

Opinion No. 2012-033

March 22, 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. Nos. 2012-006, 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

AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO REQUIRE
VOTER APPROVAL OF TAXES AT SCHEDULED ELECTIONS

Ballot Title

AN AMENDMENT TO REQUIRE VOTER APPROVAL OF CERTAIN TAX IMPOSITIONS, TAX INCREASES, TAX RENEWALS AND TAX EXTENSIONS LEVIED BY STATE AND LOCAL GOVERNMENTS AND INSTRUMENTALITIES [SIC], AND TO ESTABLISH AND RESTRICT THE DATES ON WHICH SUCH TAX ELECTIONS MAY BE HELD TO THE

DATE OF THE STATEWIDE PRIMARY OR GENERAL ELECTION IN EVEN-NUMBERED YEARS, OR IN ODD-NUMBERED YEARS TO THE THIRD TUESDAY IN MAY OR THE TUESDAY FOLLOWING THE FIRST MONDAY OF NOVEMBER. REGARDLESS OF THE DATES SUCH ELECTIONS ARE PRESENTLY SCHEDULED

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, 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 amendment. 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 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).

Before addressing the proposal's ambiguities, however, I again draw your attention to a significant preliminary concern. Your proposal's adoption would change current law in numerous and complex ways. The proposed ballot title evidences little or no effort to summarize how the proposal would change current law, and it is therefore inherently misleading. The Arkansas Supreme Court has elaborated on the duty to describe the changes in law a proposal is to make:

It is evident that before determining the sufficiency of the present ballot title we must first ascertain what changes in the law would be brought about by the adoption of the proposed amendment. For the elector, in voting upon a constitutional amendment, is simply making a choice between retention of the existing law and the substitution of something new. It is the function of the ballot title to provide information concerning the choice that he is called upon to make. Hence the adequacy of the title is directly related to the degree to which it enlightens the voter with reference to the changes that he is given the opportunity of approving.

Bradley v. Hall, Secretary of State, 220 Ark. 925, 927, 251 S.W.2d 470 (1952).

Without information regarding the extent to which your proposal would change current law, it will be impossible for a voter to make an informed "choice between retention of the existing law and the substitution of something new." *Id.*

Where a proposal does not evidence a good faith effort to comply with the rules governing the initiative process, including the requirement to summarize the proposal and its effects in a fair, accurate, and complete manner in the ballot title, and the ballot title is therefore significantly misleading under A.C.A. § 7-9-107(c), this office may decline to prepare a substitute. *See, e.g., Op. Att'y Gen. 2011-023, 2008-056, 2007-316.*

I refer to the following ambiguities:

- Your proposal would apply to "any political subdivision or instrumentality of the State. . . ." "The legislature has defined the

term ‘political subdivision’ in various ways, depending on the context of particular legislation.” Op. Att’y Gen. 2007-014 (noting several varying statutory definitions of “political subdivision”). The Arkansas Supreme Court has held that school districts are political subdivisions. *See Dermott Special School District v. Johnson*, 343 Ark. 90, 95, 32 S.W.3d 477 (2000). But “the precise meaning of the term ‘political subdivision’ can vary with the context of the legislation in which it appears.” Op. Att’y Gen. 2007-014. It is, therefore, not entirely clear whether your proposal applies to school districts. The annual school election is held in September and may not include issues other than those relating to the schools. A.C.A. § 6-14-101(a) (Supp. 2011). The annual school tax rate, including any increase, is one question presented in the annual school election. *See* Ark. Const. art. 14, § 3(c)(1). After the school tax rate is approved, the annual school tax is levied by the quorum court at its regular November meeting. *See* A.C.A. § 14-14-904(b)(1)(A)(i) (Supp. 2011). It seems likely that adoption of your proposal, to the extent your proposal applies to efforts to levy new or increased school taxes, will substantially alter current school elections practice, at least in years when a new or increased school tax is proposed. In addition to possible problems relating to the fact that your proposal would not permit such a question to be presented in September, it should be noted that the constitution requires the school tax to be approved by “a majority of the qualified voters in the school district voting in the school election,” arguably a different standard than that set by your proposal. Ark. Const. art. 14, § 3. In sum, the effect of your proposal on current practice with respect to school taxes is a significant matter that must be explained in the ballot title. Without clarification of the text of your proposal in this respect, however, there can be no adequate summation in a ballot title.

- Your proposal provides for approval by a “simple majority of the registered voters actually voting in the election in the jurisdiction. . . .” Because your proposal requires that tax questions be put before the voters at regularly-scheduled elections, it is not clear whether the words “the election” quoted above refer to the tax question or the election as a whole. It is not clear, in other words, whether a tax

must be approved by a majority of the voters voting on the tax question or a majority of the voters who cast a vote on at least one race or question appearing on the same ballot as the tax question.

- Your proposal states that “*No* new tax” may be imposed without a vote. Your ballot title, however, uses the word “certain” to describe the taxes to which the proposal applies. This usage makes the proposal’s intent ambiguous.
- Your proposal, which uses the phrase “any . . . instrumentality of the State of Arkansas,” does not appear to apply to taxes imposed by instrumentalities of local governments. Your ballot title, however, uses the phrase “state and local governments and instrumentalities,” which suggests that your intention is that such local instrumentalities be covered.
- Your proposal does not make clear by whom or how the election day for a tax question is determined; whether the governing body or petitioners proposing a tax designate the election date, or whether the election commission determines the election date; and whether the body determining the date may choose any date named in the second paragraph of your proposal, or whether the vote must occur on the first such date following the governing body’s approval or the determination of sufficiency of petitioners’ proposal or the election commission’s action.
- Your proposal purports to apply to taxes levied “by or through” the state, but only to taxes levied “by” any other body mentioned in the proposal. The word’s clear implication is that the proposal applies to taxes imposed by third parties “through” the state, but as the proposal expressly excludes federal taxes, it is unclear what the word’s actual effect and intent is.
- Similarly, the proposal requires a vote in the jurisdiction in which the tax “is sought to be levied, imposed or collected.” Tax collection is a ministerial act, distinct from the tax’s levy or imposition. The proposal can be read to imply a separate requirement for voter approval of collection of taxes levied.
- Similarly, the proposal uses the phrases “expires or ceases to be levied” and “cancel or nullify.” Words used in the disjunctive

suggest different meanings, but it is not clear that any difference meaning is actually intended. Clarification is warranted.

- Your proposal states that it “shall . . . supersede . . . [l]aws . . . in conflict herewith that do not require voter approval of the taxes set forth herein. . . .” The clear implication of the language is that the proposal does NOT supersede conflicting laws that DO require voter approval of taxes. To the extent that such existing laws require approval of a majority of a different group of voters, your proposal may be interpreted to state that two conflicting laws both control.
- Your proposal states that it “shall not cancel or nullify any tax that has been approved by the taxing authority at the time of [the proposal’s] passage. . . .” In failing to make clear the identity of the “taxing authority,” the proposal is subject to various interpretations. A city council, for example, might approve a city sales tax before adoption of your proposal and refer the tax to the people in a special election to be held on a date occurring after adoption of your proposal. Your proposal does not make clear whether the requisite approval is the city council’s or the voters’. If the requisite approval is the city council’s, then the special election presumably may proceed and the majority required by the local sales tax laws will be required or sufficient, even if different from that required by your proposal. If the voters constitute the “taxing authority” within the meaning of your proposal, then the election could not be a special election and the majority requirement of your proposal would prevail. Or, alternatively, the city council’s original approval of the sales tax might be of questionable effectiveness, and your proposal might require the process to begin all over again.
- The ballot for a local sales tax may designate uses of the tax proceeds, and the uses may be changed upon a vote of the people. *See, e.g.,* A.C.A. § 26-75-208(c) (Supp. 2011). It is not clear whether your proposal would apply to such a vote, and it is therefore uncertain which majority measure would apply and whether such a vote could be held as a special election.
- It is not clear whether the abolition, limitation, or reduction of a tax exemption or deduction would amount to a new tax or a “rate increase to an existing tax.”

- Your proposal does not make clear the role, if any, of the General Assembly or the legislative body of a local government in imposing new taxes, increasing existing tax rates, or renewing or extending existing taxes. May a legislative body propose a tax or tax change subject to the proposal, or must it wait for the voting public to take the initiative? Do the initiative provisions of Ark. Const. art. 5, § 1 apply to tax changes subject to your proposal that are initiated by the people? Do the referral provisions of Ark. Const. art. 5, § 1 apply to tax changes subject to your proposal that are proposed by a legislative body, if indeed a legislative body may propose such a change? Does the two-thirds rule of Ark. Const. art. 5, § 1 apply to all tax questions to which your proposal applies? To none of them? To only those that are initiated or referred?
- Your proposal is ambiguous in specifying that the required majority is of “registered” voters. Registration is required to vote in any election. A.C.A. § 7-1-104(a)(3). Inclusion of the word “registered” in your proposal implies that there could be some additional, perhaps post facto, examination of the qualifications of those voting on the tax questions envisioned by your proposal.
- Your proposal defines “tax” to include “any tax upon . . . the . . . use of . . . property. . . .” This language could reasonably be interpreted to include certain governmental charges normally deemed fees, such as admission charges to publicly-owned property (parks). The principal thrust of your proposal, however, seems not to include charges normally deemed fees. Your proposal is therefore ambiguous in failing to distinguish clearly between the two. *See, e.g., Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d 214 (2001).

The foregoing discussion of potential problems in the text of your proposed measure is not necessarily exhaustive, but I cannot certify a ballot title for your proposal in the face of the ambiguities noted. 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

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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 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

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Enclosure

POPULAR NAME

**AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO REQUIRE
VOTER APPROVAL OF TAXES AT SCHEDULED ELECTIONS**

BALLOT TITLE

**AN AMENDMENT TO REQUIRE VOTER APPROVAL OF CERTAIN TAX
IMPOSITIONS, TAX INCREASES, TAX RENEWALS AND TAX EXTENSIONS
LEVIED BY STATE AND LOCAL GOVERNMENTS AND INSTRUMENTALITIES,
AND TO ESTABLISH AND RESTRICT THE DATES ON WHICH SUCH TAX
ELECTIONS MAY BE HELD TO THE DATE OF THE STATEWIDE PRIMARY OR
GENERAL ELECTION IN EVEN-NUMBERED YEARS, OR IN ODD-NUMBERED
YEARS TO THE THIRD TUESDAY IN MAY OR THE TUESDAY FOLLOWING
THE FIRST MONDAY OF NOVEMBER. REGARDLESS OF THE DATES SUCH
ELECTIONS ARE PRESENTLY SCHEDULED**

AMENDMENT

No new tax, rate increase to an existing tax, or renewal or extension of an existing tax, may be levied 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 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, including those tax elections presently required by law to be held on other dates.

For purposes of this amendment "tax" shall mean 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, nor any tax levied by the United States Government or any agency thereof.

This amendment shall not cancel or nullify any tax that has been approved by the taxing authority 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 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.