NEW JERSEY REPUBLICAN STATE COMMITTEE a/k/a the NJGOP; DECLAN O'SCANLON; HAL WIRTHS; LISA NATALE-CONTESSA; and ILEANA SCHIRMER	:SUPREME COURT OF NEW JERSEY :DOCKET NO.: :M-1291 :September Term, 2019 :084731
	:CIVIL ACTION
Plaintiffs	
v.	
	:ON CERTIFICATION FROM:
PHILIP D. MURPHY, in his official capacity as Governor of New Jersey	:SUPERIOR COURT OF NEW JERSEY :MERCER COUNTY - LAW DIVISION :DOCKET NO.: MER-L-1263-20
Defendant	

PLAINTIFFS' REPLY BRIEF

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PRELIMINARY STATEMENT

The State seeks to expand Executive authority to the point it nullifies the Appropriations Clause and the Debt Limitations Clause. It asserts that simply by declaring an emergency, the political branches can avoid the restrictions of both clauses. They no longer need voter approval or a single purpose, they need only a "fiscal emergency" which they have the sole power to declare and define. Once they have done so, they can borrow and spend as they see fit. That overreach threatens the public fisc and renders the Appropriations Clause superfluous. It also threatens this Court, forcing it to choose between being permanently sidelined by the political branches or to engage annually in an evaluation of that year's "fiscal emergency."

The Debt Limitation and Appropriations Clauses must be read in harmony, and no harmonization of those clauses can construe the exceptions in the Debt Limitations Clause as wholesale exceptions to the Appropriations Clause. Properly construed they allow the State to borrow to "meet an emergency" without voter approval. They do not allow the State to borrow to pay for general operating expense. See Lance v. McGreevey, 180 N.J. 590 (2004). No other reading gives effect to both clauses.

The State's position that there is a "fiscal emergency" for FY2021 that allows it to borrow for general operating expense is antithetical to the Appropriations Clause. It is also unsupported

by the facts; Governor Murphy has issued dozens of Executive Orders related to COVID-19 yet not a single Executive Order declares a *fiscal emergency*, as opposed to a public health crisis. Moreover, the requirements of the New Jersey COVID-19 Emergency Bond Act (the "Act") that the Governor seek approval of the Legislature who will decide if there is a need to borrow before authorizing any borrowing -- which itself is unconstitutional -- reveals that there is no current fiscal emergency.

If the Appropriations Clause does not allow the Governor to declare a plenary "fiscal emergency," i.e., to borrow to pay for general operating expenses untethered to a disaster or act of God, that is especially so at the outset of a fiscal year. The Appropriations Clause requires the Governor to certify anticipated revenue at the beginning of every fiscal year. That revenue when combined with revenue on hand must meet or exceed the total proposed appropriations. Governor Murphy is required to declare anticipated revenue -- not including borrowed funds, as established in Lance v. McGreevey -- and propose a balanced budget. The fact that Governor Murphy anticipates less money than he would like to spend does not constitute a fiscal emergency allowing him to borrow to cover general operating expenses. If allowed to do so, the "emergency" exception to the Debt Limitation Clause will swallow the balanced budget requirement of the Appropriations Clause.

The assertion that the Constitution is somehow ambiguous in this respect is unfounded. The Appropriations Clause requires the Governor to certify reasonably anticipated State revenue and to propose to the Legislature how to appropriate those funds. If an emergency caused by a disaster or an act of God arises after he has done so, the Debt Limitation Clause allows the Legislature to authorize borrowing to meet the specific needs of that emergency without voter approval. That narrowly crafted exception – albeit important – does not allow borrowing because the Governor desires more revenue than he can reasonably anticipate. Moreover, the Constitution and the Legislature have created a means to address budgetary holes caused by unrealized revenues. N.J.S.A. 52:27B-26 authorizes the Governor to impound monies otherwise appropriated to meet necessary appropriations and the Constitution allows debt funding of general expenses of up to one percent of the budget to address unforeseen shortfalls. There is no ambiguity in the Debt Limitation Clause from which the State can find support.

The State's remaining arguments are equally unavailing. The Debt Limitations Clause's reference to "money that has been or may be deposited with this State by the government of the United States" does not apply to a credit facility with the Federal Reserve, which is separate and distinct from the government of the United States. Even if it did, the refunding of those bonds through a private sale no longer falls within the exception and frustrates

the purpose of the Debt Limitation Clause, which is to protect future generations from unrestrained borrowing without voter approval.

Lastly, the requirement that the Governor obtain the approval of a four (4) member panel of the Legislature before undertaking any borrowing violates Article III of the Constitution. The Constitution grants the Legislature the power to enact laws and the vests the Executive with the administration of those laws. Here, the Legislature authorized the issuance of bonds, but requires the Executive to obtain legislative approval of its decision to issue bonds. By doing so, the Legislature seeks to exercise the power of the Executive to administer the law and determine when borrowing is appropriate. Such a requirement is unconstitutional.

LEGAL ARGUMENT

POINT I: THE DEBT LIMITATION CLAUSE AND THE APPROPRIATIONS CLAUSE MUST BE READ TOGETHER.

The State seeks to expand the definition of "emergency" to the point that the exception in the Debt Limitations Clause swallows the Appropriations Clause. Plaintiffs urge the Court to interpret the "emergency" exception to give effect to both clauses. Anything less, violates basic tenets of statutory construction and

gives unfettered authority to the Executive.[1] It also forces this Court to sit idly by while authorizing the Executive to declare anything and everything a disaster that allows borrowing to meet general operating expenses or to engage in an annual evaluation of the Executive's claimed "emergency." Neither interpretation is appropriate. The only interpretation that gives effect to both the Debt Limitations Clause and to the Appropriations Clause is one that allows the State to borrow only for costs directly tied to the "emergency" and never for general operating expenses untethered from the emergency.

The State concedes that the "emergency" to be met with the bond proceeds is not COVID-19. Rather, it is the "fiscal emergency" that the State claims is a result of the pandemic (i.e. the "disaster").[2] The State argues that it can borrow for this "fiscal

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[1] See, e.g. Burgos v. State, 222 N.J. 175, 203 (2015) (holding that the Constitution should not be interpreted so as to render any of its language as surplusage or meaningless); Cent. R. Co. v. Dir. Div. of Tax Appeals, 8 N.J. 15, 27 (1951) (noting that it is a "cardinal rule" that statutes should be construed so that, if possible, full force and effect shall be given to every sentence, clause and word).

[2] This position ignores that the State cannot yet demonstrate a fiscal emergency, just the fear of one. Throughout its brief, the State reveals that this fiscal shortfall is little more than a mere guess. (Db14 "impossible to predict;" Db15 "Current indications;"). Indeed, Governor Murphy has not issued a formal declaration of a "fiscal emergency" pursuant to his statutory authority. Moreover, the State's position ignores the myriad factors other than the pandemic that may play a role in reduced economic activity.

emergency" because it is arguably tied to a disaster no matter how attenuated that claim may be. This argument strains credulity. In support of this position, the State points out that the Framers of the 1947 Constitution had just lived through the decade-long Great Depression, which was itself an especially deep and lengthy economic downturn. This fact offers no cover for the State's position, however, as the Great Depression was not the result of "disaster" or "act of God." Paradoxically, the State's current assertion forces the Court to accept that a fiscal shortfall is an "emergency" under the Debt Limitation Clause only if it can be linked to a "disaster or act of God," but the State is not allowed to borrow for a fiscal emergency that was simply the result of ordinary cyclical economics.

In other words, if borrowing to address a fiscal emergency is the way around the Appropriations Clause, it is nonsensical that such an emergency would have to be because of a separate, triggering event -- a "disaster or act of God." Thus, the State's position is apparently that it could issue bonds without voter approval to cover a fiscal "emergency" caused by a recession, but only if that recession was on account of, say, the Dust Bowl of the 1930s or Super Storm Sandy. On the other hand, the State would have to seek voter approval to issue bonds to address a fiscal emergency because of a cyclical recession or a recession caused by

the "popping" of an asset "bubble." That cannot be what the Framers of the 1947 Constitution intended.

Any budgetary shortfall with the slightest nexus to a declared "emergency" would allow the State to issue bonds without voter approval and to meet general operating expenses. Consider that Governor Christie declared a state of emergency on twenty-six (26) occasions.[3] Consider that exclusive of the COVID-19 related declaration of emergency, Governor Murphy has declared a state of emergency on eight (8) occasions.[4] Further consider that the overcrowding of New Jersey's prisons and jails was declared an "emergency" year in, year out, for more than a decade and across multiple administrations, until the courts recognized that the overcrowding situation was not an "emergency," but rather an ongoing negative condition that had to be recognized by the State. See County of Gloucester v. State, 132 N.J. 141, 144, 152 (1992). If adopted, the State's position will likely require this Court to evaluate on an annual basis the ties between the "economic emergency" and any disaster the Executive chooses to rely on to allow debt funding.

[3] Including one declaration of emergency by Acting Governor Sweeney. See Executive Orders of Governor Christie 13, 18, 49, 55, 57, 73, 80, 104, 146, 147, 148, 149, 150, 153, 167, 172, 175, 184, 186, 202, 210, 214, 221, 228, 233, 238.

[4] Executive Orders of Governor Murphy 14, 17, 33, 50, 55, 57, 59, 70.

It is important to note that all of the historic examples of borrowing cited by the State had identifiable and plainly stated single purposes. The Civil War bond acts helped raise, arm, supply, house, and care for an army. (Db34-35). The Depression-era bond acts -- from a time before unemployment insurance funds, Medicaid, and the modern governmental social safety net -- borrowed funds for the support of the jobless and dependents.[5] Id. at 35-36. Moreover, in 1933, the State Comptroller made it plain that he did not consider borrowed funds as general revenues:

> In setting up the statement as well as the chart for Revenues, I have included the amounts received from the sale of bonds. This is naturally not an earned revenue, but for the sake of completeness I have set up the amounts and have shown the bond sale receipts separately.
>
> [Annual Report of the Comptroller of the Treasury for the Fiscal Year Ended June 30, 1933 at p. 9. (emphasis added).] (Pa159-160).

In neither era were bond proceeds used on what the State proposes to use the proceeds for now. And, as the State admits, the State received voter approval for each of those Depression-era bond acts. Ibid.

The State's defense of its tradition and practice of using general obligation debt as operating revenue is also unavailing. The State actually highlights the exception that proves the rule.

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[5] Indeed, as a point of reference, the annual appropriations act for Fiscal Year 1932 appropriated $29.45 million. L. 1931 c. 382.

Every year the State does indeed use general obligation debt to fund, on the margin, various distinct State operations. To Plaintiffs' understanding, that use is less than one percent of the State's annual appropriations, and generally is tied to the administrative costs of programs funded more robustly by general obligation bonds.

The State's reference to the so-called "Dredging Bonds" confirms that understanding, and makes Plaintiffs' point. (See Db59). In FY 2016, for example, the State used about $429,000 of general obligation bond debt for administrative expenses related to the Office of Dredging and Sediment Technology. Ibid. That sum was equivalent to a rounding error in the $34.55 billion Annual Appropriations Act for FY 2016.[6] To Plaintiff's knowledge, no one has ever objected to that kind of administratively convenient use of bond revenue. Were it necessary, the State rather easily could work around any prospective restrictions placed on such funds by, for example, paying the salaries of sediment technologists directly from the fund holding the relevant bond proceeds, as opposed to from the more familiar General Fund. Most importantly for the present analysis, however, no court ever has considered and approved those arrangements, so the State's resort to the practice as a source of constitutional legitimacy means little.

[6] L. 2015, c. 63.

Although the State trips over itself, its real contention is that a shortfall in revenue can be an "emergency" or a disaster that allows borrowing without voter approval for general operating expenses. In essence, the State seeks a ruling where the Executive can label any revenue shortfall either an "emergency" or a "disaster" and borrow for general operating expenses whenever the Executive deems it expedient. This position is not only directly contrary to this Court's decision in Lance, but it renders the balanced budget requirement of the Appropriations Clause a nullity.

This position, if adopted, would sideline this Court in perpetuity. Relegating it a spectator as the political branches concoct "emergencies" and "disasters" designed to satisfy their political agendas. Imagine the political branches unrestrained to declare a "fiscal emergency" whenever revenues will not allow a desired program. Then imagine that same power in an election year, like 2021, when the political branches wish to spend to harvest votes. If a shortfall in desired revenue is an "emergency" or "disaster" that authorizes borrowing without voter approval, there is no policy initiative that cannot justify borrowing for operating expenses. Adopting such an interpretation would expand Executive authority to new heights, diminish the power of this Court and render the Appropriations Clause meaningless.

The Appropriations Clause requires the Governor to certify anticipated revenue at the outset of the fiscal year. N.J. Const. art. VIII, § 2, ¶ 2. To allow the Governor to declare a financial emergency and include "borrowed funds" in the revenue certification for operating expenses renders the "anticipated revenues" requirement meaningless. Any time a Governor anticipates less revenue than he or she desires they can simply declare a "fiscal emergency," include borrowed funds in their "anticipated revenues" and spend it on general operating expenses as they see fit with no requirement that the spending be tethered to any disaster or act of God. In this respect, they are no longer "anticipated revenues," they are desired revenues and directly contrary to the balanced budget requirement that the State live within its means.

The only conclusion that avoids such an incongruous result is to conclude that Framers never intended a fiscal shortfall to be an "emergency" or a disaster within the meaning of the Debt Limitation Clause, no matter the proximate cause of the fiscal shortfall. The emergency exception of the Debt Limitation Clause does not allow borrowing to meet general operating expenses. The emergency exception only allows borrowing to meet the unexpected costs directly related to the disaster or act of God.

Indeed, if the Framers of the Constitution intended to allow the State to issue bonds without voter approval to address a

revenue shortfall that threatened general operations, they could have easily done so. The Constitution of the State of Illinois, for example, provides:

> (a) No State debt shall be incurred except as provided in this Section. For the purpose of this Section, "State debt" means bonds or other evidences of indebtedness which are secured by the full faith and credit of the State or are required to be repaid, directly or indirectly, from tax revenue and which are incurred by the State, any department, authority, public corporation or quasi-public corporation of the State, any State college or university, or any other public agency created by the State, but not by units of local government, or school districts.
>
> (b) State debt for specific purposes may be incurred or the payment of State or other debt guaranteed in such amounts as may be provided either in a law passed by the vote of three-fifths of the members elected to each house of the General Assembly or in a law approved by a majority of the electors voting on the question at the next general election following passage. Any law providing for the incurring or guaranteeing of debt shall set forth the specific purposes and the manner of repayment.
>
> (c) State debt in anticipation of revenues to be collected in a fiscal year may be incurred by law in an amount not exceeding 5% of the State's appropriations for that fiscal year. Such debt shall be retired from the revenues realized in that fiscal year.
>
> (d) ***State debt may be incurred by law in an amount not exceeding 15% of the State's appropriations for that fiscal year to meet deficits caused by emergencies or failures of revenue.*** Such law shall provide that the debt be repaid within one year of the date it is incurred

Illinois Const., Art. IX, § 9 (emphasis added).

The Illinois Constitution, adopted in 1970, is similar to New Jersey's in that the general rule is that debt backed by the full faith and credit of the state must be subject to voter approval (or a super majority vote of the legislature in the case of Illinois). Like New Jersey, the state debt of Illinois must be for a specific purpose. Like New Jersey, there is discretion to issue a limited amount of debt without voter approval.[7]

Unlike New Jersey, Illinois may incur debt outside the normal constitutional safeguards to "meet deficits" caused by "emergencies." Thus, the Illinois constitution dispenses with the specific purpose requirement and expressly authorizes a specified amount of debt to fund general operating expenses.[8] Further, the Illinois Constitution does not qualify "emergencies" -- i.e. an emergency is an emergency regardless of whether it was caused by a disaster or act of God. Most significantly, and unlike New

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[7] New Jersey allows bonding up to 1% of the general appropriation amount, while Illinois allows up to 5%.

[8] It is noteworthy that Illinois' fiscal condition is dire. According to Illinois' state comptroller:
"*The depth of Illinois' fiscal challenges can be difficult to comprehend…the road to recovery starts with a balanced budget*." See https://illinoiscomptroller.gov/financial-data/fiscal-information/archive/illinois-finances-at-a-glance/

Further, bonds issued by the State of Illinois have recently been downgraded to just one notch above "junk." See Adam Andrzejewski, *Why Illinois is in Trouble*, FORBES, April 27, 2020.

Jersey, the Illinois constitution allows the state to incur debt to "meet deficits" caused by "*failures of revenues*." Notably the Framers of the Illinois constitution recognized that "emergencies" and "failures of revenues" are separate concepts. If the Framers of New Jersey's Constitution contemplated the State borrowing to meet general operating expenses on account of a failure of revenues, they could have inserted language similar to that found in the Illinois Constitution.[9]

The Act is unconstitutional. This Court must interpret the Appropriations Clause and the Debt Limitations Clause in harmony. The text of the Constitution, the holdings of this Court, the historical use of borrowing in the State, and pure logic allow bonding that is not voter approved only to the extent necessary to fund the direct costs of an emergency caused by a disaster. Those clauses do not allow borrowing to replace hoped-for, but unrealized funds. A disappointing outcome is not an emergency. To protect the public fisc, this Court cannot allow the State to use bond proceeds to wholesale fund the State's general operating expenses.

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[9] Interestingly, Illinois is the only state that has thus far borrowed from the Municipal Liquidity Fund. Illinois borrowed $1.2 billion in June, 2020.

(https://www.federalreserve.gov/publications/files/mlf-transaction-specific-disclosures-7-10-20.xlsx)

POINT II: FUNDS BORROWED FROM THE FEDERAL RESERVE BANK OF NEW YORK ARE NOT "FEDERAL FUNDS" UNDER THE DEBT LIMITATION CLAUSE.

The State argues that the "federal funds" exception to the Debt Limitation Clause, applies to the contemplated borrowing transaction under the Act. (Db 52-53). That argument fails for two reasons.

First, monies lent by a Federal Reserve Bank are not monies of the federal government.

The Constitution does provide that the various procedures and restrictions found in the Debt Limitation Clause do not apply to "any money that has been or may be deposited with this State by the government of the United States." N.J. Const. Art. VIII, § 2, ¶ 3(e). In this case, however, the State acknowledges that up to $9.25 billion of the bonds authorized under the Act would be sold to the Federal Reserve Bank of New York. (Da169, 529, 538). Accordingly, such monies are simply not grants or loans from the federal government.

Federal Reserve Banks are not departments of government. They are private corporations in which the federal government has an interest. Emergency Fleet Corp. v. W. Union Tel. Co., 275 U.S. 415, 425 (1928). The banks of the Federal Reserve System are not a branch or agency within the federal government and are not run by the Federal Reserve Board of Governors or any other part of the executive branch of the federal government. Scott v. FRB of Kan.

City, 406 F.3d 532, 535 (8th Cir. 2005) (holding that Federal Reserve Bank not an agency of federal government for purposes of Federal Rules of Appellate Procedure); Lewis v. U.S., 680 F.2d 1239 (9th Cir. 1982) (holding Federal Reserve not a federal agency within meaning of Tort Claims Act); Katsiavelos v. Fed. Reserve Bank of Chicago, 859 F. Supp. 1183, 1185 (N.D. Ill. 1994) ("The regional reserve banks are not owned by the United States government. While regulated by federal statute and regulations, the regional reserve banks are not controlled by the executive branch. They act with sufficient independence under private ownership and control such that they do not qualify as government corporations or independent establishments"). Federal Reserve Banks are considered separate corporations owned solely by commercial banks within a respective Federal Reserve Bank's district. Ibid. As summarized by the Scott court, "[w]e conclude that the [Federal Reserve Bank] is not a department, administration, authority or bureau of the federal government." Scott, supra, 406 F.3d at 536.

Not even the Executive Branch of the Federal Government considers the Federal Reserve an agency of the Federal Government. The United States Equal Employment Opportunity Commission Enforcement Guidance on Coverage of Federal Reserve Banks, October 20, 1993, concluded,

> “the Federal Reserve Banks are private employers covered by the private sector provisions of the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), the Equal Pay Act (EPA), and Title I of the Americans with Disabilities Act (ADA) (dealing solely with private sector employment) rather than executive agencies covered under the federal sector provisions of the ADEA, Title VII, the EPA and Section 501 of the Rehabilitation Act of 1973 (dealing solely with federal sector employment).”

Second, the Act involves borrowing from the private market as much, if not more than, borrowing from public or quasi-public sources. Even if the Federal Reserve were an agency of the Federal Government, the Act permits the State to go straight to the private markets to borrow. In other words, there is no statutory requirement that the State borrow from the Federal Reserve at all. And of course, any refunding bonds, which the State clearly plans to issue as soon as possible, would be sold on the private market exclusively. In addition, the State ignores the fact that New Jersey has been allotted a maximum loan under the MLF of $9.25 billion. The balance of the authorized bonds, about $700 million -- itself a lot of money -- would necessarily have to be sold in the private markets. As such, the State cannot rely upon the "federal funds" exception in bypassing the Debt Limitation Clause and issuing bonds under the Act.

Assuming *arguendo* that proceeds from bonds sold to the federal government satisfy the “federal funds” exception to the Debt Limitation Clause, the refunding of those bonds through a private

sale does not. A refunding is a separate issuance that the Constitution authorizes in limited circumstances without voter approval. N.J. Const., art. VIII, § 2, ¶ 3(c). In fact, it only authorizes refunding of bonds issued under Paragraphs 3(a) and (b) of the Debt Limitation Clause without voter approval. Moreover, as the Kanef certification makes plain (Da176,¶ 75), the refunding proposed under the Act also violates the Debt Limitation Clause, because it does not result in any savings at required by art. VIII, § 2, ¶3(c).

POINT III: THE ACT VIOLATES THE PRINCIPLE OF SEPARATION OF POWERS EMBODIED IN ARTICLE III OF THE CONSTITUTION.

The State describes a number of "circuit breakers" built into the Act that require a specific sequence of events before any level of borrowing can actually occur. (Db29-30). While the State touts this procedure as a safeguard that supports its bonding scheme, the procedure itself is unconstitutional under the Separation of Powers principles found in Article III of the Constitution.

No ad hoc committee of the Legislature may constitutionalize that which is unconstitutional in the first place. Gen. Assembly v. Byrne, 90 N.J. 376, 391 (1982) ("The Legislature cannot pass an act that allows it to violate the Constitution."). That principle holds true for the Act's violation of the Appropriations Debt Limitation Clause, as discussed above.

The principle also is true for the internal mechanics of the Act itself. The issuance of bonds authorized by the Act is subject to the majority agreement of "issuing officials," defined by the Act as including and consisting of the Governor, the State Treasurer and the Director of the Division of Budget and Accounting in the Department of the Treasury.[10] (Pa112-13, 134-35). Upon a decision of the issuing officials to borrow, the issue is then forwarded to a "Select Commission on Emergency COVID-19 Borrowing"[11] (the "Commission"). (Ibid.). The Commission will consist of two members of the Assembly and two members of the Senate. (Ibid.). The issuance of the bonds as may be requested by the issuing officials shall be authorized upon the approval by any three (3) members of the Commission.[12] (Ibid.). If the three members of the Commission do not approve the Executive Branch's request for a bond issuance, the request will be denied. (Ibid.).

The New Jersey Constitution reads: "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as

[10] Ibid.

[11] Ibid.

[12] Ibid.

expressly provided in this Constitution." N.J. Const., Art. III, ¶ 1.

In giving the Commission, a creature of the Legislature, the responsibility for approving the amount and timing of any bond issuance -- essentially holding veto power over the Executive -- the Act violates that sacrosanct constitutional provision. The Act does so on its face, by permitting the Legislature to encroach upon the Executive's rightful role of administering monies appropriated by law.

"The power and authority to appropriate funds are vested in the legislative branch of government." Karcher v. Kean, 97 N.J. 483, 489 (1984). Conversely, the Governor has responsibility for executing and administering the funds duly appropriated. Communications Workers of America, AFL-CIO v. Florio, 130 N.J. 439, 456 (1992). Courts recognize and protect that clear and important "distinction between the power to appropriate or not appropriate funds, a legislative function, and the power to expend the appropriated funds, an executive function." Id. at 461-62. Those powers cannot be either abdicated or infringed. "Separation-of-powers questions can arise when a branch delegates some of its own power away…or when a branch takes unto itself some of the powers of another branch." Id. at 456 (citations omitted). In this matter, the separation-of-powers concerns are double: one branch,

the Legislature, has impermissibly taken power, while another, the Executive has given it away readily.

Plaintiffs acknowledge that the separation of powers doctrine is not intended to hermetically seal each of the separate branches from the other – such stringent separation "'would preclude the establishment of a Nation capable of governing itself effectively.'" General Assembly v. Byrne, 90 N.J. 376, 382 (1982) (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)). Recognizing that some overlap between the power of the branches is permissible, the Courts have developed a workable framework for determining how much infringement by one branch on another is unconstitutional. The New Jersey Supreme Court put it succinctly:

> Where cooperation between the branches is necessary to further the underlying substantive purposes of the legislative enactment, and where the cooperation offers no substantial potential interference with the exclusive functions of the other branch, the mechanism for legislative involvement will not violate the separation-of-powers principle. But where shared authority is not necessary to effectuate the statutory scheme, or where the legislative intrusion threatens to interfere with exclusive functions of another branch, then the intrusion will violate the separation-of-powers principle.
>
> [Florio, supra, 130 N.J. at 460.]

The present controversy concerns a wholly unnecessary and substantial intrusion on one of the core functions of the Executive -- the administration of appropriated funds (regardless of the constitutionality of such funds).

This Court should reject the unconstitutional scheme created by the Act that permits four members of the Legislature to administer the (potential) proceeds of bonds issued under the Act. The Act contains no severability provision allowing the remainder of the Act to stand if any provision is struck down. Because it cannot be presumed that the Act would have been approved by the Legislature without the Commission, the Court must strike down the Act in its entirety.

CONCLUSION[13]

In light of the above, the New Jersey COVID-19 Emergency Bond Act, P.L. 2020, c. 60 is unconstitutional under Article VIII, §, 2, ¶ 2 and Article VIII, § 2, ¶ 3 of the New Jersey State Constitution of the 1947. The Act must be stricken as such.

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Dated: August 3, 2020

By: *s/ Michael L. Testa, Jr.*
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[13] The Plaintiffs recognize that this reply brief is 1.5 pages longer than allowed by R. 2:6-7. Plaintiffs' respectfully request a relaxation of this Rule.