No. 23-1084

In the Supreme Court of the United States

JILL HILE, ET AL., PETITIONERS

v.

STATE OF MICHIGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 1970, shortly after the Legislature appropriated taxpayer dollars for private schools, Michiganders adopted by statewide ballot initiative a constitutional amendment limiting taxpayer funds to public schools. Unlike nearly all other States, Michigan prohibited funding for *any* private school, religious or not. This neutrally written and neutrally applied provision was reaffirmed thirty years later when the citizens overwhelmingly rejected a private-school tuition voucher program.

The questions presented are:

1. Do petitioners lack standing to bring their political-process equal protection claim where, despite wishing to receive tax beneficial treatment to send their children to private religious schools, they failed to plead any allegation of an injury-in-fact from Michigan's neutral and generally applicable constitutional provision barring taxpayer funds for all private schools?

2. Do petitioners state a claim for relief under their novel political-process equal protection theory to challenge Michigan's neutral constitutional provision barring taxpayer funds from benefiting all private schools, whether religious or not?

PARTIES TO THE PROCEEDING

Petitioners Jill and Joseph Hile, Jessie and Ryan Bagos, Samantha and Phillip Jacokes, Nicole and Jason Leitch, Michelle and George Lupanoff, and Parent Advocates for Choice in Education Foundation were plaintiffs in the district court and appellants in the court of appeals.

Respondents State of Michigan, Governor Gretchen Whitmer, and Michigan Treasurer Rachael Eubanks were defendants in the district court and appellees in the court of appeals.

RELATED CASES

The Petition accurately sets forth the proper related cases.

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JURISDICTION

The district court and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1291, respectively. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article VIII, § 2 of Michigan's Constitution provides, in full:

> The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

INTRODUCTION

Much as petitioners seek to grab this Court's attention with free exercise cases and references to the Blaine Amendment (which, as the court below made clear, has no relevance to this case), their claim is saddled with a threshold problem: they lack standing because they fail to allege an injury-in-fact to support a challenge to Michigan's Constitution. Despite premising their equal protection claim on the conception that, as religious families, they are disadvantaged when compared to other families in their ability to advocate for a policy change in the Michigan Legislature, their complaint does not allege that they are religious or subscribe to any religious tradition, or that they have any plans to lobby the Legislature to enact a law that would contravene the challenged constitutional provision. These failures preclude petitioners from asserting standing.

Even if they could cure that jurisdictional defect, petitioners' novel claim is a square peg searching for a round hole. For starters, petitioners attempt to cobble together disparate doctrines, primarily relying on *free exercise* cases to support their *political-process* equal protection claim. Not surprisingly, no court has found merit in this legal theory; thus, petitioners offer no split of the authority for this Court to resolve.

What's more, their lodestar cases—*Trinity Lutheran*, *Espinoza*, and *Carson*—all involved laws targeting religious entities by excluding only them from public benefits. Those cases are not helpful here, where the state constitutional provision that petitioners challenge prevents taxpayer funding for *any* private school, religious or not. This Court has

repeatedly made clear that "a State need not subsidize private education." *Carson* v. *Makin*, 596 U.S. 767, 779–80 (2022) (quoting *Espinoza* v. *Mon. Dep't of Revenue*, 591 U.S. 464, 487 (2020) (cleaned up)). Michigan has chosen not to do so. Through an amendment to its state constitution that is neutrally written and neutrally applied, the State simply limits taxpayer funding to public schools.

Petitioners attempt to surmount this obstacle by tying the amendment's passage in 1970 to the Blaine Amendment of nearly a *century prior*. But Michigan's constitutional amendment is not a Blaine Amendment. It is a response to the use of scarce public funds for *nonpublic* schools, not simply religious ones. Petitioners' claim that animus guided the electorate in 1970 is unwarranted.

Michigan voters reconsidered this no-aid clause in 2000 by voting on a ballot proposal that would have adopted a school voucher program allowing the use of state funds towards private schools. But, once again, the public decided overwhelmingly to retain a clear funding line between public and private education. As before, the 2000 reauthorization was animus-free. Michigan chose to keep public funds in public schools.

Finally, petitioners not only fail to meaningfully distinguish *Schuette* v. *Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014), they seek to expand the political-process doctrine despite *Schuette*'s limitation to the realm of racial discrimination. Their challenge to Michigan's Constitution runs squarely into a prime reason that *Schuette* constrained the political-process doctrine—that citizens are trusted to decide disputed issues of public importance.

STATEMENT OF THE CASE

Michigan voters ratify a facially neutral and neutrally applied restriction on taxpayer funds for any private school.

In 1970, Michiganders considered whether to adopt Proposal C, which offered a constitutional amendment that prohibited the appropriation of "public monies or property" from "aid[ing] or maintain[ing] any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school." Article VIII, § 2. Moreover, under the proposal, "No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students." *Id*.

Proposal C passed with 56% of the vote, (Compl., ¶ 93, PageID.23), becoming Article VIII, § 2, ¶ 2 of the Michigan Constitution, (*id*. at ¶ 90, PageID.18).

Years later, Michigan voters reject private-school vouchers.

Thirty years later, voters considered whether to undo this provision. In 2000, the People of Michigan were asked whether to amend Article VIII, § 2 to both (1) authorize "indirect" support of non-public school students, and (2) create a voucher program that would "permit any pupil resident [in certain underperforming public school districts] to receive a voucher for

actual elementary and secondary school tuition to attend a nonpublic elementary or secondary school." *Initiative Petitions—Proposed Amendments to the Michigan Constitution*, Proposal 00-1, pp 2–3, https://rb.gy/qss121.

But just like 30 years prior, the People overwhelmingly voted to ensure that public monies went only to public schools. This time, the vote was even more lopsided, with over 69% voting against adoption and under 31% in favor. State of Michigan Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963* (Jan. 2019), https://rb.gy/dawlas.

In *Schuette*, this Court limits the political-process strand of equal protection jurisprudence to racial discrimination.

In 2014, this Court evaluated the vitality of the so-called political-process doctrine under the Equal Protection Clause. *Schuette*, 572 U.S. at 303. The plaintiffs brought an equal protection claim challenging the recently passed Michigan ballot proposal that prohibited the consideration of race in college admissions. *Id.* at 299. The challenge was premised on this Court's decisions in *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982).

In *Hunter*, the Akron City Council enacted an ordinance to prohibit the problem of "substandard unhealthful, unsafe, unsanitary and overcrowded" housing that had resulted from "discrimination in the sale, lease, rental and financing of housing." 339 U.S. at

391. In response, voters amended the city charter, repealing this ordinance and, going forward, requiring that housing ordinances protecting against discrimination based on "race, color, religion, national origin or ancestry" (but no others) could not be passed unless approved by popular vote. *Id.* at 387, 390. This Court concluded that this ran afoul of equal protection, "plac[ing] a special burden[ ] on racial minorities within the governmental process." *Id.* at 390.

In *Seattle*, the local school board began a pilot busing program in an attempt at racial desegregation. 458 U.S. at 460. In response, those adverse to the policy generated a statewide ballot initiative designed to target and prohibit busing programs for purposes of racial integration. 458 U.S. at 461–62. After that initiative passed, it was challenged on the ground that it violated the Equal Protection Clause. *Id.* at 464, 467. This Court held the initiative unconstitutional because it "was carefully tailored to interfere only with desegregative busing." *Id.* at 471.[1]

In *Schuette*, prospective applicants to Michigan public universities and others challenged Michigan's constitutional provision barring the use of affirmative action in its public colleges. 572 U.S. at 299–300. Relying on *Hunter* and *Seattle*, the plaintiffs contended that by enshrining this in the state constitution, Michigan placed an unconstitutional burden on racial minority interests.

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[1] As *Schuette* noted, "the legitimacy and constitutionality of the remedy in question (busing for desegregation) was assumed, and *Seattle* must be understood on that basis." 572 U.S. at 306.

In rejecting that claim, a plurality of this Court concluded that an "expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court's settled equal protection jurisprudence." *Id.* at 307. It explained that reading *Seattle* to require courts "to determine and declare which political policies serve the 'interest' of a group defined in racial terms" was unwarranted and untenable because it would require courts to make assumptions that members of a racial group "think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 308 (quoting *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993)). Such a rubric would also require courts to define "what public policies should be included in what *Seattle* called policies that 'inure primarily to the benefit of the minority' and that 'minorities consider' to be 'in their interest.' " *Id.* at 309 (quoting *Seattle*, 458 U.S. at 472 (brackets and ellipses omitted)).

The *Schuette* plurality was accompanied by a concurring opinion written by Justice Scalia and joined by Justice Thomas, who would have outright overruled *Hunter* and *Seattle*. *Id.* at 322. Thus, a majority of justices in *Schuette* agreed that the political-process doctrine should not be expanded beyond its application in *Hunter* and *Seattle*.

Petitioners seek tax-advantaged treatment for religious school expenses.

Petitioners filed a complaint alleging four federal constitutional claims—three under the Free Exercise Clause and one under the Equal Protection Clause.

The complaint centered on petitioners' desire to claim a state-law tax break for using "Section 529" funds to pay for religious school expenses. Petitioners argued that Michigan's Constitution barred them from using 529 funds for that purpose without penalty, and by doing so it violated their rights under the Free Exercise and Equal Protection Clauses.

Petitioners alleged that "Section 529 of the Internal Revenue Code allows state-sponsored education savings plans, like Michigan's Education Savings Plan (MESP)." (Compl., ¶ 25, PageID.8.) Like a Roth IRA, contributions are tax deductible if they are withdrawn for "qualified higher education expenses." (Compl., ¶¶ 25–26, PageID.8.) The Michigan Income Tax Act and the Michigan Education Savings Program Act "defer to Section 529 of the Internal Revenue Code as to what constitutes 'qualified higher education expenses' that are eligible to be funded from the MESP account and still be entitled to preferential tax treatment." (Compl., ¶ 27, PageID.8.)

Although traditionally limited to use for post-secondary education expenses, in 2017, Congress expanded the tax deductibility of Section 529 plan withdrawals under *federal* tax law to include distributions for "expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school." Tax Cuts and Jobs Act, § 11032. (See also Compl., ¶¶ 28–30, PageID.9.)

Petitioners asserted that this change to federal law also changed state law. (Compl., ¶¶ 28–30, PageID.9.) Petitioners stated that, but for Article VIII, § 2 of Michigan's Constitution, which "strictly prohibits public monies being used for private-school

expenses," they would use their MESP plans for their children's tuition at a private, religious school. (Compl., ¶¶ 31–33, PageID.9–10.) As a result, they claimed that "Michigan's Constitution prevents Plaintiffs from enjoying the current state-tax benefits if they use their 529 accounts for private, religious K-12 tuition as federal law allows." (Compl., ¶ 34, PageID.10.)

After the district court dismisses their complaint, petitioners abandon all but their equal protection claim.

Respondents filed a motion to dismiss arguing that (1) petitioners lacked standing because they could not show an injury premised on their incorrect understanding of Michigan tax law; (2) their claims were barred by the Tax Injunction Act and principles of comity, since they sought a federal court order to interfere with Michigan's state tax collection; and (3) the claims should fail on their merits.

The district court granted the motion in full. It dismissed petitioners' free exercise claims, concluding that principles of comity barred their consideration. It explained:

> If plaintiffs believe the State is wrong about its own interpretation of State law, they are free to test the issue in the ordinary process of State tax administration and collection, or potentially seek appropriate declaratory relief in the State system, which is adequate for the task.

App. 47a–48a.

That was the end of the free exercise claims; petitioners did not appeal the dismissal of those three counts. Through that decision, they abandoned any claim of entitlement under the Free Exercise Clause and effectively admitted that, for purposes of this litigation, Michigan's understanding of its own state tax law is correct—Article VIII, § 2 plays no role in their entitlement to use Section 529 funds as they hope to.

The district court also dismissed petitioners' equal protection theory because it failed to state a claim for relief. After noting that the political-process strand of equal protection "if it exists at all—is narrow," App. 48a, and that the doctrine "has, to the Court's knowledge, never been applied outside the arena of racial discrimination," *id.*, the district court explained that the doctrine is, at best, "limited to the very narrow fact patterns of *Seattle* and *Hunter*," App. 49a. Finding petitioners' claim well beyond the bounds of *Seattle* and *Hunter*, the district court explained that Michigan's Constitution bears no resemblance to the laws at issue in those cases because it "draws the line between public education, on the one hand, and all forms of private education on the other hand." *Id.* Thus, "the parents of children at non-sectarian private schools . . . like Cranbook or Country Day are on exactly the same footing as the parents of children at Catholic Central or Grand Rapids Christian when it comes to use of public funds." *Id.*

The court of appeals affirms.

In a published decision, the court of appeals affirmed the dismissal of petitioners' equal protection claim. App. 3a. Despite petitioner's misleading

characterization of the panel as "divided," Pet. 14, the panel unanimously agreed that dismissal was appropriate, and not a single judge on the panel so much as hinted that petitioners' claim had merit. Ultimately, two of the three members of the panel rejected the claim on its merits, while the third would have dismissed for lack of standing. App. 22a–23a.

First, standing. The majority found that "the question is close." App. 11a. While the individual petitioners alleged that they are "parents of school-age children," they did *not* allege in their complaint that they are religious or that they subscribe to any particular religion or religious sect, including Catholicism. App. 8a–9a. (See also Compl., ¶¶ 17–22, PageID.6–7.) Nonetheless, the majority found that their religiosity was a "reasonable inference" from their allegations "that they wish to send their children to religious schools, and because they assert free exercise and religious-based equal protection claims in the complaint." App. 9a.

Even still, the majority found it was a "close call" whether petitioners plausibly alleged an injury-in-fact because they "abandoned on appeal their claims relating to Article VIII, § 2's effect on their ability to use tax-advantaged MESP funds for their children's private, religious education," leaving their "political process claim untethered from a specific legislative policy change they may seek to advance and render[ing] their injury somewhat conjectural." App. 9a. Despite this absence, the majority relied on inference and its "experience and common sense," to find that petitioners' complaint plausibly alleged that "if Article VIII, § 2 is declared unconstitutional, they would lobby their

representatives to change Michigan's law concerning 529 plans." App. 11a.

Judge Eric Murphy disagreed. At the outset, his opinion made clear that the harm alleged in petitioners' complaint—an unconstitutional tax penalty resulting from Michigan law—had been abandoned because "the plaintiffs concede on appeal that Michigan *statutory* law independently triggers the tax penalty, so an injunction against the *constitutional* provision would not redress that harm." App. 23a, 30a–31a. Instead, on appeal, petitioners had "shifted to an unequal-treatment theory of injury." App. 23a. But even that alleged injury, according to the dissent, was a "generalized grievance" because petitioners made no allegations that they were " 'able and ready' to engage in the activity in which they fear discriminatory treatment." App. 34a (quoting *Carney* v. *Adams*, 592 U.S. 53, 60 (2020), in turn quoting *Gratz* v. *Bollinger*, 539 U.S. 244, 262 (2003)). And even if they had pled some generalized intent to lobby the state legislature, Judge Murphy explained, Article VIII, § 2 does not deprive them of their right to lobby (only the effectiveness of that lobbying). App. 32a. Because a deeply held disagreement with a general statewide policy is not sufficient to establish Article III standing, the dissent would have dismissed petitioners' equal protection claim for lack of standing.

Second, the merits. After recounting *Hunter* and *Washington*, the panel majority recognized that *Schuette* "casts doubt on the continued viability of political process claims," holding that the doctrine "applies only in cases where 'the political restriction in question was designed to be used, or was likely to be

used, to encourage infliction of injury by reason of race.' " App. 14a. (quoting *Schuette*, 572 U.S. at 314). It explained how the *Schuette* plurality placed trust in the electorate to debate "sensitive [and] complex" issues and "act through a lawful electoral process." App. 15a (quoting *Schuette*, 572 U.S. at 312). And it cited that decision's "refus[al] to disempower Michigan voters from 'choosing which path to follow' " in enacting statewide laws. App. 15a (quoting *Schuette*, 572 U.S. at 312).[2]

Applied here, the court turned away petitioners' novel political-process claim. Lacking any "principled basis" to distinguish Michigan's constitutional amendment barring affirmative action upheld in *Schuette*, the court highlighted the "facially neutral" nature of Article VIII, § 2: "It prohibits public funding of all private schools, whether religious or secular." App. 16a.

Because of that neutrality, the majority relied on this Court's reiteration of the principle that "a State need not subsidize private education." App. 17a (quoting *Carson*, 142 S. Ct. at 1997 (in turn quoting *Espinoza*, 591 U.S. at 487) (cleaned up)). Michigan's policy choice is a "legitimate" one, making federal intervention with it an affront to this Court's "caution[ ] that courts should not remove 'a difficult question of public policy' from 'the realm of public discussion, dialogue,

[2] The panel majority did not decide whether a political-process claim could be premised on religious discrimination, even in the face of overwhelming language in each of the relevant cases that the doctrine applied to racial minorities. App. 15a–16a.

and debate in an election campaign.' " App. 17a. (quoting *Schuette*, 572 U.S. at 312).

The panel majority considered and rejected petitioners' assertion that the ballot initiative leading to Article VIII, § 2 was motivated by anti-religious or anti-Catholic animus. App. 17a–19a. It also found "similarly unsupported" petitioners' "repeated claim" that Article VIII, § 2 is a "Blaine Amendment," noting that not only was Michigan's provision ratified "nearly a century after Blaine's 1875 proposal," but also "Michigan's amendment—unlike actual state-level Blaine Amendments—draws a line between public and private funding rather than between religious and nonreligious aid." App. 19a. In other words, without "either [a] temporal or textual connection to Speaker Blaine's proposal, it cannot be accurately described as a Blaine Amendment." *Id*.

Finally, tossing aside petitioners' contention that "a vote against repeal is not the same as a vote to readopt," as "mere semantics," *id*., the court found that the 2000 reauthorization "eradicated any possible concerns of antireligious animus stemming from the 1970 campaign surrounding Proposal C," App. 22a.

REASONS FOR DENYING THE PETITION

I. This Court cannot answer the questions presented because petitioners lack standing.

By presenting only a "generalized grievance" about a legitimate legislative choice, petitioners lack standing to bring their political-process claim.

The federal judicial power extends only to cases and controversies, U.S. Const. art III, § 2, and one "essential and unchanging part" of that requirement is "the core component of standing," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Built on "the idea of separation of powers," *FDA* v. *Alliance for Hippocratic Medicine*, 602 U.S. ___ (2024), slip op. at 5 (cleaned up), standing requirements ensure that federal courts do not impinge on the democratic branches of government, "allowing issues to percolate and potentially be resolved by the political branches in the democratic process." *Id*., slip op. at 7.

As part of the standing inquiry, a plaintiff must allege an injury-in-fact, just as they would plead any other element. *Lujan*, 504 U.S. at 560–61. The injury-in-fact element requires that a plaintiff must have a personal stake in the matter to be adjudicated. *Id*. at 560. That personal stake must be "concrete and particularized," *id*. at 560, i.e., not an "impermissible generalized grievance," *id*. at 575 (cleaned up). See also *Gill* v. *Whitford*, 585 U.S. 48, 65 (2018) ("A federal court is not a forum for generalized grievances.") (cleaned up). This requirement "screens out plaintiffs who might have only a general legal, moral,

ideological, or policy objection to a particular government action." *FDA*, 602 U.S. ___, slip op. at 9.

At the outset, it is important to establish what petitioners' complaint did *not* allege. It did not allege that any of petitioners or their children are religious, or that they subscribe to any religion or religious sect. See App. 8a–9a. Nor did it allege that they are Catholic or would send their children to Catholic schools, only that they are parents of school-age children. See *id*. Without basic allegations like these, one wonders how petitioners could make out a claim that they are treated unequally on the basis of the protected characteristic of religion.

Perhaps realizing this weakness, petitioners have, as the dissenting judge below noted, "shifted to an unequal-treatment theory of injury" on appeal. App. 23a. Under this new "fall[ ] back" position first presented in their court of appeals' reply brief, App. 32a, petitioners now claim that their injury is that they are hamstrung from lobbying the legislature to allow them to use their 529 plans as they would like because any change to state law would be met by Article VIII, § 2's restrictions. In support of their equal protection claim, petitioners must make out that they are being treated unequally from others similarly situated; in other words, their claim is that the State has "erect[ed] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993).

This pivot position does not create standing. In addition to the dearth of allegations about petitioners' religiosity, petitioners have not pled any readiness, willingness, or intent to lobby. See App. 23a (Murphy, J., dissenting) ("Regardless, the plaintiffs did not plead any intent to lobby."). The majority below erred in overlooking petitioners' unpled allegations, giving them the benefit of the doubt, studying the outer reaches of petitioners' allegations, making "reasonable inferences in Plaintiffs' favor[,]" drawing on "experience and common sense," and ultimately concluding that it was plausible that petitioners would lobby their representatives to change Michigan law but for Article VIII, § 2. App. 11a. These contortions fail to hold petitioners, as the masters of their complaint, to the Article III standards demanded by this Court. At best, "Plaintiffs seek to lobby generally, without a particular legislative policy in mind." App. 9a. Petitioners' paltry showing is no more than a "generalized grievance" that Article III does not countenance. See *Gill*, 585 U.S. at 65.[3]

Even if petitioners had pled that they are ready and able to successfully lobby the state legislature, their broad inability-to-effectively-lobby theory does not establish an injury-in-fact.

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[3] Petitioners' lack of standing is unsurprising given the history of the litigation—their complaint is postured predominantly as a free exercise case premised on their interpretation of Michigan tax law. But their interpretation was wrong—Article VIII, § 2 plays no role in barring petitioners from their preferred use of their 529 plans—and petitioners recognized this when they chose not to appeal the dismissal of their three First Amendment claims. Petitioners' grievance is untethered from any concrete factual foundation.

Below, petitioners relied on *City of Jacksonville*. There, Jacksonville created an ordinance which required 10% of the money used on city contracts each year to be granted to "minority business enterprises." 508 U.S. at 658. An association of construction firms, most of whom did not qualify for the program, sued under an equal protection theory. *Id.* at 659. This Court held that those contractors had standing because the city gave "preferential treatment" to minority-owned enterprises, and thus made it more difficult for "one group to *obtain a benefit* than it is for members of another group." *Id.* at 666 (emphasis added).

But unlike the construction firms that were subject to Jacksonville's ordinance, petitioners are not deprived of any particular *benefit*. Rather, assuming for the sake of argument they had alleged a readiness and ability to lobby the legislature, adopting petitioners' position would blow a hole through this Court's standing jurisprudence, granting equal protection standing to any individual who wishes a change in the law but would be hampered from succeeding because the proposed law would conflict with the constitution.[4] Quite simply, that is the nature of a constitution.

Petitioners lack standing.

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[4] A related deficiency is petitioners' failure to allege there is even a remote likelihood that the Legislature would pass their preferred law, compromising any suggestion that striking down Article VIII, § 2 is likely to redress an injury. As Judge Murphy put it, "If they are right [that they have standing], wouldn't *any* party who wants a legislature to enact a law on a topic that the state constitution prohibits suffer a cognizable unequal-treatment injury that allows the party to challenge the constitutional provision?" App. 34a (emphasis in original).

II. Petitioners bring a novel equal protection challenge to Michigan's facially neutral, and neutrally applied, funding line.

Petitioners cast their lot with *Trinity Lutheran*, *Espinoza*, and *Carson*—a series of free exercise cases—in an attempt to revive and expand an *equal protection* doctrine that has all but been laid to rest. Pet. 3–5, 28–29. This Court should not entertain petitioners' attempt to animate this narrowed constitutional doctrine.

Red flags abound. Petitioners have not pointed to other circuit decisions—let alone any decision of any court—grappling with this novel species of claim, and indeed, have conceded that "there is little litigation on the questions presented." App. 28a. That concession alone is enough to deny the petition.

Moreover, their trio of precedent plainly torpedoes their theory. In that line of cases, this Court repeatedly emphasized that "a State need not subsidize private education . . . but once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Carson*, 596 U.S. at 779–80 (quoting *Espinoza*, 591 U.S. at 487 (cleaned up)). Following this call precisely, Michigan has chosen to prohibit taxpayer funds for *all* private education, religious or not.

To discredit the religiously neutral constitutional provision, petitioners wrongly cast Michigan's citizens as controlled by 19th-century prejudices, content to ignore the intervening century between the Blaine Amendment and Michigan's neutral provision. But Michigan's neutral law was first ratified in 1970, at a

time when Michigan stood alone and apart from other States in its approach to how public funds should be used. Indeed, Michigan's constitutional amendment is distinct from the state provisions reviewed in the *Trinity Lutheran* line of cases—it does not single out religion for disfavored treatment.

Finally, petitioners' theory finds no support in the political-process equal protection doctrine, which this Court has limited to a narrow set of facts relating to racial discrimination.

This Court should not entertain such a novel and unusual petition.

A. Petitioners support their equal protection claim with free exercise cases that considered plainly different state provisions from Michigan's unique choice.

Petitioners' invitation to "complete the work" of *Trinity Lutheran*, *Espinoza*, and *Carson*, Pet. 28, is misplaced. Unlike that trio of cases, this is an equal protection case, not a free exercise case.

In *Trinity Lutheran*, this Court evaluated under the Free Exercise Clause Missouri's program to grant assistance to "public and private schools" for playground enhancements, but "categorically disqualif[ied] churches and other religious organizations." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 453–54 (2017). This Court made clear that "[i]n recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without

regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment." *Id.* at 460. Because Missouri had "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit *solely because of their religious character*," the program ran afoul of the First Amendment. *Id.* at 462 (emphasis added).

In *Espinoza*, the Court considered a similar policy—Montana's "scholarship program" granting money to any taxpayer to attend any private school. 591 U.S. at 468–69. Because Montana's constitutional provision "barr[ed] government aid to sectarian schools," a state agency administered the program by prohibiting only religious schools (but not other private schools) from participation. *Id.* at 469–70. The Montana Supreme Court found that the provision barring aid to sectarian schools required the court to strike down the program in full. *Id.* at 472. This Court agreed and, like in *Trinity Lutheran*, held that Montana's "no-aid provision bar[red] religious schools from public benefits *solely because of the religious character of the schools*" and therefore violated the Free Exercise Clause. *Id.* at 476 (emphasis added). In a nutshell, this Court announced that a "State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 487.

In another variation on the same theme, this Court considered Maine's program that offered school tuition assistance for individuals who lived in its rural areas that lacked a "public secondary school." *Carson* v. *Makin*, 596 U.S. 767, 773 (2022). Maine law

permitted tuition assistance only for "nonsectarian" schools. *Id*. at 774–75. In line with *Trinity Lutheran* and *Espinoza*, the Court concluded once again that it "is discrimination against religion" when "[t]he State pays tuition for certain students at private schools—so long as the schools are not religious." *Id*. at 781.

Michigan's constitution bears no meaningful resemblance to these policies. Unlike Michigan's straightforward policy preference to keep taxpayer funds in public schools, Missouri, Montana, and Maine explicitly disqualified religious schools from funding eligibility *because they were religious*. While "a 'State need not subsidize private education,' " *Carson*, 596 U.S. at 785 (quoting *Espinoza*, 591 U.S. at 487), "once a State decides to do so"—which Missouri, Montana, and Maine had, but Michigan has not—"it cannot disqualify some private schools solely because they are religious." *Id*.

Michigan's provision is not just a near miss from the others, it is light years away from them. One commentator noted that Michigan's approach "is something unusual" compared to other states' constitutional provisions, "which for the most part only prohibit state aid to sectarian schools." 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, 588–89 (2003), cited in *Espinoza*, 591 U.S. at 502 (2020) (Alito, J., concurring, and providing some historical context to the Blaine Amendment). Another noted that, of all the state provisions restricting the use of public money in education, "[o]nly the Michigan Constitution falls into th[e] category" of proscribing

public money for "any sectarian or nonsectarian private school," including vouchers. Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 Tex. F. on C.L. & C.R. 137, 162 (1998). "Michigan's no-funding provision is strictest and perhaps the least ambiguous in the country" because it prohibits state funds for all nonpublic schools, including via tuition vouchers. Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev. 57, 89 (2005). See also Pet. 15 (conceding that Michigan's no-aid clause belongs to a "*minority* of states" that have a facially neutral no-aid clause) (emphasis added).

Michigan's choice meets precisely this Court's recent Free Exercise Clause jurisprudence.

B. Michigan's Article VIII, § 2 is not a so-called Blaine Amendment, either in its language or in its history.

Not only does Michigan's broad no-aid provision apply to all private schools, its history has no connection to the nineteenth century Blaine Amendment and its progeny. As a plurality of this Court discussed, "[c]onsideration of the [Blaine] amendment [in the 1870's] arose at a time of pervasive hostility to the Catholic Church and to Catholics in general." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality). The ratification of Article VIII, § 2 occurred in 1970, roughly a century after the Blaine Amendment and decades after Michigan repeatedly declined to jump on the Blaine bandwagon.

Not only is the Michigan Constitution different in language and function from those state provisions that arose out of the Blaine era, but its passage is also unconnected to that era's "pervasive hostility to the Catholic Church and to Catholics in general." *Mitchell*, 530 U.S. at 828. Indeed, as petitioners themselves recount in ample detail, *Michigan successfully resisted* the anti-Catholic efforts to enshrine such views in Michigan's Constitution and statutes in the late-nineteenth and early-twentieth centuries. (Compl., ¶¶ 48–54, PageID.13–14.)

Adding to that, petitioners themselves allege, an impetus for the effort to amend Article VIII, § 2 was the Legislature's passage of 1970 PA 100, "which allowed the [Michigan] Department of Education to purchase educational services from *nonpublic* [not just religious] schools in secular subjects." (Compl., ¶ 82, PageID.17 (emphasis and bracketed words added).) Public Act 100 permitted up to $22,000,000.00 to be used for *nonpublic* schools—again, not just religious schools—that year. 1970 PA 100, Ch. 2, § 58. With scarce resources for public schools, the Michigan electorate responded and saw fit to reserve public monies for public schools. Thus, Article VIII, § 2 was a response to the use of public funds for *nonpublic* schools, not simply religious ones.[5]

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[5] Petitioners mistakenly assert that non-religious private schools in Michigan may receive public funding by seeking charter-school status, while religious private schools may not. Pet. 12, 19 n.3. What petitioners call a "charter school" is, in statutory terms, a "public school academy." Mich. Comp. Laws § 380.502. And as the name implies, a public school academy is a public school. *Council of Orgs. & Others for Educ. About Parochiaid, Inc.* v. *Governor*, 566 N.W.2d 208, 221 (Mich. 1997). And so a

Even accepting that "the large majority" of Michigan's private schools in 1970 were religiously affiliated as petitioners allege (Compl., ¶ 83, PageID.17), in this context, the Court has consistently rejected calls to look beyond a neutral provision and evaluate its impact. See, e.g., *Town of Greece* v. *Galloway*, 572 U.S. 565, 585 (2014) (where a town invited local religious leaders to offer a prayer at board meetings, the fact "[t]hat nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths."); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 658 (2002) ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.").

Trying yet another angle, petitioners rely on a curated set of opinion pieces, articles, and advertisements regarding Proposal C that they contend evidences broad religious animus (it does not) which must be imputed to the People of Michigan (again, no). (Compl., ¶ 92, PageID.19–23.) Rather than animosity toward religion, there are many legitimate policy considerations that voters might weigh when casting their ballot. Some religious voters may desire state funding for private religious schools; others might rather their church keep its distance from any State involvement, for fear of strings attached. Cf. *Espinoza*,

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charter school that receives public funding is, by definition, not a private school, but—like all schools in Michigan that receive public funding—a public school, subject to the laws governing public schools.

591 U.S. at 485 ("A school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program."). And non-religious individuals may want the State to provide taxpayer support for private secular and private religious schools, perhaps because the public school system in a particular locale is deficient.

A similar argument asserting the animus of the Michigan electorate was advanced by an amicus party in the Michigan Supreme Court in *Council of Organizations & Others for Education About Parochiaid* v. *State*, 958 N.W.2d 68, 95 (2020). The Court declined to evaluate this claim, lacking any lower-court record on the matter. *Id*. (Cavanagh, J.) And in one of the two opinions issued by the Court, Justice Cavanagh questioned the undertaking that petitioners seek here:

> [H]ow should we decide *whose* intent is relevant? Is it the intent of the proponents of the ballot proposal? The voters? And even assuming that some proponents and some voters may have been motivated by antireligious bigotry, can we fairly conclude that *all* or even *a majority* of voters shared that motivation when they cast their ballots in November 1970? We simply have no basis to reach such a conclusion.

Id. at 95, n.3 (emphases in original).[6]

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[6] This Court has recognized that "[p]roving the motivation behind official action is often a problematic undertaking," and has noted the "increas[ing]" "difficulties in determining the actual

Finally, petitioners attempt to rely on an acontextual reading of the Michigan Supreme Court's opinion in *Council of Organizations & Others for Education About Parochiaid, Inc.* v. *Governor*, 566 N.W.2d 208, 220–21 (Mich. 1997) (quoting *In re Proposal C.*, 185 N.W.2d 9, 15, n.2 (Mich. 1971), claiming that the Court's reference to Proposal C as "an anti-parochiaid amendment" constitutes a "finding" that the proposal was motivated by animus. Pet. at 22. Not even close; petitioners' reading requires blinders. Even a quick reading of the remainder of the opinion shows that the Court repeatedly used the term "parochiaid" to encompass *any* public funds for private schools. While the terminology may be inelegant, the Court plainly used the phrase to funding for *all nonpublic* schools, not just *religious* schools. See, e.g., *In re Proposal C.*, 185 N.W.2d at 19 (discussing the "parochiaid act": "Parochiaid as authorized by Chapter 2 of P.A.1970, No. 100 provided $22,000,000 of public monies for participating *nonpublic school units* to pay a portion of the salaries of private lay teachers of secular nonpublic school courses in the nonpublic school for nonpublic school students.") (emphasis added); *id.* at 29 ("Proposal C above all else prohibits state funding of purchased educational services in the *nonpublic school* where the hiring and control is in the hands of the nonpublic school, *otherwise known as* '*parochiaid*.' ") (emphasis added); *id.* at 31 (opinion of Adams, J.) ("The petitions to place Proposal C on the ballot were

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motivations" of "a body the size of the Alabama Constitutional Convention of 1901." *Hunter* v. *Underwood*, 471 U.S. 222, 228 (1985). That inquiry gets *exponentially* more difficult, and evidentiarily *unthinkable*, should the untranscribed motivations of the entire voting electorate of 54 years ago come under the scrutiny of a court.

drafted and circulated before the legislative enactment appropriating $22,000,000 *for private schools*, *commonly known as* '*parochiaid*,' became law.") (emphasis added).

Bottom line: Michigan has no Blaine Amendment.

C. The Court should not entertain petitioners' effort to dramatically expand the political-process doctrine.

The Court should decline petitioners' request to expand the political-process doctrine to an entirely new and different context. As the district court and Sixth Circuit recognized, that doctrine has only ever been applied in one area of equal protection jurisprudence—the treatment of racial minorities. App. 48a–49a (district court); App. 14a (court of appeals). And even stretching it to apply here would be futile, as petitioners cannot meaningfully distinguish the facts of *Schuette*.

Petitioners' request for this Court to nullify Michigan's considered policy choice runs afoul of a principal reason for this Court's cabining of the political-process doctrine in *Schuette*—we generally trust citizens to make policy choices in good faith. Heeding this Court's caution, "very few have tried" to make out a case under the political-process doctrine post-*Schuette*, and none have succeeded. Allison Orr Larsen, *Becoming A Doctrine*, 76 Fla. L. Rev. 1, 24 (2024). This Court should not expand the political-process doctrine to revive petitioners' claim.

1. Petitioners ask the Court to stretch the political-process doctrine beyond its historical and precedential foundation.

Petitioners do not (and could not) assert that this doctrine has ever applied—or ever would have existed—outside of the specific history of racial discrimination. As Justice Breyer explained in his *Schuette* concurrence, the political-process doctrine "is best understood against the backdrop" of the Nation's sordid history in denying racial minorities the right to "participate meaningfully and equally in its politics." 572 U.S. at 343 (Breyer, J., concurring). Just after the time of the ratification of the Fifteenth Amendment outlawing slavery and Reconstruction, the country witnessed "countless examples of States categorically denying to racial minorities access to the political process." *Id*. at 343 (Breyer, J., concurring). That trend continued through and past the Supreme Court's landmark decision in *Brown* v. *Board of Education*, with States "disregarding [that] Court's mandate by changing their political process." *Schuette*, 572 U.S. at 343 (Breyer, J., concurring). "It was in this historical context that the Court intervened" in *Hunter* and *Seattle School District*. *Schuette*, 572 U.S. 347 (Breyer, J., concurring).

Consistent with this historical underpinning, the *Schuette* plurality carefully limited its language, explaining that "*Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target *racial minorities*," *id*. at 304 (emphasis added), and that "*Seattle* is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the

serious risk, if not purpose, of causing specific injuries *on account of race*, just as had been the case in *Mulkey* and *Hunter*." *Id.* at 305 (emphasis added). See also App. 15a ("[I]t is far from settled that a political process claim may be based on religious discrimination. . . . Plaintiffs cite no precedent in which a court has recognized a political process claim based on religious discrimination.").

Even splicing out *Schuette*'s language limiting the doctrine to racial discrimination, petitioners cannot meaningfully distinguish *Schuette*. Like Michigan's affirmative action prohibition, see *Schuette*, 572 U.S. at 299, its no-aid clause is neutral; "[a]ll individuals wishing to change the funding scheme embodied in Article VIII, § 2 must follow the same process of amending Michigan's constitution." App. 16a.

2. Petitioners seek to strip Michigan citizens of their democratic voice.

Petitioners would have this Court undermine the trust it has long placed in the democratic process. Among the motivating factors for the *Schuette* plurality's severe curtailment of the political-process doctrine is the faith in and responsibility of the people to "learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Schuette*, 572 U.S. at 312. Citizens of the States are entrusted to tackle difficult and divisive issues:

> Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the

> electorate . . . or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common.

Id.

Like those who twice presented the question of taxpayer funding for private schools to the people, citizens who seek to change the Michigan Constitution have "lawful electoral process[es]" to do so. For over 100 years, iterations of the Michigan Constitution have recognized the inherent power of the people to engage in direct democracy and define their governing document. See, e.g., Mich. Const. art. XII, § 2; Mich. Const. of 1908 art. XVII, § 2. These rights "have a long history in Michigan," *League of Women Voters of Michigan* v. *Secretary of State*, 975 N.W.2d 840, 872 (Mich. 2022) (Zahra., J., concurring in part), and the Michigan courts have "a tradition of jealously guarding against legislative and administrative encroachment on the people's right to propose . . . constitutional amendments through the petition process." *Ferency* v. *Secretary of State*, 297 N.W.2d 544, 557 (Mich. 1980).[7]

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[7] Of course, the Free Exercise Clause remains to protect against state-sponsored religious animus. But petitioners do not raise such a claim here, although they retain a full and fair opportunity to litigate their tax-based claims in state court. See, e.g., Mich. Comp. Laws § 205.22(1) (permitting filing in the Michigan Court of Claims or the Tax Tribunal); Mich. Comp. Laws

Petitioners, like all Michiganders, share equally in the opportunity to propose a constitutional amendment. Their desire to change the Michigan Constitution must follow that process and not a shortcut through this Court. See Mich. Const. art. XII, § 2 (requiring signatures from registered voters equaling at least 10% of the number of votes cast in the most recent gubernatorial election).

D. Thirty years after initial ratification, Michiganders again rejected the prospect of public funds for private schools.

Petitioners also raise a question regarding Michigan's independent electoral vote to keep Article VIII, § 2 intact, 30 years after its ratification, contending that it could not cure the alleged animus animating the 1970 vote. But that question too is not well-presented. First, for the reasons described above, no animus animated the enactment of this provision, so the Court could not even reach this issue. Second, and aside from this assertion about animus, the People of Michigan broadly considered and rejected modification of Article VIII, § 2 to permit taxpayer dollars for private schools. Thus, under this Court's precedent, any alleged animus would have been purged or replaced.

In 2000, "Michigan voters overwhelmingly defeated a ballot proposition that would have approved a school voucher program and overruled the state's no-funding provision." Goldenziel, 83 Denv. U. L. Rev. at

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§ 205.22(3) (establishing an appeal of right to the Michigan Court of Appeals consistent with the typical appellate process).

90. The People of Michigan were asked to consider whether to amend Article VIII, § 2 to both (1) authorize "indirect" support of non-public school students, and (2) create a voucher program that would "permit any pupil resident [in certain unperforming public school districts] to receive a voucher for actual elementary and secondary school tuition to attend a nonpublic elementary or secondary school." *Initiative Petitions—Proposed Amendments to the Michigan Constitution*, Proposal 00-1, pp 2–3.

Just as in 1970, the People overwhelmingly voted to ensure that public monies went only to public schools, rejecting the proposal with over 69% of the vote. State of Michigan Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, p 5 (Jan. 2019).

The court of appeals, as an alternative ground to affirm, relied on *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), in finding that "Michigan voters' reconsideration of the constitutional prohibition on public funding for nonpublic schools and their rejection of the 2000 ballot proposal eradicated any possible concerns of antireligious animus stemming from the 1970 campaign surrounding Proposal C." App. 22a. In *Rostker*, this Court found that where Congress reauthorized an act on the books but in doing so, "thoroughly reconsidered" it, the later legislative history was "highly relevant in assessing the constitutional validity" of the provision. *Id*. at 74–75. See also *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1426 (2020) (Alito, J., dissenting, joined by Chief Justice Roberts and in relevant part by Justice Kagan) ("[W]hatever the reasons why Louisiana and Oregon originally adopted their rules many

years ago, both States readopted their rules under different circumstances in later years."); *id.* at 1408 (Sotomayor, J., concurring) ("Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint.").

Petitioners, without reason, seem to suggest that *Rostker* is limited to its "unique facts," App. 25a, and instead rely (again) on *Espinoza*, this time citing Justice Alito's concurrence which disclaimed Montana's attempt to mitigate its no-aid clause's sordid history by referring to a 1970s reenactment of that provision. Justice Alito looked to the language of the no-aid clause as adopted in 1972, including its use of the terms "sect" and "sectarian," which he found to be "disquieting remnants" of Blaine-era bigotry, and found that "the no-aid provision's terms keep it tethered to its original bias." *Espinoza*, 591 U.S. at 507 (Alito, J. concurring). But as explained in detail above, Michigan is different. It does not use the terms "sect" or "sectarian," and it draws the line between public and non-public schools.

In the end, Michigan's electorate in 1970 and again in 2000 elected to keep all public funding for the public schools. That is a legitimate decision. And nothing about this process disables the electorate from changing direction. This Court need not intervene in a democratic process that is not broken.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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