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 *AMICI CURIAE* STATE OF WEST VIRGINIA AND 7 OTHER STATES IN SUPPORT OF 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.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

For the States, the two issues at the heart of this case—how States choose to distribute their powers and how parents choose to educate children—are about as important as they come.

Start with the first one: structure. States can generally arrange themselves and their powers however they like. Indeed, "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978). By embracing that flexibility, our constitutional system guarantees that States can remain America's policy "laboratories," producing creative "solutions to difficult legal problems." *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015). And the broad discretion afforded to States when it comes to structure guarantees self-governance remains more than an empty promise.

But even this wide-ranging power to arrange and rearrange state government has its limits. In some cases, the Court has found such a limit in the political-process doctrine, sometimes called the political-structure or political-disenfranchisement doctrine. The doctrine applies equal-protection principles to facially neutral structures that discriminatorily shunt decision-making power around within state government. Put another way, courts have taken the doctrine to mean that "states may not alter the procedures of government to target [certain]

[*] Under Supreme Court Rule 37, *amici* timely notified counsel of record of their intent to file this brief.

minorities." *Lewis* v. *Bentley*, No. 2:16-CV-690, 2017 WL 432464, at *13 (N.D. Ala. Feb. 1, 2017).

Yet the extent of this limit—and even whether it continues to exist at all—is no longer so clear. The first few opinions from this Court recognizing the doctrine were modest in reach, but the next may have stretched too far. And when the Court had a chance to clarify things in 2014, it instead produced four opinions going every which way. See generally *Schuette* v. *Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291 (2014). The result has been an interminable "reconstruction" or "reordering" of the doctrine that has raised more questions than answers. See Peter Nicolas, *Reconstruction*, 10 UC IRVINE L. REV. 937, 961-68 (2020). The Court should grant the Petition if for no other reason than to give the States clarity on a doctrine that bears directly on their work.

But this Petition brings with it a second important issue: school choice. Educating children is one of the States' primary duties. See *Brown* v. *Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954). Deciding questions related to that critical duty should be done through a fair, nondiscriminatory process. Yet Michigan's strict Blaine Amendment can't be called fair or nondiscriminatory in any real sense. Unambiguously motivated by anti-religious animus and targeting Catholic schools, the provision moves nonpublic school funding from the legislature's hands to the level of constitutional amendment—and then forbids it. If the political-process doctrine still lives, then it must apply here.

Michigan's Blaine Amendment doesn't just offend equal-protection principles; ultra-restrictive amendments like Michigan's can also stand firmly in the way of

education-freedom policies like vouchers, education savings accounts, tax credits, and more. State experiments with nontraditional education models have proven popular among both parents and students. They are successful both academically and socially, too. As States try to find new ways to answer the exploding demand for school-choice options, strict Blaine Amendments block the path. The Court should grant the petition to remove yet another tranche of unconstitutional actions blocking freedom in education.

SUMMARY OF ARGUMENT

I. The political-process doctrine is confused and uncertain. The *Schuette* plurality's valiant but unsuccessful attempt to clean up the doctrine in 2014 left many just as confused as before, especially on issues like the current test and role that intent plays in the doctrine. States deserve clarity.

The doctrine has always been understood to protect important interests, chiefly preventing majorities from surreptitiously stacking the political deck against protected minorities. In other words, the doctrine reflects familiar equal-protection principles. And the protections it affords could be especially important in cases involving direct democracy, a method of governmental reorganization and restructuring States are using more often. At the same time, States have important, longstanding rights to structure their governments how they want. The interplay of these interests deserves the Court's attention.

If the political-process doctrine lives on, then this case is one in which it would apply. Michigan long prohibited direct public aid to religious groups. But in the 1960s, religious (read: Catholic) schools began having some

success receiving indirect aid. Explicitly motivated by and campaigning on anti-Catholic animus, a citizens group got a ballot proposal passed prohibiting all aid to nonpublic schools. Michigan's discrimination-motivated choice to move the question of funding nonpublic schools from the legislative to the constitutional level appears to be a textbook political-process doctrine violation.

II. Equal protection aside, education itself is vital to our economic and civic well-being. States have long taken the lead in providing that education, and they are always trying to improve their education policy. In recent years, they've done so by increasing education-freedom options. Over 30 States now provide some kind of school choice, whether in the form of vouchers, education-savings accounts, or charter schools. Demand for these alternatives is exploding. Parents see that school-choice options provide stellar educational and behavioral outcomes, and they want more of it. States are happy to oblige. With these tools, States save money on the front end through lower education costs and on the back end through a better, healthier citizenry. Granting the Petition and eliminating this uniquely stringent Blaine Amendment's unconstitutional reach means more of these education-freedom options are on the table and, by extension, that States' budgets and citizenry are healthier.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the Petition to clarify the confused political-process doctrine.

A. The political-process doctrine is a bit of a mess. As explained by the plurality opinion in *Schuette*, 572 U.S. at 303, the doctrine first appeared in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), was applied again in *Hunter* v. *Erickson*,

393 U.S. 385 (1969), was perhaps too aggressively applied or misapplied in *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982), and then limited to some extent in *Schuette*. But these opinions don't line up. The Court "should grant certiorari to resolve the uncertainty created by [its] own holdings." *Muehleman* v. *Florida*, 484 U.S. 882, 883 (1987) (Marshall, J., dissenting).

To get a sense of the confusion, consider the reasoning in the first opinions.

In *Reitman*, after California passed a statute prohibiting discrimination in selling or renting property, the voters adopted a state constitutional amendment saying no legislation could limit people's rights to sell or rent property. 387 U.S. at 370-73. The Court considered the amendment's "immediate objective" and "ultimate effect," including the legislative and societal background. *Id.* at 373 (cleaned up). Viewed through that lens, the Court concluded that the amendment was intended to install the right to discriminate in the state constitution. *Id.* The amendment thus impermissibly involved California in race discrimination. *Id.* at 380.

In *Hunter*, after the Akron City Council passed a fair-housing ordinance, the voters amended the city charter to require any fair-housing ordinance to be submitted to the voters. 393 U.S. at 386. The Court objected to the amendment because it distinguished between those who sought protections against racist behavior and everyone else, specifically by making "it substantially more difficult to secure enactment of" fair-housing ordinances. *Id.* at 390. Though facially neutral, the amendment "disadvantage[d] those who would benefit from" antidiscrimination laws, placing a "special burden on racial minorities within the governmental process." *Id.* at 391. The city couldn't "disadvantage any particular group

by making it more difficult to enact legislation in its behalf." *Id.* at 393. So once again, the amendment fell.

And in *Seattle*, after the Seattle School District started an aggressive busing campaign, voters passed a statewide constitutional amendment rolling back that policy. 458 U.S. at 459-64. The Court reiterated that Fourteenth Amendment protections extend to cases where political structures are subtly distorted to burden minority groups' ability to achieve beneficial legislation. *Id.* at 467. Though facially neutral, the amendment was passed to stymie a governmental action "that inure[d] primarily to the benefit of the minority." *Id.* at 471-72. In short, the amendment moved a governmental decision to a higher level of political decisionmaking, "burden[ing] minority interests," causing the amendment's "impact [to] fall[] on the minority," and making enacting "beneficial legislation difficult." *Id.* at 474-75, 484. Taking all these together, the Court once again found an equal-protection violation.

It's tough to find a common thread through these cases' reasoning. Is the core of the political-process doctrine merely a veiled disparate impact theory (as *Seattle* appears to assume)? Does intent matter? And if so, whose intent and how is that measured? How do we decide what effects certain amendments will have? Must there be existing *de jure* discrimination that the State tries to perpetuate? Does the doctrine apply only to direct-democracy actions? Is it best understood as part of the traditional equal-protection jurisprudence or something else? The cases left these and many other questions unanswered.

Even before *Schuette*, then, the political-process doctrine was confusing for courts and litigants alike. See Thomas D. Kimball, Schuette v. BAMN: *The Short-Lived Return of the Ghost of Federalism Past*, 61 LOY. L. REV.

365, 396 (2015). Unfortunately, *Schuette* took this "rather incoherent" doctrine, David E. Bernstein, *"Reverse* Carolene Products,*" the End of the Second Reconstruction, and Other Thoughts on* Schuette v. Coalition to Defend Affirmative Action, 2014 CATO SUP. CT. REV. 261, 263 (2014), and "further complicate[d]" it, Kimball, *supra*, at 396. Scholars didn't hold back: while the cases before *Schuette* were "jurisprudential enigmas that seem to lack any coherent relationship to constitutional doctrine as a whole," the post-*Schuette* world was even more unmoored. Samuel Weiss & Donald Kinder, Schuette *and Antibalkanization*, 26 WM. & MARY BILL RTS. J. 693, 731 (2018) (cleaned up); see also, *e.g.*, Margaux Poueymirou, Schuette v. Coalition to Defend Affirmative Action *& the Death of the Political Process Doctrine*, 7 UC IRVINE L. REV. 167, 186 (2017) ("[*Schuette*] reinterpreted the seminal political process cases beyond recognition, infusing even greater doctrinal confusion into an already complicated body of case law.").

The *Schuette* plurality concluded that Michigan's constitutional amendment banning affirmative action in higher education was constitutional under the political-process doctrine. In doing so, it "trie[d] gamely to make some sense out of" *Reitman*, *Hunter*, and *Seattle* without explicitly disavowing or overturning any of them. Bernstein, *supra*, at 263. But its "tacit" disapproval of at least some of *Seattle*'s reasoning, "combined with the absence of majority agreement as to which precedent case law applied," Kimball, *supra*, at 396, "created confusion and uncertainty … about political restructurings" in the equal-protection context, Steve Sanders, *Race, Restructurings, and Equal Protection Doctrine Through the Lens of* Schuette v. BAMN, 81 BROOK. L. REV. 1393, 1396 (2016).

The toughest question coming out of *Schuette* stems from its standard. The plurality held that political restructuring is impermissible when it has "the serious risk, if not purpose, of causing specific injuries on account of" a protected category. *Schuette*, 572 U.S. at 305; see also Kristen Barnes, *Breaking the Cycle: Countering Voter Initiatives and the Underrepresentation of Racial Minorities in the Political Process*, 12 DUKE J. CONST. L. & PUB. POL'Y 123, 145 (2017) (noting this is the new test); GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 14:17 (2024 supp.) (same); Weiss & Kinder, *supra*, at 731 (same). Yet *Schuette* never defined what the central phrase "serious risk" meant. Nor did it attempt to "explicat[e]" the other "critical term": "injuries on account of race." *Political-Process Doctrine-*Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary, 128 HARV. L. REV. 281, 286 (2014) ("*PPD*"). This lack of definition leaves its "test's reach undefined." *Id.*; see also Bernstein, *supra*, at 270.

Another open question concerns intent. "[T]he most notable difference between the conventional equal protection doctrine and the political process doctrine is the absence of an explicit intent requirement from the latter." Alexsis M. Johnson, *Intersectionality Squared: Intrastate Minimum Wage Preemption &* Schuette'*s Second-Class Citizens*, 37 COLUM. J. GENDER & L. 36, 41 (2018). Some say *Schuette* tried to bring the political-process doctrine in line with more traditional equal protection jurisprudence by "add[ing] the element of discriminatory purpose" or intent "to the doctrine." Russ Swafford, *Using the Ballot Box to Overturn Affirmative Action in University Admissions* Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014), 82 TENN. L. REV. 687, 710 (2015). And the new "serious risk"

standard does appear to be "intent-inflected." Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 796 (2024). But even post-*Schuette*, some wonder whether the doctrine focuses too much on "discriminatory effect" rather than more traditional "discriminatory intent." Kimball, *supra*, at 373-374; but see Poueymirou, *supra*, at 175 (disagreeing that the doctrine rests "on a discriminatory impact theory"). And if the doctrine now incorporates an intent element, then it is unclear how the doctrine does anything independent from the traditional equal-protection test. Swafford, *supra*, at 710.

These issues and more have left everyone "wondering what is left of the political process doctrine"—if anything. Kimball, *supra*, at 401. Authorities saying as much abound. See, *e.g.*, *Arkansas Passes Statute Prohibiting Local Governments from Creating New Protected Classifications—Intrastate Commerce Improvement Act (Act 137)*, 129 HARV. L. REV. 600, 601 (2015) (saying *Schuette* "cast uncertainty on the scope of these cases" and stating that *Schuette*'s "cabining" of the doctrine, the "minimal amount of political process case law, and … the absence of a majority" opinion makes the scope of the doctrine unclear); Weiss & Kinder, *supra*, at 703 ("[I]t is unclear when the political process doctrine applies, if ever."); Johnson, *supra*, at 40 (*Schuette* "rendered the future of the doctrine unclear"); Mark Strasser, Schuette*, Electoral Process Guarantees, and the New Neutrality*, 94 NEB. L. REV. 60, 99 (2015) (saying the plurality adopted an "unfathomable" read of the doctrine "without explaining what it is or how it works"); GOV. DISCRIM., *supra*, § 14:17 (saying no "unified theory support[s] the judgment").

So a fierce debate exists over how much of the doctrine still exists. Some see *Schuette* as a total "repudiat[ion]" of the political-process doctrine. See, *e.g.*, *Howe* v. *Haslam*, No. M2013-01790-COA-R3CV, 2014 WL 5698877, at *24 (Tenn. Ct. App. Nov. 4, 2014) (McBrayer, J., dissenting); see also Swafford, *supra*, at 713 ("[T]he Court's reinterpretation of the political process doctrine has rendered the doctrine virtually moot."); Weiss & Kinder, *supra*, at 731 (saying the doctrine is "likely nonexistent" and "in essence defunct"). Others speculate that the doctrine's "basic principles" endure. Sanders, *supra*, at 1402; see also Bernstein, *supra*, 262 ("The political process doctrine, however, managed to survive [*Schuette*], albeit in diminished form."). Still others just note the confusion without settling on a firm answer. See, *e.g.*, Strasser, *supra*, at 61 (saying the plurality "left open what electoral process guarantees mean and whether they have any force"); see also Allison Orr Larsen, *Becoming A Doctrine*, 76 FLA. L. REV. 1, 23-24 (2024) ("[S]cholars debate whether the political process doctrine died in the *Schuette* decision or was just gutted/misapplied.").

Ultimately, because the Court refused to "overrule any of the prior 'political-process doctrine' cases," it seems likely the doctrine still exists in *some* form. Larsen, *supra*, at 23. But it's equally true that the Court "distanced itself" from the doctrine. *Id.* (calling it a "retreat"). Indeed, "[s]ince 2013, not a single plaintiff nationwide has successfully brought a 'political process doctrine' challenge, and very few have tried." *Id.* at 24; cf. Bernstein, *supra*, at 283 (concluding that the doctrine as "strictly limit[ed]" by *Schuette* "likely" applies to "a vanishingly small" set of cases). Whether that's what the Court intended is nearly impossible to say without more guidance.

B. Uncertainty around the doctrine is especially troubling because the political-process doctrine was long seen as an important expression of interests still pressing today.

The political-process doctrine reflects that a representative democracy like ours requires a fair playing field, and courts should stop majorities from stacking the political-process deck against "socially subordinated" minority groups. Sanders, *supra*, at 1399. Those notions are just as compelling now as they were in the 1960s and 1980s. And they have a long pedigree in American jurisprudence and legal philosophy. See *United States* v. *Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938); John Hart Ely, DEMOCRACY AND DISTRUST 87, 103 (1980). The doctrine has also long been understood as an important extension of broader Equal Protection principles, which revolt against "unprincipled distributions of resources and opportunities." Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 128 (1982). And as governments become better at hiding these unprincipled distributions, the doctrine could help protect minority rights. See Kerrel Murray, *Good Will Hunting: How the Supreme Court's Hunter Doctrine Can Still Shield Minorities from Political-Process Discrimination*, 66 STAN. L. REV. 443, 471 (2014).

There's also a good argument that the doctrine's "process-based logic" allows the Court "to operationalize equal protection guarantees without dragging [it] into endlessly contested debates about substantive values and ideas." Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1364 (2011); see also Ely, *supra*, at 181. And the doctrine has always served as an important check on the excesses of direct democracy,

which by its nature "removes most of the representation filters that work to root out invidious intent." Murray, *supra*, at 458. Remember that direct democracy remains popular. See Wayne Batchis, *Suburbanization and Constitutional Interpretation: Exclusionary Zoning and the Supreme Court Legacy of Enabling Sprawl*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 40 (2012). "Since the 1990s, more initiatives have appeared on state ballots than ever before." John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1443 (2007). So any decision about the future of the political-process doctrine should carefully weigh its potential to keep ever-increasing direct democracy's excesses in check.

On the other hand, any conceptions of the political-process doctrine must grapple with "the near-limitless sovereignty of each State to design its governing structure as it sees fit." *Schuette*, 572 U.S. at 327 (Scalia, J., concurring). Again: States have "wide leeway." *Holt Civic Club*, 439 U.S. at 71 (cleaned up). And they have "absolute discretion" over the "number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised." *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178 (1907). States shift power between levels of government all the time—often through direct democracy. So the political-process doctrine has long hovered over these moves as a concerning unknown. States deserve clarity on this point. See Barnes, *supra*, at 171 (noting *Schuette* "left unresolved many questions regarding," among other things, "federalism and the Court's precedents and authority relative to state powers"). "[L]ongstanding confusion over the scope of the [doctrine]," combined with the "federalism interests affected by" it, are strong reason

to grant the Petition. *Sorich* v. *United States*, 555 U.S. 1204, 1204 (2009) (Scalia, J., dissenting).

C. This case is a good vehicle, too, as the doctrine makes a difference here. If any meaningful political-process doctrine survived *Schuette*, then it defeats Michigan's Blaine Amendment. The law reflects animus and discrimination all the way down.

History lays the foundation. State-level "hostility to aid to pervasively sectarian schools has" a long and "shameful pedigree" in America. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000). This anti-religious "hostility" was strongest in the 1870s, when Senator Blaine and his amendment began spawning mini-Blaine Amendments all over the country. *Id.* (noting the "pervasive hostility to the Catholic Church and to Catholics in general"). But Michigan had gotten into the game even earlier, adopting "the earliest proto-Blaine Amendment … in 1835." Richard D. Komer, Trinity Lutheran *and the Future of Educational Choice: Implications for State Blaine Amendments*, 44 MITCHELL HAMLINE L. REV. 551, 563 (2018); see also MICH. CONST. art. I, §§ 4, 5, 6 (1835); MICH. CONST. art. IV, §§ 39, 40 (1850); MICH. CONST. art. II, § 3 (1908). Efforts to secure public funding for Catholic schools in Michigan were later cast "as a nation-wide plot hatched by the Jesuits to destroy public education." Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 669 (1998).

Much later, in the 1960s, "a new anti-Catholicism that was more relevant" to then-current political issues reemerged—an animus that "coincided at many points with the older body of stereotypes." Philip Jenkins, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE 20 (2003). It was at this later time that several

"sensitive issues mobilized liberal and leftist opinion against the Catholic Church, especially over state support of Catholic schools." *Id.* at 37. Some States had begun using public funds to support parochial schools and their students. *Id.* Parochial schools' "perceived threat to public education" "reportedly inspired a tremendous revival of anti-Catholic feeling" across the country. *Id.* And in some States, this feeling solidified into anti-religious school measures. Lawrence McAndrews, *Unanswered Prayers: Church, State and School in the Nixon Era*, 13:4 U.S. CATHOLIC HISTORIAN 81, 82-83 (fall 1995). That "distrust of Catholic power and Catholic education was" a major "factor in the strict[] 'no-aid' separationism of the 1960s and 1970s." Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 162 (2001).

Hearkening back to its earlier years, Michigan was not immune to this wave of anti-religious—specifically anti-Catholic—animus. In the 1960s, Michigan expanded "the scope of indirect aid to nonpublic schools" "to include many … services." *State Support of Nonpublic School Students*, CITIZENS RESEARCH COUNCIL OF MICHIGAN (Jan. 2014) ("CRC 2014"), https://bit.ly/3xG3uBh; see MICH. CONST. art. I, § 4 (1963). At that time, "the vast majority of nonpublic school[s]" in Michigan were Catholic. *Id.* at 1-2. This "auxiliary" aid to Catholic schools was "largely uncontroversial" "[u]ntil the late 1960s." *Id.* at 2. Beginning in 1968, the Michigan governor and legislature began proposing budgets and passing legislation increasing nonpublic school aid. *Id.* And the Michigan Supreme Court held that funding constitutional. See *In re Legislature's Request for An Opinion on Constitutionality of Chapter 2 of Amendatory Act No. 100 of Pub. Acts of 1970 (Enrolled Senate Bill No. 1082)*, 180 N.W.2d 265 (Mich. 1970).

The backlash was fierce. "The adoption and implementation of 'parochiaid'"—a derisive portmanteau coined by nonpublic-school-aid's opponents—"set off an organized petition drive to seek a constitutional amendment to prohibit state aid to nonpublic schools." CRC 2014, *supra*, at 3. It was a bitterly fought campaign, involving many of Michigan's top political figures. *In re Proposal C.*, 185 N.W.2d 9, 17 n.2 (Mich. 1971); see also Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 90 (2005) (noting Proposal C was the subject of "much controversy"). For most, this back and forth produced only "utter and complete confusion." *In re Proposal C.*, 185 N.W.2d at 17 n.2. Only one thing was clear: "Proposal C was an anti-parochiaid amendment—no public monies to run parochial schools." *Id.* Indeed, based on the totality of the "historical record," the only reasonable conclusion is "that Michigan's Blaine amendment was the direct byproduct of anti-Catholic animus." *Is Michigan's Blaine Amendment Days Numbered?*, CITIZENS RESEARCH COUNCIL OF MICHIGAN (Oct. 8, 2021), https://bit.ly/3Jm8rBN ("CRC 2021") (calling this "clear"); see also Goldenziel, *supra*, at 90 (saying voters thought they were rejecting "public aid to religious schools").

Riding this wave of animus, Proposal C passed and was enshrined in Michigan's constitution. The language prohibits public money from "directly or indirectly" aiding or maintaining "any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school." MICH. CONST. art. VIII, § 2 (including any "payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property"). This "Blaine amendment language outlawing ANY nonpublic school aid" is "uniquely restrictive." CRC

2021, *supra*. Indeed, most see it as among the "strictest" Blaine Amendments in the country—if not *the* strictest. Goldenziel, *supra*, at 89; see also Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 587 (2003) (listing Michigan's Blaine Amendment as one of the "[m]ost [r]estrictive").

This history all seems to present a textbook political-process doctrine case, even post-*Schuette*. Just compare the rough outline of these facts to *Reitman*, *Hunter*, and *Seattle*: The Michigan Constitution contained long-enshrined prohibitions against supporting religious organizations—prohibitions that, when applied to religious private schools, created *de jure* discrimination. See generally *Espinoza* v. *Mont. Dep't of Revenue*, 591 U.S. 464 (2020). Religious minorities (particularly Catholics) pushed back against this entrenched discrimination throughout the 1960s and scored some victories. But then the empire struck back. Seizing on a national mood fearful of sectarian education, Proposal C's sponsors made strident anti-religious—and anti-Catholic—messaging the heart of its campaign, and the voters bought the story. They concretized this animus by moving decisionmaking about funding for nonpublic schools from its normal legislative level to a constitutional level. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORD. L. REV. 493, 521 (2003) (saying Michigan's Blaine Amendment "reflect[ed] a preoccupation with singling out religiously affiliated organizations"). So Michigan's Blaine Amendment looks to be unconstitutional due to an irrefutably "invidious purpose in the campaign to enact" it. Sanders, *supra*, at 1398.

Assuming the political-process doctrine lives on, Michigan's law must fall. The Court should grant the Petition to explain as much.

II. The Court should grant the Petition to give parents every possible means to educate their children.

This case also deserves this Court's attention because it carries significant "importance to the public," *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955), relating as it does to one of the most critical issues of the day: school choice.

Education is a "matter[] of supreme importance," *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923), and "grave significance … both to the individual and to our society," *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 30 (1973). People need education to "lead economically productive lives." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982). "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown*, 347 U.S. at 493. But more than that, education plays "a fundamental role in maintaining" the very "fabric of our society," *id.*, by helping children grow "into healthy, productive, and responsible adults," *Fields* v. *Palmdale Sch. Dist.*, 427 F.3d 1197, 1209 (9th Cir. 2005). It is one of the chief ways we transmit "the values on which our society rests"—the "fundamental values necessary to the maintenance of a democratic political system." *Ambach* v. *Norwick*, 441 U.S. 68, 76-77 (1979); *Brown*, 347 U.S. at 49). A solid "education is necessary" to protect our "freedom and independence." *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972).

It's also a "vital national tradition" that States take the lead in education. *Dayton Bd. of Ed.* v. *Brinkman*, 433

U.S. 406, 410 (1977). Educating children is perhaps the States' "most important function" and "basic public responsibilit[y]." *Brown*, 347 U.S. at 493. That's why "every state constitution includes language that mandates the establishment of a public education system"—many requiring the education to be "high-quality," "uniform," "thorough," "efficient," and "equal." Scott Dallman and Anusha Nath, *Education Clauses in State Constitutions Across the United States*, FED. RESERVE BANK OF MINNEAPOLIS (Jan. 8, 2020), https://bit.ly/3U0rKpa. Education is uniquely important to States because they bear the brunt of the societal costs of struggling citizens. See, *e.g.*, *Johnson's Prof'l Nursing Home* v. *Weinberger*, 490 F.2d 841, 843 (5th Cir. 1974) (noting that generally the States "bear" medical costs); Gerard E. Lynch, *Sentencing: Learning from, and Worrying About, the States*, 105 COLUM. L. REV. 933, 936 (2005) (saying States "bear the brunt of the war on crime and its associated costs"). In short, a subpar education imposes "significant social costs" on our States and our citizens. *Plyler*, 457 U.S. at 221.

Because poor education has a negative, compounding downstream effect, States are always tinkering with education policies. And they often use ballot measures to do it: between 1990 and 2018, 312 education-related "amendments were put on state ballots across the country"—on everything from equal access to parental rights to teacher pay. *Dallman*, *supra*, at 3-5.

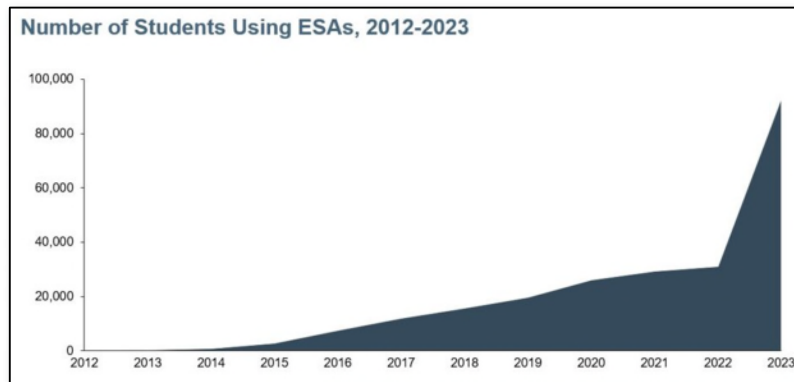
One of the more popular changes has been to increase school choice. A strong majority of States have done so through policies from vouchers to education-savings accounts (or ESAs), and more are joining all the time. Jason Mercier, *29 States Now Have Some Form Of ESA, Education Choice Tax Credit, Or Education Tax*

Scholarship, MOUNTAIN STATES POLICY CENTER (Mar. 26, 2024), https://bit.ly/3Us06mJ; see also EDCHOICE, *School Choice In America Dashboard*, https://bit.ly/49ASz9s (last accessed May 7, 2024) ("School Choice Dashboard"). These school-choice policies are increasingly more broad-based and bipartisan. Martin Lueken & Marc LeBlond, *The Case for Universal School Choice*, GOVERNING (Jan. 10, 2024), https://bit.ly/4465Ky0. And they are well in line with constitutional concerns. See generally, *e.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002).

Take the Hope Scholarship Program, West Virginia's landmark school-choice initiative. See W. VA. CODE §§ 18-31-1 to -13. That program isn't income-based, making it available for 93% of West Virginia students. EDCHOICE, *Hope Scholarship Program*, https://bit.ly/43Vr6y1 (last accessed May 7, 2024) ("Hope Scholarship"). Almost 6,000 students have already enrolled—each receiving funds to use on anything from tuition to transportation to tutoring to textbooks. *Id.* It's one of the most "expansive ESAs in the country and has the potential to help tens of thousands of students." *Id.* But West Virginia is not alone. From Wisconsin's Parental Choice Program to Arkansas's Succeed Scholarship Program (both voucher programs); from Maine's and Vermont's town-tuitioning programs to Ohio's and Oklahoma's tax credit programs; and from the ever-expanding array of ESA programs in States from New Hampshire to Indiana to Iowa to Utah—States see school choice as a crucial, ever-growing piece of their education policy. School Choice Dashboard, *supra.*

Parents and students have rushed to benefit from these options. Start with charter schools, for example. In 1999, New York City had just one charter school; in 2022, it had 270 charters that served nearly 150,000 students.

Betsy DeVos, HOSTAGES NO MORE: THE FIGHT FOR EDUCATION FREEDOM AND THE FUTURE OF THE AMERICAN CHILD 127 (2022). The number of charter students nationwide (3.3 million) has doubled since 2010. *Id.* And one million kids are now on charter-school wait lists—a number that continues to grow "significantly" since the COVID-19 pandemic. *Id.* at 126. Although the school choice options like charter and private schools are "great models," "[t]here aren't nearly enough of them." *Id.* at 137. And demand keeps rising. *Id.* Consider how demand for education savings accounts has skyrocketed in the past couple years:



Ran Ji, et al., *Unlocking Education: The Rise of Education Savings Accounts (ESAs)*, TYTON PARTNERS (Mar. 21, 2024), https://bit.ly/4cYHMZC. Or take the State activity in just the past few months. Legislation in Georgia, Louisiana, Missouri, and others would increase school-choice funding. Legislation in Mississippi would establish education-savings accounts. A school-choice ballot proposal is under consideration in Kentucky. Across the country, States are moving to meet the fast-increasing demand for school-choice options. Libby Stanford, et al., *Which States Have Private School*

Choice?, EDUCATIONWEEK (Apr. 24, 2024), https://bit.ly/4cTr79z.

That States continue experimenting with education freedom is great news for students—education freedom has a stellar record. New York City charter schools, for instance, outperform traditional public schools on proficiency tests by a rate of "nearly five to one" in English and "nearly seven to one" in math—a "remarkable success." THOMAS SOWELL, CHARTER SCHOOLS AND THEIR ENEMIES 49-50 (2020). Florida's school-choice programs make socioeconomically disadvantaged students "up to 99 percent more likely to enroll in four-year colleges and are up to 56 percent more likely to earn bachelor's degrees" than their peers. *School Choice in America: Research*, AMERICAN FEDERATION FOR CHILDREN, https://bit.ly/3JE6elk (last accessed May 7, 2024) ("AFC") (citing Matthew Chingos, et al., *The Effects of the Florida Tax Credit Scholarship Program on College Enrollment and Graduation: An Update*, THE URBAN INSTITUTE (Feb. 2019), https://urbn.is/3TUKaYB). Milwaukee's school-choice program led to higher graduation rates, higher achievement growth in math and reading, and decreased rates of crime post-school. *Research Shows Favorable Impact of Private School Choice*, AMERICAN FEDERATION FOR CHILDREN (Sept. 19, 2017), https://bit.ly/3Q1QGLL. And D.C.'s Opportunity Scholarship kids graduated 30% more than their peers and averaged a whole extra month of learning every year. *Id.* Across the board, State education freedom measures lead to significant reductions in the racial education gaps. See, *e.g.*, Dallman, *supra*, at 8 (citing examples from Florida).

Altogether, studies consistently show that students in school-choice programs have better test scores and

educational attainment. *The 123s of School Choice*, EDCHOICE 7 (Apr. 1, 2022), https://bit.ly/4cWX2G3 ("123s of School Choice"). So it's no surprise that parents who use such school-choice programs are happy about them. *Id.* at 22 (explaining that 30 of 32 studies measuring parent satisfaction in 12 States and D.C. found that parents were more satisfied with school-choice programs).

These programs have the side benefit of strengthening shaky state budgets. Of 28 studies conducted between 2007 and 2014 examining the cost of school-choice programs, 25 found these programs *save* taxpayers money, and the other three were neutral. AFC, *supra*; (examining over ten state and large city programs); see also 123s of School Choice, *supra*, at 43-46 (listing 73 studies, 68 of which found that school-choice "programs generated savings for taxpayers"). Florida, for example, spends 55 cents on the dollar for school-choice pupils. *Id.* And West Virginia spends 34% of "Public School Per-Student Spending." Hope Scholarship, *supra*.

At the same time, education freedom makes public schools stronger. Researchers say that Florida's maturing school-choice programs create "growing benefits" for "students attending public schools" like "higher standardized test scores and lower absenteeism and suspension rates." David N. Figlio, et al., *Effects of Maturing Private School Choice Programs on Public School Students*, 15 AM. ECON. J.: ECON. POL'Y 255 (Nov. 2023). And those "positive" "[e]ffects are particularly pronounced for lower-income students." *Id.* These empirical results mirror the academic literature, which has found that "school choice improved public school academic outcomes." AFC, *supra*. Studies also show that school choice lowers risky behavior like crime. North Carolina charter students, for example, were over a third

less likely to commit crimes compared to traditional public-school peers. Meanwhile, winning the charter school lottery in New York City "all-but completely eliminated the chance of incarceration for male students" and reduced teen pregnancy by ~60% for female students. Corey A. DeAngelis, *Yet Another Study Shows School Choice Programs Reduce Crime*, CATO INSTITUTE (July 2, 2019), https://bit.ly/3W5I8Hw. School-choice programs improve civic values, too. 123s of School Choice, *supra*, at 34.

So school choice bolsters academic achievement and civic values, satisfies parents, saves taxpayers money, and reduces crime and other risky behavior. Yet strict Blaine Amendments like the one in Michigan make realizing these gains harder. "[T]he specificity of [Michigan's] text precludes private school choice programs such as tuition scholarships, tax credits, and education spending accounts." Patrick Loughery, *Inhibiting Educational Choice: State Constitutional Restrictions on School Choice*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 449, 461 (2016).

Now more than ever, States need every possible tool in the toolbox to fulfill their constitutional duties to educate children. Granting this Petition and finding Michigan's uniquely troubling Blaine Amendment unconstitutional would expand options in the educational landscape.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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