TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2024-014

January 29, 2024

Stephen R. Lancaster
Wright Lindsey & Jennings LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201

Dear Mr. Lancaster:

I am writing in response to your request, made under A.C.A. § 7-9-107, that I certify the popular name and ballot title for a proposed constitutional amendment.

My decision to certify or reject a popular name and ballot title is unrelated to my view of the proposed measure's merits. I am not authorized to consider the measure's merits when considering certification.

**1. Request.** Under A.C.A. § 7-9-107, you have asked me to certify the following popular name and ballot title for a proposed initiated amendment to the Arkansas Constitution:

Popular Name

Arkansas Medical Cannabis Amendment of 2024

Ballot Title

> This amendment to the Arkansas Constitution expands access to medical cannabis by qualified patients under the Arkansas Medical Marijuana Amendment of 2016, Amendment 98 and ratifies and affirms that amendment as originally adopted and as amended by any legislative act, except as specified; amending Amendment 98, §2(4)(B) to define "cultivation facility" as including sale and delivery of usable marijuana to a processor; amending Amendment 98, §2(12) to replace the definition of "physician" with "health care practitioner," which includes medical and osteopathic doctors, nurse practitioners, physicians' assistants, and pharmacists and to remove requirements for federal controlled-substances registration; amending Amendment 98, §§4(f), 5(a)(1)-(2), 5(f)(1), 5(h);

and 15 [*sic*] to replace references to physicians with references to health care practitioners; amending Amendment 98, §2(13)(C) to add language defining such a condition as including any condition not otherwise specified in Amendment 98 that a health care practitioner considers debilitating to a patient that might be alleviated by medical marijuana; amending Amendment 98, §2(14)(A) to allow non-Arkansas residents to obtain registry identification cards in the same was [*sic*] as Arkansas residents; amending Amendment 98, §2(17) to define usable marijuana as including all parts of the plant *Cannabis sativa*, including any seeds, resin, compound, manufacture, salt, derivative, mixture, isomer or preparation of the plant, including tetrahydrocannabinol and all other cannabinol derivatives, and to exclude hemp with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis; amending Amendment 98, §2(19) to remove language requiring a physician-patient relationship from the definition of written certification and to allow assessments in person or by telemedicine; amending Amendment 98, §3(e) to allow licensed dispensaries to receive, transfer, or sell marijuana seedlings, plants, or usable marijuana to and from Arkansas-licensed cultivation facilities, processors, or other dispensaries, to accept marijuana seeds, seedlings, or clones from any individual authorized by law to possess them, and to sell usable marijuana, marijuana seedlings, plants or seeds to qualifying patients and designated caregivers; amending Amendment 98, §3(h) to remove language allowing professional licensing boards to sanction a physician for improper evaluation of a patient's medical condition or for violating the standard of care; amending Amendment 98, §3(1) to remove authorization for Department of Health rules concerning visiting qualifying patients obtaining marijuana from a dispensary; amending Amendment 98, §4(a)(4)(A) to require criminal background checks for all applicants seeking to serve as designated caregivers, with the exception of parents or guardians of minor qualifying patients applying to serve as designated caregivers for those minors; amending Amendment 98, §5(d) to extend the expiration date of registry identification cards from one to three years and to add two additional years to the expiration of date of existing cards; amending Amendment 98, § 8(e)(8) to remove and replace advertising restrictions with restrictions for dispensaries, processors, and cultivation facilities narrowly tailored to prevent advertising and packaging from appealing to children and to modify child-proof packaging requirements to reflect 16 C.F.R. § 1700.20, as of January 1, 2023; amending Amendment 98, § 8(m)(1)(A) to remove prohibitions on dispensary-provided paraphernalia requiring combustion of marijuana, requirements relating to vaporizers, and requirements for warnings and educational materials regarding methods of ingestion; amending Amendment 98, § 8(m)(4)(A)(ii) to allow cultivation facilities to sell marijuana in any form to dispensaries, processors, or other cultivation facilities; amending Amendment 98, § 16 to replace its current language with a waiver of state sovereign immunity so

> that a licensed person or entity may seek injunctive relief in the event the state fails to follow Amendment 98; amending Amendment 98, § 21 to remove a prohibition on the growing of marijuana by qualifying patients and designated caregivers and to allow such growing under Amendment 98; amending Amendment 98, § 23 to replace its current provisions with a prohibition on legislation amending, altering, or repealing Amendment 98 absent a vote of the people; repealing Amendment 98, § 26 in its entirety; amending Amendment 98 to allow qualifying patients or caregivers at least 21 years old to keep and to plant marijuana plants in limited quantities and sizes at their domicile solely for the personal use of a qualifying patient, to prohibit sale, bartering, and trade of marijuana plants, and to provide for regulation of such activities by the Alcohol [*sic*] Beverage Control Division; amending Amendment 98 to allow possession by adults of up to one ounce of usable marijuana and to allow sale of marijuana by licensed cultivators and dispensaries for adult use if current federal law prohibiting such activities changes; providing that this amendment's provisions are severable, nullifying any provision of state law in conflict with this amendment; and providing that the amendment is self-executing.

**2. Rules governing my review.** Arkansas law requires sponsors of statewide initiated measures to "submit the original draft" of the measure to the Attorney General.[1] An "original draft" includes the full text of the proposed measure along with its ballot title and popular name.[2] Within ten business days of receiving the sponsor's original draft, the Attorney General must respond in one of three ways:

- First, the Attorney General may approve and certify the ballot title and popular name in the form they were submitted.[3]

- Second, the Attorney General may "substitute and certify a more suitable and correct ballot title and popular name."[4] But A.C.A. § 7-9-107 does not authorize the Attorney General to modify the text of the proposed measure itself.

- Third, the Attorney General may reject both the popular name and ballot title "and state his or her reasons therefor and instruct" the sponsors to "redesign the proposed measure and the ballot title and popular name."[5] This response is permitted when, after reviewing the proposed measure, the Attorney General determines that "the

[1] A.C.A. § 7-9-107(a).

[2] A.C.A. § 7-9-107(b).

[3] A.C.A. § 7-9-107(d)(1).

[4] *Id.*

[5] A.C.A. § 7-9-107(e).

> ballot title or the nature of the issue" is (1) "presented in such manner" that the ballot title would be misleading or (2) "designed in such manner" that a vote for or against the issue would actually be a vote for the outcome opposite of what the voter intends.[6]

**3. Rules governing the popular name.** The popular name is primarily a useful legislative device.[7] While it need not contain detailed information or include exceptions that might be required of a ballot title, the popular name must not be misleading or partisan.[8] And it must be considered together with the ballot title in determining the ballot title's sufficiency.[9]

**4. Rules governing the ballot title.** The ballot title must summarize the proposed act. The Court has developed general rules for what must be included in the summary and how that information must be presented. Sponsors must ensure their ballot titles impartially summarize the measure's text and give voters a fair understanding of the issues presented.[10] The Court has also disapproved the use of terms that are "technical and not readily understood by voters."[11] Ballot titles that do not define such terms may be deemed insufficient.[12]

Additionally, sponsors cannot omit material from the ballot title that qualifies as an "essential fact which would give the voter serious ground for reflection."[13] Yet the ballot title must also be brief and concise lest voters exceed the statutory time allowed to mark a ballot.[14] The ballot title is not required to be perfect, nor is it reasonable to expect the title to address every possible legal argument the proposed measure might evoke.[15] The title, however, must be free from any misleading tendency—whether by amplification,

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[6] *Id.*

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

[8] *E.g.*, *Chaney v. Bryant*, 259 Ark. 294, 297, 532 S.W.2d 741, 743 (1976); *Moore v. Hall*, 229 Ark. 411, 414–15, 316 S.W.2d 207, 208–09 (1958).

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

[10] *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

[11] *Wilson v. Martin*, 2016 Ark. 334, 9, 500 S.W.3d 160, 167 (citing *Cox v. Daniels*, 374 Ark. 437, 288 S.W.3d 591 (2008)).

[12] *Id.*

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

[14] A.C.A. § 7-9-107(d)(2) (requiring the ballot title "submitted" to the Attorney General or "supplied by the Attorney General" to "briefly and concisely state the purpose the proposed measure"); § 7-5-309(b)(1)(B) (allowing no more than ten minutes); *see Bailey*, 318 Ark. at 288, 884 S.W.2d at 944 (noting the connection between the measure's length and the time limit in the voting booth).

[15] *Plugge v. McCuen*, 310 Ark. 654, 658, 841 S.W.2d 139, 141 (1992).

omission, or fallacy—and it must not be tinged with partisan coloring.[16] The ballot title must be honest and impartial,[17] and it must convey an intelligible idea of the scope and significance of a proposed change in the law.[18]

Finally, the Court has held 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.[19] Where the effects of a proposed measure on current law are unclear or ambiguous, I am unable to ensure the popular name and ballot title accurately reflect the proposal's contents until the sponsor clarifies or removes the ambiguities in the proposal itself.

**5. Application.** Having reviewed the text of your proposed initiated amendment, as well as your proposed popular name and ballot title, I have concluded that I must reject your proposed popular name and ballot title and instruct you to redesign them. The following problems in the ***text of your proposed amendment*** prevent me from (1) ensuring your ballot title is not misleading or (2) substituting a more appropriate ballot title:[20]

- ***Enacting clause.*** While the state constitution requires proposed initiated acts to include an enacting clause—"Be it Enacted by the People of the State of Arkansas"—initiated constitutional amendments do not require enacting clauses.[21] Therefore, as this office has consistently concluded, the inclusion of an enacting clause required for "bills" in your proposed constitutional amendment creates an

[16] *Bailey*, 318 Ark. at 284, 884 S.W.2d at 942 (internal citations omitted); *see also Shepard v. McDonald*, 189 Ark. 29, 70 S.W.2d 566 (1934).

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

[18] *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 250, 884 S.W.2d 605, 610 (1994).

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

[20] Although A.C.A. § 7-9-107 does not authorize the Attorney General to modify the text of the proposed measure itself, the Attorney General still reviews the text of the proposed measure because the ballot title and popular name cannot be certified when the "text of the proposed amendment itself" is ambiguous or misleading. *Roberts*, 341 Ark. at 825, 20 S.W.3d at 382. And in line with the caselaw, my predecessors have consistently rejected ballot titles "due to ambiguities in the text" of the proposed measure. *E.g.*, Ark. Att'y Gen. Ops. 2016-015, 2015-132, 2014-105, 2014-072, 2013-079, 2013-046, 2013-033, 2011-023, 2010-007, 2009-083, 2008-018, 2005-190, 2002-272, 2001-397, 2001-129, 2001-074, 2000-084, 1999-430.

[21] Ark. Const., art. 5, § 1 ("Enacting Clause"); *see also Mertz v. States*, 318 Ark. 390, 394, 885 S.W.2d 853, 855 (1994) ("Simply put….all bills initiated must be submitted in the following language set forth in Amendment 7: "'Be it enacted by the people of the State of Arkansas…."); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 262–63, 872 S.W.2d 349, 355 (1994) ("The term 'bills' as used in the Enacting Clause section of Amendment 7 does not refer to statewide constitutional amendments but only to initiated proposals where the people are seeking to enact their own laws.").

ambiguity as to what the voters are being asked to consider: a bill or a constitutional amendment.[22]

- ***Advertising language.*** Section 3(p) of the measure's text amends § 8(e)(8) of Amendment 98 as follows:

| Amendment 98, § 8(e)(8) | Proposed Text, § 8(e)(8) |
|---|---|
| Advertising restrictions for dispensaries and cultivation facilities, **including without limitation the advertising, marketing, packaging, and promotion of dispensaries and cultivation facilities with the purpose to avoid making the product of a dispensary or a cultivation facility appealing to children, including without limitation:**<br><br>(A) **Artwork**;<br><br>(B) **Building signage**;<br><br>(C) **Product design, including without limitation shapes and flavors**;<br><br>(D) Child-proof packaging that cannot be opened by a child or that prevents ready access to toxic or harmful amount of the product, and that meets the testing requirements in accordance with the method described in 16 C.F.R. § 1700.20, as existing on January 1, 2017;<br><br>(E) **Indoor displays that can be seen from outside the dispensary or cultivation facility; and**<br><br>(F) **Other forms of marketing related to medical marijuana** | "Advertising restrictions for dispensaries, **processors** and cultivation facilities **narrowly tailored to avoid making the advertising and packaging by a dispensary, processor or a cultivation facility appealing to children. The rules shall also require** child-proof packaging that cannot be opened by a child or that prevents ready access to toxic or harmful amount of the product, and that meets the testing requirements in accordance with the method described in 16 C.F.R. §1700.20, **as existing on January 1, 2023**." |

Such changes raise a few key issues. First, when the new proposed text provides that "rules shall also require child-proof packing," what "rules" are being referenced here—the Medical Marijuana Commission's (MMC) rules or the Alcoholic Beverage Control Division's (ABC) rules? Section 8 of Amendment 98 refers variously to rules that the MMC should adopt, the ABC should adopt, or that

[22] *E.g.*, Ark. Att'y Gen. Ops. 2023-109, 2023-108, 2018-076, 2017-016, 2015-065, 2013-039, 2012-013, 2011-157, 2009-169.

both should adopt. This ambiguity about what regulatory entity is promulgating rules here prevents me from ensuring your ballot title is not misleading.

Second, the citation to federal law attempts to incorporate a regulatory definition by reference, which violates the "full text" requirement. The absence of the measure's full text then renders the ballot title misleading by omission. I am aware that your proposal is simply copying what is already considered part of Amendment 98. But that cross-reference to federal law was created by the legislature, not through the initiative process.[23] Amendment 7 (Ark. Const., art. 5, § 1) to our state constitution requires that the "full text" of the initiated measure accompany each petition. Consequently, under A.C.A. § 7-1-107, all sponsors must give the Attorney General "[t]he full text of the proposed measure." And while the Arkansas Supreme Court has yet to interpret the meaning of the phrase "full text of the proposed measure," the North Dakota Supreme Court recently reviewed a substantially identical phrase in its own law.[24] In *Haugen v. Jaeger*, the North Dakota Supreme Court reviewed the legal validity of an initiated constitutional amendment that, by explicit citation, incorporated certain statutes into the state constitution.[25] There, the legal question was whether such an incorporation violated the state's full-text requirement.

Reaffirming a nearly 100-year-old decision on that topic of law, *Dyer v. Hall*,[26] the *Haugen* court held that such an incorporation by reference violates the full-text requirement for two reasons. First, it cut against "the purpose of the full-text requirement," which "was to obviate all uncertainty as to the subject-matter dealt with in the Constitution."[27] Second, *Haugen* approvingly cited *Dyer's* additional point that when initiated measures incorporate laws by reference, the "voters have no opportunity to read or examine fairly the contents [of those incorporated laws] and appreciate the real import of the proposed amendment."[28] In my opinion, the Arkansas Supreme Court likely would agree with *Haugen's* conclusion and reasoning when interpreting our own full-text requirements.

Here, you, like the sponsors in *Haugen*, expressly incorporate by reference a different law, into the definition of "testing requirement" without providing the actual definition. Therefore, voters reviewing the ballot title are not sufficiently

[23] *See* Act 640 of 2017, Regular Session.

[24] I have also recently reviewed in detail the holding of this particular North Dakota Supreme Court decision in Ark. Att'y Gen. Ops. 2023-133, 2023-113.

[25] 2020 N.D. 177, 948 N.W.2d 1.

[26] 51 N.D. 391, 199 N.W. 754 (1924).

[27] 2020 N.D. at 4, 948 N.W.2d at 4 (internal quotations omitted).

[28] *Id.* at 4, 948 N.W.2d at 3 (internal quotations omitted).

advised about the content of the statute you are attempting to incorporate into the definition of "testing requirement," and the absence of the measure's full text means the ballot title is misleading by omission. The solution to this is to simply set out in proposal the definition you are trying to incorporate by reference.

- ***Undefined phrase "medical cannabis."*** Section 3(c) of your text, which amends § 2(13)(C) of Amendment 98, uses the phrase "medical cannabis." But this phrase is neither defined nor used anywhere else in the measure's text or Amendment 98. While § 3 of the measure's text amends the definition of "usable marijuana" to include "cannabis and other substances including any parts of the plant *Cannabis sativa*," it is unclear whether "medical cannabis" is a distinct category of cannabis. Such unclarity is compounded by the lack of any definition of "medical cannabis" in Amendment 98. When a "health care practitioner" determines that a patient has a condition that "the health care practitioner considers debilitating to the patient and which may be alleviated by the use of medical cannabis," is that "usable marijuana," cannabis, or a specific type of cannabis known as "medical cannabis"? Is this term referring to cannabis used for a medicinal purpose? Or is the term referring to a specific kind of cannabis? This ambiguity prevents from be ensuring your ballot title is not misleading.

- ***Amendment by General Assembly.*** Section 3(v) amends § 23 of Amendment 98 to read: "Absent a vote of the people, the General Assembly may not amend, alter, or repeal this amendment." But this is misleading because this provision only partly summarizes the constitutional process concerning amendments. It is also unclear whether you intend any such amendment, alteration, or repeal to be considered one of the three referred amendments under article 19, section 22 to the Arkansas Constitution. This lack of clarity prevents me from ensuring that the ballot title as submitted is not misleading, and it prevents me from ensuring that any substituted and certified ballot title would not be misleading.

Because of the issues identified above, my statutory duty under A.C.A. § 7-9-107(e) is to reject your proposed popular name and ballot title, stating my "reasons therefor," and to "instruct…[you] to redesign your proposed measure and the ballot title…in a manner that would not be misleading."

**6. Additional issues.** The foregoing defects are sufficient grounds for me to reject your submission. But please note that your proposed measure contains several other issues that, while not bases for my decision to reject your proposed measure, you may wish to correct or clarify:

- "***Plants***" ***vs.*** "***cannabis plants.***" Section 4(a) of the measure's text uses the term "plants" while § 4(b) and (d) use the phrase "cannabis plants." The ballot title refers to "marijuana plants." You likely intend to use "cannabis plants" throughout § 4 of the measure's text, but that is not what the measure's text says. To remedy any confusion, you may want to clarify this switch in terminology.

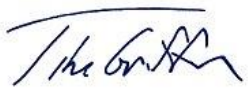
- ***Advertising Language.*** As discussed above, the proposed measure repeals advertising and marketing restrictions that were incorporated into Amendment 98 through the legislature but were never brought to the voters for review. The measure's text fails to tell voters about the impact these changes have on existing statutory law concerning advertising and marketing restrictions for dispensaries, processors, and cultivation facilities: A.C.A. § 20-56-305, which includes specific prohibitions on advertising and use of certain symbols for dispensaries and cultivation facilities, and A.C.A. § 20-56-306, which prohibits any "cultivation facility, dispensary, or processor" from "process[ing] or manufactur[ing] a medical marijuana product in a non-childproof package or container for consumption that" is "likely to appeal to minors due to shape, color, taste, or design," including products "in the shape of an animal, vehicle, person, or character."

- ***Amendment by General Assembly.*** Section 3(v) amends § 23 of Amendment 98 without adequately summarizing the current law being repealed. The change in law—both the law being displaced and the law being created—would need to be adequately summarized in any ballot title ultimately certified by this office.

- ***Grammatical issues.*** In the ballot title, the word "was" is used instead of "way" in the following clause: "amending Amendment 98, § 2(14)(A) to allow non-Arkansas residents to obtain registry identification cards in the same ***was*** as Arkansas residents." Also in the ballot title, the "Alcohol Beverage Control Division" should instead read "Alcoholic Beverage Control Division." While I have authority to change these as they appear in the measure's ballot title, I lack authority to change them as they appear in the text. You likely will want to change this in the measure's text as well. Throughout the measure's text there are missing semicolons (for instance, §3(b) and (c) of the measure's text) or improper use of apostrophes. You may wish to correct these issues.

Assistant Attorney General William R. Olson prepared this opinion, which I hereby approve.

Sincerely,



TIM GRIFFIN
Attorney General