CV-20-454

In the Arkansas Supreme Court
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 — CV-20-454

John Thurston, in his official capacity as Secretary of State — Respondent

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

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Petitioners' Brief and Addendum on Count 3

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Informational Statement

I. ANY RELATED OR PRIOR APPEAL?

N/A

II. BASIS OF SUPREME COURT JURISDICTION?

Amendment 7, Original Action

III. NATURE OF APPEAL?

N/A

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT?

N/A

V. EXTRAORDINARY ISSUES?

(X) appeal presents issue of first impression,

(_) appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,

( ) appeal involves federal constitutional interpretation,

(X) appeal is of substantial public interest,

(X) appeal involves significant issue needing clarification or development of the law, or overruling of precedent,

(X) appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation

VI. CONFIDENTIAL INFORMATION.

(1) Does the appeal involve confidential information as defined by

Sections III(A)(11) and VII(A) of Administrative Order 19?

No

(2) If the answer is "yes," then does this brief comply with Rule 4-1(d)?

N/A

Jurisdictional Statement

1. This is an original action brought by Petitioners. Pursuant to the Court's scheduling order, this brief addresses Count 3 of Petitioners' Original Action.

2. I express a belief, based on a reasoned and studied professional judgment, that this case presents no issues of legal significance for jurisdictional purposes.

/s/ Alec Gaines
Alec Gaines

Counsel for Petitioners

Issues and Principal Authorities

1. SBEC erred by finding the term "Open Primary" misleading.

    - *Cox v. Martin*, 2012 Ark. 352, 423 S.W.3d 75

2. The SBEC erred by finding the omission of any reference to pre-clearance order misleading

    - *Cox v. Martin*, 2012 Ark. 352, 423 S.W.3d 75

3. The SBEC erred by finding the omission of any reference to the proposed amendment's effect on a political party's ability to police candidates misleading

    - *Cox v. Daniels*, 374 Ark. 437, 288 S.W.3d 591 (2008)

4. The SBEC erred by finding the omission of any reference to the alleged need for new voting equipment mislead

    - *Cox v. Daniels*, 374 Ark. 437, 288 S.W.3d 591 (2008)
    - *Knight v. Martin*, 2018 Ark. 280, 556 S.W.3d 501

5. Act 376 of 2019 is unconstitutional

    - *McDaniel v. Spencer*, 2015 Ark. 94, 457 S.W.3d 641
    - Ark. Const. amend. 7

Table of Authorities

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Statement of the Case and the Facts

On July 6, 2020, Arkansas Voters First ("AVF") submitted two initiative petitions to the Arkansas Secretary of State in support of two proposed constitutional amendments: the Arkansas Citizens' Redistricting Commission Amendment ("Redistricting") and a proposed constitutional amendment requiring top-four open primary elections with instant runoff general elections in Arkansas ("Top Four Open Primaries"). The Secretary rejected both petitions on the basis that an affidavit required under Act 376 of 2019, codified at Ark. Code Ann. § 7-9-601, contained improper wording. Subsequently, on July 22, 2020, the State Board of Election Commissioners ("SBEC") met to review both ballot titles pursuant to its new authority under Act 376 of 2019.

Despite advice from both SBEC's legal counsel and its director, the board debated the merits of Top Four Open Primaries and determined that the popular name and ballot title was not sufficient for certification. The SBEC then debated and certified the popular name and ballot title for Redistricting. The SBEC accepted and considered arguments for and against the Top Four Open Primaries from members of the public as well as opposition groups.

On July 24, 2020, the SBEC and Secretary of State delivered to AVF a Notice of Non-Certification of the popular name and ballot title pursuant to Ark. Code Ann. § 7-9-111(i)(4)(A)(ii)(*a*) and a Resolution regarding the same. The Notice of Non-Certification and Resolution is attached as Exhibit 1 (Add.1).[1] Of the four arguments advanced for non-certification by the SBEC, three were adopted from a twelve-page letter submitted to the SBEC on July 16, 2020, by Arkansans for Transparency, a ballot question committee opposed to Top Four Open Primaries.

Article 5, Section 1 of the Arkansas Constitution does not afford the SBEC the discretion that it exercised in reviewing the Top Four Open Primaries popular name and ballot title for two reasons: (1) the SBEC made its determination on the merits of the proposal, not the text, and a misinterpretation of law; and (2) the role of the SBEC under Article 5, Section 1 is merely ministerial. To the extent that Act 376 of 2019 purports to provide more discretion to the SBEC than that provided under Article 5, Section 1, it is unconstitutional.

[1] Petitioners received the Notice of Non-Certification during the pendency of this expedited lawsuit.

Argument

The State Board of Election Commissioners ("SBEC") erred in finding that the ballot title and popular name were misleading, and as such, it wrongly refused to certify the ballot title and popular name to the Secretary of State. The SBEC's reasons for denying certification, as announced at its July 22, 2020, public meeting and detailed in its July 24, 2020, letter, (Exhibit 1, Add. 1) are contrary to Arkansas law and must be reversed. Moreover, the statute which delegates this authority to the SBEC is unconstitutional, as it serves no reasonable purpose in furthering the rights of the people to refer and initiate legislation, as guaranteed by the Arkansas Constitution. For these reasons, as discussed in detail below, the SBEC's decision to not certify the ballot title and popular name should be reversed.

1. Background and Standard of Review

The principles of Arkansas's Initiative and Referendum ("I&R") process are grounded in the Arkansas Constitution. Ark. Const. art. V, § 1. In relevant part to the analysis herein, that section, as amended by Amendment 7 to the Arkansas Constitution, states:

Initiative. The first power reserved by the people is the initiative. Eight per cent of the legal voters may propose any law and ten per cent may propose a constitutional amendment by initiative petition and every such petition shall include the full text of the measure so proposed. Initiative petitions for state-wide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least thirty days before the aforementioned filing, the proposed measure shall have been published once, at the expense of the petitioners, in some paper of general circulation.

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.

Court Decisions. If the sufficiency of any petition is challenged such cause shall be a preference cause and shall be tried at once, but the failure of the courts to decide prior to the election as to the sufficiency of any such petition, shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against the validity of such measure, if it shall have been approved by a vote of the people.

Self-Executing. This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.

When reviewing a ballot title, the Supreme Court has repeatedly held the title must be (1) intelligible, (2) honest, and (3) impartial. *Cox v. Martin*, 2012 Ark. 352, 7, 423 S.W.3d 75, 82 (*citing Ward v. Priest*, 350 Ark. 345, 86 S.W.3d 884 (2002)). The ballot title does not have to include every minute detail of the amendment, rather "[a] ballot title is sufficient if it recites the general purposes of the proposed law and if the ballot title contains enough information to sufficiently advise voters of the true contents of the proposed law. *Id.* at 7-8, 423 S.W.3d at 82. (*quoting Ward*, 350 Ark, 86 S.W.3d); *see also Knight v. Martin*, 2018 Ark. 280, 11, 556 S.W.3d 501, 509 (2018) ("[B]allot titles are not required to include every possible consequence or effect of a proposed measure and need not cover or anticipate every possible legal argument that the proposed measure might evoke.")

The popular name "is primarily a useful legislative device that need not contain the same detailed information or include exceptions that might be required of a ballot title. *May v. Daniels*, 359 Ark. 100, 104, 194 S.W.3d 771, 775 (2004) (*citing Parker v. Priest*, 326 Ark. 123, 930 S.W.2d 322 (1996)). The purpose of the popular name is to identify the proposal and it is not "held to the same stringent standards and need not be as

explicit as a ballot title; however, it cannot contain catch phrases or slogans that tend to mislead or give partisan coloring to a proposal." *Id.* at 104, 194 S.W.3d at 775-76. (citations omitted). The popular name must be "intelligible, honest, and impartial." *Id.* at 104, 194 S.W.3d at 776 (*citing Gaines v. McCuen*, 296 Ark. 513, 758 S.W.2d 403 (1998).

Thus, the sponsor of a proposed law do not have the impossible task of drafting a "perfect" popular name and ballot title that defines every term, the ballot title must simply "include an impartial summary of the proposed amendment that will give voters a fair understanding of the issues presented and the scope and significance of the proposed changes in the law." *Id.* at 5, 423 S.W.3d at 81 (*quoting Parker v. Priest*, 326 Ark. 123, 129, 930 S.W.2d 322, 325 (1996)). The ballot title must be free from "misleading tendency, whether of amplification, of omission, or of fallacy, and it must not be tinged with partisan coloring." *Id. (citing Bradley v. Hall*, 220 Ark. 925, 927, 251 S.W2d 470, 471 (1952)). Amendment 7 of the Arkansas Constitution places the burden on the party challenging, or in this case refusing to certify, the ballot title to prove that it is misleading or insufficient. *Cox v. Martin*, 2012 Ark. 352, 5-6, 423 S.W.3d 75, 81 (*citing Cox v. Daniels*, 374 Ark. at 444, 288 S.W.3d at 595).

It must be remembered that "strict technical construction is not required, but that substantial compliance with Amendment No. 7 is all that is required." *Becker v. Riviere*, 270 Ark. 219, 225, 604 S.W.2d 555, 558 (1980). The Supreme Court's "most significant rule in determining the sufficiency of the 'ballot' title is that it be given a **liberal construction and interpretation** in order that it secure the purposes of reserving to the people the right to adopt, reject, approve, or disapprove legislation." *Cox v. Daniels*, 374 Ark. 437, 446, 288 S.W.3d 591, 597 (2008) (*citing May v. Daniels*, 359 Ark. 100, 194 S.W.3d 771 (2004) (emphasis added)).

2. SBEC erred by finding the term "Open Primary" misleading.

The SBEC's first basis for denying the ballot title and popular name is the use of the phrase "Open Primary." The stated rationale was that the use of the phrase "Open Primary" "suggests the failure to adopt the proposed amendment would result in Arkansans voting under a closed primary system." Exhibit 1 (Add. 1). The explanation goes on to state that "the effect of this proposed amendment would be to dismantle Arkansas's current Open Primary system." *Id.*

As a threshold matter, the SBEC's consideration of the term "Open Primary" is based on a mistaken premise. Neither the popular name nor the ballot title of this proposed amendment contain the phrase "Open Primary" without the modifier "Top Four." Thus, throughout the popular name, ballot title and amendment *only* the term "Top Four Open Primary" is utilized. The suggestion that the popular name and ballot title somehow asserts that Arkansas does not currently use an open primary system is without any basis in fact.

The SBEC implicitly suggests that Petitioners should have used some other term to describe how the primary process would work under the proposed amendment. The ballot title is not required to "include every detail, term, definition, or how the law will work." *Cox v. Martin*, 2012 Ark. 352, 9, 423 S.W.3d 75, 83 (*citing May*, 359 Ark. at 111, 194 S.W.3d at 780)). Just as in *Cox*, the ballot title here "thoroughly addressed the substantive matters" of the proposed amendment and explains at length how the proposed "Top Four Open Primary" system would work. *Id.* "It is not necessary that a ballot title include every possible consequence or impact of a proposed measure." *Id.* at 10, 423 S.W.3d at 83 (*quoting May*, 359 Ark., 194 S.W.3d).

The ballot title describes the process of exactly how the “Top Four Open Primary” election would work if enacted. The voter upon reading the plain language of the proposed popular name and ballot title knows that he or she is voting for or against a new system governing the way citizens of Arkansas choose certain elected officials; otherwise, there would be no purpose for the initiative to institute “Top Four Open Primary” elections.

Moreover, the SBEC applied no legal analysis in its determination that the words "Open Primary" could be misleading. The SBEC did not determine, for instance, that such words might lead a voter to misunderstand the effect of voting "for" or "against" the measure, or whether these words might be tinged with partisan coloring. Rather, SBEC members simply applied their own individual understanding of this terminology erroneously, or adopted without any analysis the positions of Arkansans for Transparency, a ballot question committee opposed to the proposed amendment.

To summarize, the term “Open Primary” is not misleading because that is not the term used with the popular name and ballot title. This

Court should find the SBEC erred by deciding not to certify the proposed amendment on this basis.

3. The SBEC erred by finding the omission of any reference to pre-clearance order misleading.

The SBEC's second basis to deny certification states the "Ballot Title is misleading because it omits any reference to the federal court order prohibiting the State of Arkansas from changing any existing election law that required a plurality of votes to win an office to requiring a majority of votes to win that office without a pre-clearance required by *Jeffers v. Clinton*, 740 F.Supp. 585 (E.D.Ark. 1990)." Exhibit 1 (Add. 2). The SBEC "considered the logic of *Lange v. Martin* which found a ballot title that failed to disclose the proposed measure violated federal law was misleading." *Id.*

This basis is simply mistaken. First, the SBEC, despite the advice of counsel, failed to consider the effect of recent court cases on existing pre-clearance requirement mandates under the Voting Rights Act, including *Jeffers*. *See, e.g., Shelby County v. Holder*, 570 U.S. 529, 133 S.Ct. 2612 (2013) (holding portions of the Voting Rights Act unconstitutional). Second, in order for the United States Attorney General, or a federal court, to give any pre-clearance required under the

Voting Rights Act and *Jeffers*, the law must have already passed and the Attorney General of Arkansas, the chief legal officer – not the sponsor of a proposed measure – must seek the pre-clearance. 28 C.F.R. §§ 51.22-23 ("Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority").

For those reasons, the SBEC wrongly considered the types of "hypothetical scenarios" this Court rejected in *Cox v. Martin*. 2012 Ark. at 14, 423 S.W.3d at 85. Similarly, the SBEC's denial of certification based on the pre-clearance requirement is a substantive challenge to the proposed measure as opposed to a procedural challenge. *See Id.* at 12-13, 423 S.W.3d 84-85. In any event, the proposed amendment here is not "clearly contrary to the law" as was the case in *Lange v. Martin*, 2016 Ark. 337, 500 S.W.3d 154. *See* Exhibit 1 (Add. 2) (citing *Lange* as authority) and the Court should find the SBEC erred by denying certification of the proposed amendment on this basis.

4. The SBEC erred by finding the omission of any reference to the proposed amendment's effect on a political party's ability to police candidates misleading.

The third basis relied upon by SBEC takes issue with the fact that the proposed amendment delegates to the General Assembly the obligation "to enact legislation to provide for a revised election process in accordance with and in furtherance of" the proposed amendment. Since the manner of nominating or "removing" a nominee from the ballot is not covered by the proposed amendment, it would be included in the delegation to the General Assembly.

The Arkansas Supreme Court has specifically approved such delegations and, in such circumstances, does not require ballot titles to contain the kinds of speculative detail urged by the SBEC. *Cox v. Daniels*, 374 Ark. 437, 448–49, 288 S.W.3d 591, 598 (2008) ("The proposed amendment . . . puts the voters on notice that the General Assembly will pass further legislation . . . Until such legislation is enacted, we cannot interpret the particulars of the amendment . . . While Petitioner may disagree with the wisdom of such delegation or the broad discretion afforded by the proposed measure, our court will only review the sufficiency of a ballot title, and will not examine the merits of the

proposed changes in the law"). This is not the type of detail required to be included in the title, and the SBEC erred in denying certification for this reason.

5. The SBEC erred by finding the omission of any reference to the alleged need for new voting equipment misleading.

Finally, the SBEC argues that ballot title was misleading because it did not address the ability of Arkansas's current voter system to implement the Top Four Open Primary system proposed by the amendment. Again, this involves the implementation of the amendment, and that duty was delegated to the General Assembly. *See Cox*, 374 Ark., 288 S.W.3d. Furthermore, "ballot titles are not required to include every possible consequence or effect of a proposed measure and need not cover or anticipate every possible legal argument that the proposed measure might evoke." *Knight v. Martin*, 2018 Ark. 280, 556 S.W.3d 501.

As discussed above, the Arkansas Supreme Court has approved such delegations and, in such circumstances, does not require ballot titles to contain this type of speculative detail, and the SBEC was wrong to base its denial upon this argument.

6. Act 376 of 2019 is unconstitutional.

A. The standard of review should be strict scrutiny.

Acts of the legislature are presumed constitutional and Petitioners in this case have the burden to prove otherwise. *McDaniel v. Spencer*, 2015 Ark. 94, 3, 457 S.W.3d 641, 647 (*citing Archer v. Sigma Tau Gamma Alpha Epsilon, Inc.,* 2010 Ark. 8, 362 S.W.3d 303). An act will be invalidated only when there is a clear incompatibility between the act and the constitution. *Id. (citing Tsann Kuen Enters. Co. v. Campbell,* 355 Ark. 110, 129 S.W.3d 822 (2003)).

Amendment 7 itself provides that the I&R process is of paramount important and is "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). The General Assembly may not pass any law to "restrict, hamper or impair the exercise of the rights herein reserved to the people." Ark. Const. amend. 7. Thus, strict scrutiny should apply to this Court's analysis of the statute and it cannot survive unless a

"compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest." *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002).

B. Act 376 of 2019 contravenes the plain language of Amendment 7.

The plain language of Amendment 7 provides that the ballot title approval process is ministerial in nature until the Arkansas Supreme Court is given jurisdiction.

> **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.

Ark. Const. art. V, § 1 (emphasis added). Amendment 7 does not give SBEC (or the Attorney General for that matter) the ability to review a ballot title for sufficiency. SBEC **"shall certify"** the ballot title to the Secretary of State. The "sufficiency" of the petition, including the ballot title and popular name, is "a matter of law to be decided by this Court. *Bailey v. McCuen*, 318 Ark. 277, 284, 884 S.W.2d 938, 942 (1994). This is a bedrock of Amendment 7 which states the Supreme Court **"shall have**

original and exclusive jurisdiction" over the sufficiency of statewide petitions. *Id.* (emphasis added). Amendment 7 thus viewed the nature of SBEC's role in this matter as purely ministerial.

Pursuant to this Court's opinion in *Bd. of Trustees of Univ. of Arkansas v. Andrews*, the Constitution must be interpreted "precisely as it reads." 2018 Ark. 12, 10, 535 S.W.3d 616, 622 (2018). "The General Assembly does not have the power to override a constitutional provision." *Id.* at 11, 535 S.W.3d at 622. Previously in 2016, the Supreme Court upheld this concept in the Amendment 7 context when analyzing certain statutes passed by the General Assembly affecting the signature gathering process. *Benca v. Martin*, 2016 Ark. 359, 16, 500 S.W.3d 742, 752 ("Today, we have simply interpreted the laws enacted by our General Assembly-'shall' means 'shall' and the Sponsor did not comply with the statutes").

Instead of interpreting the "shall" language of Amendment 7 as mandatory, Act 376, and Act 195 previously, purports to give discretion to the SBEC and Attorney General, respectively, on *whether* to "certify such title to the Secretary of State." Contrary to Act 376, Amendment 7 tasks the SBEC with identifying with certainty and submitting to the

Secretary of State the exact language to appear on the ballot, not policing that language for content as it purports to do here. That role is exclusively in this Court's jurisdiction. That authority is underscored by the Order issued by this Court in the 2018 case of *Couch v. Rutledge*, Case No. CV-18-432, where the Attorney General was ordered to either approve the ballot title submitted or certify a more suitable ballot title within 3 days.

The discretion and authority granted to the SBEC by Act 376 is not in Amendment 7 and renders Act 376 unconstitutional.

C. Act 376 of 2019 restricts, hampers, and impairs the I&R process.

As argued *supra*, Petitioners challenge the entire ballot review process based on the plain and unambiguous language of Amendment 7 itself. Beginning 76 years ago, however, the General Assembly passed Act 195 of 1943 ("Act 195") altering Arkansas's I&R process dramatically. Act 195, previously codified in Ark. Code Ann. § 7-9-107, provided that sponsors must submit a draft of the ballot title and popular name to the Attorney General for a ballot title review before circulating a petition for signatures. Ark. Code Ann. § 7-9-107(a) (repealed 2019). The Attorney General was then given ten (10) days to approve and certify or substitute

a more suitable ballot title and popular name for the amendment. Ark. Code Ann. § 7-9-107(b) (repealed 2019). If the Attorney General found the ballot title misleading or alters the nature of a "For" or "Against" vote, the Attorney General could reject the entire ballot title. In such cases, the Attorney General was then required to **allow the petitioner " to redesign the proposed measure and the ballot title and popular name in a manner that would not be misleading."** Ark. Code Ann. § 7-9-107(c) (repealed 2019) (emphasis added). Alternatively, the petitioner was permitted to apply directly to the Supreme Court for relief. Ark. Code Ann. § 7-9-107(d) (repealed 2019).

The process mandated by Act 195 was approved by the Supreme Court in *Washburn v. Hall*, 225 Ark. 868, 286 S.W.2d 494 (1956). There, the Court upheld the General Assembly's stated purpose behind Act 195 – "that the signer of a I&R petition have the benefit of a popular name and ballot title that would give as much information about the proposed act as is possible to give by such means." *Id.* at 871-72, 286 S.W.2d at 497. The Supreme Court further stated that Act 195 "in no way curtails the operation of Amendment no. 7 but is in **aid of the amendment** and insures the giving to the signer of the petition as much information as

possible and practicable with regard to what [he or she] is being asked to sign." *Id.* (emphasis added).

If Act 195 was a departure from the plain language of Amendment 7, Act 376 is a significant overreach. Act 376 completely gutted the process approved by the Supreme Court in *Washburn*. Act 376 of 2019, § 6. Instead of an early review of the ballot title and, at least on its face, a collaborative process with the Attorney General, the highest legal office in the State of Arkansas, Act 376 provides that the sponsor must gather signatures and submit to the Secretary of State *before* the ballot title and popular name is sent to the SBEC for certification. Act 376 of 2019, § 9 (codified as Ark. Code Ann. § 7-9-111(i)(1)). SBEC consists of one elected official (the Secretary of State) and six (6) political appointees. After submission, SBEC has thirty (30) days to "*determine whether to certify.*" *Id.* (codified as Ark. Code Ann. § 7-9-111(i)(2)). Like the prior construction under Act 195, the SBEC is instructed to review the ballot title and popular name to ensure it is not misleading or alters the nature of a "For" or "Against" vote. *Id.* (codified as Ark. Code Ann. § 7-9-111(i)(3)).

It is here that there is a significant departure from Act 195. If the SBEC decides not to certify the ballot title and popular name, the sponsor

"shall not submit a redesigned ballot title or popular name to the State Board of Election Commissioners." *Id.* (codified as Ark. Code Ann. § 7-9-111(i)(4)(A)(ii)(b)). In such cases, the Secretary of State must declare the measure insufficient for inclusion on the ballot. *Id.* (codified as Ark. Code Ann. § 7-9-111(i)(4)(B)).

The question is whether Act 376 restricts, hampers, or impairs the right of Arkansans to participate in the I&R process. Act 376 was clearly designed to do just that because it effectively removes Act 195's right to cure any defect in the ballot title and popular name and thus places a significant, additional obstacle in the I&R process. This is done by greatly expanding upon the *limited* role given to the SBEC in Amendment 7.

Section 9 of Act 376 is akin to section 13 of Act 1413 of 2013 ("Act 1413"), which was held unconstitutional by this Court in *Spencer*, *supra*. Section 13 of Act 1413 prohibited a canvasser from obtaining any signatures for a petition after the petition was filed but before the Secretary of State determined the sufficiency of the filed petition. This Court held that section of the act unconstitutional because it "serve[d] no reasonable purpose in either furthering the rights guaranteed in article 5, § 1 or assisting the people in exercising their rights to refer or initiate

legislation." *Spencer*, 2015 Ark. 94, 15, 457 S.W.3d at 653. Likewise, section 9 of Act 376 serves no reasonable purpose in furthering the rights guaranteed by the Arkansas Constitution or assisting the people in exercising their right to participate in the I&R process. To the contrary, like section 13 of Act 1413, section 9 of Act 376 unreasonably restricts the people's ability to self-govern, and as such, it is unconstitutional.

Given that this Court approved Act 195 in *Washburn*, that process can be used as the baseline for the "least restrictive means" strict scrutiny test. There are many key differences between Act 195 and Act 376 that *only* serve to restrict, hamper, or impair the I&R process. First is the timing of the certification. Act 195 provided a process to certify before the expensive and burdensome process of gathering signatures whereas Act 376 states the certification process occurs only after signatures are gathered. The second key difference is the party that reviews the ballot title and popular name. Act 195 mandated that the certification process pass through the Attorney General, an elected official and highest legal officer of the State. Act 376 shifts the certification process to the SBEC, primarily political appointees who may

or may not have the necessary legal training, or impartiality, to make the weighty determination of whether to certify a ballot title.[2]

But, perhaps most egregious, Act 376 only allows a sponsor one shot at certification, and only after, in most cases, spending hundreds of thousands of dollars gathering signatures. If SBEC denies certification, there is no chance to resubmit a ballot title or popular name and the only redress is through an action before the Supreme Court. *See* Ark. Code Ann. § 7-9-112. There is no "collaborative" process with the SBEC whereby the sponsor is given feedback on reasons for denial of a ballot title certification and a chance to get it right to "aid" the I&R process. *See Washburn, infra.* The process under Act 376 potentially strips away the I&R process from tens of thousands of voters who, like here, signed an initiative petition only to be thwarted by actions of the SBEC. Act 376 does not "facilitate" the operation of Amendment 7; it serves to potentially destroy it.

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[2] Indeed, the SBEC disregarded the recommendation of its own director and legal counsel in reaching its decision not to certify the ballot title at issue herein. Exhibit 2 (Add. 5).

Act 376 of 2019 should be declared unconstitutional and the Court should direct the SBEC and Secretary of State to certify the ballot title and popular name for this issue to appear on the ballot in 2020.

Conclusion

For the reasons stated herein, this Court should find that the SBEC erred in refusing to certify the popular name and ballot title for Top Four Open Primaries and find that Act 376 of 2019 is unconstitutional.

Respectfully submitted,

/s/ Alec Gaines
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Certificate of Service

I certify that on 7 August 2020, a copy of the foregoing was filed with this Court's eFlex filing system, which serves all counsel of record.

/s/ Alec Gaines
Alec Gaines

Certification 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 statement of the case and the facts and the argument sections altogether contain 4,830 words.

By: /s/ Alec Gaines
Alec Gaines

STATE BOARD OF ELECTION COMMISSIONERS

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(501)682-1834 or (800)411-6996

July 24, 2020

Open Primaries Arkansas
Attn: Stephanie R. Matthews
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Fayetteville, Arkansas 72701

NOTICE OF NON-CERTIFICATION
IN THE MATTER OF THE BALLOT TITLE:
A CONSTITUTIONAL AMENDMENT ESTABLISHING TOP FOUR OPEN PRIMARY ELECTIONS AND MAJORITY WINNER GENERAL ELECTIONS WITH INSTANT RUNOFFS IF NECESSARY

Sponsor, Open Primaries Arkansas:

This Notice is provided pursuant to Ark. Code Ann. § 7-9-111(i)(4)(A)(ii)(*a*) which requires the State Board of Election Commissioners (SBEC) to "[n]otify the sponsors in writing, through their designated agent, that the ballot title and popular name were not certified and set forth its reasons for so finding."

At a duly called public meeting of the SBEC on July 22, 2020, the above Title came before the Board for consideration whether to Certify or Not Certify the proposed Popular Name and Ballot Title. The Board voted to Not Certify your proposed Ballot Title.

The Board provides the following reasons for its finding:

1. The SBEC found the Ballot Title and Popular Name is misleading due to the use of the phrase "Open Primary" which is misleading in that it suggests the failure to adopt the proposed amendment would result in Arkansans voting under a closed primary system. Arkansas Law currently allows any registered voter to vote in the preferential primary of any party in the state which holds a primary. This system is commonly referred to as an Open Primary System and the effect of this proposed amendment would be to dismantle Arkansas's current Open Primary system.

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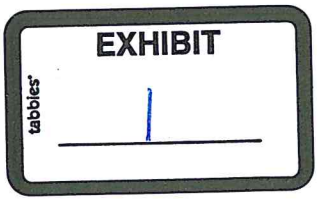

2. The SBEC further found the Ballot Title is misleading because it omits any reference to the federal court order prohibiting the State of Arkansas from changing any existing election law that required a plurality of votes to win an office to requiring a majority of votes to win that office without pre-clearance required by *Jeffers v. Clinton*. 740 F. Supp. 585 (E.D. Ark. 1990)(enforcing Section 3(c) of the Voting Rights Act of 1965). The proposed amendment changes current law which requires a plurality of votes to win the following offices to requiring a majority of votes: United States Senator, United States Representative, Governor, Lt. Governor, Attorney General, Secretary of State, State Treasure, State Auditor, Commissioner of State Lands, State Senator, and State Representative. The Board considered the logic of *Lange v. Martin* which found a ballot title that failed to disclose the proposed measure violated federal law was misleading. 2016 Ark. 337. The Board found that this was an omission of material information that would give the voters serious grounds for reflection.

3. The SBEC found the Ballot Title is misleading because the ballot title omitted any reference to the proposed amendment's elimination of a political party's ability to petition a court for the removal of candidates on the ballot which are identified with that political party but which fail to meet the standards of that party. Currently, a political party can petition a court to remove its nominee which is the only candidate currently identified with a party on the ballot. The ballot title does state parties will be able to indicate preferred candidates but is silent as to the elimination of a party's ability to have its name separated from a candidate the party opposes. The Board found that this was an omission of material information that would give the voters serious grounds for reflection.

4. The SBEC found the Ballot Title misleading because it omitted any reference to the fact Arkansas's current voting system is not capable of implementing the proposed amendment. Further, the Board found that the proposal amendment would likely require the State to procure new voting equipment at a significant expense, if such equipment could even be found, that would be capable of marking and tabulating rank choice voting in the instant runoff process. The Board found that this was an omission of material information that would give the voters serious grounds for reflection.

The SBEC found that these reasons, taken together or separately, cause the ballot title to be misleading. Based on this finding, the Board concluded that it was required under A.C.A. §7-9-111 to Not Certify this Ballot Title and Popular Name to the Secretary of State for inclusion on the General Election Ballot on November 3, 2020.

If you have any further questions regarding this matter, please contact this office.

Sincerely,

Daniel J. Shults
Director

Encl. SBEC Resolution No. 2 of 2020

cc: The Honorable John Thurston, Secretary of State

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. 2 of 2020

In the Matter of Certification of the Popular Name and Ballot Title: *A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary*

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 *A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary,* 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.

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 NOT CERTIFY the ballot titled *A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary* 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' Not Certificating the popular name and ballot titled, *A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary.*

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

John Thurston

Chair, Secretary John Thurston

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

MEMORANDUM

TO: Daniel Shults, Director State Board of Election Commissioners
FROM: Chris Madison, Legal Counsel SBEC
DATE: July 17, 2020
SUBJECT: Ballot Title Review:
A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary

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INTRODUCTION: GUIDING PRINCIPLES OF REVIEW

Sponsor proposes an amendment to restructure primary and runoff elections in Arkansas. The ballot title and popular name were submitted to the SBEC for certification on July 7, 2020. Act 379 of 2019 amending A.C.A. § 7-9-111(i), gives the SBEC the responsibility to review proposed ballot titles and popular names (collectively hereinafter "Title") for certification for inclusion on the ballot or to find that it is misleading and therefore not certify the Title.

In conducting the certification analysis, several guiding principles exist. Ark. Code Ann. § 7-9-111(i)(1)-(4) the SBEC's examination the proposed Popular Name and Ballot Title. That statute provides,

> (3) If the board determines that the ballot title and popular name, and the nature of the issue, is presented in a manner that is **not misleading** and **not designed in such a 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, or, conversely, that a vote

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> "AGAINST" an issue would be a vote for a viewpoint that the voter is against, the ballot title and popular name of the statewide initiative petition or statewide referendum petition shall be certified to the Secretary of State....

Supreme Court cases examining ballot titles focus only on areas of contention with a ballot title or popular name that may be misleading. Numerous reasons may exist for why a ballot title or popular name may be misleading. However, the Court states, "[o]ur most significant rule in determining the sufficiency of the title is that it be given a liberal construction and interpretation in order that it secure the purposes of reserving to the people the right to adopt, reject, approve, or disapprove of legislation." See *May v. Daniels*, 359 Ark. at 107, 194 S.W.3d at 777 (2004). The Court also states the central question as "whether, in the voting booth, the voter is able to reach an intelligent and informed decision for or against the proposal and to understand the consequences of his or her vote on the ballot title itself." See *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 884 S.W.2d 605, 607 (1994) (citing *Dust. v. Riviere*, 277 Ark. 1, 638 S.W.2d 663 (1982)).

The Arkansas Attorney General, when previously charged with certifying proposed Ballot Titles, has stated,

> "popular name is primarily a useful legislative device. *Pafford v. Hall,* 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950). It need not contain detailed information or include exceptions that might be required of a ballot title, but it must not be misleading or give partisan coloring to the merit of the proposal. *See, e.g., Chaney v. Bryant,* 259 Ark. 294, 297, 532 S.W.2d 741, 743 (1976); *Moore v. Hall,* 229 Ark. 411, 316

S.W.2d 207 (1958). The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency. *May v. Daniels,* 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

The ballot title must include an impartial summary of the proposed amendment or act that will give the voter a fair understanding of the issues presented. *Becker v. Riviere,* 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980) (internal citations omitted). A ballot title's failure to "honestly and accurately reflect what is contained in the proposed [act or] Amendment" may lead the Court to conclude that the "omission is significant." *Lange v. Martin,* 2016 Ark. 337, 500 S.W.3d 154, at n. 2. The Court has also disapproved the use of terms that are "technical and not readily understood by voters." *Wilson v. Martin,* 2016 Ark. 334, *9, 500 S.W.3d 160, 167 (stating that "voters [should not] be placed in a position of either having to be an expert in the subject or having to guess as to the effect his or her vote would have"). Without a definition of such terms in the ballot title, the title may be deemed insufficient. Additionally, if information omitted from the ballot title is an "essential fact which would give the voter serious ground for reflection, it must be disclosed." *Bailey v. McCuen,* 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994). The title, however, must be "free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring." *Id.* at 293, 884 S.W.2d at 946-47. Furthermore, the

> Court has confirmed that a ballot title cannot be approved if the text of the proposed measure itself contributes to confusion and disconnect between the language in the popular name and the ballot title and the language in the measure. *Roberts v. Priest,* 341 Ark. 813, 825, 20 S.W.3d 376, 382 (2000). The Court concluded that 'internal inconsistencies would inevitably lead to confusion in drafting a popular name and ballot title and to confusion in the ballot title itself.' *Id.*"

Op. Ark. Att'y Gen. No. 068 (2018). With these principles in mind, the analysis of this ballot title and popular name begins with the assumption that it is not misleading and thus certifiable.

REVIEW OF POPULAR NAME AND BALLOT TITLE (TOGETHER "TITLE")

The Title, attached as an addendum to this memo, is a proposed Constitutional Amendment to allow only the top four vote getting candidates, regardless of party affiliation, to advance to the general election from the preferential primary for "covered offices" that include each federal congressional office, each member of the General Assembly, the Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, and provides that the general election be decided by the candidate receiving a majority of eligible votes with an instant runoff process.

I. EFFECT OF A VOTE "FOR OR "AGAINST"

The Title seeks to allow voters to vote "FOR" the amendment or vote "AGAINST" the amendment. This constitutional amendment is

authored such that a vote "FOR" the amendment directs changes to the preferential primary such that only the top four vote getting candidates advance to the general election, and that no other candidates are allowed on the general election ballot for the named offices. The amendment also proposes to alter the process in which general election votes are tabulated, such that if no candidate obtains a majority of the votes in the first round, then the candidate with the least number of votes is removed, and the votes cast for that candidate are then applied to the voter's second choice candidate according to how each individual voter ranked the candidates on his or her ballot. This process is continued until a single candidate has received a majority of the votes and is then declared the winner. Whereas a vote "AGAINST" the amendment would not authorize this proposed change in the preferential primary and general election process.

II. BALLOT TITLE LANGUAGE

The analysis now turns to the Title's language as whether or not it is reflective of the proposed constitutional amendment. As is normally provided, the proposed Title is written as one sentence and divided into clauses using semicolons. The Title includes seventeen (17) separate clauses. Of the seventeen clauses, they each represent substantive portions of the proposed amendment. From reviewing the Title's numerous clauses, generally they represent the totality of the amendment under consideration and are an accurate reflection of the stated purposes of the amendment.

A. Failure to identify which portions of the Constitution are Altered by the Proposed Amendment.

The proposed amendment would alter the process by which candidates are chosen by political parties, and would indirectly repeal Arkansas Constitution Amendment 29 § 5, which states, "Only the names of candidate for office nominated by an organized political party at a convention of delegates, or by a majority of all votes cast for candidates for the office in a primary election, or by petition of electors as provided by law, shall be placed on the ballots in any election." The failure to specifically state that the proposed amendment would directly repeal an existing section of the Arkansas Constitution casts some doubt on whether the proposed amendment survives the review regarding the misleading element.

However, upon examination, the absence of a specific clause stating how the proposed amendment would alter an existing portion of the Arkansas Constitution, while helpful to the voter, is not in and of itself misleading. As stated by the Arkansas Supreme Court in *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 884 S.W. 2d 605, 608 (1994) (citing *Bradley v. Hall*, 220 Ark. 925, 927, 251 S.W. 2d 470, 471 (1952)) "the elector, in voting upon a constitutional amendment, is simply making a choice between retention of the existing law and the substitution of something new."

A voter would understand that this proposed amendment alters the selection and nomination of candidates for the general election. The proposed amendment is clear that its purpose is to alter the means by which candidates advance to the general election from the primary

election process. It seems apparent that this proposed change must alter some portion of the existing constitutional framework.

Ultimately, a voter would understand that this proposed change has some direct effect on some existing portion of the Constitution, even if not stated expressly.

B. Failure to identify the impact on a write-in candidate's access to the ballot.

The proposed amendment alters a candidate's ability to access the ballot as a write-in. The proposed amendment only allows the top four vote getters from a primary election to access the general election ballot. Under current law, a write-in candidate who receives votes in primary election "shall not be count[ed]." Ark. Code Ann. § 7-5-525(c). The absence of this information in the Title again casts some doubt on whether the proposed amendment survives the misleading element.

Looking to the impact of a write-in candidate on the election process as described by the proposed amendment, Section 3 (B)(2) states, "[t]he ballot must include space for a write-in candidate for a covered office." This provision is directing a write-in candidate to participate in the primary portion of the election process. However, the Ballot Title does not reflect this statement. The Ballot Title indirectly includes write-in candidates when discussing the primary selection process, when it says, that the primary ballot "must ... list[] all candidates for a covered office for whom that elector can vote regardless of political-party affiliation (or lack thereof) of the elector or candidate." Without an explicit inclusion of the amendment's clause that write-in candidates are eligible to run may leave a voter potentially believing that a write-in candidate is not eligible

to run for one of the covered offices. However, as stated by the Arkansas Supreme Court in *Christian Civic Action Committee* "[o]n the one hand, it is not required that the ballot title contain a synopsis of the amendment or statute.... It is sufficient for the title to be complete enough to convey *an intelligible idea of the scope and import of the proposed law....*" *Id.* at 607 (citing *Bradley v. Hall*, 220 Ark. 925, 927, 251 S.W. 2d 470, 471 (1952) (emphasis in original)).

Ultimately, the Title provides sufficiently broad explanation that "all candidates for a covered office" are to be included on the primary ballot is sufficient to inform the voter that write-in candidates are eligible to participate in the primary election, and if they receive one of the top four spots, are eligible to run in the general election.

III. CONCLUSION

When considering the ultimate question, "whether, in the voting booth, the voter is able to reach an intelligent and informed decision for or against the proposal and to understand the consequences of his or her vote on the ballot title itself," even with the absence of the specific reference to which constitutional provision is being repealed and the lack of specific clarity on the ability of a write-in candidate to access the primary ballot, the proposed Title meets this standard. See *Id.* at 608 (citing *Dust. v. Riviere*, 277 Ark. 1, 638 S.W.2d 663 (1982)).

Voting for the proposal alters the process of selecting candidates for the general election, limiting it to the top four qualified and eligible primary candidates. At the general election the ranking process allows determination by rank choice voting of the majority vote getting

candidate, thereby removing the need for a runoff after the general election for the covered offices. While the Title addresses several areas, primary election, general election, political party endorsement or not, candidate's party identification, and instant runoff process, the proposed Title describes with sufficient clarity that a voter would understand the impact of his or her vote "FOR" or "AGAINST' the proposal.

Staff's recommends the SBEC certify this Ballot Title and Popular Name as meeting the statutory standards of Act 379 of 2019 codified in A.C.A. § 7-9-111(i) and that the SBEC find the proposal is not misleading.

Recommendation: Certify the Ballot Title and Popular Name

ADDENDUM

I. Popular Name and Ballot Title as Presented to the SBEC

Popular Name

A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary

Ballot Title

An Amendment to the Arkansas Constitution requiring that all qualified electors be permitted to vote in a primary election, which must use a single ballot that lists all candidates for a covered office for whom that elector can vote regardless of political-party affiliation (or lack thereof) of the elector or candidate; defining the term "covered office" to mean each federal congressional office, each member of the General Assembly, and the Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands; providing that "covered office" does not include the Office of the President of the United States; defining "qualified elector" to mean a person who meets the requirements of Arkansas Constitution, article 3, § 1 and Amendment 51; providing that the four candidates for each covered office at a primary election who receive the most votes, regardless of party, will then appear on the general-election ballot for that covered office, and requiring that no other candidates can appear on the general-election ballot for a covered office; providing that, at a general election for a covered office, qualified electors may rank one or more candidates in order of preference; requiring that the winner of a general election for a covered office be determined through an instant runoff process where votes must first be counted based on first-choice rankings; establishing that if, after counting votes according to first-choice rankings, a candidate has a majority of votes, that candidate must be declared the winner; providing that if no candidate has a majority of the votes, then the candidate with the fewest votes is eliminated and the vote of each qualified elector whose first choice was the eliminated candidate is then

counted for the elector's next-choice candidate (if any); providing that if a candidate then has a majority of votes remaining, that candidate must be declared the winner; providing that if no candidate has a majority of the votes, then the candidate with the fewest votes is eliminated and the vote of each qualified elector whose next choice was the eliminated candidate is then counted for the elector's next-choice candidate (if any); providing that if a candidate then has a majority of votes remaining, they must be declared the winner; providing that candidates for a covered office at a primary election, and at a general election, may choose to have their political-party affiliation indicated on the ballot; providing that such an indication will not constitute or imply the political party's nomination, endorsement, or selection of the candidate; providing 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; and requiring the General Assembly to enact legislation to provide for a revised election process in accordance with and in furtherance of this Amendment; providing that all provisions of the Constitution, statutes, and common law of this State to the extent inconsistent or in conflict with any provision of this Amendment are expressly declared null and void as to, and do not apply to, any activities provided for under this Amendment.

II. Popular Name and Ballot Title Divided into Separate Clauses for Clarity of Reading

Popular Name

A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary

Ballot Title

(1) An Amendment to the Arkansas Constitution requiring that all qualified electors be permitted to vote in a primary election, which must use a single ballot that lists all candidates for a covered office for whom that elector can vote regardless of political-party affiliation (or lack thereof) of the elector or candidate;

(2) defining the term "covered office" to mean each federal congressional office, each member of the General Assembly, and the Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands;

(3) providing that "covered office" does not include the Office of the President of the United States;

(4) defining "qualified elector" to mean a person who meets the requirements of Arkansas Constitution, article 3, § 1 and Amendment 51;

(5) providing that the four candidates for each covered office at a primary election who receive the most votes, regardless of party, will then appear on the general-election ballot for that covered office, and requiring that no other candidates can appear on the general-election ballot for a covered office;

(6) providing that, at a general election for a covered office, qualified electors may rank one or more candidates in order of preference;

(7) requiring that the winner of a general election for a covered office be determined through an instant runoff process where votes must first be counted based on first-choice rankings;

(8) establishing that if, after counting votes according to first-choice rankings, a candidate has a majority of votes, that candidate must be declared the winner;

(9) providing that if no candidate has a majority of the votes, then the candidate with the fewest votes is eliminated and the vote of each qualified elector whose first choice was the eliminated candidate is then counted for the elector's next-choice candidate (if any);

(10) providing that if a candidate then has a majority of votes remaining, that candidate must be declared the winner;

(11) providing that if no candidate has a majority of the votes, then the candidate with the fewest votes is eliminated and the vote of each qualified elector whose next choice was the eliminated candidate is then counted for the elector's next-choice candidate (if any);

(12) providing that if a candidate then has a majority of votes remaining, they must be declared the winner;

(13) providing that candidates for a covered office at a primary election, and at a general election, may choose to have their political-party affiliation indicated on the ballot;

(14) providing that such an indication will not constitute or imply the political party's nomination, endorsement, or selection of the candidate;

(15) providing 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;

(16) and requiring the General Assembly to enact legislation to provide for a revised election process in accordance with and in furtherance of this Amendment;

(17) providing that all provisions of the Constitution, statutes, and common law of this State to the extent inconsistent or in conflict with any provision of this Amendment are expressly declared null and void as to, and do not apply to, any activities provided for under this Amendment.

III. Proposed Amendment Language

Section 1. Short title
This Amendment is known as and should be cited as the "Top Four Open Primaries and Majority Winner Amendment."

Section 2. Definitions

(A) (1) "Covered office" means an elective office for federal congressional office, each member of the General Assembly, and the Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands.

(2) "Covered office" does not mean the office of the President of the United States.

(B) "Qualified elector" means a person who meets the qualifications of an elector under Arkansas Constitution, article 3, § 1, and who is registered pursuant to Arkansas Constitution, Amendment 51.

Section 3: Top Four Open Primary Elections

(A) The primary election for a covered office shall be a top four open primary election.

(B) In a top four open primary election,

(1) All candidates for a covered office must appear on the same ballot regardless of political-party affiliation.

(2) The ballot must include space for a write-in candidate for a covered office.

(3) A qualified elector must be permitted to cast a vote for any candidate for a covered office for whom that elector can vote, regardless of the political-party affiliation (or lack thereof) of the qualified elector or of the candidate for whom the elector cast a vote.

(4) Candidates for a covered office may have their political-party affiliation indicated on the ballot.

(a) The 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.

(5) Political parties may choose to have their preferences for candidates for a covered office indicated on the ballot.

(a) Nothing herein limits the right of political parties to endorse, support, or oppose any candidate.

(6) Each qualified elector may vote for one candidate for a covered office. The four candidates for each covered office receiving the most votes in the top four open primary must advance to the general election for that covered office.

(a) No other candidates for a covered office may appear on the general-election ballot.

Section 4. Majority Winner through Instant Runoff at General Election

(A) The general election for a covered office shall be an instant runoff general election to ensure a majority winner.

(B) In an instant runoff general election,

(1) Candidates may have their political-party affiliation indicated on the ballot.

(a) The 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.

(2) Political parties may choose to have their candidate preferences indicated on the ballot.

(a) Nothing herein limits the right of political parties to endorse, support, or oppose any candidate.

(3) A qualified elector may cast a vote for a covered office by ranking one or more candidates for that office. No elector is required to rank more than one candidate.

(4) To determine the winner of an election for a covered office, votes must first be counted based on first choice rankings. If any candidate has a majority of such votes, that candidate must be declared the winner.

(5) If, after counting votes according to first-choice rankings, no candidate has a majority of such votes, then the following process begins:

(a) The candidate with the fewest votes is eliminated.

(b) The vote of each qualified elector whose first choice was the eliminated candidate described in section 4(B)(5)(a) is then counted for that elector's next-choice candidate instead, should a next choice be marked.

(c) If a candidate then has a majority of all remaining votes, that candidate must be declared the winner.

(6) If no candidate has a majority of the remaining votes after the instant-runoff process described in subsection (B)(5) of this section, then the instant-runoff process continues:

(a) The candidate with the fewest votes is eliminated.

(b) The vote of each qualified elector whose vote was counted for the eliminated candidate described in section 4(B)(6)(a) is then counted for that elector's next-choice candidate instead, should a next choice be marked.

(c) A candidate will then have a majority of all remaining votes, and that candidate must be declared the winner.

Section 5. General Assembly
The General Assembly is required to enact legislation to provide for a revised election process in accordance with and in furtherance of this Amendment.

Section 6. Inconsistent provisions
All provisions of the Constitution, statutes, and common law of this State to the extent inconsistent or in conflict with any provision of this Amendment are expressly declared null and void as to, and do not apply to, any activities provided for under this Amendment.

Section 7. Severability
If any provision or section of this Amendment or the application thereof to any person or circumstance is held invalid, such invalidity will not affect any other provision or application of the Amendment that can be given effect without the invalid provisions or applications, and to this end the provisions of this Amendment are declared to be severable.

Section 8. Effective date.
This Amendment becomes effective on January 1, 2021.