EXHIBIT 1

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION

Appellate Case No. 2023-001673

CANDACE EIDSON, on behalf of herself and her minor child; CONEITRA MILLER, on behalf of herself and her minor child; JOY BROWN, on behalf of herself and her minor children; CRYSTAL ROUSE, on behalf of herself and her minor children; AMANDA MCDOUGALD SCOTT, on behalf of herself and her minor child; PENNY HANNA, on behalf of herself and her minor children; SOUTH CAROLINA STATE CONFERENCE OF THE NAACP; and SOUTH CAROLINA EDUATION ASSOCIATION, ... Petitioners,

v.

SOUTH CAROLINA DEPARTMENT OF EDUCATION; ELLEN WEAVER, in her official capacity as Superintendent of Education; SOUTH CAROLINA OFFICE OF THE TREASURER; and CURTIS M. LOFTIS, JR., in his official capacity as State Treasurer of South Carolina, ... Respondents,

and

HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina; G. MURRELL SMITH, JR., in his official capacity as Speaker of the South Carolina House of Representatives; and THOMAS C. ALEXANDER, in his official capacity as President of the South Carolina Senate, ... Intervenors–Respondents.

BRIEF OF *AMICI CURIAE* MITCHELL M. ZAIS AND BARBARA S. NIELSEN IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Mitchell M. Zais and Barbara S. Nielsen (the "Superintendents" or "Amici") are former South Carolina Superintendents of Education. They have significant experience in K-12 education policy, the operations of the South Carolina Department of Education (the "Department"), and the Department's education choice programs.

A retired Brigadier General in the United States Army, Dr. Zais was elected the seventeenth South Carolina State Superintendent of Education. From 2018 to 2021, he worked in the U.S. Department of Education, serving as Deputy Secretary of Education and Acting Secretary of Education. Prior to his service as Superintendent, Dr. Zais served as the President of Newberry College and Commanding General of U.S. and Allied Forces in Kuwait. He has held many board appointments related to education, including for the South Carolina Commission on Higher Education, the University of South Carolina, the Citadel, Winthrop University, the South Carolina Commission on Aging, and the South Carolina Independent Colleges and University Board, where he served as Chair.

Barbara Nielsen was elected the fourteenth South Carolina State Superintendent of Education. Dr. Nielsen served as the first Superintendent of the South Carolina Public Charter School District. In that capacity, she established a groundbreaking organizational infrastructure to approve independent charter schools and expand school choice. She also served as the K-12 Education Advisor to Governor Mark Sanford and as his representative to the Education Commission of the States. Dr. Nielsen has held many appointments related to education, including service on the steering committee of the Education Commission of the States and the boards of the Council of State Chief School Officers, the South Carolina Education Television, and The New Teacher Project

The Superintendents offer unique and important perspectives on the implications of Petitioners' and Respondents' arguments and request for relief and contend that this brief will benefit

the Court.

INTRODUCTION

The lockdown of schools during the Covid-19 pandemic accelerated an already growing public interest in alternative forms of K-12 education. Through the Education Scholarship Trust Fund Act, 2023 S.C. Acts No. 8 (the "Act"), South Carolina's General Assembly sought to satisfy this growing demand, specifically among families in lower income brackets, and to allow for increased parental involvement in their children's education.

This brief focuses on Petitioners' argument that like the program struck down in *Adams v. McMaster*, 432 S.C. 225, 851 S.E.3d 703 (2020), the Act's Education Scholarship Trust Fund ("ESTF") program contains a "key unconstitutional element[]:" namely, a "direct benefit to private educational institutions." Petitioners Brief, p. 12. Petitioners contend that this alleged feature renders the ESTF program unconstitutional under S.C. Const. article XI, § 4 (the "No Aid Provision") of South Carolina's Constitution.

However, the entire purpose of the ESTF program is to directly benefit participating students by enhancing their educational opportunities, and any benefit to private, independent schools or others is indirect, incidental, and only results from genuine, independent choices made by parents on how best to educate their children. Although *Adams* declined to apply this "child benefit" theory, this Court was explicit that it was only doing so under the specific facts and circumstances presented in that case. *Adams*, 423 S.C. at 241, 851 S.E.3d at 711. Significant and material differences exist between the program at issue in *Adams* and the ESTF program, and the theory should apply here, removing any claim of a constitutional violation.

Unlike the program in *Adams*, which was intended to assist schools suffering financially during the pandemic, the ESTF program focuses on students as beneficiaries, and offers families a broad menu of educational options, including public school programs as well as independent

schools.[1] Any benefit to independent schools is contingent on decisions made by students and their parents on where to direct money from individual trust fund accounts established for them under the program. Recipients of distributions from the funds derive their interest in them through the intended beneficiaries of the ESTF program, and have no independent, direct claim to the money. Under the Act, only students and their parents have statutory authority to direct where ESTF funds go, and independent schools must compete with each other, as well as with public schools and various non-school education service providers, to be selected.

The indirect nature of any benefit under the ESTF program to independent schools and others besides students is reinforced by basic principles of trust law. As the name indicates, ESTF monies are held in trust for the students, who are the true beneficiaries. Independent schools and others that students choose as providers under the program are only incidental beneficiaries. Although the Department owes duties of care to the students as administrator and trustee for their individual trust fund accounts, it owes no such duties to third parties like independent schools.

Finally, United States Supreme Court caselaw has trended over the past two decades decidedly in favor of allowing more educational choices for students and parents, although it has done so in the context of the First Amendment's Religion Clauses. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the first in this line of cases, addressed how choice programs pass constitutional muster when they are neutral as between public and private, religious schools, and the latter only benefit indirectly based on genuine, independent choices made by students and their parents from

[1] As a threshold matter, Petitioners' sole claim is that the Act is unconstitutional on its face. To prevail, this claim requires that the challenged statute be unconstitutional in all of its applications. *See Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 477, 892 S.E.2d 121, 128 (2023). However, a student may use her ESTF scholarship at any "South Carolina public school . . . that chooses to participate in the [ESTF] program," S.C. Code Ann. § 59-8-110(3), which application would be permitted by the No Aid Provision. Combined with the legal presumption that a properly-enacted statute is constitutional, *see Planned Parenthood*, 440 S.C. at 476, 892 S.E.2d at 127, this would seem to be a fatal flaw in Petitioners' argument.

among various educational options. Given the fundamental similarity of the constitutional issues in that case and those now before this Court, *Zelman* supports the conclusion that the ESTF program does not violate the No Aid Provision.

ARGUMENT

STUDENTS RECEIVE THE DIRECT BENEFIT OF ESTF FUNDS, NOT EDUCATIONAL SERVICE PROVDERS THAT FAMILIES DECIDE WILL BEST SERVE INDIVIDUAL STUDENTS.

Under South Carolina's No Aid Provision, public funds cannot "be used for the direct benefit of any religious or other private educational institution." S.C. Const. article XI, § 4. In 1972, South Carolina narrowed the constitutional provision by removing its bar on indirect benefits to independent schools. *See* 1973 S.C. Acts No. 42; 1972 S.C. Acts No. 1635, § 1. Where some beneficial effect on such schools is merely ancillary to the intended purpose of a state program promoting education, the program does not violate the No Aid Provision. Here, it is beyond doubt that the Act's intended beneficiaries are South Carolina students, and any incidental benefits to third parties are not grounds for striking it down as unconstitutional.

I. Unlike Under The Specific Facts And Circumstances In *Adams*, The Child Benefit Theory Applies To The ESTF Program.

The "child benefit" theory arises out of Establishment Clause jurisprudence and holds that "it is not the school or sectarian institution that is receiving the benefits of the appropriation [of public funds] but the child itself," such that no constitutional violation occurs. *See Community Council v. Jordan*, 102 Ariz. 448, 455, 432 P.2d 460, 467 (Ariz. 1967) (citing cases). Courts have applied the theory outside the Establishment Clause context to allow public support for independent schools in states with constitutional prohibitions like South Carolina's No Aid Provision. *See, e.g.*, *Moses v. Ruszkowski*, 2019-NMSC-003, 43-46 458 P.3d 406, 419-20 (N.M. 2018); *Members of Jamestown Sch. Comm v. Schmidt*, 122 R.I. 185, 193-94, 405 A.2d 16, 20-21 (R.I. 1979).

Adams involved a state program called the "SAFE Grants Program," which was created to receive federal emergency money allocated to South Carolina and to distribute the money as directed by the Governor to cover tuition at private educational institutions adversely impacted by the coronavirus pandemic. *See Adams*, 432 S.C. at 231-33, 851 S.E.2d at 706-07. Relying on the child benefit theory, the Governor argued that "private schools here only indirectly benefit from the SAFE Grants Program, and it is the students and their families who are the primary beneficiaries of the funding." *Adams*, 432 S.C. at 241, 851 S.E.2d at 711. This Court concluded that **"[u]nder the facts of this case,**" the theory did not apply. *Id.* at 241, 851 S.E.2d at 711 (citing *Cain v. Horne*, 220 Ariz. 77, 83, 202 P.3d 1178, 1184 (Ariz. 2009)) (emphasis added). However, the ESTF program differs in material and significant ways from the program at issue in *Adams* and, under the child benefit theory, the Act survives the No Aid Provision challenge here.

First, unlike in *Adams*, students and parents in the ESTF program have an actual, beneficiary interest in their individual accounts. The federal program that funded the SAFE Grants Program "permit[ed] the grants to be awarded only to entities" and "prohibit[ed] direct payment of the funds to individuals." *Adams*, 432 S.C. at 242, 851 S.E.2d at 711. By contrast, the Act defines an ESTF as "the individual account that is administered by the department to which funds are allocated to the parent of an eligible student to pay for qualifying expenses," S.C. Code Ann. § 59-8-110(2), and payments out of the account are made "as directed by the parent," S.C. Code Ann. § 59-8-120(B). Under the Act, money goes into individual, online accounts created in the name of each scholarship student and accessible by his or her parents. S.C. Code Ann. § 59-8-120(D) & (E).

Second, the use of ESTF funds is not restricted to independent schools. In *Adams*, SAFE Grant aid could be used "only at private educational institutions." *Adams*, 432 S.C. at 242, 851 S.E.2d at 711. However, "qualifying expenses" under the Act include tuition at any eligible school, which means "a South Carolina public school or an independent school that chooses to participate in the

[ESTF] program," S.C. Code Ann. § 59-8-110(3), as well as other, non-school expenses, like tutors, therapists, and testing centers. S.C. Code Ann. § 59-8-110(13).[2]

Third, the Act limits the government's role in how ESTF funds are used, and its duties are largely ministerial. While "only . . . private educational institutions selected by the Governor's advisory panel" were eligible to receive SAFE Grant funds, *Adams*, 432 S.C. at 242, 851 S.E.2d at 711, under the ESTF program, parents and students select the education service provider they decide will best serve them (which may or may not be an independent school), *see* S.C. Code Ann. § 59-8-120(B), and direct funds there.

These are not meaningless distinctions between the program in *Adams* and the one now before this Court, but substantive differences that bear on the precise issue of who benefits directly from the aid. While the SAFE Grants Program was aimed at ameliorating the financial condition of independent schools during the pandemic, "the emphasis [of the ESTF program] is on aid to the student rather than to any institution or class of institutions." *Durham v. McLeod*, 259 S.C. 409, 413, 192 S.E.2d 202, 203 (1972) (upholding government program offering loans to students out of state trust fund to pay for tuition at any institution of higher education). The ESTF program grows through increases in the number of scholarships awarded (and number of students served by the program), *see* S.C. Code Ann. § 59-8-135(A), while the number, kind and identity of independent schools and other education service providers that participate depends on decisions made upstream by those students and their parents.

The Act does not pre-ordain that any specific independent school or other education service provider will benefit, and those that do are merely incidental beneficiaries of the transaction between the state and the student. Providers derive their interest in ESTF funds through participating students,

[2] Schools and non-schools eligible to receive funds under the Act are all referred to as "education service providers." *See* S.C. Code. Ann. § 59-8-110(7).

and they have no independent claim to the funds (other than, potentially, as creditors). Those that do not deliver value to students will not benefit.

Instructive here is *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971), where this Court characterized a state tuition grant to students as an "**indirect** benefit accruing to the private colleges [because of] their being able to attract sufficient students to their campuses to continue to function." 255 S.C. at 508, 179 S.E.2d at 909 (emphasis added). Like the ESTF program, the tuition grant in *Hartness* went directly to the participating student, who was then required to pay it over to the school. 255 S.C. at 507, 179 S.E.2d at 908. Furthermore, the benefit was even more closely tied to private schools in *Hartness* than here, as three-quarters of the private schools there were religious, and their representatives controlled administration of the program. *Id.* at 507, 179 S.E.2d at 909. In any event, although when *Hartness* was decided, "indirect" benefits were prohibited by No Aid Provision, the subsequent amendment made clear that they no longer are. *See Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895*, at 101 (1969) (recommending amendment deleting "indirect" in order to, *inter alia*, provide flexibility to General Assembly because "in the future there may be substantial reasons to aid the students" at independent schools). Given that the link between the ESTF benefit to students and independent schools is even more attenuated here than in *Hartness*, the ESTF program clearly survives this challenge under the amended No Aid Provision.

In rejecting the child benefit theory, *Adams* relied on *Cain*, citing it twice. *See Adams*, 432 S.C. at 241-42, 851 S.E.2d at 711. In *Cain*, Arizona's Supreme Court found that a voucher program that transferred state funds directly from the state treasury to private schools violated a state constitutional provision similar to South Carolina's No Aid Provision. However, *Adams* did not discuss *Niehaus v. Huppenthal*, 233 Ariz. 195, 310 P.3d 983 (Ariz. Ct. App. 2013), *review denied*, *Niehaus v. Huppenthal*, No. CV-13-0323-PR, 2014 Ariz. LEXIS 59 (Ariz. Mar. 21, 2014), the follow

up case to *Cain*, and it is difficult to rely on *Cain* without also considering *Niehaus*.

In *Niehaus*, the Arizona court of appeals upheld an education scholarship account ("ESA") program in the face of a constitutional challenge under the same no-aid provision as in *Cain*. The court explained that the "specified object of the ESA is the beneficiary families, not private or sectarian schools" because "[p]arents can use the funds . . . to customize an education that meets their children's educational needs. Depending on how the parents choose to educate their children, this may or may not include paying tuition at a private school" and those "choices are not limited to nongovernmental providers." *Niehaus*, 233 Ariz. at 199-200, 310 P.3d at 988. *Niehaus* distinguished *Cain* on the grounds that there, "every dollar of the voucher programs was earmarked for private schools," while "none of the ESA funds are pre-ordained for a particular destination." 233 Ariz. at 200, 310 P.3d at 987-88.

The present case is similarly distinguishable from *Cain*, as well as from *Adams*. Unlike the programs in those cases, the ESTF program offers a wide variety of options—including through public schools—to which parents and their children can direct funds. Thus, the ESTF program "enhance[s] the ability of [lower income] parents . . . to choose how best to provide for their [children's] education." *Niehaus*, 233 Ariz. at 200-01, 310 P.3d at 988-89.

Adams may also have misapprehended *Gaffney v. State Dep't of Educ.*, 192 Neb. 358, 220 N.W.2d 550 (Neb. 1974) as support for a broad reading of the No Aid Provision. *See Adams*, 432 S.C. at 241, 851 S.E.2d at 711. Although *Gaffney* struck down a program under which public schools loaned textbooks to private schools based on a constitutional provision barring public appropriations "in aid of" non-public schools, like the No Aid Provision, Nebraska's constitution was later narrowed by an amendment barring only appropriations "to" non-public schools. Thus, cases after *Gaffney* have allowed for state aid that benefits non-public schools indirectly. *See, e.g.*, *Father Flanagan's Boys Home v. Dep't of Soc. Servs.,* 255 Neb. 303, 583 N.W.2d 774 (Neb. 1988) (affirming damages

award to nonpublic school for tuition of wards placed by state in school, stating that benefit to school did not transform tuition into proscribed appropriation of public funds); *State ex rel. Bouc v. School Dist.*, 211 Neb. 731, 320 N.W.2d 472 (Neb. 1982) (ordering school district to provide transportation services to student, regardless of incidental benefit to nonpublic school he attended); *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (Neb. 1981) (upholding state financial assistance to enable Nebraska residents to receive postsecondary education, notwithstanding indirect benefit to non-public institutions). Like the Nebraska Supreme Court found post-*Gaffney,* the amended No Aid Provision is best understood to bar only truly direct aid to independent schools.

Finally, as Respondents note, Petitioners' overbroad reading of *Adams* would imperil longstanding, well-established programs that provide state aid to independent institutions of higher education (*e.g.*, Palmetto Fellows, LIFE, and Hope Scholarships). Respondents Brief, pp. 22-27. It would be strange, indeed, if South Carolina's Constitution were construed to ban all such programs intended to aid students on the grounds that they also have an ancillary effect of benefiting private organizations that provide services to those students. Surely *Adams* did not construe the No Aid Provision so expansively.

II. Under The Law of Trusts, Students Are The True, Direct Beneficiaries of the ESTF Program, Not Third-Party Education Service Providers.

Because the Act expressly creates trust funds for participating students to use for their education, the law of trusts law is instructive here. As a simple matter of trust law, the true, direct beneficiaries of the ESTF accounts are students who are accepted into the program. Under the Act, money goes into individual, online accounts that are created in the names of each scholarship student and accessible by his or her parents. *See* S.C. Code Ann. § 59-8-120(D) & (E). The Act requires that "[t]he trust fund must be held and applies solely toward carrying out the purposes of this chapter." S.C. Code Ann. § 59-8-120(I). Although the Department holds legal title, students hold equitable

title in the fund and enjoy its benefits. *See Epworth Children's Home v. Beasley*, 365 S.C. 157, 170-71, 616 S.E.2d 710, 717 (2005). The use of ESTF accounts to pay education service providers is another important difference from *Adams;* because SAFE Grant program funds were "distributed through the Treasury," *Adams*, 432 S.C. at 238, 851 S.E.2d at 709, students never acquired any beneficial interest in them.

Further establishing that students are the true beneficiaries, as trustee for the ESTF accounts, the Department owes students certain duties of loyalty and as their fiduciary, *see Witherspoon v. Stogner*, 182 S.C. 413, 189 S.E. 758 (1937); *Deborah Dereede Living Trust v. Karp*, 427 S.C. 337, 341-42, 831 S.E.2d 435, 438 (Ct. App. 2019), but owes no similar duties to education service providers.

That scholarship funds are transferred from an ESTF account to an education service provider—be it a public or independent school, or a non-school provider—does not change the account's beneficiary, or transform the education service provider into an additional beneficiary; money is commonly distributed out of a trust to third-party vendors, but only in order to serve the beneficiary's purposes, and the distribution does not give the vendor an independent, legal interest in the trust. *See* Restatement (Third) of Trusts, § 126 (Am. L. Inst. 2012) ("A person is not a beneficiary of a trust if the settlor does not manifest an intention to give him a beneficial interest, although he may incidentally benefit from the performance of the trust.").

III. *Zelman* Reinforces The Conclusion That A Neutral Program Under Which Independent Schools Benefit Only Indirectly As A Result of Deliberate Choices By Individual Parents And Students Is Constitutional.

Over the past two decades, caselaw from the United States Supreme Court has undeniably trended towards allowing states to offer a broader range of educational choices for students and their parents, albeit in the context of the First Amendment's Religion Clauses. *See, e.g.*, *Carson* v. *Makin*, 141 S. Ct. 2883 (2021); *Espinoza v. Montana Dep't. of Revenue*, 140 S. Ct. 2246 (2020); *Zelman*,

536 U.S. 639. Those decisions can, by analogy, offer guidance for deciding the instant case.

Zelman is particularly instructive. In *Zelman*, the question was whether Ohio's school choice program had the "forbidden effect" of advancing religion under the Establishment Clause. *See Zelman*, 536 U.S. at 648-49. *Zelman* answered that no such effect existed "where a government aid program is **neutral** with respect to religion, and provides assistance **directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice**. A program that shares these features permits government aid to reach religious institutions **only by way of the deliberate choices of numerous individual recipients**," and the benefit to religious institutions is merely "**incidental**" to the direct benefit to students. *Id.* at 652 (emphasis added).

Similarly, the ESTF program does not have the forbidden effect under the No Aid Provision of directly benefiting independent schools. The ESTF program is neutral not only as between public and independent schools, but as to non-school education service providers as well. ESTF funds assist participating students directly, and those students may instruct that the aid go to, among others, independent schools based on genuine, independent decisions made by their parents and them, not by the state. ESTF funds only reach independent schools as a result of their deliberate choices, and the benefit to such schools is incidental.

Petitioners assert that the ESTF program strongly favors independent schools, *see* Petitioners Brief, p.44 ("structural features of the Program steer the vast majority of the payments made" to "private education institutions"), but they do so without citing any supporting authority. Speculation cannot be the basis for striking down a presumptively constitutional statute and, here, there is literally "no evidence that the [General Assembly] deliberately skewed incentives towards [independent]

schools." *Zelman*, 536 U.S. at 650.[3] Like Ohio religious schools, the benefit of the ESTF program to eligible independent schools is a by-product of the benefit to participating students, and funds reach such schools only if, higher up the decision tree, families choose to direct them there. S.C. Code Ann. § 59-8-120(B).

Echoing *Zelman*, *Adams* made neutrality key to determining whether a constitutional violation existed. *See Adams*, 432 S.C. at 242, 851 S.E.2d at 711-12. Because the SAFE Grants were "made available for use only at private educational institutions selected by the Governor's advisory panel," this Court found that "[t]he program [did] not provide students with the independent choice we found to be acceptable in *Durham*." *Id.* at 242, 851 S.E.2d at 712. With regard to neutrality, the ESTF program is both distinguishable from the SAFE Grants program and similar to the student loan program in *Durham*. Again, ESTF funds can be used at public schools, independent schools, or non-school providers. *See* S.C. Code Ann. § 59-8-110(3) & (13). This range of choices is similar to the program in *Durham*, which this Court described as "'scrupulously neutral'" because it left "'all eligible institutions free to compete for [the student's] attendance,'" and the aid was not made "'to any institution or group of institutions'" in particular. *Adams*, 432 S.C. at 242, 851 S.E.2d at 711 (quoting *Durham,* 259 S.C. at 413, 192 S.E.2d at 203-04). Thus, the ESTF program, too, is scrupulously neutral.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court find that independent schools benefit only indirectly from the ESTF program, and reject Petitioners' facial challenge to the Act.

[SIGNATURE PAGE FOLLOWS]

[3] Notably, like the ESTF program, options under the Ohio program included attending public schools located in districts adjacent to a student's residential district. *See Zelman*, 536 U.S. at 645.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the enclosed *MOTION OF MITCHELL ZAIS AND BARBARA NIELSEN FOR LEAVE TO FILE AN AMICI CURIAE BRIEF* was served on counsel of record on February 1, 2024, via email pursuant to Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

/s Burl F. Williams
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