No. __-____

In The

Supreme Court of the United States

ST. AUGUSTINE SCHOOL, *ET AL.*,
Petitioners,

v.

JILL UNDERLY, 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

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Richard M. Esenberg
Counsel of Record
Anthony F. LoCoco
Cory J. Brewer
Wisconsin Institute for Law & Liberty
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
(414) 727-9455 | rick@will-law.org
Counsel for Petitioners

APPENDIX TABLE OF CONTENTS

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-2333

ST. AUGUSTINE SCHOOL, *et al.*,
Plaintiffs-Appellants,
v.

JILL UNDERLY, in her official capacity as Superintendent of Public Instruction, *et al.,*
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 2:16-cv-00575 – **Lynn Adelman**, *Judge*

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES AND AFTER CERTIFICATION TO THE WISCONSIN SUPREME COURT – DECEMBER 20, 2021

Before RIPPLE, KANNE, and WOOD, *Circuit Judges*.

WOOD, *Circuit Judge.* The State of Wisconsin provides transportation benefits to most of its school-aged children. See Wis. Stat. §§ 121.51, 121.54. For private-school students, however, it limits those benefits to only one school "affiliated or operated by a single sponsoring group" within any given attendance area. That may seem like a straightforward criterion, but the fact that this case is now on its second trip to the Seventh Circuit, after intermediate stops at the Supreme Court of the United States and the Wisconsin Supreme Court, demonstrates that complexities abound when a private school's affiliation is religious in nature. The particular question before us is whether the state Superintendent of Public Instruction, then Tony Evers (the present Governor of the state), correctly decided that St. Augustine School, a free-standing entity that describes itself as Catholic but independent of the church's hierarchy, is "affiliated with or operated by" the same sponsoring group as St. Gabriel High School, which is run by the Archdiocese of Milwaukee and therefore indisputably Catholic. (Governor Evers's successor in the post of Superintendent is now Jill Underly, whom we have substituted as the appellee.)

In 2018, we concluded that the two schools were affiliated with the same sponsoring group—the Roman Catholic church. This meant that children

attending St. Augustine were not entitled to the state's transportation benefit, because St. Gabriel's was located in the same attendance area, and its students were already receiving that benefit. As the second applicant, we thought, St. Augustine did not qualify under the state statute. See *St. Augustine School v. Evers*, 906 F.3d 591 (7th Cir. 2018) (*St. Augustine I*). The Supreme Court vacated that decision and remanded the case to us for further consideration in light of *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020). See *St. Augustine School v. Taylor*, 141 S. Ct. 186 (2020). After receiving supplemental briefs that addressed both *Espinoza* and the potential impact of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (at that time yet-to-be decided), we realized that we needed guidance from the Wisconsin Supreme Court on the proper way to determine "affiliation" under state law. We therefore certified that question to the state's highest court, which generously accepted our request and responded in an opinion issued in July 2021. See *St. Augustine School v. Taylor*, 961 N.W.2d 635 (Wis. 2021) (*St. Augustine II*).

At this stage, all that remains is for us to apply the instructions of the state supreme court to the facts of this case, and thereby (we hope) come closer to resolving this long-running dispute. Those instructions gave us broad principles for decision, rather than particularized factors:

> [I]n determining whether schools are "affiliated with the same religious denomination" [*i.e.*, the same sponsoring group] pursuant to Wis. Stat. § 121.51, the Superintendent is not limited to consideration of a school's corporate documents exclusively. In conducting a neutral and secular inquiry, the Superintendent may also consider the professions of the school with regard to the school's self-identification and affiliation, but the Superintendent may not conduct any investigation or surveillance with respect to the school's religious beliefs, practices, or teachings.

961 N.W.2d at 637. As we read these instructions, the Superintendent is not limited to formal corporate documents in her assessment of affiliation. Nonetheless, as a matter of state law she may not delve into "the school's religious beliefs, practices, or teachings," because the latter inquiry would transgress the First Amendment prohibition against excessive entanglement with religious matters. See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

We conclude that the Superintendent's decision in the case before us was not justified by neutral and secular considerations, but instead necessarily and exclusively rested on a doctrinal determination that both St. Augustine and St. Gabriel's were part of a single sponsoring group—the

Roman Catholic church—because their religious beliefs, practices, or teachings were similar enough. The fact that the Superintendent reached this result largely just by looking at St. Augustine's description of itself on its website does not matter—the doctrinal conclusion was an inescapable part of the decision. We therefore reverse the judgment of the district court and remand for further proceedings.

I

A brief review of Wisconsin law is necessary in order to understand the way in which we must apply the state supreme court's guidance. Two state statutes are relevant: Wis. Stat. § 121.54, and Wis. Stat. § 121.51. The first of those generally addresses the topic of transportation provided by Wisconsin's public-school districts. It provides as follows in relevant part:

> Except as [otherwise] provided …, the school board of each district operating high school grades shall provide transportation to and from the school a pupil attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a *private school* located 2 miles or more from the pupil's residence, if such private school is a school within whose *attendance area* the pupil resides and is

> situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.

Wis. Stat. § 121.54(2)(b)1 (emphasis added). On its face, this law contains no restrictions on private-school students, but there is more here than meets the eye. Section 121.51 defines the term we have emphasized, "attendance area," for purposes of transportation:

> In this subchapter:
> (1) "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. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. *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.

Wis. Stat. § 121.51(1) (emphasis added). Long ago, the Wisconsin Supreme Court construed the term "the same religious denomination" in this statute to mean "a single sponsoring group," in order to avoid the possibility of incompatibility with the Religion Clauses of the First Amendment. See *State ex rel. Vanko v. Kahl*, 188 N.W. 2d 460 (Wis. 1971). Neither party asked the Wisconsin Supreme Court to revisit *Vanko* in the course of deciding our certified question, and so it expressly "decline[d] to overrule or revisit" that case. See *St. Augustine II*, 961 N.W.2d at 643.

The *Vanko* court also offered an example of what it means to be "affiliated with" the same religious denomination:

> [I]f the Franciscan Order of the Roman Catholic church operates a school in the northern part of the Racine district, and the Jesuit Order operates a school in the southern part of the district, they are to be considered, along with diocesan schools, as part of the Catholic school system of Racine because all are 'affiliated with the same religious denomination.' It means that, and nothing more.

Vanko, 188 N.W.2d at 465. Importantly, however, neither the Franciscans, nor the Jesuits, nor the Diocese was involved in that case, and none of them attempted to challenge the assumption that they were all affiliated with the same religious denomination. The court thus had no need to resolve the precise question now before us.

The other pertinent case from the Wisconsin Supreme Court (apart from *St. Augustine II*) is *Holy Trinity Community School, Inc. v. Kahl*, 262 N.W.2d 210 (Wis. 1978). There the question was whether a school district erred by looking behind the Holy Trinity Community School's representation that it was nondenominational. The district questioned the accuracy of that statement, because up until a short time earlier, the school had been formally affiliated with the Roman Catholic church. The state supreme court ruled that in applying the state statutes, the Superintendent unlawfully had entangled the state in religious affairs. 262 N.W.2d at 215. In order to avoid that type of intrusion, which the court found incompatible with the First Amendment's Establishment Clause, the court adopted the following rule:

> [T]o make the inquiry and to determine that the school is or is not affiliated with the Catholic denomination is to make an impermissible inquisition into religious matters. We are obliged to accept the

> professions of the school and to accord them validity without further inquiry.

262 N.W.2d at 217.

In *St. Augustine I*, we held that the Superintendent had done no more than what *Holy Trinity* requires—that is, he had "accept[ed] the professions of [St. Augustine School] and [had] accord[ed] them validity without further inquiry." Our dissenting colleague disagreed with this characterization. In his view, there was a critical intermediate step in our case that did not exist in *Vanko* or *Holy Trinity*: namely, whether, when St. Augustine described itself as "Catholic," it was also saying that it understood itself to be part of the same sponsoring group as St. Gabriel's. That step required an "inquisition into religious matters," as he saw it, and thus was impermissible under *Holy Trinity.*

Upon closer examination, we are now persuaded that there are meaningful differences between the situation before us and the one in *Holy Trinity.* These differences help to explain why the Superintendent's seemingly simple acceptance of St. Augustine's statement that it is "Catholic" does not end the matter. *Holy Trinity* concerned a situation where a school professed that it was independent of any religious organization and had demonstrated legal independence through its corporate charter and bylaws. This represented a change from its former structure, which did involve a church affiliation. An

examination of just the kind of neutral and secular factors that *St. Augustine II* called for corroborated the school's independent self-identification. The *Holy Trinity* court thus concluded that the Superintendent had been wrong to find that the school was *de facto* still affiliated with the church.

Determining whether a school has broken away from a sponsoring organization is not the same as looking at two schools and asking whether the same organization is behind both of them. The former situation requires us to compare the "before" and "after" for the school—relying only on neutral and secular factors—and see if it has severed an affiliation. The latter situation calls for a determination whether two separate schools are both sponsored by a single entity. The latter task is difficult when one of the schools says that it has always been independent, even though some doctrinal similarities with other schools are evident.

Without a neutral and secular basis, a determination of "affiliate[ion]" for purposes of the Wisconsin statutes cannot rest exclusively on the fact that two schools say only that they are Christian, or Islamic, or Jewish. That is too high a level of generality to support a finding that both operate under the aegis of a single sponsoring organization. No one doubts that there are significant religious differences between Roman Catholics and Protestants, between Presbyterians and Baptists, between Sunni and Shi'a Muslims, and between

Orthodox and Reform Jews, just to name a few examples where umbrella labels cover distinctive faiths. Wars have been fought and in some instances are still underway, over these matters. One need only recall the hostilities that still exist between the Shi'a and the Sunni branches of Islam, or the lengthy violence in Northern Ireland between the Protestant unionists and the Catholic separatists. And as recently as 2021 there have been calls by conservative Methodists to split away from the larger denomination. See https://www.christianitytoday.com/news/2021/march/conservative-umc-split-postponed-global-methodist-church.html. Finally, there are serious tensions within Judaism among the ultra-Orthodox, Orthodox, and Reform groups.

We therefore understand from *St. Augustine II* that the Wisconsin statutes do *not* permit a finding of affiliation based on a public official's assessment of how close in doctrine two sectarian schools may be. However difficult it may be, the court has instead called for that decision to be made on neutral and secular grounds. We endeavor in this opinion to shed some light on that process.

II

The present case arose when Joseph and Amy Forro, parents of children at St. Augustine School, sought to qualify for transportation benefits. They offered two primary theories in support of their case.

First, they contended that the Superintendent deprived them of a public benefit on account of their religion, in violation of the Free Exercise Clause; and second, they argued that the Superintendent's application of the attendance-area statute violated the Establishment Clause, because the methodology he used to characterize the two schools excessively entangled the state with religious doctrine.

Given the state supreme court's decision, we do not find it necessary to reach any constitutional issues in this case. Instead, it is enough to decide whether the Superintendent properly applied Wisconsin law when he characterized the two schools as affiliated. In *St. Augustine I*, we rejected the Forros' first argument, because as we saw it, religion played no direct part in the Superintendent's decision: had St. Augustine been the incumbent school and St. Gabriel the newcomer, it would have been St. Gabriel whose students would have been ineligible. The same would have happened, we thought, for a second secular school affiliated with the same organization. Being second in line has nothing to do with religion, and it appeared to us that this criterion was neutrally applied. We need not pursue this theory further, however.

We turn instead to the Wisconsin Supreme Court's description in *St. Augustine II* of the proper way to determine affiliation for purposes of Wis. Stat. § 121.51. The overarching message the court sent was that the state officials conducting the affiliation

inquiry must confine themselves to "neutral and secular" factors. 961 N.W.2d at 637. Just as the court had held in *Holy Trinity*, anything that involves the probing of the beliefs held by a religious institution at issue is not permitted by state statute, because it is at least possible that such an inquiry may stumble into constitutional problems. In making this "neutral and secular" inquiry with respect to religiously affiliated schools, the state officials are "not limited to consideration of a school's corporate documents exclusively." *Id.* It is also permissible for them to look at "the professions of the school with regard to the school's self-identification and affiliation." *Id.* Other neutral considerations are also permissible—perhaps facts such as the presence or absence of resource sharing or joint operations. Although this is the same methodology that should be used with secular sponsoring organizations, we note that the application of the test is likely to be easier for secular schools, because the question of religious doctrine will not arise.

We note that in *St. Augustine II,* some justices would have placed great weight on mutuality of commitment between two organizations, as a key neutral factor that would reveal whether both schools are affiliated with a single sponsoring organization. They found it hard to imagine a one-way "affiliation"—a relationship that one side embraces, but the other side abjures. The majority of the justices, however, did not find that mutual agreement to affiliate is essential. Nonetheless, even under the

majority's view, we do not understand the court to have forbidden *any* consideration of mutuality. If both schools affirmatively proclaim their affiliation with one sponsoring entity, we see no reason why the Superintendent could not take that fact into account.

The Wisconsin Supreme Court, in an effort to construe the state statutes in a way that does not give rise to problems under the Religion Clauses, has instructed that those statutes forbid the Superintendent from delving into the nuances of the religious differences that pervade our country and withholding state benefits for reasons that can be tied to the religious preference of the disfavored group. See *Espinoza*, 140 S. Ct. at 2255. Yet that is what reliance on the label "Catholic" entailed here, even if only modestly. Given the fluidity of religious labels and this country's firm commitment to personal choice and religious diversity, it may be impossible to decide that two entities are affiliated by looking solely at the fact that they both use the same label. Moreover, we can find no reason why the state was entitled to accept St. Augustine's self-characterization as Catholic, while at the same time to reject its vociferous insistence that its understanding of what it means to be Catholic is significantly different from that of the diocesan schools. Neither representation was more or less important to St. Augustine's self-identification. While in other circumstances an entity may make the type of neutral and secular statement that is within

bounds for the state to consider, this is not such a case.

III

This is an appeal from the district court's grant of summary judgment in favor of the state defendants. With the benefit of the guidance we received from the Wisconsin Supreme Court, we conclude that it was error to rule for the state. Because the case was dismissed before the district court had occasion to determine the amount of monetary damages (if any) to which the Forros or St. Augustine might be entitled, or what type of injunctive relief (if any) for any plaintiff is proper, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

APPENDIX B

2021 WI 70

SUPREME COURT OF WISCONSIN

Case No.: 2021AP265-CQ

COMPLETE TITLE:

St. Augustine School, Joseph Forro and Amy Forro,
Plaintiffs-Appellants,
v.
Carolyn Stanford Taylor, in her official capacity as Superintendent of Public Instruction, Tony Evers, in his official capacity as Superintendent of Public Education, terminated 2/14/20 and Friess Lake School District,
Defendants-Appellees.

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION FILED: July 2, 2021
SUBMITTED ON BRIEFS:
ORAL ARGUMENT: May 4, 2021

SOURCE OF APPEAL:
COURT:
COUNTY:
JUDGE:

JUSTICES:
ANN WALSH BRADLEY, J., delivered the majority opinion of the Court, in which DALLET, HAGEDORN, and KAROFSKY, JJ., joined.
ROGGENSACK, J., filed a concurring opinion.
HAGEDORN, J., filed a concurring opinion.
REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ZIEGLER, C.J., joined.
NOT PARTICIPATING:

ATTORNEYS:

For the plaintiffs-appellants, there were briefs filed by *Richard M. Esenberg, Brian McGrath, Anthony LoCoco*, and *Wisconsin Institute for law & Liberty*, Milwaukee. There was an oral argument by *Richard M. Esenberg.*

For the defendants-appellees Friess Lake School District, there was a brief filed by *Lori M. Lubinsky*, *Danielle B. Tierney* and *Axley Brynelson, LLP,* Madison.

For the defendant-appellee Superintendent Carolyn Stanford Taylor, there was a brief filed by *Hannah S. Jurss*, assistant attorney general; with

whom on the brief was *Joshua L. Kaul*, attorney general. There was an oral argument by *Hanna S. Jurss*.

2021 WI 70

NOTICE
This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

Case No.: 2021AP265-CQ

STATE OF WISCONSIN : IN SUPREME COURT

St. Augustine School, Joseph Forro and Amy Forro,

Plaintiffs-Appellants,

FILED

v.

JUL 2, 2021

Carolyn Stanford Taylor, in her official capacity as Superintendent of Public Instruction and Friess Lake School District,

Sheila T. Reiff
Clerk of Supreme Court

Defendants-Appellees.

ANN WALSH BRADLEY, J., delivered the majority opinion of the Court, in which DALLET, HAGEDORN, and KAROFSKY, JJ., joined. ROGGENSACK, J., filed a concurring opinion. HAGEDORN, J., filed a concurring opinion. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ZIEGLER, C.J., joined.

CERTIFICATION of question of law from the United States Court of Appeals for the Seventh Circuit. *Certified question answered and cause remanded.*

¶1 ANN WALSH BRADLEY, J. This case is before the court on a certified question from the United States Court of Appeals for the Seventh Circuit. See Wis. Stat. § 821.01 (2019-20).[1] Explaining that the question boils down to one of methodology, it certified the following question:

> For purposes of determining whether two or more schools are "private schools affiliated with the same religious denomination" for purposes of Wis. Stat. [§] 121.51, must the state superintendent rely exclusively on neutral criteria such as ownership, control, and articles of incorporation, or

[1] All subsequent references to the Wisconsin Statutes are to the 2019-20 version unless otherwise indicated.

> may the superintendent also take into account the school's self-identification in sources such as its website or filings with the state.

¶2 This question arises in the context of St. Augustine School's (St. Augustine) application for transportation benefits pursuant to Wis. Stat. §§ 121.51 and 121.54. Pursuant to these statutes, private schools are entitled to receive public funding to transport children to their schools, but only one affiliated school per "religious denomination" can receive the funding in each "attendance area."

¶3 St. Augustine's application was denied by the Superintendent of Public Instruction on the ground that another school of the same religious denomination within the same attendance area was already receiving the benefit. Specifically, the Superintendent determined that St. Gabriel, a Catholic school affiliated with the Archdiocese of Milwaukee, was already established in the same attendance area as St. Augustine, and St. Augustine also represented itself as a Roman Catholic school.

¶4 The certified question asks us only what information the Superintendent may consider in making a determination regarding whether two schools are "affiliated with the same religious denomination." It does not ask us to resolve whether St. Gabriel and St. Augustine are actually of the same

religious denomination. The application of the facts to the law remains with the federal courts upon remand.

¶5 We conclude that, in determining whether schools are "affiliated with the same religious denomination" pursuant to Wis. Stat. § 121.51, the Superintendent is not limited to consideration of a school's corporate documents exclusively. In conducting a neutral and secular inquiry, the Superintendent may also consider the professions of the school with regard to the school's self-identification and affiliation, but the Superintendent may not conduct any investigation or surveillance with respect to the school's religious beliefs, practices, or teachings.

¶6 Accordingly, we answer the certified question and remand to the United States Court of Appeals for the Seventh Circuit for further proceedings.

I

¶7 St. Augustine is a private, religious school located within the boundaries of the Friess Lake School District (the School District). On its website, St. Augustine describes itself as "an independent and private traditional Roman Catholic School."

¶8 Plaintiffs Joseph and Amy Forro are parents whose children attend St. Augustine. Seeking transportation for their children to and from school, the Forros along with St. Augustine made a request

for a busing contract from the School District pursuant to Wis. Stat. § 121.54.[2]

¶9 In the request, St. Augustine asserted that it is unaffiliated with the Archdiocese of Milwaukee. It stated: "Our governing body is our Board of Directors and we receive no funding from nor communicate with the Diocese on matters of education." As such, St. Augustine distinguished itself from St. Gabriel Catholic School, a diocesan Catholic school also located within the boundaries of the School District.

¶10 The School District denied St. Augustine's request. In doing so, it noted that the Forros' address "is within the boundaries already approved for a

---

[2] Wisconsin Stat. § 121.54 provides in relevant part:

> Except as provided in sub. (1) or otherwise provided in this subsection, the school board of each district operating high school grades shall provide transportation to and from the school a pupil attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a private school located 2 miles or more from the pupil's residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.

§ 121.54(2)(b)1.

Catholic School." Because the School District already bused students to St. Gabriel, it determined that it could not approve St. Augustine's request as it would constitute an overlapping attendance area.

¶11 With St. Augustine and the School District at odds, they sought a determination from the Superintendent.[3] As it did before the School District, St. Augustine argued that it is not affiliated with the same religious denomination as St. Gabriel within the meaning of Wis. Stat. § 121.51(1). In support of this argument, it asserted:

> Neither St. Augustine School, Inc., nor the school operated by the corporation, has ever been affiliated by control, membership, or funding with the Archdiocese of Milwaukee. No representative of the Archdiocese or a parish church of the Archdiocese has ever been a director or officer of St.

---

[3] Wisconsin Stat. § 121.51 outlines a procedure by which a private school's attendance area is proposed by the private school's governing body and then considered by the public school district's school board. Providence Cath. Sch. v. Bristol Sch. Dist. No. 1, 231 Wis. 2d 159, 176, 605 N.W.2d 238 (Ct. App. 1999). The statute further provides that in the event of a disagreement between the private and public school, the determination will be made by the Superintendent. Id.; § 121.51(1) ("If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area.").

> Augustine School, Inc. No employees of St. Augustine School have ever been hired or compensated by the Archdiocese or a parish church of the Archdiocese. None of the religious instructors at St. Augustine School have ever been employed, assigned, or compensated for their work at St. Augustine School by the Archdiocese or a parish church of the Archdiocese.

¶12 Then-Superintendent Tony Evers[4] agreed with the School District and denied St. Augustine's request for the transportation benefit. He concluded that "St. Augustine School, Inc. is a private, religious school affiliated with the Roman Catholic denomination." Further, he determined that "[t]he District already provides transportation to students attending St. Gabriel School, another private, religious school affiliated with the Roman Catholic denomination, the attendance area of which is co-extensive with the attendance area of the District." As a result, the Superintendent concluded that St. Augustine's attendance area overlaps that of St. Gabriel and thus "the Friess Lake School District is not required to provide transportation to students attending St. Augustine School, Inc."

---

[4] Then-Superintendent Evers has since been elected Governor, and has been replaced as a party to this case by the current Superintendent, Carolyn Stanford Taylor.

¶13 The Superintendent's written decision reflects that he examined all of the parties' filings, St. Augustine's website, and the law in reaching his decision. He commented specifically on the school's bylaws and determined that nothing in that document "even hints that the School is a private religious school or a private, religious non-denominational school." The Superintendent also made specific comments on an amendment to St. Augustine's articles of incorporation changing its name from Neosho Country Christian School Inc. to its current moniker. As with the bylaws, the Superintendent concluded that "there is nothing in the School's name change amendment to its Articles of Incorporation that reveals anything about the School's nature, i.e., religious or non-religious, or its affiliation with a religious denomination."[5]

¶14 Finding these sources unhelpful in determining St. Augustine's "affiliation with a religious denomination" for purposes of Wis. Stat. §

---

[5] In previous proceedings, disputes arose as to whether St. Augustine submitted the original articles of incorporation to either the School District or the Superintendent and whether the Superintendent actually considered St. Augustine's original articles of incorporation. The Seventh Circuit determined that "plaintiffs have failed to carry their burden of producing evidence to support their assertion that the defendants looked at the document. Without any evidence that they did so, a secondary dispute over whether St. Augustine submitted the original articles of incorporation to the state is immaterial." St. Augustine Sch. v. Evers (St. Augustine II), 906 F.3d 591, 595-96 (7th Cir. 2018) (citation omitted).

121.51, the Superintendent looked to St. Augustine's publicly available website. Such a procedure was permissible, in the Superintendent's view, because "[r]eviewing a public website that is created and maintained by or on behalf of the School, and accepting the School's description of itself as set forth in that website, does not create an excessive entanglement of state authority in religious affairs." The Superintendent supported such a determination with the premise that "a public website, by its very nature, invites, and even wants persons to review it."

¶15 Relying on statements on St. Augustine's website, the Superintendent agreed with the School District that St. Augustine is affiliated with the Roman Catholic denomination. He cited in his decision "two of a number of statements in the website pages from which any reasonable person would conclude the School is a religious school affiliated with the Roman Catholic denomination." The first of these statements sets forth that St. Augustine is "an independent and private traditional Roman Catholic School . . . [that is] an incorporation of dedicated families, who believing that all good things are of God, have joined together to provide the children of our Catholic community with an exceptional classical education." Additionally, the website provides: "[St. Augustine] loves and praises all the traditional practices of the Catholic faith."

¶16 St. Augustine responded to the adverse determination by filing suit in Washington County

circuit court against the Superintendent and the School District, asserting a claim pursuant to 42 U.S.C. § 1983 that its rights under Free Exercise and Establishment Clauses of the First Amendment were violated, as well as a claim that the Superintendent and School District contravened Wis. Stat. § 121.51(1). The Superintendent and School District removed the case to federal court.

¶17 After the parties filed competing summary judgment motions, the District Court granted the Superintendent and the School District's motion with respect to the federal claims. St. Augustine Sch. v. Evers (St. Augustine I), 276 F. Supp. 3d 890 (E.D. Wis. 2017). As relevant to the certified question, the District Court determined that the Superintendent and the School District did not engage in an excessive entanglement with religion in reaching their conclusion that St. Augustine is affiliated with the Catholic denomination. Id. at 902. It concluded that "because St. Augustine was obviously a religious school and did not submit any articles of incorporation or bylaws that identified or disclaimed its affiliation with a religious denomination," the Superintendent permissibly looked elsewhere to surmise what St. Augustine purported to be. Id.

> The defendants then turned to the statement on St. Augustine's website describing it as a "Roman Catholic School," and they accepted this statement at face value and concluded

> that St. Augustine was affiliated with the Roman Catholic denomination. These actions did not involve any participation in, supervision of, or intrusive inquiry into religious affairs.

Id.

¶18 St. Augustine appealed, and the Seventh Circuit affirmed the District Court's decision over Judge Ripple's dissent. St. Augustine Sch. v. Evers (St. Augustine II), 906 F.3d 591 (7th Cir. 2018). The Seventh Circuit majority saw no free exercise problem with the Superintendent and School District's application of Wis. Stat. § 121.51, determining that "[t]he reason why St. Augustine cannot demand services within its desired attendance zone is not because it is a Catholic school; it is because by its own choice——it professes to be affiliated with a group that already has a school in that zone." Id. at 597. "The problem for St. Augustine is not that it is Catholic; it is that it is second in line." Id.

¶19 The Seventh Circuit further determined that there was no entanglement problem. "[T]he school district and state superintendent did not consider St. Augustine's theology or its religious practices." Id. at 598. Instead, in the Seventh Circuit's view, "[t]aking a party's repeated chosen label at face value hardly constitutes a deep-dive into the nuances of religious affiliation." Id. at 599.

¶20 In contrast, Judge Ripple dissented, concluding that the Superintendent failed to follow precedent when he went beyond St. Augustine's articles of incorporation and bylaws to make the determination at issue. Id. at 603 (Ripple, J., dissenting). In Judge Ripple's view, "[r]ather than grounding his decision in the articles of incorporation and by-laws as he was required to do under state law, [the Superintendent] decided to undertake an independent investigation and rested his decision on statements he found on St. Augustine's website." Id.

¶21 Judge Ripple further criticized the majority's approach for taking the term "Catholic" out of context. Id. at 604. He cautioned: "the court's selective use of the term 'Catholic' rests on the assumption that, for purposes of our Free Exercise analysis, a single term, even when culled from its context, can describe accurately the religious values and aspirations of an individual or a group of individuals." Id.

¶22 St. Augustine petitioned for certiorari with the United States Supreme Court. The Court granted certiorari but did not issue a full opinion. Instead, it simply vacated the judgment and remanded to the Seventh Circuit for consideration in light of its recent decision in Espinoza v. Montana Department of Revenue, 591 U.S. __, 140 S. Ct. 2246 (2020).[6] St.

[6] In Espinoza, the Court addressed a Montana program that provides tuition assistance to parents who send their children to

Augustine Sch. v. Taylor (St. Augustine III), 141 S. Ct. 186 (2020). After remand, the Seventh Circuit certified to this court the question now before us.

II

¶23 The certified question asks us to interpret Wis. Stat. § 121.51. Statutory interpretation is a question of law we review independently. Winebow, Inc. v. Capitol-Husting Co., Inc., 2018 WI 60, ¶23, 381 Wis. 2d 732, 914 N.W.2d 631. We are not bound by the interpretations of the federal courts, but they may aid in our analysis. See id. (citation omitted).

¶24 Our review of the statute is informed by the Constitution and precedent. The application of constitutional principles likewise presents a question of law. State v. Roundtree, 2021 WI 1, ¶12, 395 Wis. 2d 94, 952 N.W.2d 765.

III

---

private schools. Espinoza v. Mont. Dep't of Revenue, 591 U.S. __, 140 S. Ct. 2246, 2251 (2020). When the petitioners sought to use the program for scholarships at religious schools, the Montana supreme court struck down the program on the basis of a "no-aid" provision in the Montana Constitution, which prohibits any aid to a school controlled by a "church, sect, or denomination." Id. The Court determined that the no-aid provision violates the Free Exercise clause, writing that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." Id. at 2261.

¶25 We begin by setting the foundation for our analysis, detailing the history of this court's interpretation of Wis. Stat. § 121.51. With that necessary history and context in hand, we then turn to examine the certified question.

A

¶26 In 1967, the people of Wisconsin adopted a constitutional provision setting forth: "Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning." Wis. Const. art. I, § 23. Several provisions in ch. 121 of the Wisconsin Statutes operationalize this guarantee.

¶27 Wisconsin Stat. § 121.54(2)(b) sets forth the conditions under which a student attending a private school can receive publicly funded transportation. It provides:

> Except as provided in sub. (1) or otherwise provided in this subsection, the school board of each district operating high school grades shall provide transportation to and from the school a pupil attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a

> private school located 2 miles or more from the pupil's residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.

§ 121.54(2)(b)1.

¶28 "Attendance area" is a defined term that sits at the center of the instant case. Wisconsin Stat. § 121.51(1) defines "attendance area" as follows:

> [T]he 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. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. 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.

¶29 The natural question that arises from the definition of "attendance area" is what it means for private schools to be "affiliated with the same religious denomination." After all, assuming that schools are co-educational and not single-sex, only one school of each "religious denomination" may receive the transportation benefit in a single attendance area.

¶30 This court first addressed this language in 1971 in State ex rel. Vanko v. Kahl, 52 Wis. 2d 206, 188 N.W.2d 460 (1971). In Vanko, the court addressed a constitutional challenge to the attendance area statute.

¶31 The court acknowledged that there would be a constitutional problem if the statute were interpreted to include "a restriction placed upon children attending religious schools and not placed upon those attending private, secular schools." Id. at 214. This problem would arise because "[r]eligious affiliation would be the sole basis of the classification." Id. Accordingly, the court engaged in a saving construction to avoid the constitutional infirmity, interpreting the statute to apply to both religious and non-religious schools: "We read the statute as 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." Id. at 215.

¶32 Building on its decision in Vanko, the court seven years later decided Holy Trinity Community School, Inc. v. Kahl, 82 Wis. 2d 139, 262 N.W.2d 210 (1978). In Holy Trinity, the plaintiff school was previously a Catholic school affiliated with the Archdiocese. It responded to the Vanko decision by reorganizing as a "community school" with no legal ties to the Roman Catholic Church or any other religious organization. Id. at 146. However, the new community school took over all the employment contracts of the old Catholic school, accepted all students who attended the school's previous iteration, and utilized the same building as the old Catholic school, owned by the Holy Trinity Congregation, which leased the building to the community school for one dollar annually. Id.

¶33 The community school no longer required Catholic instruction, but instead instituted a release time for religious programming of the students' parents' choice. Id. at 146-47. However, in practice only the Catholic religion was taught during the release time. Id. at 147. Based on these facts, the Superintendent found that Holy Trinity Community School was affiliated with the Catholic denomination, even though it was not controlled by the Archdiocese or the Roman Catholic Church. Id.

¶34 Pinpointing a constitutional infirmity in the manner the Superintendent went about making his determination, the Holy Trinity court concluded:

> [W]here a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination, that in the absence of fraud or collusion the inquiry stops there. To make the further inquiry, as attempted by the Superintendent of Public Instruction, is to involve the state in religious affairs and to make it the adjudicator of faith.

Id. at 157-58.

¶35 The court explained that the "continuing surveillance of [the] school to determine whether its practices comport with those of the Catholic Church" causes an excessive entanglement of the government in purely religious matters. Id. at 150. It is not for the government to decide "who or what is Catholic," and accordingly the inquiry undertaken by the Superintendent in Holy Trinity was deemed unconstitutional. Id. The court continued, discussing the sources of information at play under the facts of Holy Trinity:

> For this court or for the Superintendent of Public Instruction to determine, in the light of the prima facie showing of the

> articles of incorporation to the contrary, that this school corporation is or is not affiliated with the Catholic denomination is to meddle into what is forbidden by the Constitution the determination of matters of faith and religious allegiance.

Id. Thus, it concluded that "[w]e are obliged to accept the professions of the school and to accord them validity without further inquiry." Id. at 155.

¶36 At the time we granted the certification in this case, we asked the parties to address a question in addition to that certified by the Seventh Circuit:

> The Free Exercise Clause and the Establishment Clause of the First Amendment may bear upon our interpretation of Wis. Stat. § 121.51 and its inclusion of "private schools affiliated with the same religious denomination." In meeting the query of the certified question, should we revisit this court's decisions in State ex rel. Vanko v. Kahl, 52 Wis. 2d 206, 188 N.W.2d 210 (1971) and Holy Trinity Community School, Inc. v. Kahl, 82 Wis. 2d 139, 262 N.W.2d 210 (1978) . . . .

¶37 In briefing, no party asked us to overrule either Vanko or Holy Trinity, and in fact St.

Augustine, the Superintendent, and the School District all affirmatively stated that we need not and should not overrule or revisit the holdings of those cases. When pressed at oral argument, the discussion focused on Vanko, and both parties reiterated their positions that we not upset that case.[7] Accordingly, we decline to overrule or revisit either case on our own initiative. See Serv. Emps. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35 (explaining that "[w]e do not step out of our neutral role to develop or construct arguments for parties; it is up to them to make their case").

---

[7] At oral argument, St. Augustine's counsel stated: "Here today, no one is asking this court to overrule Vanko." See State ex rel. Vanko v. Kahl, 52 Wis. 2d 206, 188 N.W.2d 460 (1971). Later, the same counsel suggested that Vanko's status of remaining unchallenged for over 50 years is some indication that its statutory interpretation has been workable and relied upon for decades:

> [This court] could certainly come to the conclusion that Vanko is a 50-year-old decision and the fact that we haven't been before the court for 50 years and are here only because the [Superintendent] did something so extraordinary that it resulted in a grant of cert and a [vacating of the Seventh Circuit's decision] is some indication that [the statute] is workable given the reliance that schools and families have had on the statutory interpretation that sticking to precedent might be the best thing to do.

Counsel for the Superintendent similarly argued that "the court got it right in Vanko."

B

¶38 With this foundation in hand, we turn now to address the certified question.

¶39 The Seventh Circuit's certification order puts a fine point on the issue before us and assists in focusing on the distinct and narrow question. After summarizing the lengthy history of this litigation, the Seventh Circuit relates that "[a]t this juncture . . . the issue has boiled down to one dispositive question of state law: what methodology for determining affiliation is required under the relevant Wisconsin statutes?" St. Augustine Sch. v. Taylor (St. Augustine IV), No. 17-2333 (7th Cir. Feb. 16, 2021) (order certifying question to Wisconsin Supreme Court) at 2.

¶40 Prior to proceeding with our analysis, we offer an observation regarding what is before us and what is not. The Seventh Circuit has certified to us a pure question of law pertaining only to the sources of information the Superintendent may consider in determining whether two schools are "affiliated with the same religious denomination" for purposes of Wis. Stat. § 121.51(1). In essence, it is an inquiry of methodology.

¶41 We do not apply our determination to the facts of this case. That is, we do not determine whether St. Augustine is affiliated with the same religious denomination as St. Gabriel. That is a

question for the federal court on remand. With this clarification, we proceed to our analysis.

¶42 Both the Constitution and our precedent interpreting the statute provide relevant guardrails around the world of information a Superintendent may consider. The Constitution prohibits the excessive entanglement of the state in religious matters. L.L.N. v. Clauder, 209 Wis. 2d 674, 686, 563 N.W.2d 434 (1997). Such a proposition, known as the entanglement doctrine, springs from the Establishment Clause of the First Amendment.[8] Id.

¶43 Excessive entanglement occurs "if a court is required to interpret church law, policies, or practices." Id. at 687. Thus, the First Amendment prohibits such an inquiry. Id. On the other hand, it is well-settled that "a court may hear an action if it will involve the consideration of neutral principles of law." Id. (citations omitted).

¶44 The certified question requires us to determine whether the consideration of certain matters in the determination of whether two schools are "affiliated with the same religious denomination" would rely on an unconstitutional religious inquiry

---

[8] The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. It is applicable to the states through the Fourteenth Amendment. L.L.N. v. Clauder, 209 Wis. 2d 674, 686, 563 N.W.2d 434 (1997).

and thus cause an impermissible excessive entanglement, or whether such consideration would merely involve the application of neutral principles of law. We are asked to address specifically a school's self-identification as set forth on its publicly available website or in its filings with the state.

¶45 St. Augustine argues that the manner in which the Superintendent considered such information impermissibly places the Superintendent in the position to decide "what is Catholic" and thus constitutes an excessive entanglement with religion. In contrast, the Superintendent and the School District advance that simply accepting St. Augustine's self-identification does not require any investigation at all or any determination of whether St. Augustine is Catholic——they are simply taking St. Augustine at its word.

¶46 Because we refrain from developing arguments not advanced by either party and determine that our precedent should be maintained rather than overruled, our inquiry is framed by Vanko and Holy Trinity. Vanko established that "affiliated with the same religious denomination" is "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." Vanko, 52 Wis. 2d at 215. It further establishes that the statute applies to both religious and secular schools "affiliated or operated by a single sponsoring group." Id.

¶47 Holy Trinity is particularly apt in guiding our approach to the certified question. There, the court engaged in a similar exercise of line-drawing to that which we undertake in the instant case. The line the Holy Trinity court drew between the constitutional and the unconstitutional was at the investigation and surveillance of a school's religious practices. Holy Trinity, 82 Wis. 2d at 150. With regard to statements made by a school, the court set forth: "We are obliged to accept the professions of the school and to accord them validity without further inquiry." Id. at 155.

¶48 Just as in Holy Trinity, accepting a school's professions that are published on its public website or set forth in filings with the state does not necessarily require any investigation or surveillance into the practices of the school. It need not require any religious inquiry at all.

¶49 As long as the Superintendent considers the school's professions and not its practices, the Superintendent remains on the correct side of the line. In other words, a superintendent attempting to determine that a school is affiliated with a specific religious denomination may rely on any evidence of affiliation between the school and a denomination that does not violate the First Amendment and that does not inquire into the religious beliefs of the school or the denomination.

¶50 The wording of the certified question implies that corporate documents represent neutral criteria while a school's self-identification in sources such as its website and filings with the state does not. But this appears to be a false dichotomy. Indeed, simply accepting a school's profession of what it claims to be or with whom it is affiliated constitutes a neutral undertaking, as does the acceptance of a school's professions of affiliation in documents filed with the state. Here St. Augustine professes that while it is Roman Catholic, it is independent of and unaffiliated with the Archdiocese. Neither accepting corporate documents nor accepting a school's professions necessarily requires any investigation of the type prohibited by Holy Trinity or even any religious inquiry whatsoever.

¶51 Our conclusion is further supported with a look to a related statute. Wisconsin Stat. § 187.01(7) addresses amendments to the articles of incorporation of a religious society. It provides in relevant part:

> Such corporation may amend its articles of organization or constitution at a regular meeting of said corporation by the majority vote of the members present so that such corporation has the right to merge with and transfer all of its real estate and personal property to another corporation of the same religious denomination.

§ 187.01(7) (emphasis added).

¶52 An important principle can be gleaned from this statutory text. The phrasing "another corporation of the same religious denomination" indicates that "religious denomination" is a broader category than "corporation." In other words, there can be multiple corporations that fit under the umbrella of a single religious denomination. If the legislature wanted to limit the Superintendent's consideration to corporate documents in an inquiry of whether the schools are affiliated with the same corporate body, it would not have used the broader term "religious denomination" in Wis. Stat. § 121.51(1). Indeed, a single corporate charter may not fully answer whether a school is affiliated with a religious denomination.

¶53 Vanko also supports such a premise. To explain, Vanko highlighted that "affiliated with the same religious denomination" is the test to be used within a school system "rather than operation by a single agency or set of trustees or religious order within a particular religious denomination." Vanko, 52 Wis. 2d at 215 (emphasis added). Thus, Vanko explicitly disclaimed an assertion that "operation by a single agency" is a necessary condition to establish that two schools are of the same religious denomination. To limit the inquiry to exclusively corporate documents would elevate this assertion that the Vanko court rejected.

¶54 However, it is important to keep in mind an additional principle arising from Vanko——the focus on a "single sponsoring group." Id. at 215. Although the Superintendent is not limited to corporate documents exclusively, corporate documents may often be determinative. Indeed, as Holy Trinity explains, "where a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination, that in the absence of fraud or collusion the inquiry stops there." Holy Trinity, 82 Wis. 2d at 157-58. But where corporate documents alone do not resolve the inquiry, the Superintendent is permitted to consider other neutral sources of information.

¶55 We thus conclude this methodological inquiry, determining that in examining whether schools are "affiliated with the same religious denomination" pursuant to Wis. Stat. § 121.51, the Superintendent is not limited to consideration of a school's corporate documents exclusively. In conducting a neutral and secular inquiry, the Superintendent may also consider the professions of the school with regard to the school's self-identification and affiliation, but the Superintendent may not conduct any investigation or surveillance with respect to the school's religious beliefs, practices, or teachings.

¶56 Accordingly, we answer the certified question and remand to the United States Court of Appeals for the Seventh Circuit for further proceedings.

By the Court.—Certified question answered and cause remanded to the United States Court of Appeals for the Seventh Circuit.

¶57 PATIENCE DRAKE ROGGENSACK, J. *(concurring).* The question before the Seventh Circuit Court of Appeals is whether St. Augustine is "affiliated with the same religious denomination" for purposes of Wis. Stat. § 121.51(1) as is St. Gabriel, a Catholic school, whom all agree is "affiliated with" the Archdiocese of Milwaukee. The answer to this question turns on the meaning of "affiliated with." There is no need to become involved in a factual examination of the religious teachings of the private schools that are being compared or the religious teachings of the organization with which they are claimed to be affiliated.

¶58 Rather, I agree with Justice Hagedorn that to be "affiliated with" in a way that will result in overlapping attendance areas of St. Augustine's and St. Gabriel's schools pursuant to Wis. Stat. § 121.51(1) requires a "mutual organizational relationship" between St. Augustine and the religious denomination with which St. Gabriel is affiliated.[1]

[1] Justice Hagedorn's concurrence, ¶¶71, 85.

That is, St. Augustine and the religious denomination, here the Archdioceses of Milwaukee, must mutually agree to be affiliated with one another. Because the majority opinion overlooks the dispositive legal issue of mutuality in the phrase "affiliated with" from § 121.51(1), and instead focuses on a variety of factual inquiries that will not assist the Seventh Circuit Court of Appeals move forward in its decisional process, I do not join the majority opinion, but respectfully concur.

I. BACKGROUND

¶59 The historic background underlying the certified question from the Seventh Circuit Court of Appeals is ably set out in the majority opinion and in the concurrence of Justice Hagedorn.[2] The certification invited us "to re-formulate" the certified question, indicating that the Seventh Circuit realized there may be more that would underlie compliance with their request than might be apparent in the words chosen for the certified question.[3] In response, we asked the parties to address First Amendment concerns that may bear on our assisting the Seventh Circuit in addition to the certified question. However, no party did so.[4]

---

[2] Majority op., ¶¶7-11; Justice Hagedorn's concurrence, ¶¶76-84.

[3] St. Augustine Sch. v. Taylor (St. Augustine IV), No. 17-2333, 6 (7th Cir. Feb. 16, 2021).

[4] Majority op., ¶¶37, 38.

II. DISCUSSION

A. Standard of Review

¶60 The dispositive issue in this case is the meaning of "affiliated with," as that phrase is used in Wis. Stat. § 121.51(1). Statutory interpretation presents a question of law that we decide independently. State v. Guarnero, 2015 WI 72, ¶12, 363 Wis. 2d 857, 867 N.W.2d 400.

B. Statutory Interpretation

¶61 Our interpretation of the meaning of the phrase, "affiliated with" in Wis. Stat. § 121.51(1), begins with the words chosen by the legislature. Spiegelberg v. State, 2006 WI 75, ¶17, 291 Wis. 2d 601, 717 N.W.2d 641. Context also is important when determining the plain meaning of a statute. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

¶62 Wisconsin Stat. § 121.51(1) 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.

(Emphasis added). Affiliated is not a defined term; therefore, we employ its "common, ordinary and accepted meaning." Kalal, 271 Wis. 2d 633, ¶45.

¶63 We often determine common meanings by consulting a dictionary. Guarnero, 363 Wis. 2d 857, ¶16. When I do so here, I note that an "Affiliate [is] an organization that is connected with or controlled by another, usually larger, organization. [For example] Our college is an affiliate of the university." Affiliate, Cambridge Dictionary, dictionary.cambridge.org, https://dictionary.cambridge.org/dictionary/english/affiliate?q=Affiliate (last visited June 21, 2021). To be "affiliated with" requires a mutuality of connection between the "affiliate" and the entity with which there is an affiliation. That is, to be affiliated with is "to be officially connected with or controlled by another." Id. From a common meaning perspective, one cannot be affiliated with another organization if there is no mutual connection between the two organizations.

¶64 "Affiliated with" is a phrase used in decisions that occur in other contexts, sometimes frequently. For example, cases involving union activities or union employees may arise when there is a question about whether workers on a particular job are affiliated with a particular union, e.g., with the AFL-CIO, such that picketing can or cannot occur. Upper Lakes Shipping, Ltd. v. Seafarers' Int'l Union of Canada, 18 Wis. 2d 646, 659, 119 N.W.2d 426 (1963). Workers join a union and the union accepts

their membership when it appears to be to their mutual benefit to do so. Id.

¶65 In Cape v. Plymouth Congregational Church, 130 Wis. 174, 109 N.W. 928 (1906), we discussed criteria that were considered in determining whether a congregation had withdrawn from affiliation with the Primitive Methodist denomination when the congregation chose to become a Congregational denomination. Id. at 179. We explained that to be a member of a synodical organization, "at least two things are essential: A profession of the accepted faith and a submission to its government." Id. at 181. We reasoned that because the deed of trust for the land on which the church building stood said that the church property was to be used by a Methodist denomination, the Primitive Methodist congregation could not be excluded from use of the church facility. Id. at 186. Again, there was a mutuality in the affiliation between the Primitive Methodist denomination and Cape et al that was not present with a Congregational denomination that challenged the Primitive Methodist's right to use the church building.

¶66 As Justice Hagedorn notes, the phrase, "affiliated with," has been used in several statutes.[5] One such statute deals with cemeteries and religious societies that are affiliated with cemeteries. Wisconsin Stat. § 157.63(6) creates potential liability

[5] Justice Hagedorn's concurrence, ¶¶96, 97.

for damages for a religious society with whom a cemetery is affiliated when the cemetery or cemetery authority fails to comply with statutory requirements. Section 157.63(6) provides:

> The religious society that is affiliated with a cemetery to which a certification under this section applies is liable for the damages of any person that result from the failure of the cemetery or cemetery authority to fully comply wit s. 157.11(9g) or 157.12(3) during the reporting period under s. 157.62(2) for which such compliance has been certified under this section.

The obligations that arise by virtue of § 157.63(6) imply that a religious society could not be affiliated with a cemetery absent mutual agreement to affiliate because such an affiliation comes with obligations that the religious society must meet if the cemetery does not comply with statutory requirements.

III. CONCLUSION

¶67 In sum, my review shows that the common dictionary definition of "affiliate," the way in which we have interpreted "affiliation" in matters relating to unions, our interpretation of "affiliate" in other legal contexts and our interpretation of "affiliated with" in other statutes have been consistent with one another. All require express or implied mutual

agreement to connection between the persons and entities that are affiliated. Therefore, in regard to the case before us, I conclude that "affiliated with" pursuant to Wis. Stat. § 121.51(1) requires a mutual organizational relationship between St. Augustine and the Archdiocese of Milwaukee, the religious denomination with which St. Gabriel is affiliated. Accordingly, the Seventh Circuit Court of Appeals should consider those facts presented to it that bear on whether St. Augustine and the Archdiocese of Milwaukee have mutually agreed that their organizations are affiliated with each other.

¶68 Because the majority opinion does not address the dispositive legal issue presented by this controversy, I respectfully concur.

¶69 BRIAN HAGEDORN, J. *(concurring).* The Seventh Circuit Court of Appeals poses a methodological question to this court: what evidence may be considered when determining whether private schools are "affiliated with the same religious denomination" under Wis. Stat. § 121.51(1) (2019-20)?[1] The parties agree the answer includes both the self-representations of a school as well as corporate documents. In a narrow opinion, the majority reiterates this conclusion, which I agree with and join. However, this answer may not be of much assistance to the Seventh Circuit without the requisite statutory

[1] All subsequent reference to the Wisconsin Statutes are to the 2019-20 version unless otherwise indicated.

analysis explaining what this information may be used for under the law. Therefore, I write separately to examine what a "religious denomination" is under the statute and what it means for a school and a religious denomination to be "affiliated with" one another.

¶70 In short, to obtain public transportation aid for its students, a private school in Wisconsin must draw an attendance area defining the region from which the public school district must transport its students. Wis. Stat. §§ 121.51(1); 121.54(2)(b)1. And the "attendance areas of private schools affiliated with the same religious denomination shall not overlap." § 121.51(1). As the subsequent analysis will show, a religious denomination under the law is not the same thing as a religious faith; rather, statutory context reveals that "religious denomination" is a kind of religious organization. A school——itself an organizational entity——must be "affiliated with" this type of religious organization. And "affiliated with" in this context involves a mutual organizational relationship. Both the private school and the religious denomination must agree to be affiliated with each other. This statutory inquiry is organizational, not theological.

¶71 Therefore, Wis. Stat. § 121.51(1) prohibits overlapping attendance areas only when multiple schools have a mutual organizational relationship with a single religious denomination. In answer to the Seventh Circuit's certified question, a school's general

description of its religious beliefs is unlikely to constitute relevant evidence because a statement of faith, even shared faith, does not demonstrate a mutual organizational relationship with a religious denomination. Affiliation requires more than a shared faith. On the other hand, a school's statement on its website or elsewhere that it is or is not affiliated with a religious denomination is relevant evidence of a mutual organizational relationship. Likewise, corporate documents, by-laws, and other types of organizational documents can also (oftentimes conclusively) demonstrate the presence or lack of a mutual organizational relationship between a school and a religious denomination.

I. STATUTORY ANALYSIS

¶72 Two statutory provisions work together to provide for and place limits on the availability of transportation aid for pupils attending private schools.

¶73 Wisconsin Stat. § 121.54(2)(b)1. provides:

> [T]he school board of each district operating high school grades shall provide transportation to and from the school a pupil attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a private school located 2 miles or more

> from the pupil's residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.

This subdivision directs school districts to provide transportation to K-12 students attending private schools if four conditions are satisfied: (1) the student lives in the district; (2) the student lives at least two miles away from the private school; (3) the student lives within the private school's "attendance area"; and (4) the private school is located in or within five miles of the district's boundaries.[2]

¶74 The third condition is further informed by the definition of "attendance area" in Wis. Stat. § 121.51(1):

> "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

---

[2] A school district has several options to satisfy its obligation under Wis. Stat. § 121.54(2)(b)1., including by providing transportation for a pupil directly or by compensating the pupil's parent or guardian for the pupil's transportation costs. Wis. Stat. § 121.55(1).

> board of the district in which the private school is located. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. 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.

(Emphasis added.) The dispute in this case concerns the restriction on overlapping attendance areas for "private schools affiliated with the same religious denomination."[3] Id. Unless the statute's exception for sex-specific schools applies, schools affiliated with the same religious denomination must have mutually exclusive attendance areas.

¶75 Wisconsin Stat. §§ 121.51 and 121.54 have entitled students attending private schools to transportation aid for more than fifty years. See generally §§ 33-40, ch. 313, Laws of 1967. How these

---

[3] The dissent aptly characterizes this provision as the "overlapping attendance area" provision, a label employed in this concurrence as well. See dissent, ¶110.

statutes came to be informs their meaning, so we begin there.[4]

A. Historical Context

¶76 In 1968, the legislature enacted Wis. Stat. § 121.54(2)(b), directing school districts to provide students attending private schools transportation directly to their schools.[5] § 40, ch. 313, Laws of 1967. As initially enacted, § 121.54(2)(b) did not prohibit overlapping attendance areas, or even use the phrase "attendance area." Instead, in addition to the other

---

[4] "By analyzing the changes the legislature has made over the course of several years, we may be assisted in arriving at the meaning of a statute." Richards v. Badger Mut. Ins. Co., 2008 WI 52, ¶22, 309 Wis. 2d 541, 749 N.W.2d 581. An inquiry into statutory history is part and parcel of a plain meaning analysis. Fabick v. Evers, 2021 WI 28, ¶30 n.12, 396 Wis. 2d 231, 956 N.W.2d 856.

[5] This was not the legislature's first attempt to provide public transportation aid to private school students. In 1962, the legislature passed a law entitling students attending private schools to receive free school transportation. Ch. 648, Laws of 1961. We struck down this law before it went into effect for violating Article I, Section 18 of the Wisconsin Constitution "which prohibits the expenditure of any public funds 'for the benefit of religious societies, or religious or theological seminaries.'" State ex rel. Reynolds v. Nusbaum, 17 Wis. 2d 148, 165-66, 115 N.W.2d 761 (1962) (quoting Wis. Const. art. I, § 18). In response to that decision, the people ratified Article I, Section 23 of the Wisconsin Constitution in April 1967, providing: "Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institutions of learning." Wis. Const. art. I, § 23.

three conditions still found in the statute, a district was obligated to provide transportation to a private school only "if such private school [was] the nearest available private school which the pupil may reasonably choose to attend." Wis. Stat. § 121.54(2)(b)1.-2. (1967-68).

¶77 This "may reasonably choose to attend" language proved problematic almost immediately, and in short order became the focus of litigation before this court. See State ex rel. Knudsen v. Bd. of Educ., Elmbrook Schs., Joint Common Sch. Dist. No. 21, 43 Wis. 2d 58, 168 N.W.2d 295 (1969). The Knudsen case arose when a school district established "service areas" defining which of the four Catholic schools students from each geographic area of the district could reasonably choose to attend. Id. at 62-63. A parent in the district requested and was denied transportation for his daughter to attend a Catholic high school that did not correspond to his daughter's district-assigned service area. Id. at 63. The parent sought a writ of mandamus to compel the district to provide transportation to his daughter's preferred Catholic school. Id. at 64. We held that the statute gave the pupil the choice of which school to attend, but added that deciding "whether that choice is reasonable is to be determined in the discretion of the school board." Id. at 65. And the school board's exercise of its discretion required "a weighing of conflicting factors which may very well vary in accordance with the subjective needs of the student

and the particular problems of the school district." Id. at 66.

¶78 Less than three months later, the legislature responded to our Knudsen decision by amending Wis. Stat. § 121.54(2)(b) and creating Wis. Stat. § 121.51(1). §§ 304c, 304j, ch. 154, Laws of 1969. The new law replaced the "may reasonably choose to attend" language with the "attendance area" provision and definition described above. Id. In adopting this change, the legislature retained the "service areas" concept, but assigned the task of drawing what it now termed "attendance areas" to the private schools themselves, subject to the overlapping attendance area provision and the school board's approval.

¶79 In the decade following Knudsen and the 1969 amendment, we decided two cases that applied Wis. Stat. § 121.51(1)'s overlapping attendance area provision: State ex rel. Vanko v. Kahl, 52 Wis. 2d 206, 188 N.W.2d 460 (1971), and Holy Trinity Comm. Sch., Inc. v. Kahl, 82 Wis. 2d 139, 262 N.W.2d 210 (1978).

¶80 Vanko involved an original action petition, filed shortly after the 1969 amendment, seeking a declaration that Wis. Stat. § 121.51(1)'s restriction on overlapping "attendance areas of private schools affiliated with the same religious denomination" was unconstitutional. Id. at 210. In our decision, we acknowledged that the most natural reading of the provision likely rendered it unconstitutional because

it imposed a restriction on private religious schools and not on private secular schools. Id. at 213-14. However, the Vanko court devised a construction of the statute to avoid the constitutional infirmity, reading "the statute as 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." Id. at 215.

¶81 Dissenting, Chief Justice Hallows objected that under the majority's reading, "the plain language 'the same religious denomination' now becomes a single operating group and 'religious' is read out of the classification." Id. at 218 (Hallows, C.J., dissenting). In so doing, the court gave "a construction to these statutes beyond the breaking point and . . . construed them to mean exactly the opposite of what the legislature plainly said and intended."[6] Id. at 217 (Hallows, C.J., dissenting).

---

[6] Chief Justice Hallows' critique, echoed by the dissent in today's decision, rings loudly. See dissent, ¶¶112-16. However, even if Vanko was wrongly decided, none of the parties in this case ask us to revisit Vanko despite our invitation to address this question. I do not disagree with the dissent's contention that it is improper in some circumstances to accept unchallenged precedent as an analytical starting point. See dissent, ¶¶103-04. But while I too would welcome an opportunity to revisit Vanko for many of the reasons well-stated in the dissent, we do not need to do so to answer the question the Seventh Circuit asked us. Our answer to the certified question does not prevent a future reconsideration of this line of cases. We answer a narrow state

¶82 The second case to interpret the overlapping attendance area provision involved a challenge to the superintendent's conclusion that a particular school was unaffiliated with the Roman Catholic denomination. Holy Trinity, 82 Wis. 2d at 141. Following our decision in Vanko, Holy Trinity School, which until then had been operated by a Roman Catholic congregation, dissolved itself, and a new school named Holy Trinity Community School incorporated. Id. at 145-46. The newly incorporated school featured the same students, teachers, and buildings as the prior Holy Trinity School. Id. at 146. But, as its corporate documents explained, Holy Trinity Community School was officially an independent school, having "no legal ties to the Roman Catholic church" and, according to its bylaws, having "no affiliation with any religious denomination." Id. at 146. The superintendent challenged Holy Trinity Community School's claim, "contend[ing] that the mere separation of the school, as a legal entity, from the Catholic Church, of which it was previously a part, is insufficient to show that it is no longer affiliated with that denomination." Id. at 147-48.

¶83 We unanimously rejected the superintendent's argument, explaining that the First

---

law question to assist the Seventh Circuit in addressing the factual and constitutional questions properly addressed to their judgment, not ours.

Amendment forbade the superintendent from "determin[ing] the denominational allegiance of the institution" based on it's "inspection and surveillance of the school." Id. at 149. Rather, we accorded "facial validity to the charter and bylaws," and observed that the school "expressly disavow[ed] affiliation with any church denomination." Id. at 154. "[T]o inquire further," we said, "impinges on the religious right of citizens to make their own declaration in respect to their religious affiliation." Id. The First Amendment obligated us "to accept the professions of the school and to accord them validity without further inquiry."[7] Id. at 155. Holy Trinity Community School was therefore "a private school, independent of any religious denomination; and, accordingly, as a matter of law it [was] entitled to a district-wide attendance area." Id.

¶84 Neither Vanko nor Holy Trinity conducted a full statutory analysis of what the overlapping attendance area provision means when it says "private schools affiliated with the same religious denomination."[8] See Wis. Stat. § 121.51(1). Vanko's

---

[7] We noted just one exception, explaining that "courts reserve the right to look behind such decisions where there is evidence of fraud or collusion." Holy Trinity Comm. Sch., Inc. v. Kahl, 82 Wis. 2d 139, 155, 262 N.W.2d 210 (1978). If fraud were "alleged and proved, we would look behind a representation which on its face purported to demonstrate a complete lack of denominational affiliation." Id.

[8] Wisconsin Stat. §§ 121.51(1) and 121.54(2)(b) have undergone slight revisions since Vanko and Holy Trinity, but no changes

statutory interpretation, such as it was, was limited to reading "same religious denomination" as functionally analogous to "single sponsoring group"; it said nothing about how affiliation occurs. 52 Wis. 2d at 215. And Holy Trinity relied primarily on the Constitution to reverse the superintendent's decision. 82 Wis. 2d at 154-55. It didn't say much about what a "religious denomination" is or what it means for a school to affiliate with one. The majority in this case limits its analysis to the types of evidence that could be relevant to affiliation, similarly declining a thoroughgoing analysis of the words of the statute. Majority op., ¶¶5, 40, 55. In my view, the statutory language clarifies how a court should employ the methodology articulated in the majority opinion, and provides the necessary context for our answer to the Seventh Circuit's certified question.

B. Analyzing the Text

¶85 A proper interpretation of "affiliated with the same religious denomination" requires a deeper dive into the meaning of two phrases: "religious denomination" and "affiliated with." Wis. Stat. § 121.51(1). As we shall see, schools are "affiliated with the same religious denomination" when a mutual organizational relationship exists between the schools and the same religious denomination.

---

since then affect our interpretation of the overlapping attendance area provision.

1. Religious Denomination

¶86 "Religious denomination" is not a defined phrase in our statutes. Nevertheless, related statutes reveal that when a statute says "religious denomination," it is not referring to a religious faith generally, but to a particular kind of religious organization.[9]

¶87 Apart from Wis. Stat. § 121.51(1), the phrase "religious denomination" appears in more than a dozen statutory sections. Many of these are in Chapter 187, titled "Religious Societies," which governs the state's relationship with religious organizations. These sections describe how religious organizations meet, incorporate, govern themselves, and own or manage property. See generally Wis. Stat. §§ 187.01-.09.

¶88 Wisconsin Stat. § 187.05 is especially noteworthy because it explains how organizations other than churches, including denominations, can take on a corporate form. It explains that a "body of authorized representatives of any church or religious denomination . . . may elect any number of trustees, not less than three, to be incorporated." § 187.05(1).

---

[9] See State ex rel. Zignego v. WEC, 2021 WI 32, ¶16 & n.9, 396 Wis. 2d 391, 957 N.W.2d 208 (illustrating that technical terms and phrases in the statutes need not always be statutorily defined); see also Wis. Stat. § 990.01(1) ("[T]echnical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.").

Then, it provides that "[a]ny denominational body mentioned in sub. (1) . . . at any stated meeting may vote to become a corporation and designate any of its members of adult age, not less than 10 in number, to make, acknowledge and file with the department of financial institutions a certificate" containing its pertinent corporate details. § 187.05(3)(a). Next, the section explains that a denomination that has taken corporate form "shall have the power and privileges and exercise the rights and be subject to the obligations imposed upon corporations organized under general law." § 187.05(3)(c). And finally, a denomination may own property and reorganize itself if it so chooses. § 187.05(3)(b), (d). All of these demonstrate that a "religious denomination" is a type of religious organization, not a generic reference to people with a kindred faith.

¶89 Further, Wis. Stat. § 187.08 provides that if a religious society belonging to a religious denomination in this state is dissolved, "the title to such real estate so owned by such defunct society shall be vested in such corporation of the same religious denomination next higher in authority in such denomination." Beyond property acquisition, this section demonstrates that a religious denomination can have a relationship with other organizational entities, here religious societies, such that the denomination and religious societies form something resembling a corporate structure with parent and subsidiary corporations. This type of structure reveals that a religious denomination under

Wisconsin law is a kind of organization, not a reference to a group's religious faith.

¶90 Statutes outside Chapter 187 paint the same picture. Wisconsin Stat. § 182.030, for example, explains that a corporation "connected with[] any church or religious denomination or society" may provide in its articles of organization "that it shall be under the supervision and control of such church, denomination, or society." It is an organized body that would supervise and control a corporation. Likewise, Wis. Stat. § 101.05(4)(b) provides a tax exemption for school buildings that are, among other things, "operated by and for members of a bona fide religious denomination." This assumes religious denominations can operate a school——something an organization, and not a religious faith, is capable of.

¶91 The statutes also use the phrase "religious denomination" when referring to entities that ordain or accredit individuals in certain fields. Wisconsin Stat. § 765.16(1m)(a), for example, authorizes an "ordained member of the clergy of any religious denomination" to officiate a marriage. Wisconsin Stat. § 455.02(2m)(i) creates a psychology licensing exemption for "[a]n ordained member of the clergy of any religious denomination." And Wis. Stat. § 979.01(1)(g), which outlines circumstances under which a death must be reported, references an "accredited practitioner of a bona fide religious denomination relying on prayer or spiritual means for healing." A religious faith cannot ordain or accredit

individuals as these sections contemplate; instead, there must be an organization that carries out those functions.

¶92 The statutory context paints a clear picture. When the legislature uses the phrase "religious denomination," it is referring to an organizational entity. To be sure, a religious denomination need not take a specific corporate form under Wisconsin law. As the majority observes, "'religious denomination' is a broader category than 'corporation.'" Majority op., ¶52. But every single use of the phrase in the Wisconsin statutes demonstrates that a "religious denomination" is an organizational entity, not a synonym for religious faith generally. Thus, when Wis. Stat. § 121.51(1) asks whether two schools are "affiliated with the same religious denomination," the question is not whether both schools share the same creed, but whether they are both affiliated with a particular kind of religious organization——a religious denomination.[10]

---

[10] This organizational understanding of "religious denomination" is also consistent with Vanko's construction of Wis. Stat. §§ 121.51 and 121.54(2)(b). Regardless of whether it was correct to do so, its decision to read "same religious denomination" synonymously with "single sponsoring group" is telling. See State ex rel. Vanko v. Kahl, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971). If "the same religious denomination" meant nothing more than a common religious faith, our use of the "single sponsoring group" terminology would be nonsensical. A denomination that shares even an identical religious faith with an entirely independent private school is not a "single sponsoring group" for that school. Religious faiths cannot sponsor schools, but religious

2. Affiliated With

¶93 Like "religious denomination," the phrase "affiliated with" is not expressly defined in the statutes. But statutory context reveals that it contemplates a mutual relationship between two organizations.[11]

¶94 As an initial matter, a proper characterization of "religious denomination" centers and circumscribes the permissible readings of "affiliated with" in Wis. Stat. § 121.51(1). It is one thing for a school to self-declare their allegiance to a particular religious faith. It is quite another to affiliate with a particular religious organization without that organization's agreement. If a private school could unilaterally affiliate itself with a

---

organizations can. The Vanko court explained that a "single sponsoring group" is a "school operating agency or corporation." Id. A religious faith is neither an agency nor a corporation; a religious denomination can take on corporate form.

Although Holy Trinity focused primarily on the Constitution, it also agreed with the organizational understanding of "religious denomination." Summarizing Vanko, the Holy Trinity court explained that "the effect of the statute was to prohibit overlapping attendance districts in respect to . . . religious schools affiliated or operated by a single sponsoring group or denomination." 82 Wis. 2d at 145.

[11] Because it is not a technically or specially defined phrase, we give "affiliated with" its "common, ordinary, and accepted meaning." State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

religious organization, it would deprive that organization of its liberty to decide with whom and with which organizations it chooses to associate. On this basis alone, the most reasonable reading of "affiliated with" in Wis. Stat. § 121.51(1) requires some mutual relationship between the private school and the religious denomination, whereby both agree to be affiliated.

¶95 The history that prompted the enactment of the overlapping attendance area provision supports this reading. After the Knudsen decision gave districts discretion to decide which private school a student could "reasonably choose to attend," the legislature immediately amended the statute to shift that discretion to the private schools in the first instance, subject to districts' approval. Supra, ¶10. But the legislature nevertheless directed private schools with the same denominational affiliation to draw non-overlapping attendance areas. The most reasonable inference from this statutory history is that by adding the overlapping attendance area provision, the legislature contemplated that the drawing of non-overlapping attendance areas is something that could be facilitated by the religious denomination——or in the words of Vanko, a single sponsoring group. It makes no sense to read the statute as asking separate organizations with no relationship (other than perhaps shared religious convictions) to draw limited attendance areas together. "[A]ffiliated with" must contemplate a

mutual relationship between two organizations that agree to associate with one another.[12]

¶96 Context from other statutes confirms this. Most notably, Chapter 157, which regulates cemeteries, routinely contains separate provisions for cemeteries that are "affiliated with a religious association."

- Wis. Stat. § 157.07(6) provides that certain platting requirements do "not apply to . . . a cemetery authority of a cemetery that is affiliated with a religious association."

- Wis. Stat. § 157.08(5) governs conveyances of cemetery lots but partially exempts cemeteries that are "affiliated with a religious association" from its reach.

- Wis. Stat. § 157.11(10) governs improvement and care of cemetery lots but partially exempts cemeteries that are "affiliated with a religious association."

- Wis. Stat. § 157.63(6) holds a "religious society that is affiliated with a cemetery" liable for damages "that result from the failure of the cemetery" to comply with certain statutory requirements.

---

[12] Our opinion in Vanko understood this in its focus on the "single sponsoring group" terminology. 52 Wis. 2d at 215. A single group sponsoring a school necessarily describes a mutual tie between two organizations that choose to be connected.

- Wis. Stat. § 157.635 permits cemeteries "affiliated with a religious association" to limit who may be buried in a cemetery.

- Wis. Stat. § 157.637 forbids cemeteries, other than cemeteries "organized and operated by, or affiliated with, a religious association" from forbidding veteran burials.

It would turn the cemetery statutes on their head if any cemetery could self-affiliate with a religious association, especially Wis. Stat. § 157.63(6)'s provision extending liability to the religious organization the cemetery chose to affiliate with. Quite clearly then, Chapter 157 uses "affiliated with" to contemplate a mutual relationship between cemeteries and religious associations.

¶97 Similarly, Wis. Stat. § 628.92(5)(b) requires navigators "not affiliated with an entity" to furnish a bond. Surely a navigator cannot avoid a bond requirement simply by self-affiliating with another entity. Likewise, Wis. Stat. § 16.99(3p) defines a "public museum" as "a nonprofit or publicly owned museum located in this state that is accredited by the American Association of Museums or an educational center that is affiliated with such a museum." Could an educational center merely self-affiliate with an accredited museum to satisfy this definition? Certainly not.

¶98 So too in Wis. Stat. § 121.51(1). When the overlapping attendance area provision says "affiliated with the same religious denomination," it means that there must be a mutual relationship that ties the private school and the religious denomination together.[13] Both entities must choose to affiliate with each other; neither can unilaterally self-affiliate with the other.[14] This statutory inquiry is not a question of theological symmetry, but of organizational connection.

II. THE CERTIFIED QUESTION

¶99 With this statutory background, the answer to the Seventh Circuit's question comes into fuller view. The Seventh Circuit asks whether the Superintendent must "rely exclusively on neutral criteria such as ownership, control, and articles of incorporation, or may the superintendent also take

---

[13] Adding additional research from our cases and reference to dictionary definitions, Justice Roggensack's concurrence agrees that a mutual organizational relationship is the most reasonable interpretation of the statutory language. Justice Roggensack's concurrence, ¶¶61-67.

[14] To the extent the majority opinion discusses "the professions of the school with regard to the school's self-identification and affiliation," majority op., ¶¶5, 55, I understand it to be discussing the school's self-identification about its mutual affiliation with a religious denomination. A school may not unilaterally self-affiliate with a denomination, but its statements professing to be affiliated with a denomination may be evidence of a mutual organizational relationship between it and the religious denomination it professes to be affiliated with.

into account the school's self-identification in sources such as its website or filings with the state." As the majority observes, however, depending on what is meant by a "school's self-identification," this question may present "a false dichotomy." Majority op., ¶50.

¶100 The Superintendent certainly must rely "exclusively on neutral criteria" to demonstrate a school's affiliation with a religious denomination. The statute's aim is neutral (organizational connection). And as we held in Holy Trinity, the Constitution provides further limits. Although "ownership, control, and articles of incorporation" are examples of neutral criteria (and often may be determinative), other types of evidence might permissibly be considered. For example, a school's profession on its website that it is an unaffiliated religious school would constitute evidence that the school shares no mutual organizational relationship with a religious denomination.[15]

¶101 Therefore, in answer to the certified question, I join the majority's conclusion that statements of affiliation by a school on its website, in filings with the state, or otherwise, along with corporate documents, may be permissible sources of evidence regarding whether two schools are affiliated with a religious denomination. This statutory inquiry,

---

[15] The parties in this case do not disagree on whether statements on a website may be relevant. They do disagree on what kind of statements may be relevant and how they may be used.

however, is organizational, not theological. A religious denomination under the law is a kind of religious organization, not a religious creed. And a school is affiliated with a religious denomination if there exists a mutual organizational relationship between the private school and the religious denomination. With this understanding, I respectfully concur.

¶102 REBECCA GRASSL BRADLEY, J. *(dissenting).* "[A] law repugnant to the constitution is void." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). Wisconsin Stat. § 121.51(1) is repugnant to the Constitution and therefore void. In answering the certified question, this court should say so. Fifty years ago in State ex rel. Vanko v. Kahl, 52 Wis. 2d 206, 188 N.W.2d 460 (1971), this court overstepped its judicial boundaries and rewrote the statute in order to save it. Vanko embodies an egregious example of legislating from the bench and should be overturned. Instead, the majority answers the certified question in a manner which unconstitutionally entangles state authorities in the religious affairs of private schools. It is of no import that none of the parties asked us to overrule Vanko in this dispute. We ordered the parties to address whether Vanko should be revisited, and the question is squarely before us notwithstanding the parties' negligible treatment of the subject. Litigants do not dictate the decisions of this court; the law does. As proclaimed over 160 years ago, "[w]e sit here to decide the law as we find it, and not as the parties or others may have supposed it to be." Ross v. Bd. of Outagamie Cnty. Supervisors, 12 Wis. 26, 44 (1860) (Dixon, C.J., dissenting).

¶103 The Wisconsin Supreme Court serves a law-development function. State ex rel. Wis. Senate v. Thompson, 144 Wis. 2d 429, 436, 424 N.W.2d 385 (1988) ("[I]t is this court's function to develop and clarify the law."). "In a legal system in which appellate opinions not only establish the meaning of

law, but do so through precedent that binds future litigants, courts cannot cede to the parties control over legal analysis." Amanda Frost, The Limits of Advocacy, 59 Duke L.J. 447, 453 (2009). In this case, the majority does a great disservice to the people of Wisconsin by letting three parties control the law for an entire state.

¶104 The logical implications of the majority's reasoning are concerning, if not absurd. In future cases, will the court refuse to follow binding precedent if no party cites it? Presumably, "[n]o one would argue that a court is free to ignore a binding precedent simply because the parties fail to cite it." Id. at 494. But if we cannot reconsider our own precedent because the parties didn't ask us to do so, the majority's reasoning would also preclude us from considering any case the parties didn't mention. What if a case has been cited, perhaps even by both parties, but we disagree with their reading of it? Are we now obligated to read our own prior decisions through the lenses of partisan litigants?

¶105 The majority's aberrantly restrictive vision of our role consigns the state's highest court to selecting winners and losers in litigation contests rather than declaring the law. However, "courts do not simply resolve disputes between parties; they are also responsible for making pronouncements of law that are binding on all who come after. When the parties fail to raise relevant legal claims and arguments——whether by error or through conscious

choice——judges must do so themselves to avoid issuing inaccurate or incomplete statements of law." Id. at 447. Doing so does not abandon our neutral role; it embraces it, while serving as "an essential means of protecting the judiciary's role in the constitutional structure." Id. at 452.

¶106 Read in conjunction with Wis. Stat. § 121.54(2)(b), Wis. Stat. § 121.51(1) precludes public school districts from providing transportation to students who attend a private school if the school district decides that the school is "affiliated with the same religious denomination" as another private school within the same geographic attendance area whose students already receive such transportation. On its face, the statute imposes a restriction on the receipt of public benefits applicable only to religious schools. Recognizing the constitutional infirmities of this statutory scheme, the Vanko court impermissibly excised the phrase "religious denomination" from the statute by applying § 121.51(1)'s overlapping-attendance-area exclusion to religious and secular schools alike.

¶107 Prioritizing the parties' collective preference to preserve the statute over our duty to faithfully interpret the law as written, the majority declines to revisit the Vanko court's mangling of the statute. However, "[t]he principle of stare decisis does not compel us to adhere to erroneous precedent or refuse to correct our own mistakes." State v. Outagamie Cnty. Bd. of Adjustment, 2001 WI 78, ¶31,

244 Wis. 2d 613, 628 N.W.2d 376. Regardless of the particular interests of the parties in perpetuating Vanko's improper reworking of the statute, our duty to the Constitution is primary. "We do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." Johnson Controls, Inc. v. Employers Ins. of Wausau, 2003 WI 108, ¶100, 264 Wis. 2d 60, 665 N.W.2d 257 (internal citations omitted).

¶108 Had the majority confronted Vanko's errors, it would have necessarily concluded that Wis. Stat. § 121.51(1) is unconstitutional under the First Amendment to the United States Constitution. It is the duty of this court "to say what the law is," Tetra Tech EC, Inc. v. DOR, 2018 WI 75, ¶50, 382 Wis. 2d 496, 914 N.W.2d 21 (quoting Marbury, 5 U.S. at 177), to "faithfully give effect to the laws enacted by the legislature" by applying the plain language of a statute, State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110, and to ensure those enacted laws are in conformity with our Constitution. This court in Vanko violated each of these responsibilities. The majority in this case repeats the error. I respectfully dissent.

I. Vanko should be overruled because the court rewrote Wis. Stat. § 121.51(1).

¶109 In the interests of the "safety and welfare of children," the Wisconsin Constitution allows the

legislature to "provid[e] for the transportation of children to and from any parochial or private school or institution of learning." Wis. Const. art. I, § 23. Following the adoption of this constitutional provision in 1967, the legislature enacted Wis. Stat. § 121.54(2)(b), which provides in relevant part:

> [T]he school board of each district operating high school grades shall provide transportation to and from the school a pupil attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a private school located 2 miles or more from the pupil's residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.

(Emphasis added.) Under this law, school districts must provide students with transportation to and from private schools, so long as certain criteria are met.[1] Specifically, the student must reside at least two miles from the school and within that school's "attendance area," and the private school must be

[1] Wisconsin Stat. § 121.55 prescribes methods of transportation.

within five miles of the school district's boundaries. In turn, the State provides aid to the school district at specified rates depending upon the location of students transported by the district. See Wis. Stat. § 121.58(2).

¶110 Wisconsin Stat. § 121.51(1) defines "attendance area" as "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." Any disagreement over the scope of the "attendance area" must be resolved by the state superintendent of public instruction (SPI): "[i]f the private school and the school cannot agree on [an] attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area." § 121.51(1). As particularly relevant to the certified question before this court, § 121.51(1) also mandates a limitation applicable only to religious schools: "[t]he attendance areas of private schools affiliated with the same religious denomination shall not overlap."[2] (Emphasis added.) (hereinafter the "overlapping attendance area" provision).

¶111 Reading Wis. Stat. § 121.51(1) in conjunction with Wis. Stat. § 121.54(2)(b), the

---

[2] This mandate is subject to an exception involving single-sex schools which is not pertinent to the matter before the court. Wis. Stat. § 121.51(1).

provision prohibiting overlapping attendance areas requires school districts to deny transportation to students who attend a private school "affiliated with the same religious denomination" as another private school within the same geographic attendance area whose students already receive transportation. In other words, if two religious schools belong to the same "religious denomination"——a term statutorily undefined and subject to the interpretation of the SPI——students attending one of the religious schools are denied transportation, regardless of their distance from the school. The Constitution prohibits such faith-based discrimination in conferring public benefits.

¶112 Soon after this statute's enactment, religious schools and parents of children attending them challenged the constitutionality of the provision prohibiting overlapping attendance areas of private schools "affiliated with the same religious denomination." Instead of confronting its glaring unconstitutionality, the Vanko court rewrote Wis. Stat. § 121.51(1) in order to cure its "apparent constitutional infirmity." Vanko, 52 Wis. 2d at 214. Although § 121.51(1) plainly prohibits overlapping attendance areas of only those schools "affiliated with the same religious denomination," the Vanko court "read the statute as 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." Id. at

215 (emphases added). To support its "reading" of § 121.51(1), the Vanko court effectively replaced the phrase "religious denomination" with "single sponsoring group" (ostensibly a secular phrase) so as to apply the statute's restriction to both secular and religious schools. Amending the law by judicial fiat, reasoned the Vanko court, prevents "[r]eligious affiliation [from being] the sole basis of the classification" and fulfills the statute's overarching purpose of providing "for the safety and welfare of school children." Id. at 214. As further support for taking this legislative action, the Vanko court misapplied the constitutional doubt canon of statutory construction: "[i]f there were any doubt as to this being the correct construction of the statute, . . . [it] use[s] the statutory construction rule that, given two alternative constructions of a statute, preference is to be given to the one that saves the statute from being struck down as unconstitutional." Id. at 215.

¶113 The Vanko court's blatant judicial activism was not lost on all members of the court. Noting the unconstitutionality of the statute, dissenting Chief Justice E. Harold Hallows pointed out that "[i]n order to save the constitutionality of [the 'overlapping attendance area' provision] . . . , the majority has given a construction to these statutes beyond the breaking point and has construed them to mean exactly the opposite of what the legislature plainly said[.]" Id. at 217 (Hallows, C.J., dissenting). In the court's reconstruction of the statute, "the plain language 'the same religious denomination' now

becomes a 'single operating group' and 'religious' is read out of the classification." Id. at 218. Chief Justice Hallows rightly criticized the court's overreach: "We cannot take clear and unambiguous language and under the guise of construction or interpretation change what the legislature has said." Id. at 219. If the "overlapping attendance area" provision is to apply to religious and secular schools alike, "the legislature must say so." Id.

¶114 Although Vanko is irreconcilable with the plain language of Wis. Stat. § 121.51(1),[3] a majority of this court nevertheless sustains its erroneous holding.[4] Because Vanko's construction of § 121.51(1) is unmoored from the statutory text, it should be overruled. An invention of the Vanko court, the phrase "single sponsoring group" is nowhere to be found in the statute. Nor does the statutory text apply the "overlapping attendance area" restriction to

---

[3] At the time of the Vanko decision, the "overlapping attendance area" provision was codified in Wis. Stat. § 121.51(4).

[4] The majority also errs in upholding Holy Trinity Cmty. Sch., Inc. v. Kahl, 82 Wis. 2d 139, 262 N.W.2d 210 (1978). In that case, this court refined its decision in Vanko to prescribe how the SPI should ascertain whether a religious private school is affiliated with a "sponsoring group." In relevant part, Holy Trinity held that "where a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination, that in the absence of fraud or collusion the inquiry stops there." Holy Trinity, 82 Wis. 2d at 157-58. Because Holy Trinity rests upon the faulty foundation laid by Vanko, it too should be overturned.

secular schools. Only students attending private schools "affiliated with the same religious denomination" as another private school within the same geographic attendance area are denied a public benefit——solely on account of their school's religious affiliation.

¶115 In arriving at its holding, the Vanko court trampled over fundamental principles of statutory interpretation, under which we are supposed to "'begin with the language of the statute,'" and when the "meaning of the statute is plain, we ordinarily stop the inquiry." Kalal, 271 Wis. 2d 633, ¶45 (quoted source omitted). We give statutory language "its common ordinary, and accepted meaning," id., and we should never "read into the statute words the legislature did not see fit to write." Dawson v. Town of Jackson, 2011 WI 77, ¶42, 336 Wis. 2d 318, 801 N.W.2d 316. "It is not up to the courts to rewrite the plain words of statutes," State v. Wiedmeyer, 2016 WI App 46, ¶13, 370 Wis. 2d 187, 881 N.W.2d 805, nor can a court "add words to a statute to give it a certain meaning." State v. Neill, 2020 WI 15, ¶23, 390 Wis. 2d 248, 938 N.W.2d 521 (quoted source omitted). "[R]ather, we interpret the words the legislature actually enacted into law." State v. Fitzgerald, 2019 WI 69, ¶30, 387 Wis. 2d 384, 929 N.W.2d 165. If the law offends the Constitution, we are duty-bound to say so.

¶116 The Vanko court began with the language of the statute, acknowledged its "constitutional

infirmity," and committed a cavalcade of errors in order to avoid employing the only appropriate judicial remedy——striking the statute. Discarding its obvious meaning, the Vanko court invoked "the purpose of the transportation statute" and declared that a "classification solely on the basis of religious sponsorship would not be germane or reasonably related to the purpose of the statute"——so it deleted it. Through the court's legislative handiwork, the phrase "same religious denomination" became "single sponsoring group." In order to absolve the legislature of an unconstitutional act, the court committed its own, arrogating to itself the power to make law.

¶117 Writing laws resides within the exclusive domain of the legislature, into which judges may not tread. "Like its federal counterpart, '[o]ur state constitution . . . created three branches of government, each with distinct functions and powers,' and '[t]he separation of powers doctrine is implicit in this tripartite division.'" Gabler v. Crime Victims Rights Bd., 2017 WI 67, ¶11, 376 Wis. 2d 147, 897 N.W.2d 384 (quoted source omitted; alterations and ellipsis in original). "Three clauses of the Wisconsin Constitution embody this separation: Article IV, Section 1 ('[t]he legislative power shall be vested in a senate and assembly'); Article V, Section 1 ('[t]he executive power shall be vested in a governor'); and Article VII, Section 2 ('[t]he judicial power . . . shall be vested in a unified court system')." Gabler, 376 Wis. 2d 147, ¶11 (alterations and ellipsis in original). "The separation of powers 'operates in a general way to

confine legislative powers to the legislature.'" League of Women Voters v. Evers, 2019 WI 75, ¶35, 387 Wis. 2d 511, 929 N.W.2d 209 (quoting Goodland v. Zimmerman, 243 Wis. 2d 459, 467, 10 N.W.2d 180 (1943)).

¶118 "Each branch's core powers reflect 'zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, . . . any exercise of authority by another branch of government is unconstitutional.'" Gabler, 376 Wis. 2d 147, ¶31 (quoting State ex rel. Fiedler v. Wisconsin Senate, 155 Wis. 2d 94, 100, 454 N.W.2d 770 (1990) (ellipsis in original)). "It is 'the province and duty of the judicial department to say what the law is[,]' and not what we think it should be." Town of Wilson v. City of Sheboygan, 2020 WI 16, ¶51, 390 Wis. 2d 266, 938 N.W.2d 493 (Rebecca Grassl Bradley, J., concurring) (quoting Marbury, 5 U.S. at 177). "This court lacks any authority to modify, tweak or supplement the legislature's work." Id.

¶119 In addition to invading the exclusive province of the legislature, the Vanko court violated multiple foundational principles underlying the plain-meaning method of statutory interpretation, which this court adopted long before the Vanko decision. See, e.g., W. Side Bank v. Marine Nat. Exch. Bank, 37 Wis. 2d 661, 669-70, 155 N.W.2d 587 (1968) ("It is not within the province of this Court to seek

secondary sources of legislative intent where the meaning of the statute is plain and unambiguous."); Folschow v. Werner, 51 Wis. 85, 7 N.W. 911 (1881) (applying the "plain meaning" of a statute to determine whether a creditor can reach the defendant's pension). In addition to transgressing the constitutional boundaries of the judicial role, the methodology employed by the Vanko court in order to reach a statute-saving outcome contravened basic principles of statutory interpretation.

¶120 The Vanko court was transparent in justifying its reconstruction of the statute: doing so "save[d] the statute from being struck down as unconstitutional." Vanko, 52 Wis. 2d at 215. Although not named by the Vanko court, this principle is known as the constitutional doubt canon of statutory construction. The Vanko court misused it. Properly applied, the constitutional doubt canon counsels that "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 241 (2012). It may be employed only "where a statute is susceptible of two constructions." Id. (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909) (per White, J.)). This court recently expressed the operation of the canon in terms of reasonableness: "where we can reasonably adopt a saving construction of a statute to avoid a constitutional conflict, we do so." State v. Hager, 2018 WI 40, ¶31, 381 Wis. 2d 74, 911 N.W.2d 17. Contrary to the Vanko court's

application of the canon, simply "avoid[ing] . . . a constitutional conflict does not drive our reading of the statute." Id. Instead, the constitutional doubt canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the legislature] did not intend the alternative which raises serious constitutional doubts." Clark v. Martinez, 543 U.S. 371, 381 (2005) (emphases added).

¶121 There is nothing "reasonable" nor "plausible" about the Vanko court's construction of Wis. Stat. § 121.51(1). The constitutional doubt canon is not a license to rewrite a statute, either to better effectuate its purpose or to conform it to the Constitution. Nor does it authorize a court to insert new words into the text or remove words from it. "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." United States v. Locke, 471 U.S. 84, 96 (1985). Nor can we employ the constitutional doubt canon when the text of the statute is plain. See Pennsylvania DOC v. Yeskey, 524 U.S. 206, 212 (1998). Although courts "will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964) (quoted source omitted). The Vanko court bent the language of § 121.51(1) to the point of changing its meaning. Secular schools cannot be classified by "religious denomination"

notwithstanding the Vanko decision's lexical distortions. It should be overturned.

¶122 In perpetuating the judicial malfeasance Vanko embodies, the majority "determine[s] that our precedent should be maintained rather than overruled," implicitly relying on the doctrine of stare decisis. Majority op., ¶46. "While adhering to precedent is an important doctrine for lending stability to the law, not every decision deserves stare decisis effect. After all, the purpose of stare decisis 'is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.'" State v. Grandberry, 2018 WI 29, ¶86, 380 Wis. 2d 541, 910 N.W.2d 214 (Rebecca Grassl Bradley, J., dissenting) (quoting Antonin Scalia, A Matter of Interpretation: Federal Court and the Law 138-40 (1997)). As the state's highest court, we are not "'constrained to follow precedent' that is 'unworkable or badly reasoned,' because stare decisis 'is a principle of policy and not a mechanical formula of adherence to the latest decisions.'" Outagamie Cnty. Bd. of Adjustment, 244 Wis. 2d 613, ¶31 (quoting Payne v. Tennessee, 501 U.S. 808, 827-28 (1991)) (internal alterations omitted).

¶123 "Reflexively cloaking every judicial opinion with the adornment of stare decisis threatens the rule of law, particularly when applied to interpretations wholly unsupported by the statute's text." Manitowoc Co., Inc. v. Lanning, 2018 WI 6, ¶81 n.5, 379 Wis. 2d 189, 906 N.W.2d 130 (Rebecca Grassl

Bradley, J., concurring). The Vanko court's construction of "religious denomination" to mean "single sponsoring group" is "wholly unsupported by the statute's text" and represents a revision rather than an interpretation of law. "In evaluating whether to persist in upholding a decision that elevated judicially-imagined legislative purpose over the words the legislature actually enacted, '[i]t is well to keep in mind just how thoroughly [the court's opinion] rewrote the statute it purported to construe.'" Id. (quoting Johnson v. Transp. Agency, 480 U.S. 616, 670 (1987) (Scalia, J., dissenting)). Because the Vanko court entirely rewrote the "overlapping attendance area" provision of Wis. Stat. § 121.51(1), the majority errs in upholding it.

¶124 In Johnson Controls, this court enumerated factors justifying a decision to overturn precedent. See Johnson Controls, 264 Wis. 2d 60, ¶¶98-99. When a prior case is "unsound in principle" or "wrongly decided," it should be overturned. Id., ¶99; see also Bartholomew v. Wisconsin Patients Comp. Fund & Compcare Health Servs. Ins. Corp., 2006 WI 91, ¶33, 293 Wis. 2d 38, 717 N.W.2d 216. A judicial decision like Vanko, which "blatantly disregarded the text of the [] statute," is "both 'unsound in principle' and 'wrongly decided,'" and should be overruled. Town of Wilson, 390 Wis. 2d 266, ¶63 (Rebecca Grassl Bradley, J., concurring). Doing so would advance the rule of law:

> This court has no apprehension about being a solitary beacon in the law if our position is based on a sound application of this state's jurisprudence. But when our light is dim and fading, then this court must be prepared to make correction. Stare decisis is neither a straightjacket nor an immutable rule. We do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision.

Johnson Controls, 264 Wis. 2d 60, ¶100 (internal citations omitted).

¶125 The majority's refusal to correct Vanko's irrefutably erroneous interpretation of the law "does not comport with our duty [to exercise our constitutionally-vested 'judicial power'] because it elevates demonstrably erroneous decisions——meaning decisions outside the realm of permissible interpretation——over the text of . . . duly enacted . . . law." Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring). "[J]udicial decisions may incorrectly interpret the law, and when they do, subsequent courts must confront the question when to depart from them." Id. at 1984. The Vanko court not only incorrectly interpreted Wis. Stat. § 121.51(1), it also usurped the legislative function by rewriting the statute. It is this court's duty to say so. "Besides eternalizing bad law, sustaining judicial rewriting of

statutes sanctions judicial usurpation of the legislative function." Town of Wilson, 390 Wis. 2d 266, ¶52 (Rebecca Grassl Bradley, J., concurring). This court should overturn the "demonstrably erroneous decision" it made in Vanko.

¶126 Overturning Vanko's reconstruction of the statute necessitates a consideration of its constitutionality, which the Vanko court avoided by expanding the "overlapping attendance area" restriction in Wis. Stat. § 121.51(1) to encompass not only religious schools but secular ones as well. On its face, § 121.51(1) denies a public benefit only to students attending religious schools in overlapping attendance areas. Private but secular schools located in overlapping attendance areas are not disqualified from receiving benefits on this basis. Denying an otherwise publicly available benefit on account of religious identity violates the First Amendment to the United States Constitution.

¶127 As it pertains to religion, the First Amendment says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. As recently interpreted by the United States Supreme Court in Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017), and Espinoza v. Montana Dep't of Rev., 140 S. Ct. 2246 (2020), the Free Exercise Clause of the First Amendment prohibits the government from denying a public benefit solely on the basis of religious identity.

Consequently, the "overlapping attendance area" provision must be struck from Wis. Stat. § 121.51(1).

¶128 The Free Exercise Clause, which applies to the states by operation of the Fourteenth Amendment,[5] provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" Trinity Lutheran Church, 137 S. Ct. at 2019 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)). "Applying that basic principle, [the United States Supreme Court] has repeatedly 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.'" Id. (quoted source omitted).

¶129 In Trinity Lutheran Church, the United States Supreme Court scrutinized a program under which the Missouri Department of Natural Resources provided grants to help public and private schools, as well as nonprofit organizations, purchase rubber playground surfaces. Id. at 2017. The Department "had a strict and express policy of denying grants to

---

[5] See Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that the First Amendment's Free Exercise Clause is incorporated against the states via the Fourteenth Amendment).

any applicant owned or controlled by a church, sect, or other religious entity." Id. Applying this policy, the Department denied a grant application by Trinity Lutheran Church Child Learning Center——a preschool and daycare——solely on the basis that it was operated by a church. Id. at 2017-18.

¶130 The United States Supreme Court held that the Department's policy violated Trinity Lutheran's rights under the Free Exercise Clause. Id. at 2019. The Court explained that the State unconstitutionally "puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution." Id. at 2021-22. According to the Court, the State cannot "expressly require[] Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified." Id. at 2024. "[W]hen the State conditions a benefit in this way, McDaniel says plainly that the State has punished the free exercise of religion: 'To condition the availability of benefits . . . upon [a recipient's] willingness . . . to surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties.'" Id. at 2022 (quoting McDaniel v. Paty, 435 U.S. 618, 626 (1978)). Choosing between "a government benefit program" and "having to disavow [one's] religious character" does not comport with the First Amendment's protection of the free exercise of religion. Id.

¶131 Just last year, the United States Supreme Court reaffirmed these principles in Espinoza. The Court held that the Free Exercise Clause precluded Montana from striking down a law establishing a scholarship program for private schools on the basis of a state constitutional provision prohibiting the state from giving public aid to any school controlled by a "church, sect, or denomination." Espinoza, 140 S. Ct. at 2251-52. The Court held that the application of Montana's "no-aid provision" to the scholarship program violated the First Amendment by "bar[ring] religious schools from public benefits solely because of the religious character of the schools" as well as by "bar[ring] parents who wish to send their children to religious schools from those same benefits, again solely because of the religious character of the schools"——a fact "apparent from the plain text" of the no-aid provision. Id. at 2255. Applying Trinity Lutheran Church, the Court subjected the state's application of the no-aid provision to the "strictest scrutiny" and determined that Montana failed to advance any "interest of the highest order" by disqualifying religious schools and the children who attend them from receiving the benefits of a scholarship program solely because of their faith. Id. at 2260.

¶132 As United States Supreme Court precedent confirms, the Free Exercise Clause prohibits Wisconsin from denying otherwise generally available transportation benefits to students attending a private school "affiliated with the same

religious denomination" as another private school within the same geographic attendance area. Because the plain text of the "overlapping attendance area" provision in Wis. Stat. § 121.51(1) applies only to religious schools, the statute violates the First Amendment. "The Free Exercise Clause 'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'" Espinoza, 140 S. Ct. at 2254 (quoting Trinity Lutheran Church, 582 U.S. at 2021).

¶133 Trinity Lutheran Church is clear: "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 Church, 137 S. Ct. at 2019 (quoted source omitted). The State rationalizes Wis. Stat. § 121.51(1)'s discrimination against religious schools as "set[ting] parameters" for a religiously-affiliated school's attendance area in order to avoid straining a "school district[']s . . . limited funds." The United States Supreme Court already rejected this sort of justification for religious discrimination: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." Espinoza, 140 S. Ct. at 2261. If the financial cost of transporting students to school trumps our right to remain free from "unequal treatment" based upon our religious identity, then the Free Exercise Clause would have little meaning.

¶134 Like Missouri's policy of "categorically disqualifying" religious organizations from receiving grants under its playground resurfacing program in Trinity Lutheran Church, Wisconsin's "overlapping attendance area" provision puts schools "to a choice: [they] may participate in an otherwise available benefit program or remain a religious institution." Trinity Lutheran Church, 137 S. Ct. at 2021-22. Under Wis. Stat. § 121.51(1), if a school overlaps with another private religious institution of "the same religious denomination," that school, and its students, may either renounce their religious affiliation or lose their right to state-provided transportation benefits. The First Amendment does not permit the government to "punish[] the free exercise of religion" in this manner. Espinoza, 140 S. Ct. at 2256 (quoted source omitted). The Constitution does not countenance a religious school being forced to either forgo a "government benefit program" or "disavow its religious character." Trinity Lutheran Church, 137 S. Ct. at 2022; see Espinoza, 140 S. Ct. at 2261.

III. Wisconsin Stat. § 121.51 impermissibly entangles the government in the affairs of religious schools.

¶135 Declaring the overlapping attendance area provision unconstitutional, as this court should have done 50 years ago when first presented with the issue, would have been dispositive of this matter. Instead, the majority persists in preserving an

unconstitutional law, necessitating a response to the certified question:

> For purposes of determining whether two or more schools are "private schools affiliated with the same religious denomination" for purposes of Wis. Stat. 121.51, must the state superintendent rely exclusively on neutral criteria such as ownership, control, and articles of incorporation, or may the superintendent also take into account the school's self-identification in sources such as its website or filings with the state?

Whether applying a faithful interpretation of the statutory text or Vanko's reconstruction of the statute, there is no way to answer this question without requiring the SPI to violate the Establishment Clause of the First Amendment.

¶136 In this case, the SPI must decide whether a self-described Roman Catholic school is "affiliated with the same religious denomination" as the Roman Catholic Archdiocese of Milwaukee, notwithstanding the school's professions of both corporate and theological independence from the Archdiocese. The inevitable litigation ensuing from a determination by the SPI that results in the denial of public benefits based upon overlapping attendance areas between religious schools will require judges to engage in the

same inquiry concerning the religious character of schools. The Establishment Clause of the First Amendment does not permit such entanglement between church and state.

¶137 The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. In interpreting this provision, the United States Supreme Court has held that "[a] statute must not foster 'an excessive entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). Wisconsin Statute § 121.51(1) not only fosters an excessive entanglement with religion, it compels it. Under the statute, the SPI is charged with conducting a comparative analysis to determine whether two schools belong to the same "religious denomination"——an exercise unavoidably requiring the government to interpret the nature of a particular faith. Discerning whether one religious school is "affiliated with the same religious denomination" as another forces the SPI as well as the courts to delve into the meaning of "religious denomination" and what it means to be "affiliated" with one. However, it is not for the government to determine the "proper interpretation of [one's] faith." United States v. Lee, 455 U.S. 252, 257 (1982). Indeed, "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment[.]" New York v. Cathedral Acad., 434 U.S. 125, 133 (1977).

¶138 Where, exactly, is the SPI expected to draw the line? What is a "religious denomination"? What characteristics, professions of faith, or doctrinal tenets render a religious institution part of a particular denomination? The statute doesn't tell us, and it would be unconstitutional for any state actor, including a court, to resolve the question. As the United States Supreme Court recognized decades ago, "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such difference in relation to the Religion Clauses." Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 715 (1981). It is not for the government to determine, for example, whether a Roman Catholic school and a Ukrainian Catholic school are "affiliated with the same religious denomination" within the meaning of Wis. Stat. § 121.51(1) or otherwise. "[A] single term" like "Catholic" cannot "describe accurately the religious values and aspirations of an individual or a group of individuals. Labels work very well for identifying commodities in a supermarket, but they are ill fitted for protecting the religious liberty of an individual American." St. Augustine v. Evers, 906 F.3d 591, 604 (7th Cir. 2018) (Ripple, J., dissenting).

¶139 Any governmental overriding of a religious school's profession of independence from the "religious denomination" of another school——whether made by the SPI or a court——would

"require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that [courts] were never intended to play." Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988). The government lacks both constitutional authority and institutional competence to make these determinations.

¶140 The majority does not address the entanglement problem presented by Wis. Stat. § 121.51 but mistakenly denies one exists at all. The majority says: "in determining whether schools are 'affiliated with the same religious denomination' pursuant to Wis. Stat. § 121.51, the Superintendent is not limited to consideration of a school's corporate documents exclusively. In conducting a neutral and secular inquiry, the Superintendent may also consider the professions of the school with regard to the school's self-identification and affiliation." Majority op., ¶5. The majority maintains that "accepting a school's professions that are published on its public website or set forth in filings with the state does not necessarily require any investigation or surveillance into the practices of the school. It need not require any religious inquiry at all." Majority op., ¶48. The majority is wrong.

¶141 As formulated by the majority, the SPI's inquiry focuses on whether "a school is affiliated with

a specific religious denomination," which obviously poses a question of a religious nature. The majority's declaration that the SPI's determination of whether schools are "affiliated with the same religious denomination" does not require any religious inquiry "at all" reflects a manner of Orwellian newspeak by which "religious" means something other than "religious." The only way for a Catholic school like St. Augustine to avoid a governmentally-decreed affiliation with the same "denomination" as another Catholic school is for St. Augustine to disavow its Catholic character.

¶142 Aside from the entanglement problem produced by the majority's decision, it offers little assistance to the Seventh Circuit in resolving this dispute. The majority notes that "St. Augustine professes that while it is Roman Catholic, it is independent of and unaffiliated with the Archdiocese." Majority op., ¶50. The majority then proclaims that "[n]either accepting corporate documents nor accepting a school's professions necessarily requires any investigation of the type prohibited by Holy Trinity or even any religious inquiry whatsoever." Id. The majority misunderstands the heart of this dispute. Although St. Augustine's corporate documents reveal no affiliation with the Archdiocese and St. Augustine explicitly disclaimed any affiliation with any other Catholic school or The Archdiocese of Milwaukee in its letters to Friess Lake School District and the SPI, it professes on its website to be "Roman Catholic,"

which prompted the SPI to declare St. Augustine affiliated with the Archdiocese by virtue of their mutual Roman Catholic identification. That is a determination derived from a religious inquiry prohibited by the Establishment Clause. Regardless, the majority supplies no rule to resolve whether a school's corporate documents, website content, or professions of corporate and ecclesiastical independence controls the question of affiliation with a particular denomination.

¶143 The majority should have restricted the inquiry to purely secular sources such as corporate documents, leaving religious labels and alliances beyond consideration, but instead directs the Seventh Circuit to apply Wis. Stat. § 121.51(1) in a manner which impermissibly entangles the courts in matters of religion. The very precedent on which the majority relies prohibits this: "For this court or for the Superintendent of Public Instruction to determine, in the light of the prima facie showing of the articles of incorporation to the contrary, that this school corporation is or is not affiliated with the Catholic denomination is to 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). "[T]he determination of who or what is Catholic . . . is an inquiry that government cannot make." Id. at 150-51.

¶144 Because the "overlapping attendance area" provision violates both the Free Exercise and Establishment Clauses of the First Amendment, it must be struck from Wis. Stat. § 121.51(1). United States Supreme Court precedent interpreting the Religion Clauses "radiates a spirit of freedom of religious organizations, an independence of 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." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 186 (2012) (quoted source omitted). Within the context of this case, the Constitution reserves decisions of religious affiliation for private schools themselves, and the State may not force private schools or their students to "choose between their religious beliefs and receiving a government benefit." Trinity Lutheran Church, 137 S. Ct. at 2023 (quoted source omitted).

* * *

¶145 "The true irony of our modern stare decisis doctrine lies in the fact that proponents of stare decisis tend to invoke it most fervently when the precedent at issue is least defensible." Gamble, 139 S. Ct. at 1988 (Thomas, J., concurring). A majority of this court privileges precedent over text in preserving this court's indefensible decision in Vanko. In answering the certified question, the majority perpetuates a judicial reconstruction of Wis. Stat. § 121.51(1), which, despite the court's legislative efforts

to save it, nevertheless violates the Religion Clauses of the First Amendment by excluding religious schools and the students who attend them from a government benefit solely on the basis of their religion. "An odious exclusion from any of the benefits common to the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture." Trinity Lutheran Church, 137 S. Ct. at 2024 (quoting Speech by H.M. Brackenridge, Dec. Sess. 1818, in H. Brackenridge, W. Worthington, & J. Tyson, Speeches in the House of Delegates of Maryland, 64 (1829)). Repeating its error from 50 years ago, this court once again neglects its duty to strike an unconstitutional statute. I respectfully dissent.

¶146 I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

APPENDIX C

Office of the Clerk
Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI53701-1688
TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

February 25, 2021

To:

Clerk for the 7th Circuit
U.S. Court of Appeals, 7th Circuit
219 S. Dearborn St., Rm. 2722
Chicago, IL 60604

Richard M. Esenberg
Anthony LoCoco
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202-3141

Hannah Schieber Jurss
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Lori M. Lubinsky
Danielle Baudhuin Tierney
Axley Brynelson, LLP
P.O. Box 1767
Madison, WI 53703

Thomas Brejcha
Pro-Life Law Center
Thomas More Society
29 S. LaSalle Street, Ste. 440
Chicago, IL 60603

You are hereby notified that the Court has entered the following order:

No. 2021AP265-CQ St. Augustine School v. Taylor

The court having considered the request of the United States Court of Appeals for the Seventh Circuit, pursuant to Circuit Court Rule 52 and Wis. Stat. § 821.01, that this court resolve the following certified question: For purposes of determining whether two or more schools are "private schools affiliated with the same religious denomination" for

purposes of Wis. Stat. 121.51, must the state superintendent rely exclusively on neutral criteria such as ownership, control, and articles of incorporation, or may the superintendent also take into account the school's self-identification in sources such as its website or filings with the state[?];

IT IS ORDERED that the certification is granted and the appeal is accepted; and

IT IS FURTHER ORDERED that on or before March 17, 2021, the plaintiffs-appellants, St. Augustine School, Joseph Forro, and Amy Forro, shall file a supplemental brief addressing the certified question and the additional questions set forth below; that on or before April 6, 2021, the defendants-appellees, Carolyn Stanford Taylor, in her official capacity as the Superintendent of Public Instruction, and the Friess Lake School District, shall file a supplemental response brief; and that on or before April 16, 2021, the plaintiffs-appellants shall file a supplemental reply brief or a statement that no supplemental reply brief will be filed. The parties shall file the supplemental briefs in conformity with Wis. Stat. § (Rule) 809.19. In addition to serving the three physical copies of a brief on each party as required by Wis. Stat. § (Rule) 809.19(8)(a), each party filing a brief shall also serve a copy of the brief on each other party via facsimile transmission or other electronic means prior to or simultaneous with the time that the brief is filed with this court; and

IT IS FURTHER ORDERED that in any brief filed in this court the parties shall not incorporate by reference any portion of a brief or memorandum filed in another court; instead any material in these documents upon which there is reliance should be restated in the brief filed in this court; and

IT IS FURTHER ORDERED that the parties shall include in an appendix that accompanies their supplemental briefs in this court all documents from the record in the federal action upon which they rely; and

IT IS FURTHER ORDERED that as part of addressing the question certified by the Seventh Circuit, the parties' briefs shall also address the following additional question:

> The Free Exercise Clause and the Establishment Clause of the First Amendment may bear upon our interpretation of Wis. Stat. § 121.51 and its inclusion of "private schools affiliated with the same religious denomination." In meeting the query of the certified question, should we revisit this court's decisions in State ex rel. Vanko v. Kahl, 52 Wis. 2d 206, 188 N.W.2d 210 (1971) and Holy Trinity Community School, Inc. v. Kahl, 82 Wis. 2d 139, 262 N.W.2d 210 (1978); and

IT IS FURTHER ORDERED that any non-party that wishes to file a brief as an amicus curiae must file a motion for leave of the court to file a non-party brief pursuant to the requirements of Wis. Stat. § (Rule) 809.19(7). Non-parties should also consult this court's Internal Operating Procedure III.B.6.c. concerning the nature of non-parties who may be granted leave to file a non-party brief. A proposed non-party brief must accompany the motion for leave to file it. Any proposed non-party brief shall be limited to the certified question and the additional questions set forth in this order, and it shall not exceed 13 pages if a monospaced font is used or 3,000 words if a proportional serif font is used. Any motion for leave with the proposed non-party brief attached shall be filed no later than 4:00 p.m. on Monday, April 12, 2021. Any such motion and proposed brief shall be filed as attachments in pdf format to an email addressed to clerk@wicourts.gov. Any submission by a non-party that does not comply with Wis. Stat. § (Rule) 809.19(7) and any proposed non-party brief for which this court does not grant leave will not be considered by the court; and

IT IS FURTHER ORDERED that the court shall hear oral argument in this matter at 9:45 a.m. on Tuesday, May 4, 2021. Due to the COVID-19 pandemic, oral arguments before the court will be conducted via videoconferencing. The hearing room will not be open to the public. The court will endeavor to make the proceedings available for viewing on the Wisconsin Eye website. Counsel in this case will

receive instructions from the Marshal of this court regarding the procedures for appearing remotely.

Sheila T. Reiff
Clerk of Supreme Court

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 16, 2021

Before

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 17-2333

ST. AUGUSTINE SCHOOL, *et al.*,
Plaintiffs-Appellants,
v.

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

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:16-cv-00575-LA

Lynn Adelman,
Judge.

O R D E R

This case, now into its fourth year before this court, concerns the entitlement of families whose children attend St. Augustine School to state-provided transportation benefits. By a 2–1 vote, we decided in 2018 that under state law, the St. Augustine families did not qualify for these benefits. See *St. Augustine School v. Evers*, 906 F.3d 591 (7th Cir. 2018). The state law in question, Wis. Stat. §§ 121.51, 121.54, provides transportation benefits to private-school students, but it limits those benefits to only one school "affiliated or operated by a single sponsoring group" per defined attendance area. St. Augustine's attendance area is defined by four roads: Highway 33 to the north, Division Road to the east, Good Hope Road to the south, and Highway P to the west ("the Attendance Zone"). This attendance area encompasses the Friess Lake School District. The state superintendent of education found that St. Augustine was a Catholic high school and that there already was another Catholic high school in the Attendance Zone—St. Gabriel, which is affiliated

with the Archdiocese of Milwaukee. The superintendent thus ruled that the St. Augustine families were not entitled to transportation benefits.

The superintendent (at the time, Tony Evers, who is now Governor) came to that conclusion by relying on St. Augustine's self-identification as a Catholic high school; this appeared both on its website and in various other documents from the school. He did not probe further into that question. But St. Augustine has no legal, operational, or other secular connection with either St. Gabriel or with the Archdiocese. In our 2018 opinion, we found that the state's and district's actions followed religiously neutral rules and that the public authorities had not impermissibly intruded into the internal religious affairs of the School. See *St. Augustine School v. Evers*, *supra*. St. Augustine's request was denied, we held, not because it was Catholic but because it was second in line. 906 F.3d at 597. Judge Ripple dissented, relying primarily on St. Augustine's independent corporate structure "as proof that it is not 'affiliated' with St. Gabriel." *Id.* at 604. St. Augustine then sought review in the Supreme Court. That Court, in an order issued on July 2, 2020, granted the petition for a writ of certiorari, vacated this court's judgment, and remanded for further consideration in light of *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020). See *St. Augustine School v. Taylor*, 141 S. Ct. 186 (2020).

Upon receiving the Supreme Court's mandate, we requested statements from the parties addressing the action that we should take on remand. See 7th Cir. Rule 54. After receiving those statements, we decided to order supplemental briefing on two questions: first, the effect of *Espinoza* on the issues before us, and second, the anticipated effect of *Fulton v. City of Philadelphia*, No. 19-123, 140 S. Ct. 1104 (2020) (argued Nov. 4, 2020), in which one question is whether the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), should be revisited. We have now received these additional briefs, for which we thank the parties.

Over the years, the issues in this case have crystallized. When we first considered it, the plaintiffs were urging that the state defendants were violating their rights under the Free Exercise Clause of the First Amendment by depriving them of a public benefit on account of their religion. Plaintiffs also contended that the state was violating the Establishment Clause by entangling itself in the minutiae of its religious identification. At this juncture, however, the issue has boiled down to one dispositive question of state law: what methodology for determining affiliation is required under the relevant Wisconsin statutes? If, as Judge Ripple urged, state law requires the authorities to use neutral criteria such as corporate structure, then there is no need for us to say anything further about the Religion Clauses of the U.S. Constitution. There

is no such relationship between the two schools, and the St. Augustine families will get their benefits. If, on the other hand, in keeping with some language in two critical decisions of the Wisconsin Supreme Court, the superintendent was supposed to rely on the professions of the school, not on criteria such as who operated it, then we would need to reach the Free Exercise and Establishment Clause arguments St. Augustine is pressing. See *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 215 (1971); *Holy Trinity Cmty. Sch., Inc. v. Kahl,* 82 Wis. 2d 139, 155 (1978). The superintendent took the latter approach, and we held in our earlier opinion that he was entitled to assume that two schools, each of which used the term "Catholic" to describe itself, are "affiliated or operated by a single sponsoring group" for purposes of state law. We now face one preliminary question and two that would flow from adherence to the status quo. The preliminary question is whether both the superintendent and we have properly understood state law. If so, then we must consider first whether *Espinoza* renders that state law invalid under the First Amendment's Religion Clauses and requires that the St. Augustine children receive transportation benefits, and second, assuming the continued vitality of *Smith*, whether the Wisconsin statute is a law of general applicability that is religiously neutral.

Espinoza presented the question whether the Montana Supreme Court correctly struck down a

state program designed to provide tuition assistance to parents who sent their children to private schools. 140 S. Ct. at 2251. When some parents tried to use that scholarship money to send their children to a Christian school, the state supreme court struck down the entire program on the theory that it violated the state constitution's rule forbidding aid to any school controlled by a church. *Id.* The Supreme Court ruled that the state had impermissibly discriminated against religion. Such discrimination, it said, could stand only if it could withstand the strictest scrutiny. *Id.* at 2260. It failed that test. Finally, the Court rejected the argument that by striking down the scholarship program for all students, secular and sectarian alike, the state court had cured the problem. But for the constitutional error of Montana's no-aid rule, the entire analysis would have been different. *Id.* at 2262.

St. Augustine contends that it stands in precisely the same position as the families in *Espinoza*. Under our earlier understanding of state law, its families are
disqualified from the transportation benefits solely because of their religious affiliation. Had they identified with any religion other than Catholicism, or had they foresworn any identification at all, or made up a new name for their version of Catholicism, the families would have qualified for benefits. The state argues, to the contrary, that the

transportation program focused generally on affiliation and treated religiously affiliated schools identically to the way it treated non-religious schools. Both parties suggest that *Smith*, and hence *Fulton*, have little to add to the analysis. St. Augustine rejects the idea that its families cannot qualify for transportation benefits because of Wisconsin's "one school per sponsoring entity per attendance area" rule. Indeed, it disclaims any challenge to that rule. Instead, it says, "the interference arises because of the policy the Defendants have adopted for resolving the threshold question of whether a school is affiliated with a particular sponsoring entity: reliance on religious labels alone as opposed to evidence of secular ties and refusals to acknowledge the religious entities' own protestations that they are religiously distinct." Supplemental Brief of Plaintiffs-Appellants on *Espinoza v. Montana* and *Fulton v. City of Philadelphia* at 23–24. The state defends the methodology that the superintendent used.

Although we could take a stab at the preliminary issue of Wisconsin law that we identified above, and that St. Augustine highlights, we would quickly run into trouble. The Supreme Court of Wisconsin has construed the controlling state statutes several times, but it has not had any occasion to focus on the issue presented in this litigation. Thus, in *Vanko* it had to decide how broad an obligation Wis. Stat. 121.51 imposed. That

statute requires school districts to bus private-school students, but only to one private school "affiliated with the same religious denomination" in each attendance area. *Id.* at 209. The court recognized the potential problem with a special rule for religious schools, and so it construed section 121.51 to reach any two private schools "affiliated or operated by a single sponsoring group, whether … secular or religious." *Id.* at 215. It gave some examples of entities that would be in the same group, but it did not give the matter close analysis. Thus, it assumed that schools operated by the Franciscan Order and the Jesuit Order would "be considered, along with diocesan schools, as part of the Catholic school system … because all are affiliated with the same religious denomination." *Id.* at 215–16 (quotation marks omitted). It did not explain why that was the case—whether, for example, it was because of corporate structure or similarity of faith. On a cautionary note, however, it held later in *Holy Trinity* that public authorities may not determine affiliation by examining the school's religious practices. *Id.* at 154–58. Instead, it instructed officials to "accept the professions of the school and to accord them validity without further inquiry." *Id.* at 155. But professions about what? Labels? Faith affiliation? Corporate structure? It did not say.

This is an important question for Wisconsin. The Private School Review reports that for the 2021 school year, there are 960 "top" private schools in

Wisconsin, serving 135,112 students. See https://www.privateschoolreview.com/wisconsin#:~:text=For%20the%202021%20school%20year,(view%20national%20tuition%20averages). The Review represents that 83% of those schools are religiously affiliated, most with either the Roman Catholic church or the Wisconsin Evangelical Lutheran Synod. *Id.* This suggests that a great number of Wisconsin students are potentially affected by the resolution of the question before us. We note as well that the Wisconsin Supreme Court has in the past interpreted these laws with sensitivity to the commands of the Religion Clauses of the U.S. Constitution. And as Judge Ripple noted in his dissent, "[section 121.51] does not define what it means for a school to be 'affiliated' with a denomination." 906 F.3d at 601.

We have concluded, on our own initiative, that this question merits the attention of the only court in a position to issue an authoritative opinion on the meaning of the state law—the Wisconsin Supreme Court. Seventh Circuit Local Rule 52 gives us the authority to present such a request to that court:

> (a) When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the

> federal court, this court, *sua sponte* or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified.

7th Cir. R. 52(a). In the same vein, the Wisconsin Supreme Court has agreed to accept certified questions from the federal courts:

> The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this state.

Wis. Stat. 821.01.

We therefore respectfully certify the following question to the Wisconsin Supreme Court:

> For purposes of determining whether two or more schools are "private schools affiliated with the same religious denomination" for purposes of Wis. Stat. 121.51, must the state superintendent rely exclusively on neutral criteria such as ownership, control, and articles of incorporation, or may the superintendent also take into account the school's self-identification in sources such as its website or filings with the state.

We invite the court to re-formulate this question, if it deems that step appropriate. Further proceedings in this court are stayed while this matter is under consideration in the state supreme court. The Clerk of this Court is directed to transmit the briefs and appendices in this case, as well as a copy of this Order and our earlier opinion in this case, under official seal to the Supreme Court of Wisconsin, and at that court's request, to transmit the full record.

QUESTION CERTIFIED.

APPENDIX E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

July 2, 2020

Clerk
United States Court of Appeals for the Seventh Circuit
219 S. Dearborn Street, Room 2722
Chicago, IL 60604

Re: St. Augustine School, et al.
v. Carolyn Stanford Taylor, in Her Official Capacity as Superintendent of Public Instruction, et al.
No. 18-1151
(Your No. 17-2333)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Espinoza v. Montana Dept. of Revenue*, 591 U. S. ___ (2020).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

Scott S. Harris, Clerk

APPENDIX F

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-2333
ST. AUGUSTINE SCHOOL, *et al.*,

Plaintiffs-Appellants,

v.

TONY EVERS, in his official capacity, as Superintendent of Public Instruction, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 2:16-cv-00575 — Lynn Adelman, *Judge*.

ARGUED NOVEMBER 29, 2017 — DECIDED OCTOBER 11, 2018

Before WOOD, *Chief Judge*, and RIPPLE and KANNE, *Circuit Judges*.

WOOD, *Chief Judge*. St. Augustine School, along with Joseph and Amy Forro, sued Wisconsin's Superintendent of Public Instruction and Friess Lake School District for refusing to provide school transportation (or equivalent cash benefits) to the Forros' children. The school and family assert that the state denied them this benefit in violation of the Establishment and Free Exercise Clauses of the First Amendment.

The district court granted summary judgment for the defendants, and we now affirm. Contrary to the plaintiffs' assertions, the record does not establish that the Superintendent or the school district furnished or withheld public benefits on the basis of non-neutral religious criteria. Nor does the evidence support the claim that public officials impermissibly determined the school's affiliation on the basis of theology, ecclesiology, or ritual. Instead, it shows that public officials applied a secular statute that limits benefits to a single school affiliated with *any* sponsoring group—and, when St. Augustine declared

itself to be Catholic, they took the school at its word.[1]

I

Wisconsin law requires school districts to bus private-school students,[2] WIS. STAT. § 121.54, but that obligation extends only to one private school "affiliated with the same religious denomination" within each geographic attendance area, WIS. STAT. § 121.51. In an effort to avoid an unconstitutional interpretation of this limitation, the Wisconsin Supreme Court has construed section 121.51 to reach any two 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 (1971) (emphasis added). According to that court, the statute's reference to *denominational* affiliation is not meant to introduce a religious criterion, but

---

[1] The dissent characterizes the Superintendent's actions as an "extensive" examination of the school's theological affiliation. *Post* at 5 n.8. As we explain below, however, that is not at all what happened. All the Superintendent did was to look at the school's own description of itself as "Catholic" and take its word for it. He did not delve into corporate niceties, educational materials, or anything else that would inappropriately have entangled him with matters of religion. Nor did the Superintendent ever assume, one way or the other, anything about the school's affiliation with the archdiocese of Milwaukee or any other subdivision of the Catholic Church, or the similarity (or differences) in the beliefs held by each one.

[2] Districts may discharge this obligation by making a direct payment to pupils' parents. WIS. STAT. § 121.55(1)(b).

rather to establish that the test of affiliation is not limited to "operation by a single agency or set of trustees or religious order." *Id.* at 215. For example, the court explained, schools operated by the Franciscan Order and Jesuit Order would "be considered, along with diocesan schools, as part of the Catholic school system ... because all are 'affiliated with the same religious denomination.'" *Id.* at 215–16. At the same time, officials may not determine the affiliation of a religious school by monitoring and evaluating its practices or personnel. *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 82 Wis.2d 139, 154–58 (1978). Instead, public officials "are obliged to accept the *professions* of the school and to accord them validity without further inquiry." *Id.* at 155 (emphasis added).

This case arose when St. Augustine applied for transportation for its students, including the Forros' children. Invoking section 121.51, the Friess Lake School District denied its request, and Wisconsin's Superintendent of Public Instruction, Tony Evers, upheld that decision. At the relevant time, St. Augustine described itself as a Catholic school. In its request for busing, the school told the district that it was "an independent, private Catholic school." In the section of its website entitled "About Us," St. Augustine stated that it is "an independent and private traditional Roman Catholic School" that "loves and praises all the traditional practices of the Catholic Faith" and "recognizes its spiritual custodial

duty of establishing an authentic Catholic environment."[3]

The problem was that there was already a Catholic school within the same catchment zone—St. Gabriel School, which was operated by the Archdiocese of Milwaukee. Relying on each school's self-classification, the school district and Superintendent determined that both schools were affiliated with the same sponsoring group, as *Vanko* used that term. (They may have thought that if the Franciscans and Jesuits were considered as "the same" for purposes of Wisconsin law, then so were St. Augustine and St. Gabriel.) Because St. Gabriel had already qualified for busing, the district and Superintendent disclaimed any obligation under section 121.51 to provide transportation services or their monetary equivalent to St. Augustine's students.

St. Augustine and the Forros sued the school district and Superintendent in state court for violations of their federal civil rights under 42 U.S.C. § 1983 and for violations of the state busing statute;

---

[3] Although not pertinent here (because it was not a factor on which the Superintendent relied), we note that St. Augustine's employment application asks applicants about their "Catholic Background," including their "views as a Catholic teacher on why you wish to teach in a small, private school teaching in the Catholic tradition" and "what [they] expect from a truly Catholic educational institution."

the defendants removed the case to federal court. St. Augustine asserts that its students are entitled to publicly subsidized transportation and that, in rejecting their application, the state impermissibly probed into its religious beliefs. It maintains that even though it identifies itself as Catholic (specifying Roman Catholic in at least one place), it was nonetheless distinct from the diocesan schools in its curriculum and religious practices. The district court remanded the state claims to the state court and granted summary judgment in favor of the defendants on the federal claims. St. Augustine and the Forros appeal from that judgment.

II

Because this case comes to us following summary judgment, we have assessed the plaintiffs' claims and evidence *de novo*, *Spierer v. Rossman*, 798 F.3d 502, 507 (7th Cir. 2015), mindful that summary judgment is appropriate in the absence of a "genuine dispute as to any material fact" if "the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–52 (1986). For the plaintiffs to move ahead on their section 1983 claim, the record must contain evidence that would permit a trier of fact to find that "(1) they held a constitutionally protected right; (2) they were deprived of this right in violation of the Constitution; (3) the defendants intentionally caused this deprivation; and (4) the defendants acted

under color of law." *Donald v. Polk Cnty.*, 836 F.2d 376, 379 (7th Cir. 1988).

Plaintiffs argue that the application of section 121.51 deprived them of their First Amendment rights in two ways. First, they assert that the defendants violated the Free Exercise Clause by depriving St. Augustine (and the parents of its students) of a public benefit on account of their religion. As we explain in more detail below, this theory fails because, as construed by the Wisconsin Supreme Court, section 121.51 is a facially neutral and generally applicable law that deprives *all* private schools—religious and secular alike—of receiving a subsidy already claimed by another school affiliated with the same group or organization. Second, plaintiffs suggest that the defendants' application of section 121.51 violated the Establishment Clause by entangling the state actors with religious doctrine and belief when they categorized St. Augustine as Catholic. This allegation lacks support in the record, which shows that it was St. Augustine—not the state—that chose to define itself as Catholic. Ironically, it is St. Augustine's approach, not the state's, that would require officials to look beyond outward expressions of affiliation to engage in potentially impermissible inquiries into the ecclesiological boundaries of religions and denominations. The district court thus properly dismissed this suit.

A

As a preliminary matter, plaintiffs incorrectly assert that a factual dispute precludes summary judgment. They believe that the record could establish that the defendants consulted St. Augustine's original articles of incorporation, which declared the institution a nondenominational Christian school, before they rejected its busing application. Had the defendants known of the articles' language, the argument goes, an impermissible inquiry into the school's religious doctrine or practice must have prompted its classification as Catholic. But plaintiffs have failed to carry their burden of producing evidence to support their assertion that the defendants looked at the document. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). Without any evidence that they did so, a secondary dispute over whether St. Augustine submitted the original articles of incorporation to the state is immaterial.

Although plaintiffs suggest that a footnote in the Superintendent's decision proves that he, at least, pulled and reviewed the articles on his own, they misconstrue that note. The footnote states that St. Augustine "did not provide the complete Articles of Incorporation," which "according to the online records of the Wisconsin Department of Financial Institution" have remained in effect since their 1981 filing. This statement does not establish that the Superintendent ever saw the articles—it indicates only that he saw

records of their filing. (And, while we do not base our opinion on this fact, we note that the website in question produces only a docket-style list of filings without links to their contents. *Corporate Records, Saint Augustine School, Inc.*, WIS. DEP'T OF FIN. INSTITUTIONS, https://www.wdfi.org/apps/CorpSearch/Details.aspx?entityID=6N08664&hash=474157237&searchFunctionID=9f86b932-7cef-4bc9-a6a5-7222036a7830&type=Simple&q=saint+augustine+school (last visited Oct. 11, 2018).) Therefore, even if it were relevant to a First Amendment analysis, plaintiffs have put forward no evidence to suggest that the defendants knew about and ignored the commitment to interdenominational Christianity professed in St. Augustine's bylaws. Because plaintiffs had no constitutional right under the First (or any) Amendment to have the defendants consult St. Augustine's articles of incorporation, their assertions that the school submitted the articles of incorporation cannot create a factual dispute sufficient to preclude summary judgment.

B

We now turn to the heart of this case: the constitutional claims. We conclude that the defendants did not violate the Free Exercise Clause when they denied St. Augustine's busing application pursuant to the religiously neutral and generally applicable grounds provided in section 121.51. Since

Employment Division v. Smith, the Supreme Court has consistently held 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).'" 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). That rule resolves the present case. The defendants refused to bus pupils to St. Augustine because another school—St. Gabriel—shared its institutional affiliation and served the same catchment zone. That the schools' shared affiliation happened to follow denominational lines in this case does not entitle plaintiffs to an exemption from a restriction placed on all private schools that have a common sponsoring group, as Wisconsin law defines it.

Plaintiffs' argument to the contrary rests on a misunderstanding of section 121.51. They repeatedly complain that the defendants denied St. Augustine (and its families) a public benefit because of St. Augustine's religious beliefs or practices. We do not doubt that section 121.51 foists a choice on religious families and schools. It requires parents 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. Here, the Forros could send their children to a school that more precisely reflects their religious values only

if they declined transportation benefits.

For its part, St. Augustine had to choose between identifying as Catholic and securing transit funding for its students. Were we presented with nothing but the text of section 121.51, which would appear to operate only with respect to religious schools, plaintiffs might have a strong case. To the extent that the statute "denies a generally available benefit solely on account of religious identity," it would "impose[ ] a penalty on the free exercise of religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017). Strict scrutiny would then apply, see *id.* at 2024, a burden that the defendants in this case do not attempt to meet.

Yet the Wisconsin Supreme Court took that problem off the table when it authoritatively construed the statute to avoid any such constitutional problem. See *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004). As the state supreme court reads the statute, section 121.51 imposes a neutral and generally applicable limitation on transportation funding. Its ban on busing services in 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." *State ex rel. Vanko*, 52 Wis.2d at 215 (emphasis added). The state supreme court interpreted the statutory language singling out "private schools affiliated with the same

religious denomination" as serving only to establish affiliation with a denomination as the operative limitation "rather than operation by a single agency or set of trustees or religious order." *Id.* at 465. In determining affiliation with a religious denomination, the state generally must accept the school's own profession of affiliation or non-affiliation. *Holy Trinity Cmty. Sch., Inc.*, 82 Wis.2d at 155–58.

Thus, section 121.51 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. As in the case of St. Augustine, the bar would apply even though the same corporate parent did not own or control both institutions and thus the articles of incorporation would reflect two entities. The reason why St. Augustine cannot demand services within its desired attendance zone is not because it is a Catholic school; it is because—by its own choice—it professes to be affiliated with a group that already has a school in that zone.[4] By the same token, Wisconsin is not denying the Forros a transit subsidy because they are Catholic or because they seek to send their children to Catholic school. It funds transportation for all of the Catholic families who send their children to St. Gabriel. The problem for St. Augustine is not that it is Catholic; it is that it

[4] We know from *Holy Trinity* that if St. Augustine professed to be anything but Catholic, that statement too would have to be taken at face value, and we would not have this case.

is second in line.

Because section 121.51 does not deny benefits *on the basis of* their religion, neither St. Augustine School nor the Forros can obtain relief under the Free Exercise Clause. See *Smith*, 494 U.S. at 879. Section 121.51 imposes a neutral and generally applicable restriction on transit funding. The defendants thus did not violate the Free Exercise Clause when they relied on section 121.51 to deny St. Augustine's busing application.

C

Plaintiffs also assert that, as applied in this case, section 121.51 violates the Establishment Clause. We agree with them that the state may neither define nor police religious orthodoxy. But they have not shown that the state did any such thing. Contrary to the dissent's assertions, the record contains no evidence of an impermissible inquiry into the religious character of St. Augustine, let alone a comparison of the respective doctrines and practices of St. Augustine, St. Gabriel, and other Catholic institutions.

Had the defendants applied a religious test to establish denominational affiliation, we can assume that they would have violated *Lemon*'s prohibition of entanglement between government and religion. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). A long

line of cases prohibits secular courts from delineating religious creeds or assessing compliance with them. *E.g.*, *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969) (prohibiting courts from judging adherence to denomination's traditional doctrines). In fact, the state may not even monitor a religious school to identify which aspects of its curriculum and courses contain religious content generally. *New York v. Cathedral Acad.*, 434 U.S. 125, 132–33 (1977) (disapproving of a scheme that required state to identify "any religious content in various classroom materials" as part of a reimbursement process, *id.* at 133); *Lemon*, 403 U.S. at 619 (invalidating Rhode Island salary supplements for parochial teachers' *secular* teaching because "comprehensive, discriminating, and continuing state surveillance w[ould] inevitably be required to ensure that" teachers' religious beliefs did not infect their teaching). Thus, had the defendants determined that St. Augustine was Catholic on the basis of an affinity between its teachings or practices and those sanctioned by chosen dioceses, orders, or prelates, we would have found the defendants' inquiry to be unconstitutional.

Plaintiffs assert that such a forbidden probe lay behind the denial of St. Augustine's busing application. They argue that the defendants "based their finding of affiliation on the conclusion that St. Augustine and St. Gabriel were *theologically*

connected even though St. Augustine said that it was 'religiously distinct' from the schools of the Archdiocese." The current system, St. Augustine argues, impermissibly permits the state "to decide who is and is not in the same religious denomination based on something other than legal and secular connections, and to ignore the claims of religious adherents about whether they are and are not religiously distinct."

The problem with St. Augustine's argument is that the school district and state superintendent did *not* consider St. Augustine's theology or its religious practices. They did not, to use plaintiffs' words, "ignore the claims of religious adherents about whether they are [or] are not religiously distinct" from another denomination. The defendants did not independently assign the label "Catholic" to St. Augustine. St. Augustine did. The defendants read and credited St. Augustine's statements on its website and busing request form that it was a Catholic—specifically a Roman Catholic—school. Defendants properly avoided wading into any discussion about whether each school faithfully operates within the Catholic tradition because each one calls itself a Catholic School. The dissent claims that the state superintendent "examined extensively the theological statements on the School's website and determined that it evinces an affiliation with the Catholic Church." But it cites a portion of the Superintendent's decision that does no more than quote verbatim the

school's own description of itself as a "Roman Catholic School" providing an education to "the children of our Catholic community" while "lov[ing] and prais[ing] all the traditional practices of the Catholic faith." R. 26-10, at 7. Taking a party's repeated chosen label at face value hardly constitutes a deep-dive into the nuances of religious affiliation.

Plaintiffs contend that section 121.51 also required the defendants to consider statements in the school's articles of incorporation and bylaws, which purportedly would have shown that the school's leadership disclaimed affiliation with the Catholic Church. But why does the Constitution compel exclusive reliance on that evidence, as opposed to the school's express statement on its application for benefits? We know of no such rule. Of course, as *Holy Trinity* illustrates, St. Augustine is free to change its affiliation, and the state must also respect such a change. See 82 Wis.2d at 146. But at least in our case, all evidence viewed by the school district and superintendent indicated that St. Augustine and St. Gabriel professed affiliation with the same Roman Catholic Church.

We see no evidence to support plaintiffs' and the dissent's hypothesized parade of horribles. Under the current system, they contend that the state could redefine denominational boundaries and "lump the Lutherans of the Missouri Synods in with those in the Evangelical Lutheran Church in America" while

"Anglican Catholics could be thrown in with the Roman Catholics" because "each of them use the 'Lutheran,' [and] Catholic,' ... monikers." That is just to say, however, that there can be a question about which entity is the "group" to which section 121.51 refers. We assume that the Missouri Synods would be entitled to argue that they are a different group from the Evangelicals, that the Orthodox Jews are entitled to argue that they are a different group from Reformed Jews, and that Shi'a Muslims can urge that they are different from Sunnis. We are content to save those cases for another day. In the present case, both St. Augustine and St. Gabriel self-designated as Roman Catholic, and that is enough. If we were presented with a state's refusal to recognize a denomination or a public official's attempt to serve as an arbiter of a religious schism, we would have a different case. We agree with our dissenting colleague that labels may not fully capture the plurality of religious beliefs in America. But for Wisconsin's statute to pose any meaningful limitation on the state's provision of busing, school districts must be able to rely on self-adopted labels.

Ironically, it is St. Augustine and the Forros—not the state—that are asking us to undertake an unconstitutional analysis of religious belief. They contend that St. Augustine is distinct because it "practices its religion differently than St. Gabriel." They argue that "even if similar practices or beliefs *could* be the basis for 'affiliation,'" the denial of St.

Augustine's busing application cannot stand because the defendants "explicitly did not look at or compare St. Augustine's beliefs and practices with St. Gabriel's to determine whether they were sufficiently comparable such that they could be considered 'affiliated' or sponsored by some group.'" Yet considering whether a difference in belief constitutes a difference in denomination is precisely what *Presbyterian Church* forbids.[5] 393 U.S. 440. The entire point of the approach endorsed by the Wisconsin Supreme Court and followed by the defendants is to take matters of doctrine and belief out of the secular determination of institutional affiliation. We will not pervert the Establishment Clause to declare internal doctrinal differences a matter of state concern. Nor are we prepared to say, in conflict with the Wisconsin Supreme Court, that the state's only choice is to assume that each and every school is unique and thus all children must receive transportation benefits.

Before concluding, we add a word about why we think it both unnecessary and inappropriate to

[5] It is hardly unusual for churches within the same denomination to display some differences. One Lutheran church might have a pastor who emphasizes public service, while another might have a minister who emphasizes self-reflection and atonement. One might approach the Bible from a strict-construction viewpoint, while another may take a more metaphorical view. Differences in theological approaches do not necessarily create different sponsoring groups, no matter how genuinely each congregation feels about its choices.

abstain *sua sponte* from deciding the issues before us pursuant to the doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The Wisconsin Supreme Court has already resolved the critical questions of state law in *Vanko* and *Holy Trinity Church*. It has told state authorities how to apply the test of affiliation with a single sponsoring group, and it has stressed that the responsible state officials must accept a religious organization's self-characterization. It has also disapproved the factor on which our dissenting colleague relies so heavily—ownership or control by a single entity. *Pullman* does not require a federal court to stay its hand simply because a state legislature or court might surprise us by reversing course. See *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973) (rejecting *Pullman* abstention where alternative interpretation of state law was "foreclosed by the decision of the" state high court).

The *Pullman* doctrine aims to avoid an unnecessary adjudication of the constitutionality of a state statute. Its purpose is not served unless there is "some risk that the statute will be found unconstitutional unless narrowed." *Mazanec v. N. Judson-San Pierre Sch. Corp.*, 763 F.2d 845, 847 (7th Cir. 1985). As it comes to us, this was not a close case. St. Augustine complains that its religious exercise was burdened by a neutral and generally applicable law. It roots an Establishment Clause violation in the *failure* of the district and state officials to contrast its religious dogma and practices with those of the

Roman Catholic diocese. And that is what inevitably would be required: two schools could be incorporated under the same entity and nonetheless differ just as much as St. Augustine and St. Gabriel do. This is not one of those cases in which we must side-step our obligation to resolve a case that is properly before us.

III

The district court properly granted summary judgment for the defendants. St. Augustine and the Forros have not shown a violation of their First Amendment rights. As applied here, section 121.51 neither impinged on plaintiffs' religious liberties nor impermissibly engaged the state in matters of religious doctrine. We therefore AFFIRM the judgment of the district court.

RIPPLE, *Circuit Judge*, dissenting. The people of Wisconsin have recognized in their state constitution the importance of ensuring that every Wisconsin schoolchild receives safe and secure transportation to the school chosen by his parents, whether that school be a state-operated school, a secular private school, or a religiously oriented private school.[1] As the Wisconsin Supreme Court has noted, by enacting this state constitutional provision

[1] *See* Wis. Const. art. I, § 23.

and its implementing legislation,[2] Wisconsin has recognized that "the same consideration of safety and welfare should apply to public and private students alike." *Cartwright v. Sharpe*, 162 N.W.2d 5, 11 (Wis. 1968).[3] Wisconsin's choice accords with the Supreme Court's recognition of the important liberty interest of parents to choose the educational environment of their children. *See Pierce v. Soc'y of Sisters,* 268 U.S. 510, 534–35 (1925).

In implementing the State's commitment, conscientious government administrators necessarily face practical problems. Limited funding is one of them. The Wisconsin legislature attempted a partial solution to this perennial problem by mandating that each private school is entitled to bus transportation within an established "attendance area"[4] and by also

---

[2] Wisconsin Statutes section 121.54(2)(b) requires the school board of each district operating high school grades to provide transportation "for each pupil residing in the school district who attends any elementary ... or high school grade at a private school located 2 miles or more from the pupil's residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district." This transportation obligation can be fulfilled in a variety of ways. *See* Wis. Stat. § 121.55. This school district's choice of the way in which it would fulfill such an obligation is not at issue in this case.

[3] We need not decide today whether the Constitution of the United States requires such evenhanded treatment of public and non-public school students. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017).

[4] Wis. Stat. § 121.51(1).

providing that, except in the case of single-sex schools, "[t]he attendance areas of private schools *affiliated* with the same religious denomination shall not overlap."[5] The statute, however, does not define what it means for a school to be "affiliated" with a denomination. There is no evidence in this record that this affiliation provision is anything other than a good-faith attempt to implement the transportation program in a sensible, fiscally responsible manner. Nevertheless, the provision's ambiguity has caused significant disagreement, resulting in two decisions by the Wisconsin Supreme Court. Before focusing on the present case, therefore, I pause to examine these two cases of the Wisconsin Supreme Court. Both interpreted the statute in the crosslight of Religion Clause concerns and shed considerable light on the path that we ought to follow in the case before us.

In *State ex rel. Vanko v. Kahl*, 188 N.W.2d 460, 464 (Wis. 1971), the Supreme Court of Wisconsin focused directly on the language that, on its face, forbids providing transportation services to children of religiously operated private schools "affiliated with the same religious denomination" as another school already receiving transportation in the same attendance area. The statute contained no similar limitation for non-religious private schools, and the Wisconsin court recognized that this difference in

---

[5] *Id.* (emphasis added). The single-sex school exception is not implicated in this case.

treatment placed an additional burden on children attending a religiously affiliated private school—a burden that was not shared by children attending a non-religious private school. The court therefore construed this provision to apply equally to children in both religiously affiliated private schools and non-religiously affiliated schools. Although not invoking squarely the rule that courts should construe a statute to avoid doubts about its constitutionality, the Wisconsin high court frankly recognized that disparity in the treatment of children attending religious schools would create "an apparent constitutional infirmity." *Id.* The statute's reference to religiously affiliated schools, noted the court, was simply to ensure that schools conducted by religious orders were considered affiliated with a religious group, even if these schools were not legally owned by the sponsoring religion. *Id.*[6] As construed by the court in *Vanko*, therefore, the statute forbade overlapping attendance zones only when a private school was "affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious." *Id.* at 465.

Vanko made clear that all private schools, not just religious private schools, were subject to the overlapping attendance area limitation. It had no

---

[6] The court later referred to this last explanation as dicta. *See Holy Trinity Cmty. Sch., Inc. v. Kahl*, 262 N.W.2d 210, 212 (Wis. 1978).

occasion to come to grips with just how a school district should determine the "affiliation" of a religious private school with a "sponsoring group." In *Holy Trinity Community School, Inc. v. Kahl*, 262 N.W.2d 210 (Wis. 1978), the Wisconsin Supreme Court addressed this question. In that case, a school of the Catholic Archdiocese of Milwaukee, desiring a larger attendance area that would overlap with other diocesan schools, closed and then immediately reopened under new articles of incorporation and bylaws that did not identify it as a Catholic school and that stated that it had no formal religious affiliation. It continued to employ many of the same teachers, to enroll many of the same students, and to lease, for a dollar a year, its building from the Catholic parish in which it was located. It conducted its religious instruction in a "released-time" program. *Id.* at 211.

The State Superintendent of Instruction concluded, on these facts, that the school remained affiliated with the Catholic Church and refused to provide transportation. The Wisconsin Supreme Court did not think that the Superintendent's determination was sustainable. Relying principally on the decisions of the United States Supreme Court in *New York v. Cathedral Academy*, 434 U.S. 125 (1977), *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court held that the Superintendent should not make such a detailed inquiry into the school's religious practices to

determine whether it was *affiliated* with another religious body. In the court's view, such an inquiry would have the primary effect of aiding religion or would result in an excessive entanglement of the government in religious affairs. The Superintendent must accept, said the court, the facial validity of the charter and bylaws of the school. *Id.* at 216.[7]

In *Vanko* and *Holy Trinity,* the Wisconsin Supreme Court adopted the salutary practice of employing "neutral principles of law," *Jones v. Wolf,* 443 U.S. 595, 600 (1979), in order to avoid slipping into the constitutionally impermissible quagmire of defining religious doctrine and practice. *Cf. Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–09 (1976).

Here, the State Superintendent failed to follow

---

[7] The majority maintains that the Wisconsin Supreme Court said in *Holy Trinity* that a court "generally must accept the school's own profession of affiliation or non-affiliation." Majority Op. at 10. Its citation to 82 Wis.2d at 155–58 apparently refers to the Wisconsin court's discussion of the judicial obligation not to pierce the articles of incorporation or the bylaws. There, the Supreme Court of Wisconsin observers: "we hold only, where a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination, that in the absence of fraud or collusion the inquiry stops there. To make the further inquiry, as attempted by the Superintendent of Public Instruction, is to involve the state in religious affairs and to make it the adjudicator of faith." *Holy Trinity*, 82 Wis.2d at 157–58.

these Wisconsin decisions. The articles of incorporation state that "[t]he purposes for which the Corporation is organized are to create, establish, maintain, and operate an interdenominational Christian school for the instruction for children in the primary and secondary grades."[8] Rather than grounding his decision in the articles of incorporation and by-laws as he was required to do under state law, he decided to undertake an independent investigation and rested his decision on statements he found on St. Augustine's website.[9]

Faced with a clear failure of the State Superintendent to follow the decisions of the Supreme Court of Wisconsin, the district court undertook a close examination of *Vanko* and *Holy Trinity*. It began its analysis by admitting frankly that, given the holdings in those two cases, the Wisconsin Supreme Court might well "build on these cases" and interpret the statute to require the State Superintendent to approve St. Augustine's proposed area "even though it overlaps with the attendance area of St. Gabriel, and even though both schools describe themselves as Roman Catholic schools."[10] However, the district court then examined the website of St. Augustine School and, noticing that the school described itself as "Catholic," the court then decided that the holdings of the Wisconsin Supreme Court permitted an

[8] R.26-1 at 1.
[9] *See* R.26-10 at 7.
[10] R.41 at 16.

examination beyond the legal documents of incorporation into the "school's religious denomination."[11] The court apparently never considered abstaining until the parties could obtain a more precise definition of the word "affiliated" than the one offered in *Holy Trinity*.[12] Rather, it took the

---

[11] *Id.* at 13. The district court noted that *Vanko* had described the required nexus as "affiliated or operated by a single sponsoring group." *Id.* It read *Holy Trinity* as not limiting the inquiry to the private school's constituent documents if those documents do not affirmatively disclose that the school has a particular affiliation. *Id* at 15. That interpretation is belied by the *Holy Trinity* court's reliance on *Bradfield v. Roberts*, 175 U.S. 291, 297 (1899), in which the operative document did not disclose the religious affiliation of the institution. *See id.* at 297–98 ("Nothing is said about religion or about the religious faith of the incorporators of this institution in the act of incorporation.... Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into.").

[12] Notably, the defendants had removed this case from the state court where the plaintiffs had commenced the action. The state court no doubt would have followed the Wisconsin precedent discussed in the text and concluded that the Superintendent was not permitted to ignore St. Augustine's claim of legal independence.

The defendants' removal of this case to federal court simply has allowed them to avoid answering to the Wisconsin Supreme Court for their failure to follow *Trinity Lutheran*, 137 S.Ct. at 2024. Had they obeyed the holding of that case, they would have

School's use of the term "Catholic" as, in effect, an admission of affiliation with the schools of the Archdiocese.[13]

My colleagues follow the lead of the district court. The panel's opinion culls out of the School's self-description on its website the word "Catholic." In their view, if two schools employ the same label—"Catholic"—to describe themselves, they are "affiliated."

In my view, there are several problems with this approach. The first is one of elemental fairness. The term "Catholic" appears in the school website in the broader context of a wide-ranging description of St. Augustine School, a text that sets forth the educational philosophy of the institution and the theological principles that animate that educational philosophy. Taking the single term "Catholic" out of this context and employing it as an outcome-determinative label obviously raises a basic question of fairness, especially when we clearly are forbidden to evaluate the remainder of the context to determine

---

treated religious and non-religious schools evenhandedly and, in the process, avoided any need to address a constitutional question.

[13] Earlier in its opinion, the district court had surmised that St. Augustine might be "Traditionalist Catholic." R.41 at 3. It then said that it mentioned this point "only to provide some background information on how St. Augustine differs from a diocesan school." *Id.*

whether the theological principles set forth there are indeed embraced by the Roman Catholic Church, which operates St. Gabriel in the same district.

I recognize, as do my colleagues, that permitting the state to derive denominational affiliation through an examination and judgment of theological doctrine would pose different constitutional concerns. I suggest, instead, that the Constitution requires the state to rely on the same neutral principles it would apply to a non-religious school. It should accept, as the Wisconsin courts certainly would, St. Augustine's independent corporate structure as proof that it is not "affiliated" with St. Gabriel. The materials submitted to the Superintendent made the Superintendent well aware that St. Augustine is legally independent from St. Gabriel and the Archdiocese.[14]

Secondly, the court's selective use of the term "Catholic" rests on the assumption that, for purposes of our Free Exercise analysis, a single term, even when culled from its context, can describe accurately

---

[14] *See, e.g.*, R.26-9 (St. Augustine's request for Superintendent to review the school district's denial of transportation benefits, emphasizing St. Augustine's independence from the Archdiocese and separately chartered corporate structure); R.33-6 at 3–4 (school district's submission to Superintendent, recognizing that St. Augustine is "incorporat[ed] under a different charter" and has a "differing organizational structure[]" from an Archdiocesan school).

the religious values and aspirations of an individual or a group of individuals. Labels work very well for identifying commodities in a supermarket, but they are ill fitted for protecting the religious liberty of an *individual* American. Our constitution recognizes "the right of every person to freely choose *his own course*" with respect to "religious training, teaching and observance." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) (emphasis added). 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. *See Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005). The congruity of personal beliefs with those of a known religious organization is beside the point. Personal beliefs may have some overlap with an institutional religion; or they may be heretical or overly zealous variations of institutional beliefs. *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012). They may even evince lax adherence to a known religion. *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988). But if an individual sincerely holds those beliefs, the Religion Clauses protect them. *Grayson*, 666 F.3d at 454 ("Religious belief must be sincere to be protected by the First Amendment, but it does not have to be orthodox.").[15]

---

[15] We have held that the government may inquire into the sincerity of a person's beliefs, *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012), and that it can be appropriate to examine, in a measured and non-intrusive manner, the congruity of a

Given our national commitment to freedom of *personal* conscience, it is not surprising that our history, even before the founding of the Republic, is filled with dissident individuals and groups who have disagreed with larger bodies and yet insisted that *they*, not the larger group, have remained faithful to the principles of the original group. As the Supreme Court noted in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715 (1981), "[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

---

person's beliefs to those of the religion that he professes in an effort to ascertain the sincerity of his beliefs, *Nelson v. Miller*, 570 F.3d 868, 880–82 (7th Cir. 2009). *But see Koger v. Bryan*, 523 F.3d 789, 799–800 (7th Cir. 2008). Similarly, civil government need not tolerate sham or fraudulent conduct designed to avoid legitimate and evenhandedly applied civil obligations. *See, e.g.*, *Welsh v. United States*, 398 U.S. 333, 339–40 (1970) noting that it is necessary to consider whether an individual's beliefs are, in fact, "religious" in nature before granting that individual conscientious objector status under the Selective Service Act); *United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]e hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity [and]a prime consideration to the validity of every claim for exemption as a conscientious objector."). But, in the end, it is the sincerity of their beliefs, not their orthodoxy, that is the touchstone for constitutional protection. These are well-settled principles.

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." *Id.* at 715–16.

Today's holding permits a local school board to deny children an important safety protection because their parents have concluded, based on their religious beliefs, that St. Augustine School embodies their personal faith commitment and that the Archdiocesan School does not. The court permits the local school board to exert significant pressure on those parents to bend to the school board's determination that what they believe to be an important religious difference between the two schools does not exist or is inconsequential. It also rejects the Supreme Court's explicit statement that, when the state conditions receipt of an important benefit program upon acceptance of such a government determination, it places "substantial pressure" on the individual to modify his behavior and "a burden upon religion exists." *Id.* at 718. "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.*; *see also Abington Twp.*, 374 U.S. at 221.

Today's decision therefore raises very concrete concerns beyond our achieving substantive justice for the parties before us. What will the court now do

when individuals identifying themselves as Anglican Catholics, Polish Catholics, or Orthodox Catholics seek to raise their children according to their own faith traditions? Barred from making any theological inquiry, will the court again rely on labels? What will it do when individuals identifying as Missouri Synod Lutherans seek to establish a facility separate from those identifying as Evangelical Lutherans? Will Methodists and United Methodists experience the same problem? As the ecumenical movement grows and individuals simply identify as "Christian," how will the court deal with the differences that still remain? Will the court recognize the right of those who identify as Orthodox Jews to nurture their faith in schools separate from Reformed or Liberal Jews? Other analogous situations surely will arise as society continues to grow more and more pluralistic in its religious beliefs. Today, the court simply puts these very pragmatic but important questions off for another day; it ignores that its label methodology is simply unworkable in these situations. The majority opinion "assume[s] that the Missouri Synods would be entitled to argue that they are a different group from the Evangelicals, that the Orthodox Jews are entitled to argue that they are a different group from Reformed Jews, and that Shi'a Muslims can urge that they are different from Sunnis."[16] Why, then, is St. Augustine foreclosed from arguing that it is governed by a separate entity than that which governs St.

---

[16] Majority Op. 14.

Gabriel's?

Today's decision raises more than pragmatic problems. It raises haunting concerns about the future health of the Religion Clauses in this circuit. It is indeed difficult to square today's decision with the Supreme Court's recent reaffirmation that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017). It is equally difficult to square this decision 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." *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). Today's exercise in label reading is not consistent with our careful protection of the *individual* liberty to adhere to, and act on, one's *personal* religious beliefs. Accordingly, I respectfully dissent.

APPENDIX G

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

ST. AUGUSTINE SCHOOL and
JOSEPH and AMY FARRO,
Plaintiffs,

v. Case No. 16-C-0575

TONY EVERS, in his official capacity
as Superintendent of Public Instruction,
and FRIESS LAKE SCHOOL DISTRICT,
Defendants.

DECISION AND ORDER

I. BACKGROUND

Wisconsin law requires the school board of a school district to provide each student residing in the district with transportation to and from his or her school if the student resides two miles or more from the school. Wis. Stat. § 121.54(2). The school board must provide transportation even to students who

attend a private school (including a religious private school), but only "if such private school is a school within whose attendance area the pupil resides" and the school is located either within the school district or within five miles of the district's boundaries *Id.* § 121.54(2)(b)1. The "attendance area" is the geographic area designated by the private school as the area from which it draws its students, but the school board of the district must also approve the attendance area. *Id.* § 121.51(1). If the private school and the school board cannot agree on the attendance area, the state superintendent of public instruction must, upon the request of the private school and the school board, make a final determination of the attendance area. *Id.* As is relevant to this case, the law provides that "[t]he attendance areas of private schools affiliated with the same religious denomination shall not overlap." *Id.*

Joseph and Amy Forro send their three children to St. Augustine School, which is a private religious school. The Forros live within the Friess Lake School District and more than two miles from St. Augustine. St. Augustine is located within five miles of the Friess Lake School District's boundaries. In March 2015, to enable the Forros to receive transportation aid as provided by Wisconsin law, a representative from St. Augustine called the district and requested that it approve the school's attendance area under Wis. Stat. § 121.51(1). The district and the school then exchanged a number of communications.

Throughout these communications, the district maintained that it could not approve St. Augustine's attendance area because that area overlapped with the attendance area of St. Gabriel, a private school in the district for which the district already provided transportation and that was affiliated with the same religious denomination as St. Augustine, which the district described as "Roman Catholic." *See, e.g.,* Decl. of Tim Zignego Ex. G.

St. Gabriel is a Roman Catholic school that is affiliated with the Archdiocese of Milwaukee. Although St. Augustine is a Roman Catholic school, it is not affiliated with the Archdiocese. Moreover, the school appears to have at least slightly different religious beliefs, and to follow at least slightly different religious practices, than would a school that is affiliated with the Archdiocese. St. Augustine has not in its briefs and affidavits extensively described how it differs from a diocesan school, but it states that it believes that it "operates more fully within the Catholic tradition than Archdiocesan schools" and that it is "religiously distinct from schools operated by the Archdiocese." Zignego Decl. ¶ 10. From my review of the excerpts from St. Augustine's website that appear in the record, I have drawn the conclusion that St. Augustine is what might be described as "Traditionalist Catholic," which is a branch of Catholicism whose members believe that there should be a restoration of many or all of the customs, traditions, and practices of the Roman Catholic

Church before the Second Vatican Council. *See* https://en.wikipedia.org/wiki/Traditionalist_Catholic (last viewed June 6, 2017). For example, St. Augustine states on its website that it follows certain traditional Catholic practices, such as the reception of communion directly on the tongue while kneeling and the celebration of Mass in Latin. ECF No. 33-6 at p. 5 of 10. These are generally considered "traditionalist" practices that the Roman Catholic Church does not necessarily follow today. However, my conclusion that St. Augustine is Traditionalist Catholic may not be accurate, and my analysis of the legal issues in this case do not depend on this conclusion. I mention the possibility that St. Augustine is Traditionalist Catholic only to provide some background information about how St. Augustine differs from a diocesan school.

After the Friess Lake School District initially denied St. Augustine's proposed attendance area, St. Augustine asked it to reconsider its decision, pointing out that St. Gabriel is a Roman Catholic school affiliated with the Archdiocese of Milwaukee, while St. Augustine is independent of the Archdiocese. *See, e.g., id.*. Ex. D. St. Augustine might also have attempted to explain to the district that it practices Catholicism differently than diocesan schools, but no such communication appears in the record. However, the administrator of the district wrote in a letter to the school that the school's "belief that there is a distinction between St. Augustine and St. Gabriel's

regarding adherence to Catholic principles is your fight, not ours." Zignego Decl. Ex. F. This statement implies that St. Augustine said something to the administrator about its practicing Catholicism differently than St. Gabriel. In any event, the district continued to refuse to approve St. Augustine's attendance area because it overlapped with St. Gabriel's attendance area, and because both schools called themselves Catholic schools.

Because St. Augustine and the district could not agree on an attendance area, they submitted their dispute to the state superintendent of public instruction for a final determination under Wis. Stat. § 121.51(1). In its letter to the superintendent, St. Augustine argued, as it did to the district, that its attendance area could overlap with St. Gabriel's because St. Gabriel was a Roman Catholic school affiliated with the Archdiocese of Milwaukee, while St. Augustine was independent of the Archdiocese. *See* Aff. of Laura M. Varriale Ex. D. St. Augustine argued, in part, as follows:

> St. Augustine School, Inc., is a Wisconsin non-stock corporation, incorporated in 1981 as Neosho Country Christian School, Inc. The name was changed in 1994 to the current name. Neither St. Augustine School, Inc., nor the school operated by the corporation, has ever been affiliated by control,

> membership, or funding with the Archdiocese of Milwaukee. No representative of the Archdiocese or a parish church of the Archdiocese has ever been a director or officer of St. Augustine School, Inc. No employees of St. Augustine School have ever been hired or compensated by the Archdiocese or a parish church of the Archdiocese. None of the religious instructors at St. Augustine School have ever been employed, assigned, or compensated for their work at St. Augustine School by the Archdiocese or a parish church of the Archdiocese. Students currently enrolled at St. Augustine school come from families who are members of five different churches, including some churches independent of the Archdiocese of Milwaukee.

Id.

St. Augustine provided the superintendent with a copy of its bylaws, and also an amendment to its articles of incorporation showing that it was previously known as Neosho Country Christian School, Inc. *Id.* Although St. Augustine seems to have intended to also provide the superintendent with a copy of the school's full articles of incorporation, *see* Pls. Resp. to Defs. Prop. Finding of Fact ¶ 22, the

superintendent claims that it never received a copy, *see* Varriale Aff. ¶ 14. The Friess Lake School District also denies ever receiving a copy of the articles of incorporation. Decl. of Denise Howe ¶ 15. The plaintiffs admit that neither the superintendent nor the district saw St. Augustine's articles of incorporation. Pls. Resp. to Defs. Prop. Finding of Fact ¶ 22.[1] The articles of incorporation describe Neosho Country Christian School as "an interdenominational Christian school." Zignego Decl. Ex. A, art. III. However, the bylaws and amendment to the articles of incorporation do not contain any similar statement or otherwise indicate whether St. Augustine is affiliated with a religious denomination.

In its submission to the superintendent, the school district argued that St. Augustine and St. Gabriel could not have overlapping attendance areas because they both described themselves as Catholic

---

[1] Technically, the plaintiffs admit only that the defendants did not "consider" the articles of incorporation. Pls. Resp. to Defs. Prop. Finding of Fact ¶ 22. This is not necessarily the same thing as admitting that the defendants did not "see" the articles of incorporation. That is, the defendants might have seen the articles of incorporation and made a conscious decision not to consider them. However, from the context of the plaintiffs' response, I conclude that the plaintiffs do not contend that the defendants saw the articles and intentionally disregarded them. Rather, they seem to admit that, due to an inadvertent error, the articles of incorporation never made their way to the relevant decisionmakers at the district and the department of public instruction. *See id.*

schools and therefore were, for purposes of § 121.51(1), "affiliated with the same religious denomination," even if they were each "incorporated under a different charter." Varriale Aff. Ex. F. The district provided the superintendent with print-outs from St. Augustine's website, which describe the school as "an independent and private traditional Roman Catholic School." *Id.* at p. 2 of 4.

On March 10, 2016, the superintendent, through his designee, issued a written decision on the dispute over St. Augustine's attendance area. Varriale Aff. Ex. G. The superintendent began by citing Wis. Stat. § 121.51(1), emphasizing the language stating that "[t]he attendance areas of private schools affiliated with the same religious denomination shall not overlap." *Id.* at 4. He then described the parties' arguments as follows:

> The District contends both [St. Augustine] and St. Gabriel's are affiliated with the Roman Catholic denomination and that their attendance areas overlap. [St. Augustine] argues the District may not look beyond the School's corporate status, its name change amendment, and its bylaws to reach the District's conclusion that the School is a religious school affiliated with the Roman Catholic denomination. To do otherwise, the School contends,

> results in a constitutionally impermissible entanglement of state authority in religious affairs.

Id. at 4–5. After discussing relevant legal authority, the superintendent noted that St. Augustine's bylaws and the amendment to its articles of incorporation revealed nothing about its religious affiliations. (Again, it is undisputed that the superintendent did not see the articles of incorporation describing St. Augustine, under its old name, as an "interdenominational Christian school.") The superintendent reasoned that because St. Augustine had submitted no organizational documents that disclosed its religious affiliations, he could consider the print-outs from St. Augustine's website—in which it described itself as a "traditional Roman Catholic School"—without excessively entangling himself in a religious matter. *Id.* at 6–7. Based on the print-outs, the superintendent concluded that St. Augustine was "a religious school affiliated with the Roman Catholic denomination" for purposes of § 121.51(1). *Id.* at 7. The superintendent thus agreed with the school district's determination that St. Augustine and St. Gabriel could not have overlapping attendance areas. *Id.* at 7–8.

Because neither the school district nor the superintendent approved St. Augustine's attendance area, the Forros did not receive state transportation aid during either the 2015–16 school year or the

2016–17 school year. The parties agree that, had the Friess Lake School District provided this aid to the Forros, the cost to the district would have been $1,500 per school year. Defs. Resp. to Pls. Prop. Finding of Fact ¶ 28.

In April 2016, the Forros and St. Augustine commenced this action in state court against the Friess Lake School District and the state superintendent of public instruction. The defendants removed the action to this court. The plaintiffs allege that the district's and the superintendent's decisions to deny it an overlapping attendance area with St. Gabriel were erroneous applications of Wis. Stat. § 121.51(1) and also violated the Religion Clauses of the United States Constitution (that is, the Free Exercise and Establishment Clauses of the First Amendment) and the Equal Protection Clause. The plaintiffs seek relief against the district and the superintendent under 42 U.S.C. § 1983 and state law.

The superintendent has filed a motion to be dismissed from this case on various grounds, and the superintendent and the district have filed a joint motion for summary judgment. The plaintiffs have filed their own motion for summary judgment. For relief, the plaintiffs seek: (1) a judicial finding (either in the form of a declaratory judgment or judicial review of the superintendent's administrative decision under state law) that the superintendent's decision to reject St. Augustine's proposed attendance

area was erroneous as a matter of state law; (2) a declaratory judgment against both the district and the superintendent stating that the defendants violated the plaintiffs' federal constitutional rights; (3) an injunction against the district and the superintendent preventing them from denying transportation aid to the Forro children to attend St. Augustine; (4) damages against Friess Lake School District in the amount of $1,500 for each of the two school years in which the Forros were already denied transportation aid; and (5) costs and attorneys' fees under 42 U.S.C. § 1988.

II. DISCUSSION

The motions under consideration are the superintendent's motion to dismiss the complaint against it, and the parties' cross-motions for summary judgment. However, I discuss only the parties' motions for summary judgment because they are dispositive. Summary judgment is required where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, I take evidence in the light most favorable to the non-moving party and must grant the motion if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

Before proceeding further, I note that the central issue in this case is one of state law: did the school district and the superintendent properly interpret and apply the definition of "attendance area" that appears in Wis. Stat. § 121.51(1)? This issue arises in the form of the plaintiffs' request for judicial review of the superintendent's final decision to deny St. Augustine its proposed attendance area under Wis. Stat. § 121.51(1). *See* Compl. ¶¶ 71–73. I may exercise jurisdiction over this state-law claim pursuant to the supplemental-jurisdiction statute because that claim is part of the "same case or controversy" as the plaintiffs' claim for violation of their rights under the Constitution. *See* 28 U.S.C. § 1367(a). However, the supplemental-jurisdiction statute provides that a district court may decline to exercise supplemental jurisdiction over a state-law claim if it "raises a novel or complex issue of State law." 28 U.S.C. § 1367(c)(1). As explained in more detail below, the plaintiffs' state-law claim does raise a novel issue of state law, in that the existing Wisconsin cases do not clearly answer the question of whether the defendants correctly implemented the attendance-area definition of § 121.51(1). Thus, I will relinquish supplemental jurisdiction over the plaintiffs' claim for judicial review of the superintendent's decision and remand that claim to state court. Still, I must decide the plaintiffs' federal claim, which they bring under 42 U.S.C. § 1983. But, as will be made clear in the discussion that follows, this federal claim is closely related to the plaintiffs'

state-law claim. For this reason, I will begin by discussing the relevant state cases, which are *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206 (1971) and *Holy Trinity Community School, Inc. v. Kahl*, 82 Wis. 2d 139 (1978).

In *Vanko*, several individuals and private religious schools in Racine County alleged that the "same religious denomination" sentence in § 121.51(1)'s definition of "attendance area" was unconstitutional.[2] The plaintiffs argued that because this prohibition against overlapping attendance areas applied only to affiliated religious schools, and not also to private nonreligious schools that were affiliated with each other, the law discriminated against religious schools in violation of the First Amendment. *Id.* at 213–14. The Wisconsin Supreme Court allowed that, if the statute indeed meant that only affiliated religious schools were prohibited from having overlapping attendance areas, then the statute would present "an apparent constitutional infirmity." *Id.* at 214. However, the court determined that the statute did not mean that only affiliated religious schools were prohibited from having overlapping attendance areas. Instead, the court determined, the statute prohibited "overlapping in attendance area boundary lines as to *all* private schools affiliated or operated by a single sponsoring

[2] At the time *Vanko* was decided, the attendance-area definition was codified at Wis. Stat. § 121.51(4). 52 Wis. 2d at 208–09.

group, whether such school operating agency or corporation is secular or religious." *Id.* at 215 (emphasis in original). The court found that this more general restriction against overlapping was "inherent in the whole concept of 'attendance areas.'" *Id.* Thus, reasoned the court, the statute treated religious and nonreligious private schools the same and did not present a constitutional problem.

The *Vanko* court recognized that its interpretation of the statute seemed to reduce the "same religious denomination" sentence in § 121.51 to "mere surplusage." *Id.* However, the court determined that this sentence still added something to the statute, which was "to make '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.* The court gave the following example:

> [The sentence] means that, if the Franciscan Order of the Roman Catholic church operates a school in the northern part of the Racine district, and the Jesuit Order operates a school in the southern part of the district, they are to be considered, along with diocesan schools, as part of the Catholic school system of Racine because all are "affiliated with the same religious denomination."

Id. at 215–16. In this part of its opinion, the court concluded that the statute defines a religious denomination as the "sponsoring group" for purposes of determining the attendance areas of religious schools. In other words, all schools affiliated with the same religious denomination are affiliated with the same sponsoring group.

In the second Wisconsin Supreme Court case at issue, *Holy Trinity Community School*, the court considered the method by which state officials could determine whether a private school is affiliated with a particular religious denomination. That case involved the Holy Trinity School, which was one of the plaintiffs in *Vanko*. Before *Vanko* was decided, the Holy Trinity School was known as the Holy Trinity Catholic School and was a parochial school affiliated with the Roman Catholic Church. *Holy Trinity*, 82 Wis. 2d at 145–46. The school's students were spread over a wide area of the Racine school district, and after *Vanko* upheld the prohibition against overlapping attendance areas, the Holy Trinity School stood to lose a large number of students to the Catholic schools that were closer to their homes. *Id.* at 145. To avoid this problem, the Holy Trinity Catholic School ceased operations and immediately reincorporated and reopened as the Holy Trinity Community School. *Id.* at 146. The reincorporated school had "no legal ties to the Roman Catholic church" and its bylaws provided that "the school shall

have no affiliation with any religious denomination." *Id.* In making these changes to its organizational structure and bylaws, the school hoped to disaffiliate from the Catholic denomination and be entitled to its own attendance area, which could overlap with any of the other Catholic schools in the Racine district. However, when the school applied for its own attendance area, the state superintendent found that the school was still "affiliated" with the Roman Catholic denomination. *Id.* at 147. The superintendent made this finding by looking behind the school's organizational documents—which stated that the school was "independent of any denomination," *id.* at 153—and examining various practices of the school—such as its hiring nuns and adopting a "released time" program through which 75% of the school's students received Roman Catholic religious instruction—that suggested it was still a Roman Catholic school. *Id.* at 146–49.

The state supreme court found that the superintendent's determining the "denominational allegiance" of the school though "inspection and surveillance of the school" resulted in "excessive entanglement of state authority in religious affairs." *Id.* at 149–50. The court held that the superintendent should have taken at face value the language in the school's articles of incorporation and bylaws that disclaimed affiliation with any religious denomination. *Id.* at 149–55. The court stated that "[b]y avoiding the making of [the superintendent's

detailed inquiry] and by accepting the Holy Trinity Community School on the basis of its articles of incorporation as what it purports to be—a school independent of any denomination—the unconstitutionality in the administration of the statute can be avoided." *Id.* at 153. The court summarized its holding as follows:

> In respect to the case before us, we hold only, where a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination, that in absence of fraud or collusion the inquiry stops there. To make further inquiry, as attempted by the Superintendent of Public Instruction, is to involve the state in religious affairs and to make it the adjudicator of faith. To so proceed results in the excessive entanglement of the secular state with religious institutions and is forbidden by the Constitution of the United States.

Id. at 157–58.

The plaintiffs interpret *Vanko* and *Holy Trinity* to mean that, in approving private-school attendance areas, "[s]chool districts and the Superintendent must ignore the question of 'religious denomination' and

focus on the question of legal affiliation." Pl. Br. at 11, ECF No. 23. The plaintiffs further argue that, under these cases, the state authorities, in determining affiliation, "must limit their review of the factors that may constitute 'affiliation' to those that are purely legal and secular—i.e., a review of the applicable constituent documents such as the articles of incorporation and by-laws of the school." *Id.* The plaintiffs contend that "[i]f those documents do not demonstrate an affiliation, the State's inquiry must end." *Id.*

The plaintiffs' interpretation of *Vanko* and *Holy Trinity* is not entirely accurate. First, these cases do not establish that state decisionmakers must entirely ignore a school's religious denomination when approving an attendance area under § 121.51(1). Although the court in *Vanko* interpreted the statute to prohibit overlapping attendance areas for private schools "affiliated or operated by a single sponsoring group," the court further determined that, with respect to religious private schools, "sponsoring group" means the religious denomination with which the school is affiliated. 52 Wis. 2d at 215–16 (stating that relevant sentence of § 121.51(1) makes "affiliated with the same religious denomination" the "test of affiliation" for religious private schools).[3] Thus, under

[3] The plaintiffs contend that this part of *Vanko* is dicta. Reply Br. at 4. And indeed it is dicta in the sense that the *Vanko* case did not require the court to apply the "same religious denomination" sentence to the facts of the case before it. But this

Vanko, state decisionmakers must still determine whether the "group" that "sponsors" the private school is religious, and, if it is, whether it is "affiliated" with a "denomination" that already operates a school with an overlapping attendance area.

Second, *Vanko* does not hold that every private school is necessarily entitled to an attendance area that overlaps with any other private school so long as both schools are organized as legal entities that are not affiliated with each other in the corporate-law sense. Rather, the test that the court adopted in *Vanko* was that schools "affiliated or operated by a single sponsoring group" cannot have overlapping attendance areas. *Id.* at 215. The court did not precisely define what constitutes a "single sponsoring group." Instead, it left the term undefined and only vaguely described it as meaning things like "a school operating agency or corporation" or a "religious denomination." *Id.* at 215–16. Certainly *Vanko* does not hold that every independent legal entity is its own

---

part of the opinion represents a key part of the court's reasoning for interpreting the statute to prohibit overlapping attendance areas for both religious and nonreligious private schools, in that the court was demonstrating that its interpretation of the statute did not reduce the sentence to mere surplusage. In any event, even if this part of the opinion is dicta and nonbinding, the important point is that no binding part of the opinion states or implies that state decisionmakers must "ignore the question of religious denomination" when determining the affiliation of a religious private school. Pl. Br. at 11.

"sponsoring group." It is possible that, in using the term "sponsoring group," the court had in mind a broader meaning that would include a collection of legal entities that are all united by some underlying similarity, even if they are not all "affiliated" in the corporate-law sense. For example, all schools that are members of the American Montessori Society,[4] but that are organized as independent, unaffiliated corporations, might qualify as schools "affiliated or operated by a single sponsoring group." *Vanko*, 52 Wis. 2d at 215. Thus, *Vanko* does not establish that a private school is necessarily entitled to an overlapping attendance area with any other private school with which it is not legally affiliated.

Third, *Holy Trinity* does not hold that if a private school's constituent documents, such as its articles of incorporation and bylaws, do not demonstrate an affiliation with a religious denomination, then the state decisionmakers cannot look further to determine whether the school is

---

[4] Montessori is an educational approach "characterized by an emphasis on independence, freedom within limits, and respect for a child's natural psychological, physical, and social development." https://en.wikipedia.org/wiki/Montessori_education (viewed June 6, 2017). The American Montessori Society advocates for the Montessori method in public and private schools throughout the United States, and publishes its own standards and criteria for its accredited member schools. https://en.wikipedia.org/wiki/American_Montessori_Society (last viewed June 6, 2017).

affiliated with that denomination. What *Holy Trinity* holds is that if the constituent documents *affirmatively demonstrate* that the school is *not* affiliated with a particular denomination, then the decisionmakers are bound by the documents and cannot, based on their own investigation, conclude that the relevant statements in the documents are false. *See, e.g.,* 82 Wis. 2d at 144 (noting that bylaws specifically disavowed affiliation with any religious denomination), 146 (same), 150 (noting that school's organizational documents made prima facie showing that school was not affiliated with a religious denomination), 157–58 (holding that "where a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination," the inquiry stops there). The case does not contain any discussion of what the decisionmakers can or cannot do where, as here, the constituent documents submitted to the decisionmakers do not indicate one way or the other whether the school is affiliated with a religious denomination, yet it is clear that the school is a religious school.

To be sure, *Holy Trinity* implies that under no circumstances could the state decisionmakers conduct their own extensive inquiry into the school's religious beliefs and practices and determine that it is affiliated with a particular religious denomination. *Id.* at 149–50. But that is not what the school district and the superintendent did in this case. They did not surveil

St. Augustine and catalogue its religious beliefs and practices to determine that it was affiliated with Roman Catholicism. Rather, they accepted St. Augustine's statement on its own website that it was a Roman Catholic school. Essentially, what the defendants did in this case was use the school's statement of religious affiliation on its website to fill in for the absence of a statement of affiliation or non-affiliation in the constituent documents that the school submitted to them. *Holy Trinity* does not hold that this was improper as a matter of state law.

My conclusion that *Vanko* and *Holy Trinity* are not dispositive does not resolve the plaintiffs' claim under state law. It is possible that the Wisconsin Supreme Court would build on these cases and interpret § 121.51(1) to require the superintendent to approve St. Augustine's proposed attendance area even though it overlaps with the attendance area of St. Gabriel, and even though both schools describe themselves as Roman Catholic schools. For example, the Wisconsin Supreme Court might agree with the plaintiffs and decide that § 121.51(1) should be construed in a way that allows religious schools to have overlapping attendance areas so long as they are not legally affiliated with each other, even if they both describe themselves as belonging to the same religious denomination.[5] Given this possibility, I

[5] The Wisconsin Supreme Court could also disagree with my conclusion that *Vanko* and *Holy Trinity* have not already

conclude that the plaintiffs' state-law claim for judicial review of the superintendent's decision to deny St. Augustine its proposed attendance area "raises a novel or complex issue of State law," and that therefore I should decline to exercise supplemental jurisdiction over it. *See* 28 U.S.C. § 1367(c)(1).

This leaves the plaintiffs' federal claim, which is that, regardless of how the Wisconsin courts ultimately interpret § 121.51(1), the defendants violated the plaintiffs' rights by denying the Forros transportation aid to attend St. Augustine for the 2015–16 and 2016–17 school years. However, it is somewhat difficult to identify the precise contours of the plaintiffs' federal legal theories. In their brief, the plaintiffs contend that they have "several constitutional rights at issue" in this case. Pl. Br. at 15. The plaintiffs then identify several rights, including (1) a right to form and attend a private school that aligns with their religious beliefs, *id.*; (2) a right not to be discriminated against because they engage in religious exercise, *id.* at 16; (3) a right not to be denied government benefits based on a test that the government does not apply to nonreligious entities, *id.* at 16–17; and (4) a right "not to have the state excessively entangled in their religious practices," *id.* at 18–20. However, in a section of their brief entitled "[t]he Plaintiffs have been deprived of

---

interpreted § 121.51(1) as the plaintiffs believe it should be interpreted.

constitutionally protected rights," the plaintiffs contend that they were deprived of only the third right on their list: the right to receive government benefits on the same terms as nonreligious entities. *Id.* at 20–21. In this section, they argue that St. Augustine's "attendance area would have been approved as requested if it were a secular private school located precisely where St. Augustine is located." *Id.* at 20. Based on this part of their brief, I understand the plaintiffs to be arguing that the defendants' actions violated their rights under the Religion Clauses and the Equal Protection Clause by applying a test to St. Augustine that they would not have applied to a similarly situated nonreligious private school. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (noting that it is "a principle at the heart of the Establishment Clause" that "government should not prefer one religion to another, or religion to irreligion"); *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872–73 (7th Cir. 2014) (recognizing that the First Amendment and the Equal Protection Clause require a state to administer its laws neutrally as between different religions and as between religion and equivalent secular organizations).

The plaintiffs' "neutrality" argument is based on the premise that the defendants would have approved St. Augustine's attendance area if it were a nonreligious private school, rather than a religious

private school. I will assume for purposes of this opinion that if St. Augustine were a nonreligious private school that was not affiliated with any "sponsoring group" that already operated a private school within the proposed attendance area, then the defendants would have approved its attendance area. But as discussed above, in *Vanko*, the Wisconsin Supreme Court inserted the "single sponsoring group" concept into § 121.51(1) to avoid the concern that the statute treated religious schools differently than secular schools. Thus, for purposes of adjudicating the plaintiffs' neutrality claim, the relevant comparator is not just any nonreligious private school, but a nonreligious private school that could be thought to be affiliated with a "sponsoring group" that already operates a school within the proposed attendance area.

The plaintiffs have pointed to no evidence in the summary-judgment record from which a reasonable trier of fact could conclude that either the Friess Lake School District or the state superintendent would, in violation of § 121.51(1) and *Vanko*, grant secular private schools that are affiliated with or operated by the same sponsoring group overlapping attendance areas. And the defendants in their brief state that it is their understanding that "it would be well within the bounds of [state law] for a district to refuse overlapping attendance areas to two Montessori schools, even if they were incorporated as two

separate legal entities." Def. Br. at 16. Although a party's statement in its brief is not evidence, the important point is that the defendants do not concede that they have treated or would treat secular private schools differently than they have treated St. Augustine, and the plaintiffs have not met their burden to produce evidence from which a reasonable trier of fact could conclude that the defendants either have treated or would treat such secular schools differently. They have not, for example, pointed to deposition testimony suggesting that the defendants would treat secular schools differently, and they have not submitted evidence suggesting that either defendant has granted secular private schools affiliated with the same secular sponsoring group, such as Montessori schools, overlapping attendance areas. Thus, the defendants are entitled to summary judgment on the plaintiffs' claim that the defendants violated the First Amendment and the Equal Protection Clause by applying a test to St. Augustine that they would not have applied to a similarly situated secular private school.

Having decided the plaintiff's "neutrality" claim, I believe I have decided the plaintiffs' only federal claim. However, at places in their briefs, the plaintiffs contend that the defendants' interpretation of § 121.51(1) caused them to "evaluat[e] competing religious claims" in a way that led to "excessive entanglement." Reply. Br. at 12. They argue that the defendants impermissibly made a religious judgment

that both St. Augustine and St. Gabriel practice the same religion and therefore are affiliated with the same religious denomination. "Excessive entanglement" is a concept that derives from the Supreme Court's Establishment Clause jurisprudence; it is one of the prongs of the so-called "*Lemon* test" of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under this prong of the test, a statute will be deemed unconstitutional if it "fosters an excessive government entanglement with religion." *Id.* at 613 (internal quotation marks omitted). In light of the plaintiffs' references to excessive entanglement, a question arises as to whether they are alleging that the defendants committed a constitutional violation by excessively entangling themselves in a religious matter. I do not believe that they are, but in case I am mistaken, I will also address whether the plaintiffs are entitled to damages under § 1983 based on an excessive-entanglement theory.

An initial issue is that the *Lemon* test and its entanglement prong are not designed to apply to a single decision made by state actors under a broader statutory scheme. Rather, the *Lemon* test is used to evaluate whether the entire statutory scheme or a broader governmental policy or practice is unconstitutional. For example, in *Lemon* itself, the Court found two state statutes unconstitutional because ongoing administration of the statutes would have led to excessive entanglement between church and state. *See Lemon*, 403 U.S. at 614–25. Other

cases evaluate whether an ongoing governmental policy or practice, even if not embodied in a statute, results in excessive entanglement. *See Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 842, 849 (7th Cir. 2012) (en banc) (evaluating whether school district's "practice" of holding "high school graduations and related ceremonies" at a church violated the *Lemon* test). The plaintiffs have not cited, and I have not found, a case holding that a governmental actor's single decision under a broader statutory scheme can be deemed unconstitutional on the ground that it involved excessive entanglement. Rather, it is usually the entire statutory scheme or governmental policy that is evaluated for excessive entanglement. Where such entanglement is found, the entire statute or practice is deemed unconstitutional and invalidated.

Thus, in the present case, if the defendants' interpretation of § 121.51(1) were correct as a matter of state law (which is something that the state courts must decide), and their ongoing administration of the statute with respect to religious private schools resulted in excessive entanglement, then a question would arise as to whether the Wisconsin law that grants transportation aid to students of private schools is unconstitutional as a whole. Alternatively, perhaps only the "same religious denomination" sentence of § 121.51(1) would be unconstitutional, and it could be severed from the statute. But the defendants' single and potentially erroneous

application of the statute to one religious school could not result in a finding of excessive entanglement. *Cf. Nelson v. Miller*, 570 F.3d 868, 881–82 (7th Cir. 2009) (finding that state actor's "one time" act of entanglement did not result in *excessive* entanglement). Accordingly, the defendants' single alleged act of entanglement could not have resulted in a violation of § 1983.

In case I am mistaken about whether a single act of entanglement could give rise to liability under § 1983, I also conclude that the defendants in this case did not excessively entangle themselves in a religious matter. "The general rule is that, to constitute excessive entanglement, the government action must involve 'intrusive government participation in, supervision of, or inquiry into religious affairs.'" *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 995 (quoting *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir.2000)). Here, I will assume that, had the district or the superintendent made the kind of extensive inquiry into St. Augustine's religious affiliations that the superintendent made in *Holy Trinity*, then the defendants would have excessively entangled themselves in the plaintiffs' religious affairs. However, as I have explained, the defendants did not make that kind of inquiry into St. Augustine's religious beliefs and practices. Rather, because St. Augustine was obviously a religious school and did not submit any articles of incorporation or bylaws

that identified or disclaimed its affiliation with a religious denomination, the defendants looked elsewhere to determine what St. Augustine "purport[ed] to be," as required by *Holy Trinity*. 82 Wis. 2d at 153. The defendants then turned to the statement on St. Augustine's website describing it as a "Roman Catholic School," and they accepted this statement at face value and concluded that St. Augustine was affiliated with the Roman Catholic denomination. These actions did not involve any participation in, supervision of, or intrusive inquiry into religious affairs.

The plaintiffs contend that the defendants' reliance on St. Augustine's describing itself as a Roman Catholic school involved the application of a "religious test." Although the plaintiffs do not precisely explain what they mean by "religious test," I understand them to be arguing that the defendants improperly concluded that all Roman Catholics have the same religious beliefs and follow the same religious practices and therefore all follow the same "religion." But this is not an accurate description of what the defendants did. What they did, instead, was conclude that, *for purposes of § 121.51(1)*, Roman Catholicism is a single "religious denomination," even if there are branches within the denomination that have different religious beliefs or follow different religious practices. The term "religious denomination," as used in the statute, is not a religious test. It does not require the state to evaluate

the truth or falsity of any particular religious belief or to determine the sincerity of any person's religious beliefs. It is simply a secular term that is used for administering the statute. Thus, the state could determine that two schools that call themselves Roman Catholic are affiliated with the same religious denomination—as that term is used in the statute—even if the schools and their attendees would not consider themselves to have the same religious beliefs or to be following the same religious practices. Making this determination does not excessively entangle the state in a religious matter. It is no different than the state's concluding that two Montessori schools are affiliated with the same sponsoring group because they each use the label "Montessori," even though each school may practice the Montessori method a bit differently.

To be sure, one can envision difficulties with the state's routinely making judgments about whether two schools that describe themselves in a similar way are affiliated with the same religious denomination. The problem here is in defining what the statute means by "religious denomination." For example, in the present case, St. Augustine did not describe itself as just a "Roman Catholic school," but as a "*traditional* Roman Catholic school." What criteria should the state employ when determining whether two schools that describe themselves similarly, but not identically, are affiliated with the same religious denomination, as that term is used in

the statute?[6] Perhaps creating and applying such criteria to the attendance areas of multiple private religious schools would lead to excessive entanglement or other constitutional problems in the long run. Similar problems could arise in the secular context: what happens if two private Montessori schools describe themselves slightly differently? To avoid these problems, the state may wish to interpret § 121.51(1) as the plaintiffs have—that is, to make the test of affiliation always turn on the school's corporate organization rather than on its affiliation with a religious denomination or a secular sponsoring group. But as I have explained, I do not read the existing state cases to have already interpreted § 121.51(1) in this way. And because the proper interpretations of "religious denomination" and "sponsoring group" present novel questions of state law, I will decline to exercise supplemental jurisdiction over the plaintiffs' state-law claim.

III. CONCLUSION

---

[6] Notably, this problem could arise even if the superintendent considered nothing other than a school's description of itself in its articles of incorporation, in accordance with *Holy Trinity*. For example, what if St. Augustine's articles of incorporation described the school as a "traditional Roman Catholic school"? In this example, the state would have to make a judgment about whether Roman Catholicism and "traditional" Roman Catholicism are each part of the same denomination.

For the reasons stated, **IT IS ORDERED** that the defendants' motion for summary judgment is **GRANTED IN PART**, that is, insofar as it pertains to the plaintiffs' federal claims.

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that the plaintiffs' state-law claim for judicial review of the superintendent's final decision under Wis. Stat. § 121.51(1) is **REMANDED** to state court pursuant to 28 U.S.C. § 1367(c).

IT IS FURTHER ORDERED that the superintendent's motion to dismiss is **DENIED** as **MOOT**.

Dated at Milwaukee, Wisconsin, this 6th day of June, 2017.

/s/ Lynn Adelman
LYNN ADELMAN
United States District Judge

APPENDIX H

STATE OF WISCONSIN
BEFORE
THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter the Transportation of Students from the Friess Lake School District to St. Augustine School, Inc.

Decision

To: Tim Zignego
Chairman of the Board
St. Augustine School, Inc.
1810 Highway CC
Hartford, WI 53027

John Engstrom
District Administrator
Friess Lake School District
1750 State Road 164
Hubertus, WI 53033

INTRODUCTION

Pursuant to Wis. Stat. § 121.51(1), St. Augustine School, Inc. ("School") and the Friess Lake School District ("District") requested the State Superintendent of Public Instruction ("State Superintendent") to determine whether the District must provide transportation to three of the School's students. The District denied the School's request for transportation. The parties have submitted various materials to the State Superintendent to assist him in making his determination. The State Superintendent has reviewed these materials, other public information, and the law to reach his determination.[1]

RELEVANT FACTS

[1] By letter dated December 21, 2015, Janet Jenkins, Chief Legal Counsel, sent a letter to the School and the District stating, among other things, that the parties could provide any additional information the parties wished to submit. By December 21, both the School and the District already had submitted their positions and the reasons therefor. The parties had also submitted other documentation. The deadline for submitting additional information, as set forth in the December 21 letter, was January 8, 2016. The District provided some supplementary information. On or about January 11, 2016, the School contacted Chief Legal Counsel for the DPI via email and stated the School had not seen the December 21 letter until then because the School was closed for the holidays. The School did not state it had additional information to provide and the State Superintendent believes it has all the information it needs to reach its decision.

The District is a Wisconsin public school district within the meaning of Wis. Stat. § 115.01(3). The School is a private school within the meaning of Wis. Stat. § 115.001(3r) and is organized as a Wisconsin non-stock corporation under the provisions of Wis. Stat., ch. 181. The School is governed by a Board of Directors selected pursuant to the School's bylaws. The School has submitted to the State Superintendent a copy of its bylaws as well as an amendment to its Articles of Incorporation. The amendment only changed the name of the School from Neosho Country Christian School, Inc. to St. Augustine School, Inc. This amendment was dated May 25, 1994 and filed with the Wisconsin Secretary of State on June 14, 1994.[2] The District has also provided information to the State Superintendent in letter form.

In a letter from the School to the District dated April 27, 2015, the School requested the District to provide transportation for three students, all siblings, via a parent transportation contract. A parent transportation contract is one method school districts can use to provide transportation. Under a parent

---

[2] The School did not provide the complete Articles of Incorporation filed by its predecessor, Neosho Country Christian School, Inc. which, according to the online records of the Wisconsin Department of Financial Institution, were filed in 1981. These Articles are still in effect except for the amendment to change the name.

compensation contract, a school district pays parents to transport children to school (Wis. Stat. § 121.55(b)).

The District responded to the School's request by letter dated April 29. It denied the School's request to provide transportation for the requested students. The reasons for the District's denial that are important to a determination of this matter are:

- The School is affiliated with the Roman Catholic denomination.
- The District already provides transportation for students attending St. Gabriel Catholic School, another Roman Catholic School within the District's attendance area.
- St. Gabriel' s attendance area includes the entirety of the District's attendance area and therefore, the attendance areas of the School and St. Gabriel School overlap.[3]

The School responded to the District's letter by letter dated May 20, 2015 claiming the District must provide transportation to the School's students because:

---

[3] The School does not dispute the District's allegations that it already provides transportation to students of St. Gabriel School, a Roman Catholic School whose attendance area is co-extensive with the attendance area of the District.

- The School's Articles of Incorporation and bylaws show the School is organized as an independent Wis. Stat., ch. 181 corporation and is governed independently of any denomination.
- St. Gabriel Catholic School and the Archdiocese of Milwaukee have not managed, controlled or had any governance affiliation with the School.
- It is unconstitutional for the District to determine denominational affiliation by examining doctrine or other religious differences between schools.
- The School is an independent, private school and as such, the law permits no inquiry beyond the School's name change amendment and bylaws to determine whether the School and St. Gabriel Catholic School are private schools affiliated with the same religious denomination.[4]
- The question of whether St. Gabriel and the School are private schools affiliated with the same religious denomination is not a factor to be considered in applying Wis. Stat. § 121.51(1).

QUESTIONS PRESENTED

[4] Additional facts will be added to the Discussions section of this Decision and Order where appropriate.

1. Under the facts of this case, did the District improperly inquire into the School's religious affiliation beyond a review of the School's name change amendment to its Articles of Incorporation and bylaws?

2. Did the District properly determine that the School was affiliated with the Roman Catholic religious denomination thus permitting the the District to deny transportation to the the School's students?

DISCUSSION

Wisconsin Statutes § 121.51(1) lies at the heart of dispute between the School and the District. That statute states:

> (1) "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. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. **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. (emphasis supplied).

The dispute herein revolves around the portion of Wis. Stat., § 121.51(1) emphasized in the above-quoted statute.

The District contends both the School and St. Gabriel's are affiliated with the Roman Catholic denomination and that their attendance areas overlap. The School argues the District may not look beyond the School's corporate status, its name change amendment, and its bylaws to reach the District's conclusion that the School is a religious school affiliated with the Roman Catholic denomination. To do otherwise, the School contends, results in a constitutionally impermissible entanglement of state authority in religious affairs.

In support of its argument, the School relies exclusively upon the decision in *Holy Trinity Community School, Inc. v. Kahl,* 82 Wis.2d 139, 262 N.W.2d 210 (1978) *("Kahl").*[5] The School's reliance is

[5] In *Kahl,* the Court reviewed the decision of the Racine County Circuit Court which affirmed the decision of State Superintendent, William C. Kahl, who upheld the decision of the

misplaced. The Supreme Court in *Kahl* did not rule it is always impermissible for a school district to look beyond the School's corporate status, Articles of Incorporation and bylaws to determine whether a school is a private religious school affiliated with a particular religious denomination. As the Supreme Court noted in *Kahl,* "**Under the facts peculiar to this case**, the attempt of the Superintendent of Public Instruction to administer the law results in excessive entanglement of state authority in religious affairs." (emphasis supplied), *Id.* 149-150. The facts in the instant case are very different from the facts in *Kahl* and lead to a different conclusion.

In *Kahl,* the court found that the bylaws of Holy Trinity, also a Wis. Stat., ch. 181 independent corporation, provided ample evidence the school was: (1) a private religious school, and (2) not affiliated with any religious denomination. Among the evidence supporting the court's conclusion were provisions in Holy Trinity's bylaws stating the corporation, i.e., the school, was to be maintained in the Judeo-Christian tradition. Moreover, the language of Article 4 of Holy Trinity's bylaws specifically disavowed any religious affiliation and encouraged students to practice the religion of their choice for which Holy Trinity provided a "released time" program in the school. *Id.* 144. The *Kahl* court found all these facts sufficient to

---

Racine County Unified School District denying Holy Trinity's request for transportation from the Racine County Unified School District to Holy Trinity.

determine Holy Trinity was a religious school not affiliated with any religious denomination.

There are no equivalent statements in the School's bylaws. Rather, the bylaws only contain provisions frequently found in the bylaws of many non-religious public and private corporations organized and operating under Wis. Stat., chs. 180 and 181. The School's bylaws relate only to such items as the composition and powers of the corporation's board of directors and the officers of the corporation, meetings of the board of directors, indemnity and liability of the corporation, its directors and officers, and a few other provisions of the same ilk. Nothing in the School's bylaws even hints that the School is a private religious school or a private, religious non-denominational school. Similarly, there is nothing in the School's name change amendment to its Articles of Incorporation that reveals anything about the School's nature, i.e., religious or non-religious, or its affiliation with a religious denomination.[6]

In the absence of such evidence, the District must look beyond the School's name change amendment and bylaws to determine how Wis. Stat. § 121.51(1) applies to the School's request for

[6] The State Superintendent recognizes that the use of a saint's name is often used by religious schools, but that fact, alone, is not sufficient to show that the School is a religious School or that the School is affiliated or not affiliated with any religious denomination.

transportation of its students. If the District cannot do this, the District cannot meet its legal obligation to comply with Wis. Stat., § 121.51(1). Therefore, under the specific facts of this case, the District has the authority to look beyond the name change amendment and bylaws to determine how to apply Wis. Stat., § 121.51(1), as long as the manner in which it does so does not create an "excessive entanglement of state authority in religious affairs. *Id.* 149-150.

The District contends the School's public website provides sufficient information from which to determine that the School is a private religious school affiliated with the Roman Catholic denomination. Reviewing a public website that is created and maintained by or on behalf of the School, and accepting the School's description of itself as set forth in that website, does not create an excessive entanglement of state authority in religious affairs. This is so because a public website, by its very nature, invites, and even wants persons to review it. Under this circumstance, the District's review of the website and acceptance of the School's description of itself as set forth therein simply does not create any entanglement, let alone an excessive entanglement of state authority in religious affairs.

The School's website provides ample evidence the School is a religious school affiliated with the Roman Catholic denomination. The "About Us" portion of the website states the School is, " ... an

independent and private traditional Roman Catholic School ... [that is] an incorporation of dedicated families, who believing that all good things are of God, have joined together to provide the children of our Catholic community with an exceptional classical education ... " The website also contains the statement, "SAS loves and praises all the traditional practices of the Catholic faith ... " These statements are but two of a number of statements in the website pages from which any reasonable person would conclude the School is a religious school affiliated with the Roman Catholic denomination.[7]. A copy of the first three pages of the website are attached to this Decision.

CONCLUSION

St. Augustine School, Inc. is a private, religious school affiliated with the Roman Catholic denomination. The District already provides transportation to students attending St. Gabriel School, another private, religious school affiliated with the Roman Catholic denomination, the attendance area of which is co-extensive with the attendance area of the District. Therefore, the attendance area of the School overlaps the attendance area of St. Gabriel. Pursuant to Wis. Stat.§ 121.51(1), the Friess Lake School District is not required to

[7] The School, in its submission to the State Superintendent did not mention the existence of its website or discuss how the website did or did not affect the decision to be made herein.

provide transportation to students attending St. Augustine School, Inc.

Dated this 10th day of March, 2016

/s/ Michael J. Thompson
Michael J. Thompson, Ph.D.
Deputy State Superintendent

APPENDIX I

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 19, 2022

Before

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 17-2333

ST. AUGUSTINE SCHOOL, *et al.*,
Plaintiffs-Appellants,
v.

JILL UNDERLY, in her official capacity as Superintendent of Public Instruction, *et al.,*
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:16-cv-00575-LA

Lynn Adelman,
Judge.

O R D E R

On consideration of the petition for rehearing filed by Plaintiffs-Appellants on January 3, 2022, all members of the original panel have voted to deny the petition for panel rehearing.

Accordingly, the petition for rehearing is hereby **DENIED**.

APPENDIX J

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 7, 2018

Before

DIANE P. WOOD, *Chief Judge*

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 17-2333

ST. AUGUSTINE SCHOOL, *et al.*,
Plaintiffs-Appellants,

v.

TONY EVERS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:16-cv-00575-LA

Lynn Adelman,
Judge.

ORDER

Plaintiffs-appellants filed a petition for rehearing and rehearing *en banc* on October 25, 2018, and on November 21, 2018, defendants-appellees filed an answer to the petition. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing is therefore DENIED.

APPENDIX K

SUBCHAPTER IV

TRANSPORTATION AID

121.51 Definitions. In this subchapter:

(1) "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. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. 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.

(3) "School board" has the meaning designated in s. 115.001(7) and includes any governmental agency transporting children to and from public schools.

(4) "School bus" has the meaning designated in s. 340.01 (56).

History: 1975 c. 120; 1983 a. 189 ss. 185, 329 (17); 1983 a. 512; 1989 a. 31; 1995 a. 27 s. 9145 (1); 1997 a. 27.

121.54 Transportation by school districts. (1) CITY OPTION. (a) Subsections (2) and (6) and s. 121.57 do not apply to pupils who reside in a school district that contains all or part of a city unless the school they attend is located outside the city but within the boundaries of the school district.

(b) If a school district elects under sub. (2) (c) to provide transportation for the pupils under par. (a), state aid shall be paid in accordance with s. 121.58, and there shall be reasonable uniformity in the transportation furnished to the pupils, whether they attend public or private schools.

(c) Paragraph (a) does not apply to pupils who reside in a school district that contains all or part of a 1st, 2nd or 3rd class city with a population exceeding 40,000 unless transportation for the pupils is available through a common carrier of passengers operating under s. 85.20 or ch. 194.

(2) GENERAL TRANSPORTATION. (a) Except as provided in sub. (1), every school board shall provide transportation to and from public school for all pupils who reside in the school district 2 miles or more from the nearest public school they are entitled to attend.

(am) In lieu of transporting a pupil who is eligible for transportation under par. (a) to and from his or her residence, a school district may transport

the pupil to or from, or both, a before− and after−school child care program under s. 120.125, a child care program under s. 120.13 (14), or any other child care program, family child care home, or child care provider.

(b) 1. Except as provided in sub. (1) or otherwise provided in this subsection, the school board of each district operating high school grades shall provide transportation to and from the school a pupil attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a private school located 2 miles or more from the pupil's residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.

2. In lieu of transporting students under subd. 1. and paying for transportation under sub. (8) (b), an underlying elementary school district of a union high school district may elect, by resolution adopted at its annual or special meeting, to transport elementary school children who reside within the underlying district and qualify for transportation under subd. 1., in vehicles owned, operated or contracted for by the district. Once adopted, such a resolution may be repealed only upon one year's notice to the board of the union high school district of which the underlying district is a part. An elementary school district shall notify the union high school district of any action

under this paragraph no later than June 15 preceding the school year in which the elementary school district's action takes effect.

3. Annually by April 1, each private school shall submit its proposed attendance area for the ensuing school year to the school board of each school district having territory within the proposed attendance area. If a proposal is not submitted by April 1, the existing attendance area shall remain in effect for the ensuing school year.

4. No later than May 15 in each year, each private school shall notify each school board of the names, grade levels and locations of all pupils, if any, eligible to have transportation provided by such school board under this paragraph and planning to attend such private school during the forthcoming school term. The school board may extend the notification deadline.

(c) An annual or special meeting of a common or union high school district, or the school board of a unified school district, may elect to provide transportation for pupils who are not required to be transported under this section, including pupils attending public school under s. 118.145 (4) or 118.53. Transportation may be provided for all or some of the pupils who reside in the school district to and from the public school they are entitled to attend or the private school, within or outside the school district, within whose attendance area they reside. If transportation is provided for less than all such pupils there shall be reasonable uniformity in the minimum distance that

pupils attending public and private schools will be transported. Except for elementary school districts electing to furnish transportation under par. (b) 2., this paragraph does not permit a school district operating only elementary grades to provide transportation for pupils attending private schools.

(d) A school board may provide transportation for teachers to and from public school, subject to the same controls and limitations as apply to the transportation of pupils.

(e) Notwithstanding par. (a), if a pupil is living outside the school district in which he or she is enrolled because the pupil's parents or guardians have joint legal custody, as defined in s. 767.001 (1s), of the pupil, upon the request of the pupil's parent or guardian the school district shall transport the pupil to and from an agreed−upon location within the school district.

(3) TRANSPORTATION FOR CHILDREN WITH DISABILITIES. Every school board shall provide transportation for children with disabilities, as defined in s. 115.76 (5), to any public or private elementary or high school, to the school operated by the Wisconsin Center for the Blind and Visually Impaired or the school operated by the Wisconsin Educational Services Program for the Deaf and Hard of Hearing or to any special education program for children with disabilities sponsored by a state tax−supported institution of higher education, including a technical college, regardless of distance, if the request for such transportation is approved by the

state superintendent. Approval shall be based on whether or not the child can walk to school with safety and comfort. Section 121.53 shall apply to transportation provided under this subsection.

(4) SUMMER CLASS TRANSPORTATION. A school board may provide transportation for pupils residing in the school district and attending summer classes. If the school board provides transportation for less than all pupils, there shall be reasonable uniformity in the minimum and maximum distances pupils are transported.

(5) TRANSPORTATION TO TECHNICAL COLLEGES. The school board of a district operating high school grades may provide for the transportation or board and lodging of residents of the school district attending technical colleges outside the school district who are not high school graduates, are less than 20 years of age and attend such colleges full time. The school board of such a district may also provide transportation for residents of the district participating in vocational education programs organized cooperatively between school districts under s. 66.0301. The school district shall be paid state aid for such transportation or board and lodging in accordance with s. 121.58. This subsection does not apply if the distance between a pupil's home and the technical college along the usually traveled public highway is more than 15 miles, unless the pupil resides on an approved bus route or board and lodging are provided.

(6) TRANSPORTATION IN SPECIAL CASES. The school board of a district operating high school grades which, under s. 121.78 (2) (a), must permit a pupil to attend high school outside the school district shall provide transportation for such pupil if the pupil resides 2 or more miles from the high school that the pupil attends.

(7) TRANSPORTATION FOR EXTRACURRICULAR ACTIVITIES. (a) A school board may provide transportation for pupils attending public or private schools, their parents or guardians, authorized chaperones, school officers, faculty and employees and school doctors, dentists and nurses in connection with any extracurricular activity of the public or private school, such as a school athletic contest, school game, after school practice, late activity, school outing or school field trip or any other similar trip when:

1. A school bus or motor bus or a motor vehicle under s. 121.555 (1) (a) is used and such transportation is under the immediate supervision of a competent adult.

2. A school operated by the school district or the private school has an actual interest in the safety and welfare of the children transported to the activity;

4. The school principal or other person with comparable authority authorizes such use.

(b) 1. If transportation is provided to pupils and other persons in connection with any extracurricular activity of a public school under par. (a), the school board may make a charge for such transportation, to

be paid by the persons transported, sufficient to reimburse it for the cost of providing the transportation. If transportation is provided to pupils and other persons in connection with any extracurricular activity of a private school under par. (a), the school board shall make a charge for such transportation, to be paid by the private school or the persons transported, sufficient to reimburse it for the cost of providing the transportation.

2. The school board may contract under s. 121.52 (2) (b) for transportation authorized under par. (a) for pupils attending public schools. The school board may authorize a charge for the transportation, to be paid by the persons transported, sufficient to make reimbursement for the cost of providing the transportation.

(8) PAYMENT OF TRANSPORTATION COSTS. (a) The cost of providing transportation for pupils under subs. (1) to (6) and s. 121.57 shall be paid by the school district in which they reside, and no part of such cost may be charged to the pupils or their parents or guardians.

(b) At the end of the school term, every union high school district shall submit to each of its underlying school districts operating only elementary grades a certified statement of the actual cost for the school year, less the amount to be paid for such pupils for that school year under s. 121.58 (2), of transporting the private school pupils residing in the underlying school district under sub. (2) (b). On or before June 30 in each year each underlying school

district shall reimburse the union high school district for the net cost of transporting its resident private school pupils as so reported in the statement.

(9) TRANSPORTATION IN AREAS OF UNUSUAL HAZARDS. (a) In school districts in which unusual hazards exist for pupils in walking to and from the school where they are enrolled, the school board shall develop a plan which shall show by map and explanation the nature of the unusual hazards to pupil travel and propose a plan of transportation if such transportation is necessary, which will provide proper safeguards for the school attendance of such pupils. Copies of the plan shall be filed with the sheriff of the county in which the principal office of the school district is located. The sheriff shall review the plan and may make suggestions for revision deemed appropriate. The sheriff shall investigate the site and plan and make a determination as to whether unusual hazards exist which cannot be corrected by local government and shall report the findings in writing to the state superintendent and the school board concerned. Within 60, but not less than 30, days from the day on which the state superintendent receives the sheriff's report, the state superintendent shall determine whether unusual hazards to pupil travel exist and whether the plan provides proper safeguards for such pupils. If the state superintendent makes findings which support the plan and the determination that unusual hazards exist which seriously jeopardize the safety of the pupils in their travel to and from school, the school

board shall put the plan into effect and state aid shall be paid under s. 121.58 (2) (c) for any transportation of pupils under this subsection. Any city, village or town may reimburse, in whole or in part, a school district for costs incurred in providing transportation under this subsection for pupils who reside in the city, village or town.

(am) Any person aggrieved by the failure of a school board to file a plan with the sheriff as provided in par. (a) may notify the school board in writing that an area of unusual hazard exists. The school board shall reply to the aggrieved person in writing within 30 days of receipt of the aggrieved person's notice. The school board shall send a copy of the board's reply to the sheriff of the county in which the principal office of the school district is located and to the state superintendent. Upon receipt of the school board's reply, the aggrieved person may request a hearing before the state superintendent for a determination as to whether an area of unusual hazard exists. If the state superintendent determines that an area of unusual hazard exists, the state superintendent shall direct the school board to proceed as provided in par. (a).

(b) Within 30 days after the sheriff's report is received by the state superintendent, any aggrieved person may request a hearing before the state superintendent on the determination by the sheriff and on the plan. After such hearing, the state superintendent shall proceed as provided in par. (a).

(c) The state superintendent and the department of transportation shall establish a definition of "unusual hazards" and "area of unusual hazards" for the implementation of this subsection. Such definition shall be promulgated, as a rule, by the state superintendent. Cross–reference: See also ch. PI 7, Wis. adm. code.

(10) ATTENDANCE IN NONRESIDENT SCHOOL DISTRICT. Subject to s. 118.51 (14) (a) 2., a school board may elect to provide transportation, including transportation to and from summer classes, for nonresident pupils who are attending public school in the school district under s. 118.51 or 121.84 (4), or its resident pupils who are attending public school in another school district under s. 118.51 or 121.84 (4), or both, except that a school board may not provide transportation under this subsection for a nonresident pupil to or from a location within the boundaries of the school district in which the pupil resides unless the school board of that school district approves.

History: 1971 c. 162; 1973 c. 89, 107, 333; 1975 c. 60, 392, 421; 1977 c. 227, 252, 418; 1981 c. 20 s. 2202 (51) (e); 1983 a. 27, 175; 1985 a. 29 s. 3202 (43); 1985 a. 218, 225, 240; 1993 a. 399, 492; 1995 a. 27 s. 9145 (1); 1995 a. 439; 1997 a. 27, 113, 164; 1999 a. 9, 117; 1999 a. 150 s. 672; 2001 a. 57; 2005 a. 68, 224; 2009 a. 185; 2013 a. 20.

121.55 Methods of providing transportation. (1) School boards may provide transportation by any of the following methods:

(a) By contract with a common carrier, a taxi company or other parties.

(b) By contract with the parent or guardian of the pupil to be transported. If the school board and the parent or guardian cannot agree upon the amount of compensation, the department shall determine the amount of compensation to be designated in the contract.

(c) By contract with another school board, board of control of a cooperative educational service agency or the proper officials of any private school or private school association.

(d) By contract between 2 or more school boards and an individual or a common carrier.

(e) By the purchase and operation of a motor vehicle.

(3) (a) If the estimated cost of transporting a pupil under s. 121.54 (2) (b) 1. is more than 1.5 times the school district's average cost per pupil for bus transportation in the previous year, exclusive of transportation for kindergarten pupils during the noon hour and for pupils with disabilities, the school board may fulfill its obligation to transport a pupil under s. 121.54 (2) (b) 1. by offering to contract with the parent or guardian of the pupil. Except as provided in pars. (b) and (c), the contract shall provide for an annual payment for each pupil of not less than $5 times the distance in miles between the pupil's

residence and the private school he or she attends, or the school district's average cost per pupil for bus transportation in the previous year exclusive of transportation for kindergarten pupils during the noon hour and for pupils with disabilities, whichever is greater.

(b) Except as provided in par. (c), if 2 or more pupils reside in the same household and attend the same private school, the contract under par. (a) may, at the discretion of the school board of the school district operating under ch. 119, provide for a total annual payment for all such pupils of not less than $5 times the distance in miles between the pupils' residence and the private school they attend, or the school district's average cost per pupil for bus transportation in the previous year exclusive of transportation for kindergarten pupils during the noon hour and for pupils with disabilities, whichever is greater.

(c) The payment under this subsection shall not exceed the actual cost nor may the aids paid under s. 121.58 (2) (a) for the pupil exceed the cost thereof. A school board which intends to offer a contract under par. (a) shall notify the parent or guardian of the private school pupil of its intention at least 30 days before the commencement of the school term of the public school district.

History: 1979 c. 34, 221; 1981 c. 263; 1983 a. 264; 1997 a. 164; 2009 a. 28.