No. 05-2371

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TEEN RANCH, INC.; MATTHEW KOCH; and MITCHELL KOSTER,

Plaintiffs-Appellants

-- v. --

MARIANNE UDOW; MUSETTE A. MICHAEL; and
DEBORA BUCHANAN,

Defendants-Appellees.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Civil Case No. 5:04-CV-0032

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN IN SUPPORT OF DEFENDANTS-APPELLEES

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INTRODUCTION

The State of Michigan properly decided that it may not finance the religious teachings and activities of the youth residential services program offered by Teen Ranch.[1] As the state recognized, the Establishment Clause strictly prohibits the government from directly funding sectarian activity and indoctrination. And such constitutional violations are greatly exacerbated where, as with the state's prior contractual arrangement with Teen Ranch, the government actually directs abused, neglected, and delinquent children within its care to attend an overtly sectarian program. The district court correctly held that such an arrangement violates the Establishment Clause, and rightly rejected Teen Ranch's claimed First Amendment entitlement to state funding for its religious activities. Some cases involving the interplay among the Free Exercise, Free Speech, and Establishment Clauses are difficult. This is not one of those cases.

Indeed, this case is made far simpler by the voluntary action taken by the state in furtherance of its constitutional obligation to avoid Establishment Clause violations. Even if the Establishment Clause issue somehow were a closer question – and it is not – Michigan surely acted well within its

[1] For purposes of clarity, *amici* will refer to Plaintiffs-Appellants collectively as "Teen Ranch." Defendants-Appellees will be referred to collectively as "the state."

constitutional authority when issuing a moratorium on continued referrals to, and funding of, Teen Ranch. The Supreme Court has made abundantly clear that "there is room for play in the joints" between the Religion Clauses, *Locke v. Davey*, 540 U.S. 712, 718 (2004), in which the government may choose to withhold state support for religious activity, even where the Establishment Clause otherwise might permit such funding. Thus, even absent a clear Establishment Clause violation, Michigan's moratorium falls squarely within this permitted sphere of government action.

The state first issued the moratorium in late 2003, after an investigation revealed that wards of the state had been subjected to persistent, government-funded proselytization at Teen Ranch – an "overtly and unapologetically . . . Christian facility with a Christian worldview that hopes to touch and improve the lives of the youth it serves by encouraging their conversion to faith in Christ, or assisting them in deepening their pre-existing Christian faith." *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 830 (W.D. Mich. 2005). Contrary to Teen Ranch's assertions, Michigan issued the moratorium not because of Teen Ranch's religious character, purpose, or views. Rather, the state severed its ties with Teen Ranch because it indisputably was the only one of nearly one hundred private child care agencies contracting with the state – at least 35 of which were faith-based

organizations – "that incorporate[d] its religious beliefs and teaching into the services funded under its contract with the [state]." *Id.* at 829.[2]

Notably, Teen Ranch has never denied that government funds were being used to indoctrinate youth sent there by the state. And not once has Teen Ranch attempted to argue that it tried to separate, monitor, or track government funds to ensure that they were not used for expressly religious activity, as required by the Constitution and relevant regulations. Instead, Teen Ranch simply brushes aside this Establishment Clause violation and argue that the First Amendment not only permits, but actually requires the state to refer children to Teen Ranch's sectarian program and to fund the minors' indoctrination.

Consistently with every court to have addressed this issue, Chief Judge Bell rejected Teen Ranch's claims in the district court. *See id.* at 837-41. Given the acute Establishment Clause dangers that arise when taxpayer dollars flow directly into the coffers of religious organizations, the

[2] As Teen Ranch itself has explained, "incorporating religious teachings into ongoing daily activities of youth and their treatment plan touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care." *Teen Ranch*, 389 F. Supp. 2d at 830 (quoting Teen Ranch Amendment of Corrective Action Plan, at 8). To date, Teen Ranch continues publicly to tout its self-described "Christian program." *See* "Teen Ranch and FIA: The Truth," *available at* http://www.teenranch.com/teenranch_and_fia.asp (last visited May 12, 2006).

government bears an affirmative obligation to ensure that no state funds ultimately are diverted to support religious activity, particularly when they are designed to promote one religious viewpoint over another. Laudably, the State of Michigan took active steps to determine whether these violations had occurred at Teen Ranch. When the state confirmed such abuses, they issued the moratorium at issue here. The state should not somehow be held liable for this appropriate exercise of its constitutional duty.

INTERESTS OF *AMICI CURIAE*

Amicus American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the preservation and defense of constitutional rights and civil liberties. *Amicus* ACLU of Michigan is one of its statewide affiliates, with roughly 15,000 members. Since its founding in 1920, the ACLU has frequently advocated in support of First Amendment rights of religious liberty and freedom of speech, both as direct counsel as *amicus curiae*. The ACLU and the ACLU of Michigan have special expertise regarding the intersection of competing civil rights and civil liberties claims based on decades of relevant litigation. Because this case involves the balancing of various constitutional liberties, its proper resolution is a matter of significant concern to the ACLU and ACLU of Michigan, and to their members

throughout the country. As more fully explained below, *amici* believe the district court correctly balanced these interests in rejecting Teen Ranch's claims.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The procedural posture of this case greatly simplifies the Court's resolution of the issues on appeal. Once the State of Michigan's investigation revealed that Teen Ranch had been using taxpayer dollars to support the religious indoctrination of troubled youth channeled there by the state, the state properly issued a moratorium on further dealings with Teen Ranch. Whatever the proper Establishment Clause analysis in this case – an analysis *amici* believe is entirely straightforward, as discussed below – Teen Ranch has no affirmative constitutional right to demand funding for it's sectarian program. In issuing the moratorium, therefore, the state acted squarely within its permissible zone of discretion, even if it were not the case, as was patently clear, that continued funding of Teen Ranch would have violated the Establishment Clause.

As the Supreme Court recently reiterated in *Locke v. Davey*, 540 U.S. 712, 718 (2004), prophylactic government policies like the moratorium are fully consistent with the essential protections afforded by the Free Exercise

Clause. Michigan has neither compelled Teen Ranch to do anything that its religion prohibits, nor barred it from any action required by its beliefs. And the moratorium does not force Teen Ranch to relinquish one constitutional right to exercise another. Rather, this dispute merely follows a long line of cases confirming that a governmental decision not to subsidize religious activity – even where that decision might make the practice of some religious beliefs more expensive – does not offend the Free Exercise Clause.

Similarly, the moratorium does not violate Teen Ranch's free speech rights. As with the funding scheme upheld in *Locke*, Michigan's residential treatment program for youth was not intended as a forum for the wide dissemination of private speech. Instead, it is a vital social service administered by the state, aiding abused, neglected, and delinquent children in the state's care. The program neither encourages a diversity of viewpoints, nor, as Teen Ranch argues, targets religious expression for punishment. The moratorium accordingly does not implicate the First Amendment's proscription on viewpoint discrimination.

In any event, the Establishment Clause mandated the issuance of the state's moratorium in this case. Under its prior agreement with Teen Ranch, Michigan had directed wards of the state to Teen Ranch's sectarian program, and had funded that indoctrination with taxpayer dollars. Such an

arrangement violates the Establishment Clause's prohibitions against state-supported proselytism and was properly terminated by the state. Teen Ranch has never denied that religion permeates its program and has never even attempted to segregate government funds from those used to advance its sectarian activities and goals.

Instead, Teen Ranch's only defense of this clearly unconstitutional funding scheme is to cast it as a form of indirect government aid, based on the fact that minors assigned to Teen Ranch can object and opt out of the placement. The narrow Establishment Clause exception for programs of "true private choice," however, has never covered situations like this, in which the state itself selects a limited universe of providers, makes the initial placement decision for minors in its care, and then expects those minors to take affirmative steps to object. The opt-out did not cure the egregious Establishment Clause violation and did not obviate the need for the moratorium.

ARGUMENT

I. TEEN RANCH HAS NO CONSTITUTIONAL RIGHT TO COMPEL THE STATE TO SUPPORT ITS PROGRAM OF RELIGIOUS INDOCTRINATION

Both before and after *Locke*, courts consistently have upheld, against free exercise and free speech challenges, state decisions to enlist and fund only secular groups to carry out certain governmental functions. Michigan has not made such a sweeping decision, however, welcoming the participation of both faith-based and secular groups in the state's residential youth services program; in fact, over one-third of the organizations contracting with and funded by the state through this program are religious. *See Teen Ranch*, 389 F. Supp. 2d at 829. Given that the state retains the constitutional power to define its program with even stricter secular parameters, it surely has the narrower authority (and, as noted below, the constitutional duty) to ensure that taxpayer dollars are not used to fund religious activity. Thus, even if the state's prior relationship with Teen Ranch were not a clear-cut Establishment Clause violation, the moratorium would fit comfortably within the acceptable range of policy choices available to the state.

A. The Free Exercise Clause Does Not Entitle Teen Ranch to Receive State Referrals and Funding for Its Sectarian Activities.

Teen Ranch's basic free exercise claim – that the moratorium unconstitutionally penalizes religious service providers – is belied by the facts and finds no support in the law. First, as noted above, Michigan has partnered with, and continues to fund, numerous religious organizations offering youth residential services in the state. *See Teen Ranch*, 389 F. Supp. 2d at 829. It had severed ties only with the one organization that refuses to abide by the regulatory and constitutional prohibition on government-funded religious activity.

More fundamentally, Teen Ranch's claimed entitlement to government referrals and grants misapprehends the nature of the right of free exercise. To be sure, the Free Exercise Clause covers a great deal, protecting "not only the right to hold a particular religious belief, but also the right to engage in conduct motivated by that belief." *Prater v. City of Burnside*, 289 F.3d 417, 428 (6th Cir. 2002) (citing *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)). "Nevertheless," as this Court has explained, "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, *not in terms of what the individual*

can exact from the government.'" *Prater*, 289 F.3d at 428 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)) (emphasis added). Teen Ranch's efforts to exact contracts, young participants, and taxpayer dollars from Michigan were properly rejected by the district court, which faithfully applied clear Supreme Court precedent in this area.

As the Supreme Court recently reiterated in upholding the State of Washington's decision not to fund religious scholarships, "there is room for play in the joints" between the Religion Clauses. *Locke v. Davey*, 540 U.S. 712, 718 (2004)(internal quotation marks and citation omitted). That is, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* Rejecting arguments similar to those of Teen Ranch here, the 7-2 majority in *Locke* found no free exercise violation where the restricted state scholarship program "imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community." *Id.* at 720-21. Likewise, Michigan's moratorium neither coerces Teen Ranch to perform any duties that violate its religion, nor prevents it from taking any action that its faith commands. *See, e.g.*, *Lyng*, 485 U.S. at 451.

Furthermore, *Locke* firmly puts to rest Teen Ranch's assertion that the moratorium impermissibly conditions the receipt of government benefits on the surrendering of its religious beliefs. Rejecting the dissent's argument that "generally available benefits are part of the baseline against which burdens on religion are measured," *Locke*, 540 U.S. at 726 (Scalia, J., dissenting), the Court concluded that Washington's scholarship restriction "does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction." *Id*. at 720-21. Similarly, Michigan's decision not to fund religious indoctrination – in furtherance of its Establishment Clause obligations, and with no evidence of any animus toward religion – simply does not burden Teen Ranch's free exercise rights in any constitutionally cognizable way.[3]

[3] This is true even if the moratorium effectively makes it more expensive for Appellants to engage in their chosen religion practices. "Inconvenient economic burdens on religious freedom do not rise to a constitutionally impermissible infringement of free exercise." *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,* 699 F.2d 303, 306 (6th Cir. 1983); *see also, e.g., Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) ("It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'" (quoting *Braunfeld v. Brown,* 366 U.S. 599, 605 (1961) (plurality opinion))).

Teen Ranch makes almost no attempt to reconcile its position with *Locke*, beyond the curious argument that unlike the defendants in *Locke*, the State of Michigan somehow has not, in fact, chosen to prohibit direct governmental funding of religious activities. *See* Teen Ranch's Initial Br. at 47-48.[4] Nor can Teen Ranch square its position with numerous relevant decisions in the lower courts, which universally have rejected free exercise claims of the sort asserted here. As noted in *Eulitt v. Maine Dept. of Educ.*, 386 F.3d 344, 354 (1st Cir. 2004), *Locke* "confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity."[5]

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[4] In addition to raising serious questions about the applicability and enforceability of the cited statute and regulations (which *amici* do not address), Teen Ranch's statutory and regulatory arguments tellingly omit any reference to the state regulatory provision ensuring that, consistent with the Establishment Clause, "no funds provided directly to institutions or organizations to provide services and administer programs, shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization." 2004 P.S. 334, § 220(1).

[5] *See also, e.g., Gary S. v. Manchester School Dist.*, 374 F.3d 15, 21 (1st Cir. 2004) ("[I]t is clear there is no federal constitutional requirement that private schools be permitted to share with public schools in state largesse on an equal basis." (citations omitted)); *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999) (cited with approval in *Prater*, 289 F.3d at 417); *Freedom From Religion Foundation, Inc. v. McCallum*, 179 F. Supp. 2d 950, 981 (W.D.

Accordingly, Teen Ranch has no affirmative free exercise right to compel taxpayer support for its religious activities.[6] Even absent the clear Establishment Clause violation in this case, Michigan's moratorium fell squarely within the constitutionally permitted sphere of government action.[7]

B. The Moratorium Did Not Violate Teen Ranch's Free Speech Rights.

Wisc. 2002) ("[T]he government's decision to subsidize particular types of rehabilitation services is distinct from the government's imposition of a penalty on alternate, unsubsidized services. . . . [A] decision to exclude [programs with religious content] from state funding would not result in an illegitimate conditioning of a government subsidy on the waiver of free exercise rights."); *Anderson v. Town of Durham*, No. Cum-04-591, __ A.2d __, 2006 WL 1083972, at *11 (Me. Apr. 26, 2006) ("None of the parties in this case has asserted that attendance at public or secular private schools is proscribed by their faith, or that they are being punished for engaging in conduct mandated by their faith, or that the statute places any pressure on them to modify their beliefs. The statute merely prohibits the State from funding their school choice, and as such, it does not burden or inhibit religion in a constitutionally significant manner."); *Bush v. Holmes*, 886 So. 2d 340, 344, 362-65 (Fla. App. 2004) (relying on *Locke* and holding that application of "no-aid" provision of Florida Constitution does not violate Free Exercise Clause), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006).

[6] If anything, Michigan's decision should be given even greater deference than in the standard funding case, because the moratorium covers an area that essentially involves delegation of core government functions – housing and caring for troubled children – to private actors. If the state has room for "play in the joints" where it is funding purely private activity, then it should have even more flexibility where official state functions are concerned (and where the need to avoid Establishment Clause violations is even more pressing, *see infra* Part II).

[7] In the absence of a valid free exercise argument, Teen Ranch's equal protection claims is subject to, and cannot overcome, rational-basis scrutiny. *See Locke*, 540 U.S. at 721 n.3; *see also, e.g.*, *Eulitt*, 386 F.3d at 354.

As with its free exercise claim, Teen Ranch's free speech claim overreaches and all but ignores the Supreme Court's recent decision in *Locke*. Teen Ranch argues, as did the plaintiffs in *Locke*, that the government's decision not to fund certain religious activity amounts to unconstitutional viewpoint discrimination. But like in *Locke*, no such violation has occurred here. *See Locke*, 540 U.S. at 721 n.3.

Amici certainly agree with the notion that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 830 (1995); *see also, e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998) (government may not base discretionary grantmaking decisions on "considerations that, in practice, would effectively preclude or punish the expression of particular views"). Michigan's moratorium, however, does not impermissibly discriminate against any religious speaker's viewpoint.

As an initial matter, the state has, in fact, chosen to fund a host of faith-based organizations; as discussed above, over one-third of youth residential services providers contracting with Michigan are religious institutions. *See Teen Ranch*, 389 F. Supp. 2d at 829. Far from viewpoint discrimination, the state simply has decided not to partner with, and provide

taxpayer dollars to, any organization that uses those funds for religious activity. Michigan's moratorium targets such presumptively unconstitutional government-funded sectarian activity, and is not "'aimed at the suppression of dangerous ideas.'" *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 552 (2001) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

Addressing a similar claim in *Locke*, the Supreme Court noted that the challenged state scholarship program was "not a forum for speech." *Locke*, 540 U.S. at 721 n.3. Instead, the program in *Locke* was designed "to assist students from low- and middle-income families with the cost of postsecondary education," and not, as in *Rosenberger*, "'to encourage a diversity of views from private speakers.'" *Id.* (quoting Rosenberger, 515 U.S. at 834); *cf. Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (confirming that "viewpoint based funding decisions can be sustained in instances in which the government itself is the speaker, or in instances . . . in which the government use[s] private speakers to transmit information pertaining to its own program"). Likewise, the youth services at issue here are not principally aimed at disseminating private speech, but rather are meant "to provide an effective program of out-of-home care for delinquent or neglected children" committed to the care of the state through its court

system. M.C.L. § 400.115(a); *see also Teen Ranch*, 389 F. Supp. 2d at 840 ("The purpose of contracting for these services is to provide treatment for troubled youth in a residential setting, not to promote the private speech of the providers of that care.").

In such contexts, prohibitions on the use of public funds for religious activities – even if not required by the Establishment Clause – do not amount to impermissible restrictions on speech. *See, e.g., Locke*, 540 U.S. at 721 n.3; *Eulitt*, 386 F.3d at 356; *McCallum*, 179 F. Supp. 2d at 980. Although the charge of viewpoint discrimination is a powerful rhetorical device, it is inapplicable here. As in *McCallum*, Teen Ranch's "interpretation of the free speech clause would require the state government to recognize a forum for private expression with regard to each of its fiscal determinations." *Id.* at 980. That cannot be the case, and the district court properly rejected Teen Ranch's free speech claim.

II. CONTINUED FUNDING OF TEEN RANCH WOULD VIOLATE THE ESTABLISHMENT CLAUSE

The Establishment Clause required Michigan to issue its moratorium on the continued funding of Teen Ranch's religious program. As the Supreme Court has consistently held, direct government funding of religious activities impermissibly advances religion and therefore violates the First Amendment. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 222-223 (1997);

Bowen v. Kendrick, 487 U.S. 589, 611 (1988).[8] Indeed, the Establishment Clause strictly forbids direct governmental grants of aid to fund "specifically religious activit[ies]" even within "an otherwise substantially secular setting." *Bowen*, 487 U.S. at 621 (internal quotation and citation omitted).

Government funding of religious activity goes to the heart of the Establishment Clause's prohibitions. Although the Supreme Court "has long held that the First Amendment reaches more than classic, 18th-century establishments," *Board of Education of Kiryas Joel School District v.*

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[8] *See also, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) ("[A]ctual diversion of government aid to religious indoctrination . . . is constitutionally impermissible."); *Hunt v. McNair*, 413 U.S. 734 , 743 (1973) ("Aid normally may be thought to have a primary effect of advancing religion when it . . . funds a specifically religious activity in an otherwise substantially secular setting."); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973) ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."); *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."); *see also, e.g.*, *Laskowski v. Spellings*, __ F.3d __, No. 05-2749, 2006 WL 947567, at *1 (7th Cir. Apr. 13, 2006) ("[T]he Supreme Court has interpreted [the First Amendment's prohibition on religious establishments] to encompass any direct financial support by the government of religious activities."); *Strout v. Albanese*, 178 F.3d 57, 63 (1st Cir. 1999) ("The historic barrier that has existed between church and state throughout the life of the Republic has up to the present acted as an insurmountable impediment to the direct payments or subsidies by the state to sectarian institutions.").

Grumet, 512 U.S. 687, 709 (1994), under any historical analysis the Establishment Clause unquestionably contemplates a ban on direct monetary grants to religious institutions. As the Supreme Court has recognized, "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast v. Cohen*, 392 U.S. 83, 103 (1968).[9] Consequently, the Court has emphasized that governmental aid may not be used for "specifically religious activities," the use or creation of materials with an "explicitly religious content," the use or creation of materials that "are designed to inculcated the views of a particular religious faith," or the teaching of the "religious doctrines of a particular sect." *Bowen*, 487 U.S. at 621-22; *see also, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) ("Although '[o]ur cases have permitted some government funding of secular functions performed by sectarian

[9] *See also, e.g.*, *Mitchell*, 530 U.S. at 856 (O'Connor, J., concurring) ("[T]he most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition."); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970) ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.").

organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'" (quoting *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring)).[10]

On the facts of this case, it is clear that continued state funding of Teen Ranch would violate "one of the few absolutes in Establishment Clause jurisprudence": "the 'prohibit[ion against] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.'" *DeStefano v. Emergency Housing Gp.*, 247 F.3d 397, 416 (2d Cir. 2001) (quoting *Bowen*, 487 U.S. at 611). Prior to the moratorium, government aid to Teen Ranch undoubtedly had been used to promote sectarian religious beliefs. In fact, Teen Ranch has never denied that religious proselytization of wards of the state, conducted with the support of

[10] Because no single opinion garnered a majority of Justices on the Court, Justice O'Connor's concurrence in *Mitchell*, which supported the judgment on the narrowest grounds, "is controlling upon this Court." *Johnson v. Econ. Dev. Corp. of County of Oakland*, 241 F.3d 501, 510 n. 2 (6th Cir.2001); *see also, e.g.*, *Simmons-Harris v. Zelman*, 234 F.3d 945, 957 (6th Cir.2000) (same), *rev'd on other grounds*, 536 U.S. 639 (2002); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 418 (2d Cir. 2001) ("Justice O'Connor's position . . . garnered the support not only of Justice Breyer, who joined in her concurrence, but also of the three Justices in dissent, and is therefore the majority view of the Supreme Court"); *see generally Marks v. United States*, 430 U.S. 188, 193 (1977).

taxpayer dollars, was one of the program's principal goals. This fact alone required the issuance of Michigan's moratorium.

Because of the relative vulnerability of the children involved, moreover, Teen Ranch is precisely the type of setting in which concern over government-supported indoctrination is most warranted. Teen Ranch provides both a home and counseling services to troubled youth who, for one reason or another, have been separated from their families. As the Supreme Court has emphasized, government supervision of minors – where even "subtle and indirect pressure" can be "as real as any overt compulsion" – requires the strictest Establishment Clause vigilance. *Lee v. Weisman*, 505 U.S. 577, 593 (1992); *see also, e.g.*, *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987); *School Dist. of Abington Twp. v Schempp*, 374 U.S. 203, 207 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

Furthermore, given the nature of the governmental functions performed by Teen Ranch prior to the moratorium, the state's impermissible endorsement of religion extended well beyond the mere funding of the program. Michigan's contract with Teen Ranch was not a passive funding scheme – although that alone would have violated the Establishment Clause.

Rather, the arrangement also created an unconstitutional delegation of government authority to a sectarian organization.

Pursuant to the Establishment Clause, the state "may not delegate a governmental power to a religious institution." *Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 590-91 (1988); *see also, e.g., Kiryas Joel*, 512 U.S. at 696 (preventing unification of civic and religious authority is a "core rationale underlying the Establishment Clause") (internal quotation marks and citation omitted); *Larkin v. Grendel's Den*, 459 U.S. 116, 123 (1982) ("delegating a governmental power to religious institutions . . . inescapably implicates the Establishment Clause"). As the Supreme Court has explained, "the mere appearance of a joint exercise of [governmental] authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin*, 459 U.S. at 125-26. Yet prior to the moratorium, the state had engaged in such an exercise. Beyond the improper funding of religious activity with taxpayer dollars, Michigan effectively had delegated a quintessential governmental function – housing troubled and disadvantaged children committed to state care – to an avowedly religious organization. By contracting with Teen Ranch, sending wards within its care to Teen Ranch's religiously infused residential program, and diverting taxpayer dollars to

support religious indoctrination, the state thus had placed its official imprimatur on the program. Such active governmental endorsement of religion could not withstand Establishment Clause scrutiny.

Faced with these inescapable constitutional infirmities, Teen Ranch grasps at a narrow exception to the categorical ban on state funding of religious activity. Teen Ranch has conceded, as it must, that direct governmental funding of its religious activity would violate the Establishment Clause. *See Teen Ranch*, 389 F. Supp. 2d at 833 ("Counsel for Teen Ranch candidly acknowledged to this Court during oral argument that if its program is directly funded by the State, then the State could not fund its program without violating the Establishment Clause and the Public Act."). But Teen Ranch contends that its prior contractual arrangement with the state involved only indirect (and therefore constitutionally permissible) funding, because, once placed by the state at Teen Ranch, children could opt out of the placement. *See* Teen Ranch's Initial Br. at 26-43. If accepted, this novel theory would unduly and dangerously expand the existing, limited Establishment Clause exemption for indirect government support of religious activity.

In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Supreme Court upheld, against an Establishment Clause challenge, a state voucher

program under which government funds flowed to religious groups and activities only as the result of the "genuine and independent choices of private individuals." *Id.* at 649 (internal quotation marks and citation omitted). In such circumstances, the Court reasoned, the relationship between the state and the religious grantee is more attenuated, and so it is less likely that the grantee will enjoy the "imprimatur of state approval." *Id.* at 651 (internal quotation marks and citation omitted). Opt-out situations, however, are an entirely different matter, especially where vulnerable minors are concerned. The onus should not be on the individual – particularly a child – to cure presumptively unconstitutional government funding of religious indoctrination. Instead, the Supreme Court's "private choice" cases carve out a narrow exception only where private beneficiaries make an affirmative decision to direct aid to the program "of their own choosing." *Id.* at 649.

The state's limited opt-out scheme, on which Teen Ranch's entire Establishment Clause defense rests, is wholly distinct from the voucher program upheld in *Zelman* and related decisions. Prior to the moratorium, it was hardly the case that taxpayer support for Teen Ranch's proselytizing activities occurred "only by way of the deliberate choices" of minors under the state's care. *Zelman*, 536 U.S. at 652. Instead, it was the state, as legal

guardian of the child participants, that made the deliberate decisions to include Teen Ranch in its residential services program, to direct wards of the state to Teen Ranch, and to fund it with taxpayer dollars. In this context, the advancement of Teen Ranch's religious activities can reasonably be attributable to the state, and the children's ability to object to such placement comes nowhere near an effective constitutional cure.[11]

Consequently, upon learning of Teen Ranch's sectarian program, Michigan wisely took steps to avoid the "'special Establishment Clause dangers'" that arise when "money is given to religious schools or entities directly." *Mitchell*, 530 U.S. at 818-19 (plurality) (emphasis in original) (quoting *Rosenberger*, 515 U.S. at 842.[12] In light of those special dangers, the government bears an affirmative obligation to employ "an effective

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[11] In related contexts, the Supreme Court has held that minors' ability to opt out of government-sponsored religious activities cannot insulate those activities from invalidation under the Establishment Clause. *See, e.g., Lee*, 505 U.S. at 596 (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962), and *School Dist. of Abington Twp. v Schempp*, 374 U.S. 203, 224-25 (1963)); *see also, e.g., Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000).

[12] *See also, e.g., Mitchell*, 530 U.S. at 844, 856 (O'Connor, J., concurring); *Bowen*, 487 U.S. at 608-09; *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976); *Nyquist*, 413 U.S. at 762; *Levitt v. Committee for Pub. Ed. and Religious Liberty*, 413 U.S 472, 480 (1973); *Hunt v. McNair*, 413 U.S. 734, 745 n.7 (1973); *Lemon*, 403 U.S. at 612; *Tilton v. Richardson*, 403 U.S. 672, 679-80 (1971); *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968); *Walz*, 397 U.S. at 675; *Everson*, 330 U.S. at 16.

means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973); *see also, e.g.*, *Bowen*, 487 U.S. at 615 ("There is no doubt that the monitoring of . . . grants is necessary if the [state] is to ensure that the public money is to be spent . . . in a way that comports with the Establishment Clause."). In recognition of that affirmative obligation, Michigan issued the moratorium challenged here. The moratorium was not only permissible, see supra Part I, but also constitutionally required.

CONCLUSION

Teen Ranch has neither free exercise nor free speech rights to demand that wards of the state be subjected to government-funded proselytization at Teen Ranch. The room for "play in the joints" between the Religion Clauses undoubtedly permits the state to choose not to fund religious indoctrination at Teen Ranch, even if such funding somehow were consistent with the Establishment Clause. But in any event, the state's continued funneling of both children and taxpayer dollars to Teen Ranch surely would have been a classic Establishment Clause violation, and the state properly took the necessary steps to avoid future transgressions. Accordingly, this Court should affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Cir.R.32(a)(7)(c), the undersigned certifies this brief complies with the type-volume limitations of Sixth Cir.R.32(a)(7)(B).

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Brenda Bove certifies that she is employed by the American Civil Liberties Union Fund of Michigan, and that on the 19th day of May, 2006, she served two copies of **Brief Of *Amici Curiae* American Civil Liberties Union and American Civil Liberties Union Fund Of Michigan in Support Of Defendants-Appellees** to all attorneys of record listed below by first class mail with postage pre-paid.

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