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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2013-M-01220-SCT

STATE OF MISSISSIPPI **PETITIONER**

v.

ROBERT SHULER SMITH ET AL. **RESPONDENTS**

ON APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BRIEF OF GOVERNOR PHIL BRYANT AS *AMICUS CURIAE* IN SUPPORT OF THE COMBINED PETITION FOR INTERLOCUTORY APPEAL AND MOTION TO VACATE PERMANENT INJUNCTION

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INTRODUCTION

Governor Phil Bryant files this brief as *amicus curiae* in support of the Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction because he has a substantial interest in the outcome of this case. Governor Bryant signed House Bill 2 into law on March 4, 2013, after it passed the Mississippi House of Representatives and Mississippi Senate by margins of 111–8 and 51–0, respectively. House Bill 2 amends state laws regarding the carrying of concealed weapons to make clear that those laws regulate only the carrying of weapons that are hidden or obscured from common observation (*i.e.*, concealed) and not the open carrying of weapons, which is protected by Article 3, Section 12 of the Mississippi Constitution. The bill was scheduled to take effect on July 1, but on June 28, the Hinds County Circuit Court enjoined it from going into effect. The Circuit Court's ruling has prevented House Bill 2's clarifying amendments from taking effect in Hinds County and has caused uncertainty and confusion in other parts of the State. Although the precise effect of the Circuit Court's ruling is unclear, it could also be read as a directive to the executive branch of the State to take some undefined steps to prohibit the open and lawful carrying of firearms. As the chief executive officer of the State, MISS. CONST. art. 5, § 116, the Governor is charged by the Constitution to "see that the laws are faithfully executed." *Id.*, § 123. As such, the Governor has a significant interest in the obtaining reversal of the Circuit Court's ruling and injunction, which could, depending on its interpretation, raise serious separation-of-powers concerns under the Mississippi Constitution. *Id.*, art. 1, §§ 1–2. The Governor also has a substantial interest in seeing that the primary purpose of House Bill 2—to clarify citizens' constitutional right to keep and bear arms—is accomplished.

Governor Bryant supports and fully agrees with the Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction filed last week by Attorney General Jim

Hood on behalf of the State. For the reasons given by the Attorney General, the ruling of the Circuit Court should be reversed summarily and the injunction vacated. This *amicus curiae* brief does not duplicate the Attorney General's filing but rather provides additional historical and legal context regarding Mississippi's constitutional right to keep and bear arms and also calls attention to the numerous other states nationwide that also permit the open carrying of weapons.

I. <u>The Mississippi Constitution Preserves Citizens' Right To Bear Arms Openly.</u>

Article 3, Section 12 of the Mississippi Constitution of 1890 provides that "[t]he right of every citizen to keep and bear arms in defense of his home, person, or property … shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." In this respect, our Constitution is similar to the Kentucky Constitution of 1891, which preserves and protects citizens' "inherent and inalienable" "right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." KY. CONST., § 1, cl. 7. Kentucky's highest court aptly described this formulation as "an exemplification of the broadest expression of the right to bear arms" because "the legislature is empowered only to deny to citizens the right to carry concealed weapons." *Holland v. Commonwealth*, 294 S.W.2d 83, 85 (Ky. 1956). It follows that "a person is granted the right to carry a weapon openly," and "[i]f the gun is worn outside the jacket or shirt in full view, no one may question the wearer's right so to do." *Ibid.* The meaning of Mississippi's substantively indistinguishable constitutional provision is the same: the Legislature may regulate or even forbid the carrying of concealed weapons, but the right to bear arms openly and unconcealed "shall not be called into question." MISS. CONST. art. 3, § 12.

In today's world, affording a greater degree of protection for the right to "open carry" than the right to "concealed carry" may seem anomalous to some. In the historical context in which these provisions were enacted, however, it made perfect sense. Bans on concealed carry

were at that time justified "to prohibit the pernicious practice of going secretly armed, and thereby prevent the dangerous use of deadly weapons in sudden personal conflicts, in which oftentimes an undue advantage is taken of the unwary." *State v. Roten*, 86 N.C. 701, 1882 WL 2859, at *1 (N.C. 1882). Indeed, it was thought that concealed weapons not only created an unfair advantage once a conflict arose but also "exert[ed] an unhappy influence upon the moral feelings of the wearer," making a conflict more likely to begin with. *State v. Reid*, 1 Ala. 612, 1840 WL 229, at *3 (Ala. 1840). For these reasons, the "carrying of concealed weapons" was regarded as a "pernicious practice" and "one of the most fruitful sources of crime." *Ex Parte Leuning*, 84 P. 445, 446 (Cal. App. 1906); *In re Brickey*, 70 P. 609 (Idaho 1902). And it was thought preferable "to compel persons who carried those weapons to so wear them about their persons, that others, who might come in contact with them, might see that they were armed." *Stockdale v. State*, 32 Ga. 225, 1861 WL 1336, at *3 (Ga. 1861). Thus, as the Louisiana Supreme Court put it in 1885, "The constitutional right is to bear arms openly, so that when one meets an armed man there can be no mistake about the fact that he is armed. When we see a man with musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense." *State v. Bias*, 37 La.Ann. 259, 1885 WL 6296, at *1 (La. 1885). "The practice of carrying … weapons concealed," in contrast, was thought to be "appreciated and indulged in mainly by the enemies of social order." *State v. Keet*, 190 S.W. 573, 576 (Mo. 1916). For instance, this Court associated the practice of carrying concealed weapons with men who were "revengeful, vindictive, brutal, violent, and dangerous," who "regard[ed] not the laws of God or men," who did "not value human life," and who were "quick to take offence, and ready to inflict great bodily harm, regardless of consequences." *Spivey v. State*, 58 Miss. 858, 1881 WL 4535, at *4 (Miss. 1881).

"Today, open carrying is uncommon, … many law-abiding people naturally prefer to carry concealed," and "[c]oncealed carrying is no longer probative of criminal intent." Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1523 (2009). But, as shown above, that was not the case when our State's Constitution was enacted in 1890. In that era, open carry was the social norm, while "concealed carry was [seen as] the behavior of criminals" and a threat to law-abiding citizens. *Id.* at 1524. This historical context explains why our Constitution affords a strong protection of the right of citizens to openly carry arms even while permitting the Legislature to regulate or even forbid the carrying of concealed weapons. MISS. CONST. art. 3, § 12. This "settled intent and meaning" of Article 3, Section 12 "should not be changed, expanded or extended … by any court to meet" any perceived "changes in the mores, manners, habits, or thinking of the people." As this Court has explained,

> A basic tenet of constitutional law is that only the people … are vested with the power of amendment…. 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.

Chevron U.S.A., Inc. v. State, 578 So. 2d 644, 649 (Miss. 1991). The Circuit Court's ruling violates this basic tenet of constitutional law and should be reversed.

II. <u>House Bill 2 Clarifies Citizens' Constitutional Right to Bear Arms Openly.</u>

Though plaintiffs have portrayed House Bill 2 as a sea change in Mississippi law, the fact is that the bill makes only minor amendments to the State's concealed weapons laws to clarify that "concealed" does mean "concealed." To "conceal" means "to prevent disclosure or recognition of" or "to place out of sight"—in short, to "hide." WEBSTER'S COLLEGIATE DICTIONARY 238 (10th ed. 1996). Thus, properly understood, the Mississippi Constitution permits the Legislature to regulate or forbid the carrying of weapons that are truly held in secret

or kept from common observation. MISS. CONST. art. 3, § 12. However, this proper understanding of Mississippi law had become confused over time by language in Miss. Code Ann. § 97-37-1(1), which, until recently amended by House Bill 2, prohibited the carrying of weapons that were "concealed *in whole or in part*" (emphasis added). Former Chief Justice Roy Noble Lee noted that, as a "young lawyer," he was surprised to learn that this statute had been construed in a manner contrary to the ordinary meaning of "concealed":

> To my amazement, I discovered 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, riding a horse with a saddle holster and revolver under a person's leg violated the statute; and that covering a weapon with feet, hands, or clothing meant that the weapon was concealed under the interpretation of the statute. Conceivably, carrying a revolver suspended from the neck by a leather throng could be partially concealing it. (One Western gunfighter used that method.)

L.M., Jr. v. State, 600 So. 2d 967, 971 (Miss. 1992) (concurring op.). *Cf. CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630 (2011) (interpreting "in whole or in part" to mean any part "no matter how small" or "even in the slightest" part).

This problem was compounded by the fact that the statute that authorizes licenses to carry concealed weapons does *not* include the language "in whole or in part." Miss. Code Ann. § 45-9-101. This led the Attorney General to conclude, in a 2012 opinion, that a concealed carry license did "not authorize a person to carry a pistol 'concealed in part,' but require[d] that it be *totally* concealed," *i.e.*, "*completely* covered." Miss. Atty. Gen. Op. No. 2012-00248 (June 14, 2012) (emphasis added), *available at* 2012 WL 3060408. Under this view, it was thought to be a crime to carry a visible, holstered pistol—*even with a license*. This interpretation meant that even a holder of a valid concealed carry permit potentially could be prosecuted if a wind gust happened to blow his coat open and reveal, however, briefly a pistol carried beneath his coat.

During the 2013 session, the Legislature acted to clarify this confusion and to remove the cloud that it had created surrounding citizens' rights under the Mississippi Constitution. To achieve this, the Legislature amended the criminal prohibition on carrying concealed weapons in two important respects: First, the "in whole or in part" language was deleted. Second, a paragraph was added to make clear that

> "concealed" means hidden or obscured from common observation and shall *not* include[, *e.g.*,] 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.

Miss. Code Ann. § 97-37-1(4) (as amended by House Bill 2, effective July 1, 2013) (emphasis added). On January 29, the House approved these amendments by a 111–8 margin. On February 27, the Senate approved them 51–0. Governor Bryant signed the bill into law on March 4, nearly four months prior to its effective date. No uproar followed. The first significant opposition to the bill was this lawsuit, filed just three days before the law was to take effect.

As amended, the statute's definition of "concealed" is straightforward, easy to understand, and consistent with the term's common meaning. It is the same basic definition of "concealed" that has been in use in several other states for well over a century, apparently without any great difficulties in application. *See, e.g.*, *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3132 (2010) (citing Virginia's 1847 concealed carry law, now found at Va. Code Ann. § 18.2-308); *State v. McNary*, 596 P.2d 417, 420 (Idaho 1979) (citing cases from four additional states for the proposition that "[t]he general test of concealment is whether a weapon is so carried as not to be discernible by ordinary observation"); *Daniel v. Commonwealth*, 1872 WL 6340 (Ky. 1872). Contrary to the Circuit Court's ruling, it easily satisfies the constitutional requirement of "sufficient definiteness that ordinary people can understand what conduct is

prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *See generally Nichols v. City of Gulfport*, 589 So. 2d 1280, 1282 (Miss. 1991).

Thus, House Bill 2 simply clarifies that what Mississippi law prohibits is the unlicensed and truly *concealed* carrying of weapons. In contrast, open carry remains lawful because—in addition to being constitutionally protected—*there is quite simply no provision of Mississippi law that purports to prohibit it.*[1] "There is no principle more essential to liberty, or more deeply imbued in our law, than that what is not prohibited, is permitted." *United States v. Gourde*, 440 F.3d 1065, 1081 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting). Stated differently, "what is not forbidden is allowed."[2] The Circuit Court's ruling turned this centuries-old principle on its head by searching for evidence that the State has granted Mississippians some specific permission to carry weapons openly. *See* Order at 2. No such specific permission is necessary. The open carrying of weapons is lawful not only because it is constitutionally protected but also because—as House Bill 2 now makes clear—no provision of state law purports to prohibit it.

III. <u>The Sky Has Not Fallen In The Numerous Other States In Which Open Carry Is Permitted.</u>

Plaintiffs' hastily-thrown-together Complaint warns of dire consequences and serious threats to public safety if House Bill 2 is allowed to go into effect. *See* Compl. ¶¶ 13–20. Given

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[1] As the Attorney General recently advised, the open carrying of weapons remains subject to the countervailing property rights of private citizens and reasonable regulations of security in public buildings. *See* Miss. Atty. Gen. Op., June 13, 2013, *available at* http://www.agjimhood.com/images/uploads/forms/guncarryopinion.pdf. In addition, under state law, as under federal law, convicted felons are prohibited from possessing firearms. Miss. Code Ann. § 97-37-5(1); 18 U.S.C. § 922(g)(1); *see also Posey v. Commonwealth*, 185 S.W.3d 170, 175–81 (Ky. 2006) (holding that prohibition of the possession of firearms by convicted felons was constitutional because historically the right to keep and bear arms was reserved to law-abiding citizens).

[2] *McMichael v. Van Ho*, 219 N.E. 2d 831, 845 (Ohio Com. Pl. 1966) ("[F]ree men have for centuries acted upon the premise that what is not forbidden is allowed, and … wide observance of this precept is essential to the exercise and enjoyment of the privileges constituting the happy condition known as a free society."); *see also, e.g.*, Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 407 (1995) ("The classical American view [of individual liberty] generally took the form that all that is not prohibited is permitted, which sets the initial presumption in favor of liberty—not in favor of government action.").

the parade of horribles trotted out by the plaintiffs, one would be forgiven for thinking that our State was about to embark on a novel experiment or that the Governor and Legislature had unintentionally authorized conduct that is illegal in every other state in the Union. To the contrary, the fact is that open carry is lawful in the vast majority of states nationwide. While precise counts may differ slightly, both supporters and opponents of Second Amendment rights agree that a majority of states permit the open carrying of firearms without a license, and at least three-quarters allow open carry with a license.[3] These include states as geographically and politically diverse as Alabama,[4] Arizona,[5] Idaho,[6] Kansas,[7] Kentucky,[8] Louisiana,[9] Michigan,[10]

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[3] *See, e.g.*, Larry Pratt, *Open Carry Deters Crime*, U.S. News & World Report, Apr. 25, 2012 ("Open carry is legal in 28 states without restriction. In another 13 states, a license is required."), *available at* http://www.usnews.com/debate-club/should-people-be-allowed-to-carry-guns-openly/open-carry-deters-crime; Joshua Horwitz, *Carrying a Firearm Puts the Community at Risk*, U.S. News & World Report, Apr. 25, 2012 (stating that 28 states permit open carry without restriction and 9 more do so subject to a "shall issue" license), *available at* http://www.usnews.com/debate-club/should-people-be-allowed-to-carry-guns-openly/carrying-a-firearm-puts-the-community-at-risk. *See also* Volokh, *supra*, at 1520 ("many courts have taken the … view … that there is a constitutional right to openly carry weapons"). Oklahoma joined the ranks of licensed open carry states last year. *See, e.g.*, Gov. Mary Fallin, *Oklahoma Open Carry Frequently Asked Questions*, *available at* http://www.ok.gov/governor/OpenCarryFAQ.html.

[4] *See, e.g.*, *State v. Looney*, 141 So. 2d 535, 536 (Ala. App. 1962) ("[A] permit is not required when a person afoot carries an unconcealed pistol.").

[5] *See, e.g.*, *Dano v. Collins*, 802 P.2d 1021, 1022–23 (Ariz. App. 1990) ("The right to bear arms in self-defense is not impaired by requiring individuals to carry weapons openly. [Arizonans] are free to bear exposed weapons for their defense.").

[6] *See, e.g.*, *In re Brickey*, 70 P. 609 (Idaho 1902) (holding that open carry is protected by the Idaho Constitution).

[7] *See, e.g.*, Kan. Atty. Gen. Op. No. 2011-24, at 2 (Dec. 29, 2011) (concluding that the manner of open carry may be regulated, such as by requiring use of a holster, but that a local government may not prohibit open carry entirely), *available at* 2011 WL 6918028.

[8] *Holland v. Commonwealth*, 294 S.W.2d 83, 85 (Ky. 1956) (holding that open carry is protected by the Kentucky Constitution).

[9] *See, e.g.*, *State v. Fluker*, 311 So. 2d 863, 865–66 (La. 1975) (holding that a citizen may lawfully carry a gun in a visible holster).

[10] *See, e.g.*, Michigan State Police Legal Update No. 86, Oct. 26, 2010 ("In Michigan, it is legal for a person to carry a firearm in public as long as the person is carrying the firearm with lawful intent and the firearm is not concealed. *You will not find a law that states it is legal to openly carry a firearm. It is legal because there is no Michigan law that prohibits it*….") (emphasis added), *available at* http://www.michigan.gov/documents/msp/MSP_Legal_Update_No._86_2_336854_7.pdf; *accord* Mich.

New Hampshire,[11] New Mexico,[12] North Carolina,[13] Ohio,[14] Vermont,[15] Virginia,[16] West Virginia,[17] and Wisconsin,[18] among others. These states have not descended into lawless anarchy; their skies have not fallen. As one editorial observed just last year in response to similar arguments from gun-control advocates in Oklahoma, "Most states already allow open carry under at least some circumstances. In fact, a surprising number of states even allow open carry of handguns without a license. Contrary to the concerns of some opponents of open carry, such measures have not led to wild-West shootouts or other serious consequences."[19]

Atty. Gen. Op. No. 7101 (Feb. 6, 2002) (carrying a handgun in a visible holster does not constitute unlawful "brandishing" of a firearm), *available at* 2002 WL 190824.

[11] *See, e.g.*, *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1223 (N.H. 2007) ("Even without a license, individuals retain the ability … to carry weapons in plain view.").

[12] *See, e.g.*, *St. John v. McColley*, 653 F. Supp. 2d 1155, 1163 (D.N.M. 2009) ("New Mexico law allows individuals to openly carry weapons in public…."); *City of Las Vegas v. Moberg*, 485 P.2d 737, 738–39 (N.M. App. 1971) (holding that open carry is protected by the New Mexico Constitution, which provides: "The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons.").

[13] *See, e.g.*, *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) ("[T]he laws of North Carolina … permit its residents to openly carry firearms."); *State v. Speller*, 86 N.C. 697, 1882 WL 2858, at *2 (N.C. 1882) (holding that open carry is protected by the North Carolina Constitution).

[14] *See, e.g.*, *Klein v. Leis*, 795 N.E.2d 633, 640 (Ohio 2003) (O'Connor, J., dissenting) ("[T]he state correctly asserts that the statute leaves open the ability to bear arms by openly carrying a firearm….").

[15] *State v. Rosenthal*, 55 A. 610 (Vt. 1903) (holding that both open and concealed carry are protected by the Vermont Constitution); *see also State v. Hamdan*, 665 N.W.2d 785, 801 n.21 (Wis. 2003) (discussing *Rosenthal* and Vermont law).

[16] *See, e.g.*, Va. Atty. Gen. Op. No. 05-078, at 1 (Jan. 4, 2006) ("The right to carry openly has not been revoked by the General Assembly."), *available at* 2006 WL 304006.

[17] *Application of Dailey*, 465 S.E.2d 601, 608 (W. Va. 1995) ("The regulatory scheme chosen by the Legislature was directed only to licensing of concealed, deadly weapons without any control of deadly weapons which would not be concealed with the exception of certain restrictions on the possession of machine guns.").

[18] *Gonzalez v. Vill. of W. Milwaukee*, 671 F.3d 649, 654–60 (7th Cir. 2012) (describing 2011 amendments to Wisconsin law to clarify that open carry is permitted).

[19] Editorial, *Open-Carry Measure Advances; Prospects for Passage Seem High*, Tulsa World, Feb. 25, 2012, *available at* http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20120225_61_a18_ameasu901659.

The existence and experience of these numerous other "open carry states" is significant because plaintiffs' challenge to House Bill 2 is based almost entirely on their alarmist claims that disaster will follow if the bill is allowed to take effect. In any context, such unsubstantiated assertions are a wholly inadequate basis for infringing upon citizens' fundamental constitutional rights or disregarding the results of the legislative process. Such claims certainly cannot carry plaintiffs' heavy burden that House Bill 2 is unconstitutional given that they are directly contradicted by the actual experience of numerous sister states.

CONCLUSION

For the foregoing reasons, the order and judgment of the Circuit Court should be reversed summarily, and the injunction entered by that Court should be vacated.

This, this 29th day of July, 2013.

Respectfully submitted,

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I certify that I have this 29th day of July, 2013, served a true and correct copy of the foregoing document on the following:

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