

Opinion No. 2013-130

October 25, 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. 2013), of the popular name and ballot title for a proposed constitutional amendment. You have previously submitted similar measures, which this office rejected due to deficiencies in the ballot title and texts. *See* Op. Att’y Gen. Nos. 2013-111, 2013-122. You have altered 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 provide that marriage consists of the union between two persons regardless of gender; providing that Arkansas shall recognize all marriages validly entered into in another state; 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; providing that all

laws and constitutional provisions that conflict with this amendment are hereby repealed to the extent that they conflict with this amendment, specifically including constitutional Amendment 83 that provides that a marriage consists only of a union of one man and one woman and any Arkansas law that prohibits same sex marriage

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.

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).

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

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,

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).

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.

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.

Having analyzed your proposed amendment, as well as your proposed popular name and ballot title under the above precepts, it is my conclusion that I am unable to certify your proposal because it fails to fully resolve the ambiguity I noted in response to your most recent submission.

In my response to your first submission (Op. 2013-111), I explained that your ballot title was wholly deficient because it made no attempt to summarize for the voter how your proposal would affect existing law. In my response to your second submission (Op. 2013-122), I noted that your attempt to provide such a summary created an ambiguity. While your current submission resolves *part* of that ambiguity, it is not entirely resolved. The continuing presence of this ambiguity

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.*

prevents me from ensuring that your ballot title accurately summarizes your proposal's text and adequately apprises voters of the changes in existing law.

Briefly stated, the continuing ambiguity is whether the following kind of relationship might be legally recognized in Arkansas if your proposed measure is adopted: (1) that of unmarried persons (2) who have entered into a legally-recognized relationship (3) that is "identical to or substantially similar to marriage," such as a civil union, (4) that was entered into out-of-state.

I pointed out this problem in my response to your most recent submission. There I noted that although your proposed measure was silent regarding its effects on, among other things, Section 2 of Amendment 83 to our state constitution, your proposed ballot title indicated that the measure would entirely repeal Amendment 83. As I explained in my previous opinion, Section 2 of Amendment 83 "places certain limitations on Arkansas law regarding the recognition of same-sex marriages (or a status 'substantially similar thereto') validly entered into out of state."¹⁵ For ease of reference, I will refer to this as Amendment 83's "civil union provision."

The only attempt you have made to address this disconnect between your proposed ballot title and the text of your measure is to add a new provision to the text, and then include a verbatim copy of that language in the ballot title. That new provision states: "Arkansas law shall recognize all *marriages* validly entered into in another state." (Emphasis added.) But, as you can see from the foregoing, this leaves unaddressed the civil union provision (which pertains to *unmarried persons*).

Nevertheless, you summarize your measure as though Amendment 83 would be repealed in its entirety. Your ballot title states that "all laws and constitutional provisions that conflict with this Amendment are hereby repealed, specifically including constitutional Amendment 83...." This inaccurate summary of your proposed measure's effects leads to two deficiencies. First, the proposed summary would mislead the voters regarding your proposed measure's effects on existing

¹⁵ Op. Att'y Gen. No. 2013-122, p. 5 (emphasis added).

law. Second, it indicates that you might misunderstand the full effect of your proposed measure. This disconnect between your proposal's text and its summary renders me unable to modify your ballot title to more accurately reflect its effect on Amendment 83 when considered in its entirety.

Without clarification of this ambiguity, I am unable to certify your proposal.

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 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 ARKANSAS SHALL RECOGNIZE ALL MARRIAGES VALIDLY ENTERED INTO IN ANOTHER STATE; 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; PROVIDING THAT ALL LAWS AND CONSTITUTIONAL PROVISIONS THAT CONFLICT WITH THIS AMENDMENT ARE HEREBY REPEALED TO THE EXTENT THAT THEY CONFLICT WITH THIS AMENDMENT, SPECIFICALLY INCLUDING CONSTITUTIONAL AMENDMENT 83 THAT PROVIDES THAT A MARRIAGE CONSISTS ONLY OF A UNION OF ONE MAN AND ONE WOMAN AND ANY ARKANSAS LAW THAT PROHIBITS SAME SEX MARRIAGE

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

SECTION TWO. Arkansas shall recognize all marriages validly entered into in another state.

SECTION THREE. No member of the clergy or religious organization shall be required to provide services, facilities or goods relating to the solemnization of marriage.

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