NO. 2023-CA-00584-SCT

IN THE SUPREME COURT OF MISSISSIPPI

ANN SAUNDERS; SABREEN SHARRIEF; and DOROTHY TRIPLETT,

Appellants,

v.

STATE OF MISSISSIPPI; STATE OF MISSISSIPPI *ex rel.* TATE REEVES, in his official capacity as Governor of the State of Mississippi; STATE OF MISSISSIPPI *ex rel.* LYNN FITCH, in her official capacity as Attorney General of the State of Mississippi; HONORABLE MICHAEL K. RANDOLPH, in his official capacity as Chief Justice of the Mississippi Supreme Court; ZACK WALLACE, in his official capacity as Circuit Clerk of the Circuit Court of Hinds County, Mississippi; and GREG SNOWDEN, in his official capacity as Director of the Administrative Office of Courts,

Appellees.

On Appeal from the Chancery Court of Hinds County, Mississippi
First Judicial District

APPELLANTS' REPLY

Oral Argument Requested

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INTRODUCTION

In defending the challenged provisions of H.B. 1020 and Section 9-1-105(2) of the Mississippi Code, the State makes arguments that are fundamentally at odds with one another. With respect to the appointment of judges to the Hinds County Circuit Court, the State asserts that only the label attached to those judges, and not their function as judges fully endowed with the power of a circuit court judge, is what matters. Because, according to the State, those judges are "special judges" and not "circuit court judges," they need not be elected. In contrast, in the case of the CCID court, the State insists that what matters is not what the statute calls it, but the fact that it functions similarly to and borrows some features from the municipal courts. The State contends that those shared functions and features make the CCID court, in fact, a municipal court, despite H.B. 1020 nowhere saying so; and that because it is a municipal court, the appeal path applicable to municipal courts applies and renders the CCID court a valid inferior court. The State's arguments are not only internally contradictory—each fails on the merits and must be rejected.[1]

The plain text of the Mississippi Constitution is the starting and ending point of this case. Under Section 153, judges of the circuit court "shall be elected by the people." Section 165 provides the only exception to that election requirement, allowing appointments for disqualification or disability. The State agrees that Section 165 does not apply here. Nonetheless, the State makes two arguments to justify judicial appointments and deprive Hinds County voters of their constitutional rights. Both arguments fail.

[1] The chancery court found that Appellants have standing. *See* R. 668–70 (finding standing). That ruling was correct. Further, Appellees do not contest standing in this Court. For additional authority regarding standing, *see* Plfs' Br. in Support of a Preliminary Injunction, R. 93–96 (describing basis for standing); Plfs' Response to Mot. to Dismiss, R. 473–77 (same). If this Court has lingering questions about Appellants' standing, Appellants respectfully request that the Court order supplemental briefing on that issue.

First, the State argues that judicial appointments to the circuit court under H.B. 1020 and Section 9-1-105(2) are constitutional because the appointed judges are not circuit court judges *at all*—and therefore need not be elected. That argument fails because Section 153 applies to "judges of the circuit court"—including "special" circuit court judges, a conclusion the State itself cannot escape: The State itself, as well as the challenged statutes quoted throughout the State's brief, denominate the appointed judges "special temporary *circuit court judges*" or "special *circuit judges*." *See* State's Br. 2, 11, 20, 22, 23, 29 (emphasis added). The State asks this Court to ignore the plain text of Section 153 which requires that judges of the circuit court be elected. Here, the judges authorized by H.B. 1020 and Section 9-1-105(2) are "judges of the circuit court" and must be elected. Moreover, under the Mississippi Constitution, the judicial power of the state can only be exercised by judges of "the Supreme Court and such other courts as are provided for" in the Constitution. Miss. Const. art. VI, §144. There is no constitutional basis for the legislature to create "special judges" exercising the state's judicial power who are not judges of a court authorized by the Constitution. The State's contention that the Constitution's election requirement applies only to judges who serve four-year terms must be rejected. Rather than providing the constitutional escape hatch the State seeks, the failure to endow these new judges with four-year terms is simply another way the statutes violate Section 153. The State's method of constitutional construction—essentially, that statutes violating one constitutional requirement need not satisfy any constitutional requirement—is fundamentally unsound.

Second, the state argues that, although the Constitution mandates that circuit court judges be elected and creates a narrow exception not applicable here in Section 165, the Constitution's failure to explicitly provide that these strictures must not be violated means the legislature is free to ignore them. The State concedes, contrary to its argument in the court below, that the

appointments under H.B. 1020 and Section 9-1-105(2) cannot be justified under Section 165. Absurdly, the State argues that it is precisely *because* these appointments do not fit under Section 165 that they are constitutionally permitted. According to the State, if it disregards the election requirement, the four-year tenure requirement, and *all* of the constitutional requirements under Section 165, the legislature's actions escape any constitutional constraint.

The CCID Court is not a municipal court and is unconstitutional. By its own terms, H.B. 1020 establishes the CCID court as a new "inferior court," and nowhere calls it a municipal court. To be sure, H.B. 1020 assigns the CCID court some—but not all—of the jurisdiction assigned to municipal courts and borrows the judicial qualifications and salary requirements applicable to municipal judges. But *resembling* a municipal court is not the same as *being* a municipal court. Indeed, the CCID court differs from municipal courts in several fundamental respects. Critically, one provision applicable to municipal courts that H.B. 1020 does not import is a right of appeal. Accordingly, the CCID court is not a municipal court. In addition, the potential availability of certiorari to the circuit court under Miss. Code Ann. § 11-51-95 does not allow for plenary supervision by a constitutional court. That plenary supervision is an essential requirement for inferior courts. The CCID court lacks a mechanism for supervision by the Hinds County Circuit Court and therefore violates Section 172 of the Constitution.

Finally, Appellants sued the correct parties. Chief Justice Randolph is a proper party because he is the official designated by the legislature to make the challenged judicial appointments. Judicial immunity is not available in suits for prospective relief, and the Chief Justice cites no controlling caselaw to dispute that. Regardless, judicial appointments are executive or administrative acts—not adjudicative acts for which immunity would apply. The existence of a case or controversy under Article III of the United States Constitution is not required. Like the

Chief Justice, Circuit Clerk Wallace plays a central role in implementing judicial appointments to the Hinds County Circuit Court because he is the official responsible for assigning cases to the appointed judges. Appealing his dismissal was not frivolous.

Appellants named the Chief Justice and the Circuit Clerk as parties not because they have personally engaged in any wrongdoing, but simply because an injunction would remedy the harm inflicted by the challenged statutes. However, Appellants agree that this Court need not reach the issue of whether Mr. Wallace or Chief Justice Randolph are proper parties—or whether judicial immunity applies here—if this Court holds that an injunction against the "State of Mississippi" will suffice for purposes of affording Appellants complete relief.

ARGUMENT

I. THE APPOINTMENTS ARE UNCONSTITUTIONAL.

Under Section 153 of the Mississippi Constitution, "judges of the circuit and chancery courts shall be elected by the people [and] shall hold their office for a term of four years." The one narrow exception to that rule is found in Section 165. That Section allows appointments in the event of disability or disqualification of a sitting judge. The State agrees that this provision does not save the challenged laws. State's Br. 23. Instead, the State makes two core arguments. *First*, the State argues that because judges appointed under H.B. 1020 and Section 9-1-105(2) are not granted the four-year terms Section 153 requires, they are not circuit judges *at all*, and they therefore need not be elected. That argument fails under the plain text of Section 153 and the challenged statutes. Section 153 applies to "judges of the circuit[] court," and that covers the appointed judges at issue here—regardless of whether the legislature labels them "special circuit court judges" or "special judges" or anything else. Indeed, the State itself refers to these appointees as "temporary special *circuit judges*" and concedes that they exercise the power of circuit judges. *E.g.*, State's Br. 2 (asserting that the Constitution gives the legislature the power to "provide for

temporary special circuit judge appointments") (emphasis added); *id.* at 26 (acknowledging that appointed judges "exercise circuit-judge power"). In any event, the appointees *are* circuit judges. *Second*, the State argues that the legislature can make unlimited exceptions to the Constitution's election requirement without any constitutional authorization, despite Section 165 of the Constitution providing only one narrow exception (which they now concede does not apply here). That also fails.

A. Judges Appointed Under H.B. 1020 and Section 9-1-105(2) Are Circuit Court Judges.

Section 153 of the Constitution contains two requirements applicable to circuit court judges: (1) circuit court judges "shall be elected by the people" and (2) they "shall hold their office for a term of four years." Miss. Const. art. VI, § 153. The State argues that judges appointed under the challenged statutes are not circuit court judges *at all*, but instead are something it calls "special judges." State's Br. 10, 30. According to the State, Section 153's election requirement is triggered only when a judge is given a four-year term on a circuit court under Section 153's tenure requirement. Thus, the State argues, because these "special judges" have not been given four-year terms they are not circuit court judges at all and do not need to be elected. State's Br. 22.

Essentially, the State asks the court to read Section 153—which is entitled "Election and Terms of Circuit and Chancery Court Judges"—not as a set of requirements for the selection and tenure of circuit court judges, but instead as a kind of circular definition. According to the State, Section 153 defines a circuit court judge as someone who is elected to the circuit court for a four-year term. Under the State's circular logic, anyone not elected or not serving a four-year term is not a circuit judge, and Section 153's requirements, including its election requirement, do not apply to them, even if they are serving on the circuit court and exercising the powers of a circuit court judge. The State urges this Court to let the legislature sidestep the Constitution—and the voters of Mississippi—with nothing more than a semantic trick. But Section 153 is not a definition. Rather,

it establishes a fundamental division of power as between "the people" and other branches of Mississippi government. It commands that "the judges of the circuit and chancery courts" are to be "elected by the people," and sets the tenure for those positions. Miss. Const. art. VI, § 153. Accepting the State's position would leave the Seventh Judicial Circuit "an elective judiciary in name only, and an appointive judiciary in fact"—a construction of Section 153 definitively rejected in *State ex rel. Collins v. Jones*, 64 So. 241, 257 (Miss. 1914).

In making this argument, the State contends that Appellants have ignored Section 153's second "shall." State's Br. 24. But it is the State—and the legislature—who ignore Section 153's tenure requirement. Under Section 153, except where Section 165 applies, judges serving on the circuit courts "shall be elected by the people" *and* "shall hold their office for a term of four years." The legislature cannot escape one requirement by violating the other. The State's argument boils down to the contention that the legislature can exempt itself from constitutional requirements simply by ignoring them. That argument must be rejected. When the legislature creates positions on the circuit courts, it must comply with *all* of the Constitution's requirements.

Not only is the State's argument inconsistent with the Constitution; it is foreclosed by the plain language of the challenged statutes. Under the text of H.B. 1020 and Section 9-1-105(2), judges appointed to the Hinds County Circuit Court *are* "judges of the circuit … court[]." Miss. Const. art. VI, § 153. H.B. 1020 refers to "temporary special *circuit judges*." H.B. 1020 § 1. Further, Section 9-1-105(2) empowers the Chief Justice to appoint "a special judge *to serve . . . in a circuit . . . court*." Thus, according to the statutory text, the appointed judges are plainly circuit judges. In addition, judges appointed under these provisions exercise the same power as circuit judges. H.B. 1020 § 1 ("No limitation whatsoever shall be placed upon the powers and duties of the judges other than those provided by the Constitution and laws of this state."). The legislature

cannot create a position that exercises all the power and authority of a circuit judge—and which, in the case of H.B. 1020, it even calls a circuit judge—and then evade constitutional requirements simply by labeling it "special judge" or "special temporary circuit judge." Indeed, despite its insistence that they are not circuit court judges, the State lacks the courage of its convictions: Throughout its brief, the State refers to the appointees repeatedly as "special *circuit judges*." Br. 2, 11, 15, 20, 22, 23 29 (emphasis added). The judges appointed pursuant to H.B. 1020 and Section 9-1-105(2)—as a matter of text, function, and common sense—are "judges of the circuit … courts." Miss. Const. art. VI, § 153. Under the Constitution, such judges must be elected.

Moreover, the State fails to identify any constitutional basis for the legislature to create "special judges" on the circuit courts. Section 144 of the Constitution provides that "[t]he judicial power of the State shall be vested in a Supreme Court and such other courts as are provided for in this Constitution." Those courts are the Supreme Court, the Chancery Courts, the Circuit Courts, the Justice Courts, and the legislatively created inferior courts. Whatever label the State attaches to them, the judges appointed pursuant to H.B. 1020 and Section 9-1-105(2) exercise that part of the state's judicial power assigned to the circuit courts. *See* H.B. 1020 § 1 ("No limitation whatsoever shall be placed upon the powers and duties of the judges other than those provided by the Constitution and laws of this state"); Miss. Code Ann. § 9-1-105(9) (providing that an appointed judge "shall, for the duration of his appointment, enjoy the full power and authority of the office to which he is appointed."). Thus, because these judges exercise the judicial power constitutionally assigned to circuit courts, they can only be circuit court judges or inferior court judges. That is because the Constitution authorizes no other actor to exercise that power: There is no such thing as a "special judge" under the Constitution. If they are circuit court judges, they must be elected. And if they are inferior court judges (despite not serving on an inferior court), then their

decisions must be appealable to the constitutional court whose jurisdiction they exercise—here, the Hinds County Circuit Court. *See Marshall v. State*, 662 So. 2d 566, 570–71 (Miss. 1995).[2]

Adopting the State's interpretation of Section 153 would produce absurd results. At bottom, the State's argument is that unelected circuit court judges are constitutionally permissible as long as the term of appointment is anything other than four years. Moreover, nothing about the state's argument is limited to "emergencies" or "overcrowded dockets." Taken to its logical conclusion, a judge appointed to the circuit court for life rather than a four-year term would not fit the State's definition of a circuit judge—and therefore could escape election under Section 153—and the legislature would not be obliged to offer any justification for sidestepping constitutional restrictions. That interpretation would make Section 153 meaningless and is not the law.

The State's logic would be equally applicable beyond Section 153 and would wreak havoc on the foundations of Mississippi's government. For example, under the State's logic, the legislature could create a "special Governor"—an appointed position serving alongside the Governor and exercising all of the power assigned to the Governor under the Constitution—as long as the appointment lasts for less (or more) than "four (4) years," Miss. Const. art. IV, § 116. If this interpretation were accepted, this "special Governor" would be perfectly constitutional: It would not violate the Constitution precisely *because* it did not conform to the Constitution's requirements.

The same reading would justify packing the Mississippi Supreme Court. Nothing would prevent the legislature from appointing unelected "special justices" to the Supreme Court—an

[2] Appellees' suggestion that it is enough that the unelected circuit judges' decisions are reviewable by this Court, State's Br. 28, fails to address the clear instruction from this Court in *Marshall* and other cases that inferior court decisions must be reviewable in the constitutional court whose jurisdiction they exercise. Appellees' position would allow for new courts swallowing all of Chancery and Circuit Court jurisdiction and presided over by lifetime appointed judges, so long as decisions were appealable to this Court. That is not Mississippi's constitutional scheme.

appointed position exercising all of the power of a Supreme Court Justice—so long as those "special justices" serve less than a full term of office or do not meet other requirements that, in the State's reasoning, "define" a Supreme Court justice. *See* Miss. Const. Art. VI, § 149 ("The term of office of the judges of the Supreme Court shall be eight (8) years."); Miss. Const. art. VI, § 150 (specifying eligibility requirements). Under the State's logic, a "special justice" who is appointed for anything other than an eight-year term or who has never practiced law would not be a Justice of the Supreme Court *at all.* Therefore, in the State's telling, appointing special justices to new positions on the Supreme Court would not violate the requirement that Justices be elected, Miss. Const. Art. IV, § 145 ("[T]here shall be elected one judge [to the Supreme Court] for and from each district by the qualified electors thereof"), or that the number of justices on the Court be limited to nine, Miss. Const. Art. VI, § 145B ("The Supreme Court shall consist of nine judges"). That interpretation would be absurd, and it is equally absurd in the context of the circuit courts. Judges of the Hinds County Circuit Court—like Supreme Court justices—must be elected. If the plain text of the Constitution is to mean anything, the State's argument must be rejected.

B. The Constitution Does Not Permit Judicial Appointments to Circuit or Chancery Courts Beyond the Circumstances in Section 165, Even Temporarily.

In direct contradiction to their argument in the chancery court, the State now concedes that Section 165 of the Constitution does not permit the appointments authorized by H.B. 1020 and Section 9-1-105(2). Notwithstanding the clear requirements of Section 153 and contrary to established principles of statutory and constitutional interpretation, the State now argues that there is no constitutional restriction on the appointment of judges to the circuit courts in circumstances beyond the scope of Section 165 (so long as those judges are not appointed to a term of four years).

In the court below, the State argued that Section 165 authorizes the appointment of temporary circuit judges when an elected circuit judge is faced with an overcrowded docket, urging

that this constitutes a "reason" why the elected circuit judge is "unable" to preside over their entire docket within the meaning of Section 165:

> [Section] 165 provides that an inability—"for any reason"—of existing judges to preside over cases shall constitute a sufficient reason for appointing temporary special circuit judges. *See* Miss. Const. art. VI, § 165. Consistent with this provision, MISS. Code Ann. § 9-1-105(2) limits the appointment of temporary special circuit judges to circumstances in which elected permanent circuit court judges face "an emergency or overcrowded docket," § 9-1-105(2), *and are thereby unable*—as a practical matter—to preside over their entire docket. Similarly, it cannot be denied that a major purpose underlying the enactment of H.B. 1020 was to assist in alleviating overcrowded and backlogged criminal court dockets (emphasis added)[.]

R. 224–25. Apparently realizing the weakness of this argument, the State has abandoned it in this Court. The State now concedes that Section 165 cannot justify appointments to address "emergencies or overcrowded dockets" which "may call for additional judges." State's Br. 26. Instead of relying on Section 165, the State now argues that the legislature can authorize judicial appointments for other reasons—indeed, for any reason or no reason at all.

The State premises that sweeping argument on the notion that "nowhere does section 165 say that someone may be appointed to exercise circuit-judge power *only* in the circumstances set out in section 165." State's Br. 26 (emphasis in original). That argument fails because, as explained in Appellants' opening brief, Section 165 is an exception to a general requirement that circuit court judges be elected. That requirement, contained in Section 153, is what denies the legislature the power to create appointive judicial positions on the circuit courts. Essentially, the State's argument comes down to an assertion that unless the Constitution expressly forbids the legislature from violating its strictures, they can be ignored with impunity.

Moreover, if Section 153's plain text were not enough on its own to make clear that circuit court judges must be elected, Section 165, by creating a single exception to the election requirement, allowing appointments for the "disability or disqualification" of a sitting judge,

excludes any other exception to the election requirement. *See, e.g., Harper v. Banks, Finley, White & Co. of Miss. P.C.*,167 So. 3d 1155, 1162 (Miss. 2015) ("[W]here a statute enumerates and specifies the subject or things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned or under a general clause"). There is no room in the Constitution for judicial appointments to the circuit courts outside of the narrow circumstances contemplated by Section 165.[3]

The State attempts to diminish the impact of Section 165 with the argument that it was included in the Constitution to address the "delicate situation" of an elected judge being disqualified or disabled from serving. The State fails to explain how authorizing appointments in *one* "delicate situation" somehow authorizes appointments in any other situation the legislature may deem appropriate. If the concern was that the legislature might fail to authorize appointments in this "delicate situation," the drafters of the Constitution could have both authorized appointments by the Governor in this one delicate circumstance *and* expressly conferred a general power on the legislature to create exceptions to Section 153's judicial election requirement in other circumstances if that is what they had intended. They did not. Instead, the drafters created a general requirement that circuit court judges be elected in Section 153, and they created a single exception in Section 165. Given the State's concession that Section 165 does not apply here, the appointments authorized by H.B. 1020 and Section 9-1-105(2) violate the Constitution.

The State makes two final arguments in defense of their position. First, the State repeatedly cites a federal district court case with no relevance or precedential value here. In *Prewitt v. Moore*,

[3] Appellees attempt to evade this result by falling back on the Court of Appeals' dicta in *McDonald v. McDonald*, 850 So. 2d 1182 (Miss. Ct. App. 2002), *aff'd*, 876 So. 2d 296 (Miss. 2004)), which mused that Section 165 of the Constitution might not be "the exclusive mechanism for selection of special judges[,]" As already explained in Appellants' principal brief, however, this dicta was unsupported by any analysis, and has no precedential value in this Court. Appellants Br. 16.

the district court addressed whether judicial appointments by the Chief Justice were subject to preclearance under Section 5 of the federal Voting Rights Act of 1965, and it concluded they were not. 840 F. Supp. 428 (N.D. Miss. 1993); *see also* 840 F. Supp. 436 (N.D. Miss. 1993) (dismissing suit challenging Section 9-1-105 appointments under Section 2 of the Voting Rights Act). The federal court in *Prewitt* did not in any way consider—and its opinion would not be authoritative if it had—whether appointments under Section 9-1-105(2) or H.B. 1020 violate the Mississippi Constitution. The *Prewitt* court's conclusion that Section 9-1-105 does not create "additional permanent judgeships" implicating federal voting rights is irrelevant to the issue before this Court. In this case, the question is not whether the judgeships created by Section 9-1-105(2) are temporary or permanent; it is whether the legislature was authorized by the Mississippi Constitution to create *any* unelected judgeships, regardless of their tenure. *Prewitt* offers no insight into that question.

Finally, the State argues that there can be no time limit on judicial appointments (again, so long as they are not four years), because "plaintiffs offer no rule by which this Court could soundly say that a temporary appointment extends too long." State's Br. 29. They then contend that "any rule would be arbitrary and without constitutional basis." *Id*. Both contentions are false. Appellants offer a clear, judicially manageable, and constitutionally based bright-line rule: temporary appointments to the circuit court are simply not allowed except pursuant to Section 165. Outside of appointments authorized by Section 165, the length of time that an appointed judge serves is irrelevant to the constitutional violation.

There is no constitutional basis for the judicial appointments authorized by H.B. 1020 and Section 9-1-105(2). Indeed, they are forbidden by the plain text of Sections 153 and 165 of the Constitution. Thus, those statutory provisions must be declared unconstitutional and any future appointments under them enjoined.

II. THE CCID COURT IS UNCONSTITUTIONAL

A. The CCID Court Is Not a Municipal Court.

The State argues—for the first time—that the CCID court is not unconstitutional because "[t]he CCID court is a municipal court" and "[t]here is a right to appeal from the decisions of municipal courts." State's Br. 32–33. But once again, the State ignores the language of the statute. If the legislature intended to create a municipal court, it would have said so. It did not. H.B. 1020 nowhere refers to the CCID court as a municipal court. On the contrary, by its terms, Section 4 of H.B. 1020 creates a new "inferior court"—not a municipal court. And it confers on it only some—and not all—of the jurisdiction exercised by municipal courts.

The State points to the ways in which the CCID court *resembles* a municipal court. Specifically, they cite its partially overlapping jurisdiction and the qualifications and compensation of its judges. State's Br. 32–33. But *resembling* a municipal court is not the same as *being* a municipal court as a matter of law. Indeed, the CCID court is different from a municipal court in critical respects. Most obviously, the CCID is not a municipality. *See*, *e.g.*, Miss. Code Ann. § 21-3-1 (requiring municipalities to be chartered). The chapter of the code creating municipal courts falls within Title 21, which concerns municipalities, *see* Miss. Code Ann. tit. 21, and provides that there shall be *one* municipal court in each municipality. Miss. Code Ann. § 21-23-1. And there is already a municipal court in Jackson. In addition, the CCID court exercises only a subset of the jurisdiction assigned to municipal courts. For example, municipal courts are empowered to hear "all cases charging violations of the municipal ordinances" without limitation. Miss. Code Ann. § 21-23-7(1). By contrast, the CCID court can hear "cases charging . . . violations of the City of Jackson's traffic ordinance or ordinances related to the disturbance of the public peace," but not other municipal ordinances. H.B. 1020 § 4. Finally, municipal court judges are appointed by the

governing authorities of the municipality, Miss. Code Ann. § 21-23-3, while the CCID court judge is appointed by the Chief Justice. H.B. 1020 § 4(2).

Moreover, if H.B. 1020 had established the CCID court as a municipal court, as the State contends, there would have been no need to enumerate its powers. It would have simply had the powers of a municipal court by definition. By contrast, H.B. 1020 expressly—and, if the State were correct, superfluously—conferred just *some* municipal court jurisdiction on the CCID court and deliberately struck out any municipal court path of appeal. The statute's failure to expressly create a right of appeal reveals a legislative intent that there be none. The CCID court therefore is not a municipal court.

While it is clear from the terms of H.B. 1020 that the CCID court is not a municipal court, all parties appear to agree that there must be a right of appeal from the CCID court for it to be valid under Section 172 of the Constitution. If this Court is inclined to uphold the CCID court, it must clarify that the right of appeal applicable to municipal courts is available to litigants in the CCID court. In the absence of that clarity, the decisions of the CCID court and the rights of litigants will be under a cloud of constitutional uncertainty.

B. Writs of Certiorari to the Circuit Court Under Miss. Code Ann. § 11-51-95 Are Insufficient.

The State further argues that even if the appellate mechanism applicable to municipal courts is not available, as a last resort, an aggrieved litigant could petition the Hinds County Circuit Court for a writ of certiorari. According to the State, writs of certiorari are available pursuant to Miss. Code Ann. § 11-51-95 and are sufficient to render the CCID court inferior to the Hinds County Circuit Court. State's Br. 33–34. Under Section 11-51-95, however, "only a pure question of law is reviewable on certiorari." *Lott v. City of Bay Springs*, 960 So. 2d 525, 527 (Miss. Ct. App. 2006). Because Section 11-51-95 would not permit plenary review of CCID court decisions, it

does not provide a sufficient mechanism for the circuit court to exercise supervisory authority over the CCID court. For example, the circuit court would have no authority to review evidentiary rulings or to correct abuses of discretion that did not turn on pure questions of law. Thus, the review available under Section 11-51-95, if it even applies to the CCID court, does not satisfy Section 172 and does not render the CCID court constitutional.

III. CHIEF JUSTICE RANDOLPH IS A PROPER PARTY AND IS NOT IMMUNE.

A. The Inclusion of Chief Justice Randolph as an Appellee Is the Plain Result of His Role in Effectuating the Challenged Statutes.

Appellants do not argue that Chief Justice Randolph is responsible for the constitutional infirmities of H.B. 1020 or Section 9-1-105(2) or that he misused the power granted to him by the legislature. Instead, the Chief Justice is a party *only* because the legislature designated him as the official responsible for appointing judges under H.B. 1020 and Section 9-1-105(2). The fact that the Chief Justice is a named party *is* unusual. But that is because this legislature took the unusual step of running afoul of the plain text of the Mississippi Constitution. Here, the Chief Justice is the official tasked with carrying out the judicial appointments at the heart of this constitutional challenge. So it is proper that he would be included among the named parties on the same terms as all other officials with a role in effectuating the challenged statutes. Had unconstitutional appointment authority been vested in someone else instead, such as the Governor, *that* official would have been named in this lawsuit. It is proper—indeed it is routine—for a court to grant declaratory and injunctive relief against officials tasked with implementing challenged laws. *See*, *e.g.*, *Parents for Public Schools v. Miss. Dep't of Finance & Admin. et al*., 2022 WL 10965489 (Miss. Ch., Oct. 13, 2022) (Trial Order) (granting preliminary injunction in suit where plaintiffs name state treasurer and state fiscal officer in their official capacity); *Clark v. Bryant et al.*, 2017

WL 11536904 (Miss. Ch., Jun. 2, 2017) (Trial Order) (rejecting on the merits claim challenging state statute in suit brought against the Governor).[4] This case should be treated no differently.

Granting relief in this case would not be "intrusive" or have a "far reaching and devastating impact on the dispensation of justice across our State." Randolph Br. 9. Again, the circumstances of this case are exceptional, but the relief Appellants seek is not. Issuing declaratory or injunctive relief to prevent future appointments under H.B. 1020 and Section 9-1-105(2) would have no expansive implications for the "dispensation of justice" in Mississippi (a claim for which the Chief Justice offers no support). Indeed, a declaration that the challenged laws are unconstitutional would simply put this matter to bed. If anything, declaring the challenged laws unconstitutional would encourage the legislature to enact a different (and legal) policy to provide resources for courts that might need them.

B. Judicial Immunity Does Not Apply to Appellants' Request for Injunctive and Declaratory Relief.

The purpose of judicial immunity is to ensure that judges "have the power to make decisions without having to worry about being held liable for [their] actions." Randolph Br. 10 (*citing Weill v. Bailey*, 227 So. 3d 931, 935 (Miss. 2017) and *Loyacono v. Ellis*, 571 So. 2d 237, 238 (Miss. 1990)). This threat of liability concerns money damages against judges for their past acts. Prospective injunctive or declaratory relief in cases involving judges does not give rise to the

[4] The Supreme Court's very recent decision in *Haaland v. Brackeen* illustrates the perils that plaintiffs face if they do not sue the precise state officials who are responsible for implementing the law they are seeking to enjoin. ___S.Ct. ___, Slip Op., No. 21-376 (decided June 15, 2023). In *Haaland,* plaintiffs were found to lack standing to challenge the constitutionality of certain provisions of the Indian Child Welfare Act (ICWA) precisely because they had failed to name as defendants the state officials directly responsible for implementing its provisions. The Court denied the injunctive relief plaintiffs sought, observing that "[t]he state officials who implement ICWA are 'not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.'" *Id.*, Slip.Op. at 30-31 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 569 (1992) (plurality opinion)). Naming the state officials who implement H.B. 1020 and Section 9-1-105(2) is also consistent with principles long ago expounded in *Ex parte Young,* 209 U.S. 123 (1908), which allows suits against state officials who administer an allegedly unconstitutional statute, even when the state itself would enjoy sovereign immunity if sued directly.

same concerns. *See, e.g., Pulliam v. Allen*, 466 U.S. 522, 537-38 (1984). A finding that the legislature violated the Constitution when it enacted H.B. 1020 and Section 9-1-105(2) would not impose any "liability" on the Chief Justice in his personal capacity. The Chief Justice would pay no price for being prohibited from making unconstitutional appointments. No party believes that an injunction would bias the Chief Justice's judgment or restrain him from acting upon his convictions in cases that arise in the future. Stated simply, judicial immunity does not apply in a case like this one where Appellants seek only prospective equitable relief. Moreover, it does not apply to this case because appointments under the challenged laws are not the sort of adjudicative acts that are protected by judicial immunity.

The Chief Justice relies on *Pryer v. Gardner* for the proposition that judicial immunity applies here, but that reliance is misplaced. 247 So. 3d 1245 (Miss. 2016). First, *Pryer* involved a *pro se* litigant's claim for monetary penalties against a judge arising from a challenge to a past judicial ruling. Indeed, a suit for money damages is the quintessential case where immunity *should* apply. That is not this case. Second, *Pryer* noted that the Chief Justice has "jurisdiction" over judicial appointments, and so the appointments were judicial acts. But even there, the Court did not hold that judicial immunity applies in *all* cases where a judge has authority over an action. Rather, the case stands for the oft-repeated proposition that a judge acting with jurisdiction over the challenged matter enjoys immunity from suits for *damages* allegedly arising from the judge's actions or decisions in that matter. *Id.* at 1250–52. *Pryer* makes no mention of situations such as this one where only prospective, non-monetary relief is sought.[5]

[5] Chief Justice Randolph cites *Jackson v. Mullins,* 341 So. 2d 1041, 1047 (Miss. Ct. App. 2022) for the sweeping proposition that, "If a judge had jurisdiction over the subject matter before him at the time he took action, he will be judicially immune." *See* Randolph Br. 16. The *Jackson* case cites *Pryer*, discussed above, and *Pryer* provides no support for the proposition that the mere existence of jurisdiction over a matter entitles a judge to immunity regardless of the relief sought.

1. The Chief Justice Misapprehends Appellants' Reliance on Federal Law. He Can Point to No Support Finding Immunity in Cases for Prospective Relief.

The Chief Justice confuses the role of federal law in this case. To be clear, the Chief Justice points to no cases under Mississippi law holding that judicial immunity applies to actions for prospective injunctive relief. The reason there are no Mississippi cases supporting the Chief Justice's position is that the purpose of judicial immunity is not served when it comes to actions for prospective injunctive relief. That basic fact is reflected in over a century of federal common law from which Mississippi law on judicial immunity developed. *See Loyacono v. Ellis,* 571 So.2d 237, 238 (Miss.1990) (citing *Bradley v. Fisher,* 80 U.S. (13 Wall) 335, 347 (1872)) (recognizing federal principles of judicial immunity). The leading case on that matter is *Pulliam v. Allen*, which explains why judicial immunity should not apply here. 466 U.S. 522 (1984). *Pulliam* provides a thoughtful analysis of the policy reasons behind judicial immunity (primarily to maintain judicial independence) and the reasons why judges historically have not been immune from cases seeking declaratory and prospective injunctive relief (judges pay no personal price when such relief is granted).

The Chief Justice attempts to undermine these established principles by pointing out that, following *Pulliam*, Congress amended 42 U.S.C. § 1983 to expand judicial immunity in suits seeking prospective relief for civil rights violations under that statute. His reliance on that history is misplaced. In amending Section 1983, Congress extended judicial immunity to (some) suits for injunctive relief, abrogating the longstanding federal common law rule in cases brought under that statute.[6] Based on that amendment, the Chief Justice engages in a lengthy but irrelevant argument that this case does not meet the federal Section 1983 standard for subjecting him to injunctive

[6] Under the amended statute, "injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

relief. Randolph Br. 12–14 (citing *Roth v. King*, 449 F. 3d 1272, 1281–83 (DC Cir. 2006) (applying the new text of Section 1983); *Moore v. Urquhart*, 899 F. 3d 1094, 1104 (9th Cir. 2018) (same); and *Thompson v. City of Millbrook, Ala.*, No. 2:22-cv-143-WHA-CWB (M.D. Ala. Aug. 2, 2022) (same)). The Chief Justice then asserts, without any citation to Mississippi law, that "the principles underlying this federal doctrine are no less true in this case." Randolph Br. 12. But the availability of immunity in suits for injunctive relief under a single federal statute is irrelevant for two reasons.

First, in expanding judicial immunity under Section 1983, Congress did not abrogate judicial immunity under federal common law or call into question the principles expounded in *Pulliam* beyond this single statutory context. *E.g.*, *Moore v. Urquhart*, 899 F.3d 1094, 1104 (9th Cir. 2018) (holding that in amending Section 1983, "Congress did not intend these limitations to apply" outside the context of suits against judicial officers under Section 1983). The common law principle of denying immunity in suits for prospective relief, including injunctive relief, still applies under both federal law (except in cases under Section 1983) and Mississippi law.

Second, even if this Court decided to incorporate immunity principles from Congress's amendment of Section 1983 into Mississippi common law—which it need not and should not do—it still would not immunize the Chief Justice from Appellants' claim for *declaratory* relief. *E.g.*, *Argen v. Att'y Gen. New Jersey*, No. 21-2571, 2022 WL 3369109, at *4 (3d Cir. Aug. 16, 2022) ("Congress in responding to *Pulliam* did not eliminate or otherwise limit the availability of declaratory relief against state judges under Section 1983"). Indeed, the premise of the amendment is that in a suit against a judicial officer, a plaintiff must first seek a declaratory judgment, and only if the officer violates that judgment may the court award injunctive relief. *See* 42 U.S.C. § 1983. In other words, Section 1983, as amended, does not immunize a judicial officer from suit. It limits the types of relief available in federal civil rights litigation against a state judicial officer.

The relevance of *Pulliam* and its reasoning has not been diminished. Nor can the Chief Justice point to any action by the Mississippi legislature to expand judicial immunity beyond its centuries-old application. Until the Mississippi legislature says otherwise, immunity must be denied in this case. The Chief Justice's insistence that he is immune from suit and that no injunction can be issued against him because Congress amended Section 1983 is incorrect.

2. The Appointment of Judges Under H.B. 1020 and Section 9-1-105(2) Is Not an Adjudicative Act.

Judicial immunity applies only in cases involving adjudicative acts. Chief Justice Randolph relies on the Mississippi Court of Appeals decision in *Vinson v. Prather* for the proposition that the appointment of judges is an adjudicative act. 879 So. 2d 1053 (Miss. Ct. App. 2004). As explained in Appellants opening brief, *Vinson* is not binding on this Court and is owed no deference. *See* Appellants' Br. 45–46. In fact, *Vinson* failed to undertake the required multi-prong analysis (or any analysis at all) to determine which acts are adjudicative rather than executive or administrative. The Chief Justice also points to the recent order issued by a federal district court, which itself relied on *Vinson,* to support his argument that appointments are judicial acts. Randolph Br. 13. But again, this Court is not bound by the federal court's rulings that rely on Mississippi Court of Appeals' rulings on Mississippi law.

In addressing the four-factor test for determining "judicial acts" described in *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 222 (5th Cir. 2009) and discussed at length in Appellants' brief, *see* Appellants' Br. 41–46, the Chief Justice does not address the unique circumstances here.[7]

[7] According to the Chief Justice, "[t]he definition of judicial acts in Mississippi is . . . straight-forward, 'If a judge had jurisdiction over the subject matter before him at the time he took the action, he will be judicially immune.'" Randolph Br. 15–16 (quoting *Jackson v. Mullins*, 341 So. 3d 1041, 1047 (Miss. Ct. App. 2022)). Thus, it follows that "[t]he Chief is immune because he acted within his jurisdiction in appointing judges under § 9-1-105." *Id*. But the Court of Appeals' non-binding definition of judicial acts would render any act "judicial" simply because the legislature authorized a judge to do it. This cannot be correct. None of the purposes of judicial immunity would be served, for example, by concluding that a judge is immune from a

Consider the first factor (whether the action is a normal judicial function). In Mississippi, judicial elections to constitutional courts are the norm. Appointments are the exception. In an attempt to refute that basic point, the Chief Justice cites a string of inapposite cases providing examples of appointments made by judges presiding in existing cases, unlike those here. *See* Randolph Br. 20–21. These cases simply do not support the Chief Justice's argument that the appointments at issue here are adjudicative rather than executive or administrative. Indeed, the appointments like those in H.B. 1020 and Section 9-1-105(2) are anything but "business as usual."

The Chief Justice insists that "[t]he appointments challenged in this matter are clearly distinct from the authority [Appellants] rely upon." Randolph Br. 23. But the Chief Justice does not—and *cannot*—make the case that appointment of judges involves the "touchstone" judicial "function[s] [of] resolving disputes between parties, or . . . authoritatively adjudicating private rights.'" *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 435, 436 (1993). He makes no attempt to explain how a judge who appoints another judge can "'meaningfully be distinguished' from an 'Executive Branch officer who is responsible for making' judicial appointments.'" Appellants' Br. 42 (paraphrasing *Forrester v. White*, 484 U.S. 219, 229 (1998)). Nor does he make any attempt to argue that the appointment of judges has "historically been reposed exclusively in the courts." *Sparks v. Character & Fitness Comm. of Ky.*, 859 F.2d 428, 434 (Ky. 1988). Nor could he. Indeed, notably absent from the Chief Justice's brief—and from the Fifth Circuit's unpublished decision in *Kemp* upon which he relies—is *any* meaningful support for the conclusion that the appointment of judges is a "normal judicial function." *Davis*, 565 F.3d at 222.

lawsuit alleging that he engaged in race discrimination while hiring staff simply because the legislature gave him "jurisdiction" by authorizing him to hire staff. *See also* Randolph Br. 22 (conceding that "[t]here is no debate that internal employment decisions have been deemed 'administrative' where judicial immunity was inapplicable").

The Chief Justice provides little argument on the remaining three *Davis* factors, which, as explained in Appellants' principal brief, all point to the appointments constituting executive or administrative acts. On factors two and four, the Chief Justice provides no support for the notion that the challenged appointments need to be made from a courtroom or judicial chambers, nor that the appointments must result from a visit to the judge acting in his official capacity. On factor three—inquiring into whether the appointments are made in pending cases—the Chief Justice makes no argument concerning H.B. 1020 appointments at all. As for Section 9-1-105(2) appointments, he notes that the September 2022 appointments assigned a specific list of cases to each of the four appointed judges. But the Chief Justice never suggests that *all* such appointments are limited in this way, and there is nothing in Section 9-1-105(2) that requires such a limitation on the scope of work for appointed judges. Regardless, it is abundantly clear that none of the appointments contemplated under the challenged laws are made in a context of "*a case pending before the [Chief Justice].*" *Davis*, 565 F.3d at 222 (emphasis added).

C. The Absence of Adverseness Does Not Justify Dismissal of the Chief Justice.

The absence of a "case or controversy" as described in the cases cited by the Chief Justice is not a proper basis for dismissal in Mississippi state courts. "The constraints of Article III [of the United States Constitution] do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution . . . or a federal statute." *ASARCO Inc. v. Kadish,* 490 U.S. 605, 617 (1989). "The Mississippi Constitution has no case or controversy clause." *Harrison County v. City of Gulfport*, 557 So. 2d 780, 782 n.1 (Miss. 1909), *rev'd in part on other grounds by Reeves v. Gunn*, 307 So. 3d 436 (Miss. 2020); *see also Reeves v. Gunn*, 307 So. 3d 436 (Miss. 2020) (Maxwell, J., concurring in part and

in result) ("Unlike the United States Constitution, Mississippi's Constitution does not limit judicial review to cases or controversies.") (citations omitted).

As required by statute, the Mississippi Attorney General has intervened and vigorously defended the constitutionality of H.B. 1020 and Section 9-1-105(2). The fact that Appellants are not in an adversarial posture with the Chief Justice regarding the challenged laws and the questionable notion that he has taken no position on the merits, *see* Appellants' Mot. for Recusal 7-9 (describing the statements the Chief Justice has made on the merits of this controversy both in the litigation and in extrajudicial contexts), do not make him an improper party. While the Chief Justice continues to emphasize his neutrality in this case, that does not diminish his centrality in the implementation of the challenged laws. He is the party tasked with making appointments under H.B. 1020 and Section 9-1-105(2), and he is the party who has made similar appointments in the past. Indeed, in opposing Appellants' Motion to Amend in the Chancery Court, the State agreed that the only state officials with authority to "enforce or implement the challenged provisions" are the Chief Justice and the Director of the AOC. R. 423, 425.

IV. HINDS COUNTY CIRCUIT CLERK ZACK WALLACE IS A PROPER APPELLEE AND APPEALING HIS DISMISSAL WAS NOT FRIVOLOUS.

Suits challenging state statutes routinely name all officials responsible for carrying out the challenged law. As explained above, unlike federal law, Mississippi law does not require the presence of a "case or controversy" for a plaintiff to have standing to sue a defendant. Rather, "[p]arties may sue [a defendant] . . . where they . . . experience an adverse effect from the conduct of the defendant." *Harrison County*, 557 So. 2d at 782. Here, there is no dispute that Appellee Wallace's duty to assign cases to judges appointed pursuant to H.B. 1020 and Section 9-1-105(2)

causes the adverse effects alleged by Appellants,[8] and that an order enjoining Appellee Wallace from performing this duty would afford Appellants the relief they seek.[9]

Appellants seek to stop unconstitutional judicial appointments under H.B. 1020 and Section 9-1-105(2). With that goal in mind, Appellants named the official responsible for making the appointment (Chief Justice Randolph), the official responsible for assigning cases to appointed Hinds County Circuit Judges (Clerk Wallace), and the official responsible for paying appointed Hinds County Circuit Judges and CCID court employees (Director Snowden). An injunction issued against each of these officials would effectively achieve Appellants' desired outcome.

Mr. Wallace's contention that Appellants' appeal of his dismissal is frivolous fails to meet the high bar to establish frivolity. "An appeal is frivolous when the appellant has no hope of success." *Matter of Est. of Cole*, 256 So. 3d 1156, 1160 (Miss. 2018); *Wheelan v. City of Gautier*, 332 So. 3d 863, 888 (Miss. Ct. App. 2022) (finding appeal was not frivolous even though "appellant does not appear to have much hope of success" and requiring "absolutely no hope" before granting fees) (citations omitted). That is a very high bar.

As explained above, there is no doubt that Appellee Wallace plays a critical role in effectuating the challenged laws due to his role of assigning cases to appointed judges. Faced with a ruling by the chancery court that Chief Justice Randolph is entitled to judicial immunity and the possibility that suing the State of Mississippi alone is insufficient for purposes of obtaining comprehensive relief, Appellants risked having no party against whom an injunction could run.

[8] The court below incorrectly concluded that Appellee Wallace could not afford the Plaintiffs' requested relief "as a matter of law" because he is only "required by law to perform the ministerial acts" of assigning cases to appointed judges. How one categorizes Appellee Wallace's duties is irrelevant. Whether his acts are "ministerial" or not, his assignment of cases to judges appointed pursuant to H.B. 1020 or Section 9-1-105(2) produces the "adverse effects" alleged by Appellants.

[9] The lower court's conclusion that Appellee Wallace should be dismissed because he does not have a "personal stake" in the outcome of the case relied solely on federal cases articulating the "case or controversy" standard for Article III standing. As such, the lower court's conclusion was in error.

That is why Appellants appealed the dismissal of all parties—and did so on equal terms. The failure to appeal Mr. Wallace's dismissal would have been reckless and imprudent. There is no merit to Mr. Wallace's claim that Appellants' efforts to preserve access to their desired remedy is frivolous.

* * *

The Chief Justice and Mr. Wallace are not the alleged wrongdoers here, but they are central figures in the implementation and execution of the challenged laws. There is no legal basis for dismissing them. Should this Court reverse the Chancery Court, order them to be reinstated as parties, and grant the relief requested by Appellants, the Chief Justice and Mr. Wallace will not be required to undertake any additional actions as a result of being parties to this litigation.

Nevertheless, if this Court affirmatively holds that complete relief for the constitutional violations Appellants allege is available from the State of Mississippi, it need not reach the question of whether the Chief Justice or Mr. Wallace are proper parties or whether the Chief Justice is entitled to judicial immunity in the circumstances of this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the chancery court dismissing Appellants' claims against the State of Mississippi, reverse the dismissal of Chief Justice Randolph and Circuit Clerk Wallace from the case, and remand to the chancery court for the entry of an injunction prohibiting the appointment of judges to the Hinds County Circuit Court under H.B. 1020 and Section 9-1-105(2) of the Mississippi Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing Appellants' Reply Brief with the Clerk of the Court using the MEC system, which sent notification of such filing to all counsel of record.

I further certify that on this day I deposited a copy of the foregoing pleading with the United States Postal Service, postage prepaid, for delivery to the following:

Hon. Dewayne Thomas
Chancery Court Judge
P.O. Box 686
Jackson, MS 39205-0686

This 19th day of June, 2023.

/s/ Cliff Johnson
CLIFF JOHNSON