



**IN THE CIRCUIT COURT OF
 MONTGOMERY COUNTY, ALABAMA**

THOMAS, MEANS, GILLIS,)	
& SEAY, P.C.,)	
)	
Plaintiff,)	
)	
v.)	NO. CV-10-900394
)	
THOMAS L. WHITE, JR., etc.,)	
)	
Defendant.)	

MOTION TO DISMISS

Defendant Thomas L. White in his representative capacity as State Comptroller of the State of Alabama “(White”), hereby moves this Court to dismiss this action, as provided in Ala. R. Civ. P., Rule 12(b)(1) and Rule 12(b)(6). This Court lacks subject matter jurisdiction to order Defendant White to provide a warrant to pay the plaintiff from the State treasury. The Complaint also fails to state a claim upon which relief may be granted. As further grounds, Defendant White shows the following:

1. The Complaint seeks relief not permitted from this Court by § 14 of the Constitution.
2. The Complaint seeks relief on the basis of conduct which reflects the exercise of discretion in an official capacity as State Comptroller under Ala. Code § 41-4-50(4) in auditing work never before approved by the Governor. *See State ex rel. Daly v. Henderson*, 74 So. 951, 952 (Ala. 1917)(approval of attorney charges is discretionary). The payment of an attorney from general appropriations is not the kind

of ministerial duty traditionally subject to mandamus relief. *See State ex rel. Troy v. Smith*, 65 So. 942, 942-43 (Ala. 1914)(denying mandamus for warrant directing payment to attorney lawfully hired by Governor) .

3. The Complaint seeks payment for services not authorized by law. Neither the House of Representatives nor the Joint Legislative Contract Review Committee has received authority in its enabling statute, Act No. 84-277 (codified at Ala. Code § 29-2-40 *et seq.*), to agree to pay for professional attorney services to seek a court order to prevent the Executive Department from entering contracts.

4. The Complaint seeks payment for activities not authorized by the Alabama Constitution. The Alabama Constitution bars the House of Representatives, and its agencies like the Joint Legislative Contract Review Committee, from choosing attorneys to sue in its name to stop the execution of contracts. *See Ala. Const.*, art. iii, sec. 43 (“the legislative department shall never exercise the executive and judicial powers”); *id.*, art. v, sec. 120 (“The governor shall take care that the laws be faithfully executed.”); *McInnish v. Riley*, 925 So.2d 174 (Ala. 2005).

5. For the additional reasons set out in the attached Memorandum, the action is due to be dismissed.

Therefore Defendant White urges this Court to enter an order dismissing the action.

Respectfully submitted this 5th day of May 2010.

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CERTIFICATE OF SERVICE

I certify that on the 5th day of May, 2010, I e-filed and served through the Court's Alafile system a true and correct copy of the foregoing Motion to Dismiss to all parties as follows:

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Of Counsel



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DEFENDANT THOMAS L. WHITE’S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

This action seeks money from the State Treasury for professional services rendered by the Plaintiff law firm Thomas Means Gillis & Seay, P.C. (“Plaintiff”) before the Joint Legislative Contract Review Committee (“the Committee”) of the Alabama House of Representatives. The Plaintiff seeks a writ of mandamus to require the State Comptroller Thomas L. White to pay it some \$78,000.

But the Plaintiff’s client overstepped its authority, and Plaintiff seeks payment not for the internal expenses of legislative operations. Rather, Plaintiff wants an order to pay it for an effort by House officials to execute law in the judicial department-- in a manner not even authorized by statute, and consistently disputed by the Governor. Worse, Plaintiff claims that executive officials have no discretion under their own statutory directives in Ala. Code § 41-4-50 to second-guess legislative requests for payment of these kinds.

For the reasons explained in more detail below, the Complaint is due to be dismissed.

STATEMENT OF FACTS

In October 2009, Plaintiff contracted with the House of Representatives to “advise, consult, and assist the Joint Legislative Contract Review Committee on any matters that come before the committee.” Complaint at 1 ¶ 4. In the Committee’s Legal Services Contract Review Report, Plaintiff’s contract was described in somewhat more limited language-- it specifically mentioned “the matter pertaining to [the] contract between Finance Dept. and Paragon Source.” *Id.* at 2 ¶ 5.

As State Comptroller, under Ala. Code § 41-16-51, Defendant White heads the division of control and accounts of the Department of Finance. He is appointed by the Director of Finance with the approval of the Governor. As explained in Ala. Code § 41-4-50, White’s division has the duty “(3) [t]o control and make records of all payments into and out of the State Treasury,” and “(4) [t]o preaudit and determine the correctness and legality of every claim and account submitted for the issuance of a warrant . . . before any warrant on the State Treasury shall be issued. . . .”

Plaintiff alleges that, in late October 2009, its attorneys served as legal counsel to the Committee and its Chairman in filing suit against several defendants, including the Department of Finance and Paragon Source, LLC. *See* Complaint at 2 ¶ 6. Other

defendants included Governor Riley, Director of Finance Bill Newton, and two principals of Paragon Source, LLC. *Id.*

The case was filed in Montgomery County Circuit Court. *See Holmes v. State Dept. of Finance, et al.*, No. CV-2009-901275, Petition for Declaratory and Injunctive Relief (15th J.D. Cir., Ala., Dec. 23, 2009)(“the *Holmes* case”). However, all the circuit judges who reside in Montgomery County recused, and the case was submitted for assignment to a judge outside the circuit court for Montgomery County. The case was assigned by the Chief Justice to the Honorable Tom King, Jr., who is a resident of Jefferson County. The suit was dismissed on December 23, 2009. *See id.*, Order (“December 23 Order”).

The December 23 Order is attached hereto as Exhibit A. The Court ruled that the plaintiffs Holmes and the Committee lacked standing to sue because they had suffered no “injury” from the Paragon Source, LLC contract being entered allegedly in violation of the competitive bid laws, Ala. Code § 41-16-31. *See* Order at 3 (discussing, *Ex parte Richardson*, 957 So.2d 1119 (Ala. 2006)). The Court also found the claims by Holmes and the Committee were moot because the disputed contract had been executed by the parties, reviewed by the Committee, and signed by the Governor. *See* Order at 6. And, the Court also wrote that the complaint reflected non-justiciable political questions. *Id.* at 6-7.¹

¹The Court dismissed Governor as a party because he was not a party to the disputed Paragon contract, and was not accused of violating any statute merely by

In December 2009, just before dismissal of the *Holmes* case, the State paid Plaintiff's October invoice. The Complaint contains no allegation that the Plaintiff's October 2009 invoice reflected attorney work pursuing the *Holmes* case, only an allegation that the invoice was "properly paid," *see* Complaint at 5 ¶ 17. Now Plaintiff seeks payment of two additional invoices for legal services submitted to the Clerk of the House of Representatives in December and January 2010 and totaling over \$78,000. *See* Complaint at 3 ¶¶ 11, 12; *id.* at 6.

Thereafter in February 2010, White declined to draw a warrant on the State Treasury on the basis of a voucher submitted for Thomas Means Gillis & Seay, PC. *Id.* at 3-4 ¶ 13 & Ex. 3. Though the Complaint is not precisely clear, paragraph 14 can be read to allege that this decision referred to a voucher based on the Plaintiff's November and December invoices. *Id.* at 4 ¶ 14. The Complaint makes a specific allegation that the November and December invoices were not paid in a later paragraph. *Id.* at 5 ¶ 17 (under "Count I").

In his February 2010 letter refusing issuance of a warrant for the Plaintiff, White advised that the voucher was based on "an obligation undertaken by an instrumentality of the state without authority to do so." *Id.* at 3 ¶ 13, Ex. 3. White's letter referred to his own duty under Ala. Code § 41-4-50 (4) "to preaudit and determine the correctness and legality of every claim and account submitted for the issuance of a warrant." *Id.*

approving it. *See* Order at 7-8.

White also noted that Ala. Code § 29-2-41 defines the authority of Plaintiff's client, the Committee. White saw that authority as limited to "reviewing contracts for personal or professional services," and providing "comment" on them. *Id.* White also advised that the authority does not include the power to "interfere with execution of a contract," or implicitly "the power to sue." *Id.*

Plaintiff filed its Complaint against White on March 30.

ARGUMENT

I. Section 14 of the Constitution Denies this Court Jurisdiction over the Complaint.

The "threshold issue" where an officer of the legislature seeks judicial relief about money he is due by agreement with the legislature is whether § 14 of the Alabama Constitution bars the action. *See Gunter v. Beasley*, 414 So.2d 41, 48 (Ala. 1982)(expense money for legislature's presiding officers). Section 14 says that "the State of Alabama shall never be made a defendant in any court of law or equity."

In fact, here, the State is a defendant. As the Complaint is framed by the Plaintiff, the State is the real party in interest, despite the caption and names of the parties designated. *See Alabama Dept. of Transportation v. Harbert Int'l*, 990 So.2d 831, 839, 844-46 (Ala. 2008); *Williams v. John C. Calhoun Community College*, 646 So.2d 1, 3 (Ala. 1994); *Wallace v. Malone*, 182 So.2d 360 (Ala. 1964); *Comer v. Banked*, 70 Ala. 492 (1881). "[T]he Court considers the nature of the suit or the relief demanded, not the character of the office of the person against whom the suit is

brought.” *ALDO v. Harbert Int’l*, 990 So.2d at 839 (citations omitted). “Section 14 prohibits actions against state officers in their official capacities when those actions are, in effect, against the State.” *Id.*(quoting, *Halley v. Barber County*, 885 So.2d 783, 788 (Ala. 2004)).

The Complaint itself shows that the claims are against the State. In paragraph 17, the Complaint says that “the State of Alabama, by and through Defendant White, has failed and refused to pay Plaintiff for the work described in Plaintiff’s November 2009 and December 2009 Invoices, totaling \$78,355.05, thereby causing a breach of the subject contract. . . .” Complaint at 5 ¶ 17.

Plaintiff seeks an order to require Defendant White to pay money from the State Treasury because of Plaintiff’s contract with the House of Representatives. The last sentence of the Complaint says that the Plaintiff demands “a writ of mandamus compelling Defendant White to issue payment to Plaintiff in the amount of \$78,355.05. . . .” *Id.* at 6.

The Complaint purports to seek mandamus relief against White in his official capacity. While a writ of mandamus requiring performance of a ministerial act can be recognized as an exception to the bar of § 14, *see Gunter*, 414 So.2d at 48, this Complaint does not qualify.

II. The Complaint Fails to Show A Proper Basis for Mandamus Relief.

Were this Complaint deemed to be an action for a writ of mandamus outside the bar of § 14, still, there are three other grounds that mandamus relief would not be

available against White.

First, the Complaint is not “verified by affidavit.” By its terms, Ala. Code § 6-6-640 requires the petition include an affidavit verifying its allegations briefly and succinctly. *See Ex parte Ackles*, 840 So.2d 145, 146 (Ala. 2002).

Second, the terms of the Complaint, and the nature of White’s duties, establish that Plaintiff seeks a remedy which would constrain his discretion, rather than enforce a ministerial duty. The Comptroller’s job is “[to preaudit and determine the correctness and legality of every claim and account submitted for the issuance of a warrant. . . .” Ala. Code. § 41-4-50(4). That kind of responsibility calls sufficiently for judgment that mandamus is not an appropriate remedy.

For instance, in *Lyons v. Norris*, 829 So.2d 748 (Ala. 2002), the Supreme Court reversed the issuance of mandamus relief against the Comptroller. The Court read § 41-4-50(4) to provide that the Comptroller was “acting within the scope of [his] authority in auditing and disallowing payments” for attorney overhead expenses incurred in defense of indigent clients, *id.* at 754. The dispute arose because the overhead expenses “had not been approved in advance as required by § 15-12-21(d),” *id.* That statute requires a trial court approval before incurring an expense, and read: “Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court,” Ala. Code § 15-12-21(d). The Supreme Court rejected the argument that § 15-12-21(d) provided for payment of overhead expense vouchers if approved by the trial court before submission to the

Comptroller. Accordingly, mandamus relief was not proper. *See Lyons v. Norris*, 829 So.2d at 753.

Also, in *State ex rel. Daly v. Henderson*, 74 So. 951 (Ala. 1917), the Supreme Court upheld the refusal of mandamus relief against the Governor in connection with payments to an attorney hired by the Attorney General. The statute provided for the expense of the attorney to be “paid by warrant drawn by the state auditor upon certificate of the Attorney General of accounts properly itemized and sworn to, such certificate to be approved by the Governor.” 1915 Ala. Acts 719, § 6. The Supreme Court did not regard the Governor’s role as “merely one of calculation.” 74 So. at 951. It concluded that the Governor’s role in the payment process does not “exclude the right of the Governor to exercise judgment and discretion in approving or disapproving expenditures submitted to him.” 74 So. at 952. The Court was also concerned that these kind of “extraordinary expenditures” be subject to “a proper balance of power” between the Governor and the Attorney General. The Governor’s duty to take care “that the laws be faithfully executed” also implied that, in the payment process, he not be “a marionette to be moved by a string in the hand of another.” *Id. Compare, id., with, State ex rel. Turner v. Henderson*, 74 So. 344, 346 (Ala. 1917)(no dispute by Governor to propriety of services claimed in invoice, demurrer to mandamus petition wrongly granted).

Here too, the approval and payment sought is for attorney work. It is likely that the § 41-4-50(4) duty to “preaudit” and “determine the correctness and legality” of a

claim for attorneys fees and expenses should be a matter of some discretion. Moreover, the paying of attorneys for suit, being an “extraordinary expenditure” under existing precedent, implies that the review under § 41-4-50(4) is not likely to be so routine as to be ministerial.

The cases cited in the Complaint for authority to issue mandamus relief involve only claims for activity within the same Department of the government. In fact, all of claims for contracts with the Highway Department. *See ALDO v. Harbert Int’l, supra*; *State Highway Dept. v. Milton*, 586 So.2d 872 (Ala. 1991); *State Board of Administration v. Roquemore*, 117 So. 757 (Ala. 1928). None construe the statutes which define the role of the Comptroller.

In contrast, the claims made here come from outside the Executive Department; not with the Governor’s pre-approval. Moreover, the Plaintiff’s particular claim here apparently is based on suit against the Governor in court, and those court proceedings were not undertaken with his approval. The Plaintiff’s contract with the House does not authorize, on the face of the document, filing suit in the courts of the State. The contract says only that plaintiff “shall advise, consult, and assist the Joint Legislative Contract Review Committee on any matters that come before the Committee.” To achieve a “proper balance of power” between the Governor and the legislature, the Comptroller’s duty in § 41-4-50(4) to “preaudit and determine the correctness and legality” of this claim should be construed to reflect a discretion not subject to mandamus relief.

The third reason that mandamus is not appropriate is the disjunction between the relief sought by the Complaint and the statutory authority of the Comptroller. As written, the Complaint seeks “payment” from White as Comptroller. However, as Comptroller, White is authorized only “to draw every warrant.” *See* Ala. Code § 41-4-50(5)(a). He has no authority in his official capacity to make “payment.” The issuance of a warrant plainly is not the same as payment, a duty of the Treasurer. *See* Ala. Code § 36-17-3(4) (describing duty of treasurer “to *pay* all warrants duly executed by the Comptroller”). *See also*, Ala. Const., art. iv, sec. 72 (“No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof . . .”).

In sum, this Complaint does not reflect a proper claim for mandamus relief.

III. The Relevant Statute, Ala. Code § 29-2-41, Shows the Comptroller Correct to Refuse a Warrant for Plaintiff’s Work.

In addition to being an improper subject of mandamus relief, the Comptroller’s judgment about the correctness and legality of the disputed invoices is right. Under *Lyons v. Norris, supra*, if the claimed expense is not undertaken in the manner provided by law, it is due to be rejected. The Plaintiff’s claims are not based on expenses permitted by law to be incurred.

The House is not authorized by law to enter a contract providing for the Committee, or its Chair, to sue Executive Department officials. The Committee has limited responsibilities set out in Ala. Code § 29-2-41. In a nutshell, the Committee is

charged with “reviewing contracts for personal or professional services with private entities or individuals to be paid out of appropriated funds . . .” It must do so “within a reasonable time not to exceed 45 days” after submission to the Committee. *Id.*

In the Committee’s statute, there is no mention of suits, or the hiring of attorneys for the Committee to bring suit. At best, the Committee “has power to issue subpoenas for any witnesses and to require the production of any documents or contracts . . . it needs to examine in the conduct of its duties.” *Id.* By the plain terms of the statute, the Committee is limited to review of contracts. Such power traditionally has not allowed the bringing of suit. *See Powers v. U.S. Fidelity & Guaranty Co.*, 182 So. 758, 758-59 (Ala. 1938)(citizen not authorized by statute to sue treasurer for legislative expenses paid under surety contract).

The statute addresses money when it is meant to be available. And, it is limited. Thus, the statute provides for committee members only to “be entitled to regular legislative compensation, per diem, and travel expenses for each day he or she attends a meeting of the committee. . . .” *Id.* There is no provision for members to receive expenses of an attorney for bringing suit.²

²The omission of a provision authorizing the Committee to seek court relief is telling. The legislature provided such authority to the Chief Examiner of the Department of Examiners of Public Accounts. *See* Ala. Code § 41-5-16 (“power to issue subpoenas” and to “invoke the aid of any circuit court in order that the testimony or evidence be produced.”) The omission thus implies that the initiation of a court action is not meant to be authorized for the Committee. *See, e.g., Ex parte Holladay*, 466 So.2d 956, 960 (Ala. 1985); *Adams v. Mathis*, 350 So.2d 381, 386 (Ala. 1977)(maxim of *expressio unius est exclusio alterius*).

In *State ex rel. Troy v. Smith*, 65 So. 942 (Ala. 1914), the Supreme Court affirmed the dismissal of a suit for mandamus relief against the state auditor. The auditor had refused to issue a warrant for an attorney's charges for giving legal advice to the Governor. The Court rejected the argument that a general 1911 appropriation statute, which provided "[f]or the payment of all obligations of the state not, not herein specially enumerated. . .," was adequate to justify the warrant. 65 So. at 943 (quoting 1911 Ala. Acts 146). The Court noted that § 71 of the Constitution limited the "general appropriation bill" to "the ordinary expenses of the executive, legislative, and judicial department . . .," and barred appropriation in the general bill "for any officer or employe[e] unless his employment and the amount of his salary have already been provided for by law." The Court construed the 1911 statute in light of § 71, and concluded it did not "provide for payment of such claims as that for which the issuance of the warrant is sought." 65 So. at 943. *See also, Chisholm v. McGehee*, 41 Ala. 192 (1867)(appropriation statute lacks sufficient specificity to justify mandamus against comptroller to issue warrant for payment to salt commissioner).

The *Smith* case also held that a statute allowing the Governor to employ clerks does not imply the authority to hire an attorney. *See Smith*, 65 So. at 945. Specific provisions for hiring an attorney and the institution of suit in a bill for the employment of clerks was not "complementary to any idea expressed" in the original bill. Therefore the statute violated § 45 of the Constitution, and its requirement that bills reflect a single subject. *Id.* In reaching this conclusion, the Court discussed at length the

presumption of constitutionality for acts of the legislature, and the need to show a violation of the Constitution beyond a reasonable doubt. *Id.* at 945-46.

Here too, Ala. Code § 29-2-41 does not show a clear underlying legal right for the Committee to hire an attorney to bring suit. Therefore, the Defendant White may not be required by writ of mandamus to issue a warrant for payment from the State treasury.

IV. The Committee Lacks The Power Under the Alabama Constitution To Hire Attorneys To File Suit.

The Plaintiff's work, and payment for its work, is not authorized for an additional reason-- the Alabama Constitution does not permit the House to hire attorneys to file suit for the Committee. Even if Ala. Code § 29-2-41 could be construed to authorize the filing of suit in the courts, such activity is the execution of law, and not the exercise of legislative power. Such a construction of § 29-2-41 would make it unconstitutional.

The legislature, and its agencies, lack the power to execute law. Section 43 of the Constitution limits the power of the legislature, and it reads: "[T]he legislative department shall never exercise the executive and judicial powers." The "executive" department is constituted by several officers named in § 112 of the Constitution. None of them is an officer of the legislature. Section 113 confers "supreme executive power" on the Governor, and § 120 requires that "[t]he governor shall take care that the laws be faithfully executed."

A. Plaintiff’s Claim for Payment Is Inconsistent With Precedent Applying the Separation of Powers Doctrine.

One effect of these texts is to re-affirm that the Constitution limits the scope of mandamus relief from the judicial department. The remedy of mandamus is not available against the “supreme executive” when it seeks “to control or direct him in the performance of executive duties, about which he has a discretion. . . .” *Tennessee & Coosa Ry. Co. v. Moore*, 36 Ala. 371 (Ala. 1860)(discussing *Marbury v. Madison*, 5 U.S. 137 (1803)).

A second effect of these texts is to restrict the legislature’s ability to reserve for itself the execution of its laws, and the employment of persons to execute laws. In *McInnish v. Riley*, 925 So.2d 174 (Ala. 2005), the Supreme Court held that a permanent joint legislative committee could not be authorized to award community service grants. Two statutes which conferred such power on the committee, Act No. 98-677 (codified at Ala. Code § 29-2-120 *et seq.*) and Act No. 2004-456, an education appropriations law, were found to reflect a reservation of the execution of law for a committee of the legislature. Under the statutes, education grants were awarded and a warrant drawn by the Comptroller, an officer of the executive branch, at the direction of the Joint Legislative Oversight Committee on Community Service Grants. *See McInnish*, 925 So.2d at 178. In these statutes, the legislature purported to authorize “a committee of its own members to spend appropriations at the committee’s discretion without at least such executive-branch control as” the Governor exercises by veto. *Id.* at 188 (citing

Opinion of the Justices, No. 64, 13 So.2d 674 (Ala. 1943)(Governor has veto in war emergency council which had authority to spend money)). It was not enough that the actual issuance of warrants for funds for grant recipients was left to an executive branch official.

The *McInnish* decision relied extensively on *Opinion of the Justices, No. 380*, 892 So.2d 332 (Ala. 2004). There, several Supreme Court justices advised that a proposed bill to revise of the powers of the Contract Review Committee reflected in Ala. Code § 29-2-41. The bill permitted either house of the legislature to veto any contract subject to review of the Committee under Ala. Code § 29-2-41. *Id.* at 336-37. The Justices concluded that such a power would exceed the legislative power conferred by the Constitution. *Id.* at 337-39 & nn. 4, 5, 6.³ *See also, id.*, at 340-42 (Opinions of Lyons, J., and Woodall, J.).

Perhaps even more than the control of money and contracts, the bringing of suit is an executive activity not available to persons as legislative officials. If the legislature, or one of its committees, cannot veto a contract entered by the Governor to implement a statute, then neither can it attempt a veto by enlisting the courts.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that Congress could not retain for itself the appointment of personnel to administer the Federal

³They also perceived nullification of a contract by action of a single House to conflict with the requirements of § 63 of the Constitution: “[N]o bill shall become a law , unless . . . a majority of each house be recorded thereon as voting in its favor, except as otherwise provided in this Constitution.” 892 So.2d at 337 nn.4, 5 (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

Election Commission, and also “vest[] in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights.” *Id.* at 140. The Court contrasted this power to conduct civil litigation with the power to require witnesses to assist in performing investigative tasks associated with the development of legislation. “The Commission’s enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function.” *Id.* at 138 (discussing *McCrain v. Daugherty*, 273 U.S. 135 (1927)(seizure of Dept of Justice official as witness by warrant issued by resolution of Senate)). *Cf.*, *Morrison v. Olson*, 487 U.S. 654, 694-95 (1988)(appointment of special attorney by “court[] of law” under Art. II, sec.2 presents no danger of legislative usurpation of executive power).

Here too, Plaintiff seeks payment for his work that is beyond the power of its legislature client to command. Executive officials are limited to those powers designated by the Constitution. Defendant White was correct to conclude that the disputed invoices are for expenses that the legislature is not empowered to incur for payment by the State.

There is no text in the Constitution which plainly says that the legislature, or one of its two houses may contract to undertake court proceedings. None says that it may contract unilaterally to pay its agents to undertake court proceedings.

B. The Implicit Power of the Legislature to Make Law Does Not Require Payment of Plaintiff’s Claim For Service to the House.

Plaintiff argues that the House had implied power to contract “with outside counsel for any purpose,” and for the purpose expressed in the contract with the Committee. *See* Complaint at 4 ¶ 14. White contends that the Plaintiff has overstated the contracting power of the House reflected in the Constitution.

First, for a legislative body, the implied power to contract for service outside the legislature itself exists only as part of making law. Law-making is a multi-step process that requires approval of the entire legislature, not just one House. *See* Ala. Const., art. iv, secs. 61-64, 66. Law-making also requires approval of the Governor. *See* Ala. Const., art. v, sec. 125. The contract with the Plaintiff was not made expressly in accordance with these processes of law.

Moreover, the Plaintiff’s contract should not be deemed to be authorized implicitly, as if made by law. Were that true, there would be no logical end to the implicit legislative authority to interfere with the operation of government, and of the citizens, by its legislative committees initiating litigation. Such a rule of construction conflicts with common sense, and is a formula for legislative tyranny-- not a government of separated powers.

Second, even if there were a contract entered via law-making process, there has been no appropriation for payment of court proceedings by the legislature. Absent funding by appropriation, there is no law which requires the Comptroller to draw a warrant. *See Lyons v. Norris*, 829 So.2d at 753-54. A general appropriation for the legislature is sufficient only for “the ordinary expenses” of the legislature. *See* Ala.

Const., art. iv, sec. 71. There is no basis for finding that these ordinary expenses refer to the House or one of its Committees receiving money to undertake court proceedings in its own name. Under judicial precedents controlling on this Court, the expenses of such court proceedings are “extraordinary.” *State ex rel. Daly v. Henderson*, 74 So. at 952.

Plaintiff cites *Hart v. deGraffenried*, 388 So.2d 1196 (Ala. 1980), as authority for the Committee to hire the Plaintiff to appear in court as its attorney to stop the Governor from contracting with Paragon Source. *See* Complaint at 4 ¶ 14. But actually, the *Hart* case only construes the provision for legislator expenses to be paid under § 67 of the Constitution in “an amount to be fixed by the legislature,” and decides that the term “fixed” does not require the enactment of a statute. This provision relates only to the travel and pay of individual legislators. Neither § 67 nor its construction in the *Hart* case supports paying attorneys to file court proceedings in the name of legislative officials, or a Committee of the House, without a specific directive in a law.

For the pay of agents of the legislature, its “officers and employees,” § 67 of the Constitution requires more than an amount “fixed by the legislature.” For the pay of legislative officers and employees, there must be a statute. Under § 67, “[t]he legislature shall prescribe by law the number, duties and compensation . . .” the pay for these persons. As explained in *Hall v. Blan*, 148 So. 601, 607 (Ala. 1933), Section 67 is a safeguard “against excessive spending of legislative sessions,” and “[t]he

Legislature cannot confer on each House the power to make laws by resolution.”⁴

In summary, the legislature is barred by the Constitution from paying its agents to seek the enforcement of law in the courts.

CONCLUSION

For these reasons, Defendant White urges this Court to enter an order which dismisses the action. The absence of a remedy in the court does not leave Plaintiff without any relief. Plaintiff may be able to obtain payment from the State Board of Adjustment, and dismissal here is a precondition to assistance there. *See* Ala. Code § 41-9-62(a)(4),(b).

⁴The other case cited by the Plaintiff, *County Board. of Education v. Taxpayers*, 163 So.2d 629, 634 (Ala. 1964) provides no basis for finding that the legislature has the power to hire attorneys to sue the Governor. It held only that in construing a constitutional provision that provided for bonds to be sold for public education, and required the bonds to be subject to general laws “*now* pertaining to the issuance . . . of capital outlay warrants.” 163 So.2d at 633. A later-enacted statute was not deemed to be outside the scope of what was permitted to the legislature by the bond provision, particularly in light of the residual power of state legislative power. *Id.* at 634. The case hardly speaks to the kind of issues presented by a dispute over payment of attorneys in a dispute with the Governor over the power of the legislature to dispute the contracts of the Executive Department.

Respectfully submitted this 5th day of May 2010.

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State of Alabama, Department of
Finance

Attorneys for the Defendant Thomas L. White, Jr.

CERTIFICATE OF SERVICE

I certify that on the 5th day of May, 2010, I e-filed and served through the Court's Alafile system a true and correct copy of the foregoing Defendant Thomas L. White's Memorandum in Support of Motion to Dismiss to all parties as follows:

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s/ *Albert L. Jordan*
Of Counsel



IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALVIN HOLMES, as Chairman of the)	
Contract Review Permanent Legislative)	
Oversight committee of the Alabama)	
Legislature; and THE CONTRACT REVIEW)	
PERMANENT LEGISLATIVE)	
OVERSIGHT COMMITTEE OF THE)	
ALABAMA LEGISLATURE,)	
)	
Plaintiffs,)	Civil Action No.: CV-2009-901275
)	
v.)	
)	
STATE OF ALABAMA DEPARTMENT OF)	
FINANCE; BILL NEWTON, Acting Director)	
of Finance; BOB RILEY, Governor of)	
Alabama; PARAGON SOURCE, LLC;)	
JANET LAUDERDALE; and THOMAS)	
RABURN,)	
)	
Defendants.)	

ORDER

This matter comes before the Court on (1) the State Defendants’ Joint Motion to Dismiss, (2) Governor Bob Riley’s Motion to Dismiss, (3) Plaintiffs’ Response to Motions to Dismiss by Government Defendants, (4) Defendants’ Joint Reply in Support of Motions to Dismiss, (5) and Plaintiffs’ Response to Defendants’ Joint Reply. The Court heard oral argument on the motions on December 17, 2009. For the following reasons, the Court finds that Defendants’ motions to dismiss are due to be granted.

Plaintiffs are the Contract Review Permanent Legislative Oversight Committee of the Alabama Legislature and Representative Alvin Holmes, who sues “in his representative capacity as Chairman” of the Committee. Petition for Declaratory Judgment and Injunctive Relief ¶ 1. Plaintiffs sued the State of Alabama Department of Finance, Acting Director of Finance Bill

Newton, and Governor Bob Riley, along with Paragon Source, LLC, Janet Lauderdale, and Thomas Raburn. Plaintiffs contend that a professional-services contract between the Finance Department and Paragon was improperly let under the “sole source” exception to Alabama’s Competitive Bid Law. *See* Ala. Code § 41-16-75. As relief, Plaintiffs seek both (1) a preliminary injunction against the execution of the Paragon contract until such time as Plaintiffs have had a “meaningful opportunity” to review and comment on it and (2) a declaratory judgment that the Paragon contract is void and a permanent injunction against its performance.

Defendants argue that the Court lacks subject-matter jurisdiction. In particular, they contend (1) that Plaintiffs have no standing to bring this suit because they have not suffered any cognizable injury in their official capacities; (2) that Plaintiffs’ claim under the Competitive Bid Law is moot because the Paragon contract has already been executed and is now in effect; and (3) that Plaintiffs’ suit raises non-justiciable political questions. Separately, Governor Riley has moved for dismissal on the ground that he has no interest under the contract that will be affected by a declaratory judgment or injunction.

Plaintiffs respond that the Court has jurisdiction and that Governor Riley is a proper and indispensable party. Plaintiffs contend that they have standing to bring this suit in their official capacities because “the validity of their statutory duty” to review professional-services contracts rests, as relevant here, “on the validity of the sole source determination.” Plaintiffs’ Response to Motions To Dismiss at 1. Plaintiffs also argue that the question “whether a contract is void at its inception is not moot even if the contract has been fully performed” and that the Paragon contract has “many months of performance outstanding.” *Id.* at 1-2. Plaintiffs further deny that their suit raises non-justiciable political questions. Finally, Plaintiffs contend that the Governor

is “the person ultimately responsible for the State’s performance under the [Paragon] contract” and, therefore, is an “indispensable party to this suit.” *Id.* at 2.

I. The State Defendants’ Joint Motion To Dismiss

A. Standing

The Court finds that this action is due to be dismissed for lack of standing. Plaintiffs have not pleaded an actual injury that would give them standing to bring suit in their official capacities. “When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction.” *State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025, 1028 (Ala. 1999). The Contract Review Committee’s rights and responsibilities are clearly established by statute. As relevant here, Alabama law gives the Committee the right to “review and comment” on all professional-services contracts during “a reasonable time not to exceed 45 days after the [executive] department has submitted the contract ... to the committee.” Ala. Code. § 29-2-41. After 45 days, any “such contract shall be deemed to have been reviewed in compliance with this section.” *Id.*

Here, the Committee exercised its statutorily-prescribed “review and comment” duties. The Finance Department submitted the Paragon contract to the Committee, at the latest, by September 4, 2009. The Committee then “review[ed]” the contract, including by directing both information requests and subpoenas to the Finance Department and Paragon. On October 19, 2009 – the forty-fifth day counting from a September 4 submission date – the Committee stamped the contract “[r]eviewed” and returned it to the Finance Department. In doing so, the Committee exercised its prerogative to “comment” on the Paragon contract. In particular, when Chairman Holmes returned the contract, he “advised [Governor Riley] of the Committee’s concerns with the Subject Contract” and “requested that Governor Riley not approve and sign the

Subject Contract.” Petition for Declaratory Judgment and Injunctive Relief ¶ 19. When the Committee returned the contract to the Finance Department on October 19, its statutory 45-day “review and comment” period concluded. (Plaintiffs filed the instant lawsuit a little more than a week later on October 29, 2009.) Given that Plaintiffs exercised the rights and responsibilities that the Alabama Code expressly gives them, they cannot be deemed to have suffered a cognizable “injury.” Accordingly, they have no standing to sue.

The standing issue in this case is controlled by the Alabama Supreme Court’s decision in *Ex parte Richardson*, 957 So.2d 1119 (Ala. 2006). There, in granting mandamus review of a circuit court’s denial of a motion to dismiss, the Court held that a public official does not have standing to sue simply to ensure that “other officials with whom he deals will discharge their duties and responsibilities in accordance with law.” *Id.* at 1125. Rather, the Court concluded, in order to have standing, a public official must show that *his own* rights and responsibilities have been infringed. Because the plaintiff there had “not suffered an actual injury to his rights as a public official [or] been prevented from performing his duties,” he did not have the necessary standing to sue. *Id.* at 1126. The same result follows here. Plaintiffs’ complaint is that the Finance Department improperly let the Paragon contract on a sole-source basis. But Plaintiffs have not demonstrated how that alleged violation of the Competitive Bid Law infringed or diminished their own statutory authority to “review and comment” on the Paragon contract. Under *Richardson*, because Plaintiffs have not shown that they have suffered a cognizable legal injury to their own statutorily-specified rights, they lack standing to sue.

Plaintiffs contend that, even if their right to “review and comment” on the Paragon contract expired on October 19, they nonetheless have continuing “standing to seek a declaratory judgment as to whether the contracts they have been asked to review – and are statutorily bound

to review – are legally binding or void as a matter of law.” Plaintiffs’ Response to Motions To Dismiss at 3. The Court finds that neither the Committee nor its individual members, such as Chairman Holmes, have standing in their official capacities to sue to declare void a state professional services contract that the Committee has reviewed, commented on, and discharged in accordance with Ala. Code § 29-2-41. Plaintiffs rely on *City Council of Prichard v. Cooper*, 358 So. 2d 440 (Ala. 1978), to support their standing argument. But the Supreme Court in *Richardson* distinguished *Cooper* at length, and on grounds that apply here, as well. *See Richardson*, 957 So. 2d at 1125-26. In *Cooper*, the Court concluded that a city’s mayor had standing to challenge the city council’s enactments because the lawfulness of his own actions were squarely implicated; as mayor, he was obligated to “carry out the legislative decisions of the council” if they were valid. *Cooper*, 358 So. 2d at 441. Here, by contrast, the Committee is not bound to perform or enforce any contract submitted for its review. By contrast, the Committee’s prerogative under the Code is to “review and comment” on contracts within its jurisdiction. It exercised that prerogative here.

Finally, it must be noted that the Committee’s role is advisory; the Code does not give it authority to disapprove contracts submitted for its review. Indeed, the Alabama Supreme Court recently held that a bill attempting to permit the Legislature (or a council thereof) “effectively to veto” contracts within the Committee’s purview unconstitutionally “infringe[d] upon the right and ability of the executive branch to execute the laws enacted by the Legislature.” *See Opinion of the Justices No. 380*, 892 So.2d 332 (Ala. 2004). The instant lawsuit, in which the Committee and its Chairman seek to void an already-executed contract, raises similar, if not identical, separation-of-powers concerns.

Because Plaintiffs have not demonstrated any way in which the alleged violation of the state's Competitive Bid Law has affected or diminished their statutory authority to "review and comment" on the Paragon contract, they do not have standing in their official capacities to void the contract or enjoin its performance.

B. Mootness

The Court concludes that, inasmuch as Plaintiffs have brought suit and requested relief under Ala. Code § 41-16-31, their action is moot. Section 41-16-31 provides the exclusive remedy for a violation of the competitive bid law. *See Jenkins, Weber & Associates v. Hewitt*, 565 So.2d 616 (Ala. 1990); *Anderson v. Fayette County Bd. of Educ.*, 738 So.2d 854, 862 (Ala. 1999) (See, J., joined by Lyons, J., concurring) ("[T]he legislature has provided the public with only one remedy to prevent a public agency from violating the provisions of the Competitive Bid Law."). Section 41-16-31's cause of action, however, is limited by its terms; it authorizes suits "to enjoin *execution* of any contract entered into in violation" of the Competitive Bid Law. Ala. Code § 41-16-31 (emphasis added). "Once a contract has been entered into and performance actually begun, the [Section 41-16-31] remedy is no longer available." *Anderson*, 738 So.2d 862 (See, J., joined by Lyons, J., concurring); *see also Masonry Arts, Inc. v. Mobile County Comm'n*, 628 So.2d 334, 335 (Ala. 1993) ("agree[ing]" that competitive bid law case was moot where "the contract ha[d] been awarded and executed"). The contract at issue here was executed by all parties, reviewed by the Committee, and signed by the Governor before Plaintiffs filed suit. Accordingly, any claim brought under Ala. Code § 41-16-31 is moot.

C. Political Question Doctrine

The Court finds that Plaintiffs' complaint raises non-justiciable political questions. Plaintiffs claim a "meaningful opportunity" to review and comment on the contract. But apart

from the text of the governing statute, which gives the Committee a maximum of 45 days to complete its review and provide its comments, there is no “judicially discoverable and manageable standard[]” for determining whether Plaintiffs’ review was “meaningful.” *Birmingham-Jefferson Civic Center Auth. v. City of Birmingham*, 912 So. 2d 204, 214 (Ala. 2005). Such a question is impossible to decide “without an initial policy determination of a kind clearly for nonjudicial discretion.” *Id.* Accordingly, the lawsuit must also be dismissed on the ground that it presents non-justiciable political questions.

II. Governor Riley’s Motion To Dismiss

The Court finds that Governor Riley is not a proper party to this lawsuit and is entitled to a dismissal. The Governor is not accused of violating any statutory obligation under the Competitive Bid Laws, and neither he nor his office is a party to the Paragon contract. The Court is not persuaded by Plaintiffs’ argument that the Governor is an “indispensable party to this suit,” either because he approved the contract or on the ground that he is “ultimately responsible for the State’s performance under the [Paragon] contract.” Plaintiffs’ Response to Motions to Dismiss 2. If either were true, then the Governor would be a proper and indispensable party to every lawsuit involving every state contract that he approves. That is not the law. *See, e.g., Union Springs Telephone Co., Inc. v. Rowell*, 623 So.2d 732 (Ala. 1993) (suit against Finance Director seeking to void no-bid contract). Accordingly, the Court concludes that Governor Riley should be dismissed as a party.

For the foregoing reasons, State Defendants Joint Motion to Dismiss is hereby **GRANTED**, Governor Bob Riley's Motion to Dismiss is hereby **GRANTED**, and Plaintiffs' Petition for Declaratory Judgment and Injunctive Relief is hereby **DISMISSED**.

Costs taxed as paid.

DONE this the 23rd day of December, 2009.

A handwritten signature in black ink, appearing to read "Tom King, Jr.", with a large, stylized flourish to the right. The signature is written over a horizontal line.

Tom King, Jr.
Circuit Judge