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IN THE SUPREME COURT OF MISSISSIPPI

REPRESENTATIVE BRYANT W. CLARK AND SENATOR JOHN HORHN — **APPELLANTS**

V. — **CAUSE NO. 2017-CA-00750**

GOVERNOR PHIL BRYANT, STATE FISCAL OFFICER LAURA JACKSON, THE MISSISSIPPI DEPARTMENT OF EDUCATION, AND STATE TREASURER LYNN FITCH — **APPELLEES**

BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

This is a case of tremendous constitutional importance. It concerns the cornerstone of Mississippi's constitutional system of government, and its outcome will touch the lives of an untold number of Mississippians – not the least of whom are its nearly half-million public schoolchildren.

Case law governing this case stretches back more than 100 years. The Court would benefit from the assistance of counsel in navigating that line of authority. Additionally, the chancery court proceedings in this case were unusually condensed. The Court would benefit from counsel's explanations of the course of those proceedings.

STATEMENT OF THE ISSUES

The Mississippi Constitution's separation of powers doctrine is "strict"[1] and "absolute."[2] Under the separation of powers doctrine, the Legislature is the only branch of government authorized to make appropriations decisions. This appeal presents one question: does a statute allowing the Executive Branch to make appropriations decisions violate the separation of powers doctrine?

STATEMENT OF ASSIGNMENT

Rule 16(d) of the Mississippi Rules of Appellate Procedure provides three reasons why the Supreme Court should retain this case.

First, Section 27-104-13's constitutionality is "a major question of first impression," as provided by Rule 16(d)(1).

Second, the legality of the Executive Branch's budget cuts is a "fundamental and urgent issue[ ] of broad public importance requiring prompt or ultimate determination by the Supreme Court," as provided by Rule 16(d)(2).

Third, this case presents "substantial constitutional questions as to the validity of a statute," as provided by Rule 16(d)(3).

STATEMENT OF THE CASE

Between September 2016 and March 2017, Governor Bryant and State Fiscal Officer Jackson reduced the Legislature's Fiscal Year 2017 appropriations by more than $170 million.[3] In February and March 2017 alod [illegible] re

public schools budget.[4] Governor Bryant and State Fiscal Officer Jackson made these budget cuts under the authority of Section 27-104-13 of the Mississippi Code.[5]

This Court's decisions are clear: under the Mississippi Constitution's separation of powers doctrine, the Legislative Branch is the only branch of government authorized to make appropriations decisions.

The Executive Branch's budget cuts, under authority assumed from Section 27-104-13, therefore violate the separation of powers doctrine. By arbitrarily changing the funding amounts appropriated by the Legislature, the Executive Branch usurps the Legislature's exclusive authority to make the state budget. Tak469-2(vE9(h)-)-8(a)1(t)-8(d)1(t)-4gj(f)-

Article I, Sections 1 and 2 of the Mississippi Constitution provide:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.[22]
>
> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.[23]

This Court's seminal decision on the separation of powers doctrine is *Alexander v. State ex rel. Allain*.[24] In that case, this Court considered the constitutionality of several commissions that included members of both the Legislative and Executive Branches. This required the Court to consider "whether Article I, Sections 1 and 2 should be interpreted faithfully to accord with its language or whether it should be interpreted loosely so that efficiency in government through permissive overlapping of departmental functions becomes paramount to the written word."[25]

After reviewing the history of the separation of powers doctrine in Mississippi, the *Alexander* Court concluded that the 1890 Constitution's drafters intended "that there be *no exceptions* to the mandates that the powers of government be held and exercised in three separate and distinct departments and that no person holding office in any one department should have or exercise any power properly belonging to either of the others."[26]

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[22] Miss. Const., art. I § 1.
[23] Miss. Const., art. I § 2.
[24] *Alexander*, 441 So. 2d 1329.
[25] *Id.* at 1333.
[26] *Id.* at 1335 (emphasis added).

This Court has since reaffirmed that, under Mississippi's rigid separation of powers doctrine, "no officer of one department may perform a function 'at the core' of the power properly belonging to either of the other two departments."[27]

The strict and absolute nature of Mississippi's separation of powers doctrine was reaffirmed recently in *Gunn v. Hughes*.[28] In that case, the Court refused to intervene in a dispute between legislators about a constitutional provision requiring the reading of bills on the House floor. To reach its decision, the Court confronted language from *Tuck v. Blackmon*,[29] which suggested that the Court could intervene, at its discretion. The *Gunn* Court explicitly overruled *Tuck*'s suggestion and reiterated — twice — that the Mississippi Constitution's separation of powers doctrine is "absolute."[30]

B. Budget-Making Is a Core Power of the Legislature. It is the Only Branch Authorized to Make Appropriations Decisions.

Inherent to Mississippi's separation of powers doctrine is the principle of nondelegation: one branch of government cannot delegate its core powers to another branch.[31] The doctrine traces its origins at least as early as John Locke's *Second Treatise of Government*. In that treatise, Locke explained, "[t]he Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others . . . ."[32]

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In Mississippi, budget-making is a purely legislative responsibility that cannot be delegated. For more than 100 years, this Court has observed:

> [T]he control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people.[33]

"Under our Constitution the *final* budget-making power is vested in the legislature because it has the *ultimate* responsibility of appropriation . . . ."[34] Like other forms of lawmaking, appropriations decisions are, by their very nature, policy decisions. When the Legislature makes an appropriation, it decides what share of the state's revenue to make available to an agency or program – often at the expense of other agencies or programs – based on legislators' collective policy judgment about the priorities of the state.[35] For that reason, appropriations decisions "must be approved and voted upon by legislative members only."[36]

In *Alexander*, this Court explained:

> [c]onstitutionally, budget-making is a legislative prerogative and responsibility in Mississippi. The legislature has the power and prerogative to provide for the collection of revenues through taxation and other means and to appropriate or direct the expenditure of monies so raised. Though subject to gubernatorial veto, the primary budget-making responsibility vests in the legislature.[37]

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[33] *State v. Bd. of Levee Comm'rs for Yazoo-Mississippi Delta*, 932 So. 2d 12, 22 (Miss. 2006) (quoting *Colbert*, 39 So. at 66).
[34] *Alexander*, 441 So. 2d at 1340 (emphases added).
[35] *See Alexander*, 441 So. 2d at 1341 (holding that constitution allows governor to submit a proposed budget to the Legislature, but that the Legislature "has the ultimate responsibility of appropriation by which it can honor the budget by appropriating, in whole or in part, or refusing a budget request by non-

This Court has since reaffirmed that "the budget-making power is a legislative duty."[38]

1. No Statute That Allows Executive-Branch Reductions to Legislative Appropriations Could Survive Under Mississippi's Separation of Powers Doctrine.

Section 27-104-13 of the Mississippi Code does exactly what this Court says is forbidden by the separation of powers doctrine: it authorizes one branch of government to wield another branch's core power.[39] Specifically, in the event of a revenue shortfall, the statute grants the Executive Branch unilateral authority to change the Legislature's appropriation amounts.[40] This blatantly violates this Court's decisions stretching back more than 100 years. These decisions uniformly hold that control of the government's purse strings belongs to the Legislature alone.[41] Therefore, the statute is facially unconstitutional.

This is not the first case to require that conclusion. In 2010, this Court held that Section 27-104-13 granted the Executive Branch unconstitutional authority.

In January 2010, the State Fiscal Officer announced a series of budget cuts under Section 27-104-13 to a number of areas of state government, including the Judiciary.[42] Within a week, this Court *sua sponte* declared those cuts to be unconstitutional. The Court first noted that Section 27-104-13, by its terms, contemplates cuts to "agencies" or to "the Mississippi Department of Transportation" (MDOT) — and that the Judiciary, as a branch of government, is neither an agency nor MDOT.[43]

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[38] *Moore*, 658 So. 2d at 887.
[39] *Id.*
[40] Miss. Code Ann. § 27-104-13.
[41] *See Colbert*, 39 So. at 66.
[42] *In re Fiscal Year 2010 Judicial Branch Appropriations*, 27 So. 3d 394, 395 (Miss. 2010).
[43] *Id.*

But this Court did not end its analysis there. It went on to reiterate that all statutes are presumed constitutional,[44] but "[t]o the extent the State Fiscal Officer interprets Section 27-104-13 to authorize reductions in the judicial branch's budget, we hold that such interpretation is inconsistent with the Constitution of the State of Mississippi."[45]

The *Fiscal Year 2010* Court had no reason to address the larger question of whether Section 27-104-13 as a whole was facially unconstitutional. Because of the *sua sponte* nature of the decision, the only issue before the Court was the cut to the Judiciary's budget. Therefore, a broader analysis of the statute was unnecessary. But *Fiscal Year 2010* unmistakably indicated that Section 27-104-13 exceeded constitutional limits.

2. Other State Supreme Courts Have Held That Executive Budget-Cut Statutes Violate the Separation of Powers Doctrine.

Fiscal Year 2010 is not the only time that an executive budget-cuts statute has violated the separation of powers doctrine. Other state supreme courts also have found that similar executive budget-cut statutes are unconstitutional.

For example, in *Chiles v. Child A,*[46] the Florida Supreme Court held that its state constitution's separation of powers doctrine forbade executive branch officials from cutting the state budget. Similar to Article I, Section 2 of the Mississippi Constitution, the Florida Constitution provides, "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[47] The Florida Supreme Court also shared the view that "the power to

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appropriate state funds is legislative and is to be exercised only through duly enacted statutes."[48] That court further explained that "budget-making" was not merely setting or increasing a budget — rather, "the power to *reduce*

branch] with authority *to determine the amount of state funds to be spent for particular purposes*."[54]

Other state courts have held that their separation of powers doctrines are not absolute. Comparing those more flexible views illustrates how strict and absolute the Mississippi Constitution is on this question.

For example, the New Hampshire Supreme Court has upheld that state's executive budget cuts statute based on its view that the state's separation of powers is *not* absolute.[55] That court has explained that its separation of powers "contemplates no absolute fixation and rigidity of powers between the three great departments of government. Instead, it expressly recognizes that, as a practical matter, there must be some overlapping among the three branches of government and that the erection of impenetrable barriers among them is not required."[56] Notably, the New Hampshire Supreme Court explicitly contrasted its view of the separation of powers with Florida's, which led the Florida Supreme Court to find its executive budget-cuts statute unconstitutional.[57]

The Vermont Supreme Court also affirmed an executive budget-cuts statute, but only after reiterating its view that its separation of powers doctrine is "a relatively forgiving standard."[58]

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[54] *Id.* (quotations omitted) (emphasis added).
[55] *New Hampshire Health Care Ass'n v. Governor*, 13 A.3d 145, 153 (N.H. 2011).
[56] *Id.* (citation and quotation omitted).
[57] *Id.* at 394 (explaining that the Florida Supreme Court's decision to strike down its executive budget-cuts

But the Mississippi Constitution's separation of powers doctrine contemplates no such flexibility. It is not relatively forgiving or practical. It is "absolute."[59] It could never sanction the executive overreaching allowed by Section 27-104-13.

C.

2. Changing the Legislature's Spending Decisions Does Not "Administer" the Budget. It Changes the Budget Altogether.

Governor Bryant's budget cuts exceed the role that the Framers envisioned for the governor. Any changes to the Legislature's appropriations decisions — including reductions to those appropriations — can be made only by the Legislature.

Again, the Florida Supreme Court's decision in *Chiles* is instructive. In *Chiles*, the executive branch officials performing budget cuts argued that their reductions did not constitute "appropriating."[71] The Florida court rejected that argument and explained that "the power to *reduce* appropriations, like any other lawmaking, is a legislative function."[72] The court "construe[d] the power granted in [the executive-branch budget-cuts statute] as precisely the power to appropriate."[73]

Similarly, the New Mexico Supreme Court recognizes the executive branch's authority "to control how the money is to be allocated"[74] — i.e., how already-appropriated money is to be distributed. This is the power of "budget control." It is purely executive and puCID 254( )-1w]( )] TJ.6 398./p11(cu)-9(i)4(s)37t-13(uCID au)-9(t)-9(i)-1(v)-7(.

power.[75] If these reductions to legislatively approved appropriations constituted "budget control," then they would have fallen within the Executive Branch's constitutional authority. But this Court was clear: these budget cuts were unconstitutional.

CONCLUSION

Affirming Section 27-104-13 as constitutional would require this Court to overturn more than 100 years of precedent. For decades, this Court has recognized that no branch of government can wield another's core powers without violating the separation of powers, and that control of the state's purse strings lies exclusively with the Legislature. Section 27-104-13 violates both these principles. It is facially unconstitutional and

CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that, simultaneous with this brief's filing, I have served true and correct copies of the same on all counsel of record via the Court's electronic filing system. Additionally, I have served a true and correct copy via United States Postal Service mail, postage prepaid, upon the Honorable Patricia Wise, Hinds County Chancery Court, P.O. Box 686, Jackson, Mississippi 39205-0686.

SO CERTIFIED this Eleventh day of October 2017.

/s/ *Will Bardwell*
Will Bardwell
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