No. CV-21-517

IN THE SUPREME COURT OF ARKANSAS

LESLIE RUTLEDGE, individually and
as Attorney General of the State of Arkansas,
Defendant-Appellant,

v.

PRATT REMMEL, GALE STEWART, GLEN HOOKS, ROBERT B. LEFLAR, ELAINE DUMAS, MICHAEL B. DOUGAN, HARVEY JOE SANNER, and JACKIE SIMPSON,
Plaintiffs-Appellees.

On Appeal from the Pulaski County Circuit Court, Sixteenth Division
No. 60CV-21-341 (Hon. Morgan E. Welch)

Appellant's Brief

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JURISDICTIONAL STATEMENT

Plaintiffs filed suit against the Attorney General in her individual and "representative" capacities (RP6), alleging that her participation in multistate amicus briefs, her consumer-protection advertisements, her candidacy for office, and her membership and participation in various political groups "are in excess of the Constitutional and statutory authority of the Attorney General" (RP4), and constitute illegal exactions. (RP8-12).

The Attorney General filed a motion to dismiss arguing, among other things, that she is entitled to absolute, qualified, and sovereign immunities. (RP21). The court, the Hon. Alice S. Gray, heard argument (RT4), and permitted supplemental briefing on the political-question doctrine (RP142), before partially dismissing the complaint with leave to amend. (RP164). Plaintiffs amended their complaint (RP188), and the Attorney General again moved to dismiss on grounds including that Plaintiffs' claims are non-justiciable political questions and that the Attorney General is entitled to immunities to suit. (RP188).

After the Hon. Alice S. Gray recused, (RP267); *see* (RT83), the case was reassigned to the Hon. Morgan E. Welch, who heard argument (RT92), and entered a September 28, 2021 order (RP269), and then the same day an amended and substituted order (RP276), denying the Attorney General's motion to dismiss. On September 28, 2021, the Attorney General brought this interlocutory appeal under Ark.

R. App. P.—Civil 2(a)(10) because she is entitled to absolute, qualified, and sovereign immunities to suit and—by raising non-justiciable political questions—Plaintiffs fail to invoke the jurisdiction of the courts. (RP283).

Jurisdiction lies in the Supreme Court under Rule 1-2(a)(1) of the Rules of the Supreme Court because this appeal implicates the interpretation or construction of the Arkansas Constitution as it relates to the Attorney General's duties; Rule 1-2(b)(1) because it involves issues of first impression; Rule 1-2(b)(4) because it involves issues of substantial public interest; Rule 1-2(b)(5) because it involves significant issues needing clarification and development of the law; and Rule 1-2(b)(6) because it involves substantial questions of law concerning the construction or interpretation of an act of the General Assembly.

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STATEMENT OF THE CASE AND THE FACTS

A. The Attorney General's historic role in maintaining the State's interests in the federal courts.

One significant way the Attorney General has historically exercised the office's broad common-law authority and "maintain[ed] the interests of the state in matters before the . . . federal courts," Ark. Code Ann. 25-16-703, is by joining in multistate amicus briefs regarding matters with implications for the people of Arkansas. This practice is not peculiar to Arkansas, but is carried out by every State in the Union. Nor is this a recent development. Previous holders of the Attorney General's office frequently joined in multistate amicus briefs filed in the federal courts; literally hundreds of such briefs filed in cases arising out of other jurisdictions could be cited. What follows are several instructive examples of the practice of former Arkansas Attorneys General.

Former Attorney General Mark Pryor (1999-2003) joined about fifty multistate briefs on various issues, including, for example:

- Brief of Amici Curiae States of Ohio, [et al.] in Support of Petitioners, *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377 (2000) (No. 98-963), 1999 WL 223519 (arguing that the First Amendment permits States to enact campaign contribution limits);
- Brief of the States of Washington, [et al.] as Amici Curiae in Support of Petitioners, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138), 1999 WL 35032455 (arguing that parents do not have the right to preclude their children from contact with third parties); and
- Brief of the States of New Jersey, [et al.] as Amici Curiae in Support of Petitioner, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (No. 00-795),

2001 WL 417679 (arguing that the federal ban on "virtual" child pornography should be upheld).

Former Attorney General Mike Beebe (2003-2006) continued in the same vein, joining several dozen briefs on various issues arising elsewhere, including these:

- Brief of Texas, [et al.] as Amici Curiae in Support of Petitioners, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624), 2003 WL 23011472 (arguing that requiring teachers to lead student recitations of the Pledge of Allegiance, including "under God," is consistent with the Establishment Clause);
- Brief of Amici Curiae the States of Indiana [et al.] in Support of the Respondents, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500), 2004 WL 2825466 (arguing that a Ten Commandments monument on the Texas Capitol grounds does not violate the Establishment Clause);
- Brief of Texas, [et al.] as Amicus Curiae in Support of Petitioner, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) (No. 04-1144), 2005 WL 1941279 (arguing that state laws requiring parental consent to abortion on minors are entitled to deference); and
- Brief of the States of Texas, [et al.] as Amici Curiae in Support of Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-380), 2006 WL 1455404 (arguing that the Court should uphold the federal partial-birth abortion ban).

Former Attorney General Dustin McDaniel (2006-2015) did the same, joining in well over a hundred multistate briefs on numerous issues during his term in office. Notable among the briefs he joined are several supporting the National Rifle Association and its robust view of the Second Amendment:

- Brief of the States of Texas, [et al.] as Amici Curiae in Support of Respondent, *D.C. v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 405558 (arguing that the Second Amendment guarantees an individual right to bear arms);

- Brief of the States of Texas, [et al.] as Amici Curiae in Support of Petitioners, *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) (No. 08-1521), 2009 WL 4378909 (arguing that the Second Amendment right to bear arms is fundamental and applies to the States through the Fourteenth Amendment);
- Brief of the States of Texas, [et al.] as Amici Curiae in Support of Petitioners, *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago, Ill.*, 561 U.S. 1041 (2010) (No. 08-1497), 2009 WL 1970185 (same);
- Brief of the Commonwealth of Virginia [et al.] as Amici Curiae in Support of Petitioners, *Kachalsky v. Cacace*, 569 U.S. 918 (2013) (No. 12-845), 2013 WL 543314 (arguing that the Second Amendment protects the right to bear arms beyond the confines of home);
- Brief of Alabama and 21 Other States as Amici Curiae in Support of Petitioners, *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 571 U.S. 1196 (2014) (No. 13-137), 2013 WL 4761429 (arguing that gun dealers should be able to sell firearms to persons under 21);
- Brief of Alabama, [et al.] as Amici Curiae in Support of Plaintiffs-Appellants, *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (consolidated with *Shew v. Malloy*, (No. 14-319-CV)), 2014 WL 2294662 (arguing that the Constitution protects the right to carry semi-automatic weapons); and
- Brief of the State of Nebraska, et al., as Amici Curiae in Support of the Petitioners, *Jackson v. City & Cty. of San Francisco*, 576 U.S. 1013 (2015) (No. 14-704), 2015 WL 138123 (arguing that a San Francisco ordinance requiring firearms to be locked up when not carried on a person violates the Second Amendment).

These briefs represent only a few examples of the Arkansas Attorney General's historic efforts to maintain the interests of the State in the federal courts pursuant to the office's broad common-law and statutory authority (fully discussed below). Again, hundreds of such instances could be cited where the Attorney General has exercised discretion to maintain the State's interests.

B. The Attorney General continued the historic practice of participating in multistate briefs.

The Attorney General continued her predecessors' historic practice of participating in multistate amicus briefs pursuant to the office's broad common-law and statutory authority. Yet Plaintiffs allege that her doing so is ultra vires activity, pointing to four briefs in particular. (RP8-11). The first two relate to litigation in which States sought to defend the interests of their voters against unconstitutional election administration in other States. They are:

- Brief of the State of Missouri and Nine Other States as Amici Curiae in Support of Petitioners, *Republican Party of Pa. v. Boockvar* and *Scarnati v. Boockvar*, 141 S. Ct. 732 (Feb. 22, 2021) (Nos. 20-542, 20-574), 2020 WL 6876041 (arguing that the Constitution's Election Clauses preserve the amici States' interest in the effectiveness of their voters' choices by assigning the proper roles of legislatures and courts in the election administration of each State); and
- Brief of State of Missouri and 16 Other States as Amici Curiae in Support of Plaintiff's Motion for Leave to File Bill of Complaint, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (Dec. 11, 2020) (No. 22O155), 2020 WL 7315111 (arguing that the amici States have a strong interest in the Court's giving effect to the Electors Clause, which ensures that the votes of their own citizens are not diluted by unconstitutional election administration in other States).

These briefs recognize that "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983).

Further, "[w]hile typically used at the appellate level, amicus briefs are sometimes filed at the trial court level. States have also come together to file multi-state amicus briefs on civil rights issues with national implications." Emily

Myers, *State Attorneys General Powers and Responsibilities* 411 (4th ed. 2018). Accordingly, the remaining two briefs were filed in support of the National Rifle Association's civil-rights claims and efforts to preserve those rights against the actions of New York Attorney General Letitia James, who carried out campaign promises to target the organization because she disagreed with its political speech and Second Amendment advocacy. They are:

- Brief of the States of Arkansas, Alaska, Georgia, Idaho, Mississippi, Oklahoma, Kansas, Kentucky, Louisiana, Missouri, Ohio, South Carolina, South Dakota, Texas, Utah, and West Virginia as Amici Curiae in Support of Plaintiff and in Opposition to Dismissal, *Nat'l Rifle Assoc. of Am. v. James,* ECF 25 (N.D.N.Y. Dec. 21, 2020) (No. 1:20CV00889) (arguing that the First Amendment and Equal Protection Clause protect the Second Amendment advocacy of the National Rifle Association and that it should be permitted to pursue its claims against the New York Attorney General); and
- Brief of the States of Arkansas, Alabama, Alaska, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia as Amici Curiae in Support of Debtors, *In re Nat'l Rifle Assoc. of Am. and Sea Girt, LLC*, ECF 445 (Bankr. N.D. Tex. Nov. 11, 2021) (No. 21-30085-HDH11) (same, opposing the New York Attorney General's motion to dismiss the National Rifle Association's efforts to reorganize in Texas).

As these briefs recognize, both the public interest and the national implications of this issue derive from the National Rifle Association's unique role as the country's foremost Second Amendment advocacy organization and the fact that a great many of its five million members reside in the amici States.

C. The Attorney General's Consumer Protection Division and the Consumer Education and Enforcement Account.

In 1991, the General Assembly "created within the Office of the Attorney General a Consumer Protection Division." 1991 Ark. Act 1177, sec. 3, 78th General Assembly, Reg. Sess. (April 10, 1991) (creating Ark. Code Ann. 4-88-105). It generally provided for the funding of the Consumer Protection Division's expenses. *Id.* (creating Ark. Code Ann. 4-88-105(e)). Then, in 2015, the General Assembly amended the law to create a Consumer Education and Enforcement Account to fund various consumer-protection activities from settlements or judgments in favor of the state. 2013 Ark. Act 763, sec. 1, 89th General Assembly, Reg. Sess. (April 4, 2013) (creating Ark. Code Ann. 4-88-105(e)(3)(A)). That legislation specifically provided, "The Consumer Education and Enforcement Account shall not carry a balance greater than one million dollars ($1,000,000), and the funds in the account shall be used in a manner determined by the Office of the Attorney General," for, among other things, "[c]onsumer education." *Id.* (creating Ark. Code Ann. 4-88-105(e)(3)(B)(x)).

ARGUMENT

This is a campaign-season lawsuit brought by political opponents of the Attorney General. It challenges the Attorney General's practices—such as joining amicus briefs in federal court cases—that are unquestionably within the office's broad common-law and statutory authority and which holders of the office from both major political parties have undertaken.

Plaintiffs correctly conceded below that their whole case depends on their claim that the Attorney General has exceeded her authority. (RT133 ("[T]he whole case depends to a great extent on whether she has committed ultra vires acts. If her acts were not ultra vires, I don't know that we would have any basis for claiming that she . . . has spent the money that we're claiming that she spent . . . in an illegal way.").

De novo review is the proper standard in this appeal. Whether a claim is a non-justiciable political question is a question of law that is reviewed de novo. *Starr v. Governor*, 910 A.2d 1247, 1249 (N.H. 2006). Further, "[t]he determination of whether an official is entitled to claim immunity from suit is purely a question of law." *Smith v. Brt*, 363 Ark. 126, 130, 211 S.W.3d 485, 489 (2005), and "[a] question of law is reviewed on appeal using a *de novo* standard." *Helena-W. Helena Sch. Dist. v. Monday*, 361 Ark. 82, 85, 204 S.W.3d 514, 516 (2005). Further, although it has been said that the denial of a motion to dismiss on immunity

grounds is reviewed for an abuse of discretion, *Hutchinson v. McArty*, 2020 Ark. 190, at 3, 600 S.W.3d 549, 552, "an abuse of discretion is established when the circuit court erroneously interprets or incorrectly applies the law." *Lowery v. State*, 2019 Ark. 332, at 7, 586 S.W.3d 644, 649.

Because the challenged acts are firmly committed to the Attorney General's discretion by the common law, the Arkansas Constitution, laws enacted by the General Assembly and signed by the Governor, and this Court's own precedents, the circuit court incorrectly applied the law, and this Court should reverse its decision with instructions to dismiss the amended complaint with prejudice. *See, e.g.*, Ark. Const. art. 6, sec. 22; Ark. Code Ann. 25-16-703; *State ex rel. Williams v. Karston*, 208 Ark. 703, 707-09, 187 S.W.2d 327, 328-30 (1945).

I. The Attorney General has broad discretion to determine the public interest both under the common law and by statute.

A. The Attorney General has broad common law authority.

The Attorney General is an office established by the Arkansas Constitution. Ark. Const. art. 6, sec. 1. The holder of this constitutional office is an executive officer "elected by the qualified electors of the State at large," *id.*, sec. 3, and charged with "perform[ing] such duties as may be prescribed by law." *id.*, sec. 22. "In most states where the constitution says that the attorney general's duty shall be 'as prescribed by law,' this is taken to mean that he has such common law powers

as have not been specifically repealed by statute—a conclusion sometimes bolstered by reference to early statutory adoption of the common law." 2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 665-66 (1974); *see* Pope's Digest, sec. 1679 (predecessor to Ark. Code Ann. 1-2-119) (adopting the "common law of England."); *see also State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 136 (Mo. 2000) (adopting the common law without enumerating the attorney general's powers vests that office "with all the powers of the attorney general at common law").

In addition to the Arkansas Constitution's grant of common-law authority, the General Assembly has *also* "placed on the Attorney General . . . 'all duties now required of him under the common law." *Karston*, 208 Ark. at 707, 187 S.W.2d at 329 (citing Pope's Digest, sec. 5582 (predecessor to Ark. Code Ann. 25-16-703(b), which provides that "[n]othing in this section shall relieve the Attorney General of discharging any and all duties required of him or her under the common law")).

Thus, under the Arkansas Constitution and by concurrence of the General Assembly, the Attorney General "became possessed of the common law powers of the English Attorney General, except as changed by constitution or statute." Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 Am. J. Legal Hist. 309 (1958). The of-

fice's "duties are so numerous and varied" that the General Assembly has not "attempt[ed] specifically to enumerate them." *Karston*, 208 Ark. at 707, 187 S.W.2d at 329 (citing 7 C.J.S., Attorney General, sec. 5, at 1222). Rather, "the office is clothed, in addition to the duties expressly defined by statute, with all the power pertaining thereto under the common law." *Id.* at 707-08, 187 S.W.2d at 329; *accord id.* at 709, 187 S.W.2d at 330 (the Attorney General has "such authority as was exercised by the Attorney General at common law" (quotation and citation omitted)).

Consequently, the Attorney General "enjoy[s] a significant degree of autonomy" and has "wide discretion in making the determination as to the public interest." *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-69 (5th Cir. 1976). The "power to institute litigation on his own initiative" is "as broad as" the "public interest requires." *Id.* at 271. This includes, for example, the filing of amicus briefs, which "has been known in English common law since the middle of the 14th century." *Young Am.'s for Freedom v. Gorton*, 588 P.2d 195, 197 (Wash. 1978) (citing Edmund Ruffin Beckwith and Rudolf Sobernheim, *Amicus Curiae—Minister of Justice*, 17 Fordham L. Rev. 38, 40 n.9 (1948)); *accord Taylor v. Roberts*, 475 So. 2d 150, 151 (Miss. 1985) (recounting history).

Further, "[i]n the exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state, but he may

also intervene in all suits or proceedings which are of concern to the general public." *Karston*, 208 Ark. at 708, 187 S.W.2d at 329. That is because "under the democratic form of government now prevailing the people are the king, so the Attorney General's duties are to that sovereign rather than to the machinery of government." *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 363 (Ky. 2016) (quoting *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974)).

Indeed, "the Attorney General's primary obligation" is to "the body politic, rather than to its officers, departments, commissions, or agencies." *Bevin*, 498 S.W.3d at 363 (quoting *Paxton*, 516 S.W.2d at 868)). Accordingly, "[u]nder the common law, the attorney general has the power to bring any action *which he or she thinks necessary* to protect the public interest." *Commonwealth. ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2009) (emphasis added) (quoting 7 Am. Jur. 2d Attorney General, sec. 6 (2009)); *accord Botelho v. Griffin*, 25 P.3d 689, 692 (Alaska 2001). "A broad discretion is vested in [the Attorney General] in determining what matters may, or may not, be of interest to the people generally." *Mundy v. McDonald*, 185 N.W. 877, 880 (1921).

It "is particularly true" that the "the attorney general has wide discretion" where, as here, "the attorney general is an official independently elected by the people." *Shevin*, 526 F.2d at 269 n.6. In that case, "the people have the continuing

satisfaction of knowing that their elected Attorney General has the right to exercise his conscientious official discretion to enter into those legal matters deemed by him to involve the public interest, even though not expressly authorized by statute." *Id.*

B. The Attorney General has broad constitutional and statutory authority.

In 1911, the General Assembly enacted a law "to Prescribe Certain Duties of the Attorney General." 1911 Ark. Act 131, secs. 2, 6, 38th General Assembly, Reg. Sess. (Mar. 24, 1911) (codified at Ark. Code Ann. 25-16-703). Accordingly, "[t]he Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved." Ark. Code Ann. 25-16-703(a).

1. Plaintiffs misread section 25-16-703.

Plaintiffs allege that these statutory mandates are instead *limitations* on the Attorney General's powers. They claim, first, that the Attorney General acts ultra vires any time she participates in litigation on the State's behalf unless she is representing "a state officer, board or commission." (RP71); (RT141); *see* (RP175-179). But it is apparent from both the common law (which Plaintiffs largely ignore) and section 25-16-703(a) that this allegation fails as a matter of law. Plaintiffs distort this provision by conflating its mandates that the Attorney General

"*shall* maintain and defend the interests of the State" and that she "*shall* be the legal representative of all state officers, board, and commissions" (emphases added). These mandates are independent.

Further, any limitation on the Attorney General's common-law powers must be express. *State v. Finch*, 280 P. 910, 913 (Kan. 1929); *State v. Young*, 170 P. 947, 948 (Mont. 1918); *see State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813, 818 (Okla. 1973). This is in keeping with the commonplace observation that "any statute in derogation of the common law will be strictly construed." *Roeder v. United States*, 2014 Ark. 156, 10-11, 432 S.W.3d 627, 634. So far from being an express limitation on the Attorney General's common-law power, section 25-16-703(b) expressly provides that "[n]othing in this section shall relieve the Attorney General of discharging any and all duties required of him or her under the common law." So Plaintiffs' claims fail as a matter of law.

2. Plaintiffs ignore the Arkansas Constitution's text and structure.

Plaintiffs relatedly challenge the "authority of the Attorney General to make decisions relative to what constitutes the 'interests of the State,'" (RP250), alleging that she has not consulted the Governor (RP175-179), whom they contend should determine it (RP79). Plaintiffs thus take issue not only with the common law (discussed above) but also with the Arkansas Constitution.

Unlike the federal government, Arkansas does not have a unitary executive. Arkansas's Constitution creates an executive branch that includes several independent officers who are directly elected by the people. Ark. Const. art. 6, secs. 1, 3. Plaintiffs' complaint that the Governor and the Attorney General could take different positions, (RP81); *see* (RP251), actually states a grievance with the Arkansas Constitution's framers, who created a structure that "weaken[ed] the power of a central chief executive and further[ed] an intrabranch system of checks and balances." William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2451 (2006). In fact, contrary to Plaintiffs' worries, history has shown that "cooperation, rather than conflict, has been the rule," and "debilitating conflict has not materialized." *Id.* at 2454.

Indeed, the Governor has not opposed the Attorney General's actions. But, even so, "the Attorney General's common law authority is so unfettered that it may allow her to bring suits in the public interest even when other executive officers or agencies oppose such actions." *Id.* at 2461*; see id.* at 2450 (describing this authority's common-law development). The Attorney General "is not required to obtain the permission of the Governor or any other executive or administrative officer or board." *State v. Texas Co.*, 7 So. 2d 161, 162 (La. 1942); *Shevin*, 526 F.2d at 272; *see State v. Fremont, E. & M. V.R. Co.*, 35 N.W. 118, 120 (Neb. 1887) (Attorney

General may proceed even over the objection of the executive agency involved in the suit).

C. Recognizing the Attorney General's authority is sufficient to dispense with Plaintiffs' claim.

Late in the proceedings below, Plaintiffs appear to have abandoned their challenge to "the substantive decisions that [the Attorney General] makes within the scope of her authority," stating that they are only "challenging the Constitutional and statutory authority of the Attorney General to make decisions relative to what constitutes the 'interests of the State.'" (RP250). If Plaintiffs have indeed abandoned their request that the courts sit in judgment of the Attorney General's substantive determinations concerning the interests of the State, then the authorities set forth in this first section are sufficient to dispense with their claim.

Alternatively, the principles set forth in this section inform the various doctrines discussed below. In any event, the Court should reverse the circuit court's decision with instructions to dismiss the amended complaint with prejudice.

II. Plaintiffs' lawsuit presents a non-justiciable political question, or at least must be rejected on separation-of-powers grounds.

Plaintiffs claim that the activities they challenge are ultra vires and constitute illegal exactions because (they allege) the Attorney General's actions "were not in the interest of the State of Arkansas, but in her own political and economic inter-

est." (RP177). Given the principles stated above, the question Plaintiffs' suit presents—What are the interests of the State?—is not a "justiciable matter" but a political question this Court should decline to entertain. Ark. Const. amend. 80, sec. 6(A). Although the nature of this suit as a political question was raised and argued below, *see, e.g.*, (RP199-202), the doctrine is a jurisdictional one that may be raised at any time. *Catlett v. Republican Party of Arkansas*, 242 Ark. 283, 285-86, 413 S.W.2d 651, 653 (1967); *Ark. Dep't of Fin. & Admin. v. Naturalis Health, LLC*, 2018 Ark. 224, at 6, 549 S.W.3d 901, 906.

Present here are several features that characterize cases the U.S. Supreme Court has described as posing non-justiciable political questions. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). First and second, such cases implicate both a "textually demonstrable" commitment "to a coordinate political department," and "the impossibility of [the] court's undertaking independent resolution without expressing lack of the respect due coordinate branches." *Id.* Here, the question of what constitutes the interests of the State is unequivocally committed to the Attorney General, who, as the State's "chief law officer," *State ex rel. Smith v. Leonard*, 192 Ark. 834, 95 S.W.2d 86, 88 (1936), occupies "a separate constitutional office, not merely an arm of the executive branch." *Zanone Properties*, 342 Ark. at 474, 30 S.W.3d at 79 (citing Ark. Const. art. 6, sec. 1). The Attorney General is elected

directly by the people and vested with broad common-law authority by the Arkansas Constitution and with the concurrence of the General Assembly. *See* Ark. Const. art. 6, sec. 22; Ark. Code Ann. 25-16-703.

Further, because the political-question doctrine "is primarily a function of the doctrine of separation of powers," 16 C.J.S. Constitutional Law, sec. 392, Justice Jackson's influential framework applies here: Because in determining the interests of the State the Attorney General "acts pursuant to an express or implied authorization of [the General Assembly], his authority is at its maximum, for it includes all that he possesses in his own right plus all that [the General Assembly] can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

If the courts were to take up the Plaintiffs' claims, therefore, it would necessarily "express[] lack of the respect due" not only to the Attorney General but also to the General Assembly—in whose hands the Arkansas Constitution has placed power to "prescribe[] by law" the Attorney General's duties. Ark. Const. art. 6, sec. 22. Indeed, this Court has recognized that "our state constitution divides governmental powers among three distinct departments: legislative, executive and judicial; each of which is prohibited from exercising powers properly belonging to either of the other two." *Goodall v. Williams*, 271 Ark. 354, 354-56, 609 S.W.2d 25, 27 (1980). So Plaintiffs' suit necessarily involves a political question.

Still more features demonstrate the non-justiciable character of this dispute. It involves "a lack of judicially discoverable and manageable standards for resolving" Plaintiffs' claims as well as "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Indeed, Plaintiffs have conceded that "[t]he interests of the State are not defined in the Constitution or in the statutes," recognizing that there is "not much guidance for us in this particular case." (RT32).

Further, "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government." *N.Y. State Inspection Emps. v. Cuomo*, 475 N.E.2d 90, 93 (1984). That's why "the right of executive discretion is constitutionally preserved" to the executive branch, and "the enforcement of [this constitutional commitment] is essential to preserve the orderly processes of government and its basic integrity." *Goodall*, 271 Ark. at 356, 609 S.W.2d at 27.

As this Court has held, even the grant of a liquor license "hinges on executive discretion." *Id.*, 609 S.W.2d at 27. Just as judicial review of such decisions "constitutes an unconstitutional exercise of executive powers by the judiciary," *id.* at 355, 609 S.W.2d at 26, so judicial review of the Attorney General's determinations concerning the interests of the State would violate the constitutional separation of powers. *See Yes on Prop 200 v. Napolitano*, 160 P.3d 1216, 1223 (Ariz. Ct.

App. 2007) (judicial review of matters committed to Attorney General's discretion violates separation of powers).

As the Attorney General's political opponents, Plaintiffs impugn her motives, alleging that her campaign for office accounts for her decisions to participate in multistate briefs and other activities. Content with mere insinuations, Plaintiffs never consider, for example, the challenged amicus briefs' own articulation of the State's interests. It does not seem to have occurred to Plaintiffs that ensuring that the votes of Arkansans are not diluted by unconstitutional election administration in other States—or that the vindication of the First and Fourteenth Amendment rights of a civil-rights advocacy organization with five million members (including countless Arkansans)—has national implications and serves the public interest.

In any event, what Florida Supreme Court Justice Westcott eloquently said in another context of an attempt to *remove* a cause from judicial scrutiny applies just as well to Plaintiffs' efforts to *subject* the Attorney General to it:

> Is it to be said that it is a function appropriate to a court to weigh the motives of contending political factions, examine into their various political theories, attempt to enter into their breasts, and determine motives? Are they to measure with microscopic analysis and ascertain whether there is passion and prejudice, and, after ascertaining that there is, to fix by judicial determination just how much of each, or either, or both, is necessary to [subject] a case [to] judicial scrutiny? The court cannot criticise the motives of a party acting as an officer.

See State v. Gleason, 12 Fla. 190, 226 (Fla. 1868) (quotation modified). Justice Westcott cogently added that "discretion is vested in the Attorney-General; if he

exercises it improperly, there is another tribunal, the people, or their grand inquest, the Assembly, to punish him." *Id.*; *see* Ark. Const. art. 15, sec. 1 (impeachment). The Attorney General has not acted improperly, but in any event, the courts are not the proper organ of government to police her determinations of the public interest.

Plaintiffs fail to invoke the subject-matter jurisdiction of the courts because their suit presents a political question unfit for judicial review. Or, at least, the Court must reject Plaintiffs' suit on separation-of-powers grounds. In either case, this Court should decline Plaintiffs' invitation to sit in judgment of the Attorney General's discretionary judgments, and it should reverse the circuit court with instructions to dismiss the amended complaint with prejudice.

III. The Attorney General is entitled to absolute immunity for actions taken pursuant to her discretionary authority.

Public officers who are "granted discretionary authority to exercise their independent judgment" are entitled to absolute immunity for "acts within the scope of their authority." *Martin v. Smith*, 2019 Ark. 232, at 5, 576 S.W.3d 32, 35; *see, e.g.*, *Hall v. Jones*, 2015 Ark. 2, at 4, 453 S.W.3d 674, 676-77 (judicial and prosecutorial immunity); *Buckley v. Ray*, 848 F.3d 855, 865 (8th Cir. 2017) (according absolute immunity to Arkansas Attorney General for allegedly defamatory testimony before the General Assembly). As in other states, here the Attorney General "has been endowed with a large discretion" in "matters of public concern. The ex-

ercise of such discretion is in its nature a judicial act, from which there is no appeal, and over which the courts have no control." *Shevin*, 526 F.2d at 270; *accord Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir. 1983). Therefore, the Attorney General is entitled to absolute immunity from suit concerning the challenged actions.

"[A]s the Supreme Court did in [*Butz v. Economou*, 438 U.S. 478, 512-17 (1978)], this Court may look by analogy to the historic or common law immunity granted to other figures within the judicial process—such as judges or criminal prosecutors." *Mangiafico v. Blumenthal*, 358 F. Supp. 2d 6, 21 (D. Conn. 2005). This "historical and common law immunity" is based on the "concern that harassment by unfounded litigation would cause a deflection of the [officer's] energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 21-22. Further, the Attorney General is "still subject to other checks whereby an abuse of authority might be redressed, such as sanctions in the underlying case, contempt, or bar disciplinary proceedings," *Dinsdale v. Commonwealth*, 675 N.E.2d 374, 378 (Mass. 1997)—or, as previously set forth, the prospect of legislative modification of her duties or even impeachment.

Absolute immunity shields the Attorney General's actions, especially those she has taken in her "traditional role as the State's advocate" concerning the interests of the State, because she "was required by statute to determine whether the State's resources and prestige would be deployed in a pending judicial action." *Mangiafico*, 358 F. Supp. 2d at 22. Indeed, "courts have consistently afforded absolute immunity to a government attorney's decision" concerning "whether the state's considerable resources and energy will be directed towards the prosecution of a particular case or controversy." *Id.* (emphasis omitted).

As a public officer, the Attorney General is granted discretionary authority to exercise her independent judgment, and she is, therefore, entitled to absolute immunity from suit for actions within the scope of her authority. Therefore, the Court should reverse the circuit court's denial of absolute immunity with instructions to dismiss the amended complaint with prejudice.

IV. The Attorney General is entitled to qualified immunity.

State officials are entitled to statutory immunity from suit for non-malicious acts made within the course and scope of their employment. *Banks v. Jones*, 2019 Ark. 204, at 5, 575 S.W.3d 111, 115 (citing Ark Code. Ann. 19-10-305(a)). Illegal-exaction claims are subject to this immunity defense. *Dockery v. Morgan*, 2011 Ark. 94, 19-20, 380 S.W.3d 377, 389. The analysis is "guided by the standard used for qualified immunity claims in federal civil rights actions." *Banks*, 2019

Ark. at 5, 575 S.W.3d. at 116. Accordingly, "[t]o overcome the defense of qualified immunity, a plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff,[1] demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." *Howard v. Kansas City Police Dep't*, 570 F.3d 984, 988 (8th Cir. 2009); *accord Early v. Crockett*, 2019 Ark. 274, at 6, 584 S.W.3d 247, 251 (the plaintiff "must demonstrate" a violation). Plaintiffs cannot carry this heavy burden.

First, Plaintiffs cannot demonstrate the deprivation of a right by making the required "showing that monies generated from tax dollars or arising from taxation are at stake."[2] *Brewer v. Carter*, 365 Ark. 531, 535, 231 S.W.3d 707, 710 (2006). Plaintiffs allege that the Attorney General has committed ultra vires acts and illegal exactions by using monies from the Consumer Education and Enforcement Account to fund consumer-education commercials. (RP180-181). But this claim fails

[1] Arkansas law materially differs from federal law in that "our rules require fact pleading," a more demanding obligation to set forth "facts showing" that "the pleader is entitled to relief." *Dockery*, 2011 Ark. 94, at 6, 380 S.W.3d. at 382 (citing Ark. R. Civ. P. 8(a)(1)).

[2] Plaintiffs lack standing for the same reasons. *See Brewer*, 365 Ark. at 534-36, 231 S.W.3d at 710-11.

as a matter of law for multiple reasons: First, the funds in that account are not derived from taxation but from settlements or judgments in favor of the State. Ark. Code Ann. 4-88-105(e)(3)(A). Second, those funds are specifically designated for, among other things, "[c]onsumer education." *Id.* 4-88-105(e)(3)(B)(*x*). Third, those funds must be used because, by statute, the account "shall not carry a balance greater than one million dollars." *Id.* 4-88-105(e)(3)(B). And fourth, by statute, "the funds in the account *shall be used in a manner determined by the office of the Attorney General*." *Id.* (emphasis added). Therefore, Plaintiffs have not been deprived of any right.

Plaintiffs lean on *Green v. Jones*, 164 Ark. 118, 261 S.W. 43, 44 (1924), to try to allege the use of tax monies by claiming that the challenged actions "required the services of Attorney General Rutledge and personnel in that Office who are paid from tax funds," and "the use of materials and equipment . . . that are provided and available from tax funds." (RP176). But this claim fails for two reasons. First, this Court's "case law has consistently required that the funds at issue in an illegal-exaction lawsuit implicate the state or local treasury and not merely be traceable to the general treasury through a 'but-for' analysis." *McCafferty v. Oxford Am. Literary Project, Inc.*, 2016 Ark. 75, at 6, 484 S.W.3d 662, 666.

Second, in *Green* an illegal-exaction claim was adequately alleged only because an explicit statute had been violated. 164 Ark. at 118, 261 S.W. at 44. Here,

on the other hand, Plaintiffs have not alleged that *any* applicable law has been violated. "It is axiomatic that . . . there must be *facts* showing that moneys . . . *are being misapplied or illegally spent*." *Dockery*, 2011 Ark. 94, at 15, 380 S.W.3d 377 at 387 (emphases added). Indeed, Plaintiffs must allege genuine *facts*—not mere speculations, suspicions, or insinuations—demonstrating that the Attorney General has violated some law, and they cannot plead conclusions in hopes of obtaining discovery later to support their claims. *Treat v. Kreutzer*, 290 Ark. 532, 534, 720 S.W.2d 716, 717 (1986). Plaintiffs cannot allege the deprivation of a right as a matter of law, and the Attorney General is entitled to qualified immunity.

The impossibility of overcoming the Attorney General's immunity is even more manifest at the "clearly established" step of the analysis, where Plaintiffs must "identify a case where an officer acting under similar circumstances . . . was held to have violated the [law]." *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *see District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (any unlawfulness must be "beyond debate"). Again, Plaintiffs have conceded that "[t]he interests of the State are not defined in the Constitution or in the statutes," recognizing that there is "not much guidance for us in this particular case." (RT32). Nothing about the Attorney General's amicus briefs, consumer-protection commercials, campaign for

office, or membership and participation in various political groups[3] even approaches the violation of "clearly established" law.

The Attorney General has not violated the statutory or constitutional right of any person, and in any case, no such right was clearly established at the time of the challenged conduct. Therefore, the Court should reverse the circuit court's denial of qualified immunity with instructions to dismiss the amended complaint with prejudice.

V. The Attorney General is entitled to sovereign immunity to any extent that Plaintiffs' claims implicate her official capacity.

A. Plaintiffs have not alleged official-capacity claims.

Despite taking the opportunity to amend their complaint below, Plaintiffs never alleged that they are suing the Attorney General in her "official" capacity. *See* (RP173). Instead, Plaintiffs alleged that they sought to sue her in a "representative" capacity (*id.*), which is simply not a recognized capacity in which a public official may be subject to suit.

Where a complaint does not specify that it is an official-capacity suit, but does allege that the defendant acted under color of state law and not in accordance

[3] The Attorney General's rights to assembly and speech are protected under both the First Amendment to the federal Constitution and Article 2, sections 4 and 6, of the Arkansas Constitution.

with any official governmental policy, the claim is properly construed as against the defendant in an individual capacity. *Carlson ex rel. Stuczynski v. Bremen High Sch. Dist. 228*, 423 F. Supp. 2d 823, 827 n.3 (N.D. Ill. 2006) (citing *Miller v. Smith*, 220 F.3d 491, 494 (7th Cir. 2000)).

Therefore, the Court should hold that Plaintiffs have failed to allege any official-capacity claim and reverse the circuit court's decision.

B. Plaintiffs have failed to "successfully plead" the violation of any applicable law.

To any extent that Plaintiffs' suit implicates the Attorney General in her official capacity, the Attorney General is entitled to sovereign immunity as to both Plaintiffs' ultra vires and illegal-exaction claims. True, this Court has found that sovereign immunity is not a defense to a "successfully pled" illegal-exaction claim. *McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 373, 201 S.W.3d 375, 380 (2005). But because Plaintiffs fail to allege that the Attorney General has violated *any* applicable law, they have not successfully pled an ultra vires claim or an illegal-exaction claim, and Article 5, section 20 of the Arkansas Constitution bars their suit. Therefore, the Court should hold that the Attorney General is entitled to sovereign immunity and reverse the circuit court's decision with instructions to dismiss the amended complaint.

C. Plaintiffs do not come within the Arkansas Constitution's illegal-exaction clause.

It is true, as far as it goes, that "the illegal-exaction clause, as the more specific provision," controls the more general [sovereign immunity provision] in art. 5 § 20, and grants taxpayers the right to sue." *McGhee*, 360 Ark. at 372-73, 201 S.W.3d at 380. But Plaintiffs' claim must *come within* that clause to avoid Article 5, section 20's sovereign-immunity bar. "Only [the general provision's] application to cases covered by the specific provision is suspended; it continues to govern all other cases." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 184 (2012).

As set forth in the qualified-immunity analysis above, Plaintiffs cannot allege an illegal-exaction claim based on the Attorney General's use of personnel, materials, and equipment paid for by tax funds. Such a claim is also foreclosed as a matter of law by the illegal-exaction clause itself, which provides that a citizen may bring suit to protect only "against *the enforcement* of any illegal exactions whatever." Ark Const. art. 16, sec. 13 (emphasis added).

This is no idle observation: "[T]he enforcement of" cannot be dismissed as surplusage. This Court construes a "statute so that no word is left void, superfluous, or insignificant" and "give[s] meaning and effect to every word" if possible. *Outdoor Cap Co. v. Benton Cty. Treasurer*, 2014 Ark. 536, at 3, 453 S.W.3d 135,

138; *see Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656, 661 (1912) (rules of construction "apply with equal force to Constitutions."). On no reasonable description has anyone attempted to "enforce[]" an illegal exaction with respect to the Attorney General's challenged actions. *Id.*

Indeed, the Court's comment—first stated in *Ghegan & Ghegan, Inc. v. Weiss*, 338 Ark. 9, 15, 991 S.W.2d 536, 539 (1999)—that "public funds" illegal-exaction claims lie "where the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent" is too broad. Such claims are more accurately characterized (as in the case from which the "public funds" moniker itself apparently derives) as involving "the *prevention* of a misapplication of public funds." *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 128, 823 S.W.2d 852, 855 (1992) (emphasis added). The cases also recognize "the recovery of funds *wrongly paid* to a public official," *id.* (emphasis added), but such cases obviously do not include the recovery of funds *properly* paid to an official who is merely alleged to have committed ultra vires acts.

For these reasons, Plaintiffs' allegations do not bring them within the illegal-exaction clause. Therefore, the illegal-exaction clause does not control, and the Attorney General is entitled to sovereign immunity under the generally applicable Article 5, section 20. Plaintiffs' claims are barred, and the Court should reverse

the circuit court's decision with instructions to dismiss the amended complaint with prejudice.

REQUEST FOR RELIEF

For all of the reasons set forth above, the Court should reverse the circuit court's denial of the motion to dismiss with instructions to dismiss the amended complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Administrative Order No. 19 in that all "confidential information" has been excluded from the "case record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

This brief complies with Administrative Order No. 21, sec. 9 in that it does not contain hyperlinks to external papers or websites.

Further, this brief conforms to the word-count limitations identified in Rule 4-2(d). The jurisdictional statement, statement of the case and the facts, argument, and request for relief together contain 7556 words.

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

/s/ Michael A. Cantrell
Michael A. Cantrell

CERTIFICATE OF SERVICE

I certify that on December 16, 2021, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will send notification of the filing to any participants.

/s/ Michael A. Cantrell
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