

Opinion No. 2013-114

September 19, 2013

Christina Harrison, Founder  
Arkansans for Equality  
10010 Raymond Drive  
Little Rock, Arkansas 72205

Dear Ms. Harrison:

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

REPEAL OF THE ARKANSAS MARRIAGE AMENDMENT

Ballot Title

A proposed amendment to the Arkansas constitution which will repeal Amendment 83, the Arkansas marriage amendment that prohibits same sex marriages in Arkansas and prohibits recognition of civil unions and relationships similar to marriage; this amendment would restore all Arkansas laws relating to marriage which were in effect prior to the adoption of Amendment 83, including the General Assembly's statutory ban on same-sex marriage, and to the extent the General Assembly has passed additional legislation since the adoption of Amendment 83, that legislation would also remain in effect; this proposed amendment, if passed, will not make same-sex marriage or civil unions legal but will reinvest the General Assembly with the power to pass such laws relating to same sex marriage as it

deems appropriate and will allow the courts to this state to interpret and construe those laws.

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,”<sup>1</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 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.**<sup>2</sup>

The popular name is primarily a useful legislative device.<sup>3</sup> It need not contain detailed information or include exceptions that might be required of a ballot title,

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<sup>1</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>2</sup> See *Arkansas Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

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

but it must not be misleading or give partisan coloring to the merit of the proposal.<sup>4</sup> The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.<sup>5</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>6</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>7</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>8</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>9</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>10</sup> The ballot title must be honest and impartial,<sup>11</sup> and it must convey an intelligible idea of the scope and significance of a proposed change in the law.<sup>12</sup>

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 "Repeal of the Arkansas Marriage Amendment" is sufficient. It is therefore hereby certified as submitted.

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<sup>4</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>5</sup> *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

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

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

<sup>8</sup> *Id.* at 288, 884 S.W.2d at 944.

<sup>9</sup> *Id.* 293, 884 S.W.2d at 946-47.

<sup>10</sup> *Id.* at 284, 884 S.W.2d at 942.

<sup>11</sup> *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

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

In my judgment, however, several changes and additions are needed to your proposed ballot title to give the electors a clear understanding of the proposed amendment. The following is hereby certified in order to ensure that, when construed together, the popular name and ballot title accurately set forth the purpose of the proposed amendment:

Ballot Title

An amendment to the Arkansas Constitution to repeal Arkansas Constitution Amendment 83, the Arkansas marriage amendment. Amendment 83 provides that marriage consists only of the union of one man and one woman and that legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas. This proposed repeal of Amendment 83, if approved by the voters, will not in itself legalize same-sex marriage, which is currently prohibited by Arkansas statute. This amendment will revive the General Assembly's authority to pass such laws relating to same-sex marriage as it deems appropriate.

Pursuant to A.C.A. § 7-9-108, instructions to canvassers and signers must precede every petition, informing them of the privileges granted by the Constitution and of the penalties imposed for violations of this act. Enclosed herewith, over the signature of the Attorney General, are instructions that should be incorporated in your petition prior to circulation.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM/cyh

Enclosures

Popular name:

Repeal of the Arkansas Marriage Amendment

Ballot Title:

A proposed amendment to the Arkansas constitution which will repeal Amendment 83, the Arkansas marriage amendment that prohibits same sex marriages in Arkansas and prohibits recognition of civil unions and relationships similar to marriage; this amendment would restore all Arkansas laws relating to marriage which were in effect prior to the adoption of Amendment 83, including the General Assembly's statutory ban on same-sex marriage, and to the extent the General Assembly has passed additional legislation since the adoption of Amendment 83, that legislation would also remain in effect; this proposed amendment, if passed, will not make same-sex marriage or civil unions legal but will reinvest the General Assembly with the power to pass such laws relating to same sex marriage as it deems appropriate and will allow the courts to this state to interpret and construe those laws.

Initiative language:

Amendment 83 to the Arkansas Constitution is repealed.