



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2018-001

January 25, 2018

Alex T. Gray, Legal Counsel  
Driving Arkansas Forward Ballot Question Committee  
c/o Steel, Wright, Gray & Hutchinson, PLLC  
400 West Capitol Avenue, Suite 2910  
Little Rock, AR 72201

Dear Mr. Gray:

I am writing in response to your request for certification, pursuant to Ark. Code Ann. § 7-9-107 (Supp. 2017), 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 is in no way a reflection of my view of the merits of a particular proposal. I am not authorized to, and do not, consider the merits of the measure when making a decision 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 my review under section 7-9-107 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

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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 (1984).

have a fair understanding of the issues presented by reference to the ballot title alone.<sup>3</sup>

Section 7-9-107 neither requires nor authorizes this office to make legal determinations concerning the merits of the proposed 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>4</sup> this office will not require that a measure’s proponents acknowledge in the ballot title any possible constitutional infirmities.<sup>5</sup> 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 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

The Arkansas Casino Gaming and Highway Funding Amendment of 2018

### Ballot Title

An amendment to the Arkansas Constitution authorizing up to three casinos to operate in Arkansas, all being subject to the laws enacted by the General Assembly in accord with this amendment and regulations promulgated by the Arkansas Department of Finance and Administration, Office of the Arkansas Lottery (“Office of the

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

<sup>4</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>5</sup> As part of my review, however, I may address constitutional concerns for consideration by the measure’s proponents.

Arkansas Lottery”), in accord with laws enacted by the General Assembly; defining “casino gaming” as dealing, operating, carrying on, conducting, maintaining, or exposing for play any game played with cards, dice, equipment, or any mechanical, electromechanical, or electronic device or machine for money, property, checks, credit, or any representative value, including, without limitation, any game, device, or type of wagering permitted at a casino operated within any one or more of the States of Louisiana, Mississippi, Missouri, Oklahoma, or Texas as of November 6, 2018; providing that the Office of the Arkansas Lottery must license and regulate casinos in accordance with regulations it establishes; providing that the Office of the Arkansas Lottery shall award at least two but not more than three casino licenses; providing that the Office of the Arkansas Lottery shall set the initial maximum application fees for casino licenses; the Office of the Arkansas Lottery shall award no more than one license per county; requiring that the first casino license be awarded to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 50,000 according to the 2010 United States Census (to-wit: Jefferson County), and if the requirements for the first casino license are not met, then the Office of the Arkansas Lottery shall issue the first casino license to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 2, 3, or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 40,000 according to the 2010 United States Census (to-wit: Crawford County, Crittenden County, Jefferson County, Miller County, Mississippi County, Pope County, Union County, or White County); requiring that the second casino license be awarded to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 3 or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 50,000 according to the 2010 United States Census (to-wit: Crittenden County or Jefferson County), and if the requirements for the second casino license are

not met, then the Office of the Arkansas Lottery shall issue the second casino license to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 2, 3, or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 40,000 according to the 2010 United States Census (to-wit: Crawford County, Crittenden County, Jefferson County, Miller County, Mississippi County, Pope County, Union County, or White County); requiring that if the Office of the Arkansas Lottery awards a third casino license, the third casino license be awarded to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 2, 3, or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 40,000 according to the 2010 United States Census (to-wit: Crawford County, Crittenden County, Jefferson County, Miller County, Mississippi County, Pope County, Union County, or White County); the Office of the Arkansas Lottery shall require all applicants to demonstrate operational experience in an existing casino that provides casino gaming; providing that the Office of the Arkansas Lottery shall require that any application for a license be accompanied by either a letter of support from the County Judge or a Resolution from the County Quorum Court in the county where the applicant is proposing the casino be located and, if the proposed casino is to be located within a city or town, a letter of support from the Mayor in the city or town where the applicant is proposing the casino to be located; providing that all applicants demonstrate a minimum investment of at least \$100,000,000 for the development of each casino facility with credit given for existing real estate value as determined by the Office of the Arkansas Lottery; defining “annual net casino gaming receipts” as gross receipts for a twelve-month period from casino gaming less amounts paid out or reserved as winnings to casino patrons for that twelve-month period; defining “annual net casino gaming receipts tax” as a tax on gross receipts for a twelve-month period from casino gaming less amounts paid out or reserved as winnings to casino patrons for that twelve-month period; providing that the annual net casino gaming receipts are subject to a 12% annual net casino gaming receipts tax; subjecting each casino to

the same income, property, sales, use, employment, and other taxation as any for-profit business located in the county and city or town in which the casino is located, except that the Arkansas Gross Receipts Act of 1941 and local gross receipts taxes shall not apply to annual net casino gaming receipts; establishing on the books of the Treasurer of State, Auditor of State, and the chief fiscal officer of the State a special account to be designated as the Arkansas Casino Gaming and Highway Funding Account; providing that the net casino gaming receipts tax shall be distributed 65% to the State Highway and Transportation Department Fund as identified in Ark. Code Ann. § 19-6-405 or its successor fund and apportioned to the State Highway and Transportation Department Fund, the County Aid Fund and the Municipal Aid Fund in the percentages provided in the Arkansas Highway Revenue Distribution Law, §§ 27-70-201 and 27-70-206, 2.5% to the Office of the Arkansas Lottery, 10% to the county in which the casino is located, and 22.5% to the city or town in which the casino is located and, in the event the casino is not located within a city or town, then the county in which the casino is located shall receive the 22.5% that would have been dedicated to the city herein; notwithstanding Ark. Code Ann. § 3-3-211, which prohibits the sale of intoxicating liquor on Christmas Day, allowing a casino to operate on any day for any portion or all of any day; notwithstanding Ark. Code Ann. § 3-9-201, et seq. and other applicable Arkansas law requiring the residents of a dry county or city to vote to approve the sale of intoxicating liquor, allowing the selling or complimentary serving of intoxicating liquor in casinos during all hours the casino operates but otherwise subjecting casinos to all applicable Arkansas laws involving the distribution and sale of intoxicating liquor; permitting the shipment into the Arkansas counties where the casinos are located of gambling devices shipped and delivered in accordance with applicable federal law; declaring inapplicable all constitutional provisions and laws to the extent they conflict with this amendment, but not otherwise amending, repealing, or otherwise affecting Amendment 84 (bingo or raffles) or Amendment 87 (state lottery) to the Arkansas Constitution, or Arkansas Act 1151 of 2005 (Electronic Games of Skill).

## GUIDELINES

The popular name is primarily a useful legislative device.<sup>6</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>7</sup> The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.<sup>8</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>9</sup> According to the Court, a ballot title will not be legally sufficient unless it "adequately inform[s]" the voters of the contents of a proposed amendment or act so that they can make a "reasoned decision in the voting booth."<sup>10</sup> A ballot title's failure to "honestly and accurately reflect what is contained in the proposed [act or] Amendment" may lead the Court to conclude that the "omission is significant."<sup>11</sup> The Court has also disapproved the use of terms that are "technical and not readily understood by voters."<sup>12</sup> Without a definition of such terms in the ballot title, the title may be deemed insufficient.<sup>13</sup>

Additionally, 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>14</sup> At the same time, however, a ballot title must be brief and concise;<sup>15</sup> otherwise voters

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<sup>6</sup> *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

<sup>7</sup> See, 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). For a better understanding of the term "partisan coloring," see note 18 *infra*.

<sup>8</sup> *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

<sup>9</sup> *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980) (internal citations omitted).

<sup>10</sup> *Lange v. Martin*, 2016 Ark. 337, 500 S.W.3d 154, at n. 2.

<sup>11</sup> *Id.* at \*9, 500 S.W.3d at 159.

<sup>12</sup> *Wilson v. Martin*, 2016 Ark. 334, \*9, 500 S.W.3d 160, 167.

<sup>13</sup> *Id.*, 500 S.W.3d at 167.

<sup>14</sup> *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

<sup>15</sup> See Ark. Code Ann. § 7-9-107(b).

could run afoul of Ark. Code Ann. § 7-5-309's five-minute limit in voting booths when other voters are waiting in line.<sup>16</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>17</sup> The title, however, must be "free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring."<sup>18</sup> The ballot title must be honest and impartial,<sup>19</sup> and it must convey an intelligible idea of the scope and significance of a proposed change in the law.<sup>20</sup>

Furthermore, the Court has confirmed 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.<sup>21</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>22</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 (1) clarification or removal of the ambiguities in the proposal itself, and (2) conformance of the popular name and ballot title to the newly worded proposal.

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<sup>16</sup> *Bailey*, 318 Ark. at 284, 884 S.W.2d at 944.

<sup>17</sup> *Id.* at 293, 884 S.W.2d at 946-47.

<sup>18</sup> *Id.* at 284, 884 S.W.2d at 942. Language "tinged with partisan coloring" has been identified by the Arkansas Supreme Court as language that "creates a fatally misleading tendency" (*Crochet v. Priest*, 326 Ark. 338, 347, 931 S.W.2d 128, 133 (1996)) 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).

<sup>19</sup> *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

<sup>20</sup> *Christian Civic Action Committee*, 318 Ark. at 245, 884 S.W.2d at 607 (internal quotations omitted).

<sup>21</sup> *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 382 (2000).

<sup>22</sup> *Id.*

## RESPONSE

In my opinion, there may be some question whether the words “Highway Funding Amendment” in your proposed popular name fairly represent that feature of the proposed constitutional amendment. I cannot confidently predict whether the Court would say this language in the popular name is *fatally* misleading. But I believe it may overstate that feature of the measure and expose the popular name to the argument that it tends to mislead voters or give them only the impression the proponents wish to convey.

With regard to your proposed ballot title, it is my opinion, based on the above guidelines established by the Court, that a number of additions or changes are 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 some ambiguities in the text of the measure itself. And thus I cannot determine precisely what changes to the ballot title are necessary to fully and correctly summarize your proposal. It is therefore not appropriate, in my opinion, for me to try to substitute and certify a more suitable and correct popular name and ballot title pursuant to Ark. Code Ann. § 7-9-107(b).

## DISCUSSION

I highlight below the more concerning ambiguities in the text of your proposal.

Subsection 3(a) of the proposed constitutional amendment authorizes “casinos and casino gaming” in the State of Arkansas as provided in the amendment. I believe it will be critical to a sufficient ballot title that the voters have an intelligible idea of the meaning of these terms and how they are used in the amendment. But several ambiguities in the text of the measure in this regard prevent accurate summation in the ballot title.

### Meaning of “casino”

- “Casino” is defined in subsection 2(c) of the proposed amendment as “a facility where casino gaming is conducted....” Subsection 4(a) of the proposal states that “[c]asinos shall be licensed by the Office of the Arkansas Lottery.” And subsection 4(i) establishes the requirements for an “application to operate a casino and engage in casino gaming.” Taken together, these subsections appear to contemplate one application for a

“casino license” (see subsections 4(k)-(o)), with a “casino license” being a license to operate a facility where casino gaming is conducted, and to conduct casino gaming at such facility.

But section 4 of the amendment also refers to a “license to operate a casino” and suggests that such license may be separate from the licensing of a casino facility. *See* subsection 4(b) (providing that the Office of the Arkansas Lottery “shall administer and regulate the licensing of casinos, *including the issuance of a license to operate a casino...*” (Emphasis added)). *See also* section 4(e)(1) (referring to “applications for and renewal of licenses for casinos and casino gaming;” subsection 4(f) (regarding licensing fees “for casino and casino gaming.”); subsection 4(h) (regarding “applications for licenses to operate a casino and engage in casino gaming.”).

These various references to the licensing of “casinos” and “casino gaming” create uncertainty regarding the casino licensing process. They also render uncertain the precise meaning of the undefined term “casino license.” Subsections 4(k) through (o) address the award of licenses in certain counties. The authority granted under a “casino license” is plainly an essential fact that would give voters serious ground for reflection. I realize that the General Assembly and the Office of the Arkansas Lottery will be implementing the amendment. *See* subsections 3(b) and 4(c). But the precise meaning of these terms will be of critical importance to voters, and accordingly I believe the ambiguities in this regard must be clarified for accurate reflection of these important features in the ballot title.

- There are additional ambiguities surrounding the term “casino” under the proposed measure. As noted above, “casino” is defined in subsection 2(c) as “a facility where casino gaming is conducted...” The meaning of “casino” as a facility is reflected in several of the amendment’s substantive provisions. For instance, subsection 4(e)(5) requires compliance with any zoning restrictions in the city or county “in which the casino would be located.” And subsection 4(q) requires that casino license applicants “demonstrate a minimum investment of at least \$100,000,000 for the development of each proposed casino facility...”

But “casino” also appears to have a different, and perhaps more expansive, meaning. Subsection 4(j) places certain limitations on “the owners, board members, or officers of the casino.” The word “casino” as used here plainly means something other than simply a facility, and seems to suggest that the word refers to a legal entity of some sort. *See also* subsection 4(t) (“No individual shall

own an interest in more than one casino in Arkansas.”); subsection 4(u) (“A casino may receive compensation for providing the goods and services allowed by this amendment.”).

The meaning of “casino” has implications for several material aspects of the proposed amendment. But without a clear understanding of the term, and its various use in the proposal, some of the measure’s fundamental provisions cannot be accurately summarized for the voters in a ballot title. For example, under subsection 5(a), “[a] casino’s annual net casino gaming receipts are subject to a 12% annual net casino gaming receipts tax.” The meaning of “casino” here would plainly be significant in the mind of a reasonable voter. But it is unclear whether this refers to something other than the “facility where casino gaming is conducted” (the subsection 2(c) definition).

If the meaning of “casino” is not limited to a “facility” and the term includes an entity of some sort, this also creates some uncertainty regarding “casino” ownership. Subsection 4(j) imposes what appears to be some prohibitions or disqualifying conditions on “the owners ... of the casino”: “None of the owners, board members, or officers of the casino: (1) Shall have been convicted of a disqualifying felony offense as defined by the Office of the Arkansas Lottery; (2) Shall have previously been an owner of a casino and had his or her license revoked; and (3) Shall be under twenty-one years of age.” The term “owners” as used here is undefined. One question that arises is whether it includes *shareholders*. Additionally, these prohibitions or disqualifications seemingly apply only to individual human beings. If “casino” here means an entity of some sort, this would suggest that an interest in a casino can only be held by an individual human being. While that may not be the intent, the impression could be reinforced by subsection 4(t), which states that “[n]o *individual* shall own an interest in more than one casino in Arkansas.” (Emphasis added).

The uncertain meaning of “casino” under subsection 4(j)—regarding “owners, board members, or officers”—also generates confusion as to the subsection’s operation and effect. The operation of each prohibition or condition appears to depend upon an event or status at a discrete point in time (*e.g.*, no owner, board member, or officer “*shall have been convicted*” or “*shall have previously ... had his or her [casino] license revoked,*” or “*shall be*” under the age of 21.) (Emphasis added). But the relevant point in time is not clearly stated. Nor can it be determined based simply upon the reference to “the casino,” given the uncertainty surrounding that term. Does casino here mean an entity, and perhaps an entity that applies for or holds a casino license? Without some clarification of the meaning

and effect of the term “the casino” under this provision, it will be impossible to determine precisely how subsection 4(j) operates. Even if we assume these are prohibitions or disqualifying conditions in relation to licensing, it remains unclear whether they relate to initial licensing only, or perhaps also extend to continued licensing.

In sum, these matters relating to the meaning of “casino” under the proposed amendment would likely be of significant concern to many voters; but without textual clarification, I am unable to determine the intent and therefore cannot summarize these important provisions in a ballot title.

### **Meaning of “casino gaming”**

Subsection 2(d) of the proposed amendment defines “casino gaming” as follows:

‘Casino gaming’ is defined as dealing, operating, carrying on, conducting, maintaining, or exposing for play any game played with cards, dice, equipment, or any mechanical, electromechanical, or electronic device or machine for money, property, checks, credit, or any representative value including, without limitation, any game, device, or type of wagering permitted at a casino operated within any one or more of the States of Louisiana, Mississippi, Missouri, Oklahoma, or Texas as of November 6, 2018.

Based on the language preceding the words “including, without limitation,” the definition essentially encompasses various activities relating to games, devices, or machines played for money or anything else of value. But importantly, the definition extends further and encompasses “any game, device, or type of wagering permitted at a casino operated within” any of the five listed states” as of “November 6, 2018.” The definition’s material effects are rendered uncertain by this language regarding casino operations in other states. First and foremost, it is impossible to know what “games[s], devices[s], or type[s] of wagering” are included, given that the operative date (November 6, 2018) is the day of the election. What is “permitted” will not be established in the other states before voters go to the polls. Consequently, it will be impossible to convey the scope and import of the definition to the voters in a ballot title.

But even if the operative date were not in the future, I believe the Arkansas Supreme Court would have serious concerns about voters’ ability to understand the scope and consequence of the changes in law this definition of “casino

gaming” proposes. The Court has stated that “[t]he voter should not have to be well versed in legal interpretation in order to decipher what is meant in a proposed constitutional amendment. Placing the voter in a position of either having to be an expert in the [given] subject ... or having to guess as to the effect his or her vote would have is impermissible.”<sup>23</sup> I believe that is the situation in which the voter is placed by the uncertain language contained in the “casino gaming” definition. Voters would be required to decipher what “type[s] of wagering” are “permitted” in any one of these states, and I believe the Court would say this is something that cannot reasonably be expected.

The Court has observed that most voters will look to the ballot title to derive information about the proposed measure.<sup>24</sup> The Court has also elaborated on the duty to describe the changes in law a proposal is to make:

[T]he elector, in voting upon a constitutional amendment, is simply making a choice between retention of the existing law and the substitution of something new. It is the function of the ballot title to provide information concerning the choice that he is called upon to make. Hence the adequacy of the title is directly related to the degree to which it enlightens the voter with reference to the changes that he is given the opportunity of approving.<sup>25</sup>

The Court has also emphasized that a ballot title will be deemed insufficient if it does not give the voters a clear understanding of the “extent and import” of the proposal, particularly when they are being asked to amend the Constitution:

If the voter knows the extent and import of such a proposal, it is the voter’s decision, not ours, as to the wisdom of the proposal. But at the same time the voters have placed on this court the duty and responsibility to see that when they vote that change, or decline to vote that change, *especially one to alter their constitution*, they are

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<sup>23</sup> *Kurrus*, 342 Ark. at 444, 29 S.W.3d at 674.

<sup>24</sup> *Wilson*, 2016 Ark. at \*7, 500 S.W.3d at 166 (“It has long been regarded as axiomatic that the majority of voters, when called upon to vote for or against a proposed measure, will derive their information about its contents from an inspection of the ballot title immediately before exercising the right of suffrage.”).

<sup>25</sup> *Bradley v. Hall*, 220 Ark. 925, 927, 251 S.W.2d 470, 471 (1952).

allowed to make an intelligent choice, fully aware of the consequences of their vote.<sup>26</sup>

Here, understanding the meaning of “casino gaming” is crucial to understanding a critical feature of your proposed amendment. But a ballot title that recites the above definition will not, in my view, impart that understanding. It consequently will not allow a reasonable voter to fully recognize the ways your measure proposes to substantially change current law in Arkansas with respect to “gaming.”

### **Content of popular name**

Additionally, I find it necessary to reiterate the standards the Court applies in assessing the sufficiency of popular names and ballot titles for initiated measures. The popular name, while not held to the same stringent standards as the ballot title, must not be misleading or color the merits of the proposal.<sup>27</sup> Determining whether this standard is met requires construing the popular name together with the ballot title.<sup>28</sup> Taken together, they must “fairly represent the issue which will be presented to the electors.”<sup>29</sup> They must be “a fair representative without misleading tendencies or partisan coloring.”<sup>30</sup>

When these standards are applied to your proposed popular name (“The Arkansas Casino Gaming and Highway Funding Amendment of 2018”), I believe there may be some question whether the words “Highway Funding Amendment” fairly represent the proposed measure without any “misleading tendencies” or “partisan coloring.” On the one hand, as reflected in the ballot title, the majority of the “12% annual net casino gaming receipts tax” under the measure will fund streets and highways. On the other hand, this is not a comprehensive highway funding measure. It is a comprehensive “casino gaming” measure. I cannot confidently predict whether the Court would say calling it a “highway funding” measure is

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<sup>26</sup> *Dust v. Riviere*, 277 Ark. 1, 4, 638 S.W.2d 663, 665 (1982) (emphasis added).

<sup>27</sup> See *Cox v. Martin*, 423 S.W.3d 75, 84, 2012 Ark. 352, 12 (citing *Ferstl v. McCuen*, 296 Ark. 504, 508, 758 S.W.2d 398, 400 (1988)).

<sup>28</sup> *Roberts*, 341 Ark. at 821-22, 20 S.W.3d at 380-81.

<sup>29</sup> *Ferstl*, 296 Ark. at 510, 758 S.W.2d at 401.

<sup>30</sup> *Id.* See also *Crochet v. Priest*, *supra* note 18.

*fatally* misleading. But I believe this language may overstate that feature of the measure and expose the popular name to the argument that it tends to mislead voters or give them only the impression the proponents wish to convey.

### **Reference to Arkansas Economic Development Commission**

As a final matter, I believe a similar issue may arise with regard to the ballot title's language concerning the award of licenses for casinos to be located in particular counties. The ballot title basically restates the text of the proposed amendment in this respect, which (in subsections (m)-(o)), references the Arkansas Economic Development Commission ("AEDC"), a 2003 act, and the identification of counties as "tier 2, 3, or 4" counties. These are technical references that do not have a "general currency among the public."<sup>31</sup> Accordingly, most voters will not readily understand what they signify in the context of your proposed amendment. The Court has emphasized that "[a] voter is entitled to be informed by plain language."<sup>32</sup> I believe the proposed ballot title is deficient in this respect. I am concerned that in simply tracking the lengthy and complex language of these subsections, the title may be insufficient to convey to the voters an intelligible idea of the measure's substance.

Additionally, I believe the ballot title may confuse voters and lead them to believe there is some direct connection between AEDC's actions and the proposed measure, including the measure's identification of counties for casino locations. In my judgment, the expansiveness of the text in this regard does not necessarily preclude the writing of an acceptable ballot title. It does, however, suggest the desirability of summarizing the effect of the proposal in as simplified a manner as possible. The precise manner of accomplishing this is, of course, a matter for you to determine and submit to this office in draft form. While I can modify a proposed ballot title to render it a more accurate summary of the measure, I am not authorized to craft a ballot title that amounts to an independent product.<sup>33</sup>

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<sup>31</sup> *Christian Civic Action Committee*, 318 Ark. at 248, 884 S.W.2d at 609.

<sup>32</sup> *Ward v. Priest*, 350 Ark. 345, 385, 86 S.W.3d 884, 900 (2002).

<sup>33</sup> *Accord* Op. Att'y Gen. 2017-122 (noting that determining whether the proposed ballot title sufficiently informs voters of the measure's content "would require me to pick and choose language from the text of the measure itself, which is tantamount to crafting a ballot title out of whole cloth ... [and] beyond the scope of my authority under section 7-9-107.").

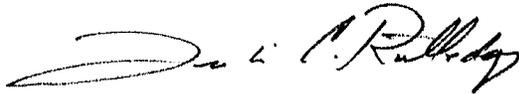
## CONCLUSION

The ambiguities noted above are not necessarily all the ambiguities contained in your proposal, but they (together with the other stated problems) are sufficiently serious to require me to reject your popular name and ballot title. I am unable to substitute language in a ballot title for your measure due to these ambiguities. Further, additional ambiguities may come to light on review of any revisions of your proposal.

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.

Based on what has been submitted, my statutory duty is to reject your proposed ballot title for the foregoing reasons and instruct you to redesign the proposed measure and ballot title.<sup>34</sup>

Sincerely,



LESLIE RUTLEDGE  
Attorney General

Enclosure

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<sup>34</sup> Ark. Code Ann. § 7-9-107(c).

**Popular Name**

THE ARKANSAS CASINO GAMING AND HIGHWAY FUNDING AMENDMENT OF 2018

**Ballot Title**

An amendment to the Arkansas Constitution authorizing up to three casinos to operate in Arkansas, all being subject to the laws enacted by the General Assembly in accord with this amendment and regulations promulgated by the Arkansas Department of Finance and Administration, Office of the Arkansas Lottery (“Office of the Arkansas Lottery”), in accord with laws enacted by the General Assembly; defining “casino gaming” as dealing, operating, carrying on, conducting, maintaining, or exposing for play any game played with cards, dice, equipment, or any mechanical, electromechanical, or electronic device or machine for money, property, checks, credit, or any representative value, including, without limitation, any game, device, or type of wagering permitted at a casino operated within any one or more of the States of Louisiana, Mississippi, Missouri, Oklahoma, or Texas as of November 6, 2018; providing that the Office of the Arkansas Lottery must license and regulate casinos in accordance with regulations it establishes; providing that the Office of the Arkansas Lottery shall award at least two but not more than three casino licenses; providing that the Office of the Arkansas Lottery shall set the initial maximum application fees for casino licenses; the Office of the Arkansas Lottery shall award no more than one license per county; requiring that the first casino license be awarded to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 50,000 according to the 2010 United States Census (to-wit: Jefferson County), and if the requirements for the first casino license are not met, then the Office of the Arkansas Lottery shall issue the first casino license to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 2, 3, or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 40,000 according to the 2010 United States Census (to-wit: Crawford County, Crittenden County, Jefferson County, Miller County, Mississippi County, Pope County, Union County, or White County); requiring that the second casino license be awarded to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 3 or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 50,000 according to the 2010 United States Census (to-wit: Crittenden County or Jefferson County), and if the requirements for the second casino license are not met, then the Office of the Arkansas Lottery shall issue the second casino license to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 2, 3, or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 40,000 according to the 2010 United States Census (to-wit: Crawford County, Crittenden County, Jefferson County, Miller County, Mississippi County, Pope County, Union County, or White County); requiring that if the Office of the Arkansas Lottery awards a third casino license, the third casino license be awarded to an applicant for a casino to be located in a county that has

been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 2, 3, or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 40,000 according to the 2010 United States Census (to-wit: Crawford County, Crittenden County, Jefferson County, Miller County, Mississippi County, Pope County, Union County, or White County); the Office of the Arkansas Lottery shall require all applicants to demonstrate operational experience in an existing casino that provides casino gaming; providing that the Office of the Arkansas Lottery shall require that any application for a license be accompanied by either a letter of support from the County Judge or a Resolution from the County Quorum Court in the county where the applicant is proposing the casino be located and, if the proposed casino is to be located within a city or town, a letter of support from the Mayor in the city or town where the applicant is proposing the casino to be located; providing that all applicants demonstrate a minimum investment of at least \$100,000,000 for the development of each casino facility with credit given for existing real estate value as determined by the Office of the Arkansas Lottery; defining "annual net casino gaming receipts" as gross receipts for a twelve-month period from casino gaming less amounts paid out or reserved as winnings to casino patrons for that twelve-month period; defining "annual net casino gaming receipts tax" as a tax on gross receipts for a twelve-month period from casino gaming less amounts paid out or reserved as winnings to casino patrons for that twelve-month period; providing that the annual net casino gaming receipts are subject to a 12% annual net casino gaming receipts tax; subjecting each casino to the same income, property, sales, use, employment, and other taxation as any for-profit business located in the county and city or town in which the casino is located, except that the Arkansas Gross Receipts Act of 1941 and local gross receipts taxes shall not apply to annual net casino gaming receipts; establishing on the books of the Treasurer of State, Auditor of State, and the chief fiscal officer of the State a special account to be designated as the Arkansas Casino Gaming and Highway Funding Account; providing that the net casino gaming receipts tax shall be distributed 65% to the State Highway and Transportation Department Fund as identified in Ark. Code Ann. § 19-6-405 or its successor fund and apportioned to the State Highway and Transportation Department Fund, the County Aid Fund and the Municipal Aid Fund in the percentages provided in the Arkansas Highway Revenue Distribution Law, §§ 27-70-201 and 27-70-206, 2.5% to the Office of the Arkansas Lottery, 10% to the county in which the casino is located, and 22.5% to the city or town in which the casino is located and, in the event the casino is not located within a city or town, then the county in which the casino is located shall receive the 22.5% that would have been dedicated to the city herein; notwithstanding Ark. Code Ann. § 3-3-211, which prohibits the sale of intoxicating liquor on Christmas Day, allowing a casino to operate on any day for any portion or all of any day; notwithstanding Ark. Code Ann. § 3-9-201, et seq. and other applicable Arkansas law requiring the residents of a dry county or city to vote to approve the sale of intoxicating liquor, allowing the selling or complimentary serving of intoxicating liquor in casinos during all hours the casino operates but otherwise subjecting casinos to all applicable Arkansas laws involving the distribution and sale of intoxicating liquor; permitting the shipment into the Arkansas counties where the casinos are located of gambling devices shipped and delivered in accordance with applicable federal law; declaring inapplicable all constitutional provisions and laws to the extent they conflict with this amendment, but not otherwise amending, repealing, or otherwise affecting Amendment 84 (bingo or raffles) or Amendment 87 (state lottery) to the Arkansas Constitution, or Arkansas Act 1151 of 2005 (Electronic Games of Skill).

**SECTION 1.** The following is added as an amendment to the Arkansas Constitution:

**§ 1. Short title.**

This amendment shall be known and cited as “The Arkansas Casino Gaming and Highway Funding Amendment of 2018.”

**§ 2. Definitions.**

(a) “Annual net casino gaming receipts” is defined as gross receipts for a twelve-month period from casino gaming less amounts paid out or reserved as winnings to casino patrons for that twelve-month period.

(b) “Annual net casino gaming receipts tax” is defined as a tax on gross receipts for a twelve-month period from casino gaming less amounts paid out or reserved as winnings to casino patrons for that twelve-month period.

(c) “Casino” is defined as a facility where casino gaming is conducted as authorized by this Amendment.

(d) “Casino gaming” is defined as dealing, operating, carrying on, conducting, maintaining, or exposing for play any game played with cards, dice, equipment, or any mechanical, electromechanical, or electronic device or machine for money, property, checks, credit, or any representative value, including, without limitation, any game, device, or type of wagering permitted at a casino operated within any one or more of the States of Louisiana, Mississippi, Missouri, Oklahoma, or Texas as of November 6, 2018.

(e) “Intoxicating liquor” is defined as any beverage containing more than one-half of one percent of alcohol by weight.

**§ 3. Authorizing Casinos and Casino Gaming.**

(a) Casinos and casino gaming are hereby authorized in the State of Arkansas as provided in this amendment.

(b) The Arkansas General Assembly shall from time to time enact laws, and appropriate monies to or for the use of the Arkansas Department of Finance and Administration, Office of the Arkansas Lottery (“Office of the Arkansas Lottery”), to fulfill the purpose of this amendment. Initial laws and appropriations enacted by the General Assembly pursuant hereto shall be in full force and effect no later than June 30, 2019.

**§ 4. Licensing of Casinos and Casino Gaming.**

(a) Casinos shall be licensed by the Office of the Arkansas Lottery.

(b) The Office of the Arkansas Lottery shall administer and regulate the licensing of casinos, including the issuance of a license to operate a casino, and shall administer and enforce the provisions of this amendment.

(c) The Office of the Arkansas Lottery shall adopt rules necessary to carry out the purposes of this amendment; and perform its duties under this amendment.

(d) Rules adopted under this section are rules as defined in the Arkansas Administrative Procedures Act, Ark. Code Ann. § 25-15-201 *et seq.*

(e) Not later than 120 days after the effective date of this amendment, the Office of the Arkansas Lottery shall adopt rules governing:

- (1) The manner in which the Office of the Arkansas Lottery considers applications for and renewals of licenses for casinos and casino gaming;
- (2) The form and content of registration and renewal of applications for casinos;
- (3) Oversight requirements for casinos and casino gaming;

(4) Recordkeeping requirements for casinos;

(5) Personnel requirements for casinos and casino gaming;

(6) Procedures for suspending or terminating the licenses of casinos that violate the provisions of this amendment or the rules adopted under this amendment;

(7) A schedule of penalties and procedures for appealing penalties;

(8) Procedures for inspection and investigations of casinos and casino gaming;

and

(9) Any other matters necessary for the Office of the Arkansas Lottery's fair, impartial, stringent, and comprehensive administration of its duties under this amendment.

(f) Not later than 120 days after the effective date of this amendment, the Office of the Arkansas Lottery shall adopt rules establishing license-application fees and license-renewal fees for casinos and casino gaming.

(g) The initial casino application fee shall be a maximum of \$250,000.

(h) Not later than June 1, 2019, the Office of the Arkansas Lottery shall begin accepting applications for licenses to operate a casino and engage in casino gaming.

(i) The application to operate a casino and engage in casino gaming shall include without limitation the following:

(1) The application fee;

(2) The legal name of the casino;

(3) The physical address of the casino;

(4) The name, address, and date of birth of each casino agent; and

(5) If the city, town, or county in which the casino would be located has enacted zoning restrictions, a sworn statement certifying that the casino will operate in compliance with the restrictions;

(j) None of the owners, board members, or officers of the casino:

(1) Shall have been convicted of a disqualifying felony offense as defined by the Office of the Arkansas Lottery;

(2) Shall have previously been an owner of a casino and had his or her license revoked; and

(3) Shall be under twenty-one years of age.

(k) The Office of the Arkansas Lottery shall award at least two but not more than three casino licenses.

(l) The Office of the Arkansas Lottery shall award no more than one casino license per county.

(m) The Office of the Arkansas Lottery shall award the first casino license to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 50,000 according to the 2010 United States Census (to-wit: Jefferson County). If the requirements in this amendment for the first casino license are not met, then the Office of the Arkansas Lottery shall issue the first casino license to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 2, 3, or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at

least 40,000 according to the 2010 United States Census (to-wit: Crawford County, Crittenden County, Jefferson County, Miller County, Mississippi County, Pope County, Union County, or White County).

(n) The Office of the Arkansas Lottery shall award the second casino license to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 3 or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 50,000 according to the 2010 United States Census (to wit: Crittenden County or Jefferson County). If the requirements in this amendment for the second casino license are not met, then the Office of the Arkansas Lottery shall issue the second casino license to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 2, 3, or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 40,000 according to the 2010 United States Census (to-wit: Crawford County, Crittenden County, Jefferson County, Miller County, Mississippi County, Pope County, Union County, or White County).

(o) The Office of the Arkansas Lottery may award a third casino license to an applicant for a casino to be located in a county that has been identified by the Arkansas Economic Development Commission pursuant to the Consolidated Incentive Act of 2003 as a tier 2, 3, or 4 county as of December 31, 2017, and requiring that the casino be located in a county with a population of at least 40,000 according to the 2010 United States Census (to-wit: Crawford County, Crittenden County, Jefferson County, Miller County, Mississippi County, Pope County, Union County, or White County).

(p) The Office of the Arkansas Lottery shall require all applicants to demonstrate operational experience in an existing casino that provides casino gaming.

(q) The Office of the Arkansas Lottery shall require all applicants to demonstrate a minimum investment of at least \$100,000,000 for the development of each proposed casino facility with credit given for existing real estate value as determined by the Office of the Arkansas Lottery.

(r) The Office of the Arkansas Lottery shall require all applications to include either a letter of support from the County Judge or a Resolution from the Quorum Court in the county where the proposed casino is to be located and, if the proposed casino is to be located within a city or town, a letter of support from the Mayor in the city or town where the applicant is proposing the casino to be located.

(s) The Office of the Arkansas Lottery may conduct a criminal background check in order to carry out this section.

(t) No individual shall own an interest in more than one casino in Arkansas.

(u) A casino may receive compensation for providing the goods and services allowed by this amendment.

(v) The Office of the Arkansas Lottery shall issue a renewal license within ten days to any entity that complies with the requirements contained in this amendment, including without limitation the payment of the renewal fee.

#### **§ 5. Taxation and distribution of proceeds.**

(a) A casino's annual net casino gaming receipts are subject to a 12% annual net casino gaming receipts tax.

(b) Each casino shall be subject to the same income, property, sales, use, employment and other taxation as any for-profit business located in the county and city or town in which the casino is located, except that the Arkansas Gross Receipts Act of 1941 and local gross receipts taxes shall not apply to annual net casino gaming receipts.

(c) There is established on the books of the Treasurer of State, Auditor of State, and the chief fiscal officer of the State a special account to be designated as the Arkansas Casino Gaming and Highway Funding Account.

(d) The annual net casino gaming receipts tax shall be distributed 65% to the State Highway and Transportation Department Fund as identified in Ark. Code Ann. § 19-6-405 or its successor fund and then to be apportioned as set forth in section (e), 2.5% to the Office of the Arkansas Lottery, 10% to the county in which the casino is located, and 22.5% to the city or town in which the casino is located and, in the event the casino is not located within a city or town, then the 22.5% dedicated to the city shall go to the county in which the casino is located.

(e) On the last day of each month, the Treasurer of State shall transfer the 65% of revenues derived by the taxes levied under this amendment referenced in section (d) to the State Highway and Transportation Department Fund, the County Aid Fund and the Municipal Aid Fund in the percentages provided in the Arkansas Highway Revenue Distribution Law, § 27-70-201 and § 27-70-206. Also, on the last day of each month, the Treasurer of State shall transfer the other percentage allocations made in section (d) to the designated entities.

**§ 6. Other operational provisions.**

(a) Casinos may operate on any day for any portion or all of any day.

(b) Notwithstanding Ark. Code Ann. § 3-3-211, which prohibits the sale of intoxicating liquor on Christmas Day, and Ark. Code Ann. § 3-9-201, et seq. and other applicable Arkansas

law requiring the residents of a dry county or city to vote to approve the sale of intoxicating liquor, casinos shall be permitted to sell intoxicating liquor or provide complimentary servings of intoxicating liquor during all hours in which the casino operates. Casinos shall be subject to all applicable Arkansas laws involving the distribution and sale of intoxicating liquor that do not conflict with any provision of this amendment.

**§ 7. Legal shipment of gambling devices into State.**

(a) All shipments of gambling devices, including slot machines, into any county of this State within which casino gaming is authorized, the registering, recording, and labeling of which have been duly performed by the manufacturer and/or dealer thereof in accordance with applicable federal law, shall be deemed legal shipments into any such county of this State within which casino gaming is authorized.

**§ 8. Effect on existing law.**

(a) By adoption of this amendment, there is no implied repeal of the existing Arkansas laws criminalizing gambling for purposes not specified in this amendment.

(b) This amendment does not amend, repeal, or otherwise affect Amendment 84 (authorizing bingo and raffles), Amendment 87 (creating the state scholarship lottery), or Act 1151 of 2005 (authorizing electronic games of skill), to the extent those Amendments and statute do not conflict with this amendment.

**§ 9. Inconsistent provisions inapplicable.**

All provisions of the Constitution of this State and statutes of this State, including without limitation laws forbidding the judicial enforcement of gambling debts and statutes declaring gambling to be a crime, to the extent inconsistent or in conflict with any provision of

this amendment are expressly declared null and void as to, and do not apply to, any activities allowed under this amendment.

**§ 10. Severability.**

If any provision or section of this amendment or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provisions or application of the amendment that can be given effect without the invalid provisions or applications, and to this end the provisions of this amendment are declared to be severable.

**SECTION 2. EFFECTIVE DATE.** This amendment shall be effective on and after November 14, 2018.