

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION**

**APRIL FORRESTER (individually and as a
Representative of all similarly situated
voter-citizens of Arkansas)**

PLAINTIFF

V.

CASE NO. CV-10-5592

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

DEFENDANT

V.

**RANDY ZOOK, RANDY WILBOURN,
RAY C. DILLON, DAVID BYERLY,
DON ZIMMERMAN, and MARK MCBRYDE,
Individually, and on behalf of
COMMITTEE FOR ARKANSAS'S FUTURE**

FILED 11/02/10 11:56:37
Pat O'Brien Pulaski Circuit Clerk
CR2

INTERVENORS

**ORDER DENYING INJUNCTIVE RELIEF AND WRIT OF MANDAMUS
AGAINST THE SECRETARY OF STATE**

Before the Court is a Complaint for Injunctive Relief and Petition for Writ of Mandamus Against the Secretary of State filed by the Plaintiff, April Forrester, a Supplement to Plaintiff's Petition for Writ of Mandamus Against the Secretary of State filed by the Plaintiff, an Answer filed by the Defendant, Charlie Daniels, Secretary of State of the State of Arkansas, in his official capacity only, a Brief in Response to the Court's Order Requiring Simultaneous Briefs on the Merits of the Complaint filed by the Defendant, a Brief filed by the Intervenors, Randy Zook, Randy Wilbourn, Ray C. Dillon, David Byerly, Don Zimmerman, and Mark McBryde, Individually, and on behalf of Committee for Arkansas's Future, a Brief filed by the Plaintiff, and a Supplement to Brief filed by the Plaintiff. Eugene Sayre, Christopher Brockett, Neil Deininger, Reba Wingfield, and Amy Hall, attorneys, represent the Plaintiff. Scott Richardson,

Assistant Attorney General, represents the Defendant. Elizabeth Robben Murray, attorney, represents the Intervenor. The Court conducted a hearing regarding the merits of this matter on November 1, 2010. Based upon the pleadings, the arguments of counsel, and other evidence before the Court, the Court finds:

During the 2009 regular session of the Arkansas General Assembly, a majority of the members of the General Assembly voted to refer three proposed amendments to the Arkansas Constitution to be considered by the voters of the State of Arkansas during the upcoming general election. The proposed amendment at issue here (hereinafter "Issue No. 2") was set forth in House Joint Resolution 1004 of 2009 (hereinafter "HJR 1004"), which was titled "Proposing an Amendment to the Constitution of Arkansas Concerning the Interest Rate Limits."

At the conclusion of the regular session, Issue No. 2 was referred to the Defendant so that he could fix and declare the number by which the proposed constitutional amendment would be designated. The Defendant subsequently referred Issue No. 2 to the Arkansas Attorney General, who issued an opinion fixing and declaring the popular name for Issue No. 2 pursuant to Ark. Code Ann. § 7-9-110. The Defendant then published notice of Issue No. 2 in various newspapers across the state every month for six months. The popular name published in these notices, as fixed by the Attorney General, was "An Amendment Concerning Interest-Rate Limits and the Issuance of Governmental Bonds to Finance Energy-Efficiency Projects."

Prior to September 20, 2010, the Defendant transmitted to the Arkansas Board of Election Commissioners and each of the County Boards of Election Commissioners a certification that the ballot title for Issue No. 2 shall read as follows:

(Title)

An amendment providing that constitutional provisions setting the maximum lawful rate of interest on bonds issued by and loans made by or to governmental

units are repealed; the maximum lawful rate of interest on loans by federally insured depository institutions shall remain at the rate resulting from the federal preemption effective on March 1, 2009; establishing that the maximum lawful rate of interest on any other loan or contract shall not exceed seventeen percent (17%) per annum; authorizing governmental units to issue bonds to finance energy efficiency projects and allowing such bonds to be repaid from any source including general revenues derived from taxes; providing that any federal laws applicable to loans or interest rates are not superseded by the amendment; and repealing Article 19, § 13, and the interest rate provisions of Amendment Nos. 30, 38, 62, 65, and 78 of the Arkansas Constitution.

(Popular Name)

AN AMENDMENT CONCERNING INTEREST-RATE LIMITS AND THE ISSUANCE OF GOVERNMENTAL BONDS TO FINANCE ENERGY-EFFICIENCY PROJECTS.

This ballot title is identical to that mandated by the General Assembly in Section 7 of HJR 1004, and the popular name is identical to that designated by the Attorney General.

The Plaintiff then filed the instant action seeking injunctive relief and a Writ of Mandamus. Simultaneously, the Plaintiff filed a corresponding, identical action in the Supreme Court of Arkansas.

This Court conducted a hearing regarding this matter on October 6, 2010. At that time, the Court deferred its ruling because the Supreme Court of Arkansas was considering whether it had original jurisdiction over the Plaintiff's challenge to the ballot title for Issue No. 2.

On October 22, 2010, the Supreme Court of Arkansas issued an opinion in which it held that it lacked original jurisdiction over the Plaintiff's challenge. Forrester v. Daniels, 2010 Ark. 397 (2010). The Supreme Court stated: "Our review of Amendment 80 and this court's well-established precedent leads us to conclude that our jurisdiction to hear challenges to amendments referred by the legislature remains appellate in nature." Id. at 7. Therefore, on October 22, 2010, the Arkansas Supreme Court relinquished jurisdiction over this matter and dismissed the case filed before it.

The Plaintiff seeks injunctive relief and a Writ of Mandamus enjoining the Secretary of State from canvassing, counting or certifying any votes cast during the November 2, 2010 general election on Issue No. 2. In seeking such relief, the Plaintiff asserts the following: 1) That the ballot title constitutes a manifest fraud upon the public because it fails to give voters notice that a majority "For" vote for Issue No. 2 will increase the usury limit on interest rates to seventeen percent (17%) per annum and also repeal the current usury limits; 2) That Issue No. 2 actually contains three separate and disparate matters such that the General Assembly has exceeded its limit of referring only three proposed amendments per session pursuant to Article 19, § 22 of the Arkansas Constitution; 3) That the Defendant certified an illegal ballot title that fails to comply with Ark. Code Ann. § 7-9-204, the statutory requirement for its wording; and 4) That Issue No. 2 contains an invalid severability clause.

The Court considers the Plaintiff's first argument under the deferential standard the Arkansas Supreme Court announced in Becker v. Riviere, 277 Ark. 252, 641 S.W.2d 2 (1982). In Becker v. Riviere, the Supreme Court considered a challenge to a proposed amendment similar to Issue No. 2. Id. at 253. The Supreme Court upheld the lower court's refusal to grant an injunction. Id. In the process, it established the "manifest fraud" standard that Arkansas courts must use when they review ballot titles for amendments which have been proposed through the legislative process outlined in Article 19, § 22 of the Arkansas Constitution. Id. at 255. The Court wrote:

When the purpose of a ballot title is to identify, as opposed to inform, the title is sufficient if it distinguishes the proposed amendment from others and is recognizable as referring to the amendment that was previously published in the newspapers. A ballot title which meets this test will be upheld *unless it is worded in some way so as to constitute a manifest fraud upon the public.*

Id. (emphasis added).

The Plaintiff contends that the wording of the ballot title of Issue No. 2 constitutes a manifest fraud on the public for two reasons. First, the Plaintiff argues that the Secretary of State did a “bait and switch” whereby it published one ballot title in the newspaper for six months and then certified another ballot title as the ballot title to be used by the 75 County Boards of Election Commissions. Second, the Plaintiff argues that the ballot title for Issue No. 2 does not provide the voters with any notice that the amendment would alter Arkansas’s usury laws.

The Plaintiff cites Finn v. McCuen, 303 Ark. 418, 798 S.W.2d 74 (2000), in which the Arkansas Supreme Court stated:

[I]f information not given by a ballot title would “give the elector ‘serious ground for reflection’ it must be disclosed.”

Id. at 426 (quoting Gaines v. McCuen, 296 Ark. 513, 758 S.W.2d 403 (1988)). Finn, however, involved a challenge to a ballot title proposed through Amendment 7 rather than Article 19, § 22. Therefore, the ballot title the Arkansas Supreme Court reviewed in Finn was not entitled to the deference to the Legislature embodied in the “manifest fraud” standard. Nonetheless, the Plaintiff contends that the ballot title constitutes a manifest fraud upon the public because it omits references to the amendment’s repeal of current usury laws.

The Defendant and Intervenors respond that Issue No. 2’s ballot title does not constitute a manifest fraud on the public because it fairly informs the voters of its terms. In Becker v. McCuen, 303 Ark. 482, 798 S.W.2d 71 (1990), the Arkansas Supreme Court elaborated on the content of the “manifest fraud” standard. The Court wrote:

It is not required that the ballot title contain a synopsis of the proposed amendment and cover every detail of it. It is sufficient if the title is complete enough to convey an intelligible idea of the scope and import of the proposed amendment. We have recognized the impossibility of preparing a ballot title which would suit everyone.

Id. at 488 (internal citations omitted). Further, the Defendant and Intervenor argue that the ballot title fairly states its purpose because it contains the following language: “An amendment...establishing that the maximum lawful rate of interest on any other loan or contract shall not exceed seventeen percent (17%) per annum...and repealing Article 19, § 13, and the interest rate provisions of Amendment Nos. 30, 38, 62, 65, and 78 of the Arkansas Constitution.”

In the instant case, the Court finds that the ballot title of Issue No. 2 does not constitute a manifest fraud upon the public. The ballot title states the amendment’s purposes. It states that the amendment establishes the maximum lawful rate of interest on loans and contracts at seventeen percent (17%) per annum. Further, it states that the amendment repeals Article 19, § 13 of the Arkansas Constitution and the interest rate provisions of various other amendments to the Arkansas Constitution. The ballot title is complete enough to convey an intelligible idea of the scope and import of the proposed amendment. The ballot title need not contain a synopsis of the proposed amendment or cover every detail of it. Therefore, the omissions of which the Plaintiff complains do not constitute a manifest fraud upon the public.

Further, in Thiel v. Priest, 342 Ark. 292, 28 S.W.3d 296 (2000), the Arkansas Supreme Court upheld a ballot title which it acknowledged omitted information that would cause voters to ~~be misled~~. Id. at 298. In that case, although the ballot title had “serious omissions,” the plaintiff failed to overcome the “enormous hurdle” of the “manifest fraud” standard. Id. at 296. Likewise, in the instant case, the Plaintiff has not shown that the omissions of which she complains constitute a manifest fraud upon the public.

The Plaintiff also contends that Issue No. 2 contains three separate and disparate matters such that the General Assembly exceeded its limit of referring only three proposed amendments per session. Article 19, § 22 of the Arkansas Constitution states, in pertinent part:

Either branch of the General Assembly, at a regular session thereof, may propose amendments to 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.

Ark. Const. Art. 19, § 22. According to the Plaintiff, this alleged violation of Article 19, § 22 constitutes a “technical argument” which is not subject to the “manifest fraud” standard.

The Defendant and Intervenors argue that neither the Arkansas Constitution nor any case decided by an Arkansas appellate court requires a legislatively proposed amendment to relate to a “single subject.” Rather, in Brockelhurst v. State, 195 Ark. 67, 111 S.W.2d 527 (1937), the Arkansas Supreme Court rejected a convicted criminal’s challenge to an amendment based on an alleged violation of Article 19, § 22. Id. at 72-73. The convicted criminal argued that the amendment was invalid because it contained one provision that allowed persons to be charged with crimes by information rather than indictment and also contained another provision directing the General Assembly to pay the salaries of prosecutors. Id. at 72. The Arkansas Supreme Court abruptly dismissed this challenge. It stated: “We perceive no objection to this manner or method of amending the Constitution as they both relate to the prosecuting attorney.” Id. at 72-73. Therefore, under Brockelhurst, as long as the provisions of a legislatively referred amendment embrace a common theme, then the referred amendment complies with the “separate vote” provision of Article 19, § 22, even if different sections of the legislatively referred amendment accomplish different tasks related to that theme.

In the instant case, all of the provisions of Issue No. 2 are related to and aimed at eliminating or easing constitutional restrictions on debt instruments such as loans and bonds. Section 1 of Issue No. 2 lifts the restrictions on interest rates applicable to “bonds issued by and loans made by or to governmental units.” Section 2 harmonizes the current restrictions on loans by federally insured depository institutions with federal law. Section 3 sets the maximum rate of

interest on all other loans or contracts at seventeen percent (17%) per annum. Section 4 takes advantage of the changes made in the preceding sections to allow a particular type of debt instrument; an energy efficiency project bond. The bonds allowed under Section 4 are feasible because of the changes adopted in the preceding sections of Issue No. 2. The remaining provisions of Issue No. 2 give effect to these first four sections. The common theme of removing or easing constitutional restrictions on debt instruments provides a rational basis for the General Assembly's decision to include these provisions in one proposed amendment. Therefore, the General Assembly did not violate Article 19, § 22 of the Arkansas Constitution when it included these provisions in one proposed amendment.

The Plaintiff's third argument is that the Defendant certified an illegal ballot title that fails to comply with the statutory requirement for its wording. Ark. Code Ann. § 7-9-204 states: "The title of the joint resolution proposing an amendment to the Arkansas Constitution shall be the ballot title of the proposed constitutional amendment." Ark. Code Ann. § 7-9-204. The Plaintiff argues that the Defendant lacks discretion to use a different ballot title because of the mandatory language used in the statute. Further, the Plaintiff again argues that this "technical violation" is not subject to the "manifest fraud" standard.

The Defendant and Intervenors responded that the Defendant properly certified the ballot title as specifically and explicitly directed by the General Assembly in Section 7 of HJR 1004. According to the Defendant and Intervenors, the general instruction found in Ark. Code Ann. § 7-9-204 must yield to the specific instruction found in Section 7 of HJR 1004. It is well established that "a general statute must yield when there is a specific statute involving the particular subject matter." Benton v. Gunter, 342 Ark. 543, 546, 29 S.W.3d 719 (2000). Since the Defendant adhered to the General Assembly's specific direction regarding the ballot title for

this specific referred amendment, the Defendant's failure to comply with Ark. Code Ann. § 7-9-204's general instruction does not render Issue No. 2's ballot title invalid.

If the General Assembly had not specified a ballot title for Issue No. 2 in HJR 1004, Ark. Code Ann. § 7-9-204 would obviously control Issue No. 2's ballot title. Since the General Assembly chose to specify a ballot title for Issue No. 2, however, that specific instruction trumps the general instruction found in Ark. Code Ann. § 7-9-204. Therefore, the Defendant certified a legal ballot title pursuant to the specific instructions of the General Assembly found in Section 7 of HJR 1004.

Finally, the Plaintiff contends that Issue No. 2 contains an invalid severability clause. The Plaintiff cites Roberts v. Priest, 334 Ark. 244, 973 S.W.2d 797 (1998), in which the Arkansas Supreme Court held that "this Court has no authority under Amendment No. 7 to rule upon or reform the ballot title at this stage of the proceeding." Id. at 247. Therefore, the Plaintiff argues that, if this Court holds any portion of this proposed amendment invalid, it must hold the whole proposed amendment invalid.

The Defendant and Intervenors respond that Roberts involved a challenge to an amendment proposed pursuant to Amendment 7, rendering it inapplicable to the present case, which involves a challenge to an amendment proposed pursuant to Article 19, § 22. Further, no authority exists which holds that the General Assembly may not include a severability clause in a legislatively referred constitutional amendment. Regardless, the issue of the validity of the severability clause is moot because this Court does not find that any portion of Issue No. 2 is invalid. Since the Court does not find any portion of Issue No. 2 invalid, the Court need not consider the validity of the severability clause.

For the foregoing reasons, this Court DENIES the Plaintiff's request for injunctive relief and for a Writ of Mandamus against the Secretary of State enjoining him from canvassing, counting or certifying any votes cast during the general election on the proposed constitutional amendment designated as Issue No. 2.

IT IS SO ORDERED. Dated this 2nd day of November, 2010.

Mary Catherine McGowan
CIRCUIT JUDGE

November 2, 2010
DATE

Judge *McGowan*
Date *11-2-10* Div *9th*
Jury Trial
Bench Trial
Non-Trial