Opinion No. 2013-117

October 2, 2013

Lieutenant Colonel Marjorie LeClair, USA, Retired
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 have previously submitted similar measures, which this office rejected due to ambiguities in the texts of the proposed measures. *See* Op. Att'y Gen. Nos. 2013-109, 2013-094 and 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

BAN PROHIBITION OF CANNABIS

Ballot Title

> Amend the constitution of Arkansas to repeal all Arkansas laws pertaining to the cannabis plant. This amendment does not change any federal laws that may exist regarding the cannabis plant.

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]

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[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] The ballot title must be honest and impartial,[11] and it must convey an intelligible idea of the scope and significance of a proposed change in the law.[12]

Furthermore, the Court has 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."[13] The Court concluded that "internal inconsistencies would inevitably lead to confusion in drafting a popular name and ballot title and to confusion in the ballot title itself."[14] 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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[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] *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

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

[13] *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 383 (2000).

[14] *Id*.

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).

The text of your measure provides in its entirety:

> This amendment repeals all Arkansas laws pertaining to the cannabis plant, however, at present, federal law has all cannabis plants listed as a Schedule 1 drug making it a controlled substance. All federal guidelines must be adhered to and federal permits obtained when reguired [sic].

1. The first sentence of your text is ambiguous in that it leaves unclear whether you intend only to repeal current state laws "pertaining to the cannabis plant" or whether you further intend to foreclose any future legislation dealing with this subject matter. Although on its face your first sentence suggests the former alternative, your proposed popular name, "Ban Prohibition of Cannabis," suggests you intend to foreclose any future prohibitive legislation relating to cannabis. Compounding the confusion on this score is the fact that your measure seeks not the adoption of an initiated act, which would suffice to repeal current legislation, but rather the adoption of a constitutional amendment, which might in theory be designed to foreclose the legislature from enacting future legislation "pertaining to the cannabis plant."[15] Without clarification of this ambiguity, I cannot inform the voter in a ballot title of the effect on current law adopting your measure would have.

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[15] I note in this regard that Section 2 of one of your previous submissions, which I rejected for other reasons in Op. Att'y Gen. 2013-061, called for precisely such a bar against future legislation.

2. The first sentence of your text is further ambiguous in that it is unclear what laws fall within the category "all Arkansas laws pertaining to the cannabis plant." At issue is how one determines precisely when a law "pertains" to a particular "plant." Although your measure would clearly repeal any current legislation banning the cultivation of marijuana, it is unclear whether it would further extend to legislation, say, addressing the production, distribution and sale of cannabis derivatives and products containing the chemical components of a "cannabis plant." It is further unclear whether a repeal of "laws pertaining to the cannabis plant" would extend to legislation that would permit the taxation of cannabis grown as an industrial or agricultural commodity. Without clarification, I cannot inform the voter of just what legislation would be repealed as "pertaining to the cannabis plant."

3. As noted, the final sentence of your measure provides: "All federal guidelines must be adhered to and federal permits obtained when re[q]uired." This sentence is ambiguous in that it suggests, wrongly, that the observance of federal guidelines and the obtaining of federal permits would allow for the exploitation of "the cannabis plant" in unspecified ways currently prohibited under Arkansas law. As acknowledged in the second clause of your opening sentence, "federal law has all cannabis plants listed as a Schedule 1 drug making it a controlled substance." As I have pointed out to you before, even in the absence of any state law on the subject, nothing in "federal guidelines" and the procedures for obtaining "federal permits" would serve to legalize the recreational or even medicinal use of cannabis. The final sentence of your measure is thus misleading, frustrating my ability to summarize your measure in a ballot title in a manner that accurately reflects what would be your measure's effect on existing law.

   As I have noted in response to your previous submissions, the cultivation of cannabis for medicinal and recreational purposes is flatly prohibited under federal law, and the cultivation of hemp is restricted to an extent that, as a practical matter, renders commercial exploitation of the crop currently infeasible. To be sure, I noted in my response to your most recent previous submission that the federal government has advised federal

> prosecutors to forbear prosecuting individuals for violations of the federal Controlled Substances Act if state law permitted the conduct and specified federal priorities would not be compromised thereby. As I further noted, however, a mere memorandum of guidance to federal prosecutors suggesting that they suspend the enforcement of federal law under certain circumstances is not the equivalent of a concession that state laws can be declared valid in the face of conflicting, preemptive federal law. All the more so, the memorandum at issue cannot plausibly be read as a declaration that, notwithstanding express federal prohibitions, individuals may cultivate marijuana at will even in states that have no laws whatsoever "pertaining to the cannabis plant."
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> ***As drafted, your measure misleadingly suggests that repealing state laws "pertaining to the cannabis plant" will enable individuals to engage in cultivation of the plant for various unspecified purposes.*** As I further noted in my last opinion directed to you:
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>> If the text of a measure *inaccurately* asserts that the amendment will realize certain specified goals, any such inaccurate assertion will in itself render the text ambiguous and insusceptible of summation in a ballot title. I am consequently foreclosed from summarizing the measure in a way that adequately informs the voters of legal consequences whose disclosure might prompt serious concern in a reasonable voter.
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> This conclusion applies in all respects to your latest submission.

Finally, I feel compelled to echo the following caveat I included in my most recent opinion to you:

> "I must . . . return your submission and instruct you to finalize the language of your proposed amendment, perhaps with the guidance of private counsel or experts of your choosing to ensure that there are no ambiguities or problems of implementation. ***Amending the Arkansas Constitution is a matter of the utmost seriousness, and the Arkansas Supreme Court holds popular names and ballot titles of proposed amendments to a standard that is***

> ***commensurate with this seriousness***. The standard cannot be met, however, if the text of the measure is unclear or uncertainties remain. That is why I suggest that you seek assistance in evaluating your text, bearing in mind that my ability to certify a popular name and ballot title depends upon the clarity of the language of the amendment."[16]

This suggestion appears particularly appropriate in light of the fact that your brief current submission contains both a run-on construction and an egregious misspelling.

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.

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.[17] 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

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[16] Op. Att'y Gen. 2013-109, quoting 2007-183 and 2003-127 (emphasis added in 2007 opinion).

[17] *See* A.C.A. § 7-9-107(c).