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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Yamilette Albertson, on her own behalf and on behalf of her children, Y., A., and J.; and Constantine Shulikov, on his own behalf and on behalf of his children, A., E., P., N., and V. ..... Petitioners,

v.

Ellen Weaver, in her official capacity as State Superintendent of Education, ...Respondent.

PETITION FOR ORIGINAL JURISDICTION AND EXPEDITED CONSIDERATION

Petitioners respectfully request that this Court entertain their proposed complaint for declaratory and injunctive relief in its original jurisdiction, pursuant to Article V, Section 5 of the South Carolina Constitution, Section 14-3-310 of the South Carolina Code of Laws, and Rule 245 of the South Carolina Appellate Court Rules. Because of the urgency of this matter, the significant public interest it involves, and the material prejudice to the rights of Petitioners that will result from delay, Petitioners further request that the Court give this matter expedited consideration.

As set forth in the attached complaint, this case challenges the South Carolina Department of Education's newly adopted policy and practice prohibiting the use of Education Scholarship Trust Fund ("ESTF") scholarships to pay for tuition and fees at private schools. The Department has taken a program that allows parents to use scholarships for a virtually unlimited array of educational expenses, both public and private, and carved out a single exception: private

schooling. In so doing, it has placed the education of thousands of low-income, South Carolina children in jeopardy.

According to the Department, its action is mandated by this Court's interpretation of Article XI, Section 4 of the South Carolina Constitution in *Eidson v. South Carolina Department of Education*, 444 S.C. 166, 906 S.E.2d 345 (2024). However, no party in *Eidson* raised, and this Court never addressed, the *federal* constitutional implications of that interpretation.

As alleged in the proposed complaint and as addressed below, barring use of ESTF scholarships to pay for private school tuition and fees violates the Fourteenth Amendment to the United States Constitution—specifically, its Due Process and Equal Protection Clauses, as well, arguably, as its Privileges or Immunities Clause. *See generally* Proposed Comp. ¶¶ 64–103. The Due Process Clause protects "the liberty of parents and guardians to direct the upbringing and education of [their] children." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). This liberty interest is "fundamental," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), and it includes, specifically, the right to choose a private school for one's child. *Pierce*, 268 U.S. at 534–35. Yet the Department now penalizes parents, and treats similarly situated families differently, based solely on their exercise of that fundamental, federal constitutional right.

It is no defense to say that this discriminatory treatment is mandated by the disfavored status of private schooling under Article XI, Section 4 of the *state* constitution. As the U.S. Supreme Court held only four years ago, when a state is "called upon to apply a state [constitutional] provision" in a way that conflicts with the federal constitution, "it [i]s obligated by the Federal Constitution to reject the invitation." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 487–88 (2020).

This Court should entertain Petitioners' proposed complaint for all the reasons above. It should also give this matter expedited consideration because Petitioners are currently incurring great financial and constitutional harm from the Department's policy and practice barring use of ESTF scholarships at private schools.

Petitioners are the parents of ESTF scholarship recipients, and, until recently, they used those scholarships to secure the education they believed was best for their children: private schooling. Aff. of Yamilette Albertson in Supp. of Pet'rs' Pet. for Original Jurisdiction and Expedited Consideration ("Albertson Aff.") ¶ 7; Aff. of Constantine Shulikov in Supp. of Pet'rs' Pet. for Original Jurisdiction and Expedited Consideration ("Shulikov Aff.") ¶ 8, Because of the Department's newly adopted policy and practice, however, they can no longer use the scholarships for that purpose. Consequently, Petitioners are undergoing tremendous financial struggle to maintain their children's attendance at their current schools, hoping—with no guarantee—that they will at least be able to finish the remainder of this school year. Albertson Aff., ¶¶ 13, 17; Shulikov Aff., ¶¶ 13, 16.

Without speedy resolution by this Court, however, they will almost certainly be forced to remove their children from their current schools by the end of the school year, if not sooner. Albertson Aff., ¶¶ 13, 17; Shulikov Aff., ¶¶ 13, 17. Starting on January 15, Petitioners will have a short window to re-apply for ESTF scholarships. Albertson Aff., ¶ 14; Shulikov Aff., ¶ 14. During that time, as a condition of renewing the scholarships, they will need to sign an agreement with the Department, promising not to enroll their children in their local public schools. Albertson Aff., ¶ 14; Shulikov Aff., ¶ 14. Meanwhile, Petitioner Albertson faces a January 22 deadline to re-enroll her children in their current private school for the 2025–26 school year. Albertson Aff., ¶ 15. If she opts out of re-enrollment before that date, they will lose

their spots. *Id*. If she opts out of re-enrollment after that date (which she almost certainly would have to do if she cannot use ESTF scholarships for tuition), she will have to pay a fee of $1,000 per child (or $2,000 per child, if the opt-out occurs after March 21). *Id*. Petitioner Shulikov similarly risks losing his children's spots in their current school if he does not notify the school by February 28 that they will be returning for the 2025–26 school year. Shulikov Aff., ¶ 14.

Thus, within a matter of a few months, Petitioners must make critical decisions regarding their children's educational future. Without a speedy injunction from this Court prohibiting the Department from enforcing its policy and practice, they will almost certainly be forced to uproot their children from their schools by, at the latest, the end of this school year. All the while, Petitioners must draw on their own limited resources to pay the current tuition they thought would be covered by ESTF scholarships.

Because of the grave federal constitutional implications of the Department's policy and practice; the substantial public interest in both education and respect for the U.S. Constitution; and the severe material harm that will continue to befall Petitioners and thousands of other low-income families in the absence of swift judicial action, Petitioners respectfully request that this Court exercise original jurisdiction over this matter and resolve it on an expedited basis.

BACKGROUND

On May 5, 2023, Governor Henry McMaster signed the ESTF Program into law. Aff. of David Hodges, in Supp. of Pet'rs' Pet. for Original Jurisdiction and Expedited Consideration ("Hodges Aff."), Ex. A. The program provides children from low-income families with scholarships that parents can "use to create a customized, flexible education for their child[ren]." *Id.* In its first year, the law directed the Department to provide 5,000 scholarships, each worth $6,000, to school-aged children from low-income families. S.C. Code Ann. §§ 59-8-110, -120, -

135. To that end, parents were permitted to use the scholarships for a wide array of enumerated, education-related expenses, including private-school[1] tuition and fees, as well as "*any other* educational expense approved by the [D]epartment." *Id.* § 59-8-120(C) (emphasis added).

Six months after the program took effect, it was challenged in an original action in this Court. The challengers alleged that the program violated the state constitutional provision barring public funds from being "used for the direct benefit of any religious or other private educational institution." *Eidson*, 444 S.C. at 185 (quoting S.C. Const. art. XI, § 4).

On September 11, 2024, this Court held that allowing scholarship recipients to use their funds for private-school tuition and fees violated Article XI, Section 4 of the state constitution. *Id.* at 189. Simultaneously, this Court upheld the numerous other uses, both public and private, to which scholarships may be put. *Id.* at 194. In upholding the legislature's ability to provide funding for these other education-related uses, this Court stressed the "many possible and hypothetical forms" that the uses could take. *Id.* at 195. In short, this Court held that the state constitution permits a parent to use the scholarship to pay for virtually any educational expense for her child except one: "use [of] a scholarship to pay [her] child's private school tuition." *Id.* at 186.

On September 11, the same day this Court issued the ruling, Petitioners received an email from the program administrator, sent on behalf of the Department, with the Department's seal, stating: "Today, the South Carolina Supreme Court ruled that sections of South Carolina's Education Scholarship Trust Fund (ESTF) program are unconstitutional. The practical impact of this decision is that – while expenses like tutoring, therapies, and other items remain eligible for

[1] Private schools are considered "education service providers" under the statute. S.C. Code Ann. § 59-8-110.

purchase – as of today, **funds from this program may no longer be used for future tuition or fee payments to nonpublic schools**." Albertson Aff. ¶ 10 & Ex. A (emphasis in original); Shulikov Aff. ¶ 10 & Ex. A (emphasis in original). A subsequent email from the administrator, sent on behalf of the Department, with the Department's seal, advised Petitioners: "[W]hile families are no longer able to use ESTF funds for non-public, independent school tuition and fees, **funds can still be used for other allowed expenses like tutoring, therapies, curriculum, educational materials and technology.**" Albertson Aff. ¶ 11 & Ex. B (emphasis in original); Shulikov Aff. ¶ 11 & Ex. B (emphasis in original).

In addition to emailing Petitioners regarding this policy, the Department also publicized the policy through the Education Scholarship Trust Fund Program webpage on the Department's website. Hodges Aff., Ex. A. The page contains a "latest information" link, which directs the user to another page, which provides: "On September 11, 2024, the South Carolina Supreme Court ruled that sections of South Carolina's Education Scholarship Trust Fund (ESTF) program are unconstitutional. Pursuant to this ruling, and as of September 11, 2024, **ESTF funds may no longer be used for tuition or fee payments to nonpublic schools.**" *Id.*, Ex. B.

For many parents, Petitioners included, the Department's newly adopted policy and practice have thrown their families' futures into disarray. Petitioners are the breadwinners in low-income families who, until recently, relied on the scholarships to pay for their children's education. Albertson Aff. ¶¶ 4, 7, 19; Shulikov Aff. ¶¶ 4, 8, 18. Although the Department's new policy and practice allow Petitioners to use the scholarships for other educational expenses, this is cold comfort for them, as they have no reason to use the scholarships for things like tutoring, homeschooling, or tuition and fees at an out-of-district public school. Albertson Aff. ¶ 19; Shulikov Aff. ¶ 18. And should Petitioners attempt to use the scholarships, in contravention of

the Department's policy and practice, for private school tuition and fees—that is, for the education they believe is best for their children—the law makes clear that they will be "subject to penalty." S.C. Code Ann. § 59-8-115(E)(4)(d).

PETITIONERS' CLAIMS

Petitioners, like all parents, have a fundamental right, or liberty interest, in directing the education and upbringing of their children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923). This includes, specifically, the right to send one's children to a private school. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). The United States Supreme Court has likened this "fundamental" right to those "specific freedoms protected by the Bill of Rights." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). This Court, too, has spoken about the right in similar terms, describing it as "fundamental" and giving parents "a protected liberty interest in the care, custody, and control of their children." *Camburn v. Smith*, 355 S.C. 574, 579, 586 S.E.2d 565, 567 (2003).

The Department's policy and practice prohibiting the use of the ESTF Program for private school tuition infringes this right. The General Assembly enacted the program to empower low-income families to direct the education of their children and, to that end, allowed use of scholarship funds for virtually any educational choice a parent might make for her child. S.C. Code Ann. § 59-8-110. The Department's policy and practice, however, target and prohibit just one of those choices: the choice to attend a private school, which was provided for in the legislation. *Id.* In other words, the Department's policy and practice penalize and discriminate against parents for exercising the very fundamental, federal constitutional right that the U.S. Supreme Court recognized in *Pierce v. Society of Sisters*.

The federal Constitution does not countenance a state's "denial of or placing of conditions upon a benefit" based on a citizen's exercise of a fundamental right. *Sherbert v.*

Verner, 374 U.S. 398, 404 (1963). This is true even if, as here, the denial or conditioning is prompted by—even necessitated by—compliance with the state's own constitution. When a state agency (or a state court) is "called upon to apply a state [constitutional] provision" in such a way, "it [i]s obligated by the Federal Constitution to reject the invitation." *Espinoza*, 591 U.S. at 487–88 (holding Montana Supreme Court's application of the "no aid" provision of the Montana Constitution violated the Free Exercise Clause of the U.S. Constitution); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (holding that the Supremacy Clause "creates a rule of decision" that state courts "must not give effect to state laws that conflict with federal laws").

For three reasons, Petitioner's proposed complaint requests that this Court declare the Department's policy and practice unconstitutional and enjoin their enforcement.

Due Process

First, the policy and practice violate the Due Process Clause of the Fourteenth Amendment. That provision "provides heightened protection against government interference with certain fundamental rights and liberty interests," including the right to direct the education and upbringing of one's children. *Glucksberg*, 521 U.S. at 720; *Pierce*, 268 U.S. 510.

The General Assembly created the ESTF Program to facilitate the exercise of that very right. The program empowers low-income parents to provide an education for their children, an education that the state requires them to obtain. S.C. Code Ann. § 59-65-10. The program grants thousands of parents the resources to provide educational alternatives to the public schools to which their children have been assigned and, in so doing, allows them to satisfy the state's compulsory attendance statute. Parents can then use the scholarships to address the diverse needs

of their children with a diverse array of educational expenses, from textbooks to tutoring to tuition and fees for private and out-of-district public schools.

The Department, however, has now singled out and excluded a single parental choice from the program: private schooling. It has done so for no other reason than that helping parents to pay for private schooling is disfavored in the South Carolina Constitution. But again, parents have a fundamental, *federal* constitutional right, under the Due Process Clause of the Fourteenth Amendment, to direct the education of their children, and the Department cannot deny an otherwise available benefit—one that the General Assembly has provided for the very purpose of facilitating the exercise of that right—simply because a parent exercises it in a way that the Department or the state constitution disfavors.

"It is too late in the day to doubt that" constitutional rights "may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S. at 404. This is especially true when the condition turns on the exercise of a fundamental constitutional right. "[I]f the government could deny a benefit to a person because of his constitutionally protected [activities], his exercise of those freedoms would in effect be penalized and inhibited," and "[s]uch interference with constitutional rights is impermissible." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding government could not prohibit use of otherwise generally available student activity funds on religious activities); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding government could not condition funding for legal aid organizations on organization's agreement not to challenge welfare laws).

To be clear, South Carolina was under no obligation to establish the ESTF Program. However, it *did* establish that benefit program, and the Department's "administration of that

benefit is subject to the [constitutional] principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient's . . . exercise" of her constitutional rights. *Carson v. Makin*, 596 U.S. 767, 785 (2022).

Equal Protection

Second, the Department's policy and practice violate the Equal Protection Clause of the Fourteenth Amendment. South Carolina created the ESTF Program to empower parents to provide an education for their children. Hodges Aff., Ex. A. Recognizing that not all children have the same needs, and that not all families can afford to meet those needs, the General Assembly provided low-income families with the means to afford educational alternatives. S.C. Code Ann. § 59-8-110. Parents were thereby empowered to exercise their fundamental right to direct the education of their children with scholarships that they could use for a wide array of educational expenses that could serve the diverse needs of their children. *Id.* Yet the Department classifies and discriminates against certain of these beneficiaries: those who would use the benefit to access a private school education—those who, in other words, would exercise their fundamental, federal constitutional right recognized in *Pierce v. Society of Sisters*.

The Department's policy and practice (correctly) do not restrict any of the other expenses that the General Assembly provided for when it enacted the ESTF Program for low-income families. S.C. Code Ann. § 59-8-110. If a parent wants to use the scholarship for the tuition and fees needed to enroll her child in an out-of-district public school, she can. *Id.* If she wants to use the scholarship to educate her child with tutors, she can. *Id.* If she wants to use the scholarship for textbooks and curricula so she can homeschool her child, she can. *Id.* If she wants to use the scholarship for any of the enumerated expenses that the General Assembly provided, or for "any educational expense approved by the [D]epartment," she can. *Id.* It is *only* when a parent wants

to use the scholarship for private school tuition and fees and facilitate the exercise of her right to send her child to private school that the Department's policy and practice say she cannot.

"[C]lassifications that . . . impinge upon the exercise of a fundamental right" are "presumptively invidious" and presumptively unconstitutional. *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982) (internal quotation marks omitted). They must withstand strict scrutiny to survive. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right."). This rule applies in the specific context of a case like this one, where a classification is drawn to condition the availability of a public benefit. *See, e.g.*, *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 262 n.21 (1974) (holding that "[s]trict scrutiny [wa]s required . . . because the challenged classification" in a state medical benefit program "impinge[d] on the [fundamental] right of interstate travel"); *see also Zobel v. Williams*, 457 U.S. 55, 60 (1982) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.").

Here, to the extent the Department's justification for its classification rests on Article XI, Section 4 of the South Carolina Constitution, it does not satisfy rational basis review, much less strict scrutiny. The Department may maintain that Article XI, Section 4, as interpreted in *Eidson*, flatly bars financial aid to attend a private school. But even where a fundamental right is *not* involved (which it is here), a state constitutional provision cannot, consistent with the federal Equal Protection Clause, impose a structural barrier on the ability of certain citizens to seek or obtain aid from the government. That is what the U.S. Supreme Court held in *Romer v. Evans*, in which it invalidated a state constitutional amendment for doing precisely that. 517 U.S. 620 (1996). "Central both to the idea of the rule of law and to our own Constitution's guarantee of

equal protection," *Romer* held, "is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.* at 633. Applying rational basis review, the Court declared: "It is not within our constitutional tradition to enact laws . . . declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government." *Id.*

Simply put, a state may not "impose[] a special disability" on a single class of citizens, *id.* at 631, especially where, as here, it defines that class by their exercise of a fundamental, federal constitutional right.

Privileges or Immunities

Third, to the extent that the source of substantive protection for the right of parents to direct the upbringing of their children is the Privileges or Immunities Clause, rather than (or in addition to) the Due Process Clause, of the Fourteenth Amendment, the Department's policy and practice abridge a privilege or immunity of citizenship. That clause protects "those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States." *Snowden v. Hughes*, 321 U.S. 1, 6 (1944). Among the unenumerated substantive rights that citizens possess is the right of parents to direct the education and upbringing of the children under their control, including by sending them to a private school. *See, e.g.*, *Glucksberg*, 521 U.S. 702; *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *Pierce*, 268 U.S. 510.

Petitioners acknowledge that a claim based on the Privileges or Immunities Clause may be foreclosed by current U.S. Supreme Court precedent. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). They nonetheless bring this claim to preserve it for eventual U.S. Supreme Court review, given the ongoing disagreement on that Court about whether the Due Process or

"Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 240, n.22 (2022). At least one currently serving justice has suggested that it is the Privileges or Immunities Clause that protects the "fundamental right of parents to direct the upbringing of their children." *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in judgment).

For their part, Petitioners argue that whatever its source, Petitioners' right to direct the upbringing of their children—including by sending them to a private school—is fundamental and is infringed by the Department's policy and practice for the reasons stated in their complaint. *See generally* Proposed Comp. ¶¶ 92–103. Their complaint accordingly asks this Court for a declaration that the Department's policy and practice violate the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment, as well as an injunction barring their enforcement and requiring the Department to permit Petitioners and other parents to use their ESTF scholarships for private school tuition and fees, as the Legislature provided.

ORIGINAL JURISDICTION REQUEST

This Court should entertain Petitioners' claims in its original jurisdiction. Rule 245 provides that the Court may take a matter in its original jurisdiction "[i]f the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised," and if "the matter [cannot] be determined in a lower court in the first instance [] without material prejudice to the rights of the parties." Rule 245(a), SCACR; *see also Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014) (holding that this Court may resolve a case in the first instance due to "the public interest involved and the need for prompt resolution").

This Court is uniquely well-suited to address Petitioners' claims. To start, a lower court may not be able to judge how this Court's recent opinion in *Eidson* harmonizes or conflicts with the federal Constitution; determining how *Eidson* corresponds to federal constitutional law is a job for this Court. Next, there are no factual issues to be developed in this case; instead, this case is purely legal. Last, the educational futures of thousands of children remain up in the air until a decision is reached. In short, because this case involves a matter of great public interest that demands an expeditious resolution to prevent material, ongoing prejudice to the rights of Petitioners and others like them, this Court should hear this case in its original jurisdiction.

1. This Case Involves a Matter of Great Public Interest.

There is no question that because this case involves education, it is a matter of great public interest that warrants this Court's exercise of its original jurisdiction. As this Court has explained, "education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society." *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 624, 767 S.E.2d 157, 159 (2014) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). The U.S. Supreme Court, meanwhile, has stressed that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," and that Americans have long "rel[ied[] on private school systems, including parochial systems," to provide the "high quality education [that is] an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." *Bd. of Educ. v. Allen*, 392 U.S. 236, 247–48 (1968).

It is hardly surprising, then, that this Court has repeatedly asserted its original jurisdiction in constitutional matters involving education. In *Adams v. McMaster*, for example, it exercised

original jurisdiction over a challenge to a government program directing federal funds to pay tuition for eligible children to attend private schools. 432 S.C. 225, 242, 851 S.E.2d 703 (2020). And in *Eidson*, it did so in a state constitutional challenge to the ESTF Program at issue in this case. 444 S.C. at 176.

This case is no less significant and therefore fits squarely within this Court's original jurisdiction jurisprudence. The question of whether the Department may prohibit a person from using a public benefit to exercise a vital constitutional right, particularly where it concerns how she will raise her children, is a matter of strong public interest. Indeed, it is no exaggeration to say that resolution of this question will affect the education of thousands of low-income children during the present academic year and many thousands more during the coming years. S.C. Code Ann. § 59-8-135(A) (expanding the number of scholarships available in subsequent school years). And the fact that the Department's policy and practice are an application of this Court's decision in *Eidson* only makes this case particularly well-suited for this Court to adjudicate.

Moreover, the right involved in this case—to direct the education of one's children, including, specifically, by choosing private schooling for them—has been likened by the U.S. Supreme Court "to the specific freedoms protected by the Bill of Rights." *Glucksberg*, 521 U.S. at 720. When the Court recognized this right over a century ago in *Meyer v. Nebraska*, it did not conjure it out of the ether, but rather stressed that it preexisted the Constitution itself. *Meyer*, 262 U.S. at 399–400. And since the Court decided *Meyer*, it has repeatedly reaffirmed the right as "fundamental," *Glucksberg*, 521 U.S. at 720, even as it has cast doubt upon, or even rescinded its recognition of, other longstanding constitutional rights.[2] Indeed, it is difficult to conceive of a

[2] *See, e.g.*, *Dobbs*, 597 U.S. at 256–57 ("[T]he right to make decisions about the education of one's children . . . do[es] not support the right to obtain an abortion, and by the same token, our

right of greater public import than the right to raise and educate one's own children. *See also S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 343, 741 S.E.2d 739, 749 (2013) ("There is perhaps no relationship more sacred than that of parent and child.").

Finally, this case raises another fundamental, public interest: the interest in ensuring that a state applies its own constitution in compliance with the requirements of the U.S. Constitution. *See State v. Waitus*, 224 S.C. 12, 19, 77 S.E.2d 256, 259 (1953) ("We are bound by [the U.S. Supreme Court's] decisions construing the Federal Constitution, although our own views may not be in accord therewith."). The U.S. Supreme Court has *repeatedly* invalidated applications of state constitutions that violate rights protected by the federal Constitution. *See, e.g.*, *Espinoza*, 591 U.S. at 488 (invalidating application of state constitutional provision to bar scholarships from being used at religious schools); *Romer*, 517 U.S. at 633 (invalidating state constitutional provision prohibiting protections for gays and lesbians); *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating state constitutional provision barring minister from serving as a constitutional delegate). This Court should entertain the current case, in its original jurisdiction, to ensure that the Department is applying the South Carolina Constitution in a manner that is consistent with the protections that the Fourteenth Amendment to the federal Constitution affords.

2. The Ongoing Material Prejudice to the Rights of Petitioners and Thousands Like Them Warrants Prompt Resolution that Can Only Be Provided by this Court.

This Court should also exercise its original jurisdiction because "the need for prompt resolution" of this case can only be satisfied by this Court without causing additional "material prejudice" to Petitioners and thousands of other low-income South Carolina families. Rule 245(a), SCACR; *Carnival Corp.*, 407 S.C. at 80. The Department's policy and practice have

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conclusion that the Constitution does not confer such a right does not undermine [the *Meyer-Pierce* right] in any way.").

threatened the education of Petitioners' children (and thousands like them), thrown their futures into disarray, and forced their families to incur enormous financial costs to keep them in school. The only way to avoid further harm to Petitioners is for this Court to hear this case now.

Time is of the essence. Right now, Petitioners, who head up low-income households, are paying the costs of their children's education without the use of the quarterly payments made to them by the Department. Albertson Aff. ¶¶ 13, 19, Shulikov Aff. ¶¶ 13, 18; S.C. Code Ann. § 59-8-120(E). Starting on January 15, they have a short window to re-apply for their children's scholarships to preserve the possibility of using the scholarships again. During that time, and in order to receive the scholarships, they must execute agreements with the Department, promising not to enroll their children in their resident public school districts. S.C. Code Ann. § 59-8-115(A).

Other deadlines are rapidly approaching. On January 8, 2025, Petitioner Albertson's children will be automatically re-enrolled in their school for the 2025–26 school year. Albertson Aff. ¶ 15. She will have until January 22 to opt out of re-enrollment. If she opts out before that date, her children will give up their slots. But if she opts out after that date, which she would almost certainly would have to do if she cannot use her children's ESTF scholarships to pay their tuition, she will have to pay a fee, per child, of $1,000 (and if she opts out after March 21, she will have to pay a fee, per child, of $2,000). Petitioner Shulikov faces a similar deadline and also risks losing his children's spots. Shulikov Aff. ¶ 14. In this light, it is essential that this case be resolved now so that Petitioners can make critical and time-sensitive decisions about where their children go to school. *See also Creswick v. Univ. of S.C.*, 434 S.C. 77, 79–80, 862 S.E.2d 706, 707 (2021) (exercising original jurisdiction to resolve dispute prior to the start of the school year).

Further, since the Department's policy and practice were adopted in response to this Court's interpretation of the state constitution, it only makes sense that this Court—not a lower court—be the one to determine whether the Department's policy and practice comport with the federal Constitution. Petitioners have already endured great financial hardships. Albertson Aff. ¶ 13, Shulikov Aff. ¶ 13. If they are forced to go to a lower court, then they are guaranteed to face further material prejudice by either having to spend even more of their limited resources to educate their children or by being forced by financial necessity to withdraw their children from school. Albertson Aff. ¶¶ 13, 17, Shulikov Aff. ¶¶ 13, 16. For these reasons, it is essential that this Court entertain Petitioners' claims in its original jurisdiction and not let them slowly wend their way through the lower courts with all the attendant delays and appeals, which would only further "material[ly] prejudice" Petitioners. Rule 245(a), SCACR.

Finally, this case involves purely legal issues; there is no need for fact finding or discovery to resolve Petitioners' claims. Rule 245, SCACR. And this Court is uniquely positioned to resolve those claims on a timeline that will benefit the Petitioners, the Department, and the broader public. Petitioners will benefit by being able to plan their children's educational futures for the coming school year; the Department will benefit from a timely determination of whether its policy and practice comport with the federal Constitution and how it must administer the program; and the public will benefit from clarity regarding their elected representatives' ability to provide for the educational needs of the children of this state. This is an "exceptional" situation and "[a] decision by this Court at this time best serves the interests of judicial economy by eliminating the numerous inevitable appeals" that will accompany the "novel issue[s] of significant public interest" that this case presents. *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471–72, 674 S.E.2d 154, 160–61 (2009). Since this Court is likely to ultimately decide the merits

of this case, both fairness and the exigencies of time warrant the Court's taking original jurisdiction of it.

SUGGESTED SCHEDULE

Because of the urgent nature of the action, and because there is no need for this Court to provide for fact finding or discovery to resolve Petitioners' claims, which are purely legal in nature, the following schedule is suggested for disposition of this matter:

1. Respondent's answer to Petitioners' complaint due 14 days after entry of the Court's order exercising original jurisdiction.
2. Petitioners' brief due 21 days after entry of the Court's order exercising original jurisdiction.
3. Brief of Respondent due 14 days after service of Petitioners' brief.
4. Reply brief of Petitioner due 10 days after service of Respondent's brief.
5. Argument and disposition at the Court's earliest convenience.

CONCLUSION

In its discretion, this Court will take a matter in its original jurisdiction "[i]f the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised," and if "the matter [cannot] be determined in a lower court in the first instance [] without material prejudice to the rights of the parties." Rule 245(a), SCACR. This is such a case. This Court should take jurisdiction of this case, direct a response to the proposed complaint, and give this matter expedited consideration.

Dated: December 5, 2024

Respectfully submitted,

/s/ Matthew P. Cavedon

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**Pro Hac Vice* Applications Pending