

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
Court of Appeals for the Sixth Circuit**

**BRIEF FOR AMICI CURIAE EDCHOICE AND DE-
FENSE OF FREEDOM INSTITUTE FOR POLICY
STUDIES IN SUPPORT OF THE PETITION**

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

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INTEREST OF AMICI CURIAE¹

EdChoice is a nonprofit, non-partisan organization organized under section 501(c)(3) of the Internal Revenue Code that serves as a national leader in education-choice research, fiscal analysis, policy development, training, outreach, and legal defense. The mission of EdChoice is to advance education freedom and choice for all as a pathway to successful lives and a stronger society. EdChoice supports policies that afford families financial access to educational opportunities that best fit the needs of their children—whether public school, private school, charter school, home school or any other learning environment.

The Defense of Freedom Institute for Policy Studies is a nonprofit, nonpartisan 501(c)3 organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker, and to protecting civil and constitutional rights of Americans at schools and in the workplace. Founded in 2021 by former senior leaders of the U.S. Department of Education who are experts in education law and policy and related constitutional and civil rights matters, DFI places a particular focus on increasing educational choices and defending faith-based educational institutions from efforts to force changes in their policies and activities

¹ No party or its counsel authored any of this brief, and no person other than EdChoice, DFI, and their members, or their counsel contributed monetarily to this brief. Counsel for EdChoice timely notified every parties' counsel of record that EdChoice and its co-signors were filing this brief.

that conflict with their religious missions. That is exactly the danger posed by Michigan's discriminatory education funding regime.

As national organizations dedicated to ensuring families every available educational option for their children, amici are interested in the outcome of this case.

State legislatures regularly introduce, enact, and expand school-choice programs. See EdChoice, *School Choice in America Dashboard*, <https://bit.ly/44M5Zi9> (last modified April 17, 2023). Every year since 2003, at least one state has enacted a new education-choice program. Together, eighty programs in thirty-two states, the District of Columbia, and Puerto Rico serve almost one million students. EdChoice, *The ABCs of School Choice 2024 Edition* 8–9, <https://bit.ly/4dwet0w>. Such programs include tax-credit scholarships, vouchers (including town tuitioning), education savings accounts, and individual tax credits or deductions.

Because religion is excluded from government-run education, see, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962), many parents choose to send their children to nonpublic schools to be educated according to their religious principles. See, e.g., Jason Bedrick & Lindsey Burke, *Surveying Florida Scholarship Families 2* (2018), <https://bit.ly/3UxPz8g>. Critically, this Court held in *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464 (2020) and *Carson v. Makin*, 596 U.S. 767 (2022), that school choice programs may not exclude

religious schools and education. Yet many states maintain “no-aid” constitutional provisions and otherwise seek ways around *Espinoza* and *Carson*. This case offers a vehicle for ensuring that policy debates over school choice afford equal footing to all education options.

SUMMARY

1. Michigan’s no-aid clauses regarding private schools are enforced in a discriminatory manner against parents. While the plain text prohibits all aid, Michigan courts interpret the provisions to allow aid to schools for services aside from core education—such as for health services. The result is discrimination against aid to parents who pay lump-sum school tuition rather than piecemeal invoices for core and non-core aspects of education.

2. Such discrimination causes real harm of great national significance that warrant this Court’s review. Empirical studies across the nation demonstrate that school-choice programs improve academic outcomes, improve educational attainment, and further civic values as well as racial and ethnic integration. What is more, studies show competition generated through school choice benefits public school students, not just private school students. Singling out parental rights for disfavored treatment prevents these benefits, resulting in substantial harm to education.

REASONS FOR GRANTING THE PETITION

Michigan’s prohibition on private school aid targets religious parents for disfavored treatment, with two important practical consequences. *First*, Michigan does not take its private-school no-aid clauses literally in all contexts; rather, it applies them literally only to school-choice programs. This results in targeted discrimination against parents—discrimination that specially affects religious parents for whom religion-free public schools are unacceptable. *Second*, such discrimination causes real harm of great national significance warranting the Court’s review.

I. Selective application of the no-aid clauses reveals discrimination against parents

Michigan’s interpretation of its no-aid rule creates a fundamental problem: selective, discriminatory application. *Council of Organizations & Others for Educ. About Parochial Aid v. State*, 958 N.W.2d 68, 80 (Mich. 2020) (op. supporting affirmance); *id.* at 93-94 (separate op.). Michigan’s no-aid clauses consequently prevent aid to *parents*—and particularly religious parents—more than *private schools*.

The text of the Michigan no-aid provision contains five prohibitions nestled within two clauses. The first clause prohibits appropriations or public credit that would “directly or indirectly” “aid or maintain any private, nondenominational, or other nonpublic, pre-elementary, elementary, or secondary school[s].” Mich. Const., Art. VIII, § 2. The second clause prohibits any

payment, tax benefit, loan, or equivalent benefits that would “be provided, directly or indirectly, to” (1) “support the attendance of any student” at a nonpublic school; (2) support “the employment of any person” at a nonpublic school; (3) “support the attendance of any student” at a place where instruction is offered to nonpublic students; or (4) support “the employment of any person” where instruction is offered to nonpublic students.

At face value, these two clauses cover vast ground. But within a year of enactment in 1970, the Michigan Supreme Court prevented their literal application. It struck entirely the prohibitions against aid for attendance or employment at a place offering instruction to nonpublic students—which it construed to mean instruction at public schools for dual-enrolled private school students—as violating the Free Exercise and Equal Protection Clauses. *See In re Proposal C.*, 185 N.W.2d 9, 19 (Mich. 1971). Those provisions, the court concluded, unlawfully discriminated between classes of students receiving services at a public school, *i.e.*, between full-time public-school students and dual-enrolled private school students. *Id.*

In addition, the Michigan Supreme Court reinterpreted the remaining provisions: Because the prohibitions appear in the section of the state constitution addressing education, it explained, the restrictions apply only to aid *directly* supporting education at a nonpublic school. *See id.* at 22. Thus, it construed the prohibitions against support for attendance or employment at a non-public school to apply only to

attendance or employment relating to “educational services” at a nonpublic school. *See id.* at 15–17. It held that shared-time or dual-enrollment programs do not count as educational services of a *nonpublic school* because they are under the control of a *public school*. *See id.* at 20. It also deemed permissible aid for “auxiliary services”—such as police and fire protection and student health services—because they have “only an incidental relation to the instruction of private school children.” *Id.* at 22.

As a result, notwithstanding the broad literal sweep of Article VIII § 2, permissible forms of aid to private school students and private schools themselves abound in Michigan. Private school students, for example, may receive health and nursing services or speech and language services from public schools, Mich. Comp. Laws § 380.1296, even though such services ordinarily constitute part of the cost of maintaining a private school, which a literal interpretation of Article VIII § 2 would bar.

Private schools may also receive state money to pay for auxiliary services provided by private vendors. Michigan reimburses private schools for compliance with health and safety mandates, record maintenance rules, playground equipment safety standards, child immunization requirements, and even bus driver safety education. Mich. Comp. Laws § 388.1752b; *see* Section 152b Reimbursement Form, Mich. Dep’t of Ed., <https://bit.ly/3UPJkhx>.

Yet Michigan’s constitution prohibits public schools from providing—or even loaning—textbooks, pencils, paper, or erasers to resident children who do not attend a public school. *See In re Advisory Opinion re Constitutionality of 1974 PA 242*, 228 N.W.2d 772, 774 (Mich. 1975) (Swainson, J., in the only opinion joined by a majority of justices but labeled “concurring in part and dissenting in part”). In its advisory opinion, the court differentiated between “primary” and “incidental” elements of private school delivery of education and deemed textbooks and supplies to be prohibited “primary” elements. *Id.* Distribution of such “primary” aid to children rather than schools was irrelevant. *See id.* at 774 n.4.

The result is that Michigan’s no-aid clause targeting private schools perversely permits aid to such schools for operational costs yet forbids aid to parents exercising their rights under *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925). Michigan’s no-aid clauses, therefore, are far from neutral in practice. They fully prohibit aid to only one type of beneficiary: families. By taking this case, the Court can address the constitutionality of such an arrangement.

II. Michigan’s selective enforcement of its no-aid clause harms educational quality

Nationwide data demonstrates that school choice improves educational quality. Efforts to stymie parent choice therefore cause serious harm.

Studies of choice programs throughout the United States overwhelmingly reflect a common conclusion: choice leads to measurable educational benefits for many students, is neutral for others, and harms none. See Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* 1 (4th ed. 2016).

1. School-choice programs improve academic outcomes. Empirical studies have examined the effect of school choice on student performance using the highest-standard method of social science research—random-assignment—which is possible where applications exceed slots, resulting in a lottery for offers. Random assignment studies provide comparison groups that are on average equivalent in baseline test scores and unobservable factors, such as parental motivation. See EdChoice, *The 123s of School Choice 2023 Edition* 14 (hereinafter *123s of School Choice*), <https://bit.ly/4btOOE7>.

To date, seventeen gold-standard studies have assessed effects on student scores in three voucher programs and five privately funded scholarship programs. Out of those studies, eleven found choice improves student outcomes and four found no effect.

For example, the scholarship program in Charlotte, North Carolina, had positive effects in both studies of that program. See Joshua Cowen, School Choice as a Latent Variable: *Estimating the “Complier Average Causal Effect” of Vouchers in Charlotte*, 36 Pol’y Stud. J. 301 (2008), <https://bit.ly/3Qxihoq>;

Jay P. Greene, *Vouchers in Charlotte*, 1 *Educ. Next* 55 (2001), <https://bit.ly/44Mdyp3>.

The scholarship program in New York City has been the subject of five random assignment studies. Three showed a positive effect on student scores. See Hui Jin, John Barnard, and Donald Rubin, *A Modified General Location Model for Noncompliance with Missing Data: Revisiting the New York City School Choice Scholarship Program using Principal Stratification*, 35 *J. Educ. and Behav. Stat.* 154 (2010), <https://bit.ly/3JLUkGl>; John Barnard, Constantine Frangakis, Jennifer Hill, and Donald Rubin, *Principal Stratification Approach to Broken Randomized Experiments: A Case Study of School Choice Vouchers in New York City*, 98 *J. Am. Stat. Ass'n*, 310 (2003), <https://bit.ly/3Wwjr7E>; William G. Howell, Patrick J. Wolf, David E. Campbell, and Paul E. Peterson, *School Vouchers and Academic Performance: Results from Three Randomized Field Trials*, 21 *J. Policy Analysis and Mgmt.* 191 (2002), <https://bit.ly/3JPXGb7>.

The remaining two studies showed a neutral outcome. See Marianne Bitler, Thurston Domina, Emily Penner, and Hilary Hoynes, *Distributional Analysis in Educational Evaluation: A Case Study from the New York City Voucher Program*, 8 *J. Rsch. Educ. Effectiveness* 419 (2015), <https://bit.ly/3ULDJbW>; Alan Krueger and Pei Zhu, *Another Look at the New York City School Voucher Experiment*, 47 *Am. Behav. Scientist* 658 (2004), <https://bit.ly/3QBfzhL>.

Three random assignment studies reviewed the Opportunity Scholarship Program in Washington, D.C. Two showed a positive effect on test scores. See Patrick J. Wolf, Brian Kisida, Babette Gutmann, Michael Puma, Nada Eissa, and Lou Rizo, *School Vouchers and Student Outcomes: Experimental Evidence from Washington, D.C.*, 32 *J. Pol’y Analysis and Mgmt.* 246 (2013), <https://bit.ly/3QAmXKa>; Howell *et al.*, *supra*. The remaining one showed a neutral effect. See Ann Webber, Ning Rui, Roberta Garrison-Mogren, Robert B. Olsen, and Babette Gutmann, *Evaluation of the DC Opportunity Scholarship Program: Impacts Three Years After Students Applied*, NCEE 2019-4006, Inst. Educ. Sci., U.S. Dep’t of Educ. (2019), <https://bit.ly/4bmfDKa>.

2. Substantial research also demonstrates that school choice improves educational attainment, *i.e.*, outcomes during and after high school. Fewer studies address attainment than scores, but the research that exists is generally positive.

Two random-assignment studies of Washington, D.C. and New York found positive effects on educational attainment, as measured by graduation rates, college enrollment, and college completion. See Wolf and Kisida, *et al.*, *supra*; Albert Cheng and Paul E. Peterson, *Experimentally Estimated Impacts of School Vouchers on Educational Attainments of Moderately and Severely Disadvantaged Students*, Program on Educ. Policy and Governance Working Papers Series (PEPG 20-02), Harvard Kennedy School (2020), <https://bit.ly/3ULIWAw>.

A collection of three studies—one of which was a random-assignment study—found positive results regarding educational attainment in Milwaukee and Florida and neutral results in Washington, D.C. See Matthew M. Chingos, Daniel Kuehn, Tomas Monarrez, Patrick J. Wolf, John F. Witte, and Brian Kisida, *The Effects of Means-Tested Private School Choice Programs on College Enrollment and Graduation*, Urban Institute (2019), <https://urbn.is/4aW-GAEx>. One random-assignment study showed neutral effects on attainment in Louisiana. See Heidi H. Erickson, Jonathan N. Mills and Patrick J. Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement and College Entrance*, 14 *J. Rsch. on Educ. Effectiveness* 861 (2021), <https://bit.ly/3WuVmxT>.

A long-term study of a privately funded voucher program for low-income elementary school students in New York City in the late 1990s found that African-American students offered vouchers were 20% more likely to attend college within three years of their expected high-school graduation date. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* 8 (3rd ed. 2013). They were also 25% more likely to attend college full-time and 130% more likely to attend a selective four-year college. *Id.*

No studies of student attainment have found negative effects for any groups of students. Overall, the empirical evidence demonstrates a largely positive effect of school choice on participating students, which

logically leads to higher graduation rates and increased rates of post-secondary education.

3. Allowing parents to direct their children's education also furthers civic values and racial and ethnic integration.

A recent statistical meta-analysis examined the association between private schools and four civic outcomes generally considered to be goals of government-run public schools. See M. Danish Shakeel, Patrick J. Wolf, et al., *The Public Purposes of Private Education: A Civic Outcomes Meta-Analysis*, 36 Ed. Psych. Rev. 40 (2024), <https://bit.ly/4dHwgSP>. The measured values were political tolerance, political participation, civic knowledge and skills, and voluntarism and social capital. *Id.* at 4–5. The analysis showed that, on average, private schools boost civic outcomes for students over comparably situated public school students. *See id.* at 19–23. Religious private schools were particularly more likely to be associated with better civic outcomes. *See id.* at 23.

Eleven other studies on civic values and practices in school choice also tend to favor school choice. *123s of School Choice* at 47–52. Seven were random-assignment studies, and three of those found positive effects on civic values and practices. See Eric Bettinger and Robert Slonim, *Using Experimental Economics to Measure the Effects of a Natural Educational Experiment on Altruism*, 90 J. Pub. Econ. 1625 (2006), <https://bit.ly/44tK8LU>; David E. Campbell, *The Civic Side of School Reform: How Do School Vouchers Affect*

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Beyond the random-assignment studies, three additional studies also found positive effects. See Corey A. DeAngelis and Patrick J. Wolf, *Private School Choice and Character: Evidence from Milwaukee*, 35 *J. Priv. Enter.* 13 (2020), <https://bit.ly/3y2BxDQ>; David J. Fleming, *Learning from Schools: School Choice, Political Learning, and Policy Feedback*, 42 *Pol'y Stud. J.* 55 (2014), <https://bit.ly/3WqGRLD>. No study has shown school choice to have a negative effect.

Studies of the racial and ethnic composition of private and public schools have also shown that school choice improves racial integration. Eight studies have assessed integration after implementation of school choice programs in Wisconsin, Ohio, Louisiana, and Washington, DC. Almost all showed a positive effect. See, e.g., Stéphane Lavertu and John J. Gregg, *The Ohio EdChoice Program's Impact on School District Enrollments, Finances, and Academics*, Thomas B.

Fordham Institute (2022), <https://bit.ly/3we17Wd>; Anna J. Egalite, Jonathan N. Mills, and Patrick J. Wolf, *The Impact of Targeted School Vouchers on Racial Stratification in Louisiana Schools*, 49 *Educ. and Urb. Soc’y* 271 (2017), <https://bit.ly/3WooKpA>; Jay P. Greene and Marcus A. Winters, *An Evaluation of the Effect of DC’s Voucher Program on Public School Achievement and Racial Integration After One Year*, 11 *J. Cath. Educ.* 83 (2007), <https://bit.ly/3WrINDp>; Howard L. Fuller and George A. Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools*, Current Education Issues No. 2000-02, Marquette University Office of Research (2000), <https://bit.ly/3yaqMQ8>; Jay P. Greene, *Choice and Community: The Racial, Economic and Religious Context of Parental Choice in Cleveland*, Buckeye Institute for Public Policy Solutions (1999), <https://bit.ly/3UwigSV>.

Only one of the three Wisconsin studies showed a neutral effect on integration. See Jay P. Greene, Jonathan N. Mills, and Stuart Buck, *The Milwaukee Parental Choice Program’s Effect on School Integration, School Choice Demonstration Project*, Report No. 20 (2010), <https://bit.ly/3QuYLJl>. No study has shown a negative effect on integration from school choice.

4. School choice programs benefit not just private schools, but public schools as well. Twenty-nine empirical studies show that school choice improves performance of public-school students just as much as students who use choice programs to be educated elsewhere. *123s of School Choice, supra*, at 38–45.

Most notably, ten studies of Florida have demonstrated positive effects of school choice programs on public school students. *See id.*; *see also, e.g.*, David N. Figlio, Cassandra M.D. Hart, and Krzysztof Karbownik, *The Ripple Effect: How Private-School Choice Programs Boost Competition and Benefit Public-School Students*, 22 *Educ. Next* 48-54 (2022), <https://bit.ly/4dwjoPk>; Rajashri Chakrabarti, *Vouchers, Public School Response, and the Role of Incentives: Evidence from Florida*, 51 *Econ. Inquiry* 500 (2013), <https://bit.ly/4abDLyd>.

Beyond Florida, studies of Ohio, Wisconsin, Maine, and Vermont have also demonstrated positive outcomes for public school students arising from school choice programs. *See, e.g.*, David Figlio and Krzysztof Karbownik, *Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance Effects*, Thomas B. Fordham Institute (2016), <https://bit.ly/3QBnbRn>; Jay P. Greene and Ryan H. Marsh, *The Effect of Milwaukee's Parental Choice Program on Student Achievement in Milwaukee Public Schools*, School Choice Demonstration Project, Report No. 11 (2009), <https://bit.ly/4brhxct>; Christopher Hammons, *The Effects of Town Tuitioning in Vermont and Maine*, School Choice Issues in Depth (2002), <https://bit.ly/4bsFDUa>.

When public schools know that students can use educational-choice funding to enroll elsewhere, they have powerful incentive to improve performance to retain and attract students. Construing school choice as

aid to private schools mistakenly ignores the benefits to all schools from the existence of school choice.

All this research matters because it shows the harm from singling out parental rights for disfavored treatment. When no-aid clauses target parents, the result is substantial harm to primary and secondary education. The Court should review whether such targeting is unlawful.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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