THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE COURT'S 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 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*,

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,……..……..…..*Intervenor-Respondents*.

AMICUS BRIEF OF SOUTH CAROLINA ATTORNEY GENERAL IN SUPPORT OF RESPONDENTS AND INTERVENOR-RESPONDENTS

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INTEREST OF AMICUS CURIAE

In this original jurisdiction action, Petitioners challenge the constitutionality of Act Number 8 of 2023. *See* 2023 S.C. Acts No. 8. Among other claims, Petitioners allege that Act 8 violates article XI, section 4 of the South Carolina Constitution.

As the State's chief legal officer and on behalf of the public, the Attorney General respectfully files this brief to defend the constitutionality of Act 8. *See State ex rel. Condon v. Hodges*, 349 S.C. 232, 232, 562 S.E.2d 623, 629 (2002).[1]

SUMMARY OF ARGUMENT

While the Attorney General joins and supports the arguments raised by the other state respondents and intervenor-respondents, the Attorney General writes separately to emphasize two limited points—one related to constitutional interpretation and the other related to the meaning of article XI, section 4.[2]

First, the Attorney General notes that this Court is bound by its precedents to apply the ordinary and popular meaning of a constitutional provision. In doing so, this Court must look to the ordinary and popular meaning of a provision's words as used by the people who framed and

[1] As noted in the motion accompanying this brief, the Attorney General submits this brief on his own behalf and on behalf of the public. While attorneys from the Attorney General's office also represent the Office of the State Treasurer and Curtis M. Loftis, Jr. in his official capacity as State Treasurer of South Carolina, the views expressed and positions taken in this amicus brief are solely those of the Attorney General. Both the Treasurer and the agency he oversees continue to take no position on the merits of this case, and they have not requested or endorsed this brief. To the extent necessary, they provide limited informed consent for the Attorney General to file this brief solely on his behalf and on behalf of the public.

[2] To the extent this Court agrees with the argument that the program outlined in Act 8 does not constitute public funds, this Court need not necessarily address the remaining arguments concerning the scope of article XI, section 4. *See Durham v. McLeod*, 259 S.C. 409, 413, 192 S.E.2d 202, 203 (1972).

adopted the relevant provision. Stated differently, this Court must apply the original meaning of the words of a provision.

Second, the Attorney General argues that the original meaning of article XI, section 4 allows for programs like the one outlined in Act 8. All of the available historical evidence suggests that the framers and adopters of article XI, section 4 intended to allow the State to provide indirect aid to students attending private schools.

ARGUMENT

I. This Court must apply the ordinary and popular meaning of article XI, section 4.

In interpreting the state's constitution, this Court is bound to apply the "ordinary and popular meaning" of the words or phrases used in the constitution. *See*, *e.g.*, *Richardson v. Town of Mount Pleasant*, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002). This principle of constitutional interpretation is cited frequently by this Court and lower courts and is nearly ubiquitous in South Carolina constitutional law.

Although this principle is often invoked, the origins of and purposes behind this principle are less often discussed by courts. As early as the 1800s, this Court identified this principle and held that it was bound to look to the "ordinary and popular meaning" of words used in the constitution. *City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881).

However, in doing so, this Court did not look to the "abstract, technical meaning of the word or words employed" but instead looked to the meaning of the word or words as used "by those who framed and those who adopted the constitution." *Id*. Stated differently, this Court sought to apply the meaning of the words at the time of the provision's adoption—namely, the original meaning of the words.

According to this Court in *Oliver*, such an approach is warranted because it alone captures the intention of the framers and the adopters of the relevant constitutional provision. *See id*. The purpose behind this method of constitutional interpretation is thus to aid the Court "in its effort to determine the intent of [a constitutional provision's] framers and of the people who adopted it." *Miller v. Farr*, 243 S.C. 342, 347 (1963). As this Court has frequently observed, the intention of the framers is paramount in constitutional interpretation. *See Ansel v. Means*, 171 S.C. 432, 436, 172 S.E. 434 (1934) ("The polestar in the construction of Constitutions, as well as other written instruments, is the intention of the makers and adopters.") (quoting *Hockett v. State Liquor Licensing Board*, 91 Ohio St. 176, 110 N.E. 485, 486, L.R.A. 1917B, 7).

The *Oliver* decision did not exist in a vacuum. On the contrary, the decision drew from familiar principles of constitutional interpretation. Specifically, this Court quoted Chief Justice John Marshall's opinion in *Ogden v. Saunders*, 25 U.S. 213, 332 (1827) for the proposition that "the intention of the instrument must prevail" and that the "intention must be collected from its words" which should be "understood in that sense in which they are generally used by those for whom the instrument was adopted." *Oliver*, 16 S.C. at 52.

Other members of the founding generation ascribed to such views, including James Madison. *See* William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC' REV. 24, 37 (2022) ("Early Justices too practiced originalism."); *see also* Letter from James Madison to Henry Lee, June 25, 1824, *Founders Online*, NATIONAL ARCHIVE, https://founders.archives.gov/documents/Madison/04-03-02-0333 ("I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers.

If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense.").

But this approach is not an anachronism limited to the founding era or the late 1800s. This Court and courts from across the country have continued to seek to apply the original meaning of state constitutions and the federal constitution well into the present. *See, e.g.*, *Johnson v. Collins Ent. Co., Inc.*, 333 S.C. 96, 103, 508 S.E.2d 575, 579 (1998) (looking to the historic meaning of the term lottery).

II. Section 4 allows for programs like this one.

Applying this method of interpretation, this Court must seek to discern what the framers and adopters of section 4 meant in prohibiting "direct aid" to private schools. A careful review of relevant primary sources from the time reveals that section 4's prohibition on direct aid does not extend to programs like this one and that the program represents a constitutionally permissible form of indirect aid.

Section 4's origins can be traced back to South Carolina's Reconstruction Constitution of 1868. As explained by Professor James L. Underwood in his "authoritative history of the State Constitution," *Knotts v. Williams*, 319 S.C. 473, 477 n.1, 462 S.E.2d 288, 290 n.1 (1995), the 1868 Constitution marked the first time that support for public education was mandated by the State Constitution. *See* S.C. Const. of 1868, art. X, § 3 ("The General Assembly shall, as soon as practicable after the adoption of this Constitution, provide for a liberal and uniform system of free public schools throughout the State . . . ."). The public schools were to be funded by a combination of tax sources. *See* S.C. Const. of 1868, art. X, § 5.

To support the new system of public schools, the 1868 Constitution prohibited "religious sects" from controlling the public school system. *See* S.C. Const. of 1868, art. X, § 5 ("No religious sect or sects shall have exclusive right to, or control of, any part of the school funds of the State, nor shall sectarian principles be taught in the public schools."); *see also* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 328 (2008) ("[C]reating a public education system and securing its financial footing became a primary concern of states in the post-Civil War era. The inclusion of a no-funding provision in such situations raises fewer inferences that it was added as part of an anti-Catholic agenda.").

That provision was carried forward and strengthened in the 1895 Constitution. *See* Op. S.C. Att'y Gen., 1969 WL 15557 (April 24, 1969) ("The Constitution of 1868 was adopted by a Reconstruction Era Convention, but its restriction with respect to the non-sectarian use of public funds for educational purposes has been carried forward into the Constitution of 1895 in strengthened form. This was apparently due to the experience obtained during the first, real public school era in South Carolina in the years 1868-1895."). The newly revised section—article XI, section 9—provided the following:

> The property or credit of the State of South Carolina, or of any [subdivision], or any public money, from whatever source derived, shall not . . . be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society, or organization, of whatever kind, which is wholly or in part under the direction or control of any church or religious or sectarian denomination, society or organization.

S.C. Const. of 1895, art. XI, § 9.

Article XI, section 9 became the center of some public controversy in the 1970s after this Court partially enjoined a popular college tuition grant program in *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971). In that decision, this Court held that article XI, section 9 prohibited the use of funds under the program at religious institutions of higher education. *Hartness v.*

Patterson, 255 S.C. 503, 508, 179 S.E.2d 907, 909 (1971). In reaching this conclusion, this Court noted that under section 9's language, the prohibited aid "does not have to be direct" but is prohibited even if it "indirectly benefits the religious schools." 255 S.C. at 506, 179 S.E.2d at 908. This Court ultimately characterized the program as an "indirect benefit" that "constitutes aid to the religious schools." 255 S.C. at 508, 179 S.E.2d at 909.

This Court's decision in *Hartness* generated significant public discussion of the issue. An editorial in *The State* newspaper offered the following analysis:

> The simple command of Article XI of the South Carolina Constitution is this: that the state may not use public money to aid, directly or indirectly, church-supported institutions. This is what the article prohibits and all that it prohibits. What the Supreme Court prohibits, however, is state aid once removed. Such aid, it reasons, what the framers of Article XI intended to deny when they stipulated that no state money be parceled out to church schools "indirectly."
>
> It is not in the least clear that this was the intent of the framers at all. Barring evidence to the contrary (none of which is cited in the court's decision), it seems reasonable to suppose that the framers meant what they said: that the state, finding the front door shut, might not deliver subsidies to religious schools thorough the rear entrance.

Court's Tuition Decree Sets Law On Its Head, THE STATE, Mar. 15, 1971. The editorial concluded by urging the General Assembly to revise the 1895 Constitution by eliminating the prohibition against indirect aid. *Id*. ("Meanwhile, since the court has stumbled over the word 'indirectly' in this instance, the General Assembly should proceed forthwith to revise the Constitution of 1895 (as has already been proposed) by eliminating that catch-all and indefinable word from the document.").

And the General Assembly did just that—revising the section based on the proposed recommendations of the West Committee. The West Committee proposed what would ultimately become article XI, section 4. *See Final Report of the Committee to Make a Study of the S.C. Const. of 1895,* 98 (1969), https://hdl.handle.net/2027/uc1.b4181710, 98 ("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.").

Significantly, this proposed revision allowed the State to provide indirect aid to students attending private educational institutions—including religious institutions. In comparison to the preexisting section 9, the proposed section 4 was "much less restrictive in proscribed connections between the State and private and religious educational institutions . . . ." Op. S.C. Att'y Gen., 1974 WL 27574 (January 4, 1974).

In its Final Report, the West Committee explained the benefits of this change, highlighting the potential importance of indirect aid to the State and to students at private institutions:

> The Committee fully recognized the tremendous number of South Carolinians being educated at private and religious schools in this State and that the educational costs to the State would sharply increase if these programs ceased. From the standpoint of the State and the independence of the private institutions, the Committee feels that public funds should not be granted outrightly to such institutions. Yet, the Committee sees that in the future there may be substantial reasons to aid the students in such institutions as well as in state colleges. Therefore, the Committee proposes a prohibition on direct grants only and the deletion of the word "indirectly" currently listed in Section 9.

Final Report, 99–101. In describing what forms of indirect aid may be permissible under the proposed amendment, the committee noted the following: "By removing the word 'indirectly' the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs. . . ." *Id*. at 101.

The General Assembly ultimately adopted the exact language used by the West Committee and proposed the language to voters. *See* 1972 S.C. Acts No. 1635. In doing so, members of the General Assembly understood the revised section 4 to allow forms of indirect aid to students attending private institutions, including aid similar to the tuition grant program. An article from *The State* newspaper in 1972 described the purpose behind the revision and its progress in the General Assembly:

> In 1970 the General Assembly approved a tuition grants program to provide financial assistance to state students attending private colleges in South Carolina.
>
> However, the State Supreme Court in a 1971 test case on the issue ruled that state f[]unds could not indirectly be used to aid church-related institutions.
>
> . . .
>
> Gov. John C. West and a number of lawmakers have openly endorsed the idea of amending the state's constitution to permit the indirect aid concept to help the financially pressed schools.
>
> Under the tuition program, individual students would receive state funds to be used towards meeting tuition costs at private schools, which would constitute indirect aid.

Robert G. Liming, *College Aid Bill Approved*, THE STATE, Jan. 28, 1972.

Voters subsequently approved that amendment in the 1972 election. Unsurprisingly, the proposed amendment received a good deal of media coverage throughout the State, and this coverage uniformly suggests that the public understood the amendment to open the door to indirect aid to individuals attending private institutions. In one article, reporters described the effect of the proposed amendment as "prohibit[ing] the General Assembly from providing direct aid to benefit religious or other educational institutions but "allow[ing] indirect aid such as scholarships to students attending those institutions." *Voters to decide these issues*, THE EVENING HERALD, Oct. 31, 1972. In another article, the amendment was described as allowing aid to "students for the purpose of attending private or denominational institutions." *Amendment Could Provide Aid*, THE BEAUFORT GAZETTE, Oct. 26, 1972. And another article noted that "[e]xperts in the field of constitutional law" say that the proposed amendment would allow the State "to assist these students who qualify by 'tuition grants' which will offset much of the difference which exists today

in the cost of attending state-operated instead of private or church-supported schools." *Plan to Aid Colleges Should Be Approved*, THE INDEX-JOURNAL, Nov. 2, 1972.[3]

The General Assembly ratified the amendment the following year, clearing the way for potential further aid to students attending private institutions. *See* Michael Livingston, *Allen Has Major Role-West*, THE STATE, Mar. 15, 1973 (describing Governor West's discussion of the recent referendum and tuition grants).

In short, the ordinary and popular meaning of article XI, section 4 is clear. By removing the prohibition on indirect aid to private institutions, the framers and adopters of the provision intended to allow grants, scholarships, and other forms of indirect aid to students attending private schools. Because Act 8 fits within this concept of indirect aid, it is constitutional under article XI, section 4.[4]

CONCLUSION

In considering Petitioners' claim that Act 8 violates article XI, section 4 of the South Carolina Constitution, this Court must seek to discern the original meaning of section 4. All relevant historical materials suggest that section 4 was meant to allow forms of indirect aid to students attending private institutions.

Accordingly, Act 8 does not violate section 4 and is constitutional.

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[3] Given the popularity of the tuition grants program, many articles discussed the amendment in terms of indirect aid to colleges. However, other articles make clear that the public understood the amendment to extend to elementary and secondary schools as well. *See* Louis H. Baker, *Education Aid*, THE TIMES AND DEMOCRAT, Nov. 6, 1972 ("The proposed revision leaves a constitutional loophole for the indirect aiding from public funds, properties of the state, credit of the state, etc. to denominational colleges, orphanages, convalescent centers, hospitals, parochial schools, and church sponsored elementary and secondary schools of all religious denominations.").

[4] As ably explained by Respondents and Intervenor-Respondents, this Court's decision in *Adams v. McMaster*, 432 S.C. 2245, 851 S.E.2d 703 (2020) does not compel a contrary result because the program created by Act 8 is materially distinguishable from the challenged program in that case.

Respectfully submitted,

s/Thomas T. Hydrick

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January 31, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211, SCACR, I certify that the foregoing complies with the length and formatting requirements of Rule 211 and Rule 267, SCACR.

s/ Thomas T. Hydrick

January 31, 2024