UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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 (PACE FOUNDATION);

Plaintiffs,

v.

STATE OF MICHIGAN; GRETCHEN WHITMER, GOVERNOR, in her official capacity; RACHEL EUBANKS, MICHIGAN TREASURER, in her official capacity;

Defendants.
_____/

Docket No. 1-21-CV-829

Hon. Robert J. Jonker

Mag. Sally J. Berens

ORAL ARGUMENT REQUESTED

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(B)(1) AND 12(B)(6)

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF FACTS 3

STANDARD OF REVIEW 3

ARGUMENT 4

I. Neither the Tax Injunction Act nor comity warrant dismissal 4

A. The TIA does not apply to this case 4

B. Principles of comity do not bar this action 8

C. The federal challenges to the Montana tax regulation at issue in *Espinoza* do not change this analysis 10

II. Plaintiffs have standing under a proper interpretation of the MESP Act 12

A. Plaintiffs properly interpret the MESP Act. The State of Michigan did too—until filing its brief in this case 12

B. Plaintiffs satisfy the essential elements of standing 18

1. Plaintiffs' injury is traceable to the State's enforcement of the Blaine Amendment 18

2. Declaring the Blaine Amendment unconstitutional and enjoining its enforcement would redress Plaintiffs' injury 19

3. Plaintiffs have alleged a cognizable injury in fact because the harm they allege is certain 20

C. Plaintiffs assert their own rights in Count III 22

III. Michigan's Blaine Amendment is non-neutral 24

IV. Plaintiffs, not Defendants, are entitled to summary judgment on each of Counts I–IV 25

A. The adoption of Michigan's Blaine Amendment was motivated by religious animus and impacted almost exclusively religious exercise 25

B. Michigan's Blaine Amendment engages in differential treatment based on religion 29

C. Michigan's Blaine Amendment illegally conditions the availability of benefits on a recipient's willingness to surrender her religious status 31

D. Michigan's Blaine Amendment creates a political structure that unconstitutionally discriminates against religion 34

1. In the equal protection context, courts look beyond facial neutrality to determine whether a law is based on invidious discriminatory intent 34

2. Political-structuring equal protection claims remain valid after *Schuette* 38

CONCLUSION 40

CERTIFICATE OF COMPLIANCE 42

TABLE OF AUTHORITIES

Page(s)

Cases

Armstrong v. Walborn,
743 F. App'x 83 (9th Cir. 2018) 10, 11

Armstrong v. Walborn,
745 F. App'x 12 (9th Cir. 2018) 10, 11

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 3

Chippewa Trading Co. v. Cox,
365 F.3d 538 (6th Cir. 2004) 8, 10

CHKRS, LLC v. City of Dublin,
984 F.3d 483 (6th Cir. 2021) 20, 21

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 24, 27, 28, 36

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 21, 22

In re Constitutionality of PA 1970, No. 100,
180 N.W.2d 265 (Mich. 1970) 1

Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Engler,
566 N.W.2d 208 (Mich. 1997) ..... *passim*

Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 25

Direct Mktg. Ass'n v. Brohl,
575 U.S. 1 (2015) 5, 6, 7, 21

Espinoza v. Mont. Dep't of Revenue,
140 S. Ct. 2246 (2020) ..... *passim*

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,
528 U.S. 167 (2000) 18

Gerber v. Herskovitz,
14 F.4th 500 (6th Cir. 2021) 18, 19

Hibbs v. Winn,
542 U.S. 88 (2004) 5, 7, 9, 10

Hunter v. Erickson,
393 U.S. 385 (1969) 35, 38, 39, 40

Levin v. Commerce Energy, Inc.,
560 U.S. 413 (2010) 8, 9, 10

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 18

Lipman v. Budish,
974 F.3d 726 (6th Cir. 2020) 3, 22

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,
138 S. Ct. 1719 (2018) 25, 26, 27

Miller v. Johnson,
515 U.S. 900 (1995) 36

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 36

Reitman v. Mulkey,
387 U.S. 369 (1967) 35, 38, 39, 40

Romer v. Evans,
517 U.S. 620 (1996) 37

SBC Health Midwest, Inc. v. City of Kentwood,
894 N.W.2d 535 (Mich. 2017) 14

Schuette v. Coalition to Defend Affirmative Action,
572 U.S. 291 (2014) 34, 37, 38, 39

Tandon v. Newsom,
141 S. Ct. 1294 (2021) (per curiam) 24, 29, 30

Traverse City Sch. Dist. v. Attorney Gen.,
185 N.W.2d 9 (Mich. 1971) 2, 28

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017) 1, 30, 33

Village of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 36

Washington v. Seattle Sch. Dist. No. 1,
458 U.S. 457 (1982) 35, 38, 39, 40

Weinberger v. Hynson, Westcott & Dunning, Inc.,
412 U.S. 609 (1973) 14

Statutes

20 U.S.C. § 1088 13

26 U.S.C. § 529 ..... 13, 15, 16, 18

28 U.S.C. § 1341 ..... 2, 5

Mich. Comp. Laws § 206.30 ..... 7, 21

Mich. Comp. Laws § 206.51 7

Mich. Comp. Laws § 380.502 32

Mich. Comp. Laws § 390.1472 ..... 12, 13, 14

Mich. Comp. Laws § 390.1477 14

Other Authorities

Glossary of Terms, MICH. EDUC. SAVINGS PROGRAM,
https://www.misaves.com/help/glossary/ 15, 16

Mich. Dep't of Treasury, *Mich. Educ. Trust Bd. Meeting Docs. for Aug. 6, 2020*, https://www.michigan.gov/documents/setwithmet/8.6.20_MET_Board_ Meeting_Documents_698462_7.pdf 18

Mich. Dep't of Treasury, *Mich. Educ. Trust Bd. Meeting Docs. for Feb. 4, 2021*, https://www.michigan.gov/documents/setwithmet/February_ 4_2021_Board_Docket_715120_7.pdf 17

INTRODUCTION

In the mid-1960s, after years of paying private, religious-school tuition *and* paying taxes that subsidized public schools, families who sent their children to private religious schools began to lobby the State of Michigan to provide a modicum of financial support. In response, the Legislature proposed allocating a modest $100 for each high-school student and $50 to each grade-school student attending a private school. This legislation ultimately became law with the passage of 1970 PA 100, and the Michigan Supreme Court upheld it, concluding that the bill neither advanced nor inhibited religion and did not violate the free exercise or establishment clauses of the U.S. or Michigan constitutions. *In re Advisory Opinion re Constitutionality of PA 1970, No. 100*, 180 N.W.2d 265 (Mich. 1970).

Political forces mobilized voter animus against religion to mount a ballot campaign that resulted in article 8, § 2, ¶ 2 of Michigan's Constitution—a so-called "Blaine Amendment"—that bars any direct or indirect public financial support for nonpublic schools, whether by appropriation, tax exemption, or otherwise. R.1, Compl. ¶33, PageID.9–10. The U.S. Supreme Court has condemned similar Blaine Amendments that deprive religious schools and families of an equal opportunity to public benefits. *E.g.*, *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). But Michigan has defended the continued vitality of its Blaine Amendment on the ground that article 8, § 2, ¶ 2 is facially neutral, i.e., it prohibits public financial support for *any* nonpublic school and does not specifically target religious schools as a class. *E.g.*, R.13, Defs.' Br. at 30–34, PageID.102–06.

But as the Michigan Supreme Court has held, "with ninety-eight percent of the private school students being in church-related schools" in 1970, article 8, § 2, ¶ 2's classification "is nearly total" in its "impact" on the class of "church-related schools." *Traverse City Sch. Dist. v. Attorney Gen.*, 185 N.W.2d 9, 29 (Mich. 1971). Indeed, that court has definitively declared, "As far as the voters were concerned in 1970 . . . '—[*the Blaine Amendment*] *was an anti-parochiaid amendment—no public monies to run parochial schools—and beyond that all else was utter and complete confusion*.'" *Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Engler*, 566 N.W.2d 208, 220–21 (Mich. 1997) (quoting *Traverse City*, 185 N.W.2d at 17 n.2)). That anti-religious impact was intentional in 1970 and continues today. So, Plaintiffs are entitled to a ruling that places them on an equal funding and political-access field as public-school parents, with respect to 529 plans and otherwise.

The State's dismissal arguments miss the mark. The Tax Injunction Act is limited to federal actions seeking to enjoin the "assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. The Act does not apply to Plaintiffs' Count IV, which is a claim based on discriminatory political structuring. Nor does it cover Counts I–III, which seek a declaration of Plaintiffs' constitutional rights.

In addition, Plaintiffs have standing to pursue Counts I–III because Michigan law incorporates Congress's 2017 expansion of "qualified higher education expense." The State's clever reimagining of its law in its dismissal brief is belied by the State allowing 529 plan spending for registered apprenticeship programs and loan repayments, when the State's arguments would equally bar such spending.

Finally, Plaintiffs have stated valid claims, making dismissal inappropriate. Indeed, because this Court can decide all disputed issues as a matter of law, it should give Defendants notice of its intent to and then enter summary judgment for Plaintiffs under Federal Rule of Civil Procedure 56(f). Michigan's Blaine Amendment was enacted for the purpose of disfavoring families who favor religious schools, and it does so with remarkable effectiveness. Such religious discrimination is unlawful, despite the Amendment's facial neutrality.

STATEMENT OF FACTS

Relevant facts are set forth in the Complaint. Because the parties' dispute is one of law, specific references to facts will be made in the context of the arguments presented below, with particular attention paid to the dismissal brief's creative reinterpretation of the Michigan Education Savings Program Act (the "MESP Act").

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court "must accept the factual allegations in the complaint as true and construe the complaint in the light most favorable to the plaintiff." *Lipman v. Budish*, 974 F.3d 726, 740 (6th Cir. 2020) (citing *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005)). Motions to dismiss under Rule 12(b)(1) presenting a facial attack on the Court's subject-matter jurisdiction, such as the State's here, are reviewed under the same standard. *E.g.*, *O'Bryan v. Holy See*, 556 F.3d 361, 375–76 (6th Cir. 2009).

ARGUMENT

I. Neither the Tax Injunction Act nor comity warrant dismissal.

The State says that the Tax Injunction Act ("TIA") and principles of comity bar bringing this suit in federal court. But the State's entire argument is premised on a fallacy. This is not a lawsuit to enjoin a tax nor to declare a state tax law unconstitutional. It is a lawsuit to enjoin the State's unconstitutional Blaine Amendment and, thereby, allow the State's taxing regime to work as the Michigan Legislature intended it to work. As the State tacitly acknowledges, that relief does not raise concerns under the TIA or comity doctrine. *See* R.13, Defs.' Br. at 9 & n.2, PageID.81. In short, this is not a lawsuit about taxes but a lawsuit about an unconstitutional provision of the Michigan Constitution that has an incidental effect on a taxing statute. And that is not the sort of lawsuit barred in federal court by the TIA or principles of comity.

What's more, the TIA and the comity doctrine would not bar Plaintiffs' lawsuit even if they might appear to apply to these circumstances. First, by its plain terms, the TIA does not bar Plaintiffs' lawsuit. Second, the Supreme Court and the Sixth Circuit's comity caselaw demonstrate that this is not the sort of case barred by that doctrine. Thus, even to the extent the TIA and comity apply, they do not bar Plaintiffs' lawsuit.

A. The TIA does not apply to this case.

The TIA does not bar this Court's jurisdiction because it does not apply to Plaintiffs' challenge. The TIA states in full:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. [28 U.S.C.A. § 1341.]

The Supreme Court has made clear that the "TIA is keyed to the acts of assessment, levy, and collection themselves" and does not apply to "all activities that may improve a State's ability to assess and collect taxes." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 11–12 (2015); *accord id.* at 14 ("The question … is whether the relief to some degree stops 'assessment, levy or collection,' not whether it merely inhibits them.").

To start, the TIA is facially inapplicable to this case because Plaintiffs do not want to enjoin Michigan's tax scheme to avoid paying a tax bill. *See Hibbs v. Winn*, 542 U.S. 88, 105 (2004) (explaining that, with the TIA, "Congress trained its attention on taxpayers who sought to *avoid* paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority" (emphasis added)). Nor are they asking to have Michigan state tax laws or regulations declared unconstitutional. And they aren't contesting the validity of Michigan's tax system. Rather, their aim is to have the unconstitutionality of Michigan's Blaine Amendment judicially confirmed so that Michigan's tax scheme can work *exactly* as the Legislature intended. As discussed below, Michigan's existing tax laws—which would apply but for the Blaine Amendment—provide the tax benefit Plaintiffs seek. *See* Part II.A. So, the problem is not the *tax* scheme; rather, the problem is the Blaine Amendment, which bars what the Legislature intended to effect with its taxing regime. (To the extent that Plaintiffs request for relief "b." is problematic under the TIA, Plaintiffs abandon that request. *See* R.1, Compl. p. 34, PageID.34.)

Even if Plaintiffs' requested relief directly affected Michigan's tax scheme, the TIA still would not apply. That is because Plaintiffs do not seek to enjoin, suspend, or restrain in any way the assessment, levy, or collection of a tax. Rather, the relief sought by Plaintiffs involves activities that occur *before* any assessment, levy, or collection of a tax. Under binding Supreme Court precedent, that removes this case from the TIA's scope.

Specifically, in *Direct Marketing*, the Supreme Court distinguished between those activities that occur before and in preparation for assessing, levying, and collecting a tax and those activities that actually constitute assessment, levying, and collecting. The former can be challenged in federal court; the latter cannot. The Supreme Court noted that "information gathering" is "a phase of tax administration procedure that occurs before assessment, levy, or collection." *Direct Mktg*., 575 U.S. at 8.

The Court then proceeded to examine the definitions of "assessment, levy, and collection." "Assessment," the Court explained, "refers to the official *recording* of a taxpayer's liability, which occurs *after* information relevant to the calculation of that liability is reported to the taxing authority." *Id.* at 9 (emphasis added). It stated that assessment is "understood as a step in the taxation process that occurs after, and is distinct from, the step of reporting information pertaining to tax liability." *Id.* (cleaned up). "Levy" likewise refers to actions that occur after information gathering. According to the Supreme Court, levy is "limited to an official governmental action imposing, determining the amount of, or securing

payment on a tax." *Id.* at 10. And "collection" simply means "the act of obtaining payment of taxes due." *Id.* The three terms must be read in conjunction with each other. *See Hibbs*, 542 U.S. at 101. Thus, assessment is the first step in a process of levying and collecting. *See id.* ("Assessment is the official recording of liability that triggers levy and collection efforts." (cleaned up)).

Here, Plaintiffs' lawsuit does not pertain to the State's assessment, levying, or collection of a tax. Rather, if anything, it pertains to the information gathering conducted for the State to assess, levy, or collect taxable income under Michigan law. Under Michigan law, income tax "is levied and imposed . . . upon the taxable income of every person" at a variety of rates. Mich. Comp. Laws § 206.51(1). "Taxable income" is defined as "adjusted gross income as defined in the internal revenue code subject" to a variety of "adjustments," including deductions for 529 plan contributions and qualified withdrawals from 529 plans as well as additions for nonqualified withdrawals from 529 plans. Mich. Comp. Laws § 206.30(1)(t)–(u). Only after the calculation of a taxpayer's taxable income and other calculations required under the Michigan Income Tax Act may a taxpayer's income tax liability be determined. And, as a matter of simple logic, only after the taxpayer's liability has been determined may the taxpayer's tax liability be "recorded" for assessment purposes—the first event that triggers the TIA under *Direct Marketing*.

Michigan's Blaine Amendment operates several steps removed from the recordation of tax liability. As alleged, the Blaine Amendment bars Plaintiffs from

deeming withdrawals for religious K-12 tuition "qualified" for purposes of calculating their taxable income under section 206.30 of the Michigan Income Tax Act, thus requiring them to include the amount of such withdrawals in their taxable income. *See* R.1, Compl. ¶¶6, 30, 34, PageID.2–3, 9–10. In other words, the Blaine Amendment works to increase Plaintiffs' taxable income well *before* the State ever assesses, levies, or collects income tax on them. Plaintiffs are not seeking to enjoin, suspend, or restrain the assessment, levy, or collection of a tax. Their suit is directed at something that comes *before* any assessment, levy, or collection. Whether a taxpayer may exclude a tuition payment from his taxable income goes to the information gathered prior to Michigan ever assessing the tax. Thus, the TIA does not bar the relief Plaintiffs seek.

B. Principles of comity do not bar this action.

Comity is also no barrier to the Court hearing this case. In the state tax context, comity is related to the TIA but "stands on its own." *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 541 (6th Cir. 2004). "The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010). While the doctrine is "more embracive than the TIA," *id.* at 424, it basically stands for the uncontroversial proposition that state law should be made in state court; comity does not suggest that federal courts decline to exercise their jurisdiction when a federal constitutional claim involves "classifications subject to heightened scrutiny or impinge on fundamental rights," *id.* at 426, like the claims Plaintiffs make here.

Thus, in *Levin*, the case on which Defendants primarily rely, the Court applied the comity doctrine to a commercial case that did "*not* involve any fundamental right or classification that attracts heightened judicial scrutiny" but instead sought federal-court intervention by businesses seeking "to improve their competitive position," a situation that involved "state legislative preferences." *Id.* at 431–32.

Plaintiffs' lawsuit has nothing in common with *Levin*. It is not a commercial matter. Plaintiffs do not seek the aid of federal courts to improve any sort of commercial position. Rather, Plaintiffs seek to vindicate their fundamental First and Fourteenth Amendment rights, involving Michigan's unconstitutional religious animus and *de facto* religious classification. Further, this Court will not be asked to weigh the State's legislative preferences. Indeed, the State's tax scheme already makes clear what those preferences are: allowing Plaintiffs to exclude from their taxable income 529 plan distributions for K-12 tuition—whether that be tuition for secular, public, or religious schools. Only an unconstitutional provision of the Michigan Constitution prevents that legislative preference from being instantiated. This Court will not need to render conclusions on decidedly state policy questions.

Crucially, the *Levin* Court highlighted its previous decision in *Hibbs*, a case challenging Arizona's tax credits for religious schools. *Hibbs* "cleared both the TIA and comity hurdles" because "state courts would have no greater leeway than federal courts to cure the alleged violation." 560 U.S. at 430–31. If the federal court had concluded that the Arizona tax credit was constitutionally "impermissible,"

"only one remedy would redress the plaintiffs' grievance: invalidation of the credit." *Id.* at 431. In *Levin*, by contrast, a federal court would have had myriad remedy options. *Id.* at 430–31. Comity applied differently to these two, different situations.

This case is like *Hibbs*, not *Levin*. Here, whether a state or federal court hears this case, there is only one remedy that will redress Plaintiffs' grievances: invalidating Michigan's Blaine Amendment. This is because Michigan's tax scheme already allows Plaintiffs to deduct MESP funds spent on parochial schools. The only bar to such a deduction is not Michigan's tax policy but its unconstitutional Blaine Amendment.

Defendants also rely on *Chippewa Trading Co. v. Cox*, 365 F.3d 538 (6th Cir. 2004), but that decision actually supports Plaintiffs. In *Chippewa*, the lawsuit was barred by the comity doctrine because the plaintiffs sought to "disable the basic enforcement mechanism of the [tax] statute" at issue. *Id.* at 542. That was a remedy properly left to state courts. Here, Plaintiffs are not attempting to disable Michigan's tax regime or its enforcement mechanisms. Rather, they are attempting to have Michigan tax law applied as written, not as the Michigan Blaine Amendment requires. Comity does not preclude this Court's jurisdiction here.

C. The federal challenges to the Montana tax regulation at issue in *Espinoza* do not change this analysis.

Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020), does not change the above conclusions. True enough, the petitioners in *Espinoza* were challenging the Montana's Blaine Amendment. But the federal litigants in *Armstrong v. Walborn*, 743 F. App'x 83 (9th Cir. 2018), and *Armstrong v. Walborn*,

745 F. App'x 12 (9th Cir. 2018), were *not*. Rather, they were challenging a Montana state *tax regulation* that "denies a tax credit for donations applied towards religious education." 743 F. App'x at 84; *see also* 745 F. App'x at 12 (describing plaintiff's appeal as one from the "district court's dismissal of its challenge to a Montana regulation, Admin. R. Mont. 42.4.802, that denies a tax credit for donations applied towards religious education").[1] In other words, the federal litigants were seeking to do exactly what the TIA and comity doctrines bar in federal courts. The Ninth Circuit simply did not address the question whether plaintiffs could have brought a direct federal challenge to the Montana Blaine Amendment in that context. Thus, the Ninth Circuit decisions in *Armstrong* do not speak to this case.

Ultimately, the State's arguments fail because they are a mismatch for Plaintiffs' lawsuit. The State cites to TIA and comity cases where plaintiffs directly challenged the constitutionality of a tax statute or taxing regime. Here, by contrast, Plaintiffs challenge the constitutionality of a provision of the Michigan Constitution. The State is comparing apples to oranges.

At the end of the day, Plaintiffs are not seeking to stop the assessment, levy, or collection of a tax. Nor do they ask this Court to disable Michigan's tax enforcement mechanisms and consider a whole host of potential state-law remedies that would best be decided by a state court. They merely seek to have Michigan's tax

[1] Indeed, the plaintiffs in *Armstrong* distinguished themselves from the *Espinoza* plaintiffs in their brief on this very point. Pls.' Br, *Armstrong v. Walborn*, 2016 WL 4595390 ("Unlike the Armstrongs, the *Espinoza* plaintiffs directly challenged Montana's Blaine Amendment under the United States Constitution's Free Exercise, Establishment, and Equal Protection Clauses.").

laws enforced as written, and that requires this Court to adjudicate Plaintiffs' federal constitutional rights vis-à-vis Michigan's unconstitutional Blaine Amendment.

II. Plaintiffs have standing under a proper interpretation of the MESP Act.

A. Plaintiffs properly interpret the MESP Act. The State of Michigan did too—until filing its brief in this case.

Plaintiffs contend that, as a matter of Michigan law, parents who create and fund Michigan 529 plans should be able to use 529 withdrawals to pay for private, religious-school tuition but are prevented from doing so by Michigan's Blaine Amendment. R.1, Compl. ¶¶4–6, PageID.2–3. The State says that Plaintiffs' theory of potential liability is premised on a "misunderstanding of state law" because Michigan 529 plans can never be used for K-12 tuition, public or private. R.13, Defs.' Br. at 16–18, PageID.88–90. The State is mistaken.

The State concedes that Michigan taxpayers receive certain state-tax benefits when they contribute to a Michigan 529 account, provided that any distribution from that account is a "qualified withdrawal." *Id.* at 16, PageID.88. A "qualified withdrawal" means a distribution not subject to a federal penalty or tax and used to pay "qualified higher education expenses." Mich. Comp. Laws § 390.1472(n). Seeking to give Michigan residents the same scope of state tax benefits as the federal government provides, the MESP Act does not provide its own definition of "qualified higher education expenses" but instead incorporates that term's meaning in "*section 529* of the internal revenue code." *Id.* § 390.1472(m) (emphasis added). And subsection 529(e)(3)(A) is the starting point, describing such expenses as "tuition, fees, books, supplies, and equipment required for the enrollment or

attendance of a designated beneficiary at an eligible educational institution," 26 U.S.C. § 529(e)(3)(A), i.e., an "Institution of higher education." *id.* § 529(e)(5); 20 U.S.C. § 1088.

This is the point where the parties diverge. If Michigan's Act defined "qualified higher education expense" as set forth *in subsection 529(e)(3)* of the Internal Revenue Code, or if Michigan's Act limited such expenses to those described in section 529 *on the date of the Michigan Act's enactment*, then expenses for K-12 tuition would obviously be excluded, as the State asserts. But Michigan's Act does not say either of those things. Instead, Michigan's Legislature defined "qualified higher education expense" by incorporating that term's meaning from the entirety of "section 529 of the internal revenue code." Mich. Comp. Laws § 390.1472(m). (There is an obvious utility to writing the state statute in this manner: it makes clear that the Legislature's intent is to mirror and incorporate federal changes to 529 plans instead of the Legislature having to specifically approve and vote on each federal change no matter how small or large.) And the 2017 Tax Cuts and Jobs Act expanded the meaning of "qualified higher education expense" in section 529 to "*include* a reference to expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school." 26 U.S.C. § 529(c)(7) (emphasis added). By earlier incorporating the meaning of "qualified higher education expense" from "section 529" as a whole, Michigan's Act picks up the 2017 federal amendments.

The State focuses myopically on subsection 529(c)(7)'s statement that it is expanding the meaning of "qualified higher education expense" as used "*in this subsection*." *Id.* (emphasis added). According to Michigan, that means the MESP Act incorporates the meaning of "qualified higher education expense" only in subsection 529(e)(3), not subsection 529(c)(7). Not so. To reiterate, the Michigan Act's definition of "qualified higher education expense" incorporates the meaning of that phrase from the entirety of "section 529 of the internal revenue code," Mich. Comp. Laws § 390.1472(m), not from any specified subsection of 529, (e)(3) or otherwise. So, a qualified 529 withdrawal, as a matter of Michigan law, includes tuition expenses at K-12 schools.

When Michigan's Legislature intends to incorporate only a *subsection* of a federal tax statute, it knows how to do so. Indeed, the MESP Act itself has several examples of such intent. *E.g.*, Mich. Comp. Laws § 390.1472(b)(ii) (defining account owners to include "an entity exempt from taxation under section 501*(c)(3)* of the internal revenue code" (emphasis added)); Mich. Comp. Laws § 390.1477(8) (discussing penalties by twice referencing "section 530*(d)(4)* of the internal revenue code" (emphasis added)). This Court should follow the "well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect," *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973); *accord, e.g.*, *SBC Health Midwest, Inc. v. City of Kentwood*, 894 N.W.2d 535, 538 (Mich. 2017) (courts give "effect to every word, phrase, and clause in a statute"), and give effect to the Michigan Legislature's broad language creating a Michigan 529 plan

that was at least as expansive as the federal plan by incorporating the entirety of "section 529" for purposes of defining "qualified higher education expense."

The State's clever reimagining of the Michigan Act in its dismissal brief is belied not only by the plain, statutory text but also by how the State treats MESP spending for parallel federal expansions of the 529 program. For example, in subsection 529(c)(8)—the subsection immediately following the K-12 tuition expansion in subsection 529(c)(7)—Congress expanded the meaning of "qualified higher education expense" to include "fees, books, supplies, and equipment required for the participation of a designated beneficiary in an *apprenticeship program* registered and certified with the Secretary of Labor under section 1 of the National Apprenticeship Act." 26 U.S.C. § 529(c)(8) (emphasis added). Like subsection 529(c)(7), subsection (c)(8) makes this change by amending any reference to the term "qualified higher education expense" "*in this subsection*." *Id.* (emphasis added). So, if the State rightly interprets K-12 tuition as excluded from the Michigan 529 program, then apprenticeship expenses are excluded, too.

But that's not how the State interprets that language. On Michigan's official Michigan 529 webpage, misaves.com, the State defines a "Qualified Withdrawal" as monies used to pay a "Qualified Higher Education Expense," including "fees, books, supplies, and equipment required for the participation of a designated beneficiary in an apprenticeship program registered and certified with the Secretary of Labor under the National Apprenticeship Act." *See Glossary of Terms*, MICH. EDUC. SAVINGS PROGRAM, https://www.misaves.com/help/glossary/ (last visited Jan. 6,

2022) [hereinafter *MESP Glossary*] (definition of "Qualified Withdrawal"). In other words, Congress made a textually indistinguishable addition of apprenticeship-program expense to the meaning of "qualified higher education expense" in section 529 of the Internal Revenue Code, and the State adopted it wholesale.

Likewise, in subsection 529(c)(9)—the subsection immediately following the apprenticeship-program expansion in subsection 529(c)(8)—Congress amended the term "qualified higher education expense" as used "*in this subsection*" to include the repayment of principle or interest on certain qualified education loans, with a $10,000 cap. 26 U.S.C. § 529(c)(9) (emphasis added). How did the State treat that expansion? Its official Michigan 529 webpage further defines "Qualified Higher Education Expense" to include "up to $10,000 repaid (including principal and interest) on any qualified education loan." *See MESP Glossary* (definition of "Qualified Higher Education Expenses"). And the only caveat on either the apprenticeship-program or loan-repayment expansion is the instruction that if you are *not* a Michigan taxpayer, "please consult with a tax advisor." *Id.* (emphasis added). In other words, Michigan parents holding 529 plans for their children can take advantage of both of these expansions, no questions asked, even though the federal authorizing language is indistinguishable from that used for K-12 tuition.

So, if apprenticeship-program and loan-repayment expenses are qualified higher education expenses according to Michigan's definitive interpretation of its 529 plan, why does Michigan exclude private-school, K-12 tuition expense? There is only one explanation: Michigan's Blaine Amendment, which categorically bars any

public funding or tax benefits associated with private-school attendance. So, Plaintiffs appropriately filed this lawsuit to challenge the Michigan Blaine Amendment's validity under the U.S. Constitution.

But the Court need not take Plaintiffs' word on this point. Take Michigan's. At a February 2021 meeting of the Michigan Education Trust Board—the entity that oversees administration of Michigan's 529 program and that Defendant Michigan Treasurer Eubanks chairs—the Executive Director's report observes that the Board had been keeping an eye on a Michigan Supreme Court case involving the appropriation of funds to reimburse private schools for safety and welfare mandates to see if the decision "would have an impact on the use of 529 accounts for K-12 tuition without state tax penalty."[2] If the MESP Act categorically barred the use of Michigan 529 accounts for K-12 tuition, that statement would be nonsensical. The Board was interested in the Michigan Supreme Court proceeding because the Board understood that Michigan 529 accounts could be used for private-school tuition *but for* Michigan's Blaine Amendment.

Indeed, the Michigan Education Trust's Executive Director was even more specific about this issue in a report to the Board for its August 2020 meeting. There, the Executive Director said that the Michigan Supreme Court decision "may be informative relating to the use of 529 accounts, with its state tax consequences, for K-12 tuition for nonpublic schools" because there is an issue "whether the state can

[2] Mich. Dep't of Treasury, *Mich. Educ. Trust Bd. Meeting Docs. for Feb. 4, 2021*, Tab B at 2, https://www.michigan.gov/documents/setwithmet/February_4_2021_Board_Docket_715120_7.pdf.

incorporate by reference amendments to the definition of 'qualified higher education expenses' in Section 529 of the Internal Revenue Code, 26 U.S.C. 529, in state legislation related to MESP, *consistent with Article 8, Section 2 of the Michigan Constitution*."[3] This Court should reject the State's revisionist interpretation.

B. Plaintiffs satisfy the essential elements of standing.

Under this proper understanding of the MESP Act, Plaintiffs satisfy the three requirements for Article III standing: "(1) an injury in fact (2) that's traceable to the defendant's conduct and (3) that the courts can redress." *Gerber v. Herskovitz*, 14 F.4th 500, 505 (6th Cir. 2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–61 (1992)). But for the Blaine Amendment, Plaintiffs could use distributions from their 529 plans to cover religious-school K-12 tuition. Declaring the Blaine Amendment unconstitutional and enjoining its enforcement would redress that injury.

1. Plaintiffs' injury is traceable to the State's enforcement of the Blaine Amendment.

As a threshold matter, Plaintiffs' injury is traceable to the Blaine Amendment. Establishing this element of standing requires Plaintiffs only to show that their injury is "fairly traceable to the challenged action of the defendant." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). This standard is not onerous, nor is it equivalent to tort-law causation. *See, e.g.*, *Lexmark*

[3] Mich. Dep't of Treasury, *Mich. Educ. Trust Bd. Meeting Docs. for Aug. 6, 2020*, Tab O at 3, https://www.michigan.gov/documents/setwithmet/8.6.20_MET_Board_Meeting_Documents_698462_7.pdf (emphasis added).

Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing . . . ."); *Gerber*, 14 F.4th at 505 ("The congregants have alleged that the protesters' conduct and their conspiracy with city employees not to enforce the city's ordinances foreseeably caused members of the congregation extreme emotional distress. That creates the requisite causal link.").

Here, the State contends that Plaintiffs cannot establish traceability only because "Michigan's statutory law [i.e., the MESP Act] grants no tax deduction for *any* use of MESP funds for K-12 schools." R.13, Defs.' Br. at 20, PageID.92. But as explained above, *see* Part II.A, the State's reimagining of the MESP Act does not hold water. On its face, the Act makes distributions from 529 plans qualified if, *inter alia*, they are for the tuition expenses of a religious K-12 school. Under a proper understanding of Michigan law, and as alleged in Plaintiffs' Complaint, R.1, Compl. ¶¶30–34, PageID.9–10, the only roadblock to those distributions being qualified is the Blaine Amendment. (Tellingly, the State nowhere represents that, inasmuch as its interpretation of the MESP Act is wrong, it will allow taxpayers such as Plaintiffs to treat distributions for religious-school K-12 tuition as qualified.) Accordingly, Plaintiffs' injury is fairly traceable to the Blaine Amendment.

2. Declaring the Blaine Amendment unconstitutional and enjoining its enforcement would redress Plaintiffs' injury.

The State's argument that Plaintiffs cannot establish the redressability prong of Article III standing fails for the same reason. Here again, the State's

argument relies entirely on its flawed reinterpretation of the MESP Act. R.13, Defs.' Br. at 19–21, PageID.91–93. Under a proper interpretation of the MESP Act, the relief Plaintiffs seek—a declaration that Michigan's Blaine Amendment is unconstitutional, an injunction enjoining the State from enforcing the Blaine Amendment, and related relief, R.1, Compl. p. 34, PageID.34—obviously would redress their injuries. That relief would remove the only impediment to treating distributions for religious-school K-12 tuition as qualified for purposes of the Act.

3. Plaintiffs have alleged a cognizable injury in fact because the harm they allege is certain.

The State's contention that Plaintiffs cannot establish a cognizable injury in fact fares no better. To satisfy the injury-in-fact prong of the Article III standing test, a plaintiff must allege "invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *CHKRS, LLC v. City of Dublin*, 984 F.3d 483, 488 (6th Cir. 2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)) (cleaned up). Here, the State does not dispute that Plaintiffs have alleged the invasion of a legally protected interest that is concrete and particularized. *See* R.13, Defs.' Br. at 21–22, PageID.93–94. Rather, the State contests only that Plaintiffs' alleged injury—the State's taxation of distributions from 529 plans for religious-school K-12 tuition—is actual or imminent. *See id.*

The State relies heavily on its defective reinterpretation of the MESP Act to argue that Plaintiffs "simply cannot show that Treasury would unconstitutionally claw back their tax deduction as they allege." R.13, Defs.' Br. at 22, PageID.94. This

argument repackages the same one the State made with respect to traceability. It fails for the same reasons. *See* Part II.B.1.

The State also appears to argue that, as a factual matter, there is nothing to Plaintiffs' allegations that the State would seek to tax distributions from 529 plans for religious-school K-12 tuition. *See, e.g.*, R.13, Defs.' Br. at 22, PageID.94. Aside from running headlong into the motion-to-dismiss standard, *see CHKRS*, 984 F.3d at 488 ("We assess a complaint's standing allegations using the same rules that we would apply for the merits."), the State's assertion contradicts its admissions in its own brief. The State repeatedly indicates that, insofar as Plaintiffs were to use distributions from 529 plans for K-12 school tuition, it *would* seek to tax those distributions. *See, e.g.*, R.13, Defs.' Br. at 18, PageID.90 ("It is true that plaintiffs will not be tax-advantaged (in their Michigan taxes) if they use their MESP accounts to pay religious-school K-12 tuition.").

The State's admission is unsurprising; taken together, the Blaine Amendment and Michigan law mandate such action. *See* Mich. Const. art. VIII, § 2 ("No . . . tax benefit, exemption or deductions . . . shall be provided, directly or indirectly . . . ."); Mich. Comp. Laws § 206.30(1)(u) (defining "taxable income" to include "the amount of money withdrawn by the taxpayer in the tax year from education savings accounts . . . if the withdrawal was not a qualified withdrawal"). These facts also distinguish this case from *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), the lone case on which the State relies. *See id.* at 412 ("[B]ecause § 1881a at most *authorizes*—but does not *mandate* or *direct*—the surveillance that respondents

fear, respondents' allegations are necessarily conjectural."). Unlike the government in *Clapper*, the State has no discretion under the Blaine Amendment. That distinction fatally undermines the State's suggestion that the threat of Plaintiffs' injury is made up and improbable.

Relatedly, the State criticizes Plaintiffs' allegations that they "*would* use their MESP plans to pay tuition for their children's attendance at private, religious schools" for lacking concreteness. R.13, Defs.' Br. at 22, PageID.94. But, in context, there is nothing speculative about those allegations. Particularly when construed in the light most favorable to Plaintiffs, *e.g.*, *Lipman v. Budish*, 974 F.3d 726, 740 (6th Cir. 2020), Plaintiffs' allegations mean that, but for the tax consequences of using 529 plan distributions to cover religious-school K-12 tuition occasioned by the Blaine Amendment, Plaintiffs would presently be doing so. *See* R.1, Compl. ¶¶17–22, 31–32, PageID.6–7, 9. Plaintiffs' understandable decision not to make distributions for religious-school K-12 tuition—distributions that even the State says it would deem nonqualified and taxable—until those distributions are qualified and nontaxable does not undermine their injury.

C. Plaintiffs assert their own rights in Count III.

Separately, the State asserts that Plaintiffs have no standing to assert Count III because Count III asserts the rights of nonparty, unnamed religious schools. R.13, Defs.' Br. at 23, PageID.95. The State misreads Plaintiffs' allegations. Count III is a free exercise claim grounded in the Supreme Court's decision in *Espinoza*, among other authorities. In *Espinoza*, the Court reaffirmed that conditioning eligibility for government benefits on the recipient divorcing himself from any

religious control or affiliation "inevitably deters or discourages the exercise of First Amendment rights" and is "subject to the strictest scrutiny." *Id.* at 2256–57 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022).

Michigan's Blaine Amendment gives rise to two free exercise claims under *Espinoza* based on Plaintiffs' own rights and interests. First, by virtue of the Blaine Amendment, Plaintiffs are ineligible for a government benefit (no taxation on distributions) because their desired use of funds has a religious character. *See* R.1, Compl. ¶¶10, 104–05, PageID.4, 25. That claim is plainly personal to them.

Second, under Michigan law, secular private schools have an option to receive public funds (i.e., by seeking charter-school status) while religious private schools do not. *Id.* ¶¶136–38, PageID.30–31. As the Supreme Court recognized in *Espinoza*, this sort of disqualification, when impelled by something like the Blaine Amendment, injures not only religious schools themselves but also parents who wish to send their children to such schools:

> Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision *also bars parents who wish to send their children to a religious school from those same benefits*, again solely because of the religious character of the school.

140 S. Ct. at 2255 (emphasis added); *see also id.* at 2261 ("[T]he prohibition before us today burdens not only religious schools but also the families whose children attend or hope to attend them."). By claiming that Plaintiffs assert the rights of third-party schools, the State ignores *Espinoza*'s teaching that denial of government benefits to religious schools also impinges on the religious liberty interests of parents who wish to send their children such schools, as is the case for Plaintiffs

here. Plaintiffs assert their own rights and interests in Count III, and they have standing to bring the claim.

III. Michigan's Blaine Amendment is non-neutral.

Michigan's primary defense of its discriminatory Blaine Amendment is the Amendment's purported neutrality: the provision bars public financial support for private religious and secular schools alike. R.13, Defs.' Br. at 24–25, PageID.96–97. But that facial neutrality does not help the State, for three independent reasons.

First, the Blaine Amendment applies almost exclusively to religious conduct and was enacted with religious animus, like the law at issue in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

Second, it is no excuse that Michigan treats private secular-school students as poorly as religious-school students because Michigan treats some comparable students better. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

Third, as applied, Michigan's Blaine Amendment conditions the availability of benefits upon citizen's willingness to surrender their religious status, which is unlawful. *Espinoza*, 140 S. Ct. at 2256.

These constitutional defects will be discussed at greater length in Section IV, below, in the context of Plaintiffs' individual claims.

IV. Plaintiffs, not Defendants, are entitled to summary judgment on each of Counts I–IV.

A. The adoption of Michigan's Blaine Amendment was motivated by religious animus and impacted almost exclusively religious exercise.

The "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Indeed, even a "slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices" requires invalidation of the government action. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). That is a problem for Michigan because the process for proposing and ratifying its Blaine Amendment is rife with religious animosity. R.1, Compl. ¶¶83–94, PageID.17–23.

Michigan suggests that the "slight suspicion" standard misstates federal constitutional law because the *Masterpiece* opinion says that when there is a slight suspicion of animus, officials need only "pause" to remember their constitutional duties. R.13, Defs.' Br. at 29–30, PageID.101–02. But that's not what *Masterpiece* held. The case involved the Colorado Civil Rights Commission's enforcement of an anti-discrimination law against cake artist Jack Phillips after Phillips declined to create a custom cake celebrating a same-sex wedding. 138 S. Ct. at 1726. The evidence of religious animus consisted of one commissioner who said that Phillips could believe "what he wants to believe" but could not act on those beliefs "if he decides to do business in the state," and a second commissioner who said that freedom of religion has been used to justify "all kinds of discrimination throughout

history" and "is one of the most despicable pieces of rhetoric that people can use." *Id.* at 1729. Based on these comments—and the fact that no other commissioner objected to the second commissioner's anti-religion rant—the Court found the necessary "suspicion" to invalidate the Commission's actions: "the Court cannot avoid the conclusion that these statements *cast doubt* on the fairness and impartiality of the Commission's adjudication of Phillips' case." *Id.* at 1730 (emphasis added). That suspicion was furthered by the fact that the Commission did not punish three other bakers who declined to create cakes with images conveying disapproval of same-sex marriage. *Id.*

For these reasons, the Court did not order the Colorado officials to "*pause*" and reconsider their actions in light of their constitutional obligations. Instead, the Court *held* that "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint" *Id.* at 1731. The Court's slight suspicion did not warrant a pause; it required invalidation of the government action.

Michigan's only other argument regarding Count I is that it is not clear the Blaine Amendment's ratifiers were motivated by animus because they "were presumably *as concerned* about public money going to Cranbrook or Detroit Country Day as they were to religiously affiliated schools." R.13, Defs.' Br. at 27, PageID.99 (emphasis added). But that's like saying the members of the Colorado Civil Rights Commission did not act with animus because they were also—perhaps even predominantly—concerned about a baker turning away a same-sex couple because

of their sexual orientation. Indeed, five commissioners said nothing about Phillips' faith, and a sixth did not say anything disparaging about Phillips' beliefs or his exercise of them. *Masterpiece Cake Shop*, 138 S. Ct. at 1729. Yet that was enough for the Supreme Court to enter judgment for Phillips.

There is no legal requirement that this Court "conclude that *all* or even *a majority* of voters shared" anti-religious bigotry "when they cast their ballots in November 1970." *Contra* R.13, Defs.' Br. at 29, PageID.101. Indeed, this Court need not reach any conclusion at all. It can rely entirely on the Michigan Supreme Court's holding that the "common understanding" among voters in 1970 was that the Blaine Amendment would prevent public funds from going to religious schools: "As far as the voters were concerned in 1970, the result of all the preelection talk and action concerning [the referendum] was simply this '—[*the Blaine Amendment*] *was an anti-parochiaid amendment—no public monies to run parochial schools—and beyond that all else was utter and complete confusion*.'" *Parochiaid*, 566 N.W.2d at 220–21 (quoting *Traverse City*, 185 N.W.2d at 15 n.2). And that's all *Masterpiece* requires.

Yet there's more: when a law like Michigan's Blaine Amendment applies almost exclusively to religious conduct, it is subject to strict scrutiny even if phrased in a facially neutral way. Consider *Lukumi*, which involved adherents of the Santeria religion who planned to build a house of worship in Hialeah, Florida. 508 U.S. at 525–26. Members of the city council disapproved of the Santeria practice of animal sacrifice and passed ordinances prohibiting the unnecessary killing of

animals in a ritual or ceremony not primarily for the purpose of food consumption. *Id.* at 526–28. When sued, the City claimed the prohibition was neutral and motivated by secular objectives, including public health and prevention of cruelty to animals. *Id.* at 527–28. But the ordinances applied almost exclusively to the Santeria ritual of animal sacrifice. *Id.* at 535 ("[A]lmost the only conduct subject to [the prohibition] is the religious exercise of Santeria church members."). And legislative history revealed that disapproval of the Santeria religious ritual motivated the ordinances' adoption. *Id.* at 534. Accordingly, the Supreme Court applied strict scrutiny and held that the ordinances violated the plaintiffs' free-exercise rights. *Id.* at 547.

So too here. In 1970, 98% of Michigan's private-school students attended church-related schools; as a result, the Michigan Supreme Court has already declared that Michigan's Blaine Amendment "is nearly total" in its "impact" on the class of "church-related schools." *Traverse City*, 185 N.W.2d at 29; *see also Parochiaid*, 566 N.W.2d at 221 (holding that the Blaine Amendment does not apply to Michigan's charter law because "the common understanding of the voters in 1970 was that no monies would be spent to run a parochial school" and "public school academies [i.e., charter schools] are not parochial schools"). That impact—combined with Plaintiffs' detailed citations to public documents showing that Michigan's Blaine Amendment was promoted and adopted with discriminatory intent, R.1, Compl. ¶¶83–94, PageID.17–23—means that strict scrutiny applies. *Lukumi*, 508 U.S. at 546.

To satisfy strict scrutiny, Michigan's Blaine Amendment "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Espinoza*, 140 S. Ct. at 2260 (cleaned up). Michigan cannot satisfy that high standard in this context. Defendants do not even try to explain what compelling government interest supports giving 529 plan state-tax benefits to those paying public-school tuition while denying the same benefits to those paying private, religious-school tuition. And without any articulation of the government interest, it is impossible to even consider whether a Blaine Amendment is the most narrowly tailored way to achieve that interest. Accordingly, Plaintiffs are entitled to summary judgment on Count I.

B. Michigan's Blaine Amendment engages in differential treatment based on religion.

Based on the proper statutory analysis, Michigan families may use Michigan 529 accounts for K-12 public-school tuition but not for K-12 religious-school tuition. *See* Section II.A; R.1, Compl. ¶¶9, 101–03, PageID.4, 24–25. Because Michigan treats religious exercise worse than some comparable secular conduct, the Blaine Amendment violates the Free Exercise Clause's neutrality principle. It is not enough to save the Amendment that Michigan treats private secular-school students as poorly as religious-school students.

Consider the Supreme Court's decision in *Tandon*. There, the plaintiffs challenged a California COVID-19 regulation that restricted at-home prayer meetings and Bible studies by limiting all gatherings in private residences to no more than three households at a time. California defended its regulation because

the restriction applied equally to secular, at-home gatherings. But the Court rejected that argument. It was no excuse, the Court held, "that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." 141 S. Ct. at 1296. The fact that California allowed other secular activities to "bring together more than three households at a time" without similar restrictions—including "hair salons, personal care services, movie theaters, private suites at sporting events and concerns, and indoor restaurants"—resulted in a likely free-exercise violation that warranted an injunction on appeal. *Id.* at 1297.

Tandon applies with full force here, and Defendants' counterarguments do not change that. First, allowing families to claim tax benefits when they pay public-school tuition but not private, religious-school tuition is undeniably a free-exercise problem. *Contra* R.13, Defs.' Br. at 31, PageID.103. As in *Espinoza* and *Trinity Lutheran*, the State of Michigan is using its Blaine Amendment to "disqualify[ ] otherwise eligible recipients from a public benefit 'solely because of their religious character.'" *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). Such state action "imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'" *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). And under *Tandon*, it matters not that Michigan families may not use 529 plan funds to pay for private, secular-school tuition; the fact that they may use such funds to pay for public-school tuition triggers strict scrutiny. *See Tandon*, 141 S. Ct. at 1296.

Second, invalidation of Michigan's Blaine Amendment is not "at direct odds" with *Espinoza*'s statement that a "State need not subsidize private education." *Contra* R.13, Defs.' Br. at 31, PageID.103. Plaintiffs do not assert that the State *must* provide them with tax-free 529 plan withdrawals. Their argument is that if the State provides that benefit for public-school education—which it does—then the State must provide the same benefits for religious-school education. Michigan's failure to do so triggers strict scrutiny, which the State has not even tried to satisfy in its briefing. Again, the Blaine Amendment is unconstitutional as applied to Plaintiffs.

C. Michigan's Blaine Amendment illegally conditions the availability of benefits on a recipient's willingness to surrender her religious status.

Defendants do not address the merits of Count III, instead contesting Plaintiffs' ability to assert a claim that, in the State's view, is more appropriately brought by private religious schools than families who desire to send their children to such schools. R.13, Defs.' Br. at 23–24, PageID.95–96. But that argument ignores what the Supreme Court said about the subject in *Espinoza*.

There, parents of students attending private religious schools sued the Montana Department of Revenue for applying Montana's Blaine Amendment to exclude the families from a state scholarship program. *Espinoza*, 140 S. Ct. at 2251. As detailed above, the Supreme Court ultimately held that Montana's Blaine Amendment could not be so applied without running afoul of the Free Exercise Clause.

In defense of its Blaine Amendment, Montana unsuccessfully argued that the Amendment promoted religious freedom by keeping the government out of religious schools' operations. *Id.* at 2261. But the Court found that position "especially unconvincing because the infringement of religious liberty [t]here broadly affect[ed] both religious schools *and* adherents." *Id.* (emphasis added). A categorical ban on any type of public aid to religious schools—like Michigan's Blaine Amendment—"burdens not only religious schools *but also* the families whose children attend or hope to attend them." *Id.* (emphasis added). In other words, the Court viewed the religious-liberty interests of religious schools and the families who attend them as conjoined for purposes of challenging the Montana Blaine Amendment. *See also* Part II.C.

On the merits, Plaintiffs' position is straightforward. First, by virtue of Michigan's Blaine Amendment, Plaintiffs are ineligible for a government benefit (no taxation on distributions) because their desired use of funds has a religious character. *See* R.1, Compl. ¶¶10, 104–05, PageID.4, 25. To receive that benefit, they must give up their religious status. Second, in Michigan, private secular schools that desire public funding can seek charter-school status, *see generally* Mich. Comp. Laws § 380.502, benefitting both themselves and the families that choose to send their students to the school. But private religious schools lack that choice unless they surrender their religious status. And the Free Exercise Clause prevents Michigan from "'impos[ing] special disabilities on the basis of religious status' and 'condition[ing] the availability of benefits upon a recipient's willingness to surrender

its religiously impelled status.'" *Espinoza*, 140 S. Ct. at 2256 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021–22) (cleaned up).

What's more, neither *Trinity Lutheran* nor *Espinoza* provides Defendants a safe harbor for Michigan's facially neutral Blaine Amendment, because the Michigan Supreme Court has already determined that Michigan voters in 1970 intended to harm a politically disfavored—and constitutionally protected—group of religious institutions and families. In fact, the Court used that anti-religious intent as the reason justifying why private, secular schools could take advantage of Michigan's charter scheme *without* running afoul of the Michigan Blaine Amendment. *Parochiaid,* 566 N.W.2d at 221 (the Blaine Amendment does not apply to Michigan's charter law because "the common understanding of the voters in 1970 was that no monies would be spent to run a parochial school" and "public school academies [i.e., charter schools] are not parochial schools"). The net result is that Michigan gives secular private schools an option to receive public benefits—an option it denies to religious private schools.

To put it another way, "[t]o be eligible for government aid under the [Michigan] Constitution, a [religious] school [or family] must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges 'inevitably deters or discourages the exercise of First Amendment rights.'" *Espinoza*, 140 S. Ct. at 2256 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022). Such coercion "punishes the free exercise of religion" and "is subject to 'the strictest scrutiny.'" *Id.* at 2256–57 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022). And, as

explained above, Michigan cannot satisfy strict scrutiny. Accordingly, Plaintiffs are entitled to summary judgment on Count III.

D. Michigan's Blaine Amendment creates a political structure that unconstitutionally discriminates against religion.

The State summarily argues that Plaintiffs' Count IV fails to state a claim because Michigan's Blaine Amendment is facially neutral and because the Supreme Court purportedly rejected a similar argument in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014). R.13, Defs.' Br. 32–34, PageID.104–06. The State's argument fails. A law's facial neutrality does not end the Equal Protection inquiry because ostensibly neutral laws may be a pretext for discrimination, as the Blaine Amendment is here. And in *Schuette*, the Supreme Court held that the political structuring argument advanced by the respondents was inapplicable because the specific political change—the barring of racial *preferences* in college admissions—did not have invidious discrimination as its purpose. *Schuette*, 134 S. Ct. at 1638. *Schuette* did *not* hold that political structuring arguments are *per se* invalid or that they do not apply where invidious discriminatory purpose is aimed at a suspect class, as here.

1. In the equal protection context, courts look beyond facial neutrality to determine whether a law is based on invidious discriminatory intent.

Under the Equal Protection Clause, a 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." *Hunter v. Erickson*, 393 U.S. 385, 393 (1969). States cannot allocate power so as to place "unusual burdens" on suspect classes to "enact legislation specifically designed to overcome the 'special condition' of prejudice." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). So, for instance, it is unconstitutional "for a community to require that laws or ordinances designed to ameliorate race relations or to protect racial minorities, be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure." *Id.* at 487. The harm lies in the extra hoops placed upon the suspect class to obtain legislative protections against discrimination that any other group can obtain without jumping through those hoops. *Accord, e.g.*, *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (recognizing Equal Protection Clause violation when California amended its state constitution to prevent the state or political subdivisions of the state from prohibiting discrimination in residential real estate sales and rentals).

The State mishangs its hat on the facial neutrality of Michigan's Blaine Amendment. But just as in the free exercise context, *see* Part IV.B, the Supreme Court has made clear that courts addressing equal protection claims must look beyond and behind the facial neutrality of a law to determine whether it was enacted with a discriminatory purpose.

For instance, in a challenge alleging racial discrimination in a voting redistricting plan, the Supreme Court held that "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express

racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). This is because the "constitutional violation" is in "the presumed racial purpose of state action, not its stark manifestation." *Id.*; *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("A racial classification . . . is presumptively invalid . . . and this rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination." (cleaned up)); *cf. Lukumi*, 508 U.S. at 534, 540 (holding that "[f]acial neutrality is not determinative" and turning to equal protection cases for guidance on how to determine whether "the object of a law is neutral").

Moreover, "[d]etermining whether invidious discriminatory purpose was a motivating factor" of a law or government action "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). This sensitive inquiry requires looking at the effect of the law, the "historical background of the decision" giving rise to it, and the "legislative or administrative history" of the law's enactment. *Id.* at 266–68; *see also Lukumi*, 508 U.S. at 540 ("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.").

Here, Plaintiffs' Complaint alleges and the Michigan Supreme Court has already determined that Michigan's Blaine Amendment was motivated by religious bias and designed to make it more difficult for parochial schools and parents supporting those schools to obtain otherwise lawful public benefits. R.1, Compl. ¶¶48–94, PageID.13–23; *Parochiaid*, 566 N.W.2d 208, 220–21. The referendum process that led to the Amendment's adoption was a direct response to the Michigan's Legislature's passage of a statute allowing the Michigan Department of Education to purchase educational services from nonpublic schools. R.1, Compl. ¶¶82–90, PageID.17–18. At the time Michigan's Blaine Amendment was passed, 218,000 of the 275,000 nonpublic students in Michigan were enrolled in Catholic schools. R.1, Compl. ¶84, PageID.18. The next largest nonpublic system was the National Union of Christian Schools of the Christian Reformed Church. *Id.* ¶85. Nonpublic schools were synonymous with parochial, i.e. religious schools. *Id.* ¶86. Based on these facts and others, the Michigan Supreme Court held the facially neutral Blaine Amendment to be "an anti-parochiaid amendment." *Parochiaid*, 566 N.W.2d at 220–21 (quoting *Traverse City*, 185 N.W.2d at 17 n.2). Full stop.

The Michigan Supreme Court's binding view of this Michigan constitutional provision compels the conclusion that the "disadvantage imposed" by Michigan's Blaine Amendment, while neutral on its face, "is born of animosity toward" religious believers who desire to petition for legislative help on the same terms of any other people. *Romer v. Evans*, 517 U.S. 620, 634 (1996); *accord Schuette*, 572 U.S. at 303–04 (describing with approval a similar fact pattern to the Blaine Amendment's

adoption as being "[c]entral to the Court's reasoning" in *Hunter*, 393 U.S. 385, a case in which the Court found a political-structuring Equal Protection violation). For that reason, this Court should deny the State's motion to dismiss and should grant summary judgment in favor of Plaintiffs.

2. Political-structuring equal protection claims remain valid after *Schuette*.

Schuette did not repudiate the political-structuring cause of action for ensuring equal protection of the laws. Indeed, it is telling that the State does not quote a word from that opinion. It is true that *Schuette* reversed a Sixth Circuit decision that employed a political structuring analysis to strike down a provision of the Michigan Constitution that barred racial *preferences* in university admissions. But the Court did so because the case before it involved a Michigan constitutional provision that required equal treatment and thus did *not* involve the sort of harm or animus that was present in *Hunter*, *Seattle*, or the other cases employing the political structuring analysis. The Supreme Court explained that the Sixth Circuit's decision extended "*Seattle*'s holding in a case presenting quite different issues to reach a conclusion that is mistaken here." 572 U.S. at 302. The Court elaborated that "*Seattle* is best understood as a case in which the state action in question . . . had the *serious risk, if not purpose*, of causing *specific injuries on account of*" a constitutionally protected characteristic. *Id.* at 305 (emphasis added). By contrast, *Schuette* did not stem from such a purpose or pose such a risk. As the Supreme Court noted, in the specific context presented by *Schuette* "there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the

Seattle schools." *Id.* at 310. And, therefore, the Sixth Circuit's decision striking down a political restructuring in the context of racial *preferences* meant that "[r]acial division would be validated, not discouraged." *Id.* at 309.

But *Schuette* did not hold that a political structuring analysis is always forbidden. "[W]hen hurt or injury is inflicted on" a suspect class "by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Id.* at 313. "*Mulkey*, *Hunter*, and *Seattle* are . . . cases . . . 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," that is, inflicted because of a group's suspect class. *Id.* at 313–14.

Here, Michigan Blaine's Amendment is like the political restrictions at issue in *Mulkey*, *Hunter*, and *Seattle*. Indeed, as the Michigan Supreme Court has held, the Blaine Amendment was intended to disadvantage parochial schools. And those who spearheaded Michigan's Blaine Amendment were not even subtle about their purposes. They did not name their group the "Public School Initiative" but the "Council Against Parochiaid," intentionally choosing a religious slur for their advocacy group's name. R.1, Compl. ¶¶88–89, PageID.18 And then, when advocating for the passage of Michigan's Blaine Amendment, they doubled-down on their anti-religious motives. *See id.* ¶92 (describing the anti-religious rhetoric used to advocate for the Blaine Amendment). In short, just as religious parents who decided to send their children to religious schools were to receive some legislative support in educating their children, *see id.* ¶¶82–87, the Council Against Parochiaid swept in and

successfully advocated passage of a constitutional amendment that took away that gain *and* placed an additional restriction on religious parents' ability to ever achieve such a gain again.

What *Mulkey*, *Hunter*, and *Seattle* make clear is that a state cannot place a "political restriction" on religious parents—because of their religion—and make it more difficult for them than other similarly situated parents to advocate for public benefits. It violates Equal Protection for a state's constitution to be used to purposely inflict an injury on a suspect class. That is what the Michigan Blaine Amendment did and continues to do, and it is why the Court should grant summary judgment to Plaintiffs on Count IV.

CONCLUSION

Michigan's persistent drumbeat is that a "State need not subsidize private education." R.13, Defs.' Br. at 24, PageID.96 (quoting *Espinoza*, 140 S. Ct. at 2261). Plaintiffs do not disagree. Michigan can choose not to provide any public financing or tax benefits to private, religious schools if it desires. But what the State cannot do is create a political structure that denies a place at the negotiating table to families who desire to send their children to private, religious schools, nor can it create a public benefit like a state 529 plan that public-school families can use to pay tuition but private, religious-school families cannot.

Accordingly, Plaintiffs respectfully request that the Court (1) deny Defendants' motion to dismiss, (2) declare that Michigan's Blaine Amendment is unconstitutional as applied to Plaintiffs, and (3) grant them summary judgment on each of Counts I–IV.

Dated: January 7, 2022

/s/ *John J. Bursch*

John J. Bursch
BURSCHLAW PLLC
9339 Cherry Valley Ave SE, #78
Caledonia, Michigan 49316
(616) 450-4235
jbursch@burschlaw.com

Patrick Wright
MACKINAC CENTER LEGAL FOUNDATION
140 W. Main Street
Midland, MI 48640
(989) 631-0900
Wright@mackinac.org

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of LCivR 7.2(b)(i) because this brief contains 10,509 words, excluding the parts of the brief exempted by LCivR 7.2(b)(i). Microsoft Word 2016 was used to generate the word count.

Dated: January 7, 2022

/s/ John J. Bursch
John J. Bursch