Opinion No. 2014-039

April 17, 2014

David A. Couch
1501 North University, Suite 228
Little Rock, Arkansas 72207

Dear Mr. Couch:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2013), of the popular name and ballot title for a proposed constitutional amendment. A similar measure was rejected due to ambiguities in the text of the proposal. *See* Op. Att'y Gen. 2014-030. You have made changes to the text of the measure and submitted your proposed popular name and ballot title, as follows:

Popular Name

THE ARKANSAS ALCOHOLIC BEVERAGE AMENDMENT

Ballot Title

> An amendment proposed by the people to the Arkansas Constitution to provide that effective July 1, 2015, the manufacture, sale, distribution and transportation of intoxicating liquors is authorized in every county of this state, defining intoxicating liquors as any beverage containing more than one-half of one percent of alcohol by weight, providing that the manufacture, sale or transportation of intoxicating liquors shall be regulated as now existing or hereafter changed by the General Assembly, and repealing all laws in conflict with this amendment specifically including laws providing for a local option election (wet-dry election) to determine whether intoxicating liquors may be sold or not sold

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 substitute and certify a more suitable and correct popular name and ballot title, if he can do so, or if the proposed popular name and ballot title are sufficiently misleading, 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

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[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).

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 (*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

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[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] *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).

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.

Having analyzed your proposed amendment, as well as your proposed popular name and ballot title under the above precepts, it is my conclusion that I must reject your proposed popular name and ballot title due to ambiguities in the *text* of your proposed measure. A number of additions or changes to your ballot title 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 ambiguities. I am therefore unable to substitute and certify a more suitable and correct popular name and ballot title pursuant to A.C.A. § 7-9-107(b).

Your proposed measure provides in its entirety:

Section 1. Effective July 1, 2015, the manufacture, sale, distribution and transportation of intoxicating liquors is authorized in every county of this State.

Section 2. Intoxicating liquors is defined as any beverage containing more than one-half of one percent (0.5%) of alcohol by weight.

Section 3. The manufacture, sale, distribution and transportation of intoxicating liquors shall be regulated as now existing or hereafter changed by the General Assembly.

Section 4. All laws which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.

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

[14] *Id.*

The measure contains the following ambiguities:

- Your proposed ballot title indicates that the measure is intended to be a constitutional amendment but the measure itself does not clearly so indicate. Any measure intended to amend the Arkansas Constitution must clearly declare as much in the text of the measure itself.

- Section 3 of your proposal is ambiguous in two ways. First, under normal rules of grammar, the phrase "as now existing or hereafter changed by the General Assembly" must be taken to modify some noun or noun phrase. It appears that you may intend the phrase to modify the verb "shall be regulated," but I cannot assume that to be the case and the section's meaning is unclear in this respect.

  Second, assuming you intend "as now existing or hereafter changed by the General Assembly" to modify "regulat[ion]," your proposal does not clearly delineate the scope of the General Assembly's regulatory power following the measure's adoption. "[T]he legislature may rightfully exercise the power of the people, subject only to the restrictions and limitations fixed by the constitutions of the United States and the state."[15] The Arkansas Constitution, which your ballot title indicates your proposal would amend, is accordingly a limitation on legislative power rather than a grant thereof. In the absence of some constitutional limitation, the General Assembly has regulatory power over alcohol, including the power of complete prohibition.[16] Section 1 of your proposal, containing no limits on the peoples' right to manufacture, sell, distribute, and transport alcohol, may be read in isolation as wholly depriving the General Assembly of any regulatory power whatsoever. But Section 3 is apparently intended to restore the General Assembly's regulatory power to the extent such regulation is of a nature "now existing or hereafter changed." Regulation "now existing" includes complete prohibition in some areas of the state. And any regulation the General Assembly

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[15] Op. Att'y Gen. 2014-034, quoting *Wells v. Purcell,* 267 Ark. 456, 464, 592 S.W.2d 100 (1979).

[16] *See, e.g., Hardin v. Spiers,* 202 Ark. 804, 152 S.W.2d 1010 (1941).

> might hereafter impose likely could be described as regulation "hereafter changed." Sections 1 and 3 thus may be read to grant unlimited rights to the people and unlimited regulatory powers to the General Assembly, respectively, directly in conflict with one another. I accordingly cannot summarize the proposal's meaning in a ballot title.

I cannot certify a ballot title for your proposed amendment in the face of the ambiguities noted above. You must remedy these confusing and ambiguous points before I can perform my statutory duty.

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,

DUSTIN MCDANIEL
Attorney General

DM/cyh

Enclosure

Popular Name
The Arkansas Alcoholic Beverage Amendment

Ballot Title
AN AMENDMENT PROPOSED BY THE PEOPLE TO THE ARKANSAS CONSTITUTION TO PROVIDE THAT EFFECTIVE JULY 1, 2015, THE MANUFACTURE, SALE, DISTRIBUTION AND TRANSPORTATION OF INTOXICATING LIQUORS IS AUTHORIZED IN EVERY COUNTY OF THIS STATE, DEFINING INTOXICATING LIQUORS AS ANY BEVERAGE CONTAINING MORE THAN ONE-HALF OF ONE PERCENT OF ALCOHOL BY WEIGHT, PROVIDING THAT THE MANUFACTURE, SALE OR TRANSPORTATION OF INTOXICATING LIQUORS SHALL BE REGULATED AS NOW EXISTING OR HEREAFTER CHANGED BY THE GENERAL ASSEMBLY, AND REPEALING ALL LAWS IN CONFLICT WITH THIS AMENDMENT SPECIFICALLY INCLUDING LAWS PROVIDING FOR A LOCAL OPTION ELECTION (WET-DRY ELECTION) TO DETERMINE WHETHER INTOXICATING LIQUORS MAY BE SOLD OR NOT SOLD

Section 1. Effective July 1, 2015, the manufacture, sale, distribution and transportation of intoxicating liquors is authorized in every county of this State.

Section 2. Intoxicating liquors is defined as any beverage containing more than one-half of one percent (0.5%) of alcohol by weight.

Section 3. The manufacture, sale, distribution and transportation of intoxicating liquors shall be regulated as now existing or hereafter changed by the General Assembly.

Section 4. All laws which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.