UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JILL and JOSEPH HILE, et al.,

Plaintiffs,

vs.

STATE OF MICHIGAN, et al.,

Defendants.
_____/

Case No. 21-cv-829

Hon. Robert J. Jonker

Mag. Sally J. Berens

AMICUS CURIAE BRIEF OF COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, 482FORWARD, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND PUBLIC FUNDS PUBLIC SCHOOLS

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INTEREST OF AMICI CURIAE

Amici curiae are organizations committed to protecting and defending Article VIII, § 2 of the Michigan Constitution, the validity of which is being challenged in this action.

The Council of Organizations and Others for Education About Parochiaid ("CAP") is a non-profit organization founded in the 1970s when a coalition of civil rights, education, religious, and civic organizations joined with other individuals to educate the public regarding a school voucher ballot proposal. CAP's mission continues as it provides education to the public regarding the preservation of religious liberty, the separation of church and state, the importance of public education in democracy, and the risks of granting governmental aid to nonpublic schools in Michigan. CAP opposes the removal of Michigan's constitutional prohibition on the public funding of private schools and the creation of school vouchers or tuition credit programs.

The American Civil Liberties Union of Michigan ("ACLU") is a nonpartisan non-profit membership organization dedicated to protecting constitutional rights. The ACLU has long been committed to protecting the right to a public education, as well as the right to religious freedom.

482Forward is a network of parents, students, residents, and educators fighting for educational equity in Detroit.

Michigan Association of School Boards ("MASB") is a voluntary, nonprofit association of local and intermediate boards of education throughout the State of Michigan, whose membership consists of boards of education of over 600 local school boards and intermediate school boards in the state. The activities of MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education.

Michigan Association of School Administrators ("MASA") is a voluntary, nonprofit association of public school administrators, and is the professional association serving superintendents and their first line of assistants, who serve as CEOs for their community's public schools. The mission of MASA is to develop leadership and unity within its membership to achieve the continuous improvement of public education in Michigan. MASA serves as an information-rich source of advice and support in areas critical to over 700 public school superintendents and first-line assistants in 584 school districts and 56 intermediate school districts. MASA serves nearly 2000 members including professionals, retirees, and businesses, helping the leaders of Michigan's most important public institutions get better results for more than 1.5 million students.

Public Funds Public Schools ("PFPS") is a national campaign to ensure that public funds for education are used to maintain, support, and strengthen public schools. PFPS opposes all forms of private school vouchers—including traditionally structured vouchers, Education Savings Account vouchers, and tax credit scholarship vouchers—and other diversions of public funds from public education. PFPS uses a range of strategies to protect and promote public schools and the rights of all students to a free, high-quality public education, including participation in litigation challenging vouchers and other diversions of public funds to private schools. PFPS is a partnership between Education Law Center ("ELC") and the Southern Poverty Law Center ("SPLC"). ELC, based in Newark, New Jersey, is a nonprofit organization founded in 1973 that advocates on behalf of public school children to enforce their right to education under state and federal laws across the nation. SPLC, based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971 that serves as a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance human rights.

ARGUMENT

I. There is no constitutional right to use public funds for private education.

Michigan's policy choice to reserve public funding for public schools, embodied in Article VIII, § 2 of its state constitution,[1] is fully supported by long-established United States Supreme Court precedent: A State's decision to fund public schools does not entail a corresponding duty to fund private schools.

For example, in *Everson v. Board of Education of Ewing*, 330 U.S. 1, 16 (1947), the Supreme Court upheld a state law that provided public transportation to students attending religious schools, but cautioned that it did "not mean to intimate that a state could not provide transportation only to children attending public schools." Similarly, in *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), the Court rejected the argument that "if private schools are not given some share of public funds allocated for education . . . such schools are isolated into a classification violative of the Equal Protection Clause." In *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974), the Court summarily affirmed a lower court's rejection of a federal constitutional challenge to state statutes that provided bus transportation for public school students without providing it to private

[1] Article VIII, § 2 of the Michigan Constitution prohibits tax benefits or deductions to support the attendance of any student at a private school, without regard to such a school's religious or non-religious character or affiliation. It provides, in pertinent part:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . . .

Mich. Const. art. VIII, § 2.

school students. In *Maher v. Roe*, 432 U.S. 464, 477 (1977), the Supreme Court reaffirmed that there is no federal constitutional "right of private or parochial schools to share with public schools in state largesse." And most recently, in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2261 (2020), the Court confirmed that "[a] State need not subsidize private education."

These decisions all reflect the sound principle that a State's decision to reserve its public funds for public schools does not violate the constitutional rights of private schools, their students, or those students' families. Unquestionably, many private schools are religious, and many parents' decisions to send their children to private schools is an exercise of their fundamental right to control the education of their children and/or provide them with a religious upbringing. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). But the Supreme Court has held time and again that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983). Thus, a State may choose "not to fund a distinct category of instruction" such as private-school education. *Locke v. Davey*, 540 U.S. 712, 721 (2004); *see also Espinoza*, 140 S. Ct. at 2261 ("A State need not subsidize private education."). That is what Michigan has chosen to do here.

II. *Trinity Lutheran* and *Espinoza* have no effect on Article VIII, § 2 of the Michigan Constitution.

The Supreme Court's recent decisions in *Trinity Lutheran Church of Columbia, Inc v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), do not support Plaintiffs' claims.

In *Trinity Lutheran*, the State of Missouri operated a program that reimbursed nonprofit organizations when they installed playground surfaces made from recycled tires. The Missouri Constitution prohibits the state from using public funds "in aid of any church, sect or denomination

of religion." *Trinity Lutheran*, 137 S. Ct. at 2017 (quoting Mo. Const. art. I, § 7). Relying on that constitutional provision, Missouri officials concluded that the Trinity Lutheran Church, solely because of its religious status, was ineligible for a reimbursement grant for its playground; a similarly situated but secular nonprofit organization with a playground would have been eligible to receive the public funds. The Supreme Court held that denying Trinity Lutheran this otherwise available public benefit solely on account of its religious status violates the Free Exercise Clause of the First Amendment. *Id*. at 2021, 2024–25.

Espinoza, in a similar fashion, involved a state tax credit for donations to organizations that award scholarships for private-school tuition. Because Montana's constitution contained a prohibition like Missouri's, Montana promulgated an administrative regulation prohibiting families who received the scholarships from using the funds for tuition at religious schools. Similar to Missouri's playground surface reimbursement program, Montana's tax benefit for private-school tuition scholarships restricted the use of tax-preferred scholarship funds only for religious private schools; private schools that were secular but otherwise similarly situated could benefit from the program. And relying principally on its holding in *Trinity Lutheran*, the Supreme Court held that once Montana decided to create a tax credit to subsidize tuition at private schools, "it [could not] disqualify some private schools solely because they are religious." *Espinoza*, 140 S. Ct. at 2261.

Article VIII, § 2 of Michigan's constitution is different in every way that matters. In *Trinity Lutheran* and *Espinoza*, Missouri and Montana "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit *solely* because their religious character." *Trinity Lutheran*, 137 S. Ct. at 2021 (emphasis added); *see Espinoza*, 140 S. Ct. at 2255. By contrast, Article VIII, § 2 of the Michigan Constitution prohibits public aid to *all*

nonpublic schools, *regardless* of whether a school is religious. In Missouri, "Trinity Lutheran Church applied for . . . a grant for its preschool and daycare center and would have received one, *but for* the fact that Trinity Lutheran is a church." *Trinity Lutheran*, 137 S. Ct. at 2017 (emphasis added). In Montana, too, the plaintiffs sought to use scholarship funds at a private school "that [otherwise] meets the statutory criteria for 'qualified education providers'" but were prohibited from doing so "solely because of [the school's] religious status." *Espinoza*, 140 S. Ct. at 2252, 2255. In Michigan, by contrast, no private school, church-affiliated or not, is eligible for state funding under Article VIII, § 2. In other words, *Trinity Lutheran* and *Espinoza* have no application to this case because under Article VIII, § 2 of the Michigan Constitution, religious private schools in Michigan are treated *exactly the same* as non-religious private schools: they are all ineligible for public funding. What makes all religious and nonreligious private schools ineligible for funding is that they are non-public. Their religious or non-religious character is irrelevant.

Plaintiffs' claim to the contrary—that Article VIII, § 2 results in "differential treatment" based on religion, Compl., pp. 28–31, PageID .28-31—rests upon a misunderstanding of both the Supreme Court's free-exercise jurisprudence and Article VIII, § 2. A religious school would not be entitled to public or MESP funds merely by abandoning its religious identity, because it would continue to be a private school. All private schools, regardless of whether they are religious or non-religious, are barred from public or tax-preferred funding by Article VIII, § 2. Therefore, no school, student, or family is being "penalized" for their religious exercise.

To illustrate, suppose that Michigan law authorized the use of public or tax-preferred funds to pay for the continuing legal education of government attorneys. Attorneys who are employed by private religious organizations would not be eligible to receive or use such funds, but neither would attorneys who work for secular law firms. The funding restriction would not violate *Trinity*

Lutheran or *Espinoza* because it would be based on the public versus non-public character of the recipient, not the recipient's religious identity. The same is true with Article VIII, § 2.

In *Trinity Lutheran*, the Court was careful to distinguish Missouri's form of discrimination from restrictions like Michigan's:

> In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.

Trinity Lutheran, 137 S. Ct. at 2020. So, too, in *Espinoza*:

> 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 (emphasis added). These passages are dispositive here. Unlike Missouri's constitution and unlike Montana's regulation, Article VIII, § 2 of Michigan's constitution is neutral and generally applicable without regard to religion, it does not single out the religious for disfavored treatment, and it does not exclude anyone from benefits solely because they are religious. As the Michigan Supreme Court has observed, Article VIII, § 2 "does not speak of religion but of nonpublic schools." *In re Constitutionality of 1974 PA 242*, 228 N.W.2d 772, 773, 777 (Mich. 1975). Therefore, *Trinity Lutheran* and *Espinoza* do not call into question the constitutionality of Article VIII, § 2.

III. The purpose of Article VIII, § 2 of the Michigan Constitution is to preserve public funding for public schools, not to discriminate against Catholics.

Plaintiffs' claim that Article VIII, § 2 is unconstitutional because it is based on anti-Catholic animus is wrong for multiple reasons. First, Plaintiffs' reliance on *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), is misplaced because Article VIII, § 2 is neutral not only on its face, but also in its application. Second, the historical record, accurately portrayed, does

not demonstrate that animus played a predominant role in the decision by 1.4 million Michigan voters to approve Proposal C in 1970. And third, even if the Court could be persuaded that the election in 1970 was influenced by anti-Catholicism, the voters' subsequent decision in 2000 to reauthorize Article VIII, § 2 by an overwhelming margin eradicated any such taint of animus.

A. Article VIII, § 2 is neutral in its operation.

Plaintiffs rely on *Lukumi*, *supra*, to argue that even though Article VIII, § 2 is facially neutral, it is unconstitutional because it was enacted with the purpose or intent of discriminating against Catholics. *Lukumi*, however, describes an enactment that was narrowly targeted to burden only a disfavored religious practice. That critical difference distinguishes *Lukumi* from this case, where 50 years of history has demonstrated that Article VIII, § 2 is neutral and generally applicable—in words *and* in actual operation—to religious and nonreligious schools alike.

In *Lukumi*, although the challenged ordinances were facially neutral, they were written to be carefully "gerrymandered" such that they would apply in fact only to religious sacrifice, and not to nonreligious conduct. *Id*. at 535–36. Thus, the ordinances were not truly laws of "general applicability," since in operation they applied only to the religious practice that they burdened. *Id*. at 542. The ordinances were also plainly overbroad and underinclusive judged in relation to the government purpose that they supposedly advanced. They "pursue[d] the city's governmental interest *only* against conduct motivated by religious belief." *Id*. at 545 (emphasis added).

None of these problems plagues Article VIII, § 2, which is neutral both in operation and on its face. As previously discussed, Article VIII, § 2 prohibits the public funding of *all* private schools, regardless of whether they are Catholic, Protestant, Muslim, Jewish, or secular. And that is how it operates in practice: thousands of children attend private schools in Michigan with no Catholic affiliation, and many with absolutely no religious affiliation at all; all such schools do not

and cannot receive public funds.[2] Thus, unlike in *Lukumi*, Proposal C was not "gerrymandered" or targeted to apply only to Catholic schools or even religious schools; it is neutral in operation as well as on its face. Similarly, unlike in *Lukumi*, Article VIII, § 2 is truly a law of general applicability because in operation it prevents non-Catholic and non-religious private schools from receiving public funds, just as it does for Catholic schools. And, unlike the ordinances in *Lukumi*, Article VIII, § 2 is neither overbroad nor underinclusive judged in relation to the legitimate state interest in preserving public funds for public schools: the law prevents the public funding of *any* private school, and it does not deprive any public school of funding. In sum, unlike in *Lukumi*, Article VIII, § 2 does not "pursue the [state's] governmental interest only against conduct motivated by religious belief." *Id*. at 545. It pursues the state's interest against funding religious and non-religious private education alike.

Contrary to Plaintiffs' suggestion, the fact that a majority of private-school students in 1970 attended Catholic schools does not indicate that Proposal C was based on anti-Catholic animus.[3] Such an argument has been rejected time and again by the Supreme Court in Establishment Clause challenges to the public funding of private schools where the vast majority of public aid is given to religious schools: "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002); *see also Agostini v. Felton*, 521 U.S. 203, 229 (1997) ("Nor are we willing to conclude that the constitutionality of an aid program depends on the

[2] *See* Julie Mack, *10 Things To Know About Michigan's Private Schools*, MLive, Oct. 2, 2017, https://goo.gl/2jwx97.

[3] Currently, the majority of private-school students in Michigan attend *non*-Catholic schools. *See* Mack, *supra*, https://goo.gl/2jwx97.

number of sectarian school students who happen to receive the otherwise neutral aid."); *Mueller v. Allen*, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on . . . the extent to which various classes of private citizens claimed benefits under the law."). The analysis is no different here, where instead of requiring state aid, the challenged law prohibits it.

B. Proposal C was not motivated by anti-Catholic animus.

The historical picture painted by Plaintiffs is misleading and inaccurate: Proposal C is not the product of anti-Catholic animus.

1. Article VIII, § 2 is not a "Blaine Amendment."

As a threshold matter, it is misleading to label Article VIII, § 2 a "Blaine Amendment." James G. Blaine was a congressman in the 19th century who proposed an amendment to the United States Constitution that would prohibit the States from allocating public education funds to religious schools. After the proposal failed, numerous States adopted identical or similar prohibitions into their state constitutions. Although Plaintiffs contend that these amendments were motivated by anti-Catholic bigotry, many historians warn that they were supported by the public for many legitimate reasons, with anti-Catholic animus playing only a small role in their enactment. *See* Brief for Legal and Religious Historians as Amici Curiae, *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2016), https://goo.gl/x2EEEp; and Brief for Historians and Law Scholars as Amici Curiae, *Locke v. Davey*, 540 U.S. 712 (2004).

In any event, there is universal consensus that the phenomenon of adding so-called Blaine amendments to state constitutions—whatever its motivation—occurred "during the late nineteenth and early twentieth century." Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 134 (2000); *see also id.* at 123 n.32 (describing Blaine amendments as enacted "between 1877 and 1917"); *id.* at 134 n.97 (same). By contrast, Article VIII, § 2 of Michigan's

Constitution was proposed and adopted in 1970—long after the addition of so-called Blaine amendments into state constitutions. As one scholar has remarked, "many of the provisions which activists term 'Blaine Amendments' cannot justifiably be associated with James G. Blaine and Reconstruction-era anti-Catholic bigotry," with Michigan's 1970 enactment being an obvious example. Jill Goldenziel, *Blaine's Name in Vain? State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev 57, 66–67 (2005). And Article VIII, § 2 is unlike the so-called Blaine amendments in another respect: it prohibits the public funding of *all* private schools, not just religious institutions. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L. & Pub. Pol'y 551, 588–89 (2003). Michigan's situation has been described as "unique," not fitting neatly into the history or pattern of other state constitutions' funding restrictions. *Id*.

The Supreme Court has explicitly rejected similar efforts to link all restrictions on public funding to the historical Blaine amendments. For example, in *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004), amici opposed to restrictions on the State of Washington's scholarship funds argued that "Washington's Constitution was born of religious bigotry because it contains a so-called 'Blaine Amendment,' which has been linked with anti-Catholicism." The state constitutional provision at issue in that case, however, was not the so-called Blaine amendment adopted in 1889. Because there was no "credible connection between the Blaine Amendment and . . . the relevant constitutional provision," the Supreme Court refused to consider "the Blaine Amendment's history." *Id*. In this case, too, there is no connection between so-called Blaine amendments and Article VIII, § 2 of Michigan's Constitution. Plaintiffs' questionable historical account should play no role in this Court's decision.

2. The historical record demonstrates an intent to preserve public funds for public schools, not to discriminate against Catholics.

Plaintiffs nonetheless argue that Article VIII, § 2 is unconstitutional by highlighting what they perceive to be anti-Catholic rhetoric in letters to the editor, newspaper articles and campaign literature from over 50 years ago. This argument, too, should be rejected. In any campaign involving a politically contentious ballot measure, it is almost inevitable that some statements made by supporters or opponents will be insensitive, misguided, or worse. But a litigant's ability to selectively identify a few instances of heated campaign rhetoric that included criticism of a religious institution does not demonstrate that anti-religious animus was the predominant factor motivating a challenged policy, and cannot be the basis for the judicial invalidation of an otherwise neutral and generally applicable law. And, although amici will not discuss each bullet point in Plaintiffs' complaint, *see* Compl. ¶ 92, PageID .19-23, the Court will doubtlessly observe that many of the examples cited are a far cry from being the hatred and animus that Plaintiffs ascribe to them.

The truth is, the campaign surrounding Proposal C was dominated by discussion about preserving public funds for public schools and maintaining the independence of private schools, not by anti-Catholicism. For example, the *Detroit Free Press* editorial board stated:

> The private and parochial schools of this state do provide an invaluable service for the children they serve. They provide a richness and diversity to American life, and we salute them for their work.
>
> The fundamental questions, though, are whether you preserve pluralism by absorbing into a semi-public status the independent school and whether the public ought to support more than one school system. The state does not support one system adequately now.

Editorial, *Public Schools Threatened by Scare Words Campaign*, Detroit Free Press, Oct. 25, 1970 (Exhibit A). Similarly, the *Detroit News* editorial board declared:

> [N]othing in the proposed amendment will keep parochial and other private schools from operating as they have in the past. And we might add that we favor their operation. We recognize them as institutions well worth the investment of parents desiring for their children something different or better than the offering of the public schools. But we believe the parents who want such benefits for their children should pay for them, not transfer the burden to the public tax rolls.

Editorial, *'Yes' on Proposal C*, Detroit News, Oct. 18, 1970 (Exhibit B). On local television, the editorial board of WJBK (TV 2) declared its support for Proposal C "because we oppose any diversion of already insufficient funds for public education" and because "the intrusion of government money and influence into private education eventually would transform *all* schools into public schools." Editorial, *What a 'Yes' Vote on Proposal 'C' Does – and Does Not – Mean*, WJBK-TV2, Oct. 28, 1970 (Exhibit C).

Supporters of Proposal C included prominent Catholics. A Republican state senator from Lansing, Phillip Pittenger, who was Catholic and sent his children to Catholic schools, viewed the public funding of private schools as a threat to their independence. His wife stated, "It was our free choice to send our children to Catholic schools. Why should our neighbor have to pay for our choice when public schools are available?" Sheila O'Brien, *Senator's Wife Discusses Rewards, Woes of Her Job*, Lansing State Journal, Dec. 16, 1973 (Exhibit D).

C. The 2000 election reauthorizing Article VIII, § 2 purged any taint of animus.

Even if this Court were to conclude that public advocacy associated with Proposal C evinces an official purpose of anti-religious animus, Article VIII, § 2 should nonetheless survive because it was reauthorized by popular vote in November 2000. In that election, voters were asked whether they wanted to eliminate Article VIII, § 2 from the Constitution so that Michigan could become a school voucher state. By an overwhelming vote of 69% to 31%, with over 4 million votes cast, the electorate voted to keep Article VIII, § 2 in the Constitution and preserve public

funding for public schools. *See* State of Michigan Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, at 5 (2019), https://goo.gl/3RMzjR. Strikingly, Plaintiffs' complaint does not allege any anti-religious animus associated with the 2000 election.

Absent any such allegation, this Court should conclude that voters' deliberate consideration and overwhelming rejection of the proposal to eliminate Article VIII, § 2 conclusively eradicates the taint of any discriminatory purpose that could be attributed to the initial enactment of Proposal C in 1970. Interestingly, an authority relied on heavily in Plaintiffs' own complaint[4] confirms this very point:

> What additional actions by a legislative body are necessary to ameliorate an original invidious purpose? Two cases, *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *United States v. Virginia*, 518 U.S. 515 (1996), suggest an answer: Explicit legislative reauthorization purges the taint of prior discriminatory purpose; the newly authorized, facially neutral provision is therefore constitutional unless a fresh showing of discriminatory purpose is made.

Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 147–48 (2000) (footnotes omitted and citations added).[5] In fact, *Rostker* even indicates that formal reauthorization is not required, so long as the relevant political body gives thorough reconsideration to the enactment in question and decides, for non-discriminatory reasons, not to rescind it. *See Rostker*

[4] *See* Compl. ¶¶ 36–42, PageID .10-12.

[5] *See also* J. Scott Slater, Comment, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33 Stetson L. Rev. 581, 619 (2004) ("Even if it could be proven that Florida's Blaine Amendment was enacted with a discriminatory purpose, the Amendment was probably 'washed clean' when it was reviewed and changed in 1968."); K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 Wm. & Mary Bill Rts. J. 525, 589 n.359 (2001) ("The Supreme Court has indicated that subsequent legislative reconsideration of a law originally enacted to achieve a discriminatory goal, may purge the taint of original invidious intent.").

v. Goldberg, 453 U.S. 57, 74-75 (1981) (relying on 1980 legislative history, evincing no discriminatory purpose, when Congress "thoroughly reconsider[ed]" but decided not to change a law that was alleged to have been enacted with a discriminatory purpose in 1948). Applying the same principle to the voters' decision in 2000 to preserve Article VIII, § 2, the constitutionality of the provision should be upheld.

IV. Charter schools are irrelevant to Plaintiffs' free-exercise claims.

Plaintiffs argue that they are forced to choose between adhering to their religious beliefs and receiving a public benefit because a secular private school can receive public funding by "seek[ing] charter-school status," Compl. ¶ 36, PageID .10-11, whereas a religious private school cannot. This argument is fatally flawed for several reasons.

First, Plaintiffs lack standing to raise this claim. Plaintiffs do not send their children to charter schools nor does their complaint allege that they wish to do so. *Id.* ¶¶ 17–22, PageID .6-7. Instead, Plaintiffs assert their wish to use MESP funds to pay for private, religious-school tuition. *Id*. But charter schools are not private schools, *see* Mich. Comp. Laws § 380.501(1),[6] and are in fact prohibited from charging tuition, *id*. § 380.504(2). Therefore, Plaintiffs are the wrong parties, and their lawsuit seeking to use MESP funds for private-school tuition is the wrong case, to complain that Michigan's charter-school system allegedly impedes their free exercise of religion.

Second, even if a claim about charter schools could be considered here, it fails on the merits. Charter schools are not private entities, like those in *Trinity Lutheran* or *Espinoza*, that seek public benefits or funding. Rather, under Michigan law a charter school is itself a "public school"—it is a "school district," "subject to the leadership and general supervision of the state board [of education]," "a governmental agency," and it performs a "governmental function." *Id.*

[6] "Public school academies" are the legal term for "charter schools" in Michigan.

§ 380.501(1); *see also Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208 (Mich. 1997); *Greater Heights Acad. v. Zelman*, 522 F.3d 678 (6th Cir. 2008) (same analysis for Ohio charter schools). Accordingly, the same rules apply to charter schools that apply to other public schools—including the requirement that they are bound by the Establishment Clause of the First Amendment not to endorse religion. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000). No public school—"charter" or otherwise—may have, as its official purpose or effect, the advancement of religious practice or viewpoints. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *see also Nampa Classical Acad. v. Goesling*, 714 F. Supp. 3d 1079, 1093 (D. Idaho 2010) (stating that a public charter school would be in violation of the Establishment Clause if it adopted a religious curriculum). Thus, not only is it permissible for Michigan to prohibit religious charter schools, it is required.

V. Article VIII, § 2 does not create a political structure that discriminates against religion.

Plaintiffs' final basis for challenging Article VIII, § 2, that it creates a political structure that discriminates against religion, must also fail. In *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014), an analogous race-based claim was raised against Article I, § 26 of the Michigan Constitution, which prohibited public universities from considering race in their admissions process. But the Supreme Court squarely rejected the plaintiffs' challenge in *Coalition to Defend Affirmative Action*. So, too, must Plaintiffs' political-structure claim fail with regard to Article VIII, § 2.

CONCLUSION

Because Article VIII, § 2 of the Michigan Constitution does not violate the United States Constitution, Plaintiffs' complaint should be dismissed.

Respectfully submitted,

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Dated: January 21, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of LCivR 7.2(b)(i) because this brief contains 5138 words, excluding the parts of the brief exempted by LCivR 7.2(b)(i). Word for Microsoft Word 365 Version 2112 was used to generate the word count.

Dated: January 21, 2022

/s/ Jeffrey S. Donahue
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PROOF OF SERVICE

I hereby certify that on January 21, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. A Judge's copy will be mailed to the Honorable Robert J. Jonker.

/s/ Melinda McKean
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JILL and JOSEPH HILE, et al.,

Plaintiffs,

vs.

STATE OF MICHIGAN, et al.,

Defendants.
_____/

Case No. 21-cv-829

Hon. Robert J. Jonker

Mag. Sally J. Berens

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EXHIBIT A

EDITORIAL, *PUBLIC SCHOOLS THREATENED BY SCARE WORDS CAMPAIGN,* DETROIT FREE PRESS, OCT. 25, 1970

Detroit Free Press

AN INDEPENDENT NEWSPAPER
JOHN S. KNIGHT, Editorial Chairman
LEE HILLS, President and Publisher JOHN B. OLSON, V. P. and General Manager
DERICK DANIELS, Executive Editor FRANK ANGELO, Managing Editor MARK ETHRIDGE JR., Editor

Published every morning by Knight Newspapers, Inc., 321 Lafayette Blvd., Detroit, Michigan 48231

2-B SUNDAY, OCTOBER 25, 1970

As We See It

Public Schools Threatened By Scare Words Campaign

PROPOSAL C on the statewide ballot has obviously been discredited with large numbers of Michigan voters, including many who oppose parochaid, and it is quite possible that it will be defeated. If that happens, we suppose it will then be argued that the people have supported aid to parochial schools, as the Legislature did before them, and that the case should be closed.

Let it be stipulated right now, then, that Proposal C is not the ideal vehicle for a popular referendum on parochaid. It embraces a ban on some auxiliary services as well, and a number of public officials have interpreted it as being even more drastic, threatening property tax exemptions and federal aid.

But we must go on to say that it is not the monster that it has been credited with being. It is, in fact, a generally reasonable delineation of the limits beyond which public aid for private education should not go.

In this we rely on the opinions of the state attorney general, Frank Kelley, as to what it will and will not do, except in certain areas where Kelley sees some grayness of meaning that we think unjustified. In those areas we have taken into account the argument by Erwin Ellmann, one of the authors of the amendment.

This, then, is what the amendment will in our judgment do and not do: It will unquestionably ban parochaid — the $22 million program passed this year and the immediate occasion for the referendum campaign. It will not ban transportation aid for parochial school pupils. It will ban most forms of auxiliary services to parochial school children and the shared-time concept *where publicly financed services have been provided in the private schools.*

The charge that Proposal C would prohibit the state from accepting federal aid is, in our judgment, nonsense.

Precedents in other states show the emptiness of the contention that such aid would be withdrawn. Nor is there much of a basis for the fear that the amendment would endanger the property tax exemption of the church schools, though Mr. Kelley leaves a small margin of doubt. And the silliest argument of all is that private school children would not be eligible for part-time enrollment or auxiliary services at a public school site or for fire, police and other general services. There are other constitutional guarantees that would obligate the state to provide this aid.

The private and parochial schools of this state do provide an invaluable service for the children they serve. They provide a richness and diversity to American life, and we salute them for their work.

The fundamental questions, though, are whether you preserve pluralism by absorbing into a semi-public status the independent school and whether the public ought to support more than one school system. The state does not support one system adequately now. We can better afford to accept the large numbers of parochial school students the public schools are constantly being threatened with than we can to support two, or several, school systems with public funds.

Finally, the bitter fight over this issue is in itself a prime argument in support of the wisdom of our forebears in insisting on the separation of church and state. The damage wrought by this fight surely exceeds whatever benefits such aid provides for one part of the population.

When a state—especially a pluralist, diverse state—undertakes as a matter of public policy to support a church-related school system, it invites religious bitterness and stirs up religious discord.

Vote "Yes" on Proposal C to preserve the wall of separation between church and state in education and to protect the public schools.

EXHIBIT B

EDITORIAL, *'YES' ON PROPOSAL C,* DETROIT NEWS, OCT. 18, 1970

Editorial Page

The Sunday News

Published in Detroit by The Evening News Association

PETER B. CLARK, *Publisher*

EDWIN K. WHEELER, *Executive Vice-President*
JAMES T. DORRIS, *General Manager*

MARTIN S. HAYDEN, *Editor*

JOHN H. O'BRIEN, *Associate Editor*
PAUL A. POORMAN, *Managing Editor*

ROBERT E. LUBECK, *Assoc. Editor—Features*
WILBUR E. ELSTON, *Assoc. Editor—Editorial Page*

Sunday, Oct. 18, 1970 3-E

'No' on parochiaid

'Yes' on Proposal C

Because this newspaper does not believe in state support for private schools, we ask Michigan voters to cast a "Yes" vote on the anti-parochiaid amendment which is Proposition C on the Nov. 3 ballot.

Some will argue that the question is not really one of state "support," that the issue involves "only $22 million" appropriated by the Legislature to provide for one-half the pay of lay teachers of nonreligious subjects. But the belief is general that the 50 percent will be pushed to 75 percent in the next legislative session. And at least one of the more ebullient of the program's legislative supporters has vowed that the drive will continue until achievement of dollar-for-dollar equality in the financing of the public and private systems.

Others would have us believe that this effort to block parochiaid essentially will put religion out of business in Michigan. After considerable pressure by this newspaper, Atty. Gen. Frank Kelley (certainly no opponent of aid to church schools) finally has delivered an informal opinion as to the proposal's provisions and limitations.

The attorney general says it is absurd to say that the amendment might upset tax exemptions for church properties.

It will **NOT** outlaw school crossing guards, health services or buses for private school children.

It will **NOT**, as claimed by some, deny to private schools the police, fire, sanitary and other services which are part of government's general obligation.

It will **NOT**, if the issue is important, keep parochial school athletic teams from playing on public school fields.

In two areas, Kelley sees a legal possibility that the new amendment may affect ongoing and important programs. These are in the areas of supplemental services (remedial reading, aid to deaf and handicapped children, etc.) and so-called "shared time" plans under which parochial school students now get science, mathematics and other advanced or expensive instruction either in public schools or from public school teachers.

The question, and the inevitable lawsuit which must be anticipated, hangs on an awkwardly-worded clause in the proposed amendment which prohibits use of public funds "to support the attendance of any student or the employment of any person at nonpublic schools or at any other location or institution where instruction is offered in whole or in part to non-public school students."

According to its authors, this complicated verbiage was designed to outlaw a subterfuge under which, in some places, public schools have leased for $1 a year a room or rooms in a private school and then provided teachers under the pretense that the premises had been made a "public school." But Kelley feels this wordage could be interpreted to prohibit any instruction in a public school of any student who took any other instruction in any non-public school.

We agree with lawyers who regard this interpretation as tortured, if not absurd. Carried to a natural conclusion, it would mean that any youngster who attended a religious Sunday school, or enrolled in off hours at the Cranbrook Academy of Art, would thereby be denied public school admission.

Significant to us is the fact that the public school officials who are leading the anti-parochiaid battle and the actual authors of the amendment all are on record as favoring the continued development of sharing programs. We concede that the new amendment would require that such instruction be given in the public schools (instead of by public school teachers in private schools) but we note that within public school systems, children now are moved from one school to another to get specialized or advanced training.

In summary, we are convinced that nothing in the proposed amendment will keep parochial and other private schools from operating as they have in the past. And we might add that we favor their operation. We recognize them as institutions well worth the investment of parents desiring for their children something different or better than the offering of the public schools. But we believe that parents who want such benefits for their children should pay for them, not transfer the burden to the public tax rolls.

For these reasons we urged a "YES" vote on Proposition C, the anti-parochiaid amendment.

EXHIBIT C

EDITORIAL, *WHAT A 'YES' VOTE ON PROPOSAL 'C' DOES – AND DOES NOT – MEAN,* WJBK-TV2, OCT. 28, 1970

WJBK-TV2

ROBERT C. WHITE
EDITORIAL DIRECTOR

EDITORIAL

7441 SECOND BLVD.
DETROIT, MICHIGAN 48202
873-7400

Wednesday, October 28, 1970

WHAT A 'YES' VOTE ON PROPOSAL 'C' DOES - AND DOES NOT - MEAN

CAMERA: CARINO

After thorough study and consultation with objective attorneys and judicial and other public officials, TV2 has no hesitation in recommending a YES vote on Proposal C -- the constitutional amendment to prohibit direct taxpayer subsidy of nonpublic schools.

VIDEOGRAPH: EFFECTS OF PROP. 'C'

According to legal opinion we respect, here is what Proposal C does and does not do:

. It does, beyond question, prohibit parochiaid.

. Properly interpreted, Proposal C does not forbid "shared time" classes at public schools.

. It does not deny auxiliary services to private school pupils, but allows those services to be rendered only at a public facility.

. It does not jeopardize federal assistance to Michigan public schools, just as such aid has not been withheld from a number of states which already have banned parochiaid.

. Proposal C does not strip private and parochial schools of basic municipal services, such as police and fire protection.

. Proposal C does not impair property tax exemptions specifically granted nonpublic schools elsewhere in the state constitution.

In short, except for outlawing parochiaid and requiring that auxiliary services be provided in public institutions, TV2 is convinced that Proposal C would leave the present status of nonpublic schools virtually unchanged. Parents desiring a private education for their children would retain this privilege and the option of paying for it.

(cont'd.)

 TV2 7:50 AM, 12:20 PM, 6:15 P.M, 11:15 PM

TV2 supports Proposal C because we oppose any diversion of already insufficient funds for public education. Despite claims to the contrary, there can be no long-range economy in requiring all taxpayers to support two or more school systems, especially with the initial $22 million dollars earmarked for parochiaid certain to multiply if Proposal C fails.

Above all, TV2 supports the anti-parochiaid amendment precisely because we value the diversity, the competition, and the alternative to public education which our nonpublic schools provide. We see a very real danger that the intrusion of government money and influence into private education eventually would transform all schools into public schools.

CHROMA KEY:
PROP. 'C'
'YES'

If you agree with TV2 -- if you, too, are opposed to public aid for nonpublic education -- we urge you to vote YES on Proposal C. Repeating -- if you want to nullify and eliminate the Legislature's current appropriation of $22 million dollars for parochiaid, vote YES on Proposal C.

Delivered by: Lawrence M. Carino, Vice President & General Manager

EXHIBIT D

SHEILA O'BRIEN, *SENATOR'S WIFE DISCUSSES REWARDS, WOES OF HER JOB,* LANSING STATE JOURNAL, DEC. 16, 1973

THE STATE JOURNAL

Sunday, December 16, 1973

Senator's Wife Discusses Rewards, Woes of Her Job

By SHEILA O'BRIEN
Staff Writer

One of the hardest things for Pat Pittenger to accept is the idea anyone could possibly differ or disagree with her husband.

Facing criticism, she said during the week, is one of the most difficult jobs for any politician's family.

MRS. PITTENGER is the wife of State Senator Phillip Pittenger, R-Lansing, in his third year in the Michigan Senate.

Pittenger served four years in the State House of Representatives before running for the Senate in 1970.

And, despite some of the hardships, Mrs. Pittenger said she enjoys the wife's role.

"I'M FREQUENTLY introduced as the senator's wife," she said. "That doesn't bother me at all. I'm proud to be a senator's wife."

Mrs. Pittenger, a registered nurse, and her husband were married in 1955 when she was 24. She was a surgical scrub nurse who sometimes worked from 7 a.m. to 10 p.m.

She is a warm, articulate person, the mother of two daughters, Pam, 13, and Penni, 8.

The four Pittengers moved to a east Hills ranch house on Hopkins a year ago.

THE HOUSE has a swimming pool and gas barbecue in the rear yard, and that, Mrs. Pittenger said, is as far as the Pittengers roam for vacations.

"We haven't had time since Phil's been in the House," she said. "He just never can get away."

Occasionally they take a long weekend somewhere with the children. Weekends are a special time around the Pittenger home.

"WE STAY home on Sunday, go to church and have a nice meal," Mrs. Pittenger said.

Both she and her husband converted to Catholicism before they met. Their daughters go to Resurrection and Catholic Central schools.

And the issue of Catholic education has been an explosive one for the Pittengers. He voted against parochial aid, afraid that state aid to private schools would interfere with their independence, his wife said.

"HE TRULY represented the opinion of most of the people in the district," she said. "But there was a lot of pressure on him to vote the other way."

She said priests visited their house trying to convince Pittenger to vote for the state aid. The Pittengers were lectured when they went to church.

In the beginning, she said, she disagreed with her husband's view.

"IT TOOK me awhile," she admits now. "But it was our free choice to send our children to Catholic schools. Why should our neighbor have to pay for our choice when public schools are available?"

Mrs. Pittenger said she keeps up on all the issues and feels a part of what her husband is doing.

"I meet the people he works with. I read about it in the papers," she said. "Sometimes it's hard to keep my mouth shut, but I've learned to do it. We're the politician. My opinions are sometimes interpreted as his."

Mrs. Pittenger said she never gives speeches but attends almost all the luncheons she is invited to attend. "If they are kind enough to invite me, I think I should go," she said.

THE SOCIAL life of the Pittengers changed drastically when he was elected to the house. "We are the ones who are entertained now," she said. Pittenger goes to dinner meetings almost every night of the week.

"I still love to have people over," she added. "I miss that."

The Pittenger day starts between 6:30 and 7 a.m. The phone rings and rings, mostly constituents who have heard or read some tidbit of news about pending legislation. They rarely catch Pittenger at home, so it's Mrs. Pittenger and the children who take messages and relay them.

HE FREQUENTLY gets home from meetings after midnight. "I used to wait up for him, but now sometimes I leave a note," she said.

The Pittenger mailbox is filled every day with letters

See Wife, Pg. D-4, Col. 1

Staff Photo by JIM MATTHEWS

Senator's wife Pat Pittenger relaxes at home