STATE OF MICHIGAN

COURT OF APPEALS

JOHN E. SCALISE, Individually, and as Parent, Guardian and Next Friend of BENJAMIN SCALISE, a Minor,

Plaintiffs-Appellants,

v

BOY SCOUTS OF AMERICA and MT. PLEASANT PUBLIC SCHOOLS,

Defendants-Appellees.

FOR PUBLICATION
January 20, 2005
9:00 a.m.

No. 244883
Isabella Circuit Court
LC No. 00-000224-NZ

Before: Zahra, P.J., and Saad and Schuette, JJ.

SCHUETTE, J.

This case arises from the circuit court grant of summary disposition to defendants, Lake Huron Area Council, the local affiliate of Boy Scouts of America (Boy Scouts)[1] and Mt. Pleasant Public Schools (Mt. Pleasant), in a suit brought by plaintiffs, father and son. Plaintiffs allege they were excluded from a local Cub Scout group affiliated with Boy Scouts when plaintiff-father refused to affirm the Boy Scouts' religious declaration. Plaintiffs charge that the relationship between defendants violated Michigan constitutional and statutory prohibitions on religious discrimination. The circuit court disagreed and granted defendants' motion for summary disposition under MCR 2.116(C)(10) and plaintiffs now appeal as of right. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Boy Scouts is a Michigan non-profit corporation chartered by the national association of Boy Scouts of America to support and organize scouting activities in nineteen counties in mid-Michigan, including Isabella County. Boy Scouts conducts scouting activities, including pack

[1] Boy Scouts of America is a national scouting organization and defendant is the local scouting affiliate, Lake Huron Area Council. We note that plaintiff's complaint named only "Boy Scouts of America, Lake Huron Area Council," not the national organization. Thus, our reference to "Boy Scouts" throughout this opinion refers only to the Lake Huron Area Council, not the national organization.

and den meetings of Cub Scouts, through local sponsorships, at times referred to as "charter partners," with a wide array of community organizations in the Mt. Pleasant area. These sponsoring groups are quite diverse, including a local business (DeWitt Lumber), fraternal groups (Borley Hamel VFW Post #3033, Shepherd Rotary Club), and religious organizations and groups (Beal City Knights of Columbus, Sacred Heart Academy, Latter Day Saints and Rosebush United Methodist Church), two local school Parent Teacher Organizations (PTO) and one local Parent Teacher Association (PTA). In addition, a local school of Mt. Pleasant's, Rosebush elementary, was a "charter partner."[2]

Before September 2000, it was the practice of a representative of Boy Scouts, with Mt. Pleasant's permission, to visit several of its elementary schools during school hours. The purpose of the visits was to speak with boys of scouting age about becoming Cub Scouts and possibly attending evening informational meetings with their parents. In September 2000, Mt. Pleasant notified Boy Scouts that these visits were no longer permissible.

Consistent with Mt. Pleasant's facilities use policy, community organizations were permitted to use school facilities during non-school hours. Among other groups,[3] Boy Scouts used school facilities to hold its den and pack meetings or other scouting activities during non-school hours. In addition, Mt. Pleasant permitted community groups to post and distribute literature within the schools and to provide recruitment flyers for distribution to students. Boy Scouts provided informational literature and recruitment flyers for distribution through this system in Mt. Pleasant classrooms. In November 1997, Ben Scalise was a third-grader at Mt. Pleasant's Fancher Elementary. After bringing home a Boy Scout flyer distributed at Fancher, he and his father attended a Cub Scout gathering. At the meeting, Mr. Scalise volunteered to become a den leader. Later, having reviewed Boy Scouts bylaws and mission statement,[4] Mr. Scalise learned that Boy Scout leaders were required to endorse the Boy Scouts' declaration of religious principle,[5] and youth members, depending on their status as Boy or Cub Scouts, were

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[2] This relationship ended a few months after this lawsuit was filed.

[3] The record reflects that since 1997, 127 different groups, organizations, and individuals have used school facilities during non-school hours. In addition to the Boy Scouts, a wide range of groups used school faciltiesfacilities in this manner, including Isabella County 4-H, Central Michigan Community Hospital, Amateur Hockey Association of Mt. Pleasant, AFSCME CMU Local 1568, Mitten Bay Girl Scouts, Saginaw Chippewa Indian Tribe, Special Olympics of Michigan, and Maranatha Baptist Church.

[4] "The mission of the Boy Scouts of America is to prepare young people to make ethical choices over their lifetimes by instilling in them the values of the Scout Oath and Law."

[5] "The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God and, therefore, recognizes the religious element in the training of the member, but is absolutely nonsectarian in its attitude toward that religious training. The Boy Scouts of America's policy is that the home and the organization or group with which the member is connected shall define attention to religious life. Only persons willing to subscribe to this declaration of religious principle and to obey the bylaws of the Boy Scouts of America shall be entitled to certificates of leadership."

required to recite either the Boy Scout Oath[6] or Cub Scout Promise[7] and abide by either the Scout Law[8] or the Law of the Pack.[9]

In January 1998, Mr. Scalise sent Boy Scouts a letter explaining the declaration of religious principle to be repugnant to his humanist beliefs and requested an exemption from the requirement. Boy Scouts refused and revoked Mr. Scalise's membership. Subsequently, Mr. Scalise removed Ben from Boy Scouts. Thereafter, Mr. Scalise contacted Mt. Pleasant to voice his concerns about in-school distribution of information about a religious organization and requested that subsequent flyers include a disclaimer informing parents of the religious character of Boy Scouts. Later, in May 1999, after a Boy Scout representative visited Ben's classroom during school hours, Mr. Scalise again contacted Mt. Pleasant because the distributed fliers lacked the requested disclaimer. Mt. Pleasant subsequently requested that Boy Scouts include such a disclaimer, and it complied. In December 1999, unsatisfied with the disclaimer's language,[10] Mr. Scalise again protested the distribution of Boy Scouts flyers. In October 2000, Mr. Scalise filed suit against defendants.

In their initial complaint, plaintiffs alleged that the actions of Boy Scouts and its use of school facilities by Boy Scouts, with the permission of Mt. Pleasant, excessively entangled Mt. Pleasant in Boy Scouts' religious mission in violation of Michigan Constitutional guarantees of equal protection and free exercise of religion, as contained in Const 1963, art 1, §1 and § 4 and art 8, § 2. Further, plaintiff claimed that Boy Scouts' actions violated the Michigan Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq*. Plaintiffs sought damages and injunctive relief.

In April 2000, plaintiffs and defendants cross-moved for summary disposition. In April 2001, plaintiff filed an amended complaint alleging criminal violation of Michigan Public Accommodation Laws, MCL 750.146, sometimes referred to as the Equal Accommodation Act. In November 2001, the circuit court granted summary disposition to defendants on all claims except one. The trial court, citing *Sherman v Community Consolidated School Dist 21*, 8 F3d 1160 (CA 7, 1993), held Boy Scouts was not a state actor and, therefore, was not liable under the Michigan Constitution's Equal Protection Clause, Const 1963, art 1, § 2, and Establishment and

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[6] "On my honor I will do my best; To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight."

[7] "I, (name), promise to do my best, To do my duty to God and my country, To help other people, and To obey the Law of the Pack."

[8] "A Scout is: Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent."

[9] "The Cub Scout follows Akela. The Cub Scout helps the pack go. The pack helps the Cub Scout grow. The Cub Scout gives goodwill."

[10] The disclaimer defined the Boy Scouts purpose and listed its leadership requirements, one of which was subscribing to the declaration of religious principle, which was reproduced on the flyers verbatim. See *supra* n 5.

Free Exercise Clauses, Const 1963, art 1, § 4, and art 8, § 2. Further, the court held that Boy Scouts, as a private club, was exempt from the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*, and was not a public accommodation as defined within MCL 750.146.

The circuit court held Mt. Pleasant's policy,[11] which provided Boy Scouts access to school facilities and mailboxes, did not provide special treatment to Boy Scouts, did not compel or encourage the maintenance of Boy Scouts' policy, and thus did not make Mt. Pleasant a symbiotic partner with Boy Scouts in violation of the Equal Protection Clause.

However, the circuit court did grant plaintiffs' motion for summary disposition relating to the Establishment Clause charge, finding defendants liable for the school-hour-recruiting effort by Boy Scouts. The court, therefore, ordered resultant damages be determined by a jury.

In February 2002, both defendants moved to dismiss that portion of the November opinion and order that sustained the plaintiffs' claim for the Boy Scouts' school-hour visit. Plaintiffs moved to revise the opinion and order, reiterating their contention that Boy Scouts was in fact a state actor, and again requested damages to be issued according to the Michigan Elliott-Larsen Civil Rights Act. In the alternative, plaintiffs contended that *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000), recognized judicially inferable damages for civil and constitutional rights violations. In response, defendants contended the Michigan Elliott-Larsen Civil Rights Act, which requires a finding of state action, provided the only remedy for violations of such rights. Defendants argued that, because state action was not present here, Boy Scouts was not liable for any damages and thus the action should be dismissed.

In November 2002, the court denied plaintiffs' motion to revise the November 2001 opinion and order and granted the defendants' motion to dismiss. The court reiterated that Boy Scouts was not a state actor, and thus the Michigan Elliott-Larsen Civil Rights Act provided no relief for plaintiffs. Further, the court held that *Jones*, *supra*, militated against judicially inferred damages when a legislative scheme existed to remedy plaintiffs' rights.

In response to the November 2002 order, plaintiffs appealed to this Court. This opinion will address plaintiffs' claims under the Michigan Constitution, including the Establishment Clause, Const 1963, art 1, § 4 and the Equal Protection Clause, Const 1963, art 1, § 2, as well as plaintiffs' claims under Michigan's public accommodation statutes MCL 37.2101 *et seq*, and MCL 750.146 *et seq*. Plaintiffs also allege that Boy Scouts was acting as a fraternity as proscribed by the Michigan School Code, MCL 380.1316. Plaintiffs failed to make this final allegation in their initial or amended complaint. This issue is not properly before this Court and will not be addressed in this opinion.

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[11] "Community groups or organizations which include residents of the district shall be permitted and encouraged to use school facilities for worth while [sic] purposes when such use does not interfere with the school program. School buildings may be used by responsible organizations for activities that are consistent with federal, state and local laws. The Board shall prescribe regulations for occupancy and use to secure fair, reasonable, and impartial use of the properties." Mt. Pleasant Policy 7510.

II. STANDARD OF REVIEW

Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003).

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). All reasonable inferences are to be drawn in favor of the nonmovant. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999), remanded 465 Mich 919; 638 NW2d 748 (2001).

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins,* 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

III. MICHIGAN CONSTITUTIONAL CLAIMS

A. ESTABLISHMENT CLAUSE

Michigan's Constitution provides:

> Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief. [Const 1963, art 1, § 4.]

Our Supreme Court has held that both the state and federal provisions of the Establishment and Free Exercise Clauses of the First Amendment to the Federal Constitution,[12] are subject to similar interpretation. *In re Legislature's Request for An Opinion, etc*, 384 Mich 82, 105; 180 NW2d 265 (1970).

Thus, our Establishment Clause analysis, like the federal analysis, is governed by *Lemon v Kurtzman*, 403 US 602; 91 S Ct 2105; 29 L Ed 2d 745 (1971), in which the Supreme Court developed a three-prong test to determine whether state action violated the prohibition on the establishment of religion: "First, the [state action] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [state action] must not foster an excessive government entanglement with religion." *Id.* at 612-13 (citation omitted).[13] If state action violates any prong of *Lemon*, *supra*, then that action contravenes the Clause. *Sherman, supra* at 1164.

We initially note that, because of the impressionable nature of school children, the Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v Aguillard,* 482 US 578, 584; 107 S Ct 2573; 96 L Ed 2d 510 (1987). We assess plaintiffs' claims with this vigilance in mind.

1. *Secular Purpose*

In pertinent part, Mt. Pleasant policy provided:

> Community groups or organizations which include residents of the district shall be permitted and encouraged to use school facilities for worth while [sic] purposes when such use does not interfere with the school program. School buildings may be used by responsible organizations for activities that are consistent with federal, state and local laws. The Board shall prescribe regulations for occupancy and use to secure fair, reasonable, and impartial use of the properties. [Mt. Pleasant Policy 7510.]

The purpose of this policy is to open Mt. Pleasant facilities to the public, a secular end, and equally allocating the resources of a limited public forum is pursuant to that end. Therefore, *Lemon's* first prong is not offended. *See Widmar v Vincent*, 454 US 263, 272-73; 102 S Ct 269; 70 L Ed 2d 440 (1981).

2. *Advancement of Religion*

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[12] The first clause of the First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." US Const. Am I.

[13] Mount Pleasant Policy 880A, Guidelines for Operations, uses *Lemon's* Establishment Clause test to control its operations.

Plaintiffs further contend that Mt. Pleasant favors religious groups over non-religious groups because it gave Boy Scouts priority over other community groups and allowed Boy Scouts to use school facilities free of charge; permitted the Boy Scouts to display recruitment posters in school hallways, while recruiting school personnel to distribute membership solicitations and promotional flyers to, and collect membership applications from, elementary students; and let Boy Scouts conduct school-hour recruiting presentations. We will address each objection.

a. *Boy Scouts Use of School Facilities*

Mt. Pleasant's policy established priorities among qualified community groups: "school directed" groups were given the highest priority among applicants and could use facilities at no cost; "school related" groups, such as school-support organizations, Boy Scouts, 4-H, and faculty organizations, were given priority after any school-directed groups and could also use facilities free of charge. Non-profit community groups followed, but were charged for their use, and for-profit groups and non-community groups had the lowest priority among qualified applicants and were required to pay for their use.

Plaintiffs contend that the structure of this policy, particularly the priority Boy Scouts received, gave Boy Scouts special advantage over other groups and thus advanced the Boy Scouts' religious position. We disagree. Although the policy created priorities among groups and waived cost for some, the structure allocated resources reasonably, impartially, and thus secularly. The facilities were open to all groups. The priority designations simply ensured that, among organizations, those most closely connected with the purpose of schools be served first. Among priority levels, facility access was even-handedly offered on a first-come-first-serve basis so that no similarly-situated group was favored over another. Thus, school-directed and school-related groups were given priority over other groups only because school-directed and school-related groups were those most closely connected with the students for whom the facilities were created. Yet within the school-related group, Boy Scouts was on an even footing with every other level-two priority group. Therefore, Mt. Pleasant's policy was neutral; it had a secular purpose and did not advance religion over non-religion. Simply because Boy Scouts utilized the system does not itself create an Establishment Clause violation.

Plaintiffs seemingly advocate a blanket prohibition on any group with a scintilla of faith-based philosophy from using a Mt. Pleasant facility. The *Lemon* test does not require, nor did the framers of the Constitution intend, to impose a constitutional straightjacket preventing any sentiment of religious belief, however mild, from being expressed by a group or individual in a school. *Comm for Pub Ed & Religious Liberty v Nyquist*, 413 US 756, 771; 93 S Ct 2955; 37 L Ed 2d 948 (1973). Incidental, indirect, or remote benefits to religion do not alone render a particular activity constitutionally invalid. *Michigan Dep't of Civil Rights ex rel Parks v General Motors Corp, Fisher Body Div*, 412 Mich 610, 657; 317 NW2d 16 (1982); *Nyquist*, *supra* at 771; *Widmar v Vincent*, 454 US 263, 272-73; 102 S Ct 269; 70 L Ed 2d 440 (1981).

Mt. Pleasant's neutrality makes this case indistinguishable from the Supreme Court's conclusions in *Bd of Ed v Mergens,* 496 US 226; 110 S Ct 2356; 110 L Ed 2d 191 (1990),

Lamb's Chapel v Ctr Moriches Union Free School Dist, 508 US 384; 113 S Ct 2141; 124 L Ed 2d 352 (1993),[14] and *Good News Club v Milford Central School*, 533 US 98, 106; 121 S Ct 2093; 150 L Ed 2d 151 (2001), which collectively hold, *inter alia*, that the Establishment Clause demands only that school districts act neutrally in allocating community access to school facilities.

> The [Establishment Clause's] guarantee of neutrality is respected, not offended, when the Government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. [*Good News Club, supra* at 114, quoting *Rosenberger v Rector and Visitors of Univ of Va,* 515 US 819, 829, 132 L Ed 2d 700, 115 S Ct 2510 (1995)].

Here, had Mt. Pleasant not evenhandedly allocated facilities between secular and organizations with some religious precepts, like Boy Scouts, "then [Mt. Pleasant] would demonstrate not neutrality but hostility toward religion." *Mergens*, *supra* at 248. Such hostility would violate Boy Scouts' student-members' First Amendment right to free speech. *Good News Club*, *supra* at 112. ("[S]peech discussing otherwise permissible subjects cannot be excluded from [school facilities] on the ground that the subject is discussed from a religious viewpoint.")

Therefore, because Boy Scouts is merely one of many diverse organizations using school facilities, Mt. Pleasant is not endorsing Boy Scouts over any other religious or secular group. See *Mergens*, *supra* at 252. Thus, Mt. Pleasant did not violate the Establishment Clause when it allowed Boy Scouts to meet in its facilities.

b. *Boy Scouts Distribution & Posting of Literature in Mt. Pleasant Public Schools*

Plaintiffs also contend that Mt. Pleasant violated the Establishment Clause by allowing Boy Scouts to use school personnel to distribute its literature and collect its communications during school hours as well as hang its posters in Mt. Pleasant school hallways. Throughout the school year, flyers from several organizations were distributed to students weekly.[15] The flyers were not discussed in the classroom, incorporated into the curriculum, or made part of the day's activities. The Boy Scouts' flyers received no special focus. The same is true of organizational

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[14] At oral argument, plaintiffs suggested that *Lamb's Chapel* supported their contention that the school district was endorsing Boy Scouts policy. Plaintiffs noted that the meeting at issue there "would have been open to the public, not just to church members." *Lamb's Chapel* at 395. The meeting's openness did not control the Supreme Court's decision in *Lamb's Chapel*; that fact was one of many the Supreme Court referenced to conclude that the school district had not endorsed the film to be shown after hours in school facilities. *See id*; see also *Sherman, supra* at 1165 n 12.

[15] The record shows that since 2000 a wide variety of organizational flyers from a variety of groups have been sent home with students via Mt. Pleasant's distribution system. The list includes the Child and Family Enrichment Council, Chippewa Lanes, the Michigan Educational Trust, the Downtown Business Association, the Isabella Community Soup Kitchen, the Youth Wrestling league, Girl Scouts, Art Reach of Mid-Michigan, and the Festival of Trees.

posters that hung in Fancher Elementary's hallways. Among those various posters, Boy Scouts enjoyed no unique focus, were not emphasized by Mt. Pleasant, and were not incorporated into the curriculum.

Thus, we are not presented with the same concerns of endorsement the Supreme Court found in *Co of Allegheny et al v ACLU*, 492 US 573; 109 S Ct 3086; 106 L Ed 2d 472 (1989), where the Court invalidated the unique, esteemed placement of a crèche in a county courthouse. Nor does this case present the same concerns over coercion the Supreme Court found in *Lee v Weisman*, 505 US 577; 112 S Ct 2649; 120 L Ed 2d 467 (1992), where the Supreme Court struck down a non-denominational prayer for a high school graduation because school officials were involved in selecting the person who delivered the prayer and drafted guidelines for the prayer. See also *Santa Fe Independent School Dist v Doe*, 530 US 290; 120 S Ct 2266; 147 L Ed 2d 295 (2000) (where the Supreme Court invalidated school policy that permitted student led prayers before school football games).

Simply because Mt. Pleasant allows civic groups, including Boy Scouts, to distribute flyers to students and hang posters in school hallways does not create an Establishment Clause violation. Ultimately, a wide array of organizations were allowed to display posters in Mt. Pleasant hallways and distribute literature to students so long as they too satisfied the neutral qualifying criteria of Mt. Pleasant Policy 9700.

Further, Boy Scout literature did not denote the religious aspect of the group until plaintiffs requested that Boy Scouts add a religious disclaimer to its advertisements. Since plaintiffs requested the addition of the disclaimer, thereby affecting their purported injury, they lack standing to challenge those advertisements with the added disclaimer. *See Lujan v Defenders of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

In sum, we hold that Mt. Pleasant's policy, which permits Boy Scouts to distribute and post literature and flyers, did not violate the Establishment Clause of the Michigan Constitution. Const 1963, art 1, § 4.

c. *Boy Scouts' School-hour Visit*

The circuit court originally concluded that the school-hour visit of a Boy Scout representative constituted an Establishment Clause violation. The circuit court later reversed that conclusion. We agree that the school-hour visit by a Boy Scout representative did not violate the Establishment Clause.

To violate *Lemon's* second prong, a state policy's *primary* effect must advance religion. The Boy Scouts are not primarily a religious organization. Rather, it is an organization whose mission it is to prepare young people to make ethical choices by instilling in them certain values, some of which are religious based. As a state actor, Mt. Pleasant's admittance of a Boy Scout representative to invite students to an informational meeting does not have the primary effect of advancing religion over non-religion. Here, the primary effect and purpose was to inform students of scouting activities. Boy Scouts were not admitted so they could proselytize students.

Here, the recitation of the Cub Scout Promise or the Scout Oath occurs at private gatherings where students and adult members attend freely and willingly. These meetings are

sufficiently distinct from school operations so that the line between Mt. Pleasant's school-hour functions and Boy Scouts' after-hours meetings will not be blurred to confuse "children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *School Dist of Grand Rapids v Ball,* 473 US 373, 390, 87 L Ed 2d 267, 105 S Ct 3216 (1985), rev'd on other grounds *Agostini v Felton*, 521 US 203; 117 S Ct 1997; 138 L Ed 2d 391 (1997).

In sum, because this visit was not coercive and was not primarily for purposes of promoting religion, Mt. Pleasant did not violate *Lemon*'s second prong and thus did not violate the Establishment Clause by advancing religious groups over non-religious groups.

3. *Excessive Entanglement*

Alternatively, plaintiffs contend that Mt. Pleasant's actions fostered an excessive governmental entanglement with religion. Here, Mt. Pleasant required Boy Scouts to comply with policies governing school access and the distribution of literature pursuant to Mt. Pleasant Policies 7510, 5722, 8800 and 9700. These general regulations applied to all organizations that sought access to school mailboxes, hallways, and facilities. Such general regulations do not create the excessive entanglement barred by *Lemon*, *supra*. Rather, *Lemon*, *supra*, prohibits "comprehensive, discriminating, and continuing state surveillance." *Lemon*, *supra* at 619. Here, Mt. Pleasant did not monitor Boy Scout gatherings; rather, Mt. Pleasant only reviewed Boy Scouts' in-school communications for compliance with Mt. Pleasant's policy. Such action falls far short of comprehensive surveillance. Thus, Mt. Pleasant did not violate the Establishment Clause through excessive entanglement with religion.

As no *Lemon* prong was violated, Mt. Pleasant did not violate the Establishment Clause.

B. EQUAL PROTECTION CLAUSE

Plaintiffs also allege that Boy Scouts and Mt. Pleasant jointly violated their right to equal protection guaranteed by Michigan's Constitution. We disagree.

The Michigan Constitution Equal Protection Clause provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation. [Const 1963, art 1, § 2.]

Our Supreme Court has held this Clause to be coextensive with the Federal Constitution's Equal Protection Clause.[16] *Harville v State Plumbing & Heating* 218 Mich App 302, 305-306; 553

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[16] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."
(continued…)

NW2d 377 (1996). Thus, the Michigan Constitution, like the Federal Constitution, only protects individuals from discriminatory "state action." *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 205; 378 NW2d 337 (1985); *Shelly v Kramer*, 334 US 1, 13; 68 S Ct 836; 92 L Ed 1161 (1948) ("The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful.") Yet, in certain limited circumstances, the Supreme Court has found private discriminatory conduct to be state action and violate the Equal Protection Clause. *Brentwood Academy v Tennessee Secondary School Athletic Ass'n*, 531 US 288, 295; 121 S Ct 924; L Ed 2d 807 (2001) ("[T]he deed of an ostensibly private organization or individual [will] be treated sometimes as if a State had caused it to be performed. Thus . . . state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" (quoting *Jackson v Metropolitan Edison Co*, 419 US 345, 351 n 2; 95 S Ct 449; L Ed 2d 477 (1974)). Thus, whether the plaintiffs' rights to equal protection were violated will turn on whether defendants' conduct can be considered discriminatory state action.

1. *Mt. Pleasant Public Schools*

Mt. Pleasant is a state actor. Thus, if Boy Scouts' policy of requiring endorsement of religious principles can be attributed to Mt. Pleasant, then defendants will have violated plaintiffs' right under Michigan's Equal Protection Clause to be free from discrimination based on religion.

In *Gilmore v City of Montgomery,* 417 US 556; 41 L Ed 2d 304; 94 S Ct 2416 (1974), the Supreme Court addressed whether an organization's discriminatory policy could be attributed to a city through the organization's use of municipal facilities. The Supreme Court held:

> Traditional state monopolies, such as electricity, water, and police and fire protection—all generalized governmental services—do not by their mere provision constitute a showing of state involvement in invidious discrimination. The same is true of a broad spectrum of municipal recreational facilities: parks, playgrounds, athletic facilities, amphitheaters, museums, zoos, and the like.
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> * * *
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> If, however, the . . . governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation. [*Id.* at 574. (citations omitted).]

The school buildings at issue here fall under that "broad spectrum of municipal recreational facilities." Thus, if Mt. Pleasant merely provided its facilities to Boy Scouts on an equal basis rather than rationing them to Boy Scouts particularly, then discriminatory state action does not exist.

(…continued)

US Const, Am 14, § 1.

As discussed in the Establishment Clause analysis, the record here shows that Mt. Pleasant simply allowed Boy Scouts to use Mt. Pleasant facilities in the same manner as other similarly situated organizations. Although Boy Scouts was given level-two priority and could use the facilities free of cost, the group was on equal footing with all other level-two priority groups. Among level-two groups, facilities were available on a first-come-first-served basis and each group's use subject to the same terms and conditions.

Thus, because Mt. Pleasant did not ration its facilities, but rather distributed access evenhandedly, Boy Scouts' use of the facilities does not fairly attribute its policy to Mt. Pleasant.[17]

2. *Boy Scouts of America*

Boy Scouts is a private organization. Thus, discriminatory state action may be found only if there was a sufficiently "close nexus between the State and the challenged action [so] that [Boy Scouts'] seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Academy*, *supra* at 295. (citations omitted) The Supreme Court has found such a nexus when a private actor assumed a traditional public function, when private discrimination has been commanded or compelled by the state, when the state has jointly participated in a private actor's discriminatory conduct, or where a private actor and the state have shared a symbiotic relationship. *Id.*

a. *Traditional Public Function*

The United States Supreme Court has found "state action" when private actors have assumed roles traditionally reserved for public administration. *Jackson, supra.* For private conduct to constitute state action under this theory, plaintiff must show that the discriminatory private actor was exercising power "traditionally exclusively reserved to the State." *Jackson, supra* at 352. The Supreme Court has explained, "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros, Inc v Brooks*, 436 US 149, 158; 98 S Ct 1729; 56 L Ed 2d 185 (1978) (citation omitted).

The Supreme Court has found private actors to have assumed traditional state functions exclusively reserved to the state when those actors discriminated in conducting elections, *Smith v Allwright,* 321 US 649; 64 S Ct 757; 88 L Ed 987 (1944), or primaries that effectively determined electoral candidates, *Terry v Adams*, 345 US 461; 73 S Ct 809; 97 L Ed 1152 (1953), or acted discriminatorily while functioning as a municipality, *Marsh v Alabama*, 326 US 501; 66 S Ct 276; 90 L Ed 265 (1946); *Evans v Newton*, 382 US 296; 86 S Ct 486; 15 L Ed 2d 373

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[17] This is the same conclusion arrived at by the Seventh Circuit Court of Appeals in *Sherman*, *supra*. The *Sherman* Court also applied *Gilmore* to a case where BSA had been allowed to use school facilities and student mailboxes. That court rightly concluded, "BSA merely took advantage of what was available to all organizations of its class." *Id.* at 1167.

(1966), or discriminatorily performed educational duties, provided fire or police protection, or collected taxes. See *Flagg Bros*, *supra* at 163.

Plaintiffs contend that the Boy Scouts' school-hour visit evinced state action by displacing, or effectively replacing, the classroom teacher. We disagree. A Boy Scouts representative's entering the classroom to disseminate information about the group and its meeting time does not rise to the level of education; the visit was informative, not educational. Therefore, Boy Scouts was not a state actor performing a traditional government function.

b. *State Command or Compulsion*

"State action" will also exist if the state, by operation of law, mandates the discrimination of a private party. "[A] State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." *Adickes v S H Kress & Co*, 398 US 144, 170; 90 S Ct 1598; 26 L Ed 2d 142 (1970). "When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby to a significant extent has become involved in it." *Peterson v City of Greenville*, 373 US 244, 248; 83 S Ct 1119; 10 L Ed 2d 323 (1963) (citations omitted). The state must effectively coerce the private party to act; merely acquiescing in the private conduct is not enough:

> [A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment. [*Blum v Yaretsky*, 457 US 991, 1004-05; 102 S Ct 2777; 73 L Ed 2d 534 (1982) (citations omitted).]

In *Moose Lodge No 107 v Irvis*, 407 US 163; 92 S Ct 1965; 32 L Ed 2d 627 (1972), the Supreme Court held a private club's policy was not state action because the state could not have forced the private club to comply with its exclusionary policy. Here, Mt. Pleasant did not force Boy Scouts to implement its policy on religion. Similarly, Mt. Pleasant did not require the Boy Scouts to visit the school system, distribute its flyers, or use school facilities for meetings. Mt. Pleasant lacked all legal force to compel Boy Scouts to participate in the school district. Therefore, Boy Scouts was not a state actor by state compulsion.

c. *Joint Participation or Entwinement*

Alternatively, the Supreme Court has found joint participation between the state and a private entity to evince state action: "[A] private party's joint participation with a state official in a conspiracy to discriminate would constitute . . . 'state action essential to show a direct violation of [a] petitioner's Fourteenth Amendment equal protection rights.'" *Lugar v Edmondson Oil Co*, 457 US 922, 931; 102 S Ct 2744; 73 L Ed 2d 482 (1982) (citations omitted).

The Supreme Court found such joint participation, or "entwinement," in *Brentwood Academy v Tennessee Secondary School Athletic Ass'n*, 531 US 288; 121 S Ct 924; 148 L Ed 2d 807 (2001). There, the Court found that the state's not-for-profit high school athletic association,

which, directed by permanent state employees, organized and regulated high school sports, was sufficiently entwined with the state school system to make the association a state actor. The Court found "pervasive entwinement [to exist] to the point of largely overlapping identity between [the association,] an ostensibly private organization[,] and [the state school system,] a governmental entity." *Id.* at 303.

Plaintiffs allege that Boy Scouts and Mt. Pleasant were so entwined by citing the charter agreement between Boy Scouts and Mt. Pleasant's Rosebush Elementary and between Boy Scouts and Mt. Pleasant PTAs; Boy Scouts' prioritized access under Mt. Pleasant's policy and the Boy Scouts' practice of referring to its troops by Mt. Pleasant names; and Boy Scouts' in-school advertising and school-hour visit. We will address each objection.

i. *Boy Scouts-Rosebush Charter Agreement*

Rosebush Elementary entered into a charter agreement with the Boy Scouts. Plaintiffs' alleged injury derives from Boy Scouts' actions at Fancher Elementary; therefore, plaintiffs lack the particularized injury required to have standing to challenge Boy Scouts' actions at Rosebush. *Lujan, supra* at 560.

ii. *Boy Scouts-Mt. Pleasant Parent-Teacher Association Charter Agreements*

Plaintiffs allege that MCL 380.485, which requires first-class school districts "[p]rovide for an autonomous school-community organization in each school within the school district," makes PTAs legally indistinguishable from the school district. MCL 380.485's mandate applies to first-class school districts, those of at least 100,000 students. MCL 380.402. Mt. Pleasant does not have 100,000 students; therefore, even if plaintiffs' contention is true, the law has not mandated the creation of the Mt. Pleasant PTAs that sponsored Boy Scouts troops. Thus, these associations' actions do not carry the state's imprimatur.

Yet even if this statute applied to Mt. Pleasant, MCL 380.485 mandates "autonomous school-community organizations." Autonomous means "[o]f or relating to a self-governing entity."[18] The statute, by the plain meaning of its words, makes its mandated school-community organizations independent, self-governing entities. When construing a statute, where the language is unambiguous, this Court gives the words their plain meaning. *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999). Therefore, this autonomous group's sponsorship of Boy Scout troops is not indicative of joint Mt. Pleasant-Boy Scouts participation.[19]

iii. *Boy Scouts Prioritized Access and Use of Mt. Pleasant Names*

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[18] *The American Heritage Dictionary of the English Language* (2000).

[19] Further, sister jurisdictions have concluded that PTAs are not state actors. See *Sherman, supra*; *Holy Spirit Association v New York State Congress of Parent and Teachers, Inc.*, 95 Misc 2d 548, 550; 408 NYS 2d 261 (NY S Ct, 1978); *Stevens v Tillman*, 855 F2d 394, 395 (CA 7, 1988).

Plaintiffs contend that Mt. Pleasant uniquely coordinates with Boy Scouts so its student-members may meet at members' schools. They also allege that Mt. Pleasant lets Boy Scouts officially use school names to reference its troops. They assert these facts evince joint Mt. Pleasant-Boy Scouts participation. We disagree.

Mt. Pleasant is responsible for allocating facility resources. However, as discussed, there is no evidence to show Mt. Pleasant favored Boy Scouts over any other school-related group or uniquely rationed out its facilities to Boy Scouts to plaintiffs' detriment. That Mt. Pleasant accommodated Boy Scouts' location requests, again on a first-come-first-serve basis, does not show joint participation; rather, this is proof of the sound administration of Mt. Pleasant's facility allocation more than probative evidence of entwinement.

Plaintiffs suggest that Boy Scouts' members' use of Mt. Pleasant names shows joint participation. Pursuant to Mt. Pleasant Policy 7510, official use of school names requires permission from the superintendent. No evidence was offered to show Boy Scouts received permission or that Mt. Pleasant Superintendent, Gary Allen, gave permission. Plaintiffs only showed that Boy Scouts' members colloquially used Mt. Pleasant names to reference troops; there is nothing 'joint' in that showing. The record shows that Boy Scouts troops are officially referred to by troop number, not school name.

Thus, Boy Scouts and Mt. Pleasant did not jointly participate in Boy Scouts' discriminatory conduct because the group accessed Mt. Pleasant facility or its members' colloquially used school names to refer to its troops.

iv. *In-school Literature Distribution and Visitation*

As discussed, Mt. Pleasant allowed Boy Scouts to distribute its flyers under the same terms and conditions that applied equally to all other groups. There was nothing uniquely cooperative about Boy Scouts' use of Mt. Pleasant literature distribution system; Mt. Pleasant merely acquiesced in Boy Scouts' use of the neutral policy Mt. Pleasant implemented to balance free speech and free exercise rights. Acquiescence is not sufficient to establish state action. *Blum*, *supra*.

Boy Scouts' school-hour visits resulted from Boy Scouts' impetus, as opposed to joint efforts between the group and Mt. Pleasant. Those visits showed no ostensible link to Boy Scouts' religious nature. Therefore, Mt. Pleasant merely approved Boy Scouts' temporary non-religious visit.

Therefore, Boy Scouts' advertising and recruiting efforts did not make Mt. Pleasant a participant in Boy Scouts' exclusion of plaintiffs. Thus, because Mt. Pleasant was not jointly participating or sufficiently entwined with Boy Scouts, Boy Scouts was not a state actor.

d. *Symbiosis*

Last, the Supreme Court has found state action when a private and government entity shared a symbiotic relationship, that is, mutually conferred benefits on one another.

In *Burton v Wilmington Parking Authority*, 365 US 715; 81 S Ct 856; 6 L Ed 2d 45 (1961), the Supreme Court found symbiosis where a diner that leased space from a publicly funded government parking structure racially discriminated against black customers:

> It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. *Id*. at 724.

Here, the benefits of the Boy Scouts-Mt. Pleasant relationship were not mutually beneficial; rather, Boy Scouts was the beneficiary of Mt. Pleasant's neutral policy applicable to all groups seeking admission to school facilities. Further, this relationship was not exclusive to Mt. Pleasant and Boy Scouts; any community organization with an acceptable purpose was eligible to enjoy the same relationship. Thus, the Boy Scouts-Mt. Pleasant relationship was not peculiarly mutual and did not benefit Mt. Pleasant. Therefore, Boy Scouts was not a state actor because it did not share a symbiotic relationship with Mt. Pleasant.

Here, plaintiffs have failed to show that Boy Scouts' policy can be fairly attributed to Mt. Pleasant, as a state actor, and has failed to show a sufficient relationship between Boy Scouts and Mt. Pleasant to make Boy Scouts a state actor. Thus, plaintiffs have failed to show that their constitutional rights to equal protection have been violated.

IV. PUBLIC ACCOMMODATION CLAIMS

Michigan protects the public's right to equal access to public accommodations through the Michigan Elliott-Larsen Civil Rights Act and provisions in the penal code, often called the Equal Accommodation Act, that criminalize violations of public accommodation law and impose civil liability. MCL 37.2101 *et seq*, MCL 750.146 *et seq*. These laws (1) guarantee and protect the right to full and equal enjoyment of educational institutions and places of public accommodation and (2) prohibit the publication of a communiqué that asserts that an educational institution or place of public accommodation is not open because of an individual's religion. MCL 37.2101 *et seq*, MCL 750.146 *et seq*.

The Elliott-Larsen Civil Rights Act was created to provide statutory relief for violations of this right of equal enjoyment and a foundation in law for injunctive relief and damages. MCL 37.2101. The Equal Accommodation Act provides similar relief and holds superintendents and employees of protected places civilly and criminally liable for violating the Act. MCL 750.147. *See Ferrell v Vic Tanny Int'l, Inc.*, 137 Mich App 238, 357 NW2d 669 (1984).

The Michigan Elliott-Larsen Civil Rights Act requires plaintiffs show unjustified disparate treatment or intentional discrimination related to access to a place of public accommodation or illegal advertising. *See Clarke v K-Mart Corp*, 197 Mich App 541; 495 NW2d 820 (1992). Similarly, the Equal Accommodation Act, requires a plaintiff show a withholding, refusal, or denial of public accommodations or illegal advertising. *Tucich v Dearborn Indoor Racquet Club*, 107 Mich App 398; 309 NW2d 615 (1981).

A. *Full, Equal Enjoyment*

Under both Acts, Mt. Pleasant is a protected educational institution and place of public accommodation. The Michigan Elliott-Larsen Civil Rights Act prohibits educational institutions from "[d]iscriminat[ing] against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion . . . ." MCL 37.2402. The Equal Accommodation Act similarly guarantees that "[a]ll persons within the . . . state [are] entitled to full and equal accommodations, advantages, facilities and privileges . . . [of] public educational institutions . . . ." MCL 750.146.

Further the Michigan Elliott-Larsen Civil Rights Act prohibits "[d]eny[ing] an individual the full and equal enjoyment of the . . . facilities, privileges, advantages, or accommodations of a place of public accommodation . . . because of religion . . . ." MCL 37.2302(a). The Equal Accommodation Act guarantees that "[a]ll persons within the . . . state [are] entitled to full and equal accommodations, advantages, facilities and privileges . . . [of] all . . . places of public accommodation . . . ." MCL 750.146.

Plaintiffs concede that Boy Scouts' meetings are not educational institutions or places of public accommodations under either Act and recognize that Boy Scouts' members, as private club members, have a First Amendment right to freely associate, which plaintiffs' forced inclusion would violate. Further, plaintiffs concede that, as a private club, Boy Scouts would normally be exempted from Public Accommodation statutes, see MCL 37.2303; *Roberts v United States Jaycees*, 468 US 609; 104 S Ct 3244; 82 L Ed 2d 462 (1984), but contend that Boy Scouts is not exempt because it is practicing its exclusionary policy in Mt. Pleasant, an avowed educational institution and place of public accommodation.

Boy Scouts and Mt. Pleasant did not violate Michigan's public-accommodation protections. Mt. Pleasant did not discriminate against plaintiffs' full, equal use of or benefit from Mt. Pleasant or its programs; nor did Boy Scouts, as a beneficiary of Mt. Pleasant's neutral access policy, inhibit plaintiffs right to full, equal access.

However, Boy Scouts' meetings were not Mt. Pleasant "programs," from which Ben was excluded; rather, they were private meetings of Boy Scouts' members who, as such, have a First Amendment right to disassociate from non-religious persons.

Further, plaintiffs had equal, but unexercised, rights of access to Mt. Pleasant for their own purposes. No evidence was offered to show that Mt. Pleasant facilities could not accommodate both Boy Scouts' activities and plaintiffs.' Mt. Pleasant did not ration its facilities to Boy Scouts over plaintiffs; rather, had they sought access to a facility, plaintiffs would have been subject to the same terms and conditions of Mt. Pleasant's neutral policy that apply to all groups. However, plaintiffs never sought admittance and, therefore, were never denied the full and equal enjoyment of Mt. Pleasant.

Plaintiffs argue that, because Boy Scouts meetings are closed to them, they are effectively deprived *full* enjoyment of Mt. Pleasant facilities. This argument sweeps too broadly. Full enjoyment does not require patrons of public accommodations or educational facilities be given carte blanch to indiscriminately enter any classroom or gymnasium regardless of the competing interests of others. That plaintiffs might be required to share separate areas of the same building

with a religious or other exclusionary group is an onus that must be suffered in a democratic society. No proof has been offered to show that, despite Boy Scouts' presence, plaintiffs could not also fully enjoy use of Mt. Pleasant facilities. Thus, plaintiffs were not denied their rights to fully and equally enjoy Mt. Pleasant as an educational institution and place of public accommodation.

B. *Prohibited Communication Purporting to Deny the Full Enjoyment of Mt. Pleasant*

The Michigan Elliott-Larsen Civil Rights Act and the Equal Accommodation Act prohibit the direct or indirect publication of any communiqué indicating that the full and equal enjoyment of the facilities, privileges, advantages, or accommodations of a place of public accommodation will be denied an individual because of religion or that an individual's presence at a place of public accommodation is unwelcome or unacceptable because of their religion. MCL 37.2302, 37.2402(e), MCL 750.147.

Boy Scouts did print and Mt. Pleasant did circulate flyers including Boy Scouts' declaration of religious principle. However, we need not decide whether those flyers violate Michigan public accommodations statutes because, as explained, plaintiffs effectively caused their alleged injury and, therefore, do not have standing to challenge the flyers. *See Lujan*, *supra*.

Affirmed.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Henry William Saad