

Opinion No. 2012-006

January 31, 2012

Mark J. Riable, Legal Counsel
Voter Approval Amendment Committee
c/o Riable Law Firm
9710 Interstate 30
Little Rock, Arkansas 72209

Dear Mr. Riable:

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 client, the Voter Approval Amendment Committee, has previously submitted similar measures which were rejected due to ambiguities in the texts of the proposed measures. *See* Op. Att’y Gen. 2011-165 and 2011-155. 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

TAX ELECTION REFORM AMENDMENT

Ballot Title

NO NEW TAX, RATE INCREASE TO AN EXISTING TAX, OR RENEWAL OR EXTENSION OF AN EXISTING TAX, MAY BE LEVIED, IMPOSED OR COLLECTED BY OR THROUGH THE STATE OF ARKANSAS, OR BY ANY COUNTY OR MUNICIPALITY THEREOF, OR BY ANY POLITICAL SUBDIVISION OR INSTRUMENTALITY OF THE STATE OF ARKANSAS, UNLESS THE TAX, TAX INCREASE, OR RENEWAL OR EXTENSION OF AN EXISTING TAX IS FIRST

APPROVED BY A SIMPLE MAJORITY VOTE OF THE REGISTERED VOTERS ACTUALLY VOTING IN THE ELECTION IN THE JURISDICTION IN WHICH THE TAX, TAX INCREASE, OR RENEWAL OR EXTENSION OF AN EXISTING TAX IS SOUGHT TO BE LEVIED, IMPOSED OR COLLECTED.

ANY ELECTION TO IMPOSE OR LEVY A NEW TAX, INCREASE THE RATE OF AN EXISTING TAX, OR RENEW OR EXTEND AN EXISTING TAX MAY ONLY BE HELD IN EVEN-NUMBERED YEARS ON THE DATE OF THE STATEWIDE PRIMARY ELECTION OR THE GENERAL ELECTION, OR IN ODD-NUMBERED YEARS ON THE TUESDAY FOLLOWING THE FIRST MONDAY OF NOVEMBER OR THE THIRD TUESDAY OF MAY.

FOR PURPOSES OF THIS AMENDMENT, "TAX" SHALL INCLUDE ANY TAX UPON REAL OR PERSONAL PROPERTY, EARNED OR UNEARNED INCOME, CAPITAL GAINS, THE SALE, TRANSFER OR USE OF GOODS, SERVICES OR PROPERTY, OR ANY OTHER AD VALOREM OR FRANCHISE TAX, BUT SHALL NOT INCLUDE CHARGES OR ASSESSMENTS LEVIED BY IMPROVEMENT DISTRICTS OR SPECIAL IMPROVEMENT DISTRICTS. FOR PURPOSES OF THIS AMENDMENT, "LEVIED" SHALL INCLUDE ANY TAX THAT HAS BEEN APPROVED BY THE TAXING AUTHORITY AND IS SUBJECT TO COLLECTION AT THE TIME OF THE PASSAGE OF THIS AMENDMENT WHETHER OR NOT IT HAS BEEN ACTUALLY COLLECTED.

THIS AMENDMENT SHALL NOT CANCEL OR NULLIFY ANY TAX LEGALLY IN EFFECT AND BEING LEVIED AT THE TIME OF PASSAGE OF THIS AMENDMENT, NOR SHALL IT BE CONSTRUED SO AS TO REQUIRE PERIODIC APPROVAL OR RE-APPROVAL OF AN EXISTING TAX UNLESS SUCH TAX EXPIRES OR CEASES TO BE LEVIED, OR UNLESS AN INCREASE OR RENEWAL OF SUCH TAX IS SOUGHT TO BE LEVIED.

THIS AMENDMENT SHALL CHANGE AND SUPERSEDE THE CONSTITUTION, CONSTITUTIONAL AMENDMENTS, ACTS AND LAWS OF THE STATE OF ARKANSAS OR ANY COUNTY OR MUNICIPALITY THEREOF, OR ANY POLITICAL SUBDIVISION OR INSTRUMENTALITY OF THE STATE OF ARKANSAS IN CONFLICT HEREWITH THAT DO NOT REQUIRE VOTER APPROVAL OF THE TAXES SET FORTH HEREIN OR THAT PROVIDE FOR ELECTIONS RELATING TO THOSE SAME TAXES ON DATES OTHER THAN THOSE SPECIFIED HEREIN TO REQUIRE, VOTER APPROVAL OF THE SUBJECT TAXES ON THE DATES SPECIFIED HEREIN.

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). 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 or act.

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*, 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 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 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).

Preliminarily, I am of the view that your proposed popular name, “TAX ELECTION REFORM AMENDMENT,” is deficient because it lends partisan coloring to the proposal’s merit. *See Arkansas Women’s Political Caucus v. Riviere, supra; Chaney v. Bryant, supra; and Moore v. Hall, supra.* “Reform,” as a noun, means “removal of faults or errors, . . . change for the better” As a verb, the word means to “[c]onvert into another and better form; make a change for the better in, improve; remove faults or errors in” NEW SHORTER OXFORD ENGLISH DICTIONARY 2522-2523 (Lesley Brown ed., 1993). By using the word “reform,” your popular name clearly implies that adoption of the proposal would improve the law. But the good of the proposal is a question for the voters, one on which the popular name may not take a partisan stance. My predecessors and I have taken a similar view of popular names containing the word “reform” on several occasions in the past. *See, e.g., Op. Att’y Gen. 2007-371, 2007-316, 2007-315, 2003-127, 99-199.*

I refer to the following ambiguities:

The proposal purports to apply all taxes collected “by or through” the state, or “by” the other taxing entities named, without express regard to the identity of the entity that imposes the tax. Federal Social Security and Medicare taxes are collected by or through the state and other entities named in the proposal in their role as public employers. If the proposal is not to be expressly limited to state and local taxes, the ballot title should disclose the proposal’s effect or lack thereof with respect to taxes imposed by entities other than the

taxing entities named in the proposal, but collected by or through those entities.

The proposal contains a sentence stating that the word “tax” “shall include” certain specified things. The word “include” suggests that the list of specified things is not exclusive, but the context suggests otherwise. I am unable to adequately summarize the provision in a substituted ballot title without resolution of this ambiguity.

The proposal has been modified to contain a sentence elaborating on the meaning of the word “levied” as used therein. The sentence presumably was added in response to an ambiguity noted in Op. Att’y Gen. 2011-165 concerning the proposal’s effect on taxes “being levied” at the time of the proposal’s adoption. But the sentence appears, not in the same paragraph as, and after, the provision in question in Op. Att’y Gen. 2011-165, but rather in a previous paragraph, immediately following a sentence referring to “levied” improvement district assessments. Although it seems unlikely that the new sentence is intended primarily to clarify the meaning of the sentence it immediately follows, its placement may imply as much, and thereby call into question the otherwise-clear exclusion of improvement district assessments from the proposal’s operation. I cannot, accordingly, adequately summarize the provision in a substituted ballot title.

I cannot certify a ballot title for your proposed amendment in the face of the ambiguities noted above. You must remedy these confusing and ambiguous points before I can perform my statutory duty.

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.

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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 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

TAX ELECTION REFORM AMENDMENT

BALLOT TITLE

No new tax, rate increase to an existing tax, or renewal or extension of an existing tax, may be levied, imposed or collected by or through the State of Arkansas, or by any County or Municipality thereof, or by any political subdivision or instrumentality of the State of Arkansas, unless the tax, tax increase, or renewal or extension of an existing tax is first approved by a simple majority vote of the registered voters actually voting in the election in the jurisdiction in which the tax, tax increase, or renewal or extension of an existing tax is sought to be levied, imposed or collected.

Any election to impose or levy a new tax, increase the rate of an existing tax, or renew or extend an existing tax may only be held in even-numbered years on the date of the state-wide primary election or the general election, or in odd-numbered years on the Tuesday following the first Monday of November or the third Tuesday of May.

For purposes of this amendment, "tax" shall include any tax upon real or personal property, earned or unearned income, capital gains, the sale, transfer or use of goods, services or property, or any other ad valorem or franchise tax, but shall not include charges or assessments levied by improvement districts or special improvement districts. For purposes of this amendment, "levied" shall include any tax that has been approved by the taxing authority and is subject to collection at the time of the passage of this amendment whether or not it has been actually collected.

This amendment shall not cancel or nullify any tax legally in effect and being levied at the time of passage of this amendment, nor shall it be construed so as to require periodic approval or re-approval of an existing tax unless such tax expires or ceases to be levied, or unless an increase or renewal of such tax is sought to be levied.

This Amendment shall change and supersede the Constitution, Constitutional Amendments, Acts and Laws of the State of Arkansas or any County or Municipality thereof, or any political subdivision or instrumentality of the State of Arkansas in conflict herewith that do not require voter approval of the taxes set forth herein or that provide for elections relating to those same taxes on dates other than those specified herein to require, voter approval of the subject taxes on the dates specified herein.

AMENDMENT

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election in the jurisdiction in which the tax, tax increase, or renewal or extension of an existing tax is sought to be levied, imposed or collected.

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This Amendment shall change and supersede the Constitution, Constitutional Amendments, Acts and Laws of the State of Arkansas or any County or Municipality thereof, or any political subdivision or instrumentality of the State of Arkansas in conflict herewith that do not require voter approval of the taxes set forth herein or that provide for elections relating to those same taxes on dates other than those specified herein to require, voter approval of the subject taxes on the dates specified herein.

The provisions of this Amendment are severable in nature. Should any provision be held unenforceable or void, the remaining provisions shall remain in full force and effect.