

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT
Appellate Case No. 2024-002062

Yamilette Albertson, on her own behalf and
on behalf of her children, Y., A., and J.; and
Constantine Shulikoy, 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,*

RESPONDENT'S RETURN TO THE PETITION FOR ORIGINAL JURISDICTION

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INTRODUCTION

Original jurisdiction is a sparingly invoked discretionary review warranted only in exceptional cases where all the stars and circumstances align. This case is not one of them. Through the years, Superintendent Weaver has been an unapologetic and committed supporter of educational choice in its many forms. She deeply sympathizes with the Petitioners' plight and has publicly expressed her commitment to see justice done on their behalf. Nevertheless, this proceeding is neither the right way nor the right time to address those matters. The Court should deny the Petition or, in the alternative, hold it in abeyance for at least three reasons.

First, the suit will likely be moot before the Court can consider the merits. The General Assembly is actively working to draft, debate, and enact legislation that would grant the relief Petitioners seek. Leaders in the General Assembly have reiterated and begun taking action on their commitment to a legislative solution. One legislative hearing on a pre-filed school choice bill was held this month, and another is imminent. The legislative train has already left the station, and the passengers will have arrived at their destination before the engineers can finish calculating whether a different route might also have gotten them there—an academic exercise that, at that point, makes no difference. *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 148, 414 S.E.2d 127, 130 (1992) (“This court will not issue advisory opinions.”); *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (“[W]hatever doesn’t make any difference, doesn’t matter.”)

Second, apart from the timing, interbranch comity advises restraint while the legislature crafts and refines a new statute. Our system of divided power works best

when coequal branches of government engage in reciprocal, respectful, and responsive dialogue. Here, the Court recently gave the legislature guidance on the permissible contours of a statutory program to provide educational options to low-income South Carolinians. *See Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 176, 906 S.E.2d 345, 350 (2024). In response, the General Assembly is attempting to comply with the Court's guidance. The mutual respect owed between branches requires the Court to allow that process to play out.

Third, the principle of constitutional avoidance dictates that this Court should abstain from or, at minimum, defer deciding the federal constitutional question raised in the Petition while the General Assembly works to pass a law that complies with the state constitution. As this Court has previously held, if a court can take a path that would avoid striking down a law on constitutional grounds, prudence and judicial restraint recommend—and even require—that path. In other words, if a statute *can* be construed to avoid creating a constitutional problem, it *should* be so construed. This Court should not proactively or voluntarily create a conflict between the state and federal constitutions.

The Petition is not an appropriate, timely, or well-suited vehicle to address and resolve the issues and claims it asserts. This lack of suitability doesn't diminish the importance of educational choice and parental rights. But this Petition isn't the place to decide them. The Court should, at minimum, hold the Petition in abeyance to allow the legislative process and any subsequent challenge to play out.

BACKGROUND

This Court partially struck down the Educational Scholarship Trust Fund, as originally enacted, in September 2024. *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 176, 906 S.E.2d 345, 350 (2024).¹ Shortly thereafter, the Speaker and Senate President released a joint statement pledging

[I]t is now the legislature's responsibility to address the consequences of the Court's opinion and correct the course. Our highest priority when the General Assembly reconvenes in January is to ensure that families have educational choice and that funding for other educational programs that have been relied upon by so many South Carolinians for decades are secured for the future."²

The Superintendent similarly urged the General Assembly to “urgently act to restore the opportunities” made possible by the ESTF program.³

The General Assembly, Governor, and Superintendent have each worked diligently since September to evaluate possible alternative structures, funding mechanisms, and program designs that would comply with this Court's ruling in *Eidson*. And the General Assembly is already acting to fulfill its promise to pass a new bill early in the new term. According to a news report on December 10, 2024, the legislative majorities “in both chambers have made reinstating school choice

¹ Respondent notes that counsel for Petitioners raised this precise theory of parental rights in an *amicus* brief they filed in *Eidson*, but the Court chose not to engage with it at that time. See *Amicus Curiae* Brief of the Partnership for Educational Choice, *Eidson v. S.C. Dep't of Educ.* (Feb. 1, 2024), at pgs. 7–13.

² Javon L. Harris, *SC lawmakers vow to reinstate school voucher program shot down by state Supreme Court*, THE STATE (Sept. 25, 2024).

³ Mary Green, *‘What are we gonna do?’: S.C. school voucher decision wrecks plans*, WRDW/WAGT (Oct. 10, 2024).

scholarships a top priority for 2025.”⁴ “In the upper chamber, Senate Republican leaders expect it will be the first major bill debated after the legislature returns to work in January.”⁵

That project is already underway: a Senate subcommittee held a hearing on a pre-filed bill draft on December 10, 2024.⁶ “House Education Chairlady Shannon Erickson remarked that this is the first time in her 17 years serving that she has seen a committee convene in December on an issue like this, which goes to show how seriously legislators are taking this pressing problem.”⁷ More progress is expected soon and will accelerate after the General Assembly reconvenes in January. A hearing of the full Senate Education Committee is scheduled for January 8, 2025.⁸

LEGAL STANDARD

Original jurisdiction is soundly committed to this Court’s discretion: “the Court *may* exercise original jurisdiction under Rule 245, SCACR.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014). Inherent in the wording of the rule governing this Court’s original jurisdiction is a presumption against granting such petitions: “The Supreme Court will not entertain

⁴ Seanna Addox, *New SC school choice plan increases income eligibility and tuition aid*, S.C. DAILY GAZETTE (Dec. 10, 2024).

⁵ Mary Green, *GOP lawmakers look to reinstate SC’s private school voucher program next year*, WCSC (Dec. 10, 2024).

⁶ *Id.*

⁷ Felicity Ropp, *The First Step to Save SC School Choice*, Palmetto Promise (Dec. 12, 2024).

⁸ *Meeting Notice*, <https://www.scstatehouse.gov/agendas/126s14582.pdf>.

matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.” Rule 245(a), SCACR. Put differently, this Court requires “an extraordinary reason” to forgo the usual processes of litigation and appeal. *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991).

ARGUMENT

At the Petition stage, the question is not primarily whether a Petition alleges a plausible claim and a viable legal argument, but whether the case involves such extraordinary reasons and exigent circumstances to warrant the unusual and discretionary step of deviating from the normal litigation-and-appeal approach and, instead, elevating the issue directly and immediately to this Court. As explained more fully below, this is not such a case.

Leaving aside the novelty of the Petition’s legal argument, this case does not provide a suitable or appropriate vehicle for this Court to decide Petitioners’ claims. Although this case does not arise under the First Amendment, the forum analysis doctrine provides a helpful mental checklist to conceive of the Court’s original jurisdiction in terms of time, place, and manner. Here, the timing is wrong: the case will soon be moot. The place is wrong: the correct forum for action at present is the General Assembly. And the manner is wrong: an aggressive attempt to create a conflict between the state and federal constitutions (in a dynamic and evolving area of federal constitutional law no less). Each is discussed below.

1. Principles of timeliness and judicial economy counsel against granting the Petition, as the issue will likely soon be mooted by impending legislative action.

Timeliness is a key factor in this Court’s determination of when to exercise its original jurisdiction. On the one hand, this Court has limited such grants to situations with a significant time-pressure, such as an upcoming election, *Bailey v. S.C. State Election Comm’n*, 430 S.C. 268, 271, 844 S.E.2d 390, 391 (2020), or some other “special emergency” that requires an “efficient and expeditious path” to resolution, *Layman v. State*, 368 S.C. 631, 646 n.9, 630 S.E.2d 265, 273 n.9 (2006). See *Carnival Corp.*, 407 S.C. at 80, 753 S.E.2d at 853 (“Rule 245 is concerned with whether a case should be resolved by this Court in the first instance because of the public interest involved and the need for prompt resolution”). On the other hand, this Court does not hear cases in the original jurisdiction that are not “ripe for judicial determination.” *S.C. Public Interest Found. v. Lucas*, 416 S.C. 269, 279, 786 S.E.2d 124, 130 (2016) (Few, J., dissenting).

This Court also has a general “policy favoring judicial economy,” see *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019), wherein it seeks to maximize the value of its limited time and resources. Courts also appreciate the need to, where possible, guard against unnecessary expenses for parties, see *Jes Operations v. Bedson*, 2020 S.C. C.P. LEXIS 5230, *2 (Richland Cty. Cir. Ct. May 20, 2020), especially those funded by taxpayers, see *State v. Henson*, 407 S.C. 154, 167, 754 S.E.2d 508, 515 (2014).

Here, considerations of timeliness and judicial economy dictate the Superintendent’s position on the Petition. The General Assembly is actively considering

legislative options that would modify the ESTF act as it currently stands in statute. A case becomes moot when the legislature substantially amends the law during judicial consideration of the case. *State ex rel. Carter v. State*, 325 S.C. 204, 208, 481 S.E.2d 429, 431 (1997). It would be a waste of judicial and party resources (including taxpayer resources) to grant the Petition and start briefing, only for the case to be moot in a few months when the statute is substantially altered.

The rewritten statute could create a second mootness problem as well: it could obviate the Petitioners' injury. The General Assembly could amend or add to the ESTF law in such a way that the Petitioners could use the program or another program to continue their enrollment in their independent or faith-based schools—indeed, this is the legislature's goal, according to the news reports. In such an instance, the case would no longer present a “justiciable controversy” because the complained-of injury would be resolved. *See Doe v. State*, 421 S.C. 490, 510, 808 S.E.2d 807, 817 (2017) (Few, J., dissenting) (on a case heard in the original jurisdiction: “Our courts will not address the merits of any case unless it presents a justiciable controversy.”).

Thus, to avoid wasting limited legal resources on a case that becomes moot in the midst of its consideration, this Court should decline to exercise its original jurisdiction at this time, given the high likelihood of amendment or addition to the ESTF program in the coming months.

2. This Court's respect for a coequal branch of government—the General Assembly—counsels restraint while the legislature crafts a new statute.

This Court has many times expressed the sentiment that “[d]eterminations of public policy are chiefly within the province of the legislature, whose authority on

these matters we must respect.” *ArrowPointe Fed. Credit Union v. Bailey*, 438 S.C. 573, 580, 884 S.E.2d 506, 509 (2023) (cleaned up). The General Assembly is currently in the midst of making a determination of public policy on this very question.

“Sometimes government works.” *Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023). “The Constitution anticipates, though it does not require, constructive exchanges between [the General Assembly] and the [state] courts.” *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) for the proposition “that ‘interdependence’ and ‘reciprocity’ should characterize the relationship between the branches as much as ‘separateness’ and ‘autonomy’”). Sometimes, “a productive dialogue” between the branches occurs, and a rewritten law “ameliorate[s] the concerns underlying the [constitutional] challenge.” *Id.* In *Oklahoma*, the U.S. Court of Appeals for the Fifth Circuit had struck down a statute on constitutional grounds, and Congress promptly amended the law. The Sixth Circuit then upheld the amended statute as having “fixed” the issue.

Similarly, the General Assembly is about to make “a sincere attempt to comply” with this Court’s ruling in *Eidson*. See *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 488, 892 S.E.2d 121, 134 (2023) (Few, J., concurring). The “separation of powers provision demands *mutual* respect.” *Id.* at 487, 892 S.E.2d at 133. In this instance, that respect dictates giving the General Assembly the opportunity to make its sincere attempt to comply, and then holding that rewritten law or new program up to the constitutional standard. Accepting this Petition could precipitously interrupt the General Assembly’s sincere attempts to comply with *Eidson* by

throwing a wrench in the legislative process. The mutual respect of the branches suggests that this Court should let the General Assembly make its policy decisions, then consider any constitutional challenge that comes, rather than taking up the constitutional question too hastily. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024) (“[C]ourts decide some contested legal questions later rather than sooner, thereby allowing issues to percolate and potentially be resolved by the political branches in the democratic process.”).

3. The principle of constitutional avoidance dictates that this Court should defer deciding the federal constitutional question when the General Assembly is working to pass a law that complies with the state constitution.

For well over a century, “the rule [has been] well settled that such a construction of an act should be adopted as would avoid any conflict with the Constitution, rather than a construction which would bring about a conflict with the Constitution.” *Segars v. Parrott*, 54 S.C. 1, 26, 31 S.E. 677, 682 (1898). *See Edwards v. State*, 383 S.C. 82, 91–92, 678 S.E.2 412, 417 (2009) (“Where a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court’s duty is to adopt the latter.”). The rule is still true today—we call it “the canon of constitutional avoidance.” *Bailey*, 430 S.C. at 278 n.5, 844 S.E.2d at 395 n.5. *See* A. Scalia & B. Gardner, *Reading Law: The Interpretation of Legal Texts* 247–48 (2012).

“This Court has a firm policy to decline to rule on constitutional issues unless such a ruling is required.” *State v. Jones*, 442 S.C. 678, 682, 901 S.E.2d 284, 286 (2024). The U.S. Supreme Court has a similar policy “to pass on questions of

constitutionality unless such adjudication is unavoidable.” *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017) (cleaned up). See also *Tory v. Cochran*, 544 U.S. 734, 740 (2005) (Thomas, J., dissenting) (“As a prudential matter, the better course is to avoid passing unnecessarily on the constitutional question”). This policy reflects an appropriate commitment to judicial restraint, not to make “unnecessary pronouncement on constitutional issues . . . [or] premature interpretations of statutes[.]” *Jones*, 442 S.C. at 682–83, 901 S.E.2d at 287 (citation and quotation marks omitted).

The canon teaches that where a court can adopt a path that does not require striking down a law on constitutional grounds, prudence and judicial restraint recommend, even require, taking that path. If a statute can be construed in such a way that it avoids creating a constitutional problem, and such a construction is otherwise reasonable, then a court should so construe it. “[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). In like fashion, a state constitutional provision should be construed so as to avoid creating a federal constitutional problem. *Society of Separationists v. Whitehead*, 870 P.2d 916, 934 n.40 (Utah 1993) (“Just as we endeavor to interpret statutes so as to uphold them as not in conflict with our state constitution, we also construe our constitution so as to uphold it under the federal constitution when reasonably possible.”); *US West Communs., Inc. v. Ariz. Corp. Comm’n*, 34 P.3d 351, 355 (Ariz. 2001) (“Whenever possible, however, we construe the Arizona Constitution to avoid conflict with the United States Constitution”).

Here, the canon of constitutional avoidance counsels against unnecessarily taking up a question of major (indeed, potentially national) importance. “Our task as judges is not to go abroad in search of dragons to slay.” *United States v. Robinson*, 119 F.3d 1205, 1217 (5th Cir. 1997). This Court should not proactively create a conflict between the state and federal constitutions when it could be avoided.

That canon is doubly wise in this instance, as the Petitioners seek a major ruling in a fraught and dynamic area of constitutional law. Lower state and federal courts are split on how to interpret the parental rights precedents.⁹ This Court should not needlessly make a sweeping ruling, striking down part of the state constitution, based on an evolving area of federal law where the doctrine relied upon may soon shift.

CONCLUSION

The Superintendent takes a backseat to no one in her enthusiasm for educational freedom and choice or her firm support for parents’ rights. That is why she has championed education choice laws for over a decade and why she is actively engaged in discussions around a new ESTF bill that respects the principles set forth in *Eidson*. It is because of her belief in the power of educational freedom and her confident expectation of a compliant bill early in the next legislative session that she makes the foregoing arguments.

This Petition, at this time, is not appropriate for review in the original jurisdiction. The wiser course is to let the General Assembly make its sincere attempt

⁹ Compare, e.g., *T.F. v. Kettle Moraine Sch. Dist.*, No. 21-CV-1650 (Waukesha Cnty., Wis. Cir. Ct., Oct. 3, 2022) with *Doe v. Del. Valley Reg’l High Sch. Bd. of Educ.*, No. 3:24-cv-107, 2024 WL 706797, at *6–*12 (D. N.J. Feb. 21, 2024).

at crafting a constitutionally compliant program that addresses the scope of the program to include students like Petitioners. If future litigation reveals that the General Assembly fails in that task, then this Court could consider the broader constitutional issues raised by the Petitioners. But at this time, principles of judicial economy, inter-branch comity, and constitutional avoidance counsel against granting the Petition.

The Court should either deny the Petition without prejudice or hold the Petition in abeyance until the General Assembly has finished its work revising the ESTF.

Respectfully submitted,

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