Opinion No. 2013-153

December 23, 2013

Marjorie LeClair, President
NCA-LWV
3362 Burnt Ridge Road
Shirley, Arkansas 72153-8329

Dear Ms. LeClair:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2013), 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. 2013-140, 2013-131, 2013-117, 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 laws pertaining to production, distribution, sale and use of the cannabis plant and products thereof. The Arkansas Legislature shall make no laws prohibiting or limiting the production, distribution, sale and use of cannabis. Preemptive federal law will remain in effect unless altered by congress.

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,

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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).

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] 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]

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[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] *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).

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.

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 an ambiguity in the *text* of your proposed measure. I cannot 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 this ambiguity. 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:

> Section 1
>
> All laws pertaining to the production, distribution, sale and use of cannabis and products derived from the cannabis plant are hereby repealed.
>
> Section 2
>
> The Arkansas legislature shall pass no law prohibiting or limiting the production, distribution, sale, and use of the cannabis plant and its derivatives.

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

[14] *Id.*

> Section 3
>
> Cannabis and its derivatives shall be taxed in accordance with the Arkansas Gross Receipts Tax Laws of 1941 and Constitution Tax Law.
>
> Section 4
>
> The Arkansas Legislature has the responsibility for categorizing products for tax purposes or tax exemption and shall classify cannabis and its products into their respective categories.

I must reject this submission because Section 3 is ambiguous in its reference to "Constitution Tax Law," rendering it impossible for me to summarize the substance and effects of your submission in a ballot title. I am unable to determine what you mean by this term. My inability to do so is only reinforced by the fact that you have capitalized this coinage, suggesting that you are referring to some unidentified provision of the Arkansas Constitution itself. Given that the Arkansas Constitution contains no provision captioned or generally recognized as the "Constitution Tax Law," I am unable to advise the voters in a ballot title what the provision authorizes.

I suspect, but cannot assume based merely upon this suspicion, that you intend to authorize the legislature to impose cannabis-related taxes not only under the Arkansas Gross Receipts Act of 1941, but further under any law enacted within the legislature's current constitutional taxing authority. Indeed, in your immediately previous submission, the phrase at issue read "Constitution*al* Tax Laws" (emphasis added), suggesting something quite different than your current submission. I do not know and am disinclined to speculate whether you merely omitted through inadvertence the "al" from "Constitutional" in your current submission. I likewise do not know and am disinclined to speculate why you capitalized the term in question in either of your most recent submissions.[15] I can

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[15] I will note, however, that your current submission, short though it may be, reveals an unfortunately cavalier attitude toward capitalization. It refers at one point, for instance, to the "Arkansas Legislature" and at another to the "Arkansas legislature." It further refers by the wrong name to the chapter of the Code

only note that without clarification I cannot summarize the meaning of this provision as submitted in a ballot title.

I cannot begin to certify a ballot title for your proposed amendment in the face of the ambiguity noted above. You must remedy this confusing and ambiguous point 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.[16] 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

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known as the "Arkansas Gross Receipts Act [not "Laws"] of 1941." *See* A.C.A. § 26-52-101 (Repl. 2008) (reciting the title of the pertinent Code chapter). I must remind you again that you are attempting to amend the Arkansas Constitution – an enterprise that will not allow of such careless inconsistencies and errors.

[16] *See* A.C.A. § 7-9-107(c).

Cheryl Hall

From: Marjorie Leclair <marjorieleclair2@hotmail.com>
Sent: Sunday, December 08, 2013 5:29 PM
To: Cheryl Hall

Below find my resubmission requesting approval of my proposal. Thank you, Marjorie

Popular Name

BAN PROHIBITION OF CANNABIS

Ballot Title

Amend the Constitution of Arkansas to repeal all laws pertaining to production, distribution, sale and use of the cannabis plant and products thereof. The Arkansas Legislature shall make no laws prohibiting or limiting the production, distribution, sale and use of cannabis. Preemptive federal law will remain in effect unless altered by congress.

Text

Section 1

All laws pertaining to the production, distribution, sale and use of cannabis and products derived from the cannabis plant are hereby repealed.

Section 2

The Arkansas legislature shall pass no law prohibiting or limiting the production, distribution, sale, and use of the cannabis plant and its derivatives

Section 3

Cannabis and its derivatives shall be taxed in accordance with the Arkansas Gross Receipts Tax Laws of 1941 and Constitution Tax Law.

Section 4

The Arkansas Legislature has the responsibility for categorizing products for tax purposes or tax exemption and shall classify cannabis and its products into

their respective categories.

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