**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**

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**PLAINTIFFS' RESPONSE IN OPPOSITION TO THE STATE'S MOTION FOR SUMMARY JUDGMENT**

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This is a simple case about two straightforward constitutional provisions.

Section 206 of the Mississippi Constitution allows only "that a school district's taxes be used to maintain 'its schools.'"[1] The Mississippi Supreme Court has explained: "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."[2]

Likewise, Section 208 restricts the use of state school funds to schools under the dual oversight of the state superintendent and a local district superintendent. This has been the law for nearly 140 years,[3] continuing even after the adoption of the Constitution of 1890.[4] The decisions requiring dual supervision of the state's free schools have never been overturned. The State's motion for summary judgment is based on a misreading of Mississippi Supreme Court precedent and a mischaracterization of

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[1] *Pascagoula Sch. Dist. v. Tucker*, 91 So. 3d 598, 600 (Miss. 2012).
[2] *Id.* at 605 (emphasis added).
[3] *Otken v. Lamkin*, 56 Miss. 758, 764 (1879) ("[T]he fund must be applied to such schools only as come within the uniform system devised, and under the general supervision of the State superintendent and the local supervision of the county superintendent.").
[4] *State Teachers' College v. Morris*, 144 So. 374, 376 (Miss. 1932) ("In order for a school to come within the system of free schools required by section 201 of the Constitution, the establishment and control thereof must be vested in the public officials charged with the duty of establishing and supervising that system of schools.").

the relevant constitutional provisions. Accordingly, the State's motion for summary judgment[5] 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.

In 2012, the Mississippi Supreme Court issued the decision that controls the case at hand. In *Pascagoula School District v. Tucker*,[6] the Mississippi Supreme Court held that Section 206 of the Mississippi Constitution prohibits the Legislature from requiring a school district to give its *ad valorem* tax revenue to schools outside its control. Section 37-28-55 of the Mississippi Code violates this straightforward principle. It is unconstitutional, and it must be permanently enjoined.

### A. The State 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 State argues that the Legislature's broad authority 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."[7] The Court explained, "[t]he Legislature has no authority to mandate how [*ad valorem*] funds

[5] Governor Bryant and the Mississippi Department of Education's Combined Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment [Docket No. 45].
[6] *Tucker*, 91 So. 3d 598.
[7] *Id.* at 605 (quoting Miss. Const. art. VIII, § 206) (emphasis in original).

are *distributed*, as Section 206 clearly states that the purpose of the tax is *to maintain the levying school district's schools*."[8]

As the *Tucker* Court explained, accepting the defendants' argument would have allowed the Legislature to dictate how school districts spent their *ad valorem* revenue, and "Section 206 would be rendered a complete nullity."[9] The Supreme Court rejected that outcome and applied "[t]he plain language of Section 206."[10] 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.

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

The State 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."[11]

The State's interpretation not only runs afoul of *Tucker*'s central holding; it directly conflicts with *Tucker*'s opening paragraph.

[8] *Id.* (emphasis added).
[9] *Id.*
[10] *Id.* at 604.
[11] *Id.* at 605.

In *Tucker*, a statute required the Pascagoula School District to share its *ad valorem* revenue with the rest of Jackson County's school districts.[12] 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.'"[13]

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."[14] 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.[15]

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."[16]

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 State's suggestions, those limits are not flexible. They are

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[12] *Tucker*, 91 So. 3d at 600-01.
[13] *Id.* at 600.
[14] *Id.* at 604 (emphasis in original).
[15] *Id.*
[16] *Id.* at 605.

rigid, and they are singular: "*the purpose of the tax is to maintain the levying school district's schools.*"[17] 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, stand-alone school districts; and (3) charter schools are not "the levying school district's schools." The CSA plainly violates Section 206.

The State ignores *Tucker*'s reasoning and its central holding. Instead, the State urges the Court to interpret the word "its" broadly. Specifically, the State argues that "its schools" should mean all schools located within the levying school district. The State does not dispute that Article 8, Section 206 of the Mississippi Constitution permits a school district to levy taxes to maintain "its schools." Further, the State concedes that charter schools are not part of the Jackson Public School District.[18] Instead, the State argues that "the City of Jackson's local taxes will be used to support 'its' schools – the local public schools . . . serving the City of Jackson's children."[19] This bizarre interpretation is clearly erroneous.

Section 206 provides, in pertinent part (with emphasis added): "Any county or separate *school district* may levy an additional tax, as prescribed by general law, to maintain *its schools*." 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

[17] *Id.* (emphasis added).
[18] Governor Bryant and the Mississippi Department of Education's Combined Memorandum Brief in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment [Docket No. 47] (hereinafter "State Brief") at 21.
[19] State Brief at 2.

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.[20] Instead, each charter school operates as its own local education agency, which is another name for a local school district.[21] Therefore, under Section 206, JPS's *ad valorem* tax revenue may not be distributed to charter schools.

The only case the State cites in support of its imaginative reading of Section 206, *Murray v. Lehman*,[22] does not change this result. In *Murray*, the Mississippi Supreme Court held a local and private bill unconstitutional because it imposed a tax on people filing suit in Warren County which fell on and benefited the entire state: the payment of state judges' salaries. There was nothing special or peculiar about filing suit in Warren County that justified the tax. *Murray* stands for the rule that all persons in a like class and all property of the same kind must be subjected to the same common taxation regime.

*Murray* is easily distinguished from the present case. The taxes at issue here – *ad valorem* taxes levied by JPS pursuant to Section 206 – are not being used to pay for a service that is the responsibility of the entire state and is otherwise paid from the State Treasury. There are not separate, unfair taxation regimes at play here. Rather, the only

[20] *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 charter school may not be considered a school within that district under the purview of the school district's school board.").
[21] 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).
[22] *Murray v. Lehman*, 61 Miss. 283 (1883).

issue is the interpretation of Section 206, which clearly authorizes a *school district* to levy taxes to maintain its schools.

The Mississippi Supreme Court's interpretation of Section 206 and the CSA itself make clear that charter schools are not part of the local school district. Under *Tucker*, they cannot receive *ad valorem* revenue.

## 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.[23] The State offers a different view. The State argues that the Constitution only requires the system of free schools to be without tuition; in the State's view, oversight is unnecessary.[24] The State is wrong.

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."[25]

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[23] 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.").
[24] State Brief at 27.
[25] *Otken v. Lamkin*, 56 Miss. 758, 764 (1879).

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,[26] or by any local district superintendent.[27] Nevertheless, the CSA's "state funding stream" requires the Mississippi Department of Education to send state school funds 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.

### A. The Constitution of 1890's Drafters Understood that the "Free Schools" Required Dual Oversight by the State Superintendent and a Local District Superintendent. They Could Have Changed that Requirement, But They Did Not.

The drafters of the Constitution of 1890 understood the Supreme Court's requirement of dual oversight. If they had wanted to change it, then they could have. History shows us that they chose to keep it. And since Section 208 was enacted, it has remained unchanged. Just as it did in 1890, Section 208 requires that any school receiving state school funds must be within the dual oversight of the state superintendent and a local district superintendent.

#### 1. *Otken v. Lamkin*: No School Outside the Dual Supervision of the State Superintendent and Local District Superintendent Can Receive State School Funds.

The Mississippi Constitution of 1868 tasked the Legislature with creating "a uniform system of free public schools," and it required that the Legislature, "as soon as

[26] 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.").
[27] 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 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.").

practicable, establish schools of higher grade."[28] A decade later, though, Mississippi still lacked public schools of higher grade (high schools).[29] Therefore, in 1878, the Legislature enacted what it believed to be a solution – but not by creating public high schools for all schoolchildren. Instead, the Legislature attempted to short-circuit the lack of public high schools by paying for children to attend *private* high schools at the State's expense.[30]

Little more than a year later, the Supreme Court found that plan to be unconstitutional. The *Otken* Court established the following definition of "free public schools":

> No portion of the school fund can be diverted to the support of schools which, in their organization and conduct, contravene the general scheme prescribed. That is to say, the fund must be applied to such schools only as come within the uniform system devised, and *under the general supervision of the State superintendent and the local supervision of the county superintendent*, are free from all sectarian religious control, and ever open to all children within the ages of five and twenty-one years . . .[31]

The Court reasoned that public funds may only be spent on "free schools" because "the general supervision of the common schools, and of the education interests of the State, are confided to the State superintendent of education."[32]

The schools being subsidized by the 1878 bill did not "come under the supervision, in any respect, of the State or county superintendent."[33] Therefore, the legislation was "plainly violative" of the Constitution.[34]

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[28] Miss. Const. of 1868, Art. VIII § 1.
[29] *State Teachers' College v. Morris*, 165 Miss. 758, 144 So. 374, 378 (1932) ("In 1878 the then common school system did not include schools of a higher grade, such, for instance, as are commonly known as high schools . . . .").
[30] *Otken v. Lamkin*, 56 Miss. 758, 764 (1879).
[31] *Id.* at 764 (emphasis added).
[32] *Id.*
[33] *Id.*
[34] *Id.*

### 2. The Constitutional Convention of 1890: The Framers Reject a Rollback of the *Otken* Decision.

Despite the Court's ruling in *Otken*, the practice of subsidizing private high-school education with public money remained popular throughout the 1880s.[35] The goal of working around *Otken* also remained popular among the state's policymakers.[36] And by the time the Constitutional Convention of 1890 rolled around, policymakers finally had an opportunity to supplant *Otken* once and for all.

The earliest draft of the Constitution of 1890 would have done just that. The Convention's education committee originally proposed including within the new Constitution a requirement for a "uniform system of free public schools" and a ban on funding "any sectarian school."[37] But unlike the Constitution of 1868, the education committee's original proposal lacked any provision forbidding appropriations to private schools.[38]

Such a proposal would have overturned *Otken* and left the door wide open to unfettered public funding of purely private schools.

Not all members of the education committee embraced this wholesale change. A minority of committee members referred approvingly to an annual report by the State Superintendent, in which he praised the practice of paying private high schools to educate public schoolchildren.[39] This demonstrates that, although the minority was

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[35] *Morris*, 144 So. at 378 (explaining that, even after *Otken*, "privately owned and controlled schools, some of them of a sectarian character, continued to affiliate with the state's common schools, and to be supported, in part, from the common school fund").
[36] *Id.* (recalling the 1890 Legislature's amendment to the school law).
[37] *Id.* (quoting Convention education committee's proposal) ("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.").
[38] *Id.* ("The proposed new section, it will be observed, did not contain the words, 'or to any school that, at the time of receiving such appropriation, is not conducted as a free school.'").
[39] *Id.*

uncomfortable with the idea of allowing unlimited public funding of private schools, it remained open to compromise.

In the end, that compromise won the day: instead of limiting public funds to schools that *actually* fell within the system of free schools, the Constitution of 1890 prohibited the funding of "any school that at the time of receiving such appropriation is not *conducted* as a free school."[40] In other words, private schools could receive public funding, but only when they conducted themselves as free schools – that is, subject to the dual supervision of the State Superintendent and the local district superintendent.

And indeed, historical evidence demonstrates that, during the era in which the Constitution of 1890 was adopted, private schools that functioned as part-time free schools were subject to state and local control during each year's "free term." In other words, although they were not technically part of the system of free schools, they operated part-time as free schools – and, therefore, were eligible for public funding during those times.

For example, in the state superintendent's report to the Legislature for 1888-89 (one of the reports relied upon by the Constitutional Convention's education committee), the superintendent of Monroe County reported the existence of a single high school in his district: "High Schools – One in county – E. E. Cowley, principal. This is run as free school during free term and subject to all the laws governing other free schools in the county."[41] In the same record, the superintendent of Newton County similarly reported that his control over the schools of higher grade existed only when they operated as free schools: "There are four high schools in the county that are

[40] Miss. Const. Art. VIII § 208 (emphasis added).
[41] Biennial Report of the State Superintendent of Public Education to the Legislature of Mississippi for the Years 1888 and 1889, at 210, *available at* http://babel.hathitrust.org/cgi/pt?id=njp.32101050882024;view=1up;seq=7 (last visited Feb. 27, 2017).

chartered and run ten months during the year. I have never had any official report from any of them other than during their public school term."[42]

The practice continued after the new Constitution's adoption. In the state superintendent's 1894 report, the principal of Brandon Female College indicated that the curriculum taught to publicly funded students was controlled by state authorities: "The school is free for seven months for pupils studying public school branches. The attendance is good during the entire session, which lasts about nine months."[43] Similarly, the superintendent of Oktibbeha County reported that, at the two high schools in his county, "[t]he public term is supplemented at both places by a pay term of five months. Besides the public school curriculum, instruction is given in book-keeping, higher mathematics, etc."[44]

### 3. *Morris v. State Teachers' College*: This Court Reaffirms that *Otken*'s Definition of "Free Schools" Endured Past the Enactment of the Constitution of 1890.

History clearly demonstrates that Section 208's framers understood that the question of whether a school is a "free school" involves much more than whether the school charges tuition.[45] But if any doubt lingered after the passage of the Constitution of 1890, the Supreme Court put that confusion to bed in 1932.

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[42] *Id.* at 217.
[43] Biennial Report of the State Superintendent of Public Education to the Legislature of Mississippi for Scholastic Years 1891-92 and 1892-93 at 406, *available at* http://babel.hathitrust.org/cgi/pt?id=njp.32101050882032;view=1up;seq=7 (last visited Feb. 27, 2017). Elsewhere in the report, it is clear that what late-1800s educators called a "branch" is what modern students would refer to as a "subject." For example, the 1894 report lists the number of pupils studying the public school branches, and it lists those branches: Spelling, Reading, Geography, Arithmetic, etc. *Id.* at page VII. Candidly, the superintendents' reports do not make clear what comprised the typical high school curriculum in the early 1890s. However, the reports leave no room for doubt that some sort of State-enforced standards were in place. For example, elsewhere in the 1894 report, the principal of Cherry Hill High School relays that at his school, during both the public and private terms, "[t]he work done is principally in the branches prescribed for the public schools in the State . . . ." *Id.* at 410.
[44] *Id.* at 267.
[45] *Otken*, 56 Miss. at 764.

In *State Teachers' College v. Morris*, a father's two children attended a demonstration and practice school at the State Teachers' College in Hattiesburg.[46] The school charged the father $72 in tuition for the 1930-31 school year.[47] Aggrieved, the father filed suit and argued that his children's school received public funding; therefore, in his view, the school was a "free school" that could not charge tuition.[48]

The Supreme Court disagreed. The majority reasoned that the demonstration school was not a "free school" at all because it did not fall under the supervision of the state superintendent and the local district superintendent. The Court explained: "In order for a school to be within the system of free public schools required by section 201 of the Constitution, the establishment and control thereof must be vested in the public officials charged with the duty of establishing and supervising that system of schools."[49] In support of that position, the *Morris* Court specifically cited the *Otken* decision.[50]

If the State were correct today – that is, if Section 208's view of "free schools" required only that they not charge tuition – then *Morris* would look very different. The Supreme Court would have seen that the practice school charged tuition and quickly would have determined that it was not a "free school." But that is not how the Supreme Court analyzed the case. The Supreme Court held that the practice school fell outside the Constitution's system of "free schools" because "the establishment and control [of a "free school"] must be vested in the public officials charged with the duty of establishing and supervising that system of schools."[51]

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[46] *Morris*, 144 So. at 375.
[47] *Id.*
[48] *Id.* at 376.
[49] *Id.*
[50] *Id.* (citing *Otken*, 56 Miss. 758).
[51] *Id.*

**4. Charter Schools are Not "Free Schools" Because They are Not Overseen by the State Superintendent or By a Local District Superintendent.**

As the *Morris* Court reaffirmed, the only schools eligible for state school funds under Section 208 are those schools within the supervision of the state superintendent and a local district superintendent. Charter schools, by their very design, are subject to neither.

Charter schools are not subject to the authority of the state superintendent because the CSA explicitly exempts charter schools from "any rule, regulation, policy or procedure adopted by the State Board of Education or the State Department of Education."[52] Charter schools are not "under . . . the local supervision of the county superintendent" because they are also expressly exempted from any local school district oversight.[53] In fact, as stated above, each charter school serves as its own local education agency, which is another name for a local school district.[54] Because charter schools are not under the general supervision of the State superintendent of education and the local superintendent of education, they are not "free schools" within the meaning of Section 208. Absent such oversight, charter schools lack the constitutionally required dual oversight that has been required of Mississippi's public schools for nearly 140 years. Without this oversight, charter schools are not part of the State's system of "free schools," and therefore, Section 208 forbids providing them with public money.

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

The State incorrectly argues that Section 202 and Section 203 of the Mississippi Constitution support the position that charter schools are "free schools."

[52] Miss. Code § 37-28-45(5).
[53] Miss. Code § 37-28-45(3).
[54] Miss. Code § 37-28-39.

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 prescribed."[55] The Board could transact no business without the state superintendent's presence.[56]

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."[57]

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 the *Otken* and *Morris* decisions. At most,

[55] Miss. Const. art. VIII, § 203 (1890).
[56] *Id.* ("The superintendent and one other of said board shall constitute a quorum.").
[57] Miss. Const. art. VIII, § 203.

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*, they only 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.

Of course, the CSA allows none of these authorities to oversee charter schools. The CSA forbids the local district superintendent from overseeing charter schools.[58] It also exempts charter schools from the oversight of the Department of Education and the State Board of Education.[59]

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.

### 6. The Washington Supreme Court Recently Invalidated That State's Charter Schools Act Because Its Charter Schools Fell Outside the System of Public Schools.

The unconstitutionality of the Charter Schools Act's funding provision is not unique to Mississippi.

In *League of Women Voters v. Washington*,[60] the State of Washington's high court considered whether funding charter schools violated a provision of its state constitution that limited educational funding to "the support of the common schools."[61]

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[58] Miss. Code Ann. § 37-28-45(3).
[59] Miss. Code Ann. § 37-28-45(5).
[60] *League of Women Voters of Washington v. State of Washington*, 184 Wash. 2d 393, 355 P.3d 1131 (2015).
[61] *Id.* at 1135 (quoting Wash. Const. Art. IX, § 2).

That court had long held that the public "common schools" are, among other things, "subject to and under the control of the qualified voters of the school district."[62] In contrast, Washington's Charter Schools Act provided for schools that were "exempt from all school district policies" and nearly "all . . . state statutes and rules applicable to school districts."[63] The Washington Supreme Court could only conclude that charter schools were not within its constitution's system of public schools and, therefore, could not receive public funding.[64]

The parallels between the Washington law and Mississippi's CSA are obvious. As in Washington, Mississippi's charter schools are exempt from the rules and regulations of the school districts where they are located.[65] As in Washington, Mississippi's charter schools are not under the supervisory authority governing public schools.[66]

The same reasoning that guided the Washington Supreme Court's decision applies to this case: charter schools are constitutionally ineligible for state school funds because they are not subject to the same oversight as the constitutionally required system of public schools.

[62] *Id.* at 1137 (quoting *Sch. Dist. No. 20 v. Bryan*, 51 Wash. 498, 504, 99 P. 28 (1909)).
[63] *Id.* at 1136.
[64] *Id.* at 1141.
[65] Miss. Code Ann. § 37-28-45(5).
[66] Miss. Code Ann. § 37-28-45(3).

## III. Jackson Schoolchildren Have Lost Millions of Dollars Because of the CSA.

The State 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.[67] Over the same time period, the Mississippi Department of Education has remitted to charter schools more than $2.7 million in state 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 funds to charter schools that otherwise would have gone to JPS.

The impact on JPS schoolchildren is indisputable. For example, the amount diverted from JPS to charter schools this school year could have paid the salaries of 65 classroom teachers.[68] For the thousands of JPS students who would have benefitted from more teachers and a lower student-teacher ratio, the damage has been done.

## IV. Conclusion

This case's controlling authorities could not be clearer. The Mississippi Supreme Court has found that Section 206 of the Mississippi Constitution forbids the use of *ad valorem* revenue by any school outside the levying school district's control. The Court also has explained that a school is ineligible to receive state school funds if it falls outside the dual oversight of the state superintendent and a local district superintendent. Section 37-28-55 of the Mississippi Code violates both principles. It is unconstitutional, and the Plaintiffs are entitled to enjoin it permanently.

The State's motion for summary judgment must be denied.

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[68] Memorandum in Support of Plaintiffs' Superseding Motion for Summary Judgment at 6.

RESPECTFULLY SUBMITTED this Twenty-Seventh day of February 2017.

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