



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-034

April 11, 2016

Don Lane, Sponsor
1408 Central Boulevard
Bull Shoals, AR 72619

Dear Mr. Lane:

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 Restoration 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 18 years of age or older to purchase and possess recreational marijuana, and to cultivate and produce limited amounts of marijuana for his or her own personal use; permitting the use of medical marijuana to assure that patients, including those under 21 years of age, may have access to medical

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).

marijuana to treat any disease, injury, or illness as recommended by their doctor; requiring the release of nonviolent 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 of any misleading tendency whether by amplification, omission, or fallacy, and it

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.

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 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.

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.*

- 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 “recreational marijuana” to exclude alcoholic beverages produced from cannabis. The provision makes unclear the state’s regulatory or prohibitory authority with respect to such beverages.

- Section 3 defines “written recommendation” as a document provided by a “medical doctor, who is licensed in this state.” Section 7 refers to a “medical doctor holding a current valid license recognized by this state.” The difference in language creates ambiguity with respect to whether such a doctor must currently be practicing, whether an out-of-state doctor licensed in Arkansas or elsewhere (to the extent “recognized by this state”) is included, and whether a doctor whose practice is limited to recommending marijuana is included. The sections also refer to a “patient” of the doctor. The provisions are unclear with respect to whether a prior physician-patient relationship is required and with respect to whether the doctor must examine the patient before the recommendation is made.

- Section 3 defines “usable marijuana” as “any part of the dried vegetation, concentrate, and consumable ready for use by the consumer.” The meanings of the words “concentrate” and “consumable” are unclear.

- Section 4 states that hemp “may be regulated but not prohibited, similar [sic] to cotton, corn, or any other crops that are currently or shall be regulated by this state.” The provision is ambiguous with respect to the extent of regulation permissible in the event such other crops are currently regulated differently. It is also ambiguous with respect to how hemp may be regulated in the event a crop may be subjected to a different level of regulation after adoption of the proposal.

- Section 6 refers to “the weight of living, drying, or plants in the process of drying or curing.” The meaning of the phrase is unclear.

- Section 9 provides that the proposal is not intended to permit the consumption of marijuana in public. The proposal does not, however, prohibit such consumption. It is therefore uncertain and ambiguous how such consumption would be treated under law following adoption of 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 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).

Don Lane, Sponsor
1408 Central Boulevard
Bull Shoals, AR 72619

Popular Name:

THE ARKANSAS CANNABIS RESTORATION 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 18 years of age or older to purchase and possess recreational marijuana, and to cultivate and produce limited amounts of marijuana for his or her own personal use; permitting the use of medical marijuana to assure that patients, including those under 21 years of age, may have access to medical marijuana to treat any disease, injury, or illness as recommended by their doctor; requiring the release of nonviolent 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 Restoration 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) "Driving under the influence of marijuana" means operating a motorized vehicle on any public road, highway, or street when the Delta-9-tetrahydrocannabinol (Delta-9-THC) content of the operators blood exceeds 13 micrograms per liter (13µg/L).

(b) "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).

(c) "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).

(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, which are not otherwise prohibited by Arkansas law.

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

(f) "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.

(g) "Recreational marijuana" means marijuana and products produced containing marijuana that is used as an intoxicant, but does not include alcoholic beverages produced from the cannabis plant (genus Cannabis).

(h) "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 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.

(i) "Usable marijuana" means any part of the dried vegetation, concentrate, and consumable ready for use by the consumer.

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 in this state and may be regulated but not prohibited, similar to cotton, corn, or any other crops that are currently or shall be regulated by this state.

Section 5. The regulation of marijuana.

The cultivation, production, distribution, sale, possession, and use of marijuana and products produced containing marijuana for medical and recreational purposes shall be lawful in this state, and may be regulated but not prohibited.

Section 6. The personal use of recreational marijuana authorized.

Notwithstanding any other provision of law, the following acts regarding the personal use of recreational marijuana by persons eighteen (18) years of age or older 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 person who is eighteen (18) years of age or older may purchase up to 1 ounce of usable recreational marijuana.

(b) Any person who is eighteen (18) years of age or older may possess up to 4 ounces of usable recreational marijuana.

(c) Any person who is eighteen (18) years of age or older may cultivate up to 6 marijuana plants for personal use 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, or with the consent of the person(s) lawfully in possession of the property. The weight of living, drying, or plants in the process of drying or curing, shall not be included as this is not usable marijuana.

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 holding a current valid license recognized by this state may authorize 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 a written recommendation authorizing the child's use.

(c) Any person eighteen (18) years of age or older may purchase marijuana for medical purposes providing that they 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 eighteen (18) years of age or older to manufacture, possess, or purchase marijuana paraphernalia, or to distribute or sell marijuana paraphernalia to a person who is eighteen (18) years of age or older.

Section 9. Employers, driving, minors, and public use.

(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.

(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 eighteen (18).

(d) Nothing in this amendment is intended to permit a person under the age of eighteen (18) to cultivate, produce, sell, possess, or use recreational marijuana.

(e) Nothing in this amendment is intended to permit the consumption of marijuana in public.

Section 10. 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 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.