



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2018-118

October 4, 2018

Rebeca Rodriguez, Sponsor
2411 South State Street
Little Rock, AR 72206

Dear Ms. Rodriguez:

I am writing in response to your request for certification, pursuant to Ark. Code Ann. § 7-9-107 (Supp. 2017), 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 I do not, consider the merits of the measure when making a decision to certify or reject.

Arkansas Code Annotated § 7-9-107 authorizes my office to 1) certify the popular name and ballot title of a proposed measure, 2) substitute and certify the popular name and ballot title, if practicable, or 3) reject the entire submission if “the ballot title, or the nature of the issue, is presented in such manner that the ballot title would be misleading” to voters.¹ The purpose of my review under section 7-9-107 is to ensure that the popular name and ballot title honestly, intelligibly, and fairly set forth the purpose of the proposed amendment or act.² In this way, voters will have a fair understanding of the issues presented by reference to the ballot title alone.³

¹ Ark. Code Ann. § 7-9-107(c) (Supp. 2017).

² See *Arkansas Women's Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846, 848 (1948).

³ *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980) (internal citations omitted).

Section 7-9-107 neither requires nor authorizes this office to make legal determinations concerning the merits of the proposed 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,”⁴ this office will not require that a measure’s proponents acknowledge in the ballot title any possible constitutional infirmities.⁵ 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.

REQUEST

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

Popular Name

An Act to Remove Marijuana from the
Arkansas Uniformed Controlled Substances Act

Ballot Title

An Act to remove the Marijuana plant and its organically derived tetrahydrocannabinols from the Arkansas Uniformed Controlled Substances Act. This Act would remove penalties associated with the manufacturing, possession, and distribution of the Marijuana plant under state law, but recognizing the listed activities with respect to marijuana remains illegal under federal law.

⁴ 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).

⁵ As part of my review, however, I may address constitutional concerns for consideration by the measure’s proponents.

GUIDELINES

The popular name is primarily a useful legislative device.⁶ 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.⁷ The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.⁸

"It has long been regarded as axiomatic that the majority of voters, when called upon to vote for or against a proposed measure, will derive their information about its contents from an inspection of the ballot title immediately before exercising the right of suffrage."⁹ Accordingly, 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.¹⁰ 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 can make a "reasoned decision in the voting booth."¹¹ 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."¹² The Court has also disapproved the use of terms that are "technical and not readily understood by voters."¹³ Without a definition of such terms in the ballot title, the title may be deemed insufficient.¹⁴

⁶ *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

⁷ 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 *infra* n.20.

⁸ *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

⁹ *Wilson v. Martin*, 2016 Ark. 334, *7, 500 S.W.3d 160, 166 (citing *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 884 S.W.2d 605 (1994)).

¹⁰ *Becker*, 270 Ark. at 226, 604 S.W.2d at 558.

¹¹ *Lange v. Martin*, 2016 Ark. 337, 500 S.W.3d 154, at n. 2.

¹² *Id.* at *9, 500 S.W.3d at 159.

¹³ *Wilson*, 2016 Ark. 334 at *9, 500 S.W.3d at 167 (stating that "voters [should not] be placed in a position of either having to be an expert in the subject or having to guess as to the effect his or her vote would have").

¹⁴ *Id.*, 500 S.W.3d at 167.

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.”¹⁵ At the same time, however, a ballot title must be brief and concise;¹⁶ otherwise voters could run afoul of the statutory five-minute limit in voting booths¹⁷ when other voters are waiting in line.¹⁸ 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.¹⁹ Yet the title must be “free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring.”²⁰ The ballot title must be honest and impartial,²¹ and it must convey an intelligible idea of the scope and significance of a proposed change in the law.²²

Furthermore, the Court has confirmed that a ballot title cannot be approved if the text of the proposed measure itself contributes to confusion and disconnect between the language in the popular name and the ballot title and the language in the measure.²³ 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.”²⁴ Where the effects of a proposed measure on

¹⁵ *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

¹⁶ See Ark. Code Ann. § 7-9-107(b).

¹⁷ Ark Code Ann. § 7-5-309 (Supp. 2017).

¹⁸ *Bailey*, 318 Ark. at 284, 884 S.W.2d at 944.

¹⁹ *Id.* at 293, 884 S.W.2d at 946-47.

²⁰ *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 Comm.*, 318 Ark. at 249, 884 S.W.2d at 610 (1994).

²¹ *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

²² *Christian Civic Action Comm.*, 318 Ark. at 245, 884 S.W.2d at 607 (internal quotations omitted).

²³ *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 382 (2000).

²⁴ *Id.*

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. While I am authorized to substitute and certify a ballot title that is *more* suitable (in terms of affording voters a fair understanding of the issues presented), section 7-9-107 does not contemplate that I generate a ballot title when the one submitted is wholly deficient. Nor does the statute require that I modify the proposed measure itself in order to then be able to summarize its text in a suitable ballot title.²⁵ Instead, crafting and accurately summarizing the measure are the sponsor's responsibilities prior to submission.

RESPONSE

My statutory duty is to certify, substitute and certify, or reject the entire proposal. Your submission has a threshold shortcoming that requires me to reject popular name, the ballot title, and proposed measure as drafted.

DISCUSSION

Before I can review any popular name and ballot title under the Court's guidelines, and as a condition of my certification, I must be provided with the complete text of the proposed constitutional amendment or initiated act. This requirement is reflected in section 7-9-107(a), which provides that "the sponsors shall submit the *original draft* to the Attorney General, with a proposed ... ballot title and popular name." (Emphasis added.)

In this regard, it is unclear whether you intended your current submission to be considered a finished product. Your submission contains some struck-through text that is currently a part of the statute your proposal appears designed to amend (Ark. Code Ann. § 5-64-215 (Repl. 2016)). This is a common drafting technique present in a "blacklined" document to show deletions from a current version. But in this case, certain deletions are not from the current version of section 5-64-215. Your submission contains other language that is not contained in section 5-64-215. This creates confusion about what you are trying to convey in using this drafting technique. It raises a question whether what you have submitted is a finished product. And it makes it difficult, if not impossible, for voters to determine from this draft precisely what changes you are proposing.

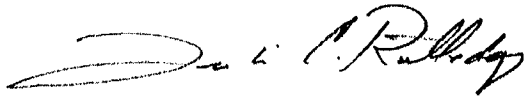
²⁵ See Op. Att'y Gen. 2017-032 (citing Ark. Code Ann. § 25-16-701, which prohibits the Attorney General from engaging in the private practice of law).

This document may be of use to you as a drafting step that enables you to reflect on how precisely you propose changing current law. However, any such transitional work product does not amount to an “original draft” of the sort that section 7-9-107 requires you to submit along with your proposed popular name and ballot title.

CONCLUSION

As stated above, section 7-9-106 does not authorize or require me to modify the proposed measure itself, in order to summarize its text in a suitable ballot title. My office is not charged with any role in drafting initiated amendments or acts. Instead, crafting and accurately summarizing the measure are the sponsor’s responsibilities prior to submission. Sponsors must vet their proposed measures, popular names, and ballot titles to ensure they meet the criteria established by section 7-9-107 and the Arkansas Supreme Court. Your submission falls short of these criteria. I must therefore reject your popular name, ballot title, and proposed measure.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge", written in a cursive style.

LESLIE RUTLEDGE
Attorney General

Enclosure

AN ACT TO REMOVE MARIJUANA FROM THE ARKANSAS UNIFORMED CONTROLLED SUBSTANCES ACT

(Popular Name)

(Ballot Title)

An Act to Remove the Marijuana plant and its organically derived tetrahydrocannabinols from the Arkansas Uniformed Controlled Substances Act. This Act would remove penalties associated with the manufacturing, possession, and distribution of the Marijuana plant under state law, but recognizing the listed activities with respect to marijuana remains illegal under federal law.

Be it enacted by the People of the State of Arkansas

§ 5-64-215 - Substances in Schedule VI, is amended to read as follows.

§ 5-64-215 - Substances in Schedule VI.

(a) Any material, compound, mixture, or preparation, ~~whether produced directly or indirectly from a substance of vegetable origin, or independently~~ by means of chemical synthesis, ~~or by a combination of extraction and chemical synthesis,~~ that contains any quantity of the following substances, or that contains any of their salts, isomers, and salts of isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation, are included in Schedule VI:

(1) ~~Marijuana;~~

(2) ~~Tetrahydrocannabinols; and~~

(3) ~~An inorganic and synthetic equivalent of the substance contained in the Cannabis plant, or in the resinous extractives of the genus Cannabis,~~ or a synthetic substance, derivative, or its isomers with similar chemical structure and pharmacological activity such as the following:

(A) ☐ 1 cis or trans tetrahydrocannabinol, and its optical isomers;

(B) ☐ 6 cis or trans tetrahydrocannabinol, and its optical isomers; and

(C) ☐ 3.4 cis or trans tetrahydrocannabinol, and its optical isomers.

(2) Excluded from Schedule VI are:

(A) Marijuana;

(B) Plant derived Tetrahydrocannabinols

(C) Resinous extractives of the genus Cannabis plant.

(b) However, the Director of the Department of Health shall not delete a controlled substance listed in this section from Schedule VI.