



STATE OF ARKANSAS  
THE ATTORNEY GENERAL  
DUSTIN MCDANIEL

Opinion No. 2014-091

August 21, 2014

Rockie E. Barley, Sponsor  
1736 South Vineyard Road  
Malvern, Arkansas 72104

Dear Mr. Barley:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2013), of the following popular name and ballot title for a proposed constitutional amendment, as follows:

Popular Name

THE CULTIVATE HEMP AND REGULATE MARIJUANA AMENDMENT

Ballot Title

An amendment proposed by the people to the Arkansas Constitution to provide, effective March 15 2017, that the, sale, possession, cultivation, manufacturing, distribution and use of the cannabis plant (genus cannabis) and every product derived from the cannabis plant (genus cannabis) are lawful in each and every county of this state; that, for purposes of this amendment, “hemp” is defined as any part of the cannabis plant (genus cannabis), living or not, containing less than three percent, by dry weight, Delta-9-Tetrahydrocannabinol (Delta-9-THC); that, for purposes of this amendment, Marijuana (genus cannabis) is defined as any part of the cannabis plant (genus cannabis), living or not, containing three percent or greater, by dry weight, Delta-9-Tetrahydrocannabinol (Delta-9-THC); that the listed activities relating to “hemp” and “marijuana” devoted to personal, industrial or commercial use may be regulated and licensed, but not

prohibited, subject to the condition that the number nor size of plants cultivated or the products derived from manufacturing shall not be limited or prohibited by the General Assembly. Preemptive federal law will remain in effect unless altered by congress.

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>**

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<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).

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>

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>

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<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> *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).

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 popular name and ballot title due to ambiguities and misleading tendencies. Additions or changes to both the popular name and 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 these matters. 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).

I refer to the following ambiguities and misleading tendencies:

- The proposed popular name — “The Cultivate Hemp and Regulate Marijuana Amendment” — is problematic in several respects. This language is in the imperative mood; that is, it expresses a command or request that hemp be cultivated and marijuana be regulated. This is confusing and inconsistent with the text of the proposal, which legalizes — but does not command — certain activities relating to “hemp” and “marijuana” (as defined by the proposed amendment). The popular name also implies that under the proposed amendment, cultivation is restricted to “hemp” and regulation is restricted to “marijuana.” This is misleading and inconsistent with the text of the proposal. It is also misleading and likely partisan to characterize the proposal as one to “regulate marijuana,” given

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

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

the measure's general purpose (expressed in Section 2) to legalize within the State of Arkansas "the cultivation, manufacturing, distribution, selling, possessing and use of the cannabis plant ... and all products derived from the cannabis plant...."

- Section 5 states in part that "**the size nor number** of plants cultivated **or** the products derived from the manufacturing, **shall not be** limited or prohibited by the General Assembly." (Emphasis added). There is a problem with the syntax in this clause that leads to confusion and difficulty in comprehension. The use of "nor" implies a "neither." But the provision is not written this way. And ambiguity remains even with the insertion of "nor." Read literally, the word "or" suggests that one or the other things can't be limited or prohibited, i.e., the General Assembly can't impose a limitation or prohibition on **either** the plants cultivated **or** the products derived from manufacturing. I doubt that is your intention, but without clarification I am unable to summarize this provision in a ballot title for the measure.
- Section 5 is also ambiguous regarding the scope of the General Assembly's regulatory authority. This section states that the various recited activities "may be regulated," but it then appears to foreclose any limitation on the size or number of plants cultivated – and possibly the products derived from manufacturing (depending upon resolution of the syntax problem noted above). It is unclear precisely what is meant by "regulated" if persons can grow as much "marijuana" as they want and create any products out of it. The proposal's position on this issue is undoubtedly a significant matter for a voter's consideration. But without clarification regarding what regulations the legislature is authorized to impose, this significant point cannot be accurately summarized for the voters in a ballot title.
- Section 5.1 introduces additional ambiguity as to the scope of the General Assembly's regulatory authority. It states that "[a]ny person, being of the age of 21 and older may cultivate, purchase, and possess 'Marijuana' and/or products containing 'Marijuana' within the state of Arkansas." While I suspect that this language may be intended to set the legal age at which a person may "cultivate, purchase, and possess" marijuana, subject to whatever regulatory authority resides in the General Assembly, that

intent is not entirely clear based on the provision's wording. As worded, there is some question whether this establishes an open-ended, affirmative right for persons 21 and over to engage in these activities. This renders ambiguous the relationship between this provision and Section 5. The ambiguity is compounded by the absence of any age-related provision with respect to "hemp."

- Section 5.1's reference to "cultivate, purchase, and possess" also creates ambiguity. This phrase differs from Section 5's reference to "cultivation, manufacturing, distribution, sale, possession and use." There is no apparent reason for this inconsistent usage. This introduces ambiguity as to the particular activities that are subject to regulation.
- Section 5.2 requires the State to issue a license to "all residents who sell 'Marijuana' and products containing 'Marijuana.'" The purpose of this state-issued license is not stated. The section leaves unclear such matters as whether a person without such a license may engage in the cultivation, manufacturing, distribution, sale, possession, and use of "marijuana," and the consequences – if any – of not obtaining the license. Additionally, if you intend to require a license of "residents" in order for such persons to legally engage in these activities, then a question arises regarding non-residents. Furthermore, if residents and non-residents are intended to be treated differently in this respect, significant constitutional questions will undoubtedly arise. I am unable to determine your intent in this regard and cannot substitute a ballot title accurately describing this important aspect of the proposed amendment.
- The application of the license requirement with respect to "hemp" is also unclear, given the statement in your proposed ballot title that "the listed activities relating to 'hemp' and 'marijuana' ... may be ... licensed..." (Emphasis added). Section 5.2 makes no reference to "hemp." This apparent inconsistency between the ballot title and text is inexplicable. I am also unable to determine why the proposed ballot title states that the activities relating to hemp and marijuana "may be ... licensed," given Section 5.2's statement that "[t]he State *shall* provide ... a state issued license." (Emphasis added).

- Section 6 provides for a “5% excise tax”

The state shall impose on the sale of “Marijuana” and products containing “Marijuana” pursuant to (Ark. Code Ann. § 26-63-101), a 5% excise tax that shall be made available to the Arkansas Department of Agriculture to provide grant opportunities to Farmers and Manufactures [sic] for the purpose of “hemp” and “Marijuana” product research and/or development.

The referenced Arkansas Code section 26-63-101 is not authority for imposing any taxes. Rather, this section simply sets out the title to Chapter 63 of Title 26 (“Arkansas Special Excise Taxes”). You may intend for this chapter of Title 26 to govern the tax established under your proposed constitutional amendment, but that is not clear from Section 6 as written. The applicable body of law in this regard is a significant matter, but this point cannot be summarized for the voters in a ballot title without clarification.

This section is also ambiguously vague in stating that the 5% excise tax “shall be made available” to the Agriculture Department “to provide grant opportunities.” The tax could generate significant revenues, the control and disposition of which are undoubtedly significant matters for a voter’s consideration. But the Department’s precise authority and duty in this respect are unclear. It is unclear, for instance, whether the Department will actually be required to make grants of the tax proceeds that are “made available” to it, and whether the Department will be subject to any regulatory authority of the General Assembly in doling out any such grant money.

- Your proposed ballot title omits any mention of Sections 5.1, 5.2, and 6. Each of these sections includes essential information for the voter that must be fairly and intelligibly disclosed in the ballot title. The ballot title you have presented is wholly deficient in failing to include such disclosure.

I cannot begin to certify a ballot title for your proposed amendment in the face of the ambiguities and misleading tendencies noted above. You must remedy these confusing, misleading, 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 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

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Enclosures

Popular Name

The Cultivate Hemp and Regulate Marijuana Amendment.

Ballot Title

An amendment proposed by the people to the Arkansas Constitution to provide, effective March 15 2017, that the, sale, possession, cultivation, manufacturing, distribution and use of the cannabis plant (genus cannabis) and every product derived from the cannabis plant (genus cannabis) are lawful in each and every county of this state; that, for purposes of this amendment, "hemp" is defined as any part of the cannabis plant (genus cannabis), living or not, containing less than three percent, by dry weight, Delta-9-Tetrahydrocannabinol (Delta-9-THC); that, for purposes of this amendment, Marijuana (genus cannabis) is defined as any part of the cannabis plant (genus cannabis), living or not, containing three percent or greater, by dry weight, Delta-9-Tetrahydrocannabinol (Delta-9-THC); that the listed activities relating to "hemp" and "marijuana" devoted to personal, industrial or commercial use may be regulated and licensed, but not prohibited, subject to the condition that the number nor size of plants cultivated or the products derived from manufacturing shall not be limited or prohibited by the General Assembly. Preemptive federal law will remain in effect unless altered by congress.

Section 1. This is an Amendment to the Arkansas Constitution that shall be called "The Cultivate Hemp and Regulate Marijuana Amendment."

Section 2. Effective March 15, 2017, the cultivation, manufacturing, distribution, selling, possessing and use of the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) is lawful within the entire geographic area of each and every county of this State.

Section 3. "Hemp" is defined for purpose of this amendment as any part of the cannabis plant (genus cannabis), living or not, containing less than three percent, by dry weight, Delta-9-tetrahydrocannabinol (Delta-9-THC).

Section 4. "Marijuana" is defined for purpose of this amendment as any part of the cannabis plant (genus cannabis), living or not, containing three percent or greater, by dry weight, Delta-9-tetrahydrocannabinol (Delta-9-THC).

Section 5. The cultivation, manufacturing, distribution, sale, possession and use of "hemp" and "Marijuana" for personal, industrial, or commercial use may be regulated, but the size nor number of plants cultivated or the products derived from the manufacturing, shall not be limited or prohibited by the General Assembly.

5.1 Any person, being of the age of 21 and older may cultivate, purchase, and possess "Marijuana" and/or products containing "Marijuana" within the state of Arkansas.

5.2 The State shall provide to all residents who sell "Marijuana" and products containing "Marijuana" a state issued license. The cost of such license shall not exceed two hundred and fifty dollars (\$250.00) per year and there shall be no limit to the number of licenses issued.

Section 6. The state shall impose on the sale of "Marijuana" and products containing "Marijuana" pursuant to (Ark. Code Ann. § 26-63-101), a 5% excise tax that shall be made available to the Arkansas Department of Agriculture to provide grant opportunities to Farmers and Manufactures for the purpose of "hemp" and "Marijuana" product research and/or development.

Section 7. All laws which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.