

THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

No. 2024002062

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.

PETITIONERS’ REPLY TO RESPONDENT’S RETURN

As “a firm support[er] for parents’ rights,” Respondent does not dispute that the Department of Education, which she heads, unconstitutionally penalizes Petitioners’ right to enroll their children in private schools by allowing families to use their Education Scholarship Trust Fund (“ESTF”) accounts for a virtually unlimited array of educational expenses, save one: private school tuition and fees. Resp’t’s Return to Pet. for Original Jurisdiction (hereinafter “Return”) at 11. Nor does she question “the importance of educational choice and parental rights” or deny that the Department is currently inflicting injuries on Petitioners that can be “obviate[d].” *Id.* at 2, 7. To the contrary, she recognizes that this Petition presents a “question of major (indeed, potentially national) importance,” *id.* at 11, which would seem to make it one of those cases that warrants a hearing in this Court’s original jurisdiction. *See Anderson v. S.C. Election Comm’n*, 397 S.C. 551, 556, 725 S.E.2d 704, 706 (2012) (hearing case in this Court’s original jurisdiction because it presents “a matter of great public importance”).

Yet, after describing herself as “an unapologetic and committed supporter of educational choice,” Return at 1—a point that is neither disputed nor relevant to the merits of the Petition—Respondent proffers three reasons why original jurisdiction is supposedly unwarranted: the possibility that a future law may render this case moot, the prospect that the judiciary and legislature’s “mutual respect” will be impaired if this Court hears a legal challenge while the General Assembly drafts legislation, and the doctrine of constitutional avoidance. Each is unavailing.

First, a case is mooted when a controversy between two parties ceases to exist—not when there is the mere *possibility* that the controversy will disappear because of what the General Assembly may do. And, here, the prospect of mootness is not even a possibility—it is a nullity.

Second, the judiciary and legislature’s “mutual respect” can hardly be threatened by this Court’s consideration of a legal challenge, particularly when the General Assembly will benefit from the resolution of that challenge by learning whether the Department’s policy and practice violate the federal Constitution. Return at 2. In fact, that is precisely the type of question that merits this Court’s exercise of original jurisdiction. *See City of Abbeville v. Aiken Elec. Coop., Inc.*, 338 S.E.2d 831, 836, 287 S.C. 361, 370 (1985) (“We accepted this declaratory judgment action in the Court’s original jurisdiction because of its manifest and patent public importance”). Moreover, exercising original jurisdiction here would respect—not disrespect—legislative authority. The General Assembly, after all, *included* private school tuition and fees as a permissible educational expense under the ESTF Program, and a ruling in favor of Petitioners would honor and restore the General Assembly’s will in that regard. And even if the Court were to accept jurisdiction and rule *against* Petitioners, the General Assembly would still benefit, as it

would receive greater clarity regarding the permissible constitutional bounds of any educational choice legislation it is presently considering or will in the future consider.

Third, the constitutional avoidance doctrine applies when a constitutional conflict is looming on the horizon and the court can resolve the case on narrow, alternative grounds—not, as here, when the conflict has already arrived and is currently inflicting damage on Petitioners and their children. It is not a reason for *refusing to hear* a case, especially when, as here, there is an ongoing, constitutional injury—one that the Respondent *acknowledges* the need to “obviate.” Return at 7.

Respondent states that she “takes a backseat to no one in her enthusiasm for educational freedom.” *Id.* at 11. But Respondent’s “enthusiasm for educational freedom,” along with the other justifications proffered in her Return, is no reason for this Court to deny Petitioners a remedy when their constitutional rights are being violated by the Department’s policy. This Court should reject Respondent’s arguments and entertain this case in the Court’s original jurisdiction. Petitioners explain more below.

ARGUMENT

1. This case is not moot and will not become moot.

Respondent starts by conceding that while this case is not moot now, this Court should nonetheless invoke the mootness doctrine because it may later become moot due to the General Assembly’s legislative efforts. This Court should reject that offer for two reasons. First, this Court has already recognized that the prospect of legislative action is no reason to refrain from granting review. Second, none of the proposed legislation would moot this case.

As noted above, Respondent’s opening argument for denying the Petition—that the Court should “giv[e] the General Assembly the opportunity to” remedy the Department’s policy, and

that, with such legislative action, the matter will “become[] moot,” Return at 6-8—has already been rejected by this Court. Indeed, it is the *exact* argument that this Court heard in *South Carolina Coin Operators Ass’n v. Beasley*, 320 S.C. 183, 464 S.E.2d 103 (1995). There, as here, an executive officer argued that an original jurisdiction action was “not ripe for judicial review,” that “the General Assembly should be given the opportunity to” remedy the challenged executive conduct, and that, with such legislative action, the “matter would be moot.” *Id.* at 185. This Court flatly rejected the argument, holding squarely that the case “presents a justiciable controversy which is ripe for judicial determination.” *Id.* The same is true here.

The simple truth is there are no grounds for this Court to refrain from reviewing a case because of concerns over “future mootness” or “hypothetical mootness,” as Respondent suggests. *See Conservation L. Found. v. Pritzker*, 37 F. Supp. 3d 254, 265 (D.D.C. 2014) (“[A]s the Supreme Court has held, as long as a regulation or statute ‘remain[s] in effect,’ then ‘the case has not become moot, whatever the ultimate disposition of’ pending reforms.” (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 53 n.15 (1980))); *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 633 n.6, 767 S.E.2d 157, 164 n.6 (2014) (explaining that “the constant evolution of a particular area of law cannot serve as an indicator as to whether a controversy is justiciable”). A case is either moot or it is not, and it is only moot if there is no longer an “actual controversy,” such that a “judgment rendered by the court will have no practical legal effect upon an existing controversy.” *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006). This case, as even Respondent concedes, is not moot. *See* Return at 7.

Respondent is also wrong to invoke what may happen “in a few months” for another reason. Return at 6-7, 11. While some legislators are interested in amending the ESTF Program, their proposed efforts, including finding an alternative source of funding for future scholarships,

*will not moot this case.*¹ That is because Petitioners have unused funds under the *current* program—funds that they are entitled to carry forward even if the General Assembly amends the ESTF program. *See* S.C. Code Ann. § 59-8-125 (“Unused funds must be rolled over to the following school year for a scholarship student who applies and continues to meet eligibility requirements to participate in the program.”). Yet, under *Eidson v. South Carolina Department of Education* and the Respondent’s policy and practice, Petitioners will not be able to use *those* funds for tuition, even if they may wind up getting funds under some new program going forward that they will be able to use for tuition. 444 S.C. 166, 906 S.E.2d 345 (2024) (barring ESTF funds from being used for private school tuition and fees).

The simple fact is there is an “active controversy” before this Court that shows no sign of abating, notwithstanding the intentions of some legislators. Since September, the Department’s policy and practice have disrupted the current school year for Petitioners and threatened to upend future school years as well. Pet’rs’ Pet. 17. Petitioners, who head low-income families, are currently incurring significant financial costs to keep their children in school without the use of scholarships provided by the Department (scholarships that they previously relied on to send their children to their schools). They also face critical deadlines in the next few weeks, including

¹ The proposal that Respondent points to in her Return would fund *future* accounts with lottery funds; it would have no effect on the ESTF funds currently in Petitioners’ accounts. *See* S.C. Code Ann. § 59-8-120(A), available at https://www.scstatehouse.gov/sess126_2025-2026/prever/62_20241211.htm (last visited Jan. 2, 2025). In addition to not remedying Petitioners’ injury, Respondent herself has suggested that the bill would be impermissible under the ruling in *Eidson*. *See* Br. of Resp’ts S.C. Dep’t of Educ. and State Superintendent of Educ. Ellen Weaver at 22-23, *Eidson v. S.C. Dep’t of Educ.*, No. 2023-001673 (Jan. 22, 2024) (suggesting that the plaintiffs’ theory in *Eidson*, “if adopted, would disrupt long-standing and beloved South Carolina scholarships,” including “the South Carolina Lottery Tuition Assistance Program,” and that “[t]he Court cannot accept Plaintiffs’ theory and proposed standard without placing all of these scholarships and programs on the chopping block”).

reapplying for the scholarships and reenrolling their children in school (and facing financial penalties totaling thousands of dollars if they later disenroll them). *Id.*

That is Petitioners' reality now and for the foreseeable future. They are suffering ongoing injuries from the Department's policy and practice—a reality that Respondent not only acknowledges but believes must be “obviate[d].” Return at 3, 7. Consequently, while Petitioners welcome legislative efforts to restore their ability to use the scholarships, their claims are hardly mooted by some legislators' good intentions (particularly since there is no guarantee that the General Assembly will enact anything or that what it does enact will benefit Petitioners). The truth is Petitioners are suffering “a continuing injury caused by the [law]” and when that happens, a “challenge is not moot.” *McDoogal's E., Inc. v. Cnty. Com'rs*, 341 F. App'x 918, 922, n. 3 (4th Cir. 2009); *see also U.S. Dep't of Treasury, Bureau of ATF v. Galioto*, 477 U.S. 556 (1986) (holding that a case became moot only *after* Congress amended the relevant statute).

In short, this Court should disregard Respondent's mootness concerns. It has already rejected the argument that the prospect of future legislative action is no reason not to exercise its original jurisdiction and it should do so again. This case is not moot now and nothing the General Assembly will do to “restore” the ESTF Program will make it moot. *Id.* at 3.

2. The General Assembly's attempt to craft legislation that complies with the state constitution is not threatened by this Court's resolution of a federal constitutional question.

Respondent next argues that the General Assembly's ability to enact legislation that complies with the state constitution is somehow threatened by this Court's consideration of a federal constitutional issue. Return at 8-9 (“Accepting this Petition could precipitously interrupt the General Assembly's sincere attempts to comply with *Eidson* by throwing a wrench in the legislative process.”). Respondent provides no relevant authority for this remarkable proposition. Nor could she. After all, if all it took to stop a lawsuit in its tracks were the legislature's

consideration of a related issue, interested parties would bombard the courts with requests not to review laws in the name of not interrupting the legislature’s delicate work. Because a court need not steer clear of constitutional issues that may also implicate a legislature’s policymaking considerations, Respondent’s argument is unavailing. *See Baker v. Allen*, 220 S.C. 141, 153, 66 S.E.2d 618, 623 (1951) (“[O]rdinarily the courts will not pass upon a constitutional question”).

Respondent then seizes on Justice Few’s observation that the “separation of powers provision demands *mutual* respect” to argue that one way the judiciary can demonstrate its respect for the legislature is by declining to weigh in on an issue of great constitutional import. Return at 8 (citing *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 488, 892 S.E.2d 121, 134 (2023) (Few, J., concurring) (emphasis in original)). But that is not what Justice Few was suggesting. He did not argue that comity requires the “Court to allow th[e] process” of legislative amendment to, as Respondent would put it, “play out” in the face of an ongoing constitutional injury. Return at 2. He simply observed that each branch of government shows respect for the other by doing its duties, as when a court upholds legislation when it “conforms to the constitution” and invalidates “legislation when it clearly violates the constitution.” *Planned Parenthood S. Atl.*, 440 S.C. at 488. In no way was Justice Few suggesting that the judiciary shows its respect for the legislature, as well as for its own “solemn duties,” by turning a blind eye to a constitutional injury. *Id.* at 487. Nor would that make any sense. A court does not decline to carry out its duties, including its duty to protect constitutional rights, because a party “expect[s]” the legislature to make remedying a constitutional injury a “priority.” Return at 4, 11; *see Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“[E]very right, when withheld, must have a remedy The province of the court is, solely, to decide on the rights of individuals”); *McDonald v. City of Chicago*, 561 U.S. 742, 794 (2010) (Scalia, J., concurring) (“[I]t would be

‘judicial abdication’ for a judge to ‘tur[n] his back’ on *his* task of determining what the Fourteenth Amendment covers”); *Joseph v. S.C. Dep’t of Lab., Licensing & Regul.*, 417 S.C. 436, 465-66, 790 S.E.2d 763, 778 (2016) (Kittredge, J., concurring) (stressing that the principle of “three branches of government . . . , each operating in a distinct sphere within which its authority [i]s inviolable,” is “central to the constitutional framework of our republic”).

What’s more, granting the petition here would respect—not disrespect—the General Assembly. That is because Petitioners are challenging a policy that the Department of Education adopted—one that *contravenes* the policy choice that the General Assembly made in enacting the ESTF Program. If anything, it is *granting* the petition, not denying it, that is necessary to respect the General Assembly’s policy-making authority. Thus, far from “interrupt[ing]” the General Assembly’s policymaking, Return at 8, Petitioners’ claims—if successful—would provide the General Assembly even *greater* policy-making authority, allowing it to use public funds for a broader array of educational purposes.

In short, the best path for this Court to take is to grant the Petition and address the federal constitutional question it presents now. *See State v. Plumer*, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023) (“[I]t is inefficient and a waste of judicial resources to delay the inevitable”). This Court has already held that the public funds used to finance ESTF scholarships cannot be used by parents for their children’s private school education. *Eidson*, 444 S.C. at 180. The Department, in turn, has adopted a policy and practice implementing that decision. The only remaining question is whether applying Article XI, Section 4, of the South Carolina Constitution as an absolute bar to financial aid for private school expenses is consistent with the federal Constitution. It is not, and this Court’s saying so would not interfere with the policy-making authority of the General Assembly. It would honor that authority.

3. Constitutional avoidance does not apply when the constitutional question is already before this Court.

Respondent concludes by invoking the doctrine of constitutional avoidance to argue that this Court “should not proactively create a conflict between the state and federal constitutions when it could be avoided.” Return at 11. This argument suffers from several deficiencies.

To start, constitutional avoidance is a doctrine that courts use to resolve a case on non-constitutional grounds when constitutional grounds can be avoided. *See Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 387, 563 S.E.2d 651, 656 (2002) (“It is this Court’s firm policy to decline to rule on constitutional issues unless such a ruling is required.”); *Garrison v. Target Corp.*, 435 S.C. 566, 588 n.3, 869 S.E.2d 797, 809 n.3 (2022) (choosing to avoid a constitutional issue because it was “unnecessary” to resolve the case); *Hyman v. City of Gastonia*, 466 F.3d 284, 290 (4th Cir. 2006) (explaining that when an otherwise acceptable construction of a statute would raise a constitutional problem, a court will construe the statute to avoid the problem). The doctrine is not a pretext that courts invoke to decline to take a case where a party is suffering an ongoing constitutional injury—particularly one that Respondent herself acknowledges the need to address. Return at 3, 7. To the extent that the doctrine can be properly applied here, it would be to revisit *Eidson* itself to determine whether its holding can be reconciled with the federal Constitution. If this Court determines that *Eidson* cannot be so reconciled, then overruling *Eidson* to avoid the federal constitutional conflict could be a proper application of the constitutional avoidance doctrine.²

² For example, this Court could revisit its interpretation in *Eidson* and hold that, to avoid a federal constitutional conflict, providing a scholarship to a child is not providing a “direct benefit [to] any religious or other private educational institution.” S.C. Const. art. XI, § 4. That would avoid the need for this Court to, as Respondent puts it, “needlessly make a sweeping ruling, striking down part of the state constitution.” Return at 11.

But if this Court does not want to revisit *Eidson*, then it should recognize that it is not Petitioners who seek to “create” a conflict between the constitutions of South Carolina and the United States. As noted in the Petition, that conflict is not on the horizon—it is here. Pet’rs’ Pet. 1-4. When this Court in *Eidson* held that the South Carolina Constitution allowed parents to use the ESTF Program for every educational expense except one that they had a constitutional right to provide their children, and then the Department adopted a policy and practice to implement that ruling, a problem arose under the federal Constitution (a problem that Petitioners’ counsel, in representing an amicus in the case, warned against). Petitioners accept this Court’s judgment that the South Carolina Constitution commands this result; they simply argue that this outcome creates a problem under the United States Constitution. *See* Pet’rs’ Pet. 2 (“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.’”). Petitioners are therefore not asking this Court to “create” a conflict between the state and federal constitutions—they are asking this Court to resolve a conflict that already exists.

Accordingly, because that conflict has not only arrived, but is actively injuring Petitioners, Respondent is wrong that the constitutional avoidance doctrine applies. Return at 11. The canon of constitutional avoidance “comes into play *only* when, after the application of ordinary textual analysis, the statute or [state constitutional provision] is found to be susceptible of more than one construction.” *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) (emphasis

added).³ Then, if the court determines that “an otherwise acceptable construction of [the state constitutional provision] would raise serious constitutional problems, [it] will construe the [provision] to avoid such problems unless such construction is plainly contrary to the intent of [the drafters].” *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001). *See also Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (explaining that, “if possible,” statutes will “be construed so as to render them valid” (emphasis added)).

That is plainly not the case here. While there may have been ambiguity about the reach of Article XI, Section 4 of the Constitution with respect to the ESTF Program prior to *Eidson*, there is none today. This Court in *Eidson* was clear: the South Carolina Constitution bars parents “who choose[]” a private school education from using the ESTF’s public funds to pay for it. 444 S.C. at 186. This Court’s ruling thus neutralizes any arguments for invoking constitutional avoidance as “the canon . . . has no application in the absence of statutory ambiguity.” *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2001). *See also Kirven v. Cent. States Health & Life Co., of Omaha*, 409 S.C. 30, 39, 760 S.E.2d 794, 799 (2014) (explaining that one of the “judicial default rules” that this Court invokes, where appropriate, is constitutional avoidance). Indeed, this is a point that even Respondent implicitly concedes since she cannot

³ Constitutional avoidance principles apply to interpretation of both statutes and state constitutional provisions. *See, e.g., Pine Martin Min. Co. v. Empire Zinc Co.*, 90 Colo. 529, 537, 11 P.2d 221, 224 (1932) (“Where practicable, state Constitutions and statutes should be so construed as to avoid conflict with the federal Constitution.”); *Comm. to Recall Robert Menendez v. Wells*, 204 N.J. 79, 103–05, 7 A.3d 720, 734–35 (2010) (“[A] state may not legislate in an area in which it is preempted by the Federal Constitution or federal law. . . . That same prohibition applies even when the challenged law . . . is authorized under a state constitutional provision. . . . Bound as we are to adhere to the supreme law of the land, we cannot permit a provision of the State Constitution to remain in force if it conflicts with the Federal Constitution.” (citations omitted)).

identify how this Court is supposed to construe the Department's policy and practice to avoid "a conflict with the Constitution." Return at 9. The simple fact is that this Court's ruling in *Eidson* makes any alternative construction impossible.

Respondent concludes by appealing to this Court's doctrine of judicial restraint to discourage it from grappling with the weighty constitutional issues posed by the Petition. *Id.* But "[i]t is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010); *see also id.* at 375 (Roberts, C.J., concurring) ("There is a difference between judicial restraint and judicial abdication. When constitutional questions are 'indispensably necessary' to resolving the case at hand, 'the court must meet and decide them.'"). Judicial restraint has no role where there is no credible argument for constitutional avoidance and where people are suffering real constitutional injuries. *Id.* at 329 (arguing it is not judicial restraint to resolve a case on narrow grounds if it results in "chilling" the exercise of a constitutional right). Simply put, this Court should reject Respondent's invitation for this Court to practice judicial abdication in the name of judicial restraint. The federal question is here, it is not going away, and the sooner this Court addresses it, the better it will be for all concerned.

CONCLUSION

For all the reasons stated above, this Court should reject Respondent's argument and grant the Petition.

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Respectfully submitted,

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