RECENT CASES

FIRST AMENDMENT — RELIGION — SEVENTH CIRCUIT HOLDS DENIAL OF BUSING TO CATHOLIC SCHOOL UNDER WISCONSIN STATUTE DOES NOT VIOLATE FREE EXERCISE OR ESTABLISHMENT CLAUSES. — *St. Augustine School v. Evers*, 906 F.3d 591 (7th Cir. 2018), *reh'g and reh'g en banc denied* (7th Cir. Dec. 7, 2018), *petition for cert. filed sub nom. St. Augustine School v. Taylor* (Mar. 6, 2019).

The simplest way, it would seem, for the government to avoid infringing on religious liberty or risking entanglement with religion is to avoid taking religion into account at all. Yet this is often difficult; churches and schools seek grants,[1] individuals desire government benefits,[2] and the state must ultimately balance accommodating religious pluralism and religious freedom with neutrality and nonentanglement.[3] Recently, in *St. Augustine School v. Evers*,[4] the Seventh Circuit found that Wisconsin state actors did not violate the Free Exercise or Establishment Clauses in denying publicly funded busing to the students of a religious private school.[5] The court held that the Superintendent and school district, acting pursuant to a Wisconsin statute, had not granted or denied benefits based on nonneutral religious criteria, nor had they impermissibly examined the school's religious beliefs.[6] The court's resolution of the plaintiffs' First Amendment claims ignores crucial free exercise and entanglement concerns arising from the state's inquiry into religious affiliation, an inquiry rendered inevitable by the statute. The best way to avert future constitutional quandaries may be for the legislature to begin anew.

Wisconsin residents Joseph and Amy Forro hoped to receive transportation aid for their children, who attended St. Augustine.[7] The school, a private religious institution, applied for busing under Wisconsin law, section 121.54.[8] But the Friess Lake School District denied St. Augustine's application, and the state's Superintendent of Public

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[1] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

[2] *See, e.g.*, Locke v. Davey, 540 U.S. 712, 717 (2004).

[3] *See generally* Douglas Laycock, Comment, *Churches, Playgrounds, Government Dollars — and Schools?*, 131 HARV. L. REV. 133 (2017).

[4] 906 F.3d 591 (7th Cir. 2018), *reh'g and reh'g en banc denied* (7th Cir. Dec. 7, 2018), *petition for cert. filed sub nom.* St. Augustine School v. Taylor (Mar. 6, 2019).

[5] *Id.* at 593.

[6] *Id.*

[7] *Id.* at 593–94.

[8] *Id.* The statute requires school districts to provide transportation for private school students if the students reside in the school's attendance area and the school is within five miles of the school district boundaries. WIS. STAT. § 121.54(2)(b) (2019).

Instruction upheld that decision.[9] The state actors based their decision on section 121.51, which limits the state's busing obligation to only one private school "affiliated with the same religious denomination" within an attendance area.[10] In *State ex rel. Vanko v. Kahl*,[11] the Wisconsin Supreme Court had interpreted section 121.51 to refer not only to religious schools but to "*all* private schools affiliated or operated by a single sponsoring group," whether secular or religious.[12] The school district and the Superintendent determined, based on the "About Us" section of St. Augustine's website, that St. Augustine was affiliated with the same sponsoring group (Roman Catholicism) as St. Gabriel, a school operated by the Archdiocese of Milwaukee.[13] Because St. Augustine was located in the same attendance area as St. Gabriel and St. Gabriel already received busing, the school district and Superintendent reasoned that — under section 121.51 and *Vanko* — they did not have to provide busing to St. Augustine.[14]

Unhappy with this decision, St. Augustine and the Forros sued the school district and the Superintendent in state court, alleging state law and federal constitutional violations.[15] They argued that St. Augustine, though Catholic, "was nonetheless distinct from the diocesan schools in its curriculum and religious practices" and that "in rejecting their application, the state impermissibly probed into its religious beliefs."[16] The defendants then removed to federal court.[17]

The district court granted summary judgment to the defendants on the plaintiffs' federal claims and remanded the section 121.51 claim to state court.[18] Regarding state law, Judge Adelman denied the plaintiffs' argument that, under *Vanko*, the school district and Superintendent had to ignore the school's religious denomination and look only to its legal

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[9] *St. Augustine*, 906 F.3d at 594.

[10] WIS. STAT. § 121.51(1). This subsection defines "[a]ttendance 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." *Id.*

[11] 188 N.W.2d 460 (Wis. 1971).

[12] *Id.* at 465. The *Vanko* court explained that requiring busing for only one religious school without the same restriction on secular private schools would be "an apparent constitutional infirmity." *Id.* at 464. However, the court clarified that it did not need to apply constitutional avoidance to reach its interpretation of the statute; rather, the general restriction for all private schools was "inherent in the whole concept of 'attendance areas.'" *Id.* at 465.

[13] *St. Augustine*, 906 F.3d at 594. The website included statements that St. Augustine was "an independent and private traditional Roman Catholic School," a school that "loves and praises all the traditional practices of the Catholic Faith," and one that "recognizes its spiritual custodial duty of establishing an authentic Catholic environment." *Id.*

[14] *Id.*

[15] *Id.* at 594–95.

[16] *Id.* at 595.

[17] *Id.*

[18] St. Augustine School v. Evers, 276 F. Supp. 3d 890, 903 (E.D. Wis. 2017).

affiliation.[19] Instead, he read *Vanko* as establishing that the "sponsoring group" for a religious private school "mean[t] the religious denomination with which the school is affiliated."[20] He further decided that, because the constituent documents St. Augustine submitted to the school district and Superintendent did not contain information about affiliation with a religious denomination, it was permissible under *Holy Trinity Community School, Inc. v. Kahl*,[21] another Wisconsin Supreme Court precedent, for the state actors to rely on St. Augustine's self-portrayal on its website.[22]

The plaintiffs fared no better on their federal claims. They argued that the defendants would have accepted St. Augustine's application if it were a secular private school.[23] But Judge Adelman countered that the plaintiffs provided no evidence the defendants would not have applied the "sponsoring group" test to, say, two secular Montessori schools.[24] He rejected a possible excessive-entanglement claim as well.[25] Though he found no First Amendment violation in this case, Judge Adelman noted that routinely determining religious denomination and affiliation under the Wisconsin statute could potentially "lead to excessive entanglement or other constitutional problems in the long run."[26]

The Seventh Circuit affirmed.[27] Writing for the panel, Chief Judge Wood[28] first rejected the free exercise claim, applying the rule established in *Employment Division v. Smith*.[29] Under *Smith*, the right of free exercise does not give rise to religious exemptions from neutral and generally applicable laws.[30] Chief Judge Wood found that, as construed by the Wisconsin Supreme Court in *Vanko*, section 121.51 was a neutral and generally applicable law.[31] Thus, the plaintiffs were not entitled to a religious exemption from it.[32] Chief Judge Wood acknowledged that section 121.51 created a choice for religious schools and families — between receiving state benefits and identifying with their religion.[33] But the statute did not "deny benefits *on the basis of* their religion"; it would

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19 *Id.* at 897–98.

20 *Id.* at 898.

21 262 N.W.2d 210 (Wis. 1978).

22 *See St. Augustine*, 276 F. Supp. 3d at 899, 902.

23 *Id.* at 900.

24 *Id.* at 900–01.

25 *See id.* at 901–03.

26 *Id.* at 903. Judge Adelman also observed that the same difficulty could arise with determining whether two secular private schools were affiliated and suggested Wisconsin courts could "make the test of affiliation always turn on the school's corporate organization" to avoid this issue. *Id.*

27 *St. Augustine*, 906 F.3d at 600.

28 Chief Judge Wood was joined by Judge Kanne.

29 494 U.S. 872 (1990).

30 *Id.* at 879.

31 *See St. Augustine*, 906 F.3d at 596–97.

32 *Id.*

33 *See id.*

impose a similar burden on secular private schools.[34] Chief Judge Wood concluded that "[t]he problem for St. Augustine is not that it is Catholic; it is that it is second in line."[35]

She then addressed the plaintiffs' Establishment Clause claim, deciding there was no evidence that the state had impermissibly inquired into St. Augustine's religious nature or compared its teachings or practices with those of St. Gabriel or other Catholic institutions.[36] She noted that the state did not independently label St. Augustine "Catholic"; rather, St. Augustine did, and the state "credited" its self-identifying statements.[37] Chief Judge Wood acknowledged the dissent's point that "labels may not fully capture" American religious pluralism, but countered that "school districts must be able to rely on self-adopted labels" for Wisconsin's statute to provide a meaningful limitation on busing.[38]

Judge Ripple dissented. He disagreed with the district court and the majority that the Wisconsin precedents permitted the school district and Superintendent to look beyond a school's articles of incorporation and bylaws to its website to determine its religious affiliation.[39] Judge Ripple would have had the court rely on St. Augustine's independent corporate structure as proof of non-affiliation with St. Gabriel because legal independence was a neutral standard that applied equally to all private schools.[40] In his view, the majority violated "elemental fairness" by "cull[ing] out" the word "Catholic" from St. Augustine's website "and employing it as an outcome-determinative label."[41] Moreover, Judge Ripple argued that the majority's "selective use" of "Catholic" assumed a single term could "describe accurately the religious values and aspirations of an individual or a group," as though they were "commodities in a supermarket" — an assumption at odds with the Religion Clauses.[42] According to Judge Ripple, the court's holding violated the plaintiffs' free exercise rights by allowing school boards to pressure parents to bend to the school board's decision that what the parent believes is an important religious difference is nonexistent or inconsequential.[43] Conditioning receipt of a government benefit upon acceptance of the school board's determination is "a burden upon religion" and, "[w]hile the com-

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[34] *Id.* at 597.
[35] *Id.*
[36] *Id.* at 598.
[37] *Id.*
[38] *Id.* at 599.
[39] *See id.* at 603 (Ripple, J., dissenting).
[40] *See id.* at 604.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 605.

pulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[44] Judge Ripple cautioned that the court's decision and its "exercise in label reading" "rais[ed] haunting concerns about the future health of the Religion Clauses."[45]

The majority's rhetoric and framing make *St. Augustine* appear to be an open-and-shut case, but a closer inspection reveals that the First Amendment analysis may not be quite so simple. In terms of the Free Exercise Clause, the text of the statute alone may violate *Smith*'s requirement of neutrality and general applicability. Its application runs into problems as well. The statute applies discriminately to different religions because it determines affiliation based on religious denomination, which itself is nonneutral and creates incentives for disavowing religious beliefs, thereby burdening the free exercise of religion. Under the Establishment Clause, the court failed to recognize the law's clear risks of entanglement. Both the statute itself and the majority's labeling methodology invite, and, in many cases, require, impermissible state inquiry into a group's religious beliefs. Because the statute as written seems likely to violate both of the Constitution's Religion Clauses, it may be wise for the Wisconsin legislature to rewrite it.

The Wisconsin statute raises significant Free Exercise concerns for several reasons. First, contrary to the court's analysis, the law may not be neutral or generally applicable under *Smith*. On its face, the statute demands that state actors ask a question for religious schools that they will not ask for nonreligious schools: namely, what is the school's religious denomination?[46] Additionally, the law provides busing for some religious schools, but not all. Given that the statute includes a built-in exception (one school in a given area) based on religion, it seems automatically not to be one of general application. The court's framing belies this differential treatment for religious schools.[47] Chief Judge Wood declared that "[t]he reason why St. Augustine cannot demand services . . . is not because it is a Catholic school; it is because — by its own

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[44] *Id.* at 605–06 (quoting Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981)).

[45] *Id.* at 606.

[46] *Vanko*'s reinterpretation of the statute to apply to all private schools "affiliated or operated by a single sponsoring group," State *ex rel.* Vanko v. Kahl, 188 N.W.2d 460, 465 (1971), does not solve this problem because the sponsoring group for a religious school is its denomination. *See* St. Augustine School v. Evers, 276 F. Supp. 3d 890, 898 (E.D. Wis. 2017). This nonneutrality point can also be restated as an entanglement concern, as the question here involves the state inquiring into the school's religion, but this is not the place to offer a comprehensive distinction between nonneutrality and entanglement, should one exist.

[47] The court commented that the statute would also bar funding for two Montessori or two International Baccalaureate schools, and thus applies equally to religious and secular schools. *See St. Augustine*, 906 F.3d at 597. Yet this is further evidence of the law's nonneutrality: Montessori is a method of education and International Baccalaureate is a diploma program schools may choose to offer. Neither group sponsors schools in the way that religious institutions do.

choice — it professes to be affiliated with a group that already has a school in that zone."[48] This is a distinction without a difference; a religious school's sponsoring group *is* its religious denomination.[49] Thus, if a religious school is denied busing "because . . . it professes to be affiliated with a group that already has a school in that zone," it is in fact being denied busing based on its religion. Framed differently and more directly than the court has done, St. Augustine cannot receive busing *because* it is a Catholic school.

Second, the statute's categorization of affiliation by religious denomination applies differently to different religions. For one, it disproportionately affects more populous religions, which are likely to have more schools within a given area. The statute's wording — "affiliated with the same religious denomination" — also discriminates against religions, such as Catholicism, in which all Roman Catholics are of the same denomination. Under the statute, "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."'"[50] In contrast, Judaism, Islam, and Protestantism are subdivided into different denominations and may have differently "denominated," and therefore unaffiliated, schools.[51] Thus, the law will disproportionately exclude from busing any school affiliated with a more centralized, less denominated religion.

Finally, the law also burdens religion by incentivizing disavowal of religious beliefs. The Wisconsin Supreme Court presaged this concern in *Holy Trinity*, asking "does [the statute] not in fact encourage religious schools, in order to survive, to disavow their religious beliefs and associations?"[52] As Judge Ripple noted, the law "places 'substantial pressure'" on religious parents and schools to modify their behavior in order to receive government benefits.[53] Schools may relabel their beliefs on their website or legally disaffiliate from their church and reincorporate as a standalone entity in order to receive busing for their students. Or if, for reasons of institutional hierarchy or honesty they cannot or will not do this, then a school may simply choose not to open

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[48] *St. Augustine*, 906 F.3d at 597.

[49] *See St. Augustine*, 276 F. Supp. 3d at 898.

[50] *St. Augustine*, 906 F.3d at 594 (alteration in original) (quoting *Vanko,* 188 N.W.2d at 465). As a historical matter, initial efforts to legalize busing for private schools in Wisconsin were supported by the Catholic Church and Catholic organizations and vehemently opposed by major Protestant churches. Some opponents went so far as to represent the Catholic Church as "a dictatorial threat to America" that "would destroy religious liberty by ending the separation of church and state." WILLIAM F. THOMPSON, THE HISTORY OF WISCONSIN: CONTINUITY AND CHANGE, 1940–1965, at 522 (1988).

[51] To the extent one might disagree with this use of "denomination," that points to another of the statute's flaws. Not only is "affiliated" ambiguous, but "religious denomination" may be as well.

[52] Holy Trinity Cmty. Sch., Inc. v. Kahl, 262 N.W.2d 210, 218 (Wis. 1978).

[53] *St. Augustine*, 906 F.3d at 605 (Ripple, J., dissenting) (quoting Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981)).

in the first place. Either outcome deprives the school and its prospective or actual students of the free exercise of their beliefs.

The Wisconsin statute is also subject to Establishment Clause critiques. First, it seems almost certain to violate the Clause's "prohibition of entanglement between government and religion."[54] The court was content to use the school's self-designation as Catholic and "save . . . for another day" the broader question of which entity counts as a school's sponsoring group.[55] Yet deciding that the school is Catholic, even because it said so, is a state decision on religion. And having provision or denial of a government benefit depend on a religious label, even a self-affixed one, is government entanglement. Chief Judge Wood's framing of St. Augustine as "second in line" is rhetorically powerful, but ignores that deciding who is in line — and which line they belong to — necessarily entails a religious inquiry.

Additionally, as Judge Ripple observed, the court's "label methodology is simply unworkable."[56] He asked what to do when, for example, an Orthodox Jewish school seeks its own attendance area separate from a Reform Jewish school.[57] This question is one that necessarily requires government entanglement with religious doctrine. And it is one that the state government should not address, nor is it within the province of the courts.[58] Accepting a group's self-designated label does not absolve the state of entanglement. Say, for instance, that a school labeling itself as Muslim receives busing. What should the school district do when a second school, labeling itself Shi'a, petitions for busing and argues that it is distinct because the first school is in fact Sunni?[59] To take a developing conflict, what to do if the United Methodist Church splits over its disagreement on same-sex marriage and other LGBTQ issues?[60] Would the school district (or eventually a court) have to decide at what point a schism has occurred and one denomination has become two? In each

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54 *Id.* at 598 (majority opinion) (citing Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)).

55 *Id.* at 599.

56 *Id.* at 606 (Ripple, J., dissenting).

57 *Id.*

58 *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (stating that the "Court is ill-equipped to sit as a national theology board"); *Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation."); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 56–57 (1998).

59 *Cf.* Jennifer K. Beaudry, Note, *Islamic Sectarianism in United States Prisons: The Religious Right of Shi'a Inmates to Worship Separately from Their Fellow Sunni Inmates*, 35 HOFSTRA L. REV. 1833, 1855 (2007) (describing claims brought by Shi'a prison inmates for a right to worship separately from Sunnis).

60 *See* Julie Zauzmer & Sarah Pulliam Bailey, *Will the Nation's Third-Largest Church Split Up Over LGBT Debate? Leaders Try to Reach an Answer.*, WASH. POST (Feb. 22, 2019), https://www.washingtonpost.com/religion/2019/02/22/will-nations-third-largest-church-split-up-over-lgbt-debate-leaders-try-reach-an-answer [https://perma.cc/8DKA-UYNP].

case, labels themselves do not provide the answer, and the state must address the underlying question posed by the statute — do these schools belong to affiliated religious denominations?[61] And thus a test designed to avoid religious entanglement in fact creates that very entanglement.[62]

Rewriting Wisconsin's statute may resolve practical concerns in addition to the constitutional ones. Judge Ripple characterized the statute as the legislature's attempt at a "partial solution" to the "practical problems," including limited funds, that state administrators "necessarily face."[63] Yet drawing lines around — and through — religion may be an area where splitting the baby simply will not work. The Wisconsin government might not wish to provide benefits to every student and the Religion Clauses do not require that it do so. But relying on religious labels and the statute as written are not the only ways to limit the state's busing obligations. The legislature could instead mandate benefits for all private school students only in the winter months or busing subsidized at seventy percent rather than entirely paid for by the state.[64] Furthermore, the current statute and test allow for schools to cleverly relabel themselves or reincorporate as standalone entities and thus evade the affiliation limitation.[65] Thus, as a practical matter, a new statute may also further the state's ability to achieve its desired goal of providing benefits to some, but not all, schools.

St. Augustine suggests that the time may have come for the Wisconsin legislature to rewrite its statute, this time without the word "religious." The constitutional protections of the Religion Clauses require the state to permit free religious exercise and avoid entangling government with religion. Yet Wisconsin's statute violates both of those fundamental liberties, forcing schools, students, and families to pay the price.

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[61] This question of what denomination a church belongs to is the archetypal question captured under the rubric of entanglement. *See, e.g.*, Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 115–16 (1952).

[62] A similar observation has been made about the ministerial exception. *See* Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1777 (2008) ("Application of the ministerial exception thus risks violating the Religion Clauses even as it attempts to vindicate those constitutional protections.").

[63] *St. Augustine*, 906 F.3d at 601.

[64] The State of Washington, for example, authorizes private school students to ride buses but requires that "[t]he [school district] board of directors shall charge an amount sufficient to reimburse the district for the actual per seat cost of providing such transportation." WASH. REV. CODE § 28A.160.020(3) (2018).

[65] *Holy Trinity* requires taking a school at its word. *See St. Augustine*, 906 F.3d at 597 n.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."). Rewriting the statute may be the only way to eliminate incentives for disaffiliation, regardless of the affiliation test used.