

Opinion No. 2011-157

December 21, 2011

Mr. Frederick N. Scott, Spokesperson  
Little Red Hen Committee  
Post Office Box 13584  
Maumelle, Arkansas 72113

Dear Mr. Scott:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2007), of the following popular name and ballot title for a proposed constitutional amendment:

Popular Name

THE INITIATIVE AND REFERENDUM REDUX.

Ballot Title

TO LESSEN THE PERCENTAGES REQUIRED FOR PLACING INITIATIVES AND REFERENDUMS ON THE BALLOT; TO MODIFY SOME CLAUSES IN ARTICLE 5, SECTION 1, HAVING TO DO WITH INITIATIVES AND REFERENDUMS IN ORDER TO CLARIFY THE ORIGINAL INTENT OF THE WORDING, AND TO ALLOW FOR RECENT CHANGES TO THE CONSTITUTION...

The Attorney General is required by A.C.A. § 7-9-107 to certify the popular name and ballot title of each petition for a proposed initiated or referred act or constitutional amendment before the petition is 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.

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**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 proposal's merits, or concerning the likelihood that it will accomplish its stated objective. In addition, following Arkansas Supreme Court precedent, this office will not address a proposal's constitutionality in the context of a ballot title review unless the measure is "clearly contrary to law." *Kurrus v. Priest*, 342 Ark. 434, 445, 29 S.W.3d 669 (2000); *see also 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 honestly, intelligibly, and fairly summarize the proposal's provisions.

**The purpose of my review and certification is to ensure that the popular name and ballot title honestly, intelligibly, and fairly set forth the proposal's purpose and effect.** *See Arkansas Women's Political Caucus v. Riviere*, 282 Ark. 463, 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.*

"It is axiomatic that the majority of voters will derive their information about a proposed measure from the ballot title immediately before exercising the right of suffrage." *Kinchen v. Wilkins*, 367 Ark. 71, 76, 238 S.W.3d 94 (2006). The ballot title must include an impartial summary of the proposal 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, 604 S.W.2d 555 (1980). According to the court, if information omitted from the ballot title is an "essential

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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 proposal might evoke. *Plugge v. McCuen*, *supra*. 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 proposal, popular name, and ballot title under the above precepts, I conclude that I must reject your proposed popular name and ballot title due to ambiguities in the *text* of your proposed measure. A number of additions or changes to your ballot title are, in my view, 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. I am therefore unable to substitute and certify a more suitable and correct popular name and ballot title pursuant to A.C.A. § 7-9-107(b).

I list below several ambiguities in your proposal. Most arise from the fact that your proposal does not make clear its relationship with or how it is intended to affect Article 5, Section 1, as currently in effect. Every sentence but one of your proposal appears to be a modified version of a sentence appearing in the current text of Article 5, Section 1, but it is impossible to determine whether your proposal is intended to remove from or preserve in the constitution parts of those sentences omitted from your proposal and other sentences and subsections sections currently in the constitution that are not included in your proposal in any form.

- In modifying a sentence currently contained in the constitution, your proposal omits the words “and every such [initiative] petition shall include the full text of the measure so proposed.” It is impossible to determine whether you intend to delete or retain this “full text” requirement.
- In modifying a sentence currently contained in the constitution, your proposal omits the words “[t]he second power reserved by the people is the referendum . . . .” It is impossible to determine whether you intend to delete or retain this language or, if it is to be deleted, the intended change in the law to be effected thereby.
- In modifying the same sentence, your proposal omits the words “against any general Act, or any item of an appropriation bill, or measure passed by the General Assembly, but the filing of a referendum petition against one or more items, sections or parts of any such act or measure shall not delay the remainder from becoming operative.” It is impossible to determine whether you intend to delete or retain this language or, if it is to be deleted, the intended change in the law to be effected thereby.
- A section of your proposal is entitled “State-wide Numbers.” The text of this section appears to be modifications of sentences currently appearing in subsections of Article 5, Section 1, entitled “Referendum” and “Initiative.” Your proposal does not, however, use all the text of either of those subsections. It is thus impossible to determine whether you intend to delete or retain the unused provisions of the current text or, if they are to be deleted, the intended change in the law to be effected thereby. It is also impossible to determine whether you intend to substitute your title for the current titles.
- A section of your proposal is entitled “Local numbers.” The text of this section appears to be modifications of sentences currently appearing in a subsection of Article 5, Section 1, entitled “Local for Municipalities and Counties.” Your proposal does not, however, use all the text of that subsection. It is thus impossible to determine whether you intend to delete or retain the unused provisions of the current text or, if they are to be deleted, the intended change in the law to be effected thereby. It is also impossible to determine whether you intend to substitute your title for the current title.
- There are many entire subsections of Article 5, Section 1, that your proposal does not modify or address in any way. It is impossible to

determine whether you intend to delete or retain those subsections or, if they are to be deleted, the intended change in the law to be effected thereby.

- Your proposal states that “the total vote cast for all aldermen” is to be the basis on which the number of signatures required will be computed in some cases. This provision is ambiguous in suggesting that the sum of the votes cast for each candidate in each race is, perhaps, to be the relevant number. It is also ambiguous in failing to specify a basis for cities that have no aldermen. *See, e.g.,* A.C.A. §§ 14-47-101 to -140 (Repl. 1998, Supp. 2011).

In the event you revise and resubmit your proposal, you should take into account the following with respect to your proposed popular name and ballot title:

Your proposed popular name is, in my view, misleading in its use of the word “redux.” One authority defines the word to mean “to bring back.” *RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY* 1618 (2nd ed. 1998). Another says it means “[b]rought back, revived, restored.” *NEW SHORTER OXFORD ENGLISH DICTIONARY* 2517 (Lesley Brown ed., 1993). The proposed popular name therefore suggests that adoption of your proposal would bring back or restore the initiative and referendum. But the initiative and referendum are alive and well now, having gone nowhere. *See* Ark. Const. art. 5, § 1. Your proposal itself proves the point, in that your proposal would not be viable absent the existing power of the people to initiate proposed constitutional amendments.

Your ballot title does not, in my view, adequately describe the proposed changes in the law. It states that the “percentages required” will be reduced, but does not say what those percentages are fractions of or quantify the very substantial reductions in any way. It states that “some clauses” of the constitution will be modified “to clarify the original intent of the wording” but does not say what those clauses are, how they will be modified, what their original intent was, or how the original intent is currently unclear. I am not certain whether the “to allow” part of the ballot title should be read as a third principal purpose of the proposal (“to lessen,” “to modify,” and “to allow”), or as the second part of the second stated principal purpose (“in order to clarify” and “in order . . . to allow”). Regardless, the language does not say what recent changes to the constitution are at issue or how your proposal will “allow for” those changes. It is difficult to perceive, in fact, how adoption of your proposal will “allow for” changes to the constitution that you state are already in effect. Finally, an ellipsis signals that material has

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been omitted from text. BRYAN A. GARNER, A DICTIONARY OF MODERN AMERICAN USAGE 539 (1<sup>st</sup> ed. 1998). A voter encountering the ellipsis at the conclusion of your ballot title might reasonably question what had been omitted and why.

Your proposal includes an enacting clause, “Be It Enacted by the People of the State of Arkansas.” While the Arkansas Constitution requires the inclusion of an enacting clause for “bills” initiated by the people, there is no such requirement for initiated constitutional amendments. *See United States Term Limits, Inc. v. Hill*, 316 Ark. 251, 262, 872 S.W.2d 349 (1994). While your proposal does not unequivocally so state, it is apparent that you propose to initiate a constitutional amendment, not an act. Because it is not required, the inclusion of an enacting clause in an initiated constitutional amendment could be confusing to voters.

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, supra*. Furthermore, the Court has 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, 825, 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.

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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 revision, resubmit your proposal, along with a proposed popular name and ballot title, at your convenience. I will be pleased to perform my statutory duties in this regard in a timely manner after resubmission.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

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Enclosure

## **The Initiative and Referendum Redux.**

To lessen the percentages required for placing initiatives and referendums on the ballot; to modify some clauses in Article 5, Section 1, having to do with initiatives and referendums in order to clarify the original intent of the wording, and to allow for recent changes to the Constitution...

### **Be It Enacted by the People of the State of Arkansas...**

**State-wide Numbers.** The total number of votes cast for the office of Governor in the last preceding general election in which the office of Governor was contested shall be the basis upon which the number of signatures of legal voters upon state-wide initiative and referendum petitions shall be computed. Upon all state-wide initiative or referendum petitions provided for in any of the sections of this article, it shall be necessary to file from at least five of the counties of the State, petitions bearing the signature of not less than one-half of the designated percentage of the electors of such county.

By initiative petition, not less than six-tenths percent (0.6%) of the legal voters may propose any law, and not less than one percent (1%) may propose a constitutional amendment.

By referendum petition, not less than one percent (0.1%) of the legal voters may order the referendum.

**Local numbers.** In municipalities, the number of signatures required upon any petition shall be computed upon the total vote cast for the office of mayor at the last preceding general election in which the office of mayor was contested; if there is no mayor or if there is no elected mayor, then the total vote cast for all aldermen. In counties, the number of signatures required upon any petition shall be computed upon the total vote cast for the office of circuit clerk at the last preceding general election in which the office of circuit clerk was contested.

Not less than one percent (1%) of the legal voters of any municipality or county may order the referendum, or invoke the initiative upon any local matter.

**Amendment and Repeal.** No initiated act approved by a vote of the people shall be amended or repealed by the General Assembly or by any city council or by any quorum court, except upon a ye and nay vote on rollcall of two-thirds of all the members elected to each house of the General Assembly, or of the city council or the quorum court, as the case may be. Amendments to the Constitution can neither be amended nor repealed except by constitutional amendment.