



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2015-117

October 9, 2015

Mary L. Berry, Sponsor  
Post Office Box 511  
Summit, AR 72677

Dear Ms. Berry:

I am writing in response to your request for certification, pursuant to Ark. Code Ann. § 7-9-107 (Repl. 2013), of the popular name and ballot title for a proposed constitutional amendment.

**At the outset, I wish to make clear to you that the decision to certify or reject a popular name and ballot title is in no way a reflection of my view of the merits of a particular proposal. I am not authorized to, and do not, consider the merits of the measure when making my determination to certify or reject a popular name and ballot title.**

The Attorney General is required, pursuant to Ark. Code Ann. § 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, if practicable*, substitute and certify a more suitable and correct popular name and ballot title. Or, if the proposed popular name and ballot title are sufficiently misleading, the Attorney General may reject the entire petition.

Section 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.<sup>2</sup> 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>3</sup>

## REQUEST

**You have requested certification, pursuant to Ark. Code Ann. § 7-9-107 (Repl. 2013), of the following popular name and ballot title for a proposed constitutional amendment:**

### Popular Name

THE ARKANSAS CANNABIS AMENDMENT

### Ballot Title

An amendment proposed by the people to the Arkansas Constitution to provide, effective January, 20 2017, [*sic*] that the cultivation, production, distribution, sale, possession, and use of the cannabis plant (genus *cannabis*) and all products derived from the cannabis plant are lawful within the entire geographic area of every county of this state; that for purposes of the amendment “hemp” means any part of the cannabis plant, living or not, containing one percent or less, by dry weight, delta-9-tetrahydrocannabinol (delta-9-thc), and

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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> As part of my review, however, I may address constitutional concerns for consideration by the measure’s proponents.

<sup>3</sup> See *Arkansas Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

“marijuana” means any part of the cannabis plant, living or not, containing more than one percent, by dry weight, delta-9-thc; that the listed activities with respect to hemp for personal, industrial, or commercial use may be regulated but not prohibited, provided that the quantity and size of plants cultivated and the products produced shall not be limited or prohibited nor subject to any special zoning requirement, licensing fee that is excessive, discriminatory, prohibitive, or in any way contrary to that which is relative to any other agricultural product produced in this state.; [*sic*] that the listed activities with respect to marijuana for personal, industrial, or commercial use by any person 18 years of age or older are lawful in this state and may be regulated but not prohibited, provided that (1)(a) the cost of a license that shall be required by the state to authorize and regulate the cultivation, production, distribution, and sale of marijuana and products containing marijuana shall not exceed \$250.00 per year; (b) any person 18 years of age or older shall qualify to obtain such license; and (c) there shall be no limit to the number of licenses issued in this state; (2) the quantity of plants cultivated shall be limited to 36 growing plants per qualified person, but the size of plants cultivated and the products produced shall not be limited or prohibited; (3) the state excise tax imposed on the sale of marijuana and products containing marijuana shall not exceed five percent; and (4) the use of marijuana and products containing marijuana shall not be prohibited to any person under 18 years of age whose physician has recommended it; upon the effective date of this amendment, all persons incarcerated or under supervision of the Arkansas Board of Correction and Community Punishment for nonviolent marijuana offenses shall be released and all civil and criminal records of nonviolent marijuana offenses in this state shall be expunged; and that all laws that conflict with the amendment are repealed to the extent that they conflict with the amendment. Voters should note that the listed activities with respect to the cannabis plant are unlawful under federal law and that the amendment can have no effect on federal law.

This is a resubmission of the proposal certified by a previous administration for petition circulation in Op. Att’y Gen. No. 2014-119 (November 2014).

## RESPONSE

The popular name is primarily a useful legislative device.<sup>4</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>5</sup> The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.<sup>6</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>7</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>8</sup> At the same time, however, a ballot title must be brief and concise (*see* Ark. Code Ann. § 7-9-107(b)); otherwise voters could run afoul of Ark. Code Ann. § 7-5-309's five-minute limit in voting booths when other voters are waiting in line.<sup>9</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>10</sup> The title, however, must be "free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring."<sup>11</sup> The ballot

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<sup>4</sup> *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

<sup>5</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). For a better understanding of the term "partisan coloring," see *infra* at note 11.

<sup>6</sup> *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

<sup>7</sup> *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

<sup>8</sup> *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

<sup>9</sup> *Id.* at 288, 884 S.W.2d at 944.

<sup>10</sup> *Id.* 293, 884 S.W.2d at 946-47.

<sup>11</sup> *Id.* at 284, 884 S.W.2d at 942. Language "tinged with partisan coloring" has been identified by the Arkansas Supreme Court as language that "creates a fatally misleading tendency" (*Crochet v. Priest*, 326 Ark. 338, 347, 931 S.W.2d 128, 133 (1996)) or that "gives the voter only the impression that the proponents of the proposed amendment wish to convey of the activity represented by the words." (*Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 249, 884 S.W.2d 605, 610 (1994)).

title must be honest and impartial,<sup>12</sup> and it must convey an intelligible idea of the scope and significance of a proposed change in the law.<sup>13</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>14</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>15</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 (1) clarification or removal of the ambiguities in the proposed amendment itself, and (2) conformance of the popular name and ballot title to the newly worded amendment.

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 in the text of your proposed amendment itself. And thus I cannot determine precisely what changes to the ballot title are necessary to fully and correctly summarize your proposal. It is therefore not appropriate, in my opinion, for me to try to substitute and certify a more suitable and correct popular name and ballot title pursuant to Ark. Code Ann. § 7-9-107(b). Instead, you will need to redesign the proposed measure and ballot title, and then resubmit for certification. In order to aid your redesign of the ballot title, I highlight below the more concerning ambiguities in the *text* of your proposed amendment.

1. Section 5 of the proposal provides that “the cultivation, production, and distribution of hemp shall not be subject to any special zoning requirement, licensing fee that is excessive, discriminatory, prohibitive, or in any way contrary to that which is relative to any other agricultural product produced

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<sup>12</sup> *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

<sup>13</sup> *Christian Civic Action Committee*, 318 Ark. at 241, 884 S.W.2d at 607 (internal quotations omitted).

<sup>14</sup> *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 383 (2000).

<sup>15</sup> *Id.*

in this state.” This provision is ambiguous in several ways: (a) it is unclear what distinguishes a “special” zoning requirement from any other; (b) it is unclear whether a “licensing fee” that is substantially identical to that imposed with respect to one agricultural product, but different from that imposed with respect to another, is to be deemed “discriminatory” or “contrary to” the second and therefore unconstitutional; and (c) it is unclear whether the “excessive, discriminatory, [etc.]” language is intended to modify “special zoning requirement.”

2. The proposal provides in section 6 that a person under 18 years old may use marijuana if his or her physician has “recommended” it. The absence of any indication of the procedure for, or formality or content of, the recommendation makes this provision ambiguous.
3. Section 7 refers to the “Arkansas Board of Correction and Community Punishment,” which no longer exists. The body formerly of that name is now known as the Board of Corrections.
4. Section 7 provides that all persons “incarcerated or under supervision of the Arkansas Board of Correction and Community Punishment for nonviolent marijuana offenses shall be released.” It is unclear whether the word “incarcerated” is intended to be modified and limited by reference to the Board. There are persons incarcerated in Arkansas in facilities not supervised or operated by the Board of Corrections. The proposal is ambiguous with respect to whether such persons would also be released.
5. The language of Section 7 quoted immediately above, applied literally, would require the release of a person serving two sentences at the same time (concurrent sentences) for a nonviolent marijuana offense and for a crime of violence. I cannot determine from the face of the proposal your intent with respect to such a person.
6. Section 7 provides for expungement and destruction of civil as well as criminal records. While expungement is a familiar concept in Arkansas criminal law, the proposal’s meaning with respect to expungement of civil records is unclear and ambiguous.
7. Section 7 provides for the Attorney General to produce a “legal document” ordering document destruction, and for distribution of the document to “all Circuit Court Clerks within the state.” It is unclear and ambiguous whether and how other courts, including in particular district courts, and other agencies and persons, including in particular law enforcement agencies, would be ordered to destroy the relevant records.

## CONCLUSION

The ambiguities noted above are not necessarily all the ambiguities contained in your proposal, but they are sufficiently serious to require me to reject your popular name and ballot title. I am unable to substitute language in a ballot title for your measure due to these ambiguities. Further, additional ambiguities may come to light on further review of any revisions of your proposal.

My office in the certification of ballot titles and popular names does not address 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 Ark. Code Ann. § 7-9-107, and my duty is to the electorate.

Based on what has been submitted, my statutory duty is to reject your proposed ballot title for the foregoing reasons and instruct you to redesign the proposed measure and ballot title.<sup>16</sup> You may resubmit your proposal along with a proposed popular name and ballot title at your convenience.

Sincerely,



LESLIE RUTLEDGE  
Attorney General

LR/cyh

Enclosure

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<sup>16</sup> Ark. Code Ann. § 7-9-107(c)

Popular Name

## THE ARKANSAS CANNABIS AMENDMENT

Ballot Title

An amendment proposed by the people to the Arkansas Constitution to provide, effective January, 20 2017, that the cultivation, production, distribution, sale, possession, and use of the cannabis plant (genus cannabis) and all products derived from the cannabis plant are lawful within the entire geographic area of every county of this state; that for purposes of the amendment "hemp" means any part of the cannabis plant, living or not, containing one percent or less, by dry weight, delta-9-tetrahydrocannabinol (delta-9-thc), and "marijuana" means any part of the cannabis plant, living or not, containing more than one percent, by dry weight, delta-9-thc; that the listed activities with respect to hemp for personal, industrial, or commercial use may be regulated but not prohibited, provided that the quantity and size of plants cultivated and the products produced shall not be limited or prohibited nor subject to any special zoning requirement, licensing fee that is excessive, discriminatory, prohibitive, or in any way contrary to that which is relative to any other agricultural product produced in this state.; that the listed activities with respect to marijuana for personal, industrial, or commercial use by any person 18 years of age or older are lawful in this state and may be regulated but not prohibited, provided that (1)(a) the cost of a license that shall be required by the state to authorize and regulate the cultivation, production, distribution, and sale of marijuana and products containing marijuana shall not exceed \$250.00 per year; (b) any person 18 years of age or older shall qualify to obtain such license; and (c) there shall be no limit to the number of licenses issued in this state; (2) the quantity of plants cultivated shall be limited to 36 growing plants per qualified person, but the size of plants cultivated and the products produced shall not be limited or prohibited; (3) the state excise tax imposed on the sale of marijuana and products containing marijuana shall not exceed five percent; and (4) the use of marijuana and products containing marijuana shall not be prohibited to any person under 18 years of age whose physician has recommended it; upon the effective date of this amendment, all persons incarcerated or under supervision of the Arkansas Board of Correction and Community Punishment for nonviolent marijuana offenses shall be released and all civil and criminal records of nonviolent marijuana offenses in this state shall be expunged; and that all laws that conflict with the amendment are repealed to the extent that they conflict with the amendment. Voters should note that the listed activities with respect to the cannabis plant are unlawful under federal law and that the amendment can have no effect on federal law.

**Section 1.** This is an amendment to the Arkansas Constitution that shall be called "The Arkansas Cannabis Amendment."

**Section 2.** Effective January 20, 2017 the cultivation, production, distribution, sale, possession, and use of the cannabis plant (genus cannabis) and all products produced from the cannabis plant (genus cannabis) shall be lawful within the entire geographic area of each and every county of this State.

**Section 3.** "Hemp" is defined for purposes of this amendment 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.** "Marijuana" is defined for purposes of this amendment 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, production, distribution, sale, possession and use of hemp for personal, industrial, or commercial use may be regulated, but not prohibited, subject to the following conditions:

(a.) The quantity and size of plants cultivated and the products produced shall not be limited or prohibited.

(b.) The cultivation, production, and distribution of hemp shall not be subject to any special zoning requirement, licensing fee that is excessive, discriminatory, prohibitive, or in any way contrary to that which is relative to any other agricultural product produced in this state.

**Section 6.** The cultivation, production, distribution, sale, possession and use of marijuana for personal, industrial, or commercial use by any person eighteen years (18) of age and older is lawful in this state and may be regulated, but not prohibited, subject to the following conditions:

(a.) The cost of a license that shall be required by the state to authorize and regulate the cultivation, production, distribution, and 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 eighteen (18) 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.

(b.) The quantity of plants cultivated shall be limited to thirty-six (36) growing plants per qualified person, but the size of plants cultivated and the products produced shall not be limited or prohibited.

(c.) The State excise tax imposed upon the sale of marijuana and products containing marijuana shall not exceed five percent (5%).

(d.) The use of marijuana and products containing marijuana shall not be prohibited to any person under eighteen (18) years of age whose physician has recommended it.

**Section 7.** Upon the effective date of this amendment, all persons incarcerated or under supervision of the Arkansas Board of Correction and Community Punishment for nonviolent marijuana offenses shall be released.

(a.) The Court shall order the immediate expungement of all civil and criminal records pertaining to nonviolent marijuana offenses in this State.

(b.) Within 90 days of the passing of this Amendment, the Arkansas Attorney General shall develop and make available to the public a legal document ordering the immediate destruction of all civil and criminal records pertaining to non-violent marijuana offenses in this State. This document shall be distributed to all Circuit Court Clerks within the state.

**Section 8.** All laws which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.