IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

GULFSIDE CASINO PARTNERSHIP **PLAINTIFF**

vs. **Case No. 60CV-19-5832**

ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION and ARKANSAS RACING COMMISSION **DEFENDANTS**

BRIEF IN SUPPORT OF GULFSIDE'S
MOTION FOR PRELIMINARY INJUNCTION

In determining whether to issue a preliminary injunction pursuant to Rule 65, Ark. Rules Civ. Pro., the trial court must consider: (1) whether irreparable harm will result in the absence of an injunction, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *Baptist Health v. Murphy*, 365 Ark. 115, 121, 226 S.W.3d 800, 806 (2006). Whether to grant a preliminary injunction is within this Court's sound discretion, and this Court's decision will not be overturned on appeal absent a showing of abuse. *Id*. When the undisputed facts listed below are applied to the Supreme Court's caselaw, Gulfside is likely to succeed on the merits and will be irreparably harmed unless the Racing Commission is enjoined from considering additional applications during the pendency of this lawsuit. Therefore, the Court should issue an order, enjoining the Racing Commission from accepting or considering any other applications for a casino gaming license in Pope County, Arkansas, and from issuing a casino gaming license until further order of the Court.

Undisputed Facts

1. Amendment 100. Based on the pleadings and motions filed in this matter, the following material facts are undisputed. On November 6, 2018, Arkansans approved The Casino

Gaming Amendment of 2018, which went into effect on November 14, 2018 and was enumerated Amendment 100 to the Arkansas Constitution. Amendment 100, § 4(n) requires all applicants for a casino license in Pope County to submit to the Arkansas Racing Commission either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino is to be located. Further, if the proposed casino is to be located within a city or town, the applicant must also submit to the Racing Commission a letter of support from the mayor in the city or town where the applicant is proposing the casino to be located. The Amendment requires the Racing Commission to begin accepting applications for casino licenses no later than June 1, 2019. *See* Amend. 100, § (4)(f); First Amended Complaint ("Amended Complaint"), ¶ 43.

2. Letters submitted. In December 2018, Gulfside obtained letters of support from the duly elected local officials at the time and submitted them to the Racing Commission. Plaintiff's Amended Complaint, ¶¶ 19–21. On December 21, 2019, Pope County Judge Jim Ed Gibson—then the duly elected Pope County Judge, having served in that position for 20 years—wrote a letter of support in favor of Gulfside. *Id*. On December 26, 2018, Randall Horton, then the duly elected Mayor of Russellville, wrote a letter of support for Gulfside. Plaintiff's Amended Complaint, ¶¶ 22–23. Gulfside submitted Judge Gibson's letter to the Racing Commission on December 28, 2018. Plaintiff's Amended Complaint, ¶ 31. And Gulfside submitted Mayor Horton's letter to the Racing Commission on December 31, 2018. Plaintiff's Amended Complaint, § 32.

The Amendment establish three sets of requirements for one to be a qualified applicant for a license. On meeting these requirements, one is permitted to apply, and if there are more than one applicant, the Racing Commission choose which, in its opinion, is the best qualified. The qualified-applicant criteria under Amendment 100 are: (1) the applicant must have experience conducting

casino gaming; (2) the applicant must have local support from certain Pope County officials; and (3) certain things that must be true of the prospective applicant at the before the applicant ever submits the application. The Racing Commission's rule (and the statute codifying it) added a criterion to the local-support rules.

In December 2018, the Racing Commission took the position that any letter of support issued after the effective date of Amendment 100 would be valid. Three facts show this. First, on December 20, 2018, counsel for the Racing Commission expressly said this in an email to an employee of the Governor's office:

> [Question from Governor's staffer] I know…I'll be asked if the letter of reference in the rule on county judge is restrictive to the judge at the time of application submission or is broader—any county judge during a time in which the amendment was in effect.
>
> [Answer from Racing Commission counsel] Letter is valid if written after the Amendment became effective. If ARC gets more than one letter of support, the Commission will determine which applicant is the best qualified.

See Exhibit "1." Second, on December 26, 2018, Racing Commission held a meeting at which its counsel stated that a letter of support from a local-government official is effective as long as it is dated after Amendment. 100's effective date: November 14, 2018. Plaintiff's Amended Complaint, ¶¶ 26–28; Racing Commission's Answer, ¶ 26. Third, on December 26, 2018, the Racing Commission voted unanimously to approve publish for comment a draft version of Rule 2.13, which provided "Letters of support…required by these Rules and the Amendment, shall be dated after the effective date of the Amendment." Plaintiff's Amended Complaint, ¶¶ 28–29; Racing Commission's Answer ¶¶ 28–29.

3. New rules. But something changed between the end of December and the new year because on January 3, 2019, counsel for the Racing Commission proposed an amendment to Rule 2.13 of the Racing Commission's Rules to require that any letter of support be issued by the official

"holding office at the time of the submission of the application for a casino gaming license." Plaintiff's Amended Complaint, ¶ 33. That very day, less than an hour later, officials at the Department of Finance and Administration ("DFA") began calculating the effect of only three casinos on the state's general revenue. See Exhibit "2," email from John Shelnutt; Plaintiff's Amended Complaint, ¶ 34. On January 10, 2019, the Racing Commission met and approved the January 3 changes for publication and comment *Id*. at ¶ 35 On February 21, 2019, the Racing Commission met, considered all comments and objections to its proposed rules—including Gulfside's written and oral objections to the constitutionality of Rule 2.13(b)(b)—and adopted the proposed change. The General Assembly also enacted Act 371 of 2019 (codified at Ark. Code Ann. § 23-117-101), which went into effect on March 8, 2019. The new law codified the Racing Commission's rule that letters of support must be made by the local-government official in office at the time of the application. *Id.* at ¶¶ 41–42; Ark. Code Ann. § 23-117-101(b) ("A letter of support from the county judge…shall be dated and signed by the county judge…holding office at the time of the submission of an application for a casino license."). The following table compares the Amendment's eligibility criteria and the Racing Commission's eligibility criteria, with the January addition emphasized:

Amendment 100	**Rule 2.13(5)—"Minimum Qualifications for Non-Franchisor Applicant"**
(m) The Arkansas Racing Commission shall require all casino applicants for a casino license in Pope County and Jefferson County to demonstrate experience conducting casino gaming.	(a) All casino applicants for a casino license in Pope County…are required to demonstrate experience conducting casino gaming.
(n) The Arkansas Racing Commission shall require all casino applicants for a casino license in Pope County and Jefferson County to submit either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino	(b) All casino applicants for a casino license in Pope County and Jefferson County are required to submit either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino is to be located and, if the proposed

is to be located and, if the proposed casino is to be located within a city or town, shall also require all casino applicants to include a letter of support from the mayor in the city or town where the applicant is proposing the casino to be located.	casino is to be located within a city or town, are also required to submit a letter of support from the mayor in the city or town where the casino applicant is proposing the casino to be located. **All letters of support or resolutions by the Quorum Court, required by these Rules and the Amendment, shall be dated and signed by the County Judge, Quorum Court members, or Mayor holding office at the time of the submission of an application for a casino gaming license**.
(h) Prior to the submission of an application for a casino license, the owners, shareholders, board members, or officers of the casino applicant: (1) If an individual, shall not have been convicted of a disqualifying felony offense as defined by the Arkansas Racing Commission; (2) Shall not have previously had a casino license in any state revoked; (3) If an individual, shall not be under twenty-one years of age; and (4) If an individual, shall not be a county judge or mayor that provides a letter of support, or a quorum court member that votes in favor of a letter of support as identified in this Amendment.	(c) Prior to the submission of an application for a casino license, the owners, shareholders, board members, or officers of the casino applicant: (i) If an individual, shall not have been convicted of a disqualifying felony offense; (ii) Shall not have previously had a casino license in any state revoked; (iii) If an individual, shall not be under twenty-one years of age; and (iv) If an individual, shall not be a county judge or mayor that provides a letter of support, or a quorum court member that votes in favor of a letter of support as identified in the Amendment.

4. Application denied. On May 1, 2019, the Racing Commission opened the application window to receive applications for a casino gaming license in Pope County. On May 17, 2019, Gulfside formally applied to the Racing Commission for casino gaming license, attaching its previously submitted letters of support from Judge Gibson and Mayor Horton. The window closed on May 30, 2019. Plaintiff's Amended Complaint, ¶¶ 44–45, 52. On June 13, 2019, the Racing Commission met and denied Gulfside's application as incomplete due solely to the

failure to have letter of support from the Pope County Judge who took office on January 1, 2019. Plaintiff's Amended Complaint, ¶¶ 54, 56; Racing Commission's Answer, ¶¶ 54, 56.

5. Appeal denied. Pursuant to the Racing Commission's rules governing appeals, Gulfside appealed the denial of its application by filing a written request on June 19, 2019 to the Racing Commission for a hearing. Plaintiff's Amended Complaint, ¶ 58. The Racing Commission held the hearing on July 18, 2019, and denied the appeal on August 15, 2019. Plaintiff's Amended Complaint, ¶¶ 61, 63; Racing Commission's Answer, ¶¶ 61, 63. Gulfside then immediately brought this suit on the same day.

Argument

I. Gulfside is likely to succeed on the merits because Amendment 100 does not require letters of support be issued by a particular county judge, but the rule and statute do.

When the Arkansas Constitution lists eligibility criteria—as Amendment 100 does—the legislature (and any administrative body tasked with implementing some or all the constitutional provision) is prohibited from adding additional criteria. The two defendants in this case try to avoid this rule in different ways. The Racing Commission, impliedly admitting that they have established an additional qualification, mistakenly claims that Amendment 100 authorizes it to add the qualification. But as shown below, the Racing Commission has no such authority. In contrast to the Racing Commission's stance, DFA claims that the rule and statute are not additional qualifications, but merely "clarifications" of Amendment 100's provisions. As explained more below, this "clarification" argument—which the Supreme Court has rejected in *Proctor v. Daniels*, 2010 Ark. 206, 5, 392 S.W.3d 360, 363—is mistaken.

A. When the Arkansas Constitution creates a right and lists the eligibility criteria to exercise it, no rule-making body may add criteria to that list.

The Arkansas Supreme Court has held, numerous times and in several different areas of law, that when the Arkansas Constitution creates a right and lists the eligibility criteria to exercise that right, no rule-making body can add to that list. A review of these cases illustrates the critical legal standards that govern the current case.

One of the earliest cases in this area, *Mississippi County v. Green*, illustrates the main reason why, when the constitution fixes certain criteria, rule-making bodies are prohibited from setting additional criteria. 200 Ark. 204, 138 S.W.2d 377, 379 (1940). In *Green*, the Court considered whether a statute that required a county judge to be "learned in the law" acted as an additional qualification for office. Since the constitution (art. 27, § 29) already listed eligibility criteria to serve as a county judge, the Court declared the statute unconstitutional. The Court said that the mere fact that the constitution establishes a set of criteria justifies the inference that the legislature is prohibited from adding to the criteria: "The qualifications fixed by the constitution…**inferentially prohibits the legislature from fixing additional qualifications**." *Id*. (emphasis added). This inference is justified because, the Court explained, "[w]hy fix…[the qualifications] in the first place if the makers of the constitution did not intend to fix all the qualifications required, and why fix only a part of them and leave it to the legislature to fix other qualifications? There is no reasonable answer to these questions." *Id*.

The Court has applied this inference—which is not limited to a particular area of law—in at least three additional areas: term limits, voter-ID, and judicial office.

The Court applied this inference in *Allred v. McLoud* when addressing term limits. 343 Ark. 35, 31 S.W.3d 836 (2000). In *Allred*, the Court considered the constitutionality of an initiated county law that fixed term limits for county officials to five, two-year terms. The Court, citing *Green* and the inference explained above, determined that the county law was unconstitutional

because the qualifications for certain offices were already listed in the Arkansas Constitution. *Id*. at 40, 31 S.W.3d at 838.

Likewise, the Court has applied this inference in *Martin v. Kohls* to strike down a voter-ID law. 2014 Ark. 427, 444 S.W.3d 844. In *Kohls*, the Court considered the constitutionality of a statute that required "any person desiring to vote…[to p]resent proof of identity to the election official when appearing to vote in person either early or at the polls on election day." *Id*. at 12, 444 S.W.3d at 851. The "key issue" in the case was whether the challenged statute "imposes upon an Arkansas voter an additional qualification beyond those voter qualifications set forth in the Arkansas Constitution." *Id*. The trial court held that it did unconstitutionally establish an added qualification, and the Supreme Court agreed, holding that the voter-ID requirement was "unconstitutional on its face" because it "imposes a requirement that falls outside the ambit" of the constitutional list of eligibility criteria for one to vote. *Id*. at 15, 444 S.W.3d at 853–54.

Finally, the Court applied this inference in several cases involving eligibility to be appointed or elected to judicial office. *See Daniels v. Dennis*, 365 Ark. 338, 229 S.W.3d 880 (2006); *Proctor v. Daniels*, 2010 Ark. 206, 392 S.W.3d 360. In *Dennis*, an appointed judge brought an action in circuit court against the Secretary of State, seeking a declaratory judgment that a statute was unconstitutional in making the judge ineligible to run for a circuit-judge position in the same judicial district. 365 Ark. at 338–39, 229 S.W.3d at 881. The Court started its analysis by noting that the qualifications for judicial office are set out in Amendment 80, § 16 to the Arkansas Constitution. *Id*. at 340, 496 S.W.3d at 882. Relying in part on *Green* and the inference it explained, the *Dennis* Court declared the statute unconstitutional and noted that when the constitution establishes eligibility criteria, "the constitution acted as a restriction on any legislative power to impose additional qualifications." *Id*. at 341, 229 S.W.3d 882–83.

The Court reached the same conclusion for the same reasons in *Proctor v. Daniels*. There, the Court reviewed a statute that prohibited a judge, who had been removed from office for misconduct, from ever being appointed or elected to a subsequent judicial office as an additional qualification. 2010 Ark. 206, 1, 392 S.W.3d 360, 361. While the Court ultimately held that when judges are removed from office under Amendment 66, they can never be appointed or elected to judicial office, the Court held the statute unconstitutional as establishing an additional qualification. *Id*.

In summary, when the constitution lists eligibility criteria to exercise one's rights, the legislature (and any other rule-making body) is "inferentially prohibited" from adding to those criteria.

B. Amendment 100 does not give the Racing Commission any authority to add eligibility criteria for one to be considered a qualified applicant.

Recognizing the foregoing rules and caselaw, the Racing Commission appears to claim Amendment 100 affirmatively gives it the authority to add the requirement that the local support be issued by the county officials in office at the time of the application for a license. Exhibit 3; Racing Commission's Answer, ¶ 66. This is mistaken. While Amendment 100 gives the Racing Commission authority over *parts of* the process of obtaining a casino license, the Amendment does not give any authority to alter the eligibility rules.

When an attorney at the Bureau of Legislative Research ("BLR") asked the Racing Commission's counsel why it has added what "appears to be an addition…not mentioned in the language of Amendment 100," counsel for the Racing Commission gave a lengthy defense of this addition by referencing all the sections of Amendment 100 that authorize the Racing Commission to regulate in certain areas of Amendment 100. *Id*. Then he concluded that Amendment 100, § 4 authorizes the Racing Commission to add qualifications because it "requires the ARC…to

administer and regulate casino licenses, including their issuance and renewal, and to enforce the provisions of the Amendment relating to all casino licensees." *Id*.

This claim is mistaken because it wrongly expands the Racing Commission's authority over the *process* of applying for and issuing a license to also cover the *eligibility criteria* for one to be considered a qualified applicant for a license.

The question here is *not* whether the racing has authority under Amendment 100 to administer the process of applying for a casino license or to issue the actual licenses. All sides agree the Racing Commission has that authority under Amendment 100, § 4(a). Nor is the question whether the Racing Commission has authority under Amendment 100 to adopt rules necessary to carry out the Amendment's purposes. All sides agree on that. Rather, the question is whether Amendment 100 authorizes the Racing Commission to add to the Amendment's eligibility to criteria. The Racing Commission appears to claim that authority for itself, though in its response to the BLR attorney, it was unable to cite any such specific authority. That is because Amendment 100 gives no such authority.

In fact, the language of Amendment 100's eligibility criteria show that while the Amendment could have invested the Racing Commission with the power it claims, the Amendment did not. Amendment 100, in section 4(h)(1), prohibits any individual applicant from being considered a qualified applicant if he or she has committed a felony "as defined by the Racing Commission." Here, the constitution sets the eligibility criteria—"no felonies"—and expressly vests the Racing Commission with authority to determine what that means in any given case. But because Amendment 100 does not grant that kind of discretion or authority to the Racing Commission for any of the other eligibility criteria, the Racing Commission is without any authority to alter the general rule that rule-making bodies cannot add additional eligibility criteria.

C. When the Racing Commission and General Assembly created the requirement that the letter of support be issued by a particular county judge, the requirement added an additional eligibility criterion not found in Amendment 100.

The Amendment establish three sets of requirements: (1) experience conducting casino gaming; (2) local support from certain Pope County officials; and (3) certain things that must be true of the prospective applicant at the before the applicant ever submits the application. The Racing Commission's rule (and the statute codifying it) added a criterion to the local-support rules. Even the Governor acknowledges that this is an added requirement. In an email sent to the Arkansas Democrat-Gazette, the Governor stated, "There was a general consensus that any application should be accompanied with the support of the current office-holder, and I agreed. As a result the legislature passed a law **making that requirement**." See Exhibit "4," Jeannie Roberts, "County Exec Says City Gets Casino-Deal Perks", Arkansas Democrat-Gazette, September 7, 2019. (Emphasis added.) As stated by the Governor, the legislature made the requirement that the letter of support must come from the county judge holding office at the time the application is submitted because the legislature believed that should be a requirement. Unfortunately for the legislature, it does not have the authority to add requirements to those enumerated by a constitutional amendment.

The clearest way to see that the rule and statute at issue here add additional criteria to Amendment 100 is to examine two calendar windows: the time between the Amendment's effective date and December 31, 2018, on the one hand, and the time at and after January 10, 2019, on the other hand.

Amendment 100 became effective on November 14, 2018. Between that time and the end of the year, if a prospective applicant obtained and submitted to the Racing Commission a letter of support from the Pope County Judge—who was Jim Ed Gibson—then the applicant met

Amendment 100's local-support criterion. As noted in the undisputed facts, above, this was exactly the original view of the Racing Commission, and it is exactly what happened with Gulfside.

But the 2019 rule and statute changed things. The rule and statute require that, not only must a prospective applicant obtain and submit a letter of support from a Pope County Judge, the letter must come from the judge in office at the time of the application. But given the facts of this case, the rule and statute are a smokescreen for saying: "no letters of support issued in 2018 count." When the Racing Commission passed its rule, and when the legislature enacted the statute, they knew that the office of the Pope County Judge had turned over and knew that the new county judge would not issue any letters of support. Plaintiff's Amended Complaint, ¶ 37; Racing Commission's Answer, ¶ 37. Armed with this knowledge, the Racing Commission adopted a rule that it knew would eliminate the only qualified applicant at the time. Such a rule is not consistent with the purpose of Amendment 100 and is, therefore, unconstitutional.

The Arkansas Supreme Court's decision in *Dep't of Human Servs. & Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 238 S.W.3d 1 (2006), is controlling. In *Howard*, the Arkansas Supreme Court held that a regulation promulgated by the Child Welfare Agency Review Board ("Review Board"), which prohibited a person from serving as a foster parent if any member of the person's household was homosexual, was unconstitutional because the regulation was not in accordance with the law and, therefore, was outside the scope of the Review Board's authority. The Review Board adopted the regulation pursuant to Ark. Code Ann. § 9-28-405(c)(1), which gave the Review Board the authority to "promulgate rules and regulations that (1) promote the health, safety, and welfare of children[.]" *Howard*, 367 Ark. at 61, 238 S.W.3d at 5. Based, in part, upon the testimony of the members of the Review Board, the Court held that "Regulation 200.3.2 does not promote the health, safety, or welfare of foster children but rather **acts to exclude**

a set of individuals from becoming foster parents based upon morality and bias." *Howard*, 367 Ark. at 62, 238 S.W.3d at 6 (emphasis added). Because the regulation was not consistent with the Review Board's statutory authority, the Supreme Court held that the regulation was unconstitutional.

Likewise, paragraph 5(b) of Rule 2.13 is unconstitutional, as it is not consistent with Amendment 100 and, as such, is outside scope of the Racing Commission's authority under the Constitution. Amendment 100 authorizes the Racing Commission to "adopt rules necessary to carry out the purposes of [the] Amendment," and the Amendment leaves no room for doubt as to what those purposes are—the Racing Commission "**shall** issue four casino licenses" and "**shall** award a casino license to a casino applicant for a casino to be located in Pope County within two miles of the city limits of the county seat." Ark. Const. Amend. 100, §§ 4(c), (i), and (k). The Racing Commission has no discretion on these points. The Racing Commission is empowered to decide **which,** among several applicants, is entitled to receive a casino license. But when presented with at least one applicant who meets the minimum requirements set out by Amendment 100, it cannot decide that **no** applicant may receive a license. As in *Howard*, the proposed Rule 2.13 is not intended to effectuate the agency's mission but, rather, to exclude a qualified applicant from receiving a license. Thus, Rule 2.13 is constitutionally infirm.

Therefore, the challenged rule and statute have impermissibly added an additional qualification to the set of criteria for one to be a qualified applicant under Amendment 100.

DFA, in its Motion to Dismiss, offers two rebuttals. First, DFA claims the rule merely "clarified" Amendment 100, but the Supreme Court has rejected the kind of "clarification" rebuttal that DFA offers here. DFA claims that the challenged statute and rule "permissibly clarify which county judge…is authorized to sign a letter of support on behalf of a casino applicant." See Brief

in Support of Defendants' Motion to Dismiss, pg. 13. But when faced with this kind of rebuttal in *Proctor v. Daniels*, the Supreme Court summarily disregarded it, because it is for the judicial to interpret the constitution:

> By enacting [the challenged statute] the General Assembly attempted to interpret the meaning of a sanction found in amendment 66—removal—and determined that removal from judicial office was permanent and, therefore, a judge removed from office could not be appointed or elected thereafter to serve as judge. We do not agree with appellees' contention that the statute is constitutional because it merely "clarifies" a qualification already created by amendment 66 of the Arkansas Constitution. **It is the duty of this court, not the General Assembly, to interpret the constitution**.

2010 Ark. 206, 5, 392 S.W.3d 360, 363 (emphasis added).

Proctor is especially significant because, there, the Court went on to hold that Amendment 66 *did* prohibit a judge from forever holding judicial office—which is just what the statute stated. But because the legislature was purporting to interpret the constitution and establish a separate, statutory requirement, the Supreme Court unanimously struck down the statute and disregarded the "clarification" argument. The same result and reasoning apply here all the more. The Racing Commission and the General Assembly have purported to interpret a constitutional provision they have no authority to interpret and have added an eligibility criterion. As it was in *Proctor*, the claim that the rule and statute simply "clarify" the statute should disregarded.

DFA's second attempted rebuttal—a reference to *Landers v. Stone*, 2016 Ark. 272—also fails. In *Landers*, a group of judges sued to invalidate a statute that required judges to choose between either running for election to judicial office after a certain age or forfeiting their pensions. As the *Landers* Court explained, the plaintiffs/appellants argued that the legislature—knowing it

could not add an additional qualification to serve in judicial office—had attempted to *indirectly* do so by penalizing a judge who chose to seek judicial office after the age cutoff:

> They [plaintiffs/appellants] argue that the amendment establishes the qualifications for becoming a judge in this state and that the forfeiture provisions of the statutes add an additional age-based qualification by creating a de facto prohibition against retaining office past the age of seventy. Their argument is based on the principle that the General Assembly does not possess the authority to augment the qualifications contained in the constitution. Appellants assert that, by exacting a penalty on their constitutional eligibility to serve, the laws indirectly accomplish what the General Assembly lacks the direct authority to do.

2016 Ark. 272, 6, 496 S.W.3d 370, 375.

DFA, which puts all its eggs in the *Landers* basket, mishandles the case, claiming it sweeps away the line of cases discussed above governing additional qualifications. See Brief in Support of Defendants' Motion to Dismiss, pg. 10. *Landers* dealt with a statute that placed a *condition on the exercise of a right* but did not alter *the right itself*. The challenged statute in *Landers* did not set additional criteria for one to qualify to run for judicial office. Rather, the Court said, the statute conditioned the exercise of that right on the person forfeiting his or her pension if past a certain age. 2016 Ark. 272, 9, 496 S.W. 370, 376–77. That is why the statute passed constitutional scrutiny: it did not act as an "absolute disqualification."

Landers would control if, for example, the Racing Commission and General Assembly set different application fees based on whether the applicant's letter-of-support was from a county judge sitting at the time of the application. Amendment 100, § 4(e)(1) authorizes the Racing Commission to set the application fee for a license, but the fee "shall not exceed $250,000." Suppose the Racing Commission created a rule saying that applicants with letters from sitting county judges have $1 application fee. But applicants with letters from a county judge who—though sitting at the time of the letters execution— was not in office at the application date must

pay a $250,000 application fee. That would make the current case fall within *Landers*. The Racing Commission would not be changing the criteria for one to be an eligible applicant, but it would be penalizing or discouraging applicants with certain letters. Under *Landers*, such a rule would not be an additional qualification. Or the Racing Commission could say it plans to give greater weight to applicants who have letters of support from county judges who are sitting at the time of the application.

But, contrary to either of these hypotheticals, what the Racing Commission has actually done in the current case falls squarely within *Green, Allred, Proctor*, and *Dennis*: the challenged rule and statute attempt to change who is eligible to even apply. Gulfside met Amendment 100's requirements to be considered a qualified applicant—but it did not meet the Racing Commission's requirements. As apparently even the Racing Commission acknowledges, the rule and statute are added, direct qualifications. And one need look, not only to the Racing Commission's statements, but also to the undisputed facts here: Gulfside's application was summarily denied as incomplete because it "failed to meet the **requirements** of the ARC rules, of Amendment 100, and of Arkansas law, because the applications did not contain the proper letters of support." *See* Plaintiff's Amended Complaint, ¶ 56. (Emphasis added.) In so finding, the Racing Commission admitted that Rule 2.13(5)(b) and Ark. Code Ann. § 23-117-101 imposed "requirements," which resulted in the absolute disqualification of Gulfside as an applicant. The rule worked an "absolute disqualification."

Therefore, far from clarifying Amendment 100, the challenged rule and statute absolutely disqualified Gulfside based on an eligibility criterion that was impermissibly added to Amendment 100.

II. In the absence of a preliminary injunction, irreparable harm will result.

The irreparable harm is straightforward. Amendment 100 permits only a single license to be issued to operate a casino in Pope County. The Racing Commission has already opened a second application window and is receiving applications. Racing Commission's Answer at ¶ 74. Based on the foregoing facts and law, Gulfside's application was wrongly denied as incomplete, and the second application period should never have been opened. If a license is awarded in this second application period, and before Gulfside has had a chance to adjudicate its claims, Gulfside will be irreparably harmed.

Wherefore, Gulfside respectfully requests this Court issue a preliminary injunction, ordering the Racing Commission to refrain, for the duration of this litigation, from issuing any license to operate a casino in Pope County.

Dated: October 7, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, state upon oath that I have caused a true and correct copy of the above and foregoing to be served upon counsel for all parties in this case, via electronic mail, as follows:

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