

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2020-001069

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 South Carolina
Department of Administration,Respondents.

**Motion for Leave to File *Amici Curiae* Brief of Public Funds Public Schools
and Southern Education Foundation**

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Pursuant to Rule 213, South Carolina Appellate Court Rules, Public Funds Public Schools (“PFPS”) and the Southern Education Foundation (“SEF”) hereby move for leave to file an *amici curiae* brief in this action.

Public Funds Public Schools is a national campaign to ensure that public funds for education are used to maintain, support, and strengthen public schools. PFPS is a collaboration of the Southern Poverty Law Center, Education Law Center, and Munger, Tolles & Olson LLP, who have participated as *amici curiae* or as counsel in cases promoting public education rights—including cases to prevent the diversion of public funds from public schools—in states across the nation.

The Southern Poverty Law Center (“SPLC”), based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971 to combat discrimination through litigation, education, and advocacy. The SPLC is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. Education Law Center (“ELC”) is a nonprofit organization founded in 1973 that advocates on behalf of public school children for equal and adequate educational opportunity under state and federal laws. ELC serves as the leading voice for New Jersey’s public school children and has become one of the most effective advocates for equal educational opportunity and education justice in the United States. Munger, Tolles & Olson LLP is a national law firm with offices in Los Angeles, San Francisco, and Washington, D.C. that is committed to pro bono legal work and giving back to the community. Munger, Tolles & Olson led the legal team that successfully challenged an expansive voucher program in Nevada.

PFPS opposes all forms of private school vouchers—including traditionally structured voucher programs, Education Savings Accounts, and tax credit scholarships—as well as direct aid to private schools and other diversions of public funds from public education. PFPS uses a range of strategies to protect and promote public schools and the rights of all students to a free, high quality public education. This includes engaging in litigation challenging private school vouchers and other diversions of public funds to private schools, as well as supporting public interest, civil rights, and private bar attorneys in doing so.

Originally founded in 1867 as the Peabody Fund, the Southern Education Foundation is a 501(c)(3) nonprofit organization supported by partners and donors committed to advancing pre-K through 16 equitable education policies and practices that elevate learning for low-income students and students of color in the southern states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. As a leader in education for over 150 years, SEF develops, disseminates, and amplifies research-based solutions and promising ideas for policymakers and grows the capacity of education leaders and influencers to create systemic, positive change in early childhood, K-12 and post-secondary education. Through its work in research, advocacy and government affairs, and leadership development, SEF has long worked to improve educational opportunities for students most in need.

Public education in the South came about following the Civil War. Private philanthropic funds drafted the implementing legislation and recruited Black elected officials during the Reconstruction Period to present legislation by which the citizens, through their taxes, would fund public education. This was done to sustain the work private philanthropy was doing (training teachers, building schools, buying books, etc.) and create in the South what had already

been established in the North, specifically, publicly funded education. The philanthropic funds responsible for these efforts ultimately consolidated into one fund—the SEF.

SEF believes education equity is essential to achieve quality and fairness in public education. Equity only exists when race and income are no longer the most reliable predictors of student success, and educational systems work to ensure that each student receives what they need when they need it, to develop children to their full academic and social potential, both for the child’s benefit and the benefit of our local and national communities. SEF’s mission is to see that every student, regardless of socioeconomic background, has access to an education that propels them toward an opportunity-rich life and thereby advances our nation’s potential and ideals.

Protecting against violations of state constitutions is central to PFPS’s mission of safeguarding the educational rights of public school children. Thus, PFPS has a strong interest in the case at bar, which challenges Governor McMaster’s use of public funds to directly benefit private schools in violation of the South Carolina Constitution. Given SEF’s legacy in the creation of Southern public education and its longstanding commitment to advancing the rights of underserved students in the South, SEF also has a strong interest in ensuring that public funding is not unconstitutionally diverted to private schools.

PFPS and SEF respectfully submit this brief in support of Petitioners to provide additional legal and factual context to assist the Court in evaluating the constitutional violation at issue and its impact on South Carolina students. The proposed *amicus* brief is attached as Exhibit A and is being conditionally filed with this motion pursuant to Rule 213, South Carolina Appellate Court Rules.

Dated: September 4, 2020

Respectfully submitted,

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EXHIBIT A

**THE STATE OF SOUTH CAROLINA
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**Brief of *Amici Curiae* Public Funds Public Schools and Southern Education Foundation
In Support of Petitioners**

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SUMMARY OF ARGUMENT

Article XI, § 4 of the South Carolina Constitution expressly forbids the use of public funds for the direct benefit of any private school. The use of Governor’s Emergency Education Relief (“GEER”) funds, appropriated under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, to fund Safe Access to Flexible Education (“SAFE”) Grants—a private school voucher program—is thus facially unconstitutional. The language of the CARES Act and the Governor’s public averments about the GEER funds and the SAFE Grants program confirm that the program is meant to directly benefit private schools, and Establishment Clause case law holding that vouchers only indirectly benefit private schools is inapposite. Governor McMaster’s unconstitutional use of GEER funds on the SAFE Grants program furthers his political agenda of expanding private school vouchers in South Carolina rather than addressing the urgent educational requirements of the vast majority of the State’s students, particularly those with the highest needs.

ARGUMENT

I. The SAFE Grants Voucher Program is Clearly a Direct Benefit to Private Schools in Violation of Article XI, § 4

Although Respondents now claim that the only direct beneficiaries of the SAFE Grants program are students, the CARES Act, the Governor’s GEER Fund application, and his statements about SAFE Grants demonstrate that the program was explicitly intended to benefit private schools. The case law relied upon by Respondents, which interprets the Establishment Clause and similar state provisions about government support of religion, is not relevant to the instant challenge to the SAFE Grants voucher program under South Carolina’s constitutional prohibition on public funding of *any* private school.

A. The CARES Act, GEER Fund Application, and Governor’s Public Statements Demonstrate SAFE Grant Vouchers Directly Benefit Private Schools

It is clear from the plain language and purpose of the CARES Act under which Governor McMaster applied for GEER funds, his signed agreement accepting the funds, and the Governor’s contemporaneous public statements, that he intended the GEER-funded SAFE Grants voucher program to be a direct benefit to private schools. The Respondents’ claims in this proceeding—that the funds were intended to benefit individuals and any benefit to schools is merely incidental—are simply post-hoc attempts to recharacterize the use of the funds in order to avoid invalidation of the program under Article XI, § 4.

The plain language of the CARES Act explicitly provides that GEER funds must go to schools or other educational organizations rather than to individuals. In establishing the GEER Fund as part of the CARES Act, Congress set forth three acceptable uses for GEER allocations received by state governors:

- (1) provide emergency support through grants to local educational agencies ...;
- (2) provide emergency support through grants to institutions of higher education serving students within the State ...; and
- (3) provide support to any other institution of higher education, local educational agency, or education related entity within the State

CARES Act, Pub. L. No. 116-136, 134 Stat. 281, § 18002(c) (2020). Thus, pursuant to the clear language of the CARES Act, only local educational agencies (“LEAs”), institutions of higher education (“IHEs”), or education related entities are permitted to receive GEER grants.¹

The CARES Act directs governors to submit applications to the U.S. Secretary of Education in order to receive GEER funding. The application developed by the U.S. Department of

¹ The Brief of Amici Curiae Members of South Carolina’s U.S. Congressional Delegation acknowledges that the CARES Act limits recipients of GEER funding to LEAs, IHEs, and education related entities. Congressional Delegation Amicus Br. at 3-4.

Education, titled the Certification and Agreement for Funding under the Education Stabilization Fund Program Governor’s Emergency Education Relief Fund (hereinafter “GEER Fund Certification and Agreement”), is consistent with the plain language and intent of the statute. The GEER Fund Certification and Agreement requires governors to certify that GEER funding will be used solely for the purposes set forth in the CARES Act: providing LEAs, IHEs, or education related entities emergency assistance needed as a result of the Novel Coronavirus Disease 2019 (COVID-19). U.S. Dept. of Educ., South Carolina GEER Fund Certification and Agreement 4 (May 8, 2020), <https://oese.ed.gov/files/2020/06/SC-GEER-Certification-and-Agreement-5-8-20-Reviewed.pdf> (also appended to Petitioners’ Brief as Attachment A). The GEER Fund Certification and Agreement further requires governors to provide their assurance that the State and each GEER fund recipient “will, to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to COVID-19....” *Id.* Clearly, such a provision contemplates that the only recipients of GEER funding are entities that have employees and/or contractors—not individual students and families.

Governor McMaster’s statements in the signed GEER Fund Certification and Agreement offer further proof that the GEER funding was intended to provide a direct benefit to schools, not individuals. Governor McMaster signed the GEER Fund Certification and Agreement on May 8, 2020, providing the above-described assurances that the GEER funding would only go to LEAs, IHEs, or education related entities. In addition, the Governor was required to set forth in that document the specific planned uses of the GEER funds. Therein, Governor McMaster certified

that he would use the funds to support remote learning in LEAs, IHEs, and private schools.² *Id.* at 6-10. The Governor further indicated that he established an advisory commission to recommend “how to spend the GEER funds to address the needs of public and private LEAs and IHEs.” *Id.* at 10. Throughout the GEER Fund Certification and Agreement, the Governor repeatedly confirmed that he would use GEER funds for LEAs, IHEs, and private schools. Nowhere in the document did the Governor mention that he would disburse any of the funds—let alone the vast majority of them—to individuals. Indeed, such a use of GEER funds would be prohibited by the CARES Act.

In addition to his assurances in the signed GEER Fund Certification and Agreement, Governor McMaster’s public statements regarding South Carolina’s GEER funding demonstrate that he intended to use it to provide a direct benefit to private schools and took action through the SAFE Grants program to do so. In his July 20, 2020 press conference announcing the SAFE Grants program, the Governor repeatedly declared that the purpose of the program was to provide GEER funds to private schools. In response to a question from the press, the Governor unequivocally stated “the money of course will go to the schools.” *Gov. Henry McMaster Creates Safe Access to Flexible Education (SAFE) Grants*, WCBD News2, (July 20, 2020), <https://www.youtube.com/watch?v=o0hE8joBQR8&feature=youtu.be&t=1388> (statement beginning at minute 16:11). He further stated that South Carolina taxpayers “are already paying taxes to support those public schools, so this is a way that we can support this private school and the independent schools.” *Id.* at 3:55. In response to a question regarding whether the SAFE

² The Governor incorrectly referred to private schools as “private LEAs.” GEER Fund Certification and Agreement at 6, 10. Under federal law, an LEA is a public school board or other public authority responsible for directing public schools within a municipality, school district or other political subdivision of the state. *See* 34 C.F.R. § 303.23(a). LEAs can only be public agencies or authorities.

Grants would be open even to schools that received Paycheck Protection Program loans, the Governor declared that the GEER funds would be available to “all private schools, independent schools ... in the state.” *Id.* at 19:03. The Governor’s public statements leave no doubt that he intended the SAFE Grants voucher program to comply with the federal requirement that GEER funds directly benefit schools, not individuals. This puts the program in direct violation of Article XI, § 4.

B. The *Zelman* Case and Other Establishment Clause Analyses are Inapposite

In arguing that SAFE Grant vouchers do not violate Article XI, § 4 because they only benefit private schools indirectly, Respondents rely heavily on *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and other cases analyzing the federal Establishment Clause and its state constitution counterparts. But the analysis of such provisions is legally distinct from the analysis of constitutional prohibitions barring aid to private schools, and there are material factual differences that distinguish SAFE Grants vouchers from the programs at issue in *Zelman* and its progeny.

First, the determination of whether a program violates the federal Establishment Clause or a similar state constitutional provision does not dictate whether it violates a clause such as Article XI, § 4 that prohibits funding of any private school, whether secular or religious. As Petitioners note, the Attorney General mistakenly “utilizes an Article I § 2 analysis to address an Article XI § 4 issue.” Petitioners’ Br. at 17. Article I, § 2 of the South Carolina Constitution mirrors the federal Establishment Clause, stating that “[t]he General Assembly shall make no law respecting an establishment of religion,” and both the federal and state provisions are immaterial to the instant case.

Cain v. Horne, 220 Ariz. 77, 202 P.3d 1178 (2009), a challenge to two private school voucher programs in Arizona, illustrates that constitutional provisions addressing church-state concerns are properly evaluated separately from those prohibiting public funding of any private educational institution. The two programs at issue in *Cain*, like the SAFE Grants voucher program, allowed public funds to be used by parents to pay private school tuition. *Id.* at 79-80, 202 P.3d at 1180-81. The Arizona courts made clear that potential violations of the state constitution’s “Religion Clause” and “Aid Clause” must be evaluated separately:

although there may be some overlap between these clauses, the Religion Clause—Arizona’s analog to the federal Establishment Clause—was intended to ensure the separation of church and state, whereas the Aid Clause—which has no equivalent in the United States Constitution—was aimed at placing restrictions on the disbursement of public funds to specified institutions, both religious and secular.

Id. at 81, 202 P.3d at 1182 (quoting *Cain v. Horne*, 218 Ariz. 301, 305, 183 P.3d 1269, 1273 (App. 2008)). In *Cain*, as in the instant case, the state defendants argued that “the parental choice involved in signing the state checks over to a private or sectarian school saves the voucher programs from unconstitutionality.” *Id.* But the Arizona Supreme Court found the fact “[t]hat the checks or warrants first pass through the hands of parents is immaterial” and held that the programs violated the Aid Clause because “applying the true beneficiary theory exception would nullify the Aid Clause’s clear prohibition against the use of public funds to aid private or sectarian education.” *Id.* at 83, 202 P.3d at 1184 (internal citations omitted).

Respondents cite authorities from several states echoing *Zelman*’s reasoning that voucher programs are constitutional because families determine where public funds are spent. Gov. McMaster Resp. Br. at 33-34; Palmetto Promise Inst. Resp. Br. at 14-16; *see also* Inst. for Justice Amicus Br. at 7-9. These cases regarding the Establishment Clause and state constitutional provisions focused on government support of religious institutions are unpersuasive, however, in

analyzing whether the SAFE Grants voucher program violates the distinct species of constitutional prohibition found in Article XI, § 4, which forbids public funding of any private school. *See Cain*, 220 Ariz. at 81, 202 P.3d at 1182 (explaining that *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), a challenge to a voucher program under Arizona’s religion clauses that is cited by Respondents in the instant case, “do[es] not compel us to interpret the Aid Clause as a mirror image of the Religion Clause or to interpret the Aid Clause as no broader than the federal Establishment Clause”).

The 1972 amendment to the provision now found at Article XI, § 4 of the South Carolina Constitution underscores the irrelevance of Establishment Clause and similar analyses. *See Miller v. Farr*, 243 S.C. 342, 347, 133 S.E.2d 838, 841 (1963) (explaining that “when construing constitutional amendments, the Court . . . determine[s] the intent of its framers and of the people who adopted it”). The South Carolina Constitution of 1895 prohibited government aid to institutions “under the direction or control of any church or of any religious or sectarian denomination, society or organization.” S.C. Const. of 1895 art. XI, § 9 (emphasis added). When the provision was amended in 1972, it was specifically broadened to prohibit use of public funds to benefit “any religious or other private educational institution.” S.C. Const. art. XI, § 4 (emphasis added). And it remains separate from Article I, § 2, the provision of the state constitution that mirrors the federal Establishment Clause. The deliberate amendment of Article XI, § 4 to prohibit public funding of any type of private educational institution bolsters the position that it should be analyzed separately from constitutional provisions, in South Carolina or elsewhere, that focus on prohibiting public aid specifically to religious institutions.

Moreover, the facts on which the *Zelman* decision hinged are not mirrored here. In *Zelman*, the plaintiffs challenged a voucher program under the Establishment Clause, which

forbids government funding of religious institutions, because the program would send public funds to religious schools. The Court rejected the challenge because, under the Ohio voucher program at issue, parents could choose to send those public funds *either* to religious *or* to secular schools. Thus, the only way the funds would reach a religious institution was through a participating parent’s decision. In this case, the Petitioners challenge a voucher program under the South Carolina Constitution’s Article XI, § 4, which forbids government funding of private educational institutions, because it would send public funds to private schools. But unlike in *Zelman*, there is *no* choice a participating parent can make that would send the public funds anywhere other than to the prohibited type of institution: a private school. According to the U.S. Supreme Court, the parental decisionmaking in *Zelman* broke the link between government funding and religious schools because the parents had a “genuine choice” in where the public funds would go. *Zelman*, 536 U.S. at 662. But under the SAFE Grants program, there is no choice parents can make that would break the link between government funding and private schools—the only way the government funds dedicated to this program can be spent is at private schools. Therefore, despite the Governor’s insistence that SAFE Grants pass constitutional muster because “the parent or guardian controls if, when, and to which eligible institution the . . . grant funds are distributed” (Gov. McMaster Resp. Br. at 32), if the program operates at all, it must violate Article XI, § 4.

II. The Governor’s Unconstitutional Use of GEER Funds Fails to Address the Urgent Needs of South Carolina Students

South Carolina’s public schools require significantly increased funding and resources to adequately serve their students during this pandemic. The Governor’s use of GEER funds in contravention of the clear mandates of Article XI, § 4 ignores the urgent educational

requirements of the vast majority of South Carolina students, particularly those with the highest needs.

A. South Carolina’s Underfunded Public Schools, which Disproportionately Serve High-Need Students, Require Significant Additional Resources During the Pandemic

South Carolina public schools are chronically underfunded.³ Due to the economic impacts of the COVID-19 pandemic, South Carolina’s revenue projections show an estimated loss of \$643 million (27.5%) for fiscal year 2021.⁴ It is anticipated that the economic downturn accompanying the pandemic will cause severe budget shortfalls for public school districts.⁵

At the same time that public schools are anticipating dramatic budget cuts, their funding and resource needs are increasing. In order to adequately serve their students, schools must pay for cleaning supplies and personal protective equipment, cover new expenses associated with remote learning and attempts to bridge the “digital divide” for students without computers and internet access, and find ways to meet the educational and social-emotional needs of students experiencing learning loss and trauma due to school closures, illnesses, and other impacts of the

³ Danielle Farrie, Robert Kim & David G. Sciarra, *Making the Grade: How Fair Is School Funding in Your State?*, Education Law Center 3, 12 (2019), <https://edlawcenter.org/assets/Making-the-Grade/Making%20the%20Grade%202019.pdf> (assigning South Carolina a grade of “C” for public school funding levels and noting its “entrenched patterns of underfunding”).

⁴ See Lisette Partelow, Jessica Yin & Scott Sargrad, *Why K-12 Education Needs More Federal Stimulus Funding*, Center for American Progress (July 21, 2020), <https://www.americanprogress.org/issues/education-k-12/reports/2020/07/21/487865/k-12-education-needs-federal-stimulus-funding/> (citing National Conference of State Legislatures, *Coronavirus (COVID-19): Revised State Revenue Projections*, available at <https://www.ncsl.org/research/fiscal-policy/coronavirus-covid-19-state-budget-updates-and-revenue-projections637208306.aspx>).

⁵ Matt Barnum, *School Budgets Are in Big Trouble, Especially in High-Poverty Areas. Here’s Why—and What Could Help*, Chalkbeat (Apr. 7, 2020), <https://www.chalkbeat.org/2020/4/7/21225437/school-budgets-are-in-big-trouble-especially-in-high-poverty-areas-here-s-why-and-what-could-help>.

pandemic.⁶ The Council of Chief State School Officers has estimated that, nationwide, schools will need as much as \$245 billion in additional funding to reopen schools safely and serve all students during this unprecedented academic year.⁷ The Learning Policy Institute estimates that South Carolina will need over \$142 million in additional funding.⁸

Although the pandemic affects all students and families, those with higher needs are disproportionately served by public schools. Across the country, public schools educate the vast majority of students.⁹ They also educate significantly higher proportions of students of color and low-income students than do private schools.¹⁰ The demographics of South Carolina’s public and private schools reflect these national patterns. Sixty-one percent of South Carolina’s public school students live in poverty, and 51% are students of color.¹¹ The State does not require private schools to publicly report their student demographics, but available sources indicate that only 20% of South Carolina private school students receive tuition assistance—the proportion who would be classified as low-income may be significantly less—and only about 14% are

⁶ See, e.g., Letter from Carissa Miller, Exec. Dir., Council of Chief State School Officers to Hon. Lamar Alexander, U.S. Sen. (July 24, 2020), <https://ccsso.org/sites/default/files/2020-06/HELPLetterFinal.pdf>.

⁷ *Id.*

⁸ Michael Griffith, *What Will It Take to Stabilize Schools in the Time of COVID-19?*, Learning Policy Institute (May 7, 2020), <https://learningpolicyinstitute.org/blog/what-will-it-take-stabilize-schools-time-covid-19>.

⁹ U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Statistics (NCES 2019-106), *School Choice in the United States: 2019* ix (Sept. 2019), <https://nces.ed.gov/pubs2019/2019106.pdf>.

¹⁰ *Id.* at 30; Jongyeon Ee, Gary Orfield & Jennifer Teitell, *Private Schools in American Education: A Small Sector Still Lagging in Diversity* 5-6, 13 (UCLA Civ. Rights Project Working Paper Mar. 5, 2018), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-schools-in-american-education-a-small-sector-still-lagging-in-diversity/> (finding that white students made up 68.6% of private school enrollment and that students from low-income families made up only 9% of private school enrollment but over 50% of public school enrollment).

¹¹ South Carolina Dept. of Educ., *Active Student Headcounts, School Headcount by Gender, Ethnicity and Pupils in Poverty 2019-20*, <https://www.ed.sc.gov/data/other/student-counts/active-student-headcounts/>.

students of color.¹² Communities of color have been disproportionately negatively affected by the coronavirus.¹³ Additionally, low-income students and students of color are more likely to lack the internet access essential to remote learning.¹⁴ Public schools, which serve the majority of high-need students, urgently require additional resources such as those allocated under the CARES Act in order to provide their students with basic health and educational necessities.

B. Rather Than Address the State’s Most Urgent Education Needs Via Constitutional Uses of GEER Funds, the Governor is Using These Funds to Advance His Agenda of Expanding Private School Vouchers

As noted above, Congress explicitly intended GEER funds to provide emergency assistance to LEAs, IHEs, and other education related entities. Because most South Carolina students, including the majority of high-need students, are educated in public schools, the most equitable and effective way to address the educational emergency created by the pandemic would be to direct the majority of GEER funds to public schools.¹⁵ Prioritizing the use of limited public funds for South Carolina’s public schools is not a mere policy preference of the

¹² Palmetto Promise Inst., *South Carolina Independent School COVID-19 Impact Survey* (May 6, 2020), <https://palmettopromise.org/wp-content/uploads/2020/05/4-2020-Covid-19-SC-Independent-Schools-Survey-5-6-20-update.pdf>; Private School Review, *Private School Minority Statistics in South Carolina*, <https://www.privateschoolreview.com/minority-stats/south-carolina>.

¹³ See, e.g., Ctrs. for Disease Control and Prevention, *Health Equity Considerations and Racial and Ethnic Minority Groups* (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

¹⁴ Brooke Auxier & Monica Anderson, *As Schools Close Due to the Coronavirus, Some U.S. Students Face a Digital “Homework Gap,”* Pew Research Ctr. (Mar. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/>.

¹⁵ Indeed, in the Governor’s GEER Fund Certification and Agreement, he noted that when the pandemic closed school buildings in Spring 2020, the State’s public schools struggled to provide remote learning to 776,461 students, while private schools served 38,594, or just under 5%, of the public school population. GEER Fund Certification and Agreement at 7-8.

Petitioners, as Respondents' contend (Gov. McMaster Resp. Br. at 12, 17); rather, it is clearly enshrined in the state constitution in Article XI, § 4.

However, the Governor's statements about SAFE Grants vouchers reveal that his aim in using the State's GEER funds on this program does not lie in addressing the educational needs of the majority of South Carolina's students during the pandemic. Rather, the Governor's clearly stated goal is to use GEER funds to advance his political agenda of expanding private school vouchers in South Carolina—something he has been unable to implement through the legislative process. During the July 20 press conference announcing the SAFE Grants vouchers, Governor McMaster acknowledged that “this [public funding of private schools] is something that... these legislators have been and other leaders have been promoting for a number of years and in fact have introduced legislation that has not yet passed. We are hoping that it will pass.” *Gov. Henry McMaster Creates Safe Access to Flexible Education (SAFE) Grants*, WCBD News2 (July 20, 2020), <https://www.youtube.com/watch?v=o0hE8joBQR8&feature=youtu.be&t=1388> (statement beginning at 24:20). He declared that the SAFE Grants voucher program, “addresses questions and aspirations legislators and education leaders have had for years, to see to it that our children, wherever they go to school, they can go where they want to go....” *Id.* at 20:53. Governor McMaster also emphasized that the GEER-funded SAFE Grants program is intended to form the basis for establishing a permanent voucher program:

This is a major step, it's a good step. We hope that this will open some doors to some ideas that have been promoted by these legislators and others who've led the way, probably in the United States, as well as our education and policy leaders. We hope that this will show the feasibility and productivity of this kind of system.

Id. at 23:13. The Governor's public remarks confirm that rather than address the unique emergency the state's schools are facing, in ways that comply with the clear language and intent

of the state constitution, he is using GEER funds to lay the foundation for his long-term goal of expanding private school vouchers in South Carolina.

CONCLUSION

Amici curiae respectfully urge this Court to invalidate the unconstitutional SAFE Grants voucher program and grant the relief requested by the Petitioners.

Dated: September 4, 2020

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**Pro hac vice* motion forthcoming

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CERTIFICATE OF SERVICE

I certify that I have served all parties to this matter 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:

Dated: September 4, 2020

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