ELECTRONICALLY FILED
Arkansas Supreme Court
Kyle E. Burton, Clerk of the Courts
2024-Aug-16 09:31:23
CV-24-492
47 Pages

CV-24-492

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.

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

LOCAL VOTERS IN CHARGE, A BALLOT QUESTION COMMITTEE; and JIM KNIGHT, individually and on behalf of LOCAL VOTERS IN CHARGE — INTERVENORS

PETITIONERS' BRIEF

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

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

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CONTENTS **3**

POINTS ON REVIEW AND PRINICIPAL AUTHORITIES **4**

TABLE OF AUTHORITIES **5**

JURISDICTIONAL STATEMENT **8**

STATEMENT OF THE CASE AND THE FACTS **9**

STANDARD OF REVIEW **12**

ARGUMENT **14**

I. Popular Name and Ballot Title Fail to Provide Sufficient Information to Voters 15
II. Popular Name Misleads Voters that Proposed Amendment Does Not Revoke an Existing License 19
III. Popular Name and Ballot Title Mislead Voters that It Limits Future Constitutional Amendments 21
IV. Ballot Title Fails to Comport With Text of Proposed Amendment 22
V. Popular Name Fails to Comport With Text of Proposed Amendment 25
VI. Ballot Title Fails to Disclose Conflicts with Federal Law 25

CONCLUSION **44**

CERTIFICATE OF SERVICE **46**

CERTIFICATE OF COMPLIANCE **47**

POINTS ON REVIEW AND PRINCIPAL AUTHORITIES

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

   Walker v. McCuen, 318 Ark. 508, 886 S.W.2d 577 (1994).

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

   Gaines v. McCuen, 296 Ark. 513, 758 S.W.2d 403 (1988)

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

   Op. Ark. Att'y. Gen. No. 009 (2024)
   City of Fayetteville v. Washington County, 369 Ark. 455, 470, 255 S.W.3d 844, 855 (2007)

4. **Ballot Title Fails to Comport With Text of Proposed Amendment**

   Rockefeller v. Matthews, 249 Ark. 341, 459 S.W.2d 110 (1970)
   Proctor v. Daniels, 2010 Ark. 206, 392 S.W.3d 360

5. **Popular Name Fails to Comport With Text of Proposed Amendment**

   Chaney v. Bryant, 259 Ark. 294, 532 S.W.2d 741 (1976)
   Moore v. Hall, 229 Ark. 411, 316 S.W.2d 207 (1958)

6. **Ballot Title Fails to Disclose Conflicts with Federal Law**

   Lange v. Martin, 2016 Ark. 337, 500 S.W.3d 154

TABLE OF AUTHORITIES

CASES

1256 Hertel Ave. Associates, LLC v. Calloway, 761 F.3d 252, (2d Cir. 2014).27, 28
301, 712, 2103 and 3151 LLC v. City of Minneapolis, 27 F.4th 1377, 1381 (8th Cir. 2022) 27
Akers v. State, 2015 Ark. App. 352, 464 S.W.3d 483 43
Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 40
Am. Fed'n of State, Cnty. & Mun. Emps. v. City of Benton, 513 F.3d 874 (8th Cir. 2008) 41
Arnold v. State, 2011 Ark. 395, 384 S.W.3d 488 ....42, 43
Bailey v. McCuen, 318 Ark. 277, 884 S.W.2d 938 (1994) 12, 15, 16
Baldwin v. Hale, 68 U.S. 223 (1863) 36
Bills v. Dahm, 32 F.3d 333 (8th Cir. 1994) 43
Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) 28
Chaney v. Bryant, 259 Ark. 294, 532 S.W.2d 741 (1976) 19, 25
Cherokee Nation Businesses, LLC v. Gulfside Casino P'ship, 2021 Ark. 17, 614 S.W.3d 811 (2021) 29
City of Fayetteville v. Washington Cty., 369 Ark. 455, 255 S.W.3d 844 (2007) 22
City of Little Rock v. Alexander Apartments, LLC, 2020 Ark. 12, 592 S.W.3d 224 ....36, 37
Conti v. United States, 291 F.3d 1334 (Fed.Cir. 2002) 29
Crown Custom Homes, Inc. v. Buchanan Servs., Inc., 2009 Ark. App. 442, 319 S.W.3d 285 39
E. Enters. v. Apfel, 524 U.S. 498, 522 (1998) 27
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, (1983) 38
Equipment Mfrs. Institute v. Janklow, 300 F.3d 842 (8th Cir. 2002) 38, 39, 40, 41
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 42
Ferstl v. McCuen, 296 Ark. 504, 758 S.W.2d 398 (1988) 20
Fuentes v. Shevin, 407 U. S. 67 (1972) 36
Gaines v. McCuen, 296 Ark. 513, 758 S.W.2d 403 (1988) 12, 13, 19
Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) 35
Hawkeye Commodity Promotions, Inc. v. Miller, 432 F.Supp.2d 822 (2006) 39
Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) 38
Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n, 110 F.3d 547 (8th Cir. 1997) 38
Iowa Assur. Corp. v. City of Indianola, 650 F.3d 1094 (8th Cir. 2011) 28
Kelo v. City of New London, Conn., 545 U.S. 469 (2005) 35

Lange v. Martin, 2016 Ark. 337, 500 S.W.3d 154 25
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)..........29
Lynch v. United States, 292 U.S. 571 (1934)..........32, 33
Mathews v. Eldridge, 424 U.S. 319 (1976) 36
May v. Daniels, 359 Ark. 100, 194 S.W.3d 771 (2004) 12
Milligan v. City of Red Oak, 230 F.3d 355 (8th Cir. 2000)..........35
Moore v. Hall, 229 Ark. 411, 316 S.W.2d 207 (1958)..........19, 20, 25
Movers Warehouse, Inc. v. City of Little Canada, 71 F.3d 716 (8th Cir. 1995) 33
Omni Behavioral Health v. Miller, 285 F.3d 646 (8th Cir. 2002)..........33
Page v. McCuen, 318 Ark. 342, 884 S.W.2d 951 (1994)..........17
Parker v. Priest, 326 Ark. 386, 931 S.W.2d 108 (1996)..........12, 16, 17
People ex rel. Davenport v. Brown, 11 Ill. 478 (1850) 24
Perry v. Sindermann, 408 U.S. 593 (1972) 33
Porter v. McCuen, 310 Ark. 562, 839 S.W.2d 512 (1992)..........12
Proctor v. Daniels, 2010 Ark. 206, 392 S.W.3d 360 24
Ray v. State, 2017 Ark. App. 574, 533 S.W.3d 587 42
Roberts v. Priest, 341 Ark. 813, 20 S.W.3d 376 (2000)..........12
Rockefeller v. Matthews, 249 Ark. 341, 459 S.W.2d 110 (1970)..........24
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 28
Sanford v. Walther, 2015 Ark. 285, 467 S.W.3d 139..........36, 37
Scott v. Priest, 326 Ark. 328, 932 S.W.2d 746 (1996) 12
Stauch v. City of Columbia Heights, 212 F.3d 425 (8th Cir. 2000) 29
Steed v. Busby, 268 Ark. 1, 593 S.W.2d 34 (1980) 39
Tex. State Bank v. United States, 423 F.3d 1370 (Fed.Cir. 2005) 28
Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005)..........28, 29
Vance v. Austell, 45 Ark. 400 (1885)..........24
Walker v. McCuen, 318 Ark. 508, 886 S.W.2d 577 (1994)..........12, 13, 18
Wash. v. Thompson, 339 Ark. 417, 6 S.W.3d 82 (1999) 36
Wells v. Heath, 274 Ark. 45, 622 S.W.2d 163 (1981) 22
Whirlpool Corp. v. Ritter, 929 F.2d 1318, 1323 (8th Cir. 1991)..........42
White Motor Corp. v. Malone, 599 F.2d 283 (8th Cir. 1979)..........40

STATUTES AND RULES

U.S. Const. Art. I, § 10, cl. 1..........26, 37
U.S. Const. Amend. V..........26, 27
U.S. Const. Amend. XIV 26, 36
Ark. Const. Art. 2, § 17..........38
Ark. Const. Art. 2, § 21..........36
Ark. Const. Art. 2, § 22..........27

Ark. Const. Art. 5, § 1 24
Ark. Const. Amend. 100 .... *passim*
Ark. Code Ann. § 7-9-107(d)(1) 22, 23
Ark. Code Ann. § 25-15-211 .... 31, 32
Casino Gaming Rule 2.13.9 34
Casino Gaming Rule 2.13.12 .... 30, 31
Casino Gaming Rule 2.13.16 30
Casino Gaming Rule 2.13.18 31

ADMINISTRATIVE DECISIONS

Op. Ark. Att'y Gen. No. 009 (2024) 21, 22
Op. Ark. Att'y Gen. No. 034 (2024) 20
Op. Ark. Att'y Gen. No. 046 (2024) 23

SECONDARY SOURCES

131 A.L.R. 1382 24

<u>JURISDICTIONAL STATEMENT</u>

1. The principal issues in this Original Action are: (1) whether the Secretary of State erred in certifying the initiative petition of Local Voters in Charge ("LVC"); and (2) whether the ballot language and popular name of the initiative petition by Local Voters in Charge is sufficient. This Brief only addresses the latter.

2. Supreme Court jurisdiction is appropriate pursuant to Ark. Const. Art. 5, § 1 and Arkansas Supreme Court Rule 6-5(a).

3. Ark. Const. Art. 5, § 1 states "[t]he sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes."

4. Arkansas Supreme Court Rule 6-5(a) states "[t]he Supreme Court shall have original jurisdiction in extraordinary actions as required by law, such as suits attacking the validity of statewide petitions filed under <u>Amendment 7 of the Arkansas Constitution</u>. . . ."

STATEMENT OF THE CASE AND THE FACTS[1]

This is an Original Action challenging, in part, the sufficiency of the ballot title and popular name of the initiative petition by Local Voters in Charge ("LVC" or "sponsor") financed exclusively by the Choctaw Nation of Oklahoma.

In 2018, Arkansas voters legalized casino gaming in Arkansas by passage of Amendment 100 of the Arkansas Constitution. Amendment 100 limited casino gaming to four casino licenses to be issued and regulated by the Arkansas Racing Commission ("ARC"). The licenses are location specific for Garland County, Crittenden County, Jefferson County, and Pope County. The Garland and Crittenden County licenses issued automatically to Oaklawn Jockey Club and Southland Greyhound Park. Downstream Development Authority sought and obtained the Jefferson County license.

To vie for the Pope County casino license, applicants needed the support of the County Judge or Quorum Court of Pope County. In 2019, Pope County Judge Ben Cross decided to support Cherokee Nation Businesses, LLC ("CNB") over various entities including the Choctaw Nation. The Choctaw Nation submitted an

[1] The facts stated hereinafter are either supported by the Petition and exhibits thereto or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Petitioners request the Court to take judicial notice of those facts pursuant to Ark. R. Evid. 201.

application for the casino gaming license in 2019, but it was denied for lack of the required local support.

CNB is the sole owner of Cherokee Nation Entertainment, LLC ("CNE"). On August 13, 2019, Pope County and CNB entered an economic development agreement ("EDA") formally establishing the anticipated long-term relationship between them. The County Judge and Quorum Court's support of CNE and the EDA continue to this day. The Choctaw Nation has funded the initiative petition at issue here to eliminate the Pope County casino license and the perceived competition a Pope County casino may pose to the Choctaw Nation's casino in Pocola, Oklahoma. That casino's front door opens to the Arkansas-Oklahoma state line and lies 91 miles from Russellville. https://www.Choctawcasinos.com/Pocola.

Following this Court's October 2023 decision in *Cherokee Nation Businesses, LLC v. Gulfside Casino Partnership*, the ARC implemented another application process. CNE was the only qualified applicant, i.e., the only applicant with the support of the County Judge or Quorum Court (CNE had both). The Choctaw Nation did not submit an application. CNE, an entity owned by CNB, was awarded the Pope County casino gaming license on June 27, 2024.

On July 31, 2024, Arkansas Secretary of State John Thurston certified the initiative petition submitted by LVC to the ballot for the November 5, 2024, general election. LVC is exclusively funded by the Choctaw Nation. The proposed

amendment would amend Ark. Const. Amend. 100 and revoke the casino gaming license issued to CNE. Nothing in the popular name, ballot title, or the proposed amendment itself states that a license has been issued, identifies the license it is revoking, or identifies the entity (CNE) holding that license. Nothing in the popular name, ballot title, or the proposed amendment itself identifies Choctaw Nation or discloses that the purpose of the proposed amendment is to protect the Choctaw Nation's financial interests.

STANDARD OF REVIEW

The ballot title must be an impartial summary of the proposed amendment, and it must give voters a fair understanding of the issues presented and the scope and significance of the proposed changes in the law. *May v. Daniels*, 359 Ark. 100, 194 S.W.3d 771 (2004); *Scott v. Priest*, 326 Ark. 328, 932 S.W.2d 746 (1996). A ballot title must be free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring. *Parker v. Priest*, 326 Ark. 386, 931 S.W.2d 108 (1996); *Bailey v. McCuen*, 318 Ark. 277, 884 S.W.2d 938 (1994).

The ultimate issue is whether the voter, while inside the voting booth, can reach an intelligent and informed decision for or against the proposal and "understand the consequences of his or her vote based on the ballot title itself." *Roberts v. Priest*, 341 Ark. 813, 821, 20 S.W.3d 376, 380 (2000); *Porter v. McCuen*, 310 Ark. 562, 839 S.W.2d 512 (1992). "The ballot title must accurately reflect the general purposes and fundamental provisions of the proposed initiative, so that an elector does not vote for a proposal based on its description in the ballot title, when, in fact, the vote is for a position he might oppose." *Gaines v. McCuen*, 296 Ark. 513, 519, 758 S.W.2d 403, 406 (1988). "[I]f information omitted from the ballot title is an **essential fact** that would give the voter serious ground for reflection, it must be

disclosed." *Walker v. McCuen*, 318 Ark. 508, 515, 886 S.W.2d 577, 581 (1994) (emphasis added).

The same rules regarding sufficiency of ballot title apply to the popular names, including that it must not be misleading. *Gaines v. McCuen*, 296 Ark. 513, 758 S.W.2d 403 (1988).

ARGUMENT

Local Voters in Charge ("LVC") designed its initiative petition to deceive Arkansas voters into thinking they are voting for something the initiative petition does not do. It does not put local voters "in charge" or provide for any local election process to allow a casino. It does not allow for any additional casino licenses. Instead, it eliminates the now-awarded Pope County casino license; restricts the allowed casino licenses to the current three; and purports to require a local election if another, later amendment passes increasing the three allowed licenses (something it obviously cannot promise). The Choctaw Nation desires to revoke the casino gaming license in Pope County to protect its casino that lies directly on the Oklahoma-Arkansas border near Pocola, Oklahoma, so much that it was the exclusive financer of LVC, contributing over $5,000,000.00 in 2024 alone.

Moreover, the popular name, ballot title, and actual text of the proposed amendment fail to inform voters that a license has been issued, to whom it was issued, that such license is being revoked, and that the EDA, worth millions of dollars to Pope County, will be nullified. They are also silent regarding the primary beneficiary of the proposed amendment: Choctaw Nation. Other deficiencies exist, including that the popular name and ballot title do not disclose numerous conflicts between the proposed amendment and federal law. Arkansas voters certainly would

want to know that a "for" vote harms Pope County to the benefit of the Choctaw Nation of Oklahoma. Accordingly, this measure should be stricken from the ballot.

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

The popular name and ballot title (and even the proposed amendment itself) fail to disclose that a license has already been issued to CNE to conduct casino gaming in Pope County, and that the Choctaw Nation is asking Arkansas voters to revoke that license for the Choctaw's benefit. These are key facts for Arkansas voters. They cannot make an informed, intelligent decision without knowing that they are being asked to revoke an existing license and the effect of that vote.

Knowing that a vote means pulling the license from a current license-holder could certainly give voters pause in the voting booth. Knowing that a vote means completely nullifying a contract – the EDA – worth millions of dollars to Pope County could also give voters pause. An Arkansas voter would further pause if informed that a foreign entity was seeking to eliminate competition from Arkansas for its own financial benefit. But, the popular name and ballot title stand silent on all these critical facts.

This Court has rejected more transparent ballot titles than this one. *Bailey* presented the Court with a ballot initiative that would have restructured and revised the Workers' Compensation Commission and workers' compensation law. 318 Ark. 277, 884 S.W.2d 938 (1994). The Court said: "If we conclude that omitted

information would, if included, give the voter serious ground for reflection on how to vote, this is a material omission and the ballot title is fatally deficient." *Id.* at 285, 884 S.W.2d at 942. That ballot title failed to inform voters "that the caps are completely removed on legal fees connected with appeals." *Id.* This omission was "a material point in that knowledge of this exception to the restriction on fees would give *some* voters serious ground for reflection on how to cast their ballots." *Id.* at 287, 884 S.W.2d at 943 (emphasis added). Thus, the ballot title was held deficient.

Parker addressed a 1996 attempt to authorize casino gaming at two locations in Garland County and two locations in Crittenden County. 326 Ark. 386, 931 S.W.2d 108 (1996). The ballot title there was deficient because it was silent that Oaklawn and Southland were predetermined sites for casino gaming. "[A]lthough some voters will know that these two racetracks are located in Crittenden and Garland Counties, it is clear that the voter will not know from the ballot title that Southland and Oaklawn are two of the three sites specifically designated in the amendment for casino gaming, and that they will therefore benefit greatly from the passage of this measure." 326 Ark. at 390, 931 S.W.2d at 110. In other words, the ballot title should have been more specific to provide the voter with necessary information to make an informed decision. If voters were misinformed then because they were not told that Oaklawn and Southland might benefit from casino licenses allowed in Garland and Crittenden Counties, voters are definitely ill-informed now

by a measure that fails to inform them (a) that it will revoke an existing and issued casino license and (b) that it seeks to protect the Choctaw Nation casino in Oklahoma from Arkansas competition.

The Choctaw Nation exclusively funded this ballot initiative. *Parker* requires ballot initiatives to identify entities that will greatly benefit from a measure. This Court expressed “a distaste for hiding from the voter that private interests will directly benefit from a measure’s passage.” *Id.* at 391, at 931 S.W.2d at 110 (citing *Page v. McCuen*, 318 Ark. 342, 884 S.W.2d 951 (1994)). Not only will the Choctaw Nation in Oklahoma directly benefit from this measure’s passage, it will do so to the detriment of Arkansas and Pope County in loss of tax revenue, jobs, and other economic benefits (*see*, e.g., terms of the EDA). When the voter is in the booth, she will have no idea that she is revoking an existing license, from whom she is taking that license, and who her vote actually benefits.

LVC will likely claim it had no way to know, when drafting the amendment, that CNE would be awarded the casino gaming license on June 27, 2024. But when LVC first submitted its proposed amendment to the Arkansas Attorney General on February 16, 2024, a tremendous amount of water had flowed under the Pope County casino license bridge. Four months prior, this Court had upheld the revocation of the casino gaming license issued to CNB and its wholly owned subsidiary Legends Resort and Casino, LLC (“Legends”) because of an error on the license form, leaving

the ARC to establish a new application period. On January 30, 2024, the ARC adopted new rules for publication for a new application period. On March 4, 2024, the Attorney General rejected LVC's proposed ballot title for its proposed amendment. On March 6, 2024, LVC submitted a revised ballot title, which was subsequently approved by the Attorney General on March 20, 2024.

Throughout all of this, CNE was the only entity that had ever received the constitutionally required support of Pope County. In fact, after this Court issued its October 26, 2023, opinion invalidating a license issued to CNB/Legends (both affiliated with CNE), the County Judge of Pope County issued a letter of support for CNE (wholly owned by CNB) the next day, October 27, 2024. Since August 2019, a Cherokee Nation Businesses entity has continuously possessed the exclusive local support required by the Arkansas Constitution. Importantly, Pope County has patiently waited on the benefits of the EDA since then. LVC and the Choctaw Nation knew this and that an application period was imminent. However, LVC and its financer did not include any language to inform voters of these essential facts.

This Court's standard of review exists to protect the Arkansas voter, not sponsors, financers, or even detractors of proposed amendments. The popular name and ballot title must set forth sufficient information, including all essential facts, for the voter to make an informed decision. *Walker*, 318 Ark. at 515, 886 S.W.2d at 581. Regardless of how unjust the sponsor feels application of this standard may be, all

essential facts must be disclosed to the voter or a ballot title will fail. Poor timing is not an exception to this rule because its purpose is to ensure that voters know the consequences of their votes. The controlling question is: will the voter, by reading the popular name and ballot title, know she is voting to revoke a license that was issued to CNE pursuant to the Arkansas Constitution? The answer is no, and whatever LVC's intentions, the popular name and ballot title fall far short of meeting the standard. For these reasons, the popular name and ballot title are insufficient and the measure should be stricken.

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

The popular name is misleading because it implies that the proposed amendment is only prospective in nature ("repealing authority to issue a casino license in Pope County, Arkansas."). But, the ballot title and the proposed amendment contemplate revoking an existing casino gaming license if one is issued prior to the effective date. Arkansas law prohibits misleading contradiction like that between prospective and retroactive effect.

The same rules regarding sufficiency of ballot title apply to the popular name, including that it must not be misleading. *Gaines*, 296 Ark. at 516, 758 S.W.2d at 404. The popular name of a proposed initiated act must be intelligible, honest, and impartial. *Id.* It must not be misleading or partisan. *Chaney v. Bryant*, 259 Ark. 294, 297, 532, S.W.2d 741, 743 (1976); *Moore v. Hall*, 229 Ark. 411, 414-15, 316 S.W.2d

207, 208-09 (1958). "The popular name is designed primarily to identify the proposal, while the ballot title is designed to adequately summarize the provisions of the proposal and be complete enough to convey to the voter an intelligible idea of the scope and import of the proposal." *Ferstl v. McCuen*, 296 Ark. 504, 509, 758 S.W.2d 398, 400 (1988).

The popular name here does not identify the proposal, in fact, it misidentifies the proposal; reading like a brief summary. Op. Ark. Att'y Gen. No. 034 (2024). LVC and Choctaw Nation avoid informing voters that the measure revokes an existing casino license. The brief summary leads the voter to believe that the proposed amendment is only prospective in nature ("authority *to issue*") rather than retroactive in nature (e.g. "repealing an *issued* casino license). The infinitive "to issue" indicates intended future action, not past. Repealing governmental authority to act in the future and overturning past governmental action are two distinct acts, but the popular name only informs of one. Thus, the popular name misleads and conflicts with the ballot title and proposed amendment, rendering both the popular name and ballot title insufficient.

The popular name also suggests that the measure would allow for "certain new casino licenses" after "local voter approval in a countywide special election," but the proposed amendment extends no such authority. Quite the opposite, the text of the measure prevents issuance of new casino licenses unless there is local voter

approval. But those suggested new casino licenses are disallowed. Any new casino licenses would require another constitutional amendment, that could repeal the vote requirement. Both the popular name and the ballot title obscure this point. In short, the popular name serves to confuse the voters, tricking them into thinking the measure authorizes more casino licenses when it actually reduces them. This means it should fail.

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

The popular name, ballot title, and text of the proposed amendment expressly state that the proposed amendment restricts future amendments, specifically that a local election will be required if a future amendment authorizes additional casinos. It is legally impossible for this amendment to restrict future amendments, which means that the popular name and ballot title are misleading.

The popular name asserts that the proposed amendment will "requir[e] local voter approval in a countywide special election for certain new casino licenses." Similarly, the ballot title states that "if a future constitutional amendment authorizes" new casino licenses "then the quorum court of each county where a casino is to be located shall call a special election by ordinance to submit the question of whether to approve of a casino in the county. . . ." The proposed amendment cannot preemptively repeal a future amendment that may conflict with it. *See* Op. Ark.

Att'y Gen. No. 009 (2024) (citing Amendment 7 as it applies to preemptive repeals). The Attorney General opined:

> Under Amendment 7, the initiative power includes creating new law (as parts of your proposed measure would do) and repealing existing law (as parts of your proposed measure would also do). But nothing in Amendment 7 allows the circulation of petitions asking citizens to support the repeal of a law that does not yet exist. Because such a "preemptive repeal" falls outside the scope of initiatives under Amendment 7, it is misleading to suggest to voters that an initiative could accomplish that goal.

The proposed amendment does just this by attempting to repeal laws that do not yet exist. But the rules of statutory construction provide that if a later amendment conflicts with this proposed amendment, the latter controls. *City of Fayetteville v. Washington County*, 369 Ark. 455, 470, 255 S.W.3d 844, 855 (2007); *see also Wells v. Heath*, 274 Ark. 45, 48, 622 S.W.2d 163, 164 (1981). In short, the proposed amendment contemplates a future amendment while simultaneously expressing that the future amendment could not repeal any part of the proposed amendment, which is an incorrect and misleading statement of law. For these reasons, the popular name and ballot title are insufficient.

IV. Ballot Title Fails to Comport With the Text of Proposed Amendment

Within ten days of submission of an original draft initiative petition, the Attorney General "shall approve and certify or shall substitute and certify a more suitable and correct ballot title and popular name for each amendment or act." Ark.

Code Ann. § 7-9-107(d)(1). On March 20, 2024, the Attorney General edited LVC's proffered popular name and ballot title and certified the edited popular name and ballot title for the Proposed Amendment. *See* Op. Ark. Att'y Gen. No. 046 (2024).

In the ballot title, the Attorney General deleted the phrase "majority of the voters in the county" and substituted "majority of those in the county who vote at the election." *Id.* This change conflicts with the text of the proposed amendment. As a result, while the ballot title was changed, the text of the proposed amendment was not. Simply stated, the ballot title language and the proposed amendment language are inconsistent.

Section 3 of the proposed amendment's text proposes to add subsection (t)(5) to Amendment 100, § 4: "A majority of the voters in the county where the casino is proposed to be located must approve of a casino at the special election." The plain language of the amendment requires a majority of registered voters, not a majority of those actually voting on the measure. "Majority of registered voters" is a substantially higher requirement than a majority of those casting votes. Thus, the ballot title does not accurately reflect the proposed amendment and is insufficient.

Moreover, the text of the proposed amendment, if approved at the November 5th general election, would amend the Arkansas Constitution, but nothing in the ballot title (and because of the substitution, especially not the ballot title) puts the voter on notice of such amendment. The ordinance and special election in the

proposed amendment are analogous to a measure and referendum as contemplated by article 5, § 1 of the Arkansas Constitution and Arkansas Code Annotated § 14-14-905(f)(1). Article 5 states that "[a]ny measure submitted to the people as herein provided shall take effect and become a law when approved by a majority of the votes cast upon such measure, and not otherwise, and shall not be required to receive a majority of the electors voting at such election."

The proposed amendment amends Article 5 by requiring a heightened standard, but nothing in the popular name, ballot title, or the text puts the voter on notice of the heightened standard. *See* 131 A.L.R. 1382; *People ex rel. Davenport v. Brown*, 11 Ill. 478 (1850). Although the Arkansas Supreme Court interpreted similar text to mean only a majority of votes cast, *see Vance v. Austell*, 45 Ark. 400 (1885), it has held this language is "susceptible of two interpretations." *Rockefeller v. Matthews*, 249 Ark. 341, 345, 459 S.W.2d 110, 112 (1970). The law in Arkansas is clear: Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. *Proctor v. Daniels*, 2010 Ark. 206, 392 S.W.3d 360. Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision. *Id.*

The plain language of the ballot title and the plain language of the proposed amendment plainly state two different standards. This conflict, along with the lack

of notice of the potential amendment of the Arkansas Constitution, renders the ballot title misleading and insufficient.

V. Popular Name Fails to Comport With the Text of Proposed Amendment

The Attorney General substituted the popular name of the proposed amendment before certification on March 20, 2024, changing "any new casino license" to "certain new casino licenses." However, the Attorney General did not, and may not, change the text of a proposed amendment. Section 3 of the proposed amendment provides language "Requiring the county quorum court to call a special election on the question of whether to approve of *any future casino* to be located in the county…[.]" (emphasis added). As a result, while the popular name was changed, the text of the proposed amendment was not. Thus, the popular name and the proposed amendment say two different things.

The current popular name, aimed at "certain" licenses, conflicts with the plain language of the proposed amendment, aimed at "any" licenses. Hence, it is misleading. *Chaney*, 259 Ark. at 297, 532 S.W.2d at 743; *Moore*, 229 Ark. at 414-15, 316 S.W.2d at 208-09. Therefore, the measure should be enjoined from appearing on the ballot.

VI. Ballot Title Fails to Disclose Conflicts with Federal Law

A ballot title must inform the voters if the proposed amendment will violate federal law. *Lange v. Martin*, 2016 Ark. 337, at 9, 500 S.W.3d 154, 159. The

proposed amendment would revoke CNE's casino gaming license, a property right protected by both the United States and Arkansas Constitutions, as well as interfere with various contracts. The State, through its process of direct democracy, would be taking a license without giving notice to the public or providing due process to CNE. The ballot title, and even the proposed amendment, is silent on who holds the license or that one has even been issued. In turn, the proposed amendment violates the Takings Clause, Contracts Clause, Equal Protection Clause, and Procedural Due Process Clause of the United States Constitution. U.S. Const. art. I, § 10, cl. 1; *id.* amend. V; *id.* amend. XIV. Likewise, the proposed amendment violates, or at the very least, amends and partially repeals sister clauses of the Arkansas Constitution. However, nothing in the popular name, ballot title, or actual text of the proposed amendment puts the voter on notice of such action. Therefore, the popular name and ballot title are insufficient.

1. Proposed Amendment Violates the Takings Clause

Despite CNE having a protectable property interest in its casino gaming license, the popular name and ballot title (and the proposed amendment) fail to disclose that a license has been issued and that the electorate will be taking CNE's property. The proposed amendment would completely nullify CNE's casino gaming license, an essential fact not known to the voters. Moreover, the ballot title and

popular name also fail to disclose that the proposed amendment will likely effect a taking for which the State (and thus taxpayer funds) must compensate CNE.

The United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Similarly, the Arkansas Constitution, Article 2, § 22 provides that "[t]he right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." The proposed amendment violates both the United States and Arkansas Constitutions.

The Takings Clause has long been recognized to apply to the states. *E.g.*, *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897) (applying the Takings Clause to the states through the Fourteenth Amendment). There are two types of takings: physical and regulatory. A physical taking occurs when the "government physically invades or appropriates private property, whether permanently or temporarily." *301, 712, 2103 and 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1381 (8th Cir. 2022). Looking to the regulatory taking, a federal circuit analyzed: "Because application of the 2005 Amendment to pre-existing liens 'does not present the 'classic taking' in which the government directly appropriates private property for its own use,' *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (alteration in original), any taking in this case would be regulatory in nature." *1256*

Hertel Ave. Assocs., LLC v. Calloway, 761 F.3d 252, 263-64 (2d Cir. 2014); *see also Iowa Assur. Corp. v. City of Indianola*, 650 F.3d 1094 (8th Cir. 2011). The proposed amendment resembles both. But because it is a complete taking, with the property being no longer of any value to CNE upon enactment, the proposed amendment likely constitutes a physical taking. However, the distinction makes no difference. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021). It also does not make any difference the manner in which the government takes the property, whether it be by statute, ordinance, or, as here, a state constitutional amendment. *Id.* "It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* The proposed amendment does this by voiding CNE's casino gaming license.

A movant must show a property interest to satisfy a bedrock requirement of a takings action. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–03 (1984), *Tex. State Bank v. United States*, 423 F.3d 1370, 1378 (Fed.Cir. 2005) (the "'bedrock requirement' of any successful takings challenge" is that the "plaintiffs must identify a property interest cognizable under the Fifth Amendment."). "Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Town of*

Castle Rock v. Gonzales, 545 U.S. 748, 756–57 (2005) (internal quotation marks omitted).

While an applicant for a license generally has no property interest, once awarded, a licensee has an interest in maintaining their license. *Stauch v. City of Columbia Heights*, 212 F.3d 425 (8th Cir. 2000). "One manner in which state law can create a property interest is by establishing procedural requirements that impose substantive limitations on the exercise of official discretion." *Id.* at 429. The Eighth Circuit found "that the licensing scheme which limits the City's discretion to deny renewal, creates a protected property interest." *Id.* at 430. Further, "[t]he rights to sell, assign, or otherwise transfer are traditional hallmarks of property." *Conti v. United States*, 291 F.3d 1334, 1341 (Fed.Cir.2002) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). In fact, this Court has previously acknowledged that the Cherokee has an interest "in the license, having its license application considered, and its contract with Pope County." *Cherokee Nation Businesses, LLC v. Gulfside Casino P'ship*, 2021 Ark. 17, 8, 614 S.W.3d 811, 816. Of course, that interest crystallized when CNE was awarded the license on June 27, 2024.

Ark. Const. Amend. 100, the Arkansas Code, and the Casino Gaming Rules establish that CNE has a property right in the casino gaming license. Consider the following provisions:

- Amendment 100 states that the Arkansas Racing Commission “shall issue four casino licenses.” Ark. Const. Amend. 100, § 4(i).
- Amendment 100 expressly contemplates a licensee transferring the license to another entity. Ark. Const. Amend. 100, § 4(e)(12); Casino Gaming Rule 2.13.16.
- Amendment 100 places various requirements on the casino licensee/applicant (including demonstrating experience in casino gaming) and also provides that “[c]asino licensees are required to conduct casino gaming for as long as they have a license.” Ark. Const. Amend. 100, § 4(l).
- Amendment 100 leaves no discretion regarding license renewal: “The Arkansas Racing Commission **shall** issue a renewal casino license within ten days to any licensed casino that complies with the requirements contained in this Amendment, including without limitation the payment of the casino license renewal fee, which shall not exceed $10,000. Casino licenses **shall** be renewed every ten years.” Ark. Const. Amend. 100, § 4(q) (emphasis added).
- The Casino Gaming Rules address renewals: “The Commission may deny an application for or renewal of a license for any of the following reasons: (i) Failure to provide the information required in these Rules; (ii) Failure to meet the requirements set forth in these Rules; (iii) Providing misleading, incorrect, false, or fraudulent information with the intent to deceive.” Casino Gaming

Rule 2.13.12(a). With these provisions, the ARC leaves itself no discretion to deny renewal if these three boxes are checked, and these boxes are objective criteria.

- The Casino Gaming Rules give the licensee a right to a hearing in front of the commission (and thereafter to the Circuit Court) after a denial of renewal, transfer of ownership, and transfer of location. Casino Gaming Rule 2.13.18.
- Ark. Code Ann. § 25-15-211(c) states in regards to negative actions against a license: "No revocation, suspension, annulment, or withdrawal of any license is lawful unless the agency gives notice by mail to the licensee of facts or conduct warranting the intended action and unless the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license."
- Ark. Code Ann. § 25-15-211(b) addresses renewals and places limitations on the effects of a denial of renewal: "When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally determined by the agency and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order, or a later date fixed by order of the reviewing court."

No greater assurance of a right exists than one prescribed by a constitution, here Amendment 100 of the Arkansas Constitution, particularly its mandate of licensure for a ten-year period with renewal required if objective standards are met. The use of the word "shall" in the language of the Amendment addressing renewal leaves no discretion. Amendment 100 never describes the license as a privilege nor does it give the ARC discretion in terminating a license or even denying the renewal or transfer of a license. It allows the sale or transfer of the license, the hallmark sign of property. There is no question that Amendment 100 itself creates a protected property interest. Additionally, the objective criteria set forth in the Casino Gaming Rules and the protections guaranteed by Ark. Code Ann. § 25-15-211 for license holders further support a property interest in a license.

Stated differently, consistent with the rights guaranteed by Amendment 100, the procedural requirements operate as significant and substantive restrictions on the government. Thus, the Amendment, and the relevant Casino Gaming Rules and Arkansas Code, create more than a unilateral expectation in their express provisions regarding renewal and protection of a casino gaming license, and therefore a property right exists.

Further, in addition to the property interest in the license, CNE also has a property interest in the business, relationships, and contracts that have been established through lawful use of that license. "Valid contracts are property, whether

the obligor be a private individual, a municipality, a state, or the United States." *Lynch v. United States*, 292 U.S. 571 (1934). Importantly, in addition to substantial limitations on official discretion creating a property interest as outlined above, an understanding between an entity and the state can create a property interest. *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716 (8th Cir. 1995) (finding a state can create a protectable property interest in a number of ways, including (1) expressly identifying a protected property interest; (2) imposing substantial limitations on the exercise of official discretion; and (3) by understandings between the state and the other party).

In addition to Amendment 100's plain language and the substantial limitations on the exercise of official discretion imposed by Amendment 100, the Arkansas Code, and the Casino Gaming Rules, CNB and CNE's contract with Pope County, a political subdivision of the State, constitutes an "understanding" sufficient to create a protectable property interest. A contract with a state entity can give rise to a property right protected under the Due Process Clause. *Perry v. Sindermann*, 408 U.S. 593, 599–601 (1972) (a professor's contract that could be terminated only for cause constituted a property right protected by the 14th Amendment), *see also Omni Behavioral Health v. Miller*, 285 F.3d 646 (8th Cir. 2002). The contract with Pope County, a political subdivision of the State, sets forth obligations on all parties and

cannot be terminated at will by the County. Thus, the contract creates a property right.

Likewise, CNE has an understanding with the State of Arkansas through the ARC and the Casino Gaming Rules (*see infra* Section VIII.2 for detailed analysis on the contract with ARC). Pursuant to Casino Gaming Rule 2.13.9(b), CNE was required to demonstrate the following to the ARC: (1) experience conducting casino gaming; (2) a timeline for opening a casino; (3) proof of financial stability and access to financial resources, including but not limited to legal sources of finances immediately available to begin operating a casino; and (4) a detailed summary of proposed casino including hotel, amenities, projected number of employees, and any other information the casino applicant deems relevant. As evidenced by the issuance of the license, CNE satisfied these criteria, including providing a detailed timeline of the development and the project which is currently underway. CNE is required to abide by the timeline and representations it has made to the ARC. This constitutes an understanding between the State of Arkansas and CNE (an implied-in-fact contract), an understanding that should not be abridged by a proposed amendment that never gives voters notice of CNE's interests and the substantial monetary loss it will suffer if the proposed amendment is enacted.

Because CNE has a property right in its license, in its contract with Pope County, and in its understanding with the ARC, the proposed amendment, if adopted,

would constitute a taking of that property right. And importantly, nothing in the text of the proposed amendment gives any indication that such a taking will be for "public use." A governmental taking that is not for public use is absolutely forbidden, regardless of whether compensation is given. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477-78 (2005). Governments are also prohibited from taking property "under the mere pretext of a public purpose[.]" *Id.* "The federal constitutional analysis of public use . . . requires two steps: whether the use is legitimate and public in nature, and whether the means are rational." *Milligan v. City of Red Oak*, 230 F.3d 355, 359 (8th Cir. 2000) (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984)). Here, the taking is not for public use, nor is such taking legitimate and rational. As stated in other parts herein, nothing in the ballot title, popular name, or proposed amendment includes any rationale as to why the proposed amendment revokes one casino license in the name of local control while simultaneously leaving three other casino licenses intact.

The popular name and ballot title do not even inform voters that a license has been issued or to whom it has been issued. The popular name and ballot title do not inform the electorate that the proposed amendment would constitute an illegal taking or, in the alternative, that the State, and thus taxpayers, could potentially be liable to pay CNE significant compensation for the taking. Thus, the popular name and ballot title are insufficient.

2. The Proposed Amendment Violates Procedural Due Process

The United States Constitution prohibits States from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), quoting *Baldwin v. Hale*, 68 U.S. 223 (1863).

Likewise, the Arkansas Constitution provides that "[n]o person shall be deprived ... of his life, liberty, or property" without due process of law. Ark. Const. art. 2, § 21. Due process requires at a minimum that a person be given notice and a reasonable opportunity for a hearing before he or she is deprived of property by state action. *See Washington v. Thompson*, 339 Ark. 417, 425, 6 S.W.3d 82, 87 (1999). "A valid due-process claim consists of four elements: action under color of state law; a right, privilege, or immunity secured by the constitution such as property; a loss of property amounting to a deprivation; and an absence of due process." *City of Little*

Rock v. Alexander Apartments, LLC, 2020 Ark. 12, 8, 592 S.W.3d 224, 230 (citing *Sanford v. Walther*, 2015 Ark. 285, at 9, 467 S.W.3d 139, 146).

As explained above, CNE has a property interest in its casino license, and the proposed amendment revokes CNE's casino license with no opportunity for CNE to be heard on its compliance with the laws governing the license. Nothing in the ballot title, popular name, or proposed amendment puts voters on notice of such action. For the voter to know it is stripping an existing license away from an entity, the voter must look outside of what is in front of her at the ballot box. Similarly, the popular name, ballot title, and proposed amendment do nothing to alert voters that a vote in support of the proposed amendment likely strips CNE of its right to Procedural Due Process in violation of the Fourteenth Amendment of the federal Constitution and the sister clause in the Arkansas Constitution. Quite the opposite, the popular name implies that the proposed amendment's effect would only be prospective (repealing authorization "to issue" casino license in the future). Therefore, the popular name and ballot title are insufficient, and the proposed amendment should be stricken from the ballot.

3. Proposed Amendment Violates the Contracts Clause

The United States Constitution sets forth that states shall not pass laws impairing contracts. U.S. Const. Art. I § 10, cl. 1. Similarly, the Arkansas

Constitution, Article 2, § 17, states that "[n]o bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed …."

A three-part test determines whether the federal Contract Clause has been violated: (1) whether state law operates as a substantial impairment on a pre-existing contractual relationship; (2) if so, whether the state has a significant public purpose behind the law or regulation; and (3) if there is no significant public purpose, then the law is unconstitutional, but if one exists, the issue then becomes "whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Equip. Mfrs. Inst. 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)).

The proposed amendment, if adopted, would substantially interfere with CNB's and CNE's contracts with vendors, contractors, and government entities, specifically the EDA with Pope County, which among other provisions requires CNB and CNE to perform. "Total destruction of a contract is 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). The proposed amendment, if adopted, would completely nullify, or at the very least substantially interfere with, the EDA with Pope County.

Further, an implied-in-fact contract between CNE and the ARC exists. *Hawkeye Commodity Promotions, Inc. v. Miller*, 432 F.Supp.2d 822 (2006). An implied contract is proven by circumstances showing the parties intended to contract or by circumstances showing the general course of dealing between the parties. *Crown Custom Homes, Inc. v. Buchanan Servs., Inc.*, 2009 Ark. App. 442, 6, 319 S.W.3d 285, 289 (citing *Steed v. Busby*, 268 Ark. 1, 593 S.W.2d 34 (1980)). Amendment 100 states that the ARC "shall issue a renewal casino license within ten days to any licensed casino that complies with the requirements contained in this Amendment, including without limitation the payment of the casino license renewal fee, which shall not exceed $10,000. Casino licenses shall be renewed every ten years." Ark. Const. Amend. 100, § 4(q). The plain language of Amendment 100 indicates the clear requirement and intention of the ARC to contract with CNE for the continuing renewal of the casino license. Because the implied-in-fact contract is for a set number of years with renewal mandatory thereafter if objective criteria are satisfied, the implied-in-fact contract is subject to the protections afforded by the United States Constitution. *Hawkeye*, 432 F.Supp.2d at 846. The proposed amendment would nullify these contracts and the ten-year licensure guaranteed to CNE by the Arkansas Constitution.

The extent of substantial impairment is even greater when it is not reasonably foreseeable. *Janklow*, 300 F.3d at 855. This substantial impairment was not

foreseeable at the time of execution of the contracts. Again, Amendment 100 sets a term of 10 years, does not allow discretion in the renewal or termination of the license, and requires the licensee to operate a casino. Although previous regulations in an industry may impact the foreseeability of an impairment, an amendment to the Arkansas constitution is not a mere regulation and is no simple alteration of CNE's contractual relationships. For example, an amendment to the Arkansas Constitution requires much more than a change of regulation by a regulatory body, the latter which may be foreseen or at least anticipated. *See id.*

Since a substantial impairment exists, the State must show that the regulation protects a "broad societal interest rather than a narrow class." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978). "[I]f a State undertakes to alter substantially the terms of a contract, it must justify the alteration, and the burden that is on the State varies directly with the substantiality of the alteration." *White Motor Corp. v. Malone*, 599 F.2d 283, 287 (8th Cir. 1979). The measure here does not have any public purpose and, in fact, does not set forth any purpose at all. "There is no statement of legislative intent or any other legislative history from which to directly ascertain the purpose of the [proposed amendment]." *See Janklow*, 300 F.3d at 860. In fact, the popular name and ballot title do not even disclose the primary intent of the measure: revoking CNE's license. Laws that substantially impair pre-existing contractual relationships must deal with a broad, generalized economic or social

problem in order to survive a challenge under the Contract Clause. *Am. Fed'n of State, Cnty. & Mun. Emps. v. City of Benton*, 513 F.3d 874, 882 (8th Cir. 2008). Laws that withstand scrutiny under the Contract Clause advance a "broad social interest" while invalid laws "directly adjust the rights and responsibilities of contracting parties." *Janklow*, 300 F.3d at 861 (holding that legislation providing restrictions for dealership contracts for machinery which intended to level the playing field between manufacturers and dealers did not serve a legitimate public purpose). Removing one county from Amendment 100's licensure mandate and revoking CNE's license does not constitute a broad societal interest, particularly when the other three casino licenses in three other counties remain unchanged and the only funding for the proposed amendment comes from an out-of-state entity like the Choctaw Nation. Because there is no significant public purpose for the proposed amendment, it violates the state and federal Contracts Clauses.

In addition to the State not being able to satisfy its burden (which is required to even move to the third prong), a complete nullification of CNE's casino gaming license and the contracts is invalid under the third prong of the Contracts Clause test, which requires the impairment to be based upon "reasonable conditions." The proposed amendment does nothing to address the interference it ultimately imposes upon the license holder CNE and other contracting parties like Pope County. Even if Respondent or Intervenors can offer some *post hoc* rationalization that the

proposed amendment benefits a public purpose, the Supreme Court has recognized the difference between generally applicable laws that "advance a broad societal interest" and those "limited in effect to contractual obligations or remedies." *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991) (quoting *Exxon Corp. v. Eagerton,* 462 U.S. 176, 191 (1983)). The proposed amendment is limited in effect to threatening CNE's pre-existing contractual interests and obligations related to its license. It will completely abrogate CNE's interests along with its contracts without any type of compensation or public purpose. Per the text of the proposed amendment, one day CNE will be a license holder with numerous enforceable contracts and the next day nothing.

For these reasons, 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). The popular name and ballot title do not disclose this fact to voters. Therefore, the popular name and ballot title are insufficient.

4. Proposed Amendment Violates Equal Protection Clause

"Equal protection under the law is guaranteed by the Fourteenth Amendment to the United States Constitution and by article 2, §§ 2, 3, and 18 of the Arkansas Constitution." *Ray v. State*, 2017 Ark. App. 574, 4, 533 S.W.3d 587, 590. For an equal-protection challenge to succeed, there must first be a determination that there

is a state action which differentiates among individuals. *Arnold v. State*, 2011 Ark. 395, 384 S.W.3d 488. Further, the plaintiff and others must be similarly situated in all relevant respects. *Bills v. Dahm*, 32 F.3d 333, 335 (8th Cir. 1994).

Amendment 100 requires the issuance of four licenses, and there are currently four license holders, including CNE. Undoubtedly all four license holders are similarly situated in all relevant respects and share indistinguishable interests in their rights and status as license holders. The proposed amendment treats CNE differently from the other license holders because it arbitrarily revokes CNE's Pope County casino license while leaving valid the casino licenses in Crittenden, Jefferson, and Garland Counties. Equal protection requires that if distinctions between similarly situated persons do exist, the distinctions must have "relevance to the purpose for which classification was made," and must not be "so disparate as to be arbitrary." *See Akers v. State*, 2015 Ark. App. 352, 464 S.W.3d 483. Here, the disparate treatment has no relationship to a rational governmental objective. No rational governmental objective is served by eliminating casino gaming in Pope County while allowing it to continue in three other counties. The ballot title, popular name, and the proposed amendment do not give any reason for revoking one license but leaving three licenses remaining.

The popular name and ballot title tout local control but not for counties where other casino gaming licenses exist. The popular name and ballot title proposed by

LVC implies that counties get to decide whether to have a casino or not. But nothing in the text of the proposed amendment gives voters in Crittenden, Jefferson or Garland Counties any power to decide anything. Rather, the proposed amendment's express language and its primary, albeit hidden, purpose is to revoke the therein unnamed casino license issued to CNE. Stated simply, the entire purpose of the proposed amendment is disparate treatment. Similarly, the proposed amendment imposes disparate treatment by affecting and interfering with contracts of CNB and CNE while doing nothing to contractual relationships to the other license holders.

In short, the proposed amendment's disparate treatment has no real purpose and is therefore arbitrary. The proposed amendment is not rationally related to achieving any legitimate governmental objective. For these reasons, the proposed amendment, if adopted, would likely violate the Equal Protection Clause of the United States Constitution. The popular name and ballot title do not disclose this fact 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, in the alternative, that this Court order votes on such not be counted.

Respectfully submitted,

PETITIONERS

By: /s/Bart W. Calhoun

Bart W. Calhoun (2011221)
Scott P. Richardson (2001208)
Brittany D. Webb (2023139)
MCDANIEL WOLFF, PLLC
1307 West Fourth Street
Little Rock, Arkansas 72201
Telephone: (501) 954-8000
scott@mcdanielwolff.com
bart@mcdanielwolff.com
bwebb@mcdanielwolff.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
Little Rock, Arkansas 72201
Telephone: (501) 379-1700
jtull@qgtlaw.com
cchiles@qgtlaw.com
ryounger@qgtlaw.com
mcausey@qgtlaw.com
glarkin@qgtlaw.com

David A. Couch (85033)
DAVID A. COUCH PLLC
5420 Kavanaugh, #7530
Little Rock, Arkansas 72217
Telephone: (501) 661-1300
david@davidcouchlaw.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 8,541 words.

/s/ Bart Calhoun
Bart Calhoun