No. CV-23-468

IN THE ARKANSAS SUPREME COURT

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

THE HONORABLE HERBERT WRIGHT, CIRCUIT JUDGE

APPELLEES' BRIEF

Ali Noland
Noland Law Firm, PA
P.O. Box 251402
Little Rock, AR 72225
Telephone: (501) 258-6186
ali@nolandfirm.com

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A. Introduction

The Pulaski County Circuit Court properly found that the emergency clause attached to the Arkansas LEARNS Act was not passed with the requisite separate roll-call vote required by Article 5, Section 1 of the Arkansas Constitution. R.P. 240. It based this finding on the clear and unambiguous video evidence of the passage of the bill in both houses, the testimony of two elected members of the Arkansas General Assembly, the testimony of the former Senate parliamentarian Steve Cook, the testimony of the then-current House parliamentarian Buddy Johnson, and affidavits submitted by the State Appellants. All of the evidence unequivocally demonstrated that no separate roll-call vote was taken in either house to pass the emergency clause attached to the LEARNS Act. *Id*. Based on that finding, the court concluded that the emergency clause is not valid and that the new law did not become effective until August 1.

The Appellants immediately appealed, and they now ask this Court to reverse the circuit court's well-reasoned and amply supported order in a way that would overturn longstanding precedent and nullify constitutional provisions applicable to the State. Such a precedent would leave state actors free to violate the Arkansas Constitution at will, would rob Arkansans of any judicial recourse or remedy when

such constitutional violations cause them harm, and strip Arkansas court of the right to conduct judicial review.

The Court need not create such precedent today. First, the Court lacks jurisdiction over this appeal because the order at issue is not a final, appealable order as it failed to dispose of some of Appellees' claims. Second, the circuit court's order is now moot because it only addressed the validity of the emergency clause and only purported to restrict the application of the LEARNS Act prior to August 1, 2023, a date which has now passed. Finally, none of the points raised on appeal warrant reversal.

The parties thoroughly briefed many of these issues in the previous appeal, *Ark. Dep't of Educ. v. Jackson*, 2023 Ark. 105, 669 S.W.3d 1, and the Appellees incorporate by reference those arguments as if reproduced in full here.

B. Standard of Review

The circuit court's order contains both findings of fact and conclusions of law. After considering the testimony, evidence, and arguments of counsel, the circuit court found that "there is no getting around the fact that the bill and emergency clause were not voted on by separate roll-call votes in either house." R.P.240. This is a finding of fact, and the standard of review on appeal from a bench trial is whether the circuit court's findings of fact were clearly erroneous or clearly against the preponderance of the evidence. *Morningstar v. Bush*, 2011 Ark. 350, at 4–5, 383

S.W.3d 840, 844. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been made. *Id*. However, disputed facts and determinations of credibility are within the province of the factfinder. *Id*. A circuit court's conclusions of law are reviewed de novo on appeal. *Hickman v. Courtney*, 361 Ark. 5, 9, 203 S.W.3d 632, 635 (2005).

C. Constitutional Background

This case hinges on the specific constitutional requirements the General Assembly must meet in order to pass a valid and effective emergency clause on a piece of legislation. In interpreting and applying those requirements, it is important to view them in the appropriate constitutional and historical context: emergency clauses are an abrogation of the people's right to repeal legislation using the referendum process, and in order to prevent legislative abuse of the emergency designation and safeguard the rights of the people, the Arkansas Constitution intentionally sets a high bar for the passage of an emergency clause.

The people of Arkansas overwhelming passed a constitutional amendment in 1910 creating the right to repeal unpopular legislation through the referendum process. Amendment 10, the state's first initiative and referendum (I &R) amendment, passed with more than seventy percent of the vote. Ledbetter, Calvin R., *"Adoption of Initiative and Referendum in Arkansas: The Roles of George W.*

Donaghey and Williams Jennings Bryan," The Arkansas Historical Quarterly 51, no. 3, 219 (1992). "The election on September 12 amounted to an impressive mandate for the initiative and referendum." *Id*. Amendment 10 established a referendum-petition process and mandated that new laws would not become effective until after the designated time for submitting referendum petitions expires. Amendment 10 contained an exception to this new rule; it allowed the legislature to make a bill effective upon passage if necessary "for the immediate preservation of public peace, health, or safety." This is the origin of the emergency clause.

Following the passage of Amendment 10, "the legislature adopted the practice of classifying much legislation as emergency in nature and therefore not subject to referendum." *Id*. "The practical effect of this legislative practice was to nullify the referendum procedure," and as such, this practice has been routinely labeled in both historical and legal documents as legislative abuse. *Id*. In 1920, fed up by this practice, the people of Arkansas passed a second constitutional amendment aimed at strengthening the initiative and referendum process and preventing legislative abuse of the emergency designation. Known as Amendment 7, this new I & R amendment was specifically and intentionally closed the loophole that had allowed the legislature to classify most bills as emergency legislation. Writing in 1933, preeminent Arkansas historian David Yancy Thomas described Amendment 7 this way: "To guard against abuse of the emergency clause, it provided that the fact of

the emergency must be stated in a separate section and, for adoption, required a two-thirds majority of all members on a separate roll call." David Y. Thomas, *"The Initiative and Referendum in Arkansas Comes of Age,"* American Political Science Review 17 (February 1933), 67. A few years later, Arkansas Supreme Court Justice Frank Smith, dissenting in *Matthews v. Bailey*, 198 Ark. 830, 131 S.W.2d 425, 433 (1939), explained that "the practice of adding the emergency clause became so common as to be an abuse," prompting the people to place stricter restrictions on the use of emergency clauses by passing Amendment 7 in 1920. Although the Speaker of the House initially declared that Amendment 7 failed to pass, this Court held in *Brickhouse v. Hill*, 167 Ark. 513, 268 S.W. 865 (1925), that Amendment 7 had, in fact, been adopted. *See Mertz v. States*, 318 Ark. 390, 401, 885 S.W.2d 853, 858 (1994) (Dudley, J., dissenting, recounting the history of Amendment 7).

It is important, in interpreting and applying the language of Amendment 7, that the Court remain conscious of the fact that the separate-vote requirement at issue in this lawsuit was never a mere technicality or superfluous bit of meaningless language. On the contrary, legislative abuse of the emergency designation was a prominent campaign issue for a decade in Arkansas, between the passage of Amendment 10 and Amendment 7, and the people of Arkansas made a clear policy choice by enshrining the separate-vote requirement in the Arkansas Constitution in 1920. Ledbetter, *supra*.

This Court has explained that, "[o]ur primary goal in construing and interpreting a constitutional provision is to ascertain and give effect to the intent of the Arkansas people." *Foster v. Jefferson Cnty. Quorum Ct.*, 321 Ark. 105, 116E, 901 S.W.2d 809, 816 (1995), on reh'g (July 17, 1995). More specifically, the Court has said, "When engaging in constitutional construction and interpretation, we look to the history of the constitutional provision and to the mischief intended to be corrected by its passage." *Id*. The "mischief" intended to be corrected by Amendment 7 was legislative abuse of the emergency designation, and this Court should not interpret Amendment 7 in a way that allows the very same abuse to continue.

D. **The Court Lacks Jurisdiction to Hear this Appeal Pursuant to Rule 54 Because the Circuit Court's Findings of Fact and Conclusions of Law Do Not Constitute a Final, Appealable Order.**

The State Appellants' Jurisdictional Statement asserts this Court has jurisdiction to decide this appeal pursuant to Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure—Civil. App. Br. 7. This is incorrect. The circuit court's Findings of Fact and Conclusions of Law do not constitute a final, appealable order. Whether an order is final and subject to appeal is a jurisdictional question that the Court must address, and the Court will raise the issue *sua sponte* if it is not raised by a party on appeal. *Hotels.com, L.P. v. Pine Bluff Advert. & Promotion Comm'n*, 2021 Ark. 196, 4, 632

S.W.3d 742, 745 (2021); *Hotfoot Logistics, LLC v. Shipping Point Mktg., Inc.*, 2012 Ark. 76, at 2; *Jones v. Huckabee*, 363 Ark. 239, 213 S.W.3d 11 (2005).

> We have explained that Rule 2 of the Arkansas Rules of Appellate Procedure–Civil requires that a judgment or decree be final for it to be appealable, with limited exceptions, and the purpose of this rule is to avoid piecemeal litigation. When no final or otherwise appealable order is entered, this court lacks jurisdiction to hear the appeal.

Id. (quoting *State ex rel. Rutledge v. Purdue Pharma L.P.*, 2021 Ark. 133, at 7–8, 624 S.W.3d 106, 110 (internal citations omitted)). Under Rule 54(b), an order is not final for purposes of appeal when it adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. *City of Corning v. Cochran*, 350 Ark. 12, 14–15, 84 S.W.3d 439, 441 (2002) (citing *Eason v. Flannigan*, 349 Ark. 1, 75 S.W.3d 702 (2002)). To be final and appealable, "[t]he order must put the judge's directive into execution, ending the litigation, or a separable branch of it." *Id*. (citing *Payne v. State*, 333 Ark. 154, 158, 968 S.W.2d 59, 61 (1998); *Tucker v. Lake View School Dist. No. 25*, 323 Ark. 693, 917 S.W.2d 530 (1996); *Festinger v. Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978)).

In this case, the order from which the Appellants appeal is not, on its face, a final, appealable order because it leaves several of the Appellees' claims unresolved and does not purport to be a final judgment. In addition to claiming that the emergency clause on Act 237 is invalid because it was not passed with a separate roll-call vote in both chambers of the Arkansas General Assembly, the Appellees

asserted claims that the emergency clause fails to state an emergency and that the emergency clause in Act 237 is an unconstitutional attempt to declare an emergency as to only specific parts of the bill. The circuit court's Findings of Fact and Conclusions of Law did not dispose of these claims. First, the order states, "[i]f the Court finds that the Legislature followed a proper procedure, the only remaining recourse left to the Plaintiffs would be the declaratory judgment request, as it goes to the substance of the underlying emergency." R.P. 237. Upon concluding that the emergency clause was not passed with the requisite separate votes required by the Arkansas Constitution, the court further stated that, "having found that the emergency clause was not properly enacted, it need not determine whether the stated ['']emergency['] of the clause was a ['']valid emergency.['']" R.P. 241. Clearly, this order does not dispose of the Appellees' challenges to the substance and language of the emergency clause, just to the procedure used to pass it. Those remaining claims have not been dismissed, abandoned, or resolved, and therefore this is not a final, appealable order.

This jurisdictional requirement is aimed at preventing the piecemeal litigation of appeals, which is exactly what will occur should the Court exercise jurisdiction over the current appeal and decide the constitutionality of the separate-vote issue while Appellees other arguments and remain alive and pending before the circuit court.

E. This Appeal Should Be Dismissed As Moot

As a general rule, Arkansas courts will not review issues that are moot. *Ark. Dep't of Human Servs. v. Ledgerwood*, 2019 Ark. 100, at 2, 571 S.W.3d 1, 2. To do so would be to render advisory opinions, which this court will not do. *Id*. A case is moot when any judgment rendered would have no practical effect on a then-existing legal controversy. *Id*.

Appellants filed this lawsuit on May 8, 2023, to prevent the State Appellants from prematurely and illegally implementing the LEARNS Act in reliance on a defective emergency clause. The circuit court found in its Findings of Fact and Conclusions of Law that, since the emergency clause was not effective, "all provisions of the Act purported to be immediately effective due to the invalid clause are now effective as of the default date the Act would be effective – August 1, 2023." All of the Appellees' claims hinge exclusively on the effective date of the legislation, and the period of time during which the circuit court's order restrained the implementation of the law has now passed. None of the claims raised by the Appellees in this lawsuit, and certainly none of the circuit court's findings of fact or conclusions of law in the order now on appeal, jeopardize the implementation of the LEARNS Act after August 1, 2023. That date has passed, and the LEARNS Act is now being implemented. Whether this Court affirms, reverses, or dismisses the circuit court's order will not change that, meaning that

the issue is now moot. Were the Court to decide the appeal, it would effectively be providing an advisory opinion aimed at shaping future litigation, not changing any outcome in the present case. The Court should, therefore, dismiss this appeal as moot.

F. Sovereign Immunity Does Not Bar the Appellees' Lawsuit.

Appellants argue that "[b]ecause Plaintiffs can't show that the State acted unlawfully, their claims are barred by sovereign immunity, and this Court should dismiss the complaint." App. Br. 43. This argument fails because the circuit court found that the Arkansas General Assembly did not meet the requirements of Article 2, Section 5 when it purported to pass the emergency clause in the LEARNS Act and that, as a result, the State Appellants' execution of a transformation contract regarding the Marvell-Elaine School District constituted ultra vires acts. This Court specifically held that "the sovereign immunity defense is not available against claims of ultra vires conduct that only seek declaratory or injunctive relief," going as far as proclaiming that "the ultra vires exception is alive and well." *Monsanto Co. v. Arkansas State Plant Bd.*, 2019 Ark. 194, 9, 576 S.W.3d 8, 13. "Where a claim is based on alleged ultra vires conduct on the part of the State, and the claimant seeks only declaratory and injunctive relief, sovereign immunity is inapplicable." *Id*. State Appellants' arguments regarding sovereign immunity boil down to an assertion that the emergency clause in the LEARNS Act was passed in accordance with the

requirements of Article 5, Section 1, and those substantive arguments are addressed below. This Court cannot reverse the circuit court's findings of fact and conclusions of law based on sovereign immunity without first determining whether the ultra vires exception applies, meaning that a sovereign-immunity ruling in this case must include a holding as to the merits of the circuit court's conclusion that the emergency clause in the LEARNS Act was passed unconstitutionally.

D. Appellees' Case Presents a Justiciable Legal Issue, Not A Political Question

Appellants contend that, because this case challenges the constitutionality of the legislative process used to pass the emergency clause in the LEARNS Act, it violates the separation of powers and qualifies as a nonjusticiable political question. Not only is this interpretation not supported by the case law articulating the scope and limitations of the political-question doctrine, it is stark departure from every Arkansas case in which this Court held that a legislative act was not properly passed (see *Rice v. Palmer*, 78 Ark. 432, 96 S.W. 396 (1906) ("it is the absolute duty of the judiciary to determine whether the Constitution has been amended in the exact and precise manner required by the Constitution")) or failed to comply with the Arkansas Constitution. See *Lake View School District No. 25 of Phillips County v. Huckabee*, 351 Ark. 31, 54, 91 S.W.3d 472, 484 (2002), *supplemented*, 358 Ark. 137, 189 S.W.3d 1 (2004) (rejecting the State's claim that a constitutional challenge to Arkansas's school-funding scheme was a nonjusticiable political question); *Safe*

Surgery Arkansas, A Ballot Question Committee v. Thurston, 2019 Ark. 403 (Dec. 17, 2019) (invalidating an emergency clause that failed to state sufficient facts).

For more than 100 years, the Arkansas Supreme Court has held that courts can take judicial notice of facts demonstrating that legislative proceedings failed to comply with mandatory provisions of the Arkansas Constitution, and in none of those case did the Court dismiss the case as nonjusticiable political question.

> The result of our present views is that the provision of the Constitution is mandatory, and should be obeyed by the General Assembly; but there is always a presumption in favor of the legality of the legislative proceedings, and that such proceedings are conclusively presumed to have been in accordance with the constitutional requirements, **unless the record, of which the courts can take judicial notice, show to the contrary.**

Booe v. Rd. Improvement Dist. No. 4, Prairie Cnty., 141 Ark. 140, 216 S.W. 500, 503 (1919) (emphasis added) (taking judicial notice that constitutionally required notice period for special session was not met); *see also Farelly Lake Levee District v. Hudson*, 169 Ark. 33, 37, 273 S.W. 711 (1925) ("The courts will take judicial notice that many special acts have been heretofore passed by the Legislature establishing levee, drainage and highway districts.").

In fact, the Arkansas Supreme Court addressed a matter very similar to that which is now before this Court when it held:

> We take judicial notice of the records of both branches of the General Assembly from which we know that the Legislature of 1929 adjourned March 14, and that, **while the act in question contained an emergency clause, no separate vote or roll call was had thereon, and therefore**

> **said emergency clause was never adopted, and the act did not go into effect until ninety days after the adjournment of the Legislature.**

Hargrove v. Arnold, 181 Ark. 537, 26 S.W.2d 581, 582 (1930) (emphasis added). The cases cited in the *Hargrove* opinion further illustrate the point that the Arkansas Supreme Court has routinely decided questions about the State's adherence to constitutionally mandated procedures, and those case have not been dismissed as political questions:

> We take judicial notice of the records of both branches of the General Assembly, and we thus know that **no separate vote was taken on the emergency clause contained in the act, and, this being true, the act did not immediately go into effect**. It did not therefore become effective as a law until 90 days after the adjournment of the session at which it was passed, and prior to that time the commissioner's sale was made, and the act did not apply to that sale, as it was not retroactive in its operation.

Crowe v. Security Mortgage Co., 5 S.W.2d 346, 176 Ark. 1130 (Ark. 1928) (internal citations omitted, emphasis added); *see also Foster v. Graves*, 275 S.W. 653, 168 Ark. 1033 (Ark. 1925) ("The statute did not go into effect…by reason of the fact there was no separate roll call"). If the Court had jurisdiction to declare an emergency clause invalid in *Hargrove*, *Crowe*, and *Foster*, the circuit court had jurisdiction to do the same here.

Justice Tom Glaze, concurring in a *Lakeview* ruling, explained that, "[w]hile it is certain that we cannot control the actions of the legislative branch, it nevertheless remains clear that the doctrine of separation of powers does not prevent the judicial

branch from passing on the validity of legislative acts." *Lake View Sch. Dist. No. 25 of Phillips Cnty., Arkansas v. Huckabee*, 362 Ark. 520, 525, 210 S.W.3d 28, 31–32 (2005). In *Baker v. Carr*, 369 U.S. 186, 209 (1962), the United States Supreme Court held that the case did not present a political question because "the question here is the consistency of state action with the Federal Constitution." 396 U.S. at 226. The alternative would be unthinkable. The Arkansas Constitution contains numerous provisions governing the actions of the executive and legislative branches. Were this Court to hold that any case alleging a violation of those provisions inherently violates the separation of powers and presents a nonjusticiable political question, it would effectively render all such provisions of the Arkansas Constitution null and void.

The Appellants contend that "Courts cannot review the legislature's understanding of its own procedures." App. Br. 25. This argument fails for three reasons. First, it ignores the fact that the Appellees have presented constitutional claims alleging violations of a duly enacted provision of the Arkansas Constitution, not mere allegations that the legislature violated its own procedures. Second, as discussed above, this separation-of-powers argument would effectively render Article 5, Section 1 and many other parts of the Arkansas Constitution meaningless and unenforceable. Finally, this argument misrepresents the issues and ignores key evidence and testimony presented below.

The Appellants acknowledge that this Court "must ensure the legislature isn't outright flouting the Constitution," citing *Russell v. Cone*, 168 Ark. 989, 272 S.W. 678, 682 (1925), but they argue that the simultaneous-vote practice "colorably complies with constitutional limitations," so "courts can't second-guess [the legislature's] understanding of those limitations." The circuit court repeatedly found, in no uncertain terms, that the legislative practice of voting once and recording that vote twice in the journals does not comply with the constitutional limitations, saying "[t]he word 'separate' cannot mean 'the same.'" R.P. 518*. Voting simultaneously for both the bill and the emergency clause is not colorable compliance; Mr. Steve Cook, the recently retired former parliamentarian of the Arkansas Senate testified at the hearing that he repeatedly raised concerns regarding the constitutionality of the practice. RT 21-27.

The Appellants also argue that the circuit court was not permitted to consider any evidence outside the legislative journals. This issue has been repeatedly briefed at length, and the Appellees incorporate all previous arguments herein. In addition to those arguments, Appellees note that the circuit court relied on *Chicot Cnty. v. Davies*, 40 Ark. 200, 215–16 (1882), in which this Court held that, "to make all legislation ultimately depend on the fidelity with which a journal clerk has made his entries, is, [. . .] to render the laws as uncertain as the terms of a horse trade." R.P. 239. The Court specifically noted that the Appellants' own evidence also contradicts

the journals. R.P. 240. For example, the Appellants submitted an affidavit from the Chief Counsel to the Arkansas Senate in which he testified that, "[a]s a matter of internal procedure, Senators have decided to convey their separate roll-call votes on emergency clauses in the same in the same utterance as their votes on the underlying bill." *Id*. This evidence, and in fact the Appellants' entire theory of the case in which it claims that it is constitutionally acceptable for the legislature to vote on bills and emergency clauses "simultaneously," directly contradicts the journals, which purport to show separate, consecutive roll-call votes, one following shortly after the other.

In this case, there was video evidence, witness testimony, and affidavits submitted by both sides which all contradict the journals. Appellants urged this Court to disregard the truth in favor of a politically convenient absurdity and hold that, because the official legislative journals reflect two votes, two votes must have occurred. When every Arkansan can easily view the videos that unequivocally show that only one vote was taken in each house, accepting the Appellants argument and holding that the legislative journals control over the video records would significantly erode public trust in the judiciary.

E. The Circuit Court's Finding that the Emergency Clause Was Not Passed With A Separate Roll-Call Vote Is Not Clearly Erroneous

Again, the Appellants attempt to rewrite the Arkansas Constitution in order to justify its self-serving alternative definitions for terms like "separate" and "vote," when those words are not ambiguous to begin with and should be given their plain meaning. Appellants argue that, as used in the Arkansas Constitution, "separate" can mean "simultaneous" and that the requirement for a separate roll-call "vote" doesn't refer to the actual act of voting but instead to the subsequent clerical task of recording that vote in the legislative journals. Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. *Forrester v. Daniels*, 2010 Ark. 397, 7, 373 S.W.3d 871, 875 (2010). Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision. *Id*. This Court must interpret a constitutional provision so that each word carries meaning. *Id*. "Just as we will not interpret statutory provisions so as to reach an absurd result, neither will we interpret a constitutional provision in such a manner." *Gray v. Mitchell*, 373 Ark. 560, 567, 285 S.W.3d 222, 229 (2008). Here, the Appellants ask the Court to reach an absurd result by substituting new meanings for "separate" and "vote." As used in Article 5, Section 1, the word "separate" is an adjective, which the Merriam-Webster Dictionary (2023) defines as "set or kept

apart," "not shared with another," "existing by itself," or "dissimilar in nature or identity." In fact, "same," "simultaneous," and "together" are antonyms for the word

"separate." *Id.*

Next the Appellants argue that "[t]his Court should consider longstanding practice if it believes that 'separate roll call' is ambiguous." This argument fails because the plain language of Article 5, Section 1 is not ambiguous. In fact, the plain meaning of the separate-vote requirement is so clear that the Arkansas legislature implemented a practice of falsely recording two consecutive separate roll-call votes in the journal each time it voted simultaneously for a bill and the emergency clause together.

Longstanding practice cannot and should not be used to subvert the plain requirements of the constitution. Here, after the legislature abused the emergency designation, the people of Arkansas passed Amendment 7 in 1920, intentionally making it more difficult for the legislature to pass an emergency clause. Now, the Appellants are asking this Court to approve a "longstanding practice" that would nullify Amendment 7. In fact, on cross examination, the Parliamentarian of the Arkansas House of Representatives, Buddy Johnson, admitted that "House rules do not override the Constitution." RT 107.

IV. CONCLUSION

For the reasons stated above, Appellees pray that the Arkansas Supreme Court dismisses this appeal based on lack of a final order and mootness or,

alternatively, affirms the circuit court's Findings of Fact and Conclusions of Law and provides all other relief to which the Appellees may be entitled.

By: /s/ *Ali Noland*
Ali Noland
Ark. Bar No. 2006151
Noland Law Firm, PA
P.O. Box 251402
Little Rock, AR 72225
501-258-6186
ali@nolandfirm.com

V. CERTIFICATE OF SERVICE

I hereby certify that electronically filed the foregoing document on August 11, 2023, using the Court's electronic filing system, thus providing notice to all parties of record herein.

/s/ *Ali Noland*
Ali Noland

VI. CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with:

(1) Administrative Order No. 19's requirements concerning confidential information;

(2) Administrative Order No. 21, Section 9, which states that briefs shall not contain hyperlinks to external papers or websites; and

(3) The word-count limitations identified in Rule 4-2(d). This document contains 4,493 words.

Undersigned further states that there are no original paper documents that do not appear in PDF format.

By: /s/ *Ali Noland*

Ali Noland
Ark. Bar No. 2006334
Noland Law Firm PA
P.O. Box 251402
Little Rock, AR 72225
501-258-6186
ali@nolandfirm.com

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