No. 21-1295

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 a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners challenged a single application of a Wisconsin statute providing that school districts need only provide transportation aid to one private school "affiliated with the same religious denomination" per attendance area. The Seventh Circuit originally concluded that the single application did not violate the First Amendment. This Court issued a grant-vacate-remand order for further consideration in light of its decision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

Did the Seventh Circuit properly (1) consider *Espinoza* upon remand and, in so doing, determine that it needed a predicate state-law question answered, and (2) upon receiving that answer from the Wisconsin Supreme Court, hold in Petitioners' favor on grounds of an erroneous application of state law?

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INTRODUCTION

The Seventh Circuit has now ruled *in Petitioners' favor*. Petitioners nevertheless ask this Court to grant certiorari to rewrite that decision on the grounds they prefer. But, of course, this Court's precious time and resources are not well spent rewriting favorable opinions.

Moreover, this case would present a poor vehicle to address First Amendment issues. Petitioners have repeatedly made clear that they do not challenge Wisconsin's statutory scheme that limits the requirement of transportation benefits to one private school per attendance area "affiliated with the same religious denomination." Instead, they challenge only a single application of that statute. And this case was shaped in large part by the unique fact that Petitioner St. Augustine School provided the State Superintendent with some but not all documentation about its organizational structure. Petitioners do not even try to argue that review would resolve any broader conflict, provide any broader clarity, or serve any purpose beyond their own desire for a First Amendment decision.

Lastly, the petition's core premise is incorrect. Petitioners argue that the Seventh Circuit did not comply with this Court's grant-vacate-remand order for further consideration in light of this Court's *Espinoza* decision, but the Seventh Circuit indeed considered *Espinoza* on remand. In so doing, it determined it needed resolution of a predicate state-law question. Petitioners somehow lament that when

the Seventh Circuit obtained that state-law clarity, it dispositively determined that the single application at issue constituted an erroneous application of state law. But it is well accepted that federal courts should not delve into constitutional questions when other grounds dispose of the matter.

This Court should deny the petition.

STATEMENT OF THE CASE

I. Statutory and factual background.

Wisconsin law generally requires local school boards to provide transportation to a student who attends a private school located two miles or more from the student's residence, but only "if such private school is a school within whose attendance area the pupil resides" and only if the private school is located either within the school district or not more than five miles beyond the district's boundaries. Wis. Stat. § 121.54(2)(b)1.

A private school's "attendance area" is the geographic area designated by the private school as the area from which its students attend, which the relevant school board must also approve. Wis. Stat. § 121.51(1). The statute provides that "[t]he attendance areas of private schools affiliated with the

same religious denomination shall not overlap."[1] *Id*. The Wisconsin Supreme Court years ago construed this language "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." *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971).

If the private school and the school board cannot agree on the attendance area, the state superintendent must, upon the request of both the private school and local school board, make a final determination of the attendance area. Wis. Stat. § 121.51(1).

Petitioners do not challenge this statutory scheme. (Pet. 8.) They challenge one particular application.

In 2015, Petitioners—St. Augustine School ("St. Augustine") and the Forro parents—applied for transportation benefits to the Friess Lake School District (the "School District") to transport the Forro children to St. Augustine. (Pet. App. 193–94a.) The School District denied the request because St. Augustine identified itself as a "Roman Catholic" school and the School District already provided transportation benefits to another "Roman Catholic"

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[1] An exception, not relevant here, is when one school limits its enrollment to students of the same sex and the other school limits its enrollment to students of the opposite sex or admits students of both sexes. Wis. Stat. § 121.51(1).

school. (Pet. App. 194a.) St. Augustine asserted it was entitled to benefits as it was an independent, private school, while the other school was affiliated with the Archdiocese of Milwaukee. (Pet. App. 195a.)

St. Augustine and the School District asked the State Superintendent of Public Instruction (the "Superintendent") to make a final decision. (Pet. App. 192a.) Though St. Augustine provided a copy of its bylaws and an amendment to its articles of incorporation, it did not provide its articles of incorporation to the Superintendent. (Pet. App. 193a; *see also* Pet. 13 n.5.) The School District provided the Superintendent with printouts from St. Augustine's website, in which the school described itself as "an independent and private traditional Roman Catholic School." (Pet. App. 192a, 200–01a.)

The Superintendent issued a written decision in 2016 affirming the denial of transportation benefits. (Pet. App. 191–202a.) The Superintendent determined that because St. Augustine had not submitted any documents addressing affiliation one way or another, that "under the specific facts of this case," consideration of St. Augustine's self-description on its own website was a proper way for the School District to fulfill its legal obligation to comply with the statute while not creating "an excessive entanglement of state authority in religious affairs." (Pet. App. 199–202a.) The Superintendent concluded that as St. Augustine self-identified as a "Roman Catholic" school, St. Augustine was a religious school affiliated with the "Roman Catholic denomination" and thus

was not entitled to benefits because the School District already provided transportation benefits to another "Roman Catholic" school in an overlapping attendance area. (Pet. App. 200–01a.)

II. Procedural history.

A. Petitioners' complaint and proceedings in the district court.

Petitioners sued the School District and the Superintendent in state court. (Pet. App 167a.) Petitioners contended that the School District's and Superintendent's decisions were erroneous applications of Wis. Stat. § 121.51(1). They further asserted claims under 42 U.S.C. § 1983, contending that the School District's and Superintendent's actions violated the First Amendment. (Pet. App. 167a.)[2]

The School District and Superintendent removed the case to the United States District Court for the Eastern District of Wisconsin. (Pet. App. 167a.) The Superintendent moved to be dismissed on various grounds. (Pet. App. 167a.) Before that motion was resolved, the parties moved for summary judgment. (Pet. App. 167–68a.)

The district court entered its decision and order on June 6, 2017. (Pet. App. 158–90a.) It denied Petitioners' motion for summary judgment and

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[2] Petitioners also raised an Equal Protection challenge but have long-since abandoned that claim.

granted Defendants' motion for summary judgment as to Petitioners' federal-law claim. (Pet. App. 190a.) It declined to exercise supplemental jurisdiction over Petitioners' state-law claim pursuant to 28 U.S.C. § 1367(a), and ordered it remanded to state court pursuant to 28 U.S.C. § 1367(c). (Pet. App. 190a.)

The district court stressed that the "central issue in this case" is a "novel issue of state law." (Pet. App. 169a.) It also noted that it was "somewhat difficult to identify the precise contours of plaintiffs' federal legal theories." (Pet. App. 180a.)

Insofar as Petitioners were raising an excessive entanglement claim, the district court held that the Superintendent's single denial of benefits did not violate the First Amendment's Establishment Clause. (Pet. App. 183–87a.) As St. Augustine had not submitted documentation that "identified or disclaimed its affiliation with a religious denomination," the Superintendent's reliance on St. Augustine's own outward self-description did not "involve any participation in, supervision of, or intrusive inquiry into religious affairs." (Pet. App. 186–87a.)

The district court also noted that though Petitioners had not precisely explained what they meant by arguing that Respondents had engaged in a "religious test," it understood them to be arguing that Respondents "improperly concluded that all Roman Catholics have the same" religious beliefs and practices. (Pet. App. 187a.) "But this is not an

accurate description of what [Respondents] did." (Pet. App. 187a.) Rather, Respondents concluded, for purposes of applying the Wisconsin statute, that Roman Catholicism is a single "religious denomination"—a "secular term that is used for administering the statute." (Pet. App. 187–88a.) It further stressed that the criteria government officials should employ to resolve the question was a matter of state-law interpretation. (Pet. App. 189a.)

Petitioners chose not to raise a challenge to the district court's decision to deny supplemental jurisdiction over their state-law claim on appeal of the district court's judgment and order. (*See* 7th Cir. Dkt. 8; 17.)

B. The Seventh Circuit's first decision and this Court's grant-vacate-remand order.

The Seventh Circuit affirmed the district court's decision granting summary judgment to Respondents on Petitioners' First Amendment claims. (Pet. App. 124–57a.) The court concluded that when "St. Augustine declared itself to be Catholic, [Respondents] took the school at its word." (Pet. App. 125–26a.)

As to Petitioners' Establishment Clause claim, the Seventh Circuit held that "[i]ronically, 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." (Pet. App. 130a.)

As to Petitioners' Free Exercise Clause claim, the Seventh Circuit held that while the statute itself—the constitutionality of which Petitioners were not challenging—would be problematic if it applied only to religious schools, prior Wisconsin caselaw "took that problem off the table" by holding that the statute applies to all private schools "affiliated or operated by a single sponsoring group, whether . . . secular or religious." (Pet. App. 134a (citation omitted).) The court noted that the same bar would apply to "two Montessori schools." (Pet. App. 135a.) It held that "[t]he problem for St. Augustine is not that it is Catholic; it is that it is second in line." (Pet. App. 135–36a.)

The Seventh Circuit also explained that it did not believe it necessary to *sua sponte* abstain from deciding the constitutional issues pursuant to the *Pullman*-abstention doctrine because the Wisconsin Supreme Court had "stressed that the responsible state officials must accept a religious organization's self characterization," and this "was not a close case." (Pet. App. 141–42a.)

Judge Ripple, relying on St. Augustine's articles of incorporation, dissented. (Pet. App. 144–57a.) He concluded the inquiry should have been limited to corporate affiliation, and expressed concern with using a school's self-identification. (Pet. App. 144–57a.)

Petitioners filed a petition for writ of certiorari with this Court in 2019; on July 2, 2020, this Court issued a grant-vacate-remand order, remanding the case to the Seventh Circuit "for further consideration in light of *Espinoza v. Montana Dept. of Revenue*, 591 U.S. ___ (2020)." (Pet. App. 122–23a.)

C. Seventh Circuit remand briefing on *Espinoza*, certification to the Wisconsin Supreme Court, and the Wisconsin Supreme Court's decision.

The Seventh Circuit then ordered the parties to engage in two rounds of briefing concerning the impact of this Court's *Espinoza* decision on this case. First, it requested statements from the parties on how it should proceed in light of this Court's order, pursuant to Seventh Circuit Rule 54. (Pet. App. 114a.) Second, the Seventh Circuit ordered further supplemental briefing on the effects of *Espinoza* and a new issue Petitioners raised in their Rule 54 statement. (Pet. App. 114a.)

After considering those *Espinoza* arguments, the Seventh Circuit explained that "[o]ver the years, the issues in this case have crystallized" and had "boiled down to one dispositive question of state law: what methodology for determining affiliation is required under the relevant Wisconsin statutes?" (Pet. App. 114a.)

The Seventh Circuit noted that this "preliminary question" of whether "both the superintendent and [the Seventh Circuit] have properly understood state law" would shape what analysis remained before it: "If so, then we must consider first whether *Espinoza* renders that state law invalid under the First Amendment." (Pet. App. 115a.) If, however, "as Judge Ripple urged, state law requires the authorities to use neutral criteria such as corporate structure," there would be no need for the Seventh Circuit "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." (Pet. App. 114–15a.)

The Seventh Circuit therefore certified 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.

(Pet. App. 121a.)

The Wisconsin Supreme Court granted the certification and held that the Superintendent "is not

limited to consideration of a school's corporate documents exclusively." (Pet. App. 44a.) Rather, "[i]n 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." (Pet. App. 44a.)

The parties then submitted statements to the Seventh Circuit concerning what further action it should take, pursuant to Seventh Circuit Rule 52(b).

D. The Seventh Circuit's second decision.

The Seventh Circuit—in the decision Petitioners ask this Court to review here—reversed the judgment of the district court. (Pet. App. 1–15a.) The Seventh Circuit concluded: "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 [the Superintendent] characterized the two schools as affiliated." (Pet. App. 12a.)

Based on the principles set forth by the Wisconsin Supreme Court, the Seventh Circuit held that the "Superintendent's decision . . . was not justified by neutral and secular considerations, but instead necessarily and exclusively rested on a doctrinal

determination." (Pet. App. 4a.) The court saw no reason "why the State was entitled to accept St. Augustine's self-characterization as Catholic" but reject its representation that it was "significantly different from . . . the diocesan schools." (Pet. App. 14a.) The Seventh Circuit reversed the judgment of the district court and remanded for further proceedings consistent with its opinion. (Pet. App. 15a.)[3]

The Seventh Circuit denied Petitioners' request for a panel rehearing, (Pet. App. 204a), and Petitioners have now asked this Court to grant certiorari.

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit ruled in Petitioners' favor.

Petitioners ask this Court to grant review to rewrite the rationale of a decision issued in their favor. They argued that they were improperly denied transportation benefits, and the Seventh Circuit has now ruled in their favor, holding that the denial of benefits constituted an erroneous application of Wisconsin law. Petitioners have therefore received a favorable holding, just not on the grounds they would have preferred.

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[3] The parties are currently engaged in post-remand briefing in the district court.

This Court's time and resources are not well spent on a request to rewrite a favorable opinion. This Court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945). This Court is not in the business of rendering "advisory opinion[s], and if the same judgment would be rendered" after editing the lower court's rationale, this Court's review would "amount to nothing more than an advisory opinion." *Id.*

This Court has repeatedly stated that it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted); *see also Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, and n.8 (1984) (collecting cases). It has only ever departed from that principle on a "few occasions," where a "policy reason[n] . . . of sufficient importance" requires it. *Camreta v. Greene*, 563 U.S. 692, 704 (2011) (alteration in original) (citation omitted).

There is no justification for this Court to depart from its longstanding refusal to review favorable opinions here. This case concerns a fact-specific challenge to a single application of a Wisconsin statute. Petitioners identify no conflict of law among jurisdictions or any reason why this Court's review would serve any purpose beyond their aim for a constitutional law-based decision.

Indeed, on remand from the Seventh Circuit, both Respondents have conceded that, pursuant to the Seventh Circuit's second decision, St. Augustine

cannot be denied transportation benefits because it is in the same attendance area as another self-identified "Roman Catholic" school. (*See* Dkt. 66:1–2; 69:8.) And the Forro family has moved and is no longer sending their children to St. Augustine. (Dkt. 60:28.) There is simply no reason for this Court to accept review to issue an advisory opinion that will have no practical effect moving forward.

Petitioners' confusing request for "summary reversal," (or, if not, a second grant-vacate-remand order, or, if not, full litigation before this Court), just further illustrates their overstepping at this stage. (*See, e.g.,* Pet. 29.) The Seventh Circuit's judgment is a reversal of the district court's judgment in Respondents' favor. And Petitioners are not asking this Court to hold that summary judgment should have been granted to Respondents. Petitioners are not actually seeking *reversal* of the Seventh Circuit's favorable decision. Rather, they just seek a *rewriting* of that favorable decision.

This Court should deny the petition on this basis alone.

II. Petitioners' fact-specific challenge to a single application of a state statute presents a poor vehicle to address First Amendment issues.

This case would also present a poor vehicle to address the First Amendment questions Petitioners wish to litigate before this Court, for two main reasons.

First, Petitioners do not challenge Wisconsin's statutory scheme—they have stated that explicitly throughout this case and acknowledge it in their petition. (Pet. 8.) They do *not* challenge that, under Wisconsin law, school districts need not provide transportation benefits to more than one school "affiliated with the same religious denomination" per attendance area. Wis. Stat. § 121.51(1).

Petitioners only challenge the specific application of that statute by the School District and Superintendent to deny them benefits—i.e., the Superintendent's 2016 decision. And, of course, the Seventh Circuit has now held that to be an erroneous application of the statute under the principles articulated by the Wisconsin Supreme Court. (Pet. App. 1–15a.) Any constitutional analysis would necessarily be muddied by the tension between arguments that attack the statute and Petitioners who do not challenge the statute.

Consider, for example, Petitioners' argument that Respondents' decision denying transportation benefits "indirect[ly] coer[ced]" St. Augustine to disavow its religious affiliation to receive benefits. (Pet. 34–35.) The Seventh Circuit has concluded that Respondents erred in applying state law by concluding that St. Augustine was affiliated with another school in the same attendance area, because Respondents relied on St. Augustine's outward self-identification of its denomination while simultaneously rejecting St. Augustine's outward

self-identification of being an independent school. (Pet. App. 14a.)

But Petitioners' *First Amendment* argument is ultimately an attack on the statute they have specifically disavowed challenging: because Wisconsin law limits school districts to providing benefits to only one school "affiliated or operated by a single sponsoring group" per attendance area, (*see* Pet. App. 134a (citation omitted)), no two private schools affiliated with a "single sponsoring group" can obtain benefits. Thus, any religious school affiliated with the same "sponsoring group" that is "second in line," (*see* Pet. App. 135–36a), faces the "indirect coercion" Petitioners assert they faced here. This case would be a poor vehicle to consider such a constitutional argument because this Court would be hamstrung by the inherent tension between a challenge to the statute's operation and a request to hold that only the single application of the statute—and not the statute itself—violates the First Amendment.

Second, and relatedly, this case would be a poor vehicle to address any First Amendment argument because it was largely shaped by the unique fact that St. Augustine provided the Superintendent with some documentation about its organizational structure—an amendment to its articles of incorporation and its bylaws—but not any documentation that "identified or disclaimed its affiliation." (Pet. App. 186–87a.) Under that unique factual scenario, the Superintendent determined that consideration of St.

Augustine's outward self-identification on its website was proper. (Pet. App. 199–202a.) The Seventh Circuit has now held otherwise under Wisconsin law. (Pet. App. 1–15a.) But any constitutional analysis of this unusual factual scenario would not provide a useful vehicle for this Court to address broader First Amendment questions.

III. The Seventh Circuit complied with this Court's grant-vacate-remand order.

Granting certiorari would further be inappropriate because the petition's core premise is incorrect. Petitioners argue that the Seventh Circuit failed to comply with this Court's order to further consider its first decision in light of *Espinoza*, but the Seventh Circuit indeed considered *Espinoza* and its effect on this case.

Petitioners incorrectly equate a grant-vacate-remand order for further consideration in light of *Espinoza*, (Pet. App. 122–23a), with a requirement of that the Seventh Circuit write a constitutional-law based *Espinoza* reversal in their favor. But this Court has stressed that a grant-vacate-remand order does not constitute a "final determination on the merits." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam); *see also, e.g., Tyler v. Cain*, 533 U.S. 656, 666 & n.6 (2001).

The Seventh Circuit unquestionably considered *Espinoza* on remand. Pursuant to Seventh Circuit Rule 54, it ordered the parties to address how it should proceed in light of this Court's order. (Pet. App.

114a.) And then, after the parties had done so, it ordered *further* supplemental briefing on the effects of *Espinoza* on this case. (Pet. App. 114a.) After considering those two rounds of *Espinoza* briefing, the Seventh Circuit then determined that it needed clarification on a predicate state-law question to be able to assess how *Espinoza* affected this case. (Pet. App. 114–18a.)

Indeed, this Court need only review the Seventh Circuit's certification order to the Wisconsin Supreme Court to appreciate the extent to which the Seventh Circuit considered *Espinoza*. (Pet. App. 111–21a.) That order makes clear that it was *because* of the Seventh Circuit's further consideration of this case in light of *Espinoza* that it determined it needed further clarification from the Wisconsin Supreme Court on what is and is not proper application of the statute.

In *Espinoza*, this Court held 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." 140 S. Ct. at 2255. The Seventh Circuit recounted this Court's *Espinoza* decision and noted that "St. Augustine contends that it stands in precisely the same position as the families in *Espinoza*." (Pet. App. 116a.) The court then explained that though the Wisconsin Supreme Court had before held that, under the statute, officials must "accept the professions of the school and accord to them validity without further inquiry," it had not before answered the questions of "professions about what? Labels? Faith affiliation?

Corporate structure?" (Pet. App. 118a (citation omitted).) The Seventh Circuit needed those questions to be answered to be able to assess whether *"Espinoza* renders that state law invalid under the First Amendment." (Pet. App. 115a.)

In short, though the Seventh Circuit initially believed it had enough of an understanding of state law to be able to address the constitutional questions, in complying with this Court's grant-vacate-remand order, the Seventh Circuit determined that it did *not* have an adequate understanding of state law to be able to perform the constitutional analysis. Petitioners may now lament that the Seventh Circuit ultimately determined that the state-law answer it received dispositively resolved the case in their favor on those grounds, but that does not in turn mean that the Seventh Circuit did not comply with this Court's grant-vacate-remand order.

Petitioners' mistaken reliance on this Court's mandamus decision in *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895), and its progeny, does not help them. (*See* Pet. 21–22, 24.) That case stands for the fundamental "law of the case" principle that "whatever was before this [C]ourt, and disposed of by its decree, is considered as finally settled." *In re Sanford Fork & Tool*, 160 U.S. at 255. But a grant-vacate-remand order does *not* "finally settle" the merits. *Henry*, 376 U.S. at 777.

Nor is this Court's holding in *Yates v. Aiken*, 484 U.S. 211 (1988), even analogous, let alone

"identical . . . in all relevant respects," as Petitioners assert. (*See* Pet. 22–25.) This case would have been comparable to *Yates* if the Seventh Circuit—following this Court's grant-vacate-remand order—held that Petitioners were *not* entitled to transportation benefits on state-law grounds and then did not consider federal constitutional law at all. That, of course, did not happen here.

In *Yates*, a few months after a criminal defendant's conviction and death sentence, the state supreme court in another case held that it was error to give a burden-shifting instruction that was also given at Yates's trial. 484 U.S. at 212. Yates sought a habeas-corpus writ from the state supreme court, arguing that the instruction was unconstitutional under the state supreme court's subsequent reasoning and under this Court's decision in an earlier case. *Id.*

While the habeas petition was pending, this Court decided another burden-shifting instruction case. *Id.* at 212–13. The state court denied Yates relief, he petitioned for writ of certiorari, and this Court summarily vacated the state supreme court's judgment and remanded for further consideration in light of its recent decision. *Id.* On remand, however, the state court "held that petitioner was *not* entitled to relief." *Id.* at 213 (emphasis added). Instead, the state supreme court held that its decision declaring such instructions to be error should not be applied retroactively, and it neither (1) considered whether this Court's recent opinion may apply retroactively nor (2) considered this Court's earlier opinion. *Id.*

Here, unlike *Yates*, the Seventh Circuit *did* consider *Espinoza* in accordance with this Court's order. Upon that consideration, it determined that a predicate state-law question needed to be answered; upon receiving that answer, it determined that it was an erroneous application of state law to deny Petitioners benefits.

This also leads to another error permeating the petition: Petitioners claim it was error for the Seventh Circuit, having dispositively resolved this case on grounds of an erroneous application of state law, to not have gone further to consider whether the same error would also equal a constitutional violation. (*See* Pet. 25–29.) But declining to consider constitutional questions where the case may be disposed of on other grounds is not error—it is a fundamental tenet of judicial restraint. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication," it is the principle that federal courts should not address constitutional questions "unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

It is a well-established rule that federal courts should *not* rule on constitutional issues where other, non-constitutional dispositive grounds are available. *Jean v. Nelson*, 472 U.S. 846, 854–55 (1985); *see also, e.g., N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) ("Before deciding the constitutional question, it was incumbent on [the lower] courts to consider whether the statutory grounds might be dispositive"); *Dist. of Columbia v. Little*, 339 U.S. 1, 3–4 (1950)

(emphasizing the "sound general policy against deciding constitutional questions if the record permits final disposition of a cause on non-constitutional grounds").

Petitioners misunderstand the cases they cite in an attempt to argue otherwise. (*See* Pet. 25–29 (citing *Monroe v. Pape*, 365 U.S. 167 (1961), and *Zinermon v. Burch*, 494 U.S. 113 (1990)).) Those cases stand for the principle that a 42 U.S.C. § 1983 claim is not *barred* simply because the plaintiff may also have available state-law remedies—"overlapping state remedies" are "generally irrelevant" to whether a plaintiff has a "*cause of action* under § 1983." *Zinermon*, 494 U.S. at 124 (emphasis added). Put differently, a plaintiff generally need not have exhausted state-law remedies prior to bringing a section 1983 claim. *Id.* at 124–25.

But that a section 1983 claim need not be *dismissed* because overlapping state-law remedies may be available does not in turn mean that a federal court somehow commits error when it adheres to the longstanding principle that it should avoid resolving the case on constitutional grounds if other, non-constitutional grounds dispose of the matter. *See Jean*, 472 U.S. at 854.

Neither this Court nor the Seventh Circuit is in the business of issuing advisory opinions. *Herb*, 324 U.S. at 125–26. This Court should not grant certiorari to rewrite a decision in Petitioners' favor concerning a fact-specific challenge to a single state statutory application.[4]

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[4] After faulting the Seventh Circuit for the scope of its remand inquiry, Petitioners quickly do an about-face and ask this Court to grant review to address three First Amendment challenges, only one of which involves *Espinoza*. (*See* Pet. 29–40.) Petitioners, however, tried to raise versions of the other two arguments—an Establishment Clause challenge and an "unconstitutional pressure" argument under *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012)—in their first petition for a writ of certiorari to this Court in 2019 (No. 18-1151). No Establishment Clause dispute existed in *Espinoza*. *Espinoza v. Mont. Dep't of Revenue*,140 S. Ct. 2246, 2254 (2020). And this Court issued its decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), building upon its rationale from *Hosanna-Tabor Evangelical Church*, a mere six days after this Court issued its grant-vacate-remand order here. This Court, however, only remanded for further consideration in light of *Espinoza*. Petitioners should not be permitted to seek further review of those other constitutional questions before this Court.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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