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**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

S.C. SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

**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.**

**PETITION FOR ORIGINAL JURISDICTION
AND
DECLARATORY AND INJUNCTIVE RELIEF**

Petitioners request that this Court entertain their Complaint for declaratory and injunctive relief in its original jurisdiction, pursuant to article V, section 5 of the South Carolina Constitution, section 14-3-310 of the Code of Laws of South Carolina, and Rule 245 of the South Carolina Appellate Court Rules.

As set forth in the attached Complaint, Petitioners’ lawsuit challenges the State’s unconstitutional plan, under the recently enacted Education Scholarship Trust Fund program (“Voucher Program”), to use millions of dollars in public funds to pay for private school tuition and fees in violation of the safeguards for the public education system established by article XI of the South Carolina Constitution. Article XI both requires the State to fulfill its educational obligations to the children of South Carolina through the State’s “system of free public schools open to all children” or other public educational institutions and, as a hard backstop, prohibits the

State from using public funds to directly benefit private schools. S.C. Const. art. XI, §§ 3, 4. Yet through the Voucher Program, the State will breach both of these fundamental constitutional obligations. It will pay for the education of students in private schools that are not part of the State's system of free public schools open to all and will do so to the direct benefit of private schools.

Just three years ago, in *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020), this Court confronted a similar, albeit more limited, attempt to create a one-year-only private school voucher program that used public funds in violation of Article XI's safeguards. The Court found the case warranted review under its original jurisdiction and held the voucher program unconstitutional under article XI, section 4 of the State Constitution because it used "public funds for the direct benefit of private educational institutions." *Id.* at 244, 851 S.E.2d at 713. The Court explained the necessity for its quick action and ruling in *Adams*, observing that "no matter the circumstances, the Court has a responsibility to uphold the Constitution." *Id.*

The Voucher Program challenged here, like the program in *Adams*, impermissibly uses public funds for the direct benefit of private schools. And it is even more sweeping in scope and duration than the program this Court struck down in *Adams*. Under the Program, public funds appropriated to the Department of Education will be paid out directly to private schools for tuition and fees indefinitely. S.C. Code Ann. § 59-8-110 *et seq.* (2023). It follows *a fortiori* that the Program is likewise unconstitutional under article XI, section 4, and this Court's exercise of original jurisdiction is appropriate and necessary. Complaint at ¶¶ 5, 22-23.

In addition, the Program violates both article XI, sections 2 and 3 and article X, sections 5 and 11, by expanding the scope of the State Superintendent of Education's authority beyond her constitutionally-defined role as head of the public education system, providing education in a

manner other than that prescribed in the Constitution, and expending millions of dollars in public funds without ensuring that a public purpose is served. *Id.* at ¶¶ 6-8.

To prevent the implementation of this unconstitutional Voucher Program, Petitioners seek this Court’s immediate review, declaration, and an injunction preventing the State from implementing the Voucher Program. *Id.* at ¶ 9.

Plaintiffs’ Complaint raises matters of great public importance that necessitate immediate action by this Court. The Voucher Program is at odds with South Carolina’s fundamental constitutional safeguards for its public educational system. And there is an urgent need for prompt resolution of this dispute, as the statutory requirement that voucher applications open in January means that implementation of the unconstitutional Voucher Program is imminent. Because the constitutional claims at issue cannot be timely resolved through the traditional litigation process before applications for the Voucher Program open, and because parents, students, schools, and state officials need clarity as to the validity of the Program to plan how best to fulfill their educational obligations and objectives, all parties to this matter, as well as the State of South Carolina and the students of this State, will benefit from this Court’s exercise of original jurisdiction to promptly resolve the fundamental constitutional issues raised by Plaintiffs’ Complaint.

BACKGROUND

A. The Voucher Program

In May 2023, the South Carolina legislature passed and the Governor signed SB 39, which created the Voucher Program.¹ The Program provides for public funds to be used to pay for, among

¹See 2023 Act No. 8 (S39), https://www.scstatehouse.gov/sess125_2023-2024/bills/39.htm.

other expenses, the education of South Carolina schoolchildren in private schools. S.C. Code Ann. §§ 59-8-110 *et seq.* The law went into effect on June 4, 2023.

The Voucher Program creates a state fund—the Education Scholarship Trust Fund (“ESTF”)—that is administered by the South Carolina Department of Education and consists of monies appropriated and transferred from the state treasury to the Department of Education. S.C. Code Ann. §§ 59-8-110(2), 59-8-120(A), (C).

Parents may apply for the Voucher Program on behalf of their eligible children. To be eligible for the Voucher Program, students must reside in South Carolina, currently attend public schools, and have household incomes below certain thresholds. *Id.* at § 59-8-110(4). The Voucher Program also prohibits participating families from obtaining a voucher if their children are enrolled full time in their neighborhood public school. *Id.* at § 59-8-115(E)(4)(e). For each application approved for the Voucher Program, the State Treasurer is required to transfer six thousand dollars from the State Treasury to the ESTF. *Id.* at § 59-8-120(C). Voucher Program funds may be used to pay for “qualifying expenses” related to education as defined in the statute. *Id.* at §§ 59-8-110(3), (13), 59-8-120(A). Because private school tuition and fees are the costliest of the enumerated “qualifying expenses,” and because families may obtain payments through the Voucher Program only if they do not send their children to their resident public school, the vast majority of the payments that will be made under the Voucher Program will be to private schools for tuition and related fees. Complaint at ¶¶ 34-35.

The Department of Education is charged with creating an online account in the name of each student participating in the Voucher Program, and the Department must transfer public funds from the ESTF to these accounts on a quarterly basis. *Id.* at § 59-8-120. Neither parents nor students can withdraw, deposit, or otherwise access the money in these online accounts. *Id.* at §§

59-115(G), 59-8-120(G). They may only select the private school to which the State transfers these public funds. *Id.* at § 59-8-120(C). Under the Voucher Program, public funds flow from the State Treasury, to Department of Education-controlled accounts, to private schools; the funds remain under the control of the State until they are transferred to the private school. *Id.* at §§ 59-8-120(A)-(B). The Voucher Program places no restriction on the use of these public funds by the private school. *Id.* at § 59-8-150(F). Thus, upon receipt of Voucher Program funds, private schools may use these funds for their own benefit in any manner they choose.

In addition to not restricting how private schools may use the public funds received from the Voucher Program, the statute does not subject private schools participating in the Voucher Program to the same education, accountability, and nondiscrimination standards as public schools. Private schools receiving public funds under the Voucher Program need not be open to all students, and the statute specifically provides that private schools are not required to alter their creeds, practices, admissions policies, or curriculums to receive public funds through the Voucher Program. *Id.* at § 59-8-150(F)(5). Although Voucher Program private schools are prohibited from discriminating on the basis of race, color, or national origin, they are not prohibited from excluding or discriminating against students on any other basis they choose, including religion, gender identity, disability or sexual orientation. *Id.* at § 59-8-150. As a condition of participating in the Voucher Program, parents and students must agree to comply with the private school's prescribed curriculum, dress code, and other requirements of enrolled students, *id.* at § 59-8-115(D)(4)(b) and must consent to diminished rights under the Individuals with Disabilities Education Act, *id.* at § 59-8-115(E).

Furthermore, the size of the Voucher Program will grow over time. In the 2024-25 school year, five thousand students whose household income is under two hundred percent of the federal

poverty level may participate; in the 2025-26 school year, ten thousand students whose household income is under three hundred percent of the federal poverty level may participate; and in the 2026-27 school year, fifteen thousand students whose household income is under four hundred percent of the federal poverty level in the 2026-27 school year may participate. S.C. Code Ann. §§ 59-8-110(4), 59-8-135. Currently, over 700,000 students attend public schools in the State of South Carolina.² More than half of these public school students are expected to be eligible to apply for the Voucher Program as of the 2026-27 school year.³

To begin providing vouchers for the 2024-25 school year, the Department of Education must develop an online application process for eligible families, with the application window required to be open for at least 45 days and close no later than March 15, 2024. S.C. Code Ann. § 59-8-115(A). To meet these deadlines, the Department must have the system in place and ready to accept applications by no later than January 2024. *Id.* The Department of Education must also develop a process for schools to apply to participate in the Voucher Program. *Id.* at § 59-8-140(A)(1). For the 2024-25 school year, the Department must complete its review, certify the approved schools, and publish the list of participating schools by February 15, 2024. *Id.* at §§ 59-8-140(2), (4), (6). To meet these deadlines, substantial public funds and resources will need to be expended this fall and winter.

B. Petitioners' Claims

Petitioners are a diverse group of parents from across the State with children in the public

²*Public Education Finances: 2013*, Table 2, US Census Bureau, <https://www.census.gov/content/dam/Census/library/publications/2015/econ/g13-aspef.pdf>.

³ Approximately 60% of South Carolina schoolchildren qualify for free or reduced-price lunch, https://nces.ed.gov/programs/digest/d22/tables/dt22_204.10.asp, which is based on a household income below 185% of federal poverty guidelines, <https://www.fns.usda.gov/cn/fr-020923>.

schools, as well as non-profit organizations representing thousands of members who work in, rely on, and support public schools. Petitioners allege that the Voucher Program violates multiple provisions of the South Carolina Constitution that are designed to preserve and protect the State’s public education system. First, as in *Adams*, the Voucher Program uses public funds for the direct benefit of private educational institutions in violation of article XI, section 4 of the State Constitution by transferring monies appropriated to the Department of Education to pay for tuition and fees at private schools. Complaint at ¶¶ 26, 51, 67. Second, the Voucher Program uses public funds to subsidize private schools that are not open to all children in the State and are not subject to the same academic, accountability, and nondiscrimination standards as the system of free public schools, and thereby violates the State’s mandate in article XI, section 3 of the State Constitution to provide education through a “system of free public schools open to all children” or other public educational institutions. *Id.* at ¶¶ 6, 54-55, 68. Third, the Voucher Program violates article XI, section 2 of the State Constitution by expanding the responsibilities of the State Superintendent of Education, an independent elected official whose constitutionally-defined role is singularly focused on the administration of the State’s public education system, to also encompass administration of this private education program. *Id.* at ¶¶ 19, 57-59, 70. And fourth, because the Voucher Program finances education at private schools that are not required to provide measurable education benefits and are expressly authorized discriminate, the Program lacks a sufficient public purpose to permit the expenditure of public funds, in violation of article X, sections 5 and 11 of the State Constitution. *Id.* at ¶¶ 8, 61-65, 69. Petitioners seek declaratory and injunctive relief declaring the Voucher Program unconstitutional and enjoining the State from implementing the Program.

ORIGINAL JURISDICTION REQUEST

Original jurisdiction is appropriate “[i]f the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised.” Rule 245(a), SCACR. Under Rule 245, a case may properly be resolved by this Court in the first instance due to “the public interest involved and the need for prompt resolution.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014); *see also S.C. Pub. Int. Found. v. Lucas*, 416 S.C. 269, 270 n.1, 786 S.E.2d 124, 125 n.1 (2016) (original jurisdiction appropriate when public interest requires expeditious resolution of the dispute). Petitioners’ Complaint presents both a matter of great public interest and the need for prompt resolution, and thus the Court’s exercise of original jurisdiction is necessary here.

A. This Action Involves a Matter of Significant Public Interest

Rule 245 provides that the Court may take a matter in its original jurisdiction “if the public interest is involved.” Rule 245(a), SCACR. There is no question this case involves a matter of great public interest. It raises the questions of whether the State of South Carolina can circumvent constitutional safeguards for the public education system contained in article XI, and the public purpose requirements in article X, by establishing a Voucher Program that will use millions of dollars in public funds to pay private school tuition and expenses.

Just three years ago, this Court addressed the constitutionality of a much more limited voucher program. In *Adams*, the Court evaluated the Governor’s Safe Access to Flexible Education (“SAFE”) Grants Program, under which the State would have used public funds awarded to the State by the federal government as part of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) to fund one-time grants to pay tuition for eligible students to attend private schools. 432 S.C. at 231-33, 851 S.E.2d at 706-07. This Court exercised original jurisdiction over

the petitioners' complaint, which alleged that the SAFE Grants Program was unconstitutional under Article XI, Section 4. And the Court agreed with the petitioners, finding that once the funds are "received in the State Treasury, and distributed through it, the funds are converted into 'public funds' within the meaning of Article XI, Section 4," *id.* at 28, 851 S.E.2d at 709, and that the payment of such public funds to private schools violated article XI, section 4's prohibition on the "use of public funds for the direct benefit of private educational institutions." *Id.* at 241, 244, 851 S.E.2d at 711, 713.

This Voucher Program presents the same constitutional question as *Adams* regarding the constitutionality of an expenditure of public funds to private schools under article XI, section 4, as well as additional constitutional questions under article XI, sections 2 and 3 and article X, sections 5 and 11. As described above, under the Voucher Program public funds appropriated to the Department of Education will be used to fund vouchers to pay tuition and fees at private schools. *See supra* at 4-7. There is a strong public interest at stake in determining the validity of the Voucher Program and the propriety of its use of public funds before such funds are spent. This Court has frequently exercised original jurisdiction over claims challenging the validity of an expenditure of public funds. *See, e.g., Adams*, 432 S.C. at 231, 851 S.E.2d at 706; *Hampton v. Haley*, 403 S.C. 395, 402, 743 S.E.2d 258, 262 (2013); *Davenport v. City of Rock Hill*, 315 S.C. 114, 115, 432 S.E.2d 451, 452 (1993); *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 638 S.E.2d 685 (2006); *Myers v. Patterson*, 315 S.C. 248, 450, 433 S.E.2d 841, 842 (1993); *Tucker v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 395, 395, 424 S.E.2d 468, 469 (1992); *Berkely Cnty. Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 336, 679 S.E.2d 913, 914 (2009); *State ex rel. Condon v. Hodges*, 349 S.C. 232, 235, 562 S.E.2d 623, 625 (2002).

Direct review is particularly warranted given the constitutional significance of the article XI mandates and the protections they provide to the public education system. Prior to the adoption of the Education Article in 1868, “free public schools did not exist in recognizable form” in South Carolina. S.C. Op. Att’y Gen., 1969 WL 15557 (Apr. 24, 1969). Both public and private schools laid claim to limited education funds, dividing public resources and ensuring that education was available only to the few. Adoption of Article XI, the Education Article, in the post-Civil War era changed all that, and did so through two complementary strategies: mandating State support for public education on the one hand, and on the other, prohibiting the State from dividing its loyalty between the public schools and other systems of education. Today education is one of the only services the State is constitutionally required to provide, along with the state militia—reflecting the framers’ view of education as being of comparable importance to the physical security of the State. S.C. Const. art. XI, §§ 1-4; S.C. Const. art. XIII, §§ 1-5. Accordingly, when the State takes actions that would undermine the Constitution’s protections for public education, this Court has stepped in and enforced those protections. *Adams*, 432 S.C. 225, 851 S.E.2d 703; *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971); *Doe v. State*, 421 S.C. 490, 497 n.5, 808 S.E.2d 807, 810 n.5 (2017) (“this Court has exercised its authority to grant a petition for original jurisdiction where a legitimate constitutional issue has been raised”). Given the similarities between the Voucher Program now at issue and the program this Court struck down in *Adams*, there is no question that a serious and substantial constitutional question exists here that will require guidance from this Court. Under these circumstances, intervention by this Court is warranted as provided by Rule 245.

B. The Constitutional Claims at Issue Require Prompt Resolution

Original jurisdiction is also warranted when a case presents time exigency. Rule 245(a), SCACR; *Carnival Corp.*, 407 S.C. at 80, 753 S.E.2d at 853. In addition to the strong public interest involved, there is a compelling need for prompt resolution of this dispute to (1) prevent the unconstitutional expenditure of public funds and (2) provide guidance to parents, students, schools, and state officials as to the validity of the Voucher Program and the availability of voucher funds before any decisions must be made to apply for or approve participation in the Program.

The Voucher Program requires the Department of Education to establish an application window for parents that lasts at least forty-five days and closes no later than March 15 of each calendar year. S.C. Code Ann. § 59-8-115(A). These requirements mean that the application period for the 2024-25 school year must open no later than the end of January 2024. *Id.* In addition, by February 1, 2024, the Department must certify the schools approved to participate in the Voucher Program, and by February 15, 2024, the Department must publish a comprehensive list of all participating schools. *Id.* at §§ 59-8-140(A)(4)-(6). Given that the Department is also required to develop and operate an online system for student applications or contract with third parties to do so, time is of the essence in resolving the legal uncertainties surrounding the Voucher Program before the substantial resources necessary to meet these statutory deadlines are invested. Allowing this matter to take the ordinary course of litigation will not provide the necessary clarity within the deadlines the statute has imposed on the Department of Education.

As this lawsuit presents a facial challenge to the Voucher Program and involves only questions of law, this Court is well positioned to address these constitutional questions in the first instance and promptly resolve the issues on a timeline that is beneficial to all impacted parties. Petitioners, state officials, schools, and potential voucher recipients would all benefit from

expedited disposition of the legal uncertainty surrounding the availability of Voucher Program funds. The urgency created by the statutory deadlines alone provides sufficient basis for this Court’s grant of original jurisdiction. *See* Rule 245(a), SCACR (original jurisdiction appropriate when “special grounds for emergency” exist); *see also* *Creswick v. Univ. of S.C.*, 434 S.C. 77, 862 S.E.2d 706 (2021) (exercising original jurisdiction to resolve dispute prior to start of school year); *Mitchell v. City of Greenville*, 411 S.C. 632, 770 S.E.2d 391 (2015) (exercising original jurisdiction to resolve dispute prior to upcoming election deadlines).

* * *

In sum, this matter presents issues of great public interest through facial constitutional challenges to a statute that provides for the disbursement of public funds to private schools, and the dispute must be resolved promptly because this unconstitutional expenditure of public funds will begin shortly due to statutory deadlines. Each of these reasons independently satisfies the Rule 245 test for this Court to exercise its original jurisdiction. Taken together, and considering this Court’s decision in *Adams*, the case for original jurisdiction is particularly strong. Accordingly, Petitioners respectfully request this Court exercise its authority to entertain this case in its original jurisdiction.

CONCLUSION

Petitioners request that the Court grant their petition for original jurisdiction. Furthermore, Petitioners respectfully request that the Court expedite briefing and decision for this matter, in order to provide clarity to all interested parties in advance of the statutory deadlines identified in the statute.

Respectfully submitted,

s/Will Tinkler

Will Tinkler (S.C. Bar # 79129)
Tinkler Law
571 Savannah Highway
Charleston, SC 29407
(843) 853-5203
williamtinkler@tinklerlaw.com

Attorney for Plaintiffs

Jessica Levin*
Wendy Lecker*
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
(973) 624-1815
jlevin@edlawcenter.org
wlecker@edlawcenter.org

*Attorneys for Individual Plaintiffs and South
Carolina Education Association*

Glynnis Hagins (S.C. Bar No. 105766)
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 580-5777
ghagins@naacpnet.org

*Attorneys for South Carolina
State Conference of the NAACP*

s/W. Allen Nickles, III

W. Allen Nickles, III (S.C. Bar # 4226)
Nickles Law Firm, LLC
17 Creek Manor Lane
Columbia, SC 29206
(803) 466-0372
wanickles@nickleslaw.com

Attorney for Plaintiffs

Alice O'Brien*
Kristen Hollar*
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7034
aobrien@nea.org
khollar@nea.org

*Attorneys for Individual Plaintiffs and South
Carolina Education Association*

Ramya Ravindran*
Grace Rybak*
Bredhoff & Kaiser PLLC
805 15th Street NW, Suite 1000
Washington, DC 20005
(202) 842-2600
rravindran@bredhoff.com
grybak@bredhoff.com

*Attorneys for South Carolina Education
Association*

* *Pro Hac Vice* Application Forthcoming