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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.

**MEMORANDUM AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR  
ORIGINAL JURISDICTION AND EXPEDITED CONSIDERATION**

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## INTRODUCTION

The Respondent and the Proposed Intervenors have urged this Court not to exercise its original jurisdiction on the theory that Petitioners' claims would supposedly "become[] moot" if the South Carolina Legislature amended the Education Scholarship Trust Fund ("ESTF") statute. Respondent's Return to Pet. for Original Jurisdiction at 7 (hereinafter "Respondent's Return"); Proposed Intervenors' Return to Pet. for Original Jurisdiction at 6 (hereinafter "Proposed Intervenors' Return"). In response, Petitioners explained that the prospect of mootness was a "nullity" since none of the changes that the Legislature could make to the ESTF Program would end the live controversy between Petitioners and the Respondent. *See, e.g.*, Reply to Respondent's Return at 2–6. On May 6, 2025, the Legislature did, in fact, amend the ESTF statute and, just as Petitioners predicted, the controversy between the parties remains. The Court should accordingly exercise original jurisdiction and resolve Petitioners' claims.

The reason the amended law does not moot the case is simple: It does nothing to liberate Petitioners' already disbursed ESTF funds from the policy and practice that the Respondent adopted in response to this Court's decision in *Eidson v. South Carolina Department of Education*, 444 S.C. 166, 906 S.E.2d 345 (2024). Petitioners are statutorily entitled to carry over and use those funds in the coming school year, S.C. Code Ann. § 59-8-125 (West 2024), yet the Respondent's policy and practice *still* prohibit Petitioners from using them for their children's private school tuition and fees. The Legislature's various amendments—such as clarifying the Program's "trust" structure—are prospective only and do not change that prohibition. While the amendments *may* resolve the state constitutionality of using *future* disbursements for private school tuition and fees, they do nothing to affect Petitioners' already disbursed funds.

Due to the amended law's failure to liberate funds disbursed under the pre-amended Program, there remains a live—not moot—controversy that this Court should address. Indeed, from the moment the Respondent adopted the prohibition to the present, Petitioners have been penalized and have suffered simply because of how they exercise their federal constitutional right to direct the education of their children. Because they exercise that right in a manner that the Respondent's policy disfavors, Petitioners have been unable to use their ESTF funds for their children's education for nearly the entire school year—funds that they, as the heads of low-income families, were statutorily entitled to use to pay for their children's education. Now, as the current school year draws to a close and planning begins for the coming year, those funds will roll over, but Petitioners *still* will be unable to use them to pay for their children's tuition, and they will remain unable for as long as the Respondent's policy and practice remain in effect. For these reasons, there remains a live controversy requiring urgent resolution—a controversy that this Court should resolve now.

Resolving it now is in the public interest, as well as the interest of judicial economy. Petitioners are not alone in their inability to use funds disbursed under the pre-amended Program for private school tuition. There are many, many more South Carolinians who believe a private school education is the best option for their children yet remain hamstrung by the Respondent's policy and practice. They, as well as the South Carolina public at large, have a clear interest in ensuring the Respondent respects the right of parents to direct the education of their children, as well as U.S. Supreme Court precedent protecting that right.

This Court, too, should welcome the opportunity to resolve this weighty federal constitutional issue at this time. After all, if this Court does not act now, then it is all but assured that a new lawsuit challenging the amended Program will be filed, asserting, as in *Eidson*, that

Article XI, Section 4 of the South Carolina Constitution prohibits use of the amended program for private school tuition and that such use must be barred. *See* Resp.'s Return at 9. By making clear *now* that the state cannot, consistent with the U.S. Constitution, bar families from using an otherwise broad and generally available education benefit simply because they choose to educate their children in a private school, the Court can head off yet another original jurisdiction action aimed at denying desperately needed educational opportunities for South Carolina schoolchildren.

For all the reasons stated above, this Court should grant the Petition now. If, however, this Court prefers to resolve the constitutional issues in Petitioners' Complaint *alongside* the similar constitutional issues with respect to the newly amended Program, then it should grant the Petition and do one of two things: Either allow Petitioners to amend the Complaint to seek a declaration of the amended law's constitutionality (which they hereby seek leave to do) or permit the Proposed Intervenors to file a crossclaim to seek a declaration of the law's *unconstitutionality* (to which Petitioners have no objection). Under either scenario, all the relevant parties would be before the Court, which would allow it to resolve the permissibility of using ESTF funds (whether previously or newly distributed) for private school tuition and fees. What's more, addressing that question now would be in the best interests of those parties and the public.

Finally, if this Court is not inclined to grant the Petition before the inevitable new original jurisdiction action challenging the amended Program has been filed, Petitioners respectfully request that the Court: (1) hold the Petition in abeyance; and (2) once the Proposed Intervenors' petition is filed, grant it, as well as Petitioners' Petition, and consolidate the two actions.

**I. Notwithstanding the amended statute, granting the Petition would serve judicial economy and the public interest.**

The Legislature’s failure to remedy Petitioners’ injury demonstrates that this case is not moot. To the contrary, it illustrates that Petitioners are suffering a “continuing injury”—the hallmark of a live case. *McDoogal’s E., Inc. v. Cnty. Comm’rs*, 341 F. App’x 918, 922 n.3 (4th Cir. 2009). Because the amended statute does not moot this case, this Court should grant the Petition, which would not only help remedy Petitioners’ injury, but would also serve judicial economy and the public interest.

In response to this Court’s ruling in *Eidson*, the Legislature attempted to amend the Program so that it would withstand a renewed challenge under the South Carolina Constitution.<sup>1</sup> For all the changes the Legislature made, however, the amended law does not cure Petitioners’ injury for one simple reason: It does not release their already disbursed funds from the policy and practice that the Respondent adopted in response to this Court’s decision in *Eidson*.

The law’s failure to free these funds means that Petitioners’ “challenge is not moot.” *McDoogal’s E., Inc.*, 341 F. App’x at 922 n.3. For Petitioners, the main—indeed, only—difference between the pre- and post-amended versions of the law is that they may—*may*—now be able to use *newly* disbursed funds for their children’s private school tuition and fees. But their already disbursed funds remain another matter: Petitioners *still* cannot use those funds to provide their children a private school education. Instead, the funds remain in their accounts, where they are simply “rolled over” from year to year but remain unusable for the purpose of paying private

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<sup>1</sup> See Michael Owen, *Horry Co. Senator exploring constitutional path to school voucher program*, ABC 15 NEWS. (Dec. 6, 2024), <https://wpde.com/news/local/south-carolina-school-voucher-program-senator-greg-hembree-outlines-education-priorities-sc-general-assemblys-126th-session-chairman-senate-education-committee-scholarship-trust-fund-private-school-teacher-pay-raise>.

school tuition—that is, for the purpose of exercising their federal constitutional right to send their children to private school. S.C. Code Ann. § 59-8-125(G) (West 2024); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (recognizing “the liberty of parents and guardians to direct the upbringing and education of children under their control”).

Petitioners’ continued inability to use their already disbursed funds for this purpose would be best addressed by this Court. *See generally* Pet’rs’ Pet. at 13–19. After all, it was in response to this Court’s ruling interpreting Article XI, Section 4 of the South Carolina Constitution, that the Respondent barred ESTF recipients from using their scholarships for private school tuition. For nearly the entire current school year, Petitioners have been unable to use those scholarships for that purpose, and they will remain unable to do so for the coming school year (and every year until they either graduate high school or are otherwise no longer eligible for the Program) unless there is judicial intervention. It is therefore appropriate for this Court to determine whether the South Carolina Constitution can, consistent with the federal Constitution, specifically bar the Legislature from providing aid to parents because of their exercise of a federal constitutional right.

This Court should grant the Petition so it can make that determination. The public interest—one of the factors for granting original jurisdiction—is also well-served by the Court taking the Petition now. Rule 245(a), SCACR. Doing so will answer the vital and open question of whether *Eidson*’s (and Respondent’s) interpretation and application of Article XI, Section 4 can be reconciled with the federal Constitution. *See In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 543 n.2, 503 S.E.2d 445, 447 n.2 (1998) (explaining that the Court should hear cases “presenting novel questions of law” that are “of great public interest”). This federal question was never presented—and thus, this Court had no occasion to address it—in *Eidson*. Given that

education is “perhaps the most important function of state and local governments,” the public is served when it knows the extent of the Legislature’s power to carry out that function. *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 623, 767 S.E.2d 157, 159 (2014) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). The public interest is also served by knowing whether South Carolina is applying its Constitution in compliance with the requirements of the U.S.

Constitution. *See State v. Waitus*, 224 S.C. 12, 19, 77 S.E.2d 256, 259 (1953) (“We are bound by [the U.S. Supreme Court’s] decisions construing the Federal Constitution, although our own views may not be in accord therewith.”).

The Court should also grant the Petition for reasons of judicial economy: Granting the Petition now could obviate the need to resolve the all-but-inevitable challenge to the amended law. *See In re Breast Implant Prod. Liab.*, 331 S.C. at 543 n.2, 503 S.E.2d at 447 n.2 (holding that “[a] decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals”). As Respondent suggested, it is a virtual certainty that there will be a challenge to the amended law—specifically, a *third* original jurisdiction action within five years seeking to deprive students of their desperately needed educational opportunity. *See* Resp’t’s Return at 2. Indeed, the Proposed Intervenors—who challenged the previous iteration of the ESTF Program, as well as the 2020 “SAFE” scholarship program—have strongly suggested as much, asserting that the amendments are a “loophole”—an “attempt to work around the Constitution”—and that the Program is still “unconstitutional.”<sup>2</sup> So too has a leading opponent of

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<sup>2</sup> *See* Lily Higgins, *SC legislators aim to fund private education — without violating constitution*, Carolina News & Rep. (Apr. 29, 2025), <https://carolinanewsandreporter.cic.sc.edu/sc-legislators-aim-to-fund-private-education-without-violating-constitution>.

the law in the Legislature.<sup>3</sup> Yet, if this Court resolves the federal question presented in Petitioners' Petition in their favor, it will not have to consider *any* other constitutional challenges under Article XI, Section 4. Instead, the question will have been answered: Article XI, Section 4 cannot be applied to bar the Legislature from providing, in its discretion, financial aid to families who exercise their fundamental, federal constitutional right to send their children to a private school. Deciding that question now plainly furthers this Court's interest in judicial economy. *See S. Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (explaining since the same issue under consideration would come up again that it was in the interest of judicial economy to decide the issue now); *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006) (same).

In short, the amended statute did not moot this case because it did not cure Petitioners' injuries. Deciding the issues in the Petition now will not only further this Court's interest in judicial economy by averting the need for future litigation, it will also serve the public's interest in a full and speedy resolution of an important matter of federal constitutional law.

**II. If this Court prefers to address the amended statute, Petitioners can amend their Complaint or assent to the Proposed Intervenors' filing of a crossclaim.**

For all the reasons stated in Section I, the most prudential course for this Court is to grant the Petition and resolve Petitioners' claims now, on their current complaint. But if this Court prefers to directly address the amended law, then it can and should do so by first granting Petitioners' Petition. Then, this Court should either (a) allow Petitioners to amend their complaint to add a claim requesting a declaration of the amended law's constitutionality or (b) permit the

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<sup>3</sup> *See* Russ McKinney, *SC Senate GOP poised to tee up private school voucher bill to fast-track it to court*, S.C. Pub. Radio (Jan. 13, 2025), <https://www.southcarolinapublicradio.org/politics/2025-01-13/sc-senate-gop-poised-to-tee-up-private-school-voucher-bill-to-fast-track-it-to-court> (quoting Senate Minority Leader Brad Hutto as saying, with respect to the amended law, "We are clearly violating the Constitution in my opinion.").

Proposed Intervenors to file a crossclaim seeking a declaration of the law's *unconstitutionality*. Petitioners welcome either option.

Allowing Petitioners to amend their complaint, or permitting the Proposed Intervenors to file a crossclaim, furthers this Court's interest in judicial economy by permitting the litigants to take immediate steps to more speedily resolve the inevitable fight regarding the amended law's constitutionality. *See Storm M. H. ex rel. McSwain v. Charleston Cnty. Bd. of Trs.*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (holding that judicial economy is served by promptly resolving an issue of important public interest); *S. Bell Tel.*, 306 S.C. at 75, 409 S.E.2d at 778 (“[S]ince this issue would be raised to the Court at some future time and since both parties have fully briefed the issue, we find that it is in the interest of judicial economy to decide the matter now.”). Petitioners could simply add a claim requesting a declaration that the amended program is constitutional while still maintaining their existing claims as they relate to Petitioners' use of funds disbursed under the pre-amended program. Alternatively, the Proposed Intervenors could assert in a crossclaim that the amended program violates Article XI, Section 4 for the same reasons as the pre-amended program in *Eidson*. Either step would facilitate this Court's ability to directly address the amended law without also requiring any of the litigants to draw up new petitions, complaints, affidavits, or intervention motions.

In addition, permitting the litigants to take these steps would be proper under the Declaratory Judgments Act. As this Court has explained, litigants invoke that act “to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). This case easily satisfies that standard. It involves the “existing controversy” of the constitutionality of the amended program—specifically, the amended law's attempt to disburse

new funds to parents like Petitioners in a manner that complies with *Eidson*, which Petitioners argue is constitutional and the Proposed Intervenors characterize as “unconstitutional.”<sup>4</sup>

For all the reasons stated in Section I, this Court should grant Petitioners’ Petition and resolve the complaint as it is. But if this Court *also* wants to address the amended law, it should grant the Petition and either construe the Declaratory Judgments Act to permit Petitioners to amend their complaint to seek a declaration of the law’s constitutionality or allow the Proposed Intervenors to file a crossclaim with respect to the law’s *unconstitutionality*. See S.C. Code Ann. § 15-53-130 (West 2024) (instructing courts to “liberally construe[] and administer[]” the Declaratory Judgments Act to provide litigants with “relief from uncertainty with respect to rights, status and other legal relations”); see also *Sunset Cay, LLC*, 357 S.C. at 423, 594 S.E.2d at 466 (“The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights.”). Whichever choice this Court makes, it will have before it a “justiciable . . . real and substantial controversy which is appropriate for judicial determination.” *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970) (citation omitted).

**III. If this Court does not grant the Petition at this time, it should hold it in abeyance until a new, promised challenge to the amended Program is filed, after which this Court should consolidate the two cases.**

This Court should grant the Petition for all the reasons in Section I, but failing that, it should allow for the options in Section II. If this Court prefers neither option, however, it should follow the Respondent’s suggestion and hold this Petition in abeyance until the inevitable petition and complaint are filed challenging the amended Program. Resp.’s Return at 2. Holding the Petition in abeyance—rather than denying it and waiting for a new lawsuit—is warranted because the new lawsuit will not address the questions of the already disbursed funds. But by

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<sup>4</sup> See note 2, *supra*.

keeping this Petition in abeyance, this Court can ensure that when the new petition is filed, as anticipated, that all the relevant parties, presenting all the relevant issues, are before the Court. *See In re Jordan*, 397 S.C. 1, 3, 723 S.E.2d 586, 587 (2012) (per curiam) (explaining that an attorney’s petition for reinstatement was held in abeyance while recent case developments could be fully accounted for). Then, this Court can grant the new petition as well as Petitioners’ Petition and consolidate the two cases. The Court can then determine the legality of the Program and interpret the South Carolina Constitution in a manner consistent with the U.S. Constitution.

Moreover, as a matter of judicial economy and fairness, it makes sense to consolidate the cases. *See Fulmer v. Cain*, 380 S.C. 466, 471, 670 S.E.2d 652, 655 (2008) (Toal, C.J., concurring) (explaining that “consolidation of the actions will promote judicial economy and reduce the risk of inconsistent rulings”). The Proposed Intervenor or some other litigants are certain to challenge the Program under Article XI, Section 4, and when they do, it would serve judicial economy for this Court to consider all the arguments together. *See, e.g., In re Schnee*, 432 S.C. 500, 504–05, 854 S.E.2d 840, 842 (2021) (per curiam) (noting the Court held the matter in abeyance upon being informed that a second, related matter was about to be filed, and “thereafter consolidated the matters for the purposes of consideration”); *Nucor Steel v. S.C. Pub. Serv. Comm’n*, 312 S.C. 79, 83, 439 S.E.2d 270, 272 (1994) (explaining that a notice of appeal was “held in abeyance pending the resolution of [a] separate appeal” but then deciding that “both appeals can be consolidated” “because the parties and issues are identical”). Consolidation would also provide this Court an opportunity to reckon with how the federal issue might inform its interpretation of the state issue—that is, to consider how interpreting the state provision the correct way would avoid the clash between federal and state constitutions. *See State v. Grace*, 350 S.C. 19, 24, 564 S.E.2d 331, 333 (Ct. App. 2002) (holding that “judicial economy was

fostered by the consolidation” because of the “interconnected” facts of the case); Rule 42(a), SCRCF (“When actions involving a common question of law or fact are pending before the court . . . it may order all the actions consolidated”). As for fairness, it is only reasonable that Petitioners should not have to intervene in a future case, that no current litigant should have to further brief this Court on intervention, and that this Court’s valuable time should only be spent reviewing the merits of each party’s briefs.

In sum, if this Court prefers not to grant the Petition at this time, it should hold it in abeyance until the inevitable new petition challenging the Program arises. At that point, it should grant the new petition as well as the current Petition and consolidate the two cases.

### **CONCLUSION**

In sum, the amended statute does not provide this Court with justification to deny the Petition. To the contrary, the amended ESTF statute’s failure to liberate already disbursed funds means that there remains an ongoing and live—not moot—controversy that this Court should address. Further, resolving that controversy serves both the public interest and judicial economy. But if this Court prefers to resolve the constitutional issues raised in Petitioners’ complaint in conjunction with the similar constitutional issues surrounding the newly amended ESTF Program, then it should grant the Petition and either allow Petitioners to amend their complaint to seek a declaration of the amended law’s constitutionality or permit the Proposed Intervenors to file a crossclaim seeking a declaration of the law’s *unconstitutionality*. Finally, if this Court prefers not to act on the Petition at this time and await the virtually certain filing of a new petition and complaint challenging the constitutionality of the ESTF Program as amended, it should hold Petitioners’ Petition in abeyance, then grant it along with the newly filed petition, and consolidate the actions at that time.

Dated: May 7, 2025

Respectfully submitted,

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