

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION

Appellate Case No. 2023-001673

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 MCDUGALD SCOTT, on behalf of herself and her minor child; PENNY HANNA, on behalf of herself and her minor children; SOUTH CAROLINA STATE CONFERENCE OF THE NAACP; and SOUTH CAROLINA EDUCATION ASSOCIATION,Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF EDUCATION; ELLEN WEAVER, in her official capacity as 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

and

Henry D. McMaster, in his official capacity as Governor of the State of South Carolina; Thomas C. Alexander, in his official capacity as President of the South Carolina Senate; and G. Murrell Smith, Jr., in his official capacity as Speaker of the House of Representatives.....Intervenors-Respondents.

Brief of *Amicus Curiae* Cato Institute
in Support of Respondents

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Question Presented

Does the Education Scholarship Trust Fund Program promote a valid public purpose consistent with Article X, Section 5 of the South Carolina Constitution?

Interest of Amicus Curiae

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. To that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

Cato Institute scholars have published extensive research for years on the benefits of public policies that empower parents to choose the education they think is best for their children. South Carolina's Education Scholarship Account Program implements several new public policies affecting the state's parents, children, and education providers. This case interests the Cato Institute because it concerns the legality of a program that offers educational autonomy to parents.

Statement of the Case and Facts

Act 8 creates the Education Scholarship Trust Fund (ESTF) Program and was signed into law on May 4, 2023. *See* Pet. Br. at 3. The law allocates up to \$6,000 per eligible student, per school year, in a student account controlled by the student's parents. *See* Resp. Br. at 5. These student accounts are funded through an annual appropriation by the General Assembly to the newly established Education Scholarship Trust Fund. S.C. Code Ann. § 59-8-120.

The ESTF Program is designed to provide grants to low- and moderate-income parents for a broad range of educational expenses, including supplies, tutoring, and testing fees, but also for tuition and fees associated with transferring between public schools or attending a private and independent school. S.C. Code Ann. § 59-8-110(13) (defining “qualifying expenses”). The law went into effect in June 2023 and the South Carolina Department of Education will begin approving parents’ ESTF accounts for student use in the 2024-2025 school year. S.C. Code Ann. § 59-8-135.

Petitioners filed their Complaint and Petition for Original Jurisdiction on October 26, 2023, alleging that the ESTF Program is unconstitutional under several provisions of the South Carolina Constitution and seeking declaratory and injunctive relief. Pet. Br. at 3. Petitioners claim that the Act is unconstitutional, in part, because it fails to provide a valid public purpose and therefore violates Article X, Section 5 of the state Constitution. Pet. Br. at 29. That section of the Constitution states: “Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.” S.C. Const. art. X, § 5. This Court granted Petitioners’ Petition for Original Jurisdiction on December 12, 2023. Pet. Br. at 3.

Standard of Review

“This Court has a limited scope of review in cases involving a constitutional challenge to a statute.” *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). The Court “begins with a presumption of constitutionality.” *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014). The Court must, “if possible,” interpret a statute “to render [it] valid.” *Id.* Only when a statute’s

“repugnance to the Constitution is clear and beyond a reasonable doubt” can it be declared unconstitutional. *Curtis*, 345 S.C. at 570, 549 S.E.2d at 597. A facial challenge “is the most difficult to mount successfully” because a petitioner must show the law “is unconstitutional in all its applications.” *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 477, 892 S.E.2d 121, 128 (2023) (cleaned up).

Introduction and Summary of Argument

It goes without saying that South Carolinian children are individuals with different needs, talents, interests, and challenges. Many students and their parents are happy with the curriculum, teachers, administration, and extracurriculars at their child’s assigned public school. But there is a subset of parents and their children who are deeply unhappy or who seek something different. Some children need specialized attention to address speech and communications challenges. Some children fall somewhere on the autism spectrum and would thrive in smaller classrooms. Still others may be subject to bullying, may be suffering from behavioral issues, or may come from families that prefer to emphasize certain parts of history, sex-education, or science consistent with their religious, ethical, or cultural beliefs. Many of these parents would therefore prefer to enroll their child in a private school or transfer the child to a different public school, but they cannot afford to. Further, there’s another subset of parents who are content with their assigned public school, but would, if they had the means, supplement their child’s education with after-school or weekend educational experiences, classes, or tutors.

South Carolina lawmakers realized that these families were being underserved and created the Education Scholarship Trust Fund Program to empower more parents to attain their educational preferences. Lawmakers also sought to give parents funds to supplement and complement the education that occurs within the four walls (and seven hours) of the typical assigned public school. In codifying such a program and dedicating funds to accomplish these aims, the law has several valid public purposes that benefit South Carolina families and the state. Programs like this can be expected to improve academic achievement, reduce social tensions about school instruction, and increase parental satisfaction with their schools. Amicus writes to highlight the challenged Program's relationship to these myriad public purposes.

Argument

I. Programs Like the Education Scholarship Account Program Have Several Valid Public Purposes.

Petitioners assert that Article X, Section 5 and Section 11 of the South Carolina Constitution require that the Education Scholarship Account Program have a valid "public purpose." Pet. Br. at 29. They argue that the Program fails this requirement because parents could possibly use ESTF Program funds for tuition at "private schools with selective admissions policies that do not adhere to the same quality or accountability standards as public schools," Pet. Br. at 29, and that any purported public benefits of the Program are "negligible and speculative." Pet. Br. at 30.

When evaluating whether a law has a valid public purpose, courts look to the "object sought to be accomplished." *See Carll v. S.C. Jobs-Econ. Dev. Auth.*, 284 S.C. 438, 443, 327 S.E.2d 331, 334 (1985). If the ends are valid, the means chosen will not

invalidate the law. *Id.* In *Anderson v. Baehr*, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975), this Court clarified that laws aimed at a public purpose “ha[ve] for their objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof.” *Id.*

Petitioners cannot prove that the law lacks any such purpose “beyond a reasonable doubt.” *Curtis*, 345 S.C. at 570, 549 S.E.2d at 597. The Program is plainly directed at improving public-school operations, reducing social friction over school operations and instruction, and improving state education and parental satisfaction, all of which qualify as a public purpose.

A. Programs Like South Carolina’s Often Improve Public Schools’ Operations and Students’ Academic Performance.

Parents can use ESTF Program funds for a variety of education-related services. S.C. Code Ann. § 59-8-110(13) (defining eleven categories of “qualifying expenses” and a broad “catch-all” category). Many of the contemplated qualifying expenses—like math tutoring services, textbooks and instructional materials, and test preparation for state tests or Advanced Placement tests—are obviously anticipated to improve students’ and schools’ academic performance. Petitioners omit discussion of these qualifying expenses in their constitutional analysis, perhaps conceding the self-evident public benefits enabled by the law. *See* Pet. Br. at 29-31.

Petitioners identify only one type of qualified expense when arguing the Program is not directed to a public purpose, which suggests they believe lawmakers’

inclusion of this sole category—tuition and fees associated with a child attending an independent school or transferring to a public school—vitiates the entire public purpose of the law. Pet. Br. at 29-31. *See* S.C. Code Ann. § 59-8-110(13)(a). Yet even this qualified expense category constitutes a public purpose.

By allowing parents to apply for and use ESTF Program funds to offset tuition at independent schools and fees for transferring to another public school, the law enables some low- and moderate-income parents to place their children in a different school if they are, for whatever reason, unhappy with the teaching quality, disciplinary policies, or administration of their assigned public school. This is a common public purpose motivating legislatures nationwide to initiate, fund, and maintain “school choice” programs. *See, e.g.,* Neal McCluskey, *SCHOOL CHOICE: CATO HANDBOOK FOR POLICYMAKERS* (2022).³ School choice efforts are a national phenomenon in part because they increase competition among and accountability at public schools. As the U.S. Supreme Court has recognized, “private schools may serve as a benchmark for public schools, in a manner analogous to the ‘TVA yardstick’ for private power companies.” *Mueller v. Allen*, 463 U.S. 388, 395 (1983). Research suggests that increased competition increases students’ academic performance and public school operations.

For example, a U.S. Department of Education-supported study of Florida elementary schools found that school choice programs “appear to lengthen the

³ Available at <http://tinyurl.com/5n9bzhk7>.

amount of time devoted to instruction, . . . increase resources available to teachers, and decrease principal control.” Cecilia Elena Rouse *et al.*, *Feeling the Florida Heat? How Low-Performing Schools Respond to Voucher and Accountability Pressure*, 5 *Am. Econ. J.* 251, 254 (2013).

The Cato Institute’s education scholar Neal McCluskey has noted that “[s]everal studies have shown that school choice leads to greatly increased high school graduation rates and college attendance, while none have found negative effects [R]esearch has consistently found that more options lead to improved *public* school test scores. Competition, it appears, spurs public schools to improve.” Neal McCluskey, *SCHOOL CHOICE: CATO HANDBOOK FOR POLICYMAKERS* 4 (2022).⁴ McCluskey and Solomon Chen also noted a study that “found that vouchers in New York City led to a 24 percent increase in college enrollment by African American students.” Neal McCluskey and Solomon Chen, *California Needs School Choice, Not Affirmative Action*, *CATO INST.* (Nov. 12, 2020).⁵

In fact, researchers recently identified and examined 29 high-quality studies of the effects of school choice programs on public schools. The EdChoice, *EDCHOICE STUDY GUIDE: A REVIEW OF THE RESEARCH ON PRIVATE SCHOOL CHOICE* (2023). Twenty-six out of those 29 empirical studies, including some of these studies mentioned, found a positive effect on public school operations or students’ academic performance. *Id.* at 11-12, 26-28 (citing studies).

⁴ Available at <http://tinyurl.com/5n9bzhk7>.

⁵ Available at <http://tinyurl.com/5n84pu7h>.

B. The Program Would Reduce Nonsectarian Disputes Over Education Policy.

Public schools “were intended to provide a uniform experience: the common school was designed to ‘create in the entire youth of the nation common attitudes, loyalties, and values, and to do so under central direction by the [democratic] state.’”

ASHLEY ROGERS BERNER, *NO ONE WAY TO SCHOOL: PLURALISM AND AMERICAN PUBLIC EDUCATION* 29 (Springer Publ’g., 1st ed. 2017). But the reality is far more complicated.

“It is easy to say, ‘everyone should get the same education,’ but settling on specifics—where education happens, with whom, what is taught—can be a fraught process.”

NEAL P. MCCLUSKEY, *THE FRACTURED SCHOOLHOUSE: REEXAMINING EDUCATION FOR A FREE, EQUAL, AND HARMONIOUS SOCIETY* 33 (Rowman & Littlefield, 2022).

The transmission of normative values is inherent to education, but there are many social communities in America, and these communities value different things. See Juliana Menasce Horowitz, *Parents Differ Sharply by Party Over What Their K-12 Children Should Learn in School*, PEW RSCH. CTR. (Oct. 26, 2022).⁶ Sometimes, these differences are minor—should the Chess Club receive the same amount of funding as last year? But other times they are not—what is the proper role of schools when it comes to instructing sex education? Should the school cut music and art programs and hire more math teachers? Which parts of American History should be emphasized?

⁶ Available at <http://tinyurl.com/4dtuj4uf>.

Parents, when given the option, make education decisions in accordance with their values. School choice reduces social friction by allowing parents to transfer their children to public and independent schools that do not undermine their educational and civic values. Authors of a study of Indiana’s school choice program—the largest program in the nation—reported that one of the primary reasons parents send their children to non-public schools were those institutions’ morals, values, and character. Andrew D. Catt & Evan Rhinesmith, *WHY INDIANA PARENTS CHOOSE: A CROSS-SECTOR SURVEY OF PARENTS’ VIEWS IN A ROBUST SCHOOL CHOICE ENVIRONMENT* 27-28 (2017).⁷

Major decisions about public school curriculum and programs often appease one group at the cost of upsetting the rest. Thus, it is expected that “[i]n a pluralist nation, populated by sundry races, ethnicities, creeds, and philosophies,” a unified public education system would force people “to fight to determine who will, and will not, have their tax dollars used in accordance with their bedrock values.” McCluskey, *supra* at 190. That public education is a source of social division is not new. As the U.S. Supreme Court recognized in its wartime decision *West Virginia State Bd. of Educ. v. Barnette*:

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such

⁷ Available at <http://tinyurl.com/3u3m8tz7>.

effort Compulsory unification of opinion achieves only the unanimity of the graveyard.

319 U.S. 624, 641 (1943).

American history is filled with vicious (sometimes violent) disputes over education policy. *See, e.g.,* McCluskey, *supra* at 56-57 (describing the “Textbook Wars” of Kanawha County, West Virginia, which broke out into violence and resulted in a school receiving multiple bomb threats); NEAL MCCLUSKEY, *WHY WE FIGHT: HOW PUBLIC SCHOOLS CAUSE SOCIAL CONFLICT* 9 (CATO INST., 2007).

The COVID-19 pandemic forced many legislatures, school boards, and parents to reevaluate schooling policies and experiment with new models. That society-wide reevaluation of schools seems to have ignited new social tensions over teaching and library materials. *See, e.g.,* Neal McCluskey, *2023 Was a Record Year for Public Schooling Culture War*, CATO INST. (Jan. 3, 2024).

South Carolina schools are no exception. Just last year, a parent in Berkeley County sued the local school board after it refused to remove 93 “problematic” books in circulation throughout the district. Blair Sabol, *Advocates, school board members question validity of parent’s 93 book challenges*, WCSC (Oct. 2, 2023).⁸ In response, and likely to avoid litigation, the school board created ten separate committees made up of librarians, staff, and parents to review the books. The incident was eventually resolved, ambiguously, with many noted committee dissents. Anna Harris, *Berkeley County Schools committee reviews first batch of challenged books*, WCSC (Oct. 3,

⁸ Available at <http://tinyurl.com/42yb5xt7>.

2023).⁹ In 2012, a teacher at Schofield Middle School was investigated after a student and parent complained about the teacher reading allegedly “pornographic” material in class. Alison Flood, *Parent files police complaint after teacher reads Ender’s Game to pupils*, THE GUARDIAN (Mar. 23, 2023).¹⁰ The parent filed a report with the local police and the teacher was placed on leave pending the investigation. (Police found no wrongdoing.) *Id.* In 2022, the South Carolina Freedom Caucus in the General Assembly filed a lawsuit against the Charleston County School District for allegedly teaching critical race theory (CRT). Mary Green, *SC lawmakers suing schools over allegations of teaching critical race theory*, WIS (Nov. 16, 2022).¹¹ The lawmakers alleged the district violated a temporary state law that prohibits state dollars from being used to teach CRT-related concepts in public schools. *Id.*

The ESTF Program provides low- and moderate-income families academic support in the form of a parent-managed student account and can be used towards the tuition costs of an eligible independent school or transferring to another public school.¹² The Program also expands extracurricular opportunities for these families. In these ways, the Program grants enormous flexibility to parents to direct their child’s education in accordance with their social and civic values. If a parent vehemently disagrees with the curriculum taught or the disciplinary or homework

⁹ Available at <http://tinyurl.com/muwz8mct>.

¹⁰ Available at <http://tinyurl.com/5d5jeyxr>.

¹¹ Available at <http://tinyurl.com/byrwwzaz>.

¹² Eligible “education providers” are being approved on a rolling basis. *Education Scholarship Trust Fund Program Application Portal*, available at <http://tinyurl.com/56jm584e> (last visited Jan. 27, 2024).

policies at their assigned public school, they may use their ESTF funds to enroll their child in an independent or transfer their child to a different public school that better aligns with their values. In other cases—say, where the parent wants a more music focused curriculum for their child, a gifted violinist—they may direct their ESTF Program funds to an approved afterschool music program. Or in the case of a struggling math student, ESTF Program funds may be used to provide him tutoring if such programs are unavailable through his public school.

Simply, the Program allows a customized education and the possibility of exit from an assigned public school, resulting in less tension between parents and administrators who would otherwise have conflicting views on how to teach and where to allocate state resources.

C. The Program Would Reduce Sectarian Disputes Over Education Policy.

Many Americans are religious, and there is an undeniable parental appetite for religious instruction and prayer in public and independent schools, where children spend most of their waking hours. *See, e.g.,* Juliana Menasce Horowitz, *Parents Differ Sharply by Party Over What Their K-12 Children Should Learn in School*, PEW RSCH. CTR. (Oct. 26, 2022) (46 percent of K-12 parents say teachers in public school should be allowed to lead students in Christian prayer, with 27 percent conditioning their approval on “if prayers from other religions are also offered”).¹³ However, the U.S. Constitution requires religious neutrality and demands two things of a public school:

¹³ Available at <http://tinyurl.com/4dtuj4uf>.

(1) it cannot punish students for their voluntary expressions of faith and (2) it cannot engage in religious instruction. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426, 2428-29 (2022). Nevertheless, school boards or school officials have incorporated religious teachings or practices into school operations time and again, and the U.S. Supreme Court has rejected that religious instruction. *See, e.g., McCollum v. Board of Education*, 333 U.S. 203 (1948) (no weekly religious teachings in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (no prayers in public schools); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (no Bible readings in public schools); *Epperson v. Ark.*, 393 U.S. 97 (1968) (no religiously tailored curriculum in public schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (no period of silence for meditation or prayer in public schools); *Lee v. Weisman*, 505 U.S. 577 (1992) (no prayers during public school graduations).

This desire for religious schooling presents an enormous problem for policymakers. In a pluralist society of over 100 recognized religions, *see Carson v. Makin*, 142 S. Ct. 1987, 2005 (2022) (Breyer, J., dissenting) (*citing Pew Research Center, America's Changing Religious Landscape 21* (May 12, 2015)), these strong preferences cannot be satisfied by a highly regulated and centralized education system sworn to religious "neutrality." What has made this system tolerable for many religious parents is their constitutional right "to choose a non-public school for their child." Stephen Arons & Charles Lawrence II., *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 Harv. C.R.-C.L. L. Rev. 309, 324-25 (1980) (*citing Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

However, “[t]hese escape hatches exist for very few,” as religious and independent school tuition is often expensive,¹⁴ “leaving the poor and working class saddled with schooling decisions that they do not control and do not like.” Arons, *supra* at 225. When parents are unable or cannot afford to opt out of the public school system, what for many is a tolerable conciliation is a resented coercion. It should be no surprise that—despite public schools being constitutionally prohibited from engaging in religious instruction—sectarian conflict over public education policy persists to this day. *See, e.g.,* Neal McCluskey, *Public schooling must discriminate against religion; American education must not*, FORBES (Jul. 17, 2018).¹⁵

The ESTF Program should alleviate sectarian conflict in public schools by giving religious parents more control over their child’s education. The program, in part, allows participating parents to direct their account funds towards the tuition costs of an eligible public or independent school.¹⁶ S.C. Code Ann. § 59-8-110(13)(a). In doing so, the Program enables religious minorities to hire like-minded tutors, enroll their child at religious independent school, or transfer their child to a public school that parents believe will not undermine the religious teaching their children receive at home.

¹⁴ *See* Melanie Hanson, *Average Cost of Private School*, EDUCATION DATA INITIATIVE, (Oct. 8, 2023) available at <http://tinyurl.com/mr4exhb8>.

¹⁵ Available at <http://tinyurl.com/3usj4b79>.

¹⁶ Eligible “education providers” are being approved on a rolling basis. *Education Scholarship Trust Fund Program Application Portal*, available at <http://tinyurl.com/56jm584e> (last visited Jan. 27, 2024).

Programs resembling the ESTF Program¹⁷ have been implemented elsewhere specifically to reduce sectarian tension, with notable success. The Netherlands provides a much-studied example. Many Dutch lawmakers realized a few decades ago that the “confessional neutrality” in the Netherlands’ public schools was not uniting its citizens. See CHARLES L. GLENN, *CONTRASTING MODELS OF STATE AND SCHOOL: A COMPARATIVE HISTORICAL STUDY OF PARENTAL CHOICE AND STATE CONTROL* 86-87 (New York: Continuum., 2011). The nation’s many Christian sects wanted instruction consistent with their firmly-held beliefs, not the state’s watered-down alternative. *See id.* at 86-87. Eventually, the government enacted major reforms that attached school funding to children and allowed parents to choose their schools. NEAL P. MCCLUSKEY, *THE FRACTURED SCHOOLHOUSE: REEXAMINING EDUCATION FOR A FREE, EQUAL, AND HARMONIOUS SOCIETY* 161 (ROWMAN & LITTLEFIELD, 2022). As of 1995, parents had sorted themselves into many types of Christian and non-Christian religious schools, as well as into numerous institutions with different pedagogical approaches, including Montessori and Waldorf. *Id.* at 161-62. Importantly, lawmakers’ fears of “religious balkanization” never came to pass and years of sectarian conflict finally began to subside. *Id.* at 162.

The ESTF Program offers a similar “release-valve” effect to South Carolina. By allowing religious parents more control over their children’s education and a greater

¹⁷ The ESTF Program is more expansive than other programs discussed in this brief, including the education reforms implemented by the Dutch government. The ESTF Program is not a private school voucher program, it is an expansive support system meant to financially aid families in a variety of academic pursuits. *See Resp. Br.* at 4.

ability to exit their assigned public school for a different public or independent school, the Program would reduce sectarian conflict across the state.

Conclusion

The ESTF Program enables parents to customize and supplement their children's education in several ways that self-evidently promote the general welfare and contentment of many of the state's citizens. The school choice aspects of the Program are also likely to benefit the state in improving public school operations, reducing social tensions over school policies, and improving parental satisfaction. For the reasons described herein, this Court should conclude that the ESTF Program has a valid public purpose and does not violate Article X, Section 5 of the South Carolina Constitution.

Respectfully submitted,

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February 1, 2024