CV-20-454

In the Arkansas Supreme Court
An Original Action

Arkansas Voters First, a ballot question committee; Bonnie Miller, individually and on behalf of Arkansas Voters First; and Open Primaries Arkansas, a ballot question committee — Petitioners

v

John Thurston, in his official capacity as Secretary of State; the State Board of Election Commissioners — Respondents

Arkansans for Transparency, a ballot question committee; and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency — Intervenors

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Petitioners' Reply Brief on Count 3

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Argument

I. The SBEC's refusal to certify AVF's popular name and ballot title was inconsistent with Arkansas law.

A. The popular name's use of the term "top four open primary" is not misleading.

The SBEC rejected AVF's popular name, in part, because the SBEC tore out the words "open primary" from the phrase "top four open primary" and then claimed the resulting fragmented popular name was misleading. But the ballot title extensively explains the manner in which the new primaries would be conducted. This Court has held that the popular name's "purpose is to identify the proposal for discussion prior to election." *Roberts v. Priest*, 341 Ark. 813, 821–22, 20 S.W.3d 376, 380 (2000). The popular name is not held to the same stringent standards, and when conducting its Amendment 7 sufficiency review, this Court reads the popular name and ballot title together. *Id.*

The SBEC's fragmented review is illustrated by its mistaken claim that Arkansans would think a vote against the proposed amendment would mean Arkansas would have "closed primaries." Add. 1. On the face of the proposed amendment, a vote against the proposal would mean Arkansas would not have a "top four open primary," which is true.

Contrary to SBEC's claim (Brief, p. 28), the term "top four open primary" is nothing like the euphemistic neologisms this Court has found wanting in other cases. For example, the term "additional racetrack wagering" was specifically designed to hide the fact that it would authorize casinos-style gambling. *Christian Civic Action Cmte. v. McCuen*, 318 Ark. 241, 248–49, 884 S.W.2d 605, 609–10 (1994). The ballot title in *McCuen* hide its true intent behind a euphemism that one could only uncover by reviewing the measure's text. But AVF's ballot title does no such thing—rather, it explains in great detail the method and manner of voting the amendment would affect.

SBEC's attempt to take phrases out of context and then claim that the removed phrases are misleading is not consistent with the sufficiency review called for under Amendment 7 and this Court's case law. Therefore, SBEC's decision regarding the popular name should be set aside.

B. Intervenor and Respondent are mistaken regarding federal preclearance law.

The SBEC, both administratively and now in their briefing, as well as the Intervenors, mistakenly claim that *Lange v. Martin,* 2016 Ark. 337, 500 S.W.3d 154 required AVF's ballot title to contain some

preclearance reference. SBEC Add. 2, Brief, p.p. 29–30; Int., p. 16. This claim is simply mistaken because, unlike the issue in *Lange*, federal preclearance law *requires* the state law be enacted before the preclearance process can even begin.

In *Lange*, the ballot title failed to inform voters that it "clearly conflicted" with a federal law that prohibited at least part of what the ballot title would authorize. *Lange v. Martin*, 2016 Ark. 337, 9, 500 S.W.3d 154, 159. Therefore, any Arkansans who voted for the measure would be voting for an immediate nullity.

But *Lange* does not apply here because the relevant portion of the Voting Rights Act—which is itself quoted in *Jeffers* and omitted from either response brief—*requires the state law be enacted* before it can go through preclearance. *Jeffers* itself quotes the relevant law, which prevents the law being "enforced" not "enacted": "[A law subjected to judicial preclearance] may be enforced if [the law]….has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission…." *Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990) (quoting section

3(c) of the Voting Rights Act). Any doubt about the meaning of the law is clarified by the regulation governing administrative review by the U.S. Attorney General, which states that the U.S. Attorney General "will not consider" a preclearance before its "final enactment." 28 C.F.R. § 51.22.

The fact that federal law requires the state law be enacted *before* going through preclearance distinguishes this case from the issue in *Lange*, where the federal law specifically prohibited what the proposed amendment tried to accomplish.

Further, though the U.S. Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013) did not directly address judicial preclearance under section 3, *Shelby*'s reasoning regarding legislative preclearance under section 4 calls into question the scope of the remedy *Jeffers* required. The SBEC itself cites a law review article whose main point is how *Shelby*'s reasoning impacts preclearance ordered under section 3. SBEC, p. 30. Therefore, while *Shelby*'s left judicial preclearance intact, the case's reasoning does not bode well for the state-wide, perpetual remedy *Jeffers* required.

Finally, if the Court were to countenance the preclearance argument, then the people of Arkansas would never be able to use their

reserved initiative power in the area of ranked-choice voting. This is because preclearance requires both that the state law be enacted before seeking preclearance and that the state's attorney general seek preclearance. But on the view expressed by SBEC and Intervenors, Arkansans could never enact the law themselves. Such a view of Arkansans' initiative power is inconsistent with Amendment 7. Therefore, the SBEC erred in its reliance on preclearance.

C. The full impact on political parties is a matter delegated to the legislature.

The SBEC and Intervenors claim that AVF's proposal eliminates a political party's statutory right to ask a court to "remove a party nominee from the ballot," and then they claim that the ballot title is deficient for that reason. SBEC, p. 32; Int. p. 20. The proposed measure itself does no such thing. Instead, the ballot title accurately summarizes the proposal's text to state that "political parties may have their preferences for candidates for a covered office indicated on the primary and general election ballots and may also nominate, endorse, support, or oppose any candidate." Add. 14. The proposed amendment itself does not address how a candidate receives a political party's support, nor does it address how a political party may withdraw support it has already given a

candidate. Those matters are therefore included in the proposed amendment's general delegation and mandate that "the General Assembly…enact legislation to provide for a revised election process in accordance with and in furtherance of" the amendment.

Just as in *May v. Daniels*, SBEC's claim that law the amendment allegedly repeals is "by no means *certainly* implicated, such that the ballot title must inform voters of this." 359 Ark. 100, 111, 194 S.W.3d 771, 780 (emphasis in the original). At this point, it is not clear how the General Assembly will address the issue SBEC raises. Therefore, SBEC and Intervenors' "assertions on this point are far too speculative" to hold that the ballot title is misleading. *May*, 359 Ark. at 111–12; 194 S.W.3d at 780. A "ballot title is not misleading for failing to give specifics where the [text of] the amendment does not." *May*, 359 Ark. at 114; 194 S.W.3d at 782. The fact that SBEC's (and Intervenors') objection does not go to the ballot title's summary of the measure shows that the objection does "not address the sufficiency of the title of the ballot….rather, it is directed at the implementation." *Richardson v. Martin*, 2014 Ark. 429, 10, 444 S.W.3d 855, 861. When a party's objection goes to an amendment's

implementation, not sufficiency, this Court "need not address" it. *Id*. Therefore, SBEC's should be set aside.

D. SBEC's claim regarding voting-equipment costs is too speculative to be included in a ballot title.

SBEC and Intervenors fault the ballot title for not engaging in speculation regarding the proposed amendment's costs. This argument fails for the same reasons as the foregoing claim regarding political parties. At this point, there is no way to know whether the proposed amendment will cause a net increase in election costs. Ranked-choice voting saves money because it does not require runoff elections. *Data on Ranked Choice Voting*, https://www.fairvote.org/data_on_rcv#rcv_versus_two-round_runoff (Last accessed, August 17, 2020). It may be that Arkansas would need new voting equipment, but it may be that the net costs would be lower—we do not know whether either of those are true at this point. And the proposed amendment delegates to the legislature the mechanics of implementing the amendment. As this Court has held in reviewing similar delegations under Amendment 7 initiatives, "[u]ntil such legislation is enacted, we cannot know whether the amendment" would increase net election costs. *May v. Daniels*, 359 Ark. 100, 114, 194 S.W.3d 771, 782 (2004). Therefore, because adding

anything about net costs would itself be speculative and potentially misleading, this claim has no merit.

E. Intervenors' additional claims regarding the proposed measure's impact on voting are both procedurally improper and wrong on the merits.

Intervenors tack on an additional reason that, though not relied on by the SBEC, they mistakenly believe to be an independent basis in support of the SBEC's refusal to certify. Intervenors claim the ballot title is deficient because it does not explain the manner in which votes are cast and counted. Int., p. 26. Even a cursory review of the ballot title shows that it goes into great detail about the manner and method of voting and counting. The variety of arguments Intervenors' pack into this additional claim require this Court interpret AVF's proposed amendment, which is procedurally improper because it is not permitted at this stage. *Roberts v. Priest*, 341 Ark. 813, 824, 20 S.W.3d 376, 382 (2000) ("Our function in the present litigation is not to interpret the amendment itself.").

But even if those arguments were considered, they are all based on a misunderstanding about the nature of ranked-choice voting. Intervenors' argument all use a single-choice vote paradigm to critique

the ranked-choice vote paradigm. *See* Richard H. Pildes, et al. *The Legality of Ranked-Choice Voting* (forthcoming; available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3563257) (Last accessed, May 17, 2020). Intervenors claim that with ranked-choice voting some votes might be ineffective if the voter does not rank all candidates, and a person who wins could actually be opposed by a majority of candidates. But both alleged deficiencies are true of Arkansas's current system: if a voter casts his or her vote for the losing candidate, that vote is no more "wasted" than it would be in ranked-choice voting. And in a race with more than three candidates, the winner might win with only 40% of the vote, where the remaining 60% opposed that winner and supported either of the other two candidates. Finally, Intervenors claim that ranked-choice voting violates the one-person-one-vote principle inherent in our constitutional structure. But that is false because in ranked-choice voting, a voter casts a *single* transferrable vote—not multiple votes.

Yet the need for such a rebuttal to Intervenors' shows that the claims are procedurally improper at this stage because they an interpretation of the amendment and an assessment of its merits.

II. Act 376's grant of discretion to the SBEC violates the scope of the authority given to the SBEC in Amendment 7.

AVF's argument on the constitutionality of Act 376 is two-pronged: (1) Act 376 contravenes the plain language of Amendment 7 (AVF Brief, pp. 24–26); *and* (2) Act 376 restricts, hamper, and impairs the I&R process (*id.* at 26–31). SBEC and Intervenor do not even attempt to respond to AVF's first argument, and even if SBEC's mootness claim were accurate, it would also mean this matter would qualify for the exception for matters capable of repetition but avoiding review.

1. Standard of review. Amendment 7 provides that the rights to initiative and referendum are of paramount importance, as the first and second powers "reserved by the people." These rights are "a cornerstone of our state's democratic government" and represent "fundamental rights guaranteed by the constitution." *Parker v. Priest*, 326 Ark. 123, 133, 930 S.W.2d 322, 328 (1996); *McDaniel v. Spencer*, 2015 Ark. 94, 24, 457 S.W.3d 641, 657 (2015) (Justice Hart, concurring in part, dissenting in part). In all other contexts, infringements on fundamental rights are reviewed using strict scrutiny: the state must show the statute advances "a compelling state interest" and the statute "is the least restrictive method available" to advance that interest. *Id.* (collecting cases). While

this Court has yet to formally declare a level-of-scrutiny for laws that infringe on Amendment 7 rights, Petitioners urge this Court to formally declare that the standard is strict scrutiny (1) because of how central the I&R process is to Arkansas's government; and (2) because of how easy it is for the legislature to overstep the narrow authority the people have given it in this area. Neither SBEC nor Intervenors attempt to engage with the foregoing arguments or case law or give any good reason for not ruling on this matter.

2. Implications of "shall." SBEC's opening paragraph in Section II (SBEC Brief, p. 36) amplifies why AVF should prevail on its argument that Act 376 contravenes the plain language of Amendment 7. SBEC, ignoring numerous other changes to Act 195, represents to this Court that Act 376 simply "transfer[s] the Attorney General's role to SBEC." SBEC, p. 36. SBEC fails to note that the "Attorney General's role" was a legislative creation in Act 195 of 1943 approved by this Court in *Washburn v. Hall*, 225 Ark. 868, 286 S.W.2d 494 (1956). This Court's recent rulings in *Bd. of Trustees of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616 (2018) and *Benca v. Martin*, 2016 Ark. 359, 500 S.W.3d 742 cast doubt on whether *Washburn* is still good law.

While Amendment 7 does not specifically reference duties of the Attorney General, it does clearly define the SBEC's duty:

> Title. At the time of filing petitions the exact title to be used on the ballot shall by the petitioners be submitted with the petition, and on state-wide measures, shall be submitted to the **State Board of Election Commissioners, who shall certify such title to the Secretary of State**, to be placed upon the ballot; on county and municipal measures such title shall be submitted to the county election board and shall by said board be placed upon the ballot in such county or municipal election.

(emphasis added).

Under this Court's rulings in *Andrews* and *Benca*, Amendment 7 must be interpreted precisely as it reads (*Andrews, supra*), "shall means shall" (*Benca*, *supra),* and SBEC has no discretion to pass judgment on whether to certify the popular name and ballot title. Yet Act 376 grants SBEC powers that **Amendment 7 itself** denied to the SBEC. Had the drafters of Amendment 7 intended to grant SBEC discretionary authority over *whether* to certify popular names and ballot titles, it would have said so. It did not, and the general assembly may not legislatively override the plain language of Amendment 7 by granting SBEC powers specifically denied it therein.

3. Hindering Amendment 7 rights. Act 376 grants SBEC, a body composed of political appointees that disregarded their own director and legal counsel's advice here and actually debated the *merits* of AVF's petition, broad discretion on whether to certify I&R petitions for the ballot. By granting SBEC this new-found discretion, Act 376 creates a significant hurdle in the way of ballot access not previously contemplated by Amendment 7. Act 376 in no sense is the successor to the Attorney General review *Washburn* approved. Rather, Act 376 is an attempt to alter the SBEC's role in ballot title review, and it should be declared unconstitutional.

4. SBEC's mootness argument. Rather than squarely address Petitioners' arguments about Amendment 7's use of "shall," SBEC posits that the Court should disregard and sidestep AVF's constitutional challenges to Act 376 because it should find the popular name and ballot title misleading. This is, in effect, a mootness argument. There are two exceptions to the mootness doctrine – (1) when an issue is capable of repetition yet evades review *and* (2) when substantial public interest warrants this Court's review. *Monsanto Co. v. Ark. St. Plant Bd.*, 2019 Ark. 194, 7, 576 S.W.3d 8, 12. If SBEC's argument were adopted, this

Court would *never* reach the constitutionality of Act 376 because the Court's opinion either way on certification of a popular name and ballot title would *always* moot the argument questioning Act 376's constitutionality. Thus, this is a classic example of a case where the issue is capable of repetition yet evades review. This case also satisfies the second exception because it concerns the I&R process, a fundamental right guaranteed by the constitution, thus a substantial public interest. *See Parker v. Priest*, 326 Ark. 123, 133, 930 S.W.2d 322, 328 (1996).

Conclusion

Petitioners respectfully ask this Court to hold that SBEC erred in refusing to certify the popular name and ballot title for Top Four Open Primaries and to hold that the broad grant of authority to the SBEC under Act 376 of 2019 is unconstitutional.

Respectfully submitted,

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Certificate of Service

I certify that on 17 August 2020, a copy of the foregoing was filed with this Court's eFlex filing system, which serves all counsel of record.

By: /s/ Ryan Owsley
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Certificate of Compliance

I certify that the foregoing brief complies with Administrative Order No. 19 and that it conforms to the word-count limitations contained in Rule 4-2(d) of this court's pilot rules on electronic filings. The argument section of the foregoing brief contains 2,802 words.

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