In the SUPREME COURT of the STATE of MISSISSIPPI

NO. 2015-CA-01227

CLARKSDALE MUNICIPAL SCHOOL DISTRICT,
CLAY COUNTY SCHOOL DISTRICT,
GREENE COUNTY SCHOOL DISTRICT,
GREENVILLE PUBLIC SCHOOL DISTRICT,
HATTIESBURG PUBLIC SCHOOL DISTRICT,
HUMPHREYS COUNTY SCHOOL DISTRICT,
JACKSON PUBLIC SCHOOL DISTRICT,
LEAKE COUNTY SCHOOL DISTRICT,
LELAND SCHOOL DISTRICT,
NORTH BOLIVAR CONSOLIDATED SCHOOL DISTRICT,
OKOLONA MUNICIPAL SEPARATE SCHOOL DISTRICT,
PRENTISS COUNTY SCHOOL DISTRICT,
RICHTON SCHOOL DISTRICT,
SIMPSON COUNTY SCHOOL DISTRICT,
SMITH COUNTY SCHOOL DISTRICT,
SUNFLOWER COUNTY CONSOLIDATED SCHOOL DISTRICT,
TATE COUNTY SCHOOL DISTRICT,
WAYNE COUNTY SCHOOL DISTRICT,
WEST TALLAHATCHIE SCHOOL DISTRICT,
WEST BOLIVAR CONSOLIDATED DISTRICT, and
WILKINSON COUNTY SCHOOL DISTRICT,

Appellants,

v.

STATE OF MISSISSIPPI,

Appellee.

On Appeal from the Chancery Court of Hinds County, Mississippi, First Judicial District

Reply Brief of Appellant School Districts

ORAL ARGUMENT REQUESTED

OF COUNSEL:

Ronnie Musgrove (3698)
Michael Smith, II (103575)
MUSGROVE/SMITH LAW
599 Highland Colony Parkway, Suite 110
Ridgeland, Mississippi 39157
(T): 601.852.1696 | (F): 601.852.1714
musgrove@musgrovesmith.com
michael@musgrovesmith.com

Michael V. Ratliff (4639)
JOHNSON RATLIFF & WAIDE
1300 Hardy Street
Hattiesburg, Mississippi 39401
(T): 601.582.4553 | (F): 601.582.4556
mratliff@jhrlaw.net

Dorian E. Turner (8532)
Dorian E. Turner, PLLC
300 West Capitol St., Suite 200
Jackson, Mississippi, 39203
(T): 601.354.2971 | (F): 601.354.3656
deturner@detpllc.com

Casey L. Lott (101766)
Dustin C. Childers (103742)
Joe-Colby R. Langston (104855)
LANGSTON & LOTT, P.A.
100 South Main Street
Booneville, Mississippi 38829
(T): 662.728.9733 | (F): 662.728.1992
clott@langstonlott.com
dchilders@langstonlott.com
clangston@langstonlott.com

Jesse Mitchell, III (103020)
THE MITCHELL FIRM, PLLC
1020 Highland Colony Pkwy, Suite 704
Ridgeland, Mississippi 39157
(T): 769.300.0462 | (F): 601.510.1981
jmitchell@themitchellfirms.com

ATTORNEYS FOR SCHOOL DISTRICTS

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I. CONSTITUTIONAL MANDATES BIND THE LEGISLATURE.

The State's brief has all the elements of a good political speech – if you keep saying the wrong thing long enough, people will start to believe it. And the next thing you know, the erroneous proposition will be repeated in paragraph 2 of every newspaper story thereafter. But no matter how many times something is mistakenly repeated, this Court, as the ultimate expositor of law in Mississippi, is tasked with getting the issue right.[1] In *Myers v. City of McComb*, this Court pronounced that "[w]e have not so learned the law as to ignore the Mississippi Constitution."[2]

No matter how many times the State argues that Miss. Code Ann. § 37-151-6 contains entrenching language, it does not. Entrenching language exists only when specific language forbids a future legislature from amending the alleged entrenching provision. As the learned professor and constitutional law expert, Eric Posner, noted, an entrenching statute must have some propositional content plus an additional provision which governs the conditions under which the statute may be repealed or amended:

> On our definition, an ordinary law has some propositional content P--no bicycles in the park, for example. An entrenching statute has this propositional content plus an additional

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1 *See UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., Inc.*, 525 So. 2d 746, 754 (Miss. 1987) ("This Court, as a matter of institutional necessity and constitutional imperative, is the ultimate expositor of the law of this state. Notwithstanding our respect for and deference to the trial judge, on matters of law it is *our* job to get it right. That the trial judge may have come close is not good enough.") (emphasis in original).

2 943 So. 2d 1 (Miss. 2006) at (¶28) (citing *Colbert v. State*, 39 So. 65, 68 (Miss. 1905) ("[w]e will not be deterred from declaring these principles because of any administrative construction and practice to the contrary. If such practice has grown up under a mistaken conception of the law, it should be at once abandoned. No false construction of the Constitution by any administrative department, however long continued, can ever ripen into law.")).

> provision R which governs the conditions under which the statute may be repealed or amended. For example, R might say that P cannot be repealed or amended with less than a two-thirds majority in both the House and the Senate. Thus, an entrenching statute might say: (P) no bicycles in the park; and (R) the prohibition on bicycles in the park cannot be repealed with less than a two-thirds majority.[3]

On its face, it is clear Miss. Code Ann. § 37-151-6 fails to meet this definition. As the School Districts have repeatedly argued, the Legislature is free to repeal or amend the statute if it so chooses. In fact, the Legislature has attempted to repeal Miss. Code Ann. § 37-151-6 in recent years, but year after year, the attempt has failed to gain any traction, ultimately not making it out of committee.

The State's brief brings to light that it has not come to grips with the fact that the Mississippi Constitution can entrench the Legislature. As Mr. Posner notes:

> Politicians secure their policies against future modification by setting up agencies and commissions, drafting legislation in ways that make repeal especially visible, inserting procedures that alert interested parties to potential amendments, committing the government to contracts, engaging in deficit spending, restricting opportunities for debate in legislatures, modifying the voting rules, and even ingeniously manipulating labels (as Roosevelt was said to do, when he called his social security program, which was a simple tax-and-transfer system, a pension plan). These are all forms of entrenchment, and formal legislative and judicial entrenchment do not pose different opportunities and dangers. Critics of entrenchment must come to terms with the ability of legislatures to affect the future and explain what makes legislative entrenchment special and worthy of constitutional concern.[4]

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[3] Eric Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1667 (2002).

[4] *Id.* at 1705.

In that light, the Mississippi Constitution "entrenches" the Legislature in many ways. Obvious sections include:

- Miss. Const. art. IV, § 101: "The seat of government of the state shall be at the city of Jackson, and shall not be removed or relocated without the assent of a majority of the electors of the state."
- Miss. Const. art. IV, § 106: "There shall be a state librarian, to be chosen by the legislature . . . ."
- Miss. Const. art. IV, § 36: "The Legislature shall meet at the seat of government in regular session on the Tuesday after the first Monday of January . . . ."
- Miss. Const. art. IV, § 39: "The senate shall choose a president pro tempore to act in the absence or disability of its presiding officer."

More notable sections obligate (i.e., entrench) the Legislature to appropriate money. For instance, Miss. Const. art. VI, §§ 145 and 152 require the Legislature to divide the state into appropriate Supreme Court, circuit, and chancery court districts while Miss. Const. art. VI, § 166 requires the Legislature to set judges' salaries. Section 166 further provides that judges' salaries shall not increase or diminish during their term.[5] Once the Legislature has set the salary, now codified in Miss. Code Ann. § 25-3-35, the general law statute creates a

[5] *See* Miss. Const. art. VI, § 166 ("The judges of the Supreme Court, of the circuit courts, and the chancellors shall receive for their services a compensation to be fixed by law, which shall not be increased or diminished during their continuance in office.").

binding obligation on future legislatures, leaving them no choice but to fund those salaries for at least a four-year period.

Likewise, these general law provisions impinge on the veto power of the Governor. For it matters not whether the Governor likes or dislikes the judiciary, the Constitution demands that once the number of judgeships is created and the compensation set, the Legislature must fund them. Other examples include the "98% rule" and the gasoline tax.

Pursuant to Miss. Code Ann. § 27-103-125, one legislature cannot appropriate expenditures exceeding "ninety-eight percent (98%) of the amount of general fund revenue estimate for the succeeding fiscal year[.]" No doubt, under the State's argument, this requirement to only appropriate 98% of revenue is entrenching on the Legislature, while also impinging on the Governor's veto authority; however, just like the School Districts argue may be done here, the Legislature has repeatedly amended Miss. Code Ann. § 27-103-125 to read, "for fiscal years 2010, 2011, 2012, 2016 and 2017 only, the total proposed expenditures from the State General Fund in Part 1 of the overall budget shall not exceed one hundred percent (100%) of the amount of the general fund revenue estimate for the succeeding fiscal year[.]"[6]

Similarly, the State collects a gasoline tax (either 18¢ or 14.4¢ per gallon) from "[a]ny person in business as a distributor of gasoline or who acts as a distributor of gasoline[.]"[7] Miss. Code Ann. § 27-5-101 then sets forth how those taxes must be distributed. In short,

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6 *See* 2009 Miss. Laws 563, § 1; 2010 Miss. Laws 562, § 1; 2015 Miss. Laws 471, § 2; 2016 Miss. Laws 460, § 2.

7 Miss. Code Ann. § 27-55-11.

the statute requires that those taxes go to the Mississippi Department of Transportation to help pay for roads, bridges, and other maintenance. Again, under the State's argument, Miss. Code Ann. § 27-5-101 would be an entrenching statute that also impinges on the Governor's veto power. This is not the case.

Other provisions obligating the Legislature to appropriate money are Miss. Const. art. VI, § 173 (requiring the Legislature to establish and fund attorney general's salary)[8] and Miss. Const. art. VI, § 174 (requiring the Legislature to establish and fund district attorneys' salaries).[9] The Legislature has the prerogative to determine the number of district attorneys needed and the compensation for those DAs and the attorney general. But once it completes that task, the Legislature has a mandatory duty to appropriate the money to fund those amounts. Miss. Code Ann. §§ 25-3-31 and 25-3-35 are binding on future legislatures until they are amended or repealed.

Indeed, this Court previously recognized these mandates, specifically as they relate to the Legislature's funding of the judiciary in this State. In *Hosford v. State*, the Court was faced with the difficult task of determining whether a trial judge erred by failing to declare a mistrial due to noise distraction.[10] Due to lack of funding, the courthouse in which the trial took place had fallen into disrepair.[11] As a result of such disrepair, over 35 noise

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8 *See* Miss. Code Ann. § 25-3-31.

9 *See* Miss. Code Ann. § 25-3-35.

10 525 So. 2d 789 (Miss. 1988).

11 *Id.* at 794.

interruptions occurred during the one-day trial.[12] In addressing the issue for inadequate funding, the Court noted that "[t]he same constitutional requirement for our courts obviously carries with it the duty on the part of the Legislative branch to provide sufficient funds and facilities for them to operate independently and effectively. Any holding otherwise would emasculate the constitutional mandate for three separate and co-equal branches of government by reducing courts to supplicants of the Legislature."[13] The Court went on to say that "[n]o court should ever usurp the authority of the Legislature to furnish what funds and facilities it deems proper except in cases of absolute necessity. On the other hand, *if the Legislative branch fails in its constitutional mandate to furnish the absolute essentials required for the operation of an independent and effective court,* then no court affected thereby should fail to act.[14]

Hosford renders the State's argument regarding "mandatory" versus "directory" on pages 17 and 18 of its brief without merit. Like in *Hosford*, when the Legislature establishes *conditions and limitations* defining what level of funding is necessary for schools to operate at a minimally adequate level, it has therein defined the *absolute essentials* required for the operation of free public schools.

Just like the judiciary, these same "entrenching" mandates exist regarding legislative compensation. Miss. Const. art IV, § 46 provides that "members of the Legislature shall severally receive from the State Treasury compensation for their services . . . ." Once legislators' compensation has been set, as is done in Miss. Code Ann. § 5-1-41 et seq., the

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12 *Id.*

13 *Id.* at 797.

14 *Id.* at 798 (emphasis added).

Legislature has a binding obligation to appropriate money to pay the total costs. This mandate is binding on future legislatures unless and until the Legislature amends or repeals the statute.

Finally, the School Districts point out that this same language exists in Article 5 of the Constitution regarding the executive branch of government.

- Miss. Const. art. V, § 118: "The Governor shall receive for his services such compensation as may be fixed by law, which shall neither be increased nor diminished during his term of office."
- Miss. Const. art. V, § 130: "The Lieutenant Governor shall receive for his services the same compensation as the speaker of the House of Representatives."
- Miss. Const. art. V, § 133: "[The Secretary of State] shall receive such compensation as shall be prescribed."
- Miss. Const. art. V, § 134: "[The State Treasurer and Auditor] shall receive such compensation as may be provided by law."

Similarly, Miss. Const. art. IV, § 103 provides that the Legislature shall provide suitable compensation to all officers needed by the Governor when vacancies have occurred. These mandates are binding on future legislatures, requiring them to appropriate sufficient money to fund these positions. In all instances herein mentioned, the provisions of Sections 33, 63, and 64 of the Mississippi Constitution are secondary to these mandates. These statutory provisions would only be entrenching legislation if, as set out above, each statute

contained some additional condition under which the statute must be amended or repealed.[15] As it stands, none of these mandates are entrenching and neither is Miss. Code Ann. § 37-151-6.

In furtherance of this argument, the School Districts adopt and incorporate herein The Mississippi Center for Justice's argument in its Amicus Brief concerning these points, specifically beginning at page eight. The Amicus Brief cites Op. Miss. Att'y Gen. No 2009-00399, 2009 WL 2184235 (June 26, 2009) to show the remedy available even if the Legislature fails to appropriate funds. As the Attorney General noted, citing *State Treasury v. Fletcher*, 163 S.W.3d 852, 866 (Ky. 2005), "constitutional provisions are mandatory and never directory."[16] For similar reasons, the Attorney General's Opinion opined that any office or agency expressly mentioned in the Constitution, or agencies responsible for carrying out duties of government expressly mentioned in the Constitution, would have the same remedy as one of the governmental branches.

For these reasons, the School Districts argue that, just like the many mandates herein discussed, Section 201 of the Mississippi Constitution requires the Legislature to "provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe." The Legislature confirmed that when it enacted Miss. Code Ann. § 37-151-6. Until the Legislature either amends or repeals Miss. Code Ann. § 37-151-1 et seq., it must abide by it.

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15 *See*, supra, nn. 3 & 4 and accompanying text.

16 Op. Miss. Att'y Gen. No. 2009-00399, 2009 WL 2184235, at *4.

II. SECTION 201 OF THE MISSISSIPPI CONSTITUTION MANDATES THAT THE LEGISLATURE PROVIDE FOR THE MAINTENANCE AND SUPPORT OF FREE PUBLIC SCHOOLS IN THIS STATE.

The only way to lend credence to the State's brief and its position on entrenching legislation is to accept that the State does not believe there is a mandate in Miss. Const. art. VIII, § 201. The School Districts disagree.

A. The History of Section 201.

When the Constitution of 1890 was adopted, Section 201 stated, "[i]t shall be the duty of the Legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty–one years, and, as soon as practicable, to establish schools of higher grade." This was a mandatory provision requiring the Legislature to establish a system of free public schools. For a school to be within the system of free public schools required by Section 201, the establishment and control thereof must be vested in the public officials charged with the duty of establishing and supervising that system of schools.[17]

In 1960, Section 201 was amended by the people to read, "[t]he Legislature may, in its discretion, provide for the maintenance and establishment of free public schools for all children between the ages of six (6) and twenty-one (21) years." Noticeably missing was the mandatory *shall* language that required a free public education for "all" children. One can speculate on the reasons why this amendment occurred, but *Brown v. Bd. of Educ. Of Topeka,*

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17 *See Otken v. Lamkin*, 56 Miss. 758, 764 (1879) ("The system of public education established and ordained by art. 8 of our Constitution contemplates the creation and maintenance of 'a uniform system of free public schools,' superintended and controlled by State officials.").

Shawnee Cnty., Kan., 347 U.S. 483 (1954) was decided six years prior, and integration was in full swing.[18]

The last amendment came in 1987, which provided the current language: "[t]he legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the legislature may prescribe." As evidenced by the original adoption and the two, subsequent amendments, Section 201 has gone from a mandatory establishment of public schools to a permissive option and back to a mandatory establishment. As this Court has held, an amended section of the Constitution has the same force and effect as if it were in the original Constitution.[19] When the Constitution mandates maintenance and support, the Legislature must comply.[20]

B. What is the Mandate?

Section 201 obligates the Mississippi Legislature is to establish, maintain, and support free public schools. Section 201 does not mandate whether the schools are county, municipal, attendance center, consolidated, or how many days a year a student must attend. It neither mandates the hours each day a student must attend nor what age a child must be to attend school. It does not specify how many grades a school must offer, how many teachers a school must provide, whether the school must have heating and air conditioning,

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18 Michael P. Mills & William Quin, II, *The Right to a "Minimally Adequate Education" as Guaranteed by the Mississippi Constitution*, 61 ALB. L. REV. 1521, 1527 (1998) ("Mississippi's Education Clause was unfortunately modified in a 1960 legislative attempt to circumvent the mandate of Brown v. Board of Education.").

19 *Cf. State v. Powell*, 27 So. 927 (Miss. 1900) (holding that successful amendment becomes part of Constitution).

20 *See State v. Bd. of Levee Comm'rs for Yazoo-Miss. Delta*, 932 So. 2d 12, 26-27 (Miss. 2006) (holding statute that permitted Legislature to take levee funds and use for non-levee purposes unconstitutional).

the courses to be taught, or the minimal grades a student must achieve to pass. All those things fall under the "conditions and limitations" provision of Section 201. The mandatory provision of Section 201 – to "establish, maintain and support free public schools" – does not appear in just one code section, but in a number of statutes, collectively forming the "system." But the funding mechanism of that system comes in the form of the general law, Miss. Code Ann. § 37-151-1 et seq.

Specifically, Miss. Code Ann. § 37-151-5(a) provides:

> "Adequate program" or "adequate education program" or "Mississippi Adequate Education Program (MAEP)" shall mean the program to establish adequate current operation funding levels necessary for the programs of such school district to meet at least a successful Level III rating of the accreditation system as established by the State Board of Education using current statistically relevant state assessment data.

Miss. Code Ann. § 37-151-5(c) provides:

> "Base student" shall mean that student classification that represents the most economically educated pupil in a school system meeting the definition of successful, as determined by the State Board of Education.

Miss. Code Ann. § 37-151-5(d) provides:

> "Base student cost" shall mean the funding level necessary for providing an adequate education program for one (1) base student, subject to any minimum amounts prescribed in Section 37-151-7(1).

Miss. Code Ann. § 37-151-5(t) provides:

> The term "successful school district" shall mean a Level III school district as designated by the State Board of Education using current statistically relevant state assessment data.

Miss. Code Ann. § 37-151-7(1)(b):

> **Determination of base student cost.** Effective with fiscal year 2011 and every fourth fiscal year thereafter, the State Board of Education, on or before August 1, with adjusted estimate no later than January 2, shall submit to the Legislative Budget Office and the Governor a proposed base student cost adequate to provide the following cost components of educating a pupil in a successful school district: (i) instructional cost; (ii) administrative cost; (iii) operation and maintenance of plant; and (iv) ancillary support cost. For purposes of these calculations, the Department of Education shall utilize financial data from the second preceding year of the year for which funds are being appropriated.

Following these numerous conditions and limitations, Miss. Code Ann. § 37-151-7 then sets out an extensive methodology used to arrive at an amount that meets the minimum funding requirement to comply with the mandate. Local districts are obligated to assess enough millage to meet their requirement to provide part of the MAEP cost. Miss. Code Ann. § 37-151-7(2)(a). Each Appellant School District has levied its required millage pursuant to Miss. Code Ann. § 37-151-7(2)(a).

Forming the basis of the mandate for free public schools are the requirements for instructional offering for every school, the teacher student ratio mandate, the providing of textbooks and transportation, and the calculation by the State of Mississippi as to how much it costs per student to provide this minimum level of education. These form the very *minimum* to comply with the word "free" found in Section 201 of the Constitution. To study the State's brief, one would think our schools are funded with Monopoly money. If Section 201 is not a mandate to fund, and Miss. Code Ann. § 37-151-6 is not the legislative call to meet that mandate, then the Legislature would and could fund our schools at whatever level it wanted regardless of the minimum requirement of a system of free public schools. This

would render Section 201 meaningless. And as this honorable Court is aware, one of the core tenets of constitutional and statutory interpretation requires courts to give effect to the plain meaning of the mandate when to do otherwise would render it meaningless and ineffective.[21]

Under the "alternative funding" theory recognized by the lower court, the Legislature could in any year, for any reason, fund our system of free public schools at any level it chooses, a fact admitted by the State in arguments below.[22] On this point, the School Districts agree with the Center for Justice's Amicus Brief. at page 5. For this reason alone, this Court should reverse and render as to the State's obligation to fully fund the MAEP. The Constitution controls and establishes the requirements for the Legislature. An alternative formula for a system of free public schools that can be funded at whatever level the Legislature chooses is no formula at all. As set out above, a specific mandate of the Constitution takes priority over the Legislature's plenary appropriations authority. Therefore, it is not statutory entrenchment when the Legislature follows the dictates of the Constitution. Nor is it entrenchment when the Legislature is free to repeal or replace, at any time, the conditions and limitations it has established.

The dictates found in the statutes are the conditions and limitations that the Legislature has the authority to establish pursuant to Section 201. The undersigned went too far in his previous pronouncement that the "subject to available funds" language was a condition or limitation. A general statute, such as Miss. Code Ann. § 37-151-7, always has

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21 *See Davis v. Miller*, 32 So. 2d 871, 873 (Miss. 1947).

22 R. 279 ([T]he 2006 legislation would not have included a contingency *for when the Legislature chooses not to 'fully fund' MAEP.*") (emphasis added).

priority over an appropriation bill.[23] Thus, *if no constitutional mandate existed*, the phrase "subject to available funds" would take precedence over any appropriation bill. But this is not true when there is a constitutional mandate such as in this case. As entering law students know, "if there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield."[24] To find otherwise would render the mandate meaningless (e.g., judges' compensation statute discussed, *supra*). Then once again, the Legislature could fund at the level it wanted as opposed the mandates of the Mississippi Constitution. For all the reasons discussed above, this cannot be the case.

III. ALTERNATIVELY, IF THIS COURT FINDS THAT SECTION 201 IS NOT A MANDATE, THEN MISS. CODE ANN. § 37-151-6 IS UNAMBIGUOUS AND THE LOWER COURT ERRED IN RULING THAT IT MEANT SOMETHING ELSE.

The State spends an inordinate amount of its brief explaining how one can contort unambiguous phrases into ambiguous ones and then use inapplicable canons of construction to explain why the lower court was correct. The School Districts set out their position on statutory construction in pages 23-32 of their principal brief. The Amicus Brief of The Mississippi Center for Justice addresses these issues in pages 2-8. The School Districts adopt the Amicus Brief on these issues. The School Districts will address the most egregious parts of the State's Brief.

The State never addresses the unambiguous language found in Miss. Code Ann. § 37-151-6 and how it can overcome that language. *City of Natchez, Miss. v. Sullivan* holds that

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[23] *See* Op. Miss. Att'y Gen. No 2013-00503, 2014 WL 581502 (January 10, 2014) ("It is our opinion that the general law prevails over an appropriations bill in so far as the appropriations bill would purport to repeal or amend the general law.").

[24] *Newell v. State*, 308 So. 2d 71, 77 (Miss. 1975)

in order to apply the canons of statutory construction, a judge must find that the statute in question to be ambiguous.[25] The lower court in this case never found Miss. Code Ann. § 37-151-6 to be ambiguous. This was error as a court cannot restrict or enlarge the meaning of an unambiguous statute.[26]

Beginning with the lower court hearing, the State continues advancing its position with all the clarity of muddy water. For instance, in support of its argument that the lower court used the proper canons of construction to interpret legislative intent, the State argues on page 13 of its brief, and again in footnote 6, that Section 4 of SB 2604 altered the MAEP formula. The State's argument continues that the language found in Miss. Code Ann. § 37-151-7(1)(f) applied to all appropriations bills after 2011. This is wrong.

SB 2604 became effective on July 1, 2006, not 2011. Section 4 amended Miss. Code Ann. § 37-151-7 in several areas. The first was subsection (a), which defined and determined average daily attendance. The subsection was made effective with the fiscal year 2011. From the date of passage to fiscal year 2011, the Mississippi Department of Education continued to use the existing formula and the definition of average daily attendance found in Miss. Code Ann. § 37-151-5(n), which was also in SB 2604 but was not amended. In addition, it is worth noting that average daily attendance has no bearing on the individual base student cost, just the total allocation when multiplied by the base student cost.

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25 612 So. 2d 1087, 1089 (Miss. 1992) ("In considering a statute passed by the legislature, the first question a court should decide is whether the statute is ambiguous. If it is not ambiguous, the court should simply apply the statute according to its plain meaning and should not use principles of statutory construction.) (citations omitted); *see also* Miss. Center for Justice Amicus Br. at 2-3.

26 *Marx v. Broom*, 632 So. 2d 1315, 1318 (Miss. 1994).

In addition, SB 2604 amended the determination of base student cost, Miss. Code Ann. § 37-151-7(1)(b), effective FY2011, and left in place the existing calculation of base student cost until FY2011. The existing language of Miss. Code Ann. § 37-151-7(1)(a)-(f) remained in place. There was virtually no change from subsection (1)(c) to subsection (1)(f), which is where the State gleans its "alternative funding" theory. If the State's position had any merit at all, the language found in subsection (1)(f) would appear in subsection (1)(b). If the legislative intent was for it to apply with the new wording going forward in 2011 it would have appeared there and not in the old language section, yet another reason the Chancellor erred.

Further, the language in Miss. Code Ann. § 37-151-7(1)(f) was not an alternative formula but language that applied to the years of 2007, 2008, and 2009. The subsection where that language is found was not amended, was not made effective in 2011, but was language that was effective on July 1, 2006. When read in *pari materia* with Miss. Code Ann. § 37-151-6, the mandated funding in Miss. Code Ann. § 37-151-6 applied to all years starting in 2010 forward. As set out in the Mississippi Center for Justice's Amicus Brief, adopted herein, the amendment to Miss. Code Ann. § 37-151-7(1)(f) dealt with allocation and not funding. The plain language of a statute is the best evidence of legislative intent, not subsequent appropriation bills or even later provisions in the same act. As set forth in *Warner v. Board of Trustees of Jackson Municipal School District*:

> The rule invoked by the appellant that, as between conflicting sections of the same act, the last in order of arrangement will control has no application, where the intention and purpose of the whole act is clear and unmistakable, and to accept the literal wording of the latter provision would destroy a legislative policy, nullify the main provisions of the act, and entirely defeat

the manifest intention and purpose of the lawmakers.[27]

Not only did the Chancellor err by failing to find Miss. Code Ann. § 37-151-6 to be unambiguous, he then rendered Miss. Code Ann. § 37-151-6 meaningless by improperly looking to other provisions of the act to interpret an otherwise unambiguous statute. The Chancellor's Final Order should have reached an interpretation that would have construed the provisions *in pari materia*, harmonized them, and avoided any conflict. Because it failed to do so, the Final Order violates the previous principles of statutory construction and other applicable law.

The State again misses the mark on *Bank of Morton v. State Bond Commission*, 199 So. 507(Miss. 1941). There was no debate about the ability to bind a future Legislature. The question was whether a previous legislature could bind the *method of payment*. The answer was a resounding *no*. Likewise, footnote 6 of the State's Brief fails to mention that the reason Miss. Code Ann. § 9-4-3 cannot constitute an enforceable mandatory command is that it is an unconstitutional invasion of the judiciary branch, not because it was a mandatory provision. All the commentary about the statute's intent to encourage this Court is meaningless.

Similarly, footnote 14 of the State's brief makes it hard to take the State's position seriously. The State complains that the State designated to another agency of the State (created by the Constitution) too much authority, and therefore the State cannot be bound

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[27] 359 So. 2d 345, 347 (Miss. 1978) (citing *Roseberry v. Norsworthy*, 100 So. 514, 517 (Miss. 1924)); *see also Kellum v. Johnson*, 115 So. 2d 147 (Miss. 1959) ("The entire statute must be read together, in order to arrive at its meaning"); *Wilson v. Yazoo & M. V. R. R. Co.*, 6 So. 2d 313 (Miss. 1942) (same); *Johnson v. Reeves & Co.*, 72 So. 925 (Miss. 1916) (same).

for an action by the State – shades of *The Whiskey Speech* by the Honorable Soggy Sweat.[28] The fallacy of this position is pointed out in Miss. Code Ann. § 37-151-7(1)(c), which provides that to arrive at the basic adequate education program cost, one would multiply the average daily attendance (defined by the Legislature) of the district by the base student cost *as established by the Legislature, which yields the total base program cost for each school district.* The decision is the Legislature's. It simply directed the State Department of Education to compute. In fact, to carry out the edict of subsection (1)(c), the Legislature actually put the base student cost in each appropriation bill from 2010-15, which likewise nullifies the State Auditor's entire position as set forth in his amicus brief.[29]

As further discussed below, the Auditor's brief is based on the proposition that he could not analyze and understand the formula and the calculation for average daily attendance, and, therefore, the State Department of Education's numbers could not be used. However, Miss. Code Ann. § 37-151-7(1)(g), which took effect on July 1, 2006, simply charged the Auditor with verifying the calculations for the MAEP program. There was no contingency or condition that the Legislature could not accept or adopt until the Auditor signed off or any other prohibition imposed on the Legislature to act regardless of the Auditor's position. In fact, the Legislature heard from the Auditor, considered what he said in his report and summarily dismissed it each year. The Auditor cannot now be heard to complain of his lack of understanding of the formula when the Legislature accepted the

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28 NOAH S. SWEAT, https://en.wikipedia.org/wiki/Noah_S._Sweat (last visited Feb. 1, 2017).

29 *See* Hearing Exhibits 12 at § 22 (base student cost for FY2010 $4,774.00); 14 at § 21 (FY2011, $4,901.77); 16 at § 21 (FY2012, $4,935.91); 18 at § 21 (FY2013, $5,017.94); 20 at § 21 (FY2014, $5,103.99); 22 at § 21 (FY2015, $5,140.07) (combined at R.E. Tab 11).

calculations from the State Department of Education every year.

As to the discussion of issues on pages 26-34 of the State's Brief, the School Districts adopt the Center for Justice's Amicus Brief.

The entire fallacy of the State's position can be summed up on page 36 of its Brief; as long as the State has put in place some mechanism to fund "free public schools," the level of funding does not matter. The Legislature may fund at whatever level it chooses, and by so doing, satisfies its obligations under Section 201. If education is a fundamental right as discussed below, and our Constitution mandates free public schools, and the Legislature demands a certain level of performance, it is unconciousable that the State insists on being able to fund education at whatever level it chooses regardless of the Constitution.

Likewise, on page 37 of its brief, the State is off base to describe Section 201 of the Constitution differently from the mandates of judicial districts and compensation, district attorneys' districts and compensation, etc. for all the reasons described *supra*.

IV. THE STATE'S SOVEREIGN IMMUNITY AND SEPARATION OF POWERS ARGUMENTS DO NOT PREVENT THE SCHOOL DISTRICTS FROM RECOVERY OF FUNDS DUE THEM.

The School Districts adopt the Center for Justice's amicus brief on these points and reiterate their principal brief arguments inasmuch as the State does not put forth any argument that would deny the School Districts from receiving the funds due them.

Additionally, the State finds no relief under the MTCA when performing a ministerial function, such as funding education. As stated in *Little v. Mississippi Department of Transportation*, "[i]f the function is ministerial, rather than discretionary, there is no immunity for the acts performed in furtherance of the function. A ministerial function is one that is

"positively imposed by law."[30] In other words, "[m]inisterial acts involve direct adherence to a governing rule or standard with a compulsory result, which may result from agency directives, case law, or statutes."[31] Here, complying with Miss. Code Ann. § 37-151-6, and more importantly Section 201 of the Constitution, is a ministerial act that requires the Legislature's direct adherence. Not only does the doctrine of sovereign immunity not bar the School Districts' request for money damages for reasons stated in the principal and amicus briefs, but the Legislature does not enjoy immunity when performing ministerial duties.

V. THE AMICUS BRIEFS FILED BY THE GOVERNOR, AUDITOR, AND SPEAKER OF THE HOUSE DO NOT ADDRESS ISSUES CURRENTLY BEFORE THE COURT.

A. The Governor.

This brief does not touch on any of the legal issues pending before the Court. The Governor argues that if Section 201 of the Constitution is mandatory, and Miss. Code Ann. § 37-151-6 is the expression of the Legislature to provide the funding obligation of Section 201, then that ruling would infringe on the Governor's right to veto bills pursuant to Sections 72 and 73 of the Constitution; however, the holding the School Districts seek would be no different than any other mandate in the Constitution. As set out herein, a constitutional mandate obligates the Legislature to appropriate funds to sufficiently support that mandate.[32]

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30 129 So. 3d 132, 136 (Miss. 2013).

31 57 AM. JUR. 2D *Municipal, etc., Tort Liability* § 68 (2016)

32 *Hosford*, 525 So. 2d at 798 ("[I]f the Legislative branch fails in its constitutional mandate to furnish the absolute essentials required for the operation of an independent and effective court, then no court affected thereby should fail to act.").

Both the Governor, and more specifically the Speaker, make the argument that they should have more options in the education programs the State offers. There, of course, is no prohibition on offering other programs; however, a number of the programs mentioned are not offered to all students. For instance, the early childhood steps program is only offered to a small number of students.

Pursuant to *Brown v Board of Education* and other authority pointed out herein, the State's first responsibility is to offer and provide a minimally defined free, public education to all students. Thereafter, the State can offer any program(s) it wishes; however, what the State has done is take away money from the MAEP, which is the defined minimum education (i.e., free public schools) for everyone, and provide various programs to some school districts and not others. Education is a fundamental right enjoyed by *all* students, not some of students.[33]

B. The Speaker.

The Speaker's brief does not touch on any of the legal issues pending before the Court. In short, the Speaker argues that the Legislature should have more choice in deciding who gets what in terms of education funding and programs. As stated above, there is no prohibition stopping the Legislature from offering any program it wishes; however, the Legislature must meet its constitutional obligation first. Nothing in the Speaker's brief should keep this Court from reversing and rendering the lower court's erroneous decision.

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[33] *Clinton Mun. Sch. Dist. v. Byrd*, 477 So. 2d 237, 240 (Miss. 1985) ("[T]he right to a minimally adequate public education created and entailed by the laws of this state is one we can only label fundamental. As such this right, to the extent our law vests it in the young citizens of this state, enjoys the full substantive and procedural protections of the due process clause of the Constitution of the State of Mississippi, whatever construction may be given the Constitution of the United States.").

C. The Auditor.

The Auditor's brief does not touch on any of the legal issues pending before the Court. Simply put, Miss. Code Ann. § 37-151-7(1)(g) obligates the Auditor to verify the calculations made by the State Board of Education. The statute does not make the calculation subject to the Auditor's approval. It does not require the Legislature to accept his findings. It does not mandate what the Auditor must find to accept the State Board of Education's calculations. There is no debate that the Auditor did his job. It is also uncontradicted that the Legislature received his reports and rejected them. In every appropriation bill (R.E. Tab 11), the Legislature complied with Miss. Code Ann. § 37-151-7(1)(c), which was to calculate the base student cost, but failed to comply with providing the total funding for every child in the state.

Of note, the Speaker's brief does not state, nor do the appropriation bills give as a reason for not fully appropriating sufficient funds, the legislature's inability to calculate the base student cost or the average daily attendance. Nothing in the Auditor's brief should keep this Court from reversing and rendering the lower court's erroneous decision.

CONCLUSION

Mississippi should finally come full circle and accept its constitutionally mandated obligation to provide free public schools to all its students. The public demands it, Section 201 of the Mississippi Constitution mandates it, and the Legislature has defined it. The only factor remaining is for the Legislature to follow the law and fund it. This Court must reverse and render the lower court's erroneous decision as to liability. The School Districts submit that the State offered no denial of the figures put into evidence concerning the amount the Legislature should have provided, and hence, should reverse and render as to the amounts due the School Districts. However, if the Court deems that more evidence is needed on the amount of lost funding, damages, or restitution, then School Districts request that the Court remand for a hearing on damages.

DATED this 2nd day of February, 2017.

APPELLANT SCHOOL DISTRICTS

/s/ Ronnie Musgrove
D. Ronald Musgrove
Counsel for Appellant School Districts

Of Counsel:

Ronnie Musgrove (3698)
Michael S. Smith, II (103575)
MUSGROVE/SMITH LAW
599 Highland Colony Parkway, Suite 110
Ridgeland, Mississippi 39157
(T): 601.852.1696 | (F): 601.852.1714
musgrove@musgrovesmith.com
michael@musgrovesmith.com

Michael V. Ratliff (4639)
JOHNSON RATLIFF & WAIDE
1300 Hardy Street
Hattiesburg, Mississippi 39401-4924
(T): 601.582.4553 | (F): 601.582.4556
mratliff@jhrlaw.net

Dorian E. Turner (8532)
Dorian E. Turner, PLLC
300 West Capitol St., Suite 200
Jackson, Mississippi, 39203
(T): 601.354.2971 | (F): 601.354.3656
deturner@detpllc.com

Casey L. Lott (101766)
Dustin C. Childers (103742)
LANGSTON & LOTT, P.A.
100 South Main Street
Booneville, Mississippi 38829
(T): 662.728.9733 | (F): 662.728.1992
clott@langstonlott.com
dchilders@langstonlott.com

Jesse Mitchell, III (103020)
THE MITCHELL FIRM, PLLC
1020 Highland Colony Pkwy, Suite 704
Ridgeland, Mississippi 39157
(T): 769.300.0462 | (F): 601.510.1981
jmitchell@themitchellfirms.com

Attorneys for School Districts

Certificate of Service

I, Ronnie Musgrove, do hereby certify that on this 2nd day of February, 2017, I caused to be served a true and correct copy of the foregoing document upon each of the following individuals in the manner described below:

TRIAL COURT JUDGE

Via United States Mail
Hon. William Singletary
P.O. Box 686
Jackson, Mississippi 39205-0686

CLERK OF APPELLATE COURTS

Via MEC
Hon. Muriel B. Ellis
Post Office Box 249
Jackson, Mississippi 39205

ATTORNEYS FOR THE STATE OF MISSISSIPPI

Via MEC
Hon. Jim Hood, Attorney General
Harold E. Pizzetta, III
Justin L. Matheny
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205-0220
Phone: 601-359-3680
Fax: 601-359-2003
hpizz@ago.state.ms.us
jmath@ago.state.ms.us

/s/ Ronnie Musgrove
D. Ronald Musgrove
Counsel for Appellant School Districts