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 21st 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.[2]

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 supplement the City's argument.

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

[2] This Court entered an order on December 17, 2020 that instructed MSDH to remove Section III from its brief. Pursuant to this Court's order, MSDH has removed the content arguments.

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."*[3]

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."[4] 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.[5]

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.[6]

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.[7] Section 273(3) resulted from a legislative amendment backed by the voters. It included the signature

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

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

[5] *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.").

[6] 93 So. 769 (Miss. 1922).

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

requirement the City challenges in this case.[8]

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.[9] 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[,]"[10] 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

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

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

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

clear text."[11] Section 273(3) has a fixed meaning until lawfully changed—even, and especially, if it vacates a majority vote.[12]

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."[13] Such an interpretative theory goes against fundamental notions of separation of powers.[14] As Justice Scalia often reminded, "the Living Constitution would better be called the Dead Democracy."[15]

A federal analogy is the Affordable Care Act. In *NFIB v. Sebelius*,[16] 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.[17] 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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[11] Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 80 (2017).

[12] *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.").

[13] *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.").

[14] 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.").

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

[16] 567 U.S. 519 (2012).

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

restrained judging.[18] 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)."[19]

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.[20]

There also is the inconsistency of the proponents' position. While Initiative 65 may well have stemmed from the Legislature's failure to act,[21] 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.[22]

Ultimately, the text of Section 273(3) should be this Court's only guide.[23] And it should be

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[18] *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").

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

[20] *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).

[21] *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).

[22] *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.").

[23] 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.[24] Altering Section 273(3)'s text is the job of the Legislative Branch of government.[25]

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."[26]

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.

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[24] *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.").

[25] 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.").

[26] *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).

RESPECTFULLY SUBMITTED: December 21, 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 21, 2020.

/s/ G. Todd Butler
G. Todd Butler