IN THE SUPREME COURT OF MISSISSIPPI

NO. 2023-CA-00584-SCT

ANN SAUNDERS, *ET AL*.

Appellants

V.

STATE OF MISSISSIPPI, *ET AL*

BRIEF OF SOUTHERN POVERTY LAW CENTER AND MISSISSIPPI VOTES AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANTS

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INTERESTS OF AMICI CURIAE

The Southern Poverty Law Center ("SPLC") is a nonprofit organization dedicated to protecting the civil rights of society's most vulnerable members. Founded in 1971 and headquartered in Montgomery, Alabama, with offices in Jackson, Mississippi and other southern states, the SPLC has been dedicated to ensuring that the promise of the civil rights movement becomes a reality for all. As a result, the SPLC has an interest in ensuring that every citizen is afforded the opportunity to fully exercise their voting rights.

Mississippi Votes is a nonprofit organization, founded by and focused on young people, that is dedicated to facilitating voter registration, strengthening democracy, and cultivating a culture of civil engagement throughout the state of Mississippi. Founded in 2017, Mississippi Votes' education, outreach, and youth leadership development programs are community-driven, locally run, and continuously tailored through surveys, evaluation, and data analysis. Mississippi Votes' policy work focuses on addressing barriers to voting, resisting voter suppression, and supporting democracy-building work statewide. As a result, Mississippi Votes has an interest in ensuring that Mississippians' votes are counted, that elected officials are elected, and that Mississippians' voting rights are equally respected wherever votes are cast.

Amici submit this brief in support of Appellants' claim that Mississippi House Bill 1020 ("HB 1020") violates the Mississippi Constitution. We aim to call the Court's attention to the facts demonstrating how HB 1020 impermissibly strips the citizens of Hinds County of their constitutionally protected right to elect their judges and to analogous out-of-state authority striking down similar laws enacted by state legislatures that circumvented state constitutional provisions requiring that judges be elected.

INTRODUCTION

The Mississippi Constitution enshrines the people's right to elect their circuit court judges. Article 6, Section 153 of the Constitution states explicitly that "[t]he judges of the circuit and chancery courts *shall be elected by the people*." (Emphasis added). HB 1020 deprives the people of Hinds County of this fundamental right by mandating the appointment of four new circuit court judges, doubling the size of that court and creating what this Court, more than a century ago, declared to be constitutionally impermissible: "an elective judiciary in name only, and an appointive judiciary in fact." *State ex rel. Collins v. Jones*, 64 So. 241, 257 (Miss. 1914).

Amici submit this brief to highlight three key points that demonstrate the unconstitutionality of HB 1020:

First, the appointed judges created by HB 1020 are *de facto* circuit court judges, holding the same title, responsibilities and powers as elected circuit court judges while serving for terms that are almost as long (and could be even longer), thereby violating Section 153's clear constitutional command that judges "shall be elected."

Second, in assigning to appointed judges the responsibilities and powers that the Constitution reserves for Hinds County's elected circuit judges, HB 1020 violates the fundamental constitutional principle of separation of powers, impermissibly usurping the authority of elected circuit judges as constitutional officers.

Third, the high courts of numerous sister states with elected judiciaries have invalidated similar statutory schemes that call for the appointment of judges who would otherwise be required under the state constitution to be elected by the people, thus confirming the unconstitutionality of HB 1020.

Fourth, *amici* further submit this brief to underscore the unconstitutionality in the current application of Section 9-1-105(2)—which provides for temporary judicial appointments in certain,

limited circumstances. Far from its intended use, it is being abused to further create *de facto* unelected circuit judges.

Accordingly, HB 1020 is plainly violative of Section 153 of the Constitution, and the Chancery Court's ruling to the contrary should be reversed.

ARGUMENT

I. The "Temporary Special Circuit Judges" Created by HB 1020 Are *De Facto* Circuit Judges And, As Such, Must Be Elected By the People

Although HB 1020 purports to create four "temporary special circuit judges," there is precious little daylight between these "temporary special" judges and standard, elected circuit court judges. This is shown by the nomenclature used in the statute, the powers vested in such judges, the term for which such appointed judges will serve, and the office and operating allowance provided for such judges.

First, HB 1020 expressly calls these new judges "circuit judges for the Seventh Circuit District," the same title their elected colleagues bear. HB 1020 Section 1(1).

Second, these new, appointed circuit judges will be vested with all the powers of their duly-elected colleagues. The judges provided for in HB 1020 shall have "no limitation whatsoever … placed upon the[ir] powers and duties … other than those provided by the Constitution and laws of this state." HB 1020 Section 1(1). In this regard, HB 1020 judges also are indistinguishable from circuit court judges. This can be contrasted with the "special judges" appointed under Section 9-1-105 of the Mississippi Code, whose appointments are sharply circumscribed "to hear[ing] particular cases, a particular type of case, or a particular portion of the court's docket." Miss. Code § 9-1-105; *see Liberty Mut. Ins. Co. v. State ex rel. Hood*, 277 So. 3d 542, 543 n.2 (Miss. 2019). Without any such statutory constraint, HB 1020 judges will hear the same number and types of cases as their elected colleagues.

Third, the statutorily-mandated term for which HB 1020 judges must serve is just shy of the constitutionally-mandated four-year term of elected circuit court judge. These appointed judges will serve from July 1, 2023 through December 31, 2026, a three-and-one-half year term. HB 1020 Section 1(1). The duly elected circuit judges in Hinds County serve a term of only four years, also ending on December 31, 2026. Miss. Const. art. VI, § 153. And, in practical terms, because HB 1020 expressly permits the Chief Justice of the Supreme Court to appoint an individual already "serving on a temporary basis ... in the Seventh Circuit Court District," HB 1020 Section 1(2), the appointed judges could very well end up serving as circuit judges for a full four years, or even *longer*, despite never having been elected.

Fourth, these appointments—and the concomitant bypassing of circuit judge elections—are not justified by any exigency. No emergency or emergency requirement is articulated in HB 1020 which necessitates immediate appointments, unlike Section 9-1-105(2)'s constraint that those special circuit judges only be appointed "in the event of an emergency or overcrowded docket."[1]

Fifth, under HB 1020, the appointed circuit judges "shall receive an office and operating allowance to be used for the purposes described and in amounts equal to those authorized in Section 9-1-36 [of the Mississippi Code]." HB 1020 Section 1(3). Section 9-1-36, in turn, provides an operating allowance for "[e]ach circuit judge and chancellor" for the expenses of operating the office of the judge. Thus, the office and operating allowances for appointed HB 1020 circuit judges are identical to those for elected circuit judges.

[1] We agree with Appellants that Section 9-1-105(2) is unconstitutional, for the reasons cited in their brief. App. Br. at 10-11. Alternatively, we respectfully submit that this Court could find unconstitutional HB 1020's three-and-a-half year appointments while upholding limited appointments necessitated by an emergency under Section 9-1-105(2). *See, infra*, Section IV.

For all these reasons, the temporary special judges are both titularly and functionally the equivalent of circuit court judges. Section 153 of the Constitution, however, requires that circuit judges "shall be elected." By providing for the appointment of circuit judges pursuant to statute rather than their election by the people, HB 1020 stands in direct conflict with "the clear language of the constitution." *PHE, Inc. v. State*, 877 So. 2d 1244, 1247 (Miss. 2004).

The Chancery Court below reasoned that there is no conflict with Section 153 because HB 1020 "does not provide for the creation of additional permanent judgeships," noting that the appointments expire on December 31, 2026. (Opinion at 20). But that reasoning ignores the plain language of Section 153, which provides that "[t]he judges of the circuit" courts "shall" be elected and hold office "for a term of four years." This necessarily means that during *any* four-year period, the circuit judges in a given county must be elected. If the legislature were free to "temporarily" suspend the operation of this command with respect to half the circuit court positions in a particular county during a four-year period, Section 153 would be rendered a nullity. Indeed, under the Chancery Court's reasoning, nothing would prevent the legislature from extending the "temporary" appointments for another four years after December 31, 2026.

The Constitution's commands cannot be so easily evaded. In *State ex rel. Collins v. Jones*, 64 So. 241 (Miss. 1914), this Court rejected a construction of Section 153 that would have allowed the governor to appoint circuit judges temporarily while the legislature was not in session, with elections required only when the legislature was in session. This Court held emphatically that Section 153 requires *all* circuit judge positions to be filled by election. Otherwise, the Court held, "*we would have an elective judiciary in name only, and an appointive judiciary in fact*. Such construction is simply impossible." *Id.* at 257 (emphasis added). So too here, the legislature's

attempt to create a shadow judiciary of appointed circuit judges for Hinds County cannot be reconciled with Section 153's directive that circuit judges "shall" be elected.

II. HB 1020 Usurps the Constitutional Duties of Elected Circuit Judges

Elected circuit court judges are constitutional officers. Miss. Const. art. VI, § 153; *Leachman v. Musgrove*, 45 Miss. 511, 515 (1871) (noting that "it is too plain to dispute" that circuit judges are constitutional officers); *Mississippi Com'n on Jud Performance v. DeLaughter*, 29 So. 3d 750, 759 (2010) ("Circuit court judges are constitutional officers") (Waller, C.J., dissenting). Because elected circuit court judges are constitutional officers, the legislature is permitted neither to take away powers or duties from existing circuit judges, nor to give the powers of a circuit court judge to anyone else. It is a general principle of state constitutional law that "the legislature cannot take away from a constitutional officer the powers or duties given that officer by the constitution, or vest such powers or functions in any other department or officer." 16 C.J.S, Constitutional Law, Section 321. This is a limitation on the legislature's authority that flows from the separation of powers doctrine. *Id.*

This Court has recognized that legislative acts abrogating the authority of constitutional officers are void. In *Fant v. Gibbs*, 54 Miss. 396, 403, 414, 415 (1877), for example, this Court relied on principles of separation of powers to strike down a statute that deprived certain elected district attorneys of their duties as a "constitutional officer." *Id.* at 403-04. There, thirteen district attorneys had been elected to serve from each of the state's thirteen judicial districts. *Id.* at 407-08. Thereafter, the legislature reduced the number of judicial districts to eleven, leaving two district attorneys with spot duties. *Id.* The Court held that the law was "clearly unconstitutional in depriving [the two unassigned district attorneys] of both duties and a district." *Id.* at 411.

In *Bd. of Trustees of State Institutions of Higher Learning v. Ray*, 809 So. 2d 627 (Miss. 2002), this Court struck down a state statute that interfered with the constitutional powers of the

Board of Trustees of State Institutions of Higher Learning ("IHL"). In *Ray*, the legislature, pursuant to Miss. Code Ann. § 37-102-3, purported to authorize the State Board for Community and Junior Colleges ("SBCJC") to prevent the IHL board from allowing a state campus to offer lower level undergraduate courses. *Id*. at 637. This Court held that "section 37-102-3, as it reads, infringes on the constitutionally vested managerial powers of the Board of Trustees and is therefore unconstitutional." *Id*. In so doing, the Court reasoned: "While we recognize that the legislature possesses the power to take away by statute what has been given by statute, the same cannot be said for that created by the Constitution. To allow this would be an affront to our Constitution." *Id*.

Here, the effect of HB 1020 is to *reduce by half* the powers and duties of the constitutionally-elected circuit judges in the Seventh Circuit Court District by doubling the number of such judges and mandating that half of them be appointed, rather than elected by the people, by the Chief Justice of the Supreme Court. By adding four appointed judges to perform duties that would otherwise be performed by the elected judges, the legislature has impermissibly usurped the powers of the elected judges as constitutional officers and diminished their constitutional office.

In denying Appellants' motion for a preliminary injunction, the Chancery Court asserted that HB 1020 did not dilute the powers of the existing elected judges because each elected judge "will retain exactly the powers that he or she enjoyed prior to" HB 1020. (Opinion at 20). But this assertion contradicts reality. HB 1020 necessarily will result in a substantial curtailment of the cases over which the elected judges can exercise their powers during their constitutionally-mandated term of office. The legislature has no authority to curtail the existing elected circuit judges' constitutional duties—which the people of Hinds County, pursuant to the Constitution, chose those judges to perform—in this manner. If the legislature believes there is a need for more

circuit judges in Hinds County, there is a remedy at hand: it can increase the number of *elected* judges. That is the only remedy permitted by the Constitution.

III. Other States' Highest Courts Have Found Similar Statutes Unconstitutional

In several other states with constitutional provisions prescribing the election of judges, courts have found unconstitutional statutes that instead provided for the appointment of judges. The holdings and reasoning of these cases are directly applicable here.

The Alabama Supreme Court, for example, has repeatedly found such legislation to be invalid. In *Opinion of the Justices.*, 41 So. 2d 907 (Ala. 1949), the Alabama Supreme Court struck down a statute naming an additional judge to serve as a circuit court judge, holding that it violated provisions of the Alabama Constitution requiring vacancies to be filled by appointment by the governor and providing for new circuit court judges to be elected at the next general election. The court held that Alabama's circuit courts "are not of statutory creation. They are provided for by the Constitution and ... the legislature may [not] name the person to serve as circuit judge." *Id.* at 910. The Alabama Supreme Court later ruled that a different statute creating the position of Assistant Judge of Probate of Jefferson County, and allowing for the judge to be appointed by the Judge of Probate, likewise ran afoul of the constitutional requirement that all judges be elected. *Opinion of the Justs.*, 357 So. 2d 648 (Ala. 1979). Both of these cases are on point here, as HB 1020 likewise contravenes the Mississippi Constitution's mandate that all circuit judges be elected.

Similarly, the Tennessee Supreme Court struck down a law allowing the mayor of Nashville and the City Council to create a new juvenile and domestic relations court and appoint its sole member. *State ex rel. Haywood v. Superintendent, Davidson Cnty. Workhouse*, 259 S.W.2d 159, 161 (Tenn. 1953). Like the Mississippi Constitution, the Tennessee Constitution endows the people with the power to elect the judges of certain courts: "The Judges of the Circuit and Chancery Courts, and of other inferior courts, shall be elected by the qualified voters of the district or circuit

to which they are to be assigned." Tenn. Const. art. VI, § 4. The Tennessee Supreme Court found the law in question was "in direct conflict with Article VI, § 4, of the Constitution in that no provision is made for the election of such judge 'by the qualified voters of the district.'" *Id*. at 162. Indeed, that court held that the right to an elected judiciary is so fundamental that "it cannot be doubted but that the judges of such courts must be elected by the qualified voters of the district over which the courts have jurisdiction." *Id*. So too in Mississippi. Because HB 1020 judges will wield the judicial power of the Seventh Circuit Court District, they must be elected by the people of Hinds County.

The Florida Supreme Court's decision in *Payret v. Adams*, 500 So. 2d 136 (Fla. 1986), is also instructive. That case involved a county court judge who had been annually reassigned by administrative order to be an acting circuit judge for five consecutive years. *Id.* at 137, 139. The Florida constitution requires circuit judges be elected by the people, Article V, section 10(b), and tasks the governor with appointing a judge to fill any vacancy, Article V, section 11(b). The Florida Supreme Court held that because "[r]espondent has become a permanent circuit judge not by the method mandated by the constitution, but by administrative order," his appointment violated the Constitution. *Payret*, 500 So. 2d at 139. Also relevant is the Court's analysis of the judge's allegedly "temporary" assignment to the circuit court. The Court noted that limited assignments of judges "to hear a limited class of support orders" did not contravene the state constitution. *Id*. at 130. But HB 1020 judges will, like the *de facto* permanent circuit court judge in Florida, at least to some degree "replace" elected circuit judges by taking over cases that would otherwise be on their dockets. *Id*. (quoting *Crusoe v. Rowls*, 472 So. 2d 1163, 1165 (Fla. 1985)). Just as in Florida, in Mississippi this plainly cannot be done.

Finally, the Oregon Supreme Court's decision in *State ex rel. Madden v. Crawford*, 295 P.2d 174 (Or. 1956), shows why the Mississippi's legislature's purported concern with excessive caseloads in Hinds County cannot justify its disregard of the Constitution. There, the Oregon legislature had passed a statute authorizing the Supreme Court to designate a circuit judge to temporarily sit on the Supreme Court to assist in clearing a case backlog. The Oregon Supreme Court struck down the statute as unconstitutional in light of a state constitutional requirement that judges sitting on the Supreme Court be elected. The court held that "[w]hen the constitution of a state reserves to the people the power of electing an officer, this impliedly forbids the legislature to appoint him, and, of course, in such circumstances the legislature cannot delegate a power of appointment which it does not have." *Id.* at 178. The court also held that "considerations of expediency," *i.e.*, the fact that the legislature was acting to remedy a case backlog, were immaterial to the constitutional analysis. *Id.* at 176. The same conclusion is compelled here.

IV. Section 9-1-105(2) Cannot be Used to Appoint *De Facto* Circuit Judges

Unfortunately, the constitutional infirmities concerning judicial appointment are not limited to HB 1020; the recent application of Section 9-1-105(2) also clearly runs afoul of Section 153 of the Mississippi Constitution. Section 9-1-105(2) authorizes the appointment of special judges to serve on a "temporary" basis, but does not define the expected duration or outer limits of such a "temporary" appointment. Instead, it merely provides that the special judge will serve "for whatever period of time is designated by the Chief Justice." Miss. Code Ann. § 9-1-105(2). Thus, multiple successive appointments of purportedly "temporary" judges threatens to similarly create *de facto* unelected circuit judges.

The misapplication of this statute, taken together with the special circuit judges created by HB 1020, demonstrate that these legislatively-created positions are not truly "temporary," and instead allow for *de facto* unelected circuit judges to serve for a period of time previously unknown

under Mississippi law. Notably, pursuant to Section 23-15-849, a circuit judge appointed under Section 9-1-103 to fill a permanent vacancy (as opposed to the temporary vacancies addressed by Section 9-1-105) may serve the remainder of the unexpired four-year term only if the term has less than nine months to run. If there are more than nine months left, a special election must be called so that a judge may be elected to the position. *See Rayner v. Barbour*, 47 So. 3d 128, 132 (Miss. 2010); *Magnolia Bar Ass'n inc., v. Lee*, 793 F. Supp. 1386, 1392 n.5 (S.D. Miss. 1992) ("If the remainder of the unexpired term is more than nine months, a special election is called."), *aff'd,* 994 F.2d 1143 (5th Cir. 1993).

Presumably, the legislature limited the period of service for an unelected circuit judge filling a vacancy, and required the calling of a special election before the next regular election, because it believed that a longer term would be inconsistent with the constitutional requirement that circuit judges be elected. The same reasoning should apply to the appointment of an unelected circuit judge who occupies a newly created judicial post—it is equally offensive to the constitution for such a judge to serve for nearly four years.

To conform with the Constitution, Section 9-1-105(2) at best must be construed to allow for the appointment by the Chief Justice of "special judges" for a limited period of months, with no ability to re-appoint such "special judges" for an indefinite number of consecutive terms. Without such a limit, the statute allows for unelected individuals to serve as *de facto* circuit judges in violation of Section 153.

V. Conclusion

This Court should find HB 1020 to be unconstitutional under the Mississippi Constitution because it allows for the appointment, rather than the election, of circuit judges. The judges appointed under the law are not, in practice, temporary or "special judges," but instead hold all of the powers of an elected circuit judge and will serve for nearly the same length of time as an elected

circuit judge (if not longer). In addition, by usurping the power of the properly elected judges, and diluting their role on the court by adding unelected judges, HB 1020 also violates the separation of powers in the State. Persuasive out-of-state precedent concerning analogous statutes in states with similar constitutional provisions confirms what the constitutional text and bedrock constitutional principles make plain: HB 1020 violates Article 6, Section 153 of the Mississippi Constitution and, as a result, is invalid.

Dated: June 9, 2023

Respectfully submitted,

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[2] New York admission pending

CERTIFICATE OF SERVICE

I, Leslie Faith Jones, attorney for *amici*, hereby certify that I have this day electronically filed the foregoing document with the Court's electronic case filing system, which sent a true and correct copy to all counsel of record.

I further certify that on this day I deposited a copy of the foregoing Brief with the U. S. Postal Service, postage prepaid, for delivery to the following:

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Dated: June 9, 2023

/s/ Leslie Faith Jones
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