Case No. CV-24-704

IN THE ARKANSAS SUPREME COURT

State of Arkansas;
Department of Finance and Administration; and
Alcoholic Beverage Control Division
Appellants

v.

Good Day Farm Arkansas, LLC and
Capital City Medicinals, LLC
Appellees

On Appeal from the Circuit Court
of Pulaski County, Arkansas

The Honorable Morgan E. Welch
Circuit Judge, Sixteenth Division

Appellants' Brief

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TABLE OF CONTENTS

POINTS ON APPEAL

1. Amendment 7 to the Arkansas Constitution allows the General Assembly to "amend[]" initiated constitutional amendments "on roll call of two-thirds of all the members elected to each house of the General Assembly." *Arkansas Game & Fish Comm'n v. Edgmon*, 218 Ark. 207, 235 S.W.2d 554 (1951), admittedly declined to follow this plain text. Should *Edgmon* be overturned?

   Ark. Const. art. 5, § 1

   Ark. Att'y Gen. Op. 2024-024

2. Amendment 98, § 23 to the Arkansas Constitution allows the General Assembly to amend Amendment 98 with its Amendment 7 powers, but limits that in one way disputed on appeal: legislative amendments must be "germane to this section"—that is, Section 23. But Section 23 prohibits the General Assembly from amending Section 23. Is the word "section" a scrivener's error that should be read as "amendment"?

   Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 237–38 (2012)

   Ark. Const. amend. 98, § 23(b)(3)

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Constitutional Amendments

Secondary Sources

Court Rules

JURISDICTIONAL STATEMENT

This appeal is from an appealable order. Good Day Farm Arkansas, LLC ("Good Day") and Capital City Medicinals, LLC ("Capital City") filed a Complaint for Declaratory Judgment, claiming: (1) the actions of the General Assembly amending Amendment 98 were unconstitutional ("Count I"); and (2) the Medical Marijuana Commission rules regarding advertising by medical marijuana cultivators and dispensaries violate the First Amendment ("Count II").

On June 14, 2023, the circuit court granted partial summary judgment to Good Day and Capital City on Count I (RP 147–152), and subsequently denied the Motion to Vacate or Modify that order by the State of Arkansas, the Department of Finance and Administration ("DFA"), and the Alcoholic Beverage Control Division ("ABC") on September 22, 2023. (RP 178–179). These orders became final and appealable upon entry of the order granting the Motion for Voluntary Dismissal of Count II by Good Day and Capital City on June 24, 2024. (RP 227).

This Court has long held that an order is "final and appealable" if it "dismiss[es] the parties from the court, discharge[s] them from the action, or conclude[s] their rights to the subject matter in controversy." *Steinbuch v. Univ. of Ark.*, 2022 Ark. 74, at 6; *see also* Ark. R. App. P.—Civ. 2(a)(1). There are no remaining causes of action pending before the Circuit Court. Entry of the June 24, 2024 order "put the

circuit court's directive into action, ending the litigation." *Steinbuch*, 2022 Ark. at 6.

This appeal is timely. The final order was entered on June 24, 2024. (RP 227). The State of Arkansas, DFA, and ABC timely filed their notice of appeal on July 24, 2024. (RP 232–234); *see also* Ark. R. App. P.—Civ. 4(a). Thus, the record was required to be tendered on or before October 22, 2024. Ark. R. App. P.—Civ. 5(a). The record was timely lodged on October 21, 2024.

The Arkansas Supreme Court should decide this case. This appeal involves the interpretation and construction of Amendments 7 and 98 to the Arkansas Constitution and is thus appropriate for this Court to decide. Ark. S. Ct. R. 1-2(a)(1).

STATEMENT OF THE CASE AND THE FACTS

The General Assembly's power to amend Amendment 98. In 2016, the "Arkansas Medical Marijuana Amendment of 2016" was ratified and became Amendment 98 to the Arkansas Constitution. (RP 4). Section 23 of Amendment 98 confirms the General Assembly's power to "amend sections of this amendment" "in the same manner as required for amendment of law initiated by the people." The General Assembly's full power is found in Amendment 7, which empowers the General Assembly to "amend[] or repeal[]" a "measure approved by a vote of the people … upon a yea and nay vote on roll call of two-thirds of all members elected to each house of the General Assembly." Ark. Const. art. 5, § 1. "Measure" is defined to include initiated constitutional amendments. *Id.* Amendment 7's text contains no additional limitations on the General Assembly's power.

Although the General Assembly retains the core of the power granted by Amendment 7 when amending Amendment 98, Amendment 98 provides several limitations on that power. Only one of those limitations is in dispute here.

Section 23 of Amendment 98 provides that legislative amendments must be "germane to this *section*." Ark. Const. art. 98, § 23(a) (emphasis added). But in the next subsection, the General Assembly is prohibited from amending Section 23. *Id.* § 23(b)(3). Thus, the Plaintiffs argue that legislative amendments to Amendment 98 must be germane to Section 23—a provision outside the General Assembly's power

to amend. (RP 57–63). The Defendants argue that the word "section" was a scrivener's error because it is not possible to amend Section 23 and instead should be read "amendment." (RP 160–164).

Amendments to Amendment 98. Since Amendment 98's ratification in 2016, the General Assembly has made 28 amendments[1] to Amendment 98 over four legislative sessions. (RP 27–29). Each amendment received a two-thirds vote. (RP 47).

Procedural Posture. Good Day and Capital City filed their complaint under the Arkansas Declaratory Judgment Act, alleging—as relevant to this appeal—that the legislative amendments to Amendment 98 were unconstitutional. (RP 4–15). The Plaintiffs argued that the legislative amendments to Amendment 98 are unconstitutional because they were required to be submitted and voted upon by the people under Article 19, § 22 of the Arkansas Constitution. (RP 23–36). The State of Arkansas, DFA, and ABC filed a Response in Opposition and a Cross-Motion for Summary Judgment, arguing that the legislature's actions were constitutional and that they are entitled to sovereign immunity. (RP 41–56).

[1] The complaint identifies only 27 legislative amendments. Their list did not include Act 1098 of 2017 (Reg. Session). There was a total of 28 amendments by the General Assembly.

Good Day and Capital City subsequently amended their complaint (RP 76–78) and incorporated into their summary judgment motion (RP 97–105) an additional position that the legislative amendments are not "germane" to Section 23 of Amendment 98. *See* Ark. Const. amend. 98, § 23.

The circuit court granted the Plaintiffs' motion. (RP 147–152, 178–179). It first held that *Arkansas Game & Fish Comm'n v. Edgmon*, 218 Ark. 207, 235 S.W.2d 554 (1951), is the controlling precedent and that the court was bound to it under the doctrine of stare decisis. (RP 148–150). *Edgmon* held that Amendment 7 does not allow the General Assembly to amend the Constitution without submitting the amendments to the people under Article 19, § 22. (RP 150–151). The circuit court then reasoned that Amendment 98, § 23's reference to legislative amendments under Amendment 7 meant that amendments to Amendment 98 must also be submitted to the people for a vote. (RP 151). Thus, it held that the amendments to Amendment 98 were unconstitutional because they were not submitted to the people. (RP 151).

Additionally, the circuit court held that Section 23 requires that any amendments be germane to Section 23 and that the amendments were void for failure to be germane to Section 23. (RP 151). Upon these findings, the circuit court held the legislative amendments were unconstitutional and void, and the original text of Amendment 98 was in effect. (RP 151).

The final order was entered on June 24, 2024, and the State of Arkansas, Department of Finance and Administration, and Alcoholic Beverage Control Division timely appealed to this Court. (RP 227, 232–234).

ARGUMENT

A party is entitled to summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ark. R. Civ. P. 56(c)(2). When reviewing an order granting a motion for summary judgment for which "the parties agree on the facts," as here, the Court "simply determine[s] whether the appellee was entitled to judgment as a matter of law." *Wash. Cnty. v. Bd. of Trs. of the Univ. of Ark.*, 2016 Ark. 34, at 4, 480 S.W.3d 173, 175. The Court applies de novo review to questions of law, including interpretations of constitutional provisions. *Id.*

1. Amendment 7 grants the General Assembly power to amend Amendment 98.

a. The plain language of Amendment 7 gives the General Assembly power to amend initiated constitutional amendments.

"When interpreting the constitution, this court's duty is to read the laws as they are written and interpret them in accordance with established principles of constitutional construction." *Martin v. Humphrey*, 2018 Ark. 295, at 6, 558 S.W.3d at 375 (citing *State v. Oldner*, 361 Ark. 316, 206 S.W.3d 818 (2005)). "Thus, when the language of a constitutional provision is plain and unambiguous, it must be given its

obvious and common meaning." *Id.* at 6, 558 S.W.3d at 375. "[A]rticle 5, section 1 of the Arkansas Constitution" is no exception: "Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision." *Ark. Dep't of Educ. v. Jackson*, 2023 Ark. 140, at 7–8, 675 S.W.3d 416, 421.

Amendment 7, which amended Article 5, § 1, provides that "[n]o measure approved by a vote of the people shall be amended or repealed by the General Assembly … except upon a yea and nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly." Ark. Const. Art. 5, § 1; *see also* Acts of Arkansas 481–489 (1919) [hereinafter, "Amend. 7"] (proposed amendment's text). The word "measure" includes "constitutional amendment[s]." *See* Amend. 7. There is no other restriction in Amendment 7 on the General Assembly's ability to amend a constitutional amendment.

Thus, under the plain language of Amendment 7, the General Assembly can amend initiated constitutional amendments, including Amendment 98.

b. <u>The Court should overturn its decision in *Edgmon*.</u>

As noted above, the circuit court was bound to this Court's 1951 decision in *Arkansas Game & Fish Comm'n v. Edgmon*, but that decision was based on erroneous reasoning and was wrongly decided. *Arkansas Game & Fish Comm'n v.*

Edgmon, 218 Ark. 207 (1951). Returning to the plain text of the constitution, the Court should overturn *Edgmon*.

At the outset, the *Edgmon* Court acknowledged that, read "literally," Amendment 7 would allow the General Assembly to "change[] by legislative action" the "meaning of a constitutional provision." 218 Ark. 207, 210–11, 235 S.W.2d 554, 556–57 (1951). Setting aside the text, however, it refused to read Amendment 7 literally because it believed that the plain meaning of Amendment 7 was "inconceivable," *id*. at 211, 235 S.W.2d at 556, saying that if the people had intended the plain meaning they should have made it even plainer. *Id.* at 211, 235 S.W.2d at 557 (stating that if the plain meaning was what was intended, Amendment 7 "would have [used] more emphatic terms").

In other words, the Court could not believe that the text meant what it said. Thus, it held—without reference to the text—that the General Assembly was prohibited from amending constitutional amendments by a two-thirds vote based on what the Court believed was the extratextual "intent" and "purpose" of Amendment 7. *Id*. at 211, 235 S.W.2d at 557.

Edgmon did not mention the absurdity doctrine in its analysis, but it may have been why the Court declined to follow the text. The doctrine, however, is inapplicable. It only applies when two elements exist: (1) the absurdity must be something "no reasonable person could intend"—a judge's belief that "the framers of the

instrument could not intend what they say" is not enough—and (2) "[t]he absurdity must be reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 237–38 (2012) (quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* § 427, at 303 (2d ed. 1858)). This narrow definition is necessary to keep judges from substituting their personal policy preferences for the plain text of the law. *See id.* at 237 ("Yet error-correction for absurdity can be a slippery slope. It can lead to judicial revision of public and private texts to make them (in the judges' view) more reasonable."). Since *Edgmon*, the Arkansas Supreme Court has adopted this particular view of the absurdity doctrine. *See State v. Coble*, 2016 Ark. 114, at 5, 487 S.W.3d 370, 373 (explaining that, when "the statute's meaning is plain," the absurdity doctrine is not applicable merely because the consequences of applying the statute's text "make little if any sense" to the Court (quoting Scalia & Garner, *supra*, at 239)). Neither prong of the doctrine is met here.

Amendment 7's grant of power to the General Assembly is not so absurd that no person could have intended it. For example, it could be that this power was intended to allow the General Assembly to change the Constitution by a supermajority vote if a ratified amendment failed to include necessary provisions or if, in application, it became clear that the amendment was unworkable. Not to mention, Arkansas

already had experience with a similar arrangement: our State's first three Constitutions allowed legislative amendments without ratification by the people. Ark. Const. of 1864, art. IV, § 33; Ark. Const. of 1861, art. IV, § 34; Ark. Const. of 1836, art. IV, § 35.

Further, even if there were an absurdity, there's no "easy fix" to Amendment 7. There is no word or phrase that was "obviously" left out or incorrect for the courts to "chang[e] or supply[]" with scalpel-like precision. Scalia & Garner, *supra*, at 238. Therefore, the absurdity doctrine provides no authority for a court to reinterpret Amendment 7's clear grant of power to the General Assembly.

The Court should also decline to apply stare decisis because it is inapplicable here for two reasons. First, courts will not follow precedent if the legal analysis has "palpable error." *Moore v. Moore*, 2016 Ark. 105, at 8–9, 486 S.W.3d 766, 772 (quoting *Ward v. State*, 2015 Ark. 62, at 4, 455 S.W.3d 830, 833). Thus, if precedent strays from the "plain language" and "rewrit[es] it to achieve a contrary result," courts "are compelled to serve justice by returning to the … clear language." *Id.* at 9, 486 S.W.3d at 772 (quoting *In re Guardianship of W.L.*, 2015 Ark. 289, at 7, 467 S.W.3d 129, 133). As explained, *Edgmon* strayed from the constitutional text.

Second, stare decisis carries less weight when interpreting the Constitution. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Most critically, the Arkansas Constitution is our State's highest law; judicial precedent is not. *See Jernigan v.*

Niblock, 260 Ark. 406, 410–11, 540 S.W.2d 593, 596 (1976). To ignore the meaning of the Arkansas Constitution in favor of stare decisis "would be to violate the instrument [courts] are sworn to support." *Id.* at 411, 540 S.W.2d at 596 (quoting *Rice v. Palmer*, 78 Ark. 432, 442, 96 S.W. 396, 398 (1906)); *see also Little Rock & Ft. Smith Ry. Co. v. R.W. Worthen*, 46 Ark. 312, 325 (1885) ("[I]f there be a conflict between the [constitution and another law], the constitution is the higher law, or, rather, the supposed law is not a law at all, being null and void."). Moreover, if a decision misinterprets the Constitution, it is difficult to alter the Constitution to align it with the correct interpretation. *Kimble*, 576 U.S. at 456. This contrasts with incorrectly interpreted legislation, which is easier than the Constitution to alter because the legislature only needs to pass new legislation to "correct any mistake it sees." *Id*. For these reasons, the Court should hold that stare decisis is inapplicable.

In light of the foregoing, the Court should overturn its decision in *Edgmon*, holding that the plain text of Amendment 7 grants the General Assembly power to amend initiated constitutional amendments without submitting the amendment to a vote at a statewide election. *See* Ark. Att'y Gen. Op. 2024-024 (opining that *Edgmon* was wrongly decided).

Thus, the General Assembly's power to amend Amendment 98—as explained below—is limited only by Amendment 98.

2. Section 23 grants the General Assembly power to amend Amendment 98 in the same way it amends other amendments under Amendment 7.

a. Section 23(a) – Manner of Amendment

Section 23(a) of Amendment 98 can be broken into three parts: (1) "Except as provided in subsection (b) of this section"; (2) "the General Assembly, in the same manner as required for amendment of laws initiated by the people, may amend the sections of this amendment"; and (3) "so long as the amendments are germane to this section and consistent with its policy and purposes." *See* Ark. Const. amend. 98, § 23(a) (emphasis added). This language clearly and unambiguously instructs the General Assembly how it is to amend "the sections of [the] amendment," and that is "in the same manner as required for amendment of laws initiated by the people." Section 23, therefore, directs the General Assembly to amend Amendment 98 by following Amendment 7.

Despite this, and relying upon *Edgmon*, the circuit court held that Amendment 7 does not allow the General Assembly to amend the Constitution unilaterally, and instead requires the legislature to submit proposed amendments to the people under Article 19, § 22 of the Constitution. (RP 149–151). These findings, however, contradict the language of Section 23 and Art. 5, § 1. Neither Amendment 98 nor Art. 5, § 1 can be read as instructing the legislature to make amendments via the manner set forth in Art. 19, § 22. To reach this conclusion, the Court must disregard the plain

and unambiguous language of the constitutional provisions and insert a separate procedure—rendering that instruction superfluous, meaningless, and inoperative.

b. Section 23(b) – What can be Amended

As noted above, Section 23(a) reserves an exception for the sections of Amendment 98, set forth in subsection (b), that cannot be amended by the General Assembly. Subsection (b) explicitly states the General Assembly cannot amend "(1) Subsections (a), (b), and (c) of § 3; (2) Subsections (h), (i), and (j) of § 8, and (3) Section 23." *See* Ark. Const. amend. 98, § 23(b).

The circuit court and the parties agree that the language of Section 23(a) states the General Assembly cannot amend specific subsections of Sections 3, 8, and 23—all of which are independent of one another and concern unrelated areas of the law. (RP 148). This is plain and unambiguous. None of these subsections were amended.

Ambiguity exists, however, in reconciling the provisions that cannot be amended and the language, "so long as the amendments are germane to this *section* and consistent with its policy and purposes." *See* Ark. Const. amend. 98, § 23(a) (emphasis added). Good Day and Capital City interpret this language to mean that any amendment by the General Assembly must be germane to Section 23 instead of germane to this section of the constitution. But this interpretation is impermissible because it renders superfluous, meaningless, and inoperative all of Section 23. *Simpson v. Calvary SPV I, LLC*, 2014 Ark. 363, at 3–4, 440 S.W.3d 335, 337–338.

Section 23 is titled, "Amendment by General Assembly." But Section 23 cannot be amended. Thus, following Plaintiffs argument, the only amendments allowed must pertain to "Amendment by General Assembly," but have to go under a different section of Amendment 98. This makes no sense. It also renders superfluous, meaningless, and inoperative the limitation on certain subsections of Sections 3 and 8, none of which are germane to Section 23. But all these provisions are germane to Amendment 98.

In other words, requiring amendments to be "germane to this section" that the General Assembly can't amend *is* an absurdity—or, more mildly put, a scrivener's error—that the Court can correct. The Court is to review Amendment 98 in its entirety and "reconcile provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part." *Id*. at 4, 440 S.W.3d at 338. The Court is to interpret the provision where "it is clear that a drafting error or omission has circumvented legislative intent." *Id*. at 4, 440 S.W.3d at 338. As explained above, there are two elements to the absurdity doctrine, both of which are met here: (1) a meaning that no reasonable person could have intended (i.e., making Section 23 inoperative by its own terms) and (2) a repair that is simple, minor, and obvious (i.e., reading "section" as "amendment"). *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 237–38 (2012).

Reviewing Amendment 98 in its entirety and importantly the inclusion of Section 23, demonstrates that the intent of Section 23 was to allow amendment to Amendment 98 so long as the amendment was germane to Amendment 98. "[T]he General Assembly, in the same manner as required for amendment of laws initiated by the people, may amend the sections of this amendment so long as the amendments are germane to this [amendment] and consistent with its policy and purposes." *See* Ark. Const. amend. 98, § 23(a) (emphases added). A scrivener's error such as this is a poignant demonstration of one reason Amendment 7 gives the General Assembly the power to amend initiated constitutional amendments. Instead of wasting judicial resources over a mistyped word, the General Assembly can fix the issue without needless litigation.

Other Constitutional Amendments provide for legislative amendments. The text of Amendment 51, § 19, concerning voter registration, provides: "The General Assembly may, in the same manner as required for amendment of laws initiated by the people, amend Sections 5 through 15 of this amendment, so long as such amendments are germane to this amendment, and consistent with its policy and purposes." Ark. Const. amend. 51, § 19. Likewise, Amendment 89, concerning interest rates on government bonds, provides for legislative amendments "so long as the amendments are germane to this amendment and consistent with its policy and purposes." Ark. Const. amend. 89, § 11(a).

Under the circuit court's reasoning, these too are constitutionally suspect—threatening to throw vital areas of regulation, like election integrity through voter registration, into chaos.

REQUEST FOR RELIEF

This Court should reverse the circuit court's order, grant summary judgment in favor of the State of Arkansas, Department of Finance and Administration, and Alcoholic Beverage Control Division and dismiss the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I filed a copy of the foregoing via eFlex, the judiciary's electronic filing system, on January 13, 2025, which notifies all counsel of record. Further, a copy will be e-mailed to the Honorable Karen Whatley, who succeeds Hon. Morgan E. Welch in the Sixteenth Division of Pulaski County Circuit Court.

/s/ Jordan Broyles
Jordan Broyles

CERTIFICATE OF COMPLIANCE

This brief complies with Administrative Order No. 19's requirements concerning confidential information, Administrative Order No. 21, § 9's requirement that briefs not contain hyperlinks to external papers or websites, and with the word-count limitation in Arkansas Supreme Court Rule 4-2(d), in that it contains 3,566 words within the jurisdictional statement, the statement of the case and the facts, the argument, and the request for relief.

/s/ Jordan Broyles
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