



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

Opinion No. 2014-115

October 13, 2014

The Honorable Mike Knoedl, Director  
Arkansas Game and Fish Commission  
2 Natural Resources Drive  
Little Rock, Arkansas 72205

Dear Mr. Knoedl:

I am writing in response to your request for my expedited opinion regarding the following questions:

1. Does “state agency” referenced in Section of SJR 7 include the two constitutional commissions, i.e., the Arkansas Game and Fish Commission and the Arkansas Highway Commission? In other words, if SJR 7 is approved by the voters, could the General Assembly enact a law that would require the Arkansas Game and Fish Commission and the Arkansas Highway Commission to seek legislative committee review and approval of their administrative rules before they could become effective?
2. If SJR 7 is approved by the voters, will any of its provisions create legal conflicts with existing provisions in Amendments 35 or 42 to the Arkansas Constitution? If so, how would such conflicts likely be resolved?
3. In light of the decision of the Arkansas Supreme Court in *Chaffin v. Arkansas Game and Fish Commission*, 296 Ark. 431, 757 S.W.2d 950 (1988), will any provision of SJR 7 conflict with any other provisions of the Arkansas Constitution, such as the separation of powers provisions in Article 4, §§ 1 and 2, or the right to hunt, fish, trap, and harvest wildlife under Amendment 88?

4. Will SJR 7, as it will appear on the November 2014 General Election ballot without any ballot title and/or popular name, adequately inform the voters of the potential conflicts and/or changes that may take place with Amendment 35, Amendment 42, and/or other provisions of the Arkansas Constitution?
5. Have all publication and other requirements in Article 19, § 22 of the Arkansas Constitution been satisfied so that the proposed amendment involving SJR 7 is now qualified for adoption in the general election of November 4, 2014?

## RESPONSE

***Question 1: Does “state agency” referenced in Section 1 of SJR 7 include the two constitutional commissions, i.e., the Arkansas Game and Fish Commission and the Arkansas Highway Commission? In other words, if SJR 7 is approved by the voters, could the General Assembly enact a law that would require the Arkansas Game and Fish Commission and the Arkansas Highway Commission to seek legislative committee review and approval of their administrative rules before they could become effective?***

Before addressing your specific question, I must note that, as a matter of policy, this office has traditionally declined to issue opinions interpreting proposed acts or amendments prior to those laws being put to a vote of the people.<sup>1</sup> As stated by my immediate predecessor with regard to a proposal referred by legislative resolution pursuant to Ark. Const. art. 19, § 22: “[The measure] has not at this date been adopted by the people and the interpretation of such proposed measures is not appropriate in the format of an official Attorney General opinion.”<sup>2</sup> Indeed, a court will likewise not entertain a declaratory judgment action to interpret proposed measures prior to enactment.<sup>3</sup> Although I must accordingly respectfully decline to interpret Senate Joint Resolution 7 (“SJR 7”), I can and will briefly note

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<sup>1</sup> See, e.g., Ops. Att’y Gen. 2012-132; 2005-127; 97-123 and 94-193 (discussing proposals initiated through the Amendment 7 “Initiative and Referendum” process).

<sup>2</sup> Op. Att’y Gen. 2004-210 at n.4; compare Op. Att’y Gen. 2001-033 (“[A] court faced with a constitutional challenge may scrutinize the practical impact of [a] Bill, if enacted, and the results accruing thereunder. I cannot, of course, engage in this type of factual analysis in an Attorney General opinion, nor could anyone with respect to a ‘bill’ which has yet to be adopted.”).

<sup>3</sup> See A.C.A. § 16-111-104 (Repl. 2006).

the issues that I believe a court might address in entertaining a challenge to legislation based upon the authority of SJR 7.<sup>4</sup>

SJR 7, entitled “An Amendment to the Arkansas Constitution Providing that Administrative Rules Promulgated by State Agencies Shall Not Become Effective Until Reviewed and Approved by a Legislative Committee of the General Assembly,” proposes to add the following provision to Article 5 of the Arkansas Constitution:

§ 42. Review and approval of administrative rules.

(a) The General Assembly may provide by law:

(1) For the review by a legislative committee of administrative rules promulgated by a state agency before the administrative rules become effective; and

(2) That administrative rules promulgated by a state agency shall not become effective until reviewed and approved by the legislative committee charged by law with the review of administrative rules under subdivision (a)(1) of this section.

(b) The review and approval by a legislative committee under subsection (a) of this section may occur during the interim or during a regular, special, or fiscal session of the General Assembly.

If the General Assembly were to exercise its option to enact a law containing the provisions of subsection (a)(2), which conditions the effectiveness of “administrative rules” upon the approval of a legislative committee, it would in effect be assigning itself a “legislative veto” over an executive agency’s actions.<sup>5</sup>

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<sup>4</sup> The brevity of this analysis in part reflects the fact that you have requested I respond to your request in expedited fashion.

<sup>5</sup> In Op. Att’y Gen. 2001-033, one of my predecessors offered the following regarding the “legislative veto” of executive rulemaking:

The legislative oversight of administrative rules and regulations, which in some states involves actual approval or disapproval of rules and regulations, has been called the “legislative veto.” It is ordinarily argued that such legislative oversight infringes on the

Nothing, of course, precludes the people from affording the legislature such veto power by constitutional amendment. However, a reviewing court faced with a challenge to any particular exercise of such de facto veto power would in all likelihood address whether and to what extent the people in fact intended to invest the legislature with authority to regulate by veto the core functions of the “constitutionally independent agencies” referenced in your question.<sup>6</sup> In this, as in

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power of the executive branch to make rules and thereby “enforce the law.” It has also been successfully argued, however, that such oversight can infringe on the power of the judicial branch to “interpret” the law. The argument is that the judicial branch, rather than the legislative branch, is invested with the power to determine when an administrative rule or regulation is contrary to legislative intent, or outside the power of the promulgating agency.

Based on an elaborate review of attempts to subject administrative rules and regulations to legislative approval, my predecessor concluded that “[a] strong majority of the courts analyzing the constitutionality of laws authorizing ‘legislative vetoes’ have invalidated the laws on various grounds, including the ‘separation of powers’ doctrine”).

<sup>6</sup> See, e.g., *Chaffin v. Arkansas Game & Fish Commission*, 296 Ark. 431, 438, 757 S.W.2d 950 (1988) (“Amendment 35 gave the [AGFC] more power to act independently than other state agencies that are not independent constitutional agencies.”); *Arkansas Game & Fish Commission v. Stanley*, 260 Ark. 176, 180, 538 S.W.2d 533 (1976) (“In considering the question of the powers of the Commission, we must first view Constitutional Amendment 35, which, of course, is an act of the ultimate sovereign, the people of Arkansas, and is subject only to constitutional, not legislative or judicial, limitations.”); *Commission on Judicial Discipline and Disability v. Digby*, 303 Ark. 24, 29, 792 S.W.2d 594 (1990) (referring to both AGFC and SHC as “independent constitutional agencies”); *White, Governor v. Hankins*, 276 Ark. 562, 565, 637 S.W.2d 603 (1982) (“The Highway Commission established by Amendment 42 is, in a large measure, patterned after the Game and Fish Commission which was established by Amendment 35.”); Op. Att’y Gen. 2008-022 (“The [SHC] was intended to operate as a policy-making group outside the realm of politics and to formulate long-range plans for the entire state.”).

With respect to the core functions of these agencies, under current law, Ark. Const. amend. 35, § 1 vests in the Arkansas Game and Fish Commission (the “AGFC”) the following authority:

The control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations and all property now owned, or use for said purposes and the acquisition and establishment of same, [and] the administration of the laws now and/or hereafter pertaining thereto . . . .

Section 8 of Amendment 35 further provides:

The Commission shall have the exclusive power and authority to issue licenses and permits, to regulate bag limits and the manner of taking game and fish and furbearing animals, and shall have the authority to divide the State into zones, and regulate seasons and the manner of taking game, and fish and furbearing animals therein, and fix penalties for violations.

all instances, the intent of the people is determinative in interpreting a constitutional amendment.<sup>7</sup>

The scope of the AGFC's independence in rulemaking is aptly summarized in the following pronouncement by the Arkansas Supreme Court:

***A majority of this court has determined that the Game and Fish Commission[,] as opposed to the Legislature, is vested with the power to make such rules and regulations as is deemed necessary to protect and conserve the wildlife resources of the state . . . .*** The Commission has a wide discretion within which it may determine what the public interest demands, and what measures are necessary to secure and promote such requirements. The only limitation upon this power to formulate these rules and regulations, which tend to promote the health, peace, morals, education, good order and welfare of the public[,] is that the rules and regulations must reasonably tend to correct some evil, and promote some interest of the commonwealth, not violative of any direct or positive mandate of the constitution . . . . The commission, as trustee for the people of this state, has the responsibility and is charged with the duty to take whatever steps it deems necessary to promote the interest of the Game and Fish Conservation Program of the state; subject only to constitutional provisions against discrimination, and to any valid exercise of authority under the provisions of the Federal Constitution.<sup>8</sup>

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The State Highway Commission (the "SHC") is invested with the following powers pursuant to Ark. Const. amend. 42, § 1:

There is hereby created a State Highway Commission which shall be vested with all the powers and duties now or hereafter imposed by law for the administration of the State Highway Department, together with all powers necessary or proper to enable the Commission or any of its officers or employees to carry out fully and effectively the regulations and laws relating to the State Highway Department.

<sup>7</sup> *Faubus v. Kinney*, 239 Ark. 443, 450, 389 S.W.2d 887 (1965) ("[I]n matters relating to constitutional amendments, the intent of the people is controlling."); accord *Bailey v. Abington*, 201 Ark. 1072, 1075, 1079, 148 S.W.2d 176 (1941); see also Op. Att'y Gen. 2008-022 (echoing this principle and, citing authority, noting that "in interpreting constitutional provisions, it may be helpful to determine what changes the constitutional amendment was intended to make").

<sup>8</sup> *Farris v. Arkansas State Game and Fish Commission*, 228 Ark. 776, 784, 310 S.W.2d 231 (1958) (emphasis added); accord *State ex rel. Wright v. Casey*, 225 Ark. 149, 152, 279 S.W.2d 819 (1955) ("The Commission has been given full and complete administrative power and authority to promulgate rules and

As one of my predecessors has noted, legislative intrusion into the rulemaking authority of a constitutionally independent commission must be undertaken by constitutional amendment.<sup>9</sup> The fact that SJR 7 proposes a constitutional amendment may suggest that the legislature intends to authorize such an intrusion, but only a court faced with the issue could determine whether the amendment warrants such action. And, of course, whether the issue arises will depend upon an actual exercise by the General Assembly of what it takes to be its newly granted authority following the measure's adoption. As my predecessor rightly noted in another opinion addressing the constitutionality of proposed legislation extending legislative oversight of administrative rules and regulations: "It is impossible to obtain the 'proof of the pudding' with regard to [the bill], as it has not been enacted or implemented."<sup>10</sup>

In the present case, I will not venture to predict how the legislature would interpret its authority in the event this measure were adopted. If this measure were to pass; and if the legislature were to interpret its adoption as authority to condition the

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regulations necessary for the conservation and preservation of all wildlife"); *Dennis v. State*, 26 Ark. App. 294, 764 S.W.2d 466 (1989). See also Op. Att'y Gen. 2000-150 (opining that a court would likely deem inapplicable to the AGFC the rulemaking requirement of A.C.A. § 25-15-204, contained within the Administrative Procedures Act, because "the procedures in the APA . . . necessarily limit an agency discretion to develop rules under whatever procedures it deems appropriate, and . . . the Commission cannot constitutionally be so limited in the exercise of its power to formulate rules and regulations pursuant to Amendment 35"). I have found no authority addressing whether the SHC, under the constitutional assignment of responsibilities set forth in note 5, *supra*, might currently be subject to greater legislative oversight of its rulemaking.

<sup>9</sup> Op. Att'y Gen. 2000-150 ("Because Amendment 35 is not subject to legislative limitations, constitutional revision would be required in order to remove any question concerning the application of the APA to the Commission.")

<sup>10</sup> Op. Att'y Gen. 2001-033. The quoted adage echoes the following remark by the Arkansas Supreme Court's in *Chaffin*:

Despite [a legislative review committee member's] testimony that the committee is merely "advising" an agency to act, the proof of the pudding is in the eating. In this case the eating is how that "advice" is treated. . . .

An unconstitutional encroachment may not always take the form of outright invasion. A subtle coercion exercise by a powerful branch of government can effectively tie the hands of a coordinate branch. . . . The legislature cannot hold the executive branch hostage to its will.

rulemaking of constitutional commissions upon obtaining prior legislative approval; and if the legislature elected actually to exercise this purported authority – then, and only then, would a judicial challenge be ripe for adjudication.

The likelihood of such a suit would doubtless increase if the AGFC considered its rules as the avenue by which it pursued its core functions as an independent agency. I assume that the primary issue before the court in the event of such a suit would not be whether the people could grant the legislature such a right of approval – they can. Rather, the issue of law would likely be whether the people intended to grant such a right in adopting this amendment.

Given the procedural posture of your request – namely, its occurrence under circumstances where this office would ordinarily decline to opine – I will not speculate further regarding the possible outcome of any such judicial inquiry.

***Question 2: If SJR 7 is approved by the voters, will any of its provisions create legal conflicts with existing provisions in Amendments 35 or 42 to the Arkansas Constitution? If so, how would such conflicts likely be resolved?***

See my response to your first question.

***Question 3: In light of the decision of the Arkansas Supreme Court in Chaffin v. Arkansas Game and Fish Commission, 296 Ark. 431, 757 S.W.2d 950 (1988), will any provision of SJR 7 conflict with any other provisions of the Arkansas Constitution, such as the separation of powers provisions in Article 4, §§ 1 and 2, or the right to hunt, fish, trap, and harvest wildlife under Amendment 88?***

In *Chaffin*, which I referenced in my response to your first question, the court held that the legislature exceeded its constitutional authority, in violation of the separation-of-powers doctrine (set forth in Ark. Const. art. 4, §§ 1 and 2) and Amendment 35, in attempting to control through legislation the AGFC's policy decisions regarding its expenditures on an agency publication. The issue addressed by the court in *Chaffin* was thus whether **legislation** conflicted with these provisions of the constitution in its current form. SJR 7, however, is not thus assailable as constitutionally impermissible legislation, given that its adoption would amend the **constitution itself**. The issue arising from the adoption of SJR 7 would not be whether the amendment was objectionable as conflicting with the constitutional principles you recite; rather, it would be whether the amendment, as a subsequently adopted constitutional principle, impliedly **qualified or repealed** such principles.

In my opinion, *Chaffin* provides no direct guidance on this question. Instead, it confirms only that the Arkansas Constitution in its current form does not allow the legislature to encroach either directly or indirectly on the policy-making independence of the AGFC. The crucial remaining issue, which you raise in your first question, is whether SJR 7 would alter the constitution by amendment in a way that would *warrant* such legislative intrusion through control over commission rulemaking. This issue will not be ripe for adjudication until the legislature, in the event the voters adopt SJR 7, rightly or wrongly interprets the scope of its new authority and acts thereon.

***Question 4: Will SJR 7, as it will appear on the November 2014 General Election ballot without any ballot title and/or popular name, adequately inform the voters of the potential conflicts and/or changes that may take place with Amendment 35, Amendment 42, and/or other provisions of the Arkansas Constitution?***

This question expresses an apparent concern regarding the absence of “any ballot title and/or popular name” to inform the voters of such possible changes. In this regard, I am attaching for your convenience an earlier opinion in which I addressed what must be disclosed to the voter in the polling booth regarding a measure referred by the legislature.<sup>11</sup> As discussed in detail in my former opinion, absent fraud, a legislatively crafted constitutional amendment referred to the people pursuant to Ark. Const. art. 19, § 22 need only be identified to an extent that “distinguishes the proposed amendment from others and is recognizable as referring to the amendment that was previously published in the newspapers.”<sup>12</sup> I will not here repeat my previous analysis. Rather, I will merely note that the information appearing on the ballot need not go further than that just described. Again, the main issue in any future litigation alleging encroachment on a commission’s rights under Amendments 35 and/or 42 will likely be whether, given SJR 7’s silence on the issue, the voters intended to abridge such substantive rights in adopting the measure.

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<sup>11</sup> Op. Att’y Gen. 2013-067.

<sup>12</sup> *Id.*, quoting *Becker v. Riviere*, 277 Ark. 252, 255, 641 S. W.2d 2 (1982); see also *Thiel v. Priest*, 342 Ark. 292, 299, 28 S.W.3d 296 (2000); *Walmsley v. McCuen*, 318 Ark. 269, 272, 885 S.W.2d 10 (1994); *Becker v. McCuen*, 303 Ark. 482, 486, 798 S.W.2d 71 (1990).

***Question 5: Have all publication and other requirements in Article 19, § 22 of the Arkansas Constitution been satisfied so that the proposed amendment involving SJR 7 is now qualified for adoption in the general election of November 4, 2014?***

I am not situated to answer this question. Please contact the Arkansas Secretary of State at the following address in order to obtain this information:

**Arkansas Secretary of State  
Elections Division  
500 Woodlane, Room 026  
Little Rock, Arkansas 72201  
501-682-5070**

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN McDANIEL  
Attorney General

DM/JHD:cyh

Enclosure

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

Opinion No. 2013-067

December 23, 2013

The Honorable Mark Martin  
Secretary of State  
State Capitol, Suite 256  
Little Rock, Arkansas 72201-1094

Dear Mr. Martin:

You have requested my opinion on the following questions concerning the preparation of a popular name for a resolution of the Arkansas General Assembly that was passed at the 2013 regular session:<sup>1</sup>

1. Does the Attorney General still have the statutory authority to prepare a Popular Name for the constitutional amendments referred by the Eighty-Ninth General Assembly? If the answer is “yes,” I request that you prepare a Popular Name for SJR 7 (Issue No. 1).
2. If the answer to the first question is “no,” what is the proper course for preparing a Popular Name for SJR 7 (Issue No. 1)?

**RESPONSE**

It appears that the answer to your first question is “no.” It is my opinion in response to your second question that legislative clarification is plainly warranted, so that the procedure for identifying and distinguishing legislatively proposed amendments on the ballot is clearly established. Pending such clarification,

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<sup>1</sup> Pursuant to Article 19, Section 22 of the Arkansas Constitution, the General Assembly may propose up to three constitutional amendments for referral to the voters. The resolution at issue, Senate Joint Resolution (SJR) 7 (Issue No. 1), was passed by the 89th General Assembly and will appear on the state’s November 4, 2014 General Election ballot.

however, it is my opinion that the Secretary of State may supply a popular name as a means of identifying SJR 7 on the ballot. My office is available for consultation in this regard.

## DISCUSSION

***Question 1 - Does the Attorney General still have the statutory authority to prepare a Popular Name for the constitutional amendments referred by the Eighty-Ninth General Assembly? If the answer is “yes,” I request that you prepare a Popular Name for SJR 7 (Issue No. 1).***

As you noted in submitting your request for my opinion, in prior years the request for my assistance in preparing popular names for legislatively proposed constitutional amendments was made pursuant to A.C.A. § 7-9-110. This section previously stated as follows, in relevant part:

The Attorney General shall fix and declare the popular name by which each amendment to the Arkansas Constitution and each initiative and referred measure shall be designated.<sup>2</sup>

The term “amendment” was defined as “any proposed amendment to the Arkansas Constitution, whether proposed by the General Assembly or by the people[.]”<sup>3</sup>

As you have further noted, section 7-9-110 was amended during the 2013 legislative session to delete the language requiring the Attorney General to fix the popular name for constitutional amendments proposed by the General Assembly.<sup>4</sup> The relevant subsection now provides:

The popular name of each state measure shall be designated as provided in § 7-9-107, and the number of the measure on the ballot shall be designated as provided in § 7-9-116.<sup>5</sup>

An amendment referred to the voters by the legislature pursuant to Ark. Const. art. 19, § 22 is not a “measure” covered by this provision. Under the definitional section, as also amended by Act 1413 of 2013, the term “measure” includes “an

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<sup>2</sup> A.C.A. § 7-9-110(a) (Repl. 2011).

<sup>3</sup> A.C.A. § 7-9-101(2) (Repl. 2011).

<sup>4</sup> See Acts 2013, No. 1413, § 12.

<sup>5</sup> *Id.*, codified in relevant part at A.C.A. § 7-9-110(a) (Supp. 2013).

amendment;”<sup>6</sup> but “amendment” now means “an amendment to the Arkansas Constitution *that is proposed by the people*.”<sup>7</sup>

Accordingly, it appears that the Attorney General has not been authorized to fix and declare a popular name for constitutional amendments proposed by the General Assembly pursuant to Ark. Const. art. 19, § 22.

***Question 2 - If the answer to the first question is “no,” what is the proper course for preparing a Popular Name for SJR 7 (Issue No. 1)?***

Pending legislative clarification – which is indicated for the reasons explained below – I believe the Secretary of State may prepare a popular name for SJR 7. Some explanation of the relevant constitutional and statutory provisions will be helpful before further explaining this response.

This question arises not only as a consequence of the recent amendment to A.C.A. § 7-9-110 by Act 1413 of 2013, discussed above, but also due to the General Assembly’s failure to designate a popular name in SJR 7. Such designation is authorized by A.C.A. § 7-9-204, as also amended by Act 1413. Section 7-9-204 now states:

The General Assembly may designate in the joint resolution proposing an amendment to the Arkansas Constitution the popular name and ballot title of the amendment for the election ballot.<sup>8</sup>

The joint resolution in question – SJR 7 – designates neither a popular name nor a ballot title; hence, your question regarding the preparation of a popular name.<sup>9</sup> This question arises, understandably, due to the constitutional requirement that amendments proposed by the General Assembly be distinguished and identified for the voters. Article 19, section 22 of the Arkansas Constitution provides as follows:

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<sup>6</sup> A.C.A. § 7-9-101(5) (Supp. 2013) (codification of Acts 2013, No. 1413, § 2).

<sup>7</sup> *Id.* at (2) (emphasis added).

<sup>8</sup> A.C.A. § 7-9-204 (Supp. 2013) (codification of Acts 2013, No. 1413, § 19). Section 7-9-204 previously stated that “[t]he title of the joint resolution proposing an amendment to the Arkansas Constitution *shall be the ballot title* of the proposed constitutional amendment.” A.C.A. § 7-9-204 (Repl. 2011) (codification of Acts 2001, No. 150, § 1) (emphasis added).

<sup>9</sup> You have not asked about a ballot title for the amendment. As noted further herein, several statutes seem to assume there will be both a popular name and a ballot title for legislatively referred constitutional amendments. But as with a popular name, there currently is no express law assigning responsibility for supplying a ballot title for such proposals.

Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the State for approval or rejection; and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution, but no more than three amendments shall be proposed or submitted at the same time. *They shall be so submitted as to enable the electors to vote on each amendment separately.*<sup>10</sup>

The Arkansas Supreme Court has held based upon the language emphasized above that the submission to the voters must be sufficient to “distinguish and identify” the proposal:

Art. 19, [§] 22 does not specifically require a ballot title. All that is required is that the proposed amendments under Art. 19, [§] 22 ‘be so submitted as to enable the electors to vote on each amendment separately.’ *So, the purpose of the ‘Ballot Title’ under Art. 19, [§] 22 is not to inform the voter, but merely to distinguish and identify the amendment....* When the purpose of a ballot title is to identify, as opposed to inform, the title is sufficient if it *distinguishes the proposed amendment from others and is recognizable as referring to the amendment that was previously published in the newspapers.* A ballot title which meets this test will be upheld unless it is worded in some way so as to constitute a manifest fraud upon the public.<sup>11</sup>

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<sup>10</sup> Ark. Const. art. 19, § 22 (emphasis added).

<sup>11</sup> *Becker v. Riviere*, 277 Ark. 252, 255, 641 S.W.2d 2 (1982 (emphasis added)). See also *Thiel v. Priest*, 342 Ark. 292, 299, 28 S.W.3d 296 (2000); *Walmsley v. McCuen*, 318 Ark. 269, 272, 885 S.W.2d 10 (1994); *Becker v. McCuen*, 303 Ark. 482, 486, 798 S.W.2d 71 (1990).

Amendments referred by the General Assembly under art. 19 § 22 are governed by different standards than those initiated by the people under Ark. Const. amend. 7 (codified at Ark. Const. art. 5 § 1). *Berry v. Hill*, 232 Ark. 648, 650, 339 S.W.2d 433 (1960); *Thiel*, 342 Ark. at 299.

As reflected in the above passage, according to the court no ballot title is necessary for an amendment proposed under art. 19, § 22.<sup>12</sup> The court has consistently made this observation in ballot title cases, that is, in cases involving challenges to ballot titles that have been attached to General Assembly proposals notwithstanding the apparent absence of a ballot title requirement.<sup>13</sup> The proposed amendment must nevertheless be separately identified so as to satisfy art. 19, § 22. And the court has observed that the *popular name* serves this function. In one of the earlier cases, the court commented that “[t]he popular name actually serves the constitutional requirement of submission in a manner enabling the voters to vote on the proposed amendments separately.”<sup>14</sup> The court reiterated this point in a more recent case where it was asked to overrule its historical adherence to a less demanding standard of review when analyzing art. 19, § 22 proposals:

In the *Chaney* decision, the court noted the two entirely different methods by which it has reviewed referred constitutional amendments under art. 19, § 22, as compared to initiative proposals under Amendment 7. The *Chaney* court further pointed out that proposals referred by the General Assembly require no ballot title, unlike those measures that are initiated under Amendment 7. Art. 19, § 22, only requires that proposals by the General Assembly be so submitted as to enable the people to vote on each amendment separately, and this court in *Chaney* determined that the popular name, alone, served this function. [Citation omitted.]<sup>15</sup>

When the court observed in *Thiel v. Priest* (decided in 2000) that the popular name serves the function of enabling the voters to vote on each legislative proposal separately, the Attorney General was responsible for fixing the popular name. This was in accordance with Act 512 of 1993, which transferred responsibility for fixing popular names for legislative proposals from the Governor, Secretary of

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<sup>12</sup> Note the quotation marks around the term “Ballot Title” in the above excerpt. This presumably is in recognition of the fact that while legislative proposals must be separately identified for the voters pursuant to art. 19, § 22, a ballot title is not specifically required in order to meet this constitutional directive.

<sup>13</sup> See *Forrester v. Martin*, 2011 Ark. 277, \* 5 (June 23, 2011); *Thiel*, 342 Ark. at 299; *Walmsley*, 318 Ark. at 272; *McCuen*, 303 Ark. at 486; *Riviere*, 277 Ark. at 254; *Chaney v. Bryant*, 259 Ark. 294, 300, 532 S.W.2d 741 (1976).

<sup>14</sup> *Chaney*, 259 Ark. at 297.

<sup>15</sup> *Thiel*, 342 Ark. at 299 (emphasis added). The court declined to overrule “the manifest-fraud standard to review art. 19, § 22 measures.” *Id.* at 300.

State and State Comptroller to the Attorney General.<sup>16</sup> The 1993 act also made the Secretary of State alone responsible for fixing the number by which such proposals are to be designated. Previously, a 1933 act directed the Governor, Secretary of State, and State Comptroller<sup>17</sup> to “fix and declare a number and a popular name by which each amendment to the constitution of Arkansas, and each initiated and referred measure shall be designated.”<sup>18</sup> The 1933 act was apparently prompted by confusion regarding the designation of amendments and other measures on the ballot.<sup>19</sup>

The setting of popular names for legislatively proposed constitutional amendments thus dates from 1933. As a consequence of the amendments discussed above, however, currently no law expressly directs any official to prepare a popular name (or ballot title)<sup>20</sup> for legislative proposals. The Secretary of State assigns an “issue number,” but no official is assigned responsibility for preparing a popular name:

(a) The Secretary of State shall fix and declare the number of the issue by which state measures shall be designated on the ballot.

(b) Each state measure shall be identified with the issue number designated by the Secretary of State.

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<sup>16</sup> Acts 1993, No. 512, § 9. The Attorney General was already responsible, pursuant to a 1943 enactment, for approving popular names and ballot titles for measures initiated or referred to the people under the provisions of Amendment 7 to the Arkansas Constitution. *See* Acts 1943, No. 195, § 4 (codified, as amended, at A.C.A. § 7-9-107 (Supp. 2013)).

<sup>17</sup> The office of state comptroller was abolished by Acts 1967, No. 468, § 2.

<sup>18</sup> Acts 1933, No. 71, § 1.

<sup>19</sup> Act 71 of 1933 act was entitled “An Act to Properly Designate the Several Amendments to the Constitution of Arkansas, and Initiated and Referred Acts, and to Avoid Confusion.” It appears that amendments proposed by the General Assembly were originally numbered by the Governor. *See* Acts 1879, No. 80, §§ 4, 7. It further appears that legislative proposals were not designated by popular name until 1933, when Act 71 of that year was enacted. Other than the number designation, I am unaware how legislatively proposed amendments were designated on the ballot between 1879 and 1933.

<sup>20</sup> Recall that prior to its recent amendment, A.C.A. § 7-9-204 (originally enacted in 2001) required that the title of legislative proposals shall be the ballot title. *See* n. 8, *supra*. The Arkansas Supreme Court had previously held that neither Ark. Const. art. 19, § 22 nor the statutes requires a ballot title for legislative proposals. *McCuen*, 303 Ark. at 486; *Chaney*, 259 Ark. at 297. It is apparent from several ballot title cases that a title was nevertheless designated, sometimes (but not always) in the resolution itself. *See, e.g., Thiel*, 342 Ark. at 295; *McCuen*, 303 Ark. at 485; *Riviere*, 277 Ark. at 254. I do not know how ballot titles were supplied in those cases where the joint resolution did not itself supply the title. *See, e.g., Chaney*, 259 Ark. at 296.

(c) Measures referred to a vote by the General Assembly shall be captioned, “CONSTITUTIONAL AMENDMENT (OR OTHER MEASURE) REFERRED TO THE PEOPLE BY THE GENERAL ASSEMBLY”.<sup>21</sup>

It is clear from subsection (c) above that this “issue number” designation encompasses constitutional amendments proposed by the General Assembly. This is also evident under the statute that governs the ballot form:

Each statewide measure shall be designated on the ballot as an issue, and the issues shall be numbered consecutively beginning with ‘Issue 1’ and in the following order:

(A) Constitutional amendments proposed by the General Assembly, if any....[.]<sup>22</sup>

The “issue number” designation plainly will not, standing alone, sufficiently identify and distinguish the legislative proposal(s) so as to satisfy Ark. Const. art. 19, § 22. Indeed, several statutes seem to contemplate the additional identification of legislative proposals by popular name and ballot title.<sup>23</sup> But, as noted above, no official has been expressly assigned the duty to prepare either a popular name or a ballot title when the joint resolution does not designate one.

There is, nevertheless, a practical necessity of sufficiently identifying legislative proposals on the ballot. Once the General Assembly has voted to propose a constitutional amendment and the necessary journal entries have been made, Ark. Const. art. 19, § 22 requires that the proposal be “published ... for six months immediately preceding the next general election ..., at which time the same shall be submitted to the electors of the State....” With regard to submission, art. 19, § 22 expressly requires that such proposals “be so submitted as to enable the electors to vote on each amendment separately.” These are “procedural constitutional requirements.”<sup>24</sup> They plainly cannot be disregarded.<sup>25</sup> The constitution does not

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<sup>21</sup> A.C.A. § 7-9-116 (Repl. 2011).

<sup>22</sup> A.C.A. § 7-9-117(c)(2)(A) (Repl. 2011).

<sup>23</sup> *E.g.*, A.C.A. § 7-9-113 (Repl. 2011) (publication of notice to contain the number, popular name, and ballot title); A.C.A. § 7-9-117 (Rep. 2011) (title and popular name to be printed upon official ballot, followed by “FOR ISSUE NO....AGAINST ISSUE NO....”).

<sup>24</sup> *Chaney v. Bryant*, 259 Ark. at 299.

<sup>25</sup> *Id.*

specify how the submission requirement is to be satisfied and ideally this will be expressly addressed by the General Assembly, either in the joint resolution proposing the amendment or by statute. Absent legislative clarification, however, I believe the Secretary of State has the power, if not the duty, to ensure that proper submission to the electorate occurs. I believe this reasonably follows from his significant statutory role in the submission process. The Secretary of State is responsible for publishing the necessary notices<sup>26</sup> and he must certify legislatively referred constitutional amendments to the county board of election commissioners for posting and placement on the ballot.<sup>27</sup> The county board in turn must print the official ballot “in the manner certified by the Secretary of State.”<sup>28</sup>

The Secretary of State is therefore the official chiefly responsible under the statutes for undertaking critical procedural steps in meeting not only the publication requirement, but also the requirement that legislative proposals be “submitted to the electors of the State...” I believe it reasonably follows that he can act to avoid a failure of submission in the event the General Assembly has not designated a popular name or ballot title in the joint resolution, or otherwise expressly addressed the procedure for identifying and distinguishing legislatively proposed amendments on the ballot.

As regards a popular name for SJR 7, specifically, my office will be available for consultation.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN MCDANIEL  
Attorney General

DM:EAW/cyh

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<sup>26</sup> A.C.A. § 7-9-113 (Repl. 2011).

<sup>27</sup> A.C.A. §§ 7-5-204(a)-(c); 7-9-117(a) (Repl. 2011).

<sup>28</sup> *Id.*