



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-012

February 23, 2016

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 (Supp. 2015), 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,”¹ this office will not require that a measure’s proponents acknowledge in the ballot title any possible constitutional infirmities.² 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.³

REQUEST

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

Popular Name

The Arkansas Cannabis Amendment

Ballot Title

Shall there be an amendment to the Arkansas Constitution concerning the cannabis plant and, in connection therewith, providing for the regulation of recreational marijuana similar to alcoholic beverages and the regulation of industrial hemp similar to corn and cotton; permitting a person 21 years of age or older to purchase and possess recreational marijuana, and to allow for the licensing of persons 21 or older to cultivate and produce limited amounts of marijuana for the personal, recreational, or medical use

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

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

of our citizenry; requiring the general assembly to enact an excise tax of 5% to be levied upon the sales of recreational marijuana; permitting the use of medical marijuana to assure that patients, including those under 21 years of age, may have safe access to medical marijuana to treat a disease, injury, or illness; requiring the release of non-violent marijuana offenders in this state from incarceration, probation, and parole and expunging such convictions from all criminal records in this state?

RESPONSE

The popular name is primarily a useful legislative device.⁴ 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.⁵ The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.⁶

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.⁷ 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."⁸ At the same time, however, a ballot title must be brief and concise;⁹ 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.¹⁰ 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.¹¹ The title, however, must be "free

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

⁵ 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 12.

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

⁷ *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980) (internal citations omitted).

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

⁹ See Ark. Code Ann. § 7-9-107(b).

¹⁰ *Bailey* at 284, 884 S.W.2d at 944.

¹¹ *Id.* at 293, 844 S.W.2d at 946-47.

of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring.”¹² The ballot title must be honest and impartial,¹³ and it must convey an intelligible idea of the scope and significance of a proposed change in the law.¹⁴

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.”¹⁵ 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.”¹⁶ 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 may, if you wish, redesign the proposed measure

¹² *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)).

¹³ *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

¹⁴ *Christian Civic Action Committee*, 318 Ark. at 245, 884 S.W.2d at 607 (internal quotations omitted).

¹⁵ *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 382 (2000).

¹⁶ *Id.*

and ballot title, and then resubmit for certification. In order to aid your redesign, I highlight below the more concerning ambiguities in the *text* of your proposed amendment.

1. Section 2 makes lawful the use, etc., of cannabis in general, without limitation. Section 4 defines “recreational marijuana” as marijuana used by adults and “regulated similar to alcoholic beverages.” Nothing in the proposal requires such regulation. It is accordingly unclear whether and how the proposal would regulate marijuana used recreationally by minors or not subjected to such regulation.
2. Section 3 of the proposal purports to relate the voters’ purpose and certain findings in connection with approving the proposal. Some of the statements in section 3 are inconsistent with or not borne out by the proposal’s substantive provisions. For instance, section 3 states that recreational marijuana buyers must show proof of age before buying, but nothing in the proposal requires such a showing. Section 3 states that marijuana will be sold by “[l]egitimate, taxpaying business people,” but the proposal provides that anyone at least 21 years old may obtain a license to sell marijuana. Section 3 states that marijuana will be labeled but nothing in the proposal requires labeling.
3. Section 4 defines “marijuana license” and “marijuana plant tag.” The proposal seems to take as a given that a person must obtain a license to sell, etc., marijuana, and tags to cultivate marijuana. Nothing in the proposal, however, requires anyone to obtain a license or tags. To the contrary, section 2 makes selling and cultivating marijuana lawful without condition.
4. Section 5 refers to “products produced *comprised of* industrial hemp.” Section 6 refers to “products produced *containing* marijuana.” The italicized words do not mean the same thing. Their use accordingly introduces uncertainty and ambiguity.
5. Section 6 refers to and describes a license to cultivate, etc., marijuana. Section 4 defines “marijuana license.” Because section 6 does not employ the defined term “marijuana license,” it is unclear whether both sections are intended to refer to the same thing.
6. Section 7 refers to “any state medical marijuana program,” without further elaboration. Because participation in such a program is a way

to obtain medical marijuana without obtaining a written recommendation from a physician, the scope, sponsorship, and other aspects of such a program are important elements of the proposal and are impossible to describe based on the proposal as written.

7. Section 9 provides that nothing in the proposal is intended to prohibit a person owning private property from prohibiting certain activities relating to marijuana, but the provision names entities that are commonly public, such as schools and hospitals, as among those who are entitled to the provision's protections. It is unclear how the provision applies, if at all, to public entities operating on public property.
8. Section 10 refers to persons "serving incarceration, prohibition, *and* parole." It seems unlikely that anyone is "serving" all three. The provision's meaning is unclear.

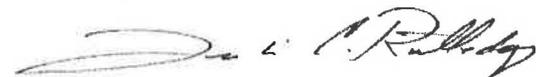
CONCLUSION

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 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.¹⁷ You may resubmit your proposed act along with a proposed popular name and ballot title at your convenience.

Sincerely,



LESLIE RUTLEDGE
Attorney General

¹⁷ Ark. Code Ann. § 7-9-107(c).

Popular Name:

THE ARKANSAS CANNABIS AMENDMENT

Ballot Title:

Shall there be an amendment to the Arkansas Constitution concerning the cannabis plant and, in connection therewith, providing for the regulation of recreational marijuana similar to alcoholic beverages and the regulation of industrial hemp similar to corn and cotton; permitting a person 21 years of age or older to purchase and possess recreational marijuana, and to allow for the licensing of persons 21 or older to cultivate and produce limited amounts of marijuana for the personal, recreational, or medical use of our citizenry; requiring the general assembly to enact an excise tax of 5% to be levied upon the sales of recreational marijuana; permitting the use of medical marijuana to assure that patients, including those under 21 years of age, may have safe access to medical marijuana to treat a disease, injury, or illness; requiring the release of non-violent marijuana offenders in this state from incarceration, probation, and parole and expunging such convictions from all criminal records in this state?

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 products produced from the cannabis plant (genus *Cannabis*) shall be lawful within the entire geographic area of each and every county of the state of Arkansas.

Section 3. Purpose and Findings:

(a) In the interest of allowing law enforcement to focus on crimes where there are victims, and to enhance individual freedom, the people of the state of Arkansas find and declare that the use of recreational marijuana should be legal for persons twenty-one (21) years of age or older.

(b) In the interest of the health and public safety of our citizenry, the people of the state of Arkansas further find and declare that the production and sale of recreational and medical marijuana should be regulated so that:

(1) Individuals will have to show proof of age before purchasing recreational marijuana;

(2) Legitimate, taxpaying business people will conduct sales of recreational and medical marijuana; and

(3) Marijuana sold by businesses will be labeled and subject to regulations to ensure that consumers and patients are informed and protected.

(c) The people of the state of Arkansas further declare that industrial hemp should be regulated similar to corn, cotton, or any other agricultural crop produced in the state.

(d) Nothing in this Amendment proposes or intends to require any individual or entity to engage in any conduct that violates federal law, or exempt any individual or entity from any requirement of federal law, or pose any obstacle to federal enforcement of federal law.

Section 4. Definitions: The following terms are defined for the purposes of this Amendment:

(a) "Industrial Hemp" means any part of the cannabis plant (genus *Cannabis*), living or not, containing one percent (1%) or less, by dry weight, Delta-9-tetrahydrocannabinol (Delta-9-THC).

(b) "Marijuana" means any part of the cannabis plant (genus *Cannabis*), living or not, containing greater than one percent (1%), by dry weight, Delta-9-tetrahydrocannabinol (Delta-9-THC).

(c) "Marijuana license" means a registration card issued by the state to any person twenty-one (21) years of age or older to lawfully cultivate, produce, distribute, and sell marijuana and products produced containing marijuana for personal, recreational, and medical purposes. Each license shall display a license account number, an expiration date, and the photo, name, date of birth, and current address of the holder.

(d) "Marijuana paraphernalia" means any equipment, products, or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, composting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, vaporizing, or containing marijuana, or for ingesting, inhaling, or otherwise introducing marijuana into the human body.

(e) "Marijuana plant tag" means a bar-coded label issued by the state that the cultivator attaches to the base or branch of a growing marijuana plant and is used for tracking the plants origin from cultivation to sale.

(f) "Medical marijuana" means marijuana and products produced containing marijuana that is used for the treatment of a disease, illness, or injury.

(g) "Products produced" means any lawful items and substances manufactured from the cannabis plant (genus *Cannabis*) that may contain Delta-9-tetrahydrocannabinol (Delta-9-THC), whereas marijuana products contain greater than one percent (1%) Delta-9-tetrahydrocannabinol (Delta-9-THC) and industrial hemp products contain one percent (1%) or less Delta-9-THC. Any item whose components may contain a variation in Delta-9-THC content that would span above the one percent (1%) threshold is to be considered marijuana.

(h) "Recreational marijuana" means marijuana and products produced containing marijuana that is used by adults twenty-one years of age or older as an intoxicant and is regulated similar to alcoholic beverages.

(i) "Written recommendation" means a document provided to a patient by their medical doctor, who is licensed in this state, authorizing the patient's use of medical marijuana. The document shall contain the patient's name, the doctor's name, type of marijuana product to be used, dosage, a list of dates in which orders may be filled to supply the patients monthly or weekly need, and an expiration date, and a name of an adult (18 years of age or older) who may procure the monthly or weekly order for the patient if needed.

Section 5. The regulation of industrial hemp.

The cultivation, production, distribution, sale, possession, and use of industrial hemp and products produced

comprised of industrial hemp shall be lawful in this state and may be regulated similar to cotton, corn, or any other crops that are currently regulated by this state.

Section 6. The regulation of marijuana.

The cultivation, production, distribution, sale, possession and use of marijuana and products produced containing marijuana for personal, recreational, and medical purposes shall be lawful and may be regulated by the state, and such regulations are subject to the following conditions:

- (a) The cost of a license that shall be issued by the state to authorize any person twenty-one (21) years of age or older to cultivate, produce, distribute, and sell marijuana and products produced containing marijuana for personal, recreational, and medical purposes shall not exceed fifty dollars (\$50.00) per license per year, and any person twenty-one (21) years of age or older shall qualify to obtain such a license, and there shall be no limit to the number of licenses issued in this state.
- (b) The cost of a marijuana plant tag that shall be issued by the state to regulate the cultivation of marijuana plants produced in this state, shall not exceed five dollars (\$5.00) per tag, and any person with a marijuana license as defined in Section 4(c) shall qualify to obtain such tags, and there shall be a limit of thirty-six (36) tags allowed per year per licensed person. Each tag shall display the marijuana license account number and an expiration date that corresponds with the cultivator's marijuana license. Marijuana plant tags may be purchased in any quantity, but not to exceed thirty-six (36) tags per licensed person per year.
- (c) The quantity of plants cultivated and displaying a state issued marijuana plant tag shall be limited to thirty-six (36) growing plants per person with a marijuana license, but the quantity of the products produced shall not be limited.
- (d) Marijuana plants may be cultivated in a location where the plants are not subject to public view without the use of binoculars, aircraft, or other optical aids on property lawfully in possession of the person with a marijuana license or with the consent of the person(s) lawfully in possession of the property.
- (e) In addition to the regular sales tax imposed upon the sale of recreational marijuana the state shall also impose an excise tax of five percent (5%).
- (f) The state shall not impose any tax upon the sale of medical marijuana to patients.

Section 7. Medical marijuana authorized.

Notwithstanding any other provision of law, the following acts regarding the use of medical marijuana are lawful and shall not be an offense under Arkansas law, or be a basis for seizure or forfeiture of assets under Arkansas law:

- (a) Any medical doctor who is licensed in this state may authorize the use of medical marijuana by written recommendation to a patient for the purpose of treating an illness, injury, or disease.
- (b) Any parent or guardian may provide medical marijuana to their minor child providing that they have valid proof of their child's participation in any state medical marijuana program, or have a written recommendation authorizing the child's use.
- (c) Any person eighteen (18) years of age or older may purchase medical marijuana providing that they have valid proof of their participation in any state medical marijuana program, or have a written recommendation authorizing the use. This shall also include an adult designated by the written recommendation to purchase on behalf of a patient.

Section 8. Marijuana paraphernalia authorized.

Notwithstanding any other provision of law, it is lawful and shall not be an offense under Arkansas law or be a basis for seizure or forfeiture of assets under Arkansas law for persons twenty-one (21) years of age or older to manufacture, possess, or purchase marijuana paraphernalia, or to distribute or sell marijuana paraphernalia to a person who is twenty-one (21) years of age or older.

Section 9. Employers, driving, minors, public use, and control of property.

- (a) Nothing in this amendment is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of recreational marijuana by employees.
- (b) Nothing in this amendment is intended to allow driving under the influence of marijuana or to supersede laws related to driving under the influence of marijuana.
- (c) Nothing in this amendment is intended to permit the transfer of recreational marijuana, with or without remuneration, to a person under the age of twenty-one (21).
- (d) Nothing in this amendment is intended to permit a person under the age of twenty-one (21) to cultivate, produce, sell, possess, or use recreational marijuana.
- (e) Nothing in this amendment is intended to permit the consumption of recreational marijuana in public.
- (f) Nothing in this amendment shall prohibit a person, employer, school, hospital, recreation or youth center, correction facility, corporation or any other entity who occupies, owns or controls private property from prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.

Section 10. Non-violent marijuana offenders and criminal record expungement.

All persons who are serving incarceration, probation, and parole in this state whose only conviction(s) were due to violating state laws as they pertain to the cultivation, production, distribution, sale, and possession of marijuana and or possession of marijuana paraphernalia, and whose violation(s) occurred prior to the effective date of this amendment shall be released, and all criminal records in this state shall be expunged of such convictions that occurred prior to the effective date of this amendment.

Section 11. Conflicting Laws.

The provisions of this amendment are independent and severable, and, except where otherwise indicated in the text, shall supersede conflicting statutes, local charter, ordinance, or resolution, and other state and local provisions. If any provision of this amendment, or the application thereof to any person or circumstance, is found to be invalid or unconstitutional, the remainder of this amendment shall not be affected and shall be given effect to the fullest extent possible.