**IN THE SUPREME COURT OF ARKANSAS**

**ARKANSAS DEPARTMENT OF EDUCATION, *et al*.** **APPELLANTS**

**v.** **No. CV-23-468**

**DORIS IVY JACKSON, *et al.*** **APPELLEES**

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On Appeal from the Circuit Court of Pulaski County, Fourth Division
No. 60CV-23-3267 (Hon. Herbert Wright)

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# State Appellants' Brief

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## JURISDICTIONAL STATEMENT

The circuit court below lacked jurisdiction because sovereign immunity bars this suit. *See* Ark. Const. art. 5, sec. 20; *Bd. of Trs. of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616. The circuit court also lacked jurisdiction because this case presents a nonjusticiable political question. And "[w]hen the trial court lacks jurisdiction, the appellate court also lacks jurisdiction." *Newton v. State*, 2014 Ark. 538, at 4, 453 S.W.3d 125, 128.

This Court has appellate jurisdiction over this appeal from a final judgment or decree. Ark. R. App. P.—Civ. 2(a)(1). The circuit court entered its declaratory judgment on June 30, 2023 (RP 234), and the State Defendants filed their notice of appeal on July 3, 2023. (RP 244).

As between this Court and the Court of Appeals, jurisdiction is appropriate here because it involves the interpretation or construction of the Arkansas Constitution. Ark. R. Sup. Ct. 1-2(a)(1).

## STATEMENT OF THE CASE AND THE FACTS

### Introduction

This case concerns the LEARNS Act's emergency clause, but it's ultimately about every emergency clause enacted for decades. As in the previous iteration of this case, the Pulaski County Circuit Court held LEARNS's emergency clause did not receive a separate roll-call vote and was invalid. That conclusion, like before, rests on neither constitutional text nor precedent. Instead, it rests entirely on a gross misreading of a single case and an assertion that two videos somehow show that the legislative journals were falsified.

This Court should reject that conclusion and dismiss this case for two primary reasons. *First*, Plaintiffs' claims are barred by separation of powers. Our Constitution mandates the strict separation of powers, and it vests the General Assembly with the exclusive power to determine its own internal procedures. So the circuit court was no more entitled "to stick[] [its] judicial nose into what is generally considered the business of [the] legislature" (RP 238 (quotation omitted)), than the legislature is to dictate judicial procedure. Rather, as courts throughout the country have done when confronted with similar claims, the circuit court should have declined to entertain Plaintiffs' claims on the ground that they present a non-justiciable political question. This Court should correct the circuit court's error

and—for the reasons Justices Wood, Womack, and Webb gave previously—hold Plaintiffs' claims are nonjusticiable and dismiss this case.

*Second*, should this Court reach the merits of Plaintiffs' challenge, it should reverse and hold that LEARNS's emergency clause complied with the Constitution's separate roll-call vote requirement. Both the Constitution and more than a century of case law construing the Constitution say that a roll-call vote occurs when the "yeas" and "nays" are recorded in the journal, and "[t]here is no dispute . . . the Journals reflect two votes were taken" here. (RP 240). That should have been the end of the matter.

The circuit court's attempt to suggest otherwise rests, at most, on an erroneous assumption that it's impossible to conduct two separate roll-call votes at the same time. But consistent legislative practice—and testimony from Plaintiffs' own legislative witnesses that they knew they were voting on both LEARNS and its emergency clause—demonstrates otherwise. Indeed, that's why accepting the circuit court's argument would have consequences far beyond LEARNS—invalidating thousands of emergency clauses and in the process upending settled expectations, undermining final criminal judgments, and flooding the courts with illegal-exaction claims.

This Court should reject such chaos, reverse the circuit court, and remand with instructions to dismiss this case once and for all.

## Factual Background

A. Constitutional Background

1. "The powers of the government of the State of Arkansas" are "divided into three distinct departments"—"those which are legislative, to one, those which are executive, to another, and those which are judicial, to another." Ark. Const. art. 4, sec. 1. "The legislative power" is vested in the "General Assembly," which "consist[s] of the Senate and House of Representatives." *Id.*, art. 5, sec. 1. Except as expressly directed or permitted, no department "shall exercise any power belonging to either of the others." *Id.*, art. 4, sec. 2.

2. In exercising the legislative power, "[e]ach house [has] power to determine the rules of its proceedings," *id.*, art. 5, sec. 12, and "their observance" is "entirely subject to legislative control and discretion, not subject to be reviewed by the courts." *Reaves v. Jones*, 257 Ark. 210, 213, 515 S.W.2d 201, 203 (1974) (quoting *St. Louis & S.F. Ry. Co. v. Gill*, 54 Ark. 101, 15 S.W. 18, 19 (1891)). But "no bill shall become a law unless, on its final passage, the vote be taken by yeas and nays; the names of the persons voting for and against the same be entered on the journal; and a majority of each house be recorded thereon as voting in its favor." Ark. Const. art. 5, sec. 22; *see also id.*, sec. 12 ("Each house shall keep a journal of its proceedings" recording "the yeas and nays").

Consistent with that requirement, this Court has held for more than a century that a roll-call vote occurs when the legislature records the votes for and against a bill in the official journal. *See Niven v. Road Improvement Dist. No. 14*, 132 Ark. 240, 200 S.W. 997, 997 (1918); *Vinsant v. Knox*, 27 Ark. 266 (1871). Thus, legislators could press a button "for" or "against" legislation, but if it isn't in the journal, it effectively didn't happen. *See Niven*, 132 Ark. 240, 200 S.W. at 997. Indeed, "the journals of each chamber serve as the *only* official record of the General Assembly's votes" and cannot be contradicted by parol evidence like "video recordings of each session." *Ark. Dep't of Educ. v. Jackson*, 2023 Ark. 105, at 15, 669 S.W.3d 1, 11 (Womack, J., concurring) (emphasis added). Consequently, those journals are stored and maintained by the Secretary of State. (RT 34, 47, 214, 233-250); *Ruddell v. Gray*, 171 Ark. 547, 285 S.W. 2, 4 (1926); Ark. Code Ann. 25-16-403(d).

3. The Arkansas Constitution also grants the General Assembly the power to enact "emergency measure[s]" that become immediately effective when "necessary for the preservation of the public peace, health and safety." Ark. Const. art 5, sec. 1. Specifically, "if . . . two-thirds of all the members elected to each house . . . shall vote upon separate roll call in favor of the measure going into immediate operation, such emergency measure shall become effective without delay." *Id.*

Consistent with our Constitution's directive that a vote occurs when "the names of persons voting for and against the [bill are] entered on the journal," *id.*, sec. 22, legislators have long exercised the power by recording separate roll-call votes for a bill and an emergency clause in the relevant journal. (RT 24, 52, 58, 197). And while as far back as anyone can recall those votes have been conducted at the same time, there is no dispute that they are separate, with—as Plaintiffs previously explained to this Court—"many examples of bills passing while their emergency clauses failed." Pls.' Br. 24, *Ark. Dep't of Educ. v. Jackson*, 2023 Ark. 105, 669 S.W.3d 1 (No. CV-23-358).

B. The LEARNS Act

This spring, the General Assembly adopted LEARNS. That law "extensive[ly]" amended Arkansas's education policies—raising teacher salaries, giving new mothers access to 12-month maternity leave, improving school security, enhancing efforts to combat human trafficking, upgrading educational standards, and giving parents and students throughout Arkansas more options. Act 237, sec. 73(a). Those changes required the Department of Education and local school districts to develop "new rules and procedures." *Id*. So to give the State and districts time to implement the Act before the new school year, the legislature made LEARNS effective before the regular August 1 effective date. *Id.*; *Jackson*, 2023 Ark. 105, at 13, 669 S.W.3d at 10 (Wood, J., concurring). And after LEARNS's

passage, schools across Arkansas immediately hit the ground running to begin implementing and preparing to implement LEARNS.

Like every other bill and emergency clause, the votes on LEARNS and its emergency clause were cast in accordance with the parliamentary rules, procedures, and practices of the Senate and House of Representatives. (RT 24, 40, 104, 115, 233-251). Thus, as relevant here, the House and Senate each conducted separate roll-call votes on the underlying bill and emergency clause at the same time. *See* (RT 234-243) (House and Senate Journals); *accord* (RT 52, 58). And consistent with constitutional requirements, "the journals" of "both" chambers "reflect . . . two separate votes were taken" on LEARNS and its emergency clause. (RT 239).

C. The Marvell-Elaine Community

Marvell-Elaine, a struggling school in rural East Arkansas, took advantage of LEARNS. Marvell-Elaine has been struggling for some time, with "poor performance in academics" and "declining enrollment." (RT 62). So last fall, the State Board of Education placed Marvell-Elaine in Level 5 – Intensive Support. (RT 62); Ark. Code Ann. 6-15-2901 to -2918.

That same month, Marvell-Elaine was placed on the State's consolidation list because it had fewer than 350 students. (RT 79-80). Marvell-Elaine asked the State Board of Education to let it stay open, but because Marvell-Elaine had been

placed in Intensive Support, the Board denied its request. (RT 80). Marvell-Elaine would have to shut its doors.

Then the community learned about a newly effectual LEARNS provision, which lets private entities contract to assume management of failing schools. Ark. Code Ann. 6-15-3201 to -3204. At an April meeting with the Board, students, teachers, and alumni pleaded with the Board to let Marvell-Elaine pursue such a contract. (RT 83-84 ("It was like a pep rally [with] standing room only. It was cheers, applause, overwhelming level of support because that community knows that that school district is the heartbeat of that community. And we shutter that community, then that community may cease to exist.")). The Board agreed to let Marvell-Elaine enter into a transformation contract and directed Secretary Oliva to find the District a partner. (RT 83).

Secretary Oliva then formed an interview committee comprised of community members and state employees. Smith Aff. (RP 480)* ¶43.[1] That committee reviewed three applications—including one from Plaintiff Jesselia Maples's group—and unanimously chose Friendship. (RT 69-70); *see* (RT 150). Smith Aff. (RP 480) ¶¶40-41, 44. And Friendship immediately began preparing curriculum,

[1] Citations followed by an asterisk are to the record of the first appeal of this matter, *Ark. Dep't of Educ. v. Jackson*, No. CV-23-358.

professional training, leadership coaching, special education, food service, transportation, custodial, board governance, and instructional support for the District. (RP 481-482)*.

D. This Case

1. *Plaintiffs' complaint and restraining order*. Plaintiffs dislike LEARNS and want to block its reforms. Yet rather than challenge LEARNS itself, they sought to throw a wrench in the implementation process. Days after the Board approved Marvell-Elaine's transformation contract, Plaintiffs sued, arguing that LEARNS's emergency clause is defective and that Marvell-Elaine had thus jumped the gun. (RP 5-24)*. After filing their complaint, Plaintiffs did little over the next month to advance their case, other than to repeatedly amend their filings.

Then, suddenly, the circuit court accelerated the process, giving the State less than 24 hours to respond to Plaintiffs' latest amendments. And just hours after the State replied, the circuit court issued Plaintiffs' draft temporary restraining order, holding that LEARNS's emergency clause was invalid and blocking any implementation of that Act. (RP 512-521)*.

2. *Prior appeal*. The State appealed, and, on expedited consideration, this Court reversed and vacated the restraining order. In so doing, this Court rejected the circuit court's conclusion that Plaintiffs had plausibly alleged irreparable harm.

*Jackson*, 2023 Ark. 105, at 8, 669 S.W.3d at 7. (Plaintiffs' alleged harms could "be adequately compensated by money damages" or were "entirely speculative.") That error alone required reversal, and consequently, the majority declined to "delve into the merits of the case." *Id.*

But multiple members of the Court wrote separately to explain why, if the Court had reached the State's other arguments for reversal, the circuit court should never have entertained this lawsuit and why Plaintiffs' claims failed on the law. First, Justices Baker and Womack each explained why Plaintiffs' claims were barred by sovereign immunity. *Id.* at 9-10, 669 S.W.3d at 8 (Baker, J., concurring); *id.* at 14-15, 669 S.W.3d at 11 (Womack, J., concurring). And Justice Wood separately added that Plaintiffs' arguments "demonstrate[d] a lack of understanding of *Andrews* and the avalanche of case law that ensued" and were "inherent[ly] contradict[ory]." *Id.* at 12 n.13, 669 S.W.3d at 9 n.13 (Wood, J., concurring).

Second, in separate concurrences, Justices Wood and Womack (joined by Justice Webb) explained why Plaintiffs' lawsuit presented a nonjusticiable political question. *Id.* at 10-12, 669 S.W.3d. at 8-9 (Wood, J., concurring); *id.* at 17-18, 669 S.W.3d. at 12-13 (Womack, J., concurring); *id.* at 21, 669 S.W.3d at 14 (Webb, J., concurring). Indeed, Justice Wood explained that entertaining Plaintiffs' lawsuit would "usurp the legislative branch's core function [and] threaten its independent institutional integrity." *Id*. at 11, 669 S.W.3d at 9 (Wood, J., concurring). As a

result, "[l]ike eight other state courts that have considered challenges based on the legality of internal legislative processes," Justice Wood concluded that this Court "should conclude that this issue presents a nonjusticiable political question." *Id.* at 11, 669 S.W.3d at 9.

Justice Womack made the same point. *Id.* at 16-17, 669 S.W.3d at 12 (Womack, J., concurring) (because the "constitution explicitly" grants each chamber the power to establish internal procedures, judicial review of those procedures "would constitute an unconstitutional judicial encroachment on the legislative brand and violate separation of powers"); *see also id*. at 17-20, 669 S.W.3d at 12-14 (explaining why Plaintiffs' other arguments likewise aren't justiciable).

Third, Justice Womack (again joined by Justice Webb) also wrote separately to explain that—contrary to Plaintiffs' claims—"video recordings are not the official record of the General Assembly" and cannot be used to dispute the journals. *Id.* at 15, 669 S.W.3d at 11 (Womack, J., concurring). Rather, our Constitution plainly says that a vote occurs when the names of those voting for and against a measure are entered on the journal and "only the official journal of each legislative body can prove or disprove the vote on a bill." *Id.* at 15-16, 669 S.W.3d at 11. Thus, Justice Womack explained, Plaintiffs' constitutional challenge fails because the journals "show the LEARNS Act received two separate votes: one on the substance of the bill and one on the emergency clause." *Id.* at 16, 669 S.W.3d at 11

3. *The circuit court's hearing on remand*. On remand, the circuit court conducted a previously scheduled hearing on Plaintiffs' claims, (RT 5-146), but it declined to entertain Plaintiffs' request for another injunction, (RP 235). At that hearing, Plaintiffs argued that LEARNS and its emergency clause did not receive separate roll-call votes and that the emergency clause was invalid.

To support that claim, Plaintiffs principally argued that the journals' entries showing separate roll-call votes had been "falsified" and "contain[ed] misrepresentation." (RT 36-37). Plaintiffs thus asked the circuit court to disregard the journals and instead rely on video recordings—wrongly admitted over the State's strenuous objections—that Plaintiffs claimed somehow demonstrated that LEARNS and its emergency clause did not receive separate roll-call votes. (RT 27-35, 53-56).

Plaintiffs' own witnesses disputed Plaintiffs' outlandish claim. To start, Plaintiffs called former Senate Chief Counsel and Parliamentarian Steve Cook. He testified that—contrary to Plaintiffs' claim—the Senate journal reflected two votes (RT40) and the journal was "[a]bsolutely not" falsified (RT48). *See also id.* ("not aware of any" prior allegation of falsification). Moreover, Cook testified that while he personally did not like the practice of conducting two separate roll-call votes at the same time, others disagreed and, so far as he could recall, "that's the way it's always been done." (RT 24). And he conceded that no one had objected to doing so here. (RT 40); *see also* (RT 27).

Next, Plaintiffs called State Senator Clarke Tucker and State Representative Tippi McCullough. Neither testified that the journals were falsified. (RT 52); (RT 58). Rather, they acknowledged the consistent practice of conducting two votes simultaneously on a bill and an emergency clause and that they understood that they were voting on both LEARNS and its emergency clause when they cast their votes here. (RT 52, 58).

Plaintiffs also called Education Secretary Jacob Oliva, who testified to Marvell-Elaine's need for intensive support, the State Board's assumption of responsibility for the district, and the transformation contract with Friendship Education Foundation. (RT 60-89).

After the close of Plaintiffs' case,[2] the State and the other defendants moved for judgment as a matter of law on sufficiency grounds, and the circuit court denied that motion. (RT 91-96). The State then called House Parliamentarian Buddy Johnson, who testified that the House Journal is the official record of the House

[2] Plaintiffs additionally called Plaintiff Veronica McClane (RT 89-91) and proffered other testimony about their purported harm (RT 119-135), but the circuit court excluded that testimony because this Court had already held those claims were insufficient as a matter of law to support an injunction. (RT 90). Defendants proffered additional testimony in response. (RT 135-146).

proceedings. (RT 99). He explained that, as the journal establishes, separate roll-call votes were taken on LEARNS and its emergency clause. (RT 104, 115).

4. *The circuit court's order*.

On June 30, the circuit court entered an unsigned declaratory judgment concluding that LEARNS's emergency clause "was not properly passed." (RP 243). It grounded that conclusion on four critical missteps.

First, asserting that it had a duty to "stick [its] judicial nose[] into what is generally considered the business of a legislature," it rejected any argument that this case presented a nonjusticiable political question. (RP 238 (quotation omitted)); (RP 240-242). But in so concluding, it did not grapple with the pitfalls of playing legislative referee, the legislature's power to determine its own processes, or the cases discussed by Justices Wood, Womack, and Webb. *See id*. Instead, betraying its misunderstanding of the doctrine, the circuit court argued it was not deciding a political question because it was not "review[ing] the prudence of any specific portion of the LEARNS Act" or whether the legislature had the "power to enact the provisions of the Act." (RP 241).

Second, the circuit court rejected the State's sovereign-immunity defense because it believed claims for injunctive and declaratory relief are not subject to sovereign immunity. (RP 242). Its single-paragraph sovereign-immunity discussion

did not consider Justices Baker's, Wood's, or Womack's analysis of Plaintiffs' claims.

Third, having decided to play legislative referee, the circuit court began by broadly declaring that courts are "not required to accept the legislature's journals as dispositive" and, as a result, concluded it was required to look beyond the journals to determine whether separate roll-call votes occurred. (RP 239). It did not cite any constitutional provision supporting that conclusion. Nor did it consider the constitution's journal requirement, cases holding that the journals control, or established legislative practice.

Instead, it cited just one case, *Chicot County v. Davies*, 40 Ark. 200 (1882), that it asserted held courts are free to ignore the journals. But as the circuit court's own discussion of that case reveals, *Chicot County* merely holds that where the journals are silent on whether something was done, courts may find it was done if other evidence shows it was. *See* (RP 238-39); *see also Chicot Cnty*., 40 Ark. at 215. It does not say—nor could it consistent with the case law or constitutional provisions that the circuit court failed to address—that parol evidence may contradict affirmative statements in the journals. *See id*.

Fourth, having misread *Chicot County*, the circuit court then concluded that the journals were inaccurate and that the General Assembly had not conducted two separate roll-call votes. Indeed, fully embracing Plaintiffs' falsification claim, it

asserted that while "[t]here is no dispute . . . that the Journals reflect two votes were taken[,] . . . the video of the proceedings clearly show that one vote was taken." (RP 240). And it declared "testimony from sitting [legislators] . . . corroborated the video." (*Id.*) Yet it tellingly never explained how—or why—it thought the videos contradicted the journals or otherwise showed that just one roll-call vote had occurred. *See* (RP 239-240). Instead, it simply said so, failing to consider testimony that, consistent with longstanding legislative practice, everyone understood two separate roll-call votes were being taken concurrently.

On that basis, the circuit court declared LEARNS's emergency clause—and by extension every emergency clause from living memory—invalid. This appeal followed, and the State urges the Court to reverse and dismiss this case.

## STANDARD OF REVIEW

This case involves only controlling questions of law. The circuit court's legal conclusions are reviewed *de novo*. *See United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 2014 Ark. 517, at 4, 451 S.W.3d 584, 586.

## ARGUMENT

### I. This Case Presents Political Questions that Courts May Not Decide

This case is about whether LEARNS's emergency clause is valid, and on the merits, that question ultimately depends on whether the General Assembly's longstanding practice of casting separate roll-call votes at the same time complies

with Article 5, section 1. "But [this Court] cannot resolve this issue without exceeding [its] judicial role by answering a political question." *Jackson*, 2023 Ark. 105, at 10, 669 S.W.3d at 8 (Wood, J., concurring). So instead, it should hold this case presents a nonjusticiable controversy and dismiss it with prejudice.

It's a fundamental principle of our constitutional system that courts should not involve themselves in issues that the constitution has "commit[ted]" . . . to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). That's because courts can't resolve such controversies without unnecessarily entangling themselves in the day-to-day operations of coordinate branches and demonstrating a "lack of … respect due" to those other branches. *Id.* Thus, to avoid violating the separation of powers—the "basic principle upon which our government is founded," *Fed. Express Corp. v. Skelton*, 265 Ark. 187, 198, 578 S.W.2d 1, 7 (1979)—courts must not entertain these so-called political questions. Ark. Const. art. 4, sec. 2 ("No . . . department[] shall exercise any power belonging to either of the others . . . ."); s*ee, e.g.*, *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (describing the political-question doctrine as "part and parcel of separation-of-powers" (internal quotation marks omitted)).

Indeed, the inner workings of the legislative process are quintessentially political issues that courts shouldn't interfere with. *See Pendergrass v. Sheid*, 241 Ark. 908, 909, 411 S.W.2d 5, 5 (1967). The Arkansas Constitution makes that

clear, vesting "[e]ach house" with the "power to determine the rules of its proceedings." Ark. Const. art. 5, sec. 12. And reviewing those internal procedures would be just as improper as the legislature prescribing judicial procedure. *Broussard v. St. Edward Mercy Health Sys.*, 2012 Ark. 14, at 5-6, 386 S.W.3d 385, 389 (holding that "[t]he General Assembly lacks authority to create procedural rules" for courts); *Hughes v. Speaker*, 876 A.2d 736, 745 (N.H. 2005) ("Just as the legislature may not invade our province of procedural rulemaking for the court system, we may not invade the legislature's province of internal procedural rulemaking." (quoting *Moffitt v. Willis*, 459 So.2d 1018, 1022 (Fla. 1984))).

The circuit court did not grapple with those principles. It did not explain why it believed that refereeing internal legislative procedures and second-guessing the long-established practice for conducting separate roll-call votes was consistent with the separation of powers or the constitutional provisions committing internal procedures to the discretion of each house. Instead, it puzzlingly declared the political-question doctrine didn't apply here because it wasn't "review[ing] the prudence of any specific portion of the LEARNS Act." (RP 241). But the political-question doctrine has nothing to do with the "prudence" of legislation; it's about the appropriate role of the courts vis-à-vis the political branches. And had the circuit court properly applied separation-of-powers principles and the Arkansas Constitution, it could not have concluded otherwise.

But it didn't do that. Instead, the circuit court assumed the role of legislative referee and then—as Plaintiffs asked—declared the House and Senate journals false based on its own interpretation of two videos. That action—as Justice Wood previously warned—"usurp[ed] the legislative branch's core functions [and] threaten[s] its independent institutional integrity." *Jackson*, 2023 Ark. 105, at 11, 669 S.W.3d at 9 (Wood, J., concurring). And as Justices Womack and Webb previously explained, that "unconstitutional judicial encroachment on the legislative branch . . . violate[s] the principle of separation of powers." *Id.*, 2023 Ark. 105, at 16-17, 669 S.W.3d at 12 (Womack, J., concurring). Thus, this Court should reverse, hold this case presents a nonjusticiable issue, and dismiss it with prejudice.

A. Courts cannot review the legislature's understanding of its own procedures.

The circuit court invalidated the longstanding practice of allowing legislators to simultaneously indicate their votes on a bill and its corresponding emergency clause while recording those votes separately. But that practice is faithful to the Constitution, which defines a vote by what was recorded in the journals and says nothing about *how* legislators indicate that vote. *See infra* Part II; *see also Jackson*, 2023 Ark. 105, at 16-17, 669 S.W.3d at 12 (Womack, J., concurring). Indeed, so long as anyone can remember, no one doubted that the legislature's practice was constitutional. S*ee Little Rock & Fort Smith Ry. Co. v. R.W. Worthen*, 46 Ark.

312, 318 (1885) (noting that legislators must independently comply with the Constitution).

This Court may not invalidate the General Assembly's reasonable internal rules. True, it must ensure the legislature isn't outright flouting the Constitution. *Russell v. Cone*, 168 Ark. 989, 272 S.W. 678, 682 (1925). But if the legislature's application of procedural requirements colorably complies with constitutional limitations, courts can't second-guess its understanding of those limitations. *Rangel v. Boehner*, 20 F. Supp. 3d 148, 168 (D.D.C. 2013). And courts routinely decline invitations to do so. *See Nixon v. United States*, 506 U.S. 224, 237 (1993) (deferring to the Senate as to "the meaning of the word 'try' in the Impeachment Trial Clause."); *Brown v. Hansen*, 973 F.2d 1118, 1123 (3d Cir. 1992) (allowing the Puerto Rico legislature to define "what constitutes a 'meeting'"); *Common Cause v. Biden*, 909 F. Supp. 2d 9, 29 (D.D.C. 2012) (identifying no case "reject[ing] Congress's own rules as unconstitutional"); *see also Jackson*, 2023 Ark. 105, at 1, 669 S.W.3d at 9 (Wood, J., concurring) (collecting cases from state courts).

Applying those same principles, the Alabama Supreme Court allowed that state's legislature to interpret the phrase "a majority of each house" in that state's constitution. *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So.2d 204, 217 (Ala. 2005). For "at least 30 years," the legislature interpreted that phrase to allow a bill to pass if "a quorum [was] present" and a majority of voting

legislators voted in favor—even if "a large number of members" comprising the quorum "abstain[ed] or [took] no action." *Id.* at 208. For instance, one bill passed with "21 yea votes, 4 nay votes, and 55 abstentions." *Id.* A trial court invalidated the bill, reasoning that a majority of the legislators present had to vote yes. *Id.* at 212. But that ruling, the Alabama Supreme Court held, violated the separation of powers. Because the constitution did not define "majority" and because the legislature could set its own rules, the court held that "the rules established by the legislature" decided whether a majority had voted in favor. *Id.* at 218. Otherwise, "uncertainty and instability would result." *Id.* at 220.

Indeed, as the Alabama Supreme Court explained, a contrary conclusion would open the floodgates to an untold number of collateral attacks on bills—permitting claims by legislators that the bill hadn't really passed because they hadn't really voted for it or that the certified tally wasn't accurate. *See id.* at 220 (discussing potential chaos if "every person were free to 'hunt through the journals of a legislature to determine whether a statute . . . is a statute or not' . . . and the internal proceedings of the legislature . . . were . . . subject to judicial challenge" (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 677 (1892))).

*Birmingham*'s reasoning applies here. For decades, the General Assembly has interpreted the separate roll-call vote requirement to let legislators indicate their separate votes simultaneously, so long as the two votes were recorded

separately. The Constitution does not provide a contrary definition. And "there is no separate provision of the Constitution that could be defeated" by allowing the legislature to interpret the requirement this way. *Nixon*, 506 U.S. at 237. To the contrary, the Arkansas Constitution firmly vests each house with the "power to determine the rules of its proceedings," Ark. Const. art. 5, sec. 12, and the legislature's interpretation fully complies with the Constitution, *see infra* Part II. *See also Reaves*, 257 Ark. 210, 213, 515 S.W.2d 201, 203 (legislature's observance of its own procedures is "entirely subject to legislative control and discretion, not subject to be reviewed by the courts").

Moreover, the proceedings below uniquely illustrate the Alabama Supreme Court's concern that entertaining challenges like Plaintiffs' will invite collateral attacks by legislators that bills haven't really passed. Indeed, Plaintiffs' entire strategy below rested on calling legislators and a former legislative official to testify that the legislative journals had been "falsified" and that separate roll-call votes hadn't been taken. *See* ((RT 36-39) (Plaintiffs' argument that legislative journals are "falsified and should not be admitted into evidence" because "they contain misrepresentations about what occurred, as just demonstrated in that video")); *see also* ((RT 28-32, 40-41) (Cook testimony about video recording)); ((RT 50-52) (Sen. Tucker) (testimony concerning LEARNS votes and journals)); ((RT 53-58) (Rep. McCullough) (same)).

To be sure, Plaintiffs' strategy backfired spectacularly here—with Cook testifying that the journal was "[a]bsolutely not" falsified" (RT 48); the legislators' declining to endorse Plaintiffs' outlandish claims (RT 52, 58); and the legislators' affirming that they understood they were voting on both LEARNS and its emergency clause when they cast their votes (RT 52, 58). But the circuit court's indulgence—and ultimately endorsement—of Plaintiffs' strategy opens the door to more of such claims, threatening "uncertainty and instability" far beyond LEARNS and challenges to thousands of emergency clauses enacted over decades that would follow absent correction by this Court.

Thus, like the Alabama Supreme Court—and other courts across the country—this Court should decline to referee the internal legislative process. It should dismiss this case.

B. Questioning the veracity of the legislative journals is outside this Court's role.

Ignoring case law to the contrary, the circuit court declared that it was "not required to accept the legislature's journals as dispositive" on the issue of whether two separate votes occurred. (RP 239). That was wrong. The journals record that LEARNS and its emergency clause received separate roll-call votes. (RT 234-243). Under the Arkansas Constitution and this Court's precedent, that's the end of the matter. *See* Ark. Const. art. 5, sec. 22; *Wiseman v. Madison Cadillac Co.*, 191 Ark. 1021, 88 S.W.2d 1007, 1009 (1935); *Jackson*, 2023 Ark. 105, at 15, 669

S.W.3d at 11 (Womack, J., concurring). This Court should reverse the circuit court's decision to question the veracity of the House and Senate journals.

The legislature, not courts, controls the journals. *Chicot Cnty. v. Davies*, 40 Ark. 200, 207 (1882); *accord Field*, 143 U.S. at 671 (the contents of Congress's journals are "left to the discretion of the respective houses"). And "[m]utual regard between the coordinate branches . . . demand[s] that [these] official representations . . . be accepted at face value." *United States v. Munoz-Flores*, 495 U.S. 385, 410 (1990) (Scalia, J., concurring in judgment); *see also Whaley v. Independence Cnty.*, 212 Ark. 320, 324, 205 S.W.2d 861, 864 (1947) ("[C]onclusive verity must be given to Journal entries. . . ."). Indeed, the Arkansas Constitution says as much, making each house the keeper of its own journal, Ark. Const. art. 5, sec. 12, and both houses have procedures designed to ensure their accuracy, *see* (RT 44-45, 103) (journals are read daily unless rules are suspended or there's unanimous consent to dispense with that reading).

That's true even if litigants think the journals are inaccurate. *United States v. Ballin*, 144 U.S. 1, 4 (1892). For instance, Alabama's constitution requires the legislature to publish notices before enacting local bills and, on separation-of-powers grounds, the Alabama Supreme Court has refused to consider arguments that the legislature failed to comply. *Etowah Cnty. Civic Ctr. Auth. v. Hotel Servs., Inc.*, 974 So.2d 964, 967 (Ala. 2007) (refusing to consider newspaper article

indicating the required notice had run too late). Rather, it "accept[ed] as true the legislature's certification that proper notice was given." *Id.* This Court too should "resist" Plaintiffs' "calls to question" the journals and to adjudicate disputes about the legislative process. *Zivotofsky v. Clinton*, 566 U.S. 189, 205 (2012) (Sotomayor, J., concurring in the judgment).

By concluding the contrary, wrongly assuming the role of keeper of the journals, and ultimately declaring the journals weren't accurate, the circuit court exceeded its authority. Indeed, as Justices Wood, Womack and Webb tellingly warned would be the case if the circuit court entertained Plaintiffs' claims, the circuit court's approach undermines and "threaten[s]" the "independent institutional integrity" of the General Assembly. *Jackson*, 2023 Ark. 105, at 11, 669 S.W.3d at 9 (Wood, J., concurring); *accord id.* at 17-18, 669 S.W.3d. at 12-13 (Womack, J., concurring); *id.* at 21, 669 S.W.3d at 14 (Webb, J., concurring).

* * *

By entertaining Plaintiffs' claims, the circuit court undermined separation-of-powers principles and assumed a role our Constitution does not grant it. In the process, it needlessly opened the door to countless collateral attacks on legislation and, if not corrected, its approach threatens chaos. This Court should reject that approach. It should reverse the circuit court and instead—as courts across the country have done when presented with similar challenges—hold that Plaintiffs'

attack on the legislature's procedures for taking and recording separate roll-call votes presents a nonjusticiable political question. This Court should dismiss this case with prejudice.

## II. The LEARNS Emergency Clause Received a Separate Roll-Call Vote

If this Court reviews Plaintiffs' emergency-clause challenge on the merits, that claim fails as a matter of law and this Court should reverse and dismiss this case with prejudice.[3] As it had in the now-vacated restraining order, the circuit court held that the LEARNS emergency clause wasn't passed by a "separate roll call" vote as required by Article 5, section 1 of the Arkansas Constitution. (RP 240). That's wrong. Instead, plain text and longstanding practice confirm that the legislature complied with the Constitution. And as Justices Womack and Webb previously explained, the sheer volume of legislation that would otherwise suddenly become invalid underscores as much. *See Jackson*, 2023 Ark. 105, at 20 n.29, 669 S.W.3d at 14 (Womack, J., concurring).

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[3] The circuit court ruled that Plaintiffs could not prevail on their illegal exaction claim, (RP 242), the only issue before this Court is the propriety of LEARNS's emergency clause.

A. The journals establish the LEARNS emergency clause received a separate roll-call vote.

The LEARNS emergency clause complied with the Constitution, and the circuit court's conclusion to the contrary conflicts with the plain text of the Constitution. In construing constitutional provisions, this court gives the relevant language "its obvious and common meaning." *Zook v. Martin*, 2018 Ark. 293, at 4, 557 S.W.3d 880, 883. Applying that standard, the circuit court's order directly conflicts with the constitutional provisions defining when a vote occurs and that the legislative journals—and only those journals—establish whether a vote was taken.

1. The Constitution provides that, to enact an emergency clause, "two-thirds of all the members elected to each house . . . shall vote upon separate roll call in favor." Ark. Const. art. 5, sec. 1. Elsewhere, the Constitution defines a roll-call vote: "the names of the persons voting for and against the [bill]" being listed "on the journal." *Id*., sec. 22. A bill passes when "a majority of each house [is] recorded thereon as voting in its favor," *id*.—not simply when the legislators press a button or say "yea" or "nay." *See Jackson*, 2023 Ark. 105, at 15, 669 S.W.3d at 11 (Womack, J., concurring) (noting that while "legislators either announce their votes or enter them via computer[,] . . . this is not what constitutes the official votes of legislators on a bill"). That's why each chamber has procedures designed to ensure their accuracy. See (RT 44-45, 103).

The Arkansas Constitution thus plainly makes the journals determinative as to whether a vote has occurred. Indeed, as this Court previously explained, if the yeas and nays aren't recorded in the journals, then as a matter of law a vote did not happen, and a bill wasn't enacted. *Niven*, 132 Ark. 240, 200 S.W. at 997 ("It will be observed that the constitutional requirement is not merely that the yeas and nays shall be taken" but also that they're "'entered on the journal'. . . .").

For instance, *Vinsant v. Knox* addressed whether a slew of legislation had been validly enacted where journal entries were sparse. 27 Ark. 266 (1871). Where the Constitution didn't require a journal entry, this Court presumed the legislature had complied. *Id.* at 279. But it cautioned that "[i]f there were such a provision, the failure of the journals to show the observance of these requirements would doubtless render invalid the legislative acts." *Id.* Because the Constitution required "*yeas* and *nays*" to be "entered on the journal," laws that weren't mentioned were "certainly . . . invalid[]." *Id.* at 280. The Court didn't inquire whether the legislators had actually spoken "yea" or "nay." *Id.* Without the journal entry, there simply was no vote.

That's because "the fact of [the bill's] having passed by the requisite majority" would not be part of the official (and "conclusive") "record" unless the journal recorded the votes. *Id.* Yet the "existence of [an] act" can only be determined by the record; it can't "depend on the uncertainty of parol proof, or upon anything

extrinsic to the law and the authenticated recorded proceedings in passing it." *Chicot Cnty.*, 40 Ark. at 212. That's why the Constitution defines a roll-call vote as occurring only upon being recorded, why this Court invalidates unrecorded "votes," and for that matter, why this Court only looks at the journal to determine whether a vote occurred. *See Ruddell*, 285 S.W. at 4. The vote in the journals *is* the vote, even if someone remembers the process of saying "yea" or "nay" differently.

This Court's own opinion procedures likewise support that commonsense understanding of "vote." Under both Supreme Court Rule 5-2 and Administrative Order 2(b), judicial decisions are only final and binding when written and published. Those rules exist—like the Constitution's journal requirement—to ensure there aren't collateral disputes (like this lawsuit) about what occurred. *See Vinsant,* 27 Ark. at 280 (noting that "[t]he obvious reason" that "it is of such paramount importance[] that" votes "must be entered on the journals" is that "such record is conclusive of the fact"). Indeed, a contrary approach, inviting parol evidence and testimony to contradict the official written record, as the Alabama Supreme Court warned in rejecting similar arguments, invites chaos and would undermine finality. *See Birmingham-Jefferson*, 912 So.2d at 220.

2. Here, the Constitution required the legislature to enter separate votes for LEARNS and its emergency clause. Ark. Const. art. 5, sec. 1; *see Vinsant*, 27 Ark.

at 281 (noting that a separate-vote requirement requires separate journal entries). The LEARNS emergency clause obviously complies. The House Journal notes that LEARNS "passed," then records a separate vote on the emergency clause. (RT 247-250). Likewise, the Senate Journal provides that the Act "passed," then notes that "the President ordered the Secretary to call the roll upon the adoption of the emergency clause," which "was adopted." (RT 234-243). So the bill and emergency clause received separate roll-call votes. *Full stop*.

3. Yet the circuit court did not stop there. Instead, it disregarded the journals and declared they were inconsistent with other evidence. *See* (RT 239-40). The circuit court didn't cite any constitutional authority for that approach, and it simply declined to consider the Arkansas Constitution's direction that votes be "entered on the journal."

Rather, it cited a single case, *Chicot County v. Davies*, 40 Ark. 200 (1882), and argued that case permitted courts to disregard the journals and go hunting for parol evidence to contradict them. (RT 239-40). But that case holds no such thing. In fact, *Chicot County* wasn't a case about whether something reflected in the journals occurred, like here, but about what happens when the journals don't say whether something occurred. Resolving that latter question, this Court held that where the journals are *silent* on a procedural matter, courts may nevertheless presume that the legislature followed relevant requirements unless extrinsic evidence

demonstrates otherwise. 40 Ark. at 215. Yet that presumption doesn't even apply to roll-call votes because that is a "matter[] where the Constitution requires the[] [journals] affirmatively to show the action taken." *Id.*; s*ee* Ark. Const. art 5, sec. 22. And it's unclear how the circuit court thought that principle somehow supported its position, when the journals—far from being silent—specifically record that both chambers took separate roll-call votes on LEARNS and its emergency clause. *See* (RT 234-246).

Further, even if the circuit court's reading of *Chicot County* could be squared with what that case actually says or the other cases discussed above, its analysis still falls flat because the extrinsic evidence that the circuit court purported to rely upon—videos and testimony—doesn't contradict the journals. For instance, the circuit court asserted that while "the Journals reflect two votes were taken[,] . . . the video of the proceedings clearly show that one vote was taken." (RP 240). Yet it never explained why—let alone how—it thought those videos contradicted the journals. Nor did it grapple with undisputed testimony by Plaintiffs' own legislative witnesses that they understood that they were voting on *both* LEARNS and its emergency clause when they cast their votes here. *See* (RT 52, 58).

Instead, at most, the circuit court seems to have simply assumed that the legislature just couldn't conduct two separate roll-call votes at the same time. But it didn't cite any authority for such an assumption, and that failure is hardly

surprising since the Constitution doesn't say *how* the yeas and nays must be secured. To the contrary, as Justices Womack and Webb previously explained, how that's done falls to each house. *See Jackson*, 2023 Ark. 105, at 15, 669 S.W.3d at 11 (Womack, J., concurring); *see also* Ark. Const. art. 5, sec. 12. Hence, the legislature can verbally call the roll or use an electronic voting system, Rules of the House sec. 102[4]; require legislators to be present "at [their] assigned voting station[s]," *id*. sec 101(c); allow absentee legislators to "pair [their] vote[s] with a representative who shall be present," *id.* sec. 99; or conduct separate votes simultaneously, (RT 114) (discussing vote batching). *See also Jackson*, 2023 Ark. 105, at 15, 669 S.W.3d at 11 (Womack, J., concurring).

All that matters is that the votes be "recorded" separately in the journals, Ark. Const. art. 5, sec. 22, and the circuit court had no authority to impose extratextual procedural requirements on the legislature. So this Court should reverse.

B. Consistent legislative practice underscores that LEARNS's emergency clause received a separate roll-call vote.

1. The General Assembly's longstanding practice of conducting simultaneous separate votes on emergency clauses also informs this Court's interpretation of the text. That's because "[l]ong settled and established practice is a consideration

[4] https://www.arkansashouse.org/assets/uploads/2023/02/20230203104203-94th-house-rule-book-for-webpdf.pdf.

of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); *see also id.* at 690 ("[A] practice of at least twenty years duration . . . is entitled to great regard in determining the true construction of a constitutional provision."). Legislators, like this Court, must faithfully follow the Constitution, and courts should assume that they do so. *R.W. Worthen*, 46 Ark. at 318. So where there is a "doubtful question" about the "powers of . . . the representatives of the people," their "practice[s] . . . ought not to be lightly disregarded." *M'Culloch v. Maryland*, 17 U.S. 316, 401 (1819) (Marshall, C.J.).

This Court should consider longstanding practice if it believes that "separate roll call" is ambiguous. Doing so requires upholding the legislature's practice. For at least the past four decades, the legislature has let members indicate their separate votes on a bill and an emergency clause at the same time while recording those votes separately. (RT 24). Indeed, no one remembers a time when the legislature conducted votes differently. *Id.* And both legislators who testified for Plaintiffs admitted that they understood they were casting their votes for the bill and emergency clause simultaneously—both in this instance and every other time they voted on a bill and emergency clause at the same time. (RT 52, 58).

Because legislators understand that their votes on a bill and an emergency clause are separate, their procedures treat them as separate. For instance, to pass,

an emergency clause must meet a much higher vote threshold (two-thirds) than a bill itself (one-half plus one). That's why, as Plaintiffs previously conceded, "[t]here are . . . many examples of bills passing while their emergency clauses failed." Pls.' Br. 24, *Ark. Dep't of Educ. v. Jackson*, 2023 Ark. 105, 669 S.W.3d 1 (No. CV-23-358); *see also* (RT 196-97). And, by definition, a single roll-call vote can't half pass and half fail—illustrating that the two votes are separate. Moreover, the fact that legislators may expunge a failed emergency-clause vote without affecting the passage of the underlying legislation further illustrates that the votes are separate. *See* (RT 196-97). Legislators simply can't expunge half a vote.

This practice perfectly complies with both the Constitution's requirement that the legislature record its roll-call votes in a journal and that emergency clauses pass with a two-thirds majority. And it does not obviously violate any other provision: the Constitution nowhere says that the legislators can't indicate their votes simultaneously while recording them separately. So it must be upheld.

2. Deferring to historical practice also has another benefit: it prevents chaos. Endorsing the circuit court's approach would upend settled understandings and undisputedly render decades of emergency clauses invalid. *See Jackson*, 2023 Ark. 105, at 20 n.29, 669 S.W.3d at 14 (Womack, J., concurring) (collecting examples of legislation passed this year that contain emergency clauses, including laws

concerning fentanyl tracking and sex-offender registration, that would be invalid as of the date of the filing of this brief).

Indeed, endorsing that approach would potentially invalidate countless convictions, sentences, or paroles entered between the time a criminal statute with an emergency clause was signed and the effective date of non-emergency legislation. For instance, the Fair Sentencing of Minors Act contains an emergency clause enacted like this one. Act 539 of 2017. Juveniles sentenced between its signing and the effective date of non-emergency legislation would no longer be parole-eligible and require resentencing. *Segerstrom v. State*, 2019 Ark. 36, at 4, 566 S.W.3d 466, 468. And on the flip side, it'd also mean that countless activities that ordinary, law-abiding Arkansans thought were legal were actually illegal and potentially subject them to criminal prosecution. *See* Act 752 of 2023 (permitting prison guards to carry guns in their cars and declaring an emergency); Act 586 of 2023 (permitting homeless shelters to administer opioid antidotes to people overdosing in their care and declaring an emergency).

It'd likewise void countless other actions taken pursuant to that suddenly ineffective legislation—potentially transforming yet more law-abiding conduct into illegal conduct. For example, laws with emergency clauses authorized licenses for rural emergency hospitals, Act 59 of 2023; driver's licenses for teenagers who've had their permits for less than 30 days, Act 550 of 2023; gubernatorial

appointments of Plant Board members, Act 135 of 2023; and new offices, such as the new position of State Fire Marshal, Act 841 of 2023. If the Court affirmed the circuit court, the licenses already issued and the appointments already made might be void.

And adopting the circuit court's conclusion would likewise invalidate decades of emergency clauses attached to appropriations, rendering every salary, rental, retirement payment, reimbursement, or grant payment made between July 1 and the effective date of non-emergency legislation an illegal exaction. *Jacksonville v. Smith*, 2018 Ark. 87, at 6, 540 S.W.3d 661, 668. That'd make every July salary paid to legislators, constitutional officers, prosecutors, police officers, child-care workers, state national guardsmen, and tutors illegal and potentially subject to an illegal-exaction suit. Indeed, for this year alone, the circuit court's approach would invalidate more than 200 appropriations bills and mean that nearly every check the State cut between July 1 and July 30 was illegal.

Neither that threat, nor the threat of criminal prosecution for violating laws that hadn't actually been repealed or altered, would go away simply because the clock strikes midnight on August 1. This Court should stave off such needless chaos, reverse the circuit court, and hold the legislature's long-accepted practice complies with our Constitution.

## III. Sovereign Immunity Requires Dismissal

Because Plaintiffs can't show that the State acted unlawfully, their claims are barred by sovereign immunity, and this Court should dismiss the complaint. As relevant here, sovereign immunity prevents lawsuits against the State that seek to control its action. *See* Ark. Const. art. 5, sec. 20; *Bd. of Trs. of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 626.

Plaintiffs' lawsuit would prevent officials from implementing State law, and as such, it's barred unless it fits the "illegal-acts" exception. That exception applies only where plaintiffs seek prospective injunctive relief against ongoing illegal conduct. *Bd. of Trs. of Univ. of Ark. v. Burcham*, 2014 Ark. 61, 3-4. And that depends on a claim's legal merits: the plaintiffs must "assert facts that, if proven, would demonstrate a legal violation." *Rutledge v. Remmel*, 2022 Ark. 86, 5, 643 S.W.3d 5, 8; *see Williams v. McCoy*, 2018 Ark. 17, 5, 535 S.W.3d 266, 269 (reversing, in part, circuit court's denial of sovereign immunity where plaintiff failed to assert a valid claim). Applying that standard here, the State enjoys sovereign immunity because—as discussed above—Plaintiffs' attempt to rewrite the Constitution fails on the merits.

The only potential claim not barred by sovereign immunity is Plaintiffs' illegal-exaction allegations. *See Jackson*, 2023 Ark. 105, at 14, 669 S.W.3d at 11 (Womack, J., concurring). However, the circuit court found that there has been no

illegal exaction. (RP 242). So that cannot save Plaintiffs' case, and this Court should dismiss this case with prejudice.

## REQUEST FOR RELIEF

For these reasons, this Court should reverse the circuit court's order and dismiss this case.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Administrative Order No. 19 and that it conforms to the word-count limitations contained in Rule 4-2(d) of this Court's pilot rules on electronic filings. The jurisdictional statement, the statement of the case and the facts, and the argument sections altogether contain 8,315 words.

/s/ *Nicholas J. Bronni*
Nicholas J. Bronni

## CERTIFICATE OF SERVICE

I certify that on July 28, 2023, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will serve all counsel of record.

/s/ *Nicholas J. Bronni*
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