CV-24-13

IN THE ARKANSAS SUPREME COURT

CONRAD REYNOLDS and ARKANSAS VOTER INTEGRITY INITIATIVE, INC., individually and on behalf of **RESTORE ELECTION INTEGRITY ARKANSAS**, a ballot question committee	**PETITIONERS**
vs.	
JOHN THURSTON, in his official capacity as **SECRETARY OF STATE,** and the **STATE BOARD OF ELECTION COMMISSIONERS**	**RESPONDENTS**

AN ORIGINAL ACTION

REPLY BRIEF OF THE PETITIONERS

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ARGUMENT IN REPLY

I. THE STATE MISCHARACTERIZES THE NATURE OF THIS CASE.

The State engages in a litigation tactic commonly used when legal authority and good arguments are scarce—when in doubt, distract and use disinformation as much as possible. That is what the State's brief does right off the bat with catchy headlines and statements designed to cause even the staunchest jurist to lose his or her lunch. Here is one example: "[t]his case is about whether this Court is the first stop in the process to get a statewide measure on the ballot." Resp't's Br. p. 11.

That is not what this case is about at all. This case is about the constitution and its limits. The petitioners do not want this court to do anything but what the constitution requires. The petitioners seek this court's aid in obtaining approval in a statewide ballot measure because that is the court's duty under Article 5, § 1 and Amendment 80. There is nothing far reaching about this request—the court has been doing it since its inception. *State v. Scott*, 9 Ark. 270, 270 (1849).

The petitioners did not make this court their first stop. The opening brief and the record in this case makes clear that the Secretary of State and the SBEC refused to act. They refused to act after the petitioners requested their approval and before the instant case was filed. No one is asking this court to find that it is the first stop in a statewide ballot measure because that would offend the limits of Article 5, § 1.

Here is another one: "[y]et petitioners have not cited a single constitutional provision, statute, or case that says [the] [r]espondents have any authority to certify or reject [the] [p]etitioners' ballot titles before they file signatures. . .[a]nd that they have a right to a pre-signature review." Resp. Br. 11. The State must not have read the parts of the petitioners' brief that cited *Stilley v. Priest* as authority for a pre-signature review. 341 Ark. 329, 335, 16 S.W.3d 251, 255 (2000). It surely overlooked *Ward v. Priest*, which makes this court's interpretation of the constitution part of the constitution itself and affirmed the right to a pre-signature review even after the underlying statute at issue in *Stilley* was repealed by the legislature. *See* 350 Ark. 345, 353, 86 S.W.3d 884, 887 (2002). It also overlooks a long line of cases which hold that the legislature cannot repeal this court's interpretation of the constitution by

repealing a statute. *City of Fayetteville v. Washington County*, 369 Ark. 455, 472, 255 S.W.3d 844, 856 (2007); *Ward,* 350 Ark. at 353, 86 S.W.3d at 887 (citing *Stilley*, *supra*); *Miller Cnty. v. Beasley*, 203 Ark. 370, 156 S.W.2d 791, 793 (1941).

What the State wants this court to believe is that the petitioners not only ask for too much from the court, but that to which they are not entitled. This is a smattering of disinformation and an attempt to distract the court from the reality of its own case law. The State is trying to hide the uncontroverted fact that the part of Article 5, § 1 cited by the *Stilley* Court has not changed, because the only way to change this court's binding construction of the constitution is to change the constitution itself. If the constitutional text examined and interpreted by the *Stilley* Court existed in the constitution when that case was decided, and the constitution has not changed, then it still exists today at this very moment because the legislature cannot repeal the court's interpretation of the constitution by repealing a statute. The State can ignore the many citations to authority and the sound reasoning about caselaw and constitutional interpretation, but that cannot make them go away.

II. THIS COURT HAS ORIGINAL JURISDICTION.

For this court to conclude that it does not have original jurisdiction of this case, it must ignore is own holdings in *Stilley* and *Ward* where the court found that Article 5, § 1 permits a pre-signature review. It would have to give no heed to *Armstrong v. Thurston*, where this court found that it had original jurisdiction even when the Secretary of State had not acted on the sufficiency of the petition and permitted a constitutional challenge when this court sits in original jurisdiction. 2022 Ark. 154 (per curiam) (*Armstrong I*); 2022 Ark. 167, 3, 652 S.W.3d 167, 171 (2022) (*Armstrong II*). The court would also have to pass over *Fort Smith Sch. Dist. v. Beebe*, and its mandate that this court is constitutionally required to liberally interpret the right to ballot initiative provision to preserve that power to the people. 2009 Ark. 333, 8, 322 S.W.3d 1, 6 (2009) (citing *U.S. Term Limits, Inc. v. Hill,* 316 Ark. 251, 872 S.W.2d 349 (1994)). *See also State v. Scott*, 9 Ark. 270, 270 (1849). Finally, this court would have to ignore the will of the people found in Amendment 80.

The court could ignore those cases and their holdings, which have become part of the constitution, and violate the duty of every member of this court to protect that foundational document to dispose of this case without reaching its merits. It could buy the State's unsupported

citations and authority that this case is filed in the wrong court because it is a pre-signature challenge and one in which constitutional attacks cannot occur. It could also continue to hold the case past the July signature deadline and call it moot (though this case would clearly meet the exception). This court could evade making a difficult, maybe even unpopular, decision in a very tough case about substantial personal and constitutional rights and nothing could be done about it.

Counsel for the petitioners can only bring the court hard cases. He cannot make the court decide them. From a jurisprudential perspective, whether this court has original jurisdiction is about the constitution and its limits. From a legally pragmatic perspective, whether this court has original jurisdiction is about each individual Justices' personal values and beliefs. If one must pick between the constitution and sour milk, it is always the constitution that should carry the day.

III. THE PETITION STATES A CLAIM.

This part of the State's argument continues to build on its prior arguments about there being no pre-signature authority and no ability to make a constitutional challenge in an original jurisdiction case. The

petitioners will not continue to regurgitate their well-established case law and this court's previous constitutional interpretations.

However, perhaps comically, one thing worth pointing out is that the State now makes a contradictory argument. It says that there is a statute which allows this court to sit in original jurisdiction when one is aggrieved by the Attorney General and his role in approving ballot titles—the very position of the petitioners in this case. The petitioners agree that such a statute exists, but not that it applies.

Previously, this court has found that the legislature cannot create original jurisdiction in this court. *Am. Party of Ark. v. Brandon*, 253 Ark. 123, 125, 484 S.W.2d 881, 883 (1972) (citations omitted) (this court has no original jurisdiction except that expressly conferred by the constitution and that jurisdiction cannot be enlarged by the legislature). If the State wants to ignore that holding for purposes of jurisdiction, the petitioners still will not jump on board because doing so is offensive to the constitution and its limits. The petitioners point it out to show how very thin the State's arguments are in this case.

This court has original jurisdiction of this case for the reasons already set out in the opening brief and this reply brief.

IV. THIS COURT SHOULD GRANT THE PETITIONERS RELIEF ON THE MERITS.

The State makes a grossly inaccurate statement. It says that the Attorney General is responsible for determining the sufficiency of the petitioners' ballot titles, not this court. Resp't's Br. p. 25. I hope the court understands that this is the problem and why we are all in this case—this is why we are here. It is not the Attorney General's responsibility, statutorily, to determine the sufficiency of ballot titles. That responsibility belongs to **THIS COURT** per the Arkansas Constitution. *Armstrong II*, 2022 Ark. at 8–9, 652 S.W.3d at 174–75 (citing *Stiritz v. Martin*, 2018 Ark. 281, at 4, 556 S.W.3d 523, 527) (emphasis added).

And, in the midst of usurping the constitutional role of this court regarding ballot titles and popular names by using a statute, the Attorney General has created and applied his own standards, not the court's. By his own admission, the Attorney General has imported a doctrine of law from North Dakota and applied it to Arkansas when the exact opposite has been the practice for nearly a century. *See* Pet'r's Br. pp. 30–31, ¶ (b). Also, instead of ensuring that the title and popular names cannot have a misleading tendency (which is the standard set by this court), he has applied a new standard—if he can't tell if the name

and title are not misleading, then it fails. *Compare Armstrong II with* Ark. Att'y Gen. Ops 2023-132 *and* 2023-133.

Please do not overlook the fact that the one ballot measure the Attorney General approved was not the petitioners' measure but the one drafted by the Attorney General. There cannot be free speech and free access to the ballot if the citizenry can only use the words written by the government. If this court allows that practice to stand in this case, we would do well to change the previous sentence and simply say that, if you want ballot access, you are only free to use the words the government tells you can use—even if those words change the legislation and how you present it to your fellow citizens in the voting booth.

V. FLOORS, CEILINGS, SIGNATURES, COUNTIES, *AND "It depends on what the meaning of the word 'is' is."*[2]

When it comes to famous quotes, Bill Clinton was no Ronald Reagan. The collective nation rolled its eyes at Clinton's explanation in his grand jury testimony when he existentially expounded on the meaning of the word "is" to explain away his sexual partner's lie about the nature of their relationship. For reasons known only to himself, that

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is exactly what the Attorney General has done for the State regarding and the number of counties and signatures needed to access the ballot. The Attorney General argues that "[f]ifty or more is at least fifteen" while simultaneously ignoring that a statute "can neither enlarge nor restrict a constitutional provision without offending the constitution." *Miller Cnty. v. Beasley*, 203 Ark. 370, 156 S.W.2d 791, 793 (1941); Resp't's Br. p. 25.

The test here is easy—is it more or less difficult to get signatures from fifty counties instead of fifteen? That answer is more difficult, and because it is more difficult it is a restriction on a constitutional provision. The State can call the ceiling the floor all it wants, but it will not make it so and if the State is so confident, perhaps it should walk on the ceiling (if such a thing were even possible) and see how well that works out. The petitioners are very confident that the State would make a hard landing, much like their twist of the phrases "at least" and "not more than." These phrases either mean what they say and how we have always treated them, or they are like Bill Clinton's version of "is" and nothing but a subjective convenience for explaining a malicious fiction.

CONCLUSION

This case has a lot of legally significant issues. From an academic standpoint, these are hard questions deserving thoughtful answers, and in a short amount of time. However, beyond these briefs, their arguments, and this court, is another perspective—that of the everyday Arkansan. It is really a series of questions posed from the perspective of your neighbor, or that family growing soybeans or raising cattle whose fields you drive by from time to time.

Those people, those normal, everyday Arkansans, have the following questions for this court:

What happens when we try to access the ballot, but the government won't let us? Do we really have free ballot access and the ability to self-legislate as set out in the constitution or is that an illusion controlled by the government? What happens when government officials refuse to act and that causes us to be unable to use our constitutional rights? Are we really free to say what we want within reason about citizen-proposed-legislation, or are we relegated to government-approved speech only?

Can we count on the court system, the third branch of government, to protect our constitutional rights? Will the members of this court put aside their personal perspectives and hesitations and decide this case?

Will this court help us when we need it most, or are we, the people, all alone when the wolf comes to the door?

Respectfully Submitted,

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CERTIFICATE OF SERVICE

By my signature above, I certify pursuant to Ark. R. Civ. P. 5(e) that a copy of the foregoing has been delivered by the below method to the following person or persons:

☐ First Class Mail ☐ Email ☒ AOC/ECF ☐ Hand Delivery

Justin Brascher

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Ark. Sup. Ct. Admin. Order 19 in that there is no unredacted confidential information (no confidential information is contained in the brief), Admin Order No. 21 in that this brief contains no live hyperlinks (hyperlinks, if any, removed by Adobe Acrobat Pro Continuous Release Version 2024.001.20615), and conforms to Rule 4-2(d) because the jurisdictional statement, statement

of the case, argument section, conclusion, and requested relief portions of this brief, including the footnotes (if any), contains **2711 of 2875** words.

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