IN THE SUPREME COURT OF MISSISSIPPI
NO. 2020-IA-01199-SCT

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

V.

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

BRIEF OF *AMICUS CURIAE* THE MISSISSIPPI STATE DEPARTMENT OF HEALTH

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CERTIFICATE OF INTERESTED PERSONS

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

1. Mayor Mary Hawkins Butler, Petitioner;
2. The City of Madison, Petitioner;
3. Secretary of State Michael Watson, Respondent;
4. Kaytie M. Pickett, Adam Stone, Andrew S. Harris, and Jones Walker LLP, Counsel for Petitioners;
5. Chelsea Brannon, Madison City Attorney, Counsel for Petitioners;
6. Attorney General Lynn Fitch, Assistant Solicitor General Justin Matheny, and Deputy Solicitor General Krissy Nobile, Counsel for Respondent;
7. Mississippi State Department of Health, *Amicus Curiae*;
8. Mississippi State Board of Health;
9. G. Todd Butler, Mallory K. Bland, and Phelps Dunbar LLP, Counsel for *Amicus Curiae*;
10. Ashley Ann Durval and Angie Calhoun, Sponsors of Initiative 65; and
11. Spencer M. Ritchie, Paul H. Stephenson III, Michael O. Gwin, Forman Watkins & Krutz LLP, and Watkins & Eager PLLC, Counsel for Ashley Ann Durval and Angie Calhoun.

SO CERTIFIED, this the 14th day of December, 2020.

/s/ G. Todd Butler
G. Todd Butler

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Mississippi State Department of Health[1] is charged with implementing, administering, and enforcing the constitutional amendment resulting from Initiative 65. That is a monumental task. The amendment touches nearly all areas of society, including healthcare, criminal justice, zoning, education, taxes, appropriations, employment, insurance, interstate commerce, advertising, public records, and legal oversight. Unless the Judicial Branch intervenes, MSDH will be forced to create a large database and write complex regulations in less than seven months.

Pending before this Court is a straightforward reason why MSDH should not be required to perform such a Herculean feat. The City of Madison ably explains that Initiative 65 should have never been certified because the petition's signatures did not comply with the plain language of Section 273(3). But the City's objection is only the tip of the iceberg. There are many content problems with the amendment, including its wide-ranging scope and conflicts with existing state and federal law.

Logically, the petition-sufficiency question comes first. The City brought its challenge before the election was held, and it asks whether Initiative 65 should have ever made it on the ballot to begin with. In answering the question, however, this Court should have a complete picture. This brief aims to both supplement the City's argument and highlight a few of the content problems with the amendment.

[1] The Mississippi State Department of Health is governed by an 11-member Board that provides policy direction for the agency.

ARGUMENT

> *"[W]hether we like a constitutional amendment or not for its content, we should remember that it is a Constitution we are amending, and we should not tinker with it lightly."*[2]

I. Citizens possess no inherent right to amend the Constitution.

Much has been made about supposed majority support for medical marijuana. But we are "a government of laws, and not of men."[3] If the proper legal process was not followed, then no amount of support matters. The very idea of a written constitution is that certain matters are insulated from majority rule.[4]

So it is with citizen initiatives. There is no inherent right to amend the Constitution at the ballot box. That right exists only *if* and *when* existing law provides for it.

For almost 100 years after Mississippi joined the Union, there was no mechanism to amend the Constitution through a citizen petition. Things changed in 1914 when the Initiative and Referendum Amendment was adopted. But the change was short lived. Eight years later, in *Power v. Robertson*, this Court declared the IRA unconstitutional.[5]

Over the next 70 years, Mississippi was without a citizen-initiative mechanism. It was not until 1992 that citizens were again permitted to propose constitutional amendments.[6] Section 273(3) resulted from a legislative amendment backed by the voters. It included the signature

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[2] Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 704 (1996).

[3] *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

[4] *Fulton Cty. Fiscal Court v. S. Bell Tel. & Tel. Co.*, 146 S.W.2d 15, 20 (Ky. Ct. App. 1940) ("As has been said in reference to the adoption of a written constitution that the people have protected themselves from themselves, so it may be said that by Section 158 the people of Kentucky have protected themselves from excessive public local debt, even though the largest majority might desire and vote for it."); *Foster v. City of Kenosha*, 12 Wis. 616, 622 (1860) ("[O]ne of the great advantages and blessings of a written constitution, above all others, is that the minority can invoke its protection against the demands and oppression of a violent majority.").

[5] 93 So. 769 (Miss. 1922).

[6] *Speed v. Hosemann*, 68 So. 3d 1278, 1282 (Miss. 2011).

requirement the City challenges in this case.[7]

II. Section 273(3) should not be changed through the courts.

Given the history, there is nothing remarkable about the City's mathematical-impossibility argument. This State was without citizen initiatives for at least seven decades. Since Mississippi lost its fifth congressional seat, at least seven resolutions have been introduced to address Section 273(3)'s numerical inconsistency.[8] Those efforts have proved unsuccessful.

So what to do with Section 273(3)? The City, on the one hand, says that Section 273(3) must be amended or that the fifth congressional seat must be restored. Respondent, on the other hand, says that this Court should look beyond the text and interpret Section 273(3) in accordance with its supposed purpose. While MSDH prescribes no ill motives to either side, the City has the better of the debate under the law.

To start, the gravity of the question presented cannot be overstated. At issue is amending our Constitution. Few things could be more important to a democratic society. Because the central goal of a written constitution is "to prevent the law from reflecting certain changes in original values that *the society adopting* the Constitution thinks fundamentally undesirable[,]"[9] the amendment process is supposed to be arduous.

A proper inquiry should turn on the plain text of Section 273(3). If the Legislature and voters meant to freeze the congressional districts as they existed in 1992, they would have explicitly done so. No one seriously argues otherwise.

To get around the textual problem, proponents point to the popularity of medicinal marijuana. But "deference to a democratic majority should not supersede a judge's duty to apply

[7] Section 273 was amended again in 1998 to insert the requirement that only Mississippi citizens may circulate an initiative petition.

[8] *See* Petitioner's Br. at p.22 n.12.

[9] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (emphasis added).

clear text."[10] Section 273(3) has a fixed meaning until lawfully changed—even, and especially, if it vacates a majority vote.[11]

The purposivist method that has been advanced here is code word for "living constitutionalism." Purposivism, however, "has been out of fashion for a long time."[12] Such an interpretative theory goes against fundamental notions of separation of powers.[13] As Justice Scalia often reminded, "the Living Constitution would better be called the Dead Democracy."[14]

A federal analogy is the Affordable Care Act. In *NFIB v. Sebelius,*[15] Chief Justice Roberts is said to have "saved" the statute by construing the penalty imposed on those without health insurance as a tax. This allowed the Court to sustain the law under the taxing power rather than strike it under the commerce clause.[16] Originalists and textualists reject the decision as an example of judicial restraint, arguing that refusing to interpret the law as written is the antithesis of

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[10] Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 80 (2017).

[11] *See* NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 111 (2019) (describing originalism as teaching "that the Constitution's original meaning is fixed"); *see also* Testimony by now-Justice Amy Coney Barrett in response to Senator Ben Sasse at her confirmation hearing, available at https://www.sasse.senate.gov/public/index.cfm/press-releases?ID=0467DABE-1372-4EA1-A364-E624E43957A0 (last visited Dec. 12, 2020) ("[T]he law stays the same until it is lawfully changed. And if we're talking about a law that has been enacted by the people's representatives or gone through the process of Constitutional Amendment or Constitutional ratification, it must go through the lawfully prescribed process before it's changed. . . . [I]t's not up to judges to short-circuit that process by updating the law. That's your job.").

[12] *Williams v. Taylor Seidenbach, Inc.*, 958 F.3d 341, 363 (5th Cir. 2020) (Oldham, J., dissenting); *see also Arangure v. Whitaker*, 911 F.3d 333, 345 (6th Cir. 2018) (Thapar, J.) ("This argument illustrates the problems with purposivism; it suggests courts can simply ignore the enacted text and instead attempt to replace it with an amorphous 'purpose' that happens to match with the outcome one party wants. But that has no limiting principle. . . . [Laws] are motivated by *many* competing—and often contradictory—purposes. [T]hese purposes [are implemented] by negotiating, crafting, and enacting [a] text. It is that text that controls, not a court's after-the-fact reevaluation of the purposes behind it.").

[13] GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 10 ("A judge should apply the Constitution or a congressional statute as it *is*, not as he thinks it *should* be. How is a judge to go about that job? For me, respect for the separation of powers implies originalism in the application of the Constitution and textualism in the interpretation of statutes.").

[14] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 410 (2012).

[15] 567 U.S. 519 (2012).

[16] *Id*. at 563-75.

restrained judging.[17] Respondent similarly invites this Court to focus on matters external to the text, such as the threat posed to past initiatives like "Initiative Measure 31 (Eminent Domain) and Initiative Measure 27 (Voter Identification)."[18]

Both are imaginary bogeymen that should not dictate the outcome of this case. Petition-sufficiency challenges were not brought to either initiative, and the resulting amendments have now been in effect for nearly a decade. By contrast, the City brought its challenge before the election, and the measure has not yet been implemented. This Court's precedent favors post-election adjudication generally, and there are no reliance interests like those at stake with already-implemented initiatives.[19]

There also is the inconsistency of the proponents' position. While Initiative 65 may well have stemmed from the Legislature's failure to act,[20] proponents now hope to exploit the Legislature's silence—namely, a failure to make Section 273(3) match Mississippi's current congressional allocation. It is wrong to use legislative inaction as both a sword and shield.[21]

Ultimately, the text of Section 273(3) should be this Court's only guide.[22] And it should be

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[17] *Id*. at 707 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting) ("The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions."); *see also* Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. at 80 (stating that "Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute").

[18] Respondent's Answer at p.16.

[19] *Speed*, 68 So. 3d at 1280 (declining to adjudicate an initiative challenge because the initiative had "not been 'put into force and effect in a way to injure the parties complaining'") (quoted case omitted).

[20] *See Legislative inaction on medical marijuana leaves some voters with tough choice*, MISSISSIPPI TODAY (Aug. 30, 2020), available at https://mississippitoday.org/2020/08/30/legislative-inaction-on-medical-marijuana-leaves-some-voters-with-tough-choice/ (last visited Dec. 8, 2020).

[21] *Cf. La Salle State Bank v. Nugent*, 508 So. 2d 658, 661 (La. Ct. App. 3d Cir. 1987) ("Appellant cannot be allowed to use the law as both a sword and a shield.").

[22] GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 10 ("[A]n originalist and a textualist will study dictionary definitions, rules of grammar, and the historical context, all to determine what the law meant to the people when their representatives adopted it." They will not, by contrast, "guess about unspoken purposes hidden in the hearts of legislators or rework the law to meet the judge's estimation of what an 'evolving' or 'maturing' society should look like[.]").

followed no matter where it leads.[23] Altering Section 273(3)'s text is the job of the Legislative Branch of government.[24]

III. The content problems with Initiative 65 are numerous.

The City's challenge could nullify any petition brought under Section 273(3) moving forward, regardless of subject matter. But other problems are unique to Initiative 65. Among the content deficiencies are the overall scope of the amendment and conflicts it creates with existing state and federal law. Other challenges remain even if Respondent's atextual position is accepted.[25]

Scope of the Amendment. The ultimate issue is not whether Mississippi law *may* address the topic of medicinal marijuana through a proper enactment. The issue is *how* Initiative 65 purports to do it in this context. Beyond simply providing medical access, Initiative 65 affects our daily life in a dramatic way.

By trying to do so much, Initiative 65 is self-defeating. Section 273(9) specifically provides that "[n]o more than five (5) initiative proposals shall be submitted to the voters on a single ballot[.]"[26] And posing only narrowly-tailored amendments has been a structural concern since our

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[23] *See Full Text of Supreme Court Nominee Gorsuch's Remarks to Senate Panel*, BLOOMBERG NEWS, available at https://www.bloomberg.com/politics/articles/2017-03-20/supreme-court-nominee-gorsuch-s-remarks-to-senate-panel-text (identifying Justice Byron White as his "judicial hero" because Justice White was said to have "followed the law wherever it took him without fear or favor to anyone") (last visited December 10, 2020); *see also* Remarks by Justice Scalia during a discussion at American University Washington College of Law on January 13, 2005, available at https://academic.oup.com/icon/article/3/4/519/791958 (last visited Dec. 8, 2020) ("I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says.").

[24] GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 10 (Judges should not "pretend to represent (or bend to) popular will. The task of making new legislation is assigned elsewhere.").

[25] Challenges to the substance of an initiative must be brought post-election, *see Speed*, 68 So. 3d at 1281 (overruling *In re Proposed Initiative Measure No. 20*, 774 So. 2d 397, 402 (2000) to the extent that it allowed pre-election substantive challenges to initiatives), and the correct venue for post-election content challenges is the Circuit Court of the First Judicial District of Hinds County, *see Measure No. 20*, 774 So. 2d at 400-01.

[26] *See also* MISS. CONST. art. 4, § 69 ("General appropriation bills shall contain only the appropriations to defray the ordinary expenses of the executive, legislative, and judicial departments of the government; to pay interest on state bonds, and to support the common schools. All other appropriations shall be made by separate bills, each embracing but one subject.").

Nation's founding.[27] Although Initiative 65 was advertised as a "single" initiative, it in reality amounts to at least 14.

The amendment spans from healthcare[28] to advertising[29] and impacts everything in between, including education,[30] employment,[31] and insurance.[32] It addresses how the medical marijuana program is to be funded[33] and requires MSDH to implement, administer, and enforce a comprehensive regulatory scheme.[34] It alters the criminal code[35] and removes zoning power from

[27] THE FEDERALIST NO. 85 (Alexander Hamilton) ("But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue.").

[28] *See generally* Initiative 65 (allowing physicians to issue certificates for the use of medical marijuana).

[29] *Id.* § 5(2) (requiring that MSDH implement and enforce restrictions on advertising and marketing).

[30] *Id.* § 3(1)(d) (providing that accommodation is not required in educational institutions).

[31] *Id.* § 3(1)(d) (providing that accommodation is not required in places of employment); § 3(1)(g) (providing that amendment does not affect any existing drug testing laws, regulations, or rules); § 4(2) (defining "criminal or civil sanctions" as including the "denial of any right, privilege, license, certification" and "disciplinary action by a licensing board or commission[;]" employees, therefore, are immunized from suspension and loss of an employment license for using, processing, selling, transporting, distributing, etc. medical marijuana, which seemingly conflicts with §§ 3(1)(d) & (g)).

[32] *Id.* § 3(1)(e) (providing that there is no requirement for any health insurance provider or government agency to reimburse expenses related to the use of marijuana).

[33] *Id.* § 6 (providing for, among other things, the creation of a special fund, a loan from special funds, and fees that may be assessed by MSDH).

[34] *Id.* § 5 (provisions for MSDH's implementation, administration, and enforcement of rules and regulations). MSDH will essentially have to create an executive, legislative, and judicial branch within the agency to comply with all of Initiative 65's requirements. The agency will be forced to regulate areas unrelated to healthcare. *See MSDH Mission Statement*, MISSISSIPPI STATE DEPARTMENT OF HEALTH (last visited Dec. 11, 2020), https://msdh.ms.gov/msdhsite/_static/19,0,378,826.html ("The Mississippi State Department of Health's mission is to protect and advance the health, well-being and safety of everyone in Mississippi."). For instance, under the expansive definition of "process," MSDH is required to regulate the cultivating, growing, harvesting, packaging, and transporting of medical marijuana. Initiative 65, § 4(10). Section 5(2) also requires MSDH to implement and enforce regulations for tracking and labelling, advertising and marketing, interstate agreements, and penalties for violations.

[35] *See id.* §§ 2, 7 (decriminalizing, among other things, the use, processing, sale, distribution, and transport of medical marijuana, as well as the issuance of physician's certificates); *see also id.* § 8(4) (providing that no medical marijuana treatment center can be located within 500 feet of a pre-existing school, church, or licensed child care center). This changes the current drug-free school statute, which provides for enhanced penalties if marijuana is sold within 1,500 feet of a school, church, public park, ballpark, public gymnasium, youth center, or movie theater. *See* Miss. Code § 41-29-142.

local authorities.[36] It exempts medical marijuana from all state and local taxes.[37] It contains public reporting requirements[38] and requires judicial oversight of licensing.[39] Even public-record requests[40] and interstate agreements[41] are not left unscathed. Overall, it would be difficult to imagine a more expansive coverage area.

On similar facts, the Nebraska Supreme Court rejected a citizen initiative just this September. While the initiative's general subject was medical marijuana, it included nine subsections. The subsections were held to constitute impermissible secondary purposes, since they impacted the law on "public space, correctional facilities, motor vehicles, negligence, employment decisions, and insurance coverage."[42] The court reasoned that these additional "subjects of constitutional amendment were included only for tactical convenience, not any natural and necessary connection" to the general purpose of "creat[ing] a constitutional right for persons with serious medical conditions to produce and medicinally use cannabis, subject to a recommendation by a licensed physician or nurse practitioner."[43]

As in Nebraska, Initiative 65 is an enterprise of unlawful logrolling. "Logrolling is the practice of combining dissimilar propositions into one voter initiative so that voters must vote for or against the whole package even though they only support certain of the initiative's

[36] *Id.* § 5(4) (providing that the number of licensed medical marijuana treatment centers cannot be limited by rule or regulation); § 8(4) (providing that zoning ordinances must comply with the amendment and cannot be more restrictive than comparable businesses).

[37] *Id.* § 8(3).

[38] *Id.* § 9 (requiring MSDH to provide a comprehensive public report of the operation of the amendment to the legislature every two years).

[39] *Id.* § 5(12) (providing that the notice and hearing requirements and judicial review provisions of Miss. Code § 43-11-11 apply to the denial, suspension, or revocation of a medical marijuana license).

[40] *Id.* § 5(7) (exempting all records containing the identity of qualified patients, caregivers, and prescribing physicians from disclosure under the Mississippi Public Records Act or any other related statute, regulation, or rule pertaining to disclosing records).

[41] *Id.* § 5(2) (requiring that MSDH implement rules and regulations for reciprocal agreements with other states for patients registered in medical marijuana programs).

[42] *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244, 258-59 (Neb. 2020).

[43] *Id.* at 250, 259.

propositions."[44] The law has long abhorred logrolling.[45] It thwarts the democratic process by forcing voters to accept unpopular ideas in order to achieve the adoption of desired ones.

Consider what voters saw on the ballot: "Should Mississippi allow qualified patients with debilitating medical conditions, as certified by Mississippi licensed physicians, to use medical marijuana?" This single question omitted secondary implications that grow out of the ten-subsection amendment, which reads like a full statute. Other ballot questions should have been:

- Should Mississippi exempt "medical marijuana treatment centers" from virtually all zoning requirements?
- Should Mississippi change criminal laws to allow the sale of medical marijuana within 500 feet of schools, churches, and licensed child care centers?
- Should Mississippi exempt the processing and sale of medical marijuana from all state and local taxes?
- Should Mississippi prevent MSDH and all other state and local bodies from limiting the number of "treatment centers" in any way?

These are merely examples that underscore the Hobson's choice voters were forced to navigate.

MSDH understands that many Mississippians support marijuana being used to address "debilitating medical conditions[.]"[46] But the reach of Initiative 65 goes much further than the 19-word question on the ballot. The actual text of the amendment includes 2,565 words that will change the fabric of Mississippi forever.

State Conflicts. Initiative 65 went too far globally, but there are specific problems as well. Under Section 273, two amendment methods are contemplated: legislative proposals and citizen initiatives.[47] But the two methods are not the same. The Legislature is granted broad authority through subsection (2), in that it may propose amendments, changes, or alterations. Not so for

[44] *Id.* at 253.

[45] *See* THE FEDERALIST NO. 85.

[46] Initiative 65, § 2.

[47] MISS. CONST. art. 15, § 273(2) & (3).

citizens. Subsection (3) solely allows citizens to propose amendments, not changes or alterations.

The "amend, alter, or change" language first appeared in the 1832 Constitution and has since remained for legislative proposals.[48] But when the citizen-initiative method was adopted in 1992, Section 273(3) limited citizens to "amendments," omitting the words alter and change. The law presumes that this exclusion was intentional.[49] It follows that the Legislature has the authority to propose measures citizens cannot—namely, constitutional changes and alterations.

The distinction is crucial because Initiative 65 did not just amend the Constitution—it fundamentally alters it. BLACK'S LAW DICTIONARY defines "amendment" as "[a] formal and usu[ally] minor revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif[ically], a change made by addition, deletion, or correction; esp., an alteration in wording." BLACK'S conversely defines "[a]lteration" as "[a]n act done to an instrument, after its execution, whereby its meaning or language is changed." Initiative 65 did not make "minor" revisions in any sense of the word. Nor does its merely "add" a constitutional provision.[50]

Initiative 65 violates the bedrock principle of separation of powers.[51] Despite our governmental structure being built on checks and balances, Initiative 65 charges an executive agency with the duty of appropriating and expending funds with no prior authorization or

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[48] *See* Constitution of 1832, art. "Mode of Revising," etc. § 1. Prior to 1832, the only method for amending the constitution was to call a constitutional convention. *See* Constitution of 1817, art. "Mode of Revising," etc. § 1.

[49] *See State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1326-27 (Miss. 1995) ("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.").

[50] *See, e.g., South Dakota's recreational marijuana law to be challenged in court*, MARIJUANA BUSINESS DAILY, https://mjbizdaily.com/lawsuit-filed-oversouth-dakota-recreational-marijuana-legalization/ (last visited December 13, 2020) (discussing lawsuit supported by South Dakota Governor Kristi Noem that contends a medical-marijuana "amendment inserts a new section into the constitution, [and should thus] be considered a revision to the constitution").

[51] MISS. CONST. art. 1, § 2 ("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.").

oversight. This is an encroachment on the "power of the purse," for the Constitution vests authority to appropriate financial resources exclusively in the Legislative Branch.[52] There are no checks in Initiative 65. There is no balance.

Illustrating the point is Section (6) of Initiative 65. It provides that, when MSDH requests, "the State Treasurer *shall* provide a line of credit[,]" up to $2,500,000, for a special fund that only MSDH controls. Missing is any legislative involvement. MSDH determines when and how much money will be taken from special funds to implement the program. After MSDH makes this determination, the State Treasurer, another executive agent, *must* provide the money. The Legislature has no say over how much is appropriated, from what fund the money is taken, whether the budget allows for the provision of funds, or any other financial considerations.

Section 6 further authorizes MSDH to expend funds generated from the program "without prior appropriation or authorization" and prevents the Legislature from reverting any funds from the program into the general fund, even if there is a surplus. The Legislative Budget Office expects that, *after the first year*, the program will generate a surplus of $10,662,000 per year, which must be used to support the state marijuana program and cannot be used for other programs.[53]

Under Initiative 65, the Executive Branch now holds the proverbial "purse." And the Legislature is prevented from tightening or loosening the strings. The medical marijuana program will be the only state-funded program where the Legislature lacks power over appropriations or revenue. To borrow from this Court's past cases in this area: Initiative 65 "subverts" our whole

[52] *See Clarksdale Mun. Sch. Dist. v. State*, 233 So. 3d 299, 306 (Miss. 2017) (Maxwell, J., specially concurring) (citing MISS. CONST. art. 4, § 33; *Colbert v. State*, 39 So. 65, 67 (Miss. 1905) ("The power to appropriate the State's financial resources belongs exclusively to the Legislature[.]").

[53] *See* November 3, 2020 Ballot Measure 1, Initiative Measure No. 65, Legislative Budget Office Fiscal Analysis. The Legislative Budget Office used figures from Oklahoma's medical marijuana program in performing its fiscal analysis. Initiative 65, however, used figures from Arizona in its revenue statement, estimating that the medical marijuana program will only generate $6,000,000 in revenue each year.

constitutional scheme.[54]

But Initiative 65 does not simply have a Section 273(3) problem. It also has a problem under Section 273(4), the provision requiring that the amount and source of revenue to *implement* the initiative be identified.[55]

While there is a statement in Initiative 65 called "Amount and Source of Revenue," it lacks the teeth required under Section 273(4). It simply provides how revenue will be generated, says that the amendment pays for itself and requires no general fund appropriation, and estimates how much revenue will be made annually. The revenue statement does not speak to the amount required to *implement* the initiative or say plainly where those funds will come from.

It is not enough for Initiative 65 to allow "a line of credit from the Working Cash Stabilization Fund *or any other available special source funds maintained in the state treasury* in an amount not to exceed" $2,500,000. That ignores the second sentence of Section 273(4), which provides that, if a reallocation of funding is required, the programs whose funding must be reduced must be identified. A vague identification of "other available special source funds" does not tell Mississippi citizens which programs the taking of money from these "other available special source funds" will impact.[56]

The Legislative Budget Office's fiscal analysis appeared on the ballot and estimated the cost to implement the program at $24,068,150. The program is anticipated to generate $13,000,000

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[54] *See Colbert*, 39 So. at 67 ("[T]he constitution regards the legislature as the sole repository of power to make appropriations of moneys to be paid out of the state treasury. We can no more infer the possibility of an appropriation by executive action of moneys for the payment of public debts than we could the levying of taxes by executive action for the same purpose. If the one may be inferred, the other may also; and *thus the entire constitutional scheme for legislative control over the public revenues be subverted*." (emphasis added)).

[55] MISS. CONST. art. 15, § 273(4).

[56] *See, e.g., Proposed Initiative Measure No. 20*, 774 So. 2d 397, 402 (2000) *overruled in part not relevant here by Speed*, 68 So. 3d 1278 ("The government revenue impact statement is a requirement designed to protect the integrity of the constitutional initiative process and to prevent the electors of this state from being presented with false and misleading initiative petitions. The people are entitled to the best, most accurate information available when voting on matters of state.").

in revenue in the first year, leaving the total taxpayer cost at $11,068,150.[57] As Section 6 only appropriates $2,500,000 for implementation, it begs the obvious question: where does the other $8,568,150 necessary for the implementation of the program come from?[58]

Federal Conflict. There are also conflicts between Initiative 65 and federal law. Initiative 65 affirmatively authorizes the use of marijuana and immunizes persons falling under its mandates from prosecution under both state and federal law. These provisions of Initiative 65 directly conflict with the federal Controlled Substance Act[59] and are thus void under the Supremacy Clause.[60]

The CSA categorizes marijuana as a Schedule I drug and prohibits the distribution, possession, and use of marijuana.[61] There is no exception for medicinal use. As a Schedule I drug, Congress has determined that marijuana "lack[s] . . . any accepted medical use . . . and . . . any accepted safety for use in medically supervised treatment."[62]

The CSA's preemption clause provides that a state law is preempted if there is a "positive conflict."[63] A "positive conflict" exists when either it is "physically impossible" to comply with both the federal and state law, such as where the state law mandates an act that the federal law forbids, or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[64]

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[57] *See* November 3, 2020 Ballot Measure 1, Initiative Measure No. 65, Legislative Budget Office Fiscal Analysis.

[58] To be clear, MSDH will first be required to spend $24,000,000 before any revenue is generated. With only $2,500,000 accounted for by Initiative 65, the remaining $21,500,000 needed to implement the program is still missing.

[59] 21 U.S.C. §§ 801 *et seq.*

[60] *See* U.S. CONST. art. VI, cl. 2; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

[61] 21 U.S.C. §§ 812(c), 841-843.

[62] *Gonzales v. Raich*, 545 U.S. 1, 14 (2005).

[63] 21 U.S.C. § 903.

[64] *Crosby*, 530 U.S. at 372-73; *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 527-28 (Or. 2010).

While preemption arguments have generally failed where a state merely decriminalizes the use of marijuana, Initiative 65 goes further. It affirmatively authorizes the use, production, sale, and distribution of medical marijuana—therefore creating a positive conflict.[65] The Oregon Supreme Court has highlighted this distinction in wording, holding that the law at issue, by authorizing the use of medical marijuana rather than simply decriminalizing it under state law, stood "as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act."[66] The court analogized this to the issuance of driver's licenses: if Congress chose to prohibit anyone under the age of 21 from driving, states could not then authorize anyone over the age of 16 to drive and give them a license to do so.[67] By the same token here, Mississippi cannot affirmatively authorize and license a use that federal law specifically prohibits.

Another problem with Initiative 65 is that it seeks to provide immunity from all criminal and civil sanctions, including those imposed under federal law. The amendment immunizes qualified patients, caregivers, physicians, and treatment centers from "criminal and civil sanctions."[68] The amendment defines "criminal and civil sanctions" as "arrest; incarceration; prosecution; penalty; fine; sanction; the denial of any right, privilege, license, certification; and/or to be subject to disciplinary action by a licensing board or commission; and/or to be subject to seizure and/or forfeiture of assets *pursuant to any Mississippi law, local ordinance, or board, commission, or agency regulation or rule.*"[69] This presents an absolute conflict with the CSA.

Such a conclusion reflects well-settled canons of construction. Under the last-antecedent canon, "relative and qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to or including others

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[65] *See generally* Initiative 65.

[66] *Emerald Steel Fabricators*, 230 P.3d at 529.

[67] *Id.* at 531.

[68] Initiative 65, §§ 2, 7.

[69] *Id.* § 4(2) (emphasis added).

more remote."[70] Applied here, the language "pursuant to any Mississippi law" would only apply to the last item in the series—"to be subject to seizure and/or forfeiture of assets"—and would not apply to the rest of the series—"arrest; incarceration; prosecution; penalty; fine; sanction; the denial of any right, privilege, license, certification; and/or to be subject to disciplinary action by a licensing board or commission[.]" Because the state-law qualifier only applies to the last item in the series, Initiative 65 immunizes the use of medical marijuana under both federal and state law, irreconcilably conflicting with the CSA.

CONCLUSION

Covid-19 undoubtedly has changed the world we live in. From MSDH's standpoint, it has placed special emphasis on the agency's mission of "promot[ing] and protect[ing] the health of all its citizens."[71]

Initiative 65 seeks to transform MSDH into something it is not. Rather than allowing the agency to focus its resources entirely on public health, it requires MSDH to get in the business of appropriations, agriculture, packaging and transport, advertising, marketing, and penalty schemes—just to name a few.

MSDH fully intends to carry out its obligations under the law. But the City has raised a serious challenge to the Initiative 65 petition. And the amendment's content amplifies the challenge even more. Such questions should be answered before MSDH is completely reshaped into a new and comingled Branch of government.

RESPECTFULLY SUBMITTED: December ___, 2020.

[70] *Marquette Cement Mfg. Co. v. Fid. & Deposit Co. of Maryland*, 158 So. 924, 925 (Miss. 1935); *see also Lockhart v. United States*, 136 S. Ct. 958, 963-65 (2016).

[71] *Mississippi State Dep't of Health – State Partnership Program*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://minorityhealth.hhs.gov/omh/content.aspx?ID=9158&lvl=2&lvlID=51 (last visited Dec. 11, 2020).

MISSISSIPPI STATE DEPARTMENT OF HEALTH

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CERTIFICATE OF SERVICE

I, G. Todd Butler, one of the attorneys for *Amicus Curiae*, certify that I had a copy of this brief electronically filed using the Court's ECF system, which sent notification of such filing to all counsel of record.

Dated: December __, 2020.

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