SC-2022-0836

In the Supreme Court of Alabama

Tiara Young Hudson,
Appellant,

v.

Kay Ivey, in her official capacity as Governor of Alabama; Patrick Tuten in his official capacity as appointee to Madison County, Alabama's Twenty-Third Judicial Circuit; and Tom Parker in his official capacity as Chair of the Judicial Resource Allocation Commission,
Appellees.

On Appeal from the Montgomery Circuit Court (CV-22-900892); Civil Appeals Court: CL-22-0936)

Brief of the Appellant

Oral Argument Requested

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 28(a)(1) and Rule 34(a) of the Alabama Rules of Appellate Procedure, Plaintiff-Appellant Tiara Young Hudson ("Ms. Hudson") respectfully requests oral argument in this matter. Oral argument is necessary because this appeal is not frivolous, the dispositive issue has not been recently decided, the lower court's ruling would fundamentally change the standard for surviving a motion to dismiss under Rule 12(b) of the Alabama Rules of Civil Procedure, and the decisional process would be significantly aided by oral argument. *Id.* at 34(a)(1)-(3).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

The Circuit Court of Montgomery County had jurisdiction under Ala. Const. Art. VI § 142 and Ala. Code § 6-6-222 because Ms. Hudson properly filed an action for declaratory relief. *C*_6. Ms. Hudson timely filed her notice of appeal to the Alabama Court of Civil Appeals on August 25, 2022. *Id.* at 844. The Alabama Court of Civil Appeals had appellate jurisdiction over this case pursuant to Ala. Code § 12-3-10 because this is a civil appeal "where the amount involved" does not exceed $50,000. This Court has jurisdiction in this case because the Court of Civil Appeals transferred it on September 6, 2022, pursuant to Ala. Code § 12-3-15. (Transfer Order).

STATEMENT OF THE CASE

On July 19, 2022, Ms. Hudson filed a Verified Complaint and a Motion for a Preliminary Injunction in the Circuit Court of Montgomery County against Kay Ivey in her official capacity as Governor of Alabama; Patrick Tuten in his official capacity as the appointee to Alabama's Twenty-Third Judicial Circuit in Madison County; and Tom Parker in his official capacity as Chair of the Judicial Resource Allocation Commission (collectively referred to as "Appellees"). *C*_4–28.

In her complaint, Ms. Hudson alleged that in enacting Alabama Code § 12-9A-2, the Alabama Legislature inappropriately delegated its "power to repeal, amend, or otherwise supplant an act of the Legislature," *Freeman v. City of Mobile,* 761 So. 2d 235, 236-37 (Ala. 1999), by giving the Judicial Resource Allocation Commission ("JRAC") the authority to eliminate and create new judgeships. *C*_12, 13.

On July 21, 2022, the circuit court set a hearing for the preliminary injunction for August 8, 2022. *C*_35. On August 4, 2022, Appellees filed a Motion to Dismiss, and a Response in Opposition to the Motion for Preliminary Injunction. *Id.* at 79-555. On August 5, 2022, Ms. Hudson filed a Motion to Continue the preliminary injunction hearing, set a

briefing schedule to give her an opportunity to respond to Appellees' Motion to Dismiss, and consolidate the Motion for Preliminary Injunction with a hearing on the merits of Appellees' Motion to Dismiss. *Id.* at 752. On that same day, Appellees filed an Opposition to the Motion to Continue, and the court denied Ms. Hudson's Motion to Continue. *Id.* at 756–60.

At the hearing on August 8, 2022, the court instructed the parties that it would hear arguments on Appellees' Motion to Dismiss, and not Appellant's Motion for Preliminary Injunction. *R*_797. Ms. Hudson's counsel requested the court allow her to respond to Appellee's Motion to Dismiss in writing before the court heard arguments on the motion. *Id.* The court declined the request and said that Ms. Hudson "should have [filed her response] before today." *Id.* At the end of the hearing, the court changed its mind and permitted Ms. Hudson to file a written response, ordering that "any briefs" regarding the motion to dismiss should be filed by noon on Friday, August 12, 2022. *Id.* at 824.

On August 12, 2022, Ms. Hudson filed her Response Brief, and Appellees filed a Post-Hearing Brief. *C*_767–793. Later that evening, the court entered an order granting Appellees' Motion to Dismiss and found:

(1) Ms. Hudson had to file a writ *of quo warranto* instead of a declaratory-judgment action, (2) in the alternative, Ms. Hudson lacked standing, and (3) in the alternative, Ms. Hudson did not state a claim on which relief could be granted. *Id.* at 830–31.

Ms. Hudson timely filed her Notice of Appeal to the Alabama Court of Civil Appeals pursuant to Rule 4(a)(1) on August 23, 2022. *Id.* at 838. On September 6, 2022, the Court of Civil Appeals entered an order transferring Ms. Hudson's case to this Court. (Transfer Order).

STATEMENT OF THE ISSUES

This appeal raises three issues. First, whether Ms. Hudson can file a declaratory-judgment action pursuant to Ala. Code § 6-6-222 to request a court to find that the Alabama Legislature unlawfully delegated its lawmaking power to JRAC?

Second, whether Ms. Hudson has standing to bring a declaratory-judgment action to challenge if it was permissible for JRAC to eliminate a judgeship she applied for in Jefferson County?

Third, whether Ms. Hudson sufficiently alleged that the Alabama Legislature delegated lawmaking power to JRAC when it eliminated the judgeship in Jefferson County, and created a new one in Madison County?

STATEMENT OF THE FACTS

On May 24, 2022, Ms. Hudson, a Black female public defender, prevailed in the Democratic Party primary election to be the Party's nominee for a criminal court judgeship in Alabama's Tenth Judicial Circuit, Criminal Division, Place 14, located in Birmingham. *C*_7. On June 1, 2022, however, Judge Clyde Jones, who then held the position, retired from the position before his term ended, thereby creating a vacancy in the Place 14 judgeship. *Id.*

Under the Alabama Constitution, judicial vacancies arising in the Birmingham Division of Jefferson County are to be filled by the Governor from one of three qualified candidates recommended by the Jefferson County Judicial Commission ("JCJC"). Ala. Const. Jeff. Cnty. §§ 8–9 (also cited as Ala. Const. Amend. No. 83 and No. 110). *C*_5. On June 1, 2022, JCJC commenced its constitutional duty by announcing that it was accepting applications to fill the vacant judgeship until June 30th. *Id.*

Ms. Hudson submitted her application to be considered for the position. *Id* at 7. JCJC was prepared to begin interviewing applicants on July 18, 2022. *Id*. After the interviews, JCJC was supposed to submit the names of the three finalists to Governor Ivey for her selection pursuant

to Ala. Const. Amend. No. 83 and No. 110. *Id.* at 5, 7. However, while JCJC was carrying out its constitutional duty to select nominees to forward to the Governor, JRAC—another commission—announced that it was convening on June 9, 2022, to decide whether to eliminate the Place 14 judgeship and create a new judgeship in another county. *Id.* at 11.

In 2017, the Alabama Legislature created JRAC to review the needs for increasing or decreasing the number of judgeships in the state annually and report those recommendations to the Governor and Legislature. Ala. Code § 12-9A-1(d)–(e). *Id.* at 9, 10. Under Ala. Code § 12-9A-2, the Legislature purported to empower JRAC to eliminate and create new judgeships if a vacancy arose. *C*_8. JRAC consistently recommended to the Legislature that it increase the size of the Madison County Circuit Court, but the Legislature never used its power to create a new judgeship. *Id.* at 9-10.

At a June 9, 2022, meeting, JRAC voted to eliminate the Place 14 circuit court judgeship in Jefferson County. *Id.* at 12. JRAC argued that a caseload study showed that Jefferson County did not need the vacant judgeship and that Madison County did. *Id.* at 11. State Senator Rodger

Smitherman testified that the caseload study was based on a flawed premise. *Id.* He explained that Jefferson County, unlike Madison County, assigns case numbers in such a way that makes the county's caseload appear smaller than it is. *Id.* Others also spoke up to oppose eliminating the Place 14 judgeship. *Id.* at 12. Nevertheless, JRAC voted 8-3 to eliminate the Tenth Judicial Circuit, Place 14 judgeship in Jefferson County and create a new judgeship in the Twenty-Third Judicial Circuit in Madison County. *Id.* All Black members of JRAC voted against transferring the judgeship, and all white members voted in favor. *Id.*

Pursuant to § 12-9A-2, JRAC proposed a set of applicants to Governor Ivey to appoint to the newly created Madison County judgeship. *Id.* at 7. On July 18, 2022, Governor Ivey appointed Patrick Tuten. *Id.* at 8. On or about when this appointment was made, JCJC stopped the constitutionally mandated application process for the Place 14 judgeship.

STANDARD OF REVIEW

"On appeal, a dismissal is not entitled to a presumption of correctness." *Nance v. Matthews,* 622 So. 2d 297, 299 (Ala. 1993). The court must view the "allegations in the complaint . . . most strongly in the pleader's favor." *Id.* The court "does not consider whether the plaintiff will ultimately prevail, but only whether [she] may possibly prevail." *Id.*

A dismissal is "proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle relief." *Id.* Additionally, a dismissal based on a lack of standing "is entitled to no deference on the appeal" because it is a "pure question of law." *Town of Mountainboro v. Griffin,* 26 So. 3d 407, 409 (Ala. 2009) (quoting *Blue Cross & Blue Shield of Alabama v. Hodurski,* 899 So. 2d 949, 953 (Ala. 2004)).

SUMMARY OF THE ARGUMENT

The circuit court erred when it granted the Motion to Dismiss for three reasons. *First,* the court did not view the complaint "most strongly in [Ms. Hudson's] favor" when it accepted Appellees' argument that she should have filed a writ *of quo warranto* instead of a declaratory-judgment action. Ms. Hudson's sole claim in her Complaint is a constitutional challenge to the authority of JRAC to eliminate and create judgeships, not a challenge to Judge Tuten's appointment to the judgeship or authority to serve. *C*_12. Relief is properly afforded to the former challenge by a declaratory judgment, while the relief for the latter challenge would be via a writ of *quo warranto.*

Second, Ms. Hudson has standing because she has suffered a concrete and particularized injury arising out of JRAC's interference with the lawful and constitutional process that JCJC was undertaking to consider her application to the Place 14 Circuit Court judgeship vacancy. Appellee Governor Kay Ivey compounded Ms. Hudson's injury by naming Appellee Patrick Tuten to serve in the newly created Madison County judgeship. Finally, the circuit court can redress Ms. Hudson's injury by declaring JRAC's action invalid and ordering Governor Ivey to make an

appointment to fill the Place 14 judicial vacancy from among the nominees JCJC forwards.

Third, viewing all the allegations of the complaint "most strongly" in Ms. Hudson's favor shows that she has more than sufficiently alleged that the Alabama Legislature "possibly" delegated its lawmaking power to JRAC. *Nance,* 622 So. 2d at 299. This is so because eliminating and creating judgeships requires an "act" by the Legislature under § 142 and § 151 of the Alabama Constitution. This Court has held that the "legislature cannot delegate its power to make a law." *Bailey v. Shelby Cnty.,* 507 So. 2d 438, 442 (Ala. 1987). Therefore, Ms. Hudson requests that this Court reverse the circuit court's decision.

ARGUMENT

I. The circuit court erred when it held that it lacked subject-matter jurisdiction to hear Ms. Hudson's declaratory-judgment action.

The circuit court held that "the only way" for it to have jurisdiction over this matter was through a writ *of quo warranto*. C_830. In so ruling, the circuit court misconstrued both the nature of Ms. Hudson's cause of action and the extent of its own jurisdiction. Ms. Hudson requested a declaratory judgment that Ala. Code § 12-9A-2 is unconstitutional because it delegates to JRAC the "power to repeal, amend, or otherwise supplant an act of the Legislature" by eliminating and creating new judgeships. *Freeman*, 761 So. 2d at 236-37 (Ala. 1999). Declaratory-judgment actions are unquestionably within the jurisdiction of the circuit court. Ala. Code § 6-6-222.

The question of whether JRAC has the power to "reallocate" judgeships—i.e., to abolish a judgeship in one county and create a new judgeship in another county—is a separate legal question from whether Judge Tuten has legal authority to act as a circuit judge. The former question, which is directed toward *JRAC*, can be brought through a

declaratory-judgment action. The latter question, which is directed toward *Judge Tuten*, can only be brought by a writ *of quo warranto*.

A. Declaratory-judgment actions require the court to ask a different legal question than when it decides a writ of *quo warranto*.

The difference between a declaratory-judgment action and a writ of *quo warranto* is clarified by reviewing both of their statutes. The purpose of a declaratory-judgment action is to "settle and to afford relief from uncertainty and insecurity with respects to rights, status, and other legal relations and is to be liberally construed and administrated." Ala. Code § 6-6-221.

Under Ala. Code § 6-6-591, a writ *of quo warranto* may be commenced for only three reasons:

> (1) When any person usurps, intrudes into or unlawfully holds or exercises any public office . . .;
>
> (2) When any public officer . . . has done or suffered any act by which, under the law, he forfeits his office; or
>
> (3) When any association, or number of persons, acts within this state as a corporation without being duly incorporated.

Ala. Code § 6-6-591.

Ms. Hudson filed her complaint pursuant to § 6-6-222 because she requested the court to "declare [the] rights" of JRAC and restore the Place 14 judicial vacancy. *C*_6. Her complaint does not allege any of the *quo warranto* violations. The only violation that could be considered is § 6-6-591(1). Yet, a review of the complaint "most strongly" in Ms. Hudson's favor confirms that she did not allege that Judge Tuten "usurp[ed]" the Madison County judgeship, but rather that JRAC did not have the power to create the office. *C*_13.

This Court highlighted the distinction between a declaratory-judgment action and a writ of *quo warranto* in stark terms in *Ex Parte Sierra Club v. Alabama Environmental Management Commission, et al.,* 674 So. 2d 54 (Ala. 1995). The plaintiff in that case, an Alabama chapter of the national environmental organization Sierra Club, challenged the appointments of representatives to the Alabama Environmental Management Commission. *Id.* at 56. The plaintiff argued that a "declaratory judgment action is the proper vehicle" for their suit. *Id.* at 58. This Court disagreed and held that:

> [t]his case is not merely one concerning the interpretation of a statute. Rather, it directly concerns whether [the representatives] are unlawfully exercising their positions as

> commissioners—i.e., whether they were appointed and confirmed in violation of Ala. Code 1975, § 22–22A–6. The question whether [the representatives] were properly or improperly appointed and confirmed strikes directly at the heart of their qualifications for those offices. Because their qualifications for service in office are being questioned, the writ *of quo warranto* is Sierra's only proper remedy in this case.

Id. This Court stated that, "[i]n contrast to the writ of *quo warranto*, the declaratory judgment procedure is designed to settle a justiciable controversy where each side has standing to engage the power of the courts for a determination of that controversy." *Id.*

This Court found that the plaintiff "would have standing to petition the trial court for a writ of *quo warranto*, on behalf of the State," but did not have standing to file a declaratory-judgment action in order to challenge the legality of the appointments. *Id.* The plaintiff's case was dismissed on that basis. *Id.* Unlike the *Sierra Club* plaintiffs, Ms. Hudson did not challenge whether Judge Tuten was legally appointed to a judgeship, but rather whether JRAC exercised inappropriate authority in creating the judgeship.

The circuit court relied on *Riley v. Hughes* in its decision, but that case is distinguishable from Ms. Hudson's claim. 17 So. 3d 643, 646 (Ala.

2009). *C*_830. In *Riley*, this Court reviewed a claim by taxpayer plaintiffs who sought, as their exclusive remedy, to oust four officials from their offices. *Id.* at 645. Specifically, the plaintiffs alleged that four trustees appointed by the Governor to the Board of Alabama A & M University had been rejected by the Alabama Senate, and therefore could not be permitted to serve. *Id.* The plaintiffs—unlike Ms. Hudson—did not challenge the legality of the statute pursuant to which the Governor made those appointments.

Indeed, the plaintiffs described their complaint as a "quo warranto complaint," but did not meet the statutory requirements for a *quo warranto* cause of action. *Id.* at 648. This is because both they and the defendants argued that the case should be "governed by the Declaratory Judgment Act." *Id.* at 646. This Court held that the lower court did not have subject-matter jurisdiction. *Id.* This Court reasoned that the plaintiffs sought to challenge the appointments and not the existence of the office, and a writ of *quo warranto* is the "exclusive remedy to determine whether a party is usurping public office." *Id.*

Here, Ms. Hudson seeks a declaration that Ala. Code § 12-9A-2 represents an unconstitutional delegation of legislative power. Ms.

Hudson can and must pursue that relief through an action for a declaratory judgment. That the unconstitutionality of § 12-9A-2 collaterally implicates Judge Tuten's authority to occupy an unlawfully created seat on the Twenty-Third Judicial Circuit does nothing to change the fact that Ms. Hudson presented to the court a justiciable controversy archetypally suited to resolution as a declaratory-judgment action. Thus, this court should reverse the circuit court's decision.

B. Only a declaratory-judgment action affords Ms. Hudson complete relief.

Even if this Court were to decide that Ms. Hudson needed to seek a writ of *quo warranto* with respect to Judge Tuten,[1] that does not warrant dismissing her declaratory judgment action against JRAC and Governor Ivey. Ms. Hudson's complaint clearly alleges a request for the court to "declare" the authority of both JRAC and the Governor under § 12-9A-2, and not whether the members of JRAC and the Governor were legally appointed to their positions. *C*_12.

[1] Judge Tuten was named as a defendant only because he was a proper party for preliminary injunctive relief to preserve the status quo, and because he had an interest in the outcome of this case.

If Ms. Hudson filed a writ of *quo warranto*, the only question a court could answer is whether Judge Tuten was illegally appointed to the judgeship. Under Ala. Code § 6-6-600, "[w]hen a defendant . . . against whom [a writ of *quo warranto*] has been commenced, is adjudged guilty of usurping or intruding into, or unlawfully holding or exercising, any office . . . judgment must be entered that such defendant be excluded from the office." Ala. Code § 6-6-600.

The court would not be able to declare that § 12-9A-2 unconstitutionally delegated lawmaking power to JRAC. Consequentially, the court would be unable to undo JRAC's termination of the Jefferson County judgeship. Ms. Hudson would still need to file a declaratory-judgment action to obtain this relief. Therefore, the circuit court erred by dismissing all defendants for lack of subject-matter jurisdiction and this Court should reverse the decision.

II. Ms. Hudson pled sufficient facts to have standing.

The circuit court incorrectly held that Ms. Hudson did not suffer an injury to a "legally protected right" or establish the elements of "traceability and redressability." *C*_830, 831. Generally, a plaintiff's complaint must allege: (1) an "actual, concrete and particularized 'injury

of fact'; (2) a 'causal connection between the injury and the conduct complained of'; and (3) a likelihood that the injury will be 'redressed by a favorable decision.'" *Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, L.L.C.,* 890 So. 2d 70, 74 (Ala. 2003) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992)). A plaintiff must also prove that she is "a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 501, 518 (1975)).

Ms. Hudson met her burden with the allegations in the complaint. She is not a mere interested citizen, but rather an interested applicant in the process. She alleged that she was participating in a constitutionally protected process to be considered for a judgeship when JRAC abruptly and unconstitutionally intervened, injuring her by dashing her prospects and causing JCJC to suspend its search and evaluation process. *C*_7, 12. Governor Ivey compounded Ms. Hudson's injury when she ratified and cemented JRAC's unconstitutional action by appointing Judge Tuten to serve in the new, illegally established Madison County seat. *Id.* But for the actions of JRAC and Governor Ivey, JCJC would have continued its constitutional search process to fill the

judicial vacancy in Jefferson County, and Ms. Hudson would have maintained her opportunity to pursue that judicial seat that—but for the unanticipated vacancy—would have been her seat based on her successful primary victory. *C*_7.

Only a declaration that JRAC exercised unconstitutionally delegated legislative authority and equitable relief restoring the *status quo ante* will redress Ms. Hudson's injury and permit her to resume her participation in the Jefferson County judicial nomination process. *Id.* at 14.

This Court's decision in *Randall v. Water Works & Sewer Board of City of Birmingham* supports Ms. Hudson's claim for standing. 885 So. 2d 757, 764 (Ala. 2003). In *Randall,* the Water Works & Sewer Board filed a declaratory-judgment action challenging the constitutionality of a proposed ordinance filed by a group of electors from the City of Birmingham. *Id.* at 759–60. The ordinance would strip the contractual powers from the Board and give it to a "special attorney for the City." *Id.* at 759.

This Court held that the Board had standing to bring this action because the electors had already acted pursuant to the ordinance by

submitting it to the probate court for review. *Id*. at 764. The probate court "indicated its intent to certify and submit" the ordinance to the Birmingham City Council. *Id.* The Court reasoned that the Board had a "redressable injury" and a "right to be protected" in this action. *Id.* (internal quotations omitted).

Ms. Hudson—like the Board—also suffered a "redressable injury" when JRAC eliminated the judgeship she applied for pursuant to an unconstitutional statute. Ms. Hudson has the "right to be protected" from being adversely affected by JRAC using unconstitutional power and to have her application considered pursuant to Amendments 83 and 110 of the Alabama Constitution. Ala. Const. Jeff. Cnty. §§ 8–9.

The cases cited in the lower court's order are inapposite. First, the court cites *State v. Prop. at 2018 Rainbow Drive Know as Oasis*, 740 So. 2d 1025, 1027 (Ala. 1999), for the proposition that Ms. Hudson's injury was not to a "legally protected right," without explanation. *C*_830. In *Rainbow Drive,* the City of Gadsden commenced an action under an Alabama forfeiture statute. 740 So. 2d at 1026. However, this Court held that Gadsden was "statutorily barred from commencing" the action

because the statute only permits the State to bring a forfeiture. *Id.* at 1028. Thus, Gadsden "had no legal right" to bring the action. *Id.*

Ms. Hudson has a "legal right" to bring a declaratory-judgment action to "settle and to afford relief from [the] uncertainty and insecurity with respect" to her application. Ala. Code § 6-6-221. Ms. Hudson is one of a small number of attorneys who *actually applied* to JCJC to be nominated for the vacant judgeship within the timeframes allowed by JCJC in its solicitation. *C*_7. An application process that is guaranteed by Amendments 83 and 110 to the Alabama Constitution. Ala. Const. Jeff. Cnty. §§ 8–9. JRAC and Governor Ivey thwarted this constitutional process and deprived Ms. Hudson of any opportunity to be considered for the Place 14 judgeship. *C*_7, 8.

Next, the court cites this Court's decision in *King v. Campbell*, 988 So. 2d 969 (Ala. 2007). *C*_830. *King* is not only factually distinguishable, but it also emphasizes the circuit court's error in deciding that Ms. Hudson did not "possibly" state a constitutional violation. *King* delt with a constitutional challenge to an act that created a new judgeship. *Id.* at 971. The original act provided that the initial officeholder was to be elected, but the act was amended before the election to provide that the

governor appoint the initial officeholder. *Id.* at 972. Before the amendment was signed into law, the plaintiff was certified as the Democratic Party nominee for the judgeship. *Id.* at 973.

The plaintiff argued that his status as the nominee prevented him from losing his position due to the legislature's amendment. *Id.* at 979. This Court rejected the plaintiff's argument because nominees are not "insulated from the effects of the abolition of the office" by the "**legislature**." *Id.* (emphasis added). This Court then cited several of its decisions as well as those from other states which rejected the contention that a candidate's status protected him from the impact of "**legislation** abolishing the office for which he is a candidate." *Id.* (emphasis added). For example, the Court quotes *Lane v. Kolb,* 9 So. 873, 874 (1891) in stating that:

> [w]hen an office is not provided for by the Constitution, but is the creature of statute, there is no element of contract between the officer chosen and the public, or constituent body which confers the office. **Being created, and its functions and emoluments conferred**, **by the legislature**, **the same body may abolish it, take away or reduce its functions and emoluments**, or make any change its wisdom or caprice may suggest, not inhibited by the organic law.

Id. (emphasis added). Additionally,

> [o]ffices are neither grants nor contracts, nor obligations which cannot be changed or impaired. **They are subject to the legislative will at all times**, except so far as the Constitution may protect them from interference. **Offices created by the Legislature may be abolished by the Legislature. The power that creates can destroy. The creator is greater than the creature**. The term of an office may be shortened, the duties of the office increased, and the compensation lessened, **by the legislative will**.

Id. at 980 (emphasis added) (citations omitted).

Turning to Ms. Hudson's case, she alleged in her complaint, argued in opposition to the motion to dismiss, and explained at the hearing that her injury does not stem from being the Democratic nominee for the Place 14 judgeship. *C*_7, 775; *R*_806. Appellees even acknowledge this in their own motion. *C*_92. Ms. Hudson was injured when JRAC—not the Legislature—eliminated the position which she applied for through a constitutionally protected process.

Being a JCJC applicant and having a commission "abolish" an office created by the legislature is not the same as being a nominee and having the legislature amend its own creation. This Court has held that the "legislature cannot delegate its power to make a law." *Bailey v. Shelby Cnty.,* 507 So. 2d 438, 442 (Ala. 1987). As described in the next section

and by this Court's rationale in *King,* creating and eliminating judgeships requires lawmaking powers. Ms. Hudson cannot have her application thwarted due to an unconstitutional act by JRAC and thus, suffered injury to a "legally protected right."

The last case the circuit court cites is *Stamps v. Jefferson County Board of Education*, 642 So. 2d 941, 944 (Ala. 1994), for the proposition that Ms. Hudson's injury is not traceable to and cannot be redressed by the Appellees.*C*_831. The plaintiff in *Stamps* did not file against the proper party. *Stamps,* 642 So. 2d at 945. This Court held that a judgment "would not terminate the uncertainty or controversy giving rise to the proceeding." *Id.* at 944. Here, by contrast, a declaration that JRAC does not have the power to eliminate or create judgeships *will* terminate the controversy.

Additionally, Ms. Hudson's claim for standing is distinguishable from *Town of Cedar Bluff v. Citizens Caring for Children,* where this Court held the plaintiffs lacked standing. 904 So. 2d 1253 (Ala. 2004). *Town of Cedar Bluff* concerned a lawsuit brought by town residents and a civic organization challenging a town election to allow the sale of alcohol after the Alabama Legislature passed an act to give certain towns

that option. *Id.* at 1255. The plaintiffs argued they had standing but did not "specifically allege any particular injury that they (or anybody else) will suffer" because of the sale of alcohol. *Id.* at 1258.

The group wanted the court to take "judicial notice" that the Legislature had already decided that alcohol sales will result in an injury to the town's "welfare, health, peace and morals" when they passed a previous statute 19 years ago making the town a part of a "dry county." *Id.* This Court held that the group did not have standing because of the omission of any evidence they were injured by the alcohol sales. *Id.* at 1259. This Court mentioned that even if they took judicial notice of the statute, the Legislature passed a new act that they "would not have enacted if it felt an imminent injury would result" from it. *Id.*

Conversely, Ms. Hudson alleged an "actual, concrete and particularized" injury. She alleged that JRAC and the Governor thwarted her JCJC application which was guaranteed by the constitution when they eliminated the judgeship and created a new one in Madison County. *C*_12, 13. Therefore, this Court should reverse the circuit court's decision.

III. Ms. Hudson properly stated a possible claim that Ala. Code § 12-9A-2 delegates lawmaking power to JRAC.

The circuit court erred when it held that Ms. Hudson did not "possibly" claim, *Nance,* 622 So. 2d at 299, that the Alabama Legislature delegated lawmaking power to JRAC. *C*_831. This Court has held that "a motion to dismiss is rarely appropriate in a declaratory-judgment action." *Harper v. Brown, Stagner, Richardson, Inc.,* 873 So. 2d 220, 223 (Ala. 2003). This is because the "test for the sufficiency of a complaint seeking a declaratory judgment is whether the pleader is entitled to declaration of rights at all, not whether the pleader will prevail" in the action. *Id.*

The circuit court held that the delegation was lawful because § 12-9A-2 "carries significant standards that limit" JRAC's discretion. *C*_831. Not only is this factual conclusion improper at this stage, but it is also irrelevant because Ms. Hudson alleged that the Legislature delegated its "power to make, alter, amend and repeal laws" to JRAC. *Freeman*, 761 So. 2d at 236-37 (Ala. 1999).

As a general principle, the Alabama Constitution states that "the legislative power of this state shall be vested in a legislature." Ala. Const. Art. IV § 44. The Legislature may delegate certain governmental powers for efficiency; however, these delegations are always subject to the "clearly implied limitation of the Constitution that the lawmaking power,

invested exclusively in the Legislature, cannot be delegated." *Parke v. Bradley,* 86 So. 28, 29 (Ala. 1920); *see also In re Opinions of the Justices,* 166 So. 706, 708 (Ala. 1936).

This Court has held that "although the Legislature can delegate the power to make rules and regulations for the 'purpose of carrying [the law] into practical effect and operation . . . and to secure an effective execution of the same' it cannot delegate the power to repeal, amend, or otherwise supplant an act of the Legislature." *Freeman*, 761 So. 2d at 236–37 (citations omitted). Thus, the circuit court should not have reached the question of whether there are sufficiently limiting standards.

Even the cases cited in the circuit court's order underscore this point. In *Monroe v. Harco, Inc.,* 762 So. 2d 828 (Ala. 2000), this Court stated that:

> [t]he true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done. To the latter, no valid objection can be made."

Id. at 831 (internal quotation marks omitted); *see Bailey v. Shelby Cnty.*, 507 So. 2d 438, 442 (Ala. 1987). ("The legislature cannot delegate its power to make a law."). In other words, the Legislature cannot permit a commission to substitute its will for the Legislature's; it can only delegate the discrete power to help execute or administer the Legislature's will.

The question the court should have asked was whether Ms. Hudson's complaint "possibly" alleged that eliminating and creating judgeships requires an act by the Legislature. *Nance,* 622 So. 2d at 299. The Court would have denied the motion to dismiss because the Alabama Constitution is unequivocal: *only* the Legislature may change the number of judges serving in each judicial circuit. Even if the Constitution did not explicitly state that changing the number of judges serving in each judicial circuit is the Legislature's exclusive purview (which it does), courts have established a clear definition of lawmaking power, and this type of decision-making falls squarely within that power.

Ms. Hudson presented the circuit court with two Alabama Constitutional provisions that illustrate this. First, Article 6 § 142(a) states that, "[f]or each circuit, there shall be one circuit court having such

divisions and *consisting of such number of judges as shall be provided by law*." Ala. Const. Art. VI § 142(a) (emphasis added).

Pursuant to that mandate, the Legislature enacted a law setting exactly the number of judges serving in each circuit: Ala. Code § 12-17-20. Section 12-17-20 establishes, in precise and unambiguous terms, that "there shall be 27 circuit judges in the tenth judicial circuit," in Jefferson County. Ala. Code § 12-17-20(b)(8). It also states that "there shall be seven circuit judges in the twenty-third judicial circuit," in Madison County. *Id.* at § 12-17-20(b)(20). The Legislature can and has amended this statute to change the number of judges in each circuit. In 2009, for example, the Legislature amended the statute to increase the number of judgeships in the twenty-third judicial circuit from six to seven.

Remarkably, this statute is now inaccurate because JRAC unilaterally decreased the number of judges in the tenth judicial circuit from 27 to 26 and increased the number of judges in the twenty-third judicial circuit from seven to eight. In other words, JRAC commandeered the Legislature's authority to amend § 12-17-20. Eliminating a judgeship in one circuit and creating a judgeship in another—and thereby

amending or otherwise supplanting § 12-17-20—requires lawmaking power that cannot be delegated.

The second constitutional provision providing evidence that the Legislature may not delegate authority to change the number of judges serving in each circuit is found in Article 6, § 151. Section 151(b) states: "*No change shall be made* in the number of circuit or district judges, or the boundaries of any judicial circuit or district *unless authorized by an act* adopted after the recommendation of the supreme court on such proposal has been filed with the legislature." Ala. Const. Art. VI § 151(b) (emphasis added).

The Alabama Legislature defines an "act" as a "bill which has passed both houses of the legislature, been enrolled, certified, approved by the governor or passed over the governor's veto, or otherwise becomes law."[2] Under the plain meaning of § 151(b), any change to the number of judgeships in a judicial circuit must be made by the Alabama Legislature. *See Jefferson Cnty. v. Weissman*, 69 So. 3d 827, 834 (Ala. 2011) ("[T]he

2 The Alabama Legislature: The Alabama Legislative Glossary, https://www.legislature.state.al.us/aliswww/ISD/AlaLegGlossary.aspx (last visited Sept. 12, 2022); *C*_780.

long-settled and fundamental rule binding this Court in construing provisions of the constitution is adherence to the plain meaning of the text.").

At the circuit court, Appellees argued that eliminating the judgeship in Jefferson County and creating a new position in Madison County did not violate § 151(b) because the total number of judges in the State remains the same. *C*_100. However, this conclusion can only be reached by failing to read § 151 in its entirety.

"Under the rules of statutory construction, [courts] must consider the statute as a whole and must construe the statute reasonably so as to harmonize the provisions of the statute." *McRae v. Security Pac. House Servs., Inc.*, 628 So. 2d 429, 432 (Ala. 1993). Applying that principle here, § 151(a) begins by requiring this Court to "establish criteria for determining the number and boundaries of judicial circuits and districts, and *the number of judges needed in each circuit and district*." *Id.* (emphasis added).

The next sentence in § 151(a) tells this Court what to do if, based on those criteria, it determines that action is warranted, stating that if a "need exists for increasing or decreasing the *number of circuit or district*

judges . . . it shall . . . certify its findings and recommendations to the legislature." *Id.* (emphasis added). This provision refers to the "number of circuit or district judges" as shorthand for the circuit and district-specific inquiry defined in the opening sentence.

To read § 151(a) otherwise would be to assume that the Legislature instructed this Court to "establish criteria" for the "number of judges in each circuit and district," but then restricted it from making circuit and district-specific judgeship recommendations to the Legislature. The more "reasonabl[e]" reading, *McRae*, 628 So. 2d at 432, is that references to "the number of circuit or district judges" throughout § 151 include the number of judges in "each circuit and district" because it effectuates this Court's mandate to "establish criteria" and issue recommendations. Thus, § 151(b) requires the Legislature to pass an act to make any change to the number of judges in "each circuit and district."

This interpretation of § 151 (b) is also supported by how this Court interpreted § 152 of the Alabama Constitution in *King*. As mentioned above, *King* dealt with an amendment that changed how a newly created judgeship would be filled. 988 So. 2d at 972. The amendment gave the governor the power to appoint the initial officeholder instead of there

being an election. *Id.* This Court held that this was unconstitutional because § 152 states that "[a]ll judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts." *Id.* at 980.

This Court reasoned that to permit the governor to make the initial appointment would be an "emasculation of § 152" because of how clear the section is. *Id*. at 981. Similarly, JRAC cannot be given the power to "emasculat[e]" § 151 by eliminating and creating new judgeships when the language of § 151 specifically reserves this power to the Legislature. Moreover, this Court cited multiple cases in *King* that illustrated the point that creating and eliminating public offices requires the will of the legislature. *Id.* at 979-81; *see Lane,* 9 So. at 874 ("Being created, and its functions and emoluments conferred, by the legislature, the same body may abolish it, take away or reduce its functions and emoluments.").

At the minimum, Ms. Hudson's complaint, viewed "most strongly" in her favor, sufficiently alleged that either § 142 or § 151 "possibly" gives the Legislature the exclusive authority to change the number of judges in each judicial circuit. *Nance,* 622 So. 2d at 299. Thus, she met her burden to survive a motion to dismiss.

This Court's decision in *Harper* supports that Ms. Hudson has met her burden. 873 So. 2d 220 (Ala. 2003). In *Harper,* the defendants received a judgment against plaintiff's corporation. *Id.* at 222. In a post-judgment deposition, defendants realized that the plaintiff could also be held personally liable for the judgment against the corporation due to fraud. *Id.* The plaintiff filed a declaratory-judgment action against the defendants "seeking to determine the rights, status, and other legal relations between the two parties." *Id.*

The defendant filed a motion to dismiss "on the grounds that there was no justiciable controversy between the parties." *Id.* The lower court granted the motion. *Id.* at 223. This Court reversed because a "declaratory-judgment action requires only that there be a bona fide justiciable controversy." *Id.* at 224. A "justiciable controversy" is one that "where present 'legal rights are thwarted or affected [so as] to warrant proceedings under the Declaratory Judgment statues.'" *Id.* (internal citation omitted.) The Court reasoned that the plaintiff met this burden because he sought to have the court "clarify the uncertain issues whether he could be individually liable for [the defendants'] judgment." *Id.* at 225.

Similarly, Ms. Hudson alleged a "justiciable controversy" in her complaint. She needed the court to "clarify the uncertain issue whether" JRAC has the power to eliminate the judgeship which she applied to through a constitutionally protected process. *C*_12. Therefore, *Harper* supports reversal of the circuit court's decision.

If this Court were to agree with the lower court that eliminating and creating judgeships are not in the exclusive control of the Legislature, then this Court should still reverse because it is a factual question whether there are "reasonably clear standards governing the execution and administration" of appointments for JRAC. *Folsom v. Wynn*, 631 So. 2d 890, 894 (Ala. 1993). This Court has held that courts do not review factual questions on a motion to dismiss. *Anonymous v. Anonymous,* 672 So. 2d at 787, 788 (Ala. 1995).

Here, § 12-9A-2 grants JRAC virtually unfettered discretion to step into the Legislature's shoes, permitting JRAC to substitute its will for the will of the Legislature—as codified in § 12-17-20, setting the number of judges in each circuit. The only constraint on JRAC's discretion is that it must "consider" rankings that JRAC itself devises based on criteria

including "[a]ny . . . information deemed relevant by the commission." Ala. Code §§ 12-9A-2(a), 12-9A-1(d)(5).

Nevertheless, all Ms. Hudson would have to allege at this stage is whether it is "possibl[e]" there are not sufficient constraints. *Nance,* 622 So. 2d at 299. Her complaint meets this burden. Therefore, this Court should reverse the circuit court's decision.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully requests this Court to reverse the circuit court's decision.

Dated: September 27, 2022

Respectfully submitted,

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*Motion for admission
pro hac vice to be filed.

**Appearance to be filed.

CERTIFICATE OF COMPLIANCE

I hereby certify compliance with the font and world limits as required by Rule 32(d) of the Alabama Rules of Appellate Procedure because this Motion contains 6,821 words and uses Century Schoolbook 14-point font.

Dated: September 27, 2022 *<u>/s/ Ellen Degnan</u>*
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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2022, I electronically filed the foregoing Brief with the Clerk of Court using AlaFile, which will send notification of such filing to all counsel of record.

Dated: September 27, 2022 *<u>/s/ Ellen Degnan</u>*
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