

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
 ADMIN ISTRATORS, 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 -

Roy H. Henley (P39921)
 Katerina M. Vujea (P76641)
 Jessica E. Mcnamara (P81885)
 THRUN LAW FIRM, P.C.
 Attorneys for Amicus Curiae National School
 Boards Association
 2900 West Road, Ste. 400
 P.O. Box 2575
 East Lansing, Michigan 48825-75
 Telephone: (517) 484-8000
 rhenley@thrunlaw.com
 kuvujea@thrunlaw.com
 jmcnamara@thrunlaw.com

Supreme Court No. 158751

Court of Appeals No. 343801

Court of Claims No. 1768-MB

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

Francisco M. Negron, Jr.
 NATIONAL SCHOOL BOARDS
 ASSOCIATION
 Co-Counsel for Amicus Curiae National
 School Boards Association
 1680 Duke Street, 2nd Floor
 Alexandria, VA 22314
 Telephone: (703) 838-7222
 fnegron@nsba.org

5(&('E\ 06&

30



INDEX OF AUTHORITIES

Cases

Alden v Maine	527 US 706; 119 S Ct 2240; 149 L Ed 2d 636 (1999)	8.
Atascadero State Hospital v Scanlon	473 US 234, n. 2; 105 S Ct 3142; 87 L Ed 2d 171 (1985)	8
Bagely v Raymond Sch Dep	1999 Me 60; 728 A2d 127 (1999)	6..
Brown et al. v Board of Educ of Topeka, Shawnee County, Kan. et al	347 US 483; 74 S Ct 686; 98 L Ed 873 (1954)	11....
Bush v Holmes	886 So2d 340 (Fl Ct App, 2004)	5, 6
Carson v Makin	unpublished decision of the United States District Court of the District of Maine dated June 26, 2019 (Docket No. 1:18-cv-027-DBH)	5.
City of Mesquite v Aladdin's Castle, Inc	455 US 283, 293; 102 S Ct 1070; 71 L Ed 2d 152 (1982)	

Trinity Lutheran Church of Columbia, Inc. v Comer, ___ US __; 137 SCt 2012; 198 L Ed 2d 551 (2017).....	1, 3.....
US v Lopez 514 US 549; 115 S Ct 1624; 131 L Ed 2d 626 (1995).....	12
Wisconsin v Yoder 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972).....	12
Witters v State Comm'n for the Blind, 112 Wash 2d 363; 771 P2d 1119 (1989).....	6
Zelman v Simon-Harris, 536 US 639; 122 S Ct 2460; 153 L Ed 2d 604 (2002).....	10
Constitutions and Statutes	
Const 1963, art 1 §.2.....	passim
Const 1963, art 1, §.3.....	5.....
Const 1963, art 1 §.6.....	5.....
Const 1963, art 8, § 2.....	passim
Fl Const, art. 1, §.3.....	6.....
Mo Const, art 1, § 7.....	3.....
US Const Am X.....	7.....
US Const. Am. I.....	2.....
MCL 388.1752b.....	11, 15.
Other	
American Public School Law 8th Ed (Wadsworth Cengage Learning 2012).....	12
Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law 21 Harv J.L. & Pub. Pol'y (1998).....	2.....
Cooley's Const Lim 50 Td (&)Tj 0.77 0 T3F1g /TT0 1 Tf 33.17 0 Td (,)Tj ET 1 g 90 225 161.04 14.16	

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." U.S. Const. Am I. (Emphasis added). The uniform state constitutional bar to public expenditure 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 Law 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 SCt 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 1039 (2003), the Supreme Court held that a state constitutional provision barring the use of public funds for religious education did not violate the Free Exercise Clause because it did not burden religious institutions or practice. In *Locke v. Davey*, 540 US 712; 124 S Ct 1307; 158 L Ed 2d 1039 (2003), the Supreme Court held that a state constitutional provision barring the use of public funds for religious education did not violate the Free Exercise Clause because it did not burden religious institutions or practice.

5(&('E\ 06&

30

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.”³ Id

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. *But*

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 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 nonpublic 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

5(&('E\ 06&

30



Supreme Court has divested itself of jurisdiction if a case is decided on independent state grounds. Michigan v Long, 463 U.S. 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, do not undertake to review the decision.” see also Fox Film Corp v Muller, 296 U.S. 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 U.S. 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, § 2

III. The Neutrality of Michigan

irrelevant the number of parochial schools that might be affected by its provisions. 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." *Supra*, 386 Bd at 354, citing *Mahe v Roe*, 432 US 464, 475-7; 97 SCt 2376; 53 LEd 2d 484 (1977).

IV.

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 basis 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, 585; 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; 94 S Ct 3112; 41 L Ed 2d 1069 (1974); *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. 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. Sc S(e)4 22n6.396 24rarleytalfn2 (a)4 e.26 Tw 11agf3222(i)mS(eeeeeeeeeeeeeee

In *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405185 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 arrived 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* 80 (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 preelementary, 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), pp 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 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 (2019) located at <http://education.msu.edu/policy-phd/pdf/MichiganSchoolFinanceat-the>

implementing the plain language of Const 1963, art 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