

Opinion No. 2014-014

February 19, 2014

Robert L. Reed, Chairman
Arkansans for Medical Cannabis
Ballot Question Committee
Post Office Box 111
Dennard, Arkansas 72629

Dear Mr. Reed:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2013), of the popular name and ballot title for a proposed initiated act. You previously submitted similar measures, which this office rejected. *See Op. Att’y Gen. Nos. 2013-021, 2011-059 and 2011-031.* 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 THE PROHIBITION OF CANNABIS

Ballot Title

Amend the Constitution of Arkansas to repeal all laws prohibiting the production, distribution, sale and use of the cannabis plant and products thereof. The Arkansas General Assembly shall pass no law prohibiting or limiting the production, distribution, sale, possession or use of the cannabis plant and its derivatives containing one percent (1%) or less of Delta-9-tetrahydrocannabinol (Delta-9-THC). The Arkansas General Assembly may, by its authority, legislate such laws as needed to regulate the production, distribution, sale,

possession or use of the cannabis plant and its derivatives containing more than one percent (1%) of Delta-9-tetrahydrocannabinol (Delta-9-THC). Preemptive federal law will remain in effect unless altered by congress. This amendment becomes effective within 180 calendar days upon approval by the voters of the state of Arkansas.

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, following Arkansas Supreme Court precedent, this office will not address the constitutionality of proposed measures in the context of a ballot title review unless the measure is “clearly contrary to law.”¹ Consequently, this review has been limited to a determination, pursuant to the guidelines that have been set forth by the Arkansas Supreme Court, discussed below, of whether the proposed popular name and ballot title accurately and impartially summarize the provisions of your proposed amendment or act.

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

¹ *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).

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

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

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

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).

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).

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 in its entirety provides as follows:

Section 1

All Arkansas laws prohibiting the production, distribution, possession, sale or use of cannabis and products derived from the cannabis plant are hereby repealed.

Section 2

The Arkansas General Assembly shall pass no law prohibiting or limiting the production, distribution, sale, possession, or use of the cannabis plant and its derivatives containing one percent (1%) or less of Delta-9-tetrahydrocannabinol (Delta-9-THC).

Section 3

The Arkansas General Assembly may, by its authority, legislate such laws as needed to regulate the production, distribution, sale, possession or use of the cannabis plant and its derivatives containing greater than one percent (1%) of Delta-9-tetrahydrocannabinol (Delta-9-THC).

¹² *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

Section 4

The Arkansas General Assembly shall pass no law that constitutes the prohibition of the cannabis plant or its derivatives.

Section 5

This amendment becomes effective within 180 calendar days upon approval by the voters of Arkansas.

This measure contains the following ambiguities:

1. The text of your measure fails to specify that the voter approval contemplated in Section 5 would have the effect of amending the Arkansas Constitution. Although you indicate in your ballot title that the measure, if adopted, would amend the constitution, you fail to include this provision in the measure itself, which merely contains a cryptic passing reference in Section 5 to “[t]his amendment.” The ballot title, being no more than a summary designed to inform the voters of a measure’s substance, cannot itself supplement the measure by adding substantive provisions. Any measure designed to amend the Arkansas Constitution must clearly declare as much in the text of the measure itself. Without textual clarification on this score, I am unable to summarize your proposal in a ballot title.
2. Section 4 of your measure directs that the legislature “pass no law that constitutes the prohibition of the cannabis plant or its derivatives.” Section 2, however, bars the legislature from prohibiting only “the cannabis plant and its derivatives” containing 1% or less of Delta-9-THC. Section 3 expressly authorizes legislation “regulat[ing]” cannabis and its derivatives containing Delta-9-THC in concentrations exceeding 1%. Such regulation could presumably entail “prohibition” in some contexts (say, an emergency-room operating theater). Section 4

consequently appears to contradict other sections of your measure, rendering it impossible for me to summarize your proposal in a ballot title.

3. Section 5 of your measure provides that your proposal will “become effective within 180 calendar days upon approval by the voters of Arkansas.” The quoted phrase is ambiguous in that it is unclear whether (1) the recited “approval by the voters” would occur “within 180 calendar days” of some unspecified event; or (2) the measure would take effect upon the occurrence of some unspecified event “within 180 calendar days” of “approval by the voters.” Specifically with respect to the latter possibility, it is unclear whether at least the bar set forth in Section 4 against legislation prohibiting “the cannabis plant or its derivatives” would take immediate effect. It is further unclear whether the possible 180-day delay in effect applies to the repeal of existing laws relating to cannabis, which Section 1 of the measure, in terms that suggest immediacy, declares “are hereby repealed.” Although the 180-day window may be intended only to impose a deadline for the implementation of a regulatory scheme of the sort referenced in Section 3, your measure at no point declares as much. Without clarification regarding these issues, I am unable to summarize your proposal 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.

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My statutory duty, under these circumstances, is to reject your proposed ballot title (for the foregoing reasons) and instruct you to “redesign” the proposed measure and ballot title. You may, after addressing 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

Enclosures

Popular Name

BAN THE PROHIBITION OF CANNABIS

Ballot Title

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Text

Section 1

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Section 2

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Section 5

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