IN THE SUPREME COURT OF MISSISSIPPI

No. 2020-M-01199

IN RE INITIATIVE MEASURE NO. 65

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

VS.

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

AMICUS CURIAE BRIEF OF INITIATIVE SPONSOR ASHLEY ANN DURVAL IN SUPPORT OF RESPONDENT

Oral Argument Requested

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the Justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal:

1. Mayor Mary Hawkins Butler, in her individual and official capacities, and the City of Madison, Petitioners;

2. Chelsea H. Brannon, Madison City Attorney, Counsel for Petitioners;

3. Adam Stone, Kaytie M. Pickett and Andrew S. Harris, Jones Walker, LLP, Counsel for Petitioners;

4. Michael Watson, in his official capacity as Secretary of State for the State of Mississippi, Respondent;

5. Krissy C. Nobile and Justin Matheny, Mississippi Attorney General's Office, Counsel for Respondent;

6. Mississippi Senators Angela Hill and Kathy Chism, and Mississippi Representative Jill Ford, the Mississippi State Department of Health, the Mississippi State Medical Association, the American Medical Association, and the Mississippi Sheriffs' Association, Amici;

7. The Mississippi Municipal League, Inc., proposed Amicus;

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 Mississippi State Department of Health;

10. John B. Howell, III, Jackson, Tullos & Rogers, PLLC, Counsel for Amici Mississippi State Medical Association and American Medical Association;

11. William R. Allen, Allen, Allen, Breeland & Allen, PLLC, Counsel for Amicus Mississippi Sheriffs' Association;

12. Jerry L. Mills and John P. Scanlon, Mills, Scanlon, Dye & Pittman, Counsel for proposed Amicus The Mississippi Municipal League.

WATKINS & EAGER PLLC

/s/ Michael O. Gwin
MICHAEL O. GWIN

Counsel for Initiative Sponsor Ashley Ann Durval

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Exhibits

Request for Oral Argument

Pursuant to M.R.A.P. 29(d), Ashley Ann Durval has filed a separate motion and brief requesting to participate in oral argument. This motion and brief both set forth her reasons for requesting oral argument and state why her participation in oral argument would assist the Court. The Court is respectfully referred to this motion and brief.

Ashley Ann Durval supports the Respondent, the Secretary of State for the State of Mississippi, and opposes the "Emergency Petition" filed by Mayor Mary Hawkins Butler and the City of Madison (collectively "Petitioners"), as follows:

I. The Petitioners' arguments violate fundamental constitutional principles.

The people made crystal clear their purpose in adding Section 273(3) to the Mississippi Constitution – "The people reserve unto themselves the power to propose and enact constitutional amendments by initiative." Miss. Const. art. 15 § 273(3). Since the adoption of Section 273(3) in 1992, the Secretary of State has consistently determined whether an initiative petition qualifies for placement on the ballot by considering the geographic distribution of the qualified electors based on the five congressional districts that existed in 1992. For over 28 years, all three branches of Mississippi government – executive, legislative and judicial – have acted consistently with this original understanding of Section 273. Indeed, the people of Mississippi have relied upon the provision to successfully place on the ballot several initiatives, including twice successfully amending our constitution to implement voter identification and eminent domain protections. Initiative 65 has now been overwhelmingly approved by Mississippi voters, garnering over 73% support of the Mississippians who voted on the ballot measure and prevailing in all eighty-two (82) counties.[1]

[1] Both the election turnout and the support for Initiative 65 are truly remarkable. Mississippi's population is three million (2,976,149) of whom two million (1,909,460) are registered voters. United States 2019 Census, https://www.census.gov/quickfacts/fact/table/MS,US/PST045219; Mississippi Secretary of State 2020 Annual Report, https://www.sos.ms.gov/content/documents/ed_pubs/pubs/FY20%20Annual%20Report_Final2.pdf, p.13. Of these two million registered Mississippians, 1.3 million (1,313,894) voted in the 2020 presidential election. Over a million (1,040,283) Mississippians voted in favor of one of the two Initiative 65 ballot measures presented, with Initiative 65 receiving 73.67% of that vote. Official 2020 General Election Results, https://www.sos.ms.gov/Elections-Voting/Pages/2020-General-Election.aspx.

Yet the Petitioners seek to strip the people of Mississippi of their fundamental right to enact constitutional amendments by initiative. The Petitioners' ill-disguised hostility to the merits of Initiative 65 provides no legal basis to alter sound and time-honored constitutional principles. Importantly, the Petitioners now acknowledge that Section 273 of the Mississippi Constitution is itself valid and constitutional—indeed they rely on its provisions to invoke this Court's jurisdiction. The Petitioners even recount this Court's invitation in 1991 to amend the Constitution for the very purpose of recognizing the people's right to constitutional amendment by initiative. Br. 30-31; [2] *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 638 (Miss. 1991). The people did so the very next year, in 1992.

Despite this history, the Petitioners nevertheless offer the astounding argument that the procedural aspects of subsection (3) should be read in such a novel, restrictive, and strained way that Section 273 is "impossible" to apply – thus rendering the people's power to propose constitutional amendments by initiative a "dead letter" and subverting the entire purpose of Section 273. The only way Petitioners can achieve this counterintuitive reading of the Mississippi Constitution is to ignore fundamental constitutional principles, including that constitutional meaning is ascertained by examining "the words used in the constitution, their context, the purpose sought to be accomplished, and the circumstances surrounding [Section 273] at the time [Section 273] was framed and adopted. . . ." *State Teacher's College v. Morris*, 144 So. 374, 377 (Miss. 1932). So the Petitioners expediently do precisely that. They ignore the very purpose of the constitutional provision, ignore the surrounding words and ignore the meaning of the provision as

[2] The Initiative Sponsor will refer to the Petitioners' initial "Emergency Petition" filed October 26, 2020 as "EP.", their November 9, 2020 proposed reply brief as "Reply," and their December 8, 2020 brief as "Br."

understood at the time of adoption. The Petitioners instead argue for such a "strict reading" of only two words contained in the procedural provisions of subsection (3) of Section 273 ("congressional district") that they claim subsection (3) "supports **only one** interpretation" and "can mean **only"** the current four congressional districts, thereby rendering subsection (3) "impossible" to apply. (Br. 12, 17, 25).

However, words in a Constitution are not read in isolation. True "originalist" and "textualist" interpretation requires the court to consider the entire context of the provision – not only the words surrounding the provision in issue, but also the very **purpose** of the provision.[3] *Moore v. General Motors Acceptance Corp.*, 155 Miss. 818, 125 So. 411, 412 (Miss. 1930) ("[T]he fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of those who adopted it, to constantly keep in mind the object desired and the evils sought to be prevented or remedied."). Equally important, "strict construction" is not "textualist"; [4] it is

[3] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, p. 56 (2012) (2. *Supremacy-of-Text-Principle*: "Of course, words are given meaning by their context, and context includes the purpose of the text. The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does. The subject matter of the document (its purpose, broadly speaking) is the context that helps to give words meaning – that might cause *draft* to mean a bank note rather than a breeze."); *Board of Supervisors of Attala County v. Illinois Central Railroad Co.*, 190 So. 241 (Miss. 1939) ("The constitutional provision would not be restricted to narrow meanings, but would be construed reasonably to accomplish the purpose therein announced."). The *Scalia* treatise has been widely found authoritative by numerous courts. *See e.g.*, *Lockhart v. U.S.*, 136 S. Ct. 956, 962-63 (2016) (Justice Sotomayor, joined by JJ., Ginsburg, Kennedy, Thomas, Roberts, and Alito, citing treatise ; treatise also cited by dissent, *Id.* at 970, JJ., Kagan and Breyer).

[4] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, p. 355-56 (2012) (62. *The false notion that words should be strictly construed*: "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. . . . Textualists should object to being called strict constructionists. Whether they know it or not, that is an irretrievably perjorative term, as it ought to be. Strict constructionism, as opposed to fair-reading textualism, is not a doctrine to be taken seriously.").

not even common sense. Though "strict construction" has been roundly condemned, "strict construction" is the precise principle argued by the Petitioners, who simultaneously hide behind a smokescreen of counter-charges such as "judicial law-making," "liberal interpretation" and "living constitution." *See* Br. 23 (arguing for "strict construction"); Br. 19 (arguing for a "strict reading").

The Petitioners' telescopic view of only two words, devoid of context, allows them to blithely state "there is no hint of textual intent to tie 'congressional district' to the 2000 five- district plan." (Br. 20). As pointed out in the last round of briefing (also ignored by the Petitioners), this is simply wrong. As originally intended by the drafters of Section 273 and by the people upon its adoption, the "one-fifth (1/5)" language of subsection (3) refers directly and unmistakably to the then existing "congressional district[s]" referenced in the provision – of which there were indisputably five. That the language "one-fifth (1/5)" is a constitutionally embedded textual reference to the then existing five congressional districts is implicitly recognized by the Petitioners because they describe the redistricting change from five districts to four in 2003. (EP. 3). Rather than effectively void a constitutional right, Section 273 can, and should, be applied today as it always has been – referring to the five then existing congressional districts.

As it turns out virtually every one of the Petitioners' arguments are exactly contrary to well-established, timeworn constitutional principles. Constitutional provisions should not be construed to render them impossible to apply.[5] Further, rather than "nullify the provision or the

[5] *Gulf Refining Co. v. Stone*, 197 Miss. 713, 21 So.2d 19, 21 (Miss. 1945) ("Constitutional and statutory provisions **do not require to be done that which is impossible** or thoroughly impracticable [citation omitted] which is another way of saying that what is impossible or thoroughly impracticable is not within a constitutional or statutory requirement.").

entire provision," there is instead a "presumption of validity."[6] It is for this reason that this Court has repeatedly said that if there is any doubt in meaning, or if the words can be reasonably read in one of two ways, then the court should adopt a construction giving effect to the provision.[7] Given this stricture, one can see why the Petitioners **must** claim their interpretation is the "only" interpretation. They can claim nothing else. If there is a more reasonable, or equally reasonable, construction their proffered interpretation must fail.

And of course there is a more reasonable interpretation. It is the very interpretation long applied and relied upon by both the people and the exact constitutional officers charged with the implementation and administration of Section 273. It is legally significant that now three of the people's initiatives have amended our constitution based on the current interpretation, *after* congressional redistricting. This decades-long interpretation and application of subsection (3) is

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[6] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, p. 66 (2012) (*5. Presumption of validity")*; *Moore v. General Motors Acceptance Corp.*, 155 Miss. 818, 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."); *State ex rel. Collins v. Jones*, 106 Miss. 522, 64 So. 241, 254 (Miss. 1914) ("[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.") .

[7] *Burrell v. Mississippi State Tax Commission*, 536 So.2d 848, 858-59 (Miss. 1988) ("A like approach applies to the construction of the open-textured language of constitutional provisions such as Section 273; that is out of deference to the authority and prerogative of the legislature, **we will afford the gray areas of the Constitution any reasonable construction** that will avoid unconstitutionality of the statute. [cite omitted] This is for the obvious reason that the propriety, wisdom and expediency of a proposed constitutional amendment are questions for the people – indirectly through their legislature and directly through referendums and not this court."); *Ivy v. Robertson*, 70 So.2d 862, 865 (Miss. 1954) ("To doubt the constitutionality of the act is to uphold its validity since we are not justified in striking a statute down unless its unconstitutionality appears beyond every reasonable doubt. Our previous decisions are replete with similar expressions of the view just stated."); *State ex rel. Greaves v. Henry*, 87 Miss. 125, 40 So. 152, 154 (Miss. 1906) ("[I]f there be a well-founded reasonable doubt of the constitutionality of a legislative act, it must be held constitutional.").

not only entitled to "great weight" but should be followed unless "manifestly incorrect."[8] The Petitioners' cavalier dismissal of these facts as a "history of misinterpretation" (Reply 25) is contrary to fundamental constitutional principles designed to effectuate the will of the people and provide consistency and uniformity in application. As noted, the Secretary of State has so read and applied the provision since 1992. The state Attorney General also so interpreted the constitutional provision. Miss. Att'y Gen. Op. No. 2009-00001, 2009 WL 367638 (Jan. 9, 2009). Justice Randolph has aptly recognized the one-fifth requirement refers to "each of Mississippi's former five congressional districts." *Hughes v. Hosemann*, 68 So. 3d 1260, 1267 n. 14 (Miss. 2011) (Randolph, J. concurring, joined by six other Justices of the Court).

The legislative branch has also so read Section 273. In 2020, the Legislature passed a bill directly addressing Section 273 and further directly addressing Initiative 65. House Concurrent Resolution No. 39 is a legislative finding that: "under Section 273 of the Mississippi Constitution of 1890, the people have the power to propose and enact constitutional amendments by initiative." Initiative Sponsor's Ex. 1. The Legislature affirmed that "the procedure for doing so is set forth in Chapter 17, Title 23, Mississippi Code of 1972." and found that "**following those provisions,** the people have proposed an Initiative Measure No. 65" which "initiative measure will be presented to the qualified electors at the November 2020 election." Importantly, though the

[8] *State Teachers College v. Morris*, 165 Miss. 758, 144 So. 374, 378 (Miss. 1932) (Considering "the contemporary and long-continued construction placed on the [Constitution] by the legislature and the state's executive officers charged with the duty of administering the affairs of its colleges, **which 'construction should not now be departed from unless manifestly incorrect.'"**); *State v. Cato*, 131 Miss. 719, 95 So. 691, 693 (Miss. 1923) ("The construction placed on this section by both of the coordinate branches of the state government is entitled to great weight, **and should prevail unless it is clearly wrong**."); *State ex rel Collins v. Jones*, 106 Miss. 522, 64 So. 241, 251 (Miss. 1914) ("In construing a constitutional provision the meaning of which can not be ascertained from the language used, **the courts will consider the contemporaneous, practical construction placed on it by the legislature and public**, and uniformly acquiesced in.").

Legislature proposed an alternative to Initiative 65, it did not propose an amendment to Section 273 addressing the words "congressional district," nor did it take any action – then or now – to challenge the Secretary of State's placement of Initiative 65 on the ballot after he determined the petition's sufficiency based on the five original congressional districts. Instead, the Legislature reviewed – and ratified – the procedures used for the adoption and presentation of Initiative 65 by passing a bill saying so.

But with their blindered reading the Petitioners reach the untenable conclusion that a constitutional initiative provision perfectly valid for over ten years suddenly became "impossible" to apply in 2003. Even worse, the Petitioners actually assert that subsection (3) is a free-floating provision "tied to the fluctuations of our population," drifting in and out of "impossibility" of application every ten years based on the U.S. Census. (EP. 23; Br. 30). Constitutions do not work that way. Petitioners' reading is in constitutional terms, "absurd" [9] and violates the principle that constitutions are "to be construed **as if intended to stand for all time** or at least for a great length of time. . . . We must **credit the makers of our constitution with wisdom and foresight** and . . . assume that they foresaw the day and provided in the Constitution therefore, when some one or more of the counties of the state would increase in population . . . ." *Ex Parte Tucker*, 143 So. 700, 701 (Miss. 1932).[10]

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[9] *USF & G Co. v. Conservatorship of Melson*, 809 So.2d 647, 660 (Miss. 2002) ("It is our duty to support a construction which would purge the legislative purpose of any invalidity, **absurdity** or unjust inequality."). The same holds true in interpreting the people's purpose in adopting a constitutional provision.

[10] *L.N. Dantzler Lumber Co. v. State*, 97 Miss. 355, 53 So. 1, 3 (Miss. 1910) ("It is true that constitutions may be amended; but it is also true that this can be done only with great difficulty, and, moreover, **frequent changes in the fundamental law of a state are not desirable**. But, be that as it may, **constitutions must be construed upon the theory that they were intended to last for all time.**").

The Petitioners wrongly assume the opposite. The people adopted Section 273 in 1992 and amended it again in 1998. But according to the Petitioners, the people both times lacked "wisdom and foresight" unintelligently adopting a "dysfunctional" provision which would only be operable – not "for all time" – but for only two years, until the 2000 census. The Petitioners incongruously acknowledge that "both the Legislature and the electorate knew that congressional districts change every ten years." (Br. 19). Nevertheless, the Petitioners plod on claiming the people "tied" a fundamental state constitutional right to fluctuations in the national population, based on their level of representation in the U.S. Congress – gaining and losing a constitutional right every 10 years. The mere thought demonstrates its absurdity. Yet this is the cornerstone of the Petitioners' argument.

In the same vein, the Petitioners reject as unsupported "speculation" that a rational basis for using the old five-district congressional plan is "geographic diversity," i.e. using the old congressional district lines as an appropriate measure to ensure an initiative's broad support throughout the State. (Br. 23-24). However, this Court in *In Re Proposed Initiative Measure 20*, 774 So. 2d 397, 402 (Miss. 2000) found precisely that: "Section 273 of the Mississippi Constitution … seeks to discourage regionalism by requiring broad-based support for any proposed initiative." This Court's 2000 observation no doubt bolstered the AG's similar finding in 2009. Att'y General Op. No. 2009-00001, 2009 WL 367638, at *2 (Miss. A.G. Jan. 9, 2009).

The Petitioners stand another constitutional interpretative principle on its head when arguing about the import of subsection (3)'s requirement that the petition be signed "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 Petitioners claim this sentence "ties the calculation of signatures to the present" thus somehow also requiring the words "congressional

district" to be tied to the present. (Br. 19). On the same page, the Petitioners undermine their own argument acknowledging that "Section 273(3) is *not* fixed to a particular date in time." (Br. 19-20) (emphasis Petitioners').

The Petitioners cite no law to support their "tied to the present" argument, no doubt because the constitutional canon of construction is the opposite: *Expressio unius est exclusio alterius*… the expression of one thing implies the exclusion of others. *Miller v. State*, 94 So. 706,711 (Miss. 1923) (dissent). Here, tying the number of signatures to the last gubernatorial election, while not tying the words "congressional district" to the present, means the omission was intentional. The Petitioners themselves argue for application of this familiar constitutional canon, when discussing an old IHL provision not even in the current constitution. They cite *State v. Griffin*, 667 So.2d 1319, 1325 (Miss. 1995) claiming: "Based on the inclusion of the disputed language in one section of the Constitution, but not the other, the drafters intentionally chose *not* to include the … language.") (Br. 21). The reference to "the last gubernatorial election" is yet another textually embedded reference supporting the Secretary of State's current construction of Section 273.

In the end, the Petitioners rely on no valid constitutional principle to support their argument. They are left with their unfounded reliance on "strict construction" and the dubious, unsupported, notion that legislative "failure to act" is somehow a valid principle of constitutional interpretation. It is not. The Petitioners' unique interpretation would nullify Section 273(3) and require striking three constitutional amendments adopted by the people. Nothing so radical is necessary, particularly when a correct, reasonable and long-standing interpretation of the constitution lies plainly before us, one which vivifies and gives effect to the people's reserved power to amend their constitution by initiative.

II. A proposed amendment to the constitution, ratified by the people, is entitled to every reasonable presumption in favor of its validity.

The Petitioners have a single-minded – and erroneous – focus on legislative intent. The Petitioners miss the mark. In construing a constitutional amendment adopted by the people (as are all constitutional amendments), the correct focus is on the **people's intent** when they voted for the amendment:

> It is worthy of remark, however, 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) (italics in original, bold added) .

"The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it." *Sykes v. Town of Columbus*, 55 Miss. 115, 134 (1877) Section 273(3) of the Constitution expresses a "power" which is "reserved" to the people, not a right granted to the people by the legislature. This power of the people to amend their constitution by initiative is not to be taken lightly, or nullified by doubtful or strict reading, particularly after an amendment has been ratified by the people at the ballot box.[11]

[11] The importance of this observation is reinforced by considering two other constitutional provisions : Miss. Const. art. 3 § 5 "Government Originating in the People" : "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 Miss. Const. art. 3 § 6 : "Regulation of Government; Right to Alter" : "**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…."**

Petitioners repeatedly cite *State v. Powell*, 27 So. 927 (Miss. 1900) to support a claimed "strict reading" of Section 273(3) (Br. 17) and "strict compliance" with the "rigorous procedural requirements" of Section 273 (Br. 17, 27-29). Petitioners even claim that *Powell* was abrogated "on other grounds" by *State ex rel Collins v. Jones*, 64 So. 241 (Miss. 1913). Petitioners are wrong. *Powell* was not abrogated "on other grounds." *Powell* was overruled in *Jones* on the very "strict reading"/ "strict compliance" ground for which the Petitioners cite *Powell*. *Jones*, 64 So. at 253-55 (the *Powell* case "is not supported by authority" and "for all practical purposes [has] been in effect, already overruled.").

The *Jones* Court noted that the earlier case of *Green v. Weller*, 32 Miss. 650 (1856) was opposed to *Powell* "breath[ing] an altogether different spirit, in reference to the rule of construction which should be adopted in passing upon proposed amendments to the Constitution." *Jones*, 64 So. at 254. The *Jones* Court insightfully noted "we cannot follow both [*Powell* and *Green*]. *Id.* The Court chose *Green*, not *Powell* — "above all else, because we believe [*Green*] is correct." *Id.* Both the losing party in *Jones* and the dissent in *Jones* – as do the Petitioners here – argued for reliance upon *Powell* for "strict construction of that provision of the Constitution authorizing the submission of such amendments to the people to be voted upon." *Jones*, 64 So. at 251; *Jones*, 64 So. at 260 (in dissent: "Mississippi has always lined up with the strict constructionists."). The *Jones* Court rejected "the exceedingly narrow construction which we are urged to place upon the section of the Constitution under consideration." *Id.* at 252.

Instead of a strict or narrow construction, the *Jones* Court adopted the holding in *People v. Sours*, 74 P. 167 (Co. 1919), which itself relied upon the Mississippi *Green* case : "At the outset it should be stated that every 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." *Jones*, 64 So. at 254. The *Jones* Court highlighted the *Powell* Court's "strictly follow" language, and rejected its application, quoting a powerful passage from the 1856 *Green* case:

> There is nothing in the nature of the submission which should cause the free exercise of it to be obstructed, or that could render it dangerous to the stability of the government; because **the measure derives all of its vital force from the action of the people at the ballot-box, and there could never be danger in submitting, in an established form, to a free people, the proposition, whether they will change their fundamental law.** The means provided for the exercise of the sovereign right of changing their constitution, **should receive such a construction as not to trammel the exercise of the right.** Difficulties and embarrassments in its exercise are in derogation of the right of free government, which is inherent in the people . . . .

Jones, 64 So. at 248.

Here, *Powell* does not provide the correct rule of law nor the proper spirit of construction.[12] In construing the procedural provisions of Section 273(3) there is no rule of "strict construction," and there is no rule of "strict," "rigorous" application of procedural requirements. On the contrary, "after the [amendment] has been ratified by the requisite majority of the vote cast," then "the *means* provided for the exercise of [the people's] sovereign right of changing their constitution, should receive such a construction as not to trammel the exercise of the right." *Jones,* 64 So. at 248. (emphasis added) The Petitioners however boldly seek to trammel the people's exercise of their

[12] Significantly, in *Power v. Robinson*, 93 So. 769 (Miss. 1922) the Supreme Court struck down an initiative and referendum amendment to the Constitution, but nevertheless upheld *Jones*. "Nothing in this opinion modifies or affects the case of *State ex rel Collins v. Jones*, 106 Miss. 522, 64 So. 241." *Power*, 93 So. at 777. Similarly, Justice Randolph's concurrence in *Hughes v. Hosemann* , joined by six other Justices, referenced with approval the earlier quoted passage from *Green.* 68 So.3d at 1269 ¶27, 1272 ¶36. *See also Burrell v. Mississippi State Tax Commission*, 536 So.2d 848, 855 (Miss. 1988) ("[W]e may glean from the cases interpreting 'old' Section 273 certain principles not without present utility.").

right and nullify an election in which over one million Mississippians participated. The disgruntled Petitioners second-guess how the Secretary of State chose to discharge his constitutional duty to "determin[e] whether the petition qualifies for *placement* on the ballot." Section 273(3). But the fact remains Initiative 65 was squarely presented on a ballot in a state-wide general election and now derives "vital force" from the action of the people. Initiative 65, by law and fact, is presumptively valid. *Jones*, 64 So. at 254. The long-held meaning of Section 273(3), as reasonably interpreted by the Secretary of State and relied on by the people, should be affirmed.

III. The Petitioners' challenge is untimely by any measure.

More than two years ago, on July 30, 2018, for reasons detailed in her *amicus* motion and brief (to which the Court is respectfully referred), Ashley Ann Durval, a Rankin County citizen, and mother of Harper Grace, exercised her undisputed constitutional right to propose a constitutional amendment regarding medical marijuana. In August 2018 the Secretary of State published notice of the Petition for Initiative 65, providing five days for public comment. *See* Miss. Code Ann. § 23-17-11, 13. After over a year of hard work, on September 4, 2019, Ashley Durval filed the signed Petition, with over 228,000 signatures, together with the certifications from the county circuit clerks, with the Secretary of State. *See* Miss. Code Ann. § 23-17-21. The Secretary of State "determin[ed] whether the petition qualifies for placement on the ballot" (Section 273(3)), concluded it did, and on January 7, 2020 filed Initiative 65 with the Legislature.[13]

[13] Evaluating the Secretary of State's discharge of his duties, as with any other public officer: "There is a presumption that public officers perform their duties in the manner required by law and **it is the responsibility of any person challenging the validity of an official, or official act, to show the invalidity by clear proof**." *Harris v. Harrison Cty. Bd. of Supervisors*, 366 So. 2d 651, 655–56 (Miss. 1979) (emphasis added). The same presumption holds true for both the Secretary of State and the Circuit Clerks' determination and certification that based on the addresses provided by each voter, the requisite elector signatures for the five congressional districts was met. No "fraud" has been shown in this regard, nor do the Petitioners challenge Initiative 65 on such basis.

See Miss. Code Ann. § 23-17-29. On March 12, 2020, the Mississippi Legislature resolved that Initiative 65 "shall be submitted by the Secretary of State to the qualified electors at an election" on November 3, 2020, also submitting an alternative measure. *See* Initiative Sponsor's Ex. 1 (House Concurrent Resolution No. 39).

On September 8, 2020, the State Board of Election Commissioners approved the official ballot for use on the November 3, 2020 general election, including Initiative 65. The following day, the statutory deadline for doing so, the Secretary of State published the official ballot so that county elections commissioners could insert local races and print the ballots. *See* Miss. Code Ann. § 23-15-367. On September 21, 2020, Mississippi voters began casting absentee ballots. *See* Miss. Code Ann. §23-15-715. By October 26, 2020, 142,591 Mississippians had cast their absentee ballots. The election was well underway. *See* Initiative Sponsor's Ex. 2 (2020 General Election Absentee Report – Week 4).

The Petitioners are charged with knowledge of all these public facts, deadlines and law and yet said nothing, and did nothing — for months and years. *Green Hills Development Company LLC v. State*, 275 So.3d 1077, 1085-86 (Miss. 2019). ("[I]t is a familiar rule that ignorance of the law excuses no one, or that every person is charged with knowledge of the law."). On October 26, 2020, over two years after Initiative 65 was first published, over one year after the Petition with certified signatures was filed with the Secretary of State, almost ten months after the Secretary of State publicly approved the sufficiency of the Petition, and thirty-six days after voting began in Mississippi, in the midst of an election, the Petitioners filed their "Emergency Petition." They obviously recognized timing was crucial.

There was, however, no "emergency." It was too late. At the latest, this challenge should have been brought "pre-election," well before the ballots were printed and the actual election had

begun. By any measure — legal, equitable or statutory — within the necessarily fast-moving statutory scheme for elections in which deadlines are described by days, the Petitioners' challenge is untimely. *See Hughes*, 68 So. 3d at 1264 ("There are two stages for challenging an initiative-driven constitutional amendment: 1) pre-election, as to form, and 2) post-election, as to substance."; recognizing "pre-election" challenge to the form only when asserted "before a measure is placed on the ballot"); *In re Proposed Initiative Measure No. 20*, 774 So. 2d 397, 401 (Miss. 2000) ("However, proposed initiatives are subject to review of form …[and] must meet minimum constitutional and statutory requirements, **prior to being placed on the ballot** to ensure full disclosure and notice to the electorate."). The Petitioners recognize the application of laches to their inaction. (Reply 25; too late after the vote is "certified," as here). The prejudice to the election process, and the Initiative Sponsor, caused by their delay is manifest. (Considerable time, money and effort, as outlined.) The Petitioners acknowledge laches applies to the Voter ID and Eminent Domain initiatives because of "inexcusable delay" (Br. 25) and merely contend, unconvincingly, the same does not apply to them. It does.

IV. Conclusion.

The people of Mississippi should not be stripped of a fundamental constitutional right by virtue of a tortured and novel reading of the Constitution. For the foregoing reasons, the "Emergency Petition" should be summarily denied.

This the 19th day of January 2021.

Respectfully submitted,

ASHLEY ANN DURVAL

By: /s/ Michael O. Gwin

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been filed using the Court's MEC system and thereby served on all counsel of record and other persons entitled to receive service in this action.

This the 19th day of January, 2021.

/s/ Michael O. Gwin
MICHAEL O. GWIN