

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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**SUPPLEMENTAL STATEMENT OF AMICI IMMACULATE HEART OF MARY
AND FIRST LIBERTY INSTITUTE REGARDING ESPINOZA**

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STATEMENT OF QUESTION PRESENTED

Whether the U.S. Supreme Court's decision in *Espinoza v Montana Department of Revenue*, 140 S Ct 2246 (2020), requires this Court to hold that Const 1963, art 8, § 2 cannot be applied to invalidate § 152b of 2016 PA 249's appropriation to private, religious schools.

Amici IHM and First Liberty Institute answer: Yes.

SUPPLEMENTAL STATEMENT REGARDING *ESPINOZA*

On February 5, 2020, this Court postponed oral argument in this matter until the U.S. Supreme Court decided *Espinoza v Montana Department of Revenue*, an opinion that later issued on June 30, 2020. 140 S Ct 2246 (2020). On July 29, 2020, the Michigan Attorney General filed her three-page supplemental brief, concluding that *Espinoza* has no impact on article 8, § 2 of Michigan’s Constitution, a so-called “Blaine Amendment.” The Attorney General is wrong.

In *Espinoza*, the U.S. Supreme Court held that Montana’s Blaine Amendment—which prohibited government aid to any school “controlled in whole or in part by any church, sect, or denomination”—could not be constitutionally applied to invalidate a Montana scholarship program that assisted families in sending their children to private religious (and secular) schools. In so doing, the Court addressed the exact question presented to this Court in the present case: “whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana’s no-aid provision to bar religious schools from the scholarship program.” *Id.* The Court answered that question “yes” for two reasons, one of which is controlling in this case. And the concurrence answered “yes” for a third reason, one that is directly relevant here.

First, the U.S. Supreme Court recognized that Montana’s “no-aid provision bars religious schools from public benefits solely because of the religious character of the schools,” and “bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school.” 140 S Ct at 2255. “This,” said the Court, “is apparent from the plain text” of the no-aid provision. *Id.*

Plaintiffs and the Attorney General focus solely on this *facial* invalidation of Montana’s no-aid provision and argue it is inapplicable here because Michigan’s Blaine Amendment discriminates against *all* private schools, not just private religious schools. AG Supp Br 1–3; Pls’ Supp Authority 1. But they ignore entirely the Court’s next holding, which was as-applied.

Second, the U.S. Supreme Court focused on the Montana Supreme Court’s decision to *apply* “the no-aid provision to hold that religious schools could not benefit from the scholarship program.” 140 S Ct at 2256. This, of course, is precisely what Plaintiffs and the Attorney General urge this Court to do here regarding the appropriation in § 152b of 2016 PA 249. “So applied,” said the Court, “the provision ‘imposes special disabilities on the basis of religious status’ and ‘conditions the availability of benefits upon a recipient’s willingness to surrender its religiously impelled status.’” *Id.* (quoting *Trinity Lutheran*, 137 S Ct at 2202, *Church of Lukumi Babalu Aye, Inc v Hialeah*, 508 US 520, 533 (1993), and *McDaniel v Paty*, 435 US 618, 626 (1978)). In other words, “[t]o be eligible for government aid under the Montana Constitution, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges ‘inevitably deters or discourages the exercise of First Amendment Rights.’” *Id.* (quoting *Trinity Lutheran*, 137 S Ct at 2202, and *Sherbert v Verner*, 374 US 398, 405 (1963)). Such coercion “punishes the free exercise of religion,” and “is subject to ‘the strictest scrutiny.’” *Id.* (quoting *Trinity Lutheran*, 137 S Ct at 2022).

So too here. As IHM and First Liberty explained in their merits brief, a private secular school that desires public funding can seek charter-school status. IHM & First Liberty Amici Br 2, 15–16. But private religious schools are denied that choice. *Id.* That means a school like IHM must surrender its religiously impelled status and divorce itself from any religious control or affiliation to obtain the same right to benefits as a private, secular school. Such status-based discrimination—a direct effect of article 8, § 2—is always subject to the strictest scrutiny.

Third, Justice Alito’s concurrence detailed at length the pervasive and unconstitutional anti-Catholic animus that undergirded Montana’s Blaine Amendment. 140 S Ct at 2267–2274 (Alito, J, concurring). Montana defended by arguing that it readopted its Blaine Amendment in the 1970s for reasons unrelated to anti-Catholic bigotry. *Id.* But Justice Alito rejected that

argument based on questionable comments made at Montana’s 1972 constitutional convention, *id.* at 2273, the fact that 45 of Montana’s 61 religiously-affiliated schools were Catholic in 1970, *id.*, and that the convention rejected an amendment that the Montana Catholic Conference proposed to remove the no-aid provision’s restriction on “indirect” aid, *id.* at 2273–2274.

As IHM and First Liberty have already detailed, the evidence of anti-Catholic animus motivating Michigan’s Blaine Amendment is far greater. IHM & First Liberty Amici 9–13, 20–22 (recording painfully bigoted comments about Catholics and the Catholic Church and the fact that 218,000 of Michigan’s 275,000 nonpublic-school students in 1970 were Catholic). That animus compels invalidation of article 8, § 2 with no need to apply strict scrutiny. *Id.* at 20–22.

Even if this Court uses a strict-scrutiny analysis, article 8, § 2 cannot be constitutionally applied to void §152b’s appropriation. Like Montana, Plaintiffs and the Attorney General have defended article 8, § 2 as ensuring a strict separation of church and state. But *Espinoza* reaffirmed that such an interest “‘cannot qualify as compelling’ in the face of the infringement of free exercise here.” 140 S Ct at 2260 (quoting *Trinity Lutheran*, 137 S Ct at 2024). Also like Montana, Plaintiffs and the Attorney General say that article 8, § 2 “safeguards” public schools by ensuring “government support is not diverted to private schools.” *Id.* at 2261. But *Espinoza* rejected that interest because Montana’s no-aid provision bars aid only to *religious* schools. *Id.* The same is true in Michigan, where every private, secular school can seek charter-school status, while Michigan prohibits every private, religious school from doing so. As the U.S. Supreme Court held, a “law does not advance ‘an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.’” *Id.* (quoting *Lukumi*, 508 US at 547).

So, *Espinoza* charts the course this Court must take. The Free Exercise Clause prohibits using article 8, § 2 to invalidate §152b’s appropriation for religious schools because article 8, § 2 was enacted with religious animus and forces schools to choose between faith and funding.

Dated: August 7, 2020

Respectfully submitted,

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