

Opinion No. 2014-022

March 6, 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. 2014-014, 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

THE ARKANSAS CANNABIS AMENDMENT

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 shall take effect six months after passage.

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.”<sup>1</sup> 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.**<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> *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).

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

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> A ballot title must convey an intelligible idea of the scope and significance of a proposed change in the law.<sup>11</sup> The ballot title must be intelligible, honest, and impartial.<sup>12</sup>

---

<sup>3</sup> *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

<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> *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 245, 884 S.W.2d 605, 607 (1994).

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

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 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).<sup>13</sup>

The text of your measure in its entirety provides as follows:

Amend the Constitution of Arkansas to allow the production, distribution, sale and use of the cannabis plant and products derived from the cannabis plant.

#### 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).

---

<sup>13</sup> For your benefit in the event you choose to resubmit your measure in the future, I will note, however, that your proposed popular name closely resembles the popular names of two measures already approved by this office. See Ops. Att’y Gen. Nos. 2013-118 (“The Arkansas Medical Cannabis Act”) and 2013-081 (“Arkansas Medical Marijuana Act”). In order to avoid confusing the voter with respect to various closely related matters on the ballot, you may wish to consider amending your popular name to distinguish it from these other measures.

### 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).

### Section 4

This amendment shall take effect six months after passage.

This measure contains the following ambiguities:

1. The opening sentence of your measure is ambiguous in that its verb is in the imperative, as opposed to the indicative, mood.<sup>14</sup> Contrary to what I assume you intend, this sentence consequently appears to command some undesignated reader to amend the constitution, as opposed to simply informing the reader that voter approval would indeed effect a constitutional amendment. Without clarification that you are not ordering the voter to amend the constitution, I cannot summarize this provision in a ballot title.
2. Apparently in response to my rejection of your most recent previous submission, you have omitted from your current submission the following earlier provision: “The Arkansas General Assembly shall pass no law that constitutes the prohibition of the cannabis plant or its derivatives.”

In the wake of this omission, your measure expressly bars the legislature from “prohibiting or limiting” activities relating to

---

<sup>14</sup> The three primary moods in the English language are the indicative, which is used to make statements of fact and to pose questions; the imperative, which is used to issue a command, a request or advice; and the subjunctive, which is typically used to express an unrealized condition such as a wish, possibility, opinion, necessity or possible action.

“the production, distribution, sale, possession or use” of cannabis and its derivatives *only with respect to products containing 1% or less Delta-9-THC*. With respect to cannabis and its derivatives containing *a greater concentration of Delta-9-THC*, your measure does not directly curtail the legislature’s authority to enact prohibitory legislation. Instead, the measure addresses only the General Assembly’s authority to pass “such laws as needed to regulate” the activities just listed. Stated differently, your measure as amended at no point directly proscribes the legislature from prohibiting altogether any activities relating to cannabis and its derivatives containing a concentration of Delta-9-THC greater than 1%. Rather, it addresses only the scope of the legislature’s authority to *regulate* activities relating to cannabis and its derivatives falling within this category.

It is well settled that the Arkansas Constitution is not a grant, but a limitation of powers, meaning that the legislature may rightfully exercise those powers it has not been expressly denied by the Arkansas or United States Constitution.<sup>15</sup> Unlike Section 2 of your measure, which bluntly bars the legislature from “prohibiting” cannabis and its derivatives containing lower Delta-9-THC concentrations, Section 3 makes no mention of the issue of prohibition with respect to cannabis and its derivatives containing higher Delta-9-THC concentrations. Although Section 3 might be read as containing an implied bar to prohibitory legislation, implication is not enough to restrict the legislature’s reserved constitutional authority. Without clarification on this score, I am unable to summarize your proposal in a ballot title.

3. Section 2 of your measure is ambiguous in that it fails to address directly whether the legislature retains *any* regulatory authority over cannabis and its derivatives containing 1% or less Delta-9-THC. This section ambiguously bars only laws “prohibiting or limiting” the activities recited with respect to such products,

---

<sup>15</sup> *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979).

without clarifying whether any regulatory legislation would amount to a barred “limitation.” It is unclear whether Section 3’s provisions relating to the regulation of products and activities above the 1% threshold are intended to foreclose altogether any regulation of products and activities below that threshold.

Of necessity, various commercial activities would attend what Section 2 describes as the “production, distribution, sale, possession, or use of the cannabis plant and its derivatives” containing 1% or less Delta-9-THC. The entire industry of commercial hemp production and distribution, for instance, would fall within this category. It is unclear whether your measure would insulate such enterprises from the application of *any* regulatory law that might otherwise apply, such as laws relating to taxation and governmental quality control. Without clarification on this score, I am unable to summarize your proposal in a ballot title.

By way of summary of the foregoing, it is unclear whether Section 3 of your measure in its current form would impose a blanket ban on legislation prohibiting production of and activities relating to the cannabis and its derivatives containing more than 1% Delta-9-THC. It is further unclear whether Section 2 would foreclose altogether any form of regulation, including the regulations described above, of cannabis and its derivatives containing 1% or less Delta-9-THC.

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.

Robert L. Reed, Chairman  
Arkansans for Medical Cannabis (BQC)  
Opinion No. 2014-022  
Page 8

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

The Arkansas Cannabis Amendment

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 shall take effect six months after passage.

Text

Amend the Constitution of Arkansas to allow the production, distribution, sale and use of the cannabis plant and products derived from the cannabis plant.

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).

Section 4

This amendment shall take effect six months after passage.