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IN THE SUPREME COURT OF ARKANSAS

JENNIFER MCGILL, INDIVIDUALLY AND ON BEHALF OF THE ARKANSAS CANVASSING COMPLIANCE COMMITTEE; & CHEROKEE NATION ENTERTAINMENT, LLC — **Petitioners**

v. **CASE NO. CV-24-492**

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**

BRIEF OF RESPONDENT

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POINTS ON REVIEW AND PRINCIPAL AUTHORITIES

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Ark. Code Ann. § 7-9-107.

B. The popular name and ballot title of the Proposed Amendment fairly and sufficiently represent the text of the Proposed Amendment.

Armstrong v. Thurston, 2022 Ark. 167, 652 S.W.3d 167.

Bailey v. McCuen, 318 Ark. 277, 884 S.W.2d 938 (1994).

C. The popular name is not misleading.

Parker v. Priest, 326 Ark. 123, 930 S.W.2d 322 (1996).

D. The ballot title comports with the text of the Proposed Amendment.

Glover v. Hot Springs Kennel Club, Inc., 230 Ark. 544, 323 S.W.2d 902 (1959).

E. The ballot title does not fail to disclose conflicts with federal law.

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

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STATEMENT OF THE CASE AND THE FACTS

A. The Proposed Constitutional Amendment.

On March 20, 2024, after a thorough review, the Attorney General issued Opinion No. 2024-046, certifying the popular name and ballot title for a proposed constitutional amendment (the "Proposed Amendment"). *See* Exhibit A, Proposed Amendment.

B. The Original Action Petition.

On August 1, 2024, Petitioners filed their Original Action Petition in the Arkansas Supreme Court. Part II of the Petition challenges the popular name and ballot title of the Proposed Amendment.

STANDARD OF REVIEW

In this original action proceeding, the sufficiency of the popular name and ballot title of the Proposed Amendment are questions of law to be decided by this Court. *Rose v. Martin*, 2016 Ark. 339, at 5, 500 S.W.3d 148, 152; *Bailey v. McCuen*, 318 Ark. 277, at 284, 884 S.W.2d 938, 942 (1994).

Popular Name

"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." *Parker v. Priest*, 326 Ark. 123, at 129, 930 S.W.2d 322, 325 (1996). "The popular name must only reflect a measure in a way that is 'concise enough,

and clear enough, for the voters to refer to and identify it easily.'" *Knight v. Martin*, 2018 Ark. 280, at 5, 556 S.W.3d 501, 506 (quoting *Gaines v. McCuen*, 296 Ark. 513, at 517, 758 S.W.2d 403, 405 (1988)). "However, a popular name must not contain catch phrases or slogans that tend to mislead or give partisan coloring to a proposal." *Id*. "The popular name is to be considered with the ballot title in determining its sufficiency." *Parker*, 326 Ark. 123, at 129, 930 S.W.2d at 325.

Ballot Title

"The ballot title must be an impartial summary of the proposed amendment, and it must give the voters a fair understanding of the issues presented and the scope and significance of the proposed changes in the law." *Knight*, 2018 Ark. 280, at 7, 556 S.W.3d at 506 (quoting *Rose v. Martin*, 2016 Ark. 339, at 4, 500 S.W.3d 148, 151). "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." *Knight*, 2018 Ark. 280, at 7, 556 S.W.3d at 507 (quoting *Rose*, 2016 Ark. 339, at 4, 500 S.W.3d at 151).

"The ballot title need not contain a synopsis of the proposed amendment or cover every detail of it." *Knight*, 2018 Ark. 280, at 7, 556 S.W.3d at 507 (quoting *Rose*, 2016 Ark. 339, at 4, 500 S.W.3d at 151). "However, if information omitted from the ballot title is an essential fact that would give the voter serious ground for reflection, it must be disclosed." *Id*. at 7, 556 S.W.3d at 507. "Thus, the 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." *Rose*, 2016 Ark. 339, at 5, 500 S.W.3d at 152.

As the parties challenging the ballot title, Petitioners have "the burden of proving that it is misleading or insufficient." *Parker v. Priest*, 326 Ark. 386, at 389, 931 S.W.2d 108, 109 (1996). This is a heavy burden. This Court has repeatedly stated that it must be "liberal" in construing the sufficiency of the ballot title. *Bailey*, 318 Ark. 277, at 285, 884 S.W.2d at 942; *Parker*, 326 Ark. 386, at 389, 931 S.W.2d at 109 (1996). Indeed, this Court's "*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." *Rose*, 2016 Ark. 339, at 5, 500 S.W.3d at 152 (emphasis added). But this "does not imply that liberality is boundless or that common sense is disregarded." *Id*. at 5, 500 S.W.3d at 152.

ARGUMENT

A. The proposed popular name and ballot title meet the requirements of Ark. Code Ann. § 7-9-107.

Ark. Code Ann. § 7-9-107 requires sponsors to "submit the original draft [of a proposed measure] with the Attorney General," consisting of "[t]he full text of the proposed measure," "[a] ballot title for the proposed measure," and "[a] popular

name for the proposed measure." Ark. Code Ann. § 7-9-107(a)–(b). Once submitted, the Attorney General determines whether the ballot title is "misleading" or designed to make a vote "for" or "against" appear to be a vote in the opposite direction. *Id.* § 7-9-107(e). One of three things occurs after the Attorney General's review:

- He may "approve and certify" the proposed popular name and ballot title;
- He may "substitute and certify a more suitable and correct ballot title and popular name" than those that were submitted; or
- He "may reject the entire ballot title, popular name, and petition" if "presented in such a manner that the ballot title would be misleading or designed in" a way that a vote "for" or vote "against" seemed like a vote in the opposite direction.

Id. § 7-9-107(d)(1), (e). Any certified ballot title must "briefly and concisely state the purpose of the proposed measure." *Id.* § 7-9-107(d)(2).

In March 2024, Local Voters in Charge ("LVC") submitted the Proposed Amendment to the Attorney General for certification of the popular name and ballot title under Ark. Code Ann. § 7-9-107. After determining there was "a more suitable and correct ballot title and popular name," the Attorney General made certain changes to the popular name and ballot title and certified the substituted language.

B. The popular name and ballot title of the Proposed Amendment fairly and sufficiently represent the text of the Proposed Amendment.

This Court has repeatedly stated that the ballot title must be an "impartial summary of the proposed amendment." *Knight v. Martin*, 2018 Ark. 280, at 7, 556

S.W.3d 501, 506. This Court has also held that it "cannot engage in the interpretation and construction of the text of the amendment." *Armstrong v. Thurston*, 2022 Ark. 167, at 13–14, 652 S.W.3d 167, 177. Further, this Court "has repeatedly stated that a ballot title need not summarize existing law." *Id.*, 2022 Ark. 167, at 10, 652 S.W.3d at 175.

This Court has also held that a ballot title is not misleading for failure to include whatever real-world impact a proposed measure might have. A case that illustrates this point is *Armstrong v. Thurston*, 2022 Ark. 167, at 13, 652 S.W.3d 167, 177. In *Armstrong*, the proposed amendment would have repealed THC dosage limitations in edible cannabis products. *Id*. Specifically, the relevant statute in effect at that time provided that food or drink that was combined with usable marijuana could not exceed 10 milligrams of active THC per portion. *Id*. The proposed amendment would have eliminated the dosage limit in those products. *Id*. Respondents and intervenors argued that the ballot title, by not explicitly stating that the proposed amendment would repeal THC dosage limits, was misleading because voters would not be aware that they were voting to repeal the limits. *Id*. This Court disagreed, concluding that the ballot title identified the sections of the relevant amendment that would be repealed and the provisions that would replace those sections. *Id*. The intervenors also argued that the ballot title was misleading because it did not explain that the proposed amendment would affect the industrial-hemp

industry in Arkansas. *Id*. at 177. This Court again disagreed. It held that the "lack of discussion of the proposed amendment's possible effects on the industrial-hemp industry in the ballot title does not render it insufficient." *Id*. This Court further explained that "[a]ssessing the impact, if any, of the proposed amendment on the industrial-hemp industry is beyond the scope of our review of the ballot title." *Id.*

Nevertheless, Petitioners here argue that the popular name and ballot title "fail to provide sufficient information to voters" because they do not tell voters about facts irrelevant to the operation of the Proposed Amendment, such as the entities that support the proposed amendment: the Choctaw Nation of Oklahoma. Yet the question of who supports a given proposed measure is irrelevant to summarizing the legal effect of that proposal. The same is true for the other alleged deficiencies: that CNE was issued the casino license for Pope County; and the potential downstream effects on a single contract between two entities, the "Economic Development Agreement" between CNE and the County Judge of Pope County. None of the foregoing three impacts—even assuming them to be true—go to summarizing the proposed measure itself.

Armstrong is applicable here. Whatever impact the Proposed Amendment will have on CNE, or the purported benefits that would flow to Choctaw Nation, are beyond the scope of the Attorney General, Secretary of State, or this Court's review of the ballot title. Contrary to Petitioners' arguments, the Court has never applied a

standard that would require such tangential effects to appear in a proposed measure.[1] And critically, Petitioners do not argue that the popular name or ballot title misrepresents the actual text of the Proposed Amendment. That's because it doesn't.

Petitioners raise two cases in support of their argument that ballot titles should speculate how a proposed measure will play out in the real world, instead of informing voters about the substance of the proposed measure. Both cases undermine Petitioners' arguments.

First, *Bailey v. McCuen*, 318 Ark. 277, at 284, 884 S.W.2d 938, 942 (1994). There, Petitioners raised two issues with a proposed amendment related to workers-compensation claims. One was that the ballot title read, "restricting legal fees for the representation of injured employees to 25%," but in practice an award of 25% would

[1] The Arkansas Supreme Court has at times looked beyond the text of a proposed amendment when the ballot title fails to disclose that the proposed amendment would clearly conflict with federal law. *Lange v. Martin*, 2016 Ark. 337, at 9, 500 S.W.3d 154, 159. On other occasions, this Court has looked to whether the proposed amendment would clearly conflict with statutory law. *Bailey*, 318 Ark. 277, at 284, 884 S.W.2d at 942. But generally speaking, this Court cabins its review of a proposed amendment to the text of the amendment and clearly conflicting law, while declining to look at other extraneous matters.

have increased—not "restrict[ed]"—fee awards in most cases, but not all. *Id.* at 285–86, 884 S.W.2d at 942–43. The ballot title did, however, represent the text of the proposed amendment. *Id.* at 285, 884 S.W.2d at 943. Thus, the Court held that the ballot title's language was not "sufficiently misleading in connection with general workers' compensation claims to warrant removal of the issue from the ballot, even though that language would raise"—rather than restrict—"most limits currently prescribed by statute." *Id*. at 286–87, 884 S.W.2d at 943. In other words, if the ballot title does not mislead a voter *about the text* of the proposed measure itself, it is sufficient; speculations about the non-legal real-world effects are not required.

The *Bailey* Petitioners' second challenge was that the proposed amendment would have removed existing caps on attorney fees in appeals from the Workers' Compensation Commission, but the ballot title was silent about what the text required. *Id*. at 286, 884 S.W.2d at 943. This, the Court agreed, made the ballot tile misleading: "The clear message sent by the ballot title language restricting legal fees to 25% is that *all* legal fees, including legal fees on appeal, will be so limited." *Id*. at 287, 884 S.W.2d at 943 (emphasis original). But under the plain language of the proposed amendment's text, "just the opposite is the case." *Id*. The proposed amendment itself would have removed the current cap on appellate legal fees, rather than restricting it. This Court therefore held that the ballot title was misleading because it omitted a material provision of the proposed amendment.

In sum, *Bailey* stands for the proposition that a ballot title should be examined primarily in relation to the text of the proposed amendment and not speculations about its downstream real-world effects.

Petitioners also miss the mark in their analysis of *Parker v. Priest*, 326 Ark. 386, 388, 931 S.W.2d 108, 109 (1996). Like *Bailey*, *Parker* holds that a ballot title is misleading if it fails to inform of the text of the proposed amendment. In *Parker*, the ballot title stated that the proposed amendment would "authorize casino gaming in Garland County at two sites, one specifically described in the amendment and one to be chosen by the quorum court of Garland County," and that it would "authorize casino gaming in Crittenden County at two sites both of which are specifically described in the amendment." *Id*. at 390, 931 S.W.2d at 110 (emphasis removed). Section 3 of the amendment, however, was even more specific about the predetermined sites than the ballot title: "Oaklawn Racetrack in Hot Springs" and "Southland Racetrack in West Memphis" would be allowed a casino. *Id*. at 392, 931 S.W.2d at 111. But there was "no hint in the ballot title" that the proposed amendment's text gave "direct benefits . . . to specific private interests." *Id*. The Court therefore held that the ballot title was misleading because it omitted material facts that could be gleaned directly from the proposed amendment.

Parker is consistent with *Bailey*. In both cases, this Court held that a ballot title was misleading when compared to the text of the proposed amendment; neither case relied on extraneous matters to find that a ballot title was misleading.

C. The popular name is not misleading.

The popular name of the Proposed Amendment is:

> 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.

Petitioners argue that the popular name is misleading in three ways.

First, Petitioners contend that the popular name is misleading because it implies that the Proposed Amendment is only prospective in nature, while the ballot title and the text of the Proposed Amendment contemplate revoking an existing casino gaming license if one is issued before the effective date. Petitioners rest this argument entirely on the words "to issue," which they claim indicates intended future action, not past. But read as a whole, rather than in isolation, the popular name makes clear that the Proposed Amendment would "repeal[] authority to issue a casino license in Pope County, Arkansas." The phrase "to issue" operates as an adjective describing the type of "authority" that is being repealed. The repealing of that authority is not prospective only. It applies to all manner of authority, past, present, and future. Thus, this language sufficiently puts voters on notice that the authority to issue licenses, including licenses that were previously issued under such authority,

would be repealed. Further, the logical extension of Petitioners' argument is that a popular name would need to identify and describe every material part of the proposed amendment. But such a standard clearly conflicts with this Court's instruction that the popular name "need not contain the same detailed information or include exceptions that might be required of a ballot title." *Parker*, 326 Ark. 123, at 129, 930 S.W.2d at 325.

Second, Petitioners rearrange the popular name to complain that it suggests a countywide election could amend the Arkansas Constitution, stating that the popular name "suggests that the measure would allow for 'certain new casino licenses' after 'local voter approval in a countywide special election.'" This is a misreading of the popular name. Read as a whole, the popular name makes clear that the proposed amendment would "requir[e] local voter approval . . . for certain new casino licenses" to be issued. The popular name says nothing about local voters *creating* new casino licenses.

Third, Petitioners contend that the popular name, ballot title, and text of the proposed amendment state that the Proposed Amendment restricts future amendments, and specifically that a local election will be required if a future amendment authorizes additional casinos. Pointing to Attorney General Opinion No. 2024-009, Petitioners argue that the Proposed Amendment cannot preemptively repeal a future amendment that may conflict with it. Opinion No. 2024-009 states

that “nothing in Amendment 7 allows the circulation of petitions asking citizens to support the repeal of a law that does not yet exist.” The Proposed Amendment at issue in this case does not do that. It merely states that in the event that a future law allowed for the issuance of new casino licenses, then local voter approval would be required. The Proposed Amendment does not “repeal . . . a law that does not yet exist.” Thus, the Proposed Amendment does not impermissibly purport to repeal any future amendments. Moreover, the constitution always operates such that it interacts with future amendments, *until a future amendment amends it*. The Proposed Amendment in this case does not purport to limit a future amendment’s ability to amend it.

D. The ballot title comports with the text of the Proposed Amendment.

Petitioners note that on March 20, 2024, the Attorney General substituted the popular name of the Proposed Amendment, changing “any new casino license” to “certain new casino licenses.” Petitioners also point out that Attorney General could not, and did not, change the text of the Proposed Amendment. And as such, Petitioners complain that: “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 …[.]’” Petitioners’ Brief at 25.

The Petitioners’ ellipsis obscures the language that defeats their argument.

In full, Section 3 states:

> 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)**.

(Emphasis added.)

The language Petitioners omit makes it apparent that changing "any new casino license" to "certain new casino licenses" was in no way misleading. The phrase "certain new casino licenses" is a fair and accurate summary of the text of the Proposed Amendment because the Proposed Amendment will apply to some casino licenses, but not to casino licenses already issued to Southland, Oaklawn, and Saracen. Stated differently, the Proposed Amendment will apply to "certain" casino licenses, but not all. The approved language therefore does not conflict with the text of the Proposed Amendment.

Petitioners also complain that the Attorney General deleted the phrase "majority of the voters in the county" from the ballot title and substituted "majority of those in the county who vote at the election," and that this change conflicts with the text of the proposed amendment. Petitioners contend that the plain language of the amendment requires a majority of registered voters, not a majority of those

actually voting on the measure. This Court has been presented with this argument before and rejected it, finding that such language has the same meaning. In *Glover v. Hot Springs Kennel Club, Inc.*, 230 Ark. 544, 547, 323 S.W.2d 902, 904 (1959), this Court reviewed a state statute that required "a majority of the qualified electors" of a county to approve a greyhound racing franchise. 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 a *majority of all of the 17,245 poll tax holders of Garland County*." *Id*., 230 Ark. 544, at 548, 323 S.W.2d at 904. Affirming and noting "an impressive line" of "on point" decisions stretching back to 1885, 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 on the proposition." *Id*., 230 Ark. 544, at 553, 323 S.W.2d at 907. Here, "majority of the voters in the county" and "majority of those in the county who vote at the election" have the same meaning: a majority of those who vote on the Proposed Amendment.

E. The ballot title does not fail to disclose conflicts with federal law.

Pointing to this Court's decision in *Lange v. Martin*, Petitioners contend that the ballot title must disclose that the proposed measure violates federal law. 2016 Ark. 337, at 8, 500 S.W.3d 154, 159. Petitioners further assert that the ballot title in

this case fails to disclose that it violates the Takings Clause, Contracts Clause, Equal Protection Clause, and Procedural Due Process Clause of the United States Constitution, and likewise, that the Proposed Amendment violates, or at the very least amends and partially repeals, sister clauses in the Arkansas Constitution.

Lange is inapposite. *Lange* involved a proposed measure that purported to legalize sports gambling in Arkansas, despite the fact that sports gambling was clearly outlawed by a federal law known as the Professional and Amateur Sports Protection Act ("PASPA").

> Turning to the ballot title before us, in reviewing a ballot title, our test for gauging materiality and the impact of omitted language in a ballot title is whether knowledge of that language would give the voters a serious basis for reflection on how to cast their ballots. The title informs voters that the Amendment will permit sports gambling, as well as any type of wagering allowed in Nevada, which necessarily includes wagers on sports. However, here, PASPA prohibits sports gambling in Arkansas. Accordingly, the Amendment's language *clearly conflicts* with federal law that prohibits sports gambling in Arkansas.

Lange, 2016 Ark. 337, at 8, 500 S.W.3d at 159 (emphasis added).

Here, the Proposed Amendment's language does not "clearly conflict[]" with the United States Constitution, the Arkansas Constitution, or any other law. Unlike *Lange*, no conflict or violation of federal or state law can be discerned from a facial comparison of the text of the Proposed Amendment and any other law. If any conflict exists, it could only be discerned from a fact-intensive application of federal and state law to the Proposed Amendment. But such analysis is beyond the scope of the

Attorney General or this Court's review.[2] Only clear conflicts with federal law would warrant setting aside the Proposed Amendment, and Petitioners cannot point to one.

CONCLUSION

This Court should deny Petitioners' request to enjoin the ballot initiative from appearing on the November 5, 2024, ballot, and it should deny Petitioners' request that this Court order votes on this initiative not be counted.

Respectfully submitted,

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Attorney General

By: /s/ Justin Brascher

[2] Petitioners' argument in this regard is like an as-applied challenge to the constitutionality of a statute as opposed to a facial challenge. *See, e.g., Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004) ("An as-applied challenge consists of a challenge to the statute's application only as-applied to the party before the court. If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable.") (internal citation omitted).

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CERTIFICATE OF SERVICE

I, Justin Brascher, hereby certify that on August 23, 2024, I electronically filed the foregoing with the Clerk of the Court using the eFlex filing system, which notifies eFlex participants.

/s/Justin Brascher
Justin Brascher

CERTIFICATE OF COMPLIANCE

This brief complies with Administrative Order No. 19's requirements concerning confidential information, Administrative Order No. 21, § 9's requirement that briefs not contain hyperlinks to external papers or websites, and with the word-count limitation in Arkansas Supreme Court Rule 4-2(d), in that it contains 3,907 words within the statement of the case and the facts, the argument, and the conclusion.

/s/Justin Brascher
Justin Brascher