IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LELAND SPEED	**APPELLANT**
VS.	**NO. 2011-CA-01106-SCT**
DELBERT HOSEMANN, SECRETARY OF STATE OF MISSISSIPPI	**APPELLEE**
VS.	
DAVID WAIDE	**APPELLEE**

On Appeal from the Circuit Court of the First Judicial District of Hinds County, Mississippi

ORIGINAL BRIEF OF APPELLEE DAVID WAIDE

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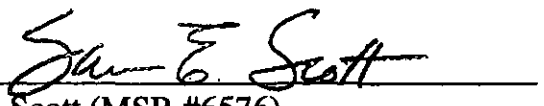
CERTIFICATE OF INTERESTED PERSONS

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 and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Leland Speed, Appellant.
2. David Waide, Appellee.
3. Samuel E. Scott, attorney for David Waide, Appellee.
4. Fred L. Banks, Jr., Luther T. Munford, and R. Gregg Mayer, attorneys for Leland Speed, Appellant.
5. Ronald D. Farris, attorney for Leland Speed, Appellant.
6. Honorable Delbert Hosemann, Mississippi Secretary of State, Appellee.
7. Attorney General Jim Hood and Special Assistant Attorney Harold Pizzetta, attorneys for Honorable Delbert Hosemann, Mississippi Secretary of State, Appellee.
8. Honorable Winston Kidd, Circuit Court Judge.

Respectfully submitted,

By: 

Sam E. Scott (MSB #6576)
Attorney of Record for David Waide, Appellee

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STATEMENT OF ISSUES

Did the Circuit Court err by holding that the initiative does not propose, modify, or repeal Article 3 §17 of the Mississippi Constitution?

STATEMENT OF THE CASE

1. *Nature of the Case.*

Citizens Initiative Measure No. 31 ("the Initiative") is a proposed amendment to the Mississippi Constitution of 1890 to limit, under certain conditions, the transfer to private parties of property after it is acquired by eminent domain for public use. The present appeal in this Court is taken by Leland Speed ("Appellant") from the dismissal of his action in the Circuit Court of the First Judicial District of Hinds County, Mississippi, seeking injunctive and other relief to prevent the Initiative from going on the November 8, 2011 ballot.

Appellant contends that the Initiative is unconstitutional because it is the proposal, modification, or repeal of Article 3 §17 of the Mississippi Constitution of 1890 which lays down fundamental requirements for the exercise of eminent domain.

The Initiative's sponsor, Appellee David Waide ("Appellee"), submits that the Initiative is in full compliance with the statutory and constitutional requirements for citizens initiatives and that the Initiative is not a proposal, modification, or repeal of any section of the Mississippi Bill of Rights.

2. *Course of the Proceedings.*

On the 22nd day of October, 2009, pursuant to Article 15 §273 of the Mississippi Constitution of 1890 and the governing statutes, Miss. Code Ann. §23-17-1 through 61,

Appellee filed the Initiative with the Mississippi Secretary of State ("SOS"). The filed Initiative complied with all applicable constitutional and statutory requirements.

Pursuant to law, the SOS transmitted a copy of the Initiative to the Mississippi Attorney General ("AG"), who reviewed it for form and style. The AG made no recommendations and issued his certificate of review.

The SOS assigned the Initiative its number 31 and submitted a certified copy of it to the AG. On November 4, 2009, the AG formulated and transmitted to the SOS the Ballot Title and a concise Ballot Summary of the Initiative, as follows:

Ballot Title

> Should government be prohibited from taking private property by eminent domain and then transferring it to other persons?

Ballot Summary

> Initiative #31 would amend the Mississippi Constitution to prohibit state and local government from taking private property by eminent domain and then conveying to other persons or private businesses for a period of ten years after acquisition. Exceptions from the prohibition include drainage and levee facilities, roads, bridges, ports, airports, common carriers, and utilities. The prohibition would not apply in certain situations including public nuisance, structures unfit for human habitation, or abandoned property.

After notifying Appellee of the Ballot Title and Summary, the SOS published the Ballot Title and Summary in the *Clarion Ledger*, a newspaper of general circulation throughout the state, on November 11, 2009. It could have been challenged at any time thereafter.

Over the next ten months, Appellee procured 119,251 certified signatures of qualified electors and filed the petition with the SOS on September 30, 2010. After determining that the required statutory number of signatures had been obtained and certified within the time allowed by law, the SOS filed the Initiative in both houses of the Mississippi legislature on the first day of the 2011 session. The legislature took no action on the Initiative. Therefore, as a matter of law, the Initiative is in compliance with the Mississippi Constitution and statutory law and must be placed on the November 8, 2011 statewide election ballot so that the voters of Mississippi may cast their votes to determine whether the Initiative is enacted into law.

3. ***Disposition in the Court Below.***

In the Circuit Court action, filed June 2, 2011, Appellant contended that the Initiative was unconstitutional because it would propose, modify, or repeal the Mississippi Bill of Rights, Mississippi Constitution of 1890, Article 3 §17. [RE. 1] Appellee timely filed a Response, which under Miss. Code Ann. §23-17-13 was a matter of first priority. A motion for judgment on the pleadings was filed by the Appellant [RE. 8] and the Appellee responded [RE. 9].

The Circuit Court Judge, Winston L. Kidd, presiding, heard the case on July 25, 2011, and issued its Opinion and Order on July 29, 2011. [RE. 10] The Opinion and Order found, after a "very thorough comparison and examination," that the Initiative "does not change any rights provided for in Article 3 §17 [and] [m]ore specifically, does not change the process of eminent domain as governed by Article 3 §17. Private property will continue to be taken for public use, and as always, if there is a question as to whether

such use is public, then the Courts will resolve that question." [RE. p. 54] Accordingly, the Circuit Court concluded that the Initiative "does not put forth anything which would change any portion of the Bill of Rights" and that the Initiative is "a proper Initiative as contemplated by Article 15 §273 of the Mississippi Constitution of 1890." *Id.* Therefore, the Court further concluded, "the Secretary of State should be allowed to proceed with placing Initiative 31 on the November 8, 2011 ballot" and ordered that the Secretary of State so proceed. *Id.*, pp. 3-4. The Circuit Court denied the request for injunctive relief, denied the motion for judgment on the pleadings, and dismissed Appellant's action. *Id.*, p. 4.

Appellant appealed the Opinion and Order.

STANDARD OF REVIEW

Since the question before the court is a question of law, it is reviewed *de novo*. *Lemon v. Mississippi Transp. Comm'n*, 735 So.2d 1013, 1023 (Miss. 1999). However, in reviewing the question, the scope of review is narrow and the initiative must only meet minimum constitutional and statutory requirements, prior to being placed on the ballot to insure full disclosure and notice to the electorate. *In re Proposed Initiative Measure No. 20*, 774 So.2d 387, 401 (Miss. 2000).

SUMMARY OF APPELLEE'S ARGUMENT

Appellee's position is straightforward and compelling. The Initiative was filed and proceeded through the statutorily required process in conformity with the Constitution and applicable statutes. Appellant does not claim that there has been any failure to meet all statutory requirements for citizen initiatives.

Adoption of the Initiative would not modify the Bill of Rights Article 3 §17 in violation of Article 15 §273(5) of the Mississippi Constitution. The Initiative's only effect is to place a defined, temporal limitation (subject to specified exceptions) on certain transfers of property after the property is acquired by eminent domain. This limitation is entirely independent of the provisions of §17 of the Bill of Rights, which govern only the exercise of the power of eminent domain, the payment of compensation, and the judicial determination of public use. Adoption of the Initiative would not alter, undermine, or diminish Mississippi law on these subjects in any respect. Not one word or punctuation mark of §17 would change, nor would the process of eminent domain as governed by Miss. Code Ann. §11-27-1 *et seq.* change in any respect, either directly or by implication, if the Initiative were adopted. Regardless of whether the voters approve or reject the Initiative, eminent domain proceedings will go on just as they are. This is undeniable.

Appellant has failed to meet his burden of showing that the Initiative is invalid. Appellant's contrived contentions should be rejected so that the people of Mississippi may have the opportunity to consider and cast their vote on this important measure.

ARGUMENT

I. The Initiative Is a Response to the *Kelo* Decision that Complies with the U.S. Supreme Court's Express Authorization and Mississippi's Constitutional Requirements.

In Mississippi and throughout the nation, the public use basis for the exercise of eminent domain evolved along with population growth and development. Over the years, federal and state courts supported the taking of property for private development projects

not intended to be open to the public at large. *See Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1896). The courts were able to find a public purpose whenever the public would benefit because the use of the property would generate employment, provide recreational activities, increase tax revenues, encourage industry, or revitalize the economy generally.

A. The *Kelo* Decision and the Response of Other States.

This jurisprudential expansion of the interpretation of public use culminated in the controversial decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, by a five-to-four vote, the Court held that the government could take Mrs. Kelo's home by eminent domain and transfer the property to a private corporation for commercial development. The Court justified this exercise of eminent domain for private commercial development because the use would benefit the city economically. "Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose." *Id.* at 485. As the Court further explained, "The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." *Id.* at 486 (*citing Berman v. Parker*, 348 U.S. 26, 33-34 (1954)). The Court refused even to reject the immediate transfer of property from one private owner to another who might be better able to develop the property for a "public purpose."

> It is further argued that without a bright-line rule nothing would stop a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes.

> Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by Appellant can be confronted if and when they arise.

Id. at 486-87 (footnotes omitted).

Significantly, however, the *Kelo* decision expressly allowed state and local governments to preclude this expansive and controversial interpretation of "public use."

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many states already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

Id. at 489 (citations omitted).

In *Kelo's* aftermath, many states utilized the Court's invitation to restrict the definition of public use by enacting statutes and constitutional amendments limiting the determination of whether property was to be put to a "public use." *See* Castle Coalition, *50 State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo* (June 2007); *see also* www.castlecoalition.org/legislativecenter. Indeed, the legislative response to the *Kelo* decision has been described as more extensive than that generated by any other Supreme Court decision in American history. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn. Law Rev. 2100, 2100 (2009). Some 43 states have now passed some form of eminent domain reform in response to *Kelo.* Harvey M. Jacobs and Ellen M. Bassett, *All Sound and No Fury? The Impacts of State*

Based Kelo Laws, 63 Planning & Env. Law 3 (Feb. 2011); *see also* Dick M. Carpenter & John K. Ross, Doomsday – *No Way; Economic Trends and Post-Kelo Eminent Domain Reform* (Institute for Justice 2008). In several states this limitation on the expansive theory of public use was achieved through citizen initiative.[1] See *50 State Report Card, supra.* In other states, the change in the law was achieved by legislative action.[2] *Id.* While many states amended their eminent domain statutes, in some states, like New Hampshire, the proponents of reform recognized the importance of the issue by amending the state constitution to limit eminent domain takings for private development. *Id.* To date, Mississippi has been unable to enact a statutory or constitutional response to *Kelo's* radical holding.

B. The Initiative.

The Initiative is intended as the response of the people of Mississippi to *Kelo* and the Supreme Court's express authorization of state limitations on the Court's holding. In Mississippi, however, eminent domain is provided for in the Bill of Rights, and the initiative process may not be used "[f]or the proposal, modification or repeal of any portion of the Bill of Rights." Miss. Const. Art. 15 §273(5). Therefore, the Initiative does not follow the pattern of other states' responses to *Kelo* and has been drafted carefully to comply with Art. 15 §273(5).

The issue in this appeal, whether the Initiative proposes, modifies, or repeals any portion of the Bill of Rights, specifically Article 3 §17, may be resolved by an examination and comparison of the Article 3 §17 and the Initiative.

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[1] *See, e.g.*, Arizona, Nevada, North Dakota, and Oregon.
[2] *See, e.g.*, Alabama, Florida, Georgia, Kansas, Michigan, Minnesota, New Mexico, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, and Wyoming.

Article 3 §17, providing for eminent domain, states in its entirety as follows:

> Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

The Initiative proposes 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 or safety caused by the property in its current condition.

The terms of the Initiative do not propose to change, indeed they do not address, any subject encompassed by Article 3 §17. The Initiative does not speak to the taking or damaging of property for public use or the payment of due compensation. The Initiative

would not impact or interfere with the exercise of the power of eminent domain by entities vested with the power to take property and pay compensation as prescribed by law. Nor does the Initiative address the public use of the property or the determination of public use by the courts. The Initiative affects only the transfer of property acquired by eminent domain to a private person or entity, "after its acquisition," for a specified period of time.

II. The Initiative Does Not "Propose, Modify, or Repeal" Mississippi's Constitution Article 3 §17: The Initiative Addresses Only the Transfer of the Property After the Exercise of the Power of Eminent Domain Is Complete.

Appellant's sole legal argument[3] is that the Initiative would propose, modify, or repeal the provision of Article 3 §17 that places the determination of public use within the discretion of the judiciary. This argument is incorrect. The straightforward terms of the Initiative are directed solely toward a subject not encompassed by any reasonable reading of Article 3 §17. The Initiative proposes only a limitation on the transfer of property for ten years after it is acquired by eminent domain, that is, after the entire eminent domain process – the taking, the court's determination of public use, and the payment of compensation and transfer of title – is complete. These processes addressed by Article 3 §17, including the judicial determination of public use (if challenged by the landowner pursuant to Miss. Code Ann. §11-27-15), must necessarily occur, and be completed, before title passes from the landowner to the expropriating authority. *See Lemon v. Mississippi Transp. Comm'n,* 735 So.2d 1013, 1023 (Miss. 1999) (holding that public use determination must take place *before* the property is taken). The Initiative

[3] Appellant also asserts speculative political arguments that are not a proper subject for this Court's limited consideration of the Initiative's constitutionality. *See* pp. 20-23, below.

restricts only the right of the expropriating authority, not the authority of the courts, and affects only the transfer of the property for a specified period after, and if and only if, the judiciary has determined that the proposed use is public.

Article 3 §17 provides only: (1) It confirms the inherent power of eminent domain by the sovereign for public use; (2) the owner of expropriated property must be paid due compensation upon the taking; (3) any question of whether the use is public is a judicial matter, regardless of legislative assertion.

Eminent domain proceedings are conducted under comprehensive statutory regulations from beginning to end. §11-27-1 *et seq.* Miss. Code of 1972 Ann. The judicial proceedings are conducted in a special court with limited jurisdiction. The rules governing the proceedings differ from ordinary civil cases. If an owner raises the issue of public use, it must be decided by the court before trial. Usually the single issue is the fair market value of the property being taken and the damage, if any, to the remainder.

The entity taking the property and the owner both must file their statements of value for the property taken or damaged. A jury almost always determines these issues. §11-27-19 Miss. Code of 1972 Ann., except in some instances, trial may be to the court. The special court of eminent domain then enters a judgment reciting the result, ordering the amount paid and this has the effect of a deed (*Baldwin v. Mississippi State Highway Department*, 193 So. 789 (Miss. 1940)) and upon payment, title vests in the entity taking the property. Then, or upon ruling of any post trial motions, the jurisdiction of the special court of eminent domain ends. An analysis of this statutory plan shows that it is not affected at all by the initiative.

The Appellant argues that the initiative will create rights in the former owner, who has been paid due compensation and transferred title to the expropriating entity. As a matter of fact and law, that cannot be so.

In *Diaz v. City of Biloxi*, 748 So.2d 161 (Miss. COA 1999), the appellants argued that because the city had not used property acquired by eminent domain for the public purpose for which it had been condemned that it created in them a reversionary interest, which is akin to the argument now advanced by the Appellant. The Mississippi Court of Appeals, Justice King, rejected this argument holding that any challenge to a public use must be exercised within the eminent domain proceeding and further:

> "The determination of public purpose must be made at the time of taking. Any determination so made becomes final upon the expiration of the time allowed for appeal. This is true even where the use of condemned property is subsequently changed."

Appellant argues also that the initiative will prevent owners from selling their land. Not so! It will help them because the entity that wants the property will have to pay an acceptable price as anyone else would. It cannot say that if the owner does not like the price offered, we will just take it by eminent domain.

Nevertheless, these arguments are political, not legal, and political differences are settled by the voters. It is worthy of note that some of the biggest business owners – Wal-Mart, Target, Walgreen's, Goodyear, Exxon - do not have the power of eminent domain in Mississippi, but they have all secured their vast properties by purchasing it, not taking it.

This initiative is nothing more than a temporal restriction in transferring certain government property to private parties. There are also other constitutional restrictions on the sale of lands owned by or ordered sold by the state or state courts.

Section 190 of the Constitution also relates to eminent domain:

> The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use; and the exercise of the police powers of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or general well-being of the state.

Section 190 is not a part of the Bill of Rights. And although it pertains to eminent domain—the same subject as Section 17 within the Bill of rights—the latter is not even mentioned in the two apparent cases to have considered Section 190. See *Cities of Oxford, et. al v. N.E. Miss. Elec. Power Ass'n*, 704 S.2d 59 (Miss.1997); *Alabama & V.Ry.Co. v. Jackson & E.Ry.Co*, 131 Miss. 857, 95 So. 733 (Miss. 1923).

Unlike Section 190, the Initiative does not affect the meaning of, nor even contain the words, "public use" and bears more resemblance to other amendments to the Constitution regulating the use and disposition of government property, such as Section 95 located in the part of the Constitution entitled "Prohibitions:"

> Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations or associations for a less price than that for which it is subject to sale to individuals. . . .

This would also apply to land acquired by the state through eminent domain. Likewise, Section 111, located in the "Miscellaneous" portion of the Constitution, concerns the terms by which the state may sell certain land or order it sold:

> All lands comprising a single tract sold in pursuance of decree of court, or execution, shall be first offered in subdivisions not exceeding one hundred and sixty acres, or one-quarter section, and then offered as an entirety, and the price bid for the latter shall control only when it shall exceed the aggregate bid for the same in subdivisions as aforesaid; but the chancery court, in cases before it, may decree otherwise if deemed advisable to do so.

The plain language of the Initiative shows that it is a regulation of government-owned property, similar to Sections 95 and 111, both of which are limitations outside of the Bill of Rights. It is not a prohibition or limitation of eminent domain or an alteration of the rights relating to eminent domain contained in Art. 3 §17.

The method by which the judiciary determines questions of public use is set forth in §11-27-15. It mandates that a defendant in an eminent domain action must file and serve a M.R.C.P. 12(b)(6) motion at least five days before trial in order to seek dismissal on the grounds that the taking is not for public use. Such a motion shall be heard and decided by the judge as a preference proceeding prior to the hearing on the complaint for eminent domain. The statute further authorizes direct appeal to the Mississippi Supreme Court as a preference matter.[4]

The Initiative would not change or interfere with this statutory process in any respect. Nor does it propose, modify, or repeal, in any respect or any part, Article 3 §17. The judicial determination of public use of an expropriated property, if one is found, will

[4] The right of the Court to determine the question of public use is similarly preserved in cases that utilize "quick take" procedures. *See* Miss. Code Ann. §11-27-81 through 91.

have become final long before the Initiative's limitation on subsequent transfers can have any effect on the property. What the courts now can determine to be a public use under Mississippi law will remain a public use after the Initiative is adopted. The Initiative does not abrogate the expropriating authority's right – if approved by the courts – to take property for private development as a public use.

The pre-taking judicial determination of the public use for the property and a limitation on the subsequent transfer of the property are distinct matters. Whether the courts find the requisite public use – or not – pursuant to § 17 is independent of any later transfer of the property by the expropriating authority or other owner. If the judicial determination results in a finding that the contemplated use was not public, then of course, the eminent domain proceeding is terminated. If, however, the judicial determination results in a finding of public use, that final determination is not altered by a limitation on the later transfer of the property. That the property may not be transferred to a private party (subject to specified exceptions) for a period of ten years does not undo the prior judicial determination of public use. Once the power of eminent domain is exercised, title passes to the expropriating authority and the eminent domain laws no longer apply. This Initiative does not affect the judiciary in any respect. It is only a limitation of when, not whether, expropriated property may be transferred to a private person or entity.

III. The Merits of the Initiative Are Not Before the Court.

It is not for this Court to determine whether property taken by eminent domain should or should not later be transferred to private ownership or whether such transfers

should be limited. This determination is for the people. The judicial examination of a proposed initiative is narrow. "It is true that proposed initiatives will not be reviewed by this or any other court for their wisdom and merit. *Power v. Ratliff*, 112 Miss. 88, 72 So. 864 (1916). The voters make those decisions." *In re Proposed Initiative 20*, 774 So.2d at 401. "[T]he courts have no more right to interfere with this legislative act of the people than they have to prevent an abortive attempt of the Legislature to pass a law ... the courts have nothing to do with the making [of the law], but must deal altogether with the finished product." *Power*, 72 So. at 867. Many other states follow the Mississippi rule that the courts' consideration of an initiative measure is limited to review of the proposal's minimum constitutional and statutory requirements.

> *Tilson v. Mofford*, 737 P.2d 1367, 1369 (Ariz. 1987) (en banc) ("Just as under the separation of powers doctrine the courts are powerless to predetermine the constitutionality of the substance of legislation, so also they are powerless to predetermine the validity of the substance of an initiated measure"); *In re Title, Ballot Title, & Submission Clause*, 943 P.2d 897, 900 (Colo. 1997) (en banc) ("We do not address the merits of a proposed initiative, nor do we interpret its language or predict its application if adopted by the electorate").

In re Proposed Initiative 20, 774 So.2d at 406 (Cobb, J., dissenting). *See also Edmondson*, 91 P.3d at 640 ("A court's place, when called on to review constitutional challenges to legislation promulgated by the people through the initiative (as it is with statutory enactments passed by Legislature), is not to second guess the law's wisdom .").

Because the merit (or lack of merit) of the Initiative is not at issue in this proceeding, the Court should not be misled by arguments that expand the plain words of the Initiative so as to inject speculation about its effects. Appellant's forecasts of

economic chaos and/or stagnation are exaggerated conjecture that is inappropriate for the Court's consideration.[5] Furthermore, there can be no doubt that in a clash between economic realities and constitutional realities the constitution prevails. *Chevron v. State of Mississippi*, 578 So.2d 644, 651 (Miss. 1991).

The Opinion of the Supreme Judicial Court of Massachusetts in *Yankee Atomic Electric Co. v. Secretary of the Commonwealth*, 525 N.E.2d 369 (Mass. 1988), rejected similar arguments. Like the Mississippi Constitution, the Massachusetts Constitution excludes certain subjects from the reach of the citizen initiative process, including the "right to receive compensation for private property appropriated to public use." The Massachusetts court delineated the facts to be considered in determining whether the initiative proposal addressed a prohibited subject and disallowed a broad-ranging consideration of possible "what-if" scenarios.

> Resourceful appellants of some initiative petitions could point to factual uncertainties regarding those petitions and the possibility that they may contain excluded matters. To construe art. 48 as requiring the Attorney General not to certify petitions on this speculative basis could effectively limit the initiative petition process. Such a construction will not be adopted.

Id. at 374 fn. 9. Similarly, this Court should not engage in speculation that would improperly broaden the narrow focus of the issue presented by this appeal.

A broad or speculative reading of the terms of the Initiative also would be inappropriate because Mississippi law requires a strict reading of provisions pertaining to eminent domain. "The power of eminent domain is in derogation of common right.

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[5] One study has flatly refuted the dire consequences that Appellant predicts. *See Doomsday – No Way, supra.* However, any consideration by this Court of the pros and cons of enacting the Initiative would be improper.

Therefore the statutes conferring the right of eminent domain are to be strictly construed. They are not to be extended beyond their plain provisions." *Webb v. Town Creek Master Water Mgmt. Dist.*, 903 So.2d 701, 706 (Miss. 2005) (*citing Branaman v. Long Beach Water Mgmt. Dist.*, 730 So.2d 1146, 1149 (Miss. 1999) (*citing Ferguson v. Bd. of Supervisors of Wilkinson Cty.*, 149 Miss. 623, 115 So. 779, 780 (1928)). *See also Mississippi Power & Light Co. v. Conerly*, 460 So.2d 107, 111 (Miss. 1984).

As an exercise of the people's right to amend the Constitution, the Initiative should be given the reading that comports with the constitutional requirements.

> When there are two constructions that could be put on a statute, one permitting the statute to be found consistent with constitutional requirements and the other not, then the constitutional interpretation is to be chosen. This has been described as a "duty to adopt a construction of the statutes which would purge the legislative purpose of any constitutional invalidity ...." *Cole v. Nat'l Life Ins. Co.*, 549 So.2d 1301, 1305 (Miss. 1989) (*quoting Sheffield v. Reece*, 201 Miss. 133, 28 So.2d 745, 749 (1947)).

Tolbert v. Southgate Timber Co., 943 So.2d 90, 97 (Miss. App. 2006). Thus, the construction of the Initiative should not be stretched beyond its plain terms in order to manufacture an artificial conflict with Article 3 §17. Instead,

> [i]f different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.
>
> This rule is especially applicable to written Constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication.

State ex rel. Collins v. Jackson, 81 So. 1, 5 (Miss. 1919).

The Mississippi Supreme Court recently reiterated these venerable principles in harmonizing two statutes that address the same subject so as to avoid an implied repeal.

> We have said that statutes on the same subject, although in apparent conflict, should if possible be construed in harmony with each other to give effect to each. This Court has stated that [i]n construing statutes, all statutes in *pari materia* are taken in consideration, and a legislative intent deduced from a consideration as a whole.

Tunica Cty. v. Hampton Co. Nat. Sur., LLC, 27 So.3d 1128, 1133-34 (Miss. 2009) (citations omitted). *See also Arant v. Hubbard*, 824 So.2d 611, 614 (Miss. 2002) ("It is a well-recognized rule in construing statutes that presumptions are indulged against contradictory provisions or enactments.") (*citing T.C. Fuller Plywood Co. v. Moffett*, 231 Miss. 382, 388, 95 So.2d 475, 478 (1957)). Applying these principles here, there is no repugnancy between the terms and effect of the Initiative and the power of eminent domain set out in §17.

There are many reasons why legal issues should not be decided on political grounds in our court system. This Court spoke to this issue on *State ex rel. Moore v. Molpus*, 578 So.2d 624, 643 (Miss. 199[illegible]) as follows:

> At stake is public confidence in our disinterestedness. Expositions of the Constitution should be grounded in law and not the proclivities of individuals, nor the politics of the moment. Legal interpretation does and should change with the times and the frequent agent of that chance is a change in judicial personnel, but it is accepted that public confidence in the law requires substantial stability to the face of such changes. We must be careful lest our interpretations reflect the idiosyncratic views of judges rather than the shared and enduring values of the people embodied in the Constitution we are sworn to serve.

> It is with good reason that people cling to the idea that their cases should be decided the same no matter who the judge may be. Popular and professional confidence in the judiciary rests on the impersonality of decisions and their reasoned foundation, which in turn are built upon the respect accorded them by successor justices and by their staying power.

IV. The Initiative Should Be Presumed Constitutional in Order to Protect the Plenary Power of the People to Amend the Constitution.

The Court's reading and analysis of the Initiative may not presume that it transgresses Article 3 §17. Indeed, Appellee submits that the proper construction is to the contrary. Section 32, the concluding section of the Bill of Rights, which is of equal weight as §17, states: "The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people." One of those rights – one that the people expressly "reserve unto themselves" – is "the power to propose and enact constitutional amendments by initiative" as set forth in Article 15 §273(3). "A basic tenet of constitutional law is that only the people of a state are vested with the power of amendment and this power is plenary." *Chevron U.S.A., Inc. v. Mississippi*, 578 So.2d 644, 649 (Miss. 1991). The judicial branch may not interfere with this right. The courts are bound to uphold it and the Circuit Court did.

In *Lemon*, this Court held that "Acts of the Mississippi Legislature are presumed to be constitutional, and the unconstitutionality of an Act must be proven beyond a reasonable doubt before it will be declared invalid." 735 So.2d at 1015 (*citing Chamberlin v. City of Hernando*, 716 So.2d 596, 601 (Miss. 1998)). *See also State ex rel. Hood v. Louisville Tire Ctr.*, 55 So.3d 1068, 1072 (Miss. 2011); *Estate of McCullough v. Yates*, 32 So.3d 403, 412 (Miss. 2010) ("[T]he challenging party is faced with a strong

presumption of constitutionality and must prove beyond a reasonable doubt that the statute violates the Constitution.").

Because constitutional amendments can be proposed by legislative action under §273 as well as by citizens initiative, the deferential judicial scrutiny applied to legislatively proposed constitutional amendments should apply equally to initiatives which are not an inferior or second-class method of constitutional amendment. As required by Miss. Code Ann. §23-27-29, the Secretary of State filed the Initiative in both houses of the Mississippi legislature on the first day of the 2011 session. Although the legislature could have rejected the Initiative or proposed an alternative, it did not do so. The legislature's review and decision not to exercise its authority to adopt, amend, or reject the Initiative support the same judicial deference to the Initiative as that afforded a legislatively-enacted statute. Courts in many states, including those that lack Mississippi's legislative consideration of initiative proposals, review initiatives under the same standard as applied to statutes passed by the state legislature. *See People v. Jablonski*, 126 P.3d 938, 973 (Cal. 2006) ("The presumption that the legislating body intended to enact a valid statute applies to measures enacted by initiative as well as those enacted by the Legislature."), *cert. denied*, 549 U.S. 863 (2006); *Edmonson v. Pearce*, 91 P.3d 605, 615 (Okla. 2004) ("[A] statutory enactment passed by the people through the initiative is entitled to the same presumption of constitutionality as one passed by the Legislature."), *cert. denied sub nom. Talley v. Edmonson*, 543 U.S. 987 (2004); *Ruiz v. Hull*, 957 P.2d 984, 991 (Ariz. 1998) ("The presumption [of constitutionality] applies equally to initiatives as well as statutes, and where alternative constructions are available,

the court should choose the one that results in constitutionality."), *cert. denied sub nom. Arizonans for Official English v. Arizona*, 525 U.S. 1093 (1999); *League of Women Voters v. Secretary of State*, 683 A.2d 769, 771 (Me. 1996) ("Since by the initiative process the people of Maine are exercising their legislative power, the constitutional validity of a citizen initiative is evaluated under the ordinary rules of statutory construction."); *Wyoming Abortion Rights League v. Karpan*, 881 P.2d 281, 289 (Wyo. 1994) ("A legislative measure adopted either by the legislature or by the people through the initiative process carries with it a presumption of constitutionality under our law."); *Montana Auto. Ass'n. v. Greely*, 632 P.2d 300, 303 (Mont. 1981) ("Whether enacted by the legislature or created by the people through initiative, all statutes carry with them a presumption of constitutionality."). Plainly, this Initiative should be entitled to the same presumption of constitutionality as any other legislative act.

In a case challenging an initiative proposal to limit the effect of *Kelo* in Oklahoma, that state's supreme court similarly acknowledged the deference due the constitutional initiative process.

> The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law. Because the right of the initiative is so precious, all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts.

In re Initiative Petition No. 382, 142 P.3d 400, 403 (Okla. 2006) (footnotes omitted). In considering a post-*Kelo* initiative, the Nevada Supreme Court similarly stated,

> [S]ignificantly, our Constitution reserves to the people the initiative power. Although the Legislature has the power to

> enact laws to facilitate the operation of the initiative process, which includes enacting a single-subject requirement for initiative petitions, this court, in interpreting and applying such laws, must make every effort to sustain and preserve the people's constitutional right to amend their constitution through the initiative process.

Nevadans for Protection of Property Rights, Inc. v. Heller, 141 P.3d 1235, 1247 (Nev. 2006) (footnotes omitted).

These well recognized principles do not permit a reading of the Initiative that would purposefully thwart the right of Mississippi citizens to propose and to vote on an amendment to the Constitution.

V. Injunctive Relief Was neither Necessary nor Proper.

Appellant was not entitled to an injunction for several reasons. First, he had an adequate remedy at law under Miss Code Ann. §23-17-13, which provides an appeal for any person who is dissatisfied with a proposed voter initiative and allows the Court "to review the facial constitutionality of proposed initiatives." *In re Proposed Initiative 20*, 774 So.2d at 401. The Complaint pursued that remedy. The Circuit Court addressed and resolved the issue Appellant raised. The availability of a statutory remedy at law precludes injunctive relief. *See Union Nat. Life Ins. Co. v. Crosby*, 870 So.2d 1175, 1181 (Miss. 2004) ("[i]t is a historical fact that the basis for equity jurisdiction of a suit for an injunction is the inadequacy of a remedy in circuit court"); *Moore v. Sanders*, 558 So.2d 1383, 1385 (Miss. 1990) ("Injunction will not issue when the complainants have a complete and adequate remedy by appeal.").

In addition to failing to satisfy this threshold requirement, Appellant cannot satisfy his "burden of showing the prerequisites for obtaining the extraordinary relief of

preliminary injunction." *See Moore*, 558 So.2d at 1385. As set out in *City of Durant v. Humphreys Cty. Mem. Hosp.*, 587 So.2d 244, 250 (Miss. 1991); *A-1 Pallet Co. v. City of Jackson*, 40 So.3d 563, 568-69 (Miss. 2010); and other cases, in considering a request for injunctive relief, the Court must balance the following factors, each of which weighs heavily against the issuance of an injunction in this case.

1. Appellant cannot show that he is likely to prevail on the merits. To the contrary, the likelihood is that he will not prevail because (a) the initiative is entitled to a presumption of constitutionality; (b) Appellant bears a heavy burden of proving unconstitutionality beyond a reasonable doubt; and (c) the Circuit Court ruled that he was not entitled to prevail.

2. An injunction is not necessary to prevent irremediable harm. This Court's jurisdiction to decide whether the Initiative is constitutional does not evaporate or vaporize either when the Initiative goes on the ballot or is voted upon. Therefore, any alleged harm may be repaired at any time.

3. The threatened injury to Appellee is much greater than to Appellant. Because this Court's jurisdiction continues until the case is decided, Appellant is not threatened with real or immediate harm. On the other hand, the threatened injury to Appellee is that, if the Initiative is not placed on the ballot but ultimately is declared constitutional, Appellee will have sustained real and irreparable harm – the cost and effort to get the Initiative to where it is now and no remedy if it is kept off the ballot and later declared constitutional. As a result, Appellant had nothing to lose if an injunction was not granted. Appellee, on the other hand, had everything to lose.

4. The public interest, including the plenary right of the people to amend the constitution by initiative, would be strongly disserved by the granting of an injunction. What would the SOS have done if the injunction was granted and later dissolved? What possible recourse would there have been for Appellee, for the 119,251 citizens who signed for the Initiative to go on the ballot, or above all, for the voters? The answer is none. That is not consistent with the public interest by any stretch of the imagination.

As easily shown by a consideration of these factors, an injunction was neither authorized by law nor appropriate under the facts of this case.

Further, it has long been a "familiar principle of equity that one coming into court must come with clean hands, and this doctrine is fully applicable where aid by injunctive remedy is sought." *Henry v. Mobile & O.R. Co.*, 163 Miss. 354, 355 (1932). The clean hands principle encompasses "[t]he doctrine of laches [which] is founded principally upon the equity maxims 'He who seeks equity must do equity,' 'He who comes into equity must come with clean hands,' and 'The laws serve the vigilant, and not those who sleep over their rights.'" *Grant v. State*, 686 So.2d 1078, 1089 (Miss. 1996), *cert. denied*, 520 U.S. 1240 (1997) (*citing Comans v. Tapley*, 101 Miss. 203, 57 So. 567 (1911)).

Appellant's dilatory bringing of this challenge fully supports denial of relief by application of laches because Appellant's delay is inexcusable and the potential prejudice to Appellee and the citizens of Mississippi is great. *See* Answer and Defenses of Intervenor David Waide, Third Affirmative Defense. [RE. p. 30] Laches will bar a claim if the record evinces "(1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is

asserted." *Environmental Defense Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (5th Cir. 1980), *cert. denied*, 449 U.S. 919 (1980).[6] These criteria are satisfied here and provide ample reason for denying this appeal.[7]

Appellant should not be rewarded for his attempt to manipulate the judicial system by sitting on his right to challenge the initiative until shortly before the election he seeks to derail. There was no need for rush to judgment by issuance of the extraordinary remedy of an injunction and the Circuit Court properly refused it.

VI. Conclusion.

Getting a citizens' initiative onto the ballot is a monumental task in every respect – effort, time, money, and endurance. To say that it is a complex project is a great understatement. History proves this as only one initiative has reached the ballot and then only after intense litigation. Experience shows it is not an undertaking for the faint of heart or the uncommitted.

This case may, and probably will, have a significant bearing on the future of citizens' initiatives. Many of the past failures were because of procedural errors or, as it were, tilting at windmills. Some did not have the necessary dedication to such an

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[6] *See also Twin States Realty Co. v. Kilpatrick*, 26 So.2d 356 (Miss. 1946) (holding injunction inappropriate where complainant waited until appellee purchased property and used it for six years to challenge use contrary to zoning regulations).

> If there has been unreasonable delay in asserting claims or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked. It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to suppose by the word [or silence, or conduct] of the Appellant that there was no objection to his operations. Diligence is an essential prerequisite to equitable relief of this nature.
>
> *Id.* at 358.

[7] The doctrine of laches is addressed more fully in Appellee's Brief to the Circuit Court, pp. 25-27, which is part of the record before this Court.

enormous task. Taking a blank sheet of paper and a short time limit, getting almost 120,000 signatures in equal proportions from five districts covering all 82 counties, getting those signatures certified by circuit clerks who receive no remuneration for doing so and navigating a course through the required legislative channel should not be scornfully viewed or casually rejected.

On the other hand, waiting for a year and a half, filing a legal challenge at the eleventh hour should be met with at least two questions: Why did Appellant wait until now and hope for a rush to judgment? Why is the Appellant afraid to let the people vote? The answers to these questions point toward grasping at straws. Such a strategy should be viewed with skepticism and must shoulder a heavy burden to succeed. Suggesting speculative consequences if the initiative is approved by the voters comes nowhere near satisfying that burden. Even if it is voted upon, it still must receive a supermajority of votes to be adopted. It is said that amending the constitution should not be easy and this case already demonstrates that. Still, it should not be nearly impossible as it may seem to the sponsor and supporters here. Citizens' efforts should not be lightly rejected nor serve as an almost impossible goal for the future.

There are many reasons why this initiative should not be kept of the ballot. A literal and fair interpretation of what it does and what it does not do easily demonstrates the lack of merit in the Appellant's claims.

Constitutional amendments by citizens' initiatives are very difficult to even get on the ballot, much less adopted. Constitutional amendments should not be easy but they are

not rare. As this Court noted in 1991, there were already over 100. *State ex rel. Moore v. Molpus*, 578 So.2d 624 (Miss. 1991).

Eminent domain laws should be strictly construed. Every phase of eminent domain is statutorily governed – not one is changed in any respect here. Eminent domain proceedings will not change whether the initiative gets on the ballot, passes or fails.

Once an owner is paid he has no interest in the land taken. Title vests in the acquiring authority with the entry of a judgment and payment of award - just the same as a deed.

The Initiative does not have any influence whatsoever until title vests in acquiring authority. At that time, the special court of eminent domain has no further jurisdiction except for post trial motions. The filing, the proceedings and the result are not affected in any way by the initiative which does not have any application until eminent domain proceedings are over and done with.

Arguments about effect upon economic development are both speculative and political Appellant put nothing whatsoever in the record to support his claim of economic doom. The proper forum for political arguments is the polls on election day – not in this Court.

The 10-year period in the initiative deals with disposition not acquisition. Neither Art. 3 §17 nor any of the statutes deal with disposition of property after title passes; rather, they deal only with the manner and methods of acquisition.

Some property acquired by eminent domain has been undeveloped for more than 10 years and no one has claimed that the former owners have new rights created by the expiration of that period of time. The same is true in this case.

The judicial determination of public use is not affected in any manner by this initiative any more than it is by §95 of the Constitution which deals with disposition not acquisition. Neither even addresses Art. 3 §17.

The Appellant argued in the Circuit Court that a citizens' initiative skips two steps that a legislatively proposed amendment must pass – the governor's approval and legislative approval. Both contentions are wrong. The governor has nothing to do with approving a constitutional amendment. Art. 4 §60 Mississippi Constitution of 1890. The legislature chose not to offer an alternative amendment as it had a right to do. There was nothing else the sponsor could have or should have done about that. The law has been followed and the Appellant does not even challenge that.

The Circuit Court studied the briefs, heard oral argument and issued its order and opinion rejecting all of the arguments Appellant makes here and ordered that the initiative go on the ballot. It should be affirmed.

Regularly we read and hear encouragement for people to get more involved in their government. This is not a proposal by some clique and it gathered more than the necessary support of Mississippi voters, from all of the old five congressional districts – in other words – all across the state. They want to get involved; they want to vote on this.

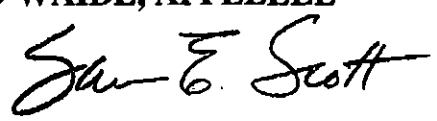
Appellant has not advanced any credible legal reason why it should not go on the ballot. Nor has Appellant advanced any such reason for why or how the initiative proposes, modifies, or repeals Art. 3 §17.

The order of the Circuit Court should be affirmed.

THIS, the 12th day of August, 2011.

Respectfully submitted,

DAVID WAIDE, APPELLEE



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the above Original Brief of Appellee David Waide has this day been served, via United States Mail, postage prepaid, on the following counsel of record:

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