IN THE ARKANSAS SUPREME COURT

CHEROKE NATION ENTERTAINMENT, LLC; JENNIFER MCGILL, individually and on behalf of the ARKANSAS CANVASSING COMPLIANCE COMMITTEE; AND CHEROKEE NATION ENTERTAINMENT, LLC — PETITIONERS

v. CV-24-492

JOHN THURSTON, in his official capacity as ARKANSAS SECRETARY OF STATE — RESPONDENT

LOCAL VOTERS IN CHARGE — INTERVENOR

PETITIONERS' REPLY BRIEF

David A. Couch (85033)
1501 N. University Avenue
Suite 228
Little Rock, Arkansas 72207
Telephone: (501) 661-1300
david@couchfirm.com

John E. Tull III (84150)
E. B. Chiles IV (96179)
R. Ryan Younger (2008209)
Meredith M. Causey (2012265)
Glenn Larkin (2020149)
QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street, Suite 1900
Telephone: (501) 379-1700
jtull@qgtlaw.com
cchiles@qgtlaw.com
ryounger@qgtlaw.com
mcausey@qgtlaw.com
glarkin@qgtlaw.com

Scott P. Richardson (2001208)
Bart W. Calhoun (2011221)
Brittany D. Webb (2023139)
MCDANIEL WOLFF, PLLC
1307 West Fourth Street
Little Rock, Arkansas 72201
Telephone: (501) 954-8000
Facsimile: (501) 419-1601
scott@mcdanielwolff.com
bart@mcdanielwolff.com
bwebb@mcdanielwolff.com

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The proposed amendment is the Choctaw Nation's last-ditch effort to prevent competition to its Oklahoma casinos since it was unable to secure the Pope County casino gaming license for itself. Its intent is clear: revoke the license issued to CNE. This real purpose is nowhere to be found in the popular name or ballot title. The Choctaw Nation and LVC want to eliminate competition by painting a picture of local control that has nothing to do with local control or anything other than self-interest. Their ambitions led them to riddle the ballot title and popular name with errors and omissions that render both misleading and insufficient.

LVC's misrepresentations continue in this appeal. It says, "the Choctaw Nation is *purportedly* behind the effort to revoke CNE's license" and "the Choctaw Nation is *allegedly* trying to revoke CNE's license for its own benefit." Intervenor's Brief, p. 19, 22 (emphasis added). According to its reports to the Arkansas Ethics Commission, LVC has raised $5,600,100.00, all but $100.00 of which the Choctaw Nation supplied. The Choctaw Nation is not "purportedly" behind this effort; it is 99.99998% behind the effort to revoke CNE's license. Its failure to acknowledge that betrays a lack of candor with the Court and the Arkansas electorate.

I. Popular Name and Ballot Title Fail to Provide Sufficient Information to Voters

The popular name and ballot title must set forth sufficient information and essential facts for voters to make an informed decision. *Walker v. McCuen*, 318 Ark.

508, 886 S.W.2d 577 (1994). Contrary to LVC's assertions otherwise, the direct impact of the proposed amendment must be taken into consideration and disclosed to voters:

> It is the function of the ballot title to provide information concerning the choice that he is called upon to make. Hence the adequacy of the title is directly related to the degree to which it enlightens the voter with reference to the changes that he is given the opportunity of approving.

Bradley v. Hall, 220 Ark. 925, 927, 251 S.W.2d 470, 471 (1952). A voter must not "have to guess as to the effect [her] vote will have. . . ." *Dust v. Riviere*, 277 Ark. 1, 6, 638 S.W.2d 663, 666 (1982). Instead, the voter must know the consequence of her vote. *Id.* at 4, 638 S.W.2d at 665; *Becker v. Reviere*, 270 Ark. 219, 604 S.W.2d 555 (1980) ("It is appropriate to determine what changes would occur from adoption of the proposed amendment…").

The ballot title says: "[I]f the Arkansas Racing Commission, or other governing body, issues a casino license for a casino in Pope County, Arkansas prior to the effective date of this Amendment, then said license is revoked on the effective date of this Amendment." "If" raises the natural question for a voter: "Has a license been issued?" No answer comes from the ballot title. Instead, the voter must look outside the voting booth to discover the answer is "yes." The next natural question is "If so, what does that mean if I vote to revoke the license?" Again, the ballot title provides zero guidance. The voter must look outside the voting booth to discover it

means (a) revocation of CNE's license; (b) significant legal liability to the State; (c) protection of the Choctaw Nation's Pocola, Oklahoma casino; (d) elimination of future tax revenue; and (e) nullification of the Economic Development Agreement ("EDA").

LVC complains that CNE did not have the license when the Arkansas Attorney General approved the popular name and ballot title. LVC accepted that risk. It does not justify omitting key information. Intervenors and Respondent cite no case establishing an "I didn't know" exception to the requirement to disclose essential facts to voters. CNE's interest in its license, directly at stake unbeknownst to the voter, exceeds LVC's (and Choctaw Nation's) interest in placing a measure on the ballot. But paramount to both is the voters' right to know all material facts and the consequences of their votes. LVC's ballot title's conditional phrasing fails to even inform the voter that a casino license has been granted, much less to whom it was granted. There is no way the voter leaves the booth not questioning the impact of her vote.

When the "downstream effects" are significant, a ballot title must inform the voter of those effects. *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000). "[B]efore determining the sufficiency of the present ballot title we must first ascertain what changes in the law would be brought about by the adoption of the proposed amendment." *Bradley*, 220 Ark. at 927, 251 S.W.2d at 471. For example,

potential downstream loss of tax revenue and government services must be disclosed. *Id.*; *see also Ward v. Priest*, 350 Ark. 345, 86 S.W.3d 884. Amendment 100 requires all four casinos, including Pope County, to generate tax revenue. Also, the EDA creates direct revenue of over $40,000,000.00 to Pope County (which Respondent downplays as a "single contract"). The ballot title and popular name (and the proposed amendment) do not disclose that the measure strips tax revenue from the State and nullifies any EDA. Unquestionably, the proposed amendment would revoke CNE's license.

These are not "hypothetical downstream effects." Yet, LVC and Choctaw Nation adamantly refuse to give Arkansas voters the same information. Why? Because it would give an Arkansas voter serious pause in deciding on this proposed measure. Would a voter want to know that a license has been issued? Would a voter want to know that revocation of the license substantially benefits the exclusive financer of the ballot initiative? Would a voter want to know that the proposed amendment takes $40,000,000.00 from Pope County? Would a voter want to know that this will impact future tax revenue? This is not about "the impact, if any, of the proposed amendment on [an] industry. . . ." *Armstrong v. Thurston*, 2022 Ark. 167, at 14, 652 S.W.3d 167, 177. That was speculative and broad; this is certain and specific.

This is why the Choctaw Nation has spent over $10,000,000.00 fighting the Pope County casino over the last four years. "[L]itigation limbo" benefits the Choctaw over Pope County and Arkansas. Intervenor's Brief, p. 20. Since August 2019, Pope County has supported only Cherokee Nation entities. It did not take a crystal ball to determine that once an application process began, a casino license would be awarded to the entity Pope County exclusively supported. These facts would give voters serious grounds for reflection. Thus, the popular name and ballot title are wholly deficient.

Intervenor also misstates the holding in *Parker v. Priest*, 326 Ark. 123, 930 S.W.2d 322 (1996). The challengers to the ballot title in *Parker* argued, in part, that it did not inform voters that there was "only one pari-mutuel franchisee in Hot Springs." *Id.* at 136, 930 S.W.2d at 329. But the Court held that the ballot title in *Parker* did disclose by name the primary beneficiary of the measure. Thus, *Parker* requires that if a proposed amendment has a specific beneficiary, it must disclose that fact to the voters. Here, the Choctaw Nation designed this measure for its own benefit (which LVC does not deny). This ballot title is misleading for failing to identify the beneficiary of the measure and for its failure to identify the target.

II. Popular Name Misleads Voters that Proposed Amendment Does Not Revoke an Existing License

Respondent makes a case against grammar in asserting that the popular name is retroactive. The popular name's plain language clearly "repeal[s] authority *to issue*

a casino license in Pope County." "To issue" is a verbal form (an infinitive) indicating future action. It does, as the Respondent suggests, modify "authority" by telling us what kind of authority is being modified. But that modification indicates future, prospective action, not past. This is consistent with the general presumption that new enactments operate prospectively, not retroactively.

Conversely, the ballot title and proposed amendment contemplate revoking a license already issued (without naming the holder). This Court has struck down such a contradiction. In *Roberts v. Priest*, the amendment referred to "any sales tax" while the popular name suggested the measure applied only to "sales taxes." "When presented with these two interpretations of the same measure, the voter cannot know which provision is controlling." *Roberts v. Priest*, 341 Ark. 813, 822-23, 20 S.W.3d 376, 381 (2000).

Likewise, the popular name, reading as a brief summary, misleads voters into believing the proposed amendment only restricts the issuance of future licenses, not that it will revoke a license already issued. Thus, the popular name misleads and conflicts with the ballot title and proposed amendment, thereby rendering both the popular name and ballot title insufficient.

III. Popular Name and Ballot Title Mislead Voters that It Limits Future Constitutional Amendments

The Respondent argues "the Proposed Amendment does not impermissibly purport to repeal any future amendments." Respondent Brief, p. 16. The ballot title

says it does exactly that. It requires future amendments to yield to the county vote requirement. That is impermissible and misleading. People will be voting on fake assurances that they can prevent casinos by a county-wide election in the future when there is no such guarantee.

IV. Ballot Title Fails to Comport with Text of Proposed Amendment

The Arkansas Supreme Court has held that the "majority of the voters in the county" language is "susceptible of two interpretations." *Rockefeller v. Matthews*, 249 Ark. 341, 345, 459 S.W.2d 110, 112 (1970). Arkansas law is clear: plain and unambiguous constitutional language must be given its obvious and common meaning. *Proctor v. Daniels*, 2010 Ark. 206, 392 S.W.3d 360. Neither rules of construction nor interpretation can defeat the clear and certain meaning of a constitutional provision. *Id.* Here, the plain language of the ballot title and the plain language of the proposed amendment state two different standards.

V. Ballot Title Fails to Disclose Conflicts with Federal Law

Petitioners are not asking for a final decision on whether the proposed amendment is unconstitutional. However, voters (and taxpayers) must be informed that the proposed amendment will violate federal law and subject the State of Arkansas to a multi-million-dollar federal suit. This answers the natural question: "What will the license-holder do about the revocation of its license?" Because the

ballot title omits such essential information, Petitioners ask this Court to deem the ballot title insufficient.

LVC also misconstrues its cases. In *Armstrong*, the Court declined to analyze "speculative" effects on the industrial-hemp industry to determine ballot title sufficiency. *Armstrong v. Thurston*, 2022 Ark. 167, 13, 652 S.W.3d 167, 177. In *Rose*, the petitioner tried to attack a ballot title by raising different, speculative ways in which the 2016 Medical Marijuana Amendment may be abused. *Rose v. Martin*, 2016 Ark. 339, 500 S.W.3d 148. The petitioner did not raise, and this Court did not consider, potential conflicts with federal law.

Despite Respondent and LVC's protestations,[1] this Court's review does encompass determining whether clear violations of law raised by Petitioners constitute information that "would give the voters a serious basis for reflection on how to cast their ballots." *Bailey v. McCuen*, 318 Ark. 277, 288, 884 S.W.2d 938, 944 (1994).

1. Proposed Amendment Violates the Takings Clause and Procedural Due Process

Amendment 100, the Arkansas Code, and the Casino Gaming Rules substantially limit state official discretion regarding the license, thus making the

[1] LVC does not consistently maintain its protestation, as it admits that the Court has, in fact, weighed in on the merits of an amendment when determining conflicts with existing laws. Intervenor's Brief, p. 33.

property interest protectable. *Stauch v. City of Columbia Heights*, 212 F.3d 425 (8th Cir. 2000). *Hawkeye Commodity Promotions, Inc. v. Vilsack* does not undercut CNE's property interest. 486 F.3d 430 (8th Cir. 2007). LVC states that *Hawkeye* "concluded that the license was a privilege, not a legal right, as evidenced by the contractual bar on Hawkeye's ability to sell, assign, or transfer the license." Intervenor's Brief, p. 36. But, there, Iowa reserved the right to "cancel at any time" plaintiff's ownership interest. *Hawkeye*, 486 F.3d at 436-437. The governing contracts subjected the franchise to any "law or promulgated regulation" and "applicable statutory or regulatory provision[s]" which would "preempt[] the conflicting [contract] provision." *Id.* at 438. CNE's license, however, has no such limitations.

Amendment 100 allows transfer of CNE's license and limits its nonrenewal. *Hawkeye* addressed a statutory not a constitutional license grant. Amendment 100 supersedes the Casino Gaming Rules. The Arkansas Code further protects CNE from license revocation absent notice and hearing. CNE's rights to its license certainly contrast with *Hawkeye*.

LVC misrelies on the Casino Gaming Rules. "Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion." *Hornsby v. Allen*, 326 F.2d 605, 609 (5th Cir. 1964). Moreso where Amendment 100 controls.

Amendment 100 does not describe the license as a privilege nor give the ARC free reign in license termination, renewal, or transfer. The Casino Gaming Rules limit the ARC's discretion to deny license renewal or transfer and require notice and hearing for any negative action. Thus, a protectable property right in the license, and the EDA, absolutely exists.

The popular name and ballot title fail to inform voters that a license has been issued or to whom it has been issued, much less the potential consequences of summary revocation. The dubious police powers argument does not relieve the obligation to inform the voters what they are exercising their police power over. Thus, the silent ballot title and popular name are insufficient.

2. Proposed Amendment Violates the Contracts Clause and Equal Protection Clause

LVC's proposed amendment substantially impairs a pre-existing contractual relationship for no significant public purpose, and the complete abrogation of contracts is entirely unreasonable. *Equipment Mfrs. Institute v. Janklow*, 300 F.3d 842, 850 (8th Cir. 2002), quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983). This Court has rejected a proposed amendment for impairing a contract. *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669.

Hawkeye quotes two Supreme Court cases where the State had not limited its ability to revoke the license or contracts. *Stone v. Mississippi*, 101 U.S. 814, 821 (1879); *Douglas v. Kentucky*, 168 U.S. 488, 502 (1897). Amendment 100 renders all

three cases distinguishable. (1) the Arkansas Constitution, not a state statute or regulation, created the license; and (2) the EDA is a contract with a political subdivision of the State.

The proposed amendment's destruction of the EDA is unquestionably a substantial impairment. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 558 (8th Cir. 1997); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431 (1934). Because Amendment 100 sets a licensure term of ten years, the substantial impairment of the EDA was not reasonably foreseeable. *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 855 (8th Cir. 2002).

Since a substantial impairment exists, what "broad societal interest rather than a narrow class" does the proposed amendment protect? *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978). Has the State met its burden in justifying the alteration? *White Motor Corp. v. Malone*, 599 F.2d 283, 287 (8th Cir. 1979). The respective answers are none and no. LVC and the Choctaw Nation hid the true intent of the proposed amendment: revoke CNE's casino license. Favoring a private business provides no real, protectable, societal interest, much less a broad one. The proposed amendment provides no statement of intent that negates the undisputed facts and purpose of Amendment 100. *See Janklow*, 300 F.3d at 860. The proposed amendment fails to address any broad, generalized economic or social problem. *Am. Fed'n of State, Cnty. & Mun. Emps. v. City of Benton, Arkansas*, 513 F.3d 874, 882

(8th Cir. 2008). Removing one county from Amendment 100's licensure mandate and revoking CNE's license does not constitute a broad societal interest. Without any significant public purpose for the proposed amendment, it violates the state and federal Contracts Clauses.

Thus, Respondent and Intervenor do not get to the third step which requires the impairment to be based upon "reasonable conditions." There is no reasonable condition. The proposed amendment completely abrogates the EDA and is limited in effect to destroying CNE's licensure and the EDA. No compensation. No public purpose. No reason to invalidate only one of four licenses. Therefore, the proposed amendment, if adopted, violates the Contracts Clause of the United States Constitution as well as the Arkansas Constitution (or, at a minimum, repeals or amends the latter). Similarly, the proposed amendment violates the Equal Protection Clause. The popular name and ballot title do not disclose these facts to voters. Therefore, the popular name and ballot title are insufficient.

CONCLUSION

For the reasons stated above, Petitioners pray that this Court enjoin the ballot initiative from appearing on the November 5, 2024 ballot, or, alternatively, that votes on the initiative not be counted.

Respectfully Submitted,

PETITIONERS

By: /s/ Bart Calhoun

Bart W. Calhoun, No. 2011221
Scott P. Richardson, No. 2001208
Brittany D. Webb, No. 2023139
McDaniel Wolff, PLLC
1307 West 4th Street
Little Rock, AR 72201
(501) 954-8000
scott@mcdanielwolff.com
bart@mcdanielwolff.com
bwebb@mcdanielwolff.com

CERTIFICATE OF SERVICE

I, Bart Calhoun, hereby certify that I have filed the foregoing on August 16, 2024, via ecf which will send notice to all case participants.

/s Bart Calhoun
Bart Calhoun

CERTIFICATE OF COMPLIANCE AND IDENTIFICATION OF
PAPER DOCUMENTS NOT IN PDF FORMAT

I, Bart Calhoun, hereby certify that this brief complies with (1) Administrative Order No. 19's requirements concerning confidential information, (2) Administrative Order 21, Section 9 which states that briefs shall not contain hyperlinks to external papers or websites, and (3) word-count limitations identified in Rule 4-2(d). Per Ark. Sup. Ct. R. 4-2(d), this brief contains 2,852 words.

/s/ Bart Calhoun
Bart Calhoun