

Opinion No. 2008-018

February 11, 2008

Mr. Frederick N. Scott, Sponsor  
Little Red Hen Committee  
Post Office Box 13135  
Maumelle, Arkansas 72113

Dear Mr. Scott:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2000), of the popular name and ballot title for a proposed constitutional amendment. You have previously submitted similar measures, which this office rejected due to ambiguities in the text of your proposed amendments. *See* Ops. Att’y Gen. Nos. 2007-327, 2007-287 and 2006-118. You have made changes in the text of your proposal since your last submission and have now submitted the following proposed popular name and ballot title for my certification:

**Popular Name**

LOCAL TERM LIMITS AMENDMENT

**Ballot Title**

AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF ARKANSAS LIMITING THE LENGTH OF TERMS OF OFFICE AND THE NUMBER OF TERMS OF OFFICE FOR ALL ELECTED COUNTY AND CITY OFFICES. (THERE ARE TWO BRANCHES OF GOVERNMENT THAT ARE COVERED IN THIS AMENDMENT: LEGISLATIVE AND ADMINISTRATIVE.) OFFICES THAT ARE ADMINISTRATIVE, SUCH AS MAYOR, COUNTY JUDGE, ASSESSOR, COLLECTOR, CLERK, TREASURER, OR SHERIFF

ARE LIMITED TO TWO, FOUR YEAR TERMS, OR A TOTAL OF EIGHT YEARS.

OFFICES THAT ARE LEGISLATIVE, SUCH AS JUSTICE OF THE PEACE OR ALDERMAN ARE LIMITED TO THREE, TWO-YEAR TERMS, OR A TOTAL OF SIX YEARS.

SCHOOL BOARDS, COMMISSIONS, TOWNSHIP OFFICES, PROSECUTORS AND COURTS ARE NOT AFFECTED

The Attorney General is required, pursuant to A.C.A. § 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 substitute and certify a more suitable and correct popular name and ballot title, if he can do so, or if the proposed popular name and ballot title are sufficiently misleading, may reject the entire petition. **Neither certification nor rejection of a popular name and ballot title reflects my view of the merits of the proposal. This Office has been given no authority to consider the merits of any measure.**

In this regard, A.C.A. §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, following Arkansas Supreme Court precedent, this office will not address the constitutionality of proposed measures in the context of a ballot title review unless the measure is “clearly contrary to law.” *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d, 669 (2000); *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996); and *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992). Consequently, this review has been limited to a determination, pursuant to the guidelines that have been set forth by the Arkansas Supreme Court, discussed below, of whether the proposed popular name and ballot title accurately and impartially summarize the provisions of your proposed amendment.

**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.** See *Arkansas Women's Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

The popular name is primarily a useful legislative device. *Pafford v. Hall*, 217 Ark. 734, 233 S.W.2d 72 (1950). 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. *Chaney v. Bryant*, 259 Ark. 294, 532 S.W.2d 741 (1976); *Moore v. Hall*, 229 Ark. 411, 316 S.W.2d 207 (1958). The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency. *Id.*

The ballot title must include an impartial summary of the proposed amendment that will give the voter a fair understanding of the issues presented. *Hoban v. Hall*, 229 Ark. 416, 417, 316 S.W.2d 185 (1958); *Becker v. Riviere*, 270 Ark. 219, 223, 226, 604 S.W.2d 555 (1980). 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." *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938 (1994), citing *Finn v. McCuen*, 303 Ark. 418, 798 S.W.2d 34 (1990); *Gaines v. McCuen*, 296 Ark. 513, 758 S.W.2d 403 (1988); *Hoban v. Hall*, *supra*; and *Walton v. McDonald*, 192 Ark. 1155, 97 S.W.2d 81 (1936). At the same time, however, a ballot title must be brief and concise (*see* A.C.A. § 7-9-107(b)); otherwise voters could run afoul of A.C.A. § 7-5-522's five minute limit in voting booths when other voters are waiting in line. *Bailey v. McCuen*, *supra*. 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. *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992). The title, however, must be free from any misleading tendency, whether by amplification, omission, or fallacy; it must not be tinged with partisan coloring. *Id.* A ballot title must convey an intelligible idea of the scope and significance of a proposed change in the law. *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 884 S.W.2d 605 (1994). It has been stated that the ballot title must be: 1) intelligible, 2) honest, and 3) impartial. *Becker v. McCuen*, 303 Ark. 482, 798 S.W.2d 71 (1990), citing *Leigh v. Hall*, 232 Ark. 558, 339 S.W.2d 104 (1960).

Having analyzed your proposed amendment, as well as your proposed popular name and ballot title under the above precepts, it is my conclusion that I must

reject your proposed popular name and ballot title due to ambiguities in the *text* of your proposed measure, as discussed below. I must also note that your proposed ballot title is wholly insufficient in apprising voters of the scope and significance of the changes in law that would be brought about by the amendment. *See Christian Civic Action Committee, supra*. The ballot title in my opinion must contain some explanation of current law regarding the length of terms of the offices affected, as well as current procedure for filling vacancies. In this regard, your ballot title only states that the amendment is one “*limiting* the Length of Terms of Office...” (emphasis added). This characterization is, moreover, misleading in light of the fact that the amendment would not change the length of terms of many elected city offices. *See, e.g.*, A.C.A. §14-43-315 and -315 (Supp. 2007) (setting four-year terms for the offices of city attorney, city clerk, treasurer, and clerk-treasurer in cities of the first class with populations under 50,000 and having the mayor-council form of government.) Additionally, most county offices currently have two-year terms, *see* Ark. Const. art. 7, § 29 (county judge), § 46 (county executive offices) and § 47 (constable), whereas the amendment would establish four-year terms for these offices, thereby *lengthening* these terms.

Thus, a number of additions or changes to your popular name and ballot title are, in my view, necessary in order to more fully and correctly summarize the effect of your proposed measure to the electorate. I cannot, however, at this time, substitute and certify a more suitable and correct popular name and ballot title pursuant to A.C.A. §7-9-107(b), without the resolution of certain ambiguities in the measure’s text. I refer to the following:

Section 3 of the proposed amendment states:

Vacancies in the Offices provided for in Section 1, shall be ruled by the provisions of Amendment 29. Nothing in this Section shall be construed to limit the scope of Amendment 29.

I cannot determine from this language whether you consider the proposed amendment as expanding the reach of Amendment 29 to the Arkansas Constitution. Amendment 29, Section 1, provides as follows:

Vacancies in the office of United States Senator, and in all elective *state, district, circuit, county, and township offices* except those of Lieutenant Governor, Member of the General Assembly and Representative in the Congress of the United States, shall be filled by appointment by the Governor.

Ark. Const. amend. 29, § 1 (emphasis added).

As you can see from the emphasized language in this excerpt, Amendment 29 does not apply to city offices. *See also Johnson County Board of Election Commissioners v. Holman*, 280 Ark. 128, 655 S.W.2d 408 (1983). Vacancies in city offices are instead currently filled pursuant to statute, under procedures that vary depending upon the particular office involved. *See, e.g.*, A.C.A. § 14-42-104 (Supp. 2007) (alderman vacancy in cities of 20,000 or more with a mayor-council government and ward elections to be filled by special election or majority vote of city council, depending upon the portion of term remaining); A.C.A. § 14-44-106 (Supp. 2007) (vacancy in office of mayor in city of second class filled by majority vote of city council or special election called by the council).

Your proposed amendment would thus significantly expand the scope of Amendment 29 by including city offices within the offices governed by Amendment 29. The Governor would make appointments to city offices, following adoption of your measure. *See* Ark. Const. amend. 29, § 1, *supra*. Additionally, those appointed to fill vacancies in city offices would be ineligible to succeed themselves because Section 2 of Amendment 29 states that “[n]o person appointed under Section 1 shall be eligible for appointment or election to succeed himself.” Current law, however, does not prohibit an appointed city officer from running to succeed himself or herself in office. *See, e.g.*, Op. Att’y Gen. 2004-282.

Section 3 of your proposed measure would have the additional expansive effect of investing the Governor, rather than the Quorum Court, with the power to fill vacancies in county offices. Although Amendment 29 applies to county offices, *see* Ark. Const. amend. 29, § 1, *supra*, a later constitutional amendment - Amendment 55 - substituted the County Quorum Court for the Governor with regard to making appointments to fill vacancies in county offices. *See Hawkins v.*

*Stover*, 274 Ark. 125, 126, 622 S.W.2d 667 (1981) (discussing Section 4 of Amendment 55, which states in relevant part that “the Quorum Court shall have the power to ... fill vacancies in elective county offices[.]”) By stating that “[v]acancies in the Offices provided for in Section 1, shall be ruled by the provisions of Amendment 29,” your proposed amendment would thus effectively reinstate the Governor’s power of appointment with respect to vacancies in county offices, found in Section 1 of Amendment 29.<sup>1</sup> Section 1 of Amendment 29 was not implicated by your previous proposed amendment. The question raised by that measure concerning Amendment 29 was limited to Section 4 of Amendment 29, regarding the length of time to be served by appointees.

While it thus seems clear from the first sentence of Section 3 of your proposed amendment that Amendment 29 would, following adoption of your measure, extend to city offices and provide for gubernatorial appointment to fill vacancies in county offices, the second sentence of Section 3 may call this into doubt by stating that “[n]othing in this Section shall be construed to *limit* the scope of Amendment 29.” (Emphasis added). This statement seems inconsistent with the first sentence’s pronouncement, considering that the proposed amendment would, as explained above, actually *expand* the scope of Amendment 29. The language of Section 3 thus leads to uncertainty, preventing me from summarizing its effect in a certified ballot title for your measure.

My office, in the certification of ballot titles and popular names, does not concern itself with 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 A.C.A. § 7-9-107 and my duty is to the electorate. I am not your counsel in this matter and cannot advise you as to the substance of your proposal.

At the same time, however, the Arkansas Supreme Court, through its decisions, has placed a practical duty on the Attorney General, in exercising his statutory duty, to include language in a ballot title about the effects of a proposed measure on current law. *See, e.g., Finn v. McCuen*, 303 Ark. 418, 793 S.W.2d 34 (1990).

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<sup>1</sup> Currently, the Governor only fills vacancies in the office of *justice of the peace*, along with the other offices listed in Section 1 of Amendment 29. *See* Ark. Const. amend. 29, § 1 and A.C.A. § 14-14-1310(b) (Repl. 1998). *See also* Op. Att’y Gen. 2004-308.

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Furthermore, the Court has recently confirmed that a proposed amendment cannot be approved if “[t]he text of the proposed amendment itself contribute[s] to the confusion and disconnect between the language in the popular name and the ballot title and the language in the proposed measure.” *Roberts v. Priest*, 341 Ark. 813, 20 S.W.3d 376 (2000). The Court concluded: “[I]nternal inconsistencies would inevitably lead to confusion in drafting a popular name and ballot title and to confusion in the ballot title itself.” *Id.* 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 clarification of the ambiguities.

My statutory duty, under these circumstances, is to reject your proposed popular name and ballot title, stating my reasons therefor, and to instruct you to “redesign” the proposed measure, popular name and ballot title. *See* A.C.A. § 7-9-107(c). You may, after clarification of the matter discussed above, resubmit your proposed amendment, along with a proposed popular name and ballot title, at your convenience. I anticipate, as noted above, that some changes or additions to your submitted popular name and ballot title may be necessary. I will perform my statutory duties in this regard in a timely manner after resubmission.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM:EAW/cyh

Enclosure