IN THE MISSISSIPPI SUPREME COURT

No. 2013-M-10220-SCT

STATE OF MISSISSIPPI ***Petitioner***

v.

ROBERT SHULER SMITH, ET AL. ***Respondents***

COMBINED MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF IN SUPPORT OF MOTION

COME NOW, Citizen Supporters of HB2, and, pursuant to the provisions of Rule 29, Miss. R. App. Proc., move the Court for leave to file an *amicus* brief herein and they would respectfully show:

1. "Citizen Supporters of HB2" is an association of over 1,000 individual Mississippi residents and legal gun owners who support the provisions of House Bill 2, enacted by the Legislature during the 2013 Regular Session, which has been enjoined from implementation by the Circuit Court of Hinds County, Mississippi.

2. Citizen Supporters of HB2 are desirous of filing an *amicus* brief with the Court in support of the *State of Mississippi's Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction*. These citizens, as legal gun owners, are directly affected by the Permanent Injunction granted by the Circuit Court of Hinds County, Mississippi, as they wish to be able to exercise their constitutional right to bear arms without fear of arrest, trial, imprisonment or fine under current Mississippi law penalizing the carrying of concealed weapons. *See* § 97-37-1, Mississippi Code of 1972 (as amended).

3. Mississippi Citizen Supporters of HB2 seek leave to file an *amicus* brief under the provisions of Rule 29 (3). As hopefully demonstrated by the their proposed *Amicus* Brief, there

are matters of fact and law that otherwise may escape the Court's attention. Movants' *Amicus* Brief offers additional authority supporting the State of Mississippi's *Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction* and, in addition, provides other authority demonstrating that the lower court's enjoinder, and its pronounced reasons supporting its enjoinder of HB2, is fundamentally and legally flawed. Further, Movant's *Amicus* Brief demonstrates that the lower court (and with all due respect to it) has engaged in "judicial activism," – a philosophy denounced by this Court. It is the belief of the movants that allowing the filing of their *Amicus* Brief will be of genuine assistance to the Court and facilitate a more thorough understanding of the facts and the law. *Taylor v. Roberts,* 475 So. 2d 150 (Miss. 1985).

PREMISES CONSIDERED, Movants respectfully request that the Court grant them leave to file an *amicus* brief in this cause.

Respectfully submitted,

CITIZEN SUPPORTERS OF HB2

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CERTIFICATE OF SERVICE

I, the undersigned, do certify that I have this day I have served a copy of the foregoing by electronic means, pursuant to the provisions of Rule 5, Miss. R. Civ. Proc., upon:

Honorable Jim Hood
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And by U.S. Mail, postage prepaid, to:

Honorable Winston L. Kidd
Circuit Judge
407 East Pascagoula Street
Jackson, MS 39206

This the 29th day of July, 2013.

David O. Butts

IN THE MISSISSIPPI SUPREME COURT

No. 2013-M-10220-SCT

STATE OF MISSISSIPPI ***Petitioner***

v.

ROBERT SHULER SMITH, ET AL. ***Respondents***

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

CITIZEN SUPPORTERS OF HB2 *AMICUS* BRIEF

in support of

The State of Mississippi's Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction

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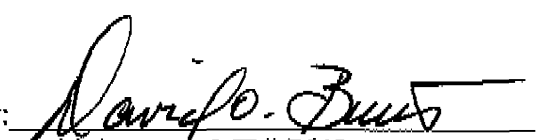
Respectfully submitted,

CITIZEN SUPPORTERS OF HB2

By: 

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III. STATEMENT OF THE ISSUE

Whether House Bill 2 as passed by the Mississippi Legislature during the 2013 Regular Session, signed into law by Governor Phil Bryant on March 4, 2013, and to become a law of the State of Mississippi on July 1, 2013 is "unconstitutionally vague."

IV. STATEMENT OF THE CASE

On June 28, at 4:30 p.m., the last business day before House Bill 2 ("HB2") was to become effective the following Monday, July 1, 2013, the Hinds County District Attorney, joined by other various law enforcement officials, filed for a temporary restraining order in the Circuit Court of Hinds County, Mississippi, to block implementation of the law, which clarified the meaning of "concealed" under Mississippi's penal law prohibiting the carrying of a "concealed weapon." Miss. Code Ann. §97-37-1 (prior to amendment by HB2). Less than two hours after the filing for the TRO, it was granted by the Court. (State of Mississippi's Combined Petition, p.1) The hearing on the preliminary injunction was scheduled by the lower court five (5) business days later, on July 8, 2013. At the July 8 hearing, the Circuit Court extended the restraining order until July 12 in order to compose a written opinion. On July 12, the lower court granted the relief requested by the Plaintiffs, enjoining implementation of HB2. (State's Exhibit 4)

Thereafter the State of Mississippi filed its "Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction." By Order of July 23, 2013, this Honorable Court ordered the Respondents to file a Response to the "Combined Petition" on or before August 5, 2013.

As there has been some confusion as to whether the Circuit Court's grant of injunctive relief to the Plaintiffs in the lower court was interlocutory or a final judgment, the State of

Mississippi also has filed a traditional notice of appeal with this Court. As this Court has ordered a Response to the State's Combined Petition For Interlocutory Appeal, etc., Citizen Supporters of HB2 have proceeded under the assumption that this Court considers the lower court's injunction a "final judgment"; that it has expedited the usual briefing schedule as set forth in Rule 31(b), Miss. R. App. Proc., and Citizen Supporters of HB2 have been compelled to move with celerity since Rule 29 (b), Miss. R. App. Proc. requires the filing of a motion for leave to file an *amicus* brief "no later than seven (7) days of after the filing of the initial brief of the party whose position the *amicus* brief will support."

V. SUMMARY OF THE ARGUMENT

HB 2 is not "unconstitutionally vague." To the contrary, the statute it amended, the penal statute against the carry of concealed weapons "in whole or in part" (Miss. Code Ann. §97-37-1) was more likely to be "unconstitutionally vague" in its failure to define "concealed." HB2 remedies the defect in the statute and gives clarification to the word "concealed." The lower court erred in granting its injunction against the implementation of HB2 by failing to enunciate any legitimate ground for holding HB2 "unconstitutionally vague." With all due respect to the lower court, its grant of the injunction was a usurpation of the powers vested in the Legislature and a hindrance to the will of a majority of the people of the State of Mississippi. It represents an act of "judicial activism" inconsistent with prior decisions of this Court. HB2 withstands constitutional scrutiny and the lower court's injunction against the implementation of HB2 should be vacated.

VI. ARGUMENT

According to the Washington Post, a 2001 survey by the Behavioral Risk Surveillance System in North Carolina indicated that 55.3 % of the households in Mississippi kept firearms in

and around the home, including those kept in a garage, outdoor storage area, car, truck or other motor vehicle.[1] According to one source, 417, 867 NICS background checks were done on gun purchases in Mississippi in the 18- month period preceding June 28, 2010.[2] The U.S.Census Bureau states that, in 2010, there were 1,085,062 households in Mississippi and if the 55.3% household gun ownership rate is correct, then there are at least 600,000 gun owners in Mississippi.

The action of the lower court immediately caused concern, consternation, chaos and confusion in Mississippi concerning gun rights among law enforcement officials and the citizens of Mississippi, who desire to exercise their constitutional right to bear arms consonant with the Second Amendment to the U.S. Constitution, the Mississippi Constitution and the various Mississippi laws concerning the right to carry firearms (concealed or not) in designated places. *See* Miss. Code Ann. §45-9-101.[3]

The lower court opined that:

> This Court has found no case, or any other authority, which gives an individual the absolute right "to open carry" a weapon, as contended by the State.

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[1]http://www.washingtonpost.com/wp-srv/health/interactives/guns/ownership.html

[2]htto://www.the dailybeast.com/articles/2010/06/.../states-with-the-most-guns. Of course, persons buying more than one gun is vetted by a single background check, so the volume of background checks does not illustrate the total number of guns purchased, nor the total number of people who bought guns.

[3]For example, Fox News in Memphis, TN, stated in an online article: "Whether that injunction affects the rest of the Magnolia State isn't clear. So far, DeSoto County and Tate County are ignoring the injunction. The legal mess has created a headache. Some counties in Mississippi are going with the injunction while some are not...(t)he Friday injunction of the open-carry law by Hinds County Circuit Judge Winston Kidd left law enforcement agencies and gun ownersconfused."http://www.myfoxmemphis.com/story/22746125/amid-ms-open-carry-confusion-cities-post-no-weapons-signs?clienttype=mobile

> Moreover, the Supreme Court of the United States found the language "to keep and bear arms" in the Second Amendment to "guarantee the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller, 554 U.S. 570, 592 (2008).* This, under no circumstances, would allow an individual to walk around openly carrying a weapon. "To keep and bear arms in defense of home, person and property" means exactly what it says. It means you can possess a weapon to defend home, person or property. The defendant has not cited any specific section of the constitution which provides for "open carry." They have not done so because it does not exist.(State of Mississippi's *Combined Petition*, Exhibit 4, p. 2., ¶ 2)

Since the need to defend one's person cannot logically be constrained to the territorial limits of one's "home" or the physical boundaries of one's "property" (i.e., a vehicle), the lower court's recognition of the U.S. Supreme Court's statement in *Heller* (the Second Amendment "guarantee(s) the individual right to possess and carry weapons in case of confrontation") and its own statement that the Second Amendment "means you can possess a weapon to defend home, person or property" is in conflict with the ultimate holding of the court. The lower court attempted to resolve this conflict by stating that "A legally obtained permit will continue to allow a citizen to carry a concealed weapon." (Id. at p.3, ¶ 4) In other words, it is the holding of the lower court that one can possess and openly carry a weapon in defense of one's home (and its boundaries) and property (within its boundaries), but to defend one's person (wherever one is outside the boundaries of the home or property) the weapon must be "concealed," and so done under Mississippi law requiring a permit. (Id., p. 3, ¶ 4)

Thereafter, the lower court launches its attack on HB2 from the premise that "(W)hen the legislature creates laws which are vague, confusing, and overbroad...it is the responsibility of the Court to make a determination as to the law's constitutionality." (Id., p.3, ¶ 5). And, after launch, the court attempts to breach the constitutional defenses of House Bill 2 by its conclusion that

"House Bill 2 does more than define "concealed." It creates confusion and chaos with respect to the enforcement of gun laws here in this state." (Id., p. 4, ¶ 6) This "confusion and chaos," the court says, is created because the Bill "does not clearly set forth "who" is allowed to openly carry a weapon in a holster and "where" they can do so. (Id.) The lower court then states: "Many other factors lead to this Court's finding House Bill 2 to be vague and, therefore, unconstitutional," (Id.) but the court does not state what those "other factors" are.

A party challenging the constitutionality of a statute must do so by showing the unconstitutionality of the statute beyond a reasonable doubt. *Summerall v. State,* 41 So. 3d 729, 731 (¶ 6) (internal citation omitted) And, as quoted in *Summerall,* "Further, statutes are presumed valid, and all doubts must be resolved in favor of validity. *Jones v. State*, 710 So.2d 870, 877 (¶ 29) (Miss.1998). When a statute is challenged for vagueness this Court considers " whether the statute defines the criminal offense with sufficient definiteness such that a person of ordinary intelligence has fair notice of what conduct is prohibited." *Lewis v. State*, 765 So.2d 493, 499 (¶ 25) (Miss.2000). This the Plaintiffs failed to do, and the lower court erred in (apparently) finding that they had met their burden of proof.

In *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), the United States Supreme Court instructed:

> [T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.... Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.

In fact, it is not House Bill 2 that is likely to be unconstitutionally vague, but its

predecessor, §97-37-1, in which "concealed" is not defined. *See, e.g., Carlson v. State*, 597 So.2d 657 (Miss. 1992) (conviction based on partial concealment of weapon). What does "in part" mean? One-tenth (.10) of the mass of the weapon? One half (.50) of the mass of the weapon? If carried in the hand, the part concealed under the hand? Under the predecessor statute to House Bill 2, one could be convicted of carrying a concealed weapon if dangled from a fishing line since that part under the fishing line could be construed as being concealed. This is precisely the statutory infirmity forbidden under *Kolender* which "may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections."

The lower court has declared that House Bill 2 is unconstitutional because it does not say "who" can carry a weapon in a holster. (State's *Combined Petition,* Exhibit 4, p.4, ¶ 6). Clearly the "who" are the people of Mississippi governed by its elected Legislature. With all due respect to the lower court, it would be ludicrous to suggest otherwise, as the law-making authority of our Legislature could not infringe on the sovereignty and people of any other State, nor to the power granted by the people to the Federal Government. The lower court declared that House Bill 2 is unconstitutional because it does not specify "where" an individual can openly carry a weapon in a holster. (Id.) Obviously, the "where" is within the boundaries of the State of Mississippi (where not prohibited) since it would likewise be ludicrous to suggest that the power of the Mississippi Legislature to enact laws extends beyond the boundaries of the State.

Again, with all due respect to the lower court, by its enjoinder of HB2, one cannot but conclude that it was an act of "judicial activism" eschewed by this Court in many cases. *See, e.g., Estate of Klaus ex rel. Klaus v. Vicksburg Healthcare, LLC*, 972 So.2d 555, 559 (¶ 10)(Miss. 2007):

> While acknowledging the rectitude of the majority view, stating it "is consistent with the legislative purpose behind Section 11-1-60" (Dissenting Opinion at ¶ 21), the dissent then mulls over the potential unintended consequences of the legislative act and concludes that these potential unjust results were "not fully taken into consideration by the Legislature." (Dissenting Opinion at ¶ 23). If perchance the Legislature should subscribe to these assumptions, it may amend Mississippi Code Annotated Section 11-1-60 and expressly manifest a contrary intention to the plain language of Mississippi Code Annotated Section 1-3-33. See Miss. Ethics Comm'n v. Grisham, 957 So.2d 997, 1003 (Miss. 2007) ("[t]he power to change this result lies with the legislature to amend the statute."). However, the dissent's suggestion that this Court should redress the perceived legislative error by judicial fiat requires an act of judicial activism. To properly preserve the separation of powers mandated by the Mississippi Constitution, see Miss. Const. art. I, §§ 1-2, this Court should act with restraint. See Grisham, 957 So.2d at 1003 ("[t]he privilege to amend a statute, not constitutionally infirm, does not rest with this Court.").

Simply stated, it was not the prerogative (absent a legitimate constitutional infirmity of HB2) of the Hinds County Circuit Court to substitute its judgment or personal opinions on what was best for law-abiding gun owners of Mississippi over that of its duly elected representatives in the Legislature.

There is no doubt that the "gun debate" is a "hot topic" given incidents of isolated multiple murders in America by apparently deranged individuals. Such incidents give instant rise to emotional appeals for "gun control" ranging from the out-right ban of all types of citizen owned firearms to the ban of "assault rifles" and "high capacity magazines." The day-in, day-out crimes committed by criminals with firearms go largely ignored by the national, and often the local, media. In *Gun Control: A Realistic Assessment,*[4]© author Don B. Kates, Jr.[5] dispels many

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[4]Published by The Pacific Research Foundation, 177 Post Street, San Francisco, CA 94108.

[5]Kates is a graduate of Yale Law School and taught constitutional law, criminal law and criminal procedure at the St. Louis University Law School and is now in private practice. His treatise may be found on the internet at: http://catb.org/esr/guns/gun-control.html

of the myths surrounding gun control. In his summary of this fifty-six page treatise he states:

(1) the claim that homicide is predominantly a matter of "ordinary law-abiding people" killing a relative or acquaintance because a loaded gun happened to be available in a moment of anger– Kates: "This claim is contradicted by every national and local study of homicide. These studies uniformly show that murderers are not "ordinary law-abiding people." Rather, they...are highly aberrant individuals, characterized by felony records, alcohol and/or drug dependence and life histories of irrational violence against those around them (p.4);

(2) the claim that (though banning all guns may not be politically feasible) banning handguns only would save lives because gun attacks are more lethal than knife attacks– Kates: "In a recent National Institute of Justice survey among about 2,000 incarcerated felons, well over 80% of those who had often misused handguns said that if handguns were unavailable they would turn to long guns (rifles or shotguns) instead..."(p.4);

(3) the claim that comparison of American statistics to those of selected gun-banning foreign countries proves that guns cause crime and then reduces it– Kates: "Differential in international crime rates reflect basic socio-economic differences that have nothing to do with gun laws." (p. 4);

(4) the claim that guns are generally not useful and not used for self-defense– Kates: "The definitive study finds that, while handguns are used in vast numbers of crimes annually, they are even more often used by good citizens to repel crime (581,000 crimes vs. 645,000 defense uses, annually). (p.4)

(5) the claim that there is no individual right to arms because the Second Amendment protects only the states' right to arm the militia– Kates: "Though mere control is constitutional,

wholesale prohibition and confiscation is not; the Constitution precludes laws barring responsible, law-abiding adults from choosing to own guns for self-defense." (p. 4)

Therefore, many of the public policy concerns and extreme hypothetical situations that may face law enforcement as expressed in the lower court's opinion granting the injunction represent unlikely, if not imaginative, scenarios upon which the lower court sought refuge to justify its grant of the injunction.

Further, Kates points out that:

> "Perhaps the single most common argument against (gun ownership) (and, by analogy, the right to "openly carry" a weapon–*the author*), is that personal self defense has been rendered obsolete by the existence of a professional police force. For decades anti-gun officials...have admonished the citizenry that they don't need guns for self-defense because the police will defend them. This advice is mendacious; when those (governmental entities represented by the officials) are sued for failure to provide police protection (they) send forth their...attorneys to invoke "(the) fundamental principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen." Id. at p. 12.

The law is likewise in the State of Mississippi. In *Dependants of Reid v. City of Canton*, 858 So.2d 163, 167 (¶ 16) (Miss.App. 2003) the Court stated:

> The Reid dependants fervently insist that the municipal officials owed a legal duty to protect George from injury by Marcus. It is true that the municipal officials are charged with the responsibility of providing police protection for the citizens of the City of Canton and that this responsibility extended to the Reid dependants' decedent. But the municipal officials are not guarantors of the safety of the general public. Hence, any assertion that the municipal officials breached a duty to George because they failed to guarantee his safety and well-being is unrealistic and untenable.

See also, *Johnson v. Alcorn State University*, 929 So.2d 398 (Miss.App. 2006).

CONCLUSION

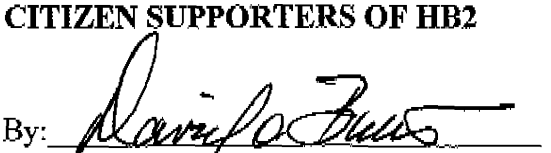
The Mississippi Constitution, Article 3, § 12 has, *since enactment,* permitted the citizens of Mississippi to carry arms, subject only to the power granted the legislature to "regulate or forbid carrying concealed weapons." The Legislature did so by enactment of a penal statute forbidding the carrying of concealed weapons "in whole or in part." HB2 merely clarified the meaning of "concealed" in § 97-37-1, and most likely cured an unconstitutionally vague statute.

There are those who have said that the principles espoused in our Constitutions, State and Federal, are out-dated in our "modern" society. We, the people, the Citizen Supporters of HB2, emphatically declare "Not so." They say the utterances of our founders are no longer relevant. Again, we say "Not so." And so it is with particular reference to the right of the people to "bear arms" and that his right "shall not be infringed," we conclude with the words of George Washington:

> Firearms stand next in importance to the constitution itself. They are the American people's liberty teeth and keystone under independence ... from the hour the Pilgrims landed to the present day, events, occurences and tendencies prove that to ensure peace security and happiness, the rifle and pistol are equally indispensable ... the very atmosphere of firearms anywhere restrains evil interference — they deserve a place of honor with all that's good.

Respectfully submitted,

CITIZEN SUPPORTERS OF HB2

By: 

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David O. Butts