



**STATE OF ARKANSAS**  
**THE ATTORNEY GENERAL**  
**DUSTIN MCDANIEL**

Opinion No. 2014-058

June 18, 2014

David E. Dinwiddie  
8608 Princeton Pike  
Pine Bluff, Arkansas 71602

Dear Mr. Dinwiddie:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2013), of the following popular name and ballot title for a proposed initiated measure:

Popular Name

PROPOSED STATUTE TO REQUIRE PRIMARY ELECTIONS  
BE CONDUCTED AS A BLANKET PRIMARY

Ballot Title

Proposed statute to require primary elections be conducted as a  
blanket primary

The Attorney General is required, pursuant to A.C.A. § 7-9-107 (Supp. 2013) to pass on the sufficiency of the popular name and ballot title of all proposed initiative and referendum acts or amendments before the petitions are circulated for signature. This process is in aid of Amendment 7 to the Arkansas Constitution, which reserves to the people the power to enact state laws and to propose statewide constitutional amendments.<sup>1</sup> The law provides that the Attorney General

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<sup>1</sup> Ark. Const. amend. 7 ("State Wide Petitions"); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994).

may approve and certify or substitute and certify a more suitable and correct popular name and ballot title; or he may reject the entire ballot title, popular name, and petition if he determines that the ballot title or the nature of the issue is presented in such a manner that the ballot title would be misleading.<sup>2</sup>

Having reviewed your proposed initiated act, ballot title, and popular name pursuant to this authority, it is my determination that your submission, which proposes to establish a blanket primary system, must be rejected because it would violate the United States Constitution. As recognized by the Arkansas Supreme Court, Amendment 7 cannot empower the people of the State of Arkansas to initiate any measure that falls outside the powers reserved to the states and their citizens by the United States Constitution:

The voters of this state essentially have, *within constitutional limits*, a right to change any law or any provision of our Constitution they deem appropriate through Amendment 7 to the Constitution. *Clearly those constitutional limitations derive from both the United States Constitution and this state's constitution.* On the federal level, the rights reserved to the states and to the people of the states originate from the Tenth Amendment to the United States Constitution, which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Thus, our Amendment 7 cannot empower the people of this state to initiate any measure, law, or amendment which falls outside the powers reserved to the states and their citizens by the United States Constitution.<sup>3</sup>

Applying this principle, I must conclude that your proposed measure is not authorized by Amendment 7 because it would violate the provisions of the First

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<sup>2</sup> A.C.A. § 7-9-107(c).

<sup>3</sup> *Donovan v. Priest*, 326 Ark. 353, 357-58, 931 S.W.2d 119, 121 (1996) (internal quotation omitted, second emphasis added). *Accord Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000) (declining to submit to the voters, as an unconstitutional impairment of contract, a proposed amendment that would abolish state and local sales and use tax on used goods).

Amendment to the United States Constitution as interpreted by the U.S. Supreme Court.<sup>4</sup> Your proposed measure states:

**Proposed Statute:** *Primary Elections shall be conducted as a Blanket Primary.*

*Voters may choose candidates for each office without regard to party. The candidates with the highest votes by party for each office advance to the general election, as the respective party's nominee. Independent candidates and new third parties are not listed on Primary Ballot but are included in General Election.*

You may be unaware of the constitutional problem with this proposal, but the United State Supreme Court has struck down the partisan blanket primary as unconstitutional under the First Amendment to the U.S. Constitution. The term “blanket primary” refers to a system in which “any person, regardless of party affiliation, may vote for a party’s nominee.”<sup>5</sup> In *California Democratic Party v. Jones*,<sup>6</sup> the Court held that California’s blanket primary violated the political parties’ First Amendment right of association because the process “open[ed] [the candidate-selection process] up to persons wholly unaffiliated with the party.”<sup>7</sup> As stated by one legal commentator in the wake of *Jones*, “a state cannot force parties to include “wholly unaffiliated” voters in their elections by virtue of blanket primaries.”<sup>8</sup>

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<sup>4</sup> The First Amendment is applicable to the states as well as the federal government. See *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>5</sup> *California Democratic Party v. Jones*, 530 U.S. 567, 576, n. 6 (2000).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 581. The District Court’s description in *Jones* of California’s blanket primary system is representative of a typical blanket primary statute: “[A]ll voters receive the same ballot, and a voter is not limited to the candidates of any single party but may vote, as to each office contested, for any candidate regardless of party affiliation.” *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1292 (E.D. Cal. 1997).

<sup>8</sup> Lauren Hancock, *The Life of the Party: Analyzing Political Parties’ First Amendment Associational Rights When the Primary Election Process is Construed Along a Continuum*, 88 Minn. L. Rev. 159, 184 (2003) (citing *Jones*). For a more in-depth discussion of *Jones*, see Sean M. Ramaley, *Is the Bell Tolling: Will the Death of the Partisan Blanket Primary Signal the End for Open Primary Elections?* 63 U. Pitt. L. Rev. 217 (2001).

Blanket primaries utilized by Alaska and Washington were of the same type as California, and were thus also invalidated following *Jones*.<sup>9</sup> The 9th Circuit Court of Appeals later summarized the principle established by *Jones*:

The Supreme Court has held that blanket primaries, in which all candidates are combined on a single ballot and may be voted upon by voters affiliated with any party, violate a party's associational right to have its nominee chosen by members of its own party. *See Jones*, 530 U.S. at 577, 120 S.Ct. 2402 (holding that a blanket primary "forces political parties to associate with — to have their nominees, and hence their positions, determined by — those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival"). ***Because blanket primaries violate political parties' First Amendment rights, they may not constitutionally be used to "choos[e] a party's nominee."*** *Id.* at 586, 120 S.Ct. 2402.<sup>10</sup>

Your proposal appears to be materially indistinguishable from the statutes struck down in these cases. The reference, in the singular, to "Primary Ballot" in the text of your proposed measure indicates that all candidates from all political parties would appear on a single ballot. It is plainly your intention that each voter's ballot would list every candidate regardless of party affiliation, allowing the voter to choose freely among them and thereby permitting voters to participate in any party primary on an office-by-office basis.

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<sup>9</sup> *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), cert. denied, 540 U.S. 1213 (2004); *O'Callaghan v. Dir. of Elections*, 6 P.3d 728 (Alaska 2000). Like California's blanket primary statute, the statutes in Washington and Arizona each provided for all primary candidates to be listed on a single ballot without regard to party affiliation, and they provided that all eligible voters could vote freely among them, without regard to party affiliation. The courts in these cases found no constitutionally significant distinctions between the blanket primary statutes at issue and the California statute declared unconstitutional in *Jones*. *See* 343 F.3d at 1203; 6 P.3d at 730. The 9th Circuit Court of Appeals' concluding statement is particularly instructive: "This case presents a facial constitutional challenge, and the Washington blanket primary statute is on its face an unconstitutional burden on the rights of free association of [the political parties]." 343 F.3d at 1207.

<sup>10</sup> *Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1178 (9th Cir. 2008) (emphasis added).

I believe it is apparent based on the above case law that this proposed blanket primary scheme contravenes the United States Constitution. And as noted by the Alaska Supreme Court, “[t]he United States Constitution’s Supremacy Clause requires states to adhere to the Supreme Court’s constitutional interpretation in *Jones*.”<sup>11</sup>

In conclusion, therefore, it is my opinion that your proposed initiated measure is not authorized by Amendment 7 to the Arkansas Constitution because it falls outside the powers reserved to the people by the U.S. Constitution. More specifically, it unconstitutionally infringes upon the political parties’ First Amendment rights of free association. Accordingly, I must respectfully decline to certify a popular name and ballot title for this measure.<sup>12</sup>

Sincerely,



DUSTIN MCDANIEL  
Attorney General

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<sup>11</sup> 6 P.3d at 730 (citing U.S. Const. art. VI).

<sup>12</sup> This office has previously declined to certify popular names and ballot titles for proposed measures that were not authorized by Ark. Const. amend. 7. *E.g.*, Op. Att’y Gen. Nos. 2011-028; 2006-002; 2005-285 (and opinions cited therein).

Attorney General of Arkansas: Opinions Dept.  
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2014-058

JUN 04 2014

ATTORNEY GENERAL  
OF  
ARKANSAS

To: Honorable Dustin McDaniel, Attorney General of Arkansas  
From: David E. Dinwiddie, Pine Bluff  
Subj: Proposed Ballot Measure for Blanket Primary  
Date: May 30, 2014

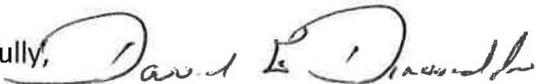
**Proposed Popular Name:** Proposed Statute to require Primary Elections be conducted as a Blanket Primary.

Voters may choose candidates for each office without regard to party. The candidates with the highest votes by party for each office advance to the general election, as the respective party's nominee.

**Ballot Title:** Proposed Statute to require Primary Elections be conducted as a Blanket Primary.

**Proposed Statute:** *Primary Elections shall be conducted as a Blanket Primary.*

*Voters may choose candidates for each office without regard to party. The candidates with the highest votes by party for each office advance to the general election, as the respective party's nominee. Independent candidates and new third parties are not listed on Primary Ballot but are included in General Election.*

Respectfully, 

David E. Dinwiddie

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