IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

PARENTS FOR PUBLIC SCHOOLS,

Plaintiff,

v.

MISSISSIPPI DEPARTMENT OF FINANCE AND ADMINISTRATION et al.,

Defendants.

No. 25CH1:22-cv-00705

MOTION OF MAIS TO INTERVENE

Pursuant to Mississippi Rule of Civil Procedure 24(a), Midsouth Association of Independent Schools ("MAIS"), by and through undersigned counsel, moves to intervene in the above-captioned case as follows:

1. For the reasons set forth in the supporting memorandum of law, which is being filed separately, MAIS submits that it should be allowed to intervene as of right under Mississippi Rule of Civil Procedure 24(a). Alternatively, the MAIS submits that is should be allowed to intervene in the above-captioned case by permission of the Court pursuant to Mississippi Rule of Civil Procedure 24(b).

2. As required by Mississippi Rule of Civil Procedure Rule 24(c), the MAIS attaches its proposed answer as **Exhibit A** and its proposed response in opposition to Plaintiff's pending motion for a preliminary injunction as **Exhibit B**, both of which set forth the grounds for which intervention is sought.

For these reasons, the MAIS requests that the Court grant this motion and enter an order allowing it to intervene in this matter.

Dated: **August 11, 2022.**

Respectfully submitted,

By: */s/Benjamin B. Morgan*
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CERTIFICATE OF SERVICE

I, Benjamin B. Morgan, hereby certify that I have filed the foregoing with the Court using the MEC filing system, which served a copy of the foregoing on all counsel of record.

This the **11th** day of **August, 2022.**

/s/Benjamin B. Morgan
Benjamin B. Morgan

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INTERVENOR-DEFENDANT'S ANSWER TO THE COMPLAINT

COMES NOW Intervenor-Defendant Midsouth Association of Independent Schools ("MAIS"), by and through counsel, and files this its Answer and Defenses to the Complaint for Declaratory and Injunctive Relief (Dkt. 2).

First Defense

Miss. Const. Art. VIII, § 208, on which the Complaint relies, is an unconstitutional abridgement of MAIS' First and Fourteenth Amendment rights under the U.S. Constitution.

Second Defense

Plaintiff lacks standing to bring this suit. Taxpayer standing does not avail a plaintiff when a case involves only federal funds. Plaintiff's members' children are also not injured by this allocation, as any alternative possible allocation is speculative and based on the policy choices of the legislature.

Third Defense

AND NOW, without waiving the above and foregoing defenses, and responding to Plaintiff's Complaint paragraph by paragraph, Intervenor-Defendant answers and alleges as follows:

1. As to the first sentence, the law speaks for itself. Deny the characterization of the legislation in the second sentence.

2. As to the first two sentences, the laws speak for themselves. Deny the remainder as legal conclusions.

3. Deny Paragraph 3 based on lack of knowledge or information sufficient to form a belief as to the truth of the allegations (hereafter abbreviated as "lack of knowledge").

4. Deny Paragraph 4 based on lack of knowledge.

5. Deny Paragraph 5 as characterization, legal conclusion, and mistaken factual assertions.

6. Deny Paragraph 6 based on lack of knowledge.

7. Deny Paragraph 7 based on lack of knowledge.

8. Deny Paragraph 8 based on lack of knowledge.

9. Deny any inference that Section 208 is constitutional. Deny any inference that Plaintiffs have standing to bring this suit. Admit the remaining allegations of Paragraph 9.

10. Deny any inference that Section 208 is constitutional. Deny any inference that Plaintiffs have standing to bring this suit. Admit the remaining allegations of Paragraph 10.

11. Deny any inference that Section 208 is constitutional. Deny any inference that Plaintiffs have standing to bring this suit. Admit the remaining allegations of Paragraph 11.

12. The text of Section 208 speaks for itself. Deny any inference that Section 208 is constitutional. Deny any other allegations in Paragraph 12.

13. Admit Paragraph 13.

14. The text of SB 3064 speaks for itself. Deny any other allegations in Paragraph 14.

15. The text of SB 3064 speaks for itself. Deny any other allegations in Paragraph 15.

16. The text of SB 3064 speaks for itself. Deny any other allegations in Paragraph 16.

17. The text of SB 2780 speaks for itself. Deny any other allegations in Paragraph 17.

18. The text of SB 2780 speaks for itself. Deny any other allegations in Paragraph 18.

19. The text of Section 208 speaks for itself. Deny any inference that Section 208 is constitutional. Deny any other allegations in Paragraph 19.

20. Admit Paragraph 20.

21. The Mississippi Supreme Court opinions in Paragraph 21 speak for themselves. Deny any other allegations in Paragraph 21.

22. Admit the first sentence. Deny any inference that Section 208 is constitutional. Deny any other allegations in Paragraph 22.

23. Deny Paragraph 23 as legal conclusions not requiring a response.

As to Plaintiff's requested relief, Intervenor-Defendant denies that Plaintiff is entitled to any relief whatsoever in this case.

Intervenor-Defendant reserves the right to amend its answer as additional facts or developments become available through discovery or otherwise.

Dated: August ____, 2022.

Respectfully submitted,

By: _____

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Exhibit A

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
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PARENTS FOR PUBLIC SCHOOLS,

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v.

MISSISSIPPI DEPARTMENT OF FINANCE AND ADMINISTRATION et al.,

Defendants.

No. 25CH1:22-cv-00705

[PROPOSED]
MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

The motion for preliminary injunction from Plaintiff Parents for Public Schools ("Parents") is based on three things: the Parents' standing as taxpayers to challenge the law; the presumed irreparable injury to those Parents; and the application of Section 208 of the Mississippi Constitution to the infrastructure grant program. The motion should be denied on all three counts: 1) the Parents lack standing as taxpayers to challenge the expenditure of purely federal funds that pass through state coffers; 2) the Parents are not irreparably injured because financial harms are not generally irreparable; 3) most importantly, the Parents are unlikely to succeed on the merits of their claim because the provision of the Mississippi Constitution on which it is based violates the U.S. Constitution's right to equal protection of the laws found in the Fourteenth Amendment and right to free exercise of religion found in the First Amendment because it was motivated by racial and religious animus.

ARGUMENT

I. Plaintiffs lack standing to bring suit as taxpayers because no state tax revenues were used to fund this program.

The State Defendants are correct that Plaintiff lacks standing, and Intervenor MAIS will not belabor the point, other than to add additional authority for the State's second argument, that the Plaintiff's members lack taxpayer standing. *See* State Resp. 9. 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. *Broxton v. Siegelman*, 861 So. 2d 376, 385 (Ala. 2003); *accord*

Brinkman v. Miami Univ., 2007-Ohio-4372, ¶ 25 (Ct. App.) (holding no taxpayer standing to challenge use of privately donated funds at a state university). 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 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. Mississippi courts have never before recognized contribution to the federal fisc as creating standing in state court. This failure to establish taxpayer standing, when combined with the failures identified in the State Defendants' response, is fatal to this Court's jurisdiction over this case.

II. The Plaintiff will not suffer any irreparable injury.

In order to earn a preliminary injunction, the Plaintiff must show "[t]he injunction is necessary to prevent irreparable injury," the second prong of the familiar four-factor test. *Miss. State Bd. of Contractors v. Hobbs Constr., LLC*, 291 So. 3d 762, 774 (Miss. 2020). "An injury is irreparable when it cannot adequately be compensated in damages or where there exists no certain pecuniary standard for

the measurement of the damages. Where the extent of the prospective injury is uncertain or doubtful so that it is impossible to ascertain the measure of just reparation, the injury is irreparable in a legal sense, so that an injunction will be granted to prevent such an injury." *Pitts v. Carothers*, 120 So. 830, 832 (Miss. 1929). Here the injury can be compensated in monetary terms. We know the exact amount of the grant program: $10 million. If the Plaintiff eventually wins its case on the merits, then this Court can order the government to pay $10 million for infrastructure grants to public schools. Such an outcome is a certain pecuniary measure, and thus no irreparable harm is present.

This is the conclusion recently reached by a three-judge trial court in Tennessee in a very similar case. There, a group of public-school parent-plaintiffs represented by the ACLU challenged an Education Savings Account program that would benefit children who enroll in nonpublic schools. The plaintiffs sought an injunction against the allegedly illegal expenditure of public funds. The court correctly concluded that the temporary injunction should not issue because the plaintiffs could not show irreparable harm: "The Plaintiffs have failed to demonstrate that the extraordinary remedy of an injunction is warranted. Specifically, we are unpersuaded that the harm the Plaintiffs believe to be imminent is sufficiently irreparable or certain so as to justify blocking the implementation of a duly enacted statute of this state at this stage of the litigation." *Metro Nashville v. Tenn. Dep't of Educ.*, No. 20-0143-II

(Order of Aug. 5, 2022) (Davidson Cty. Chancery Ct.).[1] The same answer should pertain here: there is no irreparable injury for a purely financial harm.

Plaintiff acknowledges this law, Memo. 14, but responds that this is different because you cannot put a price tag on constitutional rights. This misconstrues equity jurisprudence. A court often cannot assign a specific dollar value to constitutional rights because they have no obvious value: how does a court or a jury assign a monetary number to the right to hold a placard or use a bullhorn? Moreover, First Amendment injuries are often time-sensitive: damages cannot make up for the inability to hold a rally or event right before an election. *Elrod's* quote in full is: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury." *Elrod v. v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added). Courts recognize that some constitutional violations, like the First Amendment, cannot be repaired after the fact with monetary damages, but others can be. *See Tiger Lily LLC v. United States HUD*, 499 F. Supp. 3d 538, 551 (W.D. Tenn. 2020) (collecting cases). If a prisoner is subject to cruel and unusual punishment by deprivation of medical care, that constitutional violation can be remedied by damages as easily as any other finding of inadequate or negligent medical care. In other words, the kind of constitutional right matters. Here, the asserted constitutional violation has an obvious monetary cost which can be easily calculated against the State Defendants if they lose.

[1] https://ljc-assets.s3.amazonaws.com/2020/02/2022-08-05-Metro-Govt-v-TN-Dept-of-Ed-Order-Denying-MPI.pdf.

III. The Court should also balance the impact of the injunction on MAIS's members and other independent schools.

As part of the preliminary injunction test, this Court considers the "public interest," which is to say "[w]hether the public interest, i.e., the rights of third parties, will be served by the injunction." *Am. Elec., Div. of FL Indus. V. Singarayar*, 530 So. 2d 1319, 1324 (Miss. 1988). That consideration must include the 100+ schools within MAIS and other private, religious, independent, and nonpublic schools that would qualify for these infrastructure funds.

The intent of the federal funds, according to the U.S. Treasury, is "to carry out critical capital projects that directly enable work, education, and health monitoring, including remote options, in response to the public health emergency."[2] Infrastructure improvements for educational institutions like MAIS's members certainly fit within this intent; a study by Johns Hopkins University's Center for Health Security concludes that addressing school building ventilation is "a vital tool to reduce COVID-19 spread."[3] Indeed, guidance from the U.S. Department of Education for another pandemic relief program shows the priority the federal government assigns to infrastructure upgrades, urging schools to "[m]aintain[] healthy facilities, which could include addressing pre-existing or new ventilation,

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[2] U.S. Treasury, "Capital Funds Projects," https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/capital-projects-fund.

[3] Paula J. Olsiewski, PhD, et al., *School Ventilation: A Vital Tool to Reduce COVID-19 Spread*, Johns Hopkins University (May 2021), https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2021/20210526-school-ventilation.pdf.

roofing, and plumbing needs, or other needs that may inhibit healthy learning environments during full-time in-person learning. This might include roof repairs or replacement; reducing lead exposure in water; or mold, radon, and asbestos remediation, as well as facility updates (such as upgrading science labs) to address the impact of lost instructional time."[4] In other words, these infrastructure grants are arriving at a crucial time for MAIS's schools and the students they serve. They provide a path forward to address many of the effects of the pandemic. Putting a judicial hold on the funds now would delay needed safety and facility improvements that will better the lives of students across MAIS's 100+ schools. The public interest favors allowing these vital health, safety, and learning upgrades to go forward.

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

This case is based on a provision of the Mississippi Constitution that is over a century old—it dates back to the 1890 Constitution. That post-Reconstruction constitutional provision is one of a number across the country from that era that were all motivated by the same racial and religious prejudice. Even though facially neutral and affecting all nonpublic schools, the historical record conclusively demonstrates the sordid motives underlying this provision. Once that record is fully examined, it is clear this Court should adopt the State's construction.

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[4] U.S. Dep't of Educ., *Frequently Asked Questions: Elementary and Secondary School Emergency Relief (ESSER) Fund and Governor's Emergency Education Relief (GEER) Fund: Use of Funds to Prevent, Prepare for, and Respond to the COVID-19 Pandemic* (Dec. 2021), https://oese.ed.gov/files/2021/12/Fact-Sheet_COVID_connection_12.29.21_Final.pdf.

A. Laws motivated by racial and religious prejudice are unconstitutional.

"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). In addition to racial and religious animus, the Court should also be aware of anti-immigrant animus. *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 970 (9th Cir. 2017).

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 intervenor's responsibility is to show "an invidious discriminatory purpose was a motivating factor in the relevant decision." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (plurality). Intervenor "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).[5] 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).[6] 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.

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

[6] A "Blaine Amendment" is a reference to James G. Blaine, a member of Congress who sponsored the federal constitutional amendment barring public funds from going to sectarian schools. The term now is used to describe the 30-some state constitutional provisions that were adopted to bar aid to sectarian schools.

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

Prior to the Civil War, "[i]n the years between 1830 and 1860, anti-Catholicism in America became unprecedentedly virulent."[7] Nearly fifty people died in several anti-Catholic riots, and numerous churches and convents were burned to the ground.[8] Public schools were essentially Protestant schools, with daily prayer and readings from the King James Bible.[9] 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.[10] 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.'"[11] This widespread anti-Catholicism paused during the Civil War, as the nation turned its attention to other hatreds.

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[7] 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).

[8] *Id.*

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

[10] *Id.*

[11] 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."[12] 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.[13] African-American voters, who were Republican in party and Protestant in faith, were seen as reliable post-war supporters of the anti-Catholic agenda.[14] Therefore, Republican loyalty, Protestant faith, and post-war attitudes combined to buttress anti-Catholic animus "as the Confederates reorganized their States under Johnson's restoration."[15]

After the war's end, White Northern 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

[12] William A. Russ, Jr., *Anti-Catholic Agitation During Reconstruction*, 45 Records of the American Catholic Historical Society of Philadelphia 312, 313 (Dec. 1934).

[13] *Id.* at 314. *See* Pagliarinii *supra* note 2, at 97 ("Throughout the 1850's, a political party called the Know-Nothings convulsed the nation with its violent hostility to Catholics.").

[14] *See, e.g.*, Russ *supra* note 7, at 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).

[15] Russ *supra* note 7, at 316-17.

Convention of 1868.[16] "The convention was dominated by native and Northern white Republicans but also seated sixteen African-American delegates."[17]

The Mississippi Convention of 1868 adopted an article on public education that provided: "No religious sect or sects shall control any part of the school or university funds of this State." 1869 Const. art. VIII, § 9.[18] 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."[19] Four of the ten Reconstruction states adopted no-aid provisions.[20] Together, black and white Republicans were the party of Protestantism and public schools.

Based on this initial provision, "petitioners . . . were largely successful in litigation at striking so-called 'aid' reaching Catholic institutions. . . . [T]he Supreme

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

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

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

[19] David Tyack and Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 Am. J. Educ. 236, 241 (Feb. 1986).

[20] 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, § 5 (1868) ("No religious sect or sects shall have exclusive right to, or control of any part of the school funds of the State.").

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." 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)).

ii. The revision in the 1890 Constitution.

As federal troops withdrew from the state, Republican Reconstruction ended and white Democratic dominance resumed.[21] 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."[22] 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."[23] 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

[21] Bolton *supra* note 13, at 9.

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

[23] *Id.* at 464.

power could be consolidated in elite White hands, control of important social institutions like schools could also be taken back."[24]

The 1890 Convention strengthened and lengthened the 1868 Blaine Amendment.[25] This convention's education committee "brought forward, with a slight change, section 9, article 8, Constitution of 1869."[26] The education committee proposed language: "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."[27] An additional amendment was later added, "or to any school that at the time of receiving such appropriation from the state treasury is not conducted as a free school."[28] 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."[29] The aim

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[24] *Id.* at 464.

[25] Ursula Hackett, *Republicans, Catholics and the West: Explaining the Strength of Religious School Aid Prohibitions*, 7 Politics & Religion 499, 511 (2014).

[26] *State Teachers' Coll. v. Morris*, 144 So. 374, 379 (Miss. 1932).

[27] *Id.* at 769.

[28] *Id.* at 770.

[29] 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

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.[30]

"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."[31] 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.

iii. Anti-Catholic bias was widespread in Mississippi in 1890.

By this point, anti-Catholic animus in the South had become a bipartisan affair. Republicans indulged it through the Blaine movement, the anti-immigration American Protective Association, and "criticism of Tammany Hall."[32] African-American voters retained their Republican and Protestant affiliations, combined

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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." Miss. Const. Ann. art. 4, § 66.

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

[31] Kenneth L. Townsend, *Education and the Constitution: Three Threats to Public Schools and the Theories that Inspire Them*, 85 Miss. L.J. 327, 337 (2016).

[32] Russ *supra* note 7, at 321.

with a dislike for anyone competing in the unskilled labor market, including foreigners.[33]

Democrats were also anti-Catholic.[34] "The popular southern attitude toward immigration, latent at first but growing more open after the 1880's, was hostile."[35] 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, 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."[36] Indeed, "methods of mob terrorism used against Negroes were extended to Italians, whom many white Southerners regarded as another inferior race to be disciplined."[37] To state the obvious, the immigration from Italy, Ireland, and Poland—all heavily Catholic countries—associated the nativist reaction with the religious prejudice.[38] *See Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring) ("[T]he

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[33] Rowland T. Berthoff, *Southern Attitudes Toward Immigration, 1865-1914*, 17 J. of Southern Hist. 328, 347-48. (1951).

[34] Green, *J. Am. Legal History* 44, 55, 58.

[35] Berthoff, *supra* note 30, at 328.

[36] *Id.* at 343.

[37] *Id.* at 344.

[38] Josh Zeitz, *When America Hated Catholics*, Politico (Sept. 23, 2015).

[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."[39] Historical materials from the time associate the Mississippi provision with the National League for the Protection of American Institutions,[40] which was a leading anti-Catholic lobbying effort affiliated with the American Protective Association.[41] 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.

iv. White Democrats also sought to suppress missionary schools from the Reconstruction era.

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[39] McMahone *supra* note 6, at 472.

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

[41] Colin Gunstream, *Thesis: Home Rule or Rome Rule? The Fight in Congress to Prohibit Funding for Indian Sectarian Schools and Its Effects on Montana* (2015) 4, 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.").

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."[42] "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 literate."[43] 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 . . . ."[44]

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

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

[44] 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.

"[T]he American Missionary Association[] played a major educational role in Mississippi during the Reconstruction period."[45] "Most teachers, especially the Congregationalist AMA envoys, considered religious instruction to be an integral part of the education they were providing."[46] "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."[47]

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."[48] "[W]hite opposition to black education in Reconstruction Mississippi . . . dwarfed the scattered white support."[49] "Southern whites were hostile to schools for blacks when these were conducted by blacks or Northern whites. In many communities they burned schoolhouses,

[45] Smith *supra* note 39, at 205.

[46] *Id.* at 207.

[47] Bolton *supra* note 13, at 5.

[48] Tyack & Lowe *supra* note 15, at 242.

[49] Bolton *supra* note 13, at 6-7.

ostracized or beat teachers, and sought to intimidate the families who went to school."[50]

Meanwhile, though many African-American 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 misunderstanding marred the relationships of Northern whites and Southern blacks in a number of communities."[51]

Though both White Democrats and Black Republicans had reasons to oppose missionary schools, it was the Democrats who controlled the 1890 convention. Their goal was to stop African-American Republicans from voting, and "the most effective means of disfranchisement were literacy tests."[52] And the most effective means of ensuring African-American illiteracy was stopping the non-state-controlled schools that were teaching newly freed slaves and their families to read.[53]

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[50] Tyack & Lowe *supra* note 15, at 242. *Accord* Bolton *supra* note 13, at 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.").

[51] Tyack & Lowe *supra* note 15, at 242.

[52] Luckett *supra* note 19, at 466.

[53] Tyack & Lowe *supra* note 15, at 242.

Together, these twin prejudices fatally infected the enactment of Section 208. A constitutional provision targeting sectarian and other nonpublic schools had one purpose: to force every child into the monopoly control of Protestant public schools. For Catholics, that meant stopping any competition from parochial schools. For newly freed slaves, that meant ending any support for independent, faith-based schools that were affiliated with the Freedman's Bureau and were teaching a gospel of African-American empowerment. Both motives were based in cruel racial and religious prejudice that would fail the tests set by the U.S. Supreme Court in *Arlington Heights* and *Church of the Lukumi Babalu Aye.*

C. This Court must adopt a narrowing construction of the Mississippi provision in order to avoid creating a federal constitutional violation.

Mississippi courts are commanded to adopt a narrowing construction whenever doing so would avoid creating a constitutional violation were a provision read otherwise. *Bd. of Trs. of State Insts. of Higher Learning v. Ray*, 809 So. 2d 627, 636 (Miss. 2002) ("When one construction of a statute would endanger its constitutionality, it will be construed in harmony with the Constitution if, under the language of the statute, this may reasonably be done."). *See Threlkeld v. State,* 586 So. 2d 756, 759 (Miss. 1991).

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

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 that 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, the Court can avoid a federal constitutional problem. Such a construction is right on its own merits, as explained in the State Defendants' brief, and doubly so because it avoids the federal constitutional problem inherent in reliance on Section 208.

CONCLUSION

The Court should deny the preliminary injunction. The Plaintiff lacks standing: several decisions persuasively explain why the doctrine of taxpayer standing does not apply to federal funds, and no Mississippi court has granted standing in state court to challenge a use of federal funds before. The Plaintiff also lacks irreparable injury, because the alleged injury can be remedied with a later payment of money damages. And Plaintiff is unlikely to succeed on the merits, because this Court must adopt the State Defendants' proposed construction in order to avoid creating a federal constitutional problem because of the racial and religious prejudice that motivated Section 208's enactment.

[SIGNATURE ON NEXT PAGE]

Dated: August _____, 2022.

Respectfully submitted,

By: _____

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