

Opinion No. 2013-039

April 29, 2013

Tim Jacob  
1200 Barrow Road, Suite 204  
Little Rock, Arkansas 72205

Dear Mr. Jacob:

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 initiated constitutional amendment:

Popular Name

AN AMENDMENT REGARDING ETHICS, ESTABLISHING STRICTER LEGISLATIVE  
TERM LIMITS, REQUIRING PUBLIC VOTES TO INCREASE LEGISLATIVE  
COMPENSATION AND ENDING PENSION BENEFITS FOR LEGISLATIVE SERVICE

Ballot Title

An amendment to the Arkansas Constitution requiring former legislators to wait four years after leaving office before they can register as a lobbyist, banning gifts to elected state officials from lobbyists or any person employing a lobbyist, establishing a ten-year limit on total service in the General Assembly and re-approving limits of three two-year terms in the House of Representatives and two four-year terms in the Senate, requiring any pay increase for legislators to be approved [sic] by voters and prohibiting members of the General Assembly from accruing any pension benefits for a term commenced after the effective date of this 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, consistent with Arkansas Supreme Court precedent, unless the measure is “clearly contrary to law,”<sup>1</sup> this office will not require that a measure’s proponents acknowledge in the ballot title any possible constitutional infirmities. As part my review, however, I may address constitutional concerns for consideration by the measure’s proponents.

Consequently, this review has been limited primarily to a determination, pursuant to the guidelines that have been set forth by the Arkansas Supreme Court, discussed below, of whether the popular name and ballot title you have submitted accurately and impartially summarize the provisions of your proposed amendment.

**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.<sup>2</sup>**

The popular name is primarily a useful legislative device.<sup>3</sup> 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

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<sup>1</sup> See *Kurrus v. Priest*, 342 Ark. 434, 445, 29 S.W.3d 669, 675 (2000); *Donovan v. Priest*, 326 Ark. 353, 359, 931 S.W.2d 119, 121 (1996); *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992).

<sup>2</sup> See *Arkansas Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

<sup>3</sup> *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

proposal.<sup>4</sup> The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.<sup>5</sup>

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.<sup>6</sup> 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."<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> The title, however, must be free from any misleading tendency, whether by amplification, omission, or fallacy; it must not be tinged with partisan coloring.<sup>10</sup> A ballot title must convey an intelligible idea of the scope and significance of a proposed change in the law.<sup>11</sup> The ballot title must be intelligible, honest, and impartial.<sup>12</sup>

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, as well as a failure to summarize how your measure

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<sup>4</sup> *E.g.*, *Chaney v. Bryant*, 259 Ark. 294, 297, 532 S.W.2d 741, 743 (1976). ; *Moore v. Hall*, 229 Ark. 411, 316 S.W.2d 207 (1958).

<sup>5</sup> *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

<sup>6</sup> *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

<sup>7</sup> *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

<sup>8</sup> *Id.* at 288, 884 S.W.2d at 944.

<sup>9</sup> *Id.* 293, 884 S.W.2d at 946-47.

<sup>10</sup> *Id.* at 284, 884 S.W.2d at 942.

<sup>11</sup> *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 245, 884 S.W.2d 605, 607 (1994) (internal quotations omitted).

<sup>12</sup> *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

would change current law. 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 making your submission, you have stated that the submitted language is the full text of your proposed constitutional amendment. However, the text of your proposal as submitted to my office includes a so-called “enacting clause,” wherein it states: “Be It Enacted by the People of the State of Arkansas.” While the Arkansas Constitution requires the inclusion of an enacting clause for “bills” initiated by the people, there is no such requirement for constitutional amendments so initiated. *See United States Term Limits, Inc. v. Hill*, 316 Ark. 251, 262, 872 S.W.2d 349 (1994) (discussing the requirements under Amendment 7 to the Arkansas Constitution (now codified at Ark. Const. art. 5, § 1)). The inclusion of such a clause in an initiated constitutional amendment could therefore be confusing to the voters.
- Section 3 of your proposed measure prohibits certain constitutional officers from soliciting or accepting a “gift” from a lobbyist, or persons acting on behalf of or employing a lobbyist. Subsection (b) of this section defines the term “gift” and then provides a number of exceptions from the definition. One of the exceptions is for “[g]ifts from the spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin of a person elected to an office under subsection (a) of this section, or the spouse of any of these persons, unless the person is acting as an agent or intermediary for any person not covered by this subdivision....” (Emphasis added.) Under a literal reading of this provision, any of the constitutional officers listed in the previous subsection (a) could receive a “gift” from a family member of any other officer listed. I realize that you may

intend to create an exception only for gifts from a member of the constitutional officer's own family, but a plain reading of the exception indicates otherwise. This aspect of the measure is surely one that must be reflected in the ballot title based on the standard set out above. Clarification is therefore necessary.

- Section 4 proposes to amend Amendment 73 to the Arkansas Constitution to provide that “[a] member of the General Assembly shall serve no more than ten (10) years, whether consecutive or nonconsecutive.” This provision follows a restatement of the current term limits under Amendment 73. The term “years” is thus unclear, when considering that a member may have been appointed to fill a vacancy (*see* Ark. Const. art. 5, § 6), or may have drawn a two-year term following apportionment of the Senate (Ark. Const. art. 8, § 6). The question arises whether such partial terms are included in calculating the total number of years served by a member of the General Assembly. This aspect of the proposed amendment must be clarified for proper reflection in the ballot title.
- Section 5 addresses compensation for members of the General Assembly. It prohibits members from qualifying for “additional publicly funded pension or retirement benefits” based on service “during any terms commenced after the effective date of this amendment.” It states further that those holding office on January 1, 2013, will remain qualified for benefits until the end of that term, “but not for any subsequent terms.” While it thus seems clear that the amendment will not affect benefits arising from legislative terms that commenced before January 1, 2013, the reference to “*additional*” benefits is confusing. This might suggest that the benefits prohibition only applies to *current* members of the General Assembly. The section goes on to state that it only prevents “prospective participation” in publicly funded retirement. But this is stated only as a principle of construction. It does not clarify the general prohibition, which is only stated with reference to “additional” benefits. Without a more straightforward statement of the prohibition, this aspect of your measure remains vague and cannot be adequately summarized in a ballot title.

- Section 5 also provides that compensation for service in the General Assembly “shall only be increased upon the presentation to and approval of the voters of Arkansas at a regularly scheduled election.” This provision is ambiguous regarding the procedure for such “presentation” to the voters. Amendment 70 to the Arkansas Constitution currently provides for changes in the salaries of both Executive Department officials and members of the General Assembly. The General Assembly may refer a proposed salary change to the voters, pursuant to Section 2 of Amendment 70; or it may adjust the salaries based on the Consumer Price Index, pursuant to Section 3 thereof. Your proposal will therefore amend Amendment 70 in some respect; and it is necessary for the ballot title to inform the voters of this change in current law. But the change cannot be reflected in the ballot title without knowing precisely how a salary increase is to be presented to the voters under your proposed amendment. As reflected in Section 2 of Amendment 70, the General Assembly can refer three (3) constitutional amendments to the voters pursuant to Ark. Const. art. 19, § 22; and as noted above, it is currently authorized to refer a salary change in addition to these three. The voters can also adopt constitutional amendments through the so-called “direct initiative” under Ark. Const. amend. 7 (codified at Ark. Const. art. 5, § 1). Without knowing how an increase in compensation for the General Assembly will be presented to the voters under your measure, it is impossible to fully and fairly alert voters to the scope and significance of this proposed change in the law.

Your proposal’s adoption would change current law in numerous and significant ways. However, 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.<sup>13</sup>

Your ballot title makes no reference to these changes. Yet 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.”<sup>14</sup> Your ballot title must be redesigned to reflect these significant changes in current law. I must therefore reject your ballot title as insufficient on this basis, as well as on the basis of the above textual ambiguities that prevent me from certifying a revised ballot title for your measure.<sup>15</sup>

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.<sup>16</sup> Furthermore, the Court has confirmed that a proposed

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<sup>13</sup> *Bradley v. Hall*, 220 Ark. 925, 927, 251 S.W.2d 470 (1952).

<sup>14</sup> *Id.*

<sup>15</sup> With regard to ambiguities, I note additionally that your proposed amendment appears to incorporate some language from previous measures, including A.C.A. § 21-8-402 (Supp. 2011) (definitional section of the current Disclosure Act for Lobbyists and State and Local Officials) and House Joint Resolution 1009, adopted at the recent legislative session (referring to the voters a constitutional amendment concerning, among other things, ethics and term limits). I believe it is important to recognize that to the extent such language or such measures did not go through the ballot review process or a similar rigorous review by the Arkansas Supreme Court, a court reviewing your proposed amendment might find ambiguities in the incorporated language.

<sup>16</sup> *See, e.g., Finn v. McCuen*, 303 Ark. 418, 798 S.W.2d 34 (1990).

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.”<sup>17</sup> 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.”<sup>18</sup> 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.

Finally, as previously noted, this office will in certain instances address constitutional concerns with a proposed ballot measure. In the present case, I believe there are some concerns regarding the constitutionality of Section 2 of your proposal dealing with what is sometimes referred to as a “cooling-off period.” This is the period of time during which a former legislator is barred from registering as a lobbyist. Your proposed amendment would expand that period from its current one-year window<sup>19</sup> to a four-year window. Few cases squarely address the constitutionality of cooling-off periods (also called “revolving door” provisions). One court has struck down a one-year period for failing strict scrutiny review under the First Amendment to the United States Constitution.<sup>20</sup> Without the benefit of other case law or much scholarly commentary, it is difficult to say how a court in our jurisdiction would approach the issue. But a reading of the cases nevertheless indicates that the constitutionality of the ban will likely depend on assessing what kinds of activities are banned and the ban’s duration.

In this regard, your proposal is clearly far beyond the time frames that the judge found unconstitutional in *Brinkman, supra*. According to my review, your proposal is also far beyond all other states’ time frames, which range from no cooling-off period to a two-year cooling-off period.<sup>21</sup> As a consequence, I feel

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<sup>17</sup> *Roberts v. Priest*, 341 Ark. 813, 20 S.W.3d 376 (2000).

<sup>18</sup> *Id.*

<sup>19</sup> A.C.A. § 21-1-402(f) (Supp. 2011).

<sup>20</sup> *Brinkman v. Budish*, 692 F. Supp. 2d 855 (S.D. Ohio, Western Div. 2010) (striking down Ohio’s one-year revolving door provision).

<sup>21</sup> See National Conference of State Legislators, “Revolving Door” Prohibitions Against Legislators Lobbying State Government After They Leave Office, <http://www.ncsl.org/legislatures-elections/ethics/home/50-state-table-revolving-door-prohibitions.aspx> (last accessed April 24, 2013).

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obliged to apprise you of the possibility that the four-year ban under your proposed amendment might be struck by a court as an unconstitutional restriction on free speech. Given the absence of clear authority on the issue, I do not consider your proposal to be clearly contrary to law, so as to require acknowledgment as such in the ballot title. Rather, I am informing you of this constitutional concern merely to enable you to reflect on the possible challenges this provision in its current form might engender.

In conclusion, for the reasons set out above involving textual ambiguities and failure to address changes in current law, I must reject your proposed ballot title and 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

Enclosure

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

SECTION 1. This amendment shall be known and may be cited as "The Arkansas Ethics, Transparency, and Term Limits Amendment of 2014."

SECTION 2. Registration as a lobbyist by former members of the General Assembly.

(a) A former member of the General Assembly shall not be eligible to be registered as a lobbyist until four (4) years after the expiration of the term of office for which he or she was elected.

(b) Subsection (a) of this section applies to all persons elected or reelected to the General Assembly on or after November 4, 2014.

SECTION 3. Gifts from lobbyists.

(a) Persons elected to the following offices shall not knowingly or willfully solicit or accept a gift from a lobbyist, a person acting on behalf of a lobbyist, or a person employing a lobbyist:

- (1) Governor;
- (2) Lieutenant Governor;
- (3) Secretary of State;
- (4) Treasurer of State;
- (5) Auditor of State;
- (6) Attorney General;
- (7) Commissioner of State Lands; and
- (8) Member of the General Assembly.

(b) As used in this section:

(1)(A) "Gift" means any payment, entertainment, advance, services, or anything of value unless consideration of equal or greater value has been given therefor.

(B) "Gift" does not include:

(i)(a) Informational material such as books, reports, pamphlets, calendars, or periodicals informing a person elected to an office under subsection (a) of this section regarding his or her official duties.

(b) Payments for travel or reimbursement for any expenses are not informational material;

(ii) Gifts that are not used and which, within thirty (30) days after receipt, are returned to the donor;

(iii) Gifts from the spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin of a person elected to an office under subsection (a) of this section, or the spouse of any of these persons, unless the person is acting as an agent or intermediary for any person not covered by this subdivision (b)(1)(B)(iii);

(iv) Anything of value that is readily available to the general public;

(v) Food or drink available at a planned activity to which a specific governmental body or identifiable group of public servants is invited;

(vi) Payments by regional or national organizations for travel to regional or national conferences at which the State of Arkansas is requested to be represented by a person or persons elected to an office Under subsection (a) of this section;

(vii) Campaign contributions; and

(viii) Any devise or inheritance;

(2) "Lobbying" means communicating directly or soliciting others to communicate with a person elected to an office under subsection (a) of this section with the purpose of influencing governmental action or legislative action; and

(3) "Lobbyist" means a person who:

(A) Receives income or reimbursement in a combined amount of four hundred dollars (\$400) or more in a calendar quarter for lobbying a person elected to an office under subsection (a) of this section;

(B) Expends four hundred dollars (\$400) or more in a calendar quarter for lobbying one (1) or more persons elected to an office under subsection (a) of this section, excluding the cost of personal travel, lodging, meals, or dues; or

(C) Expends four hundred dollars (\$400) or more in a calendar quarter, including postage, for the express purpose of soliciting others to communicate with a person elected to an office under subsection (a) of this section to influence any governmental action or legislative action unless the communication has been filed with the Secretary of State or the communication has been published in the news media. If the communication is filed with the Secretary of State, the filing shall include the approximate number of recipients.

SECTION 4. Section 2 of Amendment 73 of the Arkansas Constitution is amended to read as follows [the new language is underlined]:

§ 2. Legislative Branch.

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four year terms.

(c)(1) A member of the General Assembly shall serve no more than ten (10) years, whether consecutive or nonconsecutive.

(2) The years of service in both the Senate and the House of Representatives shall be added together and included to determine the total number of years in office.

(3) A member who completes his or her tenth year of service during a term of office for which he or she has been elected may serve until the completion of that term of office.

(4) Service prior to 2013 shall not be counted in calculating whether a person has served ten (10) years in the General Assembly under section (c)(1).

SECTION 5. Compensation for members of the Arkansas General Assembly.

(1) (a) No member of the Arkansas General Assembly may qualify for additional publicly funded pension or retirement benefits by virtue of the member's service in the General Assembly during any terms commenced after the effective date of this amendment.

(b) Notwithstanding, any member holding office in the General Assembly on January 1, 2013 shall remain qualified to accrue public employee retirement benefits until the end of that term of office, but not for any subsequent terms.

(c) For the purpose of this subsection, "publicly funded pension benefits" means retirement benefits payable by the Arkansas Public Employees Retirement System or any other program funded in whole or in part by the state or local government, but not benefits payable under any federal program.

(d) This subsection shall not be construed so as to alter the calculation or treatment of any benefits earned or contributions made by any person who participates in a public employee retirement system. This subsection should be construed only to prevent prospective participation by members of the General Assembly in state or local publicly funded retirement systems using service in the General Assembly as a basis of participation.

(2) Compensation for service in the General Assembly, including pension benefits, shall only be increased upon the presentation to and approval of the voters of Arkansas at a regularly scheduled election.

(3) If any part of this section is declared to be in violation of the United States or Arkansas Constitution, the remaining parts shall remain in full force and effect. Any provision in this section that is deemed to impair the vested contractual rights of any person shall not be enforced against such person, but shall remain in full force and effect otherwise.

SECTION 6. Severability. In the event any section, subsection, subdivision, paragraph, subparagraph, item, sentence, clause, phrase, or word of this amendment is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall not affect the remaining portions of this amendment, which shall remain in full force and effect as if the portion so declared or adjudged invalid or unconstitutional was not originally a part of this amendment.

SECTION 7. Effective date. This amendment shall be effective on November 5, 2014.

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PROPOSED POPULAR NAME:

**AN AMENDMENT REGARDING ETHICS, ESTABLISHING STRICTER LEGISLATIVE TERM LIMITS, REQUIRING PUBLIC VOTES TO INCREASE LEGISLATIVE**

**COMPENSATION AND ENDING PENSION BENEFITS FOR LEGISLATIVE SERVICE.**

PROPOSED BALLOT TITLE:

**AN AMENDMENT TO THE ARKANSAS CONSTITUTION REQUIRING FORMER LEGISLATORS TO WAIT FOUR YEARS AFTER LEAVING OFFICE BEFORE THEY CAN REGISTER AS A LOBBYIST, BANNING GIFTS TO ELECTED STATE OFFICIALS FROM LOBBYISTS OR ANY PERSON EMPLOYING A LOBBYIST, ESTABLISHING A TEN-YEAR LIMIT ON TOTAL SERVICE IN THE GENERAL ASSEMBLY AND RE-APPROVING LIMITS OF THREE TWO-YEAR TERMS IN THE HOUSE OF REPRESENTATIVES AND TWO FOUR-YEAR TERMS IN THE SENATE, REQUIRING ANY PAY INCREASE FOR LEGISLATORS TO BE APPROVED BY VOTERS AND PROHIBITING MEMBERS OF THE GENERAL ASSEMBLY FROM ACCRUING ANY PENSION BENEFITS FOR A TERM COMMENCED AFTER THE EFFECTIVE DATE OF THIS MEASURE.**

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