

# CV-20-546

IN THE ARKANSAS COURT OF APPEALS

TOM STEELE

APPELLANT

v.

JOHN THURSTON,  
ARKANSAS SECRETARY OF STATE

APPELLEE

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ON APPEAL FROM THE  
CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
JUDGE MARY MCGOWAN PRESIDING

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APPELLANT'S BRIEF

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## POINTS ON APPEAL

1. THE COURT ERRED IN HOLDING THAT THE BALLOT TITLES WERE SUFFICIENT
2. THE COURT ERRED IN HOLDING THAT ISSUE 3 DID NOT VIOLATE ARK. CONST. ART. 19 §22

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## **JURISDICTIONAL STATEMENT**

This is an appeal of the denial of a request to strike two proposed constitutional amendments referred by the Arkansas General Assembly from the November 3, 2020, general election ballot. On September 9, 2020 the Circuit Court dismissed the complaint. (RP 75) On September 10, 2020 the Notice of Appeal was filed. (RP 82) Jurisdiction is proper in the Supreme Court pursuant to Ark. R. S.Ct. 1-2(a)(4).

## STATEMENT OF THE CASE AND THE FACTS

During the Regular Session of the 91<sup>st</sup> General Assembly in 2019, the Arkansas General Assembly referred three proposed amendments to the Arkansas Constitution to the voters of the State of Arkansas during the General Election to be held on November 3, 2020. The Arkansas General Assembly has the authority, pursuant to Ark. Const. Art. 19 § 22, to refer proposed amendments to the Arkansas Constitution as ballot measures to be voted on by the voters of the State of Arkansas. There can only be three proposed constitutional amendments referred by the General Assembly in any voting cycle. House Joint Resolution 1018 has been designated as Issue 1 and is not a dispute in this litigation. House Joint Resolution 1008 (“HJR 1008”) (RP 14) and Senate Joint Resolution 15 (“SJR 15”) (RP 19) were two of the proposals referred by the General Assembly. SJR 15 has been designated by the Secretary of State as Issue 2 and HJR 1008 has been designated Issue 3.

This is an action for a Writ of Mandamus, Declaratory and Injunctive Relief to challenge the sufficiency of Issue 2, Senate Joint SJR 15 and Issue 3, HJR 1008 and seeking a declaration that Issue 2 and Issue 3 are insufficient; seeking an injunction, ordering the Defendant to not place

either on the ballot, or to not count, canvass, or certify any ballots or votes cast for Issue 2 or 3. (RP 3)

SJR 15 is entitled: A CONSTITUTIONAL AMENDMENT TO BE KNOWN AS THE “ARKANSAS TERM LIMITS AMENDMENT”; AND AMENDING THE TERM LIMITS APPLICABLE TO MEMBERS OF THE GENERAL ASSEMBLY. SJR 15 was attached to the complaint as Exhibit “2.” Section 2 of SJR 15 provides: BALLOT TITLE AND POPULAR NAME. When this proposed amendment is submitted to the electors of this state on the general election ballot: (1) The title of this joint resolution shall be the ballot title; and (2) The popular name shall be “A Constitutional Amendment to Amend the Term Limits Applicable to Members of the General Assembly, to be known as the “Arkansas Term Limits Amendment. (RP 19)

HJR 1008 is entitled: AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO AMEND THE PROCESS FOR THE SUBMISSION AND APPROVAL OF PROPOSED INITIATED ACTS, CONSTITUTIONAL AMENDMENTS, AND REFERENDA. HJR 1008 is attached to the complaint as Exhibit “1.” Section 9 of HJR 1008 provides: BALLOT TITLE AND POPULAR NAME. When this proposed amendment is submitted to

the electors of this state on the general election ballot: (1) The title of this Joint Resolution shall be the ballot title; and (2) The popular name shall be “A Constitutional Amendment To Amend The Process For The Submission, Challenge, And Approval Of Proposed Initiated Acts, Constitutional Amendments, And Referenda”. (RP 14)



## ARGUMENT

### THE COURT ERRED IN HOLDING THAT THE BALLOT TITLES WERE SUFFICIENT

The Popular Name and Ballot Title are all that appears on the ballot for the voter to consider at the polls. The actual text of the proposed amendments does not appear on the ballot. Section 12 of Act 376 of 2019 added an additional section to Arkansas Code Title 7, Chapter 9, Subchapter 2 and provides the following:

7-9-205. Challenges to constitutional amendments proposed by the General Assembly.

If the General Assembly passes a joint resolution proposing an amendment to the Arkansas Constitution, a qualified elector may file an action in a court of competent jurisdiction at any time after the passage of the joint resolution challenging the sufficiency of the joint resolution, including without limitation the:

- (1) Text of the proposed amendment;
- (2) Ballot title of the proposed amendment; and
- (3) Popular name of the proposed amendment.

By enacting Act 376 of 2019, the General Assembly changed the existing precedent of the Arkansas Supreme Court set forth in *Becker v. Riviere*, 277 Ark. 252 (1982). In *Becker* the Arkansas Supreme Court said that because there was no constitutional requirement for a ballot title under existing law that the standard to have measure removed from the ballot for

a defective ballot title was manifest fraud. The linchpin of the *Becker* decision was the requirement that the proposed amendment is required to be published for a period of six months in one newspaper in each county prior to the election. Newspaper circulation has been decreasing rapidly over the last fifteen years. According to a report authored by the Hussman School of Journalism and Media at the University of North Carolina from 2004 to 2019 the number of newspapers in Arkansas declined 22% from 130 to 102 and newspaper circulation declined 31% from 970,000 to 670,000. <https://www.usnewsdeserts.com/states/arkansas/> Substantially fewer people subscribe to and read newspapers now than they did in 1982. With fewer people reading newspapers the need for a ballot title is greater.

Act 376 of 2019 contains no legislative history or intent so it is up to this Court to determine the intent of the General Assembly using the principles of statutory construction. *Holt v. City of Maumelle*, 302 Ark. 51 (1990); *Martin v. Pierce*, 370 Ark. 53 (2007). Under Arkansas law it is presumed that the legislature knows the decisions of the Supreme Court and the meaning attributed to words and phrases used by the Court when it enacts legislation unless there is unmistakable language to the contrary. *Martin v. Pierce, supra*. Statutes concerning election matters are to be

liberally construed. *King v. Whitfield*, 339 Ark. 176 (1999). Either or both the decline in newspaper circulation or this Court's admonishment to reconsider the "double standard" on ballot titles could have been the reason for the adoption of Act 376. It should be noted that Issue 3 removes the six month publication requirement from the constitution and provides instead that the publication is to be in a manner required by the General Assembly. The removal of this six month requirement supports the argument that the ballot titles should be judged by the same standard since that was the holding in *Becker*.

The General Assembly did not provide a definition for popular name or ballot title in Act 376 so one has to turn to the definitions used by this Court. The law in Arkansas with respect to these two terms is well settled under the precedents of this Court.

A ballot title has always been required on amendments initiated by the people under Amendment 7. This Court has set for the law on the sufficiency of a ballot title stating that a "ballot title must be an impartial summary of the proposed amendment, and it must give the voters a fair understanding of the issues presented and the scope and significance of the proposed changes in the law. *Rose v. Martin*, 2016 Ark. 339. A ballot title

“must be free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring. *Id.* (citations omitted). Though the standard requires an “impartial summary,” a “ballot title need not contain a synopsis of the proposed amendment or cover every detail of it.” *Id.* (citations omitted). The ballot title need only include any “essential fact that would give the voter serious ground for reflection.” *Id.* The “ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and informed decision for or against the proposal and understands the consequences of his or her vote based on the ballot title.” *Id.* Ultimately, the “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 legislation.” *Id.* (citations omitted). The Court does not “examine the relative merit or fault of the proposed changes in the law; rather, our function is merely to review the measure to ensure that, if it is presented to the people for consideration in a popular vote, it is presented fairly. *Id.* The burden of proving insufficiency falls on petitioners as the parties challenging the ballot title. *Id.* The Arkansas General Assembly knew this

to be the law when they enacted Act 376 of 2019. It is fair and appropriate that the standard for the ballot title for amendments referred by the General Assembly should be the same as that required by measures initiated by the people. Act 376 did and/or this Court should overrule *Becker*. The voters of this state are entitled to know the substantial changes being made to the constitution by these two issues when they cast their vote. For the reasons stated below, the ballot titles assigned by General Assembly fails to adequately inform the voter of the substantial changes being made. In fact the ballot titles do not inform the voter of any of the changes being made.

The Circuit Court held that Act 376 created a private right of action in which a qualified elector could challenge the sufficiency of constitutional amendments proposed by the General Assembly. It did not create that. That right already existed. Since that right already existed the obvious reason for Act 376 being enacted is to require that the standard for which ballot titles are judge on amendments referred by the General Assembly is the same as an amendment initiated by the people.

## **ISSUE 2 (RP 19)**

The ballot title of SJR 15 is misleading and insufficient because it provides the voter with no information. The ballot title fails to inform the voter that the measure creates one set of rules/limits applicable to members first elected to the General Assembly after Jan 1, 2021 and a different set of rules/limits for all other members. The ballot title fails to inform the voter that lifetime term limits would be eliminated and that members of the General Assembly could serve an unlimited number of years interrupted only by an occasional "sit out" period as short as a single 2-year term. The ballot title fails to inform the voter that members of the General Assembly first elected before Jan 1, 2021 who serve sixteen (16) years shall be eligible for subsequent service in the General Assembly four (4) years after the expiration of the last term of office in the General Assembly for which he or she was elected. The ballot title fails to inform the voter that members of the General Assembly first elected before Jan 1, 2021 who serve sixteen (16) years shall be eligible for subsequent service in the General Assembly four (4) years after the expiration of the last term of office in the General Assembly for which he or she was elected. The ballot title of SJR 15 fails to inform the voter that members of the General

Assembly first elected after Jan 1, 2021 who serve twelve (12) consecutive years shall be eligible for subsequent service in the General Assembly four (4) years after the expiration of the last term of office in the General Assembly for which he or she was elected. The ballot title fails to inform the voter that, for members first elected after Jan 1, 2021, a two-year term served as a result of apportionment of the Senate shall be included in calculating the total number of consecutive years served by a member of the General Assembly. The ballot title fails to give the voters a fair understanding of the issues presented and the scope and significance of the proposed changes. Voters are not told that lifetime limits have been eliminated, or that Legislators can essentially serve for life with a few dead periods.

### **ISSUE 3 (RP 14)**

The ballot title of HJR 1008 is misleading and insufficient because it provides the voter with no information. The ballot title fails to inform the voter that the deadline for filing initiative petitions for state-wide measures would be changed from four months prior to the election at which they are to be voted upon to January 15 of the year at which they are to be voted upon. The ballot title fails to inform the voter that the sponsor of all

initiative and referendum petitions would be required to file petitions bearing a minimum signature threshold from 45 counties instead of 15 counties. The ballot title fails to inform the voter that a challenge to the sufficiency of a statewide initiative petition shall be filed no later than April 15 of the year of the general election at which it shall be voted upon. Currently there is no deadline. The ballot title fails to inform the voter that the cure period would be eliminated. Currently if the sponsor of measure turns in a certain number of facially valid signatures, but not enough signatures from registered voters the sponsor is entitled to a cure period of 30 days to gather more signatures. The ballot title fails to mention that it eliminates the cure period on a city or countywide initiative if the first submission of signatures does not meet the threshold.

In addition to the substantial changes to the manner in which the people may initiate measures Issue 3 that also makes substantial changes to the manner in which the General Assembly refers constitutional amendments, which is a separate article of the constitution (Article 19 Section 22). These changes would, increase the number of votes needed by the General Assembly to refer a constitutional amendment to voters from a simple majority to 3/5 of the members and delete a requirement that



proposed constitutional amendments be published in each county for six months prior to the election to “in a manner provided by law.” Issue 3 also makes changes to Amendment 70, Section 2 of the Arkansas Constitution by changing how legislators propose a constitutional amendment to change the salaries of elected state officials. It deletes the requirement that the proposed be published in each county for six months prior to the election to “in a manner provided by law” and requires that the vote to refer the constitutional amendment to voters be 3/5 of the members and not a simple majority.

### **MANIFEST FRAUD**

If the Court fails to hold that *Becker* has been or is overruled, then the substantial changes in Arkansas law made by the two amendments that are not disclosed to the voters in and of itself constitutes manifest fraud. Those arguments are set forth in the previous section dealing with the adequacy of the ballot titles. For the people to vote on the substantive changes that both of these amendments make to Arkansas law and not be informed is fraudulent. The voter deserves the right to be informed of the consequences of his/her vote.

In addition the ballot title of Issue 3 is AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO AMEND THE PROCESS FOR THE SUBMISSION AND APPROVAL OF PROPOSED INITIATED ACTS, CONSTITUTIONAL AMENDMENTS, AND REFERENDA. As stated above Issue 3, involves more than INITIATED acts, constitutional amendments and referenda. Issue 3 makes substantial changes to constitutional amendments referred by the General Assembly. Since the ballot title reflects that only changes are being made to INITIATED acts, constitutional amendments and referenda the failure to disclose the other changes does rise to the level of fraud. Voters may want to change the process by which INITIATED acts, constitutional amendments and referenda are proposed but not those referred by the General Assembly. By limiting the title to just INITIATED measures and not referred amendments the General Assembly is being deceitful. Initiated acts, constitutional amendments and referenda all are authorized by Amendment 7. Amendment 7 places no limit on the number that can be initiated. Only 3 constitutional amendments are permitted to be referred by the General Assembly. It is disingenuous to say that the voter would be able to understand that the words "constitutional amendments" when

bracketed by two items that can only be accomplished pursuant to Amendment 7 can be expected to understand that constitutional amendments is referring to both initiated amendments and referred amendments. It is deceptive.

**THE COURT ERRED IN HOLDING THAT ISSUE 3 DID NOT  
VIOLATE ARK. CONST. ART. 19 §22**

The Arkansas General Assembly has the authority, pursuant to Ark. Const. Art.19 § 22, to refer proposed amendments to the Arkansas Constitution as ballot measures to be voted on by the voters of the State of Arkansas. Section 22 specifically provides as follows:

Either branch of the General Assembly, at a regular session thereof, may propose amendments to this Constitution; and if the same be agreed to by a majority of all members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the State, for approval or rejection; and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution. *But no more than three*

*amendments shall be proposed or submitted at the same time. They shall be so submitted as to enable the electors to vote on each amendment separately.* (italics added)

Section 19 includes restraints on the power of the Arkansas General Assembly; including: (1) that the General Assembly can neither propose nor submit more than three amendments at the same time, and (2) that the constitutional amendments are submitted so that the electorate can only vote on each separately. In addition, even though the General Assembly may be able to combine multiple constitutional amendments into one, the multiple constitutional amendments must be “reasonably germane to each other and to the general subject of the amendment.” *See Forrester v. Martin*, 2011 Ark. 277.

Issue 3 is not a single subject proposal; it proposes three separate and disparate constitutional amendments. One an amendment to change the way that Arkansas Citizens can propose their own measures (acts and amendments) pursuant to Article 5, Section 1. The second amendment proposes changes to Article 19, Section 22 regarding the manner in which the General Assembly can refer a constitutional amendment to the people. The third amendment proposes changes to Amendment 70, Section 2, regarding how the General Assembly proposes constitutional

amendments changing the salaries of elected state officials. In *Martin v. Zook*, 2018 Ark 253 the Arkansas Supreme Court removed a referred constitutional amendment from the ballot because it violated Article 12, Section 22 because the referred amendment contained at least four separate proposals. Issue 3 is contains at least three separate unrelated amendments that are not reasonably germane to each other. As stated by the Arkansas Supreme Court, if a constitutional amendment contains multiple provisions, the provisions must be “reasonably germane to each other and to the general subject of the amendment.” *Forrester v. Martin*, 2011 Ark. 277. Here they are not.

Amendment 7 and Article 19 are substantially different. Changes made to Amendment 7 have no effect on Article 19 and the reverse is true. Amendment 7 is a reservation unto the people of the legislative power to propose act, constitutional amendments and to reject laws made by the General Assembly.

## REQUEST FOR RELIEF

The trial court should be reversed and the Secretary of State ordered to not count any votes cast for Issue 2 and Issue 3.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that the forgoing was submitted for filing electronically under the eFlex filing system and served upon the following by electronic mail this 24<sup>th</sup> day of September, 2020:

Michael Mosley  
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/s/ David A. Couch

A copy was sent by United States mail to:

Judge Mary McGowan  
Pulaski County Courthouse  
Little Rock, Arkansas 72201

/s/ David A. Couch

**CERTIFICATE OF COMPLIANCE WITH  
ADMINISTRATIVE ORDER NO. 19  
AND WITH WORD-COUNT LIMITATION**

This brief complies with Administrative Order No. 19's requirements concerning confidential information and with the word count limitations identified in Rule 4-2(d) in that it contains 3,294 words within the jurisdictional statement, the statement of the case and the facts, the argument, and the request for relief.

/s/ David A. Couch