IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI DEPARTMENT OF FINANCE AND ADMINISTRATION, et al — APPELLANTS

vs. — CAUSE NO. 2022-SA-01129-SCT

PARENTS FOR PUBLIC SCHOOLS — APPELLEE

BRIEF OF APPELLANT MIDSOUTH ASSOCIATION OF INDEPENDENT SCHOOLS

FROM THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT – CAUSE NO. 2022-705-M

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant Midsouth Association of Independent Schools certifies that the following listed persons have an interest in the outcome of this case:

1. Mississippi Department of Finance and Administration, Appellant.
2. David McRae in his official capacity as State Treasurer, Appellant.
3. Liz Welch in her official capacity as State Fiscal Officer, Appellant.
4. Justin L. Matheny, Rex M. Shannon III, Jackie R. Bost II, and Gerald L. Kucia, attorneys for State Appellants.
5. Midsouth Association of Independent Schools ("MAIS"), Appellant.
6. Benjamin B. Morgan, attorney for MAIS Appellant.
7. M. E. Buck Dougherty III, attorney for MAIS Appellant.
8. Parents for Public Schools, Appellee.
9. William B. Bardwell, Joshua Tom, Robert B. McDuff, & Sarah Goetz attorneys for Appellee.
10. Honorable Crystal Wise Martin, Chancellor Hinds County.

Respectfully submitted,

BY: */s/ Benjamin B. Morgan*

STATEMENT REGARDING ORAL ARGUMENT

Given the important nature of the complex issues before the Court involving the Mississippi constitution, Appellant Midsouth Association of Independent Schools believes oral argument is necessary and will aid the Court. Appellant MAIS's attorney, M. E. Buck Dougherty III, Senior Counsel with Liberty Justice Center, will argue the issues on appeal on MAIS's behalf if the Court grants oral argument.

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STATEMENT OF ASSIGNMENT

Appellant MAIS submits that it would be appropriate for the Mississippi Supreme Court to adjudicate this appeal. Pursuant to Miss. R. App. P. 16(d), the Supreme Court should retain this appeal because it involves: (1) a major question of first impression, Miss. R. App. P. 16(d)(1); (2) fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court, Miss. R. App. P. 16(d)(2); and (3) substantial constitutional questions as to the validity of a statute, Miss. R. App. P. 16(d)(3).

STATEMENT OF THE ISSUES

1. Whether intervenor's motion to intervene of right under Rule 24(a)(2)—filed less than two months after the case originally commenced—was timely as a matter of law.

2. Whether Plaintiff's members have either taxpayer standing, or competitive standing, to assert a claim.

3. Whether Mississippi's Blaine Amendment to its Constitution—Article 8, Section 208—is a single unified provision to avoid creating a federal constitutional violation.

STATEMENT OF THE CASE

On June 15, 2022, Plaintiff Parents for Public Schools filed a complaint for declaratory and injunctive relief challenging the Independent Schools Program State legislation established by Senate Bill 2780 and funded by Senate Bill 3064. [C.P. 16-22]. This State legislation Plaintiff challenged appropriated federal COVID-19 relief funds to private and non-public schools including expressly those MAIS-affiliated private schools located in Mississippi. [C.P. 16-22]. Plaintiff argued that appropriating public funds — even federal funds—to non-public and private schools violated the Mississippi constitution, Article 8, Section 208's prohibition against providing funds "to any school that at the time of receiving such appropriation is not conducted as a free school." [C.P. 16]. In accordance with the express language in the State legislation, MAIS was designated to receive $10 million in funding for its private schools located in Mississippi. [C.P. 388].

On August 11, 2022, 57 days after Plaintiff filed its original complaint, MAIS filed its motion to intervene as an intervenor-defendant. [C.P. 147-48, 370]. MAIS also filed a proposed Answer attached as Exhibit A to its motion. [C.P. 149-152].

On August 23, 2022, the court heard arguments on MAIS's motion to intervene and conducted a trial under Rule 65 on Plaintiff's claim. [C.P. 376]. On October 11, 2022, the court denied MAIS's motion to intervene deeming it "untimely." [C.P. 369-372]. On October 13, 2022, 51 days after trial, the trial court delivered its ruling in Plaintiff's favor, holding the statute at issue violated Mississippi's constitution that prohibits public funds being given to private school recipients. [C.P. 373-398].

STANDARD OF REVIEW

A. Rule 24

Rule 24 includes two basic types of intervention: (1) intervention of right and (2) permissive intervention. Generally, intervention of right poses a question of law, which courts review de novo, unlike permissive intervention, which courts review for an abuse of discretion. *See Madison HMA, Inc. v. St. Dominic-Jackson Mem'l Hosp.*, 35 So. 3d 1209, 1214-15 (Miss. 2010); *see also* M.R.C.P. 24.

Under Mississippi law, anyone shall be permitted to intervene of right in an action upon timely application:

> (1) when a statute confers an unconditional right to intervene; or
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

M.R.C.P. 24(a). Determining timeliness is flexible so courts review an intervention motion's timeliness element for abuse of discretion, even when a party moves to intervene of right under M.R.C.P. 24(a). *Vasser v. Bibleway M.B. Church*, 50 So. 3d 381, 384 (Miss. Ct. App. 2010).

But in instances where the trial court fails to make a timeliness determination or support it with sufficient findings, Mississippi courts have adopted the Fifth Circuit's analysis and apply a de novo standard explaining:

> If a court denies a motion to intervene because it was untimely, we generally review this decision, and only this

> decision, for an abuse of discretion. To be entitled to the deferential standard of review, however, a court must articulate the reason the motion was untimely. If the court fails to articulate the reason the motion to intervene was untimely, we review the timeliness element de novo. *It appears that a court fails to articulate a reason a motion to intervene is untimely if it does not expressly reference any of the four factors used to decide a motion to intervene's timeliness.*

Id. (citing *John Doe No. 1 v. Glickman*, 256 F.3d 371, 376 (5th Cir. 2001) (emphasis added)).

The Mississippi Supreme Court explained the four-factor test courts are to use in assessing the timeliness of a motion to intervene under Rule 24(a)(2):

> (1) the length of time during which the would be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene;
>
> (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case;
>
> (3) the extent of the prejudice that the would be intervenor may suffer if his petition for leave to intervene is denied; and
>
> (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 381-82 (Miss. 1987) (citing *Stallworth v. Monsanto Co.* 558 F.2d 257, 264-66 (5th Cir.1977)); *see also Vasser*, 50 So. 3d at 385.

B. Standing

"Standing is a question of law reviewed under a de novo standard." *Kirk v. Pope*, 973 So. 2d 981, 986 (Miss. 2007) (citing *City of Picayune v. S. Reg'l Corp.*, 916 So. 2d 510, 519 (Miss. 2005)); *Brown v. Miss. Dep't of Human Servs.*, 806 So. 2d 1004, 1005-06 (Miss. 2000).

C. Statute's Constitutionality

"When addressing a statute's constitutionality, we apply a de novo standard of review, bearing in mind (1) the strong presumption of constitutionality; (2) the challenging party's burden to prove the statute is unconstitutional beyond a reasonable doubt; and (3) all doubts are resolved in favor of a statute's validity." *Johnson v. Sysco Food Servs.*, 86 So. 3d 242, 243-44 (Miss. 2012) (cleaned up).

SUMMARY OF THE ARGUMENT

First, the trial court erred as a matter of law by denying MAIS's motion to intervene of right under Rule 24(a)(2). The trial court failed to articulate one of the four factors under Mississippi law in ruling MAIS's motion untimely and applied an incorrect legal standard. Thus, the trial court is not entitled to the deferential standard of review, and the timeliness element here is reviewed de novo. Because MAIS filed its motion to intervene less than two months after the case originally commenced—well within the outer limits of established precedent—MAIS's motion to intervene of right under Rule 24(a)(2) was timely as a matter of law.

Second, Plaintiff Appellee does not have standing to assert a cause of action challenging the constitutionality of the statute at issue on behalf of its members, who are parents of children attending public schools in Mississippi. The Plaintiff does not have taxpayer standing nor competitive standing under existing law to challenge federal COVID-19 relief funds that the Mississippi legislature earmarked specifically for MAIS's associated private schools.

Third, if the Court determines that Plaintiff has standing to assert a claim to stop the Mississippi legislature from appropriating $10 million in federal COVID-19 relief funds to MAIS's member schools, the Court must construe Article 8, Section 208, of the Mississippi constitution as a single integrated whole to avoid creating a federal constitutional violation.

ARGUMENT

I. MAIS's motion to intervene of right under Rule 24(a)(2) was timely as a matter of law.

The first issue on appeal focuses on MAIS's motion to intervene of right under Rule 24(a)(2) and whether it was timely filed. Because the trial court failed to articulate one of the governing *Pittman* factors under Mississippi law in ruling the motion untimely and applied an incorrect legal standard, it is not entitled to the deferential standard of review, and the timeliness element is reviewed de novo. For the reasons set forth below, the trial court erred as a matter of law by denying MAIS's motion to intervene of right under Rule 24(a)(2).

A. The trial court's denial order failed to expressly reference any of the four factors courts are to use to determine timeliness.

In its order denying MAIS's motion to intervene, either of right or permissively, the trial court failed to expressly reference the four *Pittman* factors under Mississippi law that courts are to use to determine timeliness. [C.P. 369-372].

Specifically, regarding MAIS's motion to intervene of right under Rule 24(a)(2), the trial court held:

> The principal defect in MAIS's motion is that it is untimely. MAIS waited until just twelve days before trial to file its Motion to Intervene, despite its knowledge of Plaintiff's challenge and request for preliminary injunction.

[C.P. 371]. The trial court's generalized and conclusory assertion that MAIS's motion was "untimely" and failure to apply the four-factor test means it is not entitled to the deferential standard of review on the timeliness issue.

Because the trial court made no express finding on the *Pittman* timeliness factors, "a de novo standard applies" to this Court's review on appeal of the timeliness of MAIS's motion to intervene. *See Vasser*, 50 So. 3d at 384.

B. The trial court applied an incorrect legal standard by calculating the length of time before trial from the time MAIS filed its motion to intervene.

While the trial court did attempt to provide a basis outside of the governing *Pittman* factors for denying MAIS's motion to intervene, it applied an incorrect legal standard and focused on the length of time *before trial from the time MAIS filed its motion to intervene*.

Indeed, the trial court articulated this incorrect legal standard and analysis saying, "MAIS waited until just twelve days before trial to file its Motion to Intervene, despite its knowledge of Plaintiff's challenge and request for preliminary injunction." [C.P. 371]. But measuring the length of time from the time MAIS filed its motion to intervene until the consolidated trial date under Rule 65 is not the correct legal standard to determine if a motion to intervene is timely under the *Pittman* factors. 501 So. 2d at 381-82.

Consequently, the trial court applied an incorrect legal standard by focusing on the duration of time from the time MAIS filed its motion to intervene relative to the trial date. *See id*.

C. Under the correct legal standard by calculating the length of time from when MAIS first knew of its interest in the case before it filed its motion to intervene—less than two months after the case was originally filed—MAIS's motion was timely.

Under the first *Pittman* factor on timeliness, courts are to calculate "the length of time during which the would be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene." *Id*. Under this correct legal standard, MAIS's motion to intervene was timely as a matter of law.

First, the trial court found, and it is undisputed that Plaintiff commenced this action on June 15, 2022. [C.P. 16-22, 369]. *Second*, the trial court found, and it is undisputed that MAIS filed its motion to intervene as an intervenor-defendant on August 11, 2022. [C.P. 147-48, 370]. MAIS attached as exhibits to its motion a proposed Answer as Exhibit A [C.P. 149-152] and a memorandum in opposition to Plaintiff's motion for preliminary injunction as Exhibit B [C.P. 153-177]. MAIS also filed a memorandum of law in support of its motion to intervene on the same day it filed its motion [C.P. 178-187]. *Third*, the earliest possible date MAIS could have reasonably known of its interest in this case was June 15, 2022, the date Plaintiff commenced the action. And MAIS filed its motion to intervene 57 days later or less than two months after Plaintiff filed its original complaint. Such a timeline is far shorter than the four months and nine days in *Madison HMA*, 35 So. 3d at 1217, where the Mississippi Supreme Court reversed the denial of a motion to intervene. Likewise, MAIS's timeline to intervene is much shorter than 119 days in *Pittman*

where the Mississippi Supreme Court also reversed the lower court's denial of an intervenor's motion to intervene. 501 So. 2d at 382.

Here, the trial court's order denying MAIS's motion to intervene because it was "untimely" is stunning. In an underlying action where MAIS was expressly named in State legislation to be the recipient of approximately $10 million dollars in federal relief funds; where the challenge to the legislation by the Plaintiff involved deeply complex and important constitutional issues under Mississippi's constitution; and where MAIS filed its motion to intervene along with a proposed Answer and supporting briefs *57 days* after Plaintiff filed its lawsuit, the trial court chose to deny MAIS's motion to intervene without citing any of the *Pittman* factors, which courts are required to do when determining whether a motion to intervene was timely filed. This Court can correct the trial court's gross error of law because MAIS's motion to intervene was timely filed as a matter of law.

D. Because MAIS acted promptly, the parties were not prejudiced.

Since MAIS acted promptly by timely filing its motion to intervene 57 days after Plaintiff commenced the underlying action, neither Plaintiff, the State Defendants, nor the trial court were prejudiced by MAIS's motion to intervene filed on August 11, 2022, under the second *Pittman* factor.

Prejudice to existing parties is ordinarily determined based on the delay "in the prosecution of claims or defenses in the pending action." *Id*. Prejudice is only relevant if it is caused by the potential intervenor's failure to act promptly. *Id*.

Prejudice "is measured as of the date of the filing of the motion for leave to intervene." *Id*.

In its order denying MAIS's motion to intervene, the trial court further said:

> However, timeliness is not the motion's only fatal defect. MAIS's intervention would prejudice the existing parties by delaying trial and a final outcome in a time-sensitive case where the parties have acted to expedite the matter. The portion of Section 208 that MAIS challenges as violating the federal constitution is irrelevant to the subject of this case. Disposition of this action will not prevent MAIS from challenging Section 208's constitutionality; it may still file a separate lawsuit. Furthermore, the applicant's interests are adequately represented by State Defendants. The unusual circumstances in the present case counsel against intervention, because this is a time-sensitive case in which intervention could delay the Court from delivering an important ruling. Therefore, MAIS is not entitled to intervene as of right.

[C.P. 371-72]. The trial court erred as a matter of law in ruling that MAIS's motion to intervene would prejudice the existing parties and the trial court.

First, prejudice to the existing parties is not relevant here because MAIS acted promptly. The trial court analyzed prejudice to the existing parties as a separate and distinct element untethered to the intervenor MAIS's actions and whether it acted promptly. But prejudice to the existing parties is only relevant if it is caused by the potential intervenor's failure to act promptly, not whether intervention itself initiates a domino effect upon the existing parties that delays the action. *See Pittman*, 501 So. 2d at 382. Moreover, prejudice "is measured as of the date of the filing of the motion for leave to intervene." *Id*. As set forth above, MAIS acted promptly by timely filing its motion to intervene on August 11, 2022, 57 days and

less than two months after Plaintiff filed its original complaint. Ironically, the trial court deliberated for 51 days from the date of trial before delivering its ruling on the merits of Plaintiff's claim. Because MAIS acted promptly as a matter of law, its motion to intervene cannot be held to have prejudiced the existing parties.

Second, prejudice to the trial court is also not relevant because MAIS acted promptly. The trial court further analyzed intervention from its perspective and whether it might be prevented from issuing a prompt ruling, not whether MAIS failed to act promptly "in the prosecution of claims or defenses in the pending action." *See Pittman*, 501 So. 2d at 382. The trial court erroneously held that the "circumstances" of the "time-sensitive case" caution against intervention, "which could delay the Court from delivering an important ruling." [C.P. 371-72]. This was an improper legal analysis because MAIS acted promptly as a matter of law; therefore, its motion to intervene cannot be held to have prejudiced the trial court from delivering an important ruling.

II. Both of Plaintiff's theories of standing fail under established law.

Turning to the second issue on appeal, Plaintiff asserts two theories of standing—that its members are taxpayers, and thus are entitled to taxpayer standing, and that its members are public school parents whose children will suffer if public schools are put at a competitive disadvantage compared to private schools. Neither theory provides adequate grounds for Plaintiff to bring this case. And MAIS may address this issue on appeal because standing is jurisdictional, and any party can raise it. *Davis v. City of Jackson*, 240 So. 3d 381, 383 (¶9) (Miss. 2018)

("Standing is a jurisdictional issue. Thus, it may be raised by the court sua sponte or by any party at any time." (cleaned up)).[1]

A. The Plaintiff's members lack taxpayer standing.

When a case involves only federal funds that pass-through state coffers on their way to their final destination, state taxpayers lack standing to sue on their expenditure. This is the holding of published decisions from appellate courts in Alabama, Arkansas, California, Colorado, Florida, Georgia, Maryland, Michigan, Minnesota, and Pennsylvania. *Broxton v. Siegelman*, 861 So. 2d 376, 385 (Ala. 2003); *Chapman v. Bevilacqua*, 42 S.W.3d 378 (Ark. 2001); *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 589 (Minn. 1977); *In re Redevelopment Plan for Bunker Hill Urban Renewal Project 1B*, 389 P.2d 538, 573 (Cal. 1964); *White v. Philadelphia*, 408 Pa. 397 (1962); *Hogg v. Hous. Auth. of Rome*, 5 S.E.2d 431, 431 (Ga. 1939); *Matthaei v. Hous. Auth. of Balt. City*, 9 A.2d 835, 838 (Md. 1939); *Hotaling v. Hickenlooper*, 275 P.3d 723, 727 (Colo. App. 2011); *Altman v. Lansing*, 321 N.W.2d 707, 711 (Mich. App. 1982); *Country Club Hills Homeowners Asso. v. Jefferson Metro. Hous. Auth.*, 449 N.E.2d 460, 463 (Ohio App. 1981); *Hous. Auth. of Melbourne v. Richardson*, 196 So. 2d 489, 492 (Fla. Dist. Ct. App. 1967);

[1] Courts have an ongoing obligation to ensure themselves of their jurisdiction, and thus the general rule that non-parties cannot raise new issues in a case does not apply to standing arguments. *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt.*, 589 F.3d 458, 467 (1st Cir. 2009); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006); *Bd. of Trustees v. Ft. Wayne*, 362 N.E.2d 855, 859 (Ind. Ct. App. 1977) ("lack of subject matter jurisdiction need not be raised by a party with standing to litigate the merits of an action. This defect may be raised upon motion of the court or even at the suggestion of an amicus curiae.").

Wallner v. Sununu, 2020 N.H. Super. LEXIS 25, *19 (Hillsborough Cnty. Superior Ct. April 22, 2020); *Story-Bernardo v. Gov't of Guam*, 2021 Guam Trial Order LEXIS 189 (Superior Ct. May 27, 2021). *See McCafferty v. Oxford Am. Literary Project, Inc.*, 2016 Ark. 75 (2016) (university funds generated by housing, cafeterias, and other auxiliary streams of income); *Brinkman v. Miami Univ.*, 2007-Ohio-4372, ¶ 25 (Ct. App.) (university funds from a private donor).

In *Broxton*, the Supreme Court of Alabama explained why a state taxpayer lacks standing to sue for the alleged misuse of federal funds that flow through a state budget: "[I]t is the liability to replenish public funds that gives a taxpayer standing to sue, and there is no question that here there is no liability to replenish state funds." 861 So. 2d at 385. The Alabama Supreme Court reiterated this principle in a later case dealing with a state trust fund that was only funded by oil-and-gas royalties, such that no everyday income or sales taxpayer had standing to challenge its actions because they were not derived from state general purpose tax revenues. *Riley v. Pate*, 3 So. 3d 835, 839 (Ala. 2008). Plaintiff's members may be taxpayers in Mississippi, but no Mississippi tax dollars were used to fund this program. As such, they cannot have standing as taxpayers.

Indeed, a comparison to the most recent case from this Court on taxpayer standing shows how far off Plaintiff falls from achieving such standing. In *Araujo v. Bryant*, 283 So. 3d 73 (Miss. 2019), the plaintiffs had standing because they "own property in the school district, pay property taxes (a portion of which are designated to support [Jackson Public Schools] (JPS)) and have children who attend JPS." *Id.*

at 78. The parents had taxpayer standing because they were "not simply general taxpayers challenging general governmental spending as unconstitutional." *Id*. Rather, they paid the property taxes that were being diverted from JPS to the charter schools, and their children were enrolled in the JPS schools that would lose the funding. "Thus, the Plaintiffs experience a different, adverse effect than the general public due to the alleged unconstitutional spending of the ad valorem taxes." *Id*.

Compare that situation to this case. First, the funds at issue come from Washington, D.C., not from any state or local tax in Mississippi paid by the Plaintiff's members. Mississippi courts have never before recognized contribution to the federal fiscal budget as creating standing in state court. Indeed, as MAIS points out above, numerous state appellate courts have specifically rejected the idea of taxpayer standing in state court to challenge the use of federal funds flowing through state coffers.

Second, the funds at issue here were not diverted in any way from public schools where Plaintiff's members' children are enrolled. Rather, these were highly flexible federal COVID disaster relief funds. Nothing in federal law required them to be spent on schools generally, such that allocating them to nonpublic schools diverted them from public schools. [C.P. 382]. Indeed, the relevant program rules suggest the Mississippi Legislature chose to spend them on nonpublic schools to fix an inequality between public and nonpublic schools.

Mississippi's nonpublic schools only received $41 million in EANS (Emergency Assistance to Nonpublic Schools) funds under the 2021 American Recovery Plan Act (ARPA), or $610,851 on average per school.[2] Federal law specifically barred those funds from use for facilities improvements.[3] By contrast, Mississippi's public schools received $1.46 billion in ARPA funds, or $ 10,015,515 on average per school.[4] And those funds could be used for "[s]chool facility repairs and improvements to reduce risk of virus transmission and exposure to environmental health hazards, and to support student health needs."[5] Thus, it was entirely reasonable for the Legislature to conclude, first, that nonpublic schools were not receiving COVID relief funds at the same rate as public schools under existing programs, and second, that nonpublic schools could not conduct necessary facility improvements on the same basis as public schools, and so allocated other, flexible ARPA funds to capital projects at nonpublic schools.

What cannot be shown from this record is any proof that the federal funds at issue were "diverted" from public schools to nonpublic schools, or that public schools would have received these funds but for the nonpublic schools' receipt of them. Such an injury is "conjectural or hypothetical in that it depends on how legislators

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[2] https://www.mdek12.org/sites/default/files/Offices/MDE/OFP/EANS%20I/eans_assistance_amount_as_of_6.29.2021.pdf.

[3] https://www.mdek12.org/OFP/EANS-I.

[4] https://www.mdek12.org/sites/default/files/Offices/MDE/OFP/ESSER/fy21_preliminary_arp_esserf_iii_allocations.pdf.

[5] https://www.mdek12.org/OFP/ARP-ESSER.

[would] respond" if this expenditure were barred; that sort of "general and speculative conclusion" about how the funds would be reallocated by legislators doesn't cut it for standing. *Doss v. Claiborne Cty. Bd. of Supervisors*, 230 So. 3d 1100, 1105 (Miss. App. 2017) (cleaned up). So, Plaintiff fails both prongs of the *Araujo* analysis: its members did not contribute the funds in question, and the funds in question were not directly diverted from Plaintiff's members' children's public schools. Plaintiff's taxpayer standing theory must fail.

B. Plaintiff's competitive standing theory also must fail.

The Plaintiff's competition theory of standing must also fail. The Plaintiff is not in direct competition with the nonpublic schools who stand to benefit from this federal COVID relief program. Plaintiff is a membership association; it offers no education, hires no teachers, and runs no schools. Nor are Plaintiff's members in direct competition with the nonpublic schools; they are parents of children. Nor are Plaintiff's members' children in competition with the nonpublic schools. It is only at the next level of relationship, that the public schools where Plaintiff's members' children are enrolled, compete with the nonpublic schools participating in the program. But as explained below, even this "relationship" is too attenuated to establish competitive standing.

Six degrees of Kevin Bacon may be a fun party game,[6] but it is not a good model for a standing theory. There is a "general rule that a plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or

[6] https://blogs.ams.org/mathgradblog/2013/11/22/degrees-kevin-bacon/.

interests of third parties." *Perkins v. Nelson (In re Estate of Nelson)*, 266 So. 3d 1008, 1022 (Miss. App. 2018) (Wilson, J., concurring). An exception exists when "the party asserting the right has a close relationship with the person who possesses the right and there is a hindrance to the possessor's ability to protect his own interests." *Id*. (quotation omitted). Plaintiff fails on both counts. It cannot establish a close relationship with the public schools who compete with the nonpublic schools; an advocacy group for parents of children in public schools is hardly the same as a decedent's sibling. *Id*. Nor can it show that public schools are unable to sue on their own behalf in this instance—indeed, recent experience shows they are quite capable of asserting their rights when they believe they are entitled to appropriated funds. *See, e.g., Clarksdale Mun. Sch. Dist. v. State*, 233 So. 3d 299, 301 (Miss. 2017).

But even if Plaintiff, on behalf of its members' children's schools, can stand in for public schools, it has long been the law in Mississippi that "business competitors have no standing to challenge activities of corporate rivals as being ultra vires." *Tallahatchie Valley Elec. Power Ass'n v. Miss. Propane Gas Ass'n*, 812 So. 2d 912, 921 (Miss. 2002) (summarizing the holding of *W. Bros. v. Ill. C. R. Co*., 75 So. 2d 723, 726 (Miss. 1954)). And this is so for a reason: "no person has a vested right to engage in business without competition. . . . Never having been possessed of a right to conduct a business free of competition, the landowner has lost nothing and cannot be said to have been aggrieved." *Earth Movers v. Fairbanks N. Star Borough*, 865 P.2d 741, 745 (Alaska 1993) (quoting 3 Arden H. Rathkopf & Daren A. Rathkopf, *The Law of Zoning and Planning* § 43.07, at 43-53 (1992)). Thus, "where,

as here, the potential injury or prejudice is only an increase in business competition, such injury or prejudice is insufficient to confer standing. We join the majority of jurisdictions in holding that a competitor challenging legislative or executive action solely to protect its own economic interests lacks standing." *ATC S., Inc. v. Charleston Cty.*, 669 S.E.2d 337, 340 (S.C. 2008). Other state courts in this region are in accord. *1900 Highway 190, L.L.C. v. City of Slidell*, 196 So. 3d 693, 699 (La. App. 1 Cir 2016) ("The approach recognized by our colleagues . . . that denies a right of action based solely on a competitive disadvantage is the prevailing law throughout the country."); *Church of God of The Union Assembly*, 104 S.E.2d 912 (Ga. 1958); *State Alcoholic Bev. Control v. Muncrief,* 45 S.W.3d 438, 441 (Ark. 2001); *Eastern Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 311 (Fla. 1984).

At every step, then, Plaintiff's second theory of standing fails. Plaintiff cannot assert "fifth party standing" (third party standing, plus two more degrees of separation), Plaintiff is not sufficiently close to those who do have standing, those who do actually have standing have not chosen to exercise it, and if they did try to exercise it, they would lose on this competition theory, because it is contrary to well-established Mississippi law.

III. Alternatively, to the extent Plaintiff's members have standing, Mississippi's Blaine Amendment—Article 8, Section 208—is a single unified provision, not a series of separate clauses.

Finally, the third and final issue on appeal is whether Section 208 is a single unified provision within Mississippi's constitution. The trial court ignored all the arguments that follows by slicing and dicing Section 208 into different clauses and

sub-clauses and proclaiming each separate and unique. [C.P. 389-391]. But a natural reading of Section 208 shows the foolhardiness of this approach: "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."[7]

This is not a section dealing with multiple different topics in one place, like the U.S. Constitution's First Amendment with its clauses on religion, speech, press, and assembly. Section 208 is one integrated whole that targets fundings for non-public schools. And MAIS explains below why that targeting occurred: because of racial and religious prejudice against immigrant Catholics and newly freed slaves and the schools that dared to serve them in the Reconstruction period. The final portion concerning schools "not conducted as a free school" simply ensures the full coverage of the provision's desired scope, as some non-public schools were founded by religious persons without an explicitly religious affiliation,[8] and others were founded on a purely secular basis to serve newly freed slaves.[9] But all of Section 208

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[7] Miss. Const. Ann. art. 8, § 208.

[8] *See, e.g., Education Among the Freedmen*, Resolution of the Pennsylvania Branch of the American Freedman's Union Commission (post-1862), Library of Congress, https://www.thirteen.org/wnet/slavery/experience/education/docs5.html ("This 'Branch' is composed of representatives of the various religious denominations, and while it is not sectarian in its organization, plans, or movements, it aims to execute its trust on the basis of religion, for the promotion of 'freedom, industry, intelligence and christian morality.'").

[9] *See* James M. Smallwood, *Early 'Freedom Schools': Black Self-Help and Education in Reconstruction Texas—A Case Study,* 41 Negro History Bulletin 790 (1978)

drives at the same goal: ensuring Catholics and the children of freed slaves were forced into majoritarian, segregated public schools.

The natural reading of the text and the historical evidence on the purpose of the amendment are further confirmed by the general rule that two clauses in the same section should generally be treated as "an integrated whole" unless there is specific reason to separate them. *See Corr Wireless Communs., L.L.C. v. AT&T, Inc., LLC*, 907 F. Supp. 2d 793, 799 (N.D. Miss. 2012). As in contracts, so in constitutions: "in the absence of anything to indicate a contrary intention," a provision adopted at the same time, by the same people, for the same purpose, in the course of the same convention, should be treated as an integrated whole. *See Knox v. Bancorpsouth Bank*, 37 So. 3d 1257, 1262-63 (Miss. App. 2010) (discussing contract rule). There is no contrary indication here: all three parts of Section 208 work together.

Against the natural reading, historical purpose, and general rule, the trial court provides no evidence or argument to justify such severing the final clause off and treating it separately. [C.P. 389-394]. The trial court's answer that MAIS "is free to file its own lawsuit raising" a challenge to Section 208 in federal court is no answer at all. The whole point of the doctrine of constitutional avoidance is to avoid the need for such an outcome—this Court is commanded by precedent to adopt a construction of Section 208 that avoids a federal constitutional problem that could be raised in a future lawsuit if an alternative reasonable construction is available.

(discussing non-religious non-public cooperative schools organized by newly freed slaves for their children).

See Gentry v. Booneville, 199 Miss. 1, 4 (1945); *Jones v. Meridian*, 552 So. 2d 820, 824 (Miss. 1989). As is demonstrated below, Section 208 has a serious constitutional problem. But for starters, as demonstrated above, Section 208 is an integrated whole, and the religious and racial prejudice infects every clause of it.

A. State laws motivated by racial and religious animus violate the federal constitution's First and Fourteenth Amendments.

"In *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), the Supreme Court addressed a claim that racially discriminatory intent motivated a facially neutral governmental action. The Court recognized that a facially neutral law, like the one at issue here, can be motivated by invidious racial discrimination. If discriminatorily motivated, such laws are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016). This is so because "the Equal Protection Clause is offended by sophisticated as well as simple-minded modes of discrimination." *United States v. Fordice*, 505 U.S. 717, 729 (1992).

The Supreme Court later decided it would use the same *Arlington Heights* tools to discern discriminatory intent for religious-animus claims under the First Amendment as in racial-animus claims under the Fourteenth Amendment. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993). Though *Arlington Heights* and *Church of the Lukumi Babalu Aye* were both decided while reviewing a municipal ordinance, "[t]his same analysis applies to a provision in a state constitution." *United States v. Louisiana*, 9 F.3d 1159, 1167 (5th Cir. 1993).

See Hunter v. Underwood, 471 U.S. 222, 223 (1985) (evaluating an Alabama constitutional provision).

In such a case, the plaintiffs' responsibility is to show "an invidious discriminatory purpose was a motivating factor" in the decision to adopt the provision. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (plurality). A plaintiff "need not show that discriminatory purpose was the sole or even a primary motive for the legislation, just that it was a motivating factor." *N.C. State Conference*, 831 F.3d at 220 (cleaned up; emphasis original).

How does a court determine whether racial or religious discrimination was a motivating factor behind a law? The court undertakes a "sensitive inquiry" and uses a "holistic approach" that looks to "the historical background of the challenged decision; the specific sequence of events leading up to the challenged decision; departures from normal procedural sequence; the legislative history of the decision; and of course, the disproportionate impact of the official action -- whether it bears more heavily on one race [or religion] than another." *N.C. State Conference*, 831 F.3d at 220-21 (cleaned up); *see also Thai Meditation Ass'n v. City of Mobile*, 349 F. Supp. 3d 1165, 1190 (S.D. Ala. 2018) (describing the same test, as to religion). "[D]iscriminatory intent need not be proved by direct evidence." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). A smoking gun piece of evidence is not required; an "invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . ." *Washington v. Davis*, 426 U.S. 229, 242 (1976).

B. The Mississippi Blaine Amendment was motivated by racial and religious prejudice.

"[H]ostility to aid to pervasively sectarian schools has a shameful pedigree." *Mitchell* v. Helms, 530 U.S. 793, 828 (2000) (plurality).[10] The so-called Blaine Amendments were "born of bigotry and arose at a time of pervasive hostility to the Catholic Church and to Catholics in general. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020). This effort "was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace.'" *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999). This anti-Catholic "sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children." *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting). Mississippi is one of the states where this movement successfully incorporated a no-aid provision into the state constitution, in both 1869 and again in 1890. *See* Kyle S. Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution,* 72 Fordham L. Rev. 493, 519 (2003). This section will explain the historical record connecting Mississippi's constitution to the shameful history of bigotry recognized by the Supreme Court.

[10] *Accord Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring).

1. Anti-Catholic attitudes leading up to the 1869 Constitution

Prior to the Civil War, "In the years between 1830 and 1860, anti-Catholicism America became unprecedentedly virulent."[11] Nearly fifty people died in several anti-Catholic riots, and numerous churches and convents were burned to the ground.[12] Public schools were essentially Protestant schools, with daily prayer and readings from the King James Bible.[13] As a result, education took on a particular nexus to the Catholic question, as Catholics sought public funding for parochial schools since they did not feel comfortable sending their children to Protestant public schools.[14] This only reinforced the anti-Catholic animus; typical is one Virginia Baptist circular that "accused the Jesuits [a Catholic religious order] and 'certain supple politicians, of very loose consciences' of attempting to 'appropriate our Protestant public school funds.'"[15] This widespread anti-Catholicism paused during the Civil War, as the nation turned its attention to other hatreds.

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[11] Marie Anne Pagliarini, *The Pure American Woman and the Wicked Catholic Priest: An Analysis of Anti-Catholic Literature in Antebellum America*, 9 Religion and American Culture 97, 97 (1998).

[12] *Id.*

[13] Ward M. McAfee, *Religion, Race, and Reconstruction: The Public School in the Politics of the 1870s* 3 (SUNY Press 1998).

[14] *Id.*

[15] Marty McMahone, *Broadening the Picture of Nineteenth-Century Baptists: How Battles with Catholicism Moved Baptists toward Separationism*, 25 J. of L. & Religion 453, 471 (2009) (quoting Maynooth College and our Public School Funds, 7 Religious Herald 180 (Nov. 5, 1840)).

But as the Civil War reached its conclusion, "and when the question of franchise for the negro loomed on the horizon, it was impossible to keep down the longstanding antipathy of Protestants for Catholics."[16] The Republican Party was still relatively new at the time, and at its founding had received into its ranks the viciously anti-Catholic Know-Nothing Party.[17] Black voters, who were Republican in party and Protestant in faith, were seen as reliable post-war supporters of the anti-Catholic agenda.[18] Many Blacks in the South disliked Catholics in the South because, though few in number, they had generally supported slavery and the Confederacy (even as many of their Northern brethren supported abolition and the Union).[19] Therefore, Republican loyalty, Protestant faith, and post-war attitudes combined to carry over anti-Catholic animus "as the Confederates reorganized their States under Johnson's restoration."[20]

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[16] William A. Russ, Jr., *Anti-Catholic Agitation During Reconstruction*, 45 Records of the American Catholic Historical Society of Philadelphia 312 (Dec. 1934).

[17] Russ 314. *See* Pagliarini 97 ("Throughout the 1850's, a political party called the Know-Nothings convulsed the nation with its violent hostility to Catholics.").

[18] *See, e.g.*, Russ 315 ("The negro, when educated and intelligent, will ever think, act, and vote on the side of freedom, civilization, republicanism, loyalty, and the Protestant religion." Quoting Dr. Whedon, *The Negro Problem Solved*, in Western Christian Advocate, Jan. 18, 1865).

[19] Dennis C. Rousey, *Catholics in the Old South: Their Population, Institutional Development, and Relations with Protestants*, 24 U.S. Catholic Historian 1, 15 & 21 (2006).

[20] Russ 316-17.

After the war's end, White Northern Radical Republicans and newly freed slaves (now also Republicans) controlled Southern politics while federal troops remained on the scene. All of the Southern states adopted new constitutions for their governance through conventions dominated by Republicans. This included the Mississippi Convention of 1868.[21] "The convention was dominated by native and Northern white Republicans but also seated sixteen black delegates."[22]

The Mississippi Convention of 1868 adopted an article on public education which provided, "No religious sect or sects shall control any part of the school or university funds of this State." 1869 Const. art. VIII, § 9.[23] This provision reflected an "insist[ence]" by "Radical Republicans in Congress and blacks and white allies in Southern state conventions" "that states institute the Northern model of state-controlled and publicly financed nonsectarian education."[24] Four of the ten Reconstruction states adopted no-aid provisions.[25] Together, black and white Republicans were the party of Protestantism and public schools.

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[21] John W. Winkle III, Constitution of 1868, Mississippi Encyclopedia, https://mississippiencyclopedia.org/entries/constitution-of-1868/.

[22] Charles Bolton, *The Hardest Deal of All* (Univ. Press of Miss. 2005) 7.

[23] See *Journal of the Proceedings of the Constitutional Convention of the State of Mississippi 1868* 150.

[24] David Tyack and Robert Lowe, 94 Am. J. of Educ. 236, 241 (Feb. 1986).

[25] See Louisiana 1868: Title VII Art. 140 ("No appropriation shall be made by the General Assembly for the support of any private school, or any private institution of learning whatever."); Arkansas 1868: Art. IX § 1 ("but no religious or other sect or sects shall ever have any exclusive right to or control of any part of the school funds of this State."); and South Carolina art. X, sec. 5 (1868) ("No religious sect or sects

Based on this initial provision, "petitioners . . . were largely successful in litigation at striking so-called 'aid' reaching Catholic institutions. . . . [T]he Supreme Court of Mississippi [in 1879] refused a pro rata share of the school fund to parents of students attending a Catholic parochial school and struck an act entitling them to a proportionate share of the funds."[26]

2. The revision in the 1890 Constitution

As federal troops withdrew from the state, Republican Reconstruction ended and white Democratic dominance resumed.[27] Several years later, white Democrats, often called the White Redeemers by historians, convened a new convention to write a new constitution with a single goal: "to disenfranchise Blacks."[28] The President of the Constitutional Convention, S.S. Calhoon, told one newspaper at the time that "while there are other important questions to settle, the question of paramount importance was that of suffrage, and it should be dealt with in a manner to leave no doubt of the effect." This was so because "the eradication of Black political power was seen as a key goal for the White South reasserting its hegemony. If political

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shall have exclusive right to, or control of any part of the school funds of the State.").

[26] Nathan A. Adams, IV, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida*, 30 Nova L. Rev. 1, 24 (2005) (discussing *Otken v. Lamkin*, 56 Miss. 758, 764-65 (1879)).

[27] Bolton 9.

[28] Robert Luckett, Jr., *The Southern Manifesto as Education Policy in Mississippi*, 10 J. of School Choice 462, 464 (2016).

power could be consolidated in elite White hands, control of important social institutions like schools could also be taken back."[29]

The 1890 Convention strengthened and lengthened the 1868 Blaine Amendment.[30] This Convention "brought forward, with a slight change, section 9, article 8, Constitution of 1869."[31] After the committee on revision made a stylistic change, the Convention adopted the provision in its final form: "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."[32] The aim was clear: in response to a recent report by the superintendent of education listing the number of students attending sectarian or otherwise nonpublic schools, the goal was to prohibit them from receiving any further public funds.[33]

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[29] Luckett 464.

[30] Ursula Hackett, *Republicans, Catholics and the West: Explaining the Strength of Religious School Aid Prohibitions*, 7 Politics & Religion 499 (2014).

[31] *State Teachers' Coll. v. Morris*, 165 Miss. 758, 770, 144 So. 374, 379 (1932).

[32] Miss. Const. Ann. Art. 8, § 208. A few years later (1908), the Constitution was amended to add an anti-donation clause that similarly targeted religious nonprofits: "No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the Legislature, nor by any vote for a sectarian purpose or use." Art. 4, § 66.

[33] *State Teachers' Coll.*, 165 Miss. at 770.

"On its face, forbidding public aid to 'sectarian' schools might have seemed an innocuous extension of the Establishment Clause. Evidence suggests more sinister motives were at work, however."[34] Those sinister motives were to force all Mississippi students into Protestant, segregated, public schools, which stemmed from animus towards Catholic immigrants and hatred of the missionary schools teaching newly freed slaves to read.

3. Anti-Catholic bias in 1890

By this point, anti-Catholic animus in the South had become a bipartisan affair. Republicans indulged it through the Blaine movement, the American Protective Association, and "criticism of Tammany Hall."[35] Black voters retained their Republican and Protestant affiliations, combined with a dislike for foreigners as competition in the unskilled labor market.[36]

"The popular southern attitude toward immigration, latent at first but growing more open after the 1880's, was hostile."[37] Though the commercial class in the South favored immigration as a solution to a post-war shortage of manpower, "the economic interests which hoped to profit from immigrant laborers or land buyers never reconciled most of the southern people to an influx of foreigners. In fact,

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[34] Kenneth L. Townsend, *Education and the Constitution: Three Threats to Public Schools and the Theories that Inspire Them*, 85 Miss. L.J. 327 (2016).

[35] Russ 321.

[36] Berthoff, 347-48.

[37] Rowland T. Berthoff, *Southern Attitudes Toward Immigration, 1865-1914*, 17 J. of Southern Hist. 328, 328 (1951).

Southerners, though they had little experience with immigrants, in this period became as outspoken xenophobes as those old-stock Northerners who objected to the masses of foreigners actually in their midst."[38] Indeed, "methods of mob terrorism used against Negroes were extended to Italians, whom many white Southerners regarded as another inferior race to be discipline."[39] To state the obvious, the immigration from Italy, Ireland, and Sicily, all heavily Catholic countries, associated the nativism reaction with the religious prejudice. *See Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring) ("[T]he [federal Blaine] amendment was prompted by virulent prejudice against immigrants, particularly Catholic immigrants.").

This bipartisan anti-immigrant attitude carried over into education policy: "The distrust and disdain that Baptists held for Catholics certainly contributed to the hardening of the Baptist position against parochial school aid."[40] Historical materials from the time associate the Mississippi Amendment with the National League for the Protection of American Institutions,[41] which was a leading anti-

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[38] Berthoff 343.

[39] Berthoff 344.

[40] McMahone, 472.

[41] A.B. Sanford (ed.), *The Methodist Year-book for 1891* (The Methodist Episcopal Church 1891) 124. The Yearbook discusses the Mississippi provision in its section on Methodist support for the National League for the Protection of American Institutions. It lists Mississippi in the same breath as the Montana amendment, which was the target of Justice Alito's concurrence in *Espinoza*. *See* James Underwood, *The Constitution of South Carolina, Vol. 3: Church and State, Morality and Free Expression* 196 n.1 (1992) (the League "contacted state conventions and legislatures throughout the country in an effort to enlist support for insertion in the federal and state constitutions of an amendment forbidding the use of federal or

Catholic lobbying effort affiliated with the American Protective Association.[42] This is also evident from the language of the provision itself: "it was an open secret that 'sectarian' was code for 'Catholic'" at the time. *Mitchell*, 530 U.S. at 828.

4. Anti-missionary sentiment in 1890

At the same time of this anti-Catholic attitude, there was a second religious prejudice rampaging across the South: hatred of post-war Northern missionaries. "To insure the freemen learned to read and write, master simple arithmetic, and perhaps most important of all, learn to pray the right way, numerous benevolent associations were formed during and immediately after the war. Religious in affiliation and humanitarian in purpose, they sent hundreds of men and women south to bring learning to the uneducated."[43] "During the years after the war, black and white teachers from the North and South, missionary organizations, churches and schools worked tirelessly to give the emancipated population the opportunity to learn. Former slaves of every age took advantage of the opportunity to become

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state funds to support organizations, especially schools, controlled wholly or in part by religious denominations.").

[42] Colin Gunstream, *Thesis: Home Rule or Rome Rule? The Fight in Congress to Prohibit Funding for Indian Sectarian Schools and Its Effects on Montana*, at 4 (2015), https://scholars.carroll.edu/handle/20.500.12647/3689?show=full (the League was "anti-Catholic and an extension of the American Protective Association (APA)—a significant anti-Catholic group at the time.").

[43] Dorothy Vick Smith, *Black Reconstruction in Mississippi, 1862-1870* (Univ. of Kansas Ph.D. Thesis, 1985) 204.

literate."[44] One historian describes it as "a massive missionary effort, [as] northern black churches established missions to their southern counterparts, resulting in the dynamic growth of independent black churches in the southern states between 1865 and 1900. Predominantly white denominations, such as the Presbyterian, Congregational, and Episcopal churches, also sponsored missions, opened schools for freed slaves, and aided the general welfare of southern blacks . . . ."[45]

"[T]he American Missionary Association[] played a major educational role in Mississippi during the Reconstruction period."[46] "Most teachers, especially the Congregationalist AMA envoys, considered religious instruction to be an integral part of the education they were providing."[47] "Through the efforts of black Mississippians, and with the help of the Freedman's Bureau and Northern religious societies such as the American Missionary Association, by the summer of 1867 sixty-one black schools had been built in fifty Mississippi communities, teaching as many as forty-five hundred African American children."[48]

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[44] Library of Congress, https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html.

[45] Laurie Maffly-Kipp, *African American Christianity, Pt. II: From the Civil War to the Great Migration, 1865-1920*, Nat. Humanities Center, http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/aarcwgm.htm.

[46] Smith 205.

[47] Smith 207.

[48] Bolton 5.

This dislike of the missionary schools was again bipartisan. White Democrats disliked them because they were teaching newly freed slaves to read and rise in society; "Southern whites were generally hostile to the idea of giving blacks an education commensurate with republican citizenship."[49] "[W]hite opposition to black education in Reconstruction Mississippi . . . dwarfed the scattered white support."[50] "Southern whites were hostile to schools for blacks when these were conducted by blacks or Northern whites. In many communities they burned schoolhouses, ostracized or beat teachers, and sought to intimidate the families who went to school."[51]

Meanwhile, though many Black families enrolled their children in the missionary schools, most "responded negatively to condescending [Northern] whites [i.e., "carpetbaggers"], chafed at the way some white teachers observed Southern conventions of race etiquette outside the classroom, and sometimes disagreed with the sectarian leanings of missionary teachers. . . . [U]ndercurrents of mistrust and

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[49] Tyack and Lowe 242

[50] Bolton 6-7.

[51] Tyack and Lowe 242. Accord Bolton 6-7 ("[W]hites showed their displeasure with the project in numerous ways: they refused to lease or sell buildings that might be used as black schoolhouses or refused to board white teachers who came south to serve as teachers; whites arrested black teachers as vagrants under Mississippi's Black Code; and black schools were attacked by white adults and children while in session or destroyed under the cover of darkness.").

misunderstanding marred the relationships of Northern whites and Southern blacks in a number of communities."[52]

Though both White Democrats and Black Republicans had reasons to oppose missionary schools, it was the Democrats who controlled the 1890 convention. And their goal was to stop Black Republicans from voting, and "the most effective means of disfranchisement were literacy tests."[53] And the most effective means of ensuring Black illiteracy was stopping the non-state-controlled schools that were teaching Blacks to read.[54]

C. The Court must adopt a narrowing construction of this Mississippi provision to avoid creating a federal constitutional violation.

Courts in general are commanded to adopt a narrowing construction whenever doing so would avoid creating a constitutional violation were a provision read otherwise. This is exactly what the New Mexico Supreme Court did in *Moses v. Ruszkowski*, 458 P.3d 406 (N.M. 2018). There, the state's high court confronted a state constitutional provision, a Blaine Amendment, that like Mississippi's encompassed *both* secular and religious nonpublic schools. *Id.* at 412. Because of this distinction, the New Mexico provision (like the Mississippi Amendment) did not

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[52] Tyack and Lowe 242.

[53] Luckett 466.

[54] Glenn, Expert Report in Diocese of Charleston, ¶ 67: "It was surely no accident, for example, that the provision for such a literacy requirement in the South Carolina Constitution of 1895 (Article II, § 4(d)) was accompanied by another provision (Article XI, § 9) blocking public funding for the faith-based schools that had done so much to promote literacy among Black South Carolinians."

automatically fail under *Trinity Lutheran* (the precursor to *Espinoza*) because it did not facially discriminate based on religious status. *Id*. at 416. But the Court proceeded to analyze whether the New Mexico provision was motivated by religious animus, a discriminatory intent prohibited by *Church of the Lukumi Babalu Aye*. *Id*. at 416-17.

New Mexico's Supreme Court concluded that the Congress which passed the enabling act requiring a Blaine Amendment in the new state's original constitution was deeply flawed: "the history of the federal Blaine amendment and the New Mexico Enabling Act lead us to conclude that anti-Catholic sentiment tainted its adoption. New Mexico was caught up in the nationwide movement to eliminate Catholic influence from the school system, and Congress forced New Mexico to eliminate public funding for sectarian schools as a condition of statehood." *Id*. at 419. As a result, in order to avoid creating a federal constitutional violation, the Court adopted a narrowing construction of the state constitutional provision that allowed it to uphold the law. *Moses*, 458 P.3d at 420.

This Court has similarly recognized "it is a familiar rule that if it can be reasonably done we must so construe a statute as to avoid seriously endangering its constitutionality." *Gentry v. Booneville*, 199 Miss. 1, 4 (1945). *See Burnham v. Sumner*, 50 Miss. 517, 520 (1874) (first laying down this principle for Mississippi courts). Here, this Court must give a narrowing construction to a state constitutional provision to avoid seriously endangering its constitutionality under the federal constitution. *See Jones v. Meridian*, 552 So. 2d 820, 824 (Miss. 1989)

("constitutional quagmire" avoided by a "court's narrowing construction," discussing *Boos v. Barry*, 485 U.S. 312 (1988)). By adopting the State Defendants' proposed construction of Article 8, Section 208, this Court can avoid creating a federal constitutional problem.

CONCLUSION

For these reasons, Appellant MAIS requests that this Court REVERSE the decision of the lower court.

Respectfully submitted, this, the **8th** day of **May, 2023.**

MIDSOUTH ASSOCIATION OF INDEPENDENT SCHOOLS

/s/ Benjamin B. Morgan

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CERTIFICATE OF SERVICE

I, Benjamin B. Morgan, do hereby certify that I have this date filed the foregoing document with the Clerk of Court using the MEC system, which will send a true and correct copy to all counsel of record.

I further certify that I have this date mailed, by United States Mail, postage prepaid a true and correct copy of the above and foregoing to the following:

Honorable Crystal Wise Martin
Presiding Judge
P.O. Box 686
Jackson, MS 39205-0686

This, the **8th** day of **May, 2023**.

/s/ Benjamin B. Morgan