No. 23-1084

In the Supreme Court of the United States

JILL HILE, ET AL.,
Petitioners,
v.
MICHIGAN, ET AL.

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

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
ANNIKA BOONE BARKDULL*
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com
Counsel for Amicus Curiae

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INTRODUCTION, SUMMARY AND INTEREST OF *AMICUS CURIAE*[1]

School choice programs promote and protect the First Amendment rights of families to educate their children in accordance with their faith-based or philosophical beliefs, and in a setting where beliefs and values are taught according to private choice, not school board edict. Following that model, Michigan is home to countless independent schools that protect and promote a wide range of religious, cultural, and social identities and viewpoints. By providing low-income families with access to those schools, school choice programs make a critical contribution to fostering a more inclusive, diverse, and vibrant educational landscape.

But Michigan is prevented from offering low-income families such opportunities by a Blaine Amendment. Although the Amendment is neutral on its face, it was enacted because of and in furtherance of antireligious bigotry. Many states have similar provisions, which conceal behind textual neutrality their discriminatory intent and effect.

The ability of Michigan and other states with similar laws to offer genuine educational choice to all their citizens is an issue of overriding importance to *amicus* Protect the First Foundation (PT1). PT1 is committed to the principles of free speech, free association, and religious liberty enshrined in the First Amendment

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members and its counsel, made any monetary contribution toward the preparation or submission of this brief. All parties received notice of *amicus*'s intent to file more than ten days before this filing.

and supports educational choice as a vital means of exercising those freedoms. And it is a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people of all religions and no religion, people across the ideological spectrum, and people who may not even agree with the organization's views. *Amicus* urges this Court to grant certiorari to prevent these states from continuing to evade precedents of this Court that have already declared Blaine Amendments unconstitutional.

STATEMENT

In the mid-1960s, the Michigan Legislature passed a school choice grant program that allocated funds to private schools for the teaching of secular subjects. Pet. 8. Voters reacted by passing an amendment to the Michigan Constitution that prohibited the State from giving financial support to nonpublic schools. Mich. Const. Article VIII, § 2, ¶ 2. While the amendment was facially neutral, applying to both religious and secular private schools, it nevertheless was a "Blaine Amendment" in its effect on nonpublic school students. At the time of the Amendment's enactment, ninety-eight percent of nonpublic school students attended church schools, and the Michigan Supreme Court itself later recognized that the Blaine Amendment was "an anti-parochiaid amendment." *Council of Orgs. & Others for Educ. About Parochiaid, Inc.* v. *Engler*, 566 N.W.2d 208, 220–221 (Mich. 1997).

Petitioners are parents of Michigan students, and they wish to send their children to private schools. They challenged the State's Blaine Amendment on First Amendment and political disenfranchisement

grounds. The district court dismissed the First Amendment claims on comity grounds, holding that considering them "would require this court to disregard the State's own interpretation and consistent application of its own tax law." Pet. 47a. It also dismissed the political process claims, holding that the Blaine Amendment did not burden religious schools within the political process and thus did not violate equal protection under the political disenfranchisement doctrine. Pet.49a. Petitioners appealed as to the political process claim, and the Sixth Circuit affirmed. Pet. 3a.

REASONS FOR GRANTING THE PETITION

I. School Choice Programs Promote Educational Pluralism and Allow Parents To Exercise Their First Amendment Right To Educate Their Children Consistent With Their Beliefs and Values.

Liberty demands, and this Court has recognized, that a state has no power to "standardize its children by forcing them to accept instruction from public teachers only." *Pierce* v. *Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925). After all, "'[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*

This Court has thus held that parents have both a "right of control" of their children's education as well as a corresponding "natural duty" to ensure that the education is adequate and appropriate to each child. *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923). Neither governments nor schools may usurp that right. Indeed, the *Meyer* Court specifically listed parents' right

to "bring up children" as one of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. Included in this right and duty is the liberty of parents to choose which schools their children attend, whether they be public or private, religiously affiliated or otherwise.

This right is essential to American pluralism. Allowing families with diverse values and beliefs to live and teach their children according to their own conscience is core to tolerance. After all, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). And that is one reason why, as *amicus* now shows, many families voluntarily choose religious schools for their children, to the benefit of both the children and the larger society.

A. Many Families Choose Religious Schools for Their Children's Instruction.

School choice is often no mere matter of personal preference, but a decision guided by "deep religious conviction." *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972). Many different religious and ethical traditions place a heavy emphasis on education consistent with their values.

Catholics, for example, are charged with "the duty of entrusting their children to Catholic schools wherever and whenever it is possible."[2] Similarly, the

[2] Vatican Council II, *Gravissimum educationis* § 8 (1965); see also 1983 *Codex Iuris Canonici* c.798 (stating that "[p]arents are

Southern Baptist Convention teaches that "an adequate system of Christian education is necessary to a complete spiritual program for Christ's people" and that education in the Kingdom of Christ must receive "liberal support."[3] And the Presbyterian Church (U.S.A.) embraces John Knox's call for "a school in every parish."[4]

The conviction to provide children with religious education in the United States is not limited to Christian faiths.[5] Dr. Jamal Badawi, speaking to the Islamic Society of North America, said, "Establishing of Islamic schools, in the environments in which we live, takes precedence over building mosques."[6] Professor of religion Diana Eck further explained, "Many Muslims despair of the drugs, the dating, the entertainment-saturated culture that are so much a part of the public school experience. Muslim parents have responded by supporting full-time Islamic schools that create a stronger environment of support for Muslim faith and practice."[7] And recent research has found that

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to entrust their children to those schools which provide a Catholic education" when able).

[3] Southern Baptist Convention, *The Baptist Faith and Message* art. XII (June 14, 2000).

[4] Presbyterian Church U.S.A., *What We Believe: Education*, https://www.presbyterianmission.org/what-we-believe/social-issues/education/.

[5] See *id.* at 87.

[6] Diana L. Eck, *Muslim in America*, Religion Online (2001), https://www.religion-online.org/article/muslim-in-america/.

[7] *Id.*

children who attend faith-based schools, particularly Muslims, feel less alienated and *more* American.[8]

Orthodox Jews have similar beliefs on education. The requirement to "transmit[] Jewish values through education is one of the central and timeless imperatives captured in Judaism's most sacred texts."[9] Indeed, "for modern Orthodox Jews, enrolling their children in a dual curriculum Jewish day school is 'virtually mandatory.'" *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 497 (S.D.N.Y. 2006) (citing multiple expert witnesses who testified to that effect), *aff'd*, 504 F.3d 338 (2d Cir. 2007).

It would be difficult for Jewish schoolchildren at secular schools to practice their religion in ways such as participating in daily prayers or restricting travel during Jewish holidays.[10] Other religious groups, such as Muslims, also teach prayer, holiday observance, and other practices that are similarly difficult to observe in public school.[11]

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[8] See Andrew Thurston, *Inside Islamic Schools*, The Brink (April 26, 2016), https://www.bu.edu/articles/2016/inside-us-islamic-schools/.

[9] Letter from Moishe Bane, Pres, Orthodox Union Advocacy Center, to Dr. Christina Coughlin, N.Y. Educ. Dept. (Aug. 28, 2019), http://bit.ly/3q8A6dz (citing Joshua 1:8; Deuteronomy 6:7).

[10] Br. of *Amicus Curiae* Jewish Coalition of Religious Liberty in Support of Petitioners, *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020) (No. 18-1195).

[11] See Eck, *supra* n. 6 (explaining accommodations Muslim students need in public schools, including dietary needs and time for prayer and holiday observance); Muhsin S. Mahdi, *Islam*, Britannica, https://tinyurl.com/islamprayer (stating that

Whatever the reason for seeking religious education, the religious significance of faith-based education to those who seek it cannot be overstated. See *Yoder*, 406 U.S. at 216. Excluding faith-based education based on religious animus hinders families' ability to seek such education and violates the First Amendment.

B. Educational Pluralism Benefits Those Who Seek an Education Consistent With Their Values.

Invalidation of Michigan's Blaine Amendment would allow Petitioners to effectively advocate for more school choice options in Michigan, like those available in a growing number of states around the country. Such measures would allow more families, including those of modest means, to receive educational opportunities that align with their values.

For example, the Grand Rapids Christian Schools have over 350 students in their Spanish immersion program, which focuses on cultural competence along with Spanish language proficiency.[12] Greenhills School specializes in STEM programs.[13] The Roeper School is the oldest independent K-12 school for gifted children.[14] And the Rudolf Steiner School of Ann Arbor

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the second pillar of Islam "consists of five daily canonical prayers").

[12] Grand Rapids Christian Schools, *Spanish Immersion*, https://www.grcs.org/academics/programs/si.

[13] Greenhills School, *About*, https://www.greenhillsschool.org/about/.

[14] The Roeper School, *Welcome to Roeper*, https://www.roeper.org/.

uses "Waldorf education," which allows teachers to move with their classes through at least Grade 5.[15]

Michigan is also home to several highly rated schools committed to preserving different cultural and religious heritages. For instance, Michigan Chinese School "provides support to the education of the Chinese language and culture" and "provides local Chinese descendants with one of the best environments to learn Chinese culture, arts, and language."[16] The Frankel Jewish Academy is a top-rated private school in the state committed to creating an environment where all students can "grow academically, Jewishly, emotionally and socially."[17] Similarly, the Michigan Islamic Academy serves Michigan's large Muslim community by providing "excellence in education while nurturing Muslim character."[18] Brother Rice High School is an all-male Catholic school that fosters "a community of faith where young men are accepted, recognized, valued and challenged to grow."[19] And Notre Dame Preparatory School and Mercy High

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[15] Rudolf Steiner School of Ann Arbor, *Waldorf Education*, https://www.steinerschool.org/about-us/waldorf-education.cfm.

[16] Michigan Chinese School, *About Michigan Chinese School*, https://www.michiganchineseschool.org/blog/?page_id=4982.

[17] Frankel Jewish Academy, *Mission & Core Values*, https://www.frankelja.org/about/mission/.

[18] Michigan Islamic Academy, *Mission, Goals, and Values*, https://mia-aa.org/mission#TabContent.

[19] Brother Rice High School, *Home Page*, https://www.brother-rice.org/.

School are all-female Catholic schools that promote both academic and spiritual education.[20]

Each of these schools provides high-quality educations that support families in passing their values, heritage, and beliefs through generations. In a pluralistic America, every family is different, and must be able to make informed, tailored choices for their children. Such educational, cultural, and religious pluralism is the embodiment of multiple First Amendment values, and Michigan should not be handicapped in supporting such pluralism by a Blaine Amendment developed and adopted out of religious animus and antithetical to core First Amendment values and limits.

II. Michigan's Blaine Amendment Mirrors Other Blaine Amendments in its Discriminatory Intent.

As this Court has repeatedly recognized, "hostility to aid to pervasively sectarian schools has a shameful pedigree," born of anti-Catholic bigotry. *Mitchell* v. *Helms*, 530 U.S. 793, 828–829 (2000). Because of the preference for Protestant schools and a disdain for the spread of Catholic education, Senator James Blaine first proposed an amendment to the federal Constitution in 1875 that would have prohibited religious schools from receiving government funding. *Id.* at 828. Although the amendment was narrowly defeated, many states adopted their own no-aid provisions, which shared the same "checkered tradition" of anti-Catholicism that motivated the federal Blaine

[20] See Notre Dame Preparatory School, *NDP at a Glance*, https://www.notredameprep.com/about/ndp-at-a-glance; see also Mercy High School, *Mission & Vision*, https://mhsmi.org/mission/mission-vision.

Amendment. *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 482 (2020). Michigan's no-aid provision is no exception. This Court has not "hesitate[d] to disavow" such discriminatory measures in the past, *Mitchell*, 530 U.S. at 828, and it should not hesitate to do so now.

Although Michigan's Blaine Amendment is neutral on its face, that is not the end of the inquiry. As this Court has long held, the inquiry into whether a law is discriminatory does not "end with the text of the laws at issue," and "[f]acial neutrality is not determinative." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993). After all, "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* Thus in Free Exercise cases, "as in equal protection cases, we may determine [the government's] object from both direct and circumstantial evidence." *Id.* at 540 (citing *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 266 (1977)). "Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* See also *Masterpiece Cakeshop, Ltd.* v. *Colorado C.R. Comm'n*, 584 U.S. 617, 634–636 (2018) (considering public comments of decisionmakers in determining that government had acted with discriminatory animus).

Here, moreover, there is a dispositive fact: One year after Michigan's Blaine Amendment was passed, the Michigan Supreme Court examined the history of the provision and stated that, "[a]s far as the voter was

concerned, the result of all the pre-election talk and action concerning [the Blaine Amendment] was simply this—[the proposal] was an anti-parochiaid amendment—no public monies to run parochial schools." *Traverse City Sch. Dist.* v. *Attorney Gen.,* 185 N.W.2d 9, 17 n.2 (Mich. 1971).

And the court had good reason for that conclusion. Long before Michigan voted to add a Blaine Amendment to its Constitution in 1970, the State saw an increase of anti-Catholic animus. With the surge of Catholic immigration to the United States in the late 19th and early 20th centuries, at least 1 in 20 students in Michigan attended Catholic schools. Compl. ¶ 51. Fearing the growth of parochial—specifically Catholic—education, the Wayne County Civic Association, an association nominally devoted to protecting public schools, proposed a ballot measure in 1920 to require all Michigan students between the ages of 5 and 16 to attend public school. *Id.* ¶¶ 52–53. While the amendment did not pass, it was only the start of a movement by various groups to eradicate religion from education. That "anti-parochaid" movement succeeded in 1970. *Id.* ¶¶ 54–55.

A flare-up of antireligious sentiment occurred in 1968 when the Michigan Legislature passed the Investment in the Education of Children Act, which supported school choice by allocating funding to private schools for each student who attended them. *Id.* ¶ 78. In response, private school opponents created a ballot committee, the "Council Against Parochiaid," to promote an amendment to Michigan's Constitution that would prohibit state grants to nonpublic schools. *Id.* ¶ 88. Although the proposed amendment was facially neutral, the term "parochiaid"—which plays on the

word "parochial"—reflects that the initiative's intent and purpose was antireligious.

The initiative's antireligious purpose is further evident from news articles and campaign literature that urged Michigan voters to vote for the Blaine Amendment. At one of the Council Against Parochiaid's meetings, Dr. Maurice Geary stated that "parochiaid" was "anti-American" because the Catholic Church was the biggest corporation in America, yet its financial activities are kept secret. *Id.* ¶¶ 91–92. The Council Against Parochiaid, journals, and news sources disseminated op-eds, articles, and warnings against allowing religious schools to usurp taxpayer dollars. The complaint highlighted more than twenty anti-parochiaid ads and news articles that urged the public to vote for the Blaine Amendment. *Id.* ¶¶ 91–92. Examples of inflammatory statements published and disseminated by the press and campaigns include:

> "[T]he politicians want Catholic votes and the Catholic church wants money. It is that simple." *Flint Journal* (October 12, 1970).
>
> "To those tax-hungry clergymen who formed an alliance with unprincipled politicians to jam repeated parochiaid measures through the legislature and who, during the campaign, have threatened to close their religious schools ***, we say 'Don't just talk about it, DO IT!'" *Grand Rapids Press*.
>
> "[P]arochial education's only purpose is complete indoctrination of the child in the religious beliefs of a single denomination or faith." Spend Taxes on Public Schools (STOP).

> "SUPPORT CHURCHES BY GIVING ON SUNDAY! (AND NOT WITH OUR PUBLIC TAX MONEY)." *Lansing State Journal* (October 29, 1970; November 1, 1970).
>
> "LET'S BE FAIR *** More than 90% of all parochiaid funds go to schools owned by the clergy of one politically active church – a church which pays no taxes on its $80 billion holding in real estate, stocks, bonds, and business investments, or on its $12 billion annual income in this country." Council Against Parochiaid.
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> A supporter of the Blaine Amendment wrote that the "phobia" behind it was "that the tax money is being used for religious education." *Detroit News* (October 10, 1970).
>
> A Grand Rapids Press article on November 1, 1970, described the debate over the amendment as a religious battle, stating "both supporters and opponents have been waging an intense campaign to sway voters in a state where Protestants outnumber Roman Catholics about two-to-one."

Id. ¶¶ 91–92.

Sen. James Fleming stated that he had "never witnessed such anti-Catholic sentiment in [his] life.[21] He continued: "It might even be that divisiveness created

[21] Letter of Senator James Fleming to Dr. Charles T. Vear, Michigan Area United Methodist Church, (May 9, 1969).

by this issue would set back ecumenicalism fifty years in Michigan."[22]

The dominance of religious schools among Michigan private schools in 1970 further demonstrates the discriminatory intent of the amendment. When Michigan's Blaine Amendment was passed, 218,000 of the 275,000 nonpublic students in Michigan were enrolled in Catholic schools. Compl. ¶ 84. As the Michigan Supreme Court recognized, "with ninety-eight percent of the private school students being in church-related schools" when the Blaine Amendment was enacted, the Amendment "is nearly total" in its "impact" on "church-related schools." *Traverse City Sch. Dist.,* 185 N.W.2d at 29. *Cf. Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than [a protected characteristic], emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

In short, the evidence is clear that antireligious animus motivated Michigan's Blaine Amendment. Denying certiorari would allow a state to merely adopt a facially neutral (but discriminatory) Blaine Amendment to circumvent this Court's holdings in *Trinity Lutheran*, *Espinoza*, and *Carson*.

[22] *Id.*

III. Many States Have Adopted Facially Neutral Funding Prohibitions That Were in Fact Motivated by and Serve Religious Animus.

Michigan is far from alone in adopting a facially neutral constitutional provision that stemmed from discriminatory animus and has had discriminatory effects. It is imperative that the Court grant the petition, not only to bar Michigan's Blaine amendment, but also to provide a framework that will prevent other states from likewise discriminating against religious and private schools. If this Court does not grant certiorari, they will continue to evade this Court's precedent.

1. New Mexico Constitution Article XII, § 3

For example, New Mexico's constitution has a history fraught with religious animosity. The decades before the State's constitution was ratified marked a long attempt to push religious schools out of New Mexico's education system—especially Catholic schools—and that attempt succeeded with the passage of a Blaine Amendment.[23]

William Gillette Ritch, the territorial secretary appointed in 1874, was a notorious anti-Catholic.[24] When he saw the prevalence of parochial schools in the territory, he "survey[ed] the condition of education and declared it to be backward."[25] Described as a "staunch Episcopalian imbued with hatred of Catholicism, he blamed the church for the ignorance and illiteracy

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[23] Dianna Everett, *The Public School Debate in New Mexico: 1850-1891*, 26 Ariz. and the West 107 (1984).

[24] *Id.* at 112.

[25] *Id.* at 113.

prevailing among Native New Mexicans."[26] He called for congressional action to establish public schools and argued that nonsectarian education "was the only practical way of 'Americanizing' New Mexico."[27] Ritch likewise criticized the Jesuits, accusing them of "incorrigible dabbling in the political affairs of every nation in which they had resided."[28] He saw Jesuits as "totally unfit 'to become instructors of children in free America.'"[29] Early arguments for public education in New Mexico thus "relied on the familiarly Protestant objection to sectarianism" and sought to "excise[] Catholic influence."[30]

Given this climate of animus, it was hardly a surprise in 1891 when the territorial legislature approved an act "declar[ing] that all public schools must be nonsectarian and that all teachers must speak and teach the English language."[31] Later, "Congress forced New Mexico and other territories seeking admission to the union to adopt Blaine provisions as a condition of statehood." *Moses* v. *Ruszkowski*, 458 P.3d 406, 419 (N.M. 2018). That Blaine Amendment reads:

> The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 114.

[30] Kathleen Holscher, *Religious Lessons: Catholic Sisters and the Captured Schools Crisis in New Mexico* 38, 40 (2012).

[31] *Id.* at 133.

> from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university. New Mexico Const. art. XII, § 3.

Though facially neutral, the "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by" voters makes the discriminatory intent and anticipated effect of the provision plain. See *Lukumi*, 508 U.S. at 540. As the New Mexico Supreme Court stated, "the history of the federal Blaine amendment and the New Mexico Enabling Act" show "that anti-Catholic sentiment tainted [the] adoption" of New Mexico's no funding provision. *Moses*, 458 P.3d at 419.

2. Alaska Constitution Article VII, § 1

The Alaska Constitution contains the following no-aid provision:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution. Alaska Const. art. VII, § 1.

The history of Alaska's Constitutional Convention in 1956 shows that this no-funding provision was motivated by anti-religious animus. Speaking in favor of

the provision, delegate John Coghill said, "I think that sectarianism segregation in our educational system is bad for the children." Alaska Const. Convention, Jan. 9, 1956, at 1516, *available at* https://akleg.gov/pages/constitutional_convention.php. Delegate Robert Armstrong said, "This section gives the education department *** the right to seek out the child, independent of his religious affiliation, to help him to become a strong and useful part of society[.]" *Id.* at 1514. Rather than recognizing the right of parents to direct the upbringing of their children, *Pierce*, 268 U.S. at 534–535, Armstrong sought to separate children from their religious upbringing to form them to benefit the government. These statements show a negative attitude towards parochial schools and a judgment of their ability to educate Alaska's children. And notably absent from these discussions is any mention of other types of private schools. Despite the constitution's facially neutral language, the delegates targeted sectarian schools in their no-funding provision.

Other delegates discussed their concerns with the benefits they already saw religious groups reaping. Delegate Irwin Metcalf described how he saw the economic well-being of religious groups as contrary to his own pecuniary interest. Alaska Const. Convention, Jan. 9, 1956, at 1518. And delegate Victor Rivers, in comparing similar provisions from other states and territories, hesitated to use the Puerto Rican constitution as a model, it being a "highly religious little Commonwealth"—meaning highly Catholic—whose use of the word "direct," if interpreted narrowly by the courts, could lead to support for religious institutions. *Id.* at 1530.

This evidence from the Alaskan Constitutional Convention shows that its facially neutral no-funding provision is a discriminatory Blaine amendment.

3. South Carolina Constitution Article XI, § 4.1

South Carolina's no-funding provision states "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." South Carolina Const. art. XI, § 4.1. While facially neutral, it was motivated by discriminatory intent like other Blaine Amendments.

In an effort to combat Reconstruction, Governor Benjamin "Pitchfork Ben" Tillman, an "avowed racist," convinced South Carolina voters, "dominated by so-called 'Tillmanites,'" to call a constitutional convention.[32] The convention was not only marked by blatant racism, but also by anti-Catholic animus. Walther Oeland, a Tillmanite and member of the South Carolina chapter of the Junior Order of United American Mechanics, called the Catholic Church "America's most dangerous and deadly foe," and stated in the local newspaper:

> Her highest ambition is to gain control of the affairs of our government and to force us (the Protestants) to come to her terms and the only hope of [their] success is keeping the masses of our good people in ignorance *** Our order is growing very rapidly and will continue to do so until the

[32] Nicole Stelle Garnett & Daniel T. Judge, *Ending the Shame of Blaine*, Real Clear Policy (May 20, 2021), https://www.realclearpolicy.com/articles/2021/05/20/ending_the_shame_of_blaine_777880.html.

> gates of Castle Garden are locked against this worse than trash from other shores made so by the rottenness of the institutions from whence they come, and the free school in every city, town and hamlet, the Bible firmly planted within, and Old Glory is floating in the breeze from mountain to seashore.[33]

Another South Carolina editorialist said: "Roman Catholic parochial schools are avowedly intended to utterly destroy the American public school system."[34]

South Carolina's Blaine Amendment also stemmed from racial prejudice against recently freed slaves, and against the religious institutions that served and educated them. In the years following the Civil War, many missionaries frustrated racist legislation by "work[ing] tirelessly to give the emancipated population the opportunity to learn. Former slaves of every age took advantage of the opportunity to become literate."[35] For example, the Penn School in Sea Island, South Carolina, was an independent Quaker school run by Northern missionaries that was the first school in the South for freed slaves.[36] In 1867, as a wave of Reconstruction Republicans swept into power, the Penn School began receiving public funds for books

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[33] Walther Oeland, *Letter to the Editor*, Gaffney Ledger, August 20, 1896, at 7.

[34] Joseph Cook, *Romish Schools*, The Abbeville Press and Banner, September 19, 1888, at 1.

[35] *The African American Odyssey: A Quest for Full Citizenship*, Library of Congress, https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html.

[36] *South Carolina: Penn Center*, Nat'l Park Serv., https://www.nps.gov/places/south-carolina-penn-center.htm.

and school operations.[37] That taxpayer support ended when the school board forbade residents of the town to raise money or levy school taxes for the school.[38]

Other examples of religious aid to newly freed slaves included the Avery Institute in Charleston, a nonprofit school for freed slaves founded by the American Missionary Association,[39] and the Zion Presbyterian Church School in Charleston, which enrolled thousands of black students in the decades following the Civil War.[40] In 1895, only eight institutions served black students, all of which were religiously affiliated.[41] It is no wonder that Tillman's racism and his followers' religious animus would go hand in hand to produce South Carolina's Blaine amendment.

A recent proposed bill to repeal the no-aid provision suggests that South Carolina legislators recognize the problematic nature of their Blaine amendment.[42] Indeed, House Speaker Murrell Smith, when he introduced the bill, said "the proposed move will repeal the

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[37] *History*, Penn Ctr., https://www.penncenter.com/history-timeline.

[38] *Id.*

[39] *Avery Institute History*, Avery Inst., http://www.averyinstitute.us/history.html.

[40] Otis Westbrook Pickett, *Neither Slave Nor Free: Interracial Ecclesiastical Interaction In Presbyterian Mission Churches From South Carolina To Mississippi, 1818-1877*, at 287 (2013) (Ph.D. dissertation, University of Mississippi).

[41] See generally Lewis K. McMillan, Negro Higher Education in South Carolina (1952).

[42] S. 125, H. 3591 Joint Resolution, S.C. Legis. (2023-2024).

remnants of a bigoted past."[43] Such bigotry is evident not only because the amendment was Blaine's "brainchild" but also because it was instituted in South Carolina by Tillman and others who opposed providing education for the children of newly freed slaves.[44]

In short, the histories of these states' Blaine amendments show that even facially neutral no-aid provisions can be motivated by and advance religious animus.

CONCLUSION

Facially neutral Blaine amendments like Michigan's are rooted in religious animus and impermissibly restrict parents' right to direct the education of their children. This Court should grant certiorari to reverse the Sixth Circuit's dismissal and allow the suit to continue, thus placing the final nail in the coffin of Blaine amendments' burden on parents' Free Exercise and First Amendment rights to transmit their pluralistic beliefs and values across generations.

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[43] Devyani Chhetri, *This week in SC politics: Lawmakers pave way to fund religious schools with public money*, Greenville News (Mar. 6, 2023), https://www.greenville-online.com/story/news/2023/03/06/south-carolina-politics-public-money-to-religious-schools-taxpayer/69955962007/.

[44] *Id.*

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
ANNIKA BOONE BARKDULL*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amicus Curiae

*Not admitted to the D.C. Bar.

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