Case 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

Appeal from the Circuit Court of Pulaski County, Sixteenth Division,
Docket No. 60CV-21-341
Honorable Morgan E. Welch, Circuit Judge

PLAINTIFFS'/APPELLEES' BRIEF

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JURISDICTIONAL STATEMENT

Jurisdiction of this Court in this particular case is under Rule 2(a)(10) of the Arkansas Rules of Procedure – Civil, which reads in relevant part as follows:

> (a) An appeal may be taken from a circuit court to the Arkansas Supreme Court from:
> …
> (10) An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official.

Rule 1-2(a) of the Rules of the Arkansas Supreme Court and Court of Appeals provides:

> (a) All cases appealed shall be filed in the Court of Appeals except that the following cases shall be filed in the Supreme Court:
>
> 1. All appeals involving the interpretation or construction of the Constitution of Arkansas;
> …
> 3. Petitions for quo warranto, prohibition, injunction, or mandamus directed to the state, county, or municipal officials or to circuit courts;

Nothing in Rule 1-2 of the Rules of the Supreme Court and Court of Appeals relates to *interlocutory* appeals, while Rule 2(a)(10) of the Rules of Appellate Procedure – Civil *specifically* relates to appeal of an order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official. This is such a case.

Circuit Judge Welch denied the Attorney General's Motion to Dismiss by an Amended and Substituted Order dated and filed September 28, 2021. (RP 276).

Defendant Rutledge filed a Notice of Interlocutory Appeal from that Order on September 28, 2021 (RP 283). Her Brief was timely filed.

STATEMENT OF THE CASE AND FACTS

This is an unusual case, but the issue here is simply whether the Circuit Court erred in finding that Plaintiffs have stated a claim against Rutledge upon which relief can be granted.

Plaintiffs filed suit in the Circuit Court of Pulaski County against the Defendant Attorney General Rutledge ("Rutledge") on January 15, 2021 (RP 4), within weeks after Rutledge engaged in some of the acts complained of. Rutledge filed a Motion to Dismiss (RP 21), which the Circuit Court (Judge Alice Gray) denied in part and granted in part, with leave for Plaintiffs to amend those parts that were dismissed (RP 164). Plaintiffs then filed a First Amended Complaint (RP 171), asserting the following claims:

1. Rutledge has engaged in activities that are in excess of her statutory duty as Attorney General (*i.e.*, "ultra vires"). Those activities included:
   (a) On November 9, 2020, filing an *amicus curiae* brief on behalf of the State of Arkansas in a lawsuit then pending in the United States Supreme Court entitled *Republican Party of Pennsylvania v. Boockvar*, Nos. 20-524 and 20-574, urging the Supreme Court to reverse a decision of the Pennsylvania Supreme Court regarding a Pennsylvania election procedure allowing mail-in ballots to be received up to three days after Election Day.

(b) On December 9, 2020, filing a Bill of Complaint in Intervention with the Supreme Court of the United States in the case of *Texas v. Pennsylvania et al*., No. 22O155 (Original) arguing that that Court should delay the December 14, 2020 Electoral College vote and block the States of Georgia, Michigan, Pennsylvania and Wisconsin from casting their votes in the Electoral College for the Democratic candidate, Joe Biden, in an effort to overturn President-Elect Biden's national election victory in the November 5, 2020 general election.

(c) Filing on December 21, 2020, an *amicus curiae* brief in the name of the State of Arkansas in a lawsuit in the United States District Court for the Northern District of New York (Case No. 1:20-cv-00889-MAD-TWD) by the State of New York against the National Rifle Association (NRA) for revocation of the NRA's non-profit corporate status as a result of alleged wide-spread embezzlement and corruption within the management of that organization. Rutledge supported the position of the NRA, claiming that she was protecting the right of Arkansans to bear arms.

(d) On March 31, 2021, filing an *amicus curiae* brief in the name of the State of Arkansas in a bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Texas (*In re: National*

Rifle Association of America; and Sea Girt, LLC, Debtors, Case No. 21-30085-HDH-11) in which the National Rifle Association was seeking protection against the State of New York's claims (see preceding paragraph). Rutledge again supported the position of the NRA.

2. Such activities were not authorized or requested by the Governor, any agency head, or the General Assembly of Arkansas, and were undertaken solely at the whim of the Attorney General.
3. In engaging in the above-described actions, Rutledge used personnel, equipment and funds of the State of Arkansas. The *ultra vires* nature of her actions makes the expenditure of such funds an illegal exaction under Article Sixteen, Section 13 of the Constitution of the State of Arkansas.
4. Rutledge, as Attorney General, has used millions of dollars of public funds to sponsor numerous television advertisements purportedly promoting the services of her Office but which, in reality, were an effort to promote her candidacy for political office, and were in excess of and an abuse of the authority of her office.
5. In engaging in such *ultra vires* activities, Rutledge used and expended funds, personnel, equipment and other resources of the State, which

rendered such expenditures to be illegal exactions under Article 16, Section 13 of the Constitution of Arkansas.

6. Plaintiffs requested that the Circuit Court issue an injunction to Rutledge to prohibit her from continuing to act in actions that were *ultra vires*, in excess of, and in abuse of her authority, and order her to reimburse the State for the monies illegally expended.

In her Motion to Dismiss the First Amended Complaint, the Defendant, Attorney General Leslie Rutledge, raised the following issues:

1. The Plaintiffs have sued the Attorney General in her individual capacity only;
2. The Attorney General has legal authority to conduct the acts complained of;
3. The Plaintiffs have failed to allege facts showing the illegal expenditure of monies generated from tax dollars; and
4. The Attorney General is immune from suit.

Before a hearing could be held on the Motion, Judge Gray recused from further proceedings, and the case was reassigned to Circuit Judge Morgan E. Welch. Judge Welch denied all of the Attorney General's objections in a lengthy and well-reasoned Amended and Substituted Order dated and filed September 28, 2021. (RP 276).

Defendant Rutledge filed a Notice of Interlocutory Appeal on September 28, 2021 (RP 283), that designated all of the issues covered by the Motion to Dismiss as issues on appeal, and filed her principal Brief in this Court on December 16, 2021, in which she argued all issues discussed in the hearing on the Motion to Dismiss. Plaintiffs filed herein on December 27, 2021, a Motion to Strike all of those issues from this appeal except that of Rutledge's claim of immunity, citing Arkansas Supreme Court precedent providing that, on an interlocutory appeal on the denial of a public official's claim of immunity (such as this appeal), the only issue that this Court will consider is the denial of immunity.

In view of the pendency of the Motion to Strike and the precedents cited therein, this Brief will respond only to Rutledge's claim of immunity. However, Plaintiffs do not thereby intend to waive any claims or issues argued by them in the Circuit Court, and respectfully request that, if this Court overrules their Motion to Strike, Plaintiffs be granted leave to amend or supplement this Brief within fourteen (14) days from the date of such order to respond to other issues raised by Rutledge.

ARGUMENT

A. Standard of Review of this Appeal

This Court reviews the Circuit Court's decision on a *de novo* standard. *Williams v. McCoy*, 2018 Ark. 17 at 2-3; 535 S.W.3d. 266, 268; *City of Malvern v. Jenkins*, 2013 Ark. 24 at p. 7, 425 S.W.3d 711, 715; *City of Fayetteville v. Romine*, 373 Ark. 318, 284 S.W.3d 10 (2008). On review of the denial of a motion to dismiss on immunity grounds, the appellate court treats the facts alleged in the complaint as true and views them in the light most favorable to the plaintiff. *Arkansas Department of Human Services v. Harris,* 2020 Ark. 30, 592 S.W.3d 670; *Williams v. McCoy, supra*, citing *Johnson v. Butler*, 2016 Ark. 253, 494 S.W.3d 412. The facts that are treated as true are contained in the First Amended Complaint, which supercedes the original. *McMullen v. McHughes Law Firm,* 2015 Ark. 15, at 11, 454 S.W.3d 200, 207; *Farmers Union Mut. Ins. Co. v. Robertson*, 2010 Ark. 241, at 5, 370 S.W.3d 179, 183.

B. Introduction

Attorney General Rutledge clearly views any disagreement with her official actions as politically-motivated attacks on her. She characterizes this case as simply a "campaign-season lawsuit brought by political opponents of the Attorney General." While campaign seasons have become endless, this suit was initially

brought on January 14, 2021 (R 4), immediately following Rutledge's extraordinary actions described in the First Amended Complaint to overturn the results of the 2020 general election on the basis of non-existent voter fraud.

This case is not about Rutledge's political philosophy, although that has served to catapult the issues involved in this case into sharp focus. Instead, this case is about the scope of the acts that an Attorney General – any Attorney General -- may undertake in the name of the State of Arkansas; the source of and limitations on the authority of the Attorney General to undertake litigation on behalf of the State; and the use of funds of the State by the Attorney General to enable him or her to do so. These issues have been a source of controversy for many years, but Rutledge has raised *ultra vires* acts and abuses of the prerogatives of attorneys general to an unprecedented level.

The question in this interlocutory appeal is the threshold issue of whether an Attorney General has immunity for acting outside the scope of authority of her or his office. In her Motion to Dismiss, Rutledge claims several types of immunity, including absolute and limited immunity, but totally ignores a long line of Arkansas appellate decisions that courts will exercise jurisdiction to restrain acts or threatened acts of public officers, boards, or commissions that are *ultra vires*, arbitrary or capricious, in bad faith or abuse of discretion.

In analyzing Rutledge's claims of immunity, it is important to note that Plaintiffs' claims against Rutledge are not based upon deprivation of constitutional or statutory rights under 42 U.S.C. §1983, or for damages for tort, for which public officials and entities are granted immunity under Ark. Code Ann. § 21-9-301. Plaintiffs' claims are based instead on the actions of Attorney General Rutledge that are alleged to be in excess of or abuses of her constitutional, statutory and common law authority as such Attorney General. Plaintiffs are also not seeking damages, but restitution to the State of monies spent by Rutledge in pursuit of her abusive and ultra vires actions, pursuant to Arkansas Constitution Article 16, Section 13 (Illegal Exactions), which are not damages. Plaintiffs claims clearly fall within the scope of the Arkansas Supreme Court cases involving liability of public officials for their *ultra vires* and abusive actions.

Plaintiffs will first respond to Rutledge's claims of absolute or qualified immunity to demonstrate that those claims are not applicable to the allegations contained in the First Amended Complaint. Plaintiffs will then address the line of Arkansas Supreme Court decisions relating to liability of public officials, including the Attorney General, for *ultra vires* acts or those that are an abuse of office. Finally, Plaintiffs will address the other issues raised by Rutledge under the claim that they relate to immunity.

C. Rutledge Has No Defense Of Absolute or Qualified Immunity Against Plaintiffs' Claims

Rutledge attempts to claim an "absolute immunity" that she asserts is available to "public officers who are 'granted discretionary authority to exercise their independent judgment." (Rutledge Brief, p. 33, Sec. III), citing as authority the case of *Martin v. Smith*, 2019 Ark. 232, 576 S.W.3d 32, *Hall v. Jones*, 2015 Ark. 2, 453 S.W.3d 674, and *Buckley v. Ray*, 848 F.3d 855 (8th Cir., 2017). Those types of immunity are not relevant to the facts as alleged in the First Amended Complaint.

In *Martin v. Smith*, a physician who was treating a mentally-ill man on conditional release from confinement was sued by the estate of a man who was killed by the patient during that release. The physician claimed an absolute quasi-judicial immunity that is recognized when physicians and other persons are performing services that are an extension of the judicial process. This Court held that "the linchpin of the analysis [of quasi-judicial immunity] hinges instead on the function performed and its integral relation to the judicial process." 2019 Ark. 232 at p. 6.

That case is inapplicable to the facts alleged in the First Amended Complaint against Rutledge because (i) Rutledge is not a judge, nor (ii) nor were the complaints, interventions and amicus briefs filed by her in the various Federal Court proceedings named in the First Amended Complaint an "extension" of any

judicial process that she had been ordered to perform. To the contrary, her participation in the cases described in the First Amended Complaint was purely elective on her part. The First Amended Complaint alleges that her actions in engaging in the Federal Court proceedings were not authorized or requested by the Governor, the director of any state agency, or by the General Assembly.

The case of *Hall v. Jones*, supra, involved a lawsuit against a *sitting circuit judge* who had ordered the forfeiture of money taken from a defendant in an arrest for violation of drug laws. In that case, this Court confirmed that a judge is entitled to judicial immunity for actions taken *in the execution of his judicial duties*. (2015 Ark. 2 at p. 3)

The Court in *Hall v. Jones* also stated that the prosecuting attorney in the case had absolute immunity from suit for acts committed *in the performance of the duties of his office.* (2015 Ark. 2 at p. 4). However, that that does not help Rutledge. The immunity only applies to acts performed *within the scope* of those duties. The implication of the emphasized qualifying language is that, if the judge or the prosecuting attorney committed acts that were <u>not</u> within the scope of their duties, they could be liable for those acts. This requires that the Court in each case review the statutes by which a prosecutor's duties are assigned, the specific acts that the prosecutor performed in the case, and whether they were within the scope of the statutory duties. That is precisely what this Court did in *Hall v. Jones*.

In this case, Plaintiffs are alleging that Rutledge acted *outside or beyond* the scope of her authority and duties, which is the basis for liability of a public official under the *ultra vires* theory. Facts are specifically alleged in the First Amended Complaint to that effect, and the Circuit Court should be allowed to delve into those facts on remand of this case.

The case of *Buckley v. Ray, supra,* was a lawsuit brought against former Attorney General Dustin McDaniel and members of his staff regarding the alleged violation of the Fourteenth Amendment due process rights of a former inmate in the Arkansas penal system by disclosing to a legislative committee a criminal conviction of the plaintiff that had been earlier vacated or expunged. This case is not applicable to Rutledge's claim of immunity because it involves immunity to a claim based on 42 U.S.C. §1983, which is totally different from a claim based on an official's *ultra vires* act, and to which a different standard is applied to determine immunity.

In *Buckley v. Ray,* the Eighth Circuit explained the nature of claims against public officials based on alleged violation of constitutional rights under 42 U.S.C. §1983, and the defense of qualified immunity to those claims thusly:

> Qualified immunity shields officers from liability "unless [their] conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known." (848 F. 3d at 862)
> …
> Courts conduct a two-part inquiry to determine whether qualified immunity protects a government official from liability: (1) whether

> the facts taken in a light most favorable to [the plaintiff] Buckley make out a violation of a constitutional or statutory right; and (2) whether that right was clearly established at the time of the alleged violation. Truong v. Hassan, 829 F.3d 627, 630 (8th Cir. 2016). (848 F. 3d at 863)

It is obvious that this defense of qualified immunity applies to alleged violations by the public official *of the constitutional and statutory rights of the plaintiff* in the case. This was confirmed in the Arkansas Supreme Court decision in *Smith v. Brt*, 363 Ark. 126, 211 S.W.3d 485 (2005), involving immunity to claims of violation of state civil rights laws, in which this Court stated:

> Our interpretation of section 21–9–301 must begin with the analysis this court has used in interpreting the counterpart qualified-immunity statute that applies to state employees, codified at Ark.Code Ann. § 19–10–305. Section 19–10–305 provides state employees with qualified-immunity from civil liability for non-malicious acts occurring *within the course of their employment*. *See Beaulieu v. Gray*, 288 Ark. 395, 705 S.W.2d 880 (1986).
> 363 Ark. at 130 (emphasis added)

> In interpreting section 19–10–305, we have traditionally been guided by the analysis adopted by the [U.S.] Supreme Court for qualfied-immunity claims in federal civil-rights actions. *Fegans v. Norris*, 351 Ark. 200, 89 S.W.3d 919 (2002); *Rainey v. Hartness*, *supra*. Under that analysis, a motion for summary judgment based upon qualified-immunity is precluded only when the plaintiff has asserted a constitutional violation, demonstrated the constitutional right is clearly established and raised a genuine issue of fact as to whether the official would have known that the conduct violated that clearly established right. *Fegans v. Norris, supra* (citing *Baldridge v. Cordes*, 350 Ark. 114, 120–21, 85 S.W.3d 511, 514–15 (2002)). An official is immune from suit if his or her actions did not violate clearly established principles of law of which a reasonable person would have knowledge. *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The objective reasonable-person

> standard utilized in qualified-immunity analysis is a legal inquiry. *Baldridge v. Cordes, supra.* 363 Ark. at 131

A reading of the plain language of Ark. Code Ann. §§ 21–9–301 and 19–10–305 lead to the logical conclusion that those two statutes relate to immunity from tort liability, and do not bestow immunity to public officials for injunctive relief and for the obligation to make restitution for illegal exactions through ultra vires acts or acts that are an abuse of the rights, duties and privileges of their offices. In §21-9-301, the statute expressly refers to "liability" from "suit for damages, except to the extent that they may be covered by liability insurance," which would not apply to claims other than torts, and in § 19-10-305, the same references appear to immunity to "damages," with the exception for liability insurance, with the added proviso that the acts must have occurred within the course and scope of their employment.

Again, Plaintiffs here are not claiming that Rutledge acted within the course and scope of her employment, but rather that she acted outside that course and scope, and thus without authority.

Finally, Rutledge also relies heavily on the case of *Mangiafico v. Blumenthal,* 358 F.Supp.2d 6 (D. Conn., 2005), which also was a case based on 42 U.S.C. §1983, in which a member of the Connecticut Department of Corrections sued the then-Attorney General of Connecticut, Richard Blumenthal, for

deprivation of his right to be defended in a prisoner's lawsuit against him. The case is not applicable to the case at bar because of the reasons asserted above regarding other §1983 claims. It is, however, interesting to note that, after an extensive review of immunity of government attorneys to such claims, the court stated:

> [T]he case law teaches that a grant of absolute immunity to a government attorney for a particular function or action must be firmly grounded in history or the common law, must be employed sparingly to address only the most serious risks to the government attorney and the judicial process, and must be granted, if at all possible, only when other means of redress for legitimate grievances are available.
> 358 F.Supp.2d at 21.

Again, the claims asserted against Rutledge in the First Amended Complaint are *not* based upon her violation of the Plaintiffs' civil rights, nor on tort, but that she exceeded her constitutional, statutory and common law duties in using her position as Attorney General and the name and resources of the State of Arkansas in attacking in the United States Supreme Court and other Federal courts the results of the 2020 general election for the office of President of the United States, on the premise that the election was "fraudulent," without authority or request of the Governor, the head of a state agency, or the General Assembly, and without any evidence to support that claim.

The Circuit Court, in its Amended and Substituted Order denying the Motion to Dismiss (RP 276) found that the facts alleged in the Complaint regarding the acts committed by Rutledge, which the Circuit Court thoroughly

reviewed, were sufficient to overcome the claims of Sovereign Immunity and Qualified Immunity. (RP 278-280). Those findings include the following:

> 1. The Court FINDS that facts alleged in the Amended Complaint, viewed in the light most favorable to Plaintiffs, as required by the Rule, support the determination 1) that the past and pending actions of the Attorney General are *ultra vires* or without the authority of the law, and 2) that the Attorney General is about to (and continuing to) act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner, which would justify injunctive and declaratory relief.
> …
> 2. Plaintiff has sufficiently alleged "Acts in bad faith, arbitrarily, capriciously pursued, in a wantonly injurious manner", which would further justify overcoming the defense of Qualified Immunity. *See* factual allegations discussed elsewhere in this order.

These acts were not only *ultra vires* and an abuse of the authority of her office, as the Circuit Court noted, but they were damaging, not only to the State of Arkansas but to the country as a whole. They should not be taken lightly and dismissed out of hand as the harmless grandstanding of an ambitious politician. She has no immunity under the law of Arkansas from explaining and answering for those acts.

D. Rutledge Has No Immunity To Suit For Injunction For Exceeding The Authority Of Her Office

A long line of decisions of the Supreme Court of Arkansas declare the law of Arkansas to be that courts will restrain public officials or agencies who act in

excess of the legal authority of their office, who abuse the authority of their offices, or who act arbitrarily and capriciously or in bad faith, and that the officials or agencies who do so have no immunity to suits to restrain them from doing so if the claims are limited to injunctive relief, and not for damages.

One of the most recent of those cases is that of *Board of Trustees of University of Arkansas v. Burcham*, (Not Reported in S.W.3d) 2014 Ark. 61, 2014 WL 585981, in which this Court explained:

> This court has recognized three ways in which a claim of sovereign immunity may be surmounted: (1) where the State is the moving party seeking specific relief, (2) where an act of the legislature has created a specific waiver of sovereign immunity, and (3) where the state agency is acting illegally or if a state-agency officer refuses to do a purely ministerial action required by statute. *See id.* Additionally, a state agency may be enjoined if it can be shown (1) *that the pending action of the agency is ultra vires or without the authority of the agency, or (2) that the agency is about to act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner. See Arkansas Tech Univ., supra; Arkansas State Game & Fish Comm'n v. Eubank,* 256 Ark. 930, 512 S.W.2d 540 (1974).
>
> … [T]he scope of the exception to sovereign immunity for unconstitutional acts or for acts that are ultra vires, arbitrary, capricious or in bad faith, extends only to injunctive relief. *See Arkansas Lottery Comm'n v. Alpha Mktg.*, 2013 Ark. 232, –— S.W.3d ——. The exception does not apply to suits seeking money damages, and we have never recognized the exception to allow a claim for damages to proceed. *See id.*
> 2014 Ark. 61 at p. 3-4.

It should be noted that the Plaintiffs are *not* seeking damages against the Attorney General. They are seeking recovery of funds of the State claimed to be

illegally exacted by the Attorney General in her pursuit of the *ultra vires* activities alleged in the First Amended Complaint, but those funds would be reimbursed to the State, and are not "damages."

In *Monsanto Company v. Arkansas State Plant Board*, 2019 Ark. 194, 576 S.W.3d 8, this Court stated: "We view our [sovereign immunity] cases as allowing actions that are illegal, are unconstitutional or are ultra vires to be enjoined." *Cammack v. Chalmers*, 284 Ark. 161, 163, 680 S.W.2d 689, 689 (1984); *see also Bd. of Trustees of Univ. of Ark. v. Burcham*, 2014 Ark. 61, at 4, 2014 WL 585981. The Court then added:

> In short, the ultra vires exception is alive and well, and it applies in this case. … 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.

A year earlier, this Court decided *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509, in which it made a similar ruling:

> "We view our [sovereign immunity] cases as allowing actions that are illegal, are unconstitutional or are *ultra vires* to be enjoined." *Cammack v. Chalmers*, 284 Ark. 161, 163, 680 S.W.2d 689, 689 (1984); *see also Bd. of Trustees of Univ. of Ark. v. Burcham*, 2014 Ark. 61, at 4, 2014 WL 585981 ("[T]he scope of the exception to sovereign immunity for unconstitutional acts or for acts that are ultra vires, arbitrary, capricious or in bad faith, extends only to injunctive relief.").

And, in *Grine v. Board of Trustees*, 338 Ark. 79, 12 S.W.3d 54 (1999), this Court explained:

> Appellant argues that his complaint states an exception to the doctrine of sovereign immunity. He contends that he alleged facts sufficient to establish the recognized immunity exception which permits a suit against State officials or agencies to enjoin *ultra vires,* bad faith, and arbitrary and capricious actions. *Cammack v. Chalmers,* 284 Ark. 161, 680 S.W.2d 689 (1984). *Equity does have jurisdiction to enjoin or restrain officers of State agencies where the act to be restrained is* ultra vires, *wanton, capricious, in bad faith, injurious, or arbitrary*. *Toan, Comm'r v. Falbo,* 268 Ark. 337, 595 S.W.2d 936 (1980); *See also Game Comm'n v. Eubank*, 256 Ark. 930, 512 S.W.2d 540(1974); *Shellnut v. Ark. State Game & Fish Comm.,* 222 Ark. 25, 258 S.W.2d 570 (1953).

See also, *Arkansas State Game and Fish Commission v. Eubank,* 256 Ark. 930, 512 S.W.2d 540 (1974) (A state agency may be enjoined in a suit in equity if it can be shown the pending action of the agency is *ultra vires* or without the authority of the agency. ... The agency can also be enjoined if it is about to act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner.); *Jensen v. Radio Broadcasting Co.,* 208 Ark. 517, 186 S.W.2d 931(1945); *Harkey v. Matthews*, 243 Ark. 775, 422 S.W.2d 410 (1967)(Our cases also recognize that equity has jurisdiction to restrain acts of public officers or agencies which are *ultra vires* and beyond the scope of their authority); *Shellnut v. Arkansas State Game & Fish Commission,* 222 Ark. 252, 58 S.W.2d 570 (1953); and *Kerr v. Raney*, 305 F. Supp. 1152 (W.D., Ark. 1969)(If the defendants have breached an express or implied statutory duty or otherwise exceeded or abused their discretion, such action is *ultra vires* in nature, and the court may afford proper equitable relief.).

E. Rutledge Has No Common Law Right to Attempt to Set Aside A National Election

Rutledge claims that, in addition to the immunity discussed above, she also has general authority to file suits and take actions in such places and on such subjects as she, in her uncontrolled discretion, may believe to be "in the interests of the State of Arkansas," based upon common law. This is an issue going to the merits of the case, and is not relevant to her claim of immunity. However, out of an abundance of caution, Plaintiffs will briefly address it.

Rutledge does not point to a specific common law authority of attorneys general to support her authority to take action to set aside a national election, or to intervene in litigation initiated by the attorney general of another state against alleged misfeasance and malfeasance of officers of a non-profit organization – particularly where the intervention favors the officers accused of such misfeasance and malfeasance. It is not enough to claim "common law authority" to do an act without showing that there is common law that authorizes the act.

The General Assembly of the State of Arkansas adopted the common law, or so much of it as was applicable, by adoption of what is now codified as Ark. Code Ann. §1-2-119, which states:

> The common law of England, so far as it is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defects of the common law made prior to March 24, 1606, which are applicable to our own form of government, of a general nature and

> not local to that kingdom, and not inconsistent with the United States Constitution and the laws of the United States or the Arkansas Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state.

This statute is hardly a guide as to what constituted the common law of England at the time of the adoption of the statute. However, the case of *State ex rel. Williams v. Karston,* 208 Ark. 703, 187 S.W.2d 327 (1945) contains a general review of the common law duties of an attorney general:

> [A]t common law the Attorney General could 'institute equitable proceedings for the abatement of public nuisances which affected or endangered the public safety or convenience and required immediate judicial interposition.' In 5 Am.Juris. 244, in discussing the power of the Attorney General to bring an action to restrain a public nuisance, the rule is stated: 'It is the unquestioned right of the attorney general to file an information in equity for the abatement of nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition. Thus, he may institute proceedings to restrain acts which are injurious to public health, safety, or morals, and may prevent any invasion upon the rights of the public in highways, parks, and other public lands, and in navigable.
>
> 208 Ark. at 708

The cases described in the *Karston* decision are those that relate to public nuisances, public health and safety or morals. Rutledge has not alleged nor shown that, under the common law of England at the time of adoption of what is now Ark. Code Ann. §1-2-119, an attorney general would have the authority to challenge a national election upon his or her own volition without authority of the head of state and without any evidence upon which to base a claim of widespread fraud.

F. Enactment of Ark. Code Ann. Ark. Code Ann. §25-16-702 and Ark. Code Ann. §25-16-703 Limited Any Common Law Right of the Attorney General to File Suit.

The Arkansas Supreme Court, in the case of *Parker v. Murry*, 221 Ark. 554, 254 S.W.2d 468 (1953), rejected the Attorney General's claim to a right under common law to randomly and solely initiate or intervene in litigation without the express request and approval of the Governor, the director of a state agency, or the General Assembly in light of the enactment by the legislature of Ark. Code Ann. §§25-16-702 and 25-16-703, both of which are cited by Plaintiffs in their First Amended Complaint.

Ark. Code Ann. §25-16-702(a) provides in relevant part:

> *(a)* The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. *Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.* (Emphasis added)
>
> (b)(1) All office work and advice for state officials, departments, institutions, and agencies shall be given by the Attorney General and his or her assistants, and no special counsel shall be employed or additional expense paid for those services.

Ark. Code Ann. §25-16-703 provides:

> (a) The 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*. (Emphasis added)

Parker v. Murry directly addressed the question of whether the Attorney General has the authority to involve the State of Arkansas in any litigation that he or she may wish to engage without the authorization of a state officer, board or commission? The Court answered "No," stating:

> [T]he Attorney General says 'that he has the authority to control the litigation of any State department or agency when such appears necessary or desirable.' We agree with this contention where the facts in a particular case make it appear that the Attorney General's intervention was 'necessary or desirable', or stated another way, *when the institution or agency 'needs' the services of counsel and this 'need' is certified to the Attorney General.* (emphasis added)
>
> The primary and decisive question, therefore, is: Was there such 'need' in the instant case? We hold that there was not.
>
> Section 1, Article VI of our Constitution created the office of Attorney General, and Section 22 of Article VI prescribes the duties of the Attorney General, as follows: 'The * * * Attorney General shall perform such duties as may be prescribed by law * * *.' It thus appears obvious that the official position of the Attorney General is a constitutional one, but that his duties are purely statutory.
>
> Act 14 of the 1933 General Assembly provides: 'The Attorney General shall be the attorney for all State officials, departments, institutions and agencies, and whenever any officer or department, institution or agency of the State *needs the services of an attorney the matter shall be certified to the Attorney General* for attention', (emphasis ours) (now § 12–701, Ark.Stats.1947).
> 221 Ark at 559.
> …
>
> It is apparent to us that the Attorney General may intervene in a suit prosecuted by the Commissioner of Revenues, as here, *when and only when, the Commissioner of Revenues needs his services and so*

> *certifies this need to the Attorney General*, and that such was the intent of the Legislature. (Emphasis added)
> 221 Ark. at 561.

See also, *Taylor v. Zanone Properties*, 342 Ark. 465, 474, 30 S.W.3d 74, 79 (2000), in which this Court held:

> The Attorney General represents the agencies and departments of the State only when his services are needed and the request for services has been certified by the agency to the Attorney General. Ark.Code Ann. § 25–16–702(a) (Repl.1996) (c*iting Parker v. Murry, supra.*)
> 342 Ark. at 474.

Reading all of the words in Ark. Code Ann. §§25-16-702 and 25-16-703 together, and attempting to harmonize them, it seems apparent, as it did to this Court in *Parker v. Murry* and *Taylor v. Zanone Properties* that the wording requiring the certification of need for legal services by a government officer or agency to the Attorney General is a condition precedent to the Attorney General's authority to act on behalf of the State.

The common law is not a static or fixed code, and the legislature may alter it to adjust to time and circumstances. *White v. City of Newport*, 326 Ark. 667, 672, 933 S.W.2d 800, 803 (1996). The General Assembly has substituted the conditional statutory authority contained in those two statutes in place of any common law authority that may have existed prior to their enactment regarding the filing of or intervention in litigation by the Attorney General on behalf of the State.

Even assuming that any such common law authority survived those two statutes, and that the examples of common law authority of an attorney general listed in the *Karston* decision are not exclusive, Rutledge cannot seriously claim that it was her purpose to protect the interests of the State of Arkansas or its citizens from dilution of their votes due to election fraud in other states (Georgia, Michigan, Pennsylvania and Wisconsin) when there was no evidence existent or offered by her or anyone else with which to support a claim that the national election had been "rigged," manipulated, falsified or otherwise illegally influenced. No such evidence has been produced in over a year since.

Rutledge's filing of the amicus briefs and intervention petitions were, without such evidence, purely an exercise in personal politics and in excess of any authority that she may claim. However, Rutledge invoked the name and credibility of the State of Arkansas and all of its citizens in that groundless and fruitless exercise.

G. There Is No "Political Question" Issue In This Case.

Rutledge insists that her defense of "political question" goes to the Court's jurisdiction. Just because a case involves a politician does not mean that every case questioning the actions of politicians raises a "political question." In this case, Rutledge is raising the issue as "smoke and mirrors" in an effort to make the case appear more complicated than it is. Let us remember that we are still arguing about

a Motion to Dismiss the First Amended Complaint based on the allegations contained therein.

In asserting the "political question" issue, Defendant has dredged up an arcane defense that is used in cases that are between political parties or officials, primarily in political party primary election contests, and that have nothing to do with the statutory issues involved in this case. The case of *Catlett v. The Republican Party of Arkansas et al*, 242 Ark. 283, 413 S.W.2d 651 (1967) (cited by Rutledge) is an action by representatives of political parties for a declaratory judgment and injunctive relief regarding election procedure. The Supreme Court stated that "all three of the statutes in issue pertain merely to the procedure to be followed in the conduct of political elections," and that "a court of equity has no jurisdiction of such questions."

The same was true of the case cited in the *Catlett* decision as the "landmark" decision of *Walls v. Brundidge*, 109 Ark. 250, 160 S.W. 230., Ann. Cas. 1915C, 980 (1913), holding that "the extraordinary jurisdiction of courts of chancery can not … be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office." However, more to the point in the case now before the Court, the *Walls* Court also cited with approval the following statement from the case of *Fletcher v. Tuttle*, 151 Ill. 41, 37 N.E. 683:

> If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandates of the law, whether in respect to calling or conducting an election, or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But his remedy must be sought in a court of law, and not in a court of chancery.

Of course, Arkansas no longer recognizes the distinction between courts of law and separate courts of equity. They have been consolidated. So, when a public officer is alleged to have "disobeyed the mandates of the law," a person claiming that those mandates have been violated has a remedy in law.

Rutledge also cites the case of *Arkansas Department of Finance and Administration v. Naturalis Health, LLC et al*, 2018 Ark. 224, 549 S.W.3d 901 (2018), which involved an appeal under the Arkansas Administrative Procedure Act from a decision of the Medical Marijuana Commission awarding five medical marijuana cultivation permits. The Supreme Court stated, in part, that "courts do not generally have jurisdiction to examine administrative decisions of state agencies," and that "[I]t is only with respect to its judicial functions, which are basically adjudicatory or quasi-judicial in nature, that the APA purports to subject agency decisions to judicial review." There is nothing in that opinion that bears on the issues in this case.

Defendant Rutledge also claims that for the Court to grant the relief requested by the Plaintiffs would violate the "separation of powers" provision of the Arkansas Constitution by imposing on the exercise of "executive discretion."

To the contrary, Plaintiffs are not asking the Court to prevent or interfere with the executive discretion or decisions of a member of the Executive Branch of the State of Arkansas. Instead, Plaintiffs are asking the Court to determine who, in the Executive Branch, has the authority to make executive decisions to commence or intervene in litigation regarding the "interests of the state," and to prevent the Attorney General from exceeding the constitutional and statutory prerogatives of her office. "An injunction to prevent an officer from doing that which he has no legal right to do is not an interference with his discretion." *Jensen v. Radio Broadcasting Co.*, supra.

The Complaint alleges that Defendant Rutledge is taking actions based on her sole opinion of the "interests of the state" in positions taken in her rogue filings in various courts when she does not purport to represent a state agency; when her statutory authority does not include that power; and when she has not consulted with the Governor or any other officer or agency of the Executive Branch to determine those interests. Rutledge's exercise of such independent and unauthorized authority results in positions being taken in the name of the State of Arkansas and its citizens that are, or may be, contrary to official positions taken, or to be taken, by the Governor or other officials or agencies in the Executive Department; positions that could damage the State's relationship with various Federal agencies or executives; and that could be detrimental and embarrassing to

the citizens of the State. Those allegations are sufficient to state a claim upon which relief may be granted, and are sufficient to overcome Rutledge's Motion.

REQUEST FOR RELIEF

Rutledge has failed in her claim of immunity to address the lengthy line of Arkansas Supreme Court decisions holding that a state officer or agency may be enjoined if it can be shown (1) that the pending action of the officer or agency is *ultra vires* or in excess of the constitutional or statutory authority of the officer or agency, or (2) that the officer or agency is about to act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner. See, *Board of Trustees of University of Arkansas v. Burcham*, *supra*; *Monsanto Company v. Arkansas State Plant Board*, *supra;* and *Martin v. Haas*, *supra.* The other theories of immunity cited by Rutledge are not relevant to this case.

Attorney General Rutledge has conflated her position as "the State's lawyer" with the power to decide the State's position on all matters, and to file lawsuits or intervene in pending litigation based upon those decisions without consulting her "clients" (*i.e.*, the Governor, agency directors or the legislature). However, "Authority to advocate a position … is not equivalent to authority to decide what is in the public's best interest." *Associated Natural Gas Co. v. Arkansas Pub. Serv. Comm'n*, 25 Ark.App. 115, 118, 752 S.W.2d 766, 767 (1988). Rutledge's

interlocutory appeal should be denied, and this case remanded to the Circuit Court for further proceedings on the merits of the First Amended Complaint.

As noted in the Introduction to this Brief, there is pending at the time of the filing of this Brief a Motion to Strike all of Rutledge's Brief except for that portion relating to her claim of immunity. Plaintiffs have attempted to restrain the urge to respond to issues in Rutledge's Brief not related to immunity. If the Court finds that the Motion to Strike should not be granted, Plaintiffs request a period of fourteen (14) days from the date of an order denying that Motion to file a supplemental brief in response to the other issues in her Brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

(A) This Brief complies with Rule 4-1 of the Rules of the Arkansas Supreme Court and Court of Appeals.

(B) This Brief complies with Administrative Order No. 19, in that all confidential information as defined in that Order 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.

(C) This Brief complies with Administrative Order No. 21, Section 9, in that it does not contain hyperlinks to external papers or websites.

(D) This Brief conforms to the word limitation contained in Rule 4-2(d)(1) of the Rules of the Arkansas Supreme Court and Court of Appeals. The Jurisdictional Statement, Statement of the Case and Facts, the Argument and the Request for Relief portions of this Brief contain 8579 words, which is less than the allowable amount of 8,600 words.

Dated: January 11, 2022. */s/ Richard H. Mays*
Richard H. Mays

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, the above and foregoing document was filed with the Clerk of this Court via the E-flex filing system, which shall send notification of such filing to all counsel of record. The undersigned is not aware of any party or counsel who requires service by other means.

Dated: January 11, 2022. */s/ Richard H. Mays*
Richard H. Mays