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

PETITIONERS' REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

No amendments to Petitioners' earlier corporate disclosure statement are necessary. *See* Pet. ii.

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ARGUMENT

I. This Case Is Not a "Poor Vehicle to Address First Amendment Issues"

This case asks whether *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), permits a state to deny benefits to an otherwise-eligible religious institution because it shares certain terminology or beliefs with, or is otherwise too theologically close to, another eligible but unaffiliated institution.

The Superintendent, rather brazenly, does not even attempt to defend its conduct as constitutional, and, like the Seventh Circuit, even declines to address the effect of *Espinoza* on this case. As to these issues, the Petitioners will rest on the arguments they made in their petition.[1]

The Superintendent points out that the Petitioners do not challenge the statutory Wisconsin rule limiting benefits to one school affiliated with a sponsoring group per attendance area. That is correct. As 42 U.S.C. § 1983 permits, they have challenged the

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[1] The Petitioners are entitled to raise their Establishment Clause and church autonomy arguments before this Court. A lower court "may consider and decide any matters left open by the mandate of this court," *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895), so these questions were properly before the Seventh Circuit and remain properly presented on appeal before this Court. *See also* R. 55:21 n.3; R. 61:33 n.4; R. 70:19 n.5 (explicitly preserving arguments for appeal).

Respondents' separate *policy* for determining affiliation and the repeated application of that policy to deny the Petitioners transportation benefits each year. *See* App. 166a-167a (noting that at the time of District Court's decision, St. Augustine had lost two years' worth of benefits).[2] As the Seventh Circuit itself implied, far from being limited to a "single application," such a policy would affect two schools claiming to be Jewish (Orthodox vs. Reformed), or Muslim (Sunni vs. Shi'a), or Christian (Presbyterian vs. Baptist). *See* App. 10a-11a.[3]

As it did the last time this case was before this Court, the Superintendent attempts to paint this lawsuit as "fact-specific" in order to discourage this Court from reviewing it. The Superintendent is wrong. This case was decided on summary judgment; there has never been any dispute that there are no legal, operational, or other secular ties between St. Augustine and the Archdiocese or the organized Catholic Church; there has never been any dispute that St. Augustine considers itself to be religiously distinct from the schools of the Archdiocese; there has never been any allegation of fraud or collusion.

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[2] In briefing before the Seventh Circuit, the Respondents chose not to contest any of the elements of a § 1983 claim except deprivation of a constitutional right. *See, e.g.*, R. 10:41-42.

[3] The Superintendent suggests that a school that *is* affiliated with another school receiving benefits may feel indirectly coerced into foregoing that affiliation to receive benefits. But that is not a claim made in this suit. This case involves unaffiliated schools.

Thus, this case has never hinged on what materials the Petitioners submitted to the Superintendent; these facts were well-established in documentary form. *See, e.g.*, App. 114a-15a; App. 152a & n.14 (Ripple, J. dissenting); Dkt. 26-6 at 1-2. Instead, the Respondents adopted a policy providing that coincidence of religious labels between two organizations was dispositive. This is not a unique fact at all and could apply to any number of religious groups.

Further, the questions in this case—which are purely legal—are of significant national importance. Government officials cannot have the ability to dictate to religious organizations the meanings of the theological labels they assign to themselves and use the award of public benefits to coerce organizations into acceding to these determinations. *See* App. 157a (Ripple, J., dissenting) (Seventh Circuit opinion accompanying now-vacated judgment "raises haunting concerns about the future health of the Religion Clauses in this circuit"). Likewise, the Seventh Circuit's ruling guts § 1983, one of the nation's foremost civil rights statutes, while simultaneously setting a horrible precedent for lower court compliance with this Court's orders. Any of these issues is worthy of this Court's review.

II. The Seventh Circuit Did Not Rule in Petitioners' Favor on Their Claim

This Court directed the Court of Appeals to reconsider its dismissal of Petitioners' § 1983 claim in light of *Espinoza*. The Seventh Circuit declined to do so.

On remand from the Seventh Circuit, the Superintendent is now arguing to the District Court that it must dismiss the case with prejudice and without granting the Petitioners any relief—declaratory, injunctive, damages relating to the denial of benefits—because (1) the Seventh Circuit declined to reach the Petitioners' § 1983 claim (as directed by this Court); and (2) whatever the Seventh Circuit might have said about the Superintendent's application of state law, no state law claim is presented in this case to which a remedy could attach. *See* Dkt. 66:1-2. In other words, the Superintendent argues that it should win because the Seventh Circuit ignored this Court's order to reconsider Petitioners' federal question.

With a straight face, the Superintendent then simultaneously informs *this* Court that such a result for the Petitioners—denial of all the relief they are requesting and no decision on their only claim—is "favorable" and thus that the Petitioners seek only a "rewriting" of the Seventh Circuit's opinion. It argues this notwithstanding that a dismissal would leave Petitioners with no relief whatsoever. No damages. No injunction. No declaration.

This is preposterous. The Petitioners are entitled to disposition of the claim they actually asserted and

execution of the mandate they obtained from this Court rather than an advisory opinion on state law completely untethered to any claim presented.[4]

III. The Seventh Circuit Disobeyed this Court's Mandate

The Superintendent contends that the Seventh Circuit complied with this Court's order requiring it to consider this case in light of *Espinoza*, but does not identify any instances in which that consideration occurred. Instead the Superintendent observes the Seventh Circuit (1) ordered briefing on the effect of *Espinoza* on this case; (2) referenced *Espinoza* in its certification order; and (3) concluded that it need not resolve St. Augustine's First Amendment claim. None of these items, jointly or separately, establish compliance with this Court's mandate.

Start with the briefing. Following the issuance of this Court's mandate the Seventh Circuit ordered the parties to brief the effect of *Espinoza* on this case. *See* R. 58. And the parties who then wrote the briefs addressed *Espinoza*. But this Court's order was directed to the Seventh Circuit and a court demonstrates its consideration of a case by discussing

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[4] The Respondents dispute that the Petitioners are really asking for a "reversal." The Petitioners disagree, but that disposition of the Seventh Circuit's decision defies easy categorization is simply a reflection of the Seventh Circuit's failure to resolve any claim presented in this case.

it in a ruling. *Cf. Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896-97 (1997) (per curiam) (Court of Appeals' summary rejection of petitioner's argument that intervening case required relief "[did] not establish" that that court "actually considered and rejected" the argument since other grounds may have motivated decision).

Yates v. Aiken confirms this. The inferior court there had actually *discussed* the case this Court had identified for it but even that was found insufficient compliance with a grant-vacate-remand ("GVR") order since the discussion did not fully assess the "substantial federal question" on which the GVR order was predicated. *Yates v. Aiken*, 484 U.S. 211, 214-15 (1988). *A fortiori*, merely ordering briefing on the effect of a case identified by this Court, but never actually determining what effect that case has, does not meet the requirements of a GVR order.

The Seventh Circuit's certification order—on which the Superintendent relies—actually *proves* that the Seventh Circuit did not consider *Espinoza*'s effect on this case. In that order the Seventh Circuit announced its position on the case: "The preliminary question is whether both the superintendent and we have properly understood state law. If so, then we must consider . . . whether *Espinoza* renders that state law invalid under the First Amendment's Religion Clauses . . . ." App. 115a. The premise is false. Even if the Superintendent misunderstood and violated state law, the Petitioners' federal rights were

violated. But the Seventh Circuit's statement also *explicitly* confirms that that court would not "consider" *Espinoza unless* the state law question came out a particular way. The certification order thus refutes the Superintendent's argument that the Seventh Circuit complied with this Court's mandate.[5]

Finally, it is undisputed that, following the issuance of the Wisconsin Supreme Court's opinion, the Seventh Circuit never returned to *Espinoza* and instead purported to resolve this case on state law grounds. The Superintendent defends this as a straightforward application of the principle that federal courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944).

But the Seventh Circuit never cited or discussed this rule in its decision. And it is easy to understand why: the rule has no application here, because no alternate, dispositive, non-constitutional grounds of decision were available. The cases cited by the Superintendent illustrate this well. For example, in *New York City Transit Auth. v. Beazer*, individuals challenged a drug policy under Title VII of the Civil

[5] The Seventh Circuit's certification order mischaracterized this case. There is no challenge herein to Wisconsin's statutory scheme. The challenge is to Respondents' separate policy applying that scheme. *See also generally* R. 70:14-16 (discussing other errors in certification order).

Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment; this Court rightly explained that "[b]efore deciding the constitutional question, it was incumbent on those courts to consider whether the statutory grounds might be dispositive." 440 U.S. 568, 577, 582 (1979).

This case differs from *Beazer* in two critical respects. First, unlike in *Beazer*, there is but *one claim* at issue in this suit: the Petitioners' 42 U.S.C. § 1983 claim for violation of the First Amendment. The Petitioners are not asserting an alternate, statutory claim. Thus, there was no way for the Seventh Circuit to avoid the only question raised in this case. *See Mayor of City of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 629 (1974) (explaining, in § 1983 constitutional case, that it would be a "serious abuse" of "constitutional decision-avoidance principles" if the Court required "relitigation of this case on an insubstantial state issue abandoned by the parties" and concluding that "[t]here simply is not 'present some other ground upon which the case may be disposed of'" (quoting *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

Second, even if the Petitioners *were* asserting such an alternate claim, it would not be "dispositive" here. The Petitioners do not simply seek invalidation of the Respondents' policy; they have requested the panoply of remedies that Congress afforded them in § 1983, including damages for the past denial of benefits. A declaration on the meaning of state law, in contrast,

carries no additional relief. "Plaintiffs are masters of their complaints and remain so at the appellate stage of a litigation." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512 (1989). The Seventh Circuit cannot decide for the Petitioners that they should be satisfied with a non-interchangeable remedy. *See also Zinermon v. Burch,* 494 U.S. 113, 124-25 (1990).[6]

Thus, avoidance of constitutional questions does not explain the Seventh Circuit's decision not to address *Espinoza*. Indeed, that Court's decision is *opposed* to one of the original grounds animating the principles of constitutional avoidance: "refusal to render advisory opinions" and "applications of the related jurisdictional policy drawn from the case and controversy limitation." *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 568 (1947). That is, "[f]ederal courts are courts of limited jurisdiction . . . possess[ing] only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). If not properly presented with a state law claim, what authorized the Seventh Circuit to "resolve" this case on state law grounds? How is the District Court below to follow the Seventh Circuit's command to determine an appropriate remedy, App. 15a, without first identifying the source of its authority to do so? Most simply, what provides the cause of action in this suit

[6] The other cases cited by the Superintendent are similarly distinguishable. In each one, the alternate ground was properly presented and fully dispositive.

if not 42 U.S.C. § 1983? The Superintendent ducks these questions.

Ultimately, this Court could assume without deciding that alternate, dispositive, non-constitutional grounds were available to the Seventh Circuit and it *still* would not justify that Court's decision. This Court was acutely aware, on the Petitioners' last appeal, of the facts and history of this case, including any role Wisconsin law played in this dispute. This Court easily could have ordered the federal litigation halted until any supposedly predicate state law questions were resolved. This is exactly the approach this Court took in *Spector*, a case cited by the Superintendent. *See* 323 U.S. at 105-06.

But this Court did not do so. Instead, it ordered the Seventh Circuit to consider *Espinoza*'s effect on this case. Thus, the Seventh Circuit was duty-bound to unswervingly follow the path this Court identified for it and not some other one. Whether the Seventh Circuit thought that principles of constitutional avoidance might apply is immaterial; this Court did not leave it that discretion. *Cf., e.g.*, *Clinton v. Jones*, 520 U.S. 681, 690 (1997) (constitutional avoidance rule "does not dictate a discretionary denial of every certiorari petition raising a novel constitutional question"); *Sanford Fork & Tool*, 160 U.S. at 255.[7]

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[7] The Respondents argue *Sanford Fork & Tool* is inapplicable to GVR orders because they do not finally settle the merits. That is too narrow a formulation. *Sanford Fork & Tool* stands for the

In sum, the Seventh Circuit did not comply with this Court's mandate, and the Superintendent is unable to demonstrate otherwise.

IV. The Seventh Circuit's Decision Conflicts with Relevant Decisions of this Court on the Application of 42 U.S.C. § 1983

The Superintendent devotes less than a single page to attempting to explain how to read the Seventh Circuit's decision consistently with this Court's well-established case law that state remedies do not supplant 42 U.S.C. § 1983 (and ignores that there was no state law claim pending because that claim had been remanded to state court by the District Court). The Superintendent's sole defense is to argue that while the existence of a state remedy does not bar the *initiation* of a § 1983 lawsuit, once that lawsuit is filed, a Court can—in fact, must—turn around and use the existence of the remedy to avoid determination of the § 1983 claim.

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proposition (among others) that "a mandate is controlling as to matters within its compass." *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 168 (1939) (citing *Sanford Fork & Tool*). While limited, a GVR order is a mandate and, as here, often directs lower court consideration of important constitutional questions. It must be followed. *See Yates*, 484 U.S. at 214-15 (lower court decision following GVR order was only partly "responsive to our mandate").

Again, that position is contradicted by this Court's case law, which provides that § 1983 constitutional "claims are entitled to be adjudicated in the federal courts," regardless of whether the challenged "conduct is legal or illegal as a matter of state law." *McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 671 (1963).

If the Superintendent were correct, every § 1983 case would proceed in the same fashion: following suit, the federal court would first be required to determine the existence and applicability of state remedies; then determine whether those remedies are adequate; and if so, dismiss the constitutional claims without deciding them. That contravenes this Court's recognition that Congress adopted § 1983 in part "to provide a remedy in the federal courts supplementary to any remedy any State might have." *Id.* at 672.

The Superintendent's suggested position was considered in *Monroe v. Pape* itself, where Justice Frankfurter, the lone dissenter, *unsuccessfully* raised constitutional avoidance as a reason for concluding that § 1983 does not reach conduct in violation of state law. *Monroe v. Pape*, 365 U.S. 167, 240-42 (1961) (Frankfurter, J., dissenting). Plainly, this Court has decided that a federal court should not so neuter a federal statute through invocation of a judicial policy of constitutional avoidance.

The Seventh Circuit's cursory, unexplained statement that it did "not find it necessary to reach

any constitutional issues" because it was "enough to decide whether the Superintendent properly applied Wisconsin law," App. 12a, is simply inconsistent with this Court's case law and threatens the future administration of § 1983.

CONCLUSION

Petitioners respectfully request that this Court grant the Petitioners' petition for writ of certiorari and either summarily reverse the decision below or schedule the case for plenary review.[8]

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[8] The Superintendent notes in passing that the Forros have moved away from the area and that, following the Seventh Circuit's decision, it is conceding that St. Augustine families are entitled to transportation benefits going forward under state law. However, there is no contention that this case is moot, as the Petitioners seek $9,000 in compensatory damages and/or nominal damages for the completed First Amendment violations. *See, e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02 (2021). Further, the Petitioners are arguing below that the Respondents' "concession" is insufficient to show that the Respondents could not revert to their old policy and that declaratory and injunctive relief is still necessary. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017); Dkt. 60:17-18. Given that it is uncontested that this case is not moot, this Court can simply resolve the merits questions and leave it to the lower courts to determine an appropriate remedy.

Respectfully submitted,

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