No. CV-22-190

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, *et al.* APPELLANTS

v.

THE LEAGUE OF WOMEN VOTERS
OF ARKANSAS and ARKANSAS UNITED, *et al.* APPELLEES

APPELLANTS' OPPOSITION TO EMERGENCY MOTION FOR ACCELERATED PROCEEDINGS AND PETITION FOR WRIT OF CERTIORARI TO COMPLETE THE RECORD

Appellees seek an order that the rules don't allow them to seek, to file something that they cannot file, so that they can seek another order that they couldn't get—all apparently via the wrong kind of pleading and after dithering for more than a month. This Court should deny that request.

This case is ultimately about Judge Wendell Griffen's unprecedented order enjoining the enforcement of four laws designed to protect the integrity of Arkansas's electoral process. This Court immediately stayed that unlawful order. Thereafter, Appellees did nothing for more than a month until close of business Monday when they suddenly decided they needed an emergency order from this Court ordering the court reporter to complete the transcript of a four-day March bench trial in just days. This is, apparently, on the theory that Appellees can themselves lodge the record in this matter and thereafter seek expedition.

This Court should deny Appellees' unprecedented request. First, this Court's rules make clear that a writ of certiorari to complete the record is a motion of last resort only employed where a record is still incomplete at the end of Rule 5's seven-month deadline. Its purpose is not to facilitate an expedited appeal by requiring a court reporter to do what may be impossible. Indeed, Appellees don't provide *any* basis for believing the court reporter could do what they ask or that it wouldn't interfere with the reporter's ability to transcribe other critical proceedings. Second, even if Appellees could somehow force the completion of the trial transcript, they still may not lodge it with this Court to kickstart an expedited briefing schedule. Under this Court's rules, the appellant in a case lodges the record, not the appellee. And third, even if Appellees could get around this Court's rules, their deliberate procrastination undermines their claim that this matter should take precedence over the court reporter's other work or—most importantly—this Court's resolution of other cases. This Court should turn back Appellees' cockamamie procedural gambit and allow this case to proceed in the usual fashion under the rules.

I. Background

Around this time last year, Appellees filed suit in Pulaski County Circuit Court seeking injunctive and declaratory relief against Acts 249, 728, 736, and 973 of the 93rd General Assembly. Appellees raised challenges under the Arkansas Free and Equal Elections Clause, Equal Protection Clause, Voter Qualifications Clause, Right to Assembly and Speech Clause, and Amendment 51's germaneness requirement. The content of those laws and the contours of Plaintiffs' legal theories are explained in Arkansas's Motion to Stay.

Below, breaking with this Court's precedents, Judge Griffen subjected those laws to strict scrutiny and imposed a burden of proof so high that virtually no election regulation could ever survive. He thus extraordinarily (yet unsurprisingly) entered a permanent injunction barring enforcement of the four challenged Acts in the leadup to the May primary election. The following week this Court—without dissent—granted Appellants' emergency motion to stay of that injunction.

That stay order was entered on April 1. Some two weeks later, on April 15, counsel for Appellees notified Appellants that they intended to seek an expedited briefing schedule in this matter under which briefing would close on June 3. But Appellees never actually filed such a motion. Then—after waiting an additional two weeks—on 3:12 pm on May 2, Appellees suddenly emailed Appellants, stating that they intended to "file an emergency motion for a writ of certiorari to complete the record on an accelerated basis, one week after the writ issues." Counsel for Appellees did not explain the reason for this unusual request outside of "allowing this appeal to go forward on a timely basis" but did ask for Appellants' position. Undersigned counsel was in a trial in federal court on May 2, and Appellees did not wait for a response.

Instead, barely an hour later at 4:22 pm Appellees filed this "Motion."[1] They seek a writ of certiorari directing the court reporter to complete the transcript of the

[1] Appellees refer to their filing as a "Motion" in the body of the document, despite the fact that a writ of certiorari, like all extraordinary writs, is sought via petition, not motion. *See, e.g.*, Ark. R. Civ. App. 5(b)(3) (providing that "the appellant

four-day trial "within one calendar week of the issuance of the writ." Mot. at 5. They claim that, unbeknownst to Appellants, "Appellees have been unable to prompt an expedited trial transcript through efforts to work with the court reporter since the partial record was lodged." *Id.* Their filing does not represent that the Court reporter could meet such a deadline.

II. Argument

Appellees' request is as odd as it is unnecessary, and this Court should deny it. Appellees seek a writ of certiorari to complete the record, presumably for the purpose of lodging the record sooner so that they may then request an expedited briefing schedule in this matter. But the appellees in a case can neither seek a writ of certiorari to complete the record nor lodge the record with this Court. Both responsibilities fall on the appellant in a case. There is no basis for Appellees' request, and the relief they seek may in any event be impossible. Their Motion should be denied.

A. Rule 5(a) provides that the record "shall be filed with the clerk of the Arkansas Supreme Court and docketed therein within 90 days from the filing of the first notice of appeal shall be filed with the clerk of the Arkansas Supreme Court and docketed therein within 90 days from the filing of the first notice of appeal." Ark.

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may file with the clerk of the Supreme Court a petition for writ of certiorari pursuant to Rule 3-5").

R. Civ. App. 5(a). Appellants filed their notice of appeal on March 24, so they must lodge the record by June 22.

It is Appellants that must lodge the record, and this Court's rules do not allow Appellees to do it instead. The plain text of this Court's rules makes that clear. Rule 2-2 for example, provides that "[w]here a record is tendered which, on its face, appears to be outside the time allotted for docketing the case, it shall be the duty of the Clerk to notify the attorney representing the *appellant* and note on the record the date the tender was made." R. Ark. S. Ct. 2-2 (emphasis added). The attorney for the appellant—and no other party—must be notified if a record is tendered late because only appellants lodge the record on appeal. *See Davis v. C & M Tractor Co.*, 617 S.W.2d 382, 385 (Ark. App. 1981) ("[U]nder the Rules of Appellate Procedure, it is the responsibility of the appellant . . . to see that the record is filed in time.").

The text of Rule 5 also makes clear that only an appellant may lodge the record. For example, extensions of the time to file the record may be granted only when "[t]he *appellant* has filed a motion explaining the reasons for the requested extension," and "[t]he *appellant* . . . has timely ordered the stenographically reported material from the court reporter and made any financial arrangements required for its preparation." Ark. R. Civ. P. 5(b)(1) (emphasis added). In cases where the maximum seven-month extension is not long enough for the record to be completed, the rules provide that "the *appellant* may file with the clerk of the Supreme Court a

petition for writ of certiorari pursuant to Rule 3-5." Ark. R. Civ. App. 5(b)(3) (emphasis added).

Additionally, Rule 5(c) provides that "*any party* may docket the appeal to make a motion for dismissal or for any other intermediate order by filing a *partial* record with the clerk." Ark. R. Civ. App. 5(c) (emphasis added). That "any party" is absent from Rule 5(a)'s general procedures for lodging the record. This makes sense, because it is only in cases where an appellee is filing such a motion that they would be lodging any sort of record at all. Appellants lodge the record; appellees may not.

B. The rules do not authorize Appellees' request for a writ of certiorari to complete the record within a week of issuance. First, the rules do not allow Appellees to petition for a writ of certiorari at all. Instead, the rules contemplate that only "the appellant may file with the clerk of the Supreme Court a petition for writ of certiorari" to complete the record. Ark. R. Civ. App. (5)(3). This makes perfect sense because, as discussed above, the appellant is responsible for lodging the record and would be the only party to have cause to seek a writ of certiorari for its completion.

Second, the rules do not provide for an order requiring a court reporter to complete a transcript less than two months after the filing of a notice of appeal. Instead, the rules contemplate a writ of certiorari to complete the record being available

only where the "appellant has obtained the maximum seven-month extension available from the circuit court" and the record has still not been completed. Ark. R. Civ. App. 5(b)(3). The rules do not support (and Appellees provide no authority for) ordering the completion of the record on an expedited basis.

Third, the rules do not provide for an order requiring a court reporter to complete the transcript of a multi-day bench trial within a week. Instead, the rules provide that a writ of certiorari "shall order that the record be completed and certified within thirty days." R. Ark. S. Ct. 3-5(b). Rule 3-5 provides no option for shortening that time, and Appellees give no indication that it is even *possible* for the court reporter to have the trial transcript completed within a week of the issuance of a writ of certiorari. If Appellees have thus far "been unable to prompt an expedited trial transcript through efforts to work with the court reporter," Mot. 5, it stands to reason that the reporter might well be unable to provide an expedited trial transcript. And Appellees provide absolutely no basis for believing the court reporter could do what they demand without potentially jeopardizing the reporter's ability to, among other things, transcribe other critical matters.

Finally, even if Appellees could properly seek the relief they request, they are not entitled to it on an expedited basis. Their claim that this case must be expedited is belied by their own utter lack of haste. It has been over a month since this Court stayed Judge Griffen's permanent injunction, and Appellees are just now seeking

relief from this Court. The challenged laws went into effect last year, have been in place in multiple local elections, and will be effective during the May primary. As explained in Appellant's stay motion, this Court is likely to reverse the permanent injunction in any case. Appellees thus provide no basis for excusing their procrastination, overriding this Court's rules, prioritizing this matter over other trial and appellate matters, or requiring the court reporter to do what they don't even claim is possible.

Conclusion

Appellees' Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dylan Jacobs, hereby certify that on May 5, 2022, I electronically filed the foregoing with the Clerk of the Court using the e-*Flex* system, which shall send notice to all Counsel of Record.

/s/ *Dylan Jacobs*
Dylan Jacobs