NO. 1190470

IN THE SUPREME COURT OF ALABAMA

Ray Long, Jeff Clark, Randy Vest, Don Stisher, Greg Abercrombie,

Defendants/Appellants,

v.

Dr. Danna Jones, Venita Jones, Dana Gladden, Hartselle City Education Association, Rodney Randell, Decatur Education Association, Rona Blevins, Morgan County Education Association,

Plaintiffs/Appellees,

v.

Morgan County Board of Education, Decatur City Board of Education,

Plaintiffs/Appellees in Intervention.

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE ALABAMA ASSOCIATION OF SCHOOL BOARDS, SCHOOL SUPERINTENDENTS OF ALABAMA, AND COUNCIL OF LEADERS IN ALABAMA SCHOOLS ("PUBLIC SCHOOL AMICI")

ON APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY
CIVIL ACTION NO. CV 2019-477

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July 1, 2020

MOTION BY THE ALABAMA ASSOCIATION OF SCHOOL BOARDS, SCHOOL SUPERINTENDENTS OF ALABAMA, AND COUNCIL FOR LEADERS IN ALABAMA SCHOOLS FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF THE APPELLEES AND APPELLEES IN INTERVENTION

The Alabama Association of School Boards ("the AASB"), School Superintendents of Alabama ("SSA"), and the Council for Leaders in Alabama Schools ("CLAS") (hereinafter described collectively as "Public School Amici") move the Court for leave to appear as *amici curiae*, in support of the position of Appellees and Appellees-in-Intervention, and also request leave to file their amicus brief no later than July 1, 2020. The Public School Amici show the following in support of their motion:

1. The Alabama Association of School Boards (AASB) is the official voice of the state's local school boards and other boards governing K-12 public education agencies. Founded in 1949, AASB has grown in size and stature as a vocal advocate of local school boards. In 1955, the Alabama Legislature designated AASB as the "organization and representative agency of the members of the school boards of Alabama." Ala. Code §16-1-6.

2. School Superintendents of Alabama (SSA) is the professional association for school system executives and their leadership teams. SSA is a professional non-profit organization comprised of superintendents and school system leaders from across Alabama who are committed to improving education for Alabama's children. SSA represents the viewpoint of these education professionals year-round in a definitive voice to the Legislature, Governor's Office, and other policy making bodies including the State Board of Education and keep the SSA membership informed on important issues.

3. Since 1969, the Council for Leaders in Alabama Schools (CLAS) has been the premier school leader organization serving administrators in Alabama's public schools and school systems, including principals, education administrators, personnel administrators, special education administrators and others. CLAS focuses on children while providing high quality professional development and other needs for school and school system administrators.

4. The instant appeal presents important questions regarding the authority of the courts to review and reverse

educational funding decisions made by the legislature in discharging its mandate to establish, maintain, and support Alabama's public school programs and operations. Public School Amici and their members have a vital interest in the appropriate disposition of these issues.

5. The brief of Public School Amici (conditionally filed herewith) will be filed in support of Appellees Dr. Danna Jones, et al., and Appellees in Intervention Decatur City and Morgan County Boards of Education. Appellees have been granted an extension of time to tile their brief to Wednesday, July 1, 2020, and these Amici request leave to file their brief no later than said date.

6. No party will be prejudiced if the motion is granted.

For the foregoing reasons, the Public School Amici move the Court to allow them to appear as *amici curiae* for the purpose of filing their brief, and, if appropriate, participating in oral argument.

Respectfully submitted this 1st day of July, 2020.

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STATEMENT REGARDING ORAL ARGUMENT

Public School Amici hereby adopt the Statement Regarding Oral Argument set forth in Appellees' Brief.

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STATEMENT OF JURISDICTION

The Alabama Association of School Boards ("AASB"), School Superintendents of Alabama ("SSA"), and the Council of Leaders in Alabama Schools ("CLAS") (hereinafter collectively referred to as "Public School Amici"), hereby adopt the Statement of Jurisdiction set forth in Appellees' Brief.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF THE CASE

Public School Amici hereby adopt the Statement of the Case set forth in Appellees' Brief.

STATEMENT OF THE ISSUES

I.

Amendment 111 to the Alabama Constitution authorizes the legislature to provide for the establishment, funding, and general operation of the public schools, and to do so "under such circumstances and upon such conditions as it shall prescribe." Is that express, direct, and specifically targeted grant of unqualified legislative authority subject to the general prohibition imposed by §105 of the Alabama Constitution?

II.

Act 2019-272 converts use tax revenues to state school funds by earmarking and allocating them to state educational agencies for public school purposes. Because those agencies are properly viewed as part of the state itself, and because §105 has no application to the state,

may the county commission rely on §105 to challenge the Act?

III.

Even if Amendment 111 does not preclude invocation of §105 as a matter of construction, responsibility for control, funding, and maintenance of school operations has been exclusively vested in the legislature for more than a century. Citing the separation of powers principles currently embodied in §42 of the Constitution, the Alabama Supreme Court has declared itself to be without authority to direct the legislature to adopt legislation that would reconfigure state school funding formulae to achieve a more "equitable" distribution of school funds. Does the same separation of powers firewall nonetheless permit a court to invalidate an act that dedicates and reallocates use tax revenues for public school purposes?

STATEMENT OF THE FACTS

Public School Amici hereby adopt the Statement of the Facts set forth in Appellees' Brief.

STATEMENT OF THE STANDARD OF REVIEW

The issues presented for determination on appeal entail questions of law that do not depend on the resolution of disputed facts. Accordingly, the Court on appeal examines the relevant legal issues *de novo*. However, the Court's consideration of Appellants' challenge to Act 2019-272 is both informed and constricted by the strong presumption of validity that attaches to legislation, and by the Court's corresponding obligation "to seek to sustain rather than to strike down [legislative enactments]."[1]

SUMMARY OF THE ARGUMENT

Courts are constitutionally commissioned to adjudicate justiciable disputes, not to steer or second-guess legislative decisionmaking, and may not undertake the latter in the guise of the former. Act 2019-272[2] is a

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[1] See discussion *infra* at pp. 8-10.

[2] The validity of this legislation (hereinafter referred to as "the Orr Act" for clarity and ease of reference) is the central issue in the subject litigation. The Morgan County Commission contends that it violates Art. IV, §105 of the Alabama Constitution (1901) as a "local law" that impermissibly conflicts with two general laws: (1) The Simplified Seller Use Tax Remittance Act, ALA. CODE §40-23-

quintessential expression of policymaking that is based on a considered, tailored, and presumptively valid legislative assessment and refinement of educational funding priorities. Unhappy with the legislature's judgment regarding those priorities, the Morgan County Commission objects to the Orr Act's alleged unfairness. But that complaint goes to the wisdom and equity of the legislation——nonjusticiable matters that this Court has conclusively declared to be beyond the reach of its remedial authority.[3]

The chasm between the legislative and judicial domains is especially wide in the field of education. At least two state constitutional provisions——Article XIV, §256 (as amended by Amendment 111) and Article III, §42 (as set

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191, et seq., (1975) (hereinafter referred to as "the SSUT Act") and (2) The Budget Control Act, ALA. CODE §11-8-1, et seq. (1975).

[3] See discussion *infra* at pp. 32-35 *infra*, and fn. 31, in particular. In rejecting a challenge to the practice of partisan gerrymandering as a nonjusticiable political question, the United States Supreme Court recognized that courts are neither equipped nor authorized to apportion political power as a matter of fairness. Rucho v. Common Cause, 139 S.Ct. 2484, 2499 (2019)

forth in Amendment 905 to the Constitution—combine to vest complete and exclusive control over matters implicating public school operations in the legislature, and to concomitantly proscribe judicial usurpation of legislative prerogatives in establishing educational funding preferences and priorities.

Those express constitutional pronouncements, in turn, are buttressed by a host of appellate decisions that independently affirm the legislature's longstanding and exclusive authority to control and operate the hierarchically structured, statewide system of public education, the principal components of which are Alabama's city and county school districts. Alabama's integrated system of public education means, among other things, that "local" boards of education are themselves ***state*** agencies performing a ***state*** function through the expenditure of ***state*** funds. Because they are not independent principalities, but are part of the state itself, restrictions that might otherwise be imposed by §105 on municipal corporations or like entities have no application

to legislation establishing or supporting public school operations.

The exclusive control over educational policymaking that is constitutionally vested in the legislature is conspicuously bereft of qualification by or even reference to §105. The Alabama Supreme Court has firmly renounced any claim of right or authority to require re-engineering of legislatively sanctioned school funding formulae, and this case presents no occasion for the Court to reverse a course of judicial restraint that has been set and maintained for more than a century.

Moreover, §105——the legal linchpin of the Commission's argument——cannot be invoked without trenching on the legislature's exclusive authority to prescribe the means and methods by which public school operations are funded. But even if §105 could be given a field of operation in this context, it would be unavailing to the Commission.

The Commission contends that the Orr Act materially varies from two pieces of general legislation: (1) the Simplified Seller Use Tax Act ("SSUT");[4] and (2) the Budget

[4] Codified at ALA. CODE §40-23-191, et seq. (1975).

Control Act.[5] That argument misses the mark because the Orr Act is not at cross-purposes with the principal substantive objectives of either general law. Nor has it been alleged or shown to be practically incompatible with either enactment. Although the reallocation of funds mandated by the Orr Act will have an immediate positive impact on school operations in the districts that it slates for additional funding, its ultimate and long term effect will redound to the benefit of the state system of public education as a whole—a consequence that is fully consistent with the legislature's constitutional function and role as the lawmaking steward of the state's educational interests.

Courts exert significant influence over the activities of state and local governments, but can lawfully do so only through an exercise of their constitutionally conferred *judicial* authority. They have no power to preempt, interdict, or otherwise intervene in the formulation of legislative policy, even if the legislation appears in the eyes of the court to be unwise, unnecessary, or contrary to

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[5] Codified at ALA. CODE §11-8-1, et seq. (1975.

"public policy." Accordingly, the Court should hold that it has no constitutional authority to nullify a legislative decision regarding educational funding under the expedient of §105. Alternatively, the Court should find that the Commission has failed to meet its weighty burden of proving that there is no construction of the involved statutes that can avoid constitutional infirmity.

In the analysis that follows, Public School Amici demonstrate that the Orr Act can be comfortably reconciled with controlling constitutional and jurisprudential norms, and that the trial court's rejection of Appellants' challenge to it must therefore be affirmed.

ARGUMENT

(a)
Because Appellees Have Offered a Viable Construction of Ostensibly Conflicting Legislation that Avoids any Constitutional Infirmity, Appellants Cannot Meet Their Burden of Proving the Orr Act's Invalidity.

The Morgan County Commission's §105-based attack on the Orr Act is predicated on (1) a misapplication of relevant statutory provisions and decisional precedent; (2) a usurpation of authority conferred upon the legislature by

§256 of the Alabama Constitution (as amended by Amendment 111 to the Constitution) and reinforced by §42 of the Constitution; and (3) an implicit repudiation of longstanding principles of constitutional construction and analysis.

Under an unbroken line of authority, legislative acts are entitled to a strong presumption of validity, and the heavy burden of establishing their unconstitutionality falls squarely and solely on the party attacking the enactment:

> [A]cts of the legislature are presumed constitutional. State v. Alabama Mun. Ins. Corp., 730 So.2d 107, 110 (Ala.1998). See also Dobbs v. Shelby County Econ. & Indus. Dev. Auth., 749 So.2d 425, 428 (Ala.1999) ("In reviewing the constitutionality of a legislative act, this Court will sustain the act 'unless it is clear beyond reasonable doubt that it is violative of the fundamental law.'" White v. Reynolds Metals Co., 558 So.2d 373, 383 (Ala.1989) (quoting Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 9, 18 So.2d 810, 815 (1944))). We approach the question of the constitutionality of a legislative act "'with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of government.'" Monroe v. Harco, Inc., 762 So.2d 828, 831 (Ala.2000) (quoting Moore v. Mobile Infirmary Ass'n, 592 So.2d 156, 159

> (Ala.1991), quoting in turn McAdory, 246 Ala. at 9, 18 So.2d at 815).
>
> Moreover, in order to overcome the presumption of constitutionality, ... the party asserting the unconstitutionality of the Act ... bears the burden "to show that [the Act] is not constitutional." Board of Trustees of Employees' Retirement Sys. of Montgomery v. Talley, 291 Ala. 307, 310, 280 So.2d 553, 556 (1973). See also Thorn v. Jefferson County, 375 So.2d 780, 787 (Ala.1979) ("It is the law, of course, that a party attacking a statute has the burden of overcoming the presumption of constitutionality...."). 'State ex rel. King v. Morton, 955 So.2d 1012, 1017 (Ala.2006); State v. Lupo, 984 So.2d 395, 397–98 (Ala.2007).

Westphal v. Northcutt, 187 So. 3d 684, 691 (Ala. 2015). Indeed, when a construction of legislation that would avoid a constitutional problem is available, the Court must apply it. Riley v. Cornerstone Cmty. Outreach, Inc., 57 So.3d 704, 738 (Ala. 2010) *citing* Whitson v. Baker, 463 So.2d 146 (Ala. 1985).

Those presumptions, burdens, and judicial duties apply in equal measure to both general and local legislation, and no textually based edict or jurisprudential canon shifts the onus of proving constitutional compliance to proponents of local legislation. Here, as in every case, the burden of

proving fatal constitutional infirmity remains at all times with the county commission.[6]

That burden is not met, as the Commission posits, by establishing that "the Local Law addresses the same matter (or 'case') as the general law," the "general subject of the [g]eneral [l]aw," or "a subject already covered and subsumed by, and a matter of the same import as, the

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[6] Alabama courts have, on occasion, cited record evidence or legislative recitals in reaching the conclusion that a challenged local law was designed to respond to a local need that was not met by comparable general legislation. *See e.g.* Peddycoart v. City of Birmingham, 354 So.2d 808 (Ala. 1978), *citing* Drummond Co. v. Boswell, 346 So.2d 955, 958 (Ala. 1977), and cited with approval in Miller v. Marshall County Bd. of Educ., 652 So.2d 759, 761 (Ala. 1995); Shelby County v. Shelby Co. Law Enforcement Personnel Board, 611 So.2d 388 (Ala. Civ. App. 1992). *See also* Jefferson County v. Taxpayers and Citizens of Jefferson County, 232 So.3d 845 (Ala. 2017) (reaffirming the viability of *Miller* and related line of cases). However, public school amici have located no decision *holding* that the absence of such indicia strips the challenged act of its presumptive validity. *See* Jefferson County v. Taxpayers and Citizens of Jefferson County, 232 So.3d 845 (Ala. 2017) (affirming validity of local tax measure notwithstanding absence of record evidence substantiating "local need"); Shelby Co. v. Shelby Cnty. Law Enforcement Personnel Board, 611 So.2d 388 (Ala. Civ. App. 1992) (sustaining local law against §105-based challenge without evidentiary or legislative findings where local law had a "sphere of operation" separate and apart from that of general law).

[g]eneral [l]aw." (Appellants' Brief, p. 28). Indeed, precisely such open-ended formulations of the test have been expressly rejected by the Alabama Court, and in decisions on which the Commission itself purports to rely:

> It is not the broad, overall subject matter which is looked to in determining whether the local act, taken together with the general law, is violative of § 105; rather it is whether the object of the local law is to accomplish an end not substantially provided for and effectuated by a general law."

Peddycoart v. City of Birmingham, 354 So.2d 808, 815 (Ala. 1978), *citing* Drummond Co. v. Boswell, 346 So.2d 955, 958 (Ala. 1977), and cited with approval in Miller v. Marshall County Bd. of Educ., 652 So.2d 759, 761 (Ala. 1995); Shelby County v. Shelby Co. Law Enforcement Personnel Board, 611 So.2d 388 (Ala. Civ. App. 1992). *See also* Jefferson County v. Taxpayers and Citizens of Jefferson County, 232 So.3d 845 (Ala. 2017) (reaffirming viability of *Miller* and related line of cases). The Commission inexplicably flouts *Peddycoart* and its progeny when it asserts that the test is not whether the local law . . . addresses an end not

substantially provided for in the general law." (Appellants' Brief p. 28).

In any event, because the object, end, or purposes of the legislation in question are critical to the constitutional analysis, they bear careful scrutiny. Both pieces of general legislation cited by the Commission will be examined in turn and in relation to the Orr Act.

(i)

The Purpose of the Simplified Sellers Use Tax is Not at Odds with The Orr Act.

The Simplified Sellers Use Tax ("SSUT")——initially adopted by the Alabama Legislature in 2015 (Act. 2015-448; ALA. CODE §40-23-191, *et seq.*)——is designed to provide a means by which "eligible sellers"[7] are permitted "to collect, report, and remit the simplified sellers use tax authorized [by the statute] in lieu of the sales or use taxes otherwise due by or on behalf of [the eligible

[7] "(2) ELIGIBLE SELLER. A seller that sells tangible personal property or a service, but does not have a physical presence in this state or is not otherwise required to collect and remit state and local sales or use tax for sales delivered into the state." ALA. CODE §40-23-191(b)(2).

sellers'] Alabama customers. . . ." ALA. CODE §40-23-192(a). By collecting and remitting the SSUT, both the seller and purchaser are relieved of liability for payment of additional state or local sales and use taxes on the transaction. ALA. CODE §40-23-193(a). Sellers may participate in the program only by application and approval of the Department of Revenue, and by maintaining continuing compliance with its requirements. ALA. CODE §40-23-192.

As its title signals, the object or purpose of the SSUT Act is to simplify the method and means by which use taxes on out-of-state purchases are collected and remitted. It does so by establishing a uniform tax rate and a standardized reporting and payment process that is administered by a central taxing authority, thereby benefitting both the sellers and purchasers of such goods and services. As a matter of course, the law includes a feature that directs the distribution of the tax proceeds, but no party has contended or could reasonably contend that the impetus for or substantive centerpiece of the SSUT Act was to create a new use tax distribution plan for the State of Alabama.

Said differently, the distribution formula embedded in the SSUT legislation is secondary if not incidental to the statute's primary objective and is not integral to realization of its primary purpose. Accordingly, the more precisely delineated distribution formula set forth in the Orr Act does not conflict with the SSUT Act in the sense contemplated by §105. Indeed, the only discernible substantive purpose that can be gleaned from the SSUT's distribution scheme derives from its earmarking a portion of the tax proceeds for allocation to the Special Education Trust Fund—a purpose philosophically consistent with the educational allocations embodied in the Orr Act.

(ii)

The Orr Act Does Not Intersect—Let Alone Conflict With—The Budget Control Act.

The Commission erroneously asserts that a 2018 amendment[8] to the SSUT law which called for tax funds transferred to counties to be deposited in the counties' general funds accounts restricts the Commission's authority to appropriate funds to purposes supposedly specified in

[8] Act 2018-539.

what they mischaracterize as the "Allocation General Law."[9] According to the Commission, the effect of that amendment is to prohibit the transfer or expenditure of county funds for purposes other than those for which "allocations" are ostensibly made by the Budget Control Act, and which, according to the Commission, "do not include public education." (Brief, p. 38).

The Commission is wrong on all counts.

The Budget Control Act does not, as the Commission suggests, restrict or direct the allocation of funds to specified purposes or uses. Rather, its purposes and field of operation are succinctly summarized in the statute itself:

> It is the purpose of this chapter to vest in the county commission more efficient power and control over all public funds that may now or hereafter be under its management and control, to limit its power and authority to incur obligations and to approve and pay claims for current operating expenses in any fiscal year to the income of such year available for

[9] This fictional moniker is designed to recast (and miscast) the tenor of the statute. The legislation in question has been consistently and more accurately dubbed "the Budget Control Act" by Alabama courts. See fn. 10, *infra*, and will be referred to accordingly in this brief.

> such purposes and to authorize the refunding of outstanding general obligations, other than bonded indebtedness, so that the provisions of this chapter may be put into effective operation.

ALA. CODE. §11-8-2 (1975). Its principal mandate and central purpose are to require county commissions to establish and adhere to a formally adopted operating budget based on anticipated revenues and expenditures. The approved budget must:

> ...include any revenue required to be included in the budget under the provisions of Alabama law and reasonable expenditures for the operation of the offices of the judge of probate, tax officials, sheriff, county treasurer, the county jail, the county courthouse, and other offices as required by law.

ALA. CODE §11-8-3(c) (1975). However, that requirement only establishes the *minimum* requirement in terms of "county operations" that must be accounted for in the budget.

Moreover, nothing in the Budget Control Act invests county commissions or any of their constituent departments with a right or entitlement to funding at a certain level or to funding at all. Indeed, it only purports to govern

financial ***practices*** regarding "public funds that ***may be*** now or hereafter be under its management and control." ALA. CODE §11-8-2 (emphasis supplied). Manifestly, funds that are dedicated by separate legislation to other purposes and uses are not under and are not destined to be under the management and control of the Commission. In any event, Alabama courts have consistently rejected attempts to use the Budget Control Act to justify noncompliance with other legislative mandates.

For example, in Shelby County v. Shelby County Law Enforcement Personnel Board, 611 So.2d 388 (Ala. Civ. App. 1992), the Court dismissed a §105 challenge to a local law that created a law enforcement personnel board in Shelby County and that authorized the board to establish minimum and maximum salary ranges for law enforcement service classifications. Applying *Peddycoart's* "object-of-the-local-law" based test, the Court found that the local act was not infirm under §105 because it had a sphere of operation apart from that of the general law. The Court went on to hold that "the Commission may not use its

budgeting authority under the Budget Control Act to avoid its responsibility to implement the Board's wage scale."[10]

In short, the Budget Control Act does not itself dedicate revenues to or guarantee county commissions particular levels of funding generally or funding for particular purposes. Rather, it codifies the budgeting mechanism for assuring that the county lives within its fiscal means—the essential function and purpose of any budget. That process-focused objective is fundamentally different from a legislative measure that earmarks certain taxes for redistribution by the Commission to designated educational agencies. The Budget Control Act and the Orr Act thus serve fundamentally different purposes and are not in conflict with each other.

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[10] Shelby County v. Shelby Co. Law Enforcement Personnel Board, 611 So.2d at 391 *citing* Hale v. Randolph Co. Comm'n, 423 So.2d 893 (Ala. Civ. App. 1982) (Budget Control Act does not give county commission blanket authority to refuse to pay salaries mandated by the legislature); Marshall County Personnel Board v. Marshall County, 507 So.2d 954 (Ala. Civ. App. 1987) (refusing to vest county commission with veto power over personnel board's wage decision); Shelby Co. v. Smith, 372 So.2d 1092 (Ala. 1979) (Commission cannot use Budget Control Act to shield or ward off its responsibilities).

Finally, the Commission's assertion that revenues deposited in the general fund "can be only used for the purposes allowed by the [Budget Control Act]} (Appellants' Brief, p. 38) is demonstrably incorrect.

The Budget Control Act does not purport to enumerate "allowed" or, for that matter, prohibited expenditures, much less exhaustively so. More importantly, it does not presume to restrict or repeal the Commission's plenary authority "[t]o exercise such other powers as are or may be given by law," ALA. CODE §11-3-11(a)(22). Those powers include the authority to "appropriate funds it may deem proper and expedient out of the general funds of the governing body's treasury to local boards of education for the construction, repair, operation, maintenance and support of new or existing public schools within the jurisdiction of said governing body." Ala. Code §16-13-36. *See also* Ala. Op. Atty. Gen. No. 85-00066, 1984 WL 1028906 (county commission may make general appropriations to schools within county without designating the appropriation for any particular purpose).

(b)

Amendment 111's Direct, Specific, and Unqualified Grant of Exclusive Authority to the Legislature to Provide for Public School Operations Is Not Encumbered by §105

Even if the Orr Act could be said to run afoul of §105 under the faux test touted by the Commission, the Act is squarely sanctioned by Amendment 111 of the Constitution itself. As pertinent, that amendment modifies §256 of the Constitution so as to invest the Alabama Legislature with unqualified authority to provide financial and operational support to public schools:

> The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and ***upon such conditions as it may prescribe***, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes ***under such circumstances and upon such conditions as it shall prescribe***. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.

(emphases supplied). Implementation of that unfettered legislative prerogative is not limited to general

enactments. Under Amendment 111, the only restrictions on the exercise of the legislature's authority are those that are imposed by the legislature itself.

Nor does any limitation that might otherwise emanate from §105 address even indirectly the matter of legislative authority to fund and otherwise control the financial operations of the public school systems. Self-evidently, §105 is a general pronouncement that says nothing in particular about school finances or operations. Under fundamental and universally recognized principles of construction, the Court (1) may not diminish the scope and application of Amendment 111 as established by its plain meaning;[11] (2) as between ostensibly conflicting constitutional pronouncements, must regard the most recently adopted (here, Amendment 111) as controlling;[12] and

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[11] City of Bessemer v. McClain, 957 So.2d 1061, 1092 (Ala. 2006) (courts have no right to broaden or restrict meaning of words in construing constitutional provisions) *citing* City of Birmingham v. City of Vestavia Hills, 654 So.2d 532, 538 (1978).

[12] State ex rel. Rountree v. Summer, 248 Ala. 545, 548, 28 So.2d 565, 568 (1946) (later adopted act supersedes previous and governing same transaction, and takes precedent with regard to any irreconcilable conflict between the two).

(3) must view the more specific constitutional treatment on the subject of legislative authority as dispositive.[13]

Public School Amici are, of course, aware of the complicated history of §256 as amended by Amendment 111. However troubling those portions of Amendment 111 that were called into question in the "equity funding" litigation may be, *Amici* in no sense endorse or rely on them. We look instead solely to the language of Amendment 111 that affirmatively places exclusive authority in the legislature to provide for the establishment and operation of the statewide system of public education. Whatever the status and ultimate fate of its more problematic features may be, the amendment's straightforward grant of legislative authority to provide for the state's educational needs—untethered to §105—remains intact and "on the books" as a

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[13] Jefferson Cnty. v. Braswell, 407 So.2d 115, 119 (Ala. 1981) (more specific constitutional provisions will prevail against more general statement pertaining to the same subject matter).

part of the current official recompilation of the 1901 Alabama Constitution.[14]

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[14] Although a circuit judge declared Amendment 111 to be invalid based on language (other than that relied on by *Amici* here), that ruling was not affirmed or adopted by a state "court of last resort," as explained in the Code Commissioner's note to Section 256:

> The question of the status of Section 256 is complex and controversial.
>
> Clearly the last sentence of the original Section 256 providing for racially segregated schools was unconstitutional under Brown v. Board of Education, 347 U.S. 483 (1954). In response to Brown, Amendment 111 was adopted in 1956. Amendment 111 revised a number of separate provisions of the Constitution of Alabama of 1901, including an amendment of Section 256. The amended Section 256 eliminated the requirement of racially segregated schools, but at the same time eliminated the requirement of the original Section 256 that the Legislature "establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof." Instead, Section 256, as amended by Amendment 111, declared that nothing in the Alabama Constitution "shall be construed as creating or recognizing any right to education or training at public expense." In the so called "equity funding" litigation (Alabama Coalition for Equity, et al. v Hunt, CV-90-883; see Opinion of the Justices No. 333, 624 So.2d 107 (1993)), the trial court ruled that the racially discriminatory motivations underlying Amendment 111 made the amendment of Section 256 unconstitutional; and the requirement of original Section 256 that the Legislature "establish, organize and maintain a liberal system of public schools for the benefit

Separately and severally, these precepts operate in this context to subordinate §105 to Amendment 111. Conversely, any attempt to engraft §105 onto Amendment 111 would improperly reconstitute Amendment 111 and encroach on the exclusive authority that it confers upon the legislature.[15] That transgression would, in turn, undercut

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> of the children of the state" survived as a constitutional mandate on the state. While various issues arising in the litigation were appealed (see Pinto Alabama Coalition for Equity, 662 So.2d 894 (1993); Opinion of the Justices No. 333, supra; Ex parte James, 713 So.2d 869 (1997); and Ex parte James, 836 So.2d 813 (2002)), there was no appeal of the liability portion of the decision of the trial court. Since the trial court is not a court of last resort for purposes of Section 29-7-9(a)(6), Section 256, as amended by Amendment 111, is set forth without change.

See also Mitchell v. State Farm Auto Ins. Co., 118 So.3d 693, 697 (Ala. Civ. App. 2011) ("a circuit court case has no precedential authority"), aff'd sub. nom. Ex parte State Farm Mut. Auto Ins. Co., 118 So.3d 699 (Ala. 2012), *citing* Taylor v. State [Ms. CR-05-0066, Oct. 1, 2020 (Ala. Crim. App. 2010)].

[15] As Justice Houston observed in concurring with the terminal equity funding decision, the permissive phrasing of the grant of legislative authority in Amendment 111 does not prescribe any particular method for exercising its legislative prerogative. Ex parte James, 836 So.2d 813, 826-27 (2002) (concurring opinion). Nor does Amendment 111 condition the validity of legislation passed under its authority on compliance with §105. To the contrary, legislation enacted under authority of Amendment 111 may by

the basic separation-of-powers framework that is the structural hallmark of the Alabama Constitution.[16]

(c)

Legislation Involving Allocation of State School Funds to State Agencies is Beyond the Purview of §105.

The broad, constitutionally based discretion and flexibility accorded the legislature in providing financial and operational support to public schools is consistent with the status of school districts in Alabama as agencies of the State of Alabama rather than departments or divisions of local government.[17] It is also consonant with

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its own terms be adopted "upon such conditions as [the legislature] may prescribe."

[16] See discussion, *infra*, pp. 31-35.

[17] Ex parte Hale County Bd. of Educ., 14 So.3d at 848-49 (Ala. 2009), ("County boards of education are not agencies of the counties, but local agencies of the state, charged by the legislature with the task of supervising public education within the counties"); Opinion of the Justices, 512 So. 2d 72 (Ala. 1973) (declaring proposed legislation that would empower boards of education to levy taxes a constitutionally impermissible delegation of a purely legislative function that can only be exercised by a municipal corporation [e.g., a county, town, or city]; holding that "boards of education" . . . cannot be deemed municipal corporations having powers of taxation"); Chambers County Comm'n v. Chambers County Bd. of Educ., 852 So. 2d 102 (Ala. 2002); Enterprise City Bd. of Educ. v. Miller, 348 So. 2d 782 (Ala. 1977) (Like county school

the character of all public school funds as state rather than local funds, regardless of their origin or the nature or location of the account in which they are maintained. All funds that are designated for or dedicated to educational purposes are effectively earmarked for such purposes and restricted to such uses.[18] Such funds and the

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boards, city school boards are agencies of the state; as such, a city school board is not a subdivision or agency of the municipal government; city school board's relation to the city is analogous to county school board's relations to the county); Hutt v. Etowah County Bd. of Educ., 454 So. 2d 973 (Ala. 1984); Bd. of Sch. Comm'rs of Mobile County v. Architects Group, Inc., 752 So.2d 489 (Ala. 1999) (county boards of education execute a state function, namely, education); State v. Tuscaloosa County, 172 So. 892 (Ala. 1937) (rejecting contention that county school board officials are "county officers;" distinguishing local governmental functions performed by county officials from state educational by characterizing functions performed by school boards as "a major activity of state government," a "state enterprise," an outgrowth of a state constitutional mandate, and as part of "the state set-up in maintaining a system of public schools throughout the state"); Schultes v. Eberly, 2 So. 345 (1887). Moreover, education is an essential state function. Wisconsin v. Yoder, 406 U.S. 205 (1972); Bd. of Educ. of Kiryas Village Sch. Dist. v. Grumet, 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed.2d 546, (1994); Ass'n for Disabled Americans, Inc., et al. v. Fla. Int'l Univ., 405 F.3d 954, 958 fn.3 (11th Cir. 2005); Jernigan v. State, 412 So.2d 1242, 1246 (Ala. Crim. App. 1982).

[18] Mobile, Ala.-Pensacola, Fla., Bldg. & C.T.C. v. Williams, 331 So. 2d 647, 648 (Ala. 1976) (public school funds are state funds whether they come from the state treasury or

school operations they support are considered a part of an integrated statewide system of public education:

> Without question, public education through a system of public schools is, by the Constitution, as well as by the statutes, a government function in Alabama; indeed a major activity of the state government.
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> County boards of education, county superintendents of education, county treasurer of public school funds, school district organizations, are all

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local taxation); State v. Tuscaloosa County, 172 So. at 892, 894 (Ala. 1937) ("public school funds, as between the county and the State, are State funds"); Hamilton v. Pullman Car Mfg. Corp., 163 So. 329, 330 (1935) ("It is true that in a sense a public school tax is a state tax and that a municipality acts as an agent of the state in levying, collecting and disbursing that tax"); Opinion of the Justices, 624 So. 2d 107, 120 (Ala. 1993) ("[b]y law, all public school taxes are state taxes, and all public school funds are state funds, whether collected at the state or local level"); City Bd. of Educ. of Athens v. Williams, 163 So. 802 (Ala. 1935) (all contributions to boards of education from individuals and public or private sources, including municipal appropriations for public school purposes, are "held by [the board of education] for the state system of schools, regardless of its source, to be expended for the benefit of those situated in that [district]"); Ala. Coal. for Equity, Inc. v. Hunt, 1993 WL 204083 (Ala. Cir. 1993) (same); Gainer v. Sch. Bd. of Jefferson County, Ala., 135 F. Supp. 559, 570 (N.D. Ala. 1955); State ex rel. McQueen v. Brandon, 12 So.2d 319 (Ala. 1942); Hawkins v. State Bd. of Adjustment, 7 So.2d 775, 777 (Ala. 1942); Calhoun County v. Brandon, 187 So. 868, 869-70 (Ala. 1939); Garner v. McCall, 178 So. 210 (Ala. 1938); Williams v. State for Use and Benefit of Pickens County, 230 Ala. 395, 161 So. 507, 508 (1935); Brandon v. Williams, 51 So. 873 (Ala. 1909).

> parts of the state set-up in maintaining a system of public schools throughout the state.
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> In the nature of the case, schools must be located and conducted in districts where the children reside. Every public school is a state school, created by the state, supported by the state, supervised by the state, through state wide and agencies, taught by teachers licensed by the state, employed by the agencies of the state.
>
> County and district school taxes, therefore, go to maintenance of state schools, parts of the system of state schools, just as other public school funds. A loss of such funds would cripple the state school enterprise, just as the loss of any other school funds. This is the real test in the application of the prerogative doctrine; the necessity to conserve the public funds, the means whereby the state functions in its governmental undertakings. Pickens County et al. v. Williams, Superintendent of Banks, et al., 229 Ala. 250, 156 So. 548; Montgomery, Superintendent of Banks, v. State et al., 228 Ala. 296, 153 So. 394, and cases there cited.
>
> It is of no moment that the taxes are paid by local subdivisions, earmarked for the schools in which the taxpayers are directly interested, and designated as county and district funds; nor that local custodians and administrative agencies with corporate powers are made part of the state educational set-up.

Williams v. State, for Use & Benefit of Pickens Cty., 230 Ala. 395, 397, 161 So. 507, 508 (1935). Because the Orr Act's dedication of tax funds to public school purposes operates to convert them to state school funds that

"support the state school enterprise" as both a matter of fact *and of law*, its effect is necessarily statewide in scope as a matter of fact *and of law*. Knowledge of that legal verity was chargeable to the legislature when it passed the Act.[19] In any case, because the effect of the law rather than its wording or phraseology determines its character as a general or local act,[20] the Orr Act's statewide impact *at a minimum* creates a *bona fide* issue as to its true nature. Under such circumstances, "a court is obligated, when possible, to read the law a general one."[21]

Moreover, because "the State, itself, is not embraced within [the] limitary provisions [of §§104 and 105],"[22] and

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[19] Wright v. Childree, 972 So. 2d 771, 778 (Ala. 2006) (the legislature is presumed to be aware of existing law and its judicial interpretation when it adopts a statute) (citing multiple authorities)

[20] Ward v. State, 224 Ala. 242, 246, 139 So. 416, 420 (1932) ("The effect of a statute, more than its wording or phraseology, must determine its character as a public, general, special, or local statute." (*quoting* Holt v. City of Birmingham, 111 Ala. 369, 19 So. 735, 736 (Ala 1896))).

[21] Madaloni v. City of Mobile, 37 So. 3d 739, 744 (Ala. 2009) (citing "well established" Alabama law and supporting authorities)

[22] State ex rel. Carter v. Harris, 273 Ala. 374, 398, 141 So. 2d 175, 178,179 (1961).

because boards of education are "state agencies, rendering state wide services . . . to a segment of the public at large, albeit it localized to situs,"[23] they fall outside the prohibitions established by §105 that attach to municipal corporations.[24] Indeed, as operational divisions of state government rather than independent municipal

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[23] Id.

[24] *See* Opinion of the Justices, 280 So.2d 97 (Ala. 1973) (declaring proposed legislation that would empower boards of education to levy taxes a constitutionally impermissible delegation of a purely legislative function that can only be exercised by a municipal corporation [e.g., a county, town, or city]; holding that "boards of education" . . . cannot be deemed municipal corporations having powers of taxation"); Schultes v. Eberly, 82 Ala. 242, 2 So. 345 (1887) (same); *see* also Dobbs v. Shelby Co. Economic and Industrial Dev. Auth., 749 So.2d 425, 430 (Ala. 1999), *citing Schultes* for the proposition that the Alabama Constitution prohibits the legislature from authorizing public corporations, except municipal corporations, to levy taxes; Chambers County Comm'n v. Chambers Co. Bd. of Educ., 852 So.2d 102 (Ala. 2002) (county school board has no substantive taxing power and therefore no standing to compel County Commission to call an election to exercise Commission's exclusive authority to impose school tax); State v. Tuscaloosa County, 233 Ala. 611, 172 So. 892, 894 (1937) (noting that county authorities do not levy local school taxes as such taxes are levied by direct vote of the people); Joseph D. Bryant, "Birmingham Schools Tax Hike In Peril: City Can't Raise Property Taxes," BIRMINGHAM NEWS, June 19, 2012 (R.20-23) (noting that school boards may request that taxing authorities call elections, but have no independent authority to do so).

corporations, boards of education are part of the state itself.[25]

(d)

Judicial Invalidation of a School Funding Decision that is Committed to the Legislature's Exclusive Control Would Violate Constitutional Separation of Powers Principles.

Even if Amendment 111 in its entirety could be deemed tainted by its repugnant elements, the Commission's attack on the Orr Act is constitutionally foreclosed by the same separation of powers firewall[26] that ultimately doomed the equity funding litigation campaign.

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[25] Ex parte James, 836 So.2d 813, 874-75 (Ala. 2002)(Moore, C.J., concurring in part and dissenting in part).

[26] a) The powers of the government of the State of Alabama are legislative, executive, and judicial.

b) The government of the State of Alabama shall be divided into three distinct branches: legislative, executive, and judicial.

c) To the end that the government of the State of Alabama may be a government of laws and not of individuals, and except as expressly directed or permitted in this constitution, the legislative branch may not exercise the executive or judicial power, the executive branch may not exercise the legislative or judicial power, and the judicial branch may not exercise the legislative or executive power.

Indeed, the Supreme Court's final and dispositive analysis and application of §43[27]—a core constitutional component that bears none of the stigma that attaches to Amendment 111's infelicitous features—is rooted in the same axiom of exclusive legislative dominion in the educational arena that undergirds and that finds full-throated endorsement in Amendment 111:

> Like the issues surrounding the Liability Order, the issue of the proper *remedy* in this case raises concerns for judicial restraint, albeit of a different type. With regard to the remedy, our concern is not that this Court should refrain from potentially harming the public's confidence in the "reasonable certainty, stability, and consistency" of decisions of the judicial branch, but rather that the pronouncement of a specific remedy "from the bench" ***would necessarily represent an exercise of the power of that branch of government charged by the people of the***

Ala. Const. , § 42(as amended by Amendment 905); *See also,* Ala. Const., § 43 ("No order of a state court which requires disbursement of state funds shall be binding on the state or any state official until the order has been approved by a simple majority of both houses of the Legislature.")

[27] Art. III, §43 as numbered and drafted when the James decision was rendered was repealed, renumbered as Amendment 42, and reworded without substantive change by Amendment 905 to the Constitution, which became operative on January 1, 2017.

> ***State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature.***
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> . . .
>
> [W]e now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power ***entrusted exclusively to the Legislature.*** Accordingly, compelled by the authorities discussed above—primarily by our duty under §43 of the Alabama Constitution of 1901—we complete our judicially prudent retreat from this province of the legislative branch in order that we may remain obedient to the command of the people of the State of Alabama that we "*never* exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not from men." Ala. Const. 1901, §43 (emphasis added).

Ex parte James, 836 So.2d 813, 817, 819 (Ala. 2002).[28] In retreating from its foray into forbidden legislative waters, the James Court noted that the responsibility for

[28] See also, Mobile Cnty. Bd. of School Comm'rs v. Mobile County Educ. Ass'n., 394 So.2d 922 (Ala. 1981) (county school system is subject to plenary power of legislature); Opinion of the Justices, 275 Ala. 547, 156 So.2d 639 (1963) (power to provide for operation of schools is in the legislature); State Tax Commission v. Bd. of Education of Jefferson Cnty., 235 Ala. 388, 179 So. 197 (Ala. 1938) (legislature has plenary power to devise and set up system of public schools).

funding public education had "rested squarely on the shoulders of the legislature . . . for over 125 years."[29]

Although nominally couched in terms of fidelity to constitutional text, the Commission's arguments ultimately devolve into the kind of equitable and policy-based ("good governance")[30] pleas that failed to carry the day (or, more aptly, the decade) in the equity funding saga and that are insufficient to overcome governing, straightforward constitutional mandates and prohibitions.[31]

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[29] Ex parte James, 836 So.2d 813, 815 (2002). *See also* Morgan Cnty. v. Powell, 292 Ala. 300, 306, 293 So.2d 830, 834 (1974) (authority to determine the amount of appropriations necessary for the performance of essential functions of government is vested fully and exclusively in the legislature). Public education is unquestionably an essential state function. *See* fn. 17, *supra*.

[30] Commission's Brief, pp. 39-40. Even if it could be countenanced at all, the "floodgate" effect postulated by the Commission is considerably overstated and ultimately irrelevant. *See* fn. 31, *infra*. In any case, Public School Amici do not argue that §105 should be defanged or even ignored, but that courts must accord special solicitude to the legislature in matters involving the administration and operation of the statewide system of education.

[31] Ex parte Bentley, 116 So.3d 201, 203 (Ala. 2012) (determination of public policy resides first, in the constitution and second, in legislative enactments; constitutional provision may be overturned on policy grounds only through constitutional amendment; public

Notably, even at Plaintiffs' high water mark in the equity funding litigation, the Court's initial remedial directive required *the legislature* to develop a workable solution to the funding inequities that were the focus of the litigation.[32] Yet even that broadly circumscribed mandate was ultimately held to have exceeded the judiciary's constitutional authority.

Here, the legislature has already acted in a concrete manner to address a perceived funding need with regard to constituent educational agencies that are part of the statewide system of public education and that are constitutionally and statutorily consigned to its sole stewardship and control. The same separation of powers constraints that deprive courts of the authority to compel

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policy considerations cannot override constitutional mandates); Westphal v. Northcutt, 187 So.3d 684, 695 (Ala. 2015) (all questions of propriety, wisdom, necessity, utility and expediency in the enactment of laws are exclusively for the legislature, and are matters with which the courts have no concern).

[32] Ex parte James, 836 So.2d 813, 819 (Ala. 2002) (noting earlier decision in the Equity Funding series in which a court plurality conceded that the legislature bears the primary responsibility for devising a constitutionally valid public school system).

a prospective legislative restructuring of a public school funding formula do not become inert once a legislative reapportionment of school funds becomes a *fait accompli*. If anything, *post hoc* judicial interdiction of a legislatively approved and mandated distribution blueprint would be more intrusive and arguably more objectionable than a prospective funding reconfiguration.

CONCLUSION

In adopting the Orr Act, the Alabama Legislature exercised its exclusive constitutional prerogative and charge to provide for the maintenance and operation of the state's public school system by earmarking additional use tax revenues for the benefit of public school operations in Morgan County. Although local in its immediate application, as a matter of fact and of law, that measure inures to the benefit of the state public school system as a whole. It thus falls outside §105's field of operation. But even if the Orr Act could be viewed as garden variety local legislation, §105 cannot be arrogated to function as a constitutional "back door" through which courts are allowed to judicially veto legislation deemed to be

inequitable, improvident, or otherwise objectionable by parties who perceive themselves to be disadvantaged by its implementation.

The decision of the trial court should be affirmed.

Respectfully submitted this 1st day of July, 2020.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing motion and brief have been served by E-Service on this 1st day of July, 2020, on the following:

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