



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2015-122

October 26, 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.; [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 authorized it by written recommendation for the treatment of an illness or disease; upon the effective date of this amendment, all persons who are incarcerated in this state whose only conviction/convictions were for violating state laws as it pertains to marijuana shall be released; and all criminal records in this state shall be expunged of such violations. and [sic] 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 submission is a follow-up to Attorney General Opinion 2015-117, wherein I rejected your proposed popular name and ballot title due to ambiguities in the text of the proposed constitutional amendment that is the subject of your current request.

## 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 title must be honest and impartial,<sup>12</sup> and it must

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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) (Internal citations omitted).

<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.* at 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)).

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

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.

It is my opinion based on the above precepts that a number of additions or changes to your ballot title are 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 2 of the proposal would make lawful the possession and sale, etc., of “all products produced from the cannabis plant.” It seems reasonable to expect that such products may in some instances have ingredients or components other than cannabis. It is not clear whether the proposal, being

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<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, 382 (2000).

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

a constitutional amendment, would make unenforceable statute law that regulates or prohibits possession or sale, etc., of such an ingredient or component, or of an item, otherwise prohibited, that contains cannabis as an ingredient or component.

2. The proposal distinguishes between, and treats differently, “hemp” and “marijuana,” on the basis of THC content. It is not clear how an item or quantity of some substance would be classified under the proposal if the item or substance had variations in THC content.
3. Section 2 of the proposal would make lawful the possession and sale, etc., of the cannabis plant and products produced therefrom without regard to the use to be made thereof. Sections 5 and 6 permit regulation of hemp and marijuana “for personal, industrial, or commercial use.” While it may be difficult to imagine a use that is not “personal, industrial, or commercial,” the language used carries an implication that possession and sale, etc., if not for such use, will be free from regulation. It is not clear how the proposal will operate in this regard.
4. Sections 5 and 6 permit regulation of hemp and marijuana but do not, in the principal operative provisions, refer to products produced from or containing hemp or marijuana, though they do refer to “the products produced” (without further describing such products). It is not clear whether products produced from or containing hemp or marijuana would be subject to the “regulated but not prohibited” provisions of sections 5 and 6.
5. Section 6 refers to “the State excise tax imposed upon the sale of marijuana and products containing marijuana.” It is not clear whether this provision is intended to require such an excise tax or is merely a limitation on any such tax that may – or may not – be imposed.
6. Section 6 refers to “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.” It is not clear if a single license will be sufficient to permit a person to do all the listed things or if one would be required to obtain a license for each activity. The phrase “required by the state” is also not clear with respect to whether the license is to be issued by the state or is to be required by the state to be issued by some other authority.

7. Section 7 provides for the release of prisoners convicted of “violating state laws as it [*sic*] pertains to marijuana.” It is not clear to which state laws the provision refers. It is unlawful, for instance, to operate a motor vehicle while “intoxicated.”<sup>16</sup> To be “intoxicated” includes being influenced or affected by the ingestion of, among other things, alcohol or a controlled substance.<sup>17</sup> Marijuana being a controlled substance, it can certainly be maintained that the DWI law “pertains” to marijuana. Marijuana understandably plays no part in the acts constituting driving while intoxicated in many instances, but the proposal’s language can be interpreted to require the release of a person involved in such an instance. The language is also problematic in that records of the DWI conviction of a person who consumed only marijuana will not necessarily reflect that fact.
8. Portions of the proposal do not reflect the care in drafting that should accompany efforts to amend the State’s fundamental law. They include errors of grammar, punctuation, and spelling. If you determine to revise and resubmit the proposal, you should review it carefully to eliminate problematic phrases currently contained in the proposal such as “any person eighteen (18) years of age and [*sic*] older,” “state laws as it [*sic*] pertains to marijuana,” and “number of license [*sic*].” The foregoing are merely examples and are not intended to be an exhaustive list of problematic phrases and punctuation contained in the proposal.

## 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.

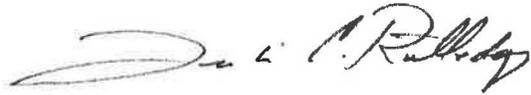
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<sup>16</sup> See Ark. Code Ann. § 5-65-103.

<sup>17</sup> See Ark. Code Ann. § 5-65-102(4).

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>18</sup> You may resubmit your proposed act along with a proposed popular name and ballot title at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge". The signature is fluid and cursive, with a large initial "L" and "R".

LESLIE RUTLEDGE  
Attorney General

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<sup>18</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.; 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 authorized it by written recommendation for the treatment of an illness or disease; upon the effective date of this amendment, all persons who are incarcerated in this state whose only conviction/convictions were for violating state laws as it pertains to marijuana shall be released; and all criminal records in this state shall be expunged of such violations. 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 condition:  
(a.) The quantity and size of plants cultivated and the products produced shall not be limited or prohibited.

**Section 6.** The cultivation, production, distribution, sale, possession and use of marijuana for personal, industrial, or commercial use by any person eighteen (18) years 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 authorized it by a written recommendation for the treatment of an illness or disease.

**Section 7.** Upon the effective date of this amendment, all persons who are incarcerated in this state whose only conviction/convictions were for violating state laws as it pertains to marijuana shall be released; and all criminal records in this state shall be expunged of such violations.

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