

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

REPRESENTATIVE PHILIP GUNN
REPRESENTATIVE JASON WHITE

PLAINTIFFS

VS.

CIVIL ACTION NO. G20-943

GOVERNOR TATE REEVES

DEFENDANT

**MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANT
GOVERNOR TATE REEVES' MOTION FOR SUMMARY JUDGMENT**

Governor Tate Reeves submits this memorandum of authorities in support of his Motion for Summary Judgment, and respectfully requests that the Court grant his motion.

INTRODUCTION

The Mississippi Constitution empowers the Governor to “veto parts of any appropriation bill” sent to him by the Legislature. Miss. Const. art. 4, § 73 (1890). Governor Tate Reeves properly exercised that partial veto power when he struck two separable, distinct, and complete appropriations of emergency Coronavirus Aid, Relief, and Economic Security (CARES) Act funds made by House Bill 1782 (“H.B. 1782”), one of which appropriated \$2,000,000 to a particular hospital and another of which appropriated \$6,000,000 to a particular program. The stricken parts of H.B. 1782 were not Legislative conditions; they were distinct appropriations. And they were properly subject to the constitutional check of a partial veto by the Governor.

In this lawsuit, two members of House of Representatives—who failed to pursue or obtain a Legislative override of the veto—seek a judicial override of the

Governor's veto on a theory that the constitutionality of a partial veto depends on where the Legislature's draftsman places a distinct appropriation within an appropriations bill. The Mississippi Supreme Court precedent cited by Plaintiffs does not permit such a superficial approach to resolving disputes of this magnitude, and fidelity to the Constitution's carefully-drawn system of checks and balances—not to mention Section 73's plain language—forbids it.

The Governor's action was a constitutional exercise of his power to veto two parts of an appropriations bill about which he had concerns, and, thereby, put those appropriations to the test of a two-thirds override vote by the full Legislature. This Court should declare the Governor's vetoes lawful and dismiss the Plaintiffs' lawsuit.

STATEMENT OF UNDISPUTED FACTS

Governor Reeves is entitled to judgment as a matter of law on Plaintiffs' request for declaratory relief based on the following undisputed and indisputable facts¹:

1. On March 14, 2020, Governor Reeves issued a Proclamation declaring a State of Emergency to exist in the State of Mississippi due to the COVID-19 pandemic. [Exh. 1, State of Emergency Declaration (Mar. 14, 2020)].
2. On March 18, 2020, the Mississippi Legislature adopted House Concurrent Resolution 65 ("H.C.R. 65"), which extended the 2020 Regular Session of the Legislature, permitted periods of adjournment longer than three days, and extended the deadlines for the passage of legislation. [Exh. 2, H.C.R. 65].

¹ A detailed narrative/statement of facts is contained in Defendant's Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction [Dkt. 23 at pp. 3-10] and is incorporated by reference herein.

3. On June 18, 2020, the Mississippi Legislature adopted House Concurrent Resolution 69 (“H.C.R. 69”), which further extended the 2020 Regular Session of the Legislature, further extended deadlines for certain legislation, and set October 10, 2020 as the date for the 2020 Regular session to adjourn *sine die*, absent motion prior to that date. [Exh. 5, H.C.R. 69].
4. On July 1, 2020, the Mississippi Legislature passed H.B. 1782. [Exh. 9, Legislative History of H.B. 1782].
5. H.B. 1782 contains numerous distinct, separable, and complete appropriations of federal CARES Act funds through four state agencies – the Mississippi Development Authority, the Mississippi State Department of Health (“MSDH”), the Mississippi State Department of Mental Health and the Board of Trustees of the Institutions of Higher Learning. [Exh. 8, H.B. 1782].
6. Among the numerous distinct, separable, and complete appropriations of federal CARES Act funds made pursuant to H.B. 1782 are: (1) \$1.5 million to Federally Qualified Health Centers; (2) \$1 million to rural hospitals; (3) \$2 million to the North Oak Regional Medical Center; (4) \$6 million to the MAGnet Community Health Disparity Program; and (5) \$80 million to all other hospitals “for their necessary expenditures incurred due to the COVID-19 public health emergency.” Such distinct, separable, and complete appropriations are to be disbursed by the MSDH. [Exh. 8, H.B. 1782].
7. CARES Act funds may only be used to cover costs that are “necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19).” 42 U.S.C. 801(d). The expenditures must have been “incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.” 42 U.S.C. 801(d); [Exh. 3, U.S. Department of the Treasury Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments (Updated June 30, 2020); Exh. 4, U.S. Department of the Treasury Coronavirus Relief Fund, Frequently Asked Questions (Updated Aug. 10, 2020)].
8. CARES Act funds used to cover expenditures that were not incurred as a result of COVID-19, that were not necessary to deal with the effects of COVID-19, or that were not incurred between March 1 and December 30, 2020, are subject to recoupment by the United States Department of the Treasury. 42 U.S.C. 801(f)(2).

9. The Inspector General of the Department of the Treasury will “conduct monitoring and oversight of the receipt, disbursement, and use of [CARES Act] funds” by the State of Mississippi. 42 U.S.C. 801(f)(1).
10. Under the CARES Act, the State of Mississippi, not the individual recipients of CARES Act funds, will be responsible for repaying CARES Act funds that were used for unauthorized purposes to the Federal Government. 42 U.S.C. 801(f)(2).
11. On July 2, 2020, the Mississippi Legislature delivered H.B. 1782 to Governor Reeves for his consideration. [Exh. 9, Legislative History of H.B. 1782].
12. On July 8, 2020, Governor Reeves timely exercised his constitutional authority pursuant to Section 73 of the Mississippi Constitution to veto “parts” of H.B. 1782 and approve the remaining “parts” of the bill. [Exh. 15, Governor’s Partial Veto Message for H.B. 1782; Exh. 9, Legislative History of H.B. 1782; Exh. 13, Daily Action Report (July 8, 2020); Exh. 16, Redline version of H.B. 1782 reflecting Parts Subject to Partial Veto].
13. As stated in Governor Reeves’ Partial Veto Message for H.B. 1782, Governor Reeves specifically vetoed two distinct, separable, and complete appropriations of CARES Act funds – the \$2 million appropriation for the North Oak Regional Medical Center and the \$6 million appropriation for the MAGnet Community Health Disparity Program. [Exh. 15, Governor’s Partial Veto Message for H.B. 1782].
14. On July 8, 2020, Governor Reeves returned H.B. 1782 with his Partial Veto Message to the Mississippi House of Representatives. [Exh. 9, Legislative History of H.B. 1782; Exh. 13, Daily Action Report (July 8, 2020); Exh. 15, Partial Veto Message for H.B. 1782].
15. On July 8, 2020, House Bill 1805 (“H.B. 1805”) was signed by Governor Reeves and became law. [Exh. 11, Legislative History of H.B. 1805].
16. Pursuant to H.B. 1805, any CARES Act Funds that have not been expended by December 28, 2020, or if at any time the entity to which CARES Act funds have been appropriated determines that the use of such funds would be an ineligible expenditure under the CARES Act, such funds shall be transferred to the Unemployment Compensation Fund no later than December 30, 2020. [Exh. 10, H.B. 1805].
17. On August 5, 2020, Plaintiffs commenced this action. [Dkt. 2].

18. On August 10, 2020, the House of Representatives pursuant to its constitutional duty under Section 72 of the Mississippi Constitution, reconsidered H.B. 1782 in light of Governor Reeves' partial veto and referred H.B. 1782 to the Rules Committee. [Exh. 9, Legislative History of H.B. 1782; Exh. 21, Daily Action Report (Aug. 10, 2020)].
19. August 24, 2020, was the third Legislative Day following Governor Reeves' return of H.B. 1782 to the House of Representatives. [Exh. 21, Daily Action Report (Aug. 10, 2020); Exh. 25, Daily Action Report (Aug. 11, 2020); Exh. 26, Daily Action Report (Aug. 17, 2020); Exh. 27, Daily Action Report (Aug. 24, 2020)].
20. On August 24, 2020, the House Rules Committee convened, took up Governor Reeves' partial veto of H.B. 1782, and recommended to the House of Representatives that it "take no action" on Governor Reeves' partial veto of H.B. 1782. [Exh. 27, Daily Action Report (Aug. 24, 2020)].
21. On August 24, 2020, the report of the House Rules Committee recommending that the House "take no action" on Governor Reeves' partial veto of H.B. 1782 was read to the full House. [Exh. 27, Daily Action Report (Aug. 24, 2020)].
22. On August 24, 2020, no member of the House of Representatives made a motion with respect to Governor Reeves' partial veto of H.B. 1782. [Exh. 27, Daily Action Report (Aug. 24, 2020)].
23. August 25, 2020 was the fourth Legislative Day following Governor Reeves' return of H.B. 1782 to the House of Representatives. [Exh. 21, Daily Action Report (Aug. 10, 2020); Exh. 25, Daily Action Report (Aug. 11, 2020); Exh. 26, Daily Action Report (Aug. 17, 2020); Exh. 27, Daily Action Report (Aug. 24, 2020); Exh. 28, Daily Action Report (Aug. 25, 2020)].
24. On August 25, 2020, no member of the House of Representatives made a motion with respect to Governor Reeves' partial veto of H.B. 1782. [Exh. 28, Daily Action Report (Aug. 25, 2020)].
25. Because no motion to override Governor Reeves' partial veto of H.B. 1782 was made by any member of the House of Representatives on or before the fourth legislative day, under Section 72 of the Mississippi Constitution and House Rule 103, the legislative process has concluded with respect to H.B. 1782. [Miss. Const. art. 4, § 72 (1890); Exh. 20, House Rule 103; Exh. 9, Legislative History of H.B. 1782].

26. Because the legislative process has concluded with respect to H.B. 1782, Governor Reeves' partial veto of H.B. 1782 is final. [Miss. Const. art. 4, § 72 (1890); Exh. 20, House Rule 103; Exh. 9, Legislative History of H.B. 1782].
27. On August 24, 2020, the House Workforce Development Committee convened, took up Governor Reeves' veto of H.B. 1387, and recommended to the House of Representatives that it "take no action" on Governor Reeves' veto of H.B. 1387. [Exh. 27, Daily Action Report (Aug. 24, 2020)].
28. On August 25, 2020, the fourth Legislative Day following Governor Reeves' return of his veto of H.B. 1387 to the House of Representatives, no member of the House of Representatives made a motion with respect to Governor Reeves' veto of H.B. 1387. [Exh. 28, Daily Action Report (Aug. 25, 2020)].

ARGUMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56(c). "A party against whom . . . a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Miss. R. Civ. P. 56(b). Governor Reeves does not have the burden of production at the summary judgment stage. *See Karpinsky v. Am. Nat'l Ins. Co.*, 109 So. 3d 84, 89 (Miss. 2013) ("[B]ecause [d]efendants do not carry any burden of production at trial, they also do not carry any burden of production at the summary-judgment stage."). For the reasons explained below, there are no genuine issues of material fact as to whether Governor Reeves properly exercised his constitutional authority under Section 73 when he partially vetoed H.B. 1782. Accordingly, the

Court should grant summary judgment to Governor Reeves and dismiss Plaintiffs' Second Amended Complaint for Declaratory Judgment with prejudice.

THE GOVERNOR'S VETO OF "PARTS" OF H.B. 1782 IS CONSTITUTIONAL PURSUANT TO SECTION 73 AND IS CONSISTENT WITH *HOLDER, FORDICE, AND BARBOUR*.

A. Under Current Law, The "Parts" Of H.B. 1782 In Issue Were Correctly Vetoed As Separate Appropriations, Not Conditions Of An Appropriation.

At the beginning of the State of Mississippi's Constitutional Convention of 1890, the President of the Convention observed that "limitations on the legislative power" did not "characterize" the 1869 State Constitution, and stated that imposing such limitations was a matter "of first importance" for the Framers of the 1890 Constitution. *Journal of the Proceedings of the Constitutional Convention of the State of Mississippi* at 11 (1890). The Framers of the 1890 Constitution did indeed adopt many constitutional provisions limiting the Legislature's powers. One of those provisions is Section 73. In addition to the power granted by Section 72 to veto any bill passed by the Legislature in its entirety, the Governor was also given the power under Section 73 to partially veto appropriations bills. Section 73 provides, in plain and unambiguous language, that "[t]he Governor may veto *parts* of any appropriation bill, and approve *parts* of the same, and the portions approved shall be law." Miss. Const. art. 4, § 73 (1890) (emphasis added). Thus, under Section 73, the Governor may veto any "part" of an appropriations bill.

The Governor's partial veto authority is an essential part of the system of checks and balances enshrined in the 1890 Constitution. As the Mississippi Supreme Court has recognized:

Basic to our holding is our recognition that there is another side to the coin labeled on one side "separation of powers." This other side, commonly referred to as "checks and balances," is the mandate that important checks be placed upon each department's exercise of its power.

For example, legislative power is checked by the governor's veto power[,] . . . Article IV, Sections 72-73 . . . , and by the judicial power of this Court to declare acts of the legislature unconstitutional.

Alexander v. State By & Through Allain, 441 So. 2d 1329, 1346 (Miss. 1983) (citations and brackets omitted). "The Governor is a check upon the spending power of the legislature within our established system of checks and balances." *Fordice v. Bryan*, 651 So. 2d 998, 1002 (Miss. 1995). "Therefore, the legislature may spend as it sees best just as the Governor may veto bills under § 73 and § 72 as he sees best" *Id.*

"Section 73 was framed with a view of guarding against the evils of omnibus appropriation bills securing unrighteous support from diverse interests, and to enable the governor to approve and make law some appropriations, and to put others to the test of securing a two-thirds vote of the legislature as the condition of becoming law." *State v. Holder*, 23 So. 643, 644 (Miss. 1898). In other words, the Governor's partial veto authority was intended to be a "corrective" to the "evil" of logrolling, *Holder*, 23 So. at 644, the legislative practice "by which, in order to secure the requisite majority to carry necessary and proper items of appropriation, unnecessary or even indefensible items are sometimes included." *Bengzon v. Sec'y of Justice of Philippine*

Islands,² 299 U.S. 410, 415 (1937); *see also* Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L. Rev. 1171, 1178 (1993).

As one court has explained, the partial veto is designed to give “the Executive, who is elected statewide rather than from a particular district, the power to achieve fiscal constraint and to advance statewide rather than parochial fiscal interests; the Governor can excise unneeded ‘pork barrel’ programs or projects from an appropriations bill so as to restrain public expenditures.” *Washington State Legislature v. Lowry*, 931 P. 2d 885, 889 (Wash. 1997); *see State v. Carruthers*, 759 P. 2d 1380, 1383 (N.M. 1988) (“The major factors which prompted drafting of constitutions to include the item-veto were: To prevent corruption, to prevent hasty and ill-conceived legislation, and most importantly, to prevent ‘logrolling’ tactics by the legislature.”).

Further, when the Governor vetoes parts of an appropriations bill, his veto forces the Legislature to reconsider the vetoed parts in isolation from the remainder of the bill and to decide whether to override the Governor’s veto under Section 72. *See Barbour v. Delta Corr. Facility Auth.*, 871 So. 2d 703, 713 (Miss. 2004) (Cobb, P.J., dissenting) (“The Legislature may make a line-item appropriation and, if the Governor disputes it, the Legislature may override his veto by a two-thirds majority. This forces a vote on that line item, and that line item alone, a process which isolates the disputed provision for consideration by itself, free from any political maneuvering

² The United States Supreme Court cited *State v. Holder*, 23 So. 643 (1898), in its discussion of the partial veto power. *See Bengzon*, 299 U.S. at 415.

which might have previously occurred in drafting the entire bill.”). Thus, Sections 72 and 73 of the Constitution “enable the Legislature to maintain control over the power to make law, to tax, and to spend, and at the same time to protect the public against untoward legislative maneuvering and interference with executive powers.” *Id.*

Pursuant to Section 73, if an appropriation bill passed by the Legislature contains several distinct and complete appropriations, or “parts,” the Governor may veto any part that can be severed from the bill without affecting the other parts:

The true meaning of section 73 is that an appropriation bill made up of several parts (that is, distinct appropriations), different, separable, each complete without the other, which may be taken from the bill without affecting the others, which may be separated into different parts complete in themselves, may be approved, and become law in accordance with the legislative will, while others of like character may be disapproved, and put before the legislature again, dissociated from the other appropriations.

Holder, 23 So. at 645. In other words, the Governor may veto any “part” of an appropriation bill that “fix[es] a definite maximum amount” of money that may be drawn from the State Treasury. *Fordice v. Bryan*, 651 So. 2d 998, 1000 (Miss. 1995) (“In order for the bills to be susceptible to the Governor’s § 73 partial veto power, they must fix a definite maximum amount”) (citing Miss. Const. art. 4, § 63 (1890) (“No appropriation bill shall be passed by the legislature which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury.”))).

On the other hand, the Supreme Court has held that the Governor may not use his partial veto authority to strike a “condition” placed on an appropriation. *See Holder* 23 So. at 645 (stating that it “would be monstrous” if the Governor could “approve and make law of the appropriation, and veto and defeat the purpose or the

conditions or both”). A “condition” is defined as “a restricting or modifying factor.” Merriam-Webster Collegiate Dictionary, Tenth Edition (1997) at 240. Thus, a condition in an appropriation bill restricts the circumstances under which the appropriated money may be drawn from Treasury or paid out.

In *Holder*, for example, the bill at issue appropriated funds to pay the wages and salaries of teachers and officers at the Industrial Institute and College of Mississippi, as well as ancillary operating expenses. 23 So. at 644-45. The Legislature imposed several conditions that had to be met before the money appropriated to pay wages and salaries would be made available to the college by the State Treasurer. *See id.* at 645 (“provided that no part of the money hereby appropriated for wages or salaries shall be available unless . . .”). The bill conditioned the money for wages and salaries on the college’s board of trustees adopting by-laws (1) conferring on the president of the college certain powers related to the hiring, firing, and disciplining of teachers and other employees; (2) conferring on the president the power “to arrange and specify the course of study and to fix the schedules of studies and classes and to establish rules of discipline for the government of the pupils”; and (3) providing for equal dormitory privileges for all students. *Id.*

In his partial veto message, the Governor stated that he approved the amount appropriated to the college and the second and third conditions prescribed by the Legislature. *Id.* However, the Governor disapproved, and thus partially vetoed, the language in the bill conditioning the availability of the funds on the adoption of by-laws giving the president more control over the teachers and employees of the college.

Id. The Supreme Court held that the Governor’s partial veto was a “nullity” because the part of the bill he vetoed was a condition, not an appropriation. *See id.* (“the bill in this case, in the parts vetoed, not being an appropriation bill, within its meaning, and not being a veto of parts of distinct and separable appropriations . . .”).

Similarly, in *Fordice v. Bryan*, 651 So. 2d 998 (Miss. 1995), the Legislature passed 27 appropriation bills at the end of its regular session.³ *Id.* at 999. Governor Fordice returned the bills to the legislature within 15 days with a message that he had vetoed parts of each of the bills. *Id.* One of the bills appropriated funds to the Board of Trustees of State Institutions of Higher Learning for the 1994 Fiscal Year and specifically “forbade the use of any funds appropriated by the bill to raise the salary of the Commissioner of Higher Learning.” *Id.* at 1000. Governor Fordice “crossed through” that provision and approved the rest of the bill. *Id.* The other 26 bills appropriated funds to various state agencies but restricted the number of employees that could be hired by each agency with the appropriated funds. *Id.* In every single one of these bills, Governor Fordice “marked through the number of employees authorized and substituted a smaller figure.” *Id.*

The Supreme Court held that Governor Fordice’s partial vetoes of these 27 bills were not authorized by Section 73 because he “sought to veto a condition prescribed

³ Governor Fordice also partially vetoed two bills that authorized the State to borrow money by issuing general obligation bonds. 65 So. 2d at 999-1000. He marked through the amounts the Legislature had authorized the State to borrow and inserted a smaller figure. *Id.* He also struck several provisions directing how the borrowed money would be spent. *Id.* The Supreme Court held that, because these two bills “were not appropriation bills within the meaning of the Constitution,” Governor Fordice’s partial vetoes were unconstitutional. *Id.* at 1001.

by the legislature rather than a distinct appropriation.” *Id.* at 1002. However, the Court emphasized that its opinion should not be read as “hold[ing] . . . that the Governor’s veto power under § 73 is without substance.” *Id.* Instead, *Fordice* merely held that “the manner in which” the Governor “used” his partial veto authority with respect to the 27 appropriations bills “was not proper and in accordance with the constitutional requirements.” *Id.* In so holding, the Court acknowledged the Governor’s power to partially veto appropriations bills: “The Governor had and yet possesses the power to veto ‘parts’ of ‘appropriation’ bills under § 73.” *Id.*

Both *Holder* and *Fordice* involved vetoes of conditions rather than vetoes of an appropriation (i.e., a definite maximum sum to be drawn from the Treasury). The conditions vetoed in *Holder* (requiring the board of trustees to adopt certain by-laws) and *Fordice* (capping the number of employees that could be hired) were restrictions or modifying limitations on the appropriations at issue in those cases. *Holder* and *Fordice* are therefore inapposite. Governor Reeves did not veto a condition of an appropriation.⁴ Instead, he vetoed two separable, distinct, and complete appropriations that both set forth a definite maximum sum of federal CARES Act funds to be distributed through the MSDH. [Exh. 8, H.B. 1782 at § 4(c), (d); Exh. 15,

⁴ The part of H.B. 1782 appropriating \$2 million to the North Oak Regional Medical Center does place a condition or restriction on the appropriation. [Exh. 8, H.B. 1782 at § 4(c)]. It provides that, if the hospital is not in operation, or a contract or memorandum of understanding for the operation of the hospital has not been executed, by October 1, 2020, the \$2 million must be reallocated to reimburse hospitals for expenses incurred due to the COVID-19 pandemic. [Exh. 8, H.B. 1782 at § 4(c), (e)]. If Governor Reeves had *only* vetoed this condition, the veto would have been invalid under *Holder* and *Fordice*.

Governor's Partial Veto Message for H.B. 1782; Exh. 16, Redline version of H.B. 1782 reflecting Parts Subject to Partial Veto].

In *Barbour v. Delta Correctional Facility Authority*, 871 So. 2d 703 (Miss. 2004), the Legislature passed a bill appropriating a total of \$250,190,746.00 to the Mississippi Department of Corrections ("MDOC") for the 2002-2003 Fiscal Year. *Id.* at 705. The bill provided that MDOC could spend no more than \$54,726,714.00 on private prisons and prohibited MDOC from transferring the amount allocated for private prisons to another division of the agency. *Id.* Governor Musgrove vetoed the part of the bill that provided for the expenditure of no more than \$54 million for the funding of private prisons. *Id.* at 704. As a result of Governor Musgrove's partial veto, which struck a condition of an appropriation and effectively defunded a division of the agency, MDOC terminated its contract with Delta Correctional Facility Authority for the housing of state prisoners. *Id.* at 704.

Delta Correctional then sued Governor Musgrove and MDOC and obtained a TRO barring MDOC from shutting down the prison or removing the inmates housed there. *Id.* The chancery court ruled that Governor Musgrove's partial veto was invalid under Section 73. *Id.* On appeal, the Supreme Court affirmed, holding that the partial veto "was unconstitutional and thus a nullity" and that the appropriation bill therefore "became law in its entirety in the form as passed by the Legislature." *Id.* at 711. In doing so, the Supreme Court adopted the argument that "the \$54 million cap is not an appropriation of a specific or certain sum of money since MDOC is not required to spend \$54 million or any amount of [sic] private prisons. The term private

prison is not a specific purpose because it is open ended and does not specify any particular prison nor tie the funds to specific expenditure.” *Id.* at 709.

Barbour is inapposite because here Governor Reeves vetoed the appropriation of *specific sums* to particular private entities, as opposed to vetoing a cap on expenditures by the division of a state agency. Further, unlike *Barbour*, the Governor’s partial vetoes had no effect on the distribution of other funds appropriated by the Legislature in H.B. 1782. Accordingly, Governor Reeves properly exercised his constitutional authority under Section 73 by vetoing two distinct and complete parts of H.B. 1782.⁵

B. Under *Holder*, Each Appropriation Bill Must Be Evaluated Based On Its Substance, Not The Location Arbitrarily Selected By The Bill Draftsman.

According to Plaintiffs, the physical location where the draftsman chooses for pertinent language to appear in the geography of an appropriation bill (“above the line, below the line”) determines its constitutional effect. This primary theme of Plaintiffs’ position elevates form over substance, a practice Mississippi courts have routinely condemned. *See, e.g., Golden v. State*, 968 So. 2d 378, 386 (Miss. 2007) (“[W]hen dealing with indictments . . . we employ a rule of substance over form.”).⁶

⁵ To the extent that *Holder*, *Fordice*, or *Barbour* could be interpreted to require a different result, Governor Reeves preserves for appeal the issue of whether any part of those cases should be modified, reinterpreted, or overruled.

⁶ *See also, e.g., Mitchell v. Moore*, 237 So. 3d 681, 684 (Miss. 2017) (“The chancery court found no merit in this claim, explaining that it constituted nothing but ‘form over substance’ . . . We agree.”); *Hobgood v. State*, 926 So. 2d 847, 851 (Miss. 2006) (“Hobgood challenges the State’s failure to use the magic words ‘tendering’ Detotto as an expert witness during the pretrial hearing. To find in favor of Hobgood would put form over substance so as to cause a miscarriage of justice.”); *USF&G v. Conservatorship of Melson*, 809 So. 2d 647, 661 (Miss. 2002) (“Clearly . . . requiring repayment of the money specifically approved by the

Cf. Wilson v. State, 198 So.3d 408, 419 (Miss. Ct. App. 2016) (A criminal “offense is not defined by its location or heading in the Mississippi Code. An offense is defined by its elements---it is simply the sum of its elements.”) (internal quotations marks omitted). This rule operates with particular force when a court is asked to consider the constitutionality of a legislative or executive action. *See, e.g., Toombs v. Sharkey*, 106 So. 273, 274-75 (Miss. 1925) (holding that courts must look to substance rather than form when determining whether a law is local or special in violation of Mississippi Constitution of 1890).

Rejecting form-over-substance arguments is in keeping with the traditions of equity practice. A court of equity should “deal[] with a matter according to its substance and regard[] mere form as a secondary consideration.” James W. Shelson, *Miss. Chancery Practice* § 2:24 (2017 ed.). Section 73 and the three partial veto cases likewise require this Court to avoid elevating form over substance. The Court must examine the substance of each part of H.B. 1782 vetoed by Governor Reeves and determine the actual nature of the vetoed provisions. Allowing clever draftsmen to defeat the Governor’s constitutional check on Legislative power was never intended by the Supreme Court.

In substance, the vetoed parts of H.B. 1782 (North Oak Hospital and MAGnet) were distinct and separable appropriations, complete in and of themselves,⁷ and not

chancery court in the divorce is putting form over substance.”); *Beverly Enterprises v. Mississippi Div. of Medicaid*, 808 So. 2d 939, 944 (Miss. 2002) (“Medicaid clearly places form over substance”).

⁷ The North Oak and MAGnet appropriations each contain all “three essential parts” of an appropriation: “the purpose . . . , the sum appropriated for the purpose, and the conditions

simply “conditions” or “purposes.” If the Legislature could avoid Section 73 by structuring the bill so that discrete and certain appropriations to particular entities or programs are incorporated into a single larger appropriation in the bill, Section 73 itself could be reduced to a nullity by the creative efforts of attorneys and staffers in the legislative drafting office.

Under the overly simplistic rule advocated by Plaintiffs, and the clever practice of the drafters, Section 73 is rendered toothless, just as warned by Justice Cobb’s dissent in *Barbour*, and the Governor’s only choice would be to veto the entire appropriation bill, a power which already independently exists under Section 72.⁸ Under such a reading and interpretation, Section 73 would be rendered meaningless, allowing the clever placement of appropriations to eviscerate the Constitutional power of the Governor -- a process completely within the control of Legislative bill drafting. The Constitutional power and authority of the Governor of this State cannot so easily be written out of existence.

upon which the appropriation shall become available.” *Holder*, 23 So. at 645. Section 4(c) of H.B. 1782 appropriates \$2 million through the MSDH to North Oak Regional Medical Center for the purpose of “allow[ing] the medical center to continue in operations during the current COVID-19 public health emergency.” [Exh. 8, H.B. 1782]. Further, it conditions the disbursement of the \$2 million on the hospital being in operation or the execution of a contract or Memorandum of Understanding for the operation of the hospital in Tate County by October 1, 2020. [Exh. 8, H.B. 1782]. Similarly, Section 4(d) appropriates \$6 million through the MSDH to the MAGnet Community Health Disparity Program for the purpose of “address[ing] the disproportionate impact on the minority community of coronavirus infections and deaths from COVID-19.” [Exh. 8, H.B. 1782]. Moreover, subsection (d) conditions the disbursement of the \$6 million on the funds being used for that purpose. [Exh. 8, H.B. 1782 (“which funding shall be used to address”).]

⁸ To the extent that Plaintiffs read *Barbour* to establish a formalistic “above-the-line, below-the-line” drafting requirement for appropriations and conditions, they are mistaken and their reading must be rejected. If their misreading of *Barbour* were to be adopted by this Court, then it would call into question the constitutional validity of the *Barbour* decision and require the Supreme Court to revisit *Barbour* and clarify or overrule its decision.

C. Each Of The Vetoed Parts Of H.B. 1782 Appropriated CARES Act Funds Whose Use Is Limited and Restricted By Federal Law And Was, Therefore, A Distinct, Separable, And Complete Appropriation Subject To Veto Pursuant To Section 73.

The funds appropriated by H.B. 1782 are not State general funds. Rather they are federal funds appropriated by the U.S. Congress to Mississippi under the CARES Act, and because H.B. 1782 appropriates CARES Act funds, the appropriations at issue here are different than those addressed in any other Mississippi case dealing with partial vetoes. Federal CARES Act funds are federally appropriated emergency funds that must be disbursed and used in accordance with U.S. Treasury guidance and are subject to recoupment by the Inspector General. 42 U.S.C. 801(f). The distinction between the funds appropriated by H.B. 1782 and the funds at issue in other cases is critical to the Court's analysis.

CARES Act funds may only be used to cover costs that are "necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)." 42 U.S.C. 801(d); [Exh. 3, U.S. Department of the Treasury Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments (Updated June 30, 2020)]. The expenditures must also have been "incurred during the period that begins on March 1, 2020, and ends on December 30, 2020." 42 U.S.C. 801(d); [Exh. 3, U.S. Department of the Treasury Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments (Updated June 30, 2020)]. Any CARES Act funds that are expended in a way that does not comply with U.S. Treasury guidance must be paid back by the State. 42 U.S.C. 801(f)(2). To that end, the Inspector General of the Department of the Treasury will "conduct

monitoring and oversight of the receipt, disbursement, and use of [CARES Act] funds” by the State of Mississippi. 42 U.S.C. 801(f)(1).

Thus, each appropriation in H.B. 1782 is necessarily a separate and distinct appropriation that must be capable of being individually evaluated by the State, and ultimately by the Inspector General. In other words, the \$2,000,000 appropriation to North Oak Regional Medical Center and the \$6,000,000 appropriation to the MAGnet Community Health Disparity Program must be evaluated separately to make sure they satisfy federal requirements. Under the CARES Act, the State of Mississippi, not the individual recipients of CARES Act funds, will be responsible for repaying CARES Act funds that were used for unauthorized purposes to the Federal Government. 42 U.S.C. 801(f)(2).

House Bill 1782 is different from any other bill ever considered by a Mississippi court. The COVID-19 pandemic is unprecedented, as is the CARES Act. House Bill 1782 was drafted with individual appropriations, each of which is separate, distinct, and severable from the whole of the bill in order to comply with the mandates of the CARES Act. The Inspector General will not be evaluating the \$91,900,000 sum in Section 3 of the bill for compliance with U.S. Treasury Guidance. Rather, the Inspector General will be evaluating each and every separate and divisible appropriation contained in this omnibus appropriation bill. Thus, each appropriation of CARES Act funds contained in H.B. 1782 necessarily is a “stand alone” appropriation, severable from the rest of the bill and subject to veto pursuant to Section 73 of Mississippi Constitution.

Under these circumstances, the Governor’s constitutional power to check the Legislature’s hasty or ill-conceived appropriations favoring parochial fiscal interests is at its height. The Governor has the constitutional authority to veto any “part” of “an appropriation bill made up of several parts (that is, distinct appropriations), different, separable, each complete without the other, which may be taken from the bill without affecting the others[.]” *Holder*, 23 So. at 645. This is precisely what has occurred in this case. Because of the mandates of the CARES Act, H.B. 1782 is an appropriation bill made up of several parts (i.e., distinct appropriations) that are all different, separable, each complete without the other. And each distinct appropriation could be removed from the bill without affecting any of the other appropriations.⁹ Therefore, Governor Reeves properly exercised his constitutional authority to veto “parts” of H.B. 1782. His exercise of that authority under these circumstances is consistent with the language of Section 73, Mississippi Supreme Court precedent, and the purposes of the partial veto authority.

CONCLUSION

For the foregoing reasons, Governor Reeves respectfully requests that the Court grant his Motion for Summary Judgment and dismiss Plaintiffs’ Second Amended Complaint for Declaratory Judgment with prejudice.

RESPECTFULLY SUBMITTED, this the 17th day of September, 2020.

⁹ The Court should note that the CARES Act funds appropriated to the MSDH by other sections of H.B. 1782 have already been disbursed.

GOVERNOR TATE REEVES, Defendant

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CERTIFICATE OF SERVICE

I, Paul E. Barnes, Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the MEC system, which sent notification of such filing to all counsel of record.

This the 17th day of September, 2020.

s/Paul E. Barnes
Paul E. Barnes