

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Murphy, P.J., and Gleicher and Letica, JJ

COUNCIL OF ORGANIZATIONS AND OTHERS Supreme Court No. 158751
FOR EDUCATION ABOUT PAROCHIAID,
AMERICAN CIVIL LIBERTIES UNION OF Court of Appeals No. 343801
MICHIGAN, MICHIGAN PARENTS FOR
SCHOOLS, 482FORWARD, MICHIGAN Court of Claims No. 17-68-MB
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,

v

STATE OF MICHIGAN, GOVERNOR,
DEPARTMENT OF EDUCATION, AND
SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellees.

**SUPPLEMENTAL BRIEF OF AMICUS
ATTORNEY GENERAL DANA NESSEL**

This Court has been holding this case in abeyance pending the United States Supreme Court's decision in *Espinoza v Montana Dep't of Revenue*, cert gtd ___ US ___; 139 S Ct 2777 (2019) (Docket No. 18-1195). On June 30, 2020, the U.S. Supreme Court decided *Espinoza*, see *Espinoza v Montana Dep't of Revenue*, ___ S Ct ___, 2020 WL 3518364 (2020), and on July 10, Plaintiffs-Appellants filed

supplemental authority advising this Court of the disposition of *Espinoza* and asserting that the disposition is not relevant to this case. The Attorney General agrees. *Espinoza* is not relevant here.

The issue in *Espinoza* was whether the Free Exercise Clause of the United States Constitution precluded the Montana Supreme Court from applying Montana's constitutional provision, which prohibited any aid to a school controlled by a "church, sect, or domination," to bar religious schools from a scholarship program that provided a tax credit for anyone who donated to certain organizations that in turn awarded scholarship to certain students attending religious schools. 2020 WL 3518364 at *2. The Montana Supreme Court had struck down the program because it aided religious schools in violation of the no-aid provision. *Id.* at *4.

The Supreme Court disagreed and reversed the judgment of the Montana Supreme Court. *Id.* at *12. The Court specifically noted that Montana's no-aid provision barred religious schools from public benefits "*solely* because of the religious character of the schools" and "single[d] out schools based on their religious character." *Id.* at *6 (emphasis added.)

Article 8, § 2 does neither. It does not bar religious schools from public benefits solely because of their religious character. Nor does it single out religious schools from other nonpublic schools. To the contrary, Article 8, § 2 of the Michigan Constitution applies to *any* nonpublic school and thus is markedly different from

Montana’s no-aid provision. Accordingly, the disposition of *Espinoza* is not relevant to this case.

Espinoza did, however, reiterate *Trinity Lutheran Church of Columbia, Inc v Comer*’s “ ‘unremarkable’ conclusion that disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character’ imposes ‘a penalty on the free exercise of religion that triggers the most exacting scrutiny.’ ” 2020 WL 3518364 at *6. As the Attorney General has already argued, (AG amicus at 3, 18–24), *Trinity Lutheran* is not in tension with this Court’s analysis in *Traverse City School District v Attorney General*, 384 Mich 390 (1971).

Respectfully submitted,

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