

Opinion No. 2013-105

September 10, 2013

John Wesley Hall, Esq.
1202 Main Street, Suite 210
Little Rock, Arkansas 72202-5057

Dear Mr. Hall:

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:

Popular Name

THE ARKANSAS MARIJUANA RIGHT OF PRIVACY AMENDMENT

Ballot Title

A constitutional amendment recognizing: a right of privacy to possess up to four ounces of marijuana in the home and the person but allowing the state to reasonably regulate and tax commercial sale, distribution, and use of such small amounts of marijuana; permitting prohibition of smoking marijuana in a public place, sale or distribution to minors, operating vehicles while impaired by marijuana, possession of amounts greater than four ounces, and other reasonable prohibitions consistent with the right of privacy; recognizing that federal law prohibits marijuana possession and distribution and this amendment does not immunize federal prosecution, but respectfully requesting the federal government to

honor Arkansas's free choice to legalize possession of small amounts of marijuana.

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

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

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).

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:

- The proposal is ambiguous in that its preamble refers to medical benefits from marijuana use but its substantive provisions do not depend on the user's medical condition.
- Section (a) states a "right of privacy . . . to possess and consume marijuana," without stated limits. Section (b) provides that "[p]ossession of up to four ounces of marijuana in the home and on the person shall be legal," but the section does not refer to the right of privacy. The proposal is unclear and ambiguous with respect to whether section (b) delineates an outer boundary of section (a)'s right to privacy or instead there remains a right of privacy to possess, say, six ounces even though the State may criminalize possession of that amount.
- Section (c)(1) may be interpreted to prohibit commercial sales of, and acts in distribution relating to, more than four ounces, but it might be interpreted to permit – subject to reasonable regulation – commercial sale and distribution of more than four ounces, provided no more than four ounces at a time is sold to an end user. The proposal is unclear, in other words, with respect to how the General Assembly may regulate distribution leading up to the final point of sale. The section's interpretation in this respect could significantly influence how and the extent to which marijuana sales and distribution are commercialized.
- The proposal is unclear with respect to the extent, if any, to which the General Assembly may regulate or prohibit cultivation and production.
- The phrase "this Amendment does not them from immunize prosecution" in section (d) is nonsensical and inherently ambiguous.

- Section (d) uses the phrase “[t]o whatever extent that may become legally possible. . . .” It is not clear to what the word “that” refers. It is most naturally read to refer to the prospect that the proposal may eventually immunize the people of Arkansas from federal prosecution. It is not clear how that result could ever come about.

I cannot 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 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

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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

The Arkansas Marijuana Right of Privacy Amendment.

BALLOT TITLE

A Constitutional Amendment Recognizing: A Right of Privacy to Possess Up to Four Ounces of Marijuana in the Home and the Person but Allowing the State to Reasonably Regulate and Tax Commercial Sale, Distribution, and Use of Such Small Amounts of Marijuana; Permitting Prohibition of Smoking Marijuana in a Public Place, Sale or Distribution to Minors, Operating Vehicles While Impaired by Marijuana, Possession of Amounts Greater Than Four Ounces, and Other Reasonable Prohibitions Consistent with the Right of Privacy; Recognizing that Federal Law Prohibits Marijuana Possession and Distribution and This Amendment Does Not Immunize Federal Prosecution, but Respectfully Requesting the Federal Government to Honor Arkansas's Free Choice to Legalize Possession of Small Amounts of Marijuana.

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

The People of the State of Arkansas believe that marijuana has medically beneficial uses and it should not be regulated or prohibited like other drugs, despite federal prohibition. Therefore:

(a) *Privacy*: There is a right of privacy in the State of Arkansas to possess and consume marijuana.

(b) *Legalization under Arkansas law*: Possession of up to four ounces of marijuana in the home and on the person shall be legal under Arkansas law.

(c) *Regulation and taxation of distribution*:

(1) Commercial sale, distribution, and use of up to four ounces of marijuana may be reasonably regulated by the legislature, consistent with the right of privacy to possess and consume marijuana.

(2) The State may reasonably tax marijuana commercial sale and distribution, and the tax may not be confiscatory or punitive. These tax revenues shall be used by

the State for drug education, treatment, rehabilitation, and enforcement.

(d) *Permitted state criminal offenses:*

(1) smoking marijuana in public may be made a low misdemeanor.

(2) sale or distribution to minors shall be a crime.

(3) operating vehicles, boats, or airplanes while impaired by marijuana shall be a crime, as it is with alcohol or other drugs.

(4) possession of amounts larger than four ounces may be a crime.

(5) the legislature may adopt other reasonable conditions and prohibitions consistent with this right of privacy to possess and consume marijuana.

(d) *Recognition of federal prohibition and lack of federal immunity:* Arkansans are aware that federal law criminalizes marijuana possession and distribution and other marijuana crimes. The People of the State of Arkansas recognize that this Amendment does not them from immunize prosecution for federal marijuana offenses. To whatever extent that may become legally possible, however, the People of the State of Arkansas assert their Tenth Amendment right to use, possess, distribute, and obtain small amounts marijuana for personal consumption, and they respectfully request the federal government to honor their free choice.