IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANAS
SEVENTEENTH DIVISION

WILLARD PROCTOR, JR. PLAINTIFF

VS. NO. 60 CV-10-1439

HONORABLE CHARLIE DANIELS
IN HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE DEFENDANT

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rules 12(b)(6), 12(b)(7) and 56 of the Arkansas Rules of Civil Procedure, defendant Charlie Daniels, in his official capacity as Arkansas Secretary of State, submits the following as his motion for summary judgment.

1. Plaintiff Willard Proctor, Jr. has previously been removed from the position of Circuit Judge for Arkansas's Sixth Judicial District, Fifth Division, by the Arkansas Supreme Court, upon a finding that the plaintiff violated numerous provisions of the Arkansas Code of Judicial Conduct. *See generally Arkansas Judicial Discipline and Disability Comm'n v. Proctor*, 2010 Ark. 38.

2. Thereafter, the plaintiff filed with the Arkansas Secretary of State as a write-in candidate for the same judicial position from which he had previously been removed. (Compl. ¶ 3.)

3. For his complaint, the plaintiff seeks a declaration that Ark. Code Ann. § 16-10-410(d), which provides that "[a]ny judge removed from office . . . cannot be appointed or elected thereafter to serve as a judge," is unconstitutional. The plaintiff also seeks a declaration that the Secretary of State is allowed to certify the plaintiff's nomination as circuit judge. (Compl. at 7.)

4. In setting out his claims, the plaintiff has purported to bring this action both as a declaratory judgment action and as a pre-election qualifications challenge.

5. The plaintiff's complaint should be dismissed pursuant to Rule 12(b)(7) of the Arkansas Rules of Civil Procedure because he has failed to join all necessary parties under Rule 19.

6. The plaintiff's pre-election qualification claim should be dismissed pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure because it is, in part, moot.

7. The plaintiff's pre-election qualification claim should be dismiss pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure because the plaintiff has failed to seek mandamus as required by the Arkansas Supreme Court.

8. The plaintiff's declaratory judgment claim should be dismissed because it is not ripe for consideration.

9. The plaintiff's declaratory judgment claim should be dismissed pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure because the challenged statute passes constitutional muster.

10. In support of this motion, the defendant submits the March 24, 2010, Affidavit of James Carder Hawkins, which is attached as Exhibit 1.

11. A supporting brief is being filed contemporaneously with this motion.

WHEREFORE, defendant Charlie Daniels, in his official capacity as Arkansas Secretary of State, respectfully requests that the Court affirms the challenged Arkansas statute, dismisses the plaintiff's complaint, and grants the defendant all other appropriate relief.

Respectfully Submitted,

DUSTIN McDANIEL
Attorney General

By: _____

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Mark N. Ohrenberger, certify that on March 25, 2010, a copy of this document was served via U.S. mail on the following individual:

Ms. Chrishauna Easley Clark
Law Office of Chrishauna Easley Clark
P.O. Box 8222
Pine Bluff, Arkansas 71611

_____
Mark N. Ohrenberger

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANAS
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WILLARD PROCTOR, JR.
PLAINTIFF

VS. **NO. 60 CV-10-1439**

HONORABLE CHARLIE DANIELS
IN HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE **DEFENDANT**

AFFIDAVIT OF JAMES CARDER HAWKINS

I, James Carder Hawkins, am over the age of twenty-one (21), have personal knowledge of the facts set forth in this affidavit, am competent to make this affidavit, and do affirm that the following is true and correct to the best of my personal knowledge:

1. I have been employed by the Arkansas Secretary of State's Office from September of 2002 to the present. My current title is "Director of Elections." I have held this position since October of 2009.

2. Among my duties as Director of Elections, I am responsible for coordinating and overseeing the filing of candidate paperwork with the Secretary of State's Office for individuals seeking to run for election. My duties also include the certification of candidates to the appropriate county boards of election commissioners so that the candidates' names can be placed on the ballot in the appropriate counties.

3. I have reviewed the records of the Arkansas Secretary of State's Office with respect to Willard Proctor, Jr.'s filing as a write-in candidate for the position of Circuit Judge for the Sixth Judicial District, Fifth Division, Subdistrict 6.1. These records reflect that the Arkansas Secretary of State's Office accepted and filed Mr. Proctor's paperwork to run as a write-in candidate for this position on Wednesday, March

17, 2010. These records further reflect that on the morning of Thursday, March 18, 2010, the Arkansas Secretary of State's Office certified Willard Proctor, Jr. to the Pulaski County Board of Election Commissioners via e-mail as a write-in candidate for the position of Circuit Judge for the Sixth Judicial District, Fifth Division, Subdistrict 6.1.

4. Subdistrict 6.1 is located entirely in Pulaski County. Therefore, the Arkansas Secretary of State's Office has not certified Mr. Proctor as a write-in candidate for the position of Circuit Judge to the board of election commissioners of any other county.

By my signature on this 24th day of March, 2010, I offer the statements in paragraphs numbered 1-4 above as my affirmed testimony.

JAMES CARDER HAWKINS

STATE OF ARKANSAS)
COUNTY OF PULASKI)

Before the undersigned notary public, duly qualified and acting in and for said county and state, appeared James Carder Hawkins, who is to me well known to be or who has sufficiently proven to be the affiant herein, who signed this affirmed affidavit.

Subscribed to and affirmed before me this 24th day of March, 2010.

OFFICIAL SEAL
PAMELA S. RATLIFF
NOTARY PUBLIC - ARKANSAS
JEFFERSON COUNTY
My Commission Expires: JAN. 12, 2015

Notary Public

My Commission Expires:

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANAS
SEVENTEENTH DIVISION

WILLARD PROCTOR, JR. PLAINTIFF

VS. NO. 60 CV-10-1439

HONORABLE CHARLIE DANIELS
IN HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE DEFENDANT

BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Defendant Charlie Daniels, in his official capacity as Arkansas Secretary of State, submits this Brief in support of his motion for summary judgment.

Introduction

Plaintiff Willard Proctor, Jr., who the Arkansas Supreme Court has previously removed from the position of circuit judge upon finding that the plaintiff had violated numerous provisions of the Arkansas Code of Judicial Conduct, seeks to challenge the constitutionality of an Arkansas statute barring him from serving as a circuit judge as a result of his removal. Proctor purports to present this challenge as a declaratory judgment action and as a pre-election qualifications challenge; however, he has failed to name all necessary parties to present either a proper declaratory judgment action or a pre-election qualification challenge, and his purported declaratory judgment action is not ripe for consideration. Additionally, with respect to his purported pre-election challenge, the plaintiff's claim is moot in part, and he has failed to seek the type of relief that the Arkansas Supreme Court has authorized in pre-election qualification challenges – mandamus. Finally, even if Proctor had properly presented his constitutional challenge, and even if such challenge was ripe for the Court's consideration, the statute at issue

passes constitutional muster and should be upheld. For all of these reasons, the defendant requests that the court dismisses the plaintiff's complaint and grants the defendant all other appropriate relief.

Factual Background

Plaintiff Willard Proctor, Jr. previously held the position of Circuit Judge for Arkansas's Sixth Judicial District, Fifth Division. However, on January 25, 2010, the Arkansas Supreme Court removed the plaintiff from that office upon finding that he had violated numerous provisions of the Arkansas Code of Judicial Conduct. *See generally Arkansas Judicial Discipline and Disability Comm'n v. Proctor*, 2010 Ark. 38. Thereafter, the plaintiff sought to file with the Arkansas Secretary of State as a write-in candidate for the same judicial position from which he had previously been removed. (Compl. ¶ 3.) The Arkansas Secretary of State's Office accepted and filed the plaintiff's paperwork to run as a write-in candidate on March 17, 2010. Ex. 1 ¶ 3. On the morning of March 18, 2010, the Secretary of State's Office certified the plaintiff to the Pulaski County Board of Election Commissioners as a write-in candidate for the appropriate nonpartisan judicial election. Ex. 1 ¶ 3.

The plaintiff filed the complaint in this matter on March 17, 2010, the same date on which the Arkansas Secretary of State accepted and filed his paperwork to run as a write-in candidate. For his complaint, the plaintiff has requested that the Court declare Ark. Code Ann. § 16-10-410(d) unconstitutional and that the Court declare that the Secretary of State is allowed to certify the plaintiff's nomination as a candidate. (Compl. at 7.)

Summary Judgment Standard

Rule 12(b) of the Arkansas Rules of Civil Procedure permits a defendant to file a motion to dismiss a plaintiff's complaint prior to filing an answer in order to assert certain defenses, including the plaintiff's failure to state facts upon which relief can be granted and failure to join necessary parties. Ark. R. Civ. P. 12(b). The rule further provides that if matters outside the pleadings are presented to and not excluded by the Court, the motion should be treated as a motion for summary judgment and disposed of in the same manner as a motion brought under Rule 56 of the Arkansas Rules of Civil Procedure. *Id.*

With respect to summary judgment motions, the Arkansas Supreme Court has held, "the purpose of our summary judgment rule is to expeditiously determine cases without necessity for formal trial where there is no substantial issue of fact and is in the nature of an inquiry to determine whether genuine issues of fact exist." *Joey Brown Interest, Inc. v. Merchants Nat'l Bank of Fort Smith*, 284 Ark. 418, 423, 683 S.W.2d 601, 604 (1985) (citation omitted). Summary judgment is not an extreme or drastic remedy, but rather is "one of the tools in a trial court's efficiency arsenal." *Thomas v. Stewart*, 347 Ark. 33, 37, 60 S.W.3d 415, 417 (2001). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion." Ark. R. Civ. P. 56(c)(2). If this standard is met, then the case "should be disposed of by summary judgment rather than exposing the litigants to unnecessary delay, work and expense in going to trial when the trial judge

would be bound to direct a verdict in movant's favor after all evidence is adduced." *Joey Brown Interest*, 284 Ark. at 423, 683 S.W.2d at 604.

Argument

A. The Plaintiff's Pre-Election Challenge is Moot and is, Moreover, Improperly Pled

For his pre-election challenge, the plaintiff named the Arkansas Secretary of State as a defendant, and he has asked the Court to declare "that the Secretary of State be allowed to certify plaintiff's nomination as Circuit Judge." (Compl. at 7.) This request, however, is moot because the Secretary of State has already certified the plaintiff's nomination as a write-in candidate for the position of circuit judge to the Pulaski County Board of Election Commissioners. Therefore, any such declaration from this Court would amount to an exercise in futility.

Under Arkansas law, in order to run as a write-in candidate in a nonpartisan judicial election for the position of circuit judge, such as the race for which the plaintiff has filed, the would-be candidate must provide written notice of his or her intention to run to the applicable county board of election commissioners and the Secretary of State no later than sixty days before the nonpartisan judicial election. Ark. Code Ann. § 7-10-103(d). The potential candidate must also file a political practices pledge with the Secretary of State contemporaneously with providing his or her notice of intent to run. Ark. Code Ann. § 7-10-103(d)-(e). After the write-in circuit judge candidate has filed with the Secretary of State, the Secretary is required to certify that candidate to the appropriate county or counties. *See* Ark. Code Ann. § 7-5-203(a)(1).

Once the nominations of all candidates, including write-in candidates, are certified to the various county boards of election commissioners, the county boards

prepare the election ballots. *See* Ark. Code Ann. § 7-5-207. In preparing the ballot forms, with respect to offices for which a write-in candidate's nomination has been certified, the county board is responsible for including a blank line for a possible write-in vote at the bottom of the list of names. Ark. Code Ann. § 7-5-208(c)(2).

After an election occurs and the votes have been counted, it is the responsibility of each county board of election commissioners to count the votes and certify the returns to their respective county clerk, who in turn transmits the results to the Secretary of State. Ark. Code Ann. § 7-5-707. At that point, assuming a run-off election has not become necessary, the Governor issues a commission to the prevailing candidate. Ark. Code Ann. § 7-5-704(a).

In this case, the Arkansas Secretary of State's Office accepted and filed the plaintiff's paperwork necessary to run as a write-in candidate for the office of Circuit Judge for Arkansas's Sixth Judicial District, Division 5, Subdistrict 6.1, on Wednesday March 17, 2010. Ex. 1 ¶ 3. That was the same day on which the plaintiff filed his complaint in this action. The following day, on Thursday, March 18, 2010, the Secretary of State's Office certified the plaintiff's name to the Pulaski County Board Election Commissioners as a write-in candidate. Ex. 1 ¶ 3. Thus, the Arkansas Secretary of State's Office has already afforded the plaintiff the relief he is seeking, rendering moot the plaintiff's request that the Court declare that the Secretary of State is permitted to certify the plaintiff's nomination. For this reason, the plaintiff's pre-election request for declaratory relief from the Arkansas Secretary of State should be dismissed.

It should further be noted that even if the plaintiff's request for a declaration that the Secretary of State is allowed to certify the plaintiff's nomination as a write-in

candidate was not moot, the plaintiff's pre-election challenge is improperly and insufficiently pled. The Arkansas Supreme Court has made abundantly clear that the proper method for asserting a pre-election candidacy qualification challenge is to seek declaratory relief in conjunction with an action for mandamus. *State ex rel. Robinson v. Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 412, 779 S.W.2d 169, 173 (1989). The *Craighead County* case involved a voter's petition to the circuit court to issue a writ of mandamus to the county board of election commissioners to remove the names of three candidates for office from the ballot on the grounds that each candidate was ineligible to run for the office he sought. On appeal, the Arkansas Supreme Court explained that in a pre-election qualifications challenge, it is necessary for the plaintiff to seek (1) a declaration concerning the candidate's eligibility and (2) a writ of mandamus to have the challenged candidate's name placed on or removed from the ballot. *Craighead County*, 300 Ark. at 411-12, 779 S.W.2d at 172-73. The court also made clear that before ruling on the plaintiff's petition for mandamus, it is incumbent upon the circuit court to see that all necessary parties are joined in the action pursuant to Arkansas Rule of Civil Procedure 19. *Craighead County*, 300 Ark. at 412, 779 S.W.2d at 172. In the present case, Proctor neither petitioned the Court for mandamus nor joined all necessary parties to this action.

As the defendant has already indicated, if the plaintiff is merely seeking to have his nomination as a write-in candidate certified to the Pulaski County Board of Election Commissioners, the Secretary of State has already afforded that relief, and the claim for such relief is moot. If, however, the plaintiff in fact seeks further relief, such as, having any votes cast in his favor counted, he must seek mandamus against the party responsible

counting the votes, which in that case would be the Pulaski County Board of Election Commissioners. Further, whether the plaintiff in fact wishes to seek mandamus relief or merely seeks a declaratory judgment concerning the constitutionality of the statute, the party responsible for enforcing the challenged statute – the Arkansas Judicial Discipline and Disability Commission – is also a necessary party because it has an interest which could be affected by the declaration. *See* Ark. Code Ann. § 16-111-106(a) ("When the declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.").

B. The Plaintiff's Declaratory Judgment Petition is Not Ripe for Consideration

Even if the plaintiff had joined all necessary parties, including the Arkansas Judicial Discipline and Disability Commission, to challenge the constitutionality of Ark. Code Ann. § 16-10-410(d), his declaratory judgment petition is not ripe for consideration. The Arkansas Supreme Court set out the standard for application of the declaratory judgment statute in *Cummings v. City of Fayetteville*, 294 Ark. 151, 741 S.W.2d 638 (1987). There, the court held:

> The Declaratory Judgment Statute is applicable only where there is a present actual controversy, and all interested persons are made parties, and only where justiciable issues are presented. It does not undertake to decide the legal effect of laws upon a state of facts which is future, contingent or uncertain. A declaratory judgment will not be granted unless the danger or dilemma of the plaintiff is present, not contingent on the happening of hypothetical future events: the prejudice to his position must be actual and genuine and not merely possible, speculative, contingent, or remote.

Cummings, 294 Ark. at 154-55, 741 S.W.2d at 639-40 (quoting Anderson on Declaratory Judgments 187 (2d ed. 1951)). The plaintiff's request for declaratory judgment is not

ripe because it is contingent upon uncertain future events, to wit, his prevailing in the nonpartisan judicial election for the position of circuit judge.

The statute at issue provides: "Any judge removed from office pursuant to this subchapter cannot be appointed or elected thereafter to serve as a judge." Because this statute only bars a removed judge from holding the position of circuit judge, whether by appointment or election, and it does not prohibit a removed judge from running for judicial office, the Arkansas Judicial Discipline and Disability Commission does not have any enforcement authority under the statute until such time as a removed judge prevails in a judicial election and seeks to secure a commission to office. Under the current state of facts, the plaintiff has merely filed to run as a write-in candidate for a judicial position; he has not, however, prevailed in a judicial election. Further, whether the plaintiff will prevail in this or any other judicial election and thus find himself in a position to secure an official commission from the Governor is a future and conditional state of facts that might or might not ever come to pass. Accordingly, the Arkansas Judicial Discipline and Disability Commission does not have any enforcement authority under the challenged statute against the plaintiff at present, and the plaintiff's request for a declaratory judgment is not ripe.

The Arkansas Supreme Court's discussion of the ripeness question with respect to the declaratory judgment statute in *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), is instructive on this point. In that case, the court held that several plaintiffs' declaratory judgment challenge to the constitutionality of a state statute criminalizing certain acts of sodomy presented a justiciable controversy because the plaintiffs alleged that they had in fact committed acts in violation of the statute and that they intended to do

so again in the future. The court explained that even though none of the plaintiffs had been prosecuted or specifically threatened with prosecution, as a result of their past and on-going violations of the statute, they "face[d] a daily dilemma due to the existence of the statute," to wit, they stood subject to prosecution at any time. *Picado*, 349 Ark. at 618, 80 S.W.3d at 341. In the present case, on the other hand, the plaintiff will not become subject to any possible sanction for violating Ark. Code Ann. § 16-10-410(d) unless and until he prevails is an election for a judicial position or until someone attempts to appoint him to such a position. Thus, this matter is not ripe for the Court's consideration and should be dismissed.

C. **Even if All Necessary Parties Were Before the Court and the Plaintiff's Constitutional Challenge Was Ripe for Consideration, the Challenged Statute Passes Constitutional Muster**

Even if all necessary parties were before the Court and the plaintiff's constitutional challenge was ripe for consideration, the challenged statute nevertheless passes constitutional muster.

The plaintiff alleges that Amendment 80, § 16 to the Arkansas Constitution conflicts with Ark. Code Ann. § 16-10-410(d), rendering the statute unconstitutional. According to the plaintiff, § 16-10-410 impermissibly adds to Amendment 80's prescribed qualifications for judicial office. To the contrary, Amendment 80 changed the state court system; it did not nullify authority granted to the legislature pursuant to Amendment 66. Section 16-10-410, was enacted by the General Assembly to address judicial misconduct and disability, which it was authorized to do pursuant to Amendment 66 to the Arkansas Constitution. As such, the statute meets constitutional muster, and the plaintiff's complaint for declaratory judgment should be dismissed.

Any challenge to the constitutionality of a state statute begins with the long-standing principle that the statute is presumed to be constitutional. *Clinton v. Bonds*, 306 Ark. 554, 816 S.W.2d 169 (1991). The burden of proving that a statute is unconstitutional rests upon the party challenging it. *Id.* If it is at all possible for a reviewing court to construe a legislative enactment so that it will meet the test of constitutionality, it must do so; every reasonable construction must be resorted to in order to save a challenged statute from unconstitutionality, and any doubts must be resolved in the act's favor. *Hand v. H & R Block, Inc.*, 258 Ark. 774, 528 S.W.2d 916 (1975); *Bush v. Martineau*, 174 Ark. 214, 295 S.W. 9 (1927); *State v Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992).

Another key principle of constitutional interpretation is how the constitution limits, or in this case, does not limit legislative action. The Arkansas Constitution does not serve as a vehicle for bestowing specific powers to act upon the State government. Rather, the Constitution serves to place limitations on the power given to the General Assembly. Consequently, if no limitation of power is either specifically or impliedly expressed in the Constitution, the legislature may, as the representative of the people, enact laws as it deems necessary. *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979). It is the duty of the courts to harmonize all provisions of the Constitution and amendments thereto and to construe them with a view of a harmonious whole. *Huggins v. Wacaster*, 223 Ark. 390, 266 S.W.2d 58 (1954). It is a rule of universal application that the Constitution must be considered as a whole, and it must be read in the light of other provisions relating to the same subject. *Chesshir v. Copeland*, 182 Ark. 425, 32 S.W.2d 301 (1930). Constitutional amendments are liberally construed so as to

accomplish their purposes. *Fort Smith School District v. Beebe*, 2009 WL 1564465 (Ark. 2009).

When viewed in light of these principles, Amendment 66 and Amendment 80 do not stand in irreconcilable conflict, and they can reasonably stand together. Thus, Ark. Code Ann. § 16-10-410 is necessarily constitutional.

Without a doubt, the public's stake in a judiciary that is both honest in fact and honest in appearance is profound. Society leaves many of its final decisions to its judiciary; consequently, it is totally dependent on the scrupulous integrity of that judiciary. Until the passage of Amendment 66, no separate body dedicated exclusively to the oversight of judicial discipline and disability existed, and judicial misconduct could be addressed only by an impeachment action tried to the Senate. *See* Ark. Const. Art. 5 § 1. Amendment 66 to the Arkansas Constitution, entitled "Judicial Discipline and Disability Commission," was approved by the voters at the 1988 general election. Amendment 66 mandated legislative action and granted the General Assembly and the Arkansas Supreme Court the authority to put the amendment into operation. The legislature enacted Ark. Code Ann. § 16-10-401, *et seq*. pursuant to the authority of and as directed by Amendment 66. Pursuant to its constitutional authority, in setting forth grounds for removal, the General Assembly concluded that "[a]ny judge removed from office pursuant to this subchapter cannot be appointed thereafter to serve as a judge." § 16-10-410(d). Amendment 66 reflected the concerns of citizens by creating a mechanism by which judicial misconduct and disability would be addressed.

Amendment 80, on the other hand, has no application to citizens' concerns about the discipline and disability of the judiciary and was not intended to displace

authority given the legislature in Amendment 66. Instead, it was intended to modernize certain archaic aspects of the State's then-existing court system.

With the passage of Amendment 80 in the November 2000 general election, the Arkansas electorate significantly revised the State's trial court system. In particular, Amendment 80 combined the previously separate courts of law and equity, creating a single system of circuit courts of general jurisdiction.

As to the qualifications for members of the judiciary, Amendment 80 made few changes. Going back to the Arkansas Constitution of 1836, circuit court judges were elected by the General Assembly, with the sole requirement that the judge be 25 years old. An 1848 amendment provided for the election of circuit court judges by qualified voters in the district. The Arkansas Constitution of 1868 added that a candidate be a qualified elector of the State, one year resident of the State, and reside in the district in which he sought office. The Arkansas Constitution of 1874 changed the age requirement to 28 years and added that the candidate must be a U.S. citizen and have practiced law for six years. Section 16 of Amendment 80 provides:

> (B) Circuit Judges shall have been licensed attorneys of this State for at least six years immediately preceding the date of assuming office. They shall serve six year terms.
>
> (D) All Justices and Judges shall be qualified electors within the geographical area from which they are chosen, and Circuit and District Judges shall reside within that geographical area at the time of election and during their period of service. A geographical area may include any county contiguous to the county to be served when there are no qualified candidates available in the county to be served.

In sum, as it pertained to judicial candidates, Amendment 80 basically eliminated any minimum age requirement. It in no way, however, impacted Amendment 66 or altered or

nullified legislative acts taken to address judicial misconduct as directed by Amendment 66.

In support of his position that § 16-10-104(d) is unconstitutional, the plaintiff cites two Arkansas cases. These cases are inapplicable, however, because they address *additional* qualifications imposed on candidates for office, not *limitations* on an individual's eligibility to hold office as the result of past judicial disciplinary action. *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940), involved a matter (not specified in the opinion) pending before the county court. Gladish, who normally would have acted as judge of the county court, recused, and Green was appointed to preside over the matter. Later, when Green submitted a claim to be paid for his services in that matter, Gladish denied payment because Green was not a lawyer, and Gladish therefore found that Green was not qualified to preside over a county court matter. Arkansas Act 452 of 1917 required that the county judge be an attorney. The Arkansas Supreme Court concluded that Act 452 had improperly added an additional qualification (being a licensed attorney) to the qualifications for judge of county court set forth in the Arkansas Constitution. *Green*, 200 Ark. at 207, 138 S.W.2d at 379. Amendment 66, adopted in 1988, was not an issue in the *Green* case, which was decided in 1940.

In *Daniels v. Dennis*, 365 Ark. 338, 229 S.W.3d 880 (2006), the court addressed a legislative act providing that only persons not previously appointed to the bench in the same circuit could be candidates for election as circuit judge. The Arkansas Supreme Court concluded that this additional qualification for the position of circuit judge ran afoul of Amendment 80, Section 16, which requires only that a candidate be a licensed attorney for six years and a qualified elector within the geographic area from which he or

she is to be chosen. Like the *Green* case, *Dennis* did not have any connection to Amendment 66, because no disciplinary action against a judge was at issue.

These cases are plainly distinguishable from the case presently before the Court. Those cases did not involve the specific authority granted to both the legislative and judicial branches by Amendment 66. Nor did they involve malfeasance by a member of the judiciary and his subsequent removal from office.

To find as the plaintiff suggests would undermine the salutary purpose sought to be achieved by Amendment 66, i.e., to deal appropriately with judges who have violated the Arkansas Code of Judicial Conduct. Clearly, in adopting Amendment 66 and establishing a scheme for addressing judicial misconduct, the people did not intend for a sitting judge to effectively end run discipline by resuming office shortly after removal. Under the plaintiff's theory, a judge removed by the Supreme Court could be appointed by the Governor to fill the very vacancy his own removal created. Amendment 80 made no changes at all to Amendment 66. And, there is nothing to suggest that the voters in any way attempted to repeal or restrict the judicial discipline regime in Amendment 66 when they adopted Amendment 80.

The defendant respectfully submits that there is no irreconcilable conflict between Amendment 66 and Amendment 80 or between Ark. Code Ann. § 16-10-410(d) and Amendment 80. These provisions may, and should, be read in harmony in order best to give effect to the intentions of the voters. The defendant is entitled to judgment as a matter of law, and accordingly, summary judgment in favor of the defendant is appropriate.

Conclusion

WHEREFORE, defendant Charlie Daniels, in his official capacity as Arkansas Secretary of State, respectfully requests that the Court affirms the challenged Arkansas statute, dismisses the plaintiff's complaint, and grants the defendant all other appropriate relief.

Respectfully Submitted,

DUSTIN McDANIEL
Attorney General

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CERTIFICATE OF SERVICE

I, Mark N. Ohrenberger, certify that on March 25, 2010, a copy of this document was served via U.S. mail on the following individual:

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_____
Mark N. Ohrenberger