NO. _____

IN THE

Supreme Court of the United States

JILL HILE, ET AL.,

Petitioners,

v.

STATE OF MICHIGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following modest legislative victories in the 1960s in favor of parochial-school parents and their children, antireligious groups mobilized voter animus against religion to adopt a Michigan constitutional amendment in 1970—akin to a so-called Blaine Amendment—that facially bars any direct or indirect public financial support for nonpublic schools. Ruling shortly thereafter, the Michigan Supreme Court recognized that, despite its neutral language, the amendment's impact was almost entirely on Michigan religious schools and families: the amendment undid the modest legislative victories parochial-school parents obtained and imposed a near insurmountable burden on future attempts to secure such funding. Indeed, in 2000, Michigan voters overwhelmingly rejected a ballot proposal that would have authorized school vouchers and partially repealed the 1970 amendment.

This lawsuit challenges the Michigan Blaine Amendment's validity and presents two questions of substantial importance for this Court's review:

1. Whether Michigan's constitutional amendment barring direct and indirect public financial support for parochial and other nonpublic schools violates the Equal Protection Clause.

2. Whether the failure of the 2000 school-voucher ballot proposal purges the amendment of its religious animus for purposes of the Equal Protection Clause.

PARTIES TO THE PROCEEDING

Petitioners Jill and Joseph Hile, Jessie and Ryan Bagos, Samantha and Phillip Jacokes, Nicole and Jason Leitch, Michelle and George Lupanoff, and Parent Advocates for Choice in Education Foundation were plaintiffs in the district court and appellants in the court of appeals. Petitioner Parent Advocates for Choice in Education Foundation has no parent company, and no publicly held company owns 10 percent or more of its stock.

Respondents the State of Michigan; Gretchen Whitmer, in her official capacity as Governor of the State of Michigan; and Rachel Eubanks, in her official capacity as Michigan's State Treasurer, were defendants in the district court and appellees in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Western District of Michigan:

- *Hile* v. *Michigan*, No. 1:21-cv-829 (W.D. Mich.), judgment entered on September 30, 2022.
- *Hile* v. *Michigan*, No. 22-1986 (6th Cir.), judgment entered on November 6, 2023.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The district court's opinion granting Respondents' motion to dismiss is unreported but is reprinted at App. 40a–50a. The Sixth Circuit's opinion affirming the dismissal is reported at 86 F.4th 269 and reprinted at App. 1a–39a.

JURISDICTION

The court of appeals entered its judgment on November 6, 2023. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article VIII, § 2, ¶ 2 of Michigan's 1963 Constitution provides, in relevant part:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or

indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

INTRODUCTION

In *Carson* v. *Makin*, 596 U.S. 767 (2022); *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020); and *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017), this Court condemned state constitutional provisions and rules that deprive religious schools and families of an equal opportunity to public benefits. But in each case, the applicable prohibition applied expressly to "religious" or "sectarian" schools. As a result, state officials continue to enforce constitutional provisions and rules that are adopted for the same antireligious purpose and have the same antireligious effect, provided that the provisions are couched in neutral language that applies broadly to all private schools. Michigan has just such an amendment. And if this Court does not act, Michigan's workaround will become the loophole through which many states discriminate against religious families and individuals.

In the late 1960s, after years of paying private, religious-school tuition *and* paying taxes that subsidized public schools, families who sent their children to private religious schools began to lobby the State of Michigan to provide a modicum of financial support. The Michigan Legislature ultimately passed 1970 PA 100, which allowed Michigan's Department of Education to purchase educational services from nonpublic schools in secular subjects. The Michigan Supreme Court upheld the law, concluding that it neither advanced nor inhibited religion and did not violate the free exercise or establishment clauses of the U.S. or Michigan constitutions. *In re Advisory Op. re Constitutionality of PA 1970, No. 100*, 180 N.W.2d 265 (Mich. 1970).

Political forces mobilized voter animus against religion to mount a ballot campaign that resulted in Article VIII, § 2, ¶ 2 of Michigan's Constitution—a so-called "Blaine Amendment"—that bars any direct or indirect public financial support for nonpublic schools, whether by appropriation, tax exemption, or otherwise. As noted, this Court has thrice condemned similar state constitutional provisions and rules that deprive religious schools and families of an equal opportunity to public benefits, in *Carson*, *Espinoza*, and *Trinity Lutheran*. But Michigan has cleverly defended its Blaine Amendment on the ground that Article VIII, § 2, ¶ 2 is facially neutral, i.e., it prohibits public financial support for *any* nonpublic school and does not explicitly target only religious schools.

Michigan successfully persuaded the Sixth Circuit that the amendment's facial neutrality insulates it from an equal protection challenge. But the historical record indisputably shows that the alleged neutrality is a sham. Indeed, the Michigan Supreme Court found contemporaneously that "with ninety-eight percent of the private school students being in church-related schools" in 1970, Article VIII, § 2, ¶ 2's classification "is nearly total" in its "impact" on the class of "church-related schools." *Traverse City Sch. Dist.* v. *Attorney Gen.*, 185 N.W.2d 9, 29 (Mich. 1971). "As far as the voters were concerned in 1970 . . . '—[the Blaine Amendment] was an anti-parochiaid amendment—no public monies to run parochial schools—and beyond that all else was utter and complete confusion.'" *Council of Orgs. & Others for Educ. About Parochiaid, Inc.* v. *Engler*, 566 N.W.2d 208, 220–21 (Mich. 1997) (quoting *Traverse City*, 185 N.W.2d at 17 n.2). In other words, the Blaine Amendment's antireligious impact was intentional, and it continues today.

Alternatively, the Sixth Circuit held that any religious animus in enacting the "neutral" Blaine Amendment was purged by the failure of a 2000 ballot proposal. That proposal would have authorized school vouchers in Michigan and thus partially repealed Article VIII, § 2, ¶ 2. But that conclusion was wrong under this Court's precedent: the Blaine Amendment's "terms keep it '[t]ethered' to its original 'bias,'" and there is no evidence whatsoever "that [Michigan] 'actually confront[ed]' the provision's 'tawdry past'" in failing to partially repeal it. *Espinoza*, 140 S. Ct. at 2274 (Alito, J., concurring) (quoting *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring in part)).

Petitioners fully agree with this Court that a "State need not subsidize private education." *Espinoza*, 140 S. Ct at 2261. But Michigan cannot enshrine a restriction against religious families in its constitution that makes it more difficult for them—as compared to other similarly situated families—to advocate for public benefits. To be sure, the ultimate policy outcome on aid to religious schools may be the same; the democratic process yields winners and losers, and religious and other minorities often are on the losing side. So if Petitioners prevail in this Court, they may still lose at the state capitol. But a state goes too far when it intentionally requires laws that benefit religious citizens to go through a more onerous approval procedure than laws that benefit unprotected classes. Petitioners seek only a level political-access field with public-school parents.

The petition should be granted.

STATEMENT OF THE CASE

A. Petitioners

Petitioners Jill and Joseph Hile, Jessie and Ryan Bagos, Samantha and Phillip Jacokes, Nicole and Jason Leitch, and Michelle and George Lupanoff are parents of school-age children who would like to obtain public assistance for their children's private, religious-school tuition in Michigan. Dist. Ct. Dkt. No. 1 ¶¶ 17–21. Each is a member of Petitioner Parent Advocates for Choice in Education Foundation, also known as P.A.C.E. *Id.*

P.A.C.E. is a grassroots coalition of parent advocates who seek to protect and advance their rights regarding their children's education. *Id.* ¶ 22. Petitioners brought this case to challenge the provision in Michigan's Constitution that bars direct and indirect financial support to religious and other nonpublic schools.

B. The sordid history of Blaine Amendments

State constitutional amendments prohibiting the use of public funds to support or maintain religious schools are called "Blaine Amendments" after Congressman and later Senator James G. Blaine of Maine. Dist. Ct. Dkt. No. 1 ¶ 36; see also Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 131 (2000). In 1875, Blaine proposed an amendment to the U.S. Constitution that sought to bar government aid to sectarian schools and institutions. Dist. Ct. Dkt. No. 1 ¶ 36.

It is now beyond dispute that Blaine's amendment was largely an anti-Catholic response to the request for public funding for Catholic schools. *Id.* ¶ 44.

"Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was a code for 'Catholic.'" *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

Although Blaine's amendment failed at the federal level, Dist. Ct. Dkt. No. 1 ¶ 43, "approximately thirty states wrote or amended their constitutions to include language substantially similar to that of" the proposed federal amendment. Heytens, *supra*, at 133. These state Blaine Amendments were significantly motivated by anti-Catholic religious animus "to make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting).

C. Efforts to obtain public benefits for Michigan religious schools

Michigan was no stranger to this nativist, anti-Catholic, and anti-parochial school zeitgeist throughout the late 19th and 20th centuries. Dist. Ct. Dkt. No. 1 ¶¶ 48–62. In 1960, a chapter of Citizens for Educational Freedom ("CEF") was launched at St. Matthew's Lutheran Church in Detroit. *Id.* ¶ 58. CEF advocated for parents' rights to send their children to the schools of their choice. *Id.* ¶ 59. Michigan's CEF chapters were ecumenical, including Catholic, Calvinist, and Lutheran members. See *id.* ¶ 60.

CEF lobbied for modest public support for religious and other nonpublic schools during the 1960s against opposition typically cast in religious terms. *Id.* ¶¶ 62–76. Indeed, CEF's lobbying led to the creation of an organization to oppose CEF's efforts,

Michigan Citizens for the Advancement of Public Education or CAPE. *Id.* ¶ 74. CAPE's antireligious aims were clear. *Id.* ¶ 75. One member lamented "three recent state laws" that had "diverted money to Church schools" and charged religious schools with "creating ghettos of the mind." *Ibid.*

In early 1968, the Investment in the Education of Children Act was introduced in the Michigan Legislature. *Id.* ¶ 78. It would have provided grants of up to $150 to parents of non-public students. *Ibid.* The media labeled the act "Parochiaid" because the overwhelming majority of students in private schools were attending religious schools. *Id.* ¶ 79. Michigan's House and Senate ultimately issued a joint report recommending that the state appropriate $40 million to purchase the teaching services of lay teachers of secular subjects in non-public schools. *Id.* ¶ 81.

Eventually, the Legislature took up this recommendation and passed legislation, 1970 PA 100, which allowed the Department of Education to purchase educational services from nonpublic schools in secular subjects, aiding religious schools by helping to offset some of their labor costs. *Id.* ¶ 82. In 1970, the vast majority of nonpublic school students attended religious schools. *Id.* ¶ 83. Catholic schools alone accounted for nearly 218,000 of the 275,000 nonpublic school students in the state. *Id.* ¶ 84 (citing *Detroit News*, Nov. 1, 1970). The National Union of Christian Schools of the Christian Reformed Church enrolled another 23,000 students. *Id.* ¶ 85 (citing *Detroit News*, Nov. 1, 1970). As a result, "nonpublic schools" in Michigan circa 1970 *meant* "religious schools." *Id.* ¶ 86.

D. Passage of Michigan's Blaine Amendment

Opponents of any public funding for religious schools created a ballot committee, the "Council Against Parochiaid." *Id.* ¶ 88. The term "Parochiaid" is an antireligious slur that plays on the word "parochial," which means "of or relating to a church parish." Parochial, *Merriam-Webster's Unabridged Dictionary*, https://unabridged.merriam-webster.com/unabridged/parochial. The loaded term thus reveals that the initiative's antireligious motivation and purpose mirrored that of the various state Blaine Amendments of the 1800s. Dist. Ct. Dkt. No. 1 ¶ 89.

The Council Against Parochiaid drafted, circulated, and advocated for what was designated "Proposal C" on the November 1970 ballot and eventually became Article VIII, § 2, ¶ 2 of the Michigan Constitution—Michigan's Blaine Amendment. *Id.* ¶ 90. The proposal was seemingly neutral in its language, barring public funding not only for "denominational" schools but for all "nonpublic" schools. *Id.* ¶ 91. But the public advocacy for the proposal removed any doubt Proposal C was an antireligious measure aimed at harming religious groups—especially the Roman Catholic Church. *Id.* ¶¶ 91–92 (collecting more than two dozen examples of public advocacy in support of Proposal C and against religious schools). Recognizing the antireligious hostility, the Michigan Supreme Court concluded in 1971, only one year after Proposal C's passage, that "[a]s far as the voters were concerned in 1970 . . . '—[*the Blaine Amendment*] *was an anti-parochiaid amendment—no public monies to run parochial schools*.'" *Parochiaid*, 566 N.W.2d at 220–21 (emphasis added) (quoting *Traverse City*, 185 N.W.2d at 17 n.2).

Regrettably, the opponents' religious invective proved successful with Michigan citizens. Dist. Ct. Dkt. No. 1 ¶ 93. Voters approved Proposal C with 56 percent of the votes cast in November 1970. Matthew J. Brouillette, Mackinac Center for Public Policy, *School Choice in Michigan: A Primer for Freedom in Education* 14–15 (1999).

E. The Michigan Blaine Amendment's effects on religious schools and families

Proposal C's prohibition on public funding for parochial and private schools became part of Michigan's Constitution upon adoption. Mich. Const. Art. VIII, § 2, ¶ 2. The constitutionalizing of the prohibition meant and still means that parents seeking to send their children to parochial schools cannot simply lobby their state representative or state senator for governmental aid or tuition help as parents of children attending public schools can and freely do. After all, the Michigan Legislature cannot pass a law that violates Michigan's Constitution. Rather, parochial-school parents first must pursue and pass a constitutional amendment reversing the Blaine Amendment.

That is no easy process. Under Michigan's Constitution, amendments may be proposed in two ways: (1) by two-thirds vote of both houses of the Michigan Legislature, or (2) by petition of the number of registered voters equal to or greater than 10 percent of the votes for governor[1] in the last general

[1] For reference, according to the Michigan Secretary of State, 4,461,972 total votes were cast for governor in the 2022 general election. *2022 Michigan Election Results*, Mich. Sec'y of State,

[footnote continued on next page]

gubernatorial election. Mich. Const. Art. XII, §§ 1–2. Successfully proposed amendments must then be approved by a majority of voters. *Ibid.*

Setting aside these procedural hurdles, the amendment process is expensive. For instance, campaign finance reports submitted shortly before the November 2022 election showed that proponents and opponents of Proposition 3—which amended Michigan's Constitution to create a right to abortion—raised $57 million dollars, more than "campaigns for governor, secretary of state and attorney general combined." Yue Stella Yu, *Proposal 3 abortion measure generates $57M in Michigan campaign donations*, Bridge Michigan (Oct. 28, 2022), available at https://bit.ly/3R18qGl. This places religious citizens who desire to lobby for funding for their children's religious schools at a distinct political disadvantage vis-à-vis parents of public-school students.

F. Michigan's 2000 voucher proposal

In 2000, Michigan voters were asked to consider a school-voucher ballot proposal that would have benefitted religious schools and families. That process shows how difficult it is to amend Michigan's Constitution. The proposal would have done the following:

a. Eliminated the Blaine Amendment's ban on *indirect* support of students attending nonpublic schools through tuition vouchers, credits, tax

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https://mielections.us/election/results/2022GEN_CENR.html (last updated Dec. 22, 2022). So, a proponent today would need more than 446,000 signatures.

benefits, exemptions or deductions, subsidies, grants or loans of public monies or property.

b. Allowed students in certain public-school districts to use tuition vouchers.

c. Required teacher testing in public schools and nonpublic schools redeeming tuition vouchers.

d. Adjusted minimum per-pupil funding levels.

Michigan Legislature, *Initiative Petitions—2000 Proposed Amendment to the Constitution*, available at https://bit.ly/3vbixSK. The proposal failed by a more than 2:1 margin. *Ibid.*

G. Michigan's charter schools

Notwithstanding the Blaine Amendment's facial prohibition of aid to all nonpublic schools, Michigan provides secular private schools an option to receive public funds. Specifically, private, secular schools that desire public funding can seek charter-school status. See generally Mich. Comp. Laws § 380.502. Private religious schools cannot. Dist. Ct. Dkt. No. 1 ¶ 138.

Notably, Michigan's charter-school law was challenged based on the Blaine Amendment. *Parochiaid,* 566 N.W.2d at 211. The Michigan Supreme Court explicitly relied on the Blaine Amendment's anti-religious purpose to reject that challenge. *Id.* at 220–21. The Court explained that the Blaine Amendment did not bar the law because "the common understanding of the voters in 1970 was that no monies would be spent to run a parochial school" and "public school academies are not parochial schools." *Id.* at 221.

H. Proceedings below.

In the district court, Petitioners alleged, in relevant part,[2] that Michigan's Blaine Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it eliminated the right of religious persons and institutions to petition for legislative help on the same terms as other citizens. App. 44a. Respondents moved to dismiss the equal protection claim under Federal Rule of Civil Procedure 12(b)(6). App. 41a. They contended that the Blaine Amendment does not violate the Fourteenth Amendment because it is facially neutral. See *ibid.*

The district court granted Respondents' motion to dismiss. *Ibid.* In relevant part, the district court doubted that this Court's Fourteenth Amendment political-disenfranchisement doctrine, on which Petitioners' equal protection claim is based, still has any viability. App. 48a–49a. And if it did, the district court reasoned, it applies "only in situations where the text of the legislation or ordinance at issue expressly single[s] out race as the trigger for additional procedural burdens." App. 48a. Because Petitioners' claim deals with religion, not race, and a facially neutral enactment, the district court held that it failed as a matter of law. App. 49a.

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[2] Petitioners also brought claims related to the Blaine Amendment's effect on uses of tax-advantaged funds under the Michigan Education Savings Program Act. App. 42a–43a. Michigan successfully avoided the district court's adjudication of those claims on the ground that it required the interpretation of state law that only a state court should provide.

A divided panel of the Sixth Circuit affirmed. Disagreeing with the district court, the panel majority assumed without deciding that the political-disenfranchisement doctrine applies to religious as well as racial discrimination. App. 15a–16a. It concluded, however, that Petitioners' claim failed because Michigan's Blaine Amendment is facially neutral and, in the panel majority's view, represents "a legitimate policy choice." App. 16a. The panel majority discounted the extensive historical record demonstrating the Blaine Amendment's antireligious intent based on the failure of the 2000 school-voucher ballot proposal that would have partially repealed the Blaine Amendment. App. 20a–22a. The majority concluded that "Michigan voters' . . . rejection of the 2000 ballot proposal eradicated any possible concerns about anti-religious animus stemming from the 1970 campaign surrounding Proposal C." App. 22a.

Judge Murphy dissented. He concluded that Petitioners lack standing because they did not explicitly plead that they would lobby Michigan's Legislature if the Blaine Amendment were invalidated, App. 34a–35a, even though the complaint as a whole made clear that the individual Petitioners and P.A.C.E. have an intense interest in changing Michigan law to accommodate support for private religious schools.

REASONS FOR GRANTING THE PETITION

In *Trinity Lutheran*, *Espinoza*, and *Carson*, this Court held that a state may not deprive religious schools and families of an equal opportunity to receive public benefits. The Sixth Circuit's egregiously wrong decision here shows that this Court's work is not yet finished.

Michigan, like a minority of states, has a facially neutral Blaine Amendment. The historical record—including the Michigan Supreme Court's own findings—demonstrates that Michigan's Blaine Amendment was motivated by religious animus and impacted religious schools almost exclusively. In other words, the Michigan Blaine Amendment's facial neutrality is a sham, and it shares the same anti-religious pedigree of constitutional provisions that target "religious" or "sectarian" schools for exclusion from public-benefit programs.

Absent this Court's review, Michigan will continue to discriminate against religious schools and families using a state constitutional provision that is indistinguishable in intent and effect from the provisions this Court struck down in *Trinity Lutheran*, *Espinoza*, and *Carson*. Worse, Michigan's Blaine Amendment likely will be a model for other states that want to circumvent this Court's precedent and can do so by cloaking their Blaine Amendments in facially neutral language.

The Court should grant review on both questions presented and confirm that sham neutrality does not insulate state enactments that exclude religious persons from an equal opportunity to receive public benefits.

I. The Sixth Circuit's decision is egregiously wrong and improperly endorses sham neutrality.

A. Michigan's Blaine Amendment falls squarely under this Court's political-disenfranchisement doctrine precedent.

The Sixth Circuit questioned whether political-disenfranchisement claims extend to religious discrimination but held it did not need to reach the issue due to the Michigan Blaine Amendment's "neutral" phrasing and a failed statewide vote for school vouchers in 2000. App. 15a–16a. But the key facts here map neatly onto this Court's primary political-disenfranchisement decisions, *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982).

In *Hunter*, the Akron City Council passed a real-estate antidiscrimination ordinance. Voters responded by amending the city's charter to require that ordinances regulating real-estate transactions based on race, religion, or ancestry (but not on other bases) be approved by a majority of voters. 393 U.S. at 386–87. The Court noted the structural disadvantage the charter amendment created for racial *and religious minorities*:

> Only laws to end housing discrimination must run [the] gauntlet [of a referendum]. It is true that the section draws no distinctions among racial *and religious groups*. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But [the charter amendment] disadvantages those who would benefit from laws

> barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate in their favor. [*Id.* at 390–91 (emphasis added).]

This structural disadvantage ran afoul of the Equal Protection Clause: a state "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393. Both Michigan and the lower courts expressed skepticism that the political-disenfranchisement doctrine applies beyond the context of race. But as this discussion shows, this Court recognized the political-disenfranchisement doctrine's applicability to religious classifications from its very beginning—in *Hunter* itself.

This Court reaffirmed the anti-political restructuring principle in *Seattle*. There, a Seattle school district adopted a busing plan to desegregate the city's schools. 458 U.S. at 461. Seattle residents opposed to the plan formed an advocacy group, which successfully proposed a statewide ballot initiative that barred school boards from "directly or indirectly requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest" to the student's home and offers the student's course of study. *Id.* at 461–62. Despite the initiative's facial neutrality, advocacy during the campaign made clear that its target was busing for purposes of desegregation. *Id.* at 463; see also *id.* at 471.

As in *Hunter*, the Court rejected this attempt to force protected minorities to jump through extra hoops to obtain legislative help. It is unconstitutional, the Court held, "for a community to require that laws or ordinances designed to ameliorate race relations or to protect racial minorities, be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure." *Id.* at 487. States cannot allocate power to place "unusual burdens" on suspect classes to "enact legislation specifically designed to overcome the 'special condition' of prejudice." *Id.* at 486 (quoting *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

More than 30 years later, this Court granted certiorari in *Schuette* v. *Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014), to consider whether a Michigan constitutional amendment *barring racial preferences* violated the Equal Protection Clause under the political-disenfranchisement doctrine. While rejecting application of the doctrine to invalidate Michigan's equal-treatment amendment, 572 U.S. at 302, the Court reaffirmed the political-disenfranchisement doctrine's vitality in other contexts. "*Hunter*[ ] and *Seattle*," the Court explained, "are . . . cases . . . in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race," that is, inflicted because of a group's suspect class. *Id.* at 313–14. "[W]hen hurt or injury is inflicted on" a suspect class "by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Id.* at 313. And as *Hunter* made clear, a suspect class means not only racial minorities but also people of faith.

That's exactly what Petitioners allege here. It is beyond dispute that Michigan's Blaine Amendment "imposes direct and undeniable burdens" on minority religious interests. *Seattle*, 458 U.S. at 484. Michigan's adoption of its Blaine Amendment did more than simply undo the modest legislative victories parochial-school supporters obtained in the 1960s. The Blaine Amendment also imposes a near insurmountable burden on future attempts to obtain similar relief from the Michigan Legislature. No longer may religious people and schools lobby their state representative or state senator for governmental aid or tuition help, like public-school and secular private-school parents.[3] Rather, they must undertake the onerous and expensive process of securing hundreds of thousands of signatures and passing a state constitutional amendment in a statewide election that costs tens of millions of dollars. Only *then* would Petitioners be able to lobby for aid to private religious schools that would not violate Michigan's Constitution.

By placing a political restriction on religious persons' ability to obtain state aid for religious-school tuition, Michigan's Blaine Amendment was designed to and does impose injuries on religious minorities. As *Hunter* and *Seattle* make clear, restructuring the political process in this fashion violates the Equal Protection Clause.

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[3] As noted earlier, Michigan provides a mechanism for private, secular schools to obtain public funding by seeking charter-school status. See generally Mich. Comp. Laws § 380.502. Private religious schools are denied that same choice. Dist. Ct. Dkt. No. 1 ¶ 138.

B. The Blaine Amendment's sham neutrality does not save it from strict scrutiny.

The Sixth Circuit gave near-dispositive weight to the Blaine Amendment's facial, sham neutrality. App. 16a–17a. But just as in the free exercise context, e.g., *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) ("A plaintiff may . . . prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise; in cases like that we have 'set aside' such policies without further inquiry." (quoting *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018))); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."), facial neutrality does not give the government a free pass in the equal protection context. Where, as here, discrimination motivated a facially neutral enactment, the enactment violates the Equal Protection Clause.

Consider first the cases underlying the political-disenfranchisement doctrine. In *Hunter* and *Seattle*, the challenged enactments also were facially neutral. *Seattle*, 458 U.S. at 471 ("[D]espite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes."); *Hunter*, 393 U.S. at 391 ("[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority."); see also *Reitman* v. *Mulkey*, 387 U.S. 369, 371 n.2 (1967) (quoting the enactment at issue). That facial neutrality did not stop this Court from subjecting the

enactments to further scrutiny and ultimately concluding that they violated the Equal Protection Clause.

Outside the political-disenfranchisement-doctrine context, this Court has likewise made clear that "a classification that is ostensibly neutral but is an obvious pretext" for purposeful discrimination against a suspect class "is presumptively invalid." *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 272 (1979) (collecting cases). "[S]tatutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express . . . classifications, but also when, though . . . neutral on their face, they are motivated by a [discriminatory] purpose or object." *Miller* v. *Johnson*, 515 U.S. 900, 913 (1995); accord *Hunter* v. *Underwood*, 471 U.S. 222, 229 (1985) (holding that a facially neutral state constitutional amendment violated the Equal Protection Clause because "delegates to the all-white convention were not secretive about their [discriminatory] purpose").

"Determining whether invidious discriminatory purpose was a motivating factor" of a law or government action "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). This sensitive inquiry requires looking at the effect of the law, the "historical background of the decision" giving rise to it, and the "legislative or administrative history" of the law's enactment. *Id.* at 266–68; accord *Lukumi*, 508 U.S. at 540 ("Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question,

and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.").

Here, evaluation of the Michigan Blaine Amendment's purpose has already been made, with the Michigan Supreme Court having found—contemporaneously—that the amendment was motivated by religious bias and targeted at religious schools and families. That court described the facially neutral Blaine Amendment as "an anti-parochiaid amendment." *Parochiaid*, 566 N.W.2d at 220–21 (quoting *Traverse City*, 185 N.W.2d at 17 n.2). "As far as the voter was concerned, the result of all the pre-election talk and action concerning [the Blaine Amendment proposal] was simply this—[the proposal] was an anti-parochiaid amendment—no public monies to run *parochial schools*—and beyond that all else was utter and complete confusion." *Traverse City*, 185 N.W.2d at 17 n.2 (emphasis added).

Given the amendment's purpose, the Michigan Supreme Court also unsurprisingly concluded that its impact falls almost exclusively on "church-related schools": "[W]ith ninety-eight percent of the private school students being in church-related schools the 'impact' is nearly total." *Id.* at 29. Later, the Michigan Supreme Court relied on the Blaine Amendment's antireligious purpose to reject a Blaine Amendment-based challenge to Michigan's charter-school law. *Parochiaid*, 566 N.W.2d at 221 (rejecting the challenge because, *inter alia*, "the common understanding of the voters in 1970 was that no monies would be spent to run a parochial school" and charter schools under Michigan's statute cannot be parochial).

The panel majority discounted the Michigan Supreme Court's findings, relying on other language in that court's opinions and a more recent, evenly split decision that therefore decided nothing. App. 17a–19a. But even if one accords the Michigan Supreme Court's findings no weight, the historical record of the lead up to and passage of the Blaine Amendment recited at length in Petitioners' complaint illustrates its antireligious purpose and sham neutrality. Much like the plaintiffs in *Hunter* and *Seattle*, those seeking a modicum of public funding for parents to send children to parochial schools achieved modest legislative victories in the 1960s and 1970. Dist. Ct. Dkt. No. 1 ¶¶ 65, 71, 82. But just as religious parents who decided to send their children to religious schools were to receive some legislative support in educating their children, the Council Against Parochiaid swept in and successfully advocated passage of a constitutional amendment—the Blaine Amendment—that took away that gain and placed an additional restriction on religious parents' ability to ever achieve such a gain again. *Id.* ¶¶ 87–94.

Those who spearheaded Michigan's Blaine Amendment were not subtle about their purposes. They did not name their group the "Public School Initiative" but the "Council Against Parochiaid." This is the religious equivalent of naming an organization advocating against public funding for majority minority schools the "Council Against Black and Hispanic Education." And when advocating for the passage of Michigan's Blaine Amendment, the Council Against Parochiaid doubled down on its antireligious motives. See Dist. Ct. Dkt. No. 1 ¶ 92 (describing the antireligious rhetoric used to advocate for the Blaine Amendment).

In sum, the Michigan Supreme Court's characterization of the Blaine Amendment's purposes was an accurate summary of an abhorrent historical record. It is beyond reasonable dispute that the Blaine Amendment was adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects" on religious people. *Feeney*, 442 U.S. at 279; see also *Underwood*, 471 U.S. at 232 ("[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was *a* 'but-for' motivation for the enactment of § 182." (emphasis added)); cf. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) ("[G]overnment regulations are not neutral . . . whenever they treat any comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." (citations omitted)). That is sufficient to establish an equal protection violation.

C. The failure of the 2000 school-voucher ballot proposal does not purge the Blaine Amendment's religious animus.

Relying on *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), the panel majority summarily concluded that the failure of Michigan's 2000 school-voucher ballot proposal purged the Blaine Amendment of any discriminatory purpose. App. 20a–22a. This Court should reject that attempt to insulate the majority's ruling that Michigan's Blaine Amendment was somehow neutral when it comes to religion.

In *Rostker*, this Court rejected a due process challenge to the Military Selective Service Act (the "MSSA"), which authorizes draft registration only of men and not women. 453 U.S. at 82–83. As part of its analysis, the Court considered whether the legislative history relevant to the MSSA's constitutionality was only that from 1948, when Congress first enacted the statute, or also included the history from 1980, when Congress extensively reconsidered the MSSA's exclusion of women in hearings, floor debate, and committee. *Id.* at 72, 74–75. The Court held that "while Congress did not change the MSSA in 1980, . . . it did thoroughly reconsider the question of exempting women." *Id.* at 75. Thus, the 1980 legislative history was "highly relevant in assessing the constitutional validity of the exemption." *Ibid.*

Whatever *Rostker*'s merits as applied to its unique facts, it has no bearing on the Michigan Blaine Amendment's unconstitutionality. To start, the 2000 ballot proposal's focus was *not* repeal or readoption of the Blaine Amendment. Its target was school vouchers and teacher testing. Michigan Legislature, *Initiative Petitions—2000 Proposed Amendment to the Constitution*, available at https://bit.ly/3vbixSK. Although the school-voucher proposal required a *partial* repeal of the Blaine Amendment's ban on *indirect* aid (while maintaining the ban on direct aid), see *ibid.*, it was not the equivalent of a thorough reconsideration of Michigan's total ban on aid to parochial and other nonpublic schools and the basis for constitutionalizing that ban in the first place. Contra *Rostker*, 453 U.S. at 75. A vote against school vouchers is not the same as a vote in favor of the Blaine Amendment.

What's more, a *failed* ballot proposal to amend the Blaine Amendment does "not alter the intent with which [the Blaine Amendment], including the parts that [would] remain[], had been adopted." *Abbott* v. *Perez*, 585 U.S. 579, 604 (2018) (citing *Underwood*, 471 U.S. at 233). For instance, *Underwood* invalidated a provision in the Alabama Constitution that disenfranchised persons convicted of certain crimes. 471 U.S. at 223. The provision was facially neutral, but the historical record showed that it was motivated by racial animus at its enactment in 1901. *Id.* at 228–29.

In the more than 80 years between its enactment and the Court's decision, the Alabama provision had been amended, and some of its more obviously racist provisions had been eliminated. *Id.* at 233. This Court held that such amendment history was of no moment: "[w]ithout deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Ibid.*; cf. *United States* v. *Fordice*, 505 U.S. 717, 729 (1992) ("If policies *traceable* to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices." (emphasis added)).

More recent decisions also demonstrate the 2000 school-voucher ballot proposal's irrelevance. Just four years ago, the Court struck down Louisiana's and Oregon's constitutional provisions allowing nonunanimous jury verdicts in criminal trials, emphasizing the facially neutral provisions' discriminatory intent. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1393–94, 1401

(2020); *id.* at 1410 (Sotomayor, J., concurring in part); *id.* at 1418 (Kavanaugh, J., concurring in part). The majority found that original discriminatory intent to be relevant even though both states readopted their rules under circumstances untainted by racism. *Id.* at 1426 (Alito, J., dissenting). In "assess[ing] the functional benefits of" the rules, the Court asked, "how can that analysis proceed to ignore the very functions those rules were adopted to serve?" *Id.* at 1401 n.44.

That same Term, the Court decided *Espinoza*, which invalidated Montana's Blaine Amendment under the Free Exercise Clause. 140 S. Ct. at 2261–63. Much like in *Ramos*, Montana argued that it reenacted its amendment long after it originally was adopted, allegedly "for reasons unrelated to anti-Catholic bigotry." *Id.* at 2259. The Court found Montana's reenactment argument unpersuasive. *Ibid.* As Justice Alito explained, "the no-aid provision's terms keep it '[t]ethered' to its original 'bias,' and it is not clear at all that the State 'actually confront[ed]' the provision's 'tawdry past in reenacting it.'" *Id.* at 2274 (Alito, J., concurring) (quoting *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring in part))).

The same is true here. Whatever the reasons for the failure of the 2000 school-voucher ballot proposal (of which there is no evidence in the record), the result is that Michigan's Blaine Amendment stands as originally enacted and intended, with the same effects. The Sixth Circuit was wrong to conclude that the failed 2000 school-voucher ballot proposal somehow purged the Michigan Blaine Amendment of its antireligious intent.

II. This case is the right vehicle to confirm that sham neutrality is no escape hatch for a Blaine Amendment.

This case is an ideal vehicle to complete the work this Court began in *Trinity Lutheran*, *Espinoza*, and *Carson*.

First, the Sixth Circuit's decision squarely raises both questions that may be expected to arise with a Blaine Amendment like Michigan's: (1) does facial neutrality shield a Blaine Amendment from review notwithstanding a historical record of religious animus, and (2) what is the effect, if any, of intermediate reconsideration of a challenged Blaine Amendment in part or in whole? The Court may answer both questions in this case.

Second, review now is essential to avoid giving states seeking to circumvent this Court's holdings in *Trinity Lutheran*, *Espinoza*, and *Carson* a roadmap for doing so. Left undisturbed, the Sixth Circuit's decision instructs other states that they need only adopt a facially "neutral" Blaine Amendment that prohibits funding to private secular and religious schools alike to get around those decisions. To preempt such efforts, the Court must grant the petition and clarify that sham neutrality is no panacea for blatant religious discrimination.

Third, further percolation is unnecessary and would harm religious school and families. To be sure, there are fewer states today with facially neutral Blaine Amendments today, and as a result, there is little litigation on the questions presented. But the constitutional issues this case presents are not so novel as to require further consideration in the lower courts; they are resolved by this Court's precedents.

Moreover, delay might lead to more opinions and law-review articles. But delay would certainly lead to more religious families being denied access to public benefits and a seat at the lobbying table while being unlikely to produce more meaningful insights. Either a neutral Blaine Amendment adopted with anti-religious animus and with an antireligious effect is unconstitutional or it is not. There is no in-between.

Given the historical record, only an ostrich could conclude that Michigan's Blaine Amendment is neutral in its intent and impact. This Court should grant the petition and clarify that sham neutrality is no silver bullet for a requirement that religious families—as compared to other similarly situated families—jump through extra, likely insurmountable, hoops to advocate for public benefits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 2024

APPENDIX

PETITION APPENDIX TABLE OF CONTENTS

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0243p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JILL HILE, SAMANTHA JACOKES; PHILIP JACKOKES; NICOLE LEITCH; MICHELLE LUPANOFF; GEORGE LUPANOFF; PARENT ADVOCATES FOR CHOICE IN EDUCATION FOUNDATION; JOSEPH HILE; JESSIE BAGOS; RYAN BAGOS; JASON LEITCH, *Plaintiffs-Appellants*, *v*. STATE OF MICHIGAN; GRETCHEN WHITMER, Governor, in her official capacity; RACHAEL EUBANKS, Michigan Treasurer, in her official capacity, *Defendants-Appellees*.	No. 22-1986

Appeal from the United States District Court
for the Western District of Michigan
at Grand Rapids.
No. 1:21-cv-00829—Robert J. Jonker, District Judge.

Argued: August 2, 2023

Decided and Filed: November 6, 2023

Before: STRANCH, BUSH, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: John J. Bursch, BURSCH LAW, PLLC, Caledonia, Michigan, for Appellants. Linus Banghart-Linn, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan. **ON BRIEF:** John J. Bursch, BURSCH LAW, PLLC, Caledonia, Michigan, for Appellants. Linus Banghart-Linn, Christopher Allen, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan. Jeffrey S. Donahue, WHITE SCHNEIDER PC, Lansing, Michigan, Daniel S. Korobkin, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, for Amici Curiae.

STRANCH, J., delivered the opinion of the court in which BUSH, J., joined. MURPHY, J. (pp. 17–28), delivered a separate dissenting opinion.

OPINION

JANE B. STRANCH, Circuit Judge. Plaintiffs-Appellants are individuals, including Jill and Joseph Hile, and the organization Parent Advocates for Choice in Education (PACE) Foundation (collectively Plaintiffs). They have sued the State of Michigan and its Governor and Treasurer (collectively the State), raising free exercise and equal protection claims to challenge a 1970 state constitutional amendment that they claim had anti-religious origins. The amendment prohibits payment of "public monies" to "any private, denominational or other nonpublic" school. *See* Mich. Const. art. VIII, § 2. The State successfully moved to dismiss all claims in the complaint, and Plaintiffs appeal only the dismissal of their equal protection

claim, which is based on a political process theory. They claim that because of the amendment, religious persons and schools cannot lobby their state representatives for governmental aid or tuition help without first amending the state constitution, which they argue disadvantages them in the political process. For the following reasons, we **AFFIRM** the district court's dismissal of this claim.

I. BACKGROUND

A. The 1970 Enactment of Article VIII, § 2

In 1970, a 57% majority of Michigan voters approved a ballot initiative known as Proposal C, amending Article VIII, § 2 of Michigan's constitution, and adding the following: "No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school." Mich. Const. Art. VIII, § 2; State of Michigan Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, at 2 (2019).

The Hile complaint alleges that this ballot initiative was spurred by the legislature's passage of a law, 1970 PA 100, which "allowed the Department of Education to purchase educational services from nonpublic schools in secular subjects," (R. 1, ¶ 82, PageID 17), and authorized $22 million in spending during the 1970-71 school year, *see* 1970 PA 100, Ch. 2 § 58. In 1970, most nonpublic schools in Michigan were religious schools, and Catholic schools accounted for the majority of nonpublic school students in the state. Plaintiffs allege that "nonpublic schools" meant

"religious schools" when 1970 PA 100 was passed. Opponents of the law formed a ballot committee, the Council Against Parochiaid, and introduced Proposal C. Plaintiffs acknowledge that the language of Article VIII, § 2 is facially neutral as to religion, but contend that the advocacy behind it was not, citing a variety of speeches, trade publications, op-eds, and pro-Proposal C ads that they characterize as evidencing anti-Catholic animus.

Indeed, Plaintiffs allege that Article VIII, § 2 is a "Blaine Amendment." That name comes from an amendment to the United States Constitution that was proposed in 1875 by House Speaker James G. Blaine of Maine, which would have explicitly barred government aid to religious schools and institutions. The full text of the proposed Blaine Amendment, which failed to pass in the Senate, is as follows:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

H.R.J. Res. 1, 44th Cong., 4 Cong. Rec. 205 (1875). Plaintiffs contend that the 1875 proposal bears on the constitutionality of Article VIII, § 2, even though Michigan's amendment was enacted ninety-five years later and does not contain language specifically disfavoring funding for religious use.

B. The 2000 Election Pertaining to Article VIII, § 2

In 2000, a 69% majority of Michigan voters rejected a ballot initiative that would have amended Article VIII, § 2. *See* State of Michigan Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, at 5 (2019). The initiative would have authorized "indirect" support of non-public school students and created a voucher program permitting "any pupil resident [in certain unperforming public school districts] to receive a voucher for actual elementary and secondary school tuition to attend a nonpublic elementary or secondary school." Initiative Petitions—Proposed Amendments to the Michigan Constitution, Proposal 00-1, https://www.legislature.mi.gov/(S(ty1fmdpfvr2nzi1xxsyh0r00))documents/publications/Mpla/2000/2000-mpla-initiative.pdf. The initiative would have eliminated Article VIII, § 2's bar on indirect funding of private education by authorizing a state school voucher system. Voters chose to maintain Article VIII, § 2, which prohibits payment of public money to "any private, denominational or other nonpublic" school. There is no allegation in the complaint of any anti-religious or anti-Catholic animus associated with the 2000 election.

C. Procedural History

More than fifty years after the enactment of Article VIII, § 2, Plaintiffs brought this suit, alleging three free exercise claims and one equal protection claim. They appealed only the equal protection claim, but we briefly note the others for context.

For the free exercise claims, the individual Plaintiffs alleged that as parents of school-age children,

they have funded Michigan Education Savings Program (MESP) plans and wish to use those plans "to pay for their children's private, religious-school tuition in Michigan," but "if they do so, the State of Michigan will use [Art. VIII, § 2] to force them to reverse the Michigan tax deduction they received at the time that they made the MESP contributions." R. 1, PageID 6-7. The district court dismissed the free exercise claims on comity grounds, holding that consideration on the merits "would require this court to disregard the State's own interpretation and consistent application of its own tax law." R. 39, Op. & Order, PageID 281. This holding is not challenged on appeal.

For the equal protection claim, Plaintiffs advance a political process theory of liability—recognized by the Supreme Court in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982)—to argue that, while Article VIII, § 2 is facially neutral, it nevertheless creates a political structure that unconstitutionally discriminates against religion. The Hile complaint alleges a general injury to "religious parents and religious schools," claiming that "to secure lawful aid to help them educate their children or to help them aid their schools, they must mount a statewide campaign to amend the Constitution of the State of Michigan" and cannot simply lobby their state representative or state senator for governmental aid or tuition help. R. 1, PageID 33. The complaint does not, however, allege that the individual Plaintiffs are religious (or that they are members of any particular religious sect). And the PACE Foundation is not alleged to be a lobbying group; it is described as "coalition of parent advocates who can learn about the need to protect and advance their rights" and the

"potential impact of legislation." *Id.*, PageID 7. Plaintiffs seek a declaratory judgment that Article VIII, § 2 is unconstitutional and an order permanently enjoining its enforcement.

The district court dismissed this claim, explaining that the political process doctrine "has never been applied outside the arena of racial discrimination," and may no longer be viable after the Supreme Court plurality's decision in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 307 (2014). R. 39, PageID 283. The district court stated that Article VIII, § 2 is facially neutral:

> It does not by its terms single out any religious minority for unequal treatment; rather, it draws the line between public education, on the one hand, and all forms of private education on the other hand. That means the parents of children at nonsectarian private schools like Cranbook or Country Day are on exactly the same footing as the parents of children at Catholic Central or Grand Rapids Christian when it comes to use of public funds.

Id. The district court was "unwilling to expand an already tenuous political process doctrine into these new arenas," and granted the State's motion to dismiss. *Id.*, PageID 284. Plaintiffs timely appealed.

II. ANALYSIS

The two main issues presented in this appeal are (1) whether Plaintiffs have standing, and (2) whether the district court properly dismissed their political process claim on the merits.

A. Standard of Review

We review de novo a district court's grant of a motion to dismiss. *Hill v. Snyder*, 878 F.3d 193, 203 (6th Cir. 2017). In reviewing a facial attack to a complaint under Rule 12(b)(1) for lack of standing, "we must accept the allegations set forth in the complaint as true" while "drawing all inferences in favor of the plaintiff," just as we do in reviewing a 12(b)(6) motion to dismiss for failure to state a claim. *Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752, 756 (6th Cir. 2019) (quoting *Gaylor v. Hamilton Crossing CMBS*, 582 F. App'x 576, 579 (6th Cir. 2014)). We then "examine whether the complaint contains 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Hill*, 878 F.3d at 203 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). But "a legal conclusion couched as a factual allegation" need not be accepted as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

B. Standing

The State asserts that Plaintiffs lack standing. By dropping their claims relating to the denial of tax benefits, the State argues that Plaintiffs fail to assert an injury under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The State contends that the Hile complaint failed to adequately allege that Plaintiffs are religious, so their claim that religious persons are disadvantaged in the political process by Article VIII, § 2 is not a concrete injury for standing purposes.

While the complaint alleges that the individual Plaintiffs are "parents of school-age children" who would like to use MESP funds to pay for private religious school tuition, it does not expressly allege

that Plaintiffs themselves are religious or part of a particular religious minority. R. 1, PageID 6-7. And despite containing allegations that Article VIII, § 2 was enacted with anti-Catholic animus, Plaintiffs do not specify that they are Catholic or seek to send their children to private Catholic schools. But in "[r]eviewing the district court's decision on a motion to dismiss, we construe the plaintiff's complaint liberally," and draw "all reasonable inferences in favor of the plaintiff." *Logsdon v. Hains*, 492 F.3d 334, 340 (6th Cir. 2007). That the individual Plaintiffs are religious is a reasonable inference to draw from this complaint because they allege that they wish to send their children to religious schools, and because they assert free exercise and religious-based equal protection claims in the complaint.

That does not, however, end our standing inquiry, as injury-in-fact is required. There remains a question as to whether the Hile complaint has plausibly alleged that Plaintiffs are able and ready to participate in lobbying activities relating to public funding for private religious schools, such that they have suffered a concrete injury-in-fact. *See Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993); *Gratz v. Bollinger*, 539 U.S. 244 (2003). This is a close call because Plaintiffs abandoned on appeal their claims relating to Article VIII, § 2's effect on their ability to use tax-advantaged MESP funds for their children's private, religious education. That leaves Plaintiffs' political process claim untethered from a specific legislative policy change they may seek to advance and renders their injury somewhat conjectural. In other words, Plaintiffs seek to lobby generally, without a particular legislative policy in mind.

But at the pleading stage, a plaintiff need only demonstrate a plausible entitlement to standing. *Ass'n of Am. Physicians & Surgeons v. U.S. FDA*, 13 F.4th 531, 543-44 (6th Cir. 2021). For an equal protection claim, a party "need only demonstrate that it is able and ready" to engage in activity "and that a discriminatory policy prevents it from doing so on an equal basis." *Jacksonville*, 508 U.S. at 666. The Supreme Court has held that:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id.

Judge Murphy's comprehensive dissent takes issue with Plaintiffs' ability to show injury-in-fact. Like Judge Murphy, we are happy to leave several of the thoughtful questions posed by his dissent for another day, and focus here on the narrow issue representing its core: Whether Plaintiffs have plausibly alleged that, absent Article VIII, § 2's bar on funding for private education, they stand able and ready to lobby the Michigan legislature to allow them to use their 529 plans for religious-school tuition. Plaintiffs' allegations include that (1) they wish to use their 529 plans to pay for their children's religious-school tuition, Compl. ¶¶ 17-21, PageID 6-7; (2) Article VIII,

§ 2 means that parents who wish to send their children to religious schools, like Plaintiffs, "cannot lobby their state representative or state senator for governmental aid or tuition help," Compl. ¶ 153, PageID 33; and (3) each individual parent is a member of PACE, an organization dedicated to advancing parents' rights and evaluating legislation concerning education policy. Compl. ¶¶ 17-22, PageID 6-7. Though the question is close, making reasonable inferences in Plaintiffs' favor and drawing on "experience and common sense," these allegations render it at least plausible that if Article VIII, § 2 is declared unconstitutional, Plaintiffs would lobby their representatives to change Michigan's law concerning 529 plans. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Plaintiffs have also satisfied the final two elements of standing—causation and redressability. *See Lujan*, 504 U.S. at 560-61. Their injury is caused by Article VIII, § 2 because if there were not a constitutional prohibition on public funding for private schools, Plaintiffs could lobby their representatives for aid "with efficacy." If Plaintiffs obtain declaratory and injunctive relief, moreover, their injury will be redressed because they will be able to lobby on equal footing with those seeking aid for public schools. And if the individual Plaintiffs have standing, the PACE Foundation consequently has organizational standing. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). As a result, Plaintiffs' claims are constitutionally adequate.

C. The Merits

Turning to the merits, the parties dispute whether the political process doctrine remains viable after the Supreme Court's decision in *Schuette*, and

whether this theory of liability can apply to claims of religious discrimination. While the parties agree that Article VIII, § 2 is facially neutral, Plaintiffs argue that it was enacted for anti-religious reasons, and that it has a discriminatory impact on religious people and schools. The State disputes this characterization of the amendment and further argues that the 2000 election purged any possible taint of animus. We address these arguments below.

1. The Political Process Doctrine

The political process theory of liability was recognized by the Supreme Court in *Hunter v. Erickson* and *Washington v. Seattle School District No. 1*. In each case, local government bodies passed antidiscrimination measures (related to fair housing and school desegregation, respectively), and the wider electorate responded with ballot initiatives requiring such antidiscrimination measures to be approved by a majority of voters. Although the ballot initiatives were facially neutral, the Supreme Court recognized that they violated equal protection principles by subjecting legislation benefiting racial minorities to a more burdensome political process than that imposed on other legislation.

In *Hunter*, the city council of Akron, Ohio enacted a fair housing ordinance that prohibited discrimination on the basis of race, color, religion, or national origin. 393 U.S. at 386. Voters responded with a ballot initiative amending Akron's City Charter to prevent the city council from implementing any ordinance dealing with discrimination in housing on those bases without the approval of a majority of voters. *Id.* at 387. The new law "thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and

rental of real estate and those who sought to regulate real property transactions in pursuit of other ends." *Id.* at 390. On its face, the law treated Black and white, "Jew and gentile in an identical manner," but the Supreme Court reasoned that "the reality is that the law's impact falls on the minority." *Id.* at 391. The Court held that the ballot measure "places [a] special burden on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others." *Id.* In other words, the ballot initiative discriminated against minorities and violated the Equal Protection Clause "by making it more difficult to enact legislation [on their] behalf." *Id.* at 393.

This political process theory was reaffirmed in *Seattle*, which concerned a school district's busing plan to desegregate its schools. 458 U.S. at 461. Voters responded by passing a statewide ballot initiative that prohibited school boards from requiring students to attend a school other than the one geographically nearest to their homes. *Id.* at 462. The statewide initiative was held to violate the Equal Protection Clause because "it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." *Id.* at 470. Even though the initiative did not expressly mention race and was facially neutral, the Supreme Court concluded that "there is little doubt that the initiative was effectively drawn for racial purposes." *Id.* at 471. As the Court explained:

> The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority

> interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.

Id. at 474.

Schuette, however, casts doubt on the continued viability of political process claims. It involved a challenge to Article I, § 26 of the Michigan Constitution that was enacted by ballot initiative in 2006 and prohibited public universities from considering race in their admissions processes. 572 U.S. at 298-99. In articulating the Supreme Court's prior political process jurisprudence, a three-Justice plurality took a narrow view, explaining that "*Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities." *Id.* at 304. And "*Seattle* is best understood as a case in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race." *Id.* at 305. The *Schuette* plurality held that the political process doctrine applies only in cases where "the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race." *Id.* at 314.

The plurality specifically rejected a "broad reading" of *Hunter* and *Seattle*. *Id.* at 307. It expressed a concern that determining whether legislation benefits a particular racial group requires courts to "define individuals according to race" and results in inquiries and categories that depend on "demeaning stereotypes" such as the notion that members of the same

racial group share the same political interests. *Id.* at 308. In upholding the constitutionality of Article I, § 26, the plurality refused to disempower Michigan voters from "choosing which path to follow," reasoning that:

> Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; . . . or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.

Id. at 312.

2. Plaintiffs' Political Process Claim

As a preliminary matter, it is far from settled that a political process claim may be based on religious discrimination. The ballot initiative at issue in *Hunter* removed local authority to regulate discrimination based on race, religion, and ancestry, but that challenge was brought by a Black plaintiff alleging racial discrimination. Much of the language in *Hunter* focused on the initiative's impact on racial minorities, as did the Supreme Court's later decisions in *Seattle* and *Schuette*. Still, the Supreme Court implied in *Hunter* that the ballot initiative violated the Equal Protection Clause as to all referenced classifications. 393 U.S. at 390-91 ("[A]lthough the law on its face treats Negro and white, Jew and gentile in an

identical manner, the reality is that the law's impact falls on the minority."). And it is undisputed here that religion, like race, is a suspect classification subject to heightened scrutiny for equal protection purposes. That said, Plaintiffs cite no precedent in which a court has recognized a political process claim based on religious discrimination. We need not resolve this issue, however, because Plaintiffs' political process claim fails for other reasons.

To start, Plaintiffs offer no principled basis for distinguishing Article VIII, § 2 from the Michigan constitutional amendment prohibiting affirmative action that was upheld in *Schuette*. Plaintiffs argue that *Schuette* allowed the challenged amendment to stand because it "required equal treatment" and did not involve the sort of harm or animus present in the earlier political process cases. This is a distinction without a difference. It is undisputed that Article VIII, § 2 is facially neutral: it prohibits the payment of public funds to "private, denominational or other nonpublic" schools. It prohibits public funding of all private schools, whether religious or secular. Plaintiffs—parents who wish to send their children to religious schools—are treated the same as parents who wish to send their children to private, non-religious schools. All individuals wishing to change the funding scheme embodied in Article VIII, § 2 must follow the same process of amending Michigan's constitution.

Adding Article VIII, § 2 to Michigan's constitution through Proposal C, moreover, embodied a legitimate policy choice that public funds be spent on public schools. The Supreme Court has long held that there is no "right of private or parochial schools to share with public schools in state largesse." *Maher v. Roe*,

432 U.S. 464, 477 (1977) (quoting *Norwood v. Harrison*, 413 U.S. 455, 462 (1973)). And just last year, it reiterated that "[a] State need not subsidize private education." *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1997 (2022) (quoting *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020)). Of course, under the Free Exercise Clause, "once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Espinoza*, 140 S. Ct. at 2261. But Article VIII, § 2 does not—it draws a distinction only between public and private schools, not between secular and religious schools. While parents have a fundamental right to control the education of their children, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 549 (1983). In other words, Proposal C evidences the legitimate choice of Michigan's electorate to dedicate public funds to public schools. *Schuette*, moreover, cautioned that courts should not remove "a difficult question of public policy" from "the realm of public discussion, dialogue, and debate in an election campaign." 572 U.S. at 312. Such a withdrawal would have "serious First Amendment implications" and would be "inconsistent with the underlying premises of a responsible, functioning democracy." *Id.*

Plaintiffs contend that the facial neutrality of Article VIII, § 2 is of no moment because the Michigan Supreme Court has determined that the amendment was motivated by anti-religious bias. This argument relies on Plaintiffs' reading of a footnote in an advisory opinion of the Michigan Supreme Court that upheld the constitutionality of Article VIII, § 2 (except insofar as the provision prohibited shared-time instruction and auxiliary services). *In re Proposal C.*, 185 N.W.2d

9, 29-30 (Mich. 1971). The footnote explained that "[a]s far as the voter was concerned, the result of all the pre-election talk and action concerning Proposal C was simply this—Proposal C was an anti-parochiaid amendment—no public monies to run parochial schools—and beyond that all else was utter and complete confusion." *Id.* at 15 n.2. The Court's footnoted characterization of Proposal C as an "anti-parochiaid amendment" is a far cry from a determination or holding that it was enacted with anti-religious animus. In the body of its ruling, the Court concluded that the purpose of Proposal C "above all else" was to prohibit "state funding of purchased educational services in *the nonpublic school* where the hiring and control is in the hands of the *nonpublic school*, otherwise known as 'parochiaid.'" *Id.* at 29-30 (emphases added). This advisory opinion footnote does not constitute a holding that Proposal C was motivated by anti-religious or anti-Catholic animus.

In a more recent case, the Michigan Supreme Court made clear that whether Proposal C has an adverse impact on religion remains an open question. *See Council of Orgs. & Others for Educ. About Parochiaid v. State*, 958 N.W.2d 68, 80 n.13 (Mich. 2020). There, the Court noted that "Proposal C was drafted by an entity named 'Council Against Parochiaid,'" a term that "undoubtedly referred to public funding for religious schools," which "might suggest that Proposal C was intended to target religious schools." *Id.* But the Court expressly declined to determine whether "these considerations regarding antireligious sentiments render Proposal C indistinguishable from the state constitutional provision at issue in . . . *Espinoza*," both because the parties failed to raise First Amendment arguments and in light of *In re Proposal C*'s "saving interpretation" of the

amendment. *Id.* In sum, the Michigan Supreme Court has never held that Proposal C was motivated by anti-religious animus.

Plaintiffs' repeated claim that Proposal C constitutes a "Blaine Amendment" is similarly unsupported by the historical record. Speaker Blaine's proposed amendment specifically precluded the use of public funds or lands by "any religious sect." H.R.J. Res. 1, 44th Cong., 4 Cong. Rec. 205 (1875). After Blaine's constitutional amendment failed in Congress, many states chose to incorporate amendments with similar wording into their state constitutions and charters in the late 1800s. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 573 (2003). But Michigan voters originally adopted Article VIII, § 2 nearly a century after Blaine's 1875 proposal, a time gap that severs any reasonable link between Michigan's amendment and Reconstruction-era anti-Catholic bigotry. And even more tellingly, Michigan's amendment—unlike actual state-level Blaine Amendments—draws a line between public and private funding rather than between religious and nonreligious aid. Because Michigan's bar on public funding for private schools lacks either temporal or textual connection to Speaker Blaine's proposal, it cannot be accurately described as a Blaine Amendment.

Plaintiffs also attempt to minimize the import of Article VIII, § 2's religious neutrality by contending that at the time Proposal C was enacted in 1970, the vast majority of nonpublic school students were enrolled in Catholic schools, and that "nonpublic" was effectively synonymous with "religious" when it came

to schools. But this does not necessarily support Plaintiffs' broader claim that Proposal C was based on anti-Catholic animus. The Supreme Court has rejected similar arguments in Establishment Clause challenges to the public funding of private schools: "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002); *see also Mueller v. Allen*, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on . . . the extent to which various classes of private citizens claimed benefits under the law.").

The State also explains that even if we assume Proposal C was enacted in 1970 based on anti-religious reasons, the 2000 election reauthorizing the amendment purged any taint of animus. Plaintiffs insist that the 2000 election has no bearing on their suit. Indeed, they claim that it is improper for this court to consider the 2000 ballot proposal given the procedural posture of the case (on appeal from a motion to dismiss) and because they chose not to reference the 2000 election in the complaint. But we may "take judicial notice of the legislative and constitutional history" of the amendment, "especially where such materials [do] not speak to any disputed fact." *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir. 2010). Plaintiffs do not dispute that in the 2000 election, Michigan voters were asked to consider a school voucher proposal that would have repealed Article VIII, § 2. Instead, they posit that "a vote against repeal is not the same as a vote to readopt." This is mere semantics. In the 2000 election,

voters were asked whether they wanted to "[e]liminate [the] ban on indirect support of students attending nonpublic schools through tuition vouchers, credits, tax benefits, exemptions or deductions, subsidies, grants or loans of public monies or property" embodied in Article VIII, § 2, and allow students to use tuition vouchers to attend nonpublic schools instead. *See* Initiative Petitions—Proposed Amendments to the Michigan Constitution, Proposal 00-1, https://www.legislature.mi.gov/(S(ty1fmdpfvr-2nzi1xxsyh0r00))/documents/publications/Mpla/2000/2000-mpla-initiative.pdf. In choosing not to do so, Michigan voters necessarily chose to stand by Article VIII, § 2 as adopted in 1970.

Supreme Court precedent establishes that a later reauthorization of a law can purge the taint of a discriminatory purpose. In *Rostker v. Goldberg*, for example, the Court held that where Congress "thoroughly reconsider[ed]" an earlier law, even without formally reauthorizing it, that later legislative history was "highly relevant in assessing [its] constitutional validity." 453 U.S. 57, 75 (1981). *Rostker* upheld the Military Selective Service Act, which required men, but not women, to register for the military, explaining that Congress's recent reconsideration of the policy was relevant to determine whether the decision to exempt women from registration was discriminatory. *Id.* at 74-75. In doing so, the Court rejected the argument "that we must consider the constitutionality of the [law] solely on the basis of the views expressed by Congress in 1948, when the [law] was first enacted[.]" *Id.* at 74. One of the sources Plaintiffs rely upon confirms this principle. *See* Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 147-48 (2000) ("Explicit legislative reauthorization purges

the taint of prior discriminatory purpose; the newly authorized, facially neutral provision is therefore constitutional unless a fresh showing of discriminatory purpose is made."). Michigan voters' reconsideration of the constitutional prohibition on public funding for nonpublic schools and their rejection of the 2000 ballot proposal eradicated any possible concerns of anti-religious animus stemming from the 1970 campaign surrounding Proposal C.

III. CONCLUSION

For these reasons, we find that Plaintiffs have standing to bring their political process claim but hold that Article VIII, § 2 does not violate Plaintiffs' equal protection rights. As noted by the district court, to hold otherwise would require striking down a facially neutral law that does not single out religious people for disfavored treatment and would effectively contradict the Supreme Court's directive that a State need not subsidize private education. Such a determination, moreover, would implicitly assume that the people of Michigan cannot "prudently exercise" their electoral power even following a full debate—"an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common." *Schuette*, 572 U.S. at 312. We **AFFIRM** the district court's judgment.

DISSENT

MURPHY, Circuit Judge, dissenting. The plaintiffs raise weighty challenges to a Michigan constitutional provision that bars its legislature from spending public funds on private schools. But no

matter how important the merits are, federal courts have no business resolving them unless they arise in a "Case" or "Controversy" within the meaning of Article III of the Constitution. This text requires plaintiffs to plead their standing by alleging that they have suffered (or will suffer) an injury traceable to a defendant's conduct and likely to be redressed by the requested relief.

The plaintiffs' complaint here asserted that the challenged constitutional provision caused one injury, and their appellate brief highlighted another one. But they have not plausibly pleaded standing for either injury. Their complaint alleged that the constitutional provision required them to incur a tax penalty if they used their education-savings accounts to pay for their children's religious schools. This monetary harm certainly qualifies as an Article III injury. But the plaintiffs concede on appeal that Michigan *statutory* law independently triggers the tax penalty, so an injunction against the *constitutional* provision would not redress that harm. On appeal, then, the plaintiffs shifted to an unequal-treatment theory of injury. They argue that, unlike other citizens, they cannot effectively lobby the legislature to change this tax law because the change would violate the state constitution. It is not clear to me that this unequal-ability-to-lobby injury states anything other than a "generalized grievance." Regardless, the plaintiffs did not plead any intent to lobby. So I would reject this theory as insufficiently pleaded. And because the lack of standing deprives us of jurisdiction, I respectfully dissent from my colleagues' decision to reach the merits.

I

Under the federal tax code, States may allow parents to invest money in state-specific "529 plans" (named after the relevant code section) to help pay for their children's education. 26 U.S.C. § 529. Many States have adopted these programs. Michigan created its version in the Michigan Education Savings Program Act. 2000 Mich. Pub. Acts 454–61 (Act No. 161) (codified at Mich. Comp. Laws §§ 390.1471–.1486). The Michigan Education Savings Program operates like a "Roth Individual Retirement Account" because parents may invest in a range of funds and have their investments "grow, federal tax-free" until they use the funds on "qualified higher education expenses." Compl., R.1, PageID 8. Michigan also allows state taxpayers to deduct contributions into (or distributions out of) 529 plans from their *state* "taxable income" up to certain amounts. *Id.* For a withdrawal to qualify for this state tax deduction, though, it must count as a "qualified withdrawal"—that is, one used "to pay the qualified higher education expenses of the designated beneficiary[.]" Mich. Comp. Laws §§ 206.30(1)(t)–(u), 390.1472(m)–(n).

The qualifying expenses have changed over time. Historically, the federal tax code allowed parents to use 529 plans only on *college* expenses. Compl., R.1, PageID 9. In 2017, however, Congress expanded the program to allow parents to use plan funds on *elementary or high-school* tuition. 26 U.S.C. § 529(c)(7); Tax Cuts and Jobs Act, Pub. L. No. 115-97, tit. I, § 11032(a), 131 Stat. 2054, 2081–82 (2017). The plaintiffs here—five sets of Michigan parents and an entity suing on behalf of its members (collectively, the "Parents")—seek to take advantage of this change by

using their 529 plans on their children's religious-school tuition. Compl., R.1, PageID 6–7.

The Parents did not interpret Michigan statutory law as posing any obstacle to this use. Michigan law defines the "qualified higher education expenses" on which parents may spend their plan funds to mean "qualified higher education expenses as defined in section 529 of the internal revenue code." Mich. Comp. Laws § 390.1472(m). Given the state law's cross-reference to federal law, the Parents believed that the state law automatically expanded the eligible expenses when Congress amended § 529 to cover children's religious elementary or high-school tuition (which I will simply refer to as "religious-school tuition"). Compl., R.1, PageID 6–7.

To the Parents' chagrin, Michigan refused to allow this use of the funds. Michigan officials asserted that taxpayers who use 529 plans for religious-school tuition must pay state taxes on the money. Why? According to the Parents, the officials decided that the Michigan Education Savings Program Act violated a provision of the Michigan Constitution when applied to religious-school tuition. Compl., R.1, PageID 9–10. The provision (Article VIII, § 2) states in relevant part:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be

> provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.

Mich. Const. art. VIII, § 2.

The Parents sued the State, its governor, and its treasurer to challenge this provision. They alleged four counts. First, they argued that the provision violated the Free Exercise Clause because, like Blaine Amendments of old, it grew out of anti-Catholic animus. Compl., R.1, PageID 26–28; *cf. Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2268–74 (2020) (Alito, J., concurring). Second, they asserted that the provision violated the Free Exercise Clause because it favored nonreligious schools. Compl., R.1, PageID 28–29. Third, they asserted that the provision violated the Free Exercise Clause because it required religious schools to give up their religious status. *Id.*, PageID 30–31. Fourth, they asserted that the provision violated the Equal Protection Clause because it forced religious individuals to amend the state constitution to receive state aid, whereas other groups needed only to convince legislators for that aid. *Id.*, PageID 32–33. As their remedy, the Parents sought a declaration that the ban violated the Free Exercise and Equal Protection Clauses and an injunction barring state officials from enforcing it. *Id.*, PageID 34.

In a motion to dismiss, the Michigan officials asserted that the Parents misinterpreted the Michigan Education Savings Program Act. Even if the state constitutional provision did not exist, the officials argued, this state statutory law would not

permit the Parents to use their 529 plans on religious-school tuition. The officials justified this state-law reading with a deep dive into § 529's text. One subsection of § 529 has long exempted "any distribution" out of a 529 plan from a party's *federal* gross income if spent on "qualified higher education expenses." 26 U.S.C. § 529(c)(1), (3)(B)(ii). Congress permitted spending on elementary and secondary education by changing the definition of "qualified higher education expense" for "this subsection"—namely, § 529(c). *Id.* § 529(c)(7). According to the Michigan officials, then, this expansion applied *only* to the subsection creating a *federal*-income exemption. And § 529 elsewhere defines "qualified higher education expenses" to cover only college expenses. *See id.* § 529(e)(3), (5). The officials thus read Michigan law to cross-reference § 529(e)'s general college-focused definition.

The Parents offered a strong response. For starters, Michigan law defines "qualified higher education expenses" to mean expenses "as defined" in "section 529"—not just in § 529*(e)*. Mich. Comp. Laws § 390.1472(m). Before this lawsuit, moreover, Michigan had treated two other *§ 529(c)-specific* expansions of the phrase "qualifying higher education expenses" as applying to Michigan's state program. Resp., R.22, PageID 144–47; *see* 26 U.S.C. § 529(c)(8)–(9).

Nevertheless, the district court refused to question the Michigan officials' interpretation of state law under the so-called "comity" doctrine. Op., R.39, PageID 281–82. This doctrine bars federal courts from issuing injunctions against state tax laws if the plaintiffs have an adequate state remedy. *Id.*, PageID 280–81. The court directed the Parents to state courts

if they wanted to challenge the officials' reading of state law. *Id.*, PageID 282. The court believed that this "comity" holding barred it from reaching any of the Parents' free-exercise claims. *Id.* That said, the court also held that the conclusion did not "necessarily" preclude the Parents' equal-protection claim. *Id.*, PageID 283. If the court accepted their "political process theory," it reasoned, the Parents would suffer an "unconstitutional burden" simply from the state constitutional provision's existence—even accepting the state officials' reading of state statutory law. *Id.* But the court rejected this political-process theory on the merits. *Id.*

II

The Parents' appeal has narrowed the issues before us. They have abandoned their reading of Michigan *statutory* law. So we must assume that this law independently bars them from using their 529 plans on religious-school tuition unless they pay state taxes on the withdrawals. The Parents have also abandoned their free-exercise theories. So we must consider only their equal-protection theory that the state constitutional provision violates the Supreme Court's "political-process doctrine." *See Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 301–314 (2014) (plurality opinion); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 467–87 (1982); *Hunter v. Erickson*, 393 U.S. 385, 389–93 (1969). My colleagues hold that the Parents have adequately alleged standing for this political-process claim but that it fails on the merits. I disagree on the standing question and so would not reach the merits.

Article III of the Constitution limits federal courts to resolving "Cases" or "Controversies." U.S. Const. art. III, § 2. This text requires parties who seek

recourse in federal court to have standing to sue. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). And under the well-known test, standing requires three things. *See id.* The plaintiff must assert a "concrete" and "particularized" "injury" that is "actual" (meaning that it has occurred) or "imminent" (meaning that it will occur soon). *Id.* Next, the injury must be "fairly traceable" to the actions that the plaintiff challenges. *Davis v. Colerain Township*, 51 F.4th 164, 172 (6th Cir. 2022) (quoting *California v. Texas*, 141 S. Ct. 2104, 2119 (2021)). Lastly, the plaintiff's requested remedy must be "likely to redress" the injury. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021).

Two procedural rules further clarify the standing framework. For one thing, plaintiffs must plead and prove standing in the same way that they must plead and prove any other element of their claim. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). At this pleading stage, then, they must meet the "plausibility" test from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Ass'n of Am. Physicians & Surgeons v. U.S. FDA*, 13 F.4th 531, 543–44 (6th Cir. 2021). Contrary to the Parents' argument, courts no longer assume that a complaint's "general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). *Twombly* "retired" that test. *Ass'n of Am. Physicians*, 13 F.4th at 543. So the Parents must plead facts that plausibly show that they have suffered an adequate injury, that the challenged provision caused that injury, and that the requested remedy would redress it. *See, e.g.*, *id.* at 544–47.

For another thing, courts do not award standing "in gross." *Davis*, 51 F.4th at 171 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)). A plaintiff must meet the three-part standing test for every "injury" that they allege and every "remedy" that they seek. *Id.* For example, a plaintiff cannot match a past injury with a request for an injunction because the injunction—a forward-looking remedy—will not redress the harm that already happened. *See id.* And a plaintiff cannot leverage standing to sue over a cognizable injury (say, an injury from a municipal tax) into standing to sue over an insufficient one (say, an injury from a state tax). *Cuno*, 547 U.S. at 353.

The Parents have not met these standing rules. Their complaint and briefing identify two injuries. They initially argued that they cannot use their 529 plans on religious-school tuition without incurring state tax liability. Compl., R.1, PageID 9–10. Apart from this monetary harm, they next argue that, unlike other Michigan residents, they cannot "lobby" the state legislature to permit the use of 529 plans on religious-school tuition because the state constitution "would invalidate any favorable legislation they secured." Reply Br. 3. But the Plaintiffs' first harm fails standing's traceability and redressability elements, and their second harm fails its injury element.

Injury One. Each group of Parents alleged in their complaint that they "have funded [a 529 plan] and would like to use it to pay for their children's private, religious-school tuition in Michigan." Compl., R.1, PageID 6–7. Yet they cannot do so because they will incur tax penalties if they spend plan funds on this tuition. *Id.*, PageID 9. This claim plausibly pleaded an Article III injury. In fact, "monetary harms" are the

"most obvious" cognizable injuries. *TransUnion*, 141 S. Ct. at 2204. To be sure, the Parents have yet to incur this monetary injury because of their refusal to use their 529 plans in the tax-harmful way. But Article III requires only an *imminent* injury. *See Carney v. Adams*, 141 S. Ct. 493, 498 (2020). And the Parents have pleaded that they are "able and ready" to use their 529 plans for religious-school tuition. *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). So the Michigan officials' "threat of enforcement" of the state tax laws suffices to create this imminent injury. *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 129 (2007).

That said, this injury theory flunks the "next two standing elements" because the Parents accept the Michigan officials' reading of state statutory law on appeal. *Outdoor One Commc'ns, LLC v. Charter Township of Canton*, 2021 WL 5974157, at *2 (6th Cir. Dec. 16, 2021). That reading means that the Parents' monetary injury does not flow out of the Michigan Constitution. It instead flows out of the narrow definition of "qualifying higher education expenses" in the Michigan Education Savings Program Act. A "mismatch" thus exists between the cause of the Parents' injury and the provision they challenge. *Davis*, 51 F.4th at 172. Or, if we consider this question from the perspective of redressability, an injunction against the state constitution would not remedy their tax injury. Even if they obtained that injunction, they could not use their 529 plans on religious-school tuition. That use would still trigger the state law's tax penalty. Because "injunctive relief could amount to no more than a declaration that the [state] provision they attack is unconstitutional," this relief does not create a live case. *California*, 141 S. Ct. at 2116.

Injury Two. I thus find it unsurprising that the Parents' appellate briefing falls back on a different injury. They argue that the challenged constitutional provision injures them by barring them from "lobby[ing] the Michigan Legislature" to amend state law and allow them to use their 529 plans in the way they prefer. Reply Br. 3. I am skeptical that this theory could ever show an Article III injury. Admittedly, the Supreme Court has made clear that "intangible harms"—such as a state restriction on a person's ability to speak—qualify as "concrete" injuries. *TransUnion*, 141 S. Ct. at 2204. But the challenged constitutional provision does not restrict the Parents' ability to "lobby" (that is, to speak) in any way. It just deprives them of the practical incentive to do so because they believe that the hoped-for statutory change would violate the state constitution.

Besides, the Parents do not allege a *speech* injury. They allege an *equality* injury. Michigan citizens who want Michiganders to be able to use 529 plans on religious-school tuition can achieve this objective only by first amending the state constitution and then convincing the state legislature to pass a law permitting this result. Yet other citizens who want the state government to adopt many other policies can skip the first step and need only convince the legislature to pass a law. This unequal treatment, the Parents claim, qualifies as a concrete injury that gives them standing to challenge the state constitutional ban on religious-school funding.

I agree that the "denial of equal treatment" can qualify as a concrete "injury in fact" for standing purposes. *Ne. Fla. Chapter*, 508 U.S. at 666. So, for example, government contractors can suffer an Article III injury when they are disadvantaged by the

"preferential treatment" that a city gives to "minority-owned businesses" in its contracting—even if the disadvantaged contractors may still lose out on the city contract under a level playing field. *Id.* at 658, 666; *see Vitolo v. Guzman*, 999 F.3d 353, 359 (6th Cir. 2021). And college applicants can suffer an Article III injury from a university's racially discriminatory admissions policy—even if they may still get rejected under a race-neutral policy. *Gratz v. Bollinger*, 539 U.S. 244, 260–62 (2003).

But I am dubious that this caselaw extends to the Parents' claimed injury. In each case, the unequal treatment made it more difficult for the challengers to obtain a *particularized* benefit—whether the award of a government contract or the admission into a university. Here, by contrast, the Parents seek a level playing field in their ability to have the legislature pass a "generally applicable [Michigan] law" that would apply just as much to them as to everyone else. *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013). So this unequal-treatment theory might trigger the traditional rule that parties do not have standing to raise "generalized grievances" unconnected to particularized injuries unique to them. *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam); *see, e.g.*, *Carney*, 141 S. Ct. at 499; *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018); *Ex parte Levitt*, 302 U.S. 633, 633 (1937) (per curiam); *Massachusetts v. Mellon*, 262 U.S. 447, 486–88 (1923). For instance, the Court has often held that a State's residents cannot seek to *defend* the State's "generally applicable" law in court because they have only a generalized interest in that state law. *Hollingsworth*, 570 U.S. at 706; *Diamond v. Charles*, 476 U.S. 54, 64–67 (1986). If that is true, I would think

that the Parents here likewise assert only a generalized interest when they seek to *enact* a generally applicable state law.

If anything, the Parents' argument could all but make "meaningless" the ban on generalized grievances. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring in the judgment). If they are right, wouldn't *any* party who wants a legislature to enact a law on a topic that the state constitution prohibits suffer a cognizable unequal-treatment injury that allows the party to challenge the constitutional provision?

Michigan's Constitution removes many topics from the legislative process. To list two examples, a Michigan resident has the "right to keep and bear arms for the defense of himself and the state," Mich. Const. art. I, § 6, and the right "to reproductive freedom," including the right to obtain an abortion in certain circumstances, *id.* art. I, § 28. Can citizens litigate a challenge to the state constitutional right to bear arms simply because they would like their legislature to ban guns? Or can citizens litigate a challenge to the right to reproductive freedom simply because they would like their legislature to ban abortions?

All of this said, I can leave this broader issue for another day. Even assuming the validity of this theory, parties alleging an unequal-treatment injury still must show that they are "able and ready" to engage in the activity in which they fear discriminatory treatment. *Carney*, 141 S. Ct. at 500 (quoting *Gratz*, 539 U.S. at 262). So, for example, a lawyer who was affiliated with no political party lacked standing to challenge a state constitutional provision reserving state judgeships to members of the main two political

parties because he failed to show that he was "able and ready" to apply for a judgeship. *Id.* at 499–503. Conversely, a college applicant established his standing to challenge a university's discriminatory admissions policy because he showed that he was "able and ready" to reapply for admission as a transfer student after the university had denied his initial application. *Gratz*, 539 U.S. at 261–62.

The Parents have not satisfied this test. At this pleading stage, they must allege facts that plausibly show that they are "able and ready" to lobby the Michigan legislature to change Michigan law so they can use their 529 plans for religious-school tuition. *See Ass'n of Am. Physicians*, 13 F.4th at 543–44. But their complaint alleged nothing of the sort. The Parents do not allege any "concrete plans" to undertake any specific lobbying activity—whether writing their state representatives or participating in an assembly at the statehouse. *Lujan*, 504 U.S. at 564. Indeed, they do not even allege the sort of "'some day' intentions" that the Court has repeatedly held do not suffice. *Carney*, 141 S. Ct. at 502 (quoting *Lujan*, 504 U.S. at 564). Instead, their complaint has alleged only that they want to use their 529 plans for their children's religious-school tuition. In my view, that allegation alone does not plausibly show that the Parents would decide to get involved in politics in order to achieve this goal.

Nor do the Supreme Court's three political-process cases help the Parents' standing theory. Most obviously, the Court did not discuss standing in any of the cases. *See Schuette*, 572 U.S. at 298–315 (plurality opinion); *Seattle*, 458 U.S. at 459–87; *Hunter*, 393 U.S. at 386–93. While a standing problem creates a jurisdictional issue that courts have a duty to raise on

their own, decisions like these that resolve constitutional issues on the merits do not create binding precedent on standing questions that they (perhaps wrongly) overlooked. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996).

Besides, any (implied) finding that standing existed in these three cases would not establish the Parents' standing in this case. First consider *Hunter*. Nellie Hunter sought to buy a home in Akron, Ohio, but a real-estate agent refused to show her several houses because their owners would not sell to African Americans. 393 U.S. at 387. Akron's city council had passed an antidiscrimination ordinance that barred racial discrimination in housing. *Id.* at 386. The ordinance delegated enforcement authority to a commission in the mayor's office and allowed parties to file complaints with the commission. *Id.* Hunter filed a complaint. *Id.* at 387. In the meantime, Akron residents voted on a city charter amendment to bar its council from enacting antidiscrimination ordinances unless a majority of residents approved. *Id.* So the commission responded to Hunter's complaint by noting "that the fair housing ordinance was unavailable" to her. *Id.* Hunter sued the mayor in state court seeking a "writ of mandamus" to require him to order his commission to process her complaint. *Id.* Hunter's inability to obtain the home of her choice likely counted as an Article III injury—just as the Parents' inability to use their 529 plans on religious schools counts as one. Unlike in this case, however, Hunter's suit likely would have redressed this injury. An injunction against the charter amendment would have led the commission to enforce Akron's antidiscrimination ordinance against the homeowners who refused to sell to Hunter. Here, by contrast, an

injunction against the state constitutional provision would not redress the Parents' injuries. Unlike the ordinance in *Hunter*, Michigan statutory law independently bars the use of plan funds on religious schools.

Or consider *Seattle*. There, a Seattle school district enacted a plan requiring some students to bus to schools farther away from their homes in order to reduce the district's de facto segregation. 458 U.S. at 461. The State of Washington's citizens responded with an initiative that generally barred school districts from forcing students to attend the school that was not closest to them. *Id.* at 462–64. Along with two other districts, the Seattle district sued the State in federal court to challenge this initiative. *Id.* at 464. It is not clear how the districts had standing. Perhaps the Court thought they could vindicate their "sovereign interests" as public bodies. *Cf. Saginaw County v. STAT Emergency Med. Servs., Inc.*, 946 F.3d 951, 956–59 (6th Cir. 2020). But the Court has long concluded that municipalities cannot sue their States over constitutional violations. *See Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907). So at least one court has held that *Seattle* says nothing about standing when it reaffirmed that municipalities lack standing to assert constitutional challenges against state laws. *See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1362–63 (9th Cir. 1998); *see also City of San Juan Capistrano v. Cal. Pub. Utils. Comm'n*, 937 F.3d 1278, 1280–81 (9th Cir. 2019). Be that as it may, I fail to see how a political subdivision's ability to vindicate its busing plan says anything about the Parents' ability to sue.

Lastly consider *Schuette*. In that case, some Michigan universities had historically given a preference to minorities in their admissions process. 572 U.S. at 298. But Michigan's citizens passed a constitutional amendment requiring universities to treat all applicants equally no matter their race. *Id.* at 299. Although a broad coalition of entities, students, faculty, and applicants challenged this equal-protection amendment on equal-protection grounds, *id.* at 299–300, only one plaintiff needed to have standing under the Supreme Court's standing test, *see Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023); *cf. Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 945–47 (E.D. Mich. 2008). And the minority applicants' inability to get into a university of their choice would likely qualify as an Article III injury— again like the Parents' inability to use their 529 plans on religious schools. As in *Hunter*, however, an injunction against the constitutional provision in *Schuette* would have resuscitated the universities' race-conscious policies. *See Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 946. Here, by contrast, an injunction would leave the statutory law that separately bars the Parents' preferred course of action.

* * *

At day's end, my disagreement with my colleagues' standing analysis does not necessarily mean that I disagree with them on the merits of the Parents' political-process claim. But "[i]t is emphatically the province and duty of the judicial department to say what the law is" *only* when necessary to resolve a "particular" case. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Because the Parents have not presented their constitutional theory in a justiciable form, I would

dismiss their suit without prejudice for lack of jurisdiction. So I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JILL HILE, ET AL.,

Plaintiffs,

v.

STATE OF MICHIGAN, ET AL.,

Defendants.

Case No. 1:21-CV-829

HON. ROBERT J. JONKER

OPINION AND ORDER

INTRODUCTION

Plaintiffs bring a series of First and Fourteenth Amendment challenges to a provision in Michigan's Constitution that prohibits use of State funds to benefit "any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school." Mich. Const. art. VIII, § 2, ¶ 2 (the "Education Provision").[1] They call the provision a "Blaine

[1] The full Provision reads:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or

[Footnote continued on next page]

Amendment" because in their view it embodies anti-religious sentiment generally, and anti-Catholic sentiment, in particular. The State resists that description and says the provision simply draws a hard line between public education and nonpublic education in all its forms—sectarian or secular—and ensures that State funds may be used only to support public education. Michigan moves to dismiss on both procedural and substantive grounds.

The Court finds that principles of comity preclude merits consideration of the plaintiffs' Free Exercise claims because the only way the Court could reach them is by first concluding that Michigan is misinterpreting and misapplying its own tax law. The Court concludes that plaintiffs' Fourteenth Amendment claim rests on a narrow political process theory that has never been applied to a case like this, and that should not be expanded to invalidate a provision of Michigan's Constitution that is facially neutral on parochial education. Accordingly, the Court grants defendants' Motion to Dismiss.

> property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

Mich. Const. art. VIII, § 2, ¶ 2.

BACKGROUND

Both Michigan and federal governments provide parents with a tax-advantaged way to fund some education expenses for their children. Parents can fund education savings plans (called Section 529 Plans federally, and Michigan Education Savings Plans ("MESPs") in Michigan) and make tax-deductible withdrawals from them to pay for qualified education expenses. The individual plaintiffs are parents of grade and secondary school aged children, and members of the plaintiff foundation. They want to send their children to private, religious schools and use MESP funds for tuition on a tax-advantaged basis. But if they do, they say the State would deprive them of any tax advantage because of the Education Provision. The State agrees that plaintiffs are not able to use MESP dollars on a tax-advantaged basis for their children's elementary and secondary education, but the State says this has nothing to do with the Education Provision in the State Constitution; rather, it is Michigan tax law that precludes *everyone* in the State from using MESP funds on any elementary or secondary education expenses, whether for private or public education. Plaintiffs disagree and argue that Michigan misunderstands its own tax law.

The parties agree about the state statutory scheme up to a point. Section 529 of the Internal Revenue Code allows a state-sponsored education savings plan, like the MESP, which is authorized under Michigan's Education Savings Program Act. (Comp. ¶ 25, ECF No. 1, PageID.8; Def. Br. 3, ECF No. 13, PageID.75). Like a Roth IRA, contributions are tax deductible if they are withdrawn for "qualified higher education expenses." (Compl. ¶¶ 25-27; Def. Br. 3). Both the Michigan Income Tax Act and the Michigan

Education Savings Program Act defer to Section 529 of the IRC as to what constitutes a "qualified higher education expense. (Compl. ¶ 27; Def. Br. 3). The statutory dispute between the parties is, in a nutshell, whether the meaning of "qualified" expense for Michigan purposes automatically floated with any changes made by Congress to the federal Section 529 provision (plaintiffs' view); or whether the meaning for Michigan remained static unless and until the Michigan legislature affirmatively made its own changes, no matter what Congress decided at the federal level (the defense position).

As originally structured, qualified expenses at both the federal and Michigan levels were limited to post-high school education. In 2017 the federal government expanded the definition of qualified expense to include tuition for elementary and secondary school education too. In particular, Congress expanded "qualified" expenses to include "tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school." 2017 Tax Cuts and Jobs Act, codified at 26 U.S.C. § 529(c)(7). The Michigan legislature made no change, but plaintiffs say that expansion automatically kicked in under a proper construction of Michigan tax law, and that the only thing preventing them from taking advantage of the expansion for their parochial school children is the Education Provision in the Michigan Constitution barring use of any state funds on non-public education. Defendants say that plaintiffs are wrong about Michigan tax law, and that the terms of the MESP program remained the same because the Michigan legislature made no changes. So in the defense view, no one in Michigan can use tax-advantaged MESP dollars for any grade or secondary

school expenses, whether public or private. If the State is correct about the interpretation of its own tax law, there is no reason to reach plaintiffs' Free Exercise claims.

Plaintiffs' other claim arises under the Fourteenth Equal Protection Clause. Plaintiffs say that they are unfairly singled out and burdened as a religious minority in trying to compete for enactment of laws that would change the rules of the Education Provision in the Michigan Constitution. Plaintiffs argue that the purpose and effect of the Education Provision—despite its facial neutrality—is to burden religious parents who want a parochial education for their children, and that by putting the Education Provision in the State Constitution, the State has unfairly tilted the playing field against them. Plaintiffs say this is a version of a political process theory recognized in *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457, 467 (1982) (invalidating legislation enacted by initiative that allowed bussing for virtually any education purpose other than racial desegregation) and *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (invalidating city charter provision requiring electoral approval of any duly enacted ordinance regulating real estate transactions based on race). Unlike the Free Exercise claims, the validity of this theory is potentially at issue, regardless of which side is correct about the meaning of Michigan tax law.

DISCUSSION

1. *Tax Injunction Act / Comity*

Federal courts must always tread cautiously when asked to assess the constitutionally of state tax provisions. This is a matter of both congressional

policy, embodied by the Tax Injunction Act, and complementary judicial doctrines of comity. Defendants say both apply here.

The Tax Injunction Act "TIA" provides that "district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The TIA "creates a jurisdictional barrier to the federal courts for claims of declaratory or injunctive relief brought by a party aggrieved by a state's administration of its taxing authority." *Pegross v. Oakland County Treasurer*, 492 F. App'x 380, 384 (6th Cir. Nov. 18, 2014). Courts have interpreted the TIA "broadly . . . to bar suits for declaratory relief, injunctive relief, as well as monetary relief when there is an adequate remedy in state court." *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 n.4 (6th Cir. 2000).

The comity doctrine, which is "more embracive than the TIA," restrains federal courts from entertaining claims in state taxation cases that risk disrupting state tax administration. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). In *Fair Assessment in Real Estate Ass'n v. McNary*, the Supreme Court held:

> [O]ur comity cases have thus far barred federal courts from granting injunctive and declaratory relief in state tax cases . . . [W]e decide today that the principle of comity bars federal courts from granting damages relief in such cases[.]
>
> [W]e hold that taxpayers are barred by the principle of comity from asserting § 1983

> actions against the validity of state tax systems in federal courts.

454 U.S. 100, 108, 116 (1981); *see also Levin v. Com. Energy, Inc.*, 560 U.S. 413, 417 (2010) ("More embracive than the TIA, the comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration.").

"The federal common-law principle of comity embodied in *Fair Assessment* 'reflects some of the same concerns that led Congress to enact the Tax Injunction Act' but 'stands on its own, and extends to cases seeking monetary damages as well as injunctive or other equitable relief.'" *Rafaeli, LLC v. Wayne Cnty.*, No. 14-13958, 2015 WL 3522546, at *6 (E.D. Mich. June 4, 2015) (quoting *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 541 (6th Cir. 2004). A long line of court decisions "'shows that a proper reluctance to interference by prevention with the fiscal operations of the state governments has caused [courts] to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired.'" *Levin*, 560 U.S. at 422 (quoting *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909); *see also id.* (quoting *Matthews v. Rodgers*, 285 U.S. 521, 525-26 (1932) for the proposition that "[s]o long as the state remedy was 'plain, adequate, and complete,' the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interference by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.'").

The court is satisfied that principles of comity preclude merits consideration of plaintiffs' First Amendment Challenges because they would require this court to disregard the State's own interpretation and consistent application of its own tax law, neither of which raises First Amendment concerns. Plaintiffs can take the issue up with Michigan tax authorities in the ordinary administration of the Michigan income tax collection process. But unless and until Michigan changes the interpretation and application of its own tax law, and replaces it with the version Plaintiffs say it should have, there is no First Amendment issue.

Here, the State emphatically declares that its own version of MESP and related tax provisions limit qualified education expense to higher education, just as both the State and federal 529 programs originally did. The State says the Michigan legislature did not broaden the term in 2017 when Congress did for Section 529 plans, and so the law of Michigan remains as it has from the start, limiting qualified education expenses to those in higher education, not grade or secondary schools. Plaintiffs say Michigan is misinterpreting its own law, and plaintiffs offer reasonable argument to support their construction. But Michigan has a reasonable argument to support its construction too. And neither side has been able to demonstrate any State practice at odds with the way Michigan says its own law works. There is nothing of record that shows Michigan approving any tax-advantaged use of MESP funds for any grade or secondary school expense in either private or public education.

If plaintiffs believe the State is wrong about its own interpretation of State law, they are free to test the issue in the ordinary process of State tax administration and collection, or potentially seek

appropriate declaratory relief in the State system, which is adequate for the task. Instead, plaintiffs want this Court to reach out and declare, first of all, that the State is wrong about its own interpretation of State tax law; and then, second, to use that declaration as a doorway to reaching Free Exercise challenges that in plaintiffs' view would require this Court to invalidate the Education Provision in Michigan's Constitution—a provision that has been on the books for over 50 years. Comity precludes the Court from walking that path.

2. *Political Process Doctrine*

Plaintiffs' Equal Protection challenge is not necessarily precluded by the TIA or comity. If plaintiffs are correct about the theory, then regardless of which side is right about Michigan tax law, plaintiffs are suffering an unconstitutional burden simply by having what they allege is an anti-Catholic education provision embodied in the State Constitution. The Court does not believe plaintiffs are correct about their political process theory, however.

In the first place, the political process theory—if it still exists at all—is narrow. It has, to the Court's knowledge, never been applied outside the arena of racial discrimination, and even then, only in situations where the text of the legislation or ordinance at issue expressly singled out race as the trigger for additional procedural burdens. *See Seattle* and *Hunter*, *supra*. And even in the arena of explicitly racially discriminatory law, the theory has not always been well-received. *See, e.g., Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 307 (2014) (plurality Opinion of Justice Kennedy "reject[ing]" broad reading of political process doctrine); 318

(concurring Opinion of Justice Scalia "repudiat[ing]" political process doctrine).

To the extent the doctrine has any continuing viability, the Court believes it is limited to the very narrow fact patterns of *Seattle* and *Hunter*. Here, racial categories are not at issue at all. Rather, plaintiffs seek to extend the theory to a new arena of religious discrimination. Moreover, unlike the express racially discriminatory provisions at issue in *Seattle* and *Hunter*, the Education Provision here is facially neutral. It does not by its terms single out any religious minority for unequal treatment; rather, it draws the line between public education, on the one hand, and all forms of private education on the other hand. That means the parents of children at non-sectarian private schools like Cranbook or Country Day are on exactly the same footing as the parents of children at Catholic Central or Grand Rapids Christian when it comes to use of public funds. None may benefit from the use of public funds. This Court is unwilling to expand an already tenuous political process doctrine into these new arenas.

CONCLUSION

To reach the merits of plaintiffs' Free Exercise challenges to the Education Provision in Michigan's Constitution, this Court would first have to wade into the thicket of Michigan tax law. Worse than that from a comity perspective, the Court would have to find that the way Michigan interprets and consistently applies its own MESP tax provisions is wrong, and that plaintiffs are correct about how Michigan should be doing so. Then, after declaring Michigan wrong about its own interpretation and application of its own tax law, plaintiffs would have this Court invalidate a 50-year-old, facially neutral provision of Michigan's

Constitution. The TIA and the broader doctrine of comity were designed to prevent a federal court from taking such an intrusive path through a state's own tax system. The Court's consideration of plaintiffs' political process theory is not precluded by these doctrines, but in the Court's view the theory fails on the merits because it would require extending an already tenuous doctrine into an entirely new arena and to an entirely different kind of legal provision.

Accordingly, the Court grants defendants' Motion to Dismiss.

Dated: September 30, 2022

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JILL HILE, ET AL.,

Plaintiffs,

v.

STATE OF MICHIGAN, ET AL.,

Defendants.

Case No. 1:21-CV-829

HON. ROBERT J. JONKER

JUDGMENT

In accordance with the Opinion and Order entered this day, Judgment is entered in favor of Defendants and against Plaintiffs, and this case is **DISMISSED.**

Dated: September 30, 2022

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES
DISTRICT JUDGE