IN THE SUPREME COURT OF FLORIDA

THE FLORIDA SENATE, and
TONI JENNINGS, in her official capacity as a
Member of and as the President of The Florida Senate
and as a citizen and taxpayer of the State of Florida,

Petitioners,

v. Case No. 95,960

KATHERINE HARRIS, in her official capacity
as Secretary of State of the State of Florida, and
ROBERT MILLIGAN, in his official capacity
as Comptroller of the State of Florida,

Respondents / Counterrespondents,

and

JEB BUSH, in his official capacity
as Governor of the State of Florida,
and as a citizen and taxpayer of the State of Florida,

Intervenor-Respondent / Counterpetitioner.
_____/

GOVERNOR JEB BUSH'S RESPONSE
TO PETITION FOR WRIT OF MANDAMUS AND
COUNTERPETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF SIZE AND STYLE OF TYPE

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Writ of Mandamus is typed in 14 point proportionately spaced Times New Roman.

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INTRODUCTION AND SUMMARY OF ARGUMENT

On May 27, 1999, Governor Jeb Bush signed into law a specific appropriation in Line Item 117C[1] of the General Appropriations Act for Fiscal Year 1999-2000, Chapter 99-226, Laws of Florida ("GAA") authorizing the award of $23,360,000 in Planning Grants to 234 designated public schools for future Extended School Year programs. Simultaneously, the Governor vetoed two specific appropriations in Line Item 117C for 1999-2000 academic year Extended School Year Operations Grants and Training Grants. The Governor's veto message explained that he nullified the Operations Grants and Training Grants because of the need for additional statewide planning and consensus building among parents, teachers and the community about Extended School Year programs. See Governor's Veto Message, Appendix at 6-7.

Petitioners now challenge the Governor's veto on two grounds. First, Petitioners argue that the Governor could not veto Extended School Year Operations Grants because the relevant proviso language in Line Item 117C does not specify a fixed dollar amount for such grants that the Governor could calculate and identify. See Petitioners' Brief at 11-13 (hereinafter, the "Senate Petition").

[1] Line Item 117C is referred to as "Specific Appropriation 117C" in Chapter 99-226, Laws of Florida, and in the brief filed by the Florida Senate and Senate President Toni Jennings (collectively, the "Petitioners"). To avoid confusion regarding a central issue in this case – whether each of the grants in "Specific Appropriation 117C" is in fact a calculable and identifiable "specific appropriation" – Governor Bush will use the more neutral term "Line Item 117C" when referring to "Specific Appropriation 117C."

Second, Petitioners argue that the vetoed Operations Grants are inseparably linked to, and share a unified purpose with, the non-vetoed Planning Grants, and that the Governor lacked the authority to veto one without also vetoing the other. Id. at 14-19.

Neither argument is persuasive. This Court has consistently upheld vetoes of calculable and identifiable specific appropriations even if the Legislature has not assigned an express numerical value to the appropriation. In this instance, the Operations Grants appropriation vetoed by Governor Bush was calculated and identified based on clear criteria described in the plain language of Line Item 117C's proviso – criteria which the Senate used to determine the available amounts for Planning, Operations and Training Grants in its own working papers. In addition, the plain language of Line Item 117C belies any claim that the vetoed Operations Grants are linked to the non-vetoed Planning Grants in a constitutionally significant manner. Line Item 117C was intended to accomplish three logically distinct purposes: Planning, Training and Operations for Extended School Year programs. The Governor fully nullified two of those purposes – Training and Operations – with his veto, as he was constitutionally authorized to do. For these reasons alone, Petitioners are entitled to no relief from the Court. Moreover, the Court could properly dismiss or transfer the Senate Petition for raising substantial factual questions that should be resolved in a circuit court rather than in this original mandamus proceeding.

In addition, the Court could properly decline to consider the merits of the Senate Petition because the specific appropriation it defends (the Operations

Grants) is based on proviso language that unconstitutionally amends existing laws regarding school operations and eligibility for Extended School Year funding. This Court has twice before declined – in analogous circumstances – to consider a veto challenge, see Lee v. Dowda, 19 So. 2d 570 (Fla. 1944), and Division of Bond Finance v. Smathers, 337 So. 2d 805 (Fla. 1976), and could do so again in this instance.

JURISDICTIONAL STATEMENT

Governor Jeb Bush, acting in his official capacity as Governor, and as a citizen and taxpayer of the State of Florida, challenges the constitutionality of Line Item 117C's Operations Grants proviso based on Article III, Section 12 of the Florida Constitution. The Court has jurisdiction over the Governor's challenge based on Article V, Section 3(b)(8) of the Florida Constitution, and Rules 9.030(a)(3) and 9.100 of the Florida Rules of Appellate Procedure, which authorize the Court to issue writs of mandamus to state officers. The Court has previously entertained original mandamus proceedings brought by a Governor to determine the validity of a legislative proviso, see, e.g., Division of Bond Finance, supra, and Chiles v. Milligan, 659 So. 2d 1055 (Fla. 1995), and such a determination is appropriate here to consider the purely legal and potentially dispositive claims the Governor advances.

As discussed at greater length below, should the Senate, upon reflection, continue to assert that the appropriation for Operations Grants could not be calculated when its own working papers show otherwise, then this Court should conclude that the Senate Petition raises substantial factual questions that should be

resolved by a circuit court. See Harvard v. Singletary, 24 Fla. L. Weekly S209, S209 (Fla. May 6, 1999) ("In the past, this Court has declined to exercise its jurisdiction over extraordinary writ petitions raising substantial issues of fact and has dismissed without prejudice or transferred such cases to the appropriate circuit court."); Brown v. Firestone, 382 So. 2d 654, 671 (Fla. 1980) (questioning efforts to use original mandamus actions to "thrust the Court into the political arena" as a "referee" of disputes between the Executive and Legislative branches).

NATURE OF THE RELIEF SOUGHT

The Governor seeks denial of the Senate Petition for a Writ of Mandamus. In the alternative, the Governor seeks a dismissal or transfer of the Senate Petition for a Writ of Mandamus to a circuit court for appropriate fact-finding. In addition, the Governor counterpetitions for the issuance of a writ of mandamus requiring (1) the Secretary of State to expunge the unconstitutional Operations Grants proviso contained in Line Item 117C of the GAA from the official records of the State, and (2) the Comptroller to ensure that this expunction is reflected in the financial operations of the State.

COUNTERSTATEMENT OF THE FACTS

The Statement of the Facts set forth in the Senate Petition is inaccurate in its description of certain key facts, and omits other facts material to a resolution of the legal and constitutional issues involved. The following is an accurate and complete statement of the material facts relevant to any resolution of this case:

Line Item 117C of the GAA appropriated $40,000,000 for 234 designated public schools that had previously expressed an interest in extending the academic

school year from 180 to 210 days. Appendix at 17-18.

This specific appropriation is sub-divided into three distinct and separate grants: grants to plan for an Extended School Year; grants to train teachers to implement an Extended School Year; and grants to fund operations during an Extended School Year. Appendix at 17, 18.

The Senate initially proposed a total of $100 million for Extended School Year programs. In its own working papers, the Senate allocated the total appropriation as follows: $22,840,000 for Planning Grants (calculated for 229 designated schools pursuant to a formula devised by the Senate[2]); $500,000 for Training Grants; and $58,033,185 for Operations Grants (calculated pursuant to a formula devised by the Senate). Any remaining funds would have been disbursed among all the school districts in the state. Appendix at 21, 22.

The House rejected the Senate's proposal in its entirety. Appendix at 23-26. After subsequent negotiations, the Senate and House agreed to a more limited Extended School Year proposal for 234 designated schools, with a total appropriation of $40,000,000. Because all parties agreed on the 234 schools and on their student population figures,[3] the amount necessary to fund the Planning

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[2] The Senate formula was: $120,000 for schools with more than 1,000 students, $100,000 for schools with 500 to 1,000 students, and $80,000 for schools with less than 500 students.

[3] The eligible student population for each of the 234 schools was determined by the Department of Education in February 1999. Representatives of the House, Senate and Governor all utilized the same information from the Department, agreeing on the identity of each of the 234 schools and the student population of each school. The list of the 234 schools and their student populations, found in the Appendix at 28-35, was obtained from the Senate, which in turn received this information from the Department.

Grants was calculable to the last penny: $23,360,000.[4] Because the Planning Grant formula remained unchanged, all parties also recognized that the total line item reduction from $100,000,000 to $40,000,000 would require a dramatic reduction in the amount available for Operations Grants. This reduced amount for Operations Grants totaled only $16,140,000[5] rather than the $58 million needed to fully fund an Extended School Year at each of the designated schools, prompting the Legislature to add new language to the Operations Grants proviso making such funding available on a "first-come, first-served basis." Appendix at 18.

Nothing in the legislative history of the appropriation suggests that the House and Senate viewed allocations for Training Grants, Planning Grants, or Operations Grants as interchangeable. In fact, the "first-come, first-served" language for Operations Grants was added in the last round of changes, after the reduction from $100,000,000 to $40,000,000 made clear that the amount available for Planning Grants would remain unchanged, but the amount available for Operations Grants would be reduced. Although the Legislature expressly provided for transfers of undisbursed funds between related initiatives in some line item appropriations, e.g., Line Item 1134 of the GAA, Appendix at 20, the Legislature did not provide for any such transfers in Line Item 117C.

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[4] 42 schools had more than 1,000 students, 148 schools had 500 to 1,000 students, and 44 schools had less than 500 students. Therefore: [42 x $120,000] + [148 x $100,000] + [44 x $80,000] = $23,360,000. Appendix at 31-35.

[5] The amount available for Operations Grants is calculable as follows: $40,000,000 Total Line Item appropriation - ($23,360,000 Planning Grants appropriation + $500,000 Training Grants appropriation) = $16,140,000.

The structure of the Legislature's proviso guaranteed all of the 234 designated schools interested in an Extended School Year a Planning Grant if they submitted a letter of intent by August 1, 1999. Not all schools receiving Planning Grants, however, would or could receive an Operations Grant. In fact, the Legislature, by slashing the total appropriation from $100 million to $40 million, ensured that very few schools would actually receive Operations Grants for the 1999-2000 academic year.

The Governor approved the Planning Grants, and vetoed the Training and Operations Grants. Appendix at 15-16. In approving the Planning Grants, the Governor used the formula contained in the proviso, and arrived at the same appropriation the Senate would have reached, $23,360,000. This precise amount would be reflected in the working papers appended to this Response and Counterpetition, but for a miscalculation by Senate staff members who incorrectly put the number of eligible schools at 229. That difference is now immaterial because in final Conference the Senate acknowledged its miscalculation, and agreed to use the correct number (234) in the proviso language. Appendix at 18. Had the working papers been redrawn to correct the Senate staff's mistake, there can be no dispute that the papers would have identified $23,360,000 as the relevant amount for Planning Grants for all 234 schools referenced in the proviso.

In vetoing the Training Grants, the Governor used the specific appropriation made by the Legislature: $500,000. Likewise in vetoing the Operations Grants, the Governor adopted the formula laid out in proviso, and arrived at the same appropriation the Legislature would necessarily have reached: $16,140,000 for

Operations Grants.

On July 7, 1999, nearly six weeks after the Governor's veto, the Petitioners filed a Petition for Writ of Mandamus, seeking an order from the Court declaring the Governor's veto of the Operations Grants to be unconstitutional.

ARGUMENT

I. RESPONSE TO PETITION FOR WRIT OF MANDAMUS

A. The Senate Petition Shows That Material Facts Are in Dispute Between the Parties, Requiring Dismissal or a Transfer of the Senate Petition.

The Senate Petition invokes this Court's original jurisdiction, and is predicated (as it must be), upon Petitioners' representation that "there are no material issues required to be resolved by the trial court." Senate Petition at 3. The Senate's "facts" are incorrect, however. Perhaps, upon reflection, the Senate will acknowledge that its own working papers and the undisputed data belie its contention that the appropriation for Operations Grants could not be precisely calculated, and that its failure to challenge the veto of the Training Grants is fatal to its argument that Line Item 117C is inseparable. If so, the Governor's counter-statement of the facts will not be disputed. Should the Senate persist in its own version of the "facts," however, then the Senate has raised material issues of fact.

There are, as evidenced by the parties' differing statements of the facts, two key controverted questions of fact: whether the specific appropriation for Operations Grants is a separate and identifiable appropriation that can be calculated; and whether Planning Grants and Operations Grants are inherently inseparable under the scheme established by the Legislature. See Senate Petition

at 7 ("Planning for, and operation of, an extended school year are inextricably tied, interrelated phases of a unified legislative purpose ....").

Resolution of these two controverted questions of fact is required before this Court can address the constitutional principles involved in this case. Indeed, the constitutional principles involved are quite clear, and can probably be applied by the parties themselves without dispute once the factual issues are resolved by a trial court. If so, there may be no need for review by this Court.

The Petitioners' legal arguments are premised upon a "key factual assertion" – that the sum of money appropriated for Operations Grants could not be determined, and thus could not be vetoed. If this factual assertion were true, the Petitioners' legal conclusion (that the veto is unconstitutional) would be correct. The Petitioners' "factual assertion," however, is incorrect, and is belied by the Senate's own working papers. These working papers show that specific appropriations were separately calculated for Planning Grants and Operations Grants, in accordance with a formula devised by the Senate. Appendix at 21, 22. The Petitioners simply cannot argue that the appropriation for Operations Grants is, as a factual matter, incalculable when the Senate itself performed the calculation. Cf. Martinez v. Florida Legislature, 542 So. 2d 358, 362 (Fla. 1989) (working papers are a manifestation of the Legislature's intent). Moreover, the Senate's working papers provide clear evidence of the Legislature's intent to do exactly what it did: create three separate, specific appropriations for three distinct grants (Planning, Training and Operations) for Extended School Year Programs. The fact that the Senate and the Governor were each able to calculate the amount

of money appropriated to Planning Grants and Operations Grants, and the fact that their calculations are consistent, shows that the specific appropriations were readily calculable.

The Petitioners' second key "factual assertion" is that two of the purposes for the Grants – Extended School Year educational planning, and Extended School Year operations – are "integrally tied" and are thus "inseparable." This "factual assertion" is clearly in dispute. The Planning Grants and Operations Grants obviously are "separable"; as structured by the Legislature, not all schools receiving Planning Grants would have received Operations Grants – in fact, very few such schools would have received Operations Grants. Obviously then, the two Grants cannot be "integrally tied." Here, by the Legislature's own design, Planning Grants and Operations Grants are readily distinguishable and are separable. This distinction is also preserved in substantive laws adopted by the Legislature and has been consistently recognized by the Department of Education in its administrative structure. See § 229.555, Fla. Stat. (education planning); § 236.081, Fla. Stat. (school operations); Mosrie Affidavit, Appendix at 37-38.

The merits of the Petitioners' argument regarding the constitutionality of the veto are thus inextricably intertwined with at least two disputed issues of fact. Since the Petitioners have taken a position on these issues contrary to the Legislature's own documents and working papers, and contrary to the evidence cited above, these questions of fact should be resolved by engaging in factual inquiry, requiring dismissal of the Senate Petition, or a Court-ordered transfer of this matter to an appropriate circuit court for fact-finding.

This conclusion is supported by a long line of Court precedent emphasizing the inadvisability of reviewing petitions for writs of mandamus that raise substantial factual issues. See, e.g., Harvard, 24 Fla. L. Weekly at S209 ("In the past, this Court has declined to exercise its jurisdiction over extraordinary writ petitions raising substantial issues of fact and has dismissed without prejudice or transferred such cases to the appropriate circuit court."); State ex rel. International Ass'n of Firefighters, Local 2019 v. Board of County Comm'rs, 254 So. 2d 195, 196 (Fla. 1971) (Court has "consistently ruled that it will not entertain a Petition for Writ of Mandamus which raises substantial issues of fact"); State ex rel. Collins v. Brooker, 46 So. 2d 600, 600-01 (Fla. 1950) (denying writ of mandamus because the "case raises issues of fact which will require the taking of evidence").

In a previous case just like this one – that is, in a case challenging the constitutionality of a gubernatorial veto where material facts are in dispute – this Court determined that the matter should properly be heard first by a trial court. See Martinez v. Florida Legislature, supra, (in which the Court dismissed the Legislature's initial mandamus petition in favor of a declaratory judgment action in circuit court). Moreover, in rendering decisions about the constitutionality of legislative appropriations or gubernatorial vetoes, Florida courts, including this Court, have consistently relied on the factual determinations of trial courts. See, e.g., Gindl v. Dep't of Educ., 396 So. 2d 1105 (Fla. 1981) (holding that the Legislature's appropriation was unconstitutional, based on trial court's finding that the proviso altered the Florida Education Finance Program's funding formula); Florida Pharmacy Ass'n, Inc. v. Lindner, 645 So. 2d 1030 (Fla. 1st DCA

1994) (holding unconstitutional an appropriations proviso related to pharmaceutical purchases, based on trial court's finding that it amended procurement requirements in existing statute).

The Petitioners' further contention that there is no time to complete a declaratory judgment action in the circuit court is also without merit and provides no grounds for an original mandamus action in this Court. First, the "August 1 deadline" identified by the Petitioners is an application deadline for Planning Grants, and Planning Grants are not an issue here. The application deadline for Operations Grants (the subject of the Senate Petition) was (prior to the Governor's veto) January 1, 2000. There is more than sufficient time between now and January 1, 2000, for a trial court to resolve the factual disputes in this case. Second, the Petitioners have caused any time problems by their own delay. The Governor's veto was signed on May 27, 1999, and the Senate raised its objections immediately thereafter in the press. Petitioners nevertheless delayed filing this action until July 7, 1999, nearly six weeks after the Governor's veto. Finally, the Petitioners have an alternative to a circuit court action should they wish to remain in this Court – they can stipulate to the Counterstatement of the Facts set forth in this Response and Counterpetition.

B. The Governor's Executive Veto of Operations Grants is Constitutional.

1. The specific appropriation for Operations Grants is a calculable and identifiable appropriation for a specified purpose, and is thus properly the subject of an executive veto.

Florida's Constitution grants the Governor the power to veto any "specific

appropriation" of a general appropriations act. Art. III, § 8(a), Fla. Const. In Brown v. Firestone, the Court defined a specific appropriation as an "identifiable, integrated fund which the legislature has allocated for a specified purpose." 382 So. 2d at 668. The Court later affirmed this definition in Florida House of Representatives v. Martinez, lamenting the difficulty of determining "when this proviso language has identified a sum of money and its purpose with sufficient definiteness that the language has become a 'specific appropriation' within the meaning of the constitution." 555 So. 2d 839, 843 (Fla. 1990).

What the Court's previous treatment of the issue has made clear is that the specificity of an appropriation is measured along two axes: the definiteness of the sum that is appropriated, and the definiteness of the purpose to which it is allocated. The Governor's veto of Operations Grants is permissible under the Florida Constitution because the veto is directed at a specific appropriation – that is, a calculable sum of money ($16,140,000) that was designated for a readily distinguishable purpose (grants for school operations to implement an Extended School Year).

i. Operations Grants are calculable and identifiable.

A definite sum can be assigned to each of the three components of the $40,000,000 appropriation in Line Item 117C, including Operations Grants. $500,000 is expressly earmarked for Training Grants to hold a summer training program for representatives from each school deemed eligible to implement the Extended School Year. The Legislature also provided precise formulas in proviso language to calculate the specific appropriations for Planning Grants and

Operations Grants. The total allocation for Planning Grants had to be preserved because they must be made available upon a proper request to a designated group of 234 schools, with the amount of the Planning Grant based upon the school's student population. Schools with a population of 500 or fewer students can receive a Planning Grant of $80,000, schools that serve between 500 and 1000 students are eligible for a $100,000 Planning Grant, and schools with more than 1000 students can receive $120,000. Based on the student populations of the 234 designated schools, the total amount needed to provide a Planning Grant to each designated school is $23,360,000. Appendix at 28-35. The Senate made the very same calculation in its initial analysis of the proposed proviso and computed a total Planning Grant allocation of $22,840,000 based on the erroneous information that only 229 schools were eligible. 1999-2000 FEFP Allocation Report, Appendix at 19. Once the Senate recognized its error, it agreed to proviso language referring to 234 schools.

The Governor and the Legislature were in accord in their method of calculating the specific appropriations for the various Grants precisely because the proviso permits only one possible interpretation of how to compute the total amount required. The Governor vetoed the specific appropriation for the Operations Grants, and arrived at this sum by performing simple calculations using readily ascertainable data identified in the proviso that was also used by the Senate in its own analysis.

The Petitioners rely principally upon Florida House of Representatives v. Martinez (referring to Governor Martinez's veto number one) for legal support,

claiming that "there isn't a dime's worth of difference" between veto number one in that case and the veto at issue in this case. Senate Petition at 12. Again, the Petitioners are wrong. Veto number one in Martinez involved a gubernatorial veto of one proviso of a lump sum appropriation for salary increases which gave the Attorney General discretion to exceed the maximum pay grade for up to eight Assistant Attorney Generals. For the reasons discussed below, that holding has little bearing on the consideration of the Governor's veto of Operations Grants in Line Item 117C.

First, the appropriation at issue in Martinez veto number one did not define who would be eligible for the salary increases; it merely authorized the Attorney General to exceed the maximum pay grade for as many as eight employees of his choosing. In contrast, Line Item 117C delineates that exactly 234 schools are eligible for funds, and the particularized list of schools was based on a survey done months before. Unlike in Martinez, the Extended School Year appropriations allow for absolutely no speculation about which recipients are eligible for the funds.

Second, the appropriation at issue in Martinez veto number one lacked any guidelines whatsoever for apportioning the additional salaries. There was no total amount specified, there was no salary cap, and there was no equity requirement regarding the distribution among the up to eight recipients. The amount of the additional salaries could not be determined. In contrast, Line Item 117C is replete with rules governing the distribution of the funds. The lengthy formulas included within the proviso demonstrate that the distribution of Extended School Year

funds is not at all discretionary. The Commissioner of Education has no discretion to modify the amounts of either the Planning Grants or the Operations Grants for schools that receive these Grants. At the very most, the Commissioner can refuse to give a school an Operations Grant if the operations funds have run out. Because veto number one in the Martinez case bears no similarity to the veto at issue, it provides no reason to hold the Governor's veto of Line Item 117C unconstitutional.

If anything, Martinez is favorable precedent for the Governor based on the Court's decision to uphold a second disputed veto in that case. As Petitioners acknowledge, Governor Martinez also vetoed $3,900,000 from a $4,000,000 appropriation which allocated $100,000 to the Toddler Intervention Program in Dade County and an unspecified amount to other projects described in Florida First Start legislation. Governor Martinez approved the $100,000 allocation to the Toddler Intervention Program and used simple arithmetic to calculate the balance remaining for the Florida First Start program, which he then vetoed. The Court upheld the veto even though the dollar figure of "$3,900,000" did not appear on the face of the proviso, because that sum was "unquestionably the amount appropriated for the Florida First Start program." Id. at 844. In this case, Governor Bush has likewise used simple arithmetic to calculate the funds available in Line Item 117C for Operations Grants, Planning Grants and Training Grants. The calculated amounts are "unquestionably" the amounts appropriated for each type of grant because they have been derived from criteria expressly referenced in Line Item 117C.

ii. Operations Grants are for a specified purpose.

Not only are specific appropriations designated for Planning Grants, Training Grants and Operations Grants, but each Grant relates to an activity with a different purpose. The fact that each of these Grants is also "related" to an Extended School Year does not render their purposes less specific – the Petitioners concede as much by acknowledging that the Governor could (and did) properly veto the Training Grants. Clearly, if the Training Grants are for a specific purpose despite their "relatedness" to an Extended School Year, so too are the Operations Grants.

By definition and design, Planning, Training and Operations Grants have different functions. Certainly, planning to do something, or attending a conference to learn how to do it, is not the same thing as doing it. Webster's New Collegiate Dictionary, for instance, defines "planning" as "the establishment of goals, policies, and procedures for a social or economic unit," id. at 878. Webster's defines "operation" as the "performance of a practical work or of something involving the practical application of principles or processes," id. at 804. These definitions comport with common experience, and suggest that while planning may be a desirable pre-condition for operations, the two terms are distinct and not mutually dependent – planning can occur without operations, and operations can occur without planning.

Moreover, the Legislature specifically designed the Planning Grants and Operations Grants to be separable: while each of the eligible schools is guaranteed to receive a Planning Grant, there is no similar guarantee with the Operations

Grants. Only if the Legislature had guaranteed an Operations Grant to each school receiving a Planning Grant – or specified that all undisbursed planning funds could be transferred for use in operations[6] – would the Senate's argument on the "inseparability" of the two Grants make any sense. But here, the Legislature did no such thing – in fact, the Legislature specifically provided that the amount of funds appropriated for Training Grants and Planning Grants would remain inviolate. Thus, according to the express terms of the proviso, if the appropriation is insufficient to fully fund Planning and Operations Grants, Operations Grants must be distributed on a first-come, first-served basis.

Significantly, the Department of Education has historically treated planning and operations as separate functions. Indeed, the policies and programs of the Department of Education demonstrate that these functions have always been viewed as separate activities, separated in time, funded differently, and involving different people. Mosrie Affidavit, Appendix at 37-38. The Department's separation of educational planning and school operations is reinforced by the Florida Statutes, which generally address planning and operations in two entirely separate chapters of the Florida Education Code. See § 229.555, Fla. Stat. (planning), and § 236.081, Fla. Stat. (school operations). Thus, to the extent that specificity of purpose is not crystal clear from the express terms of the disputed

[6] The Legislature, when it intends that residual funds be used for a related purpose, must state so in its proviso, given the language of Section 216.301(1)(b), Florida Statutes, which states that "[a]ny balance of any appropriation, except an appropriation for fixed capital outlay, for any given fiscal year remaining after charging against it any lawful expenditure shall revert to the fund from which appropriated and shall be available for reappropriation by the Legislature."

proviso, the Legislature's separate treatment of planning and operations, and the long-standing practice of the Department of Education, provided the Governor with external evidence of intent upon which he was reasonably entitled to rely. If the Legislature intended the two appropriations to be tied, it was the Legislature's obligation to say so. It did not.

2. The Governor has properly nullified the entire specific appropriation for Operations Grants.

Petitioners' second legal argument is that the Governor's veto is unconstitutional because the Governor has only "reduced," but not "nullified" the specific appropriation for the Operations Grants. This argument is the flip side of Petitioners' first argument: here, the Petitioners argue that not all eligible schools may want Planning Grants, and that any money not used for Planning Grants would then be available for Operations Grants. The Petitioners suggest that the funding for the Operations Grants is "contingent" upon the amount of money actually expended for the Planning Grants, and thus there may be more money available for the Operations Grants than indicated in the specific appropriation set forth in the Senate's own working papers. Petitioners contend that the Governor's veto of $16,140,000 may not nullify the entire funding available for the Operations Grants, and thus is unconstitutional.

Petitioners' argument is transparently wrong. First, all appropriations are subject to contingencies of one sort or another, but this does not prevent the Governor from vetoing any specific appropriations. If it did, the Governor could never veto specific appropriations. Second, Petitioners have already conceded that the Training Grants are separable and subject to veto; clearly if all the Training

Grants were not used, there might (using the Petitioners' argument) be additional money left that could be transferred to Operations Grants. Thus, based on the Petitioners' argument the veto of Training Grants would be as unconstitutional as the veto of Operations Grants. Tellingly, the Petitioners have made no such argument. The reason is clear: funds unexpended for the Training Grants cannot be used, and simply do not transfer, to the Operations Grants. Cf. § 216.221, Fla. Stat. (all appropriations are maximum appropriations); § 216.301, Fla. Stat. (undisbursed balances revert back to the fund from which they originated). Unfortunately for the Petitioners, the same is true for Planning Grants.

Indeed, there is nothing in the proviso at issue that provides even the slightest indication that this could have possibly been the Legislature's intention. Rather, from the proviso language, the Legislature has evinced a clear intent to keep the specific appropriations for each of the Training Grants, the Planning Grants and the Operations Grants separate and distinct. Any unused funds specifically appropriated for Training Grants and Planning Grants would, given the intent evident from the Legislature's proviso language, revert to the General Revenue Fund.

The Legislature knows how to draft proviso language to permit the transfer of funds from one program to another, if that is its intent. For example, in Line Item 1134 of the GAA, when the Legislature appropriated $33,998,837 for community development programs, it specified exactly how unused funds should be treated:

> Funds provided in [Line Item] 1134 shall be divided and distributed among the statutorily established program

> categories as follows: Housing 20 percent; Economic Development 30 percent; Neighborhood Revitalization 40 percent; and Commercial Revitalization 10 percent, after the allowance of 2% plus $100,000 of total funds available for administration and 1% allocation for training or technical assistance to local governments. … Funds not distributed due to an insufficient number of eligible applications during the application cycle in any of the program categories shall be transferred to the program category receiving the greatest dollar value of request for grants.

Appendix at 20 (emphasis added). This language clearly conveys authority to transfer unexpended funds from one category to another and clearly expresses the intent of the Legislature to accomplish a single inherently inseparable purpose through its allocation of funds. That the Legislature did not use similar language in Specific Appropriation 117C, and in fact provided specific appropriations for each of the three Grants, is plainly indicative of an intent to keep the three specific appropriations separate and distinct.

II. COUNTERPETITION FOR WRIT OF MANDAMUS

The Governor respectfully brings this Counterpetition seeking a writ of mandamus holding unconstitutional the Operations Grants proviso in Line Item 117C. The proviso language establishing the Operations Grants is unconstitutional because it violates Article III, Section 12 of the Florida Constitution by changing law on a subject other than appropriations. It does so in two ways: (1) by failing to fund the Extended School Year in compliance with the Florida Education Finance Program ("FEFP"), Section 236.081, Florida Statutes, as required by statute, and (2) by amending the statutory funding process for Extended School Year operations. The Governor's Counterpetition, unlike the Senate Petition, is based solely upon questions of law and undisputed questions of

fact, and is therefore appropriate for disposition in this Court by mandamus.[7]

A. The Vetoed Proviso Unconstitutionally Amends the Statutory Formula for Funding School Operations Under the Florida Education Finance Program ("FEFP").

Article III, Section 12 of the Florida Constitution declares that appropriations bills "shall contain provisions on no other subject." As this Court explained in Brown v. Firestone,

> an appropriations bill must not change or amend existing law on subjects other than appropriations. . . . Were we to sanction a rule permitting an appropriations bill to change existing law, the legislature would in many instances be able to logroll, and in every instance the integrity of the legislative process would be compromised.

382 So. 2d at 664.

This Court has held that the FEFP, "Section 236.081[,] is not an existing law on the subject of appropriations." Chiles v. Milligan, 659 So. 2d at 1059. As demonstrated below, the Operations Grants proviso of Line Item 117C unconstitutionally changes and amends the FEFP formula for funding school operations. The statutory scheme contemplates funding Extended School Year programs according to the FEFP formula. But in the disputed proviso language vetoed by the Governor, the Legislature used a different formula for funding Extended School Year programs, thereby ignoring 26 years of accumulated wisdom on what constitutes equitable funding for the state's public schools. Wise or unwise, the Legislature's choice was a policy decision appropriate for

[7] The Governor does not challenge the constitutionality of the Planning Grants, as these Grants do not amend the statutory FEFP funding process, which applies only to school operations.

substantive legislation, not an appropriations proviso.

1. The FEFP is a statutory policy scheme designed to achieve equitable school funding.

For many years, Florida has proceeded under a comprehensive scheme for providing funds "for operation of schools." § 236.081, Fla. Stat. This scheme, the Florida Education Finance Program ("FEFP"), encompasses all operational funding for kindergarten through twelfth grade, for everything from basic programs and vocational training to English for Speakers of Other Languages and enrichment for exceptional students. § 236.081(1)(c), Fla. Stat. The system also calls for local school districts to raise revenue to defray a portion of the cost of school operations, delineating the minimum extent of their contributions as well as millage ceilings. § 236.081(4), Fla. Stat.

The FEFP is more than just a laundry list of programs provided in public schools. Rather, the FEFP embodies the basic philosophy of all the successive legislatures since 1973, when the FEFP was first established. The collective policy decision it reflects is that funding is only equitable when it is provided on a statewide per-pupil basis, taking into account the varying costs of specialized programs. The FEFP ensures that relatively poor school districts receive adequate funds to provide a uniform system of education and that students in those districts are not consigned to inadequately funded schools, as compared to similar students in wealthier areas. See, e.g., § 236.081(4)(c), Fla. Stat. Each element of the FEFP is carefully crafted to achieve the Legislature's vision of equity in school funding. Each calculation serves a distinct role in the comprehensive effort to "guarantee to each student … programs and services … which are substantially equal to those

available to any similar student." § 236.012(1), Fla. Stat. (emphasis added).

2. The statutory scheme dictates that all school operations, including those under Extended School Year programs, be funded according to the FEFP.

When the Legislature adopted statutory authority for the Extended School Year program, it placed the authorization squarely within the FEFP. See § 236.081(1)(o), Fla. Stat. This statutory authority is located under FEFP subheading (1) – "Computation Of The Basic Amount To Be Included for Operation." Moreover, Section 236.012(6), Florida Statutes, declares that "the 'Florida Education Finance Program' includes all programs and costs as provided in s. 236.081" (emphasis added). The statutory scheme therefore allows for only one conclusion – funding for the operation of an Extended School Year must be accomplished pursuant to the FEFP formula. Cf. Chiles v. Milligan, 659 So. 2d at 1056.

Placing the Extended School Year statutory authority within the basic FEFP formula makes eminent sense, for the Extended School Year program is not a program of special instruction, but merely an extension of the basic operation of the school year from 180 days to 210 days or more. See § 236.081(1)(o), Fla. Stat. ("It is the intent of the Legislature that students be provided additional instruction by extending the school year to 210 days or more."); Line Item 117C (funds "are provided for schools that choose to extend the length of the academic year from 180 to 210 days"). It should therefore come as no surprise that substantive law provides that Extended School Year funding be calculated according to the FEFP, the statutory formula "for determining the annual allocation to each district for

operation." § 236.081(1), Fla. Stat.

3. The Operations Grants proviso language in Line Item 117C is unconstitutional because it changes the substantive law of the FEFP.

This Court has previously declared unconstitutional a situation where "the legislature had taken funds designated for distribution under a formula set out in section 236.081(3) and, through the appropriations act, altered the distribution formula." Gindl, 396 So. 2d at 1106; see also Chiles v. Milligan, 659 So. 2d at 1058-59 (following Gindl). The Operations Grants proviso language in 117C is unconstitutional because it changes the substantive FEFP mechanism for the funding of basic school operations, both by failing to fund the Extended School Year in compliance with the FEFP, and by purporting to authorize the Commissioner of Education to withhold FEFP funding from schools that do not report certain information on Extended School Year operations.

i. The proviso does not fund operations for the Extended School Year as required by the FEFP.

The Operations Grants proviso fails to carry out the FEFP's underlying policy goal of equitable funding. The formula for calculating each participating district's additional funds from Line Item 117C seems to be an effort to mimic proration of a district's FEFP allocation. The formula purports to use the district's current allocation for a 180-day school year, and then funds an additional 30 days for the proportion of students who attend schools with lengthened schedules. However, the proviso's attempt to prorate the funding fails to comply with the statutory FEFP formula for two reasons.

First, the proviso formula only purports to fund 15 days of operation, not

30. Viewed another way, it purports to provide half-funding for the 30 days. Giving participating districts an extra one-sixth of their base funding for the participating students might seem like a reasonable way to prorate the operating funds, but the formula in Line Item 117C goes on to cut this amount in half in step (4). By expecting schools to operate in days 181 through 210 for approximately half the basic operating cost of days 1 through 180, the Legislature is clearly undermining all the carefully crafted provisions of the FEFP that are designed to equalize funding. The Legislature may have assumed that only 15 days would fall within the 1999-2000 fiscal year, but this assumption fails to acknowledge that school calendars across the state differ widely. The reality is that within this fiscal year, some eligible schools would only need funding for 12 days, while others would need funding for as many as 27 days. See Maxwell Affidavit, Appendix at 44-45. Because of these disparities, certain schools would be funded in amounts grossly disproportionate to their needs, either resulting in a windfall or requiring re-prioritization of district resources to account for the shortfall. Allowing the FEFP formula to control funding would have resolved these issues.

Second, and perhaps more importantly, the proviso formula uses the wrong measure of districts' FEFP allocation. Though Line Item 117C provides basic operating funds for an extra 15 days at schools that receive the grants, it leaves out additional funding components that are included in the FEFP as a matter of course. As a result, the line item funds each of those extra fifteen days at different levels than the first 180 school days. The reason for the disparity is that Line Item 117C improperly relies on each district's FEFP base funding amount in step (1) of the

calculation rather than on its total FEFP funding amount. This method ignores the remainder of the FEFP statutory formula, under which, in addition to base funding, districts receive adjustments for declining enrollment, low population density, discretionary tax equalization, minimum guarantee, disparity compression adjustment, and for safe schools programs. See, e.g., § 236.081(9)(a), Fla. Stat. (Supp. 1998). These additional funds are far from trivial; in the 1999-2000 fiscal year, these supplemental and incentive programs added over $180 million to the statewide FEFP, or about 2 percent of the total state and local contribution to the FEFP. The supplemental and incentive funds constituted about 3.2 percent of the state's total contribution to the FEFP. See Maxwell Affidavit, Appendix at 42.

Part of the rationale for these statutory adjustments is to provide equitable funding for all schools, without regard to different tax bases. By failing to use the entire statutory FEFP formula, some school districts would have received significantly more or significantly less funding under the 117C formula than under the statutory FEFP formula. For example, in Gadsden County, a district with a relatively small tax base, the state funds approximately 86 per cent of the county's FEFP allocation. The state's contribution per weighted full-time equivalent student ("student") per day is approximately $16.05. Line Item 117C's Operations Grant allocation per student per day would have been just slightly higher – approximately $16.98. See Maxwell Affidavit, Appendix at 43, 44. By contrast, in Monroe County, a district with a relatively large tax base, the state provides only 10 per cent of the county's FEFP allocation. The state's contribution per student per day is approximately $1.98. Line Item 117C's Operations Grant

allocation per student per day would have been nearly ten times as much – approximately $19.50. See Maxwell Affidavit, Appendix at 43, 44. Thus, one inequitable effect of the proviso formula is to fund the extended portion of the school year in wealthier counties at much higher rates than under the existing statutory formula. Id. This flies in the face of the animating principle of the FEFP – equitable funding.

The decision to abandon the FEFP's precise statutory formula is a policy choice. The wisdom of that choice is not at issue; perhaps the Legislature had good reasons for deviating from the statutory FEFP formula. But the point remains that it is impermissible for the Legislature to use proviso language to alter policy choices contained in existing statutes. See Chiles v. Milligan, 659 So. 2d at 1059 ("it is clear that this is a policy decision which should be debated as a proposed amendment to the distribution formula in section 236.081"). By setting forth this policy in appropriations proviso, the Legislature sought to make "this policy determination immune to veto, which is the very practice article III, section 12 is designed to prevent." Id.

The proviso alters the FEFP by authorizing the Commissioner of Education to reduce the 2000-2001 FEFP allocation of districts with participating schools that fail to report student performance data.

Line Item 117C requires schools receiving Operations Grants to submit, in addition to their regular student performance data, comparative analyses of their students' performance measured against comparable student populations in 180-day schools. See Appendix at 17. If a school does not submit this analysis to the Department of Education by September 1, 2000, Line Item 117C authorizes the

Commissioner to reduce the district's FEFP allocation in the subsequent year by the amount of the 1999-2000 extended school year allocation. See Appendix at 17. Essentially, the line item compels districts to perform the prescribed data analysis with the threat of withholding future operating funds.

There is no precedent in statute or Department of Education policies for withholding any portion of a district's FEFP allocation as a penalty. See Mosrie Affidavit, Appendix at 38. Section 236.081(10)(b), Florida Statutes, does permit the Department of Education to adjust a district's FEFP allocation to compensate for previous over- or underallocations, but only if the misallocation resulted from an arithmetic or reporting error.

The absence of any previous examples of withholding FEFP funds as a penalty is consistent with the Court's previous holding in Department of Education v. School Board of Collier County, 394 So. 2d 1010 (Fla. 1981). There, the Court held that because there is a "hold harmless" provision of the FEFP formula, reducing any district's FEFP allocation through proviso language is an impermissible amendment of substantive law. Id. at 1013. The Court has struck down as unconstitutional previous appropriations provisos that altered the FEFP formula. See, e.g., Chiles v. Milligan, supra; Gindl, supra. It is obvious that if it is impermissible for the Legislature to affect a district's allocation by tweaking the formula in provisos, it is even more inappropriate for the Legislature to use proviso language to authorize punitive withholding of funds.

B. The Vetoed Proviso Unconstitutionally Amends the Existing Statutory Procedural Scheme for Funding Extended School Year Operations.

The Legislature's appropriation of Extended School Year Operations Grants for select public schools has its foundation in substantive law. Section 236.081(1)(o), Florida Statutes, expresses the Legislature's intent that Florida schools move from a 180 to a 210 day school year and announces that all school districts may apply for state funds to pay for the additional instructional time. In Line Item 117C, however, the Legislature approved Extended School Year Operations Grants, but gutted the intent and procedures embodied in the statute. These alterations improperly effectuate yet another "de facto amendment of substantive law." Department of Educ. v. Lewis, 416 S. 2d 455, 460 (Fla. 1982).

The language of subsection 236.081(1)(o) contains no qualifiers regarding which districts should be able to seek Extended School Year Operations Grants; it simply states that "districts may apply…." In the absence of a limiting qualifier, (e.g., "some districts"), the plain language of the provision applies universally to all districts. Line Item 117C violates this principle of statutory construction by arbitrarily limiting districts' eligibility for Operations Grants on the basis of individual schools' responses to a survey. Only thirty-seven of Florida's sixty-seven school districts are eligible for Operations Grants under the terms of Specific Appropriation 117C.

Moreover, the language of subsection 236.081(1)(o) clearly gives the Commissioner of Education discretionary power to approve districts' applications for Extended School Year Operating funds. § 236.081(1)(o) ("Districts may apply

to the Commissioner of Education for funds…"). Yet by enacting Line Item 117C the Legislature shifted the locus of control from the Commissioner of Education to the individual schools. Each school (intentionally or not) determined its own eligibility for funds by returning the February 1999 survey. To receive Extended School Year Operating Grants, such schools need only send the Commissioner of Education a letter of intent by August 1, 1999, to extend their school years, followed by an implementation plan. If the Legislature were fleshing out the provision in § 236.081(1)(o), it should have given guidance to the Commissioner on how to decide between competing applications. No such guidance is provided. Rather than using any sort of application process envisioned by the existing statute, the Legislature has reduced the school's responsibility to merely informing the Commissioner of Education of its plans. The criteria for funding eligibility laid out in Line Item 117C do not simply flesh out skeletal statutory language; the provisions blatantly undermine the intent and procedures of the existing statute.

In this instance, the Legislature has significantly amended not only the FEFP statutory funding formula, but also the specific statutory procedures for the distribution of Extended School Year operating dollars. As with the departure from the FEFP statutory funding formula, this departure from the statutory Extended School Year funding process is a policy choice the wisdom of which is not debated here. But the fact remains that it is a policy departure from statute that may only be effected through adoption of a substantive law, <u>not</u> through appropriations proviso.

Allowing the Legislature to ignore the existing statutory language regarding

the Extended School Year funding process would set a dangerous precedent. As this Court has acknowledged on many occasions, "were we to sanction a rule permitting an appropriations bill to change existing law, the legislature would in many instances be able to logroll, and in every instance the integrity of the legislative process would be compromised." Chiles v. Milligan, 659 So. 2d at 1058. Furthermore, if the Court holds that Line Item 117C is not based on subsection 236.081(1)(o), future legislatures may claim free rein to use appropriations acts to amend existing statutes simply by claiming that the new rules can be created within the Legislature's plenary power.

C. The Court Need Not Reach the Merits of the Senate Petition Given the Constitutional Infirmity of the Vetoed Proviso.

The foregoing demonstrates that the Operations Grants proviso of Line Item 117C violates Article III, Section 12 of the Florida Constitution. Because it works several changes to substantive law on a subject other than appropriations, this proviso cannot be countenanced by the Court. Under these circumstances, it is unnecessary for this Court to consider the merits of the Senate Petition, for

> [w]hen the legislature includes in the general appropriations bill a provision which the Constitution does not permit, the Court should declare the provision unconstitutional and void. It is not, in such circumstances, necessary for the Court to consider the constitutional validity of the governor's veto of the provision.

Brown v. Firestone, 382 So. 2d at 672 (Adkins, J., concurring); see also Division of Bond Finance v. Smathers, 337 So. 2d at 807 ("We need not consider the issue of the constitutional validity of the Governor's veto because we hold the proviso to be unconstitutional."); Lee v. Dowda, 19 So. 2d at 573.

CONCLUSION

WHEREFORE, the Governor respectfully requests that this Court deny the Senate's Petition for Writ of Mandamus, or in the alternative, dismiss or transfer the Senate Petition to an appropriate circuit court for development of factual record. The Governor also respectfully requests that the Court grant his Counterpetition for Writ of Mandamus, again reminding the Court that it need not reach the Senate Petition if it grants his Counterpetition.

Respectfully submitted,

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* Summer Law Clerk Shannon L. Bothwell, Yale Law School Class of 2001, provided valuable research assistance in the preparation of this Response and Counterpetition.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Governor Jeb Bush's Response to Petition for Writ of Mandamus and Counterpetition for Writ of Mandamus has been furnished by hand delivery to the parties listed below, this 4th day of August, 1999:

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