Opinion No. 2012-053

April 25, 2012

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 popular name and ballot title for a proposed constitutional amendment. You have previously submitted similar measures, which this office rejected due to ambiguities in the texts of the proposals. *See* Op. Att'y Gen. Nos. 2012-034, 2012-013, and 2011-157. 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

A REWRITE OF ARTICLE 5, SECTION 1 OF THE ARKANSAS CONSTITUTION, HAVING TO DO WITH THE INITIATIVE AND REFERENDUM

Ballot Title

A REWRITE OF ARTICLE 5, SECTION 1 OF THE ARKANSAS CONSTITUTION, CLARIFYING SOME CLAUSES, AND TO REDUCE THE REQUIREMENTS NEEDED TO BRING AN INITIATIVE OR REFERENDUM BEFORE THE PEOPLE.

SPECIFICALLY: FROM 10% TO 1% FOR CONSTITUTIONAL AMENDMENTS; FROM 8% TO 6/10 FOR STATE-WIDE INITIATIVE PETITIONS; FROM 6% TO 1% FOR STATE-WIDE REFERENDUMS; FROM 15% TO 1% FOR LOCAL

INITIATIVES AND REFERENDUMS; FROM 15 TO 5 COUNTIES FROM WHICH PETITIONS MUST BE RECEIVED FOR AMENDMENTS; FROM 30 TO 90 DAYS FOR AN INITIATIVE OR REFERENDUM ON A CITY COUNCIL OR QUORUM COURT MEASURE.

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).

I refer to the following ambiguities:

- In the subsection of your proposal entitled "Referendum," you add "any local or special measure passed by the General Assembly" to the list of things against which the legal voters may order the referendum. Current law provides that the time for filing a local referendum petition shall not be fixed at less than 90 days "when filed against a local or special measure passed by the General Assembly." Ark. Const. art. 5, § 1, "Local for Municipalities and Counties" subsection, 2nd paragraph. Your proposal would delete this provision. These aspects of your proposal suggest, but do not clearly provide, that you intend to remove local authority to order the referendum against a local or special measure passed by the General Assembly.

- In the subsection of your proposal entitled "Emergency," you do not expressly add quorum courts to the list of bodies that may put a measure into immediate effect by two-thirds vote. Your proposal elsewhere consistently adds references to quorum courts wherever current law refers to city or town councils. This inconsistency makes your intent unclear, including whether you intend to repeal A.C.A. § 14-14-908 (Repl. 1998) governing emergency county ordinances. Similarly, in the subsection of your proposal entitled "Enacting Clause," you do not propose to add a reference to county law to current law that provides that officials shall be guided by "general election laws or municipal laws as the case may be . . . ." Your intent is again unclear.

- Current law provides: "Municipalities may provide for the exercise of the initiative and referendum as to their local legislation. General laws shall be enacted providing for the exercise of the initiative and referendum as to counties." Ark. Const. art. 5, § 1, "Local for

Municipalities and Counties" subsection, 2nd paragraph. The General Assembly has enacted general laws governing county exercise of the initiative and referendum. *See* A.C.A. §§ 14-14-914 to -919 (Repl. 1998, Supp. 2011). Your proposal, in the subsection entitled "Local for Municipalities and Counties," provides that "[m]unicipalities and counties may provide for the exercise of the initiative and referendum as to their local legislation," and omits the provision of current law requiring general laws as to counties. It is not clear whether, in proposing these changes, you intend the invalidation of general laws, such as the statutes cited above, regarding the county initiative and referendum.

- Your proposal, in the subsections entitled "State-wide numbers" and "Local numbers," provides that the number of signatures needed on petitions is determined by reference to the "total number of voters voting in the last preceding general election." These provisions are ambiguous in that they might be deemed to refer to the number of voters who obtained ballots in the election, the number of voters who voted in the election race in which the largest number of votes was cast, the number of voters who voted in each and every election race, or some other number of voters.

- Current law provides that "[n]o measure approved by a vote of the people shall be amended or repealed" except by two-thirds vote of the legislative body. Ark. Const. art. 5, § 1, "Amendment and Repeal" subsection. You propose, in the subsection of your proposal entitled "Amendment and Repeal," to change the word "measure" to "initiated act." It is unclear whether adoption of your proposal would permit a simple majority of the legislative body to amend or repeal an act that has been upheld in a referendum.

- Current law provides that 15% of voters may cause there to be held a special referendum election. Ark. Const. art. 5, § 1, "Election" subsection. Your proposal, in the subsection entitled "Election," would substitute the words "the designated percent" for the specified percentage. Because your proposal does not designate a

> percentage of voters that may cause a special election to be held, the meaning of this provision is unclear.

The ambiguities noted above are not necessarily all the ambiguities contained in your proposal, and there can be no assurance that additional ambiguities will not be introduced in any revision of the proposal. In any event, 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.

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:

In my judgment, your proposed ballot title is overly partisan in claiming to clarify the constitution. At least with respect to the ambiguities noted above, I believe your proposal would confuse the law rather than clarify it. Whether your proposal would provide additionally clarity on balance is a subjective matter. Few people would vote against clarity, but characterizing a proposal as one that provides clarity does not make it so in fact.

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 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

A Rewrite of Article 5, Section 1 of the Arkansas Constitution, having to do with the Initiative and Referendum.

A rewrite of Article 5, Section 1 of the Arkansas Constitution, clarifying some clauses, and to reduce the requirements needed to bring an initiative or referendum before the people.

Specifically:

from 10% to 1% for Constitutional amendments;
from 8% to 6/10 % for state-wide initiative petitions;
from 6% to 1% for state-wide referendums;
from 15% to 1% for local initiatives and referendums;
from 15 to 5 counties from which petitions must be received for amendments:
from 30 to 90 days for an initiative or referendum on a city council or quorum court measure.

1. **Initiative and Referendum.**

The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly; and also reserve the power, at their own option to approve or reject at the polls any entire act or any item of an appropriation bill.

Initiative. The first power reserved by the people is the initiative. The legal voters may propose any law and may propose any constitutional amendments by initiative petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state-wide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least thirty days before the aforementioned filing, the proposed measure shall have been published once, at the expense of the petitioners, in some paper of general circulation.

Referendum. The second power reserved by the people is the referendum. The legal voters may, by petition, order the referendum against any general Act, or any item of an appropriation bill, or measure passed by the General Assembly, or against any local or special 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. Such petition shall be filed with the Secretary of State not later than ninety days after the final adjournment of the session at which such Act was passed, except when a recess or adjournment shall be taken temporarily for a period longer than ninety days, in which case such petition shall be filed not later than ninety days after such recess or temporary adjournment. Any measure referred to the

people by referendum petition shall remain in abeyance until such vote is taken.

Emergency. If it shall be necessary for the preservation of the public peace, health and safety that a measure shall become effective without delay, such necessity shall be stated in one section, and if upon a yea and nay vote two-thirds of all the members elected to each house, or two-thirds of all the members elected to city or town councils, shall vote upon separate roll call in favor of the measure going into immediate operation, such emergency measure shall become effective without delay. It shall be necessary, however, to state the fact which constitutes such emergency. Provided, however, that an emergency shall not be declared on any franchise or special privilege or act creating any vested right or interest or alienating any property of the State. If a referendum is filed against any emergency measure, such measure shall be a law until it is voted upon by the people, and if it is then rejected by a majority of the electors voting thereon, it shall be thereby repealed. The provision of this sub-section shall apply to city and town councils as well as quorum courts.

Local for Municipalities and Counties. The initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special, municipal and county legislation of every character in and for their respective municipalities and counties; but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith. Municipalities and counties may provide for the exercise of the initiative and referendum as to their local legislation.

Every extension, enlargement, grant, or conveyance of a franchise or any rights, property, easement, lease, or occupation of or in any road, street, alley or any part thereof in real property or interest in real property owned by municipalities or counties, exceeding in value three thousand dollars, whether the same be by statute, ordinance, resolution, or otherwise, shall be subject to referendum and shall not be subject to emergency legislation.

In municipalities and counties the time for filing an initiative petition shall not be fixed at less than ninety days nor more than one-hundred twenty days before the election at which it is to be voted upon. For a referendum petition the time for filing shall not be fixed at less than ninety days nor more than one-hundred twenty days after the passage of such measure by a municipal council or quorum court.

General Provisions

Definition. The word "measure" as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character.

State-wide numbers. The total number of voters voting in the last preceding general election 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 (.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 (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 number of municipal voters voting in the last preceding general election. In counties, the number of signatures required upon any petition shall be computed upon the total number of county voters voting at the last preceding general election.

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.

No Veto. The veto power of the Governor or mayor or county judge shall not extend to measures initiated by or referred to the people.

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 yea and nay vote on roll-call 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 not be amended nor repealed except by a constitutional amendment.

Election. All measures initiated by the people whether for the State, county, city or town, shall be submitted only at the regular elections, either State, congressional or municipal, but referendum petitions may be referred to the people at special elections to be called by the proper official, and such special elections shall be called when the designated percent of the legal voters shall petition for such special election, and if the referendum is invoked as to any measure passed by a city or town council or quorum court, such city or town council or quorum court may order a special election.

Majority. Any measure submitted to the people as herein provided shall take effect and become a law when approved by a majority of the votes cast upon such measure, and not otherwise, and shall not be required to receive a majority of the electors voting at such

election. Such measures shall be operative on and after the thirtieth day after the election at which it is approved, unless otherwise specified in the Act. This section shall not be construed to deprive any member of the General Assembly of the right to introduce any measure, but no measure shall be submitted to the people by the General Assembly, except a proposed constitutional amendment or amendments as provided for in this Constitution.

Canvass and Declaration of Results. The result of the vote upon any State measure shall be canvassed and declared by the State Board of Election Commissioners (or legal substitute therefore; upon a municipal or county measure, by the county election commissioners (or legal substitute therefore).

Conflicting Measures. If conflicting measures initiated or referred to the people shall be approved by a majority of the votes severally cast for and against the same at the same election, the one receiving the highest number of affirmative votes shall become law.

The Petition

Title. At the time of filing petitions, the exact title to be used on the ballot shall by the petitioners be submitted with the petition, and on state-wide measures, shall be submitted to the State Board of Election Commissioners, who shall certify such title to the Secretary of State, to be placed upon the ballot; on county and municipal measures such title shall be submitted to the county election board and shall by said board be placed upon the ballot in such county or municipal election.

Limitation. No limitation shall be placed upon the number of constitutional amendments, laws, or other measures which may be proposed and submitted to the people by either initiative or referendum petition as provided in this section. No petition shall be held invalid if it shall contain a greater number of signatures than required herein.

Verification. Only legal votes shall be counted upon petitions. Petitions may be circulated and presented in parts, but each part of any petition shall have attached thereto the affidavit of the person circulating the same, that all signatures thereon were made in the presence of the affiant, and that to the best of the affiant's knowledge and belief each signature is genuine, and that the person signing is a legal voter and no other affidavit or verification shall be required to establish the genuineness of such signatures.

Sufficiency. The sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes. The sufficiency of all local petitions shall be decided in the first instance by the county clerk

or the city clerk as the case may be, subject to review by the circuit court.

Court Decisions. If the sufficiency of any petition is challenged, such cause shall be a preference cause and shall be tried at once, but the failure of the courts to decide prior to the election as to the sufficiency of any such petition, shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against the validity of such measure, if it shall have been approved by a vote of the people.

Amendment of Petition. If the Secretary of State, county clerk or city clerk, as the case may be, shall decide any petition to be insufficient, he shall without delay notify the sponsors of such petition, and permit at least thirty days from the date of such notification, in the instance of a state-wide petition, or ten days in the instance of a municipal or county petition, for correction or amendment. In the event of legal proceedings to prevent giving legal effect to any petition upon any grounds, the burden of proof shall be upon the person or persons attacking the validity of the petition.

Unwarranted Restrictions Prohibited. No law shall be passed to prohibit any person or persons from giving or receiving compensation for circulating petitions, nor to prohibit the circulation of petitions, nor in any manner interfering with the freedom of the people in procuring petitions; but laws shall be enacted prohibiting and penalizing perjury, forgery, and all other felonies or other fraudulent practices, in the securing of signatures or filing of petitions.

Publication. All measures submitted to a vote of the people by petition under the provisions of this section shall be published as is now, or hereafter may be provided by law.

Enacting Clause. The style of all measures initiated and submitted under the provisions of this section shall be: "Be It Enacted by the People of the State of Arkansas, (municipality or county, as the case may be)." In submitting measures to the people, the Secretary of State and all other officials shall be guided by the general election laws or municipal laws as the case may be until additional legislation is provided therefore.

Self-Executing. This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.