IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION

Case No. 2023-001673

CANDACE EIDSON, on behalf of herself and her minor child; CONEITRA MILLER, on behalf of herself and her minor child; JOY BROWN, on behalf of herself and her minor children; CRYSTAL ROUSE, on behalf of herself and her minor children; AMANDA MCDOUGALD SCOTT, on behalf of herself and her minor child; PENNY HANNA, on behalf of herself and her minor children; the SOUTH CAROLINA STATE CONFERENCE OF THE NAACP; and THE SOUTH CAROLINA EDUCATION ASSOCIATION, …..…… Petitioners,

v.

SOUTH CAROLINA DEPARTMENT OF EDUCATION; ELLEN WEAVER, in her official capacity as State Superintendent of Education; SOUTH CAROLINA OFFICE OF THE TREASURER; and CURTIS M. LOFTIS, JR., in his official capacity as State Treasurer of South Carolina…….…… Respondents.

and

HENRY McMaster, in his official capacity as Governor of the State of South Carolina; G. Murrell Smith, Jr., in his official capacity as Speaker of the South Carolina House of Representatives; and THOMAS C. ALEXANDER, in his official capacity as President of the South Carolina Senate
……..……..Intervenors-Respondents

AMICUS CURIAE BRIEF OF PALMETTO PROMISE INSTITUTE IN SUPPORT OF RESPONDENTS AND INTERVENORS-RESPONDENTS

February 1, 2024

[*continued*]

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SUMMARY OF THE ARGUMENT

It is axiomatic that a court cannot nullify a constitutional amendment. Yet that is precisely what Petitioners invite this Court to do.

Neither the language of the constitutional amendment at issue nor the relevant case law supports Petitioners position. Therefore, This Court should uphold the South Carolina's Education Scholarship Trust Fund (ESTF) Program.

BACKGROUND

South Carolina's Constitution formerly prohibited "public money" from being "used, directly or indirectly, in aid or maintenance of any" religious school (hereinafter "the No Aid provision"). Hartness v. Patterson, 255 S.C. 503, 506, 179 S.E.2d 907, 908 (1971). In Hartness, this Court held that a tuition grant program enacted for the purpose of "improving the financial status" of religious schools violated the then-current No Aid provision. This Court held that tuition grants made to students indirectly aid the schools they attend. Id. at 909, 179 S.E.2d at 507-08.

The next year, this Court held that loans to students to defray their expenses at institutions of higher learning constituted "aid, direct or indirect *to higher education*, but not to any institution or group of institutions." Durham v. McLeod, 259 S.C. 409, 412-13, 192 S.E.2d 202, 203 (1972) (emphasis added). Thus, if "eligible institutions are free to compete" for state-provided funding to students, the public funds do not "aid" or "maintain" religious schools. See id. at 413, 192 S.E.2d at 203.

The West Committee recommended removing the word "directly" from South Carolina's No Aid provision. Adams v. McMaster, 432 S.C. 225, 240, 851 S.E.2d at 703, 711 (2020). The specified reason for this recommendation was to allow the General Assembly to "establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs." Id.

The West Committee's recommendation was adopted and the No Aid provision was amended in 1973. The state Constitution now provides as follows:

> No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.
>
> S.C. Const. Art. XI, § 4.

The voters in South Carolina thus signified intent to allow public funds to be used for the indirect benefit of religious or private schools.

Relying on this enactment, the State legislature then created many popular scholarships and tuition assistance programs that directly benefit students, and only indirectly benefit religious and/or private schools. (See Dep't of Educ. Br., pp. 22-23.) For nearly 50 years, the validity of these types of programs went unchallenged.

In Adams, this Court held that SAFE Grants funded from federal CARES Act moneys violated the No Aid provision. Of particular importance is this Court's rejection of the Governor's argument that the SAFE Grants Program only indirectly benefitted private schools. 432 S.C. at 241, 851 S.E.2d at 711. This Court relied heavily on case law interpreting South Carolina's former No Aid provision. There may have been concerns that emergency COVID-19 funds would have been used for a school choice program.

Many of the arguments as to what constitutes "direct" and "indirect" benefits were not fully briefed because they were raised after the close of the merits briefing in Adams. At any rate, Adams' holding regarding direct benefit is inconsistent with the text of the state Constitution, and a broad interpretation of that holding would conflict with both the state and federal constitutions.

This case presents the question of what is meant by the "use" of public funds "for the direct benefit of" religious or private schools. The amendment to Article XI, Section 4 must be presumed to have accomplished something. See Davenport v. City of Rock Hill, 315 S.C. 114, 117, 432

S.E.2d 451, 453 (1993). The ESTF program at issue is constitutional because no public funds will be used for the direct benefit of religious or private schools.

ARGUMENT

This is a facial challenge to a recently-enacted South Carolina statute that establishes the ESTF Program. 2023 S.C. Acts No. 8. The ESTF Program creates a trust fund "that is separate and distinct from the general fund . . . to provide scholarships to eligible students for qualifying expenses." S.C. Code Ann. §§ 59-8-120(A); 59-8-110(1). An ESTF is an "individual account that is administered by the department to which funds are allocated to the parent of an eligible student to pay for qualifying expenses." S.C. Code Ann. § 59-8-110(2). "Educational service providers," if approved by the Department, receive payments from ESTFs to provide educational goods and services to scholarship students. S.C. Code Ann. § 59-8-110(7). "Qualifying expenses" include the choice of services from a wide array of "education service providers" of which private schools are only one option for parents. S.C. Code Ann. § 59-8-110(13). Private and religious schools may qualify as "educational service providers" under the ESTF Program. See S.C. Code Ann. § 59-8-150(A)(3).

The primary basis for Petitioners' challenge appears to be this State's "No Aid" provision. S.C. Const. Art. XI, § 4. Petitioners contend that the ESTF program is unconstitutional under the No Aid provision because it enables public funds to be "paid . . . for the direct benefit of" religious and/or private educational institutions.

This Court should deny Petitioners' request. Assuming that a justiciable controversy exists here, which *Amicus* denies, the Petitioners have failed to carry their burden of demonstrating that the ESTF Program is unconstitutional.

I. This Court is being asked to issue an advisory opinion.

As a preliminary matter, the posture of this case is problematic because none of the parties to this case will be personally affected by the loss of ETSF funding. Should potential ETSF

recipients file a separate action, they may not be bound by the results of this action. An adjudication that cannot settle the rights of the parties is only advisory in nature, and is not authorized by the Declaratory Judgment Act. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004).

It has been pointed out that the petitioners in this case do not allege a redressable injury. (Br. of Gov. McMaster, pp. 8-10.) Petitioners allege they are parents with children in public schools and non-profit organizations representing members "who work in, rely on, and support public schools." (Br. of Pet., pp. 2-3.) They do not allege or present evidence of anything other than generalized grievances regarding the ESTF Program. In support of their standing, they invoke the "public interest" exception. (Pet. for Original Juris., pp. 8-12.) This Court previously found standing under similar circumstances. Adams, 432 S.C. at 235-36, 851 S.E.2d at 708-09.

However, it does not appear that anyone whose interests are likely to be adversely affected is a party to this case. The only defendants named in this suit are various state officials. While these state officials have an interest in defending the constitutionality of the statute in question, they may not be denied ESTF Program benefits by a ruling in favor of Petitioners.

Petitioners seek a declaratory judgment that ESTF Program is unconstitutional and an injunction prohibiting the Program from taking effect. South Carolina's Declaratory Judgment Act requires all persons who would be affected by a declaration sought to be joined as parties to the action. S.C. Code Ann. § 15-53-80. "[N]o declaration shall prejudice the rights of persons not parties to the proceeding." Id.

This Court has held that non-parties to a declaratory judgment action are not bound by a declaratory judgment that would be prejudicial to their interests. Rowe v. City of Columbia, 300 S.C. 447, 449-50, 388 S.E.2d 789, 790-91 (1989); Pharr v. Canal Ins. Co., 233 S.C. 266, 275, 104

S.E.2d 394 (1958). Not only does a declaratory judgment lack *res judicata* effect as to non-parties prejudiced thereby, it cannot even be used as evidence in a subsequent proceeding brought by a prejudiced non-party. Rowe, 300 S.C. at 449-50, 388 S.E.2d at 790-91.

The "public interest" exception may confer standing on Petitioners in that "resolution is needed for future guidance." Adams, 432 S.C. at 235-36, 851 S.E.2d at 708. The "public interest" exception cannot, however, confer jurisdiction to issue an advisory opinion. City of Columbia v. Sanders, 231 S.C. 61, 68, 97 S.E.2d 210 (1957). The courts in this State lack jurisdiction to issue advisory opinions. Richland Cnty. Sch. Dist. 2 v. Lucas, 434 S.C. 299, 306, 862 S.E.2d 920, 924 (2021); Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975).

Here, Petitioners seek to deny access to benefits the State has conferred on potential non-parties. No one is in the case to represent and advocate for the rights of potential ESTA recipients. Litigation over state No Aid provisions is often invoked by parties who were denied the benefit they would have received under a program but for the No Aid provision. See Espinoza v. Montana Dep't of Rev., 140 S. Ct. 2246, 2251 (2020); Carson as next friend of O.C. v. Makin, 596 U.S. 767, 775-76 (2022). Suppose a class of putative beneficiaries subsequently brings suit against the State for ESTF scholarships to which they would otherwise have been entitled. Courts would have to revisit the effect of the ruling in this case in light of their rights to avoid prejudice to them.

What Petitioners are seeking to do is obtain a ruling that binds only the State, to put it on ice to be used against potential beneficiaries who may subsequently assert their claims. The Court should deny this invitation because of the jurisdictional bar on advisory opinions. City of Columbia, 231 S.C. at 68, 97 S.E.2d at 213.

II. The ESTF Program does not violate the South Carolina Constitution.

Assuming Petitioners are found to enjoy standing in this action, and the justiciability requirements are found to be met (which *Amicus* denies), it is necessary to hypothesize parties who would be affected if Petitioners' request is granted.

Such aggrieved parties might allege, for example, that they are parents who seek to send their children to private private and/or religious schools. See Carson, 596 U.S. at 776-77. They may allege they selected said private and/or religious schools because their "high academic standards" and because those schools' religious "worldview aligns with their sincerely held religious beliefs." Id. They may further allege that without the tuition assistance made possible by the ESTF Program, they would not be able to afford to pay the cost of tuition at said schools. Id. After all, "[n]ot all parents wish to educate their children in the public school system." Religious Rights Foundation of Pa., *et al.* v. State Coll. Area Sch. Dist., No. 23-CV-01144, 2023 WL 8359957 at *1 (M.D. Pa. Dec. 1, 2023). Such parents resent being forced to pay taxes to support public schools they feel they cannot use in good conscience, while at the same time having to pay the full cost of private tuition with after-tax dollars. See Douglas Laycock, Church and State in the U.S.: Competing Conceptions and Historic Changes, 13 Ind. J. Global Legal Stud. 503, 511-12 (2006); Laycock, Why the Supreme Court Changed its Mind about Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments, 2008 B.Y.U. L. Rev. 275, 289 (2008). They may further allege that enforcement of South Carolina's No Aid provision violates their First Amendment rights because it conditions educational benefits upon religious beliefs. See Religious Rights Foundation, 2023 WL 8359957 at *4.

A. Petitioners' interpretation of the No Aid provision raises First Amendment concerns.

Petitioners' interpretation of South Carolina's No Aid provision would deny students the option to attend private or religious schools if they must rely to some extent on State funds to defray educational expenses. This was not considered unconstitutional under South Carolina's prior No Aid provision. Durham, 259 S.C. at 416, 192 S.E.2d at 203. A federal court interpreting South Carolina law recently held that since the No Aid discriminates against both private and religious schools, First Amendment protections do not apply. Bishop of Charleston v. Adams, 538 F. Supp. 3d 608, 612-13 (D.S.C. 2021). The net effect would be to leave South Carolinians in a worse situation now than they were under the prior No Aid provision.

However, the public / private distinction is not relevant to the question whether the First Amendment rights of prospective ESTF recipients are violated. The ESTF program gives students and their families a choice of the schools they choose to attend. Petitioners seek to muddy the waters by focusing on the rights of the educational provider, rather than the rights of the students seeking education and their families. The proper focus is on the First Amendment rights of the students and their families. "[A] State violates the Free Exercise Clause when it excludes religious observers from otherwise available state benefits." Carson, 596 U.S. at 778.

South Carolina's ESTF Program, like Maine's tuition assistance program, offers its citizens a benefit. Carson, 596 U.S. at 780. Both States' programs allow students and their families to select the school they wish to attend. Id. at 773. Maine subsequently imposed a "non-sectarian" requirement prohibiting students from directing tuition assistance to religious schools. Id. at 774. The Supreme Court held that the "non-sectarian" requirement was unconstitutional because it "effectively penalizes the free exercise of religion." Id. at 780. Petitioners' position violates the Free Exercise Clause for the same reason.

The court's analysis in Carson focused on discrimination against the educational provider. Carson, 596 U.S. at 789. "[T]he program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise."). Yet Carson's holding applies with greater force when viewed through the rights of the students seeking education. After all, state benefits can only constitutionally benefit religious institutions if the funds are directed toward those institutions as a result of the free choice of the individuals to whom the state benefits are directed. Zelman v. Simmons-Harris, 536 U.S. 639, 649-52 (2002). Because it is the free choice of the recipients of the state funds that determines where the funds are directed, it is the religious rights of those recipients that matters. Recipients of state benefits may not be denied otherwise public benefits solely because of their exercise of religious rights.

Petitioners seek an interpretation of South Carolina's No Aid provision that penalizes ESTF recipients for exercising their right to choose the type of education that best suits their needs. By interpreting "direct" to categorically prohibit students and their families from choosing religious or private schools, they seek to put South Carolina on a collision course with Carson.

Courts in other states have recognized that state No Aid provisions cannot be read so broadly as to violate First Amendment rights. In Moses v. Skandera, 367 P.3d 838 (N.M. 2015), the court held that a No Aid provision that also barred funding to both private and religious schools was insulated from First Amendment challenges. Id. at 845. The Supreme Court of the United States remanded the ensuing petition for a writ of *certiorari* for further consideration in light of Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017). See N.M. Ass'n of Non-Pub. Sch. v. Moses, 137 S. Ct. 2325 (2017). On remand, the state high court backed away from its prior holding and adopted a construction of its No Aid provision that avoids Free Exercise concerns. Moses v. Ruszkowski, 458 P.3d 406, 419-20 (N.M. 2018). The state court recognized

that No Aid provisions are typically Blaine Amendment measures that may have their genesis in anti-religious bigotry. Id.

"Since the constitutionality of school vouchers under the First Amendment was verified in Zelman, opponents of school choice programs have turned to Blaine Amendment and/or establishment provisions in state constitutions in hopes of eliminating them." 3 Religious Organizations and the Law § 25:35 (2d Dec. 2023 Update). "Blaine Amendments are provisions in state constitutions crafted specifically to prevent funds from being used for religious education." 3 Religious Organizations and the Law § 25:36 (2d Dec. 2023 Update).

A former version of Article XI, section 4 prohibited both direct and indirect funding of private schools. Hartness, 255 S.C. 503, 179 S.E.2d 907. The state legislature correctly recognized that the Blaine Amendment was an instrument of discrimination and amended the Constitution by passing a bill, sending the Amendment to the voters for their approval, and ratifying the plebescite in the next General Assembly. The current statute does not prohibit indirect funding of private or religious schools. See Op. S.C. Atty. Gen., 2003 WL 164474 (Jan. 7, 2003).

For over 50 years now, South Carolina has allowed students to benefit from private and religious schools through loans and scholarships. See Durham, 259 S.C. 409, 192 S.E.2d 202; Op. S.C. Atty. Gen., 1974 WL 27574 (Jan. 4, 1974); (Dep't of Educ. Br., pp. 22-27). Petitioners seek to turn back the clock in South Carolina by subjecting it once again to the Blaine Amendment. This is a form of anti-religious hostility.

Petitioners point out that South Carolina, like other states, promises a "system of free public schools open to all children in the State." S.C. Const. Ar. XI, § 3. However, federal law prohibits religious instruction in public schools. Sch. Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203 (1963); Carson, 596 U.S. at 790-91 (Breyer, J., dissenting) (collecting cases). Courts have even

banned *evidence* that might support certain religious teaching from being presented in public schools. Id. at 800 (citing Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987)). As a result, public schools cannot deliver on their promise. At most, they can provide a *secular* education.

For parents who believe that religious instruction is an integral part of a complete education, Petitioners would have the State respond, "Sorry, we can't help you." Nevertheless, State counties and municipalities will continue to tax such parents for the support and maintenance of public schools. This arrangement effectively penalizes religious families based upon their religious beliefs. See Espinoza, 140 S. Ct. at 2254 (holding that the Free Exercise Clause "protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status."); McDaniel v. Paty, 435 U.S. 618 (1978).

Public schools are not always capable of providing all the services to which citizens of their states are entitled. In those situations, schools have been permitted to outsource such services to private providers. See Carson, 596 U.S. at 773. In like manner, South Carolina's No Aid provision was relaxed to "establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs." Op. S.C. Atty. Gen., 1974 WL 27574 (Jan. 4, 1974).

Petitioners complain that "Vouchers take scarce funding from students in public schools and give those resources to unaccountable private schools." Issue Explainer, Vouchers, available at https://www.thescea.org/advocating-for-change/action-center/our-issues/vouchers (last accessed Jan. 29, 2024). Religious citizens pay taxes too. South Carolina's Constitution was not intended to grant one viewpoint—secularism—a monopoly on educational funding. That would violate the Establishment Clause. Therefore, this Court should avoid an overbroad interpretation of the No Aid provision that would violate First Amendment rights.

B. An overbroad extension of the Adams holding regarding indirect benefits should not control this case.

Statutes are presumed to be constitutional and they will be construed in such a manner as to uphold them if possible. Joytime Distribs. And Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Petitioners cannot meet this burden under the circumstances of this case.

As this Court recognizes, "Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Adams, 432 S.C. at 238, 851 S.E.2d at 710 (quoting Sloan v. Hardee, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Adams, 432 S.C. at 238, 851 S.E.2d at 710 (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

Amicus would also show that Petitioners seek to extend Adams far beyond the language of South Carolina's Constitution. In Adams, this Court held that CARES Act funds directly benefitted religious and private schools because the funds were "directly transferred from the State Treasury to the selected school." 432 S.C. at 241, 851 S.E.2d at 711. This Court cited several out-of-state cases for the proposition that the "true benefit theory" or "child benefit theory" has been rejected. Respectfully, these holdings do not flow from the text of the South Carolina Constitution.

1. The plain and ordinary meaning of South Carolina's No Aid provision.

In Adams, this court held that "the direct payment of the funds to private schools" violates the No Aid provision. 432 S.C. at 241, 851 S.E.2d at 711. In so doing, this Court read the legally significant phrase "direct payment" into the Constitution. See Black's Law Dictionary 519 (2d

pocket ed. 2001) (defining "direct payment" as "a payment made directly to the payee, without using an intermediary). Respectfully, that is not what the Constitution says.

What Article XI, Section 4 prohibits is the payment of public funds "for the direct benefit of" religious and private schools. The focus should be on the meaning of the phrase "payment . . . for the direct benefit of."

The plain and ordinary meaning of the phrase "payment for" looks to the purpose of the payment. The expected answer to the question, "what was this payment for?" is the reason the payment was made. A typical response might be, "that payment was made to the plumber for fixing the leak."

The phrase, "for the direct benefit of" qualifies the phrase "payment for." If the response to the question, "what was this payment for?" is "for clothes," the next question might be, "for whom?" One child might benefit from clothes purchased for another child. But the direct beneficiary is the child for whom the clothes were purchased.

Case law confirms the correctness of common understanding of the phrase, "for the direct benefit of." A court held that if a purchaser assumes a lien for the unpaid balance when purchasing an item, the seller is not taxed on the full value of the item. Indiana Dep't of State Rev. v. Northern Indiana Steel Supply Co., 180 Ind. App. 366, 369, 388 N.E.2d 596, 598 (Ct. App. 1979). The court explained that the assumption of the lien is not a payment for the direct benefit of the seller. Id. Payment of a daughter's tuition and medical premium by a former husband was found to be made for the direct benefit of the daughter. Keefe v. Keefe, 559 So.2d 987, 988 (La. Ct. App. 1990). A federal statute prohibited payments further student educational benefit payments made to or for the direct benefit of an individual convicted of certain crimes. Green v. Dumke, 480 F.2d 624, 626 (9th Cir. 1973).

By its terms, South Carolina's No Aid provision prohibits payments intended to directly benefit private or religious schools. The fact that that goods or services purchased with State funds may benefit private or religious schools is not barred by the text. What matters is whether it can be shown that the *payment* of public funds was "for the direct benefit of" such schools.

2. South Carolina's current No Aid provision is materially different from its predecessor.

In Hartness, this Court was not called upon to differentiate between "direct" or "indirect" benefit. The provision at the time prohibited state funds from being "used, directly or indirectly, in aid or maintenance" of any religious organization. Hartness, 255 S.C. at 506, 179 S.E.2d at 908. The court began by recognizing that both direct and indirect aid were prohibited. Id. This Court then "reject[ed] the argument that the tuition grants . . . d[id] not constitute aid to the participating schools." Id. at 507, 179 S.E.2d at 909. Furthermore, Hartness is factually distinguishable in that the court expressly found that "one of the main purposes of the tuition grant is to reduce the cost to a student for attending private colleges and thereby attract additional students . . . to fill vacancies in their student body." Id. at 508, 179 S.E.2d at 909. Under those circumstances, this Court found the tuition grant program directly or indirectly aided religious schools. Id.

South Carolina's current No Aid provision does not prohibit indirect benefit. Because Hartness did not distinguish between direct and indirect aid, its holding is not controlling. Second, "aid" is not the same as payment "for the direct benefit of." Finally, this facial challenge action does not bring before this Court a *finding* that the ESTF Program was intended to directly benefit religious or private schools.

3. The West Committee Report distinguishes between "direct" and "indirect."

As this Court recognized, the legislative history illuminates the intent of the term "direct" in Article XI, Section 4. The West Committee felt that "public funds should not be granted

outrightly to" religious and private schools. Adams, 432 S.C. at 240, 851 S.E.2d at 711. The Committee saw that "in the future there may be substantial reasons to aid *the students* in such institutions as well as in state colleges." Id. (emphasis added). The Committee therefore proposed to remove the word "indirectly" to allow for programs that aid students." Id. It was also felt this would allow the legislature to "contract with religious and private institutions for certain types of training and programs." Id. This makes clear that state aid for the benefit of students is a permissible indirect benefit.

4. The cases Adams cited follow from the pre-amendment No Aid provision.

Furthermore, Adams' attempt to superimpose case law rejecting the "child benefit theory" is unwarranted because it derives from the pre-amendment language. The "child benefit theory" is an interpretation that allows state "aid that is given directly to the student, who may then use it at a religious or private school." 3 Religious Organizations and the Law § 25:36 (citing Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 835 (1998)). The Wisconsin court's ruling foreshadowed subsequent United States Supreme Court decisions that focused on whether the funds reach religious schools as a result of private choice by students and their parents. Id.

The case law this Court cited in Adams interpreted provisions that are materially different from South Carolina's *current* No Aid provision. Furthermore, the cases this Court cited are all based upon Establishment Clause jurisprudence that has been overruled.

South Carolina's current No Aid provision does not contain a categorical prohibition against aid to religious and private schools. What Article XI, Section 4 proscribes is payment of "public funds . . . for the direct benefit of" any religious or other private educational institution. To prove a violation of South Carolina's No Aid provision, Petitioners must show that the ESTF scholarships are paid for the direct benefit of religious and/or private schools.

The cases Adams cited in support of its "direct benefits" holding all stand that for the proposition that when state law categorically prohibits aid to religious or private schools, measures that direct funds to those schools through students are improper because the payments to the students and their families are treated as a "mere conduit" to circumvent the No Aid provision. See Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 785-86 (1973); Gaffney v. State Dep't of Ed., 192 Neb. 358, 369, 220 N.W.2d 550, 557 (1974); Cal. Teachers Ass'n v. Riles, 29 Cal. 3d 794, 812 (1981). Were potential beneficiaries of ESTF scholarships before this Court, they might object to their very real educational needs being considered "mere conduits" of payments by the State to subsidize private and religious schools.

In Nyquist, the court held that the fact that state benefit payments at issue were made to parents, who were free to spend the money as they wished, was not relevant to the question whether the Establishment Clause is violated. 413 U.S. at 785-86. But the Establishment Clause has a much different focus.

The Establishment Clause prevents government from establishing or subsidizing religion. Mitchell v. Helms, 530 U.S. 793, 809 (2000). Viewed in this light, it is not difficult to discern why the fact that benefits are paid to individuals rather than directly to religious organizations would not make a difference. To put it bluntly, if a state may not directly subsidize a religious organization, is the Establishment Clause any less violated if the state directs the subsidy to that organization's members rather than to the religious organization itself? But as Petitioners acknowledge, the Establishment Clause is not controlling in this case.

Since Nyquist, federal jurisprudence has softened its stance on the relationship between state-funded benefits and the Establishment Clause. In Mitchell, the court overruled two of the cases that were relied on heavily in the cases this Court cited in Adams. Mitchell, 530 U.S. at 835

(overruling Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977)). The Mitchell court held that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs . . . . This doctrine, born of bigotry, should be buried now." 530 U.S. at 829. Furthermore, Mitchell held that the "distinction between direct and indirect aid" is no longer relevant. Id. at 815-16. The focus is now on whether religious organizations benefit from state aid due to private choice. Id.

The cases Adams cited in rejection of the "child benefit theory" or "true benefit theory" recognized this distinction. However, their analysis was driven by this now-overruled line of Establishment Clause cases. After all, at the time the state No Aid provisions had to be interpreted within the constraints of the Establishment Clause.

5. Gaffney, Riles, and Cain merely follows Hartness.

The earliest of the trio of cases is Gaffney. That case is not helpful in interpreting South Carolina's current No Aid provision. Gaffney heavily relied on Establishment Clause cases that are no longer good law. Furthermore, Nebraska's provision at the time was much more restrictive than South Carolina's current provision is.

The Nebraska No Aid provision prohibited appropriations "in aid of" religious schools or any educational institution not controlled by the state. Gaffney, 192 Neb. at 361, 220 N.W.2d at 553. The court interpreted the intent of that provision to be "to prohibit the extension of aid from public funds to nonpublic schools, in any manner, shape, or form." The court went on to hold that Nebraska's No Aid provision prohibited both direct and indirect aid. In fact, the opinion is replete with references to direct and indirect aid. Id. at 367-70, 220 N.W. at 556-57.

Gaffney cited a prior Nebraska case for the proposition that the plaintiffs could not "escape the direct impact of" the No Aid provision with the argument that the benefit was an aid to the students. Id. at 367, 220 N.W. at 556 (citing State ex rel. Rogers v. Swanson, 192 Neb. 125, 219

N.W.2d 726 (1974)). In Rogers, the court held that "the Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly." 192 Neb. at 129, 219 N.W.2d at 730.

Significantly, the Rogers court cited Hartness with approval, in which this Court interpreted South Carolina's prior No Aid provision. Rogers, 192 Neb. at 132-33, 219 N.W.2d at 731-32. Gaffney and Rogers, therefore, merely stand for the proposition that when a state No Aid provision completely bars aid to religious schools—both directly and indirectly—the fact that state aid benefits students does not render the offending provision constitutional.

These cases merely reiterate Hartness' holding, and do not contribute anything to the case currently before this Court other than illumination as to the intent of the distinction between "direct" and "indirect." The Nebraska cases support the interpretation that "indirect" aid is that provided by the state to students and their parents, rather than to a religious or private school. Therefore, Gaffney and Rogers support the constitutionality of the ESTF Program because it relies solely on indirect benefits to students, not direct subsidies of religious or private schools.

It is also noteworthy that Gaffney was not the end of the story in Nebraska. The voters in that state, like South Carolina did in 1973, amended their constitution to soften their No Aid provision. Lenstorm v. Thone, 209 Neb. 783, 786, 311 N.W.2d 884, 886-87 (1981). The court held that, under the updated language, Hartness no longer applied. Id. at 788, 311 N.W.2d at 888. The court went on to uphold the constitutionality of the "scholarship awards" program for "needy students." Id. at 791, 311 N.W.2d at 889. Like South Carolina's ESTF Program, the scholarships were paid directly to the students for use at any eligible institution, private or public. Id.

California's No Aid provision, like Nebraska's, flatly barred state "aid" and "support" of sectarian schools. Riles, 29 Cal. 3d at 797. The court agreed with the plaintiff's allegation that it

was "a subterfuge to allow the state to accomplish indirectly what it may not do directly." See id. at 798. Once again, the court analogized to the Establishment Clause cases that were in effect at the time. Id. at 801. The court cited numerous cases that the "child benefit theory" could not get around the blanket prohibition in California's No Aid provision. Id. at 807. Riles is another Hartness case whose only relevance in the case at bar is to support the State's interpretation as to indirect benefits.

Cain v. Horne is yet another flat-bar case. 220 Ariz. 77, 202 P.3d 1178 (2009). Like Nebraska and California, Arizona's No Aid provision prohibited "appropriation of public money made in aid of" religious institutions. Id. at 79, 202 P.3d at 1180. The court cited Riles, Gaffney, and Hartness for the proposition that "applying the true beneficiary theory exception would nullify the Aid Clause's clear prohibition against the use of public funds to aid private and sectarian education." Id. at 83, 202 P.3d at 1184. Once again, Cain's sole value is to demonstrate the distinction between direct and indirect funding.

None of the cases this Court cited in Adams supports the broad holding that opinion espoused—that merely because the SAFE Grants were directly transferred (through an online portal) from the State Treasury to the schools, the transfers were made "for the direct benefit of" the schools. 432 S.C. at 241, 851 S.E.2d at 711.

6. Sheldon is distinguishable for multiple reasons.

This Court cited one other relevant case in Adams. This Court ruled that the SAFE Grants program did not provide students the independent choice found acceptable in Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972). Adams, 432 S.C. at 242, 851 S.E.2d at 711-12 (citing Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979)).

Petitioners have not asserted an Establishment Clause challenge in this case. Therefore, the lack of independent choice is not material to the analysis of this case. See Zelman 536 U.S. at 652.

Even if an Establishment Clause violation was raised, it cannot be supported in this case. In Zelman, the court held that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," the Establishment Clause is not violated. The court distinguished Nyquist, wherein the function of the aid was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." Id. at 661. The program in Nyquist was found to be intended to benefit the schools, which were facing "increasingly grave fiscal problems." Id. Similarly, in Hartness there was a *court finding* that the tuition grant program was a means of propping up financially-strapped private schools. 255 S.C. at 508, 179 S.E.2d at 909. No such finding has been made in this case.

In Sheldon, the court interpreted a No Aid provision that is substantially similar to South Carolina's and held that a tuition grant program constituted impermissible direct payments to religious or private schools. See 599 P.2d at 128. However, Sheldon is distinguishable both legally and factually.

Sheldon is distinguishable factually in that the tuition grant program apparently awarded all Alaskan students attending private colleges a tuition grant up to $2,500 above the amount of public college tuition annually. Id. The state attorney general opined that the program violated the state No Aid clause. Id. A ballot measure attempting to support the program failed. Id.

None of these are true here. Private and religious schools under the ESTF Program only receive payment upon the independent choice of the students and their families. Several Attorney

General opinions support the constitutionality of the program. See Op. S.C. Atty. Gen., 1974 WL 27574 (S.C.A.G. Jan. 4, 1974). Additionally, South Carolina citizens voted to amend South Carolina's No Aid provision to render it more lenient toward school choice programs long ago.

As in Adams, the Sheldon court looked to the Alaskan Constitutional Convention. 599 P.2d 129. Again, the circumstances were very different. There, the record "made it abundantly clear that they did not wish to prevent the state from providing for the health and welfare of private school students, or from focusing on the special needs of individual residents." Id. The legislative history in Sheldon thus apparently supported a broad reading of its No Aid clause. This is in stark contrast to South Carolina, where the legislative history suggests a narrow reading.

Some of the Sheldon court's conclusions do not seem warranted from the text. The court held, for example, that police and fire protection are direct benefits. 599 P.2d at 130. Alaska's No Aid prohibits "payments of money from public funds for the direct benefit of any religious or private educational institution." Id. at 128. Public funding of police and fire departments do not involve direct payments to religious schools. The court's interpretation was apparently derived from Establishment Clause jurisprudence. See Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 746 (1976) (holding that religious institutions need not be quarantined from public benefits, such as police and fire protection, that are neutrally available to all). Religious schools may benefit from the police and fire protection, but they only indirectly benefit from state *funding* of these agencies.

Sheldon held that "a benefit flowing only to private institutions, or to those served by them, does not reflect the same neutrality and non-selectivity." 599 P.2d at 130. In support of this ruling, the court cited Nyquist, Wolman, and Meek. Of these, the only one that remains good law is Nyquist, and Nyquist is distinguishable, as discussed above.

Based upon the Sheldon court's description, the Alaska tuition grant program suffered from the same infirmity as in Nyquist and Hartnett. Because it was a general grant to all private school students, "the class primarily benefitted . . . consist[ed] only of private colleges and their students." Sheldon, 599 P.2d at 131. The program was basically a subsidy for private schools because "effectively the chief beneficiaries are the private colleges themselves." Id.

Under those circumstances, Sheldon held that the tuition grant program failed to pass muster. The program could not be sustained under Establishment Clause jurisprudence at the time because it was essentially a subsidy. The Alaska program might still fail under the current interpretation. Therefore, although the court couched its holding as a No Aid ruling, it appears from the factual recitation and the case law cited that Establishment Clause limitations were being read into the No Aid holding.

Sheldon thus stands for the proposition that when a benefit program is effectively a subsidy to religious or private schools that is merely routed through students, thus violating both the Establishment Clause, indirect payments to students can be considered direct for purposes of the state No Aid provision. Under those circumstances, "one may not do by indirection what is forbidden directly." Sheldon, 599 P.2d at 132.

The ESTF Program is not a subsidy. It establishes scholarships for needy students. Genuine choice is involved in that qualifying students may apply their scholarship funds toward any qualifying educational institution and select from a menu of "qualifying expenses." S.C. Code Ann. §§ 59-8-110(7), (13); 59-8-120. Therefore, Sheldon is not authoritative as to the interpretation of South Carolina's No Aid provision.

Based upon the above, none of the authorities this Court cited in Adams support the broad interpretation that state benefits paid to private or religious educational provides solely upon the

choice of students and families who otherwise could not afford the services constitutes payments "for the direct benefit of" those schools. *Amicus* respectfully request that this Court reconsider its interpretation in Adams.

C. This case is factually distinguishable from Adams.

The merits briefing has done an admirable job of demonstrating that the ESTF Program is a benefit extended to students that only indirectly benefits private and/or religious schools. The ESTF Program does not involve direct transfers of state funds to religious or private schools. Instead, it uses an online portal system wherein parents transfer scholarship funds from a trust fund to the school of their choice. S.C. Code Ann. § 59-8-120(C) and (D). Petitioners are simply incorrect in asserting that the ESTF Program involves direct transfers from state funds to religious or private schools.

Importantly, the state funds are not paid "for the benefit of" the educational providers. Rather, the funds are paid for the benefit of the *students* to compensate the providers for services rendered. Other states recognize this distinction.

In a well-reasoned opinion, the Supreme Court of Oklahoma held that state payments for services rendered are not made for the benefit of the provider. Oliver v. Hofmeister, 368 P.3d 1270, 1275 (Okla. 2016). Such payments are not gifts, donations, or appropriations directly to the providers. Id. In Oliver, the court upheld a similar scholarship program under a much stricter No Aid provision. Oklahoma's No Aid provision prohibited both direct and indirect payments to religious institutions. Id. at 1275. This is because payments for services rendered are not made "for the benefit of" the provider. In that circumstance, the State receives a substantial benefit from being relieved of duties it would otherwise have to provide. Id. at 1276.

Oliver is on point. But for the voluntary choice to attend private or religious schools made by the scholarship recipients, the State would necessarily have to expend resources to educate

those children. What the ESTF Program does is outsource some of the State's educational responsibilities to private providers. Under Oliver, the ESTF Program involve payments by students for services rendered; it does not involve state payments "for the direct benefit of" religious or private schools.

Oliver is in accord with Durham. When the benefit of the state funding is directly to the student, and schools must compete for the benefit of educating that student, there is no "aid" to a particular school or institution. Durham 259 S.C. at 413, 192 S.E.2d at 203. Furthermore, Petitioners' interpretation of South Carolina's No Aid provision is overbroad. If private and religious schools are held to directly benefit from ESTF scholarships, then they would also benefit from contracts with the State. No one in this case is contending that the No Aid provision prohibits state contracts with religious or private institutions.

Oliver supports the constitutionality of the ESTF Program. South Carolina's ESTF Program does not involve any contract or direct relationship between the State and religious or private schools. If the program in Oliver did not violate a state No Aid provision, then surely South Carolina's ESTF Program clears that hurdle.

D. Educational savings account programs have been upheld even in states with flat-bar No Aid provisions.

Finally, Respondents correctly point out that Cain was not the final story in Arizona. Arizona courts subsequently approved an educational savings account (ESA) program that is similar to South Carolina's ESTF Program. Niehaus v. Huppenthal, 233 Ariz. 195, 310 P.3d 983 (2013). Niehaus is significant because Arizona's No Aid provision was not amended. Arizona has a flat-bar No Aid provision. Cain, 220 Ariz. at 79, 202 P.3d at 1180. Thus, Niehaus stands for the proposition that ESA / ESTF programs pass must even under stricter flat-bar or "direct or indirect" No Aid language.

The ESA Program is remarkably similar to South Carolina's ESTF Program. Just as in South Carolina, the objective of the ESA programs was to benefit families, not schools. Niehaus, 233 Ariz. at 199, 310 P.3d at 987; S.C. Code Ann. § 59-8-120(A). In both states, "parents can use the funds deposited in the [ESA / ESTF] to customize an education that meets their children's unique educational needs." Niehaus, 233 Ariz. at 199, 310 P.3d at 987. ESA / ESTF funds can be applied to a wide range of education expenses. Id. at 199-200, 310 P.3d at 987-88; S.C. Code Ann. § 110(13). ESA and ESTF funds may be used at eligible schools, whether public or private. "Thus, beneficiaries have discretion as to how to spend the ESA funds without having to spend any of the aid at private or sectarian schools." Niehaus, 233 Ariz. At 200, 310 P.3d at 988. As with ESAs, South Carolina's ESTF Program transfers state funds to a trust fund for the benefit of students, and the parents make the choice how to use the funds. S.C. Code Ann. § 59-8-120.

The ESA program in Niehaus was found to clear the hurdle imposed by a No Aid provision that is must stricter than South Carolina's. It follows that South Carolina's ESTF Program is consistent with South Carolina's Constitution.

CONCLUSION

In Adams, this Court sought to ground its decision in the text of the state Constitution. *Amicus* respectfully suggests that the text of the Constitution does not support a broad interpretation that any benefit program that involves payments directly from state funds to private or religious schools necessarily fails. What the No Aid provision prohibits is direct payments for the benefit of such schools. Were this case about subsidies, Establishment Clause concerns may require a holding that either direct or indirect payments violate constitutional provisions. But this case does not involve anything remotely like subsidies. Petitioners seek to dismantle a program intended to directly benefit *students* who otherwise would not be able to afford tuition costs. Students and their parents are given a choice of providers, and state funds reach private and/or

religious schools only *indirectly* as a result of those choices. South Carolina's Constitution was amended to allow state aid to students that benefits religious and private schools only indirectly, like the ESTF Program. Accordingly, this Court should find in favor of Respondents.

Respectfully submitted,

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Columbia, South Carolina
February 1, 2024

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION

Case No. 2023-001673

CANDACE EIDSON, on behalf of herself and her minor child; CONEITRA MILLER, on behalf of herself and her minor child; JOY BROWN, on behalf of herself and her minor children; CRYSTAL ROUSE, on behalf of herself and her minor children; AMANDA MCDOUGALD SCOTT, on behalf of herself and her minor child; PENNY HANNA, on behalf of herself and her minor children; the SOUTH CAROLINA STATE CONFERENCE OF THE NAACP; and THE SOUTH CAROLINA EDUCATION ASSOCIATION, ….…… Petitioners,

v.

SOUTH CAROLINA DEPARTMENT OF EDUCATION; ELLEN WEAVER, in her official capacity as State Superintendent of Education; SOUTH CAROLINA OFFICE OF THE TREASURER; and CURTIS M. LOFTIS, JR., in his official capacity as State Treasurer of South Carolina…….…… Respondents.

and

HENRY McMaster, in his official capacity as Governor of the State of South Carolina; G. Murrell Smith, Jr., in his official capacity as Speaker of the South Carolina House of Representatives; and THOMAS C. ALEXANDER, in his official capacity as President of the South Carolina Senate
……..……..Intervenors-Respondents

PROOF OF SERVICE

I certify that the ***AMICUS CURIAE*** **BRIEF OF PALMETTO PROMISE INSTITUTE IN SUPPORT OF RESPONDENTS AND INTERVENORS-RESPONDENTS** was served on counsel of record on February 1, 2024, via email under

Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

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