IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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In the Supreme Court's Original Jurisdiction

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Appellate Case No. 2020-001069

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Dr. Thomasena Adams, Rhonda Polin, Shaun Thacker, Orangeburg County School District, Sherry East, and the South Carolina Education Association, ..... Petitioners,

v.

Governor Henry McMaster, Palmetto Promise Institute, South Carolina Office of the Treasurer, and the South Carolina Department of Administration, ..... Respondents.

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

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The Institute for Justice (IJ) respectfully moves for leave to file an amicus curiae brief in this case. IJ is a non-partisan, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code and represents all of its clients *pro bono*. IJ litigates cases in four discrete areas of the law: private property rights, economic liberty, freedom of speech, and educational choice.

As part of its educational-choice practice, IJ often represents parents who wish to use scholarships or other financial aid made available under school-choice programs when those programs are challenged as unconstitutional. IJ has represented parents in 32 such lawsuits over

the past three decades, including all three school choice lawsuits decided by the U.S. Supreme Court, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). IJ has also represented parents as intervenor-defendants in many school choice cases filed in state courts, including in the states of Arizona, Alabama, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, New Hampshire, North Carolina, Ohio, and Wisconsin. Most of these cases have arisen in states having "Blaine Amendments" in their state constitutions, similar to the South Carolina Constitution's Article XI, Section 4, one of the provisions Petitioners allege is violated here. IJ has an institutional interest in the proper interpretation of these state Blaine Amendments and unparalleled knowledge and expertise concerning them. Improper interpretations of these provisions can deprive families of desperately needed educational opportunities.

For the foregoing reasons, IJ respectfully requests for leave to file an amicus curiae brief in this case. The proposed amicus curiae brief is attached hereto as Exhibit A and is being conditionally filed herewith in compliance with Rule 213, SCRAP.

Dated: August 13, 2020

Respectfully Submitted,

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# EXHIBIT A

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**AMICUS BRIEF OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENTS' RETURN TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION**

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## SUMMARY OF ARGUMENT

The Safe Access to Flexible Education Grants Program (SAFE Program) does not violate Article XI, Section 4 of the South Carolina Constitution. Section 4 prohibits only direct public financial aid to religious or other private educational institutions. But the SAFE Program does not provide direct financial aid to any school, religious or private. Instead, the Program provides direct financial aid to *parents* who spend that aid for the educational benefit of their children. Thus, if religious or private schools receive any benefit from the SAFE Program, that benefit is not direct but rather an incidental result of parents exercising free and independent choice on behalf of their children. Article XI, Section 4 does not prohibit incidental benefits of this sort; indeed, it was amended in 1972 specifically to remove a prohibition on indirect financial aid. Thus, Petitioners' motion for preliminary injunction, to the extent it relies on Article XI, Section 4, must be denied.

## ARGUMENT

The SAFE Program helps students from low- and middle-income families by giving their parents a one-time, need-based grant to help defray the cost of sending their children to a participating religious or private school. Not one dime goes to any religious or private school but for the genuine and independent choices of parents.

This element of independent parental choice dooms Petitioners' argument under Article XI, Section 4. That provision—titled "Direct aid to religious or other private educational institutions prohibited"—states that "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." By its plain terms, this provision is aimed at preventing direct aid to religious and private schools. But it does not ban aid "for the direct benefit of"

individuals, even if such aid, by primarily benefitting the individual, indirectly or incidentally benefits a religious or private school.

That Article XI, Section 4 does not bar such indirect benefits to religious and private schools is confirmed by that provision's history: Until 1972, South Carolina's Constitution expressly prohibited indirect aid to religious schools. At that time, the analogous constitutional provision read:

> The property or credit of the State of South Carolina, or of any county, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, *directly or indirectly*, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization."

South Carolina Const. Ann. Art. XI, § 9 (1971) (emphasis added).

The constitutional amendments reflected in the current Article XI, Section 4 substantially reduced the scope of that prohibition. Most significantly, these amendments removed the word "indirectly" from the former Article XI, Section 9. That change matters. "This Court is bound to presume that the framers of the constitution had some purpose in inserting every clause and every word contained in the document." *Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993). And the same is necessarily true of deletions from that document. Simply put, the framers of Article XI, Section 4 intended the deliberate removal of the word "indirectly" to have some effect, and the only way to give it effect is to interpret the amended language—"for the direct benefit of"—to exclude indirect benefits.

Interpreting Article XI, Section 4 this way is entirely consistent with *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971), the primary authority on which Petitioners rely. That case considered the constitutionality—under the former Article XI, Section 9—of a state program that provided tuition grants to students attending colleges and universities in South Carolina. In holding

that the program did violate the now-repealed provision, this Court noted specifically that "[t]he aid does not have to be direct but is prohibited if it indirectly benefits the religious schools." *Id.* at 506, 179 S.E.2d at 908. This was, in fact, critical to the Court's ruling, because even the plaintiffs challenging the tuition program did not characterize it as providing a *direct* benefit to religious universities. Instead, they complained—in words that the Court quotes directly—that "[t]he *indirect* benefit accruing to the private colleges will consist of their being able to attract sufficient students to their campuses to continue to function." *Id.* at 508, 179 S.E.2d at 909 (emphasis added). In other words, though *Hartness* might consider the grants provided under the SAFE Program to be "aid" to private and religious schools, the decision would not consider it "direct" aid, the only type prohibited under Article XI, Section 4.

Petitioners' contrary argument ignores not only that South Carolina's Constitution was amended following *Hartness*, but also the importance of parental choice within programs like the SAFE Program, which directly funds the choices of parents, not the activities within the schools selected by those parents. Parents use the funds provided by programs like the SAFE Program to purchase an education for their children at participating schools, both religious and non-religious. When participating schools receive these funds, they are accepting them as payment for educational services—just as they would accept purely private funds from parents who are not eligible for a grant under the SAFE Program.

This is not a novel argument: The constitutional significance of independent parental choice has been a cornerstone of educational-choice jurisprudence since the Supreme Court's seminal decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). There, the Court considered the constitutionality of a state school-voucher program under the Establishment Clause of the federal constitution. In holding that the program did not violate the Establishment Clause, the

Court observed that its decisions "have drawn a consistent distinction between government programs that provide aid *directly* to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649 (citations omitted, emphasis added). Put another way, programs of true independent choice—such as the SAFE Program—do not provide aid directly to schools. Rather, such programs "provide[] benefits directly to a wide spectrum of *individuals*"—parents and their children. *Id.* at 662 (emphasis added).

Decisions from other state Supreme Courts provide further support for this interpretation of Article XI, Section 4. In *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013), for example, the Indiana Supreme Court considered the constitutionality of a school-voucher program under that state's no-aid provision, which provides that "[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution." Ind. Const. Art. 1, Section 6. The court interpreted this language to prohibit only "direct" benefits to religious and theological institutions, and then unanimously concluded that any benefits the voucher program conferred on religious schools were not direct, but rather "ancillary and indirect." 984 N.E.2d at 1227. As in *Zelman*, this was because "[a]ny benefit to program-eligible schools, religious or non-religious, derive[d] from the private, independent choice of the parents of program-eligible students, not the decree of the State…." *Id.* at 1229.

The Supreme Court of Oklahoma went even further in *Oliver v. Hofmeister*, 368 P.3d 1270 (Okla. 2016), upholding a voucher program challenged under a no-aid provision that barred both

direct *and* indirect aid to religious schools.[1] In that court's view, the "independence of choice by the parent" so thoroughly "breaks the circuit" between the distribution of government aid and the receipt of tuition by private schools, that those schools are not properly considered even *indirect* beneficiaries of the aid. *Id.* at 1274.

This Court need not go so far, however, because the amendments to Article XI, Section 4 make this an easy case. South Carolina's current Constitution forbids only *direct* aid to private and religious schools. The SAFE Program provides *direct* aid only to parents. Because parents control how and where those grants are spent, private and religious schools are, at most, the indirect beneficiaries of those grants, and the grant program thus does not violate the South Carolina Constitution.

## CONCLUSION

This Court should deny Petitioners' request for preliminary injunction to the extent it relies on South Carolina Constitution Article XI, Sec. 4.[2]

Dated: August 13, 2020

[1] "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, minister or other religious teacher or dignitary, or sectarian institution as such." Okla. Const. Art. II, Sec. 5.

[2] Petitioners' claim that the SAFE Program violates Article XI, Section 3 is equally unrooted from the actual language of the South Carolina Constitution. The plain text of that amendment requires South Carolina to maintain and support a system of free public schools open to all children. Nothing in the provision forbids the creation of *additional* educational options for students, including private options.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

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I, the undersigned Attorney of the law offices of Gordon Rees Scully Mansukhani, do hereby certify that I have served all parties to this appeal with a copy of the motion specified below by emailing a copy of the same to the email addresses for each of the below-listed counsel pursuant to the email addresses currently listed in the AIS database:

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By: /s/ Joshua Dixon
August 13, 2020

Dated: August 13, 2020