



TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2023-109

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 set the time for absentee voting, create absentee voting procedures, determine the manner in which absentee ballots are counted or tabulated, and ensure that elections cannot be conducted in this state using an internet, Bluetooth, or wireless connection.

Ballot Title

An amendment to the Arkansas Constitution that amends Amendment 50 to add additional sections effectuating a policy and practice in which absentee ballots may only be distributed within the thirty days prior to election day, limited to only registered voters who are unable to be present at the polls on election day because they are physically absent from or hospitalized, incarcerated, or in a long-term care facility within the county in which they are registered to vote, requiring the county clerk to distribute an absentee ballot only to a requesting and qualified voter, prohibiting absentee ballot harvesting as well as the unauthorized possession of absentee ballots by persons other than the requesting voter, the United States Postal Service, or a duly appointed and authorized election official, preventing the tracking of absentee ballots once they have been sent or provided to the voter,

protecting information about who has requested an absentee ballot, ensuring that all absentee ballots are counted on election day before the early or election day votes are counted, prohibiting all elections in this state from being conducted using an internet, Bluetooth, or wireless connection, and requiring that absentee ballots and absentee voting which does not strictly conform to the requirements of this amendment to not be counted.

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 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

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.*

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).

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 amendment. 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 amendment'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 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 amendment itself contributes to confusion and disconnect between the language in the popular

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) (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 Committee v. McCuen*, 318 Ark. 241, 250, 884 S.W.2d 605, 610 (1994).

name and the ballot title and the language in the proposed amendment.¹⁹ Where the effects of a proposed amendment 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. As explained in more detail below, multiple provisions in the text of your proposed amendment are ambiguous. The following ambiguities prevent me from ensuring your ballot title is not misleading:

- **Enacting clause.** Our state constitution requires that all “bills” initiated by the people (that is, proposed initiated acts) include an enacting clause with the following language: “Be It Enacted by the People of the State of Arkansas.”²⁰ There is no such requirement for initiated constitutional amendments,²¹ yet your proposed constitutional amendment includes an enacting clause. This office has long concluded that the inclusion of an enacting clause required for “bills” in a proposed constitutional amendment creates an ambiguity as to what the voters are being asked to consider, a bill or a constitutional amendment.²²
- **Unclear language regarding physical absence.** The text in § 7(c) of the proposed amendment states, “Only those voters who are unable to be present at the polls on election day because they are physically absent from or hospitalized, incarcerated, or a resident of a long-term care facility within the county in which they are registered to vote shall qualify for, possess, and utilize an absentee ballot.” This language is confusing because you do not identify the place from which the voter must be physically absent. Must the voter simply be physically absent from the polling place, or must the voter be absent from the county? The answer to this question would give the voter “serious ground for reflection because it is unclear.”
- **Ambiguity regarding Amendment 51, § 9(i).** The text in § 5 of your proposed amendment states, “The terms of this amendment shall not apply to Ark. Const. Amend. 51, § 9(i).” Presumably, you have included this stipulation in your proposed amendment to avoid violating the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),²³ which Amendment 51, § 9(i) implements. But *how* you intend your proposed amendment to operate in conjunction with Amendment 51, § 9(i) is unclear. That subsection allows

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

²⁰ Ark. Const., art. 5, § 1 (“Enacting Clause”).

²¹ See *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 262–263, 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.”).

²² See Ark. Att’y Gen. Ops. 2018-076, 2017-016, 2015-065, 2013-039, 2012-013, 2009-169.

²³ 52 U.S.C. § 20301 *et seq.*

certain qualified servicemembers, their family members, and overseas citizens who are absent from their voting residence to “vote without prior registration by absentee ballot by submission of a federal postal card application.” I assume that you intend for none of your proposal’s application requirements to apply to citizens who are covered by UOCAVA and Amendment 51, § 9(i). But what about your proposal’s requirements regarding the opening, canvassing, and counting of ballots? Arkansas law currently allows the absentee ballots of UOCAVA voters to be counted if they are executed no later than election day and received no later than ten days after the election.²⁴ Do you intend for the ballots of UOCAVA voters to be exempt from § 7(e)(5) of your proposed amendment, which prohibits the counting of any absentee ballots not physically present and in the process of being canvassed and counted when the polls close on election day? Furthermore, § 7(e)(3) of your proposed amendment prohibits the counting or tabulations of early voting and election day votes “prior to the end of the tabulation and public posting of absentee voting.” Does this mean that no early voting or election day votes may be counted until all UOCAVA ballots are received, potentially up to ten days after election day? Until you clarify these ambiguities, I cannot ensure the ballot title is not misleading.

- **Assistance for voters with disabilities.** While your proposed amendment prohibits anyone but the qualifying absentee voter from marking a vote selection on the absentee ballot, it includes an exception that allows voters with disabilities to receive assistance with *marking* their ballots. But there is no similar exception to allow a person assisting a voter with a disability to *handle, possess, or return* the absentee ballot on the voter’s behalf. It is unclear whether you intend to allow voters with disabilities to receive assistance with receiving and returning their absentee ballots. If so, you should include an exemption similar to the one that allows assistance with marking ballots. If not, this fact should be reflected in the ballot title, along with a notice to voters that this provision likely violates federal law.²⁵

While the foregoing defects are sufficient grounds for me to reject your submission, please note that there are several other issues I have identified in your proposed popular name and ballot title that you may wish to correct or clarify:

- **Insufficient summaries.** Your proposed constitutional amendment includes provisions that would give voters “serious ground for reflection,” yet they do not appear in the ballot title. For example:
 - **Tracking.** The ballot title simply states that absentee ballots cannot be tracked “once they have been sent or provided to the voter.” But your proposed constitutional amendment does more than that. It prohibits the tracking of an absentee ballot “by any method from the time the ballot leaves the possession of

²⁴ See A.C.A. § 7-5-411(a)(1)(A)(ii).

²⁵ See, e.g., 42 U.S.C. § 12131–12134 (Americans with Disabilities Act), 52 U.S.C. § 10508 (Voting Rights Act); see also Ark. Att’y Gen. Ops. 2018-076, 2011-163, 2011-038 (declining to certify proposed ballot titles if they failed to adequately inform voters that activities authorized by a proposed measure remained illegal under preemptive federal law or that the proposed measure conflicted with federal law).

the county clerk until the time it is returned to the county clerk.” That means that the voter would be unable to track his or her own ballot and would have no way of knowing if it is received and counted by the county clerk’s office.²⁶ A provision in the proposed amendment that prevents them from knowing if their *own* votes are received and counted would likely give voters “serious ground for reflection.”

- ***Limitations on who may touch a ballot.*** Your proposed constitutional amendment prohibits anyone from touching, handling, or possessing an absentee ballot except for the voter, certain election workers, and postal workers. While your ballot title states that “ballot harvesting” and the “unauthorized possession” of absentee ballots are prohibited, the prohibitions contained in your proposal are much broader and should be reflected in the ballot title.
- **§ 9 Severability.** This section of your proposal states that the amendment shall “be construed in a manner that harmonizes the intent of the amendment with the federal constitution,” but that if a harmonic outcome is not possible, “then the offensive portion, section, or language shall be **repealed** and treated as through it was never a part of the amendment.” Please note that this language is inaccurate. The power of repeal belongs to the legislature, not the judiciary.²⁷ This section should be reworded.
- **Runoff elections.** Your proposed amendment states, “Under no circumstances may a request for an absentee ballot for a primary, general or special election be valid for a subsequent election that occurs after the requested primary, general, or special election.” It also states that voting in “a primary, general, or special election in this state ... shall not be conducted or completed using an internet, Bluetooth, or wireless connection.” It is not clear whether you intend this language to include runoff elections, but if you do, you may wish to clarify that intent.
- **Popular name length.** Your proposed popular name is quite long. It reads more like a second ballot title than a popular name. While the length of your proposed popular name does not appear to be so cumbersome as to be misleading, you may wish to shorten it.
- **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.

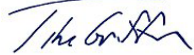
²⁶ Although your proposed amendment allows qualified absentee voters to return their ballots via the U.S. Postal Service, multiple services offered by the U.S. Postal Service include “USPS Tracking” in their price. Thus, it is not clear whether an absentee voter could mail a ballot via the U.S. Postal Service without violating your proposed amendment.

²⁷ See BLACK’S LAW DICTIONARY 1553 (11th ed. 2019) (defining “repeal” as “abrogation of an existing law by express legislative act”).

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.²⁸

Senior Assistant Attorney General Kelly Summerside prepared this opinion, which I hereby approve.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Griffin", written over a horizontal line.

TIM GRIFFIN
Attorney General

²⁸ A.C.A. § 7-9-107(e).