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 RESPONDENT

***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 so that the Justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal:

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

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

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

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

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

6. Mississippi Senators Angela Hill and Kathy Chism, and Mississippi Representative Jill Ford, the Mississippi State Department of Health ("MDOH"), the Mississippi State Medical Association ("MMA"), the American Medical Association ("AMA"), and the Mississippi Sheriffs' Association ("MSA"), Amici;

7. The Mississippi Municipal League, Inc. ("MML"), proposed Amicus;

8. Nathan S. Farmer, Nathan S. Farmer, P.A., Counsel for Amici Hill, Chism, and Ford;

9. G. Todd Butler and Mallory K. Bland, Phelps Dunbar LLP, Counsel for Amicus MDOH;

10. John B. Howell, III, Jackson, Tullos & Rogers, PLLC, Counsel for Amici MMA and AMA;

11. William R. Allen, Allen, Allen, Breeland & Allen, PLLC, Counsel for Amicus MSA;

12. Jerry L. Mills and John P. Scanlon, Mills, Scanlon, Dye & Pittman, Counsel for proposed Amicus MML;

13. Ashley Ann Durval and Angie Calhoun, Prior Proposed Intervenors/Amici;

14. Spencer M. Ritchie and Chelsea C. Lewis, Forman Watkins & Krutz LLP, Counsel for Ashley Ann Durval and Angie Calhoun, prior proposed Intervenors/Amici; and

15. Michael O. Gwin and Paul Stephenson, Watkins & Eager PLLC, Counsel for Ashley Ann Durval and Angie Calhoun, prior proposed Interventors/Amici.

LYNN FITCH
Attorney General of Mississippi

s/Justin L. Matheny
Justin L. Matheny

*Counsel for Respondent Secretary of State Michael Watson*

## STATEMENT REGARDING ORAL ARGUMENT

The Secretary of State requests oral argument. This brief comprehensively addresses the reasons this Court should deny the Petition and dismiss this case. The Secretary nevertheless welcomes oral argument, and submits it will assist this Court in resolving this significant, and doubly unusual, proceeding that arises under this Court's original jurisdiction and presents a challenge to the facial validity of a provision in our Constitution.

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## RESTATEMENT OF THE ISSUES

This case arises under this Court's narrow and unique original jurisdiction, established by Section 273(9) of the Mississippi Constitution, to review a determination of the Secretary of State as to the "sufficiency" of initiative "petitions." Section 273(3) of the Constitution requires the Secretary of State to approve petitions for initiative measures supported by a sufficient number of voter signatures evenly divided among five "congressional districts."

Current state law, originally enacted by the Legislature in 1991, divides the State into five "congressional districts." Since 2002, due to the loss of a seat in the United States House of Representatives, the State's federal congressional elections have been held using four "congressional districts" under a federal injunction.

Petitioners, the City of Madison and Mayor Mary Hawkins Butler, in her official and individual capacities ("petitioners"), dispute former-Secretary of State Hosemann's determination that the signatures for Initiative Measure No. 65's ("Measure 65") petition met Section 273(3)'s geographic distribution requirement.

The issues presented for review are:

(1) Does Section 273(3)'s term "congressional district" require initiative petition sponsors to submit voter signatures from the State's five "congressional districts" established by current state law or the four "congressional districts" established solely for federal congressional elections by a federal injunction?

(2) Does the doctrine of laches bar petitioners' procedural challenge filed a few days before the November 3, 2020 general election?

## INTRODUCTION

For years, medical marijuana has been a subject of fervid political debate. In Mississippi, the recent passage of Measure 65 has obviously further intensified that policy debate. The Secretary of State is not taking a side in the policy debate and, of course, is not asking this Court to take a side either.

This said, the question before this Court is not Measure 65's substantive content, or whether or not medical marijuana is good or bad policy. Rather, the issue is a pure question of law: whether the State's initiative petition process, established by Section 273(3) of our Constitution and applicable to every initiative petition, is currently viable. The Secretary of State, sued here only as a custodian of the petition process, simply asks that this Court resolve this issue by exercising its authority and responsibility to interpret Section 273(3)'s plain text and thereby give effect to the Legislature's intent.

Faithfully analyzing the Constitution's text ultimately proves the initiative petition process in Mississippi is alive and well. A plain reading of Section 273(3) demonstrates that utilizing the five congressional districts currently existing under state law in gathering initiative petition signatures is entirely appropriate. For that reason, among others detailed below, petitioners' belated procedural challenge to the initiative petition process fails, along with their claim's potential to destroy all of the State's initiative enactments over the past nearly 20 years.

## STATEMENT OF THE CASE

### A (Brief) History of the Evolution of the State's Constitutional Amendment Process

As originally enacted, the 1890 Constitution provided any "change, alteration, or amendment necessary to this constitution" could only be made through a proposal passed by two-thirds of each house of the Legislature and subsequently approved by a majority of qualified electors at a statewide election. MISS. CONST. art. 15, § 273 (1890) (sometimes hereinafter "Section 273"). Over two decades later, the Legislature adopted, and voters approved, an amendment establishing mechanisms in Section 33 of the Constitution for citizen-initiated constitutional amendments, legislative measures, and referenda. MISS. LAWS 1914, ch. 520; 1916 S.C.R. No. 18. The initiative and referendum amendment was challenged twice. This Court initially validated the amendment, *see State ex rel. Howie v. Brantley*, 74 So. 662, 666-67 (Miss. 1917), but later declared that, because the 1914 resolution's structure failed to comport with then-Section 273's subject matter requirements, the amendment was improperly enacted. *See Power v. Robertson*, 93 So. 769, 775-77 (Miss. 1922).

Over the next 70 years, the State modified Section 273 a few times. But in that timespan, the only mechanism available for constitutional amendments (apart from an entirely new constitutional convention) remained legislatively proposed and adopted changes, followed by approval of a majority of the electorate.

Things started to change in the spring of 1990. Sparked by a failed push to repeal then-Section 98 of the Constitution's prohibition on lotteries, Attorney General Mike Moore, and others, presented Secretary of State Dick Molpus with an initiative

petition to hold an election to repeal the lottery ban. *See State ex rel. Moore v. Molpus*, 578 So. 2d 624, 630-31 (Miss. 1991). After Secretary Molpus refused the petition, General Moore and his allies sued the Secretary to revive the initiative and referendum amendment that *Power* rejected seventy years earlier. *Id.* at 627-31. The lawsuit failed on several grounds. *Id.* at 632-44. In response to the decision, however, the Legislature adopted a resolution under then-existing Section 273 to repeal the lottery ban, which was approved by the electorate at the November 1992 general election. MISS. LAWS 1992, ch. 713.

More significantly, during its 1992 session, the Legislature also adopted Senate Concurrent Resolution No. 516. The resolution proposed to comprehensively overhaul Section 273 by establishing the people's right to propose and enact initiatives. MISS. LAWS 1992, ch. 715. After the voters approved the resolution at the November 1992 election (and subsequent U.S. Department of Justice preclearance), Section 273, as amended, established the State's present-day initiative framework. MISS. LAWS 1992, ch. 715.[1]

## Present-day Section 273

Section 273 currently provides the exclusive process for amendments to the Constitution. At issue here, Section 273(3) specifically defines the citizens' right to

[1] Section 273 exists today exactly as it did after the 1992 amendment, with one exception. In 1997, a federal district court held that some state statutes implementing the 1992 enactment, which prohibited signature gathering by non-Mississippi qualified electors, violated the First and Fourteenth Amendments. *Term Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470, 470-71 (S.D. Miss. 1997). The following year, the Legislature adopted a resolution modifying Section 273(12) to prohibit only non-residents, as opposed to Mississippians who are not qualified electors, from circulating initiative petitions. After the voters approved the resolution, the Justice Department precleared it. MISS. LAWS 1998, ch. 619; *see also Kean v. Clark*, 56 F. Supp. 2d 719, 725-34 (S.D. Miss. 1999) (confirming the 1998 amendment's validity, except as to its now-obsolete retroactivity provision).

propose and enact initiatives and the signature requirements for getting initiatives on the ballot at a statewide election:

> The people reserve unto themselves the power to propose and enact constitutional amendments by initiative. An initiative to amend the Constitution may be proposed 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. 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. 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).

Other provisions in Section 273 provide various substantive and procedural requirements for petitions, ballot initiatives, legislative alternatives to ballot initiatives, and constitutional amendments by concurrent resolution of the Legislature. Sections 273(12) and 273(13) require the Legislature to enact statutes that facilitate the initiative process, but the Legislature cannot "restrict or impair" Section 273 or citizens' reserved initiative power. Each of Section 273's amendment mechanisms (legislatively proposed amendment, initiative petition, and legislative initiative alternative) ultimately require majority approval by the electorate at a statewide election. *See* MISS. CONST. art. 15, § 273(2), (8), (10).

### The State's Congressional Districts

Throughout the 1990s, Mississippi was allotted five seats in the United States House of Representatives. After the 1991 *Molpus* decision, but before the adoption of

present-day Section 273 at the 1992 November general election, the Legislature enacted the State's current five-district congressional districting plan at an Extraordinary Session called by Governor Mabus. MISS. LAWS 1991, Ex. Sess., ch. 2, § 1.

The five districts are codified by statute. The Code provides that "The State of Mississippi is hereby divided into five (5) congressional districts below," and specifies the "counties and portions of counties" within each of the five districts. MISS. CODE ANN. § 23-15-1037(1). The Code further specifies that "[t]he boundaries of the congressional districts described in subsection (1) of this section shall be the boundaries of the counties and precincts listed in subsection (1) as such boundaries existed on October 1, 1990." MISS. CODE ANN. § 23-15-1037(2).

The Code's five districts were used for congressional elections from 1992 to 2000. After the 2000 Census revealed that the State would lose a congressional seat, the Legislature failed to enact a four-district plan for federal congressional elections. Thereafter, a pitched battle among the two major political parties, state officials, and individual parties ensued in state and federal courts. *See generally Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002) (three-judge court) ("*Smith I*"), *aff'd sub. nom.*, *Branch v. Smith*, 538 U.S. 254 (2003); *Mauldin v. Branch*, 866 So. 2d 429 (Miss. 2003).

In the end, a three-judge federal district court drew the new districts for congressional elections. Relevant here, the district court ordered the defendants to use a court-drawn four-district plan in the 2002 federal election and future congressional elections. *Smith I*, 189 F. Supp. 2d at 559.

After the 2002 *Smith I* decision and related litigation, the Legislature did not enact a four-district plan for federal elections or amend or repeal Code Section 23-15-1037. The State's congressional elections from 2002 to 2010 instead utilized the three-judge court's 2002 plan. The Legislature likewise took no action after 2010 census data showed the district court's 2002 districts were malapportioned, due to population shifts, considering the "one person, one vote" principle.

Consequently, in 2011, the Mississippi Republican Executive Committee and other parties to *Smith* petitioned the three-judge court to amend its prior final judgment and implement a new four-district plan. *Smith v. Hosemann*, 852 F. Supp. 2d 757, 762 (S.D. Miss. 2011) (three-judge court) ("*Smith II*"). The district court released a new plan in December 2011, then later enjoined the defendants to implement it for the 2012 federal congressional elections and future federal elections on the same terms as the court's 2002 order. *Id.* at 767.

The Legislature, as was the case following the 2002 *Smith I* injunction, still has not enacted a four-district plan for federal elections—nor has the Legislature ever amended or repealed Code Section 23-15-1037. Meanwhile, the State's federal congressional elections from 2012 to present have proceeded on four districts drawn by three federal judges under the 2011 *Smith II* injunction.

## Initiative Measure 65's Petition

On July 30, 2018, sponsor Ashley Ann Durval officially filed an initiative with the Secretary of State's Office that has become known as Measure 65. *See* Petition at Ex. 1. In September 2018, after the initial stages of the process were completed (such

as adoption of a ballot title and publication), the proponents' signature gathering process began. The proponents gathered petition signatures and obtained certifications from the 82 county circuit clerks. *See* MISS. CODE ANN. § 23-17-21. In September 2019, the proponents timely submitted the initiative petition, clerk certifications, the filing fee, and other required documents to then-Secretary of State Hosemann for a determination of whether the initiative qualified for placement on the ballot at a statewide election.[2] *See* MISS. CODE ANN. § 23-17-23.

September 4, 2019 is the date that Measure 65's proponents submitted their completed petition. *See* Geoff Pender, *Mississippi medical marijuana: Group turns in signatures to get it on 2020 ballot*, MISSISSIPPI CLARION LEDGER (Sept. 5, 2019).[3] After the September 4 submission, the Secretary of State's Office reviewed the clerk certifications and other submitted materials to determine whether the petition should be accepted or rejected. *See* MISS. CODE ANN. § 23-17-23.

The Secretary of State's Office ultimately determined the submission included sufficient petition signatures. *See* MISS. CODE ANN. § 23-17-23(b) (requiring the Secretary of State to reject any submission that "clearly bears insufficient signatures"). The parties here agree that former-Secretary Hosemann evaluated Measure 65's petition signatures using "'the last five district congressional district

[2] The Secretary of State's "Answer" filed in this case states the Secretary of State's Office determined the petition signatures sufficient on September 4, 2019. The "Answer" identified an incorrect date of September 4, 2019 for that event. The error is an admitted mistake of counsel, made in the limited time allowed to prepare the filing. Counsel's error stands corrected in this brief.

[3] Available on-line at: <https://www.clarionledger.com/story/news/politics/2019/09/05/mississippi-medical-marijuana-likely-before-voters-2020/2222640001/> (last visited Dec. 28, 2020).

plan which was in effect prior to the adoption of the current four-district plan.'" Petition at 2 (quoting the Secretary of State's website).[4]

In January 2020, former-Secretary of State Hosemann delivered the full-text of Measure 65 to the Legislature on the first day of its regular session. *See* MISS. CODE ANN. § 23-17-19. After receiving the initiative, in March, the Legislature passed a concurrent resolution proposing a legislative alternative to Measure 65 pursuant to Section 273(8). 2020 H.C.R. 39. The resolution established Initiative Measure 65A, which appeared on the ballot next to Initiative Measure 65 in November.

On September 8, the State Board of Election Commissioners approved the sample ballot for the general election. Then, from late September to mid-October, the Secretary of State's Office conducted public hearings all around the state regarding the competing initiative measures.

On November 3, the electorate decided the first initiative question on the ballot ("For Approval of Either" Measure 65 or 65A) by a certified vote of 816,107 to 374,931. The electorate decided the second question ("For" Measure 65 or "For" Measure 65A) by a certified vote of 766,478 to 273,805. On December 3, the Secretary of State

[4] Only the facial validity of former-Secretary Hosemann's determination in following the process required by Section 273(3) is at issue here. Pages 10-11 of petitioners' brief selectively quotes figures taken from Statewide Elections Management System ("SEMS") reports (which petitioners obtained through public records requests) in a misleading manner. The SEMS system and reports are some of the tools that employees of the Secretary of State's Office used in the process of evaluating the submitted petition signatures and circuit clerk certifications (which have been reviewed by petitioners' counsel and representatives on multiple occasions and are preserved in approximately thirty-five bankers boxes at the Secretary of State's Office). There is no claim before this Court charging the sponsors with a failure to gather sufficient signatures from five districts, and petitioners' cherry-picked quotes from SEMS reports are not evidence of the total number of petition signatures submitted, or accepted and rejected signatures.

officially certified the vote totals and that Measure 65 satisfied Section 273(8)'s thresholds for enactment. *See* Pet. Br. at App. H.

**The City of Madison and Mayor Hawkins Butler's Lawsuit**

On October 26, only days before the November 3 election, petitioners initiated this lawsuit solely against the Secretary of State by filing an "emergency" petition, pursuant to Section 273(9) of the Constitution. Petitioners challenge the "sufficiency" of the signatures submitted with Measure 65's initiative petition in 2019. They specifically contend former-Secretary of State Hosemann approved Measure 65's petition signatures in violation of Section 273(3)'s requirement that "'[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.'" Petition at 1 (quoting MISS. CONST. art. 15, § 273(3)). The approval was flawed, according to petitioners, "[b]ecause 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." Petition at 1 (emphasis in original).

As for relief, petitioners request a declaration that former-Secretary Hosemann's decision was "unconstitutional" and a writ barring the Secretary of State from certifying the vote on Measures 65 and 65A in the November election. Petition at 23-24.

This Court ordered an immediate response from the Secretary of State, then later extended the response time until November 6. The Secretary of State timely responded on that date. Later that evening, Measure 65's petition sponsor and a supporter moved to intervene or file an amicus brief. Petitioners responded with a motion for leave to file a proposed reply.

On November 17, this Court denied the pending motions and set an expedited schedule for the parties to file merits briefs and for submissions of amicus curiae. Consistent with the schedule, petitioners filed their merits brief and five amici filed briefs supporting petitioners.[5] This is the Secretary of State's merits brief.

[5] Five different proposed briefs endorsing petitioners' position were originally submitted by the following non-party amici: the Mississippi State Medical Association and the American Medical Association ("MMA"); the Mississippi Municipal League, Inc. ("MML"); the Mississippi State Department of Health ("MDOH"); three legislators including Senator Angela Hill, Senator Kathy Chism, and Representative Jill Ford ("Legislators"); and the Mississippi Sheriffs' Association ("MSA"). The MML's proposed amicus brief and some of the MDOH's originally proposed brief have been rejected by this Court as off-topic. *See* Orders on Motion #2020-3995 and Motion No. #2020-4013. As of this writing, the MML's motion for reconsideration of the denial of its motion for leave to file its proposed brief is pending.

## SUMMARY OF THE ARGUMENT

The fundamental premise of petitioners' entire case is that Mississippi currently and only has four "congressional districts" for all purposes. That premise is mistaken. Because of a federal injunction, the State has four congressional districts that must be used for federal congressional elections. That said, current Mississippi Code Section 23-15-1037 divides the State into five congressional districts and has never been amended or repealed since 1991.

Well-settled principles of federalism, state sovereignty, and the federal law of remedies prove that the three-judge federal court's injunction did not (and could not) repeal Code Section 23-15-1037 or erase it from state law. As a result, four congressional districts exist in Mississippi under a federal injunction for congressional elections, but five congressional districts exist under state law and may be used for anything but congressional elections.

With this self-evident truth in mind, this Court should turn to the merits issue of petitioners' challenge: whether Section 273(3) of the Constitution obligates the Secretary of State's Office to evaluate initiative petition signatures using the State's five currently existing congressional districts established by the Legislature (the Secretary's position), or the four currently existing congressional districts devised by three federal judges for congressional elections, which in turn, makes satisfying Section 273(3) impossible (petitioners' and their amici's position).

The Secretary of State's position is not born of "purposivism," "living constitutionalism," or any other theory arguably untethered to Section 273(3)'s text.

Quite the opposite. The Secretary's reading of Section 273(3) relies solely on its plain text and this Court's textualist-based precedents. Under the Secretary's reading, Section 273(3)'s term "congressional district" means our State's five current congressional districts established by state law, not the four districts for federal congressional elections existing only by way of a federal court's injunction.

This Court should adopt the Secretary's reading of Section 273(3). But even if the Secretary's position is not the only reasonable interpretation of the text, at a minimum, Section 273(3) is ambiguous. In that event, this Court would resort to interpretative canons to discern the legislative intent behind Section 273(3). Bedrock canons of interpretation recognized by this Court, textual jurists, and scholars alike, such as the presumption that laws must be read in a manner that effectuates their expressed purpose, demonstrate petitioners' reading of Section 273(3) is misplaced.

The objections of petitioners and their supporting amici do not support a proper text-based analysis of Section 273(3). At best, their arguments keyed on prior unrelated legislative enactments and non-enactments are only relevant if Section 273(3) is ambiguous. If Section 273(3) is ambiguous, then all evidence of legislative intent, such as the section's expressed purpose and object, comes into play and fatally undermines petitioners' purported strict constructionist argument.

Beyond the interpretative question presented, the doctrine of laches bars petitioners' challenge. They inexcusably delayed in filing this case by waiting until a few days before the November 3, 2020 general election. The undue prejudice to the

Secretary of State and the public resulting from petitioners' inexcusable delay is obvious. Moreover, the City of Madison is not per se immune from laches.

Finally, the parties largely agree on the subject matter jurisdiction issues inherent in petitioners' challenge. This is an original action, brought pursuant to Section 273(9) of the Constitution, limited to a review of former-Secretary of State Hosemann's determination that Measure 65's petition included sufficient signatures from the State's five congressional districts established by state law. Petitioners' claim is ripe, not moot, and petitioner Hawkins Butler, in her individual capacity, has standing to sue. However, the Secretary disagrees that the City (and Hawkins Butler, in her official capacity) properly has standing to raise the procedural challenge at issue here.

This Court should reject petitioners' challenge and dismiss their Petition.

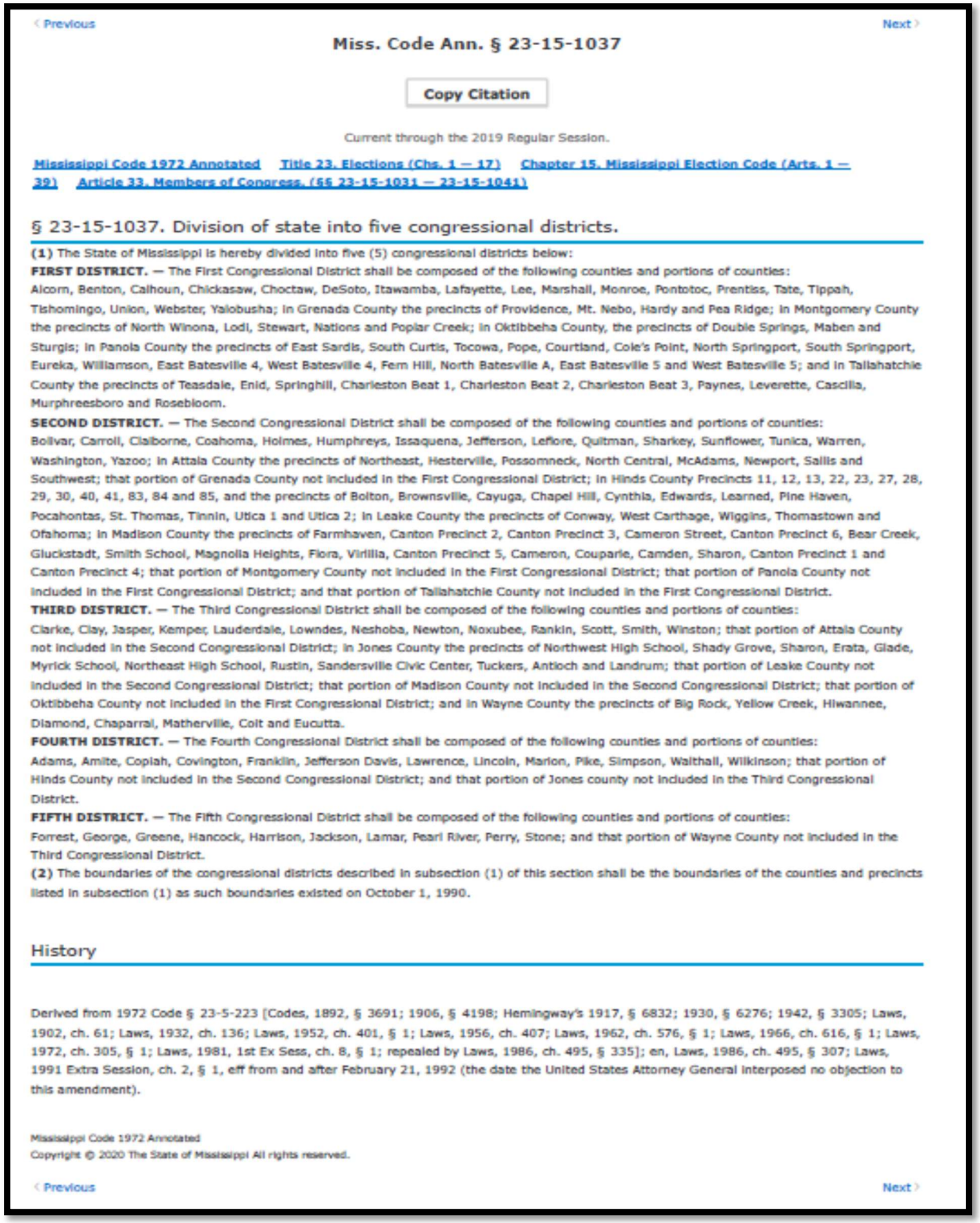
## ARGUMENT

### I. Four Congressional Districts Exist Under a Federal Injunction for Congressional Elections, but Five Congressional Districts Exist Under State Law and May be Used for Anything but Congressional Elections.

Before carefully analyzing Section 273(3), the record must be set straight on a significant point. The fundamental premise of petitioners' entire case is that "Mississippi has *four* congressional districts" *for all purposes*. Pet. Br. at 15 (emphasis in original). Petitioners' premise is incorrect, as a matter of both fact and law.

It is true that, by virtue of a federal injunction, there are four congressional districts in Mississippi which must be used for the State's federal congressional elections. Even so, it is equally true that existing state law divides the State into five congressional districts, which are not subject to any federal injunction when used for other purposes—such as interpreting Section 273(3) to determine the congressional districts used for gathering initiative petition signatures.

The current Mississippi Code, indisputable facts, principles of federalism and state sovereignty, and the law of federal remedies prove this sometimes overlooked but inescapable reality. In 1991, the Legislature established that "[t]he State of Mississippi is hereby divided into five (5) congressional districts below:…," defined the districts, and tied the district boundaries to those existing "on October 1, 1990." MISS. LAWS 1991, Ex. Sess., ch. 2, § 1. The 1991 enactment is codified at Mississippi Code Section 23-15-1037(1)-(2). Indeed, Code Section 23-15-1037 and its five districts can be found today on this Court's website using the "MS Code" link:



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Miss. Code Ann. § 23-15-1037

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Current through the 2019 Regular Session.

Mississippi Code 1972 Annotated Title 23. Elections (Chs. 1 — 17) Chapter 15. Mississippi Election Code (Arts. 1 — 39) Article 33. Members of Congress. (§§ 23-15-1031 — 23-15-1041)

§ 23-15-1037. Division of state into five congressional districts.

**(1)** The State of Mississippi is hereby divided into five (5) congressional districts below:

**FIRST DISTRICT.** — The First Congressional District shall be composed of the following counties and portions of counties: Alcorn, Benton, Calhoun, Chickasaw, Choctaw, DeSoto, Itawamba, Lafayette, Lee, Marshall, Monroe, Pontotoc, Prentiss, Tate, Tippah, Tishomingo, Union, Webster, Yalobusha; in Grenada County the precincts of Providence, Mt. Nebo, Hardy and Pea Ridge; in Montgomery County the precincts of North Winona, Lodi, Stewart, Nations and Poplar Creek; in Oktibbeha County, the precincts of Double Springs, Maben and Sturgis; in Panola County the precincts of East Sardis, South Curtis, Tocowa, Pope, Courtland, Cole's Point, North Springport, South Springport, Eureka, Williamson, East Batesville 4, West Batesville 4, Fern Hill, North Batesville A, East Batesville 5 and West Batesville 5; and in Tallahatchie County the precincts of Teasdale, Enid, Springhill, Charleston Beat 1, Charleston Beat 2, Charleston Beat 3, Paynes, Leverette, Cascilla, Murphreesboro and Rosebloom.

**SECOND DISTRICT.** — The Second Congressional District shall be composed of the following counties and portions of counties: Bolivar, Carroll, Claiborne, Coahoma, Holmes, Humphreys, Issaquena, Jefferson, Leflore, Quitman, Sharkey, Sunflower, Tunica, Warren, Washington, Yazoo; in Attala County the precincts of Northeast, Hesterville, Possomneck, North Central, McAdams, Newport, Sallis and Southwest; that portion of Grenada County not included in the First Congressional District; in Hinds County Precincts 11, 12, 13, 22, 23, 27, 28, 29, 30, 40, 41, 83, 84 and 85, and the precincts of Bolton, Brownsville, Cayuga, Chapel Hill, Cynthia, Edwards, Learned, Pine Haven, Pocahontas, St. Thomas, Tinnin, Utica 1 and Utica 2; in Leake County the precincts of Conway, West Carthage, Wiggins, Thomastown and Ofahoma; in Madison County the precincts of Farmhaven, Canton Precinct 2, Canton Precinct 3, Cameron Street, Canton Precinct 6, Bear Creek, Gluckstadt, Smith School, Magnolia Heights, Flora, Virilia, Canton Precinct 5, Cameron, Couparle, Camden, Sharon, Canton Precinct 1 and Canton Precinct 4; that portion of Montgomery County not included in the First Congressional District; that portion of Panola County not included in the First Congressional District; and that portion of Tallahatchie County not included in the First Congressional District.

**THIRD DISTRICT.** — The Third Congressional District shall be composed of the following counties and portions of counties: Clarke, Clay, Jasper, Kemper, Lauderdale, Lowndes, Neshoba, Newton, Noxubee, Rankin, Scott, Smith, Winston; that portion of Attala County not included in the Second Congressional District; in Jones County the precincts of Northwest High School, Shady Grove, Sharon, Erata, Glade, Myrick School, Northeast High School, Rustin, Sandersville Civic Center, Tuckers, Antioch and Landrum; that portion of Leake County not included in the Second Congressional District; that portion of Madison County not included in the Second Congressional District; that portion of Oktibbeha County not included in the First Congressional District; and in Wayne County the precincts of Big Rock, Yellow Creek, Hiwannee, Diamond, Chaparral, Matherville, Coit and Eucutta.

**FOURTH DISTRICT.** — The Fourth Congressional District shall be composed of the following counties and portions of counties: Adams, Amite, Copiah, Covington, Franklin, Jefferson Davis, Lawrence, Lincoln, Marion, Pike, Simpson, Walthall, Wilkinson; that portion of Hinds County not included in the Second Congressional District; and that portion of Jones county not included in the Third Congressional District.

**FIFTH DISTRICT.** — The Fifth Congressional District shall be composed of the following counties and portions of counties: Forrest, George, Greene, Hancock, Harrison, Jackson, Lamar, Pearl River, Perry, Stone; and that portion of Wayne County not included in the Third Congressional District.

**(2)** The boundaries of the congressional districts described in subsection (1) of this section shall be the boundaries of the counties and precincts listed in subsection (1) as such boundaries existed on October 1, 1990.

History

Derived from 1972 Code § 23-5-223 [Codes, 1892, § 3691; 1906, § 4198; Hemingway's 1917, § 6832; 1930, § 6276; 1942, § 3305; Laws, 1902, ch. 61; Laws, 1932, ch. 136; Laws, 1952, ch. 401, § 1; Laws, 1956, ch. 407; Laws, 1962, ch. 576, § 1; Laws, 1966, ch. 616, § 1; Laws, 1972, ch. 305, § 1; Laws, 1981, 1st Ex Sess, ch. 8, § 1; repealed by Laws, 1986, ch. 495, § 335]; en, Laws, 1986, ch. 495, § 307; Laws, 1991 Extra Session, ch. 2, § 1, eff from and after February 21, 1992 (the date the United States Attorney General interposed no objection to this amendment).

Mississippi Code 1972 Annotated



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Indisputable facts confirm why Code Section 23-15-1037 and its five congressional districts still exist today. In 2000, the State last conducted its

congressional elections using the five districts in Section 23-15-1037. In 2001, after 2000 census data showed the State would lose a congressional seat, litigation erupted in state and federal courts. *See Mauldin*, 866 So. 2d at 431-33 (¶¶2-12).

In February 2002, a three-judge district court in *Smith v. Clark* entered an injunction requiring the defendants to administer congressional elections on a court-drawn four-district plan in 2002, and beyond. *Smith I*, 189 F. Supp. 2d at 559. By late 2011, new census data showed population deviations in the 2002 plan, and the Legislature again had failed to draw new lines. The *Smith* court thus revised its original injunction to require future congressional elections on a new court-drawn plan. *Smith II*, 852 F. Supp. 2d at 767. Since 2012, the State has used the four districts implemented under the *Smith II* injunction for congressional elections.

Because of the *Smith II* injunction two sets of congressional districts exist. Four districts exist under a federal injunction and must be used for congressional elections. 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).

The State's five districts in Section 23-15-1037 would only ever expire if the Legislature repeals the statute. Yet the Legislature has never done so. And the *Smith II* federal injunction did not—and could not—repeal it either. Therefore, Mississippi currently has four "congressional districts" for federal congressional elections as a

matter of federal law, and five "congressional districts" for anything else as a matter of state law.

To be sure, petitioners may understandably, albeit mistakenly, believe that the *Smith* court eradicated Section 23-15-1037 and its five congressional districts from state law. But critical principles of federalism and state sovereignty (generally), and the federal law of remedies (specifically), illuminates why any such notion is wrong.

In *Smith I*, and again later in *Smith II*, the three-judge court issued injunctions requiring the defendants to implement four-district redistricting plans for Mississippi's congressional elections. An injunction "is a means by which a court tells someone what to do or not do. When a court employs the extraordinary remedy of injunction, …it directs the conduct of a party, and does so with the backing of its full coercive powers." *Nken v. Holder*, 556 U.S. 418, 428 (2009) (internal quotes and citation omitted).

In other words, as cogently recognized by Judge E. Grady Jolly (who issued the *Smith I* and *Smith II* injunctions), a federal "injunction enjoins a defendant, not a statute." *Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001). Federal courts obviously can, and do, issue injunctions to prevent defendants from enforcing a statute in the context of a particular case or controversy. However, only the legislative body that enacted the targeted law can repeal it, and thereby eliminate any collateral or future permissible effects of the law.[6]

[6] The United States Supreme Court, the Fifth Circuit, other federal courts, and legal texts and treatises have all recognized these salient points regarding federalism, state sovereignty, and federal remedies. *See*, *e.g.*, *Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2351 n.8 (2020) (recognizing that when a federal court "'invalidates' a law as unconstitutional, the Court of

The foregoing and well-established principles prove that Code Section 23-15-1037 and its five districts still exist despite the *Smith II* injunction. Any assumption to the contrary commits what Professor (and former Texas Solicitor General) Jonathan Mitchell has aptly dubbed a "writ-of-erasure fallacy":

> When judges or elected officials fail to recognize that a statute continues to exist as law after a court declares it unconstitutional or enjoins its enforcement, they fall victim to what I call the "writ-of-erasure" fallacy: The assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute, when the court's ruling is in fact more limited in scope and leaves room for the statute to continue to operate.

Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 937 (2018); *see also id.* at 936-37 (explaining that 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 enjoin executive officials from taking steps to enforce a statute…[b]ut the statute continues to exist…and remains a law until it is repealed by the legislature that enacted it,"

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course does not formally repeal the law from the U.S. Code or the Statutes at Large"); *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020) ("Courts hold laws unconstitutional; they do not erase them."); *Collins v. Mnuchin*, 938 F.3d 553, 611 (5th Cir. 2019) (Oldham, J. and Ho., J, concurring in part) (explaining that "it is indisputable that courts do not have the power to erase duly enacted statutes. Instead, they may decline to enforce them or enjoin their future enforcement to resolve cases and controversies"); *Winsness v. Yocum*, 433 F.3d 727, 728 (10th Cir. 2006) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts."); 1 SUTHERLAND STATUTORY CONSTRUCTION § 2:7 (Norman Singer, et al. eds., 7th ed. 2020) ("A judicial decision declaring a statute invalid does not eradicate the text from the statute books."); HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 181 (Richard H. Fallon, Jr., et al. eds., 7th ed. 2015) ("[A] federal court has no authority to excise a law from a state's statute book."); Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1080 (2020) (explaining why "[c]onstitutionally defective laws do not disappear or cease to be law following a judicial ruling" and "[c]ourts cannot repeal or eliminate a law, and a law remains on the books until repealed by the relevant legislature").

and a "judicially disapproved statute will often be left with work to do, even if it is believed to have been 'nullified' or 'invalidated' by an adverse court ruling" (internal notes omitted)).

* * *

Petitioners' core argument that four, and only four, congressional districts exist in Mississippi for all purposes either intentionally ignores Code Section 23-15-1037 or negligently commits the "writ-of-erasure fallacy." Either way, their central premise is wrong. Section 23-15-1037 and its five congressional districts still exist as a matter of state law. Any interpretation of Section 273(3)'s signature requirement provisions must therefore account for reality: the State has two sets of congressional districts which have co-existed for nearly twenty years. One set has been imposed by three federal judges for use in congressional elections; the other was duly enacted by the Mississippi Legislature and can be used for anything but congressional elections.

## II. Former-Secretary of State Hosemann Correctly Determined that Measure 65's Initiative Petition Satisfied Section 273(3)'s Signature Requirements.

With Code Section 23-15-1037 in mind, this Court should turn to the merits issue in petitioners' challenge. The issue is: whether Section 273(3) obligates the Secretary of State's Office to evaluate initiative petition signatures using the State's five currently existing congressional districts established by the Legislature (the Secretary's position), or the four currently existing congressional districts specifically devised by three federal judges for congressional elections, which in turn, makes satisfying Section 273(3) impossible (petitioners' and their amici's position).

As all state officials are supposed to do, former-Secretary Hosemann interpreted and applied Section 273(3)'s signature requirements to Measure 65 consistent with existing state law instead of a federal injunction geared only at congressional elections. The fair reading of Section 273, which follows from a text-based analysis under this Court's precedents, demonstrates former-Secretary Hosemann properly followed state law.

### Section 273's Text and this Court's Interpretative Rules

Section 273 of the Mississippi Constitution states:

> (3) The people reserve unto themselves the power to propose and enact constitutional amendments by initiative. An initiative to amend the Constitution may be proposed 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. 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. 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.
>
> ***
>
> (12) The Legislature shall provide by law the manner in which initiative petitions shall be circulated, presented and certified….
>
> (13) The Legislature may enact laws to carry out the provisions of this section but 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(3), (12), (13).

"In interpreting the Mississippi Constitution," this Court seeks "the intent of the draftsmen, keeping in mind, the object desired to be accomplished and the evils sought to be prevented or remedied." *Myers v. City of McComb*, 943 So. 2d 1, 7 (¶22) (Miss. 2006) (quotes omitted). Likewise, when interpreting statutes, "the ultimate goal of this Court…is to discern and give effect to the legislative intent." *Nissan North America, Inc. v. Tillman*, 273 So. 3d 710, 715 (¶15) (Miss. 2019) (quotes omitted). The goals are identical in each context, so "[a]lmost all rules that apply to interpretation of statutes also apply to the terms of a constitution." Leslie H. Southwick, 8 MS PRAC. ENCYCLOPEDIA MS LAW § 68:107 (Jeffrey Jackson, et al. eds., 2d ed.).

When determining the legislative intent behind a law within the context of a particularized dispute, this Court "first looks to the language" of the enactment and considers "the whole and every part of the [enactment] taken together," including the "words and context." *Matter of Adoption of D.D.H.*, 268 So. 3d 449, 452 (¶12) (Miss. 2018) (quotes omitted); *see also Johnson v. Sysco Food Services*, 86 So. 3d 242, 244 (¶3) (Miss. 2012) ("When interpreting a constitutional provision," this Court "must enforce its plain language."); *Clark v. State ex rel. Mississippi State Medical Ass'n*, 381 So. 2d 1046, 1048 (Miss. 1980) ("The primary rule of construction is to ascertain the intent of the legislature from the statute as a whole and from the language used therein.").

After textually analyzing a provision of law, if the enactment is free of ambiguity, this Court adopts its plain meaning and there is no reason to resort to canons of construction. *Dunn v. Yager*, 58 So. 3d 1171, 1189 (¶46) (Miss. 2011)

(internal quotes omitted); *see also Vicksburg Healthcare, LLC v. Mississippi State Dept. of Health*, 292 So. 3d 223, 230 (¶24) (Miss. 2020) (explaining that if a law's language is "clear and unambiguous," this Court applies its "plain meaning" and "refrains from using principles of statutory construction" (quotes omitted)).

On the other hand, if the provision at issue "is ambiguous or silent on a specific issue," then applying canons of construction is appropriate. *Mississippi Dept. of Revenue v. SBC Telecom, Inc.*, --- So. 3d ---, 2020 WL 4692426, at *3 (¶17) (Miss. 2020) (quotes omitted); *see also Cellular South, Inc. v. BellSouth Telecommunications, LLC*, 214 So. 3d 208, 212 (¶9) (Miss. 2017) ("A statute is ambiguous when open to two or more reasonable interpretations."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 425 (2012) ("SCALIA & GARNER, READING LAW") (defining "ambiguity" as "[a]n uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations").

**The Secretary of State's Fair Reading of Section 273**

The Secretary of State interprets Section 273 consistent with this Court's plain meaning precedents and what Scalia and Garner endorse as the "fair reading method," that is, "determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." SCALIA & GARNER, READING LAW 33.

The fair reading of Section 273 starts with its text. Section 273(3) first establishes Mississippians' reserved "power to propose and enact constitutional amendments by initiative." The next three sentences establish the basic signature requirements for initiative petitions. Petitioners' dispute here turns on the meaning of "congressional district" in Section 273(3)'s third and fourth sentences.

Section 273 does not specifically define "congressional district." The modifier "any" employed before "congressional district" in Section 273(3)'s third sentence only possibly broadens its meaning, rather than tying it to a specific district or districts. The modifier "single" in the fourth sentence also does not conclusively qualify "congressional district." Likewise, there is no expressed temporal qualifier for "congressional district" in Section 273(3)'s third and fourth sentences or elsewhere in the section.

The meaning of "congressional district" is also not negatively defined by omission as petitioners erroneously argue. It is true that what "congressional districts" are contemplated by Section 273(3)'s signature requirements could have been more specifically spelled out. For example, as petitioners' mention in their brief at page 20, back in 1944, the then-current version of Constitution Section 213A used the phrase "as now existing" to modify the term "each congressional district" used for appointing members of the Board of State Institutions of Higher Learning.

But that more specific words could have been employed in Section 273(3), as in former Section 213A, only leaves one to speculate why lawmakers did what they did

in different eras.[7] Missing text from Section 273(3) does not definitively inform what the section's existing text means, as petitioners seem to contend.

Rather than relying on negative implication, the true fair reading of "congressional district" derives from two clues in Section 273's text. The textual clues prove "congressional district" means the five congressional districts as established by the Legislature in Code Section 23-15-1037.

First, in Section 273(3)'s third sentence, the term "congressional district" is followed by the phrase "one-fifth (1/5) of the total number of signatures." The section's fourth sentence similarly uses the phrase "one-fifth (1/5) of the total number of required signatures." In both sentences, the phrase is obviously linked with "congressional district." Five is the denominator of the fraction "one-fifth." By including the fraction "one-fifth" twice in Section 273(3), the section's text and context plainly contemplate five congressional districts must be used as the tool for evaluating its signature requirements. *See Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131, 1137 (¶25) (Miss. Ct. App. 1999) (per Southwick, J.) ("The primary rule of construction is to ascertain the intent of the legislature from the statute as a whole

[7] To bolster their definition-by-omission argument using former Section 213A, petitioners point to this Court's decision in *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995). Pet. Br. at 20-21. In *Griffin*, this Court looked to different sections of the Constitution to conclude that the drafters intentionally excluded a residency condition from Section 154 because the condition was included in other sections. 667 So. 2d at 1325-27. Petitioners fail to explain how their supposedly text-only analysis of Section 273 can legitimately rely on a version of a constitutional provision that no longer exists. Nor do they justify applying what amounts to the "negative-implication" construction canon to interpret a text they claim is unambiguous. Furthermore, *Griffin* does not prove former Section 213A can be compared to Section 273 for divining its legislative intent. The constitutional provisions *Griffin* considered were all enacted at the same time. *Id.* at 1325-27. Former Section 213A and Section 273, on the other hand, were enacted nearly fifty years apart. The sections are thus unhelpful to petitioners' invocation of the "negative implication" canon smack-dab in the middle of their "strictly" text-based interpretative argument.

and from the language used therein.... Among the subordinate rules is that the meaning of words must be taken from their context." (quotes omitted)).

Simply put, Section 273(3) requires five congressional districts. Because Code Section 23-15-1037 is the only state law that divides the State into five congressional districts (as opposed to four districts in a federal injunction issued specifically, and only, for congressional elections), the fair reading of the term "congressional district" in Section 273(3) must mean Section 23-15-1037's five districts.

Second, Section 273 specifically says that the initiative petition signature gathering process *must* be governed by state statutes. Section 273(12) provides: "The Legislature shall provide by law the manner in which initiative petitions shall be circulated, presented and certified." Section 273(13) provides: "The Legislature may enact laws to carry out the provisions of this section but shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people."

By specifying that state laws may enable Section 273(3)'s petition circulation process, but not "restrict or impair" it, Sections 273(12) and 273(13) effectively command that "congressional district" must mean what the Legislature has said it means. Unremarkably then, Section 273(3)'s term "congressional district" plainly means Code Section 23-15-1037's five districts—instead of four districts drawn up by federal judges for purposes of an injunction applicable only to federal congressional elections.

The Secretary of State's fair reading of Section 273's meaning, derived only from a faithful textual analysis, is its plain meaning. This Court should therefore

adopt and apply the Secretary's position, "refrain from using principles of statutory construction," *Watson v. Oppenheim*, 301 So. 3d 37, 41-42 (¶12) (Miss. 2020), and dismiss petitioners' challenge.

### At the Least, the Term "Congressional District" as Used in Section 273(3) is Ambiguous

Even assuming petitioners' self-described "strict" interpretation of Section 273 is a reasonable alternative reading of its text, this Court should reject their challenge. Petitioners have, at most, identified that a dichotomy exists regarding the meaning of "congressional district" as used in Section 273(3) which could leave the constitutional provision "open to two or more reasonable interpretations." *Cellular South*, 214 So. 3d at 212 (¶9).

In petitioners' best-case scenario, Section 273(3) is ambiguous or unclear. But that scenario is a win-lose result for them. If this Court finds ambiguity in Section 273(3), then the canons of construction apply, and petitioners still lose. Every major interpretative canon relevant here undermines their position.

First, crediting petitioners' argument first violates what Scalia and Garner describe as the "presumption against ineffectiveness": "A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." SCALIA & GARNER, READING LAW 63. Section 273(3)'s text expressly states its purpose and object. It advances Mississippi citizens' power "to propose and enact" constitutional amendment initiatives. MISS. CONST. art. 15 § 273(3).

Additionally, as this Court has explained, Section 273(3)'s signature requirements specifically "discourage regionalism by requiring broad-based support

for any proposed initiative." *In re Proposed Initiative Measure No. 20*, 774 So. 2d 397, 402 (¶21) (Miss. 2000), *overruled on other grounds*, *Speed v. Hosemann*, 68 So. 3d 1278 (Miss. 2011); *see also* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 21 (1995) (explaining that generally in the context of states' initiative procedures, "the intent of geographic distribution requirements is to require minimal support for an initiative across most of the state").

Petitioners' reading of Section 273(3) flies-in-the-face of its express and textual purposes. By making it impossible to meet its signature requirements, accepting petitioners' view erects an insurmountable barrier to exercising an enumerated right reserved to the people "to propose and enact constitutional amendments by initiative." MISS. CONST. art. 15, § 273(3). This Court does not read impossible requirements into constitutional provisions. *See Gulf Refining Co. v. Stone*, 21 So. 2d 19, 21 (Miss. 1945) ("Constitutional and statutory provisions do not require to be done that which is impossible or thoroughly impracticable,…which is another way of saying that what is impossible or thoroughly impracticable is not within a constitutional or statutory requirement." (internal citation omitted)). Petitioners simply cannot square their position with Section 273(3)'s express purpose and object.

Second, when an enactment is ambiguous, this Court may consult its "historical background" to discern legislative intent. *State ex rel. Fitch v. Yazaki North America, Inc.*, 294 So. 3d 1178, 1185 n.8 (¶20) (Miss. 2020); *see also Clark*, 381 So. 2d at 1048 (when a statute "is ambiguous the court, in determining legislative

intent, may look not only to the language used but also to its historical background, its subject matter, and the purposes and objects to be accomplished").

The history of Section 273(3)'s original enactment, as petitioners acknowledge at pages 30-31 of their brief, began with an opinion from this Court that induced a legislative compromise. In 1992, the Legislature enacted, and the voters approved, present-day 273 following this Court's 1991 *Molpus* decision. In *Molpus*, this Court roundly rejected the notion that an allegedly dormant initiative and referendum process from the 1910s remained in the Constitution and could be revived. 578 So. 2d at 632-44.

At the Legislature's very next session, lawmakers proposed Section 273(3) and the section's other enabling provisions. *See* MISS. LAWS 1992, ch. 715. The enactment directly responded to the *Molpus* decision as part of a legislative compromise including a process for legislative alternatives to proposed initiatives and Section 273(3)'s geographic distribution requirements. Magleby, 66 U. COLO. REV. at 14 & n.8 (collecting newspaper articles and discussing the *Molpus* decision and circumstances attending the 1992 enactment amending Section 273).

These historical circumstances prove that Section 273(3) was intended to establish an initiative process while effectuating the compromise which led to its enactment. This well-known history subsequently led Justice Kay Cobb to observe:

> The Legislature obviously did not make the initiative process an easy one, and that is how it should be. However, neither did it make the process impossible to accomplish, and it certainly did not vest any authority in any court to determine at the outset, before the initiative is even put to the voters, that a proposed initiative measure, with only a ballot title and summary, is unconstitutional.

*In re Proposed Initiative Measure No. 20*, 774 So. 2d at 405 (¶21) (Cobb, J., dissenting).[8]

If adopted, petitioners' position would transform Section 273's intended compromise into a mere fingers-crossed promise. By destroying citizens' initiative rights altogether, Section 273's balance would shift from a procedure that is neither too "easy" nor "impossible" to the "impossible."

Third, petitioners' reading of Section 273 also violates the axiom that "constitutional provisions should be read so that each is given maximum effect and a meaning in harmony with that of each other." *Dye v. State ex rel. Hale*, 507 So. 2d 332, 342 (Miss. 1987). If petitioners are correct about Section 273(3), a reserved power vanishes, and large swaths of Section 273 become a nullity. The legislative alternative procedure and virtually all the statutes effectuating the initiative process are gone. The harmonious reading canon eschews that result. *Cellular South*, 214 So. 3d at 212 (¶10) ("statutes within an Act should be construed to harmonize with one another" (quotes omitted)); SCALIA & GARNER, READING LAW 180 ("there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously").

[8] In 2011, this Court essentially adopted part of the central premise of Justice Cobb's dissent regarding judicial review by overruling *In re Proposed Measure No. 20*, to the extent it condoned pre-election review of substantive challenges to citizen initiative measures. *Speed*, 68 So. 3d at 1281 (¶9); *Hughes v. Hosemann*, 68 So. 3d 1260, 1264-65 (¶13) (Miss. 2011).

* * *

The Secretary of State's textually faithful reading of Section 273(3) is its plain meaning. Even if somehow not, the Secretary's reading is a reasonable reading of Section 273(3), which subjects petitioners' nullification theory to this Court's construction canons. Either way, petitioners' position fails.

## III. Petitioners' and their Amici's Objections to the Secretary of State's Reading of Section 273(3) Lack Merit.

The Secretary of State's reading of Section 273 and above analysis negates the bulk of the petitioners' objections to the Secretary's position and those lodged by petitioners' amici. However, for the sake of completeness, the Secretary highlights a few particularly misplaced arguments of petitioners and their amici that deserve special attention.

### "As Existing" Clauses in Unrelated Legislation

To support their argument that Section 273(3) is a dead letter, petitioners and most of their amici rely on examples of the use of an "as existing" clause, or similar variation in legislation, linking board or commission appointments to specific congressional districts at some point in time. The examples are supposedly proof that, in 1992, legislators and the electorate could have used an "as existing" clause in Section 273(3) but did not. The argument is apparently that the omission was intentional, *i.e.*, the actual intent behind Section 273(3) was to create a right that would self-destruct if the State lost a seat in Congress.

Petitioners' version of the "as existing" clause argument, already addressed above at pages 24-25, revolves around the 1944 version of Section 213A establishing

the Board of the State Institutions of Higher Learning. Pet. Br. at 20-21. The MMA emphasizes several board membership enactments prior to 1992 that included different forms of "as existing" clauses. MMA Br. at 2-3. The three legislators similarly rely on post-2003 statutory changes that enacted "as existing" clauses or changed board membership statutes as alleged evidence that the Legislature was aware of a perceived problem with Section 273(3). Legislators Br. at 5-11. For its part, without citing any examples, the MDOH simply says "[i]f the Legislature and voters meant to freeze the congressional districts as they existed in 1992, they would have explicitly done so." MDOH Br. at 3.

Each variation of these "as existing" clause arguments shares a common problem for petitioners' "strict construction" of Section 273(3). No matter what it is called—the canon of negative implication, a resort to historical background, the good old "they-knew-how-to-do-it" canon, or something else—comparing Section 273(3) with unrelated "as existing" clause legislation is statutory construction.

Petitioners and their amici cannot have it both ways. Resort to statutory construction tools is only appropriate *if* an enactment is ambiguous. *Vicksburg Healthcare*, 292 So. 3d at 230 (¶24) (Miss. 2020) (quotes omitted) (explaining that if a law's language is "clear and unambiguous," this Court applies its "plain meaning" and "refrains from using principles of statutory construction"); *Dawson*, 735 So. 2d at 1137 (¶25) (only when a statute is "ambiguous" may the court resort to "its historical background"). Yet if Section 273(3) is ambiguous, applying interpretative canons, among other things, requires adopting the interpretation of Section 273(3) which

preserves its express purpose (an enumerated right of the people). Relying on "as existing" clauses from unrelated enactments undoes petitioners' strict construction of Section 273(3).

**Unsuccessful Efforts to Amend Section 273(3)**

Another go-to for petitioners and their amici revolves around the handful of times, post-2003, in which the Legislature proposed but did not pass resolutions to amend Section 273(3). Pet. Br. at 22; MMA Br. at 4-5; Legislators Br. at 12-13. Like their reliance on "as existing" clause laws, arguments relying on post-2003 legislation are only proper if ambiguity exists and statutory construction is appropriate. The examples of past unsuccessful legislation would have to be weighed against the fact that petitioners' position reads a right out of the Constitution while a (much more) reasonable alternative position exists.

But that is not even the worst problem for petitioners and their allies. Even if consulting post-enactment legislative history could be proper to support petitioners' allegedly pure-text reading of Section 273(3), unenacted legislation is not probative of the intent behind Section 273(3). *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (quotes omitted)); *see also Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("The complicated check on legislation…erected by our Constitution creates an inertia that makes it

impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." (quotes and internal citation omitted)).

Over the years, some legislators may have agreed with petitioners and their amici that Section 273(3) needs a fix for the sake of clarity. Some may have known it still works but thought it can be improved. Some others, consistent with the fair reading of Section 273(3), may have thought the system is not broken.[9] The answer is anyone's guess when looking to legislation that never becomes law. This Court should thus easily see through petitioners' attempt to define an enactment's meaning with later unenacted proposals.

### 2015 Senate Concurrent Resolution 549

The "evidence" of legislative intent most cited by petitioners and their amici is 2015 Senate Concurrent Resolution 549 ("S.C.R. 549"). Pet. Br. at 13; MMA Br. at 5; Legislators Br. at 13. But it is no better proof than any other resolution that did not pass. And it is no secret that Secretary of State Watson sponsored S.C.R. 549. The resolution would have distributed Section 273(3)'s signature requirements among congressional districts on a "pro-rata" basis. The Secretary has already rebutted petitioners' cries of "hypocrisy" in full:

> Secretary Watson still believes an amendment is necessary. Making a "pro rata share" or similar alteration to Section 273(3) would sensibly clarify its text, be consistent with its purpose of ensuring that proposed

[9] For example, in 2011, Senator Joey Fillingane probably would have ardently objected to petitioners' position when he sponsored the successful voter identification initiative petition that produced Section 249A of the Constitution.

> initiatives have sufficient support from electors throughout the State, and eliminate any possibility that the 2002 reduction of congressional districts prevents a proposed initiative from ever satisfying Section 273(3)'s signature requirements. A divergence of viewpoints regarding Section 273(3)'s text shows there is room for a good faith interpretative dispute, not that the section can only be interpreted to effectively bar any initiative from ever making it on the ballot, as petitioners erroneously contend.

Secretary of State "Answer" at 10.

Petitioners can cut-and-paste the Secretary's explanation however they want. But the Secretary's prior attempt to improve Section 273(3) as a State Senator fails to disprove its fair reading, much less that later dutifully defending a state law (as high-ranking executive branch officials must do) somehow undermines it.

## Attorney General Opinions

Similar to petitioners' unpersuasive personal attacks on Secretary Watson, their quibbles over prior Attorney General opinions have likewise already been put to bed. At pages 23-24 of their brief, petitioners attack the opinion in *Hosemann*, 2009 WL 367638 (MS AG Jan. 9, 2009) again. But the opinion request did not ask, and the opinion did not answer whether Section 273(3)'s signature requirements are currently viable. 2009 WL 367638, at *3 (MS AG Jan. 9, 2009). The answer to that question is in this brief.

Petitioners also fail to make hay by pitting *Hosemann* against the opinion in *Turner*, 2015 WL 4394177 (MS AG Jun. 5, 2015). Pet. Br. at 24-25. *Turner* and *Hosemann* are different opinions about different issues involving different statutory and constitutional schemes. *Turner* does not prove *Hosemann* was wrong. *Turner*, more importantly, does not prove petitioners are right. *Turner* did not analyze

competing constructions of statutory language—and certainly not an alternative interpretation, like petitioners', that would have negated the plain language and original intent of the statute at issue.

## IV. The Doctrine of Laches Bars Petitioners' Challenge.

Even if this Court adopts petitioners' position on Section 273(3), this lawsuit should still be dismissed. The laches doctrine independently defeats petitioners' procedural challenge.

### The Laches Doctrine Fully Applies Here

Laches applies when a party "(1) delay[s] in asserting a right or claim; (2) the delay was not excusable; and (3) there was undue prejudice to the party against whom the claim was asserted." *Allen v. Mayer*, 587 So. 2d 255, 260 (Miss. 1991).

Petitioners' inexcusable delay is obvious. Accepting petitioners' position means that, after 2002, no enacted initiative or future initiative petition could ever satisfy Section 273(3)'s requirements. In the past 18 years, as a matter of public record, dozens of initiative petitions have been filed. Petitioners' position is that one look at the face of Section 273(3) proves nobody since 2002 could satisfy its requirements. Petitioners thus knew or should have known everything they needed to assert their procedural claim at any time in nearly the past two decades. Their delay is inexcusable.

Even assuming they had no reason to know of their alleged procedural injury tied to Section 273(3) until Measure 65 came about, petitioners still inexcusably delayed filing suit. The petition process for Measure 65 started on July 30, 2018, over

two years before petitioners filed this case. *See* Pet. Br. at App. A. Numerous steps in the petition process subsequently were completed—from ballot title to signature gathering to an alternative measure to ballot approval and so on. Petitioners could have come to this Court, at any point in the process, to argue their position that the initiative sponsors could never meet Section 273(3)'s requirements. Yet petitioners elected not to sue until the eve of the November election.

In their brief at page 32, petitioners try to minimize their delay by contending that no claim was ripe until former-Secretary Hosemann approved Measure 65's petition signatures in 2019. As admitted above in the Statement of the Case, the precise date that former-Secretary Hosemann approved the petition signatures after September 2019 is unknown. Nevertheless, in January 2020, former-Secretary Hosemann indisputably delivered Measure 65's petition to the Legislature (it later resulted in Measure 65A's passage).

At the least, petitioners could have launched their facial challenge to Measure 65's petition signatures in January. For whatever reasons, tactical or not, they sat idle for ten months until October 28. Now, the initiative process is over. Election day has come-and-gone. Over a million Mississippians have voted for or against Measures 65 and 65A. Even judged on their own timetable, petitioners' inexcusable delay establishes laches' first two elements.

As to the third laches element, petitioners wrongfully assert a lack of "actual prejudice" cures their inexcusable delay. Pet. Br. at 34. Because this Court has afforded the Secretary of State and counsel time to prepare this brief fully setting

forth the Secretary's position, the initial litigation-related prejudice caused by petitioners' maneuvering has been diminished. But certainly not all the prejudice has dissipated. For instance, the Secretary cannot get back all the state funds expended for placing Measure 65 and 65A on the ballot, holding public hearings, drafting and publishing election literature, and completing numerous other tasks associated with the 65 versus 65A election.

Laches does not require significant prejudice. It only requires "undue prejudice." Petitioners caused undue prejudice by failing to launch their procedural attack on the initiative process in time for this Court to decide it before the process concluded.

Moreover, in the context of this case, the prejudice that counts is not bounded by the prejudice attributable to the Secretary of State. Petitioners did not insulate themselves from laches here by suing *only* the Secretary. By suing the Secretary of State, in his official capacity, petitioners effectively sued the State. Any undue prejudice caused by petitioners' delay that has been suffered by the public thus counts for laches here. *See Molpus*, 578 So. 2d at 641 ("In public interest lawsuits brought against a public official or governing body to test the validity of a law, the law provides that all citizens and taxpayers are considered parties in interest to, and are bound by, the proceedings.").

Petitioners' inexcusable delay in asserting their procedural claim has unduly prejudiced Measure 65's sponsor and supporters, hundreds of thousands of voters, and others who expended time, resources, and efforts to get Measure 65 on the ballot.

Untold numbers of people relied on its placement on the ballot and have further reliance interests at stake now that it was adopted. Assuming petitioners' position is correct on the merits (which it is not), all that prejudice could have been prevented easily if petitioners had timely raised and resolved their procedural challenge many months ago.

**The City and the Mayor are not Immune to Laches**

Petitioners are also incorrect that "laches cannot be charged against the City of Madison," *i.e.*, the City and the Mayor, in her official capacity. Pet. Br. at 31. For that misplaced proposition in their brief, petitioners rely on a "See, e.g." signal and a quote from *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." *Hill* uses those words. But petitioners are using *Hill*'s quote out of context apparently hoping nobody will notice. A close look at *Hill* shows that it is anything but "well settled" that laches can never apply to a Mississippi city in any lawsuit.

Although *Hill* mentioned "laches," the case actually involved an application of "equitable estoppel" to a school district. 564 So. 2d at 13-15. More significant, *Hill* used the term "governmental entity" in its statement about laches. But the authorities cited to support the statement only prove it is well-settled that the State and state agencies are not chargeable with laches.[10] It is not "settled" at all that cities enjoy that same status.

[10] *Hill* cited the following cases for its observation regarding laches: *Monroe County Bd. of Education v. Rye*, 521 So. 2d 900, 908 (Miss. 1988) (the State is not responsible for the laches of its officers); *Chill v. Mississippi Hospital Reimbursement Comm'n*, 429 So. 2d 574, 585 (Miss. 1983) (laches does not run against state agencies); *Alexander v. Mayor and Bd. of Aldermen*, 68 So. 2d 434,

In fact, this Court's precedent seems to point in the opposite direction. In *Brown v. City of Gulfport*, this Court analyzed whether laches or estoppel barred Gulfport from forcing a landowner to remove a structure. 57 So. 2d 290, 291 (Miss. 1952). Instead of holding Gulfport could never be guilty of laches, this Court analyzed the facts of the landowner's claim and determined the doctrine did not apply in that particular case. *Id.* at 292-94. *Brown* did not determine that Gulfport, or cities generally, are always laches-proof. *See also Mississippi Dept. of Human Services v. Molden*, 644 So. 2d 1230, 1232-33 (Miss. 1994) (observing case law has recognized laches can apply to cities).

Additionally, petitioners cannot square their municipality-laches immunity argument with petitioners' own take on how their lawsuit, if successful, will undermine previously enacted initiative measures. Petitioners assure everyone that laches is a "strong" defense to future challenges to our Constitution's voter identification and eminent domain amendments. Pet. Br. at 35. The Secretary of State's view is that laches absolutely bars any claims targeting our past amendments no matter who might bring them. *See Vanlandingham v. Meridian Creek Drainage Dist.*, 2 So. 2d 591, 592-93 (Miss. 1941) (laches barred belated suit to dissolve drainage district based on allegedly deficient signatures supporting the district's organizing petition).

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441 (Miss. 1953) (quoting an American Jurisprudence article for the proposition that "the government or other official body is not responsible for the laches of its officers"); *Aetna Ins. Co. v. Robertson*, 94 So. 7, 10 (Miss. 1922) (laches are not attributable to the State); *City of Bay St. Louis v. Hancock County*, 80 Miss. 364, 371-72 (1902) (discussing statute of limitations, not laches); *Josselyn v. Stone*, 28 Miss. 753, 763 (1855) (no laches are imputed to or run against the State).

In any event, if this Court endorses petitioners' ultimate position on Section 273(3) and a city can never be blocked by laches, as petitioners contend, then how will laches stop Madison or any other city from perpetrating a future take down of the voter identification and eminent domain amendments? *It won't.*

* * *

This Court should adopt the Secretary of State's fair reading of Section 273(3). But even if not, petitioners' inexcusable failure to timely assert their claims and the resulting prejudice to everyone is grounds to apply laches and dismiss this case.

## V. The Secretary of State Agrees with Most, but not all, of Petitioners' Subject Matter Jurisdiction Assertions.

As petitioners acknowledge on pages 35-36 of their brief, this Court must evaluate subject matter jurisdiction whether the parties dispute it or not. The Secretary of State and petitioners apparently agree on most of the subject matter jurisdiction issues presented in this case—with a few important caveats.

First, the Secretary of State agrees with petitioners that this Court has jurisdiction to adjudicate petitioners' "sufficiency of petition" claim arising under Section 273(9) and Code Section 23-17-23(b). However, this Court's subject matter jurisdiction under Section 273(9) extends solely to petitioners' stated "sufficiency of petition" claim.

Second, the Secretary of State agrees with petitioners that their request for an extraordinary writ is moot and has been abandoned. *See* Pet. Br. at 2. The Secretary also agrees that petitioners' "sufficiency of petition" claim is not moot. *See* Pet. Br. at 40.

Third, the Secretary agrees with petitioners' admission that their claim is ripe. *See* Pet. Br. at 40. The claim has been ripe, in the least, since Measure 65's sponsors filed their petition in July 2018.

Finally, the Secretary of State agrees with petitioners that petitioner Hawkins Butler, in her individual capacity, has standing to pursue her claim. *See Power*, 93 So. at 772-75 (suggesting citizens and taxpayers have standing to challenge the sufficiency of an initiative petition). The Secretary accepts that, as a citizen and qualified elector with an asserted interest in the petition process, Hawkins Butler has standing to assert her procedural challenge here under Section 273(9).

The Secretary of State disagrees that petitioners the City of Madison and Hawkins Butler, in her official capacity (the two are one-and-the-same), have standing. Petitioners base the City's standing on a standard derived from *Harrison County v. City of Gulfport*, 557 So. 2d 780 (Miss. 1990). *See* Pet. Br. at 36. The Secretary agrees with the recent opinions of members of this Court in *Reeves v. Gunn*, No. 2020-CA-01107-SCT, at ¶¶11, 59 (Dec. 17, 2020), regarding the issue of revisiting *Harrison County*'s standard.

In this case, the City's claimed standing is disconnected from the only alleged injury at issue and properly before this Court: an alleged procedural injury, shared only by citizens and electors, allegedly caused by a perceived flaw in the signature gathering requirements of the initiative petition process. The City cannot vote, has no interest in the signature gathering process, and cannot (properly) expend public funds or resources to facilitate or impair the signature gathering process. Moreover,

the City's alleged future injury here is speculative, at best, and flows from Measure 65 itself, not the petition process on trial here. *See* MISS. CONST. art. 15, § 273(9).

Due to Hawkins Butler's individual capacity status, the Secretary of State recognizes that the City's lack of standing ultimately does not inhibit this Court from reaching this case's merits. But the City's lack of alleged injury connected to the initiative process, as opposed to its alleged injury from Measure 65's content, is not enough to give it standing in the circumstances of this case.

## CONCLUSION

For the reasons stated, the Secretary of State respectfully requests that this Court deny the Petition and dismiss this case.

THIS the 28th day of December, 2020.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

THIS the 28th day of December, 2020.

S/Justin L. Matheny
Justin L. Matheny