No. 22-1175

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

v.

MARCIA ADAMS, in her official capacity as Executive Director of the South Carolina Department of Administration; BRYAN GAINES, in his official capacity as Budget Director of the South Carolina Department of Administration; HENRY MCMASTER, in his official capacity as Governor of South Carolina,
Defendants-Appellees

and

STATE OF SOUTH CAROLINA,

Intervenor/Defendant-Appellee

On Appeal from the United States District Court for the District of South Carolina, Case No. 2:21-cv-1093-BHH

BRIEF *AMICI CURIAE* OF ORANGEBURG SCHOOL DISTRICT AND THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP IN SUPPORT OF DEFENDANTS-APPELLEES SEEKING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

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INTERESTS OF AMICI CURIAE[1]

Amici curiae Orangeburg County School District ("OCSD") and the South Carolina State Conference of the NAACP ("SCNAACP") have a strong interest in protecting public funding for public schools in South Carolina. OCSD is a public school district in Orangeburg County, South Carolina, with nearly 12,000 students in 32 schools. OCSD was among the parties that brought a successful challenge under Article XI, Section 4 of the South Carolina Constitution to Governor McMaster's efforts to divert CARES Act funds to private schools. *See Adams v. McMaster*, 851 S.E.2d 703, 706 (S.C. 2020). It therefore has a significant stake in defending its victory in that related case. SCNAACP is part of the NAACP, the nation's oldest, largest, and most widely recognized grassroots-based civil rights organization. The principal objective of the NAACP and its state conferences is to ensure the political, educational, social, and economic equality of all citizens of the United States and to eliminate racial prejudice. SCNAACP has more than 12,000 members, including parents of students who attend South Carolina public schools, junior youth councils, youth councils, high school chapters, and college chapters in nearly every county in South Carolina. Most of SCNAACP's school-age members attend public schools, as do most of the school-age children of SCNAACP's adult members.

[1] No party's counsel authored this brief in whole or in part, and no person, other than amici curiae's counsel, funded the preparation or submission of this brief. All parties have consented to the filing of this brief.

An order invalidating Article XI, Section 4 could significantly reduce the funding available for OCSD's students and SCNAACP's members and the children of its members. After the Governor was blocked from diverting the funding at issue in this case to private schools, those funds instead went to public charter schools, including OCSD's High School for Health Professions, educational services for children in group home settings, the South Carolina Technical College System, early childhood education programs, and programs to combat juvenile delinquency and prevent students from dropping out of school[2]—all of which benefit amici and their constituents and members.

Because of their substantial interests in this case, amici moved to intervene as defendants in the district court. *Bishop of Charleston v. Adams*, No. 2:21-cv-01093-BBH, No. 41 (D.S.C. June 16, 2021). Their motion was denied. *Bishop of Charleston v. Adams*, No. 2:21-cv-01093-BBH, No. 60 (D.S.C. July 26, 2021). Amici have appealed that decision to this Court, which is holding the appeal in abeyance pending its decision in this appeal. *Bishop of Charleston v. Orangeburg County School District*, No. 21-1912 (4th Cir. Feb. 28, 2022). In its Order denying amici's motion to intervene, the district court stated that it would "welcome" an amicus brief from amici in lieu of intervention,

[2] *See* Press Release, Office of the Governor, *Gov. McMaster Awards Over $12 million in GEER Funds to S.C. Department of Juvenile Justice* (Apr. 21, 2021), *available at* https://governor.sc.gov/news/2021-04/gov-mcmaster-awards-over-12-million-geer-funds-sc-department-juvenile-justice (including links to press releases for other awards of GEER funds).

Bishop of Charleston v. Adams, No. 2:21-cv-01093-BBH, No. 60, at 9 (D.S.C. July 26, 2021), and amici accordingly sought and received leave to file an amicus brief at the appropriate time, *Bishop of Charleston v. Adams*, No. 2:21-cv-01093-BBH, No. 86 (D.S.C. Oct. 7, 2021).

Amici now submit this amicus brief supporting Defendants-Appellees in seeking this Court's affirmance of the district court's summary judgment order in their favor.

SUMMARY OF ARGUMENT

Appellants' challenge to Article XI, Section 4 of the South Carolina Constitution ("Article XI") is premised on their theory that this "no-aid" provision was adopted and retained based on anti-Catholic and racial animus and thus violates the U.S. Constitution's Free Exercise and Equal Protection Clauses. Appellants sought declaratory and injunctive relief striking down Article XI and prohibiting Appellees from denying them public funding for their private schools.

The district court correctly determined that Appellants' claims fail as a matter of law and evidence. Contrary to Appellants' narrative, Article XI did not originate in 1895, but rather traces back to South Carolina's Reconstruction Constitution of 1868, which for the first time in the state's history provided for the creation of a public-school system. To safeguard the revenue raised for those schools, the 1868 Constitution included a provision prohibiting diversion of school funds to religious schools, which were the main competitors to the newly created public schools at that

time. Today, South Carolina continues to zealously guard against diversion of public education funds to private schools through Article XI, which prohibits direct public aid to all private schools, whether they are religiously affiliated or not.

Because Article XI is neutral as to religion and supports the state's critical interest in public education, Appellants' religious discrimination claims fail. As the district court explained, the no-aid provision withholds public funds from *all* private schools—irrespective of their religious affiliation or lack thereof—so it is a neutral, generally applicable law that poses no federal constitutional problem. Moreover, Appellants failed to support their claim that religious animus underlies Article XI. Appellants primarily allege religious animus in the enactment history of a no-aid provision in the 1895 Constitution that was excised from the South Carolina Constitution nearly 50 years ago. Even aside from the inaccuracy of that historical claim, no case law supports the notion that religious animus in a predecessor provision unconstitutionally taints a subsequent and substantially different law adopted without such animus and for legitimate reasons. Although Appellants allege that anti-Catholic animus also motivated the adoption of Article XI in 1972, their scattershot claims amount to little more than an assertion that a few people involved in the process may have harbored some negative feelings toward Catholics. This has never been enough to demonstrate unconstitutional discrimination.

Appellants' racial discrimination claims also fail. Most critically, Appellants made no attempt to demonstrate *any* racially disproportionate impact from the State's

no-aid provision. Indeed, such an effort would be impossible: As Appellants' own expert acknowledged, South Carolina's public schools disproportionately serve non-white students, while white students disproportionately attend private schools. Appellants' requested relief for the racial discrimination they purport to identify—a ruling that would allow the Governor to divert state funding from public schools to private schools—would thus serve only to *exacerbate* existing racial disparities in educational funding. The Court should affirm the district court's rejection of this perverse outcome.

ARGUMENT

I. The Court should affirm summary judgment in favor of Appellees on Appellants' religious discrimination claims.

Appellants' religious discrimination claims fail because Article XI treats religious schools in the same manner as all other private schools, and thus does not discriminate based on religion. Purported religious animus in the enactment history of the substantially different 1895 predecessor provision does not render the current no-aid provision unconstitutional, and Appellants failed to prove religious animus in the 1972 enactment of Article XI. Finally, even if the no-aid provision were subject to strict scrutiny under the Free Exercise Clause, it would pass constitutional muster.

A. South Carolina's no-aid provision treats religious schools in the same manner as all other private schools.

As the district court recognized, South Carolina's no-aid provision does not restrict public funding solely to religious schools, but rather restricts funding to *all* private schools, regardless of whether they are religious. J.A. 44-46; J.A. 324. In denying Appellants' preliminary injunction motion, the district court drew on the Supreme Court's decision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), which held that a state could not provide funding to non-religious private schools while withholding that funding from religious private schools. *Espinoza* involved a free-exercise challenge to a Montana tax-credit program designed to provide scholarships for private-school students. *Id.* at 2251-52. State officials had determined that the program could not be used to fund scholarships at religious schools in light of a state constitutional provision that barred public monies from going to institutions "controlled in whole or in part by any church, sect, or denomination." *Id.* at 2252 (quoting Mont. Const., Art. X, § 6(1)). Because non-religious private schools were not subject to the same restraint, the Supreme Court held that the Montana program "exclude[d] schools from government aid solely because of religious status" in violation of the Free Exercise Clause. *Id.* at 2255.

Critically, *Espinoza* makes clear that the Free Exercise Clause does not prohibit states from withholding public funding from private schools as a general matter; it simply prohibits states from tying those funding decisions to the religious (or non-

religious) character of the schools. As the Supreme Court explained, "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 2261. In other words, the touchstone is not whether the state has prevented religious schools from accessing public funds but, rather whether the funding restriction "single[s] out schools based on their religious character." *Id.* at 2255; *see also* J.A. 46 ("[T]he Supreme Court struck down Montana's no-aid provision precisely because it discriminated against religious schools *but not* other private schools." (emphasis in original)).

Article XI does not single out any school based on its religious character. The provision's plain text states that public funds shall not be used "for the direct benefit of any religious *or other private educational institution*." S.C. Const. art. XI, § 4 (emphasis added). As the district court observed, "unlike the provision at issue in *Espinoza*, South Carolina's no-aid provision prohibits the use of public funds for the direct benefit of religious and non-religious private schools alike." J.A. 46. Far from reflecting "a slight difference in wording," Appellants' Br. 9, this distinction wholly eliminates the constitutional concern identified in *Espinoza*. *See* J.A. 324 ("Section 4 no longer distinguishes between religious and non-religious schools"); *see also* J.A. 46 (because "South Carolina's provision discriminates along the private/public divide, not the religious/non-religious divide," it does not violate the Free Exercise Clause).

B. Appellants' assertions of religious animus in the 1895 Constitution do not substantiate their religious discrimination claim.

Conceding that Article XI does not single out religious schools for differential treatment, Appellants assert that the no-aid provision nonetheless violates the Free Exercise Clause because, by their account, the no-aid provision in South Carolina's 1895 Constitution was enacted out of anti-Catholic animus, and that, despite substantial amendment, Article XI retains that anti-Catholic taint. Appellants' Br. 14-54. Appellants are wrong on both the facts and the law.

As to the facts, Appellants essentially ignore that the origins of Article XI lie not in South Carolina's disenfranchising Constitution of 1895 but in its Reconstruction Constitution of 1868. Over the course of South Carolina's history, the state has adopted a trilogy of no-aid provisions. S.C. Const. art. XI, § 4; S.C. Const. of 1895, art. XI, § 9; S.C. Const. of 1868, art. X, § 5. The 1868 Constitution established for the first time in the state's history a free system of public schools. S.C. Const. of 1868, art. X, § 3 ("The General Assembly shall, as soon as practicable after the adoption of this Constitution, provide for a liberal and uniform system of free public schools throughout the State . . . ."). Those schools were funded by a combination of property and poll taxes. *Id.* art. X, § 5. Revenue generated from these taxes was "distributed among the several School Districts of the State, in proportion to the respective number of pupils attending the public schools." *Id.* The same provision that set forth the funding mechanism for South Carolina's newly created

public schools also provided that "[n]o religious sect or sects shall have exclusive right to, or control of any part of the school funds of the State." *Id.*

Thus, the origin of Article XI lies in South Carolina's efforts to ensure a solid fiscal foundation for its fledgling public-school system. Although the 1868 Constitution, unlike the current version of Article XI, denied public funds to religious schools rather than private schools generally, there is no indication that the drafters of the 1868 provision were motivated by any kind of animus. On the contrary, the 1868 Constitution guaranteed religious freedom in South Carolina for the first time, long before the Free Exercise Clause had been incorporated against the states. S.C. Const. of 1868, art. I, § 9 ("No person shall be deprived of the right to worship God according to the dictates of his own conscience . . . ."); *id.* § 10 ("No form of religion shall be established by law; but it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of worship."); *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause). Indeed, Appellants' own expert uniformly praises the 1868 Constitution and South Carolina's contemporaneous efforts to develop public schools for all, noting that, unlike the 1895 Constitution, the 1868 Constitution was "developed in a constitutional convention by a black majority," "popularly ratified," and "provided for . . . free schools[] and extended personal freedoms and liberties to blacks as well as whites." J.A. 100. And, as the foremost treatise on the South Carolina Constitution explains, the 1868 provision placed

"specific emphasis upon prohibiting grants to religious organizations" not because they were the target of religious animus, but simply because they were the private entities at that time "most likely to be operating" in the field of education. 3 James Lowell Underwood, *The Constitution of South Carolina* 171 (1992). Thus, rather than religious animus, the precursor to Article XI in the 1868 Constitution reflects "an extension of traditional South Carolina fiscal conservatism to . . . educational . . . services." *Id.*; *see also* J.A. 323 ("This provision (as the State notes) was motivated by support for the State's fledgling public educational system, not prejudice."); Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. Rev. 295, 328 (2008) ("[C]reating a public education system and securing its financial footing became a primary concern of states in the post-Civil War era. The inclusion of a no-funding provision in such situations raises fewer inferences that it was added as part of an anti-Catholic agenda.").

Notably, Appellants' sole response to Article XI's origins in South Carolina's 1868 Constitution is to suggest that some post-Civil War Republicans were anti-Catholic and that some African Americans "may have seen Catholic immigrant workers as competition for menial labor jobs," a sentiment "perhaps shared" by some working-class whites. Appellants' Br. 29-30. They make no attempt to connect this speculation to the no-aid provision's enactment, because no such evidence exists.

Ignoring this fatal problem with their religious discrimination claim, Appellants instead focus on what they describe as racism and anti-Catholic animus in the 1895

Constitution's amendment and re-adoption of the no-aid provision. Appellants' Br. 14-23. As the district court concluded, however, Appellants made no showing that the inclusion of the no-aid provision in the 1895 Constitution was based on animus, rather than a continuation of the state's fiscal conservatism and support for public schools. *See* J.A. 323 ("Plaintiffs have offered no evidence that any anti-Catholic sentiment motivated the 1895 provision."). Here, again, Appellants' opening brief before this Court is telling: They point only to "contextual" indications of generalized anti-Catholic sentiment in South Carolina at that time, without citing a single piece of evidence suggesting that animus motivated the provision's readoption. Appellants' Br. 17-23.

Moreover, even if Appellants could substantiate their account of anti-Catholic animus in the 1895 Constitution, their religious discrimination claim would fail because that provision has not been in effect for 50 years. Relying on Justice Alito's concurring opinion in *Espinoza*, Appellants argue that their purported evidence of religious animus in the enactment of the 1895 provision unconstitutionally taints the 1972 provision. Appellants' Br. 37-38. But a single Justice opinion is not the law, particularly where, as here, that opinion relies on a mischaracterization of the Court's precedent. Writing for himself alone, Justice Alito contended that, under *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), courts must consider whether an original, discriminatory motivation continues to taint a modified and otherwise facially neutral law. *Espinoza*, 140 S. Ct. at 2267-68 (Alito, J., concurring). In *Ramos*, the Court held

that Oregon and Louisiana laws allowing for nonunanimous jury verdicts in criminal trials violate the Sixth Amendment. 140 S. Ct. at 1397. Although the Court struck down the laws on purely textual grounds, the majority opinion also discussed by way of background the racially discriminatory origins of predecessor versions of the laws the defendants challenged. *Id.* at 1394, 1401-02. Those origins played no role, however, in the Court's holding. *Id.* at 1401 n.44 ("[A] jurisdiction adopting a nonunanimous jury rule even for benign reasons would still violate the Sixth Amendment.").[3]

But even if Justice Alito's "discriminatory taint" test were the law, Article XI passes muster. The drafters of the 1972 no-aid provision clearly and intentionally untethered that clause from any remnant of anti-Catholic sentiment because Article XI *eliminated* both the "sectarian" focus of the 1895 no-aid provision and its ban on indirect aid to religious schools. In *Espinoza*, Justice Alito wrote, Montana did not adequately "scrub[]" the animus remaining from its 19th century provision because the state maintained in its contemporary provision "the [anti-Catholic] terms 'sect' and 'sectarian,'" thus "voluntarily" readopting "disquieting remnants" of an era rife with anti-Catholic bigotry. 140 S. Ct. at 2273-74 (Alito, J., concurring). Here,

[3] Appellants rely on *United States v. Fordice*, 505 U.S. 717 (1992), for the proposition that courts must inquire into whether an otherwise neutral policy is "rooted" in an earlier, discriminatory policy. Appellants' Br. 36. *Fordice*'s logic, however, applies only to policies that continue to "have discriminatory effects," 505 U.S. at 729, which Appellants have wholly failed to show here. *See infra* pp. 15-16.

although the words "sect" or "sectarian" appeared in both of Article XI's predecessor provisions, South Carolina *eliminated* those words when it enacted the contemporary provision. *Compare* S.C. Const. art. XI, § 4 (prohibiting direct aid to "any religious or other private educational institution"), *with* S.C. Const. of 1895, art. XI, § 9 (prohibiting direct or indirect aid to any school or college "wholly or in part under the direction or control of any . . . *sectarian* denomination, society, or organization" (emphasis added)), *and* S.C. Const. of 1868, art. X, § 5 ("No religious *sect* or *sects* shall have exclusive right to, or control of any part of the school funds of the state . . . ." (emphasis added)).

Moreover, Justice Alito observed that Montana had rejected a 1972 proposal from the Montana Catholic Conference to "remov[e] the no-aid provision's restriction on 'indirect aid,'" a concession that would have softened the impact of the no-aid provision on religious schools. *Espinoza*, 140 S. Ct. at 2273-74 (Alito, J., concurring). South Carolina, by contrast, *did* eliminate the prohibition on indirect aid that appeared in the 1895 predecessor to Article XI. *Compare* S.C. Const. art. XI, § 4 (prohibiting public funds from being "used for the direct benefit any religious or other private educational institution"), *with* S.C. Const. of 1895, art. XI, § 9 (prohibiting public funds from being used "directly *or indirectly*" by religious organizations (emphasis added)); *see also Hartness v. Patterson*, 179 S.E.2d 907, 908-09 (S.C. 1971) (holding unconstitutional under the predecessor to Article XI a program that provided state grants to students to attend religious schools rather than to the schools themselves).

Indeed, Appellant South Carolina Independent Colleges and Universities, Inc. (SCICU) itself successfully lobbied for removal of the ban on indirect aid, and the president of Wofford College, a private liberal arts school affiliated with the United Methodist Church (and a SCICU member), expressed support for the elimination of the ban on indirect aid that was included in what would become Article XI. 3 Underwood, *supra*, at 172.

In short, Article XI "remove[d] the taint of singling out religious institutions for hostile treatment." J.A. 325 (citing 3 Underwood, *supra*, at 172). *Cf. Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (where legislature did not reenact "a law originally enacted with discriminatory intent" or "carr[y] forward" its effects, courts should look only to the intent of the later-enacting legislature); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1356 (4th Cir. 1989) (holding that, even where plaintiffs proved that discriminatory intent infected an earlier version of a policy, Virginia satisfied its burden by showing that the policy was retained for legitimate reasons). Article XI is therefore distinguishable from Montana's no-aid provision in both respects, and, were it the law, Justice Alito's *Espinoza* framework would be satisfied on the facts of this case.

C. Appellants fail to prove that religious animus motivated Article XI's adoption.

Appellants alternatively contend that, even apart from the history of the 1895 provision, the 1972 adoption of Article XI demonstrates religious animus. But the

closest Appellants come to alleging anti-Catholic animus by the West Committee is an allegation that certain members at some point criticized the Catholic Church and its pro-integration views. Appellants' Br. 40-42. As the district court observed, Appellants' "reliance on these other racist or anti-religious views or policies is unavailing because [Appellants] do not connect them with [Article XI, Section 4's] adoption." J.A. 325. Indeed, it is well established that courts generally should not "void a statute that is . . . constitutional on its face, on the basis of what fewer than a handful of [legislators] said about it," *United States v. O'Brien*, 391 U.S. 367, 384 (1968)—especially where, as here, the comments apparently were made in an entirely different context.

Appellants do not even attempt to demonstrate that the enactment of Article XI had a disproportionately negative impact on Catholics, nor could they: Given that Article XI *expanded* public funding for religious schools by permitting indirect aid that had been prohibited under the 1895 provision, the amendment could only have *benefitted* Catholic schools. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (finding intentional religious discrimination where the ordinances at issue operated as a "religious gerrymander," such that "almost the only conduct subject to [the challenged ordinances] is the religious exercise of Santeria church members"); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 216–18 (4th Cir. 2016) (describing extensive data of disproportionate racial impact of voting restrictions).

As the district court observed, Appellants have not "suggest[ed], much less establish[ed], that the process leading up to Section 4's adoption provides any evidence of discriminatory intent. Nor could they. There were 'no procedural irregularities in the sequence of events leading to the enactment of' the provision." J.A. 328 (citation omitted). The 1972 amendment was the subject of extended study by the West Committee and ultimately approved by the people of South Carolina. *See* Appellees' Br. 41-47. The drafters of Article XI explained its terms from a pragmatic, fiscal standpoint, not in animus-laden terms. Recognizing "the tremendous number of South Carolinians being educated at private and religious schools," the drafters observed that "the educational costs to the state would sharply increase if these programs ceased." *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, to His Excellency the Governor and the General Assembly of the State of South Carolina* 99, 101 (1969), *available at* https://catalog.hathitrust.org/Record/006178331. Although they felt that direct aid to private schools would harm "the State and the independence of the private institutions," they recommended permitting indirect aid so that the state could in a limited way help keep afloat private schools that, in their view, helped alleviate the state's overall fiscal burden. *Id.* In other words, Article XI is "as much an expression of the fiscal conservatism of [South Carolina] as it is a reflection of separation of church and state doctrines," embodying the legitimate view that "[p]romiscuous state

fiscal aid to all forms of private endeavor, whether religious or not, [is] to be viewed with deep skepticism." 3 Underwood, *supra*, at 174.

In sum, Appellants' scattered suggestions of anti-Catholic animus in the lead-up to the 1972 constitutional amendments do not state a valid claim of religious discrimination in light of the substantial evidence that Article XI was adopted for legitimate reasons.

D. Even if Article XI were subject to strict scrutiny, it would pass constitutional muster.

For the reasons discussed above, Appellants' religious discrimination claim fails on its face and requires no further scrutiny, let alone strict scrutiny. But even if strict scrutiny applied, the no-aid provision would pass constitutional muster.

A government action satisfies strict scrutiny if it "advance[s] interests of the highest order" and is "narrowly tailored in pursuit of those interests." *Espinoza*, 140 S. Ct. at 2260 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 546). The preservation of state funding for public education is unquestionably a governmental interest of the highest order. As the Supreme Court observed in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), public "education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship." In

short, public education "ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (recognizing public education's "fundamental role in maintaining the fabric of our society").

Nor can there be any serious dispute that South Carolina's no-aid provision is narrowly tailored to preserve state funding for public education. Restricting the flow of public funds to private schools ensures that scarce tax dollars are not diverted from the public school system. Indeed, the Supreme Court concluded that the Montana no-aid provision failed strict scrutiny not because the State's interest in supporting public education was inadequate to warrant the exclusion of private schools from public funding, but because the Montana provision was "fatally underinclusive" in targeting *only* religious private schools. *Espinoza*, 140 S. Ct. at 2261. The Court emphasized that state governments are free to prohibit public funding for private schools—"a State *need not subsidize private education*"—so long as the State does not "disqualify some private schools solely because they are religious." *Id.* (emphasis added). Article XI does precisely what *Espinoza* deems constitutional: it applies to all private schools, religious or otherwise, and accordingly is properly tailored to pursue the State's compelling interest in preserving funding for public education.

II. The Court should affirm summary judgment in favor of Appellees on Appellants' racial animus claims.

Despite pages of recitation of South Carolina's general history of racism and white supremacy, Appellants fail to make any showing that Article XI was adopted in 1972 for racially discriminatory reasons. Nor have Appellants made any attempt to demonstrate that Article XI has had a racially disproportionate impact, a virtual sine qua non of the test for unconstitutional racial discrimination laid out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-69 (1977). Instead, the only evidence in the record shows that public schools disproportionately serve Black South Carolinians, and that protecting public financial support for public schools has long benefitted Black South Carolinians. Finally, the remedy Appellants seek—a ruling from a federal court that the Governor may divert to private schools funding that otherwise would go to public schools in South Carolina—would exacerbate the very history of racism that Appellants allege motivated the no-aid provision.

A. Appellants fail to show that Article XI or its predecessors have had a racially disproportionate impact.

Where a law, like Article XI, is facially neutral with respect to race, courts apply the totality-of-the-circumstances test set forth in *Arlington Heights* to determine whether it is nonetheless unconstitutional because it was motivated by racial animus. In that analysis, courts look at the "impact of the official action"; "[t]he historical background of the decision" at issue; "[t]he specific sequence of events leading up to

the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative … history." *Id.* at 266-67.

While "official action will not be held unconstitutional *solely* because it results in a racially disproportionate impact," *Arlington Heights*, 429 U.S. at 264-65 (emphasis added), any assessment of discriminatory animus underlying a facially neutral law must start with such a showing. *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 489 (1997) ("The 'important starting point' for assessing discriminatory intent under *Arlington Heights* is 'the impact of the official action whether it bears more heavily on one race than another.'" (quoting *Arlington Heights*, 429 U.S. at 266)); *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) ("Presented with a neutral state law that *produces disproportionate effects* along racial lines, the Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment." (emphasis added)); *Irby*, 889 F.2d at 1355 ("To establish an equal protection violation, a plaintiff must show discriminatory intent *as well as* disparate effect." (emphasis added)).

In denying a preliminary injunction, the district court determined that Appellants had not demonstrated a likelihood of success on the merits because they had produced "no evidence that the no-aid provision, as applied in *Adams* and the disbursement decisions by the Governor and Department of Administration, disproportionately affected African-American students, HBCUs, or religious schools." J.A. 308. Appellants did "nothing to remedy this failure of proof on summary

judgment," continuing to offer "essentially nothing about racial impact." J.A. 320. Likewise, on appeal Appellants make no attempt to demonstrate any racial impact from Article XI.

In fact, the only evidence in the record regarding Article XI's racial impact suggests the opposite. Appellants' own expert explained to the district court:

> Today, nearly half of Greenville's 87 traditional schools are made up of more than 50% minority students—demographics that are consistently reflected across South Carolina. In a state with about 64% white residents, 27% black residents and 6% Hispanic/Latino residents, only half of the students attending public schools are white.

J.A. 138 n.67; *see also* J.A. 94 (explaining that, as white students began attending private schools in greater numbers, "public schools were becoming more and more black"). Where a significantly greater percentage of non-white students attend public schools, it is difficult to see how a state constitutional provision that protects public funding for public schools could disproportionately harm Black students. Although Appellants' expert suggested that Black students *could* particularly benefit from funding to attend private schools, J.A. 95, that assertion is pure speculation unsupported by any data about who would have benefitted if the South Carolina Constitution had permitted the Governor to use the funding at issue for tuition support.

The history of South Carolina's no-aid provisions further demonstrates that maintaining public funding in public schools has long benefited Black students. As explained above, South Carolina's first no-aid provision appeared in its

Reconstruction Constitution of 1868, alongside the state's first commitment to the creation of a public-school system. *See supra* pp. 8-10. This is no accident. The drafters of South Carolina's 1868 Constitution recognized that a commitment to public education "was crucial to remedying slavery and rebuilding democracy." Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 N.W. L. Rev. 1031, 1034 (2022). Although Northern missionaries undoubtedly played a role in establishing schools for formerly enslaved people, public education was of central concern. *See id.* at 1048 ("African American-led Conventions in Alabama and South Carolina . . . placed education at the forefront of their visions of citizenship, calling on the state constitutional conventions and officials to establish 'a thorough system of common schools throughout the State, and indeed the Union, for the well-being of such ensures to the advantages of all.'"). Ensuring a strong fiscal foundation was—and remains—necessary to achieving this vision.

B. The racial animus Appellants claim motivated the 1972 Constitution would be exacerbated by an order striking down South Carolina's no-aid provision.

Appellants' primary bases for claiming that the enactment of Article XI in 1972 was tainted with racial animus are: (1) racism was widespread in South Carolina, and the West Committee in particular was "stacked with ardent racists," so it should be assumed that the Committee "took a decidedly racist view in the modifications it suggested to the state constitution," Appellants' Br. 39-43; and (2) the West Committee narrowed the no-aid provision to permit indirect aid specifically so that

white students could obtain publicly funded "segregation scholarships" "for private, whites-only schools," Appellants' Br. 43-48. The first category of evidence, even if true, has never been enough to prove an Equal Protection Clause violation; the second category cannot possibly support the relief Appellants seek.

First, the Supreme Court has explained that "'past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.' The 'ultimate question remains whether a discriminatory intent has been proved in a given case.'" *Abbott*, 138 S. Ct. at 2324-25 (brackets omitted) (quoting *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 74 (1980) (plurality op.)). This is especially true where Appellants cite only "[m]ore distant instances of official discrimination in other cases," *Mobile*, 446 U.S. at 74, and in the absence of any racially disproportionate impact that could show a nexus between the general racist attitudes Appellants cite and Article XI. Indeed, accepting Appellants' logic here would cast into doubt the entirety of South Carolina's 1972 constitutional revision. As the Eleventh Circuit has recognized, "the historical background for a given decision is only one factor relevant to intent" and "does not, by itself, compel" a finding of a discriminatory purpose for every law "passed during regrettable periods of [a state's] past." *Hall v. Holder*, 117 F.3d 1222, 1226-27 (11th Cir. 1997).

Second, Appellants' identification of "segregation academies" as the impetus for the 1972 amendments to South Carolina's no-aid provision makes no sense with respect to the West Committee's decision to *expand* the no-aid provision to ban direct

public funding not only for religious schools, but for *all* private schools. Appellants' example of the "segregation scholarships" statute in the decade after *Brown v. Board of Education* makes this point clear: That legislation *excluded* scholarships to religious schools, presumably to comply with the then-existing, more limited no-aid provision. Appellants' Br. 43-46. The idea that prohibiting all private schools from receiving direct funding facilitated segregation through private schools is illogical.

To the extent that the West Committee sought to support "segregation academies" by *narrowing* the no-aid provision to prohibit only direct aid, Appellants' requested relief is perverse: Appellants would have this Court strike down Article XI's *limitation* on funding private schools as racially discriminatory based on evidence that its *allowance* of indirect public funding for private schools is racially discriminatory. Even worse, allowing more public money to flow to private schools likely would itself have a racially disparate impact, threatening the funding available for public schools that disproportionately serve students of color. This serious and harmful incongruity between the discrimination Appellants identify and the remedy they seek makes clear that their Equal Protection claim must be rejected.[4]

[4] In addition, if the Court were to apply strict scrutiny to Appellants' racial discrimination claim, Article XI remains constitutional because it is narrowly tailored to achieving the state's compelling interest in preserving public funding for public education. *See* Part I.D *supra*.

CONCLUSION

For all of the foregoing reasons, amici OCSD and SCNAACP respectfully request that this Court affirm the district court's grant of summary judgment.

Respectfully submitted,

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May 26, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached amici curiae brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times Garamond font.

Executed this 26th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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