

Opinion No. 2013-094

August 19, 2013

Lieutenant Colonel Marjorie LeClair, USA, Ret.
3362 Burnt Ridge Road
Shirley, Arkansas 72153-8329

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 following popular name and ballot title for a proposed constitutional amendment. You previously submitted a similar measure, which this office rejected due to ambiguities in the text of the proposed measure. *See* Op. Att'y Gen. No. 2013-061. 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

REPEAL PROHIBITION OF CANNABIS

Ballot Title

An amendment to the Arkansas Constitution to repeal all Arkansas laws pertaining to the cannabis plant commonly called hemp or marijuana, this amendment does not change any federal law regarding cannabis.

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, 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

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).

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).

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

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

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).

certify a more suitable and correct popular name and ballot title pursuant to A.C.A. § 7-9-107(b).

Your measure in its entirety provides as follows:

It is the objective of the People of the State of Arkansas to:

- Restore the rights of Arkansans to cultivate cannabis as an agricultural commodity and manufacture derivative products for commercial and personal use to the extent permitted by federal law. Presently this right is denied Arkansas farmers, while at the same time cannabis-hemp-derivative products are legally imported and sold in Arkansas. This situation puts Arkansas farmers at an unfair disadvantage;
- Allow those who use cannabis for the relief of illness to do so free of fear of arrest by Arkansas state and local law enforcement, and;
- Divert tax dollars from arresting, holding, prosecuting and incarcerating those accused of cannabis-related crimes to more humane purposes such as health care.

This measure is ambiguous in the following respects:

1. As a general matter, these three provisions do no more than state the “objective[s]” to be realized by presumably undertaking some practical action. You recite this action in your ballot title – namely, the “repeal [of] all Arkansas laws pertaining to the cannabis plant” – but never do so in the text of your measure itself. As a result, rather than summarizing your measure, your ballot title impermissibly adds substantive provisions thereto.

The ballot title, as noted above, is intended to provide voters with an accurate summary of what the measure itself provides. The text of a measure, on the other hand, actually sets forth and

effects changes in the law.¹³ Your measure contains no such operative language, instead merely reciting various objectives to be realized by changes you have failed to recite. I am consequently unable to summarize in the ballot title the practical action you apparently contemplate.

2. Even assuming that the text of your measure had expressly repealed Arkansas cannabis laws, your measure would be ambiguous in that this repeal in itself could not realize the objective stated in your first point – namely, to “[r]estore the rights of Arkansas to cultivate cannabis as an agricultural commodity.” Even industrial hemp, which is arguably the least controversial cultivar of *Cannabis sativa*, is classified as a Schedule I drug under the federal Controlled Substance Act,¹⁴ and it is accordingly subject to strict regulation that verges on outright prohibition.¹⁵ This fact suggests that the repeal of Arkansas cannabis laws would have little, if any, effect on the ability of Arkansans legally to cultivate marijuana. Inasmuch as your measure’s “objective[s]” indicate otherwise, I am foreclosed from summarizing the measure in a way that adequately informs the voters of legal consequences – or the lack thereof – that might cause them serious concern.

As noted above, the text of a proposed constitutional amendment must at a minimum set forth changes or additions to current law.

¹³ This office has explored the significance of this distinction on at least two occasions. See Ops. Att’y Gen. 2013-089 and 2007-083.

¹⁴ 21 U.S.C.A. §§ 801 *et seq.*

¹⁵ See, e.g., University of Kentucky College of Agriculture Cooperative Extension Service, *Industrial Hemp*, www.uky.edu/Ag/CDBREC/introsheets/hemp.pdf (last visited 8/13/13). This article reviews the provisions of 2013 legislation, codified at Kan. Rev. Stat. §§ 260.850 through 260. 869, in relation to federal law regulating cannabis. The article concludes:

While the passage of SB50 paves the way for industrial hemp production at the state level, it is still illegal to grow this crop without a permit issued by the federal government. Currently strict federal regulations and the high cost of complying with DEA security requirements make hemp production prohibitive, even at the research level.

If the text further *inaccurately* asserts that the amendment will realize certain specified goals, any such inaccurate assertion will in itself render the text ambiguous and unsusceptible of summation in a ballot title. More specifically, if the text declares that it will necessarily accomplish a legal end that it cannot realize under controlling federal law – a condition that applies to the first of your recited objectives – the measure’s actual legal effects cannot be accurately summarized in a ballot title. I am unable, in short, to fulfill in this instance my dual charge to accurately summarize the measure and to accurately apprise the voter of its legal effects.

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.

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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

Popular Name

REPEAL PROHIBITION OF CANNABIS

Ballot Title

AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO REPEAL ALL ARKANSAS LAWS PERTAINING TO THE CANNABIS PLANT COMMONLY CALLED HEMP OR MARIJUANA, THIS AMENDMENT DOES NOT CHANGE ANY FEDERAL LAW REGARDING CANNABIS.

Text

It is the objective of the People of the State of Arkansas to:

- Restore the rights of Arkansans to cultivate cannabis as an agricultural commodity and manufacture derivative products for commercial and personal use to the extent permitted by federal law. Presently this right is denied Arkansas farmers, while at the same time cannabis-hemp-derivative products are legally imported and sold in Arkansas. This situation puts Arkansas farmers at an unfair disadvantage;
- Allow those who use cannabis for the relief of illness to do so free of fear of arrest by Arkansas state and local law enforcement, and;
- Divert tax dollars from arresting, holding, prosecuting and incarcerating those accused of cannabis-related crimes to more humane purposes such as health care.

Submitted: August 5, 2013

By: Marjorie LeClair, 3362 Burnt Ridge Rd., Shirley, AR 72153-8329; 501-745-8727

To: Attorney General Dustin McDaniel, 323 Center Street, 2nd Floor, Little Rock, Arkansas

Re: Request for approval of proposed Ballot Title for petition initiative.