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.

APPELLANTS' REPLY BRIEF

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

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SUMMARY OF THE ARGUMENT

Earlier this year, the Court explained the scope of Section 105:

> Section 105 of the Alabama Constitution of 1901 provides that "[n]o special, private, or local law ... shall be enacted in any case which is provided for by a general law." ... [T]his Court's current understanding of Section 105 [is] as a bar to any local law that "'create[s] a variance from the provisions of [a] general law.'" *City of Homewood v. Bharat, LLC*, 931 So.2d 697, 701 (Ala. 2005) (quoting *Opinion of the Justices No. 342*, 630 So.2d 444, 446 (Ala. 1994) (emphasis added in *City of Homewood*)).

Robbins v. Cleburne County Commission, 2020 WL 502541, *2 n.1 (Ala. Jan 31, 2020) (ellipsis and brackets added). Thus, the issue before the Court is simply whether a local law, Act 2019-272 ("the Local Law"), creates a variance from the provision of a general law, in the case the SSUT General Law[1] Allocation General Law[2]. If it does, then it violates Section 105 and is unconstitutional. Appellant, the Morgan County Commission ("the Commission") relies on the Court's *Peddycoart* decision as the definitive explanation of Section 105. In *Peddycoart*, the Court ruled that the general law

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[1] § 40-23-197, which is part of the Simplified Seller Use Remittance Tax. See Appendix A of the Commission's initial brief.

[2] § 11-8-3, which is part of the Budget Allocation Act. See Appendix B to the Commission's initial brief.

subsumes the local law if they are on the same topic: "We do not look upon the presence of a general law upon a given subject as a bare segment, but to the contrary, its presence is primary, and means that a local law cannot be passed upon that subject." *Id.*, 354 So.2d at 813. The different standards for applying Section 105 proposed by Appellees and Intervenors are not correct statements of the law. They also err by failing to acknowledge that Section 105 is a constraint on the Legislature's power, *id.* at 811 ("Section 105, then, is an additional constitutional proscription upon the type of kind of legislation which the legislature is allowed to enact…."). Most of their arguments are derived from this error.

ARGUMENT

1. General Response To The Appellees' and Intervenors' Arguments

Both Appellees and Intervenors chastise the Commission for failing to acknowledge the plenary power of the Legislature over counties in general and over county finances specifically. *Appellees' brief* at 11; *Intervenors' brief* at 12, 28-29. They also suggest this power in some fashion diminishes the effect of Section 105 in this case. Both propositions are wrong.

The Commission is well aware of the power of the Legislature to enact both general and local laws. This power is a "given" in Section 105 analysis, for if it is lacking, the challenge to the local law would not be based upon Section 105 but upon the absence of power to enact the local law. The broad extent of this power leads to abuse and corruption, and for that reason there are constitutional restraints on the exercise of legislative power, one of which is Section 105. The very cases cited in the opposing briefs recognize these restraints. *Kendrick v. State ex rel. Shoemaker*, 54 So.2d 442, 451 (Ala. 1951) ("legislature, in absence of constitutional limitation, has plenary power to deal with counties"); *Alabama Alcoholic Beverage Control Board v. City of Pelham*, 855 So.2d 1070, 1077 (Ala. 2003) ("Apart from limitations imposed by these fundamental charters of government, the power of the legislature has no bounds"). That Section 105 acts as a restraint on legislative power is without doubt. *Peddycoart v. City of Birmingham*, 354 So.2d 808, 811, 813 (Ala. 1978).

The interplay of legislative power and Section 105 restraint on that power is not measured on some sliding scale, so that as the power increases the restraint decreases. The

restraint as worded in Section 105 and applied in *Peddycoart* and succeeding cases is absolute: if there is a general law, a local law cannot be passed upon that subject. Appellees and Intervenors argue that because SSUT funds are deposited in county general funds, and the Legislature has plenary power over county general funds, it may pass any local law it wishes on that subject free from the restraint of Section 105. If this were so, it would be reflected in Section 105 jurisprudence, but it is not. For example, the Legislature holds power over municipalities and their finances as broad as that over counties. *Yeilding v. State ex rel. Wilkinson*, 167 So. 580, 584 (Ala. 1936). Yet in *Johnson v. City of Fort Payne*, 485 So.2d 1152 (Ala. 1986), a local law directing the City of Fort Payne to expend its funds on hazardous duty pay for police officers was held to violate Section 105 because there was a general law authorizing city councils to set municipal employee compensation. And in *County Com'n of Jefferson County v. Fraternal Order of Police*, 558 So.2d 893 (Ala. 1989), despite the Legislature's plenary authority over counties and county financing, this Court voided a local law pursuant to Section 105 because it directed counties to pay a subsistence allowance to deputies in the face of a general

law granting the county personnel board the power to determine salary income.

2. The Legislature's Control Of State Funds Is Subject To Constitutional Limits, Including Section 105

One of the Appellees and Intervenors' foundational arguments is that County funds are State funds, and the State can do what it wants with its funds. *E.g., Appellees' brief* at 10; *see also Intervenors' brief* at 27. The Commission agrees: the Legislature has plenary authority over State funds, as well as the laws of the State, and it may do as it wants with them, subject to the requirements of the Alabama Constitution, including Section 105. *Trailway Oil Co. v. City of Mobile*, 122 So.2d 757, 760 (Ala. 1960) ("It is well settled that the power of the legislature, except as retrained by the Constitution, is supreme in the enactment of statutory law, … and it has plenary power to deal with such subordinate agencies of the state as counties and municipal corporations.")(emphasis added). It necessarily follows that Section 105 can indeed prevent the Legislature from using a local law to direct a county to make a $5 expenditure, if doing so results in a variance with a general law on the same case or subject matter, *see Appellees' brief* at 9 & 37, and there is nothing "revolutionary," *id.*, about this conclusion.

Rather, it's a consequence of the plain language of Section 105.

Elsewhere, the Intervenors' confusion of plain language results in a misrepresentation the Commission's argument. According to Intervenors, the Commission "would forbid any local law requiring any expenditure by a county commission. … The Legislature would be powerless to do anything, by local law that required an expenditure of so-called 'county funds.'" *Intervenors' brief at 38 (emphasis added)*. That misstates the Commission's argument. "County funds" and "General Fund" are not the same thing. If by "county funds" Intervenors mean all of the funds held by a county, then that is very different from the General Fund. The General Fund, not all "county funds," is bounded by the Allocation General Law, § 11-8-3, which gives all county commissions discretion over the use of money in their General Fund, while at the same time requiring them to fund enumerated essential services from the General Fund. The Commission does not argue that the Legislature cannot by local law tell counties what to do with county funds. Again, the Commission's argument is that the Legislature cannot tell county commissions what to do by a local law that causes a variance from the provisions

of general law, and the Local Law does just that as to both the SSUT General Law and the Allocation General Law.

3. *Peddycoart* Is The Guide For Application Of Section 105

The Appellees and Intervenors offer the Court different ways to apply Section 105. Appellees say that the "case" – the term used in Section 105[3] – "must not be described too generally," citing *Opinion of the Justices* 376, 825 So.2d 109, 112 (Ala. 2002). *Appellees' brief* at 19. And in any event, Appellees say, "even where general law explicitly provides that local government can or cannot do something" the Legislature can by local law "do something in the same sphere," *Appellees' brief* at 19 (citing *Walker County v. Allen*, 775 So.2d 808, 812 (Ala. 2000) and *Town of Vance v. City of Tuscaloosa,* 661 So.2d 739, 743-44 *(Ala. 1995)).*

Far from helping the Appellees, these cases show why the Local Law violates Section 105. In *Walker County* the challenged local law authorized the Walker County Commission to levy license taxes on certain professions, notwithstanding general law that both already imposed such taxes and said that "no license tax shall be paid to the county." *Id.*, 775

[3] *E.g.*, "No … local law … shall be enacted in any case which is provided for by general law …." *Section 105.*

So.2d 810-811. Observing these facts the Court said:

> The license taxes Walker County has assessed, pursuant to Act No. 97-903 [the challenged local law], constitute a variance from the general law, which states that certain professionals shall not be required to pay a county license tax. Therefore, the subject of Act 97-903 is deemed to be subsumed by the general law.

Id. at 813. Thus the Court determined the challenged local law violated Section 105. In reaching this holding, the Court distinguished a series of cases in which the Court affirmed local laws imposing taxes that general law prohibited counties from assessing. *Id.* at 811-812. Those local laws did not violate Section 105, the Court explained, because unlike the Walker County local law, they "did not authorize the county to levy the prohibited tax; instead, local law provided for a levy of the tax by the Legislature. Thus, there was no violation of Section 105 because the local law did not create a variance from the general law." *Id.* at 812. The other case Appellees rely on, *Town of Vance,*[4] is in the same line: general law provided means for cities to annex new territory, but in the challenged local law an annexation to the City of Tuscaloosa was made not by the city but by the Legislature

[4] Much of the analysis in *Town of Vance* is based upon pre-*Peddycoart* law.

(to which the Constitution expressly preserved the power to alter municipal boundaries in Section 104 (18)). *Id.*, 661 So.2d at 744-745. These cases might be helpful to Appellees if in the present case the Legislature had followed the example of *Town of Vance*, but instead it followed *Walker County*. In the Local Law, the Legislature did not itself allocate SSUT proceeds to the school boards, it required the Commission to make the allocations. *See Local Law, § 2* (stating that Morgan County's SSUT proceeds "shall be allocated by the county commission each fiscal year and distributed on a monthly basis" to the school boards). This case thus is like *Walker County*, and unlike *Town of Vance*, and it follows that the Local Law violates Section 105.

For their part, the Intervenors argue that the Commission "exaggerate[s] *Peddycoart*'s effect," as to application of Section 105. Rather, for them, *Peddycoart* seemingly never happened, because they urge the Court to apply a pre-*Peddycoart* "direct conflict" threshold for Section 105 inquiries. *Intervenors' brief* at 15-21.

Intervenors are wrong. In *Peddycoart*, the Court expressly threw out its previous Section 105 case law, and it would be hard to exaggerate the importance of a case in which the

Court, before ruling, states "[w]ith conscious regard to the doctrine of stare decisis … our duty is to apply the highest law in our state as conscientiously as our abilities allow, even though this application runs counter to reasons which heretofore have been espoused for opposite views." *Peddycoart*, 354 So.2d 808, 811 (Ala. 1978).

Intervenors state the central rule of *Peddycoart* to be a prohibition of "conflicting" local laws. They then refine this to be a prohibition against local laws in "direct conflict" with general law. The Commission contends that even under this improperly narrowed formulation, the Local Law in this case is invalid. However, the actual rule in *Peddycoart* is not so limited: general law is primary "and means that a local law cannot be passed upon that subject." *Id.* at 813. This includes duplicative, supplemental, and additional local laws as well as those that conflict with general law. See for example, *Opinion of the Justices No. 316*, 469 So.2d 112 (Ala. 1985), where a proposed local law that merely duplicated general law was held to violate Section 105 because its subject matter was already subsumed by the general law. *Id.* at 114 ("Because the subject matter of S.B. 622 [the local law] is already subsumed by § 11-3-1 and in fact duplicates

what § 11-3-1 provides, S.B. 622 is unconstitutional under Section 105.")(footnote omitted). Regarding supplemental or additional local laws, see the discussion of *Drummond* below. As to "direct conflict," the Court has, since *Peddycoart*, used that term when it in fact perceived a direct conflict between a local and general laws, but it has never identified a "direct conflict" as a post-*Peddycoart* threshold for a violation of Section 105. For example, in *ABC Bonding Co. v. Montgomery Co. Sur. Comm'n*, 372 So.2d 4 (Ala. 1979), the Court examined a local law that would "revise the existing bail practices in the courts within the Fifteenth Judicial Circuit, … establish a more lenient form of qualifications for property bail, and … establish a board to regulate the licensing of professional bail agents." *Id.* at 5. The Court described a few provisions of the local law to demonstrate how they "directly conflict"[5] with general law "in this area,"

[5] Why the Intervenors rest their case on existence of a "direct conflict" is hard to explain given that the Local Law directly conflicts with the SSUT and Allocation General Laws. In *ABC Bonding*, the Court observed that "bail bondsmen doing business in the Fifteenth Judicial Circuit are subject to the authority of a Surety Commission under Article 2 of the challenged Act, while no other bail bondsmen in the State are subject to such a Commission." *Id.* at 6. If that's a "direct conflict," then the Local Law directly conflicts with the SSUT and Allocation General Laws. Under the Local Law, the

but the Court also used different terms such as "covers the same subject matter," "contains a material variation," and "substantially different and additional." *Id.* at 5-6. The Court's holding, however, was grounded not on any of these descriptive phrases, but instead returned to the language for Section 105. The challenged enactment, the Court said, was "a Local Law dealing with a subject matter already provided for by general law. This is a clear violation of Section 105." *Id.* at 6; *see also Initial brief* at 21-22. Exactly the same can be said of the Local Law.

4. The Court Has Not Continued To Rely On *Drummond*

As far as Section 105 analysis is concerned, the rule followed in *Drummond Co. v. Boswell*, 346 So.2d 955 (Ala. 1977), was repudiated in *Peddycoart*. The following passage from *Drummond* explains the pre-*Peddycoart* test:

> The test under Section 105 is:
>
> > " . . . [whether] the object of the local law is to accomplish an end not substantially provided for and effectuated by a general law, notwithstanding there is a general law dealing with the subject or system affected by the local

Commission loses both its SSUT funding and its discretion to allocate its SSUT funds for essential services as it sees fit, and no other county commission in the State is subject to these losses.

> law." *Polytinsky v. Wilhite*, 211 Ala. 94, 99 So. 843 (1924).
>
> Thus, the remaining issue is a narrow one: Does Tit. 51, § 431 – the general coal severance taxing Act – which provides the source and the objects of expenditure of the proceeds of the tax, in operation with Section 105 of the Constitution, render void Local Law No. 1005, which provides the same source but different objects of expenditure of the proceeds of the tax? Ultimately, then, we must decide if the use of the proceeds from this tax for highway maintenance in Cullman County, as provided in Local Law No. 1005, is substantially and materially different in the end to be accomplished from the general law which provides for use of the proceeds from the same source for retirement of State Dock bonds.
>
> The Taxpayers contend that "it is the identity of subject matter of the two acts (Act No. 1005 and Tit. 51, § 431) which is fatal to the Cullman Severance Tax, the local law." The test as stated in this contention is too narrow and the conclusion is not supported by our case law. It is not the broad, overall subject matter which is looked to in determining whether the local law, taken together with the general law, is violative of Section 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. Indeed, the word "subject" does not appear in Section 105. The exact wording is: "No special, private, or local law . . . shall be enacted in any case which is provided for by a general law….. "

Id. 346 So.2d at 957-58. This "substantial difference" test was one of the three old tests specifically rejected in *Peddycoart*. Under it, additional or supplemental local laws substantially different from general law did not violate

Section 105. *Standard Oil*[6] involved a local gasoline sales tax in addition to the state tax, and *Drummond* involved a local coal severance tax in addition to the state tax. Under the old rule, because general law did not address local taxes, only state ones, the local laws did not conflict with general law and were upheld. Under *Peddycoart*, the result in both cases would have been different. This Court has explicitly stated that the *Drummond* test is the old test, applicable only in pre-*Peddycoart* situations:

> Under pre-*Peddycoart* decisions, local legislation is not prohibited merely because there is already a general law dealing with the same subject. *Drummond Co. v. Boswell*, 346 So.2d 955 (Ala.1977). Instead, the test under Section 105 for legislation passed prior to *Peddycoart* is whether "the object of the local law is to accomplish an end not substantially provided for and effectuated by a general law, notwithstanding there is a general law dealing with the subject or system affected by the local law."

Amoco Production Co. v. White, 453 So.2d 358, 361 (Ala. 1984) (citations omitted).

As part of their dismissal of *Peddycoart*, Intervenors challenge the Commission's assertion that after *Peddycoart*, *Drummond* has been followed "only because *Peddycoart* is prospective in its application." *Commission's brief* at 18. To

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[6] *Standard Oil of Kentucky v. Limestone Cty.*, 124 So. 523 (Ala. 1929).

the contrary, they argue, "[t]his Court has cited *Drummond* repeatedly in many, many cases that adjudicate the validity of local laws passed after *Peddycoart*." *Intervenors' brief* at 16. According to Westlaw, since *Drummond* was decided 43 years ago this Court and the Court of Civil Appeals have cited *Drummond* only 12 times, most recently in 2006, including three cases in which the local law was pre-*Peddycoart*.[7] Of the remaining nine post-*Peddycoart* cases, one cites *Drummond* only to point out that a party relied on it,[8] and two cite *Drummond* for anodyne principles of law.[9] That leaves only seven cases

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[7] *Bradley Outdoor, Inc. v. City of Florence*, 962 So.2d 824, 827, 832 (Ala. Civ. App. 2006) (upholding a 1971 local law on a "local needs" basis); *Amoco Production Co. v. White*, 453 So.2d 358, 359, 361 (Ala. 1984) (upholding a 1971 local law, stating "Under pre-*Peddycoart* decisions, local legislation is not prohibited merely because there is already a general law dealing with the same subject."); *Yancey & Yancey Const. Co. v. DeKalb Cty. Cmm'n*, 362 So.2d 4, 4-5 (Ala. 1978) (upholding a 1975 local law on pre-*Peddycoart* law).

[8] *Walker County v. Allen*, 775 So.2d 808,812(Ala. 2000) ("*Walker County* also cites similar cases in which this Court has upheld local acts of the Legislature, despite contradictory language in a general statute," citing to *Drummond*).

[9] *Yellow Dog Development, LLC v. Bibb Cty.*, 871 So.2d 39, 42 (Ala. 2003) (not a Section 105 case; stating the "Legislature may legislate by local act, except with regard to those subjects as to which the constitution specifically speaks to the contrary" and citing *Drummond*); and *Town of Vance v. City of Tuscaloosa*, 662 So.2d 739,742(Ala. 1995) (noting that a local act must comply with Sections 104 and 105, citing *City of Birmingham v. City of Vestavia Hills, 661 So.2d 739 (Ala. 1995)*, which in turn cites *Drummond*).

in which the Court has cited *Drummond* post-*Peddycoart* on a point of substantive law, *i.e.*, the statement that "[i]t is not the broad overall subject matter which is looked to in determining whether a local law, taken together with the general law, is violative of Section 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." *Drummond*, 346 So.2d at 958. In *Drummond*, the challenged local law levied an excise tax on coal mined in Cullman County, to be paid to the Department of Transportation for use exclusively to maintain Cullman County roads. *Id.* at 956. General law specifically forbade counties from "levy[ing] a tax upon the excise or privilege of severing coal in Alabama, which power was reserved "to the State of Alabama exclusively." *Id.* at 957. Rejecting the argument that the identity of the local and general laws as excise taxes on coal was controlling, the Court looked instead to the objects of the two laws: the local law coal excise tax provided for maintenance of Cullman County roads; the general law coal excise tax provided for retirement of State Dock bonds. *Id.* at 957-58. Given this huge difference, the Court declined to hold that the local law violated Section 105 "merely because"

the local law and the general law "deal[t] with the same matter," coal excise taxes. *Id.* at 958. This holding became impossible after *Peddycoart,* yet six times since *Peddycoart* Alabama appellate courts have cited *Drummond*'s it-is-not-the-broad-overall-subject-matter language in the course of setting out principles of Section 105 law. *Opinion of the Justices No. 376*, 825 So.2d 109 (Ala. 2002); *Opinion of the Justices No. 354*, 672 So.2d 1294, 1296 (Ala. 1996); *City of Birmingham v. City of Vestavia Hills*, 654 So.2d 532, 535 (Ala. 2005); *Miller v. Marshall Cty. Bd. of Educ.*, 652 So.2d 759, 761 (Ala. 1995); *Shelby Cty. v. Shelby Cty. Law Enforcement Personnel Board*, 611 So.2d 388, 391 (Ala. Civ. App. 1992); and *Kiel v. Purvis*, 510 So.2d 190, 192 (Ala. 1987). However, in none of these cases did the appellate court apply *Drummond*'s reasoning. In two of these cases,[10] the local laws were sustained on a "local needs" rationale not relevant to this case. In three of them[11] the local laws were declared in

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[10] *Miller*, 652 So.2d at 762 ("We find Act No. 87-537 represents the legislature's response to demonstrated local needs of Marshall County."); *City of Birmingham*, 654 So.2d at 541 ("In this case, the legislature enacted a local law in response to a city's need to annex noncontiguous property.").

[11] *Opinion of the Justices No. 376*, 825 So.2d at 116 ("Accordingly, we conclude that Senate Bill 539, if enacted, would be an unconstitutional violation of § 28-2A-1 et.

violation of Section 105. And in the final case,[12] the Court of Civil Appeals sustained the local law because its subject - establishing a personnel board for county law enforcement with the authority to set salaries - was distinct from the county commission authority over the county budget. In short, in no case since *Peddycoart* has an Alabama appellate court followed *Drummond* when reviewing a post-*Peddycoart* local law.

Instead, as shown in the Commission's initial brief, after *Peddycoart*, when the Court looks at whether a subject of a local law has been provided for by general law, the Court looks more broadly than it did in its pre-*Peddycoart* case law. *Initial brief* at 19-23. Since *Peddycoart* the focus of Section 105 analysis is on the *general* subject of the general law and not the specifics of the local law, and Section 105 is understood to be a broad proscription of local laws that

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seq."); *Opinion of the Justices No. 354*, 672 So.2d at 1298 ("Based on the foregoing, we conclude that S.B. 604 would violate Section 105 of the Alabama Constitution."); *Kiel*, 510 So.2d at 193 (We hold, therefore, that Act 85-233 is in conflict with Ala. Code (1975), § 17-7-18, and violates the uniformity provisions of the Alabama Constitution.");

[12] *Shelby Cty.*,611 So.2d at 391 ("In the absence of a specific statute authorizing or directing the county commission to set and declare classification of employment, salary ranges, and sick leave benefits, we cannot say that this Act does not have a sphere of operation separate and apart from the general law.").

conflict with, duplicate, add to, supplement, vary, or extend a general law on the same subject. *Initial brief* at 19, *see also id.* at 20-26.

5. Section 105 Operates Independently Of Section 104

Because of past abuses,[13] the framers of the 1901 constitution thought it wise to identify certain topics that under the new constitution the Legislature could address only via general law. Thus Section 104. The Appellees claim that if the framers had intended to prohibit local laws "directing what a county commission shall do with any part of its general fund", "they would have put it in Section 104." *Appellees' brief* at 15. Implicit in this argument is the conclusion that a local law is constitutional if it's not on a topic identified in Section 104. The argument ignores both reality – it would have been impossible for the framers to list in Section 104 all types of future local laws they would find objectionable – and the wisdom of instead providing a rule against which local laws could be measured. If Appellees were correct, there would be no need for Section 105. Because Section 105 exists, we know Appellees are wrong. The framers

[13] *Carter v. Harris*, 141 So.2d 175, 179 (Ala. 1961) (discussing local-law abuses before 1901, and concluding: "It was to remove these evils that § 104 was framed."

obviously meant to preclude more than just local laws on topics specified in Section 104.

6. The Appellees' Argument About The Meaning Of "Variance" Is Not Supported By Case Law

Although Appellees admit "that Section 105 (with some exceptions) ordinarily prohibits local laws that create variances from general laws,'" *Appellees' brief* at 18, they do their best to prevent this prohibition from having any effect:

> This "variance" test, it must be remembered, does not prohibit local laws that create differences among localities. That is the nature of every local law. Nor does the "variance" test ask whether the local law creates a "variance" from the state of affairs that would exist without the local law. It is the nature of every law ever passed, that it creates a "variance" from the pre-existing state of affairs.

Id. (emphasis in original). That is not the law. For example, in *ABC Bonding*, the Court held the local law unconstitutional because it created a variance among localities:

> Furthermore, bail bondsmen doing business in the Fifteenth Judicial Circuit are subject to the authority of a Surety Commission under Article 2 of the challenged Act, while no other bail bondsmen in the State are subject to such a Commission.
> In view of the existence of Code 1975, § 15-13-22 [the general law], it is beyond doubt that the challenged Act, which only applies to the Fifteenth Judicial Circuit, is a Local Law dealing with a

> subject matter already provided for by general law. This is a clear violation of Section 105; therefore we reverse and remand.

Id., 372 So.2d at 6. Similarly, in *City of Homewood v. Bharat, LLC,* 931 So.2d 697, 703 (Ala. 2005), the Court found the local law unconstitutional because it created a variance from preexisting affairs. Said the Court:

> On the undisputed facts of this case, we are compelled to conclude, as did the Justices in *Opinion of the Justices No. 342,* that the local law *creates a variance* from the general act. … In this case, the local law purports to limit the discretion of municipalities in levying a lodgings tax, while the general act *specifically grants* that discretion.

Id. at 703 (emphasis in original). The same result in the case to which the *Baharat* Court referred, *Opinion of the Justices No. 342*, where the Court found unconstitutional the proposed local law that would have allowed the Escambia County Sheriff to "contract housing of federal, municipal, and county prisoners" in the Escambia County jail. *Id.*, 630 So.2d 444, 445 (Ala. 1994). Under general law, the Sheriff was required generally to accept federal prisoners and prisoners from other counties, and the proposed local law, H.B. 42, would create a variance from the state of affairs under the general law: "The last sentence of H.B. 42 … would transform Escambia County's duty to house such persons from one that is

unqualified and mandatory to one that is contingent upon the payment of a fee." *Id.* at 447. These precedents show that Appellees' understanding of the term "variance" is not Alabama law. If that is not enough, the Court's closing words in *Opinion of the Justices No. 342* clarify the relationship between "variance" and "subsumed": "Because [the last sentence] of H.B. 42 would create a variance from the provisions of general statutes … we must conclude that the subject of that portion of H.B. 42 is, indeed, 'subsumed' by those statutes." *Id.* at 447. In other words, if a local law creates a variance from general law, then the topic or "case" of the local law has been subsumed by general law and the local law violates Section 105.

7. Appellees Ignore The Requirement For The Legislature To Act In Accordance With The Constitution, Including Section 105

The Appellees' explanation of why the Local Law does not violate Section 105, *Appellees' brief* at 21-30, fails because it ignores the basic requirement for the Legislature to act in compliance with the constitution, including Section 105. The Court "will not uphold any act of the Legislature that 'violate[s] a limitation on legislative power imposed by the State … Constitution.'" *Walker County v. Allen*, 775 So.2d at

809) (citation omitted). "Therefore, to be valid, [a local law] must comply with, specifically … Section 105." *Town of Vance*, 612 SO.2d at 742 (citations omitted). In this case, the legislature has failed this basic requirement. *Initial brief* at 27-30.

Appellees would minimize the importance of the Legislature's 2018 amendment to the SSUT General Law that required SSUT proceeds to be placed in each county's General Fund, rather than merely distributed to each county without specifying an account. *Initial brief* at xiii-xiv, 37-38, *see also ACCA Amicus brief* at 8-9. They argue that no rule in Alabama requires the Legislature to keep its "hand off" the General Fund, *Appellees' brief* at 23, which is correct, so long as the Legislature complies with Section 105, as explained in the Commission's Initial brief.

8. The Appellees' Arguments About The 2018 Amendment To The SSUT General Law

Appellees also claim that by amending the SSUT General Law to require SSUT proceeds to be placed in each county's General Fund, "the Legislature was specifying that the SSUT funds would go to the fund from which it is most particularly appropriate and lawful for the Legislature to direct whatever expenditures or appropriations it might see fit." *Appellees'*

brief at 25. There are at least two fatal flaws in this argument.

First, because money in the General Fund is committed to the discretion of each county commission by general law - the Allocation General Law - the Legislature cannot by local law invade the Morgan County Commission's discretionary authority over its General Fund without creating a variance between Morgan County and other counties, thereby violating Section 105. The Legislature could avoid this problem by adopting a general law amending the Allocation General Law to allow Legislative allocations from county general funds, but it has not done that.

Second, Appellees argue that when the Legislature amended the SSUT General Law in 2018 to require SSUT funds to be deposited in a specific account (the General Fund), it did so because the other county accounts, such as the Gasoline Tax Fund and the Environmental Services Fund, are restricted by law from being used for other purposes. *Id.* at 24. If that's so, this argument equally well explains why the Legislature cannot, by local law, take money from Morgan County's General Fund. Although the money in the General Fund has a broader range of allowable uses (funding specific essential services

and other expenditures at the discretion of the Commission, thus "General" Fund), it is just as restricted to being used for these purposes as is the single-use Gasoline Tax Fund (roads and bridges).

Next, Appellees argue that when the Legislature by the 2018 amendment required SSUT funds to be placed in county General Funds, is did not mean to commit those funds to the commission's discretion, because it did not explicitly say so. In support of this argument, they refer to the local law at issue in *Jefferson Cty. v. Taxpayers and Citizens of Jefferson Cty.*, 232 So.3d 845 (Ala 2017), in which the Court reviewed a local law authorizing a new sales tax for Jefferson County, with proceeds going to, *f*, the county commission. *Id.* at 849-57. Two sections of the local law required that tax proceeds "shall be deposited into the general fund of the county for use and appropriation as the county commission shall determine in its discretion." *Id.* at 853-54 (Act 2015-226, §§ 9(a) (2) and (7). Appellees argue that the absence of a similar statement in the 2018 amendment to the SSUT General Law means the Legislature did not intend for the Commission to allocate its SSUT funds in its discretion. *Appellees' brief* at 25. This argument is quickly dispensed with. The Allocation

General Law requires county commissions to exercise discretion in deciding at what level to fund *e.g.*, the Sheriff's office, the Judge of Probate's, and other allowed activities. Therefore, while adding a statement highlighting the Jefferson County Commission's discretion over these new proceeds was not needed to give the commission that discretion, it served to emphasize the extraordinary purpose for which the local law was enacted: a levy of local taxes to provide financial assistance to Alabama's most populous county after it "experienced severe financial difficulties in recent years that eventually resulted in the County' filing a petition in bankruptcy," and after the county's occupation tax was declared unconstitutional and efforts to pass a new one failed. *Jefferson Cty.*, 232 So.3d at 848. The quoted language was consistent with the Legislature's intent to provide Jefferson County, after it came out of bankruptcy, with "flexibility with respect to its revenue sources and budget" by imposing new sales and use taxes, *id.* at 850 (Act 2015-226, § 2(a)-(c)), but this descriptive language did not add to the Jefferson County Commission's powers. Thus, in a later section of the law, the Legislature provided that certain other funds "shall be paid over to the county for

deposit into the general fund," but the Legislature did not add a statement about the commission's discretionary use of those funds. No such statement was needed. Also, if the commission did not have discretion unless the Legislature specifically spoke those magic words, then two problems are apparent. First, the Commission could not use the additional funds, because under the Appellees' argument it lacked discretion to decide their use, yet the Legislature did not tell it what to do with the funds. Also, the Appellees' interpretation would require the mixing in the General Fund money over which the Commission has discretionary authority with funds over which it did not, which makes no sense.

9. Appellees Ignore *Baldwin County v. Jenkins*

If the Legislature had amended the SSUT General Law to explicitly allow for local laws, then the Local Law would not violate Section 105. *Initial brief* at 34-36. Appellees dismiss this argument as "meritless," *Appellees' brief* at 30-32, and claim the Legislature does not need to "explicitly reserve its right to enact local laws when enacting a general law," unless the general law contains "county-by-county detail." Appellees erroneously overlook *Baldwin County v. Jenkins*, 494 So.2d 584 (Ala. 1986) which explains why their

argument misses the point. In that case, the Court reversed the trial court and held that a local law did not violate Section 105 because the relevant general law expressly allowed for local law at variance with the general law. *Id.*, 494 So.2d 584, 587. As the Court explained, when the Legislature enacts a general law without providing an exception for local laws, the general law is primary, and its subject is entirely subsumed by the general law. "In that situation, Section 105 does operate to prohibit the enactment of contrary local laws." *Id.* In *Baldwin County*, the general law, § 11-3-1, began with the statement "[u]nless otherwise provided by local law." *Id.* at 586. This statement, the Court held, changed the exclusivity of the general law: "Because the language of the statute provides for the existence of and prevailing effect of contrary local laws, it must be that the legislature did not intend the subject to be 'subsumed' exclusively within § 11-3-1." *Id.* at 587. The Court's rationale does not depend on the existence of "minute details" in a general statute. *Cf. Appellees' brief* at 31. Thus Appellees' argument fails as contrary to case law. *See also Ellis v. Pope*, 709 So.2d 1161, 1169 n.6 (Ala. 1997) (See, J., concurring): "Section 105 of the Constitution of Alabama of

1901 expresses a policy favoring general statutes over local laws. Unless the Legislature plainly states that it intends general and local laws dealing with the same subject to coexist, Section 105 sets aside the local law in favor of the general law."

10. Deference to the Legislature Is Limited By Section 105, cl. 2

Appellees and the Public School Amici argue the Court must presume the Local Law is constitutional and sustain it if at all possible. *Appellees' brief* at 11-12; *Public School Amici's brief* at 8-13. However, they fail to acknowledge the important second clause of Section 105: "and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law." The Court first cited *Marbury v. Madison* in 1840,[14] so by 1901 judicial review was long established in Alabama, and so this clause cannot be read as a mere invitation to judicial review – that would be unnecessary for a practice by then 61 years old. And reading in that way would imply that the Court lacked authority to review other parts of the constitution, where there is no similar authority. Instead, this clause must be understood as

[14] *State v. Porter*, 1 Ala. 688 (Ala. 1840).

a bulwark against the Legislature backsliding to the abusive local law practices that were a catalyst for the 1901 constitutional convention, *see Initial brief* at 6-9, and it must be enforced as such. In other words, this clause requires that in the unique case of the Court's review of local laws under Section 105, no presumption of constitutionality applies, because the Court, and not the Legislature, is the sole judge of the local law's constitutionality.

11. The Commission's Floodgate Argument Is History, Not Public Policy

Appellees and the Intervenors attack the "floodgate" argument made at the conclusion of the Commission's brief as an improper invitation for the Court to determine public policy. *Appellees' brief* at 19-20; *Intervenors' brief* at 45-48; *cf. Initial brief* at 39-40 (making floodgate argument). The Commission agrees that between the Legislature and the Court, the Legislature is the party charged with defining public policy. However, asking the Court to consider the consequence of a ruling is not an invitation to make public policy (which, to be clear, is a term Appellees used, not the Commission). Consideration of the consequences of alternative rulings is common in oral argument, properly so, and this and other Alabama Courts and Justices take notice of the

consequences of decisions. *E.g.*, *Ex parte Grand Manor*, 778 So.2d 173, 188 (Ala. 2000)(Lyons, J, dissenting) ("To allow a plaintiff to recover for exposure to a foul odor would not expand the recovery of damages so as to open the floodgate to trivial claims."); *Eastern Dredging & Const., Inc. v. Parliament House, L.L.C.*, 698 So.2d 102, 105 (Ala. 1997)("Moreover, if this Court were to hold otherwise, such a decision could potentially open the floodgates of litigation."); *Ankrom v. State*, 152 So.3d 373,384 (Ala. Crim. Ct. 2011)('[O]ther courts have worried that holding a mother liable under such statutes would open the proverbial floodgates to prosecution of pregnant women who ingest toxins, such as alcohol or nicotine …). In addition, this Court previously has voiced the same concern as the Commission:

> There should be borne in mind the reasons underlying the adoption of Sections 104 and 105 of the Constitution. Prior to the Constitution of 1901 it was common practice to pass local or special laws to accomplish the purposes listed in Section 104. Cities and towns were incorporated in local laws. All manner of corporations and associations were created by special laws. There was of necessity a lack of uniformity. There was as well a burden resting on the legislature. It was to remove these evils that Section 104 was framed. To sustain Act No. 631 in its present form-not anywise to reflect upon its merits-would be to throw open the door to an uncalculated deluge of local legislation.

Carter v. Harris, 141 So.2d at 179. So the Commission's warning was not improperly raised, and the harm done by excessive local laws is a valid concern for the Court.

12. Intervenors' Distribution-Appropriation Argument Is A Red Herring

Below and in their brief to the Court, Intervenors argue that "[t]axation has four distinct steps: levy, collection, distribution, and appropriation." *Intervenors' brief* at 41. They provide no cite for this claim. *Id.* It would be more accurate to say that Intervenors' "four distinct steps" comprise an incomplete list of activities to be accomplished after the Legislature passes a tax, to which one could add counting the tax proceeds, keeping them safe, and auditing the books of taxpayers – all equally essential to the taxation process but equally irrelevant to this case. However, Intervenors claim that the Court made a distinction between "distributing" funds and "expending" or "appropriating" funds in *Clay Cty. Comm'n v. Clay Cty. Animal Shelter, Inc.*, 283 So.3d 1218 (Ala. 2019), that has relevance here. In *Clay County* the Court, seeking to determine the plain meaning of words used in the challenged local law, asked itself whether the terms "distributed" and "expended" were the same as

"appropriation," because the constitutional provision in that case, Section 73, forbade certain appropriations. *Id.* at 1229-30. The Court concluded that all three words meant "appropriation": "Thus, the plain meaning of the relevant language in Act No. 2017-65 reflects an appropriation to the animal shelter." The Court went on to find that the part of the local law that appropriated tax proceeds to the Clay County Animal Shelter violated Section 73. *Id.* at 1243 ("We therefore conclude that the requirement in Act No. 2017-65 that 18% of Clay County's tobacco-tax proceeds be disbursed to the animal shelter constitutes an appropriation within the meaning of § 73. Because Act No. 2017065 was not approved by a vote of two-thirds of all members elected to each house, that portion is, therefore, void." *Id.* at 1244. Of this holding, the Intervenors say "[t]he Court invalidated the appropriation but left the distribution intact" and that the Court necessarily concluded that the distribution was not an appropriation because, "if it were, it would have been subject to the same defect as the appropriation." *Intervenors' brief* at 42. It's not clear what this means, but the Commission assumes by "distribution" the Intervenors mean the 98% of the tax proceeds paid to Clay County, and by "appropriation" they

mean the 18% of that amount paid out to the Animal Shelter. This reasoning is faulty, as the outcome of the case did not rest on whether a distribution is the same or different from an appropriation. Instead, it was based upon the fact that the Animal Shelter was a charitable organization and its receipt of tobacco tax funds was an appropriation subject to Section 73 of the Alabama Constitution. Regardless, Intervenors seize upon this to claim that "*Clay County* thus bars the Commissioners' attempt to treat distribution and allocation as the same thing. A distribution is not an allocation so a distribution by general act does not bar an allocation by local law." *Intervenors' brief* at 42. This is a big red herring. The issue before the Court is not fancied distinctions between distributions and allocations, but whether the Local Law violated Section 105, and because the Local Law is, as shown, on the same "case" as (at least) two general laws, the SSUT and Allocation General Laws, the Local Law is unconstitutional.

13. Reply to the Public School Amici's Arguments[15]

According to the Public School Amici the Court lacks

[15] The Commission has moved the Court to strike the parts of the Pubic School Amici's brief that argue their three new

jurisdiction over the Local Law. *Public School Amici brief* at 1-2 (purporting to state three new jurisdictional issues). First they claim that Amendment 111, modifying § 256 of the Alabama Constitution, gives the Legislature *unfettered* power over the public schools. *Id.* at 22 ("Under Amendment 111, the only restrictions on the exercise of the legislature's authority are those that are imposed by the legislature itself."). Consequently, statutes relating to funding public

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issues. The Public School Amici also argue that the Local Law is presumed constitutional and the Court must, if possible, read the Local Law so as to prevent declaring it unconstitutional, and that there is no conflict between the Local Law and the SSUT General Law or the Allocation General Law. *Public School Amici brief* at 8-20. Similar arguments were made by the Appellees and the Intervenors, to which the Commission has already responded. However, errors in that part of the Amici's brief warrant pointing out. On pp. 11-12 of their brief Amici quote the Commission's brief containing formulations of the test of Section 105 applicability that Amici claim have been expressly rejected in decisions upon which the Commission rely. In fact, the quotations in the Commissioner's brief are direct quotes from *Peddycoart* itself, addressing its "new" rule. Furthermore, the quote on p. 12 of the amicus brief purportedly is from *Peddycoart* page 815, supposedly citing *Drummond*. This quote does not appear anywhere in *Peddycoart* and that opinion does not cite *Drummond* for anything. On pp. 12-13 Amici accuse the Commission of inexplicably flouting *Peddycoart* and its progeny by asserting that "the test is not whether the local law … addresses an end not substantially provided for in the general law." The quoted test is the old rule from *Standard Oil* and *Drummond* that *Peddycoart* abrogated. It is specifically cited as the old rule in *Amoco Production Co. v. White*, 453 So.2d 358,361 (Ala. 1984) and *Yancey v. Yancey*, 361 So. 2d 4, 5 (Ala. 1978).

schools are not reviewable under Section 105. *Id.* at 25-26. This is obviously incorrect, because the Court has repeatedly subjected local laws relating to school funding to Section 105 scrutiny. *E.g., Jefferson Cty. v. Taxpayers of Jefferson Cty.*, 232 So.3d at 868 (local law authorizing a Jefferson County tax to benefit public schools held not unconstitutional under Section 105); *Opinion of the Justices No. 311*, 469 So.2d 105, 107-108 (Ala. 1985) (local law authorizing a tax in parts of that county served by the Marshall County school system held unconstitutional under Section 105). Next they argue that given Morgan County public schools are part of a statewide school system, then SSUT funds taken from the Commission for those schools must by the act of taking be converted to state school funds, thus the Local Law is actually statewide in scope and not subject to Section 105. *Public School Amici brief* at 29-30. If this were correct, the Court in *Opinion of the Justices No. 311* could not have found that local law unconstitutional. Last, they claim that the same separation of powers considerations that led the Court to invalidate the remedial order in the Equity Funding Lawsuit prevents the Court from determining whether the Local Law violates Section 105. *Public School Amici brief* at 32-

37. This argument just rehashes their previous two arguments, and is wrong for the reasons already set forth.

CONCLUSION

Before the Local Law was passed, the SSUT General Law distributed to the General Funds of all 67 county commissions the same amount of SSUT proceeds on a pro rata basis. Before the Local Law was passed each of the 67 county commissions had discretion to allocate its SSUT proceeds to fund the essential services required by the Allocation General Law.

Passage of the Local Law created a variance from both of these general law provisions. After Act 2019-272's enactment, the county commissions continue to receive their equal shares of SSUT proceeds on a pro rata basis, ***except for the Morgan County Commission***, which uniquely receives only 5% of the SSUT proceeds that the SSUT General Law entitles it to. Likewise, after passage of the Local Law, the county commissions continue to have discretion to allocate SSUT proceeds as they see fit, within the bounds of the Allocation General Law, ***except for the Morgan County Commission***, which uniquely has its discretion curtailed and its SSUT proceeds taken away and given to public education (and receives no compensatory income from any other source). Section 105 makes unconstitutional any local law that creates a variance from of general law. As just shown, the Local Law does just that,

and therefore it is unconstitutional. The Circuit Court erred by not so ruling.

Because the Local Law violates Section 05 of the Constitution, the Court should declare it unconstitutional, enter judgment for the Commission, reverse the trial court, vacate the trial court's orders, and instruct the Clerk of the Montgomery Court Circuit Court to pay to the Commission all of its SSUT proceeds, with any interest, for deposit in the Commission's General Funds and for use at the Commission's discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, which was electronically filed today, will be served on the following either electronically under Ala. R. App. P. Rules 25(c)(1)(D) and 57(h)(5), or by regular U.S. Mail, properly addressed and postage prepaid, under Ala. R. App. P. 25(c)(1)(B) and 57(h)(2):

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