ELECTRONICALLY FILED
7/29/2016 2:04 PM
14-CV-2016-900112.00
CIRCUIT COURT OF
CHILTON COUNTY, ALABAMA
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IN THE CIRCUIT COURT OF CHILTON COUNTY, ALABAMA

ROY BURNETT, on behalf of himself and a class of persons similarly situated, **Plaintiff,** **v.** **CHILTON COUNTY, a political subdivision of the State of Alabama, and THE CHILTON COUNTY HEALTH CARE AUTHORITY,** **Defendants.**	**CASE NO. 14-CV-2016-900112.00**

THE CHILTON COUNTY HEALTH CARE AUTHORITY'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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In 2014, the Alabama State Legislature passed Senate Bill 462 (now Act 2014-422), authorizing Chilton County to levy a $0.01 tax in support of the construction of a new hospital. Because the bill was passed prior to the passage of the State's annual budget, the Legislature was required to use the Constitution's Budget Isolation Resolution ("BIR") mechanism, codified in 1984 at Alabama Constitution, § 70.01(C). The BIR mechanism—essentially a "motion to proceed"—requires the Legislature to pass a BIR by a vote of "three-fifths of a quorum present" in order to pass a bill before passing an annual budget. While § 71.01(C) itself does not specify whether the House should count members present and voting or members present, whether voting or not, House Rule 36 states that a BIR must pass by a vote of "three-fifths majority of the members present and voting." In accordance with House Rule 36, the House passed a BIR for Senate Bill 462 (now Act 2014-422) on March 20, 2014 by a vote of 25 yeas, 0 nays, and 59 abstentions.[1] (See Sec. Am. Compl. at ¶¶ 7-8.) Roy Burnett now claims that this vote—and necessarily House Rule 36—are unconstitutional under Ala. Const., § 71.01(C). (See Sec. Am. Compl. at ¶¶ 31-34.) Under his construction, § 71.01(C) requires all abstentions to be counted as "Nay" votes. As a matter of law, however, Burnett is wrong, and Claim Four must be dismissed.

[1] See Reply Br. of Appellants/Cross-Appellees in Jefferson County v. Taxpayers and Citizens of Jefferson County, et al., Nos. 1150326 and 1150327 (filed Apr. 4, 2016) at 7, attached as Exhibit A (noting that House Rule 36 is meant to permit "local legislative courtesy" common with bills of purely local importance). Non-local representatives will frequently abstain from voting and allow the local delegation to decide the matter. See Commercial Money Center, Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 336 (6th Cir. 2007) (Noting that a court could "consider matters of public record in deciding a motion to dismiss without converting the motion to one for summary judgment," including briefs filed in other cases).

Specifically, in Birmingham Jefferson Civic Center Authority v. Birmingham, 912 So. 2d 204 (Ala. 2005) ("BJCCA"), the Alabama Supreme Court addressed whether the House of Representatives' longstanding internal practice of counting members present and voting, but not members present and not voting (i.e., abstentions), conflicted with Alabama Constitution, § 63's requirement that bills pass by "a majority of each house." The Court held that this "present[ed] a nonjusticiable political question, reserved to the Legislature by the separation-of-powers doctrine embodied in the Constitution of Alabama of 1901." Id. at 205. The same is true here.

A. Alabama Constitution, § 53 Textually Commits to the House the Power to Make Its Own Rule on Counting the Votes for Budget Isolation Resolutions.

In BJCCA, 912 So. 2d at 214-15, this Court explained that a question is a political one when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." (Quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). Section 53 of the Alabama Constitution textually commits to the House its own rulemaking power by providing that "[e]ach house shall have power to determine the rules of its proceedings . . . ." "The power of the Legislature to determine the rules of its own proceedings [under § 53] is unlimited except as controlled by other provisions of our Constitution . . . ." BJCCA, 912 So. 2d at 217 (internal quotation marks and citation omitted). Alabama Constitution, § 71.01(C) provides that a BIR must receive a vote of "three-fifths of a quorum present" to allow a non-appropriations bill to be voted on before the passage of the upcoming year's basic appropriations bill. House Rule 36 provides that the minimum required vote for BIRs is a "three-fifths majority of the members present and voting."

For § 71.01(C) to "control" §53 such that House Rule 36 is unconstitutional, however, § 71.01(C) must control "beyond a reasonable doubt." Norton v. Lusk, 26 So. 2d 849, 858 (Ala.

1946). The validity of House Rule 36's "present and voting" provision is based on more than mere doubts. It is based on historical facts that show House Rule 36 is consistent with:

- U.S. Constitution, Article II, § 2, which requires "two-thirds of Senators present" to ratify a treaty, and U.S. Senate practice ratifying treaties based on Senators present and voting;
- U.S. House and Senate practice reading "quorum present" as a term of art in parliamentary procedure governing the counting of a quorum, not the counting of votes for passage—a practice the Supreme Court upheld in United States v. Ballin, 144 U.S. 1 (1892); and
- The Alabama Supreme Court's ruling in BJCCA that Alabama Constitution, § 63's phrase "a majority of each house" did not literally mandate that 51% of the 105-member House vote "yea" to pass a bill.

1. House Rule 36's Interpretation of Alabama Constitution, § 71.01(C) is consistent with the U.S. Senate's Interpretation of the U.S. Constitution's Rule for Ratifying Treaties.

Alabama Constitution, § 71.01(C)'s "three-fifths of a quorum present" language does not require that the voting proportion (i.e., three-fifths) be multiplied by all members "present." Instead, it fairly allows the House to apply the voting proportion (i.e., three-fifths) to those members "present and voting" just like the U.S. Senate. See Justice Antonin Scalia, A Matter of Interpretation 23 (1997) ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.").

U.S. Constitution, Article II, § 2 provides that "two thirds of the Senators present" must concur in order to ratify a treaty. But the U.S. Constitution, like Alabama's Constitution, does not specify whether "present" means "present and voting" or "present, whether voting or not." The U.S. Senate has interpreted U.S. Constitution, Article II, § 2 to allow treaties to be ratified based on two-thirds of the Senators present and voting. When the Constitution did not specify between "present, whether voting or not" and "present and voting," the Senate had the power to

choose either rule. See U.S. Constitution, Article I, § 5 ("Each House may determine the Rules of its Proceedings . . . ."). The Senate chose "present and voting."[2]

Likewise, Alabama Constitution, § 71.01(C) does not specify between "present and voting" and "present, whether voting or not." The House therefore retains the power to choose either rule. See Ala. Const. § 53 ("Each house shall have power to determine the rules of its proceedings . . . ."). By practice and House Rule 36, the House chose "present and voting."

In Federalist No. 75, Alexander Hamilton explained that including the word "present" in the U.S. Constitution, Article II, § 2, made clear that two-thirds of the "whole number of members" were not required to ratify a treaty:

> The only objection which remains to be canvassed, is that which would substitute the proportion of two thirds of all the members composing the senatorial body, to that of two thirds of the members *present*. . . . If two thirds of the whole number of members had been required, it would, in many cases, from the non-attendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed, is a history of impotence, perplexity, and disorder. Proofs of this position might be adduced from the examples of the Roman Tribuneship, the Polish Diet, and the States-General of the Netherlands, did not an example at home render foreign precedents unnecessary.

Federalist No. 75, at 453 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (underlining added).

The word "present" in U.S. Constitution, Article II, § 2 limits the power of the U.S. Senate such that it cannot require two-thirds of the "whole number of members" (i.e., 2/3 X 100 = 67) to ratify a treaty. But the word "present" does not limit the power of the U.S. Senate to

[2] In fact, the U.S. Senate has ratified at least three treaties with as few as one Senator voting "yea." Congressional Research Service, Treaties and Other International Agreements: The Role of the United States Senate, for the Sen. Comm. on Foreign Relations, Sen. Prnt. 106-71, at 142 (2001), available at https://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf. See also Cong. Rec. S. 7222 (June 13, 1952) (statement of the Presiding Officer); Carl Marcy, A Note on Treaty Ratification, 47 Am. Pol. Sci. Rev. 1130, 1131 (Dec. 1953), available at: http://www.jstor.org/stable/1951129 (explaining how such a vote would have been permitted in 1952 so long as a quorum had been established earlier in the day and the question of a quorum had not otherwise been presented); Standing R. Sen. VI.

require either two-thirds of Senators present and voting or two-thirds of Senators present, voting or not.

Similarly, § 71.01(C)'s use of the word "present" limits the Alabama House's power such that it cannot require three-fifths of the "whole number of members" (i.e., 105) to pass a BIR. But the word "present" does not require the Alabama House to require either three-fifths of members present and voting or three-fifths of members present, voting or not.[3] Because the U.S. Senate's interpretation of "two-thirds of Senators present" is per se reasonable, the Alabama House's similar interpretation of "three-fifths of a quorum present" is both reasonable and constitutional. See Norton, 26 So. 2d at 858.

2. House Rule 36's Interpretation of Alabama Constitution, § 71.01(C) is Consistent with Congressional and U.S. Supreme Court Precedent for Determining the Existence of a Quorum by "Quorum Present," as Opposed to "Quorum Voting."

Section 71.01(C)'s phrase "quorum present" is a term of art from the field of parliamentary procedure that demonstrates an intent to mandate the method of counting a quorum, not a method of counting votes for passage. Constitutional rules of parliamentary procedure often contain terms of art that preclude a literal reading. See generally Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69, 73 (2012) ("Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense . . . as terms of art.") (Emphases added.)

[3] Had the Legislature desired to fix the voting set to the whole number of members, it could have followed the example of other sections of the Alabama Constitution. See, e.g., Ala. Const. § 125 (1901) (**"**If the governor's message proposes no amendment which would remove his objections to the bill . . ., if a majority of the whole number elected to that house vote for the passage of the bill, it shall be sent to the other house . . . .") (Emphasis added.)

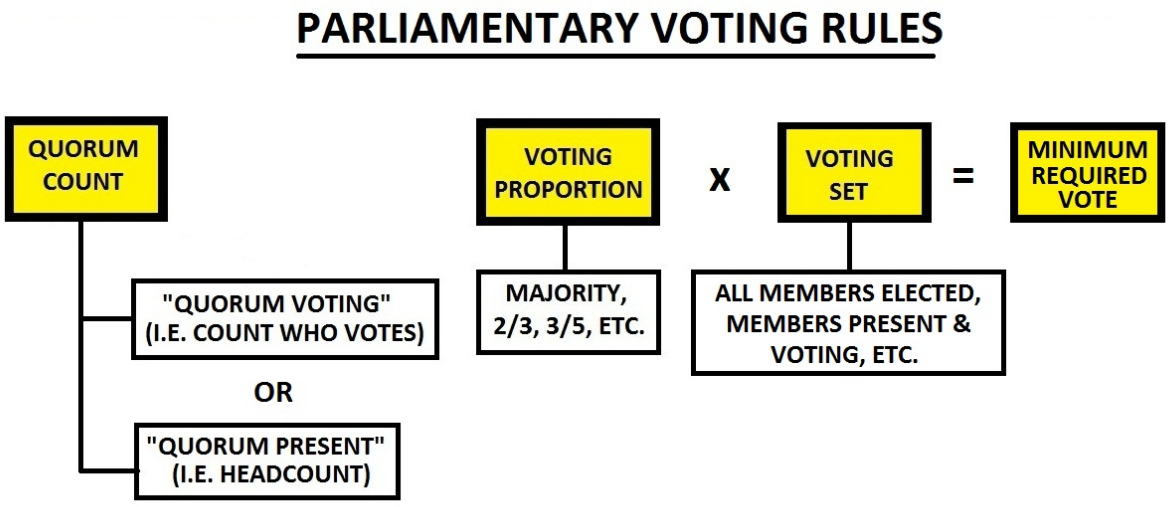
To understand these terms of art, it is helpful to note that parliamentary voting rules have four working parts:

- Quorum -- a majority of the legislative body's members required for the body to take legal action. See e.g., Henry M. Robert III, et al., Robert's Rules of Order, Newly Revised, § 40 (Da Capo Press 11th ed. 2012) ("[A] quorum in an assembly is the number of members who must be present in order that business can be validly transacted.") (Internal citation omitted.)

- Voting Proportion -- a majority, two-thirds, three-fifths, etc. proportion applied to the voting set. See id. at § 44 ("Two elements enter into the definition of [a voting rule] for decision: (1) the proportion that must concur—as a majority, two thirds, three fourths, etc. . . .") (Emphasis added.)

- Voting Set -- the set of members of the legislative body (e.g., all elected members, members voting and present) that the voting proportion is multiplied by to obtain the minimum required vote. See id. ("Two elements enter into the definition of [a voting rule] for decision: . . . (2) the set of members to which the proportion applies . . .") (Emphasis added.)

- Minimum Required Vote -- Voting proportion times the voting set. See id.



In Alabama Constitution, § 71.01(C)'s phrase "three-fifths of a quorum present," the term "quorum present" defines the quorum count, not the voting set. This is shown by the history of the term of art "quorum present."

a. The U.S. Congress switched from "quorum voting" to "quorum present" as the method for counting a quorum, not as a method of counting votes for passage.

For purposes of counting whether a quorum exists such that a legislative body can take legal action, the U.S. House changed from the "quorum voting" method to the "quorum present" method of determining a quorum in 1890. Under the "quorum voting" method, if a member abstained or did not vote, he was not counted towards the quorum—opening opportunities to filibuster. The "quorum present" method allowed Representatives present in the House chamber, but abstaining, to be counted towards a quorum, even if not counted towards passage of a bill:

> Until 1890 the view prevailed in the House that it was necessary for a majority of the Members to vote on a matter submitted to the House in order to satisfy the constitutional requirement for a quorum. Under that practice the opposition might break a quorum simply by refusing to vote. That practice was changed in 1890 with the historic ruling by Speaker Reed, later embodied in clause 4(b) of rule XX, that Members present in the Chamber but not voting would be counted in determining the presence of a quorum. This ruling was upheld by the Supreme Court in United States v. Ballin, 144 U.S. 1 (1892), the Court declaring that the authority of the House to transact business is "created by the mere presence of a majority." Since 1890, the point of order as to the absence of a quorum is that no quorum is present, not that no quorum has voted.

William Holmes Brown, et al., House Practice: A Guide to the Rules, Precedents, and Procedures of the House, ch. 43, § 5, p. 748 (2011) (citations omitted) (emphasis added), available at: https://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-108-44.pdf.[4] The Senate changed its practice to avoid similar filibuster tactics in 1892.[5]

[4] Jefferson's Manual of Parliamentary Practice—the U.S. House of Representatives' primary authority on parliamentary procedure—recounts how members used to game the "quorum voting" rule by abstaining, breaking a quorum, and defeating a bill without having to take the political heat for voting "nay" on that bill. See John V. Sullivan, Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 111-157, at 825, § 1020 (2011) (describing the "obstruction of the House" to which the "quorum voting" rule gave rise).

[5] Senator Robert Byrd explained how the Senate changed from "quorum voting" to "quorum present." During the course of a quorum filibuster, the Chair stated: "No quorum has voted. The Chair has counted the Senate. There is a **quorum present**, but no **quorum voting** . . . The chair

b. The U.S. Supreme Court upheld a statute passed where the quorum was determined using the "quorum present" method.

After the House changed its method of determining a quorum to the "quorum present" method (sometimes called the "Reed Rule," after Speaker of the House Thomas Reed), an importer challenged a tariff statute on the grounds that a quorum of the House (164 members) had not voted on the underlying bill. In United States v. Ballin, 144 U.S. 1, 3 (1892), the Speaker of the House stated that there was "a quorum present to do business . . ." There were 138 "yea" votes, 0 "nay" votes, and 74 members not voting. Id. The Supreme Court held that the U.S. House of Representatives had validly enacted the statute using the "quorum present" rule, because "when th[e] majority are present, the power of the house arises." Ballin, 144 U.S. at 6.

Similarly, when the Alabama House passed the BIR for Act 2014-422, there was a quorum present. (See Sec. Am. Compl. at ¶¶ 7-8.) The House voted on the BIR with 25 yea votes, 0 nay votes, and 59 abstaining. (See id.) Thus, the House validly passed the BIR for Act 2014-422 using the "quorum present" rule, because "when th[e] majority are present, the power of the house arises." Ballin, 144 U.S. at 6.

c. The Alabama Constitutional Convention of 1901 adopted the "quorum present" rule.

After the U.S. Senate, the U.S. House, and the U.S. Supreme Court approved the "quorum present" method of counting a quorum and dealing with abstentions, state courts and legislatures around the country adopted the same policy. For instance, Alabama explicitly

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does not think the fact that a quorum has not voted is conclusive evidence that a quorum is not present. On the contrary, in the opinion of the Chair, he has a right to count the Senate. He has counted the Senate and found that a quorum is in attendance." The Senate has used the "quorum present" rule ever since. See II Byrd, Robert C., The Senate (1789-1989): Addresses on the History of the United States Senate 102 (1991) (emphases added).

adopted the "quorum present" rule (or "Reed Rule") during its deliberations at the 1901 state constitutional convention.

At various points during the Alabama Constitutional Convention of 1901, delegates raised the "point of order that no quorum voted." See e.g., Official Proceedings of the Constitutional Convention of the State of Alabama, 1901, at 3529 (1940). This resulted in extensive debate as to whether the Convention was to be governed by the "quorum voting" method or the "Reed Rule" (i.e., "quorum present"). See id. 3539-3544. Finally, after a measure was passed with a quorum present, but with less than a quorum voting, Mr. O'Neal raised the point of order that no quorum had voted:

> MR. O'NEAL—I ask for a ruling on my point of order, whether or not a section of the Constitution of Alabama can be adopted by a minority of this Convention?
>
> THE PRESIDENT PRO TEM.—The Chair is of opinion—
> (Great confusion and cries of there is a quorum present.)
>
> THE PRESIDENT PRO TEM.—The Chair is of opinion that a quorum is present.
>
> MR. O'NEAL—The last vote showed a quorum was not present.
>
> THE PRESIDENT PRO TEM.—The Chair is of the opinion that a quorum did not vote, but a quorum is present.
>
> MR. O'NEAL—Is that the decision of the Chair?
>
> THE PRESIDENT PRO TEM.—That is the decision of the Chair, that a quorum is present, and a number of gentlemen did not vote.
>
> MR. O'NEAL—I appeal from the decision of the Chair. . . .
>
> THE PRESIDENT PRO TEM.—. . . Upon a vote being taken, the Chair was sustained. (Loud applause.)

Id. at 3836-37. Thus, the delegates to the Alabama Constitutional Convention were not only aware of the "Reed Rule" in 1901 (see also id. at 3540, where Mr. Oates discusses the "Reed Rule"), they made explicit use of the rule at the convention.[6]

3. House Rule 36's Interpretation of Alabama Constitution, § 71.01(C) is Consistent with the House's Interpretation of Alabama Constitution, § 63 that this Court Deferred to in BJCCA.

In BJCCA, 912 So. 2d at 217-18, the Alabama Supreme Court held that § 63's "majority of each house" language did not "control" how to count the votes for passage of bills because the Constitution did not define the whole phrase "a majority of each house." Instead, the Court noted that "for at least 30 years the legislature's interpretation of § 63 has been consistently applied as a parliamentary practice of the Alabama House of Representatives." BJCCA, 912 So. 2d at 211. And the Court was not persuaded by the statement of a single delegate to the 1901 constitutional convention that § 63 meant a majority of a quorum. See id. at 210. By using the word "house," § 63 was not defining the voting set (i.e., the number of members by which the voting proportion 51% is multiplied to determine the minimum required vote). Thus, the House had the power under § 53 to define the voting set as those members present and voting.[7]

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[6] The House continues to make some use of the "quorum voting" rule today (see House Rule 49), and other states only make use of the "quorum voting" rule (see League of Wisconsin Municipalities, "The Conduct of Common Council Meetings," 7 (2002), available at http://www.lwm-info.org/DocumentCenter/Home/View/189 ("the mere physical presence of a quorum is not alone sufficient to ensure the validity of any action taken. Unless a quorum actually votes, the vote is void.") This is no longer the norm, however, as other States have—like § 71.01(C)—embraced the policy behind the "quorum present" rule. See, e.g., State ex rel. Young v. Yates, 19 Mont. 239, 242-45 (1897); Northwestern Bell. Tel. Co. v. Board of Comm'nrs, 211 N.W.2d 399, 404 (N.D. 1973).

[7] The Alabama Supreme Court has also recognized that voting sets are frequently open to legislative interpretation under Ala. Const. § 53 in Jefferson County Comm'n v. Edwards, 32 So. 3d 572 (Ala. 2009) (rejecting as a political question the argument that the phrase "two-thirds of each house" in Ala. Const., § 76 should be read to mean two-thirds of all members present). The Court further suggested, however, that questions concerning a voting proportion might be less likely to present a political question. See id. at 584 ("If facts were presented to this Court, for

As in BJCCA, § 71.01(C)'s "three-fifths of a quorum present" rule does not "control" how to count the votes for passage of BIRs because the Constitution does not define the whole phrase "three-fifths of a quorum present." Instead, this Court should defer to the fact that the long-standing practice of the House has been to pass BIRs with an affirmative vote of three-fifths of those members present and voting, when there is a quorum present.[8] See Norton, 26 So. at 858-59 ("[A] construction not emanating from judicial decision, but adopted by the legislative or executive departments of the state and, moreover, long accepted by the various agencies of the government and the people, will usually be accepted as correct by the judicial department."). Further, the House has formalized its practice by promulgating Rule 36 under the power of § 53.

Similarly, by using the phrase "quorum present," § 71.01(C) is not defining the voting set. Thus, § 53 textually commits the choice of the voting set to the House, not this Court. Because interpretations of the terms "present" and "quorum present" by both Congress and U.S. Supreme Court are per se reasonable, the Alabama House's consistent interpretation of "three-fifths of a quorum present" by longstanding practice and official rule is both reasonable and constitutional. See Norton, 26 So. 2d at 858.

B. Alabama Constitution, § 71.01(C) Provides No Judicially Discoverable and Manageable Standards for Resolving this Case Because There Are Several Alternative Definitions of "Three-Fifths of a Quorum Present."

In BJCCA, 912 So.2d at 214-15, the Alabama Supreme Court recognized a second way that a question may be a political one—the question may present "a lack of judicially

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example, where the record reflected a bill . . . was passed by a vote such as 4 to 3 (plainly not a two-thirds majority under any means of legislative calculation, as 4 out of 7 votes is less than two-thirds), then this Court, in the process of invoking its jurisdiction for the purpose of determining the question of its own jurisdiction, would face an entirely different set of facts.") (Emphasis added.)

[8] See Ex. A at 7, 14 (noting that the House's practice of counting members present and voting for purposes of passing a BIR has been in place for over thirty years—and since Amendment 448 (now Ala. Const., § 70.01) was first passed).

discoverable and manageable standards for resolving it." (Quoting Baker, 369 U.S. at 217). The Court cited to Nixon v. United States, 506 U.S. 224, 230 (1993), where the U.S. Supreme Court addressed a challenge to an impeachment trial of a federal judge by committee instead of by the Senate as a whole. The U.S. Supreme Court concluded that "a variety of definitions could be assigned to the word 'try' and that, therefore, the term lacks sufficient precision to afford a 'judicially discoverable and manageable standard[]' for the judiciary to apply in reviewing legislative action." BJCCA, 912 So. 2d at 218 (emphasis added).

In BJCCA, "a majority of each house" could have a variety of definitions. First, that phrase could mean a majority of all 105 House members (i.e., 53). Second, it could mean a majority of the legally constituted House—a quorum of 53 members (i.e., 27). Third, it could mean a majority of members voting and present (e.g., 12 out of 22 yea and nay votes). See BJCCA, 912 So. 2d at 226-27 (Parker, J., concurring specially). Because the Constitution did not pick one controlling definition of "a majority of each house," neither did the Alabama Supreme Court. The Court held that there were no judicially discoverable and manageable standards. The question was political. Id. at 218-19.

Similarly, a "variety of definitions" could be assigned to § 71.01(C)'s "three-fifths of a quorum present." First, § 71.01(C) could be read to require 60% of a fixed, 53-member quorum, or 32 "yea" votes. But this reads the word "present" out of § 71.01(C) if more than 53 members are physically present in the House chamber. See Ex parte Children's Hosp. of Alabama, 721 So. 2d 184, 190 (Ala. 1998) ("[T]he Legislature could not have intended to include a meaningless phrase . . . ."). Further, it could produce the absurd result that three-fifths of 53 (i.e., 32) could pass a BIR even if all 105 members were present and 73 voted against it. See City of Bessemer v. McClain, 957 So. 2d 1061, 1075 (Ala. 2006) ("If a literal construction would produce an

absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute, such a construction is to be avoided.").

Second, § 71.01(C) could be read to mean 60% of the members present in the House, as long as at least a quorum of 53 is present. But this interpretation fails to recognize that "quorum present" is a term of art in parliamentary procedure that controls how a quorum is counted, not how votes for passage are counted. See House Practice ch. 43, § 5.

Third, § 71.01(C)'s "three-fifths of a quorum present" could be interpreted as House Rule 36 interprets it: When a quorum is present, three-fifths of members present and voting must vote "Yea" to pass a BIR.

Fourth, § 71.01(C)'s use of the word "present" could also simply mean that the voting proportion (i.e., three-fifths) is not applied to all 105 elected members of the House, leaving to the House whether to count members who are present and voting or members who are present regardless of whether they vote or abstain. See Congressional Research Service, Treaties and Other International Agreements: The Role of the United States Senate, 142 (2001); Federalist No. 75, at 453. And § 71.01(C)'s use of the term of art "quorum present," as opposed to "quorum voting," could be read to control the method of determining whether a quorum exists, not how to count votes toward passage. See House Practice, ch. 43, § 5.

Regardless of which standard the House adopts, § 71.01(C)'s phrase "three-fifths of a quorum present" "lacks sufficient precision to afford a 'judicially discoverable and manageable standard[]' for the judiciary to apply in reviewing legislative action," BJCCA, 912 So. 2d at 218 (quoting Nixon, 506 U.S. at 230).[9] It is thus reserved to the discretion of the House by § 53.

[9] Further, the only other parliamentary rule in the country to make use of the term "quorum present" that the Heath Care Authority has located is Alabama Constitution, § 66, which provides, "the reading at length may be dispensed with by a two-thirds vote of a quorum

C. Judicial Resolution of How the House is to Count Votes in its Internal Proceedings Would Show a Lack of Respect to the Legislature.

In BJCCA, 912 So. 2d at 214-15, the Alabama Supreme Court recognized a third way that a question may be a political one—the question could present "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." (Quoting Baker, 369 U.S. at 217). In BJCCA, id. at 220-21, the Court quoted Field v. Clark, 143 U.S. 649, 677 (1892), stating that it would show a lack of respect to the Legislature "if every person were free to 'hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and president of the senate, and approved by the governor, is a statute or not, . . . and the internal proceedings of the legislature when passing a bill were subject to judicial challenge." The Court also noted that the U.S. Supreme Court's conclusion that "attributing finality to an action of one of the political departments is a 'dominant consideration' in determining whether a question is political." Id. at 220.

Burnett's interpretation of Alabama Constitution, § 71.01(C)'s language "three-fifths of a quorum present" to require three-fifths of all members physically present to vote for a BIR would allow every person to hunt though the Alabama House and Senate journals to see how

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present." During a debate at the 1901 Constitutional Convention on what is now § 66, delegates variously referred to § 66 as requiring "two-thirds of the House," "a two-thirds vote," and "two-thirds vote of the members present"—suggesting that the delegates did not believe that § 66 definitively controlled the voting set. See Official Proceedings of the Constitutional Convention of the State of Alabama, 1901, at 2403 (1940).

Further, in the only case to examine this voting rule, City of Uniontown v. State, 39 So. 814 (Ala. 1905), the Supreme Court was confronted with a 21-0 vote and was asked to determine whether that vote satisfied § 66. Counting only those Senators presenting and voting, just like House Rule 36, the Supreme Court upheld the vote (though there were no abstentions, so we do not know how the Court might have addressed abstentions, the political question doctrine, etc.).

many members were present and multiply that number by three-fifths. Indeed, that is exactly what Burnett has done with this suit. Permitting this practice would directly undermine the finality of all acts of the Legislature since Ala. Const., § 71.01 was codified in 1984.

In BJCCA, 912 So. 2d at 221, the Alabama Supreme Court held "there [was] no clear constitutional provision binding the legislature to a certain manner of determining whether a 'majority of each house' has voted in favor of a bill." Similarly here, there is "no clear constitutional provision binding the legislature to a certain manner of determining whether ['three-fifths of a quorum present'] has voted in favor of a bill." Accordingly, it would show a lack of respect for the Legislature to answer the question of whether House Rule 36 is unconstitutional.[10]

II. Binding Precedent Has Established That A Bill Authorizing A Future Local Tax Does Not Violate Alabama Constitution, § 70 By Originating In The Senate. Thus, Burnett's Count Five Must Be Dismissed.

Act 2014-422 authorizes the Chilton County Commission to levy a $0.01 sales and use tax to support the construction of a new hospital. That act, originating as Senate Bill 462, was

[10] Opinion of the Justices No. 328, 524 So.2d 365 (Ala. 1988), does not alter this analysis. In that opinion, the Justices then sitting on the Court addressed, for the benefit of the Senate, voting under Ala. Const., § 71.01(C). That opinion did not address the political question doctrine or a 30-year practice and rule of the House. Nor did it address the U.S. Senate, U.S. House, and U.S. Supreme Court precedents that are before this Court in this case. See, e.g., House Practice, ch. 43, § 5; Ballin, 144 U.S. at 3. The courts of this State have not hesitated to depart from a non-binding Opinion of the Justices when later adversarial briefs place concrete arguments and facts before them. For example, in Opinion of the Justices No. 338, 624 So. 2d 107, 110 (Ala. 1993), the Justices responded to a question from the Senate by stating that the Legislature was required to follow a circuit court order that required "equity funding" in the State's public schools. Nine years later, the courts of this State confronted a real case and controversy in the equity funding litigation in Ex parte James, 836 So. 2d 813 (Ala. 2002). With concrete arguments and facts before it for the first time, the Alabama Supreme Court dismissed the case, holding: "Continuing the descent from the abstract to the concrete, we now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature." Ex parte James, 836 So. 2d at 819 (emphasis added). Same here.

first passed by the Senate. Burnett claims that this runs afoul of Ala. Const., § 70. The Alabama Supreme Court has addressed this issue, however, and Burnett's claim fails as a matter of law.

Ala. Const., § 70 states in relevant part that: "All bills for raising revenue shall originate in the house of representatives." Because Act 2014-422 merely authorized the Chilton County Commission to levy a tax, however, Act 2014-422 was not "a bill for raising revenue." (See Doc. 3 at 4) ("The governing body of the county is authorized to levy and impose in the county . . . a privilege or license tax. . .) (emphasis added). In Yancey &. Yancey Constr. Co. v. DeKalb County Comm'n, 361 So. 2d 4, 5 (Ala. 1978), for instance, the Supreme Court was similarly faced with the constitutionality of a coal severance tax levied by the DeKalb County Commission in reliance upon Alabama Act 1976-667. That Act, authorizing DeKalb County to levy the tax, originated in the Senate. The plaintiff challenged the Act as violating Ala. Const., § 70. The Court rejected this claim, holding that: "This court has held that that provision of the Constitution refers to bills which **levy a tax** as a means of collecting revenue. Act No. 667 does not levy a tax; **it merely authorizes the county commission to impose a tax. The Constitution does not require such bills to originate in the House**." Id. (Emphasis added.) Thus, while a bill levying a tax must originate in the House under Ala. Const., § 70, a bill simply authorizing a local entity to levy a tax in the future, but not levying a tax itself (such as Act 2014-422), may originate in the Senate.

Burnett's Count Five fails as a matter of law and must be dismissed.

III. Act 2014-422, § 14 Is Not "The Substance Of The Proposed Law" Subject To Alabama Constitution, § 106's Notice Requirements. Thus, Burnett's Count Six Must Be Dismissed.

Alabama Constitution, § 106 states in relevant part that, "[n]o special, private, or local law shall be passed . . . unless notice of the intention to apply therefor shall have been published,

. . . which notice **shall state the substance of the proposed law** and be published at least once a week for four consecutive weeks in some newspaper published in such county. . . ." (Emphasis added). As Burnett admits in his Second Amended Complaint, though, "[a] notice relating to the proposed Act 2014-422 was published in the Clanton Advertiser on February 16, 23, March 2 and 9, 2014. Said notice advertised the entire bill as proposed." (Sec. Am. Compl. at ¶ 41) (emphasis in original). That was sufficient to comply with Alabama Constitution,§ 106. Yet Burnett asserts that the notice was deficient because it failed to include notice of Act 2014-422, § 14. (See Sec. Am. Compl. at ¶ 42.)

Act 2014-422, § 14 was a later-added amendment that claimed to repeal Act 2014-162. (See Doc. 3 at 22.)[11] That Act—like Act 2014-422, now at issue—provided for the levy of sales and use taxes in Chilton County to support the construction of a new hospital. See Act 2014-162 at 1, attached as Exhibit B ("An Act, Relating to Chilton County; to authorize the county commission to an additional one cent sales tax which shall be used exclusively for construction, maintenance, and operation of a hospital in Chilton County.") Act 2014-162 was void as unconstitutional, however, because it included a binding referendum provision. See id. at Sec. 6 ("This Act shall become operative only if approved by a majority of the qualified electors of Chilton County who vote in an election to be called by special referendum. . . If a majority of the votes cast in the election are 'Yes,' this act shall become operative at such time as the Chilton County Commission deems appropriate. If the majority of votes are 'No,' this act shall be repealed and shall have no further effect.") (emphasis added); see also Opinion of the Justices No. 201, 251 So.2d 739, 740-42 (Ala. 1971) (noting that Ala. Const., §§ 44 and 212 render

[11] Section 14 was an amendment added by the Governor and then re-passed by the Legislature to clarify that Act 2014-162 (which was unconstitutional) was not good law. See Doc. 3 at 24 (noting that the House and Senate passed the bill on April 2, 2014 "as amended by Executive Amendment."). *Compare with* SB 462 (as introduced—excluding § 14), attached as Exhibit C.

binding referendum provisions—like the one included in Act 2014-163—"unconstitutional and void.") As a result, Act 2014-422 was needed to accomplish by constitutional means what Act 2014-162 had failed to accomplish by unconstitutional ones. Act 2014-162 was void when passed—completely dead in the water. See id. (finding that an act that violates Ala. Const., §§ 44 and 212 is "unconstitutional and **void**.") (emphasis added); see also Marbury v. Madison, 5 U.S. 137, 177 (1803) ("[A]n act of the Legislature, repugnant to the Constitution, **is void**.)" (emphasis added). A legislature cannot repeal an act that is already void. As such, Act 2014-422, § 14 was meaningless as anything other than a clarification of what was already true: Act 2014-162 was not good law.

Thus, § 14—a purely clarifying provision—does not amount to "**the substance of the proposed law**," subject to Alabama Constitution,§ 106's notice requirements. "The substance" of Act 2014-422 deals with the authorization for the levy of taxes in support of the construction of as new hospital in Chilton County. (See Doc. 3 at 2) ("An Act, Relating to Chilton County; to levy additional sales and use taxes to be used for the construction, maintenance, and operation of hospital facilities in Chilton County.") The residents of Chilton County were given proper notice of "the substance" when the entirety of Act 2014-422 was published in the Clanton Advertiser for four consecutive weeks. See Deputy Sheriffs Law Enforcement Assoc. of Mobile County v. Mobile County, 590 So. 2d 239, 241-43 (Ala. 1991) (Defining "the substance of the proposed law" as "its characteristic and essential provisions, or its most important features.") (internal citation omitted). Burnett's Count Six must be dismissed.[12]

[12] Additionally, Ala. Const., § 106 is inapplicable to Act 2014-422, § 14 because § 14 is specifically governed by Ala. Const., § 107—and "the law is settled that [h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957).

IV. Act 2014-422, § 14 Did Not Repeal Act 2014-162 In Violation Of Alabama Constitution, § 107—And Even If It Did, § 14 Is Severable. Thus, Burnett's Count Seven Must Be Dismissed.

Similarly, Burnett argues that Act 2014-422, § 14 violates Ala. Const., § 107. (See Sec. Am. Compl. at ¶¶ 46-48.) This claim fails for much the same reasons Burnett's § 106 claim fails. Ala. Const., § 107 requires that "The legislature shall not, by a special, private, or local law, repeal or modify any special, private, or local law except upon notice being given and shown as provided in the last preceding section." But while § 107 requires that notice be given before a local law is used to repeal another local law, Act 2014-422, § 14 did not actually repeal anything, as discussed above.

Act 2014-162 (the act purportedly repealed by § 14) was already void as unconstitutional for violating Ala. Const., §§ 44 and 212 (see supra Act 2014-162 at Sec. 6), and therefore § 14 was inoperable and merely clarifying. See Opinion of the Justices No. 201, 251 So.2d at 740-42 (finding that Ala. Const., §§ 44 and 212 render binding referendum provisions "unconstitutional and void.") (emphasis added); see also Marbury, 5 U.S. at 177 ("[A]n act of the Legislature, repugnant to the Constitution, is void.)" (emphasis added). A legislature cannot repeal an act that is already void. As such, Act 2014-422, § 14 was meaningless as anything other than a clarification of what was already true: Act 2014-162 was not good law.

Further, even if Act 2014-162 was not already void—and therefore that Act 2014-422, § 14 was operable—Burnett's challenge still fails because the Legislature's failure to give notice of § 14 merely renders § 14 void, not the entire act. Ala. Const., § 107 incorporates § 106's notice provisions ("notice being given and shown as provided in the last preceding section"), but it does not incorporate its remedies. This Court is bound to give effect to that distinction, because the language of § 107—not § 106—is controlling. See Fourco Glass Co. v. Transmirra Products

Corp., 353 U.S. 222, 228 (1957) ("[T]he law is settled that [h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.") And Alabama law is clear that where an act can be saved by severing an unconstitutional provision, it should be saved. Thus, because Ala. Const., § 107 does not explicitly incorporate § 106's requirement that an entire act be held unconstitutional if a provision is found unconstitutional, binding precedent bars this Court from doing so. See e.g., Newton v. City of Tuscaloosa, 36 So.2d 487, 493 (Ala. 1948) ("The act ought not to be held wholly void unless the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part so held to be unconstitutional.") (citation omitted) (emphasis added); City of Homewood v. Bharat, LLC, 931 So.2d 697, 705 (Ala. 2005) (holding that an act was unconstitutional under Ala. Const. § 105 only to the extent it violated Ala. Const., § 105). Thus, Burnett's Claim Seven must also be dismissed.[13]

[13] Burnett's Counts One, Two, and Three (for Declaratory Judgment, Injunction, and Suit for Refund, respectively) are wholly dependent claims, derivative of Counts 4-7. As such, because Burnett's Counts 4-7 are due to be dismissed, Counts 1-3 must also be dismissed.

Respectfully submitted on July 29, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the AlaFile system which will send notification of such filing and/or that a copy of the foregoing has been served upon the following by placing a copy of same in the United States mail, properly addressed and postage prepaid, on this the 29nd day of July, 2016:

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