



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-033

April 7, 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 initiated measure.

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 proposal.

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 marijuana and the regulation of industrial hemp; permitting a person 21 years of age or older to purchase and possess recreational marijuana, and to allow for the licensing of persons 21 of older to cultivate and produce limited amounts of marijuana for the recreational and medical use of our

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).

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 may have access to medical marijuana to treat any disease, injury, or illness as recommended by a physician; requiring the release of all 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

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.

argument the proposed measure might evoke.¹¹ 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.”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 measure cannot be approved if the text of the proposal itself contributes to 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 proposal itself, and (2) conformance of the popular name and ballot title to the newly worded proposal.

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 the measure 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

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

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

¹⁶ *Id.*

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 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 proposal.

- Section 2 and other provisions state that certain acts with respect to cannabis “shall be lawful.” So long as federal law prohibits any of those acts, however, the acts will not be “lawful” within the state. Statements to the contrary are inherently misleading notwithstanding your addition of an acknowledgement that certain acts are unlawful under federal law.
- Section 3 defines “marijuana paraphernalia” to include anything actually used for (among other things) “storing” marijuana. Section 7 declares the manufacture, sale, and possession of “marijuana paraphernalia” to be lawful. It is unclear whether you propose to permit persons to avoid prosecution for manufacturing, selling, or possessing currently-unlawful items by the simple expedient of, for example, storing marijuana inside them.
- Sections 5 and 6 provide that they do not “preclude[] the imposition of additional rules and regulations that the general assembly may adopt and impose.” The General Assembly enacts laws. It does not “adopt and impose rules and regulations.” Rather, edicts commonly known as “rules” and “regulations” are adopted and imposed by agencies and other administrative bodies of government. The provisions are thus of uncertain meaning.

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

Enclosure

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 marijuana and the regulation of industrial hemp; 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 recreational and 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 may have access to medical marijuana to treat any disease, injury, or illness as recommended by a physician; requiring the release of all 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, and shall be regulated pursuant to the provisions of this amendment, but acknowledging that the listed activities with respect to the cannabis plant are unlawful under federal law and that the amendment shall have no effect on federal law.

Section 3. 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 three tenths of one percent (0.3%) 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 three tenths of one percent (0.3%), 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 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, utensils, products, and materials which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, or for concealing marijuana, or for ingesting, inhaling or otherwise introduce marijuana into the human body.
- (e) "Marijuana plant tag" means a 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. Such a label may be bar-coded or be embedded with a radio frequency identification (RFID) smart chip. Each tag shall display the marijuana license account number and an expiration date that corresponds with the cultivators marijuana license.
- (f) "Medical marijuana" means marijuana and products produced containing marijuana that is used for the treatment of any disease, illness, or injury.
- (g) "Physician" means a doctor of medicine or doctor of osteopathic medicine who holds a valid, unrestricted, and existing license to practice in the state of Arkansas and has been issued a registration from the United States Drug Enforcement Administration to prescribe controlled substances.
- (h) "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 three tenths of one percent (0.3%) Delta-9-tetrahydrocannabinol (Delta-9-THC) and industrial hemp products contain three tenths of one percent (0.3%) or less Delta-9-THC. Any item whose components may contain a variation in Delta-9-THC content that would span above the three tenths of one percent (0.3%) threshold is to be considered marijuana.
- (i) "Recreational marijuana" means marijuana and products produced containing marijuana that is used as an intoxicant.
- (j) "Written recommendation" means a document provided to a patient by a physician, authorizing the patient's use of medical marijuana. The document shall contain the patient's name, the physician's name, type of

marijuana product to be used, dosage, a list of dates in which orders may be filled to supply the patient's 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 4. The regulation of industrial hemp.

The cultivation, production, distribution, sale, possession, and use of industrial hemp and products produced containing industrial hemp shall be lawful and regulated by the state, but not prohibited.

Section 5. The regulation of marijuana.

The cultivation, production, distribution, sale, possession and use of marijuana and products produced containing marijuana for recreational and medical purposes shall be lawful and regulated by the state, but not prohibited; and such regulations are subject to the following conditions:

- (a) The cost of a marijuana license that shall be issued and required 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 recreational and medical purposes shall not exceed thirty dollars (\$30.00) 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 and required by the state to regulate the cultivation of marijuana plants produced in this state, shall not exceed six dollars (\$6.00) per tag, and any person with a marijuana license as defined in Section 3(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 cultivators 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) Any person issued a marijuana license and plant tag(s) may cultivate marijuana in a location where the plant(s) is (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 the 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.
- (g) Nothing in this section precludes the imposition of additional rules and regulations that the general assembly may adopt and impose.

Section 6. 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 physician as defined in section 3(g) may authorize the use of medical marijuana by written recommendation to a patient for the purpose of treating any illness, injury, or disease.
- (b) Any parent or guardian may provide medical marijuana to their minor child providing that they 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 a written recommendation authorizing the use. This shall also include an adult (18 years of age or older) designated by the written recommendation to purchase on behalf of a patient.
- (d) Nothing in this section precludes the imposition of additional rules and regulations that the general assembly may adopt and impose.

Section 7. Marijuana paraphernalia authorized.

Notwithstanding any other provision of law, the following acts regarding marijuana paraphernalia is 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 person twenty-one (21) years of age or older may manufacture, possess, purchase, distribute and sale marijuana paraphernalia.

(b) Any person eighteen years of age or older and has a written recommendation or is the designated adult to act on behalf of a patient may purchase and possess marijuana paraphernalia.

(c) Any person with a marijuana license may use marijuana paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, or for concealing marijuana, or for ingesting, inhaling or otherwise introduce marijuana into the human body.

(d) Any person twenty-one (21) years of age or older, or any person with a written recommendation in their name may use and possess marijuana paraphernalia for the purpose of storing, containing, or concealing marijuana, or for ingesting, inhaling, or otherwise introduce marijuana into the human body.

Section 8. Employers, driving, and minors.

(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 or medical marijuana by employees.

(b) Nothing in this amendment is intended to allow 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.

Section 9. Non-violent marijuana offenders and criminal record expungement.

All persons who are serving incarceration, probation, or 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 10. 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.