

**IN THE SUPREME COURT OF MISSISSIPPI**

**CHARLES AND EVELYN ARAUJO, *ET AL.***

**APPELLANTS**

**V.**

**CAUSE NO. 2018-CA-00235**

**PHIL BRYANT, *ET AL.***

**APPELLEES**

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**BRIEF OF EDUCATION LAW CENTER  
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS**

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## **INTEREST OF AMICUS CURIAE**

Education Law Center (“ELC”) is a nonprofit organization that advocates on behalf of public school children for equal and adequate educational opportunity under state and federal laws through policy initiatives, research and legal action.

In states across the nation, ELC advances children’s opportunities to learn and succeed in school, assisting advocates and attorneys working to promote such opportunities. ELC provides research and analyses related to education cost and fair school funding, high quality preschool, and other proven education programs; assists parent and community organizations, school districts, and state policymakers in gaining the expertise needed to improve outcomes for disadvantaged children; and supports litigation and other efforts to bridge resource gaps, especially in the nation’s high-need and high-poverty public schools. Based on ELC’s extensive experience litigating constitutional challenges to inadequate funding in New Jersey and advocating for equal educational opportunity across the country, ELC has participated as *amicus curiae* or as counsel in state education rights and opportunity cases in California, Colorado, Connecticut, Delaware, Florida, Indiana, Michigan, Minnesota, Nevada, New Jersey, New York, Pennsylvania, South Carolina, and Texas.

## **SUMMARY OF THE ARGUMENT**

The statute challenged in this case, Miss. Code Ann. § 37-28-55(2), compels the Jackson Public Schools (“JPS”) and other Mississippi public school districts to transfer the *ad valorem* tax revenues raised by districts to charter schools when students attend such schools. This statute (the “Local Tax Transfer Statute” or “Statute”) violates the plain language of Section 206 of the Mississippi Constitution, which mandates that a school district’s *ad valorem* taxes be used exclusively to maintain the levying district’s schools.

Thus, the Statute operates as an unconstitutional diversion of *ad valorem* taxes from JPS's budget to charter schools that are completely outside the district's management and control.

The diversion of district *ad valorem* taxes mandated by the Local Tax Transfer Statute has a direct impact on JPS's ability to maintain its schools and provide an adequate education to its students. The district serves a very high population of at-risk students requiring additional resources and programs, but currently receives less funding from the State of Mississippi ("State") than is necessary to provide these students with an adequate opportunity to meet Mississippi's educational standards. Further, since the 2015-16 school year, the Statute has forced JPS to transfer over \$4.5 million of its *ad valorem* tax revenue to charter schools, a diversion of funds that will increase in future years. The depletion of district tax revenue from an already inadequate budget means JPS cannot provide the teachers, support staff and other essential education resources required to give its students a meaningful opportunity for an adequate education and to succeed in school.

A growing body of research from several states confirms that charter schools have a negative fiscal impact on public school districts. Because districts have fixed costs that are not offset when a student moves to a charter school and must continue to serve elevated concentrations of at-risk students, the transfer of per-pupil funds to charter schools forces districts to decrease crucial staff, programs and services needed for their own vulnerable student populations. When combined with chronic state underfunding of public school budgets – as is the case with the JPS budget – the additional loss of revenue to charter schools causes significant deficits in educational resources essential to improve outcomes for students in local districts such as JPS.

## ARGUMENT

### **I. The Diversion of District *Ad Valorem* Tax Revenue to Charter Schools Mandated by the Local Tax Transfer Statute is Unconstitutional and Further Depletes Education Resources in the Underfunded Jackson Public Schools**

Section 206 of the Mississippi Constitution permits a school district to levy an *ad valorem* tax for the express purpose of maintaining its own schools: “Any county or separate school district may levy an additional tax, as prescribed by general law, to maintain *its schools*.” Miss. Const. art. VIII, § 206 (emphasis added). In analyzing this straightforward and unambiguous language, this Court’s precedent makes clear that revenue derived from the *ad valorem* taxes levied by a school district under Section 206 must be used to maintain the district’s own schools. *Pascagoula Sch. Dist. v. Tucker*, 91 So. 3d 598, 604 (Miss. 2012) (“The plain language of Section 206 grants the [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 [school district] to levy an ad valorem tax to maintain schools outside its district.”); *Pascagoula-Gautier Sch. Dist. v. Bd. of Supervisors of Jackson Cty.*, 212 So. 3d 742, 744 (Miss. 2016) (confirming that *Tucker* held Section 206 prohibits the use of *ad valorem* taxes to maintain schools other than those of the levying district).

In the face of Section 206’s explicit command, the Local Tax Transfer Statute requires JPS to transfer the revenues derived from *ad valorem* taxes levied on local taxpayers from the district’s budget to charter schools:

For students attending a charter school located in the school district in which the student resides, the school district in which a charter school is located *shall pay directly* to the charter school an amount for each student enrolled in the charter school equal to the ad valorem tax receipts and in-lieu payments received per pupil for the support of the local school district in which the student resides.



Miss. Code Ann. § 37-28-55(2) (emphasis added). For each student who enrolls in a charter school geographically located in the district, the local district must “pay directly” – or transfer – the full per-pupil amount of its *ad valorem* tax revenue from its budget to that charter school. *Id.*

The Legislature enacted the Mississippi Charter Schools Act of 2013, Miss. Code Ann. § 37-28-1 *et seq.*, to provide for the establishment, governance and financing of charter schools, including the Local Tax Transfer Statute at issue in this appeal. Under the Act, charter schools are authorized to operate and are governed as distinct school districts wholly separate and apart from the public school districts in which they are located:

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 under the purview of the school district’s school board.*

Miss. Code Ann. § 37-28-45(3) (emphasis added); *see also* Miss. Code Ann. § 37-28-39(6) (defining a charter school as a “local educational agency” or school district). Moreover, the Mississippi Charter School Authorizer Board, a “state agency,” has “exclusive . . . jurisdiction” for authorizing new charter schools to open and operate, Miss. Code Ann. § 37-28-7(1), and for “ongoing charter school oversight and evaluation,” Miss. Code Ann. § 37-28-9 (delineating powers and duties of Charter School Authorizer Board).

As is abundantly clear, the mandate in the Local Tax Transfer Statute that JPS and other districts “pay directly” to charter schools the *ad valorem* funds raised to maintain their own schools, Miss. Code Ann. § 37-28-55(2), conflicts with the plain language of Section 206. As this Court has firmly held, Section 206 “clearly states that the purpose of

the [ad valorem] tax is to maintain the levying school district's schools." *Tucker*, 91 So. 3d at 605. The diversion of locally raised tax revenue compelled by the Statute is not only unconstitutional. It also has a direct, deleterious effect on the availability of education resources essential for the district to educate the students attending *its* schools.

**A. JPS Lacks Sufficient Funding and Resources to Provide All Students with Adequate Educational Opportunity**

**1. JPS Serves a High Concentration of Students with Increased Needs**

JPS enrolls over 25,000 students, *About Us*, Jackson Public Schools, <https://www.jackson.k12.ms.us/domain/1251> (last visited Aug. 13, 2018), with a high proportion of those students at-risk due to economic disadvantage and the effects of household and neighborhood poverty. Because of the elevated concentration of student poverty in the district, JPS now qualifies to provide free lunches to all its students through the Community Eligibility Program component of the National School Lunch Program. *See Food Service: Menus*, Jackson Public Schools, <https://www.jackson.k12.ms.us/LunchMenus> (last visited Aug. 13, 2018); *see also Food Service: Department Overview*, Jackson Public Schools, <https://www.jackson.k12.ms.us/domain/89> (last visited Aug. 13, 2018) (78% of JPS students participate in the federal free or reduced price lunch program).

It is well established that the provision of an adequate education to low-income students requires additional educational resources, and increased education spending to provide these resources is causally connected to improved outcomes for at-risk students. *See, e.g., C. Kirabo Jackson et al., The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 35, 44 (Nat'l Bureau of Econ. Research, Working Paper No. 20118, 2014). The State itself has

recognized that districts require increased funding in order to provide low-income students a meaningful opportunity to achieve state academic standards. Mississippi's education funding formula, known as the Mississippi Adequate Education Program ("MAEP"), provides districts with 5% more funding above the base per-pupil amount for each student participating in the federal free school lunch program. Miss. Code. Ann. § 37-151-7(1)(d). It is critical, therefore, that JPS have adequate funding to serve all of its students, including the additional funds recognized as necessary for its at-risk student population.

## **2. Mississippi School Districts, Including JPS, Receive Less State Funding than Required to Provide an Adequate Education**

Mississippi's overall level of public school funding is one of the lowest in the United States, placing 44<sup>th</sup> in a national ranking of school funding levels. Bruce D. Baker, Danielle Farrie & David Sciarra, *Is School Funding Fair? A National Report Card 21* (Education Law Center, 7<sup>th</sup> ed. 2018), [http://edlawcenter.org/assets/files/pdfs/publications/Is\\_School\\_Funding\\_Fair\\_7th\\_Edition.pdf](http://edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Edition.pdf); see also Bruce D. Baker et al., *In Brief: The Real Shame of the Nation: The Causes and Consequences of Interstate Inequity in Public School Investments 3* (2018), <https://drive.google.com/file/d/11p1HfePzQl1Z5Hq3l1VxqRrwlops-9-E/view> (Mississippi underfunds its public schools so severely that even students in the lowest-poverty districts are unable to reach national average achievement outcomes).

Mississippi schools, including JPS, are also underfunded according to the levels set by the State's own school funding formula. MAEP is designed to determine the amount of funding districts should receive, through a combination of state and local funding streams, to provide an adequate education for all district students. Miss. Code

Ann. § 37-151-1 *et seq.* However, over the last decade, the funding levels prescribed by MAEP have not been fully provided to the districts. See The Parents' Campaign Research & Education Fund, *School District MAEP Funding for FY2018*, [http://www.tpcref.org/wp-content/uploads/PERDIST-MAEP\\_FY09-FY18.pdf](http://www.tpcref.org/wp-content/uploads/PERDIST-MAEP_FY09-FY18.pdf) (“MAEP Funding FY2108”). Statewide, MAEP was underfunded by over \$213 million in FY2018, with cumulative statewide underfunding surpassing \$2 billion since FY2009. *Id.*

JPS is severely impacted by the State's failure to fully fund MAEP. The State portion of the MAEP allotment in the JPS budget was underfunded by over \$11 million in FY2016, over \$9 million in FY2017, and over \$11 million in FY2018. Fredrick Murray & Sharolyn Miller, *Jackson Public Schools 2017-2018 Proposed Budget* slide 7, [https://www.jackson.k12.ms.us/cms/lib/MS01910533/Centricity/Domain/133//business/budget\\_proposed.pdf](https://www.jackson.k12.ms.us/cms/lib/MS01910533/Centricity/Domain/133//business/budget_proposed.pdf) (“JPS 2017-2018 Proposed Budget”) (projecting a \$11.5 million shortfall in the MAEP portion of JPS's budget for 2017-18). Since FY2009, JPS's cumulative MAEP underfunding has reached more than \$121 million. *MAEP Funding FY2018, supra.*

**B. The Transfer of Ad Valorem Taxes to Charter Schools Results in Significant Revenue Loss for JPS and Decreased Capacity to Serve its Students**

**1. The Unconstitutional Transfer of Ad Valorem Funds to Charter Schools has Diverted Millions from JPS's Budget**

*Ad valorem* tax revenue is a critical part of the JPS budget, particularly given chronic under-funding of the MAEP portion of its budget by the State. JPS residents and taxpayers have consistently answered the constitutional call of Section 206 to pay “additional” taxes in order to generate local revenue to “maintain” their schools. Further, JPS residents have chosen to tax themselves far beyond the minimum rate of 28 mills set

by the State, Miss. Code Ann. § 37-151-7(2)(a), to ensure their schools have the resources necessary to educate students. Indeed, the district tax rate to support the maintenance revenue in JPS’s 2017-18 budget is projected at 65.91 mills, with an additional 18.68 mills for debt service on facilities improvement bonds, for a total of 84.59 mills. *JPS 2017-2018 Proposed Budget, supra*, slide 6. *Ad valorem* tax revenue comprises over 35% of the JPS maintenance revenue. *Id.* at slide 9.

The Local Tax Transfer Statute has forced JPS to relinquish increasing portions of its *ad valorem* tax revenue to charter schools as the number and size of charter schools approved by the State’s Charter School Authorizer Board has grown. The chart below shows the transfer of *ad valorem* funds from JPS’s budget to charter schools since the 2015-16 school year:

<b>School Year</b>	<b>Ad Valorem Transfer<sup>1</sup></b>
2015-16	\$595,000
2016-17	\$1,388,000
2017-18	\$2,570,000

Over the last three school years, JPS has transferred over \$4.5 million of its *ad valorem* taxpayer funds, levied to maintain its schools, to charter schools authorized and governed by the State.

The State’s Charter School Authorizer Board has recently approved two new charter schools, one in Jackson and one in Clarksdale, with more approvals likely forthcoming. Kayleigh Skinner, *Charter School Board OKs Four Groups for Final*

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<sup>1</sup> Figures rounded down to nearest thousand dollars. For 2015-16, see Parents’ Superseding Mot. for Summ. J. Ex. 3; R. 728-29. For 2016-17, see Parents’ Superseding Mot. for Summ. J. Ex. 7; R. 736-37. For 2017-18, see Appellants’ Br. Ex. A.

*Selection Round, Mississippi Today, July 9, 2018,*  
[https://mississippitoday.org/2018/07/09/charter-school-board-oks-five-groups-for-](https://mississippitoday.org/2018/07/09/charter-school-board-oks-five-groups-for-final-selection-round/)

[final-selection-round/](https://mississippitoday.org/2018/07/09/charter-school-board-oks-five-groups-for-final-selection-round/). It is clear, therefore, that the amount of *ad valorem* tax revenue JPS and other districts must transfer to charter schools from their budgets is likely to continue increasing under the unconstitutional Local Tax Transfer Statute.

**2. JPS Underfunding, Worsened by the Diversion of District *Ad Valorem* Revenue to Charter Schools, Results in a Lack of Essential Education Resources**

The diversion of significant funds from JPS schools has a material, adverse effect on the district's ability to adequately educate its students. JPS officials have repeatedly explained that the flow of *ad valorem* tax revenue from their budget to charter schools leaves them without sufficient resources to meet the basic needs of JPS pupils. See, e.g., Arielle Dreher, *JPS Shrinks as Charters Pull Students, Money*, Jackson Free Press, Mar. 15, 2017, <http://www.jacksonfreepress.com/news/2017/mar/15/jps-shrinks-charters-pull-students-money/> (reporting statements from JPS's Superintendent that numerous challenges the under-resourced district faces are exacerbated by charter schools drawing further funds away from district schools); Sierra Mannie, *Lawsuit: Charter School Law 'Heralds a Financial Cataclysm' in Mississippi*, Jackson Free Press, July 12, 2016, <http://www.jacksonfreepress.com/news/2016/jul/12/lawsuit-charter-school-law-heralds-financial-catac/> (JPS's Chief Financial Officer warned lawmakers at a public hearing that difficulties caused by the district's underfunding are compounded by the local funds flowing out to charter schools).

JPS, due to chronic State underfunding of the MAEP portion of its budget – exacerbated since 2015-16 by the diversion of district *ad valorem* revenue to charter schools – has called on its residents to raise taxes even higher to address school building

repairs, maintenance and other urgent facilities needs. *See, e.g.,* Arielle Dreher, *JPS: \$65 Million Bond 'The Only Option' for District After State Funding Cuts*, Jackson Free Press, June 12, 2018, <http://www.jacksonfreepress.com/news/2018/jun/12/jps-65-million-bond-only-option-jps-after-state-fu/> (Jackson decided to hold bond referendum to fund “district-wide repairs that the district cannot afford” because the “State cut \$6.5 million and is diverting \$3 million to charter schools” for next school year); Marie Weidmayer, *\$65 Million Bond for JPS Passes in Landslide*, Jackson Free Press, Aug. 8, 2018, <http://www.jacksonfreepress.com/news/2018/aug/08/65-million-bond-jps-passes-landslide/>. Residents and taxpayers across the state fear similar effects in their districts. *See, e.g.,* Kayleigh Skinner, *Concern in Clarksdale Over Charter School*, Mississippi Today, Nov. 13, 2017, <https://mississippitoday.org/2017/11/13/concern-in-clarksdale-over-charter-school/> (Clarksdale area residents sent state charter authorizer board a petition with over 1,300 signatures opposing a new charter school because “it would ‘help to destroy our existing public schools in Coahoma County’ by taking away funding from public schools”).

### **C. Research in Numerous States Confirms the Negative Fiscal Impact of Charter Schools on Local Districts, Resulting in Decreased Resources for District Students**

Research from several states demonstrates the negative fiscal impact of charter schools on public school districts, along with the resulting reduction in essential resources and programs for students in district schools. These studies belie the argument that districts benefit financially when students enroll in charter schools: “There is general agreement that, when charter expansion is not accompanied by additional revenues, it creates additional financial costs to a school system. In other words, it is not cost-neutral when students leave district schools to attend charter schools.” David Lapp et al., *The*

*Fiscal Impact of Charter School Expansion: Calculations in Six Pennsylvania School Districts 2* (Research for Action 2017), <https://8rri53pm0cs22jk3vvqna1ub-wpengine.netdna-ssl.com/wp-content/uploads/2017/09/RFA-Fiscal-Impact-of-Charter-Expansion-September-2017.pdf> (“*Pennsylvania Study*”) (footnote omitted).

A major reason for the negative fiscal impact of charter schools is that local districts have “fixed costs” they continue to pay even after a student has moved to a charter school.<sup>2</sup> One researcher explained that “[o]perating separate systems of public schools in the same area creates excess costs”; therefore, “[r]evenues diverted from school districts to charter schools exceed the costs that charter school enrollments allow districts to shed, and thereby cause districts to bear part of the burden of the excess costs charter schools generate.” Robert Bifulco & Randall Reback, *Fiscal Impacts of Charter Schools: Lessons from New York* 15 (Columbia University 2011), <http://www.columbia.edu/~rr2165/pdfs/nycharterfiscal.pdf> (“*New York Study*”). Thus, as North Carolina researchers demonstrated, “charter schools generate negative fiscal externalities on public school districts to the degree that districts are unable to reduce spending in line with the revenue losses they experience as a result of charter schools without reducing services to the remaining public school students.” Helen F. Ladd & John D. Singleton, *The Fiscal Externalities of Charter Schools: Evidence from North Carolina* 1 (Economic Research Initiatives at Duke (ERID) Working Paper No. 261, 2018),

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<sup>2</sup> See, e.g., Helen F. Ladd & John D. Singleton, *The Fiscal Externalities of Charter Schools: Evidence from North Carolina* 3-4 (Economic Research Initiatives at Duke (ERID) Working Paper No. 261, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3082968](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082968) (“Variable costs, such as the cost of employing teachers, vary with student enrollment. Fixed costs, in contrast, are expenses that are less responsive (at least over the relevant horizon) to changes in enrollments. Examples of fixed costs include facility operations and maintenance, administration, and support staff, and services for students with disabilities.” (footnote omitted)).



[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3082968](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082968) (“*North Carolina Study*”).

The *Pennsylvania Study* laid out the calculation of fiscal impact on a district:

[I]n many states, a student’s transition from a traditional public or private school to a charter school creates additional costs to the district of residence, mostly in the form of new charter tuition payments and increased administrative and oversight costs. There are also savings a district can realize for each student that it no longer educates in its own schools.

The difference between the increased costs of charter expansion (charter tuition payments) and the savings a district can realize as students depart (variable costs) is considered the fiscal impact of charter expansion.

*Pennsylvania Study* at i.

The *Pennsylvania, New York and North Carolina Studies* provide detailed evidence of the negative fiscal impact of charter schools on districts. The *New York Study* analyzed the fiscal impact of charter schools in two large New York districts. It estimated that “revenues lost due to charter schools by the Albany City School District exceed the estimated reduction in expenditure needs by between \$7.0 and \$8.5 million,” which meant a negative impact between \$976 and \$1,070 per district pupil. *New York Study* at 11. For the Buffalo Public Schools, the estimated negative fiscal impact was between \$20.6 and \$24.2 million, or \$633 to \$744 per pupil. *Id.*

The *North Carolina Study* analyzed the fiscal impact of charter schools on several North Carolina school districts. The researchers conducted a detailed analysis of balance sheet information for one urban district and five non-urban districts, finding “sizable negative fiscal externalities of charter schools in all six school districts.” *North Carolina Study* at 2. For the urban district of Durham, the *North Carolina Study* estimated a net fiscal impact exceeding \$500 per traditional public school student, for a total burden of \$16 million, “represent[ing] the magnitude of reductions in educational services for

[traditional public school] students due to charter schools.” *Id.* The study also “[a]lternatively quantif[ied] the externality as the fiscal cost to the district for each student enrolled in charter schools, . . . an average impact of around \$3,600 per charter school pupil in Durham.” *Id.* at 2-3. It found “smaller, though sizable” net fiscal impacts for the non-urban districts, and for two of them “the fiscal costs per charter school pupil are comparable with or exceed the estimated magnitude of the externality in Durham.” *Id.* at 3. Comparing North Carolina to New York, the study found the net fiscal impact estimated for Durham, although smaller in magnitude, was “equivalent, if not larger, than Albany and Buffalo’s in terms of the share of educational spending per pupil.” *Id.* at 16.

The *Pennsylvania Study*, a rigorous 2017 study of charter expansion in Pennsylvania districts, employed a model for calculating the fiscal impact of charter schools on districts that was vetted by school finance experts. *Pennsylvania Study* at 11. It found “a significant, negative fiscal impact of charter expansion in each of the six Pennsylvania school districts included in this study in both the short- and long-term.” *Id.* at 5. The result was “true for districts of all sizes, and d[id] not vary significantly by the rate of charter expansion.” *Id.*

Additionally, a recent study of the Newark, New Jersey, public school district examined the effects of “underfunding of the state’s school aid formula and the rapid expansion of the charter sector,” finding that these factors have caused “[e]ssential resources in district schools [to be] eroded.” Danielle Farrie & Monete Johnson, *Newark Public Schools: Budget Impacts of Underfunding and Rapid Charter Growth* 1 (Education Law Center 2017), [http://edlawcenter.org/assets/files/pdfs/publications/Newark\\_Budget\\_Report\\_2017R\\_ev.pdf](http://edlawcenter.org/assets/files/pdfs/publications/Newark_Budget_Report_2017R_ev.pdf). As the Newark district has “endured multiple years with significantly less funding

to educate students . . . and to address year-to-year increases in fixed costs,” in order to “balance the school budget, [Newark Public Schools] has had no alternative but to substantially cut teachers, support staff and special education and other programs, shrinking the resources necessary for all students to achieve” state standards. *Id.*

Because “the money that follows the students who leave traditional public schools to charters requires that a district reduce its variable spending per pupil . . . [s]uch reductions represent a reduction in the educational services provided to students who remain in the district’s public schools.” *North Carolina Study* at 5. Loss of revenue to charter schools in combination with existing underfunding – the condition presently affecting JPS schools – creates significant deficits in educational resources for students in district schools.

### **CONCLUSION**

ELC respectfully requests this Court reverse the decision below and declare that the Local Tax Transfer Statute violates Section 206 of the Mississippi Constitution because it mandates the unconstitutional diversion of *ad valorem* tax revenue in district budgets to State-authorized charter schools, depriving districts of the resources necessary to provide an adequate education to students in their schools.

Respectfully submitted, this 15th day of August, 2018.

**EDUCATION LAW CENTER,  
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