IN THE CHANCERY COURT OF HINDS COUNTY
FIRST JUDICIAL DISTRICT

PARENTS FOR PUBLIC SCHOOLS — **PLAINTIFF**

V. — **CAUSE NO. G2022-705-M**

DEPARTMENT OF FINANCE AND ADMINISTRATION;

DAVID MCRAE, IN HIS CAPACITY AS STATE TREASURER; — **DEFENDANTS**

AND LIZ WELCH, IN HER CAPACITY AS STATE FISCAL OFFICER

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

The Legislature has done precisely what the Mississippi Constitution forbids.

Section 208 of the Mississippi Constitution is clear and unambiguous. It forbids appropriating "any funds . . . to any school that at the time of receiving such appropriation is not conducted as a free school." Miss. Const., art. VIII § 208.

In April, though, the Legislature passed Senate Bill 2780 and Senate Bill 3064. Together, these bills created a funding mechanism to funnel public money toward private schools. Specifically, the legislation instructed the Department of Finance and Administration to oversee a program that provides $10 million for grants of up to $100,000 each to private schools for infrastructure projects. This funding mechanism is open to private schools only; public schools are ineligible to participate.

This private schools funding mechanism flagrantly violates Section 208 of the Mississippi Constitution. If allowed to proceed, it will irreparably injure the interests of Mississippi's taxpayers, its public schools, and its public schoolchildren.

Accordingly, a preliminary injunction should issue to avoid irreparable harm and to maintain the status quo until this Court can resolve this private schools funding mechanism's unconstitutionality.

BACKGROUND

When Congress passed the American Rescue Plan Act in response to the COVID-19 pandemic, it appropriated nearly $200 billion to distribute among the states. 42 U.S.C. §§ 802-805; *see also* "How States are Spending Their Stimulus Funds," Nat'l Conf. of State Legislatures (June 3, 2022), https://www.ncsl.org/research/fiscal-policy/how-states-are-spending-their-stimulus-funds.aspx. Rather than allocating all of Mississippi's share toward the public good, though, the Legislature chose to allocate a portion of Mississippi's COVID relief funds for the benefit of private schools.

On April 5, 2022, the Legislature's two chambers passed Senate Bill 2780, which created a private schools funding mechanism called the "Independent Schools Infrastructure Grants Program." This funding mechanism directed the Department of Finance and Administration to oversee a program for private schools to apply for grants of up to $100,000 each, to fund infrastructure projects. S.B. 2780, 2022 Leg., Reg. Sess. § 12(2) (Miss. 2022) (attached as Exhibit A). Senate Bill 2780 provides that only "eligible independent schools" may apply to the program. Public schools are not eligible. *Id.* §§ 12(4)(e)-12(4)(e)(iii) (defining "eligible independent school to mean "any private or nonpublic school operating within the State of Mississippi" that, among other things, "[i]s not subject to the purview of authority of the State Board of Education").

Under Senate Bill 2780, the Department of Finance and Administration must promulgate rules and regulations to oversee the private schools funding mechanism no later than July 1. It must also announce application deadlines by July 1. *Id.* at § 12(5). The program is scheduled to operate until July 1, 2026. *Id.* at § 12(15).

The same day that the Legislature adopted Senate Bill 2780, it also passed Senate Bill 3064, which appropriated $10 million for the private schools funding mechanism. S.B. 3064, 2022 Leg., Reg. Sess. § 2 (Miss. 2022) (attached as Exhibit B). Governor Reeves signed both bills into law on April 19, 2022.

Parents for Public Schools, a nationwide organization that originated in Mississippi and consists of more than 3,000 Mississippi public school parents, administrators, teachers, and school board members, brings this challenge. Parents for Public Schools asks this Court to preliminarily enjoin the private schools funding mechanism, in order to prevent irreparable harm and preserve the status quo until a final ruling on the funding mechanism's unconstitutionality.

ARGUMENT

I. Parents for Public Schools Exists to Stand Against Schemes that Undermine Public Schools. It Has Standing to Bring This Case.

"Mississippi's standing requirements are quite liberal." *Hall v. City of Ridgeland*, 37 So. 3d 25, 33 (Miss. 2010) (quoting *Dunn v. Miss. State Dep't of Health*, 708 So. 2d 67, 70 (Miss. 1998). Those requirements are neither "stringent" nor "restrictive." *Hall*, 37 So. 3d at 33 (quoting *Burgess v. City of Gulfport*, 814 So. 2d 149, 152-53 (Miss. 2002)). In comparison to federal courts, Mississippi courts have always been "more permissive in granting standing to parties who seek review of government actions." *Araujo v. Bryant*, 283 So. 3d 73, 77 (Miss. 2019) (quoting *Burgess*, 814 S. 2d at 152-53). Parents for Public Schools brings this challenge specifically for the purpose of seeking a review of government actions.

Parents for Public Schools meets all three requirements for associational standing: Parents for Public Schools members would otherwise have standing to sue in their own right; the interests of this challenge are germane to Parents for Public Schools' purpose; and neither the claim asserted nor the relief requested requires the participation of individual members. *Miss. Manufactured Hous. Ass'n v. Bd. of Aldermen of City of Canton*, 870 So. 2d 1189, 1192-94 (Miss. 2004).

Many pro-education organizations – including Parents for Public Schools – have challenged infringements on their members' interests, and courts repeatedly have found that those organizations had associational standing. *See, e.g.*, *In re Delaware Sch. Litigation*, 239 A.3d 451 (Del. Ch. 2020); *Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell*, 176 A.3d 28, 49 (Conn. 2018); *Parents United for Better Sch., Inc. v. Sch. Dist. of Phila. Bd. of Educ.*, 646 A.2d 689, 693 (Pa. Commw. 1994); *Denver Classroom Tchrs. Ass'n v. Denver Sch. Dist. No. 1*, 738 P.2d 414, 415 (Colo. App. 1987). *See also Charleston Cnty. Parents for Pub. Sch., Inc. v. Moseley*, 541 S.E.2d 533, 535-36 (S.C. 2001) (quoting *Baird v. Charleston Cnty.*, 511 S.E.2d 69 (S.C. 1999)) (finding standing "because the issue is one of public importance that requires resolution for future guidance"). This is another such case. Parents for Public Schools has associational standing to bring this challenge.

A. Parents for Public Schools' Members Would Have Standing as Taxpayers to Challenge Illegal Government Spending and as Parents on Behalf of Their Schoolchildren.

The first requirement for associational standing is that the plaintiff's members would have standing to bring the lawsuit if they chose. Parents for Public Schools meets that requirement for at least two reasons. First, Parents for Public Schools' members would have taxpayer standing to challenge illegal government spending. Second, Parents for Public Schools' members include parents of Mississippi public schoolchildren, and those parents would have standing to sue on behalf of their children. *Miss. Manufactured Hous. Ass'n*, 870 So. 2d at 1195 (associational standing in state court "to be interpreted under Mississippi's more liberal standing requirements").

1. Parents for Public Schools' Members are Taxpayers, and Taxpayer Standing is Available to Challenge Illegal Government Spending.

The first, and independently sufficient, reason that Parents for Public Schools' members would have standing to sue in their own right is that they would have standing as taxpayers to challenge illegal government spending. *Miss. Manufactured Hous. Ass'n*, 870 So. 2d at 1193-94.

For at least 96 years, Mississippi law has allowed taxpayer standing. *See Brannan v. Bd. of Sup'rs of DeSoto Cty.*, 106 So. 2d 768, 769 (Miss. 1926). The volume of decisions supporting taxpayer standing to challenge illegal government spending is overwhelming and consistent.

For instance, in *Prichard v. Cleveland*, 314 So. 2d 729 (Miss. 1975), a group of physicians sued a community hospital's board of trustees after the board used taxpayer funds to convert the hospital's nursing quarters into a private doctor's office. *Id.* at 732. The Mississippi Supreme Court concluded that "[t]he complainants, as taxpayers, had standing to bring this suit." *Id.*

In *Canton Farm Equipment, Inc. v. Richardson*, 501 So. 2d 1098 (Miss. 1987), a county board of supervisors purchased two backhoes from a vendor who did not submit the lowest bid. *Id.* at 1101. When the low bidder challenged the purchase in court, the circuit court dismissed for lack of standing. *Id.* at 1107-08. But the Mississippi Supreme Court reversed and held that the plaintiff, "as both an aggrieved bidder and a taxpayer had standing to bring the action." *Richardson v. Canton Farm Equip., Inc.*, 608 So. 2d 1240, 1244 (Miss. 1992).

In *State v. Quitman County*, 807 So. 2d 401 (Miss. 2001), Quitman County sued the State for requiring it to fund the representation of indigent criminal defendants – which, in the County's view, was a responsibility imposed on the State by the Mississippi Constitution. *Id.* at 402. The County filed the suit on behalf of itself and its taxpayers. *Id.* at 404. By requiring expenditures that violated the Constitution, the County argued, the State injured both the County's budget and its taxpayers. *Id.* at 405. The Mississippi Supreme Court agreed and held that both reasons supported a finding of standing. *Id.* ("Quitman County asserts that the county-based system has had devastating consequences for the county's budget, for the taxpayers, for the criminal justice system, and for the indigent defendants. For these reasons, Quitman County has standing to bring this action against the State.").

And in *Pascagoula School District v. Tucker*, 91 So. 3d 598 (Miss. 2012), plaintiffs sued to enjoin a statute requiring the Pascagoula School District to share property tax revenue with neighboring districts. *Id.* at 600-01. The Mississippi Supreme Court explained that the case "affects the rights of all taxpayers in Jackson County," *id.* at 604, and reached the case's merits.

Secondary authorities have noted the consistency of the Mississippi Supreme Court's view that taxpayer standing is available in challenges to illegal government spending. The Encyclopedia of Mississippi Law teaches that "[a] taxpayer may challenge a legislative appropriation to an object not authorized by law." James L. Robertson, *Standing to Sue – Public Interest Civil Actions*, 3 Miss. Prac. Encyc. Miss. L. § 19:219 (3d ed. 2022) (citing *Prichard*, 314 So. 2d at 730). Another scholar lists Mississippi among at least 36 jurisdictions where state law provides for taxpayer challenges to illegal appropriations. Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 Fordham L. Rev. 1263, 1313 (Dec. 2012) (Appendix).

Parents for Public Schools' case is precisely what the Mississippi Supreme Court has allowed for decades: it challenges an illegal expenditure of public funds. Its Mississippi taxpayer members would have standing to bring this challenge in their own right. Therefore, Parents for Public Schools meets the first requirement for associational standing.

2. Parents for Public Schools' Membership Includes Parents, Whose Children Suffer Adverse Effects from Violations of School Funding Requirements.

Taxpayer standing alone provides a complete justification for the members of Parents for Public Schools to have standing in this challenge. Even if that were not enough, though, Parents for Public Schools' members would have standing to sue on behalf of their children who attend public schools and who suffer an adverse effect from the unconstitutional funneling of public money to private schools.

Public schools like the ones attended by children of Parents for Public Schools' members are in inherent competition with private schools. Private schools can operate only so long as students pay tuition. Infrastructure upgrades funded by the private schools funding mechanism make private schools more competitive. And when students leave their public school, the public school's state funding diminishes. Miss. Code Ann. § 37-151-7(1)(a) (funding determined through average daily attendance). This competitive imbalance is further exacerbated by public schools' ineligibility to apply for grants through the private schools funding mechanism. This ineligibility injures public schools to the benefit of private schools, which adversely affects children attending public schools (like the children of Parents for Public Schools' members). These children – like every other child in Mississippi – enjoy a fundamental right to a minimally adequate public education. *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237, 240 (Miss. 1985) ("Thus while there may be no federally created fundamental right to education, . . . the right to a minimally adequate public education created and entailed by the laws of this state is one we can only label fundamental."). Section 208's express purpose is to preserve state education funding for public schools alone. Miss. Const., art. VIII § 208 (limits apply to "any part of the school or other educational funds of this state"). Any appropriation that violates the constitutional protections underlying children's fundamental right to education adversely affects public schoolchildren, like those of Parents for Public Schools' members. *See* Exhibit D (Affidavit of Tanya Marshaw).

This adverse effect would allow Parents for Public Schools' members to bring this challenge individually, and therefore supports Parents for Public Schools' associational standing.

B. This Challenge Strikes at the Heart of Parents for Public Schools' Core Mission: Standing Against Efforts to Undermine Public Schools.

Mississippi's second requirement for associational standing is that the claims raised in a case be germane to the association's purpose. *Miss. Manufactured Hous. Ass'n*, 870 So. 2d at 1193-94. This case is obviously germane to the purpose of Parents for Public Schools. Parents for Public Schools

began in 1991 as a group of 20 Mississippi parents who all wanted the same thing: to enroll their children in public schools, and to work together to champion better support for those schools. Since 1991, Parents for Public Schools has grown into a national group with chapters throughout America. Its mission, though, remains the same: to advocate for strengthening public schools, and to oppose efforts that undermine this bedrock of democracy. Affidavit of Kathy March (Exhibit C).

C. Cases for Injunctive Relief Do Not Require the Participation of an Association's Members.

The final rule for associational standing is that the case must not require the participation of an association's individual members. *Miss. Manufactured Hous. Ass'n*, 870 So. 2d at 1193-94. This case meets that requirement.

The Mississippi Supreme Court has explained that "[w]hen an association seeks only prospective relief and raises only issues of law, it need not prove the individual circumstances of its members to obtain that relief." *Id.* at 1194. ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supported that the remedy, if granted, will inure to the benefit of those members of the association actually injured.") (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

This is such a case. Parents for Public Schools is not seeking damages or any other sort of fact-specific relief that might change according to the characteristics of individual parties. It seeks a declaratory judgment and an injunction against an unconstitutional appropriation, relying solely on issues of law. This satisfies the third requirement for associational standing.

This case is exactly the sort of case for which associational standing exists: an association whose individual members would have standing bringing a case germane to its purpose, and the relief sought does not require the participation of the association's individual members. Parents for Public Schools satisfies Mississippi's three requirements for associational standing. Parents for

Public Schools, and the parents of public schoolchildren who make up its membership, is entitled to have this case heard.

II. A Preliminary Injunction is Necessary to Prevent the Unconstitutional Private Schools Funding Mechanism from Causing Irreparable Harm.

"[A] preliminary injunction is a mechanism for maintaining the status quo until such a time as the court can consider the merits of an application for a permanent injunction." Jeffrey Jackson et al., 5 Encyc. of Miss. L. § 38:5 (2d ed. 2022). Preliminary injunctions are necessary "to protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision on the merits." *Sec'y of State v. Gunn*, 75 So. 3d 1015, 1021 (Miss. 2011). A decision to issue a preliminary injunction is "a matter of the trial court's discretion, exercised in conformity with traditional equity practice." *Moore v. Sanders*, 558 So. 2d 1383, 1385 (Miss. 1990). The Mississippi Supreme Court has explained that traditional equity practice thusly:

> In issuing a preliminary injunction, a chancellor must balance the following factors:
> (1) There exists a substantial likelihood that plaintiff will prevail on the merits;
> (2) The injunction is necessary to prevent irreparable injury;
> (3) Threatened injury to the plaintiffs outweighs the harm an injunction might do to the defendants; and
> (4) Entry of a preliminary injunction is consistent with the public interest.

A-1 Pallet Co. v. City of Jackson, 40 So. 3d 563, 568-69 (Miss. 2010) (citing *City of Durant v. Humphreys Cnty. Mem'l Hosp./Extended Care Facility*, 587 So. 2d 244, 250 (Miss. 1991).

In this case, this balancing test tips overwhelmingly in favor of Parents for Public Schools, because Parents for Public Schools satisfies all four factors. Therefore, a preliminary injunction should issue.

A. The Private Schools Funding Mechanism Created by Senate Bill 2780 and Senate Bill 3064 is Likely Unconstitutional.

The first requirement for issuing a preliminary injunction is "a substantial likelihood that the plaintiff[s] will prevail on the merits." *A-1 Pallet Co.*, 40 So. 3d at 568. Parents for Public Schools

meets that requirement, because it is likely to prevail in showing that the private schools funding mechanism is unconstitutional.

Section 208 of the Mississippi Constitution creates a straightforward, unambiguous rule for spending public money on private schools: it is *never* allowed. Section 208 provides:

> 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.[1]

Section 208 is clear and unmistakable: it forbids appropriating "any funds" to "any school that at the time of receiving such appropriation is not conducted as a free school." Yet the Legislature's private schools funding mechanism does precisely that. It is thus unconstitutional.

1. Section 208 is Unambiguous, and the Private Schools Funding Mechanism Violates It.

The Mississippi Supreme Court has explained that "[w]hen interpreting a constitutional provision, we must enforce its plain language." *Thompson v. Attorney Gen. of State*, 227 So. 3d 1037, 1041 (Miss. 2017) (quoting *Johnson v. Sysco Food Servs.*, 86 So. 3d 242, 244 (Miss. 2012)). "[I]f the language of the constitution is plain *the Court must* enforce it." *Dye v. State ex rel. Hale*, 507 So. 2d 332, 349 (Miss. 1987) (emphasis in original).

Section 208's express purpose is to support public education by preserving state education funding for public schools alone. It forbids appropriating "any funds" to "any school that at the time of receiving such appropriation is not conducted as a free school." It makes no exceptions.

[1] The United States Supreme Court is considering a case called *Carson v. Makin*, No. 20-1088 (U.S. filed Feb. 4, 2021), involving a school funding law from Maine. The Maine law allows funding private high school tuition in areas without public high schools, but only at private high schools that are non-religious. The Court heard oral arguments on the case in December 2021. Even if the Court concludes that the federal Constitution's Free Exercise Clause requires that religious and non-religious private schools be treated the same, that will not affect the result here because Section 208 of the Mississippi Constitution already does that. It forbids appropriating funds to "*any* school that at the time of receiving such appropriation is not conducted as a free school" (emphasis added). The Legislature violates Section 208 when it appropriates money to any private school, whether religious or non-religious.

And the Mississippi Supreme Court's interpretations of Section 208 confirm that the Legislature's private schools funding mechanism is unconstitutional.

The Supreme Court has explained that Section 208's use of "funds" means "public funds of some character." *State Tchrs.' Coll, v. Morris*, 114 So. 374, 377 (Miss. 1932). Section 208's term "free schools" means "such schools only as come within the [constitutional] system devised, and under the general supervision of the State superintendent and the local supervision of the county superintendent[.]" *Otken v. Lamkin*, 56 Miss. 758, 764 (1879).[2]

Otken was decided in 1879, while the Constitution of 1868 was in force. Like our current Constitution, the Constitution of 1868 required the Legislature to establish a "system of free public schools." Miss. Const. of 1868, art. VIII § 1. The Constitution of 1868 also provided the way those schools were to be funded, and it required that those funds be appropriated only to "free schools." Miss. Const. of 1868, art. VIII § 6 (interest proceeds of "common school fund" required to be "inviolably appropriated for the support of free schools"); *id.* at art. VIII § 10 ("The Legislature shall, from time to time, as may be necessary, provide for the levy and collection of such other taxes as may be required to properly support the system of free schools herein adopted").

Despite those requirements, in 1878 the Legislature enacted a law allowing parents to receive a *pro rata* share of state education funding for private school expenses. *Otken*, 56 Miss. at 764. When a parent demanded the local superintendent remit a portion of the State's school appropriation for private school costs, the superintendent refused. *Id.* at 759-60. The parent sued, but the Mississippi Supreme Court found that the law violated the predecessor of our modern Section 208:

> It is manifest, under these provisions, that no portion of the school fund can be diverted to the support of schools which, in their organization and conduct, contravene the general scheme prescribed. That is to say, the fund must be applied to

[2] *See, e.g.*, Miss. Const. of 1868, art. VIII § 10 ("The Legislature shall, from time to time, as may be necessary, provide for the levy and collection of such other taxes as many be required to properly support the system of free schools herein adopted[.]"). The Constitution of 1890 carried forward that term into Section 208. Therefore, Section 208's use of the term "free schools" means the same thing that it meant in *Otken*.

> such schools only as come within the uniform system devised, and under the general supervision of the State superintendent and the local supervision of the county superintendent . . . and are ever open to all children within the ages of five and twenty-one years[.]

Id. at 764.

Article VIII of the Constitution of 1868 is no longer in effect, but our current Constitution's Section 208 carries forward the requirement that private schools not receive public funds ("nor shall any funds be appropriated . . . to any school that at the time of receiving such appropriation is not conducted as a free school"). And as in *Otken*, our Legislature has again run afoul of this limit by appropriating public funds toward private schools. Section 208 forbids this.

In contrast, this case is unlike *Chance v. Mississippi State Textbook Rating and Purchasing Board*, 200 So. 706 (Miss. 1941). In *Chance*, the Legislature created a program for loaning textbooks to students at both public schools and private schools. The Mississippi Supreme Court explained that the program complied with Section 208 because the resources made available for use at private schools (textbooks) remained the property of the State. *Id.* at 713 ("The books belong to, and are controlled by, the state; they are merely loaned to the individual pupil therein designated").

The Legislature's private schools funding mechanism is a different animal, though. In *Chance*, the resources at issue (textbooks) were provided to students, rather than schools; they were made available to students at both public and private schools; the resources at issue remained the State's property; and the resources at issue were not funds. In this case, though, the resources at issue are funds, not textbooks; the funds are awarded directly to private schools, not students; the funds go only to private schools; and the funds do not remain under State control.

Chance marks the outer limits of what Section 208 permits. The Legislature's private schools funding mechanism goes far past those limits. It is unconstitutional.

2. The South Carolina Supreme Court Recently Considered a Similar Funding Mechanism Under a Similar Provision of Its State Constitution. That Court Found the Funding Unconstitutional.

In 2020, the South Carolina Supreme Court heard a case called *Adams v. McMaster* that was nearly identical to this case, and it held that the appropriation was unconstitutional. 851 S.E.2d 703 (S.C. 2020).

In *Adams*, South Carolina's governor established a program to fund private school tuition with funds received from COVID relief legislation. 851 S.E.2d at 706-07. Plaintiffs challenged the program under Article XI, Section 4 of the South Carolina Constitution, which – similar to Mississippi's Section 208 – provides that "[n]o money shall be paid from public funds. . . for the direct benefit of any . . . private educational institution." The governor suggested that the money benefitted private school students, rather than private schools themselves – and that any resulting benefit to private schools was indirect. *Adams*, 851 S.E.2d at 710. But the South Carolina Supreme Court rejected that argument: "The direct payment of the funds to the private schools is contrary to the framers' intention not to grant public funds 'outrightly' to such institutions." *Id.* at 711.

The South Carolina Supreme Court also held that its state Constitution applied to the funds, even though they originated with the federal government. The Court explained that when South Carolina received the money, that money went (as state law required) into a fund in the state treasury before being disbursed through the governor's private schools funding program. *Id.* at 709. Mississippi treated its COVID relief money the same way.

When Mississippi received its ARPA funds, it set them aside into a new state fund called the Coronavirus State Fiscal Recovery Fund, which – like the fund in South Carolina – is overseen by the state treasurer. Miss. Code Ann. § 27-104-321(1) ("All funds received by or on behalf of the State of Mississippi through the Coronavirus State Fiscal Recovery Fund in Section 9901 of the American Rescue Plan Act of 2021 . . . shall be deposited into the Coronavirus State Fiscal Recovery Fund . . . .") (citation omitted). Just like in *Adams*, Mississippi's ARPA funds were converted to state funds when they entered the state treasury. 851 S.E.2d at 709. As with the South Carolina bar on

funding private schools, Section 208 of the Mississippi Constitution forbids appropriating "any funds" to private schools. And like the South Carolina program, the Mississippi Legislature's private schools funding mechanism does precisely what the constitutional provision forbids. Just as in South Carolina, the Mississippi effort is unconstitutional.

B. An Injunction is Necessary to Prevent Irreparable Injury, Because Violations of the Constitution Cannot Be Undone Through Damages.

Preliminary injunctions are generally disfavored when a party threatened by injury can later be made whole through damages. *Fratesi v. City of Indianola*, 972 So. 2d 38, 42 (Miss. Ct. App. 2008). But equity demands a preliminary injunction when the threatened injury has "no adequate remedy at law," *Reynolds v. Amerada Hess Corp.*, 778 So. 2d 759, 765 (Miss. 2000), and where the harm is "imminent." *A-1 Pallet Co.*, 40 So. 3d at 569. In particular, a violation of the Constitution "for even minimal periods of time[ ] unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *6 (5th Cir. Feb. 17, 2022) (ongoing violation of legal rights, which damages would not undo, was irreparable harm); 14A C.J.S. Civil Rights §361 (2022) ("Violations of constitutional rights, including infringements or deprivations, are deemed 'irreparable harm' for purposes of injunctive relief as a matter of law").

In this case, the constitutional protections afforded by Section 208 are directly in the Legislature's crosshairs. If a preliminary injunction does not issue, then the Mississippi Constitution will likely be violated, and Parents for Public Schools' members will suffer adverse effects for which there is no undoing. That is the definition of irreparable harm. *See Campaign for S. Equal. v. Miss. Dep't of Hum. Servs.*, 175 F. Supp. 3d 691, 711 (S.D. Miss. 2016) (Jordan, J.) ("Defendants have not demonstrated that [injuries] could be undone with a monetary award. The Court finds irreparable harm").

Moreover, the threat of that harm is imminent. Without a preliminary injunction, the Department of Finance and Administration will launch the private schools funding mechanism no later than July 1. In short order thereafter, public money will begin flowing to private schools before the private schools funding mechanism's unconstitutionality can be resolved. S.B. 2780, 2022 Leg., Reg. Sess. § 12(6) (Miss. 2022) (Exhibit A) ("Funds under the program *shall* be awarded for ARPA eligible projects in the following order . . . ") (emphasis added). *See* Mary Kay Kane et al., 11A Fed. Prac. and Proc. § 2947 (3d ed. 2022) (purpose of preliminary injunction is "to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits"). That is an irreparable, imminent harm for which a preliminary injunction should issue.

C. The Threat of a Constitutional Violation Outweighs Whatever Inconvenience the State Suffers from Being Unable to Violate Section 208.

The third requirement for issuing a preliminary injunction is that the "[t]hreatened injury to the plaintiffs outweighs the harm an injunction might do to the defendants[.]" *A-1 Pallet Co.*, 40 So. 3d at 569. In this case, the balance overwhelmingly favors Parents for Public Schools. If a preliminary injunction does not issue, then Parents for Public Schools' members will suffer a likely violation of the Constitution and all the adverse effects attendant thereto. If a preliminary injunction does issue, then the State – at worst – will be delayed in sending public money to private schools. There is no question which way this cuts: Parents for Public Schools' interest in avoiding a constitutional violation outweighs the State's interest in violating Section 208. There is no "harm to a [government agency] when it is prevented from enforcing an unconstitutional statute." *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004).

D. A Preliminary Injunction in This Case Will Serve the Public Interest.

The final requirement for issuing a preliminary injunction is that the preliminary injunction must be "consistent with the public interest." *A-1 Pallet Co.*, 40 So. 3d at 569. "It is always in the

public interest to prevent the violation of a party's constitutional rights." *Campaign for S. Equal.*, 175 F. Supp. 3d at 711 (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)).

CONCLUSION

Courts serve no higher purpose than preventing violations of constitutional protections. Section 208 of the Mississippi Constitution erects such a protection: it guarantees that public money will stay with public schools. The Legislature's private schools funding mechanism is a direct violation of Section 208. This is exactly the sort of action that requires a preliminary injunction.

THEREFORE, the Court should GRANT Parents for Public Schools' Motion for Preliminary Injunction and enjoin the Department of Finance and Administration from administering, implementing, maintaining, or otherwise putting into effect the "Independent Schools Infrastructure Grants Program" provided for in Senate Bill 2780 and funded by Senate Bill 3064.

RESPECTFULLY SUBMITTED this Seventeenth day of June 2022.

/s/ Will Bardwell
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CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that, contemporaneously with its filing, a true and correct copy of the foregoing Memorandum was served on all parties of record via the Court's electronic filing system.

SO CERTIFIED this Seventeenth day of June 2022.

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