

Opinion No. 2014-034

March 21, 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. 2014-022, 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 allow the residents of Arkansas the right to cultivate, manufacture, distribute, sell and use the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) within the legal boundaries of the state of Arkansas. 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, 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,

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

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 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).¹⁵

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

Section 1

We, the citizens of Arkansas hereby amend the Constitution of Arkansas to allow the legal residents of Arkansas the right to cultivate, manufacture, distribute, sell and use the cannabis plant

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

¹⁴ *Id.*

¹⁵ 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.

(genus cannabis) and all products derived from the cannabis plant (genus cannabis) within the legal boundaries of the State of Arkansas.

Section 2

This amendment shall take effect six months after passage.

This measure contains the following ambiguities:

1. The term “legal residents,” as used in Section 1 of your measure, is ambiguous in that it does not comprise a clearly defined group of people. This term is neither defined in your measure nor subject to any commonly recognized definition. It is consequently unclear to whom the rights set forth in your measure would extend. Without clarification on this point, I cannot summarize your measure in a ballot title.
2. Your measure leaves unclear what regulatory authority, if any, the legislature might exercise over “the right to cultivate, manufacture, distribute, sell and use” cannabis and its derivatives. As a general proposition, “the legislature may rightfully exercise the power of the people, subject only to the restrictions and limitations fixed by the constitutions of the United States and the state.”¹⁶ It is unclear in your proposal, however, whether your measure’s grant of a “right” to engage in the recited activities amounts to a complete bar on the General Assembly’s authority to enact regulatory legislation regarding these activities. We know from your measure that the General Assembly may not take away the “right” granted. The *scope* of that “right,” however, remains unclear. I simply cannot determine whether the adoption of your proposal would erase, restrict or leave unfettered the legislature’s authority to regulate

¹⁶ *Wells v. Purcell*, 267 Ark. 456, 464, 592 S.W.2d 100 (1979).

and to condition the right of “legal residents” to “cultivate, manufacture, distribute, sell and use” cannabis and its derivatives. Without clarification on the point, I cannot summarize your proposal in a ballot title.

To elaborate on this point, certain constitutional provisions – such as, say, the guarantees of equal protection and due process under the laws – are necessarily vague in defining their scope but perfectly clear in acknowledging that future legislation may occur. Indeed, the very point of these provisions is to set a standard whereby courts might test the validity of future legislation. Your proposed measure, by contrast, is specific in demarking its subject matter – namely, activities relating to cannabis and its derivatives – but unclear regarding whether the legislature can take *any* action relating thereto. It would doubtless be a matter of serious concern to voters to know whether or not the adoption of your measure would authorize the completely unregulated cultivation, manufacture, distribution, sale and use of cannabis and its derivatives at any time, in any location and by any “legal resident” (whatever that term might mean). Your measure, however, does not permit me to address this concern in a ballot title. Again, without clarification on this point, 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 (for the foregoing reasons) and instruct you to “redesign” the proposed measure

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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

Enclosure

Popular Name

The Arkansas Cannabis Amendment

Ballot Title

Amend the Constitution of Arkansas to allow the residents of Arkansas the right to cultivate, manufacture, distribute, sell and use the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) within the legal boundaries of the state of Arkansas. Preemptive federal law will remain in effect unless altered by congress. This amendment shall take effect six months after passage.

Text

Section 1

We, the citizens of Arkansas hereby amend the Constitution of Arkansas to allow the legal residents of Arkansas the right to cultivate, manufacture, distribute, sell and use the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) within the legal boundaries of the state of Arkansas.

Section 2

This amendment shall take effect six months after passage.