CV-22-482

In the Arkansas Supreme Court

Eddie Armstrong et al. **Petitioners**

v.

John Thurston et al. **Respondents**

Safe and Secure Communities et al. **Intervenors**

Intervenors Safe and Secure Communities and Michael McCauley's Brief

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Separate Intervenors' Statement of the Case and the Facts

Four measures to amend the Arkansas Constitution will appear on the ballot this year: three from the General Assembly and the one at issue in this case. The three from the General Assembly are the "Constitutional Amendment and Ballot Initiative Reform Amendment" (HJR 1005), "An Amendment to the Arkansas Constitution Concerning Extraordinary Sessions of the General Assembly" (SJR 10), and the "Arkansas Religious Freedom Amendment" (SJR 14). In addition to voting on the four proposed amendments, voters will have congressional races; races for the Arkansas Supreme Court, governor, lieutenant governor, secretary of state, attorney general, state treasurer, state auditor, commissioner of state lands; and races for many county and municipal offices. And voters have ten minutes to get it all done. Ark. Code Ann. § 7-5-309(b)(1)(B) (allowing voters ten minutes to mark their ballots).

IV.

Argument

The Court should declare the ballot title insufficient, deny the petition, and order that no votes for the proposed amendment be counted because:

- The ballot title omits material information and misleads as to industrial hemp.
- The ballot title omits material information about Tier One and Tier Two facilities.
- The ballot title misleads voters into believing that a vote "for" is a vote for tighter restrictions on advertising that appeals to children, but the opposite is true.
- The ballot title falsely suggests that adults 18 to 20 years old will be able to buy cannabis.
- The failure to mention the elimination of the THC maximum dosage limit makes the ballot title misleading.

We address each point in the following pages.

1. Standard of review

Can an average Arkansas voter, reading the ballot title during their ten minutes in the voting booth with all the other votes they must cast, reach an intelligent and informed decision and understand the consequences of the proposed amendment? That is the question for the Court. *Kurrus v. Priest*, 342 Ark. 434, 440–41, 29 S.W.3d 669, 672 (2000); Ark. Code Ann. § 7-5-309(b)(1)(B) (allowing ten minutes to mark ballots). To that end, the Court has provided a list of musts and must-nots. A ballot title must:

- Contain an impartial summary of the proposed amendment, *Lange v. Martin*, 2016 Ark. 337, at 4, 500 S.W.3d 154, 157;
- Give voters a fair understanding of the issues and of the scope and significance of the proposed changes, *id.* at 4–5, 500 S.W.3d at 157;
- Be free from misleading tendencies that by amplification, omission, or fallacy thwart a fair understanding of the issue, *id.* at 4, 500 S.W.3d at 157 (citation omitted);

- Disclose specific private interests the amendment would benefit, *Parker v. Priest*, 326 Ark. 386, 392, 931 S.W.2d 108, 111 (1996); *Dust v. Riviere*, 277 Ark. 1, 6, 638 S.W.2d 663, 666 (1982).

A ballot title must *not*:

- Omit a fact that would give the voter serious ground for reflection on how to vote, *Wilson v. Martin*, 2016 Ark. 334, at 7, 500 S.W.3d 160, 166;
- Use undefined terms voters do not understand, *id.* at 9, 500 S.W.3d at 167 ("non-economic damages"); *Kurrus*, 342 Ark. at 443–44, 29 S.W.3d at 674 ("tax increase");
- Require voters to apply rules of statutory construction to determine what the proposed amendment means, *id.* at 444, 29 S.W.3d at 675; or
- Be clearly contrary to law. *Id.* at 446, 29 S.W.3d at 676.

The ballot title here contravenes those requirements.

2. The ballot title omits material information and misleads as to industrial hemp.

The average Arkansas voter will have no idea from reading the ballot title that the proposed amendment constitutes a takeover of Arkansas's industrial-hemp industry. Thus, the ballot title does not give voters a fair understanding of the issues and of the scope and significance of the proposed changes, it misleads by omission and misstatement, it uses terms voters do not understand, and it omits facts that would give voters serious ground for reflection.

2.1. The ballot title omits that the proposed amendment includes industrial hemp.

The opening line of the ballot title tells voters that the amendment would "authoriz[e] possession and use of cannabis (i.e., marijuana) by adults, but acknowledg[e] that possession and sale of cannabis remain illegal under federal law." **Add. 18.** The references to "marijuana" and illegality under federal law will cause most voters to believe that the proposal has nothing to do with industrial hemp since industrial hemp is legal under both federal and state law. But the proposed amendment covers it all.

To see that the proposed amendment includes hemp, look to the definitions of *cannabis* in the proposal, *industrial hemp* in Arkansas's industrial-hemp statute, and *hemp* under federal law. They are all similar.

Proposed Amendment

> "Cannabis" means marijuana and other substances including any parts of the plant *Cannabis sativa*, whether growing or not, its seeds and the resin extracted from any part of the plant; and any compound, manufacture, salt, derivative, mixture, isomer or preparation of the plant, including tetrahydrocannabinol and other cannabinol derivatives, whether produced directly or indirectly by extraction. **Add. 20**, § 3(g) (emphasis in original).

Arkansas Industrial Hemp Production Act

> "Industrial hemp" means the plant Cannabis sativa and any part of the plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, that contains a tetrahydrocannabinol concentration of no more than that adopted by federal law under the Agricultural Marketing Act, 7 U.S.C. § 1639o, as it existed on January 1, 2021. Ark. Code Ann. § 2-15-503(5).[1]

[1] The Arkansas Industrial Hemp Production Act is at Ark. Code Ann. §§ 2-15-501 to -516.

Federal Hemp-Production Law

> The term "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than .3 percent on a dry weight basis. 7 U.S.C. § 1639o(1).

Because the proposal's definition of *cannabis* thus brings industrial hemp within its purview, the proposal would grant special privileges to a select few (see Section 3 of this brief) over the industrial-hemp industry. That fact is something the average Arkansan voting on the proposal would not know from reading the ballot title.

2.2. The ballot title misleads voters to believe that the amendment does not cover industrial hemp.

Not only does the ballot title omit important information, it actively misleads voters. The only effort to define *cannabis* is in the opening line where, after the word *cannabis*, it has "(i.e., marijuana)." **Add. 18.** When the average Arkansas voter sees the word *marijuana*, they think of the product that people have used for medicinal purposes for several years now in Arkansas and for other

"personal" purposes (for example, pleasure and relaxation) for much longer. Because the proposal's real definition of *cannabis* is not limited to what most Arkansas voters think of as marijuana but also covers industrial hemp, equating cannabis (as defined in the amendment) with marijuana is misleading.

In addition, the same sentence tells voters that "possession and sale of cannabis remain illegal under federal law." *Id.* That statement again suggests to voters that the proposal has to do only with something that is illegal under federal law (marijuana). But that is not true given the proposal's broad definition of *cannabis*, which includes industrial hemp, which is legal under state and federal law.

The Arkansas State Plant Board summarizes the history and current state of legal industrial hemp production in Arkansas: "On December 20, 2018, the 2018 Farm Bill (P.L. 115-334) was signed into federal law, effectively removing 'hemp' from the federal controlled substances list." https://www.agriculture.arkansas.gov/plant-industries/feed-and-fertilizer-section/hemp-

home/industrial-hemp-research-pilot-program-overview/ (last visited on August 30, 2022). "The first year of legal hemp production in Arkansas occurred in 2019 after almost eight decades of being associated with its illicit cannabis cousin, marijuana." *Id.* "From 2019 to 2021, Arkansas's Hemp Program operated as a research pilot program permitted under the federal 2014 Farm Bill authority and the Arkansas Industrial Hemp Production Act of 2017.… In June 2018, the Arkansas State Plant Board approved the 'Arkansas Industrial Hemp Research Program Rules'…." *Id.*

As of June 2022, the Plant Board had issued licenses to 22 active growers and eight processors/handlers for fiscal year 2023. https://www.agriculture.arkansas.gov/wp-content/uploads/2022/06/rpt_WEB_GROWERS_20220602.pdf; https://www.agriculture.arkansas.gov/wp-content/uploads/2022/06/rpt_WEB_PROCESSORS_20220602.pdf (last visited August 30, 2022). If the proposed amendment were to pass, the growers and processors/handlers of industrial hemp would be put out of business (as we explain in the next section), but an

average Arkansas voter reading the ballot title will not know that the proposal has anything to do with industrial hemp.

Also, the number of industrial-hemp retailers in Arkansas is in the hundreds, if not thousands. The proposed amendment would prohibit those retailers from selling hemp unless they are one of the current 40 medical-marijuana dispensaries or one of the 40 new adult-use licensees the proposed amendment would allow. Ark. Const. amend. 98, § 8(h) (limiting the number of medical-marijuana dispensary licensees to 40); **Add. 22** (proposal § 6(e) requiring ABC to issue adult-use dispensary licenses to current medical-marijuana licensees and § 6(f) requiring ABC to issue 40 more adult-use dispensary licenses). The proposed amendment alerts voters to none of these issues, not even that it applies to industrial hemp. Indeed, by saying that the proposal applies to products that are illegal under federal law, the ballot title misleads voters into believing that the proposal does not cover industrial hemp when, in fact, it does.

2.3. The misleading statements and omissions render the ballot title insufficient.

The misleading statements and omissions make this ballot title similar to others this Court has found insufficient. A ballot title that did not define "non-economic damages" in a proposed tort-reform amendment was insufficient because the average voter would not know what "non-economic damages" were. *Wilson*, 2016 Ark. 334, at 9–10, 500 S.W.3d at 167. Voters thus could not reach an intelligent and informed decision for or against the proposal. *Id.* at 9, 500 S.W.3d at 167. The Court said in *Wilson* that "[w]e have disapproved the use of terms that are technical and not readily understood by voters, such that voters would be placed in a position of either having to be an expert in the subject or having to guess as to the effect his or her vote would have." *Id.*, 500 S.W.3d at 167.

In another case, the Court held that a ballot title that did not define "tax increase," which would have required voter approval, was insufficient. *Kurrus*, 342 Ark. at 443–44, 29 S.W.3d at 674.

Voters thus had to be tax experts or had to guess about the meaning of the uncertain language. *Id.* at 444, 29 S.W.3d at 674.

The ballot title here is similar to those in *Wilson* and *Kurrus*. Most voters will not know that industrial hemp comes within the definition of cannabis. The ballot title tries to define cannabis by putting "i.e., marijuana" in parentheses, but the proposal's definition of cannabis is broader than what most voters consider to be "marijuana," thus misleading voters. And most voters—even those familiar with medical marijuana—will not know that the amendment would bring the industrial hemp industry within its purview. The ballot title further misleads by misstating that "possession and sale of cannabis remain illegal under federal law," which is true only for marijuana, not industrial hemp. Because of these infirmities, the ballot title is insufficient.

2.4. The sponsors could have easily excluded industrial hemp but chose not to.

While the sponsors of the Arkansas proposal chose to include industrial hemp in their amendment and conceal that fact, cannabis amendments in other states have made the distinction clear. In

Colorado, one of the first states to pass a marijuana amendment, the ballot title explained that the amendment would "requir[e] the general assembly to enact [separate] legislation governing the cultivation, processing, and sale of industrial hemp," and the amendment defines *marijuana* to specifically exclude hemp. https://www.fcgov.com/mmj/pdf/amendment64.pdf (last visited on August 30, 2022); Colorado Const. art. XVIII, § 16(2)(f). The now-passed New Jersey marijuana ballot initiative likewise exempts hemp from its definition. N.J. Const. art. IV, § 7, ¶ 13. And two of Arkansas's neighbors—Oklahoma and Missouri—have initiatives this year to legalize cannabis for personal use, and both initiatives exempt hemp. *See* Proposed Amendment to Oklahoma Constitution, § 10(3), https://www.sos.ok.gov/documents/questions/819.pdf (last visited on August 30, 2022); Proposed Amendment to Missouri Constitution, § 2(8), https://www.sos.mo.gov/CMSImages/Elections/Petitions/2022-059.pdf (last visited August 30, 2022).

As proponents in other states did, the Arkansas proponents could have carved out industrial hemp from the scope of the proposal but chose not to. Our point is not to say whether it is good policy to limit industrial hemp production, distribution, and sale to the producers, distributors, and sellers of marijuana. Our point is that the ballot title does not tell voters that the proposal covers more than what most Arkansans think of when they think of marijuana. Backers could have followed the lead of proponents in other states to exempt industrial hemp, but they didn't. Fine, they weren't required to. But they *are* required to present a ballot title that lets voters know that the proposal scoops up an entire industry that is already legal with current growers, processors, and sellers. If this amendment were to pass, a takeover of that already-legal market by the proposal's backers would have occurred; the current growers, processors, and sellers of industrial hemp would be shut out of their market; and almost every Arkansan who votes for the proposed amendment would have no idea of what they had just done.

3. The ballot title omits material information about Tier One and Tier Two facilities.

The ballot title omits important definitions and material information about special privileges that Tier One and Tier Two facilities would receive under the proposal. The omitted definitions and information would give voters cause for reflection, because it is information that is needed to give voters a fair understanding of the power they are being asked to grant private interests in a still-developing industry.

The ballot title says that "Tier One adult use cultivation facility licenses" must be issued to current holders of medical-marijuana cultivation licenses. **Add. 19.** The ballot title also says that "12 Tier Two adult use cultivation facility licenses" will be issued. *Id.* But the ballot title does not explain the power that Tier One facilities will have or how that power differs from Tier Two facilities. The differences are significant, and they are differences voters would want and need to know.

A Tier One facility is "a commercial establishment licensed under this amendment to cultivate, prepare, manufacture, process,

package, sell to and deliver cannabis *to another commercial establishment* for retail sale by any licensed adult use dispensary." **Add. 20** (proposal § 3(d) (emphasis added)). Because Tier One licenses could be issued only to current medical-marijuana license holders and because there are only eight of them, those current licensees—and only those eight licensees—would be granted permanent special privileges that go with Tier One status. *See* Ark. Const. amend. 98, § 8(j) (authorizing the Medical Marijuana Commission to issue no more than eight cultivation facility licenses); **Add. 24** (proposal § 6(d) (prohibiting the issuance of more than eight Tier One licenses)).

A Tier Two facility, on the other hand, is "a commercial establishment licensed under this amendment to cultivate, prepare, manufacture, package, sell to and deliver cannabis *to adult use dispensaries* for retail sale, *which may grow no more than 250 mature cannabis plants at any one time*." **Add. 21** (proposal § 3(i) (emphases added)).

So, here are the differences between Tier One and Tier Two facilities, differences the ballot title does not reflect:

- Tier One facilities have no limit on the number of mature cannabis plants they may grow; Tier Two facilities are limited to 250 such plants.
- Tier One facilities can deliver cannabis to other Tier One facilities, Tier Two facilities, and adult use dispensaries; Tier Two facilities cannot deliver cannabis to Tier One facilities or other Tier Two facilities, but can deliver cannabis to adult use dispensaries only.

What is the import of these differences? If the proposal were to pass, the eight current marijuana-cultivator licensees under Amendment 98 would be deemed "Tier One facilities" and would be handed new, special privileges. First, they would be given a permanent corner on the market for cultivating, preparing, manufacturing, processing, packaging, selling, and delivering cannabis to each other and to up to 12 other cultivation facilities (the Tier Two facilities). The Tier Two facilities, on the other hand, could sell only to adult use dispensaries.

Second, through the 250-plant limit on the Tier Two facilities—a limit the ballot title doesn't mention—Tier One facilities would have an advantage over Tier Two facilities based on mass-production capabilities. Think Walmart versus the local mom-and-pop store. Remember, too, that *cannabis* under the amendment includes not only what most people consider as marijuana but also hemp, thus expanding the Tier One facilities' power beyond what most voters would expect, even if they knew about the Tier One and Tier Two differences. That information is needed to give voters a fair understanding of the scope and significance of the proposed changes.

As we discuss above, *Wilson* and *Kurrus* both found ballot titles insufficient because they did not define important terms. *Wilson*, 2016 Ark. 334, at 9–10, 500 S.W.3d at 167 ("non-economic damages"); *Kurrus*, 342 Ark. at 443–44, 29 S.W.3d at 674 ("tax increase"). The Court has also found ballot titles insufficient where they do not disclose private interests that would benefit or the extent of the benefit. For example, a ballot title was insufficient when

it did not inform voters that the proposed amendment would authorize specific pre-existing entities to receive the right to casino gambling. *Parker*, 326 Ark. at 392, 931 S.W.2d at 111. Another ballot title was insufficient where it did not tell voters of the private interests who would have a choice in selecting a new state board. *Dust*, 277 Ark. at 6–7, 638 S.W.2d at 666.

Similarly, the ballot title here does not inform voters of the special privileges Tier One facilities will have, privileges that will be grafted into the Arkansas Constitution. A reader of the ballot title would not know of the competitive market advantages Tier One facilities would have compared to other facilities. That's because the ballot title does not define "Tier One facilities" or "Tier Two facilities" to let voters know of those advantages, nor does the ballot title let voters know who the eight privileged licensees are. Additionally, the ballot title does not tell voters of the 22 licensed industrial-hemp growers and eight processors/handlers who will be put out of business in favor of the privileged eight current medical-marijuana licensees. Again, the question is not whether the creation

of Tier One facilities with special privileges is good policy; the question is whether the ballot title informs Arkansas voters of the information they need to make that policy decision. It does not.

4. The ballot title misleads voters to believe that a vote "for" is a vote for tighter restrictions on advertising that appeals to children, but the opposite is true.

An average voter reading the ballot title would think that a vote for the amendment is a vote for tighter restrictions on advertising that appeals to children. But the opposite is true: a vote for the amendment is a vote for *looser* restrictions.

The ballot title says the amendment would "repeal[] and replac[e] 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." **Add. 18.** A voter reading that line would believe that the current Amendment 98 requires no restrictions on advertising that appeals to children and that the proposal would usher in a new era of protection for children. But Amendment 98 does require restrictions on "advertising, marketing, packaging, and promotion of dispensaries and cultivation

facilities" that would appeal to children. Ark. Const. amend. 98, § 8(e)(8). It requires the Alcoholic Beverage Control Board ("ABC") to adopt rules 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 without limitation:
>
> (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[.]

Ark. Const. amend. 98, § 8(e)(8)(A)-(F) (emphasis added). Under the proposed amendment, those detailed requirements would be removed and one new sentence added: "Advertising restrictions for dispensaries and cultivation facilities which are narrowly tailored to ensure that advertising is not designed to appeal to

children." **Add. 22** (proposal § 5(e)). To thus suggest, as the ballot title does, that the proposed amendment will strengthen child protections is misleading.

In fact, the ABC has already enacted detailed rules governing advertising in its Rules Governing the Oversight of Medical Marijuana Cultivation Facilities, Processors, and Dispensaries. Those rules would be in jeopardy under a new narrowly-tailored standard. We include here all the ABC's advertising rules, including those regarding advertising generally, because the proposal would also eliminate the requirement for advertising rules more broadly:

> **Section 19. Marketing and Advertising**
> 19.1 **Advertising and Marketing Medical Marijuana**
>
> a. Cultivation Facility and Processor Advertising and Marketing.
>
> i. Cultivation facilities and processors shall not advertise through any public medium or means designed to market its products to the public.
>
> ii. Cultivation facilities may market their products directly to dispensaries by any means directed solely to the dispensaries and not available to the public.
>
> iii. Processors may market their services directly to licensed cultivation facilities and dispensaries by any means directed solely

to the cultivation facilities and dispensaries and not available to the public.

b. Dispensary Advertising and Marketing.

i. Advertising for medical marijuana by dispensaries shall not:

1. Contain statements that are deceptive, false, or misleading;
2. *Contain any content that can reasonably be considered to target children, including, but not limited to:*
   a. Cartoon characters;
   b. Toys; or
   c. Similar images and items typically marketed towards children.
3. Encourage the transportation of medical marijuana across state lines;
4. Display consumption of marijuana;
5. Contain material that encourages or promotes marijuana for use as an intoxicant; or
6. Contain material that encourages excessive or rapid use or consumption**.**

ii. Advertising and marketing for medical marijuana shall include the following statements:

1. "Marijuana is for use by qualified patients only. *Keep out of reach of children*.";
2. "Marijuana use during pregnancy or breastfeeding poses potential harms.";
3. "Marijuana is not approved by the FDA to treat, cure, or prevent any disease."; and

4. "Do not operate a vehicle or machinery under the influence of marijuana."[2]

iii. Dispensaries shall not make any deceptive, false, or misleading assertions or statement on any information material, any sign, or any document provided to a consumer.

iv. Advertising Location Restrictions.
   1. A dispensary shall not place or maintain, or cause to be placed or maintained, any advertisement or marketing material for medical marijuana in the following locations:
      a. Within 1,000 feet of the perimeter of a public or private school or daycare center.
      b. On or in a public transit vehicle or public transit shelter; or
      c. On or in a publicly-owned or operated property.

v. Advertising Audience Restrictions
   1. A dispensary shall not utilize television, radio, print media, or the internet to advertise and market medical

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[2] These required statements on marijuana packaging—to keep it away from children, that using marijuana during pregnancy or breastfeeding could result in harm, and not to operate a vehicle or machinery while using marijuana—would also be eliminated. The ballot title does not tell voters this either.

marijuana, unless the licensee has reliable evidence that no more than 30 percent of the audience for the program, publication, or website in or on which the advertisement is to air or appear is reasonably expected to be under the age of 18.

2. Upon request by the division, a licensee shall provide the evidence relied upon to make the determination that no more than thirty (30) percent of the audience for the program, publication, or website in or on which the advertisement is to air or appear is reasonably expected to be under the age of 18.

vi. Licensed facilities shall not offer any coupons, rebates, or promotions for medical marijuana purchases, unless offered as part of a compassionate care plan presented to the Medical Marijuana Commission as part of the application for licensure.

19.2 **Building Signage Requirements**

a. Licensed facilities shall have no more than three (3) signs visible to the general public from the public right-of-way, that identify the facility by its business name.
b. Each sign shall not exceed thirty-six (36 sq. ft.) square feet in length or width.
c. Signs shall be placed inside the licensed facility's window or attached to the outside of the building.
d. Signage shall not display any of the following:

i. *Any content or symbol that can reasonably be considered to target children, including, but not limited to:*
   a. Cartoon characters;
   b. Toys; or
   c. Similar images and items typically marketed towards children.
ii. Any content or symbol commonly associated with the practice of medicine or the practice of pharmacy, including, but not limited to:
   a. A cross of any color;
   b. A caduceus; or
   c. Any other symbol that is commonly associated with the practice of medicine, the practice of pharmacy, or healthcare, in general. (Emphases added).

The proposal's "narrowly-tailored" standard would jeopardize all of those standards the ABC has enacted, yet a reader of the ballot title would think that the amendment will enhance child protection. It won't. The new standard will instead allow marijuana dealers to push the envelope to create demand for their product among children and young adults ages 18-20 who would not yet be able to purchase cannabis legally.

Knowing about looser restrictions on child-focused advertising would be especially important to voters because a link has been

established between increased teen suicide and legalization of recreational marijuana. *See* Ana Fresán et al., *Cannabis smoking increases the risk of suicide ideation and suicide attempt in young individuals of 11-21 years: A systematic review and meta-analysis*, 153 Journal of Psychiatric Research, Sept. 2022, at 90–98. And the rate of teen suicide in Colorado increased by 58% in three years after the legalization of marijuana in that state, an increase substantially higher than the national rate of teen suicide.

https://www.cpr.org/2019/09/17/the-rate-of-teen-suicide-in-colorado-increased-by-58-percent-in-3-years-making-it-the-cause-of-1-in-5-adolescent-deaths/ (last visited August 30, 2022).

A ballot title that misrepresents the import of the proposed amendment is insufficient. *Wilson*, 2016 Ark. 334, at 7, 500 S.W.3d at 166. For example, a ballot title that said it was "an amendment to require adequate safety devices at all public railroad crossings" was insufficient because it suggested that current law did not require adequate safety devices. *Johnson v. Hall*, 229 Ark. 404, 406–07, 316 S.W.2d 197, 198–99 (1958). In the same way, the ballot title

here suggests to voters that Amendment 98 does not already require protections against advertising that appeals to children. Yet the opposite is true. The proposed amendment would weaken rather than strengthen the ability to limit child-focused advertising. Because of that misleading tendency about something that would be material to voters—the health of Arkansas's children—the Court should declare the ballot title insufficient.

5. The ballot title falsely suggests that adults 18 to 20 years old will be able to buy cannabis.

The ballot title misleads voters to believe that adults of any age can buy cannabis if the amendment passes. The ballot title says the amendment would authorize possession and use of cannabis "by adults." In the common vernacular, an adult is someone 18 years or older. And Arkansas law repeatedly defines an adult as someone 18 years or older. *See, e.g.*, Ark. Code Ann. § 5-25-101(1); § 9-9-202(3), (4); § 9-9-501(5); § 9-20-103(6)(A), (10)(A); § 9-21-102(1); § 12-12-107(a)(1); § 16-90-502(a)(1); § 20-17-1202(1); § 28-72-401(1). Thus, a voter who votes for the proposed amendment

would believe that they are voting to allow anyone 18 years and up to buy cannabis.

But that is not what the amendment would allow. It defines "adult" as a person who is 21 years of age or older. **Add. 20** (§ 3(a)). The ballot title omits that definition, though it would have been easy to include. Persons who are 18, 19, or 20 years old who read the ballot title and who want to buy cannabis will believe that if the amendment passes, they will be able to beginning March 2023. For persons of that age—and for anyone who believes that persons of that age should be able to buy cannabis—the ballot title is misleading.

6. The failure to mention the elimination of the THC maximum dosage limit makes the ballot title misleading.

The Board of Election Commissioners found the ballot title misleading because it omits that the proposal would repeal the limit on the maximum dosage of 10 mg of THC. The answer to the following question, based on this Court's case law, shows that the Board was right: "Would average Arkansas voters have a serious

ground for reflection if they knew that the proposal would eliminate all limits on the amount of THC that could be put in products sold to the public?"

6.1. The omission is material and misleading.

Petitioners are incorrect that the ballot title did not have to explain that it was repealing the dosage limit because voters are presumed to know existing law. The case Petitioners rely on for that idea involved the Arkansas Civil Rights Act and government officials' claim to qualified immunity. *City of Farmington v. Smith*, 366 Ark. 473, 237 S.W.3d 1 (2006). Of course, government officials are presumed to know the law. But *City of Farmington* had nothing to do with ordinary voters' knowledge when voting on ballot titles. This Court has never said that the average Arkansas voter is presumed to know the universe of existing law when voting on a proposed constitutional amendment. Under that theory, a ballot title could say that the proposed amendment is replacing Article 3, Section 2 of the Arkansas Constitution with a provision that the Razorback is the official state animal. It would matter not that that

proposed amendment would be repealing the right of suffrage and of free and equal elections.

Petitioners do not deny that the elimination of the 10 mg limit is material. That's because it is. THC potency is important for the marijuana industry. Higher-potency products are more addictive to consumers and thus more profitable to producers. Higher-potency products result in substantially more negative health outcomes including cannabinoid hyperemesis syndrome (recurrent, painful vomiting). *See* Cannabis Hyperemesis Syndrome, Cleveland Clinic (available at https://my.clevelandclinic.org/health/diseases/21665-cannabis-hyperemesis-syndrome (last visited August 30, 2022)). And high-potency products (15% THC or more) are linked with a three-times increase of psychosis among users, a risk four to nine times higher for daily users of high-potency THC products. *See* Marta Di Forti et al., *The contribution of cannabis use to variation in the incidence of psychotic disorder across Europe (EU-GEI): a multicentre case study*, at 431–32 (May 2019) (available at https://www.thelancet.com/article/S2215-0366(19)30048-

3/fulltext (last visited August 30, 2022)). Moreover, the National Academies of Sciences, Engineering and Medicine (NASEM) has found evidence of a statistical association between cannabis use and suicidal ideation, suicide attempts, suicide completion, schizophrenia, and psychosis. Brad A. Roberts, M.D., *Legalized Cannabis in Colorado Emergency Departments: A Cautionary Review of Negative Health and Safety Effects*, 20 Western J. of Emergency Medicine 557, 559, 560 (available at https://escholarship.org/uc/item/6xb8q31x (last visited August 30, 2022)). So, yes, elimination of the 10 mg limit is material, and it would give voters serious ground for reflection.

6.2. The cases Petitioners rely on do not apply.

Petitioners contend that *Knight v. Martin*, 2018 Ark. 280, 556 S.W.3d 501, stands for the idea that all a ballot title must do is identify the proposal as a constitutional amendment and that "is sufficient to inform voters that change will result." Petitioners' Br. at 23. If that is the rule, then all a ballot title ever has to say

is, "This is a constitutional amendment." That, of course, is not what *Knight* holds.

The opponents of the *Knight* proposal argued that the ballot title did not tell voters that the proposal would overturn the Arkansas Constitution's ban on monopolies and perpetuities by giving exclusive, perpetual licenses for casino gambling and alcohol sales. 2018 Ark. 280, at 8, 556 S.W.3d at 507. The Court rejected that argument, finding that the proposal did not overturn the ban. *Id.*, 556 S.W.3d at 508. In the absence of any change to existing constitutional provisions, the Court wrote the language that Petitioners rely on: "Furthermore, the ballot title identifies Issue No. 4 as a constitutional amendment, which is sufficient to inform voters that change will result." *Id.*, 556 S.W.3d at 508. But unlike *Knight*, the ballot title here *does* change existing constitutional provisions, and does so significantly, so it is not enough to merely identify the proposal as a constitutional amendment.

Petitioners' reliance on *Cox v. Daniels*, 374 Ark. 437, 288 S.W.3d 591 (2008), is also misplaced. There, "[t]he ballot title

essentially mirror[ed] the text of the proposed amendment except that it d[id] not specifically refer to Article 19, Section 14 [of the Arkansas Constitution]." *Id.* at 444, 288 S.W.3d at 595. Opponents argued that the failure to identify the specific part of the constitution that was being changed rendered the ballot title inadequate. This Court disagreed. *Id.* at 446, 288 S.W.3d at 597. But as we, the Respondents, and the other intervenors have detailed, the ballot title here fails in many respects and does not "essentially mirror[] the text of the proposed amendment."

And *Becker v. Riviere*, 270 Ark. 219, 604 S.W.2d 555 (1980), is also inapplicable. The ballot title there "clearly track[ed] the language of the proposed amendment." *Id.* at 225, 604 S.W.2d at 558. The ballot title said that the maximum rate of interest could not exceed 10% unless two-thirds of the General Assembly voted in favor. *Id.* at 221–22, 604 S.W.2d at 556. The law that was currently in effect, however, already limited the interest rate to 10%, but did so without giving the General Assembly the ability to change it. *Id.* at 224, 604 S.W.2d at 557. The Court thus

held that the ballot title fairly represented the proposed amendment. *Id.* at 226, 604 S.W.2d at 588. Unlike the ballot title in *Becker*, the ballot title here does not track the language of or accurately reflect the proposed amendment; it instead misleads and omits material information. Therefore, neither *Becker* nor any of the cases Petitioners rely on apply.

V.

Request for Relief

The ballot title does not give voters a fair understanding of the issues and of the scope and significance of the proposed changes, it misleads by omission and misstatement, it uses terms most voters do not understand, and it omits facts that would give voters serious ground for reflection. The Court should thus deny the petition, declare the ballot title insufficient, and order that any votes cast on the proposed amendment not be counted. *See Wilson*, 2016 Ark. 334, at 9–10, 500 S.W.3d at 167 (declaring ballot title insufficient and ordering that votes cast on proposed amendment not be counted).

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VI.

Certificate of Service

I certify that a copy of the foregoing has been filed via the e-filing system on August 30, 2022, and that the system will copy opposing counsel.

/s/ Brett D. Watson
Brett D. Watson

VII.

Certificate of Compliance

This brief complies with Administrative Order No. 19's requirements concerning confidential information, Administrative Order No. 21, Section 9's requirement that briefs not contain hyperlinks to external papers or websites, and with the word-count limitation in Arkansas Supreme Court Rule 4-2(d) in that it contains 5,964 words within the statement of the case and the facts, the argument, and the request for relief.

/s/ Brett D. Watson
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