



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2018-056

May 23, 2018

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. 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.<sup>1</sup> 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.<sup>2</sup> In this way, voters will have a fair understanding of the issues presented by reference to the ballot title alone.<sup>3</sup>

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<sup>1</sup> Ark. Code Ann. § 7-9-107(c) (Supp. 2017).

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

<sup>3</sup> *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,”<sup>4</sup> this office will not require that a measure’s proponents acknowledge in the ballot title any possible constitutional infirmities.<sup>5</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.

My office treats each proposed measure, and any successive proposal from the same sponsor, as a discrete submission that must be evaluated on its own terms according to the standards established for popular names and ballot titles by the Arkansas Supreme Court. Because the Court’s scrutiny of voter-initiated acts and amendments is exacting, my office places great importance on the rigorous analysis of every submission. Each response to a request for certification will, if appropriate, identify ambiguities that militate against certifying the proposed ballot title. However, the ambiguities discussed in a given response will not necessarily be all of the ambiguities contained in the proposal. If additional ambiguities become apparent with successive submissions, I consider it my duty under section 7-9-107 to identify those ambiguities regardless of whether previous responses have included them.

## 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

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<sup>4</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>5</sup> As part of my review, however, I may address constitutional concerns for consideration by the measure’s proponents.

### Ballot Title

An amendment to the Arkansas Constitution concerning the cannabis plant, providing that the cultivation, production, distribution, sale, possession, and use of the cannabis plant and cannabis-related products produced therefrom for recreational and medical purposes may not be prohibited under state law but shall be regulated under state law; recognizing that such activities remain unlawful under federal law; providing for the release from incarceration, probation, or parole 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, and the expungement of records relating to such conviction(s); dividing cannabis into industrial hemp (containing 0.3% or less THC) and marijuana (containing more than 0.3% THC); authorizing both medical and recreational use of marijuana; providing that anyone 21 years of age or older may obtain a marijuana license permitting the person to cultivate, produce, distribute, and sell marijuana and products produced therefrom; providing that a licensed person may cultivate up to 36 cannabis plants in a location not subject to public view without optical aid; providing that sales of recreational marijuana will be subject to existing sales taxes and an additional 5% excise tax; providing that the state shall not impose any tax on the sale of medical marijuana to patients; permitting medical use of marijuana by a person of any age whose physician has recommended such use in writing; providing that the manufacture, possession, purchase, sale, and distribution of marijuana paraphernalia is lawful under state law; and providing that the amendment is not intended to (a) require employers to permit activities relating to marijuana in the workplace, (b) permit driving under the influence of marijuana, (c) permit the transfer of recreational marijuana to anyone under 21. Upon approval by the voters of the State Of [sic] Arkansas this amendment will repeal and replace Amendment 98 commonly known as the “Arkansas Medical Marijuana Amendment of 2016”.

### **RESPONSE**

My statutory duty is to certify, substitute and certify, or reject the entire proposal submitted. Having analyzed your proposed constitutional amendment, as well as

your proposed popular name and ballot title in line with guidelines established by the Arkansas Supreme Court, I conclude that the entire submission must be rejected.

## DISCUSSION

A primary, fundamental problem with your proposed measure and ballot title relates back to what I pointed out in my most previous opinion to you regarding changes in current law under this proposal.<sup>6</sup> As I explained in that opinion, the ballot title must fairly and accurately summarize the proposed measure's text, and it must sufficiently inform voters about the changes in current law they are being asked to approve.<sup>7</sup> I will not restate the Court's guidelines for determining the sufficiency of a measure's popular name and ballot title, but instead refer you to the previous opinion for the governing standards. I must again particularly draw your attention to the requirements as they pertain to informing voters of the proposed changes in existing law.

The text of your current proposed measure is identical to the text of your most previous submission. And with one exception, the ballot title you have proposed is also identical to the previous ballot title for this measure. The difference is the final clause, which has been added to the ballot title since the previous submission. It states:

Upon approval by the voters of the State Of [*sic*] Arkansas this amendment will repeal and replace Amendment 98 commonly known as the "Arkansas Medical Marijuana Amendment of 2016".

This statement amounts to a legal determination or conclusion regarding the proposed amendment's effects on current law. It is not a summary of the contents of the measure itself. The measure does not state that it repeals and replaces Amendment 98, the "Arkansas Medical Marijuana Amendment of 2016" ("AMMA"). Nor is it clear from the text precisely how the measure would alter or differ from the AMMA.

Even if the measure itself included this statement about repealing and replacing Amendment 98, simply restating such in a ballot title will not satisfy the rigorous standards set by the Court. Your proposed amendment plainly relates, in part, to

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<sup>6</sup> Op. Att'y Gen. 2018-051.

<sup>7</sup> *Id.* at 3-5.

“medical marijuana”—a term defined under subsection 3(f) of the measure. And the “medical use” of marijuana is protected under the AMMA.<sup>8</sup> In order for voters to make an informed decision about your measure, they will need information about the current state of the law on medical marijuana so that they can fully weigh the effect of repealing or otherwise changing that law. Your proposal’s substantive provisions in this regard must also be clear and unambiguous so that they can be sufficiently summarized for the voters in the ballot title. Without information in the ballot title about the AMMA and the differences between that law and the amendment you are proposing, I believe the Arkansas Supreme Court would have serious concerns about voters’ ability to fully understand and appreciate the issues presented. As the Court has stated:

The voter should not have to be well versed in legal interpretation in order to decipher what is meant in a proposed constitutional amendment. Placing the voter in a position of either having to be an expert in the [given] subject ... or having to guess as to the effect his or her vote would have is impermissible.<sup>9</sup>

When tested by the established standards governing the Court’s review of ballot titles, your proposed title must be deemed insufficient. As I have previously noted, the precise manner in which you acknowledge your proposal’s effects on existing law is a matter for you to determine and submit to this office in draft form. But that acknowledgment must reasonably follow from the actual text of the measure.

## CONCLUSION

My office, in the certification of ballot titles and popular names, does not address the merits, philosophy, or ideology of initiated measures. And I have no constitutional role in the shaping or drafting of such measures. I cannot advise individual sponsors, who 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. My statutory mandate is embodied only in Ark. Code Ann. § 7-9-107, and my duty is to the electorate.

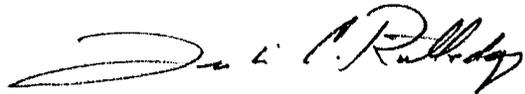
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<sup>8</sup> See Ark. Const. amend. 29, §§ 2(11) and 3 (Supp. 2017).

<sup>9</sup> *Kurrus*, 342 Ark. at 444, 29 S.W.3d at 674 (citing *Dust v. Riviere*, 277 Ark. 1, 638 S.W.2d 663, 665 (1982)).

Based on what has been submitted, my statutory duty is to reject your ballot title, popular name, and proposed measure. In considering whether to undertake another submission for this proposed measure, you should be aware that I may call attention to a proposal's ambiguities on any review, even though they may have been embodied or inherent in an earlier version of the proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge". The signature is fluid and cursive, with a large initial "L" and "R".

LESLIE RUTLEDGE  
Attorney General

Enclosure

## Popular Name

The Arkansas Hemp And Cannabis Amendment

## Ballot Title

An amendment to the Arkansas Constitution concerning the cannabis plant, providing that the cultivation, production, distribution, sale, possession, and use of the cannabis plant and cannabis-related products produced therefrom for recreational and medical purposes may not be prohibited under state law but shall be regulated under state law; recognizing that such activities remain unlawful under federal law; providing for the release from incarceration, probation, or parole 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, and the expungement of records relating to such conviction(s); dividing cannabis into industrial hemp (containing 0.3% or less THC) and marijuana (containing more than 0.3% THC); authorizing both medical and recreational use of marijuana; providing that anyone 21 years of age or older may obtain a marijuana license permitting the person to cultivate, produce, distribute, and sell marijuana and products produced therefrom; providing that a licensed person may cultivate up to 36 cannabis plants in a location not subject to public view without optical aid; providing that sales of recreational marijuana will be subject to existing sales taxes and an additional 5% excise tax; providing that the state shall not impose any tax on the sale of medical marijuana to patients; permitting medical use of marijuana by a person of any age whose physician has recommended such use in writing; providing that the manufacture, possession, purchase, sale, and distribution of marijuana paraphernalia is lawful under state law; and providing that the amendment is not intended to (a) require employers to permit activities relating to marijuana in the workplace, (b) permit driving under the influence of marijuana, (c) permit the transfer of recreational marijuana to anyone under 21. Upon approval by the voters of the State Of Arkansas this amendment will repeal and replace Amendment 98 commonly known as the "Arkansas Medical Marijuana Amendment of 2016".

Section 1. This is an amendment to the Arkansas Constitution that shall be called "The Arkansas Hemp And Cannabis Amendment."

Section 2. Effective January 01, 2019 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 regulated pursuant to the provisions of this amendment, and made lawful under Arkansas 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 lawful 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, containing or concealing medical or recreational marijuana, or for ingesting, inhaling or otherwise introducing medical or recreational 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.

U) "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 made lawful under Arkansas law, and shall be regulated by the state.

#### 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 made lawful under Arkansas law, and shall be regulated by the state, 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 state may adopt and impose.

#### Section 6. Medical marijuana authorized.

Notwithstanding any other provision of law, the following acts regarding the use of medical marijuana 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 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 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 state may adopt and impose.

#### Section 7. Marijuana paraphernalia authorized.

Notwithstanding any other provision of law, the following acts regarding marijuana paraphernalia 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, or purchase marijuana paraphernalia, or to distribute or sell marijuana paraphernalia to a person who is twenty-one (21) years of age or older, providing that marijuana paraphernalia being sold or distributed is new and unused and does not contain marijuana, unless the seller of such paraphernalia has a marijuana license to sell and distribute marijuana.

(b) 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, containing, or for concealing marijuana, or for ingesting, inhaling or otherwise introducing marijuana into the human body.

(c) Any person twenty-one (21) years of age or older may use marijuana paraphernalia for the purpose of containing, or concealing recreational marijuana, or for ingesting, inhaling, or otherwise introducing recreational marijuana into the human body.

(d) Any person with a written recommendation in their name may use marijuana paraphernalia for the purpose of containing, or concealing medical marijuana, or for ingesting, inhaling, or otherwise introducing medical marijuana into the human body.

(e) Nothing in this section permits a person to use marijuana paraphernalia in conjunction with an illegal substance or item that is prohibited by the state.

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.