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

REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

For the reasons in the Motion to Dismiss for Lack of Subject Matter Jurisdiction and as set forth herein, the Plaintiffs have failed to meet their burden to establish subject matter jurisdiction, [1] and the case must be dismissed.

INTRODUCTION

The Response's impassioned argument notwithstanding, the Governor's argument is not circular, nor does it describe a circular process. The legislative process before the court had a beginning and an end.

- The Legislature passed an appropriations bill.
- The Governor vetoed "parts" of it.
- The House considered the veto and did not override the veto.

[1] "When a plaintiff's allegations of jurisdiction are questioned, the plaintiff bears the burden to prove jurisdiction by a preponderance of the evidence." *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 822 (Miss. 2009) (citations omitted). Moreover "[s]ubject-matter jurisdiction is a threshold inquiry that must be resolved before the court adjudicates the merits of a case." *Knox v. State*, 75 So. 3d 1030, 1034 (Miss. 2011).

- The reconsideration of the veto is final, the veto remains intact and the appropriations process has concluded.

The veto is final, not because the Governor says so, but because the Mississippi Constitution makes it so. And it is not reviewable by the courts, not because the Governor says so, but because the courts have so held. Cleared of hamster wheels, hyperbole, and strawmen, Plaintiffs have failed to meet their burden of proof to establish subject matter jurisdiction, and the case must be dismissed.

ARGUMENT

Under this unique set of facts, and as a consequence of deliberate legislative action, Plaintiffs cannot meet their burden to establish that this Court has subject matter jurisdiction. *See Diocese of Biloxi*, 18 So. 3d at 822; *Knox*, 75 So. 3d at 1034. Specifically, under the Mississippi Constitution the appropriations process has concluded. The Legislature allowed the Governor's veto of parts of H.B. 1782 to stand. The action of the Legislature is final. Accordingly, this case should be dismissed. *Mississippi Dep't of Revenue v. AT&T Corp.*, 1010 So. 3d 1139, 1149 (Miss. 2020) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of the fact and dismissing the cause." (internal quotation marks and citations omitted).

A. The Dismissal Required Here is a Case of First Impression Based on Unique Facts of the Continuing 2020 Legislative Session.

The Plaintiffs' exaggerated slippery slope arguments notwithstanding, the Governor does not argue that there can *never* be judicial review of a Section 73 veto.

[Dkt. 27, Pl. Resp. at 2-5]. There are certainly situations where the courts may properly have jurisdiction to exercise such review. *See, e.g.*, *Fordice v. Bryan*, 651 So. 2d 998 (Miss. 1995); *Barbour v. Delta Correctional Facility Auth.*, 871 So. 2d 998 (Miss. 2004). However, this case of first impression presents a set of circumstances unlike either *Fordice* or *Barbour.* Here the Governor timely returned a veto to distinct, separable, and complete parts of H.B. 1782 to the House of Representatives (house of origin), which remained in regular session; and the House *officially and expressly* decided to take no action on the veto as permitted by Section 72 of the Constitution, as well as the Rules of the House itself. Section 72 prescribes only one way that a bill can become law over a Governor's veto, and that is by an affirmative two-thirds vote of both Houses of the Legislature. That did not happen. And Plaintiffs do not dispute that legislative action on H.B. 1782 is now final.

Further, Plaintiffs are individual Representatives[2] who personally participated in the formal decision of the House *as a legislative body* to "take no action," to override the Governor's veto. That action final, Plaintiffs continue to ask the judiciary, a co-equal branch of government, to now override the veto of the Governor---a legislative act that the Legislature declined to perform. Now, their

[2] Plaintiffs have not asserted that they have brought this action in their official capacities or on behalf of the House of Representatives. They have no authority to speak on behalf of the House, or to opine on the intent of the House, much less the Legislature as a whole, and their arguments and counsel's statements implying otherwise must be disregarded. Indeed, as the *Napolitano* court explained: "Our general disinclination to enter political controversy is heightened by the fact that petitioners here, though leaders in their respective chambers, represent only four of ninety members of the legislature." *Bennett v. Napolitano*, 81 P.3d 311, 318 (Ariz. 2003).

chamber having taken no action to override the Governor's veto, two members of the House of Representatives ask this Court to take their preferred action—striking down a veto that the other 120 representatives elected to let stand. *That request is unprecedented*. In the unique and anomalous circumstances presented here, and due solely to the actions of the House, the Court must dismiss for lack of subject matter jurisdiction.

The Response asserts that the substantive changes in the facts caused by H.C.R. 69 and the House's actions "do[] not change the analysis one whit." [Dkt. 27, Pl. Resp. at 7]. That is factually and legally incorrect. The actions of the House matter. And it did change the analysis. Plaintiffs' Response glosses over that it was H.C.R. 69 (extending the 2020 Regular Session of the Legislature into the month of October), combined with the actions of the House of Representatives on August 10, August 24, and August 25, that changed this from a *Fordice* or *Barbour* framework into a case of first impression.

The Governor's motion does not ask the Court to interfere with the internal workings of the House of Representatives, but merely to interpret the legal impact of those final actions recorded in "the journals of the House." Both Chambers of the Legislature unquestionably "have complete control of their journals, both as to what they shall contain and their publication[.]" [Dkt. 27., Pl. Resp.at 4 n.10 (quoting *Hunt v. Wright*, 70 Miss. 298, 308, 11 So. 608, 610 (1892) (added emphasis omitted)]. However, the Constitutional impact of the actions recorded in those

journals is certainly within the province of this Court. And it is the legal effects of those actions that now require dismissal.

B. House Action on H.B. 1782 is Final Because the Constitution Says it is Final.

The Constitution required the house of origin, here the House of Representatives, to reconsider HB 1782 and, if able, to pass it by a two-thirds vote, the Governor's veto notwithstanding. The House took the measure up by committee which did not recommend a vote to override. [Dkt. 22-27, Daily Action Report (Aug. 24, 2020)]. On the next Legislative Day following the report of the committee recommending to take no action to override the veto, no member of the House made a motion to override the veto. That the House intentionally elected to "take no action" does not change the legal import of its decision not to override the Governor's veto. Section 72 provides only one way for a bill to become law over a Governor's veto.[3] The House intentionally elected not to override. Thus, the veto is final.

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[3] Governor's veto shall be returned:

> to the House in which it originated, which *shall* enter the objections at large upon its Journal, and *proceed to reconsider it*. If after such reconsideration two-thirds (2/3) of that House shall agree to pass the Bill, it shall be sent, with the objections, to the other House, by which, likewise, it shall be reconsidered; and if approved by two-thirds (2/3) of that House, it shall become a law; but in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the Bill shall be entered on the Journal of each House respectively. . . .

MISS. CONST. Art. 4, § 72 (1890) (emphasis added).

The Response argues that "the Legislature need do nothing in the face of an impermissible partial veto" with regard to the Governor's veto of part of HB 1782. [Dkt. 27, Pl. Resp. at 7]. However, that is not what happened.[4] The "need do nothing" argument is also inconsistent with the explanation offered by the Speaker from the floor of the House on August 24. On that date, the following exchange occurred:

> Speaker Gunn: "While we wait, I am informed that there are three vetoes that must be handled. One is the Rules Committee, one is Workforce Committee, and one is the Jud-B Committee . . . . Gentleman from Adams, you have a question?"
>
> Representative Robert L. Johnson: "Yes, sir, Mr. Speaker, when you said 'deal with those vetoes' is that considered an override or, or what?"
>
> Speaker Gunn: "Yes. As I understand it, *the law requires* the vetoes to be referred back to the committee from which they came. And the committee has to decide whether they're going to sustain the veto, override the veto, or take no action. Those are the three choices, as I understand it. And so the committees are going to meet and state what they wish to do with those vetoes."
>
> Representative Robert L. Johnson: "The take no action . . . does that resolve the issue or [inaudible]"
>
> Speaker Gunn: "As I understand it, that resolves the issue."
>
> Representative Robert L. Johnson: "Oh, okay."
>
> Speaker Gunn: "It just basically says we're not going to take an action, *we're not going to override*, but we don't agree with the sustaining either."

[4] The constitutional effect of the Legislature's deciding not to consider "an impermissible partial veto," and whether, in such hypothetical circumstance, a court would have subject matter jurisdiction to review the constitutionality of such a partial veto is not before this Court. In this instance, the Legislature in fact *did* consider the Governor's partial veto of H.B. 1782 and decided not to override the veto.

Representative Robert L. Johnson: "Okay."

Speaker Gunn: "That's the way I understand it."

MS House Floor – 24 AUG 2020 at 44:00 - 45:35, (emphasis added) available at https://www.youtube.com/watch?v=LSswCjfjvO4 (accessed Sept. 13, 2020).[5]

The House Rules also confirm that the action is final. Under Rule 103 the House must take action by the third legislative day after a veto is returned, and that at the latest, once the fourth legislative day has passed, no further action is permitted or in order under House Rule 103.[6] The law views failure to override a veto as intentional. *See e.g., Burgos v. State*, 118 A. 3d 270, 289 (N.J. 2015) ("When the Legislature does not reenact itemized appropriations by overriding the

[5] Floor debates and discussion may be considered by courts [*see* 8 Miss. Prac. Enc. of Miss. Law § 68:53 (2d ed.)] as opposed to "testimony or other extra-legislature statements" prohibited by *Pagaud v. State*, 13 Miss. (15 S. & M.) 491, 497, 1845 WL 2031 (1845).

[6] "If the bill is reconsidered by referral to the committee of origin, the committee shall report, with written recommendations, to the full House not more than three (3) legislative days from the referral of the bill in question . . At the time of the report of such committee, only two (2) courses shall be open: (a) Allow Governor's veto to stand. (b) Override Governor's veto. The motion for the first course is a motion to allow the Governor's veto to stand, and the motion for the second course is a motion for passage, the Governor's veto notwithstanding. Such a motion, while not mandatory, shall be in order at any time on the same legislative day that the report of the committee is made, *but shall not be in order thereafter.* However, if the committee does not report to the full House by the end of the third legislative day from the referral of the bill to committee . . . then it shall be in order for any member of the House to make a motion for either of the two (2) courses on the fourth legislative day from referral or the appointment of the committee members, as the case may be, *but not thereafter."*

[Dkt. 22-20, House Rule 103 (emphasis added)].

Governor's line-item vetoes, that action is regarded as intentional and advertent . . . .").

The action by the House on H.B. 1782 is recorded in the journals. [*See* Dkt. 22-9, Legislative History of H.B. 1782; Dkt. 22-27, Daily Action Report (Aug. 24, 2020)]. That action is final. Since the legislative days by which the House was required to take action to override the veto by its own rules have now expired, that decision (for whatever reason that course was chosen) is now final. Section 72 of the Constitution required reconsideration and, if possible, a 2/3 vote to override. It does not countenance inaction or worse invitation by two members for a court to decide what the House expressly did not decide. If the rule urged by the Plaintiffs were adopted by this Court under these facts, then the Legislature could transfer its constitutional obligation to reconsider vetoes to the judiciary.

Plaintiffs' response concedes that Section 72 is substantive and not a "procedural nicet[y]" that is beyond review. [Dkt. 27, Pl. Resp. at 2]. The Response acknowledges a Court that can and should review substantive Legislative acts. *Id.* at 2, citing *Hunt v. Wright*. The House's substantive actions taken pursuant to Section 72 make it final. Inaction is not an option under the Constitution.

In sum, the House's decision to "take no action" is final not because the Governor says it is final, but because both Section 72 of the Constitution and House Rule 103 say that the House's action is final. Accordingly, the finality of the House's actions cannot now be collaterally attacked, recast, or reinterpreted by this Court,

at the invitation of two members of the House.[7] That has been so since 1845. *Pagaud v. State*, 13 Miss. (15 S. & M.) 491, 497, 1845 WL 2031 (1845) ("The legislative intent can be deduced from the legislative acts alone. . . .Testimony to explain the motives which operated upon the law-makers, or to point out the objects they had in view, is wholly inadmissible. It would take from the statute law every semblance of certainty, and make its character depend upon the varying and conflicting statements of witnesses."); *Mississippi Gaming Comm'n v. Imperial Palace of Mississippi, Inc.*, 751 So.2d 1025 (1999) (same). The House may adopt rules consistent with Constitutional responsibility. It did so with House Rule 103. What it is not free to do is ignore the Constitution or its own Rules, nor may two members ask a Court to ignore or change the legal impact or effects of actions taken by the House.

Indeed, the House's own actions also reflect it understands "take no action" has the effect of leaving a veto intact. While the Response notes that House action on H.B. 658—"Allow Veto to Stand," the Response fails to note that for a Section 72 veto of H.B. 1387, the Committee recommended "Take No Action." [Dkt. 22-27,Daily Action Report (Aug. 24, 2020)]. The House obviously does not view the Section 72 veto of H.B. 1387 a nullity, nor unconstitutional. That veto stands just as does the partial veto of H.B. 1782.

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[7] *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984), *disapproved of on other grounds by Raines v. Byrd*, 521 U.S. 811 (1997) (court cannot adjudicate a lawsuit filed by individual legislators asking the court to grant relief that would contravene a decision made by the legislative body of which they are members).

C. Plaintiffs' Action is Moot Because the Law Requires Standing to Continue Throughout an Action.

Plaintiffs' Response fails to cite any legal authority to refute that the Plaintiffs, who may well have had standing at the time the complaint was filed, no longer have a continuing, colorable interest, rendering this matter moot. In the *Fordice* case, the plaintiffs had an injury that remained unaddressed after the Legislature had adjourned *sine die* leaving no opportunity for it to reconsider the bills.

Here, by contrast, the Plaintiffs have had---and participated in---the Legislature's opportunity to redress any "injury" to their votes. These individual Plaintiffs may disagree with the effect of the House's action as a body, but their disagreement is now with the House and its own Rules---and the courts will not intervene to resolve a dispute between individual legislators and the internal rules of their own house.

Standing must be maintained throughout litigation, but, as here, when intervening events and actions eliminate a party's colorable interest in a matter, the action must be dismissed as moot. *Hotboxxx, LLC v. City of Gulfport*, 154 So. 3d 21, 28 (Miss. 2015) ("standing must exist when litigation is commenced and *must continue* through all subsequent stages of litigation, or the case will become moot.") (emphasis added and internal citations omitted).[8]

[8] In their Response, Plaintiffs also misinterpret the "capable of repetition yet evading review" exception to the mootness doctrine. That exception applies to a situation where, due to changed circumstances, it is impossible for the courts to remedy the plaintiff's specific injury before that injury has abated. *See Fordice*, 651

CONCLUSION

For the reasons in the Motion to Dismiss for Lack of Subject Matter Jurisdiction and based on the foregoing, Governor Reeves respectfully requests that the Court grant his Motion to Dismiss for Lack of Subject Matter Jurisdiction.

RESPECTFULLY SUBMITTED, this the 14th day of September, 2020.

GOVERNOR TATE REEVES, Defendant

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So.2d at 1002 (citations omitted). Further, the exception requires the plaintiff to establish a reasonable probability that the specific injury will reoccur. *Id.* The exception does not apply, however, when it is the action of the plaintiff that has resulted in the abatement of the alleged specific injury.

Here, Plaintiffs controlled and participated in the legislative process, which process although having the Constitutional power and option to override the Governor's partial veto of H.B. 1782, elected not to override the veto. That legislative action (or inaction) following the commencement of this suit by failing to override the Governor's partial veto rendered that veto final and abated their alleged injury. Further, because the funds at issue are federally appropriated CARES Act funds that must be spent by the State in strict compliance with guidelines issued by the United States Treasury in response to the COVID-19 emergency (as opposed to general funds), there is no probability that the specific injury to Plaintiffs, which has now been legislatively redressed, will reoccur.

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 14th day of September, 2020.

s/Paul E. Barnes
Paul E. Barnes