Rel: April 5, 2019

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170795

Clay County Commission

v.

Clay County Animal Shelter, Inc.

Appeal from Clay Circuit Court
(CV-17-900028)

BRYAN, Justice.[1]

The Clay County Commission ("the county commission") appeals from a judgment of the Clay Circuit Court ("the trial

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[1]This case was assigned to Justice Bryan on January 29, 2019.

court") in favor of Clay County Animal Shelter, Inc. ("the animal shelter"). We reverse the trial court's judgment and remand the cause for further proceedings.

Facts and Procedural History

In March 2017, the legislature enacted Act No. 2017-65, Ala. Acts 2017, which provides, in pertinent part:[2]

> "Section 1. This act shall apply only in Clay County.
>
> "Section 2. (a) The proceeds from the tobacco tax authorized in Clay County pursuant to Section 45—14-244 of the Code of Alabama 1975, and as further provided for in Sections 45—14-244.01 to 45-14-244.03, inclusive, and Section 45-14-244.06 of the Code of Alabama 1975, less two percent of the actual cost of collection, which shall be retained by the Department of Revenue, shall be distributed to the Clay County General Fund to be expended as follows:
>
> "....
>
> "(3) Eighteen percent to the Clay County Animal Shelter. The Clay County Animal Shelter shall annually report to the county commission regarding the expenditure of the funds in the preceding year.
>
> "....
>
> "Section 4. This act shall become effective on October 1, 2017."

[2]The relevant portion of Act No. 2017-65, as subsequently amended, is codified at § 45-14-244.07, Ala. Code 1975 (Local Laws, Clay County).

In July 2017, the county commission and three individuals (hereinafter referred to collectively as "the plaintiffs")[3] initiated an action in the trial court against the animal shelter and certain state officials.[4] In their complaint, the plaintiffs sought injunctive relief and a judgment, pursuant to § 6-6-220 et seq., Ala. Code 1975, declaring that part of Act No. 2017-65 directing an expenditure of a portion of Clay County's tobacco-tax proceeds to the animal shelter to be unconstitutional.[5]

The plaintiffs asserted that Act No. 2017-65 was improperly enacted without a sufficient number of legislative votes in violation of Article IV, § 73, Ala. Const. 1901, which provides:

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[3]One individual plaintiff later withdrew from the action.

[4]The state officials were later voluntarily dismissed from the action, without prejudice.

[5]The record indicates that the Attorney General's office was served in this action. See § 6-6-227, Ala. Code 1975. The record contains two certified-mail-return receipts from the Attorney General's office, and the State Judicial Information System case-action summary reflects two entries regarding those receipts stating: "Return of Service -- Served E-Filed." The county commission has also certified that the Attorney General has been served with copies of its appellate briefs.

> "No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house."

The plaintiffs also filed a motion seeking a preliminary injunction to temporarily restrain distribution of Clay County's tobacco-tax receipts to the animal shelter. The animal shelter moved to dismiss the plaintiffs' complaint.[6]

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[6]The animal shelter is a nonprofit corporation. The record indicates that the animal shelter's filings in the trial court were not prepared or filed by an attorney. Instead, "Faye Davenport, in lieu of counsel, and solely in her capacity as Secretary of the Board of Directors of the [animal shelter]," signed each the animal shelter's filings. In Progress Industries, Inc. v. Wilson, 52 So. 3d 500, 507-08 (Ala. 2010), this Court noted:

> "The general rule in Alabama is that 'a person must be a licensed attorney to represent a separate legal entity, such as a corporation.' Ex parte Ghafary, 738 So. 2d 778, 779 (Ala. 1998). ... This Court has thus held that a pleading filed by a non-attorney engaging in the unauthorized practice of law in purporting to represent a separate legal entity is a nullity. Ghafary, 738 So. 2d at 780-81. The purpose of this prohibition on the practice of law by non-attorneys, and accordingly the rule that a licensed attorney must represent a corporation, serves, among other things, 'to protect the public ... by protecting citizens from injury caused by ignorance and lack of skill on the part of those who are untrained and inexperienced in the law ....' Ghafary, 738 So. 2d at 779."

The trial court conducted a hearing regarding the county commission's motion for a preliminary injunction. On October 26, 2017, the trial court entered an order requiring the portion of Clay County's tobacco-tax receipts that would be distributed to the Clay County General Fund to be disbursed as an expenditure to the animal shelter under Act No. 2017-65 to be paid into the trial-court clerk's office and held in an escrow account pending the entry of a final judgment. On January 16, 2018, the trial court conducted a bench trial, at which only documentary evidence was admitted.

At the trial, the county commission argued that Act No. 2017-65 appropriated public funds to the animal shelter and that, because the animal shelter is a charitable organization not under the absolute control of the state, the appropriation was subject to the requirements of § 73, instead of the ordinary requirements for the passage of bills by the legislature. As noted above, § 73 requires that applicable appropriations be approved "by a vote of two-thirds of all the members elected to each house." It was undisputed that Act

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The animal shelter's motion to dismiss and other submissions, which were not filed by an attorney, were, therefore, nullities.

No. 2017-65 did not receive the vote of two-thirds of all the members elected to each house. The county commission argued that that portion of Act No. 2017-65 purporting to distribute funds to the Clay County General Fund to be disbursed to the animal shelter is, therefore, unconstitutional.

In March 2018, the legislature enacted Act No. 2018-432, Ala. Acts 2018, "to amend Section 2 of Act 2017-65 of the 2017 Regular Session, now appearing as Section 45-14-244.07 of the Code of Alabama 1975, to further provide for the distribution of the local tobacco tax; and to provide for retroactive effect." In relevant part, Act No. 2018-432 purports to amend § 45-14-244.07 to increase the share of Clay County's tobacco-tax revenue to be distributed to the Clay County General Fund to be disbursed to the animal shelter from 18% to 20%.

On April 13, 2018, the trial court entered a final judgment declaring that the county commission had failed to meet its burden of proving that the challenged portion of Act No. 2017-65 is unconstitutional. The trial court also ordered "that the distribution of the proceeds from the tobacco tax authorized in Clay County be immediately distributed in accordance with Act [No.] 2017-65, or any law superseding or

replacing said Act." The plaintiffs filed a motion to stay execution of the trial court's judgment, asserting, among other things:

> "[The p]laintiffs note [that] the Court's judgment directs the county to 'immediately distribute [the tobacco-tax proceeds] in accordance with Act [No.] 2017-65, or any law super[s]eding or replacing said Act.' (emphasis added). Although not expressly stated, the Court's inclusion of 'any law super[s]eding or replacing said Act' appears to refer to ... Act [No.] 2018-432 ... which purports to provide retroactive appropriations to the [a]nimal [s]helter from the County's tobacco tax receipts.
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> "....
>
> "11. [The county commission] will seek a declaratory judgment that [Act No. 2018-432] is void, invalid, and unconstitutional ... and therefore, [the county commission's] appeal of the judgment in the instant case will be determinative of whether the funds held in escrow are due to be released to the [a]nimal [s]helter."

The trial court conducted a hearing regarding the plaintiffs' motion and entered an order providing as follows:

> "[The p]laintiffs' motion to stay the implementation of Act [No.] 2018-432, pending a hearing on the merits of [the county commission's] challenge to said Act is GRANTED.
>
> "[The p]laintiffs' request to stay the implementation of Act [No.] 2017-65 is DENIED."

(Capitalization in original.) The county commission appealed.

Analysis

On appeal, the county commission argues that the trial court erred in determining that it failed to meet its burden of proving that the provision of Act No. 2017-65 directing that a portion of Clay County's tobacco-tax proceeds be distributed to the Clay County General Fund to be disbursed to the animal shelter received a sufficient number of legislative votes to become law.[7] Specifically, the county commission asserts that the legislature's enactment, as to that part of Act No. 2017-65, was an appropriation of funds by the legislature without a two-thirds votes of all the members elected to each house and was, therefore, a violation of § 73. Before addressing the county commission's substantive argument, we must first address certain preliminary procedural considerations.

In response to the county commission's argument, the animal shelter, with the assistance of counsel on appeal,

[7]Because, as noted above, it is undisputed that Act No. 2017-65 did not receive the vote of two-thirds of all the members elected to each house, the trial court's determination that Act No. 2017-65 received a sufficient number of legislative votes to become law must have necessarily been based on an implicit determination that the requirements of § 73 did not apply to Act No. 2017-65.

first argues that the question presented by the county commission became moot with the enactment of Act No. 2018-432, which, the animal shelter says, "effectively repealed and replaced" Act No. 2017-65. In other words, the animal shelter contends that the issue no longer presents a justiciable controversy. See Underwood v. State Bd. of Educ., 39 So. 3d 120, 127 (Ala. 2009)("'This Court has often said that, as a general rule, it will not decide questions after a decision has become useless or moot. ... Alabama courts do not give opinions in which there is no longer a justiciable controversy ....'" (quoting Arrington v. State ex rel. Parsons, 422 So. 2d 759, 760 (Ala. 1982))). Alternatively, the animal shelter also argues that "the constitutionality of Act No. 2017-65 ... raises a nonjusticiable political question." The animal shelter's brief, at 3. See, e.g., Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204 (Ala. 2005)("BJCCA").

A justiciable controversy is necessary to confer subject-matter jurisdiction on the trial court. See Chapman v. Gooden, 974 So. 2d 972, 983 (Ala. 2007)("'There must be a bona fide existing controversy of a justiciable character to confer

upon the court jurisdiction to grant declaratory relief under the declaratory judgment statutes ....'" (quoting State ex rel. Baxley v. Johnson, 293 Ala. 69, 73, 300 So. 2d 106, 110 (1974))). Moreover,

> "'"'[u]nless the trial court has before it a justiciable controversy, it lacks subject matter jurisdiction and any judgment entered by it is void ab initio.'"' Sustainable Forests, L.L.C. v. Alabama Power Co., 805 So. 2d 681, 683 (Ala. 2001)(quoting Hunt Transition & Inaugural Fund, Inc. v. Grenier, 782 So. 2d 270, 272 (Ala. 2000), quoting in turn Ex parte State ex rel. James, 711 So. 2d 952, 960 n.2 (Ala. 1998)). 'A moot case lacks justiciability.' Crawford [v. State], 153 S.W.3d [497,] 501 [(Tex. App. 2004)]. Thus, '[a]n action that originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised in it have become moot by subsequent acts or events.' Case [v. Alabama State Bar], 939 So. 2d [881,] 884 [(Ala. 2006)](citing Employees of Montgomery County Sheriff's Dep't v. Marshall, 893 So. 2d 326, 330 (Ala. 2004))."

Chapman, 974 So. 2d at 983-84. Therefore, we must first determine whether the issue presented is justiciable before considering the merits of the county commission's substantive argument.

A. Mootness

In support of its mootness argument, the animal shelter quotes from Jefferson County Commission v. Edwards, 32 So. 3d 572 (Ala. 2000), and argues that, because Act No. 2018-432

"effectively repealed and replaced" Act No. 2017-65, Act No. 2018-432 "stands as the last expression on the point by the legislature," 32 So. 3d at 580, thereby rendering Act No. 2017-65 "void." In response to the animal shelter's mootness argument, the county commission points to our decision in Ex parte Buck, 256 So. 3d 84 (Ala. 2017).

In Ex parte Buck, this Court granted certiorari review of a decision of the Court of Civil Appeals to consider whether a municipal rezoning ordinance, "Ordinance 1949-G," had complied with the notice-publication requirements set out in certain statutory provisions. The respondents argued that the issue was moot because a new ordinance had "repealed and replaced" Ordinance 1949-G. We analyzed the issue as follows:

> "If Ordinance 1949-G, the subject of this appeal, has in fact been repealed and replaced by the new ordinance, then this appeal is moot, because there no longer exists a justiciable controversy as to the single issue upon which certiorari review was granted. However, the [petitioners] argue that the new ordinance was also improperly enacted and is also void; thus, they say, it did not repeal Ordinance 1949-G and their challenge to Ordinance 1949-G remains. In fact, they contend that they have filed a new action in the Jefferson Circuit Court challenging the validity of the new ordinance, and they submitted a copy of the complaint they have filed in that new action.

> "This Court is not in a position, in the present appeal, to determine whether the new ordinance is valid or invalid and whether it did or did not properly repeal and replace Ordinance 1949-G. That issue is pending in another circuit court action, where a proper record and arguments relating to that issue can be developed. Because there remains the possibility that the new ordinance could be held invalid, a holding that this appeal is moot based on the adoption of the new ordinance is premature. Specifically, if we were to dismiss this case as moot, but the [petitioners] were to prevail in their new action challenging the new ordinance, the issue of the validity of Ordinance 1949-G would remain unresolved, and the [petitioners] would have lost their ability to maintain their challenge to it in the instant appeal. In other words, at this time it is uncertain whether the new ordinance is valid and moots this case, and we are not in a position to resolve that uncertainty. Given that uncertainty, we are unable to say that our decision in this appeal would not affect the rights of the parties and that the case has therefore been rendered moot."

256 So. 3d at 90 (footnote omitted).

Similarly, in this case, the legislature enacted Act No. 2018-432 after its enactment of Act No. 2017-65. Although the county commission asserts in its appellate brief that Act No. 2018-432 received "precisely the number of votes required by [§] 73," it contends that Act No. 2018-432 is also unconstitutional, but for different reasons, and states that it has initiated a separate action challenging Act No. 2018-432. Like the petitioners in Buck, the county commission has

"submitted a copy of the complaint [it] ha[s] filed in that new action." 256 So. 3d at 90. The county commission has also submitted a copy of the answer filed by the animal shelter in the new action.

We express no opinion regarding the effect of Act No. 2018-432 on Act No. 2017-65. Assuming without deciding, however, that the challenged portion of Act No. 2017-65 "has in fact been repealed and replaced," see Ex parte Buck, 256 So. 3d at 90, by Act No. 2018-432, the question of the validity of the challenged portion of Act No. 2017-65 is nevertheless justiciable "[b]ecause there remains the possibility that [Act No. 2018-432] could be held invalid," and, therefore, "a holding that this appeal is moot based on the adoption of [Act No. 2018-432] is premature." Ex parte Buck, 256 So. 3d at 90. As in Ex parte Buck, if we were to dismiss this appeal as moot and the county commission were to prevail in its action challenging Act No. 2018-432, the question of the validity of Act No. 2017-65 would remain unresolved. By that time, however, the county commission will have lost its opportunity to maintain a challenge to Act No. 2017-65 in this appeal. For those reasons, we conclude that

a justiciable controversy remains, and we decline to dismiss the county commission's appeal as moot.

B. Political Question

We next consider the animal shelter's argument that the issue of the validity of the challenged portion of Act No. 2017-65 is a nonjusticiable political question. In support of its argument, the animal shelter principally relies on this Court's opinion in BJCCA. In Magee v. Boyd, 175 So. 3d 79, 102-03 (Ala. 2015), we summarized the decision in BJCCA as follows:

> "In BJCCA, we declined to consider a 'nonjusticiable political question' involving the voting procedures of the legislature. This Court referred to the United States Supreme Court's formulation of what constitutes a nonjusticiable political question, being mindful that there are differences between the United States Constitution and the Alabama Constitution in that the separation-of-powers doctrine is explicit in the Alabama Constitution and implied in the United States Constitution:
>
> > "'"It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of

> the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."'

"BJCCA, 912 So. 2d at 214–15 (quoting Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)).

"In BJCCA, the City of Birmingham and Jefferson County sought a judgment declaring that certain taxation statutes were invalid because they were not passed by a majority of a proper quorum of the House of Representatives, as required by § 63 of the Alabama Constitution. 912 So. 2d at 206–07. The issue before the trial court was whether 'a bill must receive the affirmative vote of a majority of a quorum, or ... only the affirmative vote of a majority of the yea and nay votes cast in the presence of a quorum.' 912 So. 2d at 209. The trial court found that the Constitution required the former -- the affirmative votes of a majority of a quorum -- but that only the latter had actually occurred, rendering the acts unconstitutional. On appeal, this Court held that the case presented a nonjusticiable political question and that the trial court should have declined to decide the question. 912 So. 2d at 205. The Court explained that there was evidence in the form of affidavits that, for at least 30 years, the legislature had interpreted § 63

to mean that when a quorum is present and a bill receives a favorable majority of those votes for and against it, then that bill has passed that house of the legislature. The Court noted that, as a matter of local legislative courtesy, members of the legislature had the practice of abstaining from voting on a bill of purely local application unless the bill is applicable to that legislator's county. Although the members of the legislature did not always follow this practice, both the House and the Senate had rules in place contemplating that fewer than a quorum present may vote on a bill. In short, the legislature's interpretation of § 63 was reflected in its rules and practices. The Court, following the principles in Baker v. Carr, concluded:

> "'Section 53, Ala. Const. 1901, specifically commits to each house of the legislature the "power to determine the rules of its own proceedings." Our Constitution contains no identifiable textual limitation on the legislature's authority with respect to voting procedures that would permit judicial review of those procedures. There is also a lack of judicially discoverable and manageable standards for resolving whether the House of Representatives constitutionally passed Act No. 288 and Act No. 357. Finally, for the judicial branch to declare the legislature's procedure for determining that a bill has passed would be to express a lack of the respect due that coordinate branch of government. For each of these three reasons, this case presents a nonjusticiable political question.'
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> "912 So. 2d at 221."

(Emphasis added.)

The county commission contends that BJCCA is distinguishable because, it says, this case "involves a clear constitutional mandate that binds the legislature," specifically, § 73. Put another way, because the type of appropriations that are governed by § 73 require "a vote of two-thirds of all the members elected to each house" (emphasis added), we need not defer to the legislature's internal rules and procedures to determine whether two-thirds of all the members elected to each house voted in favor of Act No. 2017-65 to resolve the issue presented on appeal.[8] The county commission argues that, if § 73 is applicable to the challenged portion of Act No. 2017-65, as the county commission says it is, whether the legislature, in adopting Act No. 2017-65, violated § 73 is a justiciable question. We agree.

Among other things, this Court's decision in Magee addressed whether certain legislative actions violated specific provisions of the Alabama Constitution. In so doing,

[8]As noted above, there was no dispute below that two-thirds of all the members elected to each house did not vote in favor of Act No. 2017-65. The question presented was whether § 73's requirement of a vote of two-thirds of all the members elected to each house applied.

we addressed the holding of BJCCA and considered whether the constitutionality of certain legislative actions was a nonjusticiable political question by referring to the set of factors articulated by the United States Supreme Court in Baker v. Carr, 369 U.S. 186 (1962). Id. at 101-02. We stated:

> "The factors set out in Baker v. Carr must be interpreted in light of the purpose of the political-question doctrine:
>
> > "'The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally underequipped to formulate [state] policies or develop standards for matters not legal in nature."'
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> "Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986)(emphasis added). Nevertheless, the exercise of the judiciary's power to interpret the Constitution and to review the constitutionality of the acts of the legislature does not offend these principles. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78, 2 L. Ed. 60 (1803). The legislature's exclusive power over its internal rules does not give the legislature the right to usurp the function of the judiciary as ultimate interpreter of the Alabama Constitution. In carrying out this function, we do not violate the separation-of-powers

> doctrine upon which the political-question doctrine is based when we determine whether a legislative enactment was constitutionally adopted. Therefore, the first factor in Baker v. Carr does not preclude our review of the plaintiffs' challenges."

175 So. 3d at 104-05 (emphasis added).

Similarly, the county commission's argument in this case is that the challenged portion of Act No. 2017-65 violates constitutional constraints on legislative power, specifically those set out in § 73. This Court's interpreting § 73 and determining whether the challenged portion of Act No. 2017-65 complies with its limitations does not violate the separation-of-powers doctrine. We therefore conclude that the first factor set out in Baker v. Carr does not preclude our review of the county commission's challenge.

We likewise conclude that our review of the county commission's argument is not impeded by "'"a lack of judicially discoverable and manageable standards for resolving it,"'" i.e., the second factor set out in Baker v. Carr. Magee, 175 So. 3d at 102 (quoting BJCCA, 912 So. 2d at 214, quoting in turn Baker, 369 U.S. at 217). Our consideration of the county commission's argument requires us to examine the language of Act No. 2017-65 and the journals of the House of

Representatives and Senate, both of which can be judicially noticed. See Alabama Alcoholic Beverage Control Bd. v. City of Pelham, 855 So. 2d 1070, 1078 (Ala. 2003)(taking judicial notice of certain general appropriations acts); and Traders v. Farmers Bank of Haleyville v. Central Bank of Alabama, 294 Ala. 622, 625, 320 So. 2d 638, 641 (1975)("[C]ourts take judicial notice of the [House and Senate] Journals."). The remaining aspects of the county commission's argument turn on the proper interpretation § 73. "There exists no lack of judicially manageable standards where the underlying determination to be made is legal in nature and requires this Court to apply normal principles of interpretation to the constitutional provisions at issue." Magee, 175 So. 3d at 105.

We also find applicable the Magee Court's discussion of the third and fourth factors set forth in Baker v. Carr:

> "The plaintiffs are alleging that the legislature violated mandatory provisions of the Alabama Constitution. Simply because the plaintiffs and the State defendants disagree on whether the legislature's actions met the procedural requirements of enactment does not require 'an initial policy determination of a kind clearly for nonjudicial discretion.' Baker v. Carr, 369 U.S. at 217. A political question exists under the third factor of Baker v. Carr when, 'to resolve the

> dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.' EEOC v. Peabody W. Coal Co., 400 F.3d 774, 784 (9th Cir. 2005). This Court need not make a legislative policy determination in order to resolve the constitutional challenges. Answering these questions does not infringe upon the legislature's exclusive constitutional authority to adopt and enforce its own rules of procedure.
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> "The plaintiffs' complaint requires an interpretation of the Constitution, and we decline to forgo our responsibility to ensure that the legislature functions within the bounds of the Constitution under the pretext of deference to a coequal branch of government as set out in the fourth factor in Baker v. Carr. Invalidating a law for violating the original-purpose, three-readings, or single-subject requirements of the Alabama Constitution would not evince a lack of respect for the legislature within the meaning of Baker v. Carr. The authority to determine adherence to the Constitution is with the judiciary, and, if the legislature has not discharged its constitutional duty, then it is the judiciary's duty to say so."

175 So. 3d at 105-06.

Resolving the issue presented in this case will not require this Court to make a policy determination, and it is a function of this Court to determine whether the legislature acted within the bounds of its power, as defined by the Alabama Constitution. Thus, the third and fourth factors of Baker v. Carr do not preclude our review of the county commission's argument. Moreover, there is no indication that

this case presents "an unusual need for unquestioning adherence to a political decision already made," nor has it been suggested, by the parties or by the Attorney General, see note 5, supra, that our review of the validity of the challenged portion of Act No. 2017-65 at issue has the potential to cause "embarrassment from multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217. Thus, the final two factors in Baker v. Carr are not applicable in this case.

In addition to the foregoing, we note that this Court has, on several other occasions, decided challenges to particular legislative acts based on the constraints of § 73. See Eagerton v. Gulas Wrestling Enters., Inc., 406 So. 2d 366, 370 (Ala. 1981)("[W]hile the Legislature has the power to regulate wrestling, sparring and boxing, the distribution, by the Legislature, of one-half the monies to the American Legion was improperly accomplished and violates Art. IV, § 73, of the Alabama Constitution."); Alabama Educ. Ass'n v. James, 373 So. 2d 1076, 1081 (1979)("Plaintiffs/appellants further contend that Act No. 90 violates ... Article IV, Section 73 of the Alabama Constitution of 1901. We do not agree and hold to the

contrary."); and State ex rel. Medical Coll. of Alabama v. Sowell, 143 Ala. 494, 497, 39 So. 246, 247 (1905)("And the question raised, by the demurrer to the return is, whether or not the Medical College of Alabama, is an institution under the absolute control of the state."). Thus, we conclude that the question whether Act No. 2017-65 violates the constraints of § 73 is justiciable.

C. § 73

We now turn to the county commission's substantive argument on appeal, i.e., that the trial court erred in determining that the portion of Act No. 2017-65 directing an expenditure of tobacco-tax proceeds to the animal shelter does not violate § 73. In Magee, this Court explained the standard of review for a constitutional challenge to a legislative enactment:

> "This Court's review of constitutional challenges to legislative enactments is de novo. Richards v. Izzi, 819 So. 2d 25, 29 n.3 (Ala. 2001). In McInnish v. Riley, 925 So. 2d [174] at 178 [(Ala. 2005)], this Court further stated:
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> > "'[T]he standard of review of the trial court's judgment as to the constitutionality of legislation is well established. This Court "'should be very reluctant to hold any act unconstitutional.'" ... "[I]n passing upon

> the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government." Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944). This is so, because "it is the recognized duty of the court to sustain the act unless it is clear beyond a reasonable doubt that it is violative of the fundamental law." 246 Ala. at 9, 18 So. 2d at 815.'
>
> "(Emphasis omitted.)"

175 So. 3d at 106-07.

As noted above, the relevant part of Act No. 2017-65 provides:

> "Section 2. (a) The proceeds from the tobacco tax authorized in Clay County pursuant to Section 45—14-244 of the Code of Alabama 1975, and as further provided for in Sections 45—14-244.01 to 45-14-244.03, inclusive, and Section 45-14-244.06 of the Code of Alabama 1975, less two percent of the actual cost of collection, which shall be retained by the Department of Revenue, shall be distributed to the Clay County General Fund to be expended as follows:
>
> "....
>
> "(3) Eighteen percent to the Clay County Animal Shelter. The Clay County Animal Shelter shall annually report to the county commission regarding the expenditure of the funds in the preceding year."

(Emphasis added.) Section 73 provides:

> "No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house."

The animal shelter does not dispute that it is a "charitable or educational institution not under the absolute control of the state" within the meaning of § 73, nor does it argue that an appropriation to it would be exempt from the voting requirements of § 73. Thus, there is no dispute that, if a legislative appropriation to the animal shelter was made, that appropriation is subject to the requirement in § 73 that two-thirds of all the members elected to each house vote in favor of the appropriation.

Moreover, it is undisputed that the House journal indicates that Act No. 2017-65 received the following votes: 18 yeas; 0 nays; and 72 abstentions. The Senate journal indicates that Act No. 2017-65 received the following votes: 16 yeas; 0 nays; and 2 abstentions. The House is composed of 105 members, and the Senate is composed of 35 members. Article IV, § 50, Ala. Const. 1901. Thus, Act No. 2017-65 did not receive a "vote of two-thirds of all the members elected

to each house," as required by § 73. See, e.g., Eagerton, 406 So. 2d at 370 ("There are 105 members of the Alabama House of Representatives. The evidence shows that the vote in the House on the bill enacted as Act No. 80-121 was Yeas 67; Nays 0. This was not a two-thirds vote.").

Thus, the only remaining question, which was the focus of the proceedings below, is whether 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. In determining that a tax credit does not constitute an "appropriation" within the meaning of § 73, this Court stated in Magee:

> "'"We are cognizant that the long-settled and fundamental rule binding this Court in construing provisions of the constitution is adherence to the plain meaning of the text."' Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1, 13 (Ala. 2012)(quoting Jefferson Cnty. v. Weissman, 69 So. 3d 827, 834 (Ala. 2011)). '"[T]he Constitution is not to have a narrow or technical construction, but must be understood and enforced according to the plain, common-sense meaning of its terms."' Houston Cnty. Econ. Dev. Auth. v. State, 168 So. 3d 4, 18 (Ala. 2014)(quoting Hagan v. Commissioner's Court of Limestone Cnty., 160 Ala. 544, 554, 49 So. 417, 420 (1909)). '"'In construing a constitutional provision, the courts have no right to broaden the meaning of words used and, likewise, have no right to restrict the meaning of those words.'" This Court is "'not at liberty to disregard or restrict

> the plain meaning of the provisions of the Constitution.'"' City of Bessemer v. McClain, 957 So. 2d 1061, 1092 (Ala. 2006)(quoting City of Birmingham v. City of Vestavia Hills, 654 So. 2d 532, 538 (Ala. 1995), quoting in turn McGee v. Borom, 341 So. 2d 141, 143 (Ala. 1976))."

175 So. 3d at 121.

At the time § 73 was adopted as part of the Alabama Constitution in 1901, Black's Law Dictionary defined "appropriation" as:

> "The act of appropriating or setting apart; prescribing the destination of a thing; designating the use or application of a fund.
>
> "In public law. The act by which the legislative department of government designates a particular fund, or sets apart a specified portion of the public revenue or the money in the public treasury, to be applied to some general object of governmental expenditure, (as the civil service list, etc.,) or to some individual purchase or expense."

Black's Law Dictionary 82 (1st ed. 1891)(emphasis added).

The relevant language of Act No. 2017-65 provides that Clay County's tobacco-tax proceeds "shall be distributed to the Clay County General Fund to be expended as follows" and directs that 18% of the proceeds be paid to the animal shelter. "'Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and

where plain language is used a court is bound to interpret that language to mean exactly what it says.'" Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998)(quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)).

"Distribute" is defined as: "1. To apportion; to divide among several. 2. To arrange by class or order. 3. To deliver. 4. To spread out, to disburse." Black's Law Dictionary 576 (10th ed. 2014). "Expenditure" is defined as: "The act or process of spending or using money, time, energy, etc.; esp. the disbursement of funds." Black's Law Dictionary 698 (10th ed. 2014). The plain meaning of the relevant language used in Act No. 2017-65 reflects the legislature's intent to distribute, or deliver, 98% of Clay County's tobacco-tax proceeds from the State Department of Revenue to the Clay County General Fund. Act No. 2017-65 then sets apart a specified portion of the public revenue or the money in the public treasury, specifically 18%, to be applied to a particular expenditure or disbursement, i.e., a payment to the animal shelter. Thus, the plain meaning of the relevant

language in Act No. 2017-65 reflects an appropriation to the animal shelter.[9]

The trial court's judgment and statements made by the trial-court judge contained in the record indicate that the trial court's conclusion that the provision in Act No. 2017-65 directing an expenditure to the animal shelter is constitutional was based on the trial court's determination that, because the tobacco-tax proceeds are derived only from Clay County, an expenditure of those funds is not an appropriation by the legislature within the meaning of § 73. We recognize that the record contains information indicating that, contrary to the procedure contemplated by Section 2(a) of Act No. 2017-65, the State Department of Revenue does not actually collect and administer Clay County's tobacco-tax

[9]In a one-page argument, the animal shelter cites James, 373 So. 2d at 1081, and argues that Act No. 2017-65 does not contain appropriations, but only "earmark[s]," because the funds are already "appropriated to Clay County under" § 40-25-2(g), Ala. Code 1975, which provides, in relevant part: "Local taxes and/or license fees, county or municipal, imposed on the sale or use of cigarettes shall be paid to the local government through the use of stamps affixed to the product as provided herein for the state tax." As explained above, the legislature clearly intends that 98% of Clay County's tobacco-tax proceeds be distributed to the Clay County General Fund. The challenged portion of Act No. 2017-65, however, also specifically appropriates a particular portion of the Clay County General Fund to be disbursed to the animal shelter.

proceeds. According to that information, Clay County has, pursuant to § 11-3-11.2, Ala. Code 1975, entered into an agreement with a private company to perform those services. In other words, according to that information, the State does not exercise physical control over Clay County's tobacco-tax proceeds.[10]

Admittedly, under certain circumstances, this Court has previously discussed constitutional limitations on legislative appropriations by referring to the State treasury, as opposed to local funds. For instance, in addressing an argument based on the requirements of § 73, this Court, in Magee, 175 So. 3d

[10]Clay County's tobacco tax was created and has been maintained by the legislature. Section 40-25-2, Ala. Code 1975, provides for a State tax levied on tobacco products. In relevant part, § 40-25-2(f) makes the State tax "exclusive and ... in lieu of any other or additional local taxes ..., county or municipal, ... imposed on the sale or use of cigarettes and/or other tobacco products." However, § 40-25-2(f) also provides that "an act of the Legislature or an ordinance or resolution by a taxing authority passed or enacted on or before May 18, 2004, imposing a local tax and/or license fee shall remain operative." In 2003, the legislature enacted a local law, Act No. 2003-220, Ala. Acts 2003, codified at § 45-14-244 et seq., Ala. Code 1975, for the purpose of, among other things, "levying and providing for the collection of an additional tax on tobacco and tobacco products ...." in Clay County. Act No. 2003-220 also designated how the proceeds from Clay County's tobacco tax were to be expended. Those expenditures were altered by subsequent local laws enacted by the legislature. Act No. 2017-65 reflects a further alteration of those expenditures by the legislature.

at 122, indicated that Art. IV, § 71, Ala. Const. 1901, which places certain restrictions on general appropriation bills, and Art. IV § 72, Ala. Const. 1901, which provides the circumstances under which payments may be made out of the State treasury, apply only to appropriations from the State treasury. In Mobile County v. Rich, 216 So. 3d 1184, 1190 (Ala. 2016), for example, we concluded that certain local acts were not subject to the restrictions of § 72 because those local acts did not appropriate money from the State treasury. The plain language of § 73, however, does not indicate that its constraints are limited only to appropriations from the State treasury; the State treasury is not mentioned in § 73.

Moreover, although not directly confronted with the issue, this Court has previously indicated that the requirements of § 73 apply to appropriations of county tax proceeds made by the legislature. In Richards v. Izzi, 819 So. 2d 25, 27 (Ala. 2001), this Court considered the constitutionality of a local law enacted by the legislature that, among other things, appropriated a portion of Jefferson County's occupational tax for expenditures to "nearly a hundred non-state agencies." We concluded that the act was

unconstitutional because it failed to provide adequate notice, in violation of Art. IV, § 106, Ala. Const. 1901. Richards, 819 So. 2d at 29. In so doing, the Court stated:

> "Additionally, the proposed legislation purports to appropriate tax proceeds to nearly 100 unrelated, non-state agencies, including charitable and educational institutions not under the absolute control of the State. However, the recipients of the tax proceeds are not identified in even the most general manner in the published notice. When this omission is considered in light of the fact that § 73 ... prohibits appropriations 'to any charitable or educational institution not under the absolute control of the state, ... except by a vote of two-thirds of all the members elected to each house,' the significance and materiality of this omission become clear. By failing to notify the public that the proposed legislation intended to appropriate a percentage of the tax proceeds to such charitable and educational institutions, the published notice failed to meet the recognized purposes of § 106."

819 So. 2d at 32 (emphasis added).

In Montgomery v. State, 228 Ala. 296, 301-02, 153 So. 394, 398-99 (1934), a case concerning whether Limestone County was entitled to priority in the repayment of debts, as the State would have been, by an insolvent bank in which county funds had been deposited, this Court explained the following regarding the nature of the relationship between the State and individual counties:

"What is a county? Chief Justice Brickell, in the case of Askew v. Hale County, 54 Ala. 639, 25 Am. Rep. 730 [(1875)], observes: 'It [county] has corporate characteristics, but it is not a municipal corporation, though often so termed. It is an involuntary political or civil division of the State, created by statute to aid in the administration of government. It is in its very nature, character and purposes, public, and a governmental agency, or auxiliary, rather than a corporation. Whatever of power it possesses, or whatever of duty it is required to perform, originates in the statute creating it. It is created mainly, for the interest, advantage, and convenience of the people residing within its territorial boundaries, and the better to enable the government to extend to them the protection to which they are entitled, and the more beneficently to exercise over them its powers. All the powers with which the county is entrusted, are the powers of the State, and all the duties with which they are charged, are the duties of the State. If these were not committed to the county, they must be conferred on some other governmental agency. The character of these powers, so far as counties in this State are concerned, are all for the purposes of civil and political organization. The levy and collection of taxes, the care of the poor, the supervision and control of roads, bridges and ferries, the compensation of jurors, attending the State courts, and the supervision of convicts sentenced to hard labor, as a punishment, for many violations of the criminal law, it is the general policy of the State to entrust to the several counties, and are all but parts of the power and duty of the State. These powers could be withdrawn by the State, in the exercise of its sovereign will, and other instrumentalities or agencies established, and clothed with them.' ([Emphasis] supplied.)

"In the case of State v. Brewer, 64 Ala. 287 [(1879)], it was held: 'The taxes levied for county

purposes, while in process of collection, or after collection, may be withdrawn from the county, or from its treasury, and appropriated as the legislature may direct. There can be no ground for complaint -- the State is not dealing with an individual, nor with a corporation, having or claiming adverse rights. It is simply in the pursuit of its own policy, adapting that policy to public necessities and exigencies, as may be deemed most promotive of public rights and interests.' ([Emphasis] supplied.)

"....

"So, after all is said and done, county funds are in reality state funds, subject to state control, and no part of which can be expended by the county without express or implied authorization by the state. Should the governing board of a county expend the county funds, or any part of the same, except in cases, and for purposes, authorized by the state, they would be civilly liable therefor.

"In the case of Leach v. United States Bank, 205 Iowa, 987, 213 N.W. 528, 530 [(1927)], it is said: 'A county is a subdivision of the state, and owes its creation to the state. It is an arm of the state, and subject to the control and direction of the state, and, in the instant matter (matter involving the same questions now before us), the county's rights must be and are wholly worked out on the theory that it is a part of the state.'

"It is not, as supposed by learned counsel for appellant, a case of having two sovereigns in one and the same territory, or jurisdiction. There is but one sovereignty -- the state -- but that sovereignty extends to every county in the state. For all practical purposes -- the effective governmental operation of the state and every political subdivision thereof -- there is but one sovereignty, and whatever affects the revenues of

> the several political subdivisions of the state directly and immediately affects the state. It is a false idea to assume that the county is a separate entity from the state, that its revenues belong exclusively to the county, and are under its absolute control. Such revenues belong to the state, and may be appropriated by the state.
>
> "In such circumstances, we cannot subscribe to any doctrine which would recognize a right in the state to claim preference in the payment of moneys that must, in the first instance, come to Montgomery, but withhold the right to enforce preference in cases where the money, in the first instance, must be paid into a county treasury, but still subject to the will of the state, and in fact the state's money. Whether we are in accord with the majority holding in the several states on this question or not, we feel that our conclusion is sound and in keeping with our theory of government -- state and county.
>
> "We hold, therefore, that the state's sovereignty extends to the counties of the state, and may be invoked for the protection, preservation, and collection of the public moneys, whether due to state or county."

(Final two emphases added.) See also Kendrick v. State ex rel. Shoemaker, 256 Ala. 206, 217, 54 So. 2d 442, 451 (1951)("Matters of policy as to counties and county funds and how they shall be handled and preserved are matters of legislative policy. Covington County v. O'Neal, 239 Ala. 322, 195 So. 234 [(1939)]. It is well settled that the State may appropriate county funds by act of the legislature for public

purposes. Jefferson County v. City of Birmingham, 251 Ala. 634, 38 So. 2d 844 [(1948)], and cases cited."). Because the legislature's power includes the ability to designate and to control public revenues being held in county funds, we conclude that an appropriation by the legislature of such revenues is subject to constraints on legislative power prescribed by § 73. See Trailway Oil Co. v. City of Mobile, 271 Ala. 218, 222, 122 So. 2d 757, 760 (1960)("It is well settled that the power of the legislature, except as restrained by the Constitution, is supreme in the enactment of statutory law, in the creation of subordinate governmental agencies, in prescribing their powers and duties, and it has plenary power to deal with such subordinate agencies of the state as counties and municipal corporations." (emphasis added)). 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. 2017-65 was not approved by a vote of two-thirds of all the members elected to each house, that portion is, therefore, void.

D. Severability

We have been presented with no argument that the remaining provisions of Act No. 2017-65 were subject to the requirements of § 73, and because there is no indication that the remaining provisions are rendered meaningless in light of our decision regarding the appropriation in Act No. 2017-65 to the animal shelter, we conclude that Section 2(a)(3) of Act No. 2017-65 is severable from the other provisions of Act No. 2017-65. Although Act No. 2017-65 contains no severability clause, "the absence of such a clause does not necessarily ... require a holding of inseverability." City of Birmingham v. Smith, 507 So. 2d 1312, 1315 (Ala. 1987). See § 1-1-16, Ala. Code 1975)("If any provision of this Code or any amendment hereto, or any other statute, or the application thereof to any person, thing or circumstances, is held invalid by a court of competent jurisdiction, such invalidity shall not affect the provisions or application of this Code or such amendment or statute that can be given effect without the invalid provisions or application, and to this end, the provisions of this Code and such amendments and statutes are declared to be severable."); and State ex rel. Jeffers v. Martin, 735 So. 2d 1156, 1159 (Ala. 1999)("'[I]f the remaining portions of an Act

are complete within themselves, sensible and capable of execution, the Act will stand.'" (quoting Mitchell v. Mobile Cty., 294 Ala. 130, 134, 313 So. 2d 172, 174 (1975))). Therefore, we do not disturb the remaining provisions of Act No. 2017-65, and we express no opinion regarding their validity.

Conclusion

Legislative appropriations must comply with the requirements of the Alabama Constitution, including § 73. The plain meaning of the language in Act No. 2017-65 provides for an appropriation to the animal shelter of 18% of Clay County's tobacco-tax proceeds. The animal shelter does not dispute that it is a "charitable or educational institution not under the absolute control of the state" within the meaning of § 73, nor does it argue that an appropriation to it would be exempt from the voting requirements of § 73. Thus, the legislature's appropriation to the animal shelter had to receive "a vote of two-thirds of all the members elected to each house" to comply with § 73. It did not. That part of Act No. 2017-65 appropriating 18% of Clay County's tobacco-tax proceeds, i.e., Section 2(a)(3), is, therefore, unconstitutional. The trial

court's judgment upholding Section 2(a)(3) is, therefore, reversed, and the cause is remanded for further proceedings.[11]

REVERSED AND REMANDED.

Parker, C.J., and Shaw, Wise, and Stewart, JJ., concur.

Mitchell, J., concurs in part and concurs in the result.

Sellers and Mendheim, JJ., concur in the result.

[11]In its reply brief, the county commission also asserts, for the first time, that Act No. 2017-65 violates Art. IV, § 71.01, Ala. Code 1975. "As a general rule, issues raised for the first time in a reply brief are not properly subject to appellate review." Ex parte Powell, 796 So. 2d 434, 436 (Ala. 2001). Moreover, because we are reversing the trial court's judgment based on the county commission's argument regarding § 73, there is no need to consider the county commission's alternative argument. Gray v. Gray, 947 So. 2d 1045, 1051 (Ala. 2006).

MITCHELL, Justice (concurring in part and concurring in the result).

I concur in the Court's opinion with the exception of its severability analysis, with which I concur only in the result. Invalidating the entirety of Act No. 2017-65, Ala. Acts 2017, would potentially prejudice parties that were not joined to this declaratory-judgment action. On that basis, I agree that severance of the portion of Act No. 2017-65 the Court holds is unconstitutional is appropriate here. See § 6-6-227, Ala. Code 1975.