IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

BISHOP OF CHARLESTON, a Corporation Sole, d/b/a The Roman Catholic Diocese of Charleston, and SOUTH CAROLINA INDEPENDENT COLLEGES AND UNIVERSITIES, INC.,

Plaintiffs,

v.

MARCIA ADAMS, in her official capacity as the Executive Director of the South Carolina Department of Administration; BRIAN GAINES, in his official capacity as budget director for the South Carolina Department of Administration; and HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina,

Defendants.

C/A No. 2:21-cv-1093-BHH

INTERVENOR-DEFENDANTS' [PROPOSED] PARTIAL MOTION TO DISMISS

Intervenor-Defendants Orangeburg County School District and the South Carolina State Conference of the NAACP, through undersigned counsel, hereby move, under Rule 12(b)(6) of the Federal Rules of Civil Procedure for dismissal with prejudice of Count II of the First Amended Complaint, as well as the religious discrimination component of Count I.

INTRODUCTION

South Carolina's Reconstruction Constitution of 1868 provided for the first time in the state's history for the creation of a public-school system. To safeguard the revenue raised for those schools, the Constitution of 1868 included a provision prohibiting diversion of school funds to religious schools—the main competitors to the newly created public schools at that time. Today, South Carolina continues to zealously guard against diversion of public education funds to private

schools through Article XI, Section 4 of the South Carolina Constitution ("Article XI"), which prohibits direct aid from flowing to all private schools—whether they are religiously affiliated or not.

Plaintiffs, the Bishop of Charleston, a corporation sole doing business as the Roman Catholic Diocese of Charleston (the "Diocese"), and the South Carolina Independent Colleges and Universities, Inc. (SCICU), allege that this "no-aid" provision violates the U.S. Constitution's Free Exercise and Equal Protection Clauses. Plaintiffs' alleged injury is that the no-aid provision prevents the schools they operate or represent from accessing certain streams of public funding. They seek declaratory and injunctive relief barring Defendants from denying them those funds as the South Carolina Constitution requires.

This Court should dismiss with prejudice Plaintiffs' free exercise claim (Count II) and the religious discrimination component of their equal protection claim (Count I).[1] As this Court recognized in denying Plaintiffs' preliminary injunction motion, because the no-aid provision denies public funds to all private schools—irrespective of their religious affiliation or lack thereof—it is a neutral, generally applicable law that poses no federal constitutional problem. Plaintiffs' allegations of religious animus cannot salvage their free exercise claim or the religious discrimination component of their equal protection claim because Plaintiffs do not and cannot allege any indication of religious animus in the enactment history of the no-aid provision they challenge; instead, they allege religious animus only in the enactment history of a preceding provision of the state's disenfranchising Constitution of 1895 that was excised from the South

[1] In denying Plaintiffs' preliminary injunction motion, this Court stated that "it would be premature . . . on the current record" to evaluate Plaintiffs' claim that the no-aid provision is motivated by racial animus. *Bishop of Charleston v. Adams*, Civil Action No. 2:21-1093-BHH, 2021 WL 1890612, at *5 (D.S.C. May 11, 2021). For that reason, Intervenor-Defendants do not move for dismissal of the racial discrimination component of Count I.

Carolina Constitution nearly 50 years ago. No case law supports the argument that religious animus in a predecessor provision unconstitutionally taints a subsequent and substantially different law adopted without such animus and for legitimate reasons.

BACKGROUND

A. Article XI's recent application to public funds.

In the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (the "CARES Act"), Congress provided a stream of funding called the Governor's Emergency Education Relief (GEER) Fund, intended to assist states in providing emergency support to schools, colleges, and universities during the COVID-19 pandemic. CARES Act § 18002(a). South Carolina received more than $48 million in GEER funds. (Am. Comp. ¶ 33, ECF No. 26.) Governor Henry McMaster used a portion of the GEER funds that South Carolina received to create the Safe Access to Flexible Education (SAFE) Grants Program, which would have provided need-based grants to students attending private schools. (*Id.* ¶ 36.) The Diocese planned for 33 of its schools to participate in the SAFE Grants Program. (*Id.* ¶ 38.)

Separate from the SAFE Grants Program, Governor McMaster also planned to distribute GEER funds to support eight historically black colleges and universities (HCBUs), six of which are private schools (of which five are members of Defendant SCICU) and two of which are public schools (South Carolina State University and Denmark Technical College). (*Id.* ¶ 39); *see also* Press Release, Office of Governor Henry McMaster, Gov. Henry McMaster Invests $2.4 million in Historically Black Colleges and Universities (July 9, 2020), https://perma.cc/HB7E-BHF9. Congress provided additional GEER funds in the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA), Pub. L. 116-260 (Am. Compl. ¶ 48), but it prohibited the use of those funds for scholarships or voucher programs except to continue providing such

assistance to students who had received such aid from the CARES Act's GEER funds, CRRSAA § 312(e)(2). The General Assembly also enacted Act 154, which earmarked $154 million in block grants that South Carolina received under the CARES Act for state agencies, local governments, and higher education institutions, as well as $25 million for nonprofit organizations impacted by the COVID-19 pandemic. (Am. Compl. ¶¶ 44, 47.)

In *Adams v. McMaster*, 851 S.E.2d 703 (S.C. 2020), the Orangeburg County School District (Intervenor-Defendant here) along with others challenged the SAFE Grants Program under Article XI. *Id.* at 709. The Supreme Court of South Carolina held that the SAFE Grants Program "constitute[d] the use of public funds for the direct benefit of private educational institutions within the meaning of, and prohibited by, Article XI, Section 4 of the South Carolina Constitution." *Id.* at 713. Based on the *Adams* decision, Governor McMaster did not award GEER funds to the HCBUs as he intended to do. (Governor McMaster's Opp'n Pls.' Mot. Prelim. Inj. 5, ECF No. 22). The Executive Director of the Department of Administration, the agency authorized to distribute Act 154 funds, likewise determined that the *Adams* decision precluded the agency from disbursing funds to independent colleges and universities. (Ltr. from Marcia S. Adams, Exec. Dir., Dep't of Admin., to Dr. L. Jeffrey Perez, President & CEO, S.C. Indep. Colls. & Univs. (Oct. 13, 2020), ECF No. 6-5.)

As of this filing, Governor McMaster has allocated all of the GEER funds that South Carolina received from the CARES Act. Press Release, Office of Governor Henry McMaster, Gov. McMaster Awards Over $12 Million in GEER Funds to S.C. Department of Juvenile Justice (Apr. 21, 2021), https://perma.cc/7U62-Z8CZ. According to Plaintiffs, the Act 154 and GEER II funds have yet to be fully allocated. (Am. Compl. ¶¶ 46, 50.)

C. Procedural History

On April 14, 2021, Plaintiffs filed a Complaint alleging that Article XI violates the U.S. Constitution's Free Exercise and Equal Protection Clauses (ECF No. 1), which they subsequently amended (Am. Compl.). Plaintiffs allege that Article XI is the reason that the schools they operate or represent have not received funding from the aforementioned sources. Plaintiffs filed a Motion for Preliminary Injunction (ECF No. 6), which this Court denied, *Bishop of Charleston*, 2021 WL 1890612, at *1. In denying the Motion, this Court held that "Plaintiffs have not made a clear showing that they are likely to succeed on their claim grounded in religious discrimination." *Id.* at *4.

Despite this Court finding Plaintiffs' religious discrimination claim likely non-meritorious as a matter of law, Defendants did not move to dismiss that claim. Instead, Defendants answered. (ECF Nos. 31, 36.) Intervenor-Defendants Orangeburg County School District and South Carolina NAACP subsequently moved to intervene in this lawsuit and now move to dismiss Plaintiffs' free exercise claim (Count II) and the religious discrimination component of their equal protection claim (Count I).

LEGAL STANDARD

Intervenor-Defendants move under Rule 12(b)(6) of the Federal Rules of Civil Procedure for dismissal with prejudice of Count II of the Amended Complaint, as well as the religious discrimination component of Count I. A case is subject to dismissal under Rule 12(b)(6) if the complaint "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial

plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556). "When considering a Rule 12(b)(6) motion, a court must accept as true the facts alleged in the complaint and view them in the light most favorable to the plaintiff." *Mincey v. World Sav. Bank, FSB*, 614 F. Supp. 2d 610, 620 (D.S.C. 2008) (citing *Ostrzenski v. Seigel*, 177 F.3d 245, 251 (4th Cir. 1999)).

ARGUMENT

I. The Court should dismiss Count II and the religious discrimination component of Count I for failure to state a claim.

Intervenor-Defendants respectfully move for dismissal of Count II as well as the religious discrimination component of Count I. These religious discrimination claims fail at the pleading threshold because South Carolina's no-aid provision treats religious private schools in the same manner as all other private schools, and thus does not discriminate based on religion. Moreover, Plaintiffs do not (and cannot) allege any religious animus in the enactment of the no-aid provision they challenge, and they fail to cite any law supporting their argument that religious animus in the enactment history of a substantially different predecessor provision suffices to render the current no-aid provision unconstitutional. Finally, even if the no-aid provision were subject to strict scrutiny, it would pass constitutional muster.

A. Plaintiffs' religious discrimination claims under the Free Exercise and Equal Protection Clauses fail on the pleadings because South Carolina's no-aid provision treats religious private schools in the same manner as all other private schools.

Plaintiffs' religious discrimination claims rest on the premise that South Carolina's no-aid provision "punishes Plaintiffs for exercising their religious beliefs and free exercise rights by barring them from access to otherwise generally available funds." (Am. Comp. ¶ 66.) As this Court previously recognized, that premise is false: the no-aid provision does not restrict public funding solely to religious schools but, rather, restricts funding to *all* private schools, regardless of whether or not they are religious. *See Bishop of Charleston*, 2021 WL 1890612, at *3–4. Neither the Free Exercise Clause nor the Equal Protection Clause preclude such a restriction.

This Court's order denying Plaintiffs' preliminary injunction motion correctly concluded that a state's decision to bar public aid to all private schools does not pose a constitutional problem. The order drew specifically on the Supreme Court's recent decision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), which held that a state could not provide funding to non-religious private schools while withholding that funding from religious private schools. *Espinoza* involved a free-exercise challenge to a Montana tax-credit program designed to provide scholarships for private-school students. *Id.* at 2251–52. State officials had determined that the program could not be used to fund scholarships at religious schools in light of a state constitutional provision that barred public monies from going to institutions "controlled in whole or in part by any church, sect, or denomination." *Id.* at 2252 (quoting Mont. Const., Art. X, § 6(1)). Because non-religious private schools were not subject to the same restraint, the Supreme Court held that the Montana program "exclude[d] schools from government aid solely because of religious status," in violation of the Free Exercise Clause. *Id.* at 2255.

Critically, *Espinoza* makes clear that the Free Exercise Clause does not prohibit states from withholding public funding from private schools as a general matter; it simply prohibits states from tying those funding decisions to the religious (or non-religious) character of the schools. As the decision explains, "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." 140 S. Ct. at 2261. The touchstone, in other words, is not whether the state has prevented any religious schools from accessing public funds but, rather, whether the funding restriction "single[s] out schools based on their religious character." *Id.* at 2255; *see also Bishop of Charleston*, 2021 WL 1890612, at *4 ("[T]he Supreme Court struck down Montana's no-aid provision precisely because it discriminated against religious schools *but not* other private schools." (emphasis in original)).

South Carolina's no-aid provision does not single out any school based on its religious character. The provision's plain text states that public funds shall not be used "for the direct benefit of any religious *or other private educational institution*." S.C. Const. art. XI, § 4 (emphasis added). As this Court previously explained, "[u]nlike the provision at issue in *Espinoza*, South Carolina's no-aid provision prohibits the use of public funds for the direct benefit of religious and non-religious private schools alike." 2021 WL 1890612, at *4. Thus, "South Carolina's provision discriminates along the private/public divide, not the religious/non-religious divide." *Id.* Plaintiffs' failure to identify any religious/non-religious distinction—either in the text of the no-aid provision itself or in its application to the funding programs at issue here—warrants dismissal of their free exercise claim, as well as the religious discrimination component of their equal protection claim.[2]

[2] Indeed, Plaintiffs' theory in this case would necessarily call into question the validity of countless government regulations (like South Carolina's no-aid provision) that treat religious observers the same as relevant secular comparators. The United States government explicitly eschewed adopting

B. Plaintiffs' allegations of religious animus in the enactment history of a predecessor provision of the South Carolina Constitution cannot salvage their religious discrimination claims.

Plaintiffs' allegations of religious animus do not salvage their religious discrimination claims. These allegations arise entirely from the enactment history of a provision from South Carolina's disenfranchising Constitution of 1895—a provision that was removed from the South Carolina Constitution nearly 50 years ago. (Am. Compl. ¶¶ 15–17 (discussing Article XI, Section 9 of the South Carolina Constitution of 1895)). The Complaint does not contain a single allegation of religious animus in the 1972 enactment of Article XI, which is the provision Plaintiffs ask this Court to strike down. Instead, relying on Justice Alito's concurring opinion in *Espinoza*, Plaintiffs argue that evidence of religious animus in the enactment of the 1895 provision renders the 1972 provision unconstitutional. (*Id.* ¶ 65 (citing *Espinoza*, 140 S. Ct. at 2269–73 (Alito, J., concurring))); *see also* (Pls.' Mem. Supp. Mot. Prelim. Inj. 29–30, ECF No. 6-1.)

As an initial matter, no other Justice joined the concurring opinion cited by Plaintiffs, and for good reason. Justice Alito contended that the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), dictated his analysis. *Espinoza*, 140 S. Ct. at 2267–68 (Alito, J., concurring). In *Ramos*, the Court held that Oregon and Louisiana laws allowing for nonunanimous jury verdicts in criminal trials violated the plain text of the Sixth Amendment. 140 S. Ct. at 1397. Although the Court struck down the laws on purely textual grounds, the majority opinion also discussed by way of background the racially discriminatory origins of predecessor versions of the laws the defendants challenged. *Id.* at 1394, 1401–02. Those origins played no role, however, in

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such an expansive reading of the Free Exercise Clause in its brief supporting the plaintiffs in *Espinoza*. *See* Brief for the United States as Amicus Curiae at 19, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4512941 ("The conclusion that Montana has violated the Free Exercise Clause is also consistent with the principle that a State may cure a denial of equal treatment either by leveling up (extending the benefit to all) or leveling down (withholding the benefit from all).").

the Court's holding. *Id.* at 1401 n.44 ("[A] jurisdiction adopting a nonunanimous jury rule even for benign reasons would still violate the Sixth Amendment."). Justice Alito's *Espinoza* concurrence thus relies on a mischaracterization of *Ramos*. Moreover, neither Justice Alito nor Plaintiffs cite any precedent suggesting that either the Free Exercise Clause or Equal Protection Clause require striking down a neutral, generally applicable law enacted for legitimate purposes simply because religious animus contributed to the enactment of a preceding but substantially different version of the provision.

Although the Court need go no further to disregard Plaintiffs' religious animus allegations, it is noteworthy that South Carolina's no-aid provision passes constitutional muster even under Justice Alito's framework. As explained below, the origins of Article XI lie not in South Carolina's disenfranchising Constitution of 1895 but in its Reconstruction Constitution of 1868.[3] Moreover, Article XI *eliminated* both (1) the wording that Justice Alito described as "bigoted code" that tainted the contemporary Montana provision, *Espinoza*, 140 S. Ct. at 2270, and (2) the 1895 provision's ban on indirect aid to religious schools, a change made at the encouragement of Plaintiff SCICU and the president of one of the organization's religiously affiliated member colleges.

Over the course of South Carolina's history, the state has adopted a trilogy of no-aid provisions. S.C. Const. art. XI, § 4; S.C. Const. of 1895, art. XI, § 9; S.C. Const. of 1868, art. X, § 5. The South Carolina Constitution of 1868, for the first time in the state's history, provided for a free system of public schools. S.C. Const. of 1868, art. X, § 3 ("The General Assembly shall, as

[3] "[F]or the purposes of Rule 12(b)(6), the legislative history of [a] [law] is not a matter beyond the pleadings but is an adjunct to the [law] which may be considered by the court as matter of law." *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City of Baltimore*, 721 F.3d 264, 281 (4th Cir. 2013) (quoting *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995)).

soon as practicable after the adoption of this Constitution, provide for a liberal and uniform system of free public schools throughout the State . . . ."). Those schools were funded by a combination of property and poll taxes (notwithstanding the Constitution's prohibition on the denial of the right to vote based on non-payment of a poll tax). *Id.* art. X, § 5. Revenue generated from these taxes was "distributed among the several School Districts of the State, in proportion to the respective number of pupils attending the public schools." *Id.* The same provision that set forth the funding mechanism for South Carolina's newly created public schools also provided that "[n]o religious sect or sects shall have exclusive right to, or control of any part of the school funds of the State." *Id.*

Thus, the origin of Article XI lies in South Carolina's efforts to ensure a solid fiscal foundation for its newly created public-school system. Although the Constitution of 1868, unlike Article XI, denied public funds to religious schools rather than private schools generally, there is no indication that the drafters of the 1868 provision were motivated by religious animus (and nowhere in the Complaint do Plaintiffs suggest otherwise). On the contrary, the Reconstruction Constitution of 1868 for the first time in South Carolina's history guaranteed religious freedom long before the Free Exercise Clause had been incorporated against the states. S.C. Const. of 1868, art. I, § 9 ("No person shall be deprived of the right to worship God according to the dictates of his own conscience . . . ."); *id.* § 10 ("No form of religion shall be established by law; but it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of worship."); *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause). As the foremost treatise on the South Carolina Constitution puts it, the precursor to Article XI in the Constitution of 1868 reflects "an extension of traditional South Carolina fiscal conservatism to . . . educational . . . services."

3 James Lowell Underwood, *The Constitution of South Carolina* 171 (1992). The 1868 provision placed "specific emphasis upon prohibiting grants to religious organizations" not because they were the target of religious animus, but simply because they were the private entities at that time "most likely to be operating" in the field of education. *Id.*

Article XI also differs from the Montana no-aid clause at issue in *Espinoza* because the South Carolina drafters intentionally untethered it from any remnant of anti-Catholic sentiment. Justice Alito's concurrence relied heavily on his determination that Montana had failed to dissipate the taint from the religious animus that infected the predecessor to the state's contemporary no-aid provision. 140 S. Ct. at 2273 (Alito, J., concurring). According to Justice Alito, Montana did not adequately "scrub[]" the animus from the earlier version of the provision because the state maintained in its contemporary no-aid provision "the [anti-Catholic] terms 'sect' and 'sectarian,'" that appeared in the predecessor provision adopted in the 19th century, thus "voluntarily" readopting "disquieting remnants" of an era rife with anti-Catholic bigotry. *Id.* at 2273–74. Moreover, Justice Alito observed, Montana had rejected a 1972 proposal from the Montana Catholic Conference to "remov[e] the no-aid provision's restriction on 'indirect aid,'" a concession that would have softened the impact of the no-aid provision on religious schools. *Id.*

Article XI is distinguishable from Montana's no-aid provision in both respects. Although the words "sect" or "sectarian" appeared in both of Article XI's predecessor provisions, South Carolina eliminated those words when it enacted the contemporary provision. *Compare*, S.C. Const. art. XI, § 4 (prohibiting direct aid to "any religious or other private educational institution"), *with* S.C. Const of 1895, art. XI, § 9 (prohibiting direct or indirect aid to any school or college "wholly or in part under the direction or control of any . . . *sectarian* denomination, society, or organization" (emphasis added)), *and* 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 . . . ." (emphasis added)). South Carolina's decision to eliminate those terms—coupled with its inclusion of secular private schools within Article XI's prohibition—"remove[d] the taint of singling out religious institutions for hostile treatment." 3 Underwood, *supra* at 172.

Also, unlike Montana, South Carolina removed the ban on indirect aid that appeared in the 1895 predecessor to Article XI. *Compare* S.C. Const. art. XI, § 4 (prohibiting public funds from being "used for the direct benefit any religious or other private educational institution"), *with* S.C. Const. of 1895, art. XI, § 9 (prohibiting public funds from being used "directly *or indirectly*" by religious organizations (emphasis added)); *see also Hartness v. Patterson*, 179 S.E.2d 907, 908–09 (S.C. 1971) (holding unconstitutional under the predecessor to Article XI a program that provided state grants to students to attend religious schools rather than to the schools themselves). Indeed, Plaintiff SCICU itself successfully lobbied for removal of the ban on indirect aid, and the president of Wofford College, a private liberal arts school affiliated with the United Methodist Church (and a SCICU member), expressed support for the elimination of the ban on indirect aid that was included in what would become Article XI.[4] 3 Underwood, *supra*, at 172.

The drafters of Article XI explained their decision to permit indirect aid from a pragmatic, fiscal standpoint, and certainly not in animus-laden terms. Recognizing "the tremendous number of South Carolinians being educated at private and religious schools," the drafters observed that "the educational costs to the state would sharply increase if these programs ceased." *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, to His Excellency*

[4] Curiously, despite SCICU's role in advocating for lifting the ban on indirect aid, Plaintiffs argue that the drafters instituted that change for the purpose of maintaining segregation. (Am. Compl. ¶ 28.) But Plaintiffs do not allege—nor could they—that the removal of the indirect-aid ban was unfavorable to religious entities.

the Governor and the General Assembly of the State of South Carolina 99, 101 (1969), *available at* https://catalog.hathitrust.org/Record/006178331. Although they felt that direct aid to private schools would harm "the State and the independence of the private institutions," they recommended permitting indirect aid so that the state could in a limited way help keep afloat private schools that, in their view, helped alleviate the state's overall fiscal burden. *Id.*

In short, Plaintiffs do not and cannot contest that Article XI represents a clean break from any religious animus that contributed to its predecessor in the disenfranchising Constitution of 1895. Unlike the drafters of Montana's no-aid provision, the South Carolina drafters "actually confront[ed]" the "tawdry past" of the precursor before enacting a new and significantly different provision. *Espinoza*, 140 S. Ct. at 2274 (Alito, J., concurring) (alteration in original) (quoting *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring in part)). The provision is "as much an expression of the fiscal conservatism of [South Carolina] as it is a reflection of separation of church and state doctrines," embodying the legitimate view that "[p]romiscuous state fiscal aid to all forms of private endeavor, whether religious or not, [is] to be viewed with deep skepticism." 3 Underwood, *supra*, at 174. Because Plaintiffs do not allege anything to the contrary in their Complaint, their free exercise claim fails even under Justice Alito's view, as does the religious discrimination component of their equal protection claim.

C. Even if the no-aid provision were subject to strict scrutiny, it would pass constitutional muster.

For the reasons discussed above, Plaintiffs' free exercise claim and the religious discrimination component of their equal protection claim fail on their face and require no further scrutiny, let alone strict scrutiny. But even if strict scrutiny applied, the no-aid provision would pass constitutional muster.

A government action satisfies strict scrutiny if it "advance[s] interests of the highest order" and is "narrowly tailored in pursuit of those interests." *Espinoza*, 140 S. Ct. at 2260 (internal quotation marks omitted) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). The preservation of state funding for public education is unquestionably a governmental interest of the highest order. *See supra*, at 10–11 (describing the no-aid provision's origins in South Carolina's efforts to ensure a solid fiscal foundation for its newly created public-school system). As the Supreme Court observed in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), "education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship." In short, public education "ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (recognizing public education's "fundamental role in maintaining the fabric of our society").

Nor can there be any serious dispute that South Carolina's no-aid provision is narrowly tailored to preserve state funding for public education. Restricting the flow of public funds to private schools ensures that scarce tax dollars are not diverted away from the public school system. Indeed, the Supreme Court concluded that the Montana no-aid provision failed strict scrutiny not because the State's interest in supporting public education was inadequate to warrant the exclusion of private schools from public funding, but because the Montana provision was "fatally underinclusive" in targeting *only* religious private schools. *Espinoza*, 140 S. Ct. at 2261. The Court emphasized that state governments are free to prohibit public funding for private schools—"a State *need not subsidize private education*"—so long as the State does not "disqualify some

private schools solely because they are religious." *Id.* (emphasis added). South Carolina's no-aid provision does precisely what *Espinoza* deems constitutional: it applies to all private schools, religious or otherwise, and accordingly is properly tailored to pursue the State's compelling interest in preserving funding for public education.

CONCLUSION

For all of the foregoing reasons, Intervenor-Defendants respectfully request that this Court dismiss with prejudice Plaintiffs' free exercise claim (Count II) and the religious discrimination component of their equal protection claim (Count I).

Respectfully submitted,

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