

Opinion No. 2013-087

August 9, 2013

David E. Dinwiddie  
8608 Princeton Pike  
Pine Bluff, Arkansas 71602

Dear Mr. Dinwiddie:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2011),<sup>1</sup> of the following ballot title for a proposed initiated measure:

Ballot Title

Extending terms of certain county officials from two years to four years.

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

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<sup>1</sup> 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).

with Arkansas Supreme Court precedent, unless the measure is “clearly contrary to law,”<sup>2</sup> 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 ballot title you have submitted accurately and impartially summarizes the provisions of your proposed measure. With regard, however, to a **popular name**, I note that you did not submit a proposed popular name for my review. Section 7-9-107(a) of the Arkansas Code is very clear in requiring a sponsor of a measure to submit the text of the measure together with both a proposed ballot title **and popular name**.<sup>3</sup> Assuming you decide to redesign your proposed measure and ballot title to address the concerns outlined below, please be advised that you must include a proposed popular name in your resubmission.

**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>4</sup>

The popular name is primarily a useful legislative device.<sup>5</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>2</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>3</sup> See also Op. Att’y Gen. 2006-072 (and opinions cited therein).

<sup>4</sup> See *Arkansas Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

<sup>5</sup> *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

proposal.<sup>6</sup> The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.<sup>7</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>8</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>9</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>10</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>11</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>12</sup> A ballot title must convey an intelligible idea of the scope and significance of a proposed change in the law.<sup>13</sup> The ballot title must be intelligible, honest, and impartial.<sup>14</sup>

Having analyzed your proposed amendment as well as your proposed ballot title under the above precepts, it is my conclusion that I must reject your ballot title. The title you have submitted is wholly insufficient in apprising the voters of the

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<sup>6</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>7</sup> *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

<sup>8</sup> *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

<sup>9</sup> *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

<sup>10</sup> *Id.* at 288, 884 S.W.2d at 944.

<sup>11</sup> *Id.* 293, 884 S.W.2d at 946-47.

<sup>12</sup> *Id.* at 284, 884 S.W.2d at 942.

<sup>13</sup> *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 245, 884 S.W.2d 605, 607 (1994) (internal quotations omitted).

<sup>14</sup> *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

contents of your measure. Although it states what the term lengths will be, it does not identify the affected offices. Nor does it identify the measure as a proposed constitutional amendment. The ballot title must include this information in order to satisfy the above standards imposed by the court.

Several ambiguities also arise from 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:

- Your proposed constitutional amendment identifies the affected offices by referring to “[t]he term of office for County Elected Officials *serving in the capacity of the office of...*” (Emphasis added). This present-tense language suggests that the amendment might apply to the term of office of someone who is *currently* serving in one of the affected offices – possibly resulting in someone’s term changing mid-service. But the proposed measure then declares that the terms of office “are extended from two (2) year terms to four (4) years terms, *commencing with any county official sworn in after December 31, 2014.*” (Emphasis added).<sup>15</sup> This latter provision is clearly designed to trigger the extension of terms for officials taking office on or after January 1, 2015. It is difficult, however, to reconcile this provision with the previous reference to those “serving in” the offices. This ambiguity must be clarified before I can certify a ballot title for your measure. You may wish in this regard to refer to previous opinions of my office that have addressed similar proposals.<sup>16</sup> You may

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<sup>15</sup> Please note that the text actually states: “The **term** of office for County Elected Officials ... **are** extended...”

<sup>16</sup> *E.g.*, Op. Att’y Gen. Nos. 2009-097; 2007-179 (available on the Attorney General’s Opinions search page at [www.arkansasag.gov/opinions/](http://www.arkansasag.gov/opinions/).)

find these opinions (and the accompanying proposals' texts, which I can provide upon request) helpful in addressing this ambiguity.

- I note that the office of surveyor is not included under the text of your proposed amendment. Currently, the electors of each county elect a surveyor for two-year terms each, along with the other county executive officers provided for under Article 7, Section 46 of the Arkansas Constitution.<sup>17</sup> Given the reference to “certain county officials” in your proposed ballot title, I assume this is intentional and that surveyors are not to be included among the affected officials. However, I believe this must be made clear in the ballot title so that the voters will have a fair understanding of the scope and significance of the change you are proposing.
- The text of your proposed amendment includes constables among the affected “County Elected Officials,” but constables are elected by *township* under the Arkansas Constitution – not by the entire county.<sup>18</sup> Thus constables are not “county elected officials,” and it will likely be confusing to the voters to designate them as such.<sup>19</sup> Constables are considered county officials for some purposes.<sup>20</sup> But it is nevertheless clear under the current constitution that constables are elected by each township. I realize that any

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<sup>17</sup> Article 7, Section 46 states in full as follows:

The qualified electors of each county shall elect one sheriff, who shall be ex-officio collector of taxes, unless otherwise provided by law; one assessor, one coroner, one treasurer, who shall be ex-officio treasurer of the common school fund of the county, and one county surveyor, for the term of two years, with such duties as are now or may be prescribed by law. Provided, that no per centum shall ever be paid to assessors upon the valuation or assessment of property by them.

<sup>18</sup> See Ark. Const. art. 7, § 47.

<sup>19</sup> See Op. Att’y Gen. 2007-053 (rejecting a proposed popular name for a similar constitutional amendment where the popular name referred to “elected county officials” and the proposed amendment – similar to the one at hand – included the office of constable among the affected offices).

<sup>20</sup> See, e.g., *Farnsworth v. White County*, 312 Ark. 574, 851 S.W.2d 451 (1993) (workers’ compensation coverage) and Op. Att’y Gen. 2007-030 (use of “blue lights” by law enforcement officers).

confusion in this respect can be remedied by simply avoiding any reference in the ballot title to constables as county officials. This assumes, however, that the amendment, if adopted, would make no change respecting constables other than to change their term of office from the current two years to four years. And that may not be a fair assumption, given the inclusion of constables among the “County Elected Officials” affected by the amendment. This reference to constables as county officials is ambiguous and gives rise to uncertainty regarding the precise change in law under your proposal. Without clarification, the precise effect of the amendment in this regard cannot be accurately summarized for the voters in a ballot title.

- The incorrect use of the word “term” in “[t]he **term of office** for County Elected Officials ... **are** extended...” should be corrected to address this grammatical mistake. “Terms” (not “Officials”) is the plural subject of the plural verb “are.” This should therefore read: “The **terms** of office .... are extended....”

I cannot certify a popular name or ballot title for your proposed amendment in the face of the deficiencies and ambiguities noted above. You must remedy these matters 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.<sup>21</sup> Furthermore, the Court has recently confirmed that a proposed amendment cannot be approved if “[t]he text of the proposed amendment itself

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<sup>21</sup> See, e.g., *Finn v. McCuen*, 303 Ark. 418, 798 S.W.2d 34 (1990).

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>22</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>23</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.

My statutory duty, under these circumstances, is to reject your proposed ballot title, stating my reasons therefor, and to instruct you to design a popular name and “redesign” the proposed measure and ballot title.<sup>24</sup> 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

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<sup>22</sup> *Roberts v. Priest*, 341 Ark. 813, 20 S.W.3d 376 (2000).

<sup>23</sup> *Id.*

<sup>24</sup> A.C.A. § 7-9-107(c).

**Ballot Title: Extending Terms of Certain County  
Officials from Two Years to Four Years.**

**Proposed Amendment:**

The term of office for County Elected Officials serving in the capacity of the office of County Judge, Justice of the Peace, County Sheriff, County Collector, Constable, County Treasurer, County Assessor, Circuit Clerk, County Clerk, and County Coroner, are extended from two (2) year terms to four (4) year terms, commencing with any county official sworn in after December 31, 2014.

Submitted by David Dinwiddie, July 25, 2013