



TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2023-107

November 28, 2023

Steven Nichols
Post Office Box 7866
Little Rock, Arkansas 72217

Dear Mr. Nichols:

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

The Arkansas Reproductive Healthcare Amendment

Ballot Title

AN AMENDMENT TO THE ARKANSAS CONSTITUTION PROVIDING THAT THE GOVERNMENT OF THE STATE OF ARKANSAS, ITS OFFICERS, OR ITS POLITICAL SUBDIVISIONS SHALL NOT PROHIBIT, PENALIZE, DELAY OR RESTRICT ACCESS TO ABORTION WITHIN 18 WEEKS OF CONCEPTION, OR IN CASES OF RAPE, INCEST, IN THE EVENT OF A FATAL FETAL ANOMALY, OR WHEN ABORTION IS NEEDED TO PROTECT THE PREGNANT FEMALE'S LIFE OR HEALTH; EXCEPT FOR THE CIRCUMSTANCES DESCRIBED ABOVE, THE ARKANSAS GENERAL ASSEMBLY MAY PROHIBIT OR RESTRICT ACCESS TO ABORTION ONLY WHEN IT ESTABLISHES A COMPELLING GOVERNMENT INTEREST ACHIEVED BY THE LEAST RESTRICTIVE MEANS; THE GOVERNMENT OF THE STATE OF ARKANSAS, ITS OFFICERS OR ITS POLITICAL SUBDIVISIONS SHALL NOT PENALIZE AND [sic] INDIVIDUAL FOR REQUESTING OR RECEIVING ABORTION SERVICES NOR [sic] SHALL IT PENALIZE A PERSON OR ENTITY THAT ASSISTS AN INDIVIDUAL IN

RELATION TO ABORTION SERVICES; PROVIDING THAT A GOVERNMENT INTEREST IS “COMPELLING” ONLY IF IT IS FOR THE PURPOSE OF PROTECTING THE HEALTH OF AN INDIVIDUAL SEEKING ACCESS, DOES NOT INFRINGE ON THE INDIVIDUAL’S DECISION MAKING, AND IS CONSISTENT WITH WIDELY ACCEPTED CLINICAL STANDARDS OF PRACTICE AND EVIDENCE-BASED MEDICINE; PROVIDING THAT A FATAL FETAL ANOMALY MEANS A FETAL CONDITION DIAGNOSED BEFORE BIRTH THAT, IN THE PHYSICIAN’S GOOD FAITH MEDICAL JUDGMENT, IS INCOMPATIBLE WITH LIFE OUTSIDE THE WOMB AND FOR WHICH MEDICAL INTERVENTION WOULD BE FUTILE; PROVIDING THAT THE AMENDMENT IS SELF-EXECUTING AND THAT IF ANY SECTION IS HELD INVALID IT SHALL BE SEVERABLE FROM THE REMAINING PORTIONS OF THE AMENDMENT.

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

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.*

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

4. Rules governing the ballot title. The ballot title must summarize the proposed 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

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

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

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

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

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

¹² *Id.*

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

¹⁴ A.C.A. §§ 7-9-107(d)(2) (requiring the ballot title “submitted” to the Attorney General or “supplied by the Attorney General” to “briefly and concisely state the purpose the proposed measure”); 7-5-309(b)(1)(B) (allowing no more than ten minutes); see *Bailey*, 318 Ark. at 288, 884 S.W.2d at 944 (noting the connection between the measure’s length and the time limit in the voting booth).

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

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

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

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

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 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.

4. Application. Having reviewed the text of your proposed constitutional amendment, as well as your proposed popular name and ballot title, I must reject your popular name and ballot title due to ambiguities in the text of your proposed measure that prevent me from ensuring that the ballot title you have submitted, or any ballot title I would substitute, is not misleading. The following quotes are taken from the relevant *sections of your proposed text*.

Section 1: “The government of the State of Arkansas, its officers, or its political subdivisions shall not prohibit, penalize, delay, or restrict access to abortion within 18 weeks of conception, or in cases of rape, incest, in the event of a fatal fetal anomaly, or when abortion is needed to protect the pregnant female’s life or health.”

This section contains at least two issues that prevent me from ensuring the ballot title is not misleading:

- **“Access.”** First, this section may be read in two different ways depending on how the phrase “access to abortion” is being used. On the one hand, you could intend the phrase “access to” to modify the word “restrict,” but not the other items in the list. If that were your intent, the provision would prevent government action that would (1) prohibit abortion, (2) penalize abortion, (3) delay abortion, or (4) restrict access to abortion. On the other hand, you might intend the phrase “access to abortion” to modify the entire list. If that were your intent, then the provision would prevent government action that would (1) prohibit access to abortion, (2) penalize access to abortion, (3) delay access to abortion, (4) or restrict access to abortion. But based on the other provisions in your proposal, it seems your intent is to prevent any government action that regulates abortion itself (with the exception of certain conditions in section 2 of your proposal, which is discussed below). Is your intent to limit government action regarding abortion itself or regarding access to abortion? Under the Arkansas Supreme Court’s caselaw, the ballot title would need to describe the nature of the restriction you intend to propose. Because of this lack of clarity, I am unable to say that your ballot title is not misleading.
- **Meaning of “health.”** Second, the last clause refers to “the pregnant female’s life or health” but does not define what is meant by “health.” Is the term intended to cover physical health only, or also mental health? If the term is limited to physical health, is that intended to be restricted to emergent medical conditions? Or does the term also extend to pregnancies that increase the risk of certain medical complications? Answers to these questions would almost certainly give voters “serious ground for reflection.”²⁰ Therefore,

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

²⁰ *See Bailey*, 318 Ark. at 285, 884 S.W.2d at 942.

the ballot title would need to inform the potential petitioner or voter about these matters. Because the text of your proposed measure is unclear on these matters, I cannot ensure your ballot title is a fair summary.

Section 2: “Except for the circumstances enumerated in Section 1, the Arkansas General Assembly may prohibit or restrict access to abortion only when it establishes a compelling government interest achieved by the least restrictive means. The government of the State of Arkansas, its officers or its political subdivisions shall not penalize an individual for requesting or receiving abortion services nor [*sic*] shall it penalize a person or entity that assists an individual in relation to abortion services.”

This section of your proposed text contains at least two issues that prohibit me from ensuring your proposed ballot title is not misleading and that prevent me from substituting a more fitting ballot title:

- **Internal contradiction.** First, the two sentences in this section seem contradictory. The first sentence states that the General Assembly “may prohibit or restrict access to abortion” in certain circumstances. But the second sentence prohibits any government action that “penalize[s]” certain people for “requesting or receiving” or helping someone “in relation to abortion services.” It is unclear how the General Assembly “may prohibit or restrict access to abortion” without penalizing those who violate those regulations. This apparent contradiction renders it impossible for me to ensure the ballot title accurately summarizes this section.
- **Possible redundancy.** Second, in addition to being internally inconsistent, this section also seems to duplicate most of section 1. If your intent is for the second sentence of section 2 to accomplish something that would not already be accomplished by section 1, that intent is not clear from the current draft of your proposal.

Section 3: “A government interest is ‘compelling’ only if it is for the purpose of protecting the health of an individual seeking access, does not infringe on the individual’s decision making, and is consistent with widely accept clinical standards of practice and evidence-based medicine.”

This section contains at least three issues that prevent me from ensuring the ballot title is not misleading:

- **Meaning of “health.”** First, this provision repeats section 1’s lack of clarity regarding the scope of the term “health.”
- **“Access.”** Second, the provision defines a “compelling” government interest as one that meets a three-part test. The first part of that test is unclear. The first part refers to “protecting the health of an individual seeking access.” “Access” to what? In context, you probably mean “access to abortion services.” But since that is not clear, I cannot ensure that provision, which is repeated in the ballot title, adequately apprises citizens about the proposal’s impact.

- **Internal contradiction.** Third, the second part the definition of “compelling interest” is even less clear. It prohibits a regulation that “infringe[s] on the individual’s decision making.” Section 2 of your proposed text states that the government may regulate certain abortions only when the regulation is justified. And this part of Section 3 states that a regulation cannot be justified if it “infringe[s] the individual’s decision making.” But all regulations necessarily restrict people’s choices. Read together, the two provisions are contradictory: government may infringe on people’s choices regarding abortion unless the regulation infringes on an individual’s choices. This contradiction prevents me from identifying your intent and ensuring the ballot title summarizes your text in a way that is not misleading.

Section 4: “A fatal fetal anomaly means a fetal condition diagnosed before birth that, in the physician’s good faith medical judgment, is incompatible with life outside the womb and for which medical intervention would be futile.”

The issue with this section is the phrase “incompatible with life outside the womb.” The core meaning of this phrase seems clear enough—that the fetus would be unable to survive outside the womb. Yet your use of the phrase “incompatible with life outside the womb” suggests you may intend to cover more situations. This lack of clarity prevents me from ensuring the ballot title accurately reflects your proposed text.

The foregoing reasons—taken individually and collectively—are sufficient grounds to reject your proposed popular name and ballot title. Yet I will note a few additional concerns:

- **Popular name.** Your proposed popular name is tinged with partisan coloring and misleading because your proposal is solely related to abortion, not “reproductive healthcare” generally. Therefore, in the future, if your proposal measure were at the stage where it could be certified, I would have to substitute and certify a different popular name. I am flagging this for you now so you can provide an alternative if you would like.
- **Effect on existing law.** You have made no attempt to describe your proposal’s effect on existing constitutional law. For example, you make no effort to articulate how your proposal would relate to Amendment 68 to our state constitution. It seems plausible that even if your proposal were enacted in its current form, portions of Amendment 68 would remain. Since the Arkansas Supreme Court has declared that voters are entitled to some information on how the proposed measure would change current law, some such information would need to be provided.
- **Fetal age vs. gestational age.** Section 1 of your proposed text prohibits government action that would “prohibit, penalize, delay, or restrict access to abortion within 18 weeks of conception....” This time frame is keyed to fetal age, which begins at conception. But most court cases, medical providers, and most citizens count the weeks of pregnancy using gestational age, which begins from the date of the woman’s last menstrual cycle, not from the date of conception.²¹ When counting from the more standard starting point, the

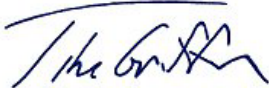
²¹ See *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ---, 142 S. Ct. 2228, 2243 n.14 (2022) (“The Act defines ‘gestational age’ to be ‘the age of an unborn human being as calculated from the first day of the last menstrual

reference to “18 weeks” is closer to “20 weeks.” This difference in timing could be misleading to voters and would certainly give them serious ground for reflection. This is not a basis to reject your proposal as misleading. But if your proposal were at the stage where it could be certified, I would have to substitute language in your ballot title to flag for all voters that the timeframe for government regulation would begin at 20 weeks gestational age.

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.²²

Deputy Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim Griffin", with a horizontal line above it.

TIM GRIFFIN
Attorney General

period of the pregnant woman.’ § 3(f).”); *Reprod. Health Serv. v. Webster*, 851 F.2d 1071, 1074, n3 (8th Cir. 1988), *rev’d on other grounds*, 492 U.S. 490 (1989) (“Gestational age is measured from the first day of a woman’s last menstrual period and is generally two weeks greater than fetal age.”).

²² A.C.A. § 7-9-107(e).