

NO. CV-22-482

IN THE ARKANSAS SUPREME COURT

ORIGINAL ACTION

EDDIE ARMSTRONG and LANCE HUEY,
Individually and on behalf
Of RESPONSIBLE GROWTH ARKANSAS,
a ballot question committee

PETITIONERS

v.

JOHN THURSTON, et al.

RESPONDENTS

SAVE ARKANSAS FROM EPIDEMIC, et al.

INTERVENORS

SAFE AND SECURE COMMUNITIES, et al.

INTERVENORS

RESPONDENTS' BRIEF

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ISSUES

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- II. Ark. Code Ann. § 7-9-111's ballot title and popular name certification process is constitutional.
 - II.A. Determination of the sufficiency of the ballot title does not require the Court's resolution of Petitioners' constitutional argument.

 - II.B. The Supreme Court lacks jurisdiction to decide the constitutional question on an original petition.

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JURISDICTIONAL STATEMENT

This Court has original jurisdiction of suits regarding the sufficiency of state initiative petitions. Ark. Const. Art. V, § 1; Ark. Sup. Ct. R. 6-5(a).

STATEMENT OF THE CASE AND FACTS

This case involves a controversial ballot measure that would amend the constitution to allow possession and recreational use of marijuana products. The decision not to certify the ballot title Petitioners proposed was not a controversial one. The State Board of Election Commissioners, acting under its statutory authority, correctly and unanimously determined that the ballot title was misleading.

The constitution's current medical marijuana amendment places a 10 mg limit on the THC content for edible products. It also provides the Alcoholic Beverage Control Board ("ABC") with rulemaking authority over the advertising, marketing, packaging, and promotion by dispensaries and cultivation facilities, including for the purpose of preventing marijuana products from being appealing to children. Both of those provisions are important because of the risk that marijuana products might be consumed by children or unintentionally by adults.

Petitioners' ballot measure would amend the constitution to allow recreational marijuana use. In conjunction with expanding access to marijuana products, including edibles, that ballot measure removes the current 10 mg THC limit and fails to replace it with any limit.

Petitioners' ballot title—which is required to fairly and honestly inform voters of the critical information necessary to understand what they are voting on—omits that information. The measure also reduces the ABC's authority over advertising, marketing, packaging, and promotion restrictions on marijuana.

The Board unanimously voted not to certify Petitioners' ballot title because of those serious concerns. The General Assembly authorized the Board to make that determination, and the constitution does not bar it from exercising that authority. The Board correctly applied this Court's case law in determining that the ballot title is misleading, and this Court should therefore deny Petitioners' request for a preliminary injunction pending an expedited briefing schedule. It should instead dismiss the Petition.

Petitioner Responsible Growth Arkansas is the sponsor of a proposed constitutional amendment having 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” (“Popular Name”). Add. 18. The 839-word proposed ballot title states:

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 facility 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.

(Emphasis Added)(“Ballot Title”).

The current Amendment 98, Section 8(e)(5)(A)–(B) provides that ABC shall adopt rules governing the “manufacture, processing, packaging, labeling, and dispensing of usable marijuana to qualifying

patients” including capping the amount tetrahydrocannabinol to 10 milligrams per portion of food or drink combined with marijuana. Amendment 98, Section 8(e)(8)(A)–(F) provides that ABC shall adopt rules governing the “advertising, marketing, packaging, and promotion by dispensaries and cultivation facilities with the purpose to avoid making the product of a dispensary or a cultivation facility appealing to children” including design and child-proof packaging that cannot be opened by a child. It gives ABC authority over artwork, building signage, product design, including without limitation shapes and flavors, child proof packaging, indoor displays that can be seen from outside the dispensary or cultivation facility, and other forms of marketing related to medical marijuana. Amend. 98 §8(e)(8)(A-F).

As required by Ark. Code Ann. § 7-9-111(i), The State Board of Election Commissioners (“Board”) reviewed the proposed Popular Name and Ballot Title and determined that the Ballot Title is misleading because it omitted material information that would give a voter serious ground for reflection. As explained by the Board Notice to Petitioner Responsible Growth Arkansas, “omitting from the Ballot Title the fact that Measure is repealing Ark. Const. Amend. 98 § 8(e)(5)(A)’s limitation

on the maximum dosage of 10 mg of ‘tetrahydrocannabinol per portion’ (“THC) is material information that is not included in the Title.” Pet. Add. 15. The Board found that omission of this information causes the Ballot Title to be misleading. Add. 15. The Board further found that “removing the concentration limit from edible products is a material omission that voters would need to know when voting For or Against” the proposed constitutional amendment. Add. 16. Finally, the Board found that by “generically describing the repeal of a subsection of Amendment 98 and replacing it with a phrase regarding child-resistant packaging, the Title places emphasis on the new clause in such a way that obscures the removal of a protective measure regarding dosage.” Pet. Add. 16.

After the Board provided Petitioners notice that it found the Ballot Title misleading and declined to certify the Popular Name and Ballot Title to the Secretary of State for inclusion on the General Election Ballot on November 8, 2022; Petitioner filed this original action.

ARGUMENT

The Court should affirm the State Board of Election Commissioners' ("Board") decision not to certify Petitioners' Ballot Title because (I) the Board correctly declined to certify the Ballot Title because it is misleading and insufficient under this Court's precedent; and (II) the Board acted within its constitutional and statutory duty in determining whether to certify a submitted ballot title and popular name for a proposed statewide initiative.

I. The Board correctly declined to certify the Ballot Title because it is misleading and insufficient under this Court's precedent.

Petitioners' proposed amendment ("Amendment") is misleading because it fails to inform voters that the 10-milligram limit of tetrahydrocannabinol ("THC") per portion for edibles will be repealed and because it falsely claims requirements for child proof packaging will be added to Amendment 98.

Sufficiency of a ballot title is a matter of law to be decided by this Court. *Bailey v. McCuen*, 318 Ark. 277, 284, 884 S.W.2d 938, 942 (1994). "[B]allot titles must include an impartial summary of the proposed amendment that will give voters a fair understanding of the issues

presented and of the scope and significance of the proposed changes in the law.” *Lange v. Martin*, 2016 Ark. 337, 4-5, 500 S.W.3d 154, 157. A ballot title must be intelligible, honest, and impartial. *Id.* Proposed ballot titles must be construed liberally when determining whether they are sufficient. *Bailey v. McCuen*, 318 Ark. at 285, 884 S.W.2d at 942. A proposed ballot title “must include an impartial summary of the proposed amendment which gives voters a fair understanding of the issues presented and the significance of the proposed changes in the law.” *Stiritz v. Martin*, 2018 Ark. 281, 4, 556 S.W.3d 523, 527. A proposed ballot title “cannot omit material information that would give the voter serious ground for reflection.” *Id.* Finally, a proposed ballot title “must be free from misleading tendencies that, whether by amplification, omission, or fallacy, thwart a fair understanding of the issues presented.” *Id.* While it is not required that ballot title cover every detail of proposed amendment, information that would give the voter serious ground for reflection must be disclosed. *Id.* The “ultimate inquiry is whether a 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.*, 2018 Ark. at 7, 556 S.W.3d at 529.

As determined by the Board, the Ballot Title here is misleading because it fails to inform voters that it will repeal the 10 milligram limit of THC per portion for edibles. Furthermore, the Ballot Title is misleading because it falsely claims that it *adds* a requirement for child-proof packaging and restrictions on advertising that appeals to children when Amendment 98 already contains a provision requiring child-proof packaging and restrictions on advertising that appeals to children.

The portion of the proposed Ballot Title that caused the Board to find it misleading states that Amendment 98 concerning medical marijuana will be amended by “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.”

Amendment 98, Section 8(e)(5)(A)-(B) provides that rules shall be adopted governing “the manufacture, processing, packaging, labeling, and dispensing of usable marijuana to qualifying patients and designated caregivers” including the following:

(A) Before sale, food or drink that has been combined with usable marijuana shall not exceed ten milligrams (10

mg) of active tetrahydrocannabinol per portion and shall be physically demarked; and

(B) If portions cannot be physically determined, the entirety of the food or drink that has been combined with usable marijuana shall not contain more than ten milligrams (10 mg) of active tetrahydrocannabinol

Amendment 98, Section 8(e)(8)(A)-(F) states that the rules shall be adopted governing “advertising 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” including the following:

(A) Artwork;

(B) Building signage;

(C) Product design, including without limitation shapes and flavors;

(D) **Child-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;

(E) Indoor displays that can be seen from outside the dispensary or cultivation facility; and

(F) Other forms of marketing related to medical marijuana

(Emphasis Added).

Petitioners erroneously claim that the Ballot title tells voters that the proposed Amendment will repeal Section 8(e)(5)(A) if adopted, and therefore, a voter reading the Ballot Title would know that the proposed Amendment repeals Section 8(e)(5)(A)'s THC limitation. As the Court has acknowledged, most voters have not studied the contents of a proposed amendment or know how the amendment will affect their private interest, but instead “derive their knowledge of the contents of a proposed law from an inspection of the title thereof.” *Westbrook v. McDonald*, 184 Ark. 740, 43 S.W.2d 356, 360 (1931). 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, 8, 500 S.W.3d 154, 159.

Simply referring to the section of Amendment 98 that limits the amount of THC in edibles without any explanation as what is contained in the section is a material omission making the Ballot Title misleading and insufficient. The omission is particularly glaring when one also considers how deeply the Amendment cuts into ABC's current authority

to issue rules that regulate the advertising, marketing, packaging, and promotion of dispensaries and cultivation facilities. A ballot title should be free from any misleading tendency...of omission.” *Westbrook*, 184 Ark. 740, 43 S.W.2d at 360.

Even though omission of an explanation that the THC limit would be repealed is enough to find the Ballot Title misleading and insufficient, the Ballot Title’s false statement that Section 8(e)(5)(A) and Section 8(e)(8) will be replaced with requirements for child-proof packaging and restrictions on advertising that appeals to children commands the conclusion that the Ballot Title is misleading and insufficient. Amendment 98, Section 8(e)(8) and its subparts already require child-proof packaging and restrictions on advertising that appeals to children. In fact, the existing law that would be repealed by Petitioners’ proposed Amendment is more specific and stringent than the Proposed Amendment’s requirements. The existing law expressly requires rules governing artwork, signage, product design (including shapes and flavors), indoor displays, and other forms of marketing. Amendment 98, § 8(e)(8)(A)-(F). The proposed Amendment would require advertising restrictions “which are narrowly tailored to ensure that advertising is not

designed to appeal to children.” That change significantly cabins the ABC’s authority.

The Ballot Title’s failure to explain that it would repeal THC limits on edibles is compounded by the false statement child-proof packaging requirements will be added to existing law. The Ballot Title’s emphasis on child-proof packaging and advertising restrictions without informing voters that said restrictions are already the law while omitting any specific mention of THC limits makes the Ballot Title misleading by omission and by fallacy. The Ballot Title omits these essential facts—the repeal of the THC limit, the narrowing of ABC’s authority to adopt rules governing advertising restrictions, and its wholesale elimination of ABC’s authority to adopt rules governing the “marketing,” “packaging,” “product design”, and “promotion” of dispensaries and cultivation facilities, that would give the voter serious ground for reflection. Ark. Const. Amend. 98 § 8(e)(8). Therefore, the Ballot Title is misleading and insufficient. The Board properly declined to certify the Ballot Title for inclusion on the General Election Ballot on November 8, 2022.

II. Ark. Code Ann. § 7-9-111's ballot title and popular name certification process is constitutional.

This court reviews issues of statutory construction under a *de novo* standard. *McCarty v. Arkansas State Plant Bd.*, 2021 Ark. 105, 2–3, 622 S.W.3d 162, 164. In considering any constitutional challenge to a statute, this court “begins with the axiom that every act carries a strong presumption of constitutionality.” *Ark. Dep't of Corr. v. Bailey*, 368 Ark. 518, 523, 247 S.W.3d 851, 855 (2007). This presumption places the burden of proof squarely on the party challenging a statute to prove its unconstitutionality, and this court resolves “all doubts” in favor of upholding the constitutionality of the statute, if possible.” *Id.*; *City of Cave Springs v. City of Rogers*, 343 Ark. 652, 658–59, 37 S.W.3d 607, 611 (2001). This Court will only strike down a statute when there is a “clear and unmistakable” conflict between the statute and the constitution. *Bailey*, 368 Ark. at 523–24, 247 S.W.3d at 855.

Petitioners first argue that Article 5, section 1 does not allow the Board to reject ballot titles this Court has held cannot appear on the ballot. However, Article 5, section 22 provides that laws may be enacted to facilitate its operation. The General Assembly authorized the Board to consider the sufficiency of the ballot title and popular name and

provide its decision to the Secretary of State, and the constitution does not bar it from exercising that authority. Ark. Code Ann. §§ 7-4-101(f); 7-9-111. Respondents do not provide any compelling authority or argument on this point. At best, they appear to imply that because Article 5, section states that the Board “shall certify” ballot titles “to the Secretary of State, to be placed upon the ballot,” the Board must certify *all* ballot titles regardless of whether they are lawful. *E.g.*, Pet. Br. at 32.

II.A. Determination of the sufficiency of the ballot title does not require the Court’s resolution of Petitioners’ constitutional argument.

If a case can be resolved without reaching a constitutional argument, it is the Court’s duty to do so. *Ark. Ethics Comm’n. v. Weaver*, 2021 Ark. 38. It is the duty of the Court to refrain from addressing constitutional questions if or when the case can be disposed of without determining the constitutional issue. *Tollett v. Wilson*, 2020 Ark. 326, 608 S.W.3d 602. Here, the Court may determine whether the ballot title satisfies the Court’s precedent without determining the constitutional question posed by the Petitioners. The Court’s determination of the sufficiency of the ballot title, regardless of whether it aligns with the

Board's decision or reasoning, would resolve the Petitioners' controversy, and dispose of this case. Thus, the Court should refrain from accepting Petitioners' invitation to address the constitutionality of Ark. Code Ann. § 7-9-111, particularly where the Petitioner's argument does not challenge the constitutionality of Ark. Code Ann. § 7-4-101(f) which gives the Board the power to consider the ballot title and popular name. Act 376 amended both statutes, yet Petitioners do not attack the General Assembly's placement of ballot title consideration with the Board under section 7-1-101(f). Finally, a determination of the constitutionality of the Ark. Code Ann. § 7-9-111 would not necessarily resolve the Petitioner's controversy because the Court would still need to consider whether the Ballot Title sufficiently complies with the Court's precedent to be placed on the general ballot.

II.B. The Supreme Court lacks jurisdiction to decide the constitutional question on an original petition.

An initiative sponsor has the right to this Court's review of the Board's determination of the sufficiency of the ballot title or popular name provided by Ark. Code Ann. § 7-9-112 but that original petition jurisdiction does not include a determination of the constitutionality of

the Board's statutory authority. The proper procedure for challenging the constitutionality of a statute is to proceed under the state's Declaratory Judgment Act. Ark. Code Ann. § 16-111-101 *et seq.* "Any person interested ... or whose rights ... are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." Ark. Code Ann. § 16-111-102. Those actions shall be brought in Pulaski County Circuit Court. Ark. Code Ann. § 16-60-104(3)(A). The Supreme Court's original jurisdiction in extraordinary actions is limited to whether the ballot title and popular name satisfy the Court's requirements for sufficiency. Thus, the Petitioner's argument that Ark. Code Ann. § 7-9-111 is unconstitutional belongs in Pulaski County Circuit Court.

Petitioners do not request a declaratory judgment on the constitutionality of Ark. Code Ann. § 7-9-111(i) in their original petition nor notify the Attorney General that they are challenging the constitutionality of a statute as required by Ark. Code Ann. § 16-111-111(a). It is the duty of the Attorney General to defend the Secretary of State and the Board when they are sued, but that does not eliminate the

duty of the Petitioner to notify the Attorney General that they are challenging the constitutionality of a statute. It is generally reversible error not to give the Attorney General notice of a declaratory-judgment action involving a constitutional challenge to a statute. *In re Guardianship of A.M.*, 2012 Ark. 278, 3–4. The relief sought by the Petition is that the Court “vacate the Board’s denial of certification, order Secretary of State Thurston to certify the Amendment to appear on the November 2022, general election ballot, grant preliminary and permanent injunctive relief, and all other relief to which petitioners are entitled. Add. 10. Petitioners do not request a declaratory judgment in this original action and the Court lacks jurisdiction to issue such judgment. As noted above, the Pulaski County Circuit Court has original jurisdiction to grant declaratory relief. As a matter of original jurisdiction, the Court should decline to reach the Petitioners’ constitutional challenge.

II.C. The authority of the SBEC to determine the sufficiency of the title and popular name is constitutional.

The Board has clear statutory authority to determine the sufficiency of the title and popular name and did not exceed its authority

by determining that the Amendment's title and popular name were misleading and should not be certified as argued *supra*. Acts of the General Assembly are presumed constitutional, and Petitioners have the burden of proving the challenged statute, Ark. Code Ann. § 7-9-111, is unconstitutional. *McDaniel v. Spencer*, 2015 Ark. 94, 3, 457 S.W.3d 641, 647. Previously the General Assembly vested review authority over ballot titles with the Attorney General. Act 376 of 2019 modified that framework to place that authority with the Board, bringing the process in line with the language of Article 5, section 1, which already provided to the Board a role in the initiative and referendum process. As noted above, Act 376 of 2019 gives the Board the authority to “[c]onsider the certification of the ballot title and popular name submitted on a statewide initiative petition or statewide referendum petition under § 7-9-111.” Ark. Code Ann. § 7-4-101(f). The Attorney General performed this duty for decades under the prior version of Ark. Code Ann. § 7-9-107. Article 5 § 22 provides that “laws may be enacted to facilitate its operation. There is no serious argument that the legislature’s decision to place that determination with a different executive-branch body somehow violates Article 5, section 1, and Petitioners do not attempt to make one.

Petitioners neatly omit that the General Assembly explicitly gave authority to the Board to “[c]onsider the certification of the ballot title and popular name submitted on a statewide initiative petition or statewide referendum petition under § 7-9-111. Ark. Code Ann. § 7-4-101(f)(12) (as amended Act 376 of 2019). Petitioners do not challenge the authority that the legislature vested in the Board through this statute as an unconstitutional delegation of the People’s initiative power. The executive branch’s review of a ballot title — whether by the Attorney General or the Board — “subjects a ballot title to rigorous legal analysis.” *Washburn v. Hall*, 225 Ark. 868, 872, 286 S.W.2d 494, 497 (1956). This review does not curtail the operation of Amendment 7 but is in aid of the amendment by ensuring that voters have a sufficiently fair understanding of the issues present. *Id.* As a result, there is no clear and unmistakable conflict between the constitution and the statute Petitioners attempt to challenge. The Board has clear statutory authority to determine the sufficiency of the title and popular name and did not exceed its authority in doing so. The transfer of the long-standing authority of the executive branch to review ballot titles and popular

names from the Attorney General to the Board does not suddenly create a conflict where none existed before.

Giving these statutes their ordinary meaning and interpreting them in accordance with the Court's established principles of constitutional construction, the language must be given its obvious and common meaning. *Ark. Hotels and Entertainment, Inc. v. Martin*, 2012 Ark. 335, 8, 423 S.W.3d 49. Any doubts should be resolved in favor of the constitutionality of the statute. *McCarty v. Ark. St. Plant Bd.*, 2021 Ark. 105, 3, 622 S.W.3d 162, 164. The General Assembly did not unconstitutionally delegate its authority by investing the Board with the power, it simply moved it from the Attorney General to the Board. When the Court construes statutes, they are construed together and in harmony, if possible, to derive the meaning and effect from the whole. *E.g., Hall v. State*, 2022 Ark. App. 232, 7, 646 S.W.3d 204. The Court's duty is to "reconcile our state's statutes to make them consistent, harmonious, and sensible." *Matter of Estate of Epperson*, 284 Ark. 35, 37, 679 S.W.2d 792 (1984). Here the sensible and harmonious reconciliation of Act 376 with Article 5 is that Board has the power to consider the ballot title and popular name of an initiative to give the voters a fair

understanding of the issues presented. Without this sensible interpretation, only a voter could challenge the popular name and ballot title, likely increasing the burden upon the Court to determine the sufficiency of each ballot title with piece-meal and repeated challenges.

Petitioner makes much of the burden placed upon the proponent of a petition if the Board fails to certify the ballot title. However, had the Board certified the Amendment's title and popular name, it would not have insulated the Petitioners from facing a challenge as to the title and popular name by any voter. Any person who is a registered voter may petition the Supreme Court to determine the sufficiency of the ballot title or popular name. Ark. Code Ann. § 7-9-112. Even if the Board had certified the Amendment's ballot title and popular name, the Petitioners could still have been faced with the same logistical and financial obstacles to the petition's sufficiency. Thus, even if the Board's certification of the sufficiency were mandatory — without any consideration of the popular name and ballot title — as Petitioners argue, its determination is not sacrosanct. As a practical matter, the Board's certification of the ballot title and popular name would still be subject to review by this Court. Furthermore, even if the Court were to now hold

that the Board somehow lacked the long-standing statutory authority given to the executive branch to determine the sufficiency of the title and popular name by statute, the Petitioners would still have faced costly and time-consuming obstacles such as those raised by the intervenors.

The Petitioners' attempt to imply that the State Board, having operated for decades as "unelected" with "no legal training" lacks the capacity to apply this Court's precedent to determine the sufficiency of the ballot title and popular name unfairly omits that the Secretary of State serves as its chair, that the Board is comprised of persons designated by the chair of Democratic and Republican parties, a person chosen by the President Pro Tempore, a person chosen by the Speaker of the House, and a county clerk and county election commissioner who has served for three years chosen by the Governor. Ark. Code Ann. § 7-4-101(a). Furthermore, the Attorney General continues to be statutorily obligated to provide the Board with "legal assistance...in answering questions related to election laws." Ark. Code Ann. § 7-4-101(g).

III. Conclusion

For these reasons, the Board's decision should be affirmed, Petitioners' request for injunctive relief should be denied, and the Court should decline to reach the Petitioners' constitutional challenge.

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CERTIFICATE OF SERVICE

I, Kate Donovan, hereby certify that on August 30, 2022, I electronically filed this Brief using the Court’s eFlex filing system, which will serve a copy on all counsel of record.

/s/ Kate Donovan

Kate Donovan

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Administrative Order No. 19 and that it conforms to the word-count limitation in Rule 4-2(d) of this court’s rules on electronic filings. The relevant sections contain 4959 words.

/s/ Kate Donovan

Kate Donovan