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 *AMICUS CURIAE* THE FOUNDATION FOR GOVERNMENT ACCOUNTABILITY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The Foundation for Government Accountability (FGA) is a 501(c)(3) non-profit organization that helps millions achieve the American Dream by improving welfare, workforce, health care, and election policy at both the state and federal levels. Launched in 2011, FGA promotes policy reforms that seek to free individuals from the trap of government dependence, restore dignity and self-sufficiency, and empower individuals to take control of their futures. FGA's policy reforms are grounded in the principles of government transparency, the free market, individual freedom, and limited constitutional government.

Since its founding, FGA has helped achieve more than 949 reforms impacting policies in 42 states as well as 29 federal reforms. FGA supports its mission by conducting innovative research, deploying outreach and education initiatives, equipping policy makers with the information they need to achieve meaningful reforms, and by appearing *amicus curiae* before state and federal courts including the U.S. Supreme Court in *Azar v. Gresham*, 141 S. Ct. 1043 (2021), *Biden v. Nebraska*, 600 U.S. 477 (2023), *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am.,*

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[*] Per this Court's Rule 37.6, this brief was not authored in whole or in part by any party, and no one other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Amicus curiae did provide notice to the parties of its intent to file this brief in support of Petitioners.

Ltd., 143 S. Ct. 978 (2023), and *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023).

The case at issue here centers on the nature of education choice policy and a state's ability to use facially neutral language to discriminate against students at private education institutions. Accordingly, this case directly implicates FGA's core mission of promoting limited, constitutional government, a free market, and individual liberty. For these reasons, FGA stands in support of Petitioners.

INTRODUCTION & SUMMARY OF ARGUMENT

In 1970, the Michigan Legislature passed PA 100, which allowed Michigan's Department of Education to compensate non-public schools for providing educational services in secular subjects. In response, political forces in Michigan created the "Council Against Parochiaid"† which drafted and mounted a ballot initiative campaign to add a "Blaine Amendment" to Michigan's Constitution. *Cf. Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 500-01 (2020) (Alito, J. concurring) (examining the Blaine Amendments adopted by the states out of anti-Catholic hostility). Ultimately, they succeeded in convincing Michigan voters to adopt Article VIII §2 into the Michigan Constitution.

† As Petitioners note in their brief, the term "parochiaid" is a slur of the term "parochial," which means "of or relating to a church or parish." Parochial, *Merriam-Webster's Dictionary*, https://www.merriam-webster.com/dictionary/parochial.

Despite clear anti-religious hostility, the Michigan Supreme Court upheld the law. *Traverse City Sch. Dist. v. Attorney Gen.,* 185 N.W.2d 9 (Mich. 1971).

In 2000, Michigan voters were presented with a ballot initiative that would have amended portions of Article VIII §2. It would have:

> a. Eliminated the ban on indirect support of students attending non public schools through tuition vouchers, credits, tax benefits, exemptions or deductions, subsidies grants or loans of public monies or property.
>
> b. Allowed students to use tuition vouchers to attend non public schools in districts with a graduation rate under 2/3.
>
> c. Required teacher testing on academic subjects in public schools and in non public schools redeeming tuition vouchers.
>
> d. Adjusted the minimum per-pupil funding level from 1994-1995 to 2000-2001.

Michigan Legislature, *Initiative Petitions-2000 Proposed Amendment to the Constitution,* available at (bit.ly/3y9aFCj). The proposed ballot initiative did not pass with nearly 70 percent opposed. *Ibid*.

In the present case, the Sixth Circuit held that "Michigan voters' reconsideration of the constitutional

prohibition on public funding for non-public schools and their rejection of the 2000 ballot proposal eradicated any possible concerns of anti-religious animus." *Hile v. Michigan*, 86 F.4th 269, 280 (2023). In making this decision, the panel cited this Court's decision in *Rostker v. Goldberg*, 453 U.S. 57, 75 (1981). However, the Sixth Circuit misapplied *Rostker* and ignored this Court's analysis of how Congress thoroughly reconsidered the law at issue in that case.

Further, the panel ignored multiple other examples of facially neutral laws passed with discriminatory animus where the process of reconsideration involved a federal or state legislative body. They also failed to provide a single example where both the legislative and reconsideration process only involved ballot initiatives and not a legislative body.

Finally, studies and analysis have shown that education choice policies are a positive force in improving outcomes for students in the United States. They improve student academic outcomes, save taxpayers money, and are used by a majority of parents who have the option to use them.

For these reasons and those given by the Petitioner, certiorari should be granted and the judgment reversed.

ARGUMENT

I. Intermediate Reconsideration of Michigan's Article VIII §2 Did Not Purge the Discriminatory Animus from the 1970 Campaign to Pass Article VIII §2.

A. Michigan voters did not reauthorize Article VIII § 2 in 2000.

The 2000 ballot initiative did not reauthorize Article VIII § 2. The Sixth Circuit's opinion stated that "Michigan voters were asked to consider a school voucher proposal that would have repealed Article VIII § 2." *Hile v. Michigan*, 86 F.4th 269, 279-280 (2023). This is untrue.

The proposed ballot initiative in 2000 would have made changes to Article VIII § 2 as part of a much larger school voucher effort, but the proposal would not have repealed the entire amendment. *See* Michigan Legislature, *Initiative Petitions-2000 Proposed Amendment to the Constitution,* available at (bit.ly/3y9aFCj). In fact, the proposed amendment maintained the language that would prohibit direct aid from the government or its political subdivisions to any private, denominational, or other non-public, pre-elementary, elementary, or secondary school. *See ibid*.

Further, the official ballot initiative description addressed four separate topics, and specifically provided that the proposed constitutional amendment would:

1.) Eliminate the ban on indirect support of students attending non-public schools through tuition vouchers, credits, tax benefits, exemptions or deductions, subsidies, grants, or loans of public monies or property.

2.) Allow students to use tuition vouchers to attend non-public schools in districts with a graduation rate under 2/3 in 1998-1999 and districts approving tuition vouchers through school board action or a public vote. Each voucher would be limited to 1/2 of state average per-pupil public school revenue.

3.) Require teacher testing on academic subjects in public schools and in non-public schools redeeming tuition vouchers.

4.) Adjust minimum per-pupil funding from 1994-1995 to 2000-2001 level.

See ibid. Any voter who voted "no" on the ballot initiative need only disapprove of any of these four subjects. This hardly rises to the level that Congress reached when it "thoroughly reconsider[ed]" the selective service process this Court reviewed in *Rostker v. Goldberg*, 453 U.S. 57, 75 (1981). In fact, it fails to reach even the Sixth Circuit's own standard.

The panel majority argued that one of Petitioner's own citations undermined their case quoting that "[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." *Hile*, 86 F.4th at 280 (citing Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 147-48 (2000)). The voters of Michigan voted "no" on a list of potential constitutional changes, several of which involved the additional controversial subject of school funding levels and teacher testing. Michigan Legislature, *Initiative Petitions-2000 Proposed Amendment to the Constitution,* available at (bit.ly/3y9aFCj). Failure of a ballot initiative does not reach the "explicit legislative reauthorization" the panel cites. *Hile*, 86 F.4th at 280.

Further, the panel ignored that the same article provides that "it remains unclear whether a general review that does not *explicitly reconsider the specific policy in question could ever be constitutionally sufficient*." Heytens, supra, at 149 (emphasis added). In the present case, no explicit reconsideration of the specific policy ever occurred outside of a failed ballot initiative that would have left the most significant portion of Article VIII §2 intact. At best, the 2000 ballot initiative was a general review of many potential policies for the state of Michigan and is not constitutionally sufficient to reach the Supreme Court's standard in *Rostker*.

As a result, Michigan voters did not reauthorize Article VIII § 2 in 2000 and there was no intermediate reconsideration of Michigan's Article VIII § 2. Therefore, the discriminatory animus of the 1970 campaign was never purged. *Cf. Espinoza*, 591 U.S. at 505-06

(Alito, J., concurring) (even if a state "readopted the no-aid provision for benign reasons," its "'uncomfortable past' must still be '[e]xamined.'").

B. The failed ballot initiative in 2000 is insufficient to reach the Supreme Court's standard in *Rostker*.

In its opinion, the panel asserted that *Rostker* provided the most comparable circumstance to the current case. *Hile*, 86 F.4th at 280. At issue in *Rostker* was whether the reauthorization of the Military Selective Service Act, 50 U.S.C. § 3801 et seq., violated the Fifth Amendment Due Process Clause. *Rostker*, 453 U.S. at 59. Unlike the present case, *Rostker* involved Congress reauthorizing prior legislation after conducting hearings, developing reports, and having robust debate on the merits of the policy to require males but not females to register for the draft. *Id.* at 72. This Court in *Rostker* described this as a process where the law was "thoroughly reconsider[ed]." *Id* at 75.

The present case involved a failed ballot initiative, which would have made no less than four changes to the Michigan Constitution. Michigan Legislature, *Initiative Petitions-2000 Proposed Amendment to the Constitution,* available at (bit.ly/3y9aFCj). Further, none of those changes would have resulted in wholesale reauthorization of or change to Michigan Article VIII §2. See *ibid*. *Rostker's* emphasis on legislative history and language that a question be "thoroughly reconsider[ed]" suggests a more robust process is required. *Rostker*, 453 U.S. at 75. This can

also be seen in this Court's opinion in *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

In *Abbott*, this Court emphasized that the 2013 Texas Legislature failed to remove any discriminatory taint from the 2011 Texas Legislature's state congressional map "because the Legislature engaged in *no deliberative process* to remove any such taint." *Abbott v. Perez*, 138 S. Ct. 2305, 2353 (2018) (quoting *Perez v. Abbott*, 274 F. Supp 3d 624, 652 (2017) (emphasis added)).

In *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), the Fifth Circuit examined a Mississippi criminal statute originally passed in 1890 and intended to discriminate against black Americans. It was subsequently amended in 1950 to add additional crimes "not considered 'black' crimes" and remove others that were. *Id.* at 391. The Court determined that this amendment process, wherein both houses of the state legislature approved the amendment with at least a two-thirds majority vote, and the subsequent majority of voters approved the revisions constituted a "deliberative process" and removed the discriminatory taint. *Id.*

In *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005), the court analyzed a disenfranchisement provision of the Florida Constitution originally adopted in 1868 and subsequently revised in 1968. *Id.* at 1218-1221. The court held that votes by the Constitution Revision Commission ("CRC"), both legislative bodies, and a majority vote of Florida voters constituted "four stages

of review" and a "deliberative process" to amend the Florida Constitution in 1968 and remove any discriminatory taint. *Id*. at 1223-1224.

Most recently, in *United States v. Sanchez-Garcia* 98 F.4th 90 (4th Cir. 2024), the court held that the 1952 passage of the Immigration and Nationality Act ("INA"), which incorporated a 1929 provision that made it "a felony for any non-citizen, once deported, to reenter or attempt to reenter the United States" was valid. *Id*. at 4. The court ruled that the 1952 passage of the INA was a "broad reformulation of the nation's immigration laws." *Id*. at 17 (citing *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1151 (9th Cir. 2023)). Further, the court noted "the clock does not stop in 1952" and that Congress has amended the provision at issue "multiple times since its original enactment, most recently in 1996." *Id*. Ultimately, the court ruled that Congress's 1952 passage of the INA is entitled to a "presumption of legislative good faith." *Id*. at 21.

Finally, there is a state example of the more robust process for a similar constitutional provision in Florida that was addressed thoroughly by the Florida First District Court of Appeal. *Bush v. Holmes*, 886 So. 2d 340 (2004).

Similar to Michigan, Article I, §3 of the Florida Constitution provides that no revenue of the state shall directly or indirectly aid any church, sect, or religious denomination or aid any sectarian institution. Fla. Const. Art. I §3. This provision was originally adopted during the 1885 Florida constitutional convention.

In 1968, Florida's state legislature revised the entire state Constitution. During that process, the CRC presented the legislature with a new constitution that omitted what is now the final sentence of Article I, section 3. *Bush*, 886 So. 2d at 351. (citing Fla H.R. Hour. 1-3 (Extra. Sess. 1967). The legislature revised the CRC's draft, however, to retain the no-aid prohibition. *See id.* (citing H. Amend. 3 to Fla. H. R. 3-XXX (1967)).

The *Bush* court reviewed the legislative history of the amendment, which occurred during a historical period where many "Blaine Amendments" were adopted into state constitutions. The court in *Bush* looked to *Lemon v. Kurtzman* and Justice Brennan's review of this time period in American history. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 645, (1971) (Brennan, J., concurring)).

The *Bush* court reviewed Justice Brennan's long discussion of Blaine Amendments and the complicated history between state governments and the public funding of parochial schools. *Id.* Following this in-depth review, the court in *Bush* concluded the language originally adopted in 1885 and again in 1968 lacked any discriminatory animus "[b]y retaining the specific prohibition on using public funds to support sectarian institutions contained in the 1885 Constitution . . . the legislature--and subsequently the electorate . . . ratified the Constitution of 1968." *Id.*

It is this process of specifically reinserting deleted language, voting to approve the draft constitution it is

contained within, and ratifying that constitution via ballot initiative that rises to the level of "thoroughly reconsider[ed]" and "deliberative process" that this Court described in *Rostker* and *Abbott*. *Rostker* 453 U.S. at 75; *Abbott*, 138 S. Ct. at 2353.

There is no comparable situation in Michigan or the present case. The most recent constitution adopted by Michigan was in 1963, before the amendment at issue. Mich. Const. of 1963. Further, there has been no subsequent review of the Michigan Constitution by the legislature or a constitutional convention. Finally, the cases above demonstrate that legislative involvement is required to purge the discriminatory animus from a previous constitutional or statutory provision. *Cf. Espinoza*, 591 U.S. at 507 (Alito, J., concurring) (If "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," the law is unconstitutional.).

Therefore, Michigan's failed ballot initiative did not rise to the level of "thoroughly review[ed]" that the Supreme Court outlined in *Rostker*, and the discriminatory animus of the 1970 campaign for Proposal C remains.

II. Non-Public Schools and Education Choice Create Better Outcomes.

A. Students with access to education choice programs perform better than their peers.

Education choice in the United States is not a new concept. In fact, its origins can be traced back to the earliest days of the country, when in 1780 Massachusetts adopted a constitution that provided:

> [I]t shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences . . . especially in the . . . public schools, and grammar-schools in towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and the natural history of the country.

Mass. Const. of 1780, Ch. V, Sec. 2. The United States has long emphasized education for all, and the push for purely public education for all is a recent phenomenon, advanced by powerful teachers' unions and other allied groups. And total government control of education is a modern innovation, antithetical to our history and tradition.

Equally important is the fact that education choice works. The evidence shows that students who are able to choose their school generally outperform those who

cannot. Chris Cargill, *There are 187 studies on impact of education choice – and the results are overwhelming,* Mountain States Policy Center (Jan 23, 2024), bit.ly/4b6iY0a. When education choice policies are adopted and advanced, students thrive.

One example of this is in a review of the original version of Florida's A+ program conducted in 2006. The authors note that "between the 2001-02 and 2002-03 administrations of the FCAT, voucher-eligible schools made the largest gain among the five categories of schools." Jay P. Greene, Marcus A. Winters, *Competition Passes the Test*, Education Next vol. 4, No. 3 (June 30, 2006), bit.ly/3UwbTiv. In the mathematics section of this test, these students' grades improved by 15.1 scale-score points more than the rest of Florida's public schools, with the next best improvement of 9.2 scale-score points coming from students in schools threatened by vouchers. See *ibid*. Florida is far from alone in seeing improvement in student performance following the adoption of education choice policies.

In Wisconsin, "[f]amilies who participate in the parental choice programs . . . are some of the most economically disadvantaged students in Wisconsin." School Choice Wisconsin, *New DPI Data Shows Choice Students Outscore Public School Peers on Standardized Tests* (last visited May 1, 2024), bit.ly/4dq9JJY. Despite this economic disadvantage, students in the Milwaukee and Racine choice programs have report card scores 12.8 points higher than their peers in the Milwaukee Public School system. *The Cost-Effectiveness of Wisconsin's Private School*

Choice Programs, School Choice Wisconsin, at 3, (2023), bit.ly/3WpcXY9. This is true despite the fact that Milwaukee Public School system spends $5,494 more per pupil than the Milwaukee and Racine choice program. See *ibid*.

The Friedman Foundation for Educational Choice analyzed 12 studies of school choice programs that used robust random-assignment methodology to determine how school choice affects the academic outcome of participants. Greg Foster, Ph.D., *A Win-Win Solution- the Empirical Evidence on School Choice*, The Friedman Foundation for Educational Choice, (April 2013), at 7, https://files.eric.ed.gov/fulltext/ED543112.pdf. This system compares students who "win" the option and are offered a choice in education, compared to those who "lose" the option and have no choice in education. *Ibid*.

Six of the studies analyzed showed positive impacts on the academic outcomes of all students participating. *Ibid*. Five found that education choice had a positive impact on some groups of students, and no visible impact on some others. *Ibid*. Only one study found no visible impact from education choice policies at all. *Ibid*. This is overwhelming evidence of education choice policies' positive impact on education outcomes.

In addition, there were another 23 empirical studies that have been conducted on how education choice programs impact academic outcomes in public schools. *Ibid* at pg 11. Twenty-two of the 23 studies showed

that education choice improves academic outcomes in public schools. *Ibid.* Again only one study showed no visible impact on public schools. *Ibid.* At the same time, no study reviewed showed a negative impact on students where school choice was available.

A wider and more recent analysis by the Mountain States Policy Center of 29 studies conducted across the United States show the positive effect private school choice programs have on public school test scores. Cargill *supra*. Of these 29 studies, 26 found "positive effects" on public school student test scores across several states and Washington, D.C. *Ibid*. Two of the remaining three studies showed negative effects and the final study showed no impact. *Ibid.* Finally, what is most important is that only education choice policies explain why these students are succeeding. Foster *supra* at 12.

Opponents of school choice habitually advance a handful of dubious theories to try to explain away the success of these programs. Some claim that the benefits of these policies are artificial. They argue that private and alternative schools take the best students for themselves and leave the others at underfunded private schools. The evidence simply does not support this claim. *Ibid* (citing William G. Howell and Paul E. Peterson, *The Education Gap* 61-65, 2d ed. (2006); and Patrick Wolf, et. al, *Evaluation of the D.C. Opportunity Scholarship Program, U.S. Dep't. of Educ.* (June 2010)). Nine education choice studies in Florida saw underperforming schools improve when faced with the possibility of a competing voucher program. *Ibid* at 12.

Another theory detractors posit is that improved schools undergo a "stigma effect." They claim this occurs where schools assigned failing grades by the state improve to remove the stigma of failing than the threat of a voucher program. *Ibid.* However, the author argues this response to a "stigma" cannot explain "the positive findings in Milwaukee, Florida, or the 100-year old 'town tuitioning' voucher systems in Maine and Vermont." *Ibid.*

The last theory is "mean reversion," where low performing schools are more likely to improve because they cannot get much worse than they already are. *Ibid* at 13. At least seven studies have examined this theory and all have found no effect from regression to the mean. *Ibid.*

Therefore, the only explanation that can explain the improvement in student performance are the education choice policies adopted. The research and evidence is overwhelmingly clear that students with access to educational choice programs perform better than their peers.

B. Education choice programs lower costs for parents and taxpayers.

Opponents of education choice programs often argue that these programs allow private institutions that would receive public funds to increase the cost of tuition. However, the evidence does not support this claim.

In a study that examined 19 education choice programs over 16 years (1990-2006), it was determined that these choice programs saved taxpayers more than $22 million. Susan L. Aud, Ph.D., *School Choice by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006*, at 37 (April 2007), https://files.eric.ed.gov/fulltext/ED508498.pdf. This however was a drop in the bucket compared to the estimated $422 million saved in local public school districts. *Ibid*. In total, these programs saved the public $444 million. *Ibid*. These savings have continued into more recent years.

An analysis conducted by the Heritage Foundation showed that states which had adopted education choice policies showed an overall 15.4 percent tuition increase between the 2013-2014 and 2022-2023 school years. Jason Bedrick, Jay Greene, PhD and Lindsey Burke, PhD.*, School Choice Policies Do Not Raise Private School Tuition*, The Heritage Found. (Sept. 28, 2023), herit.ag/44F3MVC. This is significantly less than the 27.6 percent increase in tuition this same analysis showed in states that had never adopted an education choice policy in that same period. *Ibid*.

As a part of this same analysis, the rate of tuition growth in the 10 states that adopted education choice policies were also reviewed. Before their adoption of education choice policies, these states averaged a tuition growth rate of 2.1 percent between the 2013-2014 and 2022-2023 school years. *Ibid*. After adopting education choice policies, these same 10 states saw their average change in tuition drop to -1.5 percent. *Ibid*.

In different states across the country, the conclusion is clear: Education choice programs lower costs for parents and taxpayers.

C. Education choice programs empower a majority of parents when deciding on their children's education.

Most families in the United States must send their children to schools assigned to them based on their ZIP code. When states adopt education choice policies a majority of parents choose to enroll their children in a school other than one assigned to them based upon residence. Michael DeArmond, Ashley Jochim, and Robin Lake, *Making School Choice Work*, Center for Reinventing Public Education, at 9 (July 2014), https://files.eric.ed.gov/fulltext/ED546755.pdf.

In a survey conducted of 4,000 parents in eight metropolitan areas with school choice options across the United States, 55 percent of parents chose a school over the local option. *Ibid* at pg 10. This was not limited to parents with higher levels of education, as 49 percent of parents with less than a high school diploma reported choosing a school other than the assigned public school when given the option. *Ibid*. Even more impressive is that 75 percent of these parents enrolled their children in their first or second choice of school. *Ibid*. The results of the survey are clear: A majority of parents prefer education choice programs where they are offered.

In fact, the main concern expressed by parents engaged in education choice programs was a desire for

more choices and more opportunities to access those choices. *Ibid* at 11. Education choice parents expressed concern over transportation options, the different application processes, and what schools their child were eligible to attend. *Ibid.* This was expressed most often by the parents of special needs students. *Ibid.* Ultimately, parents rarely expressed concerns regarding the education choice process, and instead wanted more ways to take advantage of the education choices they had.

The evidence is clear, education choice policies empower parents to make the best decisions for their children and benefit students in both private and public schools.

CONCLUSION

For these reasons and those given by the Petitioner, certiorari should be granted and the judgment reversed.

Respectfully submitted,

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