

Opinion No. 2013-072

July 23, 2013

Jack Michael Weir, III, Founder
Arkansas Initiative for Marriage Equality
50 Blue Mountain Drive
Maumelle, Arkansas 72113

Dear Mr. Weir:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2012), of the following popular name and ballot title for a proposed constitutional amendment, as follows:

Popular Name

THE ARKANSAS MARRIAGE EQUALITY AMENDMENT

Ballot Title

An amendment to the Arkansas Constitution to provide that the right to marry shall not be abridged or denied on account of sex or sexual orientation—providing that no member of the clergy or religious organization shall be required to provide accommodations, advantages, facilities or privileges relating to the solemnization or celebration of marriage and that the refusal to do so shall not create any civil claim or cause of action.

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,”¹ 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.²

The popular name is primarily a useful legislative device.³ 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

¹ 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).

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

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

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

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

⁴ *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).

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

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

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

⁸ *Id.* at 288, 884 S.W.2d at 944.

⁹ *Id.* 293, 884 S.W.2d at 946-47.

¹⁰ *Id.* at 284, 884 S.W.2d at 942.

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

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

Having analyzed your proposed amendment, I am unable to certify it due to ambiguities in its text.¹³

Further, in my view, your ballot title requires several additions or changes 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:

Ambiguities associated with Section 1

Section 1 of your proposed amendment states: “The right to marry shall not be abridged or denied on account of sex or sexual orientation.”

1. Section 1’s reference to the “right to marry” is ambiguous because it is not clear whether, by this language—which is repeated in your ballot title—you intend (a) to recognize what you take to be a pre-existing right to same-sex marriage in Arkansas or (b) to create a right to same-sex marriage in Arkansas. Your possible assumption that such a right under current law is questionable: Arkansas law prohibits same-sex marriages, and no federal court in our jurisdiction has held that the Fourteenth Amendment to the U.S. Constitution contains such a right. This critical ambiguity in your proposed amendment would give a voter serious grounds for reflection and renders your proposal sufficiently unclear that I cannot summarize it in the ballot title.
2. Another ambiguity stems from the fact that your proposal is unclear on the nature of “the right” to enter into a same-sex marriage. This lack of clarity has the potential to confuse or mislead voters because, as the Arkansas Supreme Court has explained, a vote on a constitutional amendment is a choice between existing law and the proposed new law:

¹³ Because I am rejecting your proposed measure due to ambiguities in its text, I will reserve until resubmission, if any, reviewing the sufficiency of your proposed ballot title and popular name.

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.¹⁴

While the Court has not been entirely consistent in its comments on this issue,¹⁵ 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.

Without some explanation regarding the extent to which your proposal would change current law, a voter would not understand how your proposed amendment is intended to relate to several statutes—especially Title 9, Chapter 11, which contains Arkansas’s general laws relating to marriage—dealing with matters that overlap your proposal and Amendment 83 to the Arkansas Constitution. For example, you have not attempted to convey to the voter the provisions of Amendment 83, which (a) prohibits same-sex marriage and (b) prohibits the General Assembly from recognizing same-sex marriages validly entered into out-of-state. While your proposal would clearly supplant the former, you have not indicated how the proposal would affect the latter. Without a clarification of its effects on existing law and an attempt to convey to the voter what those effects would be, I am unable to summarize your proposal in a ballot title.

¹⁴ *Bradley v. Hall, Secretary of State*, 220 Ark. 925, 927, 251 S.W.2d 470 (1952).

¹⁵ *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).

3. Section 1 of your text says that the “right to marry shall not be abridged or denied....” This language is ambiguous in that it is unclear to whom this prohibition is directed. It could potentially be directed toward the General Assembly, the executive branch, the judicial branch, businesses, religious organizations, or individuals, or some combination of the foregoing. This declaration could have far-reaching implications, possibly for both the public and private sectors. Yet without clarification, this part of your proposed amendment cannot be adequately summarized for the voters in a ballot title.

Ambiguities associated with Section 2

Section 2 of your proposed amendment states: “No member of the clergy or religious organization shall be required to provide accommodations, advantages, facilities or privileges related to the solemnization or celebration of marriage. The refusal to do so shall not create any civil claim or cause of action.”

4. Section 2’s references to “accommodations,” “advantages,” and “privileges” are all ambiguous as you used them. These terms are used in the context of what amounts to a proviso to or qualification of Section 1. In my view, the precise meaning or scope of this proviso will be important to a voter who is considering how to vote on the matter. Without clarification on this score, however, I am unable to summarize your proposal in a ballot title.
5. Section 2’s use of the terms “solemnization...of marriage” and “celebration of marriage” are ambiguous in that it is unclear whether these terms are being used interchangeably or whether you intend them to have some separate meaning. The term “solemnization,” when used in its legal sense, means “[t]he performance of a formal ceremony (such as a marriage ceremony) before witnesses, as distinguished from a clandestine ceremony.”¹⁶ In contrast, the term “celebration of marriage” does not appear to have a settled legal definition. Without clarification, this provision cannot be satisfactorily summarized for the voters in a ballot title for your proposed measure.

¹⁶ *Black’s Law Dictionary* (Bryan A. Garner, ed., 9th ed. West 2009), p. 1520.

6. The final sentence in Section 2—which says “[t]he refusal to do so shall not create any civil claim or cause of action”—is ambiguous because the phrase “to do so” refers to actions that were ambiguously described earlier in Section 2. These ambiguities were noted above.

I cannot begin to 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.

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

Jack M. Weir, III, Founder
Ark. Initiative for Marriage Equality
Opinion No. 2013-072
Page 8

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

(Popular Name)

The Arkansas Marriage Equality Amendment

(Ballot Title)

AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO PROVIDE THAT THE RIGHT TO MARRY SHALL NOT BE ABRIDGED OR DENIED ON ACCOUNT OF SEX OR SEXUAL ORIENTATION - PROVIDING THAT NO MEMBER OF THE CLERGY OR RELIGIOUS ORGANIZATION SHALL BE REQUIRED TO PROVIDE ACCOMMODATIONS, ADVANTAGES, FACILITIES OR PRIVILEGES RELATING TO THE SOLEMNIZATION OR CELEBRATION OF MARRIAGE AND THAT THE REFUSAL TO DO SO SHALL NOT CREATE ANY CIVIL CLAIM OR CAUSE OF ACTION.

(Proposed Constitutional Amendment)

Be it enacted by the people of the State of Arkansas:

SECTION 1. The right to marry shall not be abridged or denied on account of sex or sexual orientation.

SECTION 2. No member of the clergy or religious organization shall be required to provide accommodations, advantages, facilities or privileges related to the solemnization or celebration of marriage. The refusal to do so shall not create any civil claim or cause of action.