

Opinion No. 2013-135

November 7, 2013

Jack Michael Weir III, Founder
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. 2013), of the popular name and ballot title for a proposed constitutional amendment. You have previously submitted similar measures which this office rejected for various reasons. *See* Op. Att’y Gen. Nos. 2013-121, 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. This proposed amendment would result in the repeal of Amendment 83 of the Arkansas Constitution, prevent county clerks from denying issuance of marriage licenses on

the grounds of the sexes of the couple 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 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

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.

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).

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.

Applying the above precepts, it is my conclusion that a more suitable, complete, and correct popular name and ballot title should be substituted for those proposed. 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:

Popular Name

The Arkansas Same-Sex Marriage Amendment

Ballot Title

An amendment to the Arkansas Constitution to define marriage as the union between two people regardless of sex; providing that no clergy member or religious organization shall be obligated to perform wedding ceremonies or participate in the solemnization of any marriage; providing that the refusal by a clergy member or religious organizations to perform any marriage ceremony or solemnization shall not create any civil claim; repealing Amendment 83 to the Arkansas Constitution; prohibiting county clerks from refusing to issue marriage licenses based on the sexes of the couple;

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

¹⁴ *Id.*

and providing that the legislature retains the power—subject to this amendment— to determine the capacity of persons to marry and the legal rights, obligations, privileges, and immunities of marriage.

In my view, the purpose of your proposed measure is sufficiently stated in the above revised ballot title to satisfy this office’s mandate under A.C.A. § 7-9-107. I believe a cautionary note is warranted, however, due to the significance of the subject matter undertaken and the far-reaching effects of this amendment. You should be aware that according to my experience there is a direct correlation between the complexity of initiated constitutional amendments and their susceptibility to a successful ballot title challenge. Any ambiguity in the text of a measure could lead to a successful challenge. That is why I urge you, if you have not already done so, to consult private counsel in order to be assured that the stated purpose is accomplished by the text of your proposal.

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)

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. THIS PROPOSED AMENDMENT WOULD RESULT IN THE REPEAL OF AMENDMENT 83 OF THE ARKANSAS CONSTITUTION, PREVENT COUNTY CLERKS FROM DENYING ISSUANCE OF MARRIAGE LICENSES ON THE GROUNDS OF THE SEXES OF THE COUPLE 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: County clerks' authority to issue marriage licenses.

Section 4: Capacity, rights, obligations, privileges, and immunities.

Section 5: 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 civil claim.

Section 3: County clerks' authority to issue marriage licenses.

No county clerk shall deny the issuance of a marriage license on the basis of the sexes of the individuals seeking the marriage license.

Section 4: 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 5: Amendment 83 repealed.

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