Case No. 22-1986

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JILL HILE; SAMANTHA JACOKES; PHILLIP JACOKES; NICOLE LEITCH; MICHELLE LUPANOFF; GEORGE LUPANOFF; PARENT ADVOCATES FOR CHOICE IN EDUCATION FOUNDATION; JOSEPH HILE; JESSIE BAGOS; RYAN BAGOS; JASON LEITCH

Plaintiffs - Appellants

v.

STATE OF MICHIGAN; GRETCHEN WHITMER, Governor, in her official capacity; RACHAEL EUBANKS, Michigan Treasurer, in her official capacity

Defendants - Appellees

Appeal from the United States District Court for the Western District of Michigan

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BRIEF OF AMICI CURIAE COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, 482FORWARD, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND PUBLIC FUNDS PUBLIC SCHOOLS SUPPORTING DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Council of Organizations and Others for Education About Parochiaid, American Civil Liberties Union, American Civil Liberties Union of Michigan, Americans United for Separation of Church and State, 482Forward, Michigan Association of School Boards, Michigan Association of School Administrators, and Public Funds Public Schools are not subsidiaries or affiliates of any publicly owned corporation, and they know of no publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome.

/s/ Daniel S. Korobkin
Daniel S. Korobkin

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INTEREST OF AMICI CURIAE[1]

Amici curiae are organizations committed to protecting and defending Article VIII, § 2 of the Michigan Constitution, the validity of which is being challenged in this appeal.

The Council of Organizations and Others for Education About Parochiaid ("CAP") is a non-profit organization founded in the 1970s when a coalition of civil rights, education, religious, and civic organizations joined with other individuals to educate the public regarding a school voucher ballot proposal. CAP's mission continues as it provides education to the public regarding the preservation of religious liberty, the separation of church and state, the importance of public education in democracy, and the risks of granting governmental aid to nonpublic schools in Michigan. CAP opposes the removal of Michigan's constitutional prohibition on the public funding of private schools and the creation of school vouchers or tuition credit programs.

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[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, amici hereby state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

All parties have consented to the filing of this brief.

The American Civil Liberties Union ("ACLU") is a nonpartisan non-profit membership organization dedicated to protecting constitutional rights. The American Civil Liberties Union of Michigan is its Michigan affiliate. The ACLU and ACLU of Michigan have long been committed to protecting the right to a public education, as well as the right to religious freedom.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of religion and government. Americans United has long opposed arguments that governmental funding of public education entitles private schools to public funding.

482Forward is a network of parents, students, residents, and educators fighting for educational equity in Detroit.

Michigan Association of School Boards ("MASB") is a voluntary, nonprofit association of local and intermediate boards of education throughout the State of Michigan, whose membership consists of boards of education of over 600 local school boards and intermediate school boards in the state. The activities of MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of MASB is

to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education.

Michigan Association of School Administrators ("MASA") is a voluntary, nonprofit association of public school administrators, and is the professional association serving superintendents and their first line of assistants, who serve as CEOs for their community's public schools. The mission of MASA is to develop leadership and unity within its membership to achieve the continuous improvement of public education in Michigan. MASA serves as an information-rich source of advice and support in areas critical to over 700 public school superintendents and first-line assistants in 584 school districts and 56 intermediate school districts. MASA serves nearly 2000 members including professionals, retirees, and businesses, helping the leaders of Michigan's most important public institutions get better results for more than 1.5 million students.

Public Funds Public Schools ("PFPS") is a national campaign to ensure that public funds for education are used to maintain, support, and strengthen public schools. PFPS opposes all forms of private school vouchers—including conventionally structured vouchers, education savings account vouchers, and tax credit scholarship vouchers—and other diversions of public funds from public education. PFPS uses a range of strategies to protect and promote public schools and the rights of all students to a free, high-quality public education, including

participation in litigation challenging vouchers and other diversions of public funds to private schools. PFPS is a partnership between Education Law Center ("ELC") and the Southern Poverty Law Center ("SPLC"). ELC, based in Newark, New Jersey, is a nonprofit organization founded in 1973 that advocates on behalf of public school children to enforce their right to education under state and federal laws across the nation. SPLC, based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971 that serves as a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance human rights.

ARGUMENT

I. There is no constitutional right to use public funds for private education.

Michigan's policy choice to reserve public funding for public schools, embodied in Article VIII, § 2 of its state constitution,[2] is fully supported by long-

[2] Article VIII, § 2 of the Michigan Constitution prohibits the use of public funds to support the attendance of any student at a private school, without regard to such a school's religious or non-religious character or affiliation. It provides, in pertinent 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,

established United States Supreme Court precedent: A State's decision to fund public schools does not entail a corresponding duty to fund private schools.

For example, in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947), the Supreme Court upheld a state law that provided public transportation to students attending religious schools, but cautioned that it did "not mean to intimate that a state could not provide transportation only to children attending public schools." Similarly, in *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), the Court rejected the argument that "if private schools are not given some share of public funds allocated for education . . . such schools are isolated into a classification violative of the Equal Protection Clause." In *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974), the Court summarily affirmed a lower court's rejection of a federal constitutional challenge to state statutes that provided bus transportation for public school students without providing it to private school students. In *Maher v. Roe*, 432 U.S. 464, 477 (1977), the Supreme Court reaffirmed that there is no federal constitutional "right of private or parochial schools to share with public schools in state largesse." And most recently, in *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020),

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> directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . . .

Mich. Const. art. VIII, § 2.

and *Carson v. Makin*, 142 S. Ct. 1987, 1998, 2000 (2022), the Court confirmed that "[a] State need not subsidize private education."

These decisions all reflect the sound principle that a State's decision to reserve its public funds for public schools does not violate the constitutional rights of private schools, their students, or those students' families. Unquestionably, many private schools are religious, and many parents' decisions to send their children to private schools is an exercise of their fundamental right to control the education of their children and/or provide them with a religious upbringing. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). But the Supreme Court has held time and again that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Tax'n With Representation of Washington*, 461 U.S. 540, 549 (1983). Thus, a State may choose "not to fund a distinct category of instruction" such as private-school education. *Locke v. Davey*, 540 U.S. 712, 721 (2004); *see also Espinoza*, 140 S. Ct. at 2261 ("A State need not subsidize private education."); *Carson*, 142 S. Ct. at 1998, 2000 (same). That is what Michigan has chosen here.

II. ***Trinity Lutheran***, ***Espinoza***, and ***Carson*** have no effect on Article VIII, § 2 of the Michigan Constitution.

The Supreme Court's recent decisions in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), *Espinoza v. Montana Dep't of*

Revenue, 140 S. Ct. 2246 (2020), and *Carson v. Makin*, 142 S. Ct. 1987 (2022), do not support Plaintiffs' claims.

In *Trinity Lutheran*, the State of Missouri operated a program that reimbursed nonprofit organizations when they installed playground surfaces made from recycled tires. The Missouri Constitution prohibits the state from using public funds "in aid of any church, sect or denomination of religion." *Trinity Lutheran*, 137 S. Ct. at 2017 (quoting Mo. Const. art. I, § 7). Relying on that constitutional provision, Missouri officials concluded that Trinity Lutheran Church, solely because of its religious status, was ineligible for a reimbursement grant for its playground; a similarly situated but secular nonprofit organization with a playground would have been eligible to receive the public funds. The Supreme Court held that denying Trinity Lutheran this otherwise available public benefit solely because of its religious status violated the Free Exercise Clause of the First Amendment. *Id*. at 2021, 2024-25.

Espinoza, in a similar fashion, involved a state tax credit for donations to organizations that award vouchers for private-school tuition. Because Montana's constitution contained a prohibition like Missouri's, Montana promulgated an administrative regulation prohibiting families who received the vouchers from using the funds for tuition at religious schools. Similar to Missouri's playground surface reimbursement program, Montana's tax benefit for private-school tuition vouchers restricted the use of tax-preferred funds only for religious private schools; private

schools that were secular but otherwise similarly situated could benefit from the program. And relying principally on its holding in *Trinity Lutheran*, the Supreme Court held that once Montana decided to create a tax credit to subsidize tuition at private schools, "it [could not] disqualify some private schools solely because they are religious." *Espinoza*, 140 S. Ct. at 2261.

Carson, the most recent decision, was much the same. In that case, Maine offered to pay private-school tuition for children who lived in rural districts that did not operate public secondary schools of their own. *Carson*, 142 S. Ct. at 1993. By statute, however, tuition assistance payments could be directed only to non-religious schools. *Id*. at 1994. Applying *Trinity Lutheran* and *Espinoza*, the Supreme Court struck down Maine's restriction. *Id*. at 1997. Emphasizing again that "a 'State need not subsidize private education,'" the Court held that "'once a State decides to do so, it cannot disqualify some private schools solely because they are religious.'" *Id*. at 2000 (quoting *Espinoza*).

Article VIII, § 2 of Michigan's constitution is different in every way that matters. In *Trinity Lutheran*, *Espinoza*, and *Carson*, Missouri, Montana, and Maine "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit *solely* because of their religious character." *Trinity Lutheran*, 137 S. Ct. at 2021 (emphasis added); *see Espinoza*, 140 S. Ct. at 2255; *Carson*, 142 S. Ct. at 1997. By contrast, Article VIII, § 2 of the Michigan

Constitution prohibits public aid to *all* nonpublic schools, *regardless* of whether a school is religious. In Missouri, "Trinity Lutheran Church applied for . . . a grant for its preschool and daycare center and would have received one, *but for* the fact that Trinity Lutheran is a church." *Trinity Lutheran*, 137 S. Ct. at 2017 (emphasis added). In Montana and Maine, too, the plaintiffs sought to use public funds at a private school "that [otherwise] meets the statutory criteria for 'qualified education providers'" but were prohibited from doing so "solely because of [the school's] religious status." *Espinoza*, 140 S. Ct. at 2252, 2255; *see Carson*, 142 S. Ct. at 1997. In Michigan, by contrast, no private school, church-affiliated or not, is eligible for state funding under Article VIII, § 2. In other words, *Trinity Lutheran*, *Espinoza*, and *Carson* have no application to this case because under Article VIII, § 2 of the Michigan Constitution, religious private schools in Michigan are treated *exactly the same* as non-religious private schools: they are all ineligible for public funding. What makes all religious and nonreligious private schools ineligible for funding is that they are non-public. Their religious or non-religious character is irrelevant.

Plaintiffs' arguments to the contrary rest upon a misunderstanding of the Supreme Court's free-exercise jurisprudence and Article VIII, § 2. A religious school would not be entitled to public funds merely by abandoning its religious identity, because it would continue to be a private school. All private schools, regardless of whether they are religious or non-religious, are barred from public

funding by Article VIII, § 2. Therefore, no school, student, or family is being "penalized" for their religious exercise.

To illustrate, suppose that Michigan law authorized the use of public funds to pay for the continuing legal education of government attorneys. Attorneys who are employed by private religious organizations would not be eligible to receive or use such funds, but neither would attorneys who work for secular law firms. The funding restriction would not violate *Trinity Lutheran*, *Espinoza*, or *Carson* because it would be based on the public versus non-public character of the recipient, not the recipient's religious identity. The same is true with Article VIII, § 2.

In *Trinity Lutheran*, the Court was careful to distinguish Missouri's form of discrimination from restrictions like Michigan's:

> In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.

Trinity Lutheran, 137 S. Ct. at 2020. So, too, in *Espinoza* and *Carson* the Court said:

> A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools *solely* because they are religious.

Espinoza, 140 S. Ct. at 2261 (emphasis added); *see Carson*, 142 S. Ct. at 1997, 2000. These passages are dispositive here. Unlike Missouri's constitution, Montana's regulation, and Maine's statute, Article VIII, § 2 of Michigan's constitution is

neutral and generally applicable without regard to religion, it does not single out the religious for disfavored treatment, and it does not exclude anyone from benefits solely because they are religious. As the Michigan Supreme Court has observed, Article VIII, § 2 "does not speak of religion but of nonpublic schools." *In re Constitutionality of 1974 PA 242*, 228 N.W.2d 772, 773, 777 (Mich. 1975). Therefore, *Trinity Lutheran*, *Espinoza*, and *Carson* do not call into question the constitutionality of Article VIII, § 2.

III. The purpose of Article VIII, § 2 of the Michigan Constitution is to preserve public funding for public schools, not to discriminate against Catholics.

Plaintiffs' claim that Article VIII, § 2 is unconstitutional because it is based on anti-Catholic animus is wrong for multiple reasons. First, Plaintiffs' reliance on authorities like *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), is misplaced because Article VIII, § 2 is neutral not only on its face, but also in its application. Second, the historical record, accurately portrayed, does not demonstrate that animus played a predominant role in the decision by 1.4 million Michigan voters to approve Proposal C in 1970. And third, even if the Court could be persuaded that the election in 1970 was influenced by anti-Catholicism, the voters' subsequent decision in 2000 to reauthorize Article VIII, § 2 by an overwhelming margin eradicated any such taint of animus.

A. Article VIII, § 2 is neutral in its operation.

Plaintiffs rely on cases like *Lukumi*, *supra*, to argue that even though Article VIII, § 2 is facially neutral, it is unconstitutional because it was enacted with the purpose or intent of discriminating against Catholics. *Lukumi*, however, describes an enactment that was narrowly targeted to burden a single, disfavored religious practice. That critical difference distinguishes *Lukumi* from this case, where 50 years of history has demonstrated that Article VIII, § 2 is neutral and generally applicable—in words *and* in actual operation—to religious and nonreligious schools alike.

In *Lukumi*, although the challenged ordinances were facially neutral, they were written to be carefully "gerrymandered" such that they would apply in fact only to religious sacrifice, and not to nonreligious conduct. *Id*. at 535-36. Thus, the ordinances were not truly laws of "general applicability," since in operation they applied only to the religious practice that they burdened. *Id*. at 542. The ordinances were also both overbroad and underinclusive judged in relation to the government purpose that they supposedly advanced: They "proscribe[d] more religious conduct than [was] necessary to achieve their stated ends," *id*. at 538, and they "pursue[d] the city's governmental interest *only* against conduct motivated by religious belief," *id*. at 545 (emphasis added).

None of these problems plagues Article VIII, § 2, which is neutral both in operation and on its face. As previously discussed, Article VIII, § 2 prohibits the public funding of *all* private schools, regardless of whether they are Catholic, Protestant, Muslim, Jewish, or secular. And that is how it operates in practice: nearly a hundred thousand children attend private schools in Michigan with a non-Catholic religious affiliation or with no religious affiliation at all; all such schools do not and cannot receive public funds.[3] Thus, unlike in *Lukumi*, Proposal C is not "gerrymandered" or targeted to apply only to Catholic schools or even religious schools; it is neutral in operation as well as on its face. Similarly, unlike in *Lukumi*, Article VIII, § 2 is truly a law of general applicability because in operation it prevents non-Catholic and non-religious private schools from receiving public funds, just as it does for Catholic schools. And, unlike the ordinances in *Lukumi*, Article VIII, § 2 is neither overbroad nor underinclusive judged in relation to the legitimate state interest in preserving public funds for public schools: the law prevents the public funding of *any* private school, and it does not deprive any public school of funding. In sum, unlike in *Lukumi*, Article VIII, § 2 does not "pursue the [state's] governmental interest only against conduct motivated by religious belief."

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[3] *See* Julie Mack, *10 Things To Know About Michigan's Private Schools*, MLive, Oct. 2, 2017, https://goo.gl/2jwx97.

Id. at 545. It pursues the state's interest against funding religious and non-religious private education alike.

Contrary to Plaintiffs' suggestion, the fact that a majority of private-school students in 1970 attended Catholic schools does not indicate that Proposal C was based on anti-Catholic animus.[4] Such an argument has been rejected time and again by the Supreme Court in Establishment Clause challenges to the public funding of private schools where the vast majority of public aid is given to religious schools: "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." *Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002); *see also Agostini v. Felton*, 521 U.S. 203, 229 (1997) ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *Mueller v. Allen*, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on . . . the extent to which various classes of private citizens claimed benefits under the law."). The analysis is no different here, where instead of requiring state aid, the challenged law prohibits it.

[4] Currently, the majority of private-school students in Michigan attend *non*-Catholic schools. *See* Mack, *supra*, https://goo.gl/2jwx97.

B. Proposal C was not motivated by anti-Catholic animus.

Additionally, the historical picture painted by Plaintiffs is misleading and inaccurate: Proposal C is not the product of anti-Catholic animus.

1. Article VIII, § 2 is not a "Blaine Amendment."

As a threshold matter, it is misleading to label Article VIII, § 2 a "Blaine Amendment." James G. Blaine was a congressman in the nineteenth century who proposed an amendment to the United States Constitution that would have prohibited the States from allocating public education funds to religious schools. After the proposal failed, numerous States adopted identical or similar prohibitions into their state constitutions. Although Plaintiffs contend that these amendments were motivated by anti-Catholic bigotry, many historians warn that they were supported by the public for numerous legitimate reasons, with anti-Catholic animus playing only a small role in their enactment. *See* Brief for Legal and Religious Historians as Amici Curiae, *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2016) (No. 15-557), https://goo.gl/x2EEEp; Brief for Historians and Law Scholars as Amici Curiae, *Locke v. Davey*, 540 U.S. 712 (No. 02-1315), 2003 WL 21697729.

In any event, there is universal consensus that the phenomenon of adding so-called Blaine amendments to state constitutions—whatever its motivation—occurred "during the late nineteenth and early twentieth century." Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 134 (2000); *see*

also id. at 123 n.32 (describing Blaine amendments as enacted "between 1877 and 1917"); *id*. at 134 n.97 (same). By contrast, Article VIII, § 2 of Michigan's Constitution was proposed and adopted in 1970—long after the addition of so-called Blaine amendments into state constitutions. As one scholar has remarked, "many of the provisions which activists term 'Blaine Amendments' cannot justifiably be associated with James G. Blaine and Reconstruction-era anti-Catholic bigotry," with Michigan's 1970 enactment being an obvious example. Jill Goldenziel, *Blaine's Name in Vain? State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev 57, 66-67 (2005). And Article VIII, § 2 is unlike the so-called Blaine amendments in another respect: it prohibits the public funding of *all* private schools, not just religious institutions. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L. & Pub. Pol'y 551, 588-89 (2003). Michigan's situation has been described as "unique," not fitting neatly into the history or pattern of other state constitutions' funding restrictions. *Id*.

The Supreme Court has explicitly rejected similar efforts to link all restrictions on public funding of education to the historical Blaine amendments. For example, in *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004), amici opposed to restrictions on the State of Washington's scholarship funds argued that "Washington's Constitution was born of religious bigotry because it contains a so-

called 'Blaine Amendment,' which has been linked with anti-Catholicism." The state constitutional provision at issue in that case, however, was not the so-called Blaine amendment adopted in 1889. Because there was no "credible connection between the Blaine Amendment and . . . the relevant constitutional provision," the Supreme Court refused to consider "the Blaine Amendment's history." *Id*. In this case, too, there is no connection between so-called Blaine amendments and Article VIII, § 2 of Michigan's Constitution. Plaintiffs' questionable historical account should play no role in this Court's decision.

2. The historical record demonstrates an intent to preserve public funds for public schools, not to discriminate against Catholics.

Plaintiffs nonetheless argue that Article VIII, § 2 is unconstitutional by highlighting what they perceive to be anti-Catholic rhetoric in letters to the editor, newspaper articles and campaign literature from over 50 years ago. This argument, too, should be rejected. In any campaign involving a politically contentious ballot measure, it is almost inevitable that some statements made by supporters or opponents will be insensitive, misguided, or worse. But a litigant's ability to selectively identify a few instances of heated campaign rhetoric that included criticism of a religious institution does not demonstrate that anti-religious animus was the motivating factor behind a challenged policy, and cannot be the basis for the judicial invalidation of an otherwise neutral and generally applicable law. *See*

Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 313 (2014) ("The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage."). And, although amici will not discuss each bullet point in Plaintiffs' complaint, *see* Compl. ¶ 92, R. 1, Page ID ## 19-23, the Court will doubtlessly observe that many of the examples cited are a far cry from being the hatred and animus that Plaintiffs ascribe to them.

The truth is that the campaign surrounding Proposal C was dominated by discussion about preserving public funds for public schools and maintaining the independence of private schools, not by anti-Catholicism. For example, the *Detroit Free Press* editorial board stated:

> The private and parochial schools of this state do provide an invaluable service for the children they serve. They provide a richness and diversity to American life, and we salute them for their work.
>
> The fundamental questions, though, are whether you preserve pluralism by absorbing into a semi-public status the independent school and whether the public ought to support more than one school system. The state does not support one system adequately now.

Editorial, *Public Schools Threatened by Scare Words Campaign*, Detroit Free Press, Oct. 25, 1970 (Ex. A to Amicus Br., R. 29-2, Page ID # 211). Similarly, the *Detroit News* editorial board declared:

> [N]othing in the proposed amendment will keep parochial and other private schools from operating as they have in the past. And we might add that we favor their operation. We recognize them as institutions well worth the investment of parents desiring for their children something different or better than the offering of the public schools. But we believe the parents who want such benefits for their children should pay for them, not transfer the burden to the public tax rolls.

Editorial, *'Yes' on Proposal C*, Detroit News, Oct. 18, 1970 (Ex. B to Amicus Br., R. 29-3, Page ID # 213). On local television, the editorial board of WJBK (TV 2) declared its support for Proposal C "because we oppose any diversion of already insufficient funds for public education" and because "the intrusion of government money and influence into private education eventually would transform *all* schools into public schools." Editorial, *What a 'Yes' Vote on Proposal 'C' Does—and Does Not—Mean*, WJBK-TV2, Oct. 28, 1970 (Ex. C to Amicus Br., R. 29-4, Page ID # 216).

Supporters of Proposal C included prominent Catholics. A Republican state senator from Lansing, Philip Pittenger, who was Catholic and sent his children to Catholic schools, viewed the public funding of private schools as a threat to their independence. His wife stated, "It was our free choice to send our children to Catholic schools. Why should our neighbor have to pay for our choice when public schools are available?" Sheila O'Brien, *Senator's Wife Discusses Rewards, Woes of*

Her Job, Lansing State Journal, Dec. 16, 1973 (Ex. D to Amicus Br., R. 29-5, Page ID # 218).

C. The 2000 election reauthorizing Article VIII, § 2 purged any taint of animus.

Even if this Court were to conclude that public advocacy associated with Proposal C evinces an official anti-religious animus, Article VIII, § 2 should nonetheless survive because it was reauthorized by popular vote in November 2000. In that election, voters were asked whether they wanted to eliminate Article VIII, § 2 from the Constitution so that Michigan could become a school-voucher state. By an overwhelming vote of 69% to 31%, with over 4 million votes cast, the electorate chose to keep Article VIII, § 2 in the Constitution and preserve public funding for public schools. *See* State of Michigan Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, at 5 (2019), https://goo.gl/3RMzjR. Strikingly, Plaintiffs do not allege any anti-religious animus associated with the 2000 election.

Absent any such allegation, this Court should conclude that voters' deliberate consideration and overwhelming rejection of the proposal to eliminate Article VIII, § 2 conclusively eradicates the taint of any discriminatory purpose that could be attributed to the initial enactment of Proposal C in 1970. Interestingly, an authority relied on heavily in Plaintiffs' own complaint and brief confirms this very point:

> What additional actions by a legislative body are necessary to ameliorate an original invidious purpose? Two cases, *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *United States v. Virginia*, 518 U.S. 515 (1996), suggest an answer: Explicit legislative reauthorization purges the taint of prior discriminatory purpose; the newly authorized, facially neutral provision is therefore constitutional unless a fresh showing of discriminatory purpose is made.

Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 147-48 (2000) (footnotes omitted and citations added).[5] In fact, *Rostker* even indicates that formal reauthorization is not required, so long as the relevant political body gives thorough reconsideration to the enactment in question and decides, for non-discriminatory reasons, not to rescind it. *See Rostker*, 453 U.S. at 74-75 (relying on 1980 legislative history, evincing no discriminatory purpose, when Congress "thoroughly reconsider[ed]" but decided not to change a law that was alleged to have been enacted with a discriminatory purpose in 1948); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (even where past discrimination exists, it "cannot, in the manner of original sin, condemn governmental action that is not itself unlawful"

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[5] *See also* J. Scott Slater, Comment, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33 Stetson L. Rev. 581, 619 (2004) ("Even if it could be proven that Florida's Blaine Amendment was enacted with a discriminatory purpose, the Amendment was probably 'washed clean' when it was reviewed and changed in 1968."); K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 Wm. & Mary Bill Rts. J. 525, 574 n.359 (2001) ("The Supreme Court has indicated that subsequent legislative reconsideration of a law originally enacted to achieve a discriminatory goal, may purge the taint of original invidious intent.").

(quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion)). Applying the same principle to the voters' decision in 2000 to preserve Article VIII, § 2, the constitutionality of the provision should be upheld.

IV. Article VIII, § 2 does not create a political structure that unconstitutionally discriminates against religion.

Plaintiffs' contention that Article VIII, § 2 creates a political structure that unconstitutionally discriminates against religion must be rejected. In *Schuette v. Coalition to Def. Affirmative Action*, 572 U.S. 291 (2014), an analogous race-based claim was raised against Article I, § 26 of the Michigan Constitution, which prohibited public universities from considering race in their admissions process. But the Supreme Court squarely rejected the plaintiffs' challenge in *Schuette*. So, too, must Plaintiffs' political-structure claim fail with regard to Article VIII, § 2.

Plaintiffs contend that because *Schuette* did not overrule *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), their political-structure claim survives. They are wrong. In *Schuette*, the Court cabined the political-structure doctrine under *Hunter* and *Seattle* to situations, like in *Hunter* and *Seattle*, in which "there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated," *Schuette*, 572 U.S. at 304, and "the political restriction in question was designed to be used, or was likely used, to encourage infliction of injury by reason of race," *id*. at 314. In *Hunter*, the enactment in question deprived Black residents

of the ability to seek redress in court for what was recognized to be rampant, widespread racial discrimination in housing. *Id*. at 303-04. And in *Seattle*, the enactment terminated a program specifically designed to remedy unconstitutional racial segregation in the public schools that was actively harming Black youth. *Id*. at 304-06. In *Schuette*, by contrast, although the enactment of a constitutional amendment that prohibits the use of racial preferences in university admissions was controversial, it was deemed the legitimate subject of political debate and activity, not an injury unconstitutionally inflicted on a racial group. *Id*. at 312-14. The Court acknowledged that "[d]eliberative debate on sensitive issues such as racial preferences all too often may shade into rancor." *Id*. at 314. But, the Court held, "that does not justify removing [the issue] from the voters' reach." *Id.*

Article VIII, § 2 clearly falls on the *Schuette* side of the line: "Here there was no infliction of a specific injury of the kind at issue in [*Hunter* and *Seattle*]." *Id*. at 310. Far from inflicting an injury based on race, religion, or any other protected characteristic, Article VIII, § 2 reflects the voters' determination that the State of Michigan should subsidize public, but not private, education. As the Supreme Court has repeatedly held, such a policy choice is each State's to make. And, although as with affirmative action, debates about school funding "may shade into rancor" and "division and discord" on both sides may be observed, heated campaign rhetoric alone does not transform a politically contentious debate into unconstitutional state

action. *Id*. at 314; *see also id*. at 313. Thus, it is *Schuette*, and not *Hunter* or *Seattle*, that controls here.

Plaintiffs' political-structure claim also fails because under the Equal Protection Clause, strict scrutiny applies only if the challenged law (1) burdens a fundamental right or (2) targets a suspect class. *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010). Here, neither of these conditions is satisfied. When the asserted fundamental right at issue is the free exercise of religion, the Supreme Court has held that the failure of an independent free-exercise claim necessarily limits the equal-protection claim to rational basis review. *See Locke*, 540 U.S. at 720 n.3; *Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (1974); *see also Wirzburger v. Galvin*, 412 F.3d 271, 282 (1st Cir. 2005). As explained above, Article VIII, § 2 presents no free-exercise violation under *Lukumi* or the *Trinity Lutheran*, *Espinoza*, and *Carson* line of cases. Therefore, there is no impairment of a fundamental right to trigger strict scrutiny in this case.

As for a suspect class, Plaintiffs contend that Article VIII, § 2 "disadvantages religious people." Appellants' Br. 41. But "religion has never been held to be a suspect classification" when all "religious people" are affected in the same way regardless of their denomination or sect. *Wirzburger*, 412 F.3d at 285; *see also id.* at 283 n.6. Rather, "laws discriminating *among* religions are subject to strict scrutiny."

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) (emphasis in original). That is not the situation here.

In any event, Article VIII, § 2 does not treat religious people differently from nonreligious people. Rather, the law could be said to disadvantage people who want to send their children to private schools—religious or secular—at state expense. That category of people is far from anything that could be considered a suspect class.

Accordingly, rational basis review applies. And there can be little doubt that the State has a rational basis for preserving public funds for use in public schools that all students—religious and non-religious alike—may attend. Therefore, Plaintiffs' political-structure claim should be rejected.

CONCLUSION

Because Article VIII, § 2 of the Michigan Constitution does not violate the United States Constitution, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,900 words, excluding the parts of the brief exempted by Rule 32(f).

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CERTIFICATE OF SERVICE

On March 29, 2023, I caused this brief to be filed using the Court's electronic filing system, which will serve electronic notice of such filing to all counsel of record.

/s/ Daniel S. Korobkin
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DESIGNATON OF RELEVANT DISTRICT COURT DOCUMENTS

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