THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM LEE COUNTY
COURT OF COMMON PLEAS

Thomas W. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2007-065159

Abbeville County School District, et al., ... Appellants-Respondents,

v.

The State of South Carolina, et al., of whom Hugh K. Leatherman, Sr., as President Pro Tempore of the Senate and as a representative of the South Carolina Senate, and James H. Lucas, as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives, are .... Respondents-Appellants

and

State of South Carolina, Nikki R. Haley, as Governor of the State of South Carolina, are, ... Respondents.

APPELLANTS-RESPONDENTS' RETURN TO PETITION TO VACATE CONTINUING JURISDICTION

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Appellants-Respondents (hereinafter referred to as "Plaintiffs" or "Plaintiff Districts") submit this Return to the Petition to Vacate Continuing Jurisdiction advanced by Respondents and Respondents-Appellants (hereinafter collectively referred to as "the State").

History Is a Powerful Predictor of Future Behavior.

At each stage of this litigation, the State has urged the Court to dismiss the case and leave the General Assembly alone to determine what is required to satisfy its constitutional duty to "provide for the maintenance and support of a system of free public schools open to all children in the State," pursuant to Article XI, § 3 of our State Constitution. The State has repeatedly insisted that education is one of the State's top priorities and declared inviolate its right to make policy choices affecting the delivery of educational opportunity to the children of our state as part of the legislative process, without judicial oversight. However, the record of this litigation has established that, without judicial oversight, the General Assembly will not attack the systemic educational problems plaguing the Plaintiff Districts and address the educational crisis facing their children. History has shown that, without court intervention, these children will have no relief, and the Constitutional violations identified in *Abbeville II* will continue unabated.

This Court Has a Continuing Duty to Uphold the Constitution.

This Court remains the protector of the Constitution, and has a solemn duty to hold the State accountable for meeting its constitutional obligations. *See Marbury v. Madison*, 5 U.S. 137 (1803); *Abbeville County School Dist. v. State*, 335 S.C. 58, 66, 515 S.E.2d 535, 539 (1999) (*Abbeville I*) ("It is the court's duty to interpret and declare the meaning of the Constitution"); *Abbeville County School Dist. v. State*, 410 S.C. 619, 632-33, 767 S.E.2d 157, 164 (2014) (*Abbeville II*) (rejecting the State's justiciability challenge, the Court stated that

"interpretation of the law – and evaluation of the government's acts pursuant to that law – are critical and necessary judicial functions"); *Mims Amusement Co. v. SLED*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) ("The Court has the final responsibility of construing the constitution and laws of the state and must do so without concern for political or popular opinion.").

The Court heeded this obligation in 1999, when it declared that the Education Clause of the South Carolina Constitution includes a qualitative component, which requires the General Assembly to provide each student in the State with the opportunity to acquire a minimally adequate education. *Abbeville I*, 335 S.C. at 68, 515 S.E.2d at 540.

The Court heeded this obligation in 2014, when it held that the State had failed to provide students in the Plaintiff Districts the requisite constitutional opportunity and directed the State to take the principal initiative in developing a plan to remedy the "myriad" troubles facing the Plaintiff Districts. *Abbeville II,* 410 S.C. at 661-62, 767 S.E.2d at 179-180.

The Court heeded this obligation in 2015, when, after the State had failed to make reasonable progress toward remedying the constitutional deficiencies announced in *Abbeville II*, the Court directed the State to develop a plan of reform and to present that plan to the Court for review within the next legislative session. *Abbeville County School Dist. v. State*, 415 S.C. 19, 21, 780 S.E.2d 609, 610 (2015) (*Abbeville III*).

The Court should continue to meet this obligation now, when the State has failed to make reasonable progress toward remedying the constitutional violations announced in *Abbeville II* and has ignored the Court's most basic directive to submit a plan and timeline for implementation. As this Court held in *Abbeville II*:

> Nevertheless, it is the Defendants who must take the principal initiative, as they bear the burden articulated by our State's Constitution, and have failed in their

> constitutional duty to ensure that students in the Plaintiff Districts receive the requisite educational opportunity. Thousands of South Carolina's school children—the quintessential future of our state—have been denied this opportunity due to no more than historical accident.

Abbeville II, 410 S.C. at 662, 767 S.E.2d at 180.

The system of education in South Carolina continues to be constitutionally insufficient, and the Court should retain jurisdiction until the State has developed a rational plan for remedying the constitutional violations announced in *Abbeville II* and made reasonable progress toward implementing that plan. The Constitution demands it.

The State Has Not Satisfied the Court's Benchmark for Constitutional Compliance.

Contrary to the State's argument, it has failed to show that its actions warrant the Court vacating jurisdiction, by any standard.

The State correctly points out that the Court previously acknowledged that it is guided by *Brown v. Board of Education*, 349 U.S. 294 (1955) in its decision in this case:

> We follow the example set in *Brown* and its progeny, and apply that reasoning to the instant case. The measurable inputs and outputs show that the Defendants have failed to provide students in the Plaintiff Districts the requisite constitutional opportunity. Inadequate transportation fails to convey children to school or home in a manner conducive to even minimal academic achievement. Students in the Plaintiff Districts receive instruction in many cases from a corps of unprepared teachers. Students in these districts are grouped by economic class into what amounts to no more than educational ghettos, rated by the Department of Education's guidelines as substandard. Large percentages of the students in the Plaintiff Districts—over half in some instances—are unable to meet minimal benchmarks on standardized tests, but are nonetheless pushed through the system to "graduate."

Abbeville II, 410 S.C. at 653, 767 S.E.2d at 174-75 (footnote omitted). However, the State misconstrues the Court's citation to *Brown II* as it pertains to the remedy in this case. In *Abbeville II*, this Court stated that it would retain jurisdiction until the parties reappeared

before the Court with a plan to address the constitutional violation announced in the Court's opinion:

> Therefore, we direct both the Plaintiff Districts and the Defendants to reappear before this Court within a reasonable time from the issuance of this opinion, and present a plan to address the constitutional violation announced today, with special emphasis on the statutory and administrative pieces necessary to aid the myriad troubles facing these districts at both state and local levels. However, we give leave to the parties to suggest to the Court precisely how to proceed. In particular, we invite the parties to make additional filings suggesting a specific timeline for the reappearance, as well as specific, planned remedial measures. Until the reappearance, we will retain jurisdiction of this case. *Cf. Brown II*, 349 U.S. at 300–01, 75 S.Ct. 753 (retaining jurisdiction of the case until the defendants made a "prompt and reasonable start toward full compliance" with the ruling from *Brown I*).

Abbeville II, 410 S.C. at 661, 767 S.E.2d at 179 (footnote omitted). In *Brown II*, the Supreme Court recognized that substantial steps had been made to eliminate racial discrimination in the public schools in many communities, and held that all defendants were required to make a "prompt and reasonable start toward full compliance."[1] *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 299 (1955) (*Brown II*). The Court further held that, even after such a start was made, the lower courts would retain jurisdiction as necessary to ensure full compliance with its order. *Id.*, 349 U.S. at 301. In our case, substantial steps have *not* been made to remedy the pervasive constitutional deficiencies affecting schools in the Plaintiff Districts, and the continued jurisdiction of this Court is necessary to secure compliance with *Abbeville II*.

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[1] After its ruling in *Brown I*, the Supreme Court invited briefing and argument from the Attorney General of the United States as well as the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on the question of a remedy. In *Brown II*, the Court recognized that the presentations made to the Court demonstrated that, in the year since *Brown I* was announced, substantial steps had been made to eliminate the racial discrimination in many, but not all, public schools across the nation. *Id.* The defendants in the cases coming from South Carolina and Virginia were identified as "awaiting the decision of the Court concerning relief." *Id.*

This Court's subsequent Order dated November 5, 2015, once again reiterates the Court's need to retain jurisdiction until the State presents a rational plan and a timeline for remedying the constitutional violations announced in *Abbeville II*. In its November 5, 2015 Order, this Court directed the State to submit a plan that included all proposed, pending or enacted legislation, and a timeline for implementation of that plan. *See Abbeville III,* 415 S.C. at 21, 780 S.E.2d at 610. The Court then went on to state that, *after* the State submitted its plan and timeline, the Court would determine whether the State's efforts represent a "rational means of bringing the system of public education in South Carolina into constitutional compliance." *Id.* As pointed out in the Plaintiff Districts' July 21, 2016 Response to the Joint Report filed with the Court by the General Assembly on June 29, 2016, the State made no attempt to comply with the Court's Order requiring the State to submit a plan to cure the numerous constitutional violations, accompanied by a timeline for full implementation. With the State having failed to satisfy even the first step of producing a plan and timeline, it cannot be authentically argued that this Court should abandon its role of enforcing constitutional compliance.

Moreover, even had the Court stated that it would vacate jurisdiction once the State showed a "prompt and reasonable start" toward full compliance, which it did not, the State's efforts to date cannot meet even that standard. In more than a year and a half since the Court first announced the constitutional violations in *Abbeville II*, the State has yet to develop a plan for remedying the constitutional violations, let alone make reasonable progress toward that goal. This Court previously recognized that remedying the constitutional violations announced in *Abbeville II* would require a comprehensive effort to determine the demands of providing the constitutionally mandated educational opportunity throughout our state and to design spending

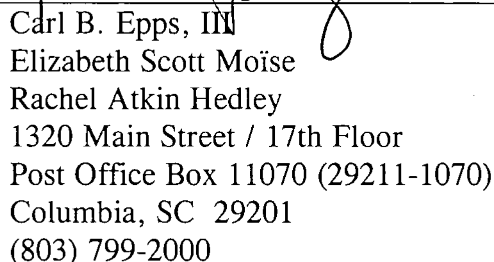
plans in a manner targeted to address the "clear disconnect between spending and results." *Abbeville II*, 410 S.C. at 653, 767 S.E.2d at 175. By any measure, the State has failed to do so. The Plaintiff Districts have previously addressed the inadequacy of the State's efforts in their Response to the Joint Report, submitted on July 21, 2016, and incorporate those arguments here by reference. In summary, the State took nineteen pages of specific recommendations developed by the five committees of the House Task Force and translated that into eight bills, of which only four were passed during the 2015-16 legislative session, and two of which do nothing more than direct further study. (*See* Plaintiff Districts' Response to the Report of Respondents-Appellants, at 3-4.) In addition, the State has continued to follow an historical pattern of providing education funding through a haphazard collection of provisos that are totally independent of actual need or sufficiency and have failed to correct their historical underfunding of the Base Student Cost ("BSC") under the EFA formula. (*See id.* at 5-8.) What is needed, and what the Constitution and *Abbeville II* require, is a comprehensive effort at educational reform. Reporting on legislative discussions and study does not equate to reassuring this Court that comprehensive reform has or will occur.

In the system of government our forefathers adopted when founding our country, three co-equal branches were formed. South Carolina is a member of this nation of laws. The courts in South Carolina, as do all courts in this nation of ours, have no greater duty than to enforce the law. Inviolate is the duty of all courts to enforce the constitution. If this Court were to leave unabated known constitutional violations, knowing full well that our state's history has not treated children in the Plaintiff Districts with any degree of care in respect of educational opportunities, relegating them to the "educational ghettos" identified in *Abbeville II*, it would be abdicating its assigned place in our system of government. The State has failed to make any

reasonable progress toward eliminating the myriad of constitutional violations made clear to it and has not come forward with a plan or a timeline to meet these children's needs in violation of a standing Order of this Court. To enforce the Constitution and its prior orders, the Court must retain jurisdiction. The children in the Plaintiff Districts are entitled to nothing less than the full protection of this Court.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP



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Attorneys for Appellants-Respondents

September 6, 2016

Columbia, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants-Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by **hand delivery** to the following address(es):

Pleadings: Appellants-Respondents' Return to Petition to Vacate Continuing Jurisdiction

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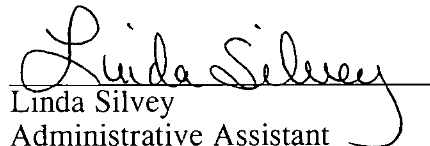
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Sept. 6, 2016