TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2023-113

December 11, 2023

David A. Couch
1501 North University Avenue, Suite 219
Little Rock, Arkansas 72207

Jen Standerfer
2302 Southwest Nottingham Avenue
Bentonville, Arkansas 72713

Dear Mr. Couch and Ms. Standerfer:

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 GOVERNMENT TRANSPARENCY AMENDMENT

Ballot Title

AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO CREATE THE ARKANSAS GOVERNMENT TRANSPARENCY AMENDMENT; ESTABLISHING A RIGHT TO GOVERNMENT TRANSPARENCY; REQUIRING THAT PUBLIC OFFICERS CONDUCT GOVERNMENT BUSINESS IN A MANNER THAT IS OPEN TO ARKANSANS IN ACCESS TO PUBLIC RECORDS, CONDUCT OF PUBLIC MEETINGS, AND ISSUANCE OF PUBLIC NOTICE; PROVIDING THAT ANY LAW REQUIRING THE DISCLOSURE OF A PUBLIC RECORD OR THE OPENNESS OF A PUBLIC MEETING BE LIBERALLY CONSTRUED AND THAT ANY EXEMPTION FROM OR EXCEPTION TO DISCLOSURE OF A PUBLIC RECORD OR THE OPENNESS OF A PUBLIC MEETING BE NARROWLY CONSTRUED; PROHIBITING THE GENERAL ASSEMBLY FROM AMENDING A LAW OR ENACTING LAW TO DIMINISH PUBLIC ACCESS TO GOVERNMENT, BUT

> ALLOWING A TWO THIRDS MAJORITY OF THE GENERAL ASSEMBLY TO REFER THAT LAW TO THE PEOPLE TO BE APPROVED OR REJECTED AT THE NEXT GENERAL ELECTION; PERMITTING THE GENERAL ASSEMBLY, BY A NINE TENTHS VOTE AND IN THE CASE OF AN EMERGENCY, TO MAKE A REFERRED LAW TAKE IMMEDIATE EFFECT UNTIL APPROVED OR REJECTED AT THE NEXT GENERAL ELECTION; CLARIFYING THAT ANY ACT REFERRED UNDER THIS AMENDMENT IS NOT A REFERRED CONSTITUTIONAL AMENDMENT UNDER ARTICLE 12, SECTION 22 OF THE ARKANSAS CONSTITUTION; DEFINING THE TERM "DIMINISHES PUBLIC ACCESS TO GOVERNMENT" TO INCLUDE MAKING A PUBLIC PROCESS, PUBLIC MEETING, PUBLIC NOTICE, OR PUBLIC RECORD LESS TRANSPARENT OR MODIFYING THE LEGAL STANDARD FOR OR LIMITING THE RECOVERY OF PENALTIES, FEES, EXPENSES, OR COSTS; DEFINING THE TERM '"LESS TRANSPARENT TO THE PEOPLE" TO INCLUDE REDUCING THE PUBLIC'S ACCESS TO VIEW, HEAR, ATTEND, OBTAIN KNOWLEDGE OF, OR ENGAGE IN A PUBLIC PROCESS OR PUBLIC MEETING, REPEALING, REMOVING, OR REDUCING ANY TIME, PLACE MANNER, TERM, OR MEDIUM OF PUBLIC NOTICE, EXEMPTING ANY PORTION OF A PUBLIC RECORD FROM DISCLOSURE REQUIREMENTS, DESIGNATING ANY PORTION OF A PUBLIC RECORD TO BE CONFIDENTIAL, OR MAKING THE PROCESS FOR REQUESTING, OBTAINING, RECEIVING, OR VIEWING ANY PORTION OF A PUBLIC RECORD MORE DIFFICULT, COMPLICATED, OR EXPENSIVE FOR THE ARKANSAS CITIZEN; PROHIBITING THE GENERAL ASSEMBLY FROM REFERRING FUTURE AMENDMENTS TO THE ARKANSAS GOVERNMENT TRANSPARENCY AMENDMENT TO THE PEOPLE UNDER ARTICLE 12, SECTION 22; PRESERVING THE PEOPLE'S POWER TO AMEND THE ARKANSAS GOVERNMENT TRANSPARENCY AMENDMENT UNDER ARTICLE 5, SECTION 1 OF THE ARKANSAS CONSTITUTION; EMPOWERING ARKANSAS CITIZENS TO SUE THE STATE OF ARKANSAS IN COURT AND RECOVER DAMAGES FOR GOVERNMENT'S FAILURE TO COMPLY WITH THE REQUIREMENTS OF ARKANSAS LAW CONCERNING GOVERNMENT TRANSPARENCY INCLUDING WITHOUT LIMITATION ACCESS TO PUBLIC RECORDS, OPENNESS OF PUBLIC MEETINGS, AND TIME, PLACE, MATTER, TERM, OR MEDIUM OF PUBLIC NOTICE; DECLARING THAT ALL PROVISIONS OF THE CONSTITUTION, STATUTES AND COMMON LAW OF THIS STATE TO THE EXTENT INCONSISTENT OR IN CONFLICT WITH ANY PROVISION OF THIS AMENDMENT ARE EXPRESSLY DECLARED NULL AND VOID; PROVIDING THAT THE PROVISIONS OF THIS AMENDMENT ARE SEVERABLE; AND, STATING THAT THE AMENDMENT IS EFFECTIVE NOVEMBER 6, 2024.

2. Rules governing my review. Arkansas law requires sponsors of statewide initiated measures to "submit the original draft" of the measure to the Attorney General.[1] An "original draft" includes the full text of the proposed measure along with its ballot title and popular name.[2] Within ten business days of receiving the sponsor's original draft, the Attorney General must respond in one of three ways:

- First, the Attorney General may approve and certify the ballot title and popular name in the form they were submitted.[3]
- Second, the Attorney General may "substitute and certify a more suitable and correct ballot title and popular name."[4]
- Third, the Attorney General may reject both the popular name and ballot title "and state his or her reasons therefor and instruct" the sponsors to "redesign the proposed measure and the ballot title and popular name."[5] This response is permitted when, after reviewing the proposed measure, the Attorney General determines that "the ballot title or the nature of the issue" is (1) "presented in such manner" that the ballot title would be misleading or (2) "designed in such manner" that a vote for or against the issue would actually be a vote for the outcome opposite of what the voter intends.[6]

3. Rules governing the popular name. The popular name is primarily a useful legislative device.[7] While it need not contain detailed information or include exceptions that might be 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

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[1] A.C.A. § 7-9-107(a).

[2] A.C.A. § 7-9-107(b).

[3] A.C.A. § 7-9-107(d)(1).

[4] *Id*.

[5] A.C.A. § 7-9-107(e).

[6] *Id*.

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

[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).

also disapproved the use of terms that are "technical and not readily understood by voters."[11] Ballot titles that do not define such terms may be deemed insufficient.[12]

Additionally, sponsors cannot omit material from the ballot title that qualifies as an "essential fact which would give the voter serious ground for reflection."[13] Yet the ballot title must also be brief and concise lest voters exceed the statutory time allowed to mark a ballot.[14] The ballot title is not required to be perfect, nor is it reasonable to expect the title to address every possible legal argument the proposed measure might evoke.[15] The title, however, must be free from any misleading tendency—whether by amplification, omission, or fallacy—and it must not be tinged with partisan coloring.[16] The ballot title must be honest and impartial,[17] and it must convey an intelligible idea of the scope and significance of a proposed change in the law.[18]

Finally, the Court has held that a ballot title cannot be approved if the text of the proposed amendment itself contributes to confusion and disconnect between the language in the popular 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 the following problems *in the text* of your proposed measure, nearly all of which are imported into your ballot title:

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[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).

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

- **Lack of clarity on key terms.** Your proposed text hinges on terms that are undefined and whose definitions would likely give voters serious ground for reflection. The following are some of the more problematic instances of this:
    - ***Government transparency***. Section 2(b) of your proposed text states that "[g]overnment transparency is a right of the citizens of Arkansas." The term "government transparency" is never defined in your proposed text. Nor is the term defined in existing state law. I am aware that a different provision of your proposed text would limit the General Assembly's power to make certain public records or meetings "less transparent to the people." While your proposed measure defines that phrase, that definition has certain issues, which are noted below. Further, it is unclear whether you intend this limitation on the legislature's power to be identical with the citizen's right to "government transparency." The meaning of this new constitutional right would likely give the voter serious ground for reflection. And since your ballot title simply repeats the phrase "government transparency" without providing any further context, I cannot ensure your ballot title does not omit material that qualifies as an "essential fact which would give the voter serious ground for reflection." Given this lack of clarity, I am unable to certify your ballot title as submitted or substitute a more appropriate title.
    - ***Notice, meetings & records.*** Your proposed text often uses the terms "public record," "public meeting," "public notice," and "public process." None of these terms are defined in the proposal. A portion of those terms are defined in existing state statutes. Since your proposal relies so heavily on these terms, their scope would almost certainly give voters serious ground for reflection. Because you have not been clear on what you mean by these terms, I cannot ensure the ballot title does not mislead by omission.
    - ***"A case concerning government transparency."*** While defining the phrase "diminishes public access to government," your proposed text twice uses the phrase "in a case concerning government transparency." Under current Arkansas law, there is no such cause of action. Rather, citizens have rights under the Freedom of Information Act that can be enforced under certain conditions. *See* A.C.A. § 25-19-107. Those rights include the right to timely receive or inspect copies of nonexempt public records or to attend public meetings. No provision of the FOIA uses the term "government transparency." Since it is unclear from the face of your proposed text what you have in mind, I cannot ensure that this version of your proposed ballot title properly summarizes your proposed text.
- **Lack of the full text.** The foregoing problems are likely the result of a larger underlying problem: the lack of the full text of the proposed measure.
    - ***The existence of the full-text requirements.*** As noted above, when sponsors of a statewide measure seek the Attorney General's review under A.C.A. § 7-1-107, that statute requires sponsors to submit the "[t]he full text of the proposed measure." The importance of the "full text" extends to the signature-gathering stage under

Amendment 7 to our state constitution and A.C.A. § 7-9-104, both of which require that the "full text" of the initiated measure accompany each petition. The requirement also extends to the signature-verification stage under A.C.A. § 7-9-126(b)(7), which prohibits the Secretary of State from counting any signatures on a petition that fails to comply with § 7-9-104.

- ***The meaning of the full-text requirements.*** While no Arkansas Supreme Court decisions have interpreted the meaning of this phrase, the Supreme Court of North Dakota has interpreted a materially identical phrase in its own law. Recently, in *Haugen v. Jaeger*, the North Dakota Supreme Court reviewed the legal validity of an initiated constitutional amendment that, by explicit citation, incorporated certain state statutes into the state constitution.[20] The legal question in *Haugen* was whether such an incorporation violated the state's full-text requirement. Reaffirming a nearly 100-year-old decision on that topic, *Dyer v. Hall*,[21] the *Haugen* court held that such an incorporation by reference violates the full-text requirement for two reasons. First, it cut against "the purpose of the full-text requirement," which "was to obviate all uncertainty as to the subject-matter dealt with in the Constitution."[22] Second, *Haugen* approvingly cited *Dyer*'s additional point that when initiated measures incorporate laws by reference, the "voters have no opportunity to read or examine fairly the contents [of those incorporated laws] and appreciate the real import of the proposed amendment."[23] In my opinion, the Arkansas Supreme Court would likely agree with *Haugen*'s conclusion and reasoning when interpreting our own full-text requirements.

- ***The lack of the full text in your proposal.*** Perhaps to avoid the issues with incorporation by reference discussed in *Haugen*, you appear to have chosen to incorporate existing state statutes into your proposal without explicitly citing or naming them but by using key terms from those statutes without carrying over those terms' definitions. Unlike the sponsors in *Haugen* who incorporated statutes by explicit reference to some of the statute's *codification*, you appear to be attempting to incorporate by explicit reference to the FOIA's defined terms without mentioning their codification or providing the relevant definitions. For example:

    - Section 2(d) refers to "[t]he provisions of law requiring the disclosure of a public record." You do not identify which provisions you have in mind. I am well aware of the provisions ***of the FOIA*** requiring the disclosure of a public record. But you do not reference the FOIA, nor do you identify what you mean by "the provisions of law requiring disclosure."

[20] 2020 N.D. 177, 948 N.W.2d 1.

[21] 51 N.D. 391, 199 N.W. 754 (1924).

[22] 2020 N.D. 177, 4, 948 N.W.2d at 4 (internal quotations omitted).

[23] *Id.* at 4, 948 N.W.2d at 3 (internal quotations omitted).

- Your text refers to certain "public notice" being "required under law." You do not identify which legal requirements you have in mind. I am well aware of the public notice requirements required under ***the FOIA***. But your proposal does not reference the FOIA, nor do you identify what you mean by "public notice" being "required under law."

- Your proposed text defines the term "less transparent to the people" as any act of the General Assembly that, among other things, "[m]akes ***the process*** for requesting, obtaining, receiving, or viewing any portion of the public record ***more difficult***…for the requester." (Emphases added.) What process? And more difficult than what? I assume you mean, "more difficult than the process as it currently exists ***under the FOIA***." But you do not cite or name the FOIA.

These examples illustrate how your proposal attempts to incorporate into the constitution the substance of existing state statutes without citing those statutes and without carrying over their definitions. The fact that you incorporate state statutes into your proposal without *citing* the statutes does not insulate your proposal from the problems the *Haugen* court identified. For the key issue in *Haugen* was not the fact that the sponsors *cited* the relevant statutes. Rather, the key issue was that the sponsors incorporated a statute into the constitution *by reference* rather than setting out in the constitution the provisions of those statutes. Indeed, in my view, your approach makes the issue worse. At least with a citation, the statute incorporated is theoretically clear to a perfectly informed voter. The use of less precise terms introduces potential ambiguities.

- ***The absence of the measure's full text renders the ballot title misleading by omission.*** When conducting my statutorily required review under A.C.A. § 7-9-107, I am required to determine whether the popular name and ballot title accurately and impartially summarize *the text* of the proposed measure. Therefore, ambiguities in the text or unclear terms prevent me (1) from ensuring the ballot title is not misleading and (2) from understanding the sponsor's intent fully enough to substitute and certify a different ballot title. These problems are amplified when, as here, the text incorporates by reference key terms of existing statutes without also including the definitions of those terms. Both issues identified in *Haugen* are present here. First, the proposed text lacks clarity regarding the meaning of key terms. Second, a voter reviewing your ballot title would not be sufficiently advised about the content of the statutes you are attempting to incorporate.

An intended effect of your proposal, as I understand it, is to sharply limit the ability of the legislature to amend statutes (or enact new statutes) in a way that "diminishes public access to government" by making government "less transparent." Defining this limitation on the legislature's power by reference to the status quo level of "access to government" or "transparency" necessarily incorporates a substantial body of current statutes, including—but almost certainly not limited to—sections of the FOIA. Under your proposal, these current statutes would be turned into quasi-

constitutional provisions. They could only be permanently amended or repealed by popular vote, and the only mechanism for the legislature to temporarily amend or repeal them before a popular vote can be held would be through a nearly unanimous vote of the legislature. If a proposal is going to incorporate and constitutionalize current law, the ballot title must attempt to describe this body of law. Without such a description, voters are not informed about what they are putting in the constitution. Under these circumstances, I am required to reject the popular name and ballot title and instruct you to redesign them to address these problems.

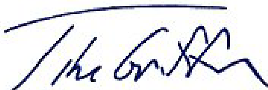
- **Impact on state statutes.** Section (c) of your proposed text would create a constitutional duty of "public officers" that seems contrary to existing state law: "It is the duty of public officers to conduct government business in a manner that is open to Arkansans in access to public documents, conduct of public meetings, and issuance of public notice." Under current law, public employees and officials have a duty to follow certain statutes that regulate which records and meetings must be open on request and which must or may be exempted from public disclosure. Some FOIA exemptions are mandatory, such as A.C.A. § 25-19-105(b)(13), regarding the disclosure of certain public employees' home addresses. But some FOIA exemptions are discretionary, such as A.C.A. § 25-19-106(c)(1)(A), which allows executive sessions for certain personnel matters. If your proposal would create constitutional a duty for public officers "to conduct government business in a manner that is open to Arkansans," then it is difficult to see how a public official could assert a discretionary statutory exemption. If it is your intent to repeal discretionary exemptions, that would need to be noted in the ballot title. But because your intent is not entirely clear at this point, I am unable to ensure the ballot title is not misleading by omission.

While the foregoing defects are sufficient grounds for me to reject your submission, please note that there is an additional issue with your proposed popular name. As one of my predecessor's concluded in Opinion No. 2012-028, the use of the term "transparency" in a popular name "has an obvious positive ring to it" that seems more designed to persuade than inform. This raises a concern about partisan coloring. I am flagging this for you now in case you would like to provide an alternative in a future submission.

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.[24]

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

Sincerely,



TIM GRIFFIN
Attorney General

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[24] A.C.A. § 7-9-107(e).