

NO. 2013-M-01220-SCT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATE OF MISSISSIPPI

Petitioner

v.

ROBERT SHULER SMITH, ET AL.

Respondent

On Appeal From The Circuit Court of Hinds County, Mississippi

***AMICUS CURIAE BRIEF IN SUPPORT OF THE STATE OF MISSISSIPPI'S
COMBINED PETITION FOR INTERLOCUTORY APPEAL AND MOTION TO VACATE
PERMANENT INJUNCTION BY CERTAIN NAMED MISSISSIPPI LEGISLATORS, IN
THEIR OFFICIAL CAPACITY***

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INTRODUCTION

COME NOW, The following members of the Mississippi House of Representatives, The Honorable Speaker of the House Phillip Gunn, The Honorable Speaker Pro Tempore Greg Snowden, The Honorable Representative Herb Frierson, The Honorable Representative Andy Gipson, The Honorable Representative William Shirley, The Honorable Representative Gary Chism, The Honorable Representative Dennis DeBar, Jr., The Honorable Representative Mark Baker, The Honorable Representative Becky Currie, The Honorable Representative Larry Byrd, The Honorable Representative Mark Formby, The Honorable Representative John L. Moore, The Honorable Representative Chris Brown, The Honorable Representative Randy Rushing, The Honorable Representative Ken Morgan, The Honorable Representative Steve Massengill, The Honorable Representative Pat Nelson, The Honorable Representative Doug McLeod, The Honorable Representative Randy P. Boyd, The Honorable Representative Bill Denny, The Honorable Representative Richard Bennett, The Honorable Representative Joey Hood, The Honorable Representative Mac Huddleston, The Honorable Representative Rita Martinson, The Honorable Representative Sam C. Mims, V., The Honorable Representative Bobby B. Howell, The Honorable Representative Charles Busby, The Honorable Representative Tom Weathersby, The Honorable Representative William Tracy Arnold, The Honorable Representative Timmy Ladner, The Honorable Representative Alex Monsour, The Honorable Representative Bubba Carpenter, The Honorable Representative Charles Jim Beckett, The Honorable Representative Hank Lott, The Honorable Representative Ray Rogers, The Honorable Representative Gary V. Staples, The Honorable Representative Brent Powell, The Honorable Representative Tommy Taylor, The Honorable Representative Jerry R. Turner, The Honorable Representative Donnie Bell, The Honorable Representative C. Scott Bounds, The Honorable Representative Bill

Kinkade, The Honorable Representative Stephen A. Horne, The Honorable Representative Jason White, The Honorable Representative Jeffrey S. Guice, The Honorable Representative Preston E. Sullivan, The Honorable Representative Gene Alday, The Honorable Representative Michael T. Evans, The Honorable Representative Casey Eure, The Honorable Representative Henry Zuber, III, The Honorable Representative Patricia H. Willis, The Honorable Representative Jeffrey C. Smith, The Honorable Representative Manly Barton, The Honorable Carolyn Crawford, The Honorable Margaret Rogers, The Honorable Brad Mayo, The Honorable Jody Steverson;

AND the following members of the Mississippi State Senate, The Honorable President Pro-Tempore Terry Brown, The Honorable Senator Giles K. Ward, The Honorable Senator Nickey Browning, The Honorable Senator Terry C. Burton, The Honorable Senator Videt Carmichael, The Honorable Senator Eugene S. (Buck) Clarke, The Honorable Senator Nancy Collins, The Honorable Senator Sally Doty, The Honorable Senator Phillip Gandy, The Honorable Senator Thomas A. Gollott, The Honorable Senator Josh Harkins, The Honorable Senator Angela Burks Hill, The Honorable Senator Gary Jackson, The Honorable Senator Russell Jolly, The Honorable Senator Will Longwitz, The Honorable Senator Chris Massey, The Honorable Senator Chris McDaniel, The Honorable Senator Philip Moran, The Honorable Senator John A. Polk, The Honorable Senator Tony Smith, The Honorable Senator Melanie Sojourner, The Honorable Senator Gray Tollison, The Honorable Senator Michael Watson, and The Honorable Senator Brice Wiggins; hereinafter the “Named Mississippi Legislators,” and respectfully file this, their brief, as *amicus curiae*, in support of the State of Mississippi’s Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction (hereinafter the “Petition”) and urge this Honorable Court to grant the relief requested in the Petition.

SUMMARY

“[T]he legislative, executive, and judiciary departments ought to be separate and distinct... No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty...” James Madison, *Federalist No. 47*.

This suit by the Plaintiffs for a Permanent Injunction on a duly enacted law represents an attack on the constitutionally mandated separation of powers as delineated in the Mississippi Constitution. The Constitution vests the power to legislate strictly and exclusively in the Legislature. Neither the Judiciary, nor the Executive branches is given any portion of the power to legislate.

In this case, the Mississippi Legislature has enacted a law, pursuant to its powers to enact legislation, and this law conforms precisely to the Mississippi Constitution. The Plaintiffs, undoubtedly upset with the *policy* behind such legislation sought out and were successful in enjoining a lawfully enacted law, and for reasons set forth in the State of Mississippi’s Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction (hereinafter “Petition”), and for reasons that will be set forth below, the *amicus curiae* respectfully request that this Honorable Court grant the Petition for interlocutory appeal and immediately vacate the Circuit Court’s permanent injunction. If this Honorable Court refuses to grant the Petition, and allows the lower court’s injunction to proceed, it would essentially call into question the authority of the Legislature to enact laws: a power specifically enumerated in the Mississippi Constitution and granted solely to the Legislature, and establish precedent that a plaintiff, upset with the *policy* behind a law, could sue to enjoin the law simply because he or she disagreed with *why* the law was enacted. This policy debate is properly left to the Legislature.

STATEMENT OF THE CASE

The Mississippi Constitution provides that “[t]he powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.” Miss. Const. art. I, § 1. The Mississippi Constitution further states that “[t]he legislative power of this state shall be vested in a legislature which shall consist of a senate and a house of representatives.” Miss. Const. art. IV, § 33. This power to legislate is vested exclusively to the Legislature.

In exercising their legislative authority, the Legislature enacted House Bill 2 (hereinafter “HB2”) during the 2013 regular session. HB2 was introduced as “An Act to Amend Sections 97-37-1, 97-37-15, 97-37-19 and 45-9-101, Mississippi Code of 1972, To Clarify the Carrying of Concealed Weapons; and For Related Purposes” and referred to Judiciary B. *See* Exhibit “1.” After passing out of committee, HB2 passed the Mississippi House of Representatives with a vote of 111 – 8, with two members voting “Present.” *See* Exhibit “2.” After passing the House, the bill was transmitted to the Senate, where it was referred to the Wildlife, Fisheries and Parks Committee. After passing out of committee in the Senate, and upon a vote, HB2 was passed unanimously, with a total of 51 votes. *See* Exhibit “3.” On March 4, 2013, Governor Phil Bryant signed HB2 into law with an effective date of July 1, 2013.

ARGUMENT

I. AS STATED IN THE PETITION, HB2 IS WITHIN THE LEGISLATURE’S EXPLICIT CONSTITUTIONAL AUTHORITY TO REGULATE CONCEALED WEAPONS

HB2 primarily accomplished two things: (1) HB2 defined and clarified what “concealed” means for the first time in the concealed firearm statutes; and (2) HB2 allowed for military

members or veterans aged between 18 – 20 to apply for and receive a permit to carry a concealed weapon.

In defining the term “concealed,” the Legislature stated that

concealed means hidden or obscured from common observation and shall not include any weapon listed in subsection (1) of this section, including, but not limited to, a loaded or unloaded pistol carried upon the person in a sheath, belt holster or shoulder holster that is wholly or partially visible, or carried upon the person in a scabbard or case for carrying the weapon that is wholly or partially visible.

House Bill 2, 2013 Reg. Session. *See* Exhibit “4” at 48-55. The Legislature is completely within their authority to regulate concealed weapons. The Mississippi Constitution states “[t]he right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, *but the legislature may regulate or forbid carrying concealed weapons.*” Miss. Const. art. III, § 12. (italics added) In this instance, the Plaintiffs have not and cannot call into question the Legislature’s authority to regulate and define what “concealed” means, or even whether the Legislature may properly regulate or forbid the carrying of a concealed weapon. The Mississippi Constitution explicitly allows for the Legislature to exercise this authority.

Missing from art. III, § 12, however, is the authority to regulate or forbid the open or unconcealed carrying of weapons.¹ This *non*-regulation of the open or unconcealed carrying of weapons is the genesis of the Plaintiffs’ lawsuit, but as the Petition makes crystal clear, “the courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act...” Petition at 14, citing *Pathfinder Coach v. Cottrell*, 62 So.2d 383, 385 (Miss. 1953) (citation omitted). The proper place for the policy arguments that

¹ This is not to say that the Legislature cannot pass laws that make it a crime to carry a firearm, concealed or otherwise, for example, on educational property, or to prohibit felons from owning or carrying firearms. In fact, the Legislature has done just that, and nothing in HB2 magically erases the prohibitions that already exist in other criminal statutes regarding firearms as the Petition correctly addresses.

Plaintiffs have made is in the same body that made the policy to begin with, the Legislature, and not with the courts. As the Petition states, and the Named Mississippi Legislators agree, “[it is] the authority of the legislature to determine what is and is not a crime under Mississippi law.” Petition at 13-14.

The second addition to the law allows for a military member or veteran, aged 18 to 20 to apply for and receive a permit, subject to the same restrictions placed on other permit applicants. Plaintiffs do not challenge the legislative authority to enact this clause, and the *amicus curiae* will not belabor the point that this clause too is in the Legislature’s authority to enact. Likewise, there has been no question raised by the Plaintiffs that this clause is unconstitutionally vague.

II. HB2 IS NOT UNCONSTITUTIONALLY VAGUE

HB2 made the concealed weapons statute clearer by defining and clarifying what is and is not a concealed weapon. Up until HB2, there was no definition of “concealed” in the statute. As a consequence, some jurisdictions classified a *holstered* and *plainly visible* sidearm as concealed. In one relatively recent case, considering how long we have had both the Second Amendment and the Mississippi provision of the right to keep and bear arms, Chief Justice Lee recounted a story about a case that the Chief Justice tried as a young lawyer. The Chief Justice was amazed to learn that “carrying a concealed weapon in whole or in part even meant that a revolver carried in a holster on a man’s hip was a partially concealed weapon.” *L.M., Jr. v. State*, 600 So. 2d 967, 971 (Miss. 1992) (Lee, concurring). Chief Justice Lee went on to state that “[c]onceivably, carrying a revolver suspended from the neck by a leather thong could be partially concealing it.” *L.M., Jr.*, 600 So. 2d at 971. That understanding of what was considered “concealed” essentially suppressed any style of open carry of a firearm without a concealed weapon permit, as a holstered and plainly visible sidearm was considered concealed.

This all changed in 2013 with the introduction, passage and signing into law of HB2. As stated *supra*, HB2 defined concealed to mean what a reasonable man or woman would understand concealed to mean: hidden or obscured from common observation. This definition can in no way make the statute less clear than it was in the past when a leather string, tied around a revolver and hung from the neck could be considered a concealed weapon. Additionally, the Legislature, understanding that the Mississippi Constitution only allows for the regulation (or forbidding) of carrying a concealed weapon, chose to state in HB2 that the “licensing requirements of this section [45-9-101] do not apply to the carrying by any person of a stun gun, pistol or revolver, knife, or other deadly weapon that is not concealed as defined in Section 97-37-1.” See Exhibit “4” at 391-394. The reason? The *concealed* statute would by definition not apply to the *unconcealed* carrying of a weapon.

III. THE NAMED MISSISSIPPI LEGISLATORS FILE THIS AMICUS CURIAE BRIEF IN FULL SUPPORT OF THE PETITION

As stated *supra*, the Named Mississippi Legislators respectfully file this *amicus curiae* brief in support of the Petition and respectfully urge this Honorable Court to grant the Petition and vacate the injunction from the lower court, and allow the lawfully and duly enacted law, HB2, to unquestionably take full effect across the Great State of Mississippi.

CONCLUSION

Defining the term “concealed” does not make the concealed weapon statutes unconstitutionally vague. To the contrary, it clarifies the statute and brings much needed resolution to what constitutes a crime in Mississippi: carrying a *concealed* weapon without a license to do so. As such, the Named Mississippi Legislators believe that the statute, HB2, is completely constitutional and necessary to protect the citizens of Mississippi, and was enacted

under the authority vested with the Legislature. The Named Mississippi Legislators pray that this Honorable Court grant the Petition and vacate the permanent injunction.

WHEREFORE, PREMISES CONSIDERED, the Named Mississippi Legislators, in their official capacity, as *amicus curiae*, respectfully move this Court, to grant the State of Mississippi's Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction.

THIS the 29th day of July, 2013.

THE NAMED MISSISSIPPI LEGISLATORS

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CERTIFICATE OF SERVICE

The undersigned, attorney for the Named Mississippi Legislators, does hereby certify that he has delivered a copy of the foregoing instrument to the following with the Clerk of the Court using the Mississippi Electronic Courts system, which sent notification of such filing to each of the following:

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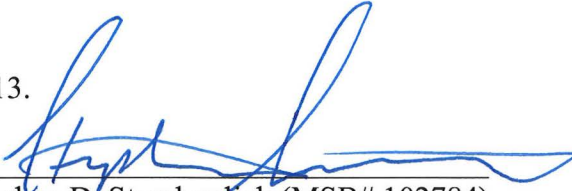
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Further, I hereby certify that I have mailed by United States Postal Service, postage pre-paid, to the following non-MEC participants:

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This, the 29th of July, 2013.


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