

Opinion No. 2013-061

July 1, 2013

Lieutenant Colonel Marjorie Leclair, USA, Ret.
Secretary
Arkansans for Medical Cannabis (BQC)
Post Office Box 111
Dennard, Arkansas 72629

Dear Lieutenant Colonel Leclair:

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 constitutional amendment. Your organization has previously submitted three similar measures, which this office rejected. *See* Ops. Att’y Gen. Nos. 2013-021, 2011-059 and 2011-031. You have made changes to your proposal since your last submission and have now submitted the following proposed popular name and ballot title for my certification:

Popular Name

AN AMENDMENT TO END THE PROHIBITION AGAINST HEMP AND MARIJUANA

Ballot Title

An amendment to the Arkansas Constitution which declares the plant cannabis, commonly called hemp and marijuana, to be both an agricultural commodity, medicinal [sic] product and intoxicant; and which ends prohibition against cultivation, possession, processing or sale of cannabis, but requires regulation and taxation of cannabis in its various forms, as with other agricultural commodities [sic], medicinal products and alcoholic beverages.

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, consistent with Arkansas Supreme Court precedent, unless the measure is “clearly contrary to law,”¹ this office will not require that a measure’s proponents acknowledge in the ballot title any possible constitutional infirmities. As part of my review, however, I may address constitutional concerns for consideration by the measure’s proponents.

Consequently, this review has been limited primarily to a determination, pursuant to the guidelines that have been set forth by the Arkansas Supreme Court, discussed below, of whether the popular name and ballot title you have submitted accurately and impartially summarize the provisions of your proposed amendment.

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,

¹ See *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); *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992).

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).

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 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

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).

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).

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:

1. Section One of your measure provides as follows:

The plant Cannabis, commonly called hemp and marijuana, is hereby recognized and declared to be an agricultural commodity, a medicinal product, and an intoxicant.

This provision is ambiguous in that it is unclear what you intend in making this declaration. You fail to indicate what consequences your declaration would have, thus leaving me unable to determine the legal effects of the declaration itself. Although you address the issues of taxation and regulation in Section Two – in the process creating the ambiguities discussed below – nothing in Section One permits me to determine what would be the full ramifications of your “declaration.” I can only assume that this section is intended to have some significance beyond what is set forth in Section Two, but I am unable to determine what that significance might be. Without clarification regarding what you intend this section to accomplish, I cannot summarize its terms in a ballot title.

2. This provision is further confusing in erroneously declaring that “[t]he plant Cannabis” will fall into all three of the categories you

have recited. The genus “Cannabis” comprises what are commonly deemed various species that cannot all be located within all of these categories. Illustrating this point, your conflation of the terms “hemp and marijuana” is confusing inasmuch as “hemp” is not commonly associated with medicinal and recreational uses, whereas “marijuana” is commonly associated exclusively with such uses. I am unable to determine what you mean to accomplish by this conflation and hence am unable to summarize this provision in a ballot title.

3. This provision is further ambiguous in that it is unclear what practical consequences you intend to result from artificially creating what can only be described as three overlapping categories. The categories “medicinal product” and “intoxicant,” for instance, clearly overlap in light of the fact that marijuana, which is generally recognized as a subset of “Cannabis,” can be used for either purpose. Both of these categories, moreover, to the extent they are implicated in commerce, would appear to qualify as “agricultural commodities,” although this latter category might further include grades and varieties of cannabis that are neither medicinal nor intoxicant. It is unclear how you intend “the plant Cannabis” to be located within any particular category and what significance you intend to attach to its location therein. Without resolution of these ambiguities, I am unable to summarize your measure in a ballot title.
4. Section Two of your measure provides as follows:

The legislature shall make no law prohibiting the cultivation, possession, processing or sale of Cannabis. The legislature shall regulate and tax Cannabis in its various forms, at a rate no greater than those placed on any other agricultural commodity, medicinal product or alcoholic beverage.

This section is ambiguous in that it fails to provide the legislature any guidance regarding the scope and nature of its role in “regulat[ing] . . . Cannabis in its various forms.” The scope and significance of the legislature’s regulatory authority are clearly matters of utmost interest to the voters. Given your blanket directive, however, that the legislature “make no law” prohibiting “cultivation, possession, processing or sale of Cannabis,” it is unclear what regulations the General Assembly might authorize in legislation implementing the amendment. There is an element of prohibition in any regulation, inasmuch as a regulation of necessity prohibits certain conduct. Without clarification regarding what activities may be regulated and to what end, I cannot sufficiently summarize this aspect of your proposal in a ballot title.

5. As noted above, the second sentence of Section Two provides as follows:

The legislature shall regulate and tax Cannabis in its various forms, at a rate no greater than those placed on any other agricultural commodity, medicinal product or alcoholic beverage.

This sentence is ambiguous in that the reference to a “rate” appears to apply to both the preceding terms “regulate” and “tax.” This impression is reinforced by the inclusion of the first comma in this sentence. I cannot interpret and hence cannot summarize in a ballot title what it might mean to “regulate” cannabis “at a rate.” Without resolution of this ambiguity, I cannot summarize your measure in a ballot title.

6. Even assuming the term “rate” is intended to apply only to a rate of taxation, your sentence mistakenly assumes that there is a uniform “rate” at which each product falling within a particular category is taxed. This assumption is erroneous in that not every “alcoholic beverage,” for instance, is taxed at the same rate.

Moreover, whatever you intend to be the range of the category “medicinal product,” certain products that clearly fall within this category, such as prescription drugs, are currently exempt from taxation. Without resolution of this ambiguity, I cannot summarize your measure in a ballot title.

7. This sentence is further ambiguous in that it appears to assume that Cannabis readily falls into one of the recited categories for purposes of taxation. As noted in my critique of Section One above, “cannabis” in what you term its “various forms” can potentially fall into more than one category, as illustrated by the potential uses of marijuana and hashish for either medicinal or intoxicant purposes. You have provided no guidance regarding whether or how “forms” of cannabis can or should be categorized. Without resolution of this ambiguity, I am unable to summarize your measure in a ballot title.
8. Both your ballot title and your measure itself further fail to acknowledge that the voters cannot completely legalize marijuana in Arkansas because the drug remains illegal under federal law.¹³ To echo my similar objection to your immediately previous submission: “[A]t 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.” Simply stated, the federal government and its agencies will retain the authority to enforce the federal drug laws even if the voters adopt your proposed amendment sanctioning the use of marijuana.¹⁴ Disclosure of

¹³ See 21 U.S.C. § 801 *et seq.* (the Controlled Substances Act). *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

¹⁴ See Note, *California Takes a Hit: The Supreme Court Upholds Congressional Authority over the State-Approved Use of Medicinal Marijuana*. *Gonzales v. Raich*, 545 U.S. 1 (2005), 28 UALR L.Rev. 545, 580 (2006).

this fact might give a reasonable voter serious ground for reflection.

Finally, as I have done previously, I must again caution you against spelling errors of the sort contained in your proposed ballot title. I will remind you that you are proposing to amend the Arkansas Constitution – an enterprise of sufficient gravity to warrant greater attention to correct spelling.

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 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

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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

(Popular Name)

AN AMENDMENT TO END THE PROHIBITION AGAINST HEMP
AND MARIJUANA

(Ballot Title)

AN AMENDMENT TO THE ARKANSAS CONSTITUTION WHICH
DECLARES THE PLANT CANNABIS, COMMONLY CALLED
HEMP AND MARIJUANA, TO BE BOTH AN AGRICULTURAL
COMMODITY, MEDICINAL PRODUCT AND A INTOXICANT;
AND WHICH ENDS PROHIBITION AGAINST CULTIVATION,
POSSESSION, PROCESSING OR SALE OF CANNABIS, BUT
REQUIRES REGULATION AND TAXATION OF CANNABIS IN ITS
VARIOUS FORMS, AS WITH OTHER AGRICULTURAL
COMMODITIES, MEDICINAL PRODUCTS AND ALCOHOLIC
BEVERAGES.

(Text)

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ARKANSAS:

Section One: The plant Cannabis, commonly called hemp and marijuana,
is hereby recognized and declared to be an agricultural commodity, a
medicinal product, and an intoxicant.

Section Two: The legislature shall make no law prohibiting the
cultivation, possession, processing or sale of Cannabis. The legislature
shall regulate and tax Cannabis in its various forms, at a rate no greater
than those placed on any other agricultural commodity, medicinal product
or alcoholic beverage.

Section Three: This amendment shall take effect six months after
passage.