IN 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.

Brief of *Amici Curiae* Members of South Carolina's U.S. Congressional Delegation U.S. Senator Lindsey Graham, U.S. Senator Tim Scott, U.S. Representative Jeff Duncan, U.S. Representative Joe Wilson, U.S. Representative Ralph Norman, U.S. Representative William Timmons, U.S. Representative Tom Rice, and the American Center for Law and Justice

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SUMMARY OF ARGUMENT

When Governor McMaster applied for, received, then used CARES Act funds to create the SAFE Grants program, administered by his Office, to award subgrants in support of tuition costs for students who need it to attend essential independent schools carrying out emergency educational services, his actions were precisely within the intent of Congress in passing the CARES Act.

It was the clear and well-reasoned intent of Congress to help all students, plainly in an emergency setting, supporting the Governor's discretionary role to administer these funds. As the Governor has made clear, the SAFE Grants Program provides eligible low- and middle-income families (up to 300 percent of the federal poverty line, or $78,600 for a family of four[1]) with a scholarship of up to $6,500 per student to pay tuition and fees at a private or religious school. The Governor anticipates that approximately 5,000 scholarships will be awarded in total for this fall's rapidly approaching school year.[2] In using GEER funds this way, the Governor is acting squarely within Congress's intent.

The terms used by Congress in creating the GEER Fund are plain and unambiguous and congressional intent is clear. Congress intended for these funds to be awarded to governors for immediate use to benefit students in a variety of ways, including by education related entities deemed essential by governors in a national emergency. Congress most assuredly did not limit school choice by excluding private or religious schools from "education related entity" and did not

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1 *See* Health & Human Services table, available online at https://aspe.hhs.gov/system/files/aspe-files/107166/2020-percentage-poverty-tool.pdf.

2 *See* MySCEducation.org, available online at https://mysceducation.org/safe-grants-101-for-parents/.

intend for students and families choosing independent schools, whether private or religious, to be excluded from the critical benefit of GEER funds.

Amici respectfully submit this brief to assist the Court and provide their perspective on the narrow issue of congressional intent for usage of the funds at issue. Because the terms used by Congress in creating the GEER Fund are plain and unambiguous, there can be no serious doubt that Congress intended these funds to be used *for the benefit of students* in need of education. That is precisely what Governor McMaster has done.

ARGUMENT

I. It is Clear that Congress Intended the Governor's Emergency Education Relief (GEER) Fund to Benefit Students Choosing Independent Schools.

Long before passage of the CARES Act, Congress established the U.S. Department of Education. It did so based upon certain congressional findings, in which it made its views on education and the role of private schools quite clear: "education is fundamental to the development of individual citizens and the progress of the Nation"; "there is a continuing need to ensure equal access for all Americans to educational opportunities of a high quality, and such educational opportunities should not be denied because of race, creed, color, national origin, or sex"; and, "parents have the primary responsibility for the education of their children, and States, localities, *and private institutions* have the primary responsibility for supporting that parental role." 20 U.S.C. § 3401(1), (2) and (3)[3] (emphasis added).

Further, Congress found that "the American people benefit from a diversity of educational settings, *including public and private schools*, libraries, museums and other institutions, the workplace, the community, and the home." 20 U.S.C. § 3401(5) (emphasis added). And, "there is

[3] Pub. L. 96–88, title I, §101, Oct. 17, 1979, 93 Stat. 669.

a need for improvement in the management and coordination of Federal education programs to support more effectively State, local, *and private institutions, students, and parents* in carrying out their educational responsibilities." 20 U.S.C. § 3401(7) (emphasis added).

It is against this backdrop of congressional findings that congressional intent in providing emergency relief funds through the U.S. Department of Education to benefit *all students*, regardless of whether they choose private or religious schools, must be considered.[4]

As part of the CARES Act, Congress made the COVID-19 relief funds at issue available through the Governors' Emergency Education Relief (GEER) Fund.[5] The statutory language is clear and the purpose of these funds is unmistakable. The GEER Fund provides Emergency Education Relief grants

> to the Governor of each State with an approved application . . . to provide emergency support through grants to local educational agencies that the State educational agency deems have been most significantly impacted by coronavirus to support the ability of such local educational agencies to continue to provide educational services to their students and to support the on-going functionality of the local educational agency.

Coronavirus Aid, Relief, and Economic Security Act ("CARES Act" or "Act"), Pub. L. No. 116-136, 134 Stat. 281, §§ 18002(a), (c)(1) (2020). Congress further specified these funds are available to

> provide support to any other institution of higher education, local educational agency, or education related entity within the State that the Governor deems essential for carrying out emergency educational services to students for authorized activities described in section 18003(d)(1) of this title or the Higher Education Act,

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[4] As the U.S. Supreme Court very recently held in *Espinoza v. Montana Department of Revenue*, the intervening choice of private individuals is key: "Any Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools." 591 U.S. ___, 140 S. Ct. 2246, 2254 (June 30, 2020).

[5] Perhaps nowhere could it be clearer what Congress intended here than in the title of the section itself: The Governors' Emergency Education Relief Fund. That title speaks for itself.

> the provision of childcare and early childhood education, social and emotional support, and the protection of education-related jobs.

CARES Act, § 18002(c)(3).

When Congress used the term, "education related entity within the State that the Governor deems essential" for the purposes described in the Act, including "the provision of childcare and early childhood education, social and emotional support, and the protection of education-related jobs," its meaning was broad and clear. § 18002(c)(3). The conclusion is inescapable that Congress meant to include support for education benefiting students at independent schools, and doing so certainly does not violate the First Amendment.[6]

As distinguished from "local educational agency" (LEA), the term "education related entity" clearly envisions non-governmental, independent entities. A private or religious school is an "entity," not a body of government or an agency. GEER funds thus broadly support the education of South Carolina's youth through LEAs *or* any "education related entity."

The only textual limitations on the term "education related entity" are found in the qualifying phrases that follow it: "within the State," "that the Governor deems essential for carrying out emergency educational services," "to students," "for authorized activities described

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[6] In *Espinoza v. Montana Department of Revenue*, the U.S. Supreme Court reemphasized its "repeated[] h[olding] that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." 591 U.S. ___, 140 S. Ct. at 2254. In fact, it would violate the First Amendment's Free Exercise Clause *if it did* exclude parents choosing religious schools from this support. As the *Espinoza* Court made clear:

> Drawing on "enduring American tradition," we have long recognized the rights of parents to direct "the religious upbringing" of their children. *Wisconsin v. Yoder*, 406 U. S. 205, 213-214, 232, 92 S. Ct. 1526 (1972). Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution. *See Pierce v. Society of Sisters*, 268 U. S. 510, 534-535, 45 S. Ct. 571 (1925). *But the no-aid provision penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason*.

Espinoza, 591 U.S. ___, 140 S. Ct. at 2261 (emphasis added).

in section 18003(d)(1) of this title[7] or the Higher Education Act" *or* "the provision of child care and early childhood education," "social and emotional support," or "the protection of education-related jobs." Notably absent from this list of qualifiers is any indication that benefitted families may not choose independent schools.

II. The Governor's Usage of CARES Act GEER Funds for SAFE Grant Programs Benefiting South Carolina Students is Consistent with the Unambiguous Intent of Congress in Passing the CARES Act.

As this Court has pronounced, "[i]t is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question." *Smith v. Tiffany*, 419 S.C. 548, 555 (2017) (citing *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970); *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010). "If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning." *Timmons*, 254 S.C. at 401, 175 S.E.2d at 817. Indeed, "[t]he text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will." *S.C. Second Injury Fund*, 389 S.C. at 429, 699 S.E.2d at 690 (2010) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

"Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." *Smith*, 419 S.C. at 556. "Only '[w]here the language of an act gives rise to doubt or uncertainty as to legislative intent' may the construing

[7] The activities identified in Section 18003(d) (1) are: "Any activity authorized by the ESEA of 1965, including the Native Hawaiian Education Act and the Alaska Native Educational Equity, Support, and Assistance Act (20 U.S.C. § 6301 *et seq.*), the Individuals with Disabilities Education Act (20 U.S.C. § 1400 *et seq.*) ("IDEA"), the Adult Education and Family Literacy Act (20 U.S.C. § 1400 *et seq.*), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. § 2301 *et seq.*) ("the Perkins Act"), or subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 *et seq.*)."

court 'search for that intent beyond the borders of the act itself.'" *Id.* (citing *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001)).

Here, no sound argument supports the notion that a legislature's use of terms is anything but deliberate and, in such a case, this Court has declined invitations to assume that the words chosen "mean anything other than what they say." *Smith*, 419 S.C. at 556 (citing *Hodges*, 341 S.C. at 87, 533 S.E.2d at 582 ("If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute."); *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[T]he words found in the statute [must be given] their 'plain and ordinary meaning'" and "if the words are unambiguous, we must apply their literal meaning.")). The United States Supreme Court has charged courts to "give effect, if possible, to every clause and word of a statute." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017).

The term "education related entity" means what it says: an entity related to education. Independent schools, whether private or religious, clearly fall within this meaning. The funds inure to the benefit of South Carolina students who need them during this national emergency. Congress did not specify which schools the students' parents or guardians could choose to enroll their children in. This makes sense, as the intent of Congress is to help children receive educational services in a time of crisis. Whether the education related entity is private or religious in nature makes no difference.

Through the CARES Act, Congress gave Governor McMaster broad discretionary power to access and use GEER funds to help students. CARES Act, § 18002. So has the South Carolina legislature. *See* S.C. Code Ann. § 25-1-430(a)(8). The Governor is using these funds for South Carolina students, just like Congress intended. Whether the funds end up being spent at a religious

"education related entity" or not depends entirely upon the intervening act of the parents/guardians choosing that entity for their student's education. This is aid to parents and families, not a "direct" benefit to religious schools in violation of Article XI, section 4 of South Carolina's Constitution.[8] The bottom line is that *the student* is the direct beneficiary. Schools, like parents, provide education and education related services and care *to students*. The religion (or not) of the education related entity is irrelevant.[9] In creating the emergency relief fund at issue, Congress was and is concerned with *students*.

Supporting the obvious and plain meaning of the term "education related entity," the U.S. Department of Education understood GEER's purpose well:

> **Purpose**
> Under the Governor's Emergency Education Relief Fund (GEER Fund), the U.S. Department of Education (Department) awards grants to Governors for the purpose of providing local educational agencies (LEAs), institutions of higher education (IHEs), and other education related entities with emergency assistance as a result of the Novel Coronavirus Disease 2019 (COVID-19).[10]

The U.S. Department of Education also clearly understood, and reflected, Congress' intent for the use of these funds:

> **Uses of Funds**
> 1. Provide emergency support through grants to the LEAs that the State educational agency (SEA) deems to have been most significantly impacted by COVID-19 to

[8] According to Article XI, section 4: "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." S.C. Const. art. IV, § 4. The Constitution was amended in 1973, and the term "indirect" was removed. Now, only "direct benefit" is implicated.

[9] An attempt to exclude religious education related entities on account of religious identity would have been imprudent. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) ("[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" (quoting *McDaniel v. Paty*, 435 U. S. 618, 628, 98 S. Ct. 1322 (1978) (plurality opinion))).

[10] Certification and Agreement for Funding under the Education Stabilization Fund Program Governor's Emergency Education Relief Fund, U.S. Dept. of Ed. (2020), https://oese.ed.gov/files/2020/04/GEER-Certification-and-Agreement.pdf.

> support the ability of such LEAs to continue to provide educational services to public and non-public school students and to support the on-going functionality of the LEA;
> 2. Provide emergency support through grants to IHEs serving students within the State that the Governor determines have been most significantly impacted by COVID-19 to support the ability of such institutions to continue to provide educational services and support the ongoing functionality of the institution; and
> 3. Provide support to any other IHE, LEA, or education-related entity within the State that the Governor deems essential for carrying out emergency educational services to students for authorized activities described in section 18003(d)(1) of the CARES Act or the Higher Education Act of 1965, as amended (HEA), the provision of childcare and early childhood education, social and emotional support, and the protection of education-related jobs.[11]

It is unsurprising that the U.S. Department of Education would have no trouble with the concept of grant funds purposed by Congress to provide support to students choosing private or religious schools, given that the very Act establishing the Department expressly recognized the value and role of private schools for children and the Nation. 20 U.S.C. § 3401.

III. It Was and Is Congress's Clear Intent that GEER Funds Be Available to States for *Quick Use* in Light of the Ongoing National Emergency.

It was the unambiguous intent of Congress that these funds be used *quickly*: "The Secretary shall issue a notice inviting applications not later than 30 days of enactment of this Act and shall approve or deny applications not later than 30 days after receipt." Sec. 18002(a). The theme of urgency appears throughout the Act. *See, e.g.*, Sec. 18003(a). "Each Governor shall return to the Secretary any funds received under this section that the Governor does not award within one year of receiving such funds." CARES Act, § 18002(d). *See* CARES Act, § 18003(f) ("A State shall return to the Secretary any funds received under this section that the State does not award within 1 year of receiving such funds.").

[11] Certification and Agreement for Funding under the Education Stabilization Fund Program Governor's Emergency Education Relief Fund, U.S. Dept. of Ed. (2020), https://oese.ed.gov/files/2020/04/GEER-Certification-and-Agreement.pdf.

The Secretary understood the manifest urgency:

> **Timeline**
> Each Governor will have one year, from the date of the State's award, to award funds. Any funds not awarded by the Governor within one year of receiving the State's award will be returned to the Department for reallocation.[12]

Congressional desire for a quick turnaround to benefit students in need makes sense. The nation was and still is in the midst of a national emergency. Funds for COVID-19 relief will necessarily be used in the immediate timeframe of the pandemic. The impending new school year, and the need of families to plan for such matters as schooling and child care, only underscores the time-sensitive nature of this relief program. It is therefore especially frustrating and disappointing that the litigants here have so far stalled – and to that extent defeated – the purpose of Congress in making these funds available to States for quick use. This very lawsuit – and lower court's restraint of the program – impaired this important remedial measure. That runs exactly contrary to the congressional intent of rapid deployment of these funds to benefit those in need, the very point of making these funds available in the first place.

CONCLUSION

For these reasons, and others, *Amici* Members of South Carolina's U.S. Congressional Delegation, U.S. Senator Lindsey Graham, U.S. Senator Tim Scott, U.S. Representative Jeff Duncan, U.S. Representative Joe Wilson, U.S. Representative Ralph Norman, U.S. Representative William Timmons, and U.S. Representative Tom Rice, and the American Center for Law and Justice, urge this Court to deny the Plaintiffs-Respondents' request for injunctive relief.

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[12] Certification and Agreement for Funding under the Education Stabilization Fund Program Governor's Emergency Education Relief Fund, U.S. Dept. of Ed. (2020), https://oese.ed.gov/files/2020/04/GEER-Certification-and-Agreement.pdf.

Respectfully Submitted,

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