

Opinion No. 2013-021

March 11, 2013

Robert L. Reed, Chairman
Arkansans for Medical Cannabis (BQC)
Post Office Box 111
Dennard, Arkansas 72629

Dear Mr. Reed:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2007), of the popular name of and ballot title for a proposed initiated act. You previously submitted two similar measures, which this office rejected. *See* Ops. Att’y Gen. Nos. 2011-059 and 2011-031. You have made changes in the text of your proposal since your last submission and have now submitted the following proposed popular name and ballot title for my certification:

Popular Name

ARKANSAS MEDICIAL [SIC] CANNABIS ACT

Ballot Title

An act to establish the requirements for the medical use of Cannabis by Arkansans under the care of there [sic] attending physician while making only those changes to existing Arkansas laws that are necessary to protect patients and their doctors from criminal and civil penalties, and are not intended to change current civil and criminal laws governing the use of Cannabis for non-medical purposes. Define Cannabis to mean all parts and any variety and/or species of the plant Cannabis that contains THC (tetrahydrocannabinol) of one percent (1%) or greater by dry weight,

whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. Require that the Department of Health establish and maintain a program for the issuance of registry identification cards for this purpose, to establish possession limits for persons authorized to engage in the medical use of Cannabis and the person's designated primary caregiver. Define "debilitating medical condition" means [sic]: (ALS) amyotrophic lateral sclerosis, agitation of Alzheimer's disease, Alzheimer's, amyotrophic lateral sclerosis ALS (Lou Gehrig's disease), anorexia, arthritis (severe), cachexia or wasting syndrome, cancer, Crohn's disease, damage to the nervous tissue of the spinal cord with intractable spasticity, glaucoma, hepatitis C, HIV/AIDS, hospice patients, intractable skeletal muscular spasticity, migraine, multiple sclerosis (MS), muscular dystrophy, nail patella, painful peripheral neuropathy, post-traumatic stress disorder, seizure disorders, including epilepsy, severe nausea, severe or chronic pain, severe or persistent muscle spasms, terminal illness. A medical condition or treatment for a medical condition that produces, for a specific patient, one or more of the following, cachexia, severe pain, severe nausea, seizures, including but not limited to seizures caused by epilepsy or persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis, or any other medical condition or treatment for a medical condition adopted by the Department by rule or approved by the Department pursuant to a petition.

The Attorney General is required, pursuant to A.C.A. § 7-9-107, to certify the popular name and ballot title of all proposed initiative and referendum acts or amendments before the petitions are circulated for signature. The law provides that the Attorney General may substitute and certify a more suitable and correct popular name and ballot title, if he can do so, or if the proposed popular name and ballot title are sufficiently misleading, may reject the entire petition. **Neither certification nor rejection of a popular name and ballot title reflects my view of the merits of the proposal. This Office has been given no authority to consider the merits of any measure.**

In this regard, A.C.A. § 7-9-107 neither requires nor authorizes this office to make legal determinations concerning the merits of the act or amendment, or concerning the likelihood that it will accomplish its stated objective. In addition, following Arkansas Supreme Court precedent, this office will not address the constitutionality of proposed measures in the context of a ballot title review unless the measure is “clearly contrary to law.”¹ Consequently, this review has been limited to a determination, pursuant to the guidelines that have been set forth by the Arkansas Supreme Court, discussed below, of whether the proposed popular name and ballot title accurately and impartially summarize the provisions of your proposed amendment or act.

The purpose of my review and certification is to ensure that the popular name and ballot title honestly, intelligibly, and fairly set forth the purpose of the proposed amendment or act.²

The popular name is primarily a useful legislative device.³ It need not contain detailed information or include exceptions that might be required of a ballot title, but it must not be misleading or give partisan coloring to the merit of the proposal.⁴ The popular name is to be considered together with the ballot title in determining the ballot title’s sufficiency.⁵

The ballot title must include an impartial summary of the proposed amendment or act that will give the voter a fair understanding of the issues presented.⁶ According to the court, if information omitted from the ballot title is an “essential fact which

¹ *Kurrus v. Priest*, 342 Ark. 434, 445, 29 S.W.3d 669, 675 (2000); *Donovan v. Priest*, 326 Ark. 353, 359, 931 S.W.2d 119, 121 (1996).

² See *Arkansas Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

³ *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

⁴ E.g., *Chaney v. Bryant*, 259 Ark. 294, 297, 532 S.W.2d 741, 743 (1976). ; *Moore v. Hall*, 229 Ark. 411, 316 S.W.2d 207 (1958).

⁵ *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

⁶ *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

would give the voter serious ground for reflection, it must be disclosed.”⁷ At the same time, however, a ballot title must be brief and concise (*see* A.C.A. § 7-9-107(b)); otherwise voters could run afoul of A.C.A. § 7-5-522’s five minute limit in voting booths when other voters are waiting in line.⁸ The ballot title is not required to be perfect, nor is it reasonable to expect the title to cover or anticipate every possible legal argument the proposed measure might evoke.⁹ The title, however, must be free from any misleading tendency, whether by amplification, omission, or fallacy; it must not be tinged with partisan coloring.¹⁰ A ballot title must convey an intelligible idea of the scope and significance of a proposed change in the law.¹¹ The ballot title must be intelligible, honest, and impartial.¹²

Having analyzed your proposed amendment, as well as your proposed popular name and ballot title under the above precepts, it is my conclusion that I must reject your proposed popular name and ballot title due to ambiguities in the *text* of your proposed measure. A number of additions or changes to your ballot title are, in my view, necessary in order to more fully and correctly summarize your proposal. I cannot, however, at this time, fairly or completely summarize the effect of your proposed measure to the electorate in a popular name or ballot title without the resolution of the ambiguities. I am therefore unable to substitute and certify a more suitable and correct popular name and ballot title pursuant to A.C.A. § 7-9-107(b).

I refer to the following ambiguities:

⁷ *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

⁸ *Id.* at 288, 884 S.W.2d at 944.

⁹ *Id.* 293, 884 S.W.2d at 946–47.

¹⁰ *Id.* at 284, 884 S.W.2d at 942.

¹¹ *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 245, 884 S.W.2d 605, 607 (1994) (internal quotations omitted).

¹² *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

1. Your submission contains two sections captioned “Section 1.”
2. Subsection 2(1) of your measure declares that cannabis is an “effective treatment” that “should be treated like other medicines.” This provision is ambiguous in that it is unclear both what you mean by “treated” and what you mean in suggesting that all “other medicines” are “treated” alike.
3. Subsection 2(2) declares that “Arkansans suffering from debilitating medical conditions should be allowed to use small amounts of Cannabis without fear of civil or criminal penalties.” Subsection 2(4) further declares an intention to provide protection from “criminal and civil penalties.” These provisions misleadingly suggests that your measure would insulate Arkansans from “civil or criminal penalties” relating to “medical use of Cannabis” as defined – a suggestion belied by the fact that such use would constitute a criminal violation of federal law. Indeed, at no point in your measure, popular name or ballot title do you even acknowledge the fact that your measure would legalize under state law conduct that would remain illegal under federal law.
4. Subsection 2(3) declares that “Arkansans with debilitating medical conditions . . . should be able to discuss freely with their doctors the possible risks and benefits of medical Cannabis use and to have the benefit of their doctor’s [sic] professional advice.” This provision wrongly implies that doctors are currently forbidden to discuss with patients the possible medical benefits of cannabis use. Although the law precludes doctors from prescribing cannabis, it does not limit their free speech rights regarding its potential medical benefits.
5. Subsection (3)(1) defines the term “attending physician” to mean “a medical doctor licensed by the Arkansas State Medical Board who has *primary responsibility* for the care and treatment of a person diagnosed with a debilitating medical condition” (emphasis added). This definition is ambiguous in that it is unclear whether it would embrace the health-care provider normally designated as a “primary care physician” even if a patient has been referred to a specialist. The provision further provides

no guidance regarding who will determine “primary responsibility” and what criteria will bear on that determination.

6. Subsection 3(2), which defines the term “debilitating medical condition,” is ambiguous in various respects. First, although the definition is apparently intended to include both specified medical *conditions* (subsection 3(2)(A)) and specified medical *symptoms* irrespective of cause (subsection 3(2)(B)), the two subsections in fact do not conform to this logical division. Under subsection 3(2)(A), for instance, “agitation of Alzheimer’s Disease,” “cachexia,” “severe nausea,” “severe or chronic pain” and “painful peripheral neuropathy” are *symptoms* of conditions, not *conditions* of the sort listed elsewhere in this subsection. Unsurprisingly, then, subsection 3(2)(B), which recites symptoms, however caused, repeats “cachexia,” “severe pain” and “severe nausea” in its list. The need for two such overlapping subdivisions is unclear and ambiguous.

The designation of “chronic pain” as a “debilitating medical condition” is ambiguous in failing to specify any minimal degree of “chronic pain” as sufficient to qualify as “debilitating.” “Chronic pain” of the mildest sort would not qualify as “debilitating” in the ordinary-language sense of the latter term. Without clarification regarding whether you intend the term “debilitating” to be used in some unique sense in your measure, this provision will remain unclear in its scope.

Among the items listed as a “debilitating medical condition” under subsection 3(2)(A) are “hospice patients.” Needless to say, a “hospice patient” is not a “condition.” This entry is ambiguous in that it is unclear whether you intend any condition suffered by a hospice patient to qualify as a “debilitating medical condition.”

Also listed as a “debilitating medical condition” is “terminal illness.” This provision is ambiguous in that it fails to define the term “terminal illness.” Many illnesses, for instance, are potentially fatal but not invariably so. It is unclear whether such conditions qualify as “terminal.”

A related ambiguity arises from the measure's failure to specify at what phase of progression a "terminal illness" becomes "debilitating." In their earliest stages, various conditions that will eventually prove fatal would not qualify as "debilitating" in the ordinary-language sense of that term. This provision is consequently unclear in its scope.

Your definition of "debilitating medical condition" includes both "(ALS) Amyotrophic Lateral Sclerosis" and "Amyotrophic Lateral Sclerosis ALS (Lou Gehrig's Disease)." It is unclear what point, if any, you intend to make by this apparent repetition.

7. Your definition of "delivery" in subsection 3(3) is ambiguous in that it is difficult, if not impossible, to comprehend what it might mean for someone to engage in a "constructive . . . transfer . . . of a controlled substance or counterfeit substance . . . whether or not there is an agency relationship." A "constructive transfer," by its very nature, would appear to *require* an "agency relationship."
8. In subsection 3(4), your definition of a "designated primary caregiver" as the person assigned "significant responsibility for managing the well-being" of a person suffering a debilitating medical condition is ambiguous given the following usage of the term "designated primary caregiver" in subsection 13(c): "A designated primary caregiver may provide Cannabis for no more than four (4) persons who possesses [sic] a registry identification card." This provision suggests that a designated primary caregiver's "significance" in assuring a patient's "well-being" may be solely to supply the patient with cannabis. It is difficult to imagine, after all, that an individual would find himself in the unfortunate position of serving as a "caregiver," in the usual sense of that term, to four individuals at once, much less that society would have an interest in restricting to four the objects of such an unfortunate's caregiving impulses. It is unclear, in short, whether the term "designated primary caregiver" in your measure is no more than a euphemism for "supplier," meaning that the term as used is, at best, ambiguous.

9. In subsection 3(6), your definition of “cannabis” is ambiguous in that it includes “manufacture” as one form of the substance itself. Defining a process as being a variety of a substance is logically inconsistent. The same objection applies to the terms “mixture” and “preparation” if these refer to processes rather than products. Moreover, the confusion as to how these two terms are used in itself reflects an ambiguity.
10. In subsection 3(7), the definition of “medical use of Cannabis” is ambiguous in that it is unclear precisely what is meant by the phrase “administration of Cannabis.” Within the context of medical treatment, the term “administer” usually denotes “giving,” not “taking.” *See, e.g., Random House Webster’s Unabridged Dictionary* (2d ed. 1999), defining “administer,” *inter alia*, as meaning “give: to administer medicine” (emphasis in original). Ironically, then, the very definition of the phrase “medical use of Cannabis,” which your measure would allow, might be read as excluding the patient’s use of the substance as needed at his own discretion and direction. Indeed, unaccountably, your definition of this term, which authorizes various activities, at no point expressly approves the actual ingestion of cannaboid products.

It is likewise unclear whether the term as defined would apply to an attending physician who merely diagnoses an ailment and provides the written documentation required to support an application for issuance of a registry identification card. To the extent that only “medical use of Cannabis” is excepted from criminal prosecution under your measure, the extent of protection afforded an attending physician remains in question.

11. Subsection 3(8) defines the term “production” as follows: “‘Production’ includes the manufacture, planting, cultivation, growing, or harvesting *of a controlled substance*” (emphasis added). The highlighted phrase denotes a range of products that includes but extends well beyond “Cannabis” as defined. The use of this term is thus ambiguous. Indeed, it is unclear why the highlighted phrase is even included in the definition, since your numerous uses of the term “production” elsewhere in your measure are immediately qualified by the phrase “of Cannabis.”

12. Subsection 3(9) defines the term “registry identification card” to mean “a document issued by the Department that identifies a person authorized to engage in the medical use of Cannabis and the person’s designated primary caregiver, if any.” The definition is ambiguous and confusing in that a “designated primary caregiver” is by definition “a person authorized to engage in the medical use of Cannabis,” thus rendering apparently superfluous the portion of this definition beginning with “and.”
13. Subsection 3(11) defines the term “Written documentation” as follows: “‘Written documentation’ means a statement signed by the attending physician of a person diagnosed with a debilitating medical condition *or copies of the person’s relevant medical records*” (emphasis added). It is unclear why the highlighted phrase is included in this definition. Registration under the terms of your measure is based solely upon providing the referenced “statement signed by the attending physician,” and your measure at no point uses the term “written documentation” in a way that might suggest “medical records.”

Illustrating the ambiguity arising from this definition, your measure later suggests that showing a police officer “written documentation” submitted in support of an as yet ungranted application to become a cardholder will suffice to avoid criminal liability. Will simply showing some medical records an individual deems “relevant” suffice, or must he or she instead – or, at least, additionally – produce a “statement signed by an attending physician”?

14. Subsection 4(a) is ambiguous in its loose use of the term “person.” Subsection 4(a)(2) excepts from state criminal prosecution under the drug laws any “person” who is “engaged in or assisting in the medical use of Cannabis” if, *inter alia*, the following condition is met:

The person who has a debilitating medical condition and his or her primary caregiver are collectively in possession of, delivering or

producing Cannabis for medical use in the amounts allowed in Section 7 of this Act.

(Emphasis added.) The highlighted term “[t]he person” is ambiguous in that the earlier use of the term “person” appears to be broader, designating not only an afflicted individual but further anyone “assisting in the medical use of Cannabis.” This dual use of the term “person” is confusing.

The phrase “assisting in the medical use of Cannabis” is ambiguous in itself in that the “medical use of Cannabis” as defined already includes “assistance” in the form of “delivery” and “administration.” This notion of “assisting” in assisting is, to say the least, vague and confusing.

This ambiguity is compounded in subsection 4(a)(1), which conditions exemption from criminal prosecution upon the exempted “person” being a registered cardholder, an applicant for registration or “the designated primary caregiver of a cardholder or applicant.” Nothing guarantees that a “person” who is merely an applicant will be found to have a “debilitating medical condition,” as does the “person” referenced in subsection 4(a)(2).

The block quotation from subsection 4(a)(2) above is further ambiguous in its use of the phrase “collectively in possession of, delivering or producing Cannabis.” It is unclear precisely what it means “collectively” to meet the itemized conditions. How, for instance, can two people “collectively” possess Cannabis in the physical custody of a single individual?

The block quotation from subsection 4(a)(2) is further ambiguous in that it is unclear whether the phrase “in the amounts allowed” is intended as meaning “up to the amounts.”

15. Subsection 4(b)(3) is ambiguous in its plural usage “attending physicians.” The defined term “attending physician” clearly provides that there can be only one person so designated.

16. Subsection 4(c)(1) refers to an attending physician's explaining "to the person *and* to one of the person's parents or legal guardians" the risks of cannabis use. (Emphasis added.) The use of the term "and" in this passage is ambiguous in its suggestion that all candidates for the medical use of Cannabis will be minors.
17. Subsection 4(d) provides: "Information regarding registry identification cards received by a local health unit of the Department of Health shall be confidential and not subject to disclosure, except as required to transmit the information to the Department." This sentence is ambiguous in that it leaves open the question whether applicant information that is confidential in the hands of the "local unit" will be likewise confidential in the hands of the Department itself.
18. Subsection 4(f)(1)(B) provides that a registry identification card must include an expiration date. Neither this subsection nor any other provision contains information regarding how this date will be determined.
19. The concluding sentence of subsection 4(f)(2) is incomplete.
20. Subsection 4(g)(1), both in its introduction and thereafter, is ambiguous in its reference to "[a] person who possesses a registry identification card." Although the quoted language might refer either to a person suffering a debilitating medical condition or to a designated primary caregiver, the text of this subsection suggests that only the former is intended.
21. The scope of the "written documentation" required under subsection 4(g)(1)(B)(i) is ambiguous for reasons set forth in item 13, *supra*.
22. Subsection 4(g)(1)(B)(ii) mandates that a cardholder's annual submission to the Department provide "[t]he name of the person's designated primary caregiver if a primary caregiver has been designated for the upcoming year." This conditional provision is confusing

inasmuch as it could never be realized, given that the annual submission is the first occasion under your measure when a primary caregiver might be “designated for the upcoming year.”

23. Subsection 4(h) is ambiguous in that it provides for the return of registry identification cards without specifying what will be the legal effects of relinquishing – and, for that matter, failing to relinquish – the cards.
24. Subsection 4(i) provides that producing “written documentation” that one has applied for a registry identification card will have “the same legal effect” as possessing a card if one “is contacted by a law enforcement officer in connection with his or her administration, possession, delivery or production of Cannabis for medical use.” For reasons set forth in item 13, *supra*, this provision is ambiguous in its use of the term “written documentation.”
25. Section 6 provides an affirmative defense against criminal prosecution to any person, apparently irrespective of whether that individual has or has not sought to be registered, who has been “diagnosed with a debilitating medical condition,” *see* subsection 6(a)(1). The intended effect of this measure is presumably to enable any such individual, subject to the restrictions stated, to produce his or her own cannabis without risk of criminal prosecution. This section is ambiguous, however, in that it fails altogether to address the legal posture of the diagnosing physician, whom you have earlier suggested requires legal protection pursuant to your measure. Neither this section, section 4 nor any other section of your measure appears to exempt the attending physician from possible criminal exposure.
26. Subsection 6(a)(3) is ambiguous in its use of the phrase “greater amount.” Greater than what?
27. Subsection 6(b) provides as follows:

It is not necessary for a person asserting an affirmative defense under subsection (a) to have received a registry identification card

in order to assert the affirmative defense established under subsection (a).

This provision is ambiguous in that it fails to address whether the person asserting the affirmative defense must at least have *applied* for a registry identification card.

28. Subsection 6(c) provides as follows:

No person who claims that Cannabis provides medically necessary benefits and who is charged with a crime pertaining to such use of Cannabis shall be precluded from presenting in his or her defense evidence supporting the necessity of Cannabis for treatment of a specific disease or medical condition, provided that the amount of Cannabis at issue is no greater than permitted under section 7 of this act.

This subsection is ambiguous in that it fails to specify that the person claiming the defense must also be claiming that “Cannabis provides medically necessary benefits” *to him specifically*. Read within the context of section 6, the term “person” in subsection 6(c) is perhaps best read as intended to refer only to a person “diagnosed with a debilitating medical condition,” *see* subsection 6(a)(1). This reading is not inevitable, however, rendering your use of the term “person” ambiguous.

29. Subsection 7(a) is ambiguous in its reference to “[a] person who possesses a registry identification card . . . and a designated primary caregiver of such a person” The distinction between these two categories is inconsistent with other provisions of the measure directing that a designated primary caregiver also be issued a registry identification card.

This subsection is further ambiguous in its use of the term “collectively possess.” It is unclear whether a designated primary caregiver who serves in that capacity for more than one person suffering from a debilitating medical condition may possess in total only the quantities of

cannabis recited in this subsection, minus whatever quantities the patients possess, or whether he may possess these amounts for each patient.

30. Subsection 7(a)(2) is ambiguous in limiting the amount of cannabis possessed as follows:

If the person is present at a location at which Cannabis is produced, including any residence associated with that location, six (6) mature Cannabis plants . . . and four (4) ounces of usable Cannabis per each mature plant.

This provision is ambiguous in that it is unclear whether the referenced four ounces of cannabis represents an amount already collected from “each mature plant,” an amount potentially harvestable from “each mature plant” or an amount that might be possessed, regardless of source, “per each mature plant.”

31. Section 7(b) provides as follows:

If the individuals described in subsection (a) possess, deliver or produce Cannabis in excess of the amounts allowed in subsection (a), such individuals are not excepted from the criminal laws of the state but may establish an affirmative defense to such charges, by a preponderance of the evidence, that the greater amount is medically necessary to mitigate the symptoms or effects of the person’s debilitating medical condition.

On its face, this subsection effectively renders irrelevant the caps on possession set forth in the preceding subsection. The caps recited in subsection 7(a) are recited as applying to the possession of cannabis for therapeutic purposes. Subsection 7(b), however, provides that these caps will not apply so long as the “greater amount” is used for therapeutic purposes. This tension creates an ambiguity.

32. Subsection 8(a) provides that possessing a registry identification card will not “alone constitute probable cause” to conduct a search of the cardholder’s person or property. The use of the term “alone” in this provision creates an ambiguity in that it suggests that possessing a registry identification card might, in combination with some other undesignated circumstances, constitute probable cause to conduct a search.
33. Subsection 8(b) refers to “the prosecuting attorney . . . or his or her *designer*” (emphasis added). I assume the final word of this phrase is a misprint. As written, this passage is unclear in its meaning.
34. Section 9 provides that “[n]o attending physician may be subjected to civil penalty or discipline by the Arkansas State Medical Board” either for advising a patient diagnosed as suffering from a debilitating medical condition regarding the medical use of cannabis or for providing “written documentation necessary for issuance of a registry identification card.”

This provision is ambiguous in that it is unclear whether the term “civil penalty” refers only to a sanction possibly imposed by the Arkansas State Medical Board.

This provision is further confusing in that it appears designed to shield attending physicians from legal consequences for engaging in the described conduct without even mentioning the potential criminal liability you at least imply might exist in subsection 2(3).

35. Subsection 12(a) provides in part as follows:

The Department shall create and maintain a list of the persons to whom the Department has issued registry identification cards and the names of any designated primary caregivers.

This provision is ambiguous in that it implies that designated primary caregivers of a cardholder will not themselves have been issued registry identification cards. This suggestion is inconsistent with other

provisions of your measure. This same ambiguity is evident in subsection 12(b)(2), which provides law enforcement agencies access to information to establish “that a person is a lawful possessor of a registry identification card *or* that a person is the designated primary caregiver of such a person” (emphasis added).

36. Subsection 13(a) provides as follows:

If a person who possesses a registry identification card chooses to have a designated primary caregiver, the person must designate the primary caregiver by including the primary caregiver’s name and address:

- (1) On the person’s application for a registry card;
- (2) In the annual updated information required
- (3) In a written, signed statement submitted to the Department.

This provision is ambiguous in several respects. It is unclear how “a person who possesses a registry identification card” and elects to designate a primary caregiver could do so on an application he has already submitted. It is further unclear what sort of “signed statement” subsection (3) envisions. Will the application itself suffice?

37. Subsection 16(2) disclaims any intent to require an employer “to accommodate the medical use of Cannabis in any workplace stricter than exists for any other prescribed or recommended medication.” This provision is syntactically garbled to the point that its meaning is elusive. In this sentence, the adjective “stricter” modifies “workplace” and the noun “workplace” is the subject of the verb “exists” – grammatical facts that lead to a nonsensical reading. The phrase “prescribed or recommended medication” is also ambiguous. “Recommended” by whom and subject to what protocols?

38. The term “commendatory” in section 17 means something different from what you obviously intended. I am neither authorized nor inclined to rewrite your text to accord with your meaning.

Finally, I must note that your measure is laden with errors of grammar and composition that suggest a lack of focus in your preparation. This office lacks the time and resources to address such haphazard submissions – particularly when, as in the present case, a measure has been submitted on multiple prior occasions. Purely by way of illustration, I will note that you have failed even to correct the misspelling of the common term “medical” in your proposed popular name, despite the fact that I devoted a separate subsection of a previous opinion to addressing the same error. Again by way of example, you spell the word “their” in two distinct ways – one of which happens to be correct – in the first clause of your proposed ballot title. You have also ignored numerous specific criticisms, which I have not repeated here but which continue to apply, made in my previous opinions.

I cannot begin to certify a ballot title for your proposed amendment in the face of the ambiguities noted above. You must remedy these confusing and ambiguous points before I can perform my statutory duty.

My office, in the certification of ballot titles and popular names, does not concern itself with the merits, philosophy, or ideology of proposed measures. I have no constitutional role in the shaping or drafting of such measures. My statutory mandate is embodied only in A.C.A. § 7-9-107 and my duty is to the electorate. I am not your counsel in this matter and cannot advise you as to the substance of your proposal.

At the same time, however, the Arkansas Supreme Court, through its decisions, has placed a practical duty on the Attorney General, in exercising his statutory duty, to include language in a ballot title about the effects of a proposed measure on current law. *See, e.g., Finn v. McCuen, supra*. Furthermore, the Court has recently confirmed that a proposed amendment cannot be approved if “[t]he text of the proposed amendment itself contribute[s] to the confusion and disconnect between the language in the popular name and the ballot title and the language in the proposed measure.” *Roberts v. Priest*, 341 Ark. 813, 20 S.W.3d 376 (2000). The Court concluded: “[I]nternal inconsistencies would inevitably lead to confusion in drafting a popular name and ballot title and to confusion in the ballot title itself.” *Id.* Where the effects of a proposed measure on current law are

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unclear or ambiguous, it is impossible for me to perform my statutory duty to the satisfaction of the Arkansas Supreme Court without clarification of the ambiguities.

My statutory duty, under these circumstances, is to reject your proposed ballot title, stating my reasons therefor, and to instruct you to “redesign” the proposed measure and ballot title. *See* A.C.A. § 7-9-107(c). You may, after clarification of the matters discussed above, resubmit your proposed amendment, along with a proposed popular name and ballot title, at your convenience. I anticipate, as noted above, that some changes or additions to your submitted popular name and ballot title may be necessary. I will be pleased to perform my statutory duties in this regard in a timely manner after resubmission.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/cyh

Enclosure

To the Honorable Mark Martin
Secretary of State of the State of Arkansas.

We the undersigned legal voters of the State of Arkansas, respectfully propose the following law to wit:

(Popular Name)

ARKANSAS MEDICAL CANNABIS ACT

(Ballot Title)

AN ACT TO ESTABLISH THE REQUIREMENTS FOR THE MEDICAL USE OF CANNABIS BY ARKANSANS UNDER THE CARE OF THERE ATTENDING PHYSICIAN WHILE MAKING ONLY THOSE CHANGES TO EXISTING ARKANSAS LAWS THAT ARE NECESSARY TO PROTECT PATIENTS AND THEIR DOCTORS FROM CRIMINAL AND CIVIL PENALTIES, AND ARE NOT INTENDED TO CHANGE CURRENT CIVIL AND CRIMINAL LAWS GOVERNING THE USE OF CANNABIS FOR NON-MEDICAL PURPOSES. DEFINE CANNABIS TO MEAN ALL PARTS AND ANY VARIETY AND/OR SPECIES OF THE PLANT CANNABIS THAT CONTAINS THC (TETRAHYDROCANNABINOL) OF ONE PERCENT (1%) OR GREATER BY DRY WEIGHT, WHETHER GROWING OR NOT; THE SEEDS THEREOF; THE RESIN EXTRACTED FROM ANY PART OF THE PLANT; AND EVERY COMPOUND, MANUFACTURE, SALT, DERIVATIVE, MIXTURE, OR PREPARATION OF THE PLANT, ITS SEEDS OR RESIN. REQUIRE THAT THE DEPARTMENT OF HEALTH ESTABLISH AND MAINTAIN A PROGRAM FOR THE ISSUANCE OF REGISTRY IDENTIFICATION CARDS FOR THIS PURPOSE, TO ESTABLISH POSSESSION LIMITS FOR PERSONS AUTHORIZED TO ENGAGE IN THE MEDICAL USE OF CANNABIS AND THE PERSON'S DESIGNATED PRIMARY CAREGIVER. DEFINE "DEBILITATING MEDICAL CONDITION" MEANS:(ALS) AMYOTROPHIC LATERAL SCLEROSIS, AGITATION OF ALZHEIMER'S DISEASE,ALZHEIMER'S',AMYOTROPHIC LATERAL SCLEROSIS ALS (LOU GEHRIG'S DISEASE), ANOREXIA, ARTHRITIS (SEVERE), CACHEXIA OR WASTING SYNDROME, CANCER, CROHN'S DISEASE, DAMAGE TO THE NERVOUS TISSUE OF THE SPINAL CORD WITH INTRACTABLE SPASTICITY, GLAUCOMA, HEPATITIS C, HIV/AIDS, HOSPICE PATIENTS, INTRACTABLE SKELETAL MUSCULAR SPASTICITY, MIGRAINE, MULTIPLE SCLEROSIS (MS), MUSCULAR DYSTROPHY, NAIL PATELLA, PAINFUL PERIPHERAL NEUROPATHY, POST-TRAUMATIC STRESS DISORDER, SEIZURE DISORDERS, INCLUDING EPILEPSY, SEVERE NAUSEA, SEVERE OR CHRONIC PAIN, SEVERE OR PERSISTENT MUSCLE SPASMS, TERMINAL ILLNESS. A MEDICAL CONDITION OR TREATMENT FOR A MEDICAL CONDITION THAT PRODUCES, FOR A SPECIFIC PATIENT, ONE OR MORE OF THE FOLLOWING, CACHEXIA, SEVERE PAIN, SEVERE NAUSEA, SEIZURES, INCLUDING BUT NOT LIMITED TO SEIZURES CAUSED BY EPILEPSY OR PERSISTENT MUSCLE SPASMS, INCLUDING BUT NOT LIMITED TO SPASMS CAUSED BY MULTIPLE SCLEROSIS, OR ANY OTHER MEDICAL CONDITION OR TREATMENT FOR A MEDICAL CONDITION ADOPTED BY THE DEPARTMENT BY RULE OR APPROVED BY THE DEPARTMENT PURSUANT TO A PETITION.

Be It Enacted by the People of the State of Arkansas:

SECTION 1: PURPOSE & INTENT

"AN ACT TO PERMIT THE MEDICAL USE OF CANNABIS; AND FOR OTHER PURPOSES."

SECTION 1. This act may be referred to and cited as the "Arkansas Medical Cannabis Act".

SECTION 2. It is known that:

- (1) Patients and doctors have found Cannabis to be an effective treatment for suffering caused by debilitating medical conditions, and therefore, Cannabis should be treated like other medicines;
- (2) Arkansans suffering from debilitating medical conditions should be allowed to use small amounts of Cannabis without fear of civil or criminal penalties when their doctors advise that such use may provide a medical benefit to them and when other reasonable restrictions are met regarding that use;

(3) Arkansans with debilitating medical conditions who may benefit from the medical use of Cannabis should be able to discuss freely with their doctors the possible risks and benefits of medical Cannabis use and to have the benefit of their doctor's professional advice; and

(4) This act intends to make only those changes to existing Arkansas laws that are necessary to protect patients and their doctors from criminal and civil penalties, and are not intended to change current civil and criminal laws governing the use of Cannabis for non-medical purposes.

SECTION 3. Definitions for purposes of this act:

(1) "Attending physician" means a medical doctor licensed by the Arkansas State Medical Board who has primary responsibility for the care and treatment of a person diagnosed with a debilitating medical condition;

(2) "Debilitating medical condition" means:

(A) (ALS) Amyotrophic Lateral Sclerosis, Agitation of Alzheimer's Disease, Alzheimer's' Amyotrophic Lateral Sclerosis ALS (Lou Gehrig's Disease), Anorexia, Arthritis (severe), Cachexia or wasting syndrome, Cancer, Crohn's disease, Damage to the nervous tissue of the spinal cord with intractable spasticity, Glaucoma, Hepatitis C, HIV/AIDS, Hospice patients, Intractable skeletal muscular spasticity, Migraine, Multiple sclerosis (MS), Muscular dystrophy, Nail patella, Painful peripheral neuropathy, Post-Traumatic Stress Disorder, Seizure disorders, including epilepsy, Severe nausea, Severe or chronic pain, Severe or persistent muscle spasms, Terminal illness;

(B) A medical condition or treatment for a medical condition that produces, for a specific patient, one or more of the following:

(a) Cachexia

(b) Severe pain

(c) Severe nausea;

(d) Seizures, including but not limited to seizures caused by epilepsy; or Persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis; or

(C) Any other medical condition or treatment for a medical condition adopted by the Department by rule or approved by the Department pursuant to a petition under section 14 of this act requesting that a particular disease or condition be included among the diseases and conditions that qualify as debilitating medical conditions;

(3) "Delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship;

(4) "Designated primary caregiver" means an individual eighteen (18) years of age or older who has significant responsibility for managing the well-being of a person who has been diagnosed with a debilitating medical condition and who is designated as such on that person's application for a registry identification card or in other written notification to the Department.

"Designated primary caregiver" does not include the person's attending physician;

(5) "Department" means the Department of Health;

(6) “Cannabis” means all parts and any variety and/or species of the plant Cannabis that contains THC (Tetrahydrocannabinol) of one percent (1%) or greater by dry weight, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination;

(7) “Medical use of Cannabis” means the production, possession, delivery, or administration of Cannabis, or paraphernalia used to administer Cannabis, as necessary for the exclusive benefit of a person to mitigate the symptoms or effects of his or her debilitating medical condition;

(8) “Production” includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance;

(9) “Registry identification card” means a document issued by the Department that identifies a person authorized to engage in the medical use of Cannabis and the person’s designated primary caregiver, if any;

(10) “Usable Cannabis” means the dried leaves and flowers of the plant Cannabis, and any mixture or preparation thereof, that are appropriate for medical use. “Usable Cannabis” does not include the seeds, stalks and roots of the plant;

(11) “Written documentation” means a statement signed by the attending physician of a person diagnosed with a debilitating medical condition or copies of the person’s relevant medical records.

SECTION 4. (a) Except as provided in this act, a person engaged in or assisting in the medical use of Cannabis is excepted from the criminal laws of the state for possession, delivery or production of Cannabis, aiding and abetting another in the possession, delivery or production of Cannabis or any other criminal offense in which possession, delivery or production of Cannabis is an element if the following conditions have been satisfied:

(1) The person holds a registry identification card, has applied for a registry identification card, or is the designated primary caregiver of a cardholder or applicant; and

(2) The person who has a debilitating medical condition and his or her primary caregiver are collectively in possession of, delivering or producing Cannabis for medical use in the amounts allowed in Section 7 of this act.

(b) The Department shall establish and maintain a program for the issuance of registry identification cards. The Department shall issue a registry identification card to any person eighteen (18) years of age or older who pays a fee in the amount established by the Department that shall not exceed sixty dollars (\$60.00) per year and provides the following:

(1) Valid, written documentation from the person's attending physician stating that the person has been diagnosed with a debilitating medical condition and that the medical use of Cannabis may mitigate the symptoms or effects of the person's debilitating medical condition;

(2) The name, address and date of birth of the person;

- (3) The name, address and telephone number of the person's attending physicians; and
- (4) The name and address of the person's designated primary caregiver, if the person has designated a primary caregiver at the time of application.

(c) The Department shall issue a registry identification card to a person who is under eighteen (18) years of age if the person submits the materials required under subsection (b), and one of the person's parents or legal guardians signs a written statement that:

- (1) The person's attending physician has explained to the person and to one of the person's parents or legal guardians the possible risks and benefits of the medical use of Cannabis;
- (2) The parent or legal guardian consents to the use of Cannabis by the person for medical purposes;
- (3) The parent or legal guardian agrees to serve as the person's designated primary caregiver; and
- (4) The parent or legal guardian agrees to control the acquisition of Cannabis and the dosage and frequency of use by the person.

(d) A person applying for a registry identification card may submit the information required in subsection (b) to a local health unit of the Department of Health for transmittal to the Department. A local health unit of the Department of Health that receives that shall transmit the information to the Department within five (5) days after receipt of the information. Information regarding registry identification cards received by a local health unit of the Department of Health shall be confidential and not subject to disclosure, except as required to transmit the information to the Department.

(e) The Department shall verify the information contained in an application submitted pursuant to this section and shall approve or deny an application within thirty (30) calendar days after receipt of the application.

(1) The Department may deny an application only for the following reasons:

(A) The applicant did not provide the information to establish his or her debilitating medical condition and to document his or her consultation with an attending physician regarding the medical use of Cannabis in connection with such condition; or

(B) The Department determines that the information provided was falsified.

(2) Denial of a registry identification card shall be considered a final Department action, subject to judicial review. Only the person whose application has been denied, or, in the case of a person under the age of eighteen (18) years of age whose application has been denied, the person's parent or legal guardian shall have standing to contest the Department's action.

(3) Any person whose application has been denied may not reapply for six (6) months after the date of the denial, unless so authorized by the Department or a court of competent jurisdiction.

(f)(1) If the Department has verified the information submitted in an application for a registry identification card and none of the reasons for denial listed in subdivision (e)(1) are applicable, the Department shall issue a serially numbered registry identification card within five (5) calendar days after verification of the information. The registry identification card shall state:

- (A) The cardholders name, address and date of birth;
- (B) The date of issuance and expiration date of the registry identification card;
- (C) The name and address of the person's designated primary caregiver, if any; and
- (D) Such other information as the Department may specify by rule.

(2) When the person to whom the Department has issued a registry identification card

pursuant to this section has specified a designated primary caregiver, the Department shall issue a registry identification card to the designated primary caregiver. The primary caregiver's registry identification card shall contain the information required in subdivision

(g)(1) A person who possesses a registry identification card shall:

(A) Notify the Department of any change in the person's name, address, attending physician or designated primary caregiver; and

(B) Annually submit to the Department:

(i) Updated written documentation of the person's debilitating medical condition; and

(ii) The name of the person's designated primary caregiver if a primary caregiver has been designated for the upcoming year.

(2) If a person who possesses a registry identification card fails to comply with this subsection, the card shall be deemed expired. If a registry identification card expires, the identification card of any designated primary caregiver of the cardholder shall also expire.

(h) A person who possesses a registry identification card and who has been diagnosed by the person's attending physician as no longer having a debilitating medical condition shall return the registry identification card to the Department within seven (7) calendar days after notification of the diagnosis. Any designated primary caregiver shall return his or her identification card within the same period of time.

(i) A person who has applied for a registry identification card but whose application has not yet been approved or denied, and who is contacted by any law enforcement officer in connection with his or her administration, possession, delivery or production of Cannabis for medical use may provide to the law enforcement officer a copy of the written documentation submitted to the Department and proof of the date of mailing or other transmission of the documentation to the Department. This documentation shall have the same legal effect as a registry identification card until such time as the person receives notification that the application has been approved or denied.

SECTION 5. (a) No person authorized to possess, deliver or produce Cannabis for medical use shall be excepted from the criminal laws of this state or shall be deemed to have established an affirmative defense to criminal charges of which possession, delivery or production of Cannabis is an element if the person, in connection with the facts giving rise to such charges:

(1). Drives under the influence of Cannabis;

(2). Engages in the medical use of Cannabis in a public place, or in public view;

(3). Delivers Cannabis to any individual who the person knows is not in possession of a registry identification card; or

(4). Delivers Cannabis for consideration to any individual, even if the individual is in possession of a registry identification card.

(b) In addition to any other penalty allowed by law, a person who the Department finds has willfully violated the provisions of this act or rules adopted under this act may be precluded from obtaining or using a registry identification card for the medical use of Cannabis for a period of up to six months, at the discretion of the Department.

SECTION 6. (a) Except as provided in sections 5 and 11 of this act, it is an affirmative defense to a criminal charge of possession or production of Cannabis, or any other criminal offense in which possession or production of Cannabis is an element, that the person charged with the offense is a person who:

- (1) Has been diagnosed with a debilitating medical condition and been advised by his or her attending physician that the medical use of Cannabis may mitigate the symptoms or effects of that debilitating medical condition;
- (2) Is engaged in the medical use of Cannabis; and
- (3) Possesses or produces Cannabis only in the amounts permitted under section 7 of this act, if the person proves by a preponderance of the evidence that the greater amount is medically necessary to mitigate the symptoms or effects of the person's debilitating medical condition.

(b) It is not necessary for a person asserting an affirmative defense under subsection (a) to have received a registry identification card in order to assert the affirmative defense established under subsection (a).

(c) No person who claims that Cannabis provides medically necessary benefits and who is charged with a crime pertaining to such use of Cannabis shall be precluded from presenting in his or her defense evidence supporting the necessity of Cannabis for treatment of a specific disease or medical condition, provided that the amount of Cannabis at issue is no greater than permitted under section 7 of this act.

SECTION 7. (a) A person who possesses a registry identification card may engage in, and a designated primary caregiver of such a person may assist in, the medical use of Cannabis only as justified to mitigate the symptoms or effects of the person's debilitating medical condition. Except as allowed in subsection (b), a registry identification cardholder and that person's designated primary caregiver may not collectively possess, deliver or produce more than the following:

(1) If the person is present at a location at which Cannabis is not produced, including any residence associated with that location, four (4) ounces of usable Cannabis; and

(2) If the person is present at a location at which Cannabis is produced, including any residence associated with that location, six (6) mature Cannabis plants, four (4) immature Cannabis plants and four (4) ounces of usable Cannabis per each mature plant.

(b) If the individuals described in subsection (a) possess, deliver or produce Cannabis in excess of the amounts allowed in subsection (a), such individuals are not excepted from the criminal laws of the state but may establish an affirmative defense to such charges, by a preponderance of the evidence, that the greater amount is medically necessary to mitigate the symptoms or effects of the person's debilitating medical condition.

(c) The Department of Health shall define by rule that a Cannabis plant is considered mature when said plant is in or past the flowering stage.

SECTION 8. (a) Possession of a registry identification card or designated primary caregiver identification card shall not alone constitute probable cause to search the person or property of the cardholder or otherwise subject the person or property of the cardholder to inspection by any governmental agency.

(b) Any property interest possessed, owned or used in connection with the medical use of Cannabis or acts incidental to the medical use of Cannabis that has been seized by state or local law enforcement officers shall not be harmed, neglected, injured or destroyed while in the possession of any law enforcement agency. No such property interest may be forfeited under any provision of law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal offense. Cannabis and paraphernalia used to administer Cannabis that was seized by any law enforcement officer shall be returned immediately upon a determination by the prosecuting attorney in whose county the property was seized, or his or her designer, that the person from whom the Cannabis or paraphernalia used to administer Cannabis was seized is entitled to the protections contained in this act. Such determination may be evidenced, for example, by a decision not to prosecute, the dismissal

of charges, or acquittal.

SECTION 9. No attending physician may be subjected to civil penalty or discipline by the Arkansas State Medical Board for:

- (1) Advising a person whom the attending physician has diagnosed as having a debilitating medical condition, or a person who the attending physician knows has been so diagnosed by another physician licensed in this state, about the risks and benefits of medical use of Cannabis or that the medical use of Cannabis may mitigate the symptoms or effects of the person's debilitating medical condition, provided the advice is based on the attending physician's personal assessment of the person's medical history and current medical condition; or
- (2) Providing the written documentation necessary for issuance of a registry identification card, if the documentation is based on the attending physician's personal assessment of the applicant's medical history and current medical condition and the physician has discussed the potential medical risks and benefits of the medical use of Cannabis with the applicant.

SECTION 10. No professional licensing board may impose a civil penalty or take other disciplinary action against a licensee based on the licensee's medical use of Cannabis or actions taken by the licensee that are necessary to carry out the licensee's role as a designated primary caregiver to a person who possesses a lawful registry identification card.

SECTION 11. Nothing in this act shall protect a person from a criminal cause of action based on possession, production, or delivery of Cannabis that is not authorized by this act.

SECTION 12. (a) The Department shall create and maintain a list of the persons to whom the Department has issued registry identification cards and the names of any designated primary caregivers. Except as provided in subsection (b), the list shall be confidential and not subject to public disclosure.

(b) Names and other identifying information from the list established pursuant to subsection (a) may be released to:

- (1) Authorized employees of the Department as necessary to perform official duties of the Department; and
- (2) Authorized employees of state or local law enforcement agencies, only as necessary to verify that a person is a lawful possessor of a registry identification card or that a person is the designated primary caregiver of such a person.

SECTION 13. (a) If a person who possesses a registry identification card chooses to have a designated primary caregiver, the person must designate the primary caregiver by including the primary caregiver's name and address:

- (1) On the person's application for a registry card;
- (2) In the annual updated information required
- (3) In a written, signed statement submitted to the Department.

(b) A person described in subsection (a) may have only one designated primary caregiver at any given time.

(c) A designated primary caregiver may provide Cannabis for no more than four (4) persons who possess a registry identification card

SECTION 14. Any person may submit a petition to the Department requesting that a particular disease or condition be included among the diseases and conditions that qualify as debilitating medical conditions. The Department shall adopt rules establishing the manner in which the Department will

evaluate petitions submitted under this subsection. The Department shall approve or deny a petition within one hundred-eighty (180) days of receipt of the petition by the Department. Denial of a petition shall be considered a final Department action subject to judicial review.

SECTION 15. The Department shall adopt all rules necessary for the implementation and administration of this act.

SECTION 16. Nothing in this act shall be construed to require:

- (1) A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of Cannabis; or
- (2) An employer to accommodate the medical use of Cannabis in any workplace stricter than exists for any other prescribed or recommended medication.

SECTION 17. All provisions of this Act of a general and permanent nature are commendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 18. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

SECTION 19. All laws and parts of laws in conflict with this Act are hereby repealed.

And by this, our petition, order that the same be submitted to the people of said state, to the end that the same may be adopted, enacted or rejected by the vote of legal voters of said state, at the regular general election to be held in said state on the 4th day of November 2014, and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Arkansas, and my printed name, date of birth, residence, city or town of residence, and date of signing this petition are correctly written after my signature.