, unlike the outright prohibition at issue in *Trinity*.

The Supreme Court categorized Missouri's program as expressly discriminating against otherwise eligible recipients by disqualifying them for a public benefit solely because of their religious character. *Id.* at 2021. The same cannot be said for Wisconsin's pupil transportation statutes or the administration thereof. Instead, this statutory scheme expressly confers a public benefit on private school students, including parochial school students, subject to certain attendance area requirements. *See*, *Vanko*, 52 Wis. 2d at 215-16.

The Supreme Court noted that under the Missouri DNR's grant program, Trinity Lutheran was "put to a choice between being a church and receiving a government benefit" in that the state had established a "[n]o churches need apply" rule. 137 S. Ct. at 2024. The Court goes on to state that "the exclusion of Trinity from a public benefit **for which it is otherwise qualified**, solely because it is a church, is odious to our Constitution. . . ." *Id.* at 2025 (emphasis added).

St. Augustine and the Forros are not in the same situation. St. Augustine's attendance area was not denied because they choose to operate as a religious organization. Rather, St. Augustine failed to establish a proposed attendance area that was distinct from that of another religious school of the same denomination. St. Augustine is not otherwise qualified to receive that public benefit. Eligibility for transportation benefits is conditioned upon a proposed attendance area that does not overlap with the established attendance area of another school affiliated with the same denomination.

Further, the Forros are not being asked to choose between practicing Catholicism or receiving transportation. This case is much closer to the quoted *Locke v. Davey* case in which the Supreme Court described, "Davey was not denied a scholarship because of who he was; he *was* denied a scholarship because of what he proposed *to do*. . . ." *Id*. at 223 (*citing Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307 (2004).). Here, the Forros have not denied transportation benefits because they are Catholic. They were denied transportation benefits because they attend St. Augustine, whose proposed attendance area overlapped with that of another Catholic school and, as such, could not be approved under the statute.

As noted in *Vanko*, the general restriction against overlapping is inherent in the entire concept of attendance areas. *Vanko*, 52 Wis. 2d at 215. Further, similar jurisdictional requirements and limitations exist for public school students. Section 121.54(2)(a) of the Wisconsin Statutes only requires school districts to provide transportation of pupils to the "nearest public school they are entitled to attend." Here, the Forros chose to send their children to a Catholic school to which their district did not transport students. They did not have to make that choice. In Wisconsin, parents may also have choices about sending their children to different public schools, such as charter schools, or they may "open enroll" their children to other public school districts. Wis. Stat. §§ 118.40, 118.51. School districts are not required to transport students to these schools where a choice is made to attend outside of the established attendance area. Wis. Stat. §§ 118.51(14)(a) and 121.54.

In this instance, the Defendants recognize that the other Catholic school within the district had already laid claim to the entirety of the Friess Lake School District as its attendance area; however, this does not in any way preclude the Plaintiffs from seeking some form of resolution with that school in order to come up with distinct attendance areas to accommodate pupils from both schools. Should this be the case, perhaps St. Augustine would be granted an attendance area on the other side of the Friess Lake

School District from where the Forros reside. In that hypothetical, the Forros would again not be entitled to transportation benefits if they choose to send their children to St. Augustine and not St. Gabriel. This would still not rise to a violation of their free exercise rights. As such, the Plaintiffs' contention that they have been denied a public benefit simply because of their choice to be religious is without merit.

III. The Plaintiffs' Establishment Clause claim fails as a matter of law because the Defendants did not excessively entangle themselves in the Plaintiffs' religion by accepting the Plaintiffs' own statements regarding religious affiliation.

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. The Plaintiffs allege the Defendants' application of the statutorily prescribed "attendance area" affiliation test violates the third prong of this test. (Pls.' Br. 2, 21, 25-32.)

To advance their claim, the Plaintiffs focus on the Defendants' review of publicly accessible information published by St. Augustine on its website. The Plaintiffs' argue that this review constitutes "excessive entanglement" in violation of the Establishment Clause. (*Id*. at 29.) In fact, they go so far as

to suggest that review of St. Augustine's website resulted in more excessive entanglement than the investigation and surveillance undertaken by the superintendent in *Holy Trinity*. (*Id.* at 23.)

A. The Defendants' decision-making processes were in accord with *Vanko* and *Holy Trinity*.

The Plaintiffs maintain that the decisions in *Vanko* and *Holy Trinity* require that the government limit its review to "purely legal and secular" documents:

> 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 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. 11.) The Plaintiffs inexplicably exclude St. Augustine's own correspondence requesting attendance area approval from the scope of permissibly reviewable legal and secular documentation. The Plaintiffs' argument misses the mark.

The Plaintiffs' argument misconstrues the *Vanko* and *Holy Trinity* decisions by narrowing the Defendants ability to consider relevant, constitutionally permissible facts, to an extreme extent and in contradiction to established precedent. *See*, *supra*. As set forth above and as held by the

district court, however, this is not what the *Vanko* and *Holy Trinity* decisions stand for. *See*, *supra*.

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 the Plaintiffs' argument, the Wisconsin Supreme Court did not preclude state imposed classifications that were dependent upon religious allegiance or affiliation. Rather, it precluded the "continued examination and surveillance of the religious composition" of an institution as the mechanism by which to make that determination. *Id*. at 149. Again, no such conduct has occurred under the facts of this case.

In the *Holy Trinity* case, the court stated that, "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, regardless of the fact that the statements were included in the articles of

incorporation, they were, in fact, statements that clarified the school's religious affiliation. The fact that the school's statement of affiliation happened to be included in its articles of incorporation in *Holy Trinity* does not represent the court's intent to forever require the Superintendent and every school district in Wisconsin to ignore any other statement of religious affiliation, regardless of degree or form. The Defendants did not excessively entangle themselves in the Plaintiffs' religion by accepting St. Augustine's assertions as to the denomination with which it is affiliated.

B. The Defendants properly relied on the Plaintiffs' own statements.

In this case, St. Augustine provided documentation in its attendance area request regarding its name change and its By-Laws. Unlike the Holy Trinity Community School, St. Augustine does not disavow affiliation with a particular religious denomination in this documentation. Instead, St. Augustine *openly proclaims its affiliation with Catholicism and its leadership in the Vatican*. (Dkt. 33, ¶10, Exs. D and F; Dkt. 34, ¶¶8, 15, Ex. B.) Furthermore, the Articles of Incorporation attached as Exhibit A to the Zignego Declaration were never provided to Friess Lake or the Superintendent as part of the request for approval of the school's attendance area. (Dkt. 34, ¶15; Dkt. 33, ¶14.) As such, the Defendants never disregarded a contrary assertion of religious affiliation.

Friess Lake's April 29, 2015 letter to St. Augustine makes clear that Friess Lake 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. (Dkt. 34, ¶¶5-6, 9, Ex. C; Dkt. 26, Ex. H.) In light of that knowledge, the documents submitted by St. Augustine 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. The Defendants then are able to rely on the Plaintiffs' own statements.

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*, the 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 it 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. (Dkt. 26, ¶3.)

C. Adopting the Plaintiffs' position in this case would result in "excessive entanglement."

The Plaintiffs argue that *any* analysis that includes the school's own statements regarding Catholicism outside of the bylaws and/or articles of incorporation constitutes excessive entanglement for purposes of the Establishment Clause, while simultaneously arguing that statements regarding religious affiliation contained *within* such secular documents are permissibly considered. (Pls.' Br. 13, 31-32.) Further, in order to sustain their Free Exercise claims, the Plaintiffs argue that if the Defendants can consider both St. Augustine and St. Gabriel to be Catholic, the Defendants must then distinguish the ways in which the schools' respective methods, practices, and beliefs in adhering to Catholicism are very different. In other words, the Plaintiffs ask the government to evaluate and analyze types of Catholicism. But this would inevitably lead to the excessive entanglement prohibited by the First Amendment.

In its letters, St. Augustine identifies itself as an "independent, private Catholic school." (Dkt. 26, Ex. D.) It prides itself on its adherence to Catholic tradition, claiming that it "operates more fully within the Catholic tradition than Archdiocesan schools." (*Id.* at ¶10.) Based on this distinction, the Plaintiffs would have the 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. (Pls.' Br. 3-4, 18-20.) This is type of inquiry is directly contrary to the line of cases cited by the Plaintiffs regarding the impermissibility of state actors or the Court interpreting the propriety of certain religious beliefs, the impropriety of interpreting the Amish faith, engaging in the "forbidden process of interpreting . . . church doctrine," and avoiding the "forbidden domain" of evaluating religious doctrine. (Pls.' Br. 26, citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969); and *United States v. Ballard*, 322 U.S. 78, 87 (1944).)

This court previously held 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).) 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).

However, the level of inquiry and scrutiny the Plaintiffs would have the 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, looking into additional public records not provided by the school, including the original articles of incorporation, etc. falls squarely within the category of activities deemed excessive entanglement in the *Holy Trinity* case and in the Supreme Court jurisprudence cited by the Plaintiffs.

IV. The Plaintiffs' Equal Protection Clause claim fails as a matter of law.

The Defendants dispute the Plaintiffs' broad interpretation of *Vanko* and *Holy Trinity* (as argued above) and reject their contention that the nature of the Defendants' decision to deny St. Augustine's proposed attendance area violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Without analysis, the Plaintiffs argue that the Defendants' conduct violates the Equal Protection clause because the Defendants would supposedly treat non-religious schools differently than religious schools. This claim is largely redundant with the Plaintiffs' First Amendment Claims that the Defendants applied a standard of religious affiliation that was outside the parameters set forth in *Vanko* and *Holy Trinity* because the test

was solely based on religion, 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, and resulted in excessive entanglement by the state in the Plaintiffs' religious beliefs. (Pls.' Br. 16, n. 6 and 25.)

A. The statutory test is not based solely on religion.

The Defendants' actions and decisions complied with *Vanko* and *Holy Trinity*. Without belaboring the analysis already set forth above, *Vanko* clearly 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.**

52 Wis. 2d. at 215 (emphasis added). As such, the test is really whether a requested attendance area overlaps with an attendance area of a school "affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious." *Id.*

Further, as noted above, the ruling in *Holy Trinity* did not create a new test, limiting Friess Lake 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, but the superintendent refused to accept the facial validity of the affirmative statements in those incorporating documents. *See*, *supra*.

B. The Plaintiffs have not – and cannot – demonstrate that the Defendants would have treated non-religious schools differently.

The Plaintiffs have not shown that Friess Lake or the Superintendent applied the statute disparately to any other private institution. Further, the Plaintiffs' argument that Friess Lake or the Superintendent could not do so is without factual or logical support. (*See*, Pls.' Br. 19-21.) Based on the construction of the applicable statutes as interpreted 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."

At the same time, the Plaintiffs fail to identify a single situation where the Superintendent or Friess Lake have treated non-religious, private schools in a different manner than religious, private schools. Simply put, there is no legal or factual basis for the Plaintiffs to assert that school districts or the Superintendent could not apply the law in this manner under those circumstances.

V. Because the 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, the Plaintiffs must establish: (1) that the Defendants have deprived them of a right secured by the "Constitution and laws" of the United States; and (2) that the 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 III, Plaintiff St. Augustine cannot demonstrate that the 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 and the Establishment Clause. As discussed in Part II, they fail to establish essential facts to support such their Free Exercise claim. Even if the Forros 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 IV. The 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. The Plaintiffs have failed to meet the first element of their claim. Therefore, the Court should deny the Plaintiffs' appeal in its entirety and affirm the decision of the district court granting the Defendants' motion for summary judgment.

CONCLUSION

For the foregoing reasons, the district court's decision should be AFFIRMED.

Dated at Madison, Wisconsin this 15th day of September, 2017.

AXLEY AND BRYNELSON, LLP

/s/ Kristin Renee Pierre
Lori M. Lubinsky, State Bar No. 1027575
Kristin Renee Pierre, State Bar No. 1085499
Attorneys for Appellee-Defendant,
Friess Lake School District
2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
Telephone: (608) 257-5661
Facsimile: (608) 257-5444
Email: llubinsky@axley.com
Email: kpierre@axley.com

WISCONSIN DEPARTMENT OF
PUBLIC INSTRUCTION

/s/ Laura M. Varriale
Laura M. Varriale, State Bar No. 1035902
Attorney for Defendant-Appellee,
Anthony Evers, in his official capacity as
Superintendent of Public Instruction
125 South Webster Street
Post Office Box 7841
Madison, WI 53707-7841
Telephone: (608) 266-9353
Facsimile: (608) 267-2223
Email: laura.varriale@dpi.wi.gov

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the applicable type-volume limitations in Fed R. App. P. 32(a)(7)(C) in that it contains 9,118 words.

/s/ Kristin Renee Pierre
Kristin Renee Pierre

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Plaintiff-Appellants are registered CM/ECF users and will be served by the appellate CM/ECF system:

Atty. Richard Esenberg

Defendant-Appellee, Anthony Evers, is also a registered CM/ECF user and will be served by the appellate CM/ECF system:

Atty. Laura M. Varriale

/s/ Kristin Renee Pierre
Kristin Renee Pierre