



## TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	3
A.    THE CREATION OF THE UNCONSTITUTIONAL GRANT PROGRAMS.....	3
B.    TREASURER MCCORMAC'S TESTIMONY .....	4
C.    THE LEGISLATIVE BRANCH SELECTS ITS GRANTEES.....	8
LEGAL ARGUMENT .....	11
A.    REQUIREMENTS FOR INJUNCTIVE RELIEF .....	11
B.    THE ACTS VIOLATE THE DOCTRINE OF SEPARATION OF POWERS .....	11
C.    THE TREASURER HAS ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER .....	19
CONCLUSION.....	21

## PRELIMINARY STATEMENT

“The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the definition of tyranny.” James Madison, Federalist No. 47.

By this action, Plaintiff, David W. Robinson, seeks to enforce the principles of “Separation of Powers” found in Article III of the New Jersey State Constitution. Accordingly, Plaintiff respectfully submits this memorandum of law in support of his Order to Show Cause seeking a declaration that the Legislative Branch’s administration of the \$128 million “Property Tax Assistance and Community Development Block Grants” program is unconstitutional, that the provisions of the Fiscal Year 2005 and Fiscal 2006 Appropriations Acts granting the Legislative Branch power to approve or disapprove the Executive Branch’s administration of the grant program is unconstitutional, and further, enjoining Defendants from distributing any of the remaining monies appropriated by the Legislature in a manner inconsistent with the New Jersey State Constitution. Plaintiff further asks that the Court compel the Executive Branch to take all steps necessary to recapture any and all grants awarded pursuant to this unconstitutional scheme.

Through the unconstitutional activities surrounding the “Property Tax Assistance and Community Development Block Grants,” Defendants have permitted the Legislative Branch to exercise the powers of both of the political branches of our State government. The Legislative Branch has thus been given a disproportionate degree of power among the coordinate branches of government, creating an unconstitutional imbalance and

leaving it unchecked by the other branches of the government. The end result is a grant program that has been used to fund the parochial interests of members of the Legislative Branch.

As discussed below, after approximately \$128 million over two years was appropriated to the Executive Branch for a grant program to be administered by the Treasurer, the Executive Branch abdicated its constitutional responsibility by allowing the Legislative Branch to administer the appropriated funds. This abdication of its constitutional obligations by the Executive Branch violates the doctrine of separation of powers embodied in Article III of the New Jersey State Constitution, every bit as much as does the Legislature's institutional overreach. Indeed, Defendants' actions offend and threaten the very core of the New Jersey State Constitution. This Court cannot permit this constitutional violation to continue.

The Executive Branch's abdication of its constitutional role to the Legislative Branch is alone sufficient to warrant the requested relief. However, the statutory language of the Fiscal Year 2005 and Fiscal Year 2006 Appropriations Acts specifically charging the Treasurer with the responsibility to identify grant recipients and otherwise administer the program and yet granting to the Legislative Branch a "legislative veto" over the Executive Branch's administration of the grant program also requires that this Court declare the Fiscal Year 2005 and Fiscal Year 2006 Appropriations Acts unconstitutional. Accordingly, Plaintiff respectfully submits that the Court must grant this application to protect the system of checks and balances so fundamental to our system of government.

## STATEMENT OF FACTS

### A. THE CREATION OF THE UNCONSTITUTIONAL GRANT PROGRAMS

The Legislative Branch of the government passed Senate Bill No. 2005 in June of 2004 establishing the budget of the State of New Jersey for Fiscal Year 2005. In June of 2005, the Legislative Branch of the government passed Senate Bill No. 3000 establishing the budget of the State of New Jersey for Fiscal Year 2005. Both the Fiscal Year 2005 and the Fiscal Year 2006 budgets were approved by the Executive Branch with certain line item exceptions. The Fiscal Year 2005 budget was codified as P.L. 2004, c.71 (the "2005 Appropriations Act"). The Fiscal Year 2006 budget was codified as P.L. 2005, c.132 (the "2006 Appropriations Act") (collectively the "Acts")

The 2005 Appropriations Act contained, among other appropriations, \$88 million for "Property Tax Assistance and Community Development Grants" to be administered by the Treasurer. Similarly, the 2006 Appropriations Act contained an appropriation of \$40 million for the same purpose. The 2006 Appropriations Act also carried forward unexpended funds from the 2005 "Property Tax Assistance and Community Development Grants." (the combined \$128 million appropriation is hereinafter referred to as the "Grant Program"). Both the 2005 and the 2006 Appropriations Acts contained the following language regarding the Grant Program:

From the amount appropriated herein above for Property Tax Assistance and Community Development Block Grants, the State Treasurer shall provide State assistance to municipalities, school districts and counties for their local purposes as the State Treasurer shall determine, for the payment of Grants-In-Aid awards to non-governmental entities for health, welfare, educational, or other purposes as the State Treasurer shall determine, and for assistance to departments or agencies of state government or state authority, commissions or public institutions of higher education as the

State Treasurer shall determine, subject to the approval of the Director of the Division of Budget and Accounting and review and approval by the Joint Budget Oversight Committee. The committee shall be provided periodically with a list of grantees approved by the director to review and shall approve or disapprove the list as provided within 10 working days or the list of grantees shall be deemed approved by the committee. No recipient of State assistance or a grant shall receive more than \$5 million from this appropriation. The amount distributed to a municipality, school district or county from this appropriation may be expended by the recipient notwithstanding any law to the contrary.

See FY 2006 Appropriations Act (emphasis added).

As discussed below, the Treasurer not only participated in this unconstitutional scheme, but he also awarded grants from the Grant Program with no discernable criteria in place within the Department of the Treasury for identifying grant recipients, i.e., without public notice or open and competitive applications. Instead, the meaningful aspect of the administration of the Grant Programs – determining grantees and the amount of public funds each would receive – has been left to the sole discretion of the Legislative Branch.

#### **B. TREASURER MCCORMAC'S TESTIMONY**

The most enlightening, and alarming, evidence on this controversy is provided by former State Treasurer John McCormac. During the Assembly Budget Committee hearings on the Fiscal Year 2006 Appropriations Act, then-Treasurer McCormac was asked to provide testimony regarding the administration of the “Property Tax Assistance and Community Development Grants.” As Treasurer McCormac’s testimony makes plain, the Legislative Branch impermissibly retained control over the administration of the grant program as the Treasurer abdicated his responsibility to administer it.

During the May 24, 2005, Assembly Budget Committee hearing, Treasurer McCormac provided the following testimony in response to questions posed Assemblyman Kevin O'Toole, a member of the Assembly Budget Committee:

Assemblyman O'Toole: *The Property Tax Assistance and Community Development grants...I am trying to understand the mechanics of the grant program. How is it set up? Was this what used to be in years past the line item legislative priorities that have now been grouped together, lumped together in one grant project...?*

Treasurer McCormac: *Certainly it is exactly as you described, its an 88 million dollar pot that in prior years it would have been delineated specifically in the budget. For whatever reason late last June the money was not specifically earmarked and it was put into a pool to be decided upon by the leadership of both houses. Treasury merely acts as the processor of the paper work. We receive a list from the Assembly and we receive a list from the Senate as to what grants will be included. That's then forwarded to the Joint Budget Oversight Committee...We [Treasury] are not involved at all in the approval process of those grants, those come to us pre-approved by the leadership of the Assembly and the Leadership of the Senate...*

See Testimony of John McCormac before Assembly Budget Committee on May 24, 2005; [http://www.njleg.state.nj.us/media/archive\\_audio2.asp?KEY=ABUB&SESSION=2004](http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=ABUB&SESSION=2004) starting at 2:02:08. Assemblyman O'Toole continued to press Treasurer McCormac for a clarification as to precisely what role, if any, the Treasury Department played in the selection of grantees:

Assemblyman O'Toole: *It just strikes me somewhat odd that this 88 million dollar allocation is in your department but yet you have no say as to the review, the selection or the follow-up in terms of auditing these grant monies.*

Treasurer McCormac: *We can audit – we can – but... somebody has to be in charge of it. The legislature can't spend money only the Executive Branch can spend the money so somebody had to be in charge of overseeing it and making sure the paper work was right – that was selected to be Treasury...*

See Testimony of John McCormac before Assembly Budget Committee on May 24, 2005; [http://www.njleg.state.nj.us/media/archive\\_audio2.asp?KEY=ABUB&SESSION=2004](http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=ABUB&SESSION=2004) starting at 2:02:08. Treasurer McCormac's testimony demonstrates that the Department of the Treasury was essentially used by the Legislative Branch as a location to warehouse the grant program money while the Legislative Branch determined how it wanted the money apportioned. In the end, Treasurer McCormac conceded that the Executive Branch had ceded its authority to administer the monies appropriated for the grant program to the Legislative Branch. "We don't handle any applications. Again, it comes to us pre-approved, they go [inaudible word] out. If there is an application process, it would be done from the legislature." Id. (emphasis added). Treasurer McCormac's testimony makes clear that the entirety of the decision making process regarding the grant program was left to the Legislature. Id.

Treasurer McCormac's testimony was confirmed by the Department of the Treasury in response to several Open Public Record Act requests. In response to Open Public Records Act requests for documents relating to the existence and administration of the grant programs, the Department of Treasury stated:

With regard to your request for any and all public notices announcing the existence of the grant programs; any and all general rules and regulations identifying the class of eligible applicants for funding; any and all documents setting forth the general ranking criteria by which competitive applications would be reviewed and criteria used to determine the amounts of funding ultimately awarded to grantees, the Department of Treasury has no records.

See Letter dated March 16, 2006 from Barbara O'Hare, Manager of the Government Records Access Unit to Thomas Neff, attached as Exhibit A to Plaintiff's Verified

Complaint. In response to requests for documents relating to the selection of grantees, Treasury advised:

With regard to your request for any and all communications or spreadsheets identifying specific organizations and contact information for the above described grant programs, all records in the possession of the Department of Treasury that list or name identified grantees are records from the Legislature and, therefore, exempt under OPRA.

Id. In response to a request for the documents the Legislative Branch provided to the Department of Treasury regarding the grants, Ms. O'Hare, the Manager of the Governmental Records Access Unit advised Plaintiff:

We have reviewed your Open Public Records Act (OPRA) Request W20154 for all documents provided to the Department of Treasury by any representative of the Legislature indicating support for an award of funds from (i) the Department of Treasury's \$40,000,000 Property Tax Assistance and Community Development Block Grants (FY 2006) or (ii) the Department of Treasury's \$88,000,000 Property Tax Assistance and Community Development Block Grants (FY2005)...Your request for records provided to the Department of Treasury by any representative of the Legislature seeks access to records which fall explicitly within the following exceptions to OPRA.

See Letter dated March 17, 2006 from Barbara O'Hare, Manager of the Government Records Access Unit to David W. Robinson, attached as Exhibit B to Plaintiff's Verified Complaint.

As the foregoing makes clear, the Executive Branch played only the most ministerial role in the administration of the funds appropriated for the "Property Tax Assistance and Community Development Grants."

**C. THE LEGISLATIVE BRANCH SELECTS ITS GRANTEEES**

The Legislative Branch, on the other hand, had total control of the most important aspect of the Grant Program – the selection of grantees and the amounts of money awarded to them. After appropriating the monies for the Grant Program to the Executive

Branch, the “leadership” or some other offices or employees of the Legislative Branch began to select grantees. This was done without public notice and without an open and competitive application process. Instead, it was based upon arbitrary decisions made by unidentified legislators or legislative staff. As Treasurer McCormac testified, all grant recipients were selected by the Legislative Branch and all grants were sent to the Executive Branch in the form of lists that were “pre-approved” by the Legislative Branch. Furthermore, the Executive Branch acknowledges that any documents in its possession relating to the award of grants came from the Legislative Branch and that they have no records relating to the administration of the Grant Program.

Emboldened by its new-found ability to administer the funds it appropriated, the Legislative Branch set forth to demonstrate its largesse. To do so, it was barely required to look outside the confines of the State House. For instance, on December 7, 2004, the Treasury Department sent three separate letters to Carmella Riccie, the Town Clerk for the Town of West New York, New Jersey, the town where then-Speaker of the Assembly Albio Sires was, and is, Mayor. Each letter advised that “as part of the Fiscal Year 2005 State budget, your organization has been awarded” a grant. (Notwithstanding the letter’s claims to the contrary, the Fiscal Year 2005 budget contains no such grant or appropriation language to the Town of West New York). The first letter to Ms. Riccie indicates West New York was award \$1,350,000 for street paving. Another advised of a \$1,400,000 grant for “upgrades for recreational facilities.” A third letter advised of a \$250,000 grant for “downtown beautification.” Amazingly, on January 19, 2005, nearly one month after the award letters went out, Mayor/Speaker of the Assembly Sires executed three separate resolutions authorizing the Town of West New York to apply for

the grants it had already been advised it had been awarded. Finally, on January 25, 2005, the Department of the Treasury wrote to Mayor/Speaker of the Assembly Sires to advise that, based upon the “grant application,” a copy of the grant agreement was enclosed. See Exhibits H through J to Plaintiff’s Complaint.

Union City benefited from a similar sequence of events. On December 6, 2004, the Treasury Department sent a letter to the Mayor of Union City, Brian Stack. Mayor Stack is also a member of the General Assembly. The purpose of Treasury’s letter was to advise Mayor/Assemblyman Stack that “as part of the Fiscal Year 2005 State budget, your organization has been awarded a \$150,000 grant for vehicles for Department of Public Works.” Two weeks later, on December 21, 2004, the Union City Board of Commissioners authorized the City to apply for such grants. See Exhibits K through N to Plaintiff’s Complaint.

On December 8, 2004, the Treasury Department advised Mayor/Assemblyman Stack that Union City had also been awarded grants for its “master plan” (\$100,000) and for “vehicles for Parks Department” (\$150,000) as part of the Fiscal Year 2005 State budget. (A review of the Fiscal Year 2005 budget reveals no language evincing grants to Union City). Before allowing that gravy train to pass it by, however, the Board of Commissioners of Union City adopted resolutions authorizing the city to “apply” for those grants on December 21, 2004. Research of counsel has revealed no *nunc pro tunc* – style mechanism by which municipalities can retroactively apply for grants they have already been awarded. Id.

The scenarios set forth above were repeated throughout 2004 and 2005 and continue to occur in 2006. In fact, between December 13, 2005 and January 9, 2006,

alone, the Department of the Treasury submitted nine (9) pages of grant recipients to the Joint Budget Oversight Committee for “approval” pursuant to the Fiscal Year 2006 Appropriations Act. These lists identify an additional \$1,950,000 in grants to the Town of West New York where Assemblyman Sires, “Speaker Emeritus” of the Assembly, is the Mayor, an additional \$150,000 in grants to Union City where Assemblyman Stack is the Mayor, and approximately \$750,000 to Lawnside where Mark Bryant, the brother of Senator Wayne Bryant, is Mayor and where Senator Bryant’s law firm is Solicitor.<sup>1</sup> See Exhibits C through E to Plaintiff’s Complaint.

Monies continue to be dispensed in an unconstitutional manner from both the 2005 and the 2006 funds comprising the “Property Tax Assistance and Community Development Grants.” Indeed, from February 28, 2006, through March 27, 2006, more than \$3,000,000 was disbursed from the funds appropriated in the 2006 Appropriations Act.

## **LEGAL ARGUMENT**

### **A. REQUIREMENTS FOR INJUNCTIVE RELIEF**

It is well settled that a party is entitled to injunctive relief where that party demonstrates that (i) it has a reasonable probability of success on the merits of its claims; (ii) absent such injunctive relief, it is probable the moving party will sustain irreparable harm; and (iii) the non-moving party will not suffer any legitimate injury from the

---

<sup>1</sup> Aside from being unconstitutional, the decision by members of the legislature to award grants to towns where they or family members hold jobs raises serious ethical concerns.

issuance of such an injunction. See Crowe v. De Gioia, 90 U. 126, 132-34 (1982); Zoning Bd. of Adjustment of Township of Sparta v. Service Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985). Harm is “irreparable when it cannot be adequately compensated in damages or when there exists no certain pecuniary standard for the measurement of the damage.” See Scherman v. Stern, 93 N.J. Eq. 626, 631 (1922). “The object of an interlocutory injunction is to prevent some threatening irreparable mischief which should be averted until opportunity is offered for a full and deliberate investigation of the case.” Outdoor Sports Corp. v. American Federation of Labor, Local 23132, 6 N.J. 217, 230 (1951). As discussed below, Plaintiff has unequivocally demonstrated his entitlement to not only the declaratory relief sought, but the injunctive relief as well.

**B. THE ACTS VIOLATE THE DOCTRINE OF SEPARATION OF POWERS**

On their face and in their implementation, the Fiscal Year 2005 and 2006 Appropriations Acts violate the New Jersey Constitution’s doctrine of separation of powers. 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 expressly provided in this Constitution.” N.J. CONST. ART. III, ¶ 1. In giving the Joint Budget Oversight Committee responsibility for approving the size, timing, and recipients of the grants at issue, the Acts violate that sacrosanct constitutional provision. They do so on their face, by permitting the Legislature to encroach on the Executive’s rightful role of administering monies appropriated by law. Moreover, the irrefutable evidence

demonstrates that, in practice, the Legislature wields its ill-gotten power vigorously, while the Executive acquiesces in that encroachment. For those reasons, the Acts are unconstitutional, and their enforcement must be enjoined.<sup>2</sup>

“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.

Plaintiff acknowledges 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, 96 S. Ct. 612, 683, 46 L.Ed. 2d 659 (1976)). Recognizing that some overlap between the power of the branches is permissible, the Courts have developed a workable

---

<sup>2</sup> These actions also violated the very language of the Appropriations Acts requiring the Treasurer to administer the funds and develop criteria for the awarding of grants.

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.

In the last two decades, the New Jersey Supreme Court and the Appellate Division have held on several occasions that the Legislature had impermissibly encroached on the authority of the Executive branch. The Byrne case, in particular, is analogous to the present matter. Byrne, supra, 90 N.J. 376. In Byrne, the Court adjudicated a controversy that began when the Legislature passed the Legislative Oversight Act over Governor Byrne's veto. The Legislative Oversight Act permitted the Legislature to disapprove of most administrative regulations promulgated by the Executive Branch by passing a concurrent resolution in the General Assembly and the Senate. The Governor considered the act to be unconstitutional, and directed his department heads to disregard the law. The General Assembly then sought a declaratory judgment that the act was constitutional.

On direct certification to the Supreme Court, the Court held that the act was indeed unconstitutional. It noted that the power to make administrative rules and regulations was at the heart of the functions of the Executive Branch. Id. at 386.

Because the powers granted to the Legislature under the act infringed on such a central function of the Executive, and because those powers would enable that infringement on a routine and repeated basis, the Court held that the act could not stand. “[I]f an exercise of functions which lie at the center of another branch is attempted on a long-term and routine basis, a violation of the constitutional rule requiring separation of powers is established.” Id. at 388 (citation and quotation omitted.)

Also apposite to the present matter are related cases in which the Legislature attempted to closely prescribe the way in which the Executive exercised its authority to administer appropriated funds. In both Karcher v. Kean, 190 N.J. Super. 197 (App. Div. 1983), affirmed in part and reversed in part, on other grounds, at 97 N.J. 483 (1984), and Florio, supra, 130 N.J. 439, Courts held that the Legislature had gone too far in instructing the Governor how to conduct reductions in the State’s workforce. The Kean case involved an appropriations bill that, among other things, required the Governor to obtain prior approval from the Subcommittee on Personnel of the Joint Appropriations Committee for certain personnel decisions. The Appellate Division rejected that requirement as a violation of the separation-of-powers doctrine. “The disbursement of appropriations is a function of the Executive Branch,” it wrote. Kean, supra, 190 N.J. Super. at 213. The Court made clear that the line between the Legislature and the Executive must remain clear when it came to the appropriation and disbursement of public funds. “[The Legislature] cannot administer the appropriation once it has been made. When the appropriation is made, its work is complete and the executive authority takes over to administer the appropriation to accomplish its purpose, subject to the

limitations imposed.” Ibid. The Legislative oversight function at issue was therefore unconstitutional.

In Florio, the Court held that the Legislature’s cooperation and oversight were not necessary to assist the Governor in making the staff reductions required by the duly-enacted appropriations law. Florio, supra, 130 N.J. at 461. That case involved a detailed appropriations law that purported to be able to instruct the Governor which categories of employees to lay off first. “[T]he Legislature’s attempt to ‘micromanage’ the staffing resource allocations in administering the appropriated funds was a serious intrusion on the Governor’s authority and ability to perform his constitutionally-delegated functions.” Ibid. The Court held that the Governor required no cooperation from the Legislature to achieve the needed staff reductions. “The Governor had the ability – and indeed the duty – to make the necessary personnel cuts so as to enable the agencies to continue to function as efficiently and effectively as possible.” Ibid. That legislative infringement on the Executive’s prerogative with respect to administering appropriated funds was therefore also unconstitutional.

The parallels between the foregoing cases and the present matter are apparent. As in Byrne, the Acts have reserved in the Legislature the ability to regularly exercise a core function of the Executive Branch. As in Kean, the Acts’ current scheme submits Executive decision making to the plenary oversight of a legislative subcommittee. And as in Kean and Florio, the recent scheme gives the Legislature the ability to micromanage a specific task left for the Executive to carry out. The Legislature simply cannot be permitted to diminish the Executive’s authority in that way.

The underlying, substantive purposes of the Grant Programs do not require the Legislature to make such incursions. The Executive Branch is fully capable of administering the modest, relatively simple Grant Programs at issue. The Legislature appropriated the money, now it must step out of the way to let the Executive administer the program. Clearly, the Acts create more than the substantial potential for interference by the Legislature with a core function of the Executive Branch. They have created a very real, and unwarranted, infringement on the power of the Executive.

That conclusion is only underscored when one considers the manner in which the unconstitutional programs have actually been put into practice. The Treasurer, to whom the Acts give at least initial discretion to award the grants, has wholly abdicated his authority to administer the appropriated funds. With regard to the FY 2005 Act, Treasurer McCormick candidly admitted that he held no competitive application process for the grants. Rather, he merely implemented the wishes of the leadership of the Assembly and the Senate by (1) receiving instructions from the Legislature as to how to distribute the money; (2) allocating the grant money to those specific "pre-approved" projects; and (3) in a redundant step, submitting those projects to the Joint Budget Oversight Committee for rubber-stamp re-approval. The Treasurer further admitted that he reduced his role in the process to a purely ministerial one of, for lack of a better phrase, writing the checks the Legislature told him to write.

A merely ministerial role of simple check writing would have been acceptable and proper had the Legislature and the Executive agreed on specific appropriations for targeted projects. But the Acts did no such thing. They appropriated pools of money to be disbursed to worthy recipients after an application process. The programs were

general and non-specific in nature, and as such required the administration of the Executive Branch, without interference from the Legislature. That is not what they received.

New Jersey is not the first State to concoct such unconstitutional spending schemes. Although the holdings of the aforementioned New Jersey cases represent both binding and persuasive precedent, other Courts in other States have struck down even more analogous legislative infringements on the Executive Branch. For example, in McInnish v. Riley, 2005 Ala. LEXIS 161 (Sep. 30, 2005), an Alabama taxpayer challenged a program that appropriated \$11.7 million for community service grants for educational purposes. The program was administered by the Joint Legislative Oversight Committee, a body comprised of 13 members of the Alabama House of Representatives and the Alabama Senate. The plaintiff argued that the program violated the separation of powers clause in the Constitution of the State of Alabama, as it allowed legislators to administer funds they had already appropriated. The Alabama Supreme Court agreed. Looking to precedent from both Alabama and elsewhere, the Court held that the community service grant program was unconstitutional.

Alabama's Constitution contains a separation-of-powers clause similar to New Jersey's. It reads: "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Ala. Const. 1901, § 42. The Court concluded that the law at issue had granted the legislative committee the discretion necessary to administer the grant program. Id. at 28. The Executive Branch,

on the other hand, had been relegated to the mere ministerial task of writing the checks the committee had ordered. Ibid. That was not acceptable under the doctrine of separation of powers. The Court wrote, “[t]he Legislature cannot . . . execute the laws it enacts . . . [and] may not create a committee of its own members to spend appropriations at the committee’s discretion without at least [some degree of] executive branch control[.]” Id. at 39. “Because the grant-making process created by [the act] begins and ends with the legislature, it violates the separation-of-powers provisions of the Constitution of Alabama.” Id. at 40.

Other jurisdictions have reached similar results. See, e.g., Stockman v. Leddy, 129 P. 220 (Colo. 1912), overruled on other grounds by Denver Ass’n for Retarded Children, Inc. v. School Dist. No. 1, 535 P.2d 200 (Colo. 1975) (joint legislative committee given right to protect State’s water rights and hire counsel, etc. violated separation-of-powers doctrine); Arizona ex rel. Woods v. Block, 942 P.2d 428 (Ariz. 1997) (committee comprised of appointees by members of the Legislature and designee of Governor was legislative body that may not perform executive functions); Alexander v. Mississippi, 441 So. 2d 1329, 1341 (Miss. 1983) (members of Legislature may not serve on commissions and boards that perform executive functions; “Once taxes have been levied and appropriations made, the legislative prerogative ends, and executive responsibility begins to administer the appropriation and to accomplish its purpose”); South Carolina ex rel. McLeod v. McInnis, 295 S.E.2d 633 (S.C. 1982) (Joint Appropriation Review Committee, comprised of 12 members of Legislature, may not jointly oversee government expenditures with Governor); Kansas ex rel. Schneider v. Bennett, 547 P.2d 786 (Kan. 1976) (state finance council, whose members included

members of Legislature, may not exercise power or authority over administrative functions of State government). In the same way, this Court should reject the unconstitutional scheme created by the Acts that permits members of the Legislature to administer the very Grant Program for which they have already appropriated the money.

**C. THE TREASURER HAS ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER**

The disbursements of the grants at issue pursuant to the Acts are contrary to the New Jersey Constitution and the State's statutes for another reason: they have been made in an arbitrary and capricious manner. It is axiomatic that State action that is arbitrary is unconstitutional. Kean, supra, 190 N.J. Super. at 225; Shelton College v. State Bd. of Ed., 48 N.J. 501 (1967). Arbitrary State action also violates the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. Karins v. City of Atlantic City, 152 N.J. 532 (1998).

In administering the programs at issue, the Treasurer's actions have been nothing if not arbitrary. The Treasurer admitted that he accepted no applications for the grants. Indeed, he exercised none of his rightful authority in connection with the program, except to write the checks the Legislature ordered. The only justification for the Treasurer's actions in doing so was that the Legislature told him to do it. Worse, in an administrative maneuver that would make Alice in Wonderland's Queen of Hearts proud, the Treasurer announced decisions granting an award *before the beneficiaries even submitted their applications!* The Executive's complicity in this unconstitutional scheme has been the essence of arbitrariness.

In truth, the programs created by these Acts are little more than legislative slush funds to which only a powerful few have access. The funds are subject to no public

scrutiny or oversight, as evidenced by the Treasury Department's refusal to disclose legislative documents used to unconstitutionally determine grantees and award amounts. Furthermore, the Executive has chosen not to check the Legislative Branch's determinations with its constitutional authority. That the Executive has participated in this shameful game is of no avail. The portions of the Acts at issue have upset the proper balance among the branches, and the excesses that have resulted are plain to see. To uphold the integrity of the Constitution, and to protect the taxpayers of New Jersey from further abuses, the Judiciary must intervene now.

Failure to intervene will serve only to steel the Legislature in its "ability" encroach on the dominion of the other branches so that it may reap rewards for itself and its members.

Mankind will soon learn to make interested uses of every right and power which they possess or may assume. The public money and public liberty, intended to have been deposited with three branches of magistracy but found inadvertently to be in the hands of one only, will soon be discovered to be sources of wealth and dominion to those who hold them; distinguished, too, by this tempting circumstance: that they are the instrument as well as the object of acquisition. With money we will get men, said Caesar, and with men we will get money.


Thomas Jefferson: Notes on Virginia Q.XIII, 1782.

### **CONCLUSION**

Based upon the foregoing, Plaintiff respectfully submits that the Court should grant his Order to Show Cause and declare the Fiscal Year 2005 and Fiscal Year 2006 Appropriations Acts to be unconstitutional, declare that the administration of the "Property Tax Assistance and Community Development Block Grants" program is unconstitutional, enjoin the Department of the Treasury from expending any more of the

monies remaining in the Grant Program in an unconstitutional manner and compelling the Executive Branch to seek to recover all grant monies awarded in an unconstitutional manner.

DRINKER BIDDLE & REATH LLP

By:   
Mark D. Sheridan  
James Webber

500 Campus Drive  
Florham Park, NJ 07932  
(973) 360-1100 (Telephone)  
(973) 360-9831 (Facsimile)

Attorneys for Plaintiff,

David W. Robinson