**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/APPELLANTS**

**V.**

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

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# REPLY BRIEF OF PETITIONERS/APPELLANTS MAYOR HAWKINS BUTLER AND THE CITY OF MADISON

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## SUMMARY OF THE ARGUMENT

The rule of law depends upon predictable, faithful interpretation of the law's plain language. Our Constitutional system, with its careful checks and balances on the separation of powers, depends on each branch adhering to this principle. As the Court so recently stated, "Our Constitution is a sacred compact among the people of this State. MISS. CONST. art. 3, § 5. No single person or branch of this government can unilaterally amend our Constitution or ignore its dictates." *Reeves v. Gunn*, No. 2020-CA-01107-SCT, 2020 WL 7489020, 2020 Miss. LEXIS 508, at *1 (Miss. Dec, 17, 2020).

The Secretary of State and his supporting *amici curiae* selectively cite Justice Scalia and Professor Mitchell in an attempt to persuade the Court to do just that. The multitude of canons of construction they proffer cannot distract from the Secretary's fundamental premise: that, previously unbeknownst to anyone, Mississippi has *two* sets of congressional districts—four districts for congressional elections, but five for everything else. The Secretary's argument can only succeed if "congressional district" does not carry its ordinary, plain, dictionary meaning: "a geographical unit of a State from which one member of the House of Representatives is elected."

The Secretary offers only the continued existence of Miss. Code Ann. § 23-15-1037 as justification for redefining "congressional districts" as "districts used for anything other than congressional elections." The Secretary's new argument ignores federal limits on the Legislature's power, the scope of the federal injunction, and the admissions his office made in the federal proceeding. Congress, not the Mississippi Legislature, sets the *number* of congressional districts. 2 U.S.C. §§ 2a & 2c. The federal injunction bars the Secretary of State's office from "implement[ing] the former five district congressional redistricting plan codified at Miss. Code Ann. § 23-15-1037." *Smith v. Clark*, 189 F. Supp. 2d 548, 559 (S.D. Miss. 2002).

And the Secretary admitted in the first federal suit that "the current districting plan (dividing the State into five congressional districts) is unenforceable…." *Smith v. Clark*, 189 F. Supp. 2d 503, 507 (S.D. Miss. 2002).

Petitioners have never argued the federal court *repealed* Miss. Code Ann. § 23-15-1037; they contend the Secretary of State is barred from implementing it. For this reason, the "writ-of-erasure fallacy" is a strawman argument. Miss. Code Ann. § 23-15-1037 is what the Fifth Circuit has called a "zombie law": it remains on the books, but it is unenforceable. Even if federal law did not make that clear, state law certainly does. As the Court recognized in *Mauldin*, Miss. Code Ann. § 23-15-1039 abrogates *all* congressional districts if Mississippi loses a congressional seat but fails to amend Miss. Code Ann. § 23-15-1037. *Mauldin v. Branch*, 866 So. 2d 429, 435-36 (Miss. 2003). This is exactly what happened. By the plain terms of state law, there is no "shadow set" of five congressional districts under Miss. Code Ann. § 23-15-1037 to define "congressional district" as used in Section 273(3).

The Secretary of State's argument depends on this zombie law's reanimation. Without it, he falls back to asking the Court to do the Legislature's job of amending Section 273(3) to fulfill its purpose. Under our state constitutional separation-of-powers mandate, the Court should refuse.

## ARGUMENT

### I. The Secretary's attempts to avoid the plain language of Section 273(3) fail.

#### A. The meaning of "congressional districts" is plain, and Miss. Code Ann. § 23-15-1037 does not alter that meaning.

To avoid the plain meaning of Section 273(3), the Secretary of State and his *amici curiae* present the Court with a dizzying array of canons of construction: the presumption against ineffectiveness; the harmonious reading canon; *expression unius est exclusion alterius*; the whole

text canon; and the absurdity doctrine. But the Court begins its Constitutional interpretation with determining whether ambiguity exists. If it does not, then "the plain meaning of the words and terms used" controls. *Dunn v. Yager*, 58 So. 3d 1171, 1189 (Miss. 2011) (quoting *Ex parte Dennis***,** 334 So. 2d 369, 373 (Miss. 1976)). "If there be no ambiguity, there…exists no reason for legislative or judicial construction." *Id*.

There is no ambiguity in Section 273(3). It states,

> 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). The Secretary protests that the words "congressional district" are not "specifically define[d]" in Section 273(3). But they do not need to be, because their plain meaning is so obvious. It is the same whether one uses a legal dictionary, an English language dictionary, or simple common sense. Black's Law Dictionary defines "congressional district" as "a geographical unit of a State from which one member of the House of Representatives is elected." Congressional District Definition, *Black's Law Dictionary* (6th ed. 1990); Merriam Webster's Dictionary defines "congressional district" as "a territorial division of a state from which a member of the U.S. House of Representatives is elected." Congressional District Definition, *merriam-webster.com*, www.merriam-webster.com/dictionary/congressional%20 district (last visited Jan. 7, 2021). Both definitions are in the present tense. The plain meaning supports only Petitioners' construction.

### 1. "Congressional district," as used in Miss. Code Ann. § 23-15-1037 and the Constitution, does not mean "district used for any purpose other than a congressional election."

To overcome MISS. CONST. art. 15, § 273(3)'s plain meaning, the Secretary of State claims that a shadow set of five congressional districts exists under Miss. Code Ann. § 23-15-1037 and that these districts define "congressional districts" as used in Section 273(3). Miss. Code Ann. § 23-15-1037 states, "The State of Mississippi is hereby divided into five (5) congressional districts below…." The Secretary's argument rests on an untenable premise: that the term "congressional districts" in the statute really just means "districts used for any purpose *other than* congressional elections." The Secretary argues Miss. Code Ann. § 23-15-1037's mere continued existence proves this. This circular reasoning does not justify reading the word "congressional" right out of the text of both the statute and the Constitution. The plain dictionary definition of the phrase "congressional district" does not allow this.

The Secretary suggests the Court of Appeals statute supports his argument, but it does the opposite. He states,

> Five districts also exist pursuant to never-repealed Code Section 23-15-1037 and can be used for anything but congressional elections. For example, the State uses the exact same five districts established in Code Section 23-15-1037 to elect the Judges of the Mississippi Court of Appeals. See MISS. CODE ANN. § 9-4-5(5)(a)-(b).

Appellee's Br. at 17. The Secretary fails to mention that the Legislature amended the Court of Appeals statutes in 2001. Before amendment, Miss. Code Ann. § 9-4-1 stated, "The Court of Appeals shall be comprised of ten (10) appellate judges, two (2) from each **congressional district**…" Miss. Code Ann. § 9-4-1 (1993) (emphasis added). After amendment, the statute states, "The Court of Appeals shall be comprised of ten (10) appellate judges, two (2) from each **Court of Appeals District**…." *See* Miss. Code Ann. § 9-4-1 (as amended by Laws, 2001, ch.

574, § 1) (emphasis added). Likewise, Miss. Code Ann. § 9-4-5 was amended to define each "Court of Appeals District" by county. Miss. Code Ann. § 9-4-5 (as amended by Laws, 2001, ch. 574, § 2).

So the Court of Appeals statutes do not "use" Miss. Code Ann. § 23-15-1037 for "another purpose," or any purpose at all; those statutes were specifically amended to *untie* the Court of Appeals Districts from the congressional districts. That the geographic boundaries match only reinforces the point: if Miss. Code Ann. § 23-15-1037 actually provided "districts to be used for any purpose other than congressional elections," then amendment would be unnecessary.

The Legislature has recognized as much, not only by amending the statutes relying upon "congressional districts" for board membership,[1] but also through Miss. Code Ann. § 5-3-121. This statute defines the membership of the standing joint congressional redistricting committee as "two (2) from each congressional district…" from both houses of the Legislature. But "[i]n the event the congressional districts of the state shall change numerically, then the number appointed…from congressional districts shall be adjusted accordingly." Today, there are eight (8) members on the Committee from the House of Representatives—two from each *actual* congressional district.[2]

In *Wilson v. Hosemann*, 185 So. 3d 370 (Miss. 2016), the Court held that the Democratic Party denied a candidate for President due process, but in a footnote, the Court rejected the Party's original interpretation of Miss. Code Ann. § 23-15-1093, which governs placement on

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[1] *See* Appellant's Br. at 21-22.

[2] *House of Representatives Committee Listing*, http://legislature.ms.gov/committees/house-committees/ (last visited Jan. 7, 2021). The Lieutenant Governor has not appointed any members from the Senate.

the presidential ballot. *Id.* at 372 n.7. That Code Section states, "To comply with this section, a candidate may file a petition or petitions signed by a total of not less than five hundred (500) qualified electors of the state, or 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." Miss. Code Ann. § 23-15-1093. The *Wilson* Court cited with approval the *Turner* Attorney General Opinion, 2015 WL 4394177 (MS AG Jun. 5, 2015), which states, "Based on the plain language of Section 23-15-1093, **since we now have only four (4) congressional districts**, a potential candidate would only need a total of four hundred (400) signatures to satisfy the statutory requirement to gain ballot access." *Id.* (emphasis added). *Wilson* and *Turner* belie the Secretary's contention that the State still has five *congressional* districts used for purposes other than congressional elections.

The meaning of "congressional district" in Miss. Code §§ 5-3-121, 23-15-1093, and 23-15-1037, and MISS. CONST. art. 15, § 273(3) is consistent: a district from which a Representative is elected. No one has ever found Miss. Code Ann. § 23-15-1037's continued existence to change the definition of "congressional districts" in the Code and the Constitution to "districts used for purposes other than congressional elections." There is no textual support for this argument; there is no authority for this argument; and there is no logical basis for this argument. The Secretary cannot avoid the plain meaning of "congressional districts" in the Constitution by asking the Court to deviate from the plain meaning of "congressional districts" in a statute.

**2. Miss. Code Ann. § 23-15-1037 is not the governing state law.**

The Secretary asserts that MISS. CONST. art. 15, § 273(12), which provides that "The Legislature shall provide by law the manner in which initiative petitions shall be circulated, presented and certified," requires that he use state law to define "congressional districts." He

then contends that Miss. Code Ann. § 23-15-1037 is the only effective state law defining Mississippi's "congressional districts." He is wrong.

Miss. Code Ann. § 23-15-1039 states,

> Should an election of representatives in Congress occur after the number of representatives to which the state is entitled changes, and before the districts have changed to conform to the new apportionment, representatives shall be chosen as follows…if the number of representatives is decreased, then the whole number shall be chosen by the electors of the state at large.

Thus, state law contemplates that *if* Mississippi's number of representatives decreases, and § 23-15-1037 is not amended "to conform to the new apportionment," then there will be *no* districts because representatives will be elected at large. By its plain terms, Miss. Code Ann. § 23-15-1039 renders Miss. Code Ann. § 23-15-1037 ineffective today.

This plain-language reading of the two statutes matches the Court's decision in *Mauldin v. Branch*, 866 So. 2d 429, 434 (Miss. 2003). Following the United States Supreme Court's affirmance of the federal injunction, this Court heard the *Mauldin* appeal from the Hinds County Chancery Court's redistricting order. After finding that the chancery court lacked jurisdiction to redistrict, the Court held state law required an at-large election under Miss. Code Ann. § 23-15-1039. *Mauldin*, 866 So. 2d at 434. The Court described § 23-15-1039 as the State's "statutorily-mandated and federally-approved default procedure which comes into play when the Legislature fails to act." *Id.* In fact, the Court went so far as to declare that to ignore § 23-15-1039 would "undermine all enforcement of state law." *Mauldin*, 866 So. 2d at 435.

As the *Mauldin* Court recognized, the "default procedure" has been triggered, and Mississippi has *no* congressional districts as a matter of state law. Miss. Code Ann. § 23-15-1037 may remain on the books, but Miss. Code Ann. § 23-15-1039 trumps. Only under the federal injunction does Mississippi have any congressional districts at all.

### 3. Federal law prohibits the Secretary of State from using Miss. Code Ann. § 23-15-1037.

#### i. 2 U.S.C. §§ 2a and 2c bar enforcement of Miss. Code Ann. § 23-15-1037.

In arguing the five "congressional districts" in Miss. Code Ann. § 23-15-1037 define the "congressional districts" in MISS. CONST. art. 15, § 273(3), the Secretary wrongly assumes the Legislature has the power to set the number of Mississippi's congressional districts. The Legislature has a clear duty to set the *boundaries* of the congressional districts. *See Growe v. Emison*, 507 U.S. 25, 34 (1993); Miss. Code Ann. § 5-3-121 *et seq*. But federal law controls the *number*.

The federal Reapportionment Act sets the number of congressional districts:

> In each State entitled…to more than one Representative…there shall be established by law **a number of districts equal to the number of Representatives to which such State is so entitled**, and Representatives shall be elected only from districts so established, no district to elect more than one Representative….

2 U.S.C. § 2c (emphasis added); *see also Branch v. Smith*, 538 U.S. 254, 275 (2003) (describing § 2c as a "federal statutory command"). Following a Census, if a state fails to redistrict in time for the next election, then a federal court may step in to create the redistricting plan. *See* 28 U.S.C. § 2284; *Branch*, 538 U.S. at 259. If neither the federal court *nor* the state timely enacts a revised redistricting plan, then the state's congressional districts are eradicated under federal law and the election is at large. 2 U.S.C. § 2a(c)(5) (emphasis added); *see also Branch*, 538 U.S. at 275 (2003).

In sum, under the federal Reapportionment Act, Mississippi must have the same number of congressional districts as Representatives, or if no plan can be timely implemented, then it must have *no* congressional districts. Federal law does not allow the number of congressional districts to exceed the number of Representatives.

The Secretary of State mentions "principles of federalism" in passing yet does not discuss the Supremacy Clause. Under U.S. CONST. art. VI, cl. 2, the Reapportionment Act supersedes any "Laws of the State to the Contrary." "The cornerstone of preemption is that a state law which conflicts with the federal law is invalid under the Supremacy Clause." *Cooper v. GMC*, 702 So. 2d 428, 434 (Miss. 1997). Miss. Code Ann. § 23-15-1037 provides, "The State of Mississippi is hereby divided into five (5) congressional districts below…." 2 U.S.C. § 2c requires that the "number of districts equal…the number of Representatives to which such State is so entitled." The two statutes now directly conflict, and "the Laws of the United States…shall be the supreme Law of the land." U.S. CONST. art. VI, cl. 2. Neither the Secretary of State nor this Court can give effect to Miss. Code Ann. § 23-15-1037 without violating the Supremacy Clause of the federal Constitution.

**ii. The *Smith* injunction is broader than the Secretary admits.**

The Secretary of State characterizes the federal redistricting injunction as inapplicable. The full history of that injunction demonstrates otherwise.

Following the 2000 Census, the Legislature failed in its statutory mandate to create a redistricting plan. *See* Miss. Code Ann. § 5-3-123 *et seq.*; *Smith v. Clark*, 189 F. Supp. 2d 503, 505 (S.D. Miss. Jan. 15, 2002). In October 2001, citizens sued the Secretary of State, the Attorney General, and the Governor in the Hinds County Chancery Court, asking the Court to draw a new congressional redistricting plan. *Smith*, 189 F. Supp. 2d at 505. Shortly after, different citizens sued the same defendants in federal court, asking the Court "to enjoin enforcement of the current congressional districting plan, Miss. Code Ann. § 23-15-1037, and to order that, in the 2002 congressional election, Mississippi's congressional representatives be chosen by the electors of the State at-large or, alternatively, that we adopt a new congressional

redistricting plan." *Id.* The three-judge federal panel assumed jurisdiction under 28 U.S.C. § 2284(a) but initially denied preliminary injunctive relief to give state authorities the chance to "to timely carry out their duty to reapportion Mississippi's congressional districts." *Id.* at 506. In the meantime, the chancery court issued an injunction adopting a new redistricting plan. *Id.*

The federal court considered the chancery court's plan and found it required preclearance under § 5 of the Voting Rights Act. *Id.* at 508. Because it had not been precleared, the federal court issued an injunction barring enforcement of the chancery court's plan, ordering implementation of the federal four-district plan, and retaining jurisdiction. *Smith v. Clark*, 189 F. Supp. 2d 548, 559 (S.D. Miss. Feb. 26, 2002). Given the Secretary of State and Attorney General's "acknowledgment that the current districting plan (dividing the State into five congressional districts) is unenforceable…," the injunction also barred implementation of Miss. Code Ann. § 23-15-1037:

> It is further ordered that the defendants are enjoined from implementing the former five-district congressional redistricting plan codified at Miss. Code Ann. § 23-15-1037.

*Smith*, 189 F. Supp. 2d at 507; *Smith*, 189 F. Supp. 2d at 559. On appeal, the Supreme Court of the United States upheld the injunction, finding that the chancery court's plan could not be implemented without preclearance. *Branch*, 538 U.S. at 265.

As discussed before, after the *Branch* decision, this Court heard the appeal from the Hinds County Chancery Court's redistricting injunction. *Mauldin*, 866 So. 2d at 434. The Court held the chancery court lacked jurisdiction to redistrict and that state law required an at-large election under Miss. Code Ann. § 23-15-1039, but the statute could not be enforced due to the federal injunction. *Mauldin*, 866 So. at 436. Like the federal panel, the Court urged the Legislature to fulfill its duty before the next election. *Id.*

The Legislature did not do so. As a result, the Mississippi Republican Executive Committee asked the federal court to modify its injunction to "equalize the malapportioned districts in order to comply with the congressional requirement of one person, one vote." *Smith v. Hosemann*, 852 F. Supp. 2d 757, 758 (S.D. Miss. 2011). The court amended its final judgment to implement a new redistricting plan but left in place the remainder of its final judgment, including the injunction against implementation of Miss. Code Ann. § 23-15-1037. *Smith*, 852 F. Supp 2d at 767.

The *Smith* injunction does not *repeal* Miss. Code Ann. § 23-15-1037, nor have Petitioners ever claimed as much. The *Smith* injunction *does* enjoin the Secretary of State and the Attorney General "from implementing the former five-district congressional redistricting plan codified at Miss. Code Ann. § 23-15-1037." The federal injunction contains no qualifications on the *purpose* of the enjoined implementation. The Secretary of State simply cannot use the statute.

In the 19 years following the federal injunction, the Secretary has never asked the court to clarify whether he can implement Miss. Code Ann. § 23-15-1037 for "other purposes." Instead, he now asks *this* Court to hold that the federal court meant something significantly narrower than what it stated. Under Federal Rule of Civil Procedure 65(d)(1)(C), every injunction must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." This Rule requires "that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016). "Implement" means "to make something such as an idea, plan, system, or law start to work and be used."[3] Any ordinary person can read

[3] *MacMillan Dictionary*, www.macmillandictionary.com/us/dictionary/american/implement_1 (last visited Jan. 7, 2021).

the *Smith* injunction to see it bars the Secretary of State from using or carrying out Miss. Code Ann. § 23-15-1037. Again, the Secretary asks the Court to ignore the plain meaning of words.

The Secretary was a party to the *Smith* cases, and to this day, he is bound by the injunction. *See* Fed. R. Civ. P. 65(d)(2)(A); *Mauldin*, 866 So. 2d at 435. Regardless whether anyone *else* can "implement" Miss. Code Ann. § 23-15-1037, the Secretary cannot. And so he cannot implement this statute to determine the sufficiency of the petition signatures under MISS. CONST. art. 15, § 273(3).

### iii. The Secretary is judicially estopped from now claiming Miss. Code Ann. § 23-15-1037 is enforceable.

The Court should hold the Secretary of State is judicially estopped from now claiming the five-district districting plan is indeed enforceable (but for "other purposes") because it has never been repealed. In *State ex rel. Moore v. Molpus*, 578 So. 2d 624 (Miss. 1991), the Court applied collateral estoppel to bar the Secretary of State from relitigating whether Mississippi's original voter initiative amendment was effective. Similarly, here the Court should hold the Secretary is judicially estopped from taking a contrary position to his position in *Smith*.

"A party will be judicially estopped from taking a subsequent position if (1) the position is inconsistent with one previously taken during litigation, (2) a court accepted the previous position, and (3) the party did not inadvertently take the inconsistent positions." *Clark v. Neese*, 131 So. 3d 556, 560 (Miss. 2013). The Secretary represented to the federal court that "the current districting plan (dividing the State into five congressional districts) is **unenforceable**…." *Smith*, 189 F. Supp. 2d at 507 (emphasis added). This is directly contrary to his current claim that "[f]ive districts…exist pursuant to never-repealed Code Section 23-15-1037 and can be used [i.e., enforced] for anything but congressional elections." Appellee's Br. at 17. The federal court accepted the Secretary's previous position by enjoining Miss. Code Ann. § 23-15-1037's

implementation. And there is no evidence that the Secretary's admission was somehow inadvertent. The elements of judicial estoppel are met, and this is but one more reason why the Secretary's argument for a "shadow set" of five districts is foreclosed.

**4. The "writ-of-erasure fallacy" is inapplicable.**

Because the Secretary of State cannot implement Miss. Code Ann. § 23-15-1037 to interpret the Constitution, whether it has been repealed is irrelevant. For this reason, Professor Mitchell's "writ-of-erasure fallacy" is merely an academic point. This article states,

> The federal courts have no authority to erase a duly enacted law from the statute books, and they have no power to veto or suspend a statute. The power of judicial review is more limited: It permits a court to decline to enforce a statute in a particular case or controversy, and it permits a court to enjoin executive officials from taking steps to enforce a statute - though only while the court's injunction remains in effect.

Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018). Here, the federal court *has* enjoined executive officials from taking steps to enforce the statute in question, and the court's injunction remains in effect. So while the article presents an interesting semantic debate, it does nothing to support the Secretary's reasoning.

*Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020), demonstrates this. There, the Fifth Circuit considered whether a plaintiff had standing to challenge a Houston ordinance allowing only registered voters to circulate initiative petitions after *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 193-97 (1999), which declared a similar Colorado law unconstitutional. The Court noted *Buckley* could not repeal all contrary laws under the writ-of-erasure fallacy, but it characterized those laws as "zombie laws." The Court went on to hold that ordinarily, a plaintiff lacks standing to challenge a zombie law; its existence causes no injury without enforcement. *Id.* at 312. In *Pool*, however, evidence existed of continued enforcement—in the Fifth Circuit's words, the "zombie show[ed] signs of life." So the Court

allowed the case to proceed on whether the City violated the plaintiffs' constitutional rights by enforcing the statute. *Id.*

The *Smith* cases did not need to find Miss. Code Ann. § 23-15-1037 unconstitutional, because the Secretary of State admitted it was unenforceable. Based on the Secretary of State's admission, the federal court enjoined him from implementing this statute. The Supremacy Clause, 2 U.S.C. § 2c, and Miss. Code Ann. § 23-15-1039 make Miss. Code Ann. § 23-15-1037 an unenforceable zombie, but the *Smith* injunction is a shot to its head. The writ-of-erasure fallacy is therefore inapplicable.

### B. The lack of ambiguity requires strict adherence to the plain meaning of the Constitution, not liberal use of canons of construction.

The Secretary of State and his *amici curiae* contend that the 1/5 requirement is a "textual clue" that requires the use of Miss. Code Ann. § 23-15-1037 to define "congressional district." But as discussed above, Miss. Code Ann. § 23-15-1039, not § 23-15-1037, is the governing state law, consistent with federal law forbidding the number of Mississippi's congressional districts from exceeding the number of its Representatives. Moreover, the Secretary is enjoined from now implementing the same statute he called "unenforceable," and the writ of erasure fallacy therefore has no relevance. Miss. Code Ann. § 23-15-1037 does not and cannot provide a constitutional definition of "congressional district" different than the dictionary's.

Miss. Code Ann. § 23-15-1037 is the linchpin of the Secretary's argument. Without it, the Secretary falls back to arguing Section 273(3) is ambiguous so that he can ask the Court to rewrite 273(3) to fulfill the Legislature's presumed intent. But for Section 273(3) to be ambiguous, it must be capable of "two reasonable interpretations." *Tellus Operating Grp., LLC v. Maxwell Energy, Inc.*, 156 So. 3d 255, 261 (Miss. 2015). The Secretary's interpretation, which relies solely on an unenforceable statute, is not reasonable.

The lack of ambiguity in Section 273(3) is critical to its construction. The logrolling cases of the early 1900s demonstrate this. The first of these is *State ex. rel. McClurg State v. Powell*, 77 Miss. 543, 27 So. 927 (1900). There, the attorney general sued to remove an appointed circuit judge who refused to vacate the bench. *Id.* at 928. The circuit judge argued that a constitutional amendment to provide for an elected, rather than appointed, judiciary was not validly passed because it was in actuality multiple amendments and because a majority of the electors voting in the election did not vote for the amendment. *Id.*

The Court first considered whether the suit presented a judicial question. Relying on *Green v. Weller*, 32 Miss. 650, 691 (1856), the Court concluded it did, holding

> When [the Constitution] prescribes the exact method in which an amendment shall be submitted, and defines positively the majority necessary to its adoption, these are constitutional directions mandatory upon all departments of the government and without strict compliance with which no amendment can be validly adopted. Whether an amendment has been validly submitted or validly adopted depends upon the fact of compliance or noncompliance with the constitutional directions as to how such amendments shall be submitted and adopted; and whether such compliance has, in fact, been had, must, in the nature of the case, be a judicial question.

*Powell*, 27 So. at 928-29. This proposition—that the judiciary has the power to review whether the requirements for constitutional amendment have been strictly complied with—has never been questioned. *See, e.g., State ex rel. Howie v. Brantley*, 113 Miss. 786, 817, 74 So. 662, 672 (1917), *overruled on other grounds*, *Power v. Robertson*, 130 Miss. 188, 230, 93 So. 769, 775 (1922) ("The authorities hold, and it is conceded here by all parties, that…whether an amendment to the Constitution has been adopted by the required majority of voters and properly inserted in the Constitution by the legislature is a question for judicial determination.").

Second, the *Powell* Court considered whether the amendment violated the Constitutional requirement that "if more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately." *Powell*, 27 So. at 933. The phrase "one amendment" was undefined, and the Court, under the claim of "strict construction," created a test: each amendment had to be "separate and independent each of the other so as that each can stand alone without the other." *Id.* at 931.

The *Powell* test did not stand the test of time. In *State ex rel. Collins v. Jones*, 106 Miss. 522, 562, 64 So. 241, 248 (1913), though the Court expressed "no sort of doubt" that the Constitution imposes "certain limitations upon amendment [to] that instrument which must be strictly followed," the Court found *Powell*'s spirit of construction toward the "one amendment" requirement was wrong. The Court found that this judicially-created test was "not supported by authority," and that the majority of other jurisdictions took a "liberal construction" to the phrase "one amendment." The Court further found that the State had passed many other amendments that could not satisfy the *Powell* test, and "'[w]here there is any **ambiguity or doubt**, or where two views may be well entertained of the meaning of a constitutional provision, the legislative construction thereof, is entitled to great weight.'" *Id.* at 251 (quoting *Dantzler Lumber Co. v. State*, 53 So. 1 (Miss. 1910)) (emphasis added). Therefore, *Jones* created a new test: to constitute more than one amendment, "the proposition submitted must relate to more than one subject and have at least two (2) distinct and separate purposes not dependent upon or connected with each other." *Id.* at 249. In *Brantley*, 74 So. at 667, the Court endorsed the *Jones* Court's construction of the ambiguous phrase "one amendment" and held that a voter initiative amendment did not violate *Jones*'s rule. Five years later, the Court in *Power*, 93 So. at 775, found that although the

*Jones* test remained in effect, the voter initiative amendment violated that test, overruling *Brantley*.

Third, the *Powell* Court considered whether the Constitution requires amendment ratification by a majority of all voters who voted in the election, or just a majority of all voters who voted on the amendment. *Powell*, 27 So. at 935. The Court strictly construed the plain language of "at the election, a majority of all qualified electors voting" to mean the former. *Id.* ("Manifestly when the constitution itself…expressly declares that no amendment shall be adopted, except, where it shall be a fact that it received, at the election, a majority of all qualified electors voting, we have a positive rule prescribed…and nothing short of strict compliance with the rule…will avail to change the organic law."). In *State ex rel. Denman v. Cato*, 131 Miss. 719, 734, 95 So. 691, 692 (1923), the Court reaffirmed this holding, noting:

> This construction was followed in the cases of *State v. Jones, supra*, and *State v. Brantley, supra*, and for twenty-two years the construction placed upon this section in the *Powell* Case remained unchallenged, and no effect was made to amend the Constitution so as to modify or change the rule of construction there announced.

*Id.*

Thus, *Powell*'s rule of strict construction depends on the absence of ambiguity. The constitutional phrase "one amendment" was ambiguous and undefined, and *Powell*'s demanding test was overruled; the phrase "at the election, a majority of all qualified electors voting," was unambiguous, and *Powell*'s strict construction was upheld. These precedents are entirely in line with modern case law requiring faithful adherence to the plain language of the Constitution, but use of canons of construction if the language is ambiguous.

In *Chandler v. McKee*, 202 So. 3d 1269, 1273 (Miss. 2016), the trial court interpreted Miss. Code Ann. § 23-15-927 to avoid an "illogical result," and the Court reversed, holding the

statute "is neither ambiguous nor silent regarding the filing deadline, and, therefore, the plain meaning of the statute should be applied because it is the best evidence of legislative intent." Thus, "[i]f there be no ambiguity, there . . . exists no reason for legislative or judicial construction.'" *Dunn*, 58 So. 3d at 1189 (quoting ***Ex parte Dennis*,** 334 So. 2d at 373 (alterations in *Dunn*)). No matter whether the Legislature included the one-fifth requirement to secure preclearance under the Voting Rights Act, to discourage regionalism, to set a hurdle for proponents of initiatives, or to forbid initiatives if the population shrank, the Court cannot ignore the plain meaning of the law to rewrite the Constitution. The purpose cannot expand or change the words of the Constitution.

The Secretary suggests Petitioners have conceded MISS. CONST. art. 15, § 273(3) is ambiguous by making a "they-know-how-to-do-it" argument of construction. Appellees' Br. at 32. But evidence that the Legislature has used "as existing" clauses before falls under the Omitted-Case Canon: "Nothing is to be added to what the text states or reasonably implies. That is, a matter not covered is to be treated as not covered." Scalia & Garner, *Reading Law* 93. This is nothing but the flip side of the plain language coin: only the plain language is to be followed, not additional language that the Legislature has used in the past but did not use here. Nothing about Petitioners' argument supports a finding that there are two reasonable interpretations of Section 273(3).

The Secretary's and his *amici curiae*'s selective reliance on canons of construction does not aid his argument. The presumption against ineffectiveness counsels that a law "should be construed, **if possible**, to work rather than fail." Scalia & Garner, *Reading Law* 63 (emphasis added). But this depends on the law being "susceptible of two constructions." *Id.* (quoting *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 348 (Tex. 1979)). There is no way

to read "congressional districts" to mean "districts used for purposes other than congressional elections." The "congressional district" language cannot be "harmonized" to allow use of the defunct five-district plan.

Finally, the absurdity doctrine does not save the Secretary's argument. As Justice Scalia and Mr. Garner explain: "The doctrine does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions." Scalia & Garner, *Reading Law* 238. Otherwise, the doctrine is "an application not of textualism but of purposivism—seeking to give the text not the meaning that it objectively conveys but the meaning that was in the mind of the drafter." *Id.* The essence of the Secretary and his *amici curiae*'s argument is that the Legislature and the ratifying electorate did not anticipate the effect of a one-fifth requirement if the congressional apportionment decreased. This is not an error the Court can correct without rewriting the text, which the Court should not do: "No single person or branch of this government can unilaterally amend our Constitution or ignore its dictates." *Reeves v. Gunn*, No. 2020-CA-01107-SCT, 2020 WL 7489020, 2020 Miss. LEXIS 508, at *1 (Dec. 17, 2020).

## II. Petitioners' Challenge is Not Barred by Laches.

The Secretary of State does not know when his predecessor determined the sufficiency of the petition, yet he claims Petitioners' suit is barred by laches. Appellees' Br. at 8 n.2. If the process is so opaque that the Secretary himself does not know the relevant date, then the idea that Petitioners inexcusably delayed is ludicrous.

To avoid this conclusion, the Secretary continues to assert that Petitioners could have filed suit under MISS. CONST. art. 15, § 273(9) *before* the unknown date the former Secretary made his determination of the petition's sufficiency. But "[a]s a matter of judicial policy, this Court does not issue advisory opinions." *Hughes v. Hosemann*, 68 So. 3d 1260, 1263 (Miss.

2011). The Secretary acknowledges this argument but offers no answer to why any suit brought pre-determination would be ripe.

Instead, he shifts his focus to January 2020, the date former-Secretary Hosemann delivered the text of the proposed amendment to the Legislature. Yet the Secretary cites no case holding that ten months constitutes an inexcusable delay, and Petitioners have found none. *See Palmetto Fire Ins. Co. v. Allen*, 148 Miss. 97, 108, 114 So. 145, 147 (1927) (holding plaintiffs' ten-month delay in filing mandate in the trial court did not constitute laches); *Cannada v. Marlar*, 185 So. 2d 649, 651 (Miss. 1966) (holding seven-month delay in seeking reinstatement at the Game and Fish Commission did not constitute laches).

Moreover, laches requires a delay beyond the applicable limitations period. *Greenlee v. Mitchell*, 607 So. 2d 97, 111 (Miss. 1992). There is no specific limitations period for a challenge brought under Section 273(9);[4] therefore, the general three-year statute for all "actions for which no other period of limitation is prescribed" applies. Miss. Code Ann. § 15-1-49. Petitioners filed well within this period, and laches is inapplicable.

The Secretary also does not meet his burden of establishing prejudice. He identifies, but does not quantify, the funds spent to place the Measures on the ballot. Of course, those ballots had to be printed anyway for the general election, regardless whether the Measures were included. The Secretary does not specify any of the costs associated with Initiative 65, and there is no evidence to suggest that this tax burden is more than a paltry sum. The Secretary further references "untold numbers of people" with unspecified "reliance interests at stake now that [the

[4] Miss. Code Ann. § 23-17-25 provides a 10-day deadline for seeking mandamus to *compel* the Secretary of State to file a sufficient petition; it does not address review of the Secretary's acceptance of an insufficient petition. The Secretary does not argue that Miss. Code Ann. § 23-17-25 applies in this case.

measure] was adopted." Appellees' Br. at 39. But he does not say what these reliance interests are—which does not meet his burden. If "untold numbers of people" have bought property to be used as dispensaries without having obtained any licenses (and without regulations having been issued), in the month since the Secretary's declaration of the vote, then Petitioners are not responsible for those unnamed persons' poor risk calculus.

Finally, the Secretary wrongfully accuses Petitioners of incorrectly citing a case for the proposition that laches cannot bar the City's claim. The citation at issue, *Hill v. Thompson*, 564 So. 2d 1, 14 (Miss. 1989), involved a school board's claim to void a 34-year-old Sixteenth Section lease for inadequate consideration. The Supreme Court summarily rejected any statute of limitations or laches defense to the claim, noting "Mississippi law is clear that the state is not subject to any statutes of limitations nor may the state lose property by adverse possession. The principle that a governmental entity is not chargeable with the laches of its officials is also well settled." *Id.* (internal citations omitted). The Court went on to hold that although equitable estoppel could apply "under the proper circumstances," those circumstances were not present. *Id.*

In support of its laches statement, *Hill* cites *Alexander v. Mayor and Board of Aldermen*, 219 Miss. 78, 85, 68 So. 2d 434, 437 (1953), a case in which the plaintiffs sought to set aside the city's contract with property appraisers because, among other reasons, they claimed the appraisers' performance bond was not properly approved. The Court found it was, but as a further reason for rejecting the plaintiffs' argument, held that a city official's failure to file a bond does not affect its validity because "the government or other official body is not responsible for the laches of its officers." *Id.* (quoting 8 Am. Jur., Bonds, § 25, p. 717). *Alexander* was also cited in *Gulfport v. Anderson*, 554 So. 2d 873, 875 n.1 (Miss. 1989), for the proposition that "The positive law of this state decrees that neither the state **nor its municipal**

**subdivisions** may lose title to land via adverse possession, limitations or laches." (emphasis added).

That is the context for *Hill*, and Petitioners' quotation is not misleading. *Hill* has been cited by this Court for the same proposition—that laches does not run against a government entity—several times. In *Jones County School District v. Mississippi Department of Revenue*, 111 So. 3d 588, 607 n.7 (Miss. 2013), the Court cited *Hill* in a footnote, stating, "[W]ell-settled law in Mississippi is that neither the state nor its entities is subject to the statutes of limitations or chargeable with the laches of its officials." That case rejected the State's argument that laches ran against a school district. *Id.*; *see also Bd. of Educ. v. Hudson*, 585 So. 2d 683, 688 (Miss. 1991) (reversing chancellor's holding that laches applied against a county school board). Notably, these cases do not distinguish between municipalities and other political subdivisions of the State.

The Secretary cites two cases to contend that laches can apply against a municipality (though statutes of limitations cannot under MISS. CONST. art. 4, § 104). Neither suggests that Petitioners' citation to *Hill* was underhanded. In *Mississippi Department of Human Services v. Molden*, 644 So. 2d 1230, 1232 (Miss. 1994), the defendant argued that *Brown v. Gulfport*, 57 So. 2d 290 (Miss. 1952), and *City of Jackson v. Alabama & Vicksburg Railway Co.*, 160 So. 602 (Miss. 1935), created fact-specific exceptions to the *Hill* rule. The Court found that neither was applicable, and both predate *Hill*. In fact, *City of Jackson* states, "The state, as well as its political subdivisions, is subject to the doctrine of laches"—in direct contradiction to *Hill* and *Hudson*. Neither *Brown* nor *City of Jackson* carves out an exception for municipalities, and both have been implicitly overruled.

## III. The City has standing.

The Secretary contends the City has suffered no "procedural injury" because it cannot vote. He cites no law whatsoever distinguishing between a "procedural injury" and a "substantive injury" for standing purposes. Naturally, one flows from the other. If Initiative Measure No. 65 was validly enacted and enforceable, then it *will* limit the City's zoning rights. The City has a specific and well-recognized interest[5] in protecting those rights.[6] The City's interest, though different, is as valid as the Mayor's.

## CONCLUSION

Petitioners respectfully ask that the rule of law be upheld and the plain language of the Constitution followed. For these reasons, Petitioners ask that the Court hold that the Secretary of State's determination of the sufficiency of the Initiative Measure No. 65 Petition was in violation of MISS. CONST. art. 15, § 273(3) and, accordingly, that Initiative Measure No. 65 is without effect.

Respectfully submitted, this, the 7th day of January, 2021.

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[5] The City sued before the Court decided *Reeves v. Gunn*, No. 2020-CA-01107-SCT, 2020 WL 7489020, 2020 Miss. LEXIS 508, at *7 (Dec. 17, 2020). *Reeves* prospectively overrules categorical standing for legislators. *Id.* To the extent *Reeves* can be construed as holding that "colorable interest" standing no longer exists under *Harrison County v. City of Gulfport*, 557 So. 2d 780 (Miss. 1990), that ruling is prospective-only and does not apply. *See Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1093 (Miss. 2000).

[6] The Mississippi Municipal League's proposed *amicus curiae* brief, which the Court denied leave for filing, explains the nature of this injury well. MML's motion for reconsideration remains pending, and the City supports that motion.

**MAYOR MARY HAWKINS BUTLER and THE CITY OF MADISON**

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## CERTIFICATE OF SERVICE

I, KAYTIE M. PICKETT, of JONES WALKER LLP, do hereby certify that I have this day filed the foregoing document via the Court's electronic filing system, which forwarded an electronic copy to all counsel of record.

This, the 7th day of January, 2021.

*/s/ Kaytie M. Pickett*
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