

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2011-CA-01106-SCT

LELAND SPEED

PLAINTIFF/APPELLANT

vs.

**DELBERT HOSEMANN, SECRETARY OF
STATE OF MISSISSIPPI**

DEFENDANT/APPELLEE

vs.

DAVID WAIDE

DEFENDANT-INTERVENOR/APPELLEE

**BRIEF OF APPELLEE MISSISSIPPI
SECRETARY OF STATE DELBERT HOSEMANN**

**On Appeal from the Circuit Court of the First Judicial
District of Hinds County, the Honorable Winston Kidd**

ORAL ARGUMENT NOT REQUESTED

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Facts and Course of Proceedings Below

Through the amendment process set forth in Article 15, Section 273 of the Mississippi Constitution, Mr. David Waide¹ has proposed to amend the Mississippi Constitution. Waide's proposed constitutional amendment has been officially designated as "Initiative Measure No. 31" and reads as follows:

No property acquired by the exercise of the power of eminent domain under the laws of the State of Mississippi shall, for a period of ten years after its acquisition, be transferred or any interest therein transferred to any person, non-governmental entity, public-private partnership, corporation, or other business entity with the following exceptions:

- (1) The above provisions shall not apply to drainage and levee facilities and usage, roads and bridges for public conveyance, flood control projects with a levee component, seawalls, dams, toll roads, public airports, public ports, public harbors, public wayports, common carriers or facilities for public utilities and other entities used in the generation, transmission, storage or distribution of telephone, telecommunication, gas, carbon dioxide, electricity, water sewer, natural gas, liquid hydrocarbons or other utility products.
- (2) The above provisions shall not apply where the use of eminent domain (a) removes a public nuisance; (b) removes a structure that is beyond repair or unfit for human habitation or use; (c) is used to acquire abandoned property; or (d) eliminates a direct threat to public health safety caused by the property in its current condition.

Initiative Measure No. 31 was submitted to the offices of the Secretary of State and the Attorney General as a proposed initiative and received its official designation, ballot title, and summary as required by statute. *See* Miss. Code Ann. §§ 23-17-7, -9, -

11. Thereafter, the proponents of Initiative Measure No. 31 circulated their petition to

¹ Although not originally named as a defendant, Waide filed a motion to intervene in this matter so that he might defend the constitutionality of his proposed initiative. The trial court granted Waide's motion to intervene on July 12, 2011.

collect the number of certified signatures required before a measure may qualify for placement on the general election ballot. *See* Miss. Code Ann. §§ 23-17-15, -17, -19. After successfully collecting the requisite number of certified signatures, the proponents submitted their petition to the Secretary of State for filing. *See* Miss. Code Ann. § 23-17-21. The Secretary of State, pursuant to Code Section 23-17-23, accepted and officially filed Initiative Measure No. 31. As required by Code Section 23-17-29, the Secretary of State filed with the Clerk of the House and the Secretary of the Senate the complete text of Initiative Measure No. 31 on the first day of the regular 2011 legislative session. The legislature took no action under Article 15, Section 273(6) or (7) with respect to Initiative Measure No. 31.

Importantly, unless ordered otherwise by this Court, the Secretary of State will place Initiative Measure No. 31 on the November 8, 2011, general election ballot.² *See* Miss. Const. Art. 15, Section 273(6); Miss. Code Ann. § 23-17-29. If this Court were to find that the initiative should not be placed on the November 2011 general election ballot, this Court should be aware of the schedule for absentee ballot printing and absentee voting. Pursuant to state election law, the counties must have absentee ballots printed and available to be distributed not later than 45 days before the election. *See* Miss. Code Ann. §§ 23-15-715; 23-15-649; 23-15-691. With the general election occurring on November 8, 2011, absentee ballots must be printed and available no later than September 24. To ensure that the counties have sufficient time to print the absentee

² Initiatives appear only on general election ballots. Initiatives do not appear on primary election ballots.

ballots so that the ballots will be available prior to September 24, the Secretary of State's office will electronically transmit an official sample ballot containing Initiative Measure No. 31 to the counties on approximately September 14. An order removing an initiative from the ballot that is received by the Secretary of State after September 14 may result in some absentee ballots being printed, distributed, and cast containing the initiative.

Plaintiff Leland Speed has filed this suit seeking a judicial declaration that Initiative Measure No. 31 violates Article 15, Section 273(5)(a). Specifically, Plaintiff argues that the initiative violates Section 273(5)(a)'s prohibition that the "initiative process shall not be used: (a) For the proposal, modification or repeal of any portion of the Bill of Rights of this Constitution." Premised on the initiative's alleged conflict with Section 273(5)(a), Plaintiff further seeks to enjoin the Secretary of State from placing the measure on the November 2011 general election ballot. Importantly, it is the duty of David Waive, as Initiative Measure No. 31's proponent, to defend the constitutionality of his proposed initiative.

Summary of Argument

This controversy regarding whether Initiative Measure No. 31 impermissibly modifies the Bill of Rights and thereby violates Article 15, Section 273(5) of the Constitution is ripe for resolution and was properly filed in the Hinds County Circuit Court. This Court has already held that the question of whether a proposed constitutional amendment violates Article 15, Section 273 of the Constitution is properly subject to judicial determination before the amendment is placed on the election ballot. Further, this Court has held that the Hinds County Circuit Court has subject matter jurisdiction to resolve just such a challenge.

While it is the duty of Initiative Measure No. 31's proponent to defend the constitutionality of his proposed amendment, it is imperative to note the heavy burden associated with any attempt to restrain the citizenry's right to amend their Constitution through the initiative process. The Secretary of State respectfully submits that Initiative Measure No. 31 should be submitted to the will and wisdom of the voters.

Argument

I. This Court has Subject Matter Jurisdiction to Consider this Ripe Facial Challenge to Initiative Measure No. 31.

Pursuant to this Court's decision in In re Proposed Initiative Measure No. 20, 774 So.2d 397 (Miss. 2000), the judiciary has subject matter jurisdiction to consider a facial legal challenge regarding an initiative's adherence to Article 15, Section 273(5)(a). In *Proposed Initiative Measure No. 20*, the Secretary of State and Attorney General brought suit in circuit court alleging that the proposed initiative failed to include an economic impact statement required by Article 15, Section 273(4) and that the proposed initiative impermissibly sought to amend the Bill of Rights in violation of Article 15, Section 273(5)(a). 774 So.2d at 398-99. The circuit court found that the proposed initiative was in conflict with both Section 273(4) and 273(5)(a). *Id.* at 400. On appeal, the Supreme Court held that the circuit court had subject matter jurisdiction "to review the facial constitutionality of proposed initiatives" with respect to the limitations imposed by Section 273. *Id.*

Separately, the *Proposed Initiative Measure No. 20* decision also held that a challenge to a proposed initiative's compliance with Section 273 is ripe and properly brought before the initiative is submitted to the voters. Rejecting the argument that "the proper and only time that the courts may review the constitutionality of a proposed initiative is after the electoral die is cast in a general election," the Supreme Court noted that such a contention "runs counter to all notions of ballot box efficiency and notice to the electorate" and is, in effect, an argument for "unbridled ballot box chaos." *Id.* at 401.

II. Unless Otherwise Instructed by This Court, the Secretary of State Will Carry Out His Duty to Place Initiative Measure No. 31 on the November 2011 General Election Ballot.

The proper application of Section 273(5)(a)'s protection for the Bill of Rights will govern current and future challenges to initiatives so that the criteria articulated by this Court is of great importance and will extend beyond the confines of the present case. In that respect, it is important to distinguish between the use of the related terms "modification" in 273(5)(a) and "modify" in 273(5)(d) verses the term "amend" in 273(5)(b) and (c). Section 273(5)(a)'s prohibition on any "modification" to the Bill of Rights includes, but is not limited to, a prohibition on any attempt to amend the Bill of Rights. "Modification" is defined as: "A change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact." *Black's Law Dictionary* 695 (Abridged 6th Ed.). Further, "modify", the verb form of modification, is defined as: "To alter; to change in incidental or subordinate features; enlarge; extend; amend; limit, reduce. Such alteration or change may be characterized, in quantitative sense, as either an increase or decrease." *Id.* By using the term "modification" in Section 273(5)(a), the Constitution forbids any "change" to the Bill of Rights, including any "amendment." By prohibiting any "modification," Section 273(5)(a) provides greater protection to the Bill of Rights than does Section 272(5)(b) which prohibits only the "amendment" or "repeal" of the Public Employees' Retirement System. Further, an impermissible modification of the Bill of Rights includes any change or amendment that extends or reduces the scope of the Bill of Rights even if that change "leaves the general purpose and effect of the

subject-matter intact.”

While it is the duty of Initiative Measure No. 31’s proponent to defend the constitutionality of his proposed amendment, it is imperative to note the heavy burden associated with any attempt to restrain the citizenry’s right to amend their Constitution through the initiative process. Importantly, Initiative Measure No. 31 has garnered more than the minimum number of signatures needed in order to be put before Mississippi voters in the 2011 statewide general election. Article 15, Section 273 recognizes the important right of citizens to propose constitutional amendments and the equally important right of citizens to vote on such amendments by declaring that the “people reserve unto themselves the power to propose and enact constitutional amendments by initiative.” Miss. Const. Art. 15, Section 273(3). The Secretary of State respectfully submits that Initiative Measure No. 31 should be submitted to the will and wisdom of the voters.³ In the absence of an instruction from this Court to the contrary, the Secretary of

³ However, it is also important to note that constitutional amendments proposed by the citizenry are not afforded a presumption of constitutionality. The presumption of constitutionality doctrine originated with this Court’s pronouncement that statutes are presumed to be constitutional because they are “passed by legislators and approved by a governor sworn to uphold the selfsame constitution as are we.” State v. Roderick, 704 So.2d 49, 52 (Miss. 1997). In Burrell v. Mississippi State Tax Com’n, 536 So.2d 848 (Miss. 1988), the Supreme Court recognized that the same presumption applied to constitutional amendments that are proposed directly by the legislature pursuant to Section 273(2). *See id.* at 852, 858 (discussing constitutional amendments proposed via House Concurrent Resolution 41 and Senate Concurrent Resolution 519). When the legislature proposes an amendment to the Constitution, that amendment, to borrow the operative analysis from *Roderick*, is being proposed by legislators and approved by a governor who are sworn to uphold the Constitution. In contrast, constitutional amendments proposed by citizens are not entitled to the presumption of constitutionality reserved for acts of the legislature. *Cf. In re Proposed Initiative Measure No. 20*, 774 So.2d 397 (Miss. 2000) (containing no mention of a presumption of constitutionality). The cases cited by Waide to the lower court are distinguishable as they addressed whether citizen proposed initiatives are entitled to a presumption of constitutionality once they are enacted by popular election and

State will place Initiative Measure No. 31 before the voters on November 8, 2011. *See* Miss. Const. Art. 15, Section 273(6); Miss. Code Ann. § 23-17-29.

Conclusion


The Secretary of State respectfully submits that the decision of the lower court be affirmed.

Respectfully submitted, this the 12th day of August, 2011.

**The Honorable C. Delbert Hosemann, Jr.,
Secretary of State of the State of Mississippi,
Defendant**

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incorporated into the constitution itself, as opposed to instances in which a proposed initiative is challenged prior to the election.

CERTIFICATE OF SERVICE

This is to certify that I, Harold E. Pizzetta, III, Assistant Attorney General for the State of Mississippi, have this date caused to be mailed, via United States Postal Service, postage prepaid, a true and correct copy of the above **Brief** to the following:

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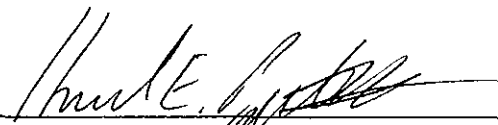
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This the 12th day of August, 2011.



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