



TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2023-108

November 29, 2023

Clinton W. Lancaster
Attorney at Law
900 South Shackleford Road, Suite 300
Little Rock, Arkansas 72211

Dear Mr. Lancaster:

I am writing in response to your request, made under A.C.A. § 7-9-107, that I certify the popular name and ballot title for a proposed constitutional amendment.

My decision to certify or reject a popular name and ballot title is unrelated to my view of the proposed measure's merits. I am not authorized to consider the measure's merits when considering certification.

1. Request. Under A.C.A. § 7-9-107, you have asked me to certify the following popular name and ballot title for a proposed initiated amendment to the Arkansas Constitution:

Popular Name

An amendment to the Arkansas Constitution to conduct all elections by paper ballots containing inherent security features which protect the integrity and authenticity of an official ballot, with vote selections marked by hand using permanent ink placed directly on the ballot by the voter (except when otherwise required by federal law), permitting the counting of election day votes only after the polls close on election day, requiring the vote count to be verified by human intelligence before certification of the vote, requiring that all elections in this State be conducted by voters selecting only one candidate or issue per race with the winner determined by which candidate or issue receives the majority plus at least one vote of the total votes, preserving the special runoff system, ensuring that elections cannot be conducted in this state using an internet, Bluetooth, or wireless connection, and allocating funding to ensure free, fair, and secure elections.

Ballot Title

An amendment to the Arkansas Constitution that repeals Amendment 50, § 4 and amends Amendment 50, § 2 to remove the language that permits elections to be conducted by voting machines, modify the language of Amendment 50, § 2 as well as adding new sections to Amendment 50 which effectuate a policy and practice that all elections in this State must be conducted with paper ballots containing inherent security features designed to prevent unauthorized duplication, with vote selections marked by hand using permanent ink placed directly on the ballot by the voter in a manner which ensures the secrecy of the votes cast on the ballot and the anonymity of the voter casting the ballot, requiring that no election day votes be counted or tabulated before the close of the polls on election day, requiring that the tabulation of votes be verified by human intelligence before certification of the vote, requiring that all elections for government positions or issues in this State be conducted by voters selecting only one candidate or issue per race with the winner determined by which candidate or issue receives the majority plus at least one vote of the total votes, ensuring that elections cannot be conducted in this state using an internet, Bluetooth, or wireless connection, and allocating funding to ensure free, fair, and secure elections.

2. Rules governing my review. Arkansas law requires sponsors of statewide initiated measures to “submit the original draft” of the measure to the Attorney General.¹ An “original draft” includes the full text of the proposed measure along with its ballot title and popular name.² Within ten business days of receiving the sponsor’s original draft, the Attorney General must respond in one of three ways:

- First, the Attorney General may approve and certify the ballot title and popular name in the form they were submitted.³
- Second, the Attorney General may “substitute and certify a more suitable and correct ballot title and popular name.”⁴
- Third, the Attorney General may reject both the popular name and ballot title “and state his or her reasons therefor and instruct” the sponsors to “redesign the proposed

¹ A.C.A. § 7-9-107(a).

² A.C.A. § 7-9-107(b).

³ A.C.A. § 7-9-107(d)(1).

⁴ *Id.*

measure and the ballot title and popular name.”⁵ This response is permitted when, after reviewing the proposed measure, the Attorney General determines that “the ballot title or the nature of the issue” is (1) “presented in such manner” that the ballot title would be misleading or (2) “designed in such manner” that a vote for or against the issue would actually be a vote for the outcome opposite of what the voter intends.⁶

3. Rules governing the popular name. The popular name is primarily a useful legislative device.⁷ While it need not contain detailed information or include exceptions that might be required of a ballot title, the popular name must not be misleading or partisan.⁸ And it must be considered together with the ballot title in determining the ballot title’s sufficiency.⁹

4. Rules governing the ballot title. The ballot title must summarize the proposed act. The Court has developed general rules for what must be included in the summary and how that information must be presented. Sponsors must ensure their ballot titles impartially summarize the measure’s text and give voters a fair understanding of the issues presented.¹⁰ The Court has also disapproved the use of terms that are “technical and not readily understood by voters.”¹¹ Ballot titles that do not define such terms may be deemed insufficient.¹²

Additionally, sponsors cannot omit material from the ballot title that qualifies as an “essential fact which would give the voter serious ground for reflection.”¹³ Yet the ballot title must also be brief and concise lest voters exceed the statutory time allowed to mark a ballot.¹⁴ The ballot title is not required to be perfect, nor is it reasonable to expect the title

⁵ A.C.A. § 7-9-107(e).

⁶ *Id.*

⁷ *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

⁸ *E.g.*, *Chaney v. Bryant*, 259 Ark. 294, 297, 532 S.W.2d 741, 743 (1976); *Moore v. Hall*, 229 Ark. 411, 414–15, 316 S.W.2d 207, 208–09 (1958).

⁹ *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

¹⁰ *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

¹¹ *Wilson v. Martin*, 2016 Ark. 334, 9, 500 S.W.3d 160, 167 (citing *Cox v. Daniels*, 374 Ark. 437, 288 S.W.3d 591 (2008)).

¹² *Id.*

¹³ *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

¹⁴ A.C.A. § 7-9-107(d)(2) (requiring the ballot title “submitted” to the Attorney General or “supplied by the Attorney General” to “briefly and concisely state the purpose the proposed measure”); § 7-5-309(b)(1)(B)

to address every possible legal argument the proposed measure might evoke.¹⁵ The title, however, must be free from any misleading tendency—whether by amplification, omission, or fallacy—and it must not be tinged with partisan coloring.¹⁶ The ballot title must be honest and impartial,¹⁷ and it must convey an intelligible idea of the scope and significance of a proposed change in the law.¹⁸

Finally, the Court has held that a ballot title cannot be approved if the text of the proposed measure itself contributes to confusion and disconnect between the language in the popular name and the ballot title and the language in the measure.¹⁹ Where the effects of a proposed measure on current law are unclear or ambiguous, I am unable to ensure the popular name and ballot title accurately reflect the proposal's contents until the sponsor clarifies or removes the ambiguities in the proposal itself.

5. Application. Having reviewed the text of your proposed initiated amendment, as well as your proposed popular name and ballot title, I have concluded that I must reject your proposed popular name and ballot title and instruct you to redesign them. The following problems in the **text of your proposed amendment** prevent me from (1) ensuring your ballot title is not misleading or (2) substituting a more appropriate ballot title:

- ***Allocation of funding.*** The popular name and ballot title state that this proposed amendment will allocate funding for elections. But nothing in the proposed text allocates funding. Instead, your text contains two conflicting statements about the allocation of funding. Section 2 of your text states that the amendment's "intent" is, in part, to "allocate funding to effectuate this amendment." But section 11 of your proposed text states that the "General Assembly shall...allocate funding" to carry out the amendment. These conflicting provisions prevent me from ensuring that your ballot title's summary is not misleading.
- ***Enacting clause.*** While the state constitution requires proposed initiated acts to include an enacting clause—"Be it Enacted by the People of the State of

(allowing no more than ten minutes); *see Bailey*, 318 Ark. at 288, 884 S.W.2d at 944 (noting the connection between the measure's length and the time limit in the voting booth).

¹⁵ *Plugge v. McCuen*, 310 Ark. 654, 658, 841 S.W.2d 139, 141 (1992).

¹⁶ *Bailey*, 318 Ark. at 284, 884 S.W.2d at 942 (internal citations omitted); *see also Shepard v. McDonald*, 189 Ark. 29, 70 S.W.2d 566 (1934).

¹⁷ *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

¹⁸ *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 250, 884 S.W.2d 605, 610 (1994).

¹⁹ *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 382 (2000).

Arkansas”—initiated constitutional amendments do not require enacting clauses.²⁰ Therefore, as this office has repeatedly concluded, the inclusion of an enacting clause required for “bills” in your proposed constitutional amendment creates an ambiguity as to what the voters are being asked to consider, a bill or a constitutional amendment.²¹

- **“Human intelligence.”** The popular name, the ballot title, and the text of the proposed measure all contain the phrase “human intelligence,” which the text defines as “the thought and physical process of a human being instead of the thought or process of a computer or an artificial intelligence.” This language is confusing because the meaning of “thought and physical process” are unclear. Does this mean a human cannot use any machine or computer, such as a calculator or Excel spreadsheet, to aid in his or her “thought and physical process”? The answer to this question would surely give voters “serious ground for reflection.” The answer is also important to determine which statutes would be supplanted by the amendment. For example, under A.C.A. § 7-5-602(c),²² paper ballots must be “run through an electronic vote tabulation device before a hand count is conducted.” And A.C.A. § 7-5-606 specifies the requirements for “exhibit marking devices and electronic vote tabulating devices.” Since your definition of the term “human intelligence” is unclear, I cannot ensure that the ballot title is not misleading.
- **Definition of “disabled voter.”** The measure’s text defines “Disabled Voter” as “a voter with a disability as that term is defined under the Help America Vote Act.” But A.C.A. § 7-5-311 defines “disability” differently than federal law when it includes “sensory impairment.” It is unclear whether you intend your definition of “disabled voter” to exclude those with sensory impairment as that term is used in § 7-5-311. If so, then this would be a change in law that may give voters “serious ground for reflection,” requiring this change in law to be identified in the ballot title. But because it is unclear to me at this time whether you intend this result, I cannot ensure your ballot title is not misleading.
- **“Public office” vs. “electable position.”** Section 9(a) provides that “[a]ll elections for public office or electable positions in city, county, or state government shall be conducted with voters selecting only one candidate for each race.” Because you use both “public office” and “electable positions,” which typically mean the same thing,

²⁰ Ark. Const., art. 5, § 1 (“Enacting Clause”); see *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 262–63, 872 S.W.2d 349, 355 (1994) (“The term ‘bills’ as used in the Enacting Clause section of Amendment 7 does not refer to statewide constitutional amendments but only to initiated proposals where the people are seeking to enact their own laws.”).

²¹ *E.g.*, Ark. Att’y Gen. Ops. 2018-076, 2017-016, 2015-065, 2013-039, 2012-013, 2009-169.

²² See also A.C.A. § 7-5-603(2)(A) (“After being run through a tabulation device, the paper ballots shall be placed in a sealed double-locking hard shell ballot box....”).

it is unclear whether this redundancy is intended or whether you intend to give each a different meaning. Because this is unclear, I cannot be sure of your intent and cannot ensure your ballot title is not misleading.

- **Issue elections.** Most ballots can be mutually divided into elections regarding candidates or issues. Section 9(c) attempts to regulate the latter by providing that “[a]ll elections to amend the Arkansas Constitution as well as any city, county, or State government initiatives, referenda, measures, matters, or issues referred to the voters shall be conducted with voters making only one selection *for each race.*” (Emphasis added.) This is confusing because “initiatives, referenda, measures, matters, or issues” are not generally considered “races.” The use of the term “race,” implies a contest between candidates, not a decision on whether to support or oppose an issue. Therefore, your use of the term “race” conflicts with the sort of elections this provision seems designed to regulate. In light of this conflict, I cannot be sure of your intent and cannot ensure your ballot title is not misleading.
- **Effect of federal law.** The second sentence of section 4 provides that “any disabled voter may also vote in county, city, or state elections by voting machines in the same manner as during federal elections pursuant to the Help America Vote Act.” It is unclear to me how one votes by “voting machine” when the proposed amendment repeals the use of voting machines.²³ Perhaps you intend this section to be an exception from the effect of your other provisions that remove voters’ ability to use voting machines. If that is your intent, it is not clearly reflected in the text. That lack of clarity prevents me from ensuring your ballot title is not misleading.
- **Secrecy of individual votes.** Amendment 50, § 2 to the Arkansas Constitution currently requires that the secrecy of individual votes be maintained: “All elections by the people shall be by ballot or by voting machines which insure the secrecy of individual votes.”²⁴ The text of your proposed amendment would repeal the secrecy requirement in Amendment 50, § 2. Section 6 of your proposed text would replace Amendment 50, § 2 with the following language, none of which maintains the current “secrecy of individual votes”: “All elections by the people in this State shall be by a paper ballot containing inherent security features which makes the paper ballot difficult to duplicate or counterfeit.” This repeal might also be read as having the effect of repealing the provision of Amendment 81 to our constitution that protects the secrecy of votes. Yet your ballot title summarizes the proposed text as “ensur[ing] the secrecy of the votes cast on the ballot and the anonymity of the voter casting the ballot.” You appear to believe that the method of voting required by your text would itself ensure the secrecy of individual votes. That may be true. But

²³ See also A.C.A. § 7-5-603(2)(D) (providing that “[a]ll ballots from voting machines used for compliance with the Equal Access to Voting Rights Act...the Americans with Disabilities Act...and the Help America Vote Act of 2002...shall be counted with the hand-counted paper ballots”).

²⁴ See also Ark. Const., amend. 81 (“Protection of secrecy of votes”).

since it is unclear to me whether you intend to remove the constitutional right to the secrecy of individual votes, I cannot ensure your ballot title is not misleading.

- **Legislative Implementation, Self-Executing clause.** Section 11 of your proposed text conflicts with other provisions in your text. Section 11 states that “all its provisions shall be treated as mandatory.” But there are provisions in the text itself that allow, rather than require, certain action. This contradiction prevents me from ensuring your ballot title is not misleading.

While the foregoing defects are sufficient grounds for me to reject your submission, please note that there are several other issues in your proposed measure that you may wish to correct or clarify:

- **Popular name length.** The popular name—at 152 words—is longer than a typical popular name. It instead reads like a second ballot title. Although this alone is not misleading, you may wish to significantly shorten the popular name to better meet the purpose of popular names as described above.
- **Partisan coloring language in the popular name.** It is my opinion that your proposed popular name contains impermissible “partisan coloring” language when it uses the word “integrity.” The Arkansas Supreme Court has held that “partisan coloring” language is “a form of salesmanship”²⁵ that “gives the voter only the impression that the proponents of the proposed amendment wish to convey of the activity represented by the words.”²⁶ The word “integrity,” as used in the popular name (i.e., “protect the integrity”), gives voters only the impression that the proponents of the proposed amendment wish to convey—a “[s]teadfast adherence to a strict moral or ethical code...being unimpaired; sound[.]”²⁷ To paraphrase the Arkansas Supreme Court, the “[voter] is entitled to form” his or her “own conclusions” on whether the proposed measure promotes integrity.²⁸
- **Partisan coloring in the ballot title.** It is my opinion that the ballot title also contains impermissible “partisan coloring” language when it uses the words “to ensure free, fair, and secure elections.” Such words, like a slogan, give voters only the impression that the proponents of the proposed amendment wish to convey—as if to vote otherwise is to ensure the opposite of those characteristics. Again, the “voter is entitled to form” his or her “own conclusions” on whether the proposed measure promotes elections that would be “free, fair, and secure.”

²⁵ *Bradley v. Hall*, 220 Ark. 925, 929, 251 S.W.2d 470, 472 (1952).

²⁶ *Christian Civic Action Comm.*, 318 Ark. at 249, 884 S.W.2d at 610.

²⁷ THE AMERICAN HERITAGE DICTIONARY 911 (5th ed. 2011).

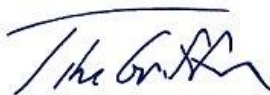
²⁸ *Johnson v. Hall*, 229 Ark. 400, 403, 316 S.W.2d 194, 196 (1958).

- **Runoff elections.** Section 9 of your proposed text, specifically subsections (b), (d), and (f), contains language concerning when and how a runoff election occurs. Under those provisions, a runoff election must occur when no candidate receives “at least fifty percent (50%) plus at least one vote.” This procedure would change the law as it applies to municipal elections. Under A.C.A. § 7-5-106(a)(2)(A), a municipal runoff election occurs when “there are more than two” candidates in a given race and neither receives either “[a] majority of the votes cast” or “[a] plurality of forty percent.” Further, under A.C.A. § 7-5-106(a)(2)(B), if a candidate in such a race does receive a plurality of 40% of the votes cast, then no runoff election occurs only if the candidate “obtain[ed] at least twenty percent (20%) more of the votes cast than the second-place candidate.” Your proposed amendment would abolish these municipal runoff procedures. The ballot title would need to apprise voters of these changes in law.
- **Severability clause.** Section 12 of your proposed measure inaccurately states that “any part or subpart of this amendment...deemed to violate the federal constitution...shall be repealed and treated as though it was never a part of the amendment.” The power of repeal belongs to the legislature, not the judiciary.²⁹ This section should be reworded.
- **Grammatical issues.** Your ballot title only uses commas. But because of the length and complexity of your ballot title, which includes multiple instances of a series within a series, the use of semicolons would provide greater clarity and promote readability. Additionally, random capitalization appears throughout the text of your proposed amendment, which does not appear to serve any purpose. You may wish to correct this.

Because of the issues identified above, my statutory duty is to reject your proposed popular name and ballot title, stating my reasons therefor, and to instruct you to “redesign” your proposed constitutional amendment, popular name, and ballot title.³⁰

Assistant Attorney General William R. Olson prepared this opinion, which I hereby approve.

Sincerely,



TIM GRIFFIN
Attorney General

²⁹ See BLACK’S LAW DICTIONARY 1553 (11th ed. 2019) (defining “repeal” as “abrogation of an existing law by express legislative act”).

³⁰ A.C.A. § 7-9-107(e).