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NO. CV-20-454

IN THE ARKANSAS SUPREME COURT
Original Action

ARKANSAS VOTERS FIRST, et al. — PETITIONERS

v.

JOHN THURSTON, in his official capacity
as Secretary of State — RESPONDENT

ARKANSANS FOR TRANSPARENCY, et al. — INTERVENORS

BRIEF OF INTERVENORS ON COUNT 3

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   D. The ballot title is misleading because it does not inform voters that the proposed amendment will require costly replacement of existing voting machines.

   E. The ballot title is misleading for the additional reason that it does not explain its radical changes in how votes are cast and counted.

II. Act 376 of 2019 is constitutional because it imposes no unwarranted restriction on the initiative and referendum process.

   A. The Court has never applied strict scrutiny to statutes dealing with initiatives and referenda, and the correct standard is whether the act imposes an unwarranted restriction on rights under Amendment 7.

   B. Petitioners have not shown that Act 376 imposes an unwarranted restriction on the initiative process.

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STATEMENT OF THE CASE AND FACTS

On July 22, 2020, the State Board of Election Commissioners ("Board") considered the ballot title for the proposed initiated amendment with the popular name "Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary" ("Open Primary Amendment"). Add. 1. The Board considered the issue under Ark. Code Ann. § 7-9-111, which requires the Board to determine whether a proposed ballot title is misleading.

The Board concluded that the ballot title is misleading and voted not to certify it for the ballot. Add. 1. As required by law, the Board gave petitioner Open Primaries Arkansas, which sponsored the initiated amendment, written notice of its decision. Add. 1. As the Board explained in that notice, it found the ballot title misleading in four separate respects:

- The use of the phrase "open primary" is misleading because the proposed amendment uses that term differently from existing understanding of the phrase under Arkansas law.

- The ballot title is misleading because it fails to explain that the proposed amendment cannot go into effect without receiving federal preclearance as required by *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990).
- The ballot title is misleading because it does not inform voters that the proposed amendment eliminates the right of political parties to disassociate themselves from undesirable candidates.
- The ballot title is misleading because it omits any reference to the fact that adopting the proposed amendment would impose great cost on the state because it would have to replace existing voting machines in favor of machines able to accept and tabulate ranked choice voting.

Add. 1–2. For those reasons, the Board declined to certify the ballot title to the Secretary of State for inclusion on the November 2020 general election ballot. Add. 2.

Petitioners then filed this action to contest the Board's decision, as well as the Secretary of State's conclusion that the petition signatures submitted were insufficient. The Court allowed Arkansans for Transparency and Jonelle Fulmer ("Arkansans for Transparency") to

intervene to defend the rulings of the Secretary of State and the Board. As the Court ordered in bifurcating petitioners' counts, this brief addresses only the ballot title issues raised in Count 3 of the petition.

ARGUMENT

The Board correctly rejected the ballot title because it was misleading in each of the ways that the Board detailed in its written notice of its determination. Add. 1–2. And the ballot title is also misleading in other ways, particularly in its failure to explain the proposed amendment's radical uprooting of how Arkansans cast and count their votes for political offices. For those reasons, the Court should find the ballot title insufficient and refuse petitioners' request to order its inclusion on the ballot. The Court should also reject petitioners' argument that Act 376 of 2019's provisions on Board consideration of ballot titles is unconstitutional because the act imposes no unwarranted restriction on the petition process.

I. The Open Primary ballot title is misleading and thus cannot appear on the ballot.

A "ballot title must be free from misleading tendencies that, whether by amplification, omission, or fallacy, thwart a fair understanding of the issue presented." *Wilson v. Martin*, 2016 Ark. 334, 7, 500 S.W.3d 160, 166. A ballot title therefore "cannot omit material information that would give the voters serious ground for reflection" and must "be complete enough to convey an intelligible idea

of the scope and import of the proposed law." *Id.* "Thus, it must be intelligible, honest, and impartial so that it informs the voters with such clarity that they can cast their ballots with a fair understanding of the issues presented." *Id.*

Petitioners try to soften this standard by quoting language from *Becker v. Riviere*, 270 Ark. 219, 604 S.W.2d 555 (1980), in which the Court referred to a "substantial compliance standard" for ballot titles. The Court has not applied a substantial compliance standard to a ballot title in the 40 years since *Becker*.[1] That standard has not resurfaced because it does not lend itself to determining whether a ballot title fails to inform voters about the provisions of the proposal adequately and therefore misleads. If the ballot title is misleading, it is insufficient and cannot appear on the ballot. That simple standard requires no more gloss through labels like "substantial compliance."

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[1] And in the different context of statutory requirements for the collection and submission of petition signatures, the Court specifically rejected substantial compliance when statutory requirements are mandatory. *Benca v. Martin*, 2016 Ark. 359, 13, 500 S.W.3d 742, 750.

Here, the Open Primary ballot title is misleading for the reasons that the Board identified, as well as several more reasons, any of which justifies its exclusion from the ballot.

A. The use of the phrase "open primary" in the ballot title is misleading because it has a different meaning from existing law.

The Board correctly determined that the ballot title's use of the phrase "open primary" is misleading because it uses that familiar term in an unfamiliar way. That conclusion does not require petitioners to define every term used in the ballot title; it merely prevents the use of a term in a misleading way. And the Board correctly determined that the ballot title uses "open primary" in a misleading way.

This Court has often concluded that ballot titles are insufficient if they use terms in misleading ways. For instance, in *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), the phrase "tax increase" in the ballot title was misleading because a voter might have read it to include increased fees for things like drivers' licenses and hunting permits not traditionally considered taxes. *Id.* at 443–44, 29 S.W.3d at 674. Similarly, a ballot title that used "additional racetrack wagering" paired with a "hypertechnical" description of that term was misleading because it offered a euphemism for casino-style gambling that would have left

voters unaware that they were voting on that sort of gambling and not new ways of betting on horses or dogs. *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 249, 884 S.W.2d 605, 609–10 (1994). In a later case, the novel phrase "non-economic damages" in a proposed amendment limiting such damages misled because the lack of a definition left voters with insufficient understanding of what the amendment would limit. *Wilson v. Martin*, 2016 Ark. 334, 9–10, 500 S.W.3d 160, 167.

Rather than use an undefined novel phrase, petitioners' ballot title uses a familiar term in an unfamiliar way without explaining the difference. Arkansas's current primary system requires an "open primary" in which registered voters may cast a ballot in a party's primary without being registered members of that party. Ark. Code Ann. § 7-7-308. That term has long described such a primary process as Arkansas's existing one. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 445 n.2 (2008) (defining open primary as one "in which a person may vote for any party's nominees"); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 222 (1986)

("The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century.").

But the ballot title here uses "open primary" to mean something different from its common use. The proposed amendment's primary is one in which all the candidates of all parties appear on a single ballot, with the top four candidates advancing to the general election. Describing that process as an "open primary" suggests that it is the same as the existing process, which is not true. As the Board also pointed out, it suggests that voting against the proposed amendment "would result in Arkansans voting under a closed primary system." Add. 1. Using the term "open primary" is therefore misleading.

And petitioners are wrong that qualifying "open primary" by appending the phrase "top four" to it cures this misleading tendency. The problem lies in the use of the phrase "open primary" with no explanation that the term does not have its common understanding. The qualifier of "top four" does not clarify the proposed amendment's new meaning of "open primary" as referring to a new process unlike the existing open primary system. Even with the qualifier, then, the phrase remains misleading.

Using the term "open primary" in this way misleads voters much like partisan language does—it uses the popular, existing concept of an open primary to disguise the proposed amendment's discarding of that system. The Board correctly found that use to be misleading.

B. The ballot title is misleading because it fails to inform voters that the proposed amendment cannot take effect unless is receives preclearance from the federal government.

A ballot title is misleading if it fails to inform voters that its provisions conflict with federal law. *Lange v. Martin*, 2016 Ark. 337, 9, 500 S.W.3d 154, 159. In *Lange*, the proposed amendment would have allowed gambling on sports, which federal law in effect that time prohibited. *Id.* But the ballot title did not "inform the voters that the Amendment violates federal law." *Id.* That omission made the ballot title misleading, so the Supreme Court removed the initiative from the ballot. *Id.*

The ballot title for the Open Primary Amendment is misleading for the same reason. The proposed amendment changes the vote totals required to prevail in general elections for "federal congressional office," General Assembly, and state constitutional officers from plurality to majority. But federal law does not permit that change because

Arkansas is subject to a preclearance requirement under the Voting Rights Act for any law imposing majority-vote requirements, an important consideration that the ballot title does not disclose to voters.

That preclearance requirement derives from *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990). In *Jeffers*, a federal court found that the state committed several violations of the Voting Rights Act through its use of majority-vote requirements to suppress black candidates for office. *Id.* at 601. The court "therefore h[e]ld that any further statutes, ordinances, regulations, practices, or standards imposing or relating to a majority-vote requirement in general elections in this State must be subjected to the preclearance process" under Section 3 of the Voting Rights Act. *Id.*

Despite petitioners' insistence to the contrary, that requirement remains in place. Petitioners cite *Shelby County v. Holder*, 570 U.S. 529 (2013), in support of this argument, but *Shelby County* does not apply because it considered a different provision of the Voting Rights Act than the one applied in *Jeffers*. *Shelby County* considered Section 4 of the Voting Rights Act, which imposed statutory preclearance requirements on certain states for enacting any law related to voting

because of a history of voting rights violations. *Id.* at 534. That consideration led to a holding that Section 4 is unconstitutional because its formula failed to consider current conditions instead of conditions prevailing in 1965 when Congress adopted the act. *Id.* at 557.

Jeffers did not apply a Section 4 preclearance requirement, though—it imposed a Section 3 preclearance requirement as a remedy for proven discrimination. 740 F. Supp. at 586. *Shelby County* did not end Section 3 preclearance requirements like the one imposed in *Jeffers*. *See Perez v. Abbott*, 390 F. Supp. 3d 803, 819 (W.D. Tex. 2019) (noting that *Shelby County* "invalidated the coverage formula in § 4 of the VRA, but left § 5 and the § 3 remedies, including bail-in, intact"). The *Jeffers* preclearance requirement thus remains in effect and applies to the proposed amendment's attempt to change Arkansas's existing vote requirements.

Omission of that federal requirement from the ballot title makes it misleading. The ballot title does not inform voters that their consideration of the issue is not the final word because the new amendment must receive federal approval before it takes effect. That

information might give voters pause for reflection before casting their votes.

Lange noted that the inclusion of information identifying the effect of federal law on the amendment saved the medical marijuana ballot title in *Cox v. Martin*, 2012 Ark. 352, 423 S.W.3d 75. *Lange*, 2016 Ark. 337 at 9 n.2, 500 S.W.3d at 159 n.2. That ballot title's first sentence acknowledged that the proposed amendment might conflict with federal law banning marijuana. *Id.* (quoting *Cox*). With that acknowledgement, "the voter was adequately informed and could make a reasoned decision in the voting booth." *Id.* But the misleading *Lange* ballot title "had no such statement" about federal gambling law and therefore failed. *Id.* The Open Primary ballot title fails for the same reason because it fails to mention the *Jeffers* preclearance requirement.

That preclearance requirement is no "hypothetical scenario" like petitioners claim—it is an existing legal requirement that applies to this proposed amendment and governs whether it can become law. Voters should have that information when deciding whether to vote for the proposed amendment, particularly minority voters protected by the

Jeffers preclearance requirement. The omission of the preclearance requirement from the ballot title makes it misleading.

C. The ballot title is misleading because it does not explain to voters that it eliminates the right of a political party to seek removal of a nominee from the ballot.

Petitioners' next argument distorts the proposed amendment's provisions by claiming that the issue of a political party's right of association with candidates is "delegated" to the General Assembly. But the proposed amendment does not delegate that issue at all. The proposed amendment gives candidates the right to "have their political-party affiliation indicated on the ballot" without giving political parties the right to avoid association with that candidate. The amendment thus marks a major change in Arkansas law that the ballot title should disclose to voters.

Under current Arkansas law, political parties have a right to ask a court to remove a party nominee from the ballot for "good and legal cause." *Ivy v. Republican Party of Arkansas*, 318 Ark. 50, 55, 883 S.W.2d 805, 808 (1994). That right is essential—without it, the political party would be "deprived of its right of association" under the First Amendment of the United States Constitution. *Id.* That deprivation

would occur because "a political party has a right to identify with and select those candidates that best reflect political party preferences." *Id.* (citing *Tashjian* and *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992)); *see also* Ark. Code Ann. §§ 7-7-203(c), (g) & (h); 7-7-301; 7-7-402.

The Open Primary Amendment would remove those rights from political parties. Under the proposed amendment, candidates will have a right to list the political party of their choice on the ballot no matter if the party approves of being linked to that candidate. Add. 20, § 3(B)(4). Unlike current law, the proposed amendment offers political parties no means to avoid association with a candidate who does not reflect the party's preference. The party simply has to suffer forced association with a candidate, no matter how undesirable that candidate might be. The ballot title offers no information about that major change in the law.

The proposed amendment eviscerates current law. In addition to political party powers set out in *Ivy*, two statutory reviews are now conducted for all candidates. First, candidates must "file with the political party" during the party filing period by filing a party pledge and an affidavit of eligibility with the party and obtaining a party

certificate for filing with the Secretary of State. Ark. Code Ann. § 7-7-203(c)(2)–(4). Second, the county boards of election commissioners certify to the Secretary of State the list of names of all candidates who prevailed in their respective political party primaries by majority vote as "nominated candidates for the offices," and the Secretary of State certifies that list to the political parties. Ark. Code Ann. § 7-7-203(g)(2). It takes an affirmative vote of the respective political party state committee to advance any nomination to the ballot with that party's label. Ark. Code Ann. § 7-7-203(h)(1)(B). The proposed amendment eliminates statutory opportunities for review—and potential disapproval—and the ballot title does not inform voters of that change.

And the undisclosed changes do not stop there. The current open primary system remains in place for county level offices, without change. So the filing of party pledges and affidavits of eligibility, both of which are required to obtain a party certificate and run with a political party label, will remain for many offices. Ark. Code Ann. § 7-7-203(c). County committees will continue to have the opportunity to review county level candidates (and some municipal candidates) before certifying successful nominees to the ballot. Ark. Code Ann. §§ 7-7-

203(g)(1); (h)(2)(B). This current structure remains in place for those offices—as an open primary in the existing sense—under the proposed amendment but the ballot title does not disclose that. These omissions are fatal to the ballot title.

The proposed amendment's delegation provision does not remedy this issue. Any legislation enacted under the delegation provision must be "in accordance with" the amendment. Add. 22, § 5. So the General Assembly could not adopt an act infringing on the newly acquired right of candidates under the amendment to list their purported party affiliation on the ballot because it would violate the new right that the amendment grants. Nor could the General Assembly adopt a law preventing candidates from listing any party name they like, including fabricated names like the "No Taxes Party," the "Cut Taxes Party," or anything else that the candidate likes. The proposed amendment therefore marks a major change in Arkansas law governing the right of political parties to avoid forced association with undesirable candidates. And the ballot title fails to inform voters of that change.

By failing to inform voters that political parties will have no choice but to associate with any candidates who choose to list those

parties next to their names on the ballot, the ballot title omits important information that voters need to know. The omission of that information makes the ballot title misleading.

D. The ballot title is misleading because it does not inform voters that the proposed amendment will require costly replacement of existing voting machines.

The Board also correctly determined that the failure of the ballot title to inform voters that the proposed amendment would require scrapping existing voting machines makes the ballot title misleading.[2] Add. 2. Ranked-choice voting would be a new concept in Arkansas, and that new concept would likely require new voting machines able to tabulate voters' ranking of the four candidates who would appear on the ballot. The cost for such a change would be substantial, and knowledge of that cost would likely give voters some pause for reflection.

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[2] The Board has the duty under Arkansas law to "examine and approve, in accordance [with statute], the types of voting machines and electronic voting tabulating devices used in any election." Ark. Code Ann. § 7-4-101(f)(10).

Voting machines used for federal elections must comply with federal law. *See* Ark. Code Ann. § 7-5-301. But it is not clear that existing voting machines will accommodate ranked choice voting. Nor is it clear that any federally approved machines offer ranked-choice capabilities. As the National Conference of State Legislatures has observed of ranked-choice voting, "administrators' concerns center on technology. No voting system currently certified by the U.S. Election Assistance Commission (EAC) has ranked-choice capability." National Conference of State Legislatures, *Ranked-Choice Voting* at ncsl.org/research/elections-and-campaigns/ranked-choice-voting.aspx (accessed July 14, 2020).

The lack of machines has "left jurisdictions to employ creative methods for doing the complicated calculations needed for allocating (and reallocating) votes." *Id.* Arkansas might end up in a similar spot, having to improvise a system for conducting ranked-choice election. And "cost is another factor" for ranked-choice voting. *Id.* . When Maine adopted ranked-choice voting, that state's secretary of state estimated that the change would cost more than $1.5 million to implement. *Id.* .

Petitioners again point to the delegation clause as justifying the omission of the cost from the ballot title, but how implementation occurs is not the point. The point is that the Board concluded that implementing the proposed amendment will require extensive changes to the mechanics of voting in Arkansas that the ballot title does not disclose. Add. 2; *see also* Ark. Code Ann. § 7-4-101(f)(10). The ballot title does not inform voters that the proposed amendment might require uprooting the entire current voting system to implement a logistically-difficult and expensive ranked-choice voting system. That sort of consideration might give voters grounds for serious reflection, and the omission of that information makes the ballot title misleading. The Board was right.

E. The ballot title is misleading for the additional reason that it does not explain its radical changes in how votes are cast and counted.

Beyond the bases for the Board's rejection of the ballot title, it is also misleading because it fails to explain to voters that it overhauls how voters cast their votes and how election officials count those votes. That omission makes the ballot title misleading.

The ballot title's description of the "instant runoff" process that the proposed amendment would impose also misleads by omission.

That omission is the ballot title's failure to inform voters that under that process, unlike current law, the candidate who receives the most votes in a general election might not win. And a candidate whom the majority of voters oppose may win. That radical change to current law requires explanation in the ballot title.

Under the current system in Arkansas, a general election candidate wins by getting more votes than any other candidate. Ark. Const. Art. 6, § 3 (providing that winners of elections for governor, secretary of state, treasurer of state, auditor of state, and attorney general are the "persons having the highest number of votes"). Under that provision, runoff elections for those positions are prohibited. *Rockefeller v. Matthews*, 249 Ark. 341, 345, 459 S.W.2d 110, 112 (1970) (holding that a statute requiring runoff elections violated Art. 6, § 3). The same rule applies in elections for the United States House of Representatives, the United States Senate, and state legislative seats, with the winners being the candidates who get the most votes. Ark. Code Ann. §§ 7-5-703, 704.

The Open Primary Amendment proposes a radical shift from that long-standing rule of most-votes-wins.[3] Instead of the current simple process of counting the votes and declaring the candidate with the most votes the winner, that point marks only the beginning of the process under the proposed amendment.

Under the amendment's terms, voters rank the four candidates in order of preference on their ballots. If none of the candidates receives a majority of the votes, the candidate who receives the most votes does not win. Instead, the fourth-place finisher is eliminated, and the votes are recounted. In that recount, ballots that selected the eliminated fourth-place finisher as the first choice are then reallocated based on their second choice—if they understood the process and chose to make a second choice—and a candidate wins by getting a majority of the remaining "valid" votes. If none of the three candidates in this second

[3] *See, e.g,, In re Questions Propounded by the Maine Senate*, 162 A.3d 188, 211 (Me. 2017) (ranked choice voting is unconstitutional because it violates Maine's plurality vote requirement) (advisory opinion).

round of voting receives a majority of the votes counted, the process is repeated, this time with the third-place finisher eliminated and his or her votes reallocated based on the third choice marked on those ballots. The votes are then counted for a third time, and the candidate who receives a majority of remaining valid votes is the winner.

This process effectively allows some voters to have more than one vote. For example, assume a scenario where candidates A, B, C, and D were in a general election, and candidate A received 49% of the first place vote, candidate B received 20%, candidate C received 19% and candidate D received 12% of the vote. After the first round of elimination, voters who ranked candidate D as their first place choice would be able to effectively "re-cast" their votes for their second-place candidate—but *only* voters who ranked candidate D could do this in the first round of elimination.

This system violates the constitutional requirement of one-person, one-vote, because only some Arkansans would get the chance to have all their choices counted. *See Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("Every voter's vote is entitled to be counted once. It must be correctly counted and reported. . . . And these rights must be recognized in any

preliminary election that in fact determines the true weight a vote will have.”). That name—”one person one vote—is an important clue that the Court’s primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five or ten…or one-half.” *Garza v. County of Los Angeles*, 918 F.2d 763, 782 (1990) (Kozinski, J., concurring and dissenting in part). The Open Primary Amendment violates the one-person, one-vote principle in two ways: by allowing some voters to cast two or three votes, while others may vote only once and therefore have half or one-third the voting strength of those who voted for the “losing” candidates.

Further, depending on how voters ranked them, candidates B or C could win this election—even if most voters opposed that candidate. The ballot title fails to explain to Arkansans that the proposed amendment allows this outcome impossible under the current system. That result is not theoretical, either—it happened in 2018 in Maine, which has adopted a similar voting system. In an election for the United States House of Representatives, incumbent Bruce Poliquin won a plurality of 46.33 percent of the votes in the first round of voting, and challenger Jared Golden received 45.6 percent of the votes. Poliquin

then lost the election in the second round of voting when Golden received a majority of the votes counted in that round.[4] The Maine Heritage Policy Center, *A False Majority: The Failed Experiment of Ranked-Choice Voting*, at 12 (Aug. 2019).[5] In another example, a candidate for mayor won despite having only 29% of the first-choice votes. Shay Totten, "Burlington Residents Seek Repeal of Instant Runoff Voting," in *Seven Days* (Dec. 29, 2009).[6]

Similarly, the ballot title misleads by failing to inform voters that their vote may not count if they do not rank all four candidates. The

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[4] Golden did not receive a majority of votes cast. He only received a majority of the votes counted in that round, which did not include the ballots eliminated after the first round because they did not rank a second choice.

[5] This report is available at https://mainepolicy.org/project/false-majority/ (accessed Aug. 10, 2020).

[6] This article is available at https://www.sevendaysvt.com/vermont/burlington-residents-seek-repeal-of-instant-runoff-voting/Content?oid=2177125 (last accessed Aug. 10, 2020).

ballot title states that "if no candidate has a majority of the votes, then the candidate with the fewest votes is eliminated and the vote of each qualified elector whose first choice was the eliminated candidate is then counted for the elector's next-choice candidate (if any)." Missing is any explanation of what happens if an elector fails to select a "next-choice" candidate, as many Arkansans likely would under this new system.

Under this system, voters who fail to rank all the candidates can have their votes thrown out and not considered in the remaining rounds of tabulation if their first-choice vote is eliminated. Thus, the final "majority" of first place votes may not even be a majority of voters' preferences, but simply a majority of the voters who ranked all the candidates. Every Arkansan who only selected their first-choice candidate can have their vote thrown out and removed from the denominator of valid voters if they choose not to select second, third, and fourth-place choices.[7] The ballot title does not explain these

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[7] *See, e.g.*, *Hagopian v. Dunlap*, No. 1:20-CV-257-LEW (D. Me. July 22, 2020) (alleging ranked choice voting causes substantially lower "full participation" rate of voters in elections as a result of voter

provisions to voters, who will have no familiarity with this process other than what the ballot title tells them.

The proposed amendment thus creates a system where the candidate who receives the most votes can lose an election, where a candidate whom most voters actively opposed can win, and where voters might have no say in the outcome if they do not rank all candidates on the ballot. But the ballot title informs voters of none of those radical changes from existing law. The omission of that information makes the ballot title misleading, and the Court should reject it on that basis, too.

II. Act 376 of 2019 is constitutional because it imposes no unwarranted restriction on the initiative and referendum process.

In contesting the constitutionality of Act 376 (the provision codified at Ark. Code Ann. § 7-9-111(i) that requires submission of a ballot title to the Board), petitioners begin by incorrectly demanding that the Court apply strict scrutiny to the amendment. But this Court has never applied such a high level of scrutiny to legislative acts affecting the initiative and referendum process, instead examining

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confusion) (preliminary injunction hearing held August 13, 2020) (expert witness report of Nolan McCarty dated July 27, 2020).

those acts for an unwarranted restriction on the initiative and referendum process. That standard is not strict scrutiny. After asking the Court to apply an unprecedented standard, petitioners then turn to the merits of their constitutionality challenge, failing to show an unwarranted restriction on the initiative and referendum process by requiring submission of the ballot title to the Board. The Court should reject the constitutionality argument.

A. The Court has never applied strict scrutiny to statutes dealing with initiatives and referenda, and the correct standard is whether the act imposes an unwarranted restriction on rights under Amendment 7.

The first paragraph of petitioners' argument on the standard of review refutes the rest of the argument. Petitioners correctly note that "acts of the legislature are presumed constitutional" and that the Court will only invalidate an act "when there is a clear incompatibility between the act and the constitution." Pet. Br. at 23 (citations omitted). That concession defeats their argument because a presumption of constitutionality conflicts with strict scrutiny, which presumes just the opposite. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17 (1973) (applying "strict scrutiny means that the [act] is not entitled to the usual presumption of validity, that the State rather than

the complainants must carry a heavy burden of justification" to sustain the act) (internal quotation marks omitted).

For that reason, the Court's extension of the presumption of constitutionality in *McDaniel v. Spencer*, 2015 Ark. 94, 3, 457 S.W.3d 641, 647, forecloses strict scrutiny here. After extending that presumption in *McDaniel*, the Court examined an act for an "unwarranted restriction on the rights granted to the people in article 5, § 1 of the Constitution." *Id*. at 5, 457 S.W.3d at 648. Under this unwarranted restriction standard, the Court proceeds from the presumption of validity to examine whether the state has an interest that the act furthers and whether the act imposes a substantial burden on the right to initiative or referendum. *Id*. The Court thus ultimately determines whether an act's "requirements aid in the proper use of the rights granted to the people of this state." *Id*. at 6, 457 S.W.3d at 648.

That standard is not strict scrutiny, under which the state could have a valid interest that would not sufficiently justify the act. Strict scrutiny therefore does not apply. The Court should instead examine Act 376 under the unwarranted restriction standard.

B. Petitioners have not shown that Act 376 imposes an unwarranted restriction on the initiative process.

Act 376 survives under that standard because it imposes no unwarranted restriction. Rather than show an unwarranted restriction, petitioners argue only that Act 376 somehow restricts the process. But the Court looks for more than a mere restriction here—it looks for an *unwarranted* restriction. And petitioners have not shown that the restriction they identify is unwarranted, so the Court should reject their constitutionality challenge.

"While article 5, § 1 prohibits any law that prohibits the circulation of petitions or interferes with the freedom of the people in procuring petitions, it expressly allows laws to facilitate its operation." *McDaniel*, 2015 Ark. 94 at 5, 457 S.W.3d at 648. *McDaniel* relied on *Washburn v. Hall*, 225 Ark. 868, 286 S.W.2d 494 (1956), which considered whether the statutory requirement for attorney general approval of a ballot title was an unwarranted restriction on initiative and referendum rights. *Id.*

In *Washburn*, the Court first found a legislative intent to require "that in signing a referendum or initiative petition the signer should have the benefit of a popular name and ballot title that would give as

much information about the proposed act as is possible to give by such means." *Washburn*, 225 Ark. at 871–72, 286 S.W.2d at 497. Furthering that intent "in no way curtails the operation of Amendment No. 7 but is in aid of the amendment and insures the giving to the signer of the petition as much information as is possible and practicable with regard to what he is being asked to sign." *Id.* The Court thus upheld the statute because it imposed no unwarranted restriction on the initiative and referendum process.

Act 376 serves a purpose like the one that the Court found in *Washburn*. Rather than focus on information given to petition signers, Act 376 focuses on the other end of the process by ensuring that voters receive a ballot title that is not misleading. That interest is a compelling one that the state has a strong interest in protecting. The interest is compelling because it is "axiomatic that the majority of voters, when called upon to vote for or against a proposed measure at a general election, will derive their information about its contents from an inspection of the ballot title immediately before exercising the right of suffrage." *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 245, 884 S.W.2d 605, 607 (1994).

A misleading ballot title thus threatens the integrity of the initiative process because voters might not have necessary information about the proposal when casting their votes. This Court has therefore long recognized that the prohibition on misleading ballot titles serves to "protect the public" from ballot titles that fail to disclose the truth of the measure presented. *Westbrook v. McDonald*, 184 Ark. 740, 43 S.W.2d 356, 360 (1931) (citation omitted). And nothing in Amendment 7 prohibits legislation that helps inform the Board's consideration of ballot titles in this process. That undertaking need not be a "rubber-stamp" or purely ministerial duty, particularly not when the legislation protects the public from misleading ballot titles.

Act 376 offers that protection by preventing misleading ballot titles from reaching the ballot. Ark. Code Ann. § 7-9-111(i). That requirement imposes no new burden on the initiative process. Before Act 376, sponsors of a petition had to provide a ballot title that was "free from misleading tendencies that, whether by amplification, omission, or fallacy, thwart a fair understanding of the issue presented." *Wilson*, 2016 Ark. 334 at 7, 500 S.W.3d at 166. And sponsors have to satisfy the same requirement under the act. The act

merely requires consideration of that issue before the initiative reaches the ballot, with access to the ballot denied if the Board finds the ballot title misleading. That determination is not the final word on the issue, either—this Court still has final word on the ballot title's sufficiency. *See* Ark. Code Ann. § 7-9-112(a) (allowing sponsors of a petition or registered voters to petition the Supreme Court to contest the Board's denial).

Rather than address whether that requirement imposes an unwarranted restriction on the initiative process, petitioners incorrectly treat *Washburn* as if it established the limits of the legislature's authority in this area. Under that incorrect reading, any different requirement is unconstitutional. But *Washburn* never addressed the limits of legislative authority in this area, and the Court has not interpreted the case that way in the intervening years. As the Court put it in *McDaniel*, the question is whether an act's "requirements aid in the proper use of the rights granted to the people of this state." 2015 Ark. 94 at 6, 457 S.W.3d at 648. The proper use of those rights includes providing a ballot title that serves its intended purpose of informing voters adequately about the measure at issue. Act 376 therefore

imposes no unwarranted restriction because it helps ensure that a proposal has a valid ballot title before it reaches the ballot.

Petitioners' argument also includes several irrelevant attempts to compare Act 376 to the previous process of submission of the ballot title to the attorney general for approval. The argument is irrelevant because nothing limits legislative authority in this area to the scope of previous acts. But the argument also fails because, if anything, the previous procedure was more restrictive than the current one. Obtaining approval from the attorney general was often difficult, with petition sponsors sometimes having to ask this Court to compel action. *See* Pet. Br. at 26 (citing *Couch v. Rutledge*). And petition sponsors kept filing those actions right up until Act 376 changed the process. *See Ark. True Grass v. Rutledge*, 2019 Ark. 165, 1 (not reported in *South Western Reporter*) (dismissing petition to compel attorney general to certify ballot title as moot after Act 376 removed the attorney general certification requirement). Act 376 thus removed impediments to the petition process by substituting a less restrictive ballot title process. If attorney general certification was acceptable, so is the Act 376 process.

Petitioners also complain that Act 376 might cause petition signers to be "thwarted by actions of the" Board. Pet. Br. at 31. But any thwarting comes from the failure of a petition sponsor to prepare an adequate ballot title. Barring misleading ballot titles from the ballot is nothing new—misleading ballot titles were insufficient before Act 376, too. And review in this Court protects petition signers from any error in the Board's determination. The process thus works almost exactly as it did before Act 376: misleading ballot titles cannot appear on the ballot, and this Court will ultimately determine whether a ballot title misleads. Act 376 simply creates a new procedure for reaching that point, and that procedure does not impede the petition process at all, much less impose an unwarranted restriction.

The Court should reject petitioners' constitutionality argument because Act 376 imposes no unwarranted restriction on the petition process by having the Board examine whether a ballot title is misleading. That requirement is constitutional.[8]

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[8] If the Court holds otherwise, it should still consider whether the ballot title is misleading to promote judicial efficiency. Otherwise, there

CONCLUSION

The Board correctly concluded that the ballot title is misleading, and this Court should uphold that ruling. The Court should also reject petitioners' request to declare Act 376 unconstitutional. That act imposes no unwarranted restriction on the petition process and is therefore a correct use of legislative authority to assist in the petition process under Amendment 7.

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will be another case challenging the ballot title. The better approach is to consider those issues now, when they have already been briefed and are ready for decision.

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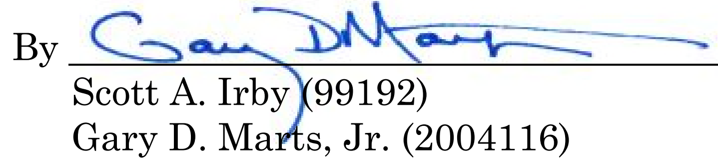
By 
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CERTIFICATE OF SERVICE

I certify that on August 14, 2020, I filed this brief using the Court's eFlex filing system, which will serve a copy on all counsel of record.

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CERTIFICATE OF COMPLIANCE

I certify that this 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 pilot rules on electronic filings. The statement of the case and the facts and the argument sections altogether contain 6,535 words.

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