IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-EC-01682 SCTE

BILLY G. RAYNER, et al. APPELLANTS

V.

HALEY BARBOUR, et al. APPELLEES/CROSS-APPELLANTS

BRIEF OF APPELLEES/CROSS-APPELLANTS GOVERNOR HALEY BARBOUR, ATTORNEY GENERAL JIM HOOD, and SECRETARY OF STATE DELBERT HOSEMANN

On Appeal from the Circuit Court of the First Judicial District of Hinds County, the Honorable Henry L. Lackey, Special Judge

ORAL ARGUMENT NOT REQUESTED

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II. When the Governor, Secretary of State, and Attorney General, individually as executive branch officials and collectively as the State Board of Election Commissioners, have rendered a permissible interpretation of state election law embodied in Code Sections 23-15-1015, 23-15-365, 9-1-103, and 23-15-849, may a court overturn that interpretation?

III. Assuming that some percentage of voters are unfamiliar with the write-in candidates or are unfamiliar with the process to cast a write-in vote, does that allegation, made pre-election, amount to a violation of any statutory or constitutional right sufficient to enjoin a regularly scheduled, quadrennial election?

Statement of the Case

I. The Unexpired 2007-2010 Term in Office.

Pursuant to state law, circuit court judges are elected to four-year terms that begin on January 1. *See* Miss. Const. art 6, § 153; Miss. Code Ann. §§ 23-15-1015, 9-7-1. The late Robert G. Evans was elected in November 2006 to a four-year term as the Circuit Court Judge for the Thirteenth Circuit Court District. Judge Evans' term began on January 1, 2007, and will end on December 31, 2010. *See* Miss. Code Ann. § 9-7-1 ("The terms of all circuit judges hereafter elected shall begin on the first day of January 1931 and their terms of office shall continue for four (4) years."). For ease of reference, this will be referred to as the "2007-2010 Term."

On July 13, 2010, Judge Evans died. The Governor declared a vacancy in the Thirteenth District and appointed an interim judge to fill the remaining five months of the 2007-2010 Term, *i.e.*, the "unexpired term" of Judge Evans. *See* Barbour Letter[1], Record Except ("R. E.") 2. Because there were only five months remaining in the 2007-2010 Term, there will be no election to fill the position of circuit court judge for the unexpired 2007-2010 Term. Instead, the Governor's appointee will "serve for the unexpired term" pursuant to Code Section 9-1-103.[2]

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[1] The letter is attached as Exhibit C to the State Defendants' opposition to the motion for preliminary injunction. It is also a public record of which the Court may take judicial notice. Plaintiffs do not dispute this fact, the amended complaint states that "the Honorable Eddie H. Bowen has been appointed by the defendant, Haley Barbour, to serve out the unexpired term of Judge Evans." *See* Amended Complaint at ¶ IV.

[2] Miss. Code Ann. § 9-1-103 ("Whenever a vacancy shall occur in any judicial office by reason of death of an incumbent, resignation or retirement of an incumbent, removal of an incumbent from office, or creation of a new judicial office in which there has not heretofore been an incumbent, **the Governor shall have the authority to appoint a qualified person to fill such vacancy to serve for the unexpired term** or until such vacancy is filled by election as provided in Section 23-15-849, Mississippi Code of 1972. When a vacancy shall occur for any of

II. The November 2, 2010, Election to Select a Circuit Court Judge for the New 2011-2014 Term.

The Mississippi Constitution grants the legislature the exclusive authority to determine the manner and timing of judicial elections. *See* Miss. Const. art. 6, § 153. On November 2, 2010, elections will be held across the state to select circuit court judges for a new four-year term beginning on January 1, 2011, and ending December 31, 2014. *See* Miss. Code Ann. § 9-7-1. Pursuant to Code Section 23-15-1015, this regularly scheduled election for "circuit and chancery court districts" **shall** occur on the "Tuesday after the first Monday in November 1986, and every four (4) years thereafter," *i.e.*, November 2, 2010. This will be referred to as the "2011-2014 Term."[3] The deadline for persons to qualify as a candidate for circuit court judge was May 7, 2010. *See* Miss. Code Ann. § 23-15-997. The only person to qualify as a candidate for circuit court judge in the Thirteenth District was Judge Evans.

Judge Evans' death on July 13, 2010, triggered the application of Code Section 23-15-365 authorizing voters to cast their votes for a write-in candidate.

> There shall be left on each ballot one (1) blank space under the title of each office to be voted for, and in the event of the death, resignation, withdrawal or removal

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the reasons enumerated in this section, the clerk of the court shall notify the Governor of such vacancy immediately.") (Emphasis supplied). Plaintiffs have not contested, nor could they contest, the Governor's authority to appoint an interim judge to serve the remaining five months of the unexpired 2007-2011 Term. Nor do Plaintiffs contend that a special election must be held between July and December 2010 to elect a judge to fill a term that expires on December 31, 2010. Importantly, by using the conjunction "or", Section 9-1-103 recognizes that a special election under Section 23-15-849 need not occur if there is such little time remaining in the unexpired term that the appointee may legally "serve for the unexpired term."

[3] Miss. Code Ann. § 23-15-1015 ("On Tuesday after the first Monday in November 1986, and every four (4) years thereafter and concurrently with the election for representatives in Congress, there shall be held an election in every county for judges of the several circuit and chancery court districts.")

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> of any candidate whose name shall have been printed on the official ballot, the name of the candidate duly substituted in the place of such candidate may be written in such blank space by the voter.

Miss. Code Ann. § 23-15-365.[4] Accordingly, the State Defendants concluded that the Thirteenth District Circuit Court election on November 2, 2010, would proceed by virtue of the write-in candidate statute and that the ballot would provide a blank line for write-in candidates. Further, the State Defendants noted that the special election provisions of Code Section 23-15-849 do not apply to the November 2010 election. Specifically, Section 23-5-849(1) provides that "**[v]acancies** in the office of circuit judge or chancellor **shall be filled for the unexpired term** by the qualified electors at the next regular election for state officers or for representatives in Congress occurring more than nine (9) months after the existence of the vacancy to be filled." Miss. Code Ann. § 23-15-849(1) (emphasis supplied).[5] The election on November 2, 2010, is not an election to fill the "unexpired" 2007-2010 Term. Instead, the November 2010 election is the regularly scheduled, quadrennial election to select circuit court judges for the next four-year

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[4] As this Court recently confirmed, "the application of the 'write-in candidate' provisions are appropriate in the event of a death of a candidate who has qualified to run for a particular office." *Upton v. McKenzie*, 761 So.2d 167, 174 (Miss. 2000) (quoting with approval the opinion of the circuit court).

[5] Miss. Code Ann. § 23-15-849(1): "Vacancies in the office of circuit judge or chancellor shall be filled for the unexpired term by the qualified electors at the next regular election for state officers or for representatives in Congress occurring more than nine (9) months after the existence of the vacancy to be filled, and the term of office of the person elected to fill a vacancy shall commence on the first Monday in January following his election. Upon the occurring of such a vacancy, the Governor shall appoint a qualified person from the district in which the vacancy exists to hold the office and discharge the duties thereof until the vacancy shall be filled by election as provided in this subsection."

term beginning on January 1, 2011. Thus, Section 23-15-849 does not apply to, and does not cancel, this regularly scheduled quadrennial election.

III. The On-Going Campaigns and the Voting Process

While this suit is brought by three circuit clerks and one election commissioner, it is the five elected election commissioners per county who are responsible for actually "conducting" the general election. *See* Miss. Code Ann. §§ 23-15-491, 23-15-531.8, 23-15-601; Secretary of State County Election Handbook at 4, R.E. 3; Rayner Testimony at 29-30, R.E. 11. Nineteen out of the twenty election commissioners and the Circuit Clerk of Covington County serving the Thirteenth Circuit Court District have not joined or otherwise indicated support for an order halting the election.

Attorneys seeking to be elected as circuit court judge on November 2 have been campaigning since before this suit was filed. Rayner Testimony at 40, R.E. 11. As of this date, the known candidates include interim Circuit Court Judge Eddie Bowen, admitted to the Mississippi Bar in 1980; Assistant District Attorney Wilton McNair, admitted in 1984; Steve Thorton, admitted in 1989; Noel Rogers, admitted in 2002; and Chris Hennis, admitted in 2004. Rayner Testimony at R. 40, 50-52, R.E. 11; Election Materials, R. E. 10.[6]

The process by which write-in votes are cast is exceptionally simple and straightforward. As the Secretary of State succinctly explained the voting in its official and publicly distributed document entitled "Write-In Election for Circuit Judge, District 13 FAQ's":

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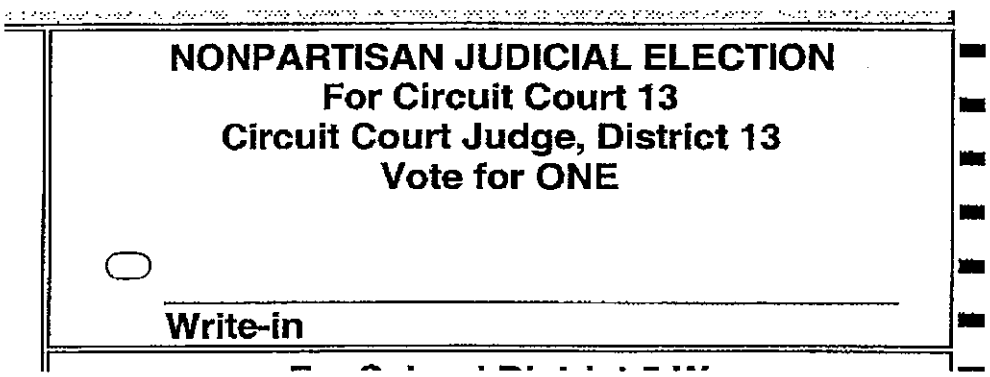
[6] The date of admission to the Mississippi Bar was supplied by reference to the Mississippi Bar's attorney directory. The candidacies of interim Circuit Court Judge Eddie Bowen and Assistant District Attorney Wilton McNair were brought to the attention of the undersigned after the close of evidence in this matter.

Q: How does the write-in provision work?

A: If you are voting either by Absentee or Affidavit Ballot, you will simply write in the name of the candidate of your choice on the line provided in the "Circuit Judge, District 13" section of your ballot. Please make sure to write as clearly as possible, so your votes can be read and counted. If you will be voting on Election Day using the TSX voting machine at your precinct, you will press the "Write-In" choice provided in the "Circuit Judge, District 13" section of the ballot on your touch screen. A key pad will appear on the screen, and you should type the name of the candidate of your choice. This name will then appear on the "Write-In" line for this race, and you can continue voting as normal.

R. E. 5. Indeed, this simple manner for casting write-in votes was known to plaintiffs and set forth in Paragraph V of the Amended Complaint and testified to by the Jasper Circuit Clerk. *See* Testimony at 33-34, 42, R.E. 11. With respect to casting a write-in vote on an absentee ballot, the absentee ballot itself, the relevant portion of which is below, is self-explanatory.



R.E. 7.[7] Further, write-in blank's on absentee ballots are common place. Code Section 23-15-365 requires a write-in blank appear in every race, on every ballot, in every election. *See* 2008 and 2010 Ballots, R.E. 7, 8, 9. As reflected on these ballots, in the event of a death, withdrawal, or resignation of a candidate state law mandates that write-in votes be permitted in votes for the federal offices of president, senator, representative. *See* R.E. 9. Write-in votes are also similarly permitted for all state, county, and local elected offices, including races for the office of governor, board of supervisors, supreme court justice, court of appeals judge, coroner, and school board. *See* R.E. 7, 8, 9; *Upton v. McKenzie*, 761 So.2d 167 (Miss. 2000) (affirming write-in candidacy for board of supervisors). Circuit Clerk Rayner testified that the printing of write-in lines on each ballot is followed every year in Jasper County. Testimony at 31, R.E. 11.

Finally, Circuit Clerk Rayner testified that the process of "prepar[ing] for a write-in election" is the "pretty much the same process" as preparing for any election. Testimony at 17. With respect to voters who may not vote in every race on a ballot, the Circuit Clerk also testified that in every election "[a] lot of people will skip a race because they don't like any of the candidates." Testimony at 27.

IV. The Role of the State Defendants Individually and Collectively as the State Board of Election Commissioners.

Plaintiffs have filed this action against Governor Haley Barbour, Secretary of State Delbert Hosemann, and Attorney General Jim Hood in their official capacities as elected state officials and collectively as the State Board of Election Commissioners. In their individual roles as elected state officials, the Governor is the State's chief executive officer charged with ensuring

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[7] The Jasper Circuit Clerk testified that Record Except G is a copy of the absentee ballot that voters in Jasper County receive. Testimony at 47-48.

the faithful execution of the law, the Secretary of State is the State's chief elections officer, and the Attorney General is the State's chief legal officer. *See, e.g.,* Miss. art. 5, §§ 116, 122; Miss. Code Ann. § 23-15-211.1; Miss. Code Ann. § 7-5-1. Collectively, the Governor, the Secretary of State, and the Attorney General comprise the "State Board of Election Commissioners." Miss. Code Ann. § 23-15-211(1)(a). As set forth below, the interpretation of state election law by the Governor, Secretary of State, and Attorney General, both individually and collectively as the State Board, is entitled to great deference.

In a meeting of the State Board of Election Commissioners on September 1, 2010, the State Defendants determined and agreed that the November 2, 2010, election for the 2011-2014 Term of the Thirteenth Circuit Court District would proceed by virtue of the write-in statute. *See* Amended Complaint at V. Further, the official sample ballot containing a space for write-in votes on the ballot for the Thirteenth Circuit Court District was approved at that same meeting. *See* Miss. Code Ann. § 23-15-367(3); Mississippi Encyclopedia of Law; New Topic Service, *Election Law*, § 10 (2003). While the State Defendants believe that the law could be improved, the State Defendants' have faithfully applied the law as it is written.

V. Course of Proceedings Below.

Plaintiffs filed their original complaint on September 23, 2010, in the Jasper County Circuit Court seeking injunctive and declaratory relief and a writ of mandamus. On September 27th, Plaintiffs filed an amended complaint deleting their federal law claims. During a later telephonic conference with the trial court, Plaintiffs further moved *ore tenus* to dismiss their claim for a writ of mandamus, which was granted by the trial court.

The Honorable Judge William Lackey was appointed by this Court to hear the matter after the interim Jasper County Circuit Court judge entered an order of recusal. The State

Defendants filed a motion to transfer the matter from Jasper County to Hinds County based on improper venue. Judge Lackey granted the State Defendants' motion and the cause was transferred to Hinds County. Subsequently, all of the Hinds County Circuit Court Judges issued orders of recusal and Judge Lackey was again appointed by this Court to hear the matter.

On October 13, 2010, Judge Lackey conducted a hearing on the matter. At this hearing, the court granted the motion to intervene of Billy R. Rogers, a Covington County registered voter, without objection from the plaintiffs or defendants. The Court then proceeded to hear testimony presented by the plaintiffs and oral argument from attorneys representing the plaintiffs, defendants, and intervenor. Having previously reviewed the briefs submitted by the parties in advance of the hearing, the Court issued a ruling from the bench denying the requested relief and dismissing the complaint. A final order was separately executed by Judge Lackey. *See* R.E. A.

Relevant to the State Defendants' cross-appeal, the lower court taxed the cost of the matter to the State Defendants. *See* R.E. A. The State Defendants have appealed the taxing of costs as there is no provision in state law requiring the State Defendants to pay the costs of this litigation.

Summary of the Argument

Plaintiffs request that this Court enjoin the November 2, 2010, election for the Thirteenth Circuit Court District at which voters will select a circuit court judge to a new four-year term of office from January 1, 2011, through December 31, 2014. Plaintiffs misread state election law because they wrongly believe that the November 2 election is an election to fill the vacancy in the current term of office left by the passing of Circuit Court Judge Robert Evans. In fact, the November 2 election is to select a judge to serve the new four-year term of office beginning January 1, 2011. It is Plaintiffs' confusion about the nature of the November 2010 election that, once exposed, shows their Complaint to be legally unfounded.

Everyone agrees that circuit court judges serve four-year terms of office beginning on January 1. The January 2007 through December 2010 term of office for all circuit court judges expires on December 31, 2010 (the "2007-2010 Term"). A new four-year term of office begins on January 1, 2011, and expires on December 31, 2014 (the "2011-2014 Term"). Everyone further agrees that there are two very different types of elections that may occur for circuit court judges.

- Pursuant to Code Section 23-15-1015, there is the "**regular**" election required by state law to occur in November of every fourth year at which voters elect a circuit court judge to serve a four-year term beginning the following January 1. It is this "regular" election that will occur on November 2, 2010, across the state, including in the Thirteenth Circuit Court District, to elect judges to serve the 2011-2014 Term beginning on January 1. Because Code Section 23-15-1015 mandates that this regular election occur on a specific date (the Tuesday after the first Monday in November every four years), there exists no legal authority to halt or enjoin this election from occurring.

- Pursuant to Code Sections 9-1-103 and 23-15-849(1), there may be a "**special**" election occurring during the four-year term to fill a vacancy for the remainder of an "unexpired term" if a judge dies during his four-year term of office. A "special" election only selects a replacement to serve the remaining "unexpired term" of office. For example, if a judge dies in the first year of his term, a special election would elect a judge to serve the "unexpired term" of the remaining three years. Judge Robert Evans died in July 2010,

> with just five months remaining in his 2007-2010 Term, which expires on December 31, 2010. There will be no special election under Code Section 23-15-849(1) to fill the remaining five-months of Evans' "unexpired" 2007-2010 Term. The five-month vacancy has been properly filled by gubernatorial appointment. To be clear, the election on November 2 is not a "special" election to fill the unexpired portion of the 2007-2010 Term. Instead, it is a "regular" election to elect a judge for the new 2011-2014 Term.

Can there ever be a conflict between Code Sections 23-15-1015 and 23-15-849(1)? No. Code Section 23-15-1015 governs regular elections conducted every four years to select judges for new four-year terms. Code Section 23-15-849(1) only governs special elections held during a four-year term when necessary to fill a vacancy for the remaining "unexpired term." Does Code Section 23-15-849(1) cancel the regular election on November 2 because Judge Evans died near the end of his four-year term? No. Code Section 23-15-1015 mandates that an election on November 2, 2010, take place to select a judge for the new 2011-2014 Term regardless of whether there was a vacancy in the 2007-2010 Term; the two Terms are unrelated.

Plaintiffs contend that Code Sections 9-1-103 and 23-15-849(1) actually cancel the November 2, 2010, regular election for circuit court judge in the Thirteenth District. Plaintiffs point out that Code Section 23-15-849(1) mandates that there be at least "nine months" between the "existence of" a vacancy in the office of circuit judge and an election to fill the "**unexpired term**" of office. Since Judge Evans died on July 13, 2010, there is less than nine months between his death and the November election, and Plaintiffs contend that the November 2010 regular election must be cancelled and rescheduled for November 2011. Plaintiffs' error is now uncovered:

- Plaintiffs believe the November 2, 2010, election is a "special" election to fill the "unexpired term" of Judge Evans 2007-2010 Term and is therefore governed by the Section 23-15-849(1)'s ninth-month-from-vacancy-to-election rule.

- In fact, the November 2 election is a "regular" election mandated by Section 23-15-1015 to select a judge for the upcoming 2011-2014 Term beginning on January 1.

It is true that Judge Evans' death created a vacancy for the "unexpired" last five months of his 2007-2010 Term (July 13 through December 31, 2010). However, the November 2, 2010, election is **not** to fill the "unexpired term" of Judge Evan's 2007-2010 Term which ends on December 31, 2010. Instead, the November 2, 2010, "regular" election mandated by Code Section 23-15-1015 will select a judge to sit for the new 2011-2014 Term beginning on January 1, 2011. Code Section 23-15-1015 and 23-15-849(1) never apply to the same election; they are never in conflict. The November 2 "regular" election is governed and mandated to occur by Section 23-15-1015; Section 23-15-849(1)'s ninth-month-from-vacancy-to-election rule does not apply because the election is not to fill a vacancy in an unexpired term.

In addition to Plaintiffs' confusion over the type of election occurring, the Complaint indirectly argues that the November 2 election for the 2011-2014 Term must be enjoined because the only qualified candidate in the race, Judge Evans, has died. However, because the death, removal, or withdrawal of a qualified candidate between the qualifying deadline and the election is not an unheard of occurrence, the Mississippi Legislature has made provisions for such an event. Code Section 23-15-365 provides that "[t]here shall be left on each ballot one (1) blank space under the title of each office to be voted for, and **in the event of the death**, resignation, withdrawal or removal of **any candidate** whose name shall have been printed on the official ballot." Miss. Code Ann. § 23-15-365 (emphasis supplied). As this Court recently confirmed, "the application of the 'write-in candidate' provisions are appropriate in the event of a death of a candidate who has qualified to run for a particular office." *Upton v. McKenzie*, 761 So.2d 167, 174 (Miss. 2000) (quoting with approval the opinion of the circuit court). Importantly, the *Upton* decision reiterated that Section 23-15-365 requires election officials to proceed with write-in candidates upon the "death of '**any** candidate.'" *Id.* at 175 (emphasis in original). Plaintiffs

cannot credibly argue that Section 23-15-365 does not apply if the deceased candidate is a judicial candidate, is the incumbent, or is the only qualified candidate; the statute is clearly triggered upon the death of "any" candidate. Plaintiffs' contention that the term "any candidate" does not include a candidate for an office that has minimum qualification requirements is plainly wrong. The legislature was aware that most, if not all, state, county, and municipal offices have minimum qualification requirements and yet Section 23-15-265 speaks in terms of the death of "any candidate." Indeed, Article VI, Section 250 of the Constitution limits all office holders to those who are qualified electors, *i.e.*, persons over the age of eighteen.

Similarly, Plaintiffs' contention that the write-in statute does not apply to judicial candidates because judicial races have qualifying deadlines by which candidates must submit qualifying documentation, including an oath, proves too much. All offices have qualifying deadlines by which documentation must be submitted. By definition, a write-in candidate enters the race after the qualifying deadline. Under Plaintiffs' reading, there could never be write-in candidates because all offices have qualifying deadlines. Moreover, the legislature was well aware of qualifying deadlines and the judicial candidate's oath and yet the legislature did not choose to exempt all judicial branch elections from Section 23-15-365's term "any candidate." There is no judicial branch exception to the write-in provision of Section 23-15-365.

While Plaintiffs may not be comfortable with a write-in candidate prevailing in the election, it is the Mississippi Legislature that makes such policy determinations and establishes state law regarding elections. It is the responsibility of the local election officials and the judiciary to "enforce that statute as written." *Id.* at 176. Moreover, Plaintiffs' prediction of confusion on election day and/or uniformed voters have never been recognized by this Court or any other court as a basis to enjoin a regularly scheduled, quadrennial election from occurring. It

is post-election challenges, and not pre-election injunctions, that are the appropriate manner to resolve issues of the will of the voter and/or vote irregularity. If alleged "voter confusion" regarding write-in voting or the write-in candidates is a valid legal basis to enjoin an election, the recognition of such a legal claim would invite a flurry of eleventh-hour suits by candidates and political groups seeking to enjoin elections based on testimony from a handful of voters in a specific county that they are "unfamiliar" with write-in voting or the write-in candidates.

Finally, while the above analysis makes clear beyond any doubt that the Governor, Secretary of State, and Attorney General have correctly interpreted the relevant statutes, it is important to recall that the judiciary affords these state officials considerable deference in their interpretation of state election statutes. The interpretation of the Governor, Secretary of State, and Attorney General must be affirmed as long as it is a "permissible interpretation" of the statutes even "if it is not the interpretation that a court may have supplied, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Mississippi Gaming Comm'n v. Imperial Palace of Mississippi, Inc.*, 751 So.2d 1025, 1029 (Miss. 1999). To conclude that the State Defendants have selected one of multiple permissible interpretations of state election law is to, in fact, conclude that the State Defendants' interpretation must be upheld.

Argument

I. The State Defendants' Interpretation of State Election Statutes is Entitled to Great Deference.

Plaintiffs challenge in this matter the Governor, Secretary of State, and Attorney General's collective interpretation of state election statutes. In their individual roles as elected state officials, the Governor is the State's chief executive officer charged with ensuring the faithful execution of the law, the Secretary of State is the State's chief elections officer, and the Attorney General is the State's chief legal officer. *See, e.g.*, Miss. art. 5, §§ 116, 122; Miss. Code Ann. § 23-15-211.1; Miss. Code Ann. § 7-5-1. Collectively, the Governor, the Secretary of State, and the Attorney General comprise the "State Board of Election Commissioners." Miss. Code Ann. § 23-15-211(1)(a). Because state election laws are entrusted to these State Defendants to administer, their interpretation of state election law is entitled to "considerable weight." *Barbour v. State ex rel. Hood*, 974 So.2d 232, 240-41 (Miss. 2008). This judicial "duty of deference" is derived from the acknowledgment that executive branch officials' "everyday experience" in the administration of statutory schemes provides them a "familiarity with the particularities and nuances of the problems committed to [their] care which no court can hope to replicate." *Gill v. Mississippi Dept. of Wildlife Conservation*, 574 So.2d 586, 593 (Miss. 1990) (citations omitted).

To apply this "considerable deference," courts review whether the statute in question either directly answers the issue or whether it is "ambiguous or silent" on the precise question. *Barbour,* 974 So.2d at 240. If the statute plainly and clearly answers the precise question, the clear terms of the statute apply. If, however, the statute is silent or ambiguous, the State Defendants' interpretation must be upheld if it is "based on a permissible construction of the

statute." *Id.* at 241 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-866 (1984)). Importantly, a court need not conclude that the State Defendants' "construction was the only one [they] permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Mississippi Gaming Comm'n v. Imperial Palace of Mississippi, Inc.*, 751 So.2d 1025, 1029 (Miss. 1999) (quoting *Chevron*, 467 U.S. at 843 n.11). In other words, to conclude that the State Defendants have selected one of multiple permissible interpretations of state election law is to, in fact, conclude that the State Defendants' interpretation must be upheld.

II. Code Section 23-15-1015 Mandates that a Regular Election be Held on November 2 to Select a Judge for the New 2011-2014 Term; Section 23-15-849(1)Does Not Apply Because the November Election Will Fill the "New" 2011-2014 Term and Not the "Unexpired" 2007-2010 Term.

The Mississippi Constitution authorizes the legislative branch, and not the executive or judicial branches, to direct the "manner" and "time" at which circuit court judges are elected. Miss. Const. art. 6, § 153. Pursuant to that constitutional authority, the legislature has enacted Code Section 23-15-1015 which requires in no uncertain terms that an election be held in every county on November 2, 2010, to select a circuit court judge for the new 2011-2014 Term. Pursuant to 23-15-1015, on "Tuesday after the first Monday in November 1986, and every four (4) years thereafter and concurrently with the election for representatives in Congress, there shall be held an election in every county for judges of the several circuit and chancery court districts," *i.e.*, November 2, 2010. The election on November 2, 2010, will select a new circuit court judge for the four-year 2011-2014 Term. By law, the 2007-2010 Term must end on December 31, 2010, and the new 2011-2014 Term must begin on January 1, 2010. *See* Miss. Code Ann. § 9-7-1 (circuit court terms are for four years beginning on January 1, 1931). Therefore, there must be

an election on November 2, 2010, to select a circuit court judge for the 2011-2014 Term beginning on January 1, 2011. Plaintiffs' request that this Court halt the November election is wholly inconsistent with, and prohibited by, the express statutory mandate in Code Section 23-15-1015 that the November 2 election proceed. This Court need look no further than the clear terms of Section 23-15-1015 to deny the relief requested by Plaintiffs.

Importantly, campaigning by write-in candidates for the November election began before this suit was filed and currently includes at least four qualified attorneys as candidates. *See* Rayner Testimony at R. 40, 50-52, R.E. 11. These qualified candidates have purchased and are distributing campaign materials. *Id.*; Election Materials, R. E. 10. The election itself has received extraordinary media attention, including newspaper stories that identify for the public the attorneys who are campaigning. *See generally*, R.E. 4; *see also* R.E. 4 at 3 (story entitled "Rogers Runs fo Circuit Judge"); R.E. 4 at 43 (story identifying three candidates). An injunction halting the election less than two weeks before election day would have a chilling effect on campaign efforts and expenditures. Candidates and supporters would be less likely to run and/or expend funds if the precedent is set for enjoining elections and nullifying hard earned campaign expenditures.

In contrast to the clear language of Section 23-15-1015, Plaintiffs wrongly contend that Code Sections 9-1-103 and 23-15-849 operate in conjunction to cancel the regularly scheduled quadrennial election for the new 2011-2014 Term because there existed a vacancy at the end of the 2007-2010 Term. Plaintiffs are plainly misreading the statutes. Mississippi Code Section 9-1-103 provides

> Whenever a vacancy shall occur in any judicial office by reason of death of an incumbent, resignation or retirement of an incumbent, removal of an incumbent from office, or creation of a new judicial office in which there has not heretofore

> been an incumbent, **the Governor shall have the authority to appoint a qualified person to fill such vacancy to serve [1] for the unexpired term or [2] until such vacancy is filled by election as provided in Section 23-15-849,** Mississippi Code of 1972. When a vacancy shall occur for any of the reasons enumerated in this section, the clerk of the court shall notify the Governor of such vacancy immediately.

(alteration and emphasis supplied). By using the conjunction "or", Section 9-1-103 recognizes that an appointee may legally "serve for the unexpired term" when there is insufficient time remaining in the term to conduct a special replacement election. More specifically, Section 23-15-849(1) states that a special replacement election to fill a vacancy in an unexpired term may occur no sooner than nine months after the vacancy occurs. Thus, if the vacancy occurs within the last nine months of the term – which is the case here – then the gubernatorial appointee serves for the remainder of the "unexpired term" and no special election under Section 23-15-849(1) occurs.

Plaintiffs' contention that Section 9-1-103 authorizes the governor to appoint an interim judge to serve the last year of the 2007-2010 Term and the first year of the 2011-2014 Term is wrong. The governor's appointment authority under Section 9-1-103 is to specifically to fill the "vacancy" in the current 2007-2010 Term. Plaintiffs cite no authority authorizing an appointee to serve beyond the term in which the vacancy exists. The statutorily mandated beginning and end dates for four-year terms cannot be altered.

Moreover, Plaintiffs' reliance on Section 23-15-849(1) as an argument to enjoin the November election is misplaced for two reasons. First, Section 23-15-849(1), by its explicit terms, applies only to elections to fill an "unexpired term," which is not the function of the November 2 election. Second, if Code Section 23-15-849(1) were interpreted to apply to cancel regularly scheduled elections, such an interpretation would produce absurd results.

First, Plaintiffs' interpretation of Code Section 23-15-849(1) is contrary to the statute's express terms. Code Section 23-15-849 applies by its explicit terms to only one type of election: a special election to fill the unexpired and remaining portion of a judge's term if the office becomes vacant. Code Section 23-15-849 provides that

> Vacancies in the office of circuit judge or chancellor **shall be filled for the unexpired term** by the qualified electors at the next regular election for state officers or for representatives in Congress occurring more than nine (9) months after the existence of the vacancy to be filled, and the term of office of the person elected to fill a vacancy shall commence on the first Monday in January following his election.

Miss. Code Ann. § 23-15-849(1) (emphasis supplied). Plaintiffs grievously err by attempting to apply Section 23-15-849 to the November 2, 2010, election because they fail to recognize two critical points. First, Section 23-15-849(1) applies only if the election is to fill the "unexpired" 2007-2010 Term. Second, the November 2, 2010, election is **not** an election to fill the "unexpired" portion of the 2007-2011 Term, but is to select a circuit court judge for the new 2011-2014 Term. Thus, Code Section 23-15-849 does not apply to the November general election. Code Section 23-15-849 simply does not cancel the regularly scheduled, quadrennial election mandated by Code Section 23-15-1015 to occur at the end of the four-year term.

When does the special election provision in Code Section 23-15-849(1) apply? If a sitting judge dies or vacates his position during the first three years of his term, Section 23-15-849 governs the timing of an election to select a judge to serve the remaining "unexpired" time in that four-year term. By way of example, if a circuit court judge died in July 2008, Section 23-15-849(1) would have governed how the remaining two and a half years of his "unexpired term" would be filled, first with an interim appointment by the governor followed by a special election. The election to fill his unexpired term would have occurred in November 2009 (for it could not

have occurred in November 2008 because that was less than nine months since the vacancy). His elected replacement's term would have commenced on "the first Monday in January following his election" – January 2010 – and the replacement would serve until the end of the unexpired 2007-2010 Term on December 31, 2010. This routine and common sense application of Section 23-15-849 does not cancel a regularly scheduled quadrennial election nor does it shorten or lengthen the statutorily mandated four-year term.

Second, if Code Section 23-15-849(1) were interpreted to apply to cancel regularly scheduled elections, such an interpretation would produce absurd results.

- For example, consider what would happen if a judge died in March of 2010, a full two months before the deadline for candidates to qualify in May. If Plaintiffs are correct that Section 23-15-849 applies, the election in November 2010 could not go forward, even though the judge would have died two months **before** the deadline to qualify, because Section 23-15-849 requires that there be at least nine months between the death/vacancy and the election. There are only eight months between March and November.

- As another example, consider if the judge and two other candidates qualified for the election and the judge died in July. If Plaintiffs are correct, Section 23-15-849 would require the November 2010 election to be canceled one of the three candidates died before the election.

- Finally, consider if a judge was not seeking reelection and died in July. Under Plaintiffs' reading, the vacancy created by the judge's death would trigger Section 23-15-849(1) and cancel the November 2010 election even though the judge was not a candidate for the election.

Obviously, there is something amiss in Plaintiffs' statutory interpretation. Section 23-15-849 simply does not cancel the regularly scheduled election occurring at the end of a four-year term; Section 23-15-849 only applies to special elections occurring within the traditional four-year term in order to fill an unexpired term. More importantly, the State Defendants' interpretation of Sections 23-15-1015, 9-1-103, and 23-15-849 is, unquestionably, "a" permissible reading of the statutes and must be affirmed.

III. An Order Halting the November Election Must Comply with the Preclearance Requirements of the Federal Voting Rights Act.

Both this Court and the United States Supreme Court have held that a court order halting an election or changing the manner of an election cannot be enforced unless and until such an order is precleared by the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act. Because the United States Attorney General is granted to 60 days in which to review any preclearance submission, and there being less than fourteen days until the election, there is likely insufficient time to preclear an order which halts or changes the manner of the election.[8]

"Section 5 requires States to obtain either judicial[9] or administrative preclearance before implementing a voting change." *Clark v. Roemer*, 500 U.S. 646, 652-653 (1991); *see also United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977) ("No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object"). A

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[8] When submitted to the Attorney General, the Department of Justice has 60 days to approve or reject the change. 28 C.F.R. § 51.9. There is a provision to request expedited consideration of the proposed change. *See* 28 C.F.R. § 51.34. However, the request does not guarantee a decision in less than 60 days. *Id.* A submission to the Department of Justice, or a privately initiated federal court challenge in the event that the order is precleared, would examine whether the change "has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance. . . ." 28 C.F.R. § 51.52; *see also* 28 C.F.R. § 51.54(a) ("A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively.")

[9] Judicial preclearance is obtained by filing a declaratory judgement action before the United States District Court for the District of Columbia. 28 C.F.R. § 51.10.

voting change in a covered jurisdiction "will not be effective as la[w] until and unless cleared" pursuant to one of these two methods. *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam). Failure to obtain either judicial or administrative preclearance "renders the change unenforceable." *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982).

Mississippi Code Section 23-15-1015 clearly requires that "[o]n Tuesday after the first Monday in November 1986, and every four (4) years thereafter and concurrently with the election for representatives in Congress, there **shall be held an election in every county for judges of the several circuit** and chancery court districts." (Emphasis supplied). Similarly, and as discussed below, Code Section 23-15-365 clearly authorizes write-in votes in any election in which there is a death of a candidate; it contains no exception for a judicial election. If an order of this Court were to halt the election or otherwise interpret those statutes in a manner as to limit their broad pronouncements, it is a possibility that the United States Department of Justice and/or a private litigant would view the order as a change in voting practice and, if the order was not precleared, file suit in federal court to counterman this Court's order. *See In re McMillin*, 642 So.2d 1336, 1339 (Miss. 1994) (order enjoining election requires preclearance before it can be enforced); *Allen v. State Bd. of Elections*, 393 U.S. 544, 570 (1969) (requiring preclearance of new procedures for casting write-in votes). As the Eleventh Circuit has held, "section 5 has been interpreted as requiring the preclearance of '[a]ny change affecting voting, even though it appears to be minor or indirect, [or] even though it ostensibly expands voting rights....'" *Maloney v. City of Marietta*, 822 F.2d 1023, 1026 (11th Cir. 1987) (quoting *NAACP v. Hampton County Electric Comm'n*, 470 U.S. 166, 179, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985)).

That the alleged change in voting practice occurs by virtue of a state-court order does not exempt the change from preclearance. This Court itself recognized that fact in *In re McMillin*.

> Moreover, the action taken by the Hinds County Chancery Court in enjoining the judicial primaries constitutes a change in voting standards, practices and procedures also subject to § 5 preclearance or approval. *See Dougherty County Board of Education v. White*, 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978). As is the case with H.B. 1809, no such preclearance of the injunction issued by the Hinds County Chancery Court was obtained. Voting changes subject to § 5 "will not be effective as law until and unless cleared." *Connor v. Waller*, 421 U.S. 656, 656, 95 S.Ct. 2003, 2003, 44 L.Ed.2d 486 (1975). *See also Clark v. Roemer*, 500 U.S. 646, 652, 111 S.Ct. 2096, 2101, 114 L.Ed.2d 691 (1991) (failure to obtain preclearance leaves the proposed change unenforceable).
>
> It follows that the preliminary injunction at issue, even if within the jurisdiction of the chancery court to grant, cannot be enforced without preclearance. Likewise, H.B. 1809 cannot be enforced without preclearance. Consequently, the statutes currently governing primary judicial elections and setting such elections for Tuesday, June 7, 1994, are the only enforceable provisions regarding said primaries.

642 So.2d at 1339; *see also Branch v. Smith*, 538 U.S. 254, 262 (2003) (Section 5 "requires preclearance of all voting changes and there is no dispute that this includes voting changes mandated by order of a state court") (citing *In re McMillin*). Furthermore, the United States Supreme Court has on at least one previous occasion granted certiorari and reversed a decision of this Court when this Court mandated a change in voting practice that had not been precleared. *See Hathorn v. Lovorn*, 457 U.S. 255 (1982).

Given that several attorneys who are qualified to be elected as circuit court judges are already campaigning, and in light of the proximately to the election and the issue of preclearance, an order enjoining the election would likely result in considerable confusion, and possible additional litigation, during the final two weeks of campaigning.

IV. The Mississippi Legislature has Directed as a Matter of State Electoral Policy that Write-In Candidacies Are Appropriate in the Event of the Death of Any Qualified Candidate, Including Judicial Candidates.

The Plaintiffs argue that Judge Evans' death must result in the cancellation of the November 2, 2010, election because he was the only candidate who qualified to run for the 2011-

2014 Term. This argument is best characterized as questioning what state election statutes require when the only qualified candidate dies between the qualification deadline and the general election. The Mississippi Constitution provides that the legislature shall establish the method by which elections for circuit court judge are conducted. *See* Miss. Const. art 6, § 153. Because the death of a qualified candidate is not an unheard of occurrence, the Mississippi Legislature, exercising its constitutionally entrusted authority to set state electoral policy, has mandated the use of write-in candidates in the event of the death, resignation, withdrawal, or removal of any candidate who has qualified for placement on an election ballot. Specifically, Code Section 23-15-365 provides:

> There shall be left on each ballot one (1) blank space under the title of each office to be voted for, and in the event of the death, resignation, withdrawal or removal of any candidate whose name shall have been printed on the official ballot, the name of the candidate duly substituted in the place of such candidate may be written in such blank space by the voter.

Miss. Code Ann. § 23-15-365.

That the legislature has deemed write-in candidates to be an important and appropriate component of each and every election is evidenced by the fact that Section 23-15-365 requires all ballots to be printed with a blank space for a write-in candidate for each office on the ballot, so that in the event of a candidate's death, withdrawal, resignation, or removal no further action need be taken in order for write-in votes to be cast. *See, e.g.,* Ballots R.E. 7, 8, 9. In other words, write-in candidates and write-in votes are an eventuality that the legislature mandates election officials to be prepared for in every election and for each office. The Mississippi Encyclopedia of Law reflects this well-settled use of the write-in statutes by summarizing that in "general or special elections, a blank space for write-ins must be provided for each office." *Elections*, § 29. Because county election officials must prepare for the possibility of write-in

candidates in each election, Circuit Clerk Rayner testified that the process of "prepar[ing] for a write-in election" is the "pretty much the same process" as preparing for any election. Testimony at 17, R.E. 11.

As recently as 2000 this Court affirmed that, pursuant to Code Section 23-15-365, election officials are required to permit and count votes for write-in candidates when a duly qualified candidate dies between the qualifying deadline and the election. *See Upton v. McKenzie*, 761 So.2d 167 (Miss. 2000). In *Upton*, Billy McKenzie qualified as a candidate prior to the qualifying deadline. *Id.* at 169. McKenzie died after qualifying but before the election. *Id.* McKenzie's wife mounted a write-in candidate campaign but the county election officials refused to count the write-in votes. *Id.* Both the trial court and this Court overruled the county election officials and agreed that Billy McKenzie's death triggered Section 23-15-365's requirement mandating write-in candidates.[10] Further, this Court confirmed that McKenzie's wife, as the write-in candidate, had been duly substituted by the voters[11] and did prevail in the election. In so holding, this Court quoted with approval the opinion of the trial court that "the

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[10] The *Upton* court also rejected the argument that a write-in candidate is only permitted if the deceased candidate's name was actually printed on the ballot prior to his passing. "Upton's argument that § 23-15-365 allows write-in candidates only where a candidate dies **after the ballot has been printed** is likewise erroneous." 761 So.2d at 176 (emphasis supplied). As long as the qualified but now deceased candidate's name would have appeared on the ballot, Section 23-15-365 applies. As the Encyclopedia of Mississippi law recognizes, the "Mississippi Supreme Court has made it clear that the name of the decease or removed candidate does not actually have to be printed on the ballot for the write-in vote to be valid." *Elections*, § 29.

[11] This Court rejected the argument that the phrase "candidate duly substituted in the place of such candidate" means that the write-in statute applies "only where a candidate dies after receiving the party's nomination in the primary" so that the political party may then "duly substitute" a candidate. 761 So.2d 173-75. "Upton's assertion, that the only 'duly substituted' candidate is a candidate nominated by the county executive committee after the death of the only qualified candidate subsequent to the printing of the ballot but before the primary election is simply without support." *Id.* at 175.

application of 'write-in candidate' provisions are appropriate in the event of a death of a candidate who has qualified to run for a particular office." 761 So.2d at 174.

Importantly, the *Upton* decision reiterated that Section 23-15-365 requires election officials to proceed with write-in candidates upon the "death of '**any** candidate.'" 761 So.2d at 175 (emphasis in original). In light of the term "any candidate," Plaintiffs cannot credibly argue that Section 23-15-365 does not apply if the deceased candidate is a judicial candidate, is the incumbent, or is the only qualified candidate; the statute is clearly triggered upon the death of "any" candidate.[12] In fact, this Court confirmed that Section 23-15-365 applies when the only qualified candidate dies by explaining that "there is no support in any section of this State's election statutes for the assertion that a voter may cast a write-in vote **only** where the candidate who died was unopposed for a particular office." *Id.* at 175 (emphasis supplied).[13] Thus, the write-in statute applies when the candidate who died was "unopposed for a particular office." More importantly, the State Defendants' interpretation of Section 23-15-365's phrase "any candidate" to include a judicial candidate who was unopposed is certainly "a" permissible reading of the statute and must be affirmed.

In response, Plaintiffs argue that the State Defendants' interpretation of the phrase "any candidate" to include judicial candidates is an "impermissible" interpretation of Section 23-15-

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[12] "Any" is defined by Merriam-Webster's Collegiate Dictionary as "1: one or some indiscriminately of whatever kind: a: one or another taken at random <ask any man you meet> b: EVERY--used to indicate one selected without restriction <any child would know that>." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 53(10th ed. 1996).

[13] "First, there is no support in any section of this State's election statutes for the assertion that a voter may cast a write-in vote only where the candidate who died was unopposed for a particular office. In fact, both § 23-25-365 and § 23-15-333 provide for the casting of write-in votes upon the death of '**any** candidate.'" *Upton*, 761 So.2d at 175 (emphasis in original).

365. Plaintiffs' arguments are less than persuasive and, if true, would gut the obviously intended broad reach of the statute. First, Plaintiffs contend that because judicial candidates have to meet certain minimum requirements in order to hold office, the write-in statute, which has no provision for the pre-qualification of candidates, cannot be applied to any judicial election. In fact, almost every, if not every, state, county, or municipal elected office has certain minimum qualifications.[14] Indeed, in *Upton*, this Court affirmed the use of write-in candidates for a county board of supervisors election even though the office supervisor has the minimum qualification requirements including that the person be a resident of the district and a qualified elector (*i.e.*, over the age of eighteen). *See* Miss. Code Ann. § 19-3-3; Miss. Const. art. 6, § 250. If the write-in statute was interpreted so as to not apply to any office for which there exists minimum qualifications, the statute would be meaningless. More importantly, the legislature knew that

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[14] For example, the Commissioner of Agriculture must be a "qualified elector with a general knowledge of agriculture, mining, manufacturing, statistics, and general industries and an experienced and practical agriculturist." Miss. Code Ann. § 69-1-1; Miss. Const. art 12, §250. District Attorneys must be a "qualified elector of the district and a practicing attorney admitted to practice before the Supreme Court of Mississippi for two years." Miss. Code Ann. § 25-3-1. A county attorney must be a "qualified elector and a regular licensed and practicing attorney." Miss. Code Ann. § 19-23-1. A county coroner must be a "qualified elector, at least 21 years of age, possessing a high school diploma or its equivalent, of the county in which he/she seeks election." Miss. Code Ann. §19-21-103; Miss. Const. art. 5, § 135; art. 12, §250. A county school board member must be a qualified elector of the district in which election is sought and "have a high school diploma or its equivalent." Miss. Const. art. 12, §250; Miss. Code Ann. § 37-7-306. The governor must be a "qualified elector, at least 30 years old, a citizen of the United States 20 years, and a resident of the state five years next preceding the day of election." Miss. Const. art 5, § 117; art. 12, § 250. The lieutenant governor must meet those same requirements. *Id.* The secretary of state, auditor, treasurer, and insurance commissioner must be a "qualified elector, at least 25 years old, and a citizen of the state five years next preceding the day of election." Miss. Const. art. 5, § 133, 134, art. 12, § 250; Miss. Code Ann. §83-1-3. A state senator must be a "qualified elector of the state four years, at least 25 years old, and an actual resident of the district or territory represented for two years before the election." Miss. Const. art. 4, § 42. A state representative must be a "qualified elector and resident citizen of the state four years, at least 21 years old, and a resident of the county or district represented for two years before the election." Miss. Const. art. 4, § 41.

most, if not all, offices have minimum qualifications and yet they clearly require Section 23-15-365 to apply upon the death of "any candidate" and not just to candidates for offices with no minimum requirements. Plaintiffs cannot avoid the simple truth that "any" candidate actually means "any" candidate. What Plaintiffs fail to acknowledge is that rationale candidates who meet the qualifications will actively campaign for the office, such as the four known attorneys actively campaigning for the circuit court office. The write-in statute is not in conflict with the requirement that a person meet certain minimal qualifications before being sworn-in to serve in an elected office.

Second, Plaintiffs note that judicial candidates must submit their qualifying documents, along with an oath to abide by the election laws, by a certain qualifying date. *See* Miss. Code Ann. §§ 23-15-977, 23-15-977.1 (the oath is submitted with the qualifying documents). Plaintiffs contend that because the write-in statute has no provision for submitting qualifying documents, the statute cannot apply to judicial races. In fact, each state, county, and municipal office has a deadline by which candidates must submit certain specific qualifying documents. *See* Miss. Code Ann. §§ 23-15-299(1)(a) & (4)(a); 23-15-359(3); 23-15-309(1); 23-15-361(2). Certainly, the legislature knew that all offices have qualifying deadlines and require the filing of qualifying documents by that deadline and yet the legislature used the phrase "any candidate" in the write-in statute. Because all offices have qualifying deadlines by which qualifying documents must be submitted, a determination that Section 23-15-365 does not apply in the event the office has a deadline to submit qualifying documents would render the statute meaningless. The very definition of a write-in candidate under 23-15-365 is candidate that joins the race **after** the deadline to submit qualifying documents because of the death of a previously qualified candidate.

Moreover, when the legislature enacted Section 23-15-977.1 in 1995 thereby directing judicial candidates to sign an oath to abide by election laws, the legislature did not amend Section 23-15-365 to exempt judicial races from the broad pronouncement that write-in provisions apply upon the death of "any candidate." As other courts have recognized in similar situations, the "legislature does not operate in a vacuum each time it enacts new legislation; it is charged with knowledge of existing law. If the legislature intended to except proceedings under the co-owner-purchase provisions from the broadly phrased reach of § 34-3-60, it could easily have done so." *Carver v. Foster*, 928 So.2d 1017, 1022 (Ala. 2005); *see also Arant v. Hubbard*, 824 So.2d 611, 615 (Miss. 2002) ("we presume that the legislature, when it passes a statute, knows the existing laws"). Under Plaintiffs' reading, because Section 23-15-977.1 applies to all judicial candidates, Section 23-15-365 would never apply to judicial candidates. The terms of Section 23-15-365, especially the use of the term "any", directly contradicts Plaintiffs' argument that the legislature intended the write-in provision to apply to the legislative and executive branches but not to the judicial branch. Plaintiffs are merely asking to judicially engraft a "judicial candidate" exception onto Section 23-15-365 that the legislature chose not to include.

As this Court reiterated in *Upton*, the judiciary's solemn responsibility regarding Section 23-15-365 is to "enforce that statute as written, [and] not to render that statute unenforceable." 761 So.2d at 176. While Plaintiffs may protest that write-in candidacies may be an appropriate means to elect other officials but not a circuit court judge, it is with the legislature that Article VI, Section 153 places the constitutional obligation and authority to make such policy determinations. The wisdom of the legislature's reliance on write-in candidacies is not an object for debate or contest for, as the Supreme Court has instructed, "it is not for the courts to question the wisdom of any constitutional declaration of public policy by the legislative body." *Chevron*

U.S.A., Inc. v. State, 578 So.2d 644, 647 (Miss. 1991) (quoting *Durham v. Durham*, 85 So.2d 807, 809 (1956)); *Frazier v. State By and Through Pittman*, 504 So.2d 675, 708 -709 (Miss. 1987) ("the propriety, wisdom and expediency of a statutory enactment is a question for the legislature, not this Court").

V. That Some Number of Voters May Be Unfamiliar With the Candidates Provides No Legal Basis to Enjoin an Election.

With Plaintiffs' original legal contentions regarding Sections 23-15-849(1) and 23-15-365 having run squarely into the plain language of those statutes, Plaintiffs next resort to vague contentions of "voter confusion" as a basis to enjoin this election, or any other election, if a plaintiff can show that some unspecified number of voters are "unfamiliar" with the write-in process or the write-in candidates themselves. Plaintiffs contend that the regularly scheduled, quadrennial election must be enjoined because (1) an unknown number of voters are unfamiliar with the process to physically cast write-in votes and/or (2) an unknown number of voters are unfamiliar with, or may not have heard of, the write-in candidates. A part from Plaintiffs' failure to identify any statutory or constitutional right or even legal theory which supports their contention, the mere recognition by this Court that such contentions could give rise to an injunction halting a regularly scheduled election will invite great mischief and a flurry of eleventh-hour suits by candidates or groups seeking to enjoin future elections. For good reason this Court has steadfastly maintain that challenges regarding the will of the voter and vote irregularity occur post-election, when the facts are known, as opposed to in pre-election emergency injunction hearings based on conjecture, rhetoric, and speculation. In truth, Plaintiffs' arguments in support of halting the election are legally and factually without support.

First, the contention that a certain percentage of voters lack of familiarity with how to cast

a write-in ballot is a false specter. The process by which write-in votes are cast is exceptionally simple and straightforward. As the Secretary of State succinctly explained,

> If you are voting either by Absentee or Affidavit Ballot, you will simply write in the name of the candidate of your choice on the line provided in the 'Circuit Judge, District 13" section of your ballot. Please make sure to write as clearly as possible, so your votes can be read and counted. If you will be voting on Election Day using the TSX voting machine at your precinct, you will press the "Write-In" choice provided in the "Circuit Judge, District 13" section of the ballot on your touch screen. A key pad will appear on the screen, and you should type the name of the candidate of your choice. This name will then appear on the "Write-In" line for this race, and you can continue voting as normal.

R.E. 5. The write-in absentee ballot is itself self-explanatory. *See* R.E. 7. If a voter is unfamiliar with the process, election officials will offer instruction on how to physically cast the ballot. Rayner Testimony at 42-44, R.E. 11. Indeed, state law mandates that these same election officials who filed suit must educate and assist voters in casting their votes. *See* Miss. Code Ann. § 23-15-491(1). Given that write-in votes are mandated by statute in the event of death, withdrawal, or resignation, Plaintiffs' vague allegations that some voters are unfamiliar with the write-in voting process would serve, if legally sufficient, to enjoin most, if not all, future write-in elections.

Second, the testimony in support of alleged "confusion" with the write-in process and/or with the write-in candidates was inadmissible and insufficient to support enjoining the election. Plaintiffs have the burden of proving their factual contentions by a preponderance of evidence. Plaintiffs called one witness, the Jasper Circuit Clerk, who testified that he talked to eleven voters casting absentee votes and that five of the eleven were "confused." Testimony at 18-21, R.E. 11. Three of the five decided not to vote and two allegedly voted for unqualified candidates. *Id.* The clerk stated that "other clerks told" him there was undefined "confusion" in other counties. Testimony at 22. The clerk further testified that he conducted a "personal poll"

in which he had "yet to speak to a voter that likes the idea of a write-in." *Id.* In all three lines of questions, valid hearsay objections by the State Defendants were improperly overruled. The above testimony in which the circuit clerk merely repeated what voters or circuit clerks told him is unquestionably inadmissible hearsay testimony under Rules 801 and 802 offered to prove the truth of the matter asserted. The entirety of the clerk's testimony regarding alleged confusion should be disallowed.

At best, the only specific testimony offered by Plaintiffs (although it was inadmissible hearsay) was that five of eleven absentee voters casting ballots in the last few weeks failed to vote in the circuit court election. Testimony at 21. This Court may take judicial notice that according to official results of the 2006 election, candidate Robert Evans, running unopposed, received 15,957 votes.[15] Testimony regarding eleven absentee voters (or the five that were confused) represents less than 0.0689% and 0.0313% respectively of the votes cast in the last Thirteenth District circuit court election. Further, when the clerk was asked on direct examination whether he believed that the five confused voters were representative of other absentee voters or election day voters, the trial court correctly sustained the State Defendants' objection. *Id.* Further, there was no testimony at all that election day voters who use voting machines are or will be denied a chance to cast a write-in vote because of confusion, or that they would be confused at all.

That 0.06% of the likely voters decided not to vote in the circuit court race is factually unremarkable. The circuit clerk confirmed that "[a] lot of people will skip a race because they don't like any of the candidates" and that some voters decide not to vote in specific races in each

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[15] http://www.sos.state.ms.us/elections/2006/primary/General%20Election%20Certification%20Circuit%20Court/CIRCUIT%2013.pdf

election. Testimony at 27-28. Plaintiffs never identify what constitutional or statutory right of the voter or the candidate is infringed upon in the event that some percentage of the electorate chooses not to vote because they are unfamiliar with the candidates. Indeed, if legally acceptable, an injunction to halt an election because some number of voters are unfamiliar with the candidates could be granted in each election every year.

Third, the possibility of alleged "voter confusion" is not a legally sufficient rationale to enjoin an election for taking place, especially in light of the post-election remedies available if the election is flawed. Plaintiffs identity no statutory or constitutional right belonging to a voter, elected official, or candidate that would be infringed if some percentage of voters are unfamiliar with the write-in candidates. Before the trial court and again before this Court, Plaintiffs failed to identify any statutory or decisional authority supporting the contention that alleged "confusion" is grounds to enjoin a regularly scheduled election. This Court has previously held that the failure to cite authority in support of claims of error precludes this Court from considering the specific claim on appeal. *Grey v. Grey*, 638 So.2d 488, 491 (Miss.1994) (collecting cases). Further, there exists established authority that a pre-election allegation of "confusion" is insufficient to enjoin an election. As courts in other states have held, "we decline to recognize a new rule of equity that citizens may enjoin an election on the basis of possible confusion of the public concerning a political question." *Senior Accountants, Analysts & Appraisers Ass'n v. City of Detroit*, 553 N.W.2d 679, 686-87 (Mich. App. 1996) (overturning injunction and finding that "[p]ossible confusion in the minds of the voters is generally not a sufficient basis to enjoin an election because the voters' understanding of the issues is itself a part of the political process."). Courts have no legal authority nor practicable ability to set a minimum floor of "voter understanding" about the candidates or issues that much be reached

before an election proceeds. "It is appropriate, therefore, to consider whether or not a possible confusion in the minds of the voters is sufficient grounds to enjoin an election. . . . . We agree with the superior court judge that a clear understanding of the issues is desirable; but this is a part of the political process and must be so resolved." *Kilpatrick v. Searl*, 115 N.W.2d 112, 114 (Mich.1962).

In the unlikely event that county election officials utterly fail in their duties to instruct voters in the physical process of casting a write-in vote, this Court has consistently relied on post-election remedies and contests to resolve any dispute regarding whether the will of the voters or voting irregularity. *See, e.g., Thompson v. Jones*, 17 So.3d 524, 526 (Miss. 2008); *Rogers v. Holder*, 636 So.2d 645, 647 (Miss.1994); *Stringer v. Lucas*, 608 So.2d 1351 (Miss.1992); *Noxubee County Democratic Exec. Comm. v. Russell*, 443 So.2d 1191 (Miss.1983). Reliance on post-election evaluations, rather than pre-election predictions of "confusion," is for good reason. There is no reliable standard to determine a "sufficient" level of "confusion" to halt an election.[16] Moreover, merely the recognition that such a legal claim exists under Mississippi law invites eleventh-hour suits seeking to enjoin elections based on testimony from a handful of voters in a specific county that they are "unfamiliar" with write-in voting or the write-in candidates. In sum, post-election challenges based on what actually occurred at the polls, along with concrete numbers regarding the number of "confused" voters verses the total number of voters, is the proper legal manner to address any irregularities in an election.

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[16] If a plaintiff called 50 voters to the stand to testify about their lack of information about candidates, is that sufficient? If a plaintiff called 50 voters to the stand who testified that they might have difficulty casing a write-in vote on the electronic voting machines on election day, is that sufficient? What percentage of the electorate must be polled in order to sustain a factually and legally sufficient claim to an injunction based on alleged voter confusion?

Finally, Plaintiffs' contention that the write-in statute should not apply unless voters are aware of all of the write-in candidates is merely an attempt to interpret the write-in statute out of existence. The Plaintiffs contend a lack of awareness of all the candidates results in wasted votes for unqualified candidates or voters choosing not to vote in that particular race. Here, Plaintiffs are raising policy objections and not legal arguments. An interpretation of Section 23-15-365 that bars its application if some undefined percentage of the voters were unfamiliar with the candidates would defeat its application in every election and/or subject each write-in election to last-minute suits for injunctions claiming voter confusion. The legislature has chosen not to create a requirement or mechanism to compile lists of write-in candidates and such a requirement may not be engrafted by judicial order. That some portion of the populace does not know all of, or even any of, the write-in candidates does not violate a voter's constitutional rights nor does it render Section 23-15-365 void, unenforceable, or subject to last-minute injunctions.

In sum, Plaintiffs' rhetorical claims that write-in elections result in confusion, wasted votes, and are generally an improper manner in which to elect a circuit court judge are properly seen as lamentations on the wisdom of the legislature's constitutionally entrusted decision to allow write-in elections for offices in the executive, legislative, and judicial branches. Because the Mississippi Constitution directs that the legislature shall determine the manner and time of judicial elections, *see* Miss. Const. art. 6, § 153, neither the undersigned executive branch officials nor the judiciary have the authority to alter that policy choice. *See Chevron U.S.A., Inc.*, 578 So.2d at 647; *Frazier*, 504 So.2d at 708. Indeed, this Court has recognized that even when confronted with valid policy concerns regarding election statutes, changes to such statutes must be accomplished through the legislative process. "The Court is keenly conscious of the import of this decision and its implications; that it may present some problems for solution. But it is our

duty to apply the law as written to the best of our understanding and ability. A charge in the existing [election] law, if any should be deemed necessary or proper, is a problem for the legislature and not the courts." *Bowen v. Williams*,117 So.2d 710, 712 (Miss.1960).

STATE DEFENDANTS' CROSS-APPEAL

VI. The Circuit Court Judge Erred in Taxing the State Defendants with Costs.

Although the State Defendants prevailed on their motion to transfer venue and subsequently prevailed on the merits in this matter, the circuit court nonetheless ordered the State Defendants to pay the costs associated with this litigation. This award is contrary to law and should be reversed.

There is only one cost-specific provision of law relevant to this litigation and it requires the Plaintiffs, and not the State Defendants, to pay costs. Specifically, the State Defendants prevailed on their Rule 82 motion to transfer for improper venue. Pursuant to Rule 82(d), the "expenses of the transfer shall be borne by the plaintiff." Thus, the Circuit Court's order requiring the State Defendants to pay all of the costs associated with this matter is contrary to Rule 82(d) and should be reversed.

Further, the taxing of those costs not associated with the transfer to the State Defendants is also contrary to law. Our state follows the American Rule requiring each party to pay their own costs and attorneys fees unless a contractual or statutory provision requires the losing party to pay the costs and fees of the prevailing party. *See Bank of Mississippi v. Mississippi Life and Health Ins. Guar. Ass'n*, 850 So.2d 127, 137 (Miss.App. 2003) ("Generally, absent a statute allowing such an award, attorney's fees and costs are not awarded unless punitive damages are awarded or may be awarded."). More specifically, Rule 54(d) directs that the circuit court shall "of course" award costs to the prevailing party unless the court specifically directs otherwise.

See Miss. R. Civ. P. 54(d) ("costs shall be allowed as of course to the prevailing party unless the court otherwise directs"). The plain language of Rule 54(d) does not authorize a court to award costs to the non-prevailing party. As other courts interpreting similar Rule 54(d) provisions have noted: "Civ.R. 54(D) provides, in relevant part, that 'costs shall be allowed to the prevailing party unless the court otherwise directs.' While a trial court is permitted to order a prevailing party to bear its own costs, it cannot award costs to a non-prevailing party." *Haynes v. Christian*, No. 24556, 2009 WL 2448256, at *1 (Ohio App. 9 Dist. Aug. 12, 2009) Thus, while the Circuit Court had authority under Rule 54(d) to either award costs to the State Defendant as the prevailing party or to require each party to pay their own costs, it did not have the authority to simply award costs to the non-prevailing party. The Circuit Court's order regarding costs is in error and should be reversed.

Conclusion

Governor Haley Barbour, Secretary of State Delbert Hosemann, and Attorney General Jim Hood respectfully submit that October 13, 2010, order of the Hinds County Circuit Court should be affirmed with respect to the merits and reversed with respect to the awarding of costs to the non-prevailing party.

This the 19th day of October, 2010.

By: JIM HOOD, ATTORNEY GENERAL
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CERTIFICATE OF SERVICE

This is to certify that I, Harold E. Pizzetta, III, a Special Assistant Attorney General for the State of Mississippi, have caused to be mailed this date, first-class postage prepaid, a true and correct copy of the foregoing **Brief of Appellees/Cross Appellants** to the following:

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This the 19th day of October, 2010.

HAROLD E. PIZZETTA, III