IN THE SUPREME COURT OF MISSISSIPPI
No. 2011-CA-01106-SCT

LELAND SPEED — APPELLANT

V.

DELBERT HOSEMANN, SECRETARY OF STATE OF MISSISSIPPI, and DAVID WAIDE — APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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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 this Court may evaluate possible disqualification or recusal.

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Delbert Hosemann, Secretary of State, appellee.

Harold E. Pizzetta, III, Assistant Attorney General, Office of the Attorney General, counsel for Delbert Hosemann.

David Waide, intervenor and appellee.

Sam Scott, counsel for David Waide.

Jackson, Mississippi Chapter, Southern Christian Leadership Conference, Stephanie Parker Weaver; Mississippi Chapter National Federation of Independent Business, Ronnie Aldridge, amici curiae.

Paul R. Scott, Smith Phillips Mitchell Scott & Nowak LLP, and Dana Berliner and Lawrence G. Salzman, Institute of Justice, Washington, D.C., counsel for amici curiae.

SO CERTIFIED, this the 12 day of August, 2011.

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INTRODUCTION

Appellant Leland Speed asks this Court to prevent an abuse of the initiative process which the Mississippi Constitution expressly forbids: A use of initiative "for the proposal, modification or repeal of any portion of the Bill of Rights," i.e., art. III of that same constitution. *See* MISS. CONST. OF 1890, art. 15, § 273(5)

In the short term, this may be a politically difficult decision, but the language forbidding this abuse was written with just these circumstances in mind. The danger of abuse only arises when the subject of the initiative is a popular, "hot button," issue. And, in the long term, a ruling enforcing these plain words will protect this Court and the constitution from repeated assaults on rights the constitution's Bill of Rights defines and protects. Those assaults will surely come if this Court should be willing to trim its sails to suit the political winds that will inevitably blow behind any initiative movement.

Because the Bill of Rights already limits eminent domain, Initiative 31 violates § 273(5). It proposes new landowner rights, and modifies or repeals old ones. For these reasons, this Court should reverse the circuit court, enter judgment here for Leland Speed, and keep Initiative 31 off the November ballot.

STATEMENT OF THE ISSUE

Is Initiative 31 a "proposal, modification or repeal of a portion" of the eminent domain section of the Bill of Rights when it expands rights of certain

landowners and restricts the powers that the courts and the state currently enjoy under that section?

STATEMENT OF THE CASE

Intervenor David Waide, former president of the Mississippi Farm Bureau, obtained the required number of signatures on a petition seeking to place what is now known as "Initiative 31" on the ballot. Defendant Secretary of State Delbert Hosemann, satisfied that the procedural requirements had been met, placed Initiative 31 before the Mississippi Legislature in December 2010. See §§ 273(6)-(8); MISS. CODE ANN. §§ 23-17-29 to -39.

During its 2011 session, the Legislature did not adopt the Initiative, a step which would have mooted it. *See* § 273(2) (two-thirds of each house can place constitutional amendment on the ballot without initiative). Nor did it propose an amendment of its own which might have provided a more desirable alternative. *See* § 273(7),(8); MISS. CODE ANN. § 23-13-27.

Accordingly, in June 2010 Leland Speed brought this lawsuit in Hinds County Circuit Court seeking a declaration that Initiative 31 violates § 273(5) of the MISS. CONST. OF 1890 and an injunction prohibiting Secretary Hosemann from placing it on the November ballot. CP:4. This was done pursuant to *In re Proposed Initiative Measure No. 20*, 774 So.2d 397, 401 (Miss. 2000), in which this Court said that, to prevent "unbridled ballot box chaos," challenges could be

brought either before signatures are gathered "or before [the initiative] is placed on the ballot for consideration by the people in a general election."

David Waide was allowed to intervene. CP:28. After both Hosemann and he had answered the complaint, Speed filed a Motion for Judgment on the Pleadings under MISS. R. CIV. P. 12(c). CP:40. The Mississippi Chapters of the Southern Christian Leadership Council and the Mississippi Federation of Independent Business filed a joint amici brief represented in part by the Institute for Justice, a Libertarian advocacy group in Washington, D.C. CP:50.[1]

The Circuit Court, the Hon. Winston Kidd presiding, heard argument, denied the motion, and granted judgment in favor of Hosemann and intervenor Waide. He dismissed the lawsuit with prejudice. CP:105. This appeal followed. CP: 109. The notice of appeal named only Secretary Hosemann as an appellee but the Court has since been notified that Waide is also an appellee.

STATEMENT OF FACTS

Leland Speed, who is the Executive Director of the Mississippi Development Authority, has filed this lawsuit in his individual capacity as a taxpayer and real estate investor who seeks to promote economic development in Mississippi.

[1] Their amicus brief filed with this Court will be referred to here as the "Libertarian Amicus Brief."

The Bill of Rights. The state's Bill of Rights is found in Article 3 of the Mississippi Constitution, which includes §§ 5 to 32 of that constitution. Section 17 of the Bill of Rights currently limits government power to take private property. It provides, among other things, that property can only be taken for a "public use" and the "question whether the contemplated use be public shall be a judicial question." That section states in full:

> 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.

Methods of constitutional amendment. There are two methods by which the MISS. CONST. OF 1890 may be amended, and both are set out in § 273.

First, two-thirds of each house of the Legislature can vote to put an amendment on the ballot at a general election. The amendment will become law if approved by the majority of voters. § 273(1), (2). That has been the case since 1890.

The second method is the initiative process which skips the Legislature. It allows placement on the ballot of a constitutional amendment supported by a sufficient number of signatures on a petition. Adopted in 1992, and amended in 1998, § 273(5) contains these limitations:

(5) 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; ...

(d) To modify the initiative process for proposing amendments to this Constitution.

Initiative 31. In 2010, David Waide collected a sufficient number of signatures to seek placement of Initiative 31 on the ballot. Initiative 31 rules out any taking which is not specifically listed if a private, or "non-governmental," person obtains an interest in that land within 10 years. It reads in full:

> 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 for 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.

CP:11.

As stated on the Farm Bureau website, the purpose of this amendment is to overrule two decisions. See http://www.savingmyland.org/liberaldecisions.aspx (last visited Dec. 20, 2010).

The first, *Culley v. Pearl River Industrial Comm'n*, 234 Miss. 788, 108 So.2d 390 (Miss. 1959), upheld the taking of a quarter-mile buffer zone around what is now the Ross Barnett Reservoir even though the purpose was to sell or lease the land for private use. The court recognized the doctrine of "incidental" use, i.e., "the fact that a by-product of the taking is sold for private use [does not] derogate from the public nature of the use." *Id.* at 816, 400. The private use was incidental to the public purposes of pollution control, control of access, and recreation.

In the second, *Paulk v. Housing Authority of City of Tupelo*, 195 So.2d 488 (Miss. 1967), this Court upheld a taking for urban renewal and slum clearance even though property taken would end up in private hands. It said the paramount public purposes controlled because orderly redevelopment was necessary to ensure against recurrence of slums in the area. *Id.* at 490.

Governor Haley Barbour's opposition. When on March 23, 2009, he vetoed legislation with language similar to that of Initiative 31, Governor Haley Barbour opposed it because it would prevent action under the Mississippi Major Economic Impact Act, MISS. CODE ANN. § 57-75-1 et seq., which had been used for "projects with large numbers of jobs like Nissan and Toyota." CP:12.

He stated:

> If House Bill 803 were to become law, Mississippi would enact a prohibition against the use of eminent domain for job creation or economic development projects under MEIA. Every company looking to site a new facility or significantly add to an existing facility here will know about this prohibition. And if they didn't, every state competing against Mississippi would tell them over and over about the prohibition; because every other state knows that the use of eminent domain is often required to provide good title to the site for the facility or the critical infrastructure needed to serve this job-creating project.
>
> As a reminder, eminent domain was used to allow Nissan, Toyota, ATK, PACCAR, Stennis Space Center and the Tennessee-Tombigbee Waterway to exist in Mississippi. Eminent domain would likely be needed to secure title to many other MEIA economic development sites in the future, and experienced site selectors, whether corporate or under contract, know it.

CP:13, RE 3. Governor Barbour also pointed out that there was no exception for "certain or all hospitals and health centers, housing authorities, industrial parks, schools and public improvement districts." *Id.*

Initiative 31 also does not make exceptions for these institutions.

Of the states surrounding Mississippi and with whom Mississippi competes for economic development projects, only Louisiana has amended its constitution in a manner similar to Initiative 31. Governors and legislatures in Arkansas, Tennessee, and Alabama all remain free to use eminent domain for industrial development projects. Their constitutions permit their courts to determine what is or is not a "public use" and any statutory restrictions on that power are subject to

legislative amendment. *See* AR CONST. of 1874, art. 2 Declaration of Rights § 22; TN CONST., art. I, Declaration of Rights § 21; ALA. CONST., art. 1 Declaration of Rights § 23.[2]

SUMMARY OF ARGUMENT

Restrictions on the use of initiative and referendum serve an important public purpose. The exclusions limit the ability of special interests wealthy enough to support a petition drive to abuse the process. Some issues are too complex to be reduced to a simple yes-no vote as opposed to the give-and-take of the legislative process. The tortured complexity of Initiative 31 is testimony to the need for that process here. Also, some "hot button" issues invite abuse because political factions can use them to drive voter turn-out that will elect favored candidates. And as this Court has observed, "[C]are must be taken that the rights of individuals, minorities, and separate regions of the state are not trampled by majoritarian impulses." *In re Proposed Initiative Measure No. 20*, 774 So.2d 397, 402-403 (Miss. 2000).

Initiative 31 is a "proposal" for new eminent domain rights in addition to those now found in § 17 of our constitution. It proposes a right not to have property taken if any private person will have "any interest" in the property within 10 years

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[2] The Libertarian Amicus Brief at 2 tells the Court that 43 states have revised eminent domain laws since 2005. What it does not say is that 33 of those states made only legislative changes, which can be reversed should the need arise, and only 10 states have amended their constitutions. The amendments are difficult to characterize. But it can be safely said that only the constitutional amendments in Louisiana, New Hampshire, North Dakota and Nevada are as restrictive as Initiative 31. See LA CONST., art. I, § 4; art. VI, § 21; NH CONST., First Part, art. XII, § a; ND CONST., art. I, § 6; NV CONST., art. I, § 8.

after the taking. Even the amici admit that new rights will be created. In fact, they would give those rights not only to the landowner but to the public at large. Exactly how many people get rights, however, is irrelevant. All that counts is that new rights are "proposed" to be created.

If reached, Initiative 31 also is a "modification" or "repeal" of existing rights. It restricts the court's authority to define public use. It abolishes the doctrine of incidental use. And it strongly suggests that the enumerated exceptions should be found to be public uses even if private ownership results.

The question of "use" cannot be separated from the process of "transfer" as Waide and the Libertarian Amici suggest. The identity of the "transferee" has by both statute and court decision been made an integral part of the public use determination. There are special requirements where the transferee is a private person. The restriction on transfer limits the property rights which the government takes just as surely as if it were a purely private transaction in which the deed contained restrictions on alienation. And, as a practical matter, the purpose and effect of Initiative 31 will be to hinder if not kill outright certain types of takings because without the power of eminent domain the government will have nothing to use in negotiations with persons who might otherwise be willing sellers.

Because Initiative 31 violates § 273(5), it is an abuse of the initiative process and this Court should keep it off the November ballot.

ARGUMENT

The circuit court found that the issue presented is a question of law. CP:106, RE 2. This court reviews questions of law de novo.

I. The prohibition against use of initiative for the "proposal, modification, or repeal of any portion" of the Bill of Rights serves an important public purpose.

The initiative process has had a long and controversial history in Mississippi. A constitutional provision adopted in 1916 was declared invalid in 1922 and in 1991 this Court refused to resurrect it. *See State ex rel. Moore v. Molpus*, 578 So.2d 624, 632-33 (Miss. 1991). The Court reasoned that, because Mississippi had long opted for a representative democracy, MISS. CONST. art. 3, §§ 5, 6 did not require the state to have an initiative process. *Id.* at 633. It added that the state constitution had been amended more than 100 times since 1890 even without the initiative process and no one "has ever thought amending a constitution ought to be made impossible or easy." *Id.* at 635.

The following year, § 273 was changed to allow amendment by initiative and referendum. 1992 Miss. Laws Ch. 715. But the change prohibits the use of the initiative process for certain "hot button" sections of the constitution, including not only the Bill of Rights, but also the Mississippi Public Employees Retirement System, the right to work without joining a union, and the initiative process itself.

The need for these restrictions is readily apparent. The exclusions limit the ability of special interests with sufficient wealth to support a petition drive to abuse

the process. According to a 2002 study by the National Conference of State Legislatures, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY,[3] many states have placed subject matter restrictions on the initiative process. *See id.* at p. 15. The study found them useful. It said the initiative "too often is exploited by special interests." *Id.* at p. vii. It recommended changes to improve the process but also recommended that states avoid initiative altogether, because "initiatives ask voters to make simple yes-no decisions about complex issues without subjecting the issue to detailed expert analysis and without asking voters to balance competing needs with limited resources." *Id.* at p. 1.

Speaking more serenely, one court has upheld the restrictions on the use of initiative because they "reflect an evident judgment that some questions are better resolved in a process that permits extended debate and compromise than in a process that essentially puts a fixed proposition to the electorate for a single up or down vote." *Boyette v. Galvin*, 311 F. Supp. 2d 237, 244 (D. Mass. 2004).

Justice Mike Mills, a veteran of the legislative process, described for this Court the need for limits on the initiative process in terms of the "dangers" it presents to those whose voices are not found within a temporary majority:

> Finally, the 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 in states lacking responsible

[3] The study is available on the organization's website, http://www.ncsl.org (last visited August 11, 2011)

> procedural guidelines in their initiative laws. Care must be taken to ensure that the rights of individuals, minorities, and separate regions of the state are not easily trampled and ignored by majority impulses. Section 273 provides reasonable checks against such abuses. It is our duty to apply these factors fairly and evenly.

In re Proposed Initiative Measure No. 20, supra, 774 So. 2d at 402-403.

Only by giving plain meaning to § 273(5) can this Court prevent the initiative process from being used for improper purposes and protect itself from a regular bombardment of cases as politically difficult as this one.

The terms used in Section 273 may ordinarily be defined as follows:

> **Proposal.** 1. An act of putting forward or stating something for consideration. 2. Something proposed.

WEBSTER'S NEW COLLEGIATE DICTIONARY 924 (1977).

> **Modify.** Some of the definitions of "modify" are "to limit; to mitigate; to reduce in extent or degree; to moderate; to lower; to change somewhat the form or qualities of; to alter somewhat; change."

Dodd v. City of Jackson, 118 So.2d 319, 238 Miss. 372 (Miss. 1960).

> **Repeal.** . . . [T]he enactment of a subsequent statute . . . which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force (called "implied" repeal).

BLACK'S LAW DICTIONARY 1299 (6th ed. 1990). When these definitions are applied, the conflict between § 273(5) and Initiative 31 is readily apparent.

II. The Bill of Rights in Mississippi, as elsewhere, includes a statement of the right of the individual to resist the state's power of eminent domain.

In our constitution, Section 17 sets out a person's right not to have property taken or damaged by the state "for public use" except upon payment of "due compensation." It goes on to provide that "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."

When Section 273(5) refers to "any portion of the Bill of the Rights", that includes Section 17, which is part of what our constitution calls its "Bill of Rights."

The Libertarian Amici Brief at p.9 argues that § 17 should not be considered to be in the Bill of Rights because there is also a provision concerning eminent domain in the article on corporations, art. 7 § 190. But the fact that eminent domain is addressed in more than one section of the Constitution does not and cannot prevent it from being a "portion" of our Bill of Rights.

III. Initiative 31 violates all three prohibitions.

A. It "proposes" a right not to have property taken if a private person will have "any interest" in the property within 10 years.

Initiative 31 "proposes" a new eminent domain right. It "puts forward" for "consideration" an additional right. To the (1) right not to have property taken for anything other than "due compensation" and (2) the right not to have property taken for anything other than a "public use" it adds (3) a right not to have property

This the 12 day of August, 2011.

Respectfully submitted,

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