

Opinion No. 2013-121

October 7, 2013

Jack Michael Weir, III
Arkansas Initiative for Marriage Equality
Post Office Box 13963
Maumelle, Arkansas 72113

Dear Mr. Weir:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2011), of the popular name and ballot title for a proposed constitutional amendment. You have previously submitted two similar measures, both of which this office rejected for various reasons. *See* Op. Att’y Gen. Nos. 2013-112 and 2013-072. You have made changes to your proposal since your last submission and have now submitted the following proposed popular name and ballot title for my certification:

Popular Name

The Arkansas Marriage Amendment

Ballot Title

An amendment to the Arkansas Constitution to recognize marriage as a union between two people regardless of sex. No member of any clergy or religious organization shall be obligated to provide wedding ceremonies or participate in the solemnization of any marriage. Refusal by clergy or religious organizations to participate shall not create any civil claim or cause of action. This proposed amendment would result in the repeal of Amendment 83 of the Arkansas Constitution, require state officials to issue marriage

licenses and provide protection to religious organizations and clergy from any legal requirement to participate in marriage ceremonies.

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

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).

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

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

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).

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.

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.

Having analyzed your proposed amendment, I conclude that certain ambiguities and deficiencies prevent me from certifying your proposal as submitted and from substituting a more suitable and correct popular name and ballot title pursuant to A.C.A. § 7-9-107(b).

Ambiguities associated with Section 2

Section 2 of your proposal states that “[n]o member of the clergy or a religious organization shall be obligated to perform any marriage ceremony or solemnization and the refusal of a clergy member or a religious organization to do so shall not create a cause of action or civil claim.”

The clause stating that “...the refusal of a clergy member or a religious organization to [perform any marriage ceremony or solemnization] shall not create a cause of action or a civil claim,” is ambiguous because it is not clear whether

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.*

you intend “cause of action” and “civil claim” to be synonymous or to refer to distinct legal actions.

Ambiguities associated with Section 3

Section 3 states: “No state official shall deny the issuance of a marriage license on the basis of the sexes of the individuals seeking the marriage license.”

- Thus, the proposal’s text *prohibits* a “state official” from denying “the issuance of a marriage license” on certain grounds. But instead of summarizing this provision as a prohibition on certain actions, the ballot title summarizes it as an affirmative obligation to engage in certain actions: “This proposed amendment would...*require* state officials to issue marriage licenses....” (Emphasis added.) This distinction creates an ambiguity regarding what you take to be the effect of your proposal’s text. Consequently, I am unable to summarize your proposal’s text in a ballot title.
- In addition, Section 3’s reference to “state officials” is unclear. Pursuant to A.C.A. § 9-11-203, “county clerks” have the authority and obligation to issue marriage licenses.

Ambiguities associated with Section 4

Section 4 states: “Legal status for unmarried persons which is identical or substantially similar to marital status, such as a civil union, shall be valid and recognized in Arkansas.”

As I noted in response to your most recent submission, 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

Thus, the ballot title must both accurately summarize the measure's text and inform the voter of how the measure would change current law.

To see the ambiguities in this Section and to see why this Section's ballot-title summary is deficient, we need to examine Amendment 83 to the Arkansas Constitution.

Amendment 83, when considered in its entirety and for purposes of this opinion, addresses four distinct matters related to same-sex marriages (or relationships "substantially similar" thereto). Amendment 83 references the legal nature of the relationship by identifying two categories (same-sex marriage or something "substantially similar" thereto). The Amendment also distinguishes the jurisdiction in which the legally-valid relationship was entered into (in Arkansas or out-of-state). Accordingly, for our purposes, Amendment 83 establishes the following principles of law:

1. Two persons of the same sex cannot validly marry *in Arkansas*.
2. Two persons of the same sex cannot, *in Arkansas*, validly enter into any other kind of legally-recognized relationship that is "substantially similar" to marriage.
3. Arkansas cannot recognize the validity of a same-sex marriage validly entered into *out-of-state*.
4. Arkansas cannot recognize the validity of a same-sex relationship that is both "substantially similar" to marriage and was entered into *out-of-state*.

Section 6 of your proposal repeals Amendment 83 in its entirety. This clearly would have the effect of repealing the above four principles. And, with the

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

exception of principle (2), your proposed measure is clear regarding the law that would be substituted for the above principles.¹⁶

As for principle (2), it appears from your proposal's literal wording that something may be substituted that is unintended. Currently, as noted above in principle (2), two persons of the same sex cannot, *in Arkansas*, validly enter into any other kind of legally-recognized relationship that is "substantially similar" to marriage. Based on the literal wording of your proposal, it seems that Arkansas law would be changed such that two kinds of legally recognized relationships could originate in Arkansas: (a) same-sex marriages; and (b) other relationships that are "substantially similar" thereto, such as civil unions.

In my opinion, a proposal that is not clear on this point is likely to confuse voters. This lack of clarity is exacerbated by the fact that your ballot title omits any reference to this point. That is, your ballot title does not attempt to summarize for the voter how your Section 4 would change existing law. This deficiency in the text of your proposal must be clarified before I am able to certify that your ballot title fairly and completely summarizes your measure.

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.

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

¹⁶ Under your proposal, two persons of the same sex can validly marry in Arkansas *and* Arkansas must recognize the validity of (a) a same-sex marriage validly entered into out-of-state, and (b) a same-sex relationship that is both entered into out-of-state and "substantially similar" to marriage.

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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 Amendment

(Ballot Title)

AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO RECOGNIZE MARRIAGE AS A UNION BETWEEN TWO PEOPLE REGARDLESS OF SEX. NO MEMBER OF ANY CLERGY OR RELIGIOUS ORGANIZATION SHALL BE OBLIGATED TO PROVIDE WEDDING CEREMONIES OR PARTICIPATE IN THE SOLEMNIZATION OF ANY MARRIAGE. REFUSAL BY CLERGY OR RELIGIOUS ORGANIZATIONS TO PARTICIPATE SHALL NOT CREATE ANY CIVIL CLAIM OR CAUSE OF ACTION. THIS PROPOSED AMENDMENT WOULD RESULT IN THE REPEAL OF AMENDMENT 83 OF THE ARKANSAS CONSTITUTION, REQUIRE STATE OFFICIALS TO ISSUE MARRIAGE LICENSES AND PROVIDE PROTECTION TO RELIGIOUS ORGANIZATIONS AND CLERGY FROM ANY LEGAL REQUIREMENT TO PARTICIPATE IN MARRIAGE CEREMONIES.

(Proposed Constitutional Amendment)

Section 1: Marriage defined.

Section 2: No interference with religious rights. Section 3: State officials' authority to issue marriage licenses.

Section 4: Marital status.

Section 5: Capacity, rights, obligations, privileges, and immunities.

Section 6: Amendment 83 repealed.

Section 1: Marriage defined.

Marriage shall be defined as the union of two people, regardless of the sex of the individuals.

Section 2: No interference with religious rights.

No member of the clergy or a religious organization shall be obligated to perform any marriage ceremony or solemnization and the refusal of a clergy member or a religious organization to do so shall not create a cause of action or civil claim.

Section 3: State officials' authority to issue marriage licenses.

No state official shall deny the issuance of a marriage license on the basis of the sexes of the individuals seeking the marriage license.

Section 4: Marital status.

Legal status for unmarried persons which is identical or substantially similar to marital status, such as a civil union, shall be valid and recognized in Arkansas.

Section 5: Capacity, rights, obligations, privileges, and immunities.

The legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.

Section 6: Amendment 83 repealed.

Amendment 83 to the Constitution of the state of Arkansas is hereby repealed.