No. 18-____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Free Exercise Clause prohibits the government from requiring a religious adherent to choose between following his or her faith tradition as he or she sees fit and the receipt of otherwise-available government benefits.

2. Whether the Religion Clauses prohibit the government from rejecting a private party's assertion that it is not affiliated with a specific organized religious group, where the sole basis for the government's decision is the religious label the party has assigned to itself.

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 Superintendent of Public Instruction,[*] and Friess Lake School District.[**]

CORPORATE DISCLOSURE STATEMENT

St. Augustine School, Inc. is a Wisconsin non-stock not-for-profit corporation. It has no parent corporation and no publicly-held company owns 10% or more of its stock.

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[*] Carolyn Stanford Taylor succeeded Tony Evers in office during the pendency of this action and has accordingly been substituted as a party. *See* Fed. R. Civ. P. 25(d).

[**] In 2018 Friess Lake School District and another school district (Richfield School District) were consolidated into Holy Hill Area School District. That consolidation has no effect on this dispute.

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JURISDICTION

The Seventh Circuit issued its opinion and entered final judgment on October 11, 2018. It issued its order denying Petitioners' petition for rehearing and rehearing en banc on December 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

Wisconsin Stats. §§ 121.51, 121.54, and 121.55, the Wisconsin transportation aid statutes most relevant

to this case, are reproduced in the Appendix at App. 82a-94a.

INTRODUCTION

The Petitioners were denied otherwise-available transportation aid because of their religious beliefs and practice. They believe that following in the Roman Catholic tradition requires them to establish their own school, religiously and operationally distinct from those operated by the Archdiocese of Milwaukee, the local arm of the Roman Catholic Church. Because they have made this religious choice to disaffiliate with the "established" Roman Catholic denomination, the State of Wisconsin will not provide transportation to their children. It says that transportation aid will only be provided if they send their children to the school recognized by the State as "Catholic," because Petitioners believe they are operating within the Catholic tradition.

The Seventh Circuit found no constitutional problem with excluding Petitioners based on their religious beliefs. It said that this Court's decisions in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012 (2017) and *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) permit Wisconsin to "foist[] a choice on religious families and schools." App. 9a-13a. Parents need to "decide whether to elect the school that qualifies for benefits, or to forgo the benefits and select a school that better reflects their

preferred ritual, doctrine, or approach." *Id.* at 10a. And if St. Augustine wished to obtain benefits, the court explained, 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 reiterated, "we would not have this case." *Id.* at 12a n.4.

Here is what happened.

Wisconsin provides transportation aid to qualifying private school students, with one significant restriction: private schools affiliated with the same sponsoring group or religious denomination may not have overlapping attendance areas.

Petitioner St. Augustine School, an interdenominational Christian school, sought transportation aid for the children of Petitioners Joseph and Amy Forro, but its application was rejected by Friess Lake School District ("Friess Lake"). The sole reason given by Friess Lake was that St. Augustine publicly refers to itself as a "Catholic" or "Roman Catholic" school and that its requested attendance area overlaps with the attendance area of a school of the Roman Catholic Archdiocese of Milwaukee. Friess Lake concluded that pursuant to the restriction referenced above, St. Augustine was ineligible for transportation. After an appeal to the Superintendent of Public Instruction ("SPI"), the SPI agreed with Friess Lake.

The problem with this conclusion is that it is undisputed that there is no legal, operational, or other secular connection between St. Augustine and the Roman Catholic Church as represented by the local Archdiocese of Milwaukee. In addition, St. Augustine considers itself to be within the Catholic tradition, but religiously distinct from the schools of the Archdiocese.

But the Seventh Circuit told St. Augustine that it cannot call itself a Catholic school if it wants to obtain State benefits. App. 10a. It said that St. Augustine's families can receive transportation aid only by attending the recognized "Catholic" school – even though the families believe that school does not fully and faithfully follow that tradition. *Id.* According to the Seventh Circuit, St. Augustine and its families must "*choose between identifying as Catholic and securing transit funding for [St. Augustine's] students*." *Id.* (emphasis added). According to the Seventh Circuit, it was not a violation of the Free Exercise Clause for the State to put St. Augustine to that choice. *Id.* at 2a, 9a-13a. Nor, according to the Seventh Circuit, was it a violation of the Establishment Clause for the State to determine, over St. Augustine's objection, that St. Augustine and the Archdiocesan school were affiliated with the same religious denomination when neither St. Augustine nor the Archdiocese actually believe that to be the case. *See id.* at 2a, 13a-18a.

This case presents important questions of federal law. The relevant issues are threefold.

First, this Court should clarify that the rule of *Trinity Lutheran Church of Columbia, Inc. v. Comer* – namely, that the government cannot make "disavow[al] [of] religious character" the price of participation in a generally-available government benefit program, *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2022 – also applies when the law requires a religious entity to describe its mission in a manner approved by the state or to affiliate with whatever institution is recognized by the state as the approved representative of its religious tradition in order to obtain government benefits. It should make clear that, contrary to the Seventh Circuit's assumption, *Trinity Lutheran* does not simply forbid the exclusion of all religious entities from a generally-available program, but requires strict scrutiny of any rule that makes access to public benefits turn on an applicant's particular religious beliefs or practices.

Second, this Court should revisit its rule in *Employment Div. v. Smith* that "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).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring in the judgment)).

This case shows the inadequacy of the *Smith* rule and the need to revise it. If *Smith*'s protection of neutral rules of general applicability permits the state to categorize religious adherents based on their beliefs in the same way as it might categorize secular institutions and then allocate benefits based on that categorization, then *Smith* does not adequately protect free exercise.

Third, this Court should explain that its cases protecting the autonomy of religious organizations to define their own missions free of government intrusion, particularly *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), prohibit government officials from determining who is affiliated with which religious denomination, unless those officials are applying secular principles that do not interfere with the internal, faith-related decisions of those organizations.

STATEMENT OF THE CASE

Wisconsin's Transportation Aid Laws

Under Wisconsin law, qualifying private school students are entitled to transportation to and from school in the form of transportation services or transportation funding. *See generally* Wis. Stat. §§ 121.54(2)(b), 121.55. To qualify for transportation to a particular private school, the student must reside a minimum distance from the school and within that

school's "attendance area," *see* Wis. Stat. § 121.54(2)(b). The school's "attendance area" is "the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located." Wis. Stat. § 121.51(1).

Although private schools are largely unconstrained when drawing attendance areas, Wis. Stat. § 121.51(1) provides that "[t]he attendance areas of private schools affiliated with the same religious denomination shall not overlap."[1]

Concerned with saving the constitutionality of a requirement that seemingly applied only to religious schools, the Wisconsin Supreme Court in 1971 construed the prohibition on overlapping attendance areas to apply "to all private schools affiliated or operated by a single sponsoring group, whether . . . secular or religious." *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971). The Court reasoned that such a restriction was "inherent in the whole concept of 'attendance areas.'" *Id.* The Wisconsin Supreme Court interpreted the statute's reference to "religious denomination" to simply clarify the scope of this general, unstated restriction when applied specifically to religious private schools. *Id.* at 215-16.

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[1] This rule is subject to an exception involving single-sex schools not relevant here. *See* Wis. Stat. § 121.51(1).

In a subsequent case, the Wisconsin Supreme Court further clarified that in applying the prohibition on overlapping attendance areas to religious schools, government officials could not "meddle into what is forbidden by the Constitution[:] the determination of matters of faith and religious allegiance." *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 82 Wis. 2d 139, 150, 262 N.W.2d 210 (1978). In *Holy Trinity* the Wisconsin Supreme Court confronted a case in which an Archdiocesan Catholic school, burdened by the restriction on overlapping attendance areas, closed its doors and then immediately reopened as a religious but non-denominational private school. *Id.* at 145-46. Because of similarities between the prior Archdiocesan school and the new non-denominational school, the State Superintendent concluded that the school remained "affiliated with the Catholic denomination and that it need not be controlled by the archdiocese in which it is located for it to be affiliated with the Roman Catholic Church." *Id.* at 147.

The Wisconsin Supreme Court disagreed, concluding that under the First Amendment "where a religious school demonstrates by a corporate charter and bylaws that it is independent and unaffiliated . . . in the absence of fraud or collusion the inquiry stops there." *Id.* at 157-58. To probe deeper, the Court added, "is to involve the state in religious affairs and to make it the adjudicator of faith." *Id.* at 158.

Factual Background

St. Augustine School is an independent religious elementary and high school located in Hartford, Wisconsin, within the boundaries of Friess Lake School District. R. 26 at ¶¶2-3, 14. It 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. *Id.* at ¶4. Originally incorporated under the name "Neosho Country Christian School, Inc.,"[2] its articles of incorporation stated at all times relevant to this dispute that it is an interdenominational Christian school for the education of students in the primary and secondary grades. R. 26-1 at Art. III.

St. Augustine is not operated by any religious order of the Catholic Church and is not affiliated with the Catholic Archdiocese of Milwaukee in any way. R. 26 at ¶7. Nor is it affiliated with any other school, Catholic or otherwise. *Id.* In fact, its by-laws clearly state that all powers of the corporation belong to its board of directors. R. 26-3 at Section 2. Neither its articles nor its by-laws reveal any legal, operational, or other connection with any other sponsoring entity, and do not make – or commit – the corporation to be subordinate or associated with such an entity, including the Roman Catholic Church or its Milwaukee Archdiocese. It is not subject to the

[2] The name was subsequently changed to St. Augustine School, Inc. R. 26 at ¶4; R. 26-2.

ecclesiastical authority of the Archbishop or otherwise affiliated with or subject to the control of any organ of the Roman Catholic Church. R. 26 at ¶¶4, 7, 10.

St. Augustine sometimes describes itself as a "Catholic" or "Roman Catholic" school, including on its website. App. 15a. To the extent that it is relevant (and it should not be), 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. R. 26 at ¶10. In other words, St. Augustine considers itself religiously distinct from schools operated by the Archdiocese. *Id.*

St. Gabriel School is a private school in Hubertus, Wisconsin. R. 25 at ¶2. It is operated under the authority of the Roman Catholic Archdiocese of Milwaukee (the "Archdiocese"). *Id.* It is under the ecclesiastic authority of the Archbishop and must comply with the Grade Specific Catholic Education Curriculum for elementary schools sponsored by the Archdiocese. *Id.* at ¶¶2, 4. St. Gabriel is listed in the Official Catholic Directory, known as the Kennedy Directory, which is an official directory that lists all schools sponsored by any Archdiocese in the United States. *Id.* at ¶6.

St. Augustine's curricula and values are determined solely by its own board of directors, administration, and staff. R. 26 at ¶9. St. Augustine does not follow

the Archdiocesan religious curriculum for high school students set by the U.S. Conference of Catholic Bishops for schools sponsored by the Archdiocese. *Id.* at ¶10. Nor does it recognize or comply with the Grade Specific Catholic Education Curriculum for elementary schools sponsored by the Archdiocese. *Id.* The employees of the school, including the teachers, are selected by the administrators of the school, who are in turn selected by the Board of Directors. *Id.* at ¶11. St. Augustine is not listed in the Kennedy Directory of Catholic schools. R. 25 at ¶6.

Joseph and Amy Forro have three children who attend St. Augustine. R. 26 at ¶13. The Forro children live within the attendance area of St. Augustine, which includes the entire geographic area that makes up the Friess Lake School District. *Id.* at ¶¶13-14. The Forros chose to send their children to St. Augustine specifically because of its traditional religious values which the Forros believe to be different from those of an Archdiocesan school. R. 24 at ¶5. The Forros did not and do not consider it a choice between two equivalent "Catholic" schools – St. Augustine or St. Gabriel – but instead a choice between a school that implements their religious values (St. Augustine) and other schools, public and private (including those operated by the Archdiocese), that do not. *Id.*

On April 27, 2015, St. Augustine made a request pursuant to Wis. Stat. § 121.54 to Friess Lake for

transportation for the Forro children to and from St. Augustine. R. 26 at ¶15; R. 26-4. In making that request, it advised Friess Lake that it was an "independent" Catholic school that was not affiliated with the Archdiocesan Catholic school, St Gabriel, or the Archdiocese itself. R. 26 at ¶16; R. 26-4 at 1. It told Friess Lake that it received no funding from and did not communicate with the Archdiocese. *Id.*

Nevertheless, Friess Lake denied the request on April 29, 2015 because St. Augustine's attendance area overlapped with the attendance area of St. Gabriel. R. 26 at ¶20, R. 26-8. Notwithstanding that the evidence showed no legal, operational, or other secular connection between the schools, Friess Lake took the position that St. Gabriel and St. Augustine School are affiliated because they both say that they are "Catholic" schools. R. 26 at ¶21; R. 26-6. As a result, Friess Lake refused to approve St. Augustine's attendance area and refused to provide transportation to the Forro children. *Id.* In subsequent correspondence, Friess Lake informed St. Augustine: "Your belief that there is a distinction between St. Augustine and St. Gabriel's regarding adherence to Catholic principles is your fight, not ours. You both call yourself Catholic schools." R. 26-6 at 1.

The dispute between St. Augustine and Friess Lake regarding St. Augustine's attendance area was submitted to the SPI in December, 2015. R. 26 at ¶23. On March 10, 2016, the SPI issued a decision

upholding Friess Lake's determination that St. Gabriel and St. Augustine School were both "affiliated with the Roman Catholic denomination." App. 78a-79a. The decision relied principally on statements on St. Augustine's website referring to itself as "Catholic" or "Roman Catholic." *Id.* at 77a-78a.[3]

Procedural Background

St. Augustine and Joseph and Amy Forro ("Petitioners") sued the SPI and Friess Lake ("Respondents") in April of 2016 in state court. App. 44a. Petitioners alleged violations of the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause, requesting relief pursuant to 42 U.S. § 1983, and also asserted a state law claim. *See id.*

Respondents removed the suit to federal court pursuant to 28 U.S.C. § 1441. *See id.* On June 6,

[3] Although there was some dispute below about whether the SPI actually considered St. Augustine's original articles of incorporation, the Seventh Circuit concluded that the records failed to establish that the SPI did so. App. 7a-9a. St. Augustine does not challenge that determination on this appeal, which is largely immaterial to its constitutional claims. *See, e.g.*, App. 29a & n.14 (Ripple, J., dissenting (citing materials other than the articles of incorporation and explaining that "[t]he materials submitted to the Superintendent made the Superintendent well aware that St. Augustine is legally independent from St. Gabriel and the Archdiocese.")

2017, on cross-motions for summary judgment, the United States District Court for the Eastern District of Wisconsin ruled in Respondents' favor on the federal claims. *Id.* at 66a-67a.[4]

St. Augustine appealed the rulings on the Free Exercise and Establishment Clause claims, and a divided panel of the United States Court of Appeals for the Seventh Circuit affirmed on October 11, 2018. *Id.* at 1a-2a.

In rejecting Petitioners' free exercise claim that the State was impermissibly denying them public benefits based upon their religious beliefs, the court concluded that the rule of law from *Employment Division v. Smith* – namely, that "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)'" – "resolve[d] the present case." *Id.* at 9a-10a (quoting *Smith*, 494 U.S. at 879).

More specifically, the court held that the prohibition on overlapping attendance areas in Wis. Stat. §

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[4] The district court had jurisdiction over the federal claims pursuant to 28 U.S.C. §1331 as this is a civil action arising under the Constitution and laws of the United States. The court declined to exercise supplemental jurisdiction over the state law claim and remanded that claim to state court pursuant to 28 U.S.C. § 1367(c). App. 66a. The state law claim is not at issue here.

121.51 as authoritatively construed by the Wisconsin Supreme Court was "religiously neutral and generally applicable." *Id.* at 9a. Pursuant to that prohibition, St. Augustine was permissibly denied transit benefits because "another school – St. Gabriel – shared its institutional affiliation and served the same catchment zone." *Id.* at 9a-10a. Shared affiliation was determined based on the fact that both schools called themselves "Catholic." *Id.* at 11a-12a.

The court similarly dismissed St. Augustine's claim that the SPI had violated the Establishment Clause by determining what the word "Catholic" means. *Id.* at 2a, 13a. The court concluded that the SPI did not engage in "an impermissible inquiry into the religious character of St. Augustine." *Id.* at 13a. 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 15a. 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 34a (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.'" *Id.* at 28a. In Judge Ripple's view, in determining whether two schools are affiliated "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 "[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.* at 28a-29a.

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 29a-32a.

Judge Ripple noted that the Court's resolution had implications for other faiths. It would allow the State to determine that the Evangelical Lutheran Church in America and the Lutheran Church-Missouri Synod were the same religious denomination because they both call themselves Lutherans, or that Reform Judaism and Orthodox Judaism are the same denomination, or that Sunni and Shi'a Islam are the same denomination. *Id.* at 32a-33a. He argued that the decision "raise[d] haunting concerns about the future health of the

Religion Clauses in this circuit" and was "difficult to square" both with this Court's recent decision in *Trinity Lutheran*, 137 S.Ct. 2012, and "with the basic tenet of the Supreme Court's Religion Clauses jurisprudence that the Constitution protects not only the 'freedom to believe' but 'the freedom to act.'" *Id.* at 33a-34a (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940)).

Petitioners timely filed a petition for rehearing en banc, which the Seventh Circuit denied on December 7, 2018. App. 80a-81a. Petitioners then timely filed this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Conclusion that the Government May Require a Religious Adherent to Choose Between Following His or Her Faith Tradition as He or She Sees Fit and the Receipt of Otherwise-Available Government Benefits Conflicts with Relevant Decisions of this Court

This Court recently confirmed that the government cannot make "disavow[al] [of] religious character" the price of participation in a generally-available government benefit program. *Trinity Lutheran*, 137 S. Ct. at 2022. Yet the Seventh Circuit ratified just such a scheme in this case, explaining forthrightly that St. Augustine needed to "choose between

identifying as Catholic and securing transit funding for its students." App. 10a.

The Seventh Circuit found *Trinity Lutheran* distinguishable because the rules of Wisconsin's transportation program apply to religious and non-religious private schools alike rather than targeting religious entities as did the program in *Trinity Lutheran*. App. 10a-13a. But the Seventh Circuit failed to heed this Court's admonition that a general ban on religious organizations is not the only kind of religious penalty: "[a] law . . . may not discriminate against '*some or all* religious beliefs.'" *Trinity Lutheran*, 137 S. Ct. at 2021 (emphasis added) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)). Wisconsin's program penalizes an entire category of religious adherent. Judge Ripple saw it as discrimination against those who "define personal religious beliefs not according to institutional norms but according to *personal* religious commitments," thereby coercing them into describing their beliefs in a manner directed by the State. App. 29a, 31a-32a (Ripple, J., dissenting). One might also say that it penalizes those who believe that they must break away from an established or "recognized" religious institution or organization to more fully follow their faith. It says that religious adherents must conform or lose benefits.

A law that forbids overlapping attendance areas between schools that have some secular connection –

common management or organizational affiliation – would be something that applies to religious and nonreligious schools alike. A scheme that requires those who lay claim to a particular religious tradition – be it Christianity, Islam, Judaism, or even Catholicism – to forgo benefits if the state concludes that they are sufficiently like an "established" religious group treats people differently because of their particular religious beliefs. This Court should take this case as a follow-up to *Trinity Lutheran* to explain that this type of penalty is just as impermissible as the unqualified exclusion in that case.

A. This Court Should Clarify that the Rule of *Trinity Lutheran v. Comer* Applies Even When a Law Penalizes Only Certain Forms of Religious Expression

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. Less than two years ago, this 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 entity." *Id.* This Court concluded that the policy violated the Free Exercise Clause. *Id.* at 2024-25. 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)), this Court observed that the state policy penalized Trinity Lutheran's free exercise of religion by "put[ting] [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 "disavow[al] [of] religious character" the price of participation in a generally-available government benefit program. *Id.* at 2022. Yet the Respondents' policy in this case, ratified by the Seventh Circuit, works in precisely this manner. Despite the utter lack of legal, operational, or other secular ties between St. Augustine and the Roman Catholic Archdiocese, the 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 a Catholic school, *i.e.,* disavow its religious character or identity. *See* App. 10a ("St. Augustine had to choose between identifying as Catholic and securing transit funding for its students."); *id.* at 12a n.4 ("[I]f St. Augustine professed to be anything but Catholic . . . we would not have this case."); *id.* at 16a ("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 that type of "indirect coercion" by the government is precisely what this Court found to be unconstitutional. *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Lyng*, 485 U.S. at 450). The same kind of indirect coercion is at work where the State, in effect, forbids St. Augustine from describing its religious character in the way that it sees fit.

The Seventh Circuit distinguished *Trinity Lutheran* because the Missouri program at issue in that case brazenly excluded all religious entities from participation whereas Wisconsin's transportation aid rules apply to religious and non-religious private schools alike. App. 10a-13a.

But this Court made clear in *Trinity Lutheran* that "[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.*, 508 U.S. at 532). *Trinity Lutheran* was a case involving discrimination against "all" religious beliefs; this is a case involving discrimination against one type of religious expression. In particular, the State is coercing parents and religious schools: (1) into outwardly describing their personal religious beliefs using only state-approved language; (2) into disregarding what are, to them, "important religious difference[s]" between schools; and (3) into "defin[ing] personal religious beliefs . . . according to institutional norms" instead of "according to personal religious commitments." App. 29a, 31a-32a (Ripple, J., dissenting).

Descriptions matter. They are not merely labels but reflect real religious beliefs. In describing itself as "Catholic," St. Augustine is not merely branding itself or seeking a particular market segment. It and its families are making a theological claim and exercising their religion. In breaking from the Archdiocese, they are not simply seeking to create another school or choose a different set of leaders. They are making a theological claim and exercising their religion. This is the kind of burden based on belief that *Trinity Lutheran* has forbidden. That Wisconsin does not discriminate against all religions but only burdens those adherents who claim to be independent and distinct from state-recognized denominations makes its practice no less offensive to the Free Exercise Clause.

B. This Is an Important Question of Federal Law

The sheer breadth of Missouri's exclusionary rule in *Trinity Lutheran* made the case ideal for the enunciation of foundational principles of law. But religious discrimination is rarely as blatant as it was in that case. This case allows the Court to illustrate how *Trinity Lutheran*'s rule applies in a scenario involving a state program that discriminates against only certain religious entities and individuals, and only because those entities and individuals choose to act in a certain way.

II. This Case Presents the Court with the Opportunity to Restore the Guarantees of the Free Exercise Clause to their Full Scope by Overruling *Employment Division v. Smith*

In *Employment Division v. Smith* this Court concluded that "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).'" *Employment Division v. Smith*, 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 n. 3 (Stevens, J., concurring in judgment)).

If the Seventh Circuit was right that the rule of *Smith* "resolves the present case," App. 10a – that it authorizes the state to force religious entities and

individuals to choose between otherwise-available benefits and the free exercise of religion – then this case serves as a prime example as to why it is time for this Court to overrule *Smith*.

The Seventh Circuit thought *Smith* applicable because under Wisconsin's rule no schools with a single sponsoring entity can have overlapping attendance areas. App. 10a-13a. But it interpreted *Smith* to allow Wisconsin to "assign" schools to religious denominations based on their professed beliefs. For Wisconsin, anyone who uses the "moniker" "Catholic," R. 26-7, is to be lumped together and their claim to be religiously distinct is to be ignored.

This highlights the problem with *Smith*. It assumes that religious exercise is limited to belief and has nothing to do with action. St. Augustine and the Forros are free to believe what they want about the Roman Catholic tradition, but if they act on it and break away to start a new school, they forfeit benefits. For the Seventh Circuit, penalizing them in this way is justified because Wisconsin would similarly penalize those who started a "second" Montessori school or French International school. App. 11a-12a. Even were that true, persons who start a Montessori school or French International school are not practicing their religion. If, as the Seventh Circuit concluded, the religious character of the Petitioners' choice can be ignored, then *Smith* provides inadequate protection to free exercise.

Just this year, four justices of this Court noted that the Court in *Smith* had "drastically cut back on the protection provided by the Free Exercise Clause," but added that the parties in the case before them had not asked the Court to "revisit" the decision. *Kennedy v. Bremerton Sch. Dist.*, No. 18-12, 2019 WL 272131, at *3 (U.S. Jan. 22, 2019) (statement of Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., respecting the denial of certiorari). If *Smith* compels a finding against Petitioners in this case, Petitioners ask the Court to revisit – and overrule – *Smith*.

A. *Smith* Does Not Adequately Protect Those Rights Provided by the Free Exercise Clause

In *Smith* this Court was asked to determine whether Oregon could apply its criminal ban on the use of the hallucinogenic drug peyote to two individuals who had taken the drug for religious purposes and were then denied unemployment compensation for that "misconduct." *Smith*, 494 U.S. at 874.

Relying primarily on the Court's own precedent in the field and on concerns about the difficulties of applying a contrary rule, this Court concluded that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878-90. But there are

at least three significant problems with the Court's holding.

First, the decision failed to adequately address the text of the Free Exercise Clause and its original meaning. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 574-75 (Souter, J., concurring in part and concurring in the judgment) (arguing that *Smith* failed to "consider the original meaning of the Free Exercise Clause" and noting the "curious absence of history from our free-exercise decisions").

There is abundant historical evidence supporting an interpretation of the Free Exercise Clause that would excuse religious objectors from compliance with generally-applicable laws in the absence of a sufficient state interest. For example, provisions in early state constitutions and colonial charters, which would have influenced the Framers, explicitly or implicitly provided for such exemptions. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1117-18 (1990) [hereinafter *Free Exercise Revisionism*]; *City of Boerne v. Flores*, 521 U.S. 507, 551-57 (1997) (O'Connor J., dissenting). And exemptions were in fact granted by early legislatures who, "in the period before judicial review . . . had the sole responsibility for upholding constitutional norms." *Free Exercise Revisionism*, *supra*, at 1118-19 (discussing exemptions "from military conscription and from oath requirements").

A number of the Framers themselves expressed support for religious accommodations. *Flores*, 521 U.S. at 560-64 (O'Connor, J., dissenting). For instance, "James Madison, principal author and floor leader of the First Amendment, advocated free exercise exemptions, at least in some contexts." *Free Exercise Revisionism*, *supra*, at 1119; *see also Flores*, 521 U.S. at 555-57 (O'Connor, J., dissenting).

While the full historical case cannot be made here, the problem with *Smith* is that the Court in that case failed to discuss any of the relevant history. *See generally Free Exercise Revisionism*, *supra*, at 1116-20 (1990); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990); *Flores*, 521 U.S. at 548-64 (O'Connor J., dissenting).

The second major flaw with the *Smith* decision is the Court's statement that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878–79. But the Court's precedent suggests precisely the opposite. In *Wisconsin v. Yoder*, for example, the Court unambiguously concluded:

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct

> protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*. . . . A regulation *neutral on its face* may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (emphases added) (concluding that Amish religious objectors were exempt from compulsory school attendance law).

The *Smith* Court distinguished *Yoder* and cases like it by variously characterizing them as involving constitutional rights in addition to the right of free exercise, *Smith*, 494 U.S. at 881-82, or as limited to the unemployment compensation context, *id.* at 882-83, or as only "purport[ing] to apply" a more stringent level of review but "always [finding] the test satisfied," *id.* at 883, or as declining to apply a heightened standard of review at all, *id.* at 883-84.

But these explanations are at odds with the often unqualified language used in the Court's prior case law. *See, e.g.*, *Yoder*, 406 U.S. at 220; *Lee*, 455 U.S. at 257 (explaining, in case in which religious objector sought exemption from Social Security taxes, "Not all burdens on religion are unconstitutional. The

state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (citations omitted)); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 565, 571 (Souter, J., concurring in part and concurring in the judgment) (characterizing case law of the Court as "hard to read as not foreclosing the *Smith* rule" and concluding that "whatever *Smith*'s virtues, they do not include a comfortable fit with settled law").

Third, the *Smith* Court's fears that implementation of the test from *Sherbert v. Verner*, 374 U.S. 398 (1963) – according to which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest," *Smith*, 494 U.S. at 883 – would produce undesirable effects are simply unfounded.

The *Smith* Court cautioned that "[a]ny society adopting such a system would be courting anarchy," but experience both before and after *Smith* disproves that statement. *Id.* at 888. Before *Smith*, courts had "been quite capable of applying [the Court's] free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment). And following *Smith*, nearly half the states and the federal government have enacted Religious Freedom Restoration Acts ("RFRA") which restore some form of heightened scrutiny to religious liberty claims. *See, e.g.*, Lucien

J. Dhooge, *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretive Case Law*, 27 Wm. & Mary Bill Rts. J. 153, 153, 164 n.47 (2018). This is to say nothing of those jurisdictions that apply heightened standards of review based on state constitutional provisions. *See generally, e.g.*, Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. St. Thomas J.L. & Pub. Pol'y 103 (2013) (surveying states). No catastrophe has resulted.

Further, the balancing required under the *Sherbert* test is the same type of private-right-versus-government-interest balancing that the Court applies in other constitutional contexts, including speech, *see e.g.*, *Reed v. Town of Gilbert*, ___ U.S. ___ 135 S. Ct. 2218, 2226 (2015), substantive due process, *see, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), and equal protection, *see, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). *See Free Exercise Revisionism*, *supra*, at 1144. Courts throughout the country have applied the test without significant problem.

B. The Conditions for Overturning Precedent Are Met Here

Stare decisis considerations do not counsel against overturning *Smith*. As an initial matter, this Court recently wrote that:

> [t]he doctrine [of *stare decisis*] "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."

Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, ___ U.S. ___, 138 S. Ct. 2448, 2478 (2018) (citation omitted) (first quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997), then quoting *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in the judgment)).

A number of the factors governing whether to overrule a case indicate that the Court need not continue with the *Smith* rule. First, the reasoning in *Smith* was faulty in several respects. *Janus*, 138 S. Ct. at 2479 ("important factor" is "the quality of [the precedent's] reasoning"). Second, "experience has pointed up the precedent's shortcomings," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009), with the "anarchy" the Court in part premised its decision upon simply never materializing in those many

areas of the country providing more robust First Amendment protections. And not least of *Smith*'s "shortcomings" is the undeniable fact that "[t]he decision has harmed religious liberty." *Flores*, 521 U.S. at 547 (O'Connor, J., dissenting) (setting forth concrete examples). Third, *Smith* is not "consisten[t] with other related decisions," *Janus*, 138 S. Ct. at 2478, namely the long line of cases preceding it such as *Yoder* that applied the very protections the *Smith* Court disavowed.

Finally, "[n]o serious reliance interests are at stake." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010). The Nation is currently a patchwork of jurisdictions with inconsistent standards in this area of the law, some applying the *Smith* rule and some applying heightened standards provided for by RFRA laws or state constitutions. Further, from the day *Smith* was decided to the present day, numerous members of this Court have expressed or suggested doubts about *Smith*. *See, e.g.*, *Kennedy*, 2019 WL 272131, at *3 (statement of Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., respecting the denial of certiorari) (noting *Smith* "drastically cut back on the protection provided by the Free Exercise Clause," but adding that the parties in the case had not asked the Court to "revisit" the decision); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, ___ U.S. ___, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) ("*Smith* remains controversial in many quarters."); *Flores*, 521 U.S. at 548 (O'Connor, J., joined by

Breyer, J., dissenting) ("I believe that we should reexamine our holding in *Smith* . . . ."); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 559 (Souter, J., concurring in part and concurring in the judgment) ("I have doubts about whether the *Smith* rule merits adherence."); *id.* at 578 (Blackmun, J., concurring in the judgment) ("I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle."). *Smith*'s viability, in other words, has long been in question.

III. The Seventh Circuit's Conclusion that the Government May Reject a Private Party's Assertion That It Is Not Affiliated with a Religious Group, Where the Sole Basis for the Government's Decision Is the Religious Label the Party Has Assigned to Itself, Conflicts with Relevant Decisions of this Court

St. Augustine argued below that the Respondents 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 are 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).

The Seventh Circuit rejected this 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." App. 15a. All the Respondents did was "credit[]" St. Augustine's statements, and "[t]aking a party's repeated chosen label at face value hardly constitutes a deep-dive into the nuances of religious affiliation." *Id.*

This reliance on labels alone – to the exclusion of what a religious organization says those labels mean – makes the government the judge of what the word "Catholic" means, in violation of this Court's case law on the Religion Clauses. That it did so superficially by saying that all who use a particular term must be lumped together even if they say they are not religiously together at all does not make it less so. Just as egregiously, the Seventh Circuit's apparent conclusion that a valid and neutral law of general applicability overrides even an internal, faith-related decision of a religious organization conflicts with decisions of this Court involving the Religion Clauses such as *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).[5]

[5] Below, Petitioners framed this argument as one under the Establishment Clause rather than under both Religion

The Seventh Circuit assumed that failing to lump St. Augustine together with the Archdiocesan schools would require some more detailed examination of its religious beliefs. *See* App. 15a, 17a-18a. It would not. Wisconsin – and the courts – are not permitted to examine St. Augustine's beliefs. It must accept them and proceed on the basis that it is religiously distinct. It may only consider whether there are secular connections between the schools.

A. This Court's Case Law Prohibits Courts from Defining Denominational Affiliation

The Seventh Circuit agreed with the Respondents that the government could constitutionally determine "that St. Augustine and St. Gabriel professed affiliation with the same Roman Catholic Church" *solely* on the basis of the fact that St. Augustine refers to itself as a "Catholic" or "Roman Catholic" school. App. 14a-16a. But as the evidence in the record discussed above shows, St. Augustine is not affiliated with the institutional Roman Catholic Church and in fact has a different view of the

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Clauses. Further, Petitioners did not specifically raise the argument pertaining to *Hosanna-Tabor* below, which relies on both Religion Clauses. But they have unequivocally asserted from the beginning of this case that Respondents' actions violated the Free Exercise and Establishment Clause, and therefore are not barred from making these arguments. *See, e.g.*, *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992).

Catholic tradition than the local Archdiocesan schools do.

The Seventh Circuit'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 thus arrogates to the government the authority to define the word "Catholic." As the dissent pointed out below, 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.

App. 29a (Ripple, J., dissenting) (citation omitted).

This Court's test for Establishment Clause violations set forth in *Lemon v. Kurtzman* prohibits, among

other things, "excessive entanglement" between the state and religion. *Lemon*, 403 U.S. at 613-14. Deciding whether two schools are sufficiently religiously alike – particularly when they say they are not – such that they ought to be considered affiliated, violates this rule against excessive entanglement. There is no way to make such a judgment without evaluating competing religious claims even if that evaluation consists of cavalierly dismissing them. The Respondents cannot conclude St. Augustine is "Catholic" in the same way as the schools of the Archdiocese without making a judgment as to what being "Catholic" is. *See, e.g.*, *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) ("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").

Further, this Court has consistently held that the state may not "evaluate" religious claims, make religious decisions, or otherwise insert itself into religious conduct and practices. *See, e.g.*, *Lyng*, 485 U.S. at 458 (stating that interpreting the propriety of certain religious beliefs puts the Court "in a role that [it was] never intended to play"); *Lee*, 455 U.S. at 257 (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) (explaining that courts may not "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). That is exactly what the Seventh Circuit authorized when it allowed the SPI to conclude that St. Augustine and St. Gabriel were affiliated with the same religious denomination based solely on the labels they assigned to themselves. Doing so based on an assumption that "Catholic" means the same thing by all who use it is a religious decision.

The Seventh Circuit voiced legitimate concern that it not "pervert the Establishment Clause to declare internal doctrinal differences a matter of state concern." App. 18a. But that is precisely what it did by allowing the state to decide that St. Augustine and the Archdiocese were religiously affiliated even though they say they are not. The Seventh Circuit could have avoided offending the Establishment Clause by applying "the same neutral principles it would apply to a non-religious school" to determine affiliation, *Id.* at 28a (Ripple, J., dissenting) such as common ownership, overlapping management, common employees, legal control, and so on. Limiting the inquiry to secular facts would treat religious and non-religious schools alike.

B. The Seventh Circuit's Application of *Smith* Contravenes Decisions of this Court Protecting the Autonomy of Religious Organizations, Particularly *Hosanna-Tabor*

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), this Court confirmed that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor*, 565 U.S. at 181.

In its decision, this Court catalogued prior decisions supporting the more general proposition that "the Religion Clauses guarantee religious organizations autonomy in matters of internal governance." *Id.* at 196-97 (Thomas, J., concurring); *see also id.* at 190 ("The present case . . . concerns government interference with an internal church decision that affects the faith and mission of the church itself."); *id.* at 185-88 (discussing precedents).

These cases established the rule that "religious organizations" have a right to a degree of "independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government *as well as those of faith and doctrine*." *Id.* at 186 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (describing *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872))) (emphasis added).

It is hard to envision a more fundamental statement of faith and doctrine than the theological title a religious organization assigns to itself, and its own interpretation of what that title signifies. In this

case, the Respondents violated St. Augustine's right of autonomy in two ways. First, they interfered with St. Augustine's right to define its own faith freely by forcing St. Augustine to choose between receiving state aid and using the religious name St. Augustine prefers. Second, the Respondents took it upon themselves to define the word "Catholic" – a religious duty inappropriate for a state actor. Yet the Seventh Circuit's decision ratifies both of these violations.

As set forth in detail above, the Seventh Circuit premised much of its decision on *Smith*'s rule that religious objectors must comply with valid and neutral laws of general applicability. App. 9a-13a. Wisconsin's rule, the Seventh Circuit said, "bars two self-identified Catholic schools from receiving transit subsidies, but it also bars funding two Montessori schools, two International Baccalaureate® schools, or two French International schools." *Id.* at 12a.

But the exact same argument was made and rejected in *Hosanna-Tabor*: the government pointed out that the employment discrimination laws at issue in that case applied to religious and non-religious organizations alike and contended that under *Smith* this was enough. *Hosanna-Tabor*, 565 U.S. at 189-90. This Court disagreed:

> It is true that the [Americans with Disabilities Act's] prohibition on retaliation, like Oregon's prohibition on

> peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.

Id. at 190. So too here. Unlike a secular school describing itself as "Montessori" or "French International," when a religious school decides to describe itself using a word like "Catholic," it is making "an internal church decision that affects the faith and mission of the church itself." *Id.* The government has no business interfering with that decision. The rule of *Smith* should not apply here and, if it does, that is a reason it should be overruled.

C. This Is an Important Question of Federal Law

This Court should address this issue because the Seventh Circuit's decision dangerously expands the scope of *Smith*'s rule to encompass even the internal faith decisions of religious organizations. This is an affront to both Religion Clauses. Religious organizations, not the state, should have the right to describe the organizations' religious beliefs and

explain what the theological words they choose mean.

Further, as suggested by the dissent below, the Seventh Circuit's decision has important implications for our diverse religious society. *See* App. 32a-33a (Ripple, J., dissenting). Today a court has decided "who or what is Catholic." *Holy Trinity*, 82 Wis. 2d at 150. Tomorrow courts will decide who or what is Lutheran, or Christian, or Jewish, or Muslim. *See* App. 32a-33a (Ripple, J., dissenting).

CONCLUSION

Petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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