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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

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 THE PROPOSED INTERVENOR-RESPONDENTS' RETURN

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INTRODUCTION

In their Return, the Proposed Intervenor-Respondents (hereinafter "Proposed Intervenors") do not grapple with Petitioners' claims. Instead, they misrepresent them, accusing Petitioners of "arguing that public funding of private school tuition is *compelled* by various provisions in the Federal Constitution." Proposed Intervenors' Return to Pet. for Original Jurisdiction at 2 (hereinafter "Return") (emphasis in original). As explained below, Petitioners do not argue that the government is required to subsidize their right to direct the education of their children (or any right). Indeed, Petitioners fully concede that the Department of Education would not violate their rights if the government merely funded public schools or if it funded public education and, say, a vocational program for public and private high school students.

Here, however, the General Assembly, in creating the Education Scholarship Trust Fund ("ESTF") Program, chose to subsidize the right of parents to direct the education of their children, and once it did, the Department could not target for disfavor those parents who exercised that right by providing their children with a private school education. It is the exclusion that the Department adopted *after* the General Assembly's establishment of the ESTF Program—not South Carolina's failure to subsidize their rights—to which Petitioners object.

Just as the Proposed Intervenors' attempt to misrepresent Petitioners' claim is no basis for denying original jurisdiction, neither are the other reasons they offer. To start, this Court never addressed the federal question presented by this Petition in *Eidson v. South Carolina Department of Education*, but it now has the chance to do so. 444 S.C. 166, 906 S.E.2d 345 (2024). Given that the Department's policy and practice were adopted in response to this Court's ruling in *Eidson*, it is important that this Court—not a lower court—decide how to reconcile the state and federal Constitutions. Doing so is not just a matter of good sense—it will also stave off ongoing

and future harm to Petitioners. Simply put, Petitioners' rights are being violated now, and this Court is best positioned to provide them with a remedy.

Petitioners respond to the Proposed Intervenors in more detail below. In Part I, they show that this case meets the requirements for original jurisdiction. In Part II, they demonstrate that their claims are not foreclosed by U.S. Supreme Court precedent. To the contrary, they are supported by it.

ARGUMENT

I. This Petition satisfies this Court's original jurisdiction requirements and the Proposed Intervenors' objections are unavailing.

The Petition meets this Court's criteria for original jurisdiction. It "involve[s]" the public interest, it cannot "be determined in a lower court in the first instance [] without material prejudice to the rights of the parties," and it involves reconciling an interpretation of the state Constitution adopted by this Court in *Eidson* with the dictates of the federal Constitution. Rule 245(a), SCACR. In arguing otherwise, the Proposed Intervenors argue that the Petitioners' injuries are "speculative," there is no risk of an "imminent" expenditure of public funds, this Court should not "reconsider" an issue it recently decided, and the current legislative process should play out. Return at 4–6. As discussed below, all four of these arguments are baseless and none should dissuade this Court from granting the Petition.

A. Petitioners' injuries are concrete and ongoing, not "speculative."

First, there is nothing "speculative" about Petitioners' injuries that would require a lower court to determine whether Petitioners "have suffered, or will ever suffer, any financial loss," as the Proposed Intervenors oddly suggest. Return at 3–4. The Department's policy and practice prohibit them *now* and *in the future* from using their ESTF accounts for their children's tuition. *See, e.g.*, Albertson Aff. ¶ 13 ("[M]y family will incur great financial hardships *for the remainder*

of the academic year, as the school charges tuition on an ongoing basis, and I can no longer use the scholarships to pay for it. I am managing to scrape by, but it is a struggle." (emphasis added)); Shulikov Aff. ¶ 13 (same). While Petitioner Albertson very recently learned that enough private donations appear to have been raised to cover her children's tuition for the remainder of the 2024–25 school year (though no funds have been raised that would cover the 2025–26 school year), the same is not true of Petitioner Shulikov.

But even if the Proposed Intervenors were correct that "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," Return at 3—and there is no reason to suggest that they are, as evidenced by Petitioner Shulikov—that fact would not undo the *constitutional* injury that those families have suffered—and are continuing to suffer—as a result of the Department's policy and practice. After all, "it is the constitutional deprivation under color of state law, not . . . the extent of the injury suffered, that provides the basis for an action under Section 1983." *Pritchard v. Perry*, 508 F.2d 423, 425 (4th Cir. 1975). "[M]itigation of damages . . . cannot immunize the constitutional deprivation or abort an aggrieved plaintiff's right of action under Section 1983." *Id.*; *cf. Covington v. Atl. Coast Line R.R. Co.*, 158 S.C. 194, 155 S.E. 438, 442 (1930) (explaining that mitigation goes to damages, not liability).

The Proposed Intervenors try to further minimize the urgency of Petitioners' injuries by arguing that "we cannot know from Petitioners' submissions whether they might exceed the [income eligibility] cap *next year* and become ineligible for the Program entirely." Return at 4 (emphasis added). But Petitioners' applications and eligibility will be determined in the next couple of months based on their *current* incomes—not whatever their incomes will be once the 2025–26 school year begins. *See* S.C. Code Ann. § 59-8-115 ("The application window

established shall last at least forty-five days, opening no earlier than January fifteenth and closing no later than March fifteenth each calendar year."). Likewise, their ability to "roll over," from this year to the next, their "[u]nused funds" in their ESTF accounts is also based on their current incomes, meaning they will retain those funds for use in the future—but *not* for the private school tuition that they so desperately need them for. *Id.* § 59-8-125. Moreover, it is also important to note that the ESTF statute provides that the cap for income eligibility goes from 200 percent of the federal poverty line for 2024–25 ESTF recipients to 300 percent for 2025–26 recipients—or, for a family of four like Petitioner Albertson's, from $62,400 to $93,600. *Id.* § 59-8-110(4)(C). Is it *possible* to speculate that Petitioners' incomes may go up so significantly that they will no longer meet the program's eligibility requirements because they receive a massive pay raise, win the lottery, or strike oil in the next year? Sure. But speculation about what is possible in the future is no reason for this Court to refuse to address their present constitutional injuries. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (explaining that a case is not moot when there is a "concrete and continuing injury.").

Moreover, Petitioners are not only suffering financial harms. In the coming weeks, they will have to apply to renew their ESTF accounts, and soon after, they will have to decide whether to re-enroll their children in their current schools. Pet'rs' Pet. at 17. If Petitioners do not re-enroll their children, then they will miss out on the education that works best for them; if Petitioners *do* re-enroll their children, but then later disenroll their children because they cannot afford the schools without use of their ESTF accounts, Petitioners will incur a financial penalty. *Id.* As detailed in their affidavits, these coming deadlines have put Petitioners "under great financial and psychological strain" by putting them to the choice of "endur[ing] tremendous financial hardship or" "withdraw[ing]" their children from school. Albertson Aff. ¶ 17; Shulikov Aff. ¶ 16. Thus, far

from being "speculative," Return at 4, Petitioners' injuries are a concrete reality. For these reasons, requiring Petitioners to go to a lower court to prove what they have already attested to is not only illogical—it is contrary to this Court's own rules. *See* Rule 245(a), SCACR (explaining that this Court will grant original jurisdiction if "the matter [cannot] be determined in a lower court in the first instance, without material prejudice to the rights of the parties").

B. The "imminent expenditure of public funds" is not a requirement of original jurisdiction.

Second, the Proposed Intervenors are simply wrong to suggest that the "imminent expenditure of public funds" is the driving reason for this Court's granting of original jurisdiction. Return at 4–5. To the contrary, this Court has *repeatedly* heard cases in its original jurisdiction in which the use of public funds—let alone their "imminent expenditure"—was not at issue. *See, e.g.*, *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 892 S.E. 2d 121 (2023) (challenge to an abortion law); *Bailey v. S.C. State Elec. Comm'n*, 430 S.C. 268, 844 S.E.2d 390 (2020) (challenge to an election law); *Doe v. State*, 421 S.C. 490, 808 S.E.2d 807 (2017) (challenge to definitions of "household member" in the Domestic Violence Reform Act and the Protection from Domestic Abuse Act); *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 694 S.E.2d 213 (2010) (challenge to a helmet ordinance). Instead, what mattered to this Court is whether a case involved a matter of great "public interest" that needed to be resolved expeditiously to prevent further "material prejudice" to Petitioners. Rule 245(a), SCACR. It is those characteristics—not the "imminent expenditure of public funds"—that are present here and which satisfy this Court's criteria to hear this case.[1]

[1] But even if imminent expenditure of public funds were a *sine qua non* of original jurisdiction, it exists here. The Department has provided, and continues to provide, ESTF funds to families, and the families' use of those funds for their children's ongoing schooling has been unconstitutionally conditioned.

C. Petitioners are not asking this Court to "reconsider" its *Eidson* decision.

Third, Petitioners are not asking this Court to "reconsider" its decision in *Eidson*. Return at 5. That decision clearly holds that Article XI, Section 4 of the South Carolina Constitution prohibits use of ESTF funds on one—and only one—educational expense: private school tuition and fees. 444 S.C. at 181. The Department, in turn, adopted and implemented a policy and practice excluding that use. Petitioners simply ask this Court to determine whether the Department's policy and practice violate the federal Constitution—a problem that this Court is uniquely well-suited to address. This is a question of vital importance to legislators, ESTF beneficiaries, and the public. Answering it does not require this Court to "resurrect" an issue it has already decided, *i.e.*, that Article XI, Section 4 prohibits parents from using their children's ESTF funds for private school tuition and fees. Return at 4. It requires this Court to consider, for the first time, whether the Department's application of that interpretation of Article XI, Section 4 is permissible under the federal Constitution.[2]

For that reason, the supposed stare decisis concerns raised by the Proposed Intervenors are illusory. Proposed Intervenors enlist those concerns to argue that "[o]nly where statutory changes justify reconsideration is revisiting an issue recently decided warranted." Return at 5–6. However, in an opinion authored by counsel for the Proposed Intervenors when she was a justice, this Court overturned a precedent that was less than two years old that had *not* been impacted by statute. As she correctly noted then, "stare decisis is not an inexorable command . . . . [It] is far

[2] The fact that Petitioners' *counsel*, on behalf of a separate amicus curiae, made a similar argument in *Eidson* that this Court declined to address is neither here nor there. *See Famulus Health, LLC v. GoodRX, Inc.*, No. 2:24-CV-00886-BHH, 2024 WL 4151090, at *5 (D.S.C. Sept. 11, 2024) ("An amicus curiae is merely a 'friend of the court,' not a party to the action, and to that end, an amicus may not assume the functions of a party, nor may it initiate, create, extend, or enlarge the issues." (citation omitted)).

more a respect for a body of decisions as opposed to a single case standing alone" and it "is at its weakest with respect to constitutional questions." *McLeod v. Starnes*, 396 S.C. 647, 654–55, 723 S.E.2d 198, 202–03 (2012) (Hearn, J.). That is particularly true in a case like this one, which involves a constitutional issue in which "the reasoning" the Court is asked to "adopt . . . was not presented by the parties in [the previous] case" and where "no legitimate reliance interest [would] be frustrated by" revisiting the earlier case. *United States v. Ross*, 456 U.S. 798, 824 (1982) (overruling a decision eleven months after initial ruling). *See also Jones v. City of Opelika*, 319 U.S. 103, 104 (1943) (reversing a decision less than two years after rendering it); *Payne v. Tennessee*, 501 U.S. 808, 830 & n.2 (1991) (overturning a decision two years after issuing it). Moreover, "adherence to precedent—stare decisis—is at its zenith when a court decision is based on statutory construction and not the constitution . . . . [W]hen a court's ruling is constitutionally based . . . stare decisis has reduced force." *Planned Parenthood S. Atl.*, 440 S.C. at 478–79, 892 S.E.2d at 129 (citations omitted)).

Perhaps recognizing that Petitioners are not, in fact, relitigating *Eidson*, the Proposed Intervenors criticize Petitioners for not becoming a party in *Eidson* or in *Adams v. McMaster* and litigating these issues then. Return at 5. This, of course, is preposterous. Faulting Petitioners because they didn't seek leave to intervene in a case that was filed well before their children *learned about*, *applied to*, and *were accepted into* the ESTF Program—or in the case of *Adams*, in a case that concerned a program their children never participated in at all—makes no sense. Moreover, their injury did not arise until September 11, 2024, and they filed this action swiftly, less than three months later. This Court should not refuse to hear a case concerning an ongoing constitutional injury because the Petitioners supposedly should have had the foresight, years ago, to know that this injury would occur in the future. *See also* Albertson Aff. ¶ 12 ("When I learned

about the *Eidson* decision and the policy and practice subsequently adopted by the Department, I was shocked."); Shulikov Aff. ¶ 12 (same).

D. The General Assembly's current actions will not remedy Petitioners' injuries.

Fourth, the Proposed Intervenors are wrong to say that any "proceedings" from this Court "will run smack into this legislative session." Return at 6. As Petitioners explained in their Reply to the Respondent, waiting for the General Assembly to amend the ESTF Program will not remedy the injury in this case. Pet'rs' Reply at 6. Petitioners have unused funds under the current program that they are entitled to carry forward even if the General Assembly amends the ESTF Program. *Id.* Yet, under 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. *Eidson*, 444 S.C. 166, 906 S.E.2d 345 (barring ESTF funds from being used for private school tuition and fees). Petitioners are pleased that the General Assembly is trying to figure out some way to provide more options for South Carolina families, but its actions will not remedy their injuries. For that reason, this Court should grant the Petition and resolve the urgent constitutional issues it presents now. *See TikTok Inc. v. Garland*, 122 F.4th 930 (D.C. Cir. 2024), *cert. granted*, No. 24-656 (U.S. Dec. 18, 2024) (granting petition alleging constitutional injury despite the possibility that an incoming administration will shortly follow through on a promise to address the injury).

II. Petitioners' claims are supported—not foreclosed—by U.S. Supreme Court precedent.

Perhaps recognizing that their attempts to argue that this case does not fit within the parameters of Rule 245 fail, the Proposed Intervenors, in the second half of their return, shift focus, arguing that Petitioners' claims are supposedly foreclosed by U.S. Supreme Court precedent. In making this argument, however, the Proposed Intervenors fundamentally

misrepresent those claims, insisting that Petitioners are really asking for an independent, free-floating obligation to subsidize their exercise of constitutional rights. Return at 2, 7, 13. Petitioners argue nothing of this kind. Contrary to the Proposed Intervenors' baseless assertions, the fact that the Department's policy and practice infringe upon Petitioners' constitutional rights does not mean that the Department must finance their rights' exercise.

Instead, Petitioners argue that the Department may not, consistently with the U.S. Constitution, deny financial aid that the General Assembly has *chosen* to provide families simply because the state Constitution disfavors, and imposes a structural barrier to, aid for private schooling. *See, e.g.*, *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464 (2020) (invalidating application of state constitutional provision to bar scholarships from being used at religious schools); *Romer v. Evans*, 517 U.S. 620 (1996) (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). Petitioners demonstrate below that the Proposed Intervenors' objections to their arguments are built on sand.

A. The Due Process Clause forbids the government from penalizing a person, or excluding her from a benefit, based on her exercise of a constitutional right.

In attempting to argue that Petitioners' Due Process claim is foreclosed, the Proposed Intervenors do battle with a caricature of Petitioners' claim: one that is arguing for a constitutional obligation to fund private schools. Return at 2, 7, 13. That is a fundamental misrepresentation. Petitioners do not argue, as the Proposed Intervenors repeatedly claim, that the government is "*compelled*" to subsidize their right to enroll their children in private school. *Id.* at 2. They argue that when the government penalizes a person for her exercise of a fundamental right, it creates a constitutional problem.

Put differently, Petitioners would not be here if the government merely funded public schooling or if it funded public education and a STEM program for public and private high school students. That would be both unremarkable (South Carolina has maintained a public education system for over a century) and perfectly constitutional (the government may provide families with educational alternatives to the public school system). *See* S.C. Const. art. XI, § 3 (establishing a public school system); *Eidson*, 444 S.C. at 195 (upholding the provision of ESTF funds for K–12 students educated outside their neighborhood public schools); *Durham v. McLeod*, 259 S.C. 409, 412, 192 S.E.2d 202, 203 (1972) (upholding student loan program for college and university students).

This situation is different. The General Assembly freely *chose* to fund virtually every kind of education, including every kind of private schooling (tutoring, home schooling, and private school). S.C. Code Ann. § 59-8-110. Once the General Assembly made that choice, the Department could not then bar parents from using public funds for private school tuition and fees—that is, barring them from using public funds to exercise a constitutional right—specifically because the state Constitution enshrines governmental disfavor toward private schooling. *See Eidson*, 444 S.C. at 186–87 ("[O]ur constitution forbids . . . tuition payments from public funds for the direct benefit of private educational institutions[.]"); *id.* at 186, 195 (holding that parents may use public funds for all the enumerated expenses in the ESTF Program, as well as the "many" other "possible" expenses that "are limited only by the creative imagination of our able General Assembly," but that they are denied one expense: when they "use a scholarship to pay their child's private school tuition."). Barring parents from using public funds in this manner is plainly an unconstitutional condition. And just as the government may not directly order someone to stop exercising his rights, it also may not coerce a person into "giving them up" by

denying a benefit if he exercises those rights. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (explaining that the government may not "burden[]" a person's rights "by coercively withholding benefits from those who exercise them."); *Frost v. R.R. Comm'n*, 271 U.S. 583, 593 (1926) ("It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.").

Indeed, the U.S. Supreme Court has repeatedly condemned exclusions like the Department's. For example, in *Espinoza v. Montana Department of Revenue*, Montana established a scholarship program that parents could use for virtually any type of private school, providing practically any kind of education except one: a religious education. 591 U.S. at 487–88. The Supreme Court held that excluding religious education from the scholarship program violated parents' Free Exercise rights. Likewise, in *Rosenberger v. Rector & Visitors of University of Virginia*, a public university provided student activity funds to subsidize virtually all types of student speech, but not religious speech. 515 U.S. 819 (1995). The Supreme Court held that the religious exclusion violated the Free Speech Clause. *See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–94 (1993) (holding that permitting school property to be used for the presentation of all views on an issue except those dealing with it from a religious standpoint constitutes prohibited viewpoint discrimination); *cf. Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (holding that benefits for all indigent people except those who were new to the state violated new residents' Fourteenth Amendment rights). In those cases, the question was not *whether* the government was obligated to subsidize the exercise of a

constitutional right (it was not), but rather whether the government, having *chosen* to subsidize the exercise of a constitutional right in virtually all of its forms, could deny the subsidy for those who exercised the right in one particular way that the government disfavored (it could not).

For that reason, it is misleading for the Proposed Intervenors to repeatedly cite the first part of the Supreme Court's admonition in *Espinoza*—"[a] State need not subsidize private education," Return at 7, 9—without including the second part: "But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." 591 U.S. at 487. As noted above, Petitioners do not argue that the General Assembly was *obligated* to establish the ESTF Program or to fund private education, including homeschooling, tutoring, and private schooling. *See* S.C. Code Ann. § 59-8-110 (listing educational expenses). They only argue that once the General Assembly did so, the Department could not "deny[] the benefit based on a recipient's . . . exercise" of her constitutional right to enroll her child in private school. *Carson v. Makin*, 596 U.S. 767, 785 (2022). *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (explaining that while "a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.").

So, the Proposed Intervenors are misleading about the holding in *Espinoza* and the unconstitutional conditions doctrine. But they are also off-target when they invoke *Maher v. Roe*, 432 U.S. 464 (1977). Return at 9. The circumstances in *Maher* are entirely distinct from those here. In that case, the Supreme Court upheld a regulation that prohibited public funding for abortions that were not "medically necessary." 432 U.S. at 466. From this, the Proposed Intervenors analogize that it is perfectly permissible for the Department to prohibit use of ESTF

funds for private schooling. But *Maher* would only work as an analogy if the following were true: (1) federal constitutional law recognized a fundamental constitutional right to obtain an abortion, including, *specifically*, an abortion in a private hospital; *and* (2) South Carolina law provided women a positive right to funding for the expenses associated with virtually any type of abortion—*e.g.*, abortions in a state hospital, abortions performed by a spouse at home, abortions performed by someone hired to come into the home, associated equipment and materials for such abortions, etc.—but flatly prohibited use of those funds for abortions performed at private hospitals, notwithstanding the fundamental, federal constitutional right to obtain an abortion in that setting. Only then would we have a scenario that begins to approach what we have here: (1) a federal constitutional right to direct the education of one's children, including specifically the right to send them to a private school; and (2) state law providing funding for all forms of education except when parents exercise the right in a disfavored manner. And even in that scenario, the abortion analogy would be inapt, because the state does not *compel* women to obtain abortions, but it does compel parents to obtain an education for their children. *See* S.C. Code Ann. § 59-65-10 (requiring parents to educate their school-aged children at a public, private, or home school).

The Proposed Intervenors' invocation of *Norwood v. Harrison*, 413 U.S. 455 (1973), is also inapposite. In *Norwood*, segregated private schools argued that if a textbook program was invalidated because it aided segregation (not because it aided private schools), that remedy would violate the rights of parents under *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) because children in those schools would no longer be receiving a state subsidy. *See Norwood*, 413 U.S. at 462–63 ("[A] State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without

regard to constitutionally mandated standards forbidding state-supported discrimination."). That is fundamentally different from the Petition in two respects: (1) Petitioners are not arguing that *Pierce* requires the giving or maintenance of a subsidy (the government, after all, need not subsidize the exercise of fundamental rights); and (2) Article XI, Section 4 is targeted at private schooling, not racial discrimination (*i.e.*, it targets a fundamental right). What's more, while the Court did reference "the limited scope of *Pierce*," it also took pains to note that *Pierce* protects "the right of parents to send their children to private schools"—*i.e.*, the very thing that the Department's policy and practice penalize. *Id.* at 461.

Equally unavailing is the Proposed Intervenors' argument that if Petitioners' Due Process claim were successful, public school parents "too could claim that the State has interfered with their right to direct the education of their children," because the ESTF Program "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." Return at 9. The unconstitutional conditions doctrine exists to protect against government *coercion*, and the ESTF Program, as enacted by the General Assembly (*i.e.*, allowing for a full range of educational expenses), *facilitated* parental choice, it did not coerce it. *See*, *e.g.*, *Niehaus v. Huppenthal*, 233 Ariz. 195, 201–02, 310 P.3d 983, 989–90 (Ariz. Ct. App. 2013) (rejecting unconstitutional condition challenge to education savings account program because the program "simply [offers] an exchange of one type of educational service for another," "the choice is voluntary and reversible," and "parents are not coerced in deciding whether or not to participate in the" program: "Parents are free to enroll their children in the public school or to participate in the [program]; the fact that they cannot do both at the same time does not amount to a waiver of their constitutional rights or coercion by the state."); *State v. Beaver*, 248 W. Va. 177, 196, 887 S.E.2d 610, 629 (2022) (rejecting

unconstitutional conditions challenge to education savings account program because the program "is entirely voluntary," "[n]o family is forced to participate," and "each student-recipient may leave the program and enroll in public school at any time").

In short, Petitioners are not asking this Court to create a free-floating right to a subsidized private education. They are simply asking this Court to recognize that when the government penalizes a person, or excludes her from using a benefit, based on her exercise of a constitutional right, it warrants this Court's attention.

B. The Equal Protection Clause does not permit the Department to impose a special disability on a group of people exercising a constitutional right.

The Proposed Intervenors' attempt to refute Petitioners' Equal Protection claim is just as unsuccessful as their efforts against the Due Process claim. In fact, they concede every premise of Petitioners' Equal Protection claim. They acknowledge that Petitioners "unquestionably have a right to choose private school" and that this right is "fundamental." Return at 7, 10. They confirm that strict scrutiny "attaches" to the infringement of fundamental rights. *Id.* at 10. And they agree that the South Carolina Constitution does not permit the state to fund a child's private schooling, *id.*, even as the state may fund practically any other educational expense a child could need. *Eidson*, 444 S.C. at 186–87 (upholding all ESTF expenses except private school tuition and fees). Yet, even after conceding all this, the Proposed Intervenors offer several reasons why equal protection does not apply. Each is unavailing.

The Proposed Intervenors start with a strawman. They claim that Petitioners argue that it violates Equal Protection for private schools not to be "given some share of public funds." Return at 10. Petitioners argue nothing of the sort. Instead, Petitioners argue that the Department's policy and practice "impermissibly interfere[]" with their right to enroll their children in private school by denying them the use of an otherwise generally available benefit to

exercise that right. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). The Department does this even as it (correctly) permits similarly situated parents to use the ESTF Program for virtually any other educational expense. S.C. Code Ann. § 59-8-110. For example, 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 other 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 so facilitate the exercise of her right to send her child to private school that the Department's policy and practice say she cannot. It is *that* exclusion—not a desire to get a "share of public funds" for private schools—to which Petitioners object. Return at 10.

For that reason, the Proposed Intervenors' citations to two federal court decisions miss the mark. *Id.* at 11. *Gary S. v. Manchester School District* concerned a challenge to the Individuals with Disabilities Education Act's provision of services *exclusively* to public school students. 374 F.3d 15, 19–22 (1st Cir. 2004). As the court explained in rejecting the challenge, the plaintiffs in *Gary S.* were "not being deprived of a *generally available* public benefit . . . [but] benefits the federal government has earmarked solely for students enrolled in the nation's public schools." *Id.* at 19 (emphasis in original). Because the services in *Gary S.* were available only to public school students—not to all students except those enrolled in private schools—the case is easily distinguishable from this one. *St. Joan Antida High School Inc. v. Milwaukee Public School District* suffers from the same defect. 919 F.3d 1003 (7th Cir. 2019). That case challenged a policy that provided busing to public school students and the private school students

who lived one mile from the nearest public bus stop. *Id.* at 1006. As with *Gary S.*, the case would only be analogous to this one if the policy had provided busing to any student pursuing any educational endeavor so long as she wasn't going to a private school. Since neither case can be fairly analogized to the facts here, each is inapposite.

The Proposed Intervenors' efforts to parse *Romer v. Evans* also fall flat. 517 U.S. 620 (1996). *Romer* concerned a state constitutional provision "declaring that in general it shall be more difficult for one group of citizens"—there, gays and lesbians—"than for all others to seek aid from the government." *Id.* at 633. So too here. Article XI, Section 4, as interpreted in *Eidson*, makes it more difficult for private school families (and private schools themselves) to seek aid from the government. *Eidson*, 444 S.C. at 184, 198. And in both cases, the constitutional provisions' defenders justified discrimination against the targeted group by minimizing the injury and, in doing so, missed the problem: a structural barrier erected against a particular group of people. *Compare Romer*, 517 U.S. at 626 ("So, the State says, the measure does no more than deny homosexuals special rights."), *with* Return at 11 ("It does not impede parents' right to choose private education in any way . . . .").

In neither case does the justification hold up. In *Romer* and this case, the law imposed a structural barrier on a group of citizens that made it "more difficult" for them "than for all others to seek aid from the government." *Romer*, 517 U.S. at 633. In *Romer*, the amendment shamefully barred the government from providing certain benefits and protections to gay and lesbian citizens. Here, Article XI, Section 4, as interpreted in *Eidson* and applied by the Department, bars the government from providing certain benefits to parents who send their children to private schools. In both cases, the constitution "imposes a special disability" on a class of citizens—one defined by their sexual orientation, the other by their exercise of a fundamental constitutional

right—and that is anathema to the Equal Protection Clause. As the Supreme Court held in voiding the state constitutional provision at issue in *Romer*, "[i]t is not within our constitutional tradition to enact laws of this sort," as "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.* at 633.

The Proposed Intervenors conclude by pointing to the supposed higher ideal behind Article XI, Section 4's depriving low-income families of public assistance: "a desire to undo segregation." Return at 11. Efforts to combat segregation are commendable and, to that end, the ESTF Program *forbids* racial discrimination, S.C. Code Ann. § 59-8-150(A)(3), and discrimination in public and private schools has long been illegal, regardless of Article XI, Section 4. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (barring segregation in public schools); 42 U.S.C. § 1981 (providing "[a]ll persons . . . the full and equal benefit of all laws," regardless of race). *See also Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that § 1981 bars racial discrimination in private schools). It is therefore difficult to see how barring use of the ESTF Program at private schools is somehow necessary to "undo segregation" when the Program itself—as well as federal law separate and apart from the ESTF Program—flatly prohibits it. It is likewise difficult to see how penalizing private schooling, which has been recognized as a *good* that is constitutionally *protected*, *Bd. of Educ. v. Allen*, 392 U.S. 236, 247–48 (1968), is necessary to prevent racial discrimination—an *evil* that is constitutionally and statutorily *prohibited*.[3] While it is always tempting to invoke the fight against racial

[3] For the same reason that Proposed Intervenor South Carolina Education Association's [SCEA's] past role in perpetuating segregation should not be held against the organization today, the fact that some private schools historically engaged in discrimination should not be held against all private schools today. *See* AL-TONY GILMORE, A MORE PERFECT UNION: THE MERGER OF THE SOUTH CAROLINA EDUCATION ASSOCIATION AND THE PALMETTO EDUCATION ASSOCIATION 28

discrimination in one's battles, the fight against one injustice should not be used to justify another injustice.

C. Petitioners properly preserved their Privileges or Immunities claim for appeal.

The Proposed Intervenors spend almost a full page attacking Petitioners' Privileges or Immunities Clause claim as "foreclosed" by existing Supreme Court precedent and argue that "[t]his Court should refrain from rendering decisions based on anticipated changes in the U.S. Supreme Court's [Privileges or Immunities Clause] jurisprudence." Return at 11–12. Petitioners agree. That is why they have already "acknowledge[d] that a claim based on the Privileges or Immunities Clause may be foreclosed by current U.S. Supreme Court precedent," and that they brought this claim simply "to preserve it for eventual U.S. Supreme Court review . . . ." Pet'rs' Pet. at 12. Petitioners recognize that it is only the U.S. Supreme Court that can ultimately decide this issue, however improbable it may be that the Court will address it. But even "if it appears 'that a recovery is very remote and unlikely'" on this theory, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), Petitioners have properly preserved their claim for potential review by the U.S. Supreme Court by raising it here.

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The Proposed Intervenors conclude with a call to judicial abdication. Although they generously allow that this Court is "capable" of answering a federal constitutional question, they contend it is better to let a federal court rule on the issues in the Petition. Return at 12–13. Respectfully, this does not make sense. Petitioners are not asking this Court to rule on an issue that can only be answered, or best answered, by a federal court. They are asking this Court to

(2017) ("The SCEA . . . aligned itself with massive resistance; tactics to avoid desegregation; and the Southern Manifesto, a declaration by leading Southerners in opposition to the *Brown* decision.").

determine whether the Department's policy and practice that it adopted to comply with this Court's decision interpreting a provision of the *state* Constitution can be reconciled with the federal Constitution. This Court is well-equipped to make that determination, as it has repeatedly ruled on that provision of the state Constitution, *Eidson*, 444 S.C. at 181, *Adams*, 432 S.C. at 244, and on the federal right of parents to direct the upbringing of their children. *Bazen v. Bazen*, 428 S.C. 511, 519–20, 837 S.E.2d 23, 27 (2019); *Camburn v. Smith*, 355 S.C. 574, 579, 586 S.E.2d 565, 567 (2003). In that light, there is no good reason for this Court to ignore the potential conflict between the Department's policy and practice and Petitioners' rights under the federal Constitution.

In short, both the principles of fairness and this Court's own rules for hearing cases in its original jurisdiction demand that this Court address the Petition now. *See* Rule 245(a), SCACR (explaining that this Court may hear a case if "the matter [cannot] be determined in a lower court in the first instance [] *without material prejudice to the rights of the parties*" (emphasis added)). As Petitioners wrote in their Reply to the Respondent, it makes far more sense for this Court to hear this case now, as "[t]he federal question is here, it is not going away, and the sooner this Court addresses it, the better it will be for all concerned." Pet'rs' Reply at 12.

CONCLUSION

For all the reasons stated above, as well as in the Petition, this Court should hear this case in its original jurisdiction.

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Respectfully submitted,

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