

Opinion No. 2013-157

January 13, 2014

Lieutenant Colonel Marjorie LeClair, USA (Retired)  
President, NCA-LWV  
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. 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. 2013-153, 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,”<sup>1</sup> 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.**<sup>2</sup>

The popular name is primarily a useful legislative device.<sup>3</sup> It need not contain detailed information or include exceptions that might be required of a ballot title,

---

<sup>1</sup> 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).

<sup>2</sup> See *Arkansas Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

<sup>3</sup> *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.<sup>4</sup> The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.<sup>5</sup>

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.<sup>6</sup> 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."<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> The title, however, must be free from any misleading tendency, whether by amplification, omission, or fallacy; it must not be tinged with partisan coloring.<sup>10</sup> The ballot title must be honest and impartial,<sup>11</sup> and it must convey an intelligible idea of the scope and significance of a proposed change in the law.<sup>12</sup>

---

<sup>4</sup> *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).

<sup>5</sup> *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

<sup>6</sup> *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

<sup>7</sup> *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

<sup>8</sup> *Id.* at 288, 884 S.W.2d at 944.

<sup>9</sup> *Id.* 293, 884 S.W.2d at 946-47.

<sup>10</sup> *Id.* at 284, 884 S.W.2d at 942.

<sup>11</sup> *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

<sup>12</sup> *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.”<sup>13</sup> 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.”<sup>14</sup> 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 ambiguities 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 these 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:

#### 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.

---

<sup>13</sup> *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 383 (2000).

<sup>14</sup> *Id.*

### Section 3

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

### 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.

In Section 3 of your current submission, you identify “the Arkansas Gross Receipts Tax Laws of 1941” as controlling any taxation relating to cannabis. As I pointed out to you in my response to your most recent previous submission,<sup>15</sup> however, the Arkansas Code contains no legislation entitled “the Arkansas Gross Receipts Tax Laws of 1941,” and no act so designated has ever been enacted by the Arkansas Legislature. More specifically, I advised you that your prior submission, which contains a provision identical to the one here at issue, apparently “refers by the wrong name to the chapter of the Code 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).”

Unaccountably, in resubmitting your proposal, you have ignored altogether my correction of your apparent error.<sup>16</sup> As a consequence, your submission again contains a confusing reference whose scope remains unclear.<sup>17</sup> A proposal that requires such speculation is insufficiently precise to allow of confident summation in a ballot title. Simply put, if you intend in your measure to tie the taxation of

---

<sup>15</sup> *See* Op. Att’y Gen. 2013-153.

<sup>16</sup> Your failure to address this problem is all the more unaccountable given that, in pointing it out, I offered the following admonition: “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.”

<sup>17</sup> For instance, nothing would preclude interpreting the reference at issue, notwithstanding its confusing capitalization, as vaguely designating any and all legislation enacted in 1941 relating in any way to the taxation of gross receipts. The mere availability of such an alternative reading renders this section insufficient to warrant my certification.

cannabis exclusively to a current chapter of the Code, you must do so precisely and without equivocation.

Moreover, if the taxation of cannabis would be controlled by legislation originally enacted in 1941, the measure must specify whether the legislature retains the authority to amend the chapter of the Code containing this legislation. Although the “Arkansas Gross Receipts Act of 1941” is currently designated as the title of an entire chapter of the Code,<sup>18</sup> presumably including its amendments to date, your measure is unclear regarding (1) whether this chapter of the Code is indeed the legislation referenced; (2) whether all post-1941 amendments thereto currently codified will apply; and (3) whether the legislature will retain authority to amend the legislation as it deems appropriate.<sup>19</sup> Without clarification on these points, I cannot summarize your measure in a ballot title.

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.<sup>20</sup> You may, after clarification of the matters discussed above, resubmit your proposed amendment, along with a proposed popular name

---

<sup>18</sup> See A.C.A. § 26-52-101 (Repl. 2008).

<sup>19</sup> I realize that Section 4 of your measure affords the legislature authority to “classify cannabis and its products” into categories for purposes of taxation. It remains unclear, however, whether this grant of authority would empower the legislature to amend whatever legislation is indicated by the phrase “the Gross Receipt Tax Laws of 1941.”

<sup>20</sup> See A.C.A. § 7-9-107(c).

Marjorie LeClair, President  
NCA-LWV  
Opinion No. 2013-157  
Page 7

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**

**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.

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.

-----  
Submitted: December 27, 2013

By: Marjorie LeClair, Lt. Colonel, U.S.A. (retired), President NCA-LWV  
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.