



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2014-142

January 14, 2015

Raymond Redmond, Sponsor
3830 Rodgers Road West
Rison, Arkansas 71665

Dear Mr. Redmond:

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 act, as follows:

Popular Name

ARKANSAS PRIVACY PROTECTION ACT

Ballot Title

An act by the People of Arkansas providing privacy protections in the areas of bank records, breach of privacy reporting, credit records, electronic records, information contained in government databases, employment records, mailing lists, school records, social security numbers, tax records, and for other changes.

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, if practicable, substitute and certify a more suitable and correct popular name and ballot title. Or, if the proposed popular name and ballot title are sufficiently misleading, the Attorney General 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

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

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).

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).

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

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.

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).

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

¹⁴ *Id.*

Applying the foregoing law to your measure, I conclude that I must reject your ballot title for failing to summarize the proposal's provisions and effects.

Preliminary Matter

Your proposal does not contain the required enacting clause. The cases discussed above, in requiring popular names and ballot titles to be intelligible, honest, and impartial, take for granted an implied fourth requirement: that the proposal comply with technical requirements plainly set forth in the constitution. Your proposal fails to do so.

The constitution provides among other things that “[t]he style of all bills initiated and submitted under the provisions of this section shall be, ‘Be It Enacted by the People of the State of Arkansas (municipality or county, as the case may be).’”¹⁵

The Arkansas Supreme Court has elaborated:

Our constitution in its present form does not afford leeway for innovative case interpretations of substantial compliance. Its language is clear that the [enacting clause] provision shall be treated as mandatory. Simply put, that all bills initiated must be submitted in the . . . language set forth in Amendment 7. . . .

Thus our constitution speaks, and thus our law requires.¹⁶

Your submission is not in final “petition” format, and it may be your intention to add an enacting clause when the proposal is incorporated into a formal petition. As noted, however, the constitution requires that the enacting clause be the bill’s “style.” Your submitted text is presumably the entire language of your proposed “bill.” Because this language does not include the enacting clause and an act initiated without it would be subject to challenge, voters may be misled as to the effectiveness of the measure.

¹⁵ Ark. Const. amend. 7 (codified at Ark. Const. art. 5, § 1 – *THE PETITION – Enacting Clause*).

¹⁶ *Mertz v. States*, 318 Ark. 390, 394-95, 885 S.W.2d 853 (1994); see also *United States Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994) (enacting clause required for initiated acts, though not for initiated constitutional amendments), *Haley v. Carter*, 221 Ark. 20, 24, 251 S.W.2d 826 (1952) (absence of enacting clause was “fatal defect”).

Ballot Title

Your ballot title is impermissibly misleading in failing to summarize any of the proposal's provisions; to mention some provisions at all; to describe changes the proposal would make in existing state law; to describe the extent, if any, to which existing federal law already provides some of the protections intended to be provided by the proposal; to describe the extent, if any, to which your proposal conflicts with existing federal law and would therefore be preempted and ineffective; to describe how, if at all, the proposal's provisions could or would be enforced against the various out-of-state persons and entities it purports to bind; the extent to which provisions of the proposal may be unconstitutional; and to disclose other material facts that would give voters grounds for reflection.

Your ballot title is merely a statement that the act would “provid[e] privacy protections” in several – but not all – areas addressed by the proposal and make “other changes.” This language is wholly deficient. It evidences little or no effort to summarize the proposal and its material effects and limitations and is therefore inherently misleading under the standards established by the Arkansas Supreme Court (as set out above).

Proposal's Text

In my view, as discussed above, your ballot title is wholly deficient as it fails to summarize the proposal. Additionally, the *text* of the proposal contains many ambiguities, making it impossible to substitute a ballot title for the one proposed. I cannot fairly or completely describe the proposal to the electorate in a ballot title without resolution of the proposal's ambiguities. I am therefore unable to substitute and certify a more suitable and correct ballot title under A.C.A. § 7-9-107(b).¹⁷

In the normal course, this office attempts to point out and describe all the ambiguities contained in a proposal rejected because of such ambiguities. Here, I

¹⁷ You should be aware that I likely would not have substituted a ballot title in this instance even if the body of your proposal had been free of ambiguity. Where the proposal does not evidence a good faith effort to comply with the rules governing the initiative process, including the requirement to summarize the proposal in a fair, accurate, and complete manner, and is therefore sufficiently misleading under A.C.A. § 7-9-107(c), this office will decline to prepare a substitute. *See, e.g.*, Op. Att’y Gen. 2011-031, 2011-023, 2008-056, 2007-316.

have rejected the proposal because of fundamental shortcomings in the ballot title. Additionally in this case, given your proposal's length, complexity, grammatical errors, and misspellings, my preparation of such a list is impracticable and would go well beyond the appropriate examination and certification process and amount to acting as the proposal's drafter. In considering whether to submit a revised proposal, you should be aware that we may call attention to a proposal's ambiguities on any review, even though they may have been embodied in an earlier version of the proposal. If you have not done so already, you may wish to consult legal counsel or someone experienced in the drafting of legislation and/or the editing of legal documents before resubmitting your proposed initiated act.

I can say in general that your proposal has several shortcomings that create ambiguity about its intent and effect. I list here some examples:

- Section 5 provides in part that "If any breach of privacy of any information contained by any person or entity shall be breached," then the Attorney General will undertake an investigation as described in the section. I do not know what might constitute a breach of a breach. Neither do I know what you mean by the phrase "information contained by any person."
- Section 9 provides in part that "Employment records shall only be made available to third parties by any person or other entity that has access to such records." It is difficult to imagine how a person that does NOT have access to employment records could make them available to a third party. The sentence is nonsensical and its meaning is therefore impossible to discern.
- Section 10 provides in part that "No list . . . shall be made . . . that shall list the name . . . or telephone number . . . of any resident of this State." The provision therefore would purport to make it unlawful, for example, to publish a telephone book or prepare a Christmas card list. It seems unlikely that result is intended but the real intent is impossible to determine.
- Section 11 provides in part that "No educational record shall be released . . . except by a written agreement to share such information with no more than one person or entity at a time. . . ." There being no requirement in the provision that the subject of the records be a party to the agreement, the provision provides no privacy protection at all, and its meaning is therefore unclear.

- Section 11 further provides in part that “at no time shall any educational record be made available to any list . . . that shall make such records publically [sic] available.” I do not know what it means to make a record available to a list.

I reiterate that the foregoing lists only a few examples of the proposal’s many ambiguities and is not exhaustive.

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,

A handwritten signature in black ink, appearing to read 'LR', with a large, sweeping flourish extending to the left and another to the right.

LESLIE RUTLEDGE
Attorney General

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Enclosure

2014-142

DEC 30 2014

Popular Name:

Arkansas Privacy Protection Act.

ATTORNEY GENERAL
OF
ARKANSAS

Ballot Title:

An Act by the People of Arkansas providing privacy protections in the areas of bank records, breach of privacy reporting, credit records, electronic records, information contained in government databases, employment records, mailing lists, school records, social security numbers, tax records, and for other changes.

Act Text:

Section 1. Short title and citation.

This act shall be known and cited as the "Arkansas Privacy Protection Act".

Section 2. Enforcement.

The people of the State of Arkansas shall have the right to file civil suits of law in the circuit court of the county of their residence for breaches of any section or subsection of this act, in an amount not to exceed thirty thousand dollars per record per incident per day. The Attorney General of this State shall have proper jurisdiction to bring court proceedings against any foreign entity violating any section or subsection of this act.

Section 3. Applicability.

This act shall apply to all persons, partnerships, companies, corporations, associations, and any other type of entity that operates within or collects information about any person within the State of Arkansas. This act shall also apply to those persons, partnerships, companies, corporations, associations, and all other types of entities that operates or collects information about any person within the State of Arkansas that shall sell, trade, or otherwise make any information available to any third party within or without the State of Arkansas. All references to notarized statements shall be construed to mean a notary public duly appointed and in good standing within the State of Arkansas for the county of the resident executing said statements.

Section 4. Bank Records.

§1. Banking and financial records shall only be made available to agencies of the United States Federal Government according to Federal Statutes, Rule or Regulation. Banking and financial records shall only be made available to agencies of the State of Arkansas by court order in the circuit court of the county in which the resident whose records are being sought by any agency of the State of Arkansas. Such resident shall be given the opportunity, in open court, to file any such motions which may be available to him or her to stop the banking and/or financial records from being released to the State of Arkansas or any agency or department thereof.

§2. No bank, credit union, or other financial institution shall make any information about a resident of this State available to any third party, without the expressed written consent of the resident whose information is being made available to a third party. This subsection shall not apply to banks, credit unions, or other financial institutions that offer online banking services through a third party vendor provided that such vendor is bound by the laws of this act. This act shall not apply to any bank, credit union, or other financial institution employee who has a bonafied reason to access such records in the ordinary course of daily business with the resident which owns the account, or for debt collection activities, or in the ordinary course of mergers of financial institutions.

Section 5. If any breach of privacy of any information contained by any person or entity shall be breached, the Attorney General of the State of Arkansas shall investigate whether the person or entity had proper and adequate safeguards to ensure that no information shall have been breached. If the Attorney General finds that necessary and proper safeguards were in place for the protection of privacy of the information on the residents of the State of Arkansas, no action other than informing all those residents whose information was breached shall be necessary. If the Attorney General shall find that other safeguards of the protection of privacy could have helped advert the breach of information, the Attorney General of this State shall bring a suit of law against the person or entity seeking an award that shall penalize the person or entity for willful breach of privacy.

Section 6. The credit records of the People of Arkansas shall not be sold, transferred, or otherwise given away to any third party entity unless a signed and notarized statement allowing the credit record to be released to a singular person or entity. No credit record shall be made available to any person or entity, either singulary or in a group of other records, including prescreened offers of credit, sharing credit records between companies or other entities.

Section 7. No electronic information collected on one website shall be given away, sold, rented, or otherwise shared with any other website, company, person or business entity. No website shall collect any information about a resident of the State of Arkansas that is intended to be gathered for a third party, nor shall any website make available to any other person or other entity any email address, telephone number, address nor any other information.

Section 8. Information contained in databases maintained by the State of Arkansas shall never be sold, rented, or otherwise given to any private entity for any reason. This section shall not apply to sharing of data between governmental agencies.

Section 9. Employment records shall only be made available to third parties by any person or other entity that has access to such records. It shall be a violation of this Act for employment records to be released without a written and notarized statement authorizing the release of the record to one person or entity. Such statement shall not release the records to any person or entity except that person or entity which is specified in the statement. It shall also be a violation of this Act for any such record or records be made available to any list by way of any database, either electronic, written, verbal, or otherwise.

Section 10. No list, either electronic or otherwise, shall be made of any person or person or entity or entities within this state that shall list the name, or address, or telephone number, or email address or addresses of any resident of this State.

Section 11. No educational record shall be released by any publically funded primary, secondary, or post-secondary except by a written agreement to share such information with no more than one person or entity at a time and at no time shall any educational record be made available to any list, electronic or otherwise, that shall make such records publically available.

Section 12. No person or entity, other than banks, credit unions, and other financial institutions shall have the authority to request the Social Security Number of any Arkansas resident. The State of Arkansas shall provide all residents of this State with a ten (10) digit letter and number combination card to serve in the stead of a Social Security Number within the State of Arkansas and without the State of Arkansas for any person or entity that is not a bank, credit union, or financial institution. It shall be a violation of this act for any person or entity specified in this section to request the Social Security Number of any resident of this State and the Attorney General

shall bring suits of law against any person or entity who shall violate this section.

Section 13. Tax records of individual shall not be subject to the Arkansas Freedom of Information Act and shall only be made available upon court order. No person or other entity shall have the power or standing to request the tax records of any resident of this State except for financial institutions.

Section 14. Arrest records shall not be made public knowledge until such person arrested has been adjudicated as guilty in a court of law.

Section 15.

§1. The people of the State of Arkansas shall have the right to verbally or in writing to inform a debt collector trying to collect a debt to cease any and all contact, including via postal mail, telephonic means, electronic means, and all other means. If any debt collector shall continue contact after being informed otherwise by a resident of this state, the offended resident shall have the power to seek damages of ten thousand dollars per contact after being informed not to contact the resident under this section, in the circuit court of the county of the resident. The call log on the resident's cellular phone, home phone or other proof shall be primifaced evidence of violation by the debt collector, or if the debt collector shall not appear at the hearing, a default judgement shall be entered against the debt collector and the debt collector shall have fifteen days to pay the judgement or the judgement shall be tripled every fifteen days thereafter in which it shall not be paid in full to the offended resident.

§2. No domestic debt collector shall be authorized to collect any debt without first registering with the Attorney General of the State of Arkansas and executing a secured bond in the amount of one million dollars, payable to the State of Arkansas, for possible future breaches of this Act, and any other act, rule or regulation of the State of Arkansas.

§2. No foreign debt collector shall be authorized to collect any debt without first registering with the Attorney General of the State of Arkansas and executing a secured bond in the amount of five million dollars, payable to the State of Arkansas, for possible future breaches of this Act, and any other act, rule or regulation of the State of Arkansas.

§3. No domestic or foreign debt collector shall initiate more than one telephone call per day and no more than two per week when trying to

collect a debt within the State of Arkansas, unless requested to stop contact under subsection 1 of this section. No debt collector shall contact any resident of this state's place of employment, family, friends or anyone other than the debtor himself or herself.

§4. No domestic debt collector shall be authorized to collect any debt without first registering with the Attorney General of the State of Arkansas and executing a secured bond in the amount of two million dollars, payable to the State of Arkansas for possible future breaches of this Act, and any other act, rule or regulation of the State of Arkansas.

§5. No domestic or foreign debt collector shall be authorized to collect any debt within the State of Arkansas if such debt collector shall have violated this act or any subsection thereof three times or more.

Section 16. It shall be the policy of the State of Arkansas to protect the strict privacy of the residents of the State of Arkansas.

Section 17. Any law, rule, regulation, or court order that is to the contrary of this Act shall be deemed null, void, and unenforceable to the extent that such law, rule, regulation, or court order conflicts with this Act.

Section 18. If any section, subsection, sentence, phrase, or word shall be deemed unenforceable or unconstitutional by a court of proper jurisdiction within the State of Arkansas the rest of this act shall survive intact and in full force and effect.