

No. 18-1195

In The
Supreme Court of the United States

—◆—
KENDRA ESPINOZA, et al.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

—◆—
**On Writ Of Certiorari To The
Supreme Court Of Montana**

—◆—
**BRIEF OF AMICUS CURIAE
MACKINAC CENTER FOR PUBLIC POLICY
IN SUPPORT OF PETITIONERS**

—◆—
PATRICK J. WRIGHT
Counsel of Record
140 West Main Street
Midland, MI 48640
(989) 631-0900
wright@mackinac.org

*Counsel for Amicus Curiae
Mackinac Center for Public Policy*

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. General History of School Choice in Michigan	3
II. Particulars Involving the Detroit Public Schools	7
A. Detroit Public Schools' Performance on National Assessment of Educational Progress	7
B. Significant Education-Related Events in Detroit	17
III. Exercise of School Choice by Detroit Residents	24
CONCLUSION.....	31

TABLE OF AUTHORITIES

	Page
CASES	
<i>Council of Orgs. and Others for Educ. about Parochiaid v. Dep't of Educ.</i> , 929 N.W.2d 281 (2019).....	4
<i>Council of Orgs. and Others for Educ. about Parochiaid v. Governor</i> , 566 N.W.2d 208, 455 Mich. 557 (1997).....	6
<i>Janus v. AFSCME</i> , ___ U.S. ___, 138 S.Ct. 2448 (2018).....	1
<i>Traverse City Sch. Dist. v. Attorney General</i> , 185 N.W.2d 9; 384 Mich. 390 (1971)	3, 4
CONSTITUTIONAL PROVISIONS	
Mich. Const. art. IX, §§ 3, 5, 8, 10-11, and 36	4
Mich. Const. art. VIII, § 2	3, 4, 31
STATUTES	
1994 Mich. Pub. Act No. 416.....	4, 6
1995 Mich. Pub. Act No. 289.....	6
1996 Mich. Pub. Act No. 300.....	6
1999 Mich. Pub. Act No. 10.....	17
1999 Mich. Pub. Act No. 119.....	6
2003 Mich. Pub. Act No. 179.....	19
2009 Mich. Pub. Act No. 204.....	20
2011 Mich. Pub. Act No. 277.....	6

TABLE OF AUTHORITIES – Continued

	Page
2016 Mich. Pub. Act No. 192.....	21
Mich. Comp. Laws § 380.501.....	5
Mich. Comp. Laws §§ 380.501-2.....	5
 OTHER AUTHORITIES	
<i>14 Face Federal Charges In \$2.7 Million Detroit Schools Kickback Scheme</i> , 62 CBS Detroit, Mar. 29, 2016, https://perma.cc/9BWJ-VUY8	21
1978 Michigan Initiatory Ballot Proposal H.....	3
1994 Michigan Senate Joint Resolution Ballot Proposal A.....	4
2000 Michigan Initiatory Ballot Proposal 00-1.....	4
<i>2017 Am. Cmty. Survey 1-Year Estimates</i> , U.S. Census Bureau https://perma.cc/4FFP-WNFT	27
<i>About NAEP</i> , Nat’l Ctr. for Educ. Statistics, https://nces.ed.gov/nationsreportcard/about/ (last visited Aug. 7, 2019).....	10
<i>Census 2000 Data for the State of Michigan</i> , U.S. Census Bureau, https://perma.cc/6RBK-4W6B	27
Center for Research on Educ. Outcomes, <i>Urban Charter Sch. Study Report on 41 Regions 2015</i> 29, 31, https://perma.cc/MG3N-PV6P	24, 25
Chad Livengood, <i>Rhodes: More criminal charges possible at DPS</i> , Detroit News, Dec. 6, 2016, https://perma.cc/QW7U-K8M6	21

TABLE OF AUTHORITIES – Continued

	Page
<i>City and Town Intercensal Datasets: 2000-2010</i> , U.S. Census Bureau, https://perma.cc/Y8LY-KAN5	27
<i>City and Town Population Totals: 2010-2018</i> , U.S. Census Bureau, https://perma.cc/PP8R-FU9D	27
<i>Ctr. for Educ. Performance and Info.</i> , Michigan. gov, https://cepi.state.mi.us/eem/PublicDatasets.aspx	5
<i>Data Tools: NAEP Data Explorer, The Nation’s Report Card</i> , https://www.nationsreportcard.gov/ndecore/xplore/nde	11, 14
<i>District/School Information</i> , MI School Data, http://bit.ly/2HdiTNa	4
<i>ELSi tableGenerator</i> , National Center for Education Statistics, https://nces.ed.gov/ccd/elsi/tableGenerator.aspx	22
<i>Extra Credit</i> , The Wall St. Journal (Sept. 5, 2001, 12:01 AM) https://www.wsj.com/articles/SB999644023712952343	1
<i>History and Innovation</i> , Nat’l Ctr. for Educ. Statistics, https://nces.ed.gov/nationsreportcard/about/timeline.aspx (last visited Aug. 7, 2019)	8
Interlocal Agreement between The Board of Regents of Eastern Michigan University and the School District for the City of Detroit Creating the Education Achievement Authority https://perma.cc/J4SS-YHQ9	20

TABLE OF AUTHORITIES – Continued

	Page
Jodi S. Cohen, <i>Where Did the Money Go?</i> , Detroit News, May 17, 2001	18
Kenneth S. Burnley, <i>The Efficiency and Effectiveness Plan</i> (April 5, 2001)	18
Lawrence W. Reed & Harry Hutchinson, <i>School Choice in Michigan</i> , Chapter 4, https://www.mackinac.org/6027	7
Melvin Claxton & Charles Hurt, <i>Bd. Picked Political Pal to Run Rebuilding Effort</i> , Det. News, Oct. 4, 1999	17
Memorandum from Detroit Public School District Financial Review Team to Governor and Superintendent of Public Instruction (Nov. 6, 2008), https://www.michigan.gov/documents/treasury/DetroitPublicSchools-ReviewTeamReport-11-6-08_417430_7.pdf	20
Nat'l Assessment Governing Bd., <i>Policy Statement: Dev. Student Achievement Levels for the Nat'l Assessment of Educ. Progress</i> , https://perma.cc/3Q6V-2CJY	9
Patrick L. Anderson, et al., <i>The Universal Tuition Tax Credit: A Proposal to Advance Parental Choice in Educ.</i> (1997), https://www.mackinac.org/archives/2012/s1997-04.pdf	1
Peggy Walsh-Sarnecki, <i>Detroit Schools Lose Track of Cash: Principals Get Blame for Sloppy Accounting</i> , Detroit Free Press, Nov. 22, 2000	18

TABLE OF AUTHORITIES – Continued

	Page
Senate Fiscal Agency, <i>Bill Analysis: Public Act 10 of 1999, S.B. 297 (1999)</i> , https://perma.cc/DXK6-N2GW	18
<i>Six years later: Takeover of Detroit Schools shows few intended results</i> , Mich. Educ. Report, Fall 2005, https://www.mackinac.org/7476	19
<i>Student Cnty.</i> , Michigan Sch. Data, https://perma.cc/E2NY-ETTZ	27
<i>The NAEP Mathematics Achievement Levels by Grade</i> , Nat'l Ctr. for Educ. Statistics, https://nces.ed.gov/nationsreportcard/mathematics/achieve.aspx	12, 15
<i>The NAEP Reading Achievement Levels by Grade</i> , Nat'l Ctr. for Educ. Statistics, https://nces.ed.gov/nationsreportcard/reading/achieve.aspx	10, 14
<i>Thompson still wants new charter schools</i> , Mich. Educ. Report, Summer 2006, https://www.mackinac.org/7731	19
<i>Trial Urban Dist. Assessment (TUDA)</i> , https://nces.ed.gov/nationsreportcard/tuda/	8
U.S. Dep't of Commerce, Bureau of the Census, <i>1990 Census of Population: Gen. Population Characteristics: Michigan</i> , 1990 CP-1-24, https://perma.cc/7LWC-KWDB	27

INTEREST OF AMICUS CURIAE¹

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

In 1997, the Center wrote a groundbreaking study on a tuition tax credit. Patrick L. Anderson, et al., *The Universal Tuition Tax Credit: A Proposal to Advance Parental Choice in Education* (1997), <https://www.mackinac.org/archives/2012/s1997-04.pdf>. In 2001, the Wall Street Journal called the Mackinac Center, “the leading advocate for a universal education tax credit.” *Extra Credit*, The Wall St. Journal (Sept. 5, 2001, 12:01 AM) <https://www.wsj.com/articles/SB999644023712952343>.

The Center has written numerous amicus briefs at this Court and just last term was cited in *Janus v. AF-SCME*, ___ U.S. ___; 138 S.Ct. 2448, 2466 n. 3 (2018).



¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The question presented in the petition for certiorari was:

Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

Michigan has a constitutional provision that prohibits any state or local aid to private schools, including religious schools:

The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

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

any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

Mich. Const. art. VIII, § 2.

This brief is not going to discuss the Religion Clauses or the Equal Protection Clause. Rather, it is going to examine the history of school choice in Michigan's largest school district – commonly referred to as the Detroit Public Schools (DPS). This review will show that the district is arguably the worst performing in the nation. Detroit's residents have taken advantage of the limited school-choice options they have – mostly through the use of charter schools. Based on the best available research, many of the students attending charters are better off than they would be in the conventional district, but the overall performance of students in Detroit shows Detroit families need more and better educational options.



ARGUMENT

I. General History of School Choice in Michigan

The second paragraph of Article VIII, § 2 of Michigan's Constitution was the result of a 1970 ballot initiative. See *Traverse City School District v. Attorney General*, 185 N.W.2d 9, 13; 384 Mich. 390 (1971). Attempts to amend that provision have failed. 1978 Michigan Initiatory Ballot Proposal H (defeated 74% to

26%); 2000 Michigan Initiatory Ballot Proposal 00-1 (defeated 69% to 31%). Thus, for the last 49 years state and local aid to private schools in Michigan (and the subset of religious schools therein) has largely been prohibited.²

Michigan's school choice and school finance framework were both fundamentally altered in 1994. In that year, Michigan initiated a charter school law. 1994 Mich. Pub. Act No. 416. Voters also changed the manner of school financing switching from a local-property-tax-based system to one where the state set more equalized per-pupil allocations. 1994 Michigan Senate Joint Resolution Ballot Proposal A.³ The funding model largely based its allocations on the numbers of pupils in each district. This brief will primarily examine data from 1994 and after since that was a landmark year in public education in Michigan.

Michigan has nearly 550 conventional school districts and slightly more than fifty five intermediate school districts. *District/School Information*, MI School Data, <http://bit.ly/2HdiTNa> (last visited Aug. 8, 2019). Intermediate school districts are regional agencies

² Despite the absolutist language found in Mich. Const. art. VIII, § 2, the Michigan Supreme Court has allowed some limited state and local aid to private institutions. See *Traverse City Sch. Dist.*, supra. The Michigan Supreme Court recently granted leave to appeal in a case that will reexamine the boundaries of that limited aid. *Council of Orgs. and Others for Educ. about Parochial Aid v. Dep't of Educ.*, 929 N.W.2d 281 (2019) (granting leave to appeal).

³ This proposal was codified in Mich. Const. art. IX, §§ 3, 5, 8, 10-11, and 36.

that oversee special education for a number of conventional school districts and many provide some administrative services for local districts. Within those conventional school districts, there are around 2900 schools.⁴ Currently, Michigan has nearly 1.5 million school-age children in public schools.⁵ Over the entire relevant time period, DPS is and has been the largest school district in the state, enrolling more students than any other district.

In Michigan, charter schools are legally known as “public school academies.” Mich. Comp. Laws § 380.501. Basically, these charters are different from conventional schools in that they are not governed by an elected school board instead being accountable to an independent authorizing agency. Mich. Comp. Laws §§ 380.501-2. The overwhelming majority of authorizers are universities or community colleges. Charter schools are public schools and must meet state standards and take the same state-required tests. The general hope is that this unique governing structure will allow experimentation and flexibility to try innovative concepts to improve results. Further, it is hoped that

⁴ This information comes from Michigan’s Center for Educational Performance Information (CEPI). *Center for Educational Performance and Information*, Michigan.gov, <https://cepi.state.mi.us/eem/PublicDatasets.aspx> (last visited July 30, 2019) (in viewing this material, LEA schools translates to conventional school buildings as opposed to PSAs, which translates to public school academies/charters, or ISDs, which translates to intermediate school districts).

⁵ *Center for Educational Performance and Information*, Michigan.gov, <https://cepi.state.mi.us/eem/PublicDatasets.aspx>.

their existence will cause the conventional school districts to improve through competition, lest the conventional districts lose financing when a student chooses a charter over a conventional school.

Michigan began using charters in 1994. See generally, *Council of Organizations and Others for Education about Parochial v. Governor*, 566 N.W.2d 208, 455 Mich. 557 (Mich. 1997); 1994 Mich. Pub. Act No. 416. In 1995, a cap was imposed on the number of charters that could be authorized by universities. The legislation allowed a gradual escalation over the years, with an eventual hard cap of 150 charter schools. 1995 Mich. Pub. Act No. 289.⁶

In 1996, Michigan enacted a law allowing for inter-district choice. This law allowed students to choose to attend a school in a different district than the one in which they lived, so long as that district was within the intermediate district region and chose to accept students from other districts. 1996 Mich. Pub. Act No. 300. In 1999, the “Schools of Choice” program was amended to allow students to attend schools in districts in a neighboring intermediate school district region. 1999 Mich. Pub. Act No. 119.

This is the basic framework that as existed for Michigan school choice from 1994 until today.

⁶ As will be discussed below, the cap was reached in 1999. That cap remained in place until 2011, when the Legislature removed any limitation on the number of charters. 2011 Mich. Pub. Act No. 277.

II. Particulars Involving the Detroit Public Schools

In 1994, according to the U.S. Census Bureau, there were slightly less than 1 million people living in Detroit and about 210,000 of them were school-age children (5-18). DPS enrolled about 171,000 or around 81% of those children.⁷ Even before Michigan created public school choice options, the parents of nearly one-fifth of the school-age children in Detroit opted not to send their children to DPS. This trend has steadily increased: The most recent data available from 2018 shows that 58% of the school-age children in Detroit attend a school not operated by the local district. This shows a desperate demand for education options for those who live in the vast boundaries of a school district with a long-time history of poor academic performance.

A. Detroit Public Schools' Performance on National Assessment of Educational Progress

Consider the National Assessment of Educational Progress (NAEP), a test administered by the United States Department of Education. According to its website:

⁷ A private-survey done three years earlier showed about 19,500 students in various private schools including religious schools. Lawrence W. Reed & Harry Hutchinson, *School Choice in Michigan*, Chapter 4, <https://www.mackinac.org/6027> (last visited Aug. 8, 2019).

The . . . (NAEP) is the only assessment that measures what U.S. students know and can do in various subjects across the nation, states, and in some urban districts. Also known as The Nation's Report Card, NAEP has provided important information about how students are performing academically since 1969.

About NAEP, Nat'l Ctr. for Educ. Statistics, <https://nces.ed.gov/nationsreportcard/about/> (last visited Aug. 7, 2019). Since 2001, NAEP has been administered to representative samples of 4th and 8th grade students in all fifty states for reading and math. *History and Innovation*, Nat'l Ctr. for Educ. Statistics, <https://nces.ed.gov/nationsreportcard/about/timeline.aspx> (last visited Aug. 7, 2019). In 2001, a decision was made to create a trial program to assess test results in urban districts. *Trial Urban Dist. Assessment (TUDA)*, <https://nces.ed.gov/nationsreportcard/tuda/> (last visited Aug. 7, 2019). DPS became part of that trial in 2009.

There are four levels of performance results on a NAEP test: below basic (not defined), basic, proficient, and advanced. According to the National Assessment Governing Board, the basic, proficient and advanced levels are defined as:

NAEP Basic

This level denotes partial mastery of prerequisite knowledge and skills that are fundamental for performance at the NAEP Proficient level.

NAEP Proficient

This level represents solid academic performance for each NAEP assessment. Students reaching this level have demonstrated competency over challenging subject matter, including subject-matter knowledge, application of such knowledge to real world situations, and analytical skills appropriate to the subject matter.

NAEP Advanced

This level signifies superior performance beyond NAEP Proficient.

Nat'l Assessment Governing Bd., *Policy Statement: Dev. Student Achievement Levels for the Nat'l Assessment of Educ. Progress*, <https://perma.cc/3Q6V-2CJY> (last visited Aug. 7, 2019). Proficiency, therefore, is the NAEP touchstone.

For 4th grade reading, proficiency is defined as:

When reading literary texts such as fiction, poetry, and literary nonfiction, fourth-grade students performing at the *Proficient* level should be able to identify implicit main ideas and recognize relevant information that supports them. Students should be able to judge elements of author's craft and provide some support for their judgment. They should be able to analyze character roles, actions, feelings, and motives.

When reading informational texts such as articles and excerpts from books, fourth-grade students performing at the *Proficient* level should be able to locate relevant information, integrate information across texts, and evaluate the way an author presents information. Student performance at this level should demonstrate an understanding of the purpose for text features and an ability to integrate information from headings, text boxes, graphics and their captions. They should be able to explain a simple cause-and-effect relationship and draw conclusions.

The NAEP Reading Achievement Levels by Grade, Nat'l Ctr. for Educ. Statistics, <https://nces.ed.gov/nationsreportcard/reading/achieve.aspx> (last visited Aug. 7, 2019).

Students attending public schools in Detroit consistently posted the nation's lowest scores on the NAEP proficiency tests. In terms of proficiency in reading, 4th graders in Detroit had the lowest scores of every large city evaluated from 2009-2017, never surpassing a proficiency rate of 10%. Nearly three-quarters of 4th graders in Detroit tested below basic over this period.

4th grade reading proficient or above (%) ⁸				
YEAR	US Avg.	Large City Avg.	Detroit	Detroit Large City Rank
2009	33	23	5	18/18
2011	34	24	7	21/21
2013	35	26	7	21/21
2015	36	27	6	21/21
2017	37	28	5	27/27

4th grade reading below basic (%)				
YEAR	US Avg.	Large City Avg.	Detroit	Detroit Large City Rank
2009	33	46	73	18/18
2011	33	45	69	21/21
2013	32	43	70	21/21
2015	31	41	73	21/21
2017	32	42	78	27/27

For 4th grade math, proficiency is defined as:

Fourth-graders performing at the *Proficient* level should be able to use whole numbers to estimate, compute, and determine whether results are reasonable. They should have a conceptual understanding of fractions and decimals; be able to solve real-world problems

⁸ This data was accumulated from the NAEP Data Explorer found at *Data Tools: NAEP Data Explorer, The Nation's Report Card*, <https://www.nationsreportcard.gov/ndecore/xplore/nde> (last visited Aug. 7, 2019).

in all NAEP content areas; and use four-function calculators, rulers, and geometric shapes appropriately. Students performing at the *Proficient* level should employ problem-solving strategies such as identifying and using appropriate information. Their written solutions should be organized and presented both with supporting information and explanations of how they were achieved.

The NAEP Mathematics Achievement Levels by Grade, Nat'l Ctr. for Educ. Statistics, <https://nces.ed.gov/nationsreportcard/mathematics/achieve.aspx> (last visited Aug. 7, 2019).

The NAEP results for Detroit in 4th grade math are similar to those in 4th grade reading. Students in public schools in Detroit ranked last of all the large urban school districts evaluated, with less than 5% of students deemed proficient on each evaluation. About two-thirds consistently post scores that are below basic proficiency.

4th grade math proficient or above (%)				
YEAR	US Avg.	Large City Avg.	Detroit	Detroit Large City Rank
2009	39	29	3	18/18
2011	40	30	3	21/21
2013	42	33	4	21/21
2015	40	32	5	21/21
2017	40	31	4	27/27

4th grade math below basic (%)				
YEAR	US Avg.	Large City Avg.	Detroit	Detroit Large City Rank
2009	18	28	69	18/18
2011	18	26	66	21/21
2013	17	25	65	21/21
2015	18	25	64	21/21
2017	20	29	71	27/27

For 8th grade reading, proficiency defined as:

When reading literary texts such as fiction, poetry, and literary nonfiction, eighth-grade students performing at the *Proficient* level should be able to make and support a connection between characters from two parts of a text. They should be able to recognize character actions and infer and support character feelings. Students performing at this level should be able to provide and support judgments about character motivation across texts. They should be able to identify how figurative language is used.

When reading informational texts such as exposition and argumentation, eighth-grade students performing at the *Proficient* level should be able to locate and provide facts and relevant information that support a main idea or purpose, interpret causal relations, provide and support a judgment about the author's argument or stance, and recognize rhetorical devices.

The NAEP Reading Achievement Levels by Grade, Nat'l Ctr. for Educ. Statistics, <https://nces.ed.gov/nationsreportcard/reading/achieve.aspx> (last visited Aug. 7, 2019)

Results in 8th grade from Detroit mirror those from 4th grade. Students consistently ranked last among urban school districts and less than 10% of students were deemed proficient. Over half tested at below basic from 2009-2017.

8th Grade Reading Proficient or above (%) ⁹				
YEAR	US Avg.	Large City Avg.	Detroit	Detroit Large City Rank
2009	32	21	7	18/18
2011	34	23	7	21/21
2013	36	26	9	21/21
2015	34	25	7	21/21
2017	36	27	7	27/27

8th grade reading below basic (%)				
YEAR	US Avg.	Large City Avg.	Detroit	Detroit Large City Rank
2009	25	37	60	18/18
2011	24	35	57	21/21
2013	22	32	54	21/21
2015	24	33	56	21/21
2017	24	32	59	27/27

⁹ This data was accumulated from the NAEP Data Explorer found at *Data Tools: NAEP Data Explorer, The Nation's Report Card*, <https://www.nationsreportcard.gov/ndecore/xplore/nde> (last visited Aug. 7, 2019).

For 8th grade math, proficiency is:

Eighth-graders performing at the *Proficient* level should be able to conjecture, defend their ideas, and give supporting examples. They should understand the connections between fractions, percents, decimals, and other mathematical topics such as algebra and functions. Students at this level are expected to have a thorough understanding of Basic level arithmetic operations – an understanding sufficient for problem solving in practical situations.

Quantity and spatial relationships in problem solving and reasoning should be familiar to them, and they should be able to convey underlying reasoning skills beyond the level of arithmetic. They should be able to compare and contrast mathematical ideas and generate their own examples. These students should make inferences from data and graphs, apply properties of informal geometry, and accurately use the tools of technology. Students at this level should understand the process of gathering and organizing data and be able to calculate, evaluate, and communicate results within the domain of statistics and probability.

The NAEP Mathematics Achievement Levels by Grade, Nat'l Ctr. for Educ. Statistics, <https://nces.ed.gov/nationsreportcard/mathematics/achieve.aspx> (last visited Aug. 7, 2019).

Detroit students posted similar results from 8th grade math: Less than 5% were proficient, ranking the city last among large urban school districts. About three-quarters were below basic.

8th grade math proficient or above (%)				
YEAR	US Avg.	Large City Avg.	Detroit	Detroit Large City Rank
2009	34	24	4	18/18
2011	35	26	4	21/21
2013	35	27	3	21/21
2015	33	26	4	21/21
2017	34	27	5	27/27

8th grade math below basic (%)				
YEAR	US Avg.	Large City Avg.	Detroit	Detroit Large City Rank
2009	27	40	77	18/18
2011	27	37	71	21/21
2013	26	35	76	21/21
2015	29	38	73	21/21
2017	30	39	73	27/27

The NAEP is the best method of comparing educational outcomes across state lines. The results for Detroit are consistently at the absolute bottom. Given these results, it is easy to see how Detroit parents of school-age children could believe that greater hope for educational opportunity lies elsewhere, despite the

fact that Michigan largely prohibits any public financial assistance to help them afford other opportunities.

B. Significant Education-Related Events in Detroit

Since 1994, DPS has had a number of controversies.

In 1999, after seven months of investigation, one of Michigan's largest newspapers, the Detroit News, ran an investigative series on a \$1.5 billion bond approved by Detroit voters. The reporting found cronyism, poor financial controls, missing money, and repeated failures to follow competitive bidding processes. Melvin Claxton & Charles Hurt, *Bd. Picked Political Pal to Run Rebuilding Effort*, Det. News, Oct. 4, 1999, at 1.

Also in 1999, an attempt was made to bring about change through a statute allowing the mayor of Detroit the power to appoint school board members. 1999 Mich. Pub. Act No. 10. Michigan's Senate Fiscal Agency described the rationale behind this legislation:

The State's largest school district, the Detroit Public Schools, ranks among the worst school districts in the State in such areas as dropout rates and test scores, according to the Department of Education's 1998 Michigan School Report. For the 1996-97 school year, which reflects the most recent available data, the dropout rate for Detroit's high school students was 26.4%. In addition,

only 29.7% of the ninth graders who began high school in Detroit graduated in the usual four years. This compares with the Statewide average dropout rate of 6.6% in 1996-97 and a four-year graduation rate of 76.2% for the same period, according to the Department.

Senate Fiscal Agency, *Bill Analysis: Public Act 10 of 1999, S.B. 297 (1999)*, <https://perma.cc/DXK6-N2GW> (last visited August 8, 2019).

In 2000, an audit of twenty-nine high schools showed that millions of dollars were not properly accounted for and some audits led to criminal referrals. The Detroit Public School Chief of Staff was cited as approving the reporter's assertion that "bad accounting became institutionalized after schools went 12 years without being audited." Peggy Walsh-Sarnecki, *Detroit Schools Lose Track of Cash: Principals Get Blame for Sloppy Accounting*, Detroit Free Press, Nov. 22, 2000, at 1B.

In 2001, the CEO of the mayor-appointed school board stated that DPS "is almost completely devoid of management systems and operational practices that support sound operations and decision-making." Kenneth S. Burnley, *The Efficiency and Effectiveness Plan* (April 5, 2001).

Further audits disclosed more financial mismanagement. Jodi S. Cohen, *Where Did the Money Go?*, Detroit News, May 17, 2001 at 1A.

In 2003, local businessman Bob Thompson offered \$200 million to build fifteen charter high schools in

Detroit. A statute was passed to allow this to happen. 2003 Mich. Pub. Act No. 179. This legislation was needed to overcome the statewide charter cap. Before and after passage, Thompson's offer was opposed by the Detroit Federation of Teachers, the union that represents the teachers in Detroit's conventional school district. In the face of this opposition and the resulting political fallout from it, Thompson withdrew his offer. *Thompson still wants new charter schools*, Mich. Educ. Report, Summer 2006 at 8, <https://www.mackinac.org/7731> (last visited Aug. 8, 2019).

The mayor-appointed school board structure was largely ineffective and ended in 2005 after six unsuccessful years. *Six years later: Takeover of Detroit Schools shows few intended results*, Mich. Educ. Report, Fall 2005, at 1, <https://www.mackinac.org/7476> (last visited Aug. 8, 2019) ("Over that time, the test score gap between Detroit and the rest of the state has diminished, but remains large, and sought-after improvements in financial management have failed to materialize.").

In 2007 and again in 2008, the district superintendent was removed by the Detroit School Board. During this time, DPS was operating with a large deficit. This led the state to appoint an Emergency Financial Manager in 2009. Before making this appointment there was a financial review by Michigan Department of Treasury Officials. Their report concluded, in part:

The Review Team is cognizant that its responsibilities . . . are limited to an assessment of the School District's financial condition. Nevertheless, the Review Team is of the opinion that the foregoing financial condition has been exacerbated by non-financial considerations. Among these considerations have been the absence of stability in School District leadership, as evidenced by high turnover in the General Superintendent position, and related upper management positions; inadequate school safety, as evidenced by the level of violence within the School District; [and] the low level of academic performance.

Memorandum from Detroit Public School District Financial Review Team to Governor and Superintendent of Public Instruction (Nov. 6, 2008), https://www.michigan.gov/documents/treasury/DetroitPublicSchools-ReviewTeamReport-11-6-08_417430_7.pdf (last visited Aug. 8, 2019).

In 2009, the Legislature created the “reform/redesign school district” to manage failing schools throughout the State. 2009 Mich. Pub. Act No. 204.

In 2011, the Governor, the Emergency Manager for the School District of Detroit, and Eastern Michigan University created the Education Achievement Authority (EAA), which was a governmental entity that managed certain Detroit schools that were made subject to the EAA by contract based on their consistent low performance on standardized tests. Interlocal Agreement between The Board of Regents of

Eastern Michigan University and the School District for the City of Detroit Creating the Education Achievement Authority <https://perma.cc/J4SS-YHQ9> (last visited Aug. 8, 2019). Essentially, fifteen Detroit schools were placed in the reform/redesign school district and immediately transferred to the EAA.

In 2016, twelve Detroit school principals and two other individuals were indicted in a \$2.7 million kickback scheme. *14 Face Federal Charges In \$2.7 Million Detroit Schools Kickback Scheme*, 62 CBS Detroit, Mar. 29, 2016, <https://perma.cc/9BWJ-VUY8> (last visited Aug. 8, 2019). That year also saw a fiscal bailout and restructuring plan that provided \$617 million in state aid to address the district's debt. 2016 Mich. Pub. Act No. 192. Further, full local control of the district was returned to the locally elected school board. *Id.*

In December 2016, Interim Superintendent Alycia Meriweather, in discussing potential academic improvement, stated: "It will take us 8 to 10 years to get there." Chad Livengood, *Rhodes: More criminal charges possible at DPS*, Detroit News, Dec. 6, 2016, <https://perma.cc/QW7U-K8M6> (last visited Aug. 8, 2019).

In 2017, the EAA returned control of its Detroit schools to DPS. The EAA was then disbanded. 2016 Mich. Pub. Act No. 192.

Some may contend that DPS's ills are related to lack of financial resources. But, the per-pupil amount it has been allocated to spend vis-à-vis charters in Detroit, other districts within Michigan, and the

national average, shows that the Detroit Public Schools has consistently received above-average financial support.

Comparative Per-Pupil Spending, Detroit District & Charters vs. Michigan and National Avg., 1994-2016¹⁰

School Year	Expenditures Per Student			
	National	Michigan	Detroit District	*Detroit Charters
1994-95	\$5,528.66	\$6,465.39	\$6,952.94	N/A
1995-96	\$5,689.20	\$6,785.36	\$7,706.84	\$6,169.58
1996-97	\$5,923.44	\$6,932.45	\$7,190.80	\$8,673.11

¹⁰ All four columns are generated from data found at the U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), “School District Finance Survey (F-33)”, 1994-95 (FY 1995) through 2015-16 (FY 2016). That data can be generated at: *ELSi tableGenerator*, National Center for Education Statistics, <https://nces.ed.gov/ccd/elsi/tableGenerator.aspx> (last visited Aug. 8, 2019).

For the state and national data, one clicks on “State.” Then, the years 1994 to 2016 (the most recent) are individually selected. Next, in “Tables Columns” select “General Finance” and “Major Finance Totals and Subtotals.” To get the number of pupils for the denominator in a per pupil spending click “All Years” under “Fall Membership.” Also, to get the total spending for the numerator, click “All Years” under “Total Current Expenditures – EL – SEC Education.” This downloads into an Excel file.

The process is then generally repeated for the district and charter data. These figures are divided by student numbers that will be set out in the tables below.

The 1996-7 Detroit Charter number looks anomalous. At the time, there were a small number of charter students, which might contribute to the anomaly. Regardless, the general trend is apparent – DPS continually receives more funding on a per-student basis than any other category.

1997-98	\$6,189.13	\$7,049.80	\$7,583.38	\$6,337.08
1998-99	\$6,508.07	\$7,432.18	\$8,116.25	\$6,332.04
1999-2000	\$6,912.25	\$8,109.63	\$8,695.04	\$6,189.97
2000-01	\$7,379.97	\$8,278.15	\$9,344.81	\$7,313.39
2001-02	\$7,727.37	\$8,652.82	\$9,463.95	\$7,454.03
2002-03	\$8,044.18	\$8,780.56	\$10,081.61	\$8,666.90
2003-04	\$8,310.44	\$9,093.66	\$10,969.77	\$8,301.67
2004-05	\$8,710.90	\$9,340.19	\$11,382.42	\$8,035.06
2005-06	\$9,144.80	\$9,574.79	\$11,061.62	\$8,249.66
2006-07	\$9,679.09	\$9,876.18	\$12,771.48	\$8,470.29
2007-08	\$10,298.19	\$10,074.51	\$12,646.95	\$8,736.11
2008-09	\$10,539.62	\$10,372.53	\$13,169.12	\$9,065.52
2009-10	\$10,651.94	\$10,446.73	\$13,709.15	\$9,439.42
2010-11	\$10,657.76	\$10,577.02	\$13,897.54	\$9,433.91
2011-12	\$10,666.76	\$10,476.51	\$13,517.90	\$9,650.56
2012-13	\$10,762.85	\$10,515.06	\$14,279.55	\$9,725.73
2013-14	\$11,066.36	\$10,648.98	\$14,460.92	\$9,922.15
2014-15	\$11,454.20	\$10,955.78	\$14,867.77	\$10,140.52
2015-16	\$11,840.81	\$11,051.18	\$15,228.99	\$10,180.08

** Entities for counting charter fiscal data do not perfectly coincide with charter enrollment on Detroit campuses. Expenditures and revenues covering a small but significant number of additional campuses may be included*

In sum, since 1994, Detroit schools have seen a number of drastic measures taken in order to try and improve the district's academic performance and financial management. At the same time, a number of

notorious management incidents further hurt the public perception of the district.

III. Exercise of School Choice by Detroit Residents

Examination of various government data shows that from 1994 until today, Detroit residents have increasingly chosen to exercise their limited school choice options, even in the absence of any governmental financial support to do so. Currently, only around 40% of age-eligible children attend the conventional school district. Comparatively, slightly more age-eligible residents attend charters (combining both those who attend charters within Detroit's geographical footprint with those who attend charters outside the district). Approximately 10% use inter-district choice to attend other conventional school districts. A far smaller percentage attend private schools in Detroit. Taken together, these facts show that even in the absence of financial aid, demand for school-choice options is quite high.

The best available research, a 2015 report by Stanford University's Center for Research on Educational Outcomes, shows that on average attending a Detroit charter school provides a couple of extra months of learning in math and reading each year.¹¹

¹¹ Obviously, within the charter sector, results will vary. A majority of charters outperform the Detroit conventional school averages. Center for Research on Educ. Outcomes, *Urban Charter Sch. Study Report on 41 Regions 2015* 29, 31, <https://perma.cc/MG3N-PV6P> <https://urbancharters.stanford.edu/download/Urban>

Center for Research on Educ. Outcomes, *Urban Charter Sch. Study Report on 41 Regions 2015* 29, 31, <https://perma.cc/MG3N-PV6P> (last visited Aug. 8, 2019). This means that the existing, limited choice options have opened up some better educational opportunities for many students. But the baseline for this measurement is the average scores of Detroit's conventional schools. And, as noted above, according to the NAEP, these schools have performed the worst in their peer group. So, whether the sector is merely providing a modest relative benefit or an absolute improvement is not known. Regardless, the charter-school experience in Detroit suggests that the ability to provide government aid to private schools (including religious schools) may lead to even greater improvements.

Below are a number of charts to highlight school-attendance trends.

The first chart uses Census figures to show Detroit's population in the second and third columns. Headcount figures for the Detroit conventional school district make up the fourth column and charter headcounts from schools located in the city limits make up the sixth column. The fifth and seventh columns are

Charter School Study Report on 41 Regions.pdf (last visited Aug. 8, 2019). In math, 60% are better, 33% of charters are of similar quality and 8% are worse. *Id.* at 29 (data provided adds to 101%). In reading, 51% are better, 45% are of similar quality, and 4% are worse. *Id.* at 31. Therefore, a smaller but significant number of Detroit charter students have not found clearly improved educational results, though they may have gained other benefits, such as safer learning environments.

the respective headcounts divided by the school-age population number. As of 2001, a headcount of private school attendees located within the city is in the eighth column and that number as a percentage of school-age children makes up the last column. Not included are resident students who go to school at physical locations outside of Detroit. The key metrics are the changing percentages of those who attend conventional schools versus those who attend charters. Over time, there has been a steady decline in the conventional-school percentage and a marked increase in the charter-school percentage.

Detroit Historical Population and Enrollment Trends, by School Location, 1994-2018¹²

¹² The total population column was created from the 1990 and 2000 Census figures. The years 1995 to 1999 are a linear interpolation from those numbers. From 2001 to 2009, we used intercensal estimates from the Census Bureau. From 2010 to 2017 we used Census Bureau Population Estimates. See U.S. Dep't of Commerce, Bureau of the Census, *1990 Census of Population: Gen. Population Characteristics: Michigan*, 1990 CP-1-24, <https://perma.cc/7LWC-KWDB> (last visited Aug. 8, 2019) (showing the 1990 Detroit population numbers as well as the population between ages 5 and 18); *Census 2000 Data for the State of Michigan*, U.S. Census Bureau, <https://perma.cc/6RBK-4W6B> (last visited Aug. 8, 2019) (showing the 2000 population of Michigan); *City and Town Intercensal Datasets: 2000-2010*, U.S. Census Bureau, <https://perma.cc/Y8LY-KAN5>; *City and Town Population Totals: 2010-2018*, U.S. Census Bureau, <https://perma.cc/PP8R-FU9D> (last visited Aug. 8, 2019) (showing population estimates).

School age population figures come from the 1990 Decennial Census and are linearly interpolated to the 2000 Decennial Census. From 2001 to 2004, they are linearly interpolated to the Census Bureau's 2005 American Community Survey, which estimates the percentage of Detroit's population in school age. These percentages are then applied to the total city population figures to get the raw numbers of school age students. Figures from 2005 to 2017 again use the ACS percentage applied to the raw number of Detroit residents. *2017 Am. Cmty. Survey 1-Year Estimates*, U.S. Census Bureau <https://perma.cc/4FFP-WNFT> (last visited Aug. 8, 2019) (showing the ACS tables).

The district headcount figures come from various CEPI pupil-headcount data. *Student Cnty.*, Michigan Sch. Data, <https://perma.cc/E2NY-ETTZ> (last visited Aug. 8, 2019). District enrollment% is simply headcount column/school-age column. Charter numbers are compiled from the same CEPI pupil headcount data page mentioned previously in this footnote. The last column is another simple equation – charter headcount column/school age column.

School Year	Detroit Total Pop.	Detroit Pop. Ages 5-18	*Detroit District K-12 Headcount	District Enroll as% of Age 5-18	Detroit Charter K-12 Headcount	Charter Enroll as% of Age 5-18	Detroit Nonpublic K-12 Headcount	Nonpublic Enroll as% of Age 5-18
1994-95	997,307	209,846	170,855	81.42%	0			
1995-96	989,641	210,138	167,378	79.65%	401	0.19%		
1996-97	981,974	210,429	175,794	83.54%	1,190	0.57%		
1997-98	974,307	210,721	168,809	80.11%	4,088	1.94%		
1998-99	966,640	211,013	168,117	79.67%	8,996	4.26%		
1999-2000	958,974	211,305	163,255	77.26%	12,660	5.99%		
2000-01	951,270	211,597	157,404	74.39%	15,007	7.09%		
2001-02	927,136	208,803	160,413	76.83%	18,567	8.89%	7,462	3.57%
2002-03	905,996	206,009	156,182	75.81%	18,454	8.96%	6,397	3.11%
2003-04	884,411	203,215	150,064	73.84%	21,351	10.51%	6,074	2.99%
2004-05	861,186	200,422	138,099	68.90%	23,761	11.86%	5,071	2.53%
2005-06	837,407	197,628	127,406	64.47%	26,348	13.33%	4,911	2.48%
2006-07	811,922	183,494	109,547	59.70%	27,834	15.17%	3,800	2.07%
2007-08	784,998	171,130	102,494	59.89%	28,808	16.83%	3,988	2.33%
2008-09	756,383	154,302	91,827	59.51%	29,594	19.18%	3,495	2.27%
2009-10	731,155	142,575	84,501	59.27%	31,234	21.91%	3,268	2.29%
2010-11	711,120	138,668	75,062	54.13%	32,721	23.60%	3,285	2.37%
2011-12	705,043	133,253	66,132	49.63%	35,388	26.56%	2,710	2.03%
2012-13	700,159	130,930	57,850	44.18%	38,594	29.48%	2,779	2.12%
2013-14	691,883	123,155	54,664	44.39%	39,614	32.17%	2,245	1.82%
2014-15	682,669	122,198	53,080	43.44%	39,625	32.43%	2,814	2.30%
2015-16	679,305	122,275	51,305	41.96%	39,005	31.90%	2,829	2.31%
2016-17	676,883	121,839	49,490	40.62%	38,779	31.83%	2,896	2.38%
2017-18	674,188	117,309	49,592	42.27%	38,177	32.54%	No data	No data

The second chart offers more detail. It covers a shorter time period because much of the relevant data only goes back to 2009, instead of reaching all the way back to 1994. It includes new information related to those who either enter or exit the Detroit city limits for schooling purposes. The fourth and fifth column will add up to the fourth column in the previous table. The sixth column reflects Detroit-age school children exercising inter-district choice, the seventh is charters within Detroit, and the eighth is charters outside Detroit. The sixth, seventh, and eighth columns are aggregated to provide a raw school choice number, which is set out in the ninth column. The tenth column is result of the fifth column divided by the third. The eleventh is the result of the ninth column divided by the third. The last column is the raw number of those that attend private school, home schools, or are otherwise unaccounted for.

Detroit Resident Student Enrollment and Choice Trends, 2009-2018

School Year	Detroit Total Pop.	Detroit Pop. Ages 5-18	Non-resident Enroll in District	Resident Enroll in District	Resident Enroll in Other Districts	Resident Enroll in Detroit Charters	Resident Enroll in Non-Detroit Charters	Public School Choice	<i>Dist.%</i>	<i>Public School Choice%</i>	Nonpublic & All Other
2009-10	731,155	142,575	30	84,471	8,773	30,161	14,538	53,472	59.2	37.5	4,632
2010-11	711,120	138,668	1,175	73,887	10,107	31,566	13,322	54,995	53.3	39.7	9,786
2011-12	705,043	133,253	1,273	64,859	9,784	33,971	13,284	57,039	48.7	42.8	11,355
2012-13	700,159	130,930	1,134	56,716	17,963	37,956	12,605	68,524	43.3	52.3	5,690
2013-14	691,883	123,155	1,590	53,074	14,917	39,606	12,140	66,663	43.1	54.1	3,418
2014-15	682,669	122,198	1,704	51,376	15,068	39,870	11,740	66,678	42.0	54.6	4,144
2015-16	679,305	122,275	1,728	49,577	14,123	39,473	11,674	65,270	40.5	53.4	7,428
2016-17	676,883	121,839	1,818	47,672	14,351	38,886	11,838	65,075	39.1	53.4	9,092
2017-18	674,188	117,309	2,346	47,246	10,015	37,529	12,155	59,699	40.3	50.9	10,364

These graphs show a population that over the last twenty-five years has taken advantage of the constricted opportunities to leave their conventional schools. Few private-sector choices appear to exist, likely due to Michigan's prohibition on any aid to private schools. What affordable choice that exists appears to be public charter schools. These charters have some improved results when compared to the extremely low baseline set by the conventional schools' performance. Whether increased private-school options would lead to still better performance is not absolutely certain, but it seems highly unlikely that if there were more such private-school options that the results could be appreciably worse.



CONCLUSION

Based on the question presented in the instant matter, if this Court were to hold that it violates the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools that ruling should be made broad enough to encompass provisions like Michigan's Mich. Const. art. VIII, § 2, which has directly or indirectly led to hundreds of thousands of Detroit schoolchildren having limited choices aside

from their poorly performing conventional school district.

Respectfully submitted,

PATRICK J. WRIGHT

Counsel of Record

140 West Main Street

Midland, MI 48640

(989) 631-0900

wright@mackinac.org

*Counsel for Amicus Curiae
Mackinac Center for Public Policy*