

NO. 2010-TS-01949

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEBORAH HUGHES and CRISTEN HEMMINS,

Plaintiffs / Appellants,

vs.

DELBERT HOSEMAN, 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

BRIEF OF THE APPELLANT

Oral Argument Requested

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V.

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Defendant/Appellee

V.

P. LESLIE RILEY & PERSONHOOD MISSISSIPPI

**Defendants-
Intervenor /
Appellees**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

Parties

1. Deborah Hughes, Plaintiff/Appellant
2. Christen Hemmins, Plaintiff/Appellant
3. Delbert Hosemann, Secretary of State, Defendant/Appellee
4. P. Leslie Riley, Defendant-Intervenor/Appellee
5. Personhood Mississippi, Defendant-Intervenor/Appellee

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Judge

1. Honorable Malcolm Harrison, Hinds County Circuit Court Judge

Respectfully submitted,

Robert B. McDuff

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Attorney for Plaintiffs/Appellants

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STATEMENT OF THE ISSUES

Proposed Initiative Measure No. 26 ("Measure 26"), which is scheduled to be placed on the November 2011 ballot, would expressly amend the Mississippi Bill of Rights, as set forth in Article III of the Mississippi Constitution. Measure 26 reads:

Section 1. Article III of the constitution for the state of Mississippi is hereby amended BY THE ADDITION OF A NEW SECTION to read:

Section 33. Person Defined. As used in this Article III of the state constitution, "The term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning, or the functional equivalent thereof."

(R.E. 5, Ex. A at 1)¹ (capital letters and bold in original). Article XV, Section 273(5) of the Mississippi Constitution, however, specifically provides that "the initiative process *shall not be used* . . . [f]or the proposal, modification, or repeal of any portion of the Bill of Rights of this Constitution." (Emphasis added.)

The issues on this appeal are:

Does Measure 26, which proposes to "amend[]" the Bill of Rights "by the *addition* of a new section," violate Section 273(5)'s prohibition on the "proposal . . . of any portion of the Bill of Rights"?

Does Measure 26, which would "amend[]" the Bill of Rights by adding a definition of the word "person" that did not exist before, violate Section 273(5)'s prohibition on the "modification . . . of any portion of the Bill of Rights"?

¹ This brief will designate the record excerpts as "R.E. __ at __," with the first blank referring to the tab number listed in the table of contents to the Record Excerpts and the second to the internal page number in the document. References to the Record on Appeal ("R.A.") will be to "R.A. __," with the blank referring to the sequential pagination stamped on the bottom of each page.

STATEMENT OF THE CASE

In November 2008, P. Leslie Riley and an organization known as Personhood Mississippi (hereinafter, “Sponsors”) filed Measure 26 with Secretary of State Delbert Hosemann. Measure 26 reads as follows:

Section 1. Article III of the constitution for the state of Mississippi is hereby amended BY THE ADDITION OF A NEW SECTION to read:

Section 33. Person Defined. As used in this Article III of the state constitution, “The term ‘person’ or ‘persons’ shall include every human being from the moment of fertilization, cloning, or the functional equivalent thereof.”

(R.E. 5, Ex. A at 1) (capital letters and bold in original). On April 1, 2010, the Secretary of State verified that a sufficient number of signatures were submitted by the Sponsors. (R.E. 5, Ex. B.) This cleared the way for Measure 26 to be submitted to the Mississippi Legislature on the first day of the 2011 legislative session, as required by Miss. Code Ann. section 23-17-29, and to appear on the November 2011 ballot.

On July 6, 2010, Appellants filed a *Complaint for Declaratory and Injunctive Relief* against Secretary Hosemann in the Circuit Court of the First Judicial District of Hinds County.² (R.E. 4.) Appellants challenged Measure 26 based on the fact that Section 273(5) prohibits the use of the initiative process to attempt the proposal or modification of any portion of the Bill of Rights of the Mississippi Constitution. Because Measure 26 does not comport with constitutional limitations, Appellants sought to enjoin the Secretary of State from placing Measure 26 on the November 2011 ballot.

² This Court previously has held that the Circuit Court of the First Judicial District of Hinds County is the proper venue and has subject matter jurisdiction to review the facial constitutionality of proposed initiatives. See *In re Proposed Initiative Measure 20*, 774 So.2d 397, 401 (Miss. 2000).

On August 10, 2010, Appellants filed a *Motion for Judgment on the Pleadings*. (R.A. 16-23.) Two days later, the Sponsors filed a *Motion to Intervene* in the circuit court case. (R.A. 35-41.) The Circuit Court subsequently entered an agreed order, which granted the Sponsors leave to intervene as defendants, and confirmed the parties' stipulations that there were no genuine issues of material fact and that the case should be resolved by way of a judgment on the pleadings. (R.E. 6.)

The Sponsors subsequently filed an opposition to the motion for judgment on the pleadings. (R.A. 42-59.) The Secretary of State also filed a response, which focused almost entirely on disputing the Sponsors' argument that the lower court lacked subject matter jurisdiction to hear the case, and not on the merits of Appellants' Section 273(5) arguments. (R.A. 60-65.) With respect to the merits, the Secretary of State stated merely that Measure 26 "garnered more than the minimum number of signatures" necessary for an initiative to be placed on the ballot and that it therefore "should be submitted to the will and wisdom of the voters." (R.A. 63-64.) Appellants have never asserted that sponsors failed to obtain the requisite number of signatures.

On October 26, 2010, the Circuit Court denied *Plaintiffs' Motion for Judgment on the Pleadings*. (R.E. 3.) Even though the sole legal claim in the *Complaint for Declaratory and Injunctive Relief* was that Measure 26 runs afoul of the limitations in Section 273(5), the Circuit Court's one and one-quarter page order did not even mention, let alone discuss, Section 273(5). Nor did the Circuit Court provide any legal reasoning for its decision, other than to say that Measure 26 had "received more than the required amount of signatures to be placed on the ballot and the Constitution recognizes the right of citizens to amend their Constitution." (R.E. 3.) On November 9, 2010, a final judgment was entered by the Circuit Court, (R.E. 2), and Appellants

timely filed their *Notice of Appeal* on November 19, 2010. (R.A. 116.)

SUMMARY OF ARGUMENT

Pursuant to Section 273, the people of the State of Mississippi may propose a constitutional amendment by initiative. However, Section 273(5) clearly states that “the initiative process shall not be used . . . [f]or the proposal, modification, or repeal of any portion of the Bill of Rights of this Constitution.” Measure 26 violates this constitutional prohibition in two ways, either of which requires that it be enjoined from placement on the ballot. First, by its own terms, the proposed initiative provides that “Article III of the constitution for the state of Mississippi is hereby amended *BY THE ADDITION OF A NEW SECTION . . .*” (R.E. 5, Ex. A at 1) (italics added, capital letters in original). The “addition of a new section” to the Mississippi Bill of Rights is clearly a “proposal . . . of any portion of the Bill of Rights,” which is prohibited by Section 273(5). Second, by adding a definition of the words “person” or “persons” so that those terms would encompass “every human being from the moment of fertilization, cloning, or the functional equivalent thereof,” (R.E. 5, Ex. A at 1), the proposal modifies at least ten provisions of the Bill of Rights which use those words, and therefore is a “modification . . . of any portion of the Bill of Rights,” which is also prohibited by Section 273(5).

If the Court agrees that Measure 26 violates Section 273(5) on either of these grounds, the measure must be held unconstitutional and it will be unnecessary to address the other ground.

ARGUMENT

The Circuit Court’s Order (R.E. 3), denying Plaintiffs-Appellants’ motion for judgment on the pleadings, and its Final Judgment (R.E. 2), granting judgment to Defendants-Appellees, are purely legal rulings, subject to *de novo* review. *Richardson v. Sara Lee Corp.*, 847 So.2d 821, 823 (Miss. 2003).

While the Mississippi Constitution expressly guarantees to the people “the power to propose and enact constitutional amendments by initiative,” Miss. Const. art. XV, § 273(3), it has also placed strict limits on that power. Section 273(5) provides that “[t]he initiative process *shall not be used . . . [f]or the proposal, modification, or repeal of any portion of the Bill of Rights of this Constitution.*” (Emphasis added.) Despite this clear prohibition, Measure 26 would do just that. It proposes a new provision to the Bill of Rights that would modify a term that is used in at least ten of its existing provisions.³

The full text of Measure 26 reads as follows:

SECTION 1. Article III of the constitution for the state of Mississippi is hereby amended *BY THE ADDITION OF A NEW SECTION to read:*

Section 33. Person defined. As used in this Article III of the state constitution [the Bill of Rights], “The term ‘person’ or ‘persons’ shall include every human being from the moment of fertilization, cloning, or the functional equivalent thereof.”

(R.E. 5, Ex. A. at 1) (italics added, bold and capital letters in original). This language leaves no doubt that Measure 26: (1) *proposes* that a new portion be added to the Bill of Rights, and (2) *modifies* the words “person” or “persons” as used throughout the Bill of Rights.

As this Court has noted “[t]he construction of a Constitutional Section is of course ascertained from the plain meaning of the words and terms used within it.” *Board of Sup’rs of Harrison County v. Duplantier*, 583 So.2d 1275, 1278 (Miss. 1991) (citing cases); *see also Chevron U.S.A., Inc. v. State*, 578 So.2d 644, 659 (Miss. 1991) (“Where the language of a

³ The provisions of the Mississippi Bill of Rights that explicitly use the word “person” or “persons” are: article III, section 8 (Citizens of state); article III, section 10 (Treason); article III, section 12 (Right to bear arms); article III, section 14 (Due process); article III, section 20 (Specific term of office); article III, section 22 (Double jeopardy); article III, section 24 (Open courts; remedy for injury); article III, section 25 (Access to courts); article III, section 27 (Proceeding by indictment or information); article III, section 29 (Excessive bail prohibited; revocation or denial of bail).

constitutional provision is plain, intelligible, and free from all ambiguity, the intent must be taken to be exactly what appears on the face of the instrument, and no process of construction or interpretation is permissible for the purpose of changing that meaning.”).

The words of Section 273(5) are simple and direct. The initiative process “*shall not be used*” for “the proposal, modification, *or* repeal of *any portion* of the Bill of Rights.” Miss. Const. art. XV, § 273(5) (emphasis added). This Court has previously held that, by explicitly protecting the Bill of Rights from the 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 397, 402 (Miss. 2000). As the Court explained, there is good reason for Section 273(5)'s prohibitions. “[T]he initiative movement of recent experience, both in Mississippi and other states, has exposed the danger that special interests can easily manipulate and control the initiative process Section 273 provides reasonable checks against such abuses.” *Id.* at 402-03.

I. MEASURE 26 PROPOSES A NEW PORTION OF THE MISSISSIPPI BILL OF RIGHTS AND THEREFORE IS UNCONSTITUTIONAL.

Measure 26 explicitly amends Article III of the Constitution, which contains the Bill of Rights. The Measure states that “Article III of the constitution for the state of Mississippi is hereby amended BY THE *ADDITION OF A NEW SECTION* to read:” (R.E. 5, Ex. A at 1) (*italics added*). In other words, Measure 26 specifically proposes adding a new section – a new “portion” – to the Bill of Rights. That clearly falls within Section 273(5)'s prohibition on any “proposal . . . of [a] portion of the Bill of Rights of this Constitution.” Thus, Measure 26 violates Section 273(5).

In the lower court, the Sponsors argued that their measure does not “automatically

constitute the ‘proposal’ of a new right.” (R.A. 50.) That is not accurate, but more importantly, it is beside the point. Section 273(5) prohibits “propos[ing]” “any portion” of the Bill of Rights, not “any right” or “any portion that creates a new right.” In other words, Section 273(5) prohibits the proposal of a new “portion” of the Bill of Rights, whether or not that “portion” creates a new right. Measure 26, which – by its terms – would “amend[]” Article III “BY THE ADDITION OF A NEW SECTION,” clearly “proposes . . . [a] portion of the Bill of Rights.” This is impermissible on its face. For this reason alone, the lower court judgment must be reversed.

II. MEASURE 26 MODIFIES THE MISSISSIPPI BILL OF RIGHTS AND THEREFORE IS UNCONSTITUTIONAL.

Because Measure 26 is unconstitutional for the reason stated in Point I, this Court need not address whether the measure also would constitute a prohibited “modification . . . of any portion of the Bill of Rights.” But clearly Measure 26 is such a modification because it contains a definition of the word “person” that is not presently written into the Bill of Rights. That definition affects at least ten of the existing provisions of the Bill of Rights that use the term “person” or “persons.”

The Sponsors argued in the lower court that they are not trying to modify the Bill of Rights with their definition of Measure 26, and that Measure 26 is a “simple clarification” that reiterates the plain and ordinary meaning of the word “person.” (R.A. 56.) This argument makes no sense. If it were commonly understood that the word “person” in the Bill of Rights already means “every human being from the moment of fertilization, cloning, or the functional equivalent thereof,” Measure 26 would serve no purpose. It is precisely because there is no such common understanding that the Sponsors have gone to the time and expense necessary to put this definition on the ballot.

Indeed, a review of the Mississippi Code shows that the proposed definition of “person” in Measure 26 is not a common understanding throughout Mississippi law. For example, Miss. Code Ann. section 97-3-37, which addresses certain criminal offenses, defines “human being” to include “an unborn child at every stage of gestation from conception until live birth,” but only “[f]or purposes of the offenses enumerated in this subsection (1).” This provision plainly does not reflect a commonly understood meaning of “human being,” but rather sets forth a definition applicable only to specific provisions and criminal offenses, but not others. This definition was added by the legislature for those specific offenses precisely because, absent such a definition, the terms “human being” and “person” do not otherwise encompass every stage of gestation from the moment of fertilization.

Certainly, if the legislature thought it necessary in Miss. Code Ann. section 97-3-37 to specifically define “human being” to include “an unborn child at every stage of gestation from conception until live birth” for the purposes of some, but not all, criminal offenses, and if the Sponsors believe it necessary to add a new section to the Bill of Rights to define “person” to “include every human being from the moment of fertilization, cloning, or the functional equivalent thereof,” it cannot be said that these definitions are part of a pre-existing common understanding of Mississippi law that dates back to the drafters of the Bill of Rights and the 1890 Constitution.

If there were such a common understanding, the State would, for example, necessarily include fetuses in “the number of persons which constitutes the norm to be represented by a senator” for redistricting purposes. *See* Miss. Code Ann. § 5-3-99. Likewise, if this were the ordinary meaning of the term “person,” teenagers would receive credit for their nine months in the womb and would be entitled to a temporary driving permit approximately fourteen years and

three months after birth, *see, e.g.*, Miss. Code Ann. § 63-1-9(2)(b), and could register to vote approximately seventeen years and three months after birth. *See, e.g.*, Miss. Code Ann. § 23-15-11. This is plainly not the law.

Moreover, there is a general presumption that legal changes have meaning. *See, e.g., Stidham v. State*, 750 So.2d 1238, 1244-45 (Miss. 1999) (“If we were to interpret the 1890 constitutional provision at issue as having the same meaning as the 1869 constitutional provision, then the change in language . . . would be rendered meaningless. ‘[W]here the words or provisions of a statute differ from those of a previous statute on the same subject, they are presumably intended to have a different construction or meaning, and to denote an intention to change the law.’”) (citation omitted); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 243 (2004) (When Congress acts to amend a statute, the court presumes that Congress intends its amendment “to have real and substantial effect.”) (citing *Stone v. INS*, 514 U.S. 386, 397 (1995)); *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 169 (5th Cir. 2000) (same); *see also Pierce County, Wash. v. Guillen*, 537 U.S. 129, 145 (2003) (rejecting narrow interpretation of statute that would render amendment to statutory language “an exercise in futility”). This principle is all the more true here, where the proponents of Measure 26 have spent a considerable amount of time and money to place this initiative on the ballot. Clearly, the measure is intended to modify the Bill of Rights in Article III.

This conclusion is further confirmed by a legal memorandum posted by Defendant-Intervenor Personhood Mississippi on its website, which specifically discusses the ways Measure 26 would change the Bill of Rights in order to extend and expand certain provisions. After the Sponsors argued in the lower court that Measure 26 would not modify the Bill of Rights, this legal memorandum was found by Appellants’ counsel and filed in the lower court in reply to the

Sponsors' argument. (R.E. 7, Ex. A); *see also* http://lc.org/media/9980/attachments/memo_ms_personhood.pdf (last accessed January 18, 2011). The memorandum, entitled "Legal Memorandum on the Mississippi Personhood Amendment," includes the following passages:

The Amendment thus *extends* equal protection of the laws to every human being from the earliest stages of life.

(R.E. 7, Ex. A at 4) (emphasis added).

By adding to Article III of the Mississippi Constitution, which sets forth the state's bill of rights, a new section defining the word 'person' as used in that Article, the proposed Amendment would *expand* application of that term to include the unborn.

(*Id.* at 7) (emphasis added).

As of today, Mississippi law does not prohibit either human cloning or the destruction of human embryos for stem cell research. As noted above, passage of the Personhood Amendment would *effectively ban* the harvesting of embryonic stem cells for destruction in Mississippi, because the *tiny embryos created by cloning would be protected under Article III, Section 14 and its guarantee of due process of law before depriving any 'person' of life.*

(*Id.* at 8) (emphasis added). Clearly, the Sponsors are trying to convince voters that Measure 26 *would modify* the Bill of Rights. Any effort to convince the Courts of Mississippi to the contrary is disingenuous.

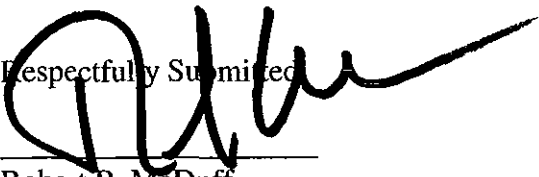
Accordingly, because Measure 26 would add a definition of the word "person" or "persons" to the Bill of Rights that presently is not specified by the Constitution, the measure would violate Section 273(5)'s mandate that "the initiative process shall not be used . . . [f]or the . . . modification . . . of any portion of the Bill of Rights."

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the Circuit Court of Hinds County should be reversed, Measure 26 should be declared unconstitutional and invalid, and the Mississippi Secretary of State should be enjoined from

placing Measure 26 on the ballot in November, 2011.

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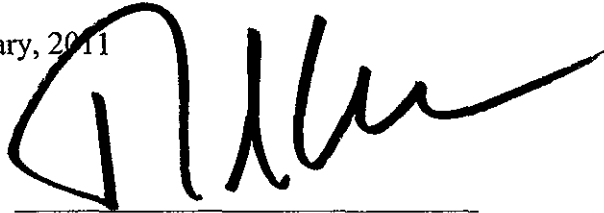
I, Robert B. McDuff, co-counsel for appellants, Deborah Hughes and Cristen Hemmins, certify that I have this day served a copy of the foregoing by United States mail with postage prepaid on the following persons at these addresses:

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This the 17th day of February, 2011

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