



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-081

July 20, 2015

Mr. Tom Steele
9 Gravelle Drive
Little Rock, AR 72223

Dear Mr. Steele:

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 following popular name and ballot title for a proposed initiated measure:

Popular Name

AN AMENDMENT TO REPEAL AMENDMENT 94

Ballot Title

Repeal Amendment 94 to the Arkansas Constitution

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 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.

The Arkansas Code, specifically Ark. Code Ann. § 7-9-107 (Supp. 2013), neither requires nor authorizes the Attorney General 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 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, 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

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).

⁶ *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

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. § 7-5-309’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

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 of the ambiguities.

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

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).

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

¹⁵ *Id.*

Ballot Title

Your ballot title is impermissibly misleading in a number of ways. As a threshold matter, the ballot title wholly fails to state that you are proposing an amendment to the Arkansas Constitution, an amendment ostensibly designed to repeal Amendment 94. As stated above, a ballot title must be free from any misleading tendency, whether by amplification, *omission*, or fallacy.¹⁶ Your ballot title also makes no attempt to summarize the changes it would make to existing law,¹⁷ nor does it disclose other material facts that would give voters grounds for reflection.¹⁸ Instead, your ballot title is merely a statement: “Repeal Amendment 94 to the Arkansas Constitution.” Because it fails to summarize the proposal and its material effects on current law, the proposed ballot title is inherently misleading under the standards established by the Arkansas Supreme Court. Your ballot title must therefore, in my opinion, be redesigned to correct these deficiencies.

Proposal’s Text

In my view, as discussed above, your ballot title is wholly deficient as it fails to summarize your proposal and the changes it would make to existing law. Additionally, the text of your proposal, while seemingly straightforward,¹⁹ contains inherent ambiguities within it, making it impossible to substitute a ballot

¹⁶ See *Bailey*, *supra* note 7, 318 Ark. at 284, 884 S.W.2d at 942 (emphasis added).

¹⁷ 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:

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.

Bradley, 220 Ark. at 927, 251 S.W.2d at 471.

¹⁸ See *Bailey*, *supra* note 7, 318 Ark. at 288, 884 S.W.2d at 944.

¹⁹ The entire text of your measure reads: “AMENDMENT 94 TO THE ARKANSAS CONSTITUTION IS HEREBY REPEALED.”

title for the one proposed. I cannot fairly or completely describe the proposal to the electorate in a ballot title without resolution of these ambiguities. I am therefore unable to substitute and certify a more suitable and correct ballot title under Ark. Code Ann. § 7-9-107(b) (Supp. 2013).

In the normal course, this office attempts to point out and describe all the ambiguities contained in a proposal rejected because of such ambiguities. In this case, I have rejected the proposal because of fundamental shortcomings in the ballot title as noted above. Additionally in this case, given your proposal's brevity and lack of detail, any preparation of such a list is impracticable, would go well beyond the appropriate examination and certification process under Ark. Code Ann. § 7-9-107, and would be tantamount to acting as the proposal's drafter. I believe, however, that many of the ambiguities arising from the text of your measure can be boiled down to two general areas: 1) the intended effects of your proposal on the portions of the constitution as it existed prior to November 5, 2014²⁰ that were amended or repealed by Amendment 94; and 2) the intended effects of your proposal on actions that have or will have already been taken pursuant to the authority granted by Amendment 94.

Please be aware that the ballot title must fully and fairly summarize these important aspects of your measure for the voter. 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. 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."²¹

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 or inherent 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 proposal.

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

²⁰ Amendment 94 became effective November 5, 2014.

²¹ *Bradley, supra* note 17, 220 Ark. at 927, 251 S.W.2d at 471.

role in the shaping or drafting of such measures. My statutory mandate is embodied only in Ark. Code Ann. § 7-9-107 (Supp. 2013), 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.²² You may resubmit your proposed act along with a proposed popular name and ballot title at your convenience.

Sincerely,



LESLIE RUTLEDGE
Attorney General

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Enclosure

²² Ark. Code Ann. § 7-9-107(c)

Popular name, ballot title, and full text of measure for a proposed statewide initiative to repeal amendment 94 to the Arkansas Contitution

JUL 06 2015
ATTORNEY GENERAL
OF
ARKANSAS

Popular name

An Amendment to Repeal Amendment 94

Ballot title

Repeal Amendment 94 to the Arkansas Constitution

Text of measure

AMENDMENT 94 TO THE ARKANAS CONSTITUTION IS HEREBY REPEALED.

Sponsor

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