No. 18-1151

# In The
# Supreme Court of the United States

ST. AUGUSTINE SCHOOL, *et al.*,

*Petitioners,*

v.

CAROLYN STANFORD TAYLOR,
in her official capacity as Superintendent
of Public Instruction, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Seventh Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Seventh Circuit Court of Appeals err in concluding that the Friess Lake School District applied sections 121.51 and 121.54 of the Wisconsin Statutes in a religiously neutral way that did not violate the Free Exercise Clause or the Establishment Clause of the First Amendment when it accepted Petitioners' assertion that St. Augustine is a Catholic school when determining the school's eligibility for school transportation aid under a statute that precludes two schools affiliated with the same organization from having overlapping attendance areas?

## PARTIES TO THE PROCEEDING

Petitioners are St. Augustine School, Inc. and Joseph and Amy Forro. Respondents are Carolyn Stanford Taylor, in her official capacity as the current Superintendent of Public Instruction,* and the former Friess Lake School District.**

* Ms. Stanford Taylor succeeded Anthony Evers in office as the Superintendent of Public Instruction of the State of Wisconsin during the pendency of this action.

** In 2018, the Friess Lake School District and an adjacent district, the Richfield School District, were consolidated into the Holy Hill Area School District.

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## INTRODUCTION

This case involves a school district and the state superintendent's application of a valid and neutral statute of general applicability governing students' eligibility for state transportation benefits. The Wisconsin school transportation aid statutes have attendance-area and proximity requirements that restrict the availability of school transportation aid, regardless of whether the student attends public or private school. *See* Wis. Stat. §§ 121.51, 121.54 (Pet. App. 82a-94a.) In this particular instance, however, Petitioner St. Augustine School ("St. Augustine") is a private school with self-professed affiliations that precluded approval of its proposed attendance area for the purpose of obtaining state transportation benefits.

The Friess Lake School District (the "District") received a request from St. Augustine for approval of the school's proposed attendance area. The school transportation aid statute at issue, as previously construed by the Wisconsin Supreme Court, precludes school districts from approving overlapping attendance areas for two private schools with the same affiliation. Because St. Augustine stated it was a Catholic school and another Catholic school within the District already had an approved attendance area that overlapped with the attendance area proposed by St. Augustine, the District denied St. Augustine's proposed attendance area. In accordance with the statute, the District and St. Augustine submitted the dispute over the proposed attendance area to the Superintendent for Public Instruction for the State of Wisconsin (the

"Superintendent"), who came to the same conclusion as the District regarding the interpretation and applicability of the statute in light of the relevant Wisconsin Supreme Court precedent.

Relying on its application of established law to the undisputed material facts of this case, the Seventh Circuit's majority decision (the "Decision") affirmed that the District had not violated the Free Exercise Clause when it applied Wisconsin's valid and neutral law of general applicability, simply because the ultimate result was a religious organization being found ineligible for certain state benefits. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). Further, the Seventh Circuit correctly concluded that there was no Establishment Clause violation because the District relied on St. Augustine's self-identification as a Catholic school when making the required determination regarding the proposed attendance area. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The District did so without conducting a detailed inquiry or surveillance into the school's religious practices or beliefs or engaging in any process of weighing the credibility or legitimacy of the statements on which St. Augustine sought to distinguish itself from St. Gabriel. *Id.*; *see also Holy Trinity Cmty. Sch., Inc. v. Kahl*, 262 N.W.2d 210, 217-18 (Wis. 1978).

The Petition should also be denied because the Decision is not in conflict with any relevant decision from this Court, any United States court of appeals, or any state court of last resort. The decisions cited by Petitioners are distinguishable from this case, and there is

no basis for overturning the established precedent of this Court in this instance based on the facts presented herein.

## STATEMENT OF THE CASE

### I. Factual Background

In the spring of 2015, the District received a request from St. Augustine seeking approval of the school's proposed attendance area for purposes of securing state transportation aid for its students. (Pet. App. 70a-71a.) The relevant state statutes, as interpreted by the Wisconsin Supreme Court, preclude school districts from approving overlapping attendance areas for two schools with the same affiliation for the purpose of allocating transportation benefits. (Pet. App. 82a-94a.) Because St. Augustine represented to the District that it was a Catholic school and another Catholic school within the District already had an approved attendance area that overlapped with the attendance area proposed by St. Augustine, the District could not approve St. Augustine's proposed attendance area. (Pet. App. 71a.)

Under the school transportation aid statute, the Superintendent of Public Instruction for the State of Wisconsin (the "Superintendent") is charged with resolving disputes between school districts and private schools over proposed attendance areas. (Pet. App. 82a.) As such, the District and St. Augustine submitted a joint request to the Superintendent to make a final

determination regarding St. Augustine's proposed attendance area. (Pet. App. 69a.) The Superintendent came to the same conclusion as the District regarding the interpretation and applicability of the state statute in light of the relevant Wisconsin Supreme Court precedent, and denied St. Augustine's proposed attendance area. (Pet. App. 78a-79a.) Because St. Augustine's proposed attendance area could not be approved under the statute, St. Augustine's students were not eligible for transportation benefits for the 2015-16 and 2016-17 school years. (Pet. App. 79a.)

Petitioners, Joseph and Amy Forros, are the parents of three St. Augustine students who were ineligible for state transportation aid for the 2015-16 and 2016-17 school years. (Pet. at 11-12.)

## II. Procedural History

The Petitioners filed the underlying lawsuit in Washington County Circuit Court, State of Wisconsin, in March 2016, alleging that the District and Superintendent's decisions were contrary to the relevant Wisconsin statutes and asserting claims under 42 U.S.C. § 1983 based on allegations that the Respondents' decision-making process violated their First and Fourteenth Amendment rights. (Pet. App. 44a.) The District removed the case to the United States District Court for the Eastern District of Wisconsin, which had jurisdiction pursuant to 28 U.S.C. § 1331 and, as such, was permitted to exercise supplemental jurisdiction over

the state law claims pursuant to 28 U.S.C. § 1367(a). (Pet. App. 44a-46a.)

The district court entered summary judgment in favor of the Respondents on June 6, 2017, and, correspondingly, denied Petitioners' Motion for Summary Judgment. (Pet. App. 35a.) The district court noted that it was "difficult to identify the precise contours of the [Petitioners'] federal legal theories," but concluded that they were alleging that Respondents' actions violated their rights under the Religion Clauses of the First Amendment and the Equal Protection Clause. (Pet. App. 57a-58a.) The district court concluded that there was no evidence in the record from which a reasonable trier of fact could conclude that the Respondents would, in violation of section 121.51(1), approve overlapping attendance areas for secular, private schools that are affiliated with or operated by the same sponsoring group. (Pet. App. 59a.) As such, the district court granted summary judgment in favor of Respondents on Petitioners' claim that Respondents violated the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment by applying a test to St. Augustine that they would not have applied to a similarly situated secular private school. (Pet. App. 58a-60a.) With respect to the Petitioners' excessive entanglement allegation, the district court specifically noted that the case law did not support the argument that "a single decision under a broader statutory scheme can be deemed unconstitutional on the ground that it involved excessive entanglement." (Pet. App. 62a.) Nonetheless, the district

court applied the excessive entanglement case law to determine that Respondents had not engaged in "intrusive government participation in, supervision of, or inquiry into religious affairs."[1] (Pet. App. 62a-63a (citing *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 637 (7th Cir. 2000).)

Petitioners appealed to the Seventh Circuit. The Panel Majority for the Seventh Circuit affirmed the district court's finding that neither the District nor the Superintendent violated the Petitioners' First or Fourteenth Amendment rights in applying the Wisconsin school transportation statutes at issue in this case. (Pet. App. 1a.) The Panel Majority relied on longstanding precedent that refutes Petitioners' contention that, as applied to them under the facts and circumstances of this case, the District and the Superintendent infringed upon their right to freely exercise their religion and excessively entangled themselves in religious matters in reaching this decision. (*See generally* Pet. App. 2a-20a.) The Seventh Circuit pointed out the logical fallacy of Petitioners' argument in that they accuse Respondents of an Establishment Clause violation, while simultaneously requesting that these entities, in order to conform their conduct to the confines of the United States Constitution, recognize a nuanced, religious distinction held between St. Augustine's view of Catholicism and other Catholic entities. (Pet. App. 17a-18a.)

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[1] The district court remanded the remaining legal issue in the case, whether the District and Superintendent correctly applied sections 121.51 and 121.54 of the Wisconsin Statutes to the Wisconsin Circuit Court. (Pet. App. 56a.)

The Seventh Circuit denied Petitioners' request for rehearing. (Pet. App. 80a-81a.)

## REASONS FOR DENYING THE WRIT

Under the Supreme Court Rules, a petition for a writ of certiorari will be granted only for compelling reasons. (Rule 10.) Rule 10 sets forth criteria indicating "the character of the reasons the Court considers . . . " in determining whether to grant a petition. Petitioners have not established meritorious grounds satisfying these conditions and, as such, this Court should deny the Petition.

### I. The Decision is not inconsistent with any relevant Free Exercise Clause decisions of any United States court of appeals, state court of last resort, or this Court.

The Free Exercise Clause of the First Amendment protects "the right to believe and profess whatever religious doctrine one desires," including being free from government punishment of the expression of religion. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). However, as the Panel Majority correctly recognized, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879

(quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring)).

Wisconsin law requires public school districts to transport private school students who live within an approved "attendance area" to their private school. *See* Wis. Stat. § 121.54(2)(b). By statute, attendance areas of affiliated private schools may not overlap. Wis. Stat. § 121.51(1). In other words, a school district may not provide transportation to a private school if there is already an affiliated private school in that attendance area. *See State ex rel. Vanko v. Kahl*, 188 N.W.2d 460, 464-65 (Wis. 1971).

Section 121.51 of the Wisconsin statutes "imposes a neutral and generally applicable limitation on transportation funding." *St. Augustine Sch. v. Evers*, No. 17-2333, 2018 U.S. App. LEXIS 28651 (7th Cir. Oct. 11, 2018), at *11. (Pet. App. 11a.) It expressly confers a public benefit on private school students, including parochial school students, subject to certain attendance area requirements. *See Vanko*, 188 N.W.2d at 464-65. The ban on overlapping attendance areas applies "to *all* private schools affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious." *St. Augustine Sch.*, 2018 U.S. App. LEXIS 28651, at *11 (citing *Vanko*, 188 N.W.2d 460). (Pet. App. 11a.)

The Panel Majority correctly decided that applying Wis. Stat. § 121.51 to St. Augustine does not deny a generally available benefit solely on account of religious identity. Rather, Wis. Stat. § 121.51 denies a generally available benefit (i.e., transportation funding) to

St. Augustine because St. Augustine "professes to be affiliated with a group that already has a school" in that attendance area. *Id.* at *12. (Pet. App. 12a.)

As recognized by the Panel Majority, Petitioners' reliance on *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), is misplaced. In *Trinity Lutheran*, the Trinity Lutheran Church challenged a state grant program that expressly prohibited the Missouri Department of Natural Resources from awarding funds to *any* entity owned or controlled by a religious organization, regardless of whether they met the other qualifications for the program. *Id.* at 2021. Even though Trinity Lutheran Church qualified for funding, it was denied funding solely because it was a religious institution. *Id.* Trinity Lutheran was "put to the choice between being a church and receiving a government benefit" in that the state had established a "[n]o churches need apply" rule. *Id*. at 2024. This violated Trinity Lutheran Church's right to free exercise.

Here, no such categorical ban exists. To the contrary, section 121.51 expressly allows for public transportation funds to private, religious schools. The distribution of funds is limited only by the neutral and generally applicable criteria of self-reported affiliation and attendance area. St. Augustine self-reported its Catholic affiliation in its attendance area proposal. The proposed attendance area already included a Catholic school, so the request was denied. If the self-reported Catholic affiliation is replaced with affiliation between "two Montessori schools, two International

Baccalaureate® schools, or two French International schools," the result is exactly the same. *St. Augustine Sch.*, 2018 U.S. App. LEXIS 28651, at *11-12. (Pet. App. 12a.) The applicable question focuses solely on *affiliation*, not on religious belief, and therefore is neutral and generally applicable.

Petitioners make an as-applied challenge to the District's decision-making process in this instance, but simultaneously claim Wis. Stat. § 121.51 can only be applied in a discriminatory fashion when it comes to determining the affiliation of private, religious schools if done so in accordance with the Wisconsin Supreme Court's decisions in *Holy Trinity* and *Vanko* by considering the school's denomination. (Pet. 34-35.) As noted by the district court, Petitioners' argument is based on pure speculation. There is no evidence to support the contention that the Superintendent or the District had or would have applied Wis. Stat. § 121.51 disparately under facts similar to this case, but involving two secular, private schools.

Petitioners point to no case law establishing that the Decision in this case regarding the alleged violation of the Free Exercise clause is in conflict with any decision from another United States court of appeals or a state court of last resort.

## II. The Decision is not inconsistent with any relevant Establishment Clause decisions of any United States court of appeals, state court of last resort, or this Court.

Petitioners raise the argument for the first time in their Petition that relying on St. Augustine's self-reported affiliation with the Catholic faith in determining whether two schools are "affiliated" for purposes the school transportation statute violates the Establishment Clause because the choice to use the Catholic moniker to describe an organization is in and of itself a fundamental doctrinal statement. Petitioners rely on *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012) in an attempt to repackage their prior failed argument regarding excessive entanglement. Petitioners now argue that by refusing to give credence to St. Augustine's nuanced description of the distinctions it perceives with respect to its use of the Catholic moniker versus that which St. Gabriel intends when it uses the term Catholic, the District inherently interfered with the school's capacity to govern its own internal, faith-related decisions because it penalized the school for choosing this label.

This argument also does not create the compelling basis necessary to call for an exercise of this Court's supervisory power. The Panel Majority correctly determined that when determining affiliation for purposes of the school transportation statute, the District must take organizations by their word: "the state generally must accept the school's own profession of affiliation or

non-affiliation." *Id.* at *11 (citing *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 262 N.W.2d 210, 217-18 (Wis. 1978)). Petitioners continue to incorrectly assert that under *Holy Trinity*, the *only* factors that can properly form the basis of affiliation for purposes of section 121.51 are those that are purely legal and secular – specifically "common ownership, overlapping management, common employees, legal control, etc." (Pet. 38.) Contrary to this contention, the *Holy Trinity* decision from the Wisconsin Supreme Court only prohibits the Superintendent and school districts from engaging in "examination and surveillance" of the school prior to rendering a decision on the proposed attendance area. *Holy Trinity*, 262 N.W.2d at 214-17. Under this standard, the Superintendent and school districts are not confined exclusively by legal organization or secular documents, but rather by the self-proclamations of the organization.[2] There is simply no basis in *Holy Trinity* or any other applicable law to conclude, as Petitioners argue, that the Superintendent and the District were required by Wisconsin law or the Establishment Clause to focus solely on the question of legal, operational, or some other secular connection between the schools.

The problematic nature of Petitioners' argument with respect to the Establishment Clause is pointed out by the Panel Majority, in that Petitioners would

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[2] Regardless of whether they were necessary to the determination of affiliation, St. Augustine did not provide its Articles of Incorporation to the District or the Superintendent as part of the request for approval of the school's attendance area. (Pet. 9.)

require the government to either dive into the nuances of religious doctrine or engage in mind-reading. (Pet. App. 17a-18a.) Respondents have no interest in or constitutional authority to do the former, and no ability to do the latter.

As set forth in the Petition, the Establishment Clause prohibits excessive government entanglement with religious affairs. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). If the Superintendent and the District "applied a religious test to establish denominational affiliation, we can assume that they would have violated" the Establishment Clause. *St. Augustine Sch.*, 2018 U.S. App. LEXIS 28651, at *13. Rather than inquire as to the nature of St. Augustine's religious curriculum and content and whether the school's educational philosophy mirrors that of St. Gabriel, the Superintendent and the District "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 *15.

Petitioners ask this Court to adopt a new, impermissible Establishment Clause test: that the state must engage in a level of inquiry that goes beyond self-professed affiliation, in order to parse out doctrinal distinctions between religious groups. (Pet. 9-11, 22, 33-34.) Complying with such a test would require the government to distinguish between two brands of Catholicism by contacting the Archdiocese, requesting the other school's incorporating documents, looking into additional public records not provided by the school, including the original articles of incorporation,

and collecting documentation on the school's teaching and religious philosophy. This surely would be excessive entanglement and is the very type of inquiry prohibited by *Holy Trinity* and the Establishment Clause. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988) (improper for the Court to interpret the propriety of certain religious beliefs); *United States v. Lee*, 455 U.S. 252, 257 (1982) (it is not the Court's function or competence to determine the proper interpretation of the Amish faith); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (courts must not engage in "forbidden process of interpreting and weighing church doctrine"); *United States v. Ballard*, 322 U.S. 78, 87 (1944) (a trier of fact enters a "forbidden domain" when evaluating the truth of religious beliefs).

St. Augustine provided documentation in its attendance area request regarding its name change and its By-Laws. Unlike in *Holy Trinity* where the government was required to take the school at its word based on its affirmative declaration that it was nondenominational, St. Augustine does not disavow its affiliation with Catholicism in its documentation. Instead, St. Augustine *openly proclaims its affiliation with Catholicism and its leadership in the Vatican*. (Pet. App. 15a.) The Articles of Incorporation relied upon by Petitioners were never provided to the District or the Superintendent as part of the request for approval of the school's attendance area. (Pet. at 13; Pet. App. 7a-9a.) As such, the District and Superintendent

accepted the school's own profession of Catholic affiliation. Thus, the Panel Majority properly declined the Petitioners' invitation to "pervert the Establishment Clause to declare internal doctrinal differences as a matter of state concern." *St. Augustine Sch.*, 2018 U.S. App. LEXIS 28651, at *18. (Pet. App. 18a.)

Under the guise of an as-applied challenge to the District's interpretation and enforcement of the school transportation aid statute, Petitioners are actually asking this Court to take under consideration a facial challenge to the constitutionality of the statutory scheme, as construed by the Wisconsin Supreme Court. (*See generally* Pet.) Petitioners are asking this Court to reinterpret the constitutionality of the statutory scheme in its entirety by arguing that the only permissible test of affiliation is by consideration of that which is legal and secular in nature. (*Id*. at 38.)

This is made clear by the Petitioners' Establishment Clause argument, which, when taken to its logical conclusion, would indicate that the government is *always* excessively entangling itself in a determination of "who or what is Catholic," at any time it considers affiliation as required by the Wisconsin Supreme Court. (*Id.*) Even if the District were to accept that each school is entitled to elect the faith tradition moniker of its choice without assigning any meaning thereto and accept further representations regarding the religious distinctions between two or more intuitions, the District would then be deemed to have made a "judgment" for acknowledging the legitimacy of those

representations. (*Id.* at 37.) The District would then be running afoul of the statutory scheme at issue.

## III. Reversal and/or clarification of the existing decisions of this Court is wholly uncalled for under the facts and circumstances of this case.

Petitioners' failure to correctly apply the Wisconsin Supreme Court's valid construction of the statute to the facts of this case does not give rise to a question of exceptional importance, or require this Court to reconsider its prior rulings in *Smith* or *Trinity Lutheran*. The rule of law must be applied to the facts of *this* case, and that is precisely what the District Court and Panel Majority have done. The material facts are undisputed. Further, and as stated above, Petitioners have not made a facial challenge to the statutory scheme at issue.

As stated by the Panel Majority, St. Augustine's problem is "not that it is Catholic; it is that it is second in line." *Id.* at *12. (Pet. App. 12a.) Further, Petitioners' arguments regarding the statutes in question rest on a misunderstanding of the statutory requirements as construed by the Wisconsin Supreme Court. (Pet. App. 10a.) However, instead of taking up their issue with the Wisconsin legislature, Petitioners made an as-applied constitutional challenge to the District and Superintendents' decision-making process. Petitioners' claims, however, are simply not supported by the facts in the record or the well-established state or federal

case law that governs this case. This does not create a question of exceptional importance triggering a need for this Court to exercise its supervisory powers.

## CONCLUSION

The Friess Lake School District respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted this 5th day of April, 2019.

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