STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST JUDICIAL CIRCUIT
Dr. Thomasena Adams,	)	Civil Action No. 2020-CP-38-00774
	)	
Plaintiff,	)	
	)	
vs.	)	PALMETTO PROMISE INSTITUTE'S
	)	MEMORANDUM IN OPPOSITION TO
State of South Carolina, Governor Henry McMaster, and Palmetto Promise Institute,	)	CONTINUATION OF EXISTING OR ISSUANCE OF PROSPECTIVE INJUNCTIVE RELIEF
	)	
Defendants.	)	
	)	

The Defendant Palmetto Promise Institute ("PPI") opposes any extension of the Amended Temporary Restraining Order in this case and respectfully requests that the current order be lifted. PPI also opposes the Motion for Preliminary Injunction.

INTRODUCTION

Sixty years ago, the U.S. Supreme Court observed in a historic case, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Ed*., 347 U.S. 483, 493 (1954).

COVID-19 has challenged many of our systems and institutions, including our schools. The opportunity for an education has been radically altered for many children by COVID, as schools closed or moved to online learning. This has created a particular challenge for children from moderate and low-income families, who are the least likely to have access to Internet and computer resources necessary for online learning, and often also lack the parental support and workplace flexibility needed to do it successfully. (Anna North, "The shift to online learning could worsen educational inequality: As school goes digital, low-income students are being left behind,"

Vox.com (April 9, 2020)).[1] In order to provide these children the ability to remain in a school of their choice or to have a new alternatives for quality education in a safe setting, the Governor recently used $32 million in federal CARES Act funds entrusted to his discretionary administration to create the Safe Access to Flexible Education (SAFE) Grants Program.

The SAFE Grants Program provides eligible low- and middle-income families (up to 300 percent of the federal poverty line, or $78,600 for a family of four[2]) with a scholarship of up to $6,500 per student to pay tuition and fees at a private or religious school. The Governor anticipates that approximately 5,000 scholarships will be awarded in total for this fall's rapidly approaching school year.[3]

This program fits well within the constitutional boundaries set by Art. XI, § 4 of the South Carolina Constitution, which prohibits direct state subsidies to private and religious schools. In more than a dozen opinions spread over five decades, the Attorney General of South Carolina has confirmed that this provision only bars direct donations or appropriations of public funds directly to private schools. It does not stop programs like this or the Tuition Grant program or the Child Early Reading Development and Education Program (CERDEP), which allow students and parents to redeem their scholarship aid at a private or religiously-affiliated school. This reading also comports with the long-standing jurisprudence of the U.S. Supreme Court which recognizes that students are the direct beneficiaries of these programs and that religious and private schools are only the incidental beneficiaries.

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1 Available online at https://www.vox.com/2020/4/9/21200159/coronavirus-school-digital-low-income-students-covid-new-york.

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

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

Moreover, the plaintiff has only pled taxpayer standing. But that is not a particularized injury in this case. Plus, the SAFE Program only uses federal funds, not funds raised from her state tax dollars. For both those reasons, her standing to bring this case fails even before reaching the merits.

The program is constitutional and the plaintiff lacks standing; for both of those reasons, the TRO should be dissolved, and a preliminary injunction should not issue.

FACTUAL BACKGROUND

The SAFE Grants Program is an initiative of Governor Henry McMaster, who has been entrusted with sole discretion to administer South Carolina's allocation from the Governors' Emergency Education Relief (GEER) Fund. Affidavit of Ms. Barton at ¶ 8. Governor McMaster applied to the U.S. Department of Education for a GEER Grant, and was notified that he was to receive approximately $48 million in GEER funds to help students in South Carolina. *Id*. Subsequently, on July 6, 2020, the Governor published a notice of intent to procure an "online platform to process applications and process grants to eligible independent K-12 schools on behalf of students in kindergarten through 12 whose family income is 300 percent or less of the federal poverty level." *Id*. at ¶ 9.

The program provides a grant of $6,500 to students who apply through the online portal and meet the financial eligibility criteria. *Id*. at ¶¶ 12-13. Once a grant has been awarded, the parent logs into the portal to direct what school should receive the funds. In the words of Melanie Barton, Governor McMaster's education policy advisor and the primary staff architect for the program, "the parent or guardian controls if, when and to which eligible educational institution the grant funds are distributed." *Id*. at ¶ 12.

The SAFE Grants Program design is similar to two other well-known, highly successful South Carolina programs: the South Carolina Higher Education Tuition Grants Program and the South Carolina Child Early Reading Development and Education Program (CERDEP). *Id*. at ¶¶ 16, 21. Both programs are long-standing examples of successful programs that rely on the independent, individual choices of grant recipients who select the private schools where they redeem their aid.

PROCEDURAL BACKGROUND

The plaintiff filed suit against the State of South Carolina, Governor Henry McMaster in his official capacity, and the Palmetto Promise Institute on July 21, 2020. The next day, the Court issued an *ex parte* temporary restraining order to preserve the status quo. A hearing is scheduled on whether to convert the TRO into a preliminary injunction on Wednesday, July 29.

Defendant Palmetto Promise Institute has not yet been served with the complaint, and only enters this appearance for purposes of defending against the possibility of continuation of the current injunction or issuance of a preliminary injunction against the Institute's work on this vital and time-sensitive program.

ARGUMENT

I. The plaintiff lacks taxpayer standing to bring this case.

"A plaintiff must have standing to institute an action." *S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017). The plaintiff is responsible for alleging facts necessary to establish the grounds for her standing in the complaint. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014).

In this complaint, the plaintiff identifies her only interest in this case as her status as a taxpayer. Compl. ¶ 1.[4] This is insufficient to justify her case. In this instance, her alleged injuries as a taxpayer are "common to all citizens and taxpayers . . . [which thereby] defeats the constitutional requirement of a concrete and particularized injury." *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012). *See id*. ("A taxpayer lacks constitutional standing when he suffers in some indefinite way in common with people generally.").

Plaintiff's taxpayer standing fails for a second reason as well: no state tax dollars are expended by the program.[5] A taxpayer only has standing to challenge the use of tax receipts which he has contributed to the fisc of the state or locality. *See Moseley v. Welch*, 209 S.C. 19, 39, 39 S.E.2d 133, 143 (1946) (taxpayers have standing to challenge "an illegal expenditure of public money belonging to a district which has been raised by taxation on their property…"). *See also Sloan v. Sch. Dist.*, 342 S.C. 515, 522, 537 S.E.2d 299, 303 (Ct. App. 2000). Here, the funds are drawn from the United States treasury. Barton Affidavit at ¶ 6, 8. When a case involves only federal funds, state taxpayers lack standing to sue on their expenditure. *Broxton v. Siegelman*, 861

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[4] In her affidavit, the Plaintiff also invokes the magic words "public importance," suggesting an intention to seek the public importance exception to standing. First, this fails to plead standing in the complaint. *See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014). Second, the public importance exception should not be used to "confer[] standing on every citizen in every case where improper governmental activity is alleged." *S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. 110, 125, 804 S.E.2d 854, 862 (2017) (Kittredge, J., dissenting); *accord id*. at 130 (Pleicones, J., dissenting). Third, this case fails the usual test for public-importance standing: the need for "future guidance." *Id*. at 119. This is a single, specific program that uses one-time federal funds: it does not create an ongoing, permanent program. Moreover, there is no need for "future guidance" when the State has run numerous other programs for almost 50 years based on the clear and consistent advice of the Attorney General that programs such as this one are obviously constitutional.

[5] Because these are exclusively federal funds, the Plaintiff lacks taxpayer standing because her tax dollars were not used to generate the funds. Art. XI, ¶ 4 still applies, however, because it governs the use of any "public funds" distributed under the South Carolina Constitution, which these federal funds became when they entered the state's coffers.

So. 2d 376, 377 (Ala. 2003); *accord Brinkman v. Miami Univ*., 2007-Ohio-4372, ¶ 25 (Ct. App.) (no taxpayer standing to challenge use of privately donated funds at a state university). This makes sense because, as here, there is no way in which the expenditure uses or could increase her state tax burden. *Sloan*, 342 S.C. at 519 (discussing *Mauldin v. City Council*, 33 S.C. 1, 11 S.E. 434 (1890)).

Plaintiff's complaint only asserts her standing as a taxpayer, and this is insufficient because it is a generalized injury and because the program is exclusively funded by federal funds. The complaint should be dismissed, the TRO dissolved, accordingly.

II. The plaintiff has no likelihood of success on the merits.

A. The plaintiff may only secure an injunction by showing that she will suffer an irreparable harm and by demonstrating her likelihood of success on the merits.

"A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc*., 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010). "An injunction is a drastic remedy," and it is the plaintiff's burden to prove her entitlement to such a substantial step as a court order stopping the Governor's initiative. *See AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009). *See* Palmetto State Teachers Assn. Amicus Brief at 4 (same, quoting *LeFurgy v. Long Cove Club Owners Ass'n*, 313 S.C. 555, 557, 443 S.E.2d 577, 578 (Ct. App. 1994)).

Here, the plaintiff does not offer a single alleged harm, much less an irreparable harm, that would require issuance of an injunction. The absence of any harm to her deprives her of standing to bring this suit, as explained above, and it should also cause the Court to deny her request for

injunctive relief. The plaintiff will not be impacted in any way if the Court declines to issue a preliminary injunction; accordingly, as a matter of law, the Court should deny her request for injunctive relief.

B. The plaintiff faces a high burden due to the presumption of constitutionality granted policy decisions by the elected branches.

Nor can the plaintiff demonstrate a likelihood of success on the merits of this case. South Carolina courts presume statutes are constitutional, endeavor to construe them to render them valid, and will only reject them if their "repugnance to the Constitution is clear and beyond a reasonable doubt." *S.C. DSS v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014) (internal quotations omitted); *accord Thompson v. Hofmann*, 263 S.C. 314, 319, 210 S.E.2d 461, 463 (1974) ("this Court has declared in the strongest terms that every presumption will be indulged in favor of constitutionality of a legislative enactment, which will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt as to its conflict with the Constitution.").

Executive policy decisions embodied in executive orders or rules are entitled to the same presumption of constitutionality as a statute. *See Cole v. Riley*, 989 So. 2d 1001, 1012 (Ala. 2007); *Ritchie v. Polis*, 2020 CO 69, ¶ 8; *In re Request of Camacho*, 2004 Guam 10, ¶ 61; *Straus v. Governor*, 459 Mich. 526, 534, 592 N.W.2d 53, 57 (1999); *Old Abe Co. v. N.M. Mining Comm'n*, 1995-NMCA-134, ¶ 43, 908 P.2d 776, 789; *Stroup v. Kapleau*, 455 Pa. 171, 177, 313 A.2d 237, 240 (1973); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015).

A governor's policy decisions deserve the same deference as the legislature's policy decisions because both are the elected representatives of the people chosen and charged to make and execute policy, and courts must observe the appropriate limits of their role by respecting the elected branches' right to make policy and only stepping in when the Constitution clearly requires

them to do so. Thus, the Governor's SAFE program is entitled to the same strong presumption of constitutionality as a statute, and the plaintiff must prove its unconstitutionality "beyond a reasonable doubt." *State v. Simmons*, ___ S.C. ___, 841 S.E.2d 845, 849 (2020).

C. The plaintiff cannot prove the SAFE program is unconstitutional beyond a reasonable doubt.

1. The SAFE program is not a "direct benefit" to the religious or private school.

Interpretation of South Carolina's Constitution begins with the "ordinary and popular meaning of the words used." *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014). Courts first "[l]ook[]to the plain language," *id.*, to resolve a constitutional challenge. Here, Art. XI, § 4 of the South Carolina Constitution provides: "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution."

In this case, the pivotal language of the provision is "for the direct benefit." Though SAFE Grants Program funds eventually reach private educational institutions, these funds do not do so directly or for the benefit of the educational institution. This program is constitutional because it provides a direct benefit ***to parents and children***, who exercise a free and independent choice whether to continue in public school or to choose a private educational option in the face of a historic global pandemic. Either way, the schools are only the secondary, indirect beneficiaries of the funds. This comports with the stated federal purpose for the funds from the U.S. Department of Education, which permits governors to use them to ensure essential educational services remain available to students during this pandemic.[6]

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[6] *See* U.S. Dep't of Ed., "FAQS for the Governors' Emergency Education Relief Fund," available online at https://oese.ed.gov/files/2020/05/FAQs-GEER-Fund.pdf, at A-3. *Contra* SCEA Amicus Brief at 3. That said, the SCEA's argument that the SAFE Grants program does not use

This interpretation of the plain language is confirmed by a comparison of the text to its predecessor text, contemporaneous accounts of the provision's meaning, and subsequent legal authorities.

a. The 1973 Amendment history supports interpreting this program as a direct benefit to parents and children, not to schools.

The South Carolina Constitution of 1895 provided, "The property or credit of the State of South Carolina, or of any County, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, ***directly or indirectly***, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization." S.C. Const. art. XI, § 9 (emphasis added).[7] *Hartness v. Patterson*, 255 S.C. 503, 506, 179 S.E.2d 907, 908 (1971), the case which plaintiff singularly relies on in her complaint, ¶ 15, interprets and applies this old, unamended version of the constitutional text.[8]

The people of South Carolina voted to substantially revise this provision one year after *Hartness*, in 1972, responding positively to a ballot proposition that, among other things, sought their support to "prohibit direct public financial aid to religious or other private educational

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the CARES Act funds in line with that Act's intent is not before this Court in that Plaintiff has not included a claim that the SAFE Grants program violates the CARES Act's text.

[7] Available online at https://www.carolana.com/SC/Documents/South_Carolina_Constitution_1895.pdf, pg. 46.

[8] Moreover, the section of *Hartness* quoted by amicus Palmetto State Teachers Association includes the Court quoting approvingly from a brief in the case: "The indirect benefit accruing to the private colleges will consist of their being able to attract sufficient students to their campuses to continue to function." PSTA Amicus Brief at 5, quoting *Hartness v. Patterson*, 255 S.C. 503, 507-508, 179 S.E.2d 907 (1971) (emphasis added). Of course, under the old provision, such an indirect benefit was unconstitutional. That is no longer the case.

institutions."[9] This "scope of new Article XI, § 4 was made much narrower than the former provision contained in Art. XI, § 9." Op. S.C. Atty. Gen., 2003 S.C. AG LEXIS 3, *9. Most importantly, it removed the bar on "indirect" support and only barred direct appropriations from the State to private schools. The framers of the amendment made this change intentionally, reasoning, "By removing the word 'indirectly' the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs." *Id*. at *11 (quoting the West Commission's Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895 (1969)). Therefore, "the South Carolina Constitution no longer contains a prohibition against indirect benefit, in the form of tuition payments to South Carolina students, to sectarian schools." Op. S.C. Atty. Gen., 1973 S.C. AG LEXIS 138, *2.

Three contemporaneous opinions from the South Carolina Attorney General confirm this interpretation at the time. *See id*. (permitting loaning of money to South Carolina students to attend out-of-state sectarian institutions under the amended provision); Op. S.C. Atty. Gen., 1974 S.C. AG LEXIS 928, *3 (permitting lease of a church-owned building for a public educational program); and Op. S.C. Atty. Gen., 1974 S.C. AG LEXIS 230, *6 (permitting loaning teaching materials from the Department of Education to parochial/private schools under the amended provision); *see also Robinson v. McGown*, 104 S.C. 285, 309, 88 S.E. 807, 815 (1916) ("contemporaneous interpretation raises a strong presumption of the correctness of a legislative construction then adopted.").

[9] *See* Amendment 6 (1972), available online at https://ballotpedia.org/South_Carolina_Establishment_of_a_State_Board_of_Education,_Amendment_6_(1972).

b. The post-1973 interpretations support finding this program is a direct benefit to parents and children, not to schools.

The Office of the South Carolina Attorney General has been asked to opine numerous times since 1974 as to the appropriate interpretation of this clause. Again and again, in thirteen opinions spread across four decades, it has confirmed that only a direct financial appropriation to a private institution violates the clause; direct assistance to a student that indirectly benefits a private educational institution is acceptable. Ops. S.C. Atty. Gen., 2018 S.C. AG LEXIS 4 (tax credits for scholarships to attend private schools); 2014 S.C. AG LEXIS 21 (direct donation of public funds to private college); 2011 S.C. AG LEXIS 18, (utility installation near private school campus); 2011 S.C. AG LEXIS 31 (tax credits for scholarships to attend private schools); 2008 S.C. AG Lexis 130 (publicly funded parking facilities near private college); 2007 S.C. AG LEXIS 16 (pre-kindergarten program funding at faith-based pre-schools); 2003 S.C. AG LEXIS 42 (lottery-funded higher education scholarships including private schools); 2003 S.C. AG LEXIS 3 (direct appropriation to historically black colleges); 1998 S.C. AG LEXIS 76 (school vouchers used at private schools); 1995 S.C. AG LEXIS 145 (public funding of a specific program at a private college); 1994 S.C. AG LEXIS 21 (tuition grant to attend Bible college); 1985 S.C. AG LEXIS 238, *6 (tuition assistance at private non-profit colleges)[10]; 1983 S.C. AG LEXIS 218 (public textbook loans to private colleges). This consistent interpretation, which has been the basis for numerous uncontested acts of the Legislature and localities, deserves deference. *See Charleston*

[10] Amicus Palmetto State Teachers Association quotes approvingly from 1985 S.C. AG LEXIS 238. PSTA Amicus Brief at 6. There the Attorney General opined that tuition grant funds could not go to for-profit colleges and universities because of their for-profit mission. Id. at 7-28. But first the same opinion explicitly approves of tuition grant scholarships being redeemed at private, non-profit institutions under Art. 9, ¶ 4: "It is clear that, generally speaking, the framers of these latter two constitutional provisions were of the view that the State's providing tuition grants to students attending private institutions of higher education was consistent with those constitutional provisions." *Id*. at *6-7.

Cty. Assessor v. Univ. Ventures, LLC, 427 S.C. 273, 289, 831 S.E.2d 412, 420 (2019) ("where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons.").

The U.S. Supreme Court, when it has considered similar scholarship and tax credit programs, has also reached the conclusion that public funds may constitutionally flow to private religious schools after an intervening, independent choice by a parent as to where to send their child. Just last month, the Supreme Court definitely reaffirmed that school choice programs which permit parents to choose religious schools do not violate the federal Establishment Clause. *Espinoza v. Mont. Dep't of Revenue*, 207 L. Ed. 2d 679, 689 (U.S. 2020). This is so, the Court said, "because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools." *Id*.[11]

Similarly, in its first major case upholding a school voucher program, the Supreme Court said, "[W]here 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, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients." *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Importantly, the Court saw this not as a direct benefit to the school but only as an "incidental

[11] These federal cases are particularly persuasive because South Carolina courts recognize that the First Amendment's provisions are coterminous with South Carolina's constitutional guarantees. *S.C. DSS v. Father*, 294 S.C. 518, 522, 366 S.E.2d 40, 42 (Ct. App. 1988).

advancement of a religious mission" that "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id*.

Courts recognize that it is the student who is the direct beneficiary of such programs, not the private school. *See, e.g.*, *Zobrest v. Catalina Foothills Sch. Dist*., 509 U.S. 1, 12 (1993) ("Handicapped children, not sectarian schools, are the primary beneficiaries of the [Individuals with Disabilities Education Act]; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries."); *Zelman*, 536 U.S. at 652 (2002); *Simmons-Harris v. Goff*, 1999-Ohio-77, 86 Ohio St. 3d 1, 9, 711 N.E.2d 203, 211 ("The primary beneficiaries of the School Voucher Program are children, not sectarian schools."); *Kotterman v. Killian*, 193 Ariz. 273, 283, 972 P.2d 606, 616 (1999) ("The primary beneficiaries of this credit are taxpayers who contribute to the STOs, parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children's educations, and the students themselves. . . . Private and sectarian schools are at best only incidental beneficiaries."); *Jackson v. Benson*, 218 Wis. 2d 835, 880, 578 N.W.2d 602, 622 (1998); *Toney v. Bower*, 318 Ill. App. 3d 1194, 1206, 744 N.E.2d 351, 362 (2001).[12]

[12] In its amicus brief, SCEA states that these schools, as the "vendors" for the program, are its beneficiaries. SCEA Amicus Brief at 2. But vendors are by nature providers of goods and services for some other end. No government procurement contract is intended to give money to a vendor as the purpose in and of itself. The contract purchases a good or service from the vendor, and then that good or service accomplishes the government's true aim. That is the case here, where the schools are "vendors" who provide educational services to those the government seeks to help: children otherwise denied optimal educational opportunities due to COVID.

In its amicus, the Palmetto State Teachers Association cites several cases holding that schools, and not students, are the beneficiaries of similar programs. PSTA Amicus Brief at 7-8. All of them pre-date, and none have the same precedential weight as the holding of the U.S. Supreme Court in *Zobrest* and *Zelman*.

This is the key principle here as well: it is the low-income student who directly benefits from the SAFE Grants Program through a tuition grant; the benefit to the school is indirect or incidental. And though that may have been barred under the 1895 version of Article XI of the South Carolina Constitution, it is not barred by the amended version.

2. If the Court were to read the Amendment as prohibiting the SAFE program, the Amendment itself may be unconstitutional under federal law.

The principle of constitutional doubt requires that "when a statute is susceptible of two constructions, courts interpret the statute to avoid grave and doubtful constitutional questions." *United Student Aid Funds, Inc. v. S.C. DHEC*, 349 S.C. 162, 168, 561 S.E.2d 650, 653 (Ct. App. 2002). This principle is directly applicable here: if the Court were to read the state constitution to bar the program, it would raise grave questions as to whether the state constitutional provision is itself unlawful under the federal constitution.

South Carolina's current Art. XI, § 4, the provision at issue in this case, is one of perhaps 30 such provisions adopted in state constitutions more than a century ago targeting religious schools, all called Blaine Amendments after congressional champion James G. Blaine.[13] Op. S.C. Atty. Gen., 2018 S.C. AG LEXIS 4, *7 n.1 (recalling history of the provision, including description as a Blaine Amendment). *See* Op. S.C. Atty. Gen., 2011 S.C. AG LEXIS 31, *2 (description of Sen. Grooms in opinion request). It is the modern equivalent of Art. XI, § 9 of the 1895 Constitution.

"The [proposed federal] Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have a similarly 'shameful pedigree.'" *Espinoza*, 207 L.Ed.2d at 694 (*quoting*

[13] These Blaine Amendments are the basis for the cases cited by PSTA in its amicus brief at 7-8.

Mitchell v. Helms, 530 U. S. 793, 828-829 (2000) (plurality opinion)). The 1895 Constitution's Art. XI, § 9 included all of the bigoted references to "sectarian" denominations, which was widely recognized at the time as code for Catholic institutions. *Espinoza*, 207 L.Ed.2d at 707 (Alito, J., concurring). The fact that it was subsequently revised and readopted does not cure its underlying issues. *Id*. at 709–10.

As Justice Alito points out in his concurrence in *Espinoza*, the bigoted motivation behind state Blaine Amendments may render them unconstitutional under the Supreme Court's recent decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). *Espinoza*, 207 L.Ed.2d at 704 (Alito, J., concurring). In *Ramos*, the Court struck down state statutes permitting non-unanimous jury verdicts by reference to the racially discriminatory motives behind them. *Id.* As Justice Alito documents in his concurrence, religiously discriminatory motives were just as much the basis for states' Blaine Amendments as racism was behind the statutes at issue in *Ramos*. Thus, if South Carolina's Blaine Amendment is given such a broad meaning as to bar the SAFE Grants Program, it may itself be unconstitutional under the United States Constitution.

CONCLUSION

The plaintiff lacks standing and has suffered no harm, there is a strong presumption of constitutionality for executive policy decisions, and the plaintiff has no likelihood of success on the merits. Legal authorities in South Carolina and across the nation have upheld programs like this one against similar challenges for decades. For all those reasons, the TRO should be dissolved, the preliminary injunction should be denied, and this case should be dismissed.

[SIGNATURE PAGE ATTACHED]

Respectfully submitted,

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