

IN THE ARKANSAS SUPREME COURT

RONALD A. MAY, SUSAN E. MAY, And
GAYLE BRADFORD

PETITIONERS

VS.

No. 04-895

CHARLIE DANIELS, in his official capacity
as Secretary of State of the State of Arkansas

RESPONDENT

JERRY COX And CHRIS STEWART,
individually and on behalf of the ARKANSAS
MARRIAGE AMENDMENT COMMITTEE

INTERVENORS

ORIGINAL ACTION

ADDENDUM AND BRIEF OF INTERVENORS

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TABLE OF CONTENTS

	<u>Page</u>	
INFORMATIONAL STATEMENT	ii	
JURISDICTIONAL STATEMENT	iv	
POINTS.....	v	
TABLE OF AUTHORITIES	vi	
STATEMENT OF THE CASE.....	SOC 1	
ARGUMENT	ARG 1	
.....	<i>Introduction</i>	ARG 1
.....	<i>Standards of Review</i>	ARG 2
I. THE POPULAR NAME AND BALLOT TITLE OF PROPOSED AMENDMENT 3 ARE SUFFICIENT TO GIVE THE VOTERS A FAIR AND COMPLETE UNDERSTANDING OF THE		DECIS
CONCLUSION.....	ARG 11	
CERTIFICATE OF SERVICE	ARG 12	
ADDENDUM INDEX.....	ARG 13	
.....	Initiative Petition	ADD 1
.....	Petitioners' Press Release	ADD 3

INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL:

None.

II. BASIS OF SUPREME COURT JURISDICTION:

Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

- (1) Construction of Constitution of Arkansas
- (2) Death penalty, life imprisonment
- (3) Extraordinary writs
- (4) Elections and election procedures
- (5) Discipline of attorneys
- (6) Discipline and disability of judges
- (7) Previous appeal in Supreme Court
- (8) Appeal to Supreme Court by law

III. NATURE OF APPEAL:

- (1) Administrative or regulatory action
- (2) Rule 37
- (3) Rule on Clerk
- (4) Interlocutory appeal
- (5) Usury
- (6) Products liability
- (7) Oil, gas, or mineral rights
- (8) Torts
- (9) Construction of deed or will
- (10) Contract
- (11) Criminal

[Write a brief statement limited to the space provided describing the case on appeal, and set out the causes of action (i.e., in a civil case, tort, contract, etc., or in a criminal case, the convicted offenses, whether felony or misdemeanor, and the punishment) underlying the judgment from which the appeal is taken.]

Action under Amendment 7, codified as Article 5, § 1 of the Arkansas Constitution, to review the sufficiency of the popular name and ballot title of a proposed constitutional amendment by initiative.

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

No.

V. EXTRAORDINARY ISSUES. (Check if applicable, and discuss in PARAGRAPH 2 of the Jurisdictional Statement.)

- 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,
- appeal is of substantial public interest,
- appeal involves significant issue needing clarification, or development of the law, or overruling of precedent.
- appeal involves significant issue concerning construction of statute, ordinance, rule or regulation.

JURISDICTIONAL STATEMENT

1. This case concerns the sufficiency of a statewide initiative petition under Amendment 7 to the Arkansas Constitution (codified as Article 5, §1). The issues presented involve the adequacy of the popular name and ballot title of the proposed amendment.

Petitioners did not invoke the review procedure pursuant to Act 877 of 1999, Ark. Code Ann. § 7-9-501 *et seq.* (Repl. 2000). However, the Court held in *Ward v. Priest*, 350 Ark. 462, 88 S.W.3d 416 (2002), that Act 877 did not divest the Court of its original and exclusive jurisdiction to review the legal sufficiency of a ballot title after the Secretary of State certifies that the signatures on the initiative petition are sufficient.

2. I express a belief, based upon a reasoned and studied professional judgment, that this appeal raises no question of legal significance for jurisdictional purposes.

POINTS

- I. THE POPULAR NAME AND BALLOT TITLE OF PROPOSED AMENDMENT 3 ARE SUFFICIENT TO GIVE THE VOTERS A FAIR AND COMPLETE UNDERSTANDING OF THE DECISION THAT THEY ARE CALLED UPON TO MAKE

Mason v. Jernigan, 260 Ark. 385, 540 S.W.2d 851 (1976)

Becker v. Riviere, 270 Ark. 219, 604 S.W.2d 555 (1980)

TABLE OF AUTHORITIES

Cases

Arkansas Women's Political Caucus v. Riviere, 283 Ark. 463,
677 S.W.2d 846 (1984).....3

Baker v. State, 744 A.2d 864 (Vt. 1999).....6

Becker v. Riviere, 270 Ark. 219, 604 S.W.2d 555 (1980)9

Bradley v. Hall, 220 Ark. 925, 251 S.W.2d 470 (1952)2

Brissett v. Sykes, 313 Ark. 515, 855 S.W.2d 330 (1993).....9

Christian Civic Action Committee v. McCuen, 318 Ark. 241, 884
S.W.2d 605 (1994).....4, 11

Crochet v. Priest, 326 Ark. 338, 931 S.W.2d 128 (1996)2, 4

Dust v. Riviere, 277 Ark. 1, 638 S.W.2d 663 (1982)..... 4-5

Faubus v. Miles, 237 Ark. 957, 377 S.W.2d 601 (1964).....10

Ferstl v. McCuen, 296 Ark. 504, 758 S.W.2d 398 (1988).....4, 8

Goodridge v. Dept. of Public Health, 798 N.E.2d 941
(Mass. 2003)6

Hooker v. Parkin, 235 Ark. 218, 357 S.W.2d 534 (1962).....9

In re Opinions of the Justices to the Senate, 802 N.E.2d 565
(Mass. 2004)6

Knight v. Schwarzenegger, No. 03AS05284 (Cal. Super. Ct.
Sept. 8, 2004)7

Kurrus v. Priest, 342 Ark. 434, 29 S.W.3d 669 (2000) 2-3, 5

Mason v. Jernigan, 260 Ark. 385, 540 S.W.2d 851 (1976).....4, 8

Pafford v. Hall, 217 Ark. 734, 233 S.W.2d 72 (1950).....2

Page v. McCuen, 318 Ark. 342, 884 S.W.2d 951 (1994).....2

<i>Rankin v. Jones</i> , 224 Ark. 1001, 278 S.W.2d 646 (1955)	10
<i>Roberts v. Priest</i> , 341 Ark. 813, 20 S.W.3d 376 (2000).....	2
<i>Wells v. Purcell</i> , 267 Ark. 456, 592 S.W.2d 100 (1979)	9

Statutes and Rules

Ark. Const. amend. VII.....	2
Ark. Const. art. 9, § 3.....	10
Ark. Code Ann. § 9-11-107(a) (Repl. 2002).....	9
Vt. Stat. Ann. tit. 15, § 1202-1207 (2000)	6

STATEMENT OF THE CASE

Intervenors filed their initiative petitions with Respondent Secretary of State on July 1, 2004, seeking to initiate a proposed constitutional amendment entitled, "An Amendment Concerning Marriage" (herein, "Amendment 3") pursuant to Amendment 7 to the Arkansas Constitution (codified as Article 5, § 1; herein, "Amendment 7"). On July 22, 2004, Respondent declared that the petitions contained a sufficient number of signatures of registered voters and certified Amendment 3 to appear on the November 2, 2004 general election ballot.

On August 26, 2004, Petitioners filed this original action seeking an order enjoining Respondent from placing Amendment 3 on the election ballot, due to the alleged insufficiency of the popular name and ballot title. On August 30, 2004, Intervenors were granted leave to intervene in support of Respondent's certification.

ARGUMENT

Introduction

Intervenors reproduce below the popular name, ballot title, and text of Amendment 3, changing the typeface from all capitals to a normal text. (*See* ADD 1)

(Popular Name)

An Amendment Concerning Marriage

(Ballot Title)

A proposed amendment to the Arkansas Constitution providing that marriage consists only of the union of one man and one woman; that legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman; and that the legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.

(Text)

Section 1. Marriage.

Marriage consists only of the union of one man and one woman.

Section 2. Marital status.

Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the

legislature may recognize a common law marriage from another state between a man and a woman.

Section 3. Capacity, rights, obligations, privileges, and immunities.

The legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.

Standards of Review

The standards of review for the popular name and ballot title of an initiative measure under Amendment 7 are well established. The ballot title must be free of "any misleading tendency, whether of amplification, of omission, or of fallacy," and it must contain no partisan coloring. *Roberts v. Priest*, 341 Ark. 813, 821, 20 S.W.3d 376 (2000) (citing *Bradley v. Hall*, 220 Ark. 925, 251 S.W.2d 470 (1952)). As stated in *Kurrus v. Priest*, 342 Ark. 434, 440-441, 29 S.W.3d 669 (2000), "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."

The Court has stated that "we construe the requirements of Amendment 7 liberally in order to secure its purposes to reserve to the people the right to adopt or reject legislation." *Crochet v. Priest*, 326 Ark. 338, 342, 931 S.W.2d 128 (1996). All that is required is that the voters be able to cast their votes "with a fair understanding of the issue." *Page v. McCuen*, 318 Ark. 342, 347, 884 S.W.2d 951 (1994).

The popular name is not required to contain the same information as the ballot title. *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72 (1950). However, the popular name is held

to the same basic standards as the ballot title and must be "(1) intelligible, (2) honest, and (3) impartial." *Arkansas Women's Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984). The popular name is considered along with the ballot title in determining its sufficiency. *Kurrus v. Priest*, 342 Ark. at 441.

I. THE POPULAR NAME AND BALLOT TITLE OF PROPOSED AMENDMENT 3 ARE SUFFICIENT TO GIVE THE VOTERS A FAIR AND COMPLETE UNDERSTANDING OF THE DECISION THAT THEY ARE CALLED UPON TO MAKE

As noted above, the ballot title of Amendment 3 is practically a mirror image of the text. When the voters read the ballot title, they will be reading words of the amendment itself.

Petitioners have a heavy burden to prove that such a ballot title is inadequate. To the knowledge of Intervenors, the Court has never stricken a proposal from the ballot on the basis of the ballot title alone, where the ballot title accurately restated the text.

In *Arkansas Women's Political Caucus v. Riviere*, 283 Ark. 463, 677 S.W.2d 846 (1984), the Court struck a proposed amendment from the ballot where the ballot title restated the text, but the basis for the Court's decision was that the popular name was misleading. The popular name of the amendment, whose primary purpose was to prohibit public funding of abortion, was "The Unborn Child Amendment." The Court held, with three Justices dissenting, that to some voters a vote against the amendment would be akin to a vote against unborn children, even though such voters might support abortion rights and favor public funding of abortion.

The popular name of Amendment 3 has no such defect. The popular name is not "The Marriage Amendment," as if to identify the amendment with marriage itself in order to garner public support. The popular name is "An Amendment Concerning Marriage," which merely

points to the subject matter of the amendment, without creating any inferences one way or the other. *See Mason v. Jernigan*, 260 Ark. 385, 389, 540 S.W.2d 851 (1976) (holding that "nothing in the popular name ... suggests approval or disapproval of the subject matter that follows"). The popular name presented here could apply as well to an amendment which recognizes same-sex marriage. The only way the voters will be able to get any sense of the import of the amendment is to read the ballot title.

Petitioners complain about the disclosure of Amendment 3 in several respects, but they show their true colors when they allege that the "popular name, the ballot title and *even the text of the amendment itself*" are insufficient. (Original Action Petition, ¶ 9; italics added) The Court has stated many times that the merit of a proposal is of no concern to the Court when the popular name and ballot title are being reviewed. The sole issue before the Court is the adequacy of the disclosure on the election ballot. *Crochet v. Priest*, 326 Ark. 338, 342, 931 S.W.2d 128 (1996) (stating that the issue "is not how the members of this court feel concerning the wisdom of the proposed amendment"); *Ferstl v. McCuen*, 296 Ark. 504, 509, 758 S.W.2d 398 (1988) (same); *Dust v. Riviere*, 277 Ark. 1, 4, 638 S.W.2d 663 (1982) (stating that the wisdom of a proposal is the voters' decision).

Since the text of Amendment 3 is written in perfectly intelligible English, *see Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 249, 884 S.W.2d 605 (1994) (commending the use of "plain, concrete English"), Petitioners' criticism of the text means that they simply object to the policy of the amendment, and are determined for it not to be voted on by the people. That is the whole motivation for this case.

The voters will understand from reading the ballot title that Amendment 3 will do the following things, if adopted:

1. It will affirm the traditional cultural and legal understanding of marriage as the union of one man and one woman;
2. It will affirm the uniqueness of marital status, by providing that other types of legal status for unmarried persons will not be recognized in Arkansas if they are "identical or substantially similar" to marriage, with an exception for a common law marriage from another state between a man and a woman; and
3. It will delegate power over other aspects of marriage to the legislature.

The voters may agree or disagree with these principles. They may agree in principle but choose not to amend their constitution in this manner. Whatever their position may be, they have the information they need to make "an intelligent and informed decision." *Kurrus v. Priest*, 342 Ark. 434, 441, 29 S.W.3d 669 (2000); *see also Dust v. Riviere*, 277 Ark. 1, 5, 638 S.W.2d 663 (1982). Therefore, the popular name and ballot title are sufficient.

The following comments address Petitioners' specific allegations in paragraph 9 of the Original Action Petition:

A. Same-Sex Marriage

Contrary to Petitioners' assertion, the voters will not be misled into believing that Amendment 3 concerns *only* same-sex marriage. The amendment does not even use the term "same-sex marriage."

The amendment does prohibit same-sex marriage, but it also prohibits polygamy and the legal recognition of other quasi-marital "relationships." It does so by affirming the traditional

understanding of marriage as the union of one man and one woman. That is why the amendment is written and identified as an amendment "concerning marriage," not as an amendment "against same-sex marriage."

B. "Civil Unions" And "Domestic Partnerships"

Petitioners complain that the voters will not know that Amendment 3 will deny same-sex couples the right to enter into "civil unions" or "domestic partnerships." Petitioners are the ones who are being unclear, not the ballot title.

By placing "civil unions" and "domestic partnerships" in quotation marks, Petitioners admit that no such legal terms currently exist in Arkansas law. Exactly what Petitioners mean by "civil unions" and "domestic partnerships" no one knows, except that it is plain enough that they are referring to some type of substitute marriage for same-sex couples.

The amendment will have no effect upon same-sex couples entering into "civil unions" or "domestic partnerships," so long as they are not marriages by another name. If they are marriages by another name – which is exactly what Petitioners want to keep open in Arkansas – then the amendment provides that they will have no legal effect in this State.

The law of marriage is being challenged in some states by demands for same-sex marriage. *See Baker v. State*, 744 A.2d 864 (Vt. 1999) (mandating the recognition of civil unions); *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) (mandating the recognition of same-sex marriage); *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (same); and Vt. Stat. Ann. tit. 15, § 1202-1207 (2000) (authorizing civil unions). Most voters are aware of this development. However, voter awareness of "civil unions" and

"domestic partnerships" is immaterial to the question whether the ballot title is sufficient. These terms are simply new legal labels for novel and untested forms of marital union.

Amendment 3 could not ban quasi-marital "civil unions" or "domestic partnerships" by name without sowing confusion. No one would know exactly what the amendment was intended to cover unless these terms were carefully defined. It would be impossible to craft definitions that would suit everyone, and they would add to the length and complexity of the amendment. Such imprecision in the text and in the ballot title could make the amendment vulnerable to a legal challenge like the one at bar, which is exactly what Petitioners want.

It is far better that Amendment 3 uses the "identical or substantially similar" standard, which is well-known to the law and easily intelligible to the voters. This standard draws a line around traditional marriage and preserves its unique status. Thus, whatever alternative forms of marital status other jurisdictions may recognize (whether same-sex or something else), and by whatever terms such jurisdictions may identify them (whether "civil unions" or "domestic partnerships"), those unions will not be recognized in Arkansas if they fail the test of Amendment 3 and turn out to be marriages with new labels.

The voters have every right to accomplish such a purpose. There is little point in amending the Constitution if the people's declaration concerning marriage may be effectively nullified by legislative or judicial action.

In *Knight v. Schwarzenegger*, No. 03AS05284 (Cal. Super. Ct. Sept. 8, 2004) (order granting motions for summary judgment), see <<http://www.lc.org/attachments/knightab205.pdf>>, the Superior Court of Sacramento County, California held that while California Proposition 22 prohibits the California Legislature from enacting laws to permit same-sex marriage, it does not

prohibit the Legislature from granting most of the attributes of marriage to same-sex couples under a different name. The *Knight* decision may be overturned on appeal, but its existence teaches an important, practical lesson. Some courts and legislatures which are forbidden to recognize same-sex marriage directly may do so indirectly, even in the face of popular laws enacted to the contrary by direct democracy.

Section 2 of the amendment means that such gamesmanship will have no place in Arkansas. This is a concept that the voters can readily understand.

C. Rights Of Unmarried Persons

Petitioners allege that the voters will not know that Amendment 3 will render certain "legal arrangements" and "forms of legal status enjoyed by unmarried people" invalid. The amendment does no such thing. Petitioners are merely arguing their private interpretations of the amendment. They have no explicit basis in the text of the amendment for their assertions.

As the Court stated in *Mason v. Jernigan*, 260 Ark. 385, 391, 540 S.W.2d 851 (1976), in rejecting a ballot title challenge to a proposed amendment concerning the rights of labor:

Let it be remembered that the purpose of a ballot title is not to "interpret" the amendment, but only to summarize adequately the provisions of such amendment; nor is it our function ... to interpret the amendment itself.

See also Ferstl v. McCuen, 296 Ark. 504, 510, 758 S.W.2d 398 (1988) (stating that it is not the Court's function "to interpret the amendment or explain how it is to be implemented").

In a press release that accompanied the filing of this case, Petitioners state that the amendment "could" mean that laws prohibiting discrimination based upon marital status are invalid, including laws prohibiting discrimination in the extension of credit. (ADD 4) Reserving

marriage to one man and one woman will in no way harm or authorize discrimination against unmarried persons. Petitioners are merely engaging in speculation and conjecture.

D. Common Law Marriage

Contrary to Petitioners' assertion, the ballot title need not explain to the voters the "current situation" concerning common law marriage in Arkansas. Case law is clear that a ballot title is not required to disclose or summarize the current state of the law. *Becker v. Riviere*, 270 Ark. 219, 224, 604 S.W.2d 555 (1980). The ballot title informs the voters that the General Assembly "may" recognize a common law marriage from another state, provided that the marriage is between one man and one woman. That is exactly what the amendment does.

The amendment will have no effect on the current Arkansas law which recognizes common law marriages contracted in other states, subject to certain requirements. Ark. Code Ann. § 9-11-107(a) (Repl. 2002); see *Brissett v. Sykes*, 313 Ark. 515, 855 S.W.2d 330 (1993).

E. Legislative Power

Petitioners allege that the ballot title fails to convey to the voters the extent of the power given to the legislature to govern marriage. Petitioners are complaining about a power that the legislature already has. Under the State Constitution, the power of the legislature is plenary. The legislature is the reservoir of all power not relinquished to the federal government, delegated to the other branches of the state government, or otherwise restricted or limited by the State Constitution. *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979); *Hooker v. Parkin*, 235 Ark. 218, 357 S.W.2d 534 (1962). The power to govern the legal aspects of marriage is one of the legislature's un-enumerated powers.

Petitioners allege in paragraph 3 of the Original Action Petition that the amendment will repeal the homestead exemption in Article 9, Section 3 of the Constitution. In their press release, they state that the legislature "could" deny married persons the right to keep their homes if they go bankrupt. (ADD 4) Amendment 3 does not express any intention to amend or repeal the homestead exemption, either directly or by implication. Repeal of constitutional provisions by implication is not favored and requires that the earlier and later provisions be so inconsistent that they cannot stand together. *Faubus v. Miles*, 237 Ark. 957, 377 S.W.2d 601 (1964); *Rankin v. Jones*, 224 Ark. 1001, 278 S.W.2d 646 (1955).

The homestead exemption grants to every state resident who is "married or the head of a family" the right to be free from a judgment lien or execution on his or her home. Section 3 of the amendment is a general provision which recognizes the legislature's power to govern the "capacity of persons to marry" and the "legal rights, obligations, privileges, and immunities of marriage." These two provisions can co-exist in the same constitution without any conflict. They could have co-existed in the State Constitution since 1874, if the framers had thought it necessary to make the legislative power over marriage explicit, rather than implicit. Moreover, it makes no sense to say that the amendment impliedly will give the legislature the power to change the "married person" part of the homestead exemption, but not the "head of a family" part of the very same exemption. There is no basis in the amendment for Petitioners' claim that the amendment may lead to a change in homestead rights.

The practical effect of Section 3 of the amendment is that the legislature, not the courts, will continue to govern the substantive law of marriage. The law in Arkansas concerning

marriage will remain as it is, except that there will be an explicit delegation of constitutional authority to the legislature to enact laws concerning marriage.

CONCLUSION

Whether voter attitudes in Arkansas are changing with regard to same-sex marriage or alternative forms of marital union is purely a political question. The place to settle such an important issue of public policy is at the ballot box. That is what Amendment 3 proposes to do.

If Petitioners believe that attitudes are changing in their favor, then they should draft their own proposal, circulate their own petitions, raise their own money, garner what public support they can, and otherwise do the hard work of democracy. They should not be heard to argue that the voters will not understand Amendment 3. Voters will be reading the very words of the amendment itself in the ballot title, written in Justice Holt's "plain, concrete English." *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 249, 884 S.W.2d 605 (1994).

The popular name and ballot title of Amendment 3 are in no way inaccurate, incomplete, misleading, or partisan. The voters will have no problem understanding what is being presented to them for their adoption or rejection at the polls. These things being true, the Original Action Petition should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Martha Adcock, hereby certify that a true and correct copy of the foregoing pleading was served upon the parties by U.S. mail, postage prepaid, this _____ day of September, 2004, addressed to:

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ADDENDUM INDEX

	<u>Page</u>
Initiative Petition.....	ADD 1
Petitioners' Press Release	ADD 3