Cite as 2022 Ark. 167

# SUPREME COURT OF ARKANSAS

No. CV-22-482

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| | **Opinion Delivered:** September 22, 2022 |
| EDDIE ARMSTRONG AND LANCE HUEY, INDIVIDUALLY AND ON BEHALF OF RESPONSIBLE GROWTH ARKANSAS, A BALLOT QUESTION COMMITTEE<br>PETITIONERS | AN ORIGINAL ACTION |
| V. | |
| JOHN THURSTON, IN HIS OFFICIAL CAPACITIES AS SECRETARY OF STATE AND CHAIR OF THE STATE BOARD OF ELECTION COMMISSIONERS; STATE BOARD OF ELECTION COMMISSIONERS<br>RESPONDENTS | |
| SAVE ARKANSAS FROM EPIDEMIC, A BALLOT QUESTION COMMITTEE; AND DAVID BURNETT, INDIVIDUALLY AND AS CHAIRMAN OF SAVE ARKANSAS FROM EPIDEMIC BALLOT QUESTION COMMITTEE<br>INTERVENORS | PETITION GRANTED. |
| SAFE AND SECURE COMMUNITIES, A BALLOT QUESTION COMMITTEE; AND MICHAEL MCCAULEY, INDIVIDUALLY AND AS TREASURER OF SAFE AND SECURE COMMUNITIES<br>INTERVENORS | |

**ROBIN F. WYNNE, Associate Justice**

Petitioners, Eddie Armstrong and Lance Huey, individually and on behalf of Responsible Growth Arkansas, have filed an original action asking this court to vacate the determination of the State Board of Election Commissioners (the Board) and the Secretary of State not to certify the ballot title for a proposed constitutional amendment authorizing the adult possession and use of cannabis. Petitioners ask this court to order the Secretary of State to certify the proposed amendment for inclusion on the ballot at the November 8, 2022 general election. Two ballot-question committees, Save Arkansas From Epidemic and Safe and Secure Communities, have intervened in support of the decision not to certify the ballot title. This court has jurisdiction under amendment 7, as codified in article 5, section 1 of the Arkansas Constitution; section 2(D)(4) of amendment 80; and Arkansas Supreme Court Rule 6-5(a). Petitioners argue that the ballot title is sufficient under this court's precedent and that Arkansas Code Annotated section 7-9-111's ballot-title certification process is unconstitutional. We grant the petition.

## I. *Background*

On July 8, 2022, Petitioners submitted to the Secretary of State a petition for a proposed constitutional amendment with the popular name "An Amendment to Authorize the Possession, Personal Use, and Consumption of Cannabis by Adults, to Authorize the Cultivation and Sale of Cannabis by Licensed Commercial Facilities, and to Provide for the Regulation of those Facilities." As its popular name suggests, the proposed amendment would authorize the adult possession and use of cannabis and make several changes to existing law, including amendment 98, which governs medical marijuana. The complete ballot title is appended to this opinion. Of particular significance, the ballot title states that

one change to amendment 98 is "repealing and replacing Amendment 98, §§ 8(e)(5)(A)–(B) and 8(e)(8)(A)–(F) with requirements for child-proof packaging and restrictions on advertising that appeals to children. . . ." The Secretary of State certified that the petition had met the signature requirements on August 2, 2022.

Under Act 376 of 2019, codified in relevant part at Arkansas Code Annotated section 7-9-111(i) (Supp. 2021), the Board was charged with certifying the popular name and ballot title of the proposed amendment. The Board declined to certify the popular name and ballot title at a meeting on August 3, 2022. In a written notice issued the following day, the Board stated that the ballot title is misleading because it omits the fact that the proposed amendment would repeal amendment 98, section 8(e)(5)(A)'s limitation on the maximum tetrahydrocannabinol (THC) content per portion, which the Board said was material information voters would need to know when voting for or against the measure. The Board also reasoned that failing to explain that the proposed amendment would repeal the THC dosage limit—while stating that the repealed section would be replaced with requirements for child-proof packaging and restrictions on advertising—is misleading because it obscures the removal of a protective dosage measure. As required under section 7-9-111(i)(4)(A)(iii), the Board notified the Secretary of State that it had declined to certify the popular name and ballot title.

After the Board declined to certify the popular name and ballot title, Petitioners filed this original action challenging the Board's decision and moved for a preliminary injunction. This court ordered the Secretary of State to conditionally certify the proposed amendment pending our decision. Two ballot-question committees, Save Arkansas From Epidemic and

Safe and Secure Communities, intervened with this court's permission. The Secretary of State declared the proposed measure insufficient on September 13, 2022.

II. *Constitutionality of Arkansas Code Annotated Section 7-9-111(i)*

Although Petitioners discuss the constitutionality of section 7-9-111(i) last in their petition and brief, we address it before reaching the sufficiency issue. Respondents urge us to decline to address the constitutional issue. It is our duty to refrain from addressing constitutional issues if or when the case can be disposed of without determining constitutional questions. *Tollett v. Wilson*, 2020 Ark. 326, at 8–9, 608 S.W.3d 602, 608. However, we cannot appropriately dispose of this case without addressing the constitutionality of the statute at issue. Respondents also argue that this issue is not properly before us because they contend that Petitioners were required to proceed under the Declaratory Judgment Act. Ark. Code Ann. §§ 16-11-101 et seq. (Repl. 2016 & Supp. 2021). But the issue of the validity of the statute is before us in this original action that does not seek declaratory relief but rather seeks a direct remedy. *Finn v. McCuen*, 303 Ark. 418, 422, 798 S.W.2d 34, 36 (1990), *overruled on other grounds by Stilley v. Priest*, 341 Ark. 329, 16 S.W.3d 251 (2000). Accordingly, it is appropriate for us to examine the constitutionality of section 7-9-111(i).

In considering any constitutional challenge to a statute, we begin with the axiom that every act carries a strong presumption of constitutionality. *McCarty v. Ark. St. Plant Bd.*, 2021 Ark. 105, at 2, 622 S.W.3d 162, 164. The burden of proof is on the party challenging a statute to prove its unconstitutionality, and we resolve all doubts in favor of upholding the constitutionality of the statute, if possible. *Id.* at 2–3, 622 S.W.3d at 164. This court will

strike down a statute only when there is a clear and unmistakable conflict between the statute and the constitution. *Id.* at 3, 622 S.W.3d at 164. Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. *Cherokee Nation Businesses, LLC v. Gulfside Casino P'ship*, 2021 Ark. 183, at 8, 623 S.W.3d 284, 289. Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision. *Id.*

Section 7-9-111(i) provides:

> (1) When a statewide initiative petition or statewide referendum petition is submitted to the Secretary of State for determination of the sufficiency of the signatures, the Secretary of State shall submit the ballot title and popular name of the proposed measure to the board for certification as required by Arkansas Constitution, Article 5, § 1.
>
> (2) *The board shall determine whether to certify the ballot title and popular name submitted for a proposed measure* within thirty (30) days after the ballot title and popular name are submitted by the Secretary of State under subdivision (i)(1) of this section.
>
> (3) If the board determines that the ballot title and popular name, and the nature of the issue, is presented in a manner that is not misleading and not designed in such a manner that a vote "FOR" the issue would be a vote against the matter or viewpoint that the voter believes himself or herself to be casting a vote for, or, conversely, that a vote "AGAINST" an issue would be a vote for a viewpoint that the voter is against, the ballot title and popular name of the statewide initiative petition or statewide referendum petition shall be certified to the Secretary of State to be placed upon the ballot if the signatures on the statewide initiative petition or statewide referendum petition are determined to be sufficient.
>
> (4)(A) If the board determines that the ballot title or popular name, or the nature of the issue, is presented in such a manner that the ballot title or popular name would be misleading or designed in such a manner that a vote "FOR" the issue would be a vote against the matter or viewpoint that the voter believes himself or herself to be casting a vote for, or, conversely, that a vote "AGAINST" an issue would be a vote for a viewpoint that the voter is against, the board of [sic] shall:

(i) Not certify the ballot title and popular name;

(ii)(a) Notify the sponsors in writing, through their designated agent, that the ballot title and popular name were not certified and set forth its reasons for so finding.

(b) If the ballot title and popular name are not certified, the sponsor shall not submit a redesigned ballot title or popular name to the board; and

(iii) Notify the Secretary of State that the ballot title and popular name were not certified.

(B) If the ballot title and popular name are not certified under subdivision (i)(4)(A) of this section, the Secretary of State shall declare the proposed measure insufficient for inclusion on the ballot for the election at which the statewide initiative petition or statewide referendum petition would be considered.

(Emphasis added.)

Petitioners contend that section 7-9-111(i), by giving the Board authority to determine whether to certify a ballot title and popular name, violates article 5, section 1 of the Arkansas Constitution. Article 5, section 1 provides in relevant part that the ballot title "shall be submitted to the State Board of Election Commissioners, who shall certify such title to the Secretary of State, to be placed upon the ballot" and that "[t]he sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State . . . ."

Respondents and Intervenors argue that section 7-9-111(i) facilitates the ballot-title review process, noting that article 5, section 1 provides that "laws may be enacted to facilitate its operation." They note that the Attorney General considered the sufficiency of the ballot title and popular name under the prior statutory scheme and argue that section 7-9-111(i) merely transfers that authority from the Attorney General to the Board. And they

point out that this court held that the prior statute authorizing the Attorney General to review the sufficiency of ballot titles did not conflict with article 5, section 1. *Washburn v. Hall*, 225 Ark. 868, 871–72, 286 S.W.2d 494, 497 (1956). But article 5, section 1 is silent on the role of the Attorney General in the initiative and referendum process, while it explicitly gives the Board a role—it states that the Board "shall certify such title to the Secretary of State."

We hold that there is a clear and unmistakable conflict between Arkansas Code Annotated section 7-9-111(i) and article 5, section 1 of the Arkansas Constitution. Article 5, section 1 provides that the Board "shall certify" the ballot title to the Secretary of State. The word "shall" is mandatory. *Smith v. Fox*, 358 Ark. 388, 393, 193 S.W.3d 238, 242 (2004). Under the plain language of article 5, section 1, the Board has no discretion to determine *whether* to certify a ballot title; it *must* certify the title to the Secretary of State. Section 7-9-111(i), by giving discretion to the Board, violates article 5, section 1. Accordingly, the Board had no authority to decline to certify the ballot title to the Secretary of State, and its action is without legal effect.

III. *Legal Sufficiency of the Ballot Title*

We now turn to the sufficiency of the ballot title, which we can review because the Secretary of State determined that the proposed ballot measure was insufficient. Respondents and Intervenors argue that the ballot title is insufficient for the following reasons: (1) the ballot title is misleading because it omits that the proposed amendment would repeal amendment 98's THC dosage limits in food and drink containing usable marijuana; (2) the ballot title is misleading because it does not explain that requirements for

child-resistant packaging and restrictions on advertising that appeals to children are already found in amendment 98 and gives the false impression that the proposed amendment will strengthen those protections; (3) the ballot title is misleading because it does not explain the effects of the proposed amendment on the industrial-hemp industry; (4) the ballot title omits material information about the proposed amendment's creation of Tier One and Tier Two facilities; and (5) the ballot title omits the proposed amendment's definition of an adult as a person twenty-one years of age or older.

Our standards for reviewing the sufficiency of ballot titles are well established. This court decides the sufficiency of the ballot title as a matter of law. *Stiritz v. Martin*, 2018 Ark. 281, at 4, 556 S.W.3d 523, 527. Under amendment 5, section 1, the burden of proof is on the party challenging the ballot title to prove that it is misleading or insufficient. *Knight v. Martin*, 2018 Ark. 280, at 7, 556 S.W.3d 501, 507. The ballot title must be an impartial summary of the proposed amendment, and it must give the voters a fair understanding of the issues presented and the scope and significance of the proposed changes in the law. *Rose v. Martin*, 2016 Ark. 339, at 4, 500 S.W.3d 148, 151. A ballot title must be free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring. *Id.* The ballot title need not contain a synopsis of the proposed amendment or cover every detail of it. *Id.* But it cannot omit material information that would give the voters serious ground for reflection. *Cox v. Daniels*, 374 Ark. 437, 443, 288 S.W.3d 591, 595 (2008).

A ballot title does not need to include every possible consequence or impact of a proposed measure, and it does not need to address or anticipate every possible legal issue.

*Stiritz*, 2018 Ark. 281, at 7, 556 S.W.3d at 529. This court has long recognized the impossibility of preparing a ballot title that would suit everyone. *Cox*, 374 Ark. at 443, 288 S.W.3d at 595. The ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and informed decision for or against the proposal and understands the consequences of his or her vote based on the ballot title. *Id.*

Our most significant rule in determining the sufficiency of the title is that it be given a liberal construction and interpretation in order that it secure the purposes of reserving to the people the right to adopt, reject, approve, or disapprove legislation. *Wilson v. Martin*, 2016 Ark. 334, at 8, 500 S.W.3d 160, 166. But that does not imply that liberality is boundless or that common sense is disregarded. *Knight*, 2018 Ark. 280, at 7, 556 S.W.3d at 507. It is not our purpose to examine the relative merit or fault of the proposed changes in the law; rather, our function is merely to review the measure to ensure that, if it is presented to the people for consideration in a popular vote, it is presented fairly. *Wilson*, 2016 Ark. 334, at 8, 500 S.W.3d at 166. "The question is not how the members of this court feel concerning the wisdom of this proposed amendment, but rather whether the requirements for submission of the proposal to the voters have been met." *Ferstl v. McCuen*, 296 Ark. 504, 509, 758 S.W.2d 398, 401 (1988).

With these standards in mind, we turn to each of the arguments set forth by Respondents and Intervenors. Respondents and Intervenors first argue that the ballot title is misleading because it fails to explain that the proposed amendment would repeal THC dosage limitations in edible cannabis products. The ballot title states that the proposed amendment "repeal[s] and replac[es] Amendment 98, §§ 8(e)(5)(A)–(B) and 8(e)(8)(A)–(F)

with requirements for child-proof packaging and restrictions on advertising that appeals to children . . . ." Under amendment 98, section 8(e)(5)(A)–(B), food or drink that is combined with usable marijuana cannot exceed 10 milligrams of active THC per portion. The proposed amendment would eliminate the dosage limit in those products. Respondents and Intervenors argue that the ballot title, by not explicitly stating that the proposed amendment would repeal THC dosage limits, is misleading because voters would not be aware that they were voting to repeal the limits. They contend that knowledge that the amendment would eliminate THC dosage limits in food and drink containing usable marijuana is material information that would give voters serious ground for reflection, rendering the ballot title insufficient.

This court has repeatedly stated that a ballot title need not summarize existing law. In *Becker v. Riviere*, 270 Ark. 219, 604 S.W.2d 555 (1980), we examined a ballot title for a proposed amendment abrogating the current limit on interest rates. In determining that the ballot title was sufficient, we explained that

> the proposed ballot title sufficiently puts a voter on notice of this change by stating "the maximum rate of interest shall not exceed 10 percent except by law enacted by two-thirds vote of the general assembly" and that it and the proposed popular name both fairly identify the true purpose of the amendment. We reject petitioners' contention that the ballot title is defective because it does not indicate that the present constitutional limit on interest rates is 10 per cent per annum. The ballot title is not required to state the present interest limitation, nor to summarize the Arkansas law on usury.

*Id.* at 224, 604 S.W.2d at 557–58. We reached a similar conclusion in *Cox*, 374 Ark. at 445, 288 S.W.3d at 596, in which we stated that the ballot title of a proposed amendment to authorize state lotteries "is not required to state the present ban on lotteries, nor to summarize the Arkansas law on lotteries. The fact that it is an amendment is sufficient to

inform the voters that change will result." And in *Richardson v. Martin*, 2014 Ark. 429, 444 S.W.3d 855, we examined the ballot title to a proposed amendment pertaining to alcoholic beverages, which would have repealed the prohibition on liquor stores being located within one thousand feet of a church or school. The ballot title stated that the measure "will repeal inconsistent laws," but did not specify that the location prohibition would be repealed. *Id.* at 8–9, 444 S.W.3d at 860–61. We determined that the ballot title informed the voters in an intelligible, honest, and impartial manner that all laws that are in conflict would be repealed. *Id.* at 9, 444 S.W.3d at 861.

We conclude that the ballot title at issue is not insufficient for not explicitly stating that the proposed amendment would eliminate THC dosage limits in food and drink containing usable marijuana. Petitioners were not required to summarize the existing law related to THC dosage limits in those marijuana products. The ballot title identifies the sections of amendment 98 that would be repealed and the provisions that would replace those sections. We have held that a ballot title is sufficient if it identifies the proposed act and fairly recites the general purpose. *Becker*, 270 Ark. at 223, 604 S.W.2d at 557. We are not convinced that specific details about the repeal of THC dosage limits in a category of marijuana-containing products is "so significant and material that it would give the voter serious ground for reflection." *Kurrus v. Priest*, 342 Ark. 434, 443, 29 S.W.3d 669, 674 (2000). The ballot title must accurately reflect the general purposes and fundamental provisions of the proposed amendment. *Id.* Repeal of dosage limits is not a fundamental provision of the proposed amendment such that failing to describe it renders the ballot title insufficient.

Respondents and Intervenors next argue that the ballot title is misleading because it fails to explain that requirements for child-resistant packaging and restrictions on advertising that appeals to children are already in amendment 98 and therefore gives the false impression that the proposed amendment will strengthen protections for children. Amendment 98, section 8(e)(8)(A)–(F) requires the Alcoholic Beverage Control Division (ABC) to adopt rules governing advertising restrictions to avoid making cannabis products appealing to children, including child-proof packaging in accordance with federal regulations. The ballot title states that the proposed amendment will repeal section 8(e)(8)(A)–(F) but does not explain what was in the section. Respondents and Intervenors claim this omission is misleading because, when coupled with the language that the section will be replaced "with requirements for child-proof packaging and restrictions on advertising that appeals to children," it gives voters the impression that child-protection requirements will be added, when, in fact, they already exist. They further argue that the omission of information about current safety protections suggests that the proposed amendment would strengthen child-protection requirements when they claim that the current protections are more stringent.

We conclude that the ballot title is not misleading for not including details about the provisions in amendment 98 pertaining to child-proof packaging and advertising restrictions that the proposed amendment would repeal. Petitioners were not required to summarize the existing law concerning child-proof packaging and advertising restrictions. *See Cox*, 374 Ark. at 445, 288 S.W.3d at 596; *Becker*, 270 Ark. at 224, 604 S.W.2d at 557–58. The ballot title gives an accurate description of what the proposed amendment will do—require child-proof packaging and restrictions on advertising that appeals to children. Specifics about the

packaging and advertising restrictions currently found in amendment 98 that would be replaced by new restrictions are not material omissions that would give voters serious ground for reflection. *Cox*, 374 Ark. at 443, 288 S.W.3d at 595. The ballot title need not contain a synopsis of the proposed amendment or cover every detail of it. *Rose*, 2016 Ark. 339, at 4, 500 S.W.3d at 151. We decline to speculate about possible differences between child-protection regulations that currently exist under amendment 98 and those that would be adopted under the proposed amendment.

Intervenors also argue that the ballot title is misleading because it does not explain that the proposed amendment will affect the industrial-hemp industry in Arkansas. According to Intervenors, the definition of "cannabis" in the proposed amendment includes industrial hemp. They argue that the ballot title omits that the proposed amendment covers industrial hemp and misleads voters into thinking it does not cover the industry and, accordingly, does not give voters a fair understanding of the effect of their vote. Moreover, they contend that the ballot title does not disclose that the proposed amendment would affect existing state and federal law governing industrial hemp and would potentially implicate the constitutional rights of industrial-hemp growers in Arkansas.

The lack of discussion of the proposed amendment's possible effects on the industrial-hemp industry in the ballot title does not render it insufficient. Any effect on the industrial-hemp industry is speculative at this point. A ballot title does not need to include every possible consequence or impact of a proposed measure, and it does not need to address or anticipate every possible legal issue. *Stiritz*, 2018 Ark. 281, at 7, 556 S.W.3d at 529. We have held that we cannot engage in the interpretation and construction of the text of the

amendment. *Cox*, 374 Ark. at 451, 288 S.W.3d at 600. We decline to do so here. As for Intervenors' argument that the proposed amendment would affect existing law, we will review a proposal's validity if the measure is "clearly contrary to law." *Kurrus*, 342 Ark. at 445, 29 S.W.3d at 675. Because we would have to interpret the proposed amendment to determine whether industrial hemp falls within its ambit, we cannot say the measure is clearly contrary to law. Assessing the impact, if any, of the proposed amendment on the industrial-hemp industry is beyond the scope of our review of the ballot title.

Intervenor Safe and Secure Communities argues two additional points. Neither is availing. First, it argues that the ballot title omits material information about the proposed amendment's creation of Tier One and Tier Two facilities. The ballot title states that Tier One cultivation-facility licenses must be issued to current holders of cultivation licenses under amendment 98 and that Tier Two cultivation licenses will be issued also. Safe and Secure Communities contends that a more thorough explanation of the differences between Tier One and Tier Two facilities is needed to give voters a fair understanding of the proposed amendment. We disagree. The ballot title adequately describes Tier One and Tier Two facilities as created by the proposed amendment. Details about the commercial operations of these facilities, including how many cannabis plants they can grow and where they can sell and deliver cannabis, are not fundamental provisions of the measure. The ballot title does not need to cover every detail of the proposed amendment. *Rose*, 2016 Ark. 339, at 4, 500 S.W.3d at 151.

Finally, Safe and Secure Communities argues that the ballot title is misleading because it states that the proposed amendment would authorize possession and use of cannabis by

adults, omitting the amendment's definition of an "adult" as a person twenty-one years of age or older. This omission, the argument goes, misleads voters into believing that the amendment would allow anyone eighteen years old or older to use cannabis. We are not persuaded. Not every term must be defined in the ballot title. *Knight*, 2018 Ark. 280, at 10, 556 S.W.3d at 509. How "adult" is defined is not a fundamental provision of the proposed amendment. Nor is the omission of the definition of "adult" a material omission that would give voters serious ground for reflection. *Cox*, 374 Ark. at 443, 288 S.W.3d at 595.

IV. *Conclusion*

"Amendment 7's reservation to the people of the initiative power lies at the heart of our democratic institutions." *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 250, 884 S.W.2d 605, 610 (1994). We give the ballot title a liberal construction and interpretation in order that it secure the purposes of reserving to the people this power. *Wilson*, 2016 Ark. 334, at 8, 500 S.W.3d at 166. And we recognize that it is impossible to prepare a ballot title that would suit everyone. *Cox*, 374 Ark. at 443, 288 S.W.3d at 595. With these standards in mind, we conclude that the ballot title at issue is complete enough to convey an intelligible idea of the scope and import of the proposed amendment. *Wilson*, 2016 Ark. 334, at 7, 500 S.W.3d at 166. Therefore, Respondents and Intervenors have not met their burden of proving that the ballot title is insufficient. The people will decide whether to approve the proposed amendment in November.

Accordingly, we grant the petition and order the Secretary of State to certify the proposed amendment for inclusion on the November 8, 2022 general election ballot. We order the mandate to issue within five days of this opinion unless a petition for rehearing is

filed.

Petition granted.

WOOD, J., concurs.

WOMACK and WEBB, JJ., concur in part and dissent in part.

**RHONDA K. WOOD, Justice, concurring.** I would also grant relief but apply a different rationale. Our constitutional government works best when courts maintain their limited role in this process and permit the people to pursue their constitutional power.

The Arkansas Constitution provides, "The first power reserved by the people is the initiative." Ark. Const. art. 5, § 1. It also states, "[T]he people reserve to themselves the power to propose legislative measures, laws, and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly." *Id.*

A ballot title is merely a description of the initiative. Although our precedent has allowed past courts to review ballot titles rigorously, I cannot find the authority to exercise that level of discretion in our constitution. Rather, this court's role in the ballot initiative process is simply to review the petition's "sufficiency." *Id.* The constitution is silent as to the level of scrutiny we should undertake in our review of the ballot title, which is submitted with the petition.

While I believe that amending our constitution is something that the voters should do with caution, we should not underestimate the intelligence of the voters or their ability to evaluate a proposed ballot initiative. Likewise, we should not speculate whether regulatory bodies, or future legal interpretations, will heighten or lighten restrictions.

I am confident that Arkansans can read this ballot title and understand that a vote for the initiative is a vote in favor of legalizing recreational marijuana and that their decision could have a wide-ranging impact on current medical-marijuana laws and regulations and children. It is for the people—not this court—to exercise the right to amend the constitution, and our court must continue to preserve this first power of the people of Arkansas by not supplanting their decisions with ours. Because I agree in the result but not necessarily with the scrutiny of review, I concur.

**SHAWN A. WOMACK, Justice, concurring in part and dissenting in part.** This court has express, constitutional authority to review the Secretary of State's sufficiency determination. Ark. Const. art. 5, § 1. I agree with the court's conclusion that the State Board of Election Commissioners cannot determine the sufficiency of a ballot title and popular name of a proposed constitutional amendment; only the Secretary of State may do this. Ark. Const. art. 5, § 1. Accordingly, Arkansas Code Annotated section 7-9-111(i) is unconstitutional. *See* Ark. Const. art. 5, § 1. But because the ballot title is partially misleading, the Secretary of State correctly declared it insufficient, and I would deny the petition.

The proposed ballot title claims it is adding the requirement for child-proof packaging and restrictions on child-targeted advertising in its proposed amendment; it is not. In fact, the proposed amendment will repeal the existing safeguards against child consumption and replace them with far less stringent ones. Currently, Amendment 98 requires "[a]dvertising restrictions for dispensaries and cultivation facilities, including *without limitation* the advertising, marketing, packaging, and promotion of dispensaries and

cultivation facilities with the purpose to avoid making the product of a dispensary or a cultivation facility appealing to children." Ark. Const. amend. 98, § 8(e)(8) (emphasis added). It further provides an *illustrative* list of permissible restrictions and regulations, including those affecting "[a]rtwork; [b]uilding signage; [p]roduct design, including without limitation shapes and flavors; . . . [i]ndoor displays that can be seen from outside the dispensary or cultivation facility; and [o]ther forms of marketing related to medical marijuana." *Id.* § 8(e)(8)(A)–C), (E)–(F). Amendment 98 also requires "[c]hild-proof packaging that cannot be opened by a child or that prevents ready access to toxic or harmful amount of the product, and that meets the testing requirements in accordance with the method described in 16 C.F.R. § 1700.20, as existing on January 1, 2017." *Id.* § 8(e)(8)(D).

However, the proposed amendment's restrictions on child-targeted advertising would only allow regulations that "are narrowly tailored to ensure advertising is not designed to appeal to children." Furthermore, the existing requirements for child-proof packaging are now diluted, only permitting the State to promulgate "[s]tandards to ensure that marijuana must be sold at retail in child-resistant packaging that is not designed to appeal to children; such standards may not prohibit the sale of any usable cannabis authorized under this amendment or other applicable state laws." This departure from the language of Amendment 98 severely cabins the State's regulatory authority and weakens the child protection provision previously adopted by the people of Arkansas. The ballot title fails to sufficiently advise voters of the magnitude of the change and gives the marijuana industry greater leeway to operate with limited oversight in these areas.

The "test for gauging the materiality and the impact of omitted language in a ballot title is whether knowledge of that language would give voters a serious basis for reflection on how to cast their ballots." *Lange v. Martin*, 2016 Ark. 337, at 8, 500 S.W.3d 154, 159. Whether the proposed amendment will liberalize the regime to the extent children may have uncontrolled access to marijuana is undoubtedly a serious basis for reflection. *See id.* "The ballot title should be complete enough to convey an intelligible idea of and scope and import of the proposed law, and that it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy . . . ." *Westbrook v. McDonald*, 184 Ark. 740, 43 S.W.2d 356, 360 (1931). The proposed ballot title is nether complete enough to reveal the scope of the proposed amendment nor free of misleading omissions regarding the issues of child protection. The Secretary of State correctly determined the ballot title was insufficient.

I respectfully dissent.

WEBB, J., joins.

APPENDIX

(Popular Name)

AN AMENDMENT TO AUTHORIZE THE POSSESSION, PERSONAL USE, AND CONSUMPTION OF CANNABIS BY ADULTS, TO AUTHORIZE THE CULTIVATION AND SALE OF CANNABIS BY LICENSED COMMERCIAL FACILITIES, AND TO PROVIDE FOR THE REGULATION OF THOSE FACILITIES

(Ballot Title)

An amendment to the Arkansas Constitution authorizing possession and use of cannabis (i.e., marijuana) by adults, but acknowledging that possession and sale of cannabis remain illegal under federal law; authorizing licensed adult use dispensaries to sell adult use cannabis produced by licensed medical and adult use cultivation facilities, including cannabis produced under Amendment 98, beginning March 8, 2023 and amending Amendment 98 concerning medical marijuana in pertinent part, including: amending Amendment 98, § 3(e) to allow licensed medical or adult use dispensaries to receive, transfer, or sell marijuana to and from medical and adult use cultivation facilities, or other medical or adult use dispensaries, and to accept marijuana seeds from individuals legally authorized to possess them; repealing Amendment 98, § 8(c) regarding residency requirements; repealing and replacing Amendment 98, §§ 8(e)(5)(A)–(B) and 8(e)(8)(A)–(F) with requirements for child-proof packaging and restrictions on advertising that appeals to children; amending Amendment 98, § 8(k) to exempt individuals owning less than 5% of dispensary or cultivation licensees from criminal background checks; amending Amendment 98, § 8(m)(1)(A) to remove a prohibition on dispensaries supplying, possessing, manufacturing, delivering, transferring, or selling paraphernalia that requires the combustion of marijuana;

amending Amendment 98, § 8(m)(3)(A)(i) to increase the marijuana plants that a dispensary licensed under that amendment may grow or possess at one time from 50 to 100 plus seedlings; amending Amendment 98, § 8(m)(4)(A)(ii) to allow cultivation facilities to sell marijuana to dispensaries, adult use dispensaries, processors, or other cultivation facilities; amending Amendment 98, §§ 10(b)(8)(A) and 10(b)(8)(G) to provide that limits on the amount of medical marijuana dispensed shall not include adult use cannabis purchases; amending Amendment 98, §§ 12(a)(1) and 12(b)(1) to provide that dispensaries and dispensary agents may dispense marijuana for adult use; amending Amendment 98, § 13(a) to allow medical and adult use cultivation facilities to sell marijuana to adult use dispensaries; repealing Amendment 98, § 17 and prohibiting state or local taxes on the cultivation, manufacturing, sale, use, or possession of medical marijuana; repealing Amendment 98, § 23 and prohibiting legislative amendment, alteration, or repeal of Amendment 98 without voter approval; amending Amendment 98, § 24(f)(1)(A)(i) to allow transporters or distributors licensed under Amendment 98 to deliver marijuana to adult use dispensaries and cultivation facilities licensed under this amendment; requiring the Alcoholic Beverage Control Division of the Department of Finance and Administration ("ABC") to regulate issuance and renewal of licenses for cultivation facilities and adult use dispensaries and to regulate licensees; requiring adult use dispensaries to purchase cannabis only from licensed medical or adult use cultivation facilities and dispensaries; requiring issuance of Tier One adult use cultivation facility licenses to cultivation facilities licensees under Amendment 98 as of November 8, 2022, to operate on the same premises as their existing facilities and forbidding issuance of additional Tier One adult use cultivation licenses; requiring issuance

of adult use dispensary licenses to dispensary licensees under Amendment 98 as of November 8, 2022, for dispensaries on their existing premises and at another location licensed only for adult use cannabis sales; requiring issuance by lottery of 40 additional adult use dispensary licenses and 12 Tier Two adult use cultivation facility licenses; prohibiting cultivation facilities and dispensaries near schools, churches, day cares, or facilities serving the developmentally disabled that existed before the earlier of the initial license application or license issuance; requiring all adult use only dispensaries to be located at least five miles from dispensaries licensed under Amendment 98; prohibiting individuals from holding ownership interests in more than 18 adult use dispensaries; requiring ABC adoption of rules governing licensing, renewal, ownership transfers, location, and operation of cultivation facilities and adult use dispensaries licensed under this amendment, as well as other rules necessary to administer this amendment; prohibiting political subdivisions from using zoning to restrict the location of cultivation facilities and dispensaries in areas not zoned residential-use only when this amendment is adopted; allowing political subdivisions to hold local option elections to prohibit retail sales of cannabis; allowing a state supplemental sales tax of up to 10% on retail cannabis sales for adult use, directing a portion of such tax proceeds to be used for an annual stipend for certified law enforcement officers, the University of Arkansas for Medical Sciences and drug court programs authorized by the Arkansas Drug Court Act, § 16-98-301 with the remainder going into general revenues, and requiring the General Assembly to appropriate funds from licensing fees and sales taxes on cannabis to fund agencies regulating cannabis; providing that cultivation facilities and adult use dispensaries are otherwise subject to the same taxation as other for-profit businesses; prohibiting excise

or privilege taxes on retail sales of cannabis for adult use; providing that this amendment does not limit employer cannabis policies, limit restrictions on cannabis combustion on private property, affect existing laws regarding driving under the influence of cannabis, permit minors to buy, possess, or consume cannabis, or permit cultivation, production, distribution, or sale of cannabis not expressly authorized by law; and prohibiting legislative amendment, alteration, or repeal of this amendment without voter approval.