No. CV-20-454

IN THE SUPREME COURT OF ARKANSAS

BONNIE MILLER, individually and on behalf of ARKANSAS VOTERS FIRST and OPEN PRIMARIES ARKANSAS, ballot question committees,
Petitioners,

v.

JOHN THURSTON, in his official capacity as Arkansas Secretary of State and in his official capacity as Chairman of the Arkansas State Board of Election Commissioners; and the ARKANSAS 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.

An Original Action

Arkansas State Board of Election Commissioners' Brief on Count 3

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JURISDICTIONAL STATEMENT

This Court has original, exclusive jurisdiction over this lawsuit, which seeks to determine whether "the ballot title or popular name of [a] proposed measure should be certified." Ark. Code Ann. 7-9-112(a); *see* Ark. Const. art. 5, sec. 1.

/s/ *Vincent M. Wagner*
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STATEMENT OF THE CASE AND THE FACTS

With millions in out-of-state financing, Petitioners want to fundamentally change Arkansas's elections. *See* John Moritz, *Ballot proposals' pro, con groups report finances*, Ark. Democrat-Gazette (July 17, 2020), https://bit.ly/3gT32CD. To that end, they have submitted two initiative petitions to the Secretary of State that they hope to place before the voters in November. The Secretary rejected both petitions, among other reasons, because Petitioners failed to certify that their paid canvassers had passed criminal background checks—a failure that left the Secretary statutorily barred from counting their submitted signatures for any purpose. (*See* Second Am. Consol. Orig. Action Compl. (Complaint) ¶¶ 25-49.) Then, on July 22, the State Board of Election Commissioners (SBEC) refused to certify the ballot title for one of the two petitions. (*See* ADD1-4.)[1] Petitioners brought this lawsuit challenging the actions of both the Secretary and SBEC, which this Court bifurcated and expedited. Because SBEC correctly determined that the ballot title in question is misleading, this Court should not certify it for the November 3 general election.

[1] Citations designated "ADD" are to the addendum to Petitioners' August 7 brief.

A. Petitioners' Two Proposed Amendments

Without identifying any need for change in Arkansas, Petitioners' two initiatives propose using Arkansans to test experimental—and sweeping—electoral reforms. Their first proposed constitutional amendment relates to the process of redistricting in Arkansas. Redistricting is currently handled by elected officials, whom Arkansans can hold accountable for their choices. *See, e.g.*, Ark. Const. art. 8, sec. 1 (entrusting aspects of redistricting to the Governor, Attorney General, and Secretary of State).

1. Petitioners' redistricting amendment would remove those democratically accountable actors from the redistricting process by creating a new unelected redistricting commission. The new process would begin with the Chief Justice of this Court appointing a panel of retired judges. (SBEC.ADD9-10.)[2] That panel would then oversee a screening process for applicants to the redistricting commission. (SBEC.ADD10.) The applications that survive the screening process are then divided into three pools: one consisting of applicants from "the political party having the greatest number of representatives in the General Assembly," one of applicants from "the political party having the second-largest number," and one of applicants "affiliated with other political parties or no political party." (SBEC.ADD10.) The

[2] Citations designated "SBEC.ADD" are to the addendum filed with this brief.

redistricting commission is then selected by "randomly draw[ing] three applicants from those remaining in each pool." (SBEC.ADD10.)

Petitioners' redistricting proposal would make Arkansas only the seventh State in the Nation to remove electorally accountable officials from the redistricting process. *See* Justin Levitt, Loyola Law School, *Who draws the lines?*, All About Redistricting (accessed Aug. 13, 2020), https://redistricting.lls.edu/who-fed20.php. And it would replace electoral accountability with a random draw.

2. Petitioners' second proposed constitutional amendment would change the nature of voting in both the primary and general elections for certain offices in Arkansas. It would apply only to elections for a "covered office," which it defines as federal or state legislative office and state executive office. (ADD19.)

The popular name and ballot title for this amendment do not disclose that partisan primaries in Arkansas are currently "open"; *i.e.*, a voter may choose to vote in any party's primary regardless of whether the voter is a registered member of that primary. *See* Ark. Code Ann. 7-7-308(b). Petitioners' proposed amendment would purportedly convert them into "top four open primar[ies]." (ADD19.) Instead of allowing voters to participate in their choice of partisan primary, Petitioners' proposal would create a single primary in which all candidates, regardless of their partisan affiliation, would appear on the ballot. (ADD19.) Each voter would select a single candidate. (ADD19-20.) The four candidates who receive

the most votes in the primary would then proceed to the general election, even if all four candidates are from the same political party. (ADD20.) Only California and Washington currently have comparable primary elections. *See State Primary Election Types*, Nat'l Conf. of State Legislatures (Mar. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx (describing these States' "'top two' primary format"). Neither the popular name nor the ballot title discloses that voting for this amendment would actually repeal Arkansas's current system of open primaries.

Beyond these changes to voters' choices in a primary election, Petitioners' second proposal would also reshape political parties' participation in the primary process. Yet the popular name and the ballot title fail to disclose this fact. Under the proposed amendment, political parties would no longer have any control over which candidates list themselves as affiliated. The candidates themselves would choose whether "their political-party affiliation [is] indicated on the ballot," and if so, what that affiliation is. (ADD20.) Although the proposed amendment claims that a "candidate's designation of such an affiliation will not constitute or imply the nomination, endorsement, or selection of the candidate by the political party designated," it creates no remedy for a political party (or a voter, for that matter) against candidates who misrepresent their party affiliation. (ADD20.)

Regarding the general election, Petitioners' proposal would make different—but no less fundamental—changes. General elections would be conducted through a process that Petitioners call an "instant runoff." (*See* ADD20-22.) Usually referred to by the name "ranked choice voting," the instant-runoff process has received significant media attention recently. *See* Jacey Fortin, *Why Ranked-Choice Voting Is Having a Moment*, N.Y. Times (Feb. 10, 2020), https://www.nytimes.com/2020/02/10/us/politics/ranked-choice-voting.html; *see also* Annette Meeks, *Minneapolis is adrift, and ranked-choice voting is the culprit*, Minneapolis Star Tribune (Aug. 10, 2020), https://www.startribune.com/minneapolis-is-adrift-and-ranked-choice-voting-is-the-culprit/572066082/. In 2018, Maine became the first State to use ranked-choice voting in a statewide election. *See* Law & Legis. Reference Libr., *Ranked Choice Voting in Maine*, Me. State Legislature (Aug. 3, 2020), https://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509. Petitioners' proposed amendment would make Arkansas the second State to use ranked-choice voting statewide. But neither the popular name nor the ballot title disclose the novelty of these proposed new election procedures.

While collecting signatures for their proposed amendments, Petitioners filed a lawsuit in federal court, claiming that COVID-19 had rendered Amendment 7's requirements unconstitutional under the U.S. Constitution. Among other relief, they sought an injunction that would have required Arkansas to create a system—

in the months leading up to an election and *in the middle of a global pandemic*—for accepting electronic petition signatures. *See Miller v. Thurston*, No. 5:20-cv-05070-PKH, 2020 WL 2617312, at *2 (W.D. Ark. May 25, 2020), *rev'd*, — F.3d —, 2020 WL 4218245 (8th Cir. July 23, 2020). Although the federal district court did not require Arkansas to accept electronic signatures, it did order other changes to Arkansas law. *Id.* at *10-12. On an emergency appeal, the Eighth Circuit first temporarily stayed the district court's judgment and then reversed it outright. 2020 WL 4218245, at *2, 8-9.

In other States, sponsors of other ballot initiatives (some quite similar to Petitioners' proposed amendments) have sought emergency exemptions in federal court from States' otherwise valid laws governing the process. Like Petitioners, those other sponsors have been almost uniformly unsuccessful, whether in district court or on appeal. *See, e.g.*, *Clarno v. People Not Politicians*, No. 20A21, 2020 WL 4589742 (U.S. Aug. 11, 2020) (granting Oregon's emergency application for stay of district court order changing ballot-initiative laws); *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (U.S. July 30, 2020) (same, Idaho); *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020) (similar, Ohio); *Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020) (denying motion for TRO that would have changed Arizona law).

B. Procedural Background

Petitioners timely filed both initiative petitions with the Secretary of State on July 6. (Complaint ¶ 10.) On July 14, however, the Secretary notified Petitioners that his office would not be counting their signatures because they had failed to comply with Arkansas law. (Complaint ¶ 18.) Before each paid canvasser began to collect signatures, Petitioners were required to "obtain" criminal background checks. Ark. Code Ann. 7-9-601(b)(1) through (2). And upon submitting a list of paid canvassers to the Secretary, Petitioners also needed to certify that each paid canvasser "has *passed* a criminal background check." *Id.* 7-9-601(b)(3) (emphasis added). Petitioners did not certify that their paid canvassers had both obtained *and passed* a criminal background check—only that they had "acquired" one. (Complaint ¶ 31.)

On July 17, Petitioners sued the Secretary and asked this Court to order him to count their signatures notwithstanding their failure to certify that their paid canvassers had passed background checks. (Complaint ¶ 19.) They filed an amended complaint on July 21. (Complaint ¶ 20.) That same day the Secretary notified Petitioners of additional reasons his office would not be counting the signatures on their petitions. (Complaint ¶ 21.)

The next day, July 22, SBEC met to fulfill its statutory duty to determine whether the popular name and ballot title for Petitioners' initiatives are misleading.

(*See* ADD1-2.) At that meeting, SBEC voted to certify the popular name and ballot title for the redistricting amendment. (SBEC.ADD1-3.) But it voted not to certify the popular name and ballot title for the ranked-choice-voting amendment. (ADD1.)

In a July 24 letter to Open Primaries Arkansas, SBEC explained its reasoning. First, it found Petitioners' use of the term "open primaries" misleading. (ADD1.) As already discussed, under the normal definition of that term, Arkansas *already has* "open primaries." So a voter who votes "FOR" the ranked-choice-voting amendment will in fact be voting "AGAINST" open primaries—precisely the opposite of what the ballot title and popular name imply. As a result, SBEC was required to "[n]ot certify the ballot title and popular name." Ark. Code Ann. 7-9-111(*i*)(4)(A)(i).

Second, SBEC found it misleading that the ballot title did not mention that a federal court has subjected Arkansas to preclearance under Section 3(c) of the Voting Rights Act for any changes to plurality-voting requirements. (*See* ADD2 (citing *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990).)

Third, SBEC found that the ballot title should have informed voters that the ranked-choice-voting amendment would eliminate political parties' ability to peti-

tion a circuit court to "remove a nominee for good and legal cause." *Ivy v. Republican Party of Ark.*, 318 Ark. 50, 55, 883 S.W.2d 805, 808 (1994). (*See* ADD2.) By omitting this change in longstanding law, the ballot title was misleading.

Fourth and finally, SBEC found it misleading not to inform voters that adopting the ranked-choice-voting amendment would require purchasing an entire new fleet of voting equipment "that would be capable of marking and tabulating rank choice voting in the instant runoff process." (ADD2.) Indeed, SBEC voiced doubts that "such equipment could even be found." (ADD2.)

On July 27, Petitioners filed a second amended complaint that added SBEC as a defendant and sought an order requiring certification of the ranked-choice-voting amendment's popular name and ballot title. (*See* Complaint ¶¶ 57-73.) Despite the expedited nature of this proceeding, Petitioners did not obtain a summons for SBEC until over two weeks later, on August 11. In the meantime, this Court had already ordered SBEC to file this brief on the ballot-title issues.

ARGUMENT

I. Petitioners show no error in SBEC's refusal to certify their petition, which has a misleading popular name and ballot title.

Arkansans, through their elected representatives, have long shown concern with keeping misleading initiatives off the ballot. SBEC applied longstanding principles of Arkansas law when it found the popular name and ballot title of the ranked-choice-voting amendment misleading. And because Petitioners have not shown, clearly and certainly, that SBEC's finding was wrong, this Court should not grant the relief Petitioners seek against SBEC.

A. Petitioners must make a clear and certain showing that the popular name and ballot title are *not* misleading.

Nearly 80 years ago, the General Assembly first tasked the Executive Branch with reviewing proposed popular names and ballot titles for initiative petitions. *See* Act 195, 54th General Assembly, Regular Session, Ark. Acts 415 (1943). Act 195 instructed the Attorney General to ensure that a ballot title "briefly and concisely state[d] the purpose of the proposed measure." *Id.*, sec. 4, 1943 Ark. Acts at 417.

Decades later, the General Assembly further clarified the standard the Attorney General should apply when considering a ballot title's sufficiency, requiring her to refuse to certify ballot titles that "would be misleading or designed in such manner that a vote 'for' the issue would be a vote against the matter or viewpoint

that the voter believes himself casting a vote for, or, convers[e]ly, a vote 'against' an issue would be a vote for a viewpoint that the voter is against." Act 208, sec. 1, 71st General Assembly, Regular Session, vol. II (book 1) Ark. Acts 279, 280 (1977). Last session, the General Assembly transferred the Attorney General's review to SBEC. *See* 2019 Ark. Act 376, secs. 6, 9, 92d General Assembly, Regular Session (moving most of the substance of former Ark. Code Ann. 7-9-107(b) through (d), to newly codified Ark. Code Ann. 7-9-111(*i*)).

Although SBEC's role in considering ballot titles is new, this Court's standard of review is not. *See Jackson v. Clark*, 288 Ark. 192, 193, 703 S.W.2d 454, 454 (1986) (discussing "well established" standard for reviewing Attorney General's ballot-title decision). As in the past, "[t]he issue of the sufficiency of a ballot title is a matter of law to be decided by this court." *Wilson v. Martin*, 2016 Ark. 334, at 7, 500 S.W.3d 160, 166. Even so, this Court has always "consider[ed] the fact of [the] Attorney General['s] certification" decision and "attach[ed] some significance to it." *Id.* at 7-8, 500 S.W.3d at 166.

When reviewing the sufficiency of the popular name and ballot title of the ranked-choice-voting amendment, this Court should not disregard SBEC's own considered certification decision. That does not mean, of course, that this Court must "defer to" SBEC's interpretation of a legal question. *Id.* at 8, 500 S.W.3d at 166. But it should place on Petitioners the burden of proving that SBEC's decision

is incorrect. *Cf. Myers v. Yamato Kogyo Co.*, 2020 Ark. 135, at 6, 597 S.W.3d 613, 617 ("On appeal [from Workers' Compensation Commission], we view the evidence in the light most favorable to the Commission's decision and affirm that decision if it is supported by substantial evidence.").

Petitioners' contrary claim about the burden of proof is based on a misreading of Amendment 7. According to Petitioners, SBEC bears the burden of disproving Petitioners' entitlement to the relief they seek. (*See* Br. 15.)[3] But Petitioners cite only precedents applying Amendment 7's standard for a "legal proceeding[] to *prevent* giving legal effect to a[] petition." Ark. Const. art. 5, sec. 1 (emphasis added). This case is just the opposite of the sort of legal proceeding described by Amendment 7: Petitioners have sued SBEC to *require* giving legal effect to their initiatives. Therefore, the precedents Petitioners cite are beside the point.

In essence, Petitioners seek mandamus relief against SBEC. That's because "the purpose of a writ of mandamus in a civil or a criminal case is to enforce an established right or to enforce the performance of a duty." *Wyatt v. Carr*, 2020 Ark. 21, at 9, 592 S.W.3d 656, 661. And Petitioners argue that SBEC had a nondiscretionary duty to certify the ranked-choice-voting amendment's popular name and ballot title—*even though* SBEC found them misleading. (*See* Br. 24-26 (arguing

[3] Citations designated "Br." are to Petitioners' August 7 brief on Count 3.

incorrectly that SBEC's role under Amendment 7 is "ministerial").) Because their claim against SBEC sounds in mandamus, Petitioners "must show a clear and certain right to the relief sought." *Wyatt*, 2020 Ark. 21, at 9, 592 S.W.3d at 661; *see Barrett v. Thurston*, 2020 Ark. 36, 5, 593 S.W.3d 1, 5.

In this context, that means Petitioners must show clearly and certainly that the popular name and ballot title of the ranked-choice-voting amendment are not misleading. Both must be intelligible, honest, and impartial. *Lange v. Martin*, 2016 Ark. 337, at 5, 500 S.W.3d 154, 157; *see Roberts v. Priest*, 341 Ark. 813, 821-22, 20 S.W.3d 376, 380 (2000). To show their ballot title is not misleading, Petitioners must show that it is "an impartial summary of the proposed amendment that will give voters a fair understanding of the issues presented and of the scope and significance of the proposed changes in the law." *Lange*, 2016 Ark. 337, at 4-5, 500 S.W.3d at 157 (quotation marks omitted). Popular names need not contain the same level of detail as ballot titles, but they still must not "contain catch phrases or slogans that tend to mislead." *Ark. Women's Pol. Caucus v. Riviere*, 283 Ark. 463, 467, 677 S.W.2d 846, 848 (1984).

When considering the sufficiency of a popular name and ballot title, this Court always has in mind the choice a voter faces when considering whether to vote "FOR" or "AGAINST" an initiative—"a choice between retention of the existing law and the substitution of something new." *Bradley v. Hall*, 220 Ark. 925,

927, 251 S.W.2d 470, 471 (1952); *see Roberts*, 341 Ark. at 822, 20 S.W.3d at 380 ("When we review the sufficiency of a ballot title and popular name, we construe the two provisions together."). Petitioners' popular name and ballot title must, therefore, "enlighten[] the voter with reference to the changes that he is given the opportunity of approving." *Bradley*, 220 Ark. at 927, 251 S.W.2d at 471. Because the popular name and ballot title in this case do not enlighten voters about "what changes in the law would be brought about by the adoption of the proposed amendment," this Court should reject Petitioners' claim against SBEC. *Id.*

B. Because the popular name and ballot title are misleading, Petitioners have not carried their burden.

1. Petitioners obscure the actual nature of their proposed amendment through technical terminology.

By "obliquely describ[ing] in highly technical terms" the changes that the ranked-choice-voting amendment would make to Arkansas law, the popular name and ballot title "cloak in semantic obscurity the actual nature of the proposed enterprise." *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 249, 884 S.W.2d 605, 609-10 (1994).

This flaw is clearest in regard to the popular name: "A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary." (ADD14.) Using the term

"Open Primary"—a term that is never defined in the ballot title—will mislead voters. According to the established definition of that term, Arkansas already has "open" primaries. *See* 26 Am. Jur. 2d *Elections*, sec. 224 (Aug. 2020 update) (defining "open primary" as a primary "where a voter is not required to declare publicly a party preference or to have that preference publicly recorded"). "The major characteristic of open primaries is that any registered voter can vote in the primary of either party." *Id.* As in the 14 other States that currently have open primaries, Arkansas voters can voter in whichever partisan primary they prefer, regardless of the partisan affiliation listed on their voter registration. *See* Ark. Code Ann. 7-7-308(b); *see also State Primary Election Types*, Nat'l Conf. of State Legislatures (Mar. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx.

According to the popular name of the ranked-choice-voting amendment, a vote "FOR" the amendment is a vote for an open primary system in Arkansas. In reality, however, a vote "FOR" the amendment is a vote against Arkansas's currently existing open primary system. So the popular name of the ranked-choice-voting amendment is "designed in such manner that a vote 'FOR' the issue would be a vote against the matter or viewpoint that the voter believes himself or herself to be casting a vote for." Ark. Code 7-9-111(*i*)(4)(A). SBEC was therefore statutorily prohibited from certifying it.

This Court has kept initiatives off the ballot for less misleading popular names. In *Roberts*, for example, the popular name simply described the proposed amendment's effects in incomplete terms. It described that amendment as "requir[ing] ¾ legislative approval and majority voter approval of any *sales* tax increases." 341 Ark. at 819, 20 S.W.3d at 379 (emphasis added). Nothing about that popular name was untrue. But it failed to inform voters that the amendment would apply not just to sales taxes but to *any taxes*. *Id.* at 823, 20 S.W.3d at 381. So this Court held that the popular name was "clearly misleading." *Id.* at 822, 20 S.W.3d at 381.

The popular name in *Roberts* was misleading because it did not provide enough nuance about the effects of the proposed amendment. Here, by using the term of art "open primary" in an idiosyncratic way, Petitioners have written a popular name that would leave voters not merely with an incomplete understanding but with a positively incorrect view of the ranked-choice-voting amendment's effects. So if the popular name in *Roberts* was misleading and insufficient, then the popular name here surely is.

The term "open primary" has a well-established meaning. Prefacing "Open Primary" with the modifier "Top Four" does not inform voters that "Open Primary" has been emptied of its conventional meaning and redefined to carry a sense with which they are unacquainted. (*See* Br. 17.) "Placing the voter in a position of

either having to be an expert in the subject" of the proposed amendment—here, novel election procedures—or of "having to guess as to the effect his or her vote would have is impermissible." *Kurrus v. Priest*, 342 Ark. 434, 444, 29 S.W.3d 669, 674 (2000).

The ballot title does nothing to remedy the misleading nature of the popular name. For one thing, the ballot title never uses the term "open primary"—let alone "top four open primary"—and thus does nothing to clear up the false impression that the popular name gives about the substance of the ranked-choice-voting amendment. (*See* ADD14-15.)

Beyond that failure to clarify the popular name, the ballot title is misleading in its own right. Like the popular name, it uses the term "instant runoff" to describe an election system that is novel to most Americans. (ADD14.) Indeed, searching Westlaw's database of all federal and state cases for the phrase "instant runoff" returns fewer than two dozen cases, most of which relate to municipal elections in San Francisco. *See, e.g.*, *Edelstein v. City & Cty. of S.F.*, 56 P.3d 1029 (Cal. 2002). As already discussed, however, to the extent Americans have heard of this system at all, they have likely heard it referred to as ranked-choice voting. *See supra* p. 14. To understand that "instant runoff" elections are the same thing as elections conducted by ranked-choice voting, voters considering Petitioners' pro-

posed amendment will need to parse a long, technical description of these elections. Petitioners could have avoided this likely source of voter confusion by using the more familiar term. Their choice not to do so renders the ballot title misleading.

Compare this ballot title with the one in *Christian Civic Action Committee*, 318 Ark. at 248-49, 884 S.W.2d at 609-10. The proposed amendment there would have authorized various kinds of gambling: "a state lottery"; "bingo games"; "raffles"; "pari-mutuel wagering"; and "additional racetrack wagering." *Id.* at 248, 884 S.W.2d at 609. The first four of those terms were defined according to their normal meanings. But the last term, "additional racetrack wagering," was defined by the proposal as "wagering on games of chance or skill conducted by mechanical, electrical, electronic or electromechanical devices and table games." *Id.* The Court held that "definition obliquely describe[d] in highly technical terms . . . the elements of casino-style gambling." *Id.* at 249, 884 S.W.2d at 609. But voters would not be able "to translate the jargon within a reasonable amount of time into such relatively familiar concepts as video poker, slot machines, roulette wheels, blackjack, craps, poker, and other games of chance unrelated to betting on horses or dogs." *Id.* Finding that the ballot title in that case consisted of "compounded

euphemisms designed to cloak in semantic obscurity the actual nature of the proposed enterprise," this Court refused to allow the initiative on the ballot. *Id.* at 249-50, 884 S.W.2d at 609-10.

The problem with the ballot title in *Christian Civic Action Committee* was that it used a defined term in an unusual way ("additional racetrack wagering") when a better known term ("casino-style gambling") would have sufficed. Given the time constraints that voters face when considering how to vote on a ballot initiative, the obscurity of this definition made the ballot title misleading. The same holds true here. While ranked-choice voting is itself not a well-known concept, it is still better known than the term "instant runoff election." Like the popular name's unconventional use of the term "open primary," the popular name and ballot title's choice of a more obscure term when a less obscure one likely would have been better understood makes them misleading.

One other aspect of this Court's holding in *Christian Civic Action Committee* further strengthens the conclusion that the ballot title here, in particular, is misleading. The Court there also focused on the length of that ballot title, which was 714 words long. *See* 318 Ark. at 250-54, 884 S.W.2d at 610-12. Standing alone, length is not "a controlling factor," but "it is a consideration." *Dust v. Riviere*, 277 Ark. 1, 6, 638 S.W.2d 663, 666 (1982). And *Christian Civic Action Committee* viewed "the specialized terminology" there—"which obscure[d] meaning" just like

the specialized terminology in the ranked-choice-voting amendment—"in the context of the ballot title's considerable length." 318 Ark. at 250, 884 S.W.2d at 610. The ballot title here, which is 525 words, is somewhat shorter than the ballot title in that case. But the use of specialized terminology "conceal[s] the proposed amendment's potential effect" to an even greater extent. *Id.*

The effect of some of the ballot title's terminology in this case is to give voters an affirmatively false impression of the effect of the ranked-choice-voting amendment on Arkansas's existing election procedures. This obscuring of meaning combined with the length and complexity of this ballot title required SBEC to find it misleading and refuse to certify it for the upcoming election.

2. The proposed amendment will likely lead to election litigation in federal court, which the ballot title does not disclose.

The ballot title of the ranked-choice-voting amendment also fails to disclose essential facts that would give voters "serious ground for reflection." *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994). Chief among these undisclosed essential facts is the risk of litigation in federal court related to changes that the amendment would require to Arkansas's election laws.

One undisclosed source of potential federal litigation regarding the ranked-choice-voting amendment is a 30-year-old federal-court decree. Applying Section 3(c) of the Voting Rights Act, 52 U.S.C. 10302(c), a three-judge district court held in 1990 "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." *Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990); *see* Edward K. Olds, Note, *More than "Rarely Used": A Post*-Shelby *Judicial Standard for Section 3 Preclearance*, 117 Colum. L. Rev. 2185, 2197-99, 2210-12 (2017) (detailing the holding and historical context for *Jeffers*). And a key feature of the ranked-choice-voting amendment is "to ensure a majority winner." (ADD20-22.) Adopting the amendment without taking it through the preclearance process would raise questions of its validity under the Voting Rights Act as interpreted by *Jeffers*.

In this way, this case is similar to *Lange*. There the Court held that when a ballot title "does not inform the voters that the Amendment violates federal law," the ballot title has omitted information that "would give the voters a serious basis for reflection on how to cast their ballots." *Lange*, 2016 Ark. 337, at 8-9, 500 S.W.3d at 159. In that case, the proposed amendment related to gambling and included provisions allowing sports betting that were illegal under federal law. *Id.* Because it did not inform voters that the substance of the proposed amendment was illegal under federal law, the ballot title did "not honestly and accurately reflect what [was] contained in the proposed Amendment." *Id.* at 9, 500 S.W.3d at 159. Although the question of the ranked-choice-voting amendment's legality under federal law is less clear than the question was in *Lange*, the same principle applies.

Knowing that the proposed amendment could lead to reopening *Jeffers*—a decades-old case regarding alleged racial discrimination in Arkansas's elections—would give voters a serious basis for reflection. The ballot title therefore needed to disclose it. *See Lange*, 2016 Ark. 337, at 8-10, 500 S.W.3d at 159-60.

Petitioners' only response on this point proves that they don't understand the federal laws implicated by the ranked-choice-voting amendment. (*See* Br. 19-20.) The U.S. Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), is completely beside the point. *Jeffers* relied on Section 3 of the Voting Rights Act. *See* 740 F. Supp. at 601. *Shelby County*, by contrast, considered only Sections 4 and 5 of the Voting Rights Act. Section 4 contains the criteria for determining which States were subject to Section 5. *See* 570 U.S. at 537-38. But Congress had not updated Section 4's criteria for decades. So the Supreme Court found Section 4 an unconstitutional "basis for subjecting jurisdictions to preclearance" under Section 5. *Id.* at 557. *Shelby County*'s majority did not cite Section 3 even one time. *Cf. id.* at 579 (Ginsburg, J., dissenting) (citing Section 3, which was then codified at 42 U.S.C. 1973a(c), as a reason for disagreeing with majority's interpretation of Section 4). Petitioners similarly misunderstand the federal regulations they cite. (Br. 20 (citing 28 C.F.R. 51.22-23).) The U.S. Department of Justice promulgated those regulations as part of its role in enforcing Section 5 of the Voting Rights Act, not Section 3.

By failing to inform voters that the ranked-choice-voting amendment may lead to federal-court litigation, the amendment's ballot title fails to disclose information to voters that would give them a serious basis for reflection.

3. The ballot title fails to disclose the sweeping changes that would be required to Arkansas's political parties.

Separate from the ballot title's failure to inform voters about its possible federal-law implications, it also fails to disclose how it would change state law regarding the role of political parties. This failure to disclose the extent of the legal changes the ranked-choice-voting amendment would cause renders the ballot title misleading. *See Scott v. Priest*, 326 Ark. 328, 332, 932 S.W.2d 746, 747 (1996); *Bailey*, 318 Ark. at 288, 884 S.W.2d at 944.

Under current law, political parties in Arkansas have significant autonomy in managing their membership and their primaries. Arkansas allows them to "[p]rescribe the qualifications of their own membership" and "for voting in their party primaries," and also to "[e]stablish rules and procedures for their own organization." Ark. Code Ann. 7-3-101. In fact, under certain circumstances, "a political party can remove a nominee for good and legal cause, but the party is merely required to petition the circuit court in so doing." *Ivy v. Republican Party of Ark.*, 318 Ark. 50, 55-56, 883 S.W.2d 805, 808 (1994) (interpreting statute now codified at Ark. Code Ann. 7-1-101(37)); *cf.* Ark. Code Ann. 7-1-101(36), (38). Yet the ranked-choice-voting amendment would mostly remove the political parties from

the primary process. (*See* ADD19-20.) And it would apparently repeal political parties' ability to remove a candidate from the general election ballot for "good and legal cause." (*See id.*)

Because the ranked-choice-voting amendment would dramatically reduce the autonomy of Arkansas's political parties, its ballot title needed to disclose this fact to voters. Petitioners' only response is to wave away this change to the State's legal framework as "speculative detail." (Br. 21.) But this Court has made clear in the past that undisclosed repeals of existing statutes can render ballot titles misleading. For example, this Court held a ballot title to be misleading because it did not disclose that the proposed amendment would require workers' compensation laws to be construed liberally, which would repeal a statute requiring strict construction. *See Bailey*, 318 Ark. at 288, 884 S.W.2d at 944. And in another case, the Court considered a ballot title disclosing that a proposed amendment would create a 20% threshold for local-option, casino-gambling elections. *Scott*, 326 Ark. at 332, 932 S.W.2d at 747. Although that much was true, this Court held the title was insufficient because it did not disclose that the threshold was higher than the 15% threshold already in Amendment 7. *Id.*

In both *Bailey* and *Scott*, the failure to disclose the full extent to which a proposed amendment changed existing law rendered the ballot title misleading. Because the ballot title for the ranked-choice-voting amendment does not disclose the

extent to which it would change Arkansas law regarding political parties, it is misleading.

4. The ballot title does not inform voters of far-reaching electoral consequences, including the need for a complete overhaul of Arkansas's voting equipment.

The ballot title must inform voters of the extent of all its consequences—not just its legal ones. A ballot title is misleading if it "does not inform the voter of the far-reaching consequences of voting for [the] measure." *Kurrus*, 342 Ark. at 443, 29 S.W.3d at 673.

The ballot title for the ranked-choice-voting amendment does not inform voters of the expense of outfitting the entire State with new voting equipment capable of complying with the amendment. "Arkansas's current voting system is not capable of implementing the proposed amendment." (ADD2.) If the amendment were adopted, therefore, it "would likely require the State to procure new voting equipment at a significant expense"—that is, "if such equipment could even be found." (ADD2.) Given that Arkansas would become only the second State in the Nation with statewide ranked-choice voting, there is a possibility that new voting equipment would need to be custom-made for Arkansas's election, adding to the expense.

Although Petitioners again do little more than dismiss this as "speculative detail" (Br. 22), this Court has made clear that the failure to disclose the expense of

implementing an amendment can render its ballot title misleading. In *Johnson v. Hall*, for instance, the Court considered a constitutional amendment called the "Safety Crossing Amendment – An amendment to require adequate safety devices at all public railroad crossings." 229 Ark. 404, 405, 316 S.W.2d 197, 197 (1958). But that ballot title failed to convey to voters the "additional burden of heavy expense" that the proposed amendment would place "on the railroads," amounting to "millions of dollars to install and maintain such devices, at an estimated 3,600 railroad crossings in Arkansas." *Id.* at 407, 316 S.W.2d at 198. For that and other reasons, this Court held the ballot title misleading in *Johnson*.

Because the ballot title for the ranked-choice-voting amendment does not disclose that it will cause the State to buy an entire fleet of new, expensive voting equipment, it is misleading.

II. The Arkansas Constitution does not require SBEC to certify misleading popular names and ballot titles.

To try and avoid SBEC's misleadingness finding, Petitioners also argue that Amendment 7 permits no one other than this Court to evaluate the sufficiency of a popular name and ballot title. As Petitioners themselves acknowledge (*see* Br. 26), other Arkansas officials have long participated in this process. Starting in 1943, the Attorney General began reviewing the sufficiency of popular names and ballot titles before this Court exercises its jurisdiction under Amendment 7. And this Court previously approved of the Attorney General's role in sufficiency review.

See Washburn v. Hall, 225 Ark. 868, 871, 286 S.W.2d 494, 497 (1956). Contrary to Petitioners' claim (*see* Br. 27-31), nothing about the General Assembly's decision last year to transfer the Attorney General's role to SBEC renders this Court's precedent inapplicable. *See* 2019 Ark. Act 376, secs. 6, 9, 92d General Assembly, Regular Session.

Ultimately, this Court need not reach Petitioners' constitutional claim if it agrees with SBEC that the popular name and ballot title are misleading. It can simply decide as a matter of its own authority under Amendment 7 that the ranked-choice-voting amendment should not appear on the ballot.

A. Standard of Review.—To shore up their constitutional attack on the longstanding structure of the sufficiency-review process, Petitioners misstate the applicable standard of review for their claim. Without explanation, they claim strict scrutiny applies to any regulation of the initiative process. (*See* Br. 23-24.) But this claim does not square with Amendment 7's express instructions to the General Assembly to legislate to facilitate its operation.

Amendment 7 grants two types of legislative authority to the General Assembly. The first type is mandatory: "[L]aws shall be enacted prohibiting and penalizing perjury, forgery, and all other felonies or other fraudulent practices, in the securing of signatures or filing of petitions." Ark. Const. art. 5, sec. 1. The second

type of legislative authority in Amendment 7 is permissive: "[L]aws may be enacted to facilitate its operation." *Id.* And as even Petitioners admit, they bear the burden of proving that Act 376 clearly exceeds those grants of legislative authority: "Acts of the legislature are presumed constitutional and Petitioners in this case have the burden to prove otherwise." (Br. 23.) *See Stone v. State*, 254 Ark. 1011, 1013, 498 S.W.2d 634, 635 (1973); *see also Robert D. Holloway, Inc. v. Pine Ridge Addition Residential Prop. Owners*, 332 Ark. 450, 453, 966 S.W.2d 241, 243 (1998) (requiring a "clear incompatibility between the act and the Arkansas Constitution").

Presuming that Act 376 is a constitutionally permissible exercise of an express grant of legislative authority is inconsistent with applying strict scrutiny. In the past, this Court has instead asked whether a challenged law imposes any "burdensome condition" and whether it "aids the Secretary of State and this court in determining" the sufficiency of a petition. *Pafford v. Hall*, 217 Ark. 734, 738, 233 S.W.2d 72, 74 (1950); *see Washburn*, 225 Ark. at 871, 286 S.W.2d at 497 (considering whether challenged law was an "unwarranted restriction on Amendment No. 7"). For example, this Court concluded it could constitutionally exercise jurisdiction to review sufficiency earlier than stated in Amendment 7 because "[a]n early resolution of a contest to the content of a popular name and ballot title and the va-

lidity of the initiative would certainly facilitate the process for legislative enactments by the people." *Stilley v. Priest*, 341 Ark. 329, 334, 16 S.W.3d 251, 254 (2000).

This Court has prescribed a form of rational-basis review: If an act is rationally related to Amendment 7's express grants of legislative authority, then it is permissible. That is why this Court has approved of laws regulating "the validity of individual signatures," when "those individual signatures are called into question," while simultaneously striking down similar laws that "invalidat[e] an entire petition part for issues with individual signatures." *McDaniel v. Spencer*, 2015 Ark. 94, at 18, 457 S.W.3d 641, 654. It is not rationally related to fraud prevention or the facilitation of the initiative process to invalidate one signature on the basis of problems with another signature. *See id.* at 18-19, 457 S.W.3d at 654. Furthermore, this Court's analysis in *McDaniel* does not support Petitioners' attempt to squeeze a least-restrictive-means analysis into Amendment 7. (*See* Br. 23-24.) *McDaniel* simply looked for a relationship between the challenged law and a permissible legislative goal; it did not analyze whether less-restrictive alternatives to the law might be available. *See* 2015 Ark. 94, at 18-19, 457 S.W.3d at 654.

B. 60-Year-Old Precedent Defeats Petitioners' Claim.—In 1956, this Court rejected a constitutional challenge to Act 195 of 1943, which was the predecessor to the act vesting SBEC with responsibility to review the sufficiency of a popular

name and ballot title. *Washburn*, 225 Ark. at 871-74, 286 S.W.2d at 497-99. In that case, an initiative sponsor failed to submit a popular name or ballot title to the Attorney General. *Id.* at 872, 286 S.W.2d at 497. The Secretary of State thus "refused to certify the petition to the election officials." *Id.* at 871, 286 S.W.2d at 497. So the sponsors challenged the act requiring them to seek a sufficiency determination from the Attorney General. *See id.*

Holding that the Attorney General's review imposed "no unwarranted restriction on Amendment No. 7," this Court rejected that challenge. *Id.* This holding arose from the conclusion that submitting a proposed popular name and ballot title for review was not a particularly onerous task. *See id.* at 872, 286 S.W.2d at 497-98 ("There is nothing complicated about Act 195; it is not difficult to follow; it is not calculated to make troublesome the right to take advantage of the I. and R. Amendment."). Moreover, "[i]t goes without saying that before any one could safely undertake to refer a measure to the people it would be necessary to review the Constitution and the Statutes pertaining to such referendum." *Id.* at 872, 286 S.W.2d at 498. And for anyone aggrieved by the Attorney General's certification decision, "there would be a remedy in the courts." *Id.* at 873, 286 S.W.2d at 498.

This Court's approval of the Attorney General's review procedure in *Washburn* should lead it to reject Petitioners' constitutional challenge to SBEC's role here. Petitioners misunderstand the constitutional analysis by suggesting that any

procedures that are not identical to the "baseline" in *Washburn* fail constitutional scrutiny. (Br. 30.) Nothing in *Washburn* purported to set a constitutional baseline against which all other regulations of the initiative process must be measured. Instead, the Court analyzed the burdens the statute in that case imposed to determine whether it was an "unwarranted restriction on Amendment 7." *Washburn*, 225 Ark. at 871, 286 S.W.2d at 497. Each law must be measured against Amendment 7—not against all other possible laws the General Assembly might have enacted.

Petitioners do not explain why SBEC's review places any more "burdensome condition[s]" on Amendment 7 than the prior law providing for the Attorney General's review. *Pafford*, 217 Ark. at 738, 233 S.W.2d at 74. First off, Petitioners point to the mere fact that SBEC is not the Attorney General. (*See* Br. 30.) But they never explain why it should matter for Amendment 7's purposes if the initial sufficiency review is performed by the Attorney General or SBEC. Petitioners' two other complaints with SBEC's review really amount a single complaint about timing—that SBEC's review comes *after* petitions have been circulated instead of *before*, as under the old statute. (Br. 30-31.) But timing was not central to *Washburn*'s analysis. It focused instead on the fact that the review process was not "complicated," and that regardless of the outcome, a person aggrieved by the process could seek judicial review of the Attorney General's decision. *Washburn*, 225 Ark. at 872-73, 286 S.W.2d at 497-98. Now that SBEC exercises the Attorney

General's former responsibilities, those facts remain true. *See* Ark. Code Ann. 7-9-112(a).

This lawsuit is a case in point. Dissatisfied with SBEC's certification decision, Petitioners sought this Court's review of SBEC's decision.

C. SBEC Review Facilitates Amendment 7.—Whatever hassle that process caused Petitioners, it was justified by ensuring that they were unable to place an initiative with a misleading popular name and ballot title before the voters this November. But Petitioners claim that keeping misleading initiatives off the ballot "serves no reasonable purpose in furthering the rights of the people to refer and initiate legislation." (Br. 12.) Indeed, they claim that Amendment 7 requires SBEC to certify for the ballot whatever language an initiative's sponsor happens to submit—regardless of how misleading that language might be. (*See* Br. 25-26.)

The reasoning beneath this claim proves too much. If Petitioners are right that it infringes their right to the initiative process for SBEC to consider whether their proposal will mislead Arkansas voters, then this Court's own review would also be suspect. Amendment 7 provides no standard for evaluating whether a popular name or ballot title is too misleading for certification, whether by the Attorney General, SBEC, or this Court. *See* Ark. Const. art. 5, sec. 1; *see also* Thomas B. Cotton, *The Arkansas Ballot Initiative: An Overview and Some Thoughts on Reform*, 53 Ark. L. Rev. 759, 761 (2000) ("Amendment 7 provides neither guidelines

for drafting nor standards for judging ballot language."). Yet this Court has long refused to allow proposals with misleading ballot titles on the ballot. *See, e.g.*, *Westbrook v. McDonald*, 184 Ark. 740, 43 S.W.2d 356, 359-60 (1931) ("As the ballot title here submitted might mislead, we have concluded that it was defective and insufficient and that the amendment was not sufficiently complied with in this respect.").

Ensuring that misleading initiatives like the ranked-choice-voting amendment stay off the ballot "facilitate[s] [the] operation" of Amendment 7, and also could be viewed as preventing a type of "fraudulent practice[]" in the "filing of petitions." Ark. Const. art. 5, sec. 1. To maintain the democratic legitimacy of the ballot-initiative process, "the people must be asked fair and reasonable questions, from which their answers have clear meanings." Steve Sheppard, *Intelligible, Honest, and Impartial Democracy: Making Laws at the Arkansas Ballot Box*, 2005 Ark. L. Notes 410, at 10 (Oct. 14), http://media.law.uark.edu/arklawnotes/files/2011/03/Sheppard-Intelligible-Honest-and-Impartial-Democracy-Arkansas-Law-Notes-2005.pdf. Otherwise, the initiative would "amount[] to a fraud, or a trick, and there [could] be no basis for believing that the law really represents the will of the people." *Id.*

Petitioners seek license to be free from any check on misleading voters with the popular name and ballot title of their initiatives. But it does not serve democracy to allow misleading initiatives to go before the voters, even though "the initiative power lies at the heart of our democratic institutions." *Christian Civic Action Comm.*, 318 Ark. at 250, 884 S.W.2d at 610. "[I]n a case of this kind, the constitution plainly places the responsibility on this court to see that the result of an election represents the objective judgment of the voters." *Ark. Women's Pol. Caucus*, 283 Ark. at 469, 677 S.W.2d at 849. Because the popular name and ballot title of the ranked-choice-voting amendment are misleading, this Court "must declare the proposed amendment ineligible for consideration at the general election" on November 3, 2020, "to uphold the integrity of the initiative process." *Christian Civic Action Comm.*, 318 Ark. at 250, 884 S.W.2d at 610.

REQUEST FOR RELIEF

For these reasons, this Court should hold that the popular name and ballot title for the ranked-choice-voting amendment are misleading and that the Arkansas Constitution does not require SBEC to certify misleading petitions. Therefore, this Court should deny Petitioners' request to certify the ranked-choice-voting petition for the 2020 ballot.

Respectfully submitted,

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Arkansas Attorney General

/s/ *Vincent M. Wagner*

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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 jurisdictional statement, the statement of the case and the facts, and the argument sections altogether contain 7,752 words.

/s/ *Vincent M. Wagner*
Vincent M. Wagner

CERTIFICATE OF SERVICE

I certify that on August 14, 2020, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will serve all counsel of record.

/s/ *Vincent M. Wagner*
Vincent M. Wagner

STATE BOARD OF ELECTION COMMISSIONERS

501 Woodlane Street – Suite 122 South
Little Rock, Arkansas 72201
(501)682-1834 or (800)411-6996

July 24, 2020

The Honorable John Thurston
Secretary of State
State Capitol, Suite 256
Little Rock, Arkansas 72201

Hand Delivered

RE: Resolution No. 3 of 2020

Mr. Secretary:

Please find the enclosed resolution certifying the popular name and ballot title for the initiative petition with the popular name: "The Arkansas Citizens' Redistricting Commission Amendment"

With the adoption of this resolution, the State Board of Election Commissioner certifies to you that the popular name and ballot title submitted by your office on July 7, 2020 is eligible to be placed on the ballot for the November 3rd General Election pursuant to A.C.A. §7-9-111(i)(3).

Sincerely,

Daniel J. Shults
Director

Enclosures: Resolution No. 3 of 2020
Ballot Title and Popular Name

STATE BOARD OF ELECTION COMMISSIONERS
501 Woodlane Street, Suite 122S
Little Rock, Arkansas 72201
(501) 682-1834 or (800) 411-6996

Secretary of State
John Thurston
Chairman

Sharon Brooks
Bilenda Harris-Ritter
William Luther
Charles Roberts
James Sharp
J. Harmon Smith
Commissioners

Daniel J. Shults
Director

Chris Madison
Legal Counsel

Jon Davidson
Educational Services Manager

Tena Arnold
Business Operations Manager

RESOLUTION No. 3 of 2020

In the Matter of Certification of the Popular Name and Ballot Title: *The Arkansas Citizens' Redistricting Commission Amendment*

Whereas, Ark. Const. Art. 5 § 1, and codified by Act 379 of 2019, in its amending of Ark. Code Ann. § 7-9-111(i) delegates, to the State Board of Election Commissioners, the responsibility and authority to certify or not certify any "statewide initiative petition or statewide referendum petition" submitted to the Secretary of State.

Whereas, On July 7, 2020, the Secretary of State submitted the popular name and ballot title, known as T*he Arkansas Citizens' Redistricting Commission Amendment* to the State Board of Election Commissioners for review and a certification decision.

Whereas, SBEC reviewed the popular name and ballot title for issues of misrepresentation and to determine whether a vote "FOR" the measure would be a vote in favor of the matter or viewpoint that the voter believes himself or herself casting a vote for.

Whereas, on July 22, 2020, the State Board of Election Commissioners met in regular session, to review, discuss, and to vote on whether to certify the proposal or not certify the proposal.

SBEC.ADD2

Now, Be It Resolved, by the State Board of Election Commissioners, that:

The State Board of Election Commissioners, during a properly called public meeting, votes to CERTIFY the ballot titled *The Arkansas Citizens' Redistricting Commission Amendment* to the Secretary of State pursuant to Ark. Const. Art. 5 §1 and Ark. Code Ann. § 7-9-111(i).

The State Board of Election Commissioners authorizes the Chair of the Board or the Chair's designee to execute this Resolution on behalf of and as an expression of the vote of the State Board of Election Commissioners' Certification of the popular name and ballot titled, *The Arkansas Citizens' Redistricting Commission Amendment*

Passed and Approved this the 22nd Day of July 2020.

John Thurston

Chair, Secretary John Thurston

SBEC.ADD3

POPULAR NAME:

The Arkansas Citizens' Redistricting Commission Amendment

BALLOT TITLE:

An amendment to the Constitution repealing and amending Sections 1, 4, and 5 of Article 8 of the Constitution to create a Citizens' Redistricting Commission, consisting of nine Commissioners who are registered voters in Arkansas, that will replace the Board of Apportionment, consisting of the Governor, Secretary of State, and Attorney General for the redistricting and apportionment of legislative districts, and the General Assembly for the redistricting and apportionment of congressional districts; providing the Commission shall apportion and redistrict congressional and legislative districts after the census every ten years; providing Commission meetings be advertised and public; requiring the Secretary of State to publish the Commission's work product and redistricting maps; providing records of communications of the Commissioners, Commission staff, and outside consultants relating to the Commission's duties be public records; requiring persons receiving income or reimbursement to influence Commission action to publicly disclose such fact; providing any registered Arkansas voter may apply for the Commission but disqualifying anyone who, within the immediately preceding five years, has served as an elected or appointed federal, state, county or city official, registered lobbyist or officer of a political party, or has been employed by a registered lobbyist, political party, political campaign or political action committee, or is related by blood or marriage to a disqualified person; providing for an application requiring statement of the applicant's qualifications, residential address, and political party affiliation or lack of party affiliation; requiring the Secretary of State to prepare and advertise the application; providing applicants be selected by a panel appointed by the Arkansas Supreme Court Chief Justice, with consideration of racial, gender, and geographical diversity, of three retired Supreme Court Justices and Court of Appeals Judges, and circuit judges if necessary to fill the panel; requiring the panel by majority decision to place the applicants into pools based on party affiliation and choose thirty applicants from the pool affiliated with the party with the largest representation in the General Assembly, thirty from the pool affiliated with the party with the next-largest representation in the General Assembly, and thirty who are not affiliated with the largest or next-largest party; providing the chosen applicants be publicly disclosed, and that the Governor and the parliamentary leaders of the parties with the largest and next-largest representation in the state House of Representatives and Senate may each eliminate up to two applicants from each pool; providing the panel shall then randomly select three applicants from each pool to serve as Commissioners, and providing for random replacement draws if necessary to ensure at least one Commissioner is selected from each congressional district, and that the panel shall fill any Commission vacancy; requiring Commissioner terms to end when a new Commission is convened and prohibiting Commissioners from holding elected office or serving as a registered lobbyist while a Commissioner and for three years thereafter; requiring the Commission to elect its chair and vice chair from different pools; providing a quorum for any meeting is seven Commissioners, and requiring attendance and voting in person and not by proxy; requiring at least two votes from each pool to approve any final redistricting map and six votes to approve any other Commission act; requiring the Secretary of State to provide the Commission census and election data and a means for public comment and proposal of maps; requiring any congressional district to have a population as equal as practical to the population of the state as reported in the census divided by the number of districts to be established; requiring any map for a state House of

Representatives or Senate district to vary by no more than three percent from the population of the state divided by the number of state House of Representatives and state Senate seats, respectively; requiring the Commission to conduct at least one public meeting in each congressional district and to publish three redistricting maps of congressional seats and three redistricting maps of state House and Senate seats, with a written report of the basis for the districts; requiring maps be drawn not to favor or disfavor any political party when viewed on a statewide basis; directing, to the extent practicable, districts be contiguous, not deny or abridge the right to vote on account of race or language, be reasonably compact, and except as required to meet the other criteria, not divide cities or counties, and as feasible after satisfying the preceding criteria, promote competition among political parties; requiring the Commission to certify its final maps, and the respective populations and boundaries, to the Secretary of State, which shall become binding unless, within thirty days, a petition for review is filed in the Supreme Court, in which case the apportionment becomes effective thirty days after the Commission certifies to the Secretary of State any revision pursuant to the Supreme Court's mandate; providing reasonable reimbursement of panelists' and Commissioners' expenses related to their duties and a per diem of up to $200, subject to increase by the General Assembly; requiring the General Assembly to appropriate moneys, in no case less than $750,000, for the Commission's duties, and providing, to the extent the Commission requires moneys prior to such appropriation, the Commission shall receive such moneys from the Constitutional Officers Fund; providing the Supreme Court have original jurisdiction to require by mandamus the Chief Justice, panel, Secretary of State, and Commission to perform their duties; providing references to the Board of Apportionment in the Constitution shall refer to the Citizens' Redistricting Commission; and repealing Arkansas Code §§ 7-2-101 through 105.

ARA100000

THE ARKANSAS CITIZENS' REDISTRICTING COMMISSION AMENDMENT

FOR OFFICE USE ONLY

_____Valid of_____

By_____ Date_____

To the Honorable John Thurston, Secretary of State of the State of Arkansas: We the undersigned registered voters of the State of Arkansas, respectfully propose the following amendment to the Constitution of the State, and by this, our petition, order that the same be submitted to the people of said state, to the end that the same may be adopted, enacted, or rejected by the vote of the registered voters of state at a regular general election to be held on the 3rd day of November, 2020, and each of us for himself or herself says: **I have personally signed this petition; I am a registered voter of the State of Arkansas, and my printed name, date of birth, residence, city or town of residence, and date of signing this petition are correctly written after my signature.** The Popular Name is The Arkansas Citizens' Redistricting Commission Amendment and the ballot title is attached or affixed hereto.

VOTERS REGISTERED IN_____COUNTY

	Signature	Printed Name	Date of Birth	Residence (Street Address)	City or Town of Residence	County of Residence	Date of Signing
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							

State of Arkansas, County of_____ (county where notary signs)

I, _____being duly sworn, state that each of the foregoing persons signed his or her own name to this sheet of petition in my presence. To the best of my knowledge and belief, each signature is genuine and each signer is a registered voter of the State of Arkansas, in the County listed at top of the Petition. At all times during the circulation of this signature sheet, an exact copy of the popular name, ballot title, and text was attached to this signature sheet. My current residence address is correctly stated below.

Signature_____

Permanent Domicile Address_____

Current Residence Address_____

Indicate one: (_____) Paid Canvasser (_____) Volunteer/Unpaid Canvasser

On this _____day of_____,2020, before me, the undersigned Notary Public, personally appeared _____well known to me (or satisfactorily proven by identification documents provided) to be the person described in the foregoing Canvasser Affidavit and acknowledged that s/he executed the same in the capacity of a Canvasser for the purposes of fulfilling legal requirements of a Canvasser in the State of Arkansas; and that I personally witnessed the signature of the Canvasser.

Signature of Notary_____

My Commission Expires_____

Residence County of Notary_____

FILED

MAR 16 2020

SBEC.ADD6

Arkansas Secretary of State

[Notary Seal Above]

Instructions to Canvassers and Signers

1. The Arkansas Constitution gives Arkansas citizens the power to *(a)* initiate legislation by petition of 8% of the legal voters or constitutional amendments by petition of 10% of legal voters, or *(b)* order the referendum against any general act or any item of an appropriation bill or measure passed by the General Assembly by petition of 6% of legal voters. A proposed measure must be submitted at a regular election. Referendum petitions may be referred at special elections on petition of 15% of the registered voters. Any measure submitted to the people becomes law when approved by a majority of the votes cast upon such measure.

2. Only registered voters may sign. All signatures must be in the signer's own handwriting and in the presence of the person circulating the petition. Each petition part should contain only the signatures of voters residing in a single county.

3. Printed name, date of birth, residence, city or town of residence, and date of signing must be given. If a petition signer needs assistance with this information due to disability, another person may print the signer's information and that person shall sign and print their name in the margin of the petition.

4. Pursuant to Ark. Code Ann. § 7-9-103, a person commits a Class A misdemeanor, punishable by a fine of up to $2,500 and confinement of up to one year in jail, if the person knowingly prints a name, address, or birth date other than his or her own to a petition or prints the date of signing for another person unless the signer requires assistance due to disability and the person complies with § 7-9-103.

5. Pursuant to Ark. Code Ann. § 5-55-601, each of the following activities constitutes "petition fraud," which is a Class D felony punishable by a fine of up to $10,000 and up to six (6) years imprisonment. Under that law, "A person commits the offense of petition fraud:

(1) If the person knowingly:
  (A) Signs a name other than his or her name to a petition;
  (B) Signs his or her name more than one (1) time to a petition; or
  (C) Signs a petition when he or she is not legally entitled to sign the petition;

(2) If the person acting as a canvasser, notary, sponsor, as defined under § 7-9-101, or agent of a sponsor:
  (A) Signs a name other than his or her own to a petition;
  (B) Prints a name, address, or birth date other than his or her own to a petition unless the signor requires assistance due to disability and the person complies with § 7-9-103;
  (C) Solicits or obtains a signature to a petition knowing that the person signing is not qualified to sign the petition;
  (D) Knowingly pays a person any form of compensation in exchange for signing a petition as a petitioner;
  (E) Accepts or pays money or anything of value for obtaining signatures on a petition when the person acting as a canvasser, sponsor, or agent of a sponsor knows that the person acting as a canvasser's name or address is not included on the sponsor's list filed with the Secretary of State under § 7-9-601; or
  (F) Knowingly misrepresents the purpose and effect of the petition or the measure affected for the purpose of causing a person to sign a petition;

(3) If the person acting as a canvasser knowingly makes a false statement on a petition verification form; [or]

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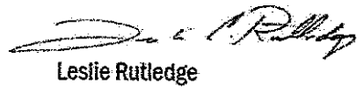
(5) If the person acting as a sponsor files a petition or a part of a petition with the official charged with verifying the signatures knowing that the petition or part of the petition contains one (1) or more false or fraudulent signatures unless each false or fraudulent signature is clearly stricken by the sponsor before filing."

Arkansas Attorney General



Leslie Rutledge

Revised 03/11/20

POPULAR NAME:

The Arkansas Citizens' Redistricting Commission Amendment

BALLOT TITLE:

An amendment to the Constitution repealing and amending Sections 1, 4, and 5 of Article 8 of the Constitution to create a Citizens' Redistricting Commission, consisting of nine Commissioners who are registered voters in Arkansas, that will replace the Board of Apportionment, consisting of the Governor, Secretary of State, and Attorney General for the redistricting and apportionment of legislative districts, and the General Assembly for the redistricting and apportionment of congressional districts; providing the Commission shall apportion and redistrict congressional and legislative districts after the census every ten years; providing Commission meetings be advertised and public; requiring the Secretary of State to publish the Commission's work product and redistricting maps; providing records of communications of the Commissioners, Commission staff, and outside consultants relating to the Commission's duties be public records; requiring persons receiving income or reimbursement to influence Commission action to publicly disclose such fact; providing any registered Arkansas voter may apply for the Commission but disqualifying anyone who, within the immediately preceding five years, has served as an elected or appointed federal, state, county or city official, registered lobbyist or officer of a political party, or has been employed by a registered lobbyist, political party, political campaign or political action committee, or is related by blood or marriage to a disqualified person; providing for an application requiring statement of the applicant's qualifications, residential address, and political party affiliation or lack of party affiliation; requiring the Secretary of State to prepare and advertise the application; providing applicants be selected by a panel appointed by the Arkansas Supreme Court Chief Justice, with consideration of racial, gender, and geographical diversity, of three retired Supreme Court Justices and Court of Appeals Judges, and circuit judges if necessary to fill the panel; requiring the panel by majority decision to place the applicants into pools based on party affiliation and choose thirty applicants from the pool affiliated with the party with the largest representation in the General Assembly, thirty from the pool affiliated with the party with the next-largest representation in the General Assembly, and thirty who are not affiliated with the largest or next-largest party; providing the chosen applicants be publicly disclosed, and that the Governor and the parliamentary leaders of the parties with the largest and next-largest representation in the state House of Representatives and Senate may each eliminate up to two applicants from each pool; providing the panel shall then randomly select three applicants from each pool to serve as Commissioners, and providing for random replacement draws if necessary to ensure at least one Commissioner is selected from each congressional district, and that the panel shall fill any Commission vacancy; requiring Commissioner terms to end when a new Commission is convened and prohibiting Commissioners from holding elected office or serving as a registered lobbyist while a Commissioner and for three years thereafter; requiring the Commission to elect its chair and vice chair from different pools; providing a quorum for any meeting is seven Commissioners, and requiring attendance and voting in person and not by proxy; requiring at least two votes from each pool to approve any final redistricting map and six votes to approve any other Commission act; requiring the Secretary of State to provide the Commission census and election data and a means for public comment and proposal of maps; requiring any congressional district to have a population as equal as practical to the population of the state as reported in the census divided by the number of districts to be established; requiring any map for a state House of Representatives or Senate district to vary by no more than three percent from the population of the state divided by the number of state House of Representatives and state Senate seats, respectively; requiring the Commission to conduct at least one public meeting in each congressional district and to publish three redistricting maps of congressional seats and three redistricting maps of state House and Senate seats, with a written report of the basis for the districts; requiring maps be drawn not to favor or disfavor any political party when viewed on a statewide basis; directing, to the extent practicable, districts be contiguous, not deny or abridge the right to vote on account of race or language, be reasonably compact, and except as required to meet the other criteria, not divide cities or counties, and as feasible after satisfying the preceding criteria, promote competition among political parties; requiring the Commission to certify its final maps, and the respective populations and boundaries, to the Secretary of State, which shall become binding unless, within thirty days, a petition for review is filed in the Supreme Court, in which case the apportionment becomes effective thirty days after the Commission certifies to the Secretary of State any revision pursuant to the Supreme Court's mandate; providing reasonable reimbursement of panelists' and Commissioners' expenses related to their duties and a per diem of up to $200, subject to increase by the General Assembly; requiring the General Assembly to appropriate moneys, in no case less than $750,000, for the Commission's duties, and providing, to the extent the Commission requires moneys prior to such appropriation, the Commission shall receive such moneys from the Constitutional Officers Fund; providing the Supreme Court have original jurisdiction to require by mandamus the Chief Justice, panel, Secretary of State, and Commission to perform their duties; providing references to the Board of Apportionment in the Constitution shall refer to the Citizens' Redistricting Commission; and repealing Arkansas Code §§ 7-2-101 through 105.

THE ARKANSAS CITIZENS' REDISTRICTING COMMISSION AMENDMENT

(1) Article 8, Section 1 of the Constitution of Arkansas is repealed and amended to state as follows:

Citizens' Redistricting Commission created – Membership.

SECTION 1. Purpose.
A Commission of nine Commissioners to be regularly appointed in accordance with the provisions hereof and known as "The Citizens' Redistricting Commission" is hereby created. It shall be the Commission's imperative duty to apportion and redistrict districts for representatives in the United States House of Representatives, the state House of Representatives and the state Senate.

SECTION 2. Transparency.
The Commission shall protect the public trust and discharge its imperative duty through a transparent process. All meetings, whether formal or informal, special or regular, of the Commission shall be advertised and open to the public. The Secretary of State shall maintain and electronically publish as soon as practicable all Commission work product, and alternate and final maps. All records of communications of the Commissioners, and Commission staff and outside consultants, that relate to the Commission's imperative duty shall be deemed public records. Any person who receives income or reimbursement to directly or indirectly communicate with a Commissioner to influence Commission action shall publicly disclose such fact prior to taking such action.

SECTION 3. Eligibility requirements.

Each Commissioner shall be an Arkansas registered voter. No person may serve or continue to serve as a Commissioner if within the preceding five years the person:

1. has served as an elected federal, state, city, or county official;
2. has served as an appointed federal or state official;
3. has served as a registered lobbyist;
4. has served as an officer of a political party;
5. has served as an employee of a registered lobbyist, political party, political campaign committee, or political action committee; or
6. was, by blood or marriage, the spouse, child, parent, or sibling, of any of the foregoing.

SECTION 4. Application Process.

A. No later than January 1, 2021 and December 1 of the subsequent years concurrent with the federal census, the Chief Justice of the Arkansas Supreme Court shall designate a panel of three, and fill any vacancies thereof, to screen applicants for appointment to the Commission. In making appointments to the panel, the Chief Justice shall consider geographic, racial, and gender diversity. The panelists shall be appointed from among retired Justices of the Supreme Court and retired Judges of the Court of Appeals, and if necessary to appoint three panelists, retired Judges of the Circuit Courts, who are able and willing to serve.

B. The Secretary of State shall advertise statewide the opportunity to serve on the Commission and develop an application form consistent with the provisions hereof no later than January 15 of the year immediately following the federal census. The application form shall require the applicant to state under penalty of perjury (i) that the applicant is eligible to serve as a Commissioner, and (ii) the applicant's residential address, political party affiliation or lack of political party affiliation, age, gender, and race or ethnicity.

C. Eligible persons may apply to serve as a Commissioner no later than March 1 of each year immediately following the federal census. No later than April 1 immediately following the federal census, the panel shall by majority decision select thirty eligible applicants from each of the following three pools: one pool of applicants affiliated with the political party having the largest number of representatives in the General Assembly, one pool of applicants affiliated with the political party having the second-largest number of representatives in the General Assembly, and one pool of applicants affiliated with other political parties or no political party. In selecting applicants for the pools, the panel shall make a good faith effort to ensure that the pools are, insofar as possible, geographically and demographically representative of the population of the state. The panel shall publish the name and application of each selected applicant. Within ten days thereafter, the below shall each, in the following descending order, have the right to eliminate no more than two applicants from each pool of applicants:

1. the Governor;

2. the parliamentary leader of the political party having the largest number of representatives in the state House of Representatives;

3. the parliamentary leader of the political party having the second-largest number of representatives in the state House of Representatives;

4. the parliamentary leader of the political party having the largest number of representatives in the state Senate; and

5. the parliamentary leader of the political party having the second-largest number of representatives in the state Senate.

D. The panel shall randomly draw three applicants from those remaining in each pool, for a total of nine. If the draw results in there being any congressional district in which no drawn applicant resides, then the panel shall conduct and repeat the following replacement draws as necessary to result in three Commissioners being selected from each of the three pools, with at least one Commissioner residing in each congressional district:

1. The panel shall remove from consideration a randomly selected applicant from the congressional district (or districts) having the greatest number of drawn applicants.

2. The panel shall randomly draw from the same pool as the removed applicant a replacement applicant residing in an unrepresented congressional district.

Notwithstanding the foregoing, the panel shall not conduct, or shall cease conducting, replacement draws if there are not enough applicants from the unrepresented congressional district(s) to ensure the selection of at least one Commissioner from each congressional district.

E. The panel shall randomly select the Commissioners no later than May 1. The panel shall fill any vacancy on the Commission by majority decision from the applicants remaining in the pool with the vacancy, maintaining, to the extent possible, representatives from each congressional district, and shall reconvene as necessary until the next federal census.

SECTION 5. Office and tenure.
Each Commissioner shall take office upon taking the regular oath of office provided in the Constitution. Each Commissioner shall serve until a new Commission is convened following the next federal census. During the tenure of office and for three years thereafter, no Commissioner may hold elected or appointed office in the legislative or executive branch or register as a lobbyist.

SECTION 6. Officers.
At the first meeting of the Commission following each federal census, the Commission shall elect one Commissioner to serve as Chair and another to serve as Vice-Chair. The Chair and Vice-Chair shall not have been selected from the same applicant pool.

SECTION 7. Meetings and Actions of the Commission.
A. Seven Commissioners, including at least the Chair or Vice-Chair, constitute a quorum at any meeting of the Commission. Commissioners must attend and vote in person, and not by proxy. Meetings shall be scheduled by the Chair or Vice-Chair as needed for the discharge of the Commission's duties.

B. Actions of the Commission require approval as follows:

1. Approval of a final district map requires six or more affirmative votes of the Commissioners, including at least two affirmative votes from Commissioners selected from each of the three pools.

2. All other actions of the Commission require six or more affirmative votes of the Commissioners.

(2) Article 8, Section 4 of the Constitution of Arkansas is repealed and amended to state as follows:

Duties of Commission.

SECTION 1. Information.

The Secretary of State shall as soon as practicable provide to the Commission census and election data required to discharge its duties. All information provided by the Secretary of State shall be fair, impartial, and complete. The Secretary of State shall also establish multiple methods for the public to provide comments and propose alternate maps for consideration by the Commissioners.

SECTION 2. Basis of districts.
Each congressional district shall have a total population that is as nearly equal as practicable to the total population of the state reported in the federal census divided by the total number of districts to be established. Each state House of Representatives and state Senate district shall have a total population that does not vary by more than three percent from the total population of the state reported in the federal census divided by the total number of districts to be established for such house.

SECTION 3. District maps.
The Commission shall prepare for public comment three alternate maps for all state districts and three alternate maps for all federal districts based on the number of inhabitants. Districts shall not, when viewed on a statewide basis, unduly favor or disfavor any political party. To the extent

practicable, the Commission shall establish districts using the criteria set forth in the following order of descending priority:

A. Districts shall be contiguous, bounded by an unbroken line, and consisting of undivided components that connect at more than a single point.

B. Districts shall not deny or abridge the right to vote on account of race or language.

C. Districts shall not divide counties or cities, except to the extent required to satisfy the requirements of Section 2 or subsections (A)-(E) of this Section.

D. Districts shall be reasonably compact.

E. Districts shall promote competition among political parties, where reasonably feasible after satisfaction of the preceding criteria.

SECTION 4. Public hearing and comments.
The Commission shall conduct at least one hearing in each congressional district and shall publicly release the three alternate maps for all state districts and three alternate maps for all federal districts for public comment at least thirty days before the first hearing. In addition, any revised maps shall be publicly released at least thirty days prior to a final vote on adoption. All maps released by the Commission, including any revised maps, shall be accompanied by a written report that explains the Commission's basis for the districts.

SECTION 5. Apportionment.
No later than November 1 immediately following each federal census, the Commission shall reapportion, report, and certify to the Secretary of State the district for each seat in the United States House of Representatives and the General Assembly, setting forth the population, boundaries, and map of each district. The apportionment shall become effective unless a proceeding for review is filed with the Supreme Court within thirty days of certification, in which case the apportionment shall become effective thirty days after the Commission reports and certifies to the Secretary of State any revision necessary to comply with the mandate of the Supreme Court.

SECTION 6. Fiscal Matters.
Panelists and Commissioners are eligible for reimbursement of expenses reasonably related to the discharge of their imperative duties and a per diem of up to $200, which amount may be increased by the General Assembly upon an affirmative majority vote. The Commission shall be entitled to funding in amounts sufficient to discharge its imperative duties. The General Assembly shall appropriate moneys for (i) the fiscal year in which the federal census is performed and (ii) the fiscal year immediately following the federal census, in such amounts as are necessary for the Commission to accomplish its tasks, but in no event shall such appropriations for each Commission's tenure total less than $750,000. To the extent the Commission requires moneys to discharge its imperative duties prior to the convening of the legislative session in which the General Assembly can next appropriate moneys, the Commission shall be entitled to and shall receive moneys from the Constitutional Officers Fund or its successor fund in such amounts necessary to discharge its imperative duties until the General Assembly duly appropriates moneys to the Commission.

(3) Article 8, Section 5 of the Constitution of Arkansas is repealed and amended to read as follows:

Mandamus to compel the Commission to act.

The Supreme Court shall have original jurisdiction to compel the Chief Justice, the panel, the Secretary of State, and Commission by mandamus to perform their respective duties on the application of any citizen and taxpayer.

(4) Each and every reference to "The Board of Apportionment" in the Constitution of Arkansas is repealed and replaced with "The Citizens Redistricting Commission."

(5) Arkansas Code Annotated sections 7-2-101 through 105 are repealed.

(6) The provisions of this Amendment are severable, and if any part or provision hereof is held invalid by a final decision of a court of competent jurisdiction, the invalidity shall not affect any other part or provision of this Amendment.