IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTEENTH DIVISION

WILLARD PROCTOR, JR. PLAINTIFF

Vs. CASE NO.: 60CV-10-1439-17

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

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Willard Proctor, Jr., by and through undersigned counsel, and for his response to the motion for summary judgment filed by the defendant, states:

1. Plaintiff specifically denies that the defendant is entitled to the entry of a summary judgment under ARCP Rule 56.

2. Entry of a summary judgment in favor of the defendant is not proper since there are genuine issues of material fact that remain to be litigated.

3. Furthermore, entry of a summary judgment in favor of the defendant is not proper since the defendant is not entitled to a summary judgment as a matter of law.

4. Plaintiff's pre-election challenge is not moot; and, the challenge is properly pled under AC.A. § 7-5-801(a) (2010).

4. The issues raised in plaintiff's complaint are ripe for review by this Court.

5. ARK. CODE ANN. §16-10-410(d) is unconstitutional since it improperly adds a qualification for the election to the office of circuit judge that is not contained in the Arkansas Constitution. *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940); *Allred v.*

McLoud, 343 Ark. 35, 31 S.W.3d 836 (2000); *Dennis v. Daniels*, 365 Ark. 388, 229, S.W.3d 880 (2006).

Wherefore, plaintiff prays that this response be deemed good and sufficient, that defendant's motion be dismissed, that he be granted his costs and fees, and that he be granted all other relief to which he may be entitled.

Respectfully submitted,

WILLARD PROCTOR, JR.

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CERTIFICATE OF SERVICE

I, Chrishauna Clark, do hereby certify that I have served a copy of the above and foregoing pleading upon all parties to this proceeding by placing hand delivering the same to:

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Shauna Clark
Chrishauna Clark

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HONORABLE CHARLIE DANIELS
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PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The law is well settled that summary judgment is to be granted by a circuit court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *See Stromwall v. Van Hoose*, 371 Ark. 267, 265 S.W.3d 93 (2007). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appellate review, the appellate court will determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. In this case, summary judgment is not appropriate because there are genuine issues of material fact to be litigated and the Defendant is not entitled to the entry of summary judgment as a matter of law.

The defendant advances three arguments in favor of his Motion for Summary Judgment: (1) Plaintiff's pre-election challenge is moot and improperly pled; (2) the issue is not ripe; and (3) ARK. CODE ANN. §16-10-410(d) is constitutional. Each of these arguments will be addressed in turn.

I. Plaintiff's Pre-Election Challenge is no Moot

Much of the Defendant's argument toward mootness hinges on the fact that the Plaintiff has been certified as a candidate in the upcoming non-partisan judicial election. However, the issue presented to this court is not simply one of certification, and Plaintiff's requests are not moot simply because he has been certified as a candidate. On the contrary, the Plaintiff needed to be a candidate to obtain the private right of action conferred specifically upon candidates to contest either the certification of nomination or the certification of vote. Ark. Code Ann. § 7-5-801(a) (2010), specifically provides that "[a] right of action is conferred on any *candidate* to contest the certification of nomination or the certificate of vote as made by the appropriate officials in any election." (emphasis added). As such, Plaintiff's certification does not render the issue moot. Rather, it gives him standing to bring this issue before the court. Since plaintiff is a candidate, he has the statutory right to contest the certification of his nomination.

It is also important to reiterate that the issue before the court is not simply about certification. The issue of certification of the vote may also be appropriately contested under Ark. Code Ann. § 7-5-801(a) (2010). If this court finds ARK. CODE ANN. §16-10-410(d) to be constitutional, there would be an issue as to whether the vote should be certified. Therefore, this matter is not moot.

The true issue before the court is the constitutionality of ARK. CODE ANN. §16-10-410(d) The Arkansas Supreme Court has held that plaintiffs have standing to challenge a law if they "show that [they have] a right which a statute infringes upon and that [they are] within the class of persons affected by the statute." *Dep't of Human Servs. and Child Welfare Agency Review Bd.* v. *Howard*, 367 Ark. 55, 59, 238 S.W.3d 1, 4 (2006); *see also Ghegan & Ghegan, Inc.* v. *Weiss*,

338 Ark. 9, 14, 991 S.W.2d 536, 539 (1999) (same). "Stated differently, plaintiffs must show that the questioned act has a prejudicial impact on them." *Ghegan*, 338 Ark. at 15, 991 S.W.2d at 539 (internal cites omitted).

Plaintiff also has standing under the Arkansas Declaratory Judgments Act since his "rights, status, or other legal relations are affected by a statute," in which case the Act provides that he is entitled to "have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." Ark. Code Ann. §16-111-104 (West 2009). This Act is "liberally construed" to confer standing, particularly where, as here, the issue before the court is a matter of significant public interest and a matter of constitutional law. *Bryant* v. *English*, 311 Ark. 187, 190, 843 S.W.2d 308, 309 (1992); *see also* Ark. Code Ann. § 16-111-102 (b) & (c) (West 2009) (explaining that the Act is to be "liberally construed" to meet this legislative purpose of resolving uncertainty about statutes).

It is undisputed that Plaintiff's right and status to hold the office of circuit judge is affected by Ark. Code Ann. §16-10-410(d). This statute specifically prohibits Plaintiff from holding the office of circuit judge based on his removal on January 25, 2010. As a result, the Arkansas Declaratory Judgment Act gives the Plaintiff the right to have the construction and validity of this statute addressed since there is a significant public interest and a matter of constitutional law.

Strong public policy considerations urge this court to not to shy away from reaching the merits of this case and addressing this issue. The Plaintiff has been certified as a candidate in the upcoming non-partisan judicial election. Prior to being certified, the Plaintiff was removed from his position as a circuit judge. There is currently an Arkansas statute which precludes Plaintiff

from holding this position. These factors demonstrate, unequivocally, that the issue is not moot. This case represents a live controversy. This case should not be dismissed simply because the Plaintiff has been certified as a candidate. The Defendant acknowledges that if the Plaintiff wins the election, the very issues that are before the court will have to be re-litigated if this case is dismissed. *See* Defendant's Brief in Support of Motion for Summary Judgment, pgs. 7-8. This court should not allow the Defendant to slip out of this controversy simply by stating that the Plaintiff has been certified as a candidate when there is a plain, clear, and unambiguous statute which would forbid the Plaintiff from being elected. And, where there is an equally plain, clear, and unambiguous statute that confers upon the Plaintiff the ability to have his rights and status considered by this court. This case presents an issue of public importance that is likely to recur in the future. Moreover, the statute is continuous in its effect and thus has the effect of affecting other similarly situated judges. As such, the issue before the court is not moot.

Finally, the Plaintiff has simultaneously with this pleading filed an Amended Complaint adding the Pulaski County Election Commission and the Arkansas Judicial Discipline and Disability Commission as Defendants. Also included in the Amended Complaint is a request for certification of vote (pursuant to Ark. Code Ann. § 7-5-801) and a request for a writ of mandamus. These amendments should properly address the remainder of Defendant's pleading concerns. The Defendant's motion should be dismissed.

II. Plaintiff's Petition and Requests are Ripe for Consideration

Plaintiff's claims are ripe and present a justiciable issue to the court for consideration. The case relied upon by the Defendant clearly illustrates this point. In *Cummings v. City of Fayetteville*, 294 Ark. 151, 741 S.W.2d 638 (1987), a Fayetteville lawyer sued seeking a declaratory judgment that a statute was unconstitutional. *Id.* at 152, 741 S.W.2d at 638. The

statute in question governed the recall of city directors, and required 8,616 signatures in order to obtain a recall election. *Id.*, 741 S.W.2d at 638. However, the lawyer could not show where he had obtained any signatures and further did not allege that he had even tried to obtain signatures. In addition, when the Attorney General's office was notified of the suit, they declined to intervene. Because the Attorney General's office declined to intervene, there was no adverse party. The Arkansas Supreme Court determined that the case did not present a justiciable issue and outlined the following four factors that must be present to obtain a declaratory judgment:

> 1. there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it;
>
> 2. the controversy must be between persons whose interests are adverse;
>
> 3. the party seeking declaratory relief must have a legal interest in the controversy; in other words a legally protectable interest; and
>
> 4. the issue involved in the controversy must be ripe for judicial determination

Cummings, 294 Ark. at 153, 741 S.W.2d at 639. Upon review of these factors, the court ultimately determined that the lawyer was simply seeking a *legal opinion* and there was no justiciable presented before the court for determination.

In *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), the Arkansas Supreme Court expanded its holding in *Cummings*. The Court stated as follows:

> Though this court clearly requires the existence of a justiciable controversy prior to granting a declaratory judgment, we have heard challenges to the constitutionality of statutes and regulations by persons who did not allege that they had been penalized under the statutes or regulations. We have not always required prosecution or a specific threat of prosecution as a prerequisite for challenging a statute. In *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), and *State v. Epperson,* 242 Ark. 922, 416 S.W.2d 322 (1967), *rev'd,* 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), both this court and the United States

> Supreme Court considered a challenge to an Arkansas criminal statute that violated constitutional rights but had not triggered an actual prosecution during its forty-year history. Likewise, in *Magruder v. Arkansas Game and Fish Commission,* 287 Ark. 343, 698 S.W.2d 299 (1985), we heard a challenge to a regulation by a plaintiff who claimed no specific threat under the regulation. There, a fisherman challenged an AGFC regulation prohibiting the taking of black bass under fifteen inches from an Arkansas lake. The fisherman did not allege that he was either penalized for the conduct or threatened with enforcement of the regulation. This court allowed the fisherman to challenge the regulation, holding: The appellant alleged he was a licensed fisherman who frequently fished Lake Maumelle. Nothing in the record showed the commission challenged that allegation. If the commission's regulation is to be enforced it will have an effect on persons who fish Lake Maumelle regardless of who owns the lake. ***One whose rights are thus affected by a statute has standing to challenge it on constitutional grounds.***

Picado, 349 Ark. at 618-19, 80 S.W.3d at 341 (emphasis added). Thus, the Arkansas Supreme Court has thoroughly illustrated that with respect to ripeness, it is not necessary to prove or even allege an imminent threat of prosecution and/or sanction under the challenged statute. "One whose rights are thus affected by a statute has standing to challenge it on constitutional grounds." *Id.* at 619, 80 S.W.3d at 341.

Under the Arkansas Supreme Court's holdings in *Cummings* and *Picado*, the Plaintiff's claims are ripe for consideration. Unlike the lawyer in *Cummings*, the Plaintiff's case represents a live controversy. In *Cummings*, the Plaintiff did not do anything. However, in this case, the Plaintiff has actually filed and been certified as a candidate in the upcoming non-partisan judicial election. The Plaintiff is actively campaigning and seeking re-election. It is inapposite that the Plaintiff has not yet been elected. It is sufficient that the Plaintiff is presently engaged in a course of conduct where the end result, if the Plaintiff is successful, is proscribed by statute. Thus, the Plaintiff has an interest that is at stake.

In addition, this case is also unlike *Cummings* in that there is an adverse party. The Attorney General's office declined to intervene in *Cummings*; however, they are present and

representing the adverse party in the case *sub judice*. *Cummings* teaches that the presence of an adverse party is one of the factors necessary to obtain a declaratory judgment.

Finally, the voters residing within the sub-district also have an interest at stake. Voters have the right to elect the official of their choice. Voters who vote for the Plaintiff have a right to have this issue resolved. If the statute is constitutional, a vote for the Plaintiff would be wasted if it is later determined that he may not hold office. Failing to address this issue would be tantamount to voter disenfranchisement. The resulting harm could not be more real. Certainly the court has an interest in making sure this issue is decided on the merits. As all parties are before the court (because the Plaintiff has added the necessary parties requested by the Defendant, and cured all procedural defects in the pleadings), judicial economy is certainly served by hearing this matter.

Whatever the courts finding in this regards, Plaintiff, as a taxpayer has adequately pleaded—and indeed there is undisputed evidence—that Ark. Code Ann. §16-10-410(d) constitutes an illegal exaction in violation of Article 16 of the Arkansas Constitution, because it causes the state to misapply tax dollars in enforcing Ark. Code Ann. §16-10-410(d). Under the Arkansas Constitution, "[a]ny citizen of any county, city, or town may institute suit, in behalf of himself and others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." Ark. Const. art. 16, § 13. There are two types of illegal-exaction cases. This is a "public funds" case, where public funds generated from tax dollars are being misapplied or illegally spent because they are supporting enforcement of Ark. Code Ann. §16-10-410(d), which is unconstitutional. *See McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 370, 201 S.W.3d 375, 379 (2005); *Pledger* v. *Featherlite Precast Corp.*, 308 Ark. 124, 128,

823 S.W.2d 852, 854 (1992); *see also Fort Smith Sch. Dist.* v. *Beebe*, No. 08-618, 2009 WL 1564465, at *2-3 (Ark. June 4, 2009) (plaintiff in public funds case "must show that the State misapplied or illegally spent money that was lawfully collected" through taxes). The Arkansas Supreme Court's analysis in *McGhee* demonstrates beyond contravention that this court should hear Plaintiff's illegal exaction claim.

McGhee involved a challenge to the Check-Casher's Act which is administered by a division of the Arkansas State Board of Collection Agencies ("ASBCA"). 360 Ark. at 367-68, 201 S.W.3d at 376-77. The *McGhee* plaintiff did not allege that too much money was spent as a result of the Check-Casher's Act or that the act was itself a tax or identify any specific misapplied funds. Instead, the plaintiffs alleged that the ASBCA "used public funds to finance its operation" and those funds were used to implement the Check-Casher's Act that was challenged as unconstitutional. *Id.* at 372, 201 S.W.3d at 380. The court found that based on these allegations, "the expenditure of public funds to support the [ASBCA's] Division of Check-Cashing would be a misapplication of public funds" and therefore held "that the complaint sufficiently states a cause of action for illegal exaction." *Id.* In a subsequent opinion, the court declared the Check-Casher's Act unconstitutional. *McGhee* v. *Ark. State Bd. Of Collection Agencies*, 375 Ark. 52, 65, 289 S.W.3d. 18, 28 (2008).

The basis for standing to assert a justiciable claim in this case is no different than in *McGhee*. Plaintiff alleges that Ark. Code Ann. §16-10-410(d) causes the Arkansas Judicial Discipline and Disability Commission to expend tax dollars to administer an unconstitutional law. Defendant cannot dispute that the Commission's operations are funded by tax dollars. All that is required is that tax dollars are misapplied in carrying out an illegal or unconstitutional law. *McGhee*, 375 Ark. at 65, 289 S.W.3d at 28; *Fort Smith Sch. Dist.*, 2009 WL 1564465, at *2.

Even if plaintiff were required to show that Ark. Code Ann. §16-10-410(d) will cause the expenditure of "additional" funds beyond what would have been spent in its absence—and that is clearly not the standard—the undisputed facts establish that Ark. Code Ann. §16-10-410(d) would be used as a basis for removing Plaintiff. As such, Ark. Code Ann. §16-10-410(d) constitutes an illegal exaction.

III. Arkansas Code Annotated § 16-10-410(d) is unconstitutional because it impermissibly adds a qualification to the constitutional office of circuit judge

This court should declare Ark. Code Ann. § 16-10-410(d) unconstitutional because it adds a qualification for holding the office of circuit judge that is not listed in the Arkansas Constitution. As a preliminary matter, the issue before this court is not whether Amendment 80 conflicts with Ark. Code Ann. § 16-10-410(d). Qualifications for the office of circuit judge can be found in areas of the Arkansas Constitution other than Amendment 80. Thus, to the exent Ark. Code Ann. § 16-10-410(d) adds a qualification to a constitutional office by legislative enactment, it conflicts with every constitutional qualification. Nor is the issue before this court whether Amendment 80 and Amendment 66 can be properly reconciled. Rather, the issue before this court is whether Ark. Code Ann. § 16-10-410(d) adds a qualification to the constitutional office of circuit judge.

The Defendant advances two (2) primary arguments regarding this issue: (1) ACA 16-10-410(d) is constitutional because the legislature received its power to enact it pursuant to Amendment 66, and (2) the cases cited in Plaintiff's Complaint are distinguishable from the present case. Each of these arguments will be addressed in turn.

A. **Amendment 66 was properly enacted to address judicial discipline and removal, not qualifications for judicial office.**

Amendment 66 is titled "Judicial Discipline and Disability Commission." ARK. CONST. amend. 66. This amendment established a separate body to deal with judicial discipline and misconduct. Specifically, Amendment 66 enumerated four (4) areas of which the Judicial Discipline and Disability Commission (the Commission) was charged with oversight: discipline, suspension, leave, and removal. ARK. CONST. amend. 66. The Amendment did not delegate to the legislature the authority to add qualifications to a constitutional office.

When Amendment 66 was presented to the voters of Arkansas in the Fall of 1988, they were voting to establish the creation of a system to specifically address judicial discipline and disability. Because the Amendment does not mention that it also intended or sought to add qualifications for holding the office of circuit judge, it is improper to state that it was the intent and will of the voters to do so.

Moreover, even though the voters were on notice that certain additional provisions would be addressed later by legislative enactment; those additional areas to be addressed by the legislature were explicitly enumerated in Amendment 66: "[g]rounds for suspension, leave, or removal from office shall be determined by legislative enactment." ARK. CONST. amend. 66. Nowhere does it mention that Amendment 66 purported to set qualifications for the office of circuit judge or conferred upon the legislature the authority to set qualifications for this office. Enacting a statute which sets qualifications for a constitutional office is unconstitutional. *E.g. Dennis v. Daniels*, 365 Ark. 388, 229, S.W.3d 880 (2006); *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000); *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940). The proper method to add a qualification to a constitutional office is by constitutional amendment.

Moreover, this court should not presume to ascertain the intent of the people by any means other than looking at Amendment 66. Although the Defendant argues that the people would not have intended for a removed judge to resume office, it is important to note that this "intention" is not reflected in the plain language of Amendment 66. What the people did and/or did not intend is reflected in the Constitution. There is no need to guess about it as their intentions as easily ascertainable. We can ascertain them by looking at the Constitution.

Amendment 66 is very specific as to what it covers. Because the drafters used such specific language to state exactly what the Amendment encompassed and the exact provisions that would be later addressed by the legislature, it can be surmised that the drafters did not intend for it to cover qualifications. The drafters' intent is clear as evidenced by the existing language in the Amendment. It is clear that the drafters *knew* how to use specific language to articulate their concerns. They specifically enumerated the areas over which the Commission had oversight, the grounds for sanctions, and the method of administering discipline. However, the drafters chose not to include any language in the Amendment relating to qualifications. There is nothing in the subject or text of the Amendment which lends support to the notion that the drafters intended the Amendment to address qualifications for judicial office, or that the voters knew they were voting on an Amendment which established qualifications for the office of circuit judge. Amendment 66 provides a mechanism where judicial misconduct is addressed. In that, it achieves its stated purpose. However, Ark. Code Ann. § 16-10-410(d) runs afoul of that purpose and the Arkansas Constitution in that it attempts to limit who can be a judge by adding an additional qualification that is not listed in the Constitution. As such, the statute is unconstitutional.

Under the analysis used by the Defendant, the legislature could add a qualification for a constitutional office simply by basing the statute on a provision in the constitution which conferred on it the right to promulgate laws, rules and regulations. This sort of interpretation has been specifically disallowed by the Supreme Court. In *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000), the Supreme Court found a statute that placed term limits on county officials unconstitutional. The Supreme Court noted as follows:

> In defending the initiative, the members of the County Board of Election Commissioners direct this court's attention to Amendment 55, § 2, to the Arkansas Constitution and specifically to this language:
>
> (b) The Quorum Court may create, consolidate, separate, revise, or abandon any elective county office or offices except during the term thereof; provided, however, that a majority of those voting on the question at a general election have approved said action.
>
> According to the commissioners, if the quorum court has the authority to abolish or revise county offices, why should the people of the county not also have the corollary authority to limit those candidates who can stand for election to those offices? It, therefore, falls to this court to interpret § 2(b) of Amendment 55. In interpreting the language of a provision of the Arkansas Constitution, we have said that we endeavor to effectuate as nearly as possible the intent of the people in passing the measure. *S.W. Ark. Comunications, Inc. v. Arrington, 296 Ark. 141, 753 S.W.2d 267 (1988)*. We have also adopted the rule of construction in connection with interpreting provisions of our State Constitution that we give language its plain and ordinary meaning. *Foster v. Jefferson County Quorum Court, 321 Ark 105, 906 S.W.2d 314 opinion on granting rehearing* 321 Ark. 116-A, 901 S.W.2d 809 (1995).
>
> The thrust of § 2(b) of Amendment 55 and the Madison County initiative are easily distinguishable in the eyes of this court. Section 2(b) deals with the creation, revision, and abandonment of *county offices* and authorizes the restructuring of county government. The initiative, on the other hand, deals with *people* who desire to stand as candidates for election to county offices, not with the offices themselves. Amendment 55 is in no way concerned with limiting candidate eligibility. We, therefore, reject the Amendment 55 argument.

Allred supra at 839. The Supreme Court rejected a similar argument in *Dennis v. Daniels*, 365 Ark. 388, 229, S.W.3d 880 (2006). In *Dennis*, Charlie Daniels, as Secretary of State for the State

of Arkansas, appealed the order of summary judgment entered in Pulaski County Circuit Court, finding Act 1448 of 2005 unconstitutional, void, and of no effect. Act 1448 was codified as Ark. Code Ann. § 16-13-104 (Supp. 2005) and declared a person appointed as circuit judge to be ineligible to run as a candidate for any circuit judgeship in the same judicial circuit to which he or she was appointed. Daniels argued that Act 1448 was constitutional, in that it is a valid exercise of the General Assembly's authority over the creation and regulation of judicial districts and divisions to deny the advantages of incumbency to judges who were not elected. Daniels also argued that Act 1448 was intended to effectuate Amendment 29, which Daniels alleged, was intended to prevent appointed judges from running for election within the same judicial district to which he or she was appointed. Judge Jodi Raines Dennis, countered that Act 1448 added qualifications required of candidates for judicial office in violation of the Arkansas Constitution. She argued that qualifications required to run for judicial office are set out in section 16 of Amendment 80 to the Arkansas Constitution and are not subject to alteration by statute. The Secretary of State sought to have Judge Jodi Dennis removed from the ballot because she was appointed to the position of circuit judge within the district which she was seeking election. In upholding the decision of the trial court, the Supreme Court noted the following:

> "Act 1448 clearly prohibits a person who was appointed to serve as circuit judge from being a candidate for any circuit judgeship in the same judicial district to which he or she was appointed. Act 1448 sets qualifications to run for judicial office. It controls who may and who may not run for the position of circuit judge. As noted, Daniels asserts that this statute is intended "to effectuate the General Assembly's authority over the creation and regulation of judicial districts." The authority asserted by Daniels comes from Section 10 of Amendment 80 and provides the following with respect to "Jurisdiction, venue, circuits, districts and number of judges":
>
> The General Assembly shall have the power to establish jurisdiction of all courts and venue of all Actions therein, unless otherwise provided in this Constitution, and the power to establish judicial circuits and districts and the number of judges

for Circuit Courts and District Courts, provided such circuits or districts are comprised of contiguous territories.

While section 10 gives the General Assembly the authority to establish jurisdiction and venue, to the extent that authority is not controlled by other constitutional provisions, and the authority to set out the circuits and number of judges, it does not give the General Assembly the authority to set judicial qualifications. Judicial qualifications are set out in Amendment 80, § 16, which provides with respect to circuit judges that he or she must have been a licensed attorney for at least six years and a qualified elector within the geographic area from which he or she is chosen.

Where specific qualifications for office are listed in both the Arkansas Constitution and a statute, the constitution controls and voids the statute. *See, e.g., Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000). The court in *Allred* relied on *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940), where this court noted the prevailing rule that regulation of qualifications in the constitution acted as a restriction on any legislative power to impose additional qualifications. **In Arkansas, our constitution provides the qualifications for judicial candidates, and this court in *Green, supra*, held that where an office is created by the constitution, and qualifications for that office are fixed by the constitution, the General Assembly lacks the power to add to those qualifications.** We again so hold.

Dennis supra.(emphasis added) Defendant's argument that Amendment 66 conferred upon the legislature the ability to add a qualification to the constitutional position of circuit judge should likewise be dismissed. This argument runs counter to one of its own opinions. The relevant portions of AG Opinion 2009012 reads as follows:

> In one relevant Arkansas case, *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940), our Supreme Court held that the General Assembly did not have the authority to enact legislation requiring a county judge to be "learned in the law," as it would add an additional qualification to that constitutional office. *Id.* However, the Court' s reasoning in that case appeared dependant on the fact that the constitution specifically sets forth the qualifications for the office of county judge at Article 7, Section 29. *Id.* The court stated: "The makers of the constitution knew exactly what qualifications a county judge should have and fixed them and of course fixed all of them and not a part of them." *Id.* The holding of Green was most recently reiterated in the case of *Dennis v. Daniels*, 365 Ark. 388, 229, S.W.3d 880 (2006).

> In another relevant case, *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000), the Supreme Court held that an initiative which attempted to establish term limits for Madison County officials was in violation of the Arkansas Constitution in that it: 1) attempted to add to the specific qualifications set forth for county judge at Ark. Const. art. 7 § 29 and justice of the peace at Ark. Const. art. 7 § 41; and 2) attempted to add to the general qualifications applicable to all county officers, specifically Ark. Const. art. 19 § 3.
>
> Although constables are constitutional officers, their qualifications, unlike those of county judges, are not expressly set forth by the Arkansas Constitution.
>
> In sum, it is my opinion that, generally speaking, the General Assembly has the authority to set requirements in the nature of training requirements for constables. I must advise caution in making the ability to hold the office of constable contingent on satisfying any training requirements because of the potential argument that such action would impermissibly add an additional qualification to a constitutional office.

AG Opinion 2009012. (March 12, 2009) Arkansas Code Annotated § 16-10-410(d) adds a qualification to a constitutional office and therefore it is unconstitutional.

B. The Arkansas Supreme Court's prior jurisprudence demonstrates that the Defendant's distinction between "limitation" and "qualification" is of no consequence.

In its argument, the defendant attempts to make a difference between a limitation and a qualification. The difference between a limitation and a qualification is a distinction without a difference, and the Arkansas Supreme Court's jurisprudence properly bears this out. *E.g. Dennis v. Daniels*, 365 Ark. 388, 229, S.W.3d 880 (2006); *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000); *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940). Black's Law Dictionary defines a limitation as "the act of limiting" and "a restriction." Black's Law Dictionary (8th ed. 2004). Qualification is defined as "the possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a

position or office." *Id.* Thus by definition, a limitation could impose a restriction that would prevent a person from possessing the "qualities or properties . . . inherently or legally necessary to make one eligible for a position or office." *Id.* It is at this point, that the limitation (or restricted behavior) becomes a qualification for office. The Arkansas Supreme Court has reviewed statutorily imposed "limitations" on constitutional offices and determined on at least three (3) occasions that the "limitation" was actually a qualification for holding office, and as such, unconstitutional.

In *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000), the Arkansas Supreme Court struck down legislation which attempted to impose term limits on several constitutional offices. The term limits were not specifically referred to in the legislation as "qualifications" for office. However, the Arkansas Supreme Court held that because the term limits in essence imposed a qualification to holding office (the qualification being a maximum number of years of service), they were unconstitutional. *Allred*, 343 Ark. at 40, 31 S.W.3d at 838. Because the term limits served to preclude a class of persons from holding office, they were deemed to be a qualification for holding office—even though they were not titled as such. *See id.*, 31 S.W.3d at 838. The Court reiterated its prior holding in *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940) that where the Arkansas Constitution has fixed the qualifications for holding office, the legislature may not add additional qualifications. *Id.*, 31 S.W.3d at 838.

In distinguishing *Mississippi County v. Green*, the Defendant argues the case is distinguishable because it was decided prior to Amendment 66's enactment. *See* Defendant's Brief in Support of Motion for Summary Judgment, pg. 13. However, this fact alone does not distinguish the case. As a preliminary matter, whether or not Amendment 66 was enacted at the time *Green* was decided is irrelevant. If Amendment 66 impermissible delegated to the

legislature the authority to add qualifications to the office of circuit judge (which it did not)—then that is an impermissible delegation of power. The bottom line is that even if the legislature was acting pursuant to authority granted in the Constitution, if the grant of power is wrong, then the resulting legislation is also wrong.

In *Green*, the Arkansas Supreme Court held that Act 452 of 1917 impermissibly added a qualification to the constitutional office of county judge that was not listed in the Arkansas Constitution. This is precisely what has occurred in the case *sub judice*. Arkansas Code Annotated § 16-10-410(d) has added the qualification of having never been removed as a judge to the qualifications of circuit judge that are listed in the Arkansas Constitution. The legislation runs afoul of the Constitution.

Likewise, the Defendant claims that the Plaintiff's reliance on *Dennis v. Daniels*, 365 Ark. 388, 229, S.W.3d 880 (2006) is misplaced as Amendment 66 was not at issue in that case. As previously stated, the Defendant's reliance on Amendment 66 as giving the legislature the authority to add qualifications to the constitutional office of circuit judge is misplaced. If there was language within the text of Amendment 66 which stated that previously removed circuit judges could never again hold office, then our arguments would be moot. But this is not what Amendment 66 states or even suggests. Amendment 66 concerns removal, not qualifications.

Finally, the Defendant argues that the people did not *intend* for a previously removed judge to resume office. This is an interesting argument as there are some previously removed judges who have run for office and been re-elected. But as established earlier, we do not have to guess or surmise what the people intended. Their intentions are reflected in the plain text of the Constitution. Upon review of the Constitution (and thus, their intentions), their argument is without merit.

For the foregoing reasons, Plaintiff respectfully requests this court to dismiss Defendant's Motion for Summary Judgment.

Respectfully submitted,

WILLARD PROCTOR, JR.

By: Shauna Clark

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CERTIFICATE OF SERVICE

I, Chrishauna Clark, do hereby certify that I have served a copy of the above and foregoing pleading upon all parties to this proceeding by hand delivering the same to:

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Shauna Clark
Chrisauana Clark

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTEENTH DIVISION

WILLARD PROCTOR, JR. PLAINTIFF

Vs. CASE NO.: 60CV-10-1439-17

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HONORABLE CHARLIE DANIELS
IN HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE
ARKANSAS, THE ARKANSAS JUDICIAL
DISCIPLINE AND DISABILITY COMMISSION
AND THE PULASKI COUNTY ELECTION
COMMISSION DEFENDANTS

AMENDED COMPLAINT

COMES NOW the Plaintiff, Willard Proctor, Jr., by and through undersigned counsel, and for his Amended Complaint, states as follows:

1. This is an action for declaratory relief pursuant to A.C.A. §16-111-104, a pre-election action seeking relief pursuant to A.C.A. §7-5-801 and an illegal exaction claim under Article 16, section 13 of the Arkansas Constitution.

2. Plaintiff is a resident of Pulaski County, Arkansas. Plaintiff is also a taxpayer.

3. Plaintiff has filed for the office of Circuit Judge for Pulaski County, Arkansas, Fifth Division as a write-in candidate.

4. Defendant Honorable Charlie Daniels is the Secretary of State for the State of Arkansas and is sued in his official capacity. The Arkansas Judicial Discipline and Disability Commission (hereinafter referred to as "JDDC") is a governmental

entity. The Pulaski County Election Commission is a governmental entity.

5. Defendant Daniels is responsible for receiving filings for candidates for state and federal office. In order to file to run as a non-partisan judicial candidate, the Plaintiff would file with the Secretary of State. A.C.A. §7-10-103. The Secretary of State would then be responsible for certifying Plaintiff's nomination and the certification of the vote. A.C.A. §7-7-401. Defendant Stewart is responsible for enforcing laws related to the discipline of judges. Defendant Allen is responsible for the certification of nomination and votes for candidates for office in Pulaski County to the Secretary of State.

6. The office of Circuit Judge for the State of Arkansas is a constitutional office created and defined by the Arkansas Constitution.

7. To be eligible to hold the position of Circuit Judge, a person must meet the qualifications set out in the Arkansas Constitution.

8. Plaintiff meets the qualifications for the office of Circuit Judge that are contained in the Arkansas Constitution. Plaintiff is a citizen on the United States of America. ARK. CONST. amend. 51, §6. Plaintiff is a resident of Pulaski County, Arkansas. ARK. CONST. amend. 51, §6. Plaintiff is over the age of eighteen. He is forty-seven. ARK. CONST. amend. 51, §6. Plaintiff is a lawful registered voter. ARK. CONST. art. 3, §1 as amended by Arkansas

Constitution, ARK. CONST. amend. 51, §51; ARK. CONST. amend. 80. Amendment 80, Section 16(B) to the Arkansas Constitution defines the qualifications to serve as a Circuit Judge for the State of Arkansas. It states that Circuit Judges "shall have been licensed attorneys of this State for at least six years immediately preceding the date of assuming office." Plaintiff has been a licensed attorney for this State for over twenty-two (22) years. Plaintiff resides in the geographical area to be served. ARK. CONST. amend. 80, §16. Article 5, §9 of the Arkansas Constitution prohibits persons convicted of "embezzlement of public money, bribery, forgery, or other infamous crime" from holding any office of trust in the State of Arkansas. Plaintiff has never been convicted of a crime.

9. On January 25, 2010, plaintiff was removed from his position as a Circuit Judge for Pulaski County by the Arkansas Supreme Court.

10. A.C.A. §16-10-410(d) provides that any judge that has been removed from office cannot be appointed or elected to serve as a judge.

11. A.C.A. §16-10-410(d) adds a qualification for the office of Circuit Judge not contained in the Arkansas Constitution.

12. It is settled law that the legislature may not by enactment add a qualification for office to a constitutional office. In *Green v. Mississippi*, 200 Ark. 204, 138 S.W.2d 377 (1940), the Arkansas Supreme Court addressed the issue with respect to the office of County Judge. The Court stated as follows:

> It is true that section 10 of act 452 of the acts of 1917, provides that a person must possess such qualifications in order to be a county judge of Mississippi county, but the act is void in so far as it imposes such qualifications upon a person in order to be a county judge in Mississippi county. The qualifications fixed by the constitution to be county judge in this state inferentially prohibits the legislature from fixing additional qualifications. Why fix them in the first place if the makers of the constitution did not intend to fix all the qualifications required, and why fix only a part of them and leave it to the legislature to fix other qualifications? There is no reasonable answer to these questions. The makers of the constitution knew exactly what qualifications a county judge should have and fixed them, and of course, fixed all of them and not a part of them. The makers of the constitution intended to cover the whole subject of the qualifications for a county judge. Had the makers of the constitution intended otherwise they would have created the office of the county judge with directions to the legislature to fix their qualifications. Instead of delegating this authority to the legislature they fixed the qualifications of county judges themselves, thinking perhaps it was better to have a good business man in the position than some lawyer who had practiced three years. Every county at that time had business to attend to and has since and will always have important business for the county to attend to and the makers of the constitution well knew that the electorate would have a better opportunity to select a man of good business education from all the citizens than if restricted to the selection of a person of good business education from among the lawyers in the county only.

Green v. Mississippi, 200 Ark. 204, 138 S.W.2d 377 (1940).

More recently, in *Daniels v. Dennis*, 365 Ark. 338, 229 S.W.3d 880 (2006), the Arkansas Supreme Court addressed this issue again. Chief Justice Hannah wrote for an unanimous court as follows:

> Where specific qualifications for office are listed in both the Arkansas Constitution and a statute, the constitution controls and voids the statute. *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000). The court in *Allred* relied on *Mississippi County v. Green*, this court noted the prevailing rule that regulation of qualifications in the constitution acted as a restriction on any legislative power to impose additional qualifications. In Arkansas, our constitution provides the qualifications for judicial candidates, and this court in *Green supra* held that where an office is created by the constitution, and qualifications for that office are fixed by the constitution, the General Assembly lacks the power to add to those qualifications. We again so hold . . . .
>
> With respect to the prevailing rule, this court in *Mississippi County v. Green 200 Ark. 204, 207, 138 S.W.2d 377, 379 (1940)*, cited 22 Ruling Case Law *Public Officers* § 41, at 401 (1918), which provides that, "[t]he power which each state has to fix the qualifications of its officers is generally exercised by inserting appropriate provisions in its constitution, and when this is done the legislature is restricted in its right to impose additional qualifications." It is further stated in this same work that "the better opinion appears to be that a regulation on the subject inserted in the constitution operates as an implied restriction on the power of the legislature to impose additional qualifications."

Daniels v. Dennis, 365 Ark. 338, 340-41, 229 S.W.3d 880, 882-83 & n.1 (2006).

The Attorney General's office has issued a recent opinion which is in accord with these holdings. *See* AG Opinion 2009012 (March 12, 2009). The relevant portions read as follows:

> In one relevant Arkansas case, Mississippi County v. Green, 200 Ark. 204, 138 S.W.2d 377 (1940), our Supreme Court held that the General Assembly did not have the authority to enact legislation

> requiring a county judge to be "learned in the law," as it would add an additional qualification to that constitutional office. Id. However, the Court' s reasoning in that case appeared dependant on the fact that the constitution specifically sets forth the qualifications for the office of county judge at Article 7, Section 29. Id. The court stated: "The makers of the constitution knew exactly what qualifications a county judge should have and fixed them and of course fixed all of them and not a part of them." Id. The holding of Green was most recently reiterated in the case of Daniels v. Dennis, 365 Ark. 338, 229 S.W. 3d 880 (200).
>
> In another relevant case, Allred v. McLoud, 343 Ark. 35, 31 S.W.3d. 836 (2000), the Supreme Court held that an initiative which attempted to establish term limits for Madison County officials was in violation of the Arkansas Constitution in that it: 1) attempted to add to the specific qualifications set forth for county judge at Ark. Const. art. 7, § 29 and justice of the peace at Ark. Const. art. 7, § 41; and 2) attempted to add to the general qualifications applicable to all county officers, specifically Ark. Const art. 19,§ 3.
>
> Although constables are constitutional officers, their qualifications, unlike those of county judges, are not expressly set forth by the Arkansas Constitution.

AG Opinion 2009-012. (March 12, 2009)

13. The additional qualification contained in A.C.A. §16-10-410(d) is akin to the legislative enactments that attempted to add term limits, require that a county judge have a law degree and limit a candidate from running in the same district. Each of these enactments were held unconstitutional because they added additional qualifications to running for a constitutional office that were not defined in the constitution. Likewise, A.C.A. §16-10-410(d) is

unconstitutional because it adds a qualification for candidacy as a Circuit Judge not specifically listed in Arkansas Constitution.

14. Pursuant to Ark. Code Ann. § 7-5-801(a), Plaintiff questions the certification his nomination as a candidate for circuit judge and questions the certification of any vote by the Defendant Pulaski County Election Commission or the Defendant Secretary of State. This court should declare Ark. Code Ann. § 16-10-410(d) unconstitutional. If the Court finds Ark. Code Ann. § 16-10-410(d) is not unconstitutional, it should issue a mandamus upon PCEC directing it to remove Plaintiff's name from the ballot.

15. The nonpartisan primary is scheduled for May 18, 2010. Early voting begins on May 3, 2010. Plaintiff prays that this matter be immediately set for a hearing in sufficient time to be declared eligible for election as a Circuit Judge prior to the election.

16. The Attorney General for the State of Arkansas is being notified of these proceedings since the constitutionality of a statue is being contested.

WHEREFORE, all premises considered, plaintiff prays a declaratory judgment be entered declaring A.C.A. §16-10-410(d) to be unconstitutional, that the Secretary of State and the Pulaski County Elections Commission be allowed to certify plaintiff's nomination and votes cast in his favor as a Circuit Judge and that he be granted all other relief to which he is entitled.

Respectfully submitted,

WILLARD PROCTOR, JR., PLAINTIFF

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CERTIFICATE OF SERVICE

I, Chrishauna Clark, the undersigned, do hereby certify that on this 29th day of March, 2010, I have hand-delivered a true copy of the above pleading to:

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Ms. Karla Burnett
Pulaski County Attorney
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Little Rock, AR 72201

Chrishuana Clark

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTEENTH DIVISION

WILLARD PROCTOR, JR. **PLAINTIFF**

vs. **CASE NO.:60CV-10-1439-17**

HONORABLE CHARLIE DANIELS IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, THE ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSIONS AND THE PULASKI COUNTY ELECTION COMMISSION **DEFENDANTS**

PULASKI COUNTY ELECTION COMMISSION'S ANSWER TO AMENDED COMPLAINT

COMES NOW Defendant Pulaski County Election Commission, by and through the Pulaski County Attorney's Office, and for its Answer to the Amended Complaint, states as follows:

1. With regard to Paragraph 1, it contains no factual allegations, however, Defendant denies that a pre-election challenge can be brought pursuant to Ark. Code Ann. §7-5-801 which is applicable to post-election contests. *See, Zolliecoffer v. Post*, 371 Ark. 263, 265 S.W.3d 114 (2007). Further, while Paragraph 1 states that is a claim for illegal exaction under Article 16, §13 of the Arkansas Constitution, no other allegation contained in the Amended Complaint pertains to illegal exaction.

2. With regard to Paragraph 2, Defendant admits the allegations.

3. With regard to Paragraph 3, Defendant admits the allegations.

4. With regard to Paragraph 4, Defendant admits the allegations.

5. With regard to Paragraph 5, Defendant admits that Defendant Daniels, as Secretary of State, has the responsibilities set forth therein. With regard to the allegations against "Defendant Stewart" and "Defendant Allen", there are no Defendants so named.

Defendant states that the Pulaski County Election Commission is the entity responsible for conducting the election and certifying the election results.

6. With regard to Paragraph 6, Defendant admits the allegations.

7. With regard to Paragraph 7, Defendant admits the allegations.

8. With regard to Paragraph 8, some of the language contained therein is a statement and/or recitation of the law and, as such, is not able to be answered with an admission or a denial. The Defendant states that the law speaks for itself. Defendant admits the allegations regarding Plaintiff's residency, age, voter registration status, and license to practice law.

9. With regard to Paragraph 9, Defendant admits the allegations.

10. With regard to Paragraph 10, the language contained therein is a statement and/or recitation of the law and, as such, is not able to be answered with an admission or a denial. The Defendant states that the statute speaks for itself.

11. With regard to Paragraph 11, Defendant denies the allegations.

12. With regard to Paragraph 12, the language contained therein is a statement and/or recitation of the law and, as such, is not able to be answered with an admission or a denial.

13. With regard to Paragraph 13, the language contained therein makes no factual allegation, but is a legal argument and, as such, is not able to be answered with an admission or a denial.

14. With regard to Paragraph 14, as noted above, Defendant denies that a pre-election challenge can be brought pursuant to Ark. Code Ann. §7-5-801 which is applicable to post-election contests between candidates. Defendant affirmatively states that Plaintiff has not been nominated as a candidate in this election, so there is not certificate of nomination to question. Further, because the election has not taken place, there is not a vote to certify. The Court cannot

issue an order directing the Pulaski County Election Commission to remove Plaintiff's name from the ballot because Plaintiff's name does not appear on the ballot. A write-in blank does appear on the ballot since Plaintiff has been certified as a write-in candidate. At this time, the entire election has been programmed and the paper ballots are in the process of being printed. Changes to the ballot would affect not only the paper ballots, but the personal electronic ballots (those used for early voting), and the optical scanning machines used to read paper ballots and count votes. If the Court were to order the Election Commission to remove the blank both the Preferential Primary Election and entire Nonpartisan Judicial General Election, not just this race, would have to be reprogrammed. At this late date, that would jeopardize the entire election process. The appropriate remedy at this time, if any, is to order the Election Commission to either count, or not count, the votes cast for Plaintiff.

15. With regard to Paragraph 15, Defendant admits that the Nonpartisan Judicial General Election and the Preferential Primary Election is scheduled for May 18, 2010 and that early voting begins on May 3, 2010. The remainder of Paragraph 15 is a prayer for hearing and, as such, is not able to be answered with an admission or a denial.

16. With regard to Paragraph 16, Defendant admits that the Attorney General has been notified.

17. Defendant denies all allegations not specifically admitted herein.

18. Defendant affirmatively states that April 13, 2010 is the deadline for it to deliver the absentee ballots to the county clerk for the Nonpartisan Judicial General Election and the Preferential Primary Election. Ark. Code Ann. §7-5-407(a). For this reason, as stated above, the ballots are already in the process of being printed. It is simply too late to make changes to the ballot and still meet the statutory election deadlines.

WHEREFORE, Defendant Pulaski County Election Commission respectfully requests that the Court decide the issues which have been brought before it. Additionally, the Pulaski County Election Commission respectfully requests that the court not order any changes to the ballot at this time, but limit any remedy to the issue of counting, or not counting, votes cast for the Plaintiff.

Respectfully submitted,

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And
AMANDA M. MITCHELL, Ark. Bar #97010
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CERTIFICATE OF SERVICE

I, Karla Burnett, hereby certify that a copy of the foregoing has been served upon all parties by email and by placing same in the United States mail, postage prepaid, on this 31st day of March, 2010 to:

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KARLA BURNETT

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, ET AL. **DEFENDANTS**

REPLY TO RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND COMBINED MOTION TO DISMISS

Defendant Charlie Daniels, in his official capacity as Arkansas Secretary of State, submits this brief in reply to the plaintiff's response to defendant Daniels' motion for summary judgment and is combined as defendant Daniels' motion to dismiss the amended complaint.

Introduction

Although plaintiff Willard Proctor, Jr. filed an amended complaint, many of the issues raised in that amended complaint are substantially similar to those raised in the original complaint. Accordingly, in filing this brief, defendant Daniels replies to the plaintiff's response to the original motion for summary judgment, and the defendant renews his motion for dismissal of this case, including the amended complaint. The plaintiff's petition for this Court to declare that Ark. Code Ann. § 16-10-410(d) is unconstitutional should be denied; his petition for mandamus relief against defendant Daniels should be denied; and the amended complaint should be dismissed.

Argument

As an initial matter, pursuant to Rule 10(c) of the Arkansas Rules of Civil Procedure, defendant Daniels incorporates by reference the arguments advanced in Argument Section C of the brief supporting his original motion for summary judgment. In his response to defendant Daniels' original summary judgment motion, the plaintiff argued that in enacting Amendment 66 to the Arkansas Constitution, the voters established a system to address matters of judicial discipline, but they expressed no intention to add new qualifications for individuals who may hold the office of circuit judge. (Pl. Br. in Support of Resp. to Mot. for Summ. J. at 10.) However, the plaintiff overlooks the fact that in authorizing the Arkansas Supreme Court to suspend or remove judges, the voters in fact approved the permanency of removal from judicial office when they enacted Amendment 66.

The Arkansas Supreme Court has at least implicitly adopted this interpretation in the recent case of *Judicial Discipline and Disability Commission v. Simes*, 2009 Ark. 543. In that case, the Arkansas Supreme Court reviewed the Arkansas Judicial Discipline and Disability Commission's recommendation that the judge in question should be removed from office on the basis of the Commission's finding that the judge had violated various provisions of the Arkansas Code of Judicial Conduct. *See Simes*, 2009 Ark. 543, at 1. Although the court accepted the Commission's findings of judicial misconduct, *id.*, it concluded that "permanent removal from the bench" was not warranted, *id.* at 24. Instead, the court concluded the appropriate sanction for the judge's conduct was suspension without pay for the remainder of the judge's term. *Id.* at 24. As such, the court expressly recognized that the sanction of suspension without pay, as opposed to

removal from the bench, would permit the sanctioned judge to run again to hold judicial office after the suspension's expiration if that judge chose to do so. *Id.*

The distinction the Arkansas Supreme Court made between suspension without pay for the remainder of the sanctioned judge's suspension and removal in the *Simes* case is an important one because it reveals that the Arkansas Supreme Court in fact recognizes that these two sanctions are different. If the court Supreme Court considered "removal" to be anything less than permanent and to place no bar on the sanctioned judge from holding judicial office again in the future, it could simply have removed the judge in question in *Simes* in order to produce the same consequences achieved by suspending the judge without pay for the remainder of his term.

In making this distinction between "permanent removal from the bench" and a suspension without pay for the remainder of a judge's existing term in *Simes*, without any reference whatsoever to Ark. Code Ann. § 16-10-410(d), the Arkansas Supreme Court acknowledge its authority to remove a judge from judicial office permanently. Such authority is inherent in the distinction between a suspension and removal, both of which are provided as permissible sanctions for judicial misconduct in the plain text of Amendment 66, and to conclude otherwise would be to render the term "removal" as a possible sanction redundant and meaningless. Thus, Ark. Code Ann. § 16-10-410(d) does little more than clarify a concept that is implicit in the text of Amendment 66. It adds nothing new or additional to the provisions of Amendment 66, which, defendant Daniels demonstrated in his opening brief, operates in harmony with the provisions of Amendment 80. Moreover, the grant of legislative authority to establish the grounds for suspension, leave, and removal from office in Amendment 66 is certainly broad enough

to encompass the challenged provision, which does little more than provide a definition for the term "removal" in the context of a statute enumerating the circumstances under which removal is warranted.

The Arkansas Supreme Court's discussion of the distinction between removal and suspension for the remainder of a judicial term in *Simes* is also significant because it sheds light on the court's apparent intentions with respect to its decision to remove Proctor from the bench rather than suspending him for the remainder of his term in office. *See Arkansas Judicial Discipline and Disability Commission v. Proctor*, 2010 Ark. 38, at 58-60. If the court intended for Proctor's removal from the bench to be anything less than permanent, when it issued its opinion in *Proctor*, less than three months after issuing its opinion in *Simes*, the court could have suspended Proctor without pay for the remainder of his term, thus permitting him to hold judicial office in the future. However, it did not do so. Instead, the court removed Proctor from the bench altogether, and removal is permanent. *Compare Simes*, 2009 Ark. 543, at 24 *with Proctor*, 2010 Ark. 38, at 58-60.

Finally, while defendant Daniels disagrees with the plaintiff's contention that Ark. Code Ann. § 16-10-410(d) establishes a "qualification" for the office of circuit judge, to the extent that this Court might conclude that the permanency of removal from office is more than a sanction for judicial misconduct and in fact constitutes a "qualification" for office, such a "qualification" is part and parcel to the removal from judicial office, which is authorized by Amendment 66 and effected by the Arkansas Supreme Court. The statute adds nothing to any such constitutionally-mandated "qualification." Thus the

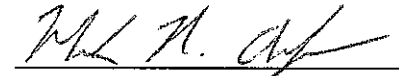
plaintiff's contention that Ark. Code Ann. § 16-10-410(d) violates the Arkansas Constitution is in error, and the amended complaint should be dismissed.

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 amended complaint, and grants the defendant all other appropriate relief.

Respectfully Submitted,

DUSTIN McDANIEL
Attorney General

By: 

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