

STATE OF MICHIGAN
IN THE SUPREME COURT

COUNCIL OF ORGANIZATIONS AND
OTHERS FOR EDUCATION ABOUT
PAROCHIAID, AMERICAN CIVIL
LIBERTIES UNION OF MICHIGAN,
MICHIGAN PARENTS FOR SCHOOLS,
482FORWARD, MICHIGAN ASSOCIATION
OF SCHOOL BOARDS, MICHIGAN
ASSOCIATION OF SCHOOL
ADMINISTRATORS, MICHIGAN
ASSOCIATION OF INTERMEDIATE
SCHOOL ADMINISTRATORS, MICHIGAN
SCHOOL BUSINESS OFFICIALS, MICHIGAN
ASSOCIATION OF SECONDARY SCHOOL
PRINCIPALS, MIDDLE CITIES EDUCATION
ASSOCIATION, MICHIGAN ELEMENTARY
AND MIDDLE SCHOOL PRINCIPALS
ASSOCIATION, KALAMAZOO PUBLIC
SCHOOLS and KALAMAZOO PUBLIC
SCHOOLS BOARD OF EDUCATION,
Plaintiffs-Appellants

Supreme Court Case No. 158751
Court of Appeals No. 343801
Court of Claims No. 17-000068-MB

Oral Argument Requested

v

STATE OF MICHIGAN, GOVERNOR,
DEPARTMENT OF EDUCATION, and
SUPERINTENDENT OF PUBLIC
INSTRUCTION,
Defendants-Appellees.

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**BRIEF OF *AMICI* IMMACULATE HEART OF MARY AND
FIRST LIBERTY INSTITUTE**

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STATEMENT OF QUESTIONS PRESENTED

1. Whether § 152b of 2016 PA 249 is valid, and the money that statute appropriated should be immediately distributed to reimburse private religious schools for state-mandated health and safety compliance costs.

Amici IHM and First Liberty Institute answer: Yes.

2. Whether Const 1963, art 8, § 2 violates the Free Exercise Clause of the United States Constitution.

Amici IHM and First Liberty Institute answer: Yes.

STATEMENT OF INTEREST

Amicus Immaculate Heart of Mary is a Catholic School located in the Diocese of Grand Rapids, Michigan. Founded by Father Charles Killgoar, O.M.I., in 1950, the school serves the families of Immaculate Heart of Mary Parish and families in the surrounding community. Its mission is to be immersed in the teachings of the Catholic Church with a dedication to provide spiritual and academic formation in the development of well-rounded individuals centered in Christ. If this Court allows to flow the funding appropriated in MCL 388.1752b for the purpose of reimbursing costs imposed by Michigan’s unfunded health and safety mandates for religious schools, Immaculate Heart of Mary will be entitled to receive a portion of that funding.

Amicus First Liberty Institute is a nonprofit law firm that handles hundreds of religious liberty cases each year through a growing network of elite, volunteer attorneys. First Liberty fights for people of all faiths whose religious liberty has been threatened or whose First Amendment rights have been violated. First Liberty’s success inside and outside the courtroom ensures that Americans can continue to freely and openly practice their faith as outlined by the First Amendment. Such freedom stands in stark juxtaposition with article 8, § 2 of Michigan’s 1963 Constitution, a so-called “Blaine Amendment,” that was enacted with the intent to discriminate against religious schools and has had precisely that effect since its passage.¹

¹ This brief was not authored by counsel for a party to this case in whole or in part, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. In addition to *amici curiae* and their counsel, the Great Lakes Education Foundation made a monetary contribution to assist in preparation of this brief.

CONSTITUTIONAL PROVISION INVOLVED

Article 8, § 2 of Michigan's Constitution states, in relevant 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 or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

INTRODUCTION

Programs and services that promote student and employee safety are only incidental to a school's core education function. Accordingly, they are "not the type of services that flout the intent of the electorate expressed through Proposal C," the proposal that created article 8, § 2 of Michigan's Constitution, a so-called "Blaine Amendment." *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 48–49; 228 NW2d 772 (1975). Accord, e.g., *In re Proposal C*, 384 Mich 390, 418–419; 185 NW2d 9 (1971) (State's provisions of auxiliary "health and safety" services to nonpublic students "have only an incidental relation to the instruction of private school children" and therefore do not run afoul of article 8, § 2, Michigan's Blaine Amendment).

But this Court should go further and hold that article 8, § 2 violates the federal Free Exercise Clause, both facially and as applied. *Cf. In re Advisory Opinion re Constitutionality of PA 1966, No 261*, 380 Mich 736; 158 NW2d 497 (1968) (per curiam) (this Court issued an opinion upholding 1966 PA 261 even though PA 261 violated article 7, § 7 of the 1963 Constitution because article 7, § 7 was itself invalid under the U.S. Constitution). As Justice Markman noted in his concurrence to this Court's Order granting leave to appeal, it is not possible for the Court to "undertake a disciplined assessment of this case absent consideration of *Trinity Lutheran*," a U.S. Supreme Court decision that invalidated Missouri's use of a state Blaine Amendment to deny funding to a religious schools as violative of the Free Exercise Clause. *Council of Organizations and Others for Education About Parochial v State of Michigan*, 504 Mich 896; 929 NW2d 281, 282 (2019) (Markman, J., concurring) (citing *Trinity Lutheran Church of Columbia, Inc v Comer*, 137 S Ct 2012 (2017)). And such an assessment shows that article 8, § 2 is unconstitutional for two independent reasons.

First, in rejecting Missouri’s use of a Blaine Amendment to deny funding to a religious school in *Trinity Lutheran*, the U.S. Supreme Court unequivocally prohibited any requirement—like Missouri’s Blaine Amendment—that forces a religious organization to make a choice: “It may participate in an otherwise available benefit program or remain a religious institution.” 137 S Ct at 2021–2022. For a Michigan religious school, the reference to a “nonpublic school” in the Michigan Blaine Amendment does not eliminate the discriminatory result because a Michigan religious school can only be a “nonpublic school. A private, Michigan, religious school cannot, for example, elect to be a public charter school. And it is not a coincidence that at the time Michigan voters approved Blaine Amendment, the overwhelming majority of private schools in Michigan were religious.

The result of the facially neutral language in Michigan’s Blaine Amendment is to “single out the religious for disfavored treatment” and therefore “impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny.” *Trinity Lutheran*, 137 S Ct at 2020, 2021. In *Trinity Lutheran*, Missouri’s Blaine Amendment could not survive such scrutiny, because a State cannot invoke an interest in separating church and state as grounds for overriding the Free Exercise Clause, and there are many more narrowly tailored ways for a state to advance such an interest short of a blanket ban on religious-school funding. Since the Michigan Blaine Amendment, like Missouri’s Blaine Amendment, puts a religious organization to an unconstitutional choice, the Michigan Blaine Amendment also violates the Free Exercise Clause, and the U.S. Supreme Court would likely so hold.

Second, Blaine Amendments like Missouri’s and Michigan’s have a “shameful pedigree” that courts “should not hesitate to disavow.” *Mitchell v Helms*, 530 US 793, 828 (2000) (plurality). As the U.S. Supreme Court recently reaffirmed, states have a “duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”

Masterpiece Cakeshop, Ltd v Colo Civ Rights Comm'n, 138 S Ct 1719, 1731 (2018). Yet Michigan's Blaine Amendment was unequivocally enacted based on religious hostility.

Article 8, § 2 was proposed in direct response to the State's appropriation of modest funding to Michigan religious schools, 80% of which were Catholic. The ballot committee that placed the proposal on the ballot used a religious slur as its name: the "Council Against Parochiad," a slur that continues to be used by the lead Plaintiff in this very case. And campaign literature and ads attacked the Catholic Church and Catholic schools, causing one Michigan Senator to comment that he had "never witnessed such anti-Catholic sentiment in [his] life."

For both these reasons, this Court should hold that article 8, § 2 violates the federal Free Exercise clause and that, as a result, § 152b is proper and should be enforced.

STATEMENT OF FACTS

I. 2016 PA 249

Section 152b of 2016 PA 249 allows a Michigan nonpublic school to seek reimbursement from the State for costs that the school incurs complying with state mandates designed to “ensur[e] the health, safety, and welfare of the children in nonpublic schools” and appropriates up to \$2.5 million for that purpose. MCL 388.1752b. The law was initiated as Senate Bill 801 and passed both the House and Senate on June 8, 2016. Governor Rick Snyder signed the bill into law on June 27, 2016, and it had an effective date of October 1, 2016. *Id.* at enacting § 3.

The funds that PA 249 provides for nonpublic schools cover a myriad of state mandates, documented in the nonpublic-schools mandate report required under Section 236 of PA 252 of 2014. That report was issued (as revised) on November 25, 2014 (see <http://goo.gl/gQEiYl>), and includes the following legislative requirements for nonpublic schools:

<u>MCL/Admin Rule</u>	<u>Description</u>	<u>Category</u>
29.5p	Hazardous Chemicals—Employee Right to Know	School Operations— Student/Staff Safety
29.19	Fire/Tornado Drills/Lockdown/Shelter in Place	Student/Staff Safety
257.715a	State Police inspection 12+ passenger motor vehicles	Student/Staff Safety
257.1807-.1873	(Pupil Transportation Act)—school bus owned/operated by nonpublic school must meet or exceed federal & state motor vehicle safety standards	Student/Staff Safety
289.1101-.8111	Food Law	School Operations— Student/Staff Safety
324.8316	Notice of pesticide application at school or day care center	Student/Staff Safety
333.9155	Concussion education	Student Health
333.9208	Immunizations	Student Health
333.17609	Licensure of school speech pathologist	Student Health
380.1135	Student records	Accountability

380.1137a	Release of student information to parent subject to PPO	Accountability
380.1151	English as basic language of instruction	Educational Requirements
380.1166	Constitution and governments mandatory courses	Educational Requirements
380.1177-.1177a	Immunization statements and vision screening	Student Health
380.1179	Possession/use of inhalers and epinephrine auto-injectors	Student Health
380.1230-.1230h	Required criminal background check by State Police/FBI; unprofessional employment history check; registered education personnel	Student/Staff Safety
380.1274b	Products containing mercury; prohibit in schools	Student/Staff Safety
380.1233; R390-1145	Teaching or counseling as noncertificated teacher; special permits; emergency permits	Educational Requirements
380.1531-.1538	Teacher certification and administrator certificates	Educational Requirements
380.1539b	Notification of conviction of listed offense	Student/Staff Safety
380.1561	Compulsory school attendance	Educational Requirements
380.1578	Attendance records	Accountability
388.514	Postsecondary Enrollment Act information and counseling	Educational Requirements
388.551-.557	Private, Denominational & Parochial Schools Act	School Operations
388.851-.855b	Construction of school buildings	Building Safety
388.863	Compliance with federal asbestos building regulation	Building Safety
388.1904	Career and technical preparation program; enrollment; records	Educational Requirements
388.1909-.1910	Career and Technical preparation information and counseling	Educational Requirements
408.411-.424	Workforce Opportunity Wage Act (minimum wage)	School Operations

408.681-.687	Playground Equipment Safety Act	Student/Staff Safety
409.104-.106	Youth Employment Standards Act; work permits in student files	School Operations
423.501-.512	Bullard-Plawecki Employee Right to Know Act (employee files)	School Operations
722.112	Child care organizations	School Operations
722.115c	Child care organization criminal history and criminal background checks	Student/Staff Safety
722.621-.638	Child Protection Law	Student/Staff Safety
R257.955	Annual school bus inspections	Student/Staff Safety
R285.637	Pesticide use	Student/Staff Safety
R289.5701.1-.6	Food establishment manager certification	School Operations
R325.70001-.700018	Bloodborne Pathogens	Student/Staff Safety
R340.293	Notification to district of auxiliary services needed	Educational Requirements
R340.484	Boarding school requirements	School Operations—includes aspects of all categories
R390.1146	Mentor teachers for noncertificated instructors	Educational Requirements
R390.1147	Certification of school counselors	Educational Requirements

None of these mandates is strictly necessary for a nonpublic school to operate or to employ teachers or staff. In other words, if the mandates did not exist, a nonpublic school could still conduct its educational day-to-day business. The mandates are simply the Legislature's entirely secular method to protect and promote the health and welfare of children attending, and employees of, Michigan's nonpublic schools. See Const 1963, art 4, § 51 ("The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.").

II. The history of Blaine Amendments in the United States demonstrates animus and hostility against Catholics and the Catholic Church.

So-called “Blaine Amendments” are named after former U.S. Representative (and later Senator and Presidential Candidate) James G. Blaine of Maine. In 1875, Blaine proposed an amendment to the United States Constitution that sought to bar government aid to sectarian schools and institutions. Toby Heytens, *Note: School Choice And State Constitutions*, 86 Va. L. Rev. 117, 131 (2000) [hereinafter *School Choice*].

When Blaine made his proposal, public schools—often described as common schools—were largely Protestant. As one scholar explains, the “common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism.” Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol’y 657, 666 (1998) [hereinafter *Blaine’s Wake*]. Catholic immigrants, who began to arrive in America in waves in the 1800s, “perceived Protestant-controlled public schools as hostile to their faith and values.” *School Choice*, p 136. And these immigrants were starting to request government financial support for Catholic schools. *Id.* The federal Blaine Amendment was a direct response to these efforts, intended to curtail the minority but growing Catholic school system.

It is now beyond cavil that the Blaine Amendment was a largely anti-Catholic response to the request by Catholics for public funding. E.g., *School Choice*, p 138; *Blaine’s Wake*, p 659 (“[T]he Blaine Amendment is a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had particular disdain for Catholics.”). Blaine’s Amendment would have mandated that no federal funds could be used to aid “sectarian” institutions, which was code for Catholic schools. *School Choice*, p 133. With the support of President Grant, the proposed amendment was approved by

the House of Representatives, but it narrowly failed to achieve the two-third majority necessary for an amendment in the Senate. *Id.*

Blaine's defeat at the federal level "did not, however, end the matter." *School Choice*, p 134. In the late 19th and 20th Century, in the wake of the federal Blaine Amendment proposal, "approximately thirty states wrote or amended their constitutions to include language substantially similar to that of" the federal Blaine Amendment. *Id.* In fact, Congress made the inclusion of Blaine Amendments a condition "of admission to the Union" for several states. *Id.* As the United States Supreme Court has noted, "[c]onsideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for Catholic." *Mitchell v Helms*, 530 US 793, 828 (2000) (plurality opinion).

Michigan did not need to pass a new Blaine Amendment as part of this wave, as it had already enshrined anti-Catholic bias in its 1850 Constitution. Article 4, § 20 stated that "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the state be appropriated for any such purpose." Const 1850, art 4, § 40. Nonetheless, Catholic animus in Michigan continued unabated. The anti-Catholic American Protective Association, an influential anti-Catholic group, had a strong membership in Michigan, and its members "swore a solemn oath never to vote for a Catholic, never to join one on strike, and to avoid hiring one if a Protestant was available." Mark S. Massa, *Anti-Catholicism in the United States* (June 2016), available at <http://goo.gl/PYWsEB>.

III. The history of Michigan’s Blaine Amendment, codified in article 8, § 2 of Michigan’s Constitution, similarly demonstrates animus and hostility toward Catholics and the Catholic Church.

In the mid-1960s, after years of paying taxes that subsidized public schools *and* paying private tuition, families who sent their children to private schools began to lobby the State to provide direct financial support to nonpublic schools. In response, the Legislature proposed allocating a modest \$100 for each high-school student and \$50 to each grade-school student attending a nonpublic school. This legislation ultimately became law with the passage of 1970 PA 100, and this Court correctly affirmed the validity of the appropriation, concluding that the legislation neither advanced nor inhibited religion and did not violate the free exercise or establishment clauses of the U.S. or Michigan constitutions. *In re Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82; 180 NW2d 265 (1970).

In 1970, Catholic schools accounted for by far the largest number of nonpublic schools in Michigan, with nearly 218,000 of the 275,000 nonpublic school students in the state. (*Detroit News*, 11/1/70.) The next largest system was the National Union of Christian Schools of the Christian Reformed Church in West Michigan, with 23,000 students. (*Id.*) As a result, the “nonpublic schools” in Michigan *circa* 1970 meant “religious schools,” as this Court has already recognized. *Traverse City Sch Dist v Attorney Gen*, 384 Mich 390, 434; 185 NW2d 9 (1971) (“with ninety-eight percent of the private school students being in church-related schools,” the classification set forth in article 8, § 2 “is nearly total” in the “ ‘impact’ of the classification on religious schools.”) And opponents of the 1970 funding measure turned public opinion against state funding by demonizing a particular sect: the Catholic church and the Catholic school system.

These opponents to Catholic school funding created a ballot committee, the “Council Against Parochiad,” the third word being a religious slur meant to play on the word “parochial,” which means “of or relating to a church parish and the area around it,” see <http://www.merriam-webster.com/dictionary/parochial>. The Council Against Parochiad introduced to the November 1970 ballot what was known as “Proposal C,” which eventually became article 8, § 2. The proposal was cleverly neutral in its language, barring public funding not only for “denominational” schools but for all “nonpublic” schools. But as just noted, “nonpublic” meant “religious schools” in 1970, and the advocacy behind the proposal showed that. Consider just a small sample of the public advocacy in support of Proposal C and against funding for Catholic schools:

- “Parochiaid is basically a Catholic position. Catholics say they cannot afford to educate their children, which is of course their own choosing. . . . As far as I am concerned the Catholic Church is the largest profit-making non-profit organization in the world.” (*Detroit News*, Letter to the editor, 11/1/70.)
- “Money used to relieve the religious body of a responsibility it has chosen to take of its own free will, immediately is a violation of church and state.” (Methodist Bishop Dwight E. Loder in an article he authored in the *Michigan Christian Advocate*, cited in the *Detroit News*, 10/21/70.)
- “Parochiaid forces advertise many well-known people who oppose Proposal C. The influence of these people is negated since, to my knowledge, they are all either Catholic, or wealthy, or both, with a personal desire to see a tax breakthrough for private parochial schools.” (*Detroit News*, Letter to the editor, 10/31/70.)
- “Public funds to finance . . . specific religious indoctrination[] would only weaken our public school system.” (*Detroit News*, Letter to the editor, 10/21/70.)
- “As more tax funds are pumped into school systems not controlled by the public, enrollments are encouraged and other churches and private groups are encouraged to open similar schools in which to indoctrinate children in their religious or political beliefs.” Voters should “reject all demands of politically-active clergy men who are seeking tax funds for religious schools. It was their decision, not the public’s to open and to operate then.” (*Grand Rapids Press* op-ed, 10/26/70.)

- “Honest, sincere teachers steeped in their faith might find it impossible to separate religious conviction from even the physical sciences. Such considerations, apparently, do not seriously worry Speaker Ryan and his minions. They are determined to fasten on the state by hook or crook, a policy of public funds for private, religious-oriented schools. (*Grand Rapids Press*, 5/8/69.)
- “[S]ince no Legislature can bind the next one, the Legislature we elect Tuesday will be free to raise the aid to the 90 percent or more, which Catholic leaders already have announced they will ask.” (*Grand Rapids Press*, Letter to the editor, 11/7/70.)
- “To those tax-hungry clergymen who formed an alliance with unprincipled politicians to jam repeated parochial measures through the legislature and who, during the campaign, have threatened to close their religious schools . . . , we say ‘Don’t just talk about it, DO IT!’” (*Grand Rapids Press*, 11/4/70.)
- “Outright anti-Catholicism” is one of the reasons for supporting Proposal C. (*Grand Rapids Press*, 10/22/70.)
- “I am deeply concerned with the possibility of parochial aid to private and catholic and other religious schools. I am asking you to vote against any form of parochial aid.” (Letter from public-school principal to Sen. James Fleming, 5/13/69.)
- “It is a well known fact that the Roman Catholic Church—as an organization—is reputed to be the wealthiest church in our nation and thus can afford their own schools, but this present move on their part smells of greed to make every taxpayer help support and encourage their church slanted education.” (Letter to Sen. James Fleming, 5/15/69.)
- “I have never witnessed such anti-Catholic sentiment in my life. It might even be that divisiveness created by this issue would set back ecumenicalism fifty years in Michigan.” (Letter of Senator James Fleming to Dr. Charles T. Vear, referencing a press release issued by Bishop Dwight Loder, Michigan Area United Methodist Church, 5/9/69.)
- “When the parochial people reach their goal of funding private and church schools on an equal basis with public schools it will cost Michigan taxpayers at least a quarter of a billion dollars!! That’s No claim, that’s their aim!” (Yes Ad, paid for by the Council Against Parochial, *Detroit News*, 10/30/70.)
- “Support Church Schools by Giving on Sunday!! (And Not With Our Public Tax Money) Parochial Must Be Stopped – Now!!” (Yes Ad paid for by the Council Against Parochial, *Detroit News*, 10/30/70.)

- “This Amounts to Segregation on a Religious Basis! Keep Church and State Separate!” (Yes Ad paid for by the Council Against Parochialism, *Detroit News*, 10/30/70.)
- And: “LET’S BE FAIR. More than 90% of all parochial funds go to schools owned by the clergy of one politically active church – a church which pays no taxes on its \$80 billion holdings in real estate, stocks, bonds, and business investments, or on its \$12 billion annual income in this country.” “BUT THIS IS ONLY THE BEGINNING. You will go on paying and paying for church and private schools of all kinds – unless you put a stop to it now.” “You may never have another chance!” (Vote Yes on “C” November 3 Ad.)

In testimony to the U.S. House Ways and Means Committee about “parochialism,” the president of the Grand Rapids area chapter of Americans United and the Michigan Federation Chapters of Americans United for Separation of Church and State summed it all up when he “spoke of his groups’ efforts in passing a referendum in Michigan in 1970 which prohibits tax dollars going to private schools. The proposal ‘said in no uncertain terms that we would not sell public education for a mess of parochial pottage’” (*Grand Rapids Press*, 8/16/72.)

The many individuals and groups seeking to discriminate against a particular religious sect and its schools carried the day. Based on all the anti-Catholic rhetoric, voters narrowly approved Proposal C with 56% of the votes cast in the November 1970 election. Broillette, *School Choice in Michigan: A Primer for Freedom in Education* (Mackinac Center for Public Policy, 1999), pp 14–15.

ARGUMENT

- I. The Court should hold that the appropriation to nonpublic schools authorized by § 152b of 2016 PA 249 is valid both because it does not violate Const 1963, art 8, § 2, and especially because article 8 § 2 is itself unconstitutional under the Free Exercise Clause of the U.S. Constitution.**
- A. Section 152b provides funding for state-mandated health and safety measures at private schools and therefore does not violate the letter or the spirit of article 8, § 2.**

Under this Court’s well-settled standard of review, § 152b is “presumed to be constitutional” and must be construed as such “unless its unconstitutionality is clearly apparent.” *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003). “Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears to clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.” *Phillips v Mirac, Inc.*, 470 Mich 415, 422; 685 NW2d 174 (2004) (quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW2d 805 (1939)).

Section § 152b’s backdrop is that it provides funding only for state requirements that guarantee the health, safety, and welfare of children attending nonpublic schools. This scope falls squarely within the Legislature’s authority to “pass suitable laws for the protection and promotion of the public health,” Const 1963, art 4, § 51, and to ensure those laws are adequately funded so that they can be implemented. The situation would be no different if, in mandating lead testing for the water in all public and nonpublic schools, the State chose to provide funding to ensure that the testing actually took place and children were adequately protected from consuming lead. Programs and services that promote student and employee safety are only incidental to a school’s core education function and thus are “not the type of services that flout

the intent of the electorate expressed through Proposal C [article 8, § 2].” *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 48–49; 228 NW2d 772 (1975).

Indeed, this Court made this very point in *In re Proposal C*, 384 Mich 390; 185 NW2d 9 (1971). There, this Court considered a variety of state laws involving public monies and private schools in the immediate wake of Proposal C’s adoption. In examining “auxiliary services” (which the Court defined as “special education services designed to remedy physical and mental deficiencies of school child”) and drivers training, the Court concluded that laws assisting nonpublic schools with providing both categories of these services were “general health and safety measures.” *Id.* at 418–419. Auxiliary services provide for the “physical health and safety” of special education students, and drivers training serves the state interest “in providing driving instruction to high school age youth . . . to enable neophyte drivers to safely handle an automobile in order to protect themselves and other citizens from injuries.” *Id.*

This Court concluded that Proposal C’s prohibitions “have no impact upon auxiliary services.” *Id.* at 419. “Since auxiliary services are general health and welfare measures, they have only an incidental relation to the instruction of private school children. *Id.* Auxiliary services “are related to educational instruction only in that by design and purpose they seek to provide for the physical health and safety of school children.” *Id.* “[T]he prohibitions of Proposal C which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation are not applicable to auxiliary services which only incidentally involve the operation of educating private school children.” *Id.* And the same is true of drivers training. Accordingly, “Proposal C does not prohibit auxiliary services and drivers training, which are general health and safety services, wherever these services are offered except in those unlikely circumstances of religious entanglement.” *Id.* at 435.

The activities that § 152b funds are similarly focused health and safety measures that are, at most, incidental to the purpose of running a private school and do not present circumstances where religious entanglement is likely. The funds do not promote nonpublic school education or employment directly or indirectly. They merely ensure that proper steps are taken to keep teachers and students safe and well. Because the services that § 152b funds are only incidental to the instruction of private school children, this Court should follow the reasoning of *In re Proposal C* and hold that § 152b was a proper exercise of the Legislature’s authority and not prohibited by Const 1963, art 8, § 2.

B. Regardless whether § 152b conflicts with Const 1963, art 8, § 2, this Court should expressly hold that § 2 violates the Free Exercise Clause of the United States Constitution.

1. Article 8, § 2 unconstitutionally forces religious schools to choose between remaining a religious school or becoming eligible for a public benefit.

Article 8, § 2 cannot survive federal constitutional scrutiny because it conflicts with the federal Free Exercise Clause by requiring private, religious schools to choose between remaining a religious school or becoming eligible for a public benefit by, for example, becoming a charter school.

The U.S. Supreme Court clarified in *Trinity Lutheran* that the Free Exercise Clause cabins any state’s interest “in achieving greater separation of church and State then is already ensured under the Establishment Clause of the Federal Constitution.” 137 S Ct at 2024 (quoting *Widmar v Vincent*, 454 US 263, 276 (1981)). Yet, Plaintiffs in this case insist that Michigan’s Blaine Amendment requires much greater space between church and state than the federal First Amendment requires. Plaintiffs’ interpretation of article 8, § 2 is correct, and that necessarily means that § 2 is unconstitutional.

In *Trinity Lutheran*, the State of Missouri offered grants to schools to subsidize making playground surfaces safer. The problem was that Missouri’s Blaine Amendment, like Michigan’s, prohibited taking money “from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.” 137 at 2017 (quoting Mo Const art I, § 7). As a result, Missouri “had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program.” *Id.*

Trinity Lutheran’s preschool applied for a playground grant and would have received the state reimbursement monies but for the preschool’s religious affiliation. *Id.* at 2017–2021. The U.S. Supreme Court held that Missouri’s denial violated the federal Free Exercise Clause because “Trinity Lutheran was denied a grant simply because of what it is—a church.” *Id.* at 2023. This was an unconstitutional result because it “single[d] out the religious for disfavored treatment” and therefore “imposed a penalty on the free exercise of religion that triggers the most exacting scrutiny.” *Id.* at 2020–2021. In so holding, the Court instructed lower courts to be “careful to distinguish” neutral and generally applicable laws from “those that single out the religious for disfavored treatment.” *Id.* at 2020. The latter forces religious organizations to the untenable “choice between being a church and receiving a government benefit.” *Id.* at 2022, 2024. States cannot impose “special disabilities on the basis of religious views or religious status,” so Missouri’s actions were unconstitutional. *Id.* at 2021.

For a Michigan religious school, the reference to a “nonpublic school” in the Michigan Blaine Amendment does not eliminate the discriminatory result because a Michigan religious school can *only* be a “nonpublic school.” The fact that non-religious private schools are also excluded from a public benefit is completely irrelevant. What the *Trinity Lutheran* case prevents is requiring the choice between remaining a religious school or become entitled to a public benefit. According to *Trinity Lutheran*:

Like the disqualification statute in *McDaniel*, the Department’s policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church, just as *McDaniel* was free to continue being a minister. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, *McDaniel* says plainly that the State has punished the free exercise of religion: “To condition the availability of benefits . . . upon [a recipient’s] willingness to . . . surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties.” 435 U.S. at 626, 98 S.Ct. 1322 (plurality opinion) (alterations omitted). [137 S Ct at 2021–2022.]

Only the most compelling and narrowly tailored government interest can justify blatantly discriminatory treatment. *Trinity Lutheran*, 137 S Ct at 2024 (quoting *Church of the Lukumi Babalu Aye, Inc v Hialeah*, 508 US 520 (1993) (such regimes “must be subjected to the ‘most rigorous’ scrutiny.”)). Only a state interest “of the highest order” justifies unequal treatment. *Id.* (quoting *McDaniel v Paty*, 435 US 618, 628 (1978)). And any such law “must be narrowly tailored to advance that interest.” *Lukumi*, 508 US at 531–532. Michigan’s Blaine Amendment does not come close to satisfying these two, independent requirements.

First, Michigan’s Blaine Amendment does not advance a compelling interest. Plaintiffs defend the Amendment as ensuring a robust separation of church and state. But the U.S. Supreme Court has already held that such an interest “is limited by the Free Exercise Clause.” *Widmar*, 454 US at 276. In other words, Michigan cannot invoke its interest in promoting the separation of church and state as a reason to override the Free Exercise Clause, much less for authorizing blatant religious discrimination.

In fact, any state’s interest in avoiding an Establishment Clause problem is not compelling when the state’s “fears” are “unfounded.” *Lamb’s Chapel v Center Moriches Union Free Sch Dist*, 508 US 384, 395 (1993); accord, *e.g.*, *Widmar*, 454 US at 280–281. Here, no reasonable observer would think that a state program that seeks to reimburse religious schools for unfunded state health and safety mandates somehow constitutes a government endorsement

of religion. That is why the U.S. Supreme Court has held that even a private-school choice program “where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals” does not carry “with it the *imprimatur* of government endorsement.” *Zelman v Simmons-Harris*, 536 US 639, 655 (2002).

Second, Michigan’s Blaine Amendment is not narrowly tailored. Any purported interest in avoiding an Establishment Clause problem could “be achieved by narrower [regulations] that burdened religion to a far lesser degree.” *Lukumi*, 508 US at 546. According to Plaintiffs, Michigan’s Blaine Amendment is as broad as it could possibly be, purporting to prohibit any public funding, directly or indirectly, and no matter how minimal or for what purpose, to religious schools or the families that attend them. A family with children attending a religious school is uniquely barred from even lobbying a state representative or senator for funding to support their child’s education, a unique status-based discrimination that does not apply to any other individual, group, or organization. *It is the very breadth of article 8, § 2 that Plaintiffs trumpet that dooms the Amendment under the federal Free Exercise Clause.*

Finally, the U.S. Supreme Court’s decision in *Trinity Lutheran* is not limited in any way by its previous opinion in *Locke v Davey*, 540 US 712 (2004). *Locke* does not authorize Michigan to violate the federal Free Exercise Clause by discriminating against religious entities to the broadest extent possible when distributing public funding. *Locke* merely held that the State of Washington could deny publicly funded scholarships to a student pursuing a degree in devotional theology. *Id.* at 720–21. In doing so, the Court relied on the “historic and substantial state interest” in “not funding the religious training of clergy.” *Id.* at 722 n5.

In *Trinity Lutheran*, the Court rejected Missouri’s argument that the free-exercise question presented was “controlled by . . . *Locke*.” 137 S Ct at 2022–2023. The Court explained that *Locke* was distinguishable because there the state was merely denying scholarships to those who use the money to “prepare for the ministry.” *Id.* at 2023. In other words, *Locke* was consistent “with the State’s antiestablishment interest in not using taxpayer funds to pay for the training of clergy.” *Id.* “[N]othing of the sort [could] be said about a program to use recycled tires to resurface playgrounds.” *Id.*

Nothing of the sort can be said about Michigan’s Blaine Amendment and the appropriations at issue here, either. The Amendment purports to exclude religious schools and students attending them from receiving *any* public funding, even though the children are receiving a general education, not ministerial training preparing them to act as clergy.

Nor can it be said that *Trinity Lutheran* can be limited to its facts. Although footnote three of the opinion said that the Court “confine[d] its holding to the particular facts and issue before it,” the footnote did not command a majority of the Justices. And “[s]uch a reading would be unreasonable” because the U.S. Supreme Court’s “cases are ‘governed by general principles, rather than ad hoc improvisations.’” *Trinity Lutheran*, 137 S Ct at 2026 (Gorsuch, J, joined by Thomas, J, concurring) (quoting *Elk Grove Unified Sch Dist v Newdow*, 542 US 1, 25 (2004) (Rehnquist, CJ, concurring in judgment)). The Court’s holding was “unremarkable in light of its prior decisions,” none of which had anything to do with playgrounds. 137 Sup Ct at 2021 (citing *Mitchell*, 530 US 793, *Rosenberger v Rector & Visitors of Univ of Va*, 515 US 819 (1995), *Lukumi*, 508 US 520, *Lamb’s Chapel*, 508 US 384, and *Widmar*, 454 US 263)). These cited decisions “make one thing clear”: any policy that “expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character” violates the Free Exercise Clause. *Id.*

That is why other courts have correctly held that *Trinity Lutheran*'s holding—that states cannot “impose special disabilities on the basis of religious status,” *id.* at 2021 (cleaned up)—cannot be confined to playground-resurfacing reimbursement. *E.g.*, *Taylor v Town of Cabot*, 178 A3d 313, 322–325 (Vt, 2017) (applying *Trinity Lutheran* to uphold a historic preservation grant to a church); *Moses v Ruszkowski*, ___ P3d ___, 2018 WL 6566646, at *1–2 (NM, 2018) (upholding textbook-loan program for students attending religious schools based on the Court's holding in *Trinity Lutheran*).

Missouri, like Plaintiffs here, tried to justify its Blaine Amendment by arguing that Missouri had a compelling interest in church-state separation, that its Amendment was narrowly tailored to advancing that goal, and that the case was controlled by *Locke*. The U.S. Supreme Court rejected all those justifications. This Court should do the same here.

2. The Michigan Blaine Amendment also violates the federal Free Exercise Clause's anti-religious-hostility principle.

The “Free Exercise Clause ‘protect[s] religious observers against unequal treatment,’ and inequality results when a [decision-making body] decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.” *Lukumi*, 508 US at 542–43 (quotations omitted). Specifically, “the First Amendment forbids an official purpose to disapprove of *a particular religion* or of *religion in general*.” *Lukumi*, 508 US at 532 (emphasis added).

Importantly, a law's facial neutrality is insufficient to take it outside the Free Exercise Clause's scope. In *Lukumi*, the Supreme Court expressly “reject[ed] the contention . . . that [its free-exercise] inquiry must end with the text of the laws at issue.” 508 US at 534 (Section II.A.1, opinion of the Court). “Facial neutrality,” said the Court “is *not* determinative.” *Id.* at 534 (emphasis added). That is because the “Free Exercise Clause, like the Establishment Clause, extends *beyond* facial discrimination. . . . Official action that targets religious conduct for

distinctive treatment *cannot* be shielded by mere compliance with the requirement of facial neutrality.” *Id.* (emphases added). Because the record in *Lukumi* “compel[led] the conclusion that suppression” of a religious sect “was the object of the” otherwise facially neutral ordinances at issue, the U.S. Supreme Court held that the ordinances, which were “*designed to persecute or oppress* a religion or its practices,” *id.* at 547 (Section IV, opinion of the Court (emphasis added)); *see also id.* at 559 (Souter, J, concurring in part and in judgment) (joining Section IV), were non-neutral and violated the Free Exercise Clause.

The U.S. Supreme Court reiterated this anti-hostility principle in *Masterpiece*. There, the Colorado Civil Rights Commission held a master cake artist liable for violating a state civil rights statute when the artist, who served all customers, respectfully declined to express a message that conflicted with his religious beliefs: creation of a custom cake celebrating a same-sex marriage. The Court invalidated the citation because the Commission acted with hostility toward the artists’ religious beliefs. Specifically, the Commission demonized those beliefs and treated the artist less favorably than similarly situated businesses that declined to create messages celebrating marriage between one man and one woman. The Court emphasized that states have a “duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.” *Masterpiece Cakeshop, Ltd v Colo civ Rights Comm’n*, 138 S Ct 1719, 1731 (2018). Even “*slight suspicion*” of government hostility toward religion is enough to invalidate state action. *Id.* (emphasis added).

As detailed above, the Michigan historical record is replete with evidence that the Blaine Amendment was motivated by anti-Catholic animus. At the time of the Amendment’s passage, 80% of students attending nonpublic schools were at Catholic institutions, and 98% were attending Christian schools of one denomination or another. The ballot committee that placed Proposal C on the ballot, like the lead Plaintiff here, used a religious slur as its name: the

“Council Against Parochiaid.” Even a cursory investigation of the relevant campaign literature, newspaper ads, and letters to the editor reveal pernicious attacks on Catholics (these people “are all either Catholic, or wealthy, or both”; Catholic leaders will be back asking for more money; opposition to public funding based on “outright anti-Catholicism”; “I have never witnessed such anti-Catholic sentiment in my life”), the Catholic Church (“largest profit-making non-profit organization in the world”; “tax-hungry clergymen”; “[i]t is a well known fact that the Roman Catholic Church—as an organization—is reputed to be the wealthiest church in our nation and thus can well afford their own schools”; “smells of greed”), and Catholic Schools (intended “to indoctrinate children”; “segregation on a religious basis”; “Their total demise cannot come too soon”).

In sum, the history of the Michigan Blaine Amendment’s passage demonstrates that it was enacted based on animus toward a particular sect—the Roman Catholic Church. The Amendment was specifically targeted to eliminate validly enacted (and constitutional) funding for Catholic and other sectarian schools, and to prevent Catholic families or school officials from ever lobbying the Legislature for such funds again. The “bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Department of Agriculture v Moreno*, 413 US 528, 534 (1973). The publicized animus provides far more than a “slight suspicion” that religious animus infected article 8, § 2’s enactment. Accordingly, this Court should strike down Michigan’s Blaine Amendment under *Masterpiece* as well.

II. Before ruling on the constitutionality of Michigan's Blaine Amendment, this Court should consider the U.S. Supreme Court's forthcoming opinion in *Espinoza*.

While this Court should complete the merits-briefing process and conduct oral argument in this case, it should carefully consider waiting to issue an opinion until the U.S. Supreme Court has had an opportunity to rule in *Espinoza v Montana Department of Revenue*, US Case No 18-1195. Like Missouri and Michigan, Montana also has a Blaine Amendment in its state constitution, an amendment the Montana Department of Revenue cited in refusing to apply a state tax credit for private-school scholarships to any student attending a religious private school. The petitioners in *Espinoza* send their children to Stillwater Christian School, a non-denominational school that qualifies for tax-credit scholarships under the statute as enacted but not under the Department's rule. The petitioners challenged the Montana Department of Revenue's rule under the federal Free Exercise Clause. The Montana Supreme Court affirmed the Department's exclusion of religious schools and students attending them.

The U.S. Supreme Court granted the petition for certiorari in *Espinoza*, and the case has been fully briefed. Oral argument is scheduled to take place on January 22, 2020, and a decision will be issued before the end of June. It is widely expected that the Court will reinstate Montana's tax-credit scholarship for students attending religious schools, and that the Court will further clarify how Blaine Amendments like Montana's and Michigan's are blatantly unconstitutional under the federal Free Exercise Clause. Given the inextricably connected issues of § 152b's validity and that of Michigan's Blaine Amendment, it is highly likely this Court will find the U.S. Supreme Court's opinion in *Espinoza* helpful in resolving this case.

III. The Court should allow *Amici* to participate in oral argument to further explain why Michigan's Blaine Amendment is unconstitutional.

Plaintiffs filed this action against the State Defendants to challenge § 152b, arguing that the appropriation violates article 8, § 2. The State Defendants have defended the action by arguing there is no conflict between § 152b and article 8, § 2. The State Defendants have not argued that article 8, § 2 is unconstitutional under the federal Free Exercise Clause, nor could they reasonably do so, since the Michigan Attorney General has taken an oath to uphold Michigan's constitutional provisions and laws, *not* to seek their invalidation.

As noted above and in Justice Markman's concurrence in the grant of leave to appeal, it is difficult if not impossible to issue a comprehensive ruling in this case *without* considering article 8, § 2's validity under the U.S. Constitution. Yet no party in the case is making the argument that article 8, § 2 is unconstitutional. When this Court schedules oral argument, *Amici* intend to request the opportunity to present that argument at the hearing. This Court should consider expanding the oral-argument time and granting *Amici*'s motion to ensure that all aspects of this important case receive a fair vetting.

CONCLUSION AND REQUESTED RELIEF

It is not practical to analyze § 152b's validity without facing head on the validity of article 8, § 2 of Michigan's Constitution under the federal Free Exercise Clause. The U.S. Supreme Court's decisions in *Trinity Lutheran* and *Masterpiece Cakeshop* provides a road map for that analysis, and that map demonstrates that Michigan's Blaine Amendment cannot stand. The Amendment singles out religious organizations and religious believers for discriminatory treatment, and the Amendment was enacted with blatant religious hostility.

Accordingly, *Amici* respectfully ask that the Court hold Michigan’s Blaine Amendment—article 8, § 2 of Michigan’s Constitution—unconstitutional. As a result, § 152b’s appropriation of monies to reimburse private religious schools for unfunded state health and safety mandates is entirely proper, and the funds appropriated under that statute should be distributed immediately.

Respectfully submitted,

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