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, FOR EDUCATION ABOUT PAROCHIAD, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, MICHIGAN PARENTS FOR SCHOOLS, 482FORWARD, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATIONS, 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.
_____/

Supreme Court No. 158751

Court of Appeals No. 343801

Court of Claims No. 17-68-MB

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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SUMMARY OF ARGUMENT

Article 8, § 2 of the Michigan Constitution prohibits direct and indirect aid to any nonpublic school, regardless of religious affiliation. The plain language of this constitutional provision, which reflects the will of Michigan's citizens, unambiguously prohibits the Legislature from appropriating funds for the direct benefit of nonpublic schools, thereby making § 152 of the State Aid Act unconstitutional. Because Article 8, § 2 applies to all nonpublic schools without regard to religion, the Supreme Court's decision in *Trinity Lutheran Church of Columbia v Comer* does not apply.

INTEREST OF AMICUS

The National School Boards Association ("NSBA") represents state associations of school boards across the country, and the board of education of the U.S. Virgin Islands. NSBA represents over 90,000 of the Nation's school board members who, in turn, govern over 13,600 local school districts that serve approximately 50 million public school students — 84 percent of the elementary and secondary students in the nation. NSBA believes that public funds raised by general taxation for education purposes should be administered efficiently by public officials, and that public funds for elementary and secondary education should be spent only for public education.[1]

[1] Counsel for a party neither authored this brief, either in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

I. *Article 8, § 2 of the Michigan Constitution Does Not Burden the Free Exercise of Religion, Because It Applies Uniformly to All Non-Public Schools.*

This case does not present free exercise of religion issues. The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*." US Const Am I. (Emphasis added). The uniform state constitutional bar to public expenditures for private education implicates neither the religious discrimination nor interference prohibited by the Free Exercise Clause.

Const 1963, art 8, § 2 prohibits "public monies or property" from being "appropriated or paid" to either "aid or maintain any private, denominational or other nonpublic . . . school," or "to support the . . . employment of any person at any such nonpublic school." This provision facially applies equally to secular and sectarian nonpublic schools. Since it neither burdens, favors, nor disfavors religion or its practice, the Free Exercise Clause of the United States Constitution is not implicated.

A. *Article 8, § 2 of the Michigan Constitution Does Not Burden Religious Schools More Than Other Private Schools.*

Many state constitutions have "no-aid" amendments proscribing only public support for parochial, as opposed to secular, private schools. Those amendments clearly state a state's intent to prohibit its funds from being used to support private education of a religious nature. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 659-60 (1998). Challenges to states' application of such provisions to prevent public dollars from flowing to religious instruction are proceeding through state and federal courts. The main issue is whether such prevention efforts violate the First Amendment's Free Exercise Clause.

In *Trinity Lutheran Church of Columbia, Inc. v Comer*, __ US __; 137 S Ct 2012; 198 L Ed 2d 551 (2017), the United States Supreme Court struck down Missouri's practice of withholding direct payments of state funds to religious institutions. There, a state-operated playground resurfacing grant program "had a policy of categorically disqualifying churches and other religious organizations" from receiving grants due in large part to Missouri's no-aid provision.[2] The court held that practice violated the Free Exercise Clause, as it essentially required any otherwise qualified program that sought public funding to "renounce its religious character." 137 S Ct at 2024.

A broad band of constitutional permissibility exists, however, where state constitutional provisions relating to public fund expenditures do not singularly and expressly burden religious institutions or practice. In *Locke v Davey*, 540 US 712; 124 S Ct 1307; 158 L Ed 2d 1 (2004), the United States Supreme Court affirmed the State of Washington's post-secondary educational scholarship program, which could be used for any education-related expense. 540 US at 716. Scholarship funds, however, could not be expended upon degrees in theology, in accordance with Washington's state constitution. *Id*. Although the Ninth Circuit found the scholarship program unconstitutionally burdened the free exercise of religion, the Supreme Court reversed. *Id*. at 718.

Finding that not all distinctions based on religion are unconstitutional, the Supreme Court reasoned:

> [T]he Establishment Clause and the Free Exercise Clause are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

[2] Mo Const, art 1, § 7 states: "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Id. (Internal citations omitted).

Ultimately finding that the burden imposed upon religion by the scholarship was constitutionally insignificant under the Free Exercise Clause, the Court first found that the prohibition could barely be considered to burden religion as it: (1) does not sanction any type of religious service or right; (2) does not deny ministers "the right to participate in the political affairs of the community"; and (3) "does not require students to choose between their religious beliefs and receiving a governmental benefit." *Id*. at 720. The Court accordingly determined that, given "the historic and substantial state interest at issue," it could not "conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Id*.

A few months after *Locke* was decided, the U.S. Court of Appeals for the First Circuit applied it to uphold Maine's tuition program, which excludes "sectarian" schools. *Eulitt ex rel. Eulitt v Maine, Dep't of Educ.*, 386 F3d 344 (CA 1, 2004). There, the First Circuit determined that under *Locke* "the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity." *Id*. at 354, citing *Locke*, *supra*, 124 S Ct at 1213. Put differently, the First Circuit stated "[t]he fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice." *Id*. *Eulitt* then recognized *Locke*'s reaffirmation that there is "'room for play in the joints'" between the Free Exercise Clause and the Establishment Clause. *Id*. at 355, quoting *Locke*, *supra*, 124 S Ct at 1311. The First Circuit rejected an argument that *Locke*'s analysis was limited to the type of restriction in the state program that had been challenged in that case, i.e., a narrow barrier to the use of public scholarship money for pursuit of training to enter religious ministries. *Id*. Instead, the *Eulitt* court applied *Locke* for

the broader proposition that "state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so." *Id*.[3]

The religiously neutral terms of Const 1963, art 8, § 2 are constitutional under the *Locke* analysis, easily clearing the joints between the Establishment Clause and the Free Exercise Clause. The prohibition on directing public monies to non-public schools under Article 8, § 2 applies to *all* non-public schools, both secular and religious. That critical distinguishing feature removes Article 8, § 2 from the Free Exercise Clause scrutiny, as religious private schools are not affected by it any more than secular private schools.

B. ***Other State Courts Have Affirmed Religiously Neutral "No-Aid" Provisions.***

Other courts interpreting neutral state constitutional provisions like Article 8, § 2 of Michigan's Constitution have found them constitutionally sound. That result should follow in the present case.

In *Bush v Holmes,* 886 So2d 340 (Fl Ct App, 2004), Florida created a school voucher program where students residing in public school districts with low performance indicators could choose to attend a public school with higher indicators or participating private school. Florida provided tuition assistance to those selecting a participating private school.

The legislation was challenged based on two state constitutional provisions: (1) Article 9, § 6, requiring all income from the state school fund to support public schools; and (2) its no-aid provision, found at Article 1, § 3. That provision states:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals,

[3] The First Circuit is considering another challenge to the Maine program in *Carson v Makin*, unpublished decision of the United States District Court of the District of Maine dated June 26, 2019 (Docket No. 1:18-cv-327-DBH). (App. A).

> peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Fl Const, art. 1, § 3.

Relying heavily on *Locke v Davey*, *supra,* the Florida Court of Appeals determined that the state's no-aid provision did not violate the federal Free Exercise Clause. *Bush,* 886 So 2d at 340. Critically, the court also rejected the notion that not providing funding for religious schools was synonymous to discriminating against them. No violation of the neutrality required by the Free Exercise Clause therefore occurred. *Id.*

Similarly, in *Witters v State Comm'n for the Blind*, 112 Wash 2d 363; 771 P2d 1119, 1122 (1989), the Washington Supreme Court upheld the decision to withhold assistance to Mr. Witters, who was blind and sought financial assistance through a state program to attend seminary. The Washington Supreme Court analyzed that state's no-aid provision under the lens of the federal Free Exercise Clause and determined:

> A state action is constitutional under the Free Exercise Clause if the action results in no infringement of a citizen's constitutional right of free exercise or if any burden on free exercise of religion is justified by a compelling state interest. To prevail in a free exercise case, the complaining party must show "the coercive effect of the enactment as it operates against him in the practice of his religion."
>
> ***
>
> In the present case, the Commission's denial of vocational aid to the [applicant] did not compel or pressure him to violate his religious beliefs. [Applicant] chose to become a minister, and the Commission's only action was to refuse to pay for his theological education. The Commission's decision may make it financially difficult, or even impossible, for [applicant] to become a minister, but this is beyond the scope of the Free Exercise Clause.

771 P2d at 1122-1123 (internal citations omitted). See also *Bagely v Raymond Sch Dep't*, 1999 Me 60; 728 A2d 127 (1999) (statute excluding tuition benefits for religious schools did not violate

the Constitution because it did not place a substantial burden on the free exercise of religion and would have violated the Establishment Clause without such an exclusion.)

Michigan's constitutional provision prevents public monies from being disbursed to any private school, regardless of religious affiliation. It accordingly cannot burden any constitutionally protected right to freely exercise religion by attending or operating a private religious school. All private schools are treated similarly.

This case presents a state constitutional provision, neutral on its face with respect to religion, which fails to implicate the "play in the joints" analysis applied in *Locke, supra*. Michigan is not required under the Free Exercise Clause to fund private sectarian schools. In fact, even if Const 1963, art 8, § 2 only impacted sectarian schools, it likely still would not violate the Free Exercise Clause. *See*, *e.g.*, *Eulitt*, *supra*, 386 F3d 344. Ultimately, however, that issue is not before this Court. Article 8, § 2 applies to all non-public schools; Section 152b of the State School Aid Act directly conflicts with that constitutional provision; and the Free Exercise Clause is not implicated in any manner.

II. *States Have the Right to Define the Parameters of Their Own Constitutions Within Federal Constitutional Guidelines.*

The Tenth Amendment makes clear that our federal constitution forms a federal, not national, government which reserves to the states and the people "[t]he powers not delegated to the United States by the Constitution." US Const Am X. As such, "states retain broad autonomy […] in structuring their governments and pursuing legislative objectives." *Shelby County v Holder*, 570 US 529, 530; 133 S Ct 2612; 186 L Ed 2d 651 (2013). "Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred [by the Constitution], is withheld, and belongs to the state authorities." *New York v United States*, 505 US 144, 156; 112 S Ct 2408; 120 L Ed 2d 120 (1992). In fact, "The Constitution never would have been ratified if the

States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Alden v Maine*, 527 US 706, 727; 119 S Ct 2240; 149 L Ed 2d 636 (1999), quoting *Atascadero State Hospital v Scanlon*, 473 US 234, 239, n. 2; 105 S Ct 3142; 87 L Ed 2d 171 (1985).

It follows, then, that states have wide latitude to draft their state constitutions to suit the policy concerns of their own populace.

> The state constitutions are based on diverse understandings and philosophies of government, are substantially easier to amend than the U.S. Constitution, provide for direct citizen involvement in the process of amendment and change (unlike the federal constitution), have a tendency, therefore, to accumulate detailed provisions […], and have bills of rights that often are different from the U.S. Bill of Rights.

State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives, Advisory Commission on Intergovernmental Relations (July 1989), available at https://library.unt.edu/gpo/acir/Reports/policy/a-113.pdf. "[T]he primary role of the states is to make policy choices dealing with that wide range of matters assigned to them by their citizens and left open to them by the very incompleteness of the U.S. Constitution." *Id.* at 8.

Additionally, the U.S. Supreme Court has explicitly recognized that state courts are free to interpret their own state constitutions with latitude, without running afoul of the U.S. Supreme Court's interpretations of similar provisions of the U.S. Constitution. *Minnesota v National Tea Co*, 309 US 551, 557; 60 S Ct 676; 84 L Ed 2d 920 (1940) ("[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.") see also *City of Mesquite v Aladdin's Castle, Inc*, 455 US 283, 293; 102 S Ct 1070; 71 L Ed 2d 152 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution.") Further evidencing its deference to state court constitutional decisions, the U.S.

Supreme Court has divested itself of jurisdiction if a case is decided on independent state grounds. *Michigan v Long*, 463 US 1032, 1041; 103 S Ct 3469; 77 L Ed 2d 1201 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."); see also *Fox Film Corp. v Muller*, 296 US 207, 210; 56 S Ct 183; 80 L Ed 158 (1935) ("where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment").

Consistent with these concepts, it necessarily follows that in its determination, this Court has authority to consider Michigan's own precedent and state interests with regard to its interpretation of Article 8, § 2 of its Constitution. That premise is reflected in *Locke v Davey*, *supra*, in which the Court respected and upheld the State of Washington's constitutional prohibition of providing funds to students to pursue degrees that are "devotional in nature or designed to induce religious faith." 540 US at 716. A key factor in that holding was the court's recognition that the Washington constitution did not violate the US Constitution, even though Washington's constitution "draws a more stringent line than that drawn by the United States Constitution," noting that Washington has "historic and substantial state interest" in the matter, especially regarding "religious instruction." 540 US at 713, 725, 723.

As previously discussed, Article 8, § 2 of Michigan's Constitution is consistent with established First Amendment Free Exercise Clause jurisprudence. As federal courts have supported states' establishment of their own constitutional standards within the federal framework, this Court should provide the people of the State of Michigan with the full protection of the constitutional provisions they enacted.

III. *The Neutrality of Michigan's Constitution Renders Its Impact on Parochial School Funding Irrelevant.*

Article 8, § 2 of the Michigan Constitution denies state funds to *all* nonpublic schools, regardless of their religious affiliation. Its mandate to apply public funds to public purposes therefore does not burden religion in a manner implicating the Free Exercise Clause. To hold otherwise would conflict with the U.S. Supreme Court's holding in *Zelman v Simons-Harris*, 536 US 639; 122 S Ct 2460; 153 L Ed 2d 604 (2002), which was based on the Establishment Clause.

In *Zelman*, a state-sponsored voucher plan provided tuition assistance to low income families in a specific district for their children to attend public *or* private schools of their choice. *Id*. at 645. Ninety-six percent of participating students enrolled in religious schools. 536 US at 647. Despite the large proportion of religious school enrollments, the Supreme Court rejected the Establishment Clause claim, finding that the facially neutral program only incidentally advanced religion. The Court reasoned:

> 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.

Id. at 659.

The *Zelman* Court further concluded that attributing constitutional significance to the number of religious schools chosen would lead to an "absurd result"; specifically, that a neutral program would be permissible in an area with few religious schools but not in an area with a high concentration of religious schools. *Id*. at 657. The statute's constitutionality was therefore not dependent upon the inherently variable number of religious schools then in existence.

Since the *Zelman* court declined to find constitutionally significant a religion-neutral program that incidentally benefitted a substantial number of religious schools, the reverse must also hold true. The religious neutrality of Article 8, § 2 of the Michigan Constitution renders

irrelevant the number of parochial schools that might be affected by its provisions. No Establishment Clause issues therefore arise from its application to MCL 388.1752b. Similarly, no Free Exercise Clause violation results.

Article 8, § 2 of the Michigan Constitution distinguishes only public from nonpublic schools for funding purposes, without singling out religious schools. That a substantial number of religious schools may be impacted by this religiously-neutral constitutional provision's effect upon the State School Aid Act does not suggest that free exercise of religion is being unconstitutionally denied. Rather, Michigan's Constitution requires only that public educational funds be spent only for public education. Religion is not a factor. Under those circumstances, no arguable constitutional burdens upon religion exist. As the First Circuit has recognized, "The fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice." *Eulitt, supra*, 386 F3d at 354, citing *Maher v Roe*, 432 US 464, 475-77; 97 S Ct 2376; 53 LEd 2d 484 (1977).

IV. *Holding State School Aid Act § 152b Unconstitutional Supports the People's Constitutional Determination to Ensure That Public Educational Funds Support Only Public Education.*

The importance of protecting the peoples' constitutionally-expressed will concerning the funding of public schools in Michigan cannot be overemphasized. The Supreme Court has long recognized the crucial importance of education in preparing students for participation as responsible members of society and its unique role as "the very foundation of good citizenship."[4]

[4] *Brown et al. v Board of Educ of Topeka, Shawnee County, Kan. et al*., 347 US 483, 493; 74 S Ct 686; 98 L Ed 873 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be

In landmark decisions, it has affirmed "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child," asserted that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all," and recognized education's "fundamental role in maintaining the fabric of our society." *Plyler v Doe*, 457 US 202, 221; 102 S Ct 2382; 72 LEd 2d 786 (1982).

At the same time, it is well-established that public education is a state and local responsibility. *US v Lopez*, 514 US 549, 580-581; 115 S Ct 1624; 131 LEd2d 626 (1995) ("... it is well established that education is a traditional concern of the States.") (citing *Milliken v Bradley*, 418 US 717, 741-742; 94 S Ct 3112; 41 L Ed 2d 1069 (1974) and *Epperson v Arkansas*, 393 US 97; 89 S Ct 266; 21 LEd 2d 228 (1968)). From our nation's birth, states, not the federal government, have borne the responsibility of financing, managing, and supporting public education, through locally chosen school boards that govern their community schools. Public education was omitted from those functions delegated to the new central government in an effort to preserve a federal system of state sovereigns and to avoid a national government. *See* Alexander, Kern and M. David, *American Public School Law*, 8th Ed (Wadsworth Cengage Learning 2012), p. 119.

Indeed, the United States Supreme Court has recognized that in Michigan, education is " a state function." *Milliken v Bradley*, 418 US at 794. The constitutionally expressed will of Michigan's citizens concerning the manner in which its public schools are funded is therefore of paramount importance.

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expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms"); *Wisconsin v Yoder*, 406 US 205, 221; 92 S Ct 1526; 32 LEd 2d 15 (1972) ("education prepares individuals to be self-reliant and self-sufficient participants in society").

In *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), this Court established the following as the primary rule of constitutional interpretation:

> A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it *the intent to be arrive at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense more obvious to the common understanding,* and ratify the instrument in the belief that was the sense designed to be conveyed.

Id., quoting *Cooley's Const Lim* 81; (emphasis in original).

The intent reflected in Const 1963, art 8, § 2 to keep public funds for the public, subject to applicable judicial exceptions, could not be clearer:

> No public monies or properties shall be appropriated or any public credit utilized, by the legislature or any other political subdivision or agency of this state directly or indirectly to aid or maintain any private, denominational or other nonpublic pre-elementary, elementary, or secondary school.

The broad prohibition against any public funds used to "aid" or "maintain" nonpublic schools, either "directly" or "indirectly," unambiguously prohibits the Legislature from directing appropriated funds to offset costs for nonpublic schools. This constitutional provision, placed on the ballot in 1970 as Proposal C, passed overwhelmingly by a margin of 56.77 percent to 43.23 percent. Michigan Dep't of State, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963* (December 5, 2008) (App B).

It is no secret that Michigan public schools historically have been woefully underfunded. The Michigan State University College of Education in January 2019 reported that Michigan ranks "dead last" among all states in revenue growth for K-12 schools since Proposal A, which drastically reduced property tax-based funding for the state's public schools, was approved in

1994. See *Michigan School Finance at the Crossroads: A Quarter Century of State Control* (2019), located at http://education.msu.edu/ed-policy-phd/pdf/Michigan-School-Finance-at-the-Crossroads-A-Quarter-Center-of-State-Control.pdf. Avoiding such under-funding of public schools by reducing dependence on local property taxes is exactly why Michigan's voters, in part, voted for Proposal C. The plain language of that constitutional provision soundly rejects the notion that public educational funds may be diverted to private purposes.

Less than twenty years ago, Michigan voters rejected a separate measure that would have directed public funds to private schools. A proposed "voucher amendment" to the Michigan Constitution was defeated by a margin of 69% to 31% in 2000. (App B., p. 10). In addition to eliminating the language in Const 1963, art 8, § 2 prohibiting indirect aid to private schools, this defeated measure would have established a publicly funded voucher system to offset private school tuition. The relevant proposed language stated:

> Subject to the provisions of Section 10, under procedures established by law, qualified school districts and any approving school district shall participate in an educational choice program to permit any pupil resident in the district to receive a voucher for actual elementary and secondary school tuition to attend a nonpublic elementary or secondary school.

(App. C).

These are policy choices that are constitutional under the First Amendment's religion clauses. States may enact a constitutional provision keeping tax dollars levied for public education from being spent on private schools not held to the same anti-discrimination and accountability standards. The notion that the neutral expression of such a policy violates fundamental religious rights should be soundly rejected.

This Court stands in the unique position of being the first to have the opportunity to affirm a clear, neutral, nondiscriminatory state policy of protecting public funding for public schools. By

implementing the plain language of Const 1963, art 8, § 2, this Court would both respect the constitutionally-expressed will of Michigan's people, and undercut the fatally flawed notion that a neutral determination not to publicly fund private education of all kinds is an unconstitutional burden on religious freedom.

CONCLUSION

For the reasons discussed above and in Plaintiffs-Appellants' Brief, *amicus curiae* National School Boards Association respectfully requests that this Court reverse the Court of Appeals majority's decision upholding the constitutionality of MCL 388.1752b and reinstate the Court of Claims' decision finding that statute to violate Const 1962, art 8, § 2.

Respectfully submitted,

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