NO. 2010-TS-01949

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEBORAH HUGHES and CRISTEN HEMMINS,

Plaintiffs / Appellants,

vs.

DELBERT HOSEMANN, MISSISSIPPI SECRETARY OF STATE

Defendant / Appellee,

and

P. LESLIE RILEY & PERSONHOOD MISSISSIPPI,

Defendants-Intervenors / Appellees

APPEAL FROM THE CIRCUIT COURT
FOR THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF THE APPELLANT

Oral Argument Set for June 6, 2011

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INTRODUCTION

P. Leslie Riley and Personhood Mississippi ("Sponsors") are speaking out of both sides of their mouths, telling this Court one thing and their supporters something else. They insist to this Court that "[Proposed Initiative] Measure 26 does not propose new rights or alter the existing substantive rights contained in Article III" (Sp. Br. 13), but they tell their supporters that Measure 26 "*extends* equal protection of the laws to every human being from the earliest stages of life," "would *expand* application of that term ["person"] to include the unborn," and "would effectively *ban* the harvesting of embryonic stem cells for destruction." Legal Memorandum on the Mississippi Personhood Amendment, http:// lc.org / media / 9980 / attachments / memo _ ms _ personhood.pdf (last visited Apr. 8, 2011); (R.E. 7, Ex. A at 4, 7, 8) (emphasis added). Despite these public claims, they argue to this Court not only that no new rights are involved, but that the Constitution prohibits only the proposal and modification of new "rights." (*See* Sp. Br. 14-16.) In so doing, the Sponsors ignore the fact that the language of Article XV, Section 273(5)(a) of the Mississippi Constitution uses "portion" rather than "right" and prohibits the use of an initiative for the "proposal, modification, or repeal of any *portion* of the Bill of Rights." (Emphasis added).

Further, the Sponsors erroneously contend that they are prejudiced by the failure of the Plaintiffs to "act[] promptly and obtain[] expedited review" because it prevented them from "lobby[ing] the legislature to formally adopt Measure 26" (Sp. Br. 9), even though the Plaintiffs filed their suit *more than sixteen months* prior to the election and soon after the signatures were certified. The Sponsors' never raised this argument in the lower court, agreed with Plaintiffs on the the lower court briefing schedule adopted by that court, and never requested that this Court shorten the briefing schedule on appeal. While Plaintiffs filed their notice of appeal and their

appellant's brief well before the due dates, the Sponsors took their full thirty days to file their response brief. And, nothing prevented the Sponsors from lobbying the legislature in the interim.

Indeed, the Sponsors' new claim that they were somehow prevented from seeking legislative adoption of Measure 26 highlights the fact that there is a constitutionally proper method for proposing and modifying portions of the Bill of Rights. Article XV, Section 273(2) of the Mississippi Constitution permits the "propos[al]" of any "amendment, change or alteration" to the Constitution by two-thirds of each house of the legislature, after which the proposal is placed on the ballot to be decided by the people. However, the Sponsors chose to pursue a constitutionally improper route through an initiative that is plainly prohibited by Section 273(5)(a).

I. MEASURE 26 PROPOSES A NEW PORTION OF THE BILL OF RIGHTS.

The Sponsors argue that Section 273(5)(a) only "prohibits the use of the initiative process to propose *new rights* . . . ." (Sp. Br. at 16.) But Section 273(5)(a) prohibits the use of an initiative for the "proposal . . . of any *portion* of the Bill of Rights" (emphasis added), not any "right." Clearly, the proposed Section 33 that Measure 26 would add to Article III would be a new "portion of the Bill of Rights," and therefore the initiative process may not be used to "propos[e]" it.

The Sponsors contend that their reading of the word "portion," by which the word means "right" rather than "portion," is "confirmed by a comparison of Section 273(5) with the only other state to specifically shield individual rights from the initiative process, Massachusetts." (Sp. Br. 13.) But the language of Massachusetts Constitutional article XVLIII, Initiative, Part II, section 2, quoted by the Sponsors at page 13 of their brief, specifically states: "No proposition

inconsistent with any one of the following rights of the individual . . . shall be the subject of an initiative or referendum petition." (Emphasis added). Thus, Massachusetts only prohibits use of the initiative process in a manner that would be "inconsistent" with certain existing "rights." Unlike the Massachusetts clause, Mississippi's limitation on the initiative process makes no mention of "rights," but broadly prohibits *any* use of the initiative process that would "propos[e]" any "portion of the Bill of Rights," without limitation. Miss. Const. art. III, § 273(5)(a). Whether that portion is merely a "clarification," as the Sponsors claim to this Court (Sp. Br. 4), or an "extension" or "expansion" of rights, as they claim to their supporters (*see* R.E. 7, Ex. A at 4, 7), it would nevertheless be a new "portion of the Bill of Rights."

The Sponsors' argument that Section 273(5)(a) does not prohibit initiatives from being used to propose definitions to terms in the Bill of Rights, (Sp. Br. 11, 16), could lead to similar attempts to change the meaning of a number of provisions in the Bill of Rights through the initiative process. For example, under the Sponsors' theory, citizens could propose an initiative to expand the definition of "citizens" in Article III, Section 8 to include undocumented immigrants. They could propose an initiative to define the meaning of "arms" in Article III, Section 12 (Right to Bear Arms) to limit its application only to rifles, and not handguns, or to expand it to include shoulder-fired missiles, or to define "citizen[s]" who have the right to "keep and bear arms" under Section 12 specifically to include convicted felons. Citizens could also propose an initiative to define the meaning of "religious" and "religion" in Article III, Section 18 (Freedom of Religion), to apply only to certain religions that were predominant when the Constitution was first enacted or to "clarify" that these terms include, and therefore constitutional protection is extended to, religions whose core tenet is the practice of polygamy. Citizens could propose an amendment defining "cruel or unusual punishment" in Article III, Section 28 so that

those terms encompassed the death penalty, or encompassed sentences in excess of twenty years for juveniles convicted of adult felonies, or conversely, to define "cruel and unusual punishment" so that the death penalty could never be held to be "cruel and unusual" under any circumstances, even as a penalty for burglary. They could propose all manner of definitions of the meaning of "due process of law" in Article III, Section 14 in reaction to court decisions with which they disagree. Or they could define "person" as used in the due process clause of Section 14, to exclude persons accused of crime. These are the types of changes that Section 273(5)(a) was meant to keep off limits from the initiative process. *See In re Proposed Initiative Measure No. 20*, 774 So.2d 397, 402 (Miss. 2000) ("Section 273 of the Mississippi Constitution seeks to temper the initiative induced tension between the unchecked will of the majority versus the inherent rights of individuals. The section protects the Bill of Rights and other matters of state interest").

The Sponsors also argue that this Court "stated in *Measure No. 20,* [that] Section 273(5)(a)'s prohibitions . . . are designed to prevent the substantive *rights* contained within Article III from being damaged . . . [and] not . . . to prevent . . . the people, from simply clarifying or defining *words* contained in the document." (Sp. Br. 11.) But in *Measure No. 20* this Court never said that so-called "definitions" could be proposed to the Bill of Rights through the initiative process, and the Sponsors provide no citation or quotation for any such statement by this Court. The Court did say that the section "protects the Bill of Rights," 774 So. 2d at 402, but that does not mean that the Sponsors can propose new portions of the Bill of Rights that define terms such as "person," "citizen," "arms," or "religion."

II. MEASURE 26 MODIFIES THE MISSISSIPPI BILL OF RIGHTS.

As mentioned in the Plaintiffs' opening brief, this Court need not address the issue of modification if the Court agrees that Measure 26 clearly "propos[es] . . . [a] portion of the Bill of Rights." If the Court does address the modification issue, however, this clearly is a modification.

In our opening brief, we pointed to Mississippi Code Annotated section 97-3-37 to show that the legislature amended the definition of "human being" to include "an unborn child" for purposes of some crimes, but not others. (Pls.' Br. 8.) We also highlighted the absurdities that would ensue if the word "person" were assumed to include fetuses for purposes of the census, drivers' licenses, and voter registration. (*Id.* at 8-9.) The Sponsors respond by saying that their Measure would affect only the Bill of Rights, not the Mississippi statutes. (*See* Sp. Br. 25 n.4.)

But their response misses the point. These statutes prove that the proposed definition in Measure 26 is not part of a common understanding of Mississippi law that dates back to the passage of the Constitution and the Bill of Rights in 1890. Thus, it was necessary for the legislature to specifically insert a definition of "human being" that includes "an unborn child" in order to change portions of the criminal law. Moreover, these statutes demonstrate that definitions make a difference and that they modify the operation of the law. For example, the definition in section 97-3-37 applies to certain criminal statutes so that they encompass third parties who injure "an unborn child." The definition, however, does not apply to other criminal statutes, and those statutes are not modified in that manner.[1]

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[1] Sponsors also contend that by omitting the term "amend" in Section 273(5)(a), but not in Sections 273(5)(b),(c), and (d), the drafters did not intend to prohibit the use of the initiative process to make the sort of change to the Bill of Rights that the Sponsors seek. (*See* Sp. Br. 14-15.) But Section 273(5) does use the term "modify." As indicated by the same online dictionary cited by the Sponsors (Sp. Br. 11), the definition of "modification" includes the following meanings: "the making of a limited change in something . . . the result of such a change . . . a limitation or qualification of the meaning of a

Indeed, the Sponsors have told their supporters that Measure 26 "*extends* equal protection of the laws to every human being from the earliest stages of life," "would *expand* application of that term ["person"] to include the unborn," and "would effectively *ban* the harvesting of embryonic stem cells for destruction." Legal Memorandum on the Mississippi Personhood Amendment, Liberty Counsel, _http:// lc.org /media / 9980 / attachments/ memo_ms _personhood.pdf (last visited Apr. 8, 2011); (R.E. 7, Ex. A at 4, 7, 8) (emphasis added). In addition, on their website, Sponsors state that: "If Mississippians vote Yes on Amendment 26 - Abortion will be outlawed. Unborn children will no longer be killed 'legally' . . . ." Exhibit A (Personhood Mississippi, http:// www.personhoodmississippi.com / amendment-26 / why.aspx (last visited Apr. 8, 2011)). Also, "[i]f Mississippians vote Yes on Amendment 26 - human cloning, embryo stem cell research, and other forms of medical cannibalism would be effectively stopped . . . ." *Id.* Those are clearly modifications in the meaning and operation of the Bill of Rights, which is why the Sponsors devoted what they have called "months of arduous labor and traveling the four corners of the state" (Sp. Br. 3), to collect signatures for their proposal.[2]

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word by another word, by an affix, or by internal change." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/modification (last visited Apr. 8, 2011). The definition proposed by the Sponsors of the word "person" is, at the very least, a "qualification of the meaning of a word by another word." Similarly, the definition of "amend" includes "to change or modify for the better" or "*to alter especially in phraseology;* especially*: to alter formally by modification, deletion, or addition.*" *See Merriam-Webster Dictionary,* http://www.merriam-webster.com/dictionary/amend (last visited Apr. 8, 2011) (emphasis added). Thus, there is a substantial overlap between amendments and modifications, and the use of the word "modify," rather than "amend," in Section 273(5)(a) does not mean that the type of initiative proposed by the Sponsors is constitutional. As explained in Plaintiffs' opening brief and in the text of this reply brief, Measure 26 is both a proposal of a portion of the Bill of Rights and a modification of portions of it.

[2] The Sponsors have also entirely misconstrued this Court's holdings in *Power v. Robertson*, 130 Miss. 188, 93 So. 769 (Miss. 1922) and *State v. Brantley*, 112 Miss. 812, 74 So. 662 (Miss. 1917). (*See* Sp. Br. 20-21.) In *Brantley*, this Court refused to hold that the then-Initiative and Referendum Amendment violated the single-subject rule regarding constitutional amendments, contained in Section 273(2), and therefore declined to rule that the Initiative and Referendum Amendment was void on its face. 74 So. at 664. Five years later, in *Power*, this Court reversed course, and held that the same Initiative and Referendum Amendment *did* in fact violate the single-subject rule in Section 273(2) because the initiative

III. THE ENFORCEMENT OF SECTION 273(5)(a) IS FULLY CONSISTENT WITH THE RIGHTS THE CITIZENS HAVE RESERVED TO THEMSELVES IN THE CONSTITUTION.

In one of the many rhetorical flourishes employed by the Sponsors in their brief, they contend that "Plaintiffs do not and cannot cite any legal authority for their interpretation that would strip Mississippi citizens of the very powers they have reserved to themselves." (Sp. Br. 11.) No one, however, is trying to strip Mississippi citizens of the powers they have reserved to themselves. This lawsuit simply seeks to enforce the powers and limitations that the citizens have imposed through the Mississippi Constitution.

Mississippi's citizens have provided for two ways to amend the Constitution. As stated in Section 273(1): "Amendments to the Constitution may be proposed by the Legislature or by initiative of the people." Through Section 273(5), Mississippi's citizens have provided that "[t]he initiative process shall not be used: (a) For the proposal, modification, or repeal of any portion of the Bill of Rights of this Constitution." However, through Section 273(2), the citizens have left open a means by which their elected representatives can propose a change to any portion of the Constitution, including the Bill of Rights, and the citizens can vote on it at the next election:

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process and the referendum process were, in fact, quite different legal animals which accomplished multiple and different ends. 93 So. at 775-77. These cases do not, as Sponsors insinuate, turn on whether an amendment constitutes a clarification or a modification, but on the meaning of the single-subject rule concerning constitutional amendments.

> Whenever two-thirds (2/3) of each house of the Legislature . . . *shall deem any change, alteration or amendment necessary to this Constitution*, such proposed amendment, change or alteration shall be read and passed by two-thirds (2/3) vote of each house, as herein provided; public notice shall then be given by the Secretary of State at least thirty (30) days preceding an election, at which the qualified electors shall vote directly for or against such change, alteration, or amendment.

(Emphasis added). Thus, the plain language of the Constitution prohibits initiatives that propose, modify, or repeal any portion of the Bill of Rights, but allows the people's representatives to propose any change, alteration, or amendment to any portion of the Constitution, including the Bill of Rights, with the citizens deciding at the polls whether to adopt the proposal.

These distinctions between proposals by initiative and proposals by the people's elected representatives are clear from the plain language of the Constitution, which the Courts are bound to follow. (Pls.' Br. 5-6) (citing cases); *see also Camp v. Stokes*, 41 So.3d 685, 686 (Miss. 2010) ("When a statute is plain on its face, there is no room for statutory construction"); *Craig v. Mercy Hospital-Street Memorial*, 209 Miss. 427, 441, 45 So.2d 809, 815 (Miss. 1950) (holding that when intent is "plainly declared in the [Constitution] itself, the courts are not at liberty to search elsewhere for possible, or even probable meanings") (internal quotations and citations omitted); *State Teachers' College v. Morris*, 165 Miss. 758, 144 So. 374, 382 (Miss. 1932) ("[T]he words employed in a Constitution are to be taken in their natural and popular sense . . . ."); *cf. Barbour v. State ex rel. Hood*, 974 So.2d 232, 246 n.22 (Miss. 2008) ("This Court must presume the words in the statute were 'intended to convey their usual meaning absent some indication to the contrary.'") (quoting *Balouch v. State,* 938 So.2d 253, 259 (Miss. 2006)). Adherence to the constitutional language does not "strip . . . citizens of the very powers they have reserved to themselves," as the Sponsors have claimed (Sp. Br. 11), but instead is faithful to

the limits on those powers that the people themselves have placed on the initiative process through the Constitution.

For that reason, the enforcement of Section 273(5)(a) does not violate the First Amendment. The Sponsors' argument that the First Amendment requires that Mississippi allow its citizens to use the initiative process to make amendments or "adjustments" to the Bill of Rights is absurd and finds no support in the cases they cite. (*See* Sp. Br. 26-28) (citing cases holding restrictions on the signature collection process must be necessary to further a compelling state interest and narrowly tailored to achieving that interest). To the contrary, as this Court has held, by insulating the Bill of Rights from the citizen initiative process, Section 273(5) wisely "seeks to temper the initiative induced tension between the unchecked will of the majority versus the inherent rights of individuals." *In re Proposed Initiative Measure No. 20*, 774 So.2d at 402; *cf. Chevron U.S.A., Inc. v. State*, 578 So.2d 644, 649 (Miss. 1991) ("[E]xpediency has no application in interpreting constitutions, nor does public clamor, majority, desire, or apparent need . . . .") (quoting 16 C.J.S. *Constitutional Law* § 18 at 67 (1984)). There is nothing in state or federal case law suggesting that Mississippi must allow its citizens to amend the Bill of Rights through the initiative process, as opposed to allowing the Legislature to pass such an amendment before sending it to the people for ratification.

Indeed, as the Sponsors note (Sp. Br. 27), the First Amendment does not require a state to provide for an initiative process. It simply guarantees a right to free speech related to any process by which the state provides for the amendment of its constitution and laws. All Mississippi citizens retain their First Amendment rights to pursue initiatives regarding subjects for which initiatives are allowed under the Constitution, and to pursue other alternatives in situations where the initiatives are not allowed.

IV. PLAINTIFFS HAVE CARRIED THEIR BURDEN OF DEMONSTRATING THAT MEASURE 26 IS UNCONSTITUTIONAL.

As demonstrated in earlier sections of this brief, Measure 26 violates Section 273(5)(a) of the Mississippi Constitution. The Sponsors attempt to confuse the issue by raising the fact that this case was decided on a Rule 12(c) motion for judgment on the pleadings, and then quote *Reynolds v. Tobacco King*, 921 So. 2d 268, 271 (Miss. 2005), to the effect that a 12(c) motion "should not be granted unless it appears beyond any reasonable doubt that the non-moving party will be unable to prove any set of facts in support of the claim which would entitle the non-movant to relief." (Sp. Br. 6.) However, the Sponsors fail to mention that the Circuit Court signed an agreed order submitted by the parties which stated: "All parties agree that this case is based on questions of law, that it should be resolved by way of a judgment on the pleadings, and that there are no genuine issues of material fact." (R.E. 6 at 1.) When there are no material facts in dispute, a motion to dismiss for judgment on the pleadings tests whether there is any *legal* basis for the suit. *See* Jeffrey Jackson, Mississippi Civil Procedure, § 5:35 (2010). This is purely a legal issue in which facts are not in dispute, and is not a situation where the Court must determine if the non-moving party can possibly prove a set of facts that would entitle it to relief.

In its terse decision, the lower court stated that the Plaintiffs have a "heavy burden" of proving unconstitutionality, and Appellee Secretary of State Hosemann and the Sponsors repeat that language. (Hosemann Br. 4, 6-7); (Sp. Br. 6.) But none cite a Mississippi case quoting that language. Purely legal questions are not subject to evidentiary burdens of proof. In factual disputes, a party must present various pieces of evidence to meet a particular burden. But in the context of the purely legal issue in this case, the measure is either constitutional or not. The parties argue their positions and the Court must decide. In criminal cases, jurors may believe the prosecution has proved its case by a preponderance of the evidence, but not beyond a reasonable

doubt, and they must acquit. By contrast, constitutional questions do not lead appellate courts to say that they believe by a preponderance of the evidence that a measure is unconstitutional, but do not believe it beyond a reasonable doubt, and therefore must hold that it is constitutional – or that they believe it unconstitutional if a normal burden is imposed, but not if a heavy burden is imposed, and therefore must hold that it is constitutional. The "heavy burden" argument is misplaced in this instance.[3]

At any rate, whether there is a burden and whatever it might be, Measure 26 constitutes a "proposal[or] modification . . . of [a] portion of the Bill of Rights" and therefore violates Section 273(5)(a) of the Mississippi Constitution.

V. THIS LAWSUIT WAS NOT UNTIMELY AND SPONSORS HAVE NOT BEEN PREJUDICED.

According to the Sponsors, they are prejudiced by the failure of the Plaintiffs to "act[] promptly and obtain[] expedited review" because it prevented them from "lobby[ing] the legislature to formally adopt Measure 26." (Sp. Br. 9.) They contend that the Plaintiffs should have filed suit sooner and should have moved to expedite the appeal.

As an initial matter, any claims of prejudice from an allegedly untimely filing of the suit are dubious given that the Sponsors failed to raise this argument at any time before the lower court. *See generally Pub. Employees' Retirement Sys. v. Langham*, 812 So.2d 969, 975 (Miss. 2002) ("[N]o new arguments can be brought up on appeal"). Moreover, Plaintiffs filed suit not long after the initiative was certified by the Secretary of State – which was *sixteen months* prior to the upcoming November 2011 election. While Mississippi Code Annotated section 23-17-13

[3] While it is true that Constitutional amendments enjoy a presumption of constitutionality *after they have been ratified by the people*, *see, e.g.*, *State ex rel. Collins v. Jones*, 64 So. 241 (Miss. 1914), this Court has never held that citizen initiatives are afforded the same presumption of constitutionality before they have been accepted by the people. (*See also* Hosemann Br. 7 n.2) (agreeing that constitutional amendments proposed by the citizenry are not afforded a presumption of constitutionality).

requires a person dissatisfied with the ballot title or summary of an initiative to file suit within five days of the publication of the title and summary, no such time limit is imposed for a challenge to the constitutionality of an initiative. There is nothing that prevents plaintiffs in such cases from waiting to determine if the initiative will receive the required number of signatures before expending the time and resources of the parties and the courts on a constitutional challenge.

In addition, the Sponsors could have asked to expedite proceedings in the lower court so that any appeal could be decided prior to the close of the 2011 legislative session, but they did not. In fact, they waited a month to file their motion to intervene. They also joined all parties in agreeing to a prompt and efficient schedule for briefing and argument and never urged that it be expedited even more (*see* R.E. 6.), nor did they, as mentioned earlier, ever argue laches in the lower court.

Plaintiffs filed their notice of appeal ten days after receiving a final judgment in the case, well within the thirty day limit set forth in Mississippi Rule of Appellate Procedure 4(a). *See also Cont'l Oil Co. v. Walker*, 238 Miss. 21, 34, 117 So.2d 333, 338 (Miss. 1960) ("[L]aches is no defense if the proceedings are brought within the prescribed period of limitation."). Plaintiffs filed their initial appeal brief seventeen days ahead of their deadline, while the Sponsors took the full thirty days to submit their brief in response. The Sponsors never requested an expedited briefing schedule or made any other effort to ask this Court to resolve the matter prior to the conclusion of the legislative session.

Moreover, the Sponsors have known all along that their initiative might be declared unconstitutional, and have not been prevented from pursuing any legislative strategy they believed appropriate in light of that possibility. It long has been reported in the press that legal scholars and advocates on both sides of the abortion debate believe that the initiative has serious constitutional flaws, primarily because it violates Section 273(5)(a). *See, e.g.*, Exhibit B (Steven Ertelt, *Mississippi Personhood Amendment to Ban Abortion Gets Enough Signatures*, LifeNews.com, Apr. 1, 2010, http://www.lifenews.com/2010/04/01/state-4948) (quoting "a prominent pro-life attorney" stating "[t]here is no doubt in my mind, however, that the initiative is an improper attempt to amend the state Bill of Rights, (by defining terms used in the Bill of Rights and by overturning the Mississippi Supreme Court's decision in the Fordice case recognizing a state privacy right to abortion), which is expressly prohibited by the state constitution"); Exhibit C (Steven Ertelt, *Mississippi Pro-Life Advocates Submit Signatures for Personhood-Abortion Amdt*, LifeNews.com, Feb. 17, 2010, http://www.lifenews.com / state4824.html) (quoting "a prominent pro-life attorney" stating "even if the proponents of Measure 26 gather enough signatures to place the initiative on the ballot, it will be struck from the ballot by the Mississippi Supreme Court because the subject of the initiative lies outside the scope of the permitted uses of the initiative mechanism"); Exhibit D (Wendy Norris, *Mississippi "Personhood" Ballot Violates Rules*, RHRealityCheck.org, Feb. 8, 2010, http://www.rhrealitycheck.org/print/12512) ("The Mississippi Constitution is clear . . . . You can't change the Bill of Rights through the initiative process.") (quoting ACLU).

In fact, the Legislature itself took up the issue of this initiative during the session in order to fix a perceived technical defect regarding the numbering of the proposed section. *See* H.B. 1457, 2011 Leg., Reg. Sess. (Miss. 2011). Despite the Sponsors' eleventh hour claim of

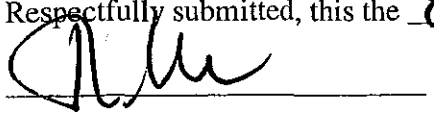
prejudice, nothing prevented them from making whatever other requests of the legislature that they deemed appropriate.

At any rate, Measure 26 is unconstitutional for the reasons discussed in the Plaintiffs' opening brief and this reply brief. Despite obvious concerns about its constitutionality, including concerns expressed by supporters of the ultimate goal of the Measure, the Sponsors plowed forward in an effort to place it on the ballot. However, the language of Section 273(5)(a) prohibits the measure from going on the ballot. This Court has no choice but to enforce that language.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Plaintiffs' opening brief, the judgment of the Circuit Court should be reversed and the Secretary of State should be enjoined for placing Measure 26 on the ballot.

Respectfully submitted, this the 8th day of April 2011.



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* Admitted Pro Hac Vice

Exhibit A

*19 I call heaven and earth to witness
have set before you life and death, bl
choose life, that you and your*

Amendment [redacted]

VOTE PRO LIFE - YES ON 26

Even though Amendment 26 is very clear and simple in what it says - some still have questions as to why? Why this approach? Why now? Why did Personhood Mississippi start this?

We have a Frequently Asked Questions page that will answer questions more fully. It will be updated regularly as more questions come. However, this page is meant to answer the most simple, basic questions of "Why"?

First, while the content of Amendment 26 and what it does in law is quite simple, its effects could be profound:

- If Mississippians vote Yes on Amendment 26, all human beings would be ensured equal rights in our state & protection under law - regardless of their size, location or developmental stage.
- If Mississippians vote Yes on Amendment 26 - Abortion will be outlawed. Unborn children will no longer be killed "legally". Mothers in crisis will be protected from a harmful medical procedure.
- If Mississippians vote Yes on Amendment 26 - human cloning, embryo stem cell research, and other forms of medical cannibalism would be effectively stopped - which would focus the attention of medical researchers on approaches that have been proven to actually work (like adult stem cells) and do not require the killing of an innocent Person
- If Mississippians vote Yes on Amendment 26 - a legal challenge will be set up to the unconstitutional court ruling "Roe-v-Wade" that allegedly "legalized" abortion. Court decisions do not make law because courts are not given the authority to make law. However, when court rulings are treated like law they have the effect of law. When a court makes a horribly unjust, immoral, and unconstitutional ruling, it should not be allowed to stand in perpetuity - if so, we would still be treating some African Americans as property because of Dred Scott. No, wrong

court decisions should be challenged until they are overturned.

The Personhood Amendment does just that - challenge Roe-v-Wade at it's very core.

Therefore:

- If Mississippians vote Yes on Amendment 26, the rule of law and obedience to the Constitution will be restored in our state in this area of law and the path towards restoring the Constitution across the nation will be advanced

Finally, and most importantly:

- If Mississippians vote Yes on Amendment 26 we will be honoring God and loving our neighbors in our law system.

Get Involved

- *Donate*
- *Volunteer*
- *Order T-Shirt*
- *Schedule Speaker*

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Exhibit B

LifeNews.com

Mississippi Personhood Amendment to Ban Abortions Gets Enough Signatures

by Steven Ertelt | LIFENEWS.COM | 4/1/10 9:00 AM

Mississippi Personhood Amendment to Ban Abortions Gets Enough Signatures

by Steven Ertelt
LifeNews.com Editor
April 1, 2010

Jackson, MS (LifeNews.com) – Mississippi Secretary of State Delbert Hosemann has notified the backers of the personhood amendment in Mississippi that the state ballot measure received enough signatures. But whether it will ever succeed in its goal of banning abortions is another question.

The amendment is the fourth ballot initiative since 1992 to fulfill the requirement of 89,285 voter signatures.

"The term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof," it says.

Les Riley, sponsor of the personhood amendment, told LifeNews.com that it's about all pro-life advocates can do to limit abortions in the state since the legislature has passed almost as many pro-life laws as possible to reduce them.

"The Legislature of the State of Mississippi has passed just about every restriction on abortion that can be passed," he said. "Still, about 3,000 pre-born persons are murdered annually here."

"We believe that the Mississippi Personhood Amendment will be voted into the Constitution, and defended," Riley added.

On February 16, the sponsors submitted over 130,000 signatures, affirming the personhood rights of pre-born babies in Mississippi.

Paul Linton, a prominent pro-life attorney, tells LifeNews.com he doesn't think the amendment will ever get before Mississippi voters.

"I would expect those who are opposed to the initiative to challenge it in court before it appears on the ballot," he said of abortion advocates. "Whether they will wait until after the legislature has had an opportunity to review it (which is mandated under the Mississippi Constitution) remains to be seen."

He explains that the under the express terms of the Mississippi Constitution, the Bill of Rights cannot be amended by the initiative mechanism and it will almost certainly be struck down in court and end in failure.

"There is no doubt in my mind, however, that the initiative is an improper attempt to amend the state Bill of Rights, (by defining terms used in the Bill of Rights and by overturning the Mississippi Supreme Court's decision in the Fordice case recognizing a state privacy right to abortion), which is expressly prohibited by the state constitution," he said.

"The initiative will have no impact whatsoever on the legality or incidence of abortion in Mississippi," Linton believes.

Lieutenant Governor Phil Bryant has been strongly supporting the personhood amendment and appeared at events with its supporters.

Exhibit C

LifeNews.com

Mississippi Pro-Life Advocates Submit Signatures for Personhood-Abortion Amdt

by Steven Ertelt | LIFENEWS.COM | 2/17/10 9:00 AM

Mississippi Pro-Life Advocates Submit Signatures for Personhood-Abortion Amdt

by Steven Ertelt
LifeNews.com Editor
February 17, 2010

Jackson, MS (LifeNews.com) – In Mississippi yesterday, pro-life advocates submitted more than 130,000 signatures to get a personhood amendment on the state ballot. The amendment would define an unborn child as a human being starting at fertilization, but some legal observers say it will be overturned.

The amendment is the fourth ballot initiative since 1992 to fulfill the requirement of 89,285 voter signatures.

Personhood Mississippi sponsored the ballot drive and volunteers have been collecting signatures since February of last year.

The group informed LifeNews.com today that 105,000 of the submitted signatures were certified as valid by 82 different County Circuit Clerks. More than 2,000 volunteers and over 1,000 churches helped with the campaign.
Lieutenant Governor Phil Bryant was present at yesterday's press conference, helping to turn in the boxes of completed petitions.

Les Riley, a representative of the group, told LifeNews.com, "Despite the superfluous restrictions set before us, the people of Mississippi have spoken. With God's blessing we have made history and exceeded the signature requirement by tens of thousands."

"In the next few days, we fully expect Secretary of State Dilbert Hosemann to approve our amendment, as we have exceeded all requirements by the State of Mississippi," Riley said.

Hosemann said he was delighted to get the signatures, according to WLOX.

"As someone who is personally pro-life, I admire our citizens' statement regarding the preservation of human life and their commitment to this being part of our Constitution," he said. "I am pleased to receive the signatures today, and I commend the efforts of the thousands of Mississippians who circulated and signed the petition."

Turning in the signatures came days after the pro-life group filed a lawsuit against state officials in order to be able to get the amendment on the ballot. The lawsuit attempts to clarify the intent of the amendment.

Riley said the need for a lawsuit arose when a large portion of valid signatures were wrongly discounted by some County Circuit Clerk's offices.

Not every pro-life advocate is on board with the strategy and one attorney worries the entire effort will be struck down in courts.

Paul Linton, a prominent pro-life attorney, tells LifeNews.com he doesn't think the amendment will ever get before Mississippi voters. He explains that the under the express terms of the Mississippi Constitution, the Bill of Rights cannot be amended by the initiative mechanism.

"Thus, even if the necessary signatures are obtained ... Measure 26 will never appear on the ballot," he says.

Linton predicts that "even if the proponents of Measure 26 gather enough signatures to place the initiative on the ballot, it will be struck from the ballot by the Mississippi Supreme Court because the subject of the initiative lies outside the scope of the permitted uses of the initiative mechanism."

Linton says it "would be exceptionally embarrassing to the pro-life movement in Mississippi to spend so much time and money" on an effort that he believes is doomed to fail.

"What is the point in collecting signatures for an initiative that cannot ever appear on the ballot?" he asked.

The court may even strike down the amendment process under the lawsuit Personhood Mississippi filed, using Linton's logic.

"It could happen after the signatures have been gathered and before it is placed on the ballot. Or it could happen after it is voted on," he writes. "But one thing is certain–Initiative Measure No. 26 will never become part of the Mississippi Constitution. The Bill of Rights cannot be amended via the initiative process."

The amendment states: "The term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning, or the functional equivalent thereof."

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Exhibit D

Published on *RHRealityCheck.org* (http://www.rhrealitycheck.org)

Mississippi 'Personhood' Ballot Violates Rules

By *Wendy Norris*
Created *Feb 8 2010 - 8:00am*

By Wendy Norris [1], RH Reality Check

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Published under: Access to Abortion [2] | Contraception [3] | Maternal Health [4] | Sexuality Education [5] | STI/HIV/AIDS Prevention [6] | Women's Rights [7] | egg-as-person [8] | mississippi [9] | personhood [10]

It appears to be all over but the cryin' for supporters of the Mississippi "egg-as-a-person" initiative to ban abortion. RH Reality Check has discovered that a unique provision in the state's Constitution prohibits modifying the Bill of Rights by voter referendum.

A fact known by the Personhood campaign and ignored for political reasons.

"The Mississippi Constitution is clear," said Jennifer Dalven, deputy director of the ACLU Reproductive Freedom Project. "You can't change the Bill of Rights through the citizen initiative process."

Dalven also confirmed that the proposed ballot measure — which seeks to change the definition of a person to include a fertilized human egg — fails the constitutional law test in two ways: It expressly amends the Bill of Rights and it reduces the rights of women to control their medical decisions.

"Personhood" activists have admitted their primary goal is to ban abortion services by challenging *Roe v Wade* on 14th Amendment grounds. They claim a fertilized egg should be defined as a "person" with civil rights and due process protections.

However, if passed, the controversial state ballot measure would also have far-reaching consequences for family planning services, fertility treatments and embryonic stem cell research. Even some of the most stalwart arch-conservative anti-choice movement leaders reject the "personhood" [11] argument.

Yet, neither the Mississippi Secretary of State nor Attorney General put the kibosh on the unlawful "Definition of a Person" amendment [12] [12]when it was submitted Nov. 22, 2008 for official approval.

Jan Schaefer, spokesperson for Mississippi Attorney General Jim Hood, deflected any responsibility for serving as a watchdog for the initiative process.

"The certificate of review issued by the AG does not constitute an endorsement of the Constitutional, statutory or substantive validity of the proposed initiative," said Schaefer.

The Secretary of State produces a lengthy *Constitutional Initiative in Mississippi: A Citizen's Guide* [13] *[PDF]* that plainly states the ballot limitation on page 3:

The initiative process **cannot** be used for any of the following:

1. To modify the Bill of Rights. [Emphasis by the Secretary of State]

Sec. Delbert Hosemann did not return calls for comment about how a measure that violates the initiative rules could get so far in the process and at what cost to county clerks charged with certifying tens of thousands of signatures.

For its part, Personhood USA, the official multi-state campaign by anti-choice activists to push the ballot measures, shrugged off the latest hitch in its efforts. The national group's co-director Keith Mason admitting knowing that the ballot measure didn't pass legal muster but pushed the amendment forward anyway.

> "There's multiple reasons and facets to doing an initiative and it's not necessarily to pass one," he said.

Mason claims the group has 100,000 petition signatures and would use that momentum to press forward with a statehouse bill as a "gun behind the door for legislators" even if the measure isn't certified for the ballot.

"It's not in their best interest to not be pro-life," warned Mason, a former Operation Rescue Truth Truck driver and veteran of the first-in-the-nation ballot campaign in Colorado that went down to a flaming 73-27 defeat in 2008.

Still, our discovery of the ballot's unconstitutionality is just one of the more recent snags for the Mississippi group led by Les Riley, a tractor salesman and father of 10 who has raised a scant $11,290 for the cause.

The local affiliate, Personhood Mississippi, filed a last ditch federal lawsuit Feb. 4 seeking to extend the deadline to collect and certify the required 89,000 petition signatures to make the November ballot. The group has been circulating petitions for a year but has yet to submit thousands of voter signatures to the county clerks for verification by Feb. 13, a process which can take several weeks. Two prior petition efforts in 2005 and 2007 failed to win enough support to get the question before voters.

The group is being represented in federal court by the Liberty Counsel, a conservative Christian pro bono law firm founded by televangelist Rev. Jerry Falwell. Personhood attorney Stephen Crampton argues that a 1996 opinion on petition certification for citizen initiatives by then-Attorney General Mike Moore contradicts the state constitution provision for a 12-month signature collection process.

Current AG Hood is defending the state in the suit and agrees with his predecessor's interpretation of the law. But it all appears to be for naught since the ballot is likely to be struck down for violating the Bill of Rights amendment provision even if it manages to qualify its petitions.

The only option left to anti-choice activists is to press the Mississippi legislature to introduce its own constitutional amendment as a referendum, which is allowable under state law. However, a legislatively-referred initiative would need to pass both chambers by a super majority two-thirds vote before it can be placed on the ballot.

According to Nsombi Lambright, executive director of the ACLU of Mississippi, she isn't detecting any enthusiasm among state lawmakers to walk into a political buzz saw as contentious as abortion. Especially as lawmakers grapple with far larger problems, including a nearly $500 million budget deficit and a 10.3 percent state unemployment rate.

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CERTIFICATE OF SERVICE

I, Robert B. McDuff, co-counsel for Plaintiffs/Appellants, Deborah Hughes and Cristen Hemmins, certify that I have this day served a copy of the foregoing by United States mail with postage prepaid on the following persons at these addresses:

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This the 8th day of April, 2011.

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