IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00955-SCT

PASCAGOULA SCHOOL DISTRICT, THE CITY OF PASCAGOULA, MISSISSIPPI, DANIEL J. MARKS, SR., INDIVIDUALLY and KATHERINE LAIRD MITCHELL, a Minor, by and through her father and natural guardian, Randall L. Mitchell — **PLAINTIFFS**

VS.

JOE TUCKER, IN HIS OFFICIAL CAPACITY AS TAX COLLECTOR OF JACKSON COUNTY, MISSISSIPPI, and BENNY GOFF, IN HIS OFFICIAL CAPACITY AS TAX ASSESSOR OF JACKSON COUNTY, MISSISSIPPI, and BOARD OF SUPERVISORS OF JACKSON COUNTY, MISSISSIPPI, and THE STATE OF MISSISSIPPI

REPLY TO JOINT SUPPLEMENTAL BRIEF OF ALL APPELLEES

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INTRODUCTION

The appellants have explained how the framers of Miss. Const. of 1890 § 206 designed it to restrict legislative discretion with respect to three different school funds, one for the district, one for the county, and one for the state. Brief of Appellants at 12-15 and Reply Brief of Appellants at 10-12.

The "Joint Supplemental Brief of All Appellees," offers nothing that in any way rebuts this explanation, which it does not even mention. In fact the brief is not, in truth, a "supplemental brief." It offers no new cases discussing § 206,[1] no new constitutional or statutory provisions, and no arguments not already found in the appellees' principal briefs. The only thing new it offers is an erroneous claim that counsel for the appellants at oral argument misrepresented the nature of the district to which Miss. Code Ann. § 19-9-171 applies. That is simply not true, as a review of the recorded argument demonstrates.

This Court should reverse and render the judgment below and either i) order the return to the Pascagoula School District of the current year funds wrongfully

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[1] The newly-cited cases are: *In the Interest of T.L.C.*, 566 So.2d 691, 696 (Miss. 1990) (repetition of standard of constitutional review); *Morco Ind. Inc. v. City of Long Beach*, 530 So.2d 141 (Miss. 1988) (tax refund procedure); *State ex rel. Knox v. Bd. Of Sup'rs Grenada County*, 105 So. 541, 548 (Miss. 1925) (county payment for auditor's services); *Yow v. Tishimingo Co. Sch. Bd.*, 172 So. 303 (Miss. 1937) (legislature could validate creation of school district); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (casino advertising); *U. S. v. O'Neill*, 11 F.3d 292 (1st Cir. 1993) (federal sentencing statute). None of these have anything to do with Miss. Const. of 1890 §§ 201 or 206.

diverted away from it, or ii) remand to the trial court for the entry of an order accomplishing that purpose.

I. The authors of the 1890 Constitution and § 206 restricted legislative discretion over school funds and established a method of local support for public schools.

The easiest and surest guide to the intent behind the text of § 206 is to compare it to its predecessor, Art. VIII, § 6 of the Constitution of 1869. That provision created one state "common school fund" which received the proceeds of public land sales, fines, liquor license fees, and money donated to the state for school purposes. It did what the appellees want this Court to say § 206 does, i.e., it gave all control to the state and none to the counties or districts.

Section 206 in contrast created three separate school funds and established the principle of local support for public education. See Brief of Appellants 13-14 and n.6.

One was a county school fund supported by poll taxes: "the poll-tax (to be retained in the counties where the same is collected)."

Another was a state "common school fund" i.e., an "additional sum from the general fund in the state treasury... sufficient to maintain the common schools for the term of four months in each scholastic year" which was to be distributed "in proportion to the number of educable children" in each district.

The third was the fund created by the "may levy" language in § 206 which is important to this case, i.e., "But any county or separate school-district may levy an additional tax to maintain its schools ...." That was the constitutional authorization for the ad valorem tax school maintenance fund at issue in this case. The Mississippi Legislature provided for that fund by enacting what became Miss. Code § 4014 (1892), and that is the "district maintenance fund" provision now known as Miss. Code Ann. § 37-57-1.[2]

Justice George Ethridge correctly perceived and reported in his treatise, MISSISSIPPI CONSTITUTIONS 376 (1928), that the purpose of the section was to restrict legislative discretion. As he wrote, "the convention seems to have been afraid to trust the legislature with distributing the school funds . . . ."

II. *Miller* held that § 206 establishes a mandatory scheme of distribution of the funds which it authorizes, but not other state funds.

Miller v. State, 130 Miss. 564, 94 So. 706 (Miss. 1923) arose out of disparaties in school terms. Pursuant to § 206, all districts got the state's four-month money. Some districts, however, could afford longer terms, and some could not. The legislature appropriated additional state money to help the poorer districts. An allegation was made that this violated § 206 because it was state money that

[2] Miss. Code of 1892 § 4014 provided that a municipality "shall make such levy of taxes as shall be necessary to maintain the schools, after the expiration of the four-months' term provided for by the state, or to supplement, during the four months, the funds distributed by the state." See also § 4047 (county authority). The statutory lineage includes Miss. Code § 7388 (1917), Miss. Code § 6725 (1930), and Miss. Code § 6518 (1942).

was distributed according to the length of local school terms and not on a per-student basis.

This court upheld the appropriation on the ground that it was an additional state appropriation over-and-above the four-month money which § 206 required to be distributed on a per-student basis. But in so doing, this court specifically stated that § 206 was to be enforced according to its terms with respect to the four-month money. It had so held in *State Board of Education v. Pridgen*, 106 Miss. 219, 63 So. 416 (Miss. 1913), and *Miller* says *Pridgen* is still good law on the "distribution" of the state appropriated four-month money:

> The decision in that case is sound as to per capita distribution because it was dealing with the four-month term prescribed by section 206, and the *funds to be used to maintain that four-month term could be distributed only upon a per capita basis*, and when the school authorities attempted to distribute it otherwise under the act it was contrary to the *method of distribution provided by the Constitution.*

94 So. at 709 (emphasis' added). Similarly, in this case the "method of distribution provided by the Constitution" should be enforced with respect to the money § 206 permits a local district to raise to "maintain its schools". *Miller* found the restriction on distribution to meet its "clear and certain" test, and the restriction in issue here does so as well.

Neither *Miller*, which said the state could provide money in addition to the constitutional allotment, nor *St. Louis & S.F. Ry. Co. v. Benton Co.*, 132 Miss. 325,

96 So. 689 (Miss. 1923), which held that counties could provide additional money, in any way found authority for the legislature to divert the funds specified as the constitutional allotment.

III. No modern amendment has either materially altered the language of § 206 or rendered it surplusage.

The appellees seize on three modern amendments to either § 206 or § 201, but none of them eliminate the requirement in § 206 that local taxes be used for the schools in "its district" as opposed to other districts. It is useful to discuss them in chronological order.

The 1987 amendments to, among other sections, § 201, ended a shameful era during which the state constitution allowed either the legislature or local authorities to abolish their public schools. *See* 1987 Miss. Laws Ch. 671. Its explanatory statement said that it "requires the Legislature to provide for the establishment, maintenance and support of free public schools." *Id.* At the same time it repealed §§ 205 and 213-B and replaced them with general language about legislative ability to impose "conditions and limitations" on those schools. *Id.* But it left intact § 206 and its requirements concerning the distribution of school funds.

The 1989 amendments to § 206 had a different purpose. As stated in the resolution, they were to delete "provisions in the Constitution referring to a poll tax, a four-month school term and a county common school fund." 1989 Miss. Laws Ch. 589. The county common school fund was eliminated because the

money had come from the poll tax. The amendment accordingly also deleted the requirement that the poll tax "be retained in counties where the same is collected." The Appellees' Brief at 8 and n.3 mentions this change but fails to mention that this language referred to the poll tax, and nothing else.

While the stated purposes of the 1987 amendment included legislative control, that is not listed as a purpose of the 1989 amendment, which is when the phrase "by general law" was added to § 206.

From this it can be seen that it was not the intent of the framers of the 1987 amendment to § 201 to modify the requirements of § 206. The general language about legislative control in § 201 did not alter the specific fund distribution requirements of § 206. It has long been held that to the extent conflict appears, a specific constitutional provision controls over a general provision, and each provision is to be given maximum effect and a meaning in harmony with that of the other. *Dye v. State ex rel. Hale*, 507 So.2d 332, 342 (Miss. 1987). Those maxims applied here mean that § 206 is to be interpreted to mean what it says, i.e. that the tax is levied by a district "to maintain its schools." They also mean that Section 206 is a positive and authorizing articulation of the "local tax, local benefit" rule, while § 112 --- extending to all "taxing districts" and all ad valorem taxes --- is a negative protection against state or other third public party interference with the "local tax, local benefit" rule.

Second, the addition of the phrase "by general law" in 1989 in no way weakened the requirement that the district's money be used to "maintain its schools." The phrase "by general law" is not a joker in the constitutional deck that allows the legislature to ignore any and every restriction to which it is attached. To so hold would be to render multiple provisions in the constitution meaningless. See Reply Brief of Appellants at 9. As Chief Justice John Roberts of the U.S. Supreme Court has recently reminded us, courts should not transform a constitution, "the guardian of individual liberty and separation of powers [we have] long recognized into mere wishful thinking." *Stern v. Marshall*, 131 U.S. 2594, 2011 WL 2472792 at 20 (June 23, 2011).

IV. Local support for public schools should be preserved.

The appellees honestly concede what the import of their unprecedented attack on local support for public schools would be. It is their position that the legislature could "completely alter or even abolish local taxation and local finance for the local schools." Appellees' Brief at 8. In the face of § 206, which says a district "may" provide for local support, they would invite this court to give the legislature the power to say "may not."

This Court should decline that invitation. Local support for the public schools is not only enshrined in our constitution but it is also vital to the well-being of our people. The framers enshrined the principle in our constitution ***because*** it is

so vital to the well-being of our people. The appellees claim the power of precedent but the appellees can not identify any instance in the life of the 1890 constitution in which one district's ad valorem school taxes have been taken away and given to another district, without a constitutional amendment. There was no such amendment here and this court should not create one by judicial fiat.

V. Counsel correctly stated that the 71% diversion at present applies only to certain refinery and terminal property.

The actual number of dollars at issue in this case makes no difference to the merits of the constitutional argument. But the appellees have incorrectly accused undersigned counsel of not being truthful with the Court. In truth, it is the supplemental brief that lacks accuracy.

The school district sets its budget and the City must fund it. To do that, it has to exclude 71% of the value of special District No. 3059 because it will not get 71% of its revenue. So the City cannot "levy" on District No. 3059 in the same way it levies on other taxing districts within the school district.

A review of the recording of oral argument shows that it was explained that there is new refinery and terminal property worth $66 million in special District No. 3059. (1:43). It was then stated that the taxes on $46.8 million of that value, i.e., 71% of "this parcel" and "that property," (1:48-51), had been diverted to the appellee districts. See also 1:55 ("this particular piece"). There was no claim that

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following persons by US Mail, properly addressed and postage prepaid:

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THIS the 19th day of July, 2011.