



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-065

June 25, 2015

Brenda V. Taylor, Esq.
Brenda Vassaur Taylor, P.A.
P.O. Box 8068
Fayetteville, AR 72703

Dear Mrs. Taylor:

Please note that 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.

This is in response to your request for certification, pursuant to Ark. Code Ann. § 7-9-107 (Supp. 2013), of the popular name and ballot title for a proposed constitutional amendment. You have submitted the following popular name and ballot title for my review:

Popular Name

ARKANSAS TERM LIMITS AMENDMENT OF 2016

Ballot Title

A proposed amendment to Arkansas Constitution concerning term limits for the Arkansas General Assembly; to provide that service shall not exceed three (3) two-year terms in the House of Representatives, two (2) four-year terms in the Senate, or ten (10) years of combined service in the House of Representatives and Senate; to clarify that a person is ineligible for election to the Senate if the term would cause the person to exceed the ten-year limit; to exclude, from the computation of whether a limit has been reached, a partial term to fill a vacancy; to provide that this amendment will not

cut short or invalidate a term to which a person was elected prior to January 1, 2017; to provide that Article 5, section 2 may be amended only by a constitutional amendment initiated by the people; to declare that if any provision in Article 5, section 2 should be held invalid, the remainder shall stand.

The Attorney General is required, pursuant to Ark. Code Ann. § 7-9-107, to certify the popular name and ballot title of all proposed initiative and referendum acts or constitutional 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.

In this regard, Ark. Code Ann. § 7-9-107 neither requires nor authorizes the Attorney General to make legal determinations concerning the merits of the proposed 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 the Attorney General 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,

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).

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;⁸ otherwise voters could run afoul of Ark. Code Ann. § 7-5-522's five-minute limit in voting booths when other voters are waiting in line.⁹ 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.¹⁰ The title, however, must be free from any misleading tendency, whether by amplification, omission, or fallacy; it must not be tinged with partisan coloring.¹¹ The ballot title must be honest and impartial,¹² and it must convey an intelligible idea of the scope and significance of a proposed change in the law.¹³

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 *See* Ark. Code Ann. § 7-9-107(b) (Supp. 2013).

⁹ *Bailey*, 318 Ark at 288, 884 S.W.2d at 944.

¹⁰ *Id.* at 293, 884 S.W.2d at 946–47.

¹¹ *Id.* at 284, 884 S.W.2d at 942.

¹² *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

¹³ *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.”¹⁴ 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.”¹⁵ 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.

Having analyzed your proposed amendment, as well as your proposed popular name and ballot title in line with the above precepts, it is my conclusion that I must reject your proposed ballot title due to deficiencies in the text of your proposed measure, as well as a failure to summarize in your ballot title how your measure would change current law. A number of additions or changes are, in my view, necessary in order to more fully and correctly summarize your proposal. I cannot, however, at this time, fairly or completely summarize the effect of your proposed measure to the electorate in a popular name or ballot title without the resolution of the deficiencies. I am therefore unable to substitute and certify a more suitable and correct popular name and ballot title pursuant to Ark. Code Ann. § 7-9-107(b).

I refer to the following ambiguities:

1. According to the text of your proposal, you are seeking to amend the Arkansas Constitution. However, your proposed constitutional amendment includes an “enacting clause” (“Be it enacted by the people of the State of Arkansas”). While Article 5, section 1 of the Arkansas Constitution requires the inclusion of an enacting clause for “bills” initiated by the people (that is, proposed initiated acts), there is no such requirement for constitutional amendments so initiated.¹⁶ The inclusion of an enacting clause that is required for a “bill” in a proposed

¹⁴ *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 383 (2000).

¹⁵ *Id.*

¹⁶ *See United States Term Limits, Inc. v. Hill*, 316 Ark. 251, 262-63, 872 S.W.2d 349, 355 (1994) (discussing the requirements under Amendment 7 to the Arkansas Constitution (now found at Ark. Const. art. 5, § 1)).

constitutional amendment makes the proposal ambiguous as to what the voters are being asked to consider, a bill or a constitutional amendment. This could be confusing to the voters.¹⁷

2. It is clear from the text of your proposal that you wish to amend the Arkansas Constitution with respect to term limits. However, the prefatory language in section 1¹⁸ of your proposal states that the proposal would amend Article 5, section 2 of the constitution. This reference to this specific part of the constitution makes the text of your proposal ambiguous for the following reasons. You have included language that by virtue of its not being underlined suggests that it is already a part of Article 5, section 2 (your subsection (b) concerning the Arkansas Senate). That language is not found in Article 5, section 2,¹⁹ but is instead a part of Article 5, section 3. Similarly, the end of your text, to be more fully discussed herein, contains stricken language regarding legislators' years of service limitations in a way that suggests that it is subsection (c) of Article 5, section 2. However, there is no subsection (c) of Article 5, section 2, and thus no such language could be stricken from it. The years-of-service limitation language instead was made a part of Amendment 73, section 2 with the passage of Amendment 94 in 2014.²⁰ This gives rise to uncertainty as to the precise changes in law under your proposal, including the part of the constitution actually being amended.

¹⁷ See Op. Att'y Gen. 2013-039 at 4.

¹⁸ I note here that your proposal, after the so-called "enacting clause" discussed above, begins with the heading "SECTION 1." This would seem to indicate that there is an additional section or sections to follow in your proposal. However, your proposal comprises only one section. This may give rise to some confusion, given the several references in your proposal's text to "this Section 2."

¹⁹ Article 5, section 2 of the constitution states in its entirety: "The House of Representatives shall consist of members to be chosen every second year, by the qualified electors of the several counties."

²⁰ Amendment 94, section 3, repealed the term limits provisions of Amendment 73 and replaced them with an overall 16-years-of-service limit on legislators. This section is to be codified at Ark. Const. amend. 73, § 2(c)(4).

3. Your ballot title states, as does the text in your proposed subsection (c)(3), that your proposal “will not cut short or invalidate a term to which a person was elected prior to January 1, 2017.” I am uncertain what this is intended to convey or to whom it is meant to apply. It might be interpreted to refer only to those legislators who won re-election in November 2016 under the auspices of Amendment 94, but whose terms would run afoul of the terms of your proposal should it be adopted. Or, it might be interpreted to refer to any legislator seeking election after January 1, 1993, per the terms of section 6 of Amendment 73.²¹ Uncertainty arises in this regard because there is no language in your measure addressing when the counting of terms or the years of service is to commence, or to which class of legislators or former legislators your proposal applies.²²

The above ambiguities must be clarified so that these important aspects of your proposed measure may be properly reflected in a ballot title that fully and fairly summarizes the measure. Clarifying these ambiguities is also critical to a ballot title that will sufficiently inform the voters about the changes in current law that they are being asked to approve.

In addition to the ambiguities above, I also note several significant changes to the law your proposal would make. As stated above, the ballot title must convey an intelligible idea of the scope and significance of a proposed change in the law.²³

²¹ “This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all person (sic) thereafter seeking election to the offices specified in this Amendment.” Ark. Const. amend. 73, § 6(a).

²² This was an important issue the Arkansas Supreme Court addressed in *Hill*, *supra* note 16, wherein the court stated that Amendment 73—which was adopted in 1992 and imposed term limits on the state constitutional officers and members of the General Assembly—was ambiguous as to when the counting of terms should begin. The court held that the amendment applied *prospectively* to periods of service commencing on or after January 1, 1993, and not *retroactively*. See *Hill*, 316 Ark. at 274, 872 S.W.2d at 361 (stating that “[c]onstitutional amendments operate prospectively unless the language used or the purpose of the provision indicates otherwise” (citing *Drennen v. Bennett*, 230 Ark. 330, 322 S.W.2d 585 (1959)). See also Op. Att’y Gen. 2014-134.

²³ See *Christian Civic Action Committee*, *supra* note 13, 318 Ark. at 250, 884 S.W.2d at 610. See also *Bradley v. Hall*, 220 Ark. 925, 251 S.W.2d 470 (1952), where the supreme court elaborated on the duty of a proposal to describe changes in the law it would make:

Your proposed ballot title contains no information about the changes brought about by your proposal. Your ballot title must, in my opinion, be redesigned to reflect the following significant changes:

1. As I have previously noted, Section 3 of Amendment 94 appears stricken at the very end of the text of your proposed measure. As stated above, uncertainty arises from the inclusion of this language, as your proposed measure makes it appear as though it is currently a part of Article 5, section 2 of the constitution. It may be that you intend, by striking through this language to repeal this provision that is part of Amendment 94. This is unclear. I also note that it appears your intent is to repeal Amendment 94's abolition of term limits and imposition of the 16-years-of-service limit, and replace that with the reinstatement of term limits and imposition of a shorter overall years-of-service limit. This significant change in the law is not reflected in the ballot title you have proposed. A more complete effort to summarize and explain to voters how the proposal would repeal and change current law must be undertaken. Without such, the ballot title is deficient.
2. The text of your proposed subsection (c)(1)(C)(ii) regarding eligibility for election to the Senate states that a "a future term after apportionment will be considered to be a four-year term." This also represents a significant change in the law of which there is no mention in the ballot title. Currently, under Amendment 94, the two-year Senate terms served as a result of

It is evident that before determining the sufficiency of the present ballot title we must first ascertain what changes in the law would be brought about by the adoption of the proposed amendment. For the elector, in voting upon a constitutional amendment, is simply making a choice between retention of the existing law and the substitution of something new. It is the function of the ballot title to provide information concerning the choice that he is called upon to make. Hence the adequacy of the title is directly related to the degree to which it enlightens the voter with reference to the changes that he is given the opportunity of approving.

the required Senate-wide election following reapportionment²⁴ are *not* included when calculating the total number of years served by a member of the General Assembly.²⁵ Your proposal does not specifically mention these two-year terms that some senators must face after reapportionment.²⁶ Presumably, however, under the generalized phrase “a future term after apportionment,” these two-year terms would be considered as four-year terms for the purposes of your measure’s 10-year limitation on years of service. This would significantly change current law, and as such must be adequately conveyed to the voter in the ballot title. But, as stated above, no attempt has been made to summarize or explain that to the voters in the ballot title. It should perhaps be noted in this regard that simply restating the phrase “a future term after apportionment” in your ballot title, in my opinion, will not satisfy the court’s test for ballot title sufficiency. I don’t believe that the average voter will fully understand the change in the current law that you are proposing in this respect or its significance. I am mindful of the court’s rulings that a ballot title must convey an intelligible idea of the scope and significance of a proposed change in the law and not

²⁴ Pursuant to Article 8, section 6 of the Arkansas Constitution, all 35 state senate positions are up for election in the next general election after the State Board of Apportionment reapportions the Senate districts following each federal decennial census. This is regardless of whether an incumbent’s four-year term to which that senator had previously been elected has expired. Furthermore, at the first regular legislative session after such reapportionment, the Senate is to divide itself into two classes by lot, “eighteen of whom shall serve a period of two years and the remaining seventeen for four years until the next reapportionment....” Publisher’s Note to Ark. Const. art. 8, § 6. This is done in order to retain staggered Senate terms. This also means that, absent any term or other service limits, more than half of those senators just elected will only be able to serve for two years instead of the usual four before having to stand for re-election. *See Williams v. Elrod*, 244 Ark. 671, 426 S.W.2d 797 (1968) (holding that the lot-drawing provisions of Ark. Const. amend. 23—which rewrote Article 8—were not in conflict with Ark. Const. amend. 45, which amended amend. 23); *Moore v. McCuen*, 317 Ark. 105, 109, 876 S.W.2d 237, 239 (1994) (holding that “the state has a rational basis for preserving the staggered-term provisions which have been a part of our constitutions for more than 150 years.”).

²⁵ *See* Ark. Const. amend. 94, § 3 (to be codified at Ark. Const. amend. 73, § 2(c)(4)).

²⁶ *See* explanation of Ark. Const. art. 8, § 6, *supra* note 24.

“cloak in semantic obscurity the actual nature of the proposed enterprise.”²⁷

3. Your proposed new subsection (d), titled simply “Amendment,” states that “[t]his Section 2 may be amended only by a constitutional amendment initiated by the people under Arkansas Constitution Article 5, Section 1, as amended by Amendment 7.” Although it is not expressly stated as such, this presumably is intended to prevent the General Assembly from submitting to the voters future proposed constitutional amendments regarding term limits. This too represents a significant change in the law of which the voters must clearly be made aware. While a shortened version of this language is in your ballot title, there is no mention of this provision’s effect on Article 19, section 22 of the constitution.²⁸ In addition to limiting the number of terms and years of service of legislators, your proposal would limit the General Assembly’s authority to submit constitutional-amendment proposals to the voters under Article 19, section 22. In sum, your proposal would seemingly represent an amendment by implication of Article 19, section 22 of the constitution. This significant change in the law must be adequately summarized for the voters and properly reflected in the ballot title.

Without the necessary information regarding the extent to which your proposal would change current law, it will be impossible for a voter to make an informed “choice between retention of the existing law and the substitution of something new.”²⁹ Your ballot title must be redesigned to reflect these significant changes in current law. I must therefore reject your ballot title as insufficient on this basis, as

²⁷ *Christian Civic Action Committee*, *supra* note 13, 318 Ark. at 249, 884 S.W.2d at 609.

²⁸ Article 19, section 22 authorizes the General Assembly to refer to the electorate as many as three proposed constitutional amendments at the next general election after a regular legislative session. The only restrictions this constitutional provision contains are 1) a limit on the number of constitutional-amendment proposals the legislature may refer to the voters, i.e. three; and 2) a requirement that each proposed constitutional amendment must be submitted as a separate ballot issue.

²⁹ *Bradley*, *supra* note 23, 220 Ark. at 927, 251 S.W.2d at 471.

well as on the basis of the above ambiguities that prevent me from certifying a revised ballot title for your measure.

My office, in the certification of ballot titles and popular names, does not address 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 Ark. Code Ann. § 7-9-107, and my duty is to the electorate.

Based on what has been submitted, my statutory duty is to reject your proposed ballot title for the foregoing reasons and instruct you to redesign the proposed measure and ballot title.³⁰ You may, after clarification of the matters discussed above, resubmit your proposed constitutional amendment along with a proposed popular name and ballot title at your convenience.

Sincerely,



LESLIE RUTLEDGE
Attorney General

LR/cyh

³⁰ Ark. Code Ann. § 7-9-107(c)

Popular Name

ARKANSAS TERM LIMITS AMENDMENT OF 2016

Ballot Title

A PROPOSED AMENDMENT TO ARKANSAS CONSTITUTION CONCERNING TERM LIMITS FOR THE ARKANSAS GENERAL ASSEMBLY; TO PROVIDE THAT SERVICE SHALL NOT EXCEED THREE (3) TWO-YEAR TERMS IN THE HOUSE OF REPRESENTATIVES, TWO (2) FOUR-YEAR TERMS IN THE SENATE, OR TEN (10) YEARS OF COMBINED SERVICE IN THE HOUSE OF REPRESENTATIVES AND SENATE; TO CLARIFY THAT A PERSON IS INELIGIBLE FOR ELECTION TO THE SENATE IF THE TERM WOULD CAUSE THE PERSON TO EXCEED THE TEN-YEAR LIMIT; TO EXCLUDE, FROM THE COMPUTATION OF WHETHER A LIMIT HAS BEEN REACHED, A PARTIAL TERM TO FILL A VACANCY; TO PROVIDE THAT THIS AMENDMENT WILL NOT CUT SHORT OR INVALIDATE A TERM TO WHICH A PERSON WAS ELECTED PRIOR TO JANUARY 1, 2017; TO PROVIDE THAT ARTICLE 5, SECTION 2 MAY BE AMENDED ONLY BY A CONSTITUTIONAL AMENDMENT INITIATED BY THE PEOPLE; TO DECLARE THAT IF ANY PROVISION IN ARTICLE 5, SECTION 2 SHOULD BE HELD INVALID, THE REMAINDER SHALL STAND.

Be it enacted by the people of the State of Arkansas:

SECTION 1. Arkansas Constitution Article 5, Section 2 is amended to read as follows:

2. Legislative Branch.

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts.

(c) Term Limits.

(1)(A) A member of the Arkansas House of Representatives may not serve more than three (3) two-year terms, whether the service is consecutive or nonconsecutive.

(B) A member of the Arkansas Senate may not serve more than two (2) four-year terms, whether the service is consecutive or nonconsecutive.

(C)(i) A person may not serve more than ten (10) years as member of the Arkansas General Assembly, whether the service is consecutive or nonconsecutive. The years of service in both the Senate and the House of Representatives shall be added together and included to determine the total number of years in the General Assembly.

(ii) A person with less than ten (10) years of service in the General Assembly is not eligible for election to the Senate if the Senate term sought would cause the person to exceed ten (10) years of service in the General Assembly. For the purpose of this subdivision (c)(1)(C)(ii) a future term after apportionment will be considered to be a four-year term.

(2) Partial Term Exception.

A partial legislative term served as a result of a special election under Article 5, § 6 shall not be included in calculating whether a person has reached a limit on service.

(3) Transition Exception.

This subsection (c) shall not cut short or invalidate a term of office to which a Senator or Representative was elected before January 1, 2017.

(d) Amendment.

This Section 2 may be amended only by a constitutional amendment initiated by the people under Arkansas Constitution Article 5, Section 1, as amended by Amendment 7.

(e) Severability.

The provisions of this Section 2 are severable, and if any provision should be held invalid, the remainder shall stand.

~~(c)(1) A member of the General Assembly shall serve no more than sixteen (16) years, whether consecutive or nonconsecutive.~~

~~(2) A member who completes his or her sixteenth year of service during a term of office for which he or she has been elected may serve until the completion of that term of office.~~

~~(3) The years of service in both the Senate and the House of Representatives shall be added together and included to determine the total number of years in office.~~

~~(4) A partial legislative term served as a result of a special election under Article 5, § 6, or a two-year term served as a result of apportionment of the Senate shall not be included in calculating the total number of years served by a member of the General Assembly.~~