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

BISHOP OF CHARLESTON, *et al.*, Plaintiffs, v. MARCIA ADAMS, *et al.*, Defendants.	C/A No. 2:21-cv-1093-BHH

BRIEF OF AMICI CURIAE ORANGEBURG SCHOOL DISTRICT AND THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP IN SUPPORT OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

INTERESTS OF AMICI CURIAE

Amici curiae Orangeburg County School District ("OCSD") and the South Carolina State Conference of the NAACP ("SCNAACP") have a significant interest in protecting public funding for public schools in South Carolina. OCSD is a public school district in Orangeburg County, South Carolina, with nearly 12,000 students in 32 schools. OCSD was among the parties that brought a successful challenge under Article XI, Section 4 of the South Carolina Constitution to Governor McMaster's efforts to divert CARES Act funds to private schools. *See Adams v. McMaster*, 851 S.E.2d 703, 706 (S.C. 2020). It therefore has a significant interest in defending its victory in that related case. SCNAACP is part of the NAACP, the nation's oldest, largest, and most widely recognized grassroots-based civil rights organization. The principal objective of the NAACP and its state conferences is to ensure the political, educational, social, and economic equality of all citizens of the United States and to eliminate race prejudice. SCNAACP has more than 12,000 members, including parents of students who attend South Carolina public schools, junior youth councils, youth councils, high school chapters, and college chapters in nearly every county in South Carolina. Most of SCNAACP's school-age members attend public schools, as do most of the school-age children of SCNAACP's adult members.

An order invalidating Article XI, Section 4 could significantly reduce the funding available for OCSD's student and SCNAACP's members and the children of its members. After the Governor was blocked from diverting funding at issue in this case to private schools, those funds instead went to public charter schools, including OCSD's High School for Health Professions, educational services for children in group home settings, the South Carolina Technical College System, early childhood education programs, and programs to combat juvenile delinquency and

prevent students from dropping out of school[1]—all of which benefit amici and their constituents and members.

Because of their substantial interests in this case, amici moved to intervene as defendants in this Court. That motion was denied, and amici currently are appealing that decision. (Op. and Order, ECF No. 60 (July 26, 2021).) In its Order denying amici's motion to intervene, the Court stated that it would "welcome [an] application to submit an amicus brief at [the] appropriate time." (Op. and Order at 9.) Amici therefore submit this brief in support of Defendants' motions for summary judgment.

SUMMARY OF ARGUMENT

Plaintiffs' challenge to Article XI, Section 4 of the South Carolina Constitution ("Article XI") is premised on their theory that this "no-aid" provision was adopted and retained based on anti-Catholic and racial animus and thus violates the U.S. Constitution's Free Exercise and Equal Protection Clauses. Plaintiffs seek declaratory and injunctive relief striking down Article XI and prohibiting Defendants from denying them funding as the South Carolina Constitution requires.

Because Plaintiffs' claims fail as a matter of law, summary judgment should be granted to Defendants. Contrary to Plaintiffs' narrative, Article XI did not originate in 1895, but rather traces back to South Carolina's Reconstruction Constitution of 1868, which for the first time in the state's history provided for the creation of a public-school system. To safeguard the revenue raised for those schools, the 1868 Constitution included a provision prohibiting diversion of school funds to religious schools—the main competitors to the newly created public schools at that time. Today,

[1] *See* Press Release, Office of the Governor, *Gov. McMaster Awards Over $12 million in GEER Funds to S.C. Department of Juvenile Justice* (Apr. 21, 2021), *available at* https://governor.sc.gov/news/2021-04/gov-mcmaster-awards-over-12-million-geer-funds-sc-department-juvenile-justice (including links to press releases for other awards of GEER funds).

South Carolina continues to zealously guard against diversion of public education funds to private schools through Article XI, which prohibits direct aid from flowing to all private schools—whether they are religiously affiliated or not.

Because Article XI is neutral as to religion and supports the state's critical interest in public education, Plaintiffs' claims of religious discrimination fail. As this Court recognized in denying Plaintiffs' preliminary injunction motion, the no-aid provision withholds public funds from all private schools—irrespective of their religious affiliation or lack thereof—so it is a neutral, generally applicable law that poses no federal constitutional problem. Moreover, Plaintiffs fail to support their claim that religious animus underlies the no-aid provision. Plaintiffs primarily allege religious animus in the enactment history of a no-aid provision in the 1895 Constitution that was excised from the South Carolina Constitution nearly 50 years ago. Even aside from the accuracy of that historical claim, no case law supports the notion that religious animus in a predecessor provision unconstitutionally taints a subsequent and substantially different law adopted without such animus and for legitimate reasons. Although Plaintiffs allege that anti-Catholic animus also motivated the adoption of Article XI in 1972, their scattershot claims amount to little more than an assertion that a few people involved in the process may have harbored some negative feelings toward Catholics. This has never been enough to demonstrate unconstitutional discrimination.

Plaintiffs' racial discrimination claims also fail. Most critically, Plaintiffs make no attempt to demonstrate *any* racially disproportionate impact from the State's no-aid provision. Indeed, such an effort would be impossible: As Plaintiffs' own expert acknowledges, South Carolina's public schools disproportionately serve non-white students, while white students disproportionately attend private schools. Plaintiffs' requested relief for the racial discrimination they purport to identify—a ruling that would allow the Governor to divert state funding from public

schools to private schools—would thus serve only to *exacerbate* existing racial disparities in educational funding. The Court should reject this perverse outcome as a matter of law.

ARGUMENT

I. The Court should grant summary judgment to Defendants on Plaintiffs' religious discrimination claims.

Plaintiffs' religious discrimination claims fail 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. Purported religious animus in the enactment history of the substantially different 1895 predecessor provision does not render the current no-aid provision unconstitutional, and Plaintiffs fail to prove religious animus in the enactment of the relevant no-aid provision in South Carolina's 1972 Constitution. Finally, even if the no-aid provision were subject to strict scrutiny under the Free Exercise Clause, it would pass constitutional muster.

A. South Carolina's no-aid provision treats religious private schools in the same manner as all other private schools.

As this Court previously recognized, South Carolina's no-aid provision does not restrict public funding solely to religious schools but, rather, restricts funding to *all* private schools, regardless of whether they are religious. *See Bishop of Charleston v. Adams*, No. 2:21-1093-BHH, ECF No. 34, 2021 WL 1890612, at *3–4 (D.S.C. May 11, 2021). In denying Plaintiffs' motion for a preliminary injunction, this Court drew 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." *Id.* 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," and does not violate the Free Exercise Clause. *Id.*

B. Plaintiffs' assertions of religious animus in the 1895 Constitution do not support a valid religious discrimination claim.

Conceding that Article XI does not single out religious schools for differential treatment, Plaintiffs assert that the no-aid provision nonetheless violates the Free Exercise Clause because, by their account, the no-aid provision in South Carolina's 1895 Constitution was enacted out of anti-Catholic animus, and that, despite substantial amendment, the current version of Article XI provision retains that anti-Catholic taint. (Pls. Mem. in Support of Mot. for Summ. J. ("Pls. Br.") 1–2, ECF No. 73-1.) Plaintiffs are wrong on both the facts and the law.

As to the facts, Plaintiffs entirely ignore that the origins of Article XI lie not in South Carolina's disenfranchising Constitution of 1895 but in its Reconstruction Constitution of 1868. 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 1868 Constitution established for the first time in the state's history a free system of public schools. 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 . . . ."). Those schools were funded by a combination of property and poll taxes. *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 fledgling public-school system. Although the 1868 Constitution, unlike the current version of 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 any kind of animus. On the contrary, the 1868 Constitution guaranteed religious freedom in South Carolina for the first time, 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). Indeed, Plaintiffs' own expert uniformly praises the 1868 Constitution and South Carolina's contemporaneous efforts to develop public schools for all, noting that, unlike the 1895 Constitution, the 1868 Constitution was "developed in a constitutional convention by a black majority," "popularly ratified," and "provided for . . . free schools[] and extended personal freedoms and liberties to blacks as well as whites." (Expert Report of Cole Blease Graham, Jr. ("Graham Report") 14, ECF No. 73-3.) And, as the foremost treatise on the South Carolina Constitution explains, 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. 3 James Lowell Underwood, *The Constitution of South Carolina* 171 (1992). Thus, rather than religious animus, the precursor to Article XI in the 1868 Constitution reflects "an extension of traditional South Carolina fiscal conservatism to . . . educational . . . services." *Id.*; *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.").

Rather than addressing Article XI's origins in South Carolina's 1868 Constitution, Plaintiffs focus exclusively on what they describe as racism and anti-Catholic animus in the amendment and re-adoption of a no-aid provision 1895 Constitution. Amici do not quarrel with the idea that some provisions of the 1895 Constitution embodied the racist and white supremacist views of its drafters. As the State demonstrates, however, Plaintiffs make no showing that the 1895 Constitution's readoption and amendment of the 1868 Constitution's *no-aid provision* was based on animus, rather than a continuation of the state's fiscal conservatism and support for public schools. (Mem. in Support of Mot. for Summ. J. State of S.C. & Opp. to Pls.' Mot. for Summ. J. ("State Br.") 15–25, ECF No. 74-7.)

In any event, even accepting Plaintiffs' account of anti-Catholic animus in the 1895 Constitution's no-aid clause, their religious discrimination claim fails. Relying on Justice Alito's concurring opinion in *Espinoza*, Plaintiffs argue that their purported evidence of religious animus in the enactment of the 1895 provision unconstitutionally taints the 1972 provision. (Pls. Br. 8–9.) But a single Justice opinion is not the law, particularly where, as here, that opinion relies on a mischaracterization of the Court's precedent. Writing for himself alone, Justice Alito contended that, under *Ramos v. Louisiana*,140 S. Ct. 1390 (2020), courts must consider whether an original, discriminatory motivation continues to taint a modified and otherwise facially neutral law. *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 violate 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 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.").[2]

But even if Justice Alito's "discriminatory taint" test were the law, Article XI passes muster. The drafters of the 1972 no-aid provision clearly and intentionally untethered that clause from any remnant of anti-Catholic sentiment because Article XI *eliminated* both the "sectarian" focus of the 1895 no-aid provision and its ban on indirect aid to religious schools. In *Espinoza*, according to Justice Alito, Montana did not adequately "scrub[]" the animus remaining from its 19th century provision because the state maintained in its contemporary provision "the [anti-Catholic] terms 'sect' and 'sectarian,'" thus "voluntarily" readopting "disquieting remnants" of an era rife with anti-Catholic bigotry. 140 S. Ct. at 2273–74 (Alito, J., concurring). But here, 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)).

[2] *United States v. Fordice*, 505 U.S. 717 (1992), on which Plaintiffs rely for the proposition that courts must inquire into whether an otherwise neutral policy is "rooted" in an earlier, discriminatory policy, is inapposite. *Fordice*'s logic applies only to policies that continue to "have discriminatory effects," *id.* at 729, which Plaintiffs have entirely failed to show here. *See infra* pp. 13, 17–18.

Moreover, Justice Alito observed that 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. *Espinoza*, 140 S. Ct. at 2273–74 (Alito, J., concurring). But, in 1972, South Carolina *did* eliminate the prohibition 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 South Carolina Independent Colleges and Universities, Inc. (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.[3] 3 Underwood, *supra*, at 172.

In short, the 1972 no-aid provision "remove[d] the taint of singling out religious institutions for hostile treatment." 3 Underwood, *supra*, at 172. *Cf. Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (where legislature did not reenact "a law originally enacted with discriminatory intent" or "carr[y] forward" its effects, courts should look only to the intent of the later-enacting legislature);

[3] 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. (Pls. Br. 29.) But Plaintiffs do not claim—nor could they—that the removal of the indirect-aid ban was unfavorable to religious entities.

Irby v. Va. State Bd. of Elecs., 889 F.2d 1352, 1356 (4th Cir. 1989) (holding that, even where plaintiffs proved that discriminatory intent infected an earlier version of a policy, Virginia satisfied its burden by showing that the policy was retained for legitimate reasons). Article XI is therefore distinguishable from Montana's no-aid provision in both respects. Justice Alito's *Espinoza* framework would be satisfied on the facts of this case.

C. Plaintiffs fail to prove that religious animus motivated Article XI's adoption.

Plaintiffs alternatively contend that, even apart from the history of the 1895 provision, the 1972 adoption of Article XI itself demonstrates religious animus under the analysis for racial animus laid out in *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977). (Pls. Br. 20–34.) In that analysis, courts determine whether a facially neutral policy was nonetheless adopted for a racially discriminatory purpose by looking at the "impact of the official action"; "[t]he historical background of the decision" at issue; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative … history." *Id*. at 266–67.

Assuming arguendo that the *Arlington Heights* framework for assessing racial discrimination claims is relevant to Plaintiffs' religious discrimination claim, Plaintiffs fall far short of satisfying that test. Despite spending a substantial amount of their brief telling a wide-ranging story of animus between the 1895 Constitution and the 1972 amendments, very few of Plaintiffs' assertions relate to anti-Catholic animus at all. Of those that do, even fewer pertain to the no-aid provision. For example, Plaintiffs allege that a government official, who died decades before the 1972 amendment, opposed Catholic immigration; that an arsonist once burned a Catholic church and a black school in 1940; and that an earlier statutory scheme for funding scholarships for private schools excluded religious schools, as was consistent with the then-effective no-aid provision. (Pls. Br. 21, 22, 28.) The closest Plaintiffs come to alleging anti-

Catholic animus on the West Committee is an allegation that one of its members at some point criticized the Catholic Church and its pro-integration views. (*Id.* at 24.) But it is well established that courts generally should not "void a statute that is . . . constitutional on its face, on the basis of what fewer than a handful of [legislators] said about it," *United States v. O'Brien*, 391 U.S. 367, 384 (1968)—especially where, as here, the comments apparently were made in an entirely different context by a lone participant on the drafting committee.

Plaintiffs make a nod toward claiming a disproportionate impact on Catholics, noting that about a third of private schools in South Carolina in 1969–1970 were Catholic and that more than half of universities and junior colleges were religious (with no information about how many of those were Catholic). (Pls. Br. 30.) But Plaintiffs provide no further information about the number of students served by these schools, the indirect funding these schools receive, or any current data that might allow the Court to assess whether a disproportionate impact in fact exists. This meager showing is insufficient to demonstrate a disproportionate impact. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (finding intentional religious discrimination where the ordinances at issue operated as a "religious gerrymander," such that "almost the only conduct subject to [the challenged ordinances] is the religious exercise of Santeria church members"); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 216–18 (4th Cir. 2016) (describing extensive data of disproportionate racial impact of voting restrictions).

Even more tellingly, Plaintiffs do not meaningfully address the remaining three *Arlington Heights* factors at all: the specific sequence of events leading up to the challenged decision; departures from normal procedural sequence; and the legislative history of the decision. Indeed, these factors do not support Plaintiffs' claim. The 1972 amendment was the subject of extended study by the West Committee and ultimately was approved by the people of South Carolina. (State

Br. 33–34.) The drafters of Article XI explained its terms from a pragmatic, fiscal standpoint, and 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 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 other words, South Carolina's no-aid 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."[4] 3 Underwood, *supra*, at 174.

In sum, Plaintiffs' scattered suggestions of anti-Catholic animus in the lead-up to the 1972 constitutional amendments do not state a valid claim under *Arlington Heights* in light of the substantial evidence that Article XI was adopted for legitimate reasons.

[4] Plaintiffs suggest that references to the separation of church and state were "simply code for anti-Catholic prejudice." (Pls. Br. 35.) But Plaintiffs' evidence for this claim is speculative at best. (*See id.* at 31–32 (suggesting that (1) during the Blaine era 100 years prior, advocates of the Blaine Amendment used similar language; (2) some unidentified South Carolinians resented the Bishop of Charleston's support for the civil rights movement; and (3) the Committee recommended a state version of the Establishment Clause, potentially rendering this rationale for the no-aid provision duplicative).) Plaintiffs' suppositions provide no good reason to refuse to take the West Committee at its word. (*See* Gov. McMaster's Consolidated Cross-Mot. for Summ. J. & Response to Pls.' Mot. for Summ. J. 21, ECF No. 76 (explaining that Establishment Clause jurisprudence at the time of Article XI's adoption made concerns about separation of church and state reasonable).)

D. Even if Article XI were subject to strict scrutiny, it would pass constitutional muster.

For the reasons discussed above, Plaintiffs' religious discrimination claims 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 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 546). The preservation of state funding for public education is unquestionably a governmental interest of the highest order. *See supra* pp. 7–9 (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), public "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.

II. The Court should grant summary judgment to Defendants on Plaintiffs' racial animus claims.

Despite pages of recitation of South Carolina's general history of racism and white supremacy, Plaintiffs fail to demonstrate that Article XI *itself* was adopted in 1972 for racially discriminatory reasons. Nor do Plaintiffs make any attempt to demonstrate that Article XI has had a racially disproportionate impact, a virtual sine qua non of the *Arlington Heights* analysis. Instead, the only evidence in the record shows that public schools disproportionately serve Black South Carolinians, and protecting public financial support for public schools has long benefitted Black South Carolinians. Finally, the remedy Plaintiffs seek—a ruling from a federal court that the Governor may divert to private schools funding that otherwise would go to public schools in South Carolina—would exacerbate the very history of racism that Plaintiffs allege motivated the 1972 no-aid provision.

A. Plaintiffs fail to show that Article XI or its predecessors have a racially disproportionate impact.

As explained above, where a law, like Article XI, is facially neutral, courts apply the *Arlington Heights* totality-of-the-circumstances test to determine whether it nonetheless was motivated by racial discrimination. But the *Arlington Heights* analysis rests on the premise that

such a facially neutral law has, in fact, resulted in a racially disproportionate impact. 429 U.S. at 264–65 ("[O]fficial action will not be held unconstitutional *solely* because it results in a racially disproportionate impact." (emphasis added)); *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 489 (1997) ("The 'important starting point' for assessing discriminatory intent under *Arlington Heights* is 'the impact of the official action whether it bears more heavily on one race than another.'" (quoting *Arlington Heights*, 429 U.S. at 266)); *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) ("Presented with a neutral state law that *produces disproportionate effects* along racial lines, the Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment." (emphasis added)); *Irby*, 889 F.2d at 1355 ("To establish an equal protection violation, a plaintiff must show discriminatory intent *as well as* disparate effect." (emphasis added)); *Bishop of Charleston*, 2021 WL 1890612, at *5 (concluding that Plaintiffs had not demonstrated a likelihood of success on the merits because they had produced "no evidence that the no-aid provision, as applied in *Adams* and the disbursement decisions by the Governor and Department of Administration, disproportionately affected African-American students, HBCUs, or religious schools").

In their motion for summary judgment, Plaintiffs at no point contend that Article XI has a racially disproportionate impact on Black South Carolinians. (*See* Pls. Br. 30 (claiming a disproportionate impact on religious schools only).) Indeed, the only evidence in the record regarding Article XI's racial impact suggests the opposite. Plaintiffs' own expert explains that:

> Today, nearly half of Greenville's 87 traditional schools are made up of more than 50% minority students—demographics that are consistently reflected across South Carolina. In a state with about 64% white residents, 27% black residents and 6% Hispanic/Latino residents, only half of the students attending public schools are white.

(Graham Report 52 n.67; *see also id.* at 8 (explaining that, as White students began attending private schools in greater numbers, "public schools were becoming more and more black").) Where a significantly greater percentage of non-white students attend public schools, it is difficult to see how a state constitutional provision that protects public funding for public schools could disproportionately harm Black students. Although Plaintiffs' expert suggests that Black students *could* particularly benefit from funding to attend private schools, (*id.* at 9,) that assertion is pure speculation unsupported by any data about who would have benefitted if the South Carolina Constitution had permitted the Governor to use the funding at issue for tuition support.

The history of South Carolina's no-aid provisions further demonstrates that maintaining public funding in public schools has long benefited Black students. As explained above, South Carolina's first no-aid provision appeared in its Reconstruction Constitution of 1868, alongside the state's first commitment to the creation of a public-school system. *See supra* pp. 7–8. This is no accident. The drafters of South Carolina's 1868 Constitution recognized that a commitment to public education "was crucial to remedying slavery and rebuilding democracy." Derek W. Black, *Freedom, Democracy, and the Right to Education*, __ N.W. L. Rev., at 4 (forthcoming 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920427. Although Northern missionaries undoubtedly played a role in establishing schools for formerly enslaved people, public education was of central concern. *See id.* at 16 ("African American-led Conventions in Alabama and South Carolina . . . placed education at the forefront of their visions of citizenship, calling on the state constitutional conventions and officials to establish 'a thorough system of common schools throughout the State, and indeed the Union, for the well-being of such ensures to the advantages of all.'"). Ensuring a strong fiscal foundation was—and remains—necessary to achieving this vision.

Ignoring this history, Plaintiffs attempt to launder the anti-Catholic animus that they claim motivated the 1895 no-aid provision into racial animus by asserting that a primary goal of the no-aid provision was to prevent churches from educating the Black population. (Pls. Br. 16–20.) But, as this history shows, missionary schools were merely one avenue of education for Black South Carolinians. Plaintiffs do not purport to show any disproportionate impact on the education of Black South Carolinians attributable to the 1895 no-aid provision, nor do they acknowledge that the 1868 Constitution already limited religious control over public funds for education. Plaintiffs therefore fall far short of showing that the 1895 no-aid provision was tainted by racially discriminatory animus; even more, they fail to show that any animus carries through the next 80 years to the 1972 enactment of Article XI.

B. The racial animus Plaintiffs claim motivated the 1972 Constitution would be exacerbated by an order striking down South Carolina's no-aid provision.

Plaintiffs' primary bases for claiming that the enactment of Article XI in 1972 was tainted with racial animus are: (1) "racism was widespread in South Carolina," and the West Committee in particular was "stacked with ardent racists," so it should be assumed that the Committee "took a decidedly racist view in the modifications it suggested to the state constitution," (Pls. Br. 22, 23, 26); and (2) the West Committee narrowed the no-aid provision to permit indirect aid specifically so that White students could obtain publicly funding "segregation scholarships" "for private, whites-only schools," (*id.* at 29). The first category of evidence, even if true, has never been enough to prove an Equal Protection Clause violation; the second category cannot possibly support the relief Plaintiffs seek.

First, the Supreme Court has explained that "'past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.' The 'ultimate question remains whether a discriminatory intent has been proved in a given case.'" *Abbott*, 138 S. Ct. at

2324–25 (brackets omitted) (quoting *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 74 (1980) (plurality op.)). This is especially true where Plaintiffs cite only "[m]ore distant instances of official discrimination in other cases," *Mobile*, 446 U.S. at 74, and in the absence of any racially disproportionate impact that could show a nexus between the general racist attitudes Plaintiffs cite and Article XI. Indeed, accepting Plaintiffs' logic here would cast into doubt the entirety of South Carolina's 1972 constitutional revision. As the Eleventh Circuit has recognized, "the historical background for a given decision is only one factor relevant to intent" and "does not, by itself, compel" a finding of a discriminatory purpose for every law "passed during regrettable periods of [a state's] past." *Hall v. Holder*, 117 F.3d 1222, 1226–27 (11th Cir. 1997).

Second, Plaintiffs' identification of "segregation academies" as the impetus for the 1972 amendments to South Carolina's no-aid provision makes no sense with respect to the West Committee's decision to *expand* the no-aid provision to ban direct public funding not only for religious schools, but for *all* private schools. Plaintiffs' example of the "segregation scholarships" statute in the decade after *Brown v. Board of Education* makes this point clear: That legislation *excluded* scholarships to religious schools, presumably to comply with the then-existing, more limited no-aid provision. (Pls. Br. 28.) The idea that prohibiting all private schools from receiving direct funding facilitated segregation through private schools is illogical.

To the extent that the West Committee sought to support "segregation academies" by *narrowing* the no-aid provision to prohibit only direct aid, Plaintiffs' requested relief is perverse: Plaintiffs would have this Court strike down Article XI's *limitation* on funding private schools as racially discriminatory based on evidence that its *allowance* of indirect public funding for private schools is racially discriminatory. Even worse, allowing more public money to flow to private schools likely would itself have a racially disparate impact, threatening the funding available for

public schools that disproportionately serve students of color. This serious and harmful incongruity between the discrimination Plaintiffs identify and the remedy they seek makes clear that their Equal Protection claim must be rejected.[5]

CONCLUSION

For all of the foregoing reasons, amici OCSD and SCNAACP respectfully request that this Court grant summary judgment in Defendants' favor.

Respectfully submitted,

/s/Kelsi Corkran
Kelsi Corkran*
Jonathan L. Backer*
Amy L. Marshak*
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
Phone (202) 662-9042
kbc74@georgetown.edu

Admitted pro hac vice

/s/Phillip D. Barber
Phillip D. Barber (Fed. ID No. 12816)
RICHARD A. HARPOOTLIAN P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
Phone (803) 252-4848
Facsimile (803) 252-4810
pdb@harpootlianlaw.com

/s/ Skyler B. Hutto
Skyler B. Hutto
Attorney No. 13471
SC Bar No. 102741
WILLIAMS & WILLIAMS
1281 Russell Street (29115)
Post Office Box 1084
Orangeburg, S.C. 29116
Phone (803) 534-5218
Facsimile (803) 536-6298
skyler@williamsattys.com

Counsel for Amici Curiae

October 6, 2021

[5] In addition, if the Court were to apply strict scrutiny to Plaintiffs' racial discrimination claim, Article XI remains constitutional because it is narrowly tailored to achieving the state's compelling interest in preserving public funding for public education. *See* Part I.D *supra*.