22-1175

United States Court of Appeal
for the Fourth Circuit

BISHOP OF CHARLESTON, a Corporation Sole, d/b/a Roman Catholic Diocese of Charleston; Sole; SOUTH CAROLINA INDEPENDENT COLLEGES AND UNIVERSITIES, INC.,
Plaintiffs – Appellants,

v.

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

and

STATE OF SOUTH CAROLINA,
Intervenor/Defendant – Appellee.

On Appeal from the United States District Court
for the District of South Carolina at Charleston
Honorable Bruce Howe Hendricks

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. This Court properly has jurisdiction over this case because the State has failed to adequately prove mootness.

A. The Court properly has jurisdiction as to the Act 154 funds.

A defendant who believes a case has become moot after a notice of appeal has been filed customarily files a suggestion of mootness and/or motion to dismiss. In this instance, the State points to the 2021 Budget Act, which was finalized by Governor McMaster on June 25, 2021. S.C. H. 4100.[1] If the State believed this appeal was moot, it could have filed a motion to dismiss or suggestion of mootness nearly a year ago, and if it had succeeded, saved the parties and four amici valuable time briefing the merits of a moot case. By making a motion, the State could also have attached affidavits from budget officials (perhaps Defendant Gaines, the state budget director) or exhibits showing the state's balance sheets for the accounts involved, but because the State waited until its response brief, there is no context or evidence for its argument. The State cites a particular subsection of the 2021 state budget (2021 S.C. Acts No. 94, Part 1.B, § 118.18(A)(5)), of which this Court may take judicial notice,

[1] Scstatehouse.gov/sess124_2021-2022/appropriations2021/gab4100.php.

but provides no information as to whether the $65 million in CARES Act funds discussed in that section are the entire residuum of CARES funds, or whether the reappropriated funds have been disbursed, or whether the provision still operates the same way given subsequent budget developments. The State's Board of Economic Advisers has recently revised revenue estimates for FY2021-22 upward by $952 million, such that the State has sufficient funds available to maintain its prior commitments.[2]

"The burden of demonstrating mootness is a heavy one," *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), and this "heavy burden of proof rests on the party suggesting mootness." *Vencor, Inc. v. Webb*, 33 F.3d 840, 844 (7th Cir. 1994). The State's single page of briefing without evidence or explanation is insufficient to bear this burden.

B. The Appellants established standing as to the Governor.

The Defendants make no concerted response to the arguments raised in the Appellants' opening brief, but instead simply quote from the district court opinion. They misconstrue the Appellants' request—since the complaint, all the Appellants have sought is a fair shot at funds they

[2] "The BEA Revises FY 2021-22 and FY 2022-23 Forecasts Upward," S.C. Revenue and Fiscal Affairs Office (May 24, 2022), rfa.sc.gov.

otherwise qualify for—they have never asked for a court order directing the governor to give them funds. ECF 26 (First Am. Compl. Prayer for Relief). The Defendants claim a "lack of evidence" that "the Governor was likely to award them GEER Funds," Resp. Br. 20-21, when in fact they had the best evidence possible: he *did* award them GEER I funds, until that award was cancelled by the South Carolina Supreme Court, which applied a state constitutional provision that itself violates the federal constitution. Regardless, the basic fact remains that unfettered discretion is not a blank check for discrimination; a fair opportunity of consideration is a constitutional command. *Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995); *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U. S. 656, 666 (1993).

The State's argument about left-over Emergency Assistance to Non-public Schools (EANS) funds becoming GEER II funds is a red herring. Resp. Br. 23-24. It's true that any unused EANS funds could become GEER II funds. And the Diocese and the members of SCICU could qualify for GEER II grants (though not for student-specific scholarships as in the original SAFE Program).[3] However, all EANS reimbursement requests

[3] U.S. Dep't of Educ., *Frequently Asked Questions ESSER and GEER,* May 2021,

were due to the South Carolina Department of Education by August 15, 2021, and neither the Governor nor the Department have given any indication that a new round of GEER II funds became available due to underutilization of ESSER funds. In short, this door has long since closed.

Finally, if the Court determines the case is in fact moot because the Act 154 and GEER I and II funds are all irretrievably gone, the proper response is to vacate the judgment below and remand for dismissal of the case as moot. *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157 (4th Cir. 2021). This is the appropriate and customary practice when a change in law renders a case moot. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020). This Court explained recently that this customary practice is only set aside when there are strong alternative considerations regarding fault or the public interest. *Hirschfeld v. ATF*, 14 F.4th 322, 327-28 (4th Cir. 2021). Here the fault belongs to no party—the General Assembly simply changed the law and (the State says) appropriated the funds at issue to a different destination. And the public interest favors allowing parties to relitigate this important issue if it arises in the future, when full appellate review is possible (as it may,

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given pending legislation creating an Education Savings Account program for South Carolina students). Here the public interest weighs in favor of vacatur, as "allowing the district court's order to stand would effectively preserve an advisory opinion on constitutional questions. . ." *BH Media Grp., Inc. v. Clarke*, 851 F. App'x 368, 370 (4th Cir. 2021).

II. The district court erred in finding that the racial and religious prejudice were not at least a motivation behind the 1972 Amendment.

A. The standard of review and the record favor the Appellants.

The State is quite right that Appellants focus on the State's lack of any expert testimony or report in the record. Resp. Br. 27. The only things before the District Court on summary judgment were the reports, records, and depositions of the Plaintiffs' experts. Normally, "when a party opposing summary judgment fails to present evidence sufficient to make an issue of an expert's conclusion—such as contrary opinion evidence or evidence tending to undermine the expert's credibility or qualifications… expert testimony may form the basis of summary judgment." *Rivera v. Home Depot USA Inc.*, 776 F. App'x 4, 7-8 (2nd Cir. 2019) (cleaned up). Otherwise the assumption is that a case based on expert testimony will normally go to trial.

Here, the State did not provide any contrary opinion evidence, conceded its motion to disqualify Dr. Glenn, and never argued the qualifications of Dr. Graham. It only argued the credibility of Dr. Graham's report versus his deposition, which was taken more like a trial cross-examination than discovery in all events.

If the State successfully convinced Judge Hendricks that a conflict exists between an expert's report and his deposition testimony (a point the Appellants do not concede), then the appropriate course was to set this case for trial. *Watson v. Allstate Tex. Lloyd's*, 224 F. App'x 335, 342 (5th Cir. 2007) ("the grant of a motion for summary judgment is often inappropriate where the evidence bearing on crucial issues of fact is in the form of expert opinion testimony."). *See Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 78 (2nd Cir. 2002) ("not only must there be no genuine issue as to the evidentiary facts, but there also must be no controversy regarding the inferences to be drawn from them.") (cleaned up). To the extent that a supposed conflict exists between Dr. Graham's report and his deposition testimony, that implicates his credibility, which is a determination inappropriate for summary judgment. *Black & Decker Corp. v. United States*, 436 F.3d 431, 442 (4th Cir. 2006) ("Weighing all

of this expert testimony should have been left for trial because witness credibility cannot be assessed on summary judgment."). Indeed, having read the State's briefs below to make the same argument, the Appellants suggested just such a course to the judge as an alternative to granting them summary judgment. ECF 109. She did not accept it, but perhaps should have.

The State then excuses its failure to qualify an expert because "an expert is not needed to address the historical record." Resp. Br. 27. Hardly. Though a Supreme Court justice's concurring opinion may rely on the independent research of law clerks, a district court acting on summary judgment is bound to rule on the record before it. The State in its brief below relied on numerous quotations from monographs, articles, and historical documents without laying a proper foundation for any of them. *See* ECF 97 (Mot. to Strike). This Court has been clear: "In order to be considered on summary judgment, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e)." *B & J Enters. v. Giordano*, 329 F. App'x 411, 415 (4th Cir. 2009). A trial court that fails to exclude such evidence abuses its discretion. *Cisson v. C.R. Bard, Inc. (In re C.R. Bard, Inc.)*, 810 F.3d 913, 925 (4th Cir. 2016).

The State did not authenticate its documents or qualify its monographs, and relying on them for summary judgment in spite of that failure was clear error by the District Court.

Indeed, the State repeats the same sin here, introducing sources for the very first time in this Court, unqualified and unexamined. The paragraphs bridging pages 32-33, pages 37-38, and on page 43 are rife with new evidence.[4] None of this is appropriate for consideration by this Court. *Montalvo v. Radcliffe*, 167 F.3d 873, 878 (4th Cir. 1999) ("On appeal, they do cite a number of medical journals and public health publications for the first time in their brief, but we will not consider factual evidence not presented at trial."). This new material now is typical of the State's cavalier approach to evidence throughout this case. This free-wheeling attempt at evidence should at minimum cause this Court to reverse summary judgment and remand the case for trial to develop a proper record.

On another front, the State tries to take one isolated line out of *Raymond* and elevate it to a rewrite of the entire *Arlington Heights* test,

[4] None of these sources were in the State's brief in support of its cross-motion for summary judgment below (ECF 74-7): The Census Bureau report (p. 33); Walter Edgar, *South Carolina: A History* (pp. 5, 6, 43); James L. Underwood, *The Dawn of Religious Freedom in South Carolina* (pp. 37, 38); and *Report of the South Carolina Election Commission for the Period Ending June 30, 1973* (p. 32).

suggesting that one factor (disparate impact) has become a command. Resp. Br. 26. Rather, *Raymond* itself correctly quotes the entirety of the *Arlington Heights* test earlier in the same opinion. *N.C. State Conf. of the NAACP v. Raymond,* 981 F.3d 295, 303 (4th Cir. 2020). *Raymond* did not transform discriminatory impact into a super-factor that is necessary but not sufficient when previously it was just one of four nonexclusive factors that are considered wholistically. Indeed, it could not, as the *Arlington Heights* factors are from the Supreme Court and ought not be substantively altered by this Court.

The State also misunderstands this Court's "intervening event" analysis in *Raymond*. *See* Principal Br. 50-51. There, the legislature passed a law this Court found was motivated, at least in part, by racial motives. The people then voted for a constitutional amendment requiring a policy, and a subsequent legislature adopted the requisite policy in statute. *Raymond* says the constitutional amendment from the people is the intervening event. Here popular adoption came at the end of the first phase: it's as though the North Carolina legislature had passed its first photo ID law with racist motives, and then the people approved it. Such a law would obviously carry the taint of the racism in the legislative phase.

B. The State's historical account is flawed.

The State accuses Appellants of "impugning South Carolina with anti-Catholic sentiments from other parts of the country," Resp. Br. 36, but ignores the reams of evidence introduced by the Appellants specific to South Carolina. Principal Br. 18-21. And to the extent anti-Catholic sentiment was rampant across the South and the nation at the time, that is at least circumstantial evidence that such sentiment existed in South Carolina as well. The State may wish over and over to emphasize South Carolina's special and unique past, but it cannot suggest with a straight face that racism and anti-Catholicism were not present and popular in the Palmetto State in the late 1800s or the 1960s.

The State repeatedly stresses a line in Appellants' briefing below that "focus in analyzing the history of the 1972 amendment should stay on the West Committee." Resp. Br. 2, 17, 28. This is to abuse the line by taking it out of context: below Appellants were saying the primary focus within the 1972 amendment process should be on the West Committee that actually wrote the amendment, not the General Assembly that put it on the ballot or the voters who adopted it as one line among many provisions. ECF 73-1 at 30. Appellants were not saying that the 1972 amendment

displaces all that has gone before; in fact they have consistently argued otherwise.

The State says the "Appellants never point to any evidence about the supposed racist and religious bias of the General Assembly that ratified this amendment in 1973." Resp. Br. 33. False. The Appellants showed in their briefs, based on Dr. Graham's expert report, that House Speaker Solomon Blatt and Senate Judiciary Chairman and amendment sponsor Marion Gressette were both ardent segregationists. Principal Br. 42-43.[5]

The State also says the Appellants had to prove the voters of South Carolina in 1973 "were necessarily racist and anti-Catholic to vote for it." Resp. Br. 32. First, Appellants did indicate that the popular environment among many South Carolina voters in the 1960s and early 1970s was racist and anti-Catholic; the politicians of the day reflected the views of the voters they represented. *See* Principal Br. 51. Second, the *Arlington Heights* factors call for courts to look at situations wholistically and to use common sense. If a legislature inserts a single prejudiced provision

[5] Appellants apologize for categorizing Senator Gressette with the West Committee members; he was the sponsor of the West Committee report in the Senate and one of the most influential politicians in South Carolina at the time (along with his close collaborator Speaker Blatt, who was on the Committee).

into a broader package that is then adopted by the people at referendum, popular adoption does not wipe the prejudice from that single provision.

The State worries that "if the Court were to embrace Appellants' logic, virtually any provision of South Carolina law—as well as the laws from other States—originating from any time during or before Jim Crow would be constitutionally suspect." Resp. Br. 30. That is not Appellants' rule—that is the attitude of this Court, which reprimanded a district court for failing to trace the North Carolina photo identification law back through that state's history of racial discrimination. *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016).

The State also wrongly dismisses Justices Sotomayor and Alito's approach to *Arlington Heights* claims. Resp. Br. 35. *Fordice* and other cases create a presumption that a revised supposedly neutral policy that is nevertheless traceable to an antecedent discriminatory policy remains problematic. *United States v. Fordice*, 595 U.S. 717, 729 (1992). Justices Sotomayor and Alito are simply saying that to overcome that presumption, the revising authority must explicitly recognize the policy's discriminatory past and provide a non-prejudiced policy rationale to nevertheless continue it. That did not happen in the West Committee at any point.

The State's paeon to the importance of public education to the 1895 Convention, Resp. Br. 38-41, skips over the one most obvious and important fact: they were segregated schools. Indeed, immediately following the three-mill tax included in the Constitution and discussed by the State, Resp. Br. 39, was this provision: "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race." 1895 Const. art. XI, § 7. And the next section after that separated Claflin University from what is now South Carolina State University, as Appellants explained in their principal brief (pp. 27-28). Public education was education designed to reinforce the racial hierarchy.

Amici's arguments largely repeat those of the State. The NAACP, Americans United, and Teachers Union amici all argue that the framers of South Carolina's constitutions discriminated against religious and other nonpublic schools not out of racial or religious animus but because they loved public education. They cite many of the same treatises and articles from Professors James Underwood and Steve Green as the State,[6] though the State did not introduce either of them as an expert

[6] Though the State did not cite Professor Green in its appellate brief, it did so nine

witness. Had the State done so, the Appellants could have asked Professor Green how the portions of his articles cited by the State and Amici compare with the portions of his articles cited by Justices Alito and Thomas. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2271 (2020) (Alito, J., concurring) ("When Blaine introduced the amendment, The Nation reported that it was 'a Constitutional amendment directed against the Catholics'—while surmising that Blaine, whose Presidential ambitions were known, sought 'to use it in the campaign to catch anti-Catholic votes.'" Quoting Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 54 (1992)); *Mitchell v. Helms*, 530 U.S. 793, 913 (2000) ("Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.' *See generally* Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992)."). In all events, the Amici's theory of the history (which is also the State's) has been rejected over and again by these and other opinions of the U.S. Supreme Court. Principal Br. 31-32.

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times in its summary judgment brief. ECF 74-1.

The one exception is the Public Funds Public Schools brief, which recounts the segregation scholarships history along the same lines as Appellants have argued. PFPS answers that though Appellants got the history right until the 1960s, suddenly at that point South Carolina bucked the trend of all the other Southern states, because the "prohibition [on public funds for private schools] in South Carolina's no-aid clause runs contrary to these historical strategies of publicly funding private schools to perpetuate segregation." PFPS Br. 10. Again, this Court should ask itself—is South Carolina truly unique compared to all other Southern states in its rejection of segregation scholarships in the 1972 amendment? Did Senator Gressette champion segregation scholarships and then a few years later sponsor a constitutional amendment to prohibit segregation scholarships? This alternate explanation is hard to credit.

CONCLUSION

At the end of the day, three things remain true. First, the Appellants only had to show that racial or religious prejudice was a motivation behind the provision at issue. *McCrory*, 831 F.3d at 220. Even if you accept the State's non-record evidence and alternate explanation, Appellants have at least shown it was *a* motivation, if not the predominant one.

Second, the South Carolina provision of 1895 reads like a Blaine Amendment, was written at the same time and championed by the same people as the Blaine Amendment, and was called a Blaine Amendment by the Attorney General of South Carolina as recently as 2018. If it "looks like, walks like, swims like, and quacks" like a Blaine Amendment, then it's a Blaine Amendment.[7] And third, this Court and courts in this circuit cannot insist on legislative good faith and a high standard of evidence in some *Arlington Heights* cases and show healthy skepticism and rely on circumstantial evidence in other *Arlington Heights* cases. There must be one rule, one standard, regardless of the policy outcome on the line.

The district court should be reversed and the case remanded with direction to enter summary judgment for the only side to have any evidence in the record, or at minimum for trial.

[7] *See Alexander v. FedEx Ground Packaging Sys.*, 765 F.3d 981, 998 (9th Cir. 2014) (Trott, J., concurring) (describing the "duck test").

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 3,197 words, excluding the cover, tables, signature block, and certificates, which is under the limit set in Fed. R. App. P. 32. /s/ Daniel R. Suhr