Appeal No. 17-2333

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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.

BRIEF OF *AMICUS CURIAE*, THE THOMAS MORE SOCIETY, IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING *EN BANC*

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RULE 26.1 DISCLOSURE STATEMENT

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

Thomas More Society

(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:

Thomas Brejcha of the Thomas More Society, a national public interest law firm.

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

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

The Thomas More Society is a 501(c)(3) not-for-profit organization. It has no parent corporation.

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

Not applicable.

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Not applicable.

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Thomas More Society ("TMS") is a nonprofit organization devoted to the defense and advocacy of First Amendment rights, including freedom of speech and religious freedom. Incorporated as a 501(c)(3) not-for-profit corporation in Illinois and based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.[1]

Given its advocacy on behalf of its clients in claims relating to the First Amendment's Free Exercise and Establishment Clauses, TMS has a particular interest in the resolution of issues relating the interpretation and application of those constitutional provisions and in the maintenance of a uniform body of precedent construing those provisions.

RULE 35(b)(1) STATEMENT

The Court's decision in this case raises issues of exceptional importance fundamental to the construction and application of the First Amendment's Religion Clauses. Those questions include, as addressed herein: "Whether, in determining access to governmental benefits, a determination of religious affiliation may be based solely on self-selected labels?"

ARGUMENT

I. The Court Erred In Finding That Self-Selected Labels Establish "Affiliation With The Same Religious Denomination."

Under Wisconsin law (Wis. Stat. §121.54(2)(b)1.), the school boards of each school district are required to provide students transportation to private schools "if such private school is a school within whose attendance area the pupil resides and is situated within the school district

[1] No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route." Wisc. Stat. §121.51 ("Section 121.51") provides, in relevant part, "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."

In an effort to avoid the admittedly constitutionally infirm actual language of Section 121.51, the Wisconsin Supreme Court interpreted Section 121.51 to mean "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." *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971). [Emphasis added.] According to the Wisconsin Supreme Court, the language of Section 121.51 stating, "[t]he attendance areas of private schools affiliated with the same religious denomination shall not overlap" "make[s] '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.*

Plaintiffs-Appellants, St. Augustine School ("St. Augustine"), and Joseph and Amy Forro ("the Forros") assert that Defendants-Appellees ("Defendants") denied the Forros' children transportation to St. Augustine in violation of the Free Exercise and Establishment Clauses of the First Amendment. The Court held that the denial of transportation to students of St. Augustine does not violate the Free Exercise Clause because the denial of that benefit was based on "the religiously neutral and generally applicable grounds provided in Section 121.51." *St. Augustine Sch. v. Evers*, No. 17-2333, 2018 WL 4925598, *3 (7th Cir. Oct. 11, 2018). The Court concluded that because both St. Augustine and another school in the same "attendance area," St.

Gabriel School ("St. Gabriel"), label themselves as "Roman Catholic," they are two private schools that share an institutional affiliation within the same attendance area and that that was a valid basis to deny benefits to "second in line," St. Augustine. *Id*. at *3-4. The foundation of the Court's ruling was that, because both schools labeled themselves Roman Catholic, they necessarily share an institutional affiliation. *Id.* at *3-4.

That conclusion, however, departs from established Wisconsin law, as determined by the Wisconsin Supreme Court, which this Court is bound to follow. See *Huddleston v. Dwyer*, 322 U.S. 232, 236, 64 S.Ct. 1015, 188 L.Ed 1246 (1944). Under Wisconsin law, a determination of whether two organizations are "affiliated" is not based on self-labeling but upon consideration of whether "two or more organizations are allied with or closely connected with one another, or with a central body." *Herman v. United Automobile, Aircraft & Agricultural Implement Workers of America*, 264 Wis. 562, 569, 59 N.W.2d 475 (1953). See also, *Holy Trinity Comty. Sch. v. Kahl*, 82 Wisc.2d 139, 147, 262 N.W.2d 210 (1978).

In this case, there was no evidence that St. Augustine was allied or closely connected with either St. Gabriel or with a central body. Instead, the record established the contrary. St. Augustine is operated by and under the control of its own board of directors under the terms of its own articles of incorporation and by-laws. (Dkt. #26 at ¶ 4). 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 sponsoring entity. Neither St. Augustine's Articles nor By-Laws associate or "closely connect" St. Augustine with any sponsoring entity, including the Roman Catholic Church or its Milwaukee Archdiocese. St. Augustine is not subject

to the ecclesiastical authority of the Archbishop and is not otherwise affiliated with or subject to the control of any organ of the Roman Catholic Church. (Dkt. #26 at ¶10.)

Moreover, in applying Section 121.51, the Wisconsin Supreme Court has held that in determining affiliation with a religious denomination the courts look to a school's articles of incorporation. *Holy Trinity Comty. Sch. v. Kahl*, 82 Wisc.2d 139, 146-147, 262 N.W.2d 210 (1978). In that case, a Catholic school re-incorporated itself with by-laws providing that the school was to have no affiliation with a religious denomination, but the Wisconsin Superintendent of Public Education concluded the reincorporated entity was still a Catholic school. The Wisconsin Supreme Court ruled that the controlling consideration was the new entity's articles of incorporation disclaiming any religious affiliation. *Holy Trinity*, 82 Wisc.2d at 150. In this case, as discussed above, St. Augustine's articles of incorporation do not assert or establish any "Catholic" or "Roman Catholic" affiliation. Notwithstanding that St. Augustine's articles of incorporation state that it is an interdenominational Christian school (Dkt. # 26-1 at Art. III), the Court found that because St. Augustine called itself "Catholic" in its application for transportation for its students and on its website, it is necessarily affiliated with the same religious denomination as St. Gabriel. *St. Augustine Sch.*, 2018 WL 4925598, *2, 4.

The test for "affiliation with the same religious denomination" adopted by the Court conflicts with the controlling decisions of the Wisconsin Supreme Court and creates a test of religious affiliation wholly divorced from any substance. The record fails to establish any actual affiliation between St. Augustine and St. Gabriel or any organ of the Roman Catholic Church. The record fails even to establish that in self-identifying as "Catholic" or "Roman Catholic," St. Augustine and St. Gabriel had a common understanding of that label. Finally, the Court affirmed summary judgment even though, under its own "self-labeling" test, an issue of fact existed

because St. Augustine had both "self-identified" as an interdenominational school and as a "Catholic" or "Roman Catholic" school.

II. Contrary To The Court's Conclusion, The Use Of The Same Nomenclature By Different Religious Organizations Does Not Establish Any Connection Between Them, Let Alone, That They Are The Same Religious Denomination.

The plain and ordinary meaning of "denomination" is not "self label" but "a religious organization whose congregations are united in their adherence to its beliefs and practices." https://www.merriam-webster.com/dictionary/denomination (last visited 10/31/2018). In this case, there was no evidence that when St. Augustine described itself as "Catholic" or "Roman Catholic" it meant the same thing that St. Gabriel meant when it described itself as "Catholic," let alone that St. Augustine was categorically acknowledging it was "united" with St. Gabriel or any other organization "in its beliefs and practices."

To the contrary, the record showed that St. Augustine is Traditionalist Catholic and follows its own "traditionalist" practices. *St. Augustine Sch. v. Evers*, 276 F.Supp.3d 890, 892 (E.D. Wis. 2017). Paradoxically, the Court stated that its decision did not foreclose religious groups, including "Anglican Catholics" and "Roman Catholics," from arguing that they are members of different "groups" for purposes of Section 121.51 (*Id.* at *6), but failed to explain why Traditionalist Catholic St. Augustine was not permitted to advance such an argument or how any such argument could be reconciled with the Court's refusal to look beyond self-labels.

The Court's decision appears to be driven by an unsupported understanding of the Roman Catholic Church as a monolithic entity with absolute control over the use of the term "Catholic" such that any organization identifying itself as "Catholic" necessarily has a close connection with the Vatican and the "same religious denomination." As the dissent recognized, "'[i]ntra-faith differences ... are not uncommon among followers of a particular creed, and the judicial process

is singularly ill equipped to resolve such differences in relation to the Religion Clauses." The "guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.... [I]t is not within the judicial function and judicial competence to inquire whether [one person or another] correctly perceive[s] the commands of their common faith.'" *St. Augustine Sch. v. Evers*, 2018 WL 4925598, *11 (Ripple, J. dissenting), quoting *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715-716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). That is precisely why, in this case, consistent with the Wisconsin Supreme Court's decision in *Holy Trinity*, St. Augustine's articles of incorporation, rather than self-identification as "Catholic" or "Roman Catholic" should have controlled the determination of whether St. Augustine was "affiliated with the same religious denomination" as St. Gabriel.

CONCLUSION

For the above and foregoing reasons, Amicus Curiae, the Thomas More Society, urges this Court to grant a rehearing of this case en banc pursuant to FED. R. APP. P. 35.

Respectfully submitted,

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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 1,742 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 for Mac 2011 in 12 point Times New Roman and with 12 point Times New Roman for the footnotes.

CERTIFICATE OF SERVICE

I certify that on November 7, 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 cases, who are registered CM/ECF users:

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