Opinion No. 2013-111

September 17, 2013

Jennifer Pierce
1501 North University, Suite 228
Little Rock, Arkansas 72207

Dear Ms. Pierce:

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 constitutional amendment:

Popular Name

THE ARKANSAS MARRIAGE EQUALITY AMENDMENT

Ballot Title

> An amendment to the Arkansas Constitution to provide that marriage consists of the union between two persons regardless of gender; providing that no member of the clergy or religious organization shall be required to provide services, facilities or goods relating to the solemnization of marriage and the refusal to do so shall not create any civil claim or cause of action; providing that all laws and constitutional provisions which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment

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

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[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).

[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).

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] The ballot title must be honest and impartial,[11] and it must convey an intelligible idea of the scope and significance of a proposed change in the law.[12]

Furthermore, the Court has 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."[13] The Court concluded that "internal inconsistencies would inevitably lead to confusion in drafting a popular name and ballot title and to confusion in the ballot title itself."[14] 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.

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

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

[13] *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 383 (2000).

[14] *Id.*

Having analyzed your proposed amendment in light of the foregoing precepts, I conclude that I must reject your proposal due to deficiencies in the ballot title and in your proposal's *text*.

The ballot title is also deficient because it makes no attempt to summarize for the voter what effect your proposal would have on existing law. As I pointed out in my response to a recent submission that is very similar to yours (see Opinion No. 2013-072), the Arkansas Supreme Court requires some attempt at explaining to voters how a proposed constitutional amendment would affect current law:

> [T]he elector, in voting upon a constitutional amendment, is simply making a choice between the 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]

You have made no attempt to describe to the voter how your proposal would change existing constitutional and statutory law. Rather, you have simply quoted a general-repeal clause that is contained in the proposal's text. The precise manner in which you acknowledge your proposal's effects on existing law is a matter for you to determine and submit to this office in draft form. I am neither authorized nor inclined to undertake this effort on your behalf. While I can modify a proposed ballot title to render it a more accurate summary of the measure, I am not authorized to simply craft, out of whole cloth, a ballot title that amounts to a completely independent product. The current ballot title is wholly deficient in its attempt to summarize for the voter what impact the proposal would have on current law.

In addition, I am unable to certify a ballot title because of some ambiguities in your proposal's text. Section 2 of your proposal states: "No member of the clergy or religious organization shall be required to provide services, facilities or goods relating to the solemnization of marriage. The refusal to do so shall not create any civil claim or cause of action." This section contains two ambiguities.

First, it is not clear what you mean by "[t]he refusal to do so…." This clause clearly intends to refer to something in the prior sentence. Yet the prior sentence speaks in terms of what clergy and religious organizations cannot be required to

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

do. Putting these two together generates an ambiguity because it is not clear what it means to "refuse to" "not be required to provide" certain things. Without clarification on this score, I am unable to summarize your proposal in a ballot title.

Second, the final clause of section two refers to "any civil claim or cause of action." It is not clear whether you intend these two terms to be synonymous or to refer to distinct legal actions. Without clarification on this score, I am unable to summarize your proposal in a ballot title.

Finally, I should note that, though I am not rejecting your proposal at this stage due to the wording of its popular name, I believe some consideration should be given to whether the latter's terminology meets the test of impartiality that the Arkansas Supreme Court has imposed in the context of ballot measures.[16]

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, for the foregoing reasons, and to instruct you to "redesign" the proposed measure and ballot title. You may, after addressing 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

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[16] *See, e.g.*, Op. Att'y Gen. 2012-028.

POPULAR NAME

The Arkansas Marriage Equality Amendment

BALLOT TITLE

AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO PROVIDE THAT MARRIAGE CONSISTS OF THE UNION BETWEEN TWO PERSONS REGARDLESS OF GENDER; PROVIDING THAT NO MEMBER OF THE CLERGY OR RELIGIOUS ORGANIZATION SHALL BE REQUIRED TO PROVIDE SERVICES, FACILITIES OR GOODS RELATING TO THE SOLEMNIZATION OF MARRIAGE AND THE REFUSUAL TO DO SO SHALL NOT CREATE ANY CIVIL CLAIM OR CAUSE OF ACTION; PROVIDING THAT ALL LAWS AND CONSTITUTIONAL PROVISIONS WHICH CONFLICT WITH THIS AMENDMENT ARE HEREBY REPEALED TO THE EXTENT THAT THEY CONFLICT WITH THIS AMENDMENT

SECTION ONE. Marriage consists of the union between two persons regardless of gender.

SECTION TWO. No member of the clergy or religious organization shall be required to provide services, facilities or goods relating to the solemnization of marriage. The refusal to do so shall not create any civil claim or cause of action.

SECTION THREE. All laws and constitutional provisions which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.