THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION

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.

RESPONDENT GOVERNOR HENRY MCMASTER'S PETITION FOR REHEARING

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Pursuant to Rules 221(a) and 240, SCACR, Respondent Governor Henry McMaster (Governor McMaster) respectfully petitions the Court to reconsider and rehear Adams v. McMaster, Op. No. 28000 (S.C. Sup. Ct. filed Oct. 7, 2020) (Shearouse Adv. Sh. No. 40 at 8–22). For the reasons set forth herein, Governor McMaster submits that the Court should grant the petition for rehearing, withdraw its previous opinion, and issue a substituted opinion dismissing Petitioners' complaint.

BACKGROUND

"The same degree of caution, which [a] court would use in declaring an act of the [General Assembly] unconstitutional, ought to be observed towards the acts of the executive." State v. Williams, 10 S.C.L. 26, 28, 1 Nott & McC. 26 (S.C. Const. App. 1817). It is well settled that "[a] legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Westvaco Corp. v. S.C. Dep't of Revenue, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995). Courts are "reluctant to declare a statute unconstitutional" and "will make every presumption in favor of finding it constitutional." Bodman v. State, 403 S.C. 60, 66, 742 S.E.2d 363, 365 (2013). To that end, "[a] possible constitutional construction must prevail over an unconstitutional interpretation." Westvaco Corp., 321 S.C. at 62, 467 S.E.2d at 741; see also Boumediene v. Bush, 553 U.S. 723, 787 (2008) ("[W]e are obligated to construe the statute to avoid [constitutional] problems if it is fairly possible to do so." (alterations in original) (internal quotation marks omitted)).

Notwithstanding two centuries of case law recognizing the appropriate deference that must be afforded to the Executive Branch, this action in the Court's original jurisdiction arose out of Petitioners Dr. Thomasena Adams, Rhonda Polin, Shaun Thacker, Orangeburg County School District, Sherry East, and the South Carolina Education Association's barebones challenge to the

Governor's lawful exercise of discretionary authority to create a need-based program that awards one-time emergency federal grant funds to allow parents to choose the education that best suits the needs of their child during a global pandemic.

After initially seeking relief in circuit court, on August 4, 2020, Petitioners filed a petition for original jurisdiction in this Court, accompanied by what "would have been included in the amended complaint" in the circuit court. Pet. at 3. In their unverified complaint, Petitioners named Governor McMaster, Palmetto Promise Institute, South Carolina Office of the Treasurer, and South Carolina Department of Administration as defendants. The amended circuit court complaint refers, without explanation, to two sections of the South Carolina Constitution—article XI, sections 3 and 4.

Expressly reserving all available defenses and without waiving the right to challenge standing and to contest the merits, Governor McMaster and the other Respondents consented to the Court hearing this matter in its original jurisdiction. On August 10, 2020, Chief Justice Beatty issued an Order for the Court, noting that Petitioners' complaint was also captioned as a motion for a preliminary injunction and directing Respondents to file any returns by the following day. Pursuant to the Court's Order, all Respondents filed returns in opposition to any further extraordinary injunctive relief. Governor McMaster's return was supported by the affidavit of Melanie Barton and extensive accompanying materials. On August 12, 2020, Petitioners filed a reply. By Order of August 19, 2020, the Court accepted this matter in its original jurisdiction, dispensed with the filing of responsive pleadings, and established an expedited briefing schedule.

Two days later, the Court—liberally construing the complaint and Petitioners' request for injunctive relief—issued an Order granting a "limited preliminary injunction" pending oral argument. Order at 1. Although the majority acknowledged Petitioners had not carried their

burden of satisfactorily demonstrating a likelihood of success on the merits, the Court noted its "firm resolve not to issue any order that would prejudice the position and rights of any party." Id. at 3. Justice Few dissented, stating he "would deny the motion for a preliminary injunction because the petitioner failed to show two of the necessary elements." Order at 5 (Few, J., dissenting). As Justice Few noted, even the majority acknowledged Petitioners had "not shown a likelihood of success on the merits." Id. Justice Few further argued that Petitioners had failed to "make any argument they will suffer irreparable harm." Id.

Petitioners then filed their opening brief on August 25, 2020. In their brief, Petitioners (1) failed to address the elements of injunctive relief, (2) never presented any argument regarding the public importance exception to standing, and (3) mentioned a request for declaratory judgment only in passing. Governor McMaster and the remaining Respondents filed briefs in response on September 2, 2020. Petitioners filed a reply brief the next day. Notably, Petitioners' reply brief addressed the public importance exception to standing in only conclusory fashion—without any citation to authority—and advanced a host of other straw-man arguments, while also emphasizing that "the present case does not pose a challenge to the CARES Act or suggest that GEER funds may not be distributed to private entities in other jurisdictions." Pet'r's Reply at 5.

The case was called for oral arguments on September 18, 2020. During oral arguments, for the first time, Petitioners addressed the public importance exception to standing. On October 7, 2020, the Court nevertheless issued an opinion finding Petitioners could bring this challenge under the public importance exception to standing. On the merits, the Court found that the federal GEER funds were "public funds" within the meaning of article XI, section 4 of the South Carolina Constitution. According to the Court, the Safe Access to Flexible Education (SAFE) Grants Program ran afoul of article XI, section 4 because it would have provided a direct benefit to

religious and private schools. The Court therefore issued a declaratory judgment finding that the SAFE Grants Program, as proposed, was unconstitutional. This petition for rehearing follows.

STANDARD

Rule 221(a), SCACR, allows a party to petition the Court for rehearing. The petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court," Rule 221(a), SCACR, so as "to aid the court in deciding correctly a case heard by it," Arnold v. Carolina Power & Light, Co., 168 S.C. 163, __, 167 S.E. 234, 238 (1933).

ARGUMENT

The Court should grant rehearing; withdraw its previous opinion; issue a substituted opinion holding the federal GEER funds at issue are not public funds within the brand of article XI, section 4 of the South Carolina Constitution; and dismiss Petitioners' complaint with prejudice. Likewise, and on a more fundamental level, the Court should grant rehearing and issue a substituted opinion dismissing the complaint because Petitioners hardly acknowledged their threshold burden of establishing standing and failed to properly plead, preserve, or otherwise prove the applicability of the public importance exception to standing.

I. The federal GEER funds do not qualify as state public funds.

In its opinion, the Court found the federal GEER funds at issue "convert" to state public funds—within the meaning of article XI, section 4 of the South Carolina Constitution—pursuant to sections 11-13-30 and 11-13-45 of the South Carolina Code of Laws. See Adams, Op. No. 28000, at 16–18. According to the Court, federal GEER funds allocated to private schools, through a third-party vendor, for student tuition "must be returned pro rata to the State Treasury if the student leaves the school before the school term ends" and "then remain funds of the State to be used presumably however the General Assembly chooses." Id. Respectfully, the Court's

conclusion in this regard misapprehends federal and state law, is at odds with the applicable fiscal procedures, and overlooks the only evidence in the record on the subject. See Barton Aff. 1–6 & Exs. A–F. Federal GEER funds are not state public funds for purposes of article XI, section 4.

A. Sections 11-13-30 and 11-13-45 do not convert the federal GEER Fund money into state public funds.

Sections 11-13-30 and 11-13-45 do not support a finding that the federal funds convert into state funds once "received in the State Treasury and distributed through it." Adams, Op. No. 28000, at 17. The Court overlooked the myriad statutes and treatment of federal funds by the General Assembly that confirm the federal funds do not lose their separate identity and distinct status simply because they pass through discrete state accounts.

First, section 11-13-30 is inapposite. See S.C. Code Ann. § 11-13-30 ("To facilitate the management, investment, and disbursement of public funds, no board, commission, agency or officer within the state government, except the State Treasurer shall be authorized to invest and deposit funds from any source, including, but not limited to, funds for which he is custodian, such funds to draw the best rate of interest obtainable."). Consistent with the title of Chapter 13, "Deposit of State Funds," that section has a limited scope. It merely authorizes the Treasurer as the sole person or agency able to invest public funds and "to draw the best rate of interest obtainable" on the funds. The circumstances in which states can draw interest on federal funds—and the calculations and conditions related to liability for the same—are provided for or governed by federal law and regulations. E.g., 31 U.S.C. § 3335 (discussing timely disbursement of federal funds); 31 C.F.R. Part 205 ("Rules and Procedures for Efficient Federal–State Funds Transfers"). See generally Barton Aff. Ex. B.

Second, the Court's reliance on section 11-13-45 overlooks both the distinctions drawn between state and federal funds in that very section and the fact that other sections of the Code

lead to a conclusion that federal funds do not convert to state funds merely because of deposit in the State treasury. The General Assembly defined "public funds" in Title 11 of the South Carolina Code, which addresses public finance. "'Public funds' means any money or property owned by the State or a political subdivision thereof, regardless of form and whether in specie or otherwise." S.C. Code Ann. § 11-35-310 (emphasis added). Section 11-35-310 contemplates public funds being raised or owned by the State. Federal funds, of course, do not fit within that definition. That is because federal funds are owned and controlled by the United States government. Cf. S.C. Const. art. X, § 11 ("The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual . . . however, the General Assembly may obligate or appropriate state funds in order to participate in federal or federally aided disaster related grant or loan programs for individuals or families, but only to the extent that such state participation is a prerequisite to federal financial assistance.").

In other words, the State does not "own" the federal GEER funds at issue here. See CARES Act § 18002(d); Buchanan v. Alexander, 45 U.S. (4 How.) 20, 20 (1846) (holding that when Congress appropriates federal funds for a specific purpose, those funds retain their federal character until that purpose has been fulfilled). 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.

The General Assembly's treatment of federal funds in the Federal Funds and Other Funds Oversight Act[1] also leads to the same conclusion. There, the General Assembly defined "federal funds" to mean "financial assistance made to a state agency by the United States Government in any form including, but not limited to, a grant, loan, subsidy, reimbursement, contract, donation,

[1] S.C. Code Ann. §§ 2-65-10 through -130.

or shared federal revenues, or noncash federal assistance in the form of equipment, buildings, and land." S.C. Code Ann. § 2-65-15. If that were not enough, the following sentence solidifies the point, providing that "[f]inancial assistance which originates with the United States Government, but which is received by a state agency from another state or local agency in any form, is considered 'federal funds.'" Id. This confirms that "federal funds," whether directly from the federal government or from a state agency, do not lose separate and distinct status simply because they pass through state accounts.

Even if all federal funds must be deposited into the state treasury under section 11-13-45, deposit alone cannot cause the federal funds to lose their separate and distinct character or otherwise "convert" all federal funds into state public funds merely upon deposit. The Court overlooked the fact that the General Assembly contemplated situations in which the federal government provides unanticipated federal funds and has authorized their expenditure by permanent statute separate and apart from the annual appropriations act. E.g., S.C. Code Ann. § 2-65-100.

More to the point, the General Assembly contemplated this precise situation and gave the Governor discretion over federal funds even if routed through the state treasury. See S.C. Code Ann. § 25-1-430(a)(8) (stating when the President declares "a major disaster or emergency . . . in this State," the Governor may "request and accept a grant by the federal government to fund financial assistance to individuals and families adversely affected by a major disaster" and "make financial grants to meet disaster-related, necessary expenses or serious needs of individuals or families adversely affected by a major disaster"); Act 135 of 2020 § 2(B) (authorizing state agencies and departments to "receive funds directly from the federal government in response to" COVID-19 and providing that "[f]unds so received shall be expended for COVID-19 preparedness

and response and in accordance with the applicable federal laws and regulations."); id. § 7 (providing that agencies may request federal and other fund authorization adjustments, which "will be approved and reported by the Executive Budget Office pursuant to Chapter 65, Title 2, the 'South Carolina Federal and Other Funds Oversight Act.'").

But the Court never mentioned subsection 25-1-430(a)(8) in the opinion or discussed its interplay with the statutes in Title 11. Cf. Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect."). Although the Court's opinion did note the existence of Act 135, it misapprehended the relevant provision, having seemingly conflated the Coronavirus Relief Fund—which is a larger, separate and distinct sub-fund under the CARES Act that is expressly referenced in section 2(C) of Act 135—with the GEER Fund, which is governed by sections 2(B) and 7 of Act 135. Adams, Op. No. 28000, at 5. While the Court acknowledged the State is in the midst of a public health emergency, the Court misapprehended the effect that has on the channels through which federal dollars flow when the State receives disaster-related relief.

The Court seemed concerned with the perceived tension between federal and state law on the expenditure of GEER funds.[2] However, there is no tension. The CARES Act, to be sure, says the money cannot go to individuals. And section 25-1-430(a)(8) gives the Governor authority both

[2] As a threshold matter, Petitioners did not allege, and even expressly waived, any challenge to the propriety of the SAFE Grants Program under the CARES Act. Pet'rs' Reply Br. at 5. After all, the U.S. Department of Education sent a letter to the Governor applauding his use of GEER funds for the SAFE Grants Program. To the extent the Court felt it could nevertheless reach this issue because it was raised in amicus briefs, respectfully, that is not the case. It is well-settled that an amicus brief is "limited to argument of the issues on appeal as presented by the parties." Rule 213, SCACR. Petitioners could not renege on their waiver of this issue for the first time at oral arguments, particularly where, as here, they never purported to raise such a claim in their complaint.

to "request and accept a grant by the federal government," which would be "subject to terms and conditions as may be imposed upon the grant," and to "make financial grants to meet disaster-related, necessary expenses or serious needs of individuals or families adversely affected by a major disaster." S.C. Code Ann. § 25-1-430(a)(8)(i) & (iii). That is what the Governor has proposed with the SAFE Grants Program. Although article XI, section 4 prohibits a direct benefit to private schools—which are education-related entities under the CARES Act to whom the funds must be provided—the third-party vendor and independent portal alleviates any potential tension because the federal funds ultimately arrive at the school only through the direction of individuals. Although Petitioners do not dispute that such a process and program would be permissible in other states under the CARES Act, to the extent the Court views the SAFE Grants Program as presenting a close call, it is a far cry from unconstitutional beyond a reasonable doubt. Cf. Williams, 10 S.C.L. at 28; Westvaco Corp., 321 S.C. at 62, 467 S.E.2d at 741. That was Petitioners' burden here. Yet the Court's opinion did not hold Petitioners to their burdens of proof or persuasion or otherwise account for either the presumption of constitutionality or the canon of constitutional avoidance. See Boumediene, 553 U.S. at 787.

In any event, the distinct nature of federal funds as separate from state public funds is further evident from, and supported by, the General Assembly's treatment of federal funds in the annual appropriations act. When the General Assembly appropriates federal funds in the appropriations act, it does so under a heading of "federal funds" and in accordance with the federal conditions attached to the use of such funds. Such treatment establishes that federal funds remain separate and distinct from tax revenue and other state public money on deposit in, and appropriated from, the general fund. If federal funds converted into state public funds merely by deposit with the Treasurer, then the General Assembly would simply include those federal amounts in the

general fund allocations to each entity in the appropriations act, and no federal funds sections would be needed. That does not happen. Separate and apart from the accounting requirements and conditions imposed by federal law and regulations, if federal funds were simply commingled with state funds and credited to, and deposited in, the State's general fund upon receipt, it would fundamentally change the State budget and annual appropriations process and have significant consequences for general and capital reserve funds.

Likewise, section 11-13-45 actually supports a finding that the conditions imposed by the federal statute control disposition of the funds and even how those funds must be deposited. That section provides, in relevant part, that "[a]ll federal funds received must be deposited in the State Treasury, if not in conflict with federal regulations, and withdrawn from the State Treasury as needed, in the same manner as that provided for the disbursement of state funds." S.C. Code Ann. § 11-13-45 (emphasis added). Here, the CARES Act authorized the Governor—and only the Governor—to request and receive the federal GEER funds. See CARES Act § 18002. It did not authorize any state legislature to request or receive the funds. Cf. Edwards v. State, 383 S.C. 82, 92–93, 678 S.E.2d 412, 418 (2009). Under section 11-13-45, the federal regulation of the federal funds controls.

The opinion attempts to avoid this rule by finding "[t]here is no evidence in the record indicating a separate fund was created for the receipt of the GEER funds." See Adams, Op. No. 28000, at 18.[3] However, that misapprehends the posture of this case and seems to penalize the Governor for not setting up a GEER funds account during pending litigation. As noted at argument, the GEER funds remain on deposit with the federal government. The Governor has not drawn down the federal funds for use in the SAFE Grants Program. The Governor, as authorized

[3] To the extent this is referencing the funds addressed in Act 135 of 2020, the Act further supports the Governor's position. See supra at pp. 8–9; Act 135 §§ 2(B) & 7.

by the federal regulation here, would set up such an account through the Executive Budget Office to administer the program upon conclusion of the litigation. As the U.S. Department of Justice thoroughly explained in its proposed amicus brief, the Governor must follow a specific process for receiving and spending the funds. See DOJ Amicus Br. at 3–9.

But this is also classic burden-shifting. Petitioners certainly never met their burden of demonstrating where the funds would go, and the Court cannot simply make assumptions on that front based upon the conclusory—and incorrect—assertions of Petitioners' counsel. See Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (noting the argument of counsel is not evidence and, standing alone, provides no support for a finding of fact).

Thus, the opinion overlooked the fact that state law confirms the federal funds do not lose separate and distinct status simply because they pass through state accounts or control.[4] As

[4] Other jurisdictions are in accord. See, e.g., Campbell v. State Rd. & Tollway Auth., 583 S.E.2d 32, 37 (Ga. 2003) ("Unlike its restrictions on state funds, however, the Georgia Constitution does not require that federal funds be deposited into the general fund."); City of Chicago v. Holland, 206 Ill. 2d 480, 494–95 (Ill. 2003) ("When grants are made by the federal government for the City's airports, the state merely serves as a conduit for the grants' disbursement. These are federal monies. That they pass through the state's treasury prior to disbursement to the City's airports does not convert them into public funds of the state."); Comm. for Educ. Equal. v. State, 967 S.W.2d 62, 64–65 (Mo. 1998) ("The idea that the state is more like a custodian of federal funds than their owner is entirely consistent with the constitutional provision authorizing receipt of federal moneys: 'Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States.' It is no longer the case, if, indeed, it ever was, that 'state revenue' merely means all moneys deposited into the state treasury. Federal funds, which, when received into the treasury, do not become state funds and are held by the state subject to the dictates of federal law, are not 'state revenue' within the meaning of article IX, section 3(b)."); Colo. Gen. Assembly v. Lamm, 738 P.2d 1156, 1170 (Colo. 1987) (holding "that 'unmatched' federal funds are custodial funds, and thus cannot be subject to legislative appropriation"); id. at 1170 n.13 ("The governor argues that federal funds are custodial funds that must be spent as the federal government directs because once the state applies for a grant and receives the funds it must comply with all federal requirements applicable to the program. The remedy for failure to comply with federal grant conditions is termination of the grant. Federal funds misused by a grantee may be recoverable retroactively. The United States retains a property interest in block grant funds appropriated to a state after the state has distributed the funds to a nonprofit community service organization. Recipients of federal grants remain accountable to expend the grants for the purposes designated by congress even though grantees may have wide discretion to choose among specific programs that serve the federal objective. The governor asserts that, because congress has appropriated federal block grants for the ultimate benefit not of the state but of identified third parties, the decision in MacManus that federal funds are custodial and not subject to legislative appropriation should apply to block grants." (internal citations omitted)); In re Proposal C., 185

demonstrated above, the General Assembly did not intend for federal funds convert to state public funds merely upon receipt by the State. The Court should therefore grant rehearing and issue an opinion finding the federal GEER funds are not state public funds under article XI, section 4 of the South Carolina Constitution.

B. GEER funds cannot revert to the state treasury and become state funds.

The Court next found that if a SAFE Grant recipient student leaves the private school the funds "must be returned pro rata to the State Treasury," and the "funds remain funds of the State." See Op. p. 18. This conclusion contradicts a direct mandate from Congress on such returned funds. What is more, it is internally inconsistent with the Court's own previous findings in the opinion. Indeed, the Court recognized in the Facts section that "[a]ny funds not awarded within the one-year period must be returned to the Department of Education for reallocation to other states." Adams, Op. No. 28000, at 12 (citing CARES Act § 18002(d)).

The CARES Act imposed a use-it-or-lose-it deadline on states to access and expend these GEER block grant funds. See CARES Act § 18002(d). In so doing, Congress ensured these one-time grants would be temporally limited. Id. Any funds not expended by the State would be returned to the federal government. Id. Here, should a student receive a SAFE Grant, it would have to be fully expended for the benefit of the student in accordance with the requirements of the GEER Fund and the SAFE Grants Program. And if a student withdraws or leaves the school beforehand, the private school cannot keep the federal grant funds. Rather, the school must return

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N.W.2d 9, 23–24 (Mich. 1971) (holding "the federal funds do not become 'public monies' when they are transmitted from the Office of Education in the Department of Health, Education and Welfare through the State Board of Education to the public school district. Instead the federal funds are impressed with a trust and must be used by state agencies in accordance with federal guidelines and for the purposes for which the funds were granted. Other courts when confronted with the question of the status of federal grants in aid of education to the states have determined that a trust arose with the federal funds serving as the res and the state agency, which administers the program, serving as trustee.").

the money to the SAFE Grants Program, at which point the funds could be utilized for the benefit of another family or student, reallocated for another purpose allowed by the CARES Act, or returned to the federal government—through the State—along with any other unused GEER funds. The CARES Act, however, does not contain any provision that would allow a state to retain returned or unexpended emergency educational funds.

Unused GEER funds cannot revert to the state treasury to be appropriated by the General Assembly. Governor McMaster trusts the U.S. Department of Education would be quite concerned with a proposition that the State could repurpose federal money in this manner. Because this finding conflicts with federal law, see 31 U.S.C. § 3335, and directly contradicts the CARES Act's provisions recognized elsewhere in the Court's opinion, see CARES Act § 18002(d), the Court cannot use it to support a finding that the GEER funds would be automatically converted to state public funds. The Court should thus grant rehearing and issue a substituted opinion finding the GEER funds are not public funds within the meaning of article XI, section 4 of the South Carolina Constitution.

C. The Court's decision is at odds with Act 154.

Last, the Court overlooked the fact that its holding on the "public funds" portion of the article XI, section 4 analysis is at odds with the General Assembly's contemporaneous construction and interpretation of that same provision, as reflected in recent legislation related to the allocation of other federal emergency funds under the CARES Act.

For example, prior to and after the Court heard argument in this case, the General Assembly considered and concluded, respectively, that that the South Carolina Constitution did not prevent the allocation of emergency federal funds directly to private and religious institutions for the

reimbursement of expenses. See 2020 S.C. Act No. 154. The relevant portions of the Act provide as follows:

> SECTION 3. State agencies and higher education institutions are authorized to expend federal funds in the Coronavirus Relief Fund if the expenditure is in compliance with the CARES Act. The Executive Budget Office is authorized to reimburse from the Coronavirus Relief Fund, up to the amounts listed below in each category, expenditures compliant with the CARES Act by the following sectors: state agencies, institutions of higher learning, counties, municipalities, special purpose districts, public and private hospitals, nonprofit and minority and small businesses.
>
> . . . .
>
> (G) Department of Administration
> State, Local Government, Independent College and University Expenditures - $115,000,000
>
> . . . .
>
> SECTION 10.
>
> (A) . . . .
>
> (2) Independent colleges and universities that are member institutions of the South Carolina Independent Colleges and Universities nonprofit corporation are authorized to apply for reimbursement of expenditures that were necessary for the response to the COVID-19 public health emergency incurred, or expected to be incurred, between March 1, 2020, and December 30, 2020. Bob Jones University and Clinton College are also authorized to apply for reimbursement of expenditures that were necessary for the response to the COVID-19 public health emergency that were incurred, or expected to be incurred, between March 1, 2020, and December 30, 2020.
>
> (3) All applications for reimbursement shall be submitted to the SC CARES Grant Management Program on or before November 15, 2020.
>
> (B) If the Executive Budget Office determines that the amount of eligible expenditures through December 30, 2020, exceeds the authorizations provided for in Act 142 of 2020 and Section 3(G) of this act, then the Executive Budget Office is authorized to prioritize the remaining reimbursements for expenses incurred as a result of COVID-19 in the following order:
>
> (1) institutions of higher learning, including member institutions of the South Carolina Independent Colleges and Universities nonprofit corporation and Bob Jones University and Clinton College, for expenses related to providing virtual and in-

> person educational services for students enrolled for the fall 2020 semester;
> . . . .

Id. §§ 3(G), 10(A)(2)–(3), (B)(1). But the Court held that "[t]he direct payment of funds to the private schools is contrary to the framers' intention not to grant public funds 'outrightly' to such institutions." Adams, Op. No. 28000, at 20. The Governor respectfully disagrees with the Court's historical analysis of this constitutional provision. Even when putting that aside, the Court erred in overlooking—and not acknowledging—the deference due to a coequal branch of government. Cf. Williams, 10 S.C.L. at 28; Westvaco Corp., 321 S.C. at 62, 467 S.E.2d at 741; Bodman, 403 S.C. at 66, 742 S.E.2d at 365. Two of the three branches of state government—each of which are entitled to a presumption of acting in accordance with the constitution—have now concluded that emergency federal funds may be allocated directly or indirectly to, or used by, private and religious educational institutions. By preemptively striking down the Governor's discretionary decision in developing the SAFE Grants Program, the Court either overlooked or misunderstood the consequences of its action that Governor McMaster foreshadowed in his brief. See Gov. McMaster's Br. at 43–45.

To be sure, only days after the Court's opinion came down, the executive director of the Department of Administration faced the proverbial Catch-22 situation: (1) ignore this Court's decision to comply with the General Assembly's directives, or (2) adhere to the Court's interpretation of the law and withhold the money against the wishes of the General Assembly. The executive director chose the latter course of action, deciding to "refrain from disbursing money to independent colleges and universities under the Act unless the Supreme Court provides further direction that would change the analysis." Ex. A, Ltr. from Marcia Adams to Gov. Henry McMaster at 2 (Oct. 13, 2020).

Although Petitioners' counsel decries this as political games, that is unfounded. The Governor raised this concern on day one when the case began in Orangeburg, arguing a potential ruling could affect the ability of independent colleges and universities—including historically black colleges and universities—to obtain direct federal funding. Petitioners pressed forward anyway and trumpeted their victory without any appreciation for the consequences. But under this Court's ruling, the State cannot send any CARES Act funds directly to private institutions, including independent colleges and universities. In light of this Court's decision in Adams, the executive director of the Department of Administration has acknowledged her responsibility not to distribute this money as directed by the General Assembly in Act 154 due to this Court's subsequent and intervening ruling, pending further clarification from the Court. See O'Shields v. Caldwell, 207 S.C. 194, 219–20, 35 S.E.2d 184, 193–94 (1945).

In any event, the Court's action on Petitioners' complaint has now crippled the ability of independent colleges and universities to receive federal funds to which they are otherwise entitled under the law.[5] According to Representative G. Murrell Smith, Jr., Chairman of the House Ways and Means Committee, this could cause these institutions to raise tuition costs in the middle of a

[5] Imposing such a limitation may raise equal protection and First Amendment concerns, among others, if private and religious educational institutions are prohibited from competing on equal terms for federal grant funds that are otherwise available for nonprofit entities, to include those provided elsewhere under Act 154. E.g., Act 154 § 6(A) ("establish[ing] through the SC CARES Grant Management Program a nonprofit entity reimbursement grant program"). Moreover, from a broader and forward-looking perspective, as the federal government shifts more authority to states—as well as local governments—to implement and distribute federal funds under the framework of "fiscal federalism," an interpretation of our state constitution that would exclude private and religious educational institutions from relief to which they would otherwise be entitled could have significant legal and practical effects. See generally *Fiscal Federalism: Theory and Practice*, CONGRESSIONAL RESEARCH SERVICE (June 3, 2020) ("General interest in fiscal federalism has increased following the economic downturn accompanying the Coronavirus Disease 2019 (COVID-19) crisis. Early evidence suggests there has been a significant shift in how fiscal responsibilities are divvied up among the federal government, and state and local governments. This shift has included $150 billion in direct federal assistance to state and local governments and the Federal Reserve's support of up to $500 billion in state and local debt issuances."), available at https://crsreports.congress.gov/product/pdf/R/R46382.

pandemic. See Avery G. Wilks, Coronavirus Aid for South Carolina's Private Colleges in Jeopardy After Court Ruling, POST & COURIER (Oct. 14, 2020), https://www.postandcourier.com/columbia/coronavirus-aid-for-south-carolinas-private-colleges-in-jeopardy-after-court-ruling/article_22f1f4fc-0e22-11eb-98dd-f30f10e86234.html. And it could ultimately put other important programs on the chopping block.

Against this backdrop, the Court respectfully misunderstood or overlooked the appropriate standards and levels of deference afforded to the actions of two coequal branches of government. As a result, its conclusion on what constitutes state public funds has far-reaching consequences that have already begun to surface, and will continue to do so, creating major problems for independent schools in this State.[6] Thus, the Court should grant rehearing and issue a new opinion finding federal block grant funds are not public funds within the meaning of article XI, section 4.

II. Petitioners failed to carry their burden of proof on standing, and this Court cannot invoke the public importance exception without Petitioners first properly pleading and proving its applicability.

Throughout this litigation, Petitioners flippantly disregarded the most fundamental, threshold inquiry in any given case—whether they have standing to pursue their claims and seek the requested relief. Although the merits of this case are heavy, no case warrants abdicating this Court's well-settled principles of standing and preservation. Adopting a selective-enforcement approach to these doctrines would inject a significant degree of uncertainty into ordinary litigation, making it difficult for counsel to provide meaningful advice to their clients. In the present case, such an approach also raises distinct separation-of-powers concerns, having complicated efforts

[6] The "far-reaching negative consequences" here stem from the "impact" of the Court clearing Petitioners' significant hurdles to reach the merits and issue a declaratory judgment. S.C. Pub. Interest Found. v. S.C. Dep't of Transp., 421 S.C. 110, 125 n.8, 804 S.E.2d 854, 862 n.8 (2017) (Kittredge, J., dissenting). By making this argument, the Governor is not giving any credence to Petitioners' belated argument on the public importance exception. See id.

by both the Governor and the General Assembly to make time-sensitive policy determinations—based on substantially similar contemporaneous constructions of the constitution—regarding the use of federal funds in the midst of an emergency.

As the court of appeals has recognized, the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case; therefore, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Beaufort Cty. v. Trask, 349 S.C. 522, 529 n.14, 563 S.E.2d 660, 664 n.14 (Ct. App. 2002) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)). Petitioners wholly failed to shoulder their burden at every step of the way. A review of their briefs confirms as much.

In their opening brief, Petitioners made the following argument on standing:

> Respondents contend that this Court should reject the present challenge to the Governor's exercise of authority on standing grounds. This dangerous position would immunize any constitutional challenge to an abuse of power affecting all citizens, because none would have a particularized interest. *See, Breeden v. S.C. Democratic Executive Committee*, 226 S.C. 204, 208, 84 S.E. 2d 723, 725 (1954) (finding standing on public interest grounds). When the Governor took on the solemn duties of his office, he pledged to "discharge the duties thereof, preserve, protect and defend the Constitution of this State and the United States." This oath coincides with his constitutional duty to faithfully execute the laws of this State. S.C. Const. art. IV, §15. To suggest that the Petitioners in this proceeding cannot come before the Court to demand that the Governor comply with his oath and confine his conduct as prescribed by our Constitution evidences a disregard for the rights of citizens and disrespect for the checks and balances this Court must protect. *See, e.g. State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (S.C. 2002) (Holding that the Governor violated statute governing transfer of funds between state colleges and universities when State statute evidenced a clear legislative intent to ensure funds were expended on the purpose for which they were appropriated).
>
> Thomas Jefferson warned the drafters of the Kentucky Resolutions of 1798 about the perils of unchecked executive powers,

> writing "in questions of power then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution." Consistent with this warning, our Governor does not enjoy unbridled power. Instead, the rights of the people are supreme. S.C. Const. art. I, § 1. Our Constitution offers the further protection that the authority granted to the three branches shall be "forever separate and distinct." S.C. Const. art. I, § 8. Accordingly, where the people have spoken through the Constitution to empower the legislative branch with allocating public funds and to bar direct benefit to private schools, it is the duty of this Court to prevent the Governor from conduct inconsistent with these express provisions. *See Hampton v. Haley*, 403 S.C. 395 (2013) (Noting that the executive branch does not have the authority to act in a legislative capacity).

Pet'rs' Br. at 11–12 (mistakes in original).[7] That was it.

Petitioners did not once invoke the public importance exception to standing in the statement of the issues, the heading of this section, or in the body of the arguments in their brief—much less cite or discuss any case law addressing the doctrine. Cf. Rule 201(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Rule

[7] This Court, however, did not find "standing on public interest grounds" in Breeden as Petitioners alleged in their initial brief. Pet'rs' Br. at 11. In fact, the word "standing" does not appear once in Breeden. Although this representation to the Court is concerning in and of itself, the Court nevertheless cited Breeden in support of its public importance determination. In doing so, the Court contravened its own precedent on this subject from only six years ago:

> While the Court may exercise original jurisdiction under Rule 245, SCACR, "[i]f the public interest is involved," the "public interest" standard of Rule 245 is not synonymous with the public importance necessary for the public importance exception to standing to apply. Rule 245 is concerned with whether a case should be resolved by this Court in the first instance because of the public interest involved and the need for prompt resolution, whereas the public importance exception is concerned with whether a case is of such public importance that the requirement of standing should be waived. Thus, because the two rules aim to answer different questions—whether the public interest requires expeditious resolution of a case versus whether the public interest requires resolution of a dispute for future guidance despite the lack of standing—the grant of the petition for original jurisdiction has no effect upon whether the public importance exception applies.

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014). Respectfully, the Court conflated the two concepts here. The Court also resolved the "future guidance" prong on a ground Petitioners did not argue.

208(b)(1)(E), SCACR (providing that, in the argument section of the brief, "[a]t the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority."). Thus, Governor McMaster invoked the longstanding rule in South Carolina that the issue was abandoned. Gov. McMaster's Br. at 15 n.7.

And when the Governor pushed back on Petitioners' puzzling, legally unsupported, and novel approach to South Carolina's standing doctrine, Petitioners simply doubled down. Under a heading titled, "Petitioners reassert their standing to challenge governmental action," with a subheading of "Constitutional Standing: Respondents and their amici ignore standing conferred by S.C. Const. art. I § 1," Petitioners argued, "Respondents equate standing with a financial stake. This intentionally narrow focus is necessary to avoid judicial review and reveals a misunderstanding or intentional disregard for the role of this Court in resolving constitutional questions." Pet'rs' Reply Br. at 3. Not so. If anyone misunderstood or intentionally disregarded the pertinent law, it was Petitioners. In any event, they further contended that "[r]estricting standing to potential beneficiaries or a fellow office holder would introduce judicial gate-keepers inconsistent with the rights reserved to the people and this Court's established practice of accepting and ruling upon constitutional challenges to executive authority brought by private citizens." Id. Again, they missed the point.

Once Petitioners finally got around to addressing the public importance exception, here is what they said:

> Respondents argue that the present case addresses the narrowest of issues and will have no impact beyond an isolated response to an unprecedented pandemic. This position is difficult to reconcile with the Governor's own stated objective that his grant program will open doors for legislative funding of private education and with the arguments advanced that our Article XI § 4 conflicts with the federal Establishment Clause. Respondents and their amici further argue that our State has already adopted programs that could

> face constitutional challenges should the Court accept this case and rule in Petitioners' favor. This position also contradicts their "no guidance required" argument. More importantly, as addressed in Petitioners' initial brief, the present case affords the Court the opportunity, should it so choose, to inform the people how the current language of Article XI § 4 applies and present the populace an opportunity to amend further if there is a desire to alter its application.
>
> Finally, Respondents cannot reasonably guarantee that South Carolina will never again receive emergency educational funding opportunities for present or future occurrences. Whether or not a reoccurrence arises, this case presents an immediate challenge to the stated will of South Carolinians. Respondents and their amici seek to avoid this clear and present question, skirt an absolute ban on directing any public money to private schools, and advance a political agenda that has thus far been legislatively unsuccessful.

Id. at 4–5 (mistakes in original) (footnotes omitted). In a footnote, they argued, "As outlined in Petitioner's initial brief, the Governor stated that he was aware that the SAFE Grants program would benefit private schools and that it was intended to act as a pilot program for future funding initiatives. This objective has been amplified by the organizations filing amicus briefs on behalf of Respondents." Id. at 4 n.2.

Petitioners cited no authority in support of their public importance exception argument that was raised for the first time in their reply brief. Nor did they cite any portions of the record supporting their mischaracterizations of the Governor's statements. Respectfully, these omissions should have been fatal. After all, for decades, our appellate courts have repeatedly held that "[a]n issue is deemed abandoned if the argument in the brief is only conclusory." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000); see also Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). And this Court requires that "[t]he brief shall contain references to the transcript, pleadings, orders,

exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged." Rule 208(b)(4), SCACR. Our courts also have an unbroken record of finding one "may not use the reply brief to argue issues not argued in his brief in chief." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993).

More importantly, our courts have held firm to the concept that a party cannot raise an issue for the first time at oral arguments. See, e.g., State v. Nelson, 336 S.C. 186, 189, 519 S.E.2d 786, 789 (1999) ("It is axiomatic that oral argument may not be used as a vehicle to argue issues not argued in the appellate brief"); State ex rel. Carter v. State, 325 S.C. 204, 208 n.1, 481 S.E.2d 429, 430 n.1 (1997) (providing the appellate court would not entertain an argument raised for the first time at oral argument); State v. Spears, 393 S.C. 466, 486, 713 S.E.2d 324, 334 (Ct. App. 2011) (declining to address an argument raised for the first time during oral argument and not addressed in the brief); Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use . . . oral argument . . . as a vehicle to argue issues not argued in the appellant's brief.").

In an effort to limit evolving positions and avoid surprises at oral argument, this Court has outlined the process by which a party may properly bring to the Court's attention pertinent authorities that were not cited in their briefs. See Rule 208(b)(7), SCACR ("When pertinent and significant authorities come to the attention of a party after his initial brief(s) has been served and filed, the party shall promptly advise the clerk of the appellate court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to an issue to which the citations pertain, but the letter shall, without argument, state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited."). Yet, having missed the ball on the threshold question of standing when it should have been raised,

Petitioners attempted to cure that fatal defect at oral arguments. After abandoning their previously proffered "everybody has it" theory on standing, Petitioners proceeded to rely upon an argument and authority that no party had addressed before stepping foot in the courtroom. Cf. J.R. v. Walgreens Boots All., Inc., No. 2:19-cv-00446-DCN, 2020 WL 3620025, at *4 n.2 (D.S.C. July 2, 2020) ("In local parlance, this strategy would be called 'sandbagging.'"). The Court should not condone it, particularly where, as here, the Court is called upon to review the actions of a coequal branch of government. Governor McMaster spent a great deal of time and effort responding to Petitioners' ever-evolving arguments. As such, it is troubling that Petitioners prevailed on an issue they so clearly failed to argue or prove, despite having the burden to do so. Respectfully, the Court cannot and should not carry a failed argument across the finish line.

The Court has outlined only three methods by which a party may obtain standing. See ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (stating a party may acquire standing (1) via statute, (2) "through the rubric of 'constitutional standing,'" or (3) pursuant to "the 'public importance' exception"). To not address a single one of them in the opening brief—when Petitioners were repeatedly put on notice that this was very much at issue—is indefensible. The standing arguments Petitioners put forward in their briefs found no support in the law, and the Governor respectfully submits the Court should not have turned a blind eye to this failure. It is beyond dispute that (1) Petitioners failed to raise the public importance exception to standing in their initial brief; (2) they addressed public importance in only a conclusory manner, without any citation to authority, as a secondary argument in their reply brief; and (3) then, for whatever reason, Petitioners finally decided to argue the issue afresh for the first time during oral arguments, citing new authorities they did not supplement for the benefit of the parties and the Court. Respectfully, that is not sufficient.

As Justice Kittredge noted during oral arguments, "[o]ne of the hardest obstacles" Petitioners faced was "getting out of the batter's box on standing," and yet "the standing issue was addressed only in a conclusory manner in the brief." See Archived Oral Argument at 9:20-9:36. The Governor agrees. However, not only did Petitioners "get[] out of the batter's box on standing," they were also able to pick a "pinch hitter" out of the stands and reframe the strike zone. Justice Kittredge further observed that "our standing jurisprudence has just been watered down" and expressed concerns that "if any citizen can come forward when he or she believes that a member of the government has exercised power in an unlawful way, then we really don't have a standing principle. Help me understand what a framework would be that we just don't throw standing out completely in South Carolina." Unfortunately, the Court arguably did just that in this case. And in the process, the Court seemingly put preservation to bed, too, disbanding with the need for parties to frame the issues for the Court.

> Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them.

Bodman v. State, 403 S.C. 60, 68–69, 742 S.E.2d 363, 367 (2011) (quoting Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 145–46 (2011)). For that reason, "courts must be more careful to insist on the formal rules of standing, not less so." Winn, 563 U.S. at 146. After all, "[s]tanding to sue is a fundamental requirement to instituting an action." Joytime Distribs. & Amusement Co., Inc. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999).

Our rules of standing—even the exception—must mean something. By invoking the public importance exception, despite Petitioners' failure to properly raise it or carry their burden of persuasion, the Court allowed the exception to "swallow the rule." Jowers v. S.C. Dep't Health &

Envtl. Control, 423 S.C. 343, 360, 815 S.E.2d 446, 455 (2018) (quoting S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013)). "To accord [Petitioners] standing in this case is tantamount to conferring standing on every citizen in every case where improper governmental activity is alleged." S.C. Pub. Interest Found. v. S.C. Dep't of Transp., 421 S.C. 110, 125, 804 S.E.2d 854, 862 (2017) (Kittredge, J., dissenting). To be sure, it is tough to envision who would not meet the exception under the Court's new test.

Respectfully, courts should not invoke the public importance exception sua sponte to address policy matters. Turning a blind eye to a party's failure to plead or preserve standing to reach a political issue sets a dangerous precedent. See Watson v. Underwood, 407 S.C. 443, 452, 756 S.E.2d 155, 160 (Ct. App. 2014) (reciting the adage that "appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." (quoting State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991))); see also Walker v. Prince George's Cty., Md., 575 F.3d 426, 429 (4th Cir. 2009) (O'Connor, J.) ("Judges are not like pigs, hunting for truffles buried in briefs." (quoting United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991))). Accordingly, the Governor submits that the Court should revisit this fundamental, threshold issue and not overlook or set aside the foregoing principles to excuse Petitioners' missteps.[8]

Petitioners' miscalculation on standing matters too. Indeed, by failing as a matter of law to properly raise or prove the public importance exception to standing, Petitioners could not present a justiciable controversy on which the Court could issue a declaratory judgment.

> While it has been held that the declaratory judgment statute should be liberally construed to accomplish its intended purpose of

[8] This was not the only issue Petitioners failed to present properly or the only burden they were able to "whistle by" in their briefs. In granting a temporary injunction, the Court seemingly set aside longstanding precedent to: (1) forgive Petitioners' failure to demonstrate a likelihood of success on the merits, (2) excuse their failure to demonstrate irreparable harm personal to them, and (3) not require a bond.

> affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships without awaiting a violation of the rights or a disturbance of the relationships, it is uniformly held that the Declaratory Judgments Act does not require the court to give a purely advisory opinion as to the issues sought to be raised.

Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970). The Court's decision did not settle the "legal rights and relationships" of the parties because Petitioners have no legally protected right to or interest in any GEER Fund monies. Nor did they have standing to challenge the Governor's action. The Court's declaratory judgment was therefore an advisory opinion, the consequences of which extend beyond the proposed SAFE Grants Program.

The rules governing practice before this Court and the requirements for standing are fundamental precepts in the law. By giving Petitioners a pass on both to reach the merits of this dispute, the Court implicitly raised separation-of-powers concerns not only as to the Governor but also with respect to the other politically accountable coequal branch of Government—the Legislative Department. In addition to limiting the prerogative power of the Governor, the Court's declaratory judgment also pierced the presumption of constitutionality afforded to the actions of the General Assembly by calling into question Act 154's allocation of CARES Act funds to independent colleges and universities. As noted above, the General Assembly's nearly unanimous action was necessarily premised on a similar determination that federal grant funds do not amount to "public funds" under the state constitution. Accordingly, the Court should grant rehearing and issue an opinion dismissing the complaint for lack of standing.

Turning to the merits, by allowing its opinion to stand as issued, the Court would risk preservation and standing being relegated from fundamental precepts to mere apparitions, inviting anyone to challenge governmental action merely by alleging a constitutional violation, even if the party fails to properly plead and prove the public importance exception to standing. Such a result

would be at odds with the Court's prior caution that "[s]tanding cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). Unfortunately, one can expect future litigants to rely on this Court's recent opinion as establishing a new framework—one which will be difficult to apply and will make it difficult to govern.

It is also worth noting that the Court's standing determination rested on its subsequent ruling on "public funds," indicating that this latter holding opened the door for the entire opinion. See Adams, Op. No. 28000, at 15 (holding that "[a] resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds, a prompt decision is necessary, and it is likely the situation will occur in the future if and when Congress approves additional education funding in response to the continued COVID-19 pandemic"). As noted above, unanticipated emergency federal grant funds are not public funds for state constitutional purposes. See Hayes v. Orleans Par. Sch. Bd., 256 La. 677, 684–85, 237 So. 2d 681, 684 (1970) ("Massive infusions of federal funds, resulting in a proliferation of special, short-term programs, were never contemplated.").

And the Court should not countenance parties filing suit—whether under the public importance exception or otherwise—to challenge the expenditure of unmatched federal block grant funds. See, e.g., Broxton v. Siegelman, 861 So. 2d 376, 385 (Ala. 2003) (holding the "liability to replenish the public treasury through the payment of taxes [] gives a plaintiff in a taxpayers action standing. In this case, it is clear that federal funds were used to replenish the state funds that were temporarily used; because the taxpayer will not face the liability of replenishing the state funds, the trial court did not err in holding that Broxton does not have standing to sue. Broxton also

argues that state funds are used, because at the moment of the reimbursement, the federal funds become state funds, and the property of the state. Again, this argument must fail, because as stated above, it is the liability to replenish public funds that gives a taxpayer standing to sue, and there is no question that here there is no liability to replenish state funds."). After all, "[t]he remedy for failure to comply with federal grant conditions is termination of the grant. Federal funds misused by a grantee may be recoverable retroactively." Lamm, 738 P.2d at 1170 n.13; see Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981) ("In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State."). Accordingly, because the Court overlooked Petitioners' failure to properly invoke the public importance exception and misunderstood the merits underpinning its findings on the issue, the Court should grant rehearing, issue a substituted opinion finding Petitioners lack standing to bring this action, and dismiss their complaint.

CONCLUSION

In sum, the Court should grant rehearing and dismiss this action for want of standing because Petitioners failed to properly plead, preserve, or prove the public importance exception. In the alternative, this Court should grant rehearing; issue a substituted opinion finding the federal GEER funds are not public funds under article XI, section 4 of the South Carolina Constitution; and dismiss Petitioners' complaint with prejudice.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

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Counsel for Respondent Governor Henry McMaster

October 22, 2020
Columbia, South Carolina

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

v.

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

Appellate Case No. 2020-001069

Exhibit A

Letter from Marcia Adams, Executive Director of South Carolina Department of Administration, to Governor Henry McMaster

RESPONDENT GOVERNOR HENRY MCMASTER'S PETITION FOR REHEARING

admin
THE SOUTH CAROLINA
DEPARTMENT of ADMINISTRATION

Henry McMaster, *Governor*
Marcia S. Adams, *Executive Director*

OFFICE of THE EXECUTIVE DIRECTOR

October 13, 2020

The Honorable Henry D. McMaster
Governor
State of South Carolina
State House, First Floor
Columbia, S.C. 29201

Dear Governor McMaster:

I am writing to discuss the impact of the recent decision of the South Carolina Supreme Court in *Adams, et al. v. McMaster, et al.*, App. Case No. 2020-001069 (*Adams*), on the ability of the South Carolina Department of Administration ("Admin) to disburse money under Section 3(G) of Act No. 154 of 2020 ("Act 154") to independent colleges and universities. We have reviewed this matter internally and received an opinion from outside counsel concerning the effect of *Adams* on Act 154. The ultimate conclusion of our review and the opinion of outside counsel is that Admin must refrain from disbursing money to independent colleges and universities under the Act without further judicial direction. As set out more fully below, our conclusion is based on the Supreme Court's determination in *Adams'* that funds received by the State through the "Coronavirus Aid, Relief, and Economic Security Act" (the "CARES Act") are public funds, and that providing CARES Act funds directly to private or religious educational institutions violates the South Carolina Constitution.

Act 154 authorizes expenditure of federal funds received by the State of South Carolina under the CARES Act. Section 3(G) of the Act states as follows:

> SECTION 3. State agencies and higher education institutions are authorized to expend federal funds in the Coronavirus Relief Fund if the expenditure is in compliance with the CARES Act. The Executive Budget Office is authorized to reimburse from the Coronavirus Relief Fund, up to the amounts listed below in each category, expenditures compliant with the CARES Act by the following sectors: state agencies, institutions of higher learning, counties, municipalities, special purpose districts, public and private hospitals, nonprofit and minority and small businesses.
>
> . . .
>
> (G) State, Local Government, Independent College and University Expenditures – $115,000,000

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Section 10(2) of Act 154 provides:

Independent colleges and universities that are member institutions of the South Carolina Independent Colleges and Universities nonprofit corporation are authorized to apply for reimbursement of expenditures that were necessary for the response to the COVID-19 public health emergency incurred, or expected to be incurred, between March 1, 2020, and December 30, 2020. Bob Jones University and Clinton College are also authorized to apply for reimbursement of expenditures that were necessary for the response to the COVID-19 public health emergency that were incurred, or expected to be incurred, between March 1, 2020, and December 30, 2020.

In *Adams*, the South Carolina Supreme Court concluded that the Governor's allocation of $32 million in GEER funds to support the SAFE Grants Program constitutes a violation of Article XI, Section 4 of the South Carolina Constitution.

Article XI, Section 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 reaching its conclusion, the Supreme Court relied on two key factors: 1) GEER funds provided to the State through the federal CARES Act are "public funds," and 2) using GEER funds to provide tuition grants for students to attend private schools is a "direct benefit" to those private schools as the SAFE Grants are directly transferred from the State Treasury to the particular private school.

Based on these two key factors, outside counsel advises that it is likely that the Supreme Court would also find that (1) federal funds provided to South Carolina under the CARES Act, and made available to the state and local government entities and independent colleges and universities, are "public funds," and (2) payments to independent colleges and universities under the Act are a "direct benefit" to the institutions, and therefore, violative of S.C. Const. art. XI, § 4. Accordingly, counsel advises that Admin should "refrain from disbursing money to independent colleges and universities under the Act unless the Supreme Court provides further direction that would change the analysis described above."

I am in the process of notifying key stakeholders of the impact of *Adams* on Act 154 and will be available at your convenience to discuss this matter further.

Sincerely,

Marcia S. Adams

Marcia S. Adams

CC: Thomas A. Limehouse, Jr., Chief Legal Counsel, Governor's Office
Trey Walker, Chief of Staff, Governor's Office