

Opinion No. 2014-037

April 11, 2014

Robert L. Reed, Chairman
Arkansans for Medical Cannabis
Ballot Question Committee
295 Elan Trail
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 constitutional amendment. You previously submitted similar measures, which this office rejected. *See* Op. Att’y Gen. Nos. 2014-034, 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 INDUSTRY AMENDMENT

Ballot Title

Amend the Constitution of Arkansas to allow the People 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. The General Assembly shall have power to enforce this article by appropriate legislation. 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).

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

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 *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 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 provides in its entirety as follows:

Section 1. Right defined.

The People of the State of Arkansas, [sic] shall have the right to cultivate, manufacture, distribute, sell, possess 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. Enforcement of amendment – Legislation authorized.

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

¹⁴ *Id.*

The General Assembly shall have power to enforce this article by appropriate legislation.

Section 3. Abridgment [sic]

The right of the people, [sic] to cultivate, manufacture, distribute, sell, possess and use the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) shall not be abridged.

Section 4. Amendment in effect, when.

This amendment shall take effect six months after passage.

This measure contains the following ambiguities:

1. The text of your measure fails to specify that voter approval contemplated 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 4 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.

I must note that this objection mirrors one made to one of your previous submissions in Ark. Op. Att’y 2014-014 – the fourth of seven responses to submissions by you relating to cannabis. Under these circumstances, I am compelled to remark that this office lacks the resources to consider a series of submissions that

repeat errors that have been previously addressed. Please refer to my earlier responses as you revise submissions in order to avoid inviting the same criticisms.

2. Read within the context of your entire measure, Section 2 of your submission is ambiguous in declaring that “[t]he General Assembly shall have power to enforce this article by appropriate legislation.”

As an initial matter, it is unclear what the term “article” betokens in the passage just quoted. In terms of constitutional provisions, the term “article” is formally distinguishable from an “amendment.” You indicate in your ballot title, although not in your measure itself, that you are asking the voters to approve only the latter. Without clarification regarding your use of the term “article,” I am unable to summarize your proposal in a ballot title.

More significantly, Section 2 is ambiguous in that it fails to define the scope of the referenced “power to enforce this article by appropriate legislation.” As I pointed out in my response to your previous submission, “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.”¹⁵ In accordance with this principle, the Arkansas Constitution, which you announce in your ballot title your measure would amend, is universally recognized as a *limitation* on legislative power, not a *grant* thereof. Given this fact, it is unclear what limitations, if any, Section 2 is designed to impose.

This provision is likewise problematic if it is not read as imposing a limitation. Unless expressly limited by constitutional provision, the General Assembly always has a reserved “power

¹⁵ Op. Att’y Gen. No. 2014-034, quoting *Wells v. Purcell*, 267 Ark. 456, 464, 592 S.W.2d 100 (1979).

to enforce” a statute or constitutional provision, and any legislation designed to “enforce” such a law would of necessity be “appropriate.” It is consequently unclear what purpose is served by a duplicative grant of authority to enforce your measure.

I appreciate that Section 2 may have been intended as a grant of *regulatory* authority to the legislature over what your measure elsewhere suggests is a totally unrestricted “right” residing in “[t]he People of the State of Arkansas . . . to cultivate, manufacture, distribute, sell, possess and use the cannabis plant.” Simply establishing a legislative power to “enforce this article,” however, cannot reasonably be read as a clear grant of such regulatory authority.

The very notion of regulatory authority, moreover, is undermined in Section 3 of your measure, which bluntly declares that the apparently unqualified “right of the people” to engage in the recited activities with respect to cannabis “shall not be abridged.” Any regulation is a form of abridgement – a fact that would support reading Section 3 as an outright ban on regulation. Section 3 would consequently conflict with Section 2 if the latter were read as authorizing legislative regulation of the activities at issue. Your measure further contains absolutely no reference to what types of regulatory authority, if any, might be reserved or awarded to the General Assembly by virtue of Section 2.

Simply stated, then, it is unclear what Section 2 means in declaring that “[t]he General Assembly shall have the power to enforce this article.” I am consequently unable to summarize in a ballot title what, if anything, the adoption of this provision would accomplish.

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.

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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 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

Arkansas Cannabis Industry Amendment

Ballot Title

Amend the Constitution of Arkansas to allow the People 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. The General Assembly shall have power to enforce this article by appropriate legislation. Preemptive federal law will remain in effect unless altered by congress. This amendment shall take effect six months after passage.

Text

Section 1. Right defined.

The People of the State of Arkansas, shall have the right to cultivate, manufacture, distribute, sell, possess 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. Enforcement of amendment-Legislation authorized.

The General Assembly shall have power to enforce this article by appropriate legislation.

Section 3. Abridgment

The right of the people, to cultivate, manufacture, distribute, sell, possess and use the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) shall not be abridged.

Section 4. Amendment in effect, when.

This amendment shall take effect six months after passage.