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

St. Augustine School and
Joseph and Amy Forro,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Constitution and Statutes

Wisconsin Constitution and Statutes

ARGUMENT

The Wisconsin Supreme Court has made it absolutely clear that when applying the statute at issue here, it is not the business of the State of Wisconsin to determine "who or what is Catholic." *Holy Trinity Community School v. Kahl*, 82 Wis. 2d 139, 153, 262 N.W.2d 210 (1977). In determining whether a school is affiliated with a religious denomination, it may make no religious judgments. If the school denies such an affiliation – as St. Augustine did here – the government may look only for secular connections to refute or overcome that denial. They may not – as Friess Lake and the Superintendent did here – decide that being rooted in some way in the "Catholic" tradition is the same as being part of the Roman Catholic denomination. Because there is no legal or other secular connection between St. Augustine and the Roman Catholic Church, the only way in which the two could be connected is by religious doctrine or allegiance. But making that the test of affiliation necessarily involves a religious judgment – a "determination of matters of faith or religious allegiance" – that is "forbidden by the Constitution." *Id.* at 149-50.

In response, the Defendants argue that St. Augustine "confessed" its affiliation with the Roman Catholic denomination and that, having done so, it may not "take it back" and is not permitted to explain. The Defendants protest that they were merely relying on this confession as if St. Augustine "sandbagged" them by only now claiming to be independent. But St. Augustine did no such thing. From the start, the State was told that St. Augustine is an independent and interdenominational Christian school, albeit one acting within what it regarded as the authentic Catholic tradition. From the beginning, there has existed absolutely no evidence that St. Augustine is subject to the legal and ecclesiastical authority of any arm of the Roman Catholic Church. It has been undisputed – all along – that there is no legal, managerial, sponsoring,

organizational, or other secular connection between St. Augustine and either the Catholic Archdiocese or St. Gabriel. In fact, although it is none of the State's business, St Augustine told the Defendants from the outset that it has religious differences and is theologically distinct from those schools operated by the local organ of the organized Roman Catholic Church.

The only basis on which the Defendants can claim that St. Augustine is "sponsored" by the same religious denomination as St. Gabriel is a religious one. St. Augustine says that it operates in the Catholic tradition. It also says that it is not religiously affiliated with the Archdiocesan schools and that it is, in fact, religiously distinct from them. The Defendants believe that St. Augustine's claim to embody the Catholic tradition, despite the absence of any legal, organizational, or operational connection between it and the Archdiocesan schools, is enough for sponsorship. There are at least two problems with the Defendants' position that create both statutory and constitutional infirmities.

First, the Defendants ask the wrong question. It may not employ any form of religious test or conduct any type or religious examination in conferring benefits. The determination is whether two schools are affiliated or, as the Wisconsin Supreme Court has put it, "operated by a single sponsoring group." *State ex rel Vanko v. Kahl*, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971). Second, in answering this question they are not free to ask, the Defendants make a judgment that they are prohibited to make. The Plaintiffs deny the very religious connection on which the Defendants rely. The Defendants say they are wrong, that both St. Augustine and St. Gabriel are actually "Catholic" and must be considered as commonly-sponsored and in the same denomination for purposes of the law. That determination inescapably passes judgment on the Plaintiffs' religious claim that they are not the same and cannot be so considered.

This double error violates state law (an issue that the District Court did not reach), but it

also violates the federal Constitution. Asking a religious question – conditioning benefits on the Plaintiffs' decision to be independent of what the State defines as the "Catholic" denomination – penalizes the Forros and St. Augustine based on their religious beliefs in violation of the Free Exercise Clause, and treats them differently than a secular school and its students in violation of both the Free Exercise and Equal Protection Clauses. Answering that question – and doing so by rendering a religious judgment – entangles the Defendants in "the determination of matters of faith or religious allegiance" in violation of the Establishment Clause. *Holy Trinity,* 82 Wis. 2d at 149-150. This is "repugnant to the Constitution." *Id.* at 153.

I. FRIESS LAKE AND THE SUPERINTENDENT MISREAD *VANKO* AND *HOLY TRINITY*.

The Defendants argue that the Wisconsin Supreme Court did not "replace the statutory language regarding religious affiliation." (Resp. Br. at 16.) That contention is, at best, imprecise. Whether or not the Wisconsin Supreme Court can be said to have "replaced" this language, it clearly applied the doctrine of constitutional avoidance to limit how it may be read. Even if the State can still ask whether two schools are sponsored by the same "denomination," affiliation with a denomination must be determined by secular connections – considerations of ownership, control, and common operation. *Holy Trinity*, 82 Wis. 2d at 150-153. Once the State bases a finding of affiliation on what it regards or assumes to be common religious belief, it is on forbidden ground.

On its face, Wis. Stat. §121.51(1) might be said to impose a religious test by saying that schools affiliated with the same religious denomination may not have overlapping attendance areas. However, in *Vanko,* the Wisconsin Supreme Court held that, because a classification based on religious affiliation would not be "germane or reasonably related to the purpose of the statute," reading "affiliation" to turn on a religious connection between schools would result in

"an apparent constitutional infirmity." 52 Wis. 2d at 214. Although the Defendants suggest that a religious classification can still be made under the statute (Resp. Br. at 16-17), the very language they quote from *Vanko* says otherwise, making clear that the test is not religious affinity, but whether a school is "affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious." *Id.* at 215.[1] Even if schools sponsored by the same denomination might be affiliated, the test for sponsorship cannot be religious affinity. In other words, to avoid this constitutional infirmity, the test of affiliation must be secular and not religious. It cannot be based on an evaluation of a school's religious beliefs, professions, or practices. *See Holy Trinity*, 82 Wis. 2d at 150 (disagreeing with the Superintendent's perceived "obligation to monitor religious schools to determine to what denomination they owe allegiance and with what denomination they are affiliated").

The Defendants argue that they can still make a religious assessment of two schools. They justify this by pointing to the hypothetical offered by the Wisconsin Supreme Court in *Vanko*, suggesting that schools operated by two different religious orders (Franciscans and Jesuits) could be considered affiliated. (Resp. Br. at 16-17.) But the Court did not suggest that the basis of that affiliation could be based upon religious affinity between the orders as opposed to secular considerations such as organizational control of both by a "single sponsoring group" (the Roman Catholic Church) which does not exist here. Indeed, the *Vanko* court referred to a "sponsoring group," which it described as a "school operating agency or corporation," 82 Wis. 2d at 215, further suggesting that affiliation requires ties to an organization and not a theology. To read the hypothetical to permit the State to assign schools to a "denomination" based on their beliefs would resurrect the religious test that the *Vanko* court said was forbidden.

[1] The Defendants acknowledge this as the real test later in their brief. (Resp. Br. at 39.)

The Wisconsin Supreme Court has itself refused to do so. In *Holy Trinity*, it noted that the hypothetical was dicta, 82 Wis. 2d at 145, and expressly rejected the suggestion that it meant the Superintendent "can properly make the determination of who or what is Catholic," *Id.* at 150. Under the Constitution, "[t]his is an inquiry that government cannot make." *Id.* at 151.

The *Holy Trinity* court held that the Superintendent must accept the operational independence of the reconstituted Holy Trinity Community School without regard to its religious similarity. *Id.* at 154-55, 157. It held this even though, in an attempt to circumvent the prohibition against overlapping attendance areas, Holy Trinity closed as an archdiocesan school and immediately reopened as an independent school with its own Articles of Incorporation and By-laws. It employed many of the same employees, served many of the same students, and leased the school building from the Catholic parish for one dollar per year. *Id.* at 146.

The Defendants distinguish the case by claiming that because, unlike the Superintendent in *Holy Trinity*, they are willing to declare St. Augustine irrevocably "Catholic" based on a statement on its website that it operates in the Catholic tradition, and are willing to ignore its simultaneous claims of legal, operational, ecclesiastical, and even religious independence. Its contention is that a religious determination is somehow constitutionally acceptable if it is superficial and incomplete. To state that proposition is to refute it. The constitutional injury that *Vanko* and *Holy Trinity* sought to avoid is not obviated when the State makes a merely lazy religious judgment.

This Court is obligated to accept and follow the Wisconsin Supreme Court's interpretation of a Wisconsin statute as binding. *Guaranty Bank v. Chubb Corp*., 538 F.3d 587, 590 (7th Cir. 2008) ("We are bound by the Wisconsin Supreme Court's interpretation of Wisconsin law, whether we think it right or wrong."). The Wisconsin Supreme Court interpreted

the statute the way it did expressly because it was necessary to save the statute from being unconstitutional. The Defendants are asking this Court to read the statute in a different way than the Wisconsin Supreme Court has, and is doing so in order to justify engaging in the exact kind of unconstitutional religious judgments the Wisconsin Supreme Court was trying to avoid.

II. THE DEFENDANTS MADE A RELIGIOUS DETERMINATION ABOUT ST. AUGUSTINE.

In their response brief, Friess Lake and the Superintendent acknowledge that their respective decisions to deny St. Augustine's requested attendance area were based upon their conclusion that "St. Augustine is a Catholic school." (Resp. Br. at 10.) They knew that St. Augustine was *not* legally affiliated with St. Gabriel or with the Archdiocese and that it was independently operated. (Dkt. #26 at ¶¶ 3-12; Dkt. ##26-1, #26-2, 26-3 and 26-5.) They knew that it was organized as an "interdenominational Christian school." They even knew that St. Augustine was "religiously distinct" from the schools of the Archdiocese. (Dkt. #26 at ¶10.) They understood (and concede here) that, under state law as detailed in *Holy Trinity*, if a school makes a *prima facie* showing of independence, the State cannot "test" that contention by conducting an investigation to "determine religious affiliation." (Resp. Br. at 20.) Yet they made no inquiry into the ownership, management, control, or legal affiliations of St. Augustine. What they did look for – and based their decision on – was what they erroneously took to be a concession of religious affiliation.

The Defendants' determination of whether St. Augustine is affiliated with the "same sponsoring group" as St. Gabriel is based upon a selective reading of St. Augustine's statements of its *religious beliefs*. (*See* Resp. Br. at 14, 18, 23, 29, 34, 40.) In fact, it could be nothing else. They point to no evidence that the Archdiocese or any other entity operated or under the aegis of the Roman Catholic Church sponsors both schools. They ignored St. Augustine's protestations

that it was independent, because it used the word "Catholic" to describe its religious views, even though it made clear that it was not "Catholic" in the same way as the Archdiocesan schools. The Defendants made a determination that religious affinity is what matters and whatever differences that St. Augustine might have with the Archdiocese were somehow self-evidently "not enough" to make the two schools separate. As the Wisconsin Supreme Court noted, "religious affiliation" and "religious considerations" are not germane to the purpose of the statute. The degree to which St. Augustine and St. Gabriel are religiously similar has nothing to do with whether their students should be transported to school or their attendance areas may overlap. *Vanko*, 52 Wis. 2d at 214.

The Defendants seek to avoid the obvious impropriety of what they have done by raising a red herring that also distracted the district court. St. Augustine's Articles of Incorporation describe the school as an "interdenominational Christian school" and describe an independent corporation that is not owned or controlled by the Archdiocese. But the Defendants say that they did not have the Articles in front of them when making their decision and therefore did not consider them. (Resp. Br. at 4, fn #1.) The facts concerning submission of the Articles of incorporation are set forth by St. Augustine and the Forros at pages 12-14 of their opening brief. Friess Lake and the Superintendent do not contest any of those facts in their response brief. They do not contest that:

- In St. Augustine's letter to Friess Lake on May 15, 2015 (Dkt. #26-5), St. Augustine said the Articles of Incorporation and By-laws of Saint Augustine were enclosed and show that the school was organized and is governed independently of any denomination.

- In that same letter, St. Augustine told Friess Lake that the school is organized under chapter 181 of the Wisconsin Statutes and that the corporation was not organized by, is not controlled by, and is not governed by any religious denomination.

- Friess Lake admits receiving the May 20, 2015 letter (Dkt. # 34, ¶ 14) and did not ever tell St. Augustine that it had not received the Articles of Incorporation which the letter plainly says were included.

What Defendants claimed – for the first time in this litigation – is that the Articles were not really enclosed and that they received only an amendment of the Articles which itself did not address the question of St. Augustine's independence. Even if that claim was relevant and material, it would, at most, raise a disputed question of material fact.[2] But it is not relevant. Friess Lake and the Superintendent treat this like a game where St. Augustine cannot "pass go" if it cannot show that its Articles of Incorporation were, in fact, included with its May 20, 2015 letter. But this is not Monopoly, and the Defendants cannot deny the Plaintiffs their statutory rights by crying "gotcha." It is undisputed that St. Augustine told the Defendants what the Articles said. If the Defendants did not actually have them and wanted to verify what they had been told, all they had to do was ask.[3]

And everyone agrees that the Articles of Incorporation are in the record in this case and Friess Lake, the Superintendent, and the district court had them as part of the argument and decision-making process. Contrary to the Defendants' claim (Resp. Br. at 23), they clearly state that St. Augustine is *not affiliated with any religious denomination*, but rather is "*independent*." In fact, all of the following facts are undisputed:

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

[2] Plaintiffs concede that the Defendants did not "consider" the Articles of Incorporation. They obviously ignored them and based their decision on snippets of what St. Augustine said about its religious beliefs. But the Plaintiffs do not concede that the Defendants did not *see* them or know what they said. Even if St. Augustine mistakenly enclosed the wrong document, the Defendants were not free to ignore its claims about what those documents actually say and were obligated to ask for the document they now claim not to have received.

[3] And, of course, the Articles were a matter of public record and available to the Defendants.

- Its Articles of Incorporation state that it is an "interdenominational Christian school." (Dkt. #26-1.)

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

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

- The curricula and values of St. Augustine are determined solely by St. Augustine and not by the Archdiocese or any other third party. (*Id.* at ¶9.)

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

These undisputed facts cannot be squared with the Defendants' conclusion that St. Augustine is part of the same school system as an Archdiocesan school. The only way they can be ignored is by arguing that some religious affinity between St. Augustine and the Archdiocese means that they are affiliated or commonly sponsored.

If the Defendants needed more information or did not have the information that St. Augustine obviously thought they had, they should have asked. Their failure to do so is telling. Defendants did not ask because they obviously believed that the legal, organizational, and operational independence of St. Augustine did not matter. They believed that they could deny transportation to the Plaintiffs because of what they believed to be the religious connection between St. Augustine and the Archdiocesan schools.

Although Defendants deny that their determination that St. Augustine was "Catholic" was the application of a religious test, they never explain what else it could be. It is necessarily a judgment that anyone who uses the term "Catholic" to describe themselves is affiliated with

everyone else who uses that term in a way that allows them to be considered affiliated and commonly "sponsored" or "operated." Because they have cited to no form of secular connection between the schools (and none exists), this claimed affiliation cannot be anything other than religious. Although their conclusion that the schools are religiously similar is wrong, it is a judgment that they were not entitled to make.

The Constitution does not permit state actors like Friess Lake and the Superintendent to use a religious test to decide who belongs to what religious denomination. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988) (stating that interpreting the propriety of certain religious beliefs puts the Court "in a role that [it was] never intended to play"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (refusing to assess the "proper interpretation of the Amish faith"); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (refusing to "engage in the forbidden process of interpreting . . . church doctrine"); *United States v. Ballard*, 322 U.S. 78, 87 (1944) (avoiding the "forbidden domain" of evaluating religious doctrine).

III. THE DEFENDANTS' APPLICATION OF A RELIGIOUS TEST TO DENY BENEFITS TO THE PLAINTIFFS VIOLATES THE FREE EXERCISE AND EQUAL PROTECTION CLAUSES.

This forbidden religious judgment violates the Constitution in two ways. First, it violates the Free Exercise Clause and Equal Protection Clauses by treating the Plaintiffs differently because of their religious status. Both the Forros and St. Augustine are being burdened because they have decided that adherence to their faith, even though it is rooted in what they see as the Catholic tradition, requires them to assert their independence of – and take a different religious course from – the Archdiocese. The Defendants argue that the Plaintiffs have not shown that they are being compelled to do something that their religion prohibits or prohibited from doing

something it compels. They argue that the State does not violate the Free Exercise Clause simply because it enacts a law that disadvantages them in a way that does not disadvantage other religious adherents, citing *Braunfeld v. Brown*, 366 U.S. 599 (1961). (Resp. Br. at 25.)

The citation of *Braunfeld* is odd. It was effectively overruled two years later by *Sherbert v. Verner*, 374 U.S. 398 (1963), in which the Court recognized that denying a government benefit because of a person's religious belief can be unconstitutional. In that case, it was unconstitutional to deny employment benefits to Seventh Day Adventists whose religious practice prohibited them from working on Saturday. *Id.* at 410. The Court recognized that a burden that is imposed because of a religious choice can impair Free Exercise. *Id.* *Sherbert* represents a line of cases that hold that a benefit cannot be denied because of a religious choice that a person has made. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a voucher program that allowed vouchers to be used in religious schools); *Thomas v. Review Bd. of Indiana Employment Sec. Div*., 450 U.S. 707 (1981) (upholding receipt of employment benefits for employee who terminated his job based on his religious convictions); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down state law denying members of the clergy right to seek public office). While the precise contours and limitations of this doctrine cannot be fully explored here, the State certainly cannot explicitly condition the availability of a benefit on a person's willingness to abandon his belief that his church represents a true and full expression of the Catholic faith tradition.

It is certainly true that the application of neutral laws of general applicability do not violate the Free Exercise Clause simply because they have a disparate impact on some religious adherents. *See Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). But in this case, the actions of the Defendants were neither neutral nor general – they single out

religious institutions for special disability. They applied a religious test to conclude that St. Augustine is "Catholic" in the same way as St. Gabriel and to deny an otherwise available benefit to the Plaintiffs because they believe differently. It is simply not the case that the State can categorize religious adherents and penalize those who claim that they do not fit into the official categories. It could not, for example, decide that a tax exemption will be permitted for only one "Protestant" or "Catholic" church and one "Muslim" mosque in each community without facing Free Exercise scrutiny. It cannot decide that only Catholics who adhere to the beliefs of or associate with whatever organized Catholic body that the State decides to recognize may receive benefits.

The Defendants argue that the Plaintiffs have not made 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." (Resp. Br. 24.) In other words, having cavalierly dismissed the Plaintiffs' beliefs, the State now asks that they prove them. Having determined "matters of faith and religious allegiance," it wants this Court to do the same. This would compound the constitutional injury. The Plaintiffs do not have to "prove" their religious beliefs;[4] evaluating them is forbidden in this situation. *See* cases at p. 10, *supra; see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2027 (2017) (briefly mentioning a sincere belief, but not analyzing it).[5]

[4] If the existence of a sincerely-held religious belief were necessary here, it is sufficiently demonstrated by the Forros' averments regarding their preferences for St. Augustine's religious teachings. (Dkt. #24 at ¶5.)

[5] The Defendants' citation to *United States. v. Seeger*, 380 U.S. 163 (1965), is ironic. That case held that a claim of conscientious objection could be based on belief in a "nontraditional" God and was driven, in part, by concern over government evaluation of the nature of religious claims. In fact, courts are famously reluctant to assess religious claims. *See Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2778 (2014) (calling judging the propriety of a religious claim a "question that the federal courts have no business

But, the Defendants argue, denial of transportation benefits does not impair free exercise because the State has no obligation to provide transportation to anyone and the receipt of such benefits are not required by their faith. This is true, but irrelevant. It is a fundamental principle of constitutional law that once it decides to offer a public benefit, the State may not deny it simply because the beneficiary is engaged in religious exercise. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (subsidizing playground materials); *Good News Club v. Milford Central School*, 533 U.S. 98, 111-12 (2001) (after school use of public buildings); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 846 (1995) (subsidizing printing costs); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14 (1993) (provision of a sign language interpreter to a deaf student attending Catholic school); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 487 (1986) (subsidizing a blind student pursuant to a state vocational assistance grant to finance pastoral studies at a Christian college).

The Defendants seek to distinguish *Trinity Lutheran* by pointing out that there, all religious entities were prohibited from receiving state grant funds. But the Defendants cannot maintain that it is better for the State to dole out benefits based on the application of a religious test. If the program in *Trinity Lutheran* had limited playground grants to only one school for each "denomination" of a church in a single city, that would not have saved it. If anything, putting government officials in charge of determining who belongs to what denomination causes an even greater constitutional injury.

The application of a religious test necessarily treats religious adherents differently

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addressing"); *Employment Divison*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.").

because it can, by definition, apply only to them. A test of religious affinity would not be applied to a secular school. And there is no authority in the statute for denying overlapping attendance areas to secular private schools that believe or do the same things. The Defendants assert, for example, that the statute would permit the refusal of overlapping schools to two Montessori schools, but they offer no support for that assertion.[6] (Resp. Br. at 40-41.) It strains credulity to think that the two schools that merely share a similar educational philosophy have the same "sponsoring group" which, as noted above, is an organization of some kind and not a set of beliefs or practices.

The Defendants also cite *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), for the proposition that a state may provide transportation only to public school students and not private school students. (Resp. Br. at 26-27.) It may be possible for a state to adopt such a policy,[7] but that is not what Wisconsin has done here. It has decided to provide such transportation, and the question here is whether such aid may be denied by application of a religious test. *Locke v. Davey*, 540 U.S. 712 (2004), which said it was permissible for a state to decline to fund scholarships for the study of devotional theology, is similarly inapposite. Wisconsin does not assert an interest in not providing transportation to parochial schools.

State actions that burden religions and are not neutral and of general applicability must be narrowly tailored to achieve a compelling interest. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 530 (1993). Religion, moreover, is a fundamental right triggering strict

[6] Nor did the District Court below explain why it believed the statute's language is consistent with denying overlapping attendance zones to two independent Montessori schools. (*See* Dkt. #41 at 14-15, 19.)

[7] That assertion is in serious doubt after the U.S. Supreme Court's very-recent decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (holding that the Free Exercise Clause protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their religious status).

scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2019. The Defendants do not even attempt to advance a compelling interest for allowing only one school that claims to be in the Catholic tradition per school district to obtain transportation. Indeed, the Wisconsin Supreme Court has made clear that religious considerations are not even germane to the purposes of the statute.

IV. THE DEFENDANTS' APPLICATION OF A RELIGIOUS TEST TO DENY BENEFITS TO THE PLAINTIFFS ALSO VIOLATES THE ESTABLISHMENT CLAUSE.

Friess Lake and the Superintendent argue that they were free to look at materials beyond the Articles of Incorporation and By-laws in coming to a decision in this case. (Resp. Br. at 10-11, 16, 20.) The Plaintiffs agree, but the key is not what the State looks at but what question it seeks to answer. The State can look at any material that is relevant to legal or other secular forms of affiliation. What they cannot do is conduct an independent review of St. Augustine to determine to what religious denomination it belonged based upon an analysis of its statements about its religious beliefs. The U.S. Supreme Court has consistently held under the Establishment Clause that the State may not "evaluate" religious claims, make religious decisions, or otherwise insert itself into religious conduct and practices. *See* cases at page 10, *supra*. Doing so makes the State a religious actor in violation of the Establishment Clause.

The Defendants do not defend the District Court's suggestion that a single episode of entanglement – just one application of a religious test – cannot violate the Establishment Clause. They do argue that the religious determination that they made is permitted because they relied only on the Plaintiffs' own words and did not engage in an extended evaluation of the Plaintiffs' religious beliefs. But the Plaintiffs' own words were not what the Defendants claim them to be. The Plaintiffs said that they operated in the Catholic tradition but were religiously distinct from the Archdiocese. The Defendants' choice to misconstrue part of what they said and ignore the

rest is, as noted above, a double error. It asks a prohibited question and answers it in a forbidden manner.

The Defendants were neither required nor permitted to assess that religious claim. They were obligated to accept it. However one frames the question – whether St. Gabriel and St. Augustine are affiliated or commonly sponsored or part of the same religious denomination – it can be answered only on secular grounds.

By telling St. Augustine and the Forros that their claim of religious distinction will be ignored and that they can obtain benefits only if they drop it is to thrust the State into a religious controversy. The Defendants do not cite a single case that suggests the application of a religious test is acceptable as long as it is done summarily. Imposing their view of who is and is not Catholic by an *ipse dixit* does not give the State free rein to make religious judgments. See *New York v. Cathedral Academy*, 434 U.S. 125, 132-33 (1977) ("[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."); *see also Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (striking down a Colorado scholarship program that subsidized tuition at private schools provided that the private institution was not "pervasively sectarian," on the grounds that it entailed "intrusive governmental judgments regarding matters of religious belief and practice.").

The Defendants argue that *Cohen v. City of Des Plaines*, 8 F. 3d 484 (7th Cir. 1993), calls for the State to engage in religious "line-drawing" in these circumstances. (Resp. Br. at 37.) In *Cohen*, a non-religious plaintiff challenged a zoning decision preventing her from opening a nursery school in a residential zoning district, arguing that she was discriminated against because a church would be allowed to operate a day care center in such a neighborhood. This Court ruled

against the plaintiff, holding that the underlying ordinance was justified by the decision of the municipality to refrain from interfering in a religious entity's use of its property. This Court held that it was a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. 8 F.3d at 490. In other words, the "line-drawing" had to do with how much the State might accommodate religion. It had nothing to do with "drawing lines" that determine who or what was Catholic (or Lutheran, or Jewish, or Muslim). The State instead was avoiding religious determinations rather than plunging into them as Friess Lake and the Superintendent did here.

CONCLUSION

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

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Cir. Rule 32 because it contains 5,611 words, calculated using the Word Count function of Microsoft Word 2010.

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Dated this 20th day of September, 2017.

/S/ RICHARD M. ESENBERG

CERTIFICATE OF SERVICE

I certify that on September 20, 2017, I electronically filed the foregoing Brief with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for the following participants in the cases, who are registered CM/ECF users:

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