IN THE SUPREME COURT OF MISSISSIPPI

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 Amici Curiae Mississippi State Medical Association and American Medical Association

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State of Mississippi, *Respondent*.

Certificate of Interested Persons

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

1. Mayor Mary Hawkins Butler ..... Petitioner
2. The City of Madison ..... Petitioner
3. Kaytie M. Pickett, Adam Stone, Andrew S. Harris, and Jones Walker LLP ..... Counsel for Petitioners
4. Chelsea Brannon, Madison City Attorney ..... Counsel for Petitioners
5. Secretary of State Michael Watson ..... Respondent
6. Attorney General Lynn Fitch, Deputy Solicitor General Krissy Nobile, and Assistant Solicitor General Justin Matheny ..... Counsel for Respondent
7. Mississippi State Medical Association ..... Amicus Curiae
8. American Medical Association ..... Amicus Curiae
9. John B. Howell III and Jackson, Tullos & Rogers, PLLC ..... Counsel for Amici Curiae

This 14th day of December 2020.

/s/John B. Howell III
John B. Howell III

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I. Summary of the Argument

Initiative 65 proposes to amend the Mississippi Constitution to legalize medical marijuana and govern its distribution in the State. The initiative was placed on the November 3, 2020, election ballot after the Secretary of State concluded all prerequisites had been met. One of those prerequisites comes from Article 15, Section 273(3) of the Constitution, and mandates that no more than one-fifth of the requisite number of voter signatures on the initiative petition can come from a single congressional district.

When it passed the 1992 resolution that became Section 273(3), the Legislature regularly included clauses that pegged "congressional districts" to a particular point in time (and still does today). The omission of such a clause in Section 273(3) was purposeful, but in nevertheless including the specific one-fifth metric, the Legislature failed to consider that voter initiative amendments would become impossible upon the loss of a House of Representatives seat. To their great credit, immediately after Mississippi's congressional seats were reduced to four, legislators recognized the error and proposed to replace the problematic "one-fifth" with language that does not need to be adjusted with future gains or losses of House seats. But that resolution died in committee, and six similar ones have since met the same fate.

Such legislative inaction means the problem still exists, and voter initiative is presently not a viable route to amending the Constitution. Hence, Initiative 65's inclusion on the ballot necessarily did not pass muster. So whence cometh the fix? The answer is, of course, through the constitutionally-prescribed amendment process shared by the Legislature and the qualified electors. It is not, as Respondent would have it, by this Court through a guise of interpretation. And like those separated powers, the stodgy necessity of having to amend the Constitution to correct an error is a design feature, not a flaw.

Making sure the constitutional amendment map is followed is always important, but given the nature of the initiative at issue and the substantial ramifications it poses for Mississippi's public health and the medical community, particular care is warranted here. The Mississippi State Medical Association and American Medical Association support Petitioners' well-articulated arguments, and as friends of the Court offer the following additional points respecting the constitutional infirmity of Respondent's determination Initiative 65 qualified for the ballot.

II. Argument

A. The Legislature purposefully chose to not lock "congressional district" to a particular point in time as it routinely did with other laws.

Although its composition may change a bit every four years, the Mississippi Legislature has relative continuity and thus a bank of institutional lawmaking knowledge. That is why this Court "presume[s] that the legislature, when it passes a statute, knows the existing laws." *Arant v. Hubbard*, 824 So. 2d 611, 615 (Miss. 2002). Therefore, when it adopted Senate Concurrent Resolution 516 in 1992, the Legislature was not starting from scratch.

1. "Existing" clauses from 1944–1992.

Indeed, far from it. As early as 1944, our lawmakers were acquainted with the concept of fixing congressional districts to a particular date in order to provide a definite geographic area from which appointments were to be made. *See* MISS. CODE ANN. § 37-101-3(1) (Board of Trustees of Institutions of Higher Learning members drawn "from each congressional district of the state *as existing as of March 31, 1944*"). In 1952, the State Veterans Affairs Board memberships were tied to "each congressional district *as they existed on January 1, 1952*." *Id.* § 35-1-1 (emphasis added). The practice only increased over the years.

In 1983, the Legislature directed that State Board of Optometry members were to be "appointed from each of the congressional district *as existing on January 1, 1980*" and that the

five members of the Mississippi State Board of Public Accountancy were to come from "the congressional districts *as they are presently constituted*." *Id.* §§ 73-19-7, 73-33-3(2) (emphasis added). The medical advisory board members of the Workers Compensation Commission were to come "from each congressional district *as they existed on January 1, 1985*." *Id.* § 71-3-115 (emphasis added). The Mississippi Real Estate Appraiser Licensing and Certification Board was drawn from "each congressional district as such district *existed on January 1, 1989*." *Id.* § 73-34-7(1)(a) (emphasis added). Ditto for the Mississippi Home Corporation. *Id.* § 43-33-704(3(a). In 1991, the Legislature linked the Board of Barber Examiners to "the congressional districts *as existing on January 1, 1991*." *Id.* § 73-5-1 (emphasis added).

Then, importantly, in 1992—the same year Senate Concurrent Resolution 516 was approved—the Legislature pegged the State Veterans Affairs Board to "each congressional district as such districts *existed on March 1, 1992*" and a commission appointed by the Mississippi Community College Board to the "congressional districts *existing on January 1, 1992*. *Id.* §§ 35-1-1(1)(b), 75-60-4(1) (emphasis added).

2. 1992 – Senate Concurrent Resolution 516.

In stark contrast to the foregoing tethers, in 1992 the Legislature also agreed to Senate Concurrent Resolution 516, which speaks in terms of "signatures of the qualified electors from any congressional district" [no tether] and limits them to "one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot." Far from being a scrivener's error, the next sentence similarly mentions "signatures from a single congressional district [no tether] which exceeds one-fifth (1/5) of the total number of required signatures." *Id.* The initiative as drafted became a part of the Constitution upon approval by voters later that year. MISS. CONST. art. 15, § 273(3).

B. With the loss of the House seat, the Legislature recognizes the problem with Section 273(3)'s one-fifth requirement and attempts are made to fix it.

Following the 2000 census and apportionment, Mississippi was slated to lose one of its five congressional seats. *Mauldin v. Branch*, 866 So. 2d 429, 431 (Miss. 2003); ROYCE CROCKER, HOUSE APPORTIONMENT 2000: STATES GAINING, LOSING, AND ON THE MARGIN 1 (Cong. Research Serv. Jan. 9, 2001), https://www.everycrsreport.com/files/20010109_RS20768_89b0e917199288249d1a475e447c498d243dff9b.pdf. The Legislature sprang into action, and its first order of business was decoupling the Court of Appeals judgeships from the five congressional districts. 2001 Miss. Laws Ch. 574, § 2. Because the statute stated 10 judges were to be elected "two (2) *from each congressional district* [no tether]," our legislators understood that the looming loss of a House seat and redistricting risked upsetting the statutory mathematical applecart because "congressional district" was not fixed to a specific date. MISS. CODE ANN. § 9-4-5. The solution was to simply copy and paste the five congressional districts from Section 23-15-1037 and rename them "Court of Appeals Districts," thus rendering irrelevant the shift to four congressional seats. *Id.*; 2001 Miss. Laws Ch. 574, § 2.

It was that very same recognition and concern that, on January 20, 2003, and just two weeks after the start of the 108th Congress when Mississippi was officially down to four congressmen, inspired the introduction of House Concurrent Resolution No. 58. In the measure, legislators proposed to replace the "one-fifth" requirement from Section 273(3) with "its pro rata share." H.R. Con. Res. 58, 2003 Leg., Reg. Sess. (Miss. 2003). Central to the that proposal was the understanding that "one-fifth" was a big problem because—just like the Court of Appeals statute (but unlike all of the other statutes previously discussed)—"congressional district" was not moored to a date certain but rather floating free as the House seats shifted. A "pro rata" fix would ensure that, whatever the number of congressional districts the future might hold, the voter

initiative signature scheme would work mathematically. Were there any doubt, both the title of the resolution and the explanation to be included on the ballot were as follows: "*to conform[] the pro rata signature requirements* of congressional districts for initiative and referendum petitions *to the number of* ***new*** *congressional districts*." *Id.* (emphasis added).

Unfortunately, the attempt to rectify the constitutional error died in committee. Identical measures met the same fate in 2007 and 2009. S. Con. Res. 510, 2007 Leg., Reg. Sess. (Miss. 2007); S. Con. Res. 523, 2009 Leg., Reg. Sess. (Miss. 2009). In 2014 and 2015, additional unsuccessful efforts were made, but with even more explicit language. This time, instead of changing "one-fifth" to "its pro rata share," the proposals deleted the fraction and replaced it with "*the percentage that the district represents in relation to the total number of districts* existing in the state at the time the initiative petition is proposed." H.R. Con. Res. 22, 2014 Leg., Reg. Sess. (Miss. 2014); H.R. Con. Res. 26, 2015 Leg., Reg. Sess. (Miss. 2015). The title and stated purpose were "*to conform the maximum percentage* amount of signatures from any single congressional district" *Id.* Another "pro rata" proposal identical to 2007 and 2009 was offered by then-Senator Watson in 2015, which also failed. S. Con. Res. 549, 2015 Leg., Reg. Sess. (Miss. 2015).

And earlier this year, a seventh fix was attempted. In that version, "one-fifth" was sensibly proposed to be changed to "a fraction with a numerator of one (1) and a denominator equal to the total number of congressional districts statewide." H.R. Con. Res. 43, 2020 Leg., Reg. Sess. (Miss. 2020). Like its six predecessors, it never left committee. It is unclear why all these fix measures failed, given at least ***seven*** statutes were updated in the same period to reflect the loss of the congressional seat and to freeze them with an "existing" clause. MISS. CODE ANN. §§ 37-3-2(2)(a); 73-5-1; 73-6-3; 73-23-41(1); 73-30-5(1); 73-33-3(2); 73-34-7(1)(c).

C. The inclusion of Initiative 65 on the ballot was unconstitutional.

Regardless, and to tie this all together, by 1992 the Legislature knew and was presumed to know how to craft an "existing" clause to freeze referent congressional districts in time. *Arant*, 824 So. 2d at 615. Indeed, on two other occasions *in* 1992, it did so. However, in its wisdom it purposefully chose not to include one in Senate Concurrent Resolution 516, which is highly significant. Once the House seat was lost, legislators tried to change the one-fifth fraction seven times. Of course, ***there would be no need to change "one-fifth" if, as Respondent argues, "congressional district" referred to the five that the State previously had***.

In interpreting any legal provision, the historical context is an important, appropriate tool for informing the text. *Bell v. State*, 160 So. 3d 188, 194 (Miss. 2015); *see Virginia Uranium, Inc. v. Warren*, __ U.S. __, 139 S. Ct. 1894, 1902 (2019) ("What the text states, context confirms.") (Gorsuch, J.). The historical background and the failed legislative patches demonstrate that, because Section 273(3)'s "congressional district" lacks an "existing" anchor, the "one-fifth" metric renders the voter initiative process currently unworkable—which means Initiative 65 could never have been, and was not, constitutionally qualified for ballot placement. Respondent's position that "congressional district" from Section 273(3) can be "interpreted as the former five congressional districts to harmonize the provisions with the 'one-fifth' requirements" simply cannot bear the load and is thus untenable. (Resp. Ans. at 8.)

D. The Court should decline Respondent's invitation to fix the one-fifth error through interpretation, for amending the Constitution is the exclusive privilege of the Legislature and the people.

Your amici respectfully suggest it would be a mistake to accept Respondent's invitation to creatively interpret Section 273(3) in light of the text and historical context just discussed. Lessons learned from the Supreme Court of the United States counsel against such an approach.

It is problematic enough when broad, muddy principles are generously interpreted, which portends decades of compounding litigation and leaves a dubious heritage. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) "(penumbras, formed by emanations"). But it is another, more troubling thing altogether to encounter a precise legal requirement—a number such as "one-fifth"—yet ignore it. Distilled to its essence, that is the circumstance this case presents.

A change to the Constitution is needed if voter initiative amendments are to continue, and the Legislature is surely aware but has chosen not to act. Unlike lawmakers, the proper role of a judicial branch is not prescription but description, at least since *Marbury*. 5 U.S. 137, 177 (1803); *Little v. Miss. Dep't of Transp.*, 129 So. 3d 132, 138 (Miss. 2013) ("We—the judicial branch of government—should not place ourselves in the position of changing the substantive law enacted by the Legislature"). Tormented saving interpretations may be well-intentioned, but they are oft recognized for what they are: judicial rewrites. *See, e.g.*, *Hans v. Louisiana*, 134 U.S. 1 (1890) (interpreting 11th Amendment to bar suits in federal court by a state's own citizens); *Nat'l Fed. of Ind. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Affordable Care Act individual mandate a tax valid under Congress's taxing power.) Under our Constitution, for better or for worse, the Legislature in concert with the people have the exclusive privilege of revising it.[1] MISS. CONST. art. 15, § 273(2). The preservation of the lines dividing governmental powers—whatever the nature of the case—necessarily preserves both liberty and public confidence.

The extent of approval a law may enjoy or the fact it is widely regarded as a good idea simply cannot override its invalidity. *See, e.g.*, *Shelby County v. Holder*, 570 U.S. 529 (2013) (declaring unconstitutional Section 4(b) of Voting Rights Act passed by vote of 98–0 in Senate and 390–33 in House of Representatives); *Clinton v. City of New York*, 524 U.S. 417 (1998)

[1] The initiative amendment process cannot be modified by an initiative amendment. MISS. CONST. art. 15, § 273(5)(d).

(declaring unconstitutional the presidential line-item veto); *INS v. Chadha*, 462 U.S. 919 (1983) (declaring unconstitutional the congressional veto, which appeared in 200 federal statutes). Likewise, the perceived ripple effects the decision may have on other laws is beside the point. *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding the eastern half of Oklahoma is a Creek Indian reservation). And in any event, prior initiative amendments to our Constitution since the loss of the House seat are hardly at risk of invalidation, as no petition-sufficiency challenges were brought in this Court before the relevant election or effective date.

In sum, the greatest negative consequence of any significance that may flow from declaring Initiative 65's ballot placement unconstitutional is the wait while the Legislature and people fix the error. Of course, "[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided." *Chadha*, 462 U.S. at 959. On the other hand, the downsides of upholding the law through an interpretive rewrite are many measures worse.

E. The initiative poses significant risks to the public health and burdens for Mississippi's physicians.

There is another, more prudential reason why following the Constitution's text and context where they lead matters: the nature of Initiative 65 itself. Your amici believe its member-physicians and the public health of this State will be significantly and adversely impacted should the initiative become law. Accordingly, it is especially important that the initiative tick all the constitutional prerequisites before it does.

Comprised of more than 5,000 physicians, residents, and medical students, amicus Mississippi State Medical Association is the largest physician organization in the State. Among other things, the Association invests its efforts in promoting the public health, assisting its members with ongoing professional practice maintenance and development, and fostering a

thriving medical community throughout Mississippi. Similarly, amicus American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including Mississippi. It is no secret that amici oppose the legalization of "medical marijuana."

And for good reasons. While it is possible there may be beneficial medicinal uses of marijuana, numerous evidence-based studies demonstrate that significant deleterious effects abound. Drug abuse and addiction. Change in brain function. Lung disease. Intoxication and impaired driving. Developmental interference. Impaired cognition. Psychological illness. Cardiovascular abnormalities. Negative social functioning effects. Cancer. Without question, the public health risks are immense. Moreover, there is a massive amount of future systematic research and controlled-trials that are needed to evaluate the safety and efficacy of marijuana for medicinal purposes. For these reasons, among others, AMA policy is that "cannabis for medicinal use should not be legalized through the state legislative, ballot initiative, or referendum process." *See* AMA, *Cannabis Legalization for Medicinal Use*, D-95.969.[2] "Follow the science" is the orientation of amici's members toward patient care and public health, but that does not work if willy-nilly usage comes first.

Initiative 65 would also put physicians in quite the pinch. Because it is still a Schedule I drug under federal law, marijuana by definition has no currently accepted medical use and thus cannot be prescribed. 21 U.S.C. § 812(b)(1). Yet physicians will be expected by their patients (though perhaps not required by Initiative 65) to sign off on certifications to receive their supply.

[2] Available at https://policysearch.ama-assn.org/policyfinder/detail/Cannabis%20Legalization%20for%20Medicinal%20Use%20D-95.969?uri=%2FAMADoc%2Fdirectives.xml-D-95.969.xml.

Perhaps no liability will lie under state law, but what about federal law? In addition, there are no standards for whether a medical condition is "of the same kind or class" of those "debilitating conditions" enumerated in Proposition 65. Physicians are at risk of both criminal and civil liability (not to mention professional discipline) should they misjudge, because immunity exists under Section 2(2) only where a certification is issued to a person with a debilitating medical condition. As everyone knows, all it takes to file a lawsuit is a piece of paper and a filing fee, so even if a physician judged correctly and immunity is appropriate, the matter will still have to be litigated. And with increased exposure and litigation comes increased costs, not least of which is rising professional liability insurance premiums.

Your amici won't belabor the point. Suffice it to say that because of the real public health dangers and physician-related burdens Initiative 65 poses, it is imperative that the constitutionality of the measure should be beyond cavil if it is to become law.

III. Conclusion

For the foregoing reasons, amici curiae Mississippi State Medical Association and American Medical Association support Petitioners' position and urge that Respondent's inclusion of Initiative 65 on the ballot be declared unconstitutional.

This 14th day of December 2020.

Respectfully submitted,

MISSISSIPPI STATE MEDICAL ASSOCIATION

AMERICAN MEDICAL ASSOCIATION
amici curiae

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Certificate of Service

I certify that today I filed the foregoing document with the Court's MEC/E-File system, which sent notification of the filing to all persons registered to receive service.

This 14th day of December 2020. /s/John B. Howell III
John B. Howell III