IN THE SUPREME COURT OF MISSISSIPPI

**CHARLES AND EVELYN ARAUJO,
CASSANDRA OVERTON-WELCHLIN,
LUTAYA STEWART, APPELLANTS
AND ARTHUR BROWN, ALL ON BEHALF
OF THEMSELVES AS TAXPAYERS AND AS
NEXT FRIENDS OF THEIR MINOR CHILDREN**

V. CAUSE NO. 2018-CA-00235-SCT

**GOVERNOR PHIL BRYANT,
THE MISSISSIPPI DEPARTMENT OF EDUCATION,
THE JACKSON PUBLIC SCHOOL DISTRICT,
THE MISSISSIPPI CHARTER SCHOOLS ASSOCIATION,
MIDTOWN PARTNERS, INC., APPELLEES
MIDTOWN PUBLIC CHARTER SCHOOL,
GLADYS AND ANDREW OVERTON,
ELLA MAE JAMES, AND TIFFANY MINOR**

REPLY BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

Counsel for the Appellants:
William B. Bardwell (Miss. Bar No. 102910)
Christine Bischoff (Miss. Bar No. 105457)
Jody E. Owens, II (Miss. Bar No. 102333)
Southern Poverty Law Center
111 E. Capitol Street, Suite 280
Jackson, Mississippi 39201
Telephone: (601) 948-8882
Facsimile: (601) 948-8885
E-mail: will.bardwell@splcenter.org
E-mail: christine.bischoff@splcenter.org
E-mail: jody.owens@splcenter.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Decisions

Mississippi Supreme Court Decisions

Mississippi Court of Appeals Decisions

Foreign State-Court Decisions

Mississippi Constitutional Provisions

Mississippi Statutes

Secondary Authorities

SUMMARY OF THE REPLY

Only one party in this case asks the Court to apply Section 206 of the Mississippi Constitution as it is written: the Parents. Every other party urges the Court to ignore Section 206's plain language and to read into it words that simply are not there.

This Court cannot do that. When the words of the Constitution are clear, they must be applied. As the Court has explained, "Section 206 . . . clearly states that a school district may tax to fund 'its schools,' leaving no room for an interpretation allowing the Legislature to mandate that the funds be distributed elsewhere." *Pascagoula Sch. Dist. v. Tucker*, 91 So. 3d 598, 607 (Miss. 2012). The Local Tax Transfer Statute requires school districts to do exactly what Section 206 forbids.

Whether charter schools are good or bad policy is irrelevant to this case. All that matters is that Section 206 forbids funding charter schools in the way the Local Tax Transfer Statute requires. This Court's inquiry ends there.

Section 37-28-55(2) of the Mississippi Code is unconstitutional.

ARGUMENT

I. The Parents Have Standing Because They are Taxpayers Whose Taxes are Being Used for Illegal Government Spending.

A. The Government Waived Its Attack Against the Parents' Standing.

The Government acknowledges both that the Chancery Court found the Parents have standing, and that it did not appeal that ruling. Brief of Appellees Governor Phil Bryant, *et al.* ("Government's Brief") at 3 n.4; Government's Brief at 14. Nevertheless, it insists that it did not waive its standing argument. For two reasons, the Government is wrong.

Hill Brothers v. Mississippi Transportation Commission unmistakably held that if an appellee plans to attack the appellant's standing, it must preserve the argument through a cross-appeal. *Hill Bros. Constr. & Engineering Co. v. Miss. Transp. Comm'n*, 909 So. 2d 58, 60 (Miss. 2005) ("MTC did not file a cross-appeal, but raised 'standing' in its appellate brief. As this issue is not properly before the Court, we decline to address this issue on the merits."). The Government paints this portion of the *Hill Brothers* decision as *dicta*, but *dicta* are portions of a judicial opinion that are "not essential to the decision." Black's Law Dictionary at 485 (8th ed. 2004). The portion of *Hill Brothers* explaining an appellee's duty to cross-appeal is not *dicta*, it is a holding: it explains the Court's decision and the basis for that decision. The Government cannot avoid this holding simply because it does not like what it says.

The Government argues that, even if it failed to preserve the issue, this Court should overlook that failure because jurisdictional questions are never waived and – according to the Government – standing is jurisdictional in nature. If this case were in federal court, then the Government would be right. But the Government's argument fails to acknowledge that standing under Mississippi law is fundamentally different than federal law. *Hotboxxx, LLC v. City of Gulfport*, 154 So. 3d 21, 27 (Miss. 2015) (standing "more liberal" under Mississippi law). And ultimately, *Hill Brothers* proves the Government wrong. To be sure, this Court periodically has described standing as a component of jurisdiction. *See, e.g.*, *Kirk v. Pope*, 973 So. 2d 981, 989 (Miss. 2007). But *Hill Brothers* implicitly acknowledged that standing and jurisdiction are distinct concepts. Jurisdiction is a question of whether a case falls within the class of controversies that courts can decide; standing is a question of whether a litigant is within the class of people entitled to bring a claim (irrespective of whether the court can

decide it). In other words, jurisdiction concerns the powers of a court, while standing concerns the powers of litigants. *See Chubb Lloyds Ins. Co. v. Miller Cty. Circuit Court*, 361 S.W.3d 809, 815 (Ark. 2010) ("Under Arkansas law, standing is not a component of subject-matter jurisdiction[.]"). Otherwise, in *Hill Brothers*, the standing issue would not have been waived.

Former Justice James L. Robertson explained this point in the treatise *Mississippi Civil Procedure*: "At times, standing has been thought an inquiry into jurisdiction of the subject matter, but this overstates the point. Whether a case is of the general type or class the court may hear is a distinct and different question than whether a particular person may bring it." James L. Robertson, "Standing to Sue," 1 MS Prac. Civil Proc. § 1:28 (May 2018).

The Government's failure to preserve its standing argument through a cross-appeal carries the same consequence that it carried in *Hill Brothers*: waiver. Therefore, the Court should dispense with a standing inquiry and review this case's merits.

B. Caselaw Provides for Taxpayer Standing to Attack Illegal Government Spending.

1. The Government Fails to Address the Parents' Authorities.

Even if the Government had not waived its argument against the Parents' standing, the Parents still would be entitled to be heard because they have standing.

The Parents' principal brief cited several cases in which this Court found taxpayer standing to attack illegal government spending. Parents' Brief at 7-8. The Parents also cited secondary authorities acknowledging those holdings. Parents' Brief at 8. *See* James L. Robertson, "Standing to Sue – Public Interest Civil Actions," 3 MS Prac. Encyclopedia MS Law § 19:211 (2d ed. 2017) ("A taxpayer may challenge a legislative appropriation to

an object not authorized by law.") (citing *Prichard v. Cleveland*, 314 So. 2d 729 (Miss. 1975)). However, the Government's brief did not address or attempt to distinguish any of those cases or secondary sources. Moreover, the Government appears to concede that state law allows taxpayer standing to attack illegal government spending. Government's Brief at 16 n.19 (acknowledging that "[t]axpayers may sue a government agency *to challenge an* unlawful purchase or *expenditure of public funds*") (emphases added).[1]

Rather than confront the Parents' authority, the Government offers a smattering of other cases where the Court considered taxpayer standing but ultimately found it absent. Each of those cases is distinct from this case in a critical way: the plaintiffs in those cases challenged something other than illegal government spending. *See Stietenroth v. Monaghan*, 114 So. 2d 754 (Miss. 1959) (action to require State Tax Commission to assess higher taxes against certain non-parties); *Bd. of Trustees of State IHL v. Ray*, 809 So. 2d 627 (Miss. 2002) (attacking university's expansion from two-year curriculum to four-year curriculum); *Burgess v. City of Gulfport*, 814 So. 2d 149 (Miss. 2002) (challenging issuance of tree-removal permit); *City of Madison v. Bryan*, 763 So. 2d 162, 163 (Miss. 2000) (suit against city for not approving site plan for proposed apartment complex); *Hotboxxx, LLC v. City of Gulfport*, 154 So. 3d 21, 23 (Miss. 2015) (constitutional challenge against zoning ordinance).

In contrast, the Parents' case is precisely what this Court has permitted for more than 50 years: an action by taxpayers to attack illegal government spending. *See* Parents' Brief at 7-8. The Parents are entitled to be heard on the merits of this case.

[1] Even this states the rule too narrowly. This Court repeatedly has allowed taxpayer standing to challenge any illegal government spending, regardless of whether the defendant is a state agency. *See, e.g.*, *Canton Farm Equipment v. Richardson*, 501 So. 2d 1098 (Miss. 1987) (taxpayer standing against members of county board of supervisors); *Prichard v. Cleveland*, 314 So. 2d 729 (Miss. 1975) (taxpayer standing against members of community hospital board of trustees).

2. The Parents Have Colorable Interests and Suffer Adverse Effects As a Result of the Local Transfer Tax Statute.

The Parents' principal brief described at length their injuries caused by the Local Tax Transfer Statute, both as taxpayers and as next friends of their children. Parents' Brief at 8-12. Specifically, the Parents argued:

- that as school district *ad valorem* taxpayers, they have colorable interests in the legal expenditure of that tax's revenue, *see Tucker*, 91 So. 3d at 604 ("[T]his case affects the rights of all taxpayers in Jackson County . . . .");
- that their schoolchildren (on whose behalves they filed suit) have colorable interests in ending their school district's illegal transfer of *ad valorem* revenue;
- that the Local Tax Transfer Statute affects the schoolchildren's constitutionally protected property interests in Mississippi's public schools and their state-law fundamental right to a minimally adequate public education, *see Goss v. Lopez*, 419 U.S. 565 (1975), and *Clinton Mun. Sep. Sch. Dist. v. Byrd*, 477 So. 2d 237, 240 (Miss. 1985); and
- that the Local Tax Transfer Statute causes the Parents an adverse effect because it affects *ad valorem* taxpayers differently than it affects the general (non-taxpaying) public, *see Tucker*, 91 So. 3d at 604.

The Government addresses none of those injuries. Instead, it invented a new injury for the Parents: a purported philosophical objection to charter schools.

This is a red herring. The Parents have never claimed to have philosophical objections to charter schools, much less based their standing claim on such objections. The Government's failure to confront the Parents' real injuries demonstrates that this attack against standing is not a serious argument. This Court should proceed to the merits of the case.

3. Standing is Not a Contest. The Parents Have Colorable Interests and Suffer Adverse Effects. It is Irrelevant That Other Parties Might Have "More Colorable" Interests.

Finally, the Government argues that even if the Parents satisfy Mississippi's liberal standing test, this Court still should ignore their challenge because other parties might have even stronger claims to standing. For example, the Government argues that

the Jackson Public School District ("JPS") would have standing in this lawsuit, and that others might as well. Government's Brief at 20.

But standing is not a contest. It is not a test of whether a plaintiff has a more direct connection to the case than anyone else. Rather, it is a simple inquiry into whether a plaintiff has a colorable interest in the litigation or experienced an adverse effect that is different than that experienced by the general public. *See Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 827 n. 13 (Miss. 2009); *Hall v. City of Ridgeland*, 37 So. 2d 25, 33-34 (Miss. 2010). The Parents more than satisfy both requirements.

Moreover, if the Parents are not allowed to attack the Local Tax Transfer Statute's unconstitutionality, then no one will. The Legislature enacted the Local Tax Transfer Statute nearly six years ago. In that time, no one else has challenged it. The Government claims that JPS would have standing to challenge it, but JPS filed a motion to dismiss and argues on appeal that the motion's denial was error. Clearly it is not interested in challenging the Local Tax Transfer Statute. Likewise, the Attorney General has vigorously defended this unconstitutional statute.

No one else is coming. It is these Parents or no one. Mississippi law allows the Parents to bring this challenge. They should be heard, and the Government's standing argument should be rejected.

II. The Local Tax Transfer Statute Requires Exactly What the Plain Language of Section 206 Forbids.

The Government acknowledges that *Pascagoula School District v. Tucker*, decided only six years ago, is good law, and does not suggest that it was decided incorrectly. Yet the Government attempts to argue that Section 206 allows precisely

what *Tucker* prohibited. Specifically, the Government argues that Section 206 allows a district to send its *ad valorem* revenue to non-district schools, so long as the funds "follow the student." Government's Brief at 11.

This argument is simply wrong, for at least three reasons. First, and most importantly, Section 206 simply does not say what the Government claims it says. Second, the Government's "money-follows-the-student" theory rests on a fallacy. Third, Section 206's Framers intended to require school districts to use *ad valorem* revenue only on schools they controlled.

A. The Local Tax Transfer Statute is Exactly Like the Statute in *Tucker*. It Requires a School District to Send *Ad Valorem* Tax Revenue to Non-District Schools.

Section 206 requires that a school district levying an *ad valorem* tax must use the tax's revenue "to maintain *its* schools" (emphasis added). In *Pascagoula School District v. Tucker*, 91 So. 3d 598 (Miss. 2012), this Court held that Section 206's plain language "clearly states that a school district may tax to fund 'its schools,' leaving no room for an interpretation allowing the Legislature to mandate that the funds be distributed elsewhere." *Id.* at 607. That conclusion controls this case.

Tucker was clear: the Legislature may not require school districts to send their *ad valorem* revenue to non-district schools.[2] *Id.* at 604 ("The plain language of Section 206 grants the [school district] the authority to levy an ad valorem tax and mandates that the

[2] The Government describes *Tucker*'s outcome as (to use its word) "rare," as if to suggest that diversions of school district *ad valorem* revenue do not always violate Section 206. Government's Brief at 31 ("And this especially made sense in *Tucker* – when the Court was addressing a one-off statute targeting a single taxed district that took funds from that district and simply gave those funds to outside, non-taxed districts. Per this Court, *that* is the rare type of law that conflicts directly with Section 206, even with the Legislature's plenary power under Section 201.") (emphases in original). The Government is wrong. Section 206 makes no exceptions: it *never* allows a school district to send *ad valorem* tax revenue to non-district schools.

revenue collected be used to maintain only its schools. Conversely, no such authority is given for the [school district] to levy an ad valorem tax to maintain schools outside its district.").

If the Government could win this case through a straightforward application of Section 206's text, then it would argue for that approach. It has chosen a different strategy, for obvious reasons. To avoid *Tucker's* holding, the Government simply declares "[t]his case is not *Tucker*." Government's Brief at 32. The Government could not be more wrong: this case is *Tucker* all over again. *Tucker* held that school district *ad valorem* tax revenue must be used "to maintain the levying school district's schools." *Tucker*, 91 So. 3d at 605. The Local Tax Transfer Statute requires just the opposite. It violates Section 206.

In an effort to distract the Court, the Government manufactures a distinction: that unlike the statute in *Tucker*, the Local Tax Transfer Statute sends *ad valorem* revenue to non-district schools only when students have left a district school.

That argument has absolutely no connection to Section 206's text. Section 206 forbids school districts from using *ad valorem* revenue on non-district schools. It does not contemplate a student's residence in relation to where the student attends school. Any other construction defies the plain language of Section 206 and this Court's holding in *Tucker*: "Section 206 clearly states that the purpose of the tax is to maintain the levying school district's schools." 91 So. 3d at 605 (emphasis omitted).

Not unexpectedly, the Government fails to identify language in Section 206 that supports its argument. That is because no such language exists. Section 206 makes no exceptions, and neither can this Court.

B. *Tucker* Requires That School District *Ad Valorem* Revenue Benefit the District That Levied the *Ad Valorem* Tax.

1. Requiring a School District to Spend *Ad Valorem* Revenue on Non-District Schools Violates Section 206's Plain Language.

The Government's case rests on the hope that this Court will do something that it cannot: ignore the Constitution's plain language.

Section 206 allows a school district to levy an *ad valorem* tax, but it requires the district to use that tax's revenue for just one purpose: "to maintain its schools." In *Tucker*, this Court explained: "Section 206 clearly states that the purpose of the tax is to maintain the levying school district's schools." *Tucker*, 91 So. 3d at 605. Nevertheless, the Government suggests that the phrase "its schools" in Section 206 might include both (1) the levying school district's schools and (2) non-district schools attended by students that reside in the district. Specifically, the Government questions:

> [T]he phrase "its schools" in Section 206 obviously means the schools of the district. But it is not obvious from the text which schools those might be. Are they schools run by the district's school board or the schools used by the district's students? Or, to put it differently, is Section 206's tax levy about maintaining the schools for those who govern them or for the students who receive an education from them?

Government's Brief at 22 (emphases omitted).

The answers to all the Government's questions are in *Tucker* and *Pascagoula-Gautier School District v. Board of Supervisors of Jackson County*. The *Tucker* Court explained that "Section 206 clearly states that the purpose of the tax is to maintain *the levying school district's schools*." *Tucker*, 91 So. 3d at 605 (emphasis added). Notably, the Parents' principal brief quoted this *Tucker* excerpt *five times*; the Government's Brief refused to address it even once. *See* Parents' Brief at 1, 5, 13, 14, 21.

But *Tucker* has not been this Court's only occasion to construe Section 206. In *Pascagoula-Gautier School District*, 212 So. 3d 742 (Miss. 2016), this Court again explained that under Section 206, "a school district may levy a tax to maintain its schools, not its schools and several others." *Pascagoula-Gautier Sch. Dist.*, 212 So. 3d at 744.

The word "its" is not a complicated word. "Its" is a possessive pronoun, demonstrating that something *belongs to* the noun being modified. *See* Its, Merriam-Webster, https://www.merriam-webster.com/dictionary/its (last viewed Nov. 12, 2018) ("of or relating to it or itself especially as *possessor*, agent, or object of an agent") (emphasis added). But the Charter Schools Act could not be clearer: charter schools do not belong to the district in which they are geographically located. 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 charter school may not be considered a school within that district . . . ."). When Section 206 empowers a school district to levy an *ad valorem* tax and then requires that revenue to be used "to maintain its schools," it obviously means the schools overseen by (belonging to) the tax-levying entity. Any other interpretation of "its" has no support in case law, history, or dictionaries.

2. The Government's "Money-Follows-the-Student" Argument is a Fabrication. It Lacks Any Support in Section 206's Text.

Beyond the fact that it is simply made up, the Government's "money-follows-the-student" theory is built on an obvious fallacy. Specifically, the Government argues that when a school district sends its *ad valorem* revenue to non-district schools (like charter schools), Section 206 is not offended because a resident student's attendance renders

that non-district charter school one of "its schools" (meaning one of the school district's schools). But that interpretation would result in schools and students "belonging" to more than one school district. That would be an administrative nightmare. For example, if Clarksdale Collegiate Charter School enrolled students residing in the Clarksdale Municipal School District and the Coahoma County School District,[3] then under the Government's theory, the charter school would belong to *three* different school districts (Clarksdale Municipal School District, Coahoma County School District, and the charter's own school district). This would also mean that charter students would somehow also be students of multiple districts. Absolutely no authority (or basic common sense) supports this convoluted reading of Section 206.

For Section 206 to permit the Government's interpretation, it would have to allow a district to spend *ad valorem* funds "to maintain its *residents*' schools." But that is not what Section 206 says. *Tucker* held that "Section 206 *clearly* states that the purpose of the tax is to maintain the levying school district's schools." *Tucker*, 91 So. 3d at 605 (emphasis added). *Tucker* further explained that "*[t]he plain language* of Section 206 . . . mandates that the revenue collected be used to maintain only its schools." *Id.* at 604 (emphasis added). The *Tucker* Court would not have described Section 206's language as clear and plain if Section 206 suffered from the ambiguity that the Government suggests. This Court has always held that "[w]hen interpreting a constitutional provision, we must enforce its plain language."). *Thompson v. Attorney Gen. of State*, 227 So. 3d 1037, 1041 (Miss. 2017). For this reason, the Government's argument should be rejected.

[3] Section 37-28-23(1)(b) of the Mississippi Code permits a student residing in a C-rated (or below) district to enroll in any charter school, even if that charter school is outside the district in which the student resides.

C. The Government's Misreading of History Defies *Tucker*.

But even if the word "its" were ambiguous, that would not allow the Government to conjure up a meaning. It simply would require the Court to determine the Framers' intent through tools of interpretation, such as Section 206's historical background. And the Constitutional Convention's machinations over Section 206's wording leave no doubt that a district may use *ad valorem* revenue only to maintain schools that it controls. Parents' Brief at 15-17.

In an effort to address this fact, the Government offers a meandering, confusing history of Section 206's life post-Convention. The point of the Government's historical analysis appears to be to suggest that Section 206's current wording ("Any county or separate school district may levy an additional tax, *as prescribed by general law*, to maintain its schools.") (emphasis added) deviates from the Convention's intent and vests the Legislature with the power to decide how district *ad valorem* revenues are spent.

Again, *Tucker* answered this question.

The *Tucker* Court explained that Section 206's phrase "as prescribed by general law" empowers the Legislature to decide the *method* of tax collection, but it does not empower them to commit that tax's revenue:

> We . . . find that the phrase "as prescribed by general law" 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. The Legislature's plenary power does not include the power to enact a statute that – on its face – directly conflicts with a provision of our Constitution. Section 206 specifically limits the use of the tax revenue from a school district's tax levy to the maintenance of "its schools," and the Legislature's plenary taxation power does not authorize it to ignore this restriction. 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.

Id. (emphases in original). *See also id.* at 604 ("Article 8, Section 206 is *the* enabling authority for *a school district's ad valorem taxation power* in this state") (first emphasis in original; second emphasis added).

The Local Tax Transfer Statute goes well beyond prescribing a "method" for collecting school district *ad valorem* revenue – it requires a district to commit the funds to a purpose other than "to maintain its schools." This requirement violates Section 206 just as much today as it did in *Tucker*. The Government's attempt to misconstrue Section 206 runs afoul of the Constitution's history and plain language. As in *Tucker*, the Government's argument should be rejected.

D. The Government's Concern for Other Nontraditional School Programs is an Unfounded Distraction.

As the Parents predicted in their principal brief, the Government attempts to distract this Court by claiming that if *Tucker* is reaffirmed, then local (not state) funding for conservatorships, the Mississippi Achievement School District, some out-of-district transfers, and dual-operated alternative schools will be endangered. Government Brief at 36-42. The Parents addressed each of these programs in their principal brief, Parents Brief at 17-20, and *amicus curiae* Clarksdale Municipal School District addresses them in even deeper detail. Therefore, no further in-depth rebuttal is required. But two points (neither of which the Government confronts) warrant reiterating.

First, none of these programs is at issue in this case. *Hughes v. Hosemann,* 68 So. 3d 1260, 1263 (Miss. 2011) ("As a matter of judicial policy, this Court does not issue

advisory opinions."). If a case ever confronts the constitutionality of these programs' funding sources,[4] then this Court can take up the question at that time.[5]

Second, *Tucker* has been the law of the land for nearly seven years. The sky has not fallen; none of the concerns mined by the Government has arisen. If a textualist approach to Section 206 endangered any of these programs, then that danger would have presented itself by now. That threat has not arisen because it does not exist.

Just as it did in *Tucker*, this Court must interpret Section 206 according to its plain language to decide only the issue presented in this case.

E. The Constitution is Not a Shell Game. The Legislature Can No More Violate It Indirectly Than It Can Directly.

The Government's final argument, which it raises for the first time on appeal, is that the Local Tax Transfer Statute should not be struck down because it only requires school districts to give up amounts *equal to* their *ad valorem* receipts – not the actual *ad valorem* funds themselves. Government's Brief at 43. In other words, the Government's view is that even if the Local Tax Transfer Statute is unconstitutional, it should be allowed to stand because it is only *indirectly* unconstitutional.

For two reasons, this argument must be rejected.

First, and most obviously, the argument has been waived. By the Government's own admission, this is a brand-new legal theory being presented for the first time on appeal. Government's Brief at 43 n.32. But new arguments cannot be presented on

---

[4] Suffice it to say that many of the programs for which the Government purports to fear do not even receive school district *ad valorem* revenue, so this case has no potential effect on them at all. *See, e.g.*, Parents' Brief at 19 (agricultural schools funded by county *ad valorem* taxes, not school district *ad valorem* taxes). *See also* Parents' Brief at 18 n.4 (only one form of out-of-district transfer allows using district *ad valorem* revenue, and record evidence shows zero students currently enrolled under that transfer allowance).

[5] And indeed, the Court *should* reserve any concerns about those programs for another day. One of the programs raised by the Government, the Achievement School District, has not even begun operation. Any challenge against it is not even ripe yet. Considering its validity at all would result in an advisory opinion.

appeal. *See, e.g.*, *Fowler v. White*, 85 So. 3d 287, 293 (Miss. 2012) ("Fowler's waiver argument is procedurally barred because he raises it for the first time on appeal."); *Anderson v. LaVere*, 136 So. 3d 404, 410 (Miss. 2014) ("In order to raise such an argument before this Court, however, Anderson and Harris must have first raised this argument in the trial court – which they did not."). The Government claims that it could not have raised this argument in Chancery Court because, at the time, the Parents also challenged the constitutionality of diverting state funds from public schools. But nothing would have forbidden the Government from raising its new legal theory as an argument in the alternative, which is exactly what it is doing now. Instead, in a case entirely about statutory interpretation, the Government raises a brand-new interpretation at its last possible opportunity. It is well established that this ambush on appeal is forbidden.

Second, even if the argument were not waived, it is simply wrong.

The Constitution is not a shell game. Lawmakers are not allowed to circumvent its protections through trickery or disguise. Section 206 unequivocally demands that the benefit of a district's *ad valorem* tax levy remain with the levying district. But regardless of whether the statute leads to a school district remitting (1) *ad valorem* funds themselves or (2) funds from other sources equal to the amount of *ad valorem* funds, the result is the same: the district is deprived of the benefit of its *ad valorem* tax levy.[6] The sole purpose of the *ad valorem* tax is to create district revenue to supplement state funding. *See Tucker*, 91 So. 3d at 605 ("The Legislature has no authority to mandate how the funds are distributed, as Section 206 clearly states that *the purpose of the tax is*

[6] If a thief steals $20 from you, it does not matter whether he took it from your left pocket or your right pocket. You are still out $20.

to maintain the levying school district's schools."). Whether the Local Tax Transfer Statute directly eliminates that benefit or indirectly eliminates it, the result is the same: the benefit is eliminated.

It is hornbook law that indirect constitutional violations are just as forbidden as direct ones. *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) ("Constitutional rights would be of little value if they could be . . . indirectly denied."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) ("The Constitution nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections.") (quotation omitted). The Local Tax Transfer Statute deprives a school district of the benefit of its *ad valorem* tax levy. It is irrelevant that the deprivation is potentially indirect.[7]

The Government's attempt to allow indirect violations of Section 206 would have unintended effects far beyond this case. For example, although no party in this litigation argues that *Tucker* was incorrectly decided, the Legislature almost certainly would revive the statute that this Court struck down in *Tucker*. By adding a few words to the statute, the Legislature would re-inflict on the Pascagoula-Gautier School District the same injury that this Court prevented in 2012. *Tucker* will have been for nothing.

Whether one views the Local Tax Transfer Statute as a direct affront to Section 206 or an indirect affront, it is still an affront. It is unconstitutional.

---

[7] Furthermore, it is unlikely that the Government's suggestion is even legal. Mississippi law makes clear that MAEP funds are allocated to school districts based on the number of students enrolled in that district. Miss. Code Ann. § 37-151-7(1)(c) (MAEP allocations determined by "[m]ultiply[ing] the average daily attendance of the district by the base student cost as established by the Legislature, which yields the total base program cost for each school district"). Under its new theory, the Government argues that charter schools are eligible to receive MAEP funds twice: once when a student enrolls in a charter school, and again in lieu of *ad valorem* receipts. In other words, school districts would lose not only the MAEP funds associated with students who enroll in charter schools, but also the MAEP funds associated with students *who remain enrolled in the school district*. Funding charter schools through MAEP funds has not been challenged on this appeal; but requiring school districts to surrender MAEP allocations *twice* would undoubtedly violate the law.

III. The Jackson Public School District is Complying with the Local Tax Transfer Statute By Sending *Ad Valorem* Revenue to Non-District Schools. It is a Necessary Party.

Separately from the other Government appellees, JPS filed a brief arguing that it was not a necessary party in Chancery Court and that it should have been dismissed.

For two reasons, this Court should not disturb the Chancery Court's ruling that JPS is a necessary party. First, JPS waived its right to appeal this decision. Second, JPS is a necessary party because it is performing actions that the Parents sought to enjoin.

A. After the Chancery Court Decided that JPS is a Necessary Party, JPS Failed to Appeal. It Has Waived Any Challenge to that Decision.

JPS moved to dismiss on January 31, 2017, arguing that it was not a necessary party. R. at 498; R.E. at 34. On May 17, 2017, the Chancery Court denied JPS's motion. R. at 994; R.E. at 81. Eventually, the Chancery Court entered Final Judgment on February 13, 2018. R. at 1116; R.E. at 90. JPS did not file a notice of appeal.

If JPS intended to challenge the Chancery Court's decision on its dispositive motion, then it should have appealed. But it did not. Its failure deprived this Court of appellate jurisdiction. *Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308, 310 (Miss. 1989) (notice of appeal "vests this Court with jurisdiction to hear the appeal").

B. JPS is Unconstitutionally Sending *Ad Valorem* Revenue to Non-District Schools. It is This Case's Most Necessary Party.

It is fundamental that a judgment binds only the parties to that judgment. 46 Am. Jur. 2d *Judgments* § 544 (Nov. 2018 Update) ("The traditional rule is that a judgment is binding in favor of or against parties to the proceedings in which it is rendered . . . and not binding upon persons who were not parties or privies to the action."). In this case, the Parents sued to enjoin unconstitutional payments of district *ad valorem* funds. The

party making those payments is JPS. In a case to prevent JPS from acting illegally, it is difficult to imagine a more necessary party than JPS.[8]

As JPS acknowledges, "[a] necessary party is a person who has such a substantial interest in the suit that no complete, practical, and final judgment can be made without directly affecting his interest . . . ." *Mahaffey v. Alexander*, 800 So. 2d 1284, 1285 (Miss. Ct. App. 2001). The Parents' effort to end JPS's illegal payments would have been incomplete without a judgment ordering that end, and such a judgment would have been impossible without including JPS as a party.

JPS suggests that the Chancery Court denied its motion "because [JPS] did not choose a position regarding the constitutionality of the relevant code section." JPS Brief at 3. *See also* JPS Brief at 4 ("The lower court determined that [JPS] was a necessary party to this action solely because [JPS] did not address the constitutionality of the funding provisions."). That simply is not true. The Chancery Court's order denying JPS's motion explained: "While JPS takes no position regarding the ultimate constitutionality of the relevant code section, it will continue to make such payments absent action by this Court or the legislature. Accordingly, relief may not be afforded to the Plaintiffs herein without the presence of JPS as a party." R. at 994-95; R.E. at 81-82. The Chancery Court recognized the obvious: any order entered would have no effect on JPS unless JPS were a party. The Chancery Court correctly denied JPS's motion to dismiss.

Both because JPS waived its challenge to the Chancery Court's decision and because that decision was correct, JPS's argument should be rejected.

[8] In its brief, JPS claims: "Even still, the Plaintiffs make no mention of whether the District is in violation of the statute or the like." JPS Brief at 5. JPS is wrong. The Parents' pleadings properly alleged that JPS's payments of *ad valorem* revenue violated Section 206. R. at 123; R.E. at 25 (First Amended Complaint at ¶62).

CONCLUSION

This case's decision must be based on the plain language of the Constitution. Undoubtedly, if the Court finds that the Local Tax Transfer Statute violates Section 206, then a legislative remedy will be required. But the inconvenience of requiring legislative action is no excuse to pretend that the Constitution says something that it does not. If words are to be added (or removed) from Section 206, then that is a task for the citizens of the state, not for this Court. Until it is changed, Section 206 requires the same conclusion today that it required in *Tucker*: that any statute depriving a school district of the benefit of its *ad valorem* tax levy is unconstitutional.

Section 37-28-55(2) of the Mississippi Code is such a statute. The Chancery Court's decision to the contrary was in error and must be reversed.

RESPECTFULLY SUBMITTED this Nineteenth day of December 2018.

/s/ Will Bardwell
William B. Bardwell
Counsel for the Appellants

Of Counsel:
William B. Bardwell (Miss. Bar No. 102910)
Christine Bischoff (Miss. Bar No. 105457)
Jody E. Owens, II (Miss. Bar No. 102333)
Southern Poverty Law Center
111 E. Capitol Street, Suite 280
Jackson, Mississippi 39201
Telephone: (601) 948-8882
Facsimile: (601) 948-8885
E-mail: will.bardwell@splcenter.org
E-mail: christine.bischoff@splcenter.org
E-mail: jody.owens@splcenter.org

CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that, contemporaneous with its filing, a true and correct copy of the foregoing Reply Brief was served on all counsel of record via the Court's electronic filing system. I further certify that, on this day, a true and correct physical copy was served on the Hon. J. Dewayne Thomas, Hinds County Chancery Court, P.O. Box 686, Jackson, Mississippi 39205-0686.

SO CERTIFIED this Nineteenth day of December 2018.

/s/ *Will Bardwell*
William B. Bardwell