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**

REPLY BRIEF OF THE APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Decisions

Mississippi Supreme Court Decisions

Foreign State-Court Decisions

Mississippi Constitutional Provisions

Mississippi Statutes

Foreign Constitutional Provisions

Secondary Authorities

SUMMARY OF THE REPLY

This case hinges on whether Mississippi's separation of powers doctrine is "strict"[1] and "absolute."[2] The Legislators contend that it is. Relying on case law stretching back more than a century,[3] the Legislators rest their case on the principle that "no officer of one department may perform a function 'at the core' of the power properly belonging to either of the other two departments."[4] Under Mississippi's strict separation of powers doctrine, Section 27-104-13 is unconstitutional because it permits one branch of government to exercise a core power of another.

The Executive Branch disagrees. The Executive Branch argues that Mississippi's separation of powers doctrine "recognizes and encourages intrusions"[5] between the branches. In the Executive Branch's view, "in practical operation each of the three departments necessarily exercise some power which is not strictly within its province."[6] The Executive Branch argues that Mississippi's separation of powers doctrine is weak, and therefore, that Section 27-104-13 is a proper delegation.

The Executive Branch is wrong: in Mississippi, no branch of government can ever exercise another branch's core powers. And under Mississippi's "strict"[7] and "absolute"[8] separation of powers doctrine, budget making is a "legislative prerogative and

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[1] *Gunn v. Hughes*, 210 So. 3d 969, 972 (Miss. 2017).
[2] *Id.* at 973.
[3] *Colbert v. State*, 39 So. 65, 66 (Miss. 1905) ("[T]he control of the purse strings of government is a legislative function. Indeed, it is *the* supreme legislative prerogative . . . .") (emphasis added).
[4] *Dye v. State ex rel. Hale*, 507 So. 2d 332, 343 (Miss. 1987) (citing *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1335 (Miss. 1983)).
[5] Appellees' Brief at 13 (quoting Leslie Southwick, *Separation of Powers at the State Level: Interpretations and Challenges in Mississippi*, 72 Miss. L.J. 927, 974 (2003)).
[6] Appellees' Brief at 13 (quoting *Jackson Cnty. v. Neville*, 95 So. 626, 628 (Miss. 1923)).
[7] *Gunn*, 210 So. 3d at 972.
[8] *Id.* at 973.

responsibility."[9] The Legislature's budget-making decisions are "ultimate" and "final."[10] If Mississippi wishes to effectuate the process that Section 27-104-13 permits — namely, making cuts to balance the budget — then the Legislature must make those cuts.

The Executive Branch's cited authorities concern issues not presented by this case. Some of the Executive Branch's cases involve delegation to an administrative agency[11] (as opposed to another branch of government), which is not at issue in this case. Other cases are from states with weak separation of power doctrines or with constitutionally mandated balanced budgets. Mississippi has neither of those, and therefore those cases are inapposite.

Section 27-104-13 of the Mississippi Code delegates budget-making decisions to the Executive Branch. Therefore, it is facially unconstitutional.[12]

ARGUMENT

I. Budget Making is a Core Power that Can Only Be Performed by the Legislature.

A. Budget Making is a Core Power.

> *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.*[13]

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[9] *Alexander*, 441 So. 2d at 1339 ("Constitutionally, budget-making is a legislative prerogative and responsibility in Mississippi.").
[10] *Id.* at 1340 ("Under our Constitution the final budget-making power is vested in the legislature because it has the ultimate responsibility of appropriation . . . .").
[11] *See infra* at § II(A).
[12] Although the Executive Branch's brief does not use the term "waiver," it suggests in two ways that the Legislators cannot raise this challenge because they have somehow waived or given up their right to do so through action or inaction. *See* Appellees' Brief at 18 ("[N]othing . . . precludes the Legislature from authorizing and instructing the executive branch to spend less than the full amount of appropriated funds. Indeed, that the Legislature has enacted a statute to this regard means that the legislative branch – which jealously guards its own authority – agrees."), 27 n.22 ("Senator John Horhn and Representative Bryant Clark . . . both voted in favor of the amendments to § 27-104-13 in 2005."). This suggestion is without merit. Legislators' votes do not waive their rights to challenge violations of the separation of powers doctrine. *Dye ex rel. State v. Hale*, 507 So. 2d 332, 339-40 (Miss. 1987) (rejecting argument that legislators waived claims by voting for Senate rules they challenged).
[13] Miss. Const., art. I § 1.

Mississippi's separation of powers doctrine reserves exclusively to each branch of government "the power to perform functions at the core of those committed" by Section 1 of the Constitution.[14] These "core powers" are the powers necessary for a branch to fulfill its obligations under Section 1.[15] For example, the Executive Branch has the core power of executing laws,[16] and the Judicial Branch has the core power of promulgating courts' procedural rules.[17]

The Legislative Branch has the core power of making laws,[18] which includes making the state budget. The Legislature's exclusive authority over budget making is well established. In 1905, this Court recognized that "the control of the purse strings of government is a legislative function,"[19] and that the Legislature's exclusive authority over appropriations decisions was "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."[20] The Court explained:

> No money can come into the treasury or go out of it lawfully except as directed by the legislative act. Collection *and disbursement* belong to the Legislature, and must be done as it directs. Thus the Constitution has placed the whole matter of obtaining money by taxation . . . *and of disbursing it* in the hands of the Legislature, guarded and restricted as stated.[21]

This century-long recognition of the Legislature's exclusive appropriations power

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[14] *Alexander*, 441 So. 2d at 1347.
[15] *See, e.g., id.* at 1338 ("Execution is at the core of executive power."); *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975) ("The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts."); *Gunn v. Hughes*, 210 So. 3d 969, 971 (Miss. 2017) ("[T]his Court lacks constitutional authority to interfere in the procedural workings of the Legislature . . . .").
[16] *Alexander*, 441 So. 2d at 1338.
[17] *Newell*, 308 So. 2d at 76.
[18] *Alexander*, 441 So. 2d at 1338.
[19] *Colbert v. State*, 39 So. 65, 66 (Miss. 1905).
[20] *Id.*
[21] *Id.* at 68 (emphases added).

continues to this day. The principle recently rearose in *Clarksdale Municipal School District v. State*,[22] which the Court decided in October 2017. In *Clarksdale*, this Court rejected a claim that state law requires a specific amount of appropriations to the Mississippi Adequate Education Program. The majority rested its view on statutory grounds.[23] But four justices, with another justice joining in part,[24] concluded that the claim violated the separation of powers doctrine. The concurring opinion stated that "the Constitution regards the Legislature as the sole repository of power to make appropriations of money to be paid out of the state treasury."[25] Ordering the Legislature to appropriate a specific amount, the concurring justices explained, "would require we cross the constitutional divide and untie the State's purse strings."[26] But the power of the purse, the concurring justices concluded, "lies instead with the representatives of the people."[27]

The authority to set appropriations is a core power of the Legislature.[28] Decisions made under that power are "ultimate" and "final."[29] The Executive Branch's arguments to the contrary are incorrect and should be rejected.

B. There is No Overlapping of Core Powers.

Any statute delegating budget-making authority to another branch violates Mississippi's separation of powers doctrine. The Executive Branch concedes that

[22] *Clarksdale Mun. Sch. Dist. v. State*, 233 So. 3d 299 (Miss. 2017).
[23] *Id.* at 304-05.
[24] *Id.* at 306 (Maxwell, J., specially concurring) (joined by Coleman, Chamberlin, and Ishee, JJ.; joined in part by Randolph, P.J.).
[25] *Id.* (quoting *Colbert v. State*, 86 Miss. 769, 778 (1905)).
[26] *Id.* at 307.
[27] *Id.*
[28] *Alexander*, 441 So. 2d at 1339; *Moore v. Bd. of Sup'rs of Hinds Cnty.*, 658 So. 2d 883, 887 (Miss. 1995).
[29] *Alexander*, 441 So. 2d at 1340 ("Under our Constitution the final budget-making power is vested in the legislature because it has the ultimate responsibility of appropriation . . . .").

appropriations decisions belong to the Legislature.[30] However, the Executive Branch argues that Mississippi's separation of powers doctrine is not absolute,[31] and that each branch of government "necessarily exercise[s] some power which is not strictly within its province."[32] But that contention is only correct when discussing administrative, non-discretionary powers at the edge of one branch's constitutional authority, [33] which is not the issue here.

This case is about a branch's core powers. When it comes to core powers, the separation of powers doctrine is "strict"[34] and "absolute,"[35] and "no officer of one department may perform a function 'at the core' of the power properly belonging to either of the other two departments."[36]

The Executive Branch implies that this Court's description of a "strict"[37] and "absolute"[38] separation of powers in *Gunn v. Hughes* created new law.[39] This is incorrect. For nearly 150 years, this Court has described the separation of powers as "sacred and inviolable."[40] In the landmark 1928 treatise *Mississippi Constitutions*, Justice Ethridge explained that the separation of powers doctrine leaves the branches

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[30] Appellees' Brief at 10 ("Indeed, there is no dispute that making appropriations is a legislative function.").
[31] Appellees' Brief at 13 (quoting Southwick, 72 Miss. L.J. at 974 ("It is the nature and limit of [constitutional] balances that constitute proper separation of powers analysis, not absolutism.")).
[32] Appellees' Brief at 13 (quoting *Neville*, 95 So. at 628).
[33] *See Alexander*, 441 So. 2d at 1336-37 ("[I]nevitably, as government endures and enlarges, there will be areas in which the functions of the separate bodies will clash with the idealistic concept of absolute separation of powers. . . . Indeed, if the encroachment be occasional and thought necessary for efficiency in government, and if the transgression be into an administrative matter with no inherent danger of enlargement, then the argument . . . that efficiency in government requires some overlapping has definite force. However, if the duties and responsibilities . . . are ongoing and are in the upper echelons of governmental affairs, . . . then the legislative trespass reaches constitutional proportions.").
[34] *Gunn*, 210 So. 3d at 972.
[35] *Id.* at 973.
[36] *Dye v. State ex rel. Hale*, 507 So. 2d 332, 343 (Miss. 1987) (quoting *Alexander*, 441 So. 2d at 1345-46).
[37] *Gunn*, 210 So. 3d at 972.
[38] *Id.* at 973.
[39] Appellees' Brief at 13-14.
[40] *Myers v. City of McComb*, 943 So. 2d 1, 5 (Miss. 2006) (quoting *Lawson v. Jeffries*, 47 Miss. 686, 702-03 (1873)).

"wholly separated" from one another.[41] In *Newell v. State* in 1975, this Court explained that its judicial power could not be shared between two branches.[42] In 1983, *Alexander* explained that textual fidelity to the separation of powers doctrine transcends practical convenience.[43] And in 2008 – nearly a decade before *Gunn v. Hughes* – this Court described one branch's obligation to abstain from using another branch's core powers as a "constitutional imperative."[44]

In *Clarksdale*, the separation of powers doctrine forbade another branch of government (the Judiciary) from "appropriat[ing] unappropriated money."[45] In this case, the separation of powers doctrine forbids another branch (the Executive) from *unappropriating* appropriated money.[46] If the separation of powers doctrine precluded a non-legislative branch from making appropriations decisions in *Clarksdale*, then it likewise precludes a non-legislative branch from making appropriations decisions in this case.

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[41] George H. Ethridge, *Mississippi Constitutions* (1928) at 28. *See also id.* at 29 (describing separation of powers doctrine) ("We have grown so used to free institutions and the blessings of liberty that we can not without effort appreciate the importance of the constitutional provisions by which it is made secure. . . . We get impatient at delays in official action, and sometimes disgusted at the follies and foibles of our fellow citizens, and want to crown some ideal man with great powers. We find in these later days many who want to change these systems of partited power and constitutional restraints so as to enable speedy and effective, if arbitrary and tyrannical action, that will secure the temporary results we greatly desire. Let us all pause when we come to consider these things, that speed, efficiency and tyranny are often boon companions. Let us not forget that the liberties we enjoy are largely due to these constitutional restraints. . . . Let us also consider those people who live in other lands where the government is specially organized for speedy results and swift punishments, and see if these people are better blessed than we are; and whether we would like to give up what we have to get what they have.").

[42] *Newell v. State*, 308 So. 2d 71, 77 (Miss. 1975) (citing Miss. Const., art. I §§ 1-2; art. VI §§ 144, 146).

[43] *Alexander*, 441 So. 2d at 1333 ("In broad terms the issue presented is 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.); *id.* at 1335 ("We must conclude the intention of the [Constitution's] draftsmen was that there be no exceptions to the mandates that the powers of government be held and exercised in three separate and distinct departments . . . .").

[44] *Wimley v. Reid*, 991 So. 2d 135, 138 (Miss. 2008) ("[W]e are unable to ignore the constitutional imperative that the Legislature refrain from promulgating procedural statutes which require dismissal of a complaint, and particularly a complaint filed in full compliance with the Mississippi Rules of Civil Procedure.").

[45] *Clarksdale Mun. Sch. Dist. v. State*, 233 So. 3d 299, 307 (Miss. 2017) (Maxwell, J., concurring).

[46] *See Chiles v. Child A*, 589 So. 2d 260, 265 (Fla. 1991) ("[T]he power to *reduce* appropriations, like any other lawmaking, is a legislative function.") (emphasis in original).

The inflexibility of the separation of powers doctrine and the Legislature's exclusive control over appropriations decisions have been the law in Mississippi for more than 100 years. The Executive Branch's arguments to the contrary are incorrect and should be rejected.

C. The Statute Violates the Separation of Powers Doctrine by Requiring the Executive Branch to Change the Legislature's Budget-Making Decisions.

In an effort to avoid this century-long line of authority, the Executive Branch attempts to reframe this case. According to the Executive Branch, Section 27-104-13 does not actually authorize changes to the Legislature's appropriations decisions. Instead, the Executive Branch argues that the statute simply allows it to spend less than the amount of the Legislature's appropriation.

This characterization misstates the Legislators' challenge. No one disputes that the Executive Branch, or any administrative agency, may spend less than the limit of its full appropriation (so long as the appropriation's purpose is accomplished).[47] But that is not what the statute authorizes. Section 27-104-13 allows the Executive Branch to *change* that spending limit. Mississippi's separation of powers doctrine allows only one branch to make such a change: the Legislature. If budget cuts must be made, it is the Legislature — the only branch with budget-making authority — that must make those cuts.

The Executive Branch's arguments raise several other problems. First, they defy the statute's plain language, which is the ultimate issue in a facial constitutional

[47] *See Alexander*, 441 So. 2d at 1341 (budget control is the "responsibility . . . to administer the appropriation and to accomplish its purpose"). *See also* Appellees' Brief at 19 (appropriations bill provides "[t]he following sums, or so much of those sums as may be *necessary*") (emphasis added).

challenge.[48] Second, their arguments would expand the Executive Branch's budget-control power so broadly that it would eviscerate the Legislature's budget-making power. If the Executive Branch can change the Legislature's appropriations, then the Legislature's power to make a budget is not truly "ultimate" and "final."[49] Third, Governor Bryant himself understands that he was reducing appropriations to comply with the statute, not merely exercising appropriate budget control authority.[50]

1. The Statute Unlawfully Delegates Budget-Making Power to the Executive Branch.

Section 27-104-13 is not limited to spending authority or any other component of budget control. The statute provides, "the State Fiscal Officer shall reduce *allocations* of general funds and state-source special funds . . . in an amount necessary to keep expenditures within the sum of actual general fund receipts."[51] The *Alexander* Court explained that budget making requires the Legislature to "appropriate or direct the expenditures of monies so raised."[52] Budget control, on the other hand, requires the Executive Branch "to administer the appropriation and to accomplish its purpose."[53]

Obviously, budget control allows an agency to accomplish an appropriation's purpose without reaching its spending limit (if it can do so). But Section 27-104-13 contemplates something different: it authorizes the Executive Branch to provide agencies with less money than the Legislature appropriated, not to allow agencies to spend less money than anticipated. This is different than staying below a spending limit – this is *changing* the spending limit. The Legislature alone has this power.

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[48] *See Crook v. City of Madison*, 168 So. 3d 930, 938-39 (Miss. 2015).
[49] *Alexander*, 441 So. 2d at 1340.
[50] Appellants' Record Excerpts at 36 (emphasis added).
[51] Miss. Code Ann. § 27-104-13(2) (emphasis added).
[52] *Alexander*, 441 So. 2d at 1339.
[53] *Id.* at 1341.

On its face, Section 27-104-13 delegates core budget-making power. This violates the Mississippi Constitution's strict separation of powers doctrine.

2. The Executive Branch's Budget-Control Power Does Not Supersede the Legislature's Budget-Making Power.

The Executive Branch concedes that budget making is a core power of the Legislature. However, it argues that changing the Legislature's budget somehow falls within the Executive's budget-control power.[54] The Executive Branch is wrong. Executing the budget made by the Legislature is budget control. Remaking that budget is budget making, which only the Legislature can do.

This Court has long recognized that "the ultimate responsibility of appropriation"[55] belongs to the Legislature alone. The Legislature's control of the purse strings is "the supreme legislative prerogative."[56] Its decisions over appropriations amounts are "final."[57] Accordingly, a sister court, the Florida Supreme Court (which, like this Court, "has traditionally applied a strict separation of powers doctrine"[58]) explained that "the power to *reduce* appropriations, like any other lawmaking, is a legislative function."[59] Otherwise, the Legislature's appropriations decisions would not be truly ultimate and final.

Budget control, on the other hand, is the Executive Branch's responsibility "to administer the appropriation and to accomplish its purpose."[60] In the words of another sister court, the Colorado Supreme Court, budget control is the power to control "how

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[54] Appellees' Brief at 16.
[55] *Alexander*, 441 So. 2d at 1340.
[56] *Colbert v. State*, 39 So. 65, 66 (Miss. 1905).
[57] *Id.*
[58] *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000).
[59] *Chiles v. Child A*, 589 So. 2d 260, 265 (Fla. 1991) (emphasis in original).
[60] *Alexander*, 441 So. 2d at 1341.

the money is to be allocated."[61] But when the Executive Branch replaces the Legislature's spending limits with new spending limits, it engages in budget making. This violates the separation of powers doctrine.

The Executive Branch argues that its budget-control power allows it to change the budget after the Legislature adjourns its regular session *sine die*.[62] The Executive Branch's only support for this suggestion is a single line from *Alexander*: "[o]nce taxes have been levied and appropriations made, the legislative prerogative ends, and executive responsibility begins to administer the appropriation and to accomplish its purpose . . . ."[63] But this means only that budget making and budget control exist distinctly from one another, without any overlap – as do all core powers in Mississippi. It did not mean that the Legislature's constitutional power of the purse[64] ends on a given day and is then passed to the Executive Branch for the rest of the year.

In fact, the Legislature's ongoing budget-making authority has been on display recently. In March 2017, the Legislature adjourned *sine die* without passing a budget for the Office of the Attorney General or the Department of Transportation.[65] When that happened, no one – not the Governor, and not the Attorney General – suggested that *sine die* adjournment allowed the Executive Branch to exercise the legislative power of budget making and set the appropriation. Instead, the Governor called the Legislature

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[61] *Anderson v. Lamm*, 195 Colo. 437, 445 (1978).
[62] Appellees' Brief at 5 ("Once appropriation bills are duly enacted pursuant to Title 27, Chapter 103, Sections 101 *et seq.*, and the Legislature's Regular Session has adjourned *sine die*, the Legislature's budget making duties are fulfilled.").
[63] *Alexander*, 441 So. 2d at 1341.
[64] *Colbert v. State*, 39 So. 65, 66 (Miss. 1905) ("[T]he control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative . . . .").
[65] Emily Pettus & Jeff Amy, "Mississippi Legislature Ends Session With Budgets Unfinished," Associated Press (Mar. 29, 2017), available at https://www.usnews.com/news/best-states/mississippi/articles/2017-03-29/lawmakers-expand-private-school-dyslexia-aid-to-12th-grade (last viewed Jan. 31, 2018).

into a special session for precisely that purpose.[66] If the separation of powers doctrine allowed what the Executive Branch suggests in its brief, then the Governor simply could have waited for *sine die* adjournment and then appropriated whatever he deemed adequate. He did not do that because the law forbids it.

The Executive Branch also argues that it must change the Legislature's budget to comply with Mississippi's balanced budget statute. [67] But statutes do not determine what is and is not constitutional. Statutes yield to the Constitution – not the other way around. Budget-balancing, like every other law, must occur within the Constitution's limits. Undoubtedly, the Legislature has the power to enact a balanced-budget statute and to make appropriations accordingly. But as the sole repository of the State's budget-making power, the Legislature alone must enforce this obligation.

The Executive Branch's description of its authority over the Legislature's appropriations decisions is irreconcilable with Mississippi's strict, absolute separation of powers doctrine. So long as an agency accomplishes an appropriation's purpose, the agency can spend less than the limits set by the Legislature – but only the Legislature can change those limits.

3. Governor Bryant Understood That He Was Reducing Appropriations.

When Governor Bryant instructed the State Fiscal Officer to reduce agencies' allocations in February 2017, his letter demonstrated that he understood he was cutting

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[66] Geoff Pender, "Gov. Bryant Issues Special Session 'Call' and Agenda," Clarion-Ledger (June 2, 2017), available at https://www.clarionledger.com/story/news/politics/2017/06/02/bryant-special-session/364967001/ (last viewed Jan. 31, 2018); Jimmie E. Gates & Geoff Pender, "Legislature Passes Funding Bills, Wraps Up Special Session in a Day," Clarion-Ledger (June 5, 2017), available at https://www.clarionledger.com/story/news/2017/06/06/special-session/370133001/ (last viewed Jan. 31, 2018).

[67] *See, e.g.*, Appellees' Brief at 21 ("[T]he statutory imperative to avoid indebtedness reinforces the conclusion that the Legislature may constitutionally assign the executive a role in averting a budget deficit.").

appropriations. In this letter Governor Bryant ordered "$43 million in *reductions to FY 2017 appropriations*."[68]

Despite the Governor's own words, the Executive Branch suggests in its brief that budget cuts under this statute do not change the Legislature's appropriations. The Executive Branch reasons that, following a budget reduction under Section 27-104-13, "the underlying appropriation remains good law, and retains its full legal effect as an 'authoriz[ation]' of the 'maximum sum' 'to be drawn from the treasury.'"[69] The Executive Branch suggests that, even though an agency will receive less than appropriated by the Legislature, the "appropriation" or "maximum sum" has not changed and therefore, this is not budget making.

The Executive Branch is wrong. When the Executive Branch makes cuts under Section 27-104-13, it changes the "maximum sum" (i.e., the spending limit) available to an agency. This is budget making, which can only be done by the Legislature.

D. *Fiscal Year 2010* Held That Section 27-104-13 Gives the Executive Branch Authority That It Cannot Constitutionally Exercise.

This Court's decision in *In re Fiscal Year 2010 Judicial Branch Appropriations*[70] is also instructive. In that case, the Court held that Section 27-104-13 gives power to the Executive Branch that it cannot legally exercise. Specifically, the Court enjoined Executive Branch cuts to the Judiciary's budget on both statutory and constitutional grounds.[71]

The Executive Branch incorrectly portrays *Fiscal Year 2010* as another iteration

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[68] Appellants' Record Excerpts at 36 (emphasis added).
[69] Appellees' Brief at 22 (quoting Miss. Const., art. 4 § 63).
[70] *In re Fiscal Year 2010 Judicial Branch Appropriations*, 27 So. 3d 394 (Miss. 2010).
[71] *Id.* at 395 (holding that Judiciary is not an "agency" under Section 27-104-13; also holding that "[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").

of *Hosford v. State*.[72] In *Hosford*, this Court ordered a county board of supervisors to pay for a courthouse.[73] *Hosford* concerned the Legislative Branch's duty under the separation of powers doctrine "to provide sufficient funds and facilities for [courts] to operate independently and effectively."[74] On the other hand, *Fiscal Year 2010* concerned an unconstitutional overreach by the Executive Branch. *Fiscal Year 2010* was not a case of the Legislative Branch appropriating too little money to the Judicial Branch; it was a case of the Executive Branch *unappropriating* funds that the Legislature had appropriated.

According to the Executive Branch, *Fiscal Year 2010* – like *Hosford* – means only that "the Legislature has the duty to fund the judicial branch of government."[75] That is too narrow a reading. To be sure, neither *Fiscal Year 2010* nor any other decision prevents the Executive Branch from engaging in its inherent budget-control power. But at a minimum, *Fiscal Year 2010* held that Section 27-104-13 delegates to the Executive Branch authority that it cannot constitutionally exercise.

II. The Executive Branch Relies on Authority Concerning Administrative Delegations, Weak Separation of Powers Doctrines, and Constitutionally Required Balanced Budgets. This Case Involves None of Those Issues.

Under its view that Mississippi's separation of powers doctrine is weak, the Executive Branch argues that Section 27-104-13 is a valid delegation. Again, the Executive Branch is incorrect. Its description of delegation is overly permissive, and its reliance on out-of-state cases ignores critical differences between Mississippi law and

[72] *See* Appellees' Brief at 24.
[73] *Hosford v. State*, 525 So. 2d 789, 798 (Miss. 1988) ("[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.").
[74] *Id.* at 797.
[75] Appellees' Brief at 24.

the laws of those states.

A. The Executive Branch's Cases About Delegation in Mississippi Only Apply to Administrative Agencies.

As this Court explained in *Alexander*, Mississippi's separation of powers doctrine requires "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."[76] But *Alexander* also explained that this principle becomes less rigid at the edges of a branch's authority:

> *[I]f the transgression be into an administrative matter with no inherent danger of enlargement*, then the argument . . . that efficiency in government requires some overlapping has definite force. However, if the duties and responsibilities of the boards and commissions are ongoing and are in the upper echelons of governmental affairs, . . . then the legislative trespass reaches constitutional proportions.[77]

Accordingly, this Court has acknowledged that "[a]lthough the Legislature *cannot delegate its power to make a law*, it can delegate *to an administrative agency* the power to determine some fact or state of things upon which the law makes or intends to make its application depend."[78]

Nevertheless, the Executive Branch argues that Section 27-104-13 properly delegates to the Executive Branch the power to decide appropriations. This argument fails for at least two reasons.

First, Section 27-104-13 delegates not an administrative, non-discretionary

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[76] *Alexander*, 441 So. 2d at 1335.
[77] *Id.* at 1337 (emphasis added).
[78] *Clark v. State ex rel. Miss. State Medical Ass'n*, 381 So. 2d 1046, 1050 (Miss. 1980) (emphases added) (quoting *State ex rel. Patterson v. Land*, 231 Miss. 529, 561 (1957)). For example, Title 63, Chapter 1 provides requirements for receiving a driver's license, *see* Miss. Code Ann. §§ 63-1-9, 63-1-19, and delegates to the Department of Public Safety the responsibility to review applications for compliance with those requirements. Miss. Code Ann. § 63-1-11 ("The provisions of this article with reference to *administration* shall be under the supervision of the commissioner of public safety . . . .") (emphasis added).

power, but a core legislative power: budget-making, which is "the supreme legislative prerogative."[79] The Legislature's budget-making decisions must be "ultimate" and "final."[80] None of the cases relied upon by the Executive Branch suggests that the Legislature can validly delegate a core power. *Alexander* and other decisions by this Court say the opposite.[81]

Second, all of the cases offered by the Executive Branch about delegation in Mississippi involve delegations to administrative agencies – not to another branch of government:

- *Abbott v. State*[82] evaluated whether authority had been delegated improperly to the Mississippi Live Stock Board.[83]
- *Clark v. Mississippi State Medical Association*[84] concerned a delegation to a non-profit organization, but the Court treated it as an agency delegation.[85]
- *Jackson County v. Neville*[86] involved the Governor's use of non-executive authority, but only within his role as a member of "an administrative board."[87]

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[79] *Colbert v. State*, 39 So. 65, 66 (Miss. 1905).
[80] *Alexander*, 441 So. 2d at 1340 ("Under our Constitution the final budget-making power is vested in the legislature because it has the ultimate responsibility of appropriation . . . .").
[81] *See Dye ex rel. Hale*, 507 So. 2d 332, 343 (Miss. 1987) ("The essence of *Alexander* is that no officer of one department may perform a function 'at the core' of the power properly belonging to either of the other two departments.") (quoting *Alexander*, 441 So. 2d at 1345-46).
[82] *Abbott v. State*, 106 Miss. 340, 63 So. 667 (1913) (cited by Appellees' Brief at 26). The Executive Branch's brief attributes the *Abbott* decision to Justice Ethridge, presumably to imply that its view on agency delegation extends to the broader views Justice Ethridge expressed in *Mississippi Constitutions*. But Justice Ethridge did not write *Abbott*. Justice Ethridge joined the Mississippi Supreme Court in 1917; he participated in *Abbott* as an assistant attorney general.
[83] *Abbott*, 63 So. at 668.
[84] *Clark v. Miss. State Med. Ass'n*, 381 So. 2d 1046 (Miss. 1980) (cited by Appellees' Brief at 26).
[85] *Clark*, 381 So. 2d at 1050 ("Does the questioned statute constitute an unlawful delegation of power to a private, non-profit corporation? There appear to be no Mississippi cases on this precise point, although we do have many cases construing statutes whereby administrative agencies are created and broad powers conferred upon them, all designed to promote their efficient and effective operation. The broad general rule governing the validity, vel non, of such statutes is whether they prescribe reasonably adequate standards for the agency's guidance.").
[86] *Jackson Cnty. v. Neville*, 95 So. 626 (Miss. 1923) (cited by Appellees' Brief at 13).
[87] *Neville*, 95 So. at 629.

- *Dunn v. Love*[88] did not involve the separation of powers doctrine at all; moreover, the chancellor's involvement in that case was merely administrative.[89] The *Dunn* Court acknowledged taking a flexible view of the Constitution's requirements because of the ongoing Great Depression;[90] in dissent, Justice Ethridge wrote, "I cannot consent to let emergency, or even a desperate situation, divert the Constitution from its full and fair operation."[91]
- The encyclopedia section quoted by the Executive Branch is entitled "Administrative Agencies – Delegation of Authority by Legislature;"[92] it explains that the limited exception for delegations of legislative authority look to "the practical imperative that it furnish *the agency* with an intelligible expression of the policy goals to be pursued, the standards *the agency* should observe in the course of its regulatory activities and, as well, the contours of its authority."[93]

The Executive Branch's brief quotes these authorities selectively to conclude that "[t]he legislative branch may constitutionally delegate authority, provided the delegating legislation fixes adequate standards or boundaries for the executive to follow."[94] These cases do not support this argument. Further, this Court repeatedly has held the

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[88] *Dunn v. Love*, 155 So. 331, 333 (Miss. 1934) (cited by Appellees' Brief at 13).
[89] *Dunn*, 155 So. at 333 ("In receivership and in liquidations, such as this, the court acts in all ordinary *administration* matters upon ex parte motion or motion and without formal notice to the parties in interest. . . . [T]o require notice of every step to be taken would hinder and embarrass *the administration* and entangle it in unbearable expense.") (emphases added).
[90] *Id.* ("This [bank reorganization] statute . . . is one among a number of legislative acts devised in the attempt to meet, so far as practicable, the unusual conditions brought about by the present economic depression, the most serious within the present generation, and in the effort to salvage something in the general wreck of things. . . . [I]n the distressing situation with which the country has been and is yet confronted, we must not permit ourselves to be maneuvered into positions which would view the Federal and state Constitutions as sculptured idols, frowning with changeless features upon a changing world, for the true view . . . is that 'the interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints' . . . .") (quoting *Bain Co. v. Pinson*, 282 U.S. 499, 501 (1931)).
[91] *Id.* at 341 (Ethridge, J., dissenting).
[92] 3 MS Prac. Encyclopedia MS Law § 19:34 (2d ed.) (cited by Appellees' Brief at 26).
[93] *Id.* (emphases added).
[94] Appellees' Brief at 27.

opposite: that any attempt to delegate the Legislature's core power is unconstitutional.[95] Any other outcome would allow this limited exception – the delegation of a non-core power to an administrative agency – to overrule more than 100 years of this Court's precedent.

B. The Out-of-State Cases Offered by the Executive Branch Come from States with Weak Separations of Powers or with Constitutionally Mandated Balanced Budgets. Mississippi's Constitution Has Neither.

The Executive Branch cites decisions from nine states that allow budget cuts by executive branch officials. [96] In each of those states, though, the constitution is fundamentally different than Mississippi's Constitution. In all of those cases, the other state's constitution either: (a) includes a weak separation of powers doctrine or (b) contains a balanced-budget requirement.

Of the nine other states cited, seven have weak separation of powers doctrines. The Vermont Supreme Court rejects the notion that the separation of powers doctrine is "absolute."[97] The Massachusetts Supreme Judicial Court holds the same view:[98] under its separation of powers doctrine, "some overlap is inevitable, and may well be desirable."[99] In North Dakota, the nondelegation doctrine is "more relaxed."[100] In Connecticut, courts hold "that the separation of powers doctrine cannot always be

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[95] *Dye*, 507 So. 2d at 343 ("[N]o officer of one department may perform a function 'at the core' of the power properly belonging to either of the other two departments.") (quoting *Alexander*, 441 So. 2d at 1345-46).
[96] Appellees' Brief at 31.
[97] *Hunter v. State*, 177 Vt. 339, 350 (2004) ("[W]e have emphasized that separation of powers doctrine does not contemplate an absolute division of authority among the three branches such that each branch is hermetically sealed from the others.").
[98] *Chief Administrative Justice of the Trial Court v. Labor Relations Commission*, 404 Mass. 53, 56 (1989) ("An absolute division of the executive, legislative, and judicial functions is neither possible nor always desirable.").
[99] *New England Div. of Am. Cancer Soc'ty. v. Comm'r of Admin.*, 437 Mass. 172, 183 (2002).
[100] *North Dakota Council of School Administrators v. Sinner*, 458 N.W.2d 280, 285 (N.D. 1990) ("[W]e traced the historical underpinnings of the doctrine and reviewed at length its evolution in this state. We concluded that a more relaxed application of the nondelegation doctrine was necessitated by the complexities of the society in which we live.") (quotation omitted).

rigidly applied."[101] Likewise, the Kansas Supreme Court "has rejected strict application of the separation of powers doctrine, adopting instead a pragmatic, flexible and practical approach in which there is an overlap and blending of functions."[102] New Hampshire's courts take the view "that separation of powers in a workable government cannot be absolute."[103] And Maryland's constitution not only "does not impose a complete separation between the branches of government,"[104] but "impose[s] upon the Governor the primary responsibility of controlling the fiscal policies and operations of the State."[105]

The other two states that the Executive Branch relies on – Kentucky and Alabama – both have constitutions that require balanced budgets.[106]

In contrast, the Mississippi Constitution neither requires a balanced budget nor creates a weak separation of powers. Mississippi's separation of powers doctrine is "strict"[107] and "absolute,"[108] and every legislative enactment must adhere to it.

The Executive Branch describes cases where courts have struck down executive budget-cuts statutes as "far afield."[109] This characterization ignores the similarity

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[101] *Univ. of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386, 394 (1986).
[102] *Washington v. State*, 216 P.3d 191 (Table) at 2 (Kan. Ct. App. 2009) (citing *State ex rel. Morrison v. Sebelius*, 179 P.3d 366 (Kan. 2008)).
[103] *In re Petition of Judicial Conduct Committee*, 855 A.2d 535, 538 (N.H. 2004) (quoting *Opinion of the Justices*, 266 A.2d 823, 825 (N.H. 1970)).
[104] *Judy v. Schaefer*, 331 Md. 239, 261 (1993) (quotation omitted).
[105] *Id.* (quotation omitted).
[106] Ky. Const., §§ 49, 50, 171; Ala. Const., art. XI § 213. *See Fletcher v. Commonwealth*, 163 S.W.3d 852, 856 (Ky. 2005) ("Unlike some state constitutions, the Constitution of Kentucky does not require a state 'budget.' It does, however, require that any such budget be balanced. That constitutional requirement derives from Sections 49, 50, and 171, which together authorize and require the General Assembly to raise revenues sufficient to pay the debts and expenses of government."); *Opinion of the Justices*, 92 So. 2d 429, 431 (Ala. 1957) ("The above-quoted provisions of Sec. 213 of the Constitution, as amended, are expressly intended to prevent further deficits in the state treasury. To this end, available funds for the payment of claims, in case of a deficit, are to be prorated, and all excess unpaid appropriations are declared null and void.").
[107] *Gunn v. Hughes*, 210 So. 3d 969, 972 (Miss. 2017).
[108] *Id.* at 973.
[109] Appellees' Brief at 33.

between the Mississippi Constitution and the constitutions involved in those cases. In *Chiles v. Child A*[110] and *State ex rel. Schwartz v. Johnson*,[111] the Florida Supreme Court and New Mexico Supreme Court operated under separation of powers provisions that are remarkably similar to Mississippi's:

Article II, Section 3 of the Florida Constitution	**Article III, Section 1 of the New Mexico Constitution**	**Article I, Section 2 of the Mississippi Constitution**
The powers of the state government shall be divided into legislative, executive and judicial branches. *No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.*	The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and *no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others,* except as in this constitution otherwise expressly directed or permitted. . . .	*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.* . . .

Like Mississippi, the Florida Supreme Court "has traditionally applied a strict separation of powers doctrine."[112] That court concluded that its strict separation of powers precluded the executive branch from making budget cuts that changed the legislature's appropriations decisions.[113] This Court's identical view of the separation of powers doctrine requires the same conclusion.

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[110] *Chiles v. Child A*, 589 So. 2d 260, 263-64 (Fla. 1991).
[111] *State ex rel. Schwartz v. Johnson*, 120 N.M. 820 (1995).
[112] *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000).
[113] *Chiles*, 589 So. 2d at 265 ("[T]his Court has long held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes. . . . Furthermore, the power to *reduce* appropriations, like any other lawmaking, is a legislative function.") (emphasis in original).

On the other hand, the New Mexico Supreme Court has a weaker separation of powers doctrine, and it still found that executive-branch budget cuts violated its constitution.[114] If New Mexico's weak separation of powers doctrine forbids executive-branch interference with legislative appropriations decisions, then Mississippi's strict and absolute separation of powers doctrine unquestionably forbids such Executive Branch interference.

C. Even in States with Weak Separation of Powers Doctrines, Section 27-104-13 Would Be Unconstitutional Because It Delegates Legislative Power Without Any Intelligible Standards Concerning How to Use It.

The Executive Branch argues that the budget-cuts statutes struck down in other states were broader than Section 27-104-13.[115] This argument misses the point. The point is not whether those statutes were broader than Section 27-104-13. The point is that under a strict separation of powers doctrine, no branch can ever delegate *any* of its core powers to another branch, regardless of whether the delegation is broad or narrow. For this reason, the Executive Branch's argument fails.

But even in states with weak separation of powers doctrines, Section 27-104-13 still would be unconstitutional. States with weak separation of powers doctrines have justified executive budget-cuts statutes by requiring that these laws limit executive discretion.[116] These opinions reason that appropriations decisions inherently require discretion, and that executive budget-cuts statutes are permissible if they provide

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[114] *State ex rel. Taylor v. Johnson*, 961 P.2d 768, 775 (N.M. 1998) ("While recognizing the specific roles of each branch of government, we also note that absolute separation of powers is neither desirable nor realistic, and that the constitutional doctrine of separation of powers permits some overlap of governmental function.") (citations and quotations omitted).

[115] Appellees' Brief at 34 ("Mississippi's statute contains substantially more constraints than the one in *Chiles*.").

[116] *See Hunter v. State*, 177 Vt. 339, 354 (2004) ("The overriding difference between deficit-prevention schemes of the type before us that have been upheld, and those that have been struck down, lies in whether there are any standards for the exercise of implementation discretion.").

standards restricting the executive's discretion. As the Vermont Supreme Court (which has a weak separation of powers doctrine[117]) explained:

> The purpose of standards is to avoid delegation of the law-making function. Thus, a distinction is consequently drawn between a delegation of the power to make the law which necessarily includes a discretion as to what it shall be and the conferring of authority or discretion as to its execution.[118]

For reasons already explained, Mississippi's strict separation of powers doctrine could not support such a view. But even if Mississippi's separation of powers doctrine were not "strict"[119] and "absolute,"[120] Section 27-104-13 still would be unconstitutional because it fails to limit the Executive Branch's discretion.

The Executive Branch claims that Section 27-104-13 is valid because it "limits the circumstances and scope of the statutory authority, supplies guidelines and a trigger for any budget revisions, compels the executive to report certain actions taken pursuant to the statute to the Legislative Budget Office, and preserves the Legislature's ultimate authority over appropriations."[121] In the Executive Branch's view, these are "adequate and intelligible standards" that render the statute constitutional.[122]

This argument is incorrect. Section 27-104-13 provides standards governing *when* the Executive Branch can utilize the statute, but it sets essentially no limits on

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[117] *Id.* at 350 ("[W]e have emphasized that separation of powers doctrine does not contemplate an absolute division of authority among the three branches such that each branch is hermetically sealed from the others.").
[118] *Id.* at 353.
[119] *Gunn v. Hughes*, 210 So. 3d 969, 972 (Miss. 2017).
[120] *Id.* at 973.
[121] Appellees' Brief at 27.
[122] Appellees' Brief at 36. The Executive Branch also argues that the statute's restriction against cutting the Department of Transportation is an intelligible standard. In the Executive Branch's view, the Legislators should resolve the concerns they raise in this case by simply adding Mississippi's school funding formula to that restriction. Appellees' Brief at 29. Although the Legislators' primary concern with the Executive Branch's budget changes has been the enormous cuts to public schools, simply adding the funding formula to the statute's restrictions would not render it constitutional. The statute still would give the Executive Branch near-unfettered discretion to change appropriations for nearly every other area of state government.

how that power can be used. As a result, the Executive Branch wields near-unfettered discretion to slash virtually every corner of state government. The only "limit" on this arbitrary decision-making is that no agency can be cut more than 5 percent until every other agency has been cut 5 percent.[123] Otherwise, the Executive Branch's authority is virtually limitless.

This is a far cry from many of the executive budget-cuts statutes that have survived constitutional challenges in states with weak separation of powers doctrines. For example, in Vermont, the statute required an executive-branch official to prepare a "deficit prevention plan" in consultation with legislative leadership and "relevant committee chairs."[124] Before the plan's cuts occurred, the legislative committee could accept, reject, or amend the plan as it saw fit.[125] Similarly, the executive budget-cuts statute in New Hampshire (which also has a weak separation of powers doctrine[126]) forbids the governor from making budget cuts without the prior approval of a legislative fiscal committee.[127] These controls prevent the executive from arbitrarily changing legislative appropriations decisions.

Section 27-104-13 includes no such controls. So long as no single agency's appropriation is cut more than 5 percent, the Executive Branch has unlimited authority to make its cuts.

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[123] Even the 5 percent limit is no meaningful control on the Executive Branch's discretion. The Legislature appropriated $2.22 billion to the Mississippi Adequate Education Program for Fiscal Year 2017-18. The 5 percent limit would allow the Executive Branch to cut up to $111 million from MAEP with no oversight whatsoever.

[124] *Hunter v. State*, 177 Vt. 339, 341 (2004)

[125] *Id.*

[126] *In re Petition of Judicial Conduct Committee*, 855 A.2d 535, 538 (N.H. 2004) ("The separation of powers provision of our State Constitution recognizes that separation of powers in a workable government cannot be absolute . . . .") (quoting *Opinion of the Justices*, 266 A.2d 823, 825 (N.H. 1970)).

[127] *New Hampshire Health Care Ass'n v. Governor*, 161 N.H. 378, 389 (2011) (Section 9:16-b of New Hampshire Revised Statutes Annotated allows governor to cut budget "with the prior approval of the fiscal committee").

The Executive Branch also is incorrect that the statute's reporting requirement makes it constitutional, and that the statute "preserves the Legislature's ultimate authority over appropriations."[128] A branch of government cannot cure a separation of powers violation by reporting the violation. Moreover, exempting some agencies do *not* preserve the Legislature's budget-making authority: the issue is not whether the Legislature can protect some areas of state government from budget cuts. The issue is whether the Executive Branch can make budget cuts *at all*. Allowing those cuts defies the notion that the Legislature's budget-making decisions are "ultimate" and "final."[129] It cannot be reconciled with the separation of powers doctrine.

CONCLUSION

This case presents diametrically opposed views of Mississippi's separation of powers doctrine. The Legislators contend that the doctrine is strict and absolute; the Executive Branch contends that it is weak and flexible.

This disagreement is crystallized in the Executive Branch's brief, where it argues that "the core of legislative power is making laws, and nothing in § 27-104-13 empowers the executive to make law."[130] The Executive Branch is wrong: budget making is lawmaking.[131] When the Executive Branch changes appropriations decisions and lowers an agency's spending limit, it remakes the budget. Mississippi's strict separation of powers doctrine forbids this.

Section 27-104-13(2) of the Mississippi Code violates the separation of powers

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[128] Appellees' Brief at 27.
[129] *Alexander*, 441 So. 2d at 1340 ("Under our Constitution the final budget-making power is vested in the legislature because it has the ultimate responsibility of appropriation . . . .").
[130] Appellees' Brief at 21 (citation and quotation omitted).
[131] *Chiles v. Child A*, 589 So. 2d 260, 265 (Fla. 1991) ("[T]his Court has long held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes. . . . Furthermore, the power to *reduce* appropriations, like any other lawmaking, is a legislative function.") (emphasis in original).

doctrine. The chancellor's decision to the contrary was in error. This Court should reverse and render judgment in favor of the Legislators.

RESPECTFULLY SUBMITTED this Second day of March 2018.

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CERTIFICATE OF SERVICE

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

SO CERTIFIED this Second day of March 2018.

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