Opinion No. 2011-163

January 3, 2012

Preston Dunn, Jr., Founder/President
Personhood Arkansas
Post Office Box 101
Blytheville, Arkansas 72316

Dear Mr. Dunn:

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. Your popular name and ballot title are as follows:

Popular Name

THE PARAMOUNT RIGHT TO LIFE

Ballot Title

AN AMENDMENT TO THE ARKANSAS CONSTITUTION: RECOGNIZING EACH INNOCENT HUMAN BEING, AT EVERY STAGE OF DEVELOPMENT, AS A PERSON WITH THE RIGHT TO LIFE; BANNING ABORTION EXCEPT WHEN THE MOTHER'S LIFE IS IN DANGER; NOT AFFECTING BIRTH CONTROL OR IN-VITRO FERTILIZATION THAT DOES NOT CAUSE THE DEATH OF A PERSON; RECOGNIZING AND AFFIRMING THAT PROTECTING THE RIGHT TO LIFE OF EVERY INNOCENT PERSON IN ARKANSAS IS THE RIGHT AND RESPONSIBILITY OF THE PEOPLE OF ARKANSAS

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 (1996); *Plugge v. McCuen,* 310 Ark. 654, 841 S.W.2d 139 (1992).

**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 or act.** *See Arkansas Women's Political Caucus v. Riviere*, 282 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 or act 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*, *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 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 both to ambiguities in the *text* of your proposed measure and to the fact that the text is in certain respects misleading regarding the relationship between your proposed measure and controlling federal law. A number of additions or changes to your ballot title are, in my view, necessary in order to enable me fully and correctly to 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 referenced problems. 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).

The following comments will focus initially on various ambiguities and possibly misleading representations that must be resolved in order for me to fulfill my statutory obligations. Following my review of these areas of concern, I will focus on various constitutional issues that must be more directly acknowledged and addressed before I can certify your submission.

**Ambiguities and misleading provisions**

1. You have captioned your submission "The Paramount Right to Life." As previously noted, the popular name, while it need not be as exhaustive as the ballot title in summarizing the measure itself, must be neither misleading nor lend a partisan coloring to a proposal.[1]

   In *Riviere, supra,* the Arkansas Supreme Court rejected as misleading the popular name "Unborn Child Amendment," offering the following analysis:

   > From this synopsis[2] it can be seen that there are three schools of thought on the issue of when life begins; at conception,[3] upon live birth, or at the point upon which the fetus becomes viable. . . . [V]oters could well make a distinction between a one-second old conceptus and a fetus of eight months gestation which this popular name does not acknowledge. More significantly, the enactment of the proposed amendment would do two things, equally far-reaching: it would immediately prohibit the use of public funds for abortion, including a female impregnated by rape or incest, unless the life of the mother were in danger; and two, it would empower the General Assembly to prohibit abortion under any circumstances to the extent permitted under the Constitution of the United States. Yet, the popular name makes no reference whatsoever to this emotionally charged subject. Instead,

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[1] *See Riviere, supra, Chaney, supra* and *Hall, supra.*

[2] The referenced synopsis is set forth in the leading case of *Roe v. Wade*, 410 U.S. 113, 160-61 (1973).

[3] Without committing to the proposition, the United States Supreme Court, in the course of summarizing the three attitudes referenced in the Arkansas Supreme Court's analysis, referenced embryological data suggesting that it might in fact be difficult to assign the point of "conception," which it indicated the data suggest could be "a 'process' over time, rather than an event." *Roe v. Wade*, 410 U.S. at 161.

> the ballot name contains only the inviting catch words "unborn child," which gives the voters only the impression the proponents of the amendment want them to have. Very few would vote against a child, born or unborn, even though they are for a woman's right to have an abortion or for the state paying for it. The popular name is a clear-cut example of the partisan coloring of ballots which we have uniformly condemned in our decisions holding that a ballot name must be fair and impartial.[4]

In my opinion, these objections apply even more strongly to the popular name "The Paramount Right to Life." Your measure would not only deny public funding for any abortion in which the life of the mother is not in danger; it would prohibit such abortions altogether. Moreover, it would not only restrict access to abortion to the extent permitted by the federal constitution – a restriction the court indicated should in itself be disclosed in the popular name – it would even repeal the provision of the Arkansas Constitution that acknowledges the existence and priority of federal constraints on restricting abortion.[5] It thus purports to impose even more significant restrictions on abortion than those at issue in *Riviere* yet likewise fails even to mention those restrictions in the popular name. Finally, the caption "The Paramount Right to Life" is at least as tendentious and emotionally charged as the caption "Unborn Child Amendment." Your popular name is consequently unacceptable under the standard set forth in *Riviere*.

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[4] 283 Ark. at 468.

[5] Section 3 of your measure would repeal Ark. amend. 68, § 2, which provides as follows: "The policy of Arkansas is to protect the life of every unborn child from conception until birth, ***to the extent permitted by the Federal Constitution***" (emphasis added).

2. Section 1 of your measure, captioned "Purpose and effect," provides as follows:

> No innocent person shall be denied the right to life. With respect to the right to life, the word "person" shall apply to all human beings, including the unborn, at every stage of their development.

This section is ambiguous and/or misleading in various respects. First, you fail to define what is meant by an "innocent person." This coinage might be a rhetorical assertion that *all* "persons" are "innocent" and hence endowed with "the right to life." Indeed, this reading might be deemed consistent with the term "paramount right," which has a universal ring, in your proposed popular name. On the other hand, the term "innocent" might apply only to a legally nonculpable subset of "persons," with some or all remaining "persons" located outside the constitutional "right to life." If the latter reading is correct, a question arises as to which non-"innocent" individuals fall within the group that is not constitutionally guaranteed a "right to life."

This ambiguity is compounded by your use of the phrase "*including* the unborn" (emphasis added), which magnifies the uncertainty as to which "persons" indeed enjoy what you categorically represent as "the right to life." The highlighted word suggests that "the right to life" is not categorically restricted to fetuses – a group whose members I assume you consider necessarily "innocent" – but rather extends at least to those "innocents" who are already born. It is unclear, then, whether this coinage applies (a) to all "persons," irrespective of legal "innocence"; (b) only to "innocent persons," whether born or unborn; or (c) only to "persons" whose "innocence" has not been compromised in some undefined fashion to a degree that would justify the relinquishment of what might otherwise have been their "right to life." Furthermore, with regard to already born "innocent persons," it is unclear how, if at all, your proposal

changes existing law. Without clarification, I am consequently unable to summarize these provisions in a ballot title.

I am further unable to summarize the provision in your measure ensuring "the right to life" to every "innocent person . . . including the unborn, at every stage of development." This formulation begs the question of when human life begins – or, stated differently, the question of what event marks a "person's" first "stage of development." Answering this question is of utmost concern in addressing various issues that are currently at the forefront of the national consciousness, such as the appropriate disposition of embryonic cells and tissues that are never destined for implantation into a human host. Although your proposed ballot title appears forthright in declaring that "abortion" will be prohibited except "when the mother's life is in danger," it is unclear in your measure, given your failure to identify a "person's" first "stage of development," what would constitute abortion in certain instances. I am consequently unable to clarify this provision in your ballot title.

The importance of apprising voters of precisely what they are being invited to approve is illustrated in a very recent case decided by a Nevada trial court. Faced with a measure similar to yours in the form of a proposed initiative to amend the Nevada Constitution to prohibit "[t]he intentional taking of a prenatal person's life," a reviewing court labeled "inadequate" a proponent's proposed "Description of Effect" and substituted the following:

> All persons are endowed by their creator with certain unalienable rights including the right to life. This initiative proposed to add a new section to the Nevada Constitution to protect a prenatal person's right to life. The new section would make it unlawful to intentionally kill a prenatal person by any means. The term "prenatal person" includes every human being from the moment an

> egg is fertilized by a sperm and at all stages of development from that time until birth. The initiative would protect a prenatal person regardless of whether or not the prenatal person would live, grow, or develop in the womb or survive birth; prevent all abortions even in the case of rape, incest, or serious threats to the woman's health or life, or when a woman is suffering from a miscarriage, or as an emergency treatment for an ectopic pregnancy. The initiative will impact some rights Nevada women currently have to utilize some forms of birth control, including the "pill;" and to access certain fertility treatments such as *in vitro* fertilization. The initiative will affect embryonic stem cell research, which offers potential for treating diseases such as diabetes, Parkinson's disease, heart disease, and others.[6]

This passage is significant in two respects. First, it specifies that the proposed restriction will apply "from the moment an egg is fertilized by a sperm and at all stages of development from that time until birth." Your measure contains no corresponding provision that would enable me to specify in the ballot title the event triggering your proposed restrictions. Secondly, the court's "Description of Effects" specifies in detail the consequences that would result from approval of the measure – information the voters are entitled to review and that I cannot provide without your defining the triggering event just discussed.

2. Section 2 of your measure, captioned "Exclusions," provides as follows:

> The Amendment shall have no effect on contraceptives or other methods of birth control that do not cause the death of a person. This Amendment shall have no

[6] *Chen et al. v. Nevada Prolife Coalition et al.*, Carson City, Nevada, First Judicial District Court, Case No. 11 OC 00328 1B (December 19, 2011).

> effect on *in vitro* fertilization or other methods of assisted reproduction that do not cause the death of a person. This Amendment shall have no effect on medical treatment for life threatening physical conditions intended to preserve life.

Given the uncertainty regarding what precisely the term "person" betokens,[7] it is unclear what effect the enactment of your amendment would have on various laws relating to birth control. As noted above, the ballot title must alert voters to the effect of a measure on current law, and any fact that would give a voter "serious ground for reflection" must be disclosed. At issue is precisely what the term "a person" means *in utero* or *in vitro* – a question your measure fails to answer, rendering it impossible for me to summarize your proposal in a ballot title. Without clarification regarding the scope of the term "person," this ambiguity, and the attendant difficulty in determining what procedures your measure would ban, cannot be avoided simply by excluding from the ban "contraceptives or other methods of birth control that do not cause the death of a person."

As a practical matter, it is further unclear under your measure precisely when a particular birth-control procedure might be deemed to "cause the death of a person." It appears to be the case that a range of birth-control practices may, but will not necessarily, involve the destruction of a fertilized egg or embryo and as such may or may not cause "the death of a person" as contemplated in your measure. This same conclusion applies in cases of "*in vitro* fertilization or other methods of assisted reproduction." Regardless of how the term "person" is defined, possibly including even an unused fertilized egg, to the extent that the referenced "methods of assisted reproduction" may only occasionally result in "the death of a person," it is unclear precisely what procedures would be allowed and under what

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[7] *See* discussion, *supra.*

circumstances. It is consequently impossible for me to summarize your measure in a ballot title. This very uncertainty might well give a voter "serious ground for reflection."

It is further misleading to characterize as "exclusions" from the prohibition birth control and assisted reproduction methods "that do not cause the death of a person." Of necessity, if the referenced measures "do not cause the death of a person," they cannot qualify as "exclusions" from a prohibition against "caus[ing] the death of a person."

In its current form, then, both your proposed measure and proposed ballot title fail to define the scope of the prohibition at issue and fail adequately to address the practical implications of a "yes" vote. With respect to this latter infirmity in your submission, it is apparent that you intend to foreclose a series of birth-control, research and treatment options that are currently available – consequences that you must identify and acknowledge in both the text of your measure and in the ballot title.

Your measure is further misleading and ambiguous in offering only the following generalized formulation: "This Amendment shall have no effect on medical treatment for life threatening physical conditions intended to preserve life." Although this provision appears intended to create an exclusion to your general prohibition by permitting abortion in order to protect the life of the mother – an intention clearly stated in your proposed ballot title – the provision as set forth in the measure itself, perhaps unintentionally, does more. Included within this "exclusion" would be the "treatment for life threatening physical conditions" suffered by ***any*** "innocent person," not just a prospective mother whose continued pregnancy would jeopardize her life. This exclusion might literally be read as justifying the sacrifice of one adult "innocent person" to save the life of another adult "innocent person" – a reading that your ballot title, but not your

measure itself, suggests is unintended. I consequently cannot accurately summarize this provision in a ballot title.

Moreover, in those instances when no "innocent person" would be sacrificed as a result of treatment, it is unclear how "medical treatment for life threatening physical conditions intended to preserve life" could be characterized as an "exclusion" to an amendment designed to preserve the life of "innocent persons." Again, this ambiguity renders it impossible for me to summarize this provision in a ballot title.

3. Section 3 of your measure, captioned "Repeal of conflicting laws," provides as follows:

> All laws and parts of laws in conflict with the provisions of this Amendment are repealed. All sections of this Amendment shall be deemed sovereign to the people of the state of Arkansas in accordance with the 10th Amendment of the United States constitution; therefore, Section 2 of Amendment 68 shall be repealed. Repeal of this Amendment or provisions thereof, shall revive previous conflicting laws.

In the discussion of constitutional issues offered immediately below, I will address the problems attending the references in this subsection to the Tenth Amendment of the United States Constitution and Amendment 68 of the Arkansas Constitution. I will not anticipate that analysis here. For the moment, I will simply note that this section is problematic in its vague declaration that the voters' adoption of the measure will repeal all conflicting laws. I am unable to determine, and hence to summarize in a ballot title, what laws your measure intends to repeal and what laws it intends to revive. The final sentence of this section is further confusing in that it is unclear whether the phrase "[r]epeal of this Amendment" refers to Amendment 68,

> which you propose repealing in part, or to the possible repeal of your proposed amendment itself. Without clarification, I am consequently unable to summarize this provision in a ballot title. Finally, to the extent that such repeal and revival, whatever its scope, would involve legislative action, this provision contradicts Section 4 of your proposed measure, which characterizes the proposed amendment as "self-executing."

**The constitutional issues**

Although your proposed measure contains the various specific ambiguities discussed above, including ambiguities relating to what might constitute the abortion of what you term an unborn "innocent person," your measure, particularly when read in the light of your proposed ballot title, is clear in its intention to ban abortion, however defined, except to save the life of the mother.[8]

Both your proposed measure and your ballot title are misleading in that they imply that the voter's adoption of the proposed constitutional amendment would indeed accomplish the ban you envision. As noted above, the Arkansas Supreme Court requires that a ballot title fully apprise the voters of the effect a measure would have on current law. Conversely, the court has clearly stated that the voters must likewise be apprised of the fact that a proposed measure, despite what may be its sponsors' contrary intention, will prove ***ineffective*** in changing controlling current law. In this regard, I am guided by the following pronouncement in *Plugge*, in which the Arkansas Supreme Court reviewed a measure proposing a term-limit amendment of dubious constitutionality: "Undoubtedly, a strong case can be made concerning the Term Limitation Amendment's invalidity both under Arkansas's and the United States' Constitutions, ***and voters should be aware that***

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[8] With respect exclusively to the question of abortion, the two references to "life" in Section 2 of your proposed measure, which excludes from the scope of the ban "medical treatment for life threatening physical conditions intended to preserve life," are clearly to the life of the mother. However, quite possibly in recognition of the constitutional difficulties discussed immediately below in my text, the drafters of this provision have avoided directly stating as much.

***their votes for or against this measure may ultimately have value only as an expression of public sentiment on the subject.***"[9]

Totally missing in your submission is any acknowledgment of the fact that the adoption of this amendment would directly flout what the United States Supreme Court has declared to be controlling federal law. Specifically, in the leading case of *Roe v. Wade*, the Court declared in the following terms that a state law of the sort you propose, purporting to ban abortion at any stage of gestation except to save the life of the mother, cannot pass constitutional muster: "A state criminal abortion statute . . . that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment."[10] In order to avoid misleading the voters, they must at the very least be apprised of the fact that the United States Supreme Court has expressly declared violative of the Constitution any measure of the sort you propose.

Your proposed measure is further inconsistent with the Supreme Court's interpretation of controlling constitutional law in its effort to restrict abortion based on a concept of "personhood." As the Court noted in *Roe v. Wade*, as regards questions involving abortion, "the word 'person,' as used in the Fourteenth Amendment of the United States Constitution, does not include the unborn."[11] In accordance with this conclusion, the Court felt no need to resolve "the difficult

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[9] 310 Ark. at 661 (emphasis added).

[10] *Roe v. Wade*, 410 U.S. 113, 164 (1973) (emphasis in original).

Although your measure contains no enforcement provisions, any enforcement mechanism would presumably contain some criminal penalties. Given the clear need for legislative action imposing such penalties, Section 4 of your measure is misleading in declaring that "[a]ll provisions of this Amendment are self-executing . . . ." To the extent that the implementation of your proposed amendment would indeed require legislative action, this provision would further appear to provide any future defendant with a potent argument that no sanctions of any sort are set forth in the applicable "self-executing" constitutional provision.

[11] 410 U.S. at 158.

question of when life begins,"[12] instead adopting an approach that weighs the privacy interests of the woman in making her reproductive choices against the state's "important and legitimate interest in preserving and protecting the health of the pregnant woman," on the one hand, and "in protecting the potentiality of human life," on the other.[13] The Court's ruling, then, turned on the premise that it would be constitutionally impermissible for a state to extend an invariable "right to life" to a fetus during any stage of gestation based solely upon the state's declaration that a fetus is a "person" – which is precisely what your measure attempts to do.

In this regard, I will note that the Alaska Attorney General, in an opinion issued in January 2011, expressly relied upon the Supreme Court precedent just discussed as a basis for recommending to the Lieutenant Governor that he refuse to certify a measure entitled "The Natural Right to Life Initiative," the text of which provided as follows:

> The State of Alaska shall protect the natural right to life and body of all mankind from the beginning of biological development. We the People affirm that the natural right to life and body of the unborn

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[12] *Id.* at 159.

In a subsequent case, the Court declined to opine regarding the constitutionality of a statute whose preamble contained a "finding" that life begins at conception and that the rights of persons extend to unborn children, subject to the dictates of the U.S. Constitution, U.S. Supreme Court precedent and contrary state law. *Webster v. Reproductive Health Services*, 492 U.S. 490, 504 n.4, 506-07 (1989). Although it declined to reach this issue, the Court reaffirmed previous dictum declaring "that a State could not 'justify' an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State's view about when life begins." *Id.* at 506, citing *Akron v. Center for Reproductive Health, Inc.*, 462 U.S. 416, 444 (1983) ("[A] state may not adopt one theory of when life begins to justify its regulation of abortions.").

[13] *Id.* at 162.

In *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992), the United States Supreme Court again endorsed this basic approach, noting that *Roe* continues to represent "a simple limitation beyond which a state law is unenforceable." The Court further reaffirmed "the validity of *Roe's* central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860.

> child supercedes [sic] the statutory right of the mother to consent to the injury or death of her unborn child. In life threatening situations the law of necessity shall dictate between the life of the mother and her child.

After acknowledging that "the lieutenant governor should presume that an initiative is constitutional 'absent clear authority establishing its invalidity,'" the Alaska Attorney General concluded that "the proposed bill meets the 'clearly unconstitutional' standard because it would supersede a woman's constitutional right to privacy" – a right he characterized as "a federal constitutional right recognized by the U.S. Supreme Court in *Roe v. Wade.*"[14] I fully concur in the Alaska Attorney General's analysis.

The just discussed provisions of your measure thus violate the United States Constitution as interpreted by the Supreme Court. The voters may not be denied knowledge of a condition that might render the measure itself ineffective, given that such information might prompt in a reasonable voter "serious ground for reflection." Simply put, to fully inform the voters of the issues, your measure must at the very least acknowledge that its terms conflict with what the Supreme Court has declared as controlling precedent.

As noted above in my review of the standard this office applies in consideration proposed measures, I am foreclosed in the context of a ballot-title review from addressing the constitutionality of a submission unless the measure is "clearly contrary to law."[15] In the present case, it would appear that your submission is indeed defective in this respect. Although I will not at this stage of review decline to certify your submission based upon its apparent unenforceability under the

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[14] 2011 WL 102725, at 2 (Alaska A.G.) (citing *Roe v. Wade*, 410 U.S. at 156-59). *Compare* 2009 WL 3423983, at 1, 4 (Alaska A.G.) (declaring "not clearly unconstitutional" a proposed bill declaring "all human beings, from the beginning of their biological development . . . as legal persons in the state of Alaska," given that "the courts could interpret the personhood measure narrowly with respect to its impact on state laws regulating abortion").

[15] *See Kurrus, supra, Donovan, supra* and *Plugge, supra.*

federal Constitution,[16] I will do so based upon your total failure to apprise the voter of your measure's likely constitutional invalidity. As the Arkansas Supreme Court made clear in *Plugge*, voters should be made aware when a strong case can be made that a proposed measure is ineffective for constitutional reasons.[17]

In offering the foregoing, I am not overlooking your attempt to justify your proposed amendment as a defensible exercise of states' rights under the Tenth Amendment to the United States Constitution.[18] Specifically, as noted above, your measure in Section 3 refers in passing to the Tenth Amendment in declaring the following:

> All sections of this Amendment shall be deemed sovereign to the people of the state of Arkansas in accordance with the 10th Amendment of the United States Constitution; ***therefore***, Section 2 of Amendment 68 shall be repealed. [19]

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[16] My reluctance to simply reject your measure based upon its unconstitutionality is based more on an issue of timing than upon any blanket proscription against my participating in such a rejection. As I noted in Op. Att'y Gen. No. 2010-033:

> Pursuant to the provisions of Ark. Const. art. 5, § 1 ("Amendment 7"), the General Assembly has enacted a statute requiring the Secretary of State, "after consultation with the Attorney General," to decide, upon the submission of a petition, whether a proposed measure, "if subsequently adopted by the electorate, would violate any state constitutional provision or any federal constitutional, statutory, or regulatory provision or would be invalid for any other reason." Ark. Code Ann. § 7-9-503(b) (Repl. 2007). In my opinion, the statute is clear evidence of legislative intent, consistent with the rules set forth in *Kurrus* and similar cases described above, that initiated proposals that are clearly contrary to law cannot appear on the ballot.

This principle might serve as a basis for rejecting your submission at some future date based purely upon its constitutional invalidity.

[17] 310 Ark. at 661.

[18] The Tenth Amendment provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[19] With respect to Medicaid programs that receive federal funds, Amendment 68, including § 2, has already been statutorily preempted pursuant to the Supremacy Clause. *See Little Rock Family Planning Services v. Dalton*, 860 F. Supp. 609 (E.D. Ark. 1994), *aff'd* 60 F.3d 497, 503 (8th Cir. 1995), *cert. denied,* 516 U.S. 1074, *rev'd on other grounds* 516 U.S. 474 (1996). Section 1 of Amendment 68 provides as follows: "No

(Emphasis added.) As previously noted, Amendment 68, § 2 provides as follows: "The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." Section 3 of your measure would repeal this provision, including the passage deferring to federal constitutional law in matters of abortion. The cryptic "therefore" in your measure appears to imply that the state, in exercising its supposed Tenth Amendment rights, might ignore the United States Supreme Court's express pronouncement that abortion is "permitted by the Federal Constitution" under the Fourteenth Amendment in limited circumstances other than those involving a threat to the life of the mother. The Supreme Court has declared as a matter of federal constitutional law that abortions cannot be restricted to instances in which the mother's life is in jeopardy – a declaration that necessarily would preclude a state from maintaining that the right to impose such a restriction is reserved to the states under the Tenth Amendment. Stated in terms of the Tenth Amendment, pursuant to the Supreme Court's express declarations, the Fourteenth Amendment has "delegated to the United States" the power to vindicate a woman's constitutional privacy interest in seeking an abortion in limited circumstances even if her life is not in danger.[20] Accordingly, again in terms of the Tenth Amendment, the power to restrict that privacy interest cannot be described as "reserved to the States respectively." Under binding Supreme

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public funds will be used to pay for any abortion, except to save the mother's life." Section 3 provides: "This amendment will not affect contraceptives or require an appropriation of public funds." The courts in these cases were not presented with, and hence did not address, the constitutionality of these provisions outside the context of federal Medicaid funding.

Significantly, in *Unborn Child Amendment Committee v, Ward*, 318 Ark. 165, 883 S.W.2d 817 (1994), the Arkansas Supreme Court deferred to the federal district court's holding regarding the preemptive force of federal statutory law, thereby illustrating its recognition that the states cannot simply ignore the federal judiciary's authority to interpret the scope of the federal constitution. *See* text accompanying note 21, *infra.*

[20] The Court has afforded constitutional protection to individuals' privacy interests in various other contexts involving uniquely personal decisions regarding procreation. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965) (holding that a statute forbidding the use of contraceptives violates the marital right of privacy) and *Eisenstadt v. Baird*, 405 U.S. 438, 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (emphasis in original).

Court precedent, then, your measure's implied assertion that the Tenth Amendment warrants ignoring federal law concerning abortion is simply wrong. The fact that your measure suggests the exact opposite without even acknowledging the possible unenforceability of your proposed amendment if adopted violates the principle of disclosure articulated in *Plugge*.

With regard to the Supreme Court's authority to define the rights reserved to the states under the Tenth Amendment, the Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[21] Basing its conclusion on a venerated precedent that has guided this country's conception of judicial authority for centuries, the United States Supreme Court has declared, and the states in the interests of federalism have consistently accepted, that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensible feature of our constitutional system."[22] Under controlling federal law as defined by the Supreme Court, the states have been reserved no authority under the Tenth Amendment to restrict abortion in the manner your measure attempts to do. It is consequently misleading to suggest in your measure that the voters can simply by their votes exercise such nonexistent authority in the name of the state. Again, in order adequately to inform the voter, the vulnerability of your measure to constitutional challenge must be clearly and directly communicated in the ballot title.[23]

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[21] U.S. Const. art. 6, cl. 2.

[22] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[23] *Compare* Op. Att'y Gen. No. 2011-038, in which I rejected a proposed initiated act seeking to legalize the medical use of marijuana, citing as one basis for the rejection the following:

> Material parts of the proposal are simply not described. . . . [T]he ballot title states that the act will make marijuana's medical use "legal under Arkansas state law." Your use of the word "legal"
>
> > fails to acknowledge that your proposed measure cannot completely legalize marijuana in Arkansas for medical purposes because the drug remains illegal

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 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

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under federal law, 21 U.S.C. § 801 *et seq.* (the Controlled Substances Act). *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyer' Cooperative*, 532 U.S. 483 (2001). The upshot of *Raich* is that the federal government and its agencies have the authority to enforce the federal drug laws, even in a state that has sanctioned the use of marijuana for medicinal purposes. *See* Note, *California Takes a Hit: The Supreme Court Upholds Congressional Authority over the State-Approved Use of Medicinal Marijuana. Gonzales v. Raich*, 545 U.S. 1 (2005), 28 UALR L.Rev. 545, 580 (2006) ("The *Raich* decision makes it clear that federal authorities can prosecute patients possessing and consuming marijuana for medicinal purposes, irrespective of a state statute authorizing the patients' use.")

Op. Att'y Gen. 2009-208.

*See also* Op. Att'y Gen. No. 2010-033 (rejecting a measure based upon its failure to apprise the voters that the measure, in derogation of the Supremacy Clause, would conflict with the preemptive federal mandate to maintain individual health insurance coverage).

From a constitutional perspective, your proposed measure is even more problematic than those just referenced inasmuch as it would repeal the portion of the Arkansas Constitution that acknowledges the priority, in accordance with the Supremacy Clause, of federal constitutional law regarding abortion.

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 ballot title, stating my reasons therefor, and to instruct you to "redesign" the proposed measure and ballot title. *See* A.C.A. § 7-9-107(c). You may, after clarification of the matters 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 be pleased to perform my statutory duties in this regard in a timely manner after resubmission.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/cyh

Enclosures

(Popular Name)
The Paramount Right to Life

(Ballot Title)
AN AMENDMENT TO THE ARKANSAS CONSTITUTION:
RECOGNIZING EACH INNOCENT HUMAN BEING, AT EVERY STAGE OF DEVELOPMENT, AS A PERSON WITH THE RIGHT TO LIFE; BANNING ABORTION EXCEPT WHEN THE MOTHER'S LIFE IS IN DANGER; NOT AFFECTING BIRTH CONTROL OR IN-VITRO FERTILIZATION THAT DOES NOT CAUSE THE DEATH OF A PERSON; RECOGNIZING AND AFFIRMING THAT PROTECTING THE RIGHT TO LIFE OF EVERY INNOCENT PERSON IN ARKANSAS IS THE RIGHT AND RESPONSIBILITY OF THE PEOPLE OF ARKANSAS.

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Be it enacted by the People of the State of Arkansas

The constitution of the state of Arkansas is amended BY THE ADDITION OF A NEW AMENDMENT, Amendment 88, to read:

The Paramount Right to Life

Section:
1. Purpose and effect.
2. Exclusions.
3. Repeal of conflicting laws.
4. Provisions self-executing.

1. Purpose and effect.
No innocent person shall be denied the right to life. With respect to the right to life, the word "person" shall apply to all human beings, including the unborn, at every stage of their development.

2. Exclusions.
This Amendment shall have no effect on contraceptives or other methods of birth control that do not cause the death of a person. This Amendment shall have no effect on in vitro fertilization or other methods of assisted reproduction that do not cause the death of a person. This Amendment shall have no effect on medical treatment for life threatening physical conditions intended to preserve life.

3. Repeal of conflicting laws.
All laws and parts of laws in conflict with the provisions of this Amendment are repealed. All sections of this Amendment shall be deemed sovereign to the people of the state of Arkansas in accordance with the 10th Amendment of the United States constitution; therefore, Section 2 of Amendment 68 shall be repealed. Repeal of this Amendment or provisions thereof, shall revive previous conflicting laws.

4. Provisions self-executing.
All provisions of this Amendment are self-executing and severable.