



TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2023-121

January 4, 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

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 IN CASES OF RAPE, INCEST, IN THE EVENT OF A FATAL FETAL ANOMALY, OR WHEN ABORTION SERVICES ARE NEEDED TO PROTECT THE PREGNANT FEMALE'S LIFE OR PHYSICAL HEALTH; 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 HEALTH MEANS A PHYSICAL DISORDER, PHYSICAL ILLNESS, OR PHYSICAL

INJURY, INCLUDING A LIFE-ENDANGERING PHYSICAL CONDITION CAUSED BY OR ARISING FROM THE PREGNANCY ITSELF, OR WHEN CONTINUATION OF THE PREGNANCY WILL CREATE A SERIOUS RISK OF SUBSTANTIAL IMPAIRMENT OF A MAJOR BODILY FUNCTION OF THE PREGNANT FEMALE, AS DIAGNOSED IN THE PHYSICIAN'S GOOD FAITH MEDICAL JUDGMENT; MAJOR BODILY FUNCTION INCLUDES 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 INTRAUTERINE 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.

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.

4. Application. In Opinion No. 2023-107, regarding the prior version of your proposal, I noted that several issues prevented me from certifying your popular name and ballot title. You have now resolved all but one of those issues. The prior version of your proposed text permitted abortion when, among other things, it was "needed to protect the pregnant female's life or health." I noted that the term "health" was unclear in this context because it could mean physical health, emotional health, etc. I concluded that this would need to be clarified to ensure a ballot title summarizing the measure would not mislead the voter in any way.

Your current proposed text attempts to address this by clarifying that abortion would be allowed when, among other things, it is “needed to protect the pregnant female’s life or *physical* health.” (Emphasis added.) Section 3(B) of your proposed text defines “physical health” as “a physical *disorder*, physical *illness*, or physical *injury*...caused by or arising from the pregnancy itself, or when continuation of the pregnancy will create a serious risk of substantial impairment of a major bodily function....” (Emphases added.)

This definition is misleading because it defines “physical health,” not as the *absence* of disorder, illness, or injury, but as the *presence* of those things. That is the opposite of the common meaning of “health.” This confusion is compounded when, for the sake of analysis, one substitutes your definition of “physical health” provided in Section 3(B) for the term “physical health” you use in Section 1. That sentence would read: “Abortion services” are permitted when, among other things, they “are needed to protect the pregnant female’s physical disorder, physical illness, or physical injury...caused by or arising from the pregnancy itself, or when continuation of the pregnancy will create a serious risk of substantial impairment of a major bodily function....” As the foregoing sentence indicates, it is readily apparent that what you likely intended to say is not what the text says. This problem in the text is imported directly into your proposed ballot title.

I assume that you did not intend this result. Rather, I suspect you intended something like this: to permit “abortion services” when, among other things, they “are needed to protect the pregnant female *from a* physical disorder, physical illness, or physical injury...caused by or arising from the pregnancy itself....” But that is not what your draft does.

The foregoing defect prevents me from certifying your proposed ballot title. And I am unable to substitute and certify a ballot title describing what I assume to be your intent because that substitution would not be a fair and accurate summary of the text as it is currently drafted. Nor can I make any change to your text because I have no authority to alter the text of proposed statewide measures.

Because of the issue 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.

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