



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2016-110

November 4, 2016

Robert L. Reed  
295 Elan Trail  
Dennard, AR 72629

Dear Mr. Reed:

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,”<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 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.<sup>3</sup>

## 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 Hemp and Cannabis Amendment of 2018

### Ballot Title

An amendment proposed by the people to the Arkansas Constitution to provide, effective January 1, 2019, that the cultivation, manufacturing, distribution, sale, possession and use of the cannabis plant (genus *cannabis*) and all products derived from the cannabis plant (genus *cannabis*) are lawful in every geographic area of each and every county of this State; that, for purposes of this amendment, “hemp” is defined as any part of the cannabis plant (genus *cannabis*), living or not, containing one percent or less, by dry weight, Delta-9-

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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 848 (1984).

Tetrahydrocannabinol (Delta-9-THC); that, for purposes of this amendment, “cannabis” is defined 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); that the listed activities relating to “cannabis” devoted to personal, industrial or commercial use may be regulated but not prohibited by the General Assembly; and that the listed activities relating to “hemp” devoted to personal, industrial or commercial use may be regulated but not prohibited, subject to the condition that the number of plants cultivated or the products derived from manufacturing shall not be limited or prohibited by the General Assembly; providing for the release from incarceration, probation, or parole and the expungement of records, of all persons whose only conviction(s) were of state laws pertaining to the cultivation, production, distribution, sale, and possession of marijuana or possession of marijuana paraphernalia. Preemptive federal law will remain in effect unless altered by Congress.

## 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, a ballot title will not be legally sufficient unless it “adequately inform[s]” the voters of the contents of a proposed amendment or act so that they

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

<sup>5</sup> See, 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 note 16 *infra*.

<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).

can make a “reasoned decision in the voting booth.”<sup>8</sup> A ballot title’s failure to “honestly and accurately reflect what is contained in the proposed [act or] Amendment” may lead the Court to conclude that the “omission is significant.”<sup>9</sup> The Court has also disapproved the use of terms that are “technical and not readily understood by voters.”<sup>10</sup> Without a definition of such terms in the ballot title, the title may be deemed insufficient.<sup>11</sup>

Additionally, 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>12</sup> At the same time, however, a ballot title must be brief and concise;<sup>13</sup> 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>14</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>15</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>16</sup> The ballot title must be honest and

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<sup>8</sup> *Lange v. Martin*, 2016 Ark. 337, \*9, at n. 2.

<sup>9</sup> *Id.* at \*9.

<sup>10</sup> *Wilson v. Martin*, 2016 Ark. 334, \*9.

<sup>11</sup> *Id.*

<sup>12</sup> *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

<sup>13</sup> *See* Ark. Code Ann. § 7-9-107(b).

<sup>14</sup> *Bailey* at 284, 884 S.W.2d at 944.

<sup>15</sup> *Id.* at 293, 844 S.W.2d at 946-47.

<sup>16</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)).

impartial,<sup>17</sup> and it must convey an intelligible idea of the scope and significance of a proposed change in the law.<sup>18</sup>

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.<sup>19</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>20</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 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.

1. Section 2 of the proposal would make lawful the possession, etc., of “all products derived from the cannabis plant.” It seems reasonable to expect that such products would in some instances contain ingredients or components other than cannabis. It is not clear whether the proposal, being a constitutional amendment, would make unenforceable statute law that regulates or prohibits possession, etc., of such an ingredient or

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<sup>17</sup> *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

<sup>18</sup> *Christian Civic Action Committee*, 318 Ark. at 245, 884 S.W.2d at 607 (internal quotations omitted).

<sup>19</sup> *Cf. Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 382 (2000).

<sup>20</sup> *Id.*

component, or of an item, otherwise prohibited, that contains cannabis as an ingredient or component. Neither is it clear how little cannabis a product could contain and still be deemed to be “derived” from cannabis, and whose legal prohibition would therefore be precluded.

2. Section 2 of the proposal would make lawful the possession, etc., of the cannabis plant and products derived therefrom without regard to the use to be made thereof. Sections 5 and 6 would permit regulation of hemp and “Cannabis” “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, etc., if not for such use, would be free from regulation. It is not clear how the proposal would operate in this regard.

3. The proposal refers generally to the “cannabis” plant, but also defines in section 3 the word “Cannabis” to refer to something less than all “cannabis.” This usage is unnecessarily confusing and difficult to describe in a ballot title.

4. Sections 5 and 6 would permit regulation of hemp and “Cannabis” but would not expressly authorize regulation of products derived therefrom. Additionally, section 5, regarding hemp, provides that “the products derived from manufacturing, shall not be limited or prohibited....” It is not clear whether the proposal is intended to wholly preclude the General Assembly from regulating products derived from “Cannabis.” Neither is the extent of the General Assembly’s intended regulatory authority over products derived from hemp clear.

5. Section 6 provides that possession, etc., of “Cannabis” may be regulated but not prohibited. Section 5 provides that possession, etc., of hemp may be regulated but that “the number of plants cultivated or the products derived from manufacturing, shall not be limited or prohibited....” The usage suggests that certain acts relating to hemp, but not to “Cannabis,” may be prohibited, but the provision’s meaning is not clear.

6. Section 7 refers to persons “whose *only* conviction(s) were due to violating state laws” pertaining to marijuana. It is not clear whether the proposal is intended to preclude relief to a person currently incarcerated for a marijuana offense but who, for example, was earlier convicted of a

crime unrelated to marijuana and has long since completed serving his sentence for that crime.

7. Section 7 provides for release of persons whose “violation(s)” occurred before the proposal’s effective date, and expungement of “convictions” that occurred before the proposal’s effective date. It is not clear whether the proposal is intended to deny expungement to a person convicted after the proposal’s effective date for conduct that occurred before the proposal’s effective date.

## 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.<sup>21</sup> You may resubmit your proposed act along with a proposed popular name and ballot title at your convenience.

Sincerely,



LESLIE RUTLEDGE  
Attorney General

Enclosure

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<sup>21</sup> Ark. Code Ann. § 7-9-107(c).

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**Subject:**

FW: Request for approval of Popular name and Ballot title

Popular Name: The Arkansas Hemp and Cannabis Amendment of 2018

Ballot Title:

An amendment proposed by the people to the Arkansas Constitution to provide, effective January 1, 2019, that the cultivation, manufacturing, distribution, sale, possession and use of the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) are lawful in every geographic area of each and every county of this state; that, for purposes of this amendment, "hemp" is defined 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); that, for purposes of this amendment, "cannabis" is defined 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); that the listed activities relating to "cannabis" devoted to personal, industrial or commercial use may be regulated but not prohibited by the General Assembly; and that the listed activities relating to "hemp" devoted to personal, industrial or commercial use may be regulated but not prohibited, subject to the condition that the number of plants cultivated or the products derived from manufacturing shall not be limited or prohibited by the General Assembly; providing for the release from incarceration, probation, or parole and the expungement of records, of all persons whose only conviction(s) were of state laws pertaining to the cultivation, production, distribution, sale, and possession of marijuana or possession of marijuana paraphernalia. Preemptive federal law will remain in effect unless altered by Congress.

Section 1. This is an Amendment to the Arkansas Constitution that shall be called "The Arkansas Hemp and Cannabis Amendment of 2018."

Section 2. Effective January 1, 2019, the cultivation, manufacturing, distribution, selling, possessing and use of the cannabis plant (genus cannabis) and all products derived from the cannabis plant (genus cannabis) is 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. "Cannabis" 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 the cultivation, manufacturing, distribution, sale, possession and use of "Hemp" for personal, industrial, or commercial use may be regulated, but the number of plants cultivated or the products derived from manufacturing, shall not be limited or prohibited, by the General Assembly.

Section 6. The the cultivation, manufacturing, distribution, sale, possession and use of "Cannabis" for personal, industrial, or commercial use may be regulated, but not prohibited, by the General Assembly.

Section 7. Non-violent marijuana offenders and criminal record expungement.

a. 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.

b. All criminal records in this state shall be expunged of such convictions that occurred prior to the effective date of this amendment.

Section 7. All laws which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.

\*\*\*END\*\*\*