IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**IN RE INITIATIVE MEASURE NO. 65:
MAYOR MARY HAWKINS BUTLER,
IN HER INDIVIDUAL AND OFFICIAL CAPACITIES,
AND THE CITY OF MADISON,**

Petitioners,

vs. **Cause No. 2020-IA-01199-SCT**

**MICHAEL WATSON, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF STATE
FOR THE STATE OF MISSISSIPPI, RESPOND
BRIEF OF PETITIONERS
MAYOR HAWKINS BUTLER
AND THE CITY OF MADISON,**

Respondents.

BRIEF AMICI CURIAE ON BEHALF OF SENATOR ANGELA HILL AND REPRESENTATIVES KATHY CHISM AND JILL FORD IN SUPPORT OF PETITIONERS

Amici, Sen. Angela Hill, Rep Kathy Chism, and Rep. Jill Ford, by and through counsel and pursuant to Miss. R. App. P. 29, submit this brief as *amici curiae* in support of Petitioners.

INTRODUCTION

MISS. CONST. art. 15, §273(3) requires that "[t]he 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*. (emphasis added). The Secretary of State accepted the Initiative Measure No. 65 Petition for filing on the theory that the highlighted language should be interpreted as meaning each of "the five congressional districts as they existed in the year 2000." Brief of Petitioners at 10 n.5 (citing Miss. Sec'y State, Initiative Information, Initiative 65, *available at* https://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IId=65).

The Legislature certainly did not give such a liberal reading to similar language as it appeared in numerous statutes, as shown by several bills passed into law between 2003 and 2007 that amended various statutes in order to conform them to the new congressional districts. Additionally, many of us in the Legislature recognized that the language in Section 273(3) referring to congressional districts could not be reconciled with the loss of a congressional seat in 2000 and must therefore be amended. Indeed, the Secretary of State himself introduced a resolution in 2015 intended to do just that. Sadly, that resolution died in committee. Nevertheless, bringing Section 273(3) into compliance with the current congressional districts remains the responsibility of the legislative branch, not the judicial branch. Amici therefore urge the Court to exercise judicial restraint by respecting the constitutional limitations on its own authority and hold the Secretary's determination of the sufficiency of the Initiative Measure No. 65 Petition unconstitutional.

ARGUMENT

MISS. CONST. art. 1, §1 divides the powers of government into three distinct departments, namely the legislative, the judicial, and the executive. Article 1, section 2 emphatically prohibits any encroachment of power by one department into that of another:

> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

Id. While it is certainly true that it is the province of the Court to say what the law *is*, it is equally true that it is *not* for the Court to say what the law *should be*. As was said in the case of *Doggett v. State* some 90 years ago, "it is, of course, not for the courts to make law or to legislate upon hardships for which the lawmaking power has not authorized the relief which is sought." *Doggett v. State*, 144 So. 854, 855 (Miss. 1932); *see also Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 105 (1993) (Scalia, J., concurring) ("Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis."). This Court should hew to these principles here and resist the temptation to rewrite the law.

I. Enacting Legislation to Govern the Initiative Process is a Legislative Function.

Under MISS. CONST. art. 15, §273(12), "[t]he Legislature shall provide by law the manner in which initiative petitions shall be circulated, presented and certified." Title 23, Chapter 17 of the Mississippi Code codifies the Legislature's response to this constitutional duty. Miss. Code §23-17-19 specifies the minimum requirements for an acceptable signatory:

> The Secretary of State shall design the form each sheet of which shall contain the following:
>
> EVERY PERSON WHO SIGNS THIS PETITION WITH ANY OTHER THAN HIS OR HER TRUE NAME, KNOWINGLY SIGNS MORE THAN ONE OF THESE PETITIONS RELATING TO THE SAME INITIATIVE MEASURE, SIGNS THIS PETITION WHEN HE OR SHE IS NOT A QUALIFIED ELECTOR OR MAKES ANY FALSE STATEMENT ON THIS PETITION MAY BE PUNISHED BY FINE, IMPRISONMENT, OR BOTH.
>
> To the Honorable ____, Secretary of State of the State of Mississippi:
>
> We, the undersigned citizens and qualified electors of the State of Mississippi, respectfully direct that this petition and the proposed measure known as Initiative Measure No. ____, entitled (here insert the established ballot title of the measure), a full, true and correct copy of which is printed or attached on the reverse side of this petition, be transmitted to the Legislature of the State of Mississippi at its next ensuing regular session, and we respectfully petition the Legislature to adopt the proposed measure; and each of us for himself or herself says: I have personally signed this petition, **I am a qualified elector of the State of Mississippi in the city (or town), county and congressional district written after my name**, my residence address is correctly stated and I have knowingly signed this petition only once."

> Each sheet shall also provide adequate space for the following information: Petitioner's signature; print name for positive identification; residence address, street and number, if any; city or town; county; precinct; and congressional district.

Id. (emphasis added).

The form requires each signatory to affirm that he or she is *currently* a qualified elector in the congressional district written after his or her name. Nothing in this form even remotely suggests that the congressional district referred to is the district as it existed twenty years ago.

The signatures in App. F that contain no reference to the congressional district in which the electors reside are quite telling in this respect. As Petitioners have suggested, such an omission likely arose from the fact that the electors are no longer in the congressional district they had been in prior to the latest census and that reporting their current district would be fatal to the initiative effort. (Pet. Opening Br. at 17-18).

II. The Legislature Always Understood Language Such as "Any Congressional District" to Mean the Current Districts and it Acted Promptly to Amend Several Statutes to Comport with the Loss of One Congressional District.

The Legislature was keenly aware of the effect of the 2000 decennial census and the loss of one congressional seat on existing laws referring to the congressional districts. As Petitioners suggested, the Legislature knew full well that the congressional districts are subject to change every ten years. (Pet.

Br. at 19). We therefore took action to clarify and address the issues arising from the loss of one congressional district as early as 2003.

For example, in Senate Bill 2028, we amended Miss. Code §73-6-3 in order to conform the State Board of Chiropractic Examiners to the new drawing of our congressional districts. As originally enacted, the law called for a six-member board consisting of the executive director of the State Board of Health and "and one (1) [member] from each congressional district as presently constituted." (*See* Exhibit 1, copy of SB 2028 (Miss. 2003)). The amendment required the appointment of one (1) member "from each of the four (4) Mississippi congressional districts as they currently exist, and one (1) from the state at large" in addition to the executive director of the State Board of Health. *Id*. We also amended Miss. Code §43-1-1 in order to revise the criteria for appointment of the members of the State Board of Health to account for the loss of a congressional district that same year. (*See* Exh. 2, copy of SB 2338 (Miss. 2003)).

One year later, in 2004, we again took action to address the challenges occasioned by loss of a congressional seat. In House Bill 560, for example, we amended Miss. Code §§73-30-5, -7, and -29. (*See* Exh. 3, copy of HB 560 (Miss. 2004)). As originally constituted, the Board of Examiners for Professional Counselors consisted of five (5) members, one "from each of the five (5) congressional districts." *Id*. The Legislature understood that such language did

not mean the five congressional districts as they existed prior to the 2000 Census, but referred instead to current districts; hence the necessity of corrective action. The amended language provided for appointment of "one (1) member from each of the four (4) congressional districts, **as such districts existed on January 22 1, 2002**," and one member selected from the state at large. *Id*. (emphasis added).

That same year we also amended Miss. Code §75-57-101, which created the Liquefied Compressed Gas Board. The members of that seven-member board were to be appointed by the Commissioner of Insurance as follows: "(a) Five (5) members, **one (1) from each of the congressional districts**," and two (2) from the state at large. (*See* Exh. 4, copy of SB 2684 (Miss. 2004) (emphasis added)). As amended, after July 2004 the members were to be appointed one (1) "from each of the four (4) Mississippi congressional districts and three (3) members from the state at large." *Id*.

Even prior to the 2000 census we had been cognizant of the danger of shifting congressional districts and the need to define which congressional districts are intended to govern in the event of a change. For example, we acted in 2004 to amend Miss. Code §73-34-7 to account for the change in congressional districts as it affected the Mississippi Real Estate Appraiser Licensing and Certification Board, even though the original language in the law called for a six-member board consisting of one (1) member "from each

congressional district **as such district existed on January 1, 1989**." (*See* Exh. 5, copy of HB1597 (Miss. 2004) (emphasis added)). Such clarifying language could easily have been included in Section 273(3); the absence of such language is fatal to the Secretary's position.

We also took action in 2004 to amend numerous statutes predicated upon the previous five congressional districts in light of the loss of one district in the 2000 census. In House Committee Substitute for Senate Bill No. 2803[1], we recognized that many of the Executive Agency boards and commissions had been created based on the previous five congressional districts. (*See* Exh. 6, copy of Bill.) We therefore undertook to amend no less than thirty-one (31) separate statutes in order to remedy the incongruity.

One of those statutes actually addressed the possibility of a change in the congressional districts. In Miss. Code §35-1-1, creating the Veterans Affairs Board, subsection (1)(a) originally instructed: "There is hereby created a State Veterans Affairs Board, to consist of seven (7) members, to be appointed by the Governor, one (1) from each congressional district **as they existed on January 1, 1952**, of the State of Mississippi." *Id*. (emphasis added). Subsection (b) provided that after May 14, 1992, "[o]ne (1) member shall be

[1] Unfortunately, the bill did not pass. It is nevertheless informative insofar as it demonstrates the Legislature's awareness of the problems arising from the loss of a congressional district and its impact on existing laws.

appointed from each congressional district **as such districts existed on March 1, 1992**, and two (2) members shall be appointed from the state at large." *Id*. (emphasis added). In our bill in 2004 we proposed to amend the statute to reflect that after July 1, 2004 "[t]here shall be appointed one (1) member of the board **from each of the four (4) Mississippi congressional districts as they currently exist**, and three (3) from the state at large, . . ." Ex. 6 at 6 (emphasis added).

Some statutes, however, like MISS. CONST. art. 15 §273(3), simply referred to the congressional districts without any qualification. For example, in Miss. Code §37-4-3, the State Board for Community and Junior Colleges was created. Subsection (2) stated that the board would have ten (10) members, "two (2) members from the First Mississippi Congressional District, . . . two (2) members from the Second Congressional District, . . . two (2) members from the Third Congressional District, . . . two (2) members from the Fourth Congressional District, . . . and two (2) members from the Fifth Congressional District." *Id*. Because there was no longer a Fifth Congressional District in our state, we understood the plain language to mean the current congressional districts, and therefore proposed an amendment whereby the law would require the appointment of two (2) members "from each of the four (4) Mississippi congressional districts **as they currently exist**." Ex. 6 at 11 (emphasis added).

Similarly, Miss. Code §37-155-7 created the Prepaid Affordable College Tuition Board. Subsection (1)(a) stated that the nine (9) voting members would consist in four designated state officials "**and one (1) member from each congressional district** to be appointed by the Governor with the advice and consent of the Senate." *Id*. (emphasis added). We understood this unambiguous language to mean what it said, that is, from each **current** congressional district**.** But because appointing one (1) member from each of the four (4) current congressional districts yielded only four (4) members, and adding those four to the four designated state officials totaled only eight (8), not nine (9) as §37-155-7 requires, we proposed to amend the statute to instruct that "[t]here shall be appointed one (1) member of the board from each of the four (4) congressional districts **as they currently exist**, and one (1) from the state at large." Ex. 6 at 17.

Again, the Health Care Trust Fund and Health Care Expendable Fund were created under Miss. Code §43-13-409. A seven-voting-member board of directors was created consisting of the State Treasurer, the Attorney General, "**and one (1) member from each congressional district** to be appointed by the Governor with the advice and consent of the Senate." *Id*. at sec. (1)(a) (emphasis added). No one in the Legislature argued in 2004 that the quoted language meant each congressional district as they existed before 2000. Instead, we proposed to amend the statute to require the appointment of one

(a) member "from each of the four (4) congressional districts **as they currently exist**" and one (1) from the state at large. Ex. 6 at 21 (emphasis added).

In short, the Legislature always understood the plain meaning of "each congressional district" as referring to each **current** congressional district unless there was additional qualifying language, such as that in Miss. Code §35-1-1, where the statute specified that it was referring to "each congressional district **as they existed on January 1, 1952**." (Emphasis added.) There is no warrant for the Court to apply any other meaning to this same language as it appears in Section 273(3).

The Secretary in effect asks the Court to rewrite Section 273(3) in order to save Measure 65. Section 273(3) unambiguously 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." *Id*. (emphasis added). Under the Secretary's suggested interpretation, the signatures of the qualified electors from any of the current four congressional districts **may** (indeed, must) exceed one-fifth of the total number of signatures required. To change "shall not" to "may" is the essence of judicial activism.

What this Court stated a few years ago in the context of a similar question applies with equal force here: **"[W]e prefer to exercise judicial**

restraint and to hold that 'shall' means 'shall,' not 'shall sometimes.'" *Poindexter v. Southern United Fire Ins. Co.*, 838 So.2d 964, 971 (Miss. 2003) (Cobb, J.) (emphasis added). In this case, "shall not" means "shall not," not "may sometimes." Any other conclusion would constitute not judicial restraint, but judicial activism.

III. The Legislature's History of Proposed Amendments to Section 273(3) Underscores its Authority and its Awareness of the Issue.

As stated earlier, it is the place of the Legislature, not the judiciary, to make and amend the laws. The Legislature has not only acted repeatedly to address the statutes that refer to the previous five congressional districts, it has also attempted on seven different occasions to fashion an amendment to Section 273(3). It first offered an amendment in 2003. It tried again in 2007, in 2009, and again in 2014. (*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)).

In fact, in 2015, then-Senator Watson, who served as Chairman of the Constitution Committee, proposed Senate Concurrent Resolution 549, entitled, "A CONCURRENT RESOLUTION PROPOSING AN AMENDMENT TO SECTION 273, MISSISSIPPI CONSTITUTION OF 1890, TO CONFORM THE PRO RATA SIGNATURE REQUIREMENTS FROM EACH

CONGRESSIONAL DISTRICT FOR AN INITIATIVE AND REFERENDUM PETITION TO THE NUMBER OF NEW CONGRESSIONAL DISTRICTS." (*See* Exh. 7, copy of S. Con. Res. 549, 2015 Leg., Reg. Sess. (Miss. 2015)). Like the four other proposed amendments before it, Secretary Watson's proposal died in committee. In the same year as Secretary Watson's proposal in the Senate a proposed amendment was also introduced in the House, H.R. Con. Res. 26, 2015 Leg., Reg. Sess. (Miss. 2015). Yet another attempt was made just this year, but yet again it failed to pass. (*See* H.R. Con. Res., 2020 Leg., Reg. Sess. (Miss. 2020)).

Clearly, the Legislature is aware of the issue and has acted numerous times in hopes of addressing it. That the Legislature has not yet succeeded in bringing a proposed amendment before the electorate is no cause for the Court to interject itself into what is clearly a legislative matter.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to hold the Secretary's determination of the sufficiency of the Initiative Measure No. 65 Petition unconstitutional.

Respectfully submitted,

/s/Nathan S. Farmer
Nathan S. Farmer, Esq.
Nathan S. Farmer, P.A.
120 Goodyear Blvd
Picayune, MS 39466
Phone: (601) 749-8745
Fax: (601) 749-7045
nathan@nathanfarmerlaw.com

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing document with the Clerk of the Court using the MEC system which sent notification of such filing to all counsel of record on this the 18th day of December, 2020.

/s/Nathan S. Farmer
Nathan S. Farmer