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

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

Richard M. Esenberg, WBN 1005622
(414) 727-6367; rick@will-law.org
Brian McGrath WBN 1016840
(414) 727-7412; brian@will-law.org
Charles J. Szafir, WI Bar No. 1088577
(414) 727-6373; cj@will-law.org

Attorneys for Plaintiffs-Appellants

MAILING ADDRESS:
WISCONSIN INSTITUTE FOR LAW & LIBERTY
1139 East Knapp Street
Milwaukee, WI 53202-2828
(414) 727-9455
FAX: (414) 727-6385

RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case.

St. Augustine School, Inc. and Joseph and Amy Forro

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

Wisconsin Institute for Law & Liberty appeared for the Plaintiffs in this case in the district court and appears for the Plaintiffs-Appellants in this Court.

(3) If the party or amicus is a corporation:

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

St. Augustine School, Inc. is a Wisconsin non-stock not-for-profit corporation and has no parent corporation.

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

Not applicable.

WISCONSIN INSTITUTE FOR LAW & LIBERTY,
Attorneys for Plaintiffs-Appellants

/s/ RICHARD M. ESENBERG
Counsel of Record
Richard M. Esenberg, WI Bar No. 1005622
(414) 727-6367
1139 East Knapp Street,
Milwaukee, WI 53202-2828
FAX: (414) 727-6385
rick@will-law.org

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RULE 35(b)(1) STATEMENT

The divided panel decision in *St. Augustine Sch. v. Evers*, No. 17-2333, 2018 WL 4925598 (7th Cir. Oct. 11, 2018) put the Plaintiffs-Appellants to a choice. The majority expressly said that they must "choose between identifying as Catholic" on the one hand "and securing transit funding" on the other hand. *St. Augustine Sch.*, 2018 WL 4925598, at *4. Notwithstanding the Plaintiffs-Appellants' assertion that their view of the Catholic faith compels them to pursue it in a way that is independent of the Roman Catholic Church in its current form, the majority allowed the State to decide that they are nevertheless "affiliated" with that Church. In its view, the fact that St. Augustine's families may "send their children to a school that more precisely reflects their religious values only if they decline[] transportation benefits," *Id.* at *3, is constitutionally permissible.

This conflicts with the decision of the United States Supreme Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012 (2017) and consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions. *See St. Augustine Sch.*, 2018 WL 4925598, at *11 (Ripple, J., dissenting) (remarking that the panel's decision "raises haunting concerns about the future health of the Religion Clauses in this circuit" and "is indeed difficult to square . . . with the Supreme Court's recent reaffirmation [in *Trinity Lutheran*] that 'denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion.'" (quoting *Trinity Lutheran*, 137 S. Ct. at 2019)).

This proceeding also involves a question of exceptional importance: may the government conclude that a school is affiliated with a religious denomination, based solely on the fact that the denomination and the school both lay claim to the same religious label, where: (1) there is no

connection – legal, operational, religious, or otherwise – between the school and the denomination; and (2) the school explicitly and vigorously disclaims any association with that denomination? In concluding that the government possesses such authority, the panel has adopted an Establishment Clause test that is "simply unworkable" in numerous situations. *Id.* (Ripple, J., dissenting). In other words, can the State decide – whether by examination of beliefs or by who claims the label first – who is "Catholic," "Lutheran" or "Muslim?"

This Court should exercise its discretion to grant a rehearing of this case en banc pursuant to FED. R. APP. P. 35.

STATEMENT OF THE CASE

The State of Wisconsin provides transportation benefits to both private and public school students, *see* Wis. Stat. § 121.54(2), reflecting a general concern for the "safety and welfare" of all schoolchildren. *Cartwright v. Sharpe*, 40 Wis. 2d 494, 506, 162 N.W.2d 5 (1968). But there are rules about when those benefits are available. Relevant to this case, private school students receive transportation to their school only if they live in that school's geographic "attendance area." *See* Wis. Stat. § 121.54(2)(b)1. And the text of the governing statute provides that, generally speaking, "the attendance areas of private schools affiliated with the same *religious denomination* shall not overlap." Wis. Stat. § 121.51(1) (emphasis added).

The statute as enacted expressly calls for discrimination against religious schools. To cure that problem, the Wisconsin Supreme Court has held that this requirement must be read as banning overlapping attendance areas with respect to "all private schools affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular *or* religious." *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971) (emphasis added). In determining the affiliation of a religious school with a sponsoring group for purposes

of this requirement, the Wisconsin Supreme Court later held that courts should look solely at secular signs of affiliation such as the schools' articles of incorporation and by-laws rather than "make an impermissible inquisition into religious matters." *Holy Trinity Community. Sch., Inc. v. Kahl*, 82 Wis. 2d 139, 154, 262 N.W.2d 210 (1978).

Although the test of "affiliation" is not simply one of ownership, it must be secular and not religious. In *Holy Trinity*, the Wisconsin Supreme Court held that two schools that both looked "Catholic" were not affiliated for purposes of the statute. Holy Trinity was an archdiocesan school that closed its doors and then immediately reopened with its own articles of incorporation. *Id.* at 146-47. It employed many of the same employees (including five Catholic nuns), served many of the same students, and leased the school building from the Catholic parish for one dollar per year. *Id.* It taught only the Catholic religion in its released time program. *Id.* On these facts, under the same statute at issue here, Holy Trinity School was characterized as "Catholic" by the Superintendent, but the Wisconsin Supreme Court held that such characterization was not constitutionally permissible, and that the only thing that mattered was Holy Trinity's lack of legal ties to the Catholic Church. *Id.* at 147-50, 153-55, 157-58.

This dispute began in April, 2015 when St. Augustine School, one of the Plaintiffs-Appellants, requested transportation for certain of its pupils, the Forro children (the parents of whom are the other Plaintiffs-Appellants). (Dkt. #26 at ¶15; Dkt. #26-4.) The Defendants-Appellees (collectively the "Superintendent") denied St. Augustine's request because St. Augustine called itself a "Catholic" or "Roman Catholic" school on its website and because its attendance area overlaps with the attendance area of St. Gabriel School, a private school operating under the authority of the Roman Catholic Archdiocese of Milwaukee. (*See* Dkt. #26-10.)

But although St. Augustine and St. Gabriel both describe themselves as "Catholic," they are not in fact "affiliated with the same religious denomination." They are not affiliated at all. St. Augustine does not operate under the authority of the Archdiocese. (Dkt. #26 at ¶¶3-4, 7.) It does not follow the curriculum mandated by the Archdiocese for its schools and is under the control of its own board of directors and operates under the terms of its own articles of incorporation and by-laws. (*Id.* at ¶¶4, 9-10.) St. Augustine's articles of incorporation state that it is an interdenominational Christian school for the education of students in the primary and secondary grades. (Dkt. #26-1 at Art. III.) It is not operated by any religious order of the Catholic Church and is not affiliated with the Catholic Archdiocese of Milwaukee in any way. (Dkt. #26 at ¶7.) Neither its Articles nor By-Laws reveal any legal, operational or other connection with any other school or sponsoring entity, and do not make – or commit – the corporation to be subordinate or associated with any other entity, including the Roman Catholic Church or its Milwaukee Archdiocese. (Dkt. #26-1; Dkt. #26-3.) It is not subject to the ecclesiastical authority of the Archbishop or subject to the control of any organ of the Roman Catholic Church. (Dkt. #26 at ¶¶4, 7, 10.)

And although it is not the government's business, St. Augustine believes that it operates more fully within the Catholic tradition than Archdiocesan schools and considers itself to be more faithfully following in that tradition. (*Id.* at ¶10.) St. Augustine has said expressly and in writing that it considers itself religiously distinct from schools operated by the Archdiocese. (*See, e.g.*, *Id.*) It has not asked the State to adjudicate that claim. To the contrary, it has said that the State is constitutionally obligated to accept it.

But the Superintendent did not accept it. Instead, he took it upon himself to review statements on St. Augustine's public website that used the term "Roman Catholic" or "Catholic"

and decided that the school and Archdiocesan schools are affiliated with the same religious denomination. (Dkt. #26-10.) Put differently, even though there is no legal, operational, religious or other connection between St. Augustine and St. Gabriel, and even though both St. Augustine and the Archdiocese of Milwaukee denied any affiliation, the Superintendent – a government actor – has concluded that the two schools are affiliated with the same religious denomination, simply because both lay claim to the name "Catholic." The Superintendent then used this legal conclusion to deny transportation benefits to St. Augustine and the Forros. (*Id.*)

The Plaintiffs-Appellants ("St. Augustine") initially sought review of the Superintendent's decision in state court, but the Superintendent removed the case pursuant to 28 U.S.C. § 1441. St. Augustine asserted causes of action arising under the Equal Protection and Free Exercise and Establishment Clauses of the United State Constitution and under 42 U.S.C. § 1983. It also asserted a state law claim under Wis. Stat. §§ 121.51-121.55. On June 6, 2017, on cross-motions for summary judgment, the district court denied St. Augustine's federal claims on the merits and declined to exercise its jurisdiction of St. Augustine's state law claim. *See St. Augustine Sch. v. Evers*, 276 F. Supp. 3d 890, 894 (E.D. Wis. 2017).

A divided panel of this Court affirmed. *St. Augustine Sch. v. Evers*, No. 17-2333, 2018 WL 4925598 (7th Cir. Oct. 11, 2018). In rejecting St. Augustine's free exercise claim, the Court held that St. Augustine could be denied transit benefits because another self-identified "Catholic" school was already receiving such benefits in that attendance area. According to the panel decision, St. Augustine was therefore not refused benefits "*on the basis of* . . . religion." *Id.* It simply needed "to choose between identifying as Catholic and securing transit funding for its students." *Id.* "[I]f St. Augustine professed to be anything but Catholic," the Court added, "we would not have this case." *Id.* at *4 n.4. Put differently, the majority concluded that even entities

that claim to be religiously and organizationally distinct are affiliated if they claim to be the more faithful exponent of a religious tradition claimed by another. Only one of them can claim benefits.

This Court similarly dismissed St. Augustine's claim that the Superintendent had violated the Establishment Clause by determining what the word "Catholic" means. *Id.* at *5. The Court concluded that the Superintendent did not "define []or police religious orthodoxy" or engage in "an impermissible inquiry into the religious character of St. Augustine." *Id.* at *4. Instead, it merely "read and credited St. Augustine's statements on its website and busing request form that it was a Catholic – specifically a Roman Catholic – school." *Id.* at *5. The fact that St. Augustine repeatedly protested that it is religiously distinct from schools operated by the Archdiocese did not matter according to the Court because St. Augustine had "assign[ed] the label 'Catholic'" to itself. *Id.*

Judge Ripple dissented, criticizing the Court's decision as an "exercise in label reading." *Id.* at *11 (Ripple, J., dissenting). More specifically, he condemned the Court's conclusion that "if two schools employ the same label – 'Catholic' – to describe themselves, they are 'affiliated.'" In Judge Ripple's view, "the Constitution requires the state to rely on the same neutral principles it would apply to a non-religious school," namely "St. Augustine's independent corporate structure," and the "[t]he materials submitted to the Superintendent made the Superintendent well aware that St. Augustine is legally independent from St. Gabriel and the Archdiocese." *Id.* The Court's approach, Judge Ripple added, pressured parents "to bend to the school board's determination that what [the parents] believe to be an important religious difference between [St. Gabriel and St. Augustine] does not exist or is inconsequential" and

burdened "the right of each individual to define personal religious beliefs not according to institutional norms but according to *personal* religious commitments." *Id.* at *10-*11.

ARGUMENT

I. THIS COURT'S DECISION CONFLICTS WITH THE SUPREME COURT'S FREE EXERCISE CLAUSE DECISION IN *TRINITY LUTHERAN v. COMER*

The Free Exercise Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. Just last year, the Supreme Court confirmed that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion)).

Trinity Lutheran involved a state program, run by an agency, which "offer[ed] reimbursement grants to qualifying nonprofit organizations that purchase[d] playground surfaces made from recycled tires." *Id.* at 2017-18. Trinity Lutheran Church applied for one of these grants but was turned away because the state had a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious identity." *Id.* at 2018. The Supreme Court concluded that the policy violated the Free Exercise Clause. *Id.* at 2024. Explaining that "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions,'" *Id.* at 2022 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)), the Supreme Court observed that the state policy penalized Trinity Lutheran's free exercise of religion by "putting [the church] to a choice . . . participate in an otherwise available benefit program or remain a religious institution." *Id.* at 2021-22.

The clear lesson of *Trinity Lutheran* is that the government cannot make "disavowal [of] religious character" the price of participation in a generally-available government benefit program. *Id.* at 2020. Yet the Superintendent's policy, ratified by this Court, works in precisely this manner. This Court literally – and repeatedly – said in its opinion that all St. Augustine needed to do to obtain transportation was to stop professing that it is Catholic. *See St. Augustine Sch.*, 2018 WL 4925598, *3 ("St. Augustine had to choose between identifying as Catholic and securing transit funding for its students."); *Id.* at *4 n.4 ("[I]f St. Augustine professed to be anything but Catholic . . . we would not have this case."); *Id.* at *5 ("St. Augustine is free to change its affiliation . . . .").

The defendants in *Trinity Lutheran* could have made the same argument. All that Trinity Lutheran had to do was stop professing that it was religious and it could have received the benefits it was seeking. But requiring a school to renounce its religious belief – or to change it to seek the approval of the state – is the exact type of "indirect coercion" by the government that the Supreme Court found to be unconstitutional. *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Lyng*, 485 U.S. at 450).

It is immaterial that Wisconsin does not discriminate against all religions and only burdens those adherents who claim to be independent and distinct from the state-recognized "Catholic" denomination. "A law . . . may not discriminate against 'some or all religious beliefs.'" *Trinity Lutheran*, 137 S. Ct. at 2021 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993)). Indeed, requiring St. Augustine to use other words to describe its beliefs – ones that it presumably regards as inaccurate – not only entangles the state in religion, it constitutes the kind of indirect burden based on belief that *Trinity Lutheran* has forbidden.

This Court distinguished its decision from *Trinity Lutheran* because under Wisconsin case law, the same test – are two schools with overlapping attendance areas affiliated with the same sponsoring group – applies to secular and religious schools alike. Yet this Court ignored a critical part of Wisconsin law regarding this test (and thus misapplied it in an unconstitutional manner). In *Holy Trinity Community School v. Kahl*, 82 Wis. 2d 139, 262 N.W.2d 210 (1978), the Wisconsin Supreme Court rejected the notion that the State could "monitor religious schools to determine to what denomination they owe allegiance and with what denomination they are affiliated." *Id.* at 149. This, the Court held, would "meddle in what is forbidden by the Constitution[:] the determination of matters of faith and religious allegiance." *Id.* at 150. The State, it said, may not and *must not* apply a religious test to determine, for example, "who or what is Catholic." *Id.* Because applying such a test would be "repugnant to the Constitution," the government must limit its review of the factors that may constitute "affiliation" to those that are purely legal and secular – such as a review of the applicable constituent documents, namely, the articles of incorporation and by-laws of the school. If there is no legal affiliation based upon this review, the State's inquiry must end. *Id.* at 150-53.

Here, St. Augustine has demonstrated that there is no legal or other secular connection between it and the Roman Catholic Church and this Court did not conclude to the contrary in its decision. St. Augustine has even "profess[ed]" that it is religiously distinct from the Catholic Archdiocese of Milwaukee, despite the fact that both use a common label – Catholic. In other words, St. Augustine has *passed* the test that applies equally to secular and religious schools.

But rather than following the test promulgated in *Holy Trinity*, the panel majority came up with a different test. It said that whether two schools are affiliated will be determined by the school's "own profession of affiliation or non-affiliation," with that phrase referring largely to

the label a school has assigned to itself. *St. Augustine*, 2018 WL 4925598, *4. But even if this is the right test (and it is difficult to imagine that it is when applied in the religious context with different groups using the same words and meaning different things), St. Augustine has "profess[ed]" no such thing. It has said that it is religiously distinct from the Catholic Archdiocese. Neither St. Augustine nor the Archdiocese profess any affiliation with each other. This Court, however, despite these "professions" to the contrary, found that because they use a common religious label – Catholic – they were affiliated.

But the state – and panel majority – can only reach that result by deciding – or assuming – that what St. Augustine means by "Catholic" and what St. Gabriel means by "Catholic" are the same thing. Given that there is no secular connection between the schools, this is necessarily a religious determination. Moreover, this Court places St. Augustine in a Catch-22 situation. When St. Augustine supports its assertion that it is distinct from adherents of another denomination with an explanation, it is, according to the Court, "asking . . . the [Court] to undertake an unconstitutional analysis of religious belief." *St. Augustine School*, 2018 WL 4925598, *6. No secular school could ever find itself in the same situation.

All this shows why this Court is wrong on two different counts when it asserts that the law evenhandedly "bars two self-identified Catholic schools from receiving transit subsidies, but . . . also bars funding two Montessori schools, two International Baccalaureate® schools, or two French International schools." *St. Augustine Sch.*, 2018 WL 4925598, at *4.

First, there is nothing in the statutory framework at issue (or Wisconsin case law) that provides the government the authority to withhold transportation benefits from students attending a secular private school simply because it shares a similar educational approach with another school with an overlapping attendance area. For example, nothing in the statute provides

that a hypothetical Smith Montessori School which is in fact legally independent of a hypothetical Jones Montessori School could be denied overlapping attendance areas because both schools apply Montessori methods in education. An entity's educational methods have nothing to do with "affiliation" under the statute.

Second, even if the Court's test had some basis in the statute, it treats secular and religious schools differently. A Montessori school could explain to government actors the meaning of the label it adopted and whether and how it differs from schools who also use that title. Religious schools, in contrast, are prohibited from doing so, as evidenced by this case.

II. THIS COURT'S DECISION ADOPTS AN UNWORKABLE ESTABLISHMENT CLAUSE TEST

St. Augustine has also argued that the Superintendent violated the Establishment Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, by assuming the authority to decide (over St. Augustine's objection) that St. Gabriel and St. Augustine were affiliated with the same religious denomination. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971) (a statute producing an "excessive entanglement between government and religion" is unconstitutional). This Court rejected the argument. In its view, "[t]he defendants did not independently assign the label 'Catholic' to St. Augustine. St. Augustine did," specifically "on its website and busing request form." *St. Augustine*, 2018 WL 4925598, *5. All the Superintendent did was "credit[]" St. Augustine's statements. *Id.*

The Court leaps from the fact that both St. Augustine and St. Gabriel use the term "Catholic" or "Roman Catholic" to the conclusion that "all evidence viewed by the school district and superintendent indicated that St. Augustine and St. Gabriel professed affiliation with *the same Roman Catholic Church*." *Id.* (emphasis added). But this is just not so. "All of the

evidence" indicated that St. Augustine has a different view of the Catholic tradition and disavows – rather than accepts – affiliation with the organized Roman Catholic Church. The panel majority's conclusion that the government can determine whether an individual – or a school – is affiliated with a particular religious denomination by the name they use for themselves without listening to what they say about what they mean by that name is making the government the judge of what the word "Catholic" means. As Judge Ripple pointed out in his dissent, the associated guarantees of free exercise and non-establishment are made of sterner stuff:

> Labels work very well for identifying commodities in a supermarket, but they are ill fitted for protecting the religious liberty of an individual American. . . . A cornerstone of our Religion Clauses jurisprudence is the right of each individual to define personal religious beliefs not according to institutional norms but according to *personal* religious commitments. The congruity of personal beliefs with those of a known religious organization is beside the point.

Id. at *10 (Ripple, J., dissenting).

The Court acknowledges the problems with this approach given the doctrinal distinctions between "Jews" (Orthodox and Reformed), "Muslims" (Sunni and Shi'a), and "Lutherans" (Missouri Synod and Evangelical). *St. Augustine*, 2018 WL 4925598, *6. For unexplained reasons it says that those groups "would be entitled to argue that they are . . . different," *Id.*, but "Catholics" are not. But that is not a legitimate constitutional rule. *See, e.g.*, *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 780–81 (7th Cir. 2010) ("a constitutional rule must be broad enough to handle all sorts of religion").

This Court voiced legitimate concern that it not "pervert the Establishment Clause to declare internal doctrinal differences a matter of state concern." *Id.* But this is *not* the alternative to the test the Court adopted. Instead, the Court should apply the same neutral principles it would apply to a non-religious school to look for affiliation such as common ownership, overlapping

management, common employees, legal control, etc. These secular facts would show whether an actual "affiliation" existed and would treat religious and non-religious schools alike. What the Court must *not* do is adopt an approach that forces government entities to "define [and] police religious orthodoxy." *Id.* at *4. Yet that is the option this Court chose. This was a poor choice and future courts will struggle mightily to apply its decision in the future.

CONCLUSION

This Court should exercise its discretion to grant a rehearing of this case en banc pursuant to FED. R. APP. P. 35.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs-Appellants

/S/ RICHARD M. ESENBERG
Richard M. Esenberg, WI Bar No. 1005622
(414) 727-6367; rick@will-law.org

MAILING ADDRESS:
1139 East Knapp Street
Milwaukee, WI 53202-2828
(414) 727-9455
FAX: (414) 727-6385

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Cir. Rule 32 because it contains 3,897 words.

2. This brief complies with the typeface requirements of Cir. Rule 32 because it has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** in **12 point Times New Roman and with 11 point Times New Roman for the footnotes**.

Dated this 25th day of October, 2018.

/S/ RICHARD M. ESENBERG

CERTIFICATE OF SERVICE

I certify that on October 25, 2018, 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 case, who are registered CM/ECF users:

Laura M. Varriale SBN 1035902
Wisconsin Department of Public Instruction
125 S. Webster St.
PO Box 7841
Madison, WI 53707-7841
(608) 266-9353
FAX: (608) 266-5856
laura.varriale@dpi.wi.gov

Lori M. Lubinsky, SBN 1027575
Attorneys for Defendant, Friess Lake Sch. Dist.
AXLEY BRYNELSON, LLP
2 East Mifflin Street, Suite 200
Madison, WI 53703
Telephone: (608) 257-5661
llubinsky@axley.com

Dated this 25th day of October, 2018.

/S/ RICHARD M. ESENBERG