IN THE SUPREME COURT OF MISSISSIPPI
No. 2022-SA-01129-SCT

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,

v.

PARENTS FOR PUBLIC SCHOOLS,
Appellee,

v.

MIDSOUTH ASSOCIATION OF INDEPENDENT SCHOOLS,
Proposed Intervenor-Appellant

Appeal from the Chancery Court of
Hinds County, Mississippi

REPLY BRIEF OF THE STATE APPELLANTS MISSISSIPPI DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE TREASURER DAVID MCRAE, AND STATE FISCAL OFFICER LIZ WELCH

Oral Argument Requested

LYNN FITCH
Attorney General of Mississippi

JUSTIN L. MATHENY
Deputy Solicitor General
MS Bar No. 100754
STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 220
Jackson, MS 39205-0220
Telephone: (601) 359-3680
E-mail: justin.matheny@ago.ms.gov

Counsel for Appellants

STATEMENT REGARDING ORAL ARGUMENT

This Court should grant oral argument to aid the Court's decisional process in adjudicating this significant case. The chancery court's judgment invalidates an important grant program for independent schools enacted by the Legislature with overwhelming bipartisan support. The justiciability and constitutional issues presented here have broad implications for disputes over legislative-appropriations authority.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statute

INTRODUCTION

This Court should reverse the lower court's judgment blocking an important grant program supporting the infrastructure of independent schools. This case is not justiciable, the grant program is lawful, and PPS's contrary arguments lack merit.

First, the chancery court lacked jurisdiction over this case because PPS lacks standing. State Br. 16-24. PPS fails to show that its members face "a different, adverse effect than the general public." *Araujo v. Bryant*, 283 So. 3d 73, 78 (Miss. 2019). PPS claims an adverse effect on public schools and public-school students, but those schools and students have benefited massively—and, compared to private-school students, lopsidedly—from federal ARPA funding. There is no plausible basis for PPS to claim any adverse effect on any of its members—let alone an adverse effect that is different from that faced by innumerable other members of the general taxpaying public. PPS claims that taxpayers have standing to challenge unconstitutional government spending of public funds. This Court has adopted no such rule. Quite the opposite: Under this Court's cases, taxpayers almost never can sue to challenge such spending. And PPS falls outside *Araujo*'s narrow allowance of taxpayer standing. The *Araujo* plaintiffs had standing as taxpayers because: (1) they plausibly connected the tax revenue at issue to taxes *that they paid*; and (2) they plausibly showed that that revenue was diverted *away from their children*. Those two features showed a tight relationship between the complained-of spending and the claimed adverse effect on the plaintiffs. PPS has failed to establish either feature.

Second, and independently, PPS's claim fails on the merits. State Br. 24-34. PPS challenges the grant program here only under Section 208's prohibition on

appropriating state funds "to any school that at the time of receiving such appropriation is not conducted as a free school." That prohibition blocks only direct legislative appropriations to public schools. It does not bar the Legislature from appropriating funds to an agency with directions to support non-free schools. PPS dislikes that result, but it follows from Section 208's text and structure—the key parts of which PPS ignores. Section 208's drafters could have made the free-school ban broader. They knew how to erect broader prohibitions: they did so elsewhere in Section 208. Yet they chose not to sweep so broadly in the free-school ban. This Court should respect that choice. And even putting all those points aside, the free-school ban at most reaches *state* funds. It does not reach the federal COVID-relief funds at issue, and so does not block SB 2780's grant program for this independent reason.

This Court should reverse the lower court's judgment, reject PPS's claim, leave in place the denial of intervention, and render judgment for the state defendants.

ARGUMENT

I. The Chancery Court Should Have Dismissed This Case Because PPS Lacks Standing To Challenge SB 2780's ARPA Grant Program.

As the state defendants have shown, PPS lacks standing because its members face no adverse effect from SB 2780's grant program and lack taxpayer standing. State Br. 16-24. PPS's responses to the state defendants (PPS Br. 7-15, 17-19) fail.

A. To start, PPS contends that its members "are adversely affected by" SB 2780's "unconstitutional appropriation of state funds to private schools." PPS Br. 8; *see id.* at 8-10, 17-18. Neither of PPS's adverse-effect arguments has merit.

First, PPS argues that Section 208 adopts the principle "that there is only so much public money to be spent on education and ... that all appropriations should go to public schools" and that "[a]ny breach of that principle ... violates the Constitution and adversely affects public schools and public-school students," whose interests PPS claims to represent. PPS Br. 9; *see also id.* at 17-18. PPS adds that the adverse effect "is exacerbated by a government program like the one challenged here, where private schools are the sole and exclusive beneficiaries of a grant program and 'chronically underfunded' public schools are excluded from eligibility." *Id.* at 9.

This argument fails. Channeling to independent schools limited federal benefits does not adversely affect PPS's members. State Br. 18. That is particularly clear here. Mississippi's independent schools stand to gain at most $10 million total—an amount dwarfed by the $1.62 billion in ARPA grant funding already given to Mississippi public schools. *Id.* at 18-19. Independent schools thus stand to receive 1/160th of an ARPA dollar for every ARPA dollar allotted to public schools. *Id.* at 19. It defies credulity to claim that providing such a comparatively modest bit of funding to independent schools causes—let alone "exacerbate[s]"—any adverse effect on PPS's members. PPS Br. 9. Unsurprisingly, PPS does not even try to show that any of its members will face any real-world adverse effect. PPS's claim of harm is entirely theoretical, resting on the notion that sending *any* money to private schools *by definition* adversely affects public-school students. But PPS cites no case saying that. Crediting PPS's argument would jettison basic limits on standing. PPS nearly says as much when it asserts that "[a]ny breach" that causes any "public money" to go to

a non-public school "adversely affects public schools and public-school students." *Ibid.* On that theory, if SB 2780 had sent $1 to DFA to distribute to independent schools, PPS's members would face an adverse effect and could sue. That is preposterous. And PPS's argument gains nothing from its claim that public schools are "chronically underfunded." *Ibid.* That kneejerk assertion has no basis where, as here, ARPA funding will so lopsidedly enrich public schools over independent schools.

Second, PPS makes a version of the competitive-advantage argument embraced by the chancery court. PPS Br. 9-10. PPS says that "some parents' decisions about whether to send their children to private or public school will be affected by the quality of the infrastructure," that SB 2780's allowance of infrastructure funding to non-free schools could "draw" to those schools "students who would otherwise attend public school," that public schools will then "receive[ ] less state funding," and thus "the students still enrolled in the public school" will "suffer." *Id.* at 9. This argument fails for the reasons set out above and in the state defendants' opening brief. Mississippi public schools are not disadvantaged where independent schools receive 6 tenths of one cent for every dollar that a public school receives. State Br. 18-21.

B. Next, PPS contends that its members have standing because they "are taxpayers challenging unconstitutional government spending of public funds." PPS Br. 8; *see id.* at 10-11. This argument fails too.

This argument rests on the view that under this Court's cases taxpayers "have standing to challenge unlawful government appropriations"—including "unlawful appropriations specifically with respect to school funding." PPS Br. 10; *see id.* at 10-

11. This Court's cases establish no such rule. To the contrary, "general taxpayers challenging general government spending as unconstitutional" ordinarily cannot rely on their taxpayer status to establish standing. *Araujo v. Bryant*, 283 So. 3d 73, 78 (Miss. 2019). This Court has let certain taxpayers challenge certain government expenditures when those taxpayers "experience a different, adverse effect than the general public," *ibid.*, or when the suit is "otherwise authorized by law," as when a statute authorizes a particular taxpayer suit, *Harrison County v. City of Gulfport*, 557 So. 2d 780, 782 (Miss. 1990). As explained above and in the state defendants' opening brief, PPS's members do not face any different adverse effect that would give them taxpayer standing. State Br. 21-22. And PPS has never claimed that any statute authorizes its members to sue as taxpayers.

PPS invokes a handful of cases to argue that its members have taxpayer standing. *See* PPS Br. 10-11. To the extent that those cases are relevant, they confirm the points made just above and show why PPS is wrong.

First, in some of those cases this Court found standing because the plaintiff(s) faced an adverse effect that was different from that faced by the general public. In *Prichard v. Cleveland*, 314 So. 2d 729 (1975), this Court held that private-practice physicians had standing "as taxpayers" to sue to enjoin a hospital's trustees and administrator from leasing part of a public hospital for the private practice of medicine. *Id.* at 732. The plaintiffs alleged that "their taxes go to retire bonds which were issued and sold and the proceeds used" to build, maintain, and renovate the part of the hospital that was to be improperly used for private-practice purposes—a use

that would have harmed their interests as competing private-practice physicians. *Id.* at 730. So, unlike PPS's members, the *Prichard* plaintiffs faced an adverse effect different from what the general public faced. In *Canton Farm Equipment v. Richardson*, 501 So. 2d 1098 (Miss. 1987), this Court held that a heavy-equipment vendor had standing to sue county supervisors who voted to deny the vendor's low bid to sell the county two backhoes. *Id.* at 1105-09. The vendor (unlike PPS) showed a "direct, adverse effect upon itself"—the denial of its bid, which caused it monetary loss. *Id.* at 1105; *see id.* at 1105-06. And, as detailed below, this Court in *Araujo* ruled that the plaintiffs had standing because they "experience[d] a different, adverse effect than the general public"—something PPS has not shown. 283 So. 3d at 78.

Similarly, in *Pascagoula-Gautier School District v. Board of Supervisors of Jackson County*, 212 So. 3d 742 (Miss. 2016), this Court held, in a dispute over a county board of supervisors' approval of a methodology to assess the valuation of (and thus taxes on) property, that a school district and a city had standing to sue the board because the plaintiffs faced an adverse effect that was different from that of the general public: plaintiffs' funding was reduced by an allegedly improperly low assessment and plaintiffs would have further costs. *Id.* at 749; *see id.* at 747-49. PPS suggests that this case "undermines" the state defendants' position because the plaintiffs there "did not sue as or on behalf of taxpayers" but instead rested their standing on "the economic harm that they stood to suffer as the '*direct* beneficiar[ies]'" of the allegedly too-low tax assessment at issue. PPS Br. 11 (quoting 212 So. 3d at 749). But that just glides over the point that matters. The *Pascagoula-Gautier*

plaintiffs had standing because they showed a direct adverse effect on themselves. PPS has not shown that. Its members are instead like "[t]he average taxpayer in the district, or the average parent of a child in the school district," who lack standing because they do not face "an adverse effect that is different from that" of the general public. 212 So. 3d at 749. Whether someone sues "as or on behalf of taxpayers" (PPS Br. 11) does not matter: if they cannot show an adverse effect, they lack standing.

Second, in other cases that PPS cites this Court allowed taxpayers to maintain a suit because a statute authorized a taxpayer lawsuit—a feature that is absent here. In *Brannan v. Board of Supervisors of DeSoto County*, 106 So. 768 (Miss. 1926), this Court let a taxpayer challenge a board of supervisors' annexation of territory under a statute allowing taxpayers to seek judicial review of such board decisions. *Id.* at 769. In *Canton Farm Equipment*, this Court ruled that, in addition to adverse-effect standing, the plaintiff had standing to sue as a taxpayer under a statute that authorized taxpayers to sue as private attorneys general to challenge supervisors' failure to comply with bidding laws. 501 So. 2d at 1105-09.

And in *Chance v. Mississippi State Textbook Rating & Purchasing Board*, 200 So. 706 (Miss. 1941), this Court ruled that persons challenging the loaning of textbooks to students at non-free schools "met the requirements of a taxpayers' suit." *Id.* at 709. In so ruling, *Chance* invoked *Mississippi Road Supply Co. v. Hester*, 188 So. 281 (Miss. 1939), which declared: "The right of a taxpayer to bring suit on behalf of a county or the public is only such as is authorized by statute." *Id.* at 285. If *Chance* is read as a ruling on standing (the Court did not refer to "standing"), it should be

read as a ruling that a statute authorized such standing—a ground not available to PPS here. *Chance* also cited *McKee v. Hogan*, 110 So. 775 (Miss. 1926), which focused on an exhaustion requirement rather than on standing. *McKee* ruled that "before a private citizen can resort to injunction to litigate public questions, he should show that he has applied to the proper parties without redress." *Id.* at 779-80. The challenger in *McKee* had failed to do that, which was a sufficient reason for this Court to order the dismissal of the suit. By contrast, the plaintiffs in *Chance* had done that, so they satisfied any exhaustion requirement. 200 So. at 709. This again does not help PPS: their problem is not exhaustion but a lack of standing.

Third, PPS invokes *Pascagoula School District v. Tucker*, 91 So. 3d 598 (Miss. 2012). There the Court observed that resolving a question about "a school district's ad valorem taxation power" was an issue that "affects the rights of all taxpayers in Jackson county" and that reaching an argument necessary to resolve the case was proper, even though the argument had been made late. *Id.* at 604; *see id.* at 603-04. The case did not mention standing—and certainly did not hold that "all taxpayers" face an adverse effect from allegedly unlawful governmental spending.

C. Last, PPS contends that a combination of "general standing" and "taxpayer standing" brings its members "squarely within" this Court's authorization of "standing for taxpaying public-school parents" in *Araujo v. Bryant*, 283 So. 3d 73, 78 (Miss. 2019), and other cases. PPS Br. 12; *see id.* at 11, 12-15, 17-19.

This argument does not hold up either, because PPS has failed to show that its members face the "different, adverse effect than the general public" that *Araujo*

requires. 283 So. 3d at 78. The taxpayer plaintiffs in *Araujo* had standing because they made that showing. They were "not simply general taxpayers challenging general governmental spending as unconstitutional." *Ibid.* Rather, two features together showed that they "experience[d] a different, adverse effect than the general public." *Ibid.* First, the plaintiffs were "*ad valorem* taxpayers alleging that governmental entities" were unlawfully "spending *ad valorem* tax revenue." *Ibid.* Second, compliance with the challenged statute "divert[ed] *ad valorem* funds from" Jackson public schools—"where the Plaintiffs' children [we]re enrolled"—to charter schools. *Ibid.* The *Araujo* plaintiffs thus: (1) plausibly connected the tax revenue at issue to taxes *that the plaintiffs paid* (by showing that it was *ad valorem* revenue, not just general revenue); and (2) plausibly showed that that revenue was diverted *away from plaintiffs' children* (by showing that the money otherwise would have gone to the public schools that plaintiffs' children attended). *Ibid.* Those two features showed a tight relationship between the complained-of spending and the claimed adverse effect on the plaintiffs, and thus showed that the plaintiffs had standing. *Ibid.*

Neither feature is present here. First, PPS has not plausibly connected the tax revenue at issue to taxes that PPS's members paid. The tax revenue here is federal ARPA money that is far, far removed from taxes that PPS's members paid. Even if some PPS members pay federal taxes, that does not establish a plausible connection between the tax revenue at issue and the taxes that those members paid. *See* 283 So. 3d at 78. Any other conclusion would as a practical matter eliminate the need to show an adverse effect that distinguishes a would-be plaintiff from innumerable other

members of the "general" taxpaying public. *Ibid.* Second, PPS has not plausibly shown that the tax revenue at issue was diverted away from PPS members' public-school students. Schools of the sort attended by PPS members' children have been allotted $1.62 billion in federal ARPA funds. State Br. 18-19. PPS has not shown (and does not even claim) that the Legislature would have sent the $10 million at issue to those schools if it had not sent it to DFA to channel to independent schools. The far more plausible inference is that the Legislature would have sent it to some use other than public schools, given the large amounts that those schools had already received in federal ARPA money. There is no basis for concluding that revenue was "divert[ed] ... *from*" PPS members' children. 283 So. 3d at 78 (emphasis added).

Nothing that PPS says overcomes these points.

First, PPS contends that like the *Araujo* plaintiffs, some PPS members "own property in their school districts, pay property taxes as well as state sales tax and federal income and gas tax, have children who attend the public schools, and allege that the Legislature has passed a law spending tax revenue in violation of the Mississippi Constitution." PPS Br. 12; *see id.* at 12-13. But those features do not show that PPS members "'experience a different, adverse effect than the general public'" under *Araujo*. *Id.* at 13 (quoting 283 So. 3d at 78). As explained, what put the *Araujo* plaintiffs in a different position than general taxpayers was that they plausibly connected the tax revenue at issue to taxes *they paid* and plausibly showed that that revenue was diverted away from *their children*. PPS has made no such showing.

PPS says that it need not show that the public funds at issue were "'diverted' from public schools to private schools in the sense that funds were diverted in *Araujo*." PPS Br. 17; *see id.* at 17-18. PPS acknowledges that "the Legislature could conceivably have used the $10 million" for something other than schools, but PPS thinks it significant that the Legislature "chose to use those funds for schools" and argues that, "in any event, those funds were 'diverted' from legitimate public purposes to an unconstitutional purpose when they were designated for private schools." *Id.* at 17; *see id.* at 17-18. But that line of argument cannot be reconciled with *Araujo*'s narrow allowance of taxpayer standing. Again, this Court found standing in *Araujo* in part because the plaintiffs plausibly showed that tax revenue was diverted away from their children. Had they shown only a diversion from some general "legitimate public purpose[ ]," *id.* at 17, the plaintiffs would have been like any other "general taxpayers" that lack standing. *Araujo*, 283 So. 3d at 78.

Second, PPS resists several other points showing why *Araujo* does not support its standing. PPS Br. 13-15. As the state defendants have explained, this case does not involve state or local funds—it involves only federal ARPA money—which places it even farther outside of *Araujo*'s narrow allowance of taxpayer standing for *ad valorem* taxpayers. State Br. 21-22. PPS tries to get around this additional obstacle to its standing by arguing that the ARPA funds at issue "were deposited into the state treasury" and "appropriated by the state Legislature." PPS Br. 13; *see id.* at 13-15. Yet even if that made them "state funds" (*id.* at 13), *but see infra* Part II, it still would not show what PPS must: an adverse effect on its members that is *different* from any

effect on the general public. The same is true for PPS's argument that "the State of Mississippi and its Legislature and its agencies are bound by the Mississippi Constitution irrespective of the original source of the money." *Id.* at 15. That argument might be relevant to the merits of PPS's challenge, but it does not help PPS's standing because it does not show a different adverse effect on PPS's members.

PPS relatedly resists the state defendants' reliance (State Br. 21-22) on U.S. Supreme Court caselaw recognizing that the spending of federal funds does not harm individual taxpayers. PPS Br. 13-15. (PPS notes that one opinion the state defendants cited is for three Justices. *Id.* at 13. PPS does not mention that the opinion was the controlling opinion—it articulated the basis for the Court's judgment—because it resolved the case on a narrower ground than the opinion of two Justices concurring in the judgment.) According to PPS, those cases "simply confirm that taxpayer standing generally does not exist in cases brought in federal courts relating to federal funding," but that understanding "does not control" here because Mississippi state courts are "more permissive in granting standing to parties who seek review of governmental actions than federal courts." *Id.* at 13, 14. That response just sidesteps the point that matters: that the (alleged) unlawful spending of federal dollars does not plausibly harm any individual federal taxpayer. State Br. 22. That is not a point unique to federal law. It is a point of basic good sense: any other view would be boundless. That point shows why PPS members' status as federal taxpayers does not establish their standing. Their payment of federal taxes does not show that they face an adverse effect that is any different from the "effect" faced by innumerable other

federal taxpayers. And without that showing, PPS members do not satisfy the requirements for standing under Mississippi law. *Araujo*, 283 So. 3d at 78.

PPS tries to shore up its response by repeating its claim that "Mississippi taxpayers generally have standing in state courts to challenge unlawful government appropriations." PPS Br. 14. Again, that is not the law. As explained, the cases that PPS cites for that point (*id.* at 14-15) found standing because the plaintiff(s) faced an adverse effect different from that faced by the general public (*Araujo*; *Canton*; *Prichard*), found standing because a statute authorized the challenger to sue (*Brannan*; *Canton*; *Chance*), or did not address standing (*Tucker*). *Supra* pp. 5-11.

Third, PPS resists the state defendants' point (State Br. 18-19) that PPS cannot show an adverse effect on public schools or public-school students where Mississippi public schools have been given $1.62 billion in federal ARPA funds and private schools stand to get only $10 million in such funds. PPS Br. 18-19. According to PPS, showing an adverse effect from the $10 million appropriation "does not hinge on who gets more funding *in toto*." *Id.* at 18. PPS provides no support for that view. And again, it is untenable: on that view, appropriating $162 to be given to private schools would "adversely affect" public schools that received $1.62 billion in public funding—even though public schools received 10,000,000 times more money than private schools. That would end the limits on standing. Rather than point to a real-world effect, PPS says: "Section 208 forbids appropriating *any* funds to private schools, and PPS members and their children are harmed by *any* unlawful appropriation to private schools." PPS Br. 18. The first part of that sentence just

repeats PPS's merits position without explaining why PPS has standing. The rest of the sentence just asserts that PPS members are harmed without showing any harm. That PPS cannot articulate a plausible adverse effect drives home the reality: it faces no adverse effect.

Last, PPS resists the argument that a mismatch in its associational-standing theory defeats its standing. PPS Br. 18. As the state defendants have explained, PPS members are parents of public-school students and school employees, those members are thus not the "public schools" or "students" that the chancery court linked with harms from SB 2780's grant program, and this mismatch precludes PPS's reliance on associational standing because PPS has failed to show that a PPS member faces an adverse effect and thus has standing. State Br. 20. PPS says that this argument "ignores the fact that parents of public-school children may sue on behalf of their children to vindicate their children's interests in securing an adequate public education." PPS Br. 18. That is not so. A parent may sue if he or she faces an adverse effect different from that of the general public—that is the central teaching of *Araujo*, the main case that PPS cites to support this sue-on-behalf-of theory. *Ibid.*; *see Araujo*, 283 So. 3d at 78. PPS has failed to show an adverse effect on its members. PPS also cites *Clinton Municipal School District v. Byrd*, 477 So. 2d 237 (Miss. 1985), but that case does not address standing. And this Court said in *Clinton* that *both* children and parents "were Plaintiffs," *id.* at 238, which undercuts PPS's view that the lawsuit was "brought" solely "by parents on [their] children's behalf." PPS Br. 18.

PPS has never shown a plausible adverse effect on its members. It has relied on abstract theories of harm that defy the facts and can be credited only if this Court were to cast aside the longstanding adverse-effect requirement. The Court should hold that PPS lacks standing and direct dismissal of this case.

II. SB 2780's ARPA Grant Program Is Constitutional And The Chancery Court Erred In Ruling Otherwise.

If this Court reaches the merits, it should hold that SB 2780's grant program comports with Section 208's narrow prohibition on legislative appropriations to non-free schools. State Br. 24-34. PPS's contrary arguments (PPS Br. 19-27) are unsound.

A. As the state defendants have explained, Section 208 prohibits the Legislature only from directly appropriating state educational funds to non-free schools. State Br. 25-29. Because the statutes at issue do not directly appropriate money to any school—they appropriate money only to DFA—those statutes comport with Section 208. *Id.* at 29-30. PPS's responses (PPS Br. 19-22) are unavailing.

First, PPS contends that the state defendants' view "is contrary to" Section 208's text. PPS Br. 20; *see id.* at 20-22. As a reminder: Section 208's second provision (the sectarian-school provision) bars the appropriation of "any funds" made "toward the support of any sectarian school." Miss. Const., art. VIII, § 208. Section 208's last provision (the free-school ban) bars the appropriation of any funds "to any school" that are "receiv[ed]" while the school "is not conducted as a free school." *Ibid*. PPS says: "The State rests its interpretation on what it perceives to be a difference between the words 'to' and 'toward'" in those two provisions. PPS Br. 20. According to PPS, the state defendants argue that "toward" and "to" mean different things and

that the latter (as used in the free-school ban) bars only direct appropriations. *Ibid.* But, PPS claims, "[t]here is no basis for such a view" because "[i]n the late Nineteenth Century," "to" and "towards" meant the same thing ("movement towards" or "with direction to"), that "to" in Section 208's last provision thus extends that clause beyond direct appropriations, and that SB 2780's directive—that public funds be moved towards or moved with direction to private schools—violates that prohibition. *Ibid.*

This facile response does not address the state defendants' argument. That argument does not rest only on a difference between "to" and "toward." The state defendants recognize that "to" can overlap in meaning with "toward." State Br. 27. But the inclusion of the word "support" in Section 208's second provision and its absence from the third provision show that the two provisions have different scopes. The sectarian-school ban blocks appropriations "toward the support" of a sectarian school and thus reaches appropriations that may aid a sectarian school *or* some other recipient who may use the funds to aid a sectarian school. But the free-school ban includes no such broadening language. It narrowly prohibits appropriations made "to" a non-free school. It does not reach an appropriation made to some other recipient. *Ibid.* Text and structure thus show that Section 208's final provision—the only one on which PPS's claim relies—does not block SB 2780's grant program.

Rather than confront this argument, PPS relies on the elementary point—to which the state defendants agreed—that "to" and "toward" can mean the same thing. PPS Br. 20. But courts do not interpret statutory words in isolation. Context matters. State Br. 27-28. And context requires reading "to" in light of the nearby phrase

"toward the support of" and recognizing that "to" and "toward the support of" do not mean the same thing. The adopters' choice of different phrases—particularly when made in the same sentence—reflects an intent to adopt a different meaning. The state defendants' view honors that different meaning. PPS's view does not.

These points doom PPS's remaining textual arguments. PPS Br. 21-22. PPS argues that the word "to" is connected in the free-school ban to "receiving," that "the money" at issue "is ultimately received by [a] private school," and that "[t]he fact that the money is 'receiv[ed]' by the school means it was appropriated 'to' the school." *Id.* at 21. That argument would work only if "to" means the same thing as "toward the support of" in Section 208. Again, it does not. PPS adds that the word "appropriation" (which appears in the free-school ban) means "[t]he act of ... setting apart" and argues that the Legislature here "set apart" $10 million for private schools, thereby violating Section 208. *Ibid.*; *see id.* at 21-22. But this argument again refuses to respect the word "to," which (given its context) limits the free-school ban to direct appropriations.

Second, PPS argues that letting non-free schools receive money from DFA under SB 2780 "would allow the Legislature to circumvent the Constitution by the simple expedient of channeling public funds through a state agency." PPS Br. 20; *see id.* at 19-20, 22. This argument fails. For one thing, it rests on the view that Section 208 prohibits non-free schools from receiving any state funds. Again, Section 208 prohibits only direct appropriations. So channeling funds through a state agency does not violate—and thus does not "circumvent"—the constitution. PPS dislikes that result, but it follows from Section 208's text and structure. Section 208's drafters

could have made the free-school ban broader. Their approach to the sectarian-school provision shows that they knew how to adopt a broader prohibition. Yet they chose not to sweep so broadly in the free-school ban. This Court should respect that choice.

For another thing, SB 2780's ARPA grant program does not "funnel" an appropriation through a state agency. This "funneling" argument ignores key features of the federally funded grant program and character of the grant transactions at issue. State Br. 32. DFA cannot just hand out money to grantees. Applicants for an ARPA grant must satisfy federal- and state-imposed conditions. SB 2780, § 12(7)-(9). And grant "awards" are subject to "the discretion of [DFA's] executive director." *Id.* § 12(9). The contemplated transactions between DFA and grantees are contracted-for, federally regulated spending—not "funneling" of state education funds that fall within the free-school restriction's narrow limits. The state defendants explained this all in their opening brief. State Br. 32. Rather than confront that argument, PPS just repeats a talking point.

B. The state defendants have explained that SB 2780's grant program uses federal ARPA money and not state educational funds (or any state funds), and the program thus does not violate Section 208's narrow free-school restriction for this independent reason. State Br. 30. PPS's responses (PPS Br. 22-25) lack merit.

First, PPS contends that this argument fails because Section 208 forbids sending "any funds" to private schools, not just state educational funds or state funds. PPS Br. 22; *see id.* at 22-23, 24. This response ignores Section 208's context. The constitution's original education articles focused on state education funds. State Br.

27-28. Reading Section 208's limits on appropriations to free schools as keyed on state education funds harmonizes with its surrounding provisions, which deal with education funds. *Ibid.* PPS says that those provisions refer to funds in ways that are more targeted ("the school funds"; "the free school fund"; "common school fund") than Section 208's free-school ban ("any funds"). PPS Br. 22. It adds that Section 208's first provision itself refers to the "school or other educational funds of this state," which contrasts with the third provision's reference to "any funds." *Id.* at 24. But even accepting all those points would still leave the problem of reading the free-school ban to refer to federal funds, which would be extraordinary: state laws do not traditionally constrain federal funds. *Cf. King v. Smith*, 392 U.S. 309, 333 n.34 (1968). PPS adds that Section 208's free-school ban "makes no exceptions based on the origin of the funds." PPS Br. 23. This argument falls with the argument above: because Section 208 does not reach federal funds its prohibition does not apply at all.

Second, PPS contends that "the South Carolina Supreme Court recently considered and rejected the very argument that the State makes here." PPS Br. 23; *see id.* at 23-24. According to PPS, in *Adams v. McMaster*, 851 S.E.2d 703 (S.C. 2020), that court rejected the view "that funds originating with the federal government were not 'public funds' within the meaning" of a South Carolina constitutional provision forbidding the use of "public funds ... for the direct benefit of any religious or other private educational institution." PPS Br. 23. The court said: "[T]he General Assembly has mandated that all federal funds be deposited into and withdrawn from the State Treasury. Given this clear directive, we must conclude that when the [federal] funds

are received in the State Treasury and distributed through it, the funds are converted into 'public funds' within the meaning of" the South Carolina Constitution. 851 S.E.2d at 709. But that court did not consider the issue here. In assessing whether the federal COVID-relief funds at issue were "public funds," that court viewed that question as turning on whether the funds were "held ... as a trust fund"—in which case they were not "public funds." *Ibid.* The court concluded that the funds were not so held but were instead "received in the State Treasury and distributed through it," which—in the court's view—meant that they were "converted into 'public funds'" under South Carolina's constitution. *Ibid.* That is not the question before this Court. The question here is instead whether Section 208's restrictions reach federal COVID-relief funds or just state educational funds (or, at the broadest, state funds). Section 208 does not reach those federal COVID-relief funds. State Br. 28, 30.

Third, PPS contends that even if Section 208's free-school restriction was limited to "school or education funds of this state," it would still prohibit SB 2780's grant program "because the Legislature specifically converted them to an educational use" by "appropriating" federal money "for an educational purpose." PPS Br. 24, 25. This argument, once again, ignores the *federal* character of the funds at issue, which places them outside Section 208's reach. Even if Section 208 were not limited to educational funds, it would still be limited to state funds.

Fourth, PPS says that "[m]uch of" Mississippi's budget "comes from federal funds" and that, if the Mississippi Constitution's "guarantees evaporate" when "federal funding is involved," then "much of the operation of state government would

be unconstrained by the state's own constitution." PPS Br. 25. But funding matters here because Section 208 is about funding. And the question of Section 208's reach here involves a threshold question of what funds are at issue. The question whether Section 208 reaches federal funds does not affect the many other constitutional provisions that do not turn on or relate to funding.

Last, PPS resists the state defendants' argument (State Br. 28-29) that Section 90(p) of the Mississippi Constitution—by allowing the Legislature to enact "general laws" to provide "support" to a "private" school—confirms that SB 2780's grant program and funding mechanism are constitutional because they are such "general laws." PPS first says that this point was not "raised in the court below and it should not be considered here." PPS Br. 25. But this Court is "charged with considering all law bearing on" an issue before it. *Pascagoula Sch. Dist. v. Tucker*, 91 So. 3d 598, 604 (Miss. 2012). SB 2780's constitutionality is before this Court. Section 90(p) bears on that issue, so the Court must consider it. Section 90(p)'s relevance is not a newly injected legal issue. It is a point that bears on the central merits issue in the case and supports the argument the state defendants have made throughout the litigation.

PPS also argues that "the fact that a general law can provide for some 'management or support' of a private school does not nullify Section 208's prohibition on financial appropriations to private schools." PPS Br. 25. Nothing in that response squares Section 90(p) with Section 208. That is unsurprising: PPS maintains that the Legislature cannot provide *any* financial "support" to private schools. *E.g.*, PPS Br. 9 (arguing that appropriating "any" money to private schools "violates" Section 208).

But that view reads Section 90(p) out of the constitution. Only the state defendants have explained how to reconcile Section 90(p) and Section 208: by reading Section 208's free-school ban in line with its plain text, to block only direct appropriations to non-free schools. State Br. 28-29.

C. PPS last claims that the "history and intent" behind Section 208 show that it forbids appropriating money to a state agency that may then be sent to a non-free school. PPS Br. 27; *see id.* at 25-27. But nothing that PPS cites bears that out. PPS points (*id.* at 26-27) to this Court's observation, in *State Teachers College v. Morris*, 144 So. 374 (Miss. 1932), that the history behind Section 208's predecessor "demonstrate[s] that what the Convention had in mind ... was the prohibiting of the custom ... of appropriating public funds to the support of sectarian schools and to a private school, whether sectarian or not, 'that at the time of receiving such appropriation is not conducted as a free school.'" *Id.* at 379. PPS claims that this passage shows that "[t]he drafters wanted to prevent the practice of funding non-free schools—not to allow it so long as the Legislature could interpose some technicality." PPS Br. 27. But the passage does not say that. The passage is instead tethered to Section 208's text: particularly its bars on appropriating "toward the support of" religious schools and "to" private schools. The two are not equivalent. PPS's argument again defies plain text, which bars only direct appropriations.

In sum: PPS's view of Section 208 fails to respect text, structure, and context. If this Court reaches the merits, it should reject that view, hold that SB 2780's grant program comports with Section 208, and reverse the judgment below.

III. This Court Should Affirm The Chancery Court's Denial of MAIS's Intervention If It Must Reach That Issue.

If this Court reaches the issue, it should affirm the chancery court's denial of intervention. State Br. 35-38. MAIS's contrary arguments (MAIS Br. 8-13) lack merit.

The state defendants have explained that MAIS was not entitled to intervene by right because it did not timely move to intervene and because the state defendants adequately represent MAIS's interests. State Br. 35-38. MAIS's appellate brief does not contest that the state defendants adequately represent MAIS's interests. That is a sufficient basis for this Court to uphold the denial of intervention. C.P. 371; *see Perry County v. Ferguson*, 618 So. 2d 1270, 1273 (Miss. 1993) (affirming trial court's denial of intervention based solely on its determination that the movant's "interest" was "already adequately represented by the existing party defendants").

The arguments that MAIS does make are unsound. It first argues that this Court should review timeliness *de novo* because the chancery court "failed to expressly reference" any of the factors used to assess timeliness. MAIS Br. 8; *see id.* at 8-9. This is wrong. The chancery court expressly referred to (C.P. 371) at least two factors: the "length of time" that the would-be intervenor delayed in seeking intervention and the "prejudice" to existing parties from that delay. *Matter of Estate of Ware*, 348 So. 3d 277, 285 (Miss. 2022). On delay, the court ruled that "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 (citing MAIS brief stating that it "became aware of this case shortly" after June 15, 2022, C.P. 179). On prejudice, the court ruled that "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." C.P. 371.

MAIS next argues that the chancery court "applied an incorrect legal standard" by assessing timeliness based on the length of time before trial "from the time MAIS filed its motion to intervene" rather than based on "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." MAIS Br. 9, 10. That is not true. As the intervention order says, the court evaluated timeliness based on the length of time between when MAIS had "knowledge of Plaintiff's challenge and request for preliminary injunction" and when MAIS "file[d] its Motion to Intervene." C.P. 371. In also noting that MAIS moved to intervene 12 days before trial, the court just put the delay in context. Although a 57-day delay may not matter greatly in a case that takes ten years to get to judgment, it can matter greatly a case where a trial is held 69 days after suit is filed—particularly when the would-be intervenor delays in seeking to intervene until less than two weeks before trial. The chancery court applied the right legal standard and correctly assessed MAIS's delay in context.

The points already made doom MAIS's remaining intervention arguments. MAIS Br. 10-13. MAIS argues that its motion to intervene was timely, emphasizing that it moved to intervene less than two months after PPS filed suit and that that period is less than other periods that have been deemed timely. *Id.* at 10-11. But MAIS again ignores the context of this case—where the litigation was expedited, MAIS showed up less than two weeks before trial, and MAIS sought to inject

arguments into the case that were irrelevant and would have prejudiced the state defendants, who had not been able to gather evidence to refute MAIS's fact-intensive arguments. State Br. 36. MAIS closes by arguing that it acted "promptly" and its delay did not prejudice existing parties. MAIS Br. 11-13. That view is insupportable. As explained, MAIS's delay prejudiced the state defendants by denying them the ability to gather evidence to address MAIS's allegations. State Br. 36.

CONCLUSION

This Court should reverse the chancery court, render judgment for the state defendants, and let stand the chancery court's denial of MAIS's motion to intervene.

Respectfully submitted,

LYNN FITCH
Attorney General of Mississippi

/s/ Justin L. Matheny
JUSTIN L. MATHENY
Deputy Solicitor General
MS Bar No. 100754
STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 220
Jackson, MS 39205-0220
Telephone: (601) 359-3680
E-mail: justin.matheny@ago.ms.gov

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this date the forgoing document was electronically filed with the Clerk of this Court using the Court's 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 the 27th day of September, 2023.

/s/ Justin L. Matheny
JUSTIN L. MATHENY