THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2020-001069

Dr. Thomasena Adams, Rhonda Polin, Shaun Thacker, Orangeburg County School District, Sherry East, and the South Carolina Education Association……**Petitioners**

v.

Governor Henry McMaster, Palmetto Promise Institute, South Carolina Office of the Treasurer, and South Carolina Department of Administration……..**Respondents**.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE UNITED STATES IN SUPPORT OF RESPONDENTS' REQUEST FOR REHEARING

The United States respectfully moves this Court for leave to appear as amicus curiae under Rule 213 of the South Carolina Appellate Court Rules. A copy of the proposed brief is attached hereto.

Congress has authorized the Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State." 28 U.S.C. § 517. This suit concerns federal emergency education funding, and the United States has a strong interest in the proper interpretation of the statutory

regime as well as the proper administration of this federal program. In particular, the United States has a significant interest in ensuring that grantees administer appropriated funds in accordance with federal law, such that United States Department of Education monies are expended for the purposes for which they are appropriated, returned to the Department when unused, and not handed over to and used at the discretion of state legislatures in violation of federal law.

* * *

The United States requests that this Court grant its motion to file the attached amicus brief.

Respectfully submitted,

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BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS' REQUEST FOR REHEARING

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INTRODUCTION

In response to a pandemic, Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). *See* Pub. L. No. 116-136, 134 Stat. 281 (2020). Under the CARES Act, Congress appropriated more than $30 billion to the Education Stabilization Fund and ordered the Secretary of Education to allocate that money to three sub-funds, one of which was the Governor's Emergency Education Relief (GEER) Fund. *See* CARES Act, 134 Stat. at 564.

Respondent Governor Henry McMaster of South Carolina applied for and received a $48,467,924 GEER Fund grant from the United States Department of Education. *See Adams v. McMaster*, No. 2020-001069, at 5 (S.C. Oct. 7, 2020) (Op.). Governor McMaster then allocated $32 million of that grant to create the Safe Access to Flexible Education (SAFE) Grants program. *Id.* The SAFE Grants program assists disadvantaged South Carolina students who choose to attend private or independent schools by providing one-time, need-based scholarships of up to $6,500 per student to cover the cost of tuition to attend participating private or independent for the 2020–2021 academic year. *Id.* Families with a household adjusted gross income of up to 300% of the federal poverty level would be eligible to apply to the program. *Id.*

In correspondence with Governor McMaster, the Department of Education concluded that this allocation of GEER funds to private or independent schools fell squarely within the legal bounds of Section 18002(c)(3) of the CARES Act, which states that "GEER funds can be used to 'provide support to any other . . . education related entity within the State that the Governor deems essential for carrying out emergency educational services to students' for a broad range of 'authorized activities,' including any activity authorized by the Elementary and Secondary Education Act of 1965 as well as 'the provision of child care and early childhood education, social and emotional support, and the protection of education-related jobs.'" Letter from Mitchell M. Zais, Deputy Secretary, U.S. Dep't of Education, to The Honorable Henry McMaster, Governor (Aug. 31, 2020) (quoting the CARES Act), filed as Ex. A to Rule 208(b)(7) Letter from Thomas A. Limehouse, Jr., to The Honorable Daniel E. Shearouse, Clerk of Court (Sept. 2, 2020).

Petitioners challenged Governor McMaster's allocation of federal funds in the circuit court as a violation of the South Carolina Constitution, seeking a declaratory judgment and injunctive relief. The circuit court issued a temporary restraining order, and the Governor moved to dissolve it. Eventually, Petitioners filed a petition for original jurisdiction, which this Court granted. Op. 6. On October 7, 2020, the Court held that the Governor's allocation of GEER funds violated the

South Carolina Constitution as "the use of public funds for the direct benefit of private educational institutions." *Id.* at 15 (citing S.C. Const. art. XI, § 4).

In its opinion, this Court made statements reflecting a misinterpretation of the CARES Act, Supreme Court precedent, and the Department's practice with respect to federal grants. Specifically, the Court stated:

> Moreover, the GEER funds given to the private schools for student tuition must be returned pro rata to the State Treasury if the student leaves the school before the school term ends. The funds then remain funds of the State to be used presumably however the General Assembly chooses. There is no evidence in the record indicating a separate fund was created for the receipt of GEER funds.

Id. at 10. The Court's characterization of GEER funds is incorrect in both law and practice.

First, federal funds do not lose their federal identity until they have been spent according to the purposes for which they were appropriated by Congress. Second, the Department's longstanding practice, as codified in federal regulations and outlined in certification agreements to receive GEER funds, is to instruct grantees to refrain from drawing down funds until the point when they have the need and capacity to disburse them. Although this Court cited a lack of evidence in the record that Governor McMaster had already created a separate fund for the receipt of GEER funds, the lack of such a separate fund

merely suggests compliance with the Department's practice and relevant regulations. In any event, the creation of a separate fund had no impact on the federal identity of the funds. Rehearing is warranted to correct these errors.

ARGUMENT

The United States requests that this Court grant rehearing to correct two sentences: "The funds then remain funds of the State to be used presumably however the General Assembly chooses. There is no evidence in the record indicating a separate fund was created for the receipt of GEER funds." Op. 10. At a minimum, the Court should strike or amend these sentences. To the extent that these misstatements formed a material part of the Court's reasoning, the United States requests that the Court reconsider its analysis and amend the opinion accordingly.

I. Federal funds retain their federal character until they are used for their appropriated purpose.

The Appropriations Clause of the Constitution governs "the disposition of money that belongs to the United States." *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 91 (1992). "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. By its plain terms, the Clause assures "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the

common good." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990). "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a).

When Congress appropriates federal funds for a specific purpose, those funds retain their federal character until that purpose has been fulfilled. This legal principle has been well established for nearly two centuries. Congress specifically appropriates funds "to certain national objects," and those federal appropriations may not "be diverted and defeated by state process or otherwise." *Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 20 (1846). Even if a federal appropriation "remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury." *Id.* at 20–21. "Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects." *Id.* at 21.

Courts uniformly have accepted and applied this legal principle in a variety of circumstances. For example,

- Federal emergency "funds allotted by the federal government for the relief of unemployment even though disbursed by state agencies were earmarked as federal funds, and if diverted from the use for which they were granted" would have "constituted a fraud upon the

government," *Madden v. United States*, 80 F.2d 672, 675 (1st Cir. 1935);

- Although "a private, nonprofit corporation and not a federal agency" received federal funds for a Headstart Program in Mississippi, the United States retained "a reversionary interest in all grant funds and in all property purchased with such funds that can no longer be used for the narrow purposes specified in the Act and regulations," *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 308–09 (5th Cir. 1979);
- In garnishment proceedings in Indiana state court, an injured employee could not obtain federal grant funds allocated to a non-profit community service organization because "federal monies are not subject to garnishment proceedings until they have been paid out for the purposes for which they were appropriated," *Palmiter v. Action, Inc.*, 733 F.2d 1244, 1247 (7th Cir. 1984); and
- The award of attorney's fees from federal grant money was improper because the funds "lapse at the end of the budget period into the United States treasury," *National Ass'n of Reg'l Med. Programs, Inc. v. Mathews*, 551 F.2d 340, 343 (D.C. Cir. 1976).

In sum, "federal grant money does not lose its federal character simply because it is administered by a nonfederal agency." *United States v. Largo*, 775 F.2d 1099, 1101 n.3 (10th Cir. 1985).

The Court misconstrued this legal principle. Federal funds appropriated by Congress as GEER funds under no circumstances become "funds of the State" for the General Assembly to use as it sees fit. Op. 10. Even if an independent or private school were to return unused GEER funds to the State, that money remains a federal fund. In that situation, the returned funds have not accomplished the purpose for which they were appropriated by Congress, and so they remain "as much the money of the United States, as if [they] had not been drawn from the treasury." *Buchanan*, 45 U.S. at 20–21.

Congress included a "Reallocation" provision in the CARES Act, § 18002(d), 134 Stat. at 565. "Each Governor shall return to the Secretary any funds received under this section that the Governor does not award within one year of receiving such funds and the Secretary shall reallocate such funds to the remaining States in accordance with subsection (b)." *Id.* This provision is consistent with well-established legal principles articulated in *Buchanan*, 45 U.S. at 20–21. A state may receive federal funds, but those funds remain federal funds even if they are not used for their appropriated purpose.

Contrary to the statement in this Court's opinion, federal GEER funds distributed to South Carolina do not become "funds of the State"

if unused or returned. Op. 10. Nor may the General Assembly repurpose those funds however it chooses. This Court should grant rehearing to correct its opinion, or at a minimum to amend the opinion to clarify that any unused or returned fund remain federal funds.

II. This Court misinterpreted the significance of a lack of a "separate fund" for the receipt of GEER funds.

On May 12, 2020, Governor McMaster signed a bill that authorized him "to receive on behalf of the State of South Carolina federal funds designated for the Coronavirus Relief Fund." Act No. 135, 2020 S.C. Acts __, Part II, Sec. 2(C). But this Court faulted Governor McMaster for failing to create "a separate fund" for the receipt of federal GEER funds. Op. 10. Again, however, the Court misinterpreted federal law.

When a state receives federal funds from the United States Department of Education, there is no requirement for the state to move all of the funds immediately into a separate account. On the contrary, the applicable regulation simply requires a state to "minimize the time between the drawdown of Federal funds from the Federal government and their disbursement for Federal program purposes." 31 C.F.R. § 205.33(a). No state should draw down federal funds without the need and capacity to disburse them. Federal agencies like the Department of Education "must limit a funds transfer to a State to the minimum amounts needed by the State and must time the disbursement to be in

accord with the actual, immediate cash requirements of the State in carrying out a Federal assistance program or project." *Id.*

To comply with this regulation, Governor McMaster should time the drawdown of GEER funds "as close as is administratively feasible to [the] State's actual cash outlay for direct program costs and the proportionate share of any allowable indirect costs." *Id.* Relevant here, the SAFE Grants program was not ready to disburse funds for immediate use, and so it was not yet "administratively feasible" for the State of South Carolina to drawdown GEER funds. *Id.* The State did not need to create a specific account for holding the GEER funds.

Moreover, governors must submit a certification and agreement to the Department of Education before a state can receive GEER funds. *See* https://oese.ed.gov/files/2020/04/GEER-Certification-and-Agreement.pdf. The governor certifies many things, including that the state will submit reports to the Department, that the state "will use its best efforts to provide grant funding on an expedited basis," and that the state has internal controls in place to ensure that funds are "used for allowable purposes and in accordance with cash management principles." *Id.* But the agreement imposes no requirement for the governor to create "a separate fund" for the receipt of GEER funds. Op. 10. This Court should grant rehearing to correct its opinion, or simply to issue an amended opinion.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing, or at a minimum amend and correct its opinion to clarify that any unused funds remain federal funds, strike the sentence regarding the lack of a separate account—or not draw any conclusions from the lack of existence of such an account—and amend its opinion to the extent that these facts had an impact on the Court's analysis and conclusions.

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