IN THE SUPREME COURT OF ARKANSAS

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

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

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

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

State Appellants' Reply Brief

TIM GRIFFIN
Arkansas Attorney General

NICHOLAS J. BRONNI (2016097)
Solicitor General

DYLAN L. JACOBS (2016167)
Deputy Solicitor General

MICHAEL A. CANTRELL (2012287)
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-6302
Nicholas.Bronni@arkansasag.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

Plaintiffs' response makes one thing clear: They're desperate to avoid this Court's review. Indeed, they're so eager to avoid review that they paradoxically claim both that: 1) there's no final judgment because the circuit court has yet to rule on some arguments; and 2) this case is moot because there's nothing left to resolve. Those claims can't both be true, and this Court should reject both.

This Court should instead invoke the public-interest exception to mootness, reverse the circuit court's erroneous, chaos-sowing order, and dismiss this case. Anything less invites further litigation challenging virtually every July expenditure in living memory, countless criminal judgments, and an unknowable number of agency actions. And waiting for another case makes little sense because—as Plaintiffs' anemic defense of the circuit court's order underscores—this isn't a difficult case on the merits. To the contrary, lawsuits like this one are barred by both the political-question doctrine and sovereign immunity, and in any event, the General Assembly's practice of conducting and recording separate, simultaneous votes on a bill and an emergency clause is constitutional.

This Court should reverse the circuit court, definitively reject Plaintiffs' claims, and dismiss this case once and for all.

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

Every General Assembly in living memory has conducted separate, simultaneous votes on bills and emergency clauses, and, as our Constitution requires, recorded those votes separately in the legislative journals. But the circuit court held that—whatever the journals say—courts must decide whether a vote really occurred. Employing that newfound power, the circuit court declared the journals fictitious and held LEARNS's emergency clause invalid. This Court should reverse.

A. The circuit court's disregard of the journals and sweeping investigation into a coordinate branch of government "violate[s] the principle of separation of powers" and represents an unprecedented, "unconstitutional judicial encroachment on the legislative branch." *Ark. Dep't of Educ. v. Jackson*, 2023 Ark. 105, at 16-17, 669 S.W.3d 1, 12 (Womack, J., concurring). Indeed, the Arkansas Constitution couldn't be clearer, firmly committing to "[e]ach house" the "power to determine the rules of its proceedings," Ark. Const. art. 5, sec. 12, including how votes are taken. *See Jackson*, 2023 Ark. 105, at 15, 669 S.W.3d at 11 (Womack, J., concurring); *see also Reaves v. Jones*, 257 Ark. 210, 213, 515 S.W.2d 201, 203 (1974) (legislature's observance of its procedures is "not subject to . . . review[] by the courts").

So the circuit court should have done what previous courts confronted with "challenges based on the legality of internal legislative processes" have and dismissed this case on the grounds that it "presents a nonjusticiable political question." *Jackson*, 2023 Ark. 105. at 11, 669 S.W.3d at 9 (Wood, J., concurring) (discussing precedent from "eight other state courts"); *id.* at 17-18, 669 S.W.3d. at 12 (Womack, J., concurring) (discussing similar federal precedent). But the circuit court did the opposite and opted to play legislative referee—reviewing videos and taking legislative testimony. That "usurp[ed] the legislative branch's core function [and] threaten[ed] its independent institutional integrity." *Id.* at 11, 669 S.W.3d at 9 (Wood, J., concurring).

This Court should reverse and hold—as Justices Wood, Womack, and Webb previously explained—that this case presents a nonjusticiable political question. Anything less, as the Alabama Supreme Court explained in rejecting a similar challenge, would open the floodgates to 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 tally wasn't accurate. *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So. 2d 204, 220 (Ala. 2005).

B. In response, Plaintiffs barely bother to defend the circuit court's conclusion. That's hardly surprising since the circuit court didn't cite any authority for its holding that—to use its words—it was entitled to "stick [its] judicial nose[] into"

an area solely committed to the legislature. (RP 238 (quotation omitted)). And what Plaintiffs do say about the political-question doctrine amounts to little more than a series of out-of-context block quotes pasted together to create an emergency clause narrative that quickly falls apart.

First, Plaintiffs cite a series of cases—*Rice v. Palmer*, 78 Ark. 432, 96 S.W. 396 (1906), *Farelly Lake Levee Dist. v. Hudson*, 169 Ark. 33, 273 S.W. 711 (1925), and *Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee*, 362 Ark. 520, 210 S.W.3d 28 (2005)—that have nothing to do with legislative votes. It's unclear why Plaintiffs think those cases are relevant.

Second, they cite *Booe v. Rd. Improvement Dist. No. 4, Prairie Cnty.*, 141 Ark. 140, 216 S.W. 500 (1919). But *Booe* hardly helps Plaintiffs since the Court there only considered the official record—the Governor's special-session proclamation, bills passed, and, tellingly, the journals—to determine whether the General Assembly had complied with the 30-day special session notice requirement. That contrasts with the circuit court's decision here to go hunting for parol evidence and ultimately declare the journals fictitious. So far from supporting Plaintiffs, *Booe* merely shows that courts defer to the journals—and that doesn't raise separation of powers concerns.

Lastly, Plaintiffs cite *Hargrove v. Arnold*, 181 Ark. 537, 26 S.W.2d 581 (1930), *Foster v. Graves*, 168 Ark. 1033, 275 S.W. 653 (1925), and *Crowe v.*

Security Mortg. Co., 176 Ark. 1130, 5 S.W.2d 346 (1928)—all of which similarly hold the journals control. For instance, *Hargrove* took "judicial notice of the records of both branches of the General Assembly"—*i.e.*, the journals—and determined that "no separate vote or roll call" had been taken on the emergency clause because the journals didn't record such a vote. *Hargrove*, 26 S.W.2d at 581-82. *Hargrove* did not inquire whether legislators had cast a vote and failed to record it, which would have strayed into a nonjusticiable political question. Instead, it treated the journals as controlling. Likewise, both *Crowe* and *Foster* treated the journals as controlling—recognizing that where the journals don't record a separate vote, one didn't occur and never suggesting that it would have been proper to consider whether parol evidence contradicted that.

In a nutshell, then, *Hargrove*, *Foster*, and *Crowe* don't hold—as Plaintiffs suggest—that courts enjoy a roving writ to search for evidence to contradict the journals or that this Court has rejected the political-question doctrine. They establish that courts look to the journals to determine whether a separate roll-call vote occurred. And deferring to those constitutionally mandated records doesn't violate separation of powers. Just the opposite; it respects "[e]ach house['s]" constitutional "power to determine the rules of its proceedings" and "keep a journal." Ark. Const. art. 5, sec. 12.

Rather, courts run afoul of the political-question doctrine when they question the journals' veracity. And Plaintiffs don't cite any case supporting that kind of inquiry. Nor could they since such a case would represent a spectacular departure from a century of precedent. So this Court should decline Plaintiffs' invitation to usurp the General Assembly's role as the sole arbiter of its votes, reverse the circuit court on the grounds that Plaintiffs' complaint presented a nonjusticiable political question, and dismiss this case once and for all.

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

If this Court doesn't resolve this case based on the political-question doctrine, it should hold LEARNS's emergency clause is valid. Our Constitution requires that to adopt 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. A roll-call vote occurs when "the names of the persons voting for and against the [bill]" are listed "on the journal," *id*., sec. 22, not when members press a button or say "yea" or "nay." *Jackson*, 2023 Ark. 105, at 15, 669 S.W.3d at 11 (Womack, J., concurring). And here, "[t]here is no dispute" that LEARNS's emergency clause received a separate roll-call vote because "the Journals reflect two votes were taken." (RP 240). That should have been the end of the matter, and the circuit court erred in holding otherwise.

A. Over a century of case law confirms this plain-text reading. Indeed, this Court previously explained that, if the "yeas and nays" aren't "entered on the journal," the vote effectively didn't happen. *Niven v. Rd. Improvement Dist. No. 14*, 132 Ark. 240, 200 S.W. 997, 997 (1918). And if the vote isn't recorded, this Court doesn't inquire further. *See Vinsant v. Knox*, 27 Ark. 266, 280 (1871). That's because the journal *is* the vote, and outside evidence (videos, testimony, or anything else) can't be used to contest it. *Ruddell v. Gray*, 171 Ark. 547, 285 S.W. 2, 4 (1926); *Chicot Cnty. v. Davies*, 40 Ark. 200, 212 (1882). And that means that when Article 5, section 1 uses the word "separate," it means a separate journal entry.

Plaintiffs don't seriously contest that plain-text reading. Instead, they describe votes being recorded in the journal as a "subsequent clerical task" to the vote. Pls.' Br. 22. But that ignores the text and case law confirming that whatever members may say on the floor, there's no vote without a journal entry. *See Niven*, 132 Ark. 240, 200 S.W. at 997; *Jackson*, 2023 Ark. 105, at 15, 669 S.W.3d at 11 (Womack, J., concurring). Recording votes in the journal then isn't a mere "clerical task." It's—as the Constitution says—the sole determinant of whether a vote occurred.

B. Plaintiffs likewise have no response to consistent legislative practice. *See The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (according "great weight" to

longstanding legislative practice in interpreting constitutional provisions). They don't grapple with the fact that the legislature has been holding separate roll-call votes at the same time for as long as anyone can remember or the fact that their own legislative witnesses testified that they knew—when voting on LEARNS—that they were voting on both the bill and its emergency clause. (RT 24, 52, 58). Nor do Plaintiffs offer any coherent explanation how—if there aren't two separate roll-call votes—a bill can pass while its emergency clause does not. *See* (RT 196-97). And they don't explain how, if there aren't separate votes, legislators may expunge a failed emergency-clause vote without affecting the passage of the underlying legislation. *See* (RT 196-97).

Instead, Plaintiffs simply assert that every General Assembly in memory has "falsely recorded" its votes. Pls.' Br. 23. Yet every witness who testified below denied that. (RT 48, 52, 58). Plaintiffs' outlandish claim fails as a matter of text, practice, and history.

C. In the end, what matters is that the journals record two separate votes. (RT 234-243, 247-250). That means that LEARNS and its emergency clause received separate votes and that the General Assembly complied with Article 5, section 1. That ends the matter and means Plaintiffs' claims fail as a matter of law.

III. Sovereign Immunity Requires Dismissal

As previously explained, sovereign immunity at this stage is simply a merits inquiry. If LEARNS's emergency clause is valid, or if the issue is a nonjusticiable political question, no exception to sovereign immunity applies and the State isn't subject to suit. *See* Ark. Const. art. 5, sec. 20. The State hasn't acted illegally, and Plaintiffs' claims should be dismissed.

IV. This Court Has Jurisdiction to Review the Circuit Court's Order

Underscoring the weakness of their substantive arguments, Plaintiffs ask this Court to simply declare this case over and leave the circuit court's erroneous order in place. To achieve that, Plaintiffs contradictorily claim that the State's appeal is both premature and moot. Neither is true, and this Court should reject Plaintiffs' attempt to insulate the circuit court's erroneous order from review.

A. The circuit court's order is final and reviewable.

Plaintiffs filed this case seeking an injunction and a declaration that LEARNS's emergency clause was invalid. This Court previously held that Plaintiffs' injunction claim failed as a matter of law, and Plaintiffs returned to circuit court on their remaining claim. The circuit court acknowledged that Plaintiffs had advanced multiple "distinct legal theories," but it held "all of them" turned on the separate roll-call vote dispute. (RP 237). It then disposed of the case entirely on that basis, and Plaintiffs, having gotten what they wanted, didn't press for a ruling

on those alternative theories. That was a final order; it resolved the case; and Plaintiffs don't show otherwise.

A circuit court's order is final and appealable when it "concludes [the parties'] rights to the subject matter in controversy." *Fisher v. Chavers*, 351 Ark. 318, 320, 92 S.W.3d 30, 31 (2002) (quotation omitted). An order that "put[s] the judge's directive into execution, ending the litigation" is final, while "an order that contemplates further action by a party or the court is not." *Robinson v. Villines*, 2012 Ark. 211, at 2.

Applying that standard, the circuit court's order declaring LEARNS's emergency clause invalid is final and appealable. That order ended the dispute between the parties, and it didn't contemplate any further action by the parties on the alternative theories that it didn't reach. (RP 243); *see also* (RP 240) (ordering that "all provisions of the Act purported to be immediately effective due to the invalid clause *are now* effective as of . . . August 1" (emphasis added)). Yet Plaintiffs claim that wasn't really a final order because the circuit court didn't reach their alternative theories for invalidating the emergency clause—including whether it "fails to state an emergency" and whether the General Assembly may "declare an emergency as to only specific parts of the bill." Pls.' Br. 12-13.

But as the circuit court explained, it "need not determine" the merits of Plaintiffs' other theories because its decision on the separate roll-call vote

argument fully resolved Plaintiffs' declaratory-judgment claim and gave them the relief they sought. (RP 241). And Plaintiffs unsurprisingly didn't press for a ruling on those alternative theories because, as they concede, "[a]ll" of their "claims hinge[d] exclusively on the effective date of" LEARNS. Pls.' Br. 14. So when the circuit court held LEARNS wasn't effective until August 1, that resolved all their outstanding claims, and this case became appealable. *See Robinson*, 2012 Ark. at 2 (where order doesn't "contemplate[] further action by . . . the court", it's final and appealable). This Court has jurisdiction to review that final order and should do so.

B. This appeal shouldn't be dismissed as moot.

Plaintiffs also claim this case is moot. They correctly observe that we're past August 1 and—emergency clause or not—LEARNS is effective. Normally, that would render a case about whether LEARNS's emergency clause was valid moot and require this Court to simply vacate the circuit court's order and remand with instructions to dismiss. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288 n.9 (1982) ("If it becomes apparent that a case has become moot while an appeal is pending, the judgment below normally is vacated with directions to dismiss the complaint."); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

But this Court shouldn't do that here because the issues raised in this appeal—whether the General Assembly's longstanding procedure for voting on emergency clauses is subject to judicial review, and if so, whether it is constitutional—go beyond this case. Indeed, absent immediate correction by this Court, the circuit court's order threatens to generate a plethora of litigation challenging countless expenditures, long-final criminal judgments, and an unknowable number of agency actions. Thus, this Court should invoke the public-interest exception and "elect to settle [the] issue, even though moot." *Protect Fayetteville v. City of Fayetteville*, 2019 Ark. 28, 4, 566 S.W.3d 105, 108.

Few cases call for the application of that exception like this one does. This case involves a major separation-of-powers issue comparable to the question of whether courts could conduct sweeping inquiries into legislative motivations at issue in *Protect Fayetteville*. And like that case, this is also a case where a circuit court has done something unprecedented, presenting an issue "of first impression," where "[g]uidance is needed for the public in pursuing litigation against the State" and "for the legislative and executive branches in conducting their business." *Id.* Moreover, the purely legal questions presented here won't "turn on facts specific to each [future] case," *Ark. Dep't of Hum. Servs. v. Ledgerwood*, 2019 Ark. 100, 3, 571 S.W.3d 1, 3, and this issue is highly "likely to be litigated [again] in the future." *Protect Fayetteville*, 2019 Ark. at 3, 556 S.W.3d at 108.

In short, this is precisely the kind of case that the public-interest exception exists to cover. As such, this Court should invoke the public-interest exception, reverse the circuit court's order, and dismiss this case with prejudice. Or, at a minimum, if this Court doesn't apply that exception, it should—as is normally the case—vacate the circuit court's order and remand with instructions to dismiss. But either way, this Court should end this case once and for all.

CONCLUSION

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

Respectfully submitted,

TIM GRIFFIN
Arkansas Attorney General

/s/ Nicholas J. Bronni
NICHOLAS J. BRONNI (2016097)
Solicitor General

DYLAN L. JACOBS (2016167)
Deputy Solicitor General

MICHAEL A. CANTRELL (2012287)
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-6302
Nicholas.Bronni@arkansasag.gov

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 2,834 words.

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

CERTIFICATE OF SERVICE

I certify that on August 18, 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*
Nicholas J. Bronni