IN THE SUPREME COURT OF MISSISSIPPI

**CHARLES AND EVELYN ARAUJO,
CASSANDRA OVERTON-WELCHLIN,
JOHN AND KIMBERLY SEWELL,
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

**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**

BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

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

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

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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

Plaintiffs/Appellants

1. Charles and Evelyn Araujo
2. John and Kim Sewell
3. Lutaya Stewart
4. Cassandra Overton-Welchlin
5. Arthur Brown

Defendants/Appellees

6. Governor Phil Bryant
7. Mississippi Department of Education
8. Jackson Public School District

Intervenors/Appellees

9. Midtown Partners, Inc.
10. Midtown Public Charter School
11. Mississippi Charter School Association
12. Gladys and Andrew Overton
13. Ella Mae James
14. Tiffany Minor

Attorneys

15. Jody E. Owens, II
16. Christine Bischoff
17. Will Bardwell
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19. Harold Pizzetta
20. Joanne Nelson Shepherd

21. James Shelson
22. Michael Bentley
23. Molly Walker
24. Shad White

SO CERTIFIED this Eighth day of August 2018.

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

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REQUEST FOR ORAL ARGUMENT

The question presented by this case is an issue of first impression. Its determination implicates constitutional issues of enormous importance: the Legislature's power to interfere with local control of public education, and the Constitution's restrictions on school funding. The local funding for Mississippi's second-largest school district will be decided by this case. The Court would benefit from the thorough examination that oral argument provides.

STATEMENT OF THE ISSUE

Section 206 of the Mississippi Constitution allows a school district to levy an *ad valorem* tax, and it "clearly states that the purpose of the tax is to maintain the levying school district's schools." *Pascagoula Sch. Dist. v. Tucker*, 91 So. 3d 598, 605 (Miss. 2012). A charter school operates as its own school district. Miss. Code Ann. § 37-28-39. Yet Section 37-28-55(2) of the Mississippi Code requires a school district to transfer *ad valorem* revenue from its budget to charter schools that are not part of the tax-levying school district.

This case is not about whether charter schools are good or bad. This case is also not about whether the Legislature has the authority to allow charter schools in Mississippi. The Legislature indisputably has that authority.

This appeal presents a single constitutional question — the same question that the Supreme Court addressed in *Tucker*: "[w]hen Section 206 of the Mississippi Constitution says the purpose of the local school district tax is to maintain 'its schools,' can the Legislature force a district to divide its maintenance tax levy with other districts?" *Tucker*, 91 So. 3d at 602.

STATEMENT OF ASSIGNMENT

Rule 16(d) of the Mississippi Rules of Appellate Procedure provides three reasons why the Supreme Court should retain this case.

First, the constitutionality of Section 37-28-55(2) is "a major question of first impression," as provided by Rule 16(d)(1).

Second, Section 37-28-55(2) has compelled the Jackson Public Schools District to transfer millions of local *ad valorem* tax dollars to charter schools that are not part of the district. The constitutionality of this statute is a "fundamental and urgent issue[ ] of

broad public importance requiring prompt or ultimate determination by the Supreme Court," as provided by Rule 16(d)(2).

Third, this case presents "substantial constitutional questions as to the validity of a statute," as provided by Rule 16(d)(3).

STATEMENT OF THE CASE

I. Factual Background.

The Charter Schools Act was enacted in 2013. Miss. Code Ann. § 37-28-1, *et seq.* Charter schools are approved by the Mississippi Charter School Authorizer Board, and are exempt from rules, regulations, policies, and procedures established by the State Board of Education, the State Department of Education, and the school district in which the charter school is geographically located. Miss. Code Ann. § 37-28-7; Miss. Code Ann. § 37-28-45(3),(5). In 2015, two charter schools opened within the geographic boundaries of the Jackson Public School District ("JPS"). In 2016 and 2018, two more charter schools opened within JPS's geographic boundaries. In 2018, a charter school also opened within the geographic boundaries of the Clarksdale Municipal School District.

The Parents in this case live with their children in Jackson. They own their homes, and they pay *ad valorem* taxes levied by JPS under Section 206 of the Constitution. They all have children enrolled in JPS. R. at 114-15, R.E. at 16-17 (First Amended Complaint at ¶¶11-15). And they want for their children what most parents want for their child: the best public education that the law allows.

Since 2015, these Parents' children have attended chronically underfunded schools that have lost millions in *ad valorem* tax revenue to charter schools. In Mississippi, charter schools receive funding through two revenue streams: one from the

State, and one from the school district within whose geographic boundaries the charter school is located. The State provides most of a charter school's funding through the Mississippi Adequate Education Program. A smaller portion of a charter school's funding comes from the school district where the charter school is located. When a student enrolls in a charter school, the school district where the student resides sends a *pro rata* portion of its *ad valorem* revenue to the charter school. Miss. Code Ann. § 37-28-55(2) (hereinafter the "Local Tax Transfer Statute").

This appeal does not concern charter school revenue from the State. The Parents expressly waive their challenge related to the state funding stream. This appeal is only about the *ad valorem* revenue levied by a school district under Section 206.

In Jackson, where the Parents' children attend school, the school district's losses of *ad valorem* revenue are accelerating. During the 2015-16 school year, the Local Tax Transfer Statute cost JPS schoolchildren approximately $561,000 in district *ad valorem* revenue. R. at 113, R.E. at 15 (First Amended Complaint at ¶5). Just two years later, during the 2017-18 school year, JPS schoolchildren lost more than $2.5 million through diverted *ad valorem* revenue. Exhibit A (JPS 2017-18 Charter School Payment).[1] To date, in only three years, JPS schoolchildren have lost more than $4.5 million of the school district's *ad valorem* funds.

[1] When the Chancery Court received dispositive motions in early 2017, JPS' January 2018 payment of roughly $2.5 million had not been remitted. This information is offered as up-to-date context and falls comfortably within Rule 201(b) of the Mississippi Rules of Evidence, which allows a court to take judicial notice of any adjudicative (non-legislative) fact that "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurate and readily determined from sources whose accuracy cannot reasonably be question." *See In re Validation of Tax Anticipation Note, Series 2014*, 187 So. 3d 1025, 1035 (Miss. 2016) (taking judicial notice of public records); *Ditto v. Hinds Cty.*, 665 So. 2d 878, 880-81 (Miss. 1995) (same).

II. Procedural History.

Seven parents of Jackson schoolchildren – Charles and Evelyn Araujo, John and Kimberly Sewell, Cassandra Overton-Welchlin, Lutaya Stewart, and Arthur Brown ("Parents") – filed this suit in July 2016 in Hinds County Chancery Court. They alleged that the Local Tax Transfer Statute violates the Mississippi Constitution by requiring school districts to divert *ad valorem* funds to charter schools that are not part of the levying school district. The suit named Governor Phil Bryant, the Mississippi Department of Education, and the Jackson Public School District as Defendants. R. at 115-16, R.E. at 17-18 (First Amended Complaint at ¶¶16-18). Three other parties intervened in October 2016. R. at 475-80, R.E. at 28-33 (orders granting motions to intervene). This brief refers to all original Defendants and Intervenors collectively as "the Government."

Between January 31, 2017, and February 13, 2017, the Parents and the Government filed dispositive motions. The Parents' motion for summary judgment asked the Chancery Court to declare that the Local Tax Transfer Statute violates Section 206 and Section 208 of the Mississippi Constitution. The Government's motions for summary judgment asked for the opposite outcome.[2] The Chancery Court held oral argument on those motions in April 2017. Afterward, the Chancery Court received proposed findings of fact and conclusions of law (and responses thereto) in May and June 2017.

On February 13, 2018, the Chancery Court decided that the Local Tax Transfer Statute did not violate Section 206 or Section 208. R. at 1118, R.E. at 83 (Memorandum

[2] JPS's motion to dismiss took no position on Section 37-28-55's constitutionality but argued that JPS was not a necessary party. R. at 498, R.E. at 34 (JPS Motion to Dismiss). The Chancellor denied JPS's motion on May 9, 2017. R. at 994, R.E. at 81. JPS did not appeal that denial.

Opinion Granting Summary Judgment). It entered Final Judgment that same day. R. at 1116, R.E. at 90 (Final Judgment Denying Plaintiffs' Motion for Summary Judgment and Granting the Defendants' Motion and Defendant-Intervenors' Cross-Motion for Summary Judgment). The Parents appealed. No other party filed an appeal.

This appeal only challenges the Chancery Court's Section 206 finding. The Parents expressly waive their challenge under Section 208. Therefore, this appeal only involves a school district's *ad valorem* funds.

SUMMARY OF THE ARGUMENT

Section 206 of the Mississippi Constitution allows a school district to levy an *ad valorem* tax "to maintain its schools." In 2012, this Court held that "Section 206 clearly states that the purpose of the tax is to maintain the levying school district's schools." *Pascagoula Sch. Dist. v. Tucker*, 91 So. 3d 598, 605 (Miss. 2012). Charter schools are not part of the school district where they are 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 under the purview of the school district's school board."). Because charter schools are not part of the school district levying the *ad valorem* tax, Section 206 forbids the school district from transferring *ad valorem* revenue to charter schools. Therefore, the statute requiring the transfer of district *ad valorem* revenue to charter schools violates Section 206 and is unconstitutional.

ARGUMENT

I. The Parents Have Standing to Bring This Lawsuit.

A. The Government Waived Any Challenge to the Parents' Standing By Failing to Appeal the Chancery Court's Ruling.

In Chancery Court, Midtown Charter (one of the Intervenors) challenged the Parents' standing to bring this case. R. at 700; R.E. at 41 (Midtown Charter's Motion for Summary Judgment). The Chancery Court rejected this challenge when it found that it "ha[d] personal and subject matter jurisdiction over this case and the parties." R. at 1117; R.E. at 91 (Final Judgment at 2). Neither Midtown Charter nor any other Appellee filed a cross-appeal on this issue or any other issue. Therefore, the Government has waived the argument that the Parents lack standing.

"Timely filing of a notice of appeal is jurisdictional." *Busby v. Anderson*, 978 So. 2d 637, 638-39 (Miss. 2008). Only by noticing an appeal can a party "vest[ ] this Court with jurisdiction to hear the appeal." *Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308, 310 (Miss. 1989). If the Government wanted to appeal the Chancery Court's ruling that the Parents have standing, then it should have cross-appealed. Its failure to do so precludes the Government from challenging standing in this appeal.

The Supreme Court confronted the same issue in *Hill Bros. Construction & Engineering Co., Inc. v. Mississippi Transportation Commission*, 909 So. 2d 58 (Miss. 2005). In *Hill Bros.*, a contract bidder sued a state agency for choosing another bid. The trial court found that the bidder had standing, but it ruled for the agency on the merits. *Id.* at 60. The bidder appealed, and on appeal, the agency again argued that the bidder lacked standing. *Id.*

But the agency had not filed an appeal from the trial court's ruling. Therefore, the Supreme Court held that the standing argument "is not before the Court, [and] we decline to address this issue on the merits." *Id.*

The Government's failure to cross-appeal the issue of standing requires the same outcome in this case. The issue has been waived.

B. Mississippi Law Allows Taxpayers to Challenge Illegal Government Spending.

Even if the Government had not waived this argument, the Parents have standing to challenge the Local Tax Transfer Statute's constitutionality.

"Mississippi's standing requirements are quite liberal" compared to the standing requirements in federal court. *State v. Quitman Cty.*, 807 So. 2d 401, 405 (Miss. 2001) (quoting *Dunn v. Miss. State Dep't of Health*, 708 So. 2d 67, 70 (Miss. 1998)). Furthermore, the Supreme Court "has been more permissive in granting standing to parties who seek review of governmental actions." *Quitman Cty.*, 807 So. 2d at 405. To have standing in state court, a party must "assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise authorized by law." *Fordice v. Bryan*, 651 So.2d 998, 1003 (Miss. 1995) (emphasis added).

For more than a half-century, the Supreme Court has recognized that taxpayers like the Parents have standing to challenge illegal government spending. *See Saxon v. Harvey*, 190 So. 2d 910, 904 (Miss. 1966) (taxpayers had standing to contest supervisor's alleged personal use of county funds) (abrogated by statute on other grounds, *see Canton Farm Equip., Inc. v. Richardson*, 501 So. 2d 1098, 1107 (Miss. 1987)). For example, in *Prichard v. Cleveland*, 314 So. 2d 729 (Miss. 1975), a group of

physicians challenged a hospital's use of public money to convert hospital facilities into private office space. The Court held that "[t]he complainants, as taxpayers, had standing to bring this suit." *Id.* at 732. Similarly, in *Richardson v. Canton Farm Equip., Inc.*, 608 So. 2d 1240 (Miss. 1992), a bidder sued a county board of supervisors for rejecting his bid. The Court explained that the plaintiff, "as both an aggrieved bidder and a taxpayer[,] had standing to bring the action." *Id.* at 1244. In *State v. Quitman County*, 807 So. 2d 401 (Miss. 2001), a county had standing to challenge the State's funding method for indigent defense on behalf of its taxpayers. *Id.* at 405. And in *Pascagoula School District v. Tucker*, 91 So. 3d 598 (Miss. 2012), the Court explained that a Section 206 challenge "affect[ed] the rights of all taxpayers in Jackson County." *Id.* at 604.

Accordingly, one noted commentator has observed that in Mississippi, "[a] taxpayer may challenge a legislative appropriation to an object not authorized by law." James L. Robertson, "Standing to Sue – Public Interest Civil Actions," 3 MS Prac. Encyclopedia MS Law § 19:211 (2d ed. 2017) (citing *Prichard*, 314 So. 2d 729). Another scholar lists Mississippi among at least 36 states that allow taxpayer standing in suits against illegal government spending. Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 Fordham L. Rev. 1263, 1313 (Dec. 2012) (Appendix).

Here, the Parents' challenge to a statute requiring unconstitutional government spending satisfies both the "colorable interest" and "adverse effect" tests. As taxpayers, the Parents have a colorable interest in ensuring the legal expenditure of district *ad valorem* revenue. Likewise, the Parents' schoolchildren (on whose behalves they filed suit) have a colorable interest in ending the illegal transfer of funds that may only be

spent to maintain JPS's schools. Additionally, as taxpayers, the Parents suffer an adverse effect from this illegal government spending.

1. Both the Parents and Their Children Have a Colorable Interest in This Challenge.

An interest is "colorable" if it "appear[s] to be true, valid, or right." *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 827 n.13 (Miss. 2009) (quoting Black's Law Dictionary 212 (abr. 7th ed. 2000)). In other words, a colorable interest is one "grounded in some legal right recognized by law, whether by statute or by common law." *City of Picayune v. S. Reg'l Corp.*, 916 So. 2d 510, 525 (Miss. 2005) (quoting *Quitman Cty.*, 807 So. 2d at 405).

As taxpayers, the Parents have a colorable interest in the Local Tax Transfer Statute's illegal government spending, just as taxpayers had standing to challenge illegal government spending in *Prichard*, *Canton Farm Equipment*, and *Quitman County*. *See supra* at § I(B). Additionally, *Tucker* recognized that a Section 206 challenge to a statute's constitutionality "affects the rights of all taxpayers in [that] [c]ounty." *Tucker*, 91 So. 3d at 604.

This principle is consistent with the Supreme Court's broad view that taxpayers have standing to bring public-interest lawsuits. *Van Slyke v. Bd. of Trustees of State Institutions of Higher Learning*, 613 So. 2d 872, 875 (Miss. 1993) (Mississippi courts are "more permissive in granting standing to parties who seek review of governmental actions"). For example, in *Fordice v. Bryan*, 651 So. 2d 998 (Miss. 1995), three legislators sought a declaration that the governor's partial vetoes of bond bills was unconstitutional. In response, the governor challenged the legislators' standing. *Id.* at 1003. The Court held that the legality of the spending decisions was "of considerable

constitutional importance to the executive and legislative branches of government, *as well as to all citizens and taxpayers of Mississippi*." *Id.* (emphasis added). Accordingly, the Court held that the plaintiffs, "as legislators *and taxpayers*, had standing to bring suit since they asserted a colorable interest in the litigation." *Id.* (emphasis added).

Similarly, in *Chance v. Mississippi State Textbook Rating & Purchasing Board*, 200 So. 706 (Miss. 1941), a group of taxpayers challenged the constitutionality of loaning state-owned textbooks to private schools. The Court ultimately ruled against the taxpayers, but only after holding that they were entitled to have the challenge heard on its merits. *Id.* at 709.

In this case, the Parents are *ad valorem* taxpayers challenging the illegal transfer of *ad valorem* revenue. This challenge is undoubtedly a matter of public interest. Section 206 explains that the purpose of the *ad valorem* taxes paid by the Parents is for the tax-levying school district "to maintain its schools." Requiring that the tax revenue be used for another purpose offends the Parents' interest under Section 206 just like the illegal government spending did in *Tucker*, *Prichard*, *Canton Farm Equipment*, and *Quitman County*. As in those cases, the taxpaying Parents in this case have standing.

The Parents' schoolchildren (on whose behalves they filed suit) also have a colorable interest in this litigation. The children have a constitutionally protected property interest in Mississippi's public schools. *Goss v. Lopez*, 419 U.S. 565 (1975). They also have a fundamental right to a minimally adequate public education. As the Supreme Court explained in a 1985 decision:

> [T]he right to a minimally adequate public education created and entailed by the laws of this state is one we can only label fundamental. As such this right, to the extent our law vests it in the young citizens of this state, enjoys the full substantive and procedural protections of the due process clause of the Constitution of the State of Mississippi . . . .

Clinton Mun. Sep. Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985).

The illegal transfer of *ad valorem* funds implicates both of those rights. The schoolchildren have a colorable interest in ending this unconstitutional diversion.

For these reasons, the Parents and their children (on whose behalves they filed this lawsuit) have a colorable interest in this litigation. Therefore, they have standing to challenge this statute.

2. The Local Tax Transfer Statute is Causing the Parents and Their Children to Experience An "Adverse Effect" That is Different From the Effect on the General Public.

"[F]or a plaintiff to establish standing on grounds of experiencing an adverse effect from the conduct of the defendant/appellee, the adverse effect experienced must be different from the adverse effect experienced by the general public." *Hall v. City of Ridgeland*, 37 So. 3d 25, 33-34 (Miss. 2010) (citing *Burgess v. City of Gulfport*, 814 So. 2d 149, 153 (Miss. 2002)). Mississippi courts do not require plaintiffs to show a specific "injury in fact." *Hotboxxx, LLC v. City of Gulfport*, 154 So. 3d 21, 27 (Miss. 2015). Instead, any adverse effect will suffice, so long as it is "different from the adverse effect experienced by the general public." *Hall*, 37 So. 3d at 34.

In this case, the Parents are *ad valorem* taxpayers. The Local Tax Transfer Statute affects them differently than it affects the general public (that is, individuals who live within the geographic boundaries of JPS but do not pay *ad valorem* taxes, or taxpayers in other school districts that do not have charter schools). *See Tucker*, 91 So. 3d at 604 (Section 206 challenge "affects the rights of all taxpayers in Jackson County"). Therefore, they have standing to attack the illegal government spending that the Local Tax Transfer Statute requires. *See, e.g.*, *Prichard*, 314 So. 2d at 732.

In Mississippi, taxpayers have standing to challenge illegal government spending if they have either a colorable interest in the litigation or have suffered an adverse effect that is different than the effect on the general public. In this case, the Parents have both. They are entitled to have their Section 206 challenge heard on its merits.

II. Section 206 Unequivocally Restricts the Use of a School District's *Ad Valorem* Tax Revenue to Maintaining the Levying District's Schools.

A. Section 206's Use Restriction for *Ad Valorem* Taxes is Unambiguous. It Allows a School District to Use *Ad Valorem* Revenue Only on Schools That are Part of the Tax-Levying School District.

As this Court has long held, "[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). *See also Johnson v. Sysco Food Servs.*, 86 So. 3d 242, 244 (Miss. 2012); *Dye v. State ex rel. Hale*, 507 So. 2d 332, 349 (Miss. 1987) ("[I]f the language of the constitution is plain *the Court must* enforce it.") (emphasis in original).

Section 206 of the Mississippi Constitution is unambiguous: "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. The Constitution permits a school district to levy an *ad valorem* tax, but restricts the use of this tax revenue to one and only one use: "to maintain its schools."

The Supreme Court repeatedly acknowledged that Section 206's use restriction is unambiguous in *Pascagoula School District v. Tucker*, 91 So. 3d 598 (Miss. 2012). In that case, the Legislature enacted a statute requiring a school district to share its *ad valorem* revenue with other districts in its county if its tax base included either a natural gas terminal or a crude oil refinery. The Pascagoula School District's tax base included

both. A group of plaintiffs (including a student and a local taxpayer, as in this case) challenged the statute's constitutionality under Section 206. *Id.* at 600-01.

The Supreme Court "look[ed] no further than the plain language of Section 206" to hold that a school district's *ad valorem* revenue cannot be diverted to schools that are not part of the tax-levying school district. *Id.* at 604. Since Section 206 "clearly state[d]" this requirement, no further analysis was required: the statute requiring the transfer of *ad valorem* revenue to schools outside the levying district's control was held unconstitutional. *Id.* at 605.

In finding that the statute violated the use restriction in Section 206, the Court held that "[t]he Legislature has no authority to mandate how the [district's *ad valorem*] funds are *distributed* . . . ." *Id.* at 605 (emphasis in original). The Court further held the Legislature cannot require a school district to share its *ad valorem* revenue with schools that are not part of that school district, because "Section 206 clearly states that the purpose of the tax is to maintain the levying school district's schools." *Id.* The Court explained:

> 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.

Id. at 604.

The Court also rejected the argument that the statute requiring the transfer of *ad valorem* taxes fell within the Legislature's broad authority to regulate school finance:

> 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. at 604-05 (emphasis added).

In 2016, the Court reaffirmed that holding in *Pascagoula-Gautier School District v. Board of Supervisors of Jackson County*, 212 So. 3d 742 (Miss. 2016). In *PGSD v. Board of Supervisors*, the Court unanimously held that *Tucker* interpreted Section 206 to "mandate[ ] that all of the school district ad valorem funds from the [refinery] property go to" the tax-levying district. *Id.* at 744. The Supreme Court re-emphasized that, under Section 206, "a school district may levy a tax to maintain its schools, not its schools and several others." *Id.*

The Local Tax Transfer Statute plainly violates Section 206's use restriction. Charter schools are not part of the school district in which they are geographically 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 § 37-28-45(3) (emphasis added). Tax-levying school districts have no relationship with or authority over charter schools located within their geographic boundaries. *Id.*

State law further requires that each charter school operate as its own, separate school district or "local education agency." 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"). As its own school district, a charter school cannot be part of the tax-levying school district.

In this case, though, despite the clear legal separation between local school districts and charter schools, the Chancery Court did not consider the plain language of Section 206 to address the central issue in this case: whether, by law, charter schools are part of the school district levying the *ad valorem* tax and, if not, whether the transfer of that tax revenue from the JPS budget to charter schools violates the use restriction in Section 206. Instead, the Chancery Court reasoned that because local taxes support other nontraditional school programs, diverting a school district's *ad valorem* revenue to charter schools is permissible. R. at 1122-23, R.E. at 87-88. The Chancery Court justified its decision by reasoning that the Local Tax Transfer Statute benefits school districts in a way the statute in *Tucker* did not. Specifically, the Chancery Court explained, "[t]he statute at issue [in *Tucker*] diverted *ad valorem* tax revenue to outside school districts without transferring any burden of educating the students of the taxed district." R. at 1122; R.E. at 87.

Section 206 provides no basis for the Chancery Court's decision. Section 206 does not contemplate benefits or burdens. It only allows a school district levying an *ad valorem* tax use the tax's revenue "to maintain its schools" – period. It makes no exceptions.

The Chancery Court's decision conflicts with Section 206's plain language, and with this Court's holdings in *Tucker* and *PGSD v. Board of Supervisors*.

B. In Section 206, the Framers Intended to Prohibit the Use of School District *Ad Valorem* Tax Revenue by Schools "Over Whose Management They Have No Control."

In addition to its plain language, Section 206's historical background shows that the Framers intended to authorize local school districts to levy *ad valorem* taxes and to restrict the use of that tax revenue to the maintenance of the levying district's schools.

Originally, the Constitution of 1890 required every school district to maintain a school for at least four months during the school year. Miss. Const. (1890) art. VIII, § 205. However, Section 206 provided that "any county or separate school district may levy an additional tax to maintain its schools for a longer term than the term of four months." Miss. Const. (1890) art. VIII, § 206.[3] Today, Section 206 still allows a school district to raise additional revenue, but it may only use that revenue "to maintain its schools."

Section 206 reflects the 1890 Constitutional Convention's goal of restricting school districts' discretion over the *ad valorem* revenue that they raise. When the Convention's Education Committee first submitted its report on the Convention floor, the proposed Section 6 (which later became Section 206) would have provided "that any town, city, county or school district may levy additional taxes *for school purposes*." Journal of the Constitutional Convention of 1890 at 123 (emphasis added).

But this proposed language faced opposition from some members of the Education Committee. Requiring merely that the school district's tax be used "for school purposes" would have created broad flexibility for using *ad valorem* revenue, which those members complained would hurt separate school districts:

> The separate school districts have been for several years, a striking and eminently successful feature of our educational development. . . . We respectfully submit that good faith to those communities requires that they shall not now be so radically disturbed as is proposed. The proposition, as we understand it, is to require those districts, not only to support their own schools, (or else abandon them), but also to aid largely in the support of the county schools, *over whose management they have no control.*

Id. at 133 (emphasis added).

[3] In 1989, Section 206 was amended to eliminate the reference to a fourth-month school term.

The argument that a school district's tax revenue should not be used by schools "over whose management they have no control" must have prevailed in the full Convention, because the delegates rejected the proposal that a school district's additional taxes could be used broadly "for school purposes." Instead, Section 206 required that a school district use its *ad valorem* revenue "to maintain *its schools* for a longer time than the term of four months." Miss. Const. (1890) art. VIII, § 206 (emphasis added). The 1989 amendment eliminated the "four-month term" language and provided that a school district's *ad valorem* revenue could be used only "to maintain its schools." Miss. Const. art. VIII, § 206. Thus, the use restriction on *ad valorem* taxes remains in the Constitution.

By law, charter schools are schools "over whose management" the local district has "no control." Journal of the Constitutional Convention of 1890 at 133. *See also* Miss. Code Ann. § 37-28-45(3). The Local Tax Transfer Statute, by requiring districts to transfer *ad valorem* taxes to charter schools, violates the plain language of Section 206 as well as the intent of the Framers who adopted it.

C. The Chancery Court's Decision Relied on Examples of Specialty Schools That Are Not Requiring School Districts to Redistribute *Ad Valorem* Funds.

In its decision upholding the statute's constitutionality, the Chancery Court concluded that *Tucker* was not "on point with the matter at hand." R. at 1112, R.E. at 87 (Memorandum Opinion at 5). Specifically, the Chancery Court reasoned that state law creates other "specialty schools" that are not part of the levying school district, but are supported by local taxes. R. at 1112-13, R.E. at 87-88 (Memorandum Opinion at 5-6) (citing "student transfers, agricultural high schools, and alternative school programs" as

examples "where Mississippi law allows for local money to follow the local student"). The Local Tax Transfer Statute, the Court reasoned, should be treated no differently.

The Chancery Court's conclusion about *Tucker*'s inapplicability is wrong; the Local Tax Transfer Statute violates Section 206 in exactly the same way that the statute in *Tucker* did. Furthermore, unlike the statute at issue in this case, none of the Chancery Court's examples actually results in school districts sending *ad valorem* revenue to schools that are not part of the school district. For example:

- **Student transfers:** Students may transfer from one school district to another under various circumstances, but no transfer results in the home district sending *ad valorem* revenue to the transferee district. *See* Miss. Code Ann. §§ 37-15-29, 37-15-31(1)-(4) (no provisions for home district to compensate transferee district with *ad valorem* revenue).[4]

[4] One of the types of transfers created by Section 37-15-31 deserves clarification. Section 37-15-31(5)(a) provides limited circumstances under which a resident of a municipal school district's added territory may transfer to an adjacent county school district. Correspondingly, Section 37-15-31(5)(b) requires the municipal school district to pay for the transfer "from the proceeds of the ad valorem taxes collected for the support of the municipal separate school district." This is likely unconstitutional. Compare to *PGSD*, 212 So. 3d at 744 (agreeing with the view that "the constitution provides that a school district may levy a tax to maintain its schools, not its schools and several others"). But this conflict is purely academic. Public records show that the Mississippi Department of Education has no record of any "added territory" transfer students actually enrolled under this statute. *See* Miss. Code Ann. § 37-15-31(5)(b) (requiring school districts to certify to MDE the number of students transferring under this statute); *see also* Exhibit B (no record at MDE of any students transferring under this statute). For that reason, even this statute is not actually resulting in *ad valorem* revenue leaving the levying school district. Therefore, reaffirming *Tucker* would have no practical effect on this provision.

It should also be noted that the "ad valorem" language in Section 37-15-31(5)(b) only applies to the added-territory transfers described by Subsection 5(a). Subsection 5(b) does not apply to the other forms of transfers provided for in Section 37-15-31 (which are not paid for by district *ad valorem* revenue). Any attempt to apply Subsection 5(b) to the rest of the statute fundamentally misreads the statute. *See, e.g.*, Covington, Mar. 12, 2010, Miss. A.G. Op. # 2010-00098, 2010 WL 1556675 (where student transfers outside school district of residence under 30-mile rule, "[w]e find no authority for ad valorem taxes collected by a school district in which a student resides to be diverted to a school district where such student is attending"). *But see* R. at 652, R.E. at 71 (Defendant-Intervenor Mississippi Charter Schools Association's Memorandum in Support of Cross Motion for Summary Judgment at 10) (incorrectly asserting that for all of Section 37-15-31's types of transfers, "the local ad valorem levy . . . follow[s] the students to the new district").

- **Agricultural high schools:** Agricultural high schools do not receive school district *ad valorem* funds. Instead, they are supported by county funds. Miss. Code Ann. § 37-27-3 (requiring county board of supervisors to levy property tax "for the support and maintenance" of agricultural high school located in said county); Miss. Code Ann. § 37-27-61 (cost of student attending agricultural high school outside her county of residence is paid from home county's "county school funds"); *See Tucker*, 91 So. 3d at 606 (when authority to tax comes from statute rather than the Constitution, "the Legislature had the authority . . . to direct where the funds would be spent").
- **Alternative schools:** Alternative schools do not necessarily receive school district *ad valorem* funds. These schools may be paid for with any funds "made available to the school district for such purpose." Miss. Code Ann. § 37-13-92(6) ("The expense of establishing, maintaining and operating such alternative school program may be paid from funds contributed or otherwise made available to the school district for such purpose or from local district maintenance funds.").[5] Because Section 37-13-92(6) is capable of application without violating Section 206, it is not facially unconstitutional.

Of course, the legality of these programs has not been challenged. The Government raised them in Chancery Court to distract the Court by implying that its decision would have a far-reaching impact. But the Government is wrong. *Tucker* has been the law for six years. In those six years, transfer students, agricultural high schools,

[5] A district maintenance fund is the fund into which a district's Mississippi Adequate Education Program proceeds and its *ad valorem* tax proceeds are deposited. *See* Miss. Code Ann. § 37-61-3.

and alternative programs have been unaffected by the *Tucker* decision. Reaffirming *Tucker* today will have the same result.

There are many forms of local taxes, but *Tucker* concerns only one: a school district's *ad valorem* taxes. Section 206 places no restraints on county taxes or the like, and the Legislature is free to set requirements on those taxes. *See Tucker*, 91 So. 3d at 606 (when authority to tax comes from statute rather than the Constitution, "the Legislature had the authority . . . to direct where the funds would be spent"). But Section 206 allows no such flexibility with a school district's *ad valorem* revenue. *See Tucker*, 91 So. 3d at 606 (a school district's "authority to tax comes from Section 206 of the *Constitution*, which provides that the purpose of the tax levied by the PSD is to 'maintain its schools.'") (emphasis in original). The Chancery Court's conflation of these taxes evinced a fundamental misunderstanding of Section 206's limitations, and it led to a decision that must be reversed.

D. In the Overwhelming Majority of States, Charter Schools Do Not Receive Local Tax Revenue.

Striking down the Local Tax Transfer Statute would bring Mississippi into conformity with the vast majority of states in the country, where at least some charter schools do not receive local property tax revenue. As of August 2018, 44 states and the District of Columbia have charter school laws. "50-State Comparison: Charter School Policies," Education Commission of the States, https://www.ecs.org/charter-school-policies (last viewed Aug. 2, 2018). But according to one survey, in 36 of those 44 states, at least some charter schools (and, in some states, all charter schools) do not receive

local property tax revenue. Rebecca Sibilia, "Meet EdBuild," EdBuild (June 24, 2015), https://edbuild.org/content/meet-edbuild (last viewed Aug. 7, 2018).[6]

Reaffirming *Tucker* and applying Section 206 in this case will not end charter schools in Mississippi. It will simply require the Legislature to do what most states have already done: find another way to fund charter schools that does not violate the Constitution.

CONCLUSION

Section 206 of the Mississippi Constitution unambiguously allows a school district to levy an *ad valorem* tax for just one purpose: for that school district "to maintain *its* schools." The Supreme Court has 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, "not its schools and several others." *Pascagoula-Gautier Sch. Dist. v. Board of Supervisors of Jackson Cty.*, 212 So. 3d 742, 744 (Miss. 2016). Charter schools are not part of the school district levying the *ad valorem* tax. Therefore, Section 206 forbids a school district from transferring *ad valorem* revenue to charter schools. The Chancery Court's decision to the contrary must be reversed.

RESPECTFULLY SUBMITTED this Eighth day of August 2018.

/s/ *Will Bardwell*
William B. Bardwell
Counsel for the Parents

[contact information on following page]

[6] In 2016, the Legislature hired EdBuild to rewrite Mississippi's public schools funding formula. *See* Bracey Harris, "Ed Funding: A New Formula in Mississippi?," *The Clarion-Ledger*, https://www.clarionledger.com/story/news/politics/2016/11/26/maep-major-issue-2017-mississippi-legislative-session/94264998/ (last viewed Aug. 2, 2018).

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CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that, simultaneous with its filing, a true and correct copy of the foregoing Brief of the Appellants was served on all counsel of record via the Court's electronic filing system. Additionally, I have served a true and correct copy via United States Postal Service mail, postage prepaid, upon the Honorable J. Dewayne Thomas, Hinds County Chancery Court, P.O. Box 686, Jackson, Mississippi 39205-0686.

SO CERTIFIED this Eighth day of August 2018.

/s/ *Will Bardwell*
William B. Bardwell
Counsel for the Parents

Exhibit A

MISSISSIPPI DEPARTMENT OF EDUCATION
Ensuring a bright future for every child

Office of School Financial Services
Donna C. Nester
Bureau Manager

January 5, 2018

Sharolyn Miller, CFO
Jackson Public School District
662 South President Street
Jackson, MS 39225

Dear Ms. Miller,

Pursuant to MS Code 37-28-55, Jackson Public Schools (JPS) shall pay an amount of local support to any charter school serving students who reside in your district. The amount is determined on a per pupil basis, using the FY17 receipts from ad valorem and in-lieu collections (excluding amounts for debt) and the district's FY17 Average Daily Membership (ADM) for months one through nine. The pro rata amount is dispersed to the charter school for the number of students enrolled at the end of month one of the current school year. The calculation is shown below:

JPS Ad Valorem and In-Lieu Receipts for FY17	$73,003,476.46 (as reported in FETS)
JPS ADM for months 1-9 of FY17	26,240.00 (as reported in MSIS)
Per pupil amount of local support	$ 2,782.14
Reimagine Prep Charter ADM for month 1 of FY17	399.00 (as reported by MSIS)
Amount due to Reimagine Prep	$ 1,110,073.86
Midtown Public Charter ADM for month 1 of FY17	242.00 (as reported in MSIS)
Amount due to Midtown Public	$ 673,277.88
Smilow Prep Charter ADM for month 1 of FY17	283.00 (as reported in MSIS)
Amount due to Smilow Prep	$ 787,345.62

Payment of the funds must be made before January 16, 2018. Failure to make the payment by that date will result in the withholding of the amounts from the MAEP payment to JPS for January.

If you have any questions concerning the calculation of the payments or any other detail of the process, please contact me.

Sincerely,

Donna C. Nester
Bureau Manager, School Financial Services

Cc: Marian Schutte, Executive Director
MS Charter School Authorizer Board

Central High School Building
359 North West Street
P.O. Box 771
Jackson, MS 39205-0771

Phone (601) 359-3294
Fax (601) 359-3414
dnester@mdek12.org
www.mdek12.org

Exhibit B

MISSISSIPPI
DEPARTMENT OF
EDUCATION
Ensuring a bright future for every child

Office of Educational Accountability
Bureau of Public Reporting
Donna Hales, Director

May 17, 2018

Will Bardwell
Southern Poverty Law Center
111 East Capitol Street, Suite 280
Jackson, MS 39201

Via e-mail: will.bardwell@splcenter.org

Dear Mr. Bardwell:

The Mississippi Department of Education (MDE) is in receipt of your request pursuant to the Mississippi Public Records Act of 1983, Section 25-61-1, et seq., of the Mississippi Code of 1972, as amended. A copy of your request is attached for your convenience. You requested a copy of the following:

> *"I request copies of any documents showing the total number of students statewide to have transferred under this statute for the 2017-2018 school year. For example, if MDE keeps a comprehensive tabulation of the number of students certified to have transferred under this statute, then that tabulation would satisfy this request. If no such comprehensive tabulation exists, then copies of the individual districts' certifications to MDE would satisfy the request."*

The MDE has not been provided certified information regarding students who have transferred under Miss. Code Ann. § 37-15-31(5)(b). Therefore, we must deny your request. The MDE does have information regarding general transfers. If you would like the agency to provide you with this information, please contact me at your convenience.

Sincerely,

Donna Hales

Donna Hales, Director
Bureau of Public Reporting

Enclosure

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Jackson, MS 39205-0771

Phone (601) 359-3857
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www.mdek12.org