ORIGINAL

2020-M-1199

IN THE SUPREME COURT OF MISSISSIPPI

No. _____

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SUPREME COURT
COURT OF APPEALS

IN RE INITIATIVE MEASURE NO. 65

MAYOR MARY HAWKINS BUTLER,
IN HER INDIVIDUAL AND OFFICIAL CAPACITIES;
THE CITY OF MADISON, PETITIONERS,

VERSUS

MICHAEL WATSON, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF STATE
FOR THE STATE OF MISSISSIPPI, RESPONDENT.

EMERGENCY PETITION FOR REVIEW PURSUANT TO ARTICLE 15, SECTION 273(9) OF THE MISSISSIPPI CONSTITUTION OF 1890 AND WRIT OF MANDAMUS AND/OR OTHER EXTRAORDINARY WRITS

EMERGENCY HEARING REQUESTED

Kaytie M. Pickett (MSB No 103202)
Adam Stone (MSB No. 10412)
Andrew S. Harris (MSB No. 104289)
JONES WALKER LLP
190 E. Capitol St., Suite 800
Jackson, Mississippi 39201
Tel (601) 949-4789
Fax (601) 949-4804
kpickett@joneswalker.com
astone@joneswalker.com
aharris@joneswalker.com

Chelsea H. Brannon (MSB No. 102805)
CITY OF MADISON, CITY ATTORNEY
P. O. Box 40
Madison, Mississippi 39130-0040
Tel (601) 856-7116
Fax (601) 853-4766
cbrannon@madisonthecity.com
Attorneys for Petitioners

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cbrannon@madisonthecity.com
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COMES NOW, Mayor Mary Hawkins Butler, in her individual and official capacities, and the City of Madison, pursuant to Article 15, Section 273(9) of the Mississippi Constitution of 1890; Miss. Code Ann. § 9-1-19; and Mississippi Rule of Appellate Procedure 21, and file this, their Petition for Review Pursuant to Article 15, Section 273(9) of the Mississippi Constitution of 1890, and Writ of Mandamus and/or Other Extraordinary Writ, seeking review of the sufficiency of the petitions submitted in support of Initiative Measure No. 65 and a writ prohibiting the Secretary of State's official declaration of the election results on any measure initiated through a constitutionally insufficient process. Because the election will take place on November 3, 2020, and because the Secretary of State has not longer than thirty days following the election to officially declare the vote, Petitioners respectfully ask that the Court hear this matter on an emergency basis.

SUMMARY

In 1992, Mississippi amended the Mississippi Constitution of 1890, Section 273, to allow for indirect ballot initiatives. An initiative measure to amend the Constitution must be supported by a petition signed by qualified electors. MISS. CONST. art. 15, § 273(3). "The signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot." *Id.*

Because Mississippi has *four* congressional districts, it is a mathematical certainty that the number of signatures submitted in support of Initiative Measure No. 65 from at least one of the four congressional district exceeds 1/5 of the total number required. Twenty percent (20%) from each congressional district equals

eighty percent (80%) total; to reach one hundred percent (100%), the number from at least one district must exceed twenty percent (20%).

The Mississippi Legislature is aware of this mathematical impossibility. Seven concurrent resolutions have been introduced since 2003 to propose an amendment to correct for the change in congressional districts. Each resolution has died, and Section 273 stands unchanged.

Despite the Legislature's failure to propose an amendment to the voters, the Secretary of State nonetheless has followed an "amended" Section 273(3) and has inserted "the last five-district congressional district plan which was is effect prior to the adoption of the current four-district plan" into the text of the Constitution.[1] Ignoring the plain language of Section 273(3) and violating Miss. Code Ann. § 23-17-23(b), the Secretary of State determined the petitions in support of Initiative Measure No. 65 were sufficient.

The Supreme Court has "original and exclusive" jurisdiction to review the sufficiency of the petitions. MISS. CONST. art. 15, § 273(9). Petitioners ask that the Court exercise this jurisdiction to determine that the petitions are constitutionally insufficient because the number of signatures from at least one of Mississippi's four congressional districts exceeds 20% of the total signatures required. Petitioners further ask that the Court issue whatever extraordinary writs necessary to effectuate its determination, including but not limited to a writ of mandamus to the Secretary

[1] *See* Miss. Sec'y State, Initiatives, Mississippi's Initiative Process, *available at* https://www.sos.ms.gov/Elections-Voting/Pages/Initiatives.aspx.

of State to prevent the official declaration of the vote on any proposal initiated through the filing of the petition for Initiative Measure No. 65.

STATEMENT OF FACTS NECESSARY TO AN UNDERSTANDING OF ISSUES PRESENTED

I. Mississippi's Four Congressional Districts

"Following the 2000 decennial census, Mississippi's delegation to the United States House of Representatives was reduced from five to four representatives. However, the Legislature failed to act and left the old five-district plan in place." *Mauldin v. Branch*, 866 So. 2d 429, 431 (Miss. 2003); Miss. Code Ann. § 23-15-1037; U.S. CONST. art. I, § 4. As a result, on February 26, 2002, a three-judge panel of federal judges issued an injunction to the Secretary of State, Attorney General, and Governor for the State of Mississippi to implement a court-drawn congressional redistricting plan. *Smith v. Clark*, 189 F. Supp. 2d 548, 549 (S.D. Miss. 2002). Under the federal Constitutional mandate of "one person, one vote," *Gray v. Sanders*, 372 U.S. 368, 381 (1963), the districts were drawn to equalize the size of the population and to comply with the Voting Rights Act's mandate to avoid minority vote dilution. *Smith v. Clark*, 189 F. Supp. 2d 512, 525 (S.D. Miss. 2002); *see also* 52 U.S.C. § 10301. The court-drawn congressional redistricting plan reflected four districts, not five. *Smith*, 189 F. Supp. 2d at 525, *affirmed by Branch v. Smith*, 538 U.S. 254, 273 (2003) (holding 2 U.S.C. § 2c mandated single-member districts); *see also Maudlin*, 866 So. 2d at 431.

Following the 2010 Census, the three-judge panel of federal judges modified the 2002 injunction and reapportioned the four congressional districts to equalize the population and to preserve minority voting strength. *Smith v. Hosemann*, 852 F.

Supp. 2d 757, 764 (S.D. Miss. 2011). The Mississippi Legislature has not enacted a new apportionment plan, and the federal injunction remains in place. Under this plan, Mississippi has four congressional districts.

II. The Initiative Process

In 1914, Mississippi enacted an initiative and referendum process as Article 4, Section 3, to the Mississippi Constitution. Though the Mississippi Supreme Court initially held that the amendment was constitutionally enacted, *State ex rel. Howie v. Brantley*, 74 So. 662, 665-67 (Miss. 1917), five years later the Court struck the amendment as "unconstitutional and void." *Power v. Robertson*, 231, 93 So. 769, 776 (Miss. 1922). Sixty-eight years later, then-Attorney General Michael Moore sought to overturn this holding, but the Court refused to judicially resurrect the initiative and referendum amendment. *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 633 (Miss. 1991). The Legislature did so instead, enacting Senate Concurrent Resolution No. 516, ratified by the electorate in the 1992 fall election, to again allow voter initiatives. This became codified as subsections 3-13 of Article 15, Section 273 to the Mississippi Constitution.[2]

Article 15, Section 273, and related statutes codified in Title 23, Article 17 of the Mississippi Code, provide the initiative process. It begins with the filing of a proposed initiative measure with the Secretary of State. Miss. Code Ann. §§ 23-17-1, 23-17-3. After a review by the Attorney General, the proposed initiative measure is refiled with a certificate of review, and the Secretary of State assigns a serial number.

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[2] Section 273 also was amended in 1998 to only allow a state resident to circulate an initiative petition.

Miss. Code Ann. §§ 23-17-5, 23-17-7. Following publication and filing of the proposed ballot title, the initiator of the measure gathers signed petition pages. Miss. Code Ann. §§ 23-17-9 through 23-17-17. The circuit clerks of the various counties must certify the signatures. Miss. Code Ann. § 23-17-21. Upon obtaining certification, the initiator must file the petition with the Secretary of State, who shall refuse to file any petition that "clearly bears insufficient signatures." Miss. Code Ann. § 23-17-23(b).

Article 15, Section 273(3) is plain:

> The signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot. If an initiative petition contains signatures from a single congressional district which exceed one-fifth (1/5) of the total number of required signatures, the excess number of signatures from that congressional district shall not be considered by the Secretary of State in determining whether the petition qualifies for placement on the ballot.

The Constitution provides that "The sufficiency of petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the state, which shall have original and exclusive jurisdiction over all such cases." MISS. CONST. art. 15, § 273(9). Upon determining the sufficiency of the petition, the Secretary of State accepts the petition for filing and thereafter files it with the Clerk of the Mississippi House of Representatives and the Secretary of the Mississippi Senate. MISS. CONST. art. 15, § 273(6); Miss. Code Ann. § 23-17-29. Even if an initiative measure is approved by the electors, it does not take effect until thirty days after the Secretary of State renders an "official declaration of the vote," absent language to the contrary in the measure. MISS. CONST. art 15, § 273(10); Miss. Code Ann. § 23-17-41.

III. Initiative 65

On July 30, 2018, Ashley Ann Durval sponsored a proposed amendment to the Constitution by filing the proposed measure with the Secretary of State under Section 273(3) and Miss. Code Ann. § 23-17-1. Ex. 1, Proposed Amendment. The Attorney General issued a Certificate of Review pursuant to Miss. Code Ann. § 23-17-5. Ex 2, Certificate of Review. Thereafter, the Secretary of State accepted for filing the proposed measure with the certificate for review and assigned the proposed measure the serial number Initiative Measure No. 65.

In November 2019, Ms. Durval, the sponsor of Initiative Measure No. 65, submitted 214,000 signatures, 105,686 of which were certified as valid by the circuit clerks of each county in which the petition was circulated.[3] In his publication of Initiative Measure No. 65, the Secretary of State stated, "According to Mississippi law, for an initiative measure to be placed on the ballot, a minimum of 86,183 certified signatures must be gathered, with at least 17,237 certified signatures from each of the five congressional districts as they existed in the year 2000." *See* Miss. Sec'y State, Initiative Information, Initiative 65, *available at* https://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IId=65. The Secretary of State deemed the signatures sufficient and presumably accepted and

[3] The Secretary of State has no official record of the official number of sufficient signatures. Ex. 3, Affidavit of Adam Stone. This count is what has been reported to the media. *See Competing ballot initiatives confuse MS medical marijuana issue*, NEMISS.NEWS (Oct. 22, 2020), https://www.nemiss.news/competing-ballot-initiatives-confuse-ms-medical-marijuana-issue/. The Secretary of State produced uncertified copies of the sponsor's signature count. Ex. 4, Sponsor's Signature Count.

filed the petition with the office of the Secretary of State and with the Clerk of the House and the Secretary of the Senate. Ex. 3, Affidavit of Adam Stone.

Initiative Measure No. 65 prohibits zoning "medical marijuana treatment centers" any more restrictively than comparably sized businesses. *See* Miss. Sec'y State, Initiative Measure No. 65, Section 8(5), *available at* https://www.sos.ms.gov/Elections-Voting/Pages/Initiative-Measure-65.aspx. A "medical marijuana treatment center" is not just a "treatment center"; it is allowed to "grow, harvest,...produce, propagate" marijuana. *See id.* at Sections 4(7) and (10). The City of Madison's Zoning Ordinance allows horticultural uses in areas zoned Residential Estate District RE-A and RE-B. *See* City of Madison Zoning Ordinance at § 7.02, art. VII and § 8.02, art. VIII, *available at* http://www.madisonthecity.com/sites/default/files/ZoningOrdinance2012-1.pdf. Initiative Measure No. 65 would likely allow any licensed "medical marijuana treatment center" to grow marijuana within residential areas, substantially harming the City's legitimate interest in conserving the value of property and protecting the health and safety of its citizenry.[4]

Pursuant to Article 15, Section 273(8) of the Mississippi Constitution and Miss. Code Ann. § 23-17-31, Mississippi State Legislature passed House Concurrent

[4] Steven Henshaw, *Reading police arrest 5 in theft of $100,000 worth of medical marijuana from growing facility*, READING EAGLE (Apr. 20, 2020), https://www.readingeagle.com/news/crime/reading-police-arrest-5-in-theft-of-100-000-worth-of-medical-marijuana-from-growing/article_2e0ce4a0-832b-11ea-9a16-afb23ac34a30.html; Vivian Leigh, *Surge in Theft of Medical Marijuana Plants in Maine*, NEWS CENTER MAINE (Oct. 5, 2017), https://www.newscentermaine.com/article/news/local/surge-in-theft-of-medical-marijuana-plants/97-481172485.

Resolution 39 as a legislative alternative to Initiative Measure No. 65, which will appear on the ballot as Alternative 65A. The vote was 72-49 in the House on March 10, and 34-17 in the Senate on March 12, 2020.

STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

The Mississippi Constitution of 1890, Article 15, Section 273(3), prohibits the Secretary of State from considering any signatures from any congressional district exceeding one-fifth (1/5) of the total number of signatures required. Miss. Code Ann. § 23-17-23(b) bars the Secretary of State from filing any initiative petition clearly bearing insufficient signatures. Because the State of Mississippi has four congressional districts, the signatures supporting Initiative Measure No. 65 for at least one congressional district exceed one-fifth (1/5) of the total required. Did the Secretary of State therefore violate Section 273(3) and Miss. Code Ann. § 23-17-23(b) by filing Initiative Measure No. 65?

Petitioners seek review of the Secretary of State's determination of the sufficiency of the petition for Initiative Measure No. 65; a declaration that Initiative Measure No. 65 and all amendments thereto were not constitutionally enacted through the initiative process; and the issuance of any appropriate extraordinary writs to prohibit the Secretary of State from officially declaring the vote for any measures placed on the November 3, 2020 ballot pursuant to Section 273(3).

STATEMENT OF REASONS FOR GRANTING THE RELIEF REQUESTED

I. The Court has subject matter jurisdiction.

MISS. CONST. art. 15, § 273(9) grants the Court "**original and exclusive**" jurisdiction to review the Secretary of State's determination of the sufficiency of the initiative petition. MISS. CONST. art. 15, § 273(9) (emphasis added). While the Court's jurisdiction ordinarily is appellate, this constitutional grant of jurisdiction requires the Court to hear this limited class of cases in the first instance. *See* MISS. CONST. art. 146; Miss. Code Ann. § 9-3-9; *cf. In re Fordice*, 691 So. 2d 429, 435 (Miss. 1997) (denying jurisdiction to hear declaratory judgment action in the absence of grant of original jurisdiction). The Legislature can neither divest nor bestow jurisdiction in contravention of the Mississippi Constitution. *Dialysis Sols., LLC v. Miss. State Dep't of Health*, 96 So. 3d 713, 717 (Miss. 2012). Here, the constitutional grant of jurisdiction is plain, and the Court's jurisdiction is secure.

Section 273(9) is self-executing; it grants an explicit right of review and requires no enabling legislation. *See Oktibbeha Cty. Bd. of Educ. v. Sturgis*, 531 So. 2d 585, 588 (Miss. 1988) (holding Sections 17 and 19 of the Mississippi Constitution are self-executing, but Section 211 is not). The courts of other states have interpreted similar constitutional grants of original jurisdiction to allow a direct action in an appellate court. *See Shepard v. McDonald*, 64 S.W.2d 559, 560 (Ark. 1933); *Merwin v. State Bd. of Elections*, 593 N.E.2d 709, 711 (1st Dist. Ill. Ct. App. 1992); *State ex rel. Jones v. Husted*, 73 N.E.3d 463, 468 (Ohio 2016). To the extent any Legislative grant of authority is necessary, that authority exists under Miss. Code Ann. § 9-1-19,

which empowers the Court to order issuance of writs of mandamus, grant injunctions, and issue all other remedial writs. *State v. Maples*, 402 So. 2d 350, 353 (Miss. 1981).

The four modern cases challenging initiatives were all brought in the Circuit Court of Hinds County, not in the Supreme Court. *See In re Proposed Initiative Measure No. 20 v. Mahoney*, 774 So. 2d 397, 398 (Miss. 2000), (upholding challenge to an initiative measure to prohibit gambling for failure to contain a revenue impact statement under MISS. CONST. art. 15, § 273(4)); *Speed v. Hosemann*, 68 So. 3d 1278 (Miss. 2011) (declining review of proposed amendment to restrict transfer of land taken by eminent domain); *Hughes v. Hosemann*, 68 So. 3d 1260, 1262 (Miss. 2011) (declining review of the constitutionality of the content of the proposed Personhood Amendment); *Legis. of the State of Miss. v. Shipman*, 170 So. 3d 1211, 1213 (Miss. 2015) (declining review of title of a Legislative amendment to a measure). None of these cases challenged the Secretary of State's determination of the sufficiency of the petition signatures,[5] and none addressed the Supreme Court's "original and exclusive" jurisdiction under Section 273(9).

The Supreme Court of the United States has interpreted its own "original and exclusive jurisdiction of all controversies between two or more States" to bar suit in any other court. *See Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992). As the Supreme Court found, there is no logical reason why "exclusive" should be given any

[5] In a concurring opinion in *Hughes v. Hosemann*, 68 So. 3d 1260, 1262 n.14 (Miss. 2011), Justice Randolph noted in passing that the proponents of Initiative Measure No. 26 had exceeded "the requirement of 89,285 certified signatures, at least 17,857 of which were from each of Mississippi's former five congressional districts." But the sufficiency of the number of signatures was not at issue in *Hughes*.

meaning other than its ordinary meaning. MISS. CONST. art. 15, § 273(9) therefore bars Petitioners from bringing suit to challenge the sufficiency of the petition in any other Court. This Court, and only this Court, has jurisdiction over this action.

II. The matter is ripe.

The Court has refused to exercise jurisdiction over challenges to the *substance* of a proposed initiative measure because any challenge to substance is unripe until the initiative passes. *See Speed*, 68 So. 3d at 1269-70; *Hughes*, 68 So. 3d at 1264 (overruling *Mahoney*, 774 So. 2d at 402, to the extent it suggested pre-election review of the substance of an initiative is allowed). But there is a distinction between form and substance. Indeed, Justice Pierce memorably illustrated this by comparing the different forms of water (ice, snow, and steam) with the substance of water itself. *Hughes*, 68 So. 3d at 1264. The Court has unequivocally recognized that a pre-election challenge to the *form* of an initiative-driven constitutional amendment is justiciable. *Id.*

Petitioners' challenge to the filing of the petition for Initiative Measure No. 65 is a challenge to form. The measure could be about any topic, and its constitutional invalidity would remain. No matter what the content of the measure is, the petition signatures are insufficient under the plain language of MISS. CONST. art. 15, § 273(3).

III. Petitioners have standing.

Both Mayor Hawkins Butler and the City of Madison have standing to bring this action. Under *Power v. Robertson*, 93 So. 769, 773 (Miss. 1922), "any qualified elector has a right to question the sufficiency and validity of the petition." *See also Mahoney*, 774 So. 2d at 402, *partially overruled on other grounds*, *Speed*, 68 So. 3d at

1281 ("As qualified electors and taxpayers of the State of Mississippi, the appellees in this case had standing to assert their claims questioning the sufficiency of Initiative Measure No. 20."). MISS. CONST. art. 12, § 241 defines a qualified elector:

> Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector, except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector.

Mayor Hawkins Butler is an inhabitant of the state, a citizen of the United States, and she has resided in the City of Madison for over forty years. Ex. 5, Affidavit of Mary Hawkins Butler. She is of legally sound mind, and she has never been convicted of a crime. *Id.* Mayor Hawkins Butler is a qualified elector, and she has individual standing. *Id.*

The City also has standing. "Mississippi parties have standing to sue when they assert a colorable interest in the subject-matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law." *Kinney v. Catholic Diocese of Biloxi, Inc.*, 142 So. 3d 407, 412-13 (Miss. 2014) (internal citation omitted). The City is likely to experience an adverse effect different from any adverse effect suffered by the general public. Specifically, the City has an interest in protecting its zoning rights. The Secretary of State's unconstitutional acceptance of

the petition for Initiative Measure No. 65 and potential declaration of the vote threatens those rights. This threat of injury is real, immediate, and direct. The City has the right and capacity to sue under Miss. Code Ann. § 21-7-1, and it is a proper party to this action.

IV. The Secretary of State's certification of Initiative Measure No. 65 was unconstitutional.

A. "Congressional district" does not mean *former* congressional district.

The key issue in this action is the Secretary of State's interpretation of MISS. CONST. art. 15, § 273(3). That Section states, "The signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot." The Secretary of State has replaced "any congressional district" with the words, "from each of the five congressional districts as they existed in the year 2000." *See* Miss. Sec'y State, Initiative Information, Initiative 65, *available at* https://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IId=65. The Court should reject this interpretation as "tantamount to a constitutional amendment devoid of the people's concurrence." *Chevron U.S.A. v. State*, 578 So. 2d 644, 648 (Miss. 1991) (citing *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966)).

A fundamental canon of constitutional construction is to give effect to the plain language of the Mississippi Constitution. *Ex parte Dennis*, 334 So. 2d 369, 373 (Miss. 1976) ("The construction of a constitutional section is of course ascertained from the plain meaning of the words and terms used within it."); *see also Pascagoula Sch. Dist. v. Tucker*, 91 So. 3d 598, 604 (Miss. 2012); *Dunn v. Yager*, 58 So. 3d 1171, 1189 (Miss.

2011); *Stidham v. State*, 750 So. 2d 1238, 1244 (Miss. 1999); *Smith v. Dorsey*, 599 So. 2d 529, 535 (Miss. 1991); *Bd. of Supervisors v. Hattiesburg Coca-Cola Bottling Co.*, 448 So. 2d 917, 922 (Miss. 1984). That canon controls here.

The plain language of Section 273(3) supports only one interpretation. The phrase "**qualified electors from any congressional district**" can mean only the current congressional districts. MISS. CONST. art. 15, § 273(3) (emphasis added). Currently, there are four, not five, congressional districts.

Our Constitution requires a qualified elector to have resided "for six (6) months in the election precinct or in the incorporated city or town **in which he offers to vote**." MISS. CONST. art. 12, § 241 (emphasis added). No elector may offer to vote in a fifth congressional district. It is non-existent. And so there are no "qualified electors" in the former fifth congressional district.

Section 273(3) provides that an initiative measure to amend the Constitution must be supported by a petition "signed over a twelve-month period by qualified electors equal in number to at least twelve percent (12%) of the votes for all candidates for Governor in the **last gubernatorial election**." (Emphasis added). This sentence ties the signature process a point in time beyond when Section 273(3) was enacted. There is no textual support for replacing "any congressional district" to "from each of the five congressional districts as they existed in the year 2000." *See* Miss. Sec'y State, Initiative Information, Initiative 65, *available at* https://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IId=65. Indeed, if the congressional redistricting plan had changed the district lines, but not the number of districts, then surely the Secretary of State would not maintain that the

geographic boundaries of the five-district plan in effect in 2000 would apply. And if Mississippi regains a congressional seat following the 2020 census, surely the Secretary of State will not hew to the 2000 congressional districting plan.

MISS. CONST. art. 15, § 273(3) forbids the Secretary of State from considering any signatures from "a single congressional district which exceed one-fifth (1/5) of the total number of required signatures." When this constitutional amendment was enacted, both the Legislature and the electorate knew that the congressional districts change every ten years. Populations in different parts of the state grow and decrease unevenly, and reapportionment is necessary to preserve one person, one vote. Section 273(3) is *not* fixed to a particular date in time; "a single congressional district" must mean a "single congressional district," not "a single congressional district as existing in 2000."

Had the Legislature wanted to bind the congressional districts to a particular redistricting plan, it could have explicitly done so. For instance, Section 213-A of the Mississippi Constitution, which governs the appointment of members to the Board of Trustees of State Institutions of Higher Learning, was enacted in 1944. It then stated, "There shall be appointed one (1) member of such board from each congressional district of the state **as now existing**...." MISS. CONST. art. 8, § 213-A (1944) (emphasis added). Consistent with this language, the enabling legislation, Miss. Code Ann. § 37-101-3, provides for "one member from each congressional district of the state as existing as of March 31, 1944." The Legislature similarly has frozen the congressional districts from which other board appointees are drawn. *See* Miss. Code Ann. § 73-5-1 ("[O]ne (1) member [of the Board of Barber Examiners] to

be appointed from each of the congressional districts as existing on January 1, 1991."); Miss. Code Ann. § 75-60-4(1) (filling seats on the Mississippi Community College Board with persons from each of the five congressional districts as they existed on January 1, 1992); Miss. Code Ann. § 73-19-7 (using January 1, 1980, as the congressional district benchmark date to fill seats on the Board of Optometry). The words "as now existing" were plain in Section 213-A. Section 273(3) contains no words of similar meaning or effect. There is no hint of textual intent to tie "congressional district" to the 1992 five-district plan.

The Court relied on a similar analysis in *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1325 (Miss. 1995). There, the Court considered Article 6, Section 154 of the Mississippi Constitution of 1890, which states, "No person shall be eligible to the office of judge of the circuit court or of the chancery court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this state." In *Griffin*, the parties disputed whether the words "immediately preceding his election" should be read into the Section 154. *Id.* The Court noted that similar language was included in Sections 41 of the Mississippi Constitution of 1890 to require persons running for the House of Representative to be a citizen of the county for "two years immediately preceding his election." *Id.* at 1326.

Based on the inclusion of the disputed language in one Section of the Constitution but not the other, the Court found that the drafters intentionally chose *not* to include the "immediately preceding" language: "It appears to this Court that after four opportunities to draft such a Section as 154, that the drafters would have

included the immediately preceding language if they had intended to do so, as they did for other positions." *Id.* at 1326-27. Relying on the plain meaning of Section 154, the Court refused to rewrite it.

The same reasoning applies here. The drafters of Section 273(3) could have included "as now existing" behind the words "any congressional district" but did not do so. Under *Griffin*, the Court should find this omission intentional.

What makes this even more apparent are the Legislature's repeated failures to amend Section 273(3). The Legislature has amended numerous statutes to address the change in congressional districts. *See* Miss. Code Ann. § 37-3-2(2)(a) (amended in 2019 to refer to the four congressional districts as they existed in January 2011); Miss. Code Ann. § 63-17-57 (amended in 2006 to fill board seats based on the four congressional districts when the members of the previous five districts began to roll off the board); *accord* Miss. Code Ann. § 75-57-101; *see also* Miss. Code Ann. § 73-21-75 (amended in 2002 to refer to congressional districts as of July 2001); Miss. Code Ann. § 73-30-5 (amended to add this caveat in 2003); Miss. Code Ann. § 73-57-7 (amended in 2012 to remove any reference to congressional districts). The Legislature is well-aware that a petition cannot be constitutionally certified under Section 273(3) as the congressional districts now stand. Seven times since the congressional districts changed has the Legislature proposed concurrent resolutions to change the 1/5 requirement. Seven times the Legislature has failed to bring a proposed amendment remedying the mathematical problem to the electorate.[6]

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[6] *See* H.R. Con. Res. 58, 2003 Leg., Reg. Sess. (Miss. 2003); S. Con. Res. 510, 2007 Leg., Reg. Sess. (Miss. 2007); S. Con. Res. 523, 2009 Leg., Reg. Sess. (Miss. 2009); H.R. Con. Res. 22, 2014 Leg., Reg. Sess. (Miss. 2014); H.R. Con. Res. 26, 2015 Leg., Reg. Sess. (Miss.

It is unfortunate that the Legislature's failure means that the Constitution cannot be amended *by initiative* until either Section 273(3) is amended or Mississippi regains a congressional seat. In *State ex rel. Moore v. Molpus*, 578 So. 2d 624 (Miss. 1991), then-Attorney General Moore argued that *Power v. Robertson*, 93 So. 769, 775-77 (Miss. 1922), which struck the first initiative amendment as unconstitutionally enacted, was wrongly decided and should be overturned. The Court rejected this argument, under principles of both *stare decisis* and collateral estoppel. In doing so, the Court noted that the Constitution has been successfully amended many times without an initiative process: "Over a hundred amendments have been made and enacted since 1890, as we have seen. If the people want [Initiative and Referendum] in Mississippi, their course is clear." *Id.* at 638. The course is also clear here: the Legislature should amend Section 273(3). Neither the judicial nor the executive branch should do so for it.

B. There is no legal support to the Secretary of State's interpretation.

More than 150 years ago, in dissenting from the infamous *Dred Scott* decision, Justice Curtis wrote,

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

2015); S. Con. Res. 549, 2015 Leg., Reg. Sess. (Miss. 2015); H.R. Con. Res. 43, 2020 Leg., Reg. Sess. (Miss. 2020).

Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting); *see also In re Hooker,* 87 So. 3d 401, 423 (Miss. 2012) (Randolph, J., dissenting); *Czekala-Chathamfiled v. State ex rel. Hood,* 195 So. 3d 187, 200 (Miss. 2015) (Coleman, J., dissenting). In this case, the Secretary of State's interpretation of the sufficiency of a petition to amend our constitution is based not on a strict construction of Section 273(3), but on one man's views of what it *ought* to mean.

Specifically, then-Attorney General Jim Hood issued an advisory opinion in 2009 on this issue, and doubtless this is the slim reed of authority upon which the Secretary of State relies. *See Hosemann*, Miss. Att'y Gen. Op. No. 2009-00001, 2009 WL 367638, 2009 Miss. AG LEXIS 278 (Jan. 9, 2009). The Attorney General's opinion of course does not bind this Court, nor is it a persuasive interpretation of the Mississippi Constitution. *See Basil v. Browning*, 175 So. 3d 1289, 1293 (Miss. 2015); *Montgomery v. Lowndes Cty. Democratic Exec. Comm.*, 969 So. 2d 1, 2-3 (Miss. 2007). Without citing any constitutional text, precedent, canons of constitutional construction, or other law, the Attorney General Opinion states, "It is likewise our opinion that the geographic distribution requirement of Section 273 requires that not more than 20% of the total required number of initiative petition signatures must come from the last five-district congressional district plan which was is effect prior to the adoption of the current four-district plan." The *only* reason given is that "[i]t would be mathematically impossible to satisfy the requirements of Section 273 using just four districts." *Id.*

The mathematical impossibility is a reason to *amend* Section 273(3). As the Attorney General admitted, "One way to remedy this problem would be to amend

Section 273 to reflect four congressional districts." *Id.* But it is not the role of the Secretary of State or the Attorney General to amend the Constitution when the Legislature fails to act. And the Court "does not 'decide what a statute should provide, but [ ] determine[s] what it does provide.'" *Legis. of the State of Miss. v. Shipman*, 170 So. 3d 1211, 1218 (Miss. 2015). This canon of statutory construction applies with equal force to constitutional construction.

The weakness of the reasoning in *Hosemann* is shown in *Turner*, Miss. Att'y Gen. Op. No. 2015-00158, 2015 WL 4394179, 2015 Miss. AG LEXIS 117 (June 5, 2015). In *Turner*, the Attorney General construed the statutory requirement for having one's name placed on the presidential preference primary ballot. Miss. Code Ann. § 23-15-1093 provides that one way to do so is for a candidate to file "petitions signed by not less than one hundred (100) qualified electors of each congressional district of the state, in which case there shall be a separate petition for each congressional district." The Attorney General opined that this plain language unambiguously means "since we now have only four (4) congressional districts, a potential candidate would only need a total of four hundred (400) signatures to satisfy the statutory requirement to gain ballot access." *Turner*, No. 2015-00158. There is no reasoning offered why "**qualified electors from any congressional district,**" as used in MISS. CONST. art. 15, § 273(3) (emphasis added), must be rewritten, but "qualified electors of each congressional district," as used in Miss. Code Ann. § 23-15-1093, unambiguously means the current congressional districts. *Hosemann* is wrong, and *Turner* is right.

C. The Secretary of State's interpretation has dire consequences.

Profound statutory and practical difficulties arise from the Secretary of State's interpretation. An elector signing the petition must attest under penalty of fine, imprisonment, or both that he is a qualified elector in the congressional district written after his name. Miss. Code Ann. § 23-17-19. The Secretary of State's interpretation requires the electors in the former fifth congressional district to contradict their own voter registration cards, because they are *not* qualified electors (nor can they be) in a congressional district that is non-existent. *Turner*, No. 2015-00158, recognizes this: "[S]ince there is no congressional district five (5), a legitimate affirmation that each signer is a qualified elector of district five (5)...would not be possible." The Constitution cannot require the petition signers to lie.

Furthermore, under the five-district plan, eleven counties were split; under the current four-district plan, four counties are split. *See Smith v. Clark*, 189 F. Supp. 2d 512, 525 (S.D. Miss. 2002); *Smith v. Hosemann*, 852 F. Supp. 2d 757, 766 (S.D. Miss. 2011). The practical difficulties of requiring circuit clerks to certify that an elector is qualified to vote in an extinct congressional district, particularly one dividing a county, are obvious.

The Attorney General Opinion speculates that the "general purpose of geographic distribution requirements for the signatures appearing on initiative petitions is to help ensure that an initiative has broad support throughout the state and to help assure that the initiative process is not used by citizens of one part of the state to the detriment of those in another." *Hosemann*, No. 2009-00001. But the use of the old five-district plan does not effectuate this purpose. The districts have been

redrawn over the last twenty years as the growth of certain areas of the state, like Madison County, has outpaced the growth of other areas. *See Smith v. Hosemann,* 852 F. Supp. 2d 757, 766 (S.D. Miss. 2011) ("The large population in Hinds and Madison Counties, as well as the need to prevent retrogression in District 2, necessitated the splitting of those counties between Districts 2 and 3.").

By its plain language, Section 273(3) is not tied to the congressional districting map as it existed in any point in the past. "Congressional district" means merely "congressional district," of which we currently have four. In the future, we may have fewer or we may have more. If the Legislature and the people wish to guarantee that the apportionment of a petition's signatures be mathematically possible and not tied to the fluctuations of our population, then the Constitution should be amended. Until it is, and so long as our congressional districts are fewer than five, then the signature apportionment of Section 273(3) cannot be satisfied. The Secretary of State's acceptance of the petition for Initiative Measure No. 65 for filing was unconstitutional, invalidating the entire initiative process.

CONCLUSION

This action is *not* about the wisdom of legalizing medical marijuana. It bears repeating that the City of Madison and Mayor Hawkins Butler are not opposed to a well-regulated medical marijuana program for the truly suffering. What the City and the Mayor oppose is the failure of the Legislature to amend Section 273(3) and the failure of the Secretary of State to follow the plain language of the Constitution. A constitutional amendment must be enacted *constitutionally.* Petitioners respectfully ask that the Court declare the Secretary of State's determination of the sufficiency of

the petition supporting Initiative Measure No. 65 unconstitutional and to issue whatever extraordinary writs appropriate, including but not limited to mandamus, to prohibit the Secretary of State's declaration of the votes under Miss. Code Ann. § 23-17-41 and MISS. CONST. art. 15, § 273(10) on Initiative Measures No. 65 and 65-A.

Respectfully submitted,

MAYOR MARY HAWKINS BUTLER and
THE CITY OF MADISON

By Their Attorneys,
JONES WALKER, LLP

By: _____
KAYTIE M. PICKETT

Kaytie M. Pickett (MSB No. 103202)
Adam Stone (MSB No. 10412)
Andrew S. Harris (MSB No. 104289)
JONES WALKER LLP
190 East Capitol St., Suite 800
Jackson, MS 39201
Tel.: (601) 949-4900; Fax: (601) 949-4804
kpickett@joneswalker.com
astone@joneswalker.com
aharris@joneswalker.com

Chelsea H. Brannon (MSB No. 102805)
CITY OF MADISON, CITY ATTORNEY
Post Office Box 40
Madison, Mississippi 39130-0040
Tel.: (601) 856-7116; Fax: (601) 853-4766
cbrannon@madisonthecity.com

CERTIFICATE OF SERVICE

I, KAYTIE M. PICKETT, of JONES WALKER LLP, do hereby certify that I have this day filed the foregoing PETITION FOR REVIEW PURSUANT TO ARTICLE 15, SECTION 273(9) OF THE MISSISSIPPI CONSTITUTION OF 1890 AND WRIT OF MANDAMUS AND/OR OTHER EXTRAORDINARY WRITS, with the Clerk of the Court; and, served copies of same, by hand-delivery and U.S. Mail, postage prepaid, to the following:

Secretary of State Michael Watson
125 S. Congress Street
Jackson, MS 39201

Attorney General Lynn Fitch
550 High Street, Suite 1200
Sillers Building
Jackson MS 39201

SO CERTIFIED, this the 26th day of October, 2020

KAYTIE M. PICKETT