TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2023-132

January 11, 2024

Clinton W. Lancaster
Attorney at Law
900 South Shackleford Road, Suite 300
Little Rock, Arkansas 72211

Dear Mr. Lancaster:

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

> An Amendment to the Arkansas Constitution to set the time for absentee voting, create absentee voting procedures, determine the manner in which absentee ballots are counted or tabulated, and ensure that elections cannot be conducted in this state using an internet, Bluetooth, or wireless connection.

Ballot Title

> An amendment to the Arkansas Constitution that amends Amendment 50 to add additional sections effectuating a policy and practice in which absentee ballots may only be distributed within the thirty days prior to election day, limited to only registered voters who are unable to be present at the polls on election day because they are physically absent from the county in which they are registered to vote, or hospitalized, incarcerated, or in a long-term care facility within the county in which they are registered to vote; requiring the county clerk to distribute an absentee ballot only to a requesting and qualified voter; prohibiting absentee ballot harvesting by limiting possession of absentee ballots to the requesting voter, an individual assisting a disabled voter, the United States Postal Service, or a duly appointed and authorized election official; preventing the tracking of absentee ballots once they

> have been sent or provided to the voter unless the voter tracking his or her own ballot or verifying that his or her cast absentee ballot has been received by a duly authorized election official; protecting information about who has requested an absentee ballot; ensuring that all absentee ballots are counted on election day before the early or election day votes are counted; prohibiting all elections in this state from being conducted using an internet, Bluetooth, or wireless connection; requiring that absentee ballots and absentee voting which does not strictly conform to the requirements of this amendment to not be counted; and directing the Arkansas General Assembly to allocate funding to effectuate and implement the terms of this amendment.

2. Rules governing my review. In Attorney General Opinion 2023-109, issued in response to your previous request for review and certification, I articulated the rules and standards that govern this process. I rely on those same rules and standards here, and I incorporate them by reference into this opinion.

3. Application to your popular name. As I noted in Opinion No. 2023-109, your proposed popular name is so long that it reads more like a second ballot title than a popular name. Therefore, I am substituting and certifying a "more suitable" popular name.[1] The popular name provided on page 4, below, is substituted and certified for your proposed amendment.

4. Application to your ballot title. Having reviewed the text of your proposed constitutional amendment and ballot title, I believe the following changes are necessary to ensure that your ballot title clearly and accurately sets forth the purpose of your proposed initiated amendment to the Arkansas Constitution:

- **Ballot title summaries.** As I explained in Attorney General Opinion 2023-109, our state constitution requires that sponsors include all material in the ballot title that qualifies as an "essential fact which would give the voter serious ground for reflection."[2] Your proposed constitutional amendment contains several material provisions that do not appear in your ballot title but would likely give voters "serious ground for reflection." These include provisions that:
    - Declare absentee voting a privilege, not a right;
    - Prohibit anyone from touching, handling, or possessing an absentee ballot except for certain listed individuals;[3]

[1] *See* A.C.A. § 7-9-107(d)(1) (authorizing the Attorney General to "substitute and certify a more suitable and correct ballot title and popular name for each amendment or act.").

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

[3] In your last submission, which was the subject of Attorney General Opinion 2023-109, I noted that even though the text of your proposed amendment prohibited anyone from touching, handling, or possessing an absentee ballot except for the voter, certain election workers, and postal workers, your ballot title only stated that "ballot harvesting" and the "unauthorized possession" of absentee ballots were prohibited. This version of your ballot title clarifies and expands the list of individuals who may possess an absentee ballot, yet it still does not inform the voter that your proposed text

- Require that an individual who assists a disabled voter return the disabled voter's absentee ballot to the county clerk's office by using the United States Postal Service and not by returning the ballot in person at the physical office of the county clerk;

- Prohibit the counting of any absentee ballots not physically present and in the canvassing or tabulation process by the close of the polls on election day; and

- Exempt Ark. Const. amend. 51, § 9(i) and any ballots requested, obtained, cast, canvassed, or counted pursuant to the federal Uniform Overseas Citizens Absentee Voting Act from the terms of this amendment.

I have, therefore, added language to your ballot title that summarizes these provisions.

- **Grammatical changes.** I have also made a few minor grammatical changes and clarifications to your ballot title to ensure it is not misleading or confusing to the voter and that it accurately reflects the content of your proposed constitutional amendment. Only one of these changes is substantive: my change of the word "all" to "any" in your provision regarding the use of internet, Bluetooth, or wireless connections. Your ballot title describes the proposed amendment as "prohibiting all elections in this state from being conducted using an internet, Bluetooth, or wireless connection." The use of the word "all" suggests that some of the elections in the state may be conducted using an internet, Bluetooth, or wireless connection," so long as not "all" of them are. But the text of your proposed amendment states, "In a public election in this state, the selecting of votes for a candidate or issue, casting of ballots, tabulation of votes for a ballot, or tabulations pertaining to ballots shall not be conducted or completed using an internet, Bluetooth, or wireless connection." This suggests that you intend to prohibit the use of an internet, Bluetooth, or wireless connection in *any* public election in the state.[4] Therefore, to better reflect the language of your proposed text, I have changed "all elections" to "any election" in your ballot title.

In addition to these edits to your ballot title, I must also note an issue in the text of your proposal. In Attorney General Opinion 2023-109, I explained that initiated constitutional amendments do not require enacting clauses,[5] and that the inclusion of an enacting clause required for "bills" in your first proposed constitutional amendment created an ambiguity as to what the voters are being

prohibits the touching or handling of absentee ballots by anyone who does not fall into one of the categories of listed individuals. Consequently, I have added this information to the ballot title.

[4] When used as an adjective in a negative context, such as in a prohibition, "any" commonly means "not even one." *See* Bryan A. Garner, GARNER'S MODERN ENGLISH USAGE 71 (5th ed. 2022). Therefore, I believe "any" better encompasses the meaning of your proposed text.

[5] *See also* Ark. Const., art. 5, § 1 ("Enacting Clause"); *Mertz v. States*, 318 Ark. 390, 394, 885 S.W.2d 853, 855 (1994) ("Simply put….all bills initiated must be submitted in the following language set forth in Amendment 7: "'Be it enacted by the people of the State of Arkansas…."); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 262–63, 872 S.W.2d 349, 355 (1994) ("The term 'bills' as used in the Enacting Clause section of Amendment 7 does not refer to statewide constitutional amendments but only to initiated proposals where the people are seeking to enact their own laws.").

asked to consider, a bill or a constitutional amendment.[6] Instead of removing the enacting clause altogether, the text of your current proposed constitutional amendment now reads: "BE IT ENACTED BY THE PEOPLE OF THE STATE OF ARKANSAS AS AN AMENDMENT TO THE ARKANSAS CONSTITUTION AND NOT AN INITIATED BILL OR REFERENDUM."

While the inclusion of an enacting clause is improper in a constitutional amendment,[7] I cannot say that this clause, as worded, would be misleading to the voter.[8] Still, please note that this question appears to be one of first impression. A court could find that your clause is an enacting clause and is therefore inherently misleading when used for a constitutional amendment, despite the additional language added to the clause in this submission.

With this caveat and with the above changes incorporated, the following popular name and ballot title are substituted and certified:

Popular Name:

The Absentee Voting Amendment of 2024

Ballot Title:

> An amendment to the Arkansas Constitution declaring that absentee voting in the state of Arkansas is not a right but a privilege; amending Amendment 50 to add additional sections effectuating a policy and practice in which absentee ballots may only be distributed within the 30 days before election day, limited to only registered voters who are unable to be present at the polls on election day because they are physically absent from the county in which they are registered to vote, or they are hospitalized, incarcerated, or in a long-term care facility within the county in which they are registered to vote; requiring the county clerk to distribute an absentee ballot only to a requesting and qualified voter; prohibiting absentee ballot harvesting by limiting the touching, handling, or possessing of absentee ballots to the requesting voter, an individual assisting a disabled voter, the United States Postal Service, or a duly appointed and authorized election official; allowing an individual assisting a disabled voter to return the disabled voter's absentee ballot to the county clerk's office only by placing the voted ballot into the custody of the United States Postal Service but not by returning the ballot in person at the physical office of the county clerk; preventing the tracking of absentee ballots once they have been sent or provided to the voter unless the voter is tracking his or her own ballot or verifying that his or her cast absentee ballot has been received by a duly authorized election official; protecting information about who has requested an absentee ballot; ensuring that all absentee ballots are counted on election day before the early or

[6] *E.g.*, Ark. Att'y Gen. Ops. 2018-076, 2017-016, 2015-065, 2013-039, 2012-013, 2009-169.

[7] *See* BLACK'S LAW DICTIONARY 315 (11th ed. 2019) (defining "enacting clause" as "[t]he part of a *statute* stating the legislative authority by which it is made and often the date when it will take effect.") (emphasis added).

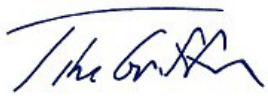
[8] As explained in Attorney General Opinion 2023-109, the General Assembly has only empowered me to reject or modify a ballot title when it is misleading or when a vote "for" is actually a vote against (or vice versa).

> election day votes are counted; prohibiting the counting of any absentee ballots not physically present and in the canvassing or tabulation process by the close of the polls on election day; exempting Ark. Const. amend. 51, § 9(i), which allows certain groups of citizens to vote without prior registration by absentee ballot, and any ballots requested, obtained, cast, canvassed, or counted pursuant to the federal Uniform Overseas Citizens Absentee Voting Act from the terms of this amendment; prohibiting any election in this state from being conducted using an internet, Bluetooth, or wireless connection; requiring that absentee ballots and absentee voting that does not strictly conform to the requirements of this amendment not be counted; and directing the Arkansas General Assembly to allocate funding to effectuate and implement the terms of this amendment.

Under A.C.A. § 7-9-108, instructions to canvassers and signers must precede every petition, informing them of the privileges granted by the Arkansas Constitution and the associated penalties for violations. I have included a copy of the instructions that should be incorporated into your petition before circulation.

Senior Assistant Attorney General Kelly Summerside prepared this opinion, which I hereby approve.

Sincerely,



TIM GRIFFIN
Attorney General