ELECTRONICALLY FILED
Arkansas Supreme Court
Stacey Pectol, Clerk of the Courts
2022-Sep-02 09:33:48
CV-22-482
21 Pages

NO. CV-22-482

IN THE ARKANSAS SUPREME COURT

Original Action

EDDIE ARMSTRONG and LANCE HUEY,
individually and on behalf
of RESPONSIBLE GROWTH ARKANSAS,
a ballot question committee — PETITIONERS

v.

JOHN THURSTON, et al. — RESPONDENTS

SAVE ARKANSAS FROM EPIDEMIC, et al. — INTERVENORS

PETITIONERS' REPLY BRIEF

Stephen R. Lancaster (93061)
Gary D. Marts, Jr. (2004116)
Erika Gee (2001196)
WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
gmarts@wlj.com

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

ARGUMENT

I. The ballot title informs voters that Amendment 98 will be changed by the Amendment.

This Court has held that a ballot title need not summarize existing law affected by a measure. *See, e.g.*, *Cox v. Daniels*, 374 Ark. 437, 445, 288 S.W.3d 591, 596 (2008) (lottery amendment ballot title "not required to state the present ban on lotteries, nor to summarize" existing law); *Knight v. Martin*, 2018 Ark. 280, 7, 556 S.W.3d 501, 506 (no need for ballot title to say that measure would overturn constitutional ban on monopolies and perpetuities); *Becker v. Riviere*, 270 Ark. 219, 224, 604 S.W.2d 555, 558 (1980) (ballot title not required to summarize existing usury law).

Responsible Growth Arkansas's brief cited those cases, but the Board and intervenor SAVE do not discuss them. Intervenor Communities tries to distinguish them (Br. at 39–41) but fails to address the rule that a ballot title need not "summarize the present law." *Cox*, 374 Ark. at 445, 288 S.W.3d at 596. Nor does Communities address *Cox's* rejection of a rule requiring a title to identify existing constitutional provisions that the proposal will change. *Id*.

That precedent establishes that the ballot title sufficiently informs voters of the Amendment's proposed changes to Amendment 98. The ballot title exceeds what the Court has previously required by telling voters the specific provisions of Amendment 98 that will be amended, including the specific change at issue here. That change is the repeal of Amendment 98, § 8(e)(5)(A), which limits THC in food or drink containing marijuana to 10 mg.[1] The ballot title informs voters specifically that the Amendment will repeal that section. Add. 18. The ballot title thus exceeds what the Court required in past cases by telling voters the existing law that will change.

Referring to existing law provides substantial information to voters. This Court has held that "***every person*** is presumed to know the law." *City of Farmington v. Smith*, 366 Ark. 473, 480, 237 S.W.3d 1, 6 (2006) (emphasis added). Voters therefore presumptively know the existing law referenced in the ballot title. Communities responds

---

[1] Contrary to suggestions in the intervenors' briefs, this Amendment 98)provision does not apply to all marijuana products. It applies to food or drink containing marijuana.

condescendingly that "every person" does not include "the average Arkansas voter." Br. at 37. The Board responds irrelevantly that voters learn about "the contents of a proposed amendment" from the ballot title (Board Br. at 20), which has nothing to do with knowledge of *existing* law. If "every person is presumed to know the law," then every person is presumed to know existing law identified in a ballot title. Accordingly, nothing has been omitted but the sort of detailed description that this Court does not require.

Indeed, the Court's precedent on referenda ballot titles recognizes that voters know existing law. Because referenda target "officially adopted and published" laws, a referenda ballot title need only "identify the act in question"[2] to be sufficient. *Fletcher v. Bryant*, 243 Ark. 864, 868, 422 S.W.2d 698, 701 (1968). The same principle should apply when an initiative proposes a change to existing law—identification should suffice, particularly because "every person" presumptively knows existing law.

[2] This rule also defeats SAVE's claim that identifying existing law is the same as a technical definition.

Moving from the non-omission of the change to) Section 8(e)(5)(A), the Board argues incorrectly that the ballot title has a "false statement child-proof packaging will be added to existing law." Board Br. at 22. That argument misstates the ballot title, which says that the Amendment will repeal and replace "Amendment 98, §§ 8(e)(5)(A)-(B) and 8(e)(8)(A)-(F) with requirements for child-proof packaging and restrictions on advertising that appeals to children." Add. 18. And that is precisely what the Amendment does, replacing the existing child-advertising provisions of Amendment 98 with a new requirement. Add. 22, § 5(e). In other words, the Amendment will repeal those existing provisions and replace them with different requirements for child-proof packaging, and the ballot title says just that. The ballot title thus accurately states what the Amendment proposes.

Similarly, both intervenors argue unconvincingly that the ballot title should say that the Amendment's new restriction is "looser" than the existing law that the Amendment will repeal and replace. SAFE Br. at 28–30; Communities Br. at 27–28. That argument demands that the ballot title do what it cannot—depart from impartiality to indulge in "partisan coloring" claiming a favorable or unfavorable effect. *See*

Christian Civic Action Comm. v. McCuen, 318 Ark. 241, 249, 884 S.W.2d 605, 610 (1994) (ballot titles are "tinged with partisan coloring" when they "give only the impression that the proponents of the proposed amendment wish to convey of the activity represented by the words"). Characterizing the Amendment's new requirement in subjective terms of either its stringency or its "looseness" would violate that prohibition. The ballot title complies with precedent by informing voters of proposed changes to the law without putting a thumb on the scale by characterizing the change as good or bad.[3]

The ballot title sufficiently tells voters about the changes that the Amendment will make to the law, providing a fair understanding of the issues presented and the scope and significance of the proposed changes in the law. Neither the Board nor intervenors have shown otherwise.

---

[3] Communities also argues the potency of THC, but those arguments go to the merits of the Amendment, not the sufficiency of the ballot title. *Ross v. Martin*, 2016 Ark. 340, 3–4 (the Court will "neither . . . interpret a proposed amendment nor discuss its merits or faults" when considering a ballot title) (citation omitted).

II. In their additional arguments, intervenors failed to rebut the sufficiency of the ballot title.

While the Board rests on its original—and incorrect—basis for rejecting the ballot title, intervenors make several additional arguments. Those arguments have no merit, as Responsible Growth Arkansas shows below.

II.A. Intervenors' hemp argument engages in speculative interpretation of the Amendment not relevant to the sufficiency determination.

Both intervenors speculate about the effect the Amendment—as they interpret it under state and federal law—might have on the industrial-hemp industry. But "a ballot title does not need to include every possible consequence or impact of a proposed measure, and it does not need to address or anticipate every possible legal issue." *Stiritz v. Martin*, 2018 Ark. 281, 7, 556 S.W.3d 523, 529 (citation omitted). "Nor is it reasonable to expect the title to cover or anticipate every possible legal argument the proposed measure might evoke." *May v. Daniels*, 359 Ark. 100, 111, 194 S.W.3d 771, 780 (2004).

The Court has long applied those principles to reject such arguments. In *Stiritz*, a ballot-title challenger argued that the title for a casino-gambling amendment failed "to inform voters of various conceivable eventualities, such as how the amendment will impact

certain laws or how future events may impact the amendment." *Id.* The Court rejected those arguments without considering the claimed "impact [on] certain laws" because such information is not required. *Id.* Similarly, *May* rejected the challengers' argument that "some current laws *may* be affected or even impliedly repealed" by the proposed measure because the Court's review of a ballot title does not extend "to the prospective application of the amendment." 359 Ark. at 111–12, 194 S.W.3d at 780–81. The Court might consider the language of the measure "to determine whether a term or phrase in the title is vague or misleading," but this does not mean that we will interpret the amendment in the sense of construing or applying it." *Id.* *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992),[4] similarly refused to require the ballot title to address the challengers' interpretation of the proposed amendment. *Id.* at 658, 841 S.W.2d at 658. The Court should do the same here, where intervenors also argue that the ballot title should have addressed the effect of the Amendment as they interpret it.

[4] *Plugge* was overruled in part on other grounds by *Bailey v. McCuen*, 318 Ark. 277, 884 S.W.2d 938 (1994).

Plugge also rejects SAVE's constitutionality arguments. *See* SAVE Br. at 34–41. The measure in *Plugge* imposed term limits on elected federal officeholders that, the challengers argued, violated the federal constitution. 310 Ark. at 142–43, 841 S.W.2d at 660–61. The Court declined to consider that issue in considering ballot-title sufficiency, concluding that "a future judicial proceeding will be required to decide the Amendment's validity if it is adopted by the people."[5] *Id.* If interpretation of the Amendment after adoption threatens the rights of hemp growers, they can assert their rights in a future lawsuit. That possibility has no effect on ballot-title sufficiency.

Nor do intervenors show insufficiency in the ballot title by citing inapposite cases. SAVE cites *Lange v. Martin*, 2016 Ark. 337, 500 S.W.3d 154, which held that the ballot title for a casino-gambling amendment that would have allowed sports gambling was insufficient

[5] After the amendment was adopted, the Court held that federal term limits were unconstitutional. *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 266, 872 S.W.2d 349, 357 (1994), *aff'd sub nom. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

because the title did not say that then-federal law "prohibit[ed] sports gambling in Arkansas." *Id.* at 8–9, 500 S.W.3d at 159. *Lange* is distinguishable, though, because intervenors cite no federal law clearly prohibiting anything expressly authorized by the Amendment. So while the ballot title informs voters that the Amendment "acknowledge[es] that possession and sale of cannabis remain illegal under federal law" (Add. 18) because federal law expressly prohibits the possession and sale of cannabis, the Amendment does not specifically address hemp and does not expressly implicate a federal prohibition. Intervenors reach their conclusion through the sort of interpretation that this Court has rejected as part of the sufficiency analysis, so the case is nothing like *Lange*.

Communities' citations also do not apply. *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), held that the term "tax increase" misled because voters might have read it to include increased fees not traditionally considered taxes. *Id.* at 443–44, 29 S.W.3d at 674. Similarly, *Wilson v. Martin*, 2016 Ark. 334, 500 S.W.3d 160, involved a proposed tort-reform amendment using the novel term "non-economic damages" without defining it, a defect that carried over into the ballot

title, leaving voters to guess its meaning. *Id*. at 8–9, 500 S.W.3d at 166–67. Here, the Amendment does not address hemp because hemp is beyond its scope, which is adult use and possession of cannabis currently prohibited by existing law. Communities thus demands that the ballot title address Communities' interpretation of the Amendment, not its express contents. This Court has never required a ballot title to anticipate legal interpretations and consequences of the measure.

Finally, while interpreting the Amendment falls beyond the scope of the sufficiency analysis, intervenors' interpretation is wrong. The Amendment does not prohibit hemp authorized under existing law. The repealer clause applies only to laws forbidding "activities allowed under this amendment," which does not mention hemp. Add. 28, § 10(b). And the clause providing that the Amendment does not "permit[] the cultivation, production, distribution, or sale of cannabis by individuals or entities except as authorized under this amendment or under Amendment 98" simply provides that the Amendment does not legalize cannabis unless specified. Add. 27, § 9(f). Intervenors try to turn those provisions into a prohibition on hemp, but that interpretation is tortured at best.

Intervenors' hemp arguments fail to refute the sufficiency of the ballot title. The Court should reject them.

II.B. The ballot title conveys an adequate understanding of Tier One and Tier Two facilities.

Even though a "ballot title is not required to include every detail, term, definition, or how the law may work," *Stiritz*, Communities insists that the ballot title should have included the Amendment's definitions of Tier One and Tier Two facilities, again invoking *Wilson* and *Kurrus*. As explained above, those cases involved, respectively, a novel term defined in neither the measure nor the ballot title and a familiar term used in an unfamiliar way. Neither case applies here, though, because Tier One and Tier Two facilities are adequately described in the ballot title.

The ballot title provides sufficient information about Tier One and Tier Two facilities. The title says that the Amendment requires "issuance of Tier One adult use cultivation facility licenses to cultivation facility licensees under Amendment 98 as of November 8, 2022, to operate on the same premises as their existing facilities and forbidding issuance of additional Tier One adult use cultivation licenses." Add. 19. Voters will thus know that existing Amendment 98

cultivation facilities will be Tier One facilities and that there cannot be additional Tier One licenses. The ballot title also informs voters that the Amendment requires issuance by lottery of 12 Tier Two adult-use cultivation facility licenses. Voters therefore will know that how those facilities will come to exist and will know that there is a distinction between them.

Communities' argument resembles arguments rejected in other cases. For instance, in *Cox v. Martin*, 2012 Ark. 352, 423 S.W.3d 75, the challengers complained that the title for a medical-marijuana measure did not include its definitions of "medical use," "qualifying medical condition," "dispensaries," "cultivation," "acquisition," "distribution," "medical uses," and "medical condition." *Id.* at 7–8, 423 S.W.3d at 82. The Court rejected those arguments because a "ballot title need not define every single term," and the ballot title "thoroughly inform[ed] voters of the subject matter and scope" of the measure. *Id.*

The same is true here—the ballot title describes the Amendment's subject matter and scope and also explains what Tier One and Tier Two facilities will be. Communities' argument fails.

II.C. The Amendment's definition of "adult" matches common understandings of the term.

Communities also complains that "adult" as used in the ballot title is misleading because the Amendment defines that term to mean people who are 21 or older, while some people might understand "adult" to refer to people who have reached 18 years of age. Communities Br. at 35–36. But that argument fails because, again, a ballot title need not define every term. Definitions are required when terms are "highly technical, obscure, . . . attempt to mislead voters, or . . . hide the actual nature of the proposal." *Stiritz*, 2018 Ark. 281 at 4–5, 556 S.W.3d at 527–28 (citation omitted). The Amendment defines "adult" in a common way to mean people over the age of 21.

In fact, defining "adult" as someone 21 years old or older is standard in the context of controlled substances. Ark. Code Ann. § 9-25-101 provides that 18 is the age of majority, but subsection (b)(2) of the statute says that a person must be 21 years old to buy controlled substances. Ark. Code Ann. § 3-3-203 similarly makes it unlawful for anyone under the age of 21 to purchase or possess intoxicants. And, tellingly, subsection (b) of that statute distinguishes "an adult" from "a person under twenty-one (21) years of age" by making it illegal for an

"adult" to buy an intoxicant for anyone under the age of 21. The definition of "adult" in the Amendment thus aligns with existing Arkansas law and is familiar, not technical or obscure.

That definition need not be included in the ballot title. Communities' argument thus fails.

III. Ark. Code Ann. § 7-9-111's ballot title certification process is unconstitutional.

Neither the Board nor the intervenors have shown that Amendment 7 allows the legislature to give the Board the authority to act as the arbiter of ballot-title sufficiency. The current process is unconstitutional because it contradicts Amendment 7, and Responsible Growth Arkansas will not repeat its unrefuted arguments in this brief.

The Board also argues that the Court lacks jurisdiction to consider constitutionality in this original action. But the Court rejected the argument that a party cannot challenge the constitutionality of a statute in a case brought under the Court's original jurisdiction over ballot-title sufficiency in *Finn v. McCuen*, 303 Ark. 418, 421, 798 S.W.2d

34, 35 (1990).[6] Like the party in *Finn*, Responsible Growth Arkansas is not seeking a declaratory judgment—it is arguing that the action of the Board challenged in this original action is void because the statute giving the Board authority to reject ballot titles is unconstitutional. That challenge falls within the scope of this Court's authority to decide the sufficiency of the ballot title.

Respondents also complain—in a brief prepared and filed by the Attorney General—that the Attorney General did not receive notice of the constitutionality challenge. Formal notice is not required when state agencies are parties to the action and thus "available to provide a complete and fully adversarial adjudication of the matter." *Bynum v. State*, 2018 Ark. App. 201, 8, 546 S.W.3d 533, 539.

REQUEST FOR RELIEF

The Court should declare the ballot title sufficient, order certification of the Amendment for inclusion on the November 2022

[6] *Finn* declared a statute unconstitutional, a holding later overruled by *Stilley v. Priest*, 341 Ark. 329, 16 S.W.3d 251 (2000).

general election ballot, and direct Secretary Thurston to canvass and certify returns on the Amendment.

WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
FAX: (501) 376-9442
gmarts@wlj.com

By 
Stephen R. Lancaster (93061)
Gary D. Marts, Jr. (2004116)
Erika Gee (2001196)

Attorneys for Petitioners

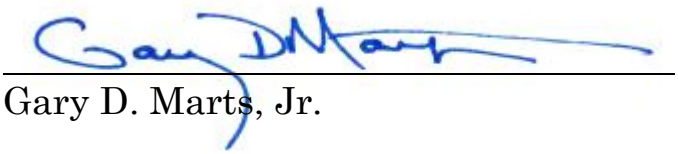
CERTIFICATE OF SERVICE

I certify that on September 2, 2022, I filed this brief using the Court's eFlex filing system, which will serve a copy on all counsel of record.


Gary D. Marts, Jr.

CERTIFICATE OF COMPLIANCE

I certify that this reply brief complies with Administrative Order No. 19 and that it conforms to the word-count limitations in Rule 4-2(d) of this court's rules. The brief contains 2,870 words.



Gary D. Marts, Jr.