



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2018-006

February 6, 2018

Alex T. Gray, Legal Counsel  
Committee to Restore Arkansan's Rights  
c/o Steel, Wright, Gray & Hutchinson  
400 West Capitol Avenue, Suite 2910  
Little Rock, AR 72201

Dear Mr. Gray:

I am responding to your request for certification of the popular name and ballot title for a proposed initiated measure.

**At the outset, I wish to make clear that the decision to certify or reject a popular name and ballot title in no way reflects my view of the merits of the measure. I am not authorized to, nor do I, consider the merits of a measure when weighing whether to certify or reject.**

Arkansas Code Annotated 7-9-107 authorizes my office to (1) certify the popular name and ballot title of a proposed measure, (2) substitute and certify the popular name and ballot title, if practicable, or (3) reject the entire submission if “the ballot title, or the nature of the issue, is presented in such manner that the ballot title would be misleading” to voters.<sup>1</sup> The purpose of this statutory review is to ensure that the popular name and ballot title honestly, intelligibly, and fairly set forth the purpose of the proposed amendment or act.<sup>2</sup> In this way, voters will have a fair understanding of the issues presented by reference to the ballot title.<sup>3</sup> Thus, and consistent with Arkansas Supreme Court precedent, I have limited my review to a

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<sup>1</sup> Ark. Code Ann. § 7-9-107(c) (Supp. 2017).

<sup>2</sup> See *Arkansas Women's Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846, 848 (1948).

<sup>3</sup> *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980) (internal citations omitted).

determination of whether your popular name and ballot title accurately and impartially summarize the content of your proposal.

## REQUEST

**You have requested certification, pursuant to Ark. Code Ann. § 7-9-107, of the following popular name and ballot title for a proposed constitutional amendment:**

### Popular Name

An Amendment to Authorize the General Assembly to Waive The State's Sovereign Immunity

### Ballot Title

An amendment to Article V, Section 20 of the Arkansas Constitution authorizing the General Assembly to waive the State's sovereign immunity.

## GUIDELINES

The *popular name* is to be considered together with the ballot title in determining the ballot title's sufficiency.<sup>4</sup> The popular name is primarily a legislative device, and it need not contain the detailed information that might be required of a ballot title.<sup>5</sup> However, the popular name must not mislead or give partisan coloring to the merit of the proposal.<sup>6</sup>

The *ballot title* must include an impartial summary of the proposed amendment that gives the voter a fair understanding of the issues presented.<sup>7</sup> A ballot title is insufficient if it does not "adequately inform" voters of the contents of a proposed

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<sup>4</sup> *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

<sup>5</sup> *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950). *See also Chaney v. Bryant*, 259 Ark. 294, 297, 532 S.W.2d 741, 743 (1976).

<sup>6</sup> *See Moore v. Hall*, 229 Ark. 411, 316 S.W.2d 207 (1958). For a better understanding of the term "partisan coloring," see note 9 *infra*.

<sup>7</sup> *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980) (internal citations omitted).

amendment so that they can make a “reasoned decision in the voting booth.”<sup>8</sup> And the title must be “free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring.”<sup>9</sup>

A ballot title’s failure to “honestly and accurately reflect what is contained in the proposed Amendment” may lead the Court to conclude that the “omission is significant.”<sup>10</sup> The Court has also disapproved the use of terms that are “technical and not readily understood by voters.”<sup>11</sup> Without a definition of such terms in the ballot title, the title may be deemed insufficient.<sup>12</sup> Likewise, if information omitted from the ballot title is an “essential fact which would give the voter serious ground for reflection, it must be disclosed.”<sup>13</sup> At the same time, a ballot title must be brief and concise.<sup>14</sup> Voters could otherwise run afoul of Ark. Code Ann. § 7-5-309’s five-minute limit when other voters are waiting in line for the voting booth.<sup>15</sup>

But the ballot title is not required to be perfect, nor is it reasonable to expect that it cover every possible legal argument the proposed measure might evoke.<sup>16</sup> And

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<sup>8</sup> *Lange v. Martin*, 2016 Ark. 337, 500 S.W.3d 154, at n.2.

<sup>9</sup> *Bailey v. McCuen*, 318 Ark. 277, 284, 884 S.W.2d 938, 942 (1994). Language “tinged with partisan coloring” has been identified by the Arkansas Supreme Court as language that “creates a fatally misleading tendency” or that “gives the voter only the impression that the proponents of the proposed amendment wish to convey of the activity represented by the words.” *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 249, 884 S.W.2d 605, 610 (1994) (internal citation omitted).

<sup>10</sup> *Lange*, 2016 Ark. at \*9, 500 S.W.3d at 159.

<sup>11</sup> *Wilson v. Martin*, 2016 Ark. 334, \*9, 500 S.W.3d 160, 167.

<sup>12</sup> *Id.*

<sup>13</sup> *Bailey*, 318 Ark. at 285, 884 S.W.2d at 942.

<sup>14</sup> *See* Ark. Code Ann. § 7-9-107(b).

<sup>15</sup> *Bailey*, 318 Ark. at 284, 884 S.W.2d at 944.

<sup>16</sup> *Id.* at 293, 884 S.W.2d at 946-47.

unless the measure is “clearly contrary to law,”<sup>17</sup> this office will not require that the ballot title acknowledge every possible constitutional infirmity.<sup>18</sup>

## RESPONSE

It is my opinion, based on the above guidelines, that the popular name you submitted is sufficient as proposed. However, the ballot title has a deficiency requiring that I reject it. I believe most voters will be unfamiliar with the term “sovereign immunity” as it appears in the ballot title, because it is a legal term of art.<sup>19</sup> Most voters will not know that the doctrine of sovereign immunity means that a state cannot be sued in its own courts. Likewise, most voters will not appreciate that authorizing the General Assembly to waive sovereign immunity means giving the legislature the ability to enact statutes that allow people and entities to sue the State in state court for money damages and other forms of relief. Given the content of your ballot title as proposed, both of these concepts—sovereign immunity and waiver of sovereign immunity—need to be briefly explained to ensure voters are “adequately inform[ed]” and can make a “reasoned decision in the voting booth.”<sup>20</sup>

## CONCLUSION

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.

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<sup>17</sup> 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).

<sup>18</sup> As part of my review, however, I may address constitutional concerns for consideration by the measure’s proponents.

<sup>19</sup> See *Wilson v. Martin*, 2016 Ark. 334, \*9, 500 S.W.3d 160, 167 (2016) (“Without a definition of this [technical] term, the voter would be in the position of guessing as to the effect his or her vote would have unless he or she is an expert in the legal field.”).

<sup>20</sup> *Lange*, 2016 Ark. 337, 500 S.W.3d 154, at n.2.

Based on what has been submitted, my statutory duty is to reject your proposed ballot title.<sup>21</sup> The ambiguities noted above are not necessarily all the ambiguities contained in your proposal, but they are sufficiently serious that I am unable to certify your ballot title at this time.

Sincerely,



LESLIE RUTLEDGE  
Attorney General

Enclosure

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<sup>21</sup> Ark. Code Ann. § 7-9-107(c).

**Popular Name**

AN AMENDMENT TO AUTHORIZE THE GENERAL ASSEMBLY TO WAIVE THE  
STATE'S SOVEREIGN IMMUNITY

**Ballot Title**

An amendment to Article V, Section 20 of the Arkansas Constitution authorizing the General Assembly to waive the State's sovereign immunity.

**ARTICLE V, SECTION 20. State not made defendant unless authorized by General Assembly.**

The State of Arkansas shall never be made defendant in any of her courts, unless authorized by the General Assembly.