NO. 23-1084

IN THE
Supreme Court of the United States

JILL HILE, ET AL.,
Petitioners,
v.
STATE OF MICHIGAN, ET AL.,
Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PATRICK WRIGHT
MACKINAC CENTER
LEGAL FOUNDATION
140 West Main Street
Midland, MI 48640
(989) 631-0900
wright@mackinac.org

JOHN J. BURSCH
Counsel of Record
BURSCH LAW, PLLC
9339 Cherry Valley
Avenue SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Counsel for Petitioners

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INTRODUCTION

Respondents' opposition fails to take seriously the abhorrent historical record showing the Michigan Blaine Amendment's antireligious intent.[1] Facial neutrality, Respondents say, gives the Blaine Amendment a free pass. But that overlooks this Court's longstanding precedents. Petitioners' detailed allegations and the Michigan Supreme Court's findings show that Michigan's Blaine Amendment is decidedly non-neutral in its intent and impact.

Respondents' nothing-to-see-here theme underscores the urgency for a ruling that sham neutrality is no safe harbor for a Blaine Amendment. Without immediate review, Michigan's Amendment will become a model for states seeking an end-run around *Carson* v. *Makin*, 596 U.S. 767 (2022); *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020); and *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017). The petition should be granted.

REPLY ARGUMENT

I. Petitioners have standing.

Respondents say Petitioners lack standing because they failed to allege an injury in fact, only a generalized grievance. Opp.16. But even a cursory reading of Petitioners' complaint shows they have identified an injury in fact.

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[1] Respondents now insist that Michigan's constitutional provision prohibiting public support for private religious schools is not a "Blaine Amendment." *E.g.*, Opp.3, 4, 24-29. But Attorney General Nessel's office has characterized the provision as akin to other Blaine amendments. *E.g.*, https://bit.ly/3WmJ0X3.

The individual Petitioners alleged that they seek state aid to fund their children's private, religious-school tuition, and that Michigan's Blaine Amendment disadvantages them in the political process because they must first secure the Amendment's repeal before seeking aid from the Michigan Legislature.[2] Dist. Ct. Dkt. No. 1 ¶¶ 17-21, 146-56. I.e., Petitioners seek state aid for their children's private, religious-school tuition, but they can't lobby the Michigan Legislature because Michigan's Blaine Amendment would invalidate any favorable legislation secured.

Petitioners' injury lies in the unlevel playing field the Amendment creates. Petitioners need not show that the Michigan Legislature *would* pass any particular policy in the absence of the Blaine Amendment. *E.g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 211 (1995) ("Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract."). "The injury … is that a 'discriminatory classification prevent[s] [them] from competing on an equal footing.'" *Ibid.* (quoting *Ne. Fla. Chapter, Associated Gen. Contractors of Am.* v. *Jacksonville*, 508 U.S. 656, 667 (1993))).

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[2] Each individual Appellant is a member of P.A.C.E., Appellant Parent Advocates for Choice in Education Foundation. Dist. Ct. Dkt. No. 1 ¶¶ 17–21. P.A.C.E.'s standing follows from the individuals' standing. *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (discussing requirements for associational standing).

Respondents' emphasis on the meaning of the Michigan Education Savings Program (MESP) Act underscores the point. According to Respondents, the MESP Act does not allow parents to use tax-advantaged funds to pay K-12 tuition. Opp.9-11, 18 n.3. Assuming Respondents are correct about the Act's proper interpretation, Petitioners would have an intense interest in petitioning the Michigan Legislature to amend the MESP Act to allow tax-advantaged funds to be used for private, religious-school tuition, as the federal government did in the 2017 Tax Cuts and Jobs Act.[3] Indeed, Petitioners filed this lawsuit because they want to use the tax-advantaged funds they have already set aside for that purpose. *E.g.*, Dist. Ct. Dkt. No. 1 ¶ 17.

But such lobbying would be fruitless: Michigan's Blaine Amendment would automatically invalidate any expansion of the MESP Act that encompasses private, religious-school tuition payments. Petitioners' requested relief would level the playing field and allow them to petition Michigan officials for aid on the same terms as other Michiganders, precisely the right the political-disenfranchisement doctrine protects. That establishes Article III standing.

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[3] As explained in Petitioners' briefs below, Respondents' online documents and MESP governing officials used to take the view that the MESP Act *incorporated* the federal changes. But after this litigation was filed, Respondents reinterpreted the Act to avoid a federal-court decision on Petitioners' three MESP-based claims.

Respondents also say that Petitioners haven't adequately alleged they are religious. Opp.17. That's wrong twice over. To begin, while Petitioners' membership in a suspect class would affect the standard of review for their equal-protection claim, whether Petitioners are religious has no bearing on their standing to *bring* a claim. The Blaine Amendment undisputedly removes one category of legislation (public funding for private schools) from the purview of Michigan's Legislature. *E.g.*, Opp.4. Petitioners, as parents who seek aid for their children's private-school education, fall on the disfavored side of the line compared to public-school parents. That injury gives rise to a cognizable equal-protection claim. Cf. *Vill. of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000) (per curiam) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

More important, it is sophistry to suggest that Petitioners are not religious given the complaint's allegations and claims. Petitioners alleged they send their children to religious schools, a decision about which they feel so strongly they were willing to file a lawsuit. Dist. Ct. Dkt. No. 1 ¶¶ 17-21. Petitioners brought three claims under the Free Exercise Clause. *Id.* ¶¶ 8-10 (summarizing claims). The only reasonable inference is that Petitioners are religious and wish to lobby the legislature for aid for their children's parochial-school education.

Lastly, Respondents complain that Petitioners' argument would "grant[ ] 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." Opp.19. To be sure, this Court has recognized even class-of-one equal-protection claims. *E.g.*, *Willowbrook*, 528 U.S. at 564. But most such claims would not go far because courts review equal-protection claims not involving suspect classifications under the rational-basis standard. *E.g.*, *ibid.* And someone complaining about a neutral constitutional provision lacking an abhorrent historical record of its purpose would have a hard time plausibly alleging intentional discrimination, as the Equal Protection Clause requires. *E.g.*, *Washington* v. *Davis*, 426 U.S. 229, 239 (1976).

This case is vastly different. When a state intentionally requires laws protective of suspect classes to go through a more-onerous approval procedure than others, it crosses the line. As the panel majority below held, App.8a-11a, Petitioners have standing.

II. The political-disenfranchisement doctrine applies to religious classifications.

Respondents assert that the political-disenfranchisement doctrine applies only to race. Opp.29-31. But Petitioners ask only to apply the political-disenfranchisement doctrine as this Court applied it in *Hunter* v. *Erickson*, 393 U.S. 385 (1969). Pet.16-19. The *Hunter* Court did *not* limit its focus to the racial aspects of the Akron charter amendment at issue. Quite the opposite, the charter amendment required that ordinances prohibiting the consideration of race,

religion, or ancestry (but not on other bases) in real-estate transactions be approved by a majority of voters, and this Court recognized that *all three* classifications ran afoul of the Equal Protection Clause. 393 U.S. at 390-91.

This Court described the ordinance as drawing an improper "distinction between those groups who sought the law's protection against racial, *religious*, or ancestral discrimination in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 390 (emphasis added). The Court underscored that while the law applied equally to black and white people and "Jews," "Catholics," and "gentiles," "the reality is the law's impact falls on the minority." *Id.* at 390-91. And it recognized that its political-process principle applies to any protected class: "[T]he State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give *any group* a smaller representation than another of comparable size." *Id.* at 393 (emphasis added).

So Respondent, Opp.30, and the lower courts, App.15a, 48a, are wrong to suggest that the political-disenfranchisement doctrine has never been applied to nonracial classifications. *Hunter* itself recognized that religious classifications run afoul of its political-process principle. And, just like the Akron charter amendment in *Hunter*, Michigan's facially neutral Blaine Amendment targeted the religious minority.

Nor should the Equal Protection Clause be interpreted to provide greater protection against discrimination based on race rather than religion. The Court's recent decisions show that government actors' anti-religious animus is as problematic as their racial animus. In the last five Terms alone, the Court has reversed or enjoined governmental action for violating a religious group or individual's constitutional rights in ten cases. *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023) (reversing state action against religious speech); *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507 (2022); *Carson*, 596 U.S. 767; *Ramirez* v. *Collier*, 595 U.S. 411 (2022); *Shurtleff* v. *City of Boston, Mass.*, 596 U.S. 243 (2022) (reversing state action that discriminates against religious speech); *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021); *Tandon v. Newsom*, 593 U.S. 61 (2021); *Roman Catholic Diocese of Brooklyn* v. *Cuomo,* 592 U.S. 14 (2020); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732 (2020); *Espinoza*, 591 U.S. 464.

Given the hostility to religion and religious exercise shown by governmental actors, it is even more important to protect people of faith under the political-disenfranchisement doctrine.

III. The Michigan Blaine Amendment's facial neutrality does not insulate it from strict scrutiny.

A. It is irrelevant that some religious people might support the Blaine Amendment or some nonreligious people might support religious-school funding.

Notwithstanding the mountain of allegations in Petitioners' complaint, Dist. Ct. Dkt. No. 1 ¶¶ 91-92 (collecting dozens of examples of public advocacy in support of the Blaine Amendment showing anti-religious sentiment), Respondents assert that the Amendment was not motivated by religious animus because (a) some religious people might support the Blaine Amendment, and (b) some nonreligious people might support public funding for parochial schools. Opp.26-27. But in *Hunter*, some members of Akron's racial, religious, or ancestral minorities surely supported the challenged charter amendment; some members of the city's majorities undoubtedly disagreed with it. That was no impediment to the Court applying strict scrutiny and striking down the amendment. 393 U.S. at 393.

So too in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), regarding mandatory school busing to integrate schools. The Court recognized that neither the supporters nor opponents of the challenged ballot initiative could be classified by race. 458 U.S. at 472 ("It undoubtedly is true … that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350."). That did not save the initiative from invalidation under strict scrutiny. *Id.* at 487.

The political-disenfranchisement-doctrine cases are not about discerning whether particular policies enacted through the political process serve a minority group. See *Schuette* v. *Coalition to Defend Affirmative Action, Integration and Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 572 U.S. 291, 305-07 (2014). Rather, they hold that a state cannot intentionally restructure the political process to disadvantage a disfavored suspect class. *Id.* at 314 ("Those cases were ones in which 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."); Cf. *Tandon*, 593 U.S. at 62 ("[G]overnment regulations are not neutral … whenever they treat any comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." (citations omitted)). That's Michigan's Blaine Amendment.

B. The Michigan Supreme Court already recognized that Michigan's Blaine Amendment targeted religion.

The Michigan Supreme Court has twice concluded that Michigan's Blaine Amendment was an anti-religious measure that targeted parochial schools. Pet.4. Respondents assert that the Michigan Supreme Court did not mean what it said because "parochiaid" purportedly means "*all nonpublic* schools, not just *religious* schools." Opp.28. That's nonsensical.

The word "Parochiaid" is a portmanteau of "parochial," which means "of or relating to a church parish," and "aid." Parochial, *Merriam-Webster's Unabridged Dictionary*, https://bit.ly/3WJ0EWq. And even a cursory review of the Michigan Supreme Court's decisions shows that it was not referencing all nonpublic schools.

In *Traverse City School District* v. *Attorney General*, 185 N.W.2d 9 (Mich. 1971), the Michigan Supreme Court considered the validity of an Attorney General opinion construing the Blaine Amendment almost immediately after approval. 185 N.W.2d at 13. In a lengthy footnote, the court described the history of aid to nonpublic schools in Michigan and the genesis of the Blaine Amendment ballot proposal. It concluded: "As far as the voter was concerned, the result of all the pre-election talk and action concerning [the Blaine Amendment proposal] was simply this—[the proposal] was an anti-parochiaid amendment—no public monies to run *parochial schools*—and beyond that all else was utter and complete confusion." *Id.* at 17 n.2 (emphasis added).

The court also rejected, under the Free Exercise Clause, the Attorney General opinion's conclusion that public schools could exclude nonpublic school students from shared-time instruction under the Blaine Amendment. *Id.* at 28-29. The Blaine Amendment's facial neutrality did not insulate it from scrutiny because its impact was "near total" on religious people. *Id.* at 29 ("ninety-eight percent of the private school students" in Michigan were "in church-related schools").

Nearly three decades later, the Michigan Supreme Court reached the same conclusion in *Council of Organizations & Others for Education About Parochiaid, Inc.* v. *Engler*, 566 N.W.2d 208 (Mich. 1997), when it considered a Blaine Amendment-based challenge to Michigan's charter-school law. The court rejected that challenge because, among other things, "the common understanding of the voters in 1970 was that no monies would be spent to run a parochial school" and charter schools under Michigan's statute cannot be parochial. 566 N.W.2d at 221. The Michigan Supreme Court's holding was based on the Amendment's antireligious purpose.

C. Respondents ignore the mountain of allegations regarding the Blaine Amendment's sordid purpose.

Respondents' only reply to the mountain of allegations in Petitioners' complaint regarding the Blaine Amendment's religious animus is that the Court should ignore them. Opp.26. Respondents imply that Michigan's electorate is too big to assess. See Opp.26-27. That position conflicts with this Court's precedents.

Take *Seattle*. The Washington ballot initiative was also facially neutral. 458 U.S. at 471. And this Court acknowledged that voters may have had nondiscriminatory reasons to support it, *id.* at 465 & n.9, 472. Nonetheless, this Court held "there is little doubt that the initiative was effectively drawn for racial purposes" and subject to strict scrutiny. *Id.* at 471.

More recently, this Court recognized that "statements made by decisionmakers *or referendum sponsors* during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative." *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196-97 (2003) (emphasis added). And just four years ago, this Court struck down Louisiana's and Oregon's constitutional provisions allowing non-unanimous criminal-jury verdicts, emphasizing the facially neutral provisions' discriminatory intent. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1393-94, 1401 (2020); *id.* at 1410 (Sotomayor, J., concurring in part); *id.* at 1418 (Kavanaugh, J., concurring in part). Notably, the Oregon constitutional provision at issue was the product of a ballot initiative. Aliza B. Kaplan & Amy Saack, *Overturning* Apodaca v. Oregon *Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 Or. L. Rev. 1, 5-6 (2016).

As the petition explained, Pet.20-24, the Michigan Supreme Court's repeated recognition that the Blaine Amendment was passed to ban state aid to religious schools, plus the detailed historical facts pleaded in Petitioners' complaint, show that the Blaine Amendment was adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects" on religious people. *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 272 (1979).

IV. The failed 2000 ballot initiative does not purge the Blaine Amendment's animus.

Respondents cast the failed 2000 Michigan school-voucher ballot proposal as a considered readoption of the Blaine Amendment, uncorrupted by religious animus. Opp.33-35. Not so.

For starters, the 2000 ballot proposal's focus was school vouchers; the proposal's partial repeal of the Blaine Amendment followed from the voucher proposal. Pet.25; see also Found. for Gov't Accountability Amicus 5-8. Respondents nowhere explain how a vote *against* school vouchers equals a vote in *favor* of the Blaine Amendment.

Respondents also dodge the upshot of the 2000 proposal's failure. As this Court recently held in a related context, a *failed* ballot proposal to amend a challenged enactment does "not alter the intent with which [the act], including the parts that [would] remain[ ], had been adopted." *Abbott* v. *Perez*, 585 U.S. 579, 604 (2018) (citing *Hunter* v. *Underwood*, 471 U.S. 222, 229 (1985)); see also Pet.26-27. The same rule applies here.

The 2000 ballot proposal did not and could not purge the Blaine Amendment of its antireligious intent, and the Sixth Circuit erred when it held otherwise.

V. Federal constitutional rights are of a higher order of importance than state democratic abuses.

Respondents accuse Petitioners of seeking to override democracy. That's wrong. Petitioners seek to enforce the Equal Protection Clause to invalidate the unconstitutional product of state action. Constitutional rights exist precisely to guard against such abuses. Cf. U.S. Const. Art. VI, Cl. 2. The state laws allowing or requiring segregation in public schools struck down in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), were also the product of state democratic action. 347 U.S. at 486 n.1. So too were the laws restructuring the political process struck down in *Seattle* and *Hunter*. *Seattle*, 458 U.S. at 461-62; *Hunter*, 393 U.S. at 386-87.

When states intentionally discriminate against suspect classes through the democratic process—even under the cloak of sham neutrality—their discriminatory enactments must withstand strict scrutiny under the Equal Protection Clause to survive. Michigan's Blaine Amendment fails that test.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PATRICK WRIGHT
MACKINAC CENTER
LEGAL FOUNDATION
140 West Main Street
Midland, MI 48640
(989) 631-0900
wright@mackinac.org

JOHN J. BURSCH
Counsel of Record
BURSCH LAW, PLLC
9339 Cherry Valley
Avenue SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

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