

IN THE SUPREME COURT OF OHIO

STATE EX REL. RESPONSIBLEOHIO, et al. :
: *Relator,* : Case No. 2015-1411
: :
v. : Original Action in Mandamus
: Expedited Election Case
THE OHIO BALLOT BOARD, et al., :
: *Respondents.* :

**BRIEF OF AMICI CURIAE FRANK E. WOOD
AND DGF, LLC IN SUPPORT OF RELATORS**

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INTRODUCTION

Amici Curiae Frank E. Wood and DGF LLC submit this brief under Rule 16.06 in support of Relators' Claim Two, which challenges the misleading and inaccurate Ballot Title for State Issue 3 (the "Proposed Amendment") on which Ohioans will vote on this November. Put simply, the Secretary of State's Title says that the Proposed Amendment will grant a "monopoly" for the production and sale of marijuana, which is factually false, misleading, and designed to prejudice the voters against the Proposed Amendment. The Secretary's actions amount to an abuse of discretion and this Court must invalidate the Ballot Title. The Proposed Amendment establishes no "monopoly," under the law, economic theory, or as that term is commonly understood. There is no limit to the number of facilities producing marijuana infused products that the State can license, there will be up to 1,100 retail outlets, and there will be, at all times, at least ten growth and cultivation farms. And although the Secretary has focused on the ten growth farms those farms are not "monopolists." They will each likely begin with about 10% of the growing "market" and will compete on price, quality, and output. There is no definition of "monopoly" that would cover this arrangement. And regardless, the Secretary has not even attempted to defend how the production facilities and sales outlets are also monopolies. For these reasons, this Court should invalidate the Ballot Title.

STATEMENT OF INTEREST

DGF, LLC is a limited liability company organized under the laws of the State of Ohio. DGF is managed by Frank E. Wood, who also owns indirectly a 50% interest in its equity. Mr. Wood, a resident of Cincinnati, is a veteran entrepreneur who has owned and managed a number of radio holding companies among other enterprises. DGF was formed for the purpose of supporting the adoption of the Proposed Amendment and becoming the principal owner of one of

the ten entities seeking to be licensed to grow and distribute marijuana in the State of Ohio as contemplated by the Proposed Amendment.

STATEMENT OF FACTS

The marijuana growing, production, and sales process that the Proposed Amendment would establish in Ohio is the result of careful research and drafting. Indeed, the specific decision to set up ten Marijuana Growth, Cultivation & Extraction (“MGCE”) facilities rather than allowing an unfettered free-for-all makes sense for regulatory, safety, taxation, and supply reasons. A study by the Rand Corporation outlines the particular advantages of this kind of system.

First, by issuing only a limited number of grower licenses, the State increases the value of each license. License holders therefore have an incentive to retain their licenses by cooperating with the State and meeting regulatory requirements. *See* Jonathan P. Caulkins et al., Rand Corp., *Considering Marijuana Legalization: Insights for Vermont and Other Jurisdictions* 67 (2015) (noting that “offer[ing] only a limited number of licenses . . . makes the licenses valuable—valuable enough that firms will have a strong incentive to cooperate with regulators rather than risk revocation”). Second, “[l]imiting the number of licensees also makes monitoring their behavior easier.” *Id.*; *see also id.* at 71 (noting that this system encourages high quality product assurance and permits the government to “restrain suppliers’ promotion of harmful use”).¹ Thus,

¹ Indeed, in Colorado, where the state has not restricted the number of growers, the state has struggled to appropriately supervise and regulate appropriately the practices of growers. *See, e.g.,* Katie Campbell, New England Center for Investigative Reporting, Institute for Nonprofit News, *Rarely Inspected, Medical Marijuana Caregivers Could Feed Illegal Markets* (Aug. 19, 2015), <http://necir.org/2015/08/19/rarely-inspected-medical-marijuana-caregivers-not-could-feed-illegal-markets/> (accessed Sept. 4, 2015) (discussing the State of Colorado’s lack of authority and oversight over the state’s numerous growers).

by issuing only ten licenses, the State will both encourage growers to comply with regulatory requirements and retain its ability to effectively monitor the growers.²

Furthermore, that there will be ten MCGE facilities initially does not mean that there will always be ten. As part of the regulatory process, the State can decide to add another MCGE facility after four years to “ensure that the supply of regulated marijuana is adequate to meet consumer demand.” Section H. The Proposed Amendment also provides the State authority to revoke and regrant a license in prescribed circumstances. *Id.*

In fact, the State of Ohio and people of Ohio have recognized that similar regulation makes sense in many other areas, including, most recently, casinos, as well as liquor and liquor sales, lottery ticket sales, and many other areas that the State highly regulates and controls. None of these are viewed or described generally as “monopolies.” The Secretary has yet to explain why the structure incorporated in the Proposed Amendment should be treated differently.

ARGUMENT

Amici submit this brief in support of Relators’ Claim Two, which challenges the misleading and inaccurate Ballot Title for the Proposed Amendment. The Ohio Constitution tasks the Secretary of State with preparing a ballot title for any proposed constitutional amendment that is a “true and impartial statement of the measures in such language that the ballot title shall not be likely to create prejudice for or against the measure.” O.R.C. 3519.21.

² Given the advantages of this approach, it is unsurprising that several states permitting the use of medical marijuana have issued only a small number of grower licenses. *See, e.g.*, Del. Code Ann. 16 § 4914A(c) (capping initial number of growers at three); Jennifer Brooks, Star Tribune, *State Medical Pot Manufacturers Chosen; Production Sites in Cottage Grove, Otsego* (Dec. 1, 2014), <http://www.startribune.com/new-medical-pot-makers-will-operate-in-cottage-grove-otsego/284327061/> (accessed Sept. 4, 2015) (noting that Minnesota initially permitted only two growing sites); N.H. Rev. Stat. Ann. § 126-X:7(III) (limiting number of growers at any given time to four); D.C. Code § 7-1671.06(d)(3)(A) (providing for a maximum number of permitted “cultivation centers”); N.Y. Comp. Codes R. & Regs. tit. 10, § 1004.6(b) (providing that a maximum of five growers could be registered initially); *see also* Vt. Stat. Ann. tit. 18, § 4474f(b) (providing that no more than four dispensaries may be licensed at any given time).

And this Court has indicated that “[i]n order to pass constitutional muster, ‘(t)he text of a ballot statement must fairly and accurately present the question or issue to be decided in order to assure a free, intelligent and informed vote by the average citizen affected.’” *State ex rel. Bailey v. Celebrezze*, 67 Ohio St.2d 516, 519, 426 N.E.2d 493 (1981) (quoting *Markus v. Trumbull Cnty. Bd. of Elections*, 22 Ohio St.2d 197, 259 N.E.2d 501 (1970), paragraph four of the syllabus). The Secretary of State has violated that directive here. The Secretary’s proposed Ballot Title is neither accurate nor impartial. Moreover, it plainly reflects the Secretary’s own, personal opposition to the Proposed Amendment.

The Secretary of State issued the Ballot Title on August 25, 2015.³ For Issue Three it is:

Grants a monopoly for the commercial production and sale of marijuana for recreational and medicinal purposes.

This Title is factually inaccurate and will mislead the voters in a manner intended to create prejudice against the measure. This Court should declare the Secretary’s Ballot Title invalid and, given the proximity of the election, direct the Secretary to adopt the title that the Counsel for the Relators proposed, “State Issue 3 – Marijuana Legalization Amendment.”

There are three main aspects to the commercial process that will culminate in marijuana retail sales under the Proposed Amendment. There will be the growing and cultivation of the marijuana at the MCGE facilities, the manufacture, processing, and production of the marijuana-infused products, and the ultimate retail sales. (*See* Sections F, G, and H of the Proposed Amendment.) There is no “monopoly” in any common or legal sense of that word with regard to any aspect of this commercial process.

³ *See* Ohio Secretary of State, *Husted Issues Titles for Statewide Ballot Questions* (Aug. 25, 2015), <http://sos.state.oh.us/sos/mediaCenter/2015/2015-08-25.aspx> (accessed Sept. 4, 2015).

The word “monopoly” literally means “one” or “sole” (from the Greek word “mono”) “seller” (from the Greek word “polion”).⁴ And the Ohio Attorney General’s “Glossary of Antitrust Related Terms” defines a “monopolist” as “a firm that is the only, or virtually the only, seller of a good or service in the market.”⁵

Legal and economic definitions of monopoly focus on whether one firm has enough market power to control the price or output of a product. According to the leading antitrust treatise, “[m]onopoly exists when one firm controls all or the bulk of a product’s output, and no other firm can enter the market, or expand output, at comparable costs.” IIB Areeda & Hovenkamp, *Antitrust Law*, ¶ 403a, at 7 (4th ed. 2014). To be sure, the “monopolist” need not control 100% of output, “antitrust lawyers often use the word ‘monopolist’ to describe any firm with a dominant share – say 65 percent or more – of a properly defined relevant market.” *Id.* at n.1.

The key is that there is one and only one dominant firm in a “monopoly” state of affairs. Under federal law, for example, Section 2 of the Sherman Act prohibits monopolies and Section 1 prohibits collusion or conspiracy among a group of competitors. *See* 15 U.S.C. §§ 1, 2.⁶ A claim that alleges a Section 2 “monopoly” involves single-firm anticompetitive behavior only. *See, e.g., Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1416 (7th Cir. 1989). The courts have consistently rejected the view that there can be joint or shared monopolies. *See, e.g., Sun Dun*

⁴ *See* Dictionary.com, *monopoly*, <http://dictionary.reference.com/browse/monopoly?s=t> (accessed Sept. 4, 2015).

⁵ *See* Ohio Attorney General, *Glossary of Antitrust Related Terms*, <http://www.ohioattorneygeneral.gov/Legal/Antitrust/Antitrust-Glossary> (accessed Sept. 4, 2015).

⁶ Ohio’s antitrust statutes, the Valentine Act, were modeled after the Sherman Act and are interpreted in light of federal judicial constructions of the Sherman Act. *C.K. & J.K., Inc. v. Fairview Shopping Ctr.*, 63 Ohio St.2d 201, 204, 407 N.E.2d 507, 508-09 (1980).

Inc. of Washington v. Coca-Cola Co., 740 F. Supp. 381, 390 (D. Md. 1990) (“an attempt to allege the necessary market power by aggregating the market power of several defendants is mere tautology”) (citing *Consolidated Terminal Sys. v. ITT World Comm’ns*, 535 F. Supp. 225, 228 (S.D.N.Y. 1982)). “[I]n order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a *particular* defendant.” *Consolidated Terminal Sys.*, 535 F. Supp. at 229 (emphasis added).

Given this backdrop, it is apparent that the Secretary’s Ballot Title is inaccurate and misleading. The Title says that the Proposed Amendment grants a “monopoly for the commercial production and sale” of marijuana in Ohio. With regard to product manufacturing, there is no limit in the Proposed Amendment on the number of Marijuana Product Manufacturing (“MPM”) facilities. *See* Section G. Those facilities will produce the marijuana and medical marijuana products and will be licensed by the Marijuana Control Commissions based on applications. In no event, will there be a production “monopolist.”

Next, with regard to “sales,” the Proposed Amendment does not set forth a specific number of retail sales outlets. Instead, the Proposed Amendment will cap the number of stores based on the state’s population. *See* Section H. Currently, that number would be 1,100. If even a fraction of those stores are actually licensed and established, there will not be a “monopoly.” The Proposed Amendment also does not limit the number of not-for-profit medical marijuana dispensaries. *See* Section C.

For these reasons alone, it is apparent that the Secretary has abused his discretion with regard to the Ballot Title, because there is no production and sales monopoly granted by the Proposed Amendment. Indeed, the opposite is true.

Perhaps recognizing these fatal flaws in the Ballot Title, the Secretary has tried to focus attention specifically on the number of MGCE facilities permitted by Section F of the Proposed Amendment. But that focus does not change the misleading nature of the Ballot Title with respect to production and sales, as outlined above. And in any event, there is no “monopoly” with respect to the ten MGCE facilities either. The Proposed Amendment does not set up a dominant MGCE firm with the ability to control price and output. Each grower is incentivized to maximize its share of the growing “market” as they begin to compete with one another. And even if some MGCE facility begins to acquire additional market share, that would be the result of vigorous market competition, not the way that the Proposed Amendment sets up the MGCE facilities to begin with.

The Secretary has tried to bolster his public argument by asserting that a “monopoly” is any “person or group having complete control over something.”⁷ Putting aside the impossible vagueness of this supposed definition of “monopoly” – what kind of “group”? what is “control”? what does “something” encompass? – the Secretary’s position proves too much in this context. By the Secretary’s logic, every single market for every single product can be defined as a “monopoly.” For example, if one defined a “group” to be all car manufacturers, like Ford, GM, Toyota, Honda etc., then that “group” of car manufacturers would, according to the Secretary, constitute a “monopoly” for the production of automobiles. This is nothing more than tautological “reasoning.” Yet this is exactly what the Secretary is doing here, placing all ten MCGE competitors together in a “group” and calling them a monopoly. This makes no sense. *See, e.g., Sun Dun Inc., supra*, 740 F. Supp. at 390 (“conclusory allegations to the effect that

⁷ *See* Jim Provance, Toledo Blade, *Language clouds marijuana ballot question* (Aug. 26, 2015), <http://www.toledoblade.com/Politics/2015/08/26/Language-clouds-marijuana-ballot-question.html> (accessed Sept. 4, 2015).

defendants as a group possessed monopoly power or dominant market power do not meet the requirements of [Sherman Act Section 2 monopolization]”).

Indeed, there is no way that a group of ten unaffiliated firms, each with a relatively equal share of the market, could have control over price or output in a market absent collusion or a conspiratorial agreement (which of course would be illegal under existing Federal and State antitrust laws). For example, as part of its “Horizontal Merger Guidelines,” the U.S. Department of Justice and the Federal Trade Commission have defined what a concentrated market looks like. The agencies commonly use a metric called the Herfindahl-Hirschman Index (“HHI”). *See ProMedica Health Sys. v. FTC*, 749 F.3d 559, 568-69 (6th Cir. 2014). HHI is calculated by summing the squares of the individual firms’ market shares, which are represented as whole numbers. Thus, a market with one firm, has an HHI of 10000 (*i.e.* 100 squared) and is completely concentrated. Assuming a ten percent market share for each MCGE when the Proposed Amendment takes effect, the HHI of this market will be 1000 (10 squared x 10 firms). If a market has an HHI below 1500, DOJ and FTC classify that as an “unconcentrated market” that does not raise competitive concerns. *See* U.S. Dep’t of Justice and Federal Trade Comm’n, Horizontal Merger Guidelines §5.3 (issued Aug. 19, 2010).

Therefore, as a factual and legal matter, the Proposed Amendment does not, in the words of the Secretary, “[g]rant[] a monopoly for the commercial production and sale of marijuana for recreational and medicinal purposes.” It is false with regard to the MCGE facilities, the manufacturing facilities, the not-for-profit dispensaries, and the retail outlets. Instead, the false “monopoly” moniker is plainly designed either to confuse and mislead the voters as to the provisions of the Proposed Amendment or to prejudice them against the Proposed Amendment.

There can be no doubt that the “monopoly” tag is pejorative.⁸ Although a monopoly per se is not necessarily illegal, it is no stretch to say that they are viewed negatively as stifling competition and innovation and yielding inefficient pricing and output. This Court has struck down misleading ballot language in the past and should do so here. *See, e.g., State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St.3d 257, 2012-Ohio-4149, 978 N.E.2d 119; *State ex rel. Bailey v. Celebrezze*, 67 Ohio St.2d 516, 426 N.E.2d 493 (1981).

CONCLUSION

For the reasons stated above, Amici Curiae respectfully request that the Court invalidate the Ballot Title in accordance with Relators’ Claim Two and, given the proximity of the election, direct him to adopt Relators’ suggested title: “State Issue 3 – Marijuana Legalization Amendment.”

⁸ *See* Bevier, “Copyright, Trespass and the First Amendment,” *Social Philosophy & Policy* 21:2, at 115 (2004) (“to invoke the pejorative ‘monopoly,’ even rhetorically”); Tollison, “An Economist Looks at the Patent System,” National Bureau of Standards, *Proceedings of the Conference on the Public Need and the Role of the Inventor* (1973) (“[a]nd monopoly is a pejorative term”); Ford, “Free Markets, Monopolies, and Copyright,” Phoenix Center for Advanced Legal & Economic Public Policy Studies (2014) (“those wishing to argue that copyright is antithetical to laissez-faire capitalism often seek to invoke the word ‘monopoly’ because of its pejorative nature”).

Respectfully submitted,

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