STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-113

October 17, 2014

Mary L. Berry, Sponsor
117 North Washington Street
Summit, Arkansas 72677-0511

Dear Ms. Berry:

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. A similar measure was rejected due to ambiguities in the text of the proposal. *See* Op. Att'y Gen. No. 2014-105. You have made changes to the text of the measure and submitted your proposed popular name and ballot title, as follows:

Popular Name

THE ARKANSAS HEMP AND MARIJUANA AMENDMENT

Ballot Title

An amendment proposed by the people to the Arkansas Constitution to provide, effective April 20, 2017, that the cultivation, manufacturing, distribution, sale, purchase, possession, and use of the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) are lawful in every geographic area of each and every county of this state, but acknowledging that the listed activities relating to the cannabis plant (genus cannabis) remains illegal under federal law unless altered by congress.; [sic] that, for purposes of this amendment "hemp" is defined as any part

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> of the cannabis plant (genus cannabis), living or not, containing one percent or less, by dry weight, Delta-9-tetrahydrocannabinol (Delta-9-THC); that, for purposes of this amendment "marijuana" is defined as any part of the cannabis plant (genus cannabis), living or not, containing greater than one percent, by dry weight, Delta-9-Tetrahydrocannabinol (Delta-9-THC); That the listed activities relating to hemp devoted to personal, industrial, or commercial use may be regulated, but not prohibited, subject to the following condition; that the quantity and size of plants cultivated or the products derived from the manufacturing shall not be limited or prohibited by the General Assembly. That the listed activities relating to marijuana devoted to personal, industrial, or commercial use by any person 21 years of age or older is lawful in this state and may be regulated, but not prohibited, subject to the following conditions; that the cost of any specific license that may be required by the state to authorize and regulate the cultivation, manufacturing, distribution, and or the sale of marijuana and products containing marijuana shall not exceed two-hundred and fifty dollars ($250.00) per license/per year, and any personal 21 years of age and older shall qualify to obtain such license, and there shall be no limit to the number of license issued in this state by the General Assembly; that the quantity of plants cultivated may be limited to thirty-six growing plants per qualified person, but the size of plants cultivated or the products derived from the manufacturing shall not be limited or prohibited by the General Assembly; that any state excise tax imposed upon the sale of marijuana and products containing marijuana shall not exceed 5%; that the use of marijuana and products containing marijuana shall not be prohibited to any person under 21 years of age who physician has prescribed it. All laws which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.

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, 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]

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[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).

[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).

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]

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.

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[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).

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

[14] *Id.*

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).

I refer to the following ambiguities:

1. The phrase "acknowledging that" introduces a descriptive, subordinate clause that causes section 2 to fail to be a complete sentence, and to be ambiguous. The phrase appears to be descriptive of the measure, yet is a part of the measure. The measure is ambiguous in purporting to describe what the measure says rather than just saying it.

2. The phrase "the manufacturing" in sections 5-1 and 6-2 is indefinite, of unclear meaning, and ambiguous.

3. Section 5-1 uses the passive voice to prohibit limits and prohibitions "by the General Assembly." It is unclear whether the language is intended to imply that only the General Assembly – and not some other governmental body that may regulate hemp – labors under the constitutional prohibition.

4. Section 6-1 limits the "cost of any specific license . . . ." It is unclear whether the word "specific" is intended to distinguish such licenses from more general licenses unlimited in cost, or is meaningless surplus.

5. Section 6-1 also refers to licenses granted "in this state by the General Assembly." It is unclear whether the language is intended to address by implication licenses issued outside the

> state and/or to limit license-granting authority to the General Assembly – which generally delegates license-granting authority to some agency – or is meaningless surplus.

I cannot 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.

The ability to fairly and completely summarize the effect of your proposal to the voters in a popular name or ballot title is dependent on an unambiguous text. In this regard, it may be advisable for you to seek the guidance of private counsel or experts of your own choosing to ensure that there are no ambiguities or problems of implementation when you submit your measure. Amending the Arkansas Constitution is a matter of utmost seriousness, and the Arkansas Supreme Court holds popular names and ballot titles of proposed amendments to a standard commensurate with this seriousness. The standard cannot be met, however, if the text of the measure is unclear or uncertainties remain.

I noted in my response to your previous submission that the proposal had aspects that – while not constituting the sort of internal inconsistencies the Court described in *Roberts* – made it less than suitable for inclusion in the Arkansas Constitution. You remedied most of the shortcomings I specifically identified but the proposal still does not reflect the thoughtful, informed attention to grammatical and other detail that should, in my view, characterize any proposal to amend the Constitution, the People's fundamental statement of the law governing our organization as a state. Possibly among other things, the proposal contains subject-verb disagreements; use of plural antecedents with singular nouns and pronouns; unconventional usage in a number written in words; unconventional rendering of "and/or"; and repetitive and adjacent use of both a punctuation mark and a word meaning the same thing. The foregoing does not necessarily note all the proposal's shortcomings of this nature, but I hope it illustrates the need to clarify and make certain the substance of your proposed constitutional amendment.

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

Cheryl Hall

From: Mary Lou Berry <marylouberry@gmx.com>
Sent: Friday, October 03, 2014 2:11 AM
To: Cheryl Hall
Subject: Submission
Attachments: arkansas hemp and marijuana amendment.doc

Please Find the Attached Popular Name and Ballot Title for certification by the Arkansas Attorney General..

Sponsor: Mary Lou Berry
117 North Washington Street.
Summit, AR 72677-0511
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Popular Name

The Arkansas Hemp and Marijuana Amendment

Ballot Title

An amendment proposed by the people to the Arkansas Constitution to provide, effective April 20, 2017, that the cultivation, manufacturing, distribution, sale, purchase, possession, and use of the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) are lawful in every geographic area of each and every county of this state, but acknowledging that the listed activities relating to the cannabis plant (genus cannabis) remains illegal under federal law unless altered by congress.; that, for purposes of this amendment "hemp" is defined as any part of the cannabis plant (genus cannabis), living or not, containing one percent or less, by dry weight, Delta-9-tetrahydrocannabinol (Delta-9-THC); that, for purposes of this amendment "marijuana" is defined as any part of the cannabis plant (genus cannabis), living or not, containing greater than one percent, by dry weight, Delta-9-Tetrahydrocannabinol (Delta-9-THC); That the listed activities relating to hemp devoted to personal, industrial, or commercial use may be regulated, but not prohibited, subject to the following condition; that the quantity and size of plants cultivated or the products derived from the manufacturing shall not be limited or prohibited by the General Assembly. That the listed activities relating to marijuana devoted to personal, industrial, or commercial use by any person 21 years of age and older is lawful in this state and may be regulated, but not prohibited, subject to the following conditions; that the cost of any specific license that may be required by the state to authorize and regulate the cultivation, manufacturing, distribution, and or the sale of marijuana and products containing marijuana shall not exceed two-hundred and fifty dollars ($250.00) per license/per year, and any person 21 years of age and older shall qualify to obtain such license, and there shall be no limit to the number of license issued in this state by the General Assembly; that the quantity of plants cultivated may be limited to thirty-six growing plants per qualified person, but the size of plants cultivated or the products derived from the manufacturing shall not be limited or prohibited by the General Assembly; that any state excise tax imposed upon the sale of marijuana and products containing marijuana shall not exceed 5%; that the use of marijuana and products containing marijuana shall not be prohibited to any person under 21 years of age whose physician has prescribed it. All laws which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.

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

Section 2. Effective April 20, 2017, the cultivation, manufacturing, distribution, sale, purchase, possession, 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, but acknowledging that the listed activities relating to the cannabis plant (genus cannabis) remains illegal under federal law unless altered by congress.

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

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

Section 5. The cultivation, manufacturing, distribution, sale, purchase, possession and use of hemp for personal, industrial, or commercial use may be regulated, but not prohibited, subject to the following condition:

5-1 that the quantity and size of plants cultivated or the products derived from the manufacturing shall not be limited or prohibited by the General Assembly.

Section 6 The cultivation, manufacturing, distribution, sale, purchase, possession and use of marijuana for personal, industrial, or commercial use by any person 21 years of age and older is lawful in this state, and may be regulated, but not prohibited, subject to the following conditions:

6-1 that the cost of any specific license that may be required by the state to authorize and regulate the cultivation, manufacturing, distribution, and or the sale of marijuana and products containing marijuana shall not exceed two-hundred and fifty dollars ($250.00) per license/per year, and any person 21 years of age and older shall qualify to obtain such license, and there shall be no limit to the number of license issued in this state by the General Assembly.

6-2 that the quantity of plants cultivated may be limited to thirty-six growing plants per qualified person, but the size of plants cultivated or the products derived from the manufacturing shall not be limited or prohibited by the General Assembly.

6-3 that any state excise tax imposed upon the sale of marijuana and products containing marijuana shall not exceed 5%.

6-4 that the use of marijuana and products containing marijuana shall not be prohibited to any person under 21 years of age whose physician has prescribed it.

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