IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI DEPARTMENT OF FINANCE AND ADMINISTRATION, ET AL. — **APPELLANTS**

VS. — **NO. 2022-SA-01129-SCT**

PARENTS FOR PUBLIC SCHOOLS — **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF NEITHER PARTY

ORAL ARGUMENT NOT REQUESTED

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The Institute for Justice ("IJ") is a national, public interest law firm and the nation's leading courtroom defender of educational choice programs: programs that provide financial assistance to parents who choose nonpublic schooling options for their children. For over thirty years, when opponents of educational choice have challenged such programs, IJ has stepped in to represent the families who are the program's true beneficiaries.

In considering the appeal in the above-captioned case, this Court is asked to determine whether the Chancery Court was correct in holding that the legislature appropriated public funds for nonpublic schools in violation of Section 208 of the Mississippi Constitution. While IJ takes no position on whether the legislature can provide institutional aid to nonpublic schools, how this case is decided could affect whether the legislature may enact educational choice programs that provide individual aid to students attending nonpublic schools. Because the distinction between individual and institutional aid is an important one, and because IJ has an interest in establishing—and defending—educational choice programs on behalf of their beneficiaries, it submits this amicus brief to highlight "matters of fact or law that may otherwise escape the court's attention." Miss. R.A.P. 29(a).

SUMMARY OF THE ARGUMENT

This brief takes no position on the narrow question of whether Section 208 of the Mississippi Constitution bars the legislature from providing institutional aid to nonpublic schools. Instead, this brief asks the Court, in resolving that narrow question, to either make clear that the legislature can provide individual aid to nonpublic school students or, at a minimum, not adopt an interpretation of Section 208 that would preclude the legislature, in its discretion, from providing such aid to students in the future.

In support, this amicus brief makes three points. First, the Mississippi Constitution permits the legislature to provide financial aid to students that they can then use for nonpublic goods and services, including tuition at nonpublic schools. Thus, even if Mississippi bars public funds from being appropriated directly to nonpublic schools, that bar does not encompass programs that provide aid to students who may use that aid to procure a nonpublic education. Second, this Court's recognition that the beneficiaries of such programs are students is consistent with rulings of numerous other high courts, including the U.S. Supreme Court. Third and finally, if this Court were to construe Section 208 to bar nonpublic students as a class from seeking or obtaining aid from the government, then it would run headfirst into the U.S. Supreme Court's jurisprudence on parental rights under the Fourteenth Amendment.

In sum, however this Court rules on direct aid to private schools, its opinion should make clear that Section 208 allows the state to enact educational choice programs that provide aid to students who choose to attend nonpublic schools. At a minimum, the Court should not preclude the legislature from exercising its discretion to adopt such a program in the future.

ARGUMENT

I. Section 208 Allows Financial Aid to Students Receiving a Nonpublic Education.

Section 208 permits the legislature to help students regardless of whether they attend public or private school. That is what this Court held over 80 years ago when—in *Chance v. Mississippi State Textbook Rating & Purchasing Board*, 90 Miss. 453, 200 So. 706, 708 (1941)—it upheld a law that appropriated funds to purchase textbooks and distribute them to students, including those in nonpublic schools. This Court should reaffirm that holding today or at least ensure that any interpretation it adopts does not preclude the legislature from enacting such student aid, including educational choice, programs in the future.

The facts of *Chance* parallel contemporary challenges to student aid programs. There, a group of taxpayers sued the state over a law that appropriated money for textbooks that could be used by all Mississippi students. Their complaint centered on Section 208, which provides, in relevant part, that funds may not be "appropriated . . . to any school that at the time of receiving such appropriation is not conducted as a free school." Miss. Const. art. VIII, § 208.

The plaintiffs argued that the textbook program "violate[d] the spirit and letter of Section 208 of the Mississippi Constitution" because it benefited nonpublic schools. *Chance*, 200 So. at 709. This Court rejected that argument. Regardless of whether the legislature could aid institutions consistent with Section 208, the state nonetheless had a "duty" to "encourage the promotion of intellectual and moral improvement" of all children, regardless of the schools they attend. *Id.* This "duty to the pupil" had to be fulfilled "by all suitable means." *Id.* at 710.

To determine whether the textbook program was an appropriate exercise of this duty—or, rather, an impermissible appropriation to nonpublic schools under Section 208—the Court drew guidance from a similar case in Louisiana.[1] There, the state supreme court upheld a law that funded books for students in public and private schools because the schools were "not the beneficiaries of these appropriations." *Chance*, 200 So. at 712. This Court then adopted the same reasoning as Louisiana's. Since the aid went "to the individual pupils," it did not constitute "direct or indirect aid to the respective schools which they attend." *Id.* at 713. Any aid that went to the private school came to it "incidentally" from the free and independent choice of the parents to send the child to private school. *Id*.

The reasoning from the Louisiana decision that the Court adopted in *Chance* is consistent with—indeed, dictated by—Section 208. The plain text of Section 208 does not prohibit the

[1] *Borden v. La. State Bd. of Educ.*, 123 So. 655 (La. 1929).

legislature from establishing aid programs for students. Indeed, the provision does not even contain the word "student." By finding that the legislature properly established a textbook program, the Court interpreted Section 208 in accordance with its actual text.

In adopting this plain reading of Section 208, moreover, the Court also clarified its own earlier ruling in *Otken v. Lamkin*, 56 Miss. 758 (1879).[2] In that case, the Court had invalidated a statute that allowed students to use their "proportionate share of the school fund" to attend a private school of their choice. *Chance*, 200 So. at 711–12. The Court explained that it had voided the law in *Otken* because the school fund was reserved for public schools under the Constitution. *Id.* (citing the Constitution's bar on "any part of the school or other educational funds of this state" being used for anything but public schools). The program in *Chance* would have met the same fate "only in the event" that it was similarly financed out of the school fund. *Id.* at 712. Since the textbook program wasn't funded from the school fund, it was perfectly permissible. *Id.* at 713.

In sum, this Court's ruling that properly designed student-aid programs are constitutional was right in 1941 and it is right today. For purposes of the Constitution, when a student receives aid, the student is the beneficiary—not the student's school. If the students in *Chance* had received, say, food stamps instead of textbooks, they would have been the beneficiaries—not the grocery stores they chose to shop at, even if those stores "incidentally" benefited when the recipients chose to shop there. Thus, no matter how the Court rules on whether there were prohibited appropriations to private schools in this case, it should not upset its ruling in *Chance* and its allowance for programs that aid individual students.

[2] One justice characterized this clarification as overruling *Otken v. Lamkin* "without expressly so stating." *Id.* at 715 (Anderson, J., dissenting).

II. Nearly Every Court to Consider the Constitutionality of Educational Choice Programs, Including This One, Has Distinguished Between Benefits to Students and Benefits to Schools.

This Court's ruling in *Chance* is consistent with the broader jurisprudence of K-12 educational choice programs that provide funds that students may use to procure a non-public education. In practically every instance when a court has been asked to determine whether the beneficiaries of such programs are students or schools, the court has answered: "Students." That is because the true beneficiaries of such programs are the persons whom the programs are designed to assist—not a party who is, at best, merely incidentally affected by the private choices of the true beneficiaries.

Consider the U.S. Supreme Court's jurisprudence under the Establishment Clause of the First Amendment, which bars the government from making a "law respecting an establishment of religion." U.S. Const. amend. I. Four times in the last forty years, the U.S. Supreme Court has considered the constitutionality, under the Establishment Clause, of educational choice or similar programs that provided aid to students, who could then use that aid at the religious (or nonreligious) schools of their choice. And four times, the Court has made clear that, "where a government aid program is neutral with respect to religion" and "provides assistance directly to a broad class of citizens" who independently direct the aid, that program "is not readily subject to challenge." *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). These programs include:

- Vouchers to students attending private schools, including religious ones, *id.*;
- Tax deductions for a child's educational expenses, including private school tuition at religious schools, *Mueller v. Allen*, 463 U.S. 388 (1983);

- Vocational scholarships that provided tuition aid to students, including those studying to become pastors at religious institutions, *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); and
- Funding for sign-language interpreters who assist deaf children, including those who attend religious schools, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

All these programs were upheld against Establishment Clause challenges for the same reason: In each case, it was the individuals—not the religious schools—who were the "primary beneficiaries" of the programs. *Zelman*, 536 U.S. at 651. The Supreme Court has reiterated this holding repeatedly over the last couple of years. *See, e.g.*, *Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022) (noting that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (explaining that "the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools").

State courts interpreting their own constitutions have also found that the beneficiaries of educational choice programs are *students* and that not a penny flows to any school under such programs but for the private and independent choice of students. In *Schwartz v. Lopez*, 382 P.3d 886, 899 (Nev. 2016), for example, the Nevada Supreme Court held that an education savings account program did not violate the state's bar on funding sectarian institutions. Just as in the U.S. Supreme Court cases discussed above, the Nevada Supreme Court concluded that when "public funds are deposited into an education savings account, the funds are no longer 'public funds' but are instead the private funds of the individual parent who established the account." *Id.* Likewise, in *Meredith v. Pence*, the Indiana Supreme Court found that a voucher program did not fund

religious schools "because no funds may be dispersed to *any* program-eligible school without the *private, independent selection by the parents of a program-eligible student*." 984 N.E.2d 1213, 1228–29 (Ind. 2013) (emphasis in original). State courts of last resort in Alabama, Wisconsin, Ohio, and North Carolina have held the same.[3]

In sum, if this Court suggested, in resolving the present dispute concerning appropriations to private *schools*, that Section 208 bars educational choice programs that provide aid to *students*, it would not only be implicitly overruling its own precedent in *Chance* but would also be out of step with an overwhelming body of precedent from the U.S. Supreme Court and other state courts of last resort. Consequently, no matter what this Court decides about the lower court's ruling, it should reaffirm that Section 208 does not bar aid to students—even if they may ultimately direct the aid to nonpublic schools of their choice.

[3] *See Magee v. Boyd*, 175 So. 3d 79, 135 (Ala. 2015) ("[T]he Section 8 tax-credit provision was designed for the benefit of *parents and students*, and not for the benefit of religious schools. . . . [A]ny aid that may ultimately flow to a religious school as a result of the tax credit will do so *only* as a result of the private decision of individual parents rather than flowing directly from the State." (emphasis in original)); *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998) ("[T]his court has held that public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties . . . ."); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999) ("The primary beneficiaries of the School Voucher Program are children, not sectarian schools."); *Hart v. State*, 774 N.E.2d 281, 292 (N.C. 2015) ("the scholarships at issue here are available only to families of modest means, and therefore inure to the benefit of the eligible students in the first instance"). *See also Toney v. Bower*, 744 N.E.2d 351, 362 (Ill. App. Ct. 2001) ("Any government aid to religion occurred only as the result of the private decisions of individual parents."). *But see Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (striking down a choice program in Arizona on the grounds that it primarily benefited schools because public funds could only be used for tuition and fees at private schools). *See also Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013) (upholding a later-enacted program in Arizona because public funds could be used for a variety of educational services, including tuition and fees at private schools).

III. Any Interpretation of Section 208 That Barred Nonpublic Students From Obtaining Financial Aid Would Almost Certainly Violate the U.S. Constitution.

It is no surprise that this Court—and, indeed, virtually every court to consider the issue—has concluded that the legislature is permitted to establish programs designed to aid students who choose to attend nonpublic schools. In fact, even as the legislature is permitted by the Mississippi Constitution to adopt such programs, Mississippi is *prohibited* by the federal Constitution from imposing a state constitutional ban on public aid to nonpublic school students.[4] This prohibition is rooted in two provisions of the Fourteenth Amendment.

First, the Fourteenth Amendment's Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Among these "fundamental" interests is the parental right to "direct the education and upbringing" of one's children, including by sending the child to a nonpublic school. *Id.* (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)). The Supreme Court has likened this liberty interest "to the specific freedoms protected by the Bill of Rights." *Id*. In fact, it is "perhaps the oldest of the fundamental liberty interests recognized by" the Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).[5]

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[4] This is not to say that the state *must* provide aid to nonpublic school students, but only that it cannot constitutionally bar the legislature's ability to provide such aid if it so chooses.

[5] *See also id.* at 80 (Thomas, J., concurring in judgment) ("I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in *Pierce v. Society of Sisters* holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them." (citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (recognizing "the right of parents to provide an equivalent education in a privately operated system" and that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society"); *Pierce*, 268 U.S. at 534–35 (recognizing the "liberty of parents and guardians to direct the upbringing and education of children under their control"); *id.* at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its

Of course, the state may not condition the availability of public benefits on the surrender of a fundamental right or liberty interest. *See Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."). This basic principle of constitutional law has been repeatedly affirmed by the Supreme Court in a variety of contexts:

- "[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).
- The state may not condition a tuition payment on a parent surrendering her right to obtain a religious education for her child. *Carson*, 142 S. Ct. at 2002; *Espinoza*, 140 S. Ct. at 2261.
- The state may not condition a police officer's job and pension benefits on surrender of the officer's right against self-incrimination. *Garrity*, 385 U.S. at 500.[6]

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children by forcing them to accept instruction from public teachers only."); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (holding that the Due Process Clause protects the liberty "to acquire useful knowledge . . . and bring up children," including "the right of parents to engage [a private teacher] to instruct their children"); *Espinoza*, 140 S. Ct. at 2261 ("[W]e have long recognized the rights of parents to direct 'the religious upbringing' of their children. Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution." (citation omitted)); *Glucksberg*, 521 U.S. at 720 ("In a long line of cases, we have held that . . . the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children . . . .").

[6] *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It 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."); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956) (holding state may not condition public school teacher's employment on surrender of right against self-incrimination); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) (noting government may not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens"); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017) ("Trinity Lutheran is free to continue operating as a church, . . . [b]ut that freedom comes at the cost of automatic and absolute exclusion from the benefits of a

- The state may not "put [a church] to the choice between being a church and receiving a government benefit." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 465 (2017).

Conditioning the availability of benefits on the non-exercise of fundamental parental rights is no different. *Cf. Garrity*, 385 U.S. at 500 (listing a non-exhaustive list of constitutional rights and liberties the surrender of which government may not require for receipt of a public benefit). While Mississippi's Constitution certainly does not require the legislature to provide aid for children whose parents choose a nonpublic education for them, the federal Constitution prohibits it from conditioning even the possibility of such aid on a parent's surrender of her fundamental right to choose a nonpublic school for her children. Thus, for the same reasons that the Supreme Court has held it is unconstitutional to condition a government benefit on foregoing a right in other contexts, it would also be unlawful here.

Second, the Fourteenth Amendment's Equal Protection Clause bars an interpretation of Section 208 that imposes a bar on aid for nonpublic school students. The fundamental guarantee of equal protection is "that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). As the U.S. Supreme Court plainly put it: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id*.

Thus, even when a state does not condition receipt of a public benefit on the surrender of a fundamental right, the Supreme Court still looks askance if the state denies the availability of

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public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, . . . the State has punished the free exercise of religion . . . .").

benefits—including educational benefits—to a particular *class* of people. For example, in *Plyler v. Doe* the Court invalidated a law that withheld state funds for the education of undocumented children. 457 U.S. 202 (1982). The Court explained that the Equal Protection Clause means that "all persons similarly circumstanced shall be treated alike." *Id.* at 216. By restricting the ability of one group of children to obtain an education, the Court explained, the law inflicted an "inestimable toll . . . on the social, economic, intellectual, and psychological well-being" of undocumented children unbalanced by any countervailing state interest. *Id.* at 222. Because the "denial of education to some isolated group of children" is not a state interest, the law violated equal protection. *Id.* at 220–21.

The Court's decision is *Plyler* was not a one-off, but rather a specific application of a more general rule that the government may not make it more difficult for one group of citizens to obtain benefits than another. For example, in *Romer*, the Court invalidated a state constitutional provision that prohibited municipalities from extending certain benefits and protections to gays and lesbians. *Id.* In *U.S. Department of Agriculture v. Moreno*, the Court held it violated equal protection to deny food stamps to unrelated people sharing a home. 413 U.S. 528, 534 (1973). In *City of Cleburne v. Cleburne Living Center*, the Court invalidated a law restricting housing for intellectually disabled people. 473 U.S. 432, 446–67 (1985). This Court has also endorsed this rule. In *Chance*, it observed that taking away a benefit from a student simply because he attended a sectarian school "would constitute a denial of equal privileges on sectarian grounds." *Chance*, 200 So. at 713.

If Section 208 were interpreted as a bar to aid for families who use nonpublic schools, it would create the same federal constitutional problem that existed in the above cases: Such an interpretation would exclude families who choose nonpublic schooling—and *only* families who

choose nonpublic schooling—from the benefit. It would make it "more difficult"—indeed, impossible— "for [this] one group of citizens than for all others to seek aid from the government." *Romer*, 517 U.S. at 633. It would be "a denial of equal protection of the laws in the most literal sense," unbalanced by any possible interest the state has in singling out one group of people as ineligible for public assistance. *Id.*

In sum, while the federal Constitution does not *require* states to establish educational choice or other programs that provide aid to families who exercise their federal constitutional right to send their children to a nonpublic school, it does prohibit state constitutions from acting as a *bar* on government's discretion to provide aid to such families. Because the federal Constitution prohibits such a bar, the Court should make clear that Section 208 does not restrict the state's ability to provide aid to students who attend nonpublic schools.

CONCLUSION

No matter how this Court resolves the constitutionality of providing direct financial assistance to nonpublic schools, it should make clear—or, at a minimum, not foreclose the possibility—that Section 208 allows aid for students whose parents exercise their fundamental constitutional right to choose a nonpublic education for their children.

Respectfully submitted, this 12th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to counsel of record registered to use the MEC system in this action.

Respectfully submitted this 12th day of May, 2023.

/s/ Aaron R. Rice
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