

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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In the Supreme Court's Original Jurisdiction

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Appellate Case No.: 2020-001069

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

vs.

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

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**BRIEF OF *AMICUS CURIAE*, NATIONAL SCHOOL BOARDS ASSOCIATION**

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## SUMMARY OF ARGUMENT

The National School Boards Association (NSBA) is a not-for-profit organization and federation of 49 state associations and the U.S. territory of the Virgin Islands, representing more than 90,000 school board officials, that advocate for public education. Local school board members govern nearly 14,000 local school districts serving more than 50 million public school students accounting for 90% of the nation's students in K-12 education. Advocating for equity and excellence in public education through school board governance and the belief that public education is America's most vital institution is at the core of NSBA's goals and mission. Education is a civil right necessary to the dignity and freedom of the American people, and all children deserve access to an education which encourages them to reach their potential.

NSBA urges the Court to consider the effects of its decision on public schools and the students they serve. If the South Carolina Governor's SAFE Grants program is allowed to go forward despite the clear directive from the people of South Carolina to forbid public funds to be used "for the direct benefit of any religious or other private educational institution," S.C. CONST Art. XI, § 4, the purpose of that directive will be lost. The state's affirmative and enduring commitment, consistent with its fiscal conservatism, was to direct the limited public funds available to support its responsibility to maintain "a system of free public schools open to all children in the State." S.C. CONST Art. XI, § 3, Brief of Petitioner, p. 14. Given Congress's express purpose in passing unprecedented relief funds to states to support education efforts for low-income students in the midst of the global coronavirus pandemic, and the harm this and similar voucher programs do to public school systems, the Governor's unusual use of public funds must be found unlawful.

## ARGUMENT

The coronavirus pandemic has created an unprecedented moment for public schools and the millions of public school children who rely on them for education and other services, including meals and basic healthcare. As school districts shifted to online learning and other modes of delivering services, deficiencies and access inequities, particularly for children and families in poverty, came to the fore. Those needs remain as K-12 public schools struggle to meet enormous challenges as they re-open school buildings, provide instruction virtually, or some combination of both. Congress' historic aid package, the CARES Act, was intended to help public schools to meet those needs and to alleviate the resulting burdens faced by those in poverty. The SAFE Grants works at cross purposes to that express intent, siphoning millions of needed dollars away from children and families in public schools and to private schools, against requirements of the Act and the Constitution of South Carolina.

**I. Through the Education Stabilization Fund, the CARES Act was intended to support public school children and families in poverty; not to serve as a conduit to funnel public money to private schools.**

In early 2020, the coronavirus pandemic was wreaking havoc on the U.S. economy, public services, and the health and well-being of vulnerable people, particularly older Americans and those facing poverty. On March 27, Congress passed and the president signed into law the third and largest stimulus package designed to address the crisis – the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or Act). Pub. L. No. 116-136, 134 Stat. 281 (2020). The Act provided an unprecedented commitment of federal funding – nearly \$2 trillion – to assist



sectors of American life hit hardest by the pandemic. It was the largest economic stimulus package in U.S. history.<sup>1</sup>

The CARES Act touched nearly every sector of the U.S. economy, including distressed industries like major passenger air carriers and large nonprofit corporations. It included the well-known Paycheck Protection Program, which awarded forgivable loans to companies, including nonprofits, so that they could continue to pay employees despite the economic downturn. It provided additional unemployment benefits for workers who had lost jobs. It mitigated the potentially devastating costs of personal protective equipment (PPE), drug shortages, and education loans. And it provided relief funding to public and private entities through federal agencies. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

Of the almost \$2 trillion authorized under the CARES Act, \$30.75 billion was allotted to the Education Stabilization Fund (Section 18001). That fund was divided into three accounts:

- (1) The Governor’s Emergency Education Relief (GEER) Fund (\$3 billion);
- (2) The Elementary and Secondary School Emergency Relief (ESSER) Fund (\$13.5 billion); and
- (3) The Higher Education Emergency Relief (HEER) Fund (\$14.25 billion).

CARES Act, Pub. L. No. 116-136, 134 Stat. 281, § 18001-18004 (2020).

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<sup>1</sup> Sarah D. Wire, Senate passes \$2-trillion economic stimulus package, *The Los Angeles Times* (March 25, 2020), <https://www.latimes.com/politics/story/2020-03-25/vote-senate-on-2-trillion-economic-stimulus-package-coronavirus>. For comparison, the American Recovery and Reinvestment Act of 2009 (ARRA), Pub.L. 111–5 123 Stat. 115, passed to encourage economic recovery during the recession caused by the financial crisis, was estimated at \$787 billion at the time of passage. Amanda Ortiz, *Comparing the CARES Act of 2020 versus the ARRA Act of 2008 and 2009*, Knowledge Leader, Colliers International (April 9, 2020), [https://knowledge-leader.colliers.com/amanda\\_ortiz/cares-act-versus-arra-act/](https://knowledge-leader.colliers.com/amanda_ortiz/cares-act-versus-arra-act/).

Seventy-four bipartisan members of Congress explained via letter to Secretary of Education Betsy DeVos the purpose of the federal dollars allocated for K-12 education through the ESSER and GEER Funds: “to help schools meet the increased costs of school closures and remote learning, disproportionately borne by low-income, rural, and isolated communities.”<sup>2</sup>

Where ESSER and HEER funds were to be used by states to support local education agencies (LEAs) and institutions of higher education (IHEs), respectively, GEER funds could be used by Governors to provide emergency support to LEAs or IHEs serving students most significantly impacted by coronavirus, and/or to “provide support to any other institution of higher education, local educational agency, or education related entity within the State that the Governor deems essential for carrying out emergency educational services to students ....” CARES Act, Pub. L. No. 116-136, 134 Stat. 281, § 18003 (2020). Pursuant to the CARES Act requirements, the Department of Education allocated GEER Funds, based 60% on the state’s relative population of individuals aged 5-24, and 40% on the basis of children counted for the purposes of making Title I, Part A, formula grants to local educational agencies, or the Title I, Part A, formula count. *Id.* South Carolina’s GEER Fund was \$48,467,924.

The Governor applied for GEER Fund dollars on May 8, 2020.<sup>3</sup> In that application, the Governor advised of his plan to use a portion of South Carolina’s GEER Fund money to support remote learning, noting the data the state had collected on that topic, but it remained to be determined whether GEER Fund money would be used to support remote learning and

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<sup>2</sup> Bipartisan Letter to Secretary Betsy DeVos from members of Congress (June 25, 2020), <https://moulton.house.gov/imo/media/doc/Moulton%20Stauber%20Coalition%20Letter%20to%20Protect%20CARES%20Act%20Funding%20for%20Public%20School%20Students.pdf>.

<sup>3</sup> U.S. Department of Education, Certificate and Agreement for Funding under the Education Stabilization Fund Program Governor’s Emergency Education Relief Fund (SC), <https://oese.ed.gov/files/2020/06/SC-GEER-Certification-and-Agreement-5-8-20-Reviewed.pdf>.

technological capacity. The state would not, the Governor asserted, use GEER Fund dollars to develop new information and academic resources. Nowhere in the application for GEER Funds did the Governor mention any plan for subsidizing private school education through vouchers. *Id.*

On July 21, 2020, the Governor announced his plan to create “Safe Access to Flexible Education (SAFE) Grants,” which are one-time grants to subsidize private school students’ education at private schools in the state. The SAFE Grants program would allow roughly 5,000 South Carolina students to receive \$6,500 grants toward tuition at participating private schools. This amounts to \$32 million (Brief of Respondent at 6) -- two-thirds of the \$48 million GEER Fund allocation the Governor received -- for a program not mentioned anywhere in the state’s GEER Fund application. The money would be distributed directly from the state to private school participants in the program, not individual students (Brief of Petitioner at 10), in apparent reliance on the position of the Department of Education that the CARES Act prohibits grants to individuals under the GEER Fund program.<sup>4</sup>

Congress clearly set out how private schools were to receive a portion of CARES Act funding: through “equitable services.” In Section 18005, the Act provides that LEAs receiving GEER or ESSER funds “shall provide equitable services in the same manner as provided under section 1117 of the ESEA of 1965 to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools.” CARES Act, Pub. L. No. 116-136, 134 Stat. 281, § 18005(a) (2020). Public agencies are to control and administer the funds. This clear and unambiguous language sets out the firm direction of Congress and the legislative intent to use the same allocation method for CARES Act funding as is used for Title I.

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<sup>4</sup> See U.S. Department of Education, Frequently Asked Questions about the Governor’s Emergency Education Relief Fund, <https://oese.ed.gov/files/2020/05/FAQs-GEER-Fund.pdf>, at 3.

Section 1117(a)(4)(A) of ESEA lays out how that allocation is to take place. “Expenditures for educational services and other benefits to eligible private school children shall be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools.” The Every Student Succeeds Act (ESSA), Public Law 114-95, Section 1117 [20 U.S.C. 6320 (2020)], Participation of Children Enrolled in Private Schools. Members of Congress have clarified that their intent was to help the most vulnerable students, which is why the Title I model was used in the legislation.<sup>5</sup>

In recent weeks, federal courts have affirmed that intent, and invalidated efforts by the Department to divert additional CARES Act dollars to private schools. In those cases, just two of the four ongoing challenges to the Department’s Interim Final Rule on equitable services requirements, courts have been asked to look at the intended purpose of the CARES Act.

On August 21, 2020, the U.S. District Court for the Western District of Washington issued a preliminary injunction in favor of the State of Washington prohibiting the Department from implementing its Interim Final Rule, which requires that LEAs apportion equitable services dollars for private schools based on total enrollment, or face severe limitations on the use of their CARES Act funds. The court agreed with the state that the Rule “misconstrues Congress’s intent and effectively diverts emergency relief funding from economically disadvantaged public schools to less disadvantaged private schools.” *Washington v. DeVos*, -- F.Supp.3d ----2020 WL 5079038, \*1 (W.D. Wash. 2020). The court also noted that “private schools have access to other sources of

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<sup>5</sup> Bipartisan Letter to Secretary Betsy DeVos from members of Congress (June 25, 2020), <https://moulton.house.gov/imo/media/doc/Moulton%20Stauber%20Coalition%20Letter%20to%20Protect%20CARES%20Act%20Funding%20for%20Public%20School%20Students.pdf>.

relief provided by Congress to which public schools do not, such as Paycheck Protection Program loans and benefits under the Families First Coronavirus Response Act.” *Id.* at \*7.

On August 25, the U.S. District Court for the Northern District of California also issued a preliminary injunction in favor of several states and local school districts prohibiting the Department from implementing the Interim Final Rule. The court held that the challengers had demonstrated “that the Rule is likely to be held an unlawful administrative action under the [Administrative Procedure Act]” because it defies Congress’s mandate in the CARES Act to allocate GEER and ESSER funds to non-public schools “in the same manner” as in Section 1117 of the ESEA. *Michigan v. DeVos*, --- F.Supp.3d ----2020 WL 5074397, \*4 (N.D. Cal. 2020). The court went on to find that Congress provided for private schools to get a share of CARES Act funding through the equitable services requirements in Section 18005(a), “and the evidence before the Court also indicates that private schools have had access to additional funding under the Paycheck Protection Program.” *Id.* at \*8.

The clear purpose of the CARES Act’s framework and focus is to direct pandemic relief funds to LEAs, IHEs, and statewide efforts to assist students and households struggling with remote learning. Given this purpose, and the recent rulings by federal courts reining back the Department’s attempts to divert federal funds intended for public schools to private schools, we should regard the U.S. Department of Education’s interpretation that private schools could be an “education related entity” deemed essential for pandemic recovery efforts under the GEER Fund provision as strained.<sup>6</sup> Congress’ clear and unequivocal intent was to direct the vast majority of CARES Act funds for K-12 education to public schools and vulnerable children in the most need

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<sup>6</sup> See U.S. Department of Education, Frequently Asked Questions about the Governor’s Emergency Education Relief Fund, <https://oese.ed.gov/files/2020/05/FAQs-GEER-Fund.pdf>, at 2.

as a result of the pandemic, and to provide for participation by private schools in CARES Act funds through the equitable services provision. That provision requires LEAs receiving CARES Act support through ESSER or GEER funds to “share,” as they are required to do under Title I, with private schools in proportion to the children in poverty served by those schools.

It is not surprising that these federal courts have ruled against the Department’s clearly erroneous interpretation of the CARES Act’s equitable services requirement, and would likely rule similarly if faced with a challenge to the Department’s erroneous determination that governors could use their GEER Fund allocations to directly support *private* schools. The vast majority of states recognized Congress’ clear purpose to support *public* schools with the CARES Act education funds, and to allow private schools to participate through equitable services. In the GEER Fund application, governors were asked to describe their planned uses of the funds – specifically, whether and how they intended to use the awarded funds to support remote learning for all students, technological capacity, and new informational and academic resources for remote learning.<sup>7</sup> Overwhelmingly, governors are using the K-12 portion of their GEER Funds for programs assisting public schools in their states, particularly for technological capacity to support remote learning, including virtual platforms, Wi-Fi hot spots, broadband infrastructure and connectivity, devices, and data plans.<sup>8</sup> Other common uses for these emergency federal funds are grants to state education agencies (SEAs), LEAs, and public charter schools; statewide social emotional learning frameworks or offices; “wraparound” programs (CT, DC, IL, MN, NV, OK,

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<sup>7</sup> U.S. Department of Education, Certificate and Agreement for Funding under the Education Stabilization Fund Program Governor’s Emergency Education Relief Fund, <https://oese.ed.gov/files/2020/04/GEER-Certification-and-Agreement.pdf>.

<sup>8</sup> The Hunt Institute, State GEER Funding, <http://www.hunt-institute.org/covid-19-resources/geer-fund-utilization> (last visited Aug. 31, 2020).



OR); addressing learning loss (FL, MA, ND, OR) including summer programs; and staff professional development (MI, MO, ND, RI, SD). *Id.*

The Governor’s SAFE Fund program is an outlier, a further indication that it is contrary to the purpose of the CARES Act. Only two other states appear to be planning voucher-like programs, and both are dedicating a lower percentage of GEER Funds to those efforts. New Hampshire suggested in its GEER Fund application that it would implement a scholarship program to address the needs of low-income families, but also focused on two other main priorities: remote instruction and support, and special education students.<sup>9</sup> Oklahoma’s governor indicated in the state’s GEER Fund application that the state would “use a portion of the GEER funds for activities to address the unique needs of those defined in Section 18004 (d)(4) of the CARES Act (low income children, children with disabilities, etc.). Once the needs are identified, the state will have a grant or microgrant.”<sup>10</sup> The Oklahoma governor announced on July 17, 2020, that he would allocate \$10 million of the state’s \$39,919,354 GEER Fund allocation for “Stay in School Funds,” temporary grants to students currently attending private schools whose continued attendance is threatened by the financial fallout of COVID-19.<sup>11</sup>

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<sup>9</sup> U.S. Department of Education, Certificate and Agreement for Funding under the Education Stabilization Fund Program Governor’s Emergency Education Relief Fund, and Governor’s Emergency Education Relief Fund Part C: Uses of Governor’s Emergency Education Funds (NH), <https://oese.ed.gov/files/2020/06/NH-GEER-Certification-and-Agreement-5-28-20-Reviewed.pdf>, and <https://oese.ed.gov/files/2020/06/New-Hampshire-Part-C.pdf>.

<sup>10</sup> U.S. Department of Education, Certificate and Agreement for Funding under the Education Stabilization Fund Program Governor’s Emergency Education Relief Fund (OK), <https://oese.ed.gov/files/2020/06/OK-GEER-Certification-and-Agreement-4-30-20-Reviewed.pdf>.

<sup>11</sup> Oklahoma Governor Kevin Stitt, Press Release, Governor Stitt Announces \$30 million education allocation plan, [https://www.governor.ok.gov/articles/press\\_releases/governor-stitt-announces--30-million-education](https://www.governor.ok.gov/articles/press_releases/governor-stitt-announces--30-million-education) (last visited Aug. 31, 2020).

Only South Carolina’s governor appears to be attempting to use the overwhelming majority of federal GEER Fund for a voucher program that supports private schools. South Carolina families with a household adjusted gross income of 300% or less of the federal poverty level (FPL) may apply for a SAFE Grant. This amounts to \$78,600 for a family of four.<sup>12</sup> The voucher program runs contrary to the clear intent of Congress to support public schools, who are facing the brunt of increased costs associated with school closures and remote learning.

## **II. Voucher programs divert public money to private schools, harming public education and the students they serve.**

School voucher schemes and tax credit scholarship arrangements, promoted as vehicles for “school choice” ostensibly allowing families that otherwise could not afford private schools to choose them, or to continue to attend them in the midst of an economic crisis like this one, often benefit only economically stable families who can afford the significant portion of private school tuition that vouchers or scholarships do not cover. Nationwide, 18% of students enrolled in K-12 public schools come from household below the poverty threshold, while only 8% of students enrolled in private K-12 schools do.<sup>13</sup> These families can use such programs to defray private school costs that they already have decided to incur. The SAFE Grants program itself is designed to assist students already attending private schools to stay in them.<sup>14</sup>

Voucher schemes like the SAFE Grant program direct public funds otherwise available to local public school systems or other public priorities, to the detriment of students who remain in

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<sup>12</sup> My SC Education, Introduction to SAFE Grants, [https://mysceducation.org/app/uploads/2020/07/SAFE-Grants\\_Introduction.pdf](https://mysceducation.org/app/uploads/2020/07/SAFE-Grants_Introduction.pdf).

<sup>13</sup> National Center for Education Statistics, School Choice in the United States 2019, September 2019, <https://nces.ed.gov/pubs2019/2019106.pdf>, at 30.

<sup>14</sup> See Gov. Henry McMaster Creates Safe Access to Flexible Education (SAFE) Grants, <https://governor.sc.gov/news/2020-07/gov-henry-mcmaster-creates-safe-access-flexible-education-safe-grants>.



public schools. In South Carolina, the number of public school students experiencing poverty is especially high. Sixty-seven percent of public school students in South Carolina are eligible for federal free and reduced price lunch, according to data from the 2016-2017 school year, the highest percentage in the nation other than the District of Columbia. The national average was 52.3%.<sup>15</sup> South Carolina reported that for the 2018-2019 year, the percentage of public school students in poverty (using as indicators such as TANF, Medicaid, SNAP, foster, homeless or migrant status) was 61.7%, up from 61.2% the previous year.<sup>16</sup> Assuming the lower estimate of 61.7%, that means 480,055 of South Carolina's 778,047 public school students live below the poverty line. Such children and their families clearly were the intended beneficiaries of CARES Act money.

Voucher and similar programs are designed to leverage public dollars away from public school students. Interestingly, vouchers did not arise in states in any significant way until the Supreme Court invalidated segregation in public schools by race in *Brown v. Board of Education*, 347 U.S. 483 (1954). Kern Alexander & M. David Alexander, *American Public School Law* (Wadsworth Cengage Learning, 9th ed. 2020), at 219. Shortly after that landmark decision, the state of Virginia allowed counties to close public schools, to open private academies for white students only, and to award parents tuition vouchers and tax credits. *Id.* The Supreme Court of the United States eventually found that program violative of the Fourteenth Amendment's Equal Protection Clause. *Griffin v. County Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 232 (1964). Since then, vouchers and similar schemes have become more sophisticated, but still have the same

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<sup>15</sup> National Center for Education Statistics, Table 204.10. Number and percentage of public school students eligible for free or reduced-price lunch, by state: Selected years, 2000-01 through 2016-17, [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_204.10.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_204.10.asp).

<sup>16</sup> SC Report Card, <https://screportcards.ed.sc.gov/overview/school-environment/financial-data/?q=eT0yMDE5JnQ9UyZzaWQ9MDAwMA>.

intended effect: to draw resources and support away from public schools, where the vast majority of students in this country attend.

Research indicates that students who participate in voucher-type programs often lose ground academically.<sup>17</sup> Such programs do not offer a panacea of superior academic choices for students.

Students with disabilities who participate in state-supported voucher-type programs give up considerable federal protections designed to ensure their equal access to education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq (2020), and Section 504 of the Rehabilitation Act. of 1973, 29 U.S.C. § 794 (2020). Whereas public schools must provide eligible students with a free appropriate public education through special education and related services, private schools do not. Congress limited the amount of federal funds directed at private schools through IDEA: a public school district must only expend federal funds in an amount “proportionate” to the number of private school students attending schools in its borders. 20 U.S.C. §1412 (a)(10)(A) (2020). Most states further limit IDEA’s already constricted reach in private schools by requiring that parents waive their rights under the law as a condition of accepting a voucher.<sup>18</sup>

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<sup>17</sup> See, e.g., Jonathan N. Mills & Patrick J. Wolf, The Effects of the Louisiana Scholarship Program on Student Achievement After Four Years, Louisiana Scholarship Program Evaluation Report #10 (Apr. 23, 2019), <http://www.uaedreform.org/wp-content/uploads/Mills-Wolf-LSP-Achievement-After-4-Years-final.pdf>; Megan Austin, R. Joseph Waddington, & Mark Berends, Voucher Pathways and Student Achievement in Indiana’s Choice Scholarship Program, RSF: The Russell Sage Foundation Journal of the Social Sciences (2019), <https://www.rsjournal.org/content/rsfjss/5/3/20.full.pdf>.

<sup>18</sup> National Council on Disability, School Choice Series: Choice & Vouchers – Implications for Students with Disabilities (Nov. 15, 2018), [https://ncd.gov/sites/default/files/NCD\\_Choice-Vouchers\\_508\\_0.pdf](https://ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf); U.S. Government Accountability Office, Private School Choice: Federal Actions Needed to Ensure Parents Are Notified About Changes in Rights for Students with Disabilities, GAO-18-94 (November 2017), <https://www.gao.gov/assets/690/688444.pdf>.

States impose numerous transparency and accountability requirements on their public schools to ensure state dollars are spent responsibly and fairly, in furtherance of the state’s educational mission.<sup>19</sup> In most states, private schools do not have to hire licensed teachers and are not subject to the academic standards imposed on public schools. They are not required to serve free or reduced lunch, offer transportation, or, as discussed above, provide special education services. This makes it more unlikely for impoverished families in socio-economically segregated neighborhoods to take advantage of the voucher programs like SAFE Grants.

In South Carolina, public schools and state entities are subject to extensive requirements regarding accountability for improving student performance, classroom practice, and school performance. South Carolina Code of Laws, § 59-18-100 et seq. (2020)<sup>20</sup> South Carolina public

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<sup>19</sup> See, e.g. California Public Schools Accountability Act, Cal.Educ.Code § 52050.5 (2020): “(i) The statewide accountability system must include rewards that recognize high achieving schools as well as interventions and, ultimately, sanctions for schools that are continuously low performing...”; Delaware Accountability for Schools, Districts and the State, Del. Code Ann. Tit. 14, § 103 (1.1)(2020): “All public schools, including charter schools, reorganized and career technical school districts and the state shall be subject to the calculation and reporting of Adequate Yearly Progress (AYP) as prescribed by the federal Elementary and Secondary Education Act (ESEA), 20 U.S. C.A. §6301 et seq. (2020). Additionally, public schools, including charter schools, reorganized and vocational technical school districts shall be subject to the applicable rewards, sanctions and other accountability activities as prescribed in this regulation”; Florida Educational Funding Accountability Act, FL ST § 1010.215 (5)(a) (2020): “5) The annual school public accountability report required by ss. 1001.42(18) and 1008.345 must include a school financial report ... to better inform parents and the public concerning how funds were spent to operate the school during the prior fiscal year....”

<sup>20</sup> The purpose of the state school accountability system is to:

- “(1) use academic achievement standards to push schools and students toward higher performance by aligning the state assessment to those standards and linking policies and criteria for performance standards, accreditation, reporting, school rewards, and targeted assistance;
- (2) provide an annual report card with a performance indicator system that is logical, reasonable, fair, challenging, and technically defensible, which furnishes clear and specific information about school and district academic performance and other performance to parents and the public;
- (3) require all districts to establish local accountability systems to stimulate quality teaching and learning practices and target assistance to low performing schools;
- (4) provide resources to strengthen the process of teaching and learning in the classroom to improve student performance and reduce gaps in performance;



schools must admit all students, including students with disabilities who are entitled to special education and related services. Private schools participating in the SAFE Grants program, on the other hand, must only complete an online form assuring the state of a fraction of the criteria required of public schools.<sup>21</sup> They must certify that they do not discriminate on the basis of race, color, or national origin, but not with regard to any other category, including disability.

These failures in voucher programs' design and implementation belie any stated intention to promote school reform; rather, their primary purpose is to provide public resources to private schools. A program genuinely designed to expand high-quality educational options and to improve student outcomes also presumably would impose public accountability, oversight, and curricular control on any school—public or private—that received public funding. Where public tax dollars are involved, the public has an interest in ensuring quality education is delivered. Similarly here, the SAFE Grants program is overtly designed to keep children in the private schools they currently attend, not to support choice broadly to all students in the state.

South Carolina's choice to restrict public funding to religious and other private schools was a conscious one to prioritize public funds for public, not private, schools. It reflects a conservative approach to stewardship of scarce public dollars. It recognizes that funneling public money to private schools does not propel improvement of public education, but rather, drains already limited resources and dilutes broad community support, undermining the very schools that most South Carolinian children, including low-income children, attend.

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(5) support professional development as integral to improvement and to the actual work of teachers and school staff; and

(6) expand the ability to evaluate the system and to conduct in-depth studies on implementation, efficiency, and the effectiveness of academic improvement efforts.”

SC ST § 59-18-110 (2020).

<sup>21</sup> SAFE Grants Independent School Eligibility Application, <https://www.surveymonkey.com/r/SAFEGrantSchool>.



Indeed, many state constitutions make clear their strong commitment to public education by restricting in various ways the flow of public money to private and/or religious schools. Nebraska's state constitution, for example, states "Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or controlled by the state or a political subdivision thereof"... "All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." Neb. Const. Art. VII, § 11. Michigan's constitution similarly prohibits "public monies or property" from being "appropriated or paid" to either "aid or maintain any private, denominational or other nonpublic . . . school," or "to support the . . . employment of any person at any such nonpublic school." Mich. Const. art. 8, §2.

This Court should reject the Governor's attempt to funnel public money to private schools through a voucher program and honor the state's constitutional commitment of support for public schools.

## CONCLUSION

Public school districts confront a barrage of challenges and opportunities as they start the school year amidst a worldwide pandemic. They face the reality that more than 16 million students lack adequate access to the Internet.<sup>22</sup> They are helping students with disabilities in a myriad of ways. They are working to continue to offer nutrition for their neediest students. They are pivoting in and out of remote instruction as coronavirus conditions change in their

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<sup>22</sup> Scott Neuman, "States Sue Education Department Over Allocation Of Pandemic Funds To Schools," National Public Radio, July 7, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/07/07/888793021/statessue-education-department-over-allocation-of-pandemic-funds-to-schools> public education.

communities. Yet, they are operating under the stress of limited funding and resources resulting from the pandemic. And, while public schools are not eligible to receive funds under the Paycheck Protection Program, private schools are, in addition to the millions they may now receive at the expense of public school families and children. The SAFE Grants program exacerbates the inequities millions of students who attend public schools are facing due to lack of resources.

For the reasons stated above, The National School Boards Association urges this Court to reject the Governor's SAFE Grants program as violative of the South Carolina Constitution and as contrary to the purpose of the CARES Act.

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September 3, 2020  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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In the Supreme Court's Original Jurisdiction

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Appellate Case No.: 2020-001069

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

vs.

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

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**CERTIFICATE OF SERVICE**

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I, David T. Duff, do hereby certify that I have served all parties to this appeal with a copy of the motion specified below by emailing a copy of the same to the email addresses for each of the below-listed counsel pursuant to the email addresses currently listed in the AIS database:

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