

Opinion No. 2013-112

September 19, 2013

Jack M. Weir, III
Christopher Jacks
Post Office Box 13963
Maumelle, Arkansas 72113

Dear Messrs. Weir and Jacks:

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 recognize that a marriage is legally recognized as a union of two people regardless of whether the parties to the marriage are of the same or different sex. The amendment protects religious freedoms by not requiring a member of the clergy or religious organization to provide obligations or privileges relating to the solemnization of marriage and that the refusal to do so shall not create any civil claim or cause of action. Any laws or constitutional amendments contrary to this amendment shall be null and void upon passage of the 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

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 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

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 *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).

“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.

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 your prior submission (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.

¹⁴ *Id.*

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

In addition to the foregoing deficiencies, I am also unable to certify your measure because ambiguities in its text prevent me from assessing whether the ballot title fairly and correctly summarizes your measure.

Ambiguities in Section 1 of your measure

In your prior submission, Section 1 stated: “The right to marry shall not be abridged or denied on account of sex or sexual orientation.” As I noted in Opinion No. 2013-072, this provision gave rise to several ambiguities, the chief of which was whether, by this language, you intended “(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.” I went on to explain that the “possible assumption that such a right [exists] under current law is questionable” due to the lack of any federal court ruling in our jurisdiction to that effect.

In your current submission, you have modified Section 1 so that it now states: “An Amendment to the Arkansas Constitution to recognize that a marriage is legally recognized as a union of two people regardless of whether the parties to the marriage are of the same or different sex.” This Section contains several ambiguities that prevent me from summarizing your measure in a ballot title.

- The primary ambiguity, which I noted in the previous submission and referred to above, remains. Section 1 now proposes to amend the Arkansas Constitution “to ***recognize*** that a marriage is legally ***recognized*** as a union of two people regardless of...sex.” (Emphasis added.) The doubling of the term “recognize” renders this provision unclear in the same way that Section 1 was previously unclear. Under current Arkansas law, a marriage between two people of the same sex is not “legally recognized.” Hence, as I noted in response to your first submission, your proposal remains unclear regarding whether it intends “(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.” This foundational ambiguity also manifests itself in the problem, which was noted above, that the ballot title fails to give the voter any account of how the current law will be changed.
- Section 1 is also ambiguous because it lacks a verb, which renders it a sentence fragment. I realize you may intend the prefatory clause “Be it enacted by the people of the State of Arkansas” to supply Section 1’s verb. But an enacting clause is not required for a proposed state constitutional

amendment.¹⁶ Indeed, the inclusion of an enactment clause may be confusing to the voters.¹⁷

Ambiguities in Section 2 of your measure

Section 2 of your proposed amendments states: “This amendment protects religious freedoms by not requiring a member of the clergy or religious organization to provide obligations or privileges relating to the solemnization of marriage and that the refusal to do so shall not create any civil claim or cause or action.” This Section contains the following ambiguities, which prevent me from summarizing your measure in a ballot title.

- Section 2 says it “protects religious freedoms” of clergy and religious organizations “by not requiring [them] to provide obligations or privileges related to the solemnization or marriage....” It is not clear what is meant by the phrase “by not requiring [them] to provide obligations.” While an “obligation” can be *created*, *met*, or *provided for*, it is not the sort of thing that can be “provided,” which essentially means to “make available; furnish.”¹⁸
- The ambiguity contained in the phrase “by not requiring [them] to provide obligations” is part of the reason that the phrase in the next sentence—“to do so”—is syntactically problematic. The phrase “to do so” has no clear referent in the prior sentence.

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.¹⁹

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.

¹⁶ See *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994).

¹⁷ See Op. Att’y Gen. 2012-034.

¹⁸ *The American Heritage Dictionary*, “provide,” <http://www.ahdictionary.com/word/search.html?q=provide> (last visited, Sept. 16, 2013).

¹⁹ See, e.g., Op. Att’y Gen. 2012-028.

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 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

(Popular Name)

The Arkansas Marriage Equality Amendment

(Ballot Title)

AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO RECOGNIZE THAT A MARRIAGE IS LEGALLY RECOGNIZED AS A UNION OF TWO PEOPLE REGARDLESS OF WHETHER THE PARTIES TO THE MARRIAGE ARE OF THE SAME OR DIFFERENT SEX. THE AMENDMENT PROTECTS RELIGIOUS FREEDOMS BY NOT REQUIRING A MEMBER OF THE CLERGY OR RELIGIOUS ORGANIZATION TO PROVIDE OBLIGATIONS OR PRIVILEGES RELATING TO THE SOLEMNIZATION OF MARRIAGE AND THAT THE REFUSAL TO DO SO SHALL NOT CREATE ANY CIVIL CLAIM OR CAUSE OF ACTION. ANY LAWS OR CONSTITUTIONAL AMENDMENTS CONTRARY TO THIS AMENDMENT SHALL BE NULL AND VOID UPON PASSAGE OF THE AMENDMENT.

(Proposed Constitutional Amendment)

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

SECTION 1. An Amendment to the Arkansas Constitution to recognize that a marriage is legally recognized as a union of two people regardless of whether the parties to the marriage are of the same or different sex.

SECTION 2. This amendment protects religious freedoms by not requiring a member of the clergy or religious organization to provide obligations or privileges relating to the solemnization of marriage and that the refusal to do so shall not create any civil claim or cause of action.

SECTION 3. Any laws or constitutional amendments contrary to this amendment shall be null and void upon passage of the Amendment.