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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN ITS ORIGINAL JURISDICTION
Appellate Case No. 2024-002062

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

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PROPOSED INTERVENOR-RESPONDENTS' RETURN TO PETITION FOR ORIGINAL JURISDICTION

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INTRODUCTION

In early 2023 the South Carolina General Assembly passed SB 39, creating the Education Scholarship Trust Fund program ("ESTF Program"). 2023 S.C. Acts 8 (SB 39). The ESTF Program is funded through public monies from the State Treasury that are transferred into an Education Scholarship Trust Fund ("ESTF") controlled by the Department of Education, and then subsequently distributed to individual "trust funds" in the name of each participating student. The Program allows participating students to use ESTF funds for a variety of education expenses, and in the original legislation those expenses included private school tuition. S.C. Code Ann. § 59-8-110, *et seq*.

A coalition of public school parents and organizations, including Proposed Intervenor-Respondents, filed a Petition for Original Jurisdiction with this Court asking for declaratory and injunctive relief against the ESTF Program on four grounds. These included a claim under Article XI, Section 4 of the South Carolina Constitution, which prohibits using public funds "for the direct benefit of any religious or other private educational institution." Complaint, *Eidson v. S.C. Dep't of Educ*., No. 2023-001673 (filed Oct. 26, 2023). In its decision of September 11, 2024, a majority of this Court agreed that the portion of the ESTF Program allowing for use of public funds to cover private school tuition violated Article XI, Section 4. *Eidson v. S.C. Dep't of Educ*., 444 S.C. 166, 173, 906 S.E.2d 345, 348 (2024).

The ESTF Program was South Carolina's second recent attempt to use public funds to pay private school tuition. In 2020 Governor McMaster created the SAFE Grants Program, which would have sent $32,000,000 in federal grant funds from the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to provide private school students with one-time grants of up to $6,500 to be paid towards tuition. In *Adams v. McMaster* this Court unanimously held that the SAFE Grants Program "constitute[d] the use of public funds for the direct benefit of private

educational institutions within the meaning of, and prohibited by, Article XI, Section 4 of the South Carolina Constitution." 432 S.C. 225, 231, 851 S.E.2d 703, 706 (2020).

Following *Adams*, pro-voucher groups filed suit in federal court attacking Article XI, Section 4, under the Fourteenth Amendment to the Federal Constitution, arguing that its enactment was driven by anti-Black and anti-Catholic sentiment. A federal district court found these claims meritless. *Bishop of Charleston v. Adams*, 584 F. Supp. 3d 131, 136 (D.S.C. 2022).[1]

In all three of the cases just cited, numerous parties filed *amicus* briefs, and at least one of the briefs in *Eidson*—authored by counsel for Petitioners in the instant case—raised federal issues substantially similar to those raised in the Petition here. *See* Amicus Curiae Brief of the Partnership for Educational Choice in Support of Respondents, *Eidson v. S.C. Dep't of Educ*., 444 S.C. 166, 906 S.E.2d 345 (2024) (No. 2023-001673). This Court also entertained rehearing petitions in both *Adams* and *Eidson*.

Petitioners now seek yet another bite at the proverbial apple, arguing that public funding of private school tuition is *compelled* by various provisions in the Federal Constitution, and asking this Court to exercise its extraordinary power of original jurisdiction to adjudicate those claims. This Court should reject that invitation.

LEGAL STANDARD

A request for the exercise of original jurisdiction is sparingly granted. Under Rule 245, SCACR, this Court will exercise its original jurisdiction "[o]nly when there is an extraordinary reason such as a question of significant public interest or an emergency." *Key v. Currie,* 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991). This Court has also made clear that it will not entertain

[1] The Fourth Circuit subsequently held the claims moot, because by the time the case reached that court the CARES funds had been otherwise allocated and were no longer available. *Bishop of Charleston v. Adams*, No. 22-1175, 2023 WL 4363654 (4th Cir. July 6, 2023).

cases in its original jurisdiction when they are "cognizable in the circuit courts." *Mod. Fin. Co. v. Hicks*, 235 S.C. 212, 215, 110 S.E.2d 859, 860–61 (1959). *See also* Rule 245(a), SCACR ("The Supreme Court will not entertain 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.").

ARGUMENT

I. There is No Extraordinary Reason to Grant the Petition

The history of this case, the Respondent Superintendent's return to the petition, and Petitioners' own affidavits demonstrate there is no emergency this Court need address, nor would granting the Petition serve the public interest. On the contrary, the public interest and judicial economy weigh against granting the petition.

First, Petitioners' filings suggest there are factual issues concerning whether they have suffered, or will ever suffer, any financial loss as a result of the *Eidson* decision. Both of the parent-petitioners admit that they have yet to suffer any financial injury—and may not for quite some time—because they expect to receive help from private donors through the end of this academic year. *See, e.g.*, Albertson Aff. ¶ 13 ("Despite this change in circumstance. . . I hope and expect to be able to rely on my family's resources, as well as help from private donors, to make tuition payments for the remainder of the academic year. . . ."); Shulikov Aff. ¶ 13 (same). As these affidavits indicate, private donors may have already pledged enough funds to cover tuition for all of the families impacted by the *Eidson* decision for the remainder of this school year.[2] At a

[2] Seanna Adcox, *New SC school choice plan increases income eligibility and tuition aid*, SOUTH CAROLINA DAILY GAZETTE (Dec. 10, 2024), https://scdailygazette.com/2024/12/10/new-sc-school-choice-plan-increases-income-eligibility-and-tuition-aid/. This article describes how private donations have already covered tuition for those students through the third of four payment

minimum, these statements call into serious question Petitioners' claims that their families are in the midst of a financial crisis that must be resolved by this Court immediately. Such issues are best resolved in the circuit courts. *State v. Gibbes*, 108 S.C. 136, 93 S.E. 449, 449 (1917) (noting that the Court has declined to hear cases in its original jurisdiction where issues of fact must be resolved).

Additionally, for the 2025-26 school year and beyond, any harm to Petitioners is speculative, because the ESTF Program is available only to students whose families' household income falls below the statutory cap, S.C. Code Ann. § 59-8-110(4)(c), and we cannot know from Petitioners' submissions whether they might exceed the cap next year and become ineligible for the Program entirely. That the State's policy may someday cause Petitioners to "decide to modify" where they send their children to school "does not transform" the policy into a violation of their constitutional rights. *Bowen v. Gilliard*, 483 U.S. 587, 601–02 (1987).

Second, unlike in *Adams* and *Eidson*, there is no imminent expenditure of public funds at issue. *See Adams*, 432 S.C. at 234, 851 S.E.2d at 707; *Eidson*, 444 S.C. at 177, 906 S.E.2d at 350–51. The public has an interest in stemming the unconstitutional expenditure of public funds, because there is often no practical way to recoup those monies once they leave the state treasury. *See, e.g.*, *Sloan v. Dep't of Transp.*, 365 S.C. 299, 302, 304–05, 618 S.E.2d 876, 877–79 (2005) (noting future guidance is needed when the legality of the expenditure of public funds is at issue); *Davenport v. City of Rock Hill*, 315 S.C. 114, 118, 432 S.E.2d 451, 454 (1993) (exercising original jurisdiction in order to weigh in on an imminent expenditure of public funds). But here

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quarters for the year. And the Palmetto Promise Institute continues to raise funds. *Ravenel B. Curry III Donates $500,000 to Palmetto Promise Institute's ESTF Families Rescue Fund*, PALMETTO PROMISE (Nov. 12, 2024), https://palmettopromise.org/release-ravenel-b-curry-iii-donates-500000-to-palmetto-promise-institutes-estf-families-rescue-fund/. Indeed, they could even exceed the ESTF Program subsidy given that private donations are not capped by statute.

Petitioners are not contending that the current expenditures under the portions of the ESTF Program which remain after *Eidson* are unconstitutional. Rather, they seek to compel by way of a petition to this Court a reinterpretation of the state constitution on unprecedented federal constitutional grounds to require the expenditure of public funds to benefit private schools and thereby alter the fundamental constitutional law of this state. The "harm" Petitioners assert due to the lack of state subsidized private education is not new and does not warrant the exercise of this Court's original jurisdiction. *Hicks*, 235 S.C. at 215–16, 110 S.E.2d at 861 (finding that where the conduct complained of in the case had existed "for at least three years," the petitioner should "in the first instance seek before the circuit court such relief as it may consider itself entitled to…").

Third, it does not serve the public interest for the Court to repeatedly reconsider issues that it has just decided. The constitutionality of the ESTF Program was thoroughly litigated in *Eidson*, and this Court was well aware of the federal constitutional provisions that Petitioners contend are violated by this Court's decision. Similar issues were at stake in *Adams v. McMaster*. Petitioners could have sought to intervene directly in either case to litigate the issues they now raise. Moreover, Petitioners' counsel did raise substantially similar arguments in their *amicus* brief in *Eidson*. *See* Amicus Curiae Brief of the Partnership for Educational Choice in Support of Respondents, *Eidson v. S.C. Dep't of Educ*., 444 S.C. 166, 906 S.E.2d 345 (2024) (No. 2023-001673).[3] Accordingly, no extraordinary circumstances justify reopening *Eidson* to resurrect issues previously presented to the Court. The public has an interest in stable, reliable precedent. *Powers v. Powers*, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (1962) ("It is manifestly in the public

[3] Indeed, two members of this Court acknowledged that *amicus* brief in their opinion and found it unpersuasive. *Eidson*, 444 S.C. at 214, 906 S.E.2d at 370 (Kittredge, C.J., dissenting) ("The remaining arguments raised by the amici are manifestly without merit."). Petitioners' failure to litigate these claims directly at some earlier juncture further undercuts their assertion that this case presents an emergency.

interest that the law remain permanently settled."). Only where statutory changes justify reconsideration is revisiting an issue recently decided warranted. *Cf. Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 478, 892 S.E.2d 121, 128 (2023). Exercising jurisdiction to entertain novel federal claims just months after this Court issued its decision in *Eidson* not only jeopardizes the principle of *stare decisis*, but erodes public confidence in the finality and predictability of Court decisions.

Finally, even if this Court were to act on the pending petition with extraordinary speed, its proceedings will run smack into this legislative session. As the Superintendent notes in her return, members of the Legislature are already at work considering the options for enacting a new voucher program which might comply with this Court's prior decisions in *Adams* and *Eidson. See Superintendent's Return*, pp. 1-4, 6-7. The public interest and judicial economy would be best served by allowing that legislative process to play out, rather than taking up a case that could be moot within a matter of weeks.

II. This Court Should Decline to Exercise Original Jurisdiction to Entertain Federal Issues That Would Extend Federal Constitutional Protections Far Beyond the Line Drawn by the U.S. Supreme Court

The nature of this case provides an additional reason for this Court to decline to exercise jurisdiction. As even the Superintendent recognizes, Petitioners' federal claims reflect an "aggressive" reading of precedent that asks the Court to wade into an evolving area of federal law in order "to create a conflict between state and federal constitutional" law. *Id.* at 5, 11. Such an invitation is not one that this Court should accept, particularly through the extraordinary exercise of its original jurisdiction. In fact, the legal landscape is far less favorable than even the

Superintendent admits.[4] The reality is that the relief sought by Petitioners is squarely foreclosed by existing U.S. Supreme Court decisions.

A. Petitioners Have No Liberty Interest in a State-Funded Private Education Under the Fourteenth Amendment Due Process Clause

The Petitioners rest their primary claim on case law recognizing that the Due Process Clause of the Fourteenth Amendment protects the liberty right to control the education of one's children. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). But this right only extends to the choice to send one's child to private school, subject to "the power of the [s]tate reasonably to regulate all schools." *Id*. As with other liberty rights, the Due Process Clause only "provides heightened protection against *government interference*" with specific "fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (holding that citizens do not have a protected liberty interest in assisted suicide) (emphasis added). It most certainly does not require the government to affirmatively promote the exercise of those rights, let alone fund them.

Unsurprisingly, no court has ever found a substantive due process right supporting that which Petitioners claim: a *state funded* private education. On the contrary, case law makes it abundantly clear that while the Federal Constitution does not impede states from providing school vouchers, *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002), states "need not subsidize private education." *Carson v. Makin*, 596 U.S. 767, 785 (2022) (quoting *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 487 (2020)). Similarly, although the Supreme Court has recognized that "the 'liberty' specially protected by the Due Process Clause includes" the right to marry, have

[4] The Superintendent's refusal to fully apprise the Court of the federal constitutional landscape, as well as her unusual suggestion that the Court hold a petition raising these unprecedented federal constitutional claims in abeyance rather than dismiss it outright, demonstrate precisely why the Superintendent is not an adequate representative of Proposed Intervenors' interests in this matter.

children, and use contraception, *Glucksberg*, 521 U.S. at 720, there are no decisions entitling citizens to state-funded weddings, fertility treatments, or birth control pills.

The U.S. Supreme Court has explicitly recognized "the limited scope of *Pierce*" when it comes to state-funded private schooling. *Norwood v. Harrison*, 413 U.S. 455, 461 (1973). *See also Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) (citing "numerous cases" illustrating that parents' *Pierce* rights are "limited in scope"). In *Norwood*, public school parents challenged a Mississippi program that loaned textbooks to private schools at the state's expense, on the basis that the state took no steps to ensure that segregation academies could not participate. The State of Mississippi argued that if the Court barred the program it would impede parents' rights under *Pierce* to send their children to private schools. The Court disagreed:

> In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. . . It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

Norwood, 413 U.S. at 462. The U.S. Supreme Court and lower federal courts have routinely embraced this principle in defining the contours of liberty interests recognized under the Due Process Clause. *See, e.g.*, *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983) (recognizing that the "decision not to subsidize the exercise of a fundamental right does not infringe the right"); *Williams v. Berry*, 977 F. Supp. 2d 621, 637 (S.D. Miss. 2013) ("The Supreme Court has recognized that parents have a fundamental liberty interests [sic] 'in the care, custody, and control of their children.' However, the Government has no obligation to subsidize the exercise of that right.") (quoting *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (additional quotation omitted)).

To the extent Petitioners' claim is premised not on the lack of funding itself, but on the State's policy of funding some education services and not others, that too is answered by existing case law. In *Maher v. Roe*, 432 U.S. 464, 476 (1977), the Supreme Court relied on both *Pierce* and *Norwood* to find that the state may fund care related to childbirth without funding abortion—notwithstanding the substantive right to abortion the Court recognized at that time under *Roe v. Wade*. 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org*., 597 U.S. 215 (2022). Using *Pierce* as an example, the Court noted that its decision in that case "casts no shadow over a State's power to favor public education by funding it." *Maher,* 432 U.S. at 477. *See also Carson*, 596 U.S. at 785 (acknowledging that a state need not subsidize private education); *Espinoza*, 591 U.S. at 487 (same); *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 138 n.12 (5th Cir. 2009) (noting private school parents had no due process right to opt into specific public school services they desired once they made the decision to opt out of public schooling).

Thus, Petitioners' Due Process theory is not only unprecedented, it is in fact specifically foreclosed by Supreme Court precedent. This alone should be sufficient justification for denying the petition. However, if more reason is needed, it should be noted that the theory advanced by Petitioners would have anomalous results. The ESTF Program, both prior to and following the *Eidson* decision, does not allow public school parents to access the Program in any fashion until they first give up their choice to send their child to their resident public school. But under Petitioners' theory, they too could claim that the State has interfered with their right to direct the education of their children by burdening their choice of public schooling. What is more, parents who receive only a portion of private school tuition under the program could likewise claim a

burden on their parental due process rights. If the federal Due Process Clause is to be stretched to such ends, which it manifestly should not be, this Court is not the place to begin that journey.

B. South Carolina's Policy of Declining to Provide State-Subsidized Private School Tuition Does Not Violate the Equal Protection Clause

Petitioners' equal protection theory is equally unavailing. Strict scrutiny is inappropriate here, given that it only attaches where a law burdens a suspect class or infringes on fundamental rights. *City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985). Equal education funding, even in the public school context, has not been recognized as a fundamental right under the Federal Constitution. *See San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973). Nor have private schools and the families who use them ever been identified as a suspect class. *Id*. at 28 (explaining that a suspect class is a group of persons that the courts have recognized as having been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); *Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d 671, 675 (7th Cir. 1987) (noting that "private schools have not historically been considered a suspect class").

Although parents unquestionably have a right to choose private school, "[i]t has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause." *Norwood*, 413 U.S. at 462. *See also Regan*, 461 U.S. at 549 (noting that the Court has "held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny").

The principle that the right to choose private education is both constitutionally protected and yet not entitled to public subsidy has been routinely recognized in the lower federal courts as

well. *Gary S. v. Manchester Sch. Dist*., 374 F.3d 15, 19–22 (1st Cir. 2004) (non-funding of private school choice does not violate equal protection); *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.,* 919 F.3d 1003, 1009 (7th Cir. 2019) (school district decision to deny private school students access to free transportation was not a "direct and substantial" burden on parents' *Pierce* rights, and strict scrutiny did not apply).

Moreover, Petitioners' offer of cases to support their position, such as *Romer v. Evans*, 517 U.S. 620 (1996), completely misses the mark. *Romer* found that the state had singled out LGBTQ persons and deprived them of the ability to obtain the same protections against discrimination enjoyed by other citizens, in a manner the Court found was "inexplicable by anything but animus." *Id*. at 632. Article XI, Section 4 does no such thing. It does not impede parents' right to choose private education in any way but merely enunciates that the state will not *fund* that choice—a policy decision by the state that the Supreme Court has explicitly said is permitted. *Carson*, 596 U.S. at 785; *Espinoza*, 591 U.S. at 487. Petitioners accuse the State of "target[ing] and prohibit[ing]" public funding of private education through Article XI, Section 4. But as the majority explained in *Eidson*, the decision not to fund private schools was borne in part by a desire to undo the damage of legalized racial segregation in schools, as well as the legacy of massive resistance and state attempts to fund private segregation academies—not to harm private schools or private school parents. *Eidson*, 444 S.C. at 189–94, 906 S.E.2d at 357–60.

C. Petitioners' Privileges or Immunities Claim is Foreclosed by U.S. Supreme Court Precedent

Petitioners briefly acknowledge that their claim under the Privileges or Immunities Clause is foreclosed by longstanding Supreme Court precedent. Nevertheless, at the same time, they attempt to manufacture "ongoing disagreement" as to the strength of that precedent, based on concurrences that have managed to garner support from, at most, two justices. *See Troxel*, 530

U.S. at 80 (Thomas, J., concurring in judgment); *Timbs v. Indiana*, 586 U.S. 146, 157 (2019) (Gorsuch, J., concurring). None of the majority opinions Petitioners cite actually relied on the Privileges or Immunities Clause as a basis for identifying substantive rights protected by the Constitution. *See Snowden v. Hughes*, 321 U.S. 1, 6–7 (1944) (finding that the Privileges or Immunities Clause was *not* implicated in protecting rights created under state law); *Glucksberg*, 521 U.S. at 759 n.6 (Souter, J., concurring) (noting that the *Slaughter-House Cases* established that the Clause "was no source of any but a specific handful of substantive rights"); *Pierce*, 268 U.S. at 529 (finding a liberty interest under the Due Process Clause of the Fourteenth Amendment, without invoking the Privileges or Immunities Clause at all). Not only does Petitioners' theory ask this Court to adopt a niche view of the Privileges or Immunities Clause as a basis to recognize a parental right to choose private education, it would require the Court to go one step further and hold that a right to *state-funded* private education can also be found in the Privileges or Immunities Clause. *See, e.g.*, *State v. Slocumb*, 426 S.C. 297, 306, 827 S.E.2d 148, 153 (2019) ("[A] long line of Supreme Court precedent prohibits us from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set."). This Court should refrain from rendering decisions based on anticipated changes in the U.S Supreme Court's jurisprudence. Indeed, if that approach were ever warranted, it most assuredly is not in a case such as this where this Court has so recently spoken on an issue of great public importance.

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While this Court is surely capable of resolving federal constitutional questions, its practice has been not to stretch to do so in cases brought as petitions for the Court to exercise its original jurisdiction. It would be particularly anomalous for the Court to grant original jurisdiction in a case like this that raises *only* federal claims, particularly where those claims could just as easily have

been brought in federal court—accompanied, if Petitioners so chose, by a Motion for Preliminary Injunction. Our research reveals that this Court has exercised original jurisdiction in just two cases bringing only federal claims—both criminal cases where the petitioner claimed he was being unconstitutionally detained. *See Slocumb*, 426 S.C. at 302–03, 827 S.E.2d at 151 (granting an original jurisdiction petition to address "whether an aggregate sentence imposed for multiple nonhomicide offenses committed while the petitioner was a juvenile was the equivalent of a sentence of life without the possibility of parole, and if so, whether the aggregate sentence violated the Eighth Amendment."); *Milton v. Richland County*, Op. No. 2015-MO-046, 2015 WL 4642832 (S.C. Sup. Ct. filed Aug. 5, 2015) (concerning whether individuals arrested in the respondent county subject to a uniform traffic ticket and not a warrant had been subject to prolonged detention without a prompt judicial determination of probable cause).

Slocumb reflects this Court's longstanding deference to federal precedent concerning federal questions. There, when faced with a claim under the Eighth Amendment, the Court declined to try and "predict what the Supreme Court may or may not do," finding that "the proper course is to respect the Supreme Court's admonition that lower courts must refrain from extending federal constitutional protections beyond the line drawn by the Supreme Court." *Slocumb*, 426 S.C. at 313. *Cf. Agostini v. Felton*, 521 U.S. 203, 237 (1997) (admonishing that the U.S. Supreme Court alone may overrule its precedents, and that lower courts and state courts should not anticipate such rulings). Yet here the Petitioners ask this Court not merely to extend federal precedent but to overturn it. The central flaw in all of Petitioners' claims is that they emanate from the false premise that because parents have a constitutional right to choose private education for their children, they are thereby entitled to *public funding* of that choice. In fact, all the relevant case law holds otherwise.

CONCLUSION

While the Petitioners are understandably disappointed that the legislative branch has been found to have exceeded its constitutional authority in offering to subsidize private school tuition, that disappointment is insufficient to support their petition. Accordingly, Proposed Intervenors join the State Superintendent's request that the petition for original jurisdiction be denied.

Respectfully submitted,

s/Kaye C. Hearn

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