NO. 2010-TS-01949

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEBORAH HUGHES and CRISTEN HEMMINS,

Plaintiffs/Appellants

v.

DELBERT HOSEMANN, MISSISSIPPI SECRETARY OF STATE,

Defendant/Appellee

v.

P. LESLIE RILEY & PERSONHOOD MISSISSIPPI,

Defendants-Intervenors/Appellees

APPEAL FROM THE CIRCUIT COURT

FOR THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF DEFENDANTS-INTERVENORS/APPELLEES
P. LESLIE RILEY & PERSONHOOD MISSISSIPPI

ORAL ARGUMENT REQUESTED

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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 may evaluate possible disqualification or recusal:

Parties

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

Attorneys of Record:

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4. Alexa Kolbi-Molinas, Attorney for Plaintiffs/Appellants

5. Eve C. Gartner, Attorney for Plaintiffs/Appellants

7. Suzanne Novak, Attorney for Plaintiffs/Appellants

8. Harold Pizzetta, III, Attorney for Defendant/Appellee

9. Stephen M. Crampton, Attorney for Defendants-Intervenors/Appellees

Judge:

1. Honorable Malcolm Harrison, Hinds County Circuit Court Judge

Respectfully Submitted,

__________/s/____________________
Stephen M. Crampton
Attorney for Defendants-Intervenors/Appellees

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STATEMENT OF THE ISSUES

1. Whether Plaintiffs' undue delay both in filing this action initially and in prosecuting this appeal violate the doctrine of "unclean hands," rendering equitable relief inappropriate here.

2. Whether Measure 26, which simply defines "person" for purposes of Article III of the Mississippi Constitution to "include every human being from the moment of fertilization, cloning or the functional equivalent thereof," violates Article XV, Section 273(5)(a) of the Constitution, which states that the initiative process shall not be used "[f]or the proposal, modification, or repeal of any portion of the Bill of Rights of this Constitution."

STATEMENT OF THE CASE

Defendants-Intervenors/Appellees P. Leslie Riley and Personhood Mississippi ("Sponsors") are sponsors of the proposed initiative constitutional amendment known as Measure 26. (Record Except "R.E." 5A). On November 22, 2008, Sponsors submitted the language of what would become Measure 26 to John Helmert at the Office of the Secretary of State. (R.E. 5A). On February 16, 2010, after successfully completing the burdensome and onerous task of collecting some 130,000 signatures from qualified electors all across the state, Sponsors submitted petitions in support of Measure 26 to Defendant Hosemann. (R.E. 5B). On April 1, 2010 Secretary Hosemann announced that the petitions contained sufficient signatures pursuant to Mississippi Constitution Article

XV, Section 273(3) to be submitted to the Legislature and placed on the 2011 General Election ballot. (R.E. 5B).

Measure 26 states:

> Be it Enacted by the People of the State of Mississippi:
>
> SECTION 1. Article III of the constitution for the state of Mississippi is hereby amended BY THE ADDITION OF A NEW SECTION to read:
>
> **Section 33. Person defined**. As used in this Article III of the state constitution, "The term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning, or the functional equivalent thereof."

(R.E. 5A).

On July 6, 2010, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief, asking that the circuit court declare Measure 26 unconstitutional and invalid and enjoin Defendant Hosemann from delivering Measure 26 to the Legislature and placing it on the ballot. (R.E. 4). Plaintiffs alleged that Measure 26 "**proposes** to add a new provision to the Bill of Rights" and "**modifies** at least ten provisions of the Bill of Rights" in violation of Article XV Section 273(5)(a). (R.E. 4) (emphasis in original).. Sponsors were granted intervention and the parties agreed that the case could be resolved by way of a judgment on the pleadings. (R.E. 6).

After receiving and reviewing briefs and hearing oral argument, Judge Malcolm Harrison, on October 26, 2010, issued an order denying Plaintiffs' motion for judgment on the pleadings. (R.E. 3). Judge Harrison found that Plaintiffs had not met their "heavy burden in attempting to restrict the citizenry's right to amend the Constitution." (R.E. 3).

On November 9, 2010 the court entered a final judgment in favor of Secretary Hosemann and Sponsors. (R.E. 2).

SUMMARY OF ARGUMENT

After months of arduous labor and traveling the four corners of the state, the Sponsors finally succeeded in garnering a sufficient number of signatures of qualified electors to warrant acceptance by the Secretary of State and placing the Measure on the ballot in November. Plaintiffs' delay in both filing and prosecuting this action have caused Sponsors great potential harm by leaving them without legislative remedy in the event this Court were to declare Measure 26 unconstitutional, because the Legislative session will have concluded and the Sponsors would not have any opportunity to lobby for formal adoption of their proposed amendment. Such undue delay constitutes a violation of the doctrine of unclean hands, and renders equitable relief inappropriate here.

On the merits, Plaintiffs face a heavy burden to prove beyond any reasonable doubt that Measure 26 violates Section 273(5)(a). Plaintiffs are unable to meet that heavy burden, and the decision of the lower court should be affirmed. Section 273(5)(a) prohibits use of the initiative process for "the proposal, modification or repeal" of "any portion of the Bill of Rights." Measure 26 does not violate the "proposal" clause of Section 273(5)(a) because it does not propose the addition of any new substantive right. Properly understood, considering the context, history, and law of the matter, Section 273(5)(a) was designed to protect the substance of the Bill of Rights, not the mere text. The offering of a simple definition for a term already appearing in the text does not fall

within the prohibition of the “proposal” clause. Measure 26 is but a clarification of a term, not the proposal of a new right.

Similarly, Measure 26 does not violate the “modification” clause of Section 273(5)(a). This Court’s precedents, together with numerous decisions from other courts establish beyond any reasonable doubt that there is a significant legal difference between a mere clarification and a modification of a law. Measure 26, which simply defines the term “person,” constitutes a permissible clarification, not an impermissible modification.

Finally, Appellants’ overly broad interpretation of Section 273(5)(a), if adopted, would implicate serious concerns regarding the infringement of First Amendment rights. For all of these reasons, this Court should affirm the decision of the lower court.

ARGUMENT

Plaintiffs, having waited over a year and a half to file their complaint and then unduly delaying this appeal, now ask this Court to declare Measure 26 unconstitutional and to enjoin Secretary Hosemann from placing it on the ballot in November, thereby denying Sponsors the fruit of their hard labor and denying the people of Mississippi the right to vote on this important issue. To reward Plaintiffs for their inexplicable delay in prosecuting this action, which in turn would result in undue prejudice to the rights of Sponsors to attempt to correct any perceived technical defects in Measure 26, would violate the doctrine of unclean hands. Consequently, even if Plaintiffs’ arguments were meritorious, which they are not, they should be denied relief.

In any event, Plaintiffs offer virtually no substantive legal argument to support their claim that simply defining an existing term in the Bill of Rights, when that term is not currently defined, somehow exceeds the citizens' right to amend the Constitution by initiative. Plaintiffs argue, without substantiation, that merely adding a new section to the Bill of Rights and clarifying the definition of those to whom existing rights attach represent fundamental changes to the nature of the Bill of Rights which cannot be made by initiative. Decisions by this Court as well as the United States Supreme Court, together with long-accepted understandings of the differences between amending and revising constitutional provisions, demonstrate that Plaintiffs' arguments are without merit.

Measure 26 neither proposes a new right nor modifies existing rights in the Bill of Rights. Instead, it defines the term "person" in the Bill of Rights to clarify when the rights encompassed in Article III inure to all human beings regardless of gestational stage, *i.e.,* from the moment of fertilization, cloning, or the functional equivalent thereof. Far from exceeding citizens' authority under Article XV Section 273(5)(a), Measure 26 provides a cogent example of the people appropriately exercising their near-plenary power to amend the Constitution. *Chevron U.S.A., Inc. v. State,* 578 So. 2d 644, 649 (Miss. 1991).

I. PLAINTIFFS FACE A HEAVY BURDEN TO DEMONSTRATE THAT MEASURE 26 IS UNCONSTITUTIONAL.

A. Measure 26 may not be Enjoined Unless it Appears "Beyond Any Doubt" that it is Unconstitutional.

As the circuit court correctly held and Appellee Hosemann argues, Plaintiffs bear and failed to meet a heavy burden in seeking to have Measure 26 declared unconstitutional. (R.E. 6); (Brief of Appellee at 4, 6-7). This matter is before the Court on appeal of denial of a motion for judgment on the pleadings. Review is *de novo*. *R.J. Reynolds Tobacco Co. v. King*, 921 So.2d 268, 270 (Miss. 2005). "Therefore, this Court sits in the same position as did the trial court." *Id.* at 270-271 (citing *Bridges ex rel. Bridges v. Park Place Entertainment*, 860 So.2d 811, 813 (Miss.2003)). A Rule 12(c) motion "should not be granted unless it appears *beyond any reasonable doubt* that the non-moving party will be unable to prove any set of facts in support of the claim which would entitle the non-movant to relief." *King*, 921 So.2d at 271 (emphasis added) (citing *Bridges*, 860 So.2d 811, 813).[1]

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[1] Appellee Hosemann, while agreeing that Plaintiffs face a heavy burden, suggests nevertheless that Measure 26 does not enjoy a presumption of constitutionality because it is a citizen initiative rather than a legislative enactment. (Appellee's Brief at 7 n.2) Secretary Hosemann's entire argument rests, however, on the silence of a single case, *In re Proposed Initiative Measure No. 20*, 774 So. 2d 397 (2000). *In re Measure No. 20* did not mention a presumption of constitutionality, but neither did it discuss the matter.

But those cases that have actually addressed the issue have in fact concluded that a citizen initiative does enjoy a presumption of constitutionality. *See, e.g., League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996) (citizen initiative "carries a heavy presumption of constitutionality, and the burden of overcoming that presumption rests on the challenger" because through "the initiative process the people of Maine are exercising their legislative power"); *see also Pierce County v. State*, 150 Wash. 2d 422, 430, 78 P.3d 640, 646 (2003) ("A statute or initiative measure is presumptively constitutional; consequently, a party asserting that either violates the state constitution 'bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt.'" (quoting *Amalgamated Transit Union Local 587 v. State,* 142 Wash.2d 183, 205, 11 P.3d 762(2000)).

The lower court correctly concluded that Plaintiffs have failed to meet that heavy burden here, and this Court should affirm that determination.

B. Plaintiffs Have Unclean Hands.

It is an elementary principle of equity that "'he who comes into equity must come with clean hands.'" *In re Estate of Richardson*, 903 So.2d 51, 55 (Miss. 2005) (citing *Thigpen v. Kennedy*, 238 So.2d 744, 746 (Miss.1970)). "'The meaning of this maxim is to declare that no person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by wilful inequity....'" *Richardson*, 903 So.2d at 55 (quoting *O'Neill v. O'Neill*, 551 So.2d 228, 233 (Miss.1989)).

Plaintiffs plainly seek an equitable remedy, namely an injunction prohibiting Secretary Hosemann from placing Measure 26 on the ballot (and thus denying Sponsors the hard-earned fruit of their labor and denying the people of Mississippi the right to vote on this important issue). *See, e.g., Madison County v. Mississippi State Highway Comm'n*, 191 Miss. 192, 198 So. 284, 287 (1940) ("the remedy of injunction is solely equitable").

In addition, unlike the plaintiffs in *In re Proposed Initiative Measure 20*, 774 So.2d 397 (Miss. 2000), Plaintiffs waited to file their complaint until after Sponsors had completed the long and laborious process of traveling the four corners of the state to solicit signatures from registered voters, sacrificed untold hours in locating and engaging passersby to consider the Measure, painstakingly organized the petitions and filed them with the various circuit clerks, begged and cajoled those clerks to review and certify the

signatures in a timely manner (when the statutory scheme governing the process contains no deadline for the clerks to act), sued the Secretary of State regarding the time for filing their petitions, and finally obtained the Secretary's certification that the petitions had been timely filed and met the onerous requirements of the law.

Moreover, Plaintiffs sought initially "to enjoin the Secretary of State from delivering Measure 26 to the Legislature." (R.E. 4 at ¶6)[2] Plaintiffs therefore sought and obtained an agreed briefing schedule and setting for oral argument on an expedited basis. (R.E. 6) After the lower court's ruling denying Plaintiffs' motion, Plaintiffs failed to seek expedited review in this Court. As a result, Measure 26 has already been delivered to the Legislature, as Secretary Hosemann was required to do. *See* Brief of Appellee at 1-2 (citing Miss. Code Ann. §23-17-21). This portion of Plaintiffs' requested relief is therefore moot; this Court cannot undo what has already been done.

Plaintiffs did include, apparently somewhat as an afterthought, an additional request that Secretary Hosemann also be enjoined from placing Measure 26 "on the ballot." Arguably, then, Plaintiffs' entire case is not moot (although fairly read it may yet be deemed moot), because it is the Secretary who is charged by law with placing the matter on the ballot. *See* Miss. Code Ann. §23-17-29. Even if not moot, however, it is clear that this matter will not be heard or ultimately determined until well after the Legislature concludes its session, thereby leaving Sponsors without any opportunity to seek a remedy for any technical defect which might be found by this Court. Had Plaintiffs

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[2] Paragraph 6 states in full: "For these reasons, Plaintiffs ask this Court to declare Measure 26 unconstitutional and invalid and to enjoin the Secretary of State from delivering Measure 26 to the Legislature so that it may appear on the November 2011 ballot and further enjoin him from placing it on the ballot." *Id.*

acted promptly and obtained expedited review, however, as equity demands, then Sponsors would have been able to lobby the Legislature to formally adopt Measure 26 and so overcome any alleged deficiency in the Measure resulting from its being purely a citizen initiative. *See generally* Miss. Const. Art. XV, Section 275(6) ("A constitutional initiative may be adopted by a majority vote of each house of the Legislature."). The restrictions on proposed constitutional amendments contained in Section 273(5), of course, do not apply to proposed amendments offered by the Legislature.

Accordingly, Plaintiffs' delay both in filing this action initially and in bringing this appeal have unduly prejudiced Sponsors, and thus constitute unclean hands barring them from obtaining equitable relief.

II. MEASURE 26 DEFINES TERMS WITHIN THE EXISTING BILL OF RIGHTS INSTEAD OF PROPOSING NEW RIGHTS.

Plaintiffs attempt to meet their high burden by arguing that Section 273(5)(a) effectively prohibits the addition of any new words to the Bill of Rights. Adopting an overly literal interpretation of Section 273(5)(a)'s prohibition against using the initiative process for a "proposal" of "any portion" of the Bill of Rights, Plaintiffs argue that the mere act of adding a new section to the Bill of Rights simply defining an otherwise undefined term automatically violates Section 273(5)(a). (Plaintiffs' Brief at p. 6). This argument defies logic, common sense, this Court's precedents, and long-established definitions of the people's near-plenary power to amend the Constitution. After all, it is a Bill of *Rights*, not a bill of *words*. *See, e.g.,* Jeffrey Jackson and Mary Miller, *Encyclopedia of Mississippi Law* §19.28 (2010) ("Bills of rights are legally enforceable

enumerations of *rights* that shield the individual from the power of the state.") (emphasis added).

A. Measure 26 does not Violate the "Proposal" Clause of Section 273(5)(a).

Plaintiffs argue first that Measure 26 violates the "proposal" clause of Section 273(5)(a) because, they claim, it would add a new "portion" to the Bill of Rights. (Plaintiffs' Brief at 6-7)[3] Under Plaintiffs' interpretation of Section 273(5)(a) every word, punctuation mark and even grammatical or typographical error in the Bill of Rights is

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[3] Plaintiffs also argue that Measure 26 would modify "at least ten" existing provisions within the Bill of Rights. (Plaintiffs' Brief at 5 n.3) Plaintiffs are once again mistaken. While the term "person" does appear in several other provisions, the contexts are such that it would make very little difference if unborn persons were included, See MISS. CONST. § 8 ("All **persons**, resident in this state, citizens of the United States, are hereby declared citizens of the state of Mississippi"); § 10 ("No **person** shall be convicted of treason unless…"); § 12 ("The right of every citizen to keep and bear arms in defense of his home, person, or property…"); § 20 ("No **person** shall be elected or appointed to office in this state for life or during good behavior"); § 22 ("No **person's** life or liberty shall be twice placed in jeopardy for the same offense"); § 25 ("No **person** shall be debarred from prosecuting or defending any civil cause for or against him or herself"); § 26 (court may in certain cases "exclude from the courtroom all **persons** except such as are necessary in the conduct of the trial"); § 27 ("No **person** shall, for any indictable offense, be proceeded against criminally by information"); § 29 ("[A]ll **persons** shall, before conviction, be bailable by sufficient sureties," and references to "when the **person** has previously been convicted of a capital offense," "a **person** charged with committing any offense," "if that **person** is indicted for a felony," "probable cause that the **person** has committed a felony while on bail," "the court shall revoke bail and shall order that the **person** be detained," "the **person** or **persons** arrested for such offense," conditions that "will reasonably assure the appearance of the **person**," "Any **person** who is charged with an offense, . . .). The Fourteenth Amendment of the federal constitution defines U.S. citizenship in terms of being born, see U.S. CONST. amend. XIV § 1 ("All **persons** born or naturalized …"), and the unborn obviously neither hold office, defend themselves, or commit crimes.

Two other sections where the inclusion or exclusion of the unborn might conceivably matter are sections 23 ("The people shall be secure in their **persons**, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the **person** or thing to be seized"), and one of the provisions in section 29 (provision for when a release would pose a "special danger to any other **person** or to the community"). In short, Plaintiffs' suggestion that many other provisions of the Bill of Rights would be modified is much ado about nothing, to borrow a phrase.

frozen in time and untouchable by the very citizens in whom all political power is vested, from whom all political power is derived, from whom government originates and upon whose will the government is founded. *See* Miss. Const., Art. III, Section 5 ("All political power is vested in, and derived from, *the people*; all government of right originates *with the people*, is founded *upon their will only*, and is instituted *solely* for the good of the whole.") (emphasis added). Plaintiffs do not and cannot cite any legal authority for their interpretation that would strip Mississippi citizens of the very powers they have reserved to themselves. *See, e.g., Power v. Robertson*, 130 Miss. 188, 93 So. 769, 776 (1922) ("The Constitution is the product of the people in their sovereign capacity. It was intended primarily to secure the rights of the people against the encroachments of the legislative branch of the government.").

In *Measure No. 20* this Court did not go so far, but merely held that Section 273(5)(a) "protects" the Bill of Rights. *In re Measure No. 20*, 774 So.2d at 402. To "protect" means "to cover or shield from exposure, injury damage or destruction;" "to maintain the status or integrity of especially through financial or legal guarantees: as a: to save from contingent financial loss b: to foster or shield from infringement or restriction." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/protect (last visited March 16, 2011). Therefore, as this Court stated in *Measure No. 20*, Section 273(5)(a)'s prohibitions against proposing, modifying or repealing any portion of the Bill of Rights are designed to prevent the substantive *rights* contained within Article III from being damaged, undermined, or infringed, not, as Plaintiffs claim, to prevent the authors of the Constitution, *i.e.,* the people, from simply clarifying or defining *words* contained in the document.

B. The Phrase "Portion of the Bill of Rights" Refers to the *Substance* of the Rights, not Mere *Text*.

Plaintiffs' suggestion that Measure 26 constitutes the "proposal" of a "portion of the Bill of Rights of this Constitution" begs the question as to the meaning of the phrase, "portion of the Bill of Rights." Instead, they invite the Court to consider the word "portion" in a vacuum. However, many courts discussing the federal Bill of Rights have used this exact phrase -- "portion of the Bill of Rights" -- to refer to portions of the *substance* of the Bill of Rights, rather than parts of its *text*. For instance, several cases hold that "portions of the Bill of Rights" have been incorporated into the Fourteenth Amendment, but what they mean is not that the *text* of the federal Bill of Rights has been incorporated into the *text* of the Fourteenth Amendment, but that part of the *substance* of the Bill of Rights -- that is, the rights themselves -- have been subsumed within the protection of the Fourteenth Amendment. *See, e.g., Brown v. Porter*, 2010 WL 3834408, *3 (N.D. Ohio) ("various **portions of the Bill of Rights** have been incorporated into the Fourteenth Amendment's limits on the power of the states"); *Brown v. Rushing*, 2010 WL 1924500, *4 (N.D. Ohio) (same); *DeSisto College, Inc. v. Town of Howey-in-the-Hills*, 706 F.Supp. 1479, 1506 (M.D.Fla.1989) (same); *Moore v. Middletown*, 2010 WL 2573817, *13 (Ohio App.) ("the court showed this zealous support of individual property rights by making the Fifth Amendment the first **portion of the Bill of Rights** to be incorporated against the states"); *Williams v. King*, 420 F.Supp.2d 1224, 1228 n.18 (N.D.Ala. 2006) (referring to a "discussion of the specific **portions of the Bill of Rights** that have been absorbed into the Fourteenth Amendment"); *Panzarella v. Boyle*, 406 F.Supp. 787, 793 n.8 (D.R.I. 1975) ("[T]he Supreme Court has selectively incorporated

portions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment"); *State v. Swafford*, 237 N.E.2d 580, 583 (Ind. 1968) ("**Portions of the Bill of Rights** and the Fifth Amendment have been 'incorporated' into the due process clause of the 14th Amendment") (emphasis added throughout).

Such a reading of "portion of the Bill of Rights" is confirmed by a comparison of § 273(5) with the only other state to specifically shield individual rights from the initiative process, Massachusetts. MASS. CONST. art. XVLIII § 2 provides: "No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition." *Id.* Massachusetts thus explicitly states that its limitation on the initiative process operates as a shield for substantive *rights*, not simply for constitutional *text*. The only logical and meaningful construction of "portion of the Bill of Rights" in § 273(5) is the one that is consistent with these precedents, not the nonsensical rendition proffered by Plaintiffs.

One scholar has described Section 273(5)(a) as precluding "the adoption of initiative measures that would *alter* the state's bill of rights." Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 473 n.268 (2003) (emphasis added). "Altering" the Bill of Rights means changing the underlying substantive *rights*, not merely clarifying or defining existing *terms*. *See generally, Merriam-Webster Dictionary,* http://www.merriam-webster.com/dictionary/alter (last visited March 16, 2011). Measure 26 does not propose new rights or alter the existing substantive rights contained in Article III, but merely

defines the term "person" in order to clear up any confusion as to whom the existing rights pertain. As such it does not violate the "proposal" clause of Section 273(5)(a).

C. Measure 26 Merely Defines a Term Already Appearing in the Text of the Bill of Rights; as such, it does not Violate the "Proposal" Clause of Section 273(5)(a).

Section 273(5) provides in full:

> 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;
>
> (b) To *amend* or *repeal* any law or any provision of the Constitution relating to the Mississippi Public Employees' Retirement System;
>
> (c) To *amend* or *repeal* the constitutional guarantee that the right of any person to work shall not be denied or abridged on account of membership or nonmembership in any labor union or organization; or
>
> (d) To *modify* the initiative process for proposing amendments to this Constitution.

Id. (emphasis added). Plaintiffs suggest that subsection (a) is an absolute – "hands off" the Bill of Rights. But that is not what it actually says; it omits the term "amend," even though that term appears immediately afterward in both subsections (b) and (c). Thus, it must be presumed that the drafters did not intend the absolute prohibition urged by Plaintiffs, for even under a rigid interpretation of Section 273(5), an initiative may still "*amend*" the Bill of Rights, so long as it does not "*propose, modify or repeal*" any portion. By the same token, under subsections (b) and (c), an initiative may "*propose*" or

"*modify*" a law or constitutional provision relating to the Mississippi Public Employees' Retirement System or the right to work, but could not "*amend*" or "*repeal*" it. And under subsection (d), an initiative may "*propose*" or "*repeal*" or "*amend*" the initiative process itself, but it may not "*modify*" the process. In short, the broad reading contended for by Plaintiffs leads only to an absurdity. The drafters clearly did not intend such an interpretation.

Section 273(5)(a) thus does not forever bind the hands of the electorate with respect to an initiative touching upon the text of the Bill of Rights, as Plaintiffs suggest. Instead, the prohibition against using the initiative process for the "proposal" of "any portion of the Bill of Rights" memorializes a long-understood distinction between amending the rights that are already in place -- which Section 273(5)(a) expressly permits and which is part of the people's plenary power -- and transforming the *substance* of the Bill of Rights to create entirely new rights. *See, e.g.,* Jason Mazzone, *UNAMENDMENTS,* 90 IOWA L. REV. 1747, 1811 (2005) (hereafter "Mazzone") (analyzing amendments to federal constitution under Article V and concluding that non-substantive amendments are permissible). Since at least the eighteenth century, "amendment" has been understood "to be a correction, shown to be necessary in light of experience, in order for the charter to function as it was intended. Rather than initiating a change in direction, amendments put things back on their proper course." *Id.* at 1794; *see also* 1 Annals of Cong. 660-661 (Joseph Gales ed., 1789) (recording, *inter alia*, debates between Roger Sherman and James Madison concerning the meaning of "amendment" in context of Art. V of federal constitution).

As is true with Article V of the United States Constitution, Section 273(5)(a) of the Mississippi Constitution sets boundaries that respect these long-held understandings regarding citizen input. Under Section 273, citizen input in the form of initiatives is permitted "to examine in an ongoing fashion the details of their constitutional arrangements and to correct those things that do not serve well the basic design," but initiatives "cannot be used to effect deep transformations in [their] constitutional arrangements." Mazzone, 90 IOWA L. REV. at 1748. Section 273 memorializes for Mississippians what Article V does for all U.S. citizens: it provides "a limited mechanism for amending the Constitution in order to preserve and enhance its basic design," but protects against improperly seeking to "effect a more foundational change in the arrangements of government." *Id.* at 1754.

Properly understood, then, Section 273(5)(a)'s prohibition on using the initiative process for the "proposal, modification or repeal" of "any portion of the Bill of Rights" does not, as Plaintiffs claim, prohibit Mississippi citizens from simply defining a term appearing in the text. Instead, Section 273(5) prohibits the use of the initiative process to propose *new rights*, change the nature of existing rights or repeal existing rights and thereby transform the very nature of the Constitution. Measure 26 therefore falls solidly within the realm of permissibility.

Judge Harrison's ruling should therefore be affirmed.

D. *In re Proposed Initiative Measure No. 20* is Inapposite.

Plaintiffs mistakenly rely on this Court's analysis of Section 273 in *In re Proposed Initiative Measure No. 20* as justification for their position. (Plaintiffs' Brief at 6, citing *In re Proposed Initiative Measure No. 20*, 774 So. 2d 397, 402-03) In *Measure*

No. 20, this Court addressed only whether a proposed constitutional amendment satisfied the requirements of Section 273(3) and 273(4), which describe petition signature and revenue impact statement requirements. *Id.* at 400 ("We must determine whether these constitutional provisions [273(3) and 273(4)] have been satisfied here."). In concluding that Measure No. 20 was unconstitutional under Section 273(4), this Court observed that Section 273, as a whole, "seeks to temper the initiative induced tension between the unchecked will of the majority versus the inherent rights of individuals." *Id.* at 402. It noted that portions of Section 273 protect the Bill of Rights and other matters of state interest; seek to protect the state coffers by requiring rationally based government revenue statements; and seek to discourage regionalism by requiring broad-based support for any proposed initiative. *Id.* at 402-403.

This Court further found that, as a whole, Section 273 provides "reasonable checks" against potential abuses of the electoral process by special interest groups. *Id.* at 403. Section 273 as a whole provides responsible procedural guidelines that help provide the care needed to "ensure that the rights of individuals, minorities, and separate regions of the state are not easily trampled and ignored by majority impulses." *Id.* Apart from mentioning that one part of Section 273 "protects the Bill of Rights and other matters of state interest," this Court did not ascribe particular import to Section 273(5)(a), which was not analyzed in *Measure 20*. Consequently, *In re Measure No. 20* does not support Plaintiffs' assertion that Section 273(5)(a) must be read to prohibit citizens from voting on an initiative that in any way touches upon the Bill of Rights.

The lower court correctly found that Measure 26 does not propose a new portion to the Bill of Rights in violation of Section 273(5)(a). This Court should affirm that ruling.

III. MEASURE 26 IS A PERMISSIBLE *CLARIFICATION*, NOT A PROHIBITED *MODIFICATION* OF THE BILL OF RIGHTS.

Appellant also argues that Measure 26 violates the "modification" clause of Section 273(5)(a) by defining the term "person." (Plaintiffs' Brief at 7-10). In truth, however, Measure 26's definition of "person" does not "modify" the Bill of Rights in violation of Section 273(5)(a). Plaintiffs present no legal authorities in support of their proposition that merely defining an existing term rises to the level of "modifying" the rights protected under the Bill of Rights. Instead, Plaintiffs offer speculation about whether Measure 26's definition of "person" is a common understanding of the term, and concoct nonsensical scenarios about crediting teenagers with "time in the womb" for driving permits and registering to vote -- statutory rights wholly outside of Measure 26's modest application to the Bill of Rights. (Plaintiffs' Brief at 8-9). Plaintiffs' diversions do nothing to substantiate their claim that simply defining an existing term is equivalent to "modifying" a constitutional right.

Neither does Plaintiffs' assertion of the unremarkable proposition that legal changes have meaning advance their cause. (Plaintiffs' Brief at 9, citing, *inter alia, Stidham v. State*, 750 So.2d 1238, 1244-1245 (Miss. 1999) and *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 243 (2004)). It is beyond dispute that Sponsors' efforts in drafting language, gathering signatures and complying with the numerous other procedural prerequisites is a meaningful exercise. What is in dispute is whether the

resulting initiative *modifies* the rights contained in the Bill of Rights as contemplated by Section 273(5), or instead simply *clarifies* the meaning of a word within Article III. Plaintiffs overlook that distinction and rush to judgment that *any* proposal affecting the Bill of Rights, however minimally, must necessarily "modify" those rights and so be rendered impermissible. (Plaintiffs' Brief at 9). Logic and case law provide otherwise, however.

Mississippi is one of eighteen (18) states that allow constitutional amendments by initiative. The others are Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. Only four -- California, Illinois, Massachusetts, and Mississippi -- impose substantive limits on the subject matter of initiative-proposed amendments, and none of them uses the precise form that Mississippi sets forth. California does not allow "*revisions*;" Illinois confines its initiatives to *procedural* and *structural* amendments; and Massachusetts protects a particular list of rights. Of these three, the Massachusetts provision: "No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition," seems the most closely analogous to the limits contained in Section 273(5), though the language is not exactly the same. Accordingly, there is no state constitutional law on the meaning of "modification" in this context to which this Court can look for guidance. Happily, there is a good deal of case law that illumines the issue here presented.

A. This Court's Precedents Distinguish between Impermissible *Modification* of the Constitution and Permissible *Clarification*.

In *Power v. Robertson*, 93 So. 769, 770-771 (Miss. 1922), this Court voided an initiative and referendum amendment as an impermissible modification of the Constitution. *Robertson* provides a cogent illustration of when a proposed change crosses the line between permissible *clarification* and impermissible *modification*, particularly when the Court's analysis is compared to the analysis in *State v. Brantley*, 74 So. 662, 667 (Miss. 1917), which was overruled in part by *Robertson*. The *Brantley* Court upheld an initiative and referendum provision when it found that "no new power was conferred by the amendment, either upon the Legislature or the people." *Brantley,* 74 So. at 667. The Court found that the challenged provision did not affect the power to make or amend the Constitution, and so was a valid amendment. *Id.* Conversely, in *Robertson*, the Court found that the initiative and referendum provision was an invalid modification because it materially changed three provisions in the Constitution. *Robertson*, 93 So. at 776. The proposed amendment

> not only reserves to the people the right to participate in legislation, but it involves also a right to amend the Constitution, and without reference to the Legislature, and imposes very many restraints upon the legislative power, apart from reserving to the people a power to legislate, and changes very materially many of the other sections of the Constitution. It creates a situation with reference to law heretofore unknown. It not only confers on the people the power to make laws, and to amend laws, and to repeal laws, but it gives to the people, and to a very small per cent of the people, the right to suspend laws of every kind by the simple expedient of filing a referendum petition within 90 days after the legislature shall have adjourned. It also expressly takes from the Governor the power to veto bills, so as to cause their reconsideration, as conferred without stint or limit in section 72 of the Constitution.

Id. That unprecedented granting and taking of powers constituted an impermissible modification, whereas the earlier provision that conferred no new power on the Legislature or people did not. *Id.*; *Brantley*, 74 So. at 667.

B. Other Courts have also Recognized the Distinction between *Modification* and *Clarification*.

The distinctions made in *Robertson* and *Brantley* echo rulings in other appellate courts that have distinguished between amendments that merely *clarify* and those that go further and *modify*. For example, the Ninth Circuit Court of Appeals held that a constitutional amendment could be applied retroactively because it merely *clarified* and did not *modify* existing law. *In re Park at Dash Point, L.P.*, 985 F.2d 1008, 1011 (9th Cir. 1993). "It is abundantly clear from both the legislative history and a subsequent (1991) amendment that the 1989 revision was intended not to *change* existing law but rather to *clarify* an ambiguity present in the 1969 revision to that statute and thereby prevent possible future judicial misinterpretations thereof." *Id.* (emphasis added). *See also, United States v. Innie,* 77 F.3d 1207, 1209 (9th Cir. 1996) (finding that an amendment to sentencing guidelines which added a definition of "mixture or substance" was a *clarifying* amendment).

Again, the Fourth Circuit Court of Appeals was faced with the question whether amendments to a Medicare law constituted a substantive change, in which case they could not be retroactively applied, or merely a clarification, in which case there was no concern regarding retroactivity. *Brown v. Thompson,* 374 F.3d 253, 258-59 (4th Cir. 2004). In holding that the amendments merely clarified the law, the court observed that "when an amendment alters, even 'significantly alters,' the original statutory language,

this does 'not necessarily' indicate that the amendment institutes a change in the law." *Id.* at 259 (quoting *Piamba Cortes v. American Airlines, Inc.,* 177 F.3d 1272, 1283 (11th Cir.1999) (internal quotation marks and citation omitted)); *accord Wesson v. United States,* 48 F.3d 894, 901 (5th Cir.1995) (noting that "an amendment to a statute does not necessarily indicate that the previous version was the opposite of the amended version"). The court further noted that Congress may amend a statute "'to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases.'" *Id.* (quoting *United States v. Sepulveda,* 115 F.3d 882, 885 n. 5 (11th Cir.1997) (internal quotation marks and citation omitted)). A change in statutory language "'need not *ipso facto* constitute a change in meaning or effect, but may be made to clarify what was intended all along.'"

A number of other courts have also explicitly distinguished "clarification" and "definition" from "modification" in a wide variety of settings:

- For purposes of determining interlocutory appellate jurisdiction, a mere "*clarification*" defeats jurisdiction because it does not rise to the level of a "*modification*" of an injunction under 28 U.S.C. § 1292(a)(1) (*Thomas v. Blue Cross and Blue Shield Ass'n*, 594 F.3d 823, 832 (11th Cir. 2010) ("[T]he order does not qualify for appeal under section 1292(a)(1) because that ruling would constitute a **clarification**, not a **modification**, of the underlying injunction"); *see also id*. (order that is "simply an **interpretation**" is not a "**modification**"));
- For purposes of a child visitation arrangement, the advocate of which bears the burden of proof (*In re M.E.H*., 2010 WL 2010931, *2 (Ohio App.) ("[W]e interpret the September 11, 2009 order as a mere **clarification**—not a **modification**—of supervised visitation under the April 8, 2009 order."));

- For purposes of a court's authority to **clarify**, but not **modify**, a divorce decree (*Connor v. Connor*, 1999 WL 1204355, *3 (Wash. App.) ("This was a reasonable time and constituted a **clarification**, not a **modification**, of the decree."); *see also In re Libby*, 1999 WL 141157 (Wash. App.) ("If the parties cannot agree, the court can step in to **define** the parties' rights and obligations. The result is a **clarification**, not a **modification** of the decree."); *Bina v. Bina*, 908 S.W.2d 595, 596 (Tex. App. 1995) ("Because the trial court found that the original decree was ambiguous, the change in the decree was a **clarification**, not a **modification**."));

- For purposes of determining the scope of a trial court's jurisdiction during an appeal, which would lie for a **clarification**, but not a **modification**, of an order (*Russell v. Russell*, 2006 WL 2805056, *6 (Va. App.) ("Because the May 20, 2005 order contained inconsistent and unclear statements, the August 19, 2005 order was a **clarification**, not a **modification**, of the original order."));

- For purposes of a Federal Rule 68 offer of judgment, in which a **clarification** would not eviscerate an initial offer, but a **modification** would (*State ex rel. Landenberger v. Project Return, Inc.*, 2009 WL 637122, *7 (Tenn. App.) ("[T]he second offer was a **clarification** (not a **modification**) of the initial offer") (quoting *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 400 (8th Cir.1988))

- For purposes of determining the time when an injunction became effective against a particular party, so that a **modification** would *not* be retroactive, but a **clarification** would be (*A.V. By Versace, Inc. v. Gianni Versace, S.p.A.*, 279 F.Supp.2d 341, 349 (S.D.N.Y. 2003) ("[T]he January 4, 2001 decision was only a **clarification** not a **modification**"));

- For purposes of determining the amount of deference owed to a trial court that was **clarifying**, rather than **modifying**, an earlier decree (*Arneson v. Arneson*, 1998 WL 10777, *2 (Wis. App.) ("[W]e pay deference to the circuit court's determination because the circuit court here '**clarified'** rather than '**modified'** its holding. The court stated: 'I recall at that time the decision was made, what was under consideration was the earnings of each party, and I think that is the way the provision should be interpreted.' We are satisfied that this language indicates a **clarification**, not a **modification**, of the original judgment."));

and finally

- For purposes of determining the effect of a statute reinstating earlier law under Title VII (*Walker v. IMS America, Ltd.*, 1994 WL 719611, *6 (E.D.Pa.) ("*Hicks* described itself to be a **clarification**, not a **modification**, of the existing *McDonnell Douglas/Burdine* framework."); *see also Board of Managers of Glen Mills Schools v. West Chester Areas School Dist*., 838 F.Supp. 1035,1042 (E.D.Pa. 1993) ("[A]ccording to the Supreme Court, *Hicks* was a **clarification**, not a **modification**, of *Burdine*").

[Note: Emphasis added throughout.]

In the same way, the fact that Measure 26 defines "person" in the Bill of Rights does not *ipso facto* constitute a "modification" in violation of Section 273(5)(a). Measure 26 does not create a new right or change which rights are included in the Bill of Rights. Instead, it simply defines a term already occurring within the Bill of Rights in a way that *clarifies* its meaning. Mississippi citizens will still have the same rights presently

enumerated in Article III. Measure 26 simply clarifies that those rights belong to citizens from the moment of fertilization or cloning as opposed to some later time.[4]

C. Defining a Previously Undefined Term Should Be Presumed a Clarification.

Courts dealing with previously-undefined terms, which is precisely the case here, have generally considered these new definitions as clarifications of earlier ambiguity. *See, e.g., Ex Parte M.D.C.*, 39 So.3d 1117, 1122 (Ala. 2009) ("When a legislature amends a statute to define a previously undefined term, it must be considered that the

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[4] That a clarification of the period of time at which those rights attach might have repercussions on other statutes or regulations does not transform the Measure from a permissible clarification into an impermissible modification. Plaintiffs' citation to several *statutes* in an attempt to stir up confusion is not well taken. (Plaintiffs' Brief at 8-9). Statutes, of course, are not binding with respect to the interpretation of constitutional provisions. Indeed, Measure 26 expressly states that its proposed definition applies to "Article III of the constitution," not to the entire body of Mississippi statutory law. Furthermore, Plaintiffs' attempt to draw a negative inference against Measure 26 by virtue of Miss. Code Ann. §97-3-37, defining "human being" as including "an unborn child at every stage of gestation from conception until live birth," is unsupported in law. (Appellants' Brief at 8).

Measure 26 clarifies the meaning of "person" in a manner not inconsistent with either the common understanding of the term as used in the constitution or the common understanding among the public in general. That there is not universal agreement as to the precise meaning of the term is hardly an argument *against* the need for clarification, as Plaintiffs seem to suggest.

Plaintiffs' argument regarding the redistricting statute, §5-3-99, is similarly unavailing. Not only does it remain the prerogative of the Legislature to determine who should be counted in any redistricting action, but in the event they adopted Measure 26's definition of "person" for such purposes, such a use may be justified on the presumption that, other things being equal, unborn children can be expected to be approximately evenly distributed among the state's legislative districts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 577 n.57 (1964) (("We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement. … We must remember that the machinery of government would not work if it were not allowed a little play in its joints.").

Finally, Plaintiffs engage in rampant speculation regarding the effect of Measure 26 on statutes dealing with certain age requirements, such as the obtaining of a driver's license. (Plaintiffs' Brief at 8-9, citing §63-1-9(2)(b)). But there is no law commanding a rigid link between "age" and "person." After passage of Measure 26, the Legislature remains free to define "age" without regard to "personhood," and Plaintiffs' wild hypotheticals evaporate.

legislature has attempted to **clarify** any ambiguity in that term.") (emphasis added). In fact, this Court has itself stated at length the manner in which a legislative act may *clarify* rather than *modify* earlier law:

> In proper cases an amendment may be viewed as a clarification of the former statute. As such it aids us in assigning meaning to the prior law. …[C]ourts … regard it as proper, in determining the meaning of a statute, to take into consideration subsequent action of the legislature, or the interpretation which the legislature subsequently places upon the statute. There are no principles of construction which prevent the utilization by the courts of subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute, and it is very common for a court, in construing a statute, to refer to subsequent legislation as impliedly confirming the view which the court has decided to adopt. Indeed, it has been held that if it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. … Construing amendments as clarifications of former statutes "removes a great deal of uncertainty in a law."

Grant Center Hosp. of Mississippi, Inc., v. Health Group of Jackson, Mississippi, Inc., 528 So.2d 804, 809-10 (Miss. 1988) (citations omitted) (quoting 2A SUTHERLAND, STATUTORY CONSTRUCTION § 49.11 (Sands ed. 1985)).

The circuit court correctly held that Measure 26 does not violate Section 273(5)(a). The Sponsors respectfully request that the court's order denying Plaintiffs relief be affirmed.

IV. INTERPRETING SECTION 273(5) AS PLAINTIFFS SUGGEST WOULD UNDULY BURDEN THE FIRST AMENDMENT RIGHTS OF MISSISSIPPI CITIZENS.

Plaintiffs' restrictive interpretation of Section 273(5) should also be rejected because it would infringe upon the Sponsors' and other Mississippi citizens' First Amendment rights and would violate core tenets of constitutional law. The initiative

process is an exercise in political speech, which, once granted, cannot be unduly burdened by draconian provisions such as Plaintiffs' version of Section 273(5)(a). *Meyer v. Grant,* 486 U.S. 414, 425 (1988); *Chevron U.S.A,* 578 So. 2d at 649.

As the United States Supreme Court stated in *Meyer*, once the state creates an initiative procedure it cannot then place restrictions on the exercise of the initiative that unduly burden First Amendment rights. *Meyer,* 486 U.S. at 425. In *Meyer,* the High Court struck down a Colorado provision that made it a felony to pay anyone to circulate a petition to get an initiative placed on the ballot. *Id.* In a unanimous ruling, the Court concluded that although the right to an initiative is not guaranteed by the federal Constitution, once an initiative procedure is created, then the First Amendment rights accorded to the people cannot be infringed. *Id.* This is particularly true since the initiative process involves political speech, "an area of public policy where protection of robust discussion is at its zenith." *Id.*

The federal district court for the Southern District of Mississippi clarified the holding in *Meyer* in two opinions that analyzed proposed restrictions upon the initiative power and found one set of proposals unconstitutional and the other constitutional. *See Term Limits Leadership Council, Inc. v. Clark,* 984 F. Supp. 470 (S.D. Miss. 1997); *Kean v. Clark*, 56 F. Supp. 2d 719, 727 (S.D. Miss. 1999). While both cases dealt with restrictions upon petition circulators instead of the subject matter of the petition, the analysis is instructive when examining Plaintiffs' request that this Court interpret Section 237(5)(a) broadly to prevent the electorate even from defining or clarifying terms in the Bill of Rights. As was true in *Term Limits*, the restrictions placed upon the initiative process under Plaintiffs' version of Section 237(5)(a) would make it less likely that the

electorate could make the adjustments necessary to ensure that the Bill of Rights they created clearly express their intent. That tying of the hands of the authors of the Constitution substantially burdens their rights under the First Amendment, and must be rejected by this Court.

Plaintiffs' expansive interpretation of Section 273(5)(a) also conflicts with "a basic tenet of constitutional law . . . that only the people of a state are vested with the power of amendment and this power is plenary." *Chevron U.S.A,* 578 So.2d at 649.

> This Court, in recognizing this tenet, has stated that the Constitution: "should not be changed, expanded or extended beyond its settled intent and meaning by any court to meet daily changes in the mores, manners, habits, or thinking of the people. The power to alter is the power to erase. Such changes should be made by those authorized so to do by the instrument itself – the people."

Id. (quoting *State v. Hall,* 187 So.2d 861, 863 (Miss.1966), and citing 16 C.J.S. *Constitutional Law* § 5 (1984)). Plaintiffs' broad interpretation of Section 273(5)(a), *i.e.*, that the people cannot propose amendments to the Bill of Rights, no matter how insubstantial, contravenes this basic tenet. If the people have the plenary power to amend the Constitution, then any limitation upon that power must be construed narrowly, consistent with the fundamental rules of construction.[5] Consequently, Plaintiffs' interpretation of Section 273(5)(a) should be rejected, and the lower court's decision affirmed.

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[5] It is worth re-emphasizing here the distinction between *amending* the Constitution and *revising* the Constitution, as discussed in Section I above.

CONCLUSION

The circuit court correctly denied Plaintiffs' injunction. The lower court's decision appropriately preserved the right of the people of Mississippi to amend their Constitution without jeopardizing the integrity of the Bill of Rights. Measure 26 is neither a proposal for new rights nor a modification of substantive rights in the Bill of Rights and therefore does not violate Section 273(5)(a). In addition, Plaintiffs have failed to do equity, and their request for injunctive relief should be denied.

For these reasons, Sponsors respectfully request that this Court affirm the ruling of the circuit court.

Dated: March 22, 2010.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I have on this 22nd day of March 2011, filed the foregoing Brief of Defendants/Intervenors-Appellees with the clerk of the court by placing an original, three copies and an electronic copy on CD-Rom in a package and placed it for delivery with Federal Express, fees prepaid, addressed to the Clerk of the Court.

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