

Opinion No. 2013-064

July 12, 2013

Judd Mann, Co-Chair
Arkansans for Equality
10010 Raymond Drive
Little Rock, Arkansas 72205

Dear Mr. Mann:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2011),¹ of the following popular name and ballot title for an initiated measure proposed to repeal an amendment to the Arkansas Constitution, as follows:

Popular Name

REPEAL OF ARKANSAS MARRIAGE AMENDMENT

Ballot Title

Proposed amendment to the Arkansas Constitution to repeal Amendment 83, which limits the definition of marriage and limits the ability of the State of Arkansas to recognize civil unions or other relationships substantially similar to marriage; which limits the rights of Arkansas residents married in other jurisdictions; which limits the rights of Arkansas residents who entered into civil unions in other states; and which prevents federal laws pertaining to the rights of married persons being applied in a consistent manner to persons living in Arkansas who were married or entered into civil

¹ Section 7-9-107 was amended by Act 1413 of 2013, but the amendment is not relevant to your submission. See Acts 2013, No. 1413, § 9 (repealing former subsections (e) and (f) of A.C.A. § 7-9-107).

unions elsewhere; but which allows the Arkansas legislature or courts to determine the capacity of persons to marry, and to regulate the legal rights, obligations, privileges and immunities of marriage, subject to federal law.

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,”² this office will not require that a measure’s proponents acknowledge in the ballot title any possible constitutional infirmities. As part of 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.³

² 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).

³ 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.⁴ 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.⁵ The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.⁶

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.⁷ 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."⁸ 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.⁹ 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.¹⁰ The title, however, must be free from any misleading tendency, whether by amplification, omission, or fallacy; it must not be tinged with partisan coloring.¹¹ A ballot title must convey an intelligible idea of the scope and significance of a proposed change in the law.¹² The ballot title must be intelligible, honest, and impartial.¹³

⁴ *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

⁵ *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).

⁶ *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

⁷ *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

⁸ *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

⁹ *Id.* at 288, 884 S.W.2d at 944.

¹⁰ *Id.* 293, 884 S.W.2d at 946-47.

¹¹ *Id.* at 284, 884 S.W.2d at 942.

¹² *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 245, 884 S.W.2d 605, 607 (1994) (internal quotations omitted).

¹³ *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

Having analyzed your proposed amendment, as well as your proposed popular name and ballot title under the above precepts, it is my conclusion that the popular name is sufficient as submitted. In my opinion, however, the ballot title you have submitted fails to satisfy these guidelines. Specifically, rather than simply describing Amendment 83 to the Arkansas Constitution (the amendment proposed to be repealed), your proposed ballot title asserts an abridgment of undefined “rights” and seems to presume Amendment 83’s illegality in terms of federal law and the laws of other states. It is conclusory and partisan to assert that Amendment 83 “limits” Arkansans’ “rights” and “prevents federal laws ... being applied in a consistent manner.” To use such terms and phrases is to promote by implication, not to summarize, a proposal.¹⁴ As a consequence, the proposed ballot title has misleading tendencies and fails to meet the Arkansas Supreme Court’s requirement of impartiality.

Additionally, your ballot title has the potential to confuse or mislead voters by omitting any mention of your proposal’s effect on current Arkansas law. The 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.¹⁵

¹⁴ *Accord* Ark. Op. Att’y Gen. 2012-002 (rejecting the proposed popular name “Right to Life” as partisan and hence misleading).

¹⁵ *Bradley v. Hall, Secretary of State*, 220 Ark. 925, 927, 251 S.W.2d 470 (1952).

While the Court has not been entirely consistent in its comments on this issue,¹⁶ I believe it is clear from the above excerpt that a sponsor would be well-served to explain the legal effect of a proposed amendment in order to avoid having the ballot title invalidated by the court. The Court's apparent preference for providing more information rather than less to the voters seems especially significant where, as here, repeal of an existing provision of the Arkansas Constitution likely will not immediately work any change in State law, because a statute barring same-sex marriage will still be in place.¹⁷

In sum, without some explanation regarding the extent to which your proposal would change current law, a voter might quite logically and mistakenly conclude that repealing Amendment 83 to the Arkansas Constitution (an amendment that defines marriage as consisting only of "the union of one man and one woman") would have some immediate legal significance regarding the legality of same-sex marriage. More specifically, a voter might mistakenly interpret the repeal of Amendment 83 as having the immediate effect of sanctioning same-sex marriage. Your proposed ballot title is therefore inherently misleading.¹⁸

A number of additions or changes to the ballot title are, in my view, necessary in order to more fully and correctly summarize your proposal. I am neither authorized nor inclined to make the changes on your behalf at this time, however. Although I can modify a proposed ballot title to render it a more accurate summary, I am not authorized simply to craft a ballot title in what amounts to a completely independent product. It is necessary for you to at least attempt to impartially and accurately summarize the substance of the measure you wish to refer to the people.¹⁹ As indicated, this summary must, in my opinion, include

¹⁶ See, e.g., *May v. Daniels*, *supra* n. 5, 359 Ark. at 116 ("... a ballot title is not insufficient merely because it fails to reflect the current state of the law[,]” citing *Becker v. Riviere*, *supra* n. 6, 270 Ark. at 224).

¹⁷ A.C.A. § 9-11-109 (Repl. 2009). See also A.C.A. §§ 9-11-107 (Repl. 2009) (validity of foreign marriages); 9-11-208 (Supp. 2011) (licenses not issued to persons of same sex).

¹⁸ It is of course well-established that the Arkansas Constitution is not a grant, but rather a limitation of power. Its provisions list what government cannot do. In the absence of such limiting language, the state government may act, subject only to restrictions and limitations imposed by the Arkansas or United States Constitution. *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979).

¹⁹ You may find it helpful in this regard to refer to the ballot title that was approved in *May v. Daniels*, *supra* n. 5, for what became Ark. Const. amend. 83.

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some acknowledgement of the proposed amendment's legal effect in order to avoid voter confusion. Precisely how you propose to make this acknowledgment is a matter for you to determine and to submit to this office in draft form.

Accordingly, I must reject your submission and await any more complete ballot title you may choose to submit.

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.

My statutory duty, under these circumstances, is to reject your proposed ballot title, stating my reasons therefor, and to instruct you to "redesign" your submission. *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 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

Language for Ballot Initiative to repeal Amendment 83 to the Arkansas Constitution:

Popular Name: Repeal of Arkansas Marriage Amendment

Title: Proposed Amendment to the Arkansas Constitution to Repeal Amendment 83, Which Limits the Definition of Marriage and Limits the Ability of the State of Arkansas to Recognize Civil Unions or Other Relationships Substantially Similar to Marriage; Which Limits the Rights of Arkansas Residents Married in Other Jurisdictions; Which Limits the Rights of Arkansas Residents Who Entered into Civil Unions in Other States; and Which Prevents Federal Laws Pertaining to the Rights of Married Persons being Applied in a Consistent Manner to Persons Living in Arkansas Who Were Married or Entered into Civil Unions Elsewhere; but Which Allows the Arkansas Legislature or Courts to Determine the Capacity of Persons to Marry, and to Regulate the Legal Rights, Obligations, Privileges and Immunities of Marriage, Subject to Federal Law.

Language: “Amendment 83 to the Arkansas Constitution is hereby repealed.”

Amendment 83

Amendment 83

Marriage

1. Marriage.

Marriage consists only of the union of one man and one woman.

2. Marital status.

Legal status for unmarried persons which is identical or substantially similar to marital status

shall not be valid or recognized in Arkansas, except that the legislature may recognize a common

law marriage from another state between a man and a woman.

3. Capacity, rights, obligations, privileges, and immunities.

The legislature has the power to determine the capacity of persons to marry, subject to this

amendment, and the legal rights, obligations, privileges, and immunities of marriage.

□