THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Case No. 2023-001673

Candace Eidson, on behalf of herself and her minor child, et al., ... Petitioners,

v.

South Carolina Department of Education, et al., ...Respondents.

***AMICUS CURIAE* BRIEF OF THE PARTNERSHIP FOR EDUCATIONAL CHOICE IN SUPPORT OF RESPONDENTS**

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This *amicus* brief makes two arguments about the Education Scholarship Trust Fund ("ESTF") Program. First, the ESTF Program does not violate Article XI, Section 4 of the South Carolina Constitution, which bars public benefits from going to the "direct benefit" of private educational institutions. Because the ESTF Program permits families to spend public funds on a wide range of educational goods and services, none of which must be from a private school, it provides no "direct" benefit to private schools and is thus constitutional under Section 4. This Court's decisions in *Adams v. McMaster* and *Durham v. McLeod*, and an analogous case from the Arizona Court of Appeals, *Niehaus v. Huppenthal*, support that conclusion. Second, if this Court construed Section 4 to bar private school students from seeking or obtaining aid from the government, as Petitioners advocate, then this Court would run headfirst into the U.S. Supreme Court's jurisprudence on parental rights under the Fourteenth Amendment.

I. South Carolina's Constitution Permits the Legislature to Establish an Educational Choice Program.

In 1973, South Carolina voters amended Article XI, Section 4 to prohibit public funding "for the *direct* benefit of any religious or other private educational *institution*." S.C. Const. art. XI, § 4. (emphasis added). In doing so, South Carolinians narrowed the reach of that restriction so that government could disburse public funds in a way that, down the line, might happen to benefit private educational institutions in some *incidental* way. No one doubts that South Carolina may, for example, provide higher education scholarships that students may use to attend public or private colleges. *See, e.g.*, S.C. Code Ann. § 59-104-20 (Palmetto Fellow Scholarship); S.C. Code Ann. § 59-104-210 (competitive grants program); S.C. Code Ann. § 59-142-70 (need-based scholarships); S.C. Code Ann. § 59-149-10 (LIFE Scholarship); S.C. Code Ann. § 59-150-370 (HOPE Scholarship). Nor does anyone doubt the validity of the Refundable Educational

Credit for Exceptional Needs Children, whereby South Carolina provides parents of children with disabilities a refundable tax credit for private school tuition. *See* S.C. Code Ann. § 12-6-3790(A)(1) (defining "[e]ligible school" to encompass "independent school[s] including those religious in nature").

Nobody, that is, except Petitioners. In effect, Petitioners argue that the constitutional proscription against direct benefits to private schools is not limited to institutional aid to private schools. Pet'rs' Br. 8. Instead, Petitioners contend it extends beyond institutional aid to bar even an *incidental* benefit that a private school might receive if a *parent* makes the private and independent choice to spend part of *her* ESTF allocation on tuition (rather than on the panoply of other educational options permitted under the ESTF Program). If adopted by this Court, Petitioners' totalizing argument would not only invalidate the ESTF Program, but also imperil at least a half-dozen student benefit programs (named above), all of which provide benefits to students attending private educational institutions. *See*, *e.g.*, S.C. Code Ann. § 12-6-3790(A)(1) (providing refundable tax credits to certain students who attend an "independent school," which are defined as a school, "other than a public school"); S.C. Code Ann. § 59-150-370 (providing scholarships to students at a "public or independent institution" of higher education); S.C. Code Ann. § 59-149-10 (same); S.C. Code Ann. § 59-104-20 (same); S.C. Code Ann. § 59-104-210 ("public and private nonproprietary post-secondary institutions"); S.C. Code Ann. § 59-142-70 (providing grants for "[s]tudents at private institutions of higher learning in this State").

Those are some of the challenges with taking Petitioners' argument seriously. But there is also a more fundamental problem: Binding South Carolina caselaw, as well as persuasive caselaw from Arizona, does not support their argument. Simply put, the South Carolina Constitution permits the legislature to establish programs in which students receive financial aid

that they can then use for educational goods and services, including tuition at private schools. In fact, this Court has repeatedly suggested that so long as the program is "scrupulously neutral" and is not designed to benefit a particular private educational "institution or group of institutions," providing such aid is constitutional. *Adams v. McMaster*, 432 S.C. 225, 242, 851 S.E.2d 703 (2020) (quoting *Durham v. McLeod*, 259 S.C. 409, 413, 192 S.E.2d 202 (1972) (per curiam)). *See infra* pp. 5–7 (discussing caselaw from Arizona).

Seen in this light, the ESTF Program is clearly constitutional: It does not reserve a single penny for a particular private school or for private schools generally. In fact, under the ESTF Program, *all* private schools can participate—and all traditional *public* schools can participate. S.C. Code Ann. § 59-8-110(3). So, too, can virtually *all* providers of educational goods and services. S.C. Code Ann. § 59-8-110(7). In fact, most of the allowable expenses under the program are not even associated with "private educational institutions"—or, for that matter, with any kind of "educational institution" at all. For example, students can use their funds for:

- Textbooks, curriculum, or other instructional materials;
- Tutoring services;
- Computer hardware or other technological devices;
- Fees for examinations for advanced placement courses, college or university admissions, or industry certifications;
- Occupational, behavioral, physical, or speech language therapies; and
- Contracted teaching services and education classes.

And were that not enough, students can use their funds on "*any other* educational expense approved by the [Education] department." S.C. Code Ann. § 59-8-110(13)(j) (emphasis added).

Petitioners do not grapple with the program as it exists. *See, e.g.*, Pet'rs' Br. 12–14. Instead, they home in on one potential expense—tuition at private schools—and treat it as if it is the whole of the program. *See id.* at 17 (speculating, without evidence, that "the vast majority of the payments made under the Voucher Program go[] to private schools.").[1] Depicting the program in this fashion may make it easier to liken it to the voucher program struck down in *McMaster*, but it does not represent the program that the legislature enacted to comply with *McMaster*, in which tuition is merely one permissible expense among many. Likewise, whereas the program in *McMaster* guaranteed that program funds would *only* be spent at private schools (more specifically, a particular group of private schools selected by a government advisory panel), the legislature ensured that the ESTF Program does not reserve a *single penny* for private schools, much less for private schools hand-selected by the government. *See McMaster*, 432 S.C. at 233 ("[T]he Governor's advisory panel will select the independent schools eligible to receive grants"). Rather, families may use their ESTF funds on a wide array of educational goods and services, which they may purchase from a wide array of providers, public and private, none of which need be a school. S.C. Code Ann. § 59-8-110(13).

[1] But even if it could somehow be proven that "the vast majority of the payments" went to students attending private schools, it still would not matter under Section 4. Students and their parents make the choice about where to direct their payments. If they direct their payments to a private school rather than to another educational provider, the private school will have *incidentally* received that payment due to the *student's* choice to attend the school—not the state's choice to aid the school. This distinction—between individual aid and institutional aid—has been repeatedly made by the U.S. Supreme Court in holding that educational choice programs do not violate the Establishment Clause's proscription against "establishing" a state religion. *See, e.g.*, *Carson v. Makin*, 596 U.S. 767, 781 (2022) (noting that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause"); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (explaining that "the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools").

This distinction is constitutionally dispositive. In fact, the distinction between the ESTF Program (an education savings account that can be used on a wide variety of educational expenses) and the program invalidated in *McMaster* (a voucher program that could only be used for private school tuition) is the *same* distinction that the Arizona Court of Appeals drew in *Niehaus v. Huppenthal*, 310 P.3d 983, 988 (Ariz. Ct. App. 2013), to distinguish *Cain v. Horne*, 220 P.3d 1178 (Ariz. 2009), the primary case this Court relied on to invalidate the voucher program in *McMaster*. *See McMaster*, 432 S.C. at 238, 241. Just as this Court looked to Arizona in reviewing the voucher program in *McMaster*, it should look to Arizona in reviewing the education savings account program at issue here.

In *Cain*—again, the primary case this Court relied on in *McMaster*—the Arizona Supreme Court invalidated a pair of private school voucher programs under the state's no-aid clause. That clause, like Article XI, section 4, provides, "[N]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." *Cain*, 220 P.3d at 1180. The court held that the program facilitated an impermissible "direct appropriation of public funds" to private schools because parents "ha[d] no choice" under the program: "they must endorse the check or warrant to the qualified school." *Id.*

But in *Niehaus*, the Arizona Court of Appeals *upheld* an education savings account (ESA) program like the ESTF and specifically *rejected* the argument that it was unconstitutional under *Cain*. Unlike the voucher program in *Cain*, the court explained, the ESA program was not reserved exclusively for tuition at private schools—far from it. *Niehaus*, 310 P.3d at 987. Like the ESTF Program, the ESA could be used on wide array of educational expenses, from a wide array of providers, "including educational therapies, home-based instruction, curriculum, tutoring, and early community college enrollment." *Id.* at 988. The court upheld the program

precisely because families had "discretion as to how to spend the ESA funds" and "[n]o funds in the ESA [were] earmarked for private schools." *Id.* at 988–89. On appeal, the Arizona Supreme Court declined to review the decision, allowing students to continue benefiting from the ESA program and the opportunity it provides.

Petitioners do not reckon with the distinctions the court drew in *Niehaus*. Instead, Petitioners try to distinguish *Niehaus* by asserting that its holding rests on the "true beneficiary" theory rejected in *McMaster*. Pet'rs' Br. 17. But the program in *Niehaus* was not upheld simply because the court found it benefited families, rather than schools. It was upheld because the program was fundamentally different from the voucher programs in *Cain*. Critically, *McMaster* rejected the student beneficiary theory only "[u]nder the facts of th[at] case," *McMaster*, 432 S.C. at 241, because the funds could go *only* to private school tuition (and only private schools chosen by the governor's panel, for that matter), which, under the teaching of *Cain*, meant that "the true beneficiary" was really the school because "parents had no choice but to endorse the check to the qualified school." *Niehaus*, 310 P.3d at 988 (citing *Cain*). In the program in *Niehaus* (and here) "none of the ESA funds [we]re preordained for a particular destination," so the court upheld it. *Id.* at 989.

This Court should adopt the reasoning in *Niehaus*. In fact, *McMaster* itself suggests as much. In *McMaster*, the governor created a voucher-type program that provided students with a one-time grant that they could use "*only* at private educational institutions selected by the Governor's advisory panel." *McMaster*, 432 S.C. at 242 (emphasis added). In invalidating the program, the Court contrasted it with the student loan program that the Court had upheld in *Durham v. McLeod*. In *Durham*, the Court wrote, "we emphasized the 'scrupulously neutral' nature of the student loan program, which left 'all eligible institutions free to compete for [the

student's] attendance,' and the aid was not made 'to any institution or group of institutions' in particular." *McMaster*, 432 S.C. at 242 (quoting *Durham*, 259 S.C. at 413). By contrast, the program in *McMaster* only allowed students to direct their aid to a select number of private schools determined by the Governor's advisory panel, and *that* is why it ran afoul of Article XI, section 4. *Id.* Here, the ESTF Program is akin to those upheld in *Niehaus* and *Durham*, and this Court should uphold it for that reason.

In sum, the ESTF Program is precisely the type of program that South Carolinians envisioned as constitutionally permissible when they amended Section 4 to prohibit only "*direct*" funding of "private educational *institutions*." Like the half-dozen other educational benefit programs serving students in this state, the ESTF Program provides students with benefits that do not directly aid private educational institutions. Consistent with Section 4, the ESTF Program is "scrupulously neutral" as to the types of goods, services, and providers for which families may use their accounts. *McMaster*, 432 S.C. at 242 (citation omitted). Moreover, because the program permits all providers—not just private educational institutions—to be "free to compete for" a family's business, it is the family's decision which goods and services it will purchase and from whom. *Durham*, 259 S.C. at 413. "[T]he emphasis" of the program "is on aid to the student rather than to any [educational] institution or class of institutions." *Id.* For these reasons, the ESTF Program is constitutional under Section 4.

II. Applying the South Carolina Constitution to Bar Private School Students from Obtaining Financial Aid Would Violate the U.S. Constitution.

There is another reason to reject Petitioners' Section 4 claim: invalidating the ESTF Program under Section 4 would violate the *federal* Constitution.

In its discretion, the South Carolina legislature has decided to assist families in exercising their fundamental, federal constitutional right to "direct the upbringing and education of [their]

children." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). It has done so by adopting a financial aid program that nonpublic school students can use on virtually any type of educational expense, including homeschool-related expenses, tutoring services, testing fees, virtual education opportunities, computer hardware and technology, education-related transportation, special education services, services from a public school district, and, of course, tuition at a private school. S.C. Code Ann. § 59-8-110(13).

Petitioners urge this Court to invalidate the ESTF Program under Section 4 because parents may use it to send their children to private school. Yet the U.S. Supreme Court has squarely held that the right to direct the education of one's children *includes* the right to send them to a private school. *Pierce*, 268 U.S. at 534–35. Of course, that does not mean there is a freestanding right to financial aid from the state. But the federal Constitution does *prohibit* a state from conditioning the availability of otherwise generally available aid on a citizen's *surrender* of a fundamental right. And that is precisely what the Petitioners urge the Court do here: bar the legislature from providing financial aid to families simply because they exercise their fundamental, federal constitutional right to send their children to a private school.

Put another way, invalidating a benefit program simply because a parent may use it to send her child to a private school is to invalidate the program because that parent may exercise a fundamental, federal constitutional right. And just as government may not condition the availability of otherwise generally available benefits on the surrender of other fundamental rights, such as free speech or free exercise of religion, so too may it not condition their availability on the surrender of the fundamental right to send one's child to a private school.

1. First, the U.S. Supreme Court squarely held, in *Pierce v. Society of Sisters*, that a parent has a constitutional right, under the Due Process Clause of the Fourteenth Amendment, to

"direct the education and upbringing" of her child, including, specifically, by sending her child to a private school. *Pierce*, 268 U.S. at 534–35. In fact, even before *Pierce*, in *Meyer v. Nebraska*, 262 U.S. 390, 400, 401 (1923), the Court invalidated a law prohibiting foreign language instruction in private schools and held that the Due Process Clause protects the right of "parents to control the education of their own," including the "right of parents to engage [a private school teacher] to instruct their children."

Then, just over a half-century ago, in *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972), the Court vindicated a religious objection to formal education after eighth grade based on "the right of parents to provide an equivalent education in a privately operated system" and "the values of parental direction of the religious upbringing and education of their children in their early and formative years." And just over a quarter-century ago the Court reaffirmed the point that, "[i]n a long line of cases, we have held that . . . the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children . . . ." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

In fact, the U.S. Supreme Court has even likened this liberty interest "to the specific freedoms protected by the Bill of Rights," *id.*, and the Court has observed that it is "perhaps the oldest of the fundamental liberty interests recognized by" the Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).[2] Not surprisingly, then, the Court and its justices continue to

[2] Four justices described the *Meyer-Pierce* right in that way. Justice Souter, concurring in the judgment, wrote that the Court had "long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 77. Justice Thomas, also concurring in the judgment, said much the same: "I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case." *Id.* at 80. In dissent, two other justices agreed. Justice Stevens wrote, "Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children." *Id.* at 87. Justice Kennedy expressed the same sentiment: "As our case law has developed, the custodial

stress its importance to this day. *E.g.*, *Espinoza*, 140 S. Ct. 2246, 2261 (2020) ("[W]e have long recognized the rights of parents to direct 'the religious upbringing' of their children. Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution." (citation omitted)); *Mahanoy Area School District v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2053 (2021) (Alito, J., concurring) ("In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children.").

2. Second, the government may not condition the availability of a benefit on the surrender of a fundamental right or otherwise penalize someone because she has exercised such a right. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("[T]he government may not deny a benefit to a person because he exercises a constitutional right." (internal quotation marks and citation omitted)); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."). And denying an otherwise generally available benefit because someone exercises a fundamental right in a particular way unquestionably imposes a penalty on that right. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring) ("We have long explained [that] the government 'penalize[s] religious activity' whenever it denies to religious persons an 'equal share of the rights, benefits, and privileges enjoyed by other citizens.'" (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988))).

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parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child." *Id.* at 95.

The U.S. Supreme Court has applied this basic rule of constitutional law in numerous contexts. For example:

- The state may not condition tuition benefits on a parent's surrendering her right to obtain a religious education for her child. *Carson,* 596 U.S. at 789; *Espinoza*, 140 S. Ct. at 2262.
- The state may not condition public employment on the surrender of one's right against self-incrimination. *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956).
- The state may not deny otherwise available public resources, such as student activity funds or school facilities, based on the viewpoint of speakers who wish to use them. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (school facilities); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (student activity funds); *Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school facilities).
- The state may not deny unemployment benefits because of a worker's adherence to the tenets of her religion. *Thomas v. Rev. Bd.*, 450 U.S. 707, 716 (1981); *Sherbert*, 374 U.S. at 404.

Simply put, "a person may not be compelled to choose between the exercise of a [fundamental] right and participation in an otherwise available public program." *Thomas*, 450 U.S. at 716.

3. Third, this basic rule against "deny[ing] a benefit to a person because he exercises a constitutional right," *Koontz*, 570 U.S. at 604, applies equally when the right in question is that which the Supreme Court recognized in *Meyer*, *Pierce*, and *Yoder*: the right of parents to choose private school for their children. That right stands on the same footing as the right to free speech

and the free exercise of religion, and government may no more condition the availability of benefits on the surrender of it than government may on the surrender of those other rights.

It is no answer, moreover, to say that the denial of benefits here is permissible because it is *mandated* by the South Carolina Constitution's proscription on public funding of private schools. In fact, the U.S. Supreme Court flatly rejected similar reasoning in *Espinoza*. There, the Montana Supreme Court invalidated a state scholarship program because it allowed children to attend religious schools, which the no-aid clause of the Montana Constitution prohibited. 140 S. Ct. at 2262. In reversing that decision, the U.S. Supreme Court held that invalidating the scholarship program under the Montana Constitution violated the *federal* Constitution—specifically, the Free Exercise Clause. Montana's no-aid clause, after all, was not "some innocuous principle of state law," but rather "a state law provision that expressly discriminate[d] on the basis of" a fundamental right: the free exercise of religion. *Id. See also Carson,* 596 U.S. at 781 (invalidating religious exclusion in state voucher program and holding that a "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise"). When a state court is "called upon to apply a state law no-aid provision" in such a way, the U.S. Supreme Court held, then the court is "obligated by the Federal Constitution to reject the invitation." *Espinoza*, 140 S. Ct. at 2262. The Supremacy Clause, after all, directs that state courts "'must not give effect to state laws that conflict with federal law[]." *Id.* (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)).

So too here. Petitioners' argument that Section 4 bars aid that incidentally benefits private schools forces a conflict between the state and federal constitutions. Petitioners seek to invalidate the ESTF Program not based on "some innocuous principle of state law," but "a state law

provision that expressly discriminates on the basis of" the exercise of a right to choose a private school education. The Court should avoid that state-federal collision by rejecting Petitioners' interpretation of Section 4. Otherwise, it must "disregard[] [Section 4] and decide[] this case 'conformably to the [C]onstitution' of the United States." *Espinoza*, 140 S. Ct. at 2262 (cleaned up).[3]

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Nothing in the federal constitution requires South Carolina to establish financial aid programs for nonpublic students. But the legislature, in its discretion, has chosen to adopt such a program—one that affords the choice of myriad goods and services from myriad providers. This Court should not—and, under the federal Constitution, may not—invalidate that program simply because *some* families may make the private and independent choice to use it to send their children to private schools in exercise of their fundamental constitutional rights.

Dated: February 1, 2024

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[3] It would also be a mistake to assume that if the *entire* ESTF Program is invalidated under Section 4, rather than just the private school tuition allowance, there will be no discrimination and, thus, no federal violation. That is another argument that the U.S. Supreme Court flatly rejected in *Espinoza*. There, the state argued that "there is no free exercise violation here because the Montana Supreme Court ultimately eliminated the scholarship program altogether," and "now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit." *Espinoza*, 140 S. Ct. at 2261–62. The U.S. Supreme Court disagreed, noting that but for its application of the discriminatory state no-aid provision, "the [Montana Supreme] Court would have had no basis for terminating the program." *Id.* at 2262. Thus, invalidation of the entire program, the Court concluded, "cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds." *Id.*

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