CHIEF JUSTICE KITTREDGE: I dissent from the majority opinion's holding that the Educational Scholarship Trust Fund (ESTF) Act provides a "direct" benefit to private educational institutions. Under the South Carolina Constitution, the use of public funds for the *direct* benefit of a private school is impermissible; the use of public funds for the *indirect* benefit of a private school is entirely permissible. *See* S.C. Const. art. XI, § 4 ("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." (emphasis added)). While at first blush the terms "direct" and "indirect" may seem clearly distinguishable and easily discernible, this Court—and, as a result, the General Assembly—has struggled for years with how to apply them in discrete factual scenarios.

Recently, we reviewed and contrasted the hallmarks of direct and indirect benefits within the meaning of article XI, section 4 of the South Carolina Constitution. *See Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020). There, as part of a grant program, Governor McMaster allocated federal funds to be paid directly and exclusively to private, independent schools on behalf of eligible students. I was part of the unanimous Court that rejected the Governor's effort to characterize the program as only indirectly benefitting private schools; the expenditure of funds was unquestionably direct. As a result, we found the Governor's direct-benefit grant program unconstitutional.

Subsequently, with a view toward addressing and rectifying the deficiencies identified in *Adams*, the General Assembly carefully crafted legislation to create a program to enable and empower parents to make education-related choices on behalf of their children. The result of that legislative effort was the ESTF Act. In my view, unlike the program in *Adams*, the structure and operation of the ESTF Act provide an indirect benefit to schools of the families' choice—both private and public alike.

Nonetheless, the majority opinion today defines the phrase "direct benefit" so broadly that it swallows any possible meaning of "indirect benefit" in the process. In doing so, the majority opinion pays lip service to the policy-making role of the legislature. Unfortunately, I have been down this road before. *See Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 663, 767 S.E.2d 157, 180 (2014) (Kittredge, J., dissenting) ("I [recognize] the emotional appeal in today's decision [and] acknowledge the self-evident truth concerning the critical importance of public education to the citizens of South Carolina. . . . I, however, approach this so-called legal case not as a private citizen, but as a judge constrained by the rule of law and the inherent constitutional limitations upon the power of the Judicial Branch. Based

on my view of the rule of law, especially the principle of separation of powers, I believe the Court has overstepped its bounds."). I cannot in good conscience join the majority opinion, as the result is reached in a manner that is fundamentally opposed to my limited, constitutionally-prescribed duties as a member of the judiciary. Just as I was convinced the Governor's school funding program in *Adams* was unconstitutional, I am firmly convinced the ESTF Act provides an indirect benefit and is facially constitutional. I leave debating the wisdom of the policy underlying the ESTF Act to those with the constitutional authority to enact it. With great respect for the majority, I dissent.

I.

I take no issue with the standing of Petitioners and the presence of "public funds" in the establishment of the ESTF. However, I do take issue with what I view as the majority opinion's effort to minimize the General Assembly's plenary authority to legislate.

The South Carolina Constitution grants power to the legislature to "enact any act it desires to pass, if such legislation is not expressly prohibited by the Constitution of this state, or the Constitution of the United States." *Heslep v. State Highway Dep't*, 171 S.C. 186, 193, 171 S.E. 913, 915 (1933); *see also Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) ("[T]he General Assembly has plenary power over all legislative matters unless limited by some constitutional provision."); *Fripp v. Coburn*, 101 S.C. 312, 317, 85 S.E. 774, 775 (1915) ("[T]he Legislature may enact any law not prohibited by the Constitution."). As a result, "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999).

Here, Petitioners attempt to mount a facial challenge to the ESTF Act. The nature of Petitioners' challenge is of particular significance because,

> A facial challenge to a legislative [a]ct is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances* exists under which the Act would be valid. The fact that the [legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [the United States Supreme Court has] not recognized an

> "overbreadth" doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987) (emphasis added); *see also Planned Parenthood S. Atl. v. State,* 440 S.C. 465, 477, 892 S.E.2d 121, 128 (2023) (*Planned Parenthood II*) (noting that the presumption in favor of the constitutionality of a legislative enactment is especially weighty for facial challenges to the constitutionality of a statute because the challenger must show the law "is unconstitutional in all its applications"). The parties agree that ESTF funds may be awarded to an applicant whose parents then direct the funds be paid to a public school. In such a case, there is unquestionably no violation of article XI, section 4, for public funds are not being paid to a private school. Accordingly, Petitioners' facial challenge necessarily—and easily—fails to pass muster, without any need to interpret whether the benefits of the ESTF Act are direct or indirect. *See Richardson ex rel. 15th Cir. Drug Enf't Unit v. $20,771.00 in U.S. Currency*, 437 S.C. 290, 297, 878 S.E.2d 868, 871 (2022) (explaining that in order to mount a successful facial challenge, a litigant must demonstrate a legislative enactment is unconstitutional under *all* conceivable circumstances (quoting *City of L.A. v. Patel*, 576 U.S. 409, 415 (2015))). However, because the majority opinion misapplies the standard of review, I must continue my own analysis and examine the complexities of direct and indirect benefits, as those terms are meant in article XI, section 4.

II.

When construing constitutional language, the Court applies the ordinary rules of statutory construction. *Neel v. Shealy*, 261 S.C. 266, 272, 199 S.E.2d 542, 545 (1973) (per curiam) (quoting *McKenzie v. McLeod*, 251 S.C. 226, 161 S.E.2d 659 (1968)). Thus, in the constitutional context, the Court's primary focus must be on ascertaining and effectuating the intent of the framers and the people who adopted a particular constitutional provision. *Id.* at 272–73, 199 S.E.2d 542, 545; *Reese v. Talbert*, 237 S.C. 356, 358, 117 S.E.2d 375, 376 (1960). Constitutional language that is plain and unambiguous, and which conveys a clear and definite meaning, is often the best evidence of the framers' intent or will. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). However, even plain constitutional language may not be read in isolation but, rather, must be read in context "in a manner consonant and in harmony with its purpose." *See CFRE, L.L.C. v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

In the abstract, the phrase "direct benefit" is not ambiguous. As the majority opinion states, "direct" means "stemming *immediately* from a source." (Emphasis added). The ambiguity—and I am firmly convinced there is uncertainty in the constitutional phrase "direct benefit"—arises when any substance is given to the word "direct" while applying it to a discrete set of facts. For example, take the majority opinion's chosen definition from Webster's Dictionary considered in isolation. The funds at issue here which may eventually aid private schools do not come "immediately" from South Carolina's public fisc. Rather, as I explain further below, the funds move from the State Treasury, to a trust fund held by a third-party bank, to an applicant's individual account, to the school of the applicant's choice (some of which can be private schools). The majority opinion finds this is a direct benefit to the private school, that is, that public funds are "immediately" going from the State Treasury to the private school. While reasonable minds could differ on whether this movement of funds is direct *enough* to qualify under article XI, section 4, certainly there must be an acknowledgement that even the majority opinion's chosen definition highlights the ambiguity inherent in applying the phrase "direct benefit." Interpreting the phrase "direct benefit" will always be a fact-dependent exercise requiring the Court to consider whether a benefit is sufficiently attenuated—or not attenuated enough—to pass constitutional muster.[2] *See Owens v. Stirling*, Op. No. 28222 (S.C. Sup. Ct. filed July 31, 2024) (Howard Adv. Sh. No. 29 at 61) (Hill, J., concurring) (explaining, in construing the seemingly plain words "cruel" and "unusual," that "when the framers left us with vague terms, they intentionally left interpretation of those terms to the only true power courts have in our republic: our judgment").

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[2] Unsurprisingly, this Court has not previously set forth a clear definition of either direct or indirect benefit in the past, resolving appeals on a case-by-case basis. *See Adams*, 432 S.C. 225, 851 S.E.2d 703; *Durham v. McLeod*, 259 S.C. 409, 192 S.E.2d 202 (1972); *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971). Surely, were the phrase "direct benefit" clear and unambiguous, and a dictionary definition the best way to interpret the term, this Court and the General Assembly would not have repeatedly wrestled with the concept over the past fifty years. *See Adams*, 432 S.C. 225, 851 S.E.2d 703; *Durham*, 259 S.C. 409, 192 S.E.2d 202; *Hartness*, 255 S.C. 503, 179 S.E.2d 907; *see also Bishop of Charleston v. Adams*, 584 F. Supp. 3d 131 (D.S.C. 2022), *rev'd on other grounds*, Op. No. 22-1175, 2023 WL 4363654 (4th Cir. July 6, 2023); H. 5164, 125th Leg., 1st Reg. Sess., as amended Mar. 20, 2024.

Seemingly acknowledging a simple dictionary definition is insufficient to resolve the question presented here, the majority opinion states that "we must always consider the words ['direct benefit'] in light of the company they keep—their context." I agree with the majority that context is important in discerning the intended scope of a "direct benefit," as that term is meant in article XI, section 4. The requisite context cannot be found via a quick, modern dictionary definition, as that reads the term in isolation, unmoored from the surrounding language and historical context. While the majority opinion touts its reading as a simple application of the "plain meaning " rule of constitutional construction, it is contrary to the *cardinal* rule of constitutional construction, that is, ascertaining and effectuating the intent of the framers and the people that voted in favor of the constitutional provision. *Owens*, (Howard Adv. Sh. No 29 at 61) (Hill, J., concurring) ("History, custom, and tradition can be essential to understanding many of the vague and open-ended terms used in our constitutions. . . . [I]t it is often helpful—and necessary—to consider the principle underlying the constitutional right to help determine the contours of the right and to then use common sense to apply it to the facts.").

To understand the phrase "direct benefit" in context here—as that phrase was meant by the framers and the people who voted in favor of the language—requires a review of the history of article XI, section 4, as well as its predecessor, which was contained in article XI, section 9 of the South Carolina Constitution of 1895. The need for this historical review is simple: in the current version of our state constitution, the phrase "direct benefit" no longer keeps company with the phrase "indirect benefit," as it did in the past. More specifically, the predecessor to article XI, section 4 expressly prohibited direct *and* indirect aid benefitting religious schools. *See* S.C. Const. of 1895 art. XI, § 9. In 1966, the General Assembly established a "Committee to Make a Study of the South Carolina Constitution of 1895," commonly known as the West Committee. The West Committee proposed two amendments to what was then referred to as the "no aid" provision in article XI, section 9. One suggested change was to remove the prohibition against indirect aid. The second proposed change broadened the scope of the schools that could not receive direct aid, from only religious schools to all independent schools. In its final report in 1969, the West Committee explained its reasoning:

> **Section D. Public funds for religious and private educational institutions.** The Committee evaluated this section in conjunction with interpretations being given by the federal judiciary to the

> "establishment of religion" clause in the federal constitution. The Committee fully recognized the tremendous number of South Carolinians being educated at private and religious schools in this State and that the educational costs to the State would sharply increase if these programs ceased. From the standpoint of the State and the independence of the private institutions, the Committee feels that public funds should not be granted outrightly to such institutions. *Yet, the Committee sees that in the future there may be substantial reasons to aid the students in such institutions as well as in state colleges. Therefore, the Committee proposes a prohibition on direct grants only and the deletion of the word "indirectly" currently listed in Section 9. By removing the word "indirectly[,]" the General Assembly could establish a program to aid students* and perhaps contract with religious and private institutions for certain types of training and programs.

See Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 99–101 (1969) (emphasis added).

The General Assembly did not immediately act on this recommendation, and the constitutional prohibition against direct and indirect aid remained. Then, in 1970, the legislature passed a law to provide financial aid for students attending independent higher-education institutions. *See* Act No. 1191, 1970 S.C. Acts 2579. More specifically, Act No. 1191 provided tuition grants directly to eligible students, who then were required to pay the money to the private school—religious or secular—selected by him or her. Following various legal challenges, this Court struck down Act No. 1191 as unconstitutional, holding it provided an indirect benefit to religious schools in violation of article XI, section 9 of the state constitution. *See Hartness v. Patterson*, 255 S.C. 503, 506, 179 S.E.2d 907, 908 (1971) (observing the "aid does not have to be direct but is prohibited if it indirectly benefits the religious schools"). In support of its holding, the Court explained,

> It is apparent that one of the main purposes of the tuition grant is to reduce the cost to a student for attending the private colleges and thereby attract additional students to their campuses so as to fill the vacancies in their student body. Such would have the effect of adding additional funds to their treasuries and thereby improve their financial status. It is perhaps better stated in respondent's brief as follows: "The indirect benefit accruing to the private colleges [from the tuition grants] will consist of their being able to attract sufficient students to their

> campuses to continue to function." Such constitutes [indirect] aid to the religious schools.

Id. at 508, 179 S.E.2d at 909.

The General Assembly responded swiftly to (and against) the *Hartness* decision by moving forward with the proposed recommendations of the West Committee regarding article XI, section 9. By 1973, the voters of our state had approved the amendments to the newly-renumbered article XI, section 4, and those amendments were adopted by the legislature. The constitutional amendments effectively overruled *Hartness* insofar as indirect aid to private schools was no longer prohibited.

Oddly, in striking down the ESTF Act, the majority opinion today recasts *Hartness* as a direct-benefit case: "[The ESTF Act] is th[e] same direct effect we found unconstitutional in *Adams* and *Hartness* . . . ." *Hartness* manifestly involved an indirect benefit, and I respectfully reject the majority opinion's effort to recast *Hartness* as a direct-benefit case.[3]

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[3] The majority opinion disagrees with my discussion of and reliance on *Hartness* as an indirect-benefit case. To confirm there was no latent ambiguity in the intended reach of the *Hartness* opinion, I carefully reviewed the briefs filed with the Court in that case. Those briefs unequivocally confirm my reading of *Hartness* and refute the majority's reading; indeed, the appellant's self-styled issue on appeal in that case was whether "an act authorizing tuition grants to students attending schools controlled by religious sects constitute[d] ***indirect aid*** to such schools within the meaning of the state constitutional prohibition against such aid." (Emphasis added). In the over-fifty years since *Hartness* was decided, there has never been a whisper that the tuition grants involved in that case constituted a direct benefit to religious institutions.

To be clear, I believe the amendment to the former article XI, section 9—getting rid of the prohibition on indirect aid to private schools—overruled the result in *Hartness*: while the indirect aid at issue there was unconstitutional under the former article XI, section 9, indirect aid is now constitutional under the current article XI, section 4. Therefore, *Hartness* is no longer good law insofar as indirect aid to private schools is no longer prohibited under the South Carolina Constitution. However, the 1973 constitutional amendment in no way changed the

If context is important—and I believe it is—the meaning and scope of a "direct benefit" can be properly understood only when considered alongside the framers' targeted and purposeful removal of the prohibition against an "indirect benefit" from our state constitution. The presumption of constitutionality aside, all of the evidence demonstrates that the framers of article XI, section 4 understood the removal of the ban on indirect aid would allow the State to provide to students grants and assistance programs that would indirectly benefit private schools. Indeed, the indisputable purpose of the constitutional amendments was to allow indirect aid to private schools.

III.

Recently, in *Adams*, we set forth a framework for distinguishing between a direct (unconstitutional) benefit and an indirect (constitutional) benefit. In response to the COVID-19 pandemic, Congress passed (and the President signed) the Coronavirus Aid, Relief, and Economic Security Act. Congress appropriated approximately $31 billion to an Education Stabilization Fund. The Secretary of Education was directed to allocate those funds to "sub-funds," one of which was the Governor's Emergency Education Relief (GEER) Fund. South Carolina was allocated $48,467,924 in GEER grant funds. Governor McMaster set aside part of the GEER funds for the Safe Access to Flexible Education (SAFE) Grants Program. The program was designed to make a payment of up to $6,500 per student directly to "participating private or independent schools"; public schools or other, non-private educational providers were not eligible to receive any SAFE grants funds. *Adams*, 432 S.C. at 232–33, 851 S.E.2d at 707.

We found the SAFE grants program unconstitutional, for it involved public funds and provided a direct benefit to private schools. *Id.* at 241, 851 S.E.2d at 711 (holding the "direct payment of the funds to the private schools is contrary to the framers' intention not to grant public funds 'outrightly' to such institutions," and noting the SAFE grants funds were "made available for use only at private educational institutions"). Unlike the majority today, the *Adams* Court did not construe the term "direct benefit" so broadly as to foreclose the legislature from enacting legislation creating a program that would result in an indirect benefit to a

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scope of what aid constitutes a direct or indirect benefit. Thus, while *Hartness*'s ultimate holding is no longer good law, its analysis remains a helpful guidepost in determining whether a particular legislative enactment directly or indirectly aids private schools.

private school. Said differently, *Adams* did not establish a categorical rule prohibiting the legislature from ever spending public funds that benefitted private schools.[4] In fact, *Adams* clearly set forth the distinguishing factors between a direct benefit and an indirect benefit. Specifically, we explained, "We reject the argument that the SAFE tuition grants do not confer a direct benefit on the participating private schools because ***unlike the grants in* Hartness, *which were made directly to the student [and only indirectly to the private institution]****, the SAFE Grants are directly transferred from the State Treasury to the selected school*." *Id.* at 241, 851 S.E.2d at 711 (emphasis added). Similarly, any unused portion of the SAFE tuition grants reverted pro rata directly to the State Treasury from the private school, highlighting the direct nature of the benefit conferred. *Id.* at 240, 851 S.E.2d at 710.

As noted, the General Assembly relied on the *Adams* framework in drafting the ESTF Act to ensure it did not bear the same constitutional defects as the SAFE grants program. Critically, one of the distinctive features of the ESTF Act is that the funds are first paid to a trust and only later—at the sole and explicit direction of the students' parents—to a school of the parents' choosing; the aid is to the student, not directly to the school, and both public and private schools are eligible to be chosen by the parents. A second distinctive feature of the ESTF Act is the fact that any unused funds do not ever revert to the State Treasury.

Accordingly, I conclude that, under *Adams*, the ESTF Act has all the hallmarks of an education-funding program that provides an indirect—and, thus, constitutional—benefit to private schools. While public funds are involved, the funds do not flow directly from the State Treasury to private schools, as they did in *Adams*. Rather, the ESTF program puts students and their parents in the driver's seat, for they alone choose where to spend the allotted funds. The ESTF Act places the funds in a trust, thus removing them from the State Treasury. From the trust fund, a student's educational dollars are transferred to his or her individual account held at a third-party bank. The student's parents select the next recipient, whether a private school

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[4] In resolving the legal challenge in *Adams*, the Court responded to an argument of the Governor by stating, "Under the facts of this case, we disagree." 432 S.C. at 241, 851 S.E.2d at 711. The decision in *Adams* explicitly turned on its facts, specifically, the congressionally-imposed terms, restrictions, and limitations associated with the use of the GEER funds.

or public school *or* a wide array of educational services.[5] It is only upon direction from the students' parents that the bank makes payment to the private or public school, or to the provider of the educational services. Of equal significance is that the ESTF program funds, once transferred to the trust, may never revert to the State Treasury. Rather, after an ESTF applicant's educational dollars are relinquished by the State Treasury and moved from the ESTF trust into his or her individual trust account, any funds unused by that particular student are returned to the corpus of the ESTF trust to benefit another ESTF applicant.[6]

These carefully crafted features of the ESTF program stand in stark contrast to the direct benefits conferred by the SAFE grants program. *Cf. Niehaus v. Huppenthal*, 310 P.3d 983, 987–89 (Ariz. Ct. App. 2013) ("Under the [Arizona Act], the state deposits funds into an account from which parents may draw to purchase a wide range of services, including therapies, home-based instruction, curriculum, tutoring, and early community college enrollment, from religious, nonreligious, and public

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[5] Those educational services include tutoring services, computer assistance, a host of therapies for pupils with disabilities, and transportation-related services.

[6] Understanding how the ESTF program operates is critical to understanding the scope of the constitutional words "direct" and "indirect." To the best of my ability, I have outlined this process by paraphrasing the text of the ESTF Act. *See generally* S.C. Code Ann. § 59-8-120 (Supp. 2023). Nonetheless, the majority opinion takes exception to my description of how the ESTF program operates, asserting my description of the ESTF program must have been taken from an affidavit, rather than from statute. As a result, the majority opinion concludes my description of the ESTF program must be rejected. Based on the statutes and the parties' submission to this Court, I believe my description of the operation of the ESTF program is accurate. Moreover, I do not believe any party presents a contrary view of the program's administration. Nevertheless, the majority opinion concludes otherwise and finds my factual recitation of how the ESTF monies flow is a fatal flaw in my analysis leading to my conclusion that the ESTF program provides an indirect benefit. It is now for the legislature, if it chooses, to address this purported fatal flaw in the ESTF Act and statutorily clarify whether my view and description of how the ESTF program operates is accurate. For today, it is sufficient to say that I accept as accurate the parties' representations regarding the intricacies of the ESTF and render my judgment based on the statutes and facts as I understand them.

providers. Thus, unlike in [*Cain v. Home*, 202 P.3d 1178 (Ariz. 2009) (en banc)], in which every dollar of the voucher programs was earmarked for private schools, none of the [Arizona Act] funds are preordained for a particular destination."). As a result, I unequivocally reject today's revisionist approach to *Adams*. The General Assembly followed the path set out in *Adams*, only to have a majority of the Court pull the rug out from under its feet and, ultimately, the feet of the students the law was designed to serve. The ESTF Act provides an indirect benefit to private schools. The *Adams* framework, if honored, requires this Court to uphold the constitutionality of the ESTF Act.

IV.

Having found the ESTF Act provides a constitutional, indirect benefit, I address Petitioners' remaining arguments.

A.

Petitioners first argue the ESTF Act violates article XI, section 3 of our state constitution. I disagree. This provision assigns to the General Assembly the responsibility to maintain and support "a system of free public schools open to all children in the State." To accept Petitioners' claim would render the 1973 amendment to article XI, section 4 a nullity, which is precisely what the majority opinion has done in defining "direct" so expansively as to swallow and prevent any benefit to a private school. I would not interpret article XI, section 3 in a way that renders article XI, section 4 surplusage.

Moreover, the "free schools" clause does not act as an implied limit on legislative power. In this regard, Petitioners' reading of the "free schools" clause is incompatible with basic constitutional theory. The General Assembly has plenary authority to legislate, meaning the legislature has power "to 'enact any act it desires to pass, if such legislation is not expressly prohibited by the Constitution of this State, or the Constitution of the United States.'" *Planned Parenthood II*, 440 S.C. at 475, 892 S.E.2d at 127 (citation omitted). The "free schools" clause thus acts as a floor, not a ceiling, on the General Assembly's authority.

In addition, the legislature has substantially increased funding to public schools each year, and this pattern has not been interrupted by the passage of the ESTF Act. In fact, the state's public education system received a record amount of funding in the last state budget.

B.

It is next claimed that the ESTF Act unconstitutionally expands the authority of the State Superintendent of Education (the Superintendent). I disagree. The Superintendent is "the chief administrative officer of the public education system of the State." S.C. Const. art. XI, § 2. As with the "free schools" clause, the language in article XI, section 2 must be read as a floor and not a ceiling: the Superintendent is the chief administrative officer of the public school system, but may also be tasked with additional, public-education related responsibilities by the legislature. Petitioners allege that the ESTF Act improperly tasks the Superintendent "with certain administrative and oversight responsibilities over private schools and educational systems." This allegation is meritless, for the Superintendent is granted no authority over private schools. Petitioners apparently misapprehend the nature and purpose of the trust created by the ESTF Act. The Superintendent is required to act as a trustee as she administers the ESTF program. The associated duties with which the Superintendent is charged are statutorily defined, largely ministerial, and tangentially related to the public education system. None of those duties even remotely suggest the Superintendent has power to exercise administrative or oversight authority over any private school.

C.

Petitioners' final challenge contends the ESTF Act "violates Article X, Sections 5 and 11 because it uses public funds without a valid public purpose." Again, I disagree. While this Court is the final arbiter of what constitutes a "public purpose" under our constitution, the law demands we discharge our constitutional duty by extending a measure of respect and deference to the Legislative Branch. *See Carll v. S.C. Jobs-Econ. Dev. Auth.*, 284 S.C. 438, 443, 284 S.E.2d 331, 334 (1985) ("The legislative determination as to what constitutes a public purpose or public need is entitled to great weight."). As I stated at the outset, the ESTF Act was designed to enable and empower parents to make education-related choices on behalf of their children. Providing educational opportunities for low-income students is a valid public purpose. "[T]he mere fact that benefits will accrue to private individuals or entities does not destroy public purpose." *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 229, 246 S.E.2d 869, 874 (1978).

The remaining arguments raised by the amici are manifestly without merit. I would dismiss them pursuant to Rule 220, SCACR.

V.

In conclusion, I dissent from the majority opinion's key holding that the ESTF Act creates a direct benefit to private schools. Recently, the *Adams* Court recognized the constitutionality of using public funds to indirectly benefit private schools. Whether such a policy is good or bad is not for this Court to decide. Our constitution allows the legislature—and only the legislature—to make this policy decision.

Today, the majority opinion ignores *Adams* and defines the term "direct" so broadly as to swallow the term "indirect." In doing so, the majority opinion renders the purpose of the 1973 amendment to article XI, section 4 meaningless and places the continuing constitutionality of indirect aid to private schools on life support.

Consider this critical passage in the majority opinion:

> The inherent flaw in Respondents' choice argument is that the constitution prohibits "direct benefit[s]." We liken Respondents' choice argument to the adage that "a rising tide lifts all boats." Like the tide, the public funds released by the Act for tuition benefit all education service providers, public and private. But just because the benefit is diffuse does not mean it is not direct; the effect of the tide is the same on all the boats.

The majority opinion makes it clear: any legislative educational policy decision that may be characterized as a "rising tide lifts all boats" effort will be deemed an unconstitutional direct benefit. The majority certainly will not sanction the use of public funds that "benefit all education service providers, public and private." Even when the benefit is "diffuse," the majority will declare it a direct benefit because, we are told, "the effect of the tide is the same on all the boats." Public funds may only be spent on a public boat, and there can never be an indirect benefit on a private boat. Thus, under today's decision, public funds may not be spent to indirectly benefit private schools. The literary style of the majority opinion may be appealing, but its underlying rationale is anathema to the rule of law.[7]

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[7] To buttress its decision, the majority opinion repeatedly invokes and discusses at length *Brown v. Board of Education*, 347 U.S. 483 (1954), *rev'g Plessy v. Ferguson*, 163 U.S. 537 (1896). The majority opinion's emotional appeal to *Brown* is presented as essential to understanding the meaning of article XI, section 4 of

The approach taken by the majority opinion today, while presented as the "plain meaning" rule, goes far beyond *Adams* and defines "direct benefit" so broadly as to prohibit any expenditure of public funds on private schools, no matter how indirect or "diffuse." In fact, the test announced by the majority opinion today places many of South Carolina's longstanding and popular scholarships and programs—through which public funds flow directly to private educational institutions—in constitutional doubt. Examples of constitutionally dubious scholarships and programs include the South Carolina HOPE Scholarship, the Legislative Incentive for Future Excellence (LIFE) Scholarship, and the Palmetto Fellow Scholarship. The First Steps 4K Program directs public funds to hundreds of kindergarten programs that are privately owned and operated. These "First Steps" funds are paid directly to the providers, not to the students through their parents. Applying the majority's reasoning, all of these scholarships and programs (and many more) may now be on the chopping block.

With great respect for the majority, I dissent.

FEW, J., concurs.

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our state constitution. There are fifteen parties in this case. The parties are represented by extremely competent counsel. We have been presented with many briefs and dozens of citations to case law and other legal authority. Yet *none of the parties* has cited to or raised the specter of *Brown*, which comes as no surprise as it has nothing to do with direct and indirect benefits to private schools, as those terms are meant in the South Carolina Constitution. As I stated in my dissent in *Abbeville*, "Despite its well-deserved iconic standing in American jurisprudence, *Brown* is not implicated in this case. Invoking *Brown* may make good theater, but it has no relevancy here." 410 S.C. at 680, 767 S.E.2d at 190 (Kittredge, J., dissenting).