IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN RE INITIATIVE MEASURE NO. 65

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

VS. **CAUSE NO.: 2020-M-1199-SCT**

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

Brief of *Amicus Curiae* Americans for Prosperity-Mississippi

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal:

1. Mayor Mary Hawkins Butler ..... Petitioner
2. The City of Madison ..... Petitioner
3. Kaytie M. Pickett, Adam Stone, Andrew S. Harris, and Jones Walker LLP ..... Counsel for Petitioners
4. Chelsea Brannon, Madison City Attorney ..... Counsel for Petitioners
5. Secretary of State Michael Watson ..... Respondent
6. Attorney General Lynn Fitch, Deputy Solicitor General Krissy Nobile, and Assistant Solicitor General Justin Matheny ..... Counsel for Respondent
7. Mississippi Senators Angela Hill and Kathy Chism and Mississippi Representative Jill Ford, the Mississippi State Department of Health ("MDOH"), the Mississippi State Medical Association ("MMA"), the American Medical Association ("AMA"), and the Mississippi Sheriffs' Association ("MSA") ..... *Amici Curiae*

8. Nathan S, Farmer,
   Nathan S. Farmer, P.A. ..... Counsel for *Amici* Hill, Chism and Ford

9. G. Todd Butler and Mallory K. Bland,
   Phelps Dunbar PLLC ..... Counsel for *Amicus* MDOH

10. John B. Howell, III,
    Jackson, Tullos & Rogers, PLLC ..... Counsel for *Amici* MMA and AMA

11. William R. Allen,
    Allen, Allen, Breeland & Allen, PLLC ..... Counsel for *Amicus* MSA

12. Americans for Prosperity-Mississippi ..... *Amicus Curiae*

13. Spencer M. Ritchie and Forman Watkins
    & Krutz LLP ..... Counsel for *Amicus Curiae*

This the 15th day of January 2021.

By: */s/ Spencer M. Ritchie*

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Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Legislative Materials

Secondary Sources

I. SUMMARY OF ARGUMENT

Section 273(3) of the Mississippi Constitution provides as follows:

> **The people reserve unto themselves the power to propose and enact constitutional amendments by initiative.** An initiative to amend the Constitution may be proposed 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. **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.

Miss. Const. Art. 15, § 273 (emphasis added).

In this case, Petitioners contend the term "congressional district," as used above in relation to the one-fifth diversity requirement for petition signatures, *unambiguously* refers to congressional districts existing at the time of a given initiative. Therefore, Petitioners contend, with the current four congressional districts, satisfying the one-fifth signature requirement has become mathematically impossible, and Section 273—along with the people's power to amend the Constitution *via* voter initiative—has defeated itself.

Contrary to the Petitioners' contentions, however, the text of Section 273(3) does not so unambiguously provide. And principles and canons of constitutional interpretation endorsed by leading textualists overwhelmingly favor the Secretary of State's interpretation of "congressional district" as meaning one of the five existing at the time Section 273 was adopted. Therefore, the reduction in congressional

districts from five to four in 2002, or any other change in the number of congressional districts that may occur in the future, has no bearing on the power reserved by the people in Section 273 to amend the Constitution *via* ballot initiative. Furthermore, the overarching principle of popular sovereignty counsels in favor of the Secretary of State's position. For these reasons, *Amicus Curiae* Americans for Prosperity-Mississippi urges the Court to deny the Petition.

II. ARGUMENT

A. Petitioners fail to show the term "congressional district" in Section 273(3) originally and unambiguously meant congressional district existing at the time of a given initiative.

Petitioners argue the reference to "any congressional district" in Section 273(3) unambiguously refers to congressional districts existing at the time a given initiative is proposed. Section 273(3)'s text, however, as adopted in 1992, contains no such language linking the definition of congressional district to the future.

Petitioners point to statutory provisions expressly linking congressional districts to those which existed at the time of their passage and that Section 273(3) lacks a similar provision. This argument, however, cuts against Petitioners' position that the plain language of Section 273(3), *i.e.*, without resorting to matters extraneous of the text, unambiguously means congressional district at the time of a given initiative.

At any rate, what Petitioners fail to mention is there are also constitutional and statutory provisions that clearly account for future changes in the number of congressional districts, and Section 273(3) contained no such provision. *E.g.*, Miss.

Const. Art. 9, § 221 (requiring the Mississippi National Guard to "consist of not less than one hundred men for each Senator and Representative *to which this state may be entitled in [Congress]*") (emphasis added); Miss. Code Ann. § 5-3-121 (basing joint congressional redistricting committee membership partially on congressional district residence and providing "[i]n the event the congressional districts of the state shall change numerically, then the number appointed . . . from congressional districts shall be adjusted accordingly.").

More importantly, however, in asserting that Section 273(3)'s reference to "congressional district" unambiguously means congressional districts existing at the time an initiative is proposed, Petitioners wrongly ignore the effect of the term "one-fifth" on the meaning of congressional district. *See Dye v. State ex rel. Hale*, 507 So. 2d 332, 342 (Miss. 1987) ("[C]onstitutional provisions should be read so that each is given maximum effect and a meaning in harmony with that of each other."). Indisputably, one-fifth is a reference to the five congressional districts that existed at the time the provision was adopted; reading "congressional district" today to mean one of the current four would be contradictory and incompatible with the one-fifth provision.[1]

Therefore, even assuming *arguendo* the term congressional district is capable of being fairly interpreted to mean one of the current four as Petitioners assert, the

[1] Petitioners' isolation of the term congressional district separate from the one-fifth reference is inconsistent with a textualist approach to interpreting legal texts and represents an approach, *i.e.*, strict constructionism, which leading textualists have explicitly rejected. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 62 (2012) ("Strict constructionism, as opposed to fair-reading textualism, is not a doctrine to be taken seriously.").

lack of language linking the term to the future combined with the one-fifth reference renders the term equally, if not more, capable of meaning the five congressional districts existing at the time Section 273 was adopted. Consequently, Section 273(3) does not unambiguously mean what the Petitioners say it means.

B. Textualist principles and canons of constitutional interpretation overwhelmingly favor the Secretary of State's position.

Petitioners fail to recognize well-established principles and canons of constitutional interpretation endorsed by leading textualists. This is likely because those principles and canons overwhelmingly support the Secretary of State's position.

1. Presumption of Validity Principle

In their book, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012), preeminent textualists United States Supreme Court Justice Antonin Scalia and Bryan A. Garner identify five "fundamental principles" of interpreting legal instruments, including constitutions. One of those five is that "[a]n interpretation that validates outweighs one that invalidates (*ut res magis valeat quam pereat*)." *Id.* at § 5. Under this presumption, therefore, when text is reasonably susceptible of two interpretations, one of which preserves the provision and the other which destroys it, the interpretation preserving the provision is favored. *Id.*

This Court has adopted the presumption of validity principle and specifically applied it when, as here, interpreting Section 273 of the Constitution. In *State ex rel. Collins v. Jones*, 64 So. 241, 248 (Miss. 1914), a case concerning whether a ballot measure improperly contained more than one amendment to the Constitution, the Court stated:

> The means provided for the exercise of their sovereign right of changing their Constitution, should receive such a construction as not to trammel the exercise of the right.
> . . . .
>
> [E]very reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the Constitution when it is attacked after its ratification by the people.

Id. at 248 (internal quotations omitted). Likewise, in *Burwell v. Miss. State Tax Comm'n*, 536 So. 2d 848 (Miss. 1988), which, like *Jones*, also concerned whether a ballot measure improperly contained more than one amendment, the Court stated:

> It has long been settled in this state that, when the constitutionality of a statute is drawn into question, a construction will be placed upon it, if reasonably possible, to enable it to withstand constitutional attack and to carry out the purpose embedded in the legislative language.
> . . .
>
> [O]ut of deference to the authority and prerogative of the legislature, we will ordinarily afford the gray areas of the Constitution any reasonable construction that will avoid unconstitutionality of the statute.
> . . .
>
> In the final analysis we have been asked to review judicially not just an enactment of the legislature but a constitutional amendment affirmatively ratified by the people. More so than in ordinary cases of judicial review, we exercise an authority requiring the utmost delicacy. We should proceed with caution.

Id. at 858-859 (internal citations omitted). More generally, in *State v. Jackson*, 81 So. 1, 5–6 (Miss. 1919), the Court stated, **"[i]t is scarcely conceivable that a case can arise where a court would be justifiable in declaring any portion of a written Constitution nugatory because of ambiguity."** (emphasis added). *Accord Moore v. General Motors Acceptance Corp.,* 125 So. 411, 413 (Miss. 1930) ("[A] constitution must be construed so as to vivify and effectuate, not to defeat in whole

or in part the policy indicated by its framers."); *USF&G Co. v. Conservatorship of Melson*, 809 So. 2d 647, 660 (¶58) (Miss. 2002) ("'[i]t is our duty to support a construction which would purge the legislative purpose of any invalidity . . . .'") (quoting *Quitman County v. Turner*, 18 So. 2d 122, 124 (Miss. 1944)).

Almost as if it were a trivial point, Petitioners acknowledge their asserted interpretation of Section 273 would effectively invalidate it *in toto*. That their interpretation would do so, were the Court to adopt it, is undisputed. As addressed above, Section 273(3) does not unambiguously mean what the Petitioners say it means, and the Secretary of State's interpretation of the text is undoubtably reasonable. Pursuant to the presumption of validity principle, therefore, as adopted by leading textualists and by this Court, the Court must adopt the Secretary of State's interpretation so as to not invalidate Section 273 and strip the people of their right to amend the Constitution by voter initiative.[2]

2. Whole-Text Canon

A central textualist canon of constitutional interpretation is that "[t]he text must be construed as a whole." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 24 (2012). This canon "calls on the judicial

[2] To the extent Petitioners would contend concerns over the continued validity of Section 273 should not factor into the Court's resolution of this matter because it would constitute "purposivism" or be "outcome-based," Scalia and Garner specifically reject that characterization: "Some outcome-pertinent consequences—what might be called textual consequences—are relevant to a sound textual decision— specifically, those that: (1) cause a private instrument or governmental prescription to: . . . be invalid (§ 5 [presumption of validity])." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 61 (2012)

interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Id.* at 167. The whole-text canon recognizes that "context is a primary determinant of meaning." *Id.*

This Court has recognized the whole-text canon and tools of construction deriving from it. In *State v. Jackson*, 81 So. 1 (Miss. 1919), for example, the Court explained:

> Frequently the meaning of one provision of a Constitution, standing by itself, may be obscure or uncertain, but is readily apparent when resort is had to other portions of the same instrument. It is therefore an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.
> . . .
>
> It follows, therefore, that, as far as possible, each provision must be construed so as to harmonize with all others, yet with a view to giving the largest measure of force and effect to each and every provision that shall be consistent with a construction of the instrument as a whole.

Id. at 6. *Accord Dye v. State ex rel. Hale*, 507 So. 2d 332, 342 (Miss. 1987) ("[C]onstitutional provisions should be read so that each is given maximum effect and a meaning in harmony with that of each other."). *See also Cellular South, Inc. v. BellSouth Telecommunications*, LLC, 214 So. 3d 208, 212 (¶10) (Miss. 2017) ("It is our job to determine legislative intent from the language of the act as a whole, and not to separate from the statutory herd one part alone.") (interpreting statute); *Manufab, Inc. v. Mississippi State Tax Com'n,* 808 So. 2d 947, 949 (Miss. 2002) ("Our long-standing rule regarding statutory construction is that the Legislature's intention must be determined by the total language of the statute and not from a

segment considered apart from the remainder.") (interpreting statute) (internal quotation omitted); *Evans v. City of Jackson*, 30 So. 2d 315, 317 (Miss. 1947) (applying the doctrine of *noscitur a sociis*, under which associated words take their meaning from one another) (interpreting statute).

The term "congressional district" in Section 273(3) must be interpreted in the light of and in harmony with its textual context. Doing so favors the Secretary of State's interpretation over the Petitioners:

- Section 273(3)'s express reservation of the "the power to propose and enact constitutional amendments by initiative" to the people contains no indication of that power being subject to any contingencies or existing for some time period other than in perpetuity.

- The reference to congressional districts is only in the context of ensuring geographical diversity of signatures in support of a ballot initiative petition. It is a provision relating to *carrying out* the people's power to amend the Constitution by initiative, *not to the very existence of that power*.

- In the text, the term "congressional district" is almost immediately followed by the one-fifth reference and those terms are necessarily associated. It is undisputed that one-fifth refers to the five congressional districts that existed at the time of Section 273(3)'s passage.

- Reading congressional district to mean districts as they may exist in the future, and as now referring to one of the four existing today, would improperly require

interpreting the one-fifth requirement as having become incompatible, meaningless, and without effect.

Accordingly, the fairest construction of the term congressional district, when read in the full context of Section 273(3) and giving maximum effect to all its provisions, is that it referred and continues to refer to one of the five congressional districts existing when Section 273(3) was adopted.

3. Absurdity Doctrine

Pursuant to the absurdity doctrine, "[a] provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 37 (2012). Under the doctrine, absurd outcomes may be avoided so long as the interpretation required to avoid the absurdity does no violence to the text. *Id.* The purpose of "[t]he doctrine of absurdity is . . . to correct obviously unintended dispositions[.]" *Id.* at 239.

This Court has endorsed the absurdity doctrine. The Court has stated that its duty is "to support a construction which would purge the legislative purpose of any . . . absurdity[.]" *USF & G Co. v. Conservatorship of Melson*, 809 So. 2d 647, 660 (Miss. 2002) (quoting *Quitman County v. Turner*, 18 So. 2d 122, 124 (Miss. 1944)). In other words, the Court will not "impute an . . . absurd purpose to the legislature when any other reasonable construction can save it from such an imputation." *Drane v. State*, 493 So. 2d 294, 298 (Miss. 1986). Similarly, the Court has stated that "Constitutional

. . . provisions do not require to be done that which is impossible or thoroughly impracticable . . . which is another way of saying that what is impossible or thoroughly impracticable is not within a constitutional . . . requirement." *Gulf Ref. Co. v. Stone*, 21 So. 2d 19, 21 (Miss. 1945).

Under Petitioners' interpretation of Section 273(3), the people's constitutional right to amend the Constitution by voter initiative is strictly contingent on the results of the United States Census every ten years and Mississippi not losing or gaining congressional districts. There could be no rational basis for the Legislature to tie the people's right to amend the Constitution to Mississippi maintaining a certain level of representation in the United States House of Representatives.

Moreover, it would neither be reasonable nor permissible to interpret a constitutional provision in such a way that it is self-defeating or "mathematically impossible" to exercise. This is especially true considering the Constitution cannot be simply "fixed" by the Legislature. Reading Section 273(3) to be self-defeating would leave re-introduction of direct participation of the citizenry in the amendment process only within the discretion of the Legislature and requiring a super-majority of the Legislature to authorize it.

The Secretary of State's asserted interpretation of congressional district as meaning one of the five existing at the time it was adopted is strongly supported by the text of Section 273(3), much less does it do violence to the text. That interpretation would also avoid an absurd and clearly unintended disposition such that the people's

power to voter initiative ceased less than a decade after it was approved by the voters when Mississippi lost a congressional district because of Census results.[3]

C. The overarching principle of popular sovereignty favors the Secretary of State's position and preserving the people's power to voter initiative.

Substantial weight must be afforded the principle of popular sovereignty when interpreting Section 273 and preserving the power of the people to amend the Constitution by voter initiative. The voter initiative process embodied in Section 273 is a key feature of the structure of political participation ensured by the Mississippi Constitution. Recognizing this counsels in favor of a construction of Section 273 that preserves the initiative process and the ability of the people to directly participate in the amendment process.

"The Mississippi Constitution is a contract between the government and the people of this State[.]" *Myers v. City of McComb*, 943 So. 2d 1, 7 (¶23) (Miss. 2006). Article 3, Sections 5 and 6 of the Mississippi Constitution provide, in pertinent part, that:

> Sec. 5. All political power is vested in, and derived from, the people; all government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.

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[3] Again, to the extent Petitioners would contend concerns over absurd or unintended dispositions resulting from their asserted interpretation of Section 273 should not factor into the Court's resolution of this matter because it would constitute "purposivism" or be "outcome-based," Scalia and Garner specifically reject that characterization as well: "Some outcome-pertinent consequences—what might be called textual consequences—are relevant to a sound textual decision—specifically, those that: (1) cause a private instrument or governmental prescription to: . . . produce an absurd result (§ 37 [absurdity doctrine])." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 61 (2012).

> Sec. 6. The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness . . . .

Miss. Const. Art. 3, §§ 5, 6 (1890). These provisions reflect that which is expressed in the Preamble to the Mississippi Constitution: "We, the People of Mississippi . . . do ordain and establish this Constitution." As this Court has stated specifically concerning citizen-led amendments to the Constitution:

> It is worthy of remark . . . that this amendment of the Constitution proceeds directly from the people of the State, *in their sovereign capacity*. It derives no sanction from the legislature, whose office it is to propose, and not to enact. . . . *[T]he Court ought not to interfere to defeat their deliberately expressed will, without the most clear and imperative necessity*.

Green v. Weller, 32 Miss. 650, 672-73 (1856) (emphasis added).

Adopting the Petitioners' interpretation of Section 273(3), when the Secretary of State's interpretation of that requirement is equally if not more reasonable, "would be an affront to Article 3, Sections 5 and 6 which declare all governmental power is vested in and derived from the people," *Frazier v. State By & Through Pittman*, 504 So. 2d 675, 697 (Miss. 1987).[4]

This is especially true when the people have on now three occasions successfully exercised the power to amend the Constitution through voter initiative

[4] In *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 633 (Miss. 1991), the Court rejected plaintiff's argument that Article 3 *required* an initiative and referendum process. In that case, however, the initiative process had been struck down decades earlier and plaintiffs sought for the Court to resurrect it. Moreover, in the *Molpus* decision, *stare decisis* and *res judicata* were the major factors. *Id.* at 633-644. Here, of course, the initiative process presently stands alive and well and Petitioners are asking the Court to toss it. In this instance, Article 3 counsels in favor of preserving the people's power.

since the time Petitioners erroneously claim that power became inoperable (*i.e.*, when Mississippi lost a congressional district in 2002). *See* Initiative 27 (voter identification, 2012); Initiative 31 (eminent domain, 2012); Initiative 65 (medical marijuana, 2020).

Furthermore, were the Court to find Section 273 inoperable, not only would it invalidate those three measures now embodied in the Constitution, it would also render highly uncertain when and if ever the people would regain their right to directly amend the Constitution. As stated earlier, for the people to regain that right, a super-majority of the Legislature would have to vote to amend the Constitution to provide for it again. Considering that the Legislature has adopted competing and contradictory alternative measures for the last two voter initiatives, it is unlikely the Legislature would choose to revive the voter initiative power for the foreseeable future. *See* 2020 H.C.R. 39 (legislative alternative to Initiative 65); 2015 H.C.R. 9 (legislative alternative to Initiative 42).

D. CONCLUSION

A true textualist interpretation of Section 273(3) and a proper recognition for popular sovereignty overwhelmingly support the Respondent's position in this case. For these reasons, *Amicus Curiae* Americans for Prosperity-Mississippi urges the Court to deny the Petition.

Respectfully submitted, this the 15th day of January 2021.

AMERICANS FOR PROSPERITY-MISSISSIPPI

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Certificate of Service

I certify that today I filed the foregoing document with the Court's MEC/E-File system, which sent notification of the filing to all persons registered to receive service.

This the 15th day of January 2021.

/s/ Spencer M. Ritchie
Spencer M. Ritchie