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 PETITIONERS MAYOR HAWKINS BUTLER AND THE CITY OF MADISON

ORAL ARGUMENT REQUESTED

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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 the Supreme Court and/or the judges of the Court of Appeals 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, Counsel for Respondent;

7. Assistant Solicitor General Justin Matheny, Counsel for Respondent; and

8. Deputy Solicitor General Krissy Nobile, Counsel for Respondent.

Respectfully submitted the 7th day of December 2020.

/s/ Kaytie M. Pickett
KAYTIE M. PICKETT

Attorney of record for Petitioners

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STATEMENT OF ISSUES

1. MISS. CONST. art. 15, § 273(3) states, "The signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot." Miss. Code Ann. § 23-17-23(b) bars the Secretary of State from filing any initiative petition clearly bearing insufficient signatures. Because the State of Mississippi has four congressional districts, the signatures supporting the Initiative Measure No. 65 Petition from at least one congressional district exceed one-fifth (1/5) of the total required. Did the Secretary of State therefore violate Section 273(3) and Miss. Code Ann. § 23-17-23(b) by deeming the Initiative Measure No. 65 Petition sufficient for filing?

2. The Secretary of State issued no public notice of his acceptance of the Initiative Measure No. 65 Petition for filing, and he has offered no evidence of suffering prejudice from the timing of Petitioners' action. Is Petitioners' action challenging the sufficiency of the Initiative Measure No. 65 Petition barred by laches?

STATEMENT REGARDING ORAL ARGUMENT

There is no greater change to our law than an amendment to our Constitution. Ensuring that a constitutional process for amendment is followed is a matter of paramount public importance. The Court has never considered the signature requirements of Section 273(3) nor the jurisdictional grant of Section 273(9). MISS. CONST. art. 15, §§ 273(3) and (9). Because of the significance of these issues of first impression, oral argument will be helpful to the Court.

STATEMENT OF THE CASE

I. Nature of the Case

Petitioners Mayor Mary Hawkins Butler and the City of Madison ask that the Court determine that the Secretary of State unconstitutionally deemed the Initiative Measure No. 65 Petition sufficient. Specifically, Petitioners ask that the Court hold that the Secretary of State unconstitutionally considered more than 1/5 of the signatures from any congressional district. Petitioners therefore seek a declaration that Initiative Measure No. 65, which has yet to be enacted or codified, is void and without effect. Petitioners abandon their requested writ relief, which is now moot. This case arises under the Court's original and exclusive jurisdiction to review the Secretary of State's determination of the sufficiency of a voter initiative petition. MISS. CONST. art. 15, § 273(9).

II. Course of the Proceedings

According to the Secretary of State, the Initiative Measure No. 65 Petition was filed with his Office on September 4, 2019. Respondent's Answer, p. 14. The

Secretary of State has submitted no evidence of this, and to Petitioners' knowledge no public notice of this filing was issued. Nor is it clear that this is the date the Secretary of State determined the sufficiency of the Petition.

On October 26, 2020, Petitioners Mayor Mary Hawkins Butler and the City of Madison filed their Emergency Petition for Review Pursuant to Article 15, Section 273(9) of the Mississippi Constitution of 1890 and Writ of Mandamus and/or other Extraordinary Writ. The Court issued an *en banc* order granting the Secretary of State until Friday, November 6, 2020, to file an answer. Oct. 28, 2020 En Banc Order, Serial: 234360.

The Secretary of State timely answered, and on the same date, the Initiative Sponsors moved to intervene or alternatively for leave to file an opposition as amicus curiae. *See* Respondent's Answer; Sponsors' Motion to Intervene, Motion #2020-3582. Neither the Petitioners nor the Secretary of State opposed the motion, though Petitioners sought leave to file a reply. *See* Petitioners' Nov. 9, 2020 Response to Motion #2020-3582; Respondent's Nov. 13, 2020 Response to Motion #2020-3582.

On November 17, 2020, the Court issued an Order providing that "[i]n this unique procedural context, the undersigned Justice finds the Emergency Petition is akin to a 'petition for permission to appeal under Rule 5' as to which the Court may 'order such further proceedings as the Court deems appropriate.'" Nov. 17, 2020 Order, Serial: 234529. The Court therefore issued a briefing schedule for Petitioners and Respondent. *Id.* By separate Orders, the Court denied Petitioners' motion for a

reply as moot and dismissed the Sponsors' Motion to Intervene without prejudice, allowing the Sponsors to move to re-file as an *amicus curiae*. Nov. 17, 2020 Order Issued on Motion #2020-3569, Serial: 234635; Nov. 17, 2020 Order on Motion #2020-3582, Serial No. 234636.

III. Statement of Facts

A. Mississippi's Four Congressional Districts

"Following the 2000 decennial census, Mississippi's delegation to the United States House of Representatives was reduced from five to four representatives. However, the Legislature failed to act and left the old five-district plan in place." *Mauldin v. Branch*, 866 So. 2d 429, 431 (Miss. 2003); Miss. Code Ann. § 23-15-1037; U.S. CONST. art. I, § 4. As a result, on February 26, 2002, a three-judge panel of federal judges issued an injunction for the State of Mississippi to implement a court-drawn congressional redistricting plan. *Smith v. Clark*, 189 F. Supp. 2d 548, 549 (S.D. Miss. 2002). The court-drawn congressional redistricting plan reflected four districts, not five. *Smith v. Clark*, 189 F. Supp. 2d 512, 525 (S.D. Miss. 2002), *affirmed by Branch v. Smith*, 538 U.S. 254, 273 (2003) (holding 2 U.S.C. § 2c mandated single-member districts); *see also Maudlin*, 866 So. 2d at 431.

Following the 2010 Census, the federal panel modified the 2002 injunction and reapportioned the four congressional districts to equalize the population and preserve minority voting strength. *Smith v. Hosemann*, 852 F. Supp. 2d 757, 764 (S.D. Miss. 2011). The Mississippi Legislature has not enacted a new redistricting

plan, and the federal injunction remains in place. Under this plan, Mississippi has four congressional districts.

B. Mississippi's Initiative Process

In 1914, Mississippi enacted an initiative and referendum process as Article 4, Section 3, to the Mississippi Constitution. Though the Mississippi Supreme Court initially held that the amendment was constitutionally enacted, *State ex rel. Howie v. Brantley*, 74 So. 662, 665-67 (Miss. 1917), five years later the Court struck the amendment as "unconstitutional and void." *Power v. Robertson*, 93 So. 769, 776 (Miss. 1922). Sixty-eight years later, then-Attorney General Michael Moore sought to overturn this holding, but the Court refused to judicially resurrect the initiative and referendum amendment. *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 633 (Miss. 1991). The Legislature did so instead, enacting Senate Concurrent Resolution No. 516, ratified by the electorate in the 1992 fall election, to again allow voter initiatives. This became codified as subsections 3-13 of Article 15, Section 273 to the Mississippi Constitution.[1]

C. Initiative Measure No. 65

On July 30, 2018, Ashley Ann Durval sponsored a proposed amendment (the "Proposed Amendment") to the Constitution by filing the proposed measure with the

[1] Section 273 was amended in 1998 to allow only a state resident to circulate an initiative petition.

Secretary of State under Section 273(3) and Miss. Code Ann. § 23-17-1. *See* App. A, Proposed Amendment.[2]

1. The Text of the Proposed Amendment

The Proposed Amendment is six pages long and contains ten sections. *See* App. A. Section 2 decriminalizes the purchase, prescribing, sale and processing of "medical marijuana." *Id.* at 4. Section 3 specifies that the Proposed Amendment will not repeal certain laws and imposes a $100 fine for smoking medical marijuana in a public place. *Id.*

Section 4 provides definitions. "Medical marijuana" is defined as marijuana "used to treat the symptoms and/or effects of a debilitating medical condition…." *Id.* at 5. "Debilitating medical condition" is defined by a list of specific medical conditions but includes "another medical condition of the same kind or class to those herein enumerated and for which a physician believes the benefits of using medical marijuana would reasonably outweigh potential health risks."[3] *Id.*

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[2] Exhibits submitted in support of the Petition for Review are re-attached here in the Appendix.

[3] The enumerated list of medical conditions includes post-traumatic stress disorder, thus raising the question of whether other mental health diagnoses, such as anxiety or depression, would be "of the same kind or class." Despite the requirement of an "in-person examination of the patient in Mississippi" under Section 4(9), telemedicine doctors have begun advertising to issue medical marijuana cards to Mississippi citizens. They interpret anxiety and depression as qualifying medical conditions. *See, e.g.*, Green Health Docs, *Mississippi Medical Marijuana Card*, https://greenhealthdocs.com/mississippi-medical-marijuana-card/. ("Q. What are the qualifying medical conditions? A. ANY condition can qualify and some of the most common conditions include:…Anxiety, Depression and other mental conditions.").

A "medical marijuana treatment center" is defined as an entity that "processes" medical marijuana and is licensed by the Department of Health. *Id.* "Process" is defined as "acquire, administer, compound, cultivate, deliver, develop, disburse, dispense, distribute, grow, harvest, manufacture, package, process, produce, propagate, research, sell, test, transport, or transfer medical marijuana or any related products such as foods, tinctures, aerosols, oils, or ointments." *Id.* at 6.

Section 5 charges the Department of Health with implementing, administering, and enforcing the Proposed Amendment. *Id.* at 6-7. The DOH is required to promulgate final rules and regulations by July 1, 2021 and to begin issuing cards and licenses by August 15, 2021. *Id.* at 7. The DOH is barred from limiting the number of licensed medical marijuana treatment centers. *Id.*

Section 6 allows the DOH to assess a fee up to the equivalent of the state's sales tax rate (currently 7%) and specifies that any funds collected shall be deposited into a special fund, to be expended by the DOH without prior appropriation, and not to revert to the General Fund. *Id.*

Section 7 provides that a medical marijuana identification card exempts the holder from criminal or civil sanctions for conduct authorized by the Proposed Amendment. *Id.* at 8. Section 8 allows possession of up to 2.5 ounces of medical marijuana per 14 day period, or approximately this much:

Id. at 8; Joe Coscarelli, *This Is What 2 Ounces of Weed Looks Like*, New York Magazine, July 9, 2014, *available at* https://nymag.com/intelligencer/2014/07/this-is-what-2-ounces-of-weed-looks-like.html. This converts to about 150 joints (marijuana cigarettes) or 250 bowls (marijuana pipes). *See What does cannabis look like? A visual guide to cannabis quantities*, LEAFLY, Feb. 26, 2020, *available at* https://www.leafly.com/news/cannabis-101/visual-guide-to-cannabis-quantities. ("So, a full ounce of cannabis, which is 28 grams, can roll nearly 60 joints or pack upwards of 100 bowls.").

Section 8 prohibits zoning "medical marijuana treatment centers" any more restrictively than comparably-sized businesses, with the exception that they cannot be located within 500 feet of a pre-existing school, church, or licensed child care center.[4] *See* App. A. at 8. Retail dispensaries cannot be zoned any more restrictively than a licensed retail pharmacy. *Id.*

[4] A "medical marijuana treatment center" is allowed to "grow, harvest,…produce, propagate" marijuana. *See* App. A at 5, 9 (§§ 4(7) and (10)). The City of Madison's Zoning Ordinance allows horticultural uses in areas zoned Residential Estate District RE-A and RE-B. *See* City of Madison Zoning Ordinance at § 7.02, art. VII and § 8.02, art. VIII,

Section 9 requires the DOH to issue a comprehensive public report on the operation of the Amendment two years after implementation. *Id.* at 9. Section 10 is a severability clause. *Id.*

2. Initiative Measure No. 65's Path to the Ballot

After the Initiative Sponsor submitted the Proposed Amendment to the Secretary of State, the Attorney General issued a Certificate of Review pursuant to Miss. Code Ann. § 23-17-5. App. B, Certificate of Review. The Secretary of State then accepted and assigned the Proposed Amendment the serial number Initiative Measure No. 65. The Attorney General drafted and filed the ballot title and ballot summary with the Secretary of State, which the Secretary of State published in a newspaper of general circulation. *See* Miss. Code Ann. § 23-17-11.

The proponents of Initiative Measure No. 65 then set out to gather Petition signatures. Under MISS. CONST. art. 15, § 273(3), the required total number of signatures of qualified electors must equal twelve percent (12%) of the votes for all candidates in the last gubernatorial election, and "[t]he signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot." The Secretary of State was barred from considering any excess signatures: "If an initiative petition contains signatures from a single congressional

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available at http://www.madisonthecity.com/sites/default/files/ZoningOrdinance2012-1.pdf. Initiative Measure No. 65 therefore would likely allow any licensed "medical marijuana treatment center" to grow marijuana within residential areas, substantially harming the City's legitimate interest in conserving the value of property and protecting the health and safety of its citizenry.

district which exceed one-fifth (1/5) of the total number of required signatures, the excess number of signatures from that congressional district shall not be considered by the Secretary of State in determining whether the petition qualifies for placement on the ballot." MISS. CONST. art. 15, § 273(3).

The Secretary of State required a total number of 86,183 certified signatures, "with at least 17,237 certified signatures from each of the five congressional districts as they existed in the year 2000."[5] The proponents' list of signatures contains the following totals:

District 1: 20,176
District 2: 23,779
District 3, 20,962
District 4, 20,767
District 5, 20,002

App. D, Proponents' Signature List. The signers attested, ""I am a qualified elector of the State of Mississippi in the city (or town), county, and congressional district written after my name…." App. F, Simpson County Signatures. This attestation is required by Miss. Code Ann. § 23-17-19. The attached signature page shows no congressional district after the signers' names. *See* App. F.

Some, but not all, of the county circuit clerks input the signers' information into the Statewide Election Management System (SEMS) to certify the signatures. In SEMS, the signature totals are as follows:

District 1: 19,808 accepted; 23,156 rejected
District 2: 11,817 accepted; 9,566 rejected

[5] Miss. Sec'y State, Initiative Information, Initiative 65, *available at* https://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IId=65.

District 3: 18,522 accepted; 21,548 rejected
District 4: 12,201 accepted; 12,553 rejected
District 5: 19,212 accepted; 25,759 rejected

See App. G, SEMS Petition 65 Signers Report. Approximately fifty-three percent (53%) of the signatures submitted in SEMS were rejected. For Districts 2 and 4, the Secretary of State's Office hand-counted Petition signatures from those counties who did not input the signers into SEMS. *See* App. C, Affidavit of Adam Stone.[6] The Secretary of State kept no record of the number of signatures that were hand-counted, or which signatures were deemed sufficient. *Id.*

Presumably the Secretary of State's Office accepted the Initiative Measure No. 65 Petition for filing, because according to the Secretary of State's Answer, the Petition was filed on September 4, 2019. Respondent's Answer, p. 14. The Secretary of State issued no press release or other public announcement that he had accepted the Petition for filing or otherwise determined the sufficiency of the Petition.

The Secretary of State transmitted the text of Initiative Measure No. 65 to the Secretary of the Senate and the Clerk of the House on January 7, 2020. Pursuant to MISS. CONST. art. 15, § 273(8) of the Mississippi Constitution and Miss. Code Ann. § 23-17-31, the Legislature passed House Concurrent Resolution 39 as a legislative alternative to Initiative Measure No. 65 ("Alternative 65A"). The vote was 72-49 in the House on March 10, and 34-17 in the Senate on March 12, 2020.

On September 8, 2020, the State Board of Electors approved the ballot, including Initiative Measure No. 65 and Alternative 65A upon it. On November 3,

[6] The Secretary of State does not dispute the contents of App. C.

2020, the electorate voted on Initiative Measure No. 65. The Secretary of State certified the vote on December 3, 2020. App. H, Secretary of State Declaration of Vote. 57.89% of the electorate voted specifically for Initiative Measure No. 65. Under MISS. CONST. art. 15, 273(10), the measure will take effect 30 days from the date of the official declaration of the vote by the Secretary of State.

SUMMARY OF THE ARGUMENT

The requirements for the number of signatures supporting a voter initiative petition are constitutional mandates. MISS. CONST. art. 15, § 273(3) is plain: "The signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot." The words "any congressional district" cannot be read to mean "from each of the five congressional districts as they existed in the year 2000." Yet the former Secretary of State, under the guidance of the former Attorney General, inserted those words into the Constitution to deem the Initiative Measure No. 65 Petition sufficient for filing.

No text supports the Secretary of State's interpretation. No evidence demonstrates that the Legislature and the electorate intended "any congressional district" to permanently mean those existing twenty years ago. The only real reason the Secretary of State offers to support his interpretation is that a plain reading of MISS. CONST. art. 15, § 273(3) makes voter initiatives currently impossible.

This is the essence of liberal interpretation driven by outcome-determinative reasoning, and it violates every principle of separation of powers. Section 273(3)

contains a mathematical impossibility for the Legislature and the electorate to correct—not the Secretary of State, not the Attorney General, and not the Court. Interpreting the law based only on what is popular or expedient undermines our legal system and shifts power beyond carefully drawn constitutional boundaries. This Court respects those boundaries, cautioning litigants who ask it to supplant the role of the Legislature that it cannot and will not reach beyond the plain language of our state's laws. The Court rightly refuses to "add language where [it] see[s] fit." *Legis. of the State of Miss. v. Shipman*, 170 So. 3d 1211, 1215 (Miss. 2015). The Court must reject the Secretary of State's interpretation.

The Secretary of State is hamstrung by the fact that, as a Senator, he proposed the very amendment to Section 273 he now asks the Court to judicially create. *See* S. Con. Res. 549, 2015 Leg., Reg. Sess. (Miss. 2015). His counsel, the Attorney General, has publicly decried liberal judicial law-making. *See* Lynn Fitch (@LynnFitchAG), Twitter (Nov. 9, 2020, 3:59 PM).[7] Neither can offer a hypocrisy-free argument against a plain reading of the Constitution. Instead, they urge the Court to avoid the merits by charging Petitioners with laches.

But laches requires prejudice, and the Secretary of State has suffered none. The Court remedied any prejudice in the timing by expanding the briefing schedule, and precedent establishes that the cost of placing the Initiative on the ballot of a regular election is not enough. No regulations have yet been promulgated; no licenses or cards issued. While laches may be a strong defense to any subsequent

[7] https://twitter.com/LynnFitchAG/status/1325920946205679616/photo/1.

challenge to Mississippi's other voter initiative amendments (both enacted nine years ago), it is no defense to this challenge.

Every public body and official has a duty to protect and uphold our laws. Petitioners are bound by that duty, and they rightly insist that constitutional processes be respected and constitutional language upheld. Petitioners therefore respectfully request that, in reviewing the Secretary of State's determination of the sufficiency of the Initiative Measure No. 65 Petition, the Court hold that determination to be unconstitutional and in violation of Section 273(3).

ARGUMENT

I. Initiative Measure No. 65 was unconstitutionally brought to the voters.

A. The Secretary of State violated Section 273(3) in determining the sufficiency of the Initiative Measure No. 65 Petition.

In determining the sufficiency of the Initiative Measure No. 65 Petition, then-Secretary of State Hosemann violated MISS. CONST. art. 15, § 273(3). That Section provides, "The signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot." Section 273(3) then expressly prohibits the Secretary of State from considering signatures in excess of one-fifth from a single congressional district: "If an initiative petition contains signatures from a single congressional district which exceed one-fifth (1/5) of the total number of required signatures, the excess number of signatures from that congressional district **shall not be considered** by the Secretary of State in determining whether

the petition qualifies for placement on the ballot." MISS. CONST. art. 15, § 273(3) (emphasis added); *see also* Miss. Code Ann. § 23-17-23(b).

Because Mississippi has *four* congressional districts, it is a mathematical certainty that the number of signatures submitted in support of Initiative Measure No. 65 from at least one of the four congressional districts exceeds 1/5 of the total number required. Twenty percent (20%) from each congressional district equals eighty percent (80%) total; to reach one hundred percent (100%), the number from at least one district must exceed twenty percent (20%). Despite this certainty, the Secretary of State unconstitutionally determined the Initiative Measure No. 65 Petition sufficient for filing. In making his determination, the Secretary of State replaced "any congressional district" with the words, "from each of the five congressional districts as they existed in the year 2000."[8]

B. Section 273(3)'s plain language refers to the current congressional districts.

The Court should reject the Secretary of State's reading as "tantamount to a constitutional amendment devoid of the people's concurrence." *Chevron U.S.A. v. State*, 578 So. 2d 644, 648 (Miss. 1991) (citing *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966)). The Mississippi Constitution sets precise limits on how and what changes may be made to it. *See generally* MISS. CONST. art 15, § 273.[9] This Court

[8] *See* Miss. Sec'y State, Initiative Information, Initiative 65, *available at* https://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IId=65.

[9] For example, Section 273(5) identifies four areas of Mississippi law that the initiative process may *not* amend, such as the Bill of Rights in the Mississippi Constitution or any law relating to the Mississippi Public Employees' Retirement System.

held long ago that "[i]t is the mandate of the constitution itself, the paramount and supreme law of the land, that [an] amendment cannot become part of the constitution unless…[it] should be submitted in the mode pointed out…." *State ex. rel. McClurg v. Powell*, 570, 27 So. 927, 930 (Miss. 1900) (explaining an amendment's "right legally to be written and inserted into the constitution" depends on conformity with Section 273), *abrogated on other grounds by State ex rel. Collins v. Jones*, 64 So. 241 (Miss. 1913)).

This is in keeping with the gravity of altering the bedrock of our law. After all, the "Constitution of Mississippi is a solemn document." *State v. Wood*, 187 So. 2d 820, 831 (Miss. 1966). It serves a fundamental purpose as our State's foundational and supreme written law. It limits the power of the executive, legislative, and judicial branches, and enjoins each from usurping the power of the others. *Id.*; MISS. CONST. art 1, § 2; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) ("[T]hat those limits [imposed on those who govern] may not be mistaken, or forgotten, the constitution is written.").

The Court's adherence to the plain language canon of construction respects these Constitutional limits. *See Ex parte Dennis*, 334 So. 2d 369, 373 (Miss. 1976) ("The construction of a constitutional section is of course ascertained from the plain meaning of the words and terms used within it."). The Court rightly refuses to "add language where [it] see[s] fit." *Shipman*, 170 So. 3d at 1215. In the recent words of Attorney General Lynn Fitch, "Courts don't write laws, they interpret them…."

Lynn Fitch (@LynnFitchAG), Twitter (Nov. 9, 2020, 3:59 PM).[10] The Court, therefore, should interpret the unambiguous text of Section 273(3) as it is written. *See Natchez v. Sullivan*, 612 So. 2d 1087, 1089 (Miss. 1992) ("If [statutory text] is not ambiguous, the court should simply apply the statute according to its plain meaning and should not use principles of statutory construction."). Failure to hold the Secretary of State to the plain text of the Constitution would undermine the true goal of a written Constitution to set limitations of power.

Because of the significance of a change to our Constitution, the Court must apply Section 273(3)'s requirements strictly. *See Powell*, 27 So. at 931-32 (articulating the "necessity for greater deliberation and strictness of procedure in respect to the adoption of constitutional amendments than that which applies to acts of the legislature…."). A strict reading of the plain language of Section 273(3) supports only one interpretation. The phrase "qualified electors from any congressional district" can mean only from the current four congressional districts. MISS. CONST. art. 15, § 273(3). Our Constitution requires a qualified elector to have resided "for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote." MISS. CONST. art. 12, § 241. No elector may offer to vote in a fifth congressional district. It is non-existent.

This impossibility is well-illustrated by App. F. That Petition page contains an attestation for each signor: "I am a qualified elector of the State of Mississippi in the city (or town), county, and congressional district written after my name…." *See*

[10] https://twitter.com/LynnFitchAG/status/1325920946205679616/photo/1.

App. F. This language is required by Miss. Code Ann. § 23-17-19. *But there are no congressional districts written after each elector's name.* This is likely because the electors were from Simpson County, which in 2000 was in the Fourth Congressional District but is now in the Third Congressional District. Electors in Simpson County cannot honestly attest to being qualified in the Fourth Congressional District. The Constitution cannot require the Petition signers to lie.

The Secretary of State argues Petitioners are reading the word "current" into the phrases "any congressional district" and "a single congressional district." This is untrue; the ordinary meaning of these phrases necessarily refers to Mississippi's current four congressional districts. Other provisions in the Mississippi Constitution make this clear. The phrase "any county" is used throughout the Mississippi Constitution. *See* MISS. CONST. art. 5, §§ 135, 139, 140; art. 6, § 171; art. 8, § 206; art. 14, § 260. For example, Section 139 provides, "The Legislature may empower the Governor to remove or appoint officers, in any county or counties or municipal corporations, under such regulations as may be prescribed by law." *See* MISS. CONST. art. 5, § 139. But no one would argue that "any county" refers to the 82 counties as they existed in 1890, because some counties, such as Forrest and Humphreys, did not then exist. *See* Miss. Code Ann. §§ 19-1-35, 19-1-53. It cannot be the case that municipal officials can be removed in every county but Humphreys or Forrest. The ordinary meaning of "any county," just like "any congressional district," refers to any *current* member of the class described.

Section 273(3) provides that an initiative measure to amend the Constitution must be supported by a petition "signed over a twelve-month period by qualified electors equal in number to at least twelve percent (12%) of the votes for all candidates for Governor in the **last gubernatorial election**." MISS. CONST. art. 15, § 273(3) (emphasis added). This sentence ties the calculation of signatures to the present, not when Section 273(3) was enacted. There is no textual support for replacing "any congressional district" to "from each of the five congressional districts as they existed in the year 2000."

Indeed, if the congressional redistricting plan had changed the district *lines*, but *not* the *number* of districts, then surely the Secretary of State would not maintain that the geographic boundaries of the five-district plan in effect in 2000 would apply. And if Mississippi regains a congressional seat following the 2020 census, surely the Secretary of State will not hew to the 2000 congressional redistricting plan. The meaning of the words "any congressional district" should not fluctuate from "as they existed in 2000" to "current" every ten years. Petitioners' interpretation is the only consistent one.

The "Legislature is presumed to know of the statutes it is enacting and of the subject matter affected." *Seward v. Dogan*, 436, 21 So. 2d 292, 294 (Miss. 1945). When MISS. CONST. art. 15, § 273(3) was enacted, both the Legislature and the electorate knew that the congressional districts change every ten years. Populations in different parts of the state grow and decrease unevenly, and redistricting is necessary to preserve one person, one vote. But Section 273(3) is *not* fixed to a

particular date in time. Had the Legislature wanted to bind the congressional districts to a particular redistricting plan, it could have explicitly done so.

For instance, Section 213-A of the Mississippi Constitution, which governs the appointment of members to the Board of Trustees of State Institutions of Higher Learning, was enacted in 1944. It then stated, "There shall be appointed one (1) member of such board from each congressional district of the state **as now existing**...." MISS. CONST. art. 8, § 213-A (1944) (emphasis added). Consistent with this language, the enabling legislation, Miss. Code Ann. § 37-101-3, provides for "one member from each congressional district of the state as existing as of March 31, 1944."[11] The words "as now existing" were plain in Section 213-A. Section 273(3) contains no words of similar meaning or effect. There is no hint of textual intent to tie "congressional district" to the 2000 five-district plan.

The Court relied on a similar analysis in *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1325 (Miss. 1995). There, the Court considered MISS. CONST. art. 6, § 154, which states, "No person shall be eligible to the office of judge of the circuit court or of the chancery court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this state." In *Griffin*, the parties disputed

[11] The Legislature similarly has frozen the congressional districts from which other board appointees are drawn. *See* Miss. Code Ann. § 73-5-1 ("[O]ne (1) member [of the Board of Barber Examiners] to be appointed from each of the congressional districts as existing on January 1, 1991."); Miss. Code Ann. § 75-60-4(1) (filling seats on the Mississippi Community College Board with persons from each of the five congressional districts as they existed on January 1, 1992); Miss. Code Ann. § 73-19-7 (using January 1, 1980, as the congressional district benchmark date to fill seats on the Board of Optometry).

whether the words "immediately preceding his election" should be read into the Section 154. *Id.* The Court noted that similar language was included in Sections 41 of the Mississippi Constitution of 1890 to require persons running for the House of Representative to be a citizen of the county for "two years immediately preceding his election." *Id.* at 1326.

Based on the inclusion of the disputed language in one Section of the Constitution but not the other, the Court found that the drafters intentionally chose *not* to include the "immediately preceding" language: "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." *Id.* at 1326-27. Relying on the plain meaning of Section 154, the Court refused to rewrite it.

The same reasoning applies here. The drafters of Section 273(3) could have included "as now existing" behind the words "any congressional district" but did not do so. Under *Griffin*, the Court should find this omission intentional. The Legislature has amended many statutes to address the change in congressional districts. *See, e.g.*, Miss. Code Ann. § 37-3-2(2)(a) (amended in 2019 to refer to the four congressional districts as they existed in January 2011); Miss. Code Ann. § 63-17-57 (amended in 2006 to fill board seats based on the four congressional districts when the members of the previous five districts began to roll off the board), *accord* Miss. Code Ann. § 75-57-101; *see also* Miss. Code Ann. § 73-21-75 (amended in 2002 to refer to congressional districts as of July 2001); Miss. Code Ann. § 73-30-5

(amended to add this caveat in 2003); Miss. Code Ann. § 73-57-7 (amended in 2012 to remove any reference to congressional districts). The Legislature is well-aware that a petition cannot be constitutionally certified under Section 273(3) as the congressional districts now stand. Seven times since the congressional districts changed the Legislature has failed to bring to the electorate a proposed amendment remedying the mathematical problem.[12]

C. There is no legal support for the Secretary of State's interpretation.

More than 150 years ago, in dissenting from the infamous *Dred Scott* decision, Justice Curtis wrote,

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Scott v. Sandford, 60 U.S. 393, 621 (1857) (Curtis, J., dissenting); *see also In re Hooker,* 87 So. 3d 401, 423 (Miss. 2012) (Randolph, J., dissenting); *Czekala-Chathamfiled v. State ex rel. Hood*, 195 So. 3d 187, 200 (Miss. 2015) (Coleman, J., dissenting). In this case, the Secretary of State's interpretation of the sufficiency of

[12] *See* H.R. Con. Res. 58, 2003 Leg., Reg. Sess. (Miss. 2003); S. Con. Res. 510, 2007 Leg., Reg. Sess. (Miss. 2007); S. Con. Res. 523, 2009 Leg., Reg. Sess. (Miss. 2009); H.R. Con. Res. 22, 2014 Leg., Reg. Sess. (Miss. 2014); H.R. Con. Res. 26, 2015 Leg., Reg. Sess. (Miss. 2015); S. Con. Res. 549, 2015 Leg., Reg. Sess. (Miss. 2015); H.R. Con. Res. 43, 2020 Leg., Reg. Sess. (Miss. 2020).

a petition to amend our constitution is based not on a strict construction of Section 273(3), but on one man's views of what it *ought* to mean.

Specifically, then-Attorney General Jim Hood issued an advisory opinion in 2009 on this issue, and this is the slim reed of authority upon which the Secretary of State relied in determining the Petition's sufficiency. *See Hosemann*, Miss. Att'y Gen. Op. No. 2009-00001, 2009 WL 367638, 2009 Miss. AG LEXIS 278 (Jan. 9, 2009). The Attorney General's opinion of course does not bind this Court, nor is it a persuasive interpretation of the Mississippi Constitution.[13] *See Basil v. Browning*, 175 So. 3d 1289, 1293 (Miss. 2015); *Montgomery v. Lowndes Cty. Democratic Exec. Comm.*, 969 So. 2d 1, 2-3 (Miss. 2007).

Without citing any constitutional text, precedent, canons of constitutional construction, or other law, the Attorney General Opinion states, "It is likewise our opinion that the geographic distribution requirement of Section 273 requires that not more than 20% of the total required number of initiative petition signatures must come from the last five-district congressional district plan which was is effect prior to the adoption of the current four-district plan." The *only* reason given is that "[i]t would be mathematically impossible to satisfy the requirements of Section 273 using just four districts." *Hosemann*, No. 2009-00001.

The Attorney General Opinion speculates that the "general purpose of geographic distribution requirements for the signatures appearing on initiative

[13] Neither the Secretary of State nor the Attorney General is entitled to deference in interpretation of the Constitution. *See King v. Miss. Military Dep't*, 245 So. 3d 404, 408 (Miss. 2018).

petitions is to help ensure that an initiative has broad support throughout the state and to help assure that the initiative process is not used by citizens of one part of the state to the detriment of those in another." *Id*. There is no evidence cited of this intent.[14] Regardless, use of the old five-district plan does *not* effectuate this purpose. The districts have been redrawn twice over the last twenty years as the growth of certain areas of the state, like Madison County, has outpaced the growth of other areas. *See Smith v. Hosemann,* 852 F. Supp. 2d 757, 766 (S.D. Miss. 2011) ("The large population in Hinds and Madison Counties, as well as the need to prevent retrogression in District 2, necessitated the splitting of those counties between Districts 2 and 3.").

The weakness of the reasoning in *Hosemann* is shown in *Turner*, Miss. Att'y Gen. Op. No. 2015-00158, 2015 WL 4394179, 2015 Miss. AG LEXIS 117 (June 5, 2015). In *Turner*, the Attorney General construed the statutory requirement for having one's name placed on the presidential preference primary ballot. Miss. Code Ann. § 23-15-1093 provides that one way to do so is for a candidate to file "petitions signed by not less than one hundred (100) qualified electors of each congressional district of the state, in which case there shall be a separate petition for each congressional district." The Attorney General opined that this plain language unambiguously means "since we now have only four (4) congressional districts, a

[14] The more likely explanation of the Legislature's intent is that the tying of the signature requirement to the congressional districts ensured preclearance under Section 5 of the Voting Rights Act. Adhering to an outdated congressional redistricting plan does *not* achieve the purpose of maintaining Voting Rights Act compliance.

potential candidate would only need a total of four hundred (400) signatures to satisfy the statutory requirement to gain ballot access." *Turner*, No. 2015-00158. Indeed, *Turner*, recognizes the very interpretative problem presented here: "[S]ince there is no congressional district five (5), a legitimate affirmation that each signer is a qualified elector of district five (5)…would not be possible." *Id.*

There is no principled reason why "qualified electors from any congressional district," as used in MISS. CONST. art. 15, § 273(3), must be rewritten, but "qualified electors of each congressional district," as used in Miss. Code Ann. § 23-15-1093, unambiguously means the current congressional districts. Ultimately, the mathematical impossibility is the only true reason the Secretary of State offers to avoid Section 273(3)'s plain language. But this impossibility is a reason to *amend* Section 273(3), not rewrite it by executive fiat. As the Secretary of State concedes, "an amendment is necessary." Secretary of State's Brief at 10.[15] Likewise, the Attorney General Opinion admits, "One way to remedy this problem would be to amend Section 273 to reflect four congressional districts." *Hosemann*, No. 2009-00001. It simply is *not* the role of the Secretary of State or the Attorney General to amend the Constitution when the Legislature fails to act.

Nor is it this Court's role to "'sit in judgment upon the wisdom or fairness or utility'" of the Legislature's choice of language for Section 273(3). *See Hughes v.*

[15] Secretary Watson asks the Court to adopt a liberal interpretation of Section 273, yet avers he ""still believes an amendment is necessary." Answer, p. 10. These inconsistent positions can best be explained by one fact: As a legislator, Secretary of State Michael Watson proposed the very amendment to Section 273 he now asks the Court to judicially create.

Hosemann, 68 So. 3d 1260, 1270 (Miss. 2011) (citation omitted). It is this Court's duty to interpret and apply the law as written. *Shipman*, 170 So. 3d at 1215 (Miss. 2015) ("We do not add language where we see fit. We do not 'decide' what a statue should provide, but…determine what it does provided." (citations omitted)); *see also State v. Wood*, 187 So. 2d 820, 831 (Miss. 1966) ("This Court has the power to construe the Constitution and thus define the powers of the three branches of our Government. This calls for objective deliberation and for the exercise of self-restraint on the part of this Court not to overstep its proper and rightful power.").

Natchez v. Sullivan illustrates the Court's faithfulness to this principle of judicial restraint. 612 So. 2d 1087, 1089 (Miss. 1992). There, a statute granted four years of retirement eligibility for active duty service in the Armed Forces of the United States. *Id.* at 1088. As written, the statute did *not* limit the credit to active duty service *during* one's public employment. *Id.* at 1089. Rather, it simply stated that active duty service shall count toward retirement. *Id.* The Court refused to read into this unambiguous statute missing language, even though it led to the potentially unintended result of awarding credit for active duty service *before* one's public employment. *See id.* at 1089-90; *see also Griffin*, 667 So. 2d at 1325-26 (refusing to rewrite a section of the Mississippi Constitution).

Just as the Court refused to let the outcome determine its statutory analysis in *Natchez v. Sullivan*, so too should the Court refuse to do so in its constitutional analysis. If this Court agrees with the Secretary of State's result-oriented interpretation, then it will open any provision of the Mississippi Constitution to

challenge based on subjective dissatisfaction with the outcome. The *end result* of constitutional interpretation should not justify the *means* employed. This Court should adhere to a textualist approach when interpreting the Mississippi Constitution and rule in Petitioners' favor.

Section 273 provides the only means to amend the Constitution. Nowhere does it permit the executive or judicial branch to change (or even propose a change) to the Mississippi Constitution. The Constitution reserves that right to the qualified electors of Mississippi, either in response to an amendment proposed by the Legislature or via a citizen initiative measure.[16] Guided by the constitutional limits imposed by the separation of powers, Court should continue to exercise constitutionally-mandated judicial restraint and refuse to take on the role of the electors.

D. Popular support for Initiative Measure No. 65 is not a sound basis for constitutional interpretation.

Popular support for Initiative Measure No. 65 does not justify rewriting Section 273(3) to say something it does not. Amendments to the Mississippi Constitution—whether under Section 273(2) or Section 273(3)—are subject to rigorous procedural requirements. *Powell*, 27 So. at 931-32.

The Mississippi Constitution provides checks and balances against government power, both between the respective branches and in their exercise of authority over the individual. The provisions of the Mississippi Constitution are not

[16] A third, although less common, alternative would be for the State to commence a constitutional convention.

mere suggestions, but mandates. The prerequisites to amendment of the Mississippi Constitution by popular vote address a concern that dates back to this Country's founders: protection of the minority against the tyranny of the majority. *Cf.* THE FEDERALIST NO. 51 (James Madison) ("If a majority be united by a common interest, the rights of the minority will be insecure."), *available at* https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-51/; *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) ("Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act."), *available at* https://avalon.law.yale.edu/18th_century/fed78.asp.

This Court explained the risk of indulging the majority, at the expense of the minority, by refusing to adhere strictly to the prerequisites for amending the Mississippi Constitution:

> The majority of the people, according to law, having adopted the constitution with a mode of amendment in it, we must regard it as a solemn declaration to the minority in the state, as binding as a compact with such minority, that the majority, however large or overwhelming, will never exercise its irresistible power, its vis major, to change the law of its organization as a government in any other way.

Powell, 27 So. at 931-32 (quoting with approval *Oakland v. Hilton*, 69 Cal. 479 (1886)). Although not binding on this Court, the Supreme Court of Virginia articulated this idea well nearly two centuries ago:

> It must be admitted that at the institution of civil government founded on the rights of all, the will of the majority must prevail over the opinions and interests of the minority: but when such government is established, its great object is to protect the rights of the minority from the tyranny of the majority; a tyranny more inflexible and implacable than the tyranny of a single despot. In the one case the majority feels no sympathy for the minority. In the other case the sufferers have the sympathy of the majority of their fellow subjects, and the force of public opinion may redress their wrongs. To effect this relief against the tyranny of majorities, written constitutions were devised by the American people.

Goddin v. Crump, 8 Leigh 120 (Va. 1837). In other words, the Mississippi Constitution stands as a promise to the minority that no matter how popular a measure may be, the majority will adhere strictly to the rules for amending that "solemn document."

Whether Initiative Measure No. 65 received majority support on November 3, 2020, cannot dictate the outcome of this case. The people of Mississippi—including whatever faction happens to be the prevailing majority today—are constrained by a written Constitution that requires more than the simple will of the majority to effect change. It requires strict compliance with the procedures outlined in Section 273. That is what is missing here, and that is what requires the invalidation of Initiative Measure No. 65.

E. The electorate will not be left powerless.

It is unfortunate that the Legislature's failure to remedy the mathematical problem of Section 273(3) means that the Constitution cannot be amended *by initiative* until either Section 273(3) is amended or Mississippi regains one or more congressional seats. But this situation is not without precedent. In 1922, the Mississippi Supreme Court invalidated as unconstitutional Mississippi's former citizen initiative procedure. *Power v. Robertson*, 93 So. 769, 775-77 (Miss. 1922). Although the electorate had voted in favor of a citizen initiative procedure years earlier, the Court determined that the Legislature presented the amendment to the voters in the wrong form. *Id.* (finding too many measures proposed in a single amendment rendered it unconstitutional).

In *State ex rel. Moore v. Molpus*, 578 So. 2d 624 (Miss. 1991), then-Attorney General Moore argued that *Power v. Robertson*, 93 So. 769, 775-77 (Miss. 1922), which struck the first initiative amendment as unconstitutionally enacted, was wrongly decided and should be overturned. The Court rejected this argument, under principles of both *stare decisis* and collateral estoppel. In doing so, the Court noted that the Constitution has been successfully amended many times without an initiative process: "Over a hundred amendments have been made and enacted since 1890, as we have seen. If the people want [Initiative and Referendum] in Mississippi, their course is clear." *Id.* at 638.

In response, the Legislature proposed an amendment to the Mississippi Constitution that created present-day Section 273(3). *See* 1992 Miss. Laws ch. 715.

Until the electorate amended Section 273 in 1992, Mississippians for 70 years had no ability to place an initiative measure on the ballot. *See Hughes v. Hosemann*, 68 So. 3d 1260, 1263 n.4 (Miss. 2011) (recounting history of initiative measures).

This history is important. While it is unfortunate that poor drafting of Section 273(3) in 1992 renders it dysfunctional today, the lack of an initiative procedure pending a legislative proposal to fix it is no historical anomaly. It was the case for the better part of the twentieth century.

As the Secretary of State advocates, the Legislature can and should propose an amendment to restore the citizen initiative procedure to working order. Likewise, if the Court invalidates Initiative Measure No. 65, the Legislature still has the opportunity to heed the will of the majority and craft a statutory scheme for medical marijuana. In both cases, the electorate retains the ultimate power: to vote its legislators out if they refuse to act.

II. Petitioners timely brought their challenge.

The Secretary of State states, "A divergence of viewpoints regarding Section 273(3)'s text shows there is room for a good faith interpretive dispute…." Respondent's Answer, p. 10. Therefore, the Secretary of State asks the Court "to resolve that question here…." *Id.* at p. 2. Yet in the same breath, the Secretary of State asks the Court to *avoid* the question and deny review based on the affirmative defense of laches. *Id.*

To begin with, laches cannot be charged against the City of Madison. *See, e.g.*, *Hill v. Thompson,* 564 So. 2d 1, 14 (Miss. 1989) ("The principle that a

governmental entity is not chargeable with the laches of its officials is also well settled."). Therefore, even if the Secretary of State could prove laches against Mayor Hawkins Butler (and he cannot), this affirmative defense cannot resolve the entire suit.

"Laches requires the party seeking to assert the defense show: '(1) delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted.'" *Nicholas v. Nicholas*, 841 So. 2d 1208, 1212-13 (Miss. Ct. App. 2003) (quoting *Allen v. Mayer*, 587 So. 2d 255, 260 (Miss. 1991)). The Secretary of State has not established any of these elements.

First, the Secretary of State cannot quantify a "delay," because he does not identify a point at which his predecessor's determination of the sufficiency of the Petition became ripe for review. Instead, he claims "Petitioners could have elected to sue at any point in the process"—a process he defines as ranging from the date the proposed measure was filed in July 2018 through Election Day on November 3, 2020. *See* Respondent's Answer, pp. 14-15.

But Section 273(9) grants the Court jurisdiction to review the Secretary of State's determination of the sufficiency of the Petition. That did not occur when the proposed measure was filed, or when the ballot title was approved, or when Notice of the Initiative was published. Unlike the Attorney General, this Court does not issue advisory opinions. Laches logically cannot run from a point before the suit even became ripe.

In fact, the precise date then-Secretary of State Hosemann finished hand-counting thousands of District 2 and 4 signatures and determined the sufficiency of the Petition is a mystery. The Secretary of State provides in his Answer that on September 4, 2019, the "Initiative Petition [was] filed with [the] Secretary of State's Office." But it is unclear whether this is the date of the Sponsor's *submission* or the date of the Secretary of State's *determination*.

Even assuming the latter, the Secretary of State cannot prove the second element of laches, that the delay was inexcusable. Petitioners did not and could not know when their right to review came into existence, because the Secretary of State made no public announcement of acceptance of Initiative Measure No. 65 Petition for filing. The Secretary of State published no notice of it, and nothing on the Secretary of State's website reflects the filing date. There is a troubling lack of transparency in this process. Indeed, the Secretary of State's office either has lost or never maintained an official record of key events surround Initiative Measure No. 65, such as the precise number of sufficient signatures. *See* App. C, Affidavit of Adam Stone. And although the Secretary of State's brief enumerates a lengthy timeline of events, it provides no evidence that all this information was actually available to the public.

The suggestion Petitioners lay in wait for a strategic advantage is false. *See* Respondent's Answer, p. 16 (accusing Petitioners of "dilatory tactics"). Mayor Hawkins Butler, concerned over the Initiative's potential effects on the City of Madison's right to zone, asked City Attorney Chelsea Brannon to look into how

Initiative Measure No. 65 came to be. Four days before filing their Petition, Petitioners realized the constitutional problem with the sufficiency of the Initiative Measure No. 65 Petition signatures. The City of Madison did not vote to retain outside counsel until the day before its Petition was filed. This does not support laches. *See Elchos v. Haas*, 178 So. 3d 1183, 1196 (Miss. 2015) (finding no laches because plaintiff complained immediately after learning of encroachment).

Finally, and most importantly, the Secretary of State has failed to establish any actual prejudice. Laches "is not delay in asserting a right, but delay resulting in disadvantage, which would make it inequitable to permit the party to assert his right." *Evanovich v. Hutto*, 204 So. 2d 477, 479 (Miss. 1967). The Secretary of State complains generally that his Office expended resources to place the measure on the ballot and the electorate has now voted on something that will be invalid if the Court rules for Petitioners. This Court has addressed and rejected similar arguments before. For example, in *Power v. Ratliff*, the Court refused to enjoin an election based on a challenge to the substance (not the form) of a proposed amendment. 72 So. 864, 865 (Miss. 1916). The Court noted no irreparable injury where there was no special election and the measure would "simply lengthen the ticket," the tax burden on the complainants would be "a paltry sum" that was "trifling and insignificant," and it was harmless if the measure were to pass but later be found void. *See id.* at 93-94.

The Secretary of State's speculation that this action might impact other initiative measures does not constitute prejudice for *this* dispute. Here, even though

the vote has been declared, the DOH has not yet promulgated any regulations, and no licenses or certificates have been issued. No rights have vested, and no prejudice could be suffered if the Court invalidated Initiative Measure No. 65 before it was carried out.

In contrast, laches is likely a *strong* defense to any future challenges brought to the two amendments enacted under Section 273(3): Initiative Measure No. 27 ("Voter ID"), enacted as Miss. Const. art. 12, § 250, and Initiative Measure No. 31 ("Eminent Domain"), enacted as Miss. Const. art. I, § 17-A. Both of those amendments went into effect nine years ago—a far more inexcusable delay. For Voter ID, the State has spent significant resources implementing its requirements, and countless elections have taken place since its enactment. For Eminent Domain, the State has structured its takings over the last nine years to comply. In both instances, rights have vested, whether in those elected in an election requiring voter identification or whether in those utilities who have been transferred property taken by eminent domain. The existence of these two other voter-initiative amendments is no bar to the Court's review of this challenge to the sufficiency of the Initiative Measure No. 65 petition.

III. The Court has subject matter jurisdiction.

The Secretary of State raised no challenges to the Court's jurisdiction in his Answer. But recognizing that the Court must be satisfied of its own jurisdiction, Petitioners address jurisdiction despite this concession. *See, e.g.*, *Smith v. Parkerson Lumber Inc.*, 890 So. 2d 832, 834 (Miss. 2003) ("Regardless of whether the parties

raise jurisdiction, the Court is required to note its own lack of jurisdiction…."); *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 826 (Miss. 2009) ("A lack of standing robs the court of jurisdiction to hear the case."). As shown below, the Court has original and exclusive jurisdiction to hear this matter; Petitioners have standing; and the matter is justiciable.

A. Original and Exclusive Jurisdiction

While the Court's jurisdiction ordinarily is appellate, MISS. CONST. art. 15, § 273(9) grants the Court "**original and exclusive**" jurisdiction to review the Secretary of State's determination of the sufficiency of the initiative petition. MISS. CONST. art. 15, § 273(9) (emphasis added); *compare to* MISS. CONST. art. 6, § 146; Miss. Code Ann. § 9-3-9; *cf. In re Fordice*, 691 So. 2d 429, 435 (Miss. 1997) (denying jurisdiction to hear declaratory judgment action in the absence of grant of original jurisdiction). The Court can be the *only* arbiter of this challenge because its jurisdiction is "exclusive." And the Court must be the *first* to hear this challenge because its jurisdiction is "original."

The Supreme Court of the United States has interpreted its own "original and exclusive jurisdiction of all controversies between two or more States" to bar suit in any other court. *See Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992). And other states' courts have interpreted similar constitutional grants of original jurisdiction to allow a direct action in an appellate court. *See Shepard v. McDonald*, 64 S.W.2d 559, 560 (Ark. 1933); *Merwin v. State Bd. of Elections*, 593 N.E.2d 709, 711 (1st Dist. Ill. Ct. App. 1992); *State ex rel. Jones v. Husted*, 73 N.E.3d 463, 468

(Ohio 2016). The words "original and exclusive" are plain, and the Court's jurisdiction is secure.

Not one of the four modern cases challenging initiatives was brought under Section 273(9), and none address this jurisdictional grant. *See In re Proposed Initiative Measure No. 20 v. Mahoney*, 774 So. 2d 397, 398 (Miss. 2000) (upholding challenge to an initiative measure to prohibit gambling for failure to contain a revenue impact statement under MISS. CONST. art. 15, § 273(4)); *Speed v. Hosemann*, 68 So. 3d 1278 (Miss. 2011) (declining review of proposed amendment to restrict transfer of land taken by eminent domain); *Hughes*, 68 So. 3d at 1262 (declining review of the constitutionality of the content of the proposed Personhood Amendment)[17]; *Shipman*, 170 So. 3d at 1213 (declining review of title of a Legislative amendment to a measure). These cases, therefore, provide no support for reading "original and exclusive" as anything other than mandating the Court's review in this case.

Section 273(9) is self-executing; it grants an explicit right of review and requires no enabling legislation. *See Oktibbeha Cty. Bd. of Educ. v. Sturgis*, 531 So. 2d 585, 588 (Miss. 1988) (holding thst Sections 17 and 19 of the Mississippi Constitution are self-executing, but Section 211 is not). Had the drafters of the Mississippi Constitution wanted to require enabling jurisdiction for Section 273(9),

[17] In a concurring opinion in *Hughes v. Hosemann*, 68 So. 3d 1260, 1262 n.14 (Miss. 2011), Justice Randolph noted in passing that the proponents of Initiative Measure No. 26 had exceeded "the requirement of 89,285 certified signatures, at least 17,857 of which were from each of Mississippi's former five congressional districts." But the sufficiency of the number of signatures was not at issue in *Hughes*.

they could have done so explicitly. For example, Section 146 explicitly contemplates enabling legislation for direct appeals from the Public Service Commission: "The Legislature may by general law provide for the Supreme Court to have original and appellate jurisdiction as to any appeal directly from an administrative agency charged by law with the responsibility for approval or disapproval of rates sought to be charged the public by any public utility." MISS. CONST. art. 6, § 146. Likewise, Section 156 grants the circuit courts "such appellate jurisdiction as shall be prescribed by law." MISS. CONST. art. 6, § 156. Section 273(9) contains no such language. No enabling jurisdiction is contemplated or required.

Section 273 contains a limited grant of enabling authority to the Mississippi Legislature, but it does *not* address Section 273(9)'s grant of original jurisdiction. Section 273(12) and (13) provide that the "Legislature shall provide by law the manner in which initiative petitions shall be circulated, presented and certified," and that it "may enact laws to carry out the provisions of this section…." MISS. CONST. art. 15, § 273(12)-(13). Yet the Mississippi Constitution is clear that the Legislature "shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people." MISS. CONST. art. 15, § 273(13). The Legislature cannot "restrict or impair" the jurisdictional grant in Section 273(9) by inaction.

It is well-established that the Legislature can neither divest nor bestow jurisdiction in contravention of the Mississippi Constitution. *See Dialysis Sols., LLC v. Miss. State Dep't of Health*, 96 So. 3d 713, 717 (Miss. 2012). "'As the highest state

court, this Court has the proper authority and responsibility to interpret the Mississippi Constitution of 1890.'" *Shipman*, 170 So. 3d at 1227 (Randolph, J., concurring) (quoting *Barbour v. Delta Corr. Facility Auth.*, 871 So. 2d 703, 710 (Miss. 2004)). This cannot be taken away by the Legislature. *See id.* ("If the Legislature shut down all the public schools, could this Court be asked to intervene under the current Constitution? Certainly it has the authority to do so.").

B. Petitioners' Standing

The Secretary of State does not dispute that both Mayor Hawkins Butler and the City of Madison have standing to bring this action. Under *Power v. Robertson*, 93 So. 769, 773 (Miss. 1922), "any qualified elector has a right to question the sufficiency and validity of the petition." *See also Mahoney*, 774 So. 2d at 402, *partially overruled on other grounds*, *Speed*, 68 So. 3d at 1281 ("As qualified electors and taxpayers of the State of Mississippi, the appellees in this case had standing to assert their claims questioning the sufficiency of Initiative Measure No. 20."). There is no dispute Mayor Hawkins Butler is a qualified elector under MISS. CONST. art. 12, § 241. *See* App. E, Affidavit of Mary Hawkins Butler.

The City also has standing. "Mississippi parties have standing to sue when they assert a colorable interest in the subject-matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law." *Kinney v. Catholic Diocese of Biloxi, Inc.*, 142 So. 3d 407, 412-13 (Miss. 2014) (internal citation omitted). The City is likely to experience an adverse effect different from any adverse effect suffered by the general public. Specifically, the

City has an interest in protecting its zoning rights. The Secretary of State's unconstitutional acceptance of the Initiative Measure No. 65 Petition threatens those rights. This threat of injury is real, immediate, and direct. The City has the right and capacity to sue under Miss. Code Ann. § 21-7-1, and it is a proper party to this action.

C. The matter is ripe and not wholly moot.

The Court has refused to exercise jurisdiction over challenges to the *substance* of a proposed initiative measure because any challenge to substance[18] is unripe until the initiative is enacted. *See Speed*, 68 So. 3d at 1269-70; *Hughes*, 68 So. 3d at 1264 (overruling *Mahoney*, 774 So. 2d at 402, to the extent it suggested pre-election review of the substance of an initiative is allowed). But the Court has unequivocally recognized that a pre-election challenge to the *form* of an initiative-driven constitutional amendment is justiciable. *Hughes*, 68 So. 3d at 1264. Petitioners brought their challenge to the filing of the Petition for Initiative Measure No. 65 pre-election, and it is a challenge to form. The measure could be about any topic, and its constitutional invalidity would remain. No matter what the content of the measure is, the Petition signatures are insufficient under the plain language of MISS. CONST. art. 15, § 273(3). The matter is therefore ripe for review.

This challenge is *not* wholly mooted by the Secretary of State's declaration of the November 3, 2020 vote. While declaration of the vote does moot the Petitioners'

[18] Indeed, substantive challenges to Initiative Measure No. 65 are imminent if Petitioners' form challenge is unsuccessful.

requested writ relief, it does *not* moot their requested review under Section 273(9) or declaratory relief. This Court invalidated Mississippi's former initiative procedure in 1922 after it had been a part of the Mississippi Constitution for many years. *Robertson*, 93 So. at 775-77. The Court can and should declare the form of Initiative Measure No. 65 unconstitutional and, on this basis, invalidate the Amendment.

CONCLUSION

The Mississippi Constitution of 1890 bars the encroachment of power: The legislative, judicial, and executive departments are forbidden to "exercise any power properly belonging to either of the others." MISS. CONST. art. 1, § 2. Neither the executive branch nor the judicial can rewrite the Constitution. The Secretary of State asks that the Court adopt the Attorney General's revision to MISS. CONST. art. 15, § 273(3). The Court should decline.

Petitioners Mayor Mary Hawkins Butler and the City of Madison therefore ask that the Court determine that the Secretary of State unconstitutionally deemed the Initiative Measure No. 65 Petition sufficient. Specifically, Petitioners ask that the Court hold that the Secretary of State unconstitutionally considered more than 1/5 of the signatures from any congressional district. Petitioners therefore respectfully ask that the Court declare that Initiative Measure No. 65, which has yet to be enacted or codified, is void and without effect.

Respectfully submitted, this, the 7th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Appellate Courts using the MEC system which sent notification of such filing to the following counsel of record:

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