

**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**

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**REPLY BRIEF OF THE APPELLANTS**

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## SUMMARY OF THE REPLY

This case hinges on whether Mississippi's separation of powers doctrine is "strict"<sup>1</sup> and "absolute."<sup>2</sup> The Legislators contend that it is. Relying on case law stretching back more than a century,<sup>3</sup> 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."<sup>4</sup> 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"<sup>5</sup> 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."<sup>6</sup> 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"<sup>7</sup> and "absolute"<sup>8</sup> separation of powers doctrine, budget making is a "legislative prerogative and

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<sup>1</sup> at 973.

<sup>3</sup> *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).

<sup>4</sup> *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)).

<sup>5</sup> 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)).

<sup>6</sup> Appellees' Brief at 13 (quoting *Jackson Cnty. v. Neville*, 95 So. 626, 628 (Miss. 1923)).

<sup>7</sup> *Gunn*, 210 So. 3d at 972.

<sup>8</sup> *Id.* at 973.







continues to this day. The principle recently reared in *Clarksdale Municipal School District v. State*,<sup>22</sup> 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.<sup>23</sup> But four justices, with another justice joining in part,<sup>24</sup> 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.”<sup>25</sup> 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.”<sup>26</sup> But the power of the purse, the concurring justices concluded, “lies instead with the representatives of the people.”<sup>27</sup>

The authority to set appropriations is a core power of the Legislature.<sup>28</sup> Decisions made under that power are “ultimate” and “final.”<sup>29</sup> 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

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<sup>22</sup> *Clarksdale Mun. Sch. Dist. v. State*, 233 So. 3d 299 (Miss. 2017).

<sup>23</sup> *Id.* at 304-05.

<sup>24</sup> *Id.* at 306 (Maxwell, J., specially concurring) (joined by Coleman, Chamberlin, and Ishee, JJ.; joined in part by Randolph, P.J.).

<sup>25</sup> *Id.* (quoting *Colbert v. State*, 86 Miss. 769, 778 (1905)).

<sup>26</sup> *Id.* at 307.

<sup>27</sup> *Id.*

<sup>28</sup> *Alexander*, 441 So. 2d at 1339; *Moore v. Bd. of Sup’rs of Hinds Cnty.*, 658 So. 2d 883, 887 (Miss. 1995).

<sup>29</sup> *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.<sup>30</sup> However, the Executive Branch argues that Mississippi's separation of powers doctrine is not absolute,<sup>31</sup> and that each branch of government "necessarily exercise[s] some power which is not strictly within its province."<sup>32</sup> But that contention is only correct when discussing administrative, non-discretionary powers at the edge of one branch's constitutional authority,<sup>33</sup> 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"<sup>34</sup> and "absolute,"<sup>35</sup> and "no officer of one sepaanmencer."

“wholly separated” from one another.<sup>41</sup> In *Newell v. State* in 1975, this Court explained that its judicial power could not be shared between two branches.<sup>42</sup> In 1983, Alexander explained that textual fidelity to the separation of powers doctrine transcends practical convenience.<sup>43</sup> And in 2008 – nearly a decade before *Gunn v. Hughes* – this Court described one branch’s obligation to abstain from u(- g)-4( a)(ex)Hy(.)5(2afeB2wp2( f)dr-2(e-26 g)-4-3

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).<sup>47</sup> 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.

challenge.<sup>48</sup> 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."<sup>49</sup> Third, Governor Bryant himself understands that he was reducing appropriations to comply with the statute, not merely exercising appropriate budget control authority.<sup>50</sup>

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."<sup>51</sup> The Alexander Court explained that budget making requires the Legislature to "appropriate or direct the expenditures of monies so raised."<sup>52</sup> Budget control, on the other hand, requires the Executive Branch "to administer the appropriation and to accomplish its purpose."<sup>53</sup>

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.

On its face, Section 27104-13 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.<sup>54</sup> 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"<sup>55</sup> belongs to the Legislature alone. The Legislature's control of the purse strings is "the supreme legislative prerogative."<sup>56</sup> Its decisions over appropriations amounts are "final."<sup>57</sup> Accordingly, a sister court, the Florida Supreme Court (which, like this Court, "has traditionally applied a strict separation of powers doctrine"<sup>58</sup>) explained that "the power to reduce



the money is to be allocated.<sup>61</sup> 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<sup>62</sup> 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 . . . ."<sup>63</sup> 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<sup>64</sup> 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<sup>8(o)4(n)2(th)2.t(ti)t2(t4)7( G32</sup>

into a special session for precisely that purpose<sup>66</sup> 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.<sup>67</sup> 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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<sup>66</sup> Geoff Pender, "Gov. Bryant Issues Special Session 'Call' and Agenda," Clarion



of *Hosford v. State*.<sup>72</sup> In *Hosford*, this Court ordered a county board of supervisors to pay for a courthouse.<sup>73</sup> *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."<sup>74</sup>

the laws of those states.

A.

power, but a core legislative power: budget-making, which is “the supreme legislative prerogative.”<sup>79</sup> The Legislature’s budget-making decisions must be “ultimate” and “final .”<sup>80</sup> 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.<sup>81</sup>

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:

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

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<sup>79</sup> Colbert v. State, 39 So. 65, 66 (Miss. 1905).

<sup>80</sup> 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 . . .”).

<sup>81</sup> 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)

x *Dunn v. Love*<sup>88</sup> did not involve the separation of powers doctrine at all;  
moreover, the chancellor's involvement in that case was merely administrative.<sup>89</sup>

The *Dunn* Court acknowledged taking a flexible view of the Con





rigidly applied.”<sup>101</sup> Likewise, the Kansas Supreme Court “has rejected strict application of the separation of powers doctrine, adopting instead a pragmatic, flexible and practical

between the Mississippi Constitution and the constitutions involved in those cases. In *Chiles v. Child A*<sup>110</sup> and *State ex rel. Schwartz v. Johnson*,<sup>111</sup> 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.”

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.<sup>114</sup> 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  
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standards restricting the executive's discretion. As the Vermont Supreme Court (which has a weak separation of powers doctrine<sup>117</sup>) 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.<sup>118</sup>

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"<sup>119</sup> and "absolute,"<sup>120</sup> 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."<sup>121</sup> In the Executive Branch's view, these are "adequate and intelligible standards" that render the statute constitutional.<sup>122</sup>

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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<sup>117</sup>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.").

<sup>118</sup>Id. at 353.

<sup>119</sup>Gunn v. Hughes, 210 So. 3d 969, 972 (Miss. 2017).

<sup>120</sup>Id. at 973.

<sup>121</sup>Appellees' Brief at 27.

<sup>122</sup>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 w Tw [72.2(6.8(l)-1( o)-3.7(e)5( )-12(L)5

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.<sup>23</sup> 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 written



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.

/s/ Will Bardwell  
William B. Bardwell  
Counsel for the Appellants

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 392050686.

SO CERTIFIED this Second day of March 2018.

/s/ Will Bardwell  
William B. Bardwell  
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