



TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2024-004

January 23, 2024

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

Arkansas Abortion 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 ABORTION SERVICES (A) IN CASES OF RAPE, (B) IN CASES OF INCEST, (C) IN THE EVENT OF A FATAL FETAL ANOMALY, OR (D) WHEN, IN A PHYSICIAN'S GOOD-FAITH MEDICAL JUDGMENT, ABORTION SERVICES ARE NEEDED TO PROTECT A PREGNANT FEMALE'S LIFE OR TO PROTECT A PREGNANT FEMALE FROM A PHYSICAL DISORDER, PHYSICAL ILLNESS, OR PHYSICAL INJURY; THE GOVERNMENT OF THE STATE OF ARKANSAS, ITS OFFICERS, OR ITS POLITICAL SUBDIVISIONS SHALL NOT PROHIBIT, PENALIZE, DELAY OR RESTRICT ABORTION SERVICES WITHIN 18 WEEKS OF FERTILIZATION; A "FATAL FETAL ANOMALY" MEANS A MEDICAL CONDITION DIAGNOSED BEFORE BIRTH THAT, IN THE PHYSICIAN'S GOOD-FAITH MEDICAL JUDGMENT, WILL LEAD TO FETAL OR

NEONATAL DEATH FOR WHICH LIFE-SAVING MEDICAL INTERVENTION WOULD BE FUTILE; "PHYSICAL DISORDER, PHYSICAL ILLNESS, OR PHYSICAL INJURY" INCLUDES, WITHOUT LIMITATION, A LIFE-ENDANGERING PHYSICAL DISORDER, PHYSICAL ILLNESS OR PHYSICAL INJURY CAUSED BY OR ARISING FROM THE PREGNANCY ITSELF AND ANY SITUATION IN WHICH CONTINUATION OF A PREGNANCY WILL CREATE A SERIOUS RISK OF SUBSTANTIAL IMPAIRMENT OF A MAJOR BODILY FUNCTION OF A PREGNANT FEMALE; "MAJOR BODILY FUNCTION" INCLUDES, WITHOUT LIMITATION, FUNCTIONS OF THE IMMUNE SYSTEM, NORMAL CELL GROWTH, AND DIGESTIVE, BOWEL, BLADDER, NEUROLOGICAL, BRAIN, RESPIRATORY, CIRCULATORY, ENDOCRINE, AND REPRODUCTIVE FUNCTIONS, AND OPERATION OF AN INDIVIDUAL ORGAN WITHIN A BODY SYSTEM; "FERTILIZATION" MEANS THE FUSION OF A HUMAN SPERMATOZOON WITH A HUMAN OVUM; "ABORTION SERVICES" ARE MEDICAL INTERVENTIONS PROVIDED TO PREGNANT FEMALES TO END THE MEDICAL CONDITION OF PREGNANCY BUT DO NOT INCLUDE ACCIDENTAL OR UNINTENTIONAL INJURY OR DEATH OF AN EMBRYO OR FETUS PRIOR TO BIRTH; ABORTION SERVICES ASSISTED BY A PHYSICIAN MAY BE PROVIDED IN A HOSPITAL, EMERGENCY DEPARTMENT, PHYSICIAN'S OFFICE OR CLINIC, SURGERY CENTER, FREE-STANDING BIRTHING CENTER, OR OTHER LICENSED HEALTHCARE FACILITY; AMENDMENT 68 OF THE ARKANSAS CONSTITUTION IS AMENDED TO READ: "SECTION 2: PUBLIC POLICY: THE POLICY OF ARKANSAS IS TO PROTECT THE LIFE OF EVERY UNBORN CHILD FROM CONCEPTION UNTIL BIRTH, TO THE EXTENT PERMITTED BY THE FEDERAL CONSTITUTION AND THE CONSTITUTION OF THE STATE OF ARKANSAS"; 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; THIS AMENDMENT SHALL BE SELF-EXECUTING; ANY PROVISION OF THIS AMENDMENT HELD INVALID SHALL BE SEVERABLE FROM THE REMAINING PORTIONS OF THIS AMENDMENT.¹

2. Rules governing my review. In Opinion No. 2023-107, 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 that analysis into this opinion.

3. Application. Having reviewed the text of your proposed constitutional amendment, as well as your proposed popular name and ballot title, my statutory duty at this stage is to substitute and

¹ After submitting your proposed measure for my review, you submitted a substituted measure that changed the definition of "fertilization" by omitting the word "intrauterine" from the phrase "intrauterine fusion of a human spermatozoon with a human ovum." This opinion addresses your substituted measure.

certify the popular name and ballot title indicated below. With regard to your proposed ballot title, I believe the following minor changes are necessary to ensure that the ballot title clearly and accurately sets forth the purpose of your proposed initiated amendment to the Arkansas Constitution:

- **Fetal age vs. gestational age.** In Attorney General Opinion 2023-107, I noted that your proposed text prohibiting government action that would “prohibit, penalize, delay, or restrict access to abortion within 18 weeks of conception...” was keyed to fetal age, which begins at conception, rather than gestational age, which begins on the first day of the female’s last menstrual cycle. Calculating the number of weeks using fetal age is not a reason to reject your submission as misleading; indeed, Arkansas statutes regulating abortion use both fetal age² and gestational age.³ But because gestational age is frequently used to count the weeks of pregnancy, I explained that if your proposal were at the stage where it could be certified, I would have to substitute language in your ballot title flagging the difference in time frames. In this third submission, you have replaced “conception” with “fertilization,” and you have provided a definition of “fertilization.” But this change does not highlight the difference between fetal age and gestational age for voters. Therefore, to ensure that no voter is misled by this portion of the ballot title, I have added language clarifying that 18 weeks after fertilization equates to approximately 20 weeks since the first day of the pregnant female’s last menstrual period.
- **Effect on existing law.** In addition to accurately summarizing the proposed measure’s text, the ballot title must sufficiently inform voters as to how the proposed measure would change existing law. Your revised text and ballot title explain how the proposed amendment would affect Amendment 98, and they declare other laws that conflict with the proposed amendment null and void. But there is no other mention of how Arkansas law currently regulates abortion. While “a ballot title is not insufficient merely because it fails to reflect the current state of the law,”⁴ it must give still voters a clear understanding of the “extent and import” of the proposal so that they can “make an intelligent choice, fully aware of the consequences of their vote.”⁵ As the Arkansas Supreme Court has explained, “It is the function of the ballot title to provide information concerning the choice that [a voter] is called upon to make,” which, “in voting upon a constitutional amendment, is simply making a choice between retention of the existing law and the substitution of something new.”⁶ To ensure your ballot title adequately conveys the proposed change in law so that voters have a fair understanding of the issue, I have added language to your ballot title.

² See, e.g., A.C.A. §§ 20-16-1402 through -1406.

³ See, e.g., A.C.A. § 20-16-1702, § 20-16-1902, § 20-16-2002, § 20-16-2004.

⁴ *May v. Daniels*, 359 Ark. 100, 116, 194 S.W.3d 771, 783 (2004).

⁵ *Dust v. Riviere*, 277 Ark. 1, 4, 638 S.W.2d 663, 665 (1982).

⁶ *Bradley v. Hall*, 220 Ark. 925, 927, 251 S.W.2d 470, 471 (1952).

With these changes incorporated, the following popular name and ballot title are substituted and certified:

Popular Name

Arkansas Abortion Amendment of 2024

Ballot Title

An amendment to the Arkansas Constitution to change Arkansas law regarding abortion; current Arkansas law prohibits abortion except to save the life of the pregnant female in a medical emergency, and the current Arkansas Constitution does not restrict the State of Arkansas's authority to regulate abortion services to protect the health and safety of the pregnant female or for other purposes; this amendment changes Arkansas law by amending the Arkansas Constitution to provide that the government of the State of Arkansas, its officers, or its political subdivisions shall not prohibit, penalize, delay, or restrict abortion services (1) in cases of rape, (2) in cases of incest, (3) in the event of a fatal fetal anomaly, or (4) when, in a physician's good-faith medical judgment, abortion services are needed to protect a pregnant female's life or to protect a pregnant female from a physical disorder, physical illness, or physical injury; to provide that the government of the State of Arkansas, its officers, or its political subdivisions shall not prohibit, penalize, delay, or restrict abortion services within 18 weeks of fertilization, which equates to approximately 20 weeks since the first day of the pregnant female's last menstrual period; to define a "fatal fetal anomaly" as a medical condition diagnosed before birth that, in a physician's good-faith medical judgment, will lead to fetal or neonatal death and for which life-saving medical intervention would be futile; to define "physical disorder, physical illness, or physical injury" to include, without limitation, (1) a life-endangering physical disorder, physical illness, or physical injury caused by or arising from the pregnancy itself and (2) any situation in which continuation of a pregnancy will create a serious risk of substantial impairment of a major bodily function of a pregnant female; to define "major bodily function" to include, without limitation, (1) functions of the immune system, (2) normal cell growth, (3) digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions, and (4) operation of an individual organ within a body system; to define "fertilization" as the fusion of a human spermatozoon with a human ovum; to define "abortion services" as medical interventions provided to a pregnant female to end the medical condition of pregnancy but not to include accidental or unintentional injury or death of an embryo or fetus before birth; to provide that abortions services assisted by a physician may be provided in a hospital, emergency department, a physician's office or clinic, a surgery center, a free-standing birthing center, or other licensed healthcare facility; to provide that section 2 of Amendment 68 of the Arkansas Constitution is amended to add the phrase "and the Constitution of the State of Arkansas," and would read as follows: "Section 2: Public Policy: The policy of Arkansas is to protect the life of every unborn child from conception until birth, to

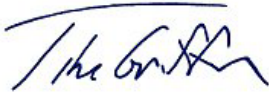
the extent permitted by the Federal Constitution and the Constitution of the State of Arkansas”; to declare that all provisions of the constitution, statutes, and common law of the State of Arkansas are null and void to the extent they conflict with any provision of this amendment; to provide that this amendment shall be self-executing; and to provide that any provision of this amendment that is held to be invalid shall be severable from the remaining provisions of this amendment.

While the foregoing have been substituted and certified, I believe that, in light of the significance of the subject matter undertaken and the potential complexity and far-reaching effects of this proposal, a cautionary note is warranted. You should be aware that experience has shown a correlation between the length and complexity of initiated measures and their susceptibility to a successful ballot-title challenge. Any ambiguity in the text of a measure could lead to a successful court challenge. Significant changes in law often have unintended consequences that, if known, would give voters serious ground for reflection.

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.

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