



STATE OF ARKANSAS  
THE ATTORNEY GENERAL  
DUSTIN MCDANIEL

Opinion No. 2014-043

May 9, 2014

Robert L. Reed  
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. 2014-037, 2014-034, 2014-022, 2014-014, 2013-021, 2011-059 and 2011-031. You have made changes to the text of the measure and resubmitted your proposed popular name and ballot title, as follows:

Popular Name

ARKANSAS CANNABIS 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 amendment 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,”<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, 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>

---

<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).

<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).

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>

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

---

<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).

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

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

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:

Add a [sic] amendment to the Constitution of Arkansas, to be titled the “Cannabis” amendment, 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

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.

It is hereby made the duty of the legislature, and the legislature is hereby directed:

- a) To enact, without unnecessary delay, all legislation necessary and sufficient to make this amendment in all respects effective and workable.
- b) No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.

Section 3. Amendment in effect, when.

After adoption by the people and as soon as, and not before, but no later than one hundred and eighty days (180 days), the legislature shall have fulfilled the requirements of section 2 hereof, this amendment or any legislation enacted in pursuant of section 2, shall be in full force and effect.

The measure contains the following ambiguities:

1. The opening sentence of your amendment again misleadingly appears to order or encourage the voter to adopt the amendment, rather than simply identifying the measure as being a constitutional amendment.<sup>15</sup> I have previously advised you that a constitutional amendment properly sets forth a provision of law that has been adopted by the voters, not a command that voters adopt a measure, as does the opening sentence of your proposal. Without clarification that you are not ordering the voter to amend the constitution, I cannot summarize this provision in a ballot title.

In possibly revising your submission, please bear in mind that the substance of your measure, if adopted, will be incorporated as drafted into the Arkansas Constitution. The directive to “[a]dd a [sic] amendment to the Constitution of Arkansas” is not a statement of law adopted by the voters; rather, literally read, it is advice, if not an outright command, to the voters to adopt the measure. As such, this declaration does not belong in the amendment itself, which should set forth only the substance of the law adopted. In short, the text of your measure must do no more than (1) identify the measure as being a constitutional amendment; and (2) state verbatim the substantive provisions of law that will apply as a result of the amendment’s adoption.

2. Unaccountably, you define the right set forth in Section 1 of your measure in the *future tense* – i.e., “The People . . . *shall have* the right . . . ” (emphasis added). This provision is confusing inasmuch as the unrestricted authorization set forth in Section 1 seems in all respects to be self-executing, suggesting that it would normally take effect immediately upon the measure’s adoption. Although your proposal refers generally to legislative action as a condition precedent to the amendment’s application, it is unclear what legislative action would be

---

<sup>15</sup> I pointed out this same error in Op. Att’y Gen. No. 2013-022, in which I explained your error as being an inappropriate use of the imperative, as distinct from the indicative, mood. Again, 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. Although you apparently intend to make an indicative declaration (namely, that your measure amends the Arkansas Constitution), you have inadvertently and inappropriately made an imperative command or offered imperative advice (namely, “Add a [sic] amendment”).

either permissible or necessary to trigger the amendment's application. *See* point 3, *infra*. Without resolution of this ambiguity, I cannot summarize your proposal in a ballot title.

3. As noted immediately above, Section 1 of your measure grants the people of Arkansas an apparently unrestricted – and hence, it would seem, self-executing – right to engage in the recited activities relating to cannabis. In accordance with this impression, Subsection 2(b) bars any legislation that might “restrict, hamper or impair the exercise of the rights herein reserved to the people.” Subsection 2(a), however, directs the legislature promptly to enact “all legislation necessary and sufficient to make this amendment in all respects effective and workable.”

Subsection 2(b) could be read as *denying* the legislature what might otherwise be interpreted as its reserved “police power” to regulate the activities authorized in Section 1. Subsection 2(a), by contrast, might be read as *requiring* restrictive legislation to the extent deemed “necessary and sufficient” to make the amendment “effective and workable.” Your measure, in short, simultaneously *authorizes* restrictions by directing the legislature to pass laws needed to render the amendment “effective and workable” and *bars* any restrictive legislation that would in any way qualify the people's open-ended “right” to engage in the activities described in Section 1.

The tension between these two provisions leaves it unclear what legislative action the General Assembly would be empowered to take – a confusion only compounded by the fact that Section 1 on its face appears to be self-executing and resistant to legislative curbs of any sort. Without clarification regarding what regulations, if any, the legislature is authorized to impose upon Section 1 conduct, I am unable to summarize your measure in a ballot title.

I feel compelled to point out that the objection just raised is materially indistinguishable from one I raised less than a month ago in response to your immediately previous submission. As I pointed out in my previous opinion: “Simply establishing a legislative power to ‘enforce this article’ . . . cannot reasonably be read as a clear grant of . . . regulatory authority.”<sup>16</sup> Notwithstanding my having pointed this out, you have

---

<sup>16</sup> Op. Att’y Gen. 2014-037.

again failed to specify in your submission whether you intend the legislature to retain regulatory authority over the activities at issue and, if so, to what extent. Your current submission is patently ambiguous on this score, meaning that I cannot summarize its substance in a ballot title.

I cannot overstate the importance of the voters understanding the scope of the regulatory authority, if any, that the legislature would retain under your measure. Whatever your reasons for failing to address this issue directly, I cannot and will not continue to tax this office's resources by repeatedly making this point to you. Accordingly, please resolve this ambiguity before submitting for my approval any revised version of your proposal.

4. Section 3 of your measure, which purports to define the effective date of your amendment, is syntactically garbled to an extent that obscures its meaning. I will not here parse this sentence to demonstrate its grammatical inadequacies. I will merely note that, as written, it is not a lucid, grammatical sentence that I can summarize in a ballot title.<sup>17</sup> Purely for purposes of illustration, I will point out that the phrase “as soon as [implying ‘at any time up to’], and not before [implying ‘not until’], but no later than” is internally contradictory on its face. It is further unclear whether this phrase applies to the legislature's required action, whatever that may be, or the effective date of the measure. I further cannot fathom what it means to declare that “this amendment *or* any legislation enacted in pursuance of section 2” (emphasis added) will take effect after 180 days have elapsed from the date of voter approval. The highlighted disjunctive “or” calls into question whether either or both the amendment and its implementing legislation will take effect on this date. Without clarification on these points, I cannot 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.

---

<sup>17</sup> Although you unambiguously declare in your proposed ballot title that “[t]his amendment shall take effect six months after passage,” I cannot look to this declaration to clarify what can most charitably be described as your confusing text.

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,

A handwritten signature in black ink, appearing to read "Dustin McDaniel". The signature is written in a cursive, flowing style.

DUSTIN MCDANIEL  
Attorney General

DM/cyh

Enclosure

Popular Name

Arkansas Cannabis 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 amendment by appropriate legislation. Preemptive federal law will remain in effect unless altered by congress. This amendment shall take effect six months after passage.

Text

Add a amendment to the Constitution of Arkansas, to be titled the "Cannabis" amendment, 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

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.

It is hereby made the duty of the legislature, and the legislature is hereby directed:

(a) To enact, without unnecessary delay, all legislation necessary and sufficient to make this amendment in all respects effective and workable.

(b) No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.

Section 3. Amendment in effect, when.

After adoption by the people and as soon as, and not before, but no later than one hundred and eighty days (180 days), the legislature shall have fulfilled the requirements of section 2 hereof, this amendment or any legislation enacted in pursuance of section 2, shall be in full force and effect.