No. 22-1986

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JILL HILE; SAMANTHA JACOKES; PHILLIP JACOKES; NICOLE LEITCH; MICHELLE LUPANOFF; GEORGE LUPANOFF; PARENT ADVOCATES FOR CHOICE IN EDUCATION FOUNDATION; JOSEPH HILE; JESSIE BAGOS; RYAN BAGOS; JASON LEITCH,

Plaintiffs-Appellants,

v.

STATE OF MICHIGAN; GRETCHEN WHITMER, Governor, in her official capacity; RACHAEL EUBANKS, Michigan Treasurer, in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Robert J. Jonker

BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

This case presents a simple question, whether the district court erred in declining to extend a barely viable legal theory into an entirely new context in order to invalidate the policy choice of Michigan's voters—a policy choice that the Supreme Court has squarely and recently held is entirely permissible. And this Court need not even reach that simple question to dispose of this appeal, given the plain deficiencies in the allegations that remain in the case. No oral argument is needed to aid this Court in affirming the manifestly correct judgment below.

If this Court orders oral argument, however, the State respectfully requests the opportunity to participate.

JURISDICTIONAL STATEMENT

Defendants do not contest this Court's jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs have standing to pursue the sole count of their complaint they challenge on appeal, having abandoned any effort to demonstrate the harm they alleged from Michigan's tax system.

2. Whether the Michigan Constitution's facially neutral and neutrally applied restriction of public funds from benefitting private schools violates the Equal Protection Clause.

INTRODUCTION

The Supreme Court has recently and unequivocally held that a state does not need to subsidize private education with taxpayer funds. The People of Michigan have exercised that permissible option, voting in 1970 and again in 2000 to bar, through their Constitution's "no-aid clause," public funding of private education. And unlike other states that have imposed similar restrictions, Michigan chose to treat private religious schools the same as private secular schools; its no-aid clause is neutral as to religion, and bars public funding of any private schools.

According to their complaint, Plaintiffs brought this lawsuit to vindicate their interest in using funds from their Michigan Education Savings Program (MESP) plans to pay for private, religious-school tuition—an interest, they alleged, that the no-aid clause unconstitutionally impaired. The district court dismissed three of Plaintiffs' counts on comity grounds, since addressing them would have required second-guessing Michigan's interpretation of its own tax code. Plaintiffs do not appeal that decision. By forgoing any argument that Michigan's tax system harms them, they fail to assert a redressible injury and thus lack standing.

Plaintiffs' sole remaining count also fails on its merits. For it, Plaintiffs dusted off a seldom used (and even more seldom successful) theory: that Michigan's citizens violated the Equal Protection Clause by placing the policy decision embodied by the no-aid clause in their Constitution, beyond the normal legislative process. Problems abound.

First, this "political process" theory is of dubious vitality in any context, and has never been recognized outside the realm of intentional racial discrimination. No caselaw supports Plaintiffs' bid here to expand it to religious discrimination—nor does the no-aid clause, which does not draw a line based on religion, but only on a public/private distinction. Moreover, Plaintiffs themselves have never alleged that they are religious, only that they wish to send their children to religious schools, which is not a suspect class.

And while Plaintiffs try to skirt the facial neutrality of the no-aid clause with examples of purported animus, they cannot, under controlling precedent, undermine Michigan's Constitution by maligning Michigan voters. Worse still, Plaintiffs completely ignore the People's decision to reaffirm the no-aid clause 30 years after it was enacted.

This Court should affirm the district court's judgment.

STATEMENT OF THE CASE

Plaintiffs are a group of 10 individual Plaintiffs and one organization. Individual Plaintiffs each allege that they "are parents of school-age children," that "[t]hey have funded an MESP plan and would like to use it to pay for their children's private, religious-school tuition in Michigan," but "if they do so, the State of Michigan will use Michigan's Blaine Amendment to force them to reverse the Michigan tax deduction they received at the time they made the MESP contributions." (Compl. ¶¶ 17–21, ECF 1, PageID.6–7.) Organizational Plaintiff alleges it "is a grassroots coalition of parent advocates who can learn about the need to protect and advance their rights, as well as the potential impact of legislation that could take away or expand education freedoms," and it "has members"—including individual Plaintiffs—"who desire to use their MESP plans to pay for private, religious-school tuition." (Compl. ¶ 22, ECF 1, PageID.7.)

Plaintiffs filed a complaint alleging four federal constitutional claims—three under the Free Exercise Clause and one under the Equal Protection Clause. The complaint sought declaratory and injunctive relief, asking to direct the State of Michigan, Michigan Treasurer

Rachel Eubanks, and Michigan Governor Gretchen Whitmer (Defendants) to permit them to utilize the MESP tax deduction. (Compl., Request for Relief, ECF 1, PageID.34.) Plaintiffs also asked the court to declare unconstitutional and enjoin Michigan's Article VIII, § 2 of Michigan's Constitution. (*Id.*)

Defendants filed a motion to dismiss based on Fed. R. Civ. P 12(b)(1) and 12(b)(6). Defendants argued that (1) Plaintiffs lacked standing because they could not show an injury premised on their incorrect understanding of Michigan tax law; (2) the claims were barred by the Tax Injunction Act and principles of comity, since Plaintiffs sought a federal court order to interfere with Michigan's state tax collection; and (3) Plaintiffs' claims should fail on their merits. The parties briefed the motion, including a round of supplemental briefs at Plaintiffs' request which were filed after oral argument.

The district court granted the motion to dismiss. (Dist. Ct. Op. and Order, ECF 39, PageID.284.) The court held that principles of comity barred consideration of Plaintiffs' three Free Exercise Claims:

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

> in the State system, which is adequate for the task. Instead, plaintiffs want this Court to reach out and declare, first of all, that the State is wrong about its own interpretation of State tax law; and then, second, to use that declaration as a doorway to reaching Free Exercise challenges that in plaintiffs' view would require this Court to invalidate the Education Provision in Michigan's Constitution—a provision that has been on the books for over 50 years. Comity precludes the Court from walking that path.

(*Id.*, PageID.282.) Plaintiffs do not raise those claims before this Court. (Dist. Ct. Op. & Order, ECF 39, PageID.282, 284; Pls' Br., Doc. 14, p 32 n.2.)

For the equal protection claim, the district court declined to address Defendants' arguments under the Tax Injunction Act and comity principles, instead rejecting the claim because it did "not believe plaintiffs are correct about their political process theory[.]" (Dist. Ct. Op. & Order, ECF 39, PageID.283.) The court noted that the political process theory was of questionable validity in general, and that if it did have any "continuing vitality," it would only be in "the very narrow fact patterns of *Seattle* and *Hunter*," cases addressing racial discrimination. (*Id.*) In sum, the court was "unwilling to expand an already tenuous political process doctrine into these new arenas." (*Id.*, PageID.284.)

Plaintiffs appealed, limited to the district court's dismissal of their equal protection claim.

STANDARD OF REVIEW

A motion to dismiss based on Federal Rule of Civil Procedure 12(b)(1) presents a challenge to the Court's subject-matter jurisdiction. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). A facial challenge to subject-matter jurisdiction requires this Court to construe the material allegations of the complaint as true and construed in the manner most favorable to the non-moving party. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). A district court's evaluation of a 12(b)(1) motion is akin to its review of a 12(b)(6) motion. *Gentek Bldg. Prod., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007).

In a motion to dismiss for failure to state a claim under Rule 12(b)(6), this Court must accept as true the factual allegations of the complaint and then determine whether the statements are sufficient to make out a right of relief. *United States v. Gaubert*, 499 U.S. 315, 327

(1991). However, although it must accept well-pled facts as true, the Court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). In evaluating the sufficiency of a plaintiff's pleadings, this Court may make reasonable inferences in the non-moving party's favor, "but [this Court is] not required to draw [p]laintiffs' inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, conclusory allegations are "not entitled to be assumed true." *Iqbal*, 556 U.S. at 681.

This Court reviews de novo a district court's dismissal of a complaint for failure to state a claim. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006).

ARGUMENT

I. With their complaints for tax relief abandoned, Plaintiffs' remaining claim is untethered from any theory of standing and does not present a case or controversy.

In their complaint, Plaintiffs laid out several counts of perceived constitutional violations, all supporting their demand to receive the same tax advantages for sending their children to private religious schools that they alleged other Michiganders would receive for sending their children to public schools. (Compl., ECF 1, ¶¶ 100, 105,

PageID.24–25.) The State countered that Plaintiffs were misreading Michigan statutes and that in reality, no MESP tax-advantaged funds can be used to pay for K-12 tuition, public or private, depriving Plaintiffs of any claim to standing. (Br. in Support of Defs' Mot. to Dismiss, ECF 13, PageID.86–94.) Thus, contrary to Plaintiffs' assertions, they were not "harmed" compared to parents of other K-12 students, either by Michigan's no-aid clause or otherwise.

The district court acknowledged the parties' disagreement on the correct interpretation of Michigan's statutes, and correctly exercised comity to decline to resolve the dispute, dismissing Plaintiffs' first three counts. (Op. & Order, ECF 39, PageID.281–82.) The court noted that the State's interpretation and application of Michigan tax law raises no First Amendment issues, and that Plaintiffs remain free to dispute the interpretation and application "in the ordinary process of State tax administration and collection, or potentially seek appropriate declaratory relief in the State system, which is adequate for the task." (*Id.*)

Rather than simply redirecting their claims to the proper state forum, Plaintiffs chose to press ahead with this narrow appeal. In so

doing, Plaintiffs chose not to appeal this ruling, accepting that the federal courts would not be declaring, in this litigation, that Plaintiffs' interpretation of Michigan tax law would prevail over the State's own interpretation. And with that acceptance, any theory of redressible harm evaporated from this lawsuit.

As is clear from their complaint, Plaintiffs' stated interest in bringing this suit was their desire to use funds from their MESP plans to pay for tuition at private religious schools, and the injury they sought to cure was their alleged inability to do so without incurring discriminatorily unfavorable tax treatment under Michigan law. (Compl. ¶¶ 17–22, ECF 1, PageID.6–7.) But as Defendants explained below, Plaintiffs' interpretation of Michigan law is wrong: Michigan's tax statutes treat Plaintiffs the same as not only as non-religious private-school parents, but also to *public-school parents*. The disparity in tax treatment Plaintiffs alleged simply does not exist under Michigan law, and there thus is no harm Plaintiffs could attribute in that regard to Michigan's no-aid clause. And as the district court noted, there has been no showing of "any State practice at odds with the way Michigan says its own law works." (Op. & Order, ECF 39, PageID.282.)

None of this is in dispute anymore. And as a result, Plaintiffs no longer have an alleged theory of redressible harm; Plaintiffs have excised it from the case on appeal. All that is left is Plaintiffs' apparent preference that Michigan's Constitution not contain a no-aid clause. The federal judicial power, however, extends only to cases and controversies, U.S. Const. art III, § 2, and one "essential and unchanging part" of that requirement is "the core component of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing contains three elements[:] the plaintiff must have suffered an 'injury in fact,' . . . there must be a causal connection between the injury and the conduct complained of . . . [and] it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Id.* at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 43 (1976)).

What's left of Plaintiffs' suit fails to meet this threshold. In this appeal, Plaintiffs chose to effectively abandon the purported factual predicate supporting their complaint. In their appellate brief, Plaintiffs refer only *once* to Michigan's tax scheme that was the driver of their

claims of harm—in a footnote telling this Court that they have decided not to appeal three counts of their complaint. (Pls Br., Doc. 14, p. 23 n.2.) Having dropped their mistaken interpretation of Michigan tax law, Plaintiffs can no longer seek to strike down Article VIII, § 2 in order to abate any alleged concrete injury to themselves. To the extent they alleged any such injury, it was a purported tax disadvantage caused by Michigan's no-aid clause—but there is no such injury to redress under the now-uncontested operation of Michigan law. Instead, Plaintiffs come to this Court with only a disagreement with the policy twice approved by Michigan's electorate. This Court's power under Article III does not extend to adjudicate such a claim.

Plaintiffs may respond that they allege a distinct harm pertinent to their sole claim on appeal: that "religious parents," "religious persons," "religious . . . schools," and "religious . . . institutions" are disadvantaged in the political process because they must "mount a statewide campaign" to change the Constitution's no-aid clause. (Compl, ECF 1, ¶¶ 152–154, 156, PageID.33.) But as discussed in Section II.A.3 below, Plaintiffs did not allege in their complaint that they themselves fall within any of those categories—that they are

religious, for instance, or that they subscribe to any particular religion or religious sect. (*See id.* ¶¶ 17–22, PageID. 6–7.) This, in other words, is not the harm that Plaintiffs have alleged *they* are suffering; that alleged harm is now out of the case, and Plaintiffs cannot continue before this Court without it.

Simply put, Plaintiffs' complaint challenging their purported maltreatment under Michigan tax law belongs, if anywhere, in Michigan's state courts. Because Plaintiffs abandoned any such allegations of harm here, this Court should affirm the decision below on standing grounds.

II. For several reasons, Plaintiffs fail to plausibly allege an equal protection violation.

Plaintiffs claim that Michigan has impermissibly structured its government to discriminate against religion. This claim lacks merit. The narrow strain of equal protection doctrine they rely on is either deceased or barely breathing after the Supreme Court's decision in *Schuette v Coalition to Defend Affirmative Action*, 572 US 291 (2014). Yet Plaintiffs would have this Court revive and expand the doctrine to a

new frontier that lacks the historical underpinning that once animated it: racial discrimination.

Moreover, Plaintiffs have not alleged they are religious or that Article VIII, § 2 operates on its face to discriminate on the basis of religion. By its language and operation, the Michigan Constitution—unlike many other state constitutions—prohibits taxpayer funds for *all private schools*—which tracks the Supreme Court's unqualified permission that "[a] State need not subsidize private education." *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2261 (2020). That *religious* schools fall within that category of private education (alongside private secular schools) does not transform this neutral law into one that violates equal protection.

Instead, Plaintiffs ask this Court to look past the facially neutral law, claiming that the Michigan Supreme Court has already held that the Michigan electorate's adoption of Article VIII, § 2 was motivated by religious bias (plainly untrue), or in the alternative, that a curated set of opinion pieces, articles, and advertisements prior to the People's vote in 1970 not only evidences broad religious animus (it does not) but can also be imputed to the People of Michigan (again, no). In any event,

Sixth Circuit precedent bars inquiry into the minds of voters to make out an equal protection claim challenging a ballot initiative. Even if this were not so, the People of Michigan overwhelmingly voted again in 2000 to keep public funds in public schools, a fact that Plaintiffs ignore.

For any or all of these reasons, this Court should affirm.

A. The so-called political-process strain of equal protection doctrine either no longer exists or is severely diminished; this Court should not expand it.

1. In *Schuette*, the Supreme Court tightly circumscribed the political process doctrine.

In 2014, the Supreme Court considered a so-called political process claim under the Equal Protection Clause. *Schuette*, 572 U.S. at 303. The plaintiffs brought an equal protection claim challenging the recently passed ballot proposal that prohibited the consideration of race in college admissions. *Id.* at 299. The plaintiffs' challenge was premised on *Hunter v. Erickson,* 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457 (1982), which this Court found controlling. *Coal. to Defend Affirmative Action v. Regents of Univ. of Michigan*, 701 F.3d 466, 475 (6th Cir. 2012).

In *Hunter*, the Akron City Council enacted a fair housing ordinance to prohibit the problem of "substandard unhealthful, unsafe, unsanitary and overcrowded" housing that had resulted from "discrimination in the sale, lease, rental and financing of housing." 339 U.S. at 391. In response, voters amended the city charter, tossing out this ordinance and, going forward, requiring that housing ordinances protecting against discrimination based on "race, color, religion, national origin or ancestry" (but no others) could not be passed unless approved by popular vote. *Id.* at 387, 390. The Supreme Court found this ran afoul of equal protection, "plac[ing] a special burden[ ] on racial minorities within the governmental process." *Id.* at 390.

In *Seattle*, the local school board began a pilot busing program in an attempt at racial desegregation. 458 U.S. at 460. In response, those adverse to the policy generated a statewide ballot initiative designed to target and prohibit busing programs for purposes of racial integration. 458 U.S. at 461–62. It passed, and suit was filed on the ground that it violated the Equal Protection Clause. *Id.* at 464, 467. The Supreme

Court found the initiative unconstitutional—it "was carefully tailored to interfere only with desegregative busing." *Id.* at 471.[1]

In both cases, a public policy question was selectively removed from the standard decision-making process, making it more difficult to enact or sustain certain laws, in a manner disadvantaging racial minorities.

Plaintiffs are correct that the *Schuette* Court did not explicitly overrule *Hunter* and *Seattle*. (Pls Br., Doc. 14, p. 38.) But its opinion should give no one confidence that those cases continue to stand for (if they ever did) a distinct strand of equal protection jurisprudence.

The *Schuette* plurality rejected the Sixth Circuit's "broad rationale" and asserted that its "expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court's *settled equal protection jurisprudence*." *Id.* at 307 (emphasis added). The plurality explained that a reading of *Seattle* that required courts "to determine and declare which political policies serve the 'interest' of a group defined in racial terms" was unwarranted and

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

untenable. *Id.* This would require courts to make assumptions that members of a racial group "think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 308 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Such a rubric would also require courts to define "what public policies should be included in what *Seattle* called policies that 'inure primarily to the benefit of the minority' and that 'minorities consider' to be 'in their interest.' " *Id.* at 309 (quoting *Seattle*, 458 U.S. at 472 (brackets and ellipses omitted)).

The plurality was accompanied by a concurring opinion written by Justice Scalia and joined by Justice Thomas, who would have outright overruled *Hunter* and *Seattle*. *Id.* at 322. Justice Scalia characterized the plurality as "repudiat[ing] this doctrine," *id.* at 318, but rather than overruling *Hunter* and *Seattle*, choosing to "reinterpret[ ] them beyond recognition," *id.* at 320.

Thus, while the Court did not explicitly overrule *Hunter* and *Seattle*, it did adopt a highly narrowed understanding of those cases. While what remains of the political-process strain of equal protection doctrine is not a model of clarity, the Court signaled that those cases are "best understood" to have found an equal protection violation where

"the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race." *Id.* at 305.

2. If the doctrine still exists at all, it should not be revived and expanded beyond its historical bounds.

Even if the *Schuette* Court did not effectively overrule *Hunter* and *Seattle*, there can be no dispute that it cabined and clarified the understanding of political-process doctrine, making clear its limitations and signaling its demise. *See, e.g., Lewis v. Governor of Alabama*, 896 F.3d 1282, 1297 (11th Cir. 2018) ("[T]he Supreme Court's most recent consideration of the doctrine has called its former interpretations into question.").[2]

Yet Plaintiffs wish not only to revive it but expand it to an entirely new and different context. If it exists at all, the parties agree that the so-called political-process theory rests on "a very limited, narrow doctrine." (3/24/22 Hr'g Tr., ECF 43, Page ID.314 (statement of counsel for Plaintiffs).) The doctrine has only ever been applied in one narrow

[2] *But see Lewis v. Governor of Alabama*, 944 F.3d 1287, 1306 (11th Cir. 2019) (upon rehearing en banc, the Eleventh Circuit found the plaintiffs lacked standing).

area of equal protection jurisprudence—the treatment of racial minorities. (Dist. Ct. Op. and Order, ECF 39, PageID.283 ("Here, racial categories are not at issue at all. Rather plaintiffs seek to extend the theory to a new arena of religious discrimination.").)

At issue in *Hunter* and *Seattle* were blatant efforts to disenfranchise racial minorities. The doctrine's history coupled with the limited scope of the doctrine counsel against newfound expansion.

Justice Breyer explained that the political-process doctrine "is best understood against the backdrop" of the Nation's sordid history in denying racial minorities the right to "participate meaningfully and equally in its politics." 572 U.S. 291, 343 (Breyer, J., dissenting). Just after the time of the ratification of the Fifteenth Amendment outlawing slavery and Reconstruction, the country witnessed "countless examples of States categorically denying to racial minorities access to the political process." *Id.* at 343. That trend continued through and past the Supreme Court's landmark decision in *Brown v. Board of Education*, with States "disregarding [that] Court's mandate by changing their political process." *Id.* "It was in this historical context that the Court

intervened" in *Hunter* and *Seattle School District*. *Id.* at 347 (Breyer, J., dissenting).

Plaintiffs do not (and could not) assert that this doctrine has ever applied—or ever would have existed—outside of these specific parameters. This is borne out by the plurality opinion in *Schuette* itself. It explained that "*Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target *racial minorities*," *id.* at 304 (emphasis added), and that "*Seattle* is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries *on account of race*, just as had been the case in *Mulkey* and *Hunter*." *Id.* at 305 (emphasis added). (Dist. Ct. Op. and Order, ECF 39, PageID.283.)

Ultimately, *Schuette* characterized the only three cases that have even arguably applied this political-process doctrine as "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*." *Id.* at 314 (emphasis added). One would be hard-pressed to read *Schuette*

and suggest that the political-process doctrine not only retains the vitality it had pre-*Schuette*, but is ripe for expansion.

What is clear is that Plaintiffs cannot make out a plausible claim for relief. In *Seattle*, a local effort at racial desegregation was prohibited by a subsequent statewide law; in *Hunter*, voters singled out a racially targeted antidiscrimination housing program as needing popular support, different from other antidiscrimination provisions. Here, a matter of statewide concern was decided by statewide vote, and the taxpayer funding directive did not target a suspect classification—its hinge point is public schools versus non-public schools.

3. Plaintiffs have not alleged that they are religious, a necessary predicate for them to claim they were discriminated against on the basis of their religion.

Assuming the claim they bring is a cognizable one, strikingly, Plaintiffs have not alleged that they are religious, nor that they are discriminated against on the basis of any religious belief. Thus, they

have failed to claim, let alone plausibly show, that they are discriminated against because of religion.[3]

Schuette's suggestion that *Seattle* and *Hunter* should comport with "settled equal protection jurisprudence," 572 U.S. at 307, is a strong indication that any viable claim of this sort should be judged by the traditional equal protection rubric. The Equal Protection Clause is essentially a mandate of like treatment for similarly situated individuals. *Dubay v. Wells*, 506 F.3d 422, 428 (6th Cir. 2007). When evaluating an equal protection challenge to a state law, this Court presumes the law valid. *Id.* at 429.

To make out an equal protection claim, Plaintiffs must first show differential treatment. *Maye v. Klee*, 915 F.3d 1076, 1085 (6th Cir. 2019). Only when the differential treatment adversely affects a suspect class will the law be judged by heightened scrutiny. *Id.* at 1085–86.

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[3] Defendants do not contest that the Supreme Court has stated that religion is a suspect classification that would require strict scrutiny under its equal protection doctrine. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). But Plaintiffs' failure to identify a single Supreme Court case actually scrutinizing an equal protection claim based on religion highlights the odd fit of Plaintiffs' claim. Plaintiffs brought several Free Exercise challenges to Article VIII, § 2 below, but have not appealed those dismissed claims. (Dist. Ct. Op. and Order, ECF 39, PageID.282, 284; Pls' Br., Doc. 14, p 32 n.2.)

Plaintiffs must additionally show discriminatory intent or purpose. *Id.* at 1085.

Since Article VIII, § 2 is facially neutral with regard to Plaintiffs' proposed suspect class (religion, (Compl., ECF 1, ¶ 151, PageID.33)), rational basis review applies. *See Dubay*, 506 F.3d at 430 ("[W]e do not need to apply intermediate scrutiny because the Michigan Paternity Act does not discriminate on the basis of gender. The statutory provisions that impose the obligation of support upon Dubay, and similarly situated fathers, are gender neutral."). Article VIII, § 2 bars state funding to directly or indirectly aid all private schools; Plaintiffs are similarly situated to all individuals who send their children to private, non-religious schools, and are treated identically to them.

Relatedly, Plaintiffs allege that "religious persons" or "religious parents" are disadvantaged by Article VIII, § 2. (Compl, ECF 1, ¶¶ 152–154, 156, PageID.33.) But without any allegation that they are "religious persons" or "religious parents," their claim for relief is premised only on their interest in receiving state funding for their children's attendance at private, religious schools. (*Id.* ¶¶ 17–22,

PageID. 6–7.) In other words, Plaintiffs have not pled that their proffered suspect class even includes them.

Given these deficiencies, Plaintiffs' political process claim plainly calls for rational basis review; "parents who wish to send their children to religious schools" is not a suspect class. There are undoubtedly parents who are not religious who send, or wish to send, their children to private, religious schools. Non-religious individuals without children may want the State to provide taxpayer support for private secular and private religious schools, perhaps because the public school system in a particular locale is deficient. There are also surely religious individuals attending private, religious schools who would rather the State not provide funding to religious schools if only to keep the State separate from religious schools. (*See* 3/24/22 Hr'g Tr., ECF 43, PageID.335–36.)

Any of these individuals, religious or not, must follow the same process to achieve their political goals. This does not generate an equal protection violation, even under *Seattle*. 458 U.S. at 470 ("[T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action."). Some policies are set beyond the reach of the

standard legislative process—indeed, this is inherent in the very idea of a constitution.

Even if Plaintiffs had pled that they are religious, or are members of a minority religious sect, they apparently assume that religious individuals, as a group, would support Plaintiffs' own desired change to Michigan's Constitution. Problems abound. *Schuette* was adamant in rejecting the premise that members of a defined group—"regardless of their age, education, economic status, or the community in which they live—think alike [and] share the same political interests." *Schuette*, 572 U.S. at 308; *see also id.* ("It cannot be entertained as a serious proposition that all individuals of the same race think alike."). Moreover, this Court would be charged to "determine the policy realms in which certain groups—groups defined by race—have a political interest," a step that *Schuette* criticized as in stark discord "with the Court's settled equal protection jurisprudence." *Id.* at 307.

B. Plaintiffs cannot bypass the facially neutral and generally applicable language and effect of Article VIII, § 2.

To make out their equal protection claim, Plaintiffs argue that this Court should look under the hood of Article VIII, § 2 to discover

animus buried beneath the language that does not discriminate on the basis of religion or religious belief. Plaintiffs try this from two angles, but neither has merit.

1. The Michigan Supreme Court has never held that Article VIII, § 2 was passed for antireligious reasons.

The first strategy is to declare that the Michigan Supreme Court has already issued a "holding" that Article VIII, § 2 "was passed for antireligious reasons." (Pls Br., Doc. 14, pp 44, 47–48.) With this premise, Plaintiffs ask this Court to look past the facially neutral language of Michigan's Constitution.[4] But this premise is simply untrue.

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[4] Plaintiffs mistakenly assert that non-religious private schools in Michigan may receive public funding by seeking charter-school status, while religious private schools may not. (Pls' Br., Doc. 14, pp 22–23; 42 n.4.) What Plaintiffs call a "charter school" is, in statutory terms, a "public school academy." Mich. Comp. Laws § 380.502. And as the name implies, a public school academy is not a private school that receives public funding, but is—like all schools in Michigan that receive public funding—a public school. *See, e.g., Council of Organizations & Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208, 221 (Mich. 1997) (explaining that public school academies cannot charge tuition or restrict admission as private schools can).

Plaintiffs point to a single line in the Michigan Supreme Court's decision in *Council of Organizations & Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208, 220–21 (Mich. 1997) (quoting *In re Proposal C.*, 384 Mich. 390, 410 n.2 (1971)), as dispositive. But Plaintiffs' acontextual touting of the Court's reference to Proposal C as "an anti-parochiaid amendment," (Pls Br, Doc. 14, at p 47), fails to recognize that the Court has *repeatedly* used "parochiaid" as a defined term encompassing *any* public funds for private schools. While reading the term "parochiaid" in a vacuum may suggest a poor fit to reference funding for all private schools, there is no question that Michigan Supreme Court properly understood the phrase as referring to funding for *all nonpublic* schools, not just *religious* schools. *See, e.g., In re Proposal C.*, 384 Mich. at 413 (discussing the "parochiaid act": "Parochiaid as authorized by Chapter 2 of P.A.1970, No. 100 provided $22,000,000 of public monies for participating *nonpublic school units* to pay a portion of the salaries of private lay teachers of secular nonpublic school courses in the nonpublic school for nonpublic school students.") (emphasis added); *id.* at 425 ("Proposal C above all else prohibits state funding of purchased educational services in the *nonpublic school* where

the hiring and control is in the hands of the nonpublic school, *otherwise known as 'parochiaid.'* ") (emphasis added); *id.* at 438 (opinion of Adams, J.) ("The petitions to place Proposal C on the ballot were drafted and circulated before the legislative enactment appropriating $22,000,000 *for private schools, commonly known as 'parochiaid,'* became law.") (emphasis added).

In short, the Michigan Supreme Court has never held that the People of Michigan's purpose in voting to adopt Article VIII, § 2 was anti-religious prejudice. Plaintiffs' request that this Court defer to the Michigan Supreme Court's "determination" to that effect is disingenuous and reflects a crabbed reading of its relevant cases. It would be surprising indeed if the Michigan Supreme Court had actually issued such a holding but the no-aid clause has remained an operative part of the State's founding document for over 50 years.

2. This Court's precedent prohibits looking into the minds of voters in an equal protection claim, dooming Plaintiffs' effort to tarnish Michigan's voters.

Plaintiffs attempt to color Michigan's electorate of 1970 as motivated by animus against Catholics; this is as untrue as it is insulting. (Pls' Br., Doc 14, pp 48–50.)

Plaintiffs never directly allege in their complaint that the millions of individuals who actually ratified the no-aid clause were motivated by animus, but instead try to paint the Michigan electorate of 1970 as bigoted by citing "public advocacy" though contemporary newspaper articles, opinion pieces, and letters to newspaper editors. (Compl., ECF 1, ¶ 92, PageID.19–23.)[5] But the views expressed by these sources cannot be simply imputed to the Michigan electorate.

Indeed, this Court has determined that it is not competent to evaluate the intent of an electorate when faced with a *Hunter/Seattle*-based claim. In *Arthur v. City of Toledo, Ohio*, this Court evaluated an equal protection challenge to a referendum vote that repealed city

[5] Plaintiffs' snippets speak for themselves, but the vast majority of them do not demonstrate bigotry, but only legitimate disagreement about the proper use of taxpayer funds in Michigan's education system.

council ordinances that had granted a local housing authority to construct sewers to affordable housing projects. 782 F.2d 565, 566–67 (6th Cir. 1986). The plaintiffs alleged that the voters were motivated by an intent to discriminate based on race. *Id.* at 571, 573. This Court observed that neither it nor the Supreme Court "has ever inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was *the only possible motivation* behind the referendum results." *Id.* at 573 (emphasis added). It went on to hold that "[s]ince a court cannot ask voters how they voted or why they voted that way, a court has no way of ascertaining what motivated the electorate." *Id.* at 573. This refusal stemmed in part from the nature of the secret ballot. *See id.* at 574, citing Fed. R. Evid. 606(b). This Court noted the "logical extreme" of striking down a popularly enacted provision "if one voter testified that racial considerations motivated the voter's vote." *Id.*

Although *Arthur's* holding on this point has been questioned, this Court has recognized that it applies "to equal protection challenges to referendum elections," which is essentially what Plaintiffs raise here.

Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 637 n.2 (6th Cir. 2001) *rev'd in part, vacated in part* 538 U.S. 188 (2003). *See also* 263 F.3d at 638 ("[W]e are bound by the Sixth Circuit's decision in *Arthur v. City of Toledo* . . . .").

Under the pre-*Schuette* understanding of *Seattle School District*, the *Arthur* Court held that "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." 782 F.2d at 574.[6]

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

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

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

Caveats aside—including the caveat that this line of cases should not be extended beyond the context of *racial* discrimination—Plaintiffs have not argued that the *only possible rationale* for Michigan's no-aid clause was religious animus, nor could they. The People of Michigan had a sound, non-discriminatory reason to keep public funds in public schools, evidenced by the very provision they ratified. The ratifiers of Article VIII, § 2 voted not to bar public funds only from religious schools, but from *all private schools.* In that way, Michiganders were presumably as concerned about public money going to Cranbrook or Detroit Country Day as they were to religiously affiliated schools.

Indeed, as Plaintiffs state in their complaint, the genesis of the effort to amend Article VIII, § 2 was the Legislature's passage of 1970 PA 100, "which allowed the [Michigan] Department of Education to purchase educational services from *nonpublic* [not just religious] schools in secular subjects." (Compl., ECF 1, ¶ 82, PageID.17 (emphasis and bracketed words added).) 1970 PA 100 permitted up to "$22,000,000.00 during the 1970–71 school year" to be used for nonpublic schools. 1970 PA 100, Ch. 2, § 58. With scarce resources for public schools, the Michigan electorate saw fit to reserve public monies for them.

Notable here is the *Schuette* plurality's extended discussion of the value of direct democracy and the firm statement that courts will not "disempower the voters from choosing which path to follow." 572 U.S. at 310. In this case, Plaintiffs request that this Court remove this "difficult question of public policy" "from the realm of public discussion, dialogue, and debate." *Id.* at 312. But, as *Schuette* recognized, "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* By imputing to Michigan's electorate its curated and acontextual set of statements from opinion writers, articles, and advertisements (Compl., ECF 1, ¶¶ 91–92, PageID.19–23), Plaintiffs strive to do the very thing that *Schuette* cautioned against.

Like Section 26 of the Michigan Constitution challenged in *Schuette*, which "reflects in part the national dialogue regarding the wisdom and practicality of race-conscious admissions policies in higher education," 572 U.S. at 301, Article VIII, § 2 represents the People's choice on what some might consider a sensitive policy issue. The Equal Protection Clause does not take this policy choice from the People.

C. Even if this Court were competent to evaluate the intent of millions of Michigan voters, Plaintiffs allege no animus by the People during the 2000 re-ratification of the same provision.

When it comes to the validity of Article VIII, § 2 of the Michigan Constitution, the circumstances surrounding Proposal C in 1970 are, quite simply, irrelevant. Even assuming for the sake of argument that the Michigan electorate in 1970 was motivated entirely by animus, the People again considered and rejected modification of Article VIII, § 2 thirty years later. Plaintiffs ignore this glaring fact, and offer no hint that it ever occurred, let alone that this new vote suffered the same alleged taint of the 1970 vote.

In 2000, the People of Michigan were asked to consider whether to amend Article VIII, § 2 to both (1) authorize "indirect" support of non-public school students, and (2) create a voucher program that would "permit any pupil resident [in certain unperforming public school districts] to receive a voucher for actual elementary and secondary school tuition to attend a nonpublic elementary or secondary school."

Initiative Petitions—Proposed Amendments to the Michigan Constitution, Proposal 00-1, pp 2–3.[7]

Just as in 1970, the People overwhelmingly voted to ensure that public monies went only to public schools. This time, the vote was even more lopsided, with over 69% voting against adoption and under 31% in favor. State of Michigan Bureau of Elections, *Initiatives and*

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OFFICIAL BALLOT LANGUAGE

PROPOSAL 00-1

A PROPOSAL TO AMEND THE CONSTITUTION TO PERMIT STATE TO PROVIDE INDIRECT SUPPORT TO STUDENTS ATTENDING NONPUBLIC PRE-ELEMENTARY, ELEMENTARY AND SECONDARY SCHOOLS; ALLOW THE USE OF TUITION VOUCHERS IN CERTAIN SCHOOL DISTRICTS; AND REQUIRE ENACTMENT OF TEACHER TESTING LAWS

The proposed constitutional amendment would:

1.) Eliminate ban on indirect support of students attending nonpublic schools through tuition vouchers, credits, tax benefits, exemptions or deductions, subsidies, grants or loans of public monies or property.

2.) Allow students to use tuition vouchers to attend nonpublic schools in districts with a graduation rate under 2/3 in 1998-1999 and districts approving tuition vouchers through school board action or a public vote. Each voucher would be limited to 1/2 of state average per-pupil public school revenue.

3.) Require teacher testing on academic subjects in public schools and in nonpublic schools redeeming tuition vouchers.

4.) Adjust minimum per-pupil funding from 1994-1995 to 2000-2001 level.

Should this proposal be adopted?

Yes ☐

No ☐

Available at https://www.legislature.mi.gov/(S(ty1fmdpfvr2nzi1xxsyh0r00))/documents/publications/Mpla/2000/2000-mpla-initiative.pdf

Referendums Under the Constitution of the State of Michigan of 1963 (Jan 2019).[8]

Plaintiffs fail to mention, let alone discuss, Proposal 2000-1. But it should be highly relevant, if not dispositive. To entirely ignore this subsequent statewide vote—with no allegation that this electorate, too, was motivated by animus—would mean that animus behind a particular policy would forever taint an otherwise valid and facially neutral law. The dead hand of the past would forever imprison this permissible constitutional choice because of an earlier generation's alleged invidious intent, stripping all future well-intentioned citizens of valid policy solutions.

The Supreme Court has suggested that even mere reconsideration of the basis for a particular provision may purge the taint of a questionable discriminatory purpose. *See e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 74–75 (1981) (where Congress reauthorized an act on the books but in doing so, "thoroughly reconsidered" it, the later legislative history

[8] Available at https://www.michigan.gov/-/media/Project/Websites/sos/01mcalpine/Initia_Ref_Under_Consti_1208.pdf?rev=2ab5f4a3b213442293f787202b38933d

was "highly relevant in assessing the constitutional validity" of the provision).

Several Justices have endorsed the relevance of a clean re-adoption of a law previously motivated by animus. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1426 (2020) (Alito, J., dissenting, joined by Chief Justice Roberts and in relevant part by Justice Kagan). In *Ramos*, the Supreme Court overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972) which had permitted non-unanimous verdicts in state criminal trials as consistent with the Sixth Amendment. 140 S. Ct. at 1408. The majority discussed the sordid (and apparently uncontested) racist history behind the initial adoption of Louisiana and Oregon's non-unanimity rules. *Id.* at 1394.

After condemning the racist past of the initial enactions, Justice Alito's dissent chided the majority for ignoring what came later—the states' non-unanimity rules were reconsidered and readopted without any hint of discriminatory purpose. *Id.* 1426 ("For one thing, whatever the reasons why Louisiana and Oregon originally adopted their rules many years ago, both States readopted their rules under different circumstances in later years."); *see also id.* at 1408 (Sotomayor, J.,

concurring) ("Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint."). *See also* Toby J. Heytens, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 149 (2000) (discussing Supreme Court cases that "demonstrate that sufficient legislative reconsideration may purge the taint of original invidious intent").

Although not ultimately relevant to the holding in *Ramos*—which turned on the Sixth Amendment's right to a unanimous jury verdict applied to the states via the Fourteenth Amendment, *id.* at 1402—the common sense remains.

D. Plaintiffs' claim would eviscerate the Supreme Court's clear declaration that "[a] State need not subsidize private education."

Plaintiffs' novel political-process theory—asking this Court to strike down a facially neutral, neutrally applied, and twice-ratified provision of Michigan's Constitution—attempts an end-run around the Supreme Court's plain statement: "A State need not subsidize private education." *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2261 (2020); *see also Carson v. Makin*, 142 S. Ct. 1987, 2000

(2022) (quoting and following *Espinoza* in striking down Maine's tuition assistance program).

1. The Supreme Court has confirmed that states need not subsidize private education, and Michigan has chosen that path.

Michigan's public-private no-aid clause is an odd target for federal constitutional challenge. When the People of Michigan first voted in 1970 to restrict public funds from going to all private schools, they drew a line that the U.S. Supreme Court has made clear is a valid one. Michigan's Constitution—unlike Montana's or Maine's, which were struck down in *Espinoza* and *Carson*, respectively—draws its funding line between public and private schools, not between religious and non-religious schools. Mich. Const. art. VIII, § 2; compare *Espinoza*, 140 S. Ct. at 2252 (reciting the relevant provision of Montana's constitution). *See also id.* at 2261 (Montana's law unconstitutionally "cut[s] families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason").

The Supreme Court could not have been more clear: "A State need not subsidize private education." *Carson*, 142 S. Ct. at 2000 (quoting *Espinoza*, 140 S. Ct. at 2261). "[O]nce a State decides to do

so"—which Montana and Maine have, but Michigan has not—"it cannot disqualify some private schools solely because they are religious." *Id.* (brackets added).

2. Michigan's Article VIII, § 2 is not a so-called Blaine Amendment.

This Court should not entertain Plaintiffs' invitation to broadside this settled principle by lumping Michigan in with states that *do* draw their funding schemes between religious and non-religious schools.

As Plaintiffs themselves describe in no small detail, Michigan successfully resisted the anti-religious and anti-Catholic efforts to enshrine such views in Michigan's Constitution and statutes in the late-nineteenth and early-twentieth centuries. (Compl. ¶¶ 48–54, PageID.13–14.) *See Espinoza*, 140 S. Ct. at 2259 (describing the failed "Blaine Amendment of the 1870s" as sharing a "shameful pedigree" with many state counterparts that "prohibit[ ] States from aiding 'sectarian' schools").

Justice Alito outlined some history of the Blaine Amendment and its state counterparts in his concurring opinion in *Espinoza*, 140 S. Ct. at 2267–74. Notably, the focus of this discussion was properly on the

mid-to-late nineteenth-century passage of several state constitutional provisions barring aid to sectarian schools in the wake of Congress's rejection of the Blaine Amendment in 1875. *See id. Nearly 100 years later*, Michigan first adopted Article VIII, § 2, which bars taxpayer funds from benefitting all nonpublic schools, not just sectarian ones. Put simply, Michigan has no so-called "Blaine Amendment" and cannot be shoehorned into the group of states with provisions that may, in fact, have repugnant geneses.

And it warrants emphasis that Michigan is "unique" in that its no-aid clause functions on a distinction between public and private schools, not between secular and non-secular schools. Commentators have noted that Michigan's approach "is something unusual" compared to other states' constitutional provisions, "which for the most part only prohibit state aid to sectarian schools." Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 588–89 (2003), cited in *Espinoza*, 140 S. Ct. at 2271 (Alito, J., concurring, and providing some historical context to the Blaine Amendment). Indeed, according to one commentator, of all the state provisions restricting the

use of public money in education, "[o]nly the Michigan Constitution falls into th[e] category" of proscribing public money for "any sectarian or nonsectarian private school." Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 Tex. F. on C.L. & C.R. 137, 162 (1998).

If Michigan's choice is, on this record, susceptible to the equal protection theory offered by Plaintiffs, the Supreme Court's plain statement that "[a] State need not subsidize private education," *Espinoza*, 140 S. Ct. at 2261, would be eviscerated.

3. Whether private schools in Michigan are largely religiously affiliated is of no moment.

Yet another dent in Plaintiffs' case comes in their reliance on the premise that, "[i]n 1970, the large majority of nonpublic school students were in religious schools," and thus that " 'nonpublic schools' in Michigan circa 1970 *meant* 'religious schools.' " (Compl., ¶¶ 83, 86 (emphasis in original).) But the Supreme Court has rejected this tactic of looking behind the curtain of a facially neutral law in evaluating the constitutionality of a state scheme regarding public- and private-school funding. In *Zelman v. Simmons-Harris*, the Court turned away an Establishment Clause challenge to an Ohio program that granted

parents within Cleveland's school district tuition aid to, if they chose, send their children to any participating private school, religious or nonreligious. 536 U.S. 639, 643–45 (2002). Responding to Justice Souter's dissent, the Court declined to "attribute constitutional significance" to the fact that the overwhelming majority of participating schools are religious schools, *id.* at 657, or that "96% of scholarship recipients have enrolled in religious schools," *id.* at 658. Put plainly, "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Id.* at 658.

That *Zelman* found this program viable against an Establishment Clause challenge does not suggest, of course, that this kind of funding scheme is *required* by the Constitution. Rather, the takeaway is that the Constitution looks kindly on facially neutral funding schemes, whether they permit or prohibit the indirect grant of public funds to religious schools. (*See* Dist. Ct. Op. and Order, ECF 39, PageID.283 ("[U]nlike the express racially discriminatory provisions at issue in *Seattle* and *Hunter*, the Education Provision here is facially neutral.").)

The classic "play-in-the-joints" trope between the Free Exercise and Establishment Clauses is valuable here. Michigan has chosen to permit taxpayer funding to benefit only public schools. *Oregon v Ice*, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems."). Ohio, in its program discussed in *Zelman*, chose to permit funding to be indirectly used toward private, religious schools. Under our Constitution, neither course is required nor prohibited. Yet Plaintiffs proceed under a distinct doctrine of questionable vitality to effectively force government subsidy of religious education. This Court should decline the invitation.

CONCLUSION AND RELIEF REQUESTED

Defendants respectfully request this Court affirm the judgment of the district court.

Respectfully submitted,

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Dated: March 23, 2023

CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I certify that on March 23, 2023, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 28(a), 28(a)(1)–(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint	09/23/21	R. 1	6–7, 13–14, 17, 19–24–25, 33, 34
Brief in Support of Defendants' Motion to Dismiss	11/04/21	R. 13	86–94
District Court Opinion and Order	09/30/22	R. 39	281–284
Judgment	09/30/22	R. 40	285
3/24/22 Hearing Transcript	11/27/2022	R. 43	314, 335–36
Notice of Appeal	10/28/22	R. 41	286