No. 23-1084

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

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MICHAEL E. BINDAS
Counsel of Record
INSTITUTE FOR JUSTICE
600 University Street
Suite 1730
Seattle, WA 98101
(206) 957-1300
mbindas@ij.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT.................................... 4

ARGUMENT 6

I. Public/Private Blaine Amendments Like Michigan's Continue to Deny Educational Opportunity in Several States, Notwithstanding *Espinoza* and *Carson*. 6

A. Ongoing Litigation Involving Alaska's Public/Private Blaine Amendment.......... 11

B. Ongoing Litigation Involving Massachusetts' Public/Private Blaine Amendment.. 14

II. Public/Private Blaine Amendments Penalize a Parent's Fundamental Right to Direct the Education of Her Children and Discriminate Against Parents Based on Their Exercise of that Right.......................... 17

CONCLUSION.. 24

TABLE OF AUTHORITIES

PAGE

Cases

Adams v. *McMaster*,
851 S.E.2d 703 (S.C. 2020) 10

Alexander v. *Teshner*,
No. 3AN-23-04309CI (Alaska Super. Ct., 3d
Jud. Dist. Jan. 24, 2023) 11–14

Ams. United for Separation of Church & State Fund, Inc. v. *State*,
648 P.2d 1072 (Colo. 1982) 9

Ariz. Christian Sch. Tuition Org. v. *Winn*, 563
U.S. 125 (2011) 1, 10

Bd. of Trs. v. *Cory*,
145 Cal. Rptr. 136 (Cal Ct. App. 1978) 9

Carson v. *Makin*,
596 U.S. 767 (2022) 2–4, 6–7, 10, 20

Chance v. *Miss. State Textbook Rating & Purchasing Bd.*,
200 So. 706 (Miss. 1941) 9

Dobbs v. *Jackson Women's Health Org.*,
597 U.S. 215 (2022) 19, 22

Dunn v. *Blumstein*,
405 U.S. 330 (1972) 21

Emp. Div. v. *Smith*,
494 U.S. 872 (1990) 13, 19

Espinoza v. *Mont. Dep't of Revenue*,
591 U.S. 464 (2020) 2–4, 6–7, 10, 13–14, 20, 22

Farrington v. *Tokushige*,
273 U.S. 284 (1927) 19

Garrity v. *New Jersey*,
385 U.S. 493 (1967) 20

Good News Club v. *Milford Cent. Sch.*,
533 U.S. 98 (2001) 20–21

Hellman v. *Mass. Bd. of Elementary & Secondary Educ.*,
No. 1:24-cv-11200 (D. Mass. May 6, 2024) 16–17

Koontz v. *St. Johns River Water Mgmt. Dist.*,
570 U.S. 595 (2013) 20

Lamb's Chapel v. *Ctr. Moriches Union Free Sch. Dist.*,
508 U.S. 384 (1993) 21

Lenstrom v. *Thone*,
311 N.W.2d 884 (Neb. 1981) 9

Mem'l Hosp. v. *Maricopa County*,
415 U.S. 250 (1974) 21

Meyer v. *Nebraska*,
262 U.S. 390 (1923) 2, 4, 18–19, 22

Moses v. *Ruszkowski*,
458 P.3d 406 (N.M. 2018)....................................... 9

Niehaus v. *Huppenthal*,
310 P.3d 983 (Ariz. Ct. App. 2013)......................... 9

Opinion of Justices to Senate,
514 N.E.2d 353 (Mass. 1987) 10

Pierce v. *Soc'y of Sisters*,
268 U.S. 510 (1925) 2–5, 13, 18–19, 22

Romer v. *Evans*,
517 U.S. 620 (1996) 23

Rosenberger v. *Rector & Visitors of Univ. of Va.*,
515 U.S. 819 (1995) 21

Saenz v. *Roe*,
526 U.S. 489 (1999) 21

Sheldon Jackson Coll. v. *State*,
599 P.2d 127 (Alaska 1979)............................ 10, 12

Sherbert v. *Verner*,
374 U.S. 398 (1963) 21

Slochower v. *Bd. of Higher Educ.*,
350 U.S. 551 (1956) 21

Spears v. *Honda*,
449 P.2d 130 (Haw. 1969) 10

Thomas v. *Rev. Bd.*,
450 U.S. 707 (1981) 21

Troxel v. *Granville*,
530 U.S. 57 (2000) 19, 22

Washington v. *Glucksberg*,
521 U.S. 702 (1997) 19

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 19

Zelman v. *Simmons-Harris*,
536 U.S. 639 (2002) 1, 10

Zobel v. *Williams*,
457 U.S. 55 (1982) 21

Constitutional Provisions

U.S. Const. art. XIV, § 1 22

Alaska Const. art. VII, § 1 .... 8, 12

Ala. Const. art. IV, § 73 7

Ariz. Const. art. IX, § 10 8

Cal. Const. art. IX, § 8 8

Colo. Const. art. V, § 34 8

Haw. Const. art. X, § 1 8

Ky. Const. § 184 7

Mass. Const. amend. art. XVIII, § 2 .... 8, 16

Mich. Const. art. VIII, § 2 2

Miss. Const. art. VIII, § 208 8

Mont. Const. art. V, § 11(5) 9

N.D. Const. art. VIII, § 5 8

N.M. Const. art. IV, § 31 9

N.M. Const. art. XII, § 3 8

Neb. Const. art. VII, § 11 8

Pa. Const. art. III, § 30 7

S.C. Const. art. XI, § 4 8

Wyo. Const. art. III, § 36 9

Statutes

Alaska Stat. § 14.03.310(a) 11

Alaska Stat. § 14.03.310(b) 11

Mass. Gen. Laws ch. 71B, § 1 14

Mass. Gen. Laws ch. 71B, § 3 14

Mass. Gen. Laws ch. 71B, § 4 15

Mass. Gen. Laws ch. 71B, § 5 15

State Codes

603 Mass. Code Regs. 28.03(1)(e)(3) 15

603 Mass. Code Regs. 28.05(5)(a)(2) 15

Alaska Admin. Code tit. 4, § 33.421(h) 11

Other Authorities

Michael Bindas, *Using My Religion:* Carson v. Makin *and the Status/Use (Non)Distinction*, 2022 CATO SUP. CT. REV. 163 .... 7, 9

INTEREST OF AMICUS CURIAE[1]

The Institute for Justice files this brief on its own behalf as amicus curiae. The Institute is a public interest law firm based in Arlington, Virginia. It litigates cases in four areas, one of which is the defense of private educational choice programs: programs such as vouchers, tax-credit scholarships, and education savings accounts that empower families to choose a private alternative to the public education system.

As part of its educational choice practice, the Institute has represented families four times in this Court, and those cases have established both the constitutionality of including religious options in educational choice programs and the unconstitutionality of excluding them:

- In *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), the Institute successfully defended, against an Establishment Clause challenge, an Ohio voucher program for low-income children in the Cleveland City School District.

- In *Arizona Christian School Tuition Organization* v. *Winn*, 563 U.S. 125 (2011), the Institute prevailed in defending against a

[1] No counsel for any party authored this brief in whole or part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Institute for Justice made such a monetary contribution. Counsel for the Institute for Justice provided notice to counsel for all parties, at least ten days prior to the deadline to file this brief, of the Institute's intention to file it.

challenge to an Arizona tax-credit scholarship program when this Court held that the plaintiffs challenging it lacked standing.

- In *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020), the Institute prevailed in a free exercise challenge to Montana's application of the "no-aid" provision, or Blaine Amendment, of its state constitution to bar religious schools from participating in the state's tax-credit scholarship program.

- And in *Carson* v. *Makin*, 596 U.S. 767 (2022), the Institute successfully challenged, again under the Free Exercise Clause, Maine's exclusion of schools that teach religion from a voucher program.

Notwithstanding these momentous decisions, which paved the way for greater educational opportunity throughout the country, an important federal constitutional question concerning educational choice programs remains unanswered: May a state constitution impose a blanket prohibition on education benefits for any child whose parents have exercised their fundamental, federal constitutional right[2] to educate that child outside of the public school system?

Article VIII, section 2 of the Michigan Constitution does precisely that, barring any form of state financial

[2] See *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

aid for children attending private schools, religious or nonreligious. So, too, do similar provisions in a handful of other state constitutions. And because these provisions, at least facially, target *all* private education, rather than religious, or sectarian, education alone, their enforceability remains unaffected by this Court's decisions in *Carson* and *Espinoza*. Thus, the provisions remain a barrier to educational choice programs in some states.

The Institute for Justice is as committed to removing the barrier that these "public/private" Blaine Amendments impose to educational choice as it was to removing the barrier that the more conventional "sectarian/nonsectarian" Blaine Amendments once imposed. To that end, the Institute is currently defending an educational choice program in Alaska against a challenge under that state's public/private Blaine Amendment, and it is squarely raising the federal equal protection and due process problems that would arise from invalidating the program under that provision. Similarly, the Institute is currently challenging a state agency's reliance on Massachusetts' public/private Blaine Amendment to ban the provision of state- and locally-funded special education services—services that the Massachusetts Legislature mandated be made available to *all* students—on-site at private schools. As in Alaska, the Institute's argument is that such application of a state's public/private Blaine Amendment would violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Simply put, it would penalize parents for exercising the fundamental constitutional right that this Court recognized in *Pierce* v. *Society of*

Sisters and *Meyer* v. *Nebraska*: to choose a private education for one's children.

Whether these public/private Blaine Amendments are preventing parents from asking a state legislature for aid, as in the present case, or being wielded as a weapon to deprive children of aid that a state legislature, in its discretion, has already chosen to provide them, as in the pending Alaska and Massachusetts cases, these provisions act as a barrier to educational opportunity. For three decades, the Institute for Justice has fought to remove barriers to educational opportunity, and it is in that spirit that it submits this amicus brief in support of certiorari.

SUMMARY OF ARGUMENT

This Court's decisions in *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020), and *Carson* v. *Makin*, 596 U.S. 767 (2022), were the death-knell for the many state constitution "no-aid" clauses, or Blaine Amendments, that barred state education benefits for students attending religious schools. The decisions thus went a long way toward making educational choice programs legally possible for children throughout this country. But the decisions did not go *all* the way in that regard. That is because several states have Blaine Amendment variants that, at least on their face, are neutral toward religion, prohibiting aid for any form of private education, religious or not. Because these provisions are facially neutral, *Espinoza* and *Carson* did not speak directly to their constitutionality.

Thus, these "public/private" Blaine Amendment variants still stand as a barrier to educational choice programs in several states, including Michigan. When legislatures in these states have enacted programs to provide greater educational opportunity to students, public/private Blaine Amendments have been weaponized to take that opportunity away. In fact, families in Alaska and Massachusetts are currently litigating to secure education benefits to which they are statutorily entitled but being denied because of the public/private Blaine Amendments in those states.

As Petitioners demonstrate, these state constitutional provisions, although facially neutral, were often motivated by the same anti-religious animus that undergirded the more conventional "sectarian/nonsectarian" Blaine Amendments, and they bear heavily on parents who desire a religious education for their children. That is an equal protection problem. But these provisions bear, as well, on parents who desire other types of private education for their children, and that, too, is an equal protection—and due process—problem. Simply put, public/private Blaine Amendments condition the possibility of educational aid on the surrender of a parent's fundamental federal constitutional right to choose a private school for her child, see *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925), and they discriminate against parents based on their exercise of that right. To remove the unconstitutional barrier—indeed, weapon—that these provisions present, this Court should grant certiorari.

ARGUMENT

I. Public/Private Blaine Amendments Like Michigan's Continue to Deny Educational Opportunity in Several States, Notwithstanding *Espinoza* and *Carson*.

The standard state constitution's "no-aid" provision, or Blaine Amendment, prohibits public funding of sectarian schools. Such provisions, which have well-documented roots in 19th-century anti-Catholic bigotry, see *Espinoza* v. *Mont. Dep't of Revenue*, 591 U.S. 464, 482 (2020); *id.* at 497–508 (Alito, J., concurring),[3] were once the favored legal weapon of opponents of educational choice programs—*i.e.*, programs that provide educational opportunities outside the public school system. Thankfully, this Court defanged conventional Blaine Amendments in *Espinoza* and *Carson* v. *Makin*, holding that a state law cannot be applied to deny otherwise available financial aid to students simply because they wish to use that aid at schools that teach religion, *Carson*, 596 U.S. 767, 786–789 (2022), or have a religious identity, *Espinoza*, 591 U.S. at 476–477. Thus, these provisions no longer pose a barrier to state legislatures

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[3] The term "Blaine Amendment" comes from a failed federal constitutional amendment, proposed by Representative James G. Blaine, to restrict public funding of so-called "sectarian" schools. Although some states had already included such provisions in their own constitutions, many more—either by amendment or in the new constitutions they approved to obtain statehood—adopted them in the wake of Blaine's failed effort. *Espinoza*, 591 U.S. at 482; *id.* at 497–508 (Alito, J., concurring).

that wish to adopt educational choice programs (or to citizens who wish to lobby their legislators to do so).

There is, however, a Blaine Amendment variant that, at least facially, turns not on the *religiosity* of private schools, but on the mere fact that they are private. Found in fewer state constitutions and sometimes referred to as "public/private" Blaine Amendments, in order to distinguish them from their sectarian/nonsectarian cousins, see Michael Bindas, *Using My Religion:* Carson v. Makin *and the Status / Use (Non)Distinction*, 2022 CATO SUP. CT. REV. 163, 185 n.108, 189–91, these provisions typically prohibit[4]

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[4] Occasionally, rather than prohibit aid to private schools, a state constitution imposes special political barriers to such aid. *E.g.*, ALA. CONST. art. IV, § 73 ("No appropriation shall be made to any charitable or educational institution not under the absolute control of the state * * * except by a vote of two-thirds of all the members elected to each house."); KY. CONST. § 184 ("No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation * * * ."); PA. CONST. art. III, § 30 ("No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth * * * except by a vote of two-thirds of all the members elected to each House.").

public funding of "private" schools[5] or those not under the "absolute" or "exclusive" control of the state.[6]

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[5] *E.g.*, 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 * * * ."); N.M. CONST. art. XII, § 3 ("[N]o * * * funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university."); S.C. CONST. art. XI, § 4 ("No money shall be paid from public funds * * * for the direct benefit of any religious or other private educational institution."); see also MISS. CONST. art. VIII, § 208 ("[N]or shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.").

[6] *E.g.*, CAL. CONST. art. IX, § 8 ("No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools * * * ."); COLO. CONST. art. V, § 34 ("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."); MASS. CONST. amend. art. XVIII, § 2 ("No grant, appropriation or use of public money * * * shall be made * * * for the purpose of * * * 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 * * * ."); NEB. CONST. art. VII, § 11 ("[A]ppropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof * * * ."); N.D. CONST. art. VIII, § 5 ("All colleges, universities, and other educational institutions, * * * which are supported by a public tax, shall remain under the absolute and exclusive control of the

Thankfully, "most state courts have appropriately interpreted [these provisions] as barring only aid to private *schools*—not aid to students who attend private schools." Bindas, *supra*, at 190.[7] In such states, public/private Blaine Amendments pose no barrier to

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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."); see also 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 * * * .").

[7] *E.g.*, *Moses* v. *Ruszkowski*, 458 P.3d 406 (N.M. 2018) (upholding lending of instructional materials to private school students); *Ams. United for Separation of Church & State Fund, Inc.* v. *State*, 648 P.2d 1072 (Colo. 1982) (upholding higher education scholarship program); *Lenstrom* v. *Thone*, 311 N.W.2d 884 (Neb. 1981) (upholding higher education scholarship program); *Bd. of Trs.* v. *Cory*, 145 Cal. Rptr. 136, 139 (Cal Ct. App. 1978) ("[P]ayment of funds in the amount of the tuition for education directly to a student or to a public or private school on behalf of a special student, such as a veteran, who designates the school of his choice, is not unconstitutional, since any benefit to a private school is an 'incidental' or 'indirect' effect of the direct benefit to the student."); *Chance* v. *Miss. State Textbook Rating & Purchasing Bd.*, 200 So. 706, 713 (Miss. 1941) (upholding textbook loan program for private school students); *Niehaus* v. *Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013) (upholding education savings account program that could be used for private school tuition or other education-related expenses).

educational choice programs, because these programs provide aid to individuals to meet their educational needs, not aid to schools or other educational institutions. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652 (2002) (recognizing that a voucher program "provides assistance directly to a broad class of citizens who, in turn, direct government aid to * * * schools wholly as a result of their own genuine and independent private choice").

In some states, however, these provisions, by either their plain text or judicial interpretation, prohibit even *student*-aid programs designed to assist families for whom public schools are not the best option.[8] In such states, the educational opportunity made possible by this Court's decisions in *Zelman*, *Winn*, *Espinoza*, and *Carson* is yet to be realized.

In those states, moreover, public/private Blaine Amendments are not merely a barrier to a parent's ability to *lobby* her elected representatives to adopt an educational choice or other student-aid program,

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[8] *E.g.*, *Adams* v. *McMaster*, 851 S.E.2d 703 (S.C. 2020) (invalidating voucher program under South Carolina's Blaine Amendment); *Sheldon Jackson Coll.* v. *State*, 599 P.2d 127 (Alaska 1979) (invalidating, under Alaska's Blaine Amendment, tuition assistance grants for students attending private colleges); *Opinion of Justices to Senate*, 514 N.E.2d 353 (Mass. 1987) (opining that proposed legislation to provide tax deductions to parents for tuition, textbook, and transportation expenses incurred on behalf of their children would violate Massachusetts' Blaine Amendment); *Spears* v. *Honda*, 449 P.2d 130 (Haw. 1969) (invalidating, under Hawaii's Blaine Amendment, statute authorizing transportation of private school students).

as is the case in Michigan.[9] Rather, the provisions are sometimes weaponized to deny education benefits that a state legislature, in its discretion, has *already* chosen to provide students. That is currently happening in cases making their way through courts in Alaska and Massachusetts.

A. Ongoing Litigation Involving Alaska's Public/Private Blaine Amendment

For example, an ongoing case in Alaska involves a challenge to the state's Correspondence Study Program, through which students may receive an "allotment," up to $4,500 per year, that the student's parents can use to pay for a wide variety of "instructional expenses"—including tuition, textbooks, curricular materials, tutoring services, school supplies, technology expenses, and other "services and materials"—from "a public, private, or religious organization." ALASKA STAT. § 14.03.310(a), (b); see also ALASKA ADMIN. CODE tit. 4, § 33.421(h). The program is designed to empower parents to provide a customized education to best meet the unique educational needs of their children.

In January 2023, however, a group of plaintiffs, funded by the NEA-Alaska, filed a lawsuit challenging the program. Compl., *Alexander* v. *Teshner*, No. 3AN-23-04309CI (Alaska Super. Ct., 3d Jud. Dist.

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[9] Pet. 10 ("The constitutionalizing of the prohibition * * * 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.").

Jan. 24, 2023). They asserted a single claim: that the correspondence program violates Alaska's public/private Blaine Amendment, which provides that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution." ALASKA CONST. art. VII, § 1; see also Compl. ¶¶ 59–72, *Alexander*, *supra* (No. 3AN-23-04309CI). In support of the claim, the plaintiffs are relying primarily on *Sheldon Jackson College* v. *State*, 599 P.2d 127 (Alaska 1979), in which the Alaska Supreme Court invalidated, under the Blaine Amendment, a tuition assistance grant program for students attending private colleges. See Compl. ¶¶ 59, 65, 69, *Alexander*, *supra* (No. 3AN-23-04309CI).[10] The complaint requests "[a]n order declaring [the Correspondence Study Program] unconstitutional" and "enjoining any current or future use of public funds to reimburse payments to private educational institutions pursuant to [the program]." *Id.* at 22.

A group of mothers whose children use the correspondence program has intervened in the litigation to defend the program alongside the State. Like Petitioners in this case, they are arguing that to apply Alaska's public/private Blaine Amendment as a complete bar to aid for students attending private schools and educational institutions would violate the Equal Protection (and Due Process) Clauses of the 14th Amendment to the U.S. Constitution. Their

[10] See also Mem. in Support of Pls.' Opp'n to State of Alaska's Mot. to Dismiss/Cross Mot. for Summ. J. 24–39, *Alexander*, *supra* (No. 3AN-23-04309CI); Pls.' Reply in Support of Summ. J. and Opp'n to State of Alaska's Cross-Motion for Summ. J. 10–35, *Alexander*, *supra* (No. 3AN-23-04309CI).

argument, however, is not focused solely on the barrier that Alaska's Blaine Amendment poses to students seeking a *religious* education. Rather, and as discussed in more detail in Section II, below, they maintain that Alaska's Blaine Amendment: (1) discriminates against parents based on their exercise of the fundamental, federal constitutional right to direct the education of their children, which includes the right to choose a private school for them, see *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925); and (2) unconstitutionally conditions the availability of public benefits on their surrender of that right. See Intervenors' Resp. in Opp'n to Pls.' Cross-Mot. for Summ. J. at 13–22, *Alexander*, *supra* (No. 3AN-23-04309CI); Intervenors' Reply to Pls.' Resp. to Cross-Mot. for Summ. J. at 6–12, *Alexander*, *supra* (No. 3AN-23-04309CI).[11]

To be clear, the mothers are not arguing that the federal Constitution *requires* a state to provide aid to families who choose a private education for their children. After all, "[a] State need not subsidize private education." *Espinoza*, 591 U.S. at 487. Rather, they maintain that applying Alaska's Blaine Amendment to *deprive* them of benefits that the Alaska Legislature, in its discretion, *chose* to provide violates their federal constitutional rights, just as the application of

[11] They also maintain that application of the Blaine Amendment would impermissibly burden a "hybrid" right—to freely exercise religion and direct the education of one's children—recognized by this Court in *Employment Division* v. *Smith*, 494 U.S. 872, 881–82 (1990). See Intervenors' Resp. in Opp'n to Pls.' Cross-Motion for Summ. J. at 23–25, *Alexander*, *supra* (No. 3AN-23-04309CI); Intervenors' Reply to Pls.' Resp. to Cross-Mot. for Summ. J. at 6, 9–10, *Alexander*, *supra* (No. 3AN-23-04309CI).

Montana's Blaine Amendment to deny legislatively provided benefits in *Espinoza* violated the federal constitutional rights of parents.

On April 12, 2024, a state trial court invalidated the correspondence program, in its entirety, under Alaska's Blaine Amendment, notwithstanding the mothers' federal constitutional arguments. *See* Order Denying Defs.' Mot. to Dismiss & Granting Pls.' Mot. for Summ. J., *Alexander*, *supra* (No. 3AN-23-04309CI). An appeal to the Alaska Supreme Court is forthcoming.

B. Ongoing Litigation Involving Massachusetts' Public/Private Blaine Amendment

Litigation involving the application of a public/private Blaine Amendment to deny legislatively provided education benefits is currently proceeding in Massachusetts, as well. The Massachusetts Legislature has guaranteed publicly funded special education services for children in both public *and* private schools. MASS. GEN. LAWS ch. 71B, § 1 (defining "[s]chool age child with a disability" as including a child "in a public or non-public school setting"). "[T]o the maximum extent appropriate," the legislature has required that these children be "educated with children who are not disabled," and that "removal of children with disabilities from the *regular educational environment*" may "occur[] *only* when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily." *Ibid.* (emphasis added) (defining "least restrictive environment"); see also *id.* § 3 (imposing "requirement that

school committees educate children in the least restrictive environment").

Despite this statutory requirement that a child receive state- and local-funded special education services in the "regular educational environment" whenever possible, the Massachusetts Board of Elementary and Secondary Education has promulgated regulations that single out private school students and impose a blanket "place" restriction that bars them from receiving those services at their own schools. See 603 MASS. CODE REGS. 28.03(1)(e)(3).[12] Rather, the services may only be provided in "a public school facility or other public or neutral site." *Ibid.* Consequently, private school students cannot receive state- or local-funded special education services at the schools they attend—*i.e.*, in their regular educational environment. Instead, the Board forces them to travel off-site to a "neutral" location, and it denies them a right to transportation to that "neutral" location. 603 MASS. CODE REGS. 28.05(5)(A)(2).

This ban on services at private schools makes many special education services impractical at best and useless at worst. For many students, services are required *at the point of learning*, in the classroom.

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[12] The bar to on-site services only applies to "parentally-placed" private school students—that is, children enrolled in a private school by their parents. There is no comparable bar to on-site services when a *school district* places a child in a private school (for example, when a district contracts with a private day or residential school to provide services for public school students whose needs the district itself is unable to meet, see MASS. GEN. LAWS ch. 71B, §§ 4, 5).

Being removed from their school to access services, moreover, is stigmatizing for these children, who already face physical or emotional challenges. And time spent traveling rather than learning results in children falling even further behind in their academics. (Of course, many parents cannot spend time during the workday shuttling their children from location to location.) Consequently, many families simply forgo the services to which their children are legally entitled.

As in Alaska, the justification for Massachusetts' ban on the ability of students to access their statutorily guaranteed special education services at private schools is the Commonwealth's public/private Blaine Amendment. It provides that "[n]o grant, appropriation or use of public money * * * shall be made * * * for the purpose of * * * 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." MASS. CONST. amend. art. XVIII, § 2.

On May 6, 2024, two families with special needs children challenged the Blaine-based ban on federal constitutional grounds. See Compl., *Hellman* v. *Mass. Bd. of Elementary & Secondary Educ.*, No. 1:24-cv-11200 (D. Mass. May 6, 2024), ECF No. 1. Like Petitioners in the present case and the parents in the Alaska case discussed in Section I.A above, they maintain that the ban violates the federal Equal Protection Clause, as well as the Due Process and Privileges or Immunities Clauses. And like the parents in the Alaska case, their claims turn on the impact of the ban on not only religious school students, but all

private school students. Specifically, they allege that the ban: (1) discriminates against parents based on their exercise of their fundamental, federal constitutional right to direct the education of their children, in violation of the Equal Protection Clause, *id.* ¶¶ 92–102; and (2) unconstitutionally conditions the availability of special education services on their surrender of that right, regardless of whether the source of the right's substantive protection is the Due Process Clause or the Privileges or Immunities Clause, *id.* ¶¶ 83–91, 103–112.

In short, the federal constitutionality of applying public/private Blaine Amendments—whether as a bar to the ability of citizens to lobby their legislators for benefits, as in the present case, or to deny benefits that legislators, in their discretion, have already chosen to provide their constituents, as in the Alaska and Massachusetts cases discussed above—is an issue of profound importance and one that this Court should resolve.

II. Public/Private Blaine Amendments Penalize a Parent's Fundamental Right to Direct the Education of Her Children and Discriminate Against Parents Based on Their Exercise of that Right.

As Petitioners explain, Michigan's Blaine Amendment prevents parents desiring a religious education for their children from even lobbying their legislators for state aid. But it is not the religious alone who suffer. Like the public/private Blaine Amendments of

several other states, Michigan's provision conditions the possibility of state financial aid on the surrender of a parent's fundamental right to choose *any* kind of private education for her children. The broader reach of the provision, as compared to the more conventional "sectarian/nonsectarian" Blaine Amendments, means a broader federal constitutional problem.

For a century, this Court has provided substantive protection, through the Due Process Clause of the Fourteenth Amendment, to a parent's liberty interest in directing the education and upbringing of her children. Beginning in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), the Court held that the "liberty" protected by the Due Process Clause "denotes," among other things, the right to "bring up children" and "acquire useful knowledge." *Id.* at 399. More specifically, the Court held that it encompasses the right of parents "to control the education of their own," including "the right of parents to engage [a private teacher] so to instruct their children." *Id.* at 400, 401.

Just two years later, in *Pierce*, the Court again recognized "the liberty of parents and guardians to direct the upbringing and education of children under their control," including by sending them to a private school. *Pierce*, 268 U.S. at 534–535. "The fundamental theory of liberty upon which all governments in this Union repose," the Court explained, "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535. "The child is not the mere creature of the state," the Court held, and "those who nurture him and direct his destiny have the right,

coupled with the high duty, to recognize and prepare him for additional obligations." *Ibid.*

This Court has reaffirmed the right of parents to direct the education of their children many times in the century since *Meyer* and *Pierce* were decided. *E.g.*, *Farrington* v. *Tokushige*, 273 U.S. 284, 298–299 (1927); *Wisconsin* v. *Yoder*, 406 U.S. 205, 213–214 (1972); *Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990); *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 256 (2022). It has recognized the right as "fundamental" for Fourteenth Amendment purposes; indeed, it is "perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (plurality); see also *id.* at 80 (Thomas, J., concurring in judgment) ("I agree with the [four-justice] plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case."); *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] * * * to direct the education and upbringing of one's children.").

Public/private Blaine Amendments abridge this "oldest of the fundamental liberty interests." *Troxel*, 530 U.S. at 65 (plurality). By barring aid to private school students, they condition the availability of education benefits on a parent's surrender of her fundamental constitutional right to send her child to a private school, much the same way that Montana and Maine conditioned the availability of education benefits on the surrender of a parent's fundamental right

to choose a specifically religious private school for her child.[13]

This court has repeatedly held that a state may not condition the availability of public benefits on the surrender of a fundamental constitutional right; nor may it penalize someone because she has exercised such a right. See *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("[T]he government may not deny a benefit to a person because he exercises a constitutional right." (internal quotation marks and citation omitted)); *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."). For example, the Court has held that a state may not:

- condition tuition benefits on a parent's surrender of her right to obtain a religious education for her child, *Carson*, 596 U.S. at 789; *Espinoza*, 591 U.S. at 489;

- deny otherwise available public resources, such as student activity funds or school facilities, based on the viewpoint of speakers who wish to use them, *Good News Club* v.

[13] See *Espinoza*, 591 U.S. at 486 (recognizing that parents have "the right[] * * * to direct the religious upbringing of their children," that "[m]any parents exercise that right by sending their children to religious schools," and that Montana's Blaine Amendment "penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one" (internal quotation marks and citations omitted)).

Milford Cent. Sch., 533 U.S. 98, 107 (2001) (school facilities); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–846 (1995) (student activity funds); *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–394 (1993) (school facilities);

- condition public employment on the surrender of one's right against self-incrimination, *Slochower* v. *Bd. of Higher Educ.*, 350 U.S. 551, 558 (1956);

- deny unemployment benefits because of a worker's adherence to the tenets of her religion, *Thomas* v. *Rev. Bd.*, 450 U.S. 707, 716 (1981); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); or

- deny the right to vote, or withhold welfare, medical, or dividend benefits, based on a resident's exercise of her right to travel, *Saenz* v. *Roe*, 526 U.S. 489, 502–507 (1999) (welfare benefits); *Zobel* v. *Williams*, 457 U.S. 55, 58–61, 65 (1982) (dividend benefits); *Mem'l Hosp.* v. *Maricopa County*, 415 U.S. 250, 269 (1974) (medical benefits); *Dunn* v. *Blumstein*, 405 U.S. 330, 338–343, 360 (1972) (voting).

Simply put, "a person may not be compelled to choose between the exercise of a [fundamental] right and participation in an otherwise available public program." *Thomas*, 450 U.S. at 716. But that is precisely the choice compelled by Michigan's—and

Alaska's and Massachusetts'—bar to education benefits for children whose parents have exercised their fundamental right to send those children to a private school. These state constitutional proscriptions are thus at loggerheads with the federal constitutional command of the Fourteenth Amendment.[14]

Of course, none of this is to say that a state *must* subsidize a parent's choice to provide her child a private education. See Pet. 5. The Court could not have put it more plainly in *Espinoza*: "A State need not subsidize private education." *Espinoza*, 591 U.S. at 487. But a state may not do what Michigan has done: erect an absolute barrier to even the possibility of aid to anyone who exercises a fundamental right in a way the state disfavors. And a state constitution may not be wielded, as those of Alaska and Massachusetts currently are, to take away aid that a state legislature, in its discretion, has *chosen* to provide the state's

[14] A strong case can be made that the source of substantive protection for constitutional rights against the state—including the right to direct the education of one's children—is the Privileges or Immunities Clause, rather than (or in addition to) the Due Process Clause. *E.g.*, *Troxel*, 530 U.S. at 80 n.* (Thomas, J., concurring in judgment) (recognizing that the right of parents to direct the upbringing of their children is "fundamental," but leaving open the possibility that the Privileges or Immunities Clause, rather than the Due Process Clause, is the source of protection for the right); see also *Dobbs*, 597 U.S. at 240 n. 22 ("Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights."). Regardless of which clause(s) provide(s) substantive protection for the right recognized in *Meyer* and *Pierce*, public/private Blaine Amendments both "deprive" parents of and "abridge" that right. U.S. CONST. art. XIV, § 1.

residents, simply because those residents have exercised a fundamental right in a way that the state constitution disfavors.

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Thus, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Ibid.*

And that, again, is precisely what a public/private Blaine Amendment like Michigan's does: it makes it "more difficult"—indeed, impossible—"for one group of citizens than for all others to seek aid from the government." *Ibid.* Worse, it defines that "one group of citizens" based on a single characteristic: whether they send their children to a private school, which, again, it is their fundamental, federal constitutional right to do.

A state constitution may not "impose[] a special disability" on a single class of citizens, *id.* at 631, especially when it defines that class by their exercise of a federal constitutional right. To do so is "a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

Whether a state's public/private Blaine Amendment is preventing citizens from seeking aid from their government, as in this case, or is instead being weaponized to deprive citizens of aid that their government has already chosen to provide them, as in the Alaska and Massachusetts cases, there is a federal constitutional problem. That problem certainly falls on the religious; indeed, as Petitioners demonstrate, Michigan's public/private Blaine was specifically *targeted* at the religious. But it falls as well on *any* parent who believes, for *any* reason, that a government school is not the best school for her child.

CONCLUSION

For these reasons, as well as those advanced by Petitioners, this Court should grant certiorari.

Respectfully submitted,

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MICHAEL E. BINDAS
Counsel of Record
INSTITUTE FOR JUSTICE
600 University Street
Suite 1730
Seattle, WA 98101
(206) 957-1300
mbindas@ij.org

Counsel for Amicus Curiae