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Sixth Circuit Rejects Challenge to Michigan Constitutional Amendment Prohibiting Public Funds for Private Schools

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On November 6, 2023, the U.S. Court of Appeals for the Sixth Circuit rejected a challenge to a 1970 amendment to the Michigan Constitution that prohibits payment of “public monies” to private schools.

Believing that the 1970 amendment, Michigan Constitution Article VIII, Section 2, has anti-religion (specifically, anti-Catholic) origins, Parent Advocates for Choice in Education (PACE) along with five families, sued the State of Michigan, the governor, and the treasurer. The plaintiffs argued that the 1970 amendment violates the right to free exercise of religion and equal protection.

In September 2022, the United States District Court of the Western District of Michigan dismissed both claims, finding that the amendment was facially neutral: By its terms, nothing in the 1970 amendment singles out any religious minority for unequal treatment in government funding. “[P]arents of students at non-sectarian private schools like Cranbook or Country Day,” observed the district court, “are on exactly the same footing as the parents of children at Catholic Central or Grand Rapids Christian when it comes to use of public funds. None may benefit from the use of public funds.” Hile, et. al., v. State of Michigan, et. al., Case No. 1:21-CV-829, 2022 WL 21416529 at *4 (W.D. Mich. Sept. 30, 2022, Jonker, J.).

Plaintiffs appealed only their equal protection claim to the U.S. Court of Appeals for the Sixth Circuit. On November 6, 2023, the Sixth Circuit affirmed the district court dismissal, rejecting the plaintiffs’ political-process theory of liability. That theory states that citizens cannot vote to create special procedures that change the political process so that minorities (here, parents of children attending private schools) must overcome hurdles that other groups do not confront when they employ political action to advance their interest. Imposing special burdens on religious groups in the form of a political restriction designed to inflict injury by reason of religion, claimed the plaintiffs, is an equal protection violation. But although religion, like race, is a suspect classification subject to heightened scrutiny for equal protection purposes, the court noted that plaintiffs cited no precedent recognizing a political process claim based on religious discrimination.

The Sixth Circuit held the 1970 Michigan constitutional amendment “evidences the legitimate choice

of Michigan’s electorate to dedicate public funds to public schools.” In doing so, it rejected plaintiffs’ suggestion that Article VIII, Section 2 constitutes a so-called “Blaine Amendment,” referring to a series of late 19th century proposals that sought to constitutionally prohibit public funds from financially supporting religious schools. Article VIII, Section 2 was adopted nearly a century after Blaine’s constitutional amendment proposal failed in Congress in 1875, and this long period of time “severs any reasonable link between Michigan’s amendment and Reconstruction-era anti-Catholic bigotry.” Even if the court were to assume for the sake of argument that the 1970 constitutional amendment was tainted with anti-Catholic bias, the 2000 election reauthorizing the amendment dispelled that belief. In 2000, Michigan voters were asked to consider—and ultimately rejected—a school voucher proposal that would have repealed Article VIII, Section 2 and resulted in various state benefits given for students attending nonpublic schools, including tuition vouchers, credits, tax benefits, exemptions, subsidies, and grants. In sum, held the Sixth Circuit, the Michigan Constitution does not legitimize differential treatment for religious persons, as it is a facially neutral law. Rendering unconstitutional Article VIII, Section 2 would go against the basic legal proposition that a state should not subsidize private education using public funds.

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