CV-24-492

IN THE ARKANSAS SUPREME COURT

JENNIFER MCGILL, individually and on behalf of the ARKANSAS CANVASSING COMPLIANCE COMMITTEE; & 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

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STATEMENT OF THE CASE AND THE FACTS

In 2018, Arkansas voters approved Amendment 100 to the Arkansas Constitution and authorized the Arkansas Racing Commission ("ARC") to issue casino licenses for casino gaming in four counties, including one for Pope County. Litigation over that license has been ongoing ever since.

In 2019, the ARC awarded the Pope County license to Gulfside Casino Partnership ("Gulfside"). Cherokee Nation Businesses, LLC—the sole owner of Cherokee Nation Entertainment, LLC or "CNE"—successfully challenged that decision in this Court. *See Cherokee Nation Businesses, LLC v. Gulfside Casino P'ship*, 2021 Ark. 183, 632 S.W.3d 284. Following this Court's decision, the ARC met and in November 2021, it awarded the license to CNB.

Gulfside then sought a declaratory judgment that the ARC acted unconstitutionally, thereby rendering CNB's license void. The circuit court agreed, and on appeal to this Court, the decision was affirmed. *See Cherokee Nation Businesses, LLC v. Gulfside Casino P'ship*, 2023 Ark. 153, 676 S.W.3d 368. As a result, the ARC reopened the application process for the Pope County casino license in the fall of 2023.

In January 2024, Local Voters in Charge ("LVC") registered as a ballot question committee for the purpose of sponsoring a proposed constitutional amendment to require local voter approval for certain new casino licenses and to repeal authority to issue a casino license in Pope County, Arkansas (hereinafter, the "Proposed Amendment").

On February 16, 2024, LVC submitted the popular name, ballot title, and full text of the Proposed Amendment to the Arkansas Attorney General as required by Ark. Code Ann. § 7-9-107(a). The office of the Attorney General rejected LVC's submission. *See* Op. Ark. Att'y Gen. No. 34 (2024).

After revision and resubmission by LVC, the office of the Attorney General revised the proposed popular name and ballot title. *See* Op. Ark. Att'y Gen. No. 46 (2024); Intv. Add. 6. In particular, deputy Attorney General William Olson, changed the phrase "majority of the voters in the county" in the ballot title to "majority of those in the county who vote at the election." *Id.*; Intv. Add. 8. He also swapped the word "any" with "certain" in reference to the counties where the Proposed Amendment requires a countywide special election before any new casino licenses

could be issued. *Id.*; Intv. Add. 9-10. Mr. Olson made some minor grammatical changes as well. *Id.*; Intv. Add. 10.

The Attorney General's Office then certified the substituted popular name and ballot title. *Id.*; Intv. Add. 10-11. The certified popular name and ballot title state in whole[1]:

Popular Name

An amendment requiring local voter approval in a countywide special election for certain new casino licenses and repealing authority to issue a casino license in Pope County, Arkansas.

Ballot Title

> An amendment to the Arkansas Constitution, Amendment 100, § 4, subsection (i) to reduce the number of casino licenses that the Arkansas Racing Commission is required to issue from four to three; amending Amendment 100, § 4, subsections (k) through (n) to repeal authorization for a casino in Pope County, Arkansas and to repeal the authority of the Arkansas Racing Commission to issue a casino license for Pope County, Arkansas; amending Amendment 100 § 4, to add subsection (s), providing that if 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

[1] The full text of the Proposed Amendment is contained in Intervenors' Addendum. *See* Intv. Add. 2.

effective date of this Amendment; amending Amendment 100 § 4, to add subsection (t), providing that if a future constitutional amendment authorizes the issuance of a casino license in any county other than those issued now or hereafter for Crittenden County (to Southland Racing Corporation), Garland County (to Oaklawn Jockey Club, Inc.) and Jefferson County (to Downstream Development Authority of the Quapaw Tribe of Oklahoma and later transferred to Saracen Development, LLC), 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; amending Amendment 100 § 4, to add subsection (t)(l)-(3), setting the date for the special election and requiring the ordinance calling the special election to state the election date and to specify the format of the question on the ballot as "FOR a casino in [ ] County" and "AGAINST a casino in [] County," and, "The question presented to voters must include whether or not a casino may be located in the county"-"A casino is defined as a facility where casino gaming is conducted"; amending Amendment 100 § 4, to add subsection (t)(4), requiring the county board of election commissioners to publish the ordinance calling the special election as soon as practicable in a newspaper of general circulation in the county in which the special election is held; amending Amendment 100 § 4, to add subsection (t)(5), requiring a majority of the voters in any county where any future casino is proposed to be located to approve of the casino at the special election before the Arkansas Racing Commission, or other governing body, may accept any applications for a casino license in that county; making this Amendment effective on and after November 13,

> 2024; providing that the provisions of this Amendment are severable in that if any provision or section of this Amendment or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application; and repealing all laws or parts of laws in conflict with this Amendment.

On July 31, 2024, Respondent certified the sufficiency of the initiative petition for the Proposed Amendment for the November 5, 2024 general-election ballot. Just 34 days prior, on June 27, 2024, the ARC awarded the Pope County casino license to CNE.

Armed with the newly issued license, on August 1, 2024, CNE along with Jennifer McGill, individually and on behalf of the Arkansas Canvassing Compliance Committee (collectively, "Petitioners"), filed this Original Action, seeking to prevent the Proposed Amendment from reaching the voters. Count 1 of the petition contends the number of signatures collected in support of the initiative petition is insufficient. *See* Orig. Action Pet. at 6-14. Count II contends that both the popular name and ballot title are deficient. *See* Orig. Action Pet. at 14-29. The signature challenge contained in Count I has been bifurcated from Count II, which is briefed here.

ARGUMENT

Petitioners' challenge to the sufficiency of the popular name and ballot title is one in name only. The arguments made by Petitioners about the ballot title—that it should tell voters that CNE holds the license, that it impermissibly repeals future law, and that it does not comport with the text of the Proposed Amendment—are easily disposed of by the familiar standards governing the Court's review of ballot titles. The same is true for the arguments advanced about the popular name, which is held to an even lower standard and serves to simply identify the proposal for discussion prior to the election.

In reality, the thrust of Petitioners' challenge is one to the substance of the Proposed Amendment itself—specifically to its constitutionality in light of the Takings Clause, Contracts Clause, Equal Protection Clause, and Procedural Due Process Clause of the United States Constitution. (Pets. Br. at 25-44) This challenge, however, is premature. The Proposed Amendment has not been approved by the voters, and thus its merits are not up for decision at this juncture. *Cox v. Martin*, 2012 Ark. 352, at 12, 423 S.W.3d 75, 84 (stating in the context of a ballot-title challenge, "We will not entertain substantive challenges to

a proposed measure."). Thus, the Court should not address the arguments raised in the latter half of Petitioners' brief.

If the Court were to do so, however, each of Petitioners' constitutional arguments fails on the merits. This is because they all ignore a fundamental legal tenet: a license to conduct gambling activities is a privilege, not a right. Almost 60 years ago, this Court explained: "It is well recognized by all authorities that a franchise granted by the State to conduct dog racing, just as a franchise to sell liquor, is a privilege and not a property right. The State gives the privilege, and it can take away that privilege by the same token." *Spa Kennel Club, Inc. v. Dunaway*, 241 Ark. 51, 54, 406 S.W.2d 128, 130 (1966). The state's regulation of gambling, which may include an outright ban, has long been deemed a valid exercise of its core police powers. *See Douglas v. Kentucky*, 168 U.S. 488, 502 (1897) (stating that "a lottery grant is not, in any sense, a contract within the meaning of the Constitution of the United States, but is simply a gratuity and license, which the State, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery"). Indeed, the ARC Casino Gaming Rules expressly warn that the license is a "revocable privilege."

When put in the proper context, the Proposed Amendment poses no conflict with federal constitutional law even though it may revoke CNE's license, resulting in significant financial loss. Courts across the country, including the U.S. Court of Appeals for the Eighth Circuit, have come to this very conclusion under analogous circumstances. *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430 (8th Cir. 2007) (holding that an Iowa law banning a form of gaming called "TouchPlay" did not violate the Takings Clause, Contracts Clause, Due Process Clause or Equal Protection Clause); *see also Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193 (N.D. Fla. 2020) (holding that a constitutional amendment outlawing dog racing was not a taking, an impairment of contracts, a violation of equal protection, or denial of due process). The same result should follow here. Petitioners have presented no compelling argument or authority for the Court to conclude otherwise.

For all of these reasons, and as more fully discussed herein, the popular name and ballot title are sufficient for inclusion on the November 5, 2024 ballot. The petition should be denied.

Standard of Review

The sufficiency of a ballot title is a matter of law to be decided by this Court. *Knight v. Martin*, 2018 Ark. 280, at 7, 556 S.W.3d 501, 507 (citations omitted). "The most significant rule in determining the sufficiency of the title is that it be given a liberal construction and interpretation in order that it secure the purposes of reserving to the people the right to adopt, reject, approve, or disapprove legislation." *Id.*; *see also Armstrong v. Thurston*, 2022 Ark. 167, at 17, 652 S.W.3d 167, 178–79 ("It is for the people—not this court—to exercise the right to amend the constitution, and our court must continue to preserve this first power of the people of Arkansas by not supplanting their decisions with ours.") (Wood, J., concurring).

As such, the ballot title need not contain a synopsis of the proposed amendment or cover every detail of it, and the Court has long recognized the impossibility of preparing a ballot title that would suit everyone. *Cox v. Daniels*, 374 Ark. 437, 288 S.W.3d 591 (2008) (citing *May v. Daniels*, 359 Ark. 100, 194 S.W.3d 771 (2004)). "[T]he ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and informed decision for or against the proposal and understands the

consequences of his or her vote based on the ballot title." *May*, 359 Ark. at 107, 194 S.W.3d at 777 (citing *Roberts v. Priest*, 341 Ark. 813, 20 S.W.3d 376 (2000); *Porter v. McCuen*, 310 Ark. 562, 839 S.W.2d 512 (1992)). Petitioners bear the burden of proving that the ballot title and popular name are misleading or insufficient. Ark. Const., art. 5, § 1.

I. The Ballot Title Sufficiently Informs Voters that a Casino License Issued for Pope County Before the Passage of the Proposed Amendment Will Be Revoked.

Here, Petitioners ask the Court to remove the proposed amendment from the upcoming election because the ballot title fails to tell voters that the ARC has already issued a casino license to CNE in Pope County and that the Proposed Amendment would mean "pulling the license from a current license-holder." (Pets. Br. at 15) This argument should be rejected.

The ballot title tells the voter in no uncertain terms that if a casino license has been issued, the Proposed Amendment revokes it. The ballot title clearly states: "[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 a voter reads this

language while inside the voting booth, he or she will be able to make an intelligent, informed decision and discern that a vote "for" the Proposed Amendment will revoke the current casino license held for Pope County. The ballot title is therefore sufficient.

Contrary to Petitioners' argument, the ballot title is not required to specifically name CNE as the current license holder, explain the hypothetical downstream effects of the license's revocation, or reveal that the Choctaw Nation is purportedly behind the effort to revoke CNE's license. (Pets. Br. at 15-16) As this Court has reiterated numerous times, ballot titles do not have to include "every possible consequence or impact of a proposed measure" or "account for every possible occurrence that might impose some effect upon the amendment's operation, particularly those that are speculative." *Stiritz v. Martin*, 2018 Ark. 281, at 7-8, 556 S.W.3d 523, 529. Nor are ballot titles required to summarize the current state of the law. *See Cox*, 374 Ark. at 448, 288 S.W.3d at 598 (holding that a ballot title for a proposed amendment to enact laws to establish and regulate state lotteries was not required to state that such lotteries were currently banned or provide a summary of the law on lotteries); *Becker v. Riviere*, 270 Ark. 219, 604 S.W.2d 555 (1980) (holding that the ballot title

for a proposed amendment to abrogate the limit on interest rates was not required to state the current limit on interest rates or to summarize Arkansas law on usury). Further, the Court's review of the ballot title does not include analyzing the impact of the proposed measure. *See Armstrong*, 2022 Ark. 167, at 14, 652 S.W.3d at 177 ("Assessing the impact, if any, of the proposed amendment [to legalize recreational marijuana] on the industrial-hemp industry is beyond the scope of our review of the ballot title.")

These well-established principles take on added importance here where the state of the law and the holder of the license have been in litigation limbo for years. As noted above, the Pope County casino license was first awarded to Gulfside 2019, then taken away in 2021; it was then awarded to CNB in 2021 but taken away in 2023; and then the license was awarded to CNE—notably, a different entity than CNB—less than two months ago. Still, even now, another lawsuit is pending and seeks "a declaration that the casino gaming license issued to CNE by the Arkansas Racing Commission is void[.]" *See Gulfside Casino P'ship v. Cherokee Nation Business, LLC, et al.,* Case No. 4:24-cv-592-LPR (E.D. Ark. July 16, 2024). While Petitioners understandably want CNE's status

as the license holder to be a foregone conclusion, that is simply not the reality of the situation. To now require LVC to have predicted the specific entity holding the license (if any) at the start of the petition process would be unreasonable, if not impossible. The law does not require a crystal ball or a ballot title catered to CNE. *Cox*, 374 Ark. at 443, 288 S.W.3d at 595 (recognizing the impossibility of drafting a ballot title that would suit everyone).

The case law cited by Petitioners on this point does not move the needle. In *Bailey v. McCuen*, 318 Ark. 277, 884 S.W.2d 938 (1994), the proposed amendment would have unquestionably changed the way workers' compensation laws are to be construed—from a strict construction to a liberal one—but the ballot title made no mention of that change. That is not the case here. The ballot title clearly and matter-of-factly tells voters that the Proposed Amendment will take away any current casino license issued for Pope County.

As for *Parker v. Priest*, 326 Ark. 123, 930 S.W. 2d 322 (1996), Petitioners stretch its holding beyond any bounds sanctioned by this Court. Petitioners assert, "*Parker* requires ballot initiatives to identify entities that will greatly benefit from a measure." (Pets. Br. at 17). No

court, let alone this Court, has construed *Parker* to require ballot titles to include a list of possible benefactors. No cultivators or dispensaries were disclosed in the ballot title for the measure seeking to legalize recreational marijuana, even though they surely obtained a direct benefit, just to name one example.

Indeed, to do what Petitioners are asking here—inform voters that the Choctaw Nation is allegedly trying to revoke CNE's license for its own benefit—would require injecting the very type of biased, tinged, and inflammatory language that this Court has admonished against. *See Arkansas Women's Pol. Caucus v. Riviere*, 283 Ark. 463, 468, 677 S.W.2d 846, 849 (1984) (rejecting a ballot title that contained partisan coloring and a biased view of the merits of the proposal). Such a result is untenable.

Thus, for all of these reasons, Petitioners' arguments must fail.

II. The Popular Name Identifies the Proposal and Is Not Misleading as to the Revocation of the Existing Casino License for Pope County.

Petitioners argue that the popular name is misleading because again, it does not state that a license has already been issued and instead

"implies that the proposed amendment is only prospective in nature." (Pets. Br. at 19). This argument is without merit.

As a threshold matter, contrary to Petitioners' assertion, the rules for the ballot title are not the same as those for a popular name. *See* Pets. Br. at 13. It is well-established law that an initiative's popular name is not held to the same standard as ballot titles. It need not contain the same level of detail or description as the ballot title. *May*, 359 Ark. at 104–05, 194 S.W.3d at 775–76 ("The popular name is not held to the same stringent standards and need not be as explicit as a ballot title[.]"); *Parker,* 326 Ark. 123, 930 S.W.2d 322 (1996) ("The popular name is primarily a useful legislative device that need not contain the same detailed information or include exceptions that might be required of a ballot title.") The popular name serves to identify the proposal and facilitate discussion of it among the electorate. *May*, 359 Ark. at 104, 194 S.W.3d at 775 (citation omitted). In fact, "because so little is required of a popular name, [the Court has] *never* held a proposed measure invalid solely because of an incomplete description of the act by the popular name." *Stiritz*, 2018 Ark. 281, at 7-8, 556 S.W.3d at 529 (citation omitted) (emphasis added).

Furthermore, the ballot title and popular name must be considered together to determine the popular name's sufficiency. *Knight*, 2018 Ark. 280, at 6, 556 S.W.3d at 506. Thus, where the popular name omits information that is otherwise contained in the ballot title, the Court has deemed the popular name sufficient. In *Knight*, for example, the Court rejected the petitioners' argument that the popular name was misleading because it did not include the proposed amendment's effect on alcohol sales and sports wagering. Although that information was not in the popular name, it was included in the ballot title. Thus, the Court held that when the popular name was read together with the ballot title, it was sufficient and "offer[ed] voters a clear and concise way to identify the measure to be considered." 2018 Ark. 280, at 6, 556 S.W.3d at 506.

The same reasoning and rules applied in *Knight*, apply here. Although the popular name does not explicitly state that the proposed amendment will revoke an existing casino license for Pope County, the ballot title unquestionably does. Thus, when the popular name is read together with the ballot title, it is sufficient and not misleading. Petitioners' argument about the popular name is without merit.

III. The Popular Name and Ballot Title Do Not Preemptively Repeal Future Constitutional Amendments and Are Not Misleading.

Next, Petitioners contort the language of the popular name, ballot title, and Proposed Amendment to argue that it misleads voters into thinking that the Proposed Amendment will repeal a future constitutional amendment that authorizes a casino which it is "legally impossible" to do. (Pets. Br. at 21-22). Petitioners' interpretation is not supported by the plain text of the Proposed Amendment or the law.

The Proposed Amendment simply states that if a future casino is authorized by constitutional amendment, a local-option election must be held in the county where the proposed casino is to be located. It is not a preemptive repeal in any sense of the word and mirrors other laws firmly established in the Arkansas code. *See* Ark. Code Ann. § 23-113-201 (allowing wagering on electronic games of skill at Oaklawn and Southland but only if a majority of electors in the city, town, or county where the racetrack is located approve of such wagering at a local-option election).

Furthermore, to side with Petitioners on this point, the Court would have to interpret the text of the Proposed Amendment, which the Court

cannot do within the confines of its review of the ballot title language. *See Armstrong*, 2022 Ark. 167, at 9, 652 S.W.3d at 174-75 ("It is not our purpose to examine the relative merit or fault of the proposed changes in the law; rather, our function is merely to review the measure to ensure that, if it is presented to the people for consideration in a popular vote, it is presented fairly.") (citation omitted).

Accordingly, Petitioners' argument on this point must fail as well.

IV. The Phrase "Majority of the Voters in the County" in the Proposed Amendment Has a Fixed Legal Meaning that Matches the Language in the Ballot Title.

Petitioners next take issue with an edit made by the Attorney General's Office. Prior to certification, Deputy Attorney General William Olson changed the phrase "majority of the voters in the county" to "majority of those in the county who vote at the election" in the ballot title. Citing case law, Mr. Olson concluded that "the Arkansas Supreme Court has long defined 'a majority of the voters' to mean the majority of those who actually vote on an issue, not those that could have voted." *See* Op. Ark. Att'y Gen. No. 34, at 3-4 (2024). Thus, "majority of qualified electors in the county" has "a fixed legal meaning, to-wit: a majority of those who voted." *Id.* at 4. Because the text of the Proposed Amendment

still contains the phrase "majority of the voters in the county," however, Petitioners contend that the ballot title does not accurately reflect the proposed amendment and is insufficient. (Pets. Br. at 23).

Additionally, Petitioners assert that the phrase—"majority of the voters in the county"— impliedly amends the Arkansas Constitution by creating a higher standard for passage than Article 5, section 1, which only requires "a majority of the votes cast upon . . . a measure." According to Petitioners, the ballot title's "lack of notice of the potential amendment of the Arkansas Constitution renders[] it misleading and insufficient." (Pets. Br. at 24-25). Neither argument is well-taken.

As to the latter argument, Petitioners again proceed from an incorrect premise—namely, that the ballot title has to account for all possible legal effects and consequences of the Proposed Amendment. There is no such requirement, and the ballot title does not have to contain language speculating about a "potential amendment" to Article 5, section 1. *See, e.g.*, *Armstrong*, 2022 Ark. 167, at 13, 652 S.W.3d at 176-77 (holding that the ballot title does not have to include the effect of existing state and federal law governing industrial hemp and that the proposed measure would potentially implicate the constitutional rights of

industrial-hemp growers in Arkansas). And to agree with the Petitioners, the Court would also have to delve into the merits of the Proposed Amendment and interpret it. Again, this is outside the scope of the Court's review. *See Armstrong*, 2022 Ark. 167, at 9, 652 S.W.3d at 174–75.

As to Petitioners' argument that the ballot title and text of the Proposed Amendment conflict, the same rule applies—the Court does not interpret or apply the Proposed Act at this stage of review. Even so, Petitioners' argument is dispensed with by their own brief. Petitioners recognize that this Court has long interpreted "majority of voters in the county" and similar language to mean "a majority of those who actually voted." (Pets. Br. at 24) (citing *Vance v. Austell*, 45 Ark. 400 (1885); *see also Glover v. Hot Springs Kennel Club, Inc.*, 230 Ark. 544, 544–45, 323 S.W.2d 902, 902 (1959) (construing the phrase "a majority of the qualified electors of [the] county" to mean a majority of those who voted on the measure and discussing case law holding same). By arguing that the same phrase in the text of the Proposed Amendment is ambiguous, Petitioners are ignoring 139 years of this Court's precedent holding

otherwise. In other words, Petitioners are creating a conflict where none exists. Thus, their argument on this point should be rejected.

V. The Popular Name Comports with the Proposed Amendment's Text.

Petitioners also argue that the Attorney General's Office made the popular name misleading when it changed the wording from requiring a countywide special election on "any new casino license" to "certain new casino licenses" but did not change the text of the Proposed Amendment in the same fashion. Because the text of the proposed Amendment still requires "a special election on the question of whether to approve of *any future casino* to be located in the county," Petitioners assert that the popular name is insufficient. (Pets. Br. at 25).

Like their other challenges to the popular name, this one should be summarily dismissed as well. The word change to "certain" reflects the fact that the Proposed Amendment does not require a countywide special election for casino licenses for Crittenden County (to Southland Racing Corporation), Garland County (to Oaklawn Jockey Club, Inc.) and Jefferson County (to Downstream Development Authority of the Quapaw Tribe of Oklahoma and later transferred to Saracen Development, LLC). The ballot title explicitly notes these exceptions—as does the text of the

Proposed Amendment. Proposed section 3 reads, "Requiring the county quorum court to call a special countywide election on the question of whether to approve of any future casino to be located in the county, excepting casinos operating in Crittenden County (pursuant to a license issued now or hereafter to Southland Racing Corporation), Garland County (pursuant to a licensed issued now or hereafter to Oaklawn Jockey Club, Inc.) and Jefferson County (pursuant to a license issued now or hereafter to Downstream Development Authority of the Quapaw Tribe of Oklahoma and later transferred to Saracen Development, LLC)."

No conflict exists. When the popular name is read together with the language from the ballot title (and the Proposed Amendment), the popular name is sufficient. *Knight*, 2018 Ark. 280, 556 S.W.3d 501. Petitioners' argument is unavailing.

VI. The Court Need Not Reach Petitioners' Constitutional Claims, but Even If It Does, the Ballot Title Comports with Federal Law and Is Not Misleading.

Petitioners' argument that the ballot title fails to disclose the Proposed Amendment's conflict with federal law should be rejected on both procedural and substantive grounds.

Procedurally, it is clear that Petitioners are challenging the merits of the Proposed Amendment and are asking the Court to determine its constitutionality. The Court should decline to do so, just as it has repeatedly done in the past.

Notwithstanding, Petitioners' arguments on the merits are unavailing. The license to conduct casino gaming is a privilege, not a right, and the state (through the initiative process) can limit the number of casinos as a valid exercise of its core police powers. *See Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430 (8th Cir. 2007). It is no different than the state's regulation of liquor licensing. In that arena, "[t]he power of the state over liquor licenses is complete," and "[t]he state may repeal the statute authorizing the license; revoke, annul or modify the license; create conditions, limitations, and regulations subsequent to its issue burdening its exercise[.]" *Yarbrough v. Beardon*, 206 Ark. 553, 177 S.W.2d 38, 39-40 (1944). The same is true here, and the Proposed Amendment poses no conflict with federal law.

1. Petitioners' constitutional claims are outside the scope of the Court's review of the ballot title.

Half of Petitioners' argument section concerns the ballot title's alleged failure to reveal conflicts with federal law. *See* Orig. Action Pet.

at 25-44. Specifically, Petitioners' claim that the Proposed Amendment: "potentially violates the Takings Clause"; "potentially violates the Contracts Clause"; "potentially violates the Equal Protection Clause"; and "potentially violates procedural due process." *See* Pets. Compl. at 23, 25, 27, & 28. Each of these claims is beyond the scope of the Court's review of the ballot title. This is because they require the Court to analyze and interpret the Amendment itself prior to its passage, which the Court has consistently declined to do. *See, e.g.*, *Armstrong*, 2022 Ark. 167, at 13–14, 652 S.W.3d 167, 177 (stating in the context of a ballot-title challenge, "We have held that we cannot engage in the interpretation and construction of the text of the amendment.") (citation omitted); *Rose v. Martin*, 2016 Ark. 339, at 8, 500 S.W.3d 148, 153 ("[I]n large part, the petitioner's arguments [about the ballot title] call for an interpretation of the amendment. However, this court does not interpret a proposed amendment or discuss its merits or faults.") (citations omitted); *May*, 359 Ark. at 112, 194 S.W.3d at 781 (declining to interpret the proposed amendment and stating that the petitioners may pursue their arguments in the event that the proposed amendment is approved by the voters, but "[u]ntil that time, our review is limited").

The only exception to this general rule is where the proposed measure is "clearly contrary to law" on its face. *See May*, 359 Ark. at 111, 194 S.W.3d at 780 (citing *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000)). Thus, on the rare occasion when the Court has weighed the merits, it has been because the laws implicated by the ballot title were "*certainly* implicated, such that the ballot title must inform the voters of this." *Id.* at 111, 194 S.W.3d at 780. (distinguishing *Kurrus,* where the measure, if passed, would have immediately halted the collection of revenue generated from sales and use tax on used goods but failed to inform the voter of this in the ballot title).

For example, in *Lange v. Martin*, which Petitioners cite in support of their argument (Pets. Br. at 25), the ballot title was held insufficient because it purported to authorize any type of wagering allowed in Nevada, including wagers on sports, while federal law specifically prohibited sports betting outside of Nevada. Because "the Amendment's language *clearly conflict[ed]* with federal law that prohibits sports gambling in Arkansas," and because the ballot title failed to inform the voter of this, the Court concluded that the ballot title was misleading. 2016 Ark. 337, at 9-10, 500 S.W.3d 154, 159.

This case is not like *Lange* or *Kurrus*. Unlike the clear conflicts in those two cases, the arguments made by Petitioners amount to nothing more than the assertion that some constitutional provisions might be implicated. Any argument to the contrary is belied by the sheer length of Petitioners' own brief; a "clear conflict" would not require 19 pages to explain how the Proposed Amendment might "potentially" violate CNE's alleged constitutional rights related to the license.

The Court should not address these constitutional arguments. They are not ripe and thus fall outside the scope of the Court's ballot-title review. If the Proposed Amendment is passed by the voters in November, Petitioners are free to pursue the same arguments then. Until that time, the Court's review is limited. *May*, 359 Ark. at 112, 194 S.W.3d at 781.

2. There is no conflict between the Proposed Amendment and federal law because a casino license is a privilege, not a right, and the state can limit casino gaming or abolish it altogether, just like liquor.

Notwithstanding, even if the Court chooses to interpret the Proposed Amendment and conduct a constitutional analysis, Petitioners are wrong on the merits. If approved, the Proposed Amendment would not violate federal law and thus the ballot title is not misleading. The

Eighth Circuit Court of Appeals' opinion in *Hawkeye Commodity Promotions, Inc. v. Vilsack* ("*Hawkeye*") is instructive.

In *Hawkeye*, the Iowa legislature passed a statute ending TouchPlay lottery games in the state. Hawkeye was a licensed retailer of TouchPlay machines, having invested almost $7 million in the venture. The law effectively put it out of business.

Hawkeye sued and after obtaining an adverse ruling below, appealed to the Eighth Circuit, raising the very same constitutional claims made by Petitioners here. The Eighth Circuit rejected every single one.

First, Hawkeye argued that the statute unconstitutionally impaired its contracts with the state and with local businesses. Looking to federal law, the court reasoned that a lottery grant or charter is not a protected contract under the Contracts Clause of the federal constitution, but even if it were, the court found that Hawkeye's claim would still fail because the law did not substantially impair Hawkeye's contracts. As the court explained, "substantial impairment depends on 'the extent to which the parties' reasonable contract expectations have been disrupted. Reasonable expectations are affected by the regulated nature of an

industry in which a party is contracting." 486 F.3d at 437-38. Because the state unquestionably had authority to regulate gambling in the interest of public health, safety, and general welfare, Hawkeye had diminished contract expectations from the get-go. Indeed, as the court noted, the terms and conditions Hawkeye agreed to as part of its license recognized the existence of pervasive regulation; the agreement stated that its terms were subject to present and future changes in state and federal law—like the outright ban of TouchPlay. Thus, there was no violation of the Contracts Clause.

Second, Hawkeye argued that the statute effected a legislative taking of its property (the TouchPlay machines, its overall business, the lottery contract, and the contracts with various businesses). The Eighth Circuit rejected this argument, too. It 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. It also determined that the other contracts were not cognizable property interests because again, Hawkeye's expectations that its contracts would not be modified or nullified were tempered by its participation in a

heavily regulated industry and by contract language that made the agreements subject to applicable laws and regulations.

As to the taking of tangible personal property (the machines), the Eighth Circuit held none occurred. The court looked to a number of factors to determine if Hawkeye suffered a regulatory taking without compensation. The factors included: (1) the economic impact of the regulation on Hawkeye; (2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and (3) the character of the government regulation. While the Eighth Circuit agreed that the statute had a "devastating economic impact" on Hawkeye's multi-million-dollar TouchPlay investment, the Court again emphasized that Hawkeye's expectations in its TouchPlay business are diminished by its participation in a heavily regulated industry and the fact that its contracts were made subject to changes in applicable laws and regulations. The court found no unconstitutional taking.

Lastly, the Eighth Circuit rejected Hawkeye's claims that the TouchPlay ban violated the Equal Protection Clause and Due Process Clause of the U.S. Constitution. With regard to the former, the court applied a rational-basis standard such that the statute would be held

constitutional if there was "a plausible public policy reason for the classification, the legislative facts on which the classification is apparently based may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." 486 F.3d at 442 (citation omitted). The court deemed the statute constitutional because the TouchPlay ban was motivated by concerns for the "proliferation of gambling," and regulating gambling is a legitimate public purpose. Even an incremental reform, such as banning one form of gaming, was "not so attenuated to its asserted purpose that the distinction it draws is wholly arbitrary and irrational." *Id.* The court relied on the same reasoning to summarily dismiss the due process clause claim. 486 F.3d at 443 (concluding that the statute "is neither arbitrary nor irrational and serves a legitimate public purpose. Hawkeye's due process argument fails.").

The reasoning and authority employed by the Eighth Circuit applies with equal force to Petitioners' arguments here, and the same result should follow. *See Decay v. State*, 2009 Ark. 566, at 6, 352 S.W.3d 319 ("There is not an Arkansas case directly on point; however, the

Eighth Circuit has ruled on this specific issue and, while not binding on our court, we find it highly persuasive.")

Like the TouchPlay license holder in *Hawkeye*, CNE does not have a property right or any fundamental right in its casino license. Rather, a license to conduct casino gaming is merely a privilege that the State is free to revoke at any time as part of its core police powers. *See Spa Kennel Club*, 241 Ark. at 54, 406 S.W.2d at 130. Although not cited by Petitioners, the ARC Casino Gaming Rules themselves reinforce this longstanding principle. Rule 4.040 provides: "A Casino license is a revocable privilege, and no holder thereof shall be deemed to have acquired any vested rights therein or thereunder." Intv. Add. 17. Without a protectable property interest, no illegal taking can occur—a point that Petitioners readily concede. *See* Pets. Br. at 28 ("A movant must show a property interest to satisfy a bedrock requirement of a takings action.") (citation omitted). Thus, the claim fails.

Additionally, the highly regulated nature of the casino gaming industry defeats the Contracts Clause claim. This conclusion is again buttressed by the ARC Casino Gaming Rules. In particular Rule 2.16 prevents the license holder from selling, assigning, or transferring the

license (the hallmarks of a protectable property interest) similar to the rules in *Hawkeye*. Intv. Add. 15. The Rules also contemplate that there may be future enactments that may conflict, and in fact defeat, its terms and conditions, again just like *Hawkeye. See* ARC R. 1.020 "Construction" ("Nothing contained in these Rules shall be so construed as to conflict with any provision of the Amendment or of any other applicable law"). Intv. Add. 14.

As to the due process claim, again, a required element is missing—namely, "a right, privilege or immunity secured by the constitution such as property." (Pets. Br. at 36) (citation). Petitioners have no protectable right in a license to conduct casino gaming.

Further, the Proposed Amendment is subject to the same rational-basis test employed by the *Hawkeye* Court. That test is easily satisfied by Arkansans' interests in regulating gambling activities by limiting the proliferation of casinos. Thus, Petitioners' alleged violations of due process fail.

The same is true for Petitioners' Equal Protection Claim, which is also reviewed under a rational-basis standard here. Although Intervenors have no obligation to produce evidence to sustain the

rationality of the classification, it easily passes muster. *See Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) ("A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.") (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993)).

It is of no moment that the Proposed Amendment only repeals the Pope County casino license while three other casino licenses remain unaffected. "[T]hose attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it[.]" *Beach Commc'ns, Inc.*, 508 U.S. at 315 (citation omitted). Petitioners cannot meet that burden.

It is well-recognized that the state, (here through its electorate), has discretion under its police powers to "select one phase of one field and apply a remedy there, neglecting the others." *See Support Working Animals, Inc.*, 457 F. Supp. 3d at 1221 (quoting *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955)). Indeed, "[t]he Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." *Id.* (quoting *Dandridge*

v. Williams, 397 U.S. 471 (1970)). A state could reasonably conclude that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies." *Id.* (citing *Williamson*, 348 U.S. at 489)). Thus, "it is permissible for the government to take the less inclusive step of allowing the conduct but reducing the demand through restrictions." *State ex rel. Walgate v. Kasich*, 2017-Ohio-5528, ¶ 32, 93 N.E.3d 417, 425 (citation omitted).

Here, the Proposed Amendment states that it is limiting the universe of casinos by reducing the number from four to three; the fact that some inequality results does not mean that the Proposed Amendment fails rationale-basis review. *Id.* (holding that a constitutional amendment did not violate the Equal Protection Clause because the state has a legitimate governmental interest in regulating gambling and pursing economic development by limiting where casinos may be located).

Petitioners have presented no compelling argument or authority to distinguish this case from *Hawkeye* and similar cases that have rejected Petitioners' constitutional claims in the context of gambling. *See, e.g.*, *Support Working Animals, Inc., supra*; *State ex rel. Walgate, supra;*

Abdow v. Att'y Gen., 468 Mass. 478, 480, 11 N.E.3d 574, 577 (2014) (holding that an initiative petition meant to prohibit casino and slots gambling and abolish parimutuel wagering on simulcast greyhound races did not constitute a taking without just compensation because the state has broad police powers to regulate gambling and the possible abolition of gambling was a foreseeable risk to licensees). The Proposed Amendment does not conflict with federal law.

Lastly, it should be noted that while this Court has not considered constitutional claims related to the revocation of a casino license, the Court has decided similar issues in the liquor-licensing arena. Those decisions are in line with *Hawkeye* and hold that there is no protectable right to a liquor license.

The case of *Yarbrough v. Beardon*, 206 Ark. 553, 177 S.W.2d 38,(1944) is on point. There, the Court considered a constitutional challenge to local-option elections held under a voter-approved initiated act whereby liquor sales became prohibited in Lawrence and Grant counties. When the measure took effect, existing liquor licenses in those counties were effectively revoked.

On appeal, this Court considered the argument that the initiated act violated procedural due process rights because there was no notice or opportunity to be heard prior to the ban and license revocations. The Court held that no constitutional violation had occurred. It explained:

> The authorities are practically uniform in holding that a liquor license is a mere privilege, revocable at the will of the state. It is not a contract between the state and the licensee, and no property rights inhere in it. Constitutional limitations against impairing obligations, retroactive laws, etc., cannot be invoked in support of rights under it. It is not a vested right for any definite period; in fact, is not a vested right at all, but is a mere permission temporarily to do what otherwise would be a violation of the criminal laws.
>
> . . . .
>
> The power of the state over liquor licenses is complete. It is part of the internal police [policy] of the state, in which the power of the state is sovereign. The state may repeal the statute authorizing the license; revoke, annul or modify the license; create conditions, limitations, and regulations subsequent to its issue burdening its exercise; and may delegate these powers to agencies of the state, as municipal corporations, county courts, boards of excise commissioners, etc.

206 Ark. 553, 177 S.W.2d at 39-40 (internal citations omitted). Because of the all-encompassing power of the state to regulate liquor licensing, the court concluded that each license holder took the license "with its

concomitant perils, including the right of the people under said act to take away from him, with or without notice, the privilege theretofore granted him, there being no contract or property right involved." *Id.*; *see also Gipson v. Morley*, 217 Ark. 560, 567, 233 S.W.2d 79, 83 (1950) ("[I]t is within the competency of the legislature to determine under the police power what regulatory rules are needful in controlling a type of business fraught with perils to public peace, health and safety as is the liquor business."); *Brennan v. White Cnty.*, 2019 Ark. App. 146, at 8, 573 S.W.3d 577, 583 (holding that the local-option framework satisfied rational-basis review and did not violate plaintiff's due process rights).

Here too, CNE knowingly and voluntarily applied for and took the casino license with its concomitant perils, including the right of the people to take it away with or without notice. Indeed, the ARC Rules warn that the license is "a revocable privilege" and "no holder . . . shall be deemed to have acquired any vested rights therein or thereunder." Intv. Add. 17. This is the nature of the industry. CNE has no protected rights related to its license, and in turn, no legal basis to complain.

REQUEST FOR RELIEF

For the reasons stated herein, this Court should deny Count II of the Original Action Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing will be served on the following counsel of record via eFlex as of the file-marked date above, pursuant to Administrative Order No. 21, § 7(a):

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CERTIFICATE OF COMPLIANCE

I, the undersigned attorney, hereby certify that the foregoing Intervenors' Brief on Count II complies with Administrative Order No. 19 in that all "confidential information" has been excluded from the "Case Record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

I further certify that this Brief satisfies Administrative Order 21, Section 9 which states that briefs shall not contain hyperlinks to external papers or websites.

Further, the undersigned states that the foregoing brief conforms to the word-count limitation identified in Rule 4-2(d). According to Microsoft Word (Office 365), this brief contains 7,698 words.

By: /s/ Kathy McCarroll
KATHY MCCARROLL

INDEX TO ADDENDUM

Popular Name

ATTORNEY GENERAL OF ARKANSAS

"An amendment requiring local voter approval in a countywide special election for any new casino licenses and repealing authority to issue a casino license in Pope County, Arkansas."

Ballot Title

"An amendment to the Arkansas Constitution, Amendment 100, § 4, subsection (i) to reduce the number of casino licenses that the Arkansas Racing Commission is required to issue from four to three; amending Amendment 100, § 4, subsections (k) through (n) to repeal authorization for a casino in Pope County, Arkansas and to repeal the authority of the Arkansas Racing Commission to issue a casino license for Pope County, Arkansas; amending Amendment 100 § 4, to add subsection (s), providing that if 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; amending Amendment 100 § 4, to add subsection (t), providing that if a future constitutional amendment authorizes the issuance of a casino license in any county other than those issued now or hereafter for Crittenden County (to Southland Racing Corporation), Garland County (to Oaklawn Jockey Club, Inc.) and Jefferson County (to Downstream Development Authority of the Quapaw Tribe of Oklahoma and later transferred to Saracen Development, LLC), 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; amending Amendment 100 § 4, to add subsection (t)(1)-(3), setting the date for the special election and requiring the ordinance calling the special election to state the election date and to specify the format of the question on the ballot as "FOR a casino in [ ] County" and "AGAINST a casino in [ ] County," and, "The question presented to voters must include whether or not a casino may be located in the county"—"A casino is defined as a facility where casino gaming is conducted"; amending Amendment 100 § 4, to add subsection (t)(4), requiring the county board of election commissioners to publish the ordinance calling the special election as soon as practicable in a newspaper of general circulation in the county in which the special election is held; amending Amendment 100 § 4, to add subsection (t)(5), requiring a majority of the voters in any county where any future casino is proposed to be located to approve of the casino at the special election before the Arkansas Racing Commission, or other governing body, may accept any applications for a casino license in that county; making this Amendment effective on and after November

13, 2024; providing that the provisions of this Amendment are severable in that if any provision or section of this Amendment or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application; and repealing all laws or parts of laws in conflict with this Amendment."

Full Text of the Proposed Measure

SECTION 1. Repeal of Authorization for a Casino in Pope County. Arkansas Constitution, Amendment 100, § 4, subsections (i) – (n), are amended to read as follows, with stricken language to be deleted from Amendment 100 and underlined language to be added to Amendment 100:

(i) The Arkansas Racing Commission shall issue ~~four~~ three casino licenses.

(j) The Arkansas Racing Commission shall issue a casino license, as provided in this Amendment, to a Franchise holder located in Crittenden County, there being only one, to conduct casino gaming at a casino to be located at or adjacent to the Franchise holder's greyhound racing track and gaming facility as of December 31, 2017 in Crittenden County. The Arkansas Racing Commission shall also issue a casino license, as provided in this Amendment, to a Franchise holder located in Garland County, there being only one, to conduct casino gaming at a casino to be located at or adjacent to the Franchise holder's horse racing track and gaming facility as of December 31, 2017 in Garland County. Casino licenses to be issued to Franchise holders shall be issued upon:

(1) Adoption by the Arkansas Racing Commission of rules necessary to carry out the purposes of this Amendment; and

(2) Initial laws and appropriations required by this Amendment being in full force and effect.

(k) ~~The Arkansas Racing Commission shall award a casino license to a casino applicant for a casino to be located in Pope County within two miles of the city limits of the county seat.~~ The Arkansas Racing Commission shall ~~also~~ award a casino license to a casino applicant for a casino to be located in Jefferson County within two miles of the city limits of the county seat.

(l) Casino licensees are required to conduct casino gaming for as long as they have a license.

(m) The Arkansas Racing Commission shall require all casino applicants for a casino license in ~~Pope County and~~ Jefferson County to demonstrate experience conducting casino gaming.

(n) The Arkansas Racing Commission shall require all casino applicants for a casino license in ~~Pope County and~~ Jefferson County to submit either a letter of support from the county judge or a resolution from the quorum county in the court in ~~the county where the proposed casino is to be located~~ Jefferson County and, if the proposed casino is to be located within a city or town, shall also require all casino applicants to include a letter of support from the mayor in the city or town where the applicant is proposing the casino to be located.

SECTION 2. Revocation of any casino license issued for Pope County, Arkansas prior to the effective date of this Amendment.

Arkansas Constitution, Amendment 100, § 4, is amended to add subsection (s) to read as follows with underlined language to be added to Amendment 100:

(s) If 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.

SECTION 3. Requiring the county quorum court to call a special countywide election on the question of whether to approve of any future casino to be located in the county, excepting casinos operating in Crittenden County (pursuant to a license issued now or hereafter to Southland Racing Corporation), Garland County (pursuant to a licensed issued now or hereafter to Oaklawn Jockey Club, Inc.) and Jefferson County (pursuant to a license issued now or hereafter to Downstream Development Authority of the Quapaw Tribe of Oklahoma and later transferred to Saracen Development, LLC).

Arkansas Constitution, Amendment 100, § 4, is amended to add subsection (t) to read as follows with underlined language to be added to Amendment 100:

(t) If a constitutional amendment authorizes or otherwise allows the issuance of a casino license in any county other than those issued now or hereafter for Crittenden County (to Southland Racing Corporation), Garland County (to Oaklawn Jockey Club, Inc.) and Jefferson County

(to Downstream Development Authority of the Quapaw Tribe of Oklahoma and later transferred to Saracen Development, LLC), 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.

(1) Except as provided in subsection (t)(2), the special election shall be held on the second Tuesday of:

(A) March or November in a year when a presidential election is held; or

(B) May or November of all other years.

(2)(A) Special elections scheduled to occur in a month in which the second Tuesday is a legal holiday shall be held on the third Tuesday of the month.

(B) Special elections held in months in which a preferential primary election or general election is scheduled to occur shall be held on the date of the preferential primary election or general election.

(3) The ordinance calling the special election shall:

(A) State the date of the special election; and

(B) Require the special election ballot to set forth the question substantially as follows:

"FOR a casino in [_____] County

AGAINST a casino in [_____] County

The question presented is whether or not a casino may be located in the county. A casino is defined as a facility where casino gaming is conducted."

(4) The county board of election commissioners shall publish the ordinance calling the special election as soon as practicable in a newspaper of general circulation in the county in which the special election is held.

(5) 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 before the Arkansas Racing Commission, or other governing body, may accept any applications for a casino license in that county.

SECTION 4. Severability.
If any provision or section of this Amendment or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provisions or application of the Amendment that can be given effect without the invalid provisions or applications, and to this end the provisions of this Amendment are declared to be severable.

SECTION 5. Repeal of Conflicting Laws.
By adoption of this Amendment, all Arkansas laws or parts of Arkansas laws in conflict with this Amendment are repealed.

SECTION 6. Effective Date.
This amendment shall be effective on and after November 13, 2024.

TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2024-046

March 20, 2024

Elizabeth Robben Murray, Attorney
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Dear Ms. Murray:

I am writing in response to your request, made under A.C.A. § 7-9-107, that I certify the popular name and ballot title for a proposed constitutional amendment. In Opinion No. 2024-034, I rejected a prior version of your proposed initiated amendment to the Arkansas Constitution. You have now revised the language of your proposal and submitted it for certification.

My decision to certify or reject a popular name and ballot title is unrelated to my view of the proposed measure's merits. I am not authorized to consider the measure's merits when considering certification.

1. Request. Under A.C.A. § 7-9-107, you have asked me to certify the following popular name and ballot title for a proposed initiated amendment to the Arkansas Constitution:

Popular Name

> An amendment requiring local voter approval in a countywide special election for any new casino licenses and repealing authority to issue a casino license in Pope County, Arkansas.

Ballot Title

> An amendment to the Arkansas Constitution, Amendment 100, § 4, subsection (i) to reduce the number of casino licenses that the Arkansas Racing Commission is required to issue from four to three; amending Amendment 100, § 4, subsections (k) through (n) to repeal authorization for a casino in Pope County, Arkansas and to repeal the authority of the Arkansas Racing Commission to issue a casino license for Pope County,

> Arkansas; amending Amendment 100 § 4, to add subsection (s), providing that if 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; amending Amendment 100 § 4, to add subsection (t), providing that if a future constitutional amendment authorizes the issuance of a casino license in any county other than those issued now or hereafter for Crittenden County (to Southland Racing Corporation), Garland County (to Oaklawn Jockey Club, Inc.) and Jefferson County (to Downstream Development Authority of the Quapaw Tribe of Oklahoma and later transferred to Saracen Development, LLC), 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; amending Amendment 100 § 4, to add subsection (t)(1)-(3), setting the date for the special election and requiring the ordinance calling the special election to state the election date and to specify the format of the question on the ballot as "FOR a casino in [ ] County" and "AGAINST a casino in [ ] County," and, "The question presented to voters must include whether or not a casino may be located in the county"—"A casino is defined as a facility where casino gaming is conducted"; amending Amendment 100 § 4, to add subsection (t)(4), requiring the county board of election commissioners to publish the ordinance calling the special election as soon as practicable in a newspaper of general circulation in the county in which the special election is held; amending Amendment 100 § 4, to add subsection (t)(5), requiring a majority of the voters in any county where any future casino is proposed to be located to approve of the casino at the special election before the Arkansas Racing Commission, or other governing body, may accept any applications for a casino license in that county; making this Amendment effective on and after November 13, 2024; providing that the provisions of this Amendment are severable in that if any provision or section of this Amendment or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application; and repealing all laws or parts of laws in conflict with this Amendment.

2. Rules governing my review. In Opinion No. 2024-034, issued in response to your first submission for review and certification, I explained the rules and legal standards that govern my review of popular names and ballot titles. I rely on those same rules and legal standards here and incorporate them by reference.

3. Application to your popular name. Although the popular name need not contain detailed information or include exceptions that might be required of a ballot title, the

popular name must not be misleading.[1] And, as I noted in Opinion 2024-034, the popular name's length itself is not misleading.[2] But a word used in the popular name does not accurately reflect the proposed measure or the ballot title (emphasis added): it requires "voter approval in a countywide special election for **any** new casino licenses." The proposed measure itself is narrower (emphases added): it requires voter approval in a countywide special election "[i]f a constitutional amendment authorizes or otherwise allows the issuance of a casino license in **any** county **other than those issued now or hereafter** for Crittenden County (to Southland Racing Corporation), Garland County (to Oaklawn Jockey Club, Inc.) and Jefferson County (to Downstream Development Authority of the Quapaw Tribe of Oklahoma and later transferred to Saracen Development, LLC)."[3] Therefore, I am substituting and certifying a "more suitable" popular name.[4] The popular name provided below is substituted and certified for your proposed constitutional amendment.

4. Application to your ballot title. Having reviewed the text of your proposed constitutional amendment and ballot title, I believe the following changes to your ballot title are necessary to ensure that your ballot title clearly and accurately sets forth the purpose of your proposed initiated amendment to the Arkansas Constitution:[5]

- ***"Majority of the voters."*** Section 3 of the measure's text adds subsection (t)(5) to Amendment 100, § 4 (emphasis added): "**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." While you may intend that phrase to mean "registered voters," the Arkansas Supreme Court has long defined "a majority of the voters" to mean the majority of those who actually vote on an issue, not those that could have voted.[6]

[1] *E.g.*, *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); see also Ark. Att'y Gen. Op. 2024-034 (articulating this rule in the opinion issued for your original submission for certification).

[2] Although I did note in that same opinion that you may wish to shorten the popular name to better the meet the purpose of popular names. Here, your popular name is one word shorter than it was previously.

[3] To ensure the popular name is not misleading, and to adequately apprise the voters of the licenses following the "other than" language, approximately fifty-five words would need to be added to the popular name—currently at twenty-eight words.

[4] *See* A.C.A. § 7-9-107(d)(1) (authorizing the Attorney General to "substitute and certify a more suitable and correct ballot title and popular name for each amendment or act").

[5] In the measure's text, you recite Amendment 100, § 4(i)–(n), striking language to indicate what you intend to remove from Amendment 100 and underlining language to indicate what you intend to add to Amendment 100. But when reciting Amendment 100, § 4(n), the measure's text contains the phrase "quorum county in the court" instead of "quorum court in the county." While that is not a reason for rejection here, the measure's text contains a scrivener's error that you may wish to correct.

[6] *E.g.*, *Vance v. Johnson*, 238 Ark. 1009, 1013, 386 S.W.2d 240, 243 (1965); *Glover v. Hot Springs Kennel Club, Inc.*, 230 Ark. 544, 548–53, 323 S.W.2d 902, 904–07 (1959); *Browning v. Waldrip*, 169 Ark. 261, 273 S.W. 1032, 1032–33 (1925); *Graves v. McConnell*, 162 Ark. 167, 257 S.W. 1041, 1043 (1924); *Watts v.*

In *Glover v. Hot Springs Kennel Club, Inc.*, the Arkansas Supreme Court reviewed a state statute that required "a majority of the qualified electors" of a county to approve a greyhound racing franchise.[7] There, the legal question was whether "it was necessary for the greyhound racing proposition submitted to the voters of Garland County to receive *merely a majority of those voting* on the proposition at the election, or was it necessary for the proposition to receive the vote of the *majority of all of the 17,245 poll tax holders* of Garland County."[8]

Affirming and noting "an impressive line" of "on point" decisions stretching back to 1885,[9] the *Glover* Court held that "a majority of the qualified electors of the county" has "a fixed legal meaning, to-wit: a majority of those who voted."[10] And while that case concerned certain statutory language—"majority of the qualified electors of the county"—the Court cited Arkansas Supreme Court cases that held the same based on different statutory language.[11] For instance, the *Glover* Court cites *Browning v. Waldrip*, which held that "majority of the landowners in a district" means "a majority of the landowners in the district voting at the election."[12] The Arkansas Supreme Court holdings over the last 138 years recognize that the language "majority of" those voting in a particular voting district or jurisdiction has a fixed legal meaning: those who actually voted at the particular election.

So, in the ballot title, I have changed "majority of the voters in the county" to "majority of those in the county who vote at the election." If instead you intend to vary from the "fixed legal meaning" that the Arkansas Supreme Court cases cited herein describe, you may make those changes and resubmit your popular name, ballot title, and full text of the proposed measure for certification.

- ***Ballot title summary.*** The Arkansas Supreme Court has interpreted the Arkansas Constitution to require that sponsors include all material in the ballot title that qualifies as an "essential fact which would give the voter serious ground for reflection."[13] But your proposed constitutional amendment contains a material provision that does not appear in your ballot title, which would likely give voters

Bryan, 153 Ark. 313, 240 S.W. 405, 406 (1922); *Vance v. Austell*, 45 Ark. 400, 406–07 (1885); Ark. Att'y Gen. Op. 2004-195.

[7] 230 Ark. at 548–53, 323 S.W.2d at 904–07.

[8] *Id.*, 230 Ark. at 548, 323 S.W.2d at 904.

[9] *Id.*, 230 Ark. at 548–52, 323 S.W.2d at 904–07.

[10] *Id.*, 230 Ark. at 553, 323 S.W.2d at 907.

[11] *Id.*, 230 Ark. at 548–52, 323 S.W.2d at 904–07.

[12] 169 Ark. at 261, 273 S.W. at 1032–33.

[13] *Bailey*, 318 Ark. at 285, 884 S.W.2d at 942.

"serious ground for reflection" and would render the ballot tile misleading by omission. The ballot title inaccurately and incompletely summarizes the measure's text by stating it requires "a majority of the voters in **any** county where **any** future casino is proposed to be located to approve of the casino at the special election." So I have replaced the first instance of "any" with "certain" and the second instance of "any" with "a" to better summarize the measure's text.

- ***Grammatical changes.*** I also made a few minor grammatical changes and clarifications to your ballot title to ensure it is not misleading or confusing to voters. A comma has been added after each of the following phrases: "subsection (i)" and "subsections (k) through (n)." I also expanded the space between the brackets used in the ballot title.

5. Substitution and certification. With the above changes incorporated, the following popular name and ballot title are substituted and certified:

Popular Name

An amendment requiring local voter approval in a countywide special election for certain new casino licenses and repealing authority to issue a casino license in Pope County, Arkansas.

Ballot Title

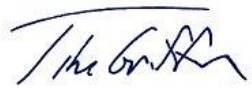
An amendment to the Arkansas Constitution, Amendment 100, § 4, subsection (i), to reduce the number of casino licenses that the Arkansas Racing Commission is required to issue from four to three; amending Amendment 100, § 4, subsections (k) through (n), to repeal authorization for a casino in Pope County, Arkansas and to repeal the authority of the Arkansas Racing Commission to issue a casino license for Pope County, Arkansas; amending Amendment 100 § 4, to add subsection (s), providing that if 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; amending Amendment 100 § 4, to add subsection (t), providing that if a future constitutional amendment authorizes the issuance of a casino license in any county other than those issued now or hereafter for Crittenden County (to Southland Racing Corporation), Garland County (to Oaklawn Jockey Club, Inc.) and Jefferson County (to Downstream Development Authority of the Quapaw Tribe of Oklahoma and later transferred to Saracen Development, LLC), 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; amending Amendment 100 § 4, to add subsection (t)(1)-(3), setting the date for the special election and requiring the ordinance calling the

> special election to state the election date and to specify the format of the question on the ballot as "FOR a casino in [ ] County" and "AGAINST a casino in [ ] County," and, "The question presented to voters must include whether or not a casino may be located in the county"—"A casino is defined as a facility where casino gaming is conducted"; amending Amendment 100 § 4, to add subsection (t)(4), requiring the county board of election commissioners to publish the ordinance calling the special election as soon as practicable in a newspaper of general circulation in the county in which the special election is held; amending Amendment 100 § 4, to add subsection (t)(5), requiring a majority of those in the county who vote at the election in certain counties where a future casino is proposed to be located to approve of the casino at the special election before the Arkansas Racing Commission, or other governing body, may accept any applications for a casino license in that county; making this Amendment effective on and after November 13, 2024; providing that the provisions of this Amendment are severable in that if any provision or section of this Amendment or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application; and repealing all laws or parts of laws in conflict with this Amendment.

Under A.C.A. § 7-9-108, instructions to canvassers and signers must precede every petition, informing them of the privileges granted by the Arkansas Constitution and the associated penalties for violations. I have included a copy of the instructions that should be incorporated into your petition before circulation.

Assistant Attorney General William R. Olson prepared this opinion, which I hereby approve.

Sincerely,



TIM GRIFFIN
Attorney General

STATE OF ARKANSAS
RULES OF THE
ARKANSAS RACING COMMISSION
LITTLE ROCK, ARKANSAS

CASINO GAMING

RULE 1
ISSUANCE OF RULES; CONSTRUCTION; DEFINITIONS

1.010 Promulgation, amendment, modification and repeal. The following Rules are issued pursuant to the Amendment. The Commission will, from time to time, promulgate, amend and repeal such Rules, consistent with the policy, objects and purposes of the Arkansas Racing

Commission, as it may deem necessary or desirable in carrying out the policy and provisions of the Amendment.

1.020 Construction. Nothing contained in these Rules shall be so construed as to conflict with any provision of the Amendment or of any other applicable law.

1.030 Severability. If any provision of these Rules be held invalid, it shall not be construed to invalidate any of the other provisions of these Rules.

1.040 Definitions, words and terms; tense, number and gender. The provisions of the Amendment relating to definitions, tense, number and gender apply and govern the interpretation of these Rules, except when otherwise plainly declared or clearly apparent from the context.

1.050 "Amendment" defined. "Amendment" means Amendment 100 to the Arkansas Constitution, known as the Arkansas Casino Gaming Amendment of 2018.

1.055 "Automated teller machine" defined. "Automated teller machine" or "ATM" means an automated bank teller machine capable of dispensing cash.

1.060 "Card game" defined**.** "Card game" means a game in which the licensee is not party to wagers and from which the licensee receives compensation in the form of a rake-off, a time buy-in, or other fee or payment from a player for the privilege of playing, and includes but is not limited to the following: Poker, bridge, whist, solo and panguingui.

1.062 "Cashable credits" defined. "Cashable credits" means wagering credits that are redeemable for cash.

1.065 "Casino" defined. "Casino" means a facility where casino gaming is conducted as authorized by the Amendment.

"**Casino applicant**" is defined as any individual, corporation, partnership, association, trust, or other entity applying for a license to conduct casino gaming at a casino in Pope County or Jefferson County, Arkansas, pursuant to Section 4 of the Amendment. Franchise holders shall be exempt from this definition pursuant to Section 4 of the Amendment.

"Casino gaming" is defined as dealing, operating, carrying on, conducting, maintaining, or exposing for play any game played with cards, dice, equipment, or any mechanical, electromechanical, or electronic device or machine for money, property, checks, credit, or any representative value. Casino gaming shall also be defined to include accepting wagers on sporting events. "Casino gaming" does not include lotteries conducted pursuant to Amendment 87 and/or The Arkansas Scholarship Lottery Act, Ark. Code Ann. § 23-115-101, et seq.

"**Casino gaming receipts**" is defined as gross receipts from casino gaming.

"**Casino license**" is defined as a license issued by the Arkansas Racing Commission to conduct casino gaming at a casino.

"**Casino licensee**" is defined as any individual, corporation, partnership, association, trust, or other entity holding a license issued by the Arkansas Racing Commission to conduct casino gaming at a casino.

1.066 "Commission" means the Arkansas Racing Commission.

(b) Before renewing a license, the Commission may require further information and documentation and may conduct additional background checks to determine that the licensee continues to meet the requirements of these Rules.
(c) Within seven days of receiving written notice from the Commission that its renewal application has been approved, the casino licensee shall pay the ten-year renewal fee of $10,000.00 in certified funds. Any certified or cashier's check shall be payable to the state of Arkansas.
(d) A casino licensee whose license is not renewed shall cease all casino gaming immediately upon expiration of the license and return the license to the Commission.
(e) Upon the determination that a casino licensee has not met the requirements for renewal, the Commission shall provide written notice by certified mail or personal delivery to the casino licensee. The notice shall provide an explanation for the denial of the renewal application. The casino licensee is entitled to a hearing before the Commission pursuant to these Rules.

14. Surrender of License
(a) A casino licensee may voluntarily surrender its license to the Commission at any time.
(b) If a casino licensee surrenders its license, the casino licensee shall:
i. Return the license to the Commission;
ii. Submit a report to the Commission including the reason for surrendering the license; contact information following the close of business; the person or persons responsible for the close of the business; and where business records will be retained.

15. Change in Information
(a) The casino licensee shall notify the Commission of any changes in contact information.
(b) The casino licensee shall notify the Commission in writing no less than fourteen days in advance of any change that may affect the licensee's qualifications for licensure, and submit to the commission supporting documentation to prove the casino licensee continues to be qualified. In the event of a change for which a casino licensee does not have prior notice, the licensee shall notify the Commission immediately upon learning of the change.
(c) Pursuant to section (b), the licensee shall notify the Commission of the following:
i. The arrest or conviction for any felony of any individual listed in an application or subsequently identified as a casino applicant, licensee, or individual with a financial interest;
ii. The temporary closure of the casino for any reason for longer than fifteen days;
iii. The permanent closure of the business; and
iv. Any other change that may affect the licensee's qualification for licensure.
(d) If the Commission determines that the change has the potential to disqualify a licensee, the Commission shall conduct a hearing for adjudication.

16. Transfer of License
(a) Casino licenses shall only be effective for the individual, corporation, partnership, association, trust, or other entity identified in the original application.
(b) A casino licensee may not sell, transfer, or otherwise dispose of its license to another person or entity without approval from the Commission.

(c) A casino licensee shall not make any modification to the board members, or officers as designated in the initial application without approval from the Commission.
(d) A casino licensee's failure to obtain approval from the Commission before engaging in ownership changes described in (b) and (c) above may result in Commission's revocation of that license.
(e) In order to obtain approval to transfer ownership of a casino license, the casino licensee shall submit to the Commission an application for license transferal on a form and in a manner prescribed by the Commission.
(f) If the Commission denies an application for transfer of license, the Commission shall provide written notice by certified mail or personal delivery to the licensee. The notice shall provide an explanation for the denial of the application. The licensee may request a hearing before the Commission pursuant to this Rule.

17. Transfer of Location
(a) A casino license shall only be valid at the location for which it was originally issued by the Commission.
(b) A casino licensee shall not relocate a casino without prior approval by the Commission.
(c) In order to obtain approval to transfer a casino license to another location, a casino licensee shall submit to the Commission an application for license transferal on a form and in a manner prescribed by the Commission.
(d) If the Commission denies an application for transfer of location, the Commission shall provide written notice by certified mail or personal delivery to the licensee. The notice shall provide an explanation for the denial of the application. The casino licensee is entitled to a hearing before the Commission pursuant to this Rule.

18. Appellate Procedure following Denial of Application for License, Renewal, Transfer of License, or Location.
(a) Denial of Application for License
i. If the Commission denies an application for a casino license, the casino applicant is entitled to a hearing before the Commission by filing a written request no later than fifteen (15) days from receipt of the notice of denial from the Commission. The Commission's decision may be appealed to the Pulaski County Circuit Court. Appeals shall be governed by the terms of the Arkansas Administrative Procedure Act, §25-15-201, et seq.
(b) Denial of Application for Renewal of License, Transfer of License or Transfer of Location
i. If the Commission denies an application for the renewal of a casino license, the transfer of a casino license, or the transfer of the location for a casino license, the casino licensee is entitled to a hearing before the Commission by filing a written request no later than fifteen (15) days from receipt of the notice of denial from the Commission.
ii. The Commission shall conduct a hearing no later than sixty (60) days from the receipt of the request for hearing. The Commission shall provide notice of the hearing to all interested parties, conduct the hearing, and issue a decision in accordance with the Arkansas Administrative Procedure Act, §25-15-201 et seq.
iii. The Commission's decision may be appealed to the circuit court of the county in which the casino is situated or the Pulaski County Circuit Court. Appeals shall be

exhausted, if the crime or conviction discredits or tends to discredit the State of Arkansas or the gaming industry.

4.025 Operation of keno games.

1. As used in this Rule, "Commission" means the Arkansas Racing Commission or the Commission's designee.

2. A licensee authorized to operate a keno game shall not increase the limits of winning tickets or the value of a keno game or a progressive keno game to an amount exceeding the total maximum sum of $250,000 on any one game unless the licensee installs and uses a computerized keno system that satisfied the specification approved by the Commission.

3. A licensee shall not operate a keno game or progressive keno game with limits on winning tickets or the value of the keno game exceeding the total maximum sum of $250,000 on any one game without the prior written approval of the Commission.

4. The Commission may:

(a) Require that a limit be imposed on a progressive keno game, or that the limits of winning tickets or the value of a keno game or a progressive keno game be decreased, if such a limit or decrease is deemed necessary for the licensee to maintain sufficient minimum bankroll requirements pursuant to these Rules; or

(b) Require the licensee to at all times maintain a reserve in the form of cash, cash equivalent, a bond, or a combination thereof in an amount determined by the Commission. Subject to the discretion of the Commission, the reserve provided for by this paragraph must be created and maintained in the same manner as a reserve required by these Rules.

5. Progressive keno is further subject to the provisions of these Rules governing progressive payoff schedules.

4.030 Violation of law or Rules. Violation of any provision of the Amendment or of these Rules by a licensee, the licensee's agent or employee shall be deemed contrary to the public health, safety, morals, good order and general welfare of the inhabitants of the State of Arkansas and grounds for suspension or revocation of a license and a fine in an amount of up to $100,000. Acceptance of a state Casino license or renewal thereof by a licensee constitutes an agreement on the part of the licensee to be bound by all of the Rules of the Commission as the same now are or may hereafter be amended or promulgated. It is the responsibility of the licensee to keep informed of the content of all such Rules, and ignorance thereof will not excuse violations.

4.040 Investigation of conduct of licensees, generally. A Casino license is a revocable privilege, and no holder thereof shall be deemed to have acquired any vested rights therein or thereunder. The burden of proving his or her qualifications to hold any license rests at all times on the licensee. The Commission is charged by law with the duty of observing the conduct of all licensees to the end that licenses shall not be held by unqualified or disqualified persons or unsuitable persons or persons whose operations are conducted in an unsuitable manner.

4.045 Compliance review and reporting system.

1. Whenever the Commission is acting upon any application of a licensee, and if the Commission determines that special circumstances exist which require additional management