



**STATE OF ARKANSAS**  
**THE ATTORNEY GENERAL**  
**DUSTIN MCDANIEL**

Opinion No. 2014-042

May 2, 2014

David A. Couch  
Attorney at Law  
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. Two similar measures were rejected due to ambiguities in the text of the proposals. *See* Op. Att’y Gen. 2014-039 and 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 and transportation of intoxicating liquors shall be regulated 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,”<sup>1</sup> 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.<sup>2</sup>**

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<sup>1</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>2</sup> See *Arkansas Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

The popular name is primarily a useful legislative device.<sup>3</sup> 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.<sup>4</sup> The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.<sup>5</sup>

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.<sup>6</sup> 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."<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> The title, however, must be free from any misleading tendency, whether by amplification, omission, or fallacy; it must not be tinged with partisan coloring.<sup>10</sup> The ballot title must be honest and impartial,<sup>11</sup> and it must convey an intelligible idea of the scope and significance of a proposed change in the law.<sup>12</sup>

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<sup>3</sup> *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

<sup>4</sup> *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).

<sup>5</sup> *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

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

<sup>7</sup> *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

<sup>8</sup> *Id.* at 288, 884 S.W.2d at 944.

<sup>9</sup> *Id.* 293, 884 S.W.2d at 946-47.

<sup>10</sup> *Id.* at 284, 884 S.W.2d at 942.

<sup>11</sup> *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

<sup>12</sup> *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 245, 884 S.W.2d 605, 607 (1994) (internal quotations omitted).

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.”<sup>13</sup> 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.”<sup>14</sup> 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. This is an Amendment to the Arkansas Constitution that shall be called “the Arkansas Alcoholic Beverage Amendment.”

Section 2. Effective July 1, 2015, the manufacture, sale, distribution and transportation of intoxicating liquors is authorized in every county of this State.

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<sup>13</sup> *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 383 (2000).

<sup>14</sup> *Id.*

Section 3. Intoxicating liquors is defined as any beverage containing more than one-half of one percent (0.5%) of alcohol by weight.

Section 5. The manufacture, sale, distribution and transportation of intoxicating liquors shall be regulated by the General Assembly.

Section 6. All laws which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.

The measure contains the following ambiguities:

- I said in Opinion 2014-039 that “your proposal does not clearly delineate the scope of the General Assembly’s regulatory power following the measure’s adoption.” In response you deleted the phrase “as now existing or hereafter changed by the General Assembly,” words apparently intended to modify the verb “shall be regulated.” But as I implied in that opinion, the deleted phrase was meaningless in context; thus your revision was without substance. The question essentially is whether the proposal would be interpreted by courts as merely making the state permanently “wet” (absent another constitutional amendment), or as also granting the people new substantive rights to manufacture, etc. Absent your proposal, the General Assembly has complete regulatory authority over alcohol, including the power to ban it outright. The proposal directs the General Assembly to “regulate[]” alcohol. It states no limit on that regulatory power. So a court might conclude that the proposal does not affect the General Assembly’s authority. But the proposal also authorizes manufacture, etc., without stated limit, an authorization not otherwise afforded. Without some indication of how, if at all, the proposal will change the General Assembly’s authority to regulate – directly or indirectly by granting the people new rights – it is impossible to discern the proposal’s meaning and describe it in a ballot title.
- Your proposal states that manufacture, etc., “is authorized in every county of this State.” It is unclear whether the entire state would be “wet” or the requirement would be met if at least some area of each county were “wet.”

- It is unclear whether your proposal would actually make the state – or parts of each county at least – permanently “wet” or would be interpreted merely to make areas “wet” as of its effective date and leave in effect existing local-option laws that allow voters to make areas “dry.” Your proposed ballot title states that the measure would repeal conflicting law “specifically including laws providing for a local option election,” but the proposal itself does not specify any laws it would repeal. While your own intent regarding local-option laws is clear, the proposal’s language is ambiguous regarding the post-effectiveness availability of local-option elections.
- How your proposal will change the law concerning the General Assembly’s regulatory authority and the people’s rights with respect to alcohol, the state’s wet areas, and local-option elections are all matters of fundamental concern to voters. The ballot title must communicate an intelligible indication of the scope and import of how the proposal will change the law. It is up to the proponent to present a measure that is of reasonably certain meaning and to prepare a ballot title that accurately describes not only the proposal’s words but also its effect on current law.
- Your proposal’s sections are numbered incorrectly.

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

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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 AND TRANSPORTATION OF INTOXICATING LIQUORS SHALL BE REGULATED 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. This is an Amendment to the Arkansas Constitution that shall be called "The Arkansas Alcoholic Beverage Amendment."
- Section 2. Effective July 1, 2015, the manufacture, sale, distribution and transportation of intoxicating liquors is authorized in every county of this State.
- Section 3. Intoxicating liquors is defined as any beverage containing more than one-half of one percent (0.5%) of alcohol by weight.
- Section 5. The manufacture, sale, distribution and transportation of intoxicating liquors shall be regulated by the General Assembly.
- Section 6. All laws which conflict with this amendment are hereby repealed to the extent that they conflict with this amendment.