No. 23-1084

In the Supreme Court of the United States

JILL HILE, ET AL.,

Petitioners,

v.

MICHIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE MANHATTAN INSTITUTE AND NOTRE DAME EDUCATION LAW PROJECT AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

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 a 2000 school-voucher ballot proposal purges the amendment of its religious animus for purposes of the Equal Protection Clause analysis.

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INTEREST OF *AMICI CURIAE*[1]

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting educational opportunity and opposing governmental overreach.

The Notre Dame Law School Education Law Project seeks to enhance civil society, promote educational opportunity, and protect religious liberty by supporting educational pluralism through research, scholarship, and legal advocacy.

This case interests *amici* because Michigan's constitution stands as an unconstitutional barrier to the expansion of much-needed educational opportunities for children—especially disadvantaged children—in the state. As the petitioners detail, while Article VIII, § 2 [the state's "Blaine amendment"], on its face, prohibits state support for any private schools, this neutrality is a sham that masks demonstrable hostility to religious schools, especially Catholic schools.

This case also interests *amici* because it highlights an ongoing problem in other states with so-called "religion neutral" no-aid provisions that, while facially nondiscriminatory, nonetheless are a product of anti-Catholic (and in some cases racial) bias.

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[1] Rule 37 statement: Counsels of record for all parties were timely notified of this filing. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

BACKGROUND AND SUMMARY OF ARGUMENT

Petitioners are members of Parent Advocates for Choice in Education Foundation (PACE), which seeks to protect and further educational rights. They contend that Art. VIII, § 2 of the Michigan constitution discriminates against religion. Accordingly, its enforcement would violate the Free Exercise Clause.

The district court dismissed petitioners' claim, stating that Article VIII, § 2 was facially neutral. *Hile v. Michigan*, No. 1:21-cv-00829, 2022 WL 21416529 (W.D. Mich. Sept. 30, 2022). The Sixth Circuit affirmed and held that the provision does not violate the petitioners' equal protection rights. *Hile v. Michigan*, 86 F.4th 269 (6th Cir. 2023).

The lower courts failed to recognize that the enforcement of facially neutral Blaine amendments that were motivated by bigotry may violate the Constitution. Article VIII, § 2, while facially neutral, was a product of religious bias that this Court's precedents make clear violates the Free Exercise Clause. *See Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020).

The problem presented here is not limited merely to Michigan. There are other states with similar facially nondiscriminatory Blaine amendments that were adopted under circumstances suggestive of both religious and racial bigotry. The Court should grant *certiorari* to make clear that the nondiscrimination principle articulated in *Carson*, *Espinoza*, and *Trinity Lutheran Church v. Comer*, 137 S.Ct. 2012 (2017), applies with equal force when facially neutral legal provisions mask unconstitutional bias.

ARGUMENT:

FACIALLY NEUTRAL BLAINE AMENDMENTS CAN MASK RELIGIOUS AND RACIAL ANIMOSITY THAT IS ODIOUS TO OUR CONSTITUTION

In 1875, House Speaker James G. Blaine proposed a constitutional amendment to bar government aid to religious schools and institutions. Blaine's proposed amendment reflected the nation's anti-Catholic sentiment, as its primary purpose was to disallow public funding for Catholic schools. *See, e.g.*, McCarley Elizabeth Maddock, *Blaine in the Joints: The History of Blaine Amendments and Modern Supreme Court Religious Liberty Doctrine in Education*, 18 Duke J. Const. L. & Pub. Pol'y 195, 197 (2023) (recounting the view that "these provisions reflect hate and anti-Catholic bigotry that peaked in the 1870s." (citations omitted)); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("[The Blaine amendment] arose at a time of pervasive hostility to the Catholic Church and to Catholics in general . . . ."); Expert Report of Charles L. Glenn ¶38, *Bishop of Charleston v. Adams*, 584 F. Supp. 3d 131 (D.S.C. 2022) (No. 21-cv-1093) ("[T]he target of a fierce campaign presenting their Catholic school equivalents as a fundamental threat to the country"); *id.* ¶ 39 ("The ungrateful Catholic immigrants wanted . . . 'any kind of schools but such as are American, and will make Americans of their children.'" (quoting Horace Bushnell)).

Although Blaine's proposal was unsuccessful at the federal level, various states enacted their own Blaine amendments. These "baby Blaine amendments" can be categorized as falling into two categories: religious/non-religious and public/private. While most

state Blaine amendments are "religious/nonreligious" provisions that expressly single out religious (or, more typically "sectarian") schools for disfavor, public/private Blaine amendments prohibit the public funding of all private educational institutions, regardless of whether they are religiously affiliated.

It took Michigan nearly a century to enact its own Blaine amendment, when in 1970 the state amended Article VIII, § 2 of its Constitution to provide: "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."

As the cert. petition explains, when Michigan voters approved that 1970 amendment, they were acting against faith-based schools. Proponents capitalized on voters' anti-religious bias to prohibit direct or indirect public support for nonpublic schools. The amendment disproportionately impacted religious schools and the families that they served, precluding their attempts to obtain funding. *See, e.g.*, *Traverse City Sch. Dist. v. Att'y Gen.*, 185 N.W.2d 9, 29 (Mich. 1971) ("[W]ith 98 percent of the private school students being in church-related schools, the 'impact' is nearly total."). *See also Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Engler*, 566 N.W.2d 208, 221 (Mich. 1997) (discussing how a "common understanding of the voters in 1970 was that no monies would be spent to run a parochial school"). Thus, Article VIII, § 2 was adopted in an atmosphere of anti-religious bias.

In a series of recent cases, this Court has made clear that states may not rely on facially

discriminatory state constitutional provisions to justify the exclusion of religious institutions from public programs. In *Trinity Lutheran Church v. Comer*, 137 S.Ct. 2012, 2021-23 (2017), the Court found that Missouri's reliance on its Blaine amendment to reject a religious school's grant application to participate in a playground resurfacing program violated the Free Exercise Clause. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), similarly held that the Montana Supreme Court violated the Free Exercise Clause by invalidating tax credit scholarship program on Blaine-amendment grounds. And in *Carson v. Makin*, 596 U.S. 767 (2022), the Court held that Maine violated the Free Exercise Clause by excluding religious schools from participating in a tuition-assistance program for students in rural school districts.

Scholars have discussed how these cases render most Blaine amendments unenforceable. *See, e.g.,* Joshua Dunn, *In* Carson v. Makin*, Justices Prolong Death of Blaine Amendments, but Don't Quite Finish the Job*, 23 Educ. Next 1 (2023); Maddock, *supra*; Steven K. Green, *Requiem for State "Blaine Amendments*," 64 J. Church & State 437 (2022).

The Court, however, has yet to make clear that these precedents apply with equal force to a state Blaine amendment that, while enacted under circumstance suggestive of unconstitutional biases, apply with equal force to both religious and nonreligious schools. Indeed, Michigan is not the only state to have adopted a public/private Blaine amendment that was inspired by unconstitutionally discriminatory motives. As we detail below, other states' "religion neutral" Blaine amendments suffer from similar defects.

I. SHAM NEUTRALITY IN SOUTH CAROLINA

Like Michigan's Art. VIII, § 2, the South Carolina constitution's Article XI, § 4 applies to both religious and nonreligious private schools. The provision provides: "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution."

The history of South Carolina's Blaine amendment is a particularly sordid one. Benjamin Ryan "Pitchfork Ben" Tillman was elected governor of South Carolina in 1890. In his inaugural address, Tillman praised "the triumph of Democracy and white supremacy over mongrelism and anarchy." Benjamin Ryan Tillman, Inaugural Address (Dec. 4, 1890). Later, as a U.S. Senator, Tillman spearheaded the 1895 state constitutional convention that gutted the Reconstruction-era constitution and reinstituted segregation and the subjugation of black people. The 1895 South Carolina Constitution included, for the first time, a Blaine amendment, which, among other things, mandated segregated public schools, S.C. Const. of 1895, Art. XI, § 7, and prohibited both direct and indirect aid to religious schools, S.C. Const., Art. XI, § 9.

It is well established that Tillman was a despicable racial bigot, *see, e.g.*, Stephen David Kantrowitz, *Ben Tillman & the Reconstruction of White Supremacy* (2002), and that the goal of the 1895 constitutional convention was the re-subjugation of blacks. As this Court has observed, "The South Carolina Constitutional Convention of 1895 was a leader in the widespread movement to disenfranchise Negroes." *South Carolina v. Katzenbach*, 383 U.S. 301, 310 n.9 (1966).

What is less well understood is that South Carolina's segregationist constitutional convention was heavily influenced by anti-Catholic nativist sentiment. Moreover, Tillman and his racist compatriots saw the Blaine amendment as a means of undermining the efforts of religious missionaries who had come south after the Civil War to educate freed slaves. Since the 1895 constitution also included a literacy test, the missionaries' efforts undercut the segregationists' goal of disenfranchising blacks. Tillman admitted as much in a 1890 Senate speech, observing, "We did not disfranchise the negroes until 1895. Then we had a constitutional convention convened which took the matter up calmly, deliberately, and avowedly with the purpose of disfranchising as many of them as we could under the fourteenth and fifteenth amendments. We adopted the educational qualification as the only means left to us . . . ." 33 Cong. Rec. 3223–24 (1900) (statement of Sen. Benjamin R. Tillman). Referring to the missionaries' educational efforts in particular, he continued, "it cannot be denied that . . . the poison in their minds—the race hatred of the whites—is the result of the teachings of Northern fanatics." *Id*.

In 1972, Art. IX, § 4 prohibited the "direct" funding of all private schools, religious and nonreligious, again under circumstances suggestive of both racial and religious bias. Paul Clement & Jeannie Allen, *Burying the Bigotry of South Carolina's Blaine Amendment*, The Hill, (May 13, 2021); Nicole Stelle Garnett & Daniel Judge, *Ending the Shame of Blaine*, S.C. Center Square (May 20, 2021).

Currently before the South Carolina Supreme Court is a challenge to its Education Scholarship Trust Program (ESTP), a program which provides families

with publicly funded savings accounts. *See Eidson v. S.C. Dept. of Education,* Case No. 2023-001673 (S.C.). The state teachers' union argues that ESTP contravenes Article XI, § 4. Defendants contend that, since Article XI § 4 is a legacy of racial bigotry, the court cannot rely on the constitutionally infirm Article XI § 4 to invalidate ESTP.

Article XI, § 4, of the South Carolina Constitution stands as a lingering reminder of the worst aspects of that state's racist and anti-Catholic history. It continues to deny direct public funding for individuals in independent schools and thus perpetuates the bigoted legacy embedded in the state constitution since 1895.

II. OTHER STATES' "RELIGION NEUTRAL" BLAINE AMENDMENTS ALSO MASK UNCONSTITUTIONAL DISCRIMINATION

Other states have adopted Blaine amendments that cover all private schools, masking improper motives. After the federal Blaine Amendment failed to receive the requisite two-thirds vote in the Senate in 1875, Congress began requiring states to adopt these provisions as constitutional amendments for Union admittance. Congress could thus continue to perpetuate its anti-Catholic bigotry. *See Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. at 2267–74 (Alito, J., concurring). New Hampshire Senator Henry Blair characterized this requirement in the Montana Enabling Act as "completing the unfinished work of the failed Blaine Amendment." Patrick M. Garry & Candice Spurlin, *History of the 1889 South Dakota Constitution*, 59 S.D. L. Rev. 14, 31 (2014) (citing Jon K. Lauck, *"You Can't Mix Wheat and Potatoes in the Same Bin": Anti-Catholicism in Early Dakota*, 38 S.D. Hist. 1, 32 (2008)).

Alaska,[2] Arizona,[3] Hawaii,[4] Montana,[5] New Mexico,[6] North Dakota,[7] and Wyoming[8] were all required to adopt no-aid provisions to be admitted into the union. All seven of these states adopted educational provisions that cover all private schools, whether religious or not.[9] While these provisions are "religion neutral" in

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[2] An Act to provide for the admission of the State of Alaska into the Union, Pub. L. No. 85-508, § 6(j), 72 Stat. 339, 342–43 (1958).

[3] Oklahoma Enabling Act of June 16, 1906, Pub. L. No. 234, ch. 3335, § 25, 34 Stat. 267, 280 (1906) (admitting Oklahoma, New Mexico, and Arizona into the union).

[4] An Act to provide for the admission of the State of Hawaii into the Union, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959).

[5] Montana Enabling Act, ch. 180, § 4, 25 Stat. 676, 677 (1889).

[6] Oklahoma Enabling Act of June 16, 1906, Pub. L. No. 234, ch. 3335, § 25, 34 Stat. 267, 280 (1906) (admitting Oklahoma, New Mexico, and Arizona into the union).

[7] Montana Enabling Act, *supra*, (splitting Dakota into two states and admitting Montana and Washington into the union).

[8] An Act to Provide for the Admission of the State of Wyoming into the Union, ch. 664, § 8, 26 Stat. 222, 223 (1890).

[9] Alaska Const. art. VII, § 1 ("No money shall be paid from public funds for the direct benefit of any religious or other private educational institution."); Ariz. Const. art. IX, § 10 ("No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."); Haw. Const. art. X, § 1 ("[N]or shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution . . . ."); Mont. Const. art. V, § 11(5) ("No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state."); N.M. Const. art. IV, § 31 ("No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state . . . ."); N.D. Const. art. VIII, § 5 ("All colleges, universities, and other educational

effect, they are not "religion neutral" on their face. Most of them, in fact, specifically mention both religious and "other" private schools, and a majority employ what this Court has acknowledged is "bigoted code language" by explicitly referring to "sectarian" schools. *Espinoza,* 140 S. Ct. at 2270 (Alito, J., concurring); s*ee also Mitchell v. Helms*, 530 U.S. at 828 ("Consideration of the 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 code for 'Catholic.'")

Other states with no-aid amendments that apply to all private schools have similar ugly histories of bigotry. For example, Massachusetts's Know Nothing-dominated legislature adopted its no-aid amendment[10] in 1855 as part of an agenda "to decrease the political influence of immigrants and Catholics." Tyler Anbinder, *Nativism & Slavery: The Northern Know Nothings & the Politics of the 1850s* 135 (1992). By adopting this amendment, the legislature hoped it "would make parochial schools financially unfeasible,

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institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state."); Wyo. Const. art. III, § 36 ("No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.").

[10] Mass. Const. art. XVIII, § 2 ("No grant, appropriation or use of public money or property or loan of credit shall be made . . . for the purpose of founding, maintaining or aiding any . . . primary or secondary school . . . which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth . . . .").

forcing the children of Catholics to learn 'American' customs in the public schools." *Id.* at 136.

Additionally, as in South Carolina, most Southern states adopted Blaine amendments under circumstances suggestive of both racist and anti-Catholic motives. For example, Mississippi adopted its Blaine amendment in 1890 and has made no significant changes to it since. In the contemporary words of future Mississippi Governor and U.S. Senator James K. Vardaman, "There is no use to equivocate or lie about the matter. . . . Mississippi's constitutional convention of 1890 was held for no other purpose than to eliminate the n*gger from politics." Neil R. McMillen, *Dark Journey: Black Mississippians in the Age of Jim Crow* 43 (1989)*; see also* Buck Dougherty, *Mississippi's 1890 Constitution Should Not Discriminate against Private Schools, Attorney Says*, Clarion Ledger, Oct. 3, 2023, https://tinyurl.com/4xstkure ("Blaine Amendments—like Mississippi's—have a sordid past and were enacted into law and made part of some state constitutions after the Civil War because of racial prejudice against immigrant Catholics and newly freed slaves and the schools that dared to serve them in the Reconstruction period.").

As in South Carolina, these provisions likely were motivated, at least in part, by a desire to undermine the efforts of northern missionaries, including but not limited to Catholics, who came South to educate freed slaves in the wake of the Civil War. As one historian observed in 1919, even before the Civil War, Catholics were "long active in the cause of elevating colored people," but often were "denied access to the Negroes in most southern communities, even when they volunteered to work as missionaries among the colored

people." Carter Godwin Woodson, *The Education of the Negro Prior to 1861: A History of the Education of the Colored People of the United States from the Beginning of Slavery to the Civil War* 108, 183 (1919). Especially in the wake of the Civil War, these missionary efforts frustrated Southern racists who sought to thwart efforts to educate black citizens. As another historian observed, "The Northern missionary teachers who came to the South to educate Negroes in the period after the Civil War are remembered as having been among the vilest of all mankind." Horace Mann Bond, *Education in the South*, 12 J. Educ. Soc. 264, 269 (1939).

CONCLUSION

The fact that a state Blaine amendment applies, on its face, to both religious and nonreligious schools does not give the government a free pass when it comes to the Constitution's prohibition on religious and racial discrimination. The application of those provisions which are rooted in racial or religious bias should also be subject to strict scrutiny. Michigan's Article VIII, § 2, although facially neutral, was rooted in anti-religious bigotry, and cannot be constitutionally enforced.

The petition for *certiorari* should be granted.

Respectfully submitted,

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