

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

Marion Humphrey, Individually and as a representative
Of all similarly situated voter-citizens of Arkansas

PLAINTIFF

CASE NO. 60CV-18-_____

MARK MARTIN, in his official capacity as
Secretary of State for the State of Arkansas

DEFENDANT

**COMPLAINT FOR ISSUANCE OF A WRIT OF MANDAMUS,
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

The Plaintiff, by and through undersigned counsel, states the following for this *Complaint for Issuance of a Writ of Mandamus, Declaratory Judgment and Injunctive Relief*:

I. INTRODUCTION

1. This is an action for a Writ of Mandamus, Declaratory and Injunctive Relief brought by a citizen and resident of Pulaski County and the State of Arkansas pursuant to the Arkansas Rules of Civil Procedure, specifically Rules 57 and 65, seeking a declaration that Issue No. 1 violates the Arkansas Constitution; seeking a declaration and injunction ordering the Defendant to not count, canvass, or certify any ballots or votes cast for Issue No. 1; and for all other just and proper relief.

2. The Defendant Arkansas Secretary of State named herein is named only in his official capacity and is named as the State Official responsible with the certification, publication of notice of, and transmitting to the Arkansas State Board of Election Commissioners and all seventy-five County Boards of Election Commissioners

the proposed constitutional amendments that have been referred by the Arkansas General Assembly for use on the ballot and consideration by the voters of the State of Arkansas at the upcoming November 6, 2018 General Election.

II. JURISDICTION AND VENUE

3. Plaintiff is not seeking monetary or other damages and Plaintiff's cause of action relates to the Defendant acting illegally; therefore, this Court has subject matter jurisdiction over this matter and the parties. See Ark. Code Ann. §§ 16-13-201 and 16-115-102.

4. Venue lies in Pulaski County because the Plaintiff resides here, the cause of action arose in Pulaski County and the Defendant is an officer and official of the State of Arkansas. See Ark. Code Ann. §16-60-103 and § 16-60-104.

III. PARTIES

5. Plaintiff Marion Humphrey is a citizen of the United States of America, a resident of the State of Arkansas, over the age of 18, is a resident of and registered to vote in Pulaski County, Arkansas, and is a retired Pulaski County Circuit Court Judge. Plaintiff has standing under Arkansas law to bring this *Complaint*.

6. Defendant Mark Martin is the Secretary of State for the State of Arkansas. In that capacity, the Arkansas Secretary of State is the official charged by the Arkansas Constitution and Arkansas statutes with the certification, publication of notice of, and transmitting to the Arkansas State Board of Election Commissioners and all seventy-five County Boards of Election Commissioners the proposed constitutional amendments that

have been referred by the Arkansas General Assembly for use on the ballot and consideration by the voters of the State of Arkansas at the upcoming November 6, 2018 General Election. See Ark. Code Ann. § 7-9-115. In addition, the Arkansas Secretary of State is responsible for receiving an abstract of all votes cast for and against referred constitutional amendments, canvassing these returns, and certifying the results to the Governor of the State of Arkansas and the State Board of Election Commissioners. See Ark. Code Ann. § 7-9-119.

IV. STATEMENT OF FACTS

7. The Arkansas General Assembly has the authority, pursuant to Ark. Const. Art. 19 § 22, to refer proposed amendments to the Arkansas Constitution as ballot measures to be voted on by the voters of the State of Arkansas.

8. There can only be three proposed constitutional amendments referred by the General Assembly in any voting cycle.

9. During the Regular Session of the 91st General Assembly in 2017, the Arkansas General Assembly referred multiple proposed amendments to the Arkansas Constitution to the voters of the State of Arkansas during the General Election to be held on November 6, 2018.

10. Senate Joint Resolution 8 (“SJR 8 ”) was one of the proposals. It was entitled:

PROPOSING AN AMENDMENT TO THE ARKANSAS CONSTITUTION
TO LIMIT ATTORNEYS' CONTINGENCY FEES IN CIVIL ACTIONS TO
THIRTY-THREE AND ONE-THIRD PERCENT (33 1/3 %) OF THE NET

RECOVERY; TO LIMIT AWARDS OF PUNITIVE DAMAGES AND NON-ECONOMIC DAMAGES IN CIVIL ACTIONS; TO REQUIRE ADJUSTMENTS TO THE LIMITATIONS ON PUNITIVE AND NON-ECONOMIC DAMAGE AWARDS FOR INFLATION OR DEFLATION; AND TO PROVIDE THAT THE GENERAL ASSEMBLY MAY, BY A THREE-FIFTHS VOTE OF EACH HOUSE, AMEND OR REPEAL A RULE OF PLEADING, PRACTICE, OR PROCEDURE PRESCRIBED BY THE SUPREME COURT AND ADOPT A RULE OF PLEADING, PRACTICE, OR PROCEDURE.

A copy of SJR 8, as passed by the General Assembly, is attached hereto as **Exhibit 1**.

11. SJR 8 attempts to claw back what the Arkansas Legislature has previously admitted and recognized as the Arkansas Supreme Court's vested constitutional, inherent and statutory authority. See Ark. Code Ann. §16-11-301. This authority and separate power was affirmed in Amendment 80 to the Arkansas Constitution. SJR 8 proposes to reverse the Legislature's previous admission and recognition of this inherent power and to reverse § 3 of Amendment 80 to the Arkansas Constitution by bestowing upon the General Assembly the power to enact and control the rules of "pleading, practice, and procedure" for all cases, civil, criminal, domestic, and otherwise, in all courts in Arkansas, including the Arkansas Supreme Court. This sweeping proposal undermines and violates the separation of powers and, therefore, it is inherently unconstitutional.

12. SJR 8 would add a new section to the Constitution of Arkansas, § 53 to Article 7 of the Arkansas Constitution. Section 53 to Article 7 would place free market

limits on attorney's fees that would be considered "contingency fees" that are presently governed by ethical Rules of Professional Conduct promulgated by the Arkansas Supreme Court in conjunction with the input and review of professional committees appointed for such purposes.

13. SJR 8 also proposes to amend § 32 of Article 5 of the Arkansas Constitution to place arbitrary, Legislatively-controlled limits on a jury's ability to award "non-economic damages" (pain, suffering, mental anguish, scars and disfigurement and visible results of injury, loss of consortium, loss of the value of care-taking, the nature, extent, duration and permanency of the injury, the loss of life, as well as the instruction, moral training and supervision of education the deceased might have reasonably given his or her child had they lived) and "punitive damages."

14. SJR 8 also proposes to amend the Constitution in a fourth way: by lowering the General Assembly's supermajority requirement from a two-thirds vote (66.67 percent) to a three-fifths vote (60 percent) for the General Assembly to amend or repeal court rules regarding pleading, practice, or procedure proscribed by the Arkansas Supreme Court. This again strips away the vested Constitutional balance of power from the judiciary and places it in the hands of the General Assembly.

15. SJR 8 also directs the Arkansas Secretary of State to utilize a specific "Popular Name and Ballot Title" on the November 6, 2018, General Election Ballot. Per the directive of the Arkansas General Assembly, the "Popular Name and Ballot Title" shall be:

- (a) When presented on the general election ballot, the popular name for this proposed amendment shall be "An Amendment Concerning Civil Lawsuits and the Powers of the General Assembly and Supreme Court to Adopt Court Rules."

- (b) When presented on the general election ballot, the ballot title for this proposed amendment shall be "A proposed amendment to the Arkansas Constitution providing that a contingency fee for an attorney in a civil lawsuit shall not exceed thirty-three and one-third percent (33 1/3 %) of the net recovery; defining "contingency fee" as an attorney's fee that is paid only if the claimant recovers money; providing that the General Assembly may amend the foregoing percentage by a two-thirds (2/3) vote of each house; limiting punitive damages awards for each claimant in lawsuits for personal injury, property damage, or wrongful death to the greater of (i) five hundred thousand dollars (\$500,000), or (ii) three (3) times the amount of compensatory damages awarded; defining "punitive damages" as damages assessed to punish and deter wrongful conduct; providing that the General Assembly may not decrease the foregoing limitations on punitive damages but may increase the limitations by a two-thirds (2/3) vote of each house; providing that the limitations on punitive damages do not apply if the factfinder determines by clear and convincing evidence that the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage to the claimant and that such intentional conduct harmed the claimant; limiting awards of non-economic damages in lawsuits for personal injury, property damage, or wrongful death to (i) five hundred thousand dollars (\$500,000) for each claimant, or (ii) five hundred thousand dollars (\$500,000) for all beneficiaries of an individual deceased person in the aggregate in a lawsuit for wrongful death; defining "non-economic damages" as damages that cannot be measured in money, including pain and suffering, mental and emotional distress, loss of life or companionship, or visible result of injury; providing that the General Assembly may not decrease the foregoing limitations on non-economic damages but may increase the limitations by a two-thirds (2/3) vote of each house; providing that the General Assembly shall adopt a procedure to adjust the dollar limitations on punitive damages and non-economic damages in future years to account for inflation or deflation; providing that the Supreme Court's power to prescribe rules of pleading, practice, and procedure for courts is subject to the provisions of this amendment; providing that the General Assembly, by a three-fifths vote of each house, may amend or repeal a rule prescribed by the Supreme Court and may adopt other rules of pleading, practice, or procedure on its own initiative; providing that rules of pleading, practice, and procedure in effect on January 1, 2019, shall continue in effect until amended, superseded, or repealed under the provisions of this amendment; providing that a rule of pleading, practice, or procedure enacted by the General Assembly shall

supersede a conflicting rule of pleading, practice, or procedure prescribed by the Supreme Court; providing that certain other rules promulgated by the Supreme Court may be annulled or amended by a three-fifths (3/5) vote of each house of the General Assembly instead of a two-thirds (2/3) vote as presently stated in the Arkansas Constitution; and providing that this amendment becomes effective on January 1, 2019."

16. SJR 8 is not a single subject proposal; it proposes four separate and disparate constitutional amendments to be voted on in the November 6, 2018 General Election.

17. The Arkansas Secretary of State, pursuant to Arkansas Code Annotated § 7-9-110, has "numbered" SJR 8 as "Issue No. 1."

18. Issue No. 1 will not be the only legislative referendum on the November 6, 2018 General Election Ballot. In addition to SJR 8, the Arkansas General Assembly also passed House Joint Resolution 1016 ("HJR 1016"), another constitutional amendment that would amend Article 3, Section 1 of the Arkansas Constitution and include a new requirement for "Voter ID" in order to vote at an election in Arkansas. A copy of HJR 1016 is attached hereto as **Exhibit 2**. HJR 1016 has been identified by the Arkansas Secretary of State as "Issue No. 2" on the ballot.

19. Issue No. 1 is not just four separate constitutional amendments; Issue No. 1 is a substantial re-write of the entire Arkansas Constitution. Without informing Arkansas Voters of the effect, Issue No. 1 would not only make the Arkansas Judicial Branch into a subordinate state agency, it would also, for example:

- a. Violate Article 4, section 1 of the Arkansas Constitution by taking power away from the Judiciary and giving it to the Arkansas legislature;

- b. Violate Article 4, section 21 of the Arkansas Constitution by allowing the Arkansas legislature to exercise the power of the Arkansas Judiciary;
- c. Violate Amendment 80 of the Arkansas Constitution regarding power of the Judicial branch; and
- d. Violate Article 2, Section 7 of the Arkansas Constitution by taking away the right to have damages determined by a jury of Arkansans.

20. The Arkansas Legislature should not be able to hide this attempt to re-write the Arkansas Constitution behind the veil of Issue No. 1.

21. As stated by the Arkansas Supreme Court,

Our constitution divides our state government into three branches and states that no branch “shall exercise any power belonging to either of the others.” Ark. Const. Art. 4, § 2. This is foundational to our government.

See Arkansas Department of Finance and Administration v. Naturalis Health, LLC, 2018 Ark. 224 (2018). Issue No. 1 would tear away this foundation and would do so without informing the electorate of its consequences.

V. CAUSES OF ACTION

Count 1 – Writ of Mandamus

22. Plaintiff re-alleges and incorporates the allegations contained in the preceding paragraphs of this Complaint.

23. As an elector in Arkansas, Plaintiff has a specific right to vote on constitutional amendments separately when a constitutional amendment is referred to voters by the General Assembly.¹

¹ See Ark. Const. Art. 19, § 22.

24. No other adequate remedy exists for the Plaintiff except for that contained herein.

25. For the reasons stated herein, Plaintiff requests an order prohibiting Defendant from canvassing, counting, and/or certifying any votes for Issue No. 1.

Count 2 – Declaratory Judgment

A. Not Separate and Not Disparate

26. Pursuant to Article 19, Section 22 of the Arkansas Constitution, the General Assembly may only refer three proposed constitutional amendments to the voters and the proposed amendments “shall be submitted as to enable the electors to vote on each amendment separately.”

27. Issue No. 1 violates Article 19, Section 22 of the Arkansas Constitution as it contains four separate and distinct Amendments to the Arkansas Constitution.

28. Issue No. 1 does not allow the voters in the State of Arkansas to “vote on each amendment separately” and instead includes four amendments into one vote, which constitutes unconstitutional “logrolling” and “pork-barreling.”

B. Not Germane

29. Even if the General Assembly was able to combine multiple constitutional amendments into one, the multiple constitutional amendments must be “reasonably germane to each other and to the general subject of the amendment.” *Forrester v. Martin*, 2011 Ark. 277, 9, 383 S.W.3d 375, 381.

30. The four amendments contained in Issue No. 1 relate to four different subjects and/or goals.

31. First, Section 1 of Issue No. 1 attempts to place limits on attorney fees that are considered “contingency fees.” It does so by adding § 53 to Article 7 of the Arkansas Constitution. Article 7 of the Arkansas Constitution is the original Judicial Article that addressed the Judicial Branch of the Arkansas Government.

32. Through Section 1 of Issue No. 1, the General Assembly seeks to control the ability of ordinary Arkansas citizens to contract in the free market with attorneys in contingency fee cases, fees that are already subject to ethical Rules of Professional Conduct as promulgated by the Arkansas Supreme Court. This proposal would close the doors to the courthouse for ordinary citizens and effectively extinguish their right to a jury trial in all cases.

33. Second, Section 2 of Issue No. 1, amends Article 5, § 32 of the Arkansas Constitution to place arbitrary limits on a jury’s ability to award “non-economic damages” and “punitive damages” in cases resulting in injuries or death to persons or property. Article 5 of the Arkansas Constitution establishes the Legislative Branch of Arkansas Government.

34. Through Section 2 of Issue No. 1, the General Assembly seeks to limit non-economic and punitive damages that can be recovered by Arkansas citizens if a jury decided to award more than allowed by the caps.

35. As alleged by a co-sponsor, Senator Trent Garner, Issue No. 1 allegedly (which does not even attempt to incorporate Rule 11 of the Rules of Civil Procedure, sanctioning frivolous lawsuits) “relieves financial burdens from investors and job creators, making Arkansas competitive with neighboring states. It levels the playing field for economic development, attracting new industries to our state by protecting them and

our small business and entrepreneurs from frivolous lawsuits.”² Rule-making and the destruction of the separation is not even mentioned.

36. Third, Section 3 of Issue 1 amends § 3 of Amendment 80 to the Arkansas Constitution by allowing the Arkansas General Assembly to enact and control the rules of “pleading, practice, and procedure” for all courts in Arkansas, including the Arkansas Supreme Court.

37. Through Section 3 of Issue No. 1, the General Assembly seeks to control all rule making authority of the Judicial Branch of government and thus undermine and violate the separation and balance of power in the Three Branches of Government.

38. Section 3 of Issue No. 1 takes away the procedural rule making authority from the judiciary and transfers it to the General Assembly, which violates separations of powers under Ark. Const. Art. 4 § 2, stating that “No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”

39. Fourth, Section 4 of Issue No. 1 amends Section 9 of Amendment 80 by lowering the General Assembly’s supermajority requirement from a two-thirds vote (66.67 percent) to a three-fifths vote (60 percent) for the General Assembly to amend or repeal certain specific rules.

40. The four sections have no legal common chord or singular purpose, subject or goal. This is a blatant attempt to “logroll” and “pork-barrel” disparate

² See **Exhibit 3** -- “For tort reform, Potential benefits far-reaching” which was an op-ed published by the Arkansas Democrat Gazette on May 28, 2018.

constitutional amendments and present them to Arkansas voters, in violation of Ark. Const. Art. 19 § 22.³

41. The factual base for each Section of Issue No. 1 also demonstrates each Section is not germane to the other.

RELIEF SOUGHT

42. Based on the facts and law, the provisions of Issue No. 1 are not separate, disparate, nor germane to each other in violation of the Arkansas Constitution.

43. Plaintiff requests that this Court enter an Order declaring Issue No. 1 to be unconstitutional and invalid.

44. Plaintiff requests that this Court enter an Order and/or writ of mandamus enjoining the Defendant should not count, canvass, and/or certify any ballots or votes cast for Issue No. 1 during the November 2018 general election.

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Enter judgment in favor of Plaintiff on the Complaint in its entirety and against Defendant;
2. Declare that Issue No. 1 violates the Arkansas Constitution and is invalid under the Arkansas Constitution;
3. Order that Defendant should not count, canvass, and/or certify any ballots or votes cast for Issue No. 1 during the November 2018 general election;

³ See e.g., *Andrews v. Governor of Maryland*, 294 Md. 285, 449 A.2d 1144 (1982).

4. Issue a writ of mandamus precluding Defendant from canvassing, counting, and/or certifying any ballots or votes cast for Issue No. 1 during the November 2018 general election;

5. Award Plaintiff all relief allowed by law and equity, including but not limited to declaratory, preliminary and permanent injunctive relief; and

6. Award any other relief the Court deems proper.

Respectfully submitted,

/s/ David H. Williams

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