IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

CHARLES ARAUJO, *ET AL.* **PLAINTIFFS**

V. **CAUSE NO. 25CH1:16-cv-001008**

GOVERNOR PHIL BRYANT, *ET AL.* **DEFENDANTS**

PLAINTIFFS' RESPONSE IN OPPOSITION TO
MISS. JUSTICE INSTITUTE'S MOTION FOR SUMMARY JUDGMENT

> *"[F]reedom of choice is the only way to save quality public education. Freedom of choice – what could be more American? Or more democratic?"*
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> *Rep. Charles H. Griffin, in opposition to the U.S. Supreme Court's order in Alexander v. Holmes County Board of Education that public schools desegregate "at once" (Oct. 29, 1969)*

. . .

The Mississippi Justice Institute ("the Institute") argues that charter schools are a mechanism of "school choice," and that "school choice" is good for Mississippi. But the CSA is not Mississippi's first experiment with dual school systems. Contrary to the Institute's assertions, the "school choice" movement was not invented in Mississippi in 2013. It came to our state more than 50 years ago as a way to avoid desegregation. At that time, it was called "freedom of choice." Under Mississippi's "freedom of choice" plans, school districts purported to integrate their schools by allowing students to attend any school in the district. In reality, though, Mississippi continued to maintain its system of dual public schools.[1]

[1] Charles C. Bolton, *The Hardest Deal of All: The Battle Over School Integration in Mississippi, 1870-1980* (University Press 2005) at 119-120.

Mississippi's dual school systems failed all students, black and white, because the State could barely pay for one public school system, let alone two. The same is true today.

This is a simple case about two straightforward constitutional provisions. Section 206 of the Mississippi Constitution prohibits the Legislature from ordering school districts how to spend their *ad valorem* tax revenue, and it requires that *ad valorem* revenue be spent only by schools under the levying school district's control. Section 208 of the Mississippi Constitution requires that state school funds go only to schools under the dual oversight of the state superintendent and a local district superintendent.

The Mississippi Supreme Court's holdings on these constitutional principles are clear. Nevertheless, the Institute argues that the Supreme Court's holdings do not mean what they say. The Institute is incorrect, and its motion for summary judgment must be denied.

I. Section 206 Allows *Ad Valorem* Tax Revenue to Be Used Only By the Levying School District. Any Other Use of *Ad Valorem* Revenue is Unconstitutional.

Section 206 of the Mississippi Constitution provides that, in addition to state government's support of public schools, "[a]ny county or separate school district may levy an additional tax, as prescribed by general law, to maintain its schools." In *Pascagoula School District v. Tucker*, the Mississippi Supreme Court held that revenue from a school district's *ad valorem* taxes can be used for only one purpose: maintaining its schools.[2]

The Institute offers a reading of Section 206 in patent conflict with *Tucker*. The Institute argues that Section 206 permits sending *ad valorem* revenue to any school, so

[2] *Pascagoula Sch. Dist. v. Tucker*, 91 So. 3d 598, 604 (Miss. 2012).

long as that school is attended by students living within the geographic boundaries of the tax-levying school district.[3] However, the Institute offers no legal authority to support its position, and indeed *Tucker* provides no basis for such an interpretation. At no point did the *Tucker* Court discuss geographic boundaries of school districts. Instead, *Tucker* focused on school districts in their capacities as taxing entities. *Tucker* made clear that *ad valorem* revenue can only maintain the schools under the levying school district's control.

Therefore, the Institute's argument fails for two reasons. First, the Institute's reading of *Tucker* defies the decision's central holding. Second, even if *Tucker* could be interpreted to mean that *ad valorem* revenue simply cannot leave the school district, the CSA still would be unconstitutional because the law explicitly states that charter schools are separate, stand-alone school districts.

A. Section 206 Only Allows a Levying School District's Taxes to Be Used to Maintain Its Schools.

The Institute claims that Section 206 allows a school district to send *ad valorem* revenue to any school – even a school outside its control – so long as that school falls within the district's geographic boundaries. Yet, the Mississippi Supreme Court recently explained, "Section 206 clearly states that the purpose of the tax is to maintain the levying school district's schools."[4]

The Institute's interpretation not only runs afoul of *Tucker*'s central holding; it directly conflicts with *Tucker*'s opening paragraph. In *Tucker*, a statute required the Pascagoula School District to share its *ad valorem* revenue with the rest of Jackson

[3] Defendant-Intervenors Gladys Overton, Et Al. Cross Motion for Summary Judgment and Motion in Opposition to Plaintiffs' Motion for Summary Judgment [Docket No. 53] (hereinafter "Institute Brief") at 19.
[4] *Tucker*, 91 So. 3d at 605.

County's school districts.[5] A group of plaintiffs challenged the law's constitutionality. In the *Tucker* decision's opening paragraph, the Supreme Court agreed that "the contested statute violates the constitutional mandate that a school district's taxes be used to maintain 'its schools.'"[6]

The *Tucker* Court explained that Section 206 defines the limits of a levying school district's taxing power. Section 206 "is *the* enabling authority for a school district's ad valorem taxation power in this state."[7] Without Section 206, a school district's power to levy *ad valorem* taxes would not exist; with Section 206 come the limits it imposes on that power. And the *Tucker* Court defined those limits unambiguously:

> The plain language of Section 206 grants [the Pascagoula School District] the authority to levy an ad valorem tax and mandates that the revenue collected be used to maintain only its schools. Conversely, no such authority is given for the PSD to levy an ad valorem tax to maintain schools outside its district.[8]

More to the point, the *Tucker* Court explained that Section 206 vests control over *ad valorem* revenue solely with the levying school district: "The Legislature has no authority to mandate how the funds are distributed, as Section 206 clearly states that the purpose of the tax is to maintain the levying school district's schools."[9]

At no point in *Tucker* did the Court describe school districts as geographic areas. The word "geographic" does not even appear in the opinion. Instead, the Court described school districts as tax-levying authorities, and it placed firm limits on that taxing power. Contrary to the Institute's suggestions, those limits are not flexible. They are rigid, and they are singular: "*the purpose of the tax is to maintain the levying school*

[5] *Tucker*, 91 So. 3d at 600-01.
[6] *Id.* at 600.
[7] *Id.* at 604.
[8] *Id.*
[9] *Id.* at 605.

district's schools."[10] Any other use of a school district's *ad valorem* revenue – including sharing that revenue with charter schools -- is contrary to the clear rule set forth by the Mississippi Supreme Court in *Tucker*.

In this case, three facts are indisputable: (1) the tax levying school district is the Jackson Public School District; (2) charter schools are separate, standalone school districts; and (3) charter schools are not "the levying school district's schools." The CSA plainly violates Section 206.

B. The Institute Claims That the Legislature's Broad Authority Over School Finance Allows It to Violate Section 206. The *Tucker* Court Already Has Rejected That Argument.

The Institute argues that Section 201 of the Mississippi Constitution permits the Legislature to violate Section 206.[11] Specifically, the Institute argues that the Legislature's broad authority under Section 201 of the Mississippi Constitution allows it to control a school district's *ad valorem* revenue, regardless of what Section 206 says. Ironically, the *Tucker* defendants raised the same argument. It failed then, and it must fail now.

The *Tucker* Court held that Section 201 only "means that the Legislature is to establish, through general law, the *method* by which a 'county or separate school district may levy an additional tax.' No doubt Section 201 grants the Legislature broad power to regulate school finance, but it must be read in conjunction with Section 206."[12] As the *Tucker* Court explained, accepting the defendants' argument would have allowed the

[10] *Id.*
[11] Institute Brief at 18-19.
[12] *Tucker*, 91 So. 3d at 605 (quoting Miss. Const. art. VIII, § 206) (emphasis in original).

Legislature to dictate how school districts spent their *ad valorem* revenue, and "Section 206 would be rendered a complete nullity."[13]

The Supreme Court rejected that outcome and applied "[t]he plain language of Section 206."[14] Under that plain language, *ad valorem* revenue must be used only by the school district that levied the tax. The Legislature has no power to order levying school districts how to spend their *ad valorem* revenue. Here, the levying school district is JPS, and charter schools are not "the levying school district's schools." Requiring JPS to redirect its *ad valorem* revenue to charter schools violates Section 206.

The Institute ignores *Tucker*'s reasoning and its central holding. Instead, the Institute urges the Court to interpret the word "its" broadly. Specifically, the Institute argues that "its schools" should mean all schools located within the levying school district.

This interpretation would directly violate *Tucker*. Section 206 provides, in pertinent part: "Any county or separate *school district* may levy an additional tax, as prescribed by general law, to maintain *its schools*."[15] By its plain language, Section 206 allows a *school district* – not a city or municipality – the authority to levy *ad valorem* taxes, or property taxes, for the maintenance and operation of its own schools. Accordingly, pursuant to Section 206, the Jackson Public School District may levy an additional tax, as prescribed by general law, to maintain *its schools.*

In Mississippi, a charter school is not part of the school district where it is geographically located.[16] Instead, each charter school operates as its own local education

[13] *Tucker*, 91 So. 3d at 605.
[14] *Id.* at 604.
[15] Miss. Const. art. VIII, § 206 (emphasis added).
[16] *See* Miss. Code § 37-28-45(3) ("Although a charter school is geographically located within the boundaries of a particular school district and enrolls students who reside within the school district, the

agency, which is another name for a local school district.[17] Therefore, under Section 206, JPS' ad valorem tax revenue may not be distributed to charter schools.

II. Section 208 of the Mississippi Constitution Forbids Sending State School Funds to Schools Outside the Dual Supervision of the State Superintendent and a Local District Superintendent.

Article VIII of the Mississippi Constitution requires the establishment of a system of free public schools and provides guidelines for those schools' funding and governance. Chief among those guidelines is Section 208, which forbids providing state school funds to any school outside the system contemplated by the Constitution.[18]

Through the years, some provisions of Article VIII have been revised from time to time. But for nearly 140 years, the fundamental requirements for schools within that system have been clear: they must be "under the general supervision of the State superintendent and the local supervision of the [district] superintendent, are free from all sectarian religious control, and ever open to all children within the ages of five and twenty-one years."[19]

Charter schools lack this mandatory supervision. They are not overseen by the state superintendent, by the State Board of Education, by the Mississippi Department of Education,[20] or by any local district superintendent.[21] Nevertheless, the CSA's "state

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charter school may not be considered a school within that district under the purview of the school district's school board.").

[17] Miss. Code § 37-28-39; *see also* Miss. Code § 37-135-31 (defining "local education agency" as a public authority legally constituted by the state as an administrative agency to provide control of and direction for Kindergarten through 12th grade public educational institutions).

[18] Miss. Const. art. VIII, § 208 ("No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.").

[19] *Otken v. Lamkin*, 56 Miss. 758, 764 (1879).

[20] Miss. Code Ann. § 37-28-45(5) ("A charter school is not subject to any rule, regulation, policy or procedure adopted by the State Board of Education or the State Department of Education unless otherwise required by the authorizer or in the charter contract.").

[21] Miss. Code Ann. § 37-28-45(3) ("Although a charter school is geographically located within the boundaries of a particular school district and enrolls students who reside within the school district, the

funding stream" requires the Mississippi Department of Education to send state money to charter schools from the Mississippi Adequate Education Program. Sending state school funds to schools that are not under the general supervision of the State superintendent and the local superintendent violates Section 208.

Despite this longstanding restriction on spending state school funds, the Institute argues that changes to two other constitutional provisions have amended Section 208 by implication. The Institute is wrong for two reasons. First, the 1984 amendments to Section 202 and 203 strengthened the dual-supervision requirement of Section 208. Second, Section 204 is irrelevant to the dual-supervision requirement of Section 208.

A. The 1984 Amendments to Section 202 and Section 203 Only Strengthened the Dual-Supervision Requirement in Section 208.

The Institute correctly points out that Section 202 of the Mississippi Constitution changed in 1984. But the Institute's telling of the story is incomplete.

When the Constitution of 1890 was enacted, Section 202 broadly charged the state superintendent of education with "the general supervision of the common schools, and of the educational interests of the State." In contrast, Section 203 envisioned the Board of Education as a weaker entity: only three members (one of whom was the state superintendent), and charged with "the management and investment of the school funds, according to law, and for the performance of such other duties as may be

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charter school may not be considered a school within that district under the purview of the school district's school board. The rules, regulations, policies and procedures established by the school board for the noncharter public schools that are in the school district in which the charter school is geographically located do not apply to the charter school unless otherwise required under the charter contract or any contract entered into between the charter school governing board and the local school board.").

prescribed."[22] The Board could transact no business without the state superintendent's presence.[23]

Beginning in 1984, the responsibilities became more evenly divided. Section 202 and Section 203 both were amended, with Section 202 dropping the "general supervision" clause and requiring the state superintendent to "administer the [Department of Education] in accordance with the policies established by the State Board of Education."

In turn, the 1984 changes added far more detailed responsibilities for the State Board of Education: Section 203 still required the Board to "manage and invest school funds according to law," but it also became responsible for "formulat[ing] policies according to law for implementation by the State Department of Education, and perform[ing] such other duties as prescribed by law."[24]

The Mississippi Supreme Court has not considered the effects of these changes on the dual-supervision requirement. But clearly, the Court did not do away with the state-level supervision requirement at the heart of its decision in *Otken v. Lamkin*[25] and *State Teachers' College v. Morris*.[26] At most, these amendments simply distributed state-level supervision to both the state superintendent and the State Board of Education.

In other words, if the 1984 amendments brought any change at all to the rule of *Otken* and *Morris*, it added an additional layer of supervision necessary to be a "free school:" supervision by a local district superintendent, the state superintendent, *and* the State Board of Education.

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[22] Miss. Const. art. VIII, § 203 (1890).
[23] *Id.* ("The superintendent and one other of said board shall constitute a quorum.").
[24] Miss. Const. art. VIII, § 203.
[25] *Otken v. Lamkin*, 56 Miss. 758 (1879).
[26] *State Teachers' College v. Morris*, 144 So. 374, 376 (Miss. 1932).

Of course, the CSA allows none of these authorities to oversee charter schools. The CSA forbids the local district superintendent from overseeing charter schools.[27] It also exempts charter schools from the oversight of the Department of Education and the State Board of Education.[28]

Any one of these failings would render the CSA's funding statute unconstitutional under Section 208. Together, they leave absolutely no doubt that charter schools are outside the dual supervision required by the Mississippi Supreme Court for nearly 140 years.

B. Section 204 is Irrelevant to the Dual-Supervision Requirement of Section 208.

The Institute also argues that Section 204 of the Mississippi Constitution invalidates the dual-supervision requirement emphasized by the Supreme Court in *Otken* and *Morris*.[29]

Section 204 of the Mississippi Constitution provides for "a superintendent of public education in each county."[30] However, Section 204 also empowers the Legislature to "abolish said office." The Institute seizes on this component and argues that, because Section 204 allows the Legislature to abolish the office of county superintendent, the dual-supervision requirement in *Otken* and *Morris* must be invalid.

The Institute is wrong for an obvious reason: Section 204 has never been amended. It is an original provision of the Constitution of 1890. It existed in its current

[27] Miss. Code Ann. § 37-28-45(3).
[28] Miss. Code Ann. § 37-28-45(5).
[29] Institute Brief at 25 ("[T]he modern day Mississippi Constitution states that the Legislature 'may otherwise provide for the discharge of the duties of county superintendent or abolish said office.'").
[30] Miss. Const. art. VIII, § 204 ("There shall be a superintendent of public education in each county, who shall be appointed by the board of education by and with the advice and consent of the senate, whose term of office shall be four years, and whose qualifications, compensation, and duties, shall be prescribed by law: Provided, That the legislature shall have power to make the office of county school superintendent of the several counties elective, or may otherwise provide for the discharge of the duties of county superintendent, or abolish said office.").

form when the Supreme Court decided *Morris*. If the enactment of Section 204 had changed the dual-supervision requirement, then the *Morris* Court would have said so. Instead, *Morris* makes no mention of Section 204 because it is irrelevant to the dual-supervision requirement.

C. Jackson Schoolchildren Have Lost Millions of Dollars Because of the CSA.

The Institute suggests that Jackson schoolchildren have not actually lost money because of the CSA. This argument lacks even a shred of merit. During the past two school years, the Jackson Public School District has written checks to charter schools totaling $1.6 million.[31] Over the same time period, the Mississippi Department of Education has remitted to charter schools more than $2.7 million in state school funds that would have gone to JPS, but for the CSA. By the time the current school year ends, MDE will send approximately $1.1 million more state school funds to charter schools that otherwise would have gone to JPS.

The issue in this case is not how JPS's 2017 budget compares to its 2013 budget. The only issue is whether the payments from JPS and MDE to charter schools, pursuant to Section 27-38-55, violate the Mississippi Constitution. The Institute's attempt to twist the issue speaks volumes about its confidence in its legal position. As with all its other arguments, this final argument should also be rejected.

III. Enforcing the Constitution Will Not Affect Specialty Schools in the State.

With no legal authority supporting its interpretation of Section 208, the Institute falls back on its warnings of certain doom if the Constitution is enforced. Specifically, the Institute claims that applying Section 208 will implicate the Mississippi School for

Math and Science, the Mississippi School for the Arts, Agricultural High Schools, Alternative School Programs, Conservatorships, the Recovery School District, and transfer students.

The Institute is wrong. Mississippi's longstanding commitment to local and state oversight over public schools has never limited the Legislature's establishment of specialty schools, and it will not do so now.

A. The School for Math and Science and the School of the Arts are "State Owned and Supported Schools." *Morris* Explains that Funding These Schools is Constitutional.

Neither the Mississippi School for Math and Science nor the Mississippi School of the Arts is part of any local school district; therefore, neither is overseen by a district superintendent. Nevertheless, they may receive state funds without offending Section 208.[32]

The Supreme Court has explained that, despite Section 208, the Legislature may establish "state owned and supported schools" that (1.) are individually contemplated by either the Constitution or statute, (2.) are overseen exclusively at the state level of government, and (3.) receive no *ad valorem* tax revenue. Such schools intentionally exist outside the system of "free schools" contemplated by Section 208 and, therefore, are not subject to Section 208's limitations.

This recognition appears most clearly in *State Teachers' College v. Morris*.[33] In that case, a father enrolled his two daughters in a teacher demonstration and practice school operated by the State Teachers' College. The practice school was established and overseen by the college's administration pursuant to a statute that allowed the state's

[32] To be clear, Section 206 would prohibit either from receiving *ad valorem* tax revenue. And indeed, *ad valorem* tax revenue is not allocated to the Mississippi School for Math and Science or to the Mississippi School for the Arts.
[33] *State Teachers' College v. Morris*, 165 Miss. 758, 144 So. 374 (1932).

colleges and universities to open such schools.[34] When the City of Hattiesburg declined to pay the girls' tuition, the school billed the father. He then filed suit under the theory that any school receiving state money must be conducted as a "free school."[35]

On appeal, the Mississippi Supreme Court rejected that theory. The Court explained that Section 201 of the Constitution required establishment of a system of public schools, but it did not preclude the intentional establishment of schools outside that system.[36] For example, the Court pointed to the Legislature's creation of colleges and universities, which charged tuition and were not "free schools."[37] On that basis, the Court concluded that the Constitution's drafters "did not have state owned and supported schools, including the State's University and colleges, in mind, and that it was no part of its purpose to interfere with the Legislature's power over them."[38]

Notably, the *Morris* Court did not hold that colleges and universities were the only schools outside the scope of Section 208. Instead, the Court explained that the group of schools outside the coverage of Section 208 "*includ[ed]* the State's University and colleges."[39] Clearly, the *Morris* Court envisioned that some K-12 schools – such as

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[34] *See id.* at 375 ("A part of [State Teachers' College's] activities include the operation of a teachers' demonstration and practice school established by it under the provisions of section 7241-7246, Code 1930."); Miss. Code of 1930 §7241 ("The right and authority is hereby recognized and conferred upon the respective administrative authorities of the major state institutions of learning in Mississippi to operate, maintain and conduct teachers' demonstration and practice schools in connection with such institutions. In conducting the affairs of such teachers' demonstration or practice schools, power is hereby conferred upon the authorities aforesaid to lawfully regulate the affairs of such schools. The aforesaid authorities in co-operation with and having the approval of the board of trustees of any of the respective school districts so co-operating and/or the county superintendent of education and/or county school board as the case may be shall determine what grade, or grades, or parts of grades of said districts, from which such students may be admitted.").

[35] *Id.* at 375-76.

[36] *Id.* 376-77. Section 201 has since been amended, but like the version in effect in 1932, Section 201 still requires establishment of a system of public schools. *See* Miss. Const. art 8 § 201 ("The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.").

[37] *Id.* at 379.

[38] *Id.*

[39] *Id.* (emphasis added).

the practice and demonstration school – might also fall outside the scope of Section 208.

The practice school in *Morris* had several characteristics that intentionally removed it from the system of free schools covered by Section 208. First, the school was contemplated individually by statute.[40] Second, the school was overseen by officials at the state level of government – specifically, the State Teachers' College administration.[41] Third, the school was not entitled to *ad valorem* tax revenue.[42]

Similarly, the Mississippi School for Math and Science and the Mississippi School for the Arts are (1) individually contemplated by statute;[43] (2) overseen exclusively by the State Board of Education;[44] and (3) receive no *ad valorem* tax revenue.[45] Like the practice school at issue in *Morris*, the Mississippi School for Math and Science and the Mississippi School for the Arts were intentionally created to be outside the existing system of free public schools and are governed and funded accordingly. Thus, these schools do not contradict Section 208.

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[40] Miss. Code of 1930 §7241 (authority to establish practice schools granted only to individual institutions of higher learning).

[41] *Id.* ("The right and authority is hereby recognized and conferred upon the respective administrative authorities of the major state institutions of learning in Mississippi to operate, maintain and conduct teachers' demonstration and practice schools in connection with such institutions.

[42] Miss. Code of 1930 §7242 (conditioning payment of public funds to practice schools upon approval of local public school officials); Miss. Code of 1930 §7243 (granting permission for practice schools to charge tuition if local school authorities do not provide funding). *See also Morris*, 144 So. at 375 (school billed students' father for tuition after City of Hattiesburg refused to pay).

[43] Miss. Code Ann. § 37-139-1, *et seq.* (creating Mississippi School for Math and Science); Miss. Code Ann. § 37-140-1, *et seq.* (creating Mississippi School for the Arts).

[44] Miss. Code Ann. § 37-139-3(2) (MSMS "shall be governed by the State Board of Education"); Miss. Code Ann. § 37-140-5(1) (MSA "shall be governed by State Board of Education").

[45] Miss. Const. art 8 § 206 (*ad valorem* tax revenue only available to schools of the levying district). *See also* Bracey Harris, *The Clarion-Ledger*, "Mississippi School for Math and Science Cuts Enrollment, Cites Funding" (June 2, 2016), *available at* http://www.clarionledger.com/story/news/2016/06/01/school-math-and-science-cuts-enrollment-citing-funding/85191634 (last viewed Aug. 24, 2016) (noting that MSMS, MSA, and the schools for the deaf and blind "do not have an ad valorem tax base to draw funds from and are therefore excluded from the [Mississippi Adequate Education Program] formula").

Charter schools satisfy none of the three characteristics of the "state owned and supported schools" in *Morris*. They are not individually contemplated by statute; they are overseen by private organizations instead of state government officials; and they receive *ad valorem* revenue. Unlike the Mississippi School of Math and Science and the Mississippi School of the Arts, charter schools are *not* overseen by the State Board of Education.[46] Further, charter schools are funded, in part, by the diversion of *ad valorem* tax receipts from the school district within which they are geographically located.[47] Charter schools do not fit *Morris*' "state owned and supported schools" exception to Section 208.

As with the practice school in *Morris*, state-owned and supported schools such as the Mississippi School for Math and Science are eligible for state funding. Applying Section 208 to the CSA will have no effect on the School for the Arts or the School for Math and Science.

B. The Statutes that Fund Agriculture Schools and Alternative Schools are Not Facially Unconstitutional. Unlike the CSA, These Statutes Do Not Require the Expenditure of *Ad Valorem* Revenue.

Unlike the CSA and the statute at issue in *Tucker*, the statutes calling for local funds to follow students attending agriculture schools and alternative schools do not require diversion of *ad valorem* taxes. [48] For out-of-county students attending

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[46] Miss. Code § 37-28-45(5) ("A charter school is not subject to any rule, regulation, policy or procedure adopted by the State Board of Education or the State Department of Education unless otherwise required by the authorizer or in the charter contract.").

[47] Miss. Code § 37-28-55(2).

[48] *See* MISS. CODE. ANN. § 37-27-61 (emphasis added) ("The county superintendent of education of a county which does not alone or in conjunction with another county maintain an agricultural high school or an agricultural high school-junior college, may provide, with the approval of the county board of education and the board of supervisors, for the attendance of pupils residing in the county of which he is superintendent of education, at an agricultural high school or an agricultural high school-junior college located in a county adjoining thereto, and pay by certificate drawn by him on the county school funds for the instruction of such pupils."); *See* MISS. CODE. ANN. § 37-13-92(6) (emphasis added) ("the expense of establishing, maintaining and operating such alternative school program may be paid from funds

agricultural high schools, county school funds are used to pay for the child's education. For out-of-district students attending alternative schools, funds made available to the district for alternative schools or local district maintenance funds may be used to pay for the child's education. Because local school districts are not required to use *ad valorem* funds to pay for out-of-district students attending an alternative school located in the district, this statute is not facially unconstitutional.

C. In a Conservatorship, the State Does Not Eliminate a District's Local Oversight. It Simply Replaces the Officials Performing that Oversight.

The Institute also argues that reaffirming the dual-supervision requirement would make school conservatorships impossible. That is incorrect.

A conservatorship is, by definition, a temporary remedy to address a "state of emergency in a school district."[49] When the State "takes over" a failing school district and places it under conservatorship, the conservator becomes "responsible for the administration, management and operation of the school district."[50] Accordingly, the conservator steps into the shoes of the local education agency and assumes responsibility for *every* aspect of local oversight over the school district. Because the school is still part of state system of free public schools, the State Board of Education continues to exercise oversight over the school as well. Again, this remedy is only temporary, since the conservatorship will cease when the state of emergency no longer exists.[51]

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contributed or otherwise made available to the school district for such purpose or from local district maintenance funds.

[49] Miss. Code § 37-17-6(15)(a).

[50] Miss. Code Ann. § 37-17-6(15)(a).

[51] *Id.*

Charter schools, in contrast, are not under the oversight of the local superintendent or the state board at any time, even in a state of emergency. Unlike a local school board or a conservator, the Charter Authorizer Board does not attend all meetings of Midtown Charter's board and administrative staff; supervise the day-to-day activities of Midtown Charter's staff; or appoint a parent advisory committee. The Authorizer Board does not approve Midtown Charter's checks, ratify its employment contracts, or approve its financial obligations. Moreover, unlike a conservatorship, the Authorizer Board is not a temporary remedy during a state of emergency.

In sum, a conservatorship does not eliminate local oversight over a district during a state of emergency; it merely replaces the officials responsible for performing that oversight. Since local oversight remains in place, a conservatorship does not change the fact that the district's schools are correctly characterized as "free schools" pursuant to Section 208. In contrast, a charter school has no local or state oversight, whether in a state of emergency or not.

D. The Mississippi Recovery School District Provides State Oversight For Districts in Individual Conservatorships.

The Mississippi Recovery School District operates as the formal oversight for individual conservatorships. Under the Mississippi Recovery School District, schools under conservatorship are placed under special oversight by at the State Department of Education, through the appointment of a Deputy Superintendent to oversee the Recovery School District.[52] This state school district is a specialized layer of state oversight that does not inhibit the conservator from performing her temporary role in

[52] Miss. Code. Ann. § 37-17-6 ("here is established a Mississippi Recovery School District within the State Department of Education under the supervision of a deputy superintendent appointed by the State Superintendent of Public Education, who is subject to the approval by the State Board of Education. The Mississippi Recovery School District shall provide leadership and oversight of all school districts that are subject to state conservatorship).

the district. The Mississippi Recovery School District is the arm of state oversight, and does nothing to impede Section 208.

E. The Law Governing Transfer Students Is Not Facially Unconstitutional. Unlike the CSA, This Statute Does Not Require the Expenditure of *Ad Valorem* Revenue.

Mississippi law permits students to transfer to an adjacent school district "if the respective districts agree to the transfer."[53] Therefore, a student may only transfer to an out-of-district school if the sending-district and the receiving-district permit the transfer. If both districts agree, the sending-district sends *ad valorem* funds to the receiving-district. In stark contrast to the CSA, the transfer statute does not require districts to spend *ad valorem* funds on schools that are not "its" schools. For this reason, unlike the CSA, the transfer statute is not unconstitutional on its face.

III. Conclusion.

The Institute favors charter schools as a policy matter. That is its right. But courts do not dabble in policy experiments. In a facial constitutional challenge, courts only decide whether a statute's text is inconsistent with the Constitution's requirements. In this case, Section 37-28-55 violates both Section 206 and Section 208 of the Mississippi Constitution. The Plaintiffs' constitutional rights trump the Institute's special interests. The Institute's motion for summary judgment should be denied.

RESPECTFULLY SUBMITTED this Twenty-Seventh day of February 2017.

/s/ *Will Bardwell*
Will Bardwell
Counsel for the Plaintiffs

[53] Miss. Code. Ann. § 37-15-31(5)(a) ("If the board of trustees of a municipal separate school district with added territory does not have a member who is a resident of the added territory outside the corporate limits, upon the petition in writing of any parent or legal guardian of a school-age child who is a resident of the added territory outside the corporate limits, the board of trustees of the municipal separate school district and the school board of the school district adjacent to the added territory shall consent to the transfer of the child from the municipal separate school district to the adjacent school district.")

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CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that, simultaneously with its filing, a copy of the foregoing Response was served on all counsel of record via the Court's MEC electronic filing system.

SO CERTIFIED this Twenty-Seventh day of February 2017.

/s/ *Will Bardwell*
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