Supreme Court No. 158751

IN THE

Supreme Court of Michigan

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID (CAP); AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN (ACLU); MICHIGAN PARENTS FOR SCHOOLS; 482FORWARD; MICHIGAN ASSOCIATION OF SCHOOL BOARDS;
MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATORS; MICHIGAN
ASSOCIATION OF INTERMEDIATE
SCHOOL ADMINISTRATORS;
MICHIGAN SCHOOL BUSINESS
OFFICIALS; MICHIGAN ASSOCIATIONS
OF SECONDARY SCHOOL PRINCIPALS;
MIDDLE CITIES EDUCATION
ASSOCIATION; MICHIGAN
ELEMENTARY AND MIDDLE SCHOOL
PRINCIPALS ASSOCIATIONS;
KALAMAZOO PUBLIC SCHOOLS; AND
KALAMAZOO PUBLIC SCHOOLS BOARD
OF EDUCATION,

Plaintiffs-Appellants,

v.

STATE OF MICHIGAN; GRETCHEN
WHITMER, Governor, in her official
capacity, MICHIGAN DEPARTMENT OF
EDUCATION; and MICHAEL RICE,
Superintendent of Public Instruction, in his
official capacity,

Defendants-Appellees.

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE[1]

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its many functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through the submission or participation in amicus curiae briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general. One of Agudath Israel's roles in this connection is to serve as an advocate for Jewish schools and Jewish education, which Orthodox Jews see as both a personal religious obligation and a critical factor—perhaps the critical factor—in ensuring Jewish religious identity and continuity. The overwhelming majority of Agudath Israel's constituents choose to send their children to the approximately 750 Orthodox Jewish day schools

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[1] We thank Scott Whitman, a student at Georgetown University Law Center, and Mark Pollak, a student at Columbia Law School, for their assistance with the research and writing of this brief.

No counsel for any party authored or assisted with the preparation of this brief in whole or in part, and no person other than Agudath Israel, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

across the country that collectively educate over 250,000 students. Therefore, it is of great interest to Agudath Israel that this Court uphold Michigan's mandated services reimbursement program, enacted in 2016 PA 249, as amended by 2017 PA 108, which allocates money from the state's general fund to reimburse actual costs incurred to nonpublic schools in complying with a health, safety, or welfare requirement mandated by law or administrative rule of the State of Michigan.

But our interest in this case extends well beyond this particular reimbursement program. In addition to the reimbursement program at issue in this case, there are programs in numerous other states in the country which also provide government-encouraged funding and other forms of assistance to students who elect to attend nonpublic (including religious) schools. From time to time proposals for such programs have been advanced in other states as well. The constitutional principle that this case could establish thus has great significance for our constituents not only in Michigan but throughout the country.

If Michigan's mandated services reimbursement program is upheld, not only will Michigan's religious schools be better able to serve their students but the precedent could potentially enable proposals for similar programs in other states to move forward even in the thirty-eight states that have provisions barring state aid to religious institutions (often called "Blaine Amendments") in their state constitutions. Repeatedly, state "Blaine Amendments" have been cited in opposition to programs involving school

choice that could benefit students who wish to attend religious schools. *See* Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice Programs*, 18 FED. SOC'Y REV. 48 (2017) ("Just in the past ten years, Blaine Amendments have been used to challenge school choice programs eleven times. There are still more instances of opponents pointing to Blaine Amendments to try to convince state legislatures and governors to reject school choice bills."). If the sections of the Michigan State Constitution, MICH. CONST. 1963, art. 8, § 2, that bar state assistance to religious institutions, are held to not prohibit assistance to religious schools because to do so would violate the Free Exercise Clause of the United States Constitution, as our brief argues, it could lead the way for other states with similar constitutional provisions to be able to provide needed assistance to religious schools and to students choosing to attend religious schools. A ruling upholding Michigan's mandated services reimbursement program could also serve as an important precedent in states where opponents of government-encouraged scholarships and other forms of assistance for nonpublic (including religious) school students are seeking or may seek to challenge existing programs that provide such funding.

On the other hand, should this Court overturn the decision of the Michigan Court of Appeals and hold that Michigan's mandated services reimbursement program is unconstitutional, not only would religious schools in Michigan be barred from receiving reimbursements for compliance with

state-mandated health, safety, and welfare requirements, but legislative attempts to provide for such assistance in other states that contain provisions in their state constitutions that bar religious schools from receiving government aid would be hampered given the precedent established by this case.

Agudath Israel of America respectfully submits this amicus curiae brief in support of Appellees because we believe that states' Blaine Amendments and Michigan's ballot approval of Proposal C (which mirrors a Blaine Amendment) were motivated by anti-Catholic bigotry and religious animus. Further, we believe that the U.S. Supreme Court's decision in *Comm. for Pub. Ed. & Religious Liberty v. Regan*, 100 S. Ct. 840 (1980) supports the finding that mandatory services reimbursements to religious schools for complying with state-mandated health, safety, and welfare requirements do not violate the Establishment Clause of the U.S. Constitution. Finally, we believe that the U.S. Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct 2012 (2017) compels the conclusion that the exclusion of mandatory services reimbursements to religious schools would violate the Free Exercise Clause of the U.S. Constitution.

ARGUMENT

I. THE HISTORY OF THE BLAINE AMENDMENTS DEMONSTRATES THAT THEIR ADOPTIONS WERE PRIMARILY MOTIVATED BY ANTI-CATHOLIC BIGOTRY AND RELIGIOUS ANIMUS.

History demonstrates that states who adopted Blaine Amendments into their state constitutions were motivated primarily by anti-Catholic bigotry and religious animus, and not by the ethos of maintaining institutional separation between church and state. States adopted Blaine Amendments in response to the fierce Protestant backlash against the increasing Catholic population who were opposed to the overt Protestantism common in the public-school system and were demanding funding of their alternative school system or exemptions from taxation. This assertion is supported by prominent historians and by the Supreme Court of the United States.

In the second half of the 19th century, there was a mass Catholic immigration to the United States. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 42 (1992). This mass immigration triggered a fear among American citizens, a majority of whom were Protestants, about the so-called Catholic-immigrant menace. *Id.* at 41–42. Fierce opposition to Catholic immigrants fueled the rise of several nativists parties that were determined to prevent Catholics from gaining influence or power. *Id.* Such parties included the Order of American Union, the Alpha Association, the American Protective Association, and, most

famously, the Native American Party, commonly known as the Know Nothing party. *Id.* at 42.

"The Blaine Amendment arose as a result of a nationwide controversy over the still developing public school system." Green, *supra* at 41. As Catholics grew in number and prominence, they began challenging the overt Protestantism of the public-school system. *Id.* While public schools were supposedly "non-denominational," that merely meant that public schools did not teach the doctrines of any Protestant sect or denomination but were still committed to traditional Protestant indoctrination. R. Laurence Moore, *Bible reading and nonsectarian schooling: The failure of religious instruction in nineteenth-century public education*, 86 J. AM. HIST. 1581, 1582 (2000). At the time, it was common practice in public schools for there to be hymn singing, praying, and reading from the Protestant King James Bible, all infused with an obvious Protestant overtone. *See* Green, *supra* at 41; Moore, *supra* 1583–84. Reasonably uncomfortable with the current state of public schools, Catholics established their own parochial schools and sought their fair share of public school funding or exemptions from taxation. Green, *supra* at 41. Furthermore, Catholics began to challenge Protestant-inspired religious practices and exercises prevalent in public schools. *Id.*

While Catholics enjoyed several early victories in their attempts to gain state educational funding for their developing network of parochial schools in the early 1870's, Protestant reaction was fierce and quick. In 1876, Congressman James G. Blaine from Maine proposed an amendment to the U.S. Constitution ("Blaine Amendment") that would have applied the

Establishment Clause of the First Amendment to the states and would in addition have prohibited tax support of any school or institution "under the control of any religious or anti-religious sect, organization, or denomination." Moore, *supra* at 1590; *see* Green, *supra* at 38; U.S. CONST. amend I. Although the amendment failed in the U.S. Senate, Protestants began calling for legislation prohibiting sectarian control over public schools and the diversion of public funds for religious institutions. Green, *supra* at 43. These efforts were overwhelming successful and by 1890, twenty-nine states had adopted Constitutional amendments, known as Blaine Amendments, that prohibited the transfer of public funds to parochial schools. *Id.* Currently, over 37 state constitutions contain Blaine Amendments. George Will, *Blaine's Lasting Blight on Education*, AP NEWS (May 20, 2019), *available at* https://www.apnews.com/0ced71857074458a91fe3133faec9619.

It is indisputable that the Blaine Amendments were passed in an atmosphere of anti-Catholic bigotry and religious animus. In the bitterly contested election of 1876, Democrats attributed Republican enthusiasm for the amendment to anti-Catholicism and historians state that the "main aim was to prevent the use of public money to sustain the rapidly growing Catholic parochial school system." James W. Fraser, *Between Church and State: Religion and Public Education in a Multicultural America* 106 (St. Martin's Press eds., 1st ed. 1999); *see also*, Moore, *supra* at 1590; Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 666 (1998) ("[T]he Blaine Amendment is a remnant of

nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had particular disdain for Catholics."). The U.S. Supreme Court in *Mitchell v. Helms,* acknowledged that "[o]pposition to aid 'sectarian' schools acquired prominence in the 1870's with Congress' consideration . . . of the Blaine Amendment . . . [and that] [c]onsideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" 530 U.S. 793, 828 (2000) (plurality op.) (citing Green, *supra*). The U.S. Supreme Court further declared that "hostility to aid pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Id.* (citation omitted).

II. MICHIGAN'S BALLOT APPROVAL OF PROPOSAL C WAS ALSO MOTIVATED BY ANTI-CATHOLIC BIGOTRY AND RELIGIOUS ANIMUS.

Michigan's ballot approval of Proposal C was also motivated by anti-Catholic bigotry and religious animus. In 1970, the Michigan Legislature passed a bill that would provide modest state funding to nonpublic schools. At the time, the bill's main beneficiaries were Catholic schools. Opponents to the bill acted swiftly and introduced Proposal C to the November 1970 ballot that would prohibit state funding to any nonpublic school. While couched in neutral language, it is evident through advertisements, public statements made by supporters and historical analysis, that the proponents of Proposal C used anti-Catholic hostility

to garner support for its adoption.

Michigan did not adopt a Blaine Amendment at the time when other states did because its 1850 State Constitution already stated that "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the state be appropriated for any such purpose." MICH. CONST. 1850, art 4, § 40. However, in the 1960's, the Legislature passed 1970 PA 100, as an amendment to 1969 PA 249, that allocated $100 for each high school student and $50 to each grade-school student attending nonpublic school. 1970 Mich. Pub. Acts 100. In an advisory opinion, this Court affirmed the validity of the appropriation, concluding that the legislation neither advanced nor inhibited religion and did not violate the establishment clauses of the U.S. or Michigan Constitutions. *In re Advisory Opinion re Constitutionality of PA 1970*, *No 100*, 384 Mich 82, 180 NW2d 265 (1970). This legislation mainly benefited Catholic schools and their students because in the 1970's Catholic schools overwhelmingly accounted for the largest number of nonpublic school students in the state. *Catholic News Service – Newsfeeds, 7 July 1970*, THE CATHOLIC NEWS ARCHIVE (July 6, 1970), *available at* https://thecatholicnewsarchive.org/?a=d&d=cns19700706-01.1.4. Therefore, as a practical matter, the nonpublic schools in Michigan *circa* 1970 meant Catholic Schools.

Opponents of the new nonpublic school funding measure turned public opinion against the state funding by demonizing the Catholic church and the Catholic school system. They formed a ballot

committee, the "Council Against Parochiad ("CAP")," that introduced "Proposal C" to the November 1970 ballot. *The History of CAP*, CAP Michigan, *available at* http://www.capmichigan.org/history.html.While Proposal C was neutral in language, barring funding not only for "denominational" schools but for all "nonpublic" schools, proponents of Proposal C were undeniably focused on the state public funding of the Catholic school system. According to CAP's website, the initial support for parochiaid "emanated largely out of concerns that Roman Catholic schools needed state support or they would all close," and that the then governor, Governor William G. Milliken, was "perhaps seeking the support from Catholic Democrats for his election" when he proposed a measure that would pay part of the salaries of private school lay teachers teaching secular subjects. *The History of CAP*, CAP Michigan, available at http://www.capmichigan.org/history.html. This anti-Catholic bias was reflected in the public comments made by private citizens who supported Proposal C. *See e.g.*, Letter to the Editor, DETROIT NEWS, Nov. 1, 1970 ("Parochiaid is basically a Catholic position . . . . As far as I am concerned the Catholic Church is the largest profit-making non-profit organization in the world."); Letter to the Editor, DETROIT NEWS, Oct. 31, 1970 ("Parochiaid forces advertise many well-known people who oppose Proposal C. The influence of these people is negated since, to my knowledge, they are all either Catholic, or wealthy, or both, with a personal desire to see a tax breakthrough for private parochial schools."). Advertisements and opinions that supported Proposal C expressed inflammatory anti-religious and anti-Catholic sentiment. *See e.g.*, Yes Ad paid for by CAP, DETROIT NEWS, Oct. 30, 1970 (stating

that "Support Church Schools by Giving on Sunday!! . . . Parochiad Must Be Stopped – Now!!"); Jamie Gass & Ben Degrow, *The Supreme Court has a chance to uphold school choice and religious liberty*, THEHILL (June 6, 2019), *available at* https://thehill.com/opinion/education/449069-the-supreme-court-has-a-chance-to-uphold-school-choice-and-religious (quoting an opinion piece written by proponents of Proposal C that "[t]here can be no doubt in the mind of any informed observer that the goal of the Catholic Church hierarchy is complete tax support of its schools."). Finally, the media and public officials from that era acknowledged the decisively anti-Catholic atmosphere present at the time of Proposal C's adoption. *See e.g.*, GRAND RAPIDS PRESS, Oct. 22, 1970 ("Outright anti-Catholicism"' is one of the reasons for supporting Proposal C.); Gass et al, *supra* (quoting one state senator from that era who observed that "I have never witnessed such anti-Catholic sentiment in my life.").

III. THE UNITED STATES SUPREME COURT'S DECISION IN *COMM. FOR PUB. ED. & RELIGIOUS LIBERTY V.* REGAN SUPPORTS THE CONCLUSION THAT MANDATORY SERVICE REIMBURSEMENTS TO PRIVATE PAROCHIAL SCHOOLS ARE CONSTITUTIONAL.

The Supreme Court has held that mandatory service reimbursements to private parochial schools are constitutional when the legislative enactment at issue satisfies a three-factor test. Under Supreme Court precedent, a legislative enactment does not violate the Establishment Clause of the Constitution if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits

religion, and if it does not foster excessive government entanglement with religion. The Supreme Court concluded that the New York statute satisfied this test and held it to be constitutional, and, therefore, the substantially similar Michigan statute at issue here should also be deemed constitutional.

In *Comm. for Pub. Ed. & Religious Liberty v. Regan*, 100 S. Ct. 840 (1980), the United States Supreme Court held that a New York statute that appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the State did not violate the First and Fourteenth Amendments of the U.S. Constitution. *Id.* at 843. There, the New York Legislature enacted a statute that directed payments to nonpublic schools of the costs incurred by them in complying with state-mandated requirements such as testing, reporting, and recordkeeping, and provided a means by which state funds were audited. *Id.* at 842; N.Y. COMP. CODES R. & REGS. tit. 8, § 176 (2018). Opponents of this law brought suit to enjoin enforcement of the statute alleging that it violated the Establishment Clause of the U.S. Constitution.

The court used a three-factor test, based on Supreme Court precedent, to determine whether a legislative enactment contravened the Establishment Clause: (1) does the legislative enactment have a "secular legislative purpose?" (2) does "its principal or primary effect . . . advance[] . . . [or] inhibit[] religion?" and, (3) does it "foster an excessive government entanglement with religion?" *Regan*, 100 S. Ct. at 846 (citations omitted). The court determined that: (1) the New York statute has the "secular purpose of providing educational opportunity," *Id.* at 843, (2) that

"the reimbursements for the costs of so complying with state law has primarily a secular, rather than a religious purpose and effect," *Id* at 848, and (3) that "services for which the private schools are reimbursed are discrete and clearly identifiable, and the statutory reimbursement process is straightforward [which suggests] . . . no excessive [government] entanglement." *Id.* at 850.

The reimbursement program at issue here is substantially similar to the reimbursement program at issue in *Regan* and should, accordingly, be upheld. Like the New York statute in *Regan*, the Michigan reimbursement law has the secular purpose of reimbursing "actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirements mandated by a law or administrative rule of . . . [Michigan] state." MICH. COMP. LAWS § 388.1752b (2019). Furthermore, the primary purposes of the underlying activities reimbursed by the state, mainly, the fulfillment of state-mandated health, safety or welfare requirements, certainly do not advance religion. *Cf. Agostini v. Felton,* 521 U.S. 203, 228–230, 117 S. Ct. 1997, 2013–2014 (1997) (holding that services that are supplemental to the regular curriculum do not advance religion because such services do not 'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students' *(quoting Zobrest v. Catalina Foothills Sch. Dist*., 509 U.S. 2, 12–13, 113 S. Ct. 2462, 2468–69 (1993)). Finally, the reimbursements will not foster "excessive entanglement with religion," because, similarly to the New York statute at issue in *Regan*, the services covered are "discrete and clearly identifiable," and the reimbursement process is "straightforward," suggesting that there will be "no

excessive entanglement." *See* MICH. COMP. LAWS § 388.1752b (for a description of the reimbursement scheme that is straightforward and susceptible to routinization that characterizes most reimbursement schemes); *See also*, *Bowen v. Kendrick*, 487 U.S. 589, 615–617, 108 S.Ct. 2562, 2577–2579 (1988) (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 764–765, 96 S.Ct. 2337, 2353–2354 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion). In fact, the Michigan reimbursement statute engenders even less "excessive entanglement with religion" than the New York statute because the Michigan reimbursement statute is limited by amount, $2,750,000, and time, the year 2019, and, the reimbursable underlying services are auxiliary in nature and lack any relation to "educational services" that are covered in the New York statue. *See* MICH. COMP. LAWS § 388.1752b; *see also Traverse City Sch. Dist. v. Attorney General*, 384 Mich. 390, 406–407, 420 (1971) (where the Michigan Supreme Court noted that auxiliary services were not included in Proposal C's blanket prohibition on providing aid to nonpublic schools, and that "auxiliary services are general health and safety measures.").

IV. UNDER THE UNITED STATES SUPREME COURT'S DECISION IN *TRINITY LUTHERAN CHURCH V. COMER*, TO DENY REIMBURSEMENTS TO RELIGIOUS SCHOOLS BECAUSE OF MICHIGAN'S BLAINE AMENDMENT WOULD VIOLATE THE FREE EXERCISE CLAUSE OF THE U.S. CONSTITUTION.

In a recent decision, the Supreme Court has concluded that barring religious institutions from receiving public funds solely because of their religious character is a violation of the Free Exercise Clause of the U.S. Constitution. The Supreme Court also held that the Free Exercise Clause of the U.S. Constitution prevails over a state constitution's Blaine Amendment. Based on this precedent, this Court should rule that the Michigan mandated services reimbursement program is constitutional, and that the Free Exercise Clause should prevail over Proposal C's Blaine Amendment contained in Michigan's Constitution.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct 2012 (2017), the United States Supreme Court held that a Missouri grant program to help public and private schools and other nonprofit entities could not constitutionally prohibit a church from benefitting from the program. To the contrary, the court held that barring the church from receiving benefits from the program was a violation of the church's rights under the Free Exercise Clause of the First Amendment.

The United States Supreme Court, citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion) (quoting *Wisconsin v. Yoder*, 406 U.S. 205,

215 (1972)), stated that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" Thus, for example, the Court in *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), upheld a New Jersey law enabling local school districts to reimburse parents for the costs of transportation to schools, including religious schools. As the court explained in that case, a state "cannot hamper its citizens in the free exercise of their own religion . . . [and] cannot exclude . . . members of any faith, because of their faith . . . from receiving the benefits of public welfare legislation." *Id.* at 16. The court in *Trinity Lutheran*, 137 S. Ct at 2016, then cited other cases in which it held that the Free Exercise Clause protects against laws that "impose special disabilities on the basis of . . . religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990)).

This holding was not a new one, rather—as was stated in *McDaniel*—the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." 435 U.S. at 639 (Brennan, J. concurring). To put it simply, as Justice Kavanaugh stated, "under the Constitution, the government may not discriminate against religion generally or against particular religious denominations." *Morris County Board of Chosen Freeholders v. Freedom From Religion Foundation*, 139 S. Ct. 909, 909 (2019) (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

Turning to the Missouri program in question, the United States Supreme Court ruled that the Missouri program "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Trinity Lutheran*, 137 S. Ct. at 2021. Such a policy, said the court, "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* (quoting *Lukumi*, 508 U.S. at 546). The court made clear that barring a benefit is itself an infringement of the Free Exercise Clause: "The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church, solely because it is a church—to compete with secular organizations for a grant." *Id.* at 2015. When the State conditions benefits in this way, stated the court, it has "punished the free exercise of religion." *Id.* at 2022 (citing *McDaniel*, 435 U.S. at 626). The court concluded that barring Trinity Lutheran from participating in the Missouri grant program was a violation of the Free Exercise Clause because "[t]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand." *Id.* at 2025.

In footnote 3, a plurality of the United States Supreme Court added that, "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

We note that Justices Thomas and Gorsuch

expressly did not agree to footnote 3. Moreover, in his concurring opinion, Justice Gorsuch explained why the ruling and logic of *Trinity Lutheran* extended beyond the program involved in that case alone, stating that:

> [I] worry that some might mistakenly read it [footnote 3] to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are 'governed by general principles, rather than ad hoc improvisations.' *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 25 (2004)(Rehnquist, C.J., concurring in judgment). And the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else." (emphasis added).

Trinity Lutheran, 137 S. Ct. at 2026 (Gorsuch, J. concurring).

Using Justice Gorsuch's rationale, we urge the Court to consider that although footnote 3 did not expressly extend the decision of the Court to other issues of religious funding, it would only be logical to do so. There should be no distinction as to whether a state is denying funds for playground resurfacing or, as in the instant case, denying reimbursements for compliance with state-mandated health, safety, or welfare requirements. In fact, even if a distinction was

made, here, both cases relate to the health and safety of children which suggest that the Supreme Court would agree that denying the public funding on the basis of the schools' religious character would violate the Free Exercise Clause. Under the Free Exercise Clause, only a state interest "of the highest order" can justify a policy that discriminates against religious institutions and individuals in the provision of government benefits. Here there is no such interest, because to the contrary, it is well settled that students attending religious schools must be treated equitably. *See*, *E.g.*, *Mitchell v. Helms*, 530 U. S. 793, 828 (2000) (plurality opinion) (noting that "our decisions have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity")

In *Trinity Lutheran*, the State based its exclusion of the church from its playground resurfacing program on Missouri's "Blaine Amendment," which prohibits state funds from being used, directly or indirectly, in aid of any church. *See Trinity Lutheran*, 137 S. Ct. at 2017; MO. CONST. art. I, § 7. The Court of Appeals for the Eighth Circuit held that the Free Exercise Clause did not compel the State to disregard its "Blaine Amendment". *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F. 3d 779, 785 (2015). However, the United States Supreme Court reversed the Eighth Circuit's ruling and held that the Free Exercise Clause did compel the State to provide the public benefits in question to the church. *Id.* at 2019. As such, the Supreme Court clearly held that in the conflict between a state's "Blaine Amendment" and the Free Exercise Clause, the Free Exercise Clause must prevail.

The ruling in *Trinity Lutheran* should stand for the general proposition that a "Blaine Amendment," such as those contained in the Missouri and Michigan State Constitutions, which prohibit religious institutions from receiving public benefits, cannot, under the Free Exercise Clause of the U.S. Constitution, bar religious schools from receiving public funds for safety programs or prevent them from being reimbursed with public funds for complying with state-mandated health, safety, and welfare requirements.

CONCLUSION

For the reasons stated, Agudath Israel of America as amicus curiae urges this Court to affirm the Michigan's Court of Appeal's decision upholding Michigan's mandated services reimbursement program as constitutional.

Respectfully submitted,

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