IN THE SUPREME COURT OF MISSISSIPPI

Mississippi Department of Finance and Administration, David McRae, in his official capacity as State Treasurer, and Liz Welch, in her official capacity as State Fiscal Officer **APPELLANTS**

VS. **NO. 2022-SA-01129-SCT**

Parents for Public Schools **APPELLEE**

Appeal from the Chancery Court of Hinds County, Mississippi, First Judicial District
Hinds County Chancery Court Cause No. No. 25CH1:22-cv-00705

AMICUS BRIEF OF THE CATHOLIC DIOCESE OF BILOXI AND THE CATHOLIC DIOCESE OF JACKSON IN SUPPORT OF BRIEF OF THE STATE APPELLANTS

By: Amici Curiae, Catholic Diocese of Biloxi; Catholic Diocese of Jackson

/s/Christian Strickland
Christian Strickland, Esq. MSB NO. 104474
Robert T. Schwartz, Esq. MSB NO. 10482
Carlee Dymond, Esq. MSB NO. 106473
Schwartz, Orgler & Jordan, PLLC
2355 Pass Road, Suite B
Biloxi, Mississippi 39531
Telephone: (228) 388-7441
Facsimile: (228) 388-7442
christian@sojlaw.net

/s/ Stephen J. Carmody
Stephen J. Carmody, Esq. MSB NO. 8345
Richard Cirilli, Esq., MSB NO. 99132
Brunini Grantham Grower & Hewes, PLLC
Post Office Drawer 119
Jackson, MS 39205-0119
Telephone: (601) 948-3101
Facsimile: (601) 960-6902
scarmody@brunini.com

Counsel for Amici, the Catholic Diocese of Biloxi and the Catholic Diocese of Jackson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES, RULES AND OTHER AUTHORITIES:

SECONDARY SOURCES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Catholic Diocese of Jackson, Mississippi, and the Catholic Diocese of Biloxi, Mississippi are ecclesiastical entities of the Roman Catholic Church (ñthe Churchò). *Amici* are the two (2) Catholic Dioceses in Mississippi. There are thirteen (13) Catholic schools in the Catholic Diocese of Biloxi, including high schools and elementary schools. There are twelve (12) Catholic schools in the Catholic Diocese of Jackson, including high schools and elementary schools. The Church has substantial legitimate interests that will likely be affected by the outcome of the case in that the Church, under the lower courtôs decision, as written, may potentially be unable to apply for future federal and/or state financial assistance, including for relief in the event of hurricanes and other natural disastersð for example, in the aftermath of Hurricane Katrinað or in the event of a global pandemic. As such, the Churchôs interests may not be otherwise properly protected by the current parties in this appeal.

STATEMENT OF THE ISSUES

The issue presented is: Whether the trial courtôs Order violates the First Amendment of the United States Constitution.

FACTS

The statement of the issues, the case, and the facts are set forth in State Appellants' brief. These are only supplemented as follows:

Amici take issue specifically with the trial Court's extremely broad ruling that portions of Mississippi Senate Bills 2780 and 3064 violated Section 208's "**constitutional prohibition against the appropriation of public funds for private school recipients**." (CP 407). The trial Court's overly broad Order violates the First Amendment.

In this case, the Appellee, Parents for Public Schools (ñPPSò and/or ñAppelleeò) sought to enjoin enforcement of Mississippi Senate Bills 2780 and 3064, which were to take effect on

July 1, 2022, and which laws were to establish the Independent Schools Grant Program (ñthe Grant Programò), funded from appropriations by the Mississippi Legislature to the Department of Finance and Administration (ñthe Departmentò) from the Coronavirus State Fiscal Recovery Fund, and to allocate certain funds to the Department for the purpose of funding the Program. Under the program, private schools could apply for reimbursable grants to make necessary investments in water, wastewater, stormwater, broadband, and other eligible infrastructure projects to be funded by the Legislature using Coronavirus State Fiscal Recovery Funds made available under the American Rescue Plan Act (ñARPAò), enacted by the United States Congress in 2021 to support state and local governmentôs response to the COVID-19 pandemic. Section 2002 of ARPA also allocated certain funds enumerated in the Act to certain qualifying Non-Public Schools, which amounts would be *ñ[i]n addition to amounts otherwise available*.ò https://www.congress.gov/bill/117th-congress/house-bill/1319/text (emphasis added). This is a public record and federal law of which this Court can take judicial notice. See, *Riverview Dev. Co., LLC v. Golding Dev. Co., LLC*, 109 So. 3d 572, 576 (Miss. App. 2013). Under Rule 201, ñ[a] court may look to any source it deems helpful and appropriate, including official public documents, records and publications.ò *Enroth v. Mem'l. Hosp. at Gulfport*, 566 So. 2d 202, 205 (Miss.1990). ARPA made no restrictions that made non-public schools ineligible for ARPA funds simply because they were not public schools and it was the clear intent of the ARPA that certain monies be allocated to non-public schools across the United States of America.

On October 13, 2022, the trial Court granted the Plaintiffôs requested relief and enjoined enforcement of S.B. 2780 and 3064, issuing an extremely broad ruling that the laws violated Section 208ôs ñ**constitutional prohibition against the appropriation of public funds for private school recipients**.ò (CP 407).

ñFundsò is not defined in Section 208, leaving open the question of whether ñfundsò would also encompass federal funds deriving from emergency pandemic assistance which otherwise were not exclusive of private schools as set forth in the ARPA. The basis for the Courtôs ruling that Section 208 applies to federal emergency COVID relief funds is not clear in the record.

SUMMARY OF THE ARGUMENT

The trial courtôs order violates the First Amendment of the United States Constitution. Therefore, the trial courtôs decision must be reversed.

ARGUMENT

I. The trial court's Order violates the First Amendment and must be reversed.

Section 208 of the Mississippi Constitution provides:

> Control of Funds by **Religious Sect**; certain appropriations prohibited.
> 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.

MS Const. Art. 8, § 208 (emphasis added).

Amici take issue specifically with the trial Court's extremely broad ruling that portions of Mississippi Senate Bills 2780 and 3064 violated Section 208's "**constitutional prohibition against the appropriation of public funds for private school recipients**." (CP 407). The trial Court's overly broad Order violates the First Amendment.

Schools all along the Mississippi Gulf Coast received FEMA assistance after Hurricane Katrina, which decimated the Mississippi Gulf Coast in 2005. The United States of America, and the entire world, experienced a global pandemic related to the coronavirus in 2020. As a result, schools, businesses, and courts throughout the entire world were turned upside down. Schools

all along the Gulf Coast and in the Jackson areað public and private alikeð applied for and received public funding and emergency assistance.

Mississippi Senate Bills 2780 and 3064 were not unconstitutional[1]ð rather *the trial Court's Order was unconstitutional* because it violates the First Amendment of the United States Constitution. *See, Espinoza v. Montana Dept. of Revenue,* 140 S. Ct. 2246 (2020). The trial Courtôs Order is inherently discriminatory because it discriminates against private schools as not being ñfree schoolsò instead of maintaining a position of neutrality.

In *Espinoza*, the Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. *Id.* at 2251. The program granted a tax credit to anyone who donated to certain organizations that in turn awarded scholarships to selected students attending such schools. *Id*. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. *Id.* The Court relied on the ñno-aidò provision of the State Constitution, which prohibits any aid to a school controlled by a ñchurch, sect, or denomination.ò *Id*. The question presented in *Espinoza* was whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision. *Id*.

[1] ñThe constitutionality of a statute is presumed, and it should be interpreted in a manner to avoid constitutional defect if that is possible without doing violence to the language.ò *Tolbert v. Southgate Timber Co*., 943 So. 2d 90, 97 (Miss. App. 2006) (*citing Estate of Smiley*, 530 So.2d 18, 22ï 23 (Miss.1988). ñWhen there are two constructions that could be put on a statute, one permitting the statute to be found consistent with constitutional requirements and the other not, then the constitutional interpretation is to be chosen. This has been described as a óduty to adopt a construction of the statutes which would purge the legislative purpose of any constitutional invalidity....ôò *Id.* (citing *Cole v. Nat'l Life Ins. Co.,* 549 So.2d 1301, 1305 (Miss.1989) (quoting *Sheffield v. Reece,* 201 Miss. 133, 28 So.2d 745, 749 (1947)).

The United States Supreme Court examined Montanaôs version of the ñBlaine Amendment,ò the sister provision of Mississippiôs Section 208:

> ñAid prohibited to sectarian schools. ... The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.ò

Id. at 2252 (citing Mont. Const., Art. X, § 6(1)).

In *Espinoza,* the Montana Supreme Courtð just as the trial Court did in this caseð held that ñthe programò was ñin violation of the no-aid provision of the Montana Constitution[,]ò and ñ[i]n the [Montana] Courtôs view, the no-aid provision ó**broadly and strictly prohibits aid to sectarian schools**.ôò *Id.* at 2253 (citing 435 P.3d at 609) (emphasis added). The Montana Supreme Court had acknowledged that ñóan overly-broadò application of the no-aid provision ócould implicate free exercise concernsôand that óthere may be a caseô where óprohibiting the aid would violate the Free Exercise Clause.ôò *Id*. (citing 435 P.3d at 614). But, the Montana Supreme Court concluded, ñóthis is not one of those cases.ôò *Ibid*. The United States Supreme Court disagreed and reversed. Chief Justice John Roberts wrote the majority opinion, and the Court did not mince words in finding the ñno-aidò provision in the Montana Constitutionð similar to the ñno-aidò provision in the Mississippi Constitutionð violated the First Amendment.

The Supremacy Clause governs state courts and state constitutions, including that of the State of Mississippi. ñThe Supremacy Clause provides that óthe Judges in every State shall be boundôby the Federal Constitution, óany Thing in the Constitution or Laws of any State to the Contrary notwithstanding.ôò *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. at 2262 (citing U.S.C.A. Const. Art. VI cl. 2. ñ[T]his Clause creates a rule of decisionôdirecting state courts that they ómust not give effect to state laws that conflict with federal law[ ].ôò *Id.* (citing

Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 324, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015). In this case, as the Court found in *Espinoza*, ñ[g]iven the conflict between the Free Exercise Clause and the application of the no-aid provision here, [the trial Court in this case] should have disregard[ed] the no-aid provision and decided this case ñconformably to the [C]onstitutionò of the United States.ò *Id.* (citing *Marbury v. Madison*, 1 Cranch 137, 178, 5 U.S. 137, 2 L. Ed. 60 (1803) (internal quotation marks omitted). ñThat ósupreme law of the landô condemns discrimination against religious schools and the families whose children attend them. They are ñmember[s] of the community too,ò and their exclusion from the scholarship program here is ñodious to our Constitutionò and ñcannot stand.ò *Id*. at 2263 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 U.S. 449, 467 (2017)).

ñ**We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from <u>neutral</u> government programs**.ò *Id.* at 2254 (emphasis added) (citing *Locke,* 540 U.S. at 719, 124 S. Ct. 1307; *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 839, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *Trinity Lutheran,* 582 U.S., at ï ï ï ï , 137 S. Ct., at 2019ï 2020 (noting the parties' agreement that the Establishment Clause was not violated by including churches in a playground resurfacing program)).

The trial Courtôs Order undermines the Constitution, specifically the Free Exercise Clause. ñThe Free Exercise Clause, which applies to the States under the Fourteenth Amendment, óprotects religious observers against unequal treatmentô and against ólaws that impose special disabilities on the basis of religious status.ôò *Id.* (*citing Trinity Lutheran*, 582 U.S., at ï ï ï ï , ï ï ï ï , 137 S. Ct., at 2021 (internal quotation marks and alterations omitted); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). ñThose óbasic

principle[s]ô have long guided this Court.ò *Id.* at 2254-2255 (*citing Trinity Lutheran*, 582 U.S., at ïïïï ï ïïïï, 137 S. Ct. at 2019ï 2021; *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16, 67 S.Ct. 504, 91 L. Ed. 711 (1947) (a State ñcannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislationò); *Lyng v. Northwest Indian Cemetery Protective Assn*., 485 U.S. 439, 449, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) (the Free Exercise Clause protects against laws that ñpenalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizensò). The Court in *Espinoza* observed that ñdisqualifying otherwise eligible recipients from a public benefit ósolely because of their religious characterô imposes óa penalty on the free exercise of religion that triggers the most exacting scrutiny.ôò *Id.* (citing *Trinity Lutheran*, 582 U.S., at ïïïï ï ïïïï, 137 S. Ct., at 2021).

Here, the Appellee, PPS, will likely contend that Section 208 does not directly or explicitly bar religious schools from public benefits *per se*, however, *Espinoza* succinctly refutes this fallacy: ñ**The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character**.ò *Id.* at 2255 (emphasis added). Thus, ñ[t]he provision plainly excludes schools from government aid solely because of religious status.ò *Id.* (*citing Trinity Lutheran,* 582 U.S., at ïïïï ï ïïïï, 137 S. Ct., at 2019ï 2021). ñ**Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses."** *Id.* at 2256 (emphasis added).

Moreover, to the extent that it was argued that the prohibition against funds being directed to schools who are not ñfree schoolsò was not discriminatory to religious schools, this

premise overlooks the obvious implication of private schools as necessarily including a vast majority of religious schools, as modern religious schools could never operate as a public or ñfree schoolò because the state government is barred from paying for all tuition for students of religious schools. It goes without saying that a school must receive funds in some form to continue in existence. Therefore, the argument that religious schools are not implicated by the prohibition of aid to non-ñfree schoolsò is disingenuous. It cannot be denied that private religious schools are the unavoidable targets and victims of the inherently discriminatory application of Section 208.

Indeed, the trial Court erroneously found that ñ[t]he challenged legislative scheme is likely constitutionally suspect under *Section 208's prohibition on funding for sectarian schools*, as many grant eligible private schools in Mississippi, including a significant majority of Midsouth Association of Independent Schools (ñMAISò) member schools [sic], have a *religious or sectarian character*.ò [CP 386, ft. 3]. The trial Court attempted to sever its analysis from the reference to ñsectarianò schools, and instead focus on the ineligibility of ñprivateò schools the Court equivocated as those not conducted as a ñfree school.ò [#45 at 14]. The trial Courtôs attempt to analyze the constitutional text in isolated fragments contradicts established principles of constitutional and statutory construction. ñ[C]onstitutional provisions should be read so that each is given maximum effect and a meaning in harmony with that of each other.ò *Dye v. State ex rel. Hale,* 507 So. 2d 332, 342 (Miss. 1987). Section 208 sets forth two (2) types of schools that, it is alleged, cannot receive public funds: ñsectarianò and non-ñfree schools.ò These must be read in conjunction with the other to discern the types of schools the Section is attempting to prohibit funding to. Any attempt to play games and analyze these separately is to overlook the

plain meaning of Section 208: stop funding to religious schools. Any other interpretation devolves into a game of semantics.

There is no cogent basis for the Courtôs attempt to interpret only specific excerpts of Section 208 in a vacuum. It appears that the Court was trying to distance its analysis from the ñsectarianò reference, with which the ñfree schoolò clause is grammatically connected. ñThe Free Exercise Clause protects against even óindirect coercion,ô and a State ópunishe[s] the free exercise of religionôby disqualifying the religious from government aidé ò *Id.* at 2257 (*citing Trinity Lutheran*, 137 S. Ct. at 2022).

The argument of the Appellee that only the ñfree schoolò provision is implicated in Section 208 is nonsensical. Section 208 is Mississippiôs version of the ñBlaine Amendment,ò which sought to prohibit government funding going to private religious schools, specifically Catholic schools. ñ[I]t was an open secret that ósectarianô was code for óCatholic.ôò *Id.* at 2259 (citation omitted). ñThe Blaine Amendment was óborn of bigotryô and óarose at a time of pervasive hostility to the Catholic Church and to Catholics in generalô; many of its state counterparts have a similarly óshameful pedigree.ôò *Id.* (citing *Mitchell*, 530 U.S. at 828ï 829, 120 S. Ct. 2530 (plurality opinion); 216; Jeffries & Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 301ï 305 (2001) (citation omitted). ñThe no-aid provisions of the 19th century [such as the one in the case at bar] hardly evince a tradition that should inform our understanding of the Free Exercise Clause.ò *Id*.

Call it a prohibition of aid for non-ñfree schools,ò or call it a prohibition from funding ñsectarianò schools, or any other term for barring aid to non-public schools, the cause and effect is the same: ñRegardless of how the benefit and restriction are described,ò the trial Courtôs Order

ñoperates to identify and exclude otherwise eligible schools on the basis of their religious exercise.ò *Carson as next friend of O. C. v. Makin*, 142 S. Ct. 1987, 2002 (2022).

In *Carson*, the State of Maine enacted a program of tuition assistance for parents who live in school districts that do not operate a secondary school of their own. Under the program, parents designate the secondary school they would like their child to attendð public or privateð and the school district transmits payments to that school to help defray the costs of tuition. Private schools were eligible to receive payments so long as they were ñnonsectarian.ò The question presented in *Carson* was whether this restriction violated the Free Exercise Clause of the First Amendment, which the Court found in the affirmative. *Id.* at 1993. ñSaying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools.ò *Id*. at 1999. But ótthe definition of a particular program can always be manipulated to subsume the challenged condition,ôand to allow States to órecast a condition on fundingô in this manner would be to see óthe First Amendment ... reduced to a simple semantic exercise.ôò *Id.* at 1999-2000 (*citing Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.,* 570 U.S. 205, 215, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013) (quoting *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 547, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001)); *see also Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (Harlan, J., concurring) (ñThe Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.ò). The Courtôs holding in *Espinoza,* as stated and affirmed in *Carson*, ñturned on the substance of free exercise protections, not on the presence or absence of magic words.ò *Id.* at 2000.

ñ**The Free Exercise Clause of the First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions**.ò *Id*. at 1996 (emphasis added) (*citing Lyng v. Northwest Indian Cemetery Protective Assn*., 485 U.S. 439, 450, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988). ñ**[A] State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."** *Id.* (emphasis added) (*citing Sherbert v. Verner*, 374 U.S. 398, 404, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (ñIt is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.ò); *see also Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16, 67 S. Ct. 504, 91 L. Ed. 711 (1947) (a State ñcannot excludeò individuals ñbecause of their faith, or lack of it, from receiving the benefits of public welfare legislationò). ñOn the contrary, a government violates the Constitution when (as here) it excludes religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like.ò *Shurtleff v. City of Boston, Massachusetts,* 142 S. Ct. 1583, 1594ï 95 (2022) (KAVANAUGH, concurring) (*citing Espinoza v. Montana Dept. of Revenue*, 591 U. S. ï ï ï ï , 140 S. Ct. 2246, 207 L.Ed.2d 679 (2020); *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S. Ct. 2093, 150 L.Ed.2d 151 (2001); *McDaniel v. Paty,* 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978). ñUnder the Constitution, a government may not treat religious persons, religious organizations, or religious speech as second-class.ò *Id*.

In *Ramos v. Louisiana*, the Supreme Court considered a state constitutional provision that originated in its state constitutional convention of 1898, but the ñconstitutional convention of 1974 adopted a new, narrower rule, and its stated purpose was judicial efficiency, and [i]n that debate no mention was made of race.ò 140 S. Ct. at 1426 (Alito, J., dissenting). Yet even though the provision had been readopted, revised, and narrowed, Justice Sotomayor said that under her

understanding of the equal-protection intent analysis, this was likely insufficient: the state must ñtruly grapple[] with the lawsô sordid history in reenacting them.ò Id. at 1410 (Sotomayor, J., concurring). Only ñ[w]here a law . . . is untethered to racial biasð and perhaps also where a legislature actually confronts a lawôs tawdry past in reenacting itð the new law may well be free of discriminatory taint.ò *Id.*

Later during the same term, Justice Alito grappled with a Blaine Amendment in *Espinoza v. Montana*. There the original amendment of 1889 was readopted in 1972. Justice Alito says, ñUnder *Ramos,* it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provisionôs óuncomfortable pastô must still be ó[e]xamined.ôò *Espinoza*, 140 S. Ct. at 2273 (Alito, J., concurring) (quoting *Ramos*, 140 S. Ct. at 1401 n.44). Justice Alito concludes that ñthe no-aid provisionôs terms keep it ñ[t]etheredò to its original ñbias,ò and it is not clear at all that the State ñactually confront[ed]ò the provisionôs ñtawdry past in reenacting it.ò *Id.* (quoting *Ramos,* 140 S. Ct. at 1410 (Sotomayor, J., concurring)). ñ[A]nd the discrimination in this case shows that the provision continues to have its originally intended effect.ò *Id.*

ñThe Court establishes that in the Free Exercise context, ó[f]acial neutrality is not determinative,ô and therefore overt or covert targeting of óreligious conduct for distinctive treatmentô violates the Free Exercise Clause.ò Margo A. Borders, *The Future of State Blaine Amendments in Light of Trinity Lutheran: Strengthening the Nondiscrimination Argument*, 93 Notre Dame L. Rev. 2141 (2018) (citing *Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 535 (1993)). ñThe Free Speech Clause, the Establishment Clause, and the Free Exercise Clause of the First Amendment é together reinforce nondiscrimination principles that work against the statesô interpretations of State Blaine [Amendments] that discriminatorily burden the free exercise of

religion.ò *Id*. at 2168. ñThe exclusion of religious believers and their institutions from full equality of rights is not only offensive to fundamental principles of equality of citizenship, liberalism, and distributive justice, but also deeply offensive to the Constitution's guarantee of religious liberty.ò Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origin, Scope and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 613 (2003). ñState Blaine Amendments do not exist in a constitutional vacuum, however, but are subject to the provisions of the First Amendment.ò *Id.* at 625. ñThe Supreme Court's jurisprudence, as developed in the cases of *Rosenberger v. Rector* and *Visitors of the University of Virginia and Velasquez v. Legal Services Corporation*, prohibits state governments from denying religious persons and organizations access to funds that are available to non-religious entities. While no state is required to provide grants or aid for students attending private schools, if a state does decide to provide such aid, it simply cannot discriminate against religious believers and institutions and still comply with the requirements of the First Amendment.ò *Id.* at 626 (citing *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819 (1995); *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001)).

The trial Courtôs Order is unmoored from the dictates of the First Amendment. *Trinity Lutheran Church* sheds light on the case at bar in that private religious schools should not be denied the ability to apply for grant monies which should be neutral and open to public and private religious schools alike. *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 U.S. at 466. Private religious schools should not be disproportionately denied access to the ability to apply for emergency coronavirus relief funds. Ultimately what these monies would go to would be for eligible infrastructure projects, somewhat akin to the grants in *Trinity Lutheran Church* for purchase of rubber playground surfaces. It is clear that this grant should be available for public

and private religious schools and the Courtôs interpretation of Section 208 would seek to preclude any government assistance to private religious schoolsð ever. This clearly does violence to the Constitution. See, Andrew Pete Cicero, III, *Is It Will with Your Soul? The Surprising Divide Within the Baptist Community Concerning Trinity Lutheran Church of Columbia, Inc. v. Comer*, 88 Miss. L.J. 587, 623-24 (2020). ñIn *Trinity,* the focus was on the futureð children.ò *Id.* (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. at 466). In *Trinity,* ñ[t]he Court protected churches from intrusive and heavy- handed state action by allowing a simple grant, a grant that should have been distributed without bias, to protect children on a school playground.ò *Id.* at 623-624. Similarly, in this case, these grant monies were intended by the federal government to assist schoolsð public and private religious schools alikeð who were impacted by the COVID-19 pandemic. The trial Courtôs Order which deprived children of private religious schools the ability to receive that intended benefit is contrary to the First Amendmentôs edict.

The prohibition on non-ñfree schoolsò or ñsectarianò schools from receiving available public benefits is inherently discriminatory toward private religious schools. This constitutes an indirect penalty on the free exercise of religion of private schools, including private Catholic schools in the Dioceses of Biloxi and Jackson. The First Amendment requires neutrality with regard to public benefits in nature of the ability to apply for grant monies related to S.B. 2780 and 3064. The trial Courtôs Order is a result that is odious to the Constitution, and therefore, this Court should reverse that Order.

CONCLUSION

The trial courtôs Order violates the First Amendment. Therefore, this Court should reverse the trial courtôs decision.

RESPECTFULLY SUBMITTED, this 24th day of May, 2023.

THE CATHOLIC DIOCESE OF BILOXI; THE CATHOLIC DIOCESE OF JACKSON

/s/Christian Strickland
Christian Strickland, Esq. MSB NO. 104474
Robert T. Schwartz, Esq. MSB NO. 10482
Carlee Dymond, Esq. MSB NO. 106473
Schwartz, Orgler & Jordan, PLLC
2355 Pass Road, Suite B
Biloxi, Mississippi 39531
Telephone: (228) 388-7441
Facsimile: (228) 388-7442
christian@sojlaw.net

/s/ Stephen J. Carmody
Stephen J. Carmody, Esq. MSB NO. 8345
Richard Cirilli, Esq., MSB NO. 99132
Brunini Grantham Grower & Hewes, PLLC
Post Office Drawer 119
Jackson, MS 39205-0119
Telephone: (601) 948-3101
Facsimile: (601) 960-6902
scarmody@brunini.com
Counsel for Amici, the Catholic Diocese of Biloxi and the Catholic Diocese of Jackson

CERTIFICATE OF SERVICE

I hereby certify that on this date the forgoing document was electronically filed with the Clerk of this Court using the Courtôs MEC system, which transmitted a copy to all counsel of record. A hard copy of the forgoing document has also been mailed to the following persons via U.S. Mail:

Hon. Crystal Wise Martin
Chancery Court Judge
Fifth Chancery District
P.O. Box 686
Jackson, MS 39205

This 24th day of May, 2023.

/s/ Christian Strickland
CHRISTIAN STRICKLAND