

Order

Michigan Supreme Court
Lansing, Michigan

February 5, 2020

Bridget M. McCormack,
Chief Justice

158751 (137)

David F. Viviano,
Chief Justice Pro Tem

COUNCIL OF ORGANIZATIONS AND
OTHERS FOR EDUCATION ABOUT
PAROCHIAID, AMERICAN CIVIL
LIBERTIES UNION OF MICHIGAN,
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
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,

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

v

SC: 158751
COA: 343801
Court of Claims: 17-000068-MB

STATE OF MICHIGAN, GOVERNOR,
DEPARTMENT OF EDUCATION, and
SUPERINTENDENT OF PUBLIC
INSTRUCTION,
Defendants-Appellees.

On order of the Court, the motion for peremptory reversal is DENIED. By order of June 24, 2019, leave to appeal the October 16, 2018 judgment of the Court of Appeals was granted, 504 Mich 896, and this case was scheduled for argument as part of the March 2020 session calendar. It now appears to this Court that the case of *Espinoza v Montana Dep't of Revenue*, cert gtd ___ US ___; 139 S Ct 2777 (2019) (Docket No. 18-1195), is pending before the United States Supreme Court and that the decision in that case may resolve an issue raised in the present case. Therefore, we ADJOURN the oral argument of this case, and we ORDER that this case be held in ABEYANCE pending the decision in *Espinoza*.

MARKMAN, J. (*dissenting*).

I respectfully dissent to yet another delay in resolving the constitutionality of MCL 388.1752b, a significant school funding measure enacted by our Legislature in 2016.

With oral argument now likely to be rescheduled to the next term of the Court, it will have been nearly five years from the time of the enactment of this measure that a determination of constitutionality may perhaps emerge. Even more troubling is that during the entirety of this period, the implementation of this law will have been precluded by the judiciary of this state-- first, as the result of delay occasioned by this Court's decision to deny constitutional guidance to then-Governor Snyder who sought an advisory opinion in this regard; second, as the result of a preliminary injunction imposed by a judge of the Court of Claims; third, as the result of refusals by the Court of Appeals and this Court to review the preliminary injunction; fourth, as the result of a permanent injunction subsequently imposed by the Court of Claims; fifth, as the result of continuing litigation in the Court of Appeals; and finally, as the result of this Court having granted leave to appeal last summer and now choosing not to finally resolve the case until perhaps the Court's 2020–2021 term. If ultimately this Court holds MCL 388.1752b to be unconstitutional, *so be it*, but in the face of the lower court's ceaseless injunction, we have failed, in my judgment, to show a sufficient sense of urgency in order either to strike down the law or to allow the Legislature's will to be done. In other words, whether MCL 388.1752b is ultimately sustained or nullified, it is long overdue that the highest court of this state finally decide this matter so that the product of our representative process is no longer held in limbo. As United States Supreme Court Justice Samuel Alito has observed, "the longer an injunction [against a state defendant] . . . stays in place, the greater the risk that it will improperly interfere with a State's democratic processes." *Horne v Flores*, 557 US 433, 453 (2009). See also MCR 7.305(B)(4)(b).

On behalf of the citizenry, legislative majorities in 2016 enacted MCL 388.1752b, presumably with the view that by reimbursing nonpublic schools for compliance costs associated with state-imposed "health, safety, or welfare" requirements, they were furthering in some manner the "health, safety, or welfare" of nonpublic school students. And if this law is ultimately deemed to be constitutional, nonpublic school students will have been deprived of benefits to which they were lawfully entitled for nearly five years. A student who was enrolled in a nonpublic elementary school in the fourth grade when the law was enacted will be enrolled in high school by the time this Court decides its constitutionality.

Today, merely two weeks after finally scheduling oral argument of this case, the Court adjourns this same argument because "[i]t now appears to this Court that the case of *Espinoza v Montana Dep't of Revenue*, cert gtd ___ US ___; 139 S Ct 2777 (2019), is pending before the United States Supreme Court and that the decision in that case may resolve an issue raised in the present case." While, indeed, *Espinoza* "may" help resolve an issue in the present case, it is also possible that *Espinoza* "may not" help, and it is also quite *certain* that resolution of issues will be helped-- conceivably in a decisive manner-- by the Supreme Court's recent decision in *Trinity Lutheran Church of Columbia, Inc v Comer*, 582 US ___; 137 S Ct 2012 (2017), a case unaccountably unmentioned in our

order granting leave to appeal. In order to allow this Court the benefit of the Supreme Court's guidance in *Espinoza*, while also taking into consideration the extraordinary circumstances of the ongoing injunction, I would not postpone oral argument, but would instead proceed with such argument; hold our final decision in abeyance for *Espinoza*, which is to be decided no later than the end of June; and then issue our decision prior to the close of our term at the end of July. I would not further delay consideration of this case, especially when this Court should have been well aware of the potential connection between these cases at least seven months ago when the Supreme Court first granted certiorari to hear *Espinoza*, and at a time when it was at least conceivable that a thoughtful decision from this Court might have influenced the Supreme Court in *Espinoza*. See generally Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (New York: Oxford Univ Press, 2018).

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 5, 2020

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Clerk